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

APPLICANT'S RECORD

VOLUME 1 of 3

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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 8, 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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Court File No.: A-102-20

FEDERAL COURT OF APPEAL

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CANADIAN TRANSPORTATION AGENCY

Intervener

AFFIDAVIT OF DR. GÁBOR LUKÁCS
(Affirmed: September 7, 2023)

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

1. I am the founder, a director, and the President 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 under the *Canada Not-for-profit Corporations Act*, SC 2009 on or about May 2019, to expand and continue the air passenger advocacy work that I have initiated in my personal capacity for the last fifteen years. Details of APR's and my air passenger advocacy work are described below.

3. Since 2008, I have been volunteering my personal time as an air passenger rights advocate, using my knowledge and expertise on air travel, for the benefit of the travelling public, specifically air passengers. Since around 2012, my public interest advocacy work has been conducted under the banner "Air Passenger Rights," which was later formalized as a not-for-profit entity in May 2019, as described above. The non-profit entity APR continued the public interest advocacy work that I was conducting under the "Air Passenger Rights" banner.

4. A copy of APR's articles of incorporation are attached and marked as **Exhibit "1"**. Within said articles of incorporation, the purpose of APR is declared as:

> 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.

5. APR's mandate is to engage in public interest advocacy for the travelling public, continuing most of the four pillars of public interest advocacy work that I had previously performed under the banner "Air Passenger Rights," consisting of:

(a) ***Enforcing Air Passenger Protections***: filing regulatory complaints with the Canadian Transportation Agency [**CTA**] to enforce the airlines' obligations under the laws or the airlines' tariffs, or initiating or intervening in judicial proceedings regarding airlines' obligations to passengers.

(b) ***Advocating for Stronger Passenger Protections***: participating in consultations, and attending Parliamentary committees to give evidence to assist Parliament in strengthening protections for air passengers.

(c) ***Sharing Information on Passenger Rights***: offering a platform for passengers to obtain information and share their travel woes.

(d) ***Assisting Passengers in Enforcing Their Legal Rights***: assisting passengers *pro bono* by providing information and, for precedent setting matters, assisting passengers in court as permitted by the applicable rules.

6. I actively lead or supervise all of APR's work. APR operates on a non-profit basis and its directors, including myself, do not receive remuneration other than reimbursement for reasonable expenses incurred in the performance of duties.

7. APR does not expect any remuneration for its public interest advocacy work. APR's only source of funding is small donations from a small number of passengers that appreciate APR's work or the work I performed through APR.

8. A small group of volunteers assist with APR's work, including managing APR's Facebook Group, as detailed further below.

9. For this judicial review, APR is represented by Mr. Simon Lin, who is also a director of APR. Since the commencement of this application for judicial review, Mr. Lin's legal services in this matter have been, and is being, provided on a *pro bono* basis. APR's board of directors has agreed that any costs awarded to APR in this judicial review application 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.

10. The fact that Mr. Lin is acting on a *pro bono* basis for APR on this judicial review was already disclosed in paragraph 78 of my April 7, 2020 affidavit in this proceeding, which was served on the CTA on or about April 9, 2020.

11. For greater clarity, I am providing the above information regarding APR's retainer with Mr. Lin for the purpose of supporting APR's submissions on costs only, and should not be construed as a waiver of any applicable privilege, including solicitor-client privilege and/or litigation privilege.

B. The Four Pillars of Air Passenger Rights' Public Interest Advocacy Work

12. Below I describe the four pillars of public interest advocacy work that I conducted under the banner "Air Passenger Rights," and then continued by the non-profit entity APR.

(i) Enforcing the Existing Air Passenger Protections

13. Prior to forming the non-profit organization Air Passenger Rights, I filed more than two dozen successful regulatory complaints with the CTA in my personal capacity. These complaints resulted in airlines being ordered to amend their terms and conditions and/or their websites and/or their signage, and to offer better protection to passengers. An excerpt from a 2017 brief, summarizing my activities, is attached and marked as **Exhibit "2"**.

14. On the topic of refunds owed to passengers when airlines cancel flights, I initiated three regulatory complaints before the CTA that resulted in three decisions in 2013 and 2014, where the CTA confirmed passengers' longstanding fundamental right to a refund, even if a cancellation was outside an airlines' control:

    (a) The CTA decision from *Lukács v. Sunwing Airlines Inc.*, bearing number 313-C-A-2013, is attached and marked as **Exhibit "3"**. This decision has also been filed in the Federal Court as T-476-20. This CTA decision

discusses the fundamental right to a refund at paragraph 15 as follows:

> [15] In terms of passengers' right to refunds, in Decision No. 28-A-2004, the Agency recognized the fundamental right of passengers to be refunded for the unused portions of their tickets if the carrier is unable to provide transportation on its services or on the services of other carrier(s) within a reasonable period of time.
>
> [Emphasis added.]

(b) The CTA's decision from *Lukács v. Porter Airlines Inc.*, bearing number 344-C-A-2013, is attached and marked as **Exhibit "4"**. This decision has also been filed in the Federal Court as T-475-20. This CTA decision discusses the right to a refund at paragraphs 83 and 88 as follows:

> [83] In this regard, Mr. Lukács points out that in Decision No. 28-A-2004 (Air Transat), the Agency considered in great detail the rights of passengers for protection in the case of events that are beyond the passengers' control:
>
> > By Decision No. LET-A-166-2003 dated August 7, 2003 [...] the Agency advised Air Transat that Rule 6.3 of its tariff was not just and reasonable within the meaning of subsection 111(1) of the ATR, in that it does not provide adequate options to passengers affected by a schedule irregularity, and does not protect passengers from events that are beyond the passengers' control, and, therefore, does not allow passengers any recourse if they are unable to connect to other air carriers or alternate modes of transportation such as cruise ships or trains.
>
> [...]
>
> **Analysis and findings**
>
> [...]
>
> [88] The Agency agrees with Mr. Lukács, and finds that it is unreasonable for Porter to refuse to refund the

> fare paid by a passenger because of its cancellation of a flight, even if the cause is an event beyond Porter's control.
>
> [Emphasis added.]

(c) The CTA decision from *Lukács v. Porter Airlines Inc.*, bearing number 31-C-A-2014, is attached and marked as **Exhibit "5"**. This decision has also been filed in the Federal Court as T-477-20. This CTA decision discusses the right to a refund at paragraph 137 as follows:

> **Analysis and findings**
>
> [137] As for reasonableness, Mr. Lukács correctly notes that passengers are entitled to reprotection or a refund, irrespective of the reason for their inability to travel, as long as the passengers are not responsible for it. In Decision No. 28-A-2004, the Agency recognized the right of passengers to be refunded for the unused portions of their tickets if the carrier is unable to provide transportation on its services or on the services of other carrier(s) within a reasonable period of time. Taking "all reasonable measures" does not relieve Porter from its obligation to refund passengers for the unused portions of their tickets or reprotect passengers affected by flight cancellation, denied boarding or flight advancement. If it was Porter's intent under Proposed Tariff Rule 15(c) not to reprotect or refund for unused portions of tickets, employing the "all reasonable measures" defense, Proposed Tariff Rule 15(c) fails to strike a balance between the passengers' rights to be subject to reasonable terms and conditions of carriage and Porter's statutory, commercial and operational obligations.
>
> [Emphasis added.]

15. For greater certainty, before the three aforementioned CTA decisions, the fundamental right to a refund was already stated in the CTA's 2004 decision in *Re: Air Transat*, bearing number 28-A-2004, a copy of which is attached and marked as **Exhibit "6"**. This decision is referred to in some of the cited passages above.

16. A decade ago, on September 4, 2013, the Consumers' Association of Canada recognized my achievements in the area of air passenger rights by awarding me its Order of Merit for "singlehandedly initiating Legal Action resulting in revision of Air Canada unfair practices regarding Over Booking."

17. In a 2013 review article on aviation law in Canada, a copy of which is attached and marked as **Exhibit "7"**, Mr. Carlos Martins, now a partner at WeirFoulds LLP, described my advocacy as follows:

> In the consumer protection landscape, for the last several years, the field has largely been occupied by Gabor Lukács, a Canadian mathematician who has taken an interest in challenging various aspects of the tariffs filed by air carriers with the regulator, the Canadian Transportation Agency (the Agency). The majority of Mr Lukács' complaints centre on the clarity and reasonableness of the content of the filed tariffs, as well as the extent to which air carriers are applying their tariffs, as filed, in the ordinary course of business.
>
> Mr Lukács' efforts have created a significant body of jurisprudence from the Agency - to the extent that his more recent decisions often rely heavily upon principles enunciated in previous complaints launched by him.

18. In addition, I have successfully challenged, in the public interest, the legality of the CTA's actions on a number of occasions before this Honourable Court:

(a) *Lukács v. Canada (Transport, Infrastructure and Communities)*, 2015 FCA 140, relating to the open court principle in proceedings before the Canadian Transportation Agency;

(b) *Lukács v. Canada (Canadian Transportation Agency)*, 2015 FCA 269, relating to denied boarding compensation; and

(c) *Lukács v. Canada (Canadian Transportation Agency)*, 2016 FCA 220, relating to standing to bring a complaint about discrimination against large passengers without being personally affected.

19. In *Lukács v. Canada (Transportation Agency)*, 2016 FCA 174, at paragraph 6, the Federal Court of Appeal recognized my genuine interest in air passenger rights and the legality of the CTA's decisions and actions, and granted me both leave to appeal and public interest standing on that basis.

20. In October 2017, I appeared before the Supreme Court of Canada. The court's judgment was delivered on January 19, 2018, and is indexed as *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2. The appeal arose from the CTA's refusal to consider my regulatory complaint against Delta Airlines for discriminating against large passengers. The CTA initially refused to consider my complaint on the basis that I was not directly affected (i.e., I was not a large passenger).

21. In *Lukács v. Canada (Transportation Agency)*, 2019 FC 1148, at paragraphs 46 and 50, the Federal Court recognized my reputation, continued interest, and expertise in advocating for passenger rights. The judicial review involved the CTA giving Air Transat "credit" against a regulatory penalty by paying the equivalent as compensation to passengers. This matter is ongoing.

22. In March 2020, this Honourable Court granted leave for me to intervene in the appeal of the International Air Transport Association and a number of airlines against certain provisions of the *Air Passenger Protection Regulations* [***APPR***] in File No. A-311-19. This Honourable Court found that:

> [...] the Court is of the view that the case engages the public interest, that the proposed intervener would defend the interests of airline passengers in a way that the parties 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;
>
> [Emphasis added.]

A copy of this Court's Order is attached and marked as **Exhibit "8"**.

(ii) Advocating for Stronger Air Passenger Protections

23. Over the past decade, both in my personal capacity under the banner "Air Passenger Rights" and in my capacity as President for APR, I have been advocating for stronger air passenger protections before:

(a) Parliament, including giving evidence and making submissions at the House of Commons Standing Committee on Transport, Infrastructure and Communities [**TRAN Committee**], the Standing Senate Committee on Transport and Communications [**Senate TCRM Committee**], and the House of Commons Standing Committee on Finance [**FINA Committee**]; and

(b) the CTA, as a stakeholder, in consultations.

Involvement in the Transportation Modernization Act and Updates Thereof

24. In September 2017 and March 2018, by invitation, I testified before the TRAN Committee and the Senate TCRM Committee, respectively, regarding the *Transportation Modernization Act*. The *Transportation Modernization Act* created the legislative framework for the APPR.

25. The CTA also recognized me as a stakeholder in the consultation process leading to the development of the *APPR* and I participated in the CTA's consultations described below. These bilateral consultation sessions were organized only for those whom the CTA identified as "stakeholders," and were distinct and separate from the CTA's town hall meetings for the general public.

(a) In June 2018, I had a 2-hour bilateral consultation session with officials from the CTA.

(b) In August 2018, I submitted a 26-page brief to the CTA with respect to the *APPR*.

(c) In January 2019, after the proposed *APPR* were prepublished in Canada Gazette Part I, I had a 1.5-hour bilateral consultation session with officials from the CTA.

(d) In February 2019, I submitted a 52-page brief to the CTA with respect to the proposed *APPR*. A copy of the brief is attached and marked as **Exhibit "9"**.

26. The 52-page brief that was submitted to the CTA in February 2019 (Exhibit "9") highlighted the concern that the *APPR* did not consolidate the right to a refund for unused tickets in events that are outside an airline's control—a right that has long been recognized in the CTA's jurisprudence—and it would give passengers a false impression about their rights if they only look at the *APPR*. The relevant section is on pages 42-44 of the brief.

27. Shortly after the COVID-19 pandemic began, on October 29, 2020, the TRAN Committee adopted a motion to initiate a study entitled "*Impact of COVID-19 on the Aviation Sector*." The study consisted of twelve (12) meetings between December 1, 2020 and June 8, 2021.

(a) On December 8, 2020, I testified before the TRAN Committee by invitation in my capacity as President of APR on the topic of airlines' failure to provide refunds to passengers, and other related topics.

(b) After the testimony at the TRAN Committee, in or around February 2021, APR also submitted a written brief to the TRAN Committee, a copy of which is attached and marked as **Exhibit "10"**.

28. On June 16, 2021, the TRAN Committee released its report entitled "*Emerging from the Crisis: A Study of the Impact of the COVID-19 Pandemic on the Air Transport Sector*," a copy of which is attached and marked as **Exhibit "11"**.

Within this report, the TRAN Committee made numerous recommendations, including some that specifically relate to refunds for passengers:

(a) **Recommendation 20**: that the Government of Canada amend the *APPR* and its enabling legislation to "*make explicit passengers' pre-existing right to receive reimbursement in circumstances where the airlines are unable to complete the client's itinerary in a reasonable period of time, even in cases beyond the control of the airlines*." [emphasis added]

(b) **Recommendation 21**: that the Canadian Transportation Agency be required to explain the measures it takes to prevent regulatory capture.

(c) **Recommendation 22**: that the Government of Canada expressly recognize the fundamental right to a refund that is found outside of the *APPR*.

29. In addition to the aforementioned appearances before Parliamentary committees, I also appeared at Parliamentary committees as a witness in my capacity as APR's President on the following instances:

(a) On November 21, 2022 and January 26, 2023, I appeared before the House of Commons TRAN Committee to speak about rights for air passengers. In or around December 2022, APR also submitted a brief to the House of Commons TRAN Committee, a copy of which is attached and marked as **Exhibit "12"**.

(b) On May 16, 2023, I appeared before the Senate TRCM Committee to speak about rights for air passengers, specifically the omnibus budget bill that included some changes to the *APPR* and the *Canada Transportation Act*. Before testifying at the Senate TRCM Committee on May 16, 2023, APR also submitted a brief to the Senate TRCM Committee, a copy of which is attached and marked as **Exhibit "13"**.

(c) On May 18, 2023, I appeared before the FINA Committee regarding the same omnibus budget bill described in the above subparagraph. Before giving the testimony before the FINA Committee on May 18, 2023, APR also submitted a brief to the FINA Committee, which is substantially identical to the brief submitted to the Senate TRCM Committee (above).

Involvement with Accessibility Initiatives for Air Passengers

30. In addition to the *APPR*, I have also been involved with initiatives to enhance accessibility for passengers that require accommodation, all under the "Air Passenger Rights" banner.

31. In October 2018, I filed a brief to the House of Commons' Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities about the *Act to ensure a barrier-free Canada* (Bill C-81).

32. In April 2019, I submitted a brief to the CTA about the draft *Accessible Transportation for Persons with Disabilities Regulations* that were prepublished in Canada Gazette Part I.

33. In April 2019, I submitted a brief to the Standing Senate Committee on Social Affairs, Science, and Technology with respect to the *Act to ensure a barrier-free Canada* (Bill C-81).

34. In February 2020, I submitted a brief to the Agency about phase 2 of the *Accessible Transportation for Persons with Disabilities Regulations*.

(iii) Sharing Information on Passenger Rights

35. In October 2018, I delivered two invited lectures at McGill University Faculty of Law's Institute of Air and Space Law under the banner "Air Passenger Rights" on the topic of air passenger rights.

36. APR promotes the rights of air passengers by referring passengers mistreated by airlines to legal information and resources through the press, social media, and the AirPassengerRights.ca website.

37. APR also has a Facebook group, entitled "Air Passenger Rights (Canada)," which has more than 133,200 members as of August 28, 2023 [**APR Facebook Group**]. In April 2020, there were approximately 23,700 members on the APR Facebook Group. The APR Facebook Group is a public group. While only members of the APR Facebook Group can post in that group, anyone can see the posts made by members of the APR Facebook Group.

38. The APR Facebook Group is a platform for members to share their concerns regarding air travel and passenger rights, and to discuss their issues and concerns with other passengers. Volunteers, including myself, answer some of the queries submitted by members of the APR Facebook Group.

(iv) Assisting Passengers in Enforcing Their Legal Rights

39. In addition to the three aforementioned pillars, I also provide, in my personal capacity, *pro bono* assistance to passengers in their disputes with airlines to the extent that I am permitted to do so by law. For example:

(a) In *Lachance v. Air Canada*, 2014 NSSM 14, I assisted a passenger in obtaining a judgment requiring Air Canada to compensate the passenger, who had been bumped.

(b) Since 2015, I have been assisting and representing Ms. Nayla Farah and Ms. Amal Haddad of Toronto, Ontario, who were harassed and discriminated against by airline crew due to their visual impairment and reliance on the assistance of Seeing Eye service dogs. In October 2018, the Canadian Human Rights Commission decided to refer the case to the Canadian Human Rights Tribunal for an inquiry.

(c) In *Paine v. Air Canada*, 2018 NSSC 215, I was granted permission to represent passengers in an appeal before the Supreme Court of Nova Scotia in a case relating to denied boarding compensation.

(d) In *Geddes v. Air Canada*, 2021 NSSM 27, as permitted by Nova Scotia legislation, I acted as agent for a passenger seeking standardized compensation under the *APPR*. I continued to assist the passenger on appeal to the Supreme Court of Nova Scotia and the reasons for judgment is indexed at *Geddes v. Air Canada*, 2022 NSSC 49.

40. APR itself does not represent or assist passengers in court. APR's mandate in that regard focuses on "educat[ing] 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" (Exhibit "1").

C. Background Relating to the COVID-19 Pandemic and Air Travel

41. At the start of the COVID-19 pandemic in early March 2020, I observed that the APR Facebook Group had begun to regularly receive Facebook posts from members concerning disruption of their travel plans to countries that were heavily affected by COVID-19 during that time, such as the China and Italy.

42. On March 11, 2020, the World Health Organization declared COVID-19 a pandemic, in a press release that is attached and marked as **Exhibit "14"**.

43. On March 13, 2020, the Government of Canada issued an advisory advising those within Canada to avoid non-essential travel abroad, and those abroad to consider returning to Canada earlier as options were becoming more limited. A copy of the news release issued by Global Affairs Canada is attached and marked as **Exhibit "15"**.

44. At around the time of the Global Affairs Canada advisory above, the government of Canada began urging Canadians to stem the spread of COVID-19. A copy of a news report published by Reuters, which appeared in the National Post online on March 16, 2020, is attached and marked as **Exhibit "16"**.

(i) Canadian Air Carriers Suspend or Significantly Reduce Flights

45. On or around March 22, 2020, Air Canada announced the reduction of the frequency of and/or suspension of some of its flight schedules. A copy of Air Canada's Route Updates page published on March 22, 2020, showing many flights suspended up to April 30, 2020, as it was archived on March 23, 2020, retrieved from the Internet Archive repository, is attached and marked as **Exhibit "17"**.

46. Air Canada subsequently expanded the suspension of many flights up to the end of May 2020. A copy of Air Canada's Route Updates page published on April 13, 2020, showing many flights suspended up to May 31, 2020, as it was archived on April 13, 2020, retrieved from the Internet Archive repository, is attached and marked as **Exhibit "18"**.

47. On March 18, 2020, Air Transat announced that it was temporarily suspending flights until April 30, 2020. A copy of Air Transat's news release dated March 18, 2020 is attached and marked as **Exhibit "19"**.

48. Air Transat subsequently expanded the suspension of flights up to the end of May 2020. A copy of Air Transat's "Coronavirus (COVID-19)" page, as it was archived on April 14, 2020, retrieved from the Internet Archive repository, is attached and marked as **Exhibit "20"**.

49. Sunwing announced that it was temporarily suspending southbound flights between March 17, 2020 to April 30, 2020. A copy of Sunwing's COVID-19

Policies page as it was archived on March 21, 2020, retrieved from the Internet Archive repository, is attached and marked as **Exhibit "21"**.

50. Sunwing later expanded the suspension of flights up to the end of May 2020. A copy of Sunwing's COVID-19 Policies page, as it was archived on April 14, 2020, retrieved from the Internet Archive repository, is attached and marked as **Exhibit "22"**.

51. In a news release dated March 19, 2020, Swoop announced that it was suspending transborder and international flights until October 24, 2020. A copy of Swoop's news release is attached and marked as **Exhibit "23"**.

52. On March 16, 2020, WestJet announced that it was suspending transborder and international flights as of March 22, 2020. A copy of WestJet's announcement is attached and marked as **Exhibit "24"**.

53. WestJet subsequently expanded the suspension of flights up until June 4, 2020. A copy of WestJet's blog page is attached and marked as **Exhibit "25"**.

54. For greater certainty, I am attaching these Canadian air carriers' suspension announcements solely as evidence of the air carriers' decision to cancel their flights *en masse*. I do not accept that each one of those cancellations were "situations outside carrier's control" within the meaning of s. 10 of the *APPR*.

(ii) Before the CTA's Statement on Vouchers was Drafted, Canadian Air Carriers Were Already Issuing Vouchers for Flights They Had Cancelled

55. In this subsection, I attach the announcements or webpages for major Canadian air carriers showing that they were already issuing vouchers instead of refunds for flights they cancelled, even before the CTA issued the March 25, 2020 Statement on Vouchers in Exhibit "36" further below.

56. On March 18, 2020, Air Canada sent an email to travel agents noting that credits that are valid for 24 months would be issued to customers whose flights were cancelled by Air Canada, and this was an amendment to Air Canada's existing schedule change policy:

> [...] Affected customers whose flights are cancelled will be able to receive a full credit, regardless of fare type, valid for 24 months. We will be providing you additional information shortly on how to process the 24-month validity. **At this time, we ask that you refrain from actioning or refunding tickets affected by this schedule change.**
>
> This new change in schedule change policy will take effect tomorrow March 19, 2020 for all schedule changes implemented as of tomorrow March 19, 2020. Kindly note, any schedule changes made by Air Canada prior to March 19, 2020 are covered by our standard Schedule Change policy, which includes the option for a full refund for all fare brands.
>
> [...]
>
> [Emphasis added in underline; original emphasis in bold.]

A copy of Air Canada's email to travel agents is attached and marked as **Exhibit "26"**. The name and email address of the travel agent that received this email has been redacted to protect their identity.

57. On or before March 21, 2020, Air Canada announced that, for flights that Air Canada cancelled, passengers would receive a credit valid for 24 months instead of a refund in the original form of payment:

> **My flight has been cancelled What should I do?**
>
> If your flight has been cancelled, you will receive full credit, which you can use towards future travel. This credit is valid for travel within 24 months of your flight cancellation date.
>
> [...]
>
> [Emphasis added.]

A copy of Air Canada's COVID-19 Updates page, as it was archived on March 21, 2020, retrieved from the Internet Archive repository, is attached and marked as **Exhibit "27"**.

58. On March 18, 2020, Air Transat announced that for flights that Air Transat cancelled, passengers would receive a credit valid for 24 months instead of a refund in the original form of payment:

> [...] All customers who were unable to travel because their flight is cancelled will receive a credit for future travel, to be used within 24 months of their original travel date.
>
> [...]

A copy of Air Transat's news release dated March 18, 2020 can be found in Exhibit "19".

59. On or before March 21, 2020, Sunwing announced that for flights that Sunwing cancelled, passengers would receive a credit valid for 24 months instead of a refund in the original form of payment:

> [...]
>
> Customers with departure dates for flights or vacation packages between March 17th and April 30th are eligible to receive a future travel credit in the value of the original amount paid. No action needed. Your original booking number will be the code of your future travel credit. We will communicate formally via the email address we have on file (including group travel bookings). You do not need to contact us.
>
> This credit can be redeemed against future travel for travel up to 24 months from original departure date to anywhere Sunwing Airlines operates.
>
> [...]

A copy of Sunwing's COVID-19 Policies page can be found in Exhibit "21".

60. On or before March 21, 2020, Swoop announced that for flights that Swoop cancelled, passengers would receive a credit valid for 24 months instead of a refund in the original form of payment:

> [...]
>
> Flight Refunds will be returned as a future travel credit in the form of a Swoop Credit, valid for 24 months. We are not processing refunds to original form of payment at this time,
>
> [...]
>
> **Are you travelling to the U.S., Mexico, and/or Jamaica before May 31, 2020?**
>
> - Log into Manage My Booking and cancel your flight reservation for a credit. For instructions on how, click here [...]

A copy of Swoop's "Making changes to your flight" page as it was archived on March 21, 2020, retrieved from the Internet Archive repository, is attached and marked as **Exhibit "28"**. A copy of Swoop's "How to cancel for credit" page as it was archived on March 21, 2020, retrieved from the Internet Archive repository, is attached and marked as **Exhibit "29"**. Swoop's "How to cancel for credit" page could be accessed by the URL show above from the "Making changes to your flight" page.

61. For greater certainty, I am only attaching Swoop's "Making changes to your flight" page to illustrate that Swoop was already issuing credits valid for 24 months on or before March 21, 2020. I do not accept, as complete or accurate, Swoop's representation at the bottom of the page that it should be up to passengers to cancel their own reservation. On March 19, 2020, Swoop already announced it was suspending all international flights (Exhibit "23").

62. On March 18, 2020, WestJet had communicated to travel agents that WestJet's existing cancellation policy would be "updated" to issue credits and that WestJet

was "not processing refunds to original form of payment at this time." A copy of WestJet's email with the subject line "Updated cancellation policy" is attached and marked as **Exhibit "30"**.

63. On or before March 21, 2020, WestJet announced that for flights that WestJet cancelled, passengers would receive a credit valid for 24 months instead of a refund in the original form of payment:

> Flight refunds will be returned as a future travel credit in the form of a Travel Bank, valid for 24 months. Vacation refunds will be returned as WestJet dollars, valid for 24 months. We are not processing refunds to original form of payment at this time.

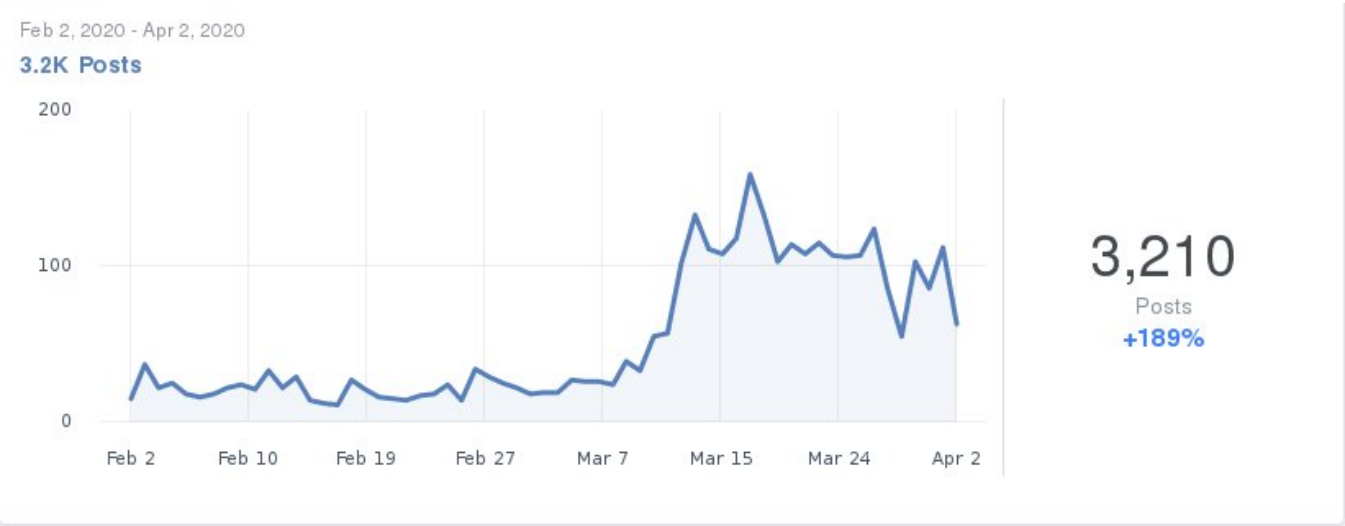
A copy of WestJet's "Coronavirus (COVID-19)" page as it was archived on March 21, 2020, retrieved from the Internet Archive repository, is attached and marked as **Exhibit "31"**.

64. For greater certainty, I am only attaching WestJet's "Coronavirus (COVID-19)" page to illustrate that WestJet was already issuing credits valid for 24 months on or before March 21, 2020. I do not accept, as complete or accurate, WestJet's representation within the page that it should be up to passengers to cancel their own reservation. On March 16, 2020, WestJet already announced it was suspending all international flights (Exhibit "24").

(iii) COVID-19's Impact on APR Facebook Group Members

65. After the March 11 WHO announcement and the March 13 Global Affairs Canada advisory, internet traffic to the APR Facebook Group increased substantially, despite individuals refraining from air travel for a number of reasons. The majority of that increased traffic relates to members experiencing difficulties obtaining a full refund of unused or cancelled travel services, mostly air fare, in light of the COVID-19 pandemic.

66. During the period of February 2 to April 2, 2020, the daily number of new Facebook posts to the APR Facebook Group increased by 189%, to 3,210 posts for the entire period. The graph generated by Facebook is reproduced below.



67. During the same time period, the daily number of comments to the new Facebook posts (above) increased by 196%, to 53,205 for the entire period. The graph generated by Facebook is reproduced below.

68. During the same time period, the APR Facebook Group increased from approximately 15,700 members to 23,709 members on or about April 7, 2020. The graph generated by Facebook is reproduced below.

69. Based on my ongoing and daily involvement with assisting members on the APR Facebook Group, I observed that those members' air travels had been disrupted by the COVID-19 pandemic, starting from mid-March 2020, in at least the following ways:

(a) members could no longer travel to some countries by air, such as France and Italy, because those countries closed their borders to foreign nationals;

(b) members adhering to the government travel advisories or health warnings decided to cancel their air travel plans; and/or

(c) airlines, including those that travel to, from, and within Canada, cancelled some or all of their flights due to low or no demand.

D. The CTA's Lawful Actions in Response to COVID-19

70. Since March 13, 2020 and up to around April 7, 2020, the CTA issued some formal orders or determinations relating to COVID-19, which are summarized below, and are **not** the subject of challenge on this judicial review application.

(i) Exemptions for the *APPR* Minimum Compensation and Rebooking

71. On March 13, 2020, the CTA issued Determination No. A-2020-42, suspending and/or relaxing some of the air carriers' obligation to pay minimum compensation to passengers and the obligation to rebook passengers, under the *APPR*, until April 30, 2020. A copy of Determination No. A-2020-42 is attached and marked as **Exhibit "32"**.

72. On March 25, 2020, the CTA issued Determination No. A-2020-47, extending the exemptions under Decision No. A-2020-42 (Exhibit "32") to June 30, 2020, and further allowing air carriers to respond to passenger compensation requests within 120 days after June 30, 2020, instead of the usual 30 days after receipt. A copy of Determination A-2020-47 is attached and marked as **Exhibit "33"**.

(ii) Suspension of All Existing and New Passenger Dispute Resolutions

73. On March 18, 2020, the CTA issued Order No. 2020-A-32, suspending all of the CTA's new and existing dispute resolution activities, including passenger complaints, until April 30, 2020. A copy of Order No. 2020-A-32 is attached and marked as **Exhibit "34"**.

74. On March 25, 2020, the CTA issued Order No. 2020-A-37, extending the suspension of all passenger dispute resolution activities to June 30, 2020. A copy of Order No. 2020-A-37 is attached and marked as **Exhibit "35"**.

E. The CTA's Publications that are Impugned on this Judicial Review

(i) The CTA's Statement on Vouchers

75. On March 25, 2020, at approximately the same time as the formal orders and determinations of the CTA on March 25, 2020 (Exhibits "33" and "35") were posted online, the CTA also posted a "Statement on Vouchers" [**Statement on Vouchers**] on its website.

76. The Statement on Vouchers did not state if it was approved by any of the CTA's appointed Members. The contents of the Statement on Vouchers are excerpted in full below.

> 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.

The English version of the Statement is attached and marked as **Exhibit "36"**.

(ii) The CTA's COVID-19 Page citing the Statement on Vouchers

77. On March 18, 2020, before the aforementioned Statement on Vouchers was published, the CTA posted on its website a page dedicated to COVID-19 matters [**COVID-19 Page**].

78. On March 25, 2020 at approximately the same time as the posting of the Statement on Vouchers, the COVID-19 Page was updated to include four references to the Statement on Vouchers with a URL linking to the Statement on Vouchers for all three defined scenarios in the *APPR*, namely: (a) situations outside the carrier's control; (b) situations within carrier's control that are not required for safety purposes; and (c) situations within carrier's control, but required for safety purposes.

> **Air Passenger Protection Obligations During COVID-19 Pandemic**
>
> [...]
>
> In addition to the APPR, carriers must also follow their tariffs. In light of the COVID-19 Pandemic, CTA has issued a Statement on Vouchers.
>
> **Delays and Cancellations**
>
> [...]

The CTA has identified a number of situations related to the COVID-19 pandemic that are considered outside the airline's control. These include:

- flight disruptions to locations that are covered by a government advisory against travel or unnecessary travel due to COVID-19;
- employee quarantine or self-isolation due to COVID-19; and
- additional hygiene or passenger health screening processes put in place due to COVID-19.

Airlines may make decisions to cancel or delay flights for other reasons. Whether these situations are within or outside the airline's control would have to be assessed on a case-by-case basis.

Airline obligations

[...]

Situations outside airline control (including COVID-19 related situations mentioned above)

In these situations, airlines must:

- Rebook passengers [...]
  - Please refer to the CTA's Statement on Vouchers.

  [...]

Situations within airline control

In these situations, airlines must:

- Rebook passengers [...]
  - Please refer to the CTA's Statement on Vouchers.

  [...]

Situations within airline control, but required for safety

In these situations, airlines must:

- Rebook passengers [...]
  - Please refer to the CTA's Statement on Vouchers.

  [...]

A copy of the English version of the COVID-19 Agency Page, entitled "Important Information for Travellers During COVID-19," is attached and marked as **Exhibit "37"**.

F. The CTA's Organizational Structure and Composition

79. A copy of the CTA's organizational chart, retrieved from the CTA's website on December 22, 2020, is attached and marked as **Exhibit "38"**.

80. A copy of the CTA's "Organization and mandate" page, which includes a list of the CTA's members, as it was archived on March 30, 2020, retrieved from the Internet Archive repository, is attached and marked as **Exhibit "39"**.

81. 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 "40"**.

82. At the time the Statement on Vouchers was published, the CTA's Members consisted of the following individuals, as outlined in Exhibit "39":

(a) Scott Streiner, Chairperson and CEO

(b) Elizabeth C. Barker (also known as Liz Barker), Vice-Chair

(c) William G. McMurray
(d) Mark MacKeigan, Member
(e) Mary Tobin Oates, Member
(f) Heather Smith, Member
(g) Gerald Dickie, Temporary Member
(h) Lenore Duff, Temporary Member

83. A copy of the CTA's "Organization and mandate" page, which includes a list of the CTA's members, printed on September 4, 2023, is attached and marked as **Exhibit "41"**. The CTA did not update the "Date Modified" at the bottom of the "Organization and mandate" page, which continued to read as "2019-05-02," although Ms. France Pégeot was appointed as Chair and CEO of the CTA on June 1, 2021.

84. As of September 4, 2023, five of the CTA Members above are still in their position as CTA Members:

(a) Elizabeth C. Barker (also known as Liz Barker), Vice-Chair
(b) Mark MacKeigan, Member
(c) Mary Tobin Oates, Member
(d) Heather Smith, Member
(e) Lenore Duff, Temporary Member

85. For greater certainty, I am attaching Exhibits "39," "40," and "41" only for the purpose of placing before the Court the list of the CTA's appointed Members from March 30, 2020, the current list of the CTA's appointed Members, and the CTA's *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*.

G. The CTA's Behind the Scenes Drafting of the Statement on Vouchers

86. Since publishing the Statement on Vouchers, the CTA has been nontransparent and unresponsive as to what occurred behind the scenes leading up to the CTA drafting and publishing the Statement on Vouchers, including who approved it.

87. In this section, I attach the pertinent documents that were disclosed by the CTA and/or Transport Canada [**TC**], in response to the Court's disclosure Orders or subpoenas, after this judicial review application was commenced.

(i) March 18, 2020: Transport Canada Sent Encrypted Email to the CTA

88. On March 18, 2020 at 2:57 p.m., Mr. Colin Stacey, the Director General of Air Policy at Transport Canada, sent an email to Ms. Marcia Jones, the then Chief Strategy Officer at the CTA [**Transport Canada Encrypted Email**], a copy of which is attached and marked as **Exhibit "42"**, and is excerpted below:

> **Subject:** FW: From MinO: Air Transat
>
> Hi Marcia,
>
> Air Transat are telling us that they are getting pressure from creditors who are pushing on the airlines for cash. They will request that we officially let them to provide vouchers to passengers instead of providing them cash because they literally do not have enough cash to give refunds.
>
> Have you heard anything about this? Are you available to discuss?
>
> Thanks,
>
> cs
>
> [Emphasis added.]

89. Ms. Jones's 5:28 p.m. reply to the Transport Canada Encrypted Email indicates that the Transport Canada Encrypted email (Exhibit "42") was indeed

encrypted:

> 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.
>
> I would assume that writ large this situation is outside of the carrier's control.
>
> If a flight cancellation is within the carrier's control, or within the carrier's control but required for safety, a refund is required and a voucher would not be compliant. Again, this does not seem to be relevant here.
>
> Looping in Cait in case she has anything to add.
>
> I hope this is helpful.
>
> Thanks,
>
> Marcia
>
> [Emphasis added.]

90. In response to the Court's disclosure Orders, the CTA was unable to locate the original Transport Canada Encrypted Email, but only a subsequent response to it. In response to this Court's subpoena, Transport Canada was also unable to produce the original Transport Canada Encrypted Email. A copy of Transport Canada's letter, dated June 8, 2023, is attached and marked as **Exhibit "43"**.

(ii) March 18-20, 2020: CTA-TC Side Exchange after the Transport Canada Encrypted Email

91. After the Transport Canada Encrypted Email was sent to the CTA, Mr. Vincent Millette of Transport Canada sent an email to Ms. Caitlin Hurcomb to initiate a "side exchange" (Exhibit "43"). The subsequent discussions after Mr. Millette's email are attached and marked as **Exhibit "44"**. These two exhibits contain "From MinO: Air Transat" in the email subject line and, collectively, will be referred to as the **CTA-TC Side Exchange**. The material portions of the CTA-TC Side Exchange are excerpted below:

(a) On March 18, 2020 at 5:14 p.m., Mr. Millette (TC) initially asked:

> Hi Cait - we have a question from our MinO. Would that be contrary to the APPRs to provide vouchers instead of cash for tickets refunds? [...]

(b) On March 18, 2020 at 5:24 p.m., Ms. Hurcomb (CTA) responded:

> [...] are we talking about refunds under the APPR or refunds for trips cancelled by the passenger? [...]

(c) On March 18, 2020 at 5:28 p.m., Mr. Millette (TC) clarified and also asked further questions:

> Refunds under the APPR.
>
> Refunds for trips cancelled by the passenger would be dealt with accordingly with the carriers' tariff? If the tariff allows it, then they can do it. What if the tariff says they reimburse cash but now they want to do vouchers, do they need to amend their tariff?
>
> [Emphasis added.]

(d) On March 18, 2020 at 5:31 p.m., Ms. Hurcomb (CTA) answered stating:

> [...] Yes, policies on cancellations by the passenger would be an airline tariff/fare rules issue. I can ask my col-

leagues in the Tariffs about your last question.

(e) On the following day, March 19, 2020 at 1:24 p.m., Ms. Hurcomb (CTA) emailed Mr. Millette (TC) stating that:

> [...] Spoke with Tariffs Division and they confirm that airlines must follow the policies in their tariffs and if they wanted to follow different policies, they would have to amend their tariff. [...]
>
> [Emphasis added.]

(f) On March 19, 2020 at 4:53 p.m., Mr. Millette (TC) responded inquiring:

> Would you know what would be involved in terms of process and timelines if a carrier wanted to quickly change certain conditions of its tariff.

(g) On Friday March 20, 2020 at 8:21 a.m., Ms. Hurcomb (CTA) sent a lengthy email answering the inquiry from Mr. Millette (TC), outlining the available options for a carrier to formally amend its tariff and stating that:

> [...] Obviously I can't speak for senior management or decision-makers at the Agency, but I think there would be some concern here if carriers were looking to change their tariffs in a way that would leave passengers without recourse. [...]

(iii) March 18, 2020 Evening: Air Transat's Request that Vouchers be Recognized in Lieu of Cash Refunds

92. On the evening of March 18, 2020, shortly after Ms. Jones's response to the Transport Canada Encrypted Email, Mr. George Petsikas (Transat A.T.'s Senior Director of Government and Industry Affairs) had a lengthy call with Ms. Jones. The call between Mr. Petsikas (Transat A.T.) and Ms. Jones (CTA) was on the topic of Air Transat's request that the CTA recognize vouchers to pre-empt passengers from making credit card chargebacks.

93. Mr. Petsikas documented his call with Ms. Jones in an email sent to Ms. Jones, which was forwarded within an email thread between Ms. Jones and Mr. Streiner and is attached and marked as **Exhibit "45"** [**AT-CTA Voucher Request Thread**]. Mr. Petsikas's email to Ms. Jones is excerpted in full below:

> 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 chargeback 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.
>
> [Emphasis added.]

94. In the AT-CTA Voucher Request Thread (Exhibit "45"), at around 10:05 p.m. in the evening on March 18, 2020, Ms. Jones reported back to Mr. Streiner (CTA) and forwarded a copy of Mr. Petsikas's email. Within minutes, Mr. Streiner responded to Ms. Jones stating that:

> 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.
>
> [Emphasis added.]

(iv) March 19, 2020: CTA EC Meeting Discussion on Refunds or Vouchers

95. Starting from March 16, 2020, the CTA had scheduled daily Executive Committee [**EC**] meetings relating to the COVID-19 pandemic. These meetings were attended by senior CTA personnel, including Mr. Streiner and Ms. Jones. The

Outlook meeting invite for these "EC" meetings is attached and marked as **Exhibit "46"**. The required attendees of the "EC" meetings at the time included:

(a) Mr. Scott Streiner, Chairperson and CEO
(b) Ms. Liz Barker, Vice-Chair
(c) Ms. Marcia Jones, Chief Strategy Officer
(d) Mr. Tom Oommen, Director General, Analysis and Outreach
(e) Ms. Valérie Lagacé, Senior General Counsel and Secretary
(f) Mr. Sebastien Bergeron, Chief of Staff
(g) Ms. Mireille Drouin, Director General and CFO
(h) Ms. Alysia Lau, Advisor, Office of the Chair and CEO
(i) Mr. Douglas Smith, Senior Special Project Officer
(j) Ms. Lesley Roberson, Executive Coordinator

96. Notes were taken at the CTA "EC" meetings, including the one that occurred on March 19, 2020. Below is an excerpt of the meeting notes from March 19, 2020 that relates to the issue of refunds for air passengers:

Debriefs - External

- MJ [Ms. Marcia Jones]: Debriefed on suspension order and APPR determination. Air carrier tone is nothing within their control. Want Agency to clarify that they are not required to refund carriers (*sic*). Air carriers don't have resources to turn to implementing ATPDR.
- SS [Mr. Scott Streiner]: ATPDR largely reflect previous codes, so not reasonable to delay coming-into-force wholesale.
- SS [Mr. Scott Streiner]: Other issue is air carriers refusing to provide refund or voucher to passengers.
- SS [Mr. Scott Streiner]: Considering issuing statement - current context very different from regulations, Agency view is it would be reasonable that air carriers provide refunds or vouchers to passengers affected by mass cancellations.
- DS [Mr. Douglas Smith, Senior Special Project Officer]: Prefer vouchers given cash flow issues.

- LB [Ms. Liz Barker]: Vouchers would need to include reasonable conditions.
- VL [Ms. Valérie Lagacé, Senior General Counsel and Secretary]: Could offer suspension of compensation requirements altogether. SS [Mr. Scott Streiner]: Could imply that these types of situations are outside air carrier control.
- SS and SB [Mr. Scott Streiner and Mr. Sebastien Bergeron, Chief of Staff]: What if government provides bailout?

[Emphasis added.]

A copy of said meeting notes is attached and marked as **Exhibit "47"**.

(v) March 19, 2020: CTA's Response to Air Transat's Urgent Request

97. In the early afternoon of March 19, 2020, Mr. Petsikas (Transat A.T.) sent an email to Ms. Jones (CTA), marked with high importance, to follow up regarding Transat A.T.'s request the previous evening about recognition of vouchers. The email exchange between Mr. Petsikas (Transat A.T.) and Ms. Jones (CTA) on March 19, 2020 is attached and marked as **Exhibit "48"**.

98. Ms. Jones responded to Mr. Petsikas the same afternoon stating that:

> 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

(vi) March 19, 2020 evening: Canadian Automobile Association Highlights the Financial Stress of Air Passengers

99. On March 19, 2020 at 7:21 p.m., Mr. Jason Kerr (Senior Director of Government Relations at the Canadian Automobile Association) sent a letter to the then Minister of Transport (The Honourable Marc Garneau) and copied to Mr. Streiner and Mr. Bergeron (CTA's Chief of Staff) [**CAA March 19 Letter**]. In Mr. Kerr's letter, he highlighted concerns about air carriers denying refunds to passengers for flight cancellations, and the unfairness to passengers:

> **Subject: Air passengers and financial stress**
>
> I am writing today concerning two issues of importance to many thousands of Canadian air travellers affected by government actions in response to the COVID-19 virus.
>
> [...] In a related issue, many carriers are offering only credits for future flights, most of which expire within a year, for flights cancelled due to government advisories or orders not to fly to certain destinations. In contrast, Via Rail Canada is offering full refunds to consumers wishing to cancel travel, regardless of when the ticket was purchased.
>
> [...] As for credits, we note that European Union policy in this area is clear, different than Canada's, and much better for travellers. It requires that airlines offer a full refund (https://ec.europa.eu/transport/sites/transportifiles/legislation/c20201830.pdf). Customers may choose to accept a credit for future flight, but they should not be forced to. Again, we support a balanced approach that does not unduly further destabilize the carriers. It may well be that their systems are overwhelmed right now, they are properly focused on repatriating Canadians with special flights, and their cash flow cannot withstand a stream of cash refunds at the moment. But it is not fair to expect passengers to shoulder this either. They should be able to access a cash refund, if not now then in the coming months, whether it is the carriers 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 a year before a Canadian's financial situation is good enough for her or him to contemplate another trip.

[...]

[Emphasis added.]

A copy of Mr. Kerr's letter is attached and marked as **Exhibit "49".**

100. On March 20, 2020, Mr. Streiner forwarded Mr. Kerr's letter to the "EC" email list without comments (Exhibit "49").

(vii) March 20, 2020 (Friday Afternoon): Mr. Streiner Parked the Statement on Vouchers Idea

101. At the "EC" meeting on Friday March 20, 2020, Ms. Jones was already tasked to "[p]repare and circulate draft statement with respect to air passenger refunds and vouchers during COVID-19" with an expected deadline of the next week. An email, with the list of tasks, is attached and marked as **Exhibit "50"**.

102. However at 5:00 p.m., shortly after the "EC" meeting, Mr. Streiner instructed that (Exhibit "50"):

> [...] let's remove the "refunds and vouchers" item, since we're not quite sure yet what will be done on this front or how.

(viii) March 21, 2020 (Saturday): Mr. Petsikas (Transat A.T.) Follows Up Again with Ms. Jones (CTA)

103. At 12:30 p.m. on Saturday March 21, 2020, Mr. Petsikas (Transat A.T.) emailed Ms. Jones (CTA) to follow up on Transat A.T.'s request for assistance on passenger credit card chargebacks:

> [...] As you can see, we are not alone in our concerns and that this option is essential to avoid a catastophic run on carrier cash reserves not just from consumers but from credit card chargeback refunds that the big banks want us to pay for.
>
> I await news regarding our urgent request of earlier this week to this end.

A copy of an email thread containing Mr. Petsikas's email and Ms. Jones forwarding Ms. Petsikas's email is attached and marked as **Exhibit "51"**.

(ix) March 22, 2020 (Sunday): Mr. Streiner Unveils Draft Statement on Vouchers within the CTA

104. At 8:54 a.m. on Sunday March 22, 2020, Mr. Streiner circulated the first draft of the Statement on Vouchers to senior personnel of the CTA, including Ms. Jones and Ms. Barker (the Vice-Chair), but excluding the appointed Members. In the email, Mr. Streiner said:

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

A copy of Mr. Streiner's email is attached and marked as **Exhibit "52"**.

105. Mr. Streiner had scheduled a meeting for Sunday, March 22, 2020 at 10:30 a.m. with the senior CTA personnel that received the draft Statement on Vouchers. That meeting invite had the subject line "Urgent Debrief - Please confirm attendance ASAP." A copy of Mr. Streiner's Microsoft Outlook calendar invite to this meeting is attached and marked as **Exhibit "53"**.

(x) March 22, 2020 (Sunday): CTA Members Approve the Statement on Vouchers

106. After the "Urgent Debrief" meeting with senior CTA personnel, Mr. Streiner circulated the draft Statement on Vouchers to the CTA's appointed Members: Mr. Mark MacKeigan; Ms. Heather Smith; Ms. Mary Tobin Oates; Ms. Lenore Duff; and Mr. Gerald Dickie. In that email, Mr. Streiner said:

> [...] 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?
>
> [Emphasis added.]

A copy of Mr. Streiner's email to all the CTA Members is attached and marked as **Exhibit "54"**.

107. The CTA's constituent Members replied to Mr. Streiner's email (Exhibit "54"), signalling their approval or endorsement of the Statement on Vouchers:

(a) A copy of the email of Ms. Mary Tobin Oates, CTA Member, to Mr. Streiner and other CTA Members with one attachment entitled "Statement mto.docx", dated March 22, 2020 at 12:55 p.m., is attached and marked as **Exhibit "55"**.

(b) A copy of the email of Mr. Mark MacKeigan, CTA Member, to Mr. Streiner and other CTA Members, with one attachment entitled "Statement mto_mm.docx", dated March 22, 2020 at 1:11 p.m., is attached and marked as **Exhibit "56"**.

(c) A copy of the email of Ms. Lenore Duff, CTA Member, to Mr. Streiner and other CTA Members, with one attachment entitled "Statement.docx", dated March 22, 2020 at 1:12 p.m., is attached and marked as **Exhibit "57"**.

(d) A copy of a chain of emails sent by CTA Members Ms. Heather Smith and Mr. Gerald Dickie, to Mr. Streiner and other CTA Members, is attached and marked as **Exhibit "58"**.

(e) A copy of an email from Ms. Barker (Vice-Chair of the CTA), endorsing all of the above changes, is attached and marked as **Exhibit "59"**.

108. At 4:42 p.m. on March 22, 2020, Mr. Streiner emailed the CTA Members again, stating that:

> Thanks for the quick replies. Most of the suggestions have been incorporated. I'll explain more during our call on Tuesday.

A copy of Mr. Streiner's email is attached and marked as **Exhibit "60"**.

109. While Mr. Kerr's CAA March 19 Letter was forwarded to the "EC" (Exhibit "49"), which included Mr. Streiner and Ms. Barker (see paragraph 95), none of the documents that the CTA produced in this judicial review application show whether Mr. Kerr's CAA March 19 Letter was brought to the attention of any of the CTA's other constituent Members.

(xi) March 22, 2020 (Sunday Afternoon): Transport Canada Already Knew of the Statement on Vouchers and Lengthy Exchanges Thereafter

110. At 2:22 p.m. on Sunday, March 22, 2020, Mr. Millette (TC) emailed Ms. Hurcomb (CTA) indicating he already knew about the Statement on Vouchers:

> **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.
>
> He understood, based on a conversation with Marcia, that the measure you would announce may have an adverse impact on larger carriers like AC or WestJet.

> We are not entirely sure we understand this. Can you explain?
>
> Feel free to call me if easier 343-996-9858
>
> Thanks!
>
> [Emphasis added.]

A copy of an email chain between Mr. Millette (TC) and Ms. Hurcomb (CTA), during the dates of March 22-24, 2020, is attached and marked as **Exhibit "61"**.

111. In the aforementioned email thread (Exhibit "61"), Ms. Hurcomb responded to Mr. Millette on March 23, 2020 at 10:15 a.m. indicating that she was aware that meetings had already occurred between Transport Canada and the Canadian Transportation Agency:

> **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 Minister's Chief of Staff 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
>
> [Emphasis added.]

112. In the aforementioned email thread, Ms. Hurcomb's email on March 23, 2020 at 10:15 a.m. states the title of the three Transport Canada officials, but not their names. I have included the names and titles of those individuals, which were gleaned from the documents disclosed in this judicial review application and publicly available documents showing the names of the individuals in those positions at the time:

(a) "**DM**" refers to Mr. Michael Keenan. Mr. Keenan was the Deputy Minister of Transport since March 2016, and his previous profile on Transport Canada's website is attached and marked as **Exhibit "62"**. According to the Government of Canada's website, a printout of which is attached and marked as **Exhibit "63"**, on February 20, 2023 Arun Thangaraj was appointed to replace Mr. Keenan.

(b) "**Minister's Chief of Staff"** refers to Mr. Marc Roy. Based on Mr. Roy's LinkedIn Profile, which is attached and marked as **Exhibit "64"**, Mr. Roy was the Minister of Transport's Chief of Staff in March 2020 and he departed from Transport Canada around February 2021.

(c) "**ADM**" refers to Mr. Lawrence Hanson. Based on Mr. Lawrence Hanson's LinkedIn profile, which is attached and marked as **Exhibit "65"**. Mr. Hanson was the Assistant Deputy Minister of Policy at Transport Canada from June 2017 to March 2021, and Mr. Hanson then moved to the Department of Fisheries and Oceans Canada in March 2021.

113. Mr. Keenan and Mr. Hanson were also part of the email threads bearing subject line "From MinO: Air Transat" that was circulated within Transport Canada between March 18-19, 2020, which is attached and marked as **Exhibit "66"**.

114. In the aforementioned email thread (Exhibit "61"), Mr. Millette (TC) asked Ms. Hurcomb (CTA) for further details on March 23, 2020 at 10:20 a.m.:

> 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?

115. At 11:04 a.m. on March 23, 2020, Ms. Hurcomb (CTA) responded to Mr. Millette (TC) as follows:

> 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. It's not our intention to take enforcement actions against one of these airlines if this practice is not followed, in alignment with their tariff.
>
> If a complaint were brought forward to the CTA, it would be assessed on its own merits, of course.
>
> [Emphasis added.]

116. After receiving Ms. Hurcomb's email at 11:04 a.m. on March 23, 2020, Mr. Millette (TC) reported back to Mr. Stacey (TC) stating that:

> 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.

A copy of this email between Mr. Millette and Mr. Stacey is attached and marked as **Exhibit "67"**.

(xii) March 22, 2020 (Sunday Afternoon): Transat A.T. Chairman Requests Vouchers be Recognized as a Refund to Defeat Credit Card Chargebacks

117. On March 22, 2020, Mr. Jean-Marc Eustache (the Chairman, President, and CEO of Transat A.T.) sent a letter directly to Mr. Streiner [**Transat A.T. Chairman Voucher Request**], stating that:

> **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**
>
> [...] 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.
>
> [...] 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;
[...]

[Emphasis added in underline; original emphasis in bold.]

A copy of the Transat A.T. Chairman Voucher Request letter is attached and marked as **Exhibit "68"**.

118. Within minutes of receiving the aforementioned letter from Mr. Eustache (Transat A.T.), Mr. Steiner forwarded that letter to the "EC" email list and also commented that:

> 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

[Emphasis added.]

A copy of the Mr. Streiner's email is attached and marked as **Exhibit "69"**.

(xiii) March 22, 2020 (Sunday Evening): Association of Canadian Travel Agencies Seeks the CTA's Assistance on Refunds and Credit Card Chargebacks

119. At 7:49 p.m. on Sunday March 22, 2020, Ms. Heather Craig-Peddle (Association of Canadian Travel Agencies [**ACTA**], Vice President of Advocacy and Member Relations) sent Ms. Caitlin Hurcomb (CTA) an email marked as high importance [**ACTA Request for Assistance on Passenger Refunds**], which stated the following:

> Caitlin, ACTA has received numerous responses from our Travel Agency Members concerned about the messaging that Gabor Lukas is reciting in main stream media. While the CTA has suspended all air dispute resolution activities, and airlines are not allowing for refunds to occur (only travel credits/vouchers), this puts tremendous pressure on travel agencies especially in the regulated provinces of BC, ON and QC. For example, Section 45 of the Ontario Travel Industry Act references that consumers must receive a refund if they do not get their product. The travel industry is on the brink. We anticipate 90% of travel agency businesses to temporarily close operations in the next 7 to 21 days. Recovery will be slow until consumers feel confident in traveling again. The industry will not recover if we have to adhere to these regulations.
>
> Is the CTA in any position to assist the retail Canadian travel industry to work with the federal and provincial governments to quell Mr. Lukas's damaging messaging (difficult I know with freedom of speech), and/or assist with going to the banks and credit card companies for prevention of credit card chargebacks during this time. [...]
>
> I appreciate your urgent response to our serious concerns.
>
> [Emphasis added.]

A copy of the ACTA Request for Assistance on Passenger Refunds is attached and marked as **Exhibit "70"**.

120. The CTA has not produced any documents on what response, if any, the CTA provided to the ACTA Request for Assistance on Passenger Refunds (Exhibit "70").

(xiv) March 23, 2020 (Monday morning): CTA Discussions about Expiry Dates on Vouchers

121. At 9:09 a.m. on March 23, 2020, Mr. Streiner sent an email to the "EC" group and, for the Statement on Vouchers, Mr. Streiner asked "should we retain language on expiry dates and if so, is the current text the best approach?" A copy of an email thread dated March 22-23, 2020, containing Mr. Streiner's email, is attached and marked as **Exhibit "71"**.

122. In response to Mr. Streiner's question, Mr. Bergeron (CTA Chief of Staff) noted the following (Exhibit "71"):

> 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.
>
> [Emphasis added.]

123. In response to Mr. Streiner's question, Ms. Barker (CTA Vice Chair) mentioned the EU approach to the issue of refunds for passengers (Exhibit "71"):

> I think the EU has landed on something different:
>
> https://ec.europa.eu/commission/presscorner/detail/en/ip_20_485

124. The URL in Ms. Barker's email links to the European Commission news release "COVID-19: Commission provides guidance on EU passenger rights," dated March 18, 2020, which stated that:

> In our efforts to mitigate the economic impacts of the COVID-19 pandemic, the Commission has today published guidelines to ensure EU passenger rights are applied in a coherent manner across the EU.
>
> National governments have introduced different measures, including travel restrictions and border controls. The purpose of these guidelines is to reassure passengers that their rights are protected.
>
> Commissioner for Transport Adina Vălean said: "*In light of the mass cancellations and delays passengers and transport operators face due to the COVID-19 pandemic, the Commission wants to provide legal certainty on how to apply EU passenger rights.*

> *In case of cancellations the transport provider must reimburse or re-route the passengers. If passengers themselves decide to cancel their journeys, reimbursement of the ticket depends on its type, and companies may offer vouchers for subsequent use. Today's guidelines will provide much-needed legal certainty on how to apply EU passenger rights in a coordinated manner across our Union. We continue to monitor the rapidly evolving situation, and, if need be, further steps will be taken.*"
>
> This guidance will help passengers, the industry and national authorities in this unprecedented situation, with important passenger travel restrictions imposed by national governments and knock-on effects on transport services across the EU. By introducing clarity, the guidelines are also expected to help reduce costs for the transport sector, which is heavily affected by the outbreak. The guidelines cover the rights of passengers when travelling by air, rail, ship or bus/coach, maritime and inland waterways, as well as the corresponding obligations for carriers.
>
> If passengers face the cancellation of their journey, for example, they can choose between reimbursement of the ticket price or re-routing to reach their final destination at a later stage. At the same time, the guidelines clarify that the current circumstances are "extraordinary", with the consequence that certain rights – such as compensation in case of flight cancellation less than two weeks from departure date – may not be invoked.
>
> [Emphasis added.]

A copy of the European Commission page is attached and marked as **Exhibit "72"**.

125. The "guidelines" URL within the above European Commission news release links to a PDF file entitled "Commission Notice - Interpretative Guidelines on EU passenger rights regulations in the context of the developing situation with Covid-19." A copy of these guidelines, as it was archived on March 21, 2020, retrieved from the Internet Archive repository, is attached and marked as **Exhibit "73"**.

(xv) March 23, 2020 (Monday Afternoon): Air Canada Request for Assistance on Passenger Refunds

126. On March 23, 2020, Mr. David Shapiro (Executive Vice President, International & Regulatory Affairs & Chief Legal Officer of Air Canada) made a request directly to Mr. Streiner by way of a letter that was marked "Private and Confidential" [**Air Canada Refund Assistance Request**]. The pertinent portions of that letter stated that:

> I regret that I have to be writing with the degree of urgency that I am to request immediate relief from the ongoing application of APPR, and the imminent entry into force of ATPDR on June 25, 2020, as a result of the devastating impact that the COVID-19 crisis is having on airlines. These concerns were raised during the Agency's technical briefing on March 19th, 2020, and we were invited to put them in writing.
>
> [...]
>
> **Request**
>
> ***Therefore, pursuant to s. 80 of the Canada Transportation Act ("Act"), we request that the Agency declare a complete suspension of the application of all obligations under APPR until further notice.***
>
> If this most sensible measure in these unprecedented circumstances is, for whatever reason, deemed not feasible, we request that the Agency at a minimum:
>
> – Clearly recognize that all delays, cancellations, and denied boarding occurring at this time of crisis are **outside of airlines' control**, with no exceptions;
> – Clarify that the uncontrollable nature of the crisis means that no refunds to passengers are required under APPR [footnote 4]. While this may be clear to the Agency and in Air Canada's tariffs, it is increasingly evident that it is not clear to the general public. Failure to clarify this will inevitably lead to a sharp and unnecessary increase in complaints and meritless lawsuits;
>
> [footnote 4] While para. 7 of Determination No. A-2020-42 does read that only rebooking obligations apply to situations outside

> carrier's control, a clear statement that no refunds apply would be extremely helpful in light of the current state of confusion in the public sphere.
>
> [...]
>
> [Emphasis added.]

A copy of the Air Canada Refund Assistance Request letter, and Mr. Streiner's email forwarding the letter to the "EC" email list, is attached and marked as **Exhibit "74"**.

127. I observe that the two bullet points from the Air Canada Refund Assistance Request letter seem to be worded almost identically to the bullet points in the Transat A.T. Chairman Voucher Request from March 22, 2020 (Exhibit "68").

(xvi) March 23, 2020 (Monday afternoon): CTA "EC" Meeting Discussion on Refunds or Vouchers

128. Below is an excerpt of the "EC" meeting notes taken by Ms. Lau (CTA's Advisor, Office of the Chair and CEO) from the March 23, 2020 "EC" meeting that relate to the issue of refunds for air passengers:

> **Debriefs**
>
> - SS [Scott Streiner]: TC [Transport Canada] indicated Agency moved faster than they expected. Other travel restrictions expected. Agreement between SS [Scott Streiner] and MK [Michael Keenan] that agencies/departmernts should not issue piecemeal decisions. Call this evening between TC and Agency officials.
>
> **Messaging on CTA services**
>
> - SS [Scott Streiner]: Where message says CTA pausing air disputes, should specify that Agency still receiving complaints.
> - LB [Liz Barker]: Maintaining Agency services "to the extent possible" too vague and signaling slowdown of services when not true. Need to be more specific.

- ***TH [Tim Hillier] to revise messaging - continuing normal activity, with the exception of... passengers can file complaints, but response times may be different. Do not want to solicit air travel complaints.**

Air carrier requests for additional measures

- SS [Scott Streiner] prepared table comparing AC [Air Canada] and AT [Air Transat] asks.
- ***Statement that all situations in COVID context = Category 3 should be discussed at Members meeting.**

[...]

Varia

- TO [Tom Oommen]: We received two requests for tariffs information. SS [Scott Streiner]: Summary of what tariffs say about refunds/vouchers. MJ [Marcia Jones]: Asked that tariffs team prioritize WJ, AC, and AT tariffs.

[...]

[Emphasis added in underline; original emphasis in bold.]

A copy of the March 23, 2020 "EC" meeting notes is attached and marked as **Exhibit "75"**.

129. The table of the Air Canada and the Air Transat "asks" that Mr. Streiner prepared and referred to above is attached and marked as **Exhibit "76"**, and excerpted below.

Item	AT	AC
APPR		Issue a blanket exemption from all APPR, or take the steps below
Classification of flight disruptions	State that all current disruptions are category 3	Same
Refunds	State that no refunds are owed	Same
Vouchers	Signal that vouchers are acceptable in lieu of cash refunds	
Response time	Exempt airlines from the 30 day timeline	Same
Alternative travel arrangements	Exempt airlines from any obligation to provide alternative travel arrangements	Same
April 30	Extend the current exemptions for at least 90 days	Same
Enforcement	Suspend for 1 year	Same
ATPDR		A 90-day or longer delay to the "deadline for compliance" or, at least, to certain provisions

130. I understand "category 3" in the table above refers to situations outside of an air carrier's control under the *APPR*.

(xvii) March 24, 2020: CTA Members' Meeting on Air Carrier Requests

131. On March 24, 2020, the CTA's Members held a meeting. One of the CTA Members (Ms. Heather Smith) made notes in respect of that meeting, by making annotations to the table of asks compiled by Mr. Streiner (Exhibit "76"). A copy of the annotated table of asks is attached and marked as **Exhibit "77"**. For Transat A.T.'s and Air Canada's request that the CTA state publicly that no refunds are owed to passengers, Ms. Smith's annotation (Exhibit "77") stated:

> Already addressed through the Agency's statement.

(xviii) March 24, 2020: CTA Strategizing on Media Responses, Social Media Complaints, and Public Response to the Statement on Vouchers

132. On the morning of March 24, 2020, Ms. Jones (the CTA's Chief Strategy Officer) prepared a draft email to be disseminated to air carriers *en masse* about the Statement on Vouchers, and Mr. Streiner provided input on that draft email. The text of the draft email, after Mr. Streiner's edits, is excerpted below:

> 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.
>
> [Emphasis added.]

A copy of the email exchange between Mr. Streiner and Ms. Jones is attached and marked as **Exhibit "78"**.

133. In the afternoon of March 24, 2020, Mr. Vincent Turgeon (CTA) indicated that the CTA had just received a third request from the media on the issue of airline refunds and vouchers, with the first such media request received the previous week. Mr. Turgeon also indicated that "our Twitter account has received dozens of questions on that same topic" and asked if he could "use that strategy [i.e., responding using the Statement on Vouchers] for direct responses on email (@Info inbox) and on Twitter?" A copy of Mr. Turgeon's email is attached and marked as **Exhibit "79"**.

134. On the evening of March 24, 2020, Mr. Streiner circulated "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. [...] we need to be ready when the calls come." A copy of Mr. Streiner's email, and the enclosed draft answers, is attached and marked as **Exhibit "80"**.

135. Mr. Streiner's draft answers stated the following (Exhibit "80"):

- 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

[Emphasis added.]

136. In response to Mr. Streiner's draft answers to possible questions, Ms. Jones then circulated her proposed answers on the same issue, stating that:

> 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.
>
> [Emphasis added.]

A copy of Ms. Jones's email is attached and marked as **Exhibit "81"**.

(xix) March 25, 2020: CTA Publishes the Statement on Vouchers

137. At 9:45 a.m. on March 25, 2020, Mr. Streiner circulated a further revision to the draft Statement on Vouchers to include, among other changes, that "airlines believe[d]" that their tariffs have clauses that relieve the airlines from providing refunds. A copy of Mr. Streiner's email, and the revised draft Statement on Vouchers, is attached and marked as **Exhibit "82"**.

138. At 9:53 a.m. on March 25, 2020, a few hours before the Statement on Vouchers was finalized and published, Mr. Streiner also provided some comments on Ms. Jones's proposed answer (Exhibit "81"). Mr. Streiner stated that:

> 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"?
>
> [Emphasis added.]

A copy of Mr. Streiner's email to Ms. Jones is attached and marked as **Exhibit "83"**.

139. Approximately thirty minutes after Mr. Streiner's email, Mr. Bergeron (CTA's Chief of Staff) opined that the Statement on Vouchers should instead be labelled as "guidance," as it would carry more weight. Mr. Streiner responded and stated:

> Not sure we should call this [the Statement on Vouchers] guidance. That might slightly overstate it.

An email thread containing this exchange between Mr. Bergeron and Mr. Streiner is attached and marked as **Exhibit "84"**.

140. In the above email thread (Exhibit "84"), Ms. Barker also provided her input on whether to label the Statement on Vouchers as "guidance":

> I understand Seb's [Mr. Bergeron's] point, to try to frame this, and your response, that it might overstate it. But given that it is consistent with your intent, that this be seen as guidance by all, it might be OK to overstate it slightly

[Emphasis added.]

141. At 1:35 p.m. on March 25, 2020, Mr. Streiner circulated the final version of the Statement on Vouchers and included a line stating that "24 months would be considered reasonable in most cases" for expiry of vouchers or credits. As described earlier, in paragraphs 55-64, by March 21, 2020, major Canadian air carriers had already been issuing vouchers with 24-month expiry dates. A copy of the email from Mr. Streiner, with the final version of the Statement on Vouchers, is attached and marked as **Exhibit "85"**.

142. At 1:55 p.m. on March 25, 2020, Ms. Jones forwarded Mr. Streiner's final version of the Statement on Vouchers to relevant CTA personnel for posting on the internet and stated:

> Over to you! ☺

A copy of Ms. Jones's email is attached and marked as **Exhibit "86"**.

(xx) March 25, 2020 Afternoon: CTA Informs Stakeholders of the Statement on Vouchers

143. At 2:34 p.m. on March 25, 2020, Ms. Jones sent an email using the "Blind Carbon Copy (BCC)" feature to an undisclosed list of recipients to announce that the Statement on Vouchers had been published, among other measures. Mr. Petsikas (Transat A.T.) responded to that email thanking the CTA "for turning this around and getting it out the door." A copy of Mr. Petsikas's email, including Ms. Jones's email announcement, is attached and marked as **Exhibit "87"**.

144. At 4:01 p.m. on March 25, 2020, Ms. Jones sent another email using the "Blind Carbon Copy (BCC)" feature to another undisclosed list of recipients, including Mr. Kerr (Senior Director of Government Relations at the Canadian Automobile Association), to announce that the Statement on Vouchers had been published, among other measures. A copy of Mr. Kerr's response to Ms. Jones's announcement email is attached and marked as **Exhibit "88"**.

(xxi) March 25, 2020 Afternoon: CBC Urgent Inquiry about the Statement on Vouchers

145. At 3:53 p.m. on March 25, 2020, a journalist from CBC sent an urgent inquiry to the CTA and also brought the CTA's attention to the CTA decision in *Lukács v. Porter Airlines Inc.* (No: 344-C-A-2013):

> Is this from the CTA?
>
> https://www.otc-cta.gc.ca/eng/statement-vouchers
>
> It has no name attached to it and I would like to know who to attribute it to and on what legislative basis it is endorsing credits and not refunds?
>
> I ask because the CTA has issued decisions that say airlines must refund passengers, even when the cancellation is beyond the airlines' control.

> An August 29, 2013 decision from the Canadian Transport Agency states "The Agency agrees with Mr. Lukács, and finds that it is unreasonable for Porter to refuse to refund the fare paid by a passenger because of its cancellation of a flight, even if the cause is an event beyond Porter's control." I must finish my story today but I need confirmation from you that this link is legitimate and the release is from the CTA. I am hoping you can respond to my questions within the next few hours. Regards, Yvonne
>
> [Emphasis added.]

An email thread containing this CBC media inquiry is attached and marked as **Exhibit "89"**.

146. Within about twelve minutes of the CBC inquiry, Mr. Turgeon (CTA) suggested to Ms. Jones (CTA) and Mr. Hillier (CTA) the following (Exhibit "89"):

> Hi Marcia and Tim, please advise. We just received this. We could simply respond that it is a clarification offered by the CTA.

(xxii) March 25, 2020 Afternoon: Discussion on FAQs for Statement on Vouchers

147. On the afternoon of March 25, 2020, shortly after the Statement on Vouchers was posted on the CTA's website, Mr. Streiner, Ms. Barker, and Mr. Bergeron were exchanging comments on a "Web FAQs" document that related to the Statement on Vouchers. A copy of the email thread and a marked-up copy of the "Web FAQs" is attached and marked as **Exhibit "90"**. In the "Web FAQs," Ms. Barker made a number of comments including those excerpted below:

> [...] The CTA believes that fair and robust air protection for passengers whose flights are cancelled in these circumstances is essential.[...]
>
> > 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..]
>
> [...] 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 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.
>
> > Commented [LB8: Would definitely not say this because I believe that if tariffs provide for nothing, they are out of compliance with the APPR.]

H. Transat A.T., Air Canada, and ACTA Correspondences with the CTA Were Not Documented in the Lobbying Registry Communication Reports

148. I searched the Registry of Lobbyists on the website of the Office of the Commissioner of Lobbying of Canada [**Commissioner of Lobbying**].

(a) Attached and marked as **Exhibit "91"** are the communication reports that Transat A.T. Inc. filed with the Commissioner of Lobbying for the time period between February 2020 and May 2020 [**Transat Communication Reports**].

(b) Attached and marked as **Exhibit "92"** are the communication reports that Air Canada filed with the Commissioner of Lobbying for the time period between February 2020 and May 2020 [**Air Canada Communication Reports**].

(c) Attached and marked as **Exhibit "93"** are the communication reports that ACTA filed with the Commissioner of Lobbying for the time period between February 2020 and May 2020 [**ACTA Communication Reports**].

149. The four known communications between Transat A.T. and the CTA were not documented in the Transat Communication Reports:

(a) The call between Mr. Petsikas (Transat A.T.) and Ms. Jones (CTA) on March 18, 2020 (paragraphs 92-93).

(b) Mr. Petsikas's email to Ms. Jones within the AT-CTA Voucher Request Thread (Exhibit "45").

(c) Mr. Petsikas's follow-up email to Ms. Jones on March 19, 2020 (Exhibit "48").

(d) Mr. Petsikas's further follow-up email to Ms. Jones on Saturday March 21, 2020 (Exhibit "51").

150. The March 23, 2020 Air Canada Refund Assistance Request (Exhibit "74"), sent to the CTA and marked "Private and Confidential," was not documented in the Air Canada Communication Reports.

151. The Sunday March 22, 2020 ACTA Request for Assistance on Passenger Refunds (Exhibit "70") that was sent to the CTA was not documented in the ACTA Communication Reports.

I. CTA Invoked the Statement on Vouchers to Respond to Passengers

152. On March 25, 2020, the CTA began responding to public Twitter tweets from passengers using the following text:

> [...] please refer to this link that will answer your question: https://otc-cta.gc.ca/eng/statement-vouchers Thank you. CTA social media

A copy of the CTA's public tweets on March 25, 2020, also included in my April 7, 2020 affidavit, is attached and marked as **Exhibit "94"**. A copy of the CTA's public tweets on March 25, 2020, and disclosed by the CTA in response to this Court's disclosure orders, is attached and marked as **Exhibit "95"**.

153. Between March 20 to 27, 2020, the CTA was responding to inquiries from a passenger named Tammy Pedersen. On March 20, 2020 at 1:08A a.m., Ms. Pedersen asked the CTA about her rights to a refund when Swoop is cancelling the flight, without reference to the COVID-19 situation:

> I booked a flight with Swoop Airlines for next month and they are cancelling the flight and only offering me a future credit. The flight is from Abbotsford, B.C. to Las Vegas, Nevada and return.
>
> Am I not entitled to a refund back to my card?
>
> [Emphasis added.]

154. On March 20, 2020 at 7:43 a.m., the CTA replied and referred to the COVID-19 situation. The CTA then cited to Ms. Pedersen material portions of Determination No. A-2020-42 (Exhibit "32") relating to the relaxing of an air carrier's obligation to pay the minimum compensation under the *APPR* and that the air carrier "would have to make sure the passenger completes the itinerary."

155. On March 20, 2020 at 11:25 a.m., Ms. Pedersen wrote back to the CTA indicating she did not understand the CTA's answer. Ms. Pedersen specifically inquired what her rights would be if the air carrier is unable to complete her itinerary:

> Thank you for your response, but I don't understand the answer.
>
> "However, they would have to make sure the passenger completes their itinerary." If the carrier doesn't - what form of compensation am I entitled to? A refund in the form of a future credit or a refund in the original form of payment?
>
> I have them my money in exchange for a service they are unable to provide. This is also outside of my control and a financial burden to me. All I want is my money returned.
>
> Any info/clarification would be appreciated.
>
> [Emphasis added.]

156. On March 27, 2020 at 10:25 a.m., the CTA responded to Ms. Pedersen's inquiry from March 20, 2020 with a copy of material portions of the Statement on Vouchers as follows:

> 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 may relieve the airline of such obligations in force majeure situations.
>
> 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).

157. A copy of the email chain between the CTA and Ms. Pedersen between March 20 to 27, 2020, provided to me by Ms. Pedersen, is attached and marked as **Exhibit "96"**.

158. On March 27, 2020, a passenger named Ms. Jennifer Mossey received from the CTA a similar email as Ms. Pedersen that repeats the Statement on Vouchers. The CTA's response did not answer Ms. Mossey's concern about Sunwing initially agreeing to a refund pursuant to their own policies, only to change the policy days after and deny any refunds. In particular, the CTA provided a generic response as follows:

> [...]
>
> The CTA has taken steps to address the major impact that the COVD-19 pandemic is having on the airlines industry by making temporary exemptions to certain requirements of the Air Passenger Protection Regulations (APPR). These exemptions apply to flight disruptions that occur from March 13, 2020 until June 30, 2020.

> [...]
>
> 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 may relieve the airline of such obligations in force majeure situations.
>
> 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).**
>
> [...]
>
> [Original emphasis in bold.]

A copy of the exchange between the CTA and Ms. Mossey, provided to me by Ms. Mossey, is attached and marked as **Exhibit "97"**.

159. The CTA continued to respond to passengers using the Statement on Vouchers in the weeks thereafter. A bundle of emails citing the Statement on Vouchers sent by the CTA in response to passengers' inquiries between April 8 to April 20, 2020 is attached and marked as **Exhibit "98"**.

J. CTA Included the Statement on Vouchers in Boilerplate Complaint Responses

160. After the CTA published the Statement on Vouchers, it began including the Statement on Vouchers within the automated response emails that were sent to passengers:

> Thank you. We have successfully received your complaint. Your case number is [...]

> **Suspension of all air dispute resolution activities**
>
> [...]
>
> **Air carriers' obligations during the global COVID-19 pandemic**
>
> The CTA has taken steps to address the major impact that the COVD-19 pandemic is having on the airlines industry by making temporary exemptions to certain requirements of the Air Passenger Protection Regulations (APPR). These exemptions apply to flight disruptions that occur from March 13, 2020 until June 30, 2020.
>
> Statement on Vouchers for flight disruptions
>
> [Emphasis added.]

A copy of the automated email received by a passenger named Reine Desrosiers is attached and marked as **Exhibit "99"**.

K. Canadian Air Carriers Immediately Invoked the Statement on Vouchers to Deny Passenger Refunds

161. On March 27, 2020, Sunwing issued a letter that was distributed to travel agents, including an accompanying FAQ, both of which contained the text below:

> Initially, we offered customers booked on our flights during this suspension the choice between a future travel credit valid for 12 months and a full cash refund. However, after the Government of Canada's non-essential travel advisory, we adjusted our policy to be aligned with all other Canadian airlines and tour operators. This decision is also consistent with the ruling made by the Canadian Transportation Agency on March 26, 2020.
>
> [Emphasis added.]

A copy of the letter to the travel agents is attached and marked as **Exhibit "100"**.

A copy of the accompanying FAQ is attached and marked as **Exhibit "101"**.

162. On March 31, 2020, WestJet communicated with a passenger, Ms. Steffany Christopher, via Facebook Messenger, stating that:

> We understand the challenges our guest have been faced with. However, the Canadian Transport Agency has approved us to issue refunds to the travel bank. [...]
>
> [Emphasis added.]

A screenshot of those Facebook messages, provided to me by Ms. Christopher, is attached and marked as **Exhibit "102"**.

163. On April 1, 2020, Air Canada wrote in response to an email from Mr. David Foulkes, a passenger, demanding a refund:

> I would like to attach two links from the Canadian Transportation Agency website as they may help clarify some of your questions. The CTA has issued temporary exemptions to the Air Passenger Protection Regulations regarding refund request and extension of ticket validity.
>
> https://www.otc-cta.gc.ca/eng/content/canadian-transportation-agency-issues -temporary-exemptions-certain-air-passenger-protection
>
> https://otc-cta.gc.ca/eng/statement-vouchers [...]
>
> [Emphasis added.]

A copy of the email chain between Air Canada and Mr. Foulkes, provided to me by Mr. Foulkes, is attached and marked as **Exhibit "103"**.

164. On March 27, 2020, Air Canada wrote in response to an email from Mr. Ahren Belisle, a passenger, demanding a refund:

> As mention previously the maximum we can provide is to keep your ticket as a credit for 24 months (2 years) [...] The policy we follow at the moment is supported by the CTA (Canadian air transportation agency).
>
> [Emphasis added.]

A copy of the email chain between Air Canada and Mr. Belisle, provided to me by Mr. Belisle, is attached and marked as **Exhibit "104"**.

165. On March 26, 2020, Air Transat responded to a personal message on Twitter from a passenger, Mr. Adam Bacour, as follows:

> [...] We strongly believe that the 24-month credit offered to our customers to compensate for their cancelled travel plans is a flexible proposition in these exceptional circumstances [...] In this regard, the Canadian Transportation Agency recently issued an opinion on the subject, which supports our decision and emphasizes that the solution proposed by Transat, among others, is appropriate given the current situation.
>
> [Emphasis added.]

A screenshot of that Twitter message, which was provided to me by Mr. Bacour, is attached and marked as **Exhibit "105"**.

166. On March 28, 2020, Swoop responded to an email request for a refund from a passenger, Ms. Susan Simpson, as follows:

> We do understand that a refund would be preferred, however we are only offering Swoop credits at this time for cancelled flights.
>
> On March 25, the Canadian Transportation Agency clarified its position on providing credit for travel due to the uncertain times we are in. This clarification stated that airlines could offer travel credit for cancelled flights, and the credit should be valid for a reasonable amount of time, which was indicated to be 24 months. If you would like more information please visit the CTA's website here: https://otc-cta.gc.ca/eng/statement-vouchers
>
> [Emphasis added.]

A copy of the email chain between Swoop and Ms. Simpson, which was provided to me by Ms. Simpson, is attached and marked as **Exhibit "106"**.

L. Travel Industry Invoked the CTA's Statement on Vouchers to Deter Refunds

167. On March 25, 2020, a travel agency based in Ontario named TravelOnly, made the following Facebook post on their Facebook page, citing the CTA's Statement on Vouchers as follows:

> To all of our amazing clients - thank you for putting your trust in TravelOnly and our amazing advisors. Over the course of the past two weeks, our advisors have been on hold for upwards of 12+ hours to help you get home or cancel or rebook your trips. No doubt this will continue for the foreseeable future – we are here for you and hope that you will remember the value of using a travel advisor in the future!
>
> Some of you have reached out to enquire how the new Air Passenger Protection Regulations would impact the requirements of airlines when flights were cancelled and/or rebooked.
>
> The Canadian Transportation Agency has provided a statement which provides direction for you and your travel advisor regarding the issuing of future travel vouchers. In summary, the CTA believes that providing affected passengers with vouchers or credits for future travel is appropriate and reasonable. We understand that you may have questions on your voucher and how to use it for future travel and we encourage you to reach out to your TravelOnly advisor or our offices for assistance at any time. Please note that most vouchers will be issued within the next 4-6 weeks depending on the airline and travel supplier.
>
> [Emphasis added.]

A copy of the Facebook post is attached and marked as **Exhibit "107"**.

168. On April 3, 2020, a news article entitled "Tactful and tough, agents have effective strategies for dealing with refund demands" was published in Travel Week, a weekly publication targeting travel agents. The news article referred to the CTA's Statement on Vouchers and outlined an example of how travel agents can utilize the Statement on Vouchers to cause passengers to accept a voucher, in part, as follows:

> [...] On March 25 the Canadian Transportation Agency waded into the fray, issuing a special statement saying that while specific cases may get further analysis, in general, vouchers are appropriate in these extraordinary circumstances.
>
> [...]
>
> A letter that Vanderlubbe and his team have ready for any client making persistent refund requests or launching credit card chargebacks is strongly worded but fair, and explains the situation from the retailer's side. The letter cites the CTA statement and reads, in part: "We too are experiencing financial damage from the COVID19 pandemic, paying our staff for more than 5 weeks now with little or no revenue coming, in order to help our customers return home, process future travel credits, and we will be re-booking for months later."
>
> The letter also notes: "The Federal Government has issued a plain language statement which you can read from the link below [https://otc-cta.gc.ca/eng/statement-vouchers] that states that, as far as the air travellers protection regime goes, it was never intended to cover acts of God, or a force majeure situation. In short, they state that a future travel credit for 2 years is sufficient compensation under this circumstance.
>
> "Further, the Travel Industry Council of Ontario, that administers the Ontario Travel Industry Act, has issued a statement that 'under Ontario law, there is no requirement for a travel company to refund or offer alternative travel services if a government travel advisory is in effect'. In short, our suppliers are not even obligated to provide a future travel credit, but they are.
>
> [*sic*] Your chargeback through your credit card is unreasonable given that you are being offered a travel credit good for two years, and that you had the opportunity to purchase cancellation insurance at the time of booking, and you declined to do so.
>
> [*sic*] We ask that you contact your credit card company and 'reverse the chargeback request'. We need evidence of this in order to process your future travel credit."
>
> [Emphasis added.]

A copy of the article is attached and marked as **Exhibit "108"**.

169. On April 1, 2020, the Canadian Life and Health Insurance Association, a voluntary association representing 99 percent of Canada's life and health insurance business, published a press release entitled "Advisory: Travel cancellation insurance and airline vouchers or credits" that specifically relied on the CTA's Statement on Vouchers, suggesting that passengers may be unable to claim against their travel insurance policies as follows:

> [...] On March 25, 2020, the Canadian Transportation Agency updated its endorsement of the use of vouchers or credits as an appropriate approach for Canada's airlines as long as these vouchers or credits do not expire in an unreasonably short period of time.
>
> Travel insurers are advising policyholders that if you have been offered this type of full credit, or voucher for future use by an airline, train or other travel provider, in many instances, under the terms of your insurance policy you will not be considered to have suffered an insurable loss. [...]
>
> Disputes over refunds and credits should be directed to your travel service provider, transportation carrier or the Canadian Transportation Agency. [...]
>
> [Emphasis added.]

A copy of the press release is attached and marked as **Exhibit "109"**.

M. March 30, 2020: APR Raises Concerns About the Statement on Vouchers Directly with the CTA

170. On March 30, 2020, APR sent a letter to the CTA, specifically raising a concern that the Statement on Vouchers is misleading. APR specifically requested that the CTA remove the Statement on Vouchers by March 31, 2020. A copy of that letter is attached and marked as **Exhibit "110"**.

171. On March 30, 2020, the Secretariat of the CTA sent an email acknowledging receipt of APR's letter of March 30, 2020. A copy of that acknowledgement email is attached and marked as **Exhibit "111"**.

172. The CTA has not responded to APR's letter of March 30, 2020, except for the acknowledgment email above.

N. Statement on Vouchers was Inconsistent with a Lawful Directive of the US Regulator and the Guidelines of the European Commission

173. The United States Department of Transportation [**USDOT**] is the federal regulator of commercial US and foreign airlines that fly to, from, or within the United States. Unlike the CTA in Canada, the USDOT is a regulator, and not a quasi-judicial tribunal that adjudicates air passenger disputes with air carriers. In the USDOT's "A Consumer Guide to Air Travel," the USDOT recommends filing a complaint and, as a last resort, suing in small clams court. A copy of the USDOT's "A Consumer Guide to Air Travel", as it was archived on April 3, 2020, retrieved from the Internet Archive repository, is attached and marked as **Exhibit "112"**.

174. On April 3, 2020, the USDOT issued a formal enforcement notice, citing various legal authorities and signed by the USDOT Assistant General Counsel for Aviation Enforcement and Proceedings, entitled "Enforcement Notice Regarding Refunds by Carriers Given the Unprecedented Impact of the COVID-19 Public Health Emergency On Air Travel" [**USDOT Enforcement Notice**]. The USDOT Enforcement Notice specifies that:

> Although the COVID-19 public health emergency has had an unprecedented impact on air travel, the airlines' obligation to refund passengers for cancelled or significantly delayed flights remains unchanged.
>
> [Emphasis added.]

A copy of the USDOT's notice is attached and marked as **Exhibit "113"**.

175. On or around May 12, 2020, the USDOT further published a document entitled "Frequently Asked Questions Regarding Airline Ticket Refunds Given the Un-

precedented Impact of the COVID-19 Public Health Emergency on Air Travel," which is attached and marked as **Exhibit "114"**, and stated that:

> [...] **4. May airlines and ticket agents retroactively apply new refund policies?**
>
> The Department interprets the statutory prohibition against unfair or deceptive practices to cover actions by airlines and ticket agents applying changes retroactively to their refund policies that affect consumers negatively. The refund policy in place at the time the passenger purchased the ticket is the policy that is applicable to that ticket. The Aviation Enforcement Office would consider the denial of refunds in contravention of the policies that were in effect at the time of the ticket purchase to be an unfair and deceptive practice.
>
> **5. May airlines or ticket agents offer credits or vouchers to consumers in lieu of refunds?**
>
> Airlines and ticket agents can offer consumers alternatives to a refund, such as credits or vouchers, so long as the option of a refund is also offered and clearly disclosed if the passenger is entitled to a refund. Further, any restrictions that apply to the credits and vouchers, such as the period in which credits must be used or any fees charged for using the credit, must be clearly disclosed to consumers. If an airline, by representation or omission, engages in conduct that is likely to mislead consumers about their right to a refund, or the value of a voucher or credit that is offered, the Aviation Enforcement Office would deem such conduct to be a deceptive practice [...]
>
> [Emphasis added.]

176. As described in paragraphs 123-125, on March 18, 2020, the European Commission issued guidelines to the effect that (Exhibit "73"):

> In case of cancellations the transport provider must reimburse or re-route the passengers. If passengers themselves decide to cancel their journeys, reimbursement of the ticket depends on its type, and companies may offer vouchers for subsequent use.
>
> [Emphasis added.]

O. CTA Changed the Statement on Vouchers Twice After this Judicial Review Application was Commenced

177. Since APR commenced this application for judicial review, the CTA modified the Statement on Vouchers at least twice.

(i) April 22, 2020: CTA's New FAQs Page

178. On or about April 22, 2020, about a week before the deadline for the CTA's responding motion record for the interlocutory injunction motion, the CTA added a new hyperlink at the bottom of the Statement on Vouchers, linking to a new Frequently Asked Questions webpage [**New FAQs Page**]. The New FAQs Page stated for the first time that the Statement was not a legal ruling and purported to provide some explanation why the CTA issued the Statement on Vouchers. A copy of this New FAQs Page is attached and marked as **Exhibit "115"**.

179. For greater clarity, Exhibit "115" is not tendered for the accuracy of its content, but merely as proof that the aforementioned New FAQs Page was posted on the CTA's website on or about April 22, 2020.

180. On April 21, 2020, Ms. Jones (CTA) wrote to Mr. Hanson (Transport Canada) to give him a heads up that the intent of the New FAQs Page was to diffuse legal risk. Ms. Jones's email was then forwarded to Mr. Keenan (then Deputy Minister of Transport) and Mr. Roy (then Minister of Transport's Chief of Staff):

> **Subject: FAQs**
>
> Hi Lawrence,
>
> I just wanted to give you a heads up the CTA intends to post these tomorrow. The Chair's office is also advising MINO about these.
>
> The intent is to diffuse legal risk head on, in relation to litigation that has been launched by a consumer advocate. The FAQs also clarify some misperceptions.

Please let me know if you have any questions or wish to discuss.

Thanks, Marcia

[Emphasis added.]

A copy of this email is attached and marked as **Exhibit "116"**.

181. On April 24, 2020, FlyTrippers (a travel information website based in Quebec) posted an article to their website regarding the CTA's New FAQs Page entitled "The CTA Says Their Previous Statement on Refunds Essentially Meant Nothing," which is attached and marked as **Exhibit "117"**.

182. On April 24, 2020, Prince of Travel (a licensed travel agency in Ontario) posted an article to their website regarding the CTA's Statement on Vouchers and New FAQs Page entitled "Refunds on Cancelled Flights: What's the Latest in Canada?," which is attached and marked as **Exhibit "118"**.

(ii) November 16, 2020: CTA's Revamped Statement on Vouchers

183. On or about November 16, 2020, the CTA published a revamped version of the Statement on Vouchers [**Revamped Statement on Vouchers**].

(a) A new textbox was added to the top of the page, stating that the Statement on Vouchers was "non-binding" and purporting to explain why it was originally published on March 25, 2020.

(b) The hyperlink to the New FAQs Page was replaced with the actual content from the New FAQs Page being pasted below the body of the original Statement on Vouchers.

A copy of the Revamped Statement is attached and marked as **Exhibit "119"**.

184. For greater clarity, Exhibit "119" is not tendered for the truth of its content, but merely as proof that the aforementioned Revamped Statement on Vouchers was posted on the CTA's website on or about November 16, 2020.

185. The Revamped Statement on Vouchers (Exhibit "119") included a textbox at the top stating that:

> This non-binding statement on vouchers was issued on March 25, 2020, in the face of unprecedented and extraordinary circumstances impacting domestic and international air travel. Because the law does not require airlines to include refund provisions in their tariffs for flights that are cancelled for reasons beyond their control, there was a real risk that many passengers would end up getting nothing for cancelled flights. This statement was intended to help ensure that didn't happen.
>
> This statement changes nothing with respect to airline obligations and passenger rights under individual airline tariffs. Any passenger who believes they're owed a refund under the relevant tariff and hasn't received one can file a complaint with us. All complaints are dealt with on their merits.

[Emphasis added.]

186. One of the sentences (i.e., "the law does not require airlines to include refund provisions in their tariffs for flights that are cancelled for reasons beyond their control") in the Revamped Statement on Vouchers (Exhibit "119") misled the public about the state of the law on whether airlines are required to include refund provisions in their tariffs. This is contradicted by ss. 107(1)(n)(xii) and 122(c)(xii) of the *Air Transportation Regulations*, applicable for domestic and international tariffs, respectively, which state that:

> **107 (1)** Every tariff shall contain
>
> (n) the terms and conditions of carriage, clearly stating the air carrier's policy in respect of at least the following matters, namely,
>
> (xii) refunds for services purchased but not used,

whether in whole or in part, either as a result of the client's unwillingness or inability to continue or the air carrier's inability to provide the service for any reason,

122 Every tariff shall contain

(c) the terms and conditions of carriage, clearly stating the air carrier's policy in respect of at least the following matters, namely,

(xii) refunds for services purchased but not used, whether in whole or in part, either as a result of the client's unwillingness or inability to continue or the air carrier's inability to provide the service for any reason,

[Emphasis added.]

187. For all of the changes described above, the CTA did not update the "Date Modified" at the bottom of the Statement on Vouchers, which continued to read as "2020-03-25."

P. Statement on Vouchers Invoked to Resist Credit Card Chargebacks

188. In the subsections below, I enclose examples of how the Statement on Vouchers was invoked in response to passengers' credit card chargebacks. These examples were passengers that shared their credit card chargeback experiences with APR. For greater certainty, the examples are only a subset of instances where the Statement on Vouchers was invoked to respond to credit card chargebacks. The passengers' sensitive information has been redacted from these examples.

189. All of the examples below were after the CTA released the New FAQs Page on April 22, 2020 (Exhibit "115"). However, other than the one exception (Exhibit "127" below), airlines continued to include copies and/or excerpts of the original Statement on Vouchers posted on March 25, 2020, without reference to the New FAQs Page posted on April 22, 2020.

(i) WestJet's Reliance on Statement on Vouchers to Respond to Chargebacks

190. In response to passenger credit card chargebacks, WestJet responded with a screenshot of the CTA's original Statement on Vouchers from March 25, 2020, in addition to a template letter [**WestJet Template Letter**] which stated that:

> [Date]
>
> To Whom It May Concern,
>
> I am writing you today regarding the chargeback you processed related to Westjet Vacations booking [number] for the [passenger name(s)].
>
> Based on the Canadian Government's recommendations to help stop the spread of COVID-19, Westjet made critical decisions to suspend our transborder and international flights through [date]. These decisions were made in the best interest of our country, our guests and our employees. As a result of the coronavirus COVID-19 situation we implemented a nonrefundable cancellation policy, whereby flight refunds will be returned as a Travel Bank credit, valid for 24 months, and vacation refunds will be returned as Westjet dollars, also valid for 24 months.
>
> Not only is this policy in line with other tour operators experiencing similar repercussions, but recently the Canadian Transportation Agency (CTA) released a statement which supports the manner in which Canadian airlines are addressing the mass flight cancellations taking place. They indicate that credits for future travel are an acceptable form of refund as long as the credit is available for a reasonable amount of time, and they have stated 24 months is considered reasonable. We are following their guidelines and their statement on this situation can be found on the following page of their website, https://otc-cta.gc.ca/eng/statement-vouchers.
>
> We have already received, and processed, thousands of cancellations. Where we have been provided Westjet Rewards account numbers, we have deposited the **full value of the trip** to either a travel bank (for air only itineraries), or a Westjet Dollars account (for Westjet Vacations package bookings), which of course will be available for 2 years. **For guests who do not have a WestJet Rewards account, we have requested that they create one so we can provide them this same reimbursement.** We understand some guests may prefer a different form of refund, how-

> ever in order to be fair to everyone who finds themselves in this same situation, we cannot make exceptions for some and not to others.
>
> In this case, and given the circumstances, we kindly request you reverse the chargeback so that we can provide this guest the same resolution that all other guests have received, and accepted. Upon receiving the guest's Westjet Rewards account number, we will in good faith, provide them the value of their trip in a credit available to them for 24 months.
>
> Thank you for your cooperation and understanding.
>
> Sabrina #5041 Manager, Payment Fraud Operations
>
> [Emphasis added in underline; original emphasis in bold.]

A copy of WestJet's response to Mr. John Rigsby's RBC credit card chargeback received on or around May 15, 2020, containing the WestJet Template Letter, is attached and marked as **Exhibit "120"**.

191. WestJet used a substantially similar response to other passenger chargebacks, including the WestJet Template Letter or the substance thereof, as shown in the exhibits listed below:

(a) A copy of WestJet's response to Ms. Maddison Toppe's Servus CU credit card chargeback, received on or around June 2, 2020, is attached and marked as **Exhibit "121"**.

(b) A copy of WestJet's response to Mr. Byron Thorburn's PC Financial credit card chargeback, received on or around June 13, 2020, is attached and marked as **Exhibit "122"**.

(c) A copy of WestJet's response to Gurmel Chattha's CIBC Visa credit card chargeback, received on or around July 17, 2020, is attached and marked as **Exhibit "123"**.

(d) A copy of WestJet's response to Ms. Joanne Phillips's CIBC Visa credit card chargeback, received on or around July 17, 2020, is attached and marked as **Exhibit "124"**.

(e) A copy of WestJet's response to the Dryhanov-Atroschanka party's Canadian Tire Mastercard credit card chargeback, received on or around July 30, 2020, is attached and marked as **Exhibit "125"**.

(f) A copy of WestJet's response to Mr. Anthony McCullough's PC Financial credit card chargeback, received on or around August 5, 2020, is attached and marked as **Exhibit "126"**.

192. For greater certainty, I am including the WestJet Template Letter above to illustrate that WestJet was invoking the Statement on Vouchers. I do not accept WestJet's assertion in the WestJet Template Letter about other passengers having accepted a credit as being complete or accurate.

193. On or around September 10, 2020, in response to Mr. Damon Criger's RBC Mastercard credit card chargeback, WestJet relied on the Statement on Vouchers and the COVID-19 Page (Exhibit "37") for the assertion that:

> [...]
>
> [a]ccording to the Canadian Transportation Agency, a future travel credit or Airline Dollars is an acceptable form of refund during this type of global crisis.
>
> [...]
>
> [Emphasis added.]

A copy of WestJet's response to Mr. Damon Criger's RBC Mastercard credit card chargeback, received on or around September 10, 2020, is attached and marked as **Exhibit "127"**.

194. In relation to Mr. Damon Criger's chargeback, WestJet also included a lengthy written submission that cited the Statement on Vouchers as the CTA's policies and the CTA's New FAQs Page on April 22, 2020 as the CTA's reaffirmation that no refunds are required.

195. For greater certainty, I am including WestJet's response to Mr. Damon Criger's chargeback above to illustrate that WestJet was invoking the Statement on Vouchers. I do not accept WestJet's assertion in the written submissions that WestJet complied with its tariff as being complete or accurate.

(ii) Air Canada's Reliance on Statement on Vouchers to Respond to Chargeback

196. In response to Morgan Rioux's RBC Visa credit card chargeback, Air Canada responded with the CTA's Statement on Vouchers, as follows:

> [...] We confirm that flights were cancelled for reasons listed below:
>
> "As and from February 1, 2020, all of Air Canada's route suspensions were directly caused by the factors beyond its control, principally the COVID-19 pandemic and the government measures put in place to contain its spread. As a result, Air Canada's policy of issuing long term credits with respect to nonrefundable tickets for the flight cancellations relating to those suspended routes is compliance with applicable law (as confirmed in the Canadian Transport Agency's guidance updated March 25, 2020,..."...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..." (https://otc-cta.gc.ca/eng/statement-vouchers))"
>
> [Emphasis added.]

A copy of Air Canada's response to Morgan Rioux's RBC Visa credit card chargeback, received on or about July 28, 2020, is attached and marked as **Exhibit "128"**.

(iii) Swoop's Reliance on Statement on Vouchers to Respond to Chargeback

197. In response to Ms. Marlaina Boskers's CIBC credit card chargeback, Swoop relied on the Statement on Vouchers and COVID-19 Page (Exhibit "37") for the assertion that:

> [...]
>
> According to the Canadian Transportation Agency, a future travel credit or Airline Dollars is an acceptable form of refund during this type of global crisis.
>
> [...]
>
> [Emphasis added.]

An except of Swoop's response to Ms. Marlaina Boskers's CIBC credit card chargeback, received on or around May 27, 2020, is attached and marked as **Exhibit "129"**.

(iv) Transat's Reliance on Statement on Vouchers to Respond to Chargeback

198. In response to Ms. Serena Uppal's Amex credit card chargeback, Transat Tours invoked the CTA's Statement on Vouchers. An excerpt of Transat's response, received on or around April 28, 2020, is attached and marked as **Exhibit "130"**.

(v) Amex Reliance on Statement on Vouchers to Respond to Chargebacks

199. American Express [**Amex**] specifically excerpted portions of the CTA's Statement on Vouchers for Amex's template letter for refusing chargebacks [**Amex Airline Vouchers Template**], stating that:

> [...]
>
> It is worth noting that the Canadian Transportation Agency (CTA) has stated 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. However, if

> you think you are entitled to a refund and the airline refuses to provide one or offers a voucher with conditions you don't want to accept, the CTA has indicated that you can file a complaint with them directly, and they will determine if the airline complied with the terms of its tariff on a case-by-case basis in due course.
>
> [...]

200. An excerpt of Amex's response, dated May 16, 2020, to Ms. Heather Steven's chargeback against WestJet, containing the Amex Airline Vouchers Template, is attached and marked as **Exhibit "131"**.

201. An excerpt of Amex's response, dated May 27, 2020, to Mr. Tim Willms's chargeback against Sunwing, containing the Amex Airline Vouchers Template, is attached and marked as **Exhibit "132"**.

202. An excerpt of Amex's response, dated May 28, 2020, to Ms. Carla Paradisi's chargeback against WestJet, containing the Amex Airline Vouchers Template, is attached and marked as **Exhibit "133"**.

203. An excerpt of Amex's response, dated June 21, 2020, to Ms. Kelsey Pruse's chargeback against Air Canada, containing the Amex Airline Vouchers Template, is attached and marked as **Exhibit "134"**.

204. An excerpt of Amex's response, dated June 26, 2020, to Nuo Li's chargeback against Air Canada, containing the Amex Airline Vouchers Template, is attached and marked as **Exhibit "135"**.

Q. Consumer Protection Regulators' Position on Refunds for Passengers

205. On or about March 16, 2020, Consumer Protection BC (the consumer protection regulator in the province of British Columbia) published an information page entitled "Questions about travel plans and COVID-19?" at

https://www.consumerprotectionbc.ca/questions-about-travel-plans-and-covid-19/, which stated that:

> **Have your travel plans been cancelled?**
>
> - Some airlines and wholesalers are offering options for re-booking. While you may not receive the travel services on the desired date; you may be able to re-book travel services on another date or maybe even get a partial refund.
> - Contact your travel service provider to find out their policy on cancellations and re-booking. Be aware that in some cases, you may be required to pay the difference between the original booking and the new booking or a cancellation fee.
> - While you may remember to check your flights, don't forget to contact your accommodation providers and any tours you may have booked to find out your cancellation rights and responsibilities.
> - If you booked with a licensed travel agent, contact your booking agent for assistance. They will be able to help you with your options for re-booking.
> - If travel services are not provided and you paid by credit card, check with your credit card company to see if they will provide a refund for the travel services that were not provided.
>
> [Emphasis added.]

A copy of the Consumer Protection BC "Questions about travel plans and COVID-19?" page, as it was archived on May 3, 2020, retrieved from the Internet Archive repository, is attached and marked as **Exhibit "136"**.

206. On or about May 25, 2020, Consumer Protection BC renamed the "Questions about travel plans and COVID-19?" to "Information for consumers: travel vouchers and refunds," which also included a specific section entitled "**Trying to get a refund**" :

We continue to get questions about consumer transactions in the time of COVID-19 including travel bookings and other types of businesses offering vouchers for future goods or services.

Many travel plans and other services have been disrupted over the last few months. When trying to resolve an issue, we encourage you to always start by contacting the business – in the case of travel, talk to your licensed travel agent, travel service provider or airline to find out what your options are. Please read all the fine print to fully understand the implications with any consumer contract.

The following information is focused on travel-related bookings, but the rules apply to any business offering vouchers, credits or gift cards, or anyone who has purchased a good or service online or by phone. Please note that these rules apply to not only to BC-based businesses and but also to any business dealing with a BC consumer.

Request a credit card chargeback

If your travel dates have passed and the business did not provide the service (as opposed to you choosing not to go) or if you have been informed by the business that your future travel has been cancelled, and you paid by credit card, check with your credit card company to request that the charges on the card be cancelled/reversed. If you are denied by your credit card company, you will need to go to the Civil Resolution Tribunal or court (depending on the dollar amount) to seek compensation from the business.

Did you book online or over the phone? If you booked your travel online or by phone and didn't get your services (as opposed to you choosing not to go), you can cancel your contract under BC's distance sales contracts provisions and be entitled to a refund from the business or chargeback from the credit card company. There are several steps to this process, waiting periods, and the remedy only kicks in 30 days after you don't get the service you bought (which means the date that you were supposed to travel). To understand and follow the process, visit the "Problem with an online purchase" page on our website, and follow these steps:

- Step 1: Read the section called "My product never arrived" and follow the instructions using the cancellation form. If the business doesn't respond to issue you a refund within 15 days, go to step 2.

- Step 2: Read the section called "I tried to cancel but didn't get a refund" and follow those instructions to obtain a reversal or cancellation of the charges from your credit card provider.

- Step 3: If the business and the credit card company both fail to provide you a refund, contact us to file a complaint. (Please follow all the steps above first.)

Remember that these options apply to any transaction done over the phone or online, it is not limited to travel bookings.

Read about distance sales in the *Business Practices and Consumer Protection Act*.

[Emphasis added.]

A copy of the Consumer Protection BC "Information for consumers: travel vouchers and refunds" page, as it was archived on August 13, 2020, retrieved from the Internet Archive repository, is attached and marked as **Exhibit "137"**.

207. On or around April 30, 2021, Consumer Protection BC also published an FAQ page entitled "FAQ: Refunds for cancelled travel services" which provides that:

> Looking for a refund for travel services that were cancelled by your airline, cruise line or other travel provider? Here are some of the most common questions we get on this topic along with our answers.
>
> **What you need to know**
>
> After over a year of cancelled travel plans, many consumers have had issues getting refunds from travel suppliers. As a BC regulator, one of the laws we oversee gives you cancellation and refund rights when you don't receive the services you paid for online or over the phone. If you're eligible, you may be owed a refund under BC law.
>
> There's a lot to know and a number of steps to follow to get your refund, so we recommend you start by reading this page: COVID-19 and refunds for cancelled travel.
>
> [...]

> **Q: The travel supplier (airline, hotel, cruise, etc.) has given me a voucher. Does that count as a refund?**
>
> A: It depends. Here are some examples where a voucher is permissible, meaning you would not be eligible to go through our refund process: The travel supplier had a promotion or incentive of some kind to take a voucher and you agreed to it. Or you and the travel supplier agreed over email that a voucher was an acceptable resolution.
>
> Generally speaking, if you have had a voucher forced on you as a substitute to the travel services you bought and you did not indicate that you accept the voucher, you may still be able to go through our process to claim a refund. For example, a situation where the supplier cancelled your travel plans and simply put a voucher into your travel account (despite you wanting a refund). Depending on each circumstance, we may not deem that to be consent.
>
> If you are eligible for a refund under our laws, have been actively pursuing a refund from the business, and have followed the necessary steps, you must be refunded in the same way you paid.
>
> [...]
>
> **Q: The travel provider says that their policy does not allow for refunds/full refunds. Can they refuse me a full refund?**
>
> A: If you are eligible for a refund under the distance sales law, it does not matter what the business's refund/cancellation policy is - you should still receive a full refund.
>
> [...]
>
> [Emphasis added.]

A copy of the Consumer Protection BC "FAQ: Refunds for cancelled travel services" page, as it was archived on May 6, 2021, retrieved from the Internet Archive repository, is attached and marked as **Exhibit "138"**.

208. On January 11, 2022, the Ombudsman for Banking Services and Investments issued a news release entitled "Consumer pursues credit card refund for vacation

cancelled due to COVID-19," which stated that:

> **Key lessons** [...]
>
> - Many provinces have specific consumer protection laws to protect consumers against improper business practices and give them certain rights when they purchase goods and services with a credit card. These laws set out very specific rules and timelines that need to be met for their protections to apply.
>
> **Consumer seeks refund when travel plans are cancelled**
>
> In early 2020, Ms. Z booked an all-inclusive family vacation for the upcoming March Break through her travel agency. She paid the travel agency $5,600 using her credit card. A week before Ms. Z's departure, the travel agency cancelled her trip due to the COVID-19 lockdown that began in mid March.
>
> Ms. Z thought she would get a refund for the cancelled vacation. Instead, the travel agency offered her a voucher for future travel. Shortly afterwards, she contacted them to request a full refund on her credit card. When the travel agency refused, she contacted her bank to dispute the charge. The bank agreed to process a temporary chargeback for the full amount on Ms. Z's credit card while they investigated.
>
> During the bank's investigation, the travel agency said that it refused Ms. Z's request because its agreement with the bank stated that consumers did not have dispute rights when their vacations were cancelled due to a government regulation. Additionally, the travel agency said their refund policy permitted them to provide travel credit for the value of a cancelled vacation.
>
> [...]
>
> **Our findings**
>
> During our investigation, we interviewed Ms. Z and reviewed the details of the bank's investigation that led to its decision not to process the chargeback for her vacation. We found that the bank had appropriately applied its own policies and procedures and the rules for credit card chargebacks. However, when we reviewed the applicable consumer protection laws, we found that Ms. Z had complied with all the requirements and timelines for the charge to be cancelled or reversed under her provincial

> consumer protection law. As a result, we recommended that the bank process a refund for Ms. Z's vacation along with any associated interest.
>
> [Emphasis added.]

A copy of the Ombudsman for Banking Services and Investments news release is attached and marked as **Exhibit "139"**.

R. May 28, 2020: Minister of Transport on the Statement on Vouchers

209. On May 28, 2020, the Minister of Transport invoked the Statement on Vouchers when questioned on how the Government of Canada intended to answer the National Assembly of Quebec's motion on passenger refunds:

> **Mr. Xavier Barsalou-Duval (Pierre-Boucher-Les Patriotes-Verchéres, BQ):** Thank you, Mr. Chair.
>
> On April 27, Option consommateurs sent a letter to the Minister of Transport to warn him that the airlines' refusal to reimburse their customers for cancelled flights was contrary to Quebec's laws.
>
> What is the minister going to do to put an end to this situation?
>
> **Hon. Marc Garneau (Minister of Transport):** Mr. Chair, I sympathize with the people who would have preferred to get a refund, and I understand their frustration. It is not an ideal situation. The airlines are going through a very difficult time right now. If they were forced to refund their customers immediately, many of them would go bankrupt.
>
> **Mr. Xavier Barsalou-Duval:** Mr. Chair, the minister sounds like a broken record.
>
> A few hours ago, the following motion was passed unanimously: "THAT the National Assembly ask the Government of Canada to order airlines and other carriers under federal jurisdiction to allow customers whose trips have been cancelled because of the current pandemic to obtain a refund."
>
> What will the Minister of Transport tell the National Assembly of Quebec?

> **Hon. Marc Garneau:** Mr. Chair, as my hon. colleague knows, the Canadian Transportation Agency has ruled on this issue and has ruled that, in the present circumstances and in a non-binding way, it is acceptable for airlines to offer credits for up to two years. In the case of Air Canada, the credit has no expiry date.
>
> **The Chair:** Mr. Barsalou-Duval, you have about 15 seconds for a question.
>
> **Mr. Xavier Barsalou-Duval:** Mr. Chair, I find it rather odd that the Minister of Transport and the Canadian Transportation Agency are telling the airlines that Quebec's regulations and laws are not important and that they can override them. It seems to me that this is a strange way to operate. Theoretically, under the famous Canadian Constitution, which they imposed on us, that is not how it should work.
>
> Can they uphold their own constitution?
>
> **The Chair:** The hon. minister can answer in 15 seconds or less, please.
>
> **Hon. Marc Garneau:** Mr. Chair, as my hon. colleague probably knows, the Canadian Transportation Agency is a quasi-judicial body that operates at arm's length from Transport Canada and the Government of Canada.
>
> [Emphasis added.]

An excerpt of the House of Commons COVI Committee's Evidence from May 28, 2020 is attached and marked as **Exhibit "140"**.

S. December 1, 2020: Mr. Streiner's Testimony Before the House of Commons TRAN Committee on the Statement on Vouchers

210. On December 1, 2020, Mr. Scott Streiner, the CEO and Chairperson of the CTA, testified before the House of Commons TRAN Committee and also gave evidence in respect of the Statement on Vouchers. A copy of the transcript from that session of the TRAN Committee is attached and marked as **Exhibit "141"**. The pertinent sections are excerpted in the paragraphs following.

211. In the opening statement, Mr. Streiner acknowledged that it would be inappropriate to comment on government policy or matters that are before the CTA:

> **Mr. Scott Streiner:** [Opening Statement...] Let me conclude, Mr. Chair, by noting that because of the CTA's independent status and the quasi-judicial nature of our adjudications, it would not be appropriate for me to comment on government policy or on any matters that are currently before the CTA, but within those limits, my colleagues and I would be happy to respond to any questions the committee may have.
>
> [Emphasis added.]

212. Mr. Streiner was questioned by numerous MPs on the Statement on Vouchers, loss of impartiality from having issued the Statement on Vouchers, and subparagraph 122(c)(xi) of the *Air Transport Regulations* [***ATR***] and excerpted below:

> **122** Every tariff shall contain
>
> (c) the terms and conditions of carriage, clearly stating the air carrier's policy in respect of at least the following matters, namely,
>
> (xii) refunds for services purchased but not used, whether in whole or in part, either as a result of the client's unwillingness or inability to continue or the air carrier's inability to provide the service for any reason,
>
> [Emphasis added.]

213. The pertinent part of Mr. Streiner's answers to MP Mr. Xavier Barsalou-Duval's questions on paragraph 122(c)(xi) of the *ATR* is excerpted below:

> **Mr. Scott Streiner:** In fact, this provision and regulation requires that the carrier or the airline specify its terms and conditions of services. This regulation doesn't specifically require terms and conditions of service. In other words, there is no minimum obligation in this regulation to refund customers in these situations.

Mr. Xavier Barsalou-Duval (Pierre-Boucher-Les Patriotes-Verchères, BQ): Thank you, Mr. Streiner. However, if we read paragraph 122(c) correctly, what I just mentioned is one of the minimum conditions that tariffs must contain. So it's contained in the price of all tickets and in all carrier fares. This regulation applies to everyone, doesn't it?

Mr. Scott Streiner: This regulation applies, but it says that the airline must specify its terms and conditions of service. It does not specify exactly what conditions of service the tariffs must contain. It does not establish a minimum obligation.

Mr. Xavier Barsalou-Duval: Mr. Streiner, paragraph 122(c) states that, "Every tariff shall contain ... the following matters, namely", among which is noted that there must be a refund if the service is not provided. I think it's pretty clear that there has to be a refund.

Mr. Scott Streiner: It's clear that carriers must explain to passengers the terms and conditions of service contained in their tariffs. The interpretation of this regulation is clear. I don't want to repeat myself, but this regulation does not specify the exact content of tariffs.

Mr. Xavier Barsalou-Duval: I think we're playing word games. Are you able to name a single case in the jurisprudence that supports the interpretation that passengers aren't entitled to a refund in these circumstances?

Mr. Scott Streiner: As a quasi-judicial tribunal, we make decision case by case based on the facts and on the relevant act and regulations. This means that we consider all terms and conditions and all circumstances.

It's a question of interpretation of the legislation. I think all the honourable members understand that it isn't appropriate for me, as chair of the Canadian Transportation Agency, to interpret the legislation here or make formal rulings. There is a legal process for that.

Mr. Xavier Barsalou-Duval: I'd like to know if the people who work at the Canadian Transportation Agency know the provisions of the Quebec civil code relating to consumers.

Mr. Scott Streiner: I suppose some of them do. It's provincial legislation. We're responsible for applying federal legislation.

Mr. Xavier Barsalou-Duval: According to the Quebec civil code, when a service has not been rendered, it must be refunded. It would be interesting if federal institutions, such as the Canadian Transportation Agency, could recognize and enforce the legislation that already exists.

I have another question. The Canadian Transportation Agency recently released new details about its statement on vouchers. You say that this statement isn't a binding decision. I'm trying to understand. Does the Canadian Transportation Agency have the power to issue a statement that is unenforceable but in conflict with the legislation?

Mr. Scott Streiner: The agency has the power to issue statements and guidance material on any topic within its scope.

As you specified, the statement does not change the obligations of the airlines or the rights of the passengers. The statement contains suggestions, and only suggestions. It isn't a binding decision.

Mr. Xavier Barsalou-Duval: Does the Canadian Transportation Agency have the power to change the legislation?

Mr. Scott Streiner: Of course not. The legislation exists, and our responsibility is to enforce it, which we always do impartially and objectively.

Mr. Xavier Barsalou-Duval: Don't you think the positions that have been taken by the Canadian Transportation Agency call into question its impartiality?

Mr. Scott Streiner: Not at all.

Mr. Xavier Barsalou-Duval: But that's the impression many people have.

The Canadian Transportation Agency is currently nearly two years behind in processing the various complaints. Last spring, the agency also said that none of the complaints regarding air travel and ticket refunds would be dealt with until September.

What kind of message does it send to the airlines when it says that it won't deal with travel complaints? Are they being told not to issue refunds to their customers, because they're not going to get a slap on the wrist anyway? [Emphasis added.]

214. The pertinent part of Mr. Streiner's answers to MP Mr. Taylor Bachrach's questions on paragraph 122(c)(xi) of the *ATR* is excerpted below:

> **Mr. Taylor Bachrach (Skeena–Bulkley Valley, NDP):** Picking up where Mr. Barsalou-Duval left off, I did not get clarity on this in the answers to his questions, so I'm going to ask them again.
>
> **Mr. Scott Streiner:** Certainly.
>
> **Mr. Taylor Bachrach:** In the air transportation regulations, it very specifically speaks to the refunds issue, yet the statement on vouchers says, "The law does not require airlines to include refund provisions in their tariffs for flights that are cancelled for reasons beyond their control."
>
> If you read the regulations, section 122, which Mr. Barsalou-Duval read earlier, it very clearly says: [text of subparagraph 122 omitted]
>
> These seem to be in direct conflict with each other. How do you explain this?
>
> **Mr. Scott Streiner:** The air transportation regulations in the section that you and your colleague referred to outline the areas or topics that must be addressed by an airline's tariff. They don't establish the minimum obligations. They don't establish what the terms are; they simply indicate that terms must be established in these areas. Therefore, they don't establish a minimum obligation to pay compensation or to pay refunds in situations beyond airlines' control, only that a tariff has to address those questions.

215. The pertinent part of Mr. Streiner's answers to MP Mr. Fayçal El-Khoury's questions on the Statement on Vouchers and *force majeure* is excerpted below:

> **Mr. Fayçal El-Khoury (Laval–Les Îles, Lib.):** Thank you, Mr. Chair.
>
> I'd like to thank the witnesses. Their being here with us is really important and useful to the committee.
>
> We are in the middle of a really complicated and dangerous situation. The impact of the pandemic on the airline industry is unprecedented. Here, in Canada, we rely heavily on our airline industry, much more so than most other countries.

My first question is for Mr. Streiner.

Mr. Streiner, you explained the provisions of the Air Transportation Regulations regarding the obligation to refund - or not - customers. Could you tell us what happens in case of a force majeure? And can the pandemic be called a force majeure?

Mr. Scott Streiner: I thank the honourable member for his question.

I can't really answer that question, for one simple reason: as a quasi-judicial tribunal, we might have to deal with this issue. It's a matter of interpretation of the situation, the facts and the legislation. In order to maintain our impartiality, it's important to wait for the decision-making process before answering this important question.

[...]

Mr. Fayçal El-Khoury: In the context of this pandemic, in your opinion, Mr. Streiner, what would have happened to the airlines if they had been required to pay cash refunds to all passengers who applied for them? And what might have been the impact on Canadian travellers and communities?

Mr. Scott Streiner: Once again, I think this question should be directed more to my colleagues at Transport Canada, but I'll give a bit of an answer anyway.

We know that this crisis is unprecedented, but we don't know exactly what the consequences might have been in the situation you describe. Our role is simply to determine what the obligations of airlines are and what the rights of air passengers are under the law. These are the issues we are dealing with. I don't want to speculate by commenting on hypothetical situations.

Mr. Fayçal El-Khoury: Why did you issue directives that credits may be an acceptable alternative to cash reimbursement for travellers whose flights have been cancelled due to COVID-19?

Mr. Scott Streiner: The reason is simple: we did it to reduce the risk of air passengers ending up without any compensation. As I said, the legislation refers to this great variability in the conditions of service of different airlines; that's what creates this risk for air passengers. The objective of our Statement on Vouchers was to reduce this risk. [Emphasis added.]

216. MP Mr. Taylor Bachrach also specifically questioned Mr. Streiner on the purpose of the Statement on Vouchers, who approved the Statement on Vouchers, and whether the CTA would provide to the TRAN Committee documents relating to the Statement on Vouchers, which is excerpted below:

> **Mr. Taylor Bachrach:** Thank you, Mr. Chair.
>
> Mr. Streiner, which individuals authored and approved the March 25 statement on vouchers?
>
> **Mr. Scott Streiner:** With regard to the statement on vouchers, like all guidance material posted by the CTA - and we post a great deal of non-binding guidance material, policy statements and information - there are many people who participate in its preparation, in its drafting and in its review, so it's a large number of employees who contributed to that.
>
> **Mr. Taylor Bachrach:** Who approved it?
>
> **Mr. Scott Streiner:** Ultimately, every statement like this is an expression of the organization's guidance. As I emphasized earlier, the statement on vouchers, like these other documents, was nonbinding in nature, and it's an expression of guidance or a suggestion to the travelling public by the institution.
>
> [...]
>
> **Mr. Taylor Bachrach:** Mr. Streiner, will you commit to providing this committee with all internal documents, memos and emails concerning the March 25 statement on vouchers and the subsequent clarification?
>
> **Mr. Scott Streiner:** The CTA is subject to the same access to information rules as any other organization. We have a policy of transparency, and so we try to come forward. I will commit to certainly providing the committee with those documents that it's appropriate to provide, but we are a quasi-judicial tribunal, an independent regulator, and certain material is privileged.
>
> **Mr. Taylor Bachrach:** The challenge here, Mr. Streiner, as I'm sure you can guess from this line of questioning, is that as a quasi-judicial body, the CTA is in a position to fairly and without prejudice adjudicate these complaints that have come in from air passengers. Does this statement on vouchers not prejudice

> that process? This very clearly sets out the outcome of those complaints related to refunds. You've already said that it's reasonable, so why adjudicate the specific complaint if you've already said that it's a reasonable approach?
>
> **Mr. Scott Streiner:** I want to give a very clear response to this question. The non-binding statement on vouchers was issued in order to protect passengers from ending up with nothing at all as a result of this situation, in part because of the legislative gap that I spoke about earlier. Nothing in that non-binding statement in any way affected or affects the rights of anybody who brings a complaint before us. The Federal Court of Appeal has already recognized that passengers' rights aren't affected. Right in the body of the statement, we said that every complaint would be considered on its merit. Every complaint will be considered on its merit, impartially, based on the evidence and the law.
>
> [Emphasis added.]

217. For greater certainty, I am citing Mr. Streiner's TRAN Committee testimony only to place before the Court what Mr. Streiner had represented to the TRAN Committee. I do not accept Mr. Streiner's TRAN Committee testimony as being correct, complete, or accurate regarding the asserted purpose for issuing the Statement on Vouchers and his assertion that the CTA has "a policy of transparency."

AFFIRMED remotely by Dr. Gábor Lukács at the City of Budapest, Hungary before me at the City of Coquitlam, British Columbia on September 7, 2023, 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

This is **Exhibit "1"** to the Affidavit of Dr. Gábor Lukács affirmed before me on September 7, 2023

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Signature

Innovation, Science and Economic Development Canada
Corporations Canada

Innovation, Sciences et Développement économique Canada
Corporations Canada

115

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)

Gabor Lukacs

Signature

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.

Canada

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 "2"** to the Affidavit of Dr. Gábor Lukács affirmed before me on September 7, 2023

_____

Signature

Halifax, NS

AirPassengerRights.ca

lukacs@AirPassengerRights.ca

The *Transportation Modernization Act* (Bill C-49)

Submissions to the Standing Committee on Transport, Infrastructure and Communities

by *Air Passenger Rights*

September 2017

Appendix

A. Final Decisions Arising from Dr. Lukács's Successful Complaints (Highlights)

1. *Lukács v. Air Canada*, Decision No. 208-C-A-2009;
2. *Lukács v. WestJet*, Decision No. 313-C-A-2010;
3. *Lukács v. WestJet*, Decision No. 477-C-A-2010
(leave to appeal denied, Federal Court of Appeal File No.: 10-A-41);
4. *Lukács v. WestJet*, Decision No. 483-C-A-2010
(leave to appeal denied, Federal Court of Appeal File No.: 10-A-42);
5. *Lukács v. Air Canada*, Decision No. 291-C-A-2011;
6. *Lukács v. WestJet*, Decision No. 418-C-A-2011;
7. *Lukács v. United Airlines*, Decision No. 182-C-A-2012;
8. *Lukács v. Air Canada*, Decision No. 250-C-A-2012;
9. *Lukács v. Air Canada*, Decision No. 251-C-A-2012;
10. *Lukács v. Air Transat*, Decision No. 248-C-A-2012;
11. *Lukács v. WestJet*, Decision No. 249-C-A-2012;
12. *Lukács v. WestJet*, Decision No. 252-C-A-2012;
13. *Lukács v. United Airlines*, Decision No. 467-C-A-2012;
14. *Lukács v. Porter Airlines*, Decision No. 16-C-A-2013;
15. *Lukács v. Air Canada*, Decision No. 204-C-A-2013;
16. *Lukács v. WestJet*, Decision No. 227-C-A-2013;
17. *Lukács v. Sunwing Airlines*, Decision No. 249-C-A-2013;
18. *Lukács v. Sunwing Airlines*, Decision No. 313-C-A-2013;
19. *Lukács v. Air Transat*, Decision No. 327-C-A-2013;
20. *Lukács v. Air Canada*, Decision No. 342-C-A-2013;
21. *Lukács v. Porter Airlines*, Decision No. 344-C-A-2013;
22. *Lukács v. British Airways*, Decision No. 10-C-A-2014;
23. *Lukács v. Porter Airlines*, Decision No. 31-C-A-2014;
24. *Lukács v. Porter Airlines*, Decision No. 249-C-A-2014;
25. *Lukács v. WestJet*, Decision No. 420-C-A-2014; and
26. *Lukács v. British Airways*, Decision No. 49-C-A-2016.

This is **Exhibit "3"** to the Affidavit of Dr. Gábor Lukács affirmed before me on September 7, 2023

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Signature

CANADIAN TRANSPORTATION AGENCY

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Decision No. 313-C-A-2013

August 15, 2013

COMPLAINT by Gábor Lukács against Sunwing Airlines Inc.

File No.: M4120-3/13-02395

INTRODUCTION

[1] On April 22, 2013, Gábor Lukács filed a complaint with the Canadian Transportation Agency (Agency) alleging that Rules 3.4, 15, 18(c), 18(e), and 18(f) of Sunwing Airlines Inc.'s (Sunwing) International Tariff (Tariff) are unclear, contrary to paragraph 122(*c*) and unreasonable within the meaning of subsection 111(1) of the *Air Transportation Regulations*, SOR/88-58, as amended (ATR (Air Transportation Regulations)). Those Rules concerns Sunwing's liability for schedule changes such as flight delay, advancement and cancellation.

[2] In its answer, as amended on June 3, 2013, Sunwing states that it proposes to delete Tariff Rule 3.4 and certain provisions of Tariff Rule 18 as they were repetitive with Tariff Rule 15. Sunwing advised that it would be replacing its Tariff Rule 15 with Proposed Tariff Rules 15 and 15A, which are, in its opinion, compliant with the *Convention for the Unification of Certain Rules for International Carriage by Air – Montreal Convention* (Convention), the Code of Conduct of Canada's Airlines and Transport Canada's Flight Rights provisions, and reflect the Agency's jurisprudence.

[3] In his reply, also dated June 3, 2013, Mr. Lukács states that the parties agree, among other things, that Sunwing's Proposed Tariff Rules 15 and 15A fully address the issues raised in his complaint.

[4] Sunwing subsequently filed, in its Tariff with the Agency, Proposed Tariff Rules 15 and 15A for an effective date of June 14, 2013. In this case, only Proposed Tariff Rule 15 is relevant to the matter before the Agency. Given that the Previous Tariff Rules to which Mr. Lukács objected in his complaint are no longer in effect, it is not necessary for the Agency to address the clarity and reasonableness of those Rules.

[5] The Agency therefore will only consider the clarity and reasonableness of Existing Tariff Rules 15(1)(b), 15(1)(e), 15(1)(f), 15(1)(h) and 15(3).

ISSUES

1. Is Existing Tariff Rule 15(1)(h) clear within the meaning of paragraph 122(*c*) of the ATR (Air Transportation Regulations)?
2. Are ExistingTariff Rules 15(1)(b), 15(1)(e), 15(1)(f), 15(1)(h) and 15(3) reasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations)?

RELEVANT STATUES AND TARIFF EXTRACTS

[6] The relevant Tariff provisions and the statutory extracts relevant to this Decision are set out in the Appendix.

CLARITY AND REASONABLENESS OF THE PROPOSED TARIFF RULES

Test for clarity

[7] In Decision No. 2-C-A-2001, the Agency formulated the test respecting the carrier's obligation of tariff clarity as follows:

> [...] the Agency is of the opinion that an air carrier's tariff meets its obligations of clarity when, in the opinion of a reasonable person, the rights and obligations of both the carrier and passengers are stated in such a way as to exclude any reasonable doubt, ambiguity or uncertain meaning.

Test for reasonableness

[8] To assess whether a term or condition of carriage is "unreasonable", the Agency has traditionally applied a balancing test, which requires that a balance be struck between the rights of passengers to be subject to reasonable terms and conditions of carriage and the particular air carrier's statutory, commercial and operational obligations. This test was first established in Decision No. 666-C-A-2001 (*Anderson v. Air Canada*), and was recently applied in Decision No. 227-C-A-2013 (*Lukács v. WestJet*).

ISSUE 1: IS EXISTING TARIFF RULE 15(1)(h) CLEAR WITHIN THE MEANING OF PARAGRAPH 122(c) OF THE ATR (Air Transportation Regulations)?

Analysis and findings

[9] The Agency notes that Existing Tariff Rule 15(1)(h) states that the rights of a passenger vis-à-vis Sunwing are, in most cases of international carriage, governed by the Montreal Convention. The same Rule also provides that a carrier is liable for damage caused by delay in the carriage of the passenger and goods unless the carrier proves that it did everything that could reasonably be expected to avoid the damage.

[10] As stated in the test for clarity set out earlier in this Decision, an air carrier meets its tariff obligation of clarity when the rights and obligations of both the carrier and the passenger are stated in such a way as to exclude any reasonable doubt, ambiguity or uncertain meaning.

[11] The Agency finds that Existing Tariff Rule 15(1)(h) clearly establishes that a carrier does have liability for loss, damage or delay of baggage and only in exceptional circumstances is a carrier able to raise a defence to a claim for liability or invoke damage limitations.

[12] The Agency therefore finds that Existing Tariff Rule 15(1)(h) is clear within the meaning of paragraph 122(*c*) of the ATR (Air Transportation Regulations).

ISSUE 2: ARE EXISTING TARIFF RULES 15(1)(b), 15(1)(e), 15(1)(f), 15(1)(h) AND 15(3) REASONABLE WITHIN THE MEANING OF SUBSECTION 111(1) OF THE ATR (Air Transportation Regulations)?

Analysis and findings

- Existing Tariff Rule 15(1)(e) states, in part, that a passenger has a right to information on flight times and schedule changes;
- Existing Tariff Rule 15(1)(f)(i) states, in part, that a passenger whose journey has been interrupted by an advance flight departure, a flight cancellation or overbooking, will be provided with remedial choices of whether they wish to continue to travel or receive a refund;
- Existing Tariff Rule 15(1)(b) establishes that Sunwing shall not be liable for damage occasioned by overbooking or cancellation if it proves that it and its employees and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for the carrier and its employees or agents to take such measures;
- Existing Tariff Rule 15(1)(f) states that a passenger whose journey is interrupted by an advance flight departure, a flight cancellation or overbooking will be provided with the option of accepting one or more of the following: reimbursement of the total price of the ticket for the parts of the journey not made, and/or transportation to the passenger's intended destination at the earliest opportunity at no additional cost.

[13] With respect to a passengers' right to notice about schedule changes, the Agency noted in Decision No. 16-C-A-2013 that some Canadian carriers have tariff provisions stating that that passengers have a right to information on flight times and schedule changes and found such a tariff provision to be reasonable.

[14] Concerning a carrier's liability for damage, the Agency stated in Decision No. LET-C-A-80-2011 (*Lukács v. Air Canada*) that Article 19 of the Convention imposes certain obligations upon the carrier, beyond those of payment of compensation:

> A carrier, pursuant to Article 19 of the Convention, is liable for damage occasioned by delay in the carriage of, amongst other matters, passengers, but will not be liable for damage occasioned by

delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or it was impossible for them to take such measures. **128**

[15] In terms of passengers' right to refunds, in Decision No. 28-A-2004, the Agency recognized the fundamental right of passengers to be refunded for the unused portions of their tickets if the carrier is unable to provide transportation on its services or on the services of other carrier(s) within a reasonable period of time.

[16] The Agency is of the opinion that all of the Agency's findings stated above are applicable to this complaint.

[17] The Agency finds that Existing Tariff Rules 15(1)(b), 15(1)(e), 15(1)(f), 15(1)(h) and 15(3) are reasonable in that they strike a balance between the right of passengers to be subject to reasonable terms and conditions of carriage and Sunwing's statutory, commercial and operational obligations. Furthermore, these provisions are consistent with previous Agency decisions.

CONCLUSION

Issue 1

[18] The Agency has determined that Existing Tariff Rule 15(1)(h) is clear within the meaning of paragraph 122(*c*) of the ATR (Air Transportation Regulations).

Issue 2

[19] The Agency has determined that Existing Tariff Rules 15(1)(b), 15(1)(e), 15(1)(f), 15(1)(h) and 15(3) are reasonable in that they strike a balance between the right of passengers to be subject to reasonable terms and conditions of carriage and Sunwing's statutory, commercial and operational obligations. Furthermore, these provisions are consistent with previous Agency decisions.

APPENDIX

EXISTING TARIFF RULES

RULE 15 – RESPONSIBILITY FOR SCHEDULES AND OPERATIONS

[...]

General

[...]

(b) The provisions of this Rule are not intended to make Carrier responsible for the acts of third parties that are not deemed employees and/or agents of the Carrier under applicable law or international

conventions and all the rights herein described are subject to the following exception, namely, that Carrier shall not be liable for damage occasioned by overbooking or cancellation if the Carrier proves that it, and its employees and agents, took all measures that could reasonably be required to avoid the damage or if it was impossible for the Carrier, and its employees or agents to take such measures. **129**

(e) Passengers have a right to information on flight times and schedule changes. In the event of a delay, an advanced flight departure or schedule change the carrier will make reasonable efforts to inform the passengers of delays, proposed advanced flight departures and schedule changes, and, to the extent possible, the reasons for them.

(f) (i) If the passenger's journey is interrupted by an Advance Flight Departure, a flight cancellation or overbooking, the Carrier will take into account all the circumstances of the case as known to it and will provide the passenger with the option of accepting one or more of the following remedial choices:

> reimbursement of the total price of the ticket at the price at which it was bought, for the part or parts of the journey not made, and for the part or parts already made if they no longer serve any purpose in relation to the passengers original travel plan, together with, when relevant, transportation to the passenger's point of origin, at the earliest opportunity, at no additional cost;
>
> transportation to the passenger's intended destination at the earliest opportunity, at no additional cost;

[...]

> (ii) When determining the transportation service to be offered, the Carrier will consider:
>
> available transportation services, including services offered by interline, code sharing and other affiliated partners and, if necessary, other non-affiliated carriers;
>
> the circumstances of the passenger, as known to it, including any factors which impact upon the importance timely arrival at the destination,
>
> (iii) having taken all known circumstances into consideration, the Carrier will take all measures that can reasonably be required to avoid or mitigate the damages caused by the Advance Flight Departure, overbooking and cancellation. Where a passenger nevertheless incurs expense as a result of the overbooking or cancellation, the Carrier will in addition offer a cash payment or travel credit, the choice of which will be at the passenger's discretion.
>
> (iv) When determining the amount of the offered cash payment or travel credit, the Carrier will consider all circumstances of the case, including any expenses which the passenger, acting reasonably, may have incurred as a result of the Advance Flight Departure, overbooking or cancellation, for example, costs incurred for accommodation, meals or additional transportation. The Carrier will set the amount of compensation offered with a view to reimbursing the passenger for all such reasonable expenses.

[...]

(h) The rights of a passenger against the Carrier are, in most cases of international carriage, governed

by an international convention known as the Montreal Convention, 1999. Article 19 of that Convention provides that an air carrier is liable for damage caused by delay in the carriage of passengers and goods unless it proves that it did everything it could reasonably be expected to do to avoid the damage. There are some exceptional cases of international carriage in which the rights of the passengers are not governed by an international convention. In such cases only, a court of competent jurisdiction can determine which system of laws must be consulted to determine what those rights are. **130**

[...]

(3) Passenger Expenses Resulting from Flight Delays or Advance Flight Departures

Passengers will be entitled to reimbursement from the Carrier for reasonable expenses incurred as a result of a flight delay or an Advance Flight Departure, subject to the following conditions:

(a) The Carrier shall not be liable for any damages, costs, losses or expenses occasioned by delays or advance flight departures if the Carrier proves it, and its employees and agents, took all measures that could reasonably be required to avoid the damage or if it was impossible for the Carrier and its employees or agents to take such measures;

(b) Any passenger seeking reimbursement for expenses resulting from delays or advance flight departures must provide the carrier with (a) written notice of his or her claim, (b) particulars of the expenses for which reimbursement is sought and (c) receipts or other documents establishing to the reasonable satisfaction of the Carrier that the expenses were incurred; and

(c) The Carrier may refuse or decline any claim, in whole or part, if:

the passenger has failed or declined to provide proof or particulars establishing, to the reasonable satisfaction of the Carrier, that the expenses claimed were incurred by the passenger and resulted from a delay or advanced flight departure for which compensation is available under this Rule 15; or

(ii) the expenses for which reimbursement is claimed, or any portion thereof, are not reasonable or did not result from the delay or advanced flight departure as determined by the Carrier, acting reasonably.

Without affecting any obligation to reimburse a passenger as provided for in this tariff, the Carrier may, in its sole discretion, issue meal, hotel and/or ground transportation vouchers to passengers affected by a delay or advanced flight departure.

Air Transportation Regulations, SOR/88-58, as amended

111. (1) All tolls and terms and conditions of carriage, including free and reduced rate transportation, that are established by an air carrier shall be just and reasonable and shall, under substantially similar circumstances and conditions and with respect to all traffic of the same description, be applied equally to all that traffic.

122. Every tariff shall contain

[...]

(c) the terms and conditions of carriage, clearly stating the air carrier's policy in respect of at least the following matters, namely, **131**

[...]

iv. passenger re-routing,

v. failure to operate the service or failure to operate on schedule,

vi. refunds for services purchased but not used, whether in whole or in part, either as a result of the client's unwillingness or inability to continue or the air carrier's inability to provide the service for any reason,

[...]

x. limits of liability respecting passengers and goods,

xi. exclusions from liability respecting passengers and goods

[...]

Montreal Convention

Article 19 – Delay

The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.

Member(s)

J. Mark MacKeigan
Sam Barone

Back to rulings

Date modified:
2013-08-15

This is **Exhibit "4"** to the Affidavit of Dr. Gábor Lukács affirmed before me on September 7, 2023

_____

Signature

CANADIAN TRANSPORTATION AGENCY

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Decision No. 344-C-A-2013

An erratum was issued on October 8, 2013

August 29, 2013

COMPLAINT by Gábor Lukács against Porter Airlines Inc.

File No.: M4120-3/13-01412

INTRODUCTION

[1] Gábor Lukács filed a complaint with the Canadian Transportation Agency (Agency) alleging that certain provisions appearing in Rule 16, *Responsibility for Schedules and Operations*, i.e., Rules 16(c), (e) and (g) (Existing Tariff Rules) of the *Tariff Containing Rules Applicable to Services for the Transport of Passengers and Baggage or Goods between Points in Canada, CTA(A) No. 1* (Tariff) applied by Porter Airlines Inc. (Porter) are unreasonable within the meaning of subsection 67.2(1) of the *Canada Transportation Act*, S.C., 1996, c. 10, as amended (CTA) for the following reasons:

i. these provisions deprive passengers of the right to be provided with notice about schedule changes;
ii. these provisions are a blanket exclusion that exonerates Porter from liability for delays (such as failure to operate on schedule or sudden changes to its flight schedule);
iii. these provisions are inconsistent with the principles of the *Convention for the Unification of Certain Rules for International Carriage by Air – Montreal Convention* (Convention).

[2] Mr. Lukács asks the Agency to disallow the Existing Tariff Rules in their entirety, or in part, and substitute them with wording that incorporates the principles of the Convention.

[3] In its answer to the complaint, Porter proposed certain tariff revisions (Proposed Tariff Rules) in an effort to respond to Mr. Lukács' challenge of the Existing Tariff Rules. In his reply, Mr. Lukács asserts that some of these Proposed Tariff Rules lack clarity, that are inconsistent with the principles of the Convention. He also asserts that they are unjust and unreasonable, and therefore, they should be disallowed.

[4] In this Decision, the Agency will address both Porter's Existing Tariff Rules and the Proposed Tariff

Rules. **134**

ISSUES

With respect to the Existing Tariff Rules:

1. Does Existing Tariff Rule 16(c), when considered together with Existing Tariff Rule 20, relieve Porter from the obligation to provide timely notice to its passengers about schedule changes? If so, is Existing Tariff Rule 16(c) unreasonable within the meaning of subsection 67.2(1) of the CTA?
2. Do Existing Tariff Rules 16(c), 16(e) and 16(g) relieve Porter from liability for damages suffered by passengers occasioned by delay and failure to operate on schedule and are they inconsistent with the principles of the Convention? If so, are these Tariff Rules unreasonable within the meaning of subsection 67.2(1) of the CTA?
3. Do the provisions of Existing Tariff Rule 16, starting on the 3rd Revised Page 31 of the Tariff, setting out a list of events for which Porter shall not be liable for failure in the performance of any of its obligations, relieve Porter from liability for delay, regardless of whether it took all reasonable steps necessary to avoid the delay? Are they inconsistent with the principles of the Convention and, if so, are these tariff provisions unreasonable within the meaning of subsection 67.2(1) of the CTA?

With respect to the Proposed Tariff Rules:

1. Is Proposed Tariff Rule 16(b) unclear with respect to Porter's obligations to inform passengers of delays and schedule changes because the phrase "without notice" in Proposed Tariff Rule 16(b) contradicts and negates the obligation to inform stated in Proposed Tariff Rule 16(c)?
2. Is Proposed Tariff Rule 16(b) unreasonable because it is inconsistent with the principles of the Convention, in that it relieves Porter from liability for failure to make connections? Does it appear to relieve Porter from liability for the consequences of providing inaccurate information to passengers, including liability for delay as a result of the misinformation?
3. Is the phrase "will make reasonable efforts" found in Proposed Tariff Rule 16(c) unreasonable in that it tends to relieve Porter from liability if it fails to notify the passenger about a schedule change resulting in the passenger's inability to travel with respect to 1) flight delays; and 2) flight advancements?
4. Is Proposed Tariff Rule 16(d) unclear in that it does not contain "terms and conditions of carriage" or other information that a tariff ought to contain pursuant to subsection 107(1) of the *Air Transportation Regulations*, SOR/88-58, as amended (ATR (Air Transportation Regulations))?
5. Is Proposed Tariff Rule 16(f) unreasonable and inconsistent with the principles of the Convention as it appears to: a) limit or exclude Porter's liability in the case of delay due to flight cancellation or schedule change and focuses on the cause rather than Porter's reaction to events; and; b) fail to provide passengers with the right to seek a full refund if Porter is unable to transport them within a reasonable amount of time and limit or exclude Porter's liability in the case of delay due to flight

cancellation or schedule change?

6. Should the phrase “the Carrier proves that” be inserted into Proposed Tariff Rules 16(a)(i) and 16.2(b)(i) before “the Carrier and its employees and agents” to ensure that the burden of proof of the affirmative defense is on the carrier and to reflect the wording of Article 19 of the Convention?
7. Is the reference to “Event of Force Majeure” in Proposed Tariff Rule 16(f) unreasonable, given the proposed definition of “Event of Force Majeure” in Rule 1, because it is misleading and may prejudice passengers’ ability to enforce their rights?

RELEVANT TARIFF AND STATUTORY EXTRACTS

[5] The provisions of Existing Tariff Rules, Proposed Tariff Rules and the relevant legislation are set out in the Appendix.

CLARITY AND REASONABLENESS OF TARIFF PROVISIONS

Clarity

[6] As recently stated in Decision No. 249-C-A-2012 (*Lukács v. WestJet*), a carrier meets its tariff obligation of clarity when the rights and obligations of both the carrier and the passenger are stated in such a way as to exclude any reasonable doubt, ambiguity or uncertain meaning.

Reasonableness and conformity with the principles of the Convention

[7] To assess whether a term or condition of carriage is “unreasonable,” the Agency has traditionally applied a balancing test, which requires that a balance be struck between the rights of passengers to be subject to reasonable terms and conditions of carriage and the particular air carrier’s statutory, commercial and operational obligations. This test was first established in Decision No. 666-C-A-2001 (*Anderson v. Air Canada*) and was recently applied in Decision No. 204-C-A-2013 (*Lukács v. Air Canada*).

[8] The terms and conditions of carriage are set out by an air carrier unilaterally without any input from passengers. The air carrier sets its terms and conditions of carriage on the basis of its own interests, which may have their basis in purely commercial requirements. There is no presumption that a tariff is reasonable.

[9] When balancing the passengers’ rights against the carrier’s obligations, the Agency must consider the whole of the evidence and the submissions presented by both parties and make a determination on the reasonableness or unreasonableness of the term or condition of carriage based on which party has presented the more compelling and persuasive case.

[10] Mr. Lukács, in addition to setting out concerns regarding the reasonableness and clarity of Porter’s Existing Tariff Rules and Proposed Tariff Rules, also submits that the provisions do not conform with the

principles of the Convention. In past Decisions, the Agency has determined that tariff provisions that are contrary to the principles of the Convention are unreasonable. The Agency will consider the submissions of the parties on the issue of conformity with the principles of the Convention.

EXISTING TARIFF RULES

Issue 1: Does Existing Tariff Rule 16(c), when considered together with Existing Tariff Rule 20, relieve Porter from the obligation to provide timely notice to its passengers about schedule changes? If so, is Existing Tariff Rule unreasonable within the meaning of subsection 67.2(1) of the CTA?

Positions of the parties

Mr. Lukács

[11] Mr. Lukács submits that, when considered together with Existing Tariff Rule 20, which provides the check-in requirements, Existing Tariff Rule 16(c) is unreasonable because it deprives passengers of their right to be notified about schedule changes affecting their travels.

[12] Mr. Lukács contends that transportation by air requires significant preparations for the passenger such as travelling to an airport that might be located some distance away from their residence, checking in, clearing security and then boarding the flight. Mr. Lukács adds that that due to natural and fully justifiable operation considerations, carriers set deadlines for completing each of these steps. Missing these deadlines may result in losing the assigned seat at the very least and possibly the cancellation of the passenger's reservation. If the departure time of a flight changes, then the respective deadlines change accordingly. In particular, if a carrier reschedules a flight an hour earlier than published, it results in passengers having to arrive at the airport an hour earlier, and having to check in an hour earlier, or else they lose their seats and reservations. Mr. Lukács points out that the Agency recognized, in Decision No. 16-C-A-2013 (*Lukács v. Porter*), the passenger's right to be informed about delays and schedule changes.

Porter

[13] Porter conceded that Existing Tariff Rule 16(c) is unreasonable and filed Proposed Tariff Rule 16(c).

Analysis and findings

[14] Existing Tariff Rule 20 provides a list of check-in requirements and states that failure to meet these requirements may result in the loss of the passenger's assigned seat or reservation.

[15] Existing Tariff Rule 16(c) is silent on the matter of the liability assumed by Porter should a flight be delayed. Given this absence of liability, passengers may not be informed of a delay or changes and therefore may fail to meet the check-in requirements set out in Existing Tariff Rule 20.

[16] In Decision No. 16-C-A-2013, the Agency addressed the same provisions as in this matter in a case that addressed Porter's international tariff. In that Decision, the Agency found that the absence of a provision to this effect relieves Porter from the obligation to provide timely notice to its passengers about delays or schedule changes. Porter has not provided any rationale that would convince the Agency that the domestic tariff should be governed by a different logic than the international tariff. As noted above, Porter conceded that Existing Rule 16(c) is unreasonable.

[17] The Agency therefore finds that Existing Tariff Rule 16(c) is unreasonable.

Issue 2: Do Existing Tariff Rules 16(c), 16(e) and 16(g) relieve Porter from liability for damages suffered by passengers occasioned by delay and failure to operate on schedule and are they inconsistent with the principles of the Convention? If so, are these Tariff Rules unreasonable within the meaning of subsection 67.2(1) of the CTA?

Positions of the parties

Mr. Lukács

[18] Mr. Lukács challenges the reasonableness of Existing Tariff Rules 16(c), 16(e) and 16(g) on the grounds that they are blanket exclusions that relieve Porter from any and every liability for delay and failure to operate on schedule, and because they are inconsistent with the principles of the Convention.

[19] Mr. Lukács submits that the Agency has consistently found blanket exclusions of liability to be unreasonable even in the context of domestic tariffs, where the Convention is not applicable. Mr. Lukács adds that the Agency held that the principles of the Convention are a persuasive authority for determining the reasonableness of provisions, regardless of whether the Convention applies, such as in Decision No. 181-C-A-2007 (*Pinksen v. Air Canada*) and Decision No. 309-C-A-2010 (*Kipper v. WestJet*).

[20] Mr. Lukács points out that the Agency's preliminary opinion on this issue was affirmed in Decision No. 291-C-A-2011 (*Lukács v. Air Canada*) and was subsequently cited with approval by the Agency in Decision No. 16-C-A-2013, which concluded that Porter's international tariff Rule 18(e), a provision similar to its Existing Tariff Rule 16(g) of its domestic tariff, was unreasonable.

Porter

[21] Porter conceded that Existing Tariff Rules 16(c), 16(e) and 16(g) are unreasonable, and filed Proposed Tariff Rules.

Analysis and findings

[22] Existing Tariff Rules 16(c), 16(e) and 16(g) are silent on the matter of the liability assumed by Porter for failure to make connections, to operate any flight according to schedule, or for changing the schedule

of any flight. **138**

[23] With respect to applying the principles of the Convention to domestic tariff provisions, the Agency stated in Decision No. LET-C-A-129-2011 (*Lukács v. Air Canada*) that:

> [...] it is clear that the Agency is, and has been, of the view that the Convention is a useful interpretive tool to which the Agency may refer when applying its "reasonableness" test and striking the balance between passengers' rights and the statutory, commercial and operational obligations of a carrier. In doing so the Agency takes into account the principles of the Convention rather than applying the Convention itself.
>
> The Agency is of the view that passengers should expect and be entitled to consistency in treatment irrespective of whether they are on a domestic or international flight. To that end, the principles set out in the Convention provide insight into what is reasonable to apply in a domestic context.

[24] Article 19 of the Convention provides that the carrier is liable for delay, and it can exonerate itself from liability only if it demonstrates the presence of an affirmative defense, namely, that it and its servants and agents have taken all reasonable steps necessary to avoid the delay.

[25] In Decision No. 16-C-A-2013, the Agency addressed tariff provisions similar to those currently being considered. In that Decision, the Agency determined that the tariff provisions were contrary to Article 19 of the Convention and therefore unreasonable because they were silent on the liability assumed by Porter. Porter has not provided any arguments which would convince the Agency to decide differently than it did in Decision No. 16-C-A-2013. As noted above, Porter conceded that Existing Tariff Rules 16(c), 16(e) and 16(g) are unreasonable.

[26] The Agency therefore finds that Existing Tariff Rules 16(c), 16(e) and 16(g) are unreasonable and inconsistent with the principles of Article 19 of the Convention.

Issue 3: Do the provisions of Existing Tariff Rule 16, starting on the 3rd Revised Page 31 of the Tariff, setting out a list of events for which Porter shall not be liable for failure in the performance of any of its obligations, relieve Porter from liability for delay, regardless of whether it took all reasonable steps necessary to avoid the delay? Are they inconsistent with the principles of the Convention and, if so, are these tariff provisions unreasonable within the meaning of subsection 67.2(1) of the CTA?

Positions of the parties

Mr. Lukács – Delay

[27] Mr. Lukács submits that the exclusions appearing on the list starting on 3rd Revised Page 31 of the Tariff are unreasonable as they amount to a blanket exclusion of liability. He argues that they are inconsistent with the principles of the Convention.

[28] Mr. Lukács points out that the list has a preamble that reads:

> Notwithstanding any other terms or conditions contained herein, the Carrier shall not be liable for failure in the performance of any of its obligations due to:
>
> [...]
>
> Upon the happening of any of the foregoing events, the Carrier may without notice cancel, terminate, divert, postpone or delay any flight whether before departure or enroute. If the flight, having commenced is terminated, the carrier shall refund the unused portion of the fare and shall use its best effort to provide alternate transportation to the destination for the passengers and baggage at the expense and risk of the passenger or shipper. If the flight has not commenced prior to termination, the carrier will provide a credit equal to the paid fare which will be available for use in the purchase of a new ticket on the same terms for a period of one year from the date of termination. No refund will be available.

[29] Mr. Lukács also points out that the list of events that Porter purports to exonerate itself from any liability from performance of any of its obligations includes, for example:

> v) Accidents to or failure of the aircraft or equipment used in connection therewith including, in particular, mechanical failure.
>
> vi) Non-availability of fuel at the airport of origin, destination or enroute stop.
>
> vii) Others upon whom the Carrier relies for the performance of the whole or any part of any charter contract or flight.

[30] Mr. Lukács asserts that, as the Agency explained in Decision No. 16-C-A-2013, it is not the cause of delay that determines liability but how the carrier reacts to the delay. The exclusions listed starting on 3rd Revised Page 31 of the Tariff relieve Porter from liability for delay solely based on the cause and without reference to how it reacts to the delay. Mr. Lukács argues that these exclusions are inconsistent with the principles of the Convention, and are therefore unreasonable.

Mr. Lukács – Damage or destruction of baggage or cargo

[31] Mr. Lukács points out that destruction, loss and damage to checked baggage and to cargo are governed respectively by Article 17(2) and Article 18(2) of the Convention. The exclusions listed starting on 3rd Revised Page 31 of the Tariff relieve Porter from liability for delay solely based on the cause and without reference to how Porter reacts to the delay. This is inconsistent with the principles of Articles 17(2) and 18(2) of the Convention, and therefore unreasonable.

Mr. Lukács – Relief from “performance of any of its obligations”

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[32] Mr. Lukács contends that the impugned provisions purport to relieve Porter from “performance of any of its obligations” in the case of certain events, regardless of how the event affects Porter’s ability to perform. Mr. Lukács thus submits that the impugned provisions are a blanket exclusion of liability, and are therefore inconsistent with the principles of the Convention.

Porter

[33] Porter conceded that the provisions starting on 3rd Revised Page 31 of the Tariff, which are in effect, a “force majeure” clause, may have the effect of excluding liability in a manner that is inconsistent with the Convention, and filed Proposed Tariff Rules.

Analysis and findings

[34] Article 19 of the Convention provides that carriers are liable for delay unless it and its servants and agents have taken all reasonable steps necessary to avoid the delay. Articles 17(2) and 18(2) of the Convention provide that carriers are liable for damage or loss of baggage and cargo even in the absence of a causal link between the damage or loss and the inherent defect, vice or quality of the baggage.

[35] The Agency agrees with Mr. Lukács that the exclusions of liability relieve Porter from liability for delay, regardless of whether it took all reasonable steps necessary to avoid the delay, and for damage or loss of baggage or cargo. Also, as noted above, Porter conceded that the provisions starting on 3rd Revised Page 31 of the Tariff, which are in effect a “force majeure” clause, may have the effect of excluding liability in a manner that is inconsistent with the Convention, and Porter filed Proposed Tariff Rules.

[36] The Agency therefore finds the exclusions listed in Existing Tariff Rule 16, starting on 3rd Revised Page 31 of the Tariff, are unreasonable within the meaning of subsection 67.2(1) of the CTA and inconsistent with the principles of the Convention.

PROPOSED TARIFF RULES

Issue 1: Is Proposed Tariff Rule 16(b) unclear with respect to Porter’s obligations to inform passengers of delays and schedule given that the phrase “without notice” in Proposed Tariff Rule 16(b) contradicts and negates the obligation to inform stated in Proposed Tariff Rule 16(c)?

Positions of the parties

Mr. Lukács

[37] Mr. Lukács maintains that Proposed Tariff Rule 16(b) is unclear as part of it contradicts and negates Proposed Tariff Rule 16(c). Proposed Tariff Rule 16(b) states, in part: “Schedules are subject to change without notice.” Mr. Lukács points out that at the same time, Proposed Tariff Rule 16(c) states that: “The carrier will make reasonable efforts to inform passengers of delays and schedule changes and, to the extent possible, the reasons for them.”

[38] According to Mr. Lukács, these two provisions contradict each other because the phrase “without notice” in Proposed Tariff Rule 16(b) purports to relieve Porter of any obligation to inform passengers of delays and schedule changes, and thus negates the obligation stated in Proposed Tariff Rule 16(c).

Analysis and findings

[39] The Agency agrees with Mr. Lukács that Proposed Tariff Rule 16(b) is unclear when read in conjunction with Proposed Tariff Rule 16(c) because Proposed Tariff Rule 16(b) contradicts and seems to negate the obligation stated in Proposed Tariff Rule 16(c). In that sense, Proposed Tariff Rule 16(b) creates reasonable doubt, ambiguity or uncertain meaning.

[40] The Agency therefore finds that if filed with the Agency, Proposed Tariff Rule 16(b) would be found to be unclear.

Issue 2: Is Proposed Tariff Rule 16(b) unreasonable because it is inconsistent with the principles of the Convention, in that it relieves Porter from liability for failure to make connections? Does it appear to relieve Porter from liability for the consequences of providing inaccurate information to passengers, including liability for delay as a result of the misinformation?

Positions of the parties

Porter

[41] Porter submits that Proposed Tariff Rule 16(b) contains language taken from Rule 90(B)(2) of the Sample Tariff published by the Agency, and that the statement “schedules are subject to change without notice” was found reasonable in light of the Agency’s finding in Decision No. 16-C-A-2013. Proposed Tariff Rule 16(b) reads as follows:

> Schedules are subject to change without notice, and the carrier assumes no responsibility for the passenger making connections. The carrier will not be responsible for errors or omissions either in timetables or other representation of schedules.

[42] Porter acknowledges that when considering the same language in the context of Porter’s proposed tariff rule in that other proceeding, the Agency also held that additional language was required stating that the carrier “will make reasonable efforts to inform passengers of delays and schedule changes, and

the reasons for them." Porter advises that it has accordingly included the latter language in Proposed Tariff Rule 16 at Proposed Tariff Rule 16(c). Porter asserts that this statement serves to inform the passenger that notice from the carrier may not reach the passenger despite the carrier's reasonable efforts, thus reducing the possibility that passengers will place undue reliance on the expectation that they will necessarily receive prior notice in all instances. **142**

[43] Porter contends that passengers may more frequently (but are not required to) take steps to independently ascertain their flights' status, thus reducing the likelihood that they will be unaware of schedule changes and increasing their opportunity to mitigate the impact thereof.

[44] Porter contends that the balance of Proposed Tariff Rule 16(b) reflects the Agency's repeated findings that timetables do not form part of the contract of carriage and that undue reliance by passengers on stated departure times is unreasonable. Porter argues that, to the extent that this provision is contained in the Agency's Sample Tariff, it is *prima facie* evidence of its reasonableness.

Mr. Lukács

[45] Mr. Lukács states that Proposed Tariff Rule 16(b) provides, among other things, that: "[...] the carrier assumes no responsibility for the passenger making connections."

[46] Mr. Lukács submits that in Decision No. 16-C-A-2013, the Agency considered Porter's international tariff Rule 18(c) that contained a similar disclaimer of liability with respect to making connections, and found that the absence of a provision setting out Porter's liability should a flight be delayed and Porter is unable to provide the proof required by Article 19 of the Convention to relieve itself from such liability rendered tariff Rule 18(c) inconsistent with Article 19 of the Convention, and therefore unreasonable.

[47] Mr. Lukács also states that Proposed Tariff Rule 16(b) provides that: "The carrier will not be responsible for errors or omissions [...]"

[48] Mr. Lukács asserts that this provision is unreasonable because it relieves Porter from the duty of due diligence to provide accurate information to passengers about Porter's timetables and schedules.

[49] Mr. Lukács points out that in Decision No. 16-C-A-2013, the Agency recognized that carriers should have the latitude required to amend flight schedules based on commercial and operational obligations, but also recognized the passengers' fundamental right to be informed about schedule changes that affect their itinerary and their ability to travel.

[50] Mr. Lukács submits that this portion of Proposed Tariff Rule 16(b) is therefore unreasonable because it purports to relieve Porter from liability for the consequences of providing inaccurate information to passengers, including liability for delay that follows as a result of the misinformation. Mr. Lukács adds that the impugned portion of Proposed Tariff Rule 16(b) is also unreasonable because it is inconsistent with the principles of the Convention.

Analysis and findings

[51] Porter has made statements concerning the Sample Tariff published by the Agency on its Web site.

The Agency clarified its intent in the *Important Qualifiers* section of the Sample Tariff which is set out below. **143**

> This Sample Tariff has been prepared by Agency staff and does not represent an Agency endorsement or approval of its terms. If a carrier chooses to adopt the Sample Tariff as its own, in whole or in part, it can still be subject to Agency review and complaints filed pursuant to the CTA or the ATR (Air Transportation Regulations). The Agency, upon investigating a complaint or on its own motion, could find a carrier's tariff provision to be unreasonable and require a carrier to amend its tariff accordingly even if the carrier's tariff reflects the wording of the Sample Tariff.

[52] In Decision No. 16-C-A-2013, the Agency determined that the absence of a provision that required Porter to make reasonable efforts to inform passengers of delays and schedule changes and the reasons for them rendered the Tariff Rule at issue unreasonable. Porter's Proposed Tariff Rule 16(b) does not meet that standard, nor has Porter provided any rationale that would justify a change to the Agency's determination in Decision No. 16-C-A-2013.

[53] Passengers should not be deprived of the right to be informed as described above because an error or omission has been committed by a carrier in preparing and/or publishing a timetable or schedule. The absence of a provision in Proposed Tariff Rule 16(b) compelling Porter to make a reasonable effort to advise passengers of errors or omissions in timetables and/or schedules renders that Rule unreasonable.

[54] The Agency therefore finds that if filed with the Agency, Proposed Tariff Rule 16(b) would be found to be unreasonable.

Issue 3: Is the phrase "will make reasonable efforts" found in Proposed Tariff Rule 16(c) unreasonable in that it tends to relieve Porter from liability if Porter fails to notify the passenger about a schedule change resulting in the passenger's inability to travel with respect to 1) flight delays; and 2) flight advancements?

Positions of the parties

Porter

[55] Porter advises that Proposed Tariff Rule 16(c) states: "The carrier will make reasonable efforts to inform passengers of delays and schedule changes and, to the extent possible, the reasons for them." In this regard, Porter submits that in Decision No. 16-C-A-2013, the Agency found that the same proposed change applicable to international transportation properly balances the passenger's right to information on schedule changes.

Mr. Lukács

[56] Mr. Lukács acknowledges that Proposed Tariff Rule 16(c) is an improvement compared to the current state of affairs, but submits that making “reasonable efforts” sets the bar too low for Porter in some circumstances. **144**

[57] Mr. Lukács refers to Decision No. LET-A-112-2003 in which the Agency held, under the heading “Passenger Notification,” that:

> The Agency is of the opinion that Air Transat should undertake to notify passengers of all schedule irregularities, not just flight advancements.

[58] Mr. Lukács argues that the phrase “will make reasonable efforts” ought to be replaced with the more onerous “undertakes.”

[59] Mr. Lukács contends that, while in the case of flight delays, failing to notify passengers usually causes only inconvenience, in the case of advancement of flight schedules, Porter’s failure to inform passengers about the schedule change will likely result in passengers not being able to travel at all, because they miss the check-in cut-off times.

[60] Mr. Lukács submits that under Proposed Tariff Rule 16 in general, and Proposed Tariff Rule 16(c) in particular, the passenger is left without any rights or remedies. However, if the word “undertakes” appeared in Proposed Tariff Rule 16(c), then the passenger would have recourse.

Analysis and findings

“Reasonable efforts” versus flight delays

[61] In Decision No. 16-C-A-2013, the Agency stated that:

> [87] [...] the Agency notes that some Canadian carriers, including Air Canada, have tariff provisions that provide that passengers have a right to information on flight times and schedule changes, and that carriers must make reasonable efforts to inform passengers of delays and schedule changes, and the reasons for them. The Agency finds that such provisions are reasonable, and that, in this regard, the rights of passengers to be subject to reasonable terms and conditions of carriage outweigh any of the carrier’s statutory, commercial or operational obligations.

[62] The Agency finds that the commitment to make “reasonable efforts” to inform passengers, insofar as such commitment pertains to flight delays and schedule changes, is consistent with the Agency’s ruling in Decision No. 16-C-A-2013, and is reasonable.

“Reasonable efforts” versus flight advancements

[63] No evidence has been put forth that flight advancements are common. They may occur in practice

from time to time. When the air carrier advances the scheduled departure of a flight, the consequences 145 may be more severe than a delay for the passenger and it follows that the duty to inform should be no less onerous.

[64] With respect to flight advancements, passengers affected by flight advancement are not afforded the same protection as passengers affected by flight delay or other schedule changes. In that sense, the Agency agrees with Mr. Lukács' submission that in such a case, the passenger is left without any rights or remedies as the liability established by the principles of the Convention only apply to flight delays, and not to flight advancements. The absence of a tariff provision that imposes on Porter a requirement to "undertake" to inform passengers of flight advancements would severely limit the recourses available to passengers affected by those advancements, and would certainly be disadvantageous.

[65] The Agency is of the opinion that the commitment to make "reasonable efforts" to inform passengers, insofar as such commitment pertains to flight advancements, is unreasonable. The Agency therefore finds that if filed with the Agency, Proposed Tariff Rule 16(c) would be found to be unreasonable.

Issue 4: Is Proposed Tariff Rule 16(d) unclear in that it does not contain "terms and conditions of carriage" or other information that a tariff ought to contain pursuant to subsection 107(1) of the ATR (Air Transportation Regulations)?

Positions of the parties

Porter

[66] Porter submits that Proposed Tariff Rule 16(d) contains language taken from Rule 90(B)(5) of the Agency's Sample Tariff. Proposed Tariff Rule 16(d) states:

> It is always recommended that the passenger communicate with the Carrier either by telephone, electronic device or via the Carrier's Web site or refer to airport terminal displays to ascertain the flight's status and departure time.

[67] Porter asserts that to the extent that this provision does not create any obligation on the part of the passenger, nor limit the obligations or liability of the carrier, it is reasonable. According to Porter, this provision operates similarly to the warning that schedules may change without notice, insofar as it precludes undue reliance on notice from the carrier and increases the likelihood that passengers will be informed of any schedule changes and thus be better positioned to mitigate the impact.

Mr. Lukács

[68] Mr. Lukács submits that while Porter notes that this provision was taken from the Agency's Sample Tariff, Porter omits to acknowledge that the Sample Tariff is provided to carriers together with the

following warning: **146**

> This Sample Tariff has been prepared by Agency staff and does not represent an Agency endorsement or approval of its terms. If a carrier chooses to adopt the Sample Tariff as its own, in whole or in part, it can still be subject to Agency review and complaints filed pursuant to the CTA or the ATR (Air Transportation Regulations). The Agency, upon investigating a complaint or on its own motion, could find a carrier's tariff provision to be unreasonable and require a carrier to amend its tariff accordingly even if the carrier's tariff reflects the wording of the Sample Tariff.

[69] Mr. Lukács maintains that the fact that this provision was included in the Agency's Sample Tariff does not speak either to its clarity or the reasonableness of any provision, and does not convey any obligation of either the passenger or the carrier.

[70] Mr. Lukács asserts that while a carrier is entitled to display various travel tips and recommendations on its Web site, such recommendations do not and cannot form part of the contract of carriage; they are not terms and conditions of carriage, and as such, they ought not be included in the carrier's tariff.

[71] Mr. Lukács submits that Proposed Tariff Rule 16(d) fails to be clear, and ought not be included in Porter's Tariff as it contains no "terms and conditions of carriage" or any other information that a tariff is to contain pursuant to subsection 107(1) of the ATR (Air Transportation Regulations).

Analysis and findings

[72] The Agency disagrees with Mr. Lukács' contention that Proposed Tariff Rule 16(d) is unclear. The Agency finds that it is worded in such a manner that does not create reasonable doubt, ambiguity or uncertain meaning. The Agency does agree with Mr. Lukács that Proposed Tariff Rule 16(d) does not represent a term or condition of carriage. However, Proposed Tariff Rule 16(d) does not impose an obligation on either the carrier or the passenger, and is therefore unenforceable.

[73] The Agency has not been presented with evidence establishing any harm if Proposed Tariff Rule 16(d) were to appear in the Tariff.

Issue 5: Is Proposed Tariff Rule 16(f) unreasonable and inconsistent with the principles of the Convention as it appears to: a) limit or exclude Porter's liability in the case of delay due to flight cancellation or schedule change and focuses on the cause rather than Porter's reaction to events; and b) fail to provide passengers with the right to seek a full refund if Porter is unable to transport them within a reasonable amount of time and limit or exclude Porter's liability in the case of delay due to flight cancellation or schedule change?

Positions of the parties

Porter

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[74] Porter contends that the provisions following Existing Tariff Rule 16(g) have the effect of excluding liability in a manner inconsistent with the Convention, and therefore proposes to replace the impugned clause with Proposed Tariff Rule 16(f) which reads as follows:

> Except with respect to compensation available to passengers under this Rule 16, the Carrier will not guarantee and will not be held liable for cancellations or changes to scheduled flight times due to an Event of Force Majeure.

[75] Porter maintains that Proposed Tariff Rules 16.1 and 16.2 specifically incorporate the principle that passengers are entitled to compensation unless the carrier took all reasonable and possible measures to avoid the damage. Porter therefore argues that even in the case of a delay due to force majeure, passengers will have recourse to reimbursement for their resulting damages where the conditions of the Convention are satisfied.

[76] Porter advises that it is not aware of any Agency Decision in which a force majeure clause has been disallowed as unreasonable for any reason other than its failure to allow for the application of the liability regime prescribed by the Convention. Porter submits that it is reasonable, in balancing the rights of the carrier and the passenger, to exclude liability for events beyond the control of the carrier, subject always to the carrier's strict liability for damages resulting from delay, irrespective of the cause of the delay.

[77] Porter contends that Proposed Tariff Rule 16(f) corrects the defect in the Existing Tariff Rule 16 force majeure clause by specifically subjecting it to the liability regime in which Porter will be liable for delay unless it demonstrates the limited defense set forth in Article 19 of the Convention, rendering the Proposed Tariff Rule reasonable.

1. Proposed definition of "Event of Force Majeure"

[78] Porter submits that, as Proposed Tariff Rule 16(f) makes reference to the term "Force Majeure Event," Porter proposes to add a definition of this term under Rule 1 (Definitions) of its Tariff. Porter advises that the proposed definition provides that a "Force Majeure Event" represents occurrences "which are not within the reasonable control of the Carrier," and sets forth a number of examples of situations which may constitute force majeure events, subject always to the qualification that such events were beyond Porter's reasonable control.

Mr. Lukács

[79] Mr. Lukács contends that what determines liability for delay is not the cause of the delay, but rather how the carrier reacts to events that may cause delay, even if these events may have been caused by third parties that are not directed by the carrier.

[80] Mr. Lukács submits that the Agency explains this in Decision No. 16-C-A-2013:

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> [105] Accordingly, what is at issue, in terms of avoiding liability for delay, is not who caused the delay but, rather, how the carrier **reacts** to a delay. In short, did the carrier's servants and agents do everything they reasonably could in the face of air traffic control delays, security delays on releasing baggage, delays caused by late delivery of catered supplies or fuel to the aircraft and so forth, even though these may have been caused by third parties who are not directed by the carrier?

[81] Mr. Lukács maintains that as Proposed Tariff Rule 16(f) deals with flight cancellations and schedule changes, it is difficult to understand what kind of liability, other than liability for delay, this provision aims to exclude. Mr. Lukács further submits that Porter provided no explanation or examples of scenarios where it may wish to invoke Proposed Tariff Rule 16(f), but which do not already fall within the scope of delay.

[82] Mr. Lukács asserts that Porter seems to suggest that the Convention is the only reason the Agency disallowed provisions dealing with the rights of passengers in the case of flight cancellation and schedule changes, which is not the case.

[83] In this regard, Mr. Lukács points out that in Decision No. 28-A-2004 (*Air Transat*), the Agency considered in great detail the rights of passengers for protection in the case of events that are beyond the passengers' control:

> By Decision No. LET-A-166-2003 dated August 7, 2003 [...] the Agency advised Air Transat that Rule 6.3 of its tariff was not just and reasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations), in that it does not provide adequate options to passengers affected by a schedule irregularity, and does not protect passengers from events that are beyond the passengers' control, and, therefore, does not allow passengers any recourse if they are unable to connect to other air carriers or alternate modes of transportation such as cruise ships or trains.

[84] According to Mr. Lukács, that Agency Decision demonstrates that passengers have a fundamental right to a refund of their fares if the carrier is unable to transport them for any reason that is outside the passengers' control and that the carrier cannot keep the fare paid by the passengers and refuse to provide a refund on the basis that its inability to provide transportation was due to certain events.

Analysis and findings

[85] The Agency agrees with Mr. Lukács' submission that Proposed Tariff Rule 16(f) is unreasonable in that it fails to reflect the appropriate approach to the issue of liability, as set out in Decision No. 16-C-A-2013:

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> [105] Accordingly, what is at issue, in terms of avoiding liability for delay, is not who caused the delay but, rather, how the carrier **reacts** to a delay. In short, did the carrier's servants and agents do everything they reasonably could in the face of air traffic control delays, security delays on releasing baggage, delays caused by late delivery of catered supplies or fuel to the aircraft and so forth, even though these may have been caused by third parties who are not directed by the carrier?

[86] The Agency also agrees with Mr. Lukács' submission that Proposed Tariff Rule 16(f) does not provide for refunds should Porter be unable to carry the passenger because of reasons beyond Porter's control. Proposed Tariff Rule 16(f) simply requires that passengers be compensated in accordance with that Rule.

[87] Existing Tariff Rule 17(b) provides that:

> **Involuntary Cancellations** – In the event a refund is required because of the carrier's failure to complete the operation of any flight after its commencement and the ticket is partially unused as a result of an enroute cancellation, termination or diversion, that part of the total fare paid for each unused segment will be refunded. If the ticket is totally or partially unused as a result of a refusal to transport, the total fare or that part of the total fare paid for each unused segment will be refunded. No refund will be available if the flight is cancelled prior to the commencement of the flight and the provisions of Rule 16 will apply.

[88] The Agency agrees with Mr. Lukács, and finds that it is unreasonable for Porter to refuse to refund the fare paid by a passenger because of its cancellation of a flight, even if the cause is an event beyond Porter's control.

[89] The Agency therefore finds that if filed with the Agency, Proposed Tariff Rule 16(f) would be found to be unreasonable.

Issue 6: Should the phrase "the Carrier proves that" be inserted into Proposed Tariff Rules 16(a)(i) and 16.2(b)(i) before "the Carrier and its employees and agents" to ensure that the burden of proof of the affirmative defense is on the carrier and to reflect the wording of Article 19 of the Convention?

Positions of the parties

Porter

[90] Porter submits that Proposed Tariff Rule 16.1 clearly sets out the circumstances in which Porter will be liable to passengers for expenses resulting from delays, in accordance with the principles of the Convention. Porter points out that the contents of its various provisions were considered and determined

to be reasonable in Decision No. 16-C-A-2013. **150**

[91] Porter maintains that Proposed Tariff Rule 16.1 is consistent with Decision No. LET-C-A-29-2011 and that Rule states plainly that Porter will be liable to reimburse passengers in the circumstances set out in that Decision; there is no suggestion that liability will only adhere in exceptional circumstances.

[92] Porter contends that Proposed Tariff Rule 16.2 addresses Porter's liability under the Tariff for delayed delivery of a passenger's baggage. Porter adds that the Proposed Tariff Rule's contents are substantially identical to those found to be reasonable in Decision No. 16-C-A-2013.

[93] According to Porter, consistent with the Convention's liability principles, Proposed Tariff Rule 16.2(b) positively states that, notwithstanding that concurrent baggage delivery is not guaranteed, Porter will be liable for delays in the carriage of baggage except in the circumstances set out therein. Porter adds that as with Proposed Tariff Rule 16.1(i)(b), Proposed Tariff Rule 16.2(b) reproduces the exception to liability contained in Article 19 of the Convention, and sets out a reasonable process by which passengers may submit claims for compensation to Porter.

[94] Porter asserts that Proposed Tariff Rule 16.2(c) provides notice to passengers of the compensation available to them from Porter, including that:

(a) Porter will reimburse passengers for the loss of her bag after 21 days, subject to limits of:

i. 1131 SDR, expressly stated to be approximately equivalent to CAD $1,800, where no excess value has been declared, and
ii. (CAD $3,000, where the passenger has declared an excess value of the lost item.

[95] Porter points out that in Decision No. 418-C-A-2011 (*Lukács v. WestJet*), the Agency has found similar provisions – including as to clarity, limits of liability and requirement of proof of value – to be reasonable.

[96] Porter also points out that as with Proposed Tariff Rule 16.1, Proposed Tariff Rule 16.2 permits Porter to deny otherwise eligible claims only where the passenger has failed to follow the reasonable process set out therein, or where the expenses claimed are not reasonable.

Mr. Lukács

[97] Mr. Lukács contends that the vast majority of the provisions under Proposed Tariff Rules 16.1 and 16.2 are reasonable but the phrase "the Carrier proves that" ought to be inserted into Proposed Tariff Rule 16.1(a)(d) [or more correctly, Proposed Tariff Rule 16.2(a)(i)] and Proposed Tariff Rule 16.2(b)(i) before "the Carrier and its employees and agents" in order to reflect the wording of Article 19 of the Convention.

[98] According to Mr. Lukács, this phrase is to ensure that the burden of proof of the affirmative defense is on the carrier, which is a central feature of the Convention that has been widely recognized by the courts in Canada.

[99] Mr. Lukács disagrees with Porter's statement that Existing Tariff Rule 16 does not affect Porter's liability with respect to baggage; not only do these provisions explicitly refer to baggage, but they also

purport to relieve Porter from all of its obligations, including with respect to delivery of baggage to the passenger. **151**

[100] Mr. Lukács points out that the provisions in Existing Tariff Rule 16 provide that:

Notwithstanding any other terms or conditions contained herein, the Carrier shall not be liable for failure in the performance ofany of its obligations due to:

> [...]
>
> Upon the happening of any of the foregoing events, the Carrier may without notice cancel, terminate, divert, postpone or delay any flight whether before departure or enroute. If the flight, having commenced is terminated, the carrier shall refund the unused portion of the fare and shall use its best effort to provide alternate transportation to the destination for the passengers and baggage at the expense and risk of the passenger or shipper. If the flight has not commenced prior to termination, the carrier will provide a credit equal to the paid fare which will be available for use in the purchase of a new ticket on the same terms for a period of one year from the date of termination. No refund will be available.

[101] Mr. Lukács submits that not only do these provisions explicitly refer to baggage, they also purport to relieve Porter from all of its obligations, including with respect to delivery of baggage to the passenger.

Analysis and findings

[102] Proposed Tariff Rules 16.1 and 16.2 are exactly the same as Rules 18.1 and 18.2 in Porter's international tariff, which were found reasonable by the Agency in Decision No. 16-C-A-2013. The only new argument raised by Mr. Lukács is the need to add the words "the Carrier proves that." The Agency disagrees with Mr. Lukács' submission that to accurately reflect the principles of the Convention, these words should be inserted in the Proposed Tariff Rules.

[103] The Agency is of the opinion that irrespective of whether the words "the Carrier proves that" appear in Proposed Tariff Rules 16.1 and 16.2, the burden of proof rests with the carrier to demonstrate that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.

[104] The Agency finds that it is not necessary that the phrase "the Carrier proves that" be inserted into Proposed Tariff Rules 16.1 and 16.2 to reflect the wording of Article 19 of the Convention.

Issue 7: Is the reference to "Event of Force Majeure" in Proposed Tariff Rule 16(f) unreasonable, given the proposed definition of "Event of Force Majeure" in Rule 1, because it is misleading and may prejudice passengers' ability to enforce their rights?

Positions of the parties

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Porter

[105] Porter advises that as Proposed Tariff Rule 16(f) makes reference to an “Event of Force Majeure,” Porter has filed a definition of that term which it proposes to add to Rule 1 (Definitions) of its Tariff.

[106] Porter submits that the proposed definition provides that an “Event of Force Majeure” is an occurrence that is not within the reasonable control of the Carrier and Porter sets forth a number of examples of situations which may constitute events of force majeure, subject always to the qualification that such events were beyond Porter’s reasonable control.

Mr. Lukács

[107] Mr. Lukács maintains that most events of the type listed under the proposed definition are not considered to be force majeure by Canadian courts or international authorities. Mr. Lukács contends that Porter’s proposed definition of “Event of Force Majeure” is misleading and may prejudice passengers’ ability to enforce their rights. According to Mr. Lukács, the definition is cause-and-event based and unnecessarily complicates the simple and straightforward liability regime of Article 19 of the Convention.

Analysis and findings

[108] The Agency is of the opinion that, in and of itself, the proposed definition of “Event of Force Majeure” provided under Proposed Tariff Rule 1 is unreasonable as it includes incidents that have not been determined to be of a nature to constitute “force majeure.” In addition, the event causing a flight delay or cancellation is not the determining factor in establishing whether a carrier is liable under the principles of the Convention. The Agency has determined in Decision No. 16-C-A-2013, for example, that what is vital is the manner in which the carrier reacts to those events.

[109] The Agency finds that the reference to “Event of Force Majeure” in Proposed Tariff Rule 16(f) would be found to be unreasonable if filed with the Agency, given the proposed definition of “Event of Force Majeure” in Rule 1.

SUMMARY OF CONCLUSIONS

With respect to Porter’s Existing Tariff Rules

Issue 1

[110] The Agency has determined that Existing Tariff Rule 16(c), when considered together with Existing Tariff Rule 20 of the Tariff, is unreasonable.

Issue 2

[111] The Agency has determined that Existing Tariff Rules 16(c), 16(e) and 16(g) are unreasonable. **153**

Issue 3

[112] The Agency has determined that the exclusions listed in Existing Tariff Rule 16, starting on the 3rd Revised Page 31 of the Tariff, are unreasonable.

With respect to Porter's Proposed Tariff Rules

Issue 1

[113] The Agency has determined that the wording in Proposed Tariff Rule 16(b) would be found to be unclear if filed with the Agency.

Issue 2

[114] The Agency has determined that the wording in Proposed Tariff Rule 16(b) would be found to be unreasonable if filed with the Agency.

Issue 3

[115] The Agency has determined that the wording in Proposed Tariff Rule 16(c) would be found to be unreasonable if filed with the Agency.

Issue 4

[116] The Agency has determined that the wording in Proposed Tariff Rule 16(d) would be found to be clear if filed with the Agency.

Issue 5

[117] The Agency has determined that Proposed Tariff Rule 16(f) would be found to be unreasonable if filed with the Agency.

Issue 6

[118] The Agency has determined that it is not necessary to insert the phrase "the Carrier proves that" in Proposed Tariff Rules 16.1 and 16.2.

Issue 7

[119] The Agency has determined that the reference to "Event of Force Majeure" in Proposed Tariff Rule 16(f) would be found to be unreasonable if filed with the Agency, given the proposed definition of "Event of Force Majeure" in Rule 1.

ORDER

[120] The Agency, pursuant to section 113 of the ATR (Air Transportation Regulations), disallows the following provisions of Porter's Tariff: **154**

- Rule 16(c);
- Rule 16(e);
- Rule 16(g); and,
- The exclusions listed in Existing Tariff Rule 16, starting on 3rd Revised Page 31.

[121] The Agency orders Porter, by September 30, 2013, to amend its Tariff to conform to this Order and the Agency's findings set out in this Decision.

[122] Pursuant to paragraph 28(1)(*b*) of the CTA, the disallowance of Existing Tariff Rules 16(c), 16(e) and 16(g), and the exclusions listed in Existing Tariff Rule 16 starting on 3rd Revised Page 31, shall come into force when Porter complies with the above or on September 30, 2013, whichever is sooner.

Appendix

RELEVANT TARIFF EXTRACTS

Existing Tariff Rules

RULE 16 – RESPONSIBILITY FOR SCHEDULES AND OPERATIONS

a. The Carrier will endeavour to transport the passenger and baggage with reasonably dispatch, but times shown in timetables or elsewhere are not guaranteed and form no part of this contract.
b. The agreed stopping places are those places shown in the carrier's timetable as scheduled stopping places on the route. The carrier may, without notice, substitute alternative carriers or aircraft and, if necessary, may alter or omit stopping places shown in the timetables.
c. Schedules are subject to change without notice. The carrier is not responsible or liable for failure to make connections or for failure to operate any flight according to schedule, or for a change to the schedule of any flight.
d. Without limiting the generality of the foregoing, the carrier cannot guarantee that the passenger's baggage will be carried on the flight if sufficient space is not available as determined by the carrier.
e. The Carrier is not responsible or liable for failure to make connections, or for failure to operate any flight according to schedule, or for a change to the schedule of any flight.
f. Without limiting the generality of the foregoing, the Carrier cannot guarantee that a passenger's baggage will be carried on the flight if sufficient space is not available as determined by the Carrier.
g. The Carrier will not provide or reimburse passengers for expenses incurred due to delays or cancellations of flights or be responsible for any special, incidental, direct or indirect, or

consequential damages arising out of such delays or cancellations of flights whether or not the carrier had knowledge that such damages might be occurred. **155**

Notwithstanding any other terms or conditions contained herein, the Carrier shall not be liable for failure in the performance of any of its obligations due to:

i. Act of God.
ii. War, revolution, insurrection, riot, blockade or any other unlawful act against public order or authority including an act of terrorism involving the use or release or threat thereof, of any nuclear weapon or device or chemical or biological agent.
iii. Strike, lock-out, labour dispute, or other industrial disturbance whether involving the Carrier's employees or others upon whom the Carrier relies.
iv. Fire, flood, explosion, storm, lightning or adverse weather conditions generally.
v. Accidents to or failure of the aircraft or equipment used in connection therewith including, in particular, mechanical failure.
vi. Non-availability of fuel at the airport of origin, destination or enroute stop.
vii. Others upon whom the Carrier relies for the performance of the whole or any part of any charter contract or flight.
viii. Government order, regulation, action or inaction.
ix. Unless caused by its negligence, any difference in weight or quantity of cargo from shrinkage, leakage or evaporation.
x. The nature of the cargo or any defect in the cargo or any characteristic or inherent vice therein.
xi. Violation by a consignee or any other party claiming an interest in the cargo of any of the terms and conditions contained in this tariff or in any other applicable tariff including, but without being limited to, failure to observe any of the terms and conditions relating to cargo not acceptable for transportation or cargo acceptable only under certain conditions.
xii. Improper or insufficient packing, securing, marking or addressing.
xiii. Acts or omissions of warehousemen, customs or quarantine officials or other persons other than the Carrier or its agents, in gaining lawful possession of the cargo.

[...]

RELEVANT STATUTORY EXTRACTS

Air Transportation Regulations, SOR/88-58, as amended

Subsection 107(1)

Every tariff shall contain:

[...]

(*l)* the terms and conditions governing the tariff, generally, stated in such a way that it is clear as to how the terms and conditions apply to the tolls named in the tariff;

[...] **156**

(*n)* the terms and conditions of carriage, clearly stating the air carrier's policy in respect of at least the following matters, namely,

> [...]
>
> (iii) compensation for denial of boarding as a result of overbooking,
>
> (iv) passenger re-routing,
>
> (v) failure to operate the service or failure to operate on schedule,
>
> (vi) refunds for services purchased but not used, whether in whole or in part, either as a result of the client's unwillingness or inability to continue or the air carrier's inability to provide the service for any reason,
>
> [...]

Subsection 111(1)

All tolls and terms and conditions of carriage, including free and reduced rate transportation, that are established by an air carrier shall be just and reasonable and shall, under substantially similar circumstances and conditions and with respect to all traffic of the same description, be applied equally to all that traffic.

Section 113

The Agency may

a. suspend any tariff or portion of a tariff that appears not to conform with subsections 110(3) to (5) or section 111 or 112, or disallow any tariff or portion of a tariff that does not conform with any of those provisions; and
b. establish and substitute another tariff or portion thereof for any tariff or portion thereof disallowed under paragraph (*a*).

Canada Transportation Act, S.C., 1996, c. 10, as amended

Subsection 67.2(1)

If, on complaint in writing to the Agency by any person, the Agency finds that the holder of a domestic licence has applied terms or conditions of carriage applicable to the domestic service it offers that are unreasonable or unduly discriminatory, the Agency may suspend or disallow those terms or conditions and substitute other terms or conditions in their place.

PROPOSED AMENDED RULE 16 TO PORTER'S TARIFF 157

Rule 16 – Responsibility for Schedules and Operations

a. The carrier will endeavor to transport the passenger and baggage with reasonable dispatch, but times shown in timetables or elsewhere are not guaranteed and form no part of this contract.
b. Schedules are subject to change without notice, and the carrier assumes no responsibility for the passenger making connections. The carrier will not be responsible for errors or omissions either in timetables or other representation of schedules.
c. The Carrier will make reasonable efforts to inform passengers of delays and schedule changes and, to the extent possible, the reasons for them.
d. It is always recommended that the passenger communicate with the Carrier either by telephone, electronic device or via the Carrier's Web site or refer to airport terminal displays to ascertain the flight's status and departure time.
e. The agreed stopping places are those places shown in the carrier's timetable as scheduled stopping places on the route. The carrier may, without notice, substitute alternative carriers or aircraft and, if necessary, may alter or omit stopping places shown in the timetable.
f. Except with respect to compensation available to passengers under this Rule 16, the Carrier will not guarantee and will not be held liable for cancellations or changes to scheduled flight times due to an Event of Force Majeure.

Rule 16.1 – Passenger Expenses Resulting from Delays

(a) Passengers will be entitled to reimbursement from the Carrier for reasonable expenses incurred as a result of a delay,subject to the following conditions:

i. The Carrier shall not be liable for any damages, costs, losses or expenses occasioned by delays if it, and its employees and agents, took all measures that could reasonably be required to avoid the damage or if it was impossible for the Carrier and its employees or agents to take such measures;
ii. Any passenger seeking reimbursement for expenses resulting from delays must provide the Carrier with (a) written notice of his or her claim, (b) particulars of the expenses for which reimbursement is sought and (c) receipts or other documents establishing to the reasonable satisfaction of the Carrier that the expenses were incurred.

(b) The Carrier may refuse or decline any claim, in whole or in part, if:

i. the passenger has failed or declined to provide proof or particulars establishing, to the reasonable satisfaction of the Carrier, that the expenses claimed were incurred by the passenger and resulted from a delay for which compensation is available under this Rule 16; or
ii. the expenses for which reimbursement is claimed, or any portion thereof, are not reasonable or did not result from the delay, as determined by the Carrier, acting reasonably.

In any case, the Carrier may, in its sole discretion, issue meal, hotel and/or ground transportation vouchers to passengers affected by a delay.

Rule 16.2 – Baggage Delays

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(a) The carrier cannot guarantee that the passenger's baggage will be carried on the flight if sufficient space is not available as determined by the Carrier.

(b) Notwithstanding the foregoing, passengers whose baggage does not arrive on the same flight as the passenger will be entitled to reimbursement from the Carrier for reasonable expenses incurred as a result of the baggage delay, subject to the following conditions:

i. The Carrier shall not be liable for any damages, costs, losses or expenses occasioned by delays in the delivery of baggage if the Carrier, and its employees and agents, took all measures that could reasonably be required to avoid the damage or if it was impossible for the Carrier and its employees or agents to take such measures;
ii. The passenger must have complied with the check-in requirements set out in Rule 20 of this tariff;
iii. In order to assist the Carrier in commencing the tracing of the baggage in question, the passenger is encouraged to report the delayed baggage to the Carrier as soon as reasonably practicable following the completion of the flight;
iv. The passenger must provide the Carrier with (a) written notice of any claim for reimbursement within 21 days of the date on which the baggage was placed at the passenger's disposal, or in the case of loss within 21 days of the date on which the baggage should have been placed at the passenger's disposal; (b) particulars of the expenses for which reimbursement is sought; and (c) receipts or other documents establishing to the reasonable satisfaction of the Carrier that the expenses were incurred;
v. The liability of the Carrier in the case of lost or delayed baggage shall not exceed CAD$1,800 for each passenger, unless the passenger has declared a higher value and paid the supplementary sum in accordance with Rule 9(a) of this tariff, in which case the Carrier's liability will be limited to the lesser of the value of the delayed baggage or the declared value, up to a maximum of CAD$3,000.

(c) After a 21 day delay, the Carrier will provide a settlement in accordance with the following rules:

i. if no value is declared per Rule 9(a), the settlement will be for the value of the delayed baggage or CAD$1 ,800, whichever is the lesser, and
ii. if value is declared per Rule 9(a), the settlement will be for the value of the delayed baggage or the declared sum (per Rule 9(a)) up to a maximum of $3,000, whichever is the lesser.
iii. in connection with any settlement under this subsection (c), the passenger shall be required to furnish proof of the value of the delayed baggage which establishes such value to the satisfaction of the Carrier, acting reasonably.

(d) The Carrier may refuse or decline any claim relating to delayed baggage, in whole or in part, if:

i. the conditions set out in subsection 16.2(b) above have not been met;
ii. the passenger has failed or declined to provide proof or particulars establishing, to the reasonable satisfaction of the Carrier, that the expenses claimed were incurred by the passenger and resulted from a delay for which compensation is available under this Rule 16; or

iii. the expenses for which reimbursement is claimed, or any portion thereof, are not reasonable or did not result from the delay, as determined by the Carrier, acting reasonably.

Proposed Addition to Rule 1 (Definition)

Event of Force Majeure means an event, the cause or causes of which are not within the reasonable control of the Carrier, which may include, but are not limited to (i) earthquake, flood, hurricane, explosion, fire, storm, epidemic, other acts of God or public enemies, war, national emergency, invasion, insurrection, riots, strikes, picketing, boycott, lockouts or other civil disturbances, (ii) interruption of flying facilities, navigational aids or other services, (iii) any laws, rules, proclamations, regulations, orders, declarations, interruptions or requirements of or interference by any government or governmental agency or official thereof, (iv) inability to procure materials, accessories, equipment or parts from suppliers, mechanical failure to the aircraft or any part thereof, damage, destruction or loss of use of an aircraft, confiscation, nationalization, seizure, detention, theft or hijacking of an aircraft, or (v) any other cause or circumstances whether similar or dissimilar, seen or unforeseen, which the Carrier is unable to overcome by the exercise of reasonable diligence and at reasonable cost.

Member(s)

Raymon J. Kaduck
Sam Barone

Back to rulings

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Date modified:
2013-08-29

This is **Exhibit "5"** to the Affidavit of Dr. Gábor Lukács affirmed before me on September 7, 2023

_____

Signature

CANADIAN TRANSPORTATION AGENCY

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Decision No. 31-C-A-2014

January 31, 2014

COMPLAINT by Gábor Lukács against Porter Airlines Inc.

File No.: M4120-3/13-05680

INTRODUCTION

[1] Gábor Lukács filed a complaint with the Canadian Transportation Agency (Agency) alleging that certain provisions in Rules 1, 3.4, 15, 18 and 20 (Existing Tariff Rules) of the Tariff Containing Rules Applicable to Scheduled Services for the Transportation of Passengers and Baggage or Goods Between Points in Canada on the One Hand and Points Outside Canada on the Other Hand (Tariff) applied by Porter Airlines Inc. (Porter) are inconsistent with the Convention for the Unification of Certain Rules for International Carriage by Air – Montreal Convention (Montreal Convention), and are unclear and/or unreasonable. The Rules at issue set out Porter's responsibilities relating to flight cancellation, schedule change, flight advancement and denied boarding. Mr. Lukács also alleges that Porter's Tariff fails to incorporate certain elements of the *Code of Conduct of Canada's Airlines* (Code of Conduct).

[2] Porter filed proposed revisions to its Existing Tariff Rules (Proposed Tariff Rules) with its answer.

ISSUES

With respect to the Existing Tariff Rules

1. Does the failure to incorporate certain elements of the Code of Conduct into Porter's Tariff render it unreasonable?
2. Is the definition of "Event of Force Majeure" in Existing Tariff Rule 1.1 unreasonable within the meaning of subsection 111(1) of the *Air Transportation Regulations*, SOR/88-58, as amended (ATR (Air Transportation Regulations))?
3. Are Existing Tariff Rules 3.4 and 15 unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations) and/or unclear, contrary to section 122 of the ATR (Air Transportation Regulations)?
4. Is Existing Tariff Rule 18(c) unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations)?

5. Is Existing Tariff Rule 20 unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations) and/or unclear, contrary to section 122 of the ATR (Air Transportation Regulations)? **162**

With respect to the Proposed Tariff Rules

1. Is the definition of “Credit Shell” in Proposed Tariff Rule 1.1 unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations)?
2. Is Proposed Tariff Rule 15(a)(iii)(b) unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations)?
3. Is Proposed Tariff Rule 15(a)(iv) unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations)?
4. Is Proposed Tariff Rule 15(a) unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations) and/or unclear, contrary to section 122 of the ATR (Air Transportation Regulations)?
5. Is Proposed Tariff Rule 15(c) unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations) and/or unclear, contrary to section 122 of the ATR (Air Transportation Regulations)?
6. Is Proposed Tariff Rule 18(c) unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations)?
7. Is Proposed Tariff Rule 20 unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations) and/or unclear, contrary to section 122 of the ATR (Air Transportation Regulations)?

RELEVANT STATUTORY AND TARIFF EXTRACTS

[3] The Existing Tariff Rules and Proposed Tariff Rules as well as the statutory extracts relevant to this Decision are set out in the Appendix.

CLARITY AND REASONABLENESS OF TARIFF PROVISIONS

Clarity

[4] In Decision No. 2-C-A-2001 (*Mr. H v. Air Canada*) the Agency formulated the test respecting the carrier’s obligation of tariff clarity as follows:

> [...] the Agency is of the opinion that an air carrier’s tariff meets its obligations of clarity when, in the opinion of a reasonable person, the rights and obligations of both the carrier and passengers are stated in such a way as to exclude any reasonable doubt, ambiguity or uncertain meaning.

[5] This test was recently applied in Decision No. 442-C-A-2013 (*Azar v. Air Canada*).

Unreasonableness

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[6] To assess whether a term or condition of carriage is “unreasonable”, the Agency has traditionally applied a balancing test, which requires that a balance be struck between the rights of passengers to be subject to reasonable terms and conditions of carriage and the particular air carrier’s statutory, commercial and operational obligations.

[7] When balancing the passengers’ rights against the carrier’s obligations, the Agency must consider the whole of the evidence and the submissions presented by both parties, and make a determination on the reasonableness or unreasonableness of the term or condition of carriage based on which party has presented the more compelling and persuasive case. This test was first established in Decision No. 666-C-A-2001 (*Anderson v. Air Canada*) and was recently applied in Decision No. 442-C-A-2013.

EXISTING TARIFF RULES

Issue 1: Does the failure to incorporate certain elements of the Code of Conduct into Porter’s Tariff render it unreasonable?

Positions of the parties

Mr. Lukács

[8] Mr. Lukács submits that in 2008, the Government of Canada and the three major Canadian air carriers (Air Canada, Air Transat A.T. Inc. carrying on business as Air Transat (Air Transat) and WestJet) voluntarily agreed to the Code of Conduct.

[9] Mr. Lukács asserts that the key points of the Code of Conduct are:

- Passengers have a right to information on flight times and schedule changes. Airlines must make reasonable efforts to inform passengers of delays and schedule changes and to the extent possible, the reason for the delay or change.
- Passengers have a right to punctuality.
    a. If a flight is delayed and the delay between the scheduled departure of the flight and the actual departure of the flight exceeds 4 hours, the airline will provide the passenger with a meal voucher.
    b. If a flight is delayed by more than 8 hours and the delay involves an overnight stay, the airline will pay for overnight hotel stay and airport transfers for passengers who did not start their travel at that airport.
    c. If the passenger is already on the aircraft when a delay occurs, the airline will offer drinks and snacks if it is safe, practical and timely to do so. If the delay exceeds 90 minutes and circumstances permit, the airline will offer passengers the option of disembarking from the aircraft until it is time to depart.
- Passengers have a right to take the flight they paid for. If the flight is overbooked or cancelled, the airline must offer passengers a choice between transportation to their destination or a refund of the

unused portion. **164**

[10] Mr. Lukács argues that Existing Tariff Rules 3.4 and 15 are inconsistent with the Code of Conduct. He contends that the Rules fail to incorporate the “right for care” provisions (meal voucher, overnight hotel, and drinks and snacks) that the three major Canadian air carriers have long ago adopted, and which Sunwing Airlines Inc. (Sunwing) recently incorporated into its tariff.

Porter

[11] Porter submits that inclusion in tariffs of the provisions set out in the Code of Conduct is not required by the ATR (Air Transportation Regulations), and that its Proposed Tariff Rules contain reasonable provisions, to the full extent required, concerning remedies available to passengers for delay. In addition, Porter argues that any failure to prescribe a right to vouchers in no way limits the rights of passengers in a manner inconsistent with the Montreal Convention.

Mr. Lukács

[12] Mr. Lukács states that while Porter incorporated (c) of the Code of Conduct as Proposed Tariff Rule 18(d), Porter refuses to incorporate (a) and (b) of the Code of Conduct into its Tariff, and vehemently argues against them.

[13] Mr. Lukács maintains that subsection 86(1) of the *Canada Transportation Act*, S.C., 1996, c. 10, as amended (CTA), and subsection 111(1) and section 113 of the ATR (Air Transportation Regulations) confer upon the Agency jurisdiction to examine whether the absence of tariff provisions requiring Porter to distribute meal, accommodation and transportation vouchers in the case of flight delay renders Porter’s Tariff unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations).

[14] Mr. Lukács asserts that subparagraph 122(*c*)(v) of the ATR (Air Transportation Regulations) requires Porter to state its policy with respect to flight delay in its Tariff. He therefore maintains that even if the Agency’s jurisdiction were confined to matters listed under section 122 of the ATR (Air Transportation Regulations), the issue of distributing meal, accommodation and transportation vouchers to delayed passengers would still be within the Agency’s jurisdiction.

[15] Mr. Lukács argues that while passengers have a legitimate interest in being issued meal, accommodation and transportation vouchers in the case of longer delays (as set out in the Code of Conduct), doing so would not affect Porter’s ability to meet its statutory, commercial and operational obligations. Mr. Lukács contends that the incorporation of the Code of Conduct has become an industry standard for Canadian air carriers, and Porter’s competitors have implemented that Code in their respective tariffs.

[16] Mr. Lukács therefore concludes that the absence of the Code of Conduct from Porter’s Tariff, including the requirement to distribute meal, accommodation and transportation vouchers to delayed passengers, renders the Tariff unreasonable.

Analysis and findings

[17] The Agency notes, as does Mr. Lukács, that the Code of Conduct is voluntary, and was agreed upon by Air Canada, Air Transat and WestJet. The word “voluntary”, in and of itself, is clearly indicative of a free and unrestrained will. In that sense, the Agency cannot force a carrier, through an Agency decision, to abide by that Code. In any case, the Agency agrees with Porter that its Proposed Tariff Rules provide, to the extent required, reasonable remedies for passengers who have been affected by flight delays. The Agency therefore finds that the absence from Porter’s Tariff of all of the elements of the Code of Conduct does not render the Tariff unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations). **165**

Issue 2: Is the definition of “Event of Force Majeure” in Existing Tariff Rule 1.1 unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations)?

Positions of the parties

Mr. Lukács

[18] Mr. Lukács points out that in Decision No. 344-C-A-2013 (*Lukács v. Porter*), a virtually identical tariff provision that Porter had proposed to include in its domestic tariff was considered, and the Agency held that:

> [108] The Agency is of the opinion that, in and of itself, the proposed definition of “Event of Force Majeure” provided under Proposed Tariff Rule 1 is unreasonable as it includes incidents that have not been determined to be of a nature to constitute “force majeure.” In addition, the event causing a flight delay or cancellation is not the determining factor in establishing whether a carrier is liable under the principles of the Convention. The Agency has determined in Decision No. 16-C-A-2013, for example, that what is vital is the manner in which the carrier reacts to those events.

[19] Mr. Lukács maintains that the same conclusion is applicable to the definition of “Event of Force Majeure” in Existing Tariff Rule 1.1, and that the definition ought to be disallowed.

Porter

[20] Porter acknowledged that this Existing Tariff Rule as well as the Existing Tariff Rules set out in Issues 3 to 6 require revisions. In this regard, Porter filed Proposed Tariff Rules.

Analysis and findings

[21] The Agency finds that because the definition of “Event of Force Majeure” includes incidents that have not been determined to be of a nature to constitute “force majeure”, the same conclusion is applicable in this matter as that reached in Decision No. 344-C-A-2013. The Agency finds, therefore, that the definition of “Event of Force Majeure” in Existing Tariff Rule 1.1 fails to strike a balance between the rights of passengers to be subject to reasonable terms and conditions of carriage and Porter’s statutory, commercial and operational obligations. As such, the definition is unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations).

Issue 3: Are Existing Tariff Rules 3.4 and 15 unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations) and/or unclear, contrary to section 122 of the ATR (Air Transportation Regulations)? 166

Position of Mr. Lukács – Reasonableness of Existing Tariff Rules 3.4 and 15: Limitation of liability

[22] Mr. Lukács submits that the Agency explained in Decision No. 16-C-A-2013 (*Lukács v. Porter*) that what determines liability for delay is not the cause of the delay, but rather how the air carrier reacts to the delay.

[23] Mr. Lukács maintains that the effect of Existing Tariff Rules 3.4 and 15 is to relieve Porter from virtually every liability in the case of delay and/or failure to operate on schedule, regardless of whether Porter and its servants and agents have taken all reasonable measures necessary to avoid the delay. He contends that the impugned provisions effectively limit Porter's liability in the case of delay to providing passengers, at Porter's sole discretion, a credit that is valid for one year or otherwise a refund of the fare paid by the passengers.

[24] Mr. Lukács argues that Existing Tariff Rules 3.4 and 15 are provisions tending to relieve Porter from the liability set out in Article 19 of the Montreal Convention and/or to fix a lower limit of liability than what is set out in that Convention. He submits that Existing Tariff Rules 3.4 and 15 are null and void, under Article 26 of the Montreal Convention, and are therefore unreasonable and ought to be disallowed.

Analysis and findings

[25] The Agency finds that Existing Tariff Rules 3.4 and 15 relieve Porter from virtually all liability in the case of delay and/or failure to operate on schedule, regardless of whether Porter and its servants and agents have taken all reasonable measures necessary to avoid the delay. The Agency indicated in Decision No. 16-C-A-2013 that it is how the air carrier reacts to the delay that will determine the liability, and not who caused the delay. As such, the Agency finds that these Rules are inconsistent with Article 19 of the Montreal Convention, are null and void pursuant to Article 26 of that Convention, and are therefore unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations).

Position of Mr. Lukács – Concomitant obligation of air carriers to reprotect passengers

[26] Mr. Lukács points out that in Decision No. 250-C-A-2012 (*Lukács v. Air Canada*), the Agency held that:

[25] It is clear that Article 19 of the Convention imposes on a carrier liability for damage occasioned by delay in the carriage of, amongst other matters, passengers, but a carrier will not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or it was impossible for them to take such measures. As the Agency stated in the Show Cause Decision, with a presumption of liability for delay against a carrier,

there is a concomitant obligation for a carrier to mitigate such liability and address the damage which has or may be suffered by a passenger as a result of delay. [...] **167**

[27] Mr. Lukács cites certain court cases to support his position.

[28] Mr. Lukács argues that a carrier cannot avoid liability under Article 19 of the Montreal Convention by merely stating that its flights were fully booked. He maintains that, instead, the carrier must take steps to mitigate the damage suffered by passengers as a result of the delay, and must attempt to secure seats on other carriers.

Analysis and findings

[29] The Agency finds that when a flight delay occurs, Article 19 of the Montreal Convention imposes an obligation on the carrier to take the necessary steps to mitigate the damage suffered by passengers because of the delay, including the arranging of alternative air transportation. As such, the Agency finds that the absence of this obligation in Existing Tariff Rules 3.4 and 15 renders them inconsistent with Article 19 of the Montreal Convention, null and void pursuant to Article 26 of the Montreal Convention, and therefore unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations).

Position of Mr. Lukács – Passengers are entitled to a refund if the carrier is unable to transport them within a reasonable period of time

[30] Mr. Lukács points out that in Decision No. 28-A-2004, the Agency recognized the fundamental right of passengers to be refunded for the unused portions of their tickets if the carrier is unable to provide transportation on its services or on the services of other carrier(s) within a reasonable period of time. He also points out that in that Decision, the Agency substituted Air Transat's International Tariff Rule 6.3(d) with the following provision:

> 6.3(d) If the Carrier is unable to provide reasonable alternative transportation on its services or on the services of other carrier(s) within a reasonable period of time, then it will refund the unused ticket or portions thereof.

[31] Mr. Lukács submits that passengers have a fundamental right to a refund of their fares if the carrier is unable to transport them for any reason that is outside the passengers' control. Mr. Lukács adds that, in particular, the carrier cannot keep the fare paid by passengers and refuse to provide a refund on the basis that its inability to provide transportation was due to certain events.

[32] Mr. Lukács points out that in Decision No. 344-C-A-2013 (*Lukács v. Porter*), the Agency considered Porter's proposed Domestic Tariff Rule 16(f), and reached the same conclusion as in Decision No. 28-A-2004. He asserts that the same conclusion is applicable to Existing Tariff Rules 3.4 and 15, namely, that they are unreasonable, because they purport to allow Porter to refuse to refund fares paid for flights that were cancelled.

Analysis and findings

[33] The Agency finds that as they allow Porter to refuse the tendering of refunds when a flight is cancelled for reasons outside the passenger's control, Existing Tariff Rules 3.4 and 15 are unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations). The Agency finds that the Rules fail to strike a balance between the passengers' rights to be subject to reasonable terms and conditions of carriage and Porter's statutory, commercial and operational obligations.

Position of Mr. Lukács – The choice with respect to refund lies with the passenger

[34] Mr. Lukács refers to Decision No. LET-C-A-80-2011 (*Lukács v. Air Canada*), where the Agency expressed the preliminary opinion that it is unreasonable for a carrier to retain the choice between reprotecting passengers and providing a refund, and that the choice ought to lie with the passengers. He points out that in Decision No. 250-C-A-2012, the Agency affirmed this finding, and stated that:

> [123] [...] the Agency finds that Tariff Rule 91(B)(3), as currently drafted, is unreasonable for failing to give the passenger sole discretion to choose to obtain a refund.
>
> [124] The Agency also determines that Air Canada's proposal to leave the choice of option with the passenger is reasonable.

[35] Mr. Lukács argues that the choice of whether to obtain a refund or be reprotected ought to lie solely with the passenger, and any provision purporting to allow the carrier to retain that choice is unreasonable. He therefore concludes that Existing Tariff Rules 3.4 and 15 are unreasonable as they fail to give the passenger sole discretion to choose to obtain a refund.

Analysis and findings

[36] The Agency finds that the absence of a provision in Existing Tariff Rules 3.4 and 15 providing the passenger with the sole discretion to determine whether a refund will be tendered or reprotection occurs, renders those Rules unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations). The Agency therefore finds that these Rules fail to strike a balance between the passengers' rights to be subject to reasonable terms and conditions of carriage and Porter's statutory, commercial and operational obligations.

Position of Mr. Lukács – In certain circumstances, passengers are entitled to transportation to their point of origin without a charge in addition to a full refund

[37] Mr. Lukács refers to Decision No. LET-C-A-80-2011, where the Agency held that:

> [104] [...] As Mr. Lukács submits, payment of a partial refund may force a passenger to absorb some of the costs directly associated with their delayed travel. The Agency accepts Mr. Lukács' submission that the actual costs, or damages, incurred by a passenger may exceed the mere refund of the unused ticket.
>
> [105] Accordingly, the Agency is of the preliminary opinion that the part of Tariff Rule 91(B) that allows for a refund of the unused portion of the ticket only is unreasonable. Air Canada has not demonstrated why, given its commercial and operational obligations, it cannot refund the entire

ticket cost. Furthermore, Air Canada has not addressed the question of returning a passenger to their point of origin, within a reasonable time and at no extra cost, in cases where delay or cancellation occurs at a connecting point during travel, with the result that a passenger's travel no longer serves the passenger's purpose. As Mr. Lukács argues, many situations can be envisioned in which a passenger could be forced to absorb the cost of a flight that does not meet their needs, nor fulfill their purpose of travel, and does not coincide with the transportation for which the passenger contracted. **169**

[38] Mr. Lukács maintains that in Decision No. 250-C-A-2012, the Agency affirmed these preliminary findings. He also notes that Air Canada, Air Transat, Sunwing and WestJet have all incorporated provisions in their tariffs that give effect to these findings. He submits that Porter will suffer no competitive disadvantage by doing the same.

[39] Mr. Lukács asserts that Existing Tariff Rules 3.4 and 15 are unreasonable in that they fail to address the question of returning a passenger to their point of origin, within a reasonable time and at no cost, in cases where delay or cancellation occurs at a connecting point during travel, with the result that a passenger's travel no longer serves the passenger's purpose. He also asserts that these Rules fail to provide for a refund of the full fare in such situations.

Analysis and findings

[40] The Agency finds that Existing Tariff Rules 3.4 and 15 are unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations) because they do not provide for the return of a passenger to their point of origin, within a reasonable time and at no cost, when a delay or cancellation occurs at a connecting point during travel, with the result that a passenger's travel no longer serves the passenger's purpose. The Agency finds that the absence of such a provision in Existing Tariff Rules 3.4 and 15 fails to strike a balance between the passengers' rights to be subject to reasonable terms and conditions of carriage and Porter's statutory, commercial and operational obligations.

Position of Mr. Lukács – Existing Tariff Rule 3.4: "without notice to any passengers affected thereby"

[41] Mr.Lukácspoints out that Existing Tariff Rule 3.4, which he also submits is unreasonable because it purports to deprive passengers of the right to notice of schedule changes affecting their travel, states that:

> The Carrier reserves the right to cancel or change the planned departure, schedule, route, aircraft or stopping places of any flight for which fares in respect of a International Service have been paid, at any time and from time to time, for any reason, **without notice to any passengers affected thereby** and, in connection therewith, the Carrier shall not be liable to any passenger in respect of such cancellation or change, whether or not resulting from an Event of Force Majeure [...] [Emphasis added by Mr. Lukács]

[42] Mr. Lukács points out that in Decision No. LET-A-112-2003, the Agency held, in relation to Air Transat's tariff, that:

> The Agency notes that Rule 5.2(b) of the tariff is devoid of any provision relating to the notification of passengers in the event of a flight delay. As such, the Agency is of the view that this provision may not be just and reasonable. The Agency is of the opinion that **Air Transat should undertake to notify passengers of all schedule irregularities, not just flight advancements**. [Emphasis added by Mr. Lukács]

[43] Mr. Lukács submits that the right of passengers to be informed about delays and schedule changes was more recently recognized by the Agency in Decision No. 16-C-A-2013, in the context of Porter's International Tariff.

[44] Mr. Lukács maintains that in the absence of notice about schedule changes, passengers are at risk of losing the entire benefit of the itinerary for which they have paid. He asserts that it is unreasonable to deprive passengers of notice about schedule changes, and that any provision exempting Porter from the obligation to notify passengers ought to be disallowed as unreasonable.

Analysis and findings

[45] The Agency finds that the absence of a provision in Existing Tariff Rule 3.4 requiring Porter to provide notice to passengers regarding schedule changes renders that Rule unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations). The Agency therefore finds that Existing Tariff Rule 3.4 fails to strike a balance between the passengers' rights to be subject to reasonable terms and conditions of carriage and Porter's statutory, commercial and operational obligations.

Position of Mr. Lukács – Lack of clarity of Existing Tariff Rules 3.4 and 15

[46] Mr. Lukács contends that Existing Tariff Rule 18, which was established in its existing form following Decision No. 16-C-A-2013, imposes liability upon Porter for damage occasioned by delay that reflects Porter's obligations under Article 19 of the Montreal Convention. He adds that, at the same time, Existing Tariff Rules 3.4 and 15 purport to relieve Porter from virtually every liability in the case of delay and/or failure to operate on schedule, regardless of whether Porter demonstrated the facts necessary to invoke the defense set out in Existing Tariff Rule 18.1(i) (which reflects Article 19 of the Montreal Convention). Mr. Lukács concludes that Existing Tariff Rules 3.4 and 15 contradict Existing Tariff Rule 18 and, as such, they render Porter's Tariff unclear, contrary to section 122 of the ATR (Air Transportation Regulations).

Analysis and findings

[47] The Agency finds that Existing Tariff Rules 3.4 and 15 are unclear, contrary to section 122 of the ATR (Air Transportation Regulations) given the contradiction between those Rules and Existing Tariff Rule 18(c). Given that contradiction, the Agency finds that Existing Tariff Rules 3.4 and 15 are stated in such a way as to create reasonable doubt, ambiguity or uncertain meaning as to the Rules' application.

Issue 4: Is Existing Tariff Rule 18(c) unreasonable within the meaning

of subsection 111(1) of the ATR (Air Transportation Regulations)? **171**

Position of Mr. Lukács

[48] Mr. Lukács contends that while in the case of flight delays failing to notify passengers usually causes only inconvenience, in the case of advancement of flight schedules, the failure of Porter to inform passengers about the schedule change will likely result in passengers not being able to travel at all, because they miss the check-in cut-off times. He argues that making "reasonable efforts" sets the bar too low for Porter in the case of flight advancements, and points out that in Decision No. LET-A-112-2003, the Agency stated, under the heading "Passenger Notification", that:

> The Agency is of the opinion that Air Transat should undertake to notify passengers of all schedule irregularities, not just flight advancements.

[49] Mr. Lukács points out that, subsequently, in Decision No. 344-C-A-2013, the Agency held that:

> [64] [...] The absence of a tariff provision that imposes on Porter a requirement to "undertake" to inform passengers of flight advancements would severely limit the recourses available to passengers affected by those advancements, and would certainly be disadvantageous.
>
> [65] The Agency is of the opinion that the commitment to make "reasonable efforts" to inform passengers, insofar as such commitment pertains to flight advancements, is unreasonable. [...]

[50] Mr. Lukács concludes that Existing Tariff Rule 18(c) ought to be substituted with wording that imposes on Porter the requirement to "undertake" to inform passengers of flight advancements.

Analysis and findings

[51] The Agency agrees with Mr. Lukács' submission. As the Agency indicated in Decision No. 344-C-A-2013, the absence of a provision in Existing Tariff Rule 18(c) requiring Porter to undertake to advise passengers of a flight advancement renders that Rule unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations). The Agency finds that Existing Tariff Rule 18(c) fails to strike a balance between the passengers' rights to be subject to reasonable terms and conditions of carriage and Porter's statutory, commercial and operational obligations.

Issue 5: Is Existing Tariff Rule 20 unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations) and/or unclear, contrary to section 122 of the ATR (Air Transportation Regulations)?

[52] Mr. Lukács challenges the reasonableness and clarity of Existing Tariff Rule 20, as a whole, because it is, according to him, inconsistent with the legal principles set out by the Agency in Decision No. 666-C-A-2001, Decision No. 204-C-A-2013 (*Lukács v. Air Canada*) and Decision No. 227-C-A-2013 (*Lukács v. WestJet*).

Reasonableness

Position of Mr. Lukács – "reasonable efforts" and "same comparable, or lower booking code" 172

[53] Mr. Lukács asserts that it is a common practice of air carriers to reprotect passengers who are denied boarding on booking codes higher than their original codes, if doing so results in mitigation of the passengers' delay. He also asserts that reprotecting passengers, on a higher booking class if necessary, is the normal and ordinary consequence of overselling a flight, and is consistent with the carrier's concomitant obligation under Article 19 of the Montreal Convention to mitigate the delay of passengers.

Analysis and findings

[54] The Agency finds that the phrase "same comparable, or lower booking code" is unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations) because such phrase is inconsistent with the obligation under Article 19 of the Montreal Convention to mitigate the delay of passengers, including reprotecting those passengers on booking codes higher than their original reservations.

Position of Mr. Lukács – No refund or alternate transportation for flights originating in the United States

[55] Mr. Lukács notes that Existing Tariff Rule 20 provides, in part, that:

> If a passenger has been denied a reserved seat in case of an oversold flight on Porter Airlines:
>
> [...]
>
> (b) where the flight originates in the United States, the Carrier will provide denied boarding compensation as set forth in this Rule 20 below.

[56] Mr. Lukács submits that a literal reading of this provision suggests that with respect to flights originating in the United States, Porter provides only monetary compensation, but has no obligation to provide a refund or to arrange for alternate transportation.

[57] Mr. Lukács contends that while this is likely not the intended meaning of Existing Tariff Rule 20, it is obvious that the Rule is either unclear or unreasonable with respect to the rights of passengers departing from the United States.

Analysis and findings

[58] The Agency finds that the absence of a provision from Existing Tariff Rule 20 requiring Porter to also provide a refund or arrange for alternate transportation for flights originating in the United States renders that Rule unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations). In this regard, the Agency finds that Existing Tariff Rule 20 fails to strike a balance between the passengers' rights to be subject to reasonable terms and conditions of carriage and Porter's statutory, commercial and operational obligations.

Position of Mr. Lukács – No denied boarding compensation for passengers departing

from Canada

[59] Mr. Lukács submits that Existing Tariff Rule 20 contains no provisions requiring Porter to pay compensation to passengers departing from Canada who are denied boarding, and that, instead, the Rule is confined to the reprotection of these passengers. He argues that reprotection of passengers is not a form of compensation, but rather the belated fulfillment of the contract of carriage.

[60] Mr. Lukács refers to Decision No. 666-C-A-2001, where the Agency considered the principles governing the amount of denied boarding compensation payable to passengers, and held, in part, that:

> [...] any passenger who is denied boarding is entitled to compensation; evidence of specific damages suffered need not be provided.

[61] Mr. Lukács contends that compensation of victims of denied boarding has two components:

1. reimbursement for out-of-pocket expenses, including refunds; and,
2. denied boarding compensation (lump sum, no evidence of specific damage is required).

[62] Mr. Lukács maintains that this principle has been recognized, for example, in Decision No. 268-C-A-2007 (*Kirkham v. Air Canada*), where the Agency ordered Air Canada to both reimburse the passenger for his out-of-pocket expenses and pay the passenger denied boarding compensation.

[63] Mr. Lukács points out that in Decision No. 227-C-A-2013, the Agency considered the lack of tariff provisions requiring the payment of denied boarding compensation in WestJet's International Tariff, and stated that:

> [21] [...] any passenger who is denied boarding is entitled to compensation. [...] The Agency finds, therefore, that Existing Tariff Rule 110(E) is unreasonable.
>
> [...]
>
> [39] [...] The failure to establish conditions governing denied boarding compensation for flights to and from Canada is contrary to Decision No. 666-C-A-2001. Therefore, the Agency finds that if Proposed Tariff Rule 110(E) were to be filed with the Agency, it would be considered unreasonable.

[64] Mr. Lukács maintains that Existing Tariff Rule 20 is unreasonable because it fails to impose any obligation of paying denied boarding compensation to passengers, contrary to the Agency's findings in Decision No. 666-C-A-2001. Mr. Lukács asserts that the Rule ought to be substituted with a provision that implements the denied boarding compensation amounts of the United States regime, so that the same amounts will apply to all international flights of Porter, regardless of the point of origin.

Analysis and findings

[65] The Agency finds that Existing Tariff Rule 20 is unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations) because the Rule does not require Porter to tender denied boarding compensation to passengers departing from Canada, contrary to the Agency's findings in Decision No. 666-C-A-2001. The Agency therefore finds that Existing Tariff Rule 20 fails to strike a balance between the passengers' rights to be subject to reasonable terms and conditions

of carriage and Porter's statutory, commercial and operational obligations. **174**

Position of Mr. Lukács – Substitution of aircraft with one of a smaller capacity

[66] According to Mr. Lukács, Existing Tariff Rule 20 relieves Porter from the obligation to pay denied boarding compensation to passengers who are denied boarding because "a smaller capacity aircraft was substituted for safety or operational reasons." He notes that a virtually identical provision was recently considered in Decision No. 204-C-A-2013.

[67] Mr. Lukács points out that in Decision No. 204-C-A-2013, the Agency concluded that, in the absence of specific language that established context or qualified Air Canada's exemption from paying denied boarding compensation, the applicable rule was unreasonable.

[68] Mr. Lukács submits that this conclusion is equally applicable to Existing Tariff Rule 20, and therefore the impugned provision is unreasonable.

Analysis and findings

[69] The Agency finds that the finding in Decision No. 204-C-A-2013 relating to the payment of denied boarding compensation when substitution to a smaller aircraft occurs is equally applicable to this matter. The absence of specific language that establishes context or qualifies Porter's exemption from paying denied boarding compensation renders Existing Tariff Rule 20 unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations) as it fails to strike a balance between the passengers' rights to be subject to reasonable terms and conditions of carriage and Porter's statutory, commercial and operational obligations.

Position of Mr. Lukács – Cash v. voucher

[70] Mr. Lukács points out that Existing Tariff Rule 20 provides, under the heading "Method of Payment", that:

> Except as provided below, the Carrier must give each passenger who qualifies for denied boarding compensation a payment by cheque or draft for the amount specified above, on the day and place the involuntary denied boarding occurs. However, if the Carrier arranges alternate transportation for the passenger's convenience that departs before the payment can be made, the payment will be sent to the passenger within 24 hours. Carrier may offer free or discounted transportation vouchers in place of cash or cheque payment. The passenger may, however, insist on the cash/cheque payment or refuse all compensation and bring private legal action.

[71] Mr. Lukács submits that in Decision No. LET-C-A-83-2011 (*Lukács v. WestJet*), the Agency stated that any compensation paid in accordance with the tariff is to be paid in the form of cash, cheque, credit to a passenger's credit card, or any other form acceptable to the passenger. He adds that this finding was reiterated by the Agency in Decision No. 227-C-A-2013 in the specific context of denied boarding compensation.

[72] Mr. Lukács argues that the acceptance of other forms of denied boarding compensation must be an

informed decision, based on the passenger being fully informed of the restrictions that accepting an alternative form of compensation may entail. Mr. Lukács states that this principle is common to both the American and the European denied boarding compensation regimes. **175**

[73] Mr. Lukács contends that although, in theory, receiving a travel voucher for an amount equal to double or triple the cash denied boarding compensation may mutually benefit Porter and its passengers, in practice, the vouchers tend to be nearly worthless due to the many restrictions imposed on their use, and benefit only Porter. He states that one of these restrictions is that vouchers seem to be valid only for Porter's flights, and that is a significant restriction given that Porter does not have an extensive network.

[74] Mr. Lukács asserts that the vast majority of passengers are not aware of the many restrictions associated with vouchers, and that it is very difficult to verify whether passengers have been adequately informed about their rights by the carrier. He maintains that even if passengers are made aware of all the restrictions and limitations of Porter's travel vouchers, they cannot make an informed decision at the airport, in a matter of minutes, as to whether to seek cash compensation or accept a travel voucher instead.

[75] Mr. Lukács points out that in Decision No. 252-C-A-2012 (*Lukács v. WestJet*), the Agency recognized the importance of passengers having a reasonable opportunity to fully assess their options.

[76] Mr. Lukács submits that in this case, acceptance of compensation by way of travel vouchers may have very significant disadvantages for passengers, and there is a very serious concern about passengers being deprived of the ability to make an informed decision, based on the consideration of all the pros and cons, about the form of compensation that they wish to receive.

[77] Mr. Lukács maintains that even if the Agency were to find that paying compensation by way of travel vouchers, with the written consent of the passenger, is a reasonable alternative to cash compensation, passengers ought to be able to change their minds within a reasonable amount of time, and exchange their travel vouchers with cash compensation.

[78] Mr. Lukács refers to Decision No. 342-C-A-2013 (*Lukács v. Air Canada*), where the Agency considered the issue of appropriate method of payment of denied boarding compensation. He states that in that Decision, the Agency imposed the following restrictions on Air Canada offering denied boarding compensation by way of travel vouchers:

- (R1) carrier must inform passengers of the amount of cash compensation that would be due, and that the passenger may decline travel vouchers, and receive cash or equivalent;
- (R2) carrier must fully disclose all material restrictions before the passenger decides to give up the cash or equivalent payment in exchange for a travel voucher;
- (R3) carrier must obtain the signed agreement of the passenger, confirming that the passenger was provided with the aforementioned information, prior to providing travel vouchers in lieu of compensation;
- (R4) the amount of the travel voucher must be not less than 300% of the amount of cash compensation that would be due;
- (R5) passengers are entitled to exchange the travel vouchers to cash at the rate of $1 in cash being equivalent to $3 in travel vouchers within one (1) month.

[79] Mr. Lukács submits that these restrictions are reasonable, and strike a balance between the rights of passengers to be subject to reasonable terms and conditions of carriage and the carrier's statutory, commercial and operational obligations. He also submits that if Porter chooses to offer denied boarding compensation by way of travel vouchers at all, then Porter ought also be subject to the aforementioned restrictions.

Analysis and findings

[80] The Agency finds that Existing Tariff Rule 20 is unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations) because of the absence of provisions that provide for the following:

- denied boarding compensation must be tendered in the form of cash, cheque, credit to a passenger's credit card, or any other form acceptable to the passenger;
- the passenger must be fully informed of the restrictions that may apply to alternative forms of compensation;
- in the event that a passenger opts for travel vouchers as compensation, the passenger must be able to change their mind within a reasonable amount of time, and exchange their vouchers for cash;
- if the carrier offers travel vouchers, the restrictions set out in Decision No. 342-C-A-2013 must apply.

[81] The Agency finds that, in the absence of the above provisions, Existing Tariff Rule 20 fails to strike a balance between the passengers' rights to be subject to reasonable terms and conditions of carriage and Porter's statutory, commercial and operational obligations.

Lack of clarity

Position of Mr. Lukács – Where does the choice lie?

[82] Mr. Lukács points out that in Decision No. LET-A-82-2009, the Agency considered a similar provision in Air Canada's tariff and raised serious concerns about its clarity. He also points out that Air Canada subsequently amended its tariffs to clarify that it retained the choice between a refund and alternate transportation. Mr. Lukács maintains that in Decision No. 479-A-2009, the Agency accepted this amendment for the limited purpose of the Agency's concerns about clarity; however, subsequently, in Decision No. LET-C-A-80-2011, the Agency stated that:

> [108] [...] By retaining some discretion over the selection of the choice of options from its Tariff provision, Air Canada may be limiting or avoiding the actual damage incurred by a passenger as a result of delay. The Agency also notes that with respect to this Issue, Air Canada has not demonstrated to the satisfaction of the Agency why, from an operational and commercial perspective, the choice of option could not lie exclusively with the passenger.

[83] Mr. Lukács states that following this finding, Air Canada amended its tariffs to ensure that the choice lies exclusively with the passenger.

[84] Mr. Lukács asserts that Existing Tariff Rule 20 is unclear in its current form because it fails to specify with whom the choice lies between a refund and alternate transportation. He maintains that the choice between a refund and alternate transportation ought to lie exclusively with the passenger. 177

Analysis and findings

[85] The Agency finds that Existing Tariff Rule 20 is unclear because it fails to specify with whom the choice lies between a refund and alternate transportation. The Agency finds that the choice between a refund and alternate transportation ought to lie exclusively with the passenger. The Agency therefore finds that Existing Tariff Rule 20 is contrary to section 122 of the ATR (Air Transportation Regulations) because the Rule is stated in such a way as to create reasonable doubt, ambiguity and uncertain meaning as to the Rule's application.

Position of Mr. Lukács – "reasonable efforts" and "same comparable, or lower booking code"

[86] Mr. Lukács argues that the phrase "will make reasonable efforts" renders Existing Tariff Rule 20 unclear in that it does not impose a clear obligation upon Porter, and that "will make reasonable efforts" ought to be replaced simply with "shall". He also argues that Existing Tariff Rule 20 purports to limit Porter's obligation to secure alternate transportation on flights "in the same comparable, or lower booking code". Mr. Lukács submits that this phrase is unclear because Porter's booking codes may not be comparable to the booking codes of other air carriers, and that, more importantly, this restriction is unreasonable.

Analysis and findings

[87] The Agency finds that the phrase "will make reasonable efforts" in Existing Tariff Rule 20 is unclear in that the provision, as worded, does not impose a clear obligation on Porter. The Agency agrees with Mr. Lukács' submission that the phrase "same comparable, or lower booking code" is unclear because other carriers may not have booking codes comparable to those of Porter. The Agency finds that, given those phrases, Existing Tariff Rule 20 is contrary to section 122 of the ATR (Air Transportation Regulations) because it is stated in such a way as to create reasonable doubt, ambiguity and uncertain meaning as to the Rule's application.

Reasonableness and lack of clarity

Position of Mr. Lukács – Passenger's option

[88] Mr. Lukács notes that Existing Tariff Rule 20 provides, under the heading "Passenger's Option", that:

> Acceptance of the compensation relieves the Carrier from any further liability to the passenger caused by the failure to honour the confirmed reservation. However, the passenger may decline the payment and seek to recover damages in a court of law or in some other manner.

[89] Mr. Lukács contends that this provision is virtually identical to WestJet's Tariff Rule 110(G) in effect at that time that was considered in Decision No. 227-C-A-2013, where the Agency held, in part, that:

> [28] [...] the Agency is of the opinion that even if a payment is accepted by a passenger, that passenger can still seek to recover damages in a court of law or in some other manner [...]

[90] Mr. Lukács argues that the same conclusion is applicable to the "Passenger's Option" section of Existing Tariff Rule 20, and thus the provisions under this heading are both unclear and unreasonable.

Analysis and findings

[91] With respect to the issue of clarity, the Agency finds that the findings in Decision No. 227-C-A-2013 also apply to this matter, and that the provision at issue is unclear, contrary to section 122 of the ATR (Air Transportation Regulations), because it leaves the impression that the passenger cannot seek to recover damages in a court of law or in some other manner even if a payment is accepted by the passenger. The Agency finds that the provision at issue in Existing Tariff Rule 20 is stated in such a way as to create reasonable doubt, ambiguity and uncertain meaning as to the Rule's application.

[92] With respect to the reasonableness of the provision at issue, the Agency agrees with Mr. Lukács' submission. The Agency finds that the findings in Decision No. 227-C-A-2013 also apply to this matter, and that the provision at issue is unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations) because even if a passenger has accepted a payment, that passenger can still seek to recover damages in a court of law or in some other manner. The Agency therefore finds that the provision fails to strike a balance between the passengers' rights to be subject to reasonable terms and conditions of carriage and Porter's statutory, commercial and operational obligations.

Position of Mr. Lukács – Last sentence of "Method of Payment"

[93] Mr. Lukács notes that Existing Tariff Rule 20 provides, under the heading "Method of Payment", that:

> [...] The passenger may, however, insist on the cash/cheque payment or refuse all compensation and bring private legal action.

[94] Mr. Lukács maintains that this provision is virtually identical to WestJet's Proposed Tariff Rule 110(G) that was considered in Decision No. 227-C-A-2013, where the Agency held that:

> [44] As to the reasonableness of Proposed Tariff Rule 110(G), the Agency concurs with Mr. Lukács' submission that the Rule seems to indicate that for a person to retain a right to legal redress, that person must first reject any payment offered by WestJet, and that a similar provision was deemed to be unreasonable in Decision No. 249-C-A-2012. The Agency finds that if Proposed Tariff Rule 110(G) were to be filed with the Agency, it would also be determined to be unreasonable.

[95] Mr. Lukács submits that the same conclusion is applicable to the last sentence of the "Method of Payment" section of Existing Tariff Rule 20, and thus the impugned sentence is both unclear and unreasonable.

Analysis and findings

[96] With respect to clarity, the Agency finds that the findings in Decision No. 227-C-A-2013 also apply to this matter, and that the provision at issue is unclear, contrary to section 122 of the ATR (Air Transportation Regulations), because it leaves the impression that the availability of the option of seeking payment in a court of law is predicated on the passenger first declining payment offered by Porter. The Agency therefore finds that the provision at issue in Existing Tariff Rule 20 is stated in such a way as to create reasonable doubt, ambiguity and uncertain meaning as to the Rule's application.

[97] With respect to reasonableness, the Agency finds that the findings in Decision No. 227-C-A-2013 also apply to this matter, and that the provision at issue is unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations). The Agency therefore finds that the provision fails to strike a balance between the passengers' rights to be subject to reasonable terms and conditions of carriage and Porter's statutory, commercial and operational obligations.

PROPOSED TARIFF RULES

Issue 1: Is the definition of "Credit Shell" in Proposed Tariff Rule 1.1 unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations)?

Position of Mr. Lukács

[98] Mr. Lukács notes that stipulation (a) of the proposed definition of "Credit Shell" is that a "Credit Shell" is valid only for one year, and stipulation (c) of that definition states that a "Credit Shell" can be used only once, and the remainder of the balance is forfeited. He submits that the "Credit Shell" refers to payments made by passengers, and that, therefore, it appears that a "Credit Shell" is not a form of goodwill credit by Porter to passengers, but rather a credit for consideration received by Porter.

[99] Mr. Lukács argues that stipulations (a) and (c) purport to permit Porter to keep some or all of the consideration offered by passengers without providing any services in exchange, and that the absence of services (consideration) provided to passengers in return would result in the unjust enrichment of Porter. He maintains that the unjust enrichment of Porter provided by the "Credit Shell" fails to strike a balance between the rights of passengers and the ability of Porter to meet its statutory, commercial and operational obligations, and hence stipulations (a) and (c) of the "Credit Shell" proposed definition are unreasonable.

Analysis and findings

[100] A "Credit Shell" represents one of the alternatives available to a passenger under Proposed Tariff Rule 15 when the passenger's carriage is affected by flight overbooking, cancellation or advancement. As correctly noted by Mr. Lukács, the "Credit Shell" constitutes a remedy, and not a goodwill gesture. The Agency finds that the restrictions associated with the "Credit Shell", as set out in (a) and (c) of the definition in Proposed Tariff Rule 1.1 fail to strike a balance between the passengers' rights to be subject to reasonable terms and conditions of carriage and Porter's statutory, commercial and operational obligations. Therefore, the definition of "Credit Shell" in Proposed Tariff Rule 1.1 would be

found unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations) if filed with the Agency. **180**

Issue 2: Is Proposed Tariff Rule 15(a)(iii)(b) unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations)?

Position of Mr. Lukács

[101] Mr. Lukács asserts that Proposed Tariff Rule 15(a)(iii)(b) is overly restrictive with respect to the rights of passengers, and imposes an unreasonable and impossible burden of proof on passengers, who do not always have evidence about the cause of a schedule irregularity. He argues that the burden of proof ought to rest with the carrier, rather than the passengers, and the test ought to incorporate the principle of “all reasonable measures”.

[102] Mr. Lukács refers to Decision No. 204-C-A-2013, where the Agency considered the question of what conditions a carrier must satisfy to relieve itself from the obligation to pay denied boarding compensation in the case of aircraft substitution with one of a smaller capacity. He states that the Agency made the following key findings:

> In order to relieve itself from the obligation to pay denied boarding compensation, the carrier must demonstrate that:
>
> 1. substitution occurred for operational and safety reasons beyond its control; and,
> 2. it took all reasonable measures to avoid the substitution or that it was impossible for the carrier to take such measures.
>
> If the carrier fails to demonstrate both of these, then compensation should be due to the affected passengers.

[103] Mr. Lukács contends that in that Decision, the Agency concluded that, in the absence of specific language that establishes context or qualifies Air Canada’s exemption from paying denied boarding compensation, the Air Canada tariff provision at issue was unreasonable. He argues that the same principles are applicable to the obligation to refund passengers for the fare and charges paid for segments already travelled that no longer serve the purpose for which the passenger undertook the travel. Mr. Lukács maintains that Porter ought to be able to relieve itself from this obligation only if it demonstrates that:

- (C1) the Schedule Irregularity occurred for reasons beyond its control, and
- (C2) it took all reasonable measures to avoid the Schedule Irregularity or that it was impossible for the carrier to take such measures.

[104] Mr. Lukács concludes that based on the Agency’s findings in Decision No. 204-C-A-2013, Proposed Tariff Rule 15(a)(iii)(b) is unreasonable without imposing on Porter the requirement to demonstrate (C1) and (C2).

Analysis and findings

[105] The Agency agrees with Mr. Lukács' submission respecting this matter. Particularly, the Agency agrees that the principles set out in Decision No. 204-C-A-2013 (respecting the matter of the conditions that a carrier must satisfy to relieve itself from the obligation of tendering denied boarding compensation in the event of substitution of aircraft) also apply to refunding passengers for the fare and charges paid for segments already travelled that no longer serve a purpose.

[106] The Agency finds that Proposed Tariff Rule 15(a)(iii)(b) fails to strike a balance between the passengers' rights to be subject to reasonable terms and conditions of carriage and Porter's statutory, commercial and operational obligations. Therefore, the Agency finds that Proposed Tariff Rule 15(a)(iii)(b) would be found unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations) if filed with the Agency.

Issue 3: Is Proposed Tariff Rule 15(a)(iv) unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations)?

Position of Mr. Lukács

[107] Mr. Lukács points out that in Decision No. LET-C-A-83-2011, the Agency stated that any compensation paid in accordance with the tariff is to be paid in the form of cash, cheque, credit to a passenger's credit card, or any other form acceptable to the passenger. He adds that this finding was reiterated by the Agency in Decision No. 227-C-A-2013 in the specific context of denied boarding. Mr. Lukács maintains that the same conclusion is applicable with respect to the refund of fares and charges in the case of flight cancellation or advancement: passengers who paid cash or equivalent are entitled to be refunded in the same manner.

[108] Mr. Lukács contends that the "Credit Shell" is a highly restricted instrument: it is valid only for one year from the original ticket's issuance date and it can be used only once; any balance remaining after its use is forfeited by the passenger. He asserts that these restrictions have a high potential of unjust enrichment for Porter, without providing any benefit to passengers, and that allowing Porter to offer passengers a "Credit Shell" instead of a refund carries the same risks and disadvantages for passengers as offering travel vouchers in lieu of denied boarding compensation.

[109] Mr. Lukács submits that a future credit is not a proper form of refunding passengers money paid for services that were not provided, and that Proposed Tariff Rule 15(a)(iv) is unreasonable. He argues that the Agency should impose the same restrictions on Porter providing a "Credit Shell" in lieu of a refund as the Agency did with respect to travel vouchers in lieu of denied boarding compensation in Decision No. 342-C-A-2013. Mr. Lukács proposes the following restrictions:

- (R1) carrier must inform passengers of the amount of cash refund that would be due, and the passenger may decline travel vouchers, and receive cash or equivalent;
- (R2) carrier must fully disclose all material restrictions before the passenger decides to give up the cash or equivalent payment in exchange for a travel voucher;

- (R3) carrier must obtain the signed agreement of the passenger, confirming that the passenger was provided with the aforementioned information, prior to providing travel vouchers in lieu of cash refund; **182**
- (R4) the amount of the travel voucher must be not less than 300% of the amount of cash refund that would be due;
- (R5) passengers are entitled to exchange the travel vouchers to cash at the rate of $1 in cash being equivalent to $3 in travel vouchers within one (1) month.

Analysis and findings

[110] The Agency finds that in the absence of the safeguards set out in Decision No. 342-C-A-2013 associated with the tendering of travel vouchers when denied boarding occurs, Proposed Tariff Rule 15(a)(iv) fails to strike a balance between the passengers' rights to be subject to reasonable terms and conditions of carriage and Porter's statutory, commercial and operational obligations. Therefore, the Agency finds that Proposed Tariff Rule 15(a)(iv) would be found unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations) if filed with the Agency.

Issue 4: Is Proposed Tariff Rule 15(a) unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations) and/or unclear, contrary to section 122 of the ATR (Air Transportation Regulations)?

Positions of the parties

Porter

[111] Porter contends that Proposed Tariff Rule 15 resolves the inconsistency found between Existing Tariff Rules 3.4 and 15 and Existing Tariff Rule 18, by removing the exclusionary language in Existing Tariff Rule 15, and with the revision in Proposed Tariff Rule 15(a), which expressly indicates that passengers affected by schedule irregularities may be entitled to reimbursement for damages resulting from delays under Tariff Rule 18. Porter notes that in Decision No. 248-C-A-2012 (*Lukács v. Air Transat*), Decision No. 249-C-A-2012 (*Lukács v. WestJet*) and Decision No. 250-C-A-2012 (*Lukács v. Air Canada*), the Agency determined that situations of overbooking and cancellation that are within the carrier's control constitute delays entitling passengers to relief, and such relief may, in certain circumstances, also apply where overbooking and cancellation are not within the carrier's control. Porter submits that by expressly indicating that relief under Proposed Tariff Rule 18 may be available to passengers affected by schedule irregularities, Proposed Tariff Rule 15 harmonizes the two Rules.

[112] Porter submits that, similarly, Proposed Tariff Rule 15 omits the language in Existing Tariff Rule 3.4 indicating that Porter is not required to give notice of schedule irregularities to passengers, consistent with the requirement in Tariff Rule 18 that Porter make efforts to notify passengers in advance of any schedule changes.

[113] Porter maintains that consistent with the circumstance-focussed approach endorsed by the

Agency in Decision No. 248-C-A-2012, Decision No. 249-C-A-2012 and Decision No. 250-C-A-2012, **183** Proposed Tariff Rule 15 sets out those remedies which are potentially available in cases of schedule irregularities – including alternative transport within a reasonable time and at no additional cost, refund, credit and remedies under the principles of Article 19 of the Montreal Convention.

[114] Porter contends that Proposed Tariff Rule 15 clearly states that Porter (a) "will consider, to the extent they are known to the Carrier, the transportation needs of the passenger and/or other relevant circumstances of the passenger affected by the Schedule Irregularity", (b) will not limit its consideration of alternative transportation to its own services, and (c) will "make a good faith effort to fairly recognize, and appropriately mitigate, the impact of the Schedule Irregularity upon the passenger".

[115] Porter argues that Proposed Tariff Rule 15 clearly sets forth the range of potential remedies arising from scheduling irregularities, and indicates that Porter will, acting in good faith and in light of all relevant circumstances, offer a remedy or remedies designed to "appropriately mitigate the impact of the Schedule Irregularity", including remedies available under Proposed Tariff Rule 18.

[116] Porter submits that Proposed Tariff Rule 18 clearly indicates that it is the passenger who bears "the choice" among the remedies offered, including as between a refund (Proposed Tariff Rule 15(a)(iii)) and a credit (Proposed Tariff Rule 15(a)(iv)).

[117] Porter also submits that its Proposed Tariff Rule 15(a) is similar to that of Air Transat in all material respects, and thus similarly meets the requirement of clarity.

Mr. Lukács

[118] Mr. Lukács points out that Proposed Tariff Rule 15(a) requires Porter to offer passengers the choice between one or more of five remedial options, including:

> v. a monetary payment to the passenger for any amounts to which the passenger may be entitled pursuant to Rule 18 of this Tariff.

[119] Mr. Lukács contends that this suggests that Porter views the monetary payment pursuant to Proposed Tariff Rule 18 as an alternative to reprotecting passengers, instead of viewing the two as working together, in tandem.

[120] Mr. Lukács submits that it is not clear whether Proposed Tariff Rule 15(a) is simply unclear, or if Porter intended it to be read as monetary compensation under Proposed Tariff Rule 15(a)(v) being an alternative to reprotection. He suggests that the latter interpretation is reinforced by Porter's submission, which refers to three options, at the passenger's choice:

i. alternative transportation to their destination within a reasonable time at no additional charge; or
ii. where the flight is interrupted at a connection point, return to the point of origin and a refund or credit for unused segments or the full ticket in the indicated circumstances; and
iii. compensation for resulting damages under Rule 18, which incorporates the principles of Article 19 of the Montreal Convention per Decision No. 16-C-A-2013.

[121] Mr. Lukács argues that the presence of (v) renders Proposed Tariff Rule 15(a) at the very least unclear, but possibly also unreasonable, depending on its intended meaning.

[122] Mr. Lukács asserts that Proposed Tariff Rule 15 ought to clearly state that passengers are entitled to monetary payment pursuant to Proposed Tariff Rule 18 regardless of how they choose to be reprotected (transportation to destination, transportation to point of origin, or refund).

Analysis and findings

[123] As noted by Mr. Lukács, the monetary payment available to passengers under Proposed Tariff Rule 15(a) represents one of several options made available by Porter to passengers affected by flight overbooking, delay or cancellation. Given the wording of that Rule, i.e., “the Carrier will offer the passenger the choice of accepting one or more of the following remedial choices”, it is not entirely clear whether a monetary payment constitutes a sole remedy. The Agency finds that Proposed Tariff Rule 15(a) is stated in such a way as to create reasonable doubt, ambiguity or uncertain meaning as to the Rule’s application and, as such, the application of that Rule is unclear.

[124] With respect to the reasonableness of Proposed Tariff Rule 15(a), the Agency finds that the Rule should clearly state that passengers are entitled to monetary payment, under Tariff Rule 18, irrespective of how the passengers choose to be reprotected. Given that Proposed Tariff Rule 15(a) does not do so, the Agency finds that it fails to strike a balance between the passengers’ rights to be subject to reasonable terms and conditions of carriage and Porter’s statutory, commercial and operational obligations.

[125] Therefore, the Agency finds that Proposed Tariff Rule 15(a) would be found unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations) and unclear, contrary to section 122 of the ATR (Air Transportation Regulations), if filed with the Agency.

Issue 5: Is Proposed Tariff Rule 15(c) unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations) and/or unclear, contrary to section 122 of the ATR (Air Transportation Regulations)?

Positions of the parties

Porter

[126] Porter argues that Proposed Tariff Rule 15(c) is consistent with the rule filed by WestJet as a result of Decision No. 249-C-A-2012.

[127] Porter maintains that Proposed Tariff Rule 15(c) does not purport to exclude any liability on Porter’s part, but rather confirms that the intention of that Rule is not to create an absolute liability regime; that is, there may be instances where schedule irregularities resulting from matters beyond the carrier’s control do not necessarily result in the carrier’s liability under the principles of Article 19 of the Montreal Convention. Porter notes that in Decision No. 249-C-A-2012, the Agency stated that:

> [93] Whether a carrier will be held liable under Article 19 of the Convention will depend on whether it or its servants and agents took all measures that could reasonably be required to avoid damage

occasioned by delay, or that it was impossible for them to take such measures. Rather than setting out broad exclusions from liability such as acts of nature or of third parties, a case by case approach is warranted which looks, for example, at the predictability of an event in determining whether the carrier is exonerated under Article 19 of the Convention.

[128] Porter points out that the Agency ultimately accepted a tariff filing by WestJet upon its clarification that it was not intended that WestJet be liable for acts of nature or third parties “in all cases”, which clarification is reflected in Proposed Tariff Rule 15(c).

Mr. Lukács

[129] Mr. Lukács submits that Proposed Tariff Rule 15(c) creates the impression that Porter does not have to reprotect or refund passengers for the unused portions of their tickets if Porter can demonstrate the “all reasonable measures” defense. He states that if this was not Porter’s intent, then Proposed Tariff Rule 15(c) is simply unclear, and that if it was Porter’s intent, then Proposed Tariff Rule 15(c) is unreasonable, and inconsistent with the Agency’s findings in Decision No. 344-C-A-2013.

[130] Mr. Lukács also submits that Proposed Tariff Rule 15(c) confuses two different rights of passengers who are affected by a flight cancellation, denied boarding or flight advancement:

1. the right for damages occasioned by the cancellation, denied boarding, or flight advancement (Proposed Tariff Rule 18); and,
2. the right for reprotection or refund of unused portion (Proposed Tariff Rules 15(a)(i) to (iii)).

[131] Mr. Lukács argues that the difference between the nature of these two obligations is very substantial. He maintains that a carrier can relieve itself from the obligation under right 1 above by demonstrating that it and its agents and employees have taken all reasonable steps necessary to avoid the damage or that no such measures were available, but a carrier cannot relieve itself from the obligation under right 2 above.

[132] Mr. Lukács contends that passengers are entitled to reprotection or a refund regardless of the reason for their inability to travel, as long as the passengers are not culpable for it. He notes that in Decision No. 28-A-2004, the Agency recognized the fundamental right of passengers to be refunded for the unused portions of their tickets if the carrier is unable to provide transportation on its services or on the services of other carrier(s) within a reasonable period of time.

[133] Mr. Lukács submits that Proposed Tariff Rule 15(c) is either unclear or unreasonable in that it purports to relieve Porter from the obligation to refund the unused portions of tickets to passengers, contrary to the Agency’s findings in Decision No. 344-C-A-2013.

[134] Mr. Lukács asserts that the first half of Proposed Tariff Rule 15(c) incorrectly focuses on the cause of the so-called “Schedule Irregularity” rather than on how Porter reacts to it, and thus misstates the test under Article 19 of the Montreal Convention. He notes that in Decision No. 16-C-A-2013, the Agency explained that what determines liability for delay is not the cause of the delay, but rather how the carrier reacts to the delay. Mr. Lukács argues that Proposed Tariff Rule 15(c) is inconsistent with the findings of the Agency in that Decision, and thus it ought to be disallowed as being either unclear or unreasonable.

[135] Mr. Lukács maintains that the "all reasonable measures" test set out in Proposed Tariff Rule 15(c) does not relieve Porter from the obligation to refund or reprotect passengers, regardless of the cause of the "Schedule Irregularity", and that the test is relevant only to the obligation to refund the fares and charges for segments travelled that no longer serve any purpose for the passenger's travel. He submits, therefore, that the scope of Proposed Tariff Rule 15(c) ought to be confined to the second portion of Proposed Tariff Rule 15(a)(iii).

Analysis and findings

[136] The Agency finds that Proposed Tariff Rule 15(c) creates the impression that Porter does not have to reprotect or refund passengers for the unused portions of their tickets if Porter can demonstrate the "all reasonable measures" defense. As such, the Agency finds that Proposed Tariff Rule 15(c) is contrary to section 122 of the ATR (Air Transportation Regulations) because the Rule is stated in such a way as to create reasonable doubt, ambiguity or uncertain meaning as to the Rule's application.

[137] As for reasonableness, Mr. Lukács correctly notes that passengers are entitled to reprotection or a refund, irrespective of the reason for their inability to travel, as long as the passengers are not responsible for it. In Decision No. 28-A-2004, the Agency recognized the right of passengers to be refunded for the unused portions of their tickets if the carrier is unable to provide transportation on its services or on the services of other carrier(s) within a reasonable period of time. Taking "all reasonable measures" does not relieve Porter from its obligation to refund passengers for the unused portions of their tickets or reprotect passengers affected by flight cancellation, denied boarding or flight advancement. If it was Porter's intent under Proposed Tariff Rule 15(c) not to reprotect or refund for unused portions of tickets, employing the "all reasonable measures" defense, Proposed Tariff Rule 15(c) fails to strike a balance between the passengers' rights to be subject to reasonable terms and conditions of carriage and Porter's statutory, commercial and operational obligations.

[138] Therefore, the Agency finds that Proposed Tariff Rule 15(c) would be found unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations) and unclear, contrary to section 122 of the ATR (Air Transportation Regulations), if filed with the Agency.

Issue 6: Is Proposed Tariff Rule 18(c) unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations)?

Positions of the parties

Porter

[139] Porter submits that Proposed Tariff Rule 18 reflects an approach similar to those adopted by Air Transat and WestJet in their tariff rules concerning remedies for schedule irregularities, filed in response to Decision No. 248-C-A-2012 and Decision No. 249-C-A-2012.

[140] Porter advises that its Existing Tariff Rule 18 was filed in response to Decision No. 16-C-A-2013, and following issues raised in this complaint, Porter has made further revisions, reflected in Proposed

Tariff Rule 18, which: **187**

a. Extend the rights set forth therein, including concerning advance notice, to passengers affected by flight advancements (Proposed Tariff Rules 18(c) and 18.1); and,
b. Confirm Porter's practices concerning on-board flight delays, consistent with the voluntary Code of Conduct.

[141] Porter argues that Proposed Tariff Rule 18.1 entitles passengers affected by flight advancements to resulting damages to the same extent as such are available to passengers affected by flight delays pursuant to Article 19 of the Montreal Convention. Porter submits that taken together with the remedies available to such passengers under Proposed Tariff Rule 15, the Tariff would provide clear and reasonable recourse for such passengers which accord with the Agency requirements.

[142] Porter states that it has proposed in Proposed Tariff Rule 18(c) to make "best efforts" to inform passengers of flight advancements. Porter argues that it is not in a position to guarantee that notice will reach the passenger despite any efforts Porter may make. Porter submits that it would be required to take the same steps on a "best efforts" basis as pursuant to an "undertaking"; the distinction being, however, one of result: As Porter cannot guarantee that the passenger will receive the message, it cannot "undertake" to ensure that the passenger is informed.

[143] Porter maintains that the explicit extension of the remedies under Proposed Tariff Rule 18, together with the availability of the remedies under Proposed Tariff Rule 15, satisfy the Agency's prescribed requirements as to relief that must be made available in the case of flight advancements.

Mr. Lukács

[144] Mr. Lukács argues that "best efforts" to advise of flight advancements are not sufficient, and that Porter must "undertake" to inform passengers affected by such an event. He notes that in Decision No. LET-A-112-2003, the Agency held, under the heading "Passenger Notification", that:

> The Agency is of the opinion that Air Transat should undertake to notify passengers of all schedule irregularities, not just flight advancements.

[145] Mr. Lukács also points out that in Decision No. 344-C-A-2013, the Agency held that:

> [63] [...] When the air carrier advances the scheduled departure of a flight, the consequences may be more severe than a delay for the passenger and it follows that the duty to inform should be no less onerous.
>
> [64] [...] The absence of a tariff provision that imposes on Porter a requirement to "undertake" to inform passengers of flight advancements would severely limit the recourses available to passengers affected by those advancements, and would certainly be disadvantageous.
>
> [65] The Agency is of the opinion that the commitment to make "reasonable efforts" to inform passengers, insofar as such commitment pertains to flight advancements, is unreasonable [...]

[146] Mr. Lukács submits that in response to Decision No. 344-C-A-2013, Porter amended its Domestic Tariff Rule 16(c) to read as follows:

> Schedules are subject to change. Passengers have a right to information on flight times and schedule changes, and the Carrier will make reasonable efforts to inform passengers of flight delays, and schedule changes and, to the extent possible, the reasons for them. Carrier will also undertake to inform passengers of any advancement of departure times. **188**

[147] Mr. Lukács contends that Porter does not have any difficulty to "undertake" to inform passengers on domestic itineraries about advancement of departure times. He adds that the purpose of the requirement to "undertake" to inform passengers of flight advancements is precisely to provide an adequate recourse for passengers affected by these advancements. He submits that the consequence of a passenger not being notified about a flight advancement is not merely a delay of a few hours, but rather the passenger missing the flight, and possibly forfeiting the ability to travel.

[148] Mr. Lukács concludes that in respect of flight advancements, Porter ought to bear all the risks and consequences associated with passengers missing their flights because they did not know about the flight advancement. He argues that Porter making merely a "best effort" to inform such passengers ought not to relieve Porter from these risks, consequences and liabilities, because it is inconsistent with the passengers' fundamental rights to travel on the itinerary they paid for.

Analysis and findings

[149] The Agency finds that "best efforts" to advise passengers of flight advancements is unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations) for the reasons set out by Mr. Lukács, that carriers must undertake to inform passengers of those advancements, and that the Agency has already ruled on this matter in other decisions. Therefore, the Agency finds that Proposed Tariff Rule 18(c) fails to strike a balance between the passengers' rights to be subject to reasonable terms and conditions of carriage and Porter's statutory, commercial and operational obligations. The Agency therefore finds that Proposed Tariff Rule 18(c) would be found unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations) if filed with the Agency.

Issue 7: Is Proposed Tariff Rule 20 unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations) and/or unclear, contrary to section 122 of the ATR (Air Transportation Regulations)?

Position of Porter

Form of compensation

[150] Porter argues that Proposed Tariff Rule 20 is already clear that the choice between cash or voucher lies solely with the passenger, and this discretion on the passenger's part is maintained with the broadening of the denied boarding compensation regime to Canadian-originating flights. Porter states that, consistent with the Agency's ruling in Decision No. 342-C-A-2013, Porter may only tender vouchers in lieu of cash as follows:

a. at a value ratio of 3:1; i.e., vouchers offered must be redeemable at three times the value of cash compensation the passenger would otherwise be entitled to;
b. upon disclosing to the passenger all material restrictions applicable to the vouchers;
c. if the passenger agrees in writing to accept the vouchers in lieu of cash.

[151] Porter submits that in recognition that passengers accepting vouchers will be making decisions affecting their legal rights in a relatively short time frame, Porter will permit passengers to reverse their decisions and exchange their vouchers for cash within 30 days of the denied boarding incident, in accordance with the Agency's finding in Decision No. 342-C-A-2013.

Reprotection of passengers who are involuntarily denied boarding

[152] Porter points out that passengers affected by overbooking are now expressly entitled to certain remedies under Proposed Tariff Rule 15, including the choice between reprotection and a refund, and Porter is not limited to offering alternative service on its own flights or the "same or lower booking code" on another carrier's flights.

Denied boarding compensation is available on all flights

[153] Porter contends that while Existing Tariff Rule 20 provides distinct remedies depending on whether a flight departs from the United States or Canada (the only two countries served by Porter), Proposed Tariff Rule 20 removes this distinction, applying the same rules on all flights under the Tariff.

Amount of denied boarding compensation

[154] Porter proposes to implement the same "grid" of compensation amounts, depending on length of the delay in the passenger's arrival at their destination, as currently applies to its United States-originating flights.

[155] Porter points out that in Decision No. 204-C-A-2013, the Agency found that the United States' compensation regime and an alternative regime proposed by Mr. Lukács were both reasonable options. Porter indicates that it has elected to implement the United States regime for all of Porter's international flights, including those originating in Canada. Porter believes that the adoption of a single compensation regime will be less confusing to passengers, and that the implementation of a single, uniform regime across all of its stations will ensure consistency and facility of implementation for its own personnel.

[156] Porter points out that it has modified the United States regime slightly to provide for compensation of "at least" the amount prescribed under that regime, up to the stipulated maximums. Porter advises that while this will not prejudice passengers, it will allow Porter some flexibility during the rollout of its broader denied boarding compensation program as overbooking is tested on more routes, whereby it may simply offer the maximum amount to passengers during initial rollout until it can confidently implement a compensation regime based on actual fares paid by each individual passenger. Porter submits that it will not pay any passenger less than the minimum amounts indicated in Proposed Tariff Rule 20, which amounts the Agency has found to be reasonable.

Position of Mr. Lukács

Form of compensation

190

[157] Mr. Lukács points out that in Decision No. 342-C-A-2013, the Agency imposed the following conditions on the offering of travel vouchers in lieu of denied boarding compensation:

- (R1) carrier must inform passengers of the amount of cash compensation that would be due, and the passenger may decline travel vouchers, and receive cash or equivalent;
- (R2) carrier must fully disclose all material restrictions before the passenger decides to give up the cash or equivalent payment in exchange for a travel voucher;
- (R3) carrier must obtain the signed agreement of the passenger, confirming that the passenger was provided with the aforementioned information, prior to providing travel vouchers in lieu of compensation;
- (R4) the amount of the travel voucher must be not less than 300% of the amount of cash compensation that would be due;
- (R5) passengers are entitled to exchange the travel vouchers to cash at the rate of $1 in cash being equivalent to $3 in travel vouchers within one (1) month.

[158] Mr. Lukács argues that while Proposed Tariff Rule 20 incorporates (R2), (R4), and (R5), it fails to incorporate (R1) and to fully incorporate (R3).

[159] Mr. Lukács notes that Proposed Tariff Rule 20 only requires Porter to obtain a written agreement from passengers to accept vouchers in lieu of cash or cheque payment, but omits the requirement to obtain written confirmation that the passengers were provided with the information required under (R1) and (R2). He asserts that the absence of (R1) and the full incorporation of (R3) renders Proposed Tariff Rule 20 unreasonable, and Porter ought to be ordered to fully incorporate (R1) and (R3) into the Rule.

[160] Mr. Lukács submits that it is common knowledge that cash or equivalent, which constitutes legal tender, is more valuable than any kind of coupons or vouchers, which can be used only for payment at a specific business or from a service provider. He notes that vouchers, as acknowledged by Porter, are subject to restrictions imposed by Porter (including an expiry date), while legal tender is not subject to these restrictions.

[161] Mr. Lukács maintains that the conditions on the offering of travel vouchers in lieu of denied boarding compensation set out in Decision No. 342-C-A-2013 mitigate these disadvantages, and it is important to bear in mind that the restrictions were imposed by the Agency precisely for the purpose of mitigating the disadvantage to passengers.

The reference to “reconfirmation requirements” in Proposed Tariff Rule 20

[162] Mr. Lukács argues that the reference to “reconfirmation requirements” renders Proposed Tariff Rule 20 unclear and/or unreasonable for the following reasons:

1. Porter’s general conditions of carriage state that: “3. Reconfirmation of flights is not required [...]”. Thus, Proposed Tariff Rule 20 appears to be incorporating a non-existent requirement, which creates substantial confusion and lack of clarity, at the very least;
2. The word/term “reconfirmation” is nowhere defined in Porter’s Tariff;

3. Reconfirmation of reservations is an outdated requirement that has been abandoned by the industry, given that the standard practice is to issue confirmed reservations; and,
4. It is virtually impossible for a passenger to prove that they reconfirm their reservation.

[163] Mr. Lukács maintains, therefore, that conditioning the payment of denied boarding compensation on some sort of reconfirmation would effectively deprive passengers of their right to be paid denied boarding compensation.

Analysis and findings

[164] The Agency finds that paragraphs (a) to (d) under “Method of Payment” in Proposed Tariff Rule 20 do not fully incorporate the restrictions imposed by Decision No. 342-C-A-2013 (R1 to R5). Specifically, R3 is not fully incorporated into paragraph (c) because it only requires Porter to obtain a written agreement from the passenger to accept vouchers in lieu of cash or cheque payment, but omits the requirement to obtain written confirmation that the passengers were provided with the information required under (R1) and (R2). Also, R1 is not reflected in Proposed Tariff Rule 20. The Agency finds that the failure to fully reflect the conditions associated with the issuance of travel vouchers, set out in Decision No. 342-C-A-2013, fails to strike a balance between the passengers’ rights to be subject to reasonable terms and conditions of carriage and Porter’s statutory, commercial and operational obligations.

[165] The Agency also finds that the reference to “reconfirmation requirements” makes Proposed Tariff Rule 20 unclear for the reasons set out by Mr. Lukács. The Agency therefore finds that the Rule is stated in such a way as to create reasonable doubt, ambiguity and uncertain meaning as to the Rule’s application.

[166] Furthermore, the Agency agrees with Mr. Lukács’ submission that requiring reconfirmation fails to strike a balance between the passengers’ rights to be subject to reasonable terms and conditions of carriage and Porter’s statutory, commercial and operational obligations.

[167] Therefore, the Agency finds that Proposed Tariff Rule 20 would be found unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations) and unclear, contrary to section 122 of the ATR (Air Transportation Regulations), if filed with the Agency.

SUMMARY OF CONCLUSIONS

With respect to Porter’s Existing Tariff Rules

Issue 1

[168] The Agency has determined that the absence from Porter’s Tariff of all of the elements of the Code of Conduct does not render the Tariff unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations).

Issue 2

[169] The Agency has determined that the definition of “Event of Force Majeure” in Existing Tariff Rule 1.1 is unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations). 192

Issue 3

[170] The Agency has determined that Existing Tariff Rules 3.4 and 15 are unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations) and are unclear, contrary to section 122 of the ATR (Air Transportation Regulations).

Issue 4

[171] The Agency has determined that Existing Tariff Rule 18(c) is unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations).

Issue 5

[172] The Agency has determined that Existing Tariff Rule 20 is unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations) and is unclear, contrary to section 122 of the ATR (Air Transportation Regulations).

With respect to Porter’s Proposed Tariff Rules

Issue 1

[173] The Agency has determined that the definition of “Credit Shell” in Proposed Tariff Rule 1.1 would be found unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations) if filed with the Agency.

Issue 2

[174] The Agency has determined that Proposed Tariff Rule 15(a)(iii)(b) would be found unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations) if filed with the Agency.

Issue 3

[175] The Agency has determined that Proposed Tariff Rule 15(a)(iv) would be found unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations) if filed with the Agency.

Issue 4

[176] The Agency has determined that Proposed Tariff Rule 15(a) would be found unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations) and unclear, contrary to

section 122 of the ATR (Air Transportation Regulations), if filed with the Agency. **193**

Issue 5

[177] The Agency has determined that Proposed Tariff Rule 15(c) would be found unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations) and unclear, contrary to section 122 of the ATR (Air Transportation Regulations), if filed with the Agency.

Issue 6

[178] The Agency has determined that Proposed Tariff Rule 18(c) would be found unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations) if filed with the Agency.

Issue 7

[179] The Agency has determined that Proposed Tariff Rule 20 would be found unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations) and unclear, contrary to section 122 of the ATR (Air Transportation Regulations), if filed with the Agency.

ORDER

[180] The Agency, pursuant to section 113 of the ATR (Air Transportation Regulations), disallows the following provisions of Porter's Tariff:

- the definition of "Event of Force Majeure" in Existing Tariff Rule 1.1;
- Existing Tariff Rules 3.4 and 15;
- Existing Tariff Rule 18(c); and,
- Existing Tariff Rule 20.

[181] The Agency orders Porter, by February 28, 2014, to amend its Tariff to conform to this Order and the Agency's findings set out in this Decision in the following manner:

Adopt Proposed Tariff Rules 1.1, 15, 18 and 20 with the following amendments:

1. Delete (a) and (c) from the definition of "Credit Shell" in Proposed Tariff Rule 1.1.

2. Amend Proposed Tariff Rule 15(a)(iii) to read: a refund of the fare paid by the passenger for each unused segment, and, subject to Rule 15(c), for segments already flown if they no longer serve the purpose for which the passenger undertook the travel.

3. Delete Proposed Tariff Rule 15(a)(v), and delete Proposed Tariff Rule 15(a)(iv) should Porter choose not to include the additional provisions under Proposed Tariff Rule 20 set out below in (6).

4. Amend Proposed Tariff Rule 15(c) to read:

If the Carrier demonstrates that

1. the Schedule Irregularity occurred for reasons beyond its control, and
2. it took all reasonable measures to avoid the Schedule Irregularity or that it was impossible for the Carrier to take such measures,

then the Carrier shall not be required to refund passengers for segments already travelled, regardless of whether they serve the purpose for which the passenger undertook such travel.

5. Amend Proposed Tariff Rule 18(c) by replacing “best efforts” with “undertake”.

6. Amend the provision in Proposed Tariff Rule 20 appearing as the first bullet under the heading “Compensation for Involuntary Denied Boarding” by deleting the word “reconfirmation”; and should Porter choose to retain a “Credit Shell” as a form of compensation, add the following conditions under the heading “Method of Payment”:

- Carrier must inform passengers of the amount of cash compensation that would be due and the passenger may decline travel vouchers, and receive cash or equivalent.
- Carrier must obtain the signed agreement of the passenger, confirming that the passenger was provided with the aforementioned information, prior to providing travel vouchers in lieu of compensation.

[182] Pursuant to paragraph 28(1)(*b*) of the CTA, the disallowance of Existing Tariff Rules 1.1, 3.4, 15, 18(c) and 20 shall come into force when Porter complies with the above or on February 28, 2014, whichever is sooner.

APPENDIX

EXISTING TARIFF RULES

RULE 1. DEFINITIONS AND INTERPRETATION

1.1 Definitions

Event of Force Majeure means an event, the cause or causes of which are not attributable to the willful misconduct or gross negligence of the Carrier, including, but not limited to (i) earthquake, flood, hurricane, explosion, fire, storm, epidemic, other acts of God or public enemies, war, national emergency, invasion, insurrection, riots, strikes, picketing, boycott, lockouts or other civil disturbances, (ii) interruption of flying facilities, navigational aids or other services, (iii) any laws, rules, proclamations, regulations, orders, declarations, interruptions or requirements of or interference by any government or governmental agency or official thereof, (iv) inability to procure materials, accessories, equipment or parts from suppliers, mechanical failure to the aircraft or any part thereof, damage, destruction or loss of use of an aircraft, confiscation, nationalization, seizure, detention, theft or hijacking of an aircraft, or (v) any other cause or circumstances whether similar or dissimilar, seen or unforeseen, which the Carrier is unable to overcome by the exercise of reasonable diligence and at a reasonable cost.

RULE 3. RATES AND CHARGES – INTERNATIONAL SERVICE 195

3.4 Carrier Cancellation, Change, and Refund Terms

The Carrier reserves the right to cancel or change the planned departure, schedule, route, aircraft or stopping places of any flight for which fares in respect of a International Service have been paid, at any time and from time to time, for any reason, without notice to any passengers affected thereby and, in connection therewith, the Carrier shall not be liable to any passenger in respect of such cancellation or change, whether or not resulting from an Event of Force Majeure; provided that, the Carrier may and reserves the right, at its sole discretion, to provide any passengers affected by such cancellation or change with:

a. a credit, valid for one year from the original ticket issuance date, towards the provision of a fare relating to a future flight, which credit shall be equal to the original fare (s) which was/were cancelled. When redeeming the credit toward a future booking, passenger may apply the credit toward the base fare, airlines surcharges, change fees, and government taxes and fees. Credit can be used one time only. If the total cost of the transaction to which the credit is applied is less than the value of the credit, the residual value left from its use is forfeited. Bookings using credit must be in the name of the owner of the credit. Credit may be transferred to another traveler one time only, and the credit's original expiration date shall continue to apply after any such transfer; or
b. to otherwise refund to such passenger, an amount which shall not be greater than the fare paid by that passenger in respect of that flight or flights if booked as a round trip and the originating sector is cancelled.

RULE 15. CARRIER CANCELLATION, CHANGE, AND REFUND TERMS

The Carrier reserves the right to cancel or change the planned departure, schedule, route, aircraft or stopping places of any flight for which fares have been paid, at any time and from time to time, for any reason, in connection therewith, the Carrier shall not be liable to any passenger in respect of such cancellation or change, whether or not resulting from an Event of Force Majeure; provided that, the Carrier may and reserves the right, at its sole discretion, to provide any passengers affected by such cancellation or change with:

a. a credit, valid for one year from the original ticket issuance date, towards the provision of a fare relating to a future flight, which credit shall be equal to the original fare which was cancelled. When redeeming the credit toward a future booking, passenger may apply the credit toward the base fare, airlines surcharges, change fees, and government taxes and fees. Credit can be used one time only. If the total cost of the transaction to which the credit is applied is less than the value of the credit, the residual value left from its use is forfeited. Bookings using credit must be in the name of the owner of the credit. Credit may be transferred to another traveler one time only, and the credit's original expiration date shall continue to apply after any such transfer; or
b. to otherwise refund to such passenger, an amount which shall not be greater than the fare paid by that passenger in respect of that flight.

RULE 18. RESPONSIBILITY FOR SCHEDULES AND OPERATIONS

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[...]

(c) Passengers have a right to information on flight times and schedule changes. In the event of a delay or schedule change, the carrier will make reasonable efforts to inform the passengers of delays and schedule changes, and, to the extent possible, the reasons for them.

RULE 20. DENIED BOARDING COMPENSATION

General

For the purposes of this Rule 20, “alternate transportation” means air transportation with a confirmed reservation at no additional charge (by a scheduled airline licensed by Canada or another appropriate country), or other transportation accepted and used by the passenger in the case of denied boarding.

If a passenger has been denied a reserved seat in case of an oversold flight on Porter Airlines:

a. where the flight originates in Canada, the Carrier will:
    i. refund the total fare paid for each unused segment; or
    ii. arrange reasonable alternate transportation on its own services; or
    iii. if reasonable alternate transportation on its own services is not available, the Carrier will make reasonable efforts to arrange transportation on the services of another carrier or combination of carriers on a confirmed basis in the same comparable, or lower booking code; and
b. where the flight originates in the United States, the Carrier will provide denied boarding compensation as set forth in this Rule 20 below.

Volunteers and Boarding Priorities

If a flight is oversold (more passengers hold confirmed reservations than there are seats available), no one may be denied boarding against his/her will until the Carrier’s personnel first ask for volunteers who will give up their reservations willingly, in exchange for such compensation as the Carrier may choose to offer. If there are not enough volunteers, other passengers may be denied boarding involuntarily, in accordance with the Carrier’s boarding priority.

In determining boarding priority, the Carrier will consider the following factors:

- whether a passenger is traveling due to death or illness of a member of the passenger’s family, or,
- age of a passenger, or
- whether a passenger is an unaccompanied minor, or
- whether a passenger is a person with a disability, or
- the fare class purchased and/or fare paid by a passenger

Compensation for Involuntary Denied Boarding (Applicable only on flights originating in the United States)

If you are denied boarding involuntarily on a flight originating in the United States, you are entitled to a payment of “denied boarding compensation” from Carrier unless: 197

- you have not fully complied with the Carrier’s ticketing, check-in and reconfirmation requirements, or you are not acceptable for transportation under the Carrier’s usual rules and practices; or
- you are denied boarding because the flight is cancelled; or
- you are denied boarding because a smaller capacity aircraft was substituted for safety or operational reasons; or
- you are offered accommodations in a section of the aircraft other than specified in your ticket, at no extra charge, (a passenger seated in a section for which a lower fare is charged must be given an appropriate refund); or
- Carrier is able to place you on another flight or flights that are planned to reach your final destination within one hour of the scheduled arrival of your original flight.

Amount of Denied Boarding Compensation

Passengers traveling from the United States to Canada with a reserved seat on Porter Airlines who are denied boarding involuntarily from an oversold flight originating at a U.S. airport are entitled to:

a. No compensation if the Carrier offers alternate transportation that is planned to arrive at the passenger’s destination or first stopover not later than one hour after the planned arrival time of the passenger’s original flight;
b. 200% of the fare to the passenger’s destination or first stopover, with a maximum of $650 USD, if the Carrier offers alternate transportation that is planned to arrive at the passenger’s destination or first stopover more than one hour but less than four hours after the planned arrival time of the passenger’s original flight; and
c. 400% of the fare to the passenger’s destination or first stopover, with a maximum of $1,300 USD, if the Carrier does not offer alternate transportation that is planned to arrive at the airport of the passenger’s destination or first stopover less than four hours after the planned arrival time of the passenger’s original flight.

0 to 1 hour arrival delay – No compensation.

1 to 4 hour arrival delay – 200% of one-way fare (but no more than $650 USD).

Over 4 hours arrival delay – 400% of one-way fare (but no more than $1,300 USD).

For the purpose of calculating compensation under this Rule 20, the “fare” is the one-way fare for the flight including any surcharge and air transportation tax, minus any applicable discounts. All flights, including connecting flights, to the passenger’s destination or first 4-hour stopover are used to compute the compensation.

Method of Payment

Except as provided below, the Carrier must give each passenger who qualifies for denied boarding compensation a payment by cheque or draft for the amount specified above, on the day and place the

involuntary denied boarding occurs. However, if the Carrier arranges alternate transportation for the passenger's convenience that departs before the payment can be made, the payment will be sent to the passenger within 24 hours. Carrier may offer free or discounted transportation vouchers in place of cash or cheque payment. The passenger may, however, insist on the cash/cheque payment or refuse all compensation and bring private legal action.

Passenger's Option

Acceptance of the compensation relieves the Carrier from any further liability to the passenger caused by the failure to honour the confirmed reservation. However, the passenger may decline the payment and seek to recover damages in a court of law or in some other manner.

PROPOSED TARIFF RULES

RULE 1. DEFINITIONS AND INTERPRETATION

1.1 Definitions

Credit Shell means a record with a payment but no flight used to hold a credit or credits for future flights, which (a) shall be valid for one year from the original ticket issuance date, towards the provision of a fare relating to a future flight, (b) may be applied toward the base fare, airlines surcharges, change fees, and government taxes and fees, (c) can be used one time only, whereby if the total cost of the transaction to which the Credit Shell is applied is less than the value of the Credit Shell, the residual value left from its use is forfeited, (d) may be used exclusively toward bookings in the name of the owner of the Credit Shell, provided however that a Credit Shell may be transferred to another traveler one time only, and the Credit Shell's original expiration date shall continue to apply after any such transfer;

Event of Force Majeure: Deleted

RULE 3. RATES AND CHARGES – INTERNATIONAL SERVICE

3.4 Carrier Cancellation, Change and Refund Terms

Refer to **Rule 15. Carrier Cancellation, Change and Refund Terms** for applicable terms and conditions.

RULE 15. CARRIER CANCELLATION, CHANGE, AND REFUND TERMS

a. If the passenger's journey is interrupted due to overbooking, a flight cancellation or an advancement of a flight's scheduled departure by more than the minimum period for the passenger to check in pursuant to Rule 21 of this Tariff (each a "Schedule Irregularity"), the Carrier will offer the passenger the choice of accepting one or more of the following remedial choices:
    i. alternative transportation, within a reasonable time and without additional charge, to the passenger's intended destination;

ii. return transportation to the passenger's point of origin within a reasonable time and without additional charge;
iii. a refund of the fare and charges paid by the passenger for each unused segment, and for the segments already flown if (a) they no longer serve the purpose for which the passenger undertook such travel, and (b) the Schedule Irregularity was within the control of the Carrier;
iv. a Credit Shell in the amount described in sub-section (iii) above; and
v. a monetary payment to the passenger for any amounts to which the passenger may be entitled pursuant to Rule 18 of this Tariff.

b. In defining the remedy or remedies appropriate in each case arising under Rule 15(b) above, the Carrier:
i. will consider, to the extent they are known to the Carrier, the transportation needs of the passenger and/or other relevant circumstances of the passenger affected by the Schedule Irregularity;
ii. will not limit itself to considering its own services or the services of carriers with which it has interline or code-sharing agreements; and
iii. will make a good faith effort to fairly recognize, and appropriately mitigate, the impact of the Schedule Irregularity upon the passenger.

c. The provisions of this Rule are not intended to make the Carrier responsible in all cases for acts of nature or for the acts of third parties that are not deemed servants and/or agents of the Carrier under applicable law or international conventions, and all the rights set forth herein are subject to the following exception, namely, that the Carrier shall not be liable for damage occasioned by a Schedule Irregularity if the Carrier, and its employees and agents, took all reasonable steps that could reasonably be required to avoid the damage or if it was impossible to take such measures.

d. The rights of a passenger against the Carrier in the event of overbooking and cancellation is, in most cases of international carriage, governed by the Montreal Convention. Article 19 of that Convention provides that an air carrier is liable for damage caused by delay in the carriage of passengers and goods unless it proves that it took all reasonable measures to avoid the damage or that it was impossible for it to take such measures. There are some exceptional cases of international carriage in which the rights of passengers are not governed by an international convention. In such cases, only a court of competent jurisdiction can determine which system of laws must be consulted to determine what those rights are.

RULE 18. RESPONSIBILITY FOR SCHEDULES AND OPERATIONS

a. The Carrier will endeavor to transport the passenger and baggage with reasonable dispatch, but times shown in timetables or elsewhere are not guaranteed.

b. The agreed stopping places are those places shown in the carrier's timetable as scheduled stopping places on the route. The Carrier may, without notice, substitute alternative carriers or aircraft and, if necessary, may alter or omit stopping places shown in the timetable.

c. Passengers have a right to information on flight times and schedule changes. In the event of a delay or schedule change, the carrier will make reasonable efforts to inform the passengers of delays and schedule changes, and, to the extent possible, the reasons for them, including that the Carrier will make best efforts to inform passengers of advancements of scheduled flight

departures.

d. If a delay occurs after passengers have boarded the aircraft, the Carrier will offer drinks and snacks if it is safe, practical and timely to do so. If the delay exceeds 90 minutes and circumstances permit, the Carrier will offer passengers the option of disembarking from the aircraft until it is time to depart.

18.1 Passenger Expenses Resulting from Delays and Flight Advancements

For the purposes of this Sub-Rule 18.1, “Flight Advancement” shall mean an advancement of the scheduled flight departure by more than the minimum period for the passenger to check in pursuant to Rule 21 of this Tariff.

Passengers will be entitled to reimbursement from the Carrier for reasonable expenses incurred as a result of a delay or a Flight Advancement, subject to the following conditions:

i. The Carrier shall not be liable for any damages, costs, losses or expenses occasioned by delays or a Flight Advancements if it, and its employees and agents, took all measures that could reasonably be required to avoid the damage or if it was impossible for the Carrier and its employees or agents to take such measures;
ii. Any passenger seeking reimbursement for expenses resulting from delays or a Flight Advancements must provide the Carrier with (a) written notice of his or her claim, (b) particulars of the expenses for which reimbursement is sought and (c) receipts or other documents establishing to the reasonable satisfaction of the Carrier that the expenses were incurred; and
iii. The Carrier may refuse or decline any claim, in whole or in part, if:
    A. the passenger has failed or declined to provide proof or particulars establishing, to the reasonable satisfaction of the Carrier, that the expenses claimed were incurred by the passenger and resulted from a delay or Flight Advancement for which compensation is available under this Rule 18; or
    B. the expenses for which reimbursement is claimed, or any portion thereof, are not reasonable or did not result from the delay or Flight Advancement, as determined by the Carrier, acting reasonably.

In any case, the Carrier may, in its sole discretion, issue meal, hotel and/or ground transportation vouchers to passengers affected by a delay or a Flight Advancement.

RULE 20. DENIED BOARDING COMPENSATION

General

If a passenger has been involuntarily denied a reserved seat in case of an oversold flight on Porter Airlines, the Carrier will provide the passenger with:

a. a remedy or remedies in accordance with Rule 15 above; and
b. denied boarding compensation as set forth in this Rule 20 below.

Volunteers and Boarding Priorities

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If a flight is oversold (more passengers hold confirmed reservations than there are seats available), no one may be denied boarding against his/her will until the Carrier's personnel first ask for volunteers who will give up their reservations willingly, in exchange for such compensation as the Carrier may choose to offer. If there are not enough volunteers, other passengers may be denied boarding involuntarily, in accordance with the Carrier's boarding priority.

In determining boarding priority, the Carrier will consider the following factors:

- whether a passenger is traveling due to death or illness of a member of the passenger's family, or,
- age of a passenger, or
- whether a passenger is an unaccompanied minor, or
- whether a passenger is a person with a disability, or
- the fare class purchased and/or fare paid by a passenger

Compensation for Involuntary Denied Boarding

If you are denied boarding involuntarily on a flight, you are entitled to a payment of "denied boarding compensation" from Carrier unless:

- you have not fully complied with the Carrier's ticketing, check-in and reconfirmation requirements, or you are not acceptable for transportation under the Carrier's usual rules and practices; or
- you are denied boarding because the flight is cancelled; or
- you are denied boarding because a smaller capacity aircraft was substituted for safety or operational reasons, and the events prompting such substitution were beyond the Carrier's control and the Carrier took all reasonable measures to avoid the substitution or it was impossible for the Carrier to take such measures; or
- you are offered accommodations in a section of the aircraft other than specified in your ticket, at no extra charge, (a passenger seated in a section for which a lower fare is charged must be given an appropriate refund); or
- Carrier is able to place you on another flight or flights that are planned to reach your final destination within one hour of the scheduled arrival of your original flight.

Amount of Denied Boarding Compensation

Passengers with a reserved seat on Porter Airlines who are denied boarding involuntarily from an oversold flight are entitled to:

a. No compensation if the Carrier offers alternate transportation that is planned to arrive at the passenger's destination or first stopover not later than one hour after the planned arrival time of the passenger's original flight;
b. No less than 200% of the fare to the passenger's destination or first stopover, with a maximum of $650 USD, if the Carrier offers alternate transportation that is planned to arrive at the passenger's destination or first stopover more than one hour but less than four hours after the planned arrival time of the passenger's original flight; and
c. No less than 400% of the fare to the passenger's destination or first stopover, with a maximum of

$1,300 USD, if the Carrier does not offer alternate transportation that is planned to arrive at the airport of the passenger's destination or first stopover less than four hours after the planned arrival time of the passenger's original flight. **202**

0 to 1 hour arrival delay – No compensation

1 to 4 hour arrival delay – At least 200% of one-way fare (but no more than $650 USD)

Over 4 hours arrival delay – At least 400% of one-way fare (but no more than $1,300 USD)

For the purpose of calculating compensation under this Rule 20, the "fare" is the one-way fare for the flight including any surcharge and air transportation tax, minus any applicable discounts. All flights, including connecting flights, to the passenger's destination or first 4-hour stopover are used to compute the compensation.

Method of Payment

Except as provided below, the Carrier must give each passenger who qualifies for denied boarding compensation a payment by cheque or draft for the amount specified above, on the day and place the involuntary denied boarding occurs. However, if the Carrier arranges alternate transportation for the passenger's convenience that departs before the payment can be made, the payment will be sent to the passenger within 24 hours. The Carrier may offer free or discounted transportation vouchers in place of cash or cheque payment, provided:

a. the value of such voucher(s) is no less than 300% of the value of the cash compensation to which the passenger would otherwise have been entitled;
b. the Carrier has disclosed to the passenger all material restrictions applicable to the use of such vouchers;
c. the passenger agrees in writing to accept vouchers in lieu of cash or cheque payment; and
d. The passenger may in any event refuse to accept such vouchers and insist on the cash/cheque payment, including that any passenger who accepts vouchers in lieu of cash or cheque payment at the time of involuntary denied boarding may, within 30 days, elect to exchange such vouchers for the cash or cheque payment she would have been entitled to receive had the passenger not accepted vouchers, provided that the vouchers have not been redeemed by the passenger in whole or in part.

Air Transportation Regulations, SOR/88-58, as amended

111(1) All tolls and terms and conditions of carriage, including free and reduced rate transportation, that are established by an air carrier shall be just and reasonable and shall, under substantially similar circumstances and conditions and with respect to all traffic of the same description, be applied equally to all that traffic.

122. Every tariff shall contain

[...]

(*c*) the terms and conditions of carriage, clearly stating the air carrier's policy in respect of at least the following matters, namely, **203**

[...]

Convention for the Unification of Certain Rules for International Carriage by Air – Montreal Convention

Article 19 – Delay

The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.

Article 26 – Invalidity of contractual provisions

Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this Convention shall be null and void, but the nullity of any such provision does not involve the nullity of the whole contract, which shall remain subject to the provisions of this Convention.

Member(s)

Sam Barone
Geoffrey C. Hare

Back to rulings

Date modified:
2014-01-31

This is **Exhibit "6"** to the Affidavit of Dr. Gábor Lukács affirmed before me on September 7, 2023

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Signature

CANADIAN TRANSPORTATION AGENCY

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Decision No. 28-A-2004

January 16, 2004

January 16, 2004

APPLICATION by Air Transat A.T. Inc. carrying on business as Air Transat for an exemption from subsection 115(1) of the *Air Transportation Regulations*, SOR/88-58, as amended, to file with the Canadian Transportation Agency a new international scheduled services tariff on less than statutory notice; and IN THE MATTER OF a new international scheduled services tariff applicable to Air Transat A.T. Inc. carrying on business as Air Transat.
File No. M4110/A328-1

APPLICATION

On January 15, 2002, Air Transat A.T. Inc. carrying on business as Air Transat (hereinafter Air Transat) applied to the Canadian Transportation Agency (hereinafter the Agency) for an exemption from subsection 115(1) of the *Air Transportation Regulations* (hereinafter the ATR (Air Transportation Regulations)) to file a new international scheduled services tariff on less than statutory notice.

Pursuant to subsection 29(1) of the *Canada Transportation Act*, S.C., 1996, c. 10 (hereinafter the CTA), the Agency is required to make its decision no later than 120 days after the application is received unless the parties agree to an extension. In this case, Air Transat has agreed to an indefinite extension of the deadline.

BACKGROUND

After numerous exchanges of correspondence between staff of the Agency and Air Transat concerning certain issues arising from the proposed international scheduled services tariff, the Agency, by Decision No. LET-A-359-2002 dated December 10, 2002, advised Air Transat that the Agency was satisfied with Air Transat's proposed international scheduled services tariff, in general, but that certain amendments should be made to make the tariff fully acceptable to the Agency. These amendments concerned the following provisions, respectively: refusal to transport, fare guarantee, schedule irregularity, refunds in cases of schedule irregularity, advancement of flight times, and the introduction of more restrictive conditions/increases in charges.

On February 25, 2003, Air Transat, in response to Decision No. LET-A-359-2002, filed on statutory

notice a new international scheduled services tariff, designated CTA(A) No. 4, for effect April 24, 2003. Air Transat advised the Agency that it had considered the amendments proposed by the Agency, and had attempted to address these concerns through a multitude of changes to tariff provisions. Air Transat also advised the Agency that it was unable to accept the Agency's proposal that a full refund be provided should a passenger wish to cancel a reservation for a flight that has been delayed for more than six hours due to a schedule irregularity. In Air Transat's view, such a provision would have a major and perhaps crippling financial impact, given that Air Transat is a non-network, non-connecting and non-interlining carrier that carries primarily origin/destination traffic.

Following additional exchanges of correspondence between Agency staff and Air Transat respecting certain matters not addressed by the carrier in relation to Decision No. LET-A-359-2002, Air Transat filed amendments to its tariff on April 22, 2003 for effect April 24, 2003.

AGENCY ANALYSIS AND FINDINGS

The Agency's jurisdiction in matters respecting international tariffs is set out, in part, in section 26 of the CTA, and sections 111 and 113 of the ATR (Air Transportation Regulations).

Pursuant to section 26 of the CTA, the Agency may require a person to do or refrain from doing any thing that the person is or may be required to do or is prohibited from doing under any Act of Parliament that is administered in whole or in part by the Agency.

Subsection 111(1) of the ATR (Air Transportation Regulations) provides that:

> All tolls and terms and conditions of carriage, including free and reduced rate transportation, that are established by an air carrier shall be just and reasonable and shall, under substantially similar circumstances and conditions and with respect to all traffic of the same description, be applied equally to all that traffic.

Further, section 113 of the ATR (Air Transportation Regulations) provides that the Agency may:

> (*a*) suspend any tariff or portion of a tariff that appears not to conform with subsections 110(3) to (5) or section 111 or 112, or disallow any tariff or portion of a tariff that does not conform with any of those provisions; and(*b*) establish and substitute another tariff or portion thereof for any tariff or portion thereof disallowed under paragraph (*a*).

By Decision No. LET-A-112-2003 dated May 12, 2003, the Agency advised Air Transat that in order to make the tariff provisions filed by the carrier fully acceptable, further amendments would be required to Rule 5.2 (Responsibility for schedules and operations) and Rule 6.3 (Liability for refusal to transport and for failure to operate on schedule). These tariff provisions provide that:

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5.2 Responsibility for schedules and operations:(a) The Carrier will endeavor to transport passengers and baggage with reasonable dispatch. Times shown in schedules, scheduled contracts, tickets, air waybills or elsewhere are not guaranteed. Flight times are subject to change without notice. The Carrier assumes no responsibility for making connections.(b) Schedules are subject to change without notice. The Carrier is not responsible or liable for failure to make connections, or for failure to operate any flight according to schedule, or for a change to the schedule of any flight. Under no circumstances shall the Carrier be liable for any special, incidental or consequential damages arising directly or indirectly from the foregoing (including the carriage of baggage) whether or not the Carrier had knowledge that such damages might be incurred. Notwithstanding, the Carrier will undertake to notify passengers reasonably in advance through means it deems appropriate of any schedule changes resulting in the advancement of flight departure times.(c) Without limiting the generality of the foregoing, the Carrier cannot guarantee that a passenger's baggage will be carried on the flight if sufficient space is not available as determined by the Carrier.(d) Subject to the Convention, the Carrier will not provide or reimburse passengers for expenses incurred due to delays or cancellations of flights.(e) In the event of an involuntary re-routing of a flight, the Carrier will undertake to ensure that the passenger is routed or transported to his/her ultimate destination, as per the contract of carriage, within a reasonable period of time and at no extra cost.6.3 Liability for refusal to transport and for failure to operate on scheduleThe Carrier is not liable for its refusal to transport any passenger in accordance with Rule 6. Subject to Rule 5.3.1, where a passenger incurs a schedule irregularity of not less than six (6) hours involving a flight operated by the Carrier:(a) The Carrier will transport the passenger without stopover on its next flight on which space is available and in the same class of service as his original flight.(b) If the Carrier is unable to provide reasonable alternative transportation on its services, the Carrier will arrange transportation on the services of other carriers or combination of carriers with whom the Carrier has interline traffic agreements for such transportation. In such cases, the passenger will be transported without stopover and at no additional costs to himself, in the same class of service as applied to his original outbound flight on the Carrier.(c) In the event that space on the Carrier is only available and used in a lower class of service than applied to the passenger's original flight(s), the difference in fares will be refunded.(d) Where the flight is cancelled after the initial delay, the Carrier will provide a full refund of the fare paid.

In Decision No. LET-A-112-2003, the Agency noted that Rule 5.2 includes a provision that states that Air Transat will undertake to ensure that the passenger is routed or transported to his/her destination, as per the contract of carriage, within a reasonable period of time and at no extra cost. The Agency stated that this provision may not be just and reasonable as it does not provide the passenger with any recourse should such passenger find the anticipated time or the alternate travel arrangements provided by the carrier to reach the passenger's ticketed destination unacceptable. The Agency expressed the view that, in such circumstances, Air Transat should, at the request of the passenger, provide a refund.

The Agency also noted that Rule 5.2(b) is devoid of any provision relating to the notification of passengers in the event of a flight delay. As such, the Agency stated that this provision may not be just

and reasonable. The Agency advised Air Transat that it should undertake to notify passengers of all schedule irregularities, not just flight advancements. **208**

With respect to Rule 6.3, the Agency noted that this rule includes a provision which states that where passengers incur a schedule irregularity of not less than six hours involving a flight operated by Air Transat, and the flight is cancelled after the initial delay, Air Transat will provide a full refund. The Agency stated that this provision may not be just and reasonable in that it does not provide adequate options to passengers affected by a schedule irregularity, and does not protect passengers from events that are beyond the passengers' control. The Agency therefore advised Air Transat that it should include a provision that provides a refund, at the request of the passenger, should a flight be delayed for more than a certain period of time, e.g., 12 hours, whether or not a flight is cancelled.

The Agency further noted that Air Transat has removed its liability to passengers who do not concur with the alternate travel arrangements in Rule 6.3 of the tariff. Such liability appeared in Air Transat's tariff previously on file with the Agency. The Agency stated that the current provision may not be just and reasonable, as it does not include a requirement that the passenger agree to the alternate travel arrangements. The Agency also advised Air Transat that it should include a provision that provides for a refund in the event a passenger finds the alternate travel arrangements unsatisfactory.

With respect to flight advancement, the Agency stated that the six hour criterion to qualify as a schedule irregularity, set out in Rule 6.3, may not be just and reasonable. The Agency expressed the opinion that, in the event of a flight advancement, the consumer should be offered alternate travel options immediately. In addition, the Agency stated that it would be beneficial if Air Transat included a provision that provides for a refund, at the request of the passenger, if such passenger should wish to cancel a reservation for a flight that has been advanced.

The Agency therefore provided Air Transat with the opportunity to show cause why the Agency should not (i) pursuant to paragraph 113(*a*) of the ATR (Air Transportation Regulations), disallow the aforementioned tariff provisions as being unjust and unreasonable, thereby contravening subsection 111(1) of the ATR (Air Transportation Regulations), and (ii) pursuant to paragraph 113(*b*) of the ATR (Air Transportation Regulations), substitute another tariff or portion thereof to make the tariff acceptable to the Agency.

On May 20, 2003, Air Transat requested an extension until June 19, 2003 to respond to the Agency's letter. By Decision No. LET-A-122-2003 dated May 26, 2003, the Agency granted this extension. On May 29, 2003, Air Transat filed its response, in which it advised that the Agency's proposal respecting refund provisions in cases of flight delays of more than a certain period of time, or if the passenger finds alternative travel arrangements to be unsatisfactory, may constitute an undue financial burden. Air Transat asked the Agency to reconsider its proposal for amendments to the aforementioned tariff provisions.

Concerning the Agency's proposal that the consumer be offered alternative travel options and refunds in the event of any scheduled flight time advancement, Air Transat advised that this is unreasonable, as the advancement may be the result of circumstances beyond the carrier's control, such as the airport authority altering pre-authorized slot times as a result of congestion. Air Transat also advised that by

eliminating any minimum threshold for a flight time advancement, it would have to offer alternative travel arrangements or refunds for a 15 minute change. The carrier further stated that by undertaking to notify all passengers in the event of a flight advancement of six hours or less and generally treating all other such schedule changes as irregularities, Air Transat has struck a reasonable and fair balance.

With respect to a provision allowing for refunds where an involuntary routing is invoked and the anticipated time or the alternate travel arrangements are deemed unacceptable to the passenger, Air Transat stated that this is unfair and imbalanced, given that a rerouting can often be caused by reasons beyond Air Transat's control.

Concerning passenger notification for all schedule irregularities, the carrier suggested that airport notification is sufficient, except where a delay of at least three hours becomes known a minimum of six hours in advance of the scheduled departure time, in which case Air Transat would undertake to advise affected passengers, normally by telephone.

By Decision No. LET-A-166-2003 dated August 7, 2003, the Agency advised Air Transat that it was not satisfied that Air Transat had shown cause as to why the Agency should not, pursuant to paragraph 113(*b*) of the ATR (Air Transportation Regulations), substitute another tariff or portion thereof to make the tariff acceptable to the Agency. The Agency advised Air Transat that Rule 6.3 of Air Transat's tariff was not just and reasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations), in that it does not provide adequate options to passengers affected by a schedule irregularity, and does not protect passengers from events that are beyond the passengers' control, and, therefore, does not allow passengers any recourse if they are unable to connect to other air carriers or alternate modes of transportation such as cruise ships or trains. The Agency also advised Air Transat that the Agency found that the six hour criterion to qualify as a schedule irregularity set out in the rule was not reasonable in the event of a flight advancement. The Agency further advised Air Transat that the passengers should have some recourse if a flight is advanced beyond the check-in requirement.

With respect to involuntary rerouting and passenger notification, the Agency advised Air Transat that the Agency found paragraphs (b) and (e) of Rule 5.2 to be not just and reasonable, as they do not provide the passenger with any recourse if the carrier can not arrange any reasonable transportation in the event of an involuntary rerouting. The Agency also noted that Rule 5.2(b) was devoid of any provision relating to the notification of passengers if a flight is delayed or cancelled.

In view of the foregoing, the Agency provided Air Transat with the opportunity to show cause as to why the Agency should not:

1. pursuant to paragraph 113(*a*) of the ATR (Air Transportation Regulations), disallow Rule 6.3 (Liability for refusal to transport and for failure to operate on schedule), appearing on First Revised Page 16; Rule 1 (Definitions) as it pertains to the definition of "Schedule Irregularity", appearing on First Revised Page 7; and paragraphs (b) and (e) of Rule 5.2 (Responsibility for schedules and operations), appearing on First Revised Page 10 of Air Transat's International Scheduled Services Tariff, CTA(A) No. 4, for being unjust and unreasonable, thereby contravening subsection 111(1) of the ATR (Air Transportation Regulations), and
2. pursuant to paragraph 113(*b*) of the ATR (Air Transportation Regulations), substitute the wording

of these provisions with certain prescribed wording. **210**

Regarding passenger notification in the event of a flight delay, the Agency advised Air Transat that the carrier's position, as described in its May 29, 2003 letter, was acceptable, and requested Air Transat to provide the Agency with proposed wording, for consideration.

On September 3, 2003, Air Transat filed its response, indicating that it was prepared to accept the Agency's proposed changes to Rule 5.2(b) and to the definition of "Schedule Irregularity" contained in Rule 1. With respect to Rule 6.3, Air Transat advised the Agency that it was not prepared to accept the proposed amendment to paragraph (d) because, as previously stated, the carrier believes that this could have a major financial impact on its operation.

On September 30, 2003, Air Transat further advised the Agency that it was prepared to accept the principle of refunding the unused portion of a ticket in the event of a delay exceeding a certain amount of time, i.e., 36 hours.

The Agency has carefully considered the submissions filed by Air Transat with respect to this matter, and is satisfied, in general, with the tariff provisions filed by Air Transat. However, the Agency is of the opinion that Air Transat has not proven to the Agency's satisfaction, that it is reasonable to have a time limit in the event of a delay of 36 hours or more, after which Air Transat would refund the unused ticket or portion thereof.

CONCLUSION

Based on the above findings, the Agency has determined that the terms and conditions relating to liability for refusal to transport and failure to operate on schedule, as set out in Rule 6.3(d) of Air Transat's International Scheduled Services Tariff, CTA (A) No. 4, are not just and reasonable, and are therefore contrary to subsection 111(1) of the ATR (Air Transportation Regulations).

Accordingly, the Agency, pursuant to paragraph 113(*a*) of the ATR (Air Transportation Regulations), hereby disallows Rule 6.3(d) of Air Transat's International Scheduled Services Tariff, CTA (A) No. 4, and, pursuant to paragraph 113(*b)* of the ATR (Air Transportation Regulations), hereby substitutes the following provision:

> 6.3(d) If the Carrier is unable to provide reasonable alternative transportation on its services or on the services of other carrier(s) within a reasonable period of time, then it will refund the unused ticket or portions thereof.

Pursuant to section 28 of the CTA, this disallowance and substitution are effective 10 (ten) days from the date of this Decision.

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This is **Exhibit "7"** to the Affidavit of Dr. Gábor Lukács affirmed before me on September 7, 2023

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Signature

WHO'SWHOLEGAL

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AVIATION PRACTICE AREA REVIEW

SEPTEMBER 2013

Carlos Martins of Bersenas Jacobsen Chouest Thomson Blackburn outlines recent developments in aviation law in Canada.

There have been a number of developments in Canada in the realm of aviation law that promise to make for interesting times in the months ahead. In this review, we will consider some of these decisions, their implications and how they may play out in the coming year.

Warsaw/Montreal Liability

On the airline liability front, the Supreme Court of Canada will hear the appeal of the Federal Court of Appeal's decision in *Thibodeau v Air Canada*, 2012 FCA 246. This case involves a complaint by Michel and Lynda Thibodeau, passengers on a series of Air Canada flights between Canada and the United States in 2009. On some of the transborder legs of those journeys, Air Canada was not able to provide the Thibodeaus with French-language services at check-in, on board the aircraft or at airport baggage carousels. The substantive aspect of the case is of limited interest to air carriers because the requirement that air passengers be served in both official languages applies only to Air Canada as a result of the Official Languages Act (Canada), an idiosyncratic piece of legislation that continues to apply to Air Canada even though it was privatised in 1988.

However, from the perspective of other air carriers, the most notable facet of the Supreme Court's decision will be whether that Court will uphold the Federal Court of Appeal's "strong exclusivity" interpretation of the Warsaw/Montreal Conventions. If it does, it will incontrovertibly bring the Canadian law in line with that of the United States and the United Kingdom – meaning that passengers involved in international air travel to which either of the Conventions apply are restricted to only those remedies explicitly provided for in the Conventions. At present, the Federal Court of Appeal's decision in *Thibodeau* provides the most definitive statement to date that "strong exclusivity" is the rule in Canada.

YQ Fares Class Action

The battle over "YQ Fares" is expected to continue in a British Columbia class action. The case relates to the practice of several air carriers identifying the fuel surcharge levied on their tickets in a manner that may cause their passengers to believe that these charges are taxes collected on behalf of a third party when, in fact, fuel surcharges are collected by the air carrier for its own benefit. In the British Columbia action, the plaintiffs complain that this practice contravenes the provincial consumer protection legislation which provides that service providers shall not engage in a "deceptive act or practice".

Last year, an issue arose as to whether air carriers can be subject to the provincial legislation given that, in Canada, matters relating to aeronautics are in the domain of the federal government. Most recently, in *Unlu v Air Canada*, 2013 BCCA 112, the British Columbia Court of Appeal held that the complaint should be allowed to proceed on the basis that, among other things, there was no operational conflict between the workings of the provincial legislation and the regime imposed under the federal Air Transportation Regulations, SOR/88-58, that deal with airfare advertising. Leave to appeal the Court of Appeal's decision to the Supreme Court of Canada was denied in August 2013.

Regulatory/Passenger Complaints

In the consumer protection landscape, for the last several years, the field has largely been occupied by Gabor Lukács, a Canadian mathematician who has taken an interest in challenging various aspects of the tariffs filed by air carriers with the regulator, the Canadian Transportation Agency (the Agency). The majority of Mr Lukács' complaints centre on the clarity and reasonableness of the content of the filed tariffs, as well as the extent to which air carriers are applying their tariffs, as filed, in the ordinary course of business.

Mr Lukács' efforts have created a significant body of jurisprudence from the Agency – to the extent that his more recent decisions often rely heavily upon principles enunciated in previous complaints launched by him.

Since 2012, Mr Lukács has been involved in complaints arising from, among other things:

- air carriers' online and airport communications to the public as to the extent to which baggage claims involving "wear and tear" must be paid (*Lukács v United Airlines*, CTA Decision Nos. 182/200-C-A-2012);

- lack of compliance of tariff liability provisions with the Montreal liability regime (*Lukács v Porter Airlines*, CTA Decision No. 16-C-A-2013);

• the reasonableness of imposing releases of liability as a precondition for the payment of compensation provided for in a tariff (*Lukács v WestJet*, CTA Decision No. 227-C-A-2013);

• the reasonableness of air carriers engaging in overselling flights for commercial reasons (*Lukács v Air Canada*, CTA Decision No. 204-C-A-2013);

• the amount of denied boarding compensation to be paid to involuntarily bumped passengers in the event of a commercial overbooking (*Lukács v Air Canada*, CTA Decision No. 342-C-A-2013);

• the amount of compensation to be paid to passengers who miss their flight as a result of an early departure (*Lukács v Air Transat*, CTA Decision No. 327-C-A-2013); and

• the use of cameras by passengers onboard aircraft (*Lukács v United Airlines*, CTA Decision No. 311-C-A-2013)

It is expected that, in 2014, Mr Lukács will continue in his quest to ensure that air carrier tariffs are reasonable, clear and faithfully applied.

Although it may not be initiated by Mr Lukács, we expect that, in 2014, the Agency will consider the issue of whether air carriers should be able to charge a fee for booking a specific seat for a child travelling with a parent or guardian.

Regulatory/ Notices to Industry

Wet Leasing

On 30 August 2013, the Agency released its new policy on wet leasing of foreign aircraft. It applies to operators who wet lease foreign aircraft for use on international passenger services for arrangements of more than 30 days. The key changes are that, in order for the Agency to approve such an arrangement:

• the number of aircraft leased by an operator is capped at 20 per cent of the number of Canadian-registered aircraft on the lessees' Air Operator Certificate at the time the application was made;

• small aircraft are excluded from the number of Canadian-registered aircraft described above; and

• small aircraft is defined as an aircraft equipped for the carriage of passengers and having a certificated maximum carrying capacity of not more than 39 passengers.

In addition to the above, the lessee is required to provide a rationale as to why the wetlease arrangement (or its renewal) is necessary. The Agency has stated that it:

• will not deny an application solely on the basis of the rationale for the use of foreign aircraft with flight crew, as long as the cap is not exceeded; and

• may renew approvals of wet-lease applications of more than 30 days as long as the cap is not exceeded.

There is some flexibility for short-term arrangements and where unexpected events require an exception.

All-Inclusive Fare Advertising

In December 2012, the Agency approved new regulations with respect to all-inclusive fare advertising. Initially, the regulations were enforced through a "proactive and collaborative educational approach". The Agency has recently released a notice to the industry advising that it will now take a firmer stance in ensuring compliance. It has recently issued administrative monetary penalties (AMPs) against two online travel retailers for not advertising the total all-inclusive price on their online booking systems. In one case, the AMP amounted to $40,000 due to the lack of initial response from the retailer. In another, the AMP was $8,000 in a situation where that retailer complied in the case of booking through its main website, but not with respect to booking on its mobile website.

Baggage Rules

The Agency has recently completed a consultation process with the industry and with the public with respect to the issue of baggage rules. The issues under contemplation include à la carte pricing, regulatory change and carriers' attempts to further monetize the transportation of baggage. At present, there are two regimes being used in Canada: one of which was adopted by the International Air Transport Association (Resolution 302) and the other by way of recently promulgated

regulations to be enforced by the United States Department of Transportation (14 CFR part 399.87). The Agency has gone on the record to state that it expects to make a decision on the appropriate approach to apply for baggage being transported to/from Canada in the fall of 2013.

Defining the Boundaries of Regulation

In the arena of business aviation, the Appeal Panel of the Transportation Appeal Tribunal of Canada is expected to revisit the extent to which the Canadian Transportation Agency should regulate business-related aviation in Canada. The facts arise from the practice of a casino based in Atlantic City, New Jersey, offering voluntary air transfers to the casino to some of its most valued clients. In evidence that has already been led in these proceedings, the casino has asserted that the complimentary flights are at the sole discretion of the casino; no customer was entitled to such a service; and the provision of the flights is not based on the amount spent by the customers at the casino.

The core of the issue is whether the casino requires a licence from the Agency in order to offer this benefit to its customers. Under the applicable legislation, those who offer a “publicly available air service” in Canada require such a licence and are subject to all of the requirements imposed on licensees. *In Marina District Development Company v Attorney General of Canada*, 2013 FC 800, the Federal Court was asked by the casino, on a judicial review, to overturn the Appeal’s panel’s previous finding that the casino’s air service did, in fact, trigger the Agency’s oversight. The Federal Court found that the legal test imposed by the Appeal Panel for determining whether an air service was publicly available bordered on tautological but declined to answer the question itself. The matter was sent back to the Appeal Panel for reconsideration. A new decision is expected in 2014. In our view, it is likely that the matter will be sent back to the Federal Court, possibly before the end of 2014 as well, regardless of which party prevails.

This is **Exhibit "8"** to the Affidavit of Dr. Gábor Lukács affirmed before me on September 7, 2023

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Signature

Federal Court of Appeal | Cour d'appel fédérale

Date: 20200303

Docket: A-311-19

Ottawa, Ontario, March 3, 2020

Present: **NEAR J.A.**

BETWEEN:

INTERNATIONAL AIR TRANSPORT ASSOCIATION, AIR TRANSPORTATION ASSOCIATION OF AMERICA DBA AIRLINES FOR AMERICA, DEUTSCHE LUFTHANSA AG, SOCIÉTÉ AIR FRANCE, S.A., BRITISH AIRWAYS PLC, AIR CHINA LIMITED, ALL NIPPON AIRWAYS CO., LTD., CATHAY PACIFIC AIRWAYS LIMITED, SWISS INTERNATIONAL AIRLINES LTD., QATAR AIRWAYS GROUP Q.C.S.C., AIR CANADA, PORTER AIRLINES INC., AMERICAN AIRLINES INC., UNITED AIRLINES INC., DELTA AIR LINES INC., ALASKA AIRLINES INC., HAWAIIAN AIRLINES, INC. and JETBLUE AIRWAYS CORPORATION

Appellants

and

CANADIAN TRANSPORTATION AGENCY and THE ATTORNEY GENERAL OF CANADA

Respondents

and

DR. GÁBOR LUKÁCS

Intervener

ORDER

WHEREAS Dr. Gábor Lukács moves for an order permitting him to intervene in this appeal;

AND WHEREAS the Court has read the proposed intervener's motion record, the appellants' responding motion record in response to the motion to intervene, correspondence from the respondent Canadian Transportation Agency, and the proposed intervener's reply;

AND WHEREAS the appellants oppose the proposed intervener's motion, and the respondents take no position;

AND WHEREAS the Court has considered the factors relevant to granting leave to intervene under rule 109 of the *Federal Courts Rules*, SOR/98-106;

AND WHEREAS the Court is of the view that the case engages the public interest, that the proposed intervener would defend the interests of airline passengers in a way that the parties 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;

AND WHEREAS the Court is nevertheless of the view that the proposed intervention in the motion for a stay is not in the interests of justice, and would not be of assistance to the Court;

THIS COURT ORDERS that:

1. Dr. Lukács's motion to intervene in this appeal is granted in part. Dr. Lukács may intervene in the appeal subject to the terms described below. Dr. Lukács may not intervene in the motion for a stay.

2. The style of cause shall be amended by including Dr. Lukács as an intervener as appears in this Order, and shall be used on all further documents in this appeal.

3. Dr. Lukács's intervention in the appeal shall be subject to the following terms:

    i. Dr. Lukács may serve and file a memorandum of fact and law of no more than twenty (20) pages with respect to the appeal within twenty (20) days of the service of the Respondents' memoranda;

    ii. Dr. Lukács shall have the right to make oral submissions at the hearing of the appeal for no more than twenty (20) minutes; and

    iii. Dr. Lukács may not seek costs, nor shall costs be awarded against him.

"D. G. Near"

J.A.

This is **Exhibit "9"** to the Affidavit of Dr. Gábor Lukács affirmed before me on September 7, 2023

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Signature

Deficiencies of the Proposed Air Passenger Protection Regulations

by Air Passenger Rights

Submissions to the Canadian Transportation Agency

February 2019

Halifax, NS • AirPassengerRights.ca • lukacs@AirPassengerRights.ca

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About *Air Passenger Rights*

Air Passenger Rights (APR) is an independent nonprofit network of volunteers, devoted to empowering travellers through education, advocacy, investigation, and litigation.

APR is in a unique position to comment on the regulations to be made under s. 86.11 of the *Canada Transportation Act* on behalf of the public interest:

- **Experience based.** *APR*'s submissions are based on the expertise and experience accumulated through assisting passengers daily in enforcing their rights.
- **Independence.** *APR* accepts no government or business funding.
- **No business interest.** *APR* has no business interest in the regulations to be made.

APR's presence on the social media includes the Air Passenger Rights (Canada) Facebook group, with **over 9,900 members**, the Air Passenger Rights Facebook page, and the @AirPassRightsCA Twitter feed.

APR was founded and is coordinated by Dr. Gábor Lukács, a Canadian air passenger rights advocate, who volunteers his time and expertise for the benefit of the travelling public.

Gábor Lukács, PhD (Founder and Coordinator)

Since 2008, Dr. Lukács has filed **more than two dozen successful complaints**[1] with the Canadian Transportation Agency (the Agency), challenging the terms, conditions, and practices of air carriers, resulting in orders directing them to amend their conditions of carriage and offer better protection to passengers.

Dr. Lukács has appeared before courts across Canada, including the Federal Court of Appeal and the Supreme Court of Canada,[2] in respect of air passenger rights. He successfully challenged the Agency's lack of transparency and the reasonableness of the Agency's decisions.

In 2013, the Consumers' Association of Canada awarded Dr. Lukács its Order of Merit for singlehandedly initiating legal action resulting in the revision of Air Canada's unfair practices regarding overbooking. Dr. Lukács's advocacy in the public interest and his expertise and experience in the area of passenger rights have been recognized by the transportation bar,[3] the academic community,[4] the judiciary,[5] and the legislature.

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1 See Appendix A.
2 *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2.
3 Carlos Martins: Aviation Practice Area Review (September 2013), WHO'SWHOLEGAL.
4 Air Passenger Rights Advocate Dr. Gabor Lukacs lectures at the IASL, Institute for Air and Space Law, October 2018.
5 *Lukács v. Canada*, 2015 FCA 140 at para. 1; *Lukács v. Canada*, 2015 FCA 269 at para. 43; and *Lukács v. Canada*, 2016 FCA 174 at para. 6.

Executive Summary

Canada has fallen behind the rest of the Western world in terms of consumer protection for air passengers. In 2006, the European Union's *Regulation (EC) 261/2004* came into force. It has since become known as the gold standard of air passenger rights. No similar laws have been passed in Canada. Regrettably, this is not going to change any time soon. Canada will continue to lag behind.

The proposed *Air Passenger Rights Regulations* [Proposed Regulations] undermine the rights of air passengers travelling within, to, and from Canada in some key areas (Figure 1), while largely regifting existing rights in other areas. It is for this reason that **more than 8,000 emails protesting against the shortcomings of the Proposed Regulations** have been sent to the Canadian Transportation Agency.

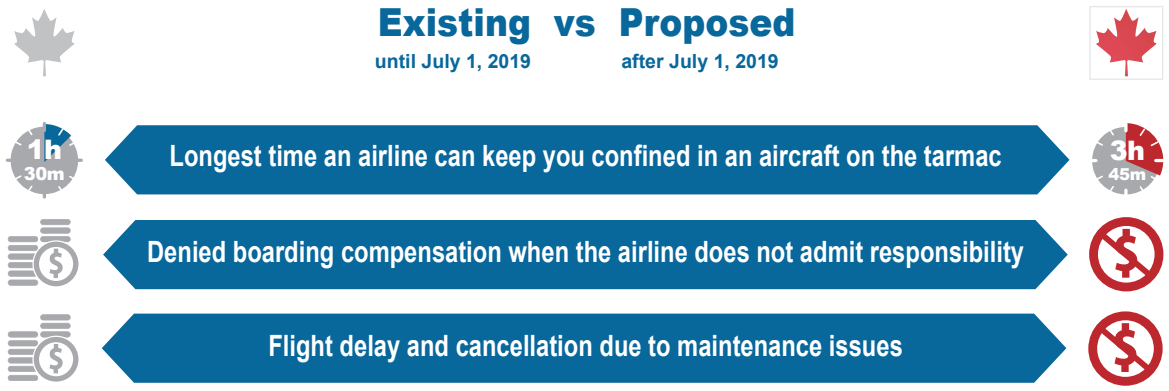

Figure 1. Existing (until July 1, 2019) vs. Proposed (after July 1, 2019)

The Proposed Regulations leave the impression of an instrument written by the airlines to ensure that in most cases, airlines will have to pay no compensation to passengers, while creating the facade of a consumer protection legislation.

APR has identified the following key areas where the Proposed Regulations are fundamentally flawed:

1. **Tarmac Delay.** The Proposed Regulations purport to permit airlines to keep passengers confined in an idling aircraft on the tarmac for up to **3 hours and 45 minutes**. *APR* is of the view that these provisions are: (1) inhumane, causing significant suffering and hardship to passengers with disabilities and to families travelling with young children; (2) unlawful, conflicting with the *Canadian Charter of Rights and Freedoms*, and (3) unacceptable.

   APR believes that no passenger should be kept on the tarmac for more than **90 minutes**, as the Senate recommended in March 2018.

2. **No Entitlement to Denied Boarding Compensation in Most Cases.** The Proposed Regulations define "denied boarding" much more narrowly than the commonly used definition, established in *Regulation (EC) 261/2004* (Figure 2). The proposed definition is so narrow that it deprives passengers from being entitled to compensation in many if not most cases. This challenge is compounded by the requirement that passengers seeking denied boarding compensation establish facts that are within the airlines' exclusive knowledge, such as the number of passengers who checked in.

   APR believes that Canada should adopt the commonly used definition of denied boarding established in *Regulation (EC) 261/2004*.

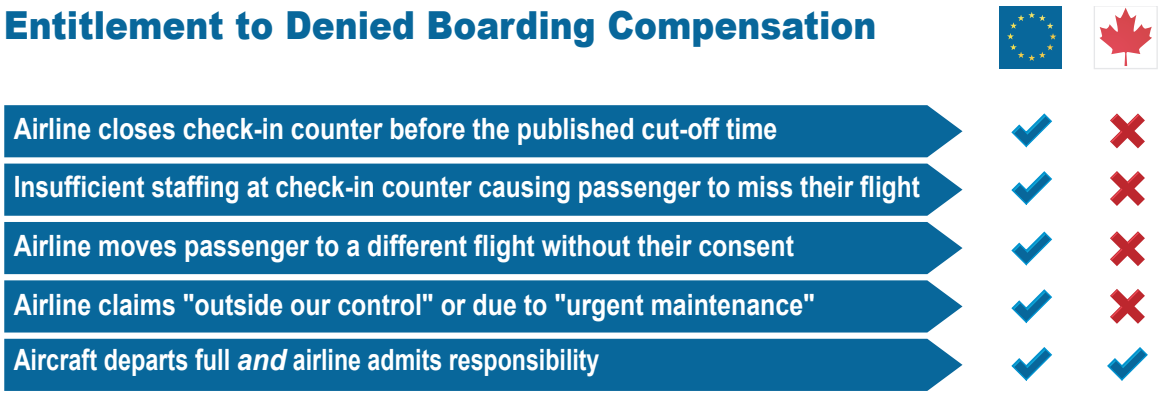

Figure 2. Denied Boarding Compensation: EU vs. Proposed Regulations

3. **No Entitlement to Monetary Compensation in Most Cases.** The Proposed Regulations establish lack of compensation as the norm in the case of flight delay, cancellation, and denial of boarding, and payment of compensation as the exception. Passengers who seek monetary compensation will have to establish that the event was "within the carrier's control" and was not required for safety purposes. In practice, passengers can neither verify nor prove these, because they have no access to the airlines' crew assignment databases, operation centre databases, and aircraft maintenance log books; therefore, unlike in the European Union, where the burden of proof is on the airlines and not the passengers, in Canada, passengers will receive no monetary compensation in most cases.

   APR believes that Canada should adopt the principle established in *Regulation (EC) 261/2004* that payment of compensation is the norm, and the airlines must prove any extenuating circumstance.

4. **No Compensation for Passengers Who Do Not Complain within 120 Days.** The Proposed Regulations do not require airlines to proactively compensate passengers for flight delay or cancellation. Instead, passengers are required to complain to the airline and ask for compensation. If they fail to do so within 120 days, they lose their right to compensation.

   APR is of the view that imposing a 120-day deadline on passengers is unreasonable and serves only the airlines' private interests.

5. **No Meals or Hotel in Most Cases.** Under the Proposed Regulations, if the airline notifies passengers about a delay or cancellation at least 12 hours in advance, then the airline is **not required** to provide meals or accommodation, even if the delay or cancellation is "within the carrier's control." This means that passengers may be left fending for themselves away from their homes, possibly in a foreign country, without any right to assistance from the airline—as long as the airline provided a 12-hour notice.

   APR is of the view that passengers affected by a flight delay or cancellation within the carrier's control must **always** be provided with meals and overnight accommodation, regardless of how much advance notice the airline provided.

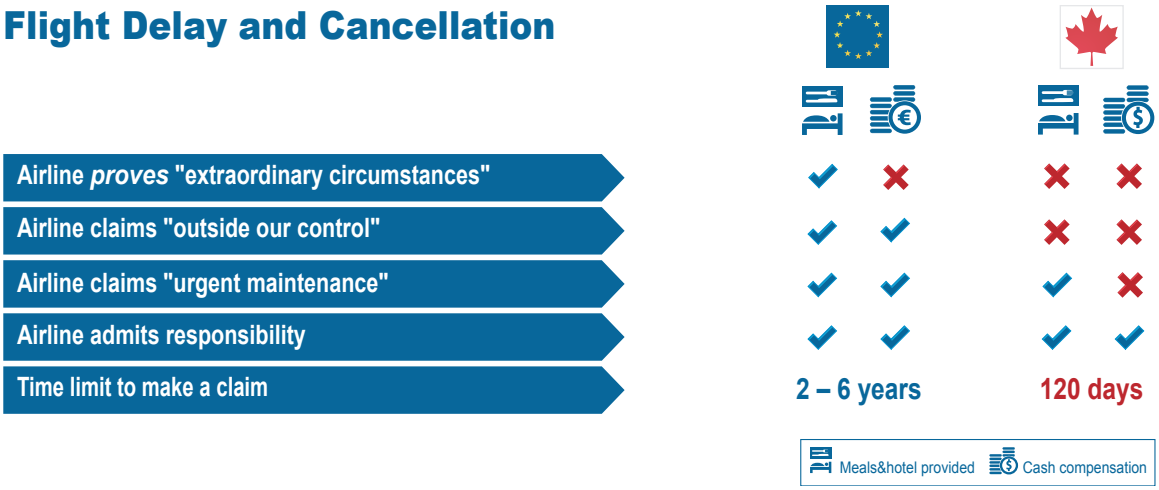

Figure 3. Flight Delay and Cancellation: EU vs. Proposed Regulations

6. **Shortchanging Passengers Booked on "Small" Carriers.** The Proposed Regulations provide substantially fewer rights and a fraction of the compensation amounts to passengers travelling on "small" carriers, including on airlines operating large aircraft such as Flair or Swoop (wholly owned by WestJet).

   APR is of the view that this distinction is unlawful, unfair to passengers, and inconsistent with the objective of uniformity stated in Parliament by Transport Minister Marc Garneau.

7. **Important Issues Not Addressed.** The Proposed Regulations fail to address the following issues: (1) right to a refund of the unused portion of a ticket in the case of delay, cancellation, and denial of boarding "outside the carrier's control;" (2) boarding priorities and the obligation to seek volunteers in the case of denial of boarding "outside the carrier's control;" and (3) "flight advancement," that is, when the carrier changes the departure time to a time earlier than it appears on the passenger's original ticket with the consequence that the passenger misses their flight.

   APR is of the view that the regulations must address these issues.

Summary of Recommended Amendments

Tarmac delay

1. Delete the words "at an airport in Canada" from subsection 9(1) of the Proposed Regulations.

2. Delete subsection 9(2) of the Proposed Regulations.

3. Replace section 9 of the Proposed Regulations with:

    (1) No person directly or indirectly in control of an aircraft with passengers on board, including but not limited to a carrier or a licensee, shall permit the aircraft to remain on the tarmac for more than 90 minutes.

    (2) Within 90 minutes of its door being closed, an aircraft with passengers on board must either take off or return to a position that permits passengers to disembark.

    (3) Within 90 minutes of landing at an airport, an aircraft with passengers on board must either take off or taxi to a position that permits passengers to disembark.

    (4) A carrier that allows passengers to disembark must, if feasible, give passengers with disabilities and their support person, service animal or emotional support animal, if any, the opportunity to disembark first.

    (5) This section does not apply if the person invoking this subsection proves that providing an opportunity for passengers to disembark is not possible for reasons that are beyond the carrier's control, including reasons related to safety and security or to air traffic or customs control.

Definition of "denied boarding"

4. Replace subsection 1(3) of the Proposed Regulations with:

    1(3) For the purpose of these Regulations, "denied boarding" means a refusal to carry passengers on a flight, if

    (1) the passenger held a confirmed reservation on the flight concerned, and

    (2) the passenger presented themselves for check-in as stipulated and at the time indicated in advance in writing (including by electronic means) by the carrier, or if no time indicated, no later than 45 minutes before the published departure time,

    except if the carrier proves that there were reasonable grounds to refuse to carry the passenger, such as reasons of health, safety or security, or inadequate travel documentation.

Burden of proof

5. Replace subsection 1(1) with:

1 (1) The following definitions apply in Part II of the Act.

mechanical malfunction means a mechanical problem that reduces the safety of passengers but does not include:

(i) a problem that is identified further to scheduled maintenance undertaken in compliance with legal requirements; or

(ii) a problem that has previously been identified and whose repair has been deferred pursuant to sections 605.07-605.10 of the *Canadian Aviation Regulations*.

(défaillance mécanique)

required for safety purposes means legally required in order to reduce risk to passengers but does not include:

(i) scheduled maintenance in compliance with legal requirements; or

(ii) repair of a problem that has previously been identified and whose repair has been deferred in accordance with sections 605.07-605.10 of the *Canadian Aviation Regulations*.

(nécessaire par souci de sécurité)

6. Replace subsection 10(1) with:

10 (1) This section applies in respect of a carrier when there is delay, cancellation or denial of boarding that the carrier proves to be exclusively due to situations outside the carrier's control, including

7. Replace subsection 11(1) with:

11 (1) This section applies in respect of a carrier when there is delay, cancellation or denial of boarding that the carrier fails to prove to be outside the carrier's control, but proves that it is required solely for safety purposes.

8. Replace subsection 12(1) with:

12 (1) This section applies in respect of a carrier when there is delay, cancellation or denial of boarding unless the carrier proves circumstances referred to in subsection 10(1) or 11(1).

Limitation and prescription periods

9. Replace subsection 19(3) of the Proposed Regulations with a provision mirroring s. 39 of the *Federal Courts Act*: (1) provincial limitation statutes apply to claims arising in a province; and (2) a six-year period applies to claims arising otherwise than in a province.

"Large" vs. "small" carriers

10. Delete subsections 1(2), 17(1)(b), 18(b), 19(1)(b), and 19(5) and delete the words "in the case of a large carrier" in subsections 17(1)(a), 18(a), and 19(1)(a) of the Proposed Regulations.

11. Alternatively, replace "one million" with "one hundred thousand" in subsection 1(2)(a) of the Proposed Regulations, and append immediately after subsection 1(2)(b):

> (c) operates at least one aircraft having a certificated maximum carrying capacity of more than 39 passengers.

Right to rebooking on another carrier

12. Replace the phrase "departs within nine hours" with "scheduled to arrive at the passenger's destination within four hours" in subparagraph 17(1)(a)(i) of the Proposed Regulations.

13. Replace "paragraph (a)" with "subparagraph (i)" in subparagraph 17(1)(a)(ii) of the Proposed Regulations.

Right to meals and hotel

14. Correct paragraphs 12(2)(b) and 12(3)(b) of the Proposed Regulations to match the intent stated in the Regulatory Impact Analysis Statement, to read:

> ~~if a passenger is informed of the [...] less than 12 hours before the departure time on their original ticket,~~ provide the treatment set out in section 14.

15. Replace paragraphs 11(2)(b) and 11(3)(b) of the Proposed Regulations with:

> provide the treatment set out in section 14.

Form of payment

16. Replace paragraph 21(1)(a) of the Proposed Regulations with:

> compensation in the other form has a monetary value of at least 300% of the minimum monetary value of the compensation that is required under these Regulations;

Seating of children

17. Replace the first sentence of section 22(1) of the Proposed Regulations with:

> In order to seat children who are under 14 years of age in close proximity to a parent, guardian or tutor in accordance with subsection (2), a carrier shall

18. Append the following subparagraph immediately after subparagraph 22(1)(b)(iv):

> (v) if no passenger volunteers to change seats before take-off, involuntarily change the seats of passengers on board before take-off.

19. Replace subsection 22(2) of the Proposed Regulations with:

> **22(2)** The carrier shall assign to a child who is under 14 years of age by offering, at no additional charge,
>
> (a) in the case of a child who is under 12 years of age, a seat that is adjacent to their parent, guardian or tutor's seat;
>
> (b) in the case of a child who is 12 or 13 years of age, a seat that is in a row that is separated from the row of their parent, guardian or tutor's seat by no more than one row.

Clarification of the scope

20. Replace subsection 2(1) of the Proposed Regulations with:

> All carriers carrying a passenger, including but not limited to the marketing carrier, operating carrier, contracting carrier, and actual carrier, are jointly and severally, or solidarily, liable to the passenger with respect to the obligations set out in these Regulations or, if they are more favourable, the obligations set out in the applicable tariff.

Right to a refund of unused portion of ticket

21. Renumber section 18 as 18(1) of the Proposed Regulations, and append the following provision immediately after it:

> **(2)** If the alternate travel arrangements offered in accordance with subsection (1) do not accommodate the passenger's travel needs, the carrier must instead refund the unused portion of the ticket.

Boarding priorities

22. Append the following paragraph to subsection 10(2):

> (d) in the case of a cancellation or a denial of boarding, deny boarding in accordance with section 15.

23. Replace subsection 15(1) of the Proposed Regulations with:

> **15 (1)** ~~If paragraph 11(4)(b) or 12(4)(b) applies in respect of a~~ A carrier~~, it~~ must not deny boarding unless it has asked if any passenger is willing to give up their seat.

Flight advancement

24. Append the following subsection immediately after subsection 1(3) of the Proposed Regulations:

> **1(4)** For the purposes of these Regulations, a flight whose departure time was brought forward compared to the time appearing on the original ticket, with the consequence that the passenger misses that flight, shall be considered a flight on which the passenger has been denied boarding.

Lack of Integrity and Institutional Bias in the Regulation-Making

APR is deeply concerned that the regulation-making process has been compromised by lack of integrity and institutional bias at the Canadian Transportation Agency in favour of the airline industry and against the travelling public. *APR* is of the view that the issues described below have created a reasonable apprehension of institutional bias, which undermines the integrity and credibility of the present regulation-making process.

APR is particularly troubled by what transpires as undue influence of the International Air Transport Association [IATA] on the Agency's regulation and decision making. IATA is the trade association for the world's airlines, representing some 290 airlines,[6] including most commercial airlines flying within, to, and from Canada.

A. Private consultations with IATA prior to June 2017

According to the affidavit sworn by Ms. Nicola Colville, Area Manager, Canada and Bermuda for IATA, on June 16, 2017:

> The Agency has sought IATA's input with regard to the regulations it will draft. IATA is actively participating in the consultation process with Transport Canada and the Agency on this topic.[7]

The private "consultation" between IATA and the Canadian Transportation Agency took place before June **2017**, at which time Bill C-49 had neither been studied nor passed into law by Parliament; yet, the Agency engaged in these **private, confidential** discussions with IATA about the content of the regulations that would be made. Notably, the Canadian public and the consumer advocacy community were excluded from these private discussions.

APR is struggling to understand why the Agency communicated with IATA in private about the regulations to be made in private in **2017** (or earlier), given that public consultations about the regulations commenced only a year later, in **2018**.

These circumstances, and the Agency's failure to publicly disclose all of its communications with IATA in relation to the regulations, including the communications referenced in Ms. Colville's affidavit, create the impression that the past and current "public consultation" is a sham, a dog and pony show, serving the sole purpose of lending an air of legitimacy to regulations. *APR* can only conclude that the Agency decided to develop the regulations based on its private communications with IATA.

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6 "About us", IATA's official website (retrieved: August 9, 2018).

7 Affidavit of Nicola Colville, Affirmed June 16, 2017, filed on behalf of IATA in Supreme Court of Canada File No. 37276, at para. 25.

B. Member MacKeigan's marriage to IATA's assistant general counsel

Member J. Mark MacKeigan, a duly appointed quasi-judicial decision-maker of the Agency, is married to the assistant general counsel of the International Air Transportation Association [IATA].[8]

IATA has been recognized by the Agency as a stakeholder in the current regulation-making process, and has made detailed submissions on the subject.[9]

The failure of Member MacKeigan to recuse himself from all involvement in the regulation-making process creates a reasonable apprehension of bias and institutional bias.

[8] Leslie Lugo, Mark MacKeigan, July 30, 2017, New York Times.
[9] IATA's submissions to the Agency, dated August 28, 2018.

1. Tarmac Delay: 3 Hours and 45 Minutes is Inhumane and Unlawful

APR is of the view that provisions of the Proposed Regulations that purport to permit airlines to keep passengers confined to an aircraft idling on the tarmac for up to **3 hours and 45 minutes** are inhumane, unreasonable, and unlawful:

> **9 (1)** If a flight is delayed on the tarmac **at an airport in Canada** for more than **three hours** after the aircraft doors have been closed for take-off or the flight has landed, the carrier must provide an opportunity for passengers to disembark.
>
> **(2)** A carrier is not required to provide an opportunity for passengers to disembark in accordance with subsection (1) if take-off is likely in less than **45 minutes** and the carrier is able to provide the treatment referred to in section 8 until take-off.[10]

In addition, *APR* is of the view that the limitation of the scope of subsection 9(1) to "an airport in Canada" is inconsistent with Parliament's direction.

Unfortunately, paragraph 86.11(1)(f) of the *Act*, passed by the Trudeau Government, limits the Agency's powers with respect to the making of regulations to tarmac delays of "**over 3 hours**." Consequently, the aforementioned objective cannot be achieved by regulations alone, and the Agency must also use its broad adjudicative powers under ss. 67.2(1) and 86(1)(h) of the *Canada Transportation Act* and s. 113 of the *Air Transportation Regulations* to fulfill its consumer protection mandate.

APR believes that under the fundamentally flawed framework of Bill C-49,[11] the best the Agency can do in terms of regulations relating to tarmac delays over three hours is imposing a complete prohibition. *APR* proposes the following specific provisions:

> (1) No person directly or indirectly in control of an aircraft with passengers on board, including but not limited to a carrier or a licensee, shall permit the aircraft to remain on the tarmac for more than three hours.
>
> (2) Within three hours of its door being closed, an aircraft with passengers on board must either take off or return to a position that permits passengers to disembark.
>
> (3) Within three hours of landing at an airport, an aircraft with passengers on board must either take off or taxi to a position that permits passengers to disembark.

APR further submits that, based on the constitutional considerations explained below, the Agency may and should replace "three hours" with "90 minutes."

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[10] Proposed Regulations, ss. 9(1) and 9(2) (emphasis added).

[11] "That is doubling the time airlines can stay on the tarmac, and it can cause severe problems for persons with disabilities," said Mr. Terrance Green, Transportation Committee Co-Chair, Council of Canadians with Disabilities. Proceedings of the Standing Senate Committee on Transport and Communications, Issue No. 32 - Evidence - March 20, 2018.

A. Inconsistency with the parent statute

The Agency is enacting the Proposed Regulations, including the requirement to pay compensation in certain limited cases, based on powers delegated to it by Parliament in subparagraph 86.11(1)(f) of the *Act*:

> **86.11 (1)** The Agency shall, after consulting with the Minister, make regulations in relation to flights **to, from and within Canada**, including connecting flights,
>
> ⋮
>
> (f) respecting the carrier's obligations in the case of tarmac delays over three hours, including the obligation to provide timely information and assistance to passengers, as well as the minimum standards of treatment of passengers that the carrier is required to meet; [...][12]

Contrary to Parliament's express language requiring the making of regulations in relation to flights "to, from and within Canada," subsection 9(1) of the Proposed Regulations applies only to flights that are "at an airport in Canada." The Agency thus failed to carry out Parliament's will.

APR submits that the Agency must comply with the express language of Parliament, and is required to enact regulations that govern not only flights located "at an airport in Canada," but all flights to Canada, even if the tarmac delay takes place outside Canada.

B. Lack of data supporting the "imminent take-off" provision

Subsection 9(2) purports to allow airlines to keep passengers on the tarmac not only for 3 hours, but up to 3 hours and 45 minutes if "take off is likely."

The "imminent take-off" argument is a logical fallacy. One could equally make the same argument after 3 hours and 45 minutes, or after 4 hours, or 5 hours. Accepting an argument of this nature without actual data about the statistical distribution of the length of tarmac delays would be tantamount to accepting that airlines can keep passengers on the tarmac indefinitely. This clearly was not Parliament's intent.

On January 17, 2019, the Agency's representatives acknowledged that there is no evidence or data capable of supporting the assumption that if a flight did not take off for 3 hours, then there is a reasonable chance that it will be able to take off in the 45-minute window after the 3-hour deadline.

APR therefore submits that subsection 9(2) should be deleted.

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[12] *Canada Transportation Act*, s. 86.11 (emphasis added).

C. Conflict with the *Charter*

Canada is a signatory to the *Tokyo Convention*.[13] Pursuant to Chapter III of the *Tokyo Convention*, the "aircraft commander" represents state authority on board the aircraft "from the moment when all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation." Much in the same vein, the *Criminal Code* includes pilots in command in the definition of a "peace officer."

Thus, when the aircraft is stranded on the tarmac with its doors closed and the passengers unable to disembark, the aircraft's captain ("pilot in command" or "aircraft commander") represents state authority on board. As such, their actions are subject to provisions of the *Canadian Charter of Rights and Freedoms* [*Charter*]. The *Charter* provides that:

> **7.** Everyone has the right to life, **liberty** and security of the person and **the right not to be deprived thereof** except in accordance with the principles of fundamental justice.
>
> **9.** Everyone has the right not to be **arbitrarily detained or imprisoned**.[14]

When passengers board an aircraft, they do so voluntarily for the specific purpose of being transported to their destinations, and consent to being kept on the aircraft for the duration of the flight. The passengers' consent is inherently tied to the purpose for which it was given, and does not encompass being kept on the tarmac for hours.

As the Quebec Court of Appeal confirmed,[15] once a passenger has expressed their desire to leave, that passenger cannot lawfully be confined to the aircraft. The person in control of the aircraft must conduct themselves in such a matter as to allow and facilitate the passenger disembarking if such an action is possible at all.

When an aircraft is stranded on the tarmac, the passengers are kept on board for a purpose different than the one for which their consent was given. As such, they are entitled to withdraw their consent to being kept on the aircraft, and disembark. Keeping passengers on the aircraft against their will, after they have withdrawn their consent to being kept on the aircraft, is forcible confinement,[16] and is a breach of the passengers' rights guaranteed by the *Charter*.

APR therefore submits that section 9 of the Proposed Regulations is unlawful and violates the rights guaranteed by the *Charter* in that it purports to permit airlines and pilots in command to keep passengers confined to the aircraft for an extended period of time without their consent.

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[13] *Convention on Offences and Certain Other Acts Committed on Board Aircraft*, Tokyo, 14 September 1963, Can. T.S. 1970/5.
[14] *The Constitution Act, 1982*, ss. 7 and 9 (emphasis added).
[15] *R. c. Tremblay*, 1997 CanLII 10526 (QC CA).
[16] *R. v. Gratton (1985)*, 18 C.C.C. (3d) 462 (Ont. C.A.); leave to appeal ref'd: [1985] 1 S.C.R

APR is of the view that the 90-minute limit on tarmac delays that has been the Canadian standard since 2008 strikes the balance between the right of passengers to withdraw their consent to being kept on the aircraft and the operational realities of an aircraft requiring to taxi from the gate to the de-icing pad and then to the runway.

Recommended Amendments

1. Delete the words "at an airport in Canada" from subsection 9(1) of the Proposed Regulations.

2. Delete subsection 9(2) of the Proposed Regulations.

3. Replace section 9 of the Proposed Regulations with:

    (1) No person directly or indirectly in control of an aircraft with passengers on board, including but not limited to a carrier or a licensee, shall permit the aircraft to remain on the tarmac for more than 90 minutes.

    (2) Within 90 minutes of its door being closed, an aircraft with passengers on board must either take off or return to a position that permits passengers to disembark.

    (3) Within 90 minutes of landing at an airport, an aircraft with passengers on board must either take off or taxi to a position that permits passengers to disembark.

    (4) A carrier that allows passengers to disembark must, if feasible, give passengers with disabilities and their support person, service animal or emotional support animal, if any, the opportunity to disembark first.

    (5) This section does not apply if the person invoking this subsection proves that providing an opportunity for passengers to disembark is not possible for reasons that are beyond the carrier's control, including reasons related to safety and security or to air traffic or customs control.

2. Definition of "Denied Boarding": Deprives Passengers of Compensation

APR is concerned that the proposed regulations define "denied boarding" so narrowly that it deprives passengers from being entitled to compensation in many if not most cases:

> **1(3)** For the purpose of these Regulations, there is a denial of boarding when a passenger is not permitted to board an aircraft **because** the number of passengers who
>
> (1) **checked in** by the required time,
>
> (2) hold a confirmed reservation and valid travel documentation and
>
> (3) are **present at the boarding gate** in time for boarding
>
> is greater than the number of seats available on the flight.[17]

This definition imposes a burden of proof on passengers that cannot be met, depriving them from compensation in cases where the Agency had previously recognized that compensation was owing. It also unlawfully displaces Parliament's intended broad meaning of "denied boarding" with the narrow meaning of "denial of boarding as a result of overbooking" in the existing *Air Transportation Regulations*.

A. Imposition of a burden of proof that cannot be met

The Proposed Regulations require a passenger who seeks denied boarding compensation to prove three facts that are within the airline's exclusive knowledge:

(a) the number of passengers who checked in by the required time, held a confirmed reservation and valid travel documents, and were present at the boarding gate in time for boarding;

(b) the number of seats available on the flight (which depends on the model and configuration of the aircraft); and

(c) the **reason** that they were denied boarding is **because** the number identified in (a) is greater than the number identified in (b), and no other reason.

Given that passengers have no access to the airlines' reservation and departure control systems, the Proposed Regulations create conditions for payment of denied boarding compensation that passengers are unable to verify, and in practice cannot prove. "The imposition of a test that can never be met could not be what Parliament intended" when it conferred upon the Agency the powers to make regulations governing denied boarding compensation.[18]

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[17] Proposed Regulations, s. 1(3) (emphasis, formatting, and numbering added).
[18] *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2 at para 17.

B. Comparison with the outcome-based definition in *Regulation (EC) 261/2004*

In sharp contrast, *Regulation (EC) 261/2004* defines denied boarding based on facts that are within the passenger's knowledge:

> **2(j)** "denied boarding" means a refusal to carry passengers on a flight, although they have presented themselves for boarding **under the conditions laid down in Article 3(2)**, except where there are reasonable grounds to deny them boarding, such as reasons of health, safety or security, or inadequate travel documentation;
>
> **3(2)** Paragraph 1 shall apply on the condition that passengers:
>
> (a) **have a confirmed reservation on the flight concerned** and, except in the case of cancellation referred to in Article 5, **present themselves for check-in**,
>
> — as stipulated and at the time indicated in advance and in writing (including by electronic means) by the air carrier, the tour operator or an authorised travel agent,
>
> or, if no time is indicated,
>
> — not later than 45 minutes before the published departure time; or
>
> (b) **have been transferred** by an air carrier or tour operator from the flight for which they held a reservation to another flight, irrespective of the reason.

In other words, under the European regulations, a passenger who is refused transportation has to prove only that they held a "confirmed reservation" and that they "presented themselves for check-in" on time. Both of these are within the knowledge of a passenger and can reasonably be proven.

C. A step backward compared to the existing jurisprudence

In *Nawrots v. Suwning*, the Agency held that passengers who present themselves for check-in on time but are unable to travel due to the airline's failure to adequately staff its check-in counters are entitled to denied boarding compensation:

> [84] Where a carrier fails to check in passengers because of the absence of personnel at the counter prior to the cut-off time for check in, the Agency is of the opinion that it is reasonable that compensation be tendered:
>
> - when passengers holding confirmed and ticketed reservations can demonstrate that they presented themselves at the ticket counter prior to the cut-off time for check in; and,
>
> - when the ticket counter was closed.

> [85] For greater clarity, where such passengers present themselves for boarding before the cut-off time, only to discover that the check-in counter has been closed, the carrier cannot avoid paying denied boarding compensation, **regardless of whether or not the flight is fully booked**, nor can it avoid liability by closing the check-in counter early.[19]

Under the narrow definition in the Proposed Regulations, such situations will no longer be recognized as "denied boarding," because the number of passengers who "are present at the boarding gate in time for boarding" is not greater than the number of seats available on the flight. Passengers caught in such situations will not be eligible for denied boarding compensation, and will be left without any remedy.

In *Janmohamed v. Air Transat*, the Agency coined the notion of *de facto* or constructive denied boarding, and confirmed passengers' entitlement to compensation in such situations:

> [19] The Agency agrees with the applicants that the affected passengers had previously confirmed space on a flight, and then were subsequently denied seats on that flight because of a lack of available seats on the aircraft. According to Air Transat, Flight No. TS246 departed with only one empty seat, and Flight No. TS247 departed with no empty seats. The fact that Air Transat notified the passengers in advance about having moved them to other flights does not relieve Air Transat of the obligation to pay denied boarding compensation. The fact is that there were insufficient seats to accommodate the applicants, despite the fact that they had previously confirmed seats, and that they were involuntarily moved to another flight. **This is a case of *de facto* or constructive denied boarding.**
>
> [20] The Agency appreciates that this situation may be unique, and not a typical case of denied boarding that normally occurs at the gate. However, effectively, the applicants were involuntarily denied boarding on their original flight because Air Transat elected, unilaterally, to give preference to other passengers who had been moved to their flight with the effect that the flight became oversold, resulting in prejudice to the applicants. **Rather than wait for the applicants to arrive at the airport and deny them boarding at that time, they were instead moved, without their consent, to another flight in advance**. The effect is the same. The applicants were not permitted to board their original flight because there was no longer room for them. It was oversold and they were "bumped".[20]

Under the narrow definition in the Proposed Regulations, *de facto* or constructive denied boarding will no longer be recognized as "denied boarding," because the unilateral change to the passengers' itinerary happens in advance and not at the airport, and the number of passengers present at the boarding gate is not greater than the number of seats available. Consequently, passengers who are *de facto* or constructively denied boarding will not be eligible for denied boarding compensation, and will be left without remedy.

To summarize, the narrow definition of "denied boarding" in the Proposed Regulations will deprive passengers from receiving denied boarding compensation in cases where such compensation would be owed under existing jurisprudence developed by the Agency.

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[19] *Nawrots v. Sunwing*, Decision 432-C-A-2013, paras. 84-85 (emphasis added).
[20] *Janmohamed v. Air Transat*, Decision No. 95-C-A-2016, paras. 19-20 (emphasis added).

D. Invalidity due to inconsistency with the parent statute

Subparagraph 86.11(1)(b)(i) of the *Canada Transportation Act* [*Act*] requires the Agency to make regulations governing compensation for "denial of boarding":

> **86.11 (1)** The Agency shall, after consulting with the Minister, make regulations in relation to flights to, from and within Canada, including connecting flights,
>
> ⋮
>
> (b) respecting the **carrier's obligations** in the case of flight delay, flight cancellation or denial of boarding, including
>
> (i) the minimum standards of treatment of passengers that the carrier is required to meet and the **minimum compensation** the carrier is required to pay for inconvenience when the delay, cancellation or **denial of boarding** is within the carrier's control,[21]

The legislature is presumed to have knowledge of laws existing at the time of enactment of new legislation. In particular, Parliament is presumed to have been aware of provisions of the *Air Transportation Regulations* [*ATR*] that require domestic and international carriers to set out in their tariffs:

> (iii) compensation for **denial of boarding as a result of overbooking**,[22]

Thus, Parliament was aware that the term "denial of boarding as a result of overbooking" already existed on the law books, yet it chose not to use such a restrictive, caused-based language, but rather chose to expand the protection offered to air travellers by directing the Agency to make regulations with respect to compensation for "denial of boarding."

Consequently, the intended meaning of "denial of boarding" in subparagraph 86.11(1)(b)(i) of the *Act* is different and broader than the meaning of "denial of boarding as a result of overbooking" in the *ATR*. To put it differently, Parliament's intent was that the Agency develop regulations governing compensation for all forms of denied boarding, not just for those that are "as a result of overbooking" as the Proposed Regulations do.

The Proposed Regulations are therefore inconsistent with the *Act* and defeat its purpose by taking away or restricting rights that Parliament intended to confer on the travelling public.

It is trite law that a regulation is invalid and cannot stand if it is inconsistent with its parent statute.[23] Hence, subsection 1(3) of the Proposed Regulations is invalid.

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[21] *Canada Transportation Act*, s. 86.11 (emphasis added).

[22] *Air Transportation Regulations*, ss. 107(1)(n)(iii) and 122(c)(iii) (emphasis added).

[23] *Booth v. R.*, 1915 CanLII 596 (SCC), [1915] 21 D.L.R. 558 (S.C.C.); *The Grand Truck Pacific Railway Co. v. The City of Fort William*, 1910 CanLII 51 (SCC), 43 S.C.R. 412; and *Morine v. L & J Parker Equipment Inc*, 2001 NSCA 53 at para. 49.

Recommended Amendments

4. Replace subsection 1(3) of the Proposed Regulations with:

> **1(3)** For the purpose of these Regulations, "denied boarding" means a refusal to carry passengers on a flight, if
>
> (1) the passenger held a confirmed reservation on the flight concerned, and
>
> (2) the passenger presented themselves for check-in as stipulated and at the time indicated in advance in writing (including by electronic means) by the carrier, or if no time indicated, no later than 45 minutes before the published departure time,
>
> except if the carrier proves that there were reasonable grounds to refuse to carry the passenger, such as reasons of health, safety or security, or inadequate travel documentation.

3. Burden of Proof that Passengers Cannot Meet

The Proposed Regulations improperly establish lack of compensation as the norm, and payment of compensation as the exception to the norm:

> **12 (1)** This section applies in respect of a carrier when there is delay, cancellation or denial of boarding that is
>
> (i) within the carrier's control **and**
> (ii) that is not referred to in subsection 11(1).[24]

Subsection 11(1), referenced in 12(1), states that:

> **11 (1)** This section applies in respect of a carrier when there is delay, cancellation or denial of boarding that is within the carrier's control **but is required for safety purposes**.[25]

The Agency's longstanding position has been that passengers bear the burden of proving facts necessary to establish that the airline failed to comply with its obligations:

> When a complaint such as this one is filed with the Agency, **the complainant must, on a balance of probabilities, establish** that the air carrier has failed to apply, or has inconsistently applied, terms and conditions of carriage appearing in the applicable tariff.[26]

This means that passengers seeking to enforce their rights to compensation under section 12 will need to prove, on balance of probabilities, that:

(i) the delay, cancellation or denial of boarding was indeed within the carrier's control; and
(ii) **was not** required for safety purposes.

Determining whether an event was "within the carrier's control" requires access to information and data within the carrier's exclusive knowledge and control: crew assignment databases, operations centre databases, and aircraft maintenance log books at the bare minimum.

Given that passengers have no access to any of these, the Proposed Regulations create conditions for payment of compensation that passengers are unable to verify, and in practice cannot prove. "The imposition of a test that can never be met could not be what Parliament intended" when it conferred upon the Agency the powers to make regulations governing compensation for flight delay, cancellation, and denial of boarding.[27]

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[24] Proposed Regulations, s. 12(1) (emphasis and roman numbering added).
[25] Proposed Regulations, s. 11(1) (emphasis added).
[26] *Nawrots v. Sunwing*, Decision 432-C-A-2013, para. 38 (emphasis added).
[27] *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2 at para 17.

A. Inconsistency with the *Montreal Convention* and the *Carriage by Air Act*

The Proposed Regulations are also inconsistent with the principles of the *Carriage by Air Act*, which create a presumption of liability and payment of compensation as the norm. The carrier can exonerate itself from liability and paying compensation only if it establishes an affirmative defence:

> **Article 19 - Delay**
>
> The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay **if it proves** that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.[28]

The principle that the burden of proof to establish extenuating circumstances is on the carrier and not the passenger is the law not only in Canada,[29] but also in the more than 130 signatory states to the *Montreal Convention*, an international treaty governing the rights of passengers travelling on international itineraries. Drafters of the *Montreal Convention* recognized that it is the carrier that is in the best position to present evidence on the circumstances of a delay or cancellation and any facts that may relieve it from liability.

APR submits that the Proposed Regulations should incorporate the same principle: it is the carrier, and not the passenger, that must establish that an event was outside the carrier's control and/or was required for safety purposes.

B. Comparison with *Regulation (EC) 261/2004*

Regulation (EC) 261/2004 of the European Union is based on the same principle, established by the *Montreal Convention*, that payment of compensation is the norm, while the airline has to establish exceptional circumstances to exonerate itself from the obligation to compensate passengers:

> 3. An operating air carrier shall not be obliged to pay compensation in accordance with Article 7, **if it can prove** that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.
>
> 4. **The burden of proof** concerning the questions as to whether and when the passenger has been informed of the cancellation of the flight **shall rest with the operating air carrier**.[30]

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[28] *Carriage by Air Act*, Schedule VI ("*Montreal Convention*"), Article 19 (emphasis added).
[29] *Carriage by Air Act*, s. 2(2.1).
[30] *Regulation (EC) 261/2004*, Articles 5(3) and 5(4).

C. The definitions of "mechanical malfunction" and "required for safety purposes" are vague

The Proposed Regulations provide that:

> **1 (1)** The following definitions apply in Part II of the Act.
>
> **mechanical malfunction** means a mechanical problem that reduces the safety of passengers but does not include a problem that is identified further to scheduled maintenance undertaken in compliance with legal requirements. (défaillance mécanique)
>
> **required for safety purposes** means legally required in order to reduce risk to passengers but does not include scheduled maintenance in compliance with legal requirements. (nécessaire par souci de sécurité)[31]

APR submits that these definitions fail to be clear, and overlooks ss. 605.07-605.10 of the *Canadian Aviation Regulations* [*CAR*], governing Minimum Equipment List [MEL], and the Master Minimum Equipment List / Minimum Equipment List Policy and Procedures Manual established by Transport Canada.

It is a common misconception to believe that the inoperability of any component makes an aircraft inoperable. In fact, many aircraft carry passengers with numerous components inoperable. It is the MEL that specifies the conditions under which an aircraft can be operated with a particular component inoperable, and the maximum number of days in which the defect must be repaired.

Consequently, while the repair of an inoperable component may "reduce risk to passengers" (as arguably having all components operative is the safest state of an aircraft), such repairs are often not immediately required by law, and can be deferred in accordance with the applicable MEL and the *CAR*.

APR is concerned that the vague definition of "required for safety purposes" can and will be abused by carriers as a smokescreen by choosing to perform a repair that could be deferred as per MEL at times when a flight would have to be delayed or cancelled due to circumstances within the carrier's control, such as a missing crew member. The carrier will argue that the delay or cancellation was "required for safety purposes," and will conveniently omit to mention the missing crew member or other relevant circumstances.

APR submits that carriers should be encouraged to perform all repairs promptly, and should not be permitted to rely on deferring repairs under MEL as a way to avoid paying compensation. *APR* recommends amending the definition of "required for safety purposes" to incorporate the aforementioned information about MEL.

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[31] Proposed Regulations, s. 1(1) (emphasis is in the original).

Recommended Amendment

5. Replace subsection 1(1) with:

1 (1) The following definitions apply in Part II of the Act.

mechanical malfunction means a mechanical problem that reduces the safety of passengers but does not include:

(i) a problem that is identified further to scheduled maintenance undertaken in compliance with legal requirements; or

(ii) a problem that has previously been identified and whose repair has been deferred pursuant to sections 605.07-605.10 of the *Canadian Aviation Regulations*.

(défaillance mécanique)

required for safety purposes means legally required in order to reduce risk to passengers but does not include:

(i) scheduled maintenance in compliance with legal requirements; or

(ii) repair of a problem that has previously been identified and whose repair has been deferred in accordance with sections 605.07-605.10 of the *Canadian Aviation Regulations*.

(nécessaire par souci de sécurité)

6. Replace subsection 10(1) with:

10 (1) This section applies in respect of a carrier when there is delay, cancellation or denial of boarding that the carrier proves to be exclusively due to situations outside the carrier's control, including

7. Replace subsection 11(1) with:

11 (1) This section applies in respect of a carrier when there is delay, cancellation or denial of boarding that the carrier fails to prove to be outside the carrier's control, but proves that it is required solely for safety purposes.

8. Replace subsection 12(1) with:

12 (1) This section applies in respect of a carrier when there is delay, cancellation or denial of boarding unless the carrier proves circumstances referred to in subsection 10(1) or 11(1).

4. 120-Day Limitation Period for Making Claims: Unlawful and Unreasonable

APR is concerned that the Proposed Regulations condition the payment of compensation on passengers making a complaint, and unlawfully impose a 120-day statutory limitation period for making a claim:

> **19 (3)** To receive the compensation referred to in paragraph (1) or (2), **a passenger must file a request for compensation** with the carrier **within 120 days** after the day on which the flight delay or flight cancellation occurred.[32]

It is submitted that this provision is *ultra vires* of the Agency's regulation-making powers, unconstitutional, and unreasonable.

A. Parliament did not confer on the Agency the power to enact limitations

By virtue of the rule of law principle, all exercises of public authority must find their source in law.[33] The Agency, created by its enabling legislation, the *Canada Transportation Act* [*Act*], must exercise only those powers that were assigned to it by Parliament and in the manner intended by Parliament. The Agency is enacting the Proposed Regulations, including the requirement to pay compensation in certain limited cases, based on powers delegated to it by Parliament in subparagraph 86.11(1)(b)(i) of the *Act*:

> **86.11 (1)** The Agency shall, after consulting with the Minister, make regulations in relation to flights to, from and within Canada, including connecting flights,
>
> ⋮
>
> (b) respecting the **carrier's obligations** in the case of flight delay, flight cancellation or denial of boarding, including
>
> (i) the minimum standards of treatment of passengers that the carrier is required to meet and the **minimum compensation the carrier is required to pay for inconvenience** when the delay, cancellation or denial of boarding is within the carrier's control,[34]

The words of the *Act* clearly and unambiguously reflect the legislature's intent that the regulations deal with the "carrier's obligations." The *Act* contains no similar language to authorize the Agency to enact regulations regarding the passengers' obligations. The *Act* confers no power on the Agency to make regulations whose effect is to impose limitations on passenger claims for compensation owed to passengers. Thus, it is submitted that subsection 19(3) of the Proposed Regulations is *ultra vires* of the Agency.

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[32] Proposed Regulations, s. 19(3) (emphasis added).
[33] *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 28.
[34] *Canada Transportation Act*, s. 86.11 (emphasis added).

B. Enacting statutory limitations is within the exclusive provincial legislative competence

Action for damages for personal injury fall within the exclusive provincial legislative competence in relation to property and civil rights.[35] On the other hand, aeronautics is within the exclusive jurisdiction of the federal Parliament,[36] which allows Parliament to enact laws and delegate legislative powers to the Agency to regulate airlines and impose on airlines obligations as a condition for being permitted to operate within, to, and from Canada.

The "pith and substance" of subsection 19(3) of the Proposed Regulations cannot be legitimately said to relate to aeronautics. The leading feature of this provision is prescription and limitation on claims, and not aeronautics. Its effect relates to tort law (or contract law), which falls squarely within the provincial legislative competence.

Subsection 19(3) severely encroaches on provincial jurisdiction by preventing passengers from making a claim after 120 days, while provincial limitation statutes provide for a longer period. A limitation provision is not "truly necessary" or "essential" to the scheme of the Proposed Regulations,[37] and is severable from the rest of the Proposed Regulations.

It is therefore submitted that it would be unconstitutional for the Agency to enact regulations with respect to prescription and limitation periods such as subsection 19(3) of the Proposed Regulations.

Parliament recognized that, in the absence of an explicit provision in a statute, provincial limitation statutes must be applied in relation to claims arising within a provincial territory, even if the subject matter falls within federal jurisdiction.

> **39 (1)** Except as expressly provided by any other Act, **the laws relating to prescription and the limitation of actions in force in a province** between subject and subject 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.
>
> (2) A proceeding in the Federal Court of Appeal or the Federal Court in respect of a cause of action arising otherwise than in a province shall be taken within **six years** after the cause of action arose.[38]

It is submitted that the same principles should apply to claims that may arise under the Proposed Regulations: Since Parliament did not enact any legislation to expressly provide prescription and limitation periods for claims under the Proposed Regulations, the provincial limitation statutes should apply to actions arising in a province, and the six-year period should apply to claims arising otherwise than in a province.

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[35] *The Constitution Act*, 1867, 30 & 31 Vict, c. 3, ss. 92(13) and 92(14).
[36] *Re: Aeronautics*, [1932] A.C. 54.
[37] *General Motors of Canada Ltd. v. City National Leasing*, [1989] 1 SCR 641.
[38] *Federal Courts Act*, s. 39 (emphasis added).

C. Proposed subsection 19(3) is unreasonable

Prescription and limitation provisions deprive claimants from enforcing their rights after the passage of a certain amount of time, while they protect defendants from the risk of having to defend against claims arising from decades-old incidents, where the evidence may no longer be available. As such, establishing limitation periods requires the balancing of competing interests.

It is submitted that proposed section 19(3) serves only the airlines' private interests while ignoring the interests of the travelling public, and is inconsistent with international norms; as such, it is unreasonable. **First**, 120 days is a small fraction (16.438%) of the two-year limitation period set by the *Carriage by Air Act*:

> **Article 35 - Limitation of actions**
>
> 1. The right to damages shall be extinguished if an action is not brought within a period of **two years**, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.[39]

The two-year limitation period is the law not only in Canada,[40] but also in the more than 130 signatory states to the *Montreal Convention*, an international treaty governing the rights of passengers travelling on international itineraries.

Second, imposing a special and substantially shorter limitation period on claims arising under the Proposed Regulations would put Canada significantly behind the European Union, where limitation of claims under *Regulation (EC) 261/2004* is governed by state law,[41] and ranges from 2 years in many civil law states to 6 years in the UK.

Third, given that airlines may be sued for delay in the transportation of passengers for up to two years under the *Montreal Convention*, airlines are anyway required to retain evidence for at least two years. Thus, proposed subsection 19(3) deprives passengers of compensation without conferring any benefit on the airlines in terms of abbreviating the retention period for evidence.

Recommended Amendments

9. Replace subsection 19(3) of the Proposed Regulations with a provision mirroring s. 39 of the *Federal Courts Act*: (1) provincial limitation statutes apply to claims arising in a province; and (2) a six-year period applies to claims arising otherwise than in a province.

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[39] *Carriage by Air Act*, Schedule VI ("*Montreal Convention*"), Article 35.
[40] *Carriage by Air Act*,s. 2(2.1).
[41] *Moré v. KLM*, European Court of Justice, Case C-139/11.

5. Shortchanging Passengers Booked on "Small" Carriers: Unlawful and Unfair

The Proposed Regulations provide substantially fewer rights and a fraction of the compensation amounts to passengers travelling on "small" carriers:

> **large carrier means**
>
> (a) a carrier that transported one million passengers or more during each of the two preceding calendar years; or
>
> (b) a carrier that is, under a commercial agreement with a carrier referred to in paragraph (a), operating a flight or carrying passengers on behalf of that carrier. (gros transporteur)
>
> **small carrier** means any carrier that is not a large carrier. (petit transporteur)[42]

It follows from the definition that airlines operating "large aircraft" within the meaning of the *Air Transportation Regulations*, such as Flair or Swoop (wholly owned by WestJet), would nevertheless be considered "small" for a number of years.

Passengers travelling on "small" carriers are adversely affected and shortchanged compared to the rest of the travelling public in two respects:

(a) "small" carriers will be required to pay only a small fraction of the compensation normally owed for flight delays and cancellations;[43] and

(b) unlike "large carriers," the "small" carriers will not be required to rebook passengers on flights of competitor airlines.[44]

APR submits that these provisions of the Proposed Regulations are unlawful, unfair to passengers, and unreasonable.

A. Invalidity due to inconsistency with the parent statute

By virtue of the rule of law principle, all exercises of public authority must find their source in law.[45] The Agency, created by its enabling legislation, the *Canada Transportation Act* [*Act*], must exercise only those powers that were assigned to it by Parliament and in the manner intended by Parliament. The Agency

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[42] Proposed Regulations, s. 1(2) (emphasis is in the original).
[43] Proposed Regulations, s. 19.
[44] Proposed Regulations, ss. 17(1) and 18
[45] *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 28.

is enacting the Proposed Regulations, including the requirement to pay compensation in certain limited cases, based on powers delegated to it by Parliament in paragraph 86.11(1)(b) of the *Act*:

> **86.11 (1)** The Agency shall, after consulting with the Minister, make regulations in relation to flights to, from and within Canada, including connecting flights,
>
> ⋮
>
> (b) respecting the **carrier's obligations** in the case of flight delay, flight cancellation or denial of boarding, including
>
> (i) the minimum standards of treatment of passengers that the carrier is required to meet and the minimum **compensation the carrier is required to pay for inconvenience** when the delay, cancellation or denial of boarding is within the carrier's control,
>
> (ii) the minimum standards of treatment of passengers that the carrier is required to meet when the delay, cancellation or denial of boarding is within the carrier's control, but is required for safety purposes, including in situations of mechanical malfunctions,
>
> (iii) the carrier's obligation to ensure that passengers complete their itinerary when the delay, cancellation or denial of boarding is due to situations outside the carrier's control, such as natural phenomena and security events,[46]

The legislative objective expressed in subparagraph 86.11(1)(b)(i) of the *Act* is to require carriers to compensate passengers "for inconvenience" caused by flight delay, cancellation, or denial of boarding. There is no causal link between the inconvenience suffered by passengers and the type of carrier they were booked on. A passenger booked on Air Canada suffers the same inconvenience as a passenger booked on Flair or Swoop if they are delayed for 9 hours.

Parliament did not authorize the Agency to distinguish between passengers, and discriminate against those who travel on so-called "small" carriers. Paragraph 86.11 of the *Act* was enacted to create a uniform regime, as the Minister of Transport acknowledged:

> I believe that when passengers purchase an airline ticket, they expect and deserve the airline to fulfill its part of the transaction. When that agreement is not fulfilled, passengers deserve clear, transparent, and enforceable standards of treatment and compensation. Under this proposed legislation, Canadians would benefit from a **uniform**, predictable, and reasonable approach. [47]

The distinction between so-called "small" and "large" carriers is introduced in the Proposed Regulations without any statutory mandate to do so, and it violates the stated policy objective of uniformity.

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[46] *Canada Transportation Act*, s. 86.11 (emphasis added).
[47] *Hansard*, Volume 148, Number 187, 1st Session, 42nd Parliament (June 5, 2017), p. 12071.

While Parliament provided three categories of events that provide passengers with a different set of rights, Parliament chose not to distinguish between passengers based on the size of the carrier or the number of passengers transported by the carrier on which the passengers are travelling. Thus, the distinction between "small" and "large" carriers introduced in the Proposed Regulations is inconsistent with the objective of its parent statute to create a uniform regime.

It is trite law that a regulation is invalid and cannot stand if it is inconsistent with its parent statute.[48] Hence, the distinction between "small" and "large" carriers in the Proposed Regulations is invalid.

B. The definition of a "small" carrier is unreasonable

Even if one were to accept that Parliament authorized making a distinction between "small" and "large" carriers, it is submitted that the current definition is unreasonable and detached from the reality of airline operations in Canada.

The Proposed Regulations would classify, for example, not only Flair but also Swoop as a "small" carrier even though it is fully owned by WestJet, which is clearly a "large" carrier, and operates the same type and size of aircraft as WestJet does. In so doing, the Proposed Regulations create an uneven playing field and provide a competitive advantage for certain airlines over others. *APR* submits that this could not have been Parliament's intent, and it is clearly unfair to passengers who pay approximately the same airfare, but would be deprived of the same compensation for the sole reason that their carrier is classified as "small."

At the same time, it might not be unreasonable to relieve carriers operating only small aircraft from some of the financial burden imposed by the Proposed Regulations. For example, it might not be desirable to hold bush pilots operating a small aircraft with 4 or 8 seats to the same standard as commercial airlines.

It is therefore submitted that the definition of a "small" carrier should be adjusted to be consistent with the economic reality and terminology developed in the *Air Transportation Regulations*.

Recommended Amendments

10. Delete subsections 1(2), 17(1)(b), 18(b), 19(1)(b), and 19(5) and delete the words "in the case of a large carrier" in subsections 17(1)(a), 18(a), and 19(1)(a) of the Proposed Regulations.

11. Alternatively, replace "one million" with "one hundred thousand" in subsection 1(2)(a) of the Proposed Regulations, and append immediately after subsection 1(2)(b):

> (c) operates at least one aircraft having a certificated maximum carrying capacity of more than 39 passengers.

[48] *Booth v. R.*, 1915 CanLII 596 (SCC), [1915] 21 D.L.R. 558 (S.C.C.); *The Grand Truck Pacific Railway Co. v. The City of Fort William*, 1910 CanLII 51 (SCC), 43 S.C.R. 412; and *Morine v. L & J Parker Equipment Inc*, 2001 NSCA 53 at para. 49.

6. Limiting the Right to Rebooking on Another Carrier to Delays Longer than 9 Hours

In 2012, the Agency issued five decisions requiring Air Canada, Air Transat, and WestJet to rebook passengers on flights of other airlines in the event of a flight disruption within the carrier's control.[49] In these five proceedings, the Agency concluded, based on the provisions and principles of the *Montreal Convention*, that carriers have a concomitant obligation to take all reasonable measures to prevent delay to passengers. Such reasonable measures include rebooking passengers on flights of other airlines with whom the carrier has no interline agreement. The five decisions from 2012 did not limit the right of passengers to be rebooked on another carrier to delays of a specific length.

Paragraph 17(1)(a) of the Proposed Regulations require carriers to rebook passengers on flights of another carrier with whom it has no commercial agreement if it is unable to rebook the passenger on its own network on a flight that departs within nine hours of the departure time on the original ticket:

> **17 (1)** If paragraph 11(2)(c), (3)(c) or (4)(c) or 12(2)(c), (3)(c) or (4)(c) applies in respect of a carrier, it must provide the following free of charge to ensure that passengers complete their itinerary as soon as possible:
>
> (a) in the case of a large carrier
>
> (i) a confirmed reservation on the next available flight that is operated by the original carrier, or a carrier with which the original carrier has a commercial agreement, and that is on any route to the destination on the passenger's original ticket and **departs within nine hours** of the departure time on the original ticket, or
>
> (ii) a confirmed reservation on a flight operated by any carrier on any route to the destination on the passenger's original ticket **if the carrier cannot provide a confirmed reservation that complies with** paragraph (a);

While *APR* welcomes the codification in regulations of the existing obligations that were established in 2012, *APR* is concerned by the restrictive language introduced in subparagraph 17(1)(a)(i).

First, the relevant time for the purpose of rerouting passengers should be the scheduled **arrival time** of the alternative transportation being offered, and not the scheduled departure time as subparagraph 17(1)(a)(i) currently reads. This distinction has a significant impact on passengers with connecting flights, for example, from Montreal to Frankfurt via Toronto. *APR* believes that the intent of the Proposed Regulations is to mitigate the passenger's delay on arrival at Frankfurt, and not simply to encourage the airline to put the passenger on a flight from Montreal to Toronto while stranding the passenger in Toronto for 24 hours.

[49] *Lukács v. Air Canada*, Decision No. 250-C-A-2012; *Lukács v. Air Canada*, Decision No. 251-C-A-2012; *Lukács v. Air Transat*, Decision No. 248-C-A-2012; *Lukács v. WestJet*, Decision No. 249-C-A-2012; and *Lukács v. WestJet*, Decision No. 252-C-A-2012.

APR thus submits that the word "departs" should be replaced with "arrives" or "scheduled to arrive" in subparagraph 17(1)(a)(i) of the Proposed Regulations.

Second, on January 17, 2019, the Agency's representatives acknowledged that there is no evidence or data capable of supporting the choice of **nine hours** as the timeframe to rebook on the carrier's own network, nor were they able to explain the rationale for choosing this figure.

Third, *APR* is of the view that allowing carriers to rebook passengers on their own network instead of another carrier as long as the new flight departs within **nine hours** is unreasonably long, to the point that it would defeat the purpose of the travel for many passengers. In practical terms, this would mean that a passenger booked on an 8 am flight could be rebooked on a 5 pm flight, or a passenger booked on a 9 pm flight could be rebooked on a 6 am flight the next day.

APR submits that the requirement to rebook passengers on flights of other carriers should be imposed if the carrier is unable to reroute the passenger on a flight that arrives at the final destination within **four hours** of the original arrival time. This figure represents one half of a normal 8-hour working day, and ensures that passengers can still substantially benefit from the purpose of their travel.

Recommended Amendments

12. Replace the phrase "departs within nine hours" with "scheduled to arrive at the passenger's destination within four hours" in subparagraph 17(1)(a)(i) of the Proposed Regulations.

13. Replace "paragraph (a)" with "subparagraph (i)" in subparagraph 17(1)(a)(ii) of the Proposed Regulations.

7. No Meals or Hotel for Passengers Notified at Least 12 Hours in Advance

Section 14 of the Proposed Regulations creates the impression that carriers are required to provide meals and overnight accommodation for passengers affected by flight delay or cancellation that are within the carrier's control.

This is, however, not the case. Subsection 14(1) of the Proposed Regulations starts with the phrase:

> If **paragraph 11(2)(b) or (3)(b) or 12(2)(b) or (3)(b)** applies in respect of a carrier [...][50]

Each one of paragraphs 11(2)(b), 11(3)(b), 12(2)(b), and 12(3)(b) reads as follows:

> **if** a passenger is **informed** of the [...] **less than 12 hours before the departure time** on their original ticket, provide the treatment set out in section 14;[51]

It follows that passengers who are informed about the delay or cancellation at least 12 hours in advance are **not** entitled to hotel or accommodation under the Proposed Regulations.

APR submits that these provisions are inconsistent with the text of the Regulatory Impact Analysis Statement, inconsistent with the principles of the *Montreal Convention*, and are unreasonable.

A. Inconsistency with the Regulatory Impact Analysis Statement

The regulatory impact analysis states that:

> The proposal establishes minimum standards of treatment for all flight delays and cancellations that are either **(1) within the carrier's control**, or (2) within the carrier's control but required for safety purposes, where the passenger has been informed of the delay fewer than 12 hours before departure time.[52]

Based on the regulatory impact analysis statement, there was no intent to impose the 12-hour advance notice limitation in the case of delays and cancellations that are within the carrier's control and are not required for safety purposes. The intent was to impose this limitation only with respect to delays and cancellations that are required for safety purposes.

Thus, the texts of paragraphs 12(2)(b) and 12(3)(b) were intended to be different than paragraphs 11(2)(b) and 11(3)(b), but in the Proposed Regulations they are identical due to a copy-paste error.

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[50] Proposed Regulations, s. 14(1) (emphasis added).
[51] Proposed Regulations, ss. 11(2)(b), 11(3)(b), 12(2)(b), and 12(3)(b) (emphasis added).
[52] Proposed Regulations, Regulatory Impact Analysis Statement (emphasis added).

B. Inconsistency with the *Montreal Convention* and the *Carriage by Air Act*

The *Carriage by Air Act* imposes a strict liability on carriers for damages incurred by passengers due to delay in transportation by air:

> **Article 19 - Delay**
>
> **The carrier is liable for damage occasioned by delay in the carriage by air of passengers**, baggage or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.[53]

This is the law not only in Canada,[54] but also in the more than 130 signatory states to the *Montreal Convention*, an international treaty governing the rights of passengers travelling on international itineraries.

The Canadian Transportation Agency's longstanding and considered view has been that terms and conditions applicable to travel within Canada must conform to the principles of the *Montreal Convention*.[55] *APR* agrees with this view, and believes that provisions of the regulations applicable to travel where the *Montreal Convention* does not apply, such as travel entirely within Canada, should nevertheless be consistent with the legal principles of the *Montreal Convention* to achieve uniformity and clarity.

Sections 11 and 12 prescribe the rights of passengers in the case of delays and cancellations causing delay in transportation by air that are "within the carrier's control," and as such, clearly trigger liability under Article 19 of the *Montreal Convention*.

Yet, the effect of the 12-hour notice restriction in paragraphs 11(2)(b), 11(3)(b), 12(2)(b), and 12(2)(c) of the Proposed Regulations is that the carrier is not required to provide meals and accommodation if it provides sufficient advance notice in situations where the carrier is clearly liable for the passengers' expenses under Article 19 of the *Montreal Convention*.

To put it differently, these provisions of the Proposed Regulations are inconsistent with the principles of the *Montreal Convention*.

APR submits that the Agency should not incorporate terms and conditions in the Proposed Regulations that would have been found to be unreasonable by the Agency due to their inconsistency with the principles of the *Montreal Convention*. In particular, the "12-hour advance notice" limitation should be removed from paragraphs 11(2)(b), 11(3)(b), 12(2)(b), and 12(3)(b) of the Proposed Regulations.

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[53] *Carriage by Air Act*, Schedule VI ("*Montreal Convention*"), Article 19 (emphasis added).
[54] *Carriage by Air Act*, s. 2(2.1).
[55] See, for example: Decision No. 181-C-A-2007 at para. 36; Decision No. 483-C-A-2010 at para. 32 (leave to appeal to FCA denied: 10-A-42); Decision No. 251-C-A-2012 at para. 19; and Decision No. 344-C-A-2013 at para. 23.

C. Adverse impact on passengers

The purpose of section 14 of the Proposed Regulations is to offer basic protection (food and shelter) for passengers who find themselves stranded far away from their homes, possibly in a foreign country, for reasons that are within the carrier's control (whether or not due to "safety reasons"). To put it simple, passengers in such situations should not have to go hungry or be forced to sleep at the airport or on the street.

A mere 12-hour notice before the scheduled flight does not afford passengers a reasonable opportunity to book accommodation at an affordable rate; instead, it will force passengers to incur significant expenses for hotels at last-minute rates—if they can at all afford it. Not every passenger can.

Therefore, it is submitted that **all** passengers affected by a flight delay or cancellation within the carrier's control should be provided with meals and overnight accommodation as needed, regardless of whether they were given an advance notice.

Recommended Amendments

14. Correct paragraphs 12(2)(b) and 12(3)(b) of the Proposed Regulations to match the intent stated in the Regulatory Impact Analysis Statement, to read:

> ~~if a passenger is informed of the [...] less than 12 hours before the departure time on their original ticket,~~ provide the treatment set out in section 14.

15. Replace paragraphs 11(2)(b) and 11(3)(b) of the Proposed Regulations with:

> provide the treatment set out in section 14.

8. Form of Payment: A Step Backward

Subsection 21(1) of the Proposed Regulations governs the form of payment:

> **21 (1)** If a carrier is required by these Regulations to provide compensation for inconvenience to a passenger, the carrier must offer the amount required in monetary form. However, the compensation may be made in another form if
>
> (a) compensation in the other form has a greater monetary value than the minimum monetary value of the compensation that is required under these Regulations;
>
> (b) the passenger has been informed in writing of the monetary value of the other form of compensation;
>
> (c) the compensation does not expire; and
>
> (d) the passenger confirms in writing that they have been informed of their right to receive monetary compensation and have chosen the other form of compensation.

APR is of the view that subsection 21(1) is a step backward compared to the Agency's existing jurisprudence that prescribes a 1:3 ratio for compensation offered by way of travel vouchers (i.e., at least $3 of travel vouchers must be tendered for every $1 of cash compensation owed).

In *Lukács v. Air Canada*, the Agency held:

> [49] The Agency agrees with Mr. Lukács' submission that passengers must be afforded ample opportunity to determine whether they wish to choose travel vouchers in lieu of a cash payment as denied boarding compensation, and that this choice should only be made after Air Canada fully informs passengers of the conditions attached to those vouchers. **The Agency finds that, in light of the ratio applicable to cash compensation versus values of travel vouchers for international carriage, the ratio of 1:3 proposed by Mr. Lukács is reasonable.**
>
> [50] In light of the foregoing, the Agency finds that the restrictions that Mr. Lukács proposes be imposed on the issuance of vouchers are reasonable, with the exception of the one-year period proposed by Mr. Lukács for persons to exchange travel vouchers for cash. The Agency is of the opinion that the proposed period is excessive, and finds that a one-month period for an exchange is more reasonable.[56]

Subsequently, in *Lukács v. Porter*, the Agency reaffirmed these findings:

> [80] The Agency finds that Existing Tariff Rule 20 is unreasonable within the meaning of subsection 111(1) of the ATR because of the absence of provisions that provide for the

[56] *Lukács v. Air Canada*, Decision No. 342-C-A-2013, paras. 49-50 (emphasis added).

following:

- denied boarding compensation must be tendered in the form of cash, cheque, credit to a passenger's credit card, or any other form acceptable to the passenger;
- the passenger must be fully informed of the restrictions that may apply to alternative forms of compensation;
- in the event that a passenger opts for travel vouchers as compensation, the passenger must be able to change their mind within a reasonable amount of time, and exchange their vouchers for cash;
- **if the carrier offers travel vouchers, the restrictions set out in Decision No. 342-C-A-2013 must apply.**[57]

The legislature is presumed to have knowledge of these decisions, and there is no indication that Parliament intended to alter the law they have created. Thus, it is unclear why the Agency chose to claw back the 1:3 ratio that has been the Agency's longstanding considered view.

APR submits that rather than unreasonably clawing back the existing rights of passengers, the regulations should simply reflect the Agency's longstanding considered view articulated in the above-noted decisions.

Recommended Amendments

16. Replace paragraph 21(1)(a) of the Proposed Regulations with:

> compensation in the other form has a monetary value of at least 300% of the minimum monetary value of the compensation that is required under these Regulations;

[57] *Lukács v. Porter*, Decision No. 31-C-A-2014, para. 80.

9. Seating of Children

While *APR* strongly supports enshrining in regulations the rights of children to be seated next to an accompanying adult, *APR* is concerned that the Proposed Regulations fail to impose clear and enforceable obligations and constitute a step backward compared to the existing policies of some airlines.

A. Failure to impose clear and enforceable obligations

APR is of the view that section 22 of the Proposed Regulations, concerning the seating of children, suffers from a number of flaws that make it unclear and unenforceable.

First, section 22 uses the verb "facilitate," whose common and ordinary meaning is "to make easier" or "help bring about." The use of such vague phrases instead of "shall" could, and likely would, be interpreted as stating a desired or recommended outcome rather than imposing a strict legal obligation.[58]

Second, there appears to be a conflict between paragraphs 22(1)(a) and 22(1)(b):

> **22 (1)** In order to facilitate the seating of a child who is under the age of 14 years in close proximity to a parent, guardian or tutor in accordance with subsection (2), a carrier must
>
> (a) **assign seats before check-in** at no additional charge to a child under the age of 14 and their parent, guardian or tutor; and
>
> (b) **if the carrier does not assign seats in accordance with paragraph (a)**, do the following: [...][59]

If the obligation imposed by paragraph 22(1)(a) is to assign seats before check-in, then it is difficult to understand the purpose of paragraph 22(1)(b) concerning the case where the carrier violated its obligation under paragraph 22(1)(b), and did not assign a seat. If the intent is to impose a legal obligation, then the consequence of failing to comply with paragraph 22(1)(a) must first and foremost be a penalty imposed on the airline.

Third, paragraph 22(1)(b) fails to address the situation if no volunteers are found on board:

> **22(1)(b)** if the carrier does not assign seats in accordance with paragraph (a), do the following:
>
> (i) advise passengers before check-in that the carrier will facilitate seat assignment of the child in close proximity to a parent, guardian or tutor at no additional charge at the time of check-in or at the boarding gate,

[58] *Interpretation Act*, s. 11.
[59] Proposed Regulations, s. 22(1) (emphasis added).

(ii) assign seats at the time of check-in, if possible,

(iii) if it is not possible to assign seats at the time of check-in, request that other passengers volunteer to change seats at the time of boarding, and

(iv) if it is not possible to assign seats at the time of check-in and no passenger volunteers to change seats at the time of boarding, request that other passengers volunteer to change seats before take-off.[60]

Paragraph 22(1)(b) is based on the assumption that volunteers will be found before take-off. But if no one volunteers, will a young child be seated apart from their accompanying adult?

APR submits that this outcome would be contrary to the purpose for which s. 86.11(1)(d) of the *Canada Transportation Act* was enacted. It is further submitted that if no volunteers are found, airlines must change the seats of passengers to ensure that children are seated next to an accompanying adult.

B. A step backward compared to Air Canada's existing rules

Air Canada's Domestic/International Tariff Rule 10(C)(1) provides:

> Note: The Carrier has a supplemental seating policy (and related procedures) for passengers under the **age of 12** travelling with a parent or guardian traveler to ensure that reasonable efforts are made by the Carrier prior to check-in, at time of check-in and by airport and in-flight agents to seat the child **next to their parent or guardian traveler**, free of charge.
>
> ⋮
>
> Children **under age 8** must be accompanied by an adult age 16 or older when travelling. The accompanying adult must occupy a seat in the same cabin and be **seated adjacent** to the young child.[61]

Section 22(2) of the Proposed Regulations is a step backward compared to this existing standard:

> **22(2)** The carrier must facilitate the assignment of a seat to a child who is under the age of 14 years by offering, at no additional charge,
>
> (a) in the case of a child who is **4 years of age or younger**, a seat that is **adjacent** to their parent, guardian or tutor's seat;
>
> (b) in the case of a child who is 5 to 11 years of age, a seat that is in the same row as their parent, guardian or tutor's seat, and that is separated from that parent, guardian or tutor's seat by no more than one seat; and

[60] Proposed Regulations, s. 22(1)(b) (emphasis added).
[61] Air Canada's Domestic Tariff, Rule 10(C)(1) (emphasis added).

(c) in the case of a child who is 12 or 13 years of age, a seat that is in a row that is separated from the row of their parent, guardian or tutor's seat by no more than one row.[62]

APR submits that the rules should be simplified by expanding the existing rule of adjacent seating to children under the age of 12.

Recommended Amendments

17. Replace the first sentence of section 22(1) of the Proposed Regulations with:

> In order to seat children who are under 14 years of age in close proximity to a parent, guardian or tutor in accordance with subsection (2), a carrier shall

18. Append the following subparagraph immediately after subparagraph 22(1)(b)(iv):

> (v) if no passenger volunteers to change seats before take-off, involuntarily change the seats of passengers on board before take-off.

19. Replace subsection 22(2) of the Proposed Regulations with:

> **22(2)** The carrier shall assign to a child who is under 14 years of age by offering, at no additional charge,
>
> (a) in the case of a child who is under 12 years of age, a seat that is adjacent to their parent, guardian or tutor's seat;
>
> (b) in the case of a child who is 12 or 13 years of age, a seat that is in a row that is separated from the row of their parent, guardian or tutor's seat by no more than one row.

[62] Proposed Regulations, s. 22(2) (emphasis added).

10. Scope: Further Clarity is Needed

APR warmly welcomes the intent of subsection 2(1) of the Proposed Regulations:

> **2 (1)** All carriers **carrying a passenger** are jointly and severally, or solidarily, liable to the passenger with respect to the obligations set out in these Regulations or, if they are more favourable, the obligations set out in the applicable tariff.[63]

At the same time, *APR* is concerned that the phrase "carrying a passenger" may lead to ambiguity and to unnecessary litigation. *APR* submits that additional language would be necessary to ensure that the provision is clear and unambiguous.

Recommended Amendments

20. Replace subsection 2(1) of the Proposed Regulations with:

> All carriers carrying a passenger, including but not limited to the marketing carrier, operating carrier, contracting carrier, and actual carrier, are jointly and severally, or solidarily, liable to the passenger with respect to the obligations set out in these Regulations or, if they are more favourable, the obligations set out in the applicable tariff.

[63] Proposed Regulations, s. 2(1) (emphasis added).

11. Important Issues not Addressed

APR is deeply concerned about the omission of a number of important issues from the Proposed Regulations. This state of affairs creates the incorrect impression that airlines are free to do as they please in these areas. *APR* strongly believes this was not Parliament's intent.

A. Right to a refund of unused portion of ticket in events "outside the carrier's control"

Section 18 of the Proposed Regulations, governing the rights of passengers in events that are "outside the carrier's control," is silent about the rights of passengers to cancel their travel and receive a refund. This is to be contrasted with subsection 17(2), which provides for such rights in events that are "within the carrier's control."

As a result, the Proposed Regulations create the incorrect impression that passengers **cannot** cancel their tickets in the case of events that are "outside the carrier's control" delaying their travel. *APR* submits that this was not Parliament's intent in enacting paragraph 86.11(1)(b) of the *Canada Transportation Act* [*Act*]. The legislature is presumed to have knowledge of laws existing at the time of enactment of a new legislation, including the case law. In particular, Parliament is presumed to have been aware of the Agency's jurisprudence on the right of passengers to cancel their travel and receive a refund regardless of whether the flight delay or cancellation prompting them to do so is within the carrier's control.

> [...] the Agency is of the opinion that Air Transat **has not proven** to the Agency's satisfaction, **that it is reasonable** to have a time limit in the event of a delay of **36 hours or more**, after which Air Transat would refund the unused ticket or portion thereof.[64]

Ultimately, the Agency substituted Air Transat's International Tariff Rule 6.3(d) with:

> 6.3(d) If the Carrier is unable to provide reasonable alternative transportation on its services or on the services of other carrier(s) within a reasonable period of time, then it will refund the unused ticket or portions thereof.[65]

In *Lukács v. Sunwing*, the Agency reaffirmed passengers' "fundamental right" to be refunded for the unused portions of their tickets if the carrier cannot transport them within a reasonable amount of time:

> [15] In terms of passengers' right to refunds, in Decision No. 28-A-2004, the Agency recognized the **fundamental right of passengers to be refunded for the unused portions of their tickets** if the carrier is unable to provide transportation on its services or on the services of other carrier(s) within a reasonable period of time.[66]

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[64] *Re: Air Transat*, Decision No. 28-A-2004 (emphasis added).
[65] Ibid.
[66] *Lukács v. Sunwing*, Decision No. 313-C-A-2013 at para. 15 (emphasis added).

In *Lukács v. Porter*, the Agency reinforced this conclusion:

> [33] The Agency finds that as they allow Porter to **refuse the tendering of refunds when a flight is cancelled for reasons outside the passenger's control**, Existing Tariff Rules 3.4 and 15 are **unreasonable** within the meaning of subsection 111(1) of the ATR. The Agency finds that the Rules fail to strike a balance between the passengers' rights to be subject to reasonable terms and conditions of carriage and Porter's statutory, commercial and operational obligations.[67]

In a subsequent *Lukács v. Porter* case, the Agency held:

> [88] The Agency agrees with Mr. Lukács, and finds that it is **unreasonable** for Porter **to refuse to refund the fare** paid by a passenger because of its cancellation of a flight, **even if the cause is an event beyond Porter's control**.[68]

As these decisions of the Agency demonstrate, passengers do have a fundamental right to a refund of their fares if the carrier is unable to transport them for any reason that is outside the passengers' control.

There is no indication that Parliament intended to alter the law in this area. Parliament clearly did not intend to force passengers to fly at a time later than stated on their tickets if they no longer desire to do so, nor did Parliament intend to deprive passengers from the option of cancelling their travel and receiving a refund for the unused portion of their tickets.

On January 17, 2019, the Agency's representatives expressed concern about the lack of delegated legislative authority to make regulations giving effect to the rights that are deeply rooted in the jurisprudence.

APR submits that the Agency's concerns are ill-founded for the following reasons.

First, paragraph 86(1)(n) of the *Act* provides that the Agency may make regulations:

> (n) generally for carrying out the purposes and provisions of this Part.

Ensuring that the regulations enacted unambiguously state the rights of passengers is clearly consistent with the Agency "carrying out the purposes and provisions" of Part II of the *Act*.

Second, pursuant to subparagraph 86.11(b)(1)(iv), the Agency may require carriers to inform passengers about their right to cancel their travel and receive a refund in the event of a delay or cancellation outside the carrier's control.

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[67] Lukács v. Porter, Decision No. 31-C-A-2014 at para. 33 (emphasis added).
[68] *Lukács v. Porter*, Decision No. 344-C-A-2013 at para. 88 (emphasis added).

Third, paragraph 86.11(1)(g) of the *Act* provides that the Agency shall make regulations:

> **86.11 (1)** The Agency shall, after consulting with the Minister, make regulations in relation to flights to, from and within Canada, including connecting flights,
>
> ⋮
>
> (g) respecting any of the carrier's other obligations that the Minister may issue directions on under subsection (2).[69]

Thus, the Agency may, and in the circumstances of this case, should ask the Minister to issue directions under subsection 86.11(2) of the *Act* for enacting regulations that remove this ambiguity.

B. Boarding priorities and the obligation to seek volunteers in events "outside the carrier's control"

The Proposed Regulations are silent about the obligation of carriers to seek volunteers and to follow certain boarding priorities in the event of denial of boarding due to circumstances "outside the carrier's control." This is to be contrasted with section 15 of the Proposed Regulations, which imposes such obligations in events that are "within the carrier's control."

This suggests that under the Proposed Regulations, the carrier may even deny boarding to a passenger who is already on the aircraft if it claims that it is doing so due to circumstances "outside the carrier's control."

On January 17, 2019, the Agency's representatives expressed concern about the lack of delegated legislative authority to enact provisions similar to section 15 for denial of boarding "outside the carrier's control."

APR respectfully disagrees.

In addition to the Agency's authority under paragraph 86(1)(n) and 86.11(1)(g) of the *Act*, the Agency may also enact under paragraph 170(1)(c) of the *Act*, regulations to ensure that vulnerable passengers are not left stranded even in circumstances that are "outside the carrier's control."

C. Flight advancement

"Flight advancement" occurs when the carrier changes the departure time of its flight to a time **earlier** than it appears on the passenger's original ticket. Flight advancement has the same effect on passengers as denial of boarding, causing them to miss or be unable to take the flight they had paid for.

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[69] *Canada Transportation Act*, s. 86.11(1)(g).

In *Re: Air Transat*, the Agency held that:

> The Agency is of the opinion that, in the event of a flight advancement, the consumer should be offered alternate travel options **immediately**. In addition, the Agency feels it would be beneficial if Air Transat includes a tariff provision that provides for a refund, at the request of the passenger, if such passenger should wish to cancel a reservation for a flight that has been advanced.[70]

The Agency reached the same conclusion in *Lipson v. Air Transat*.[71] In *Lukács v. Air Transat*, it was held that:

> [28] With regard to the matter of flight advancements, the Agency is of the opinion that such advancements **may impact as negatively on those passengers as is the case with passengers whose flight is delayed**, and that **affected passengers should be able to avail themselves of the same remedies as those available to passengers whose flight is delayed**. Therefore, the Agency finds that the absence of protection for all passengers affected by flight advancements fails to strike a balance between a passenger's right to be subject to reasonable terms and conditions of carriage and Air Transat's statutory, commercial and operational obligations. As such, Proposed Rule 21(2)(i) would not be considered reasonable within the meaning of subsection 111(1) of the ATR if it were included in the Tariff on file with the Agency.[72]

In spite of these findings of the Agency, the Proposed Regulations are silent about the issue of flight advancement.

On January 17, 2019, the Agency's representatives expressed concern about the lack of delegated legislative authority to enact provisions relating to flight advancement.

APR respectfully disagrees.

The effect of flight advancement is the same as denial of boarding or delay: for no fault of their own, the passenger is unable to take the flight for which they had previously paid for, and as a result they are delayed in reaching or unable to reach their destination.

Thus, flight advancement is no more than a sophisticated form of denial of boarding, performed by changing the departure time of the passenger's flight in a manner that the passenger is prevented from being able to present themselves for check-in on time.

APR therefore submits that flight advancement should be recognized as a form of denial of boarding and affected passengers should have the same protection and rights accordingly.

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[70] *Re: Air Transat*, Decision No. LET-A-112-2003 (emphasis added).
[71] *Lipson v. Air Transat*, Decision No. LET-C-A-59-2003.
[72] *Lukács v. Air Transat*, Decision No. 327-C-A-2013 at para. 28 (emphasis added).

Recommended Amendments

21. Renumber section 18 as 18(1) of the Proposed Regulations, and append the following provision immediately after it:

> **(2)** If the alternate travel arrangements offered in accordance with subsection (1) do not accommodate the passenger's travel needs, the carrier must instead refund the unused portion of the ticket.

22. Append the following paragraph to subsection 10(2):

> (d) in the case of a cancellation or a denial of boarding, deny boarding in accordance with section 15.

23. Replace subsection 15(1) of the Proposed Regulations with:

> **15 (1)** ~~If paragraph 11(4)(b) or 12(4)(b) applies in respect of a~~ A carrier~~, it~~ must not deny boarding unless it has asked if any passenger is willing to give up their seat.

24. Append the following subsection immediately after subsection 1(3) of the Proposed Regulations:

> **1(4)** For the purposes of these Regulations, a flight whose departure time was brought forward compared to the time appearing on the original ticket, with the consequence that the passenger misses that flight, shall be considered a flight on which the passenger has been denied boarding.

12. Enforcement: Turning a Blind Eye to Violations

APR is profoundly concerned that the regulations will remain dead letter due to the lack of enforcement by the Canadian Transportation Agency. *APR* is of the view that:

- Airlines should have a positive duty to pay compensation, without a demand from the passenger. Section 19(3) of the Proposed Regulations violates this principle and improperly conditions payment of compensation on the passenger complaining to the airline.
- The Canadian Transportation Agency must adopt a zero tolerance policy with respect to contraventions of the regulations, and direct its enforcement officers to issue an Administrative Monetary Penalty in each and every case that an airline fails to comply with the regulations.
- The Canadian Transportation Agency must cease and desist its unlawful practice of issuing "formal warnings" instead of Administrative Monetary Penalties.

A. A leading example

In late 2017, numerous CBC reports revealed that WestJet systematically misled passengers whose flights were cancelled. WestJet falsely claimed that the destination airports were closed as a result of hurricane damage. Based on this false claim, WestJet refused to rebook passengers on flights of other airlines that were available to these destinations.[73,74,75] According to the Canadian Transportation Agency's website:

> Results of an investigation initiated on December 19, 2017 by a designated enforcement officer of the Canadian Transportation Agency indicate that WestJet made public statements contrary to and **resulting in a contravention of subsection 18(b)** of the *Air Transportation Regulations*.
>
> Such public statements, to passengers, were made in relation to scheduled flights being cancelled due to apparent airport closures in but not limited to the areas of Santa Clara, Cuba and Turks and Caicos Islands when in fact the airports in question were in an open status.[76]

Although contravention of subsection 18(b) is punishable by an Administrative Monetary Penalty [AMP] of up to $25,000, no such action was taken against WestJet. Instead of issuing a notice of violation and a penalty, a mere "formal warning" was issued **without any statutory authorization to do so**. Unfortunately, this case is not an isolated incident of the Agency failing to enforce the law against airlines.

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[73] "'This is bunk': WestJet apologizes for misleading passengers about why it cancelled flights," CBC News (Nov. 18, 2017).
[74] "'It hurts us': Air Canada, WestJet under fire for their reasons behind Puerto Rico flight cancellations," CBC News (Nov. 26, 2017).
[75] "WestJet once again gives passengers 'erroneous information' about why it cancelled flights," CBC News (Dec. 17, 2017).
[76] Summary of enforcement action, Canadian Transportation Agency's website (emphasis added).

B. Specific areas of lack of enforcement

The Canadian Transportation Agency may designate provisions of the *Canada Transportation Act* and regulations made under the *Act* as a provision that may be enforced by way of Administrative Monetary Penalties of up to $25,000.[77] The Schedule to the *Canadian Transportation Agency Designated Provisions Regulations* lists all such "designated" provisions and the maximum penalty that a designated enforcement officer of the Canadian Transportation Agency may impose for contravention of the provisions.[78]

Unlawfully issuing "formal warnings" instead of Administrative Monetary Penalties

Since 2013, designated enforcement officers of the Canadian Transportation Agency have issued 232 "formal warnings" instead of notices of violation and Administrative Monetary Penalties **without any statutory authorization to do so**. When the legislature intends to authorize a person to issue warnings, it does so explicitly in the enabling legislation.[79] The *Canada Transportation Act* **does not authorize** designated enforcement officers to issue "formal warnings," but only to issue notices of violation with Administrative Monetary Penalties.[80]

Failure to apply the terms and conditions in the tariff (AMP: $10,000/violation)

Subsection 110(4) of the *Air Transportation Regulations* requires an international licence holder to apply the terms and conditions set out in its tariff. Subsection 110(4) is a "designated provision," the contravention of which carries an Administrative Monetary Penalty of up to $10,000. In a large number of cases, no notice of violation nor Administrative Monetary Penalty was issued, notwithstanding the Canadian Transportation Agency's finding that the airline contravened subsection 110(4).[81]

Making publicly a false or misleading statement about services (AMP: $25,000/violation)

Subsection 18(b) of the *Air Transportation Regulations* prohibits carriers from making a false or misleading statement about their services. Subsection 18(b) is a "designated provision," the contravention of which carries an Administrative Monetary Penalty of up to $25,000. While airlines were found by the Canadian Transportation Agency to have contravened this provision,[82] nevertheless, there is no record of a notice of violation or an Administrative Monetary Penalty **ever** being issued for such a violation.

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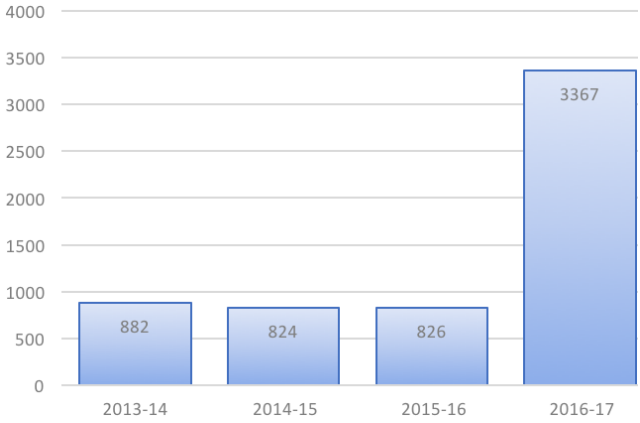
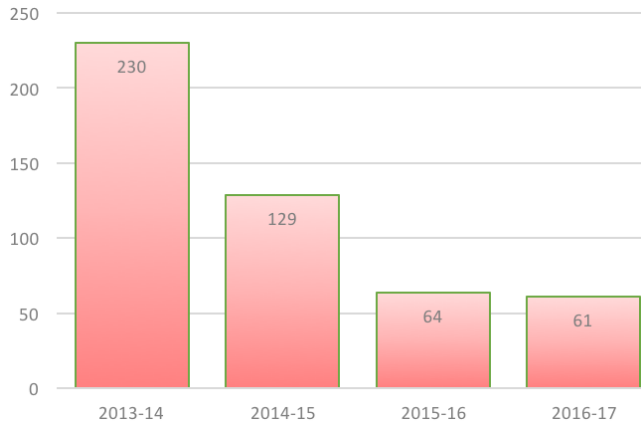
[77] *Canada Transportation Act*, s. 177.
[78] *Ibid.*, s. 180.
[79] See, for example, *Agriculture and Agri-Food Administrative Monetary Penalties Act*, SC 1995, c. 40.
[80] *Canada Transportation Act.*, s. 180.
[81] Decision No. 239-C-A-2013 at para. 78; Decision No. 284-C-A-2013 at para. 17; Decision No. 55-C-A-2014 at para. 42; Decision No. 244-C-A-2014 at para. 22; Decision No. 330-C-A-2015 at para. 20; Decision No. 209-C-A-2015 at para. 23; Decision No. 373-C-A-2016 at para. 30; Decision No. 95-C-A-2016 at para. 24; Decision No. 111-C-A-2016 at para. 17; Decision No. 193-C-A-2016 at para. 16; Decision No. 17-C-A-2017 at para. 16; Decision No. 27-C-A-2017 at para. 23; Decision No. 61-C-A-2017 at para. 34; Decision No. 63-C-A-2017 at para. 4; Decision No. 69-C-A-2017 at para. 36; Decision No. 73-C-A-2017 at para. 30; Decision No. 15-C-A-2018 at para. 25; Decision No. 8-C-A-2018 at para. 29; Decision No. 18-C-A-2018 at para. 28; Decision No. 24-C-A-2018 at para. 22; Decision No. 33-C-A-2018 at para. 23; Decision No. 36-C-A-2018 at para. 33; Decision No. 43-C-A-2018 at para. 24; and Decision No. 44-C-A-2018 at para. 34.
[82] See, for example, Decision No. 335-C-A-2012 at para. 12, and Decision No. 105-C-A-2017 at paras. 48-49.

C. The Canadian Transportation Agency's dismal record

Implementation of the existing consumer-protection laws, regulations, and regulatory decisions has been thwarted by lack of enforcement and financial consequences for airlines that breach the rights of passengers. This anomaly is readily visible in the published statistics of the Agency: since 2013, the number of **complaints** received by the Agency has **quadrupled**, while **enforcement** actions have seen a near **four-fold decrease**:[83]



Complaints Against Airlines



Enforcement Actions by the Agency

Our understanding is that the number of complaints against airlines in 2017-2018 was even higher, exceeding 5,500. *APR* believes that the substantial decline in the enforcement actions may have contributed to the soaring number of complaints.

[83] Agency's Statistics 2016-17, Canadian Transportation Agency's website (September 3, 2017).

Appendix

A. Final Decisions Arising from Dr. Lukács's Successful Complaints (Highlights)

1. *Lukács v. Air Canada*, Decision No. 208-C-A-2009;
2. *Lukács v. WestJet*, Decision No. 313-C-A-2010;
3. *Lukács v. WestJet*, Decision No. 477-C-A-2010
(leave to appeal denied, Federal Court of Appeal File No.: 10-A-41);
4. *Lukács v. WestJet*, Decision No. 483-C-A-2010
(leave to appeal denied, Federal Court of Appeal File No.: 10-A-42);
5. *Lukács v. Air Canada*, Decision No. 291-C-A-2011;
6. *Lukács v. WestJet*, Decision No. 418-C-A-2011;
7. *Lukács v. United Airlines*, Decision No. 182-C-A-2012;
8. *Lukács v. Air Canada*, Decision No. 250-C-A-2012;
9. *Lukács v. Air Canada*, Decision No. 251-C-A-2012;
10. *Lukács v. Air Transat*, Decision No. 248-C-A-2012;
11. *Lukács v. WestJet*, Decision No. 249-C-A-2012;
12. *Lukács v. WestJet*, Decision No. 252-C-A-2012;
13. *Lukács v. United Airlines*, Decision No. 467-C-A-2012;
14. *Lukács v. Porter Airlines*, Decision No. 16-C-A-2013;
15. *Lukács v. Air Canada*, Decision No. 204-C-A-2013;
16. *Lukács v. WestJet*, Decision No. 227-C-A-2013;
17. *Lukács v. Sunwing Airlines*, Decision No. 249-C-A-2013;
18. *Lukács v. Sunwing Airlines*, Decision No. 313-C-A-2013;
19. *Lukács v. Air Transat*, Decision No. 327-C-A-2013;
20. *Lukács v. Air Canada*, Decision No. 342-C-A-2013;
21. *Lukács v. Porter Airlines*, Decision No. 344-C-A-2013;
22. *Lukács v. British Airways*, Decision No. 10-C-A-2014;
23. *Lukács v. Porter Airlines*, Decision No. 31-C-A-2014;
24. *Lukács v. Porter Airlines*, Decision No. 249-C-A-2014;
25. *Lukács v. WestJet*, Decision No. 420-C-A-2014; and
26. *Lukács v. British Airways*, Decision No. 49-C-A-2016.

This is **Exhibit "10"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

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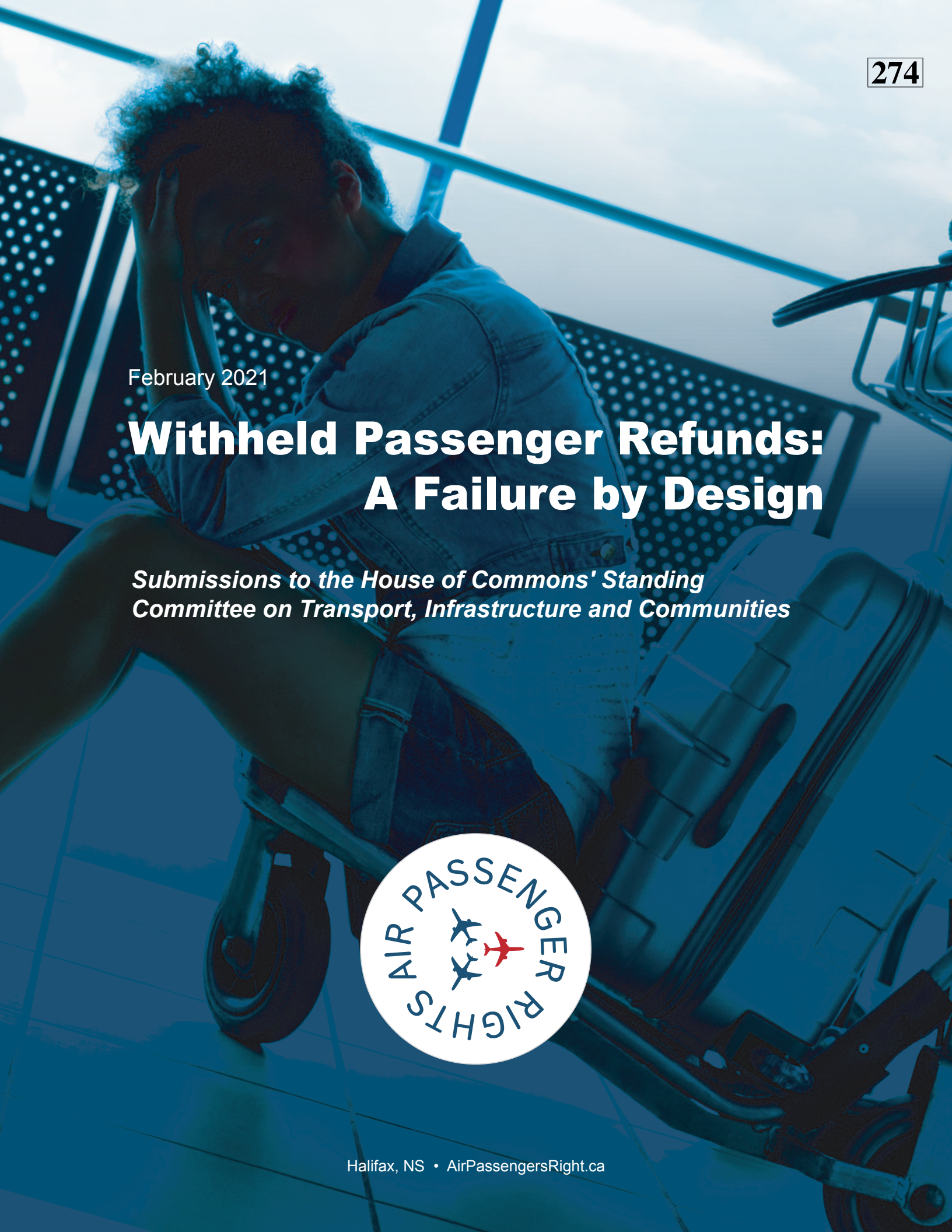
Signature



February 2021

Withheld Passenger Refunds: A Failure by Design

Submissions to the House of Commons' Standing Committee on Transport, Infrastructure and Communities

Halifax, NS • AirPassengersRight.ca

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About *Air Passenger Rights*

Air Passenger Rights [**APR**] is an independent nonprofit organization of volunteers, devoted to empowering travellers through education, advocacy, investigation, and litigation. APR is in a unique position to comment on behalf of the public interest on the impact of the COVID-19 pandemic on air travel:

- **Experience based.** APR's submissions are based on the expertise and experience accumulated through assisting passengers daily in enforcing their rights.
- **Independence.** APR takes no government or business funding.
- **No business interest.** APR has no business interest in the aviation sector.

APR's presence on social media includes the Air Passenger Rights (Canada) Facebook group, with **over 38,700 members**, and the @AirPassRightsCA Twitter feed.

APR was founded and is led by Dr. Gábor Lukács, a Canadian air passenger rights advocate, who volunteers his time and expertise for the benefit of the travelling public.

Gábor Lukács, PhD (President)

Since 2008, Dr. Lukács has filed **more than two dozen successful complaints**[1] with the Canadian Transportation Agency [**Agency**], challenging the terms, conditions, and practices of air carriers, resulting in orders directing them to amend their conditions of carriage and offer better protection to passengers.

Dr. Lukács's advocacy in the public interest and his expertise and experience in the area of passenger rights have been recognized by the transportation bar,[2] the academic community,[3] and the judiciary.[4] Dr. Lukács has appeared before courts across Canada, including the Federal Court of Appeal and the Supreme Court of Canada,[5] in respect of air passenger rights. He successfully challenged the Agency's lack of transparency and the reasonableness of the Agency's decisions. In 2020, the Federal Court of Appeal allowed Dr. Lukács to intervene in the airlines' challenge to the *Air Passenger Protection Regulations*, noting that he "would defend the interests of airline passengers in a way that the parties cannot."[6]

In 2013, the Consumers' Association of Canada awarded Dr. Lukács its Order of Merit for singlehandedly initiating legal action resulting in the revision of Air Canada's unfair practices regarding overbooking.

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1 See Appendix A.
2 Carlos Martins: Aviation Practice Area Review (September 2013), WHO'SWHOLEGAL.
3 Air Passenger Rights Advocate Dr. Gabor Lukacs lectures at the IASL, Institute for Air and Space Law, October 2018.
4 *Lukács v. Canada*, 2015 FCA 140 at para. 1; *Lukács v. Canada*, 2015 FCA 269 at para. 43; and *Lukács v. Canada*, 2016 FCA 174 at para. 6.
5 *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2.
6 Order of the Federal Court of Appeal (Near, J.A.), dated March 3, 2020 in File No. A-311-19.

1. Fundamental Right: Refund for Cancelled Flights

It is settled law that passengers whose flights were cancelled by the airline are entitled to a refund of all amounts paid. A "refund" means return of all monies paid in the original form payment. This principle, coined a "fundamental right,"[7] is deeply rooted in the common law and provincial and federal legislation.

The fundamental right to a refund does not apply to passengers whose flight did operate, but who nevertheless chose not to travel ("no show"). A "non-refundable ticket" means that if the passenger is a "no show," the airline may not have to refund their ticket; however, if it is the airline that cancels a flight, then there are no "no show" passengers, and therefore all tickets must be refunded.

General Principles. A key element of consumer contracts is "consideration": goods or services received by the consumer in exchange for the money the consumer had paid. If a supplier does not deliver for any reason, the supplier must refund the consumer all monies the consumer had paid. A refund of monies paid is separate and apart from compensation for damages caused by the supplier's failure to deliver: *force majeure* is a defence to a claim for compensation, but it is not a defence for a claim for a refund.

A consumer contract that purports to allow a supplier to keep monies received for goods or services that were not delivered is illusory. Provisions purporting to grant such a broad relief from liability reduce the contract to "a mere declaration of intent."[8]

Provincial Legislation. Most Canadian provinces have codified these principles in their respective consumer protection statutes, which guarantee consumers the right to cancel contracts and receive a full refund in the event the supplier does not deliver the goods or services the consumer had paid for. British Columbia, Newfoundland and Labrador, and Quebec have such provisions for distance sales contracts, while Ontario has provisions for future performance contracts.[9] Alberta, Manitoba, Nova Scotia, and Saskatchewan have codified these principles for goods and services purchased using the Internet.[10]

These provincial legislation not only reaffirm the norm that suppliers must refund consumers all monies paid for goods or services not delivered, regardless of the reasons for the non-delivery,[11] but also provide passengers with an additional layer of protection. Indeed, while airlines are federally regulated, they are nevertheless subject to provincial laws of general applicability.[12]

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7 *Lukács v. Sunwing Airlines*, Decision No. 313-C-A-2013 at para. 15.

8 *Suisse Atlantique Societe d'Armament v. NV Rotterdamsche Kolen Centrale*, [1967] 1A.C. 361 at 432 (*per* Lord Wilberforce).

9 *Business Practices and Consumer Protection Act*, SBC 2004, c. 2, ss. 49(1)(d) and 50; *Consumer Protection and Business Practices Act*, SNL 2009, c. C-31.1, ss. 32-33; *Consumer Protection Act*, CQLR c. P-40.1, ss. 54.9-54.13; and *Consumer Protection Act*, 2002, SO 2002, c 30, Sch A, ss. 26 and 92-96.

10 *Internet Sales Contract Regulation*, Alta Reg 81/2001, ss. s. 6(2)(b) and 10(1); *Consumer Protection Act*, CCSM c C200, ss. 130(1) and 133(1)(b); *Internet Sales Contract Regulations*, NS Reg 91/2002, ss. 6(c)(ii) and 7 and *Consumer Protection Act*, RSNS 1989, c. 92, s. 21AC(1); and *The Consumer Protection Act*, SS 1996, c C-30.1, ss. 75.61(2)(b) and 75.72(1).

11 The only exception being when the consumer evades delivery.

12 *Bank of Montreal v. Marcotte*, 2014 SCC 55 at para. 84.

Federal Legislation. Passengers' fundamental right to a refund had already been established well before the much spoken of *Air Passenger Protection Regulations* [***APPR***]. The legislative provisions giving effect to this right are found in the *Canada Transportation Act* and the *Air Transportation Regulations*.

Every air carrier operating an air service within, to, and from Canada must establish a "tariff,"[13] setting out clearly the airlines' policies with respect to certain enumerated matters, including:

> refunds for services purchased but not used, whether in whole or in part, either as a result of the client's unwillingness or inability to continue or the air carrier's inability to provide the service for any reason,[14]

The tariff operates as the contract of carriage between the air carrier and passengers. The terms and conditions set out in the tariff are legally binding on the air carrier.[15] The terms and conditions are subject to the statutory requirement that they must be just and reasonable.[16]

In 2004, some 15 years before the *APPR*, the Canadian Transportation Agency [**Agency**] recognized that the aforementioned legislative provisions give rise to a right to a refund for passengers whose flights were cancelled by the airline for any reason.[17] In 2013, the Agency reaffirmed this right, and held that:

> [...] it is unreasonable for [the airline] to refuse to refund the fare paid by a passenger because of its cancellation of a flight, even if the cause is an event beyond [the airline's] control.[18]

In subsequent decisions, the Agency reaffirmed this right again, and coined it a "fundamental right."[19]

At the time the *APPR* were drafted, we expressed serious concerns about the *APPR*'s silence on passengers' fundamental right to a refund.[20] Regrettably, the Canadian Transportation Agency failed to follow APR's recommendation to consolidate this right into the *APPR*, claiming lack of statutory mandate.

The omission of passengers' fundamental right to a refund from the *APPR* does not negate that right, because the *APPR* is not a complete statutory code. The provisions of the *Canada Transportation Act* and the *Air Transportation Regulations* giving rise to passengers' fundamental right to a refund were not amended or negated by the *Transportation Modernization Act* nor by the *APPR*, and remain in full force.

Therefore, passengers' fundamental right to a refund remains the law and part of the parties' contracts.

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[13] *Canada Transportation Act*, s. 67(1); *Air Transportation Regulations*, SOR/88-58, s. 110(1).
[14] *Air Transportation Regulations*, SOR/88-58, ss. 107(1)(n)(xii) and 122(c)(xii) (emphasis added).
[15] *Canada Transportation Act*, s. 67(3); *Air Transportation Regulations*, SOR/88-58, s. 110(4).
[16] *Canada Transportation Act*, s. 67.2(1); *Air Transportation Regulations*, SOR/88-58, s. 111(1).
[17] *Re: Air Transat*, Decision No. 28-A-2004.
[18] *Lukács v. Porter*, Decision No. 344-C-A-2013 at para. 88 (emphasis added).
[19] *Lukács v. Sunwing Airlines*, Decision No. 313-C-A-2013 at para. 15; and *Lukács v. Porter*, Decision No. 31-C-A-2014 at paras. 33 and 137.
[20] Deficiencies of the Proposed Air Passenger Protection Regulations, pp. 42-44 (February 2019).

2. Withheld Refunds: Magnitude and Impact

Since March 2020, Canadian air passengers have witnessed an unprecedented assault on their private property and the collapse of consumer protection. Airlines whose revenues were decimated by the pandemic have helped themselves to passengers' money, and pocketed airfares paid in advance without providing any services in return.

Airlines helping themselves to passengers' money to make up for lost income has been a global problem. What sets Canada apart from other western countries is the response of the state authorities. On March 18, 2020, the European Commission issued interpretive guidelines reaffirming passengers' fundamental right to a refund.[21] On April 3, 2020, the US Department of Transportation issued an enforcement notice, reminding airlines that "passengers should be refunded promptly when their scheduled flights are cancelled or significantly delayed."[22] On May 15, 2020, the UK Civil Aviation Authority reminded airlines that "under the law, consumers are entitled to receive a refund for their cancelled flights, despite the challenges the industry is currently facing."[23] In July 2020, the European Commission commenced legal action against 10 of its member states to enforce passengers' fundamental right to a refund.[24]

In sharp contrast, the Government of Canada took no steps to hold airlines accountable criminally or otherwise for their actions, which may well amount to theft.[25] On the contrary, the government has been aiding and abetting the airlines in their efforts to misappropriate passengers' money.

Instead of protecting consumers, the Canadian Transportation Agency [**Agency**] mounted a disinformation campaign on Twitter and on its own website. On March 25, 2020, the Agency published its "Statement on Vouchers" that told the public, without any basis or authority, that airlines do not have to refund cancelled flights, but may provide an I-owe-you instead.

The Agency has been advancing pseudolegal propositions that conflate a "refund" with "compensation for inconvenience." First, the Agency says that an airline can cancel a flight for "reasons outside the carrier's control" and keep passengers' money so long as the ticket was marked "non-refundable." Second, the Agency blames lawmakers for ostensibly tying its hands and taking away its power to order airlines to refund passengers.

The Agency's contentions are devoid of any merit. The *Transportation Modernization Act* imposed additional obligations on airlines to pay "compensation for inconvenience" for flight cancellations that are "within the carrier's control," but it did not alter passengers' fundamental right to a refund.

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[21] Interpretative Guidelines on EU passenger rights regulations in the context of the developing situation with Covid-19.
[22] Enforcement Notice Regarding Refunds by Carriers Given the Unprecedented Impact of the COVID-19 Public Health Emergency on Air Travel, US Department of Transportation (April 3, 2020).
[23] "UK Civil Aviation Authority reviewing airline refunds" (May 15, 2020).
[24] "Coronavirus: EU launches legal action against 10 countries over cancelled flights compensation," Euronews (July 3, 2020).
[25] *Criminal Code*, RSC 1985, c. C-46, s. 322.

The Agency conceded that the "Statement on Vouchers" was not legally binding and did not alter passengers' rights to a refund only after it was directed to explain itself by the Federal Court of Appeal. Yet, the Agency continues to display an amended version of the "Statement on Vouchers" on its website.

The Agency's conduct has undermined consumers' confidence in the Canadian travel industry and the government to respect private property and protect consumer rights. Not only the airlines but also travel agents, credit card issuers, and even travel insurers used the Agency's statement as an excuse to deprive passengers of refunds for flights the **airlines themselves** cancelled.

The Minister of Transport or the Cabinet could have put an end to the Agency's and the airlines' running amok by promptly issuing policy directions under s. 43 of the *Canada Transportation Act*, making an order under s. 47, or issuing a ministerial direction under s. 86.11(2). Instead, Minister Marc Garneau washed his hands, and told the COVI Committee that the Agency "has ruled" on the refunds controversy.[26]

The Agency's callous conduct encouraged airlines to upgrade their cashgrab scheme to a full-fledged "bait-and-switch": Drumming up demand contrary to federal health guidance,[27] selling tickets on flights the airlines do not genuinely intend to operate, and then canceling the flights later without any consequences, while keeping passengers' cash, free and clear. For example, over 80% of the flights scheduled in July-September 2020 were cancelled by the airlines.[28]

While the number of victims of the airlines withholding refunds owed to passengers is within the airlines' exclusive knowledge, APR's conservative estimate is that as of September 30, 2020, **3,870,000 passengers** were affected.[29] The refunds controversy has therefore affected a significant portion of consumers.

Canadian airlines have demonstrated economic short-sightedness, and have done a disservice to themselves, to the entire Canadian travel industry, and to the Canadian population by alienating their customers and the public. The harm may well outlive the pandemic.

APR believes that sooner or later the airlines will have to be brought into compliance with the law, including honouring passengers' fundamental right to a refund, and returning the monies the airlines have misappropriated from the travelling public. The longer this process takes, the greater the long-term economic damage for the sector, damage that is entirely caused by loss of consumer confidence and goodwill.

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[26] "[...] the Canadian Transportation Agency has ruled on this issue and has ruled that, in the present circumstances and in a non-binding way, it is acceptable for airlines to offer credits for up to two years. In the case of Air Canada, the credit has no expiry date." – COVI Committee, Evidence (43rd Parl., 1st Sess., No. 013), p. 14 (emphasis added).

[27] "Air Canada hires influencers to promote vacation travel even as federal guidelines urge people to stay home" (Globe and Mail, January 5, 2021).

[28] Consultation paper on requested temporary adjustments to the Air Passenger Protection Regulations, Annex "A" (APR disputes the accuracy and completeness of the data).

[29] This estimate is based on Air Canada reportedly holding $2.322 billion in advance ticket sales (Air Canada's Third Quarter 2020 Interim Unaudited Condensed Consolidated Financial Statements and Notes, p. 2.), while having an (over)estimated market share of 60%, and an overestimated average round-trip ticket cost of $1,000. If Air Canada's market share is only 50% and the average round trip ticket costs only $800, then the estimate would be 5,805,000 affected passengers.

3. Captured Regulator: Canadian Transportation Agency

Lawmakers entrusted the The Canadian Transportation Agency [**Agency**] with administering the regulatory scheme created by the *Canada Transportation Act*, including numerous consumer protection provisions. In respect of air travel, the Agency has two main roles: (i) as a quasi-judicial tribunal, it adjudicates consumer disputes between passengers and carriers; and (ii) as the economic regulator, it regulates entrants into the air travel industry through its statutory powers to issue operating licenses or permits to airlines.[30]

Organizational Structure. The Agency is composed exclusively of its appointed members, appointed by the Governor in Council. Appointed members exercise the powers conferred upon the Agency by its enabling statute.[31] Appointed members of the Agency are assisted by a roster of civil service staff, who are supervised directly or indirectly by the appointed members.[32] Civil service staff are not appointed members, and have no authority act on the Agency's behalf. It is the Agency's appointed members who are ultimately responsible for the Agency's actions and the work performed by the civil service staff.

Code of Conduct for the Agency's Members. As a quasi-judicial body, the Agency's appointed members are held to a high standard of professional and ethical conduct, akin to judicial members of a court. The Agency's *Code of Conduct* further reinforces the standard statutory and common law rules with specific safeguards of the members' independence, and prohibitions against outside influence and conduct that might create an apprehension of bias:

> (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.[33]

The Agency's "Statement on Vouchers" violates the *Code of Conduct*, because it is a public expression of an opinion on a matter that "could be before the Agency" and also on "potential cases"; indeed, on the face of the "Statement on Vouchers" the Agency contemplates that it would receive consumer complaints about airlines withholding refunds owed to passengers.

The Agency initially claimed that there was no evidence that its appointed members approved, supported, or otherwise endorsed the "Statement on Vouchers;"[34] however, the opposite is the truth. On October 5, 2020, a Transport Canada policy adviser confirmed to MP Nathaniel Erskine-Smith that the "Statement on

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[30] *Lukács v. Canada (Transportation Agency)*, 2014 FCA 76 at paras. 50-52.
[31] *Canada Transportation Act*, ss. 7(2) and 16.
[32] *Canada Transportation Act*, s. 19.
[33] *Code of Conduct for Members of the Agency*, paras. 39 and 40 (emphasis added).
[34] *Air Passengers Rights v. Canada (Transportation Agency)*, 2020 FCA 92 at para. 35.

Vouchers" was issued in the name of the Agency, with the approval of the Agency's members.[35] On December 1, 2020, Mr. Scott Streiner, the Agency's Chairperson, testified before this Committee. In response to a question about Mr. Streiner's involvement with the Statement on Vouchers, he replied, "as head of the organization, I am always involved, of course."[36] Mr. Streiner stated that the Statement on Vouchers was also "reviewed by senior members of the organization."[37] Redacted Agency records disclosed on December 23, 2020 under the *Access to Information Act* [***ATIA***] strongly support an inference that at least the chairperson and vice-chairperson approved the "Statement on Vouchers" prior to its issuance.

APR is challenging the "Statement on Vouchers" before the Federal Court of Appeal on the grounds that, among other things, it gives rise to a reasonable apprehension of bias. Two justices of that court have already confirmed that this ground presents a *serious issue to be tried* on its merits.[38]

The Agency's "Statement on Vouchers" also raises concerns and runs afoul of the *Code of Conduct* in that the Agency was not acting independently, but had input from the airlines and Transport Canada during the drafting process. On March 11, 2020, an individual from WestJet's "Government Relations and Regulatory Affairs" team sent a lengthy email to Ms. Marcia Jones, the Agency's Chief Strategy Officer, with the subject line "by way of example," which was circulated within the Agency as part of the drafting of the Statement on Vouchers.[39] On March 12, 2020, Mr. George Petsikas, Air Transat's Senior Director of Government and Industry Affairs, emailed Ms. Jones with the subject line "APPR Guidelines - COVID-19," thanked her for a verbal discussion "re the above-mentioned matter" earlier that morning, and urged the Agency to issue guidance to assist Air Transat in dealing with passenger refunds and protecting employment levels. On the morning of March 22, 2020, the Agency held an "EC" (Executive Committee) meeting. At 2:22pm on the same day, Transport Canada's manager for national air services policy commenced an email chain with the Agency using the subject line "CTA announcement tomorrow," which continued until March 24, 2020.[40] The "Statement on Vouchers" was issued on March 25, 2020.

APR believes that the Agency's drafting, issuance, and wide dissemination of the misleading "Statement on Vouchers" create the perception and support the conclusion that the Agency has abdicated its consumer protection mandate, given up even the appearance of independence and impartiality, and instead has become beholden to the industry it is supposed to regulate, doing its bidding.

APR recommends that the Committee not only ask the Agency to produce all records in respect of the "Statement on Vouchers," including but not limited to emails, meeting agendas, meeting minutes, notes, draft documents, and memos, but more broadly inquire into its cozy relationship with the airlines.

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[35] Email exchange between Ms. Blake Oliver and MP Nathaniel Erskine-Smith, dated October 5, 2020.

[36] TRAN Committee, Evidence (43rd Parl., 2nd Sess., No. 008), p. 11.

[37] *Ibid.*

[38] *Air Passengers Rights v. Canada (Transportation Agency)*, 2020 FCA 92 at para. 17; and *Air Passengers Rights v. Canada (Transportation Agency)*, 2020 FCA 155 at para. 33.

[39] In the copy disclosed under the *ATIA*, the Agency redacted the entire content of that email save for one line.

[40] This heavily redacted email chain was disclosed by the Agency under the *ATIA*, as part of a response to a request for records relating to the drafting of the Statement on Vouchers.

4. Airline Bankruptcy: Reality Check

The possibility of bankruptcy of Canadian airlines has been regularly floated in the media as an excuse for withholding refunds owed to passengers. It has also been argued that in the event of such bankruptcy, passengers would be left with nothing as unsecured creditors. APR believes these concerns are ill-founded.

The publicly available financial data suggest that Canadian airlines do have cash reserves, and are nowhere near insolvency.[41]

Withholding refunds owed to passengers does not assist airlines to avert insolvency or escape being petitioned into bankruptcy. If an airline is unable to or fails to meet its financial obligations, including its obligations to refund passengers, then the airline is insolvent in the eyes of the law.[42]

In the unlikely event that a Canadian airline would become insolvent, it would most likely apply for and be granted creditor protection under the *CCAA*[43] to allow it to restructure, while maximizing returns for creditors and preserving both jobs and the airline's value as a functioning business. Unlike the current chaotic situation, a *CCAA* proceeding is carried out under the supervision of a superior court justice, who ensures that all creditors, including passengers, are treated fairly. In many cases, this would be an improvement over the *status quo*.

It might be easier for passengers to get their refunds in the event of the creditor protection or a bankruptcy. In many cases, monies paid in advance for services to be performed in the future must be held in trust, and the supplier (airline) is deemed to be the trustee.[44] A creditor protection or a bankruptcy could ensure that the funds held in trust are promptly returned to their rightful owners (passengers). Furthermore, if the airline helped itself to the trust funds or if it obtained funds by false pretenses,[45] then debts and liabilities arising from these acts would survive the creditor protection or a bankruptcy.[46]

While APR hopes that no airline will have to be put through a *CCAA* proceeding or be petitioned into bankruptcy to enforce compliance with its obligations to passengers, such court-supervised proceedings would likely bring much-needed transparency into the airlines' finances and a rapid closure to the refunds controversy.

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41 Air Canada's Third Quarter 2020 Interim Unaudited Condensed Consolidated Financial Statements and Notes, p. 2.
42 *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s. 2.
43 *Companies' Creditors Arrangement Act*, RSC 1985, c. C-36.
44 *Consumer Protection Act*, CQLR c P-40.1, s. 256.
45 Such as misrepresenting its intent to operate flights that were never meant to take off.
46 *Companies' Creditors Arrangement Act*, RSC 1985, c. C-36, ss. 19(2)(c) and 19(2)(d); and *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, ss. 178(1)(d) and 178(1)(e).

5. Path to Recovery: Restoring Consumer Confidence

Consumer confidence and goodwill is the lifeblood for every airline and the travel industry as a whole, which depends on consumers paying in advance for services to be rendered at a later date. Consumers will pay for services in advance only if they have confidence that they will receive the services they had paid for, or, if the services are not provided, a full refund of their hard-earned money. In the absence of such assurances, consumers will vote with their wallets: travel less, or whenever possible, take their business to airlines based in jurisdictions that do offer such guarantees, such as the US or the EU.

In the past eleven months, Canadian airlines and their travel industry partners have squandered their most precious assets: consumer confidence and goodwill. The Government of Canada's actions and omissions, and in particular those of the Canadian Transportation Agency, have compounded the loss by eroding consumers' confidence in the government's willingness to protect private property and consumer rights.

APR is of the view that this loss of confidence will slow the entire sector's recovery. To mitigate the long-term economic harm, it is therefore imperative to enact measures that guarantee that money the public pays in advance to airlines would never be misappropriated again. In addition, the serious shortcomings of enforcement of passengers' rights and the regulatory capture of the Canadian Transportation Agency by the industry it is supposed to regulate must also be remedied.

APR therefore recommends the following measures:

1. Passing a declaratory legislation, such as Bill C-249, to reaffirm passengers' right to a refund, in the original form of payment, for cancelled flights—regardless of the reason for the cancellation.

   Legislation by Parliament is necessary to protect this fundamental right, because otherwise the Canadian Transportation Agency or Cabinet could attempt to negate these rights at their whim by issuing regulatory exemptions, as we have recently seen with respect to certain provisions of the *Air Passenger Protection Regulations*.[47]

2. Passing a legislation similar to s. 256 of the Quebec *Consumer Protection Act*, requiring all airlines to hold all advance ticket sales in a trust account.

3. Studying the regulatory capture of the Canadian Transportation Agency by the airline industry.

   The Canadian Transportation Agency's conduct during the pandemic, and the issuance of the controversial "Statement on Vouchers" in particular, confirm that the Agency has lost its independence, and its consumer protection activities have been compromised. This must be remedied.

   Strict and consistent enforcement of passenger rights, while unpopular with airlines in the short-term, is vital for the Canadian travel industry's long-term prosperity.

[47] See Determination No. A-2020-42 and Determination No. A-2020-47.

Appendix

A. Final Decisions Arising from Dr. Lukács's Successful Complaints (Highlights)

1. *Lukács v. Air Canada*, Decision No. 208-C-A-2009;
2. *Lukács v. WestJet*, Decision No. 313-C-A-2010;
3. *Lukács v. WestJet*, Decision No. 477-C-A-2010
(leave to appeal denied, Federal Court of Appeal File No.: 10-A-41);
4. *Lukács v. WestJet*, Decision No. 483-C-A-2010
(leave to appeal denied, Federal Court of Appeal File No.: 10-A-42);
5. *Lukács v. Air Canada*, Decision No. 291-C-A-2011;
6. *Lukács v. WestJet*, Decision No. 418-C-A-2011;
7. *Lukács v. United Airlines*, Decision No. 182-C-A-2012;
8. *Lukács v. Air Canada*, Decision No. 250-C-A-2012;
9. *Lukács v. Air Canada*, Decision No. 251-C-A-2012;
10. *Lukács v. Air Transat*, Decision No. 248-C-A-2012;
11. *Lukács v. WestJet*, Decision No. 249-C-A-2012;
12. *Lukács v. WestJet*, Decision No. 252-C-A-2012;
13. *Lukács v. United Airlines*, Decision No. 467-C-A-2012;
14. *Lukács v. Porter Airlines*, Decision No. 16-C-A-2013;
15. *Lukács v. Air Canada*, Decision No. 204-C-A-2013;
16. *Lukács v. WestJet*, Decision No. 227-C-A-2013;
17. *Lukács v. Sunwing Airlines*, Decision No. 249-C-A-2013;
18. *Lukács v. Sunwing Airlines*, Decision No. 313-C-A-2013;
19. *Lukács v. Air Transat*, Decision No. 327-C-A-2013;
20. *Lukács v. Air Canada*, Decision No. 342-C-A-2013;
21. *Lukács v. Porter Airlines*, Decision No. 344-C-A-2013;
22. *Lukács v. British Airways*, Decision No. 10-C-A-2014;
23. *Lukács v. Porter Airlines*, Decision No. 31-C-A-2014;
24. *Lukács v. Porter Airlines*, Decision No. 249-C-A-2014;
25. *Lukács v. WestJet*, Decision No. 420-C-A-2014; and
26. *Lukács v. British Airways*, Decision No. 49-C-A-2016.

This is **Exhibit "11"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

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Signature

HOUSE OF COMMONS
CHAMBRE DES COMMUNES
CANADA

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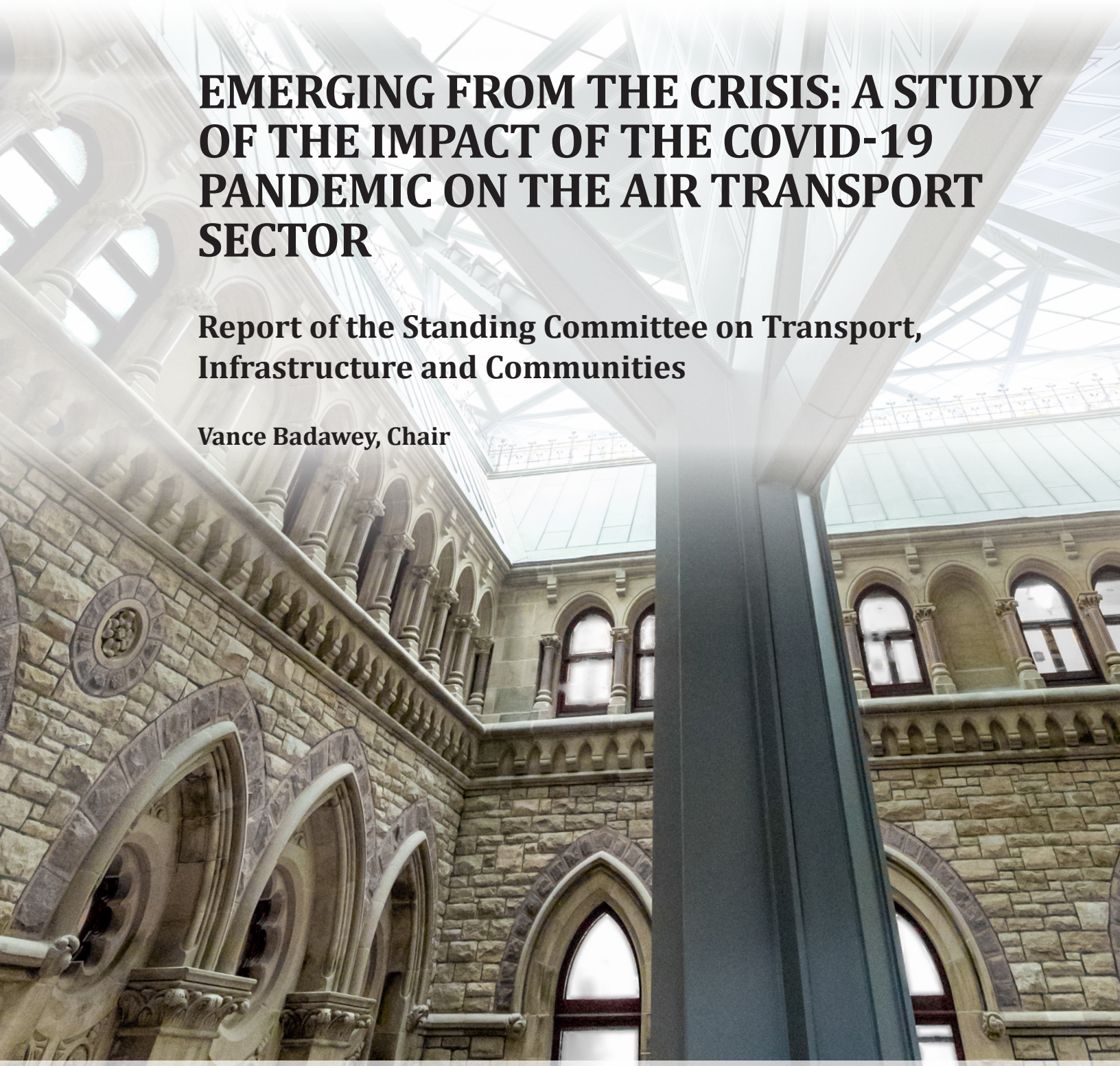

EMERGING FROM THE CRISIS: A STUDY OF THE IMPACT OF THE COVID-19 PANDEMIC ON THE AIR TRANSPORT SECTOR

Report of the Standing Committee on Transport, Infrastructure and Communities

Vance Badawey, Chair

JUNE 2021
43rd PARLIAMENT, 2nd SESSION

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NOTICE TO READER

Reports from committee presented to the House of Commons

Presenting a report to the House is the way a committee makes public its findings and recommendations on a particular topic. Substantive reports on a subject-matter study usually contain a synopsis of the testimony heard, the recommendations made by the committee, as well as the reasons for those recommendations.

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THE STANDING COMMITTEE ON TRANSPORT, INFRASTRUCTURE AND COMMUNITIES

has the honour to present its

THIRD REPORT

Pursuant to its mandate under Standing Order 108(2), the committee has studied the impact of COVID-19 on the aviation sector and has agreed to report the following:

TABLE OF CONTENTS

SUMMARY

Canada is a vast country with diverse communities scattered from coast to coast. An efficient and affordable air transportation system is essential to connect these communities to each other, to major cities and to the rest of the world. Furthermore, some Canadian communities rely on air travel for work, medical appointments and supply.

Since international travel restrictions were implemented in March 2020, Canadian airlines have cancelled most of their international flights and significantly curtailed their scheduled domestic flights. The decrease in air traffic also had a significant impact on the revenues of air carriers, airports, airport service providers and aerospace companies. This unprecedented crisis led to many temporary and permanent layoffs in the aviation sector and left some regions of the country more isolated.

It is in this context that the House of Commons Standing Committee on Transport, Infrastructure and Communities undertook its study on the impact of the COVID-19 pandemic on the Canadian air transport sector. The witnesses who appeared before the Committee proposed various solutions to ensure the survival and recovery of the sector while prioritizing the health and safety of workers, passengers and the Canadian public.

While most witnesses said that the financial assistance provided to date by the Government of Canada was a good first step, they also agreed that it was not enough, given the scale of the crisis Canada’s air transport sector is experiencing. Many of them called for more financial assistance, commensurate with pandemic losses, to ensure the future competitiveness of the industry internationally.

Some witnesses pointed out that the Government of Canada's support measures must be fair to all stakeholders in the sector, large and small. They mentioned that financial assistance was needed to keep certain regional routes operating, but that it should not go only to the large air carriers.

On the topic of promoting recovery in the sector, many witnesses said it was vital to rebuild passenger confidence to ensure that passengers continue to view air travel as a safe and secure mode of transportation. Witnesses also pointed out that travellers should be given a refund for flights cancelled due to the pandemic to help restore their trust.

Lastly, given that the aviation industry cannot operate without its workers, and given that these workers have skills and expertise that are highly sought after by other sectors within Canada and around the world, the assistance measures implemented by the government should ensure maximum employee retention.

LIST OF RECOMMENDATIONS

As a result of their deliberations committees may make recommendations which they include in their reports for the consideration of the House of Commons or the Government. Recommendations related to this study are listed below.

Recommendation 1 — Encourage Competition

That the Government of Canada focus on measures to encourage competition in the air sector.

Recommendation 2 — Health and Safety of Workers

That the Government of Canada take meaningful steps to improve the safety of the working environments for airline workers, including recognizing the right to refuse unsafe work.

Recommendation 3 —Definition of "Crew" in Regulations

That the Government of Canada act to clarify definitions of "crew" in regulations to support the movement of airline workers and pilots through travel restrictions.

Recommendation 4 —Workforce Issues at NAV CANADA

That the Government of Canada act to address chronic understaffing and lack of trainees at multiple NAV CANADA locations through its representation within NAV CANADA governance and the Minister of Transportation's safety mandate.

Recommendation 5 – Flight Controller Fatigue

That the Government of Canada consider modernizing fatigue regulations for flight controllers as it did recently for pilots.

Recommendation 6 —Recovery Strategy (protect jobs)

That the Government of Canada work with industry and labour groups to devise a recovery plan for the aviation sector that includes measures to protect jobs in the wider aerospace sector.

Recommendation 7 — NAV CANADA's Service Level Reviews (safety and economic concerns)

That the Government of Canada recognize the safety and economic concerns raised by witnesses concerning the proposed service reductions to NAV CANADA Air Traffic Control Towers and Area Control Centres, and further, that the government never compromise on safety in the aerospace sector, including ensuring that safety is not compromised as part of any service level adjustments by NAV CANADA.

Recommendation 8 — NAV CANADA's Service Level Reviews (the role of the Minister of Transport)

That the Government of Canada undertake to provide new powers to the Minister of Transport that would allow them to shield NAV CANADA towers from a service review.

Recommendation 9 — Recovery Strategy

That the government of Canada work with public health, the industry and labour groups to establish an aviation re-start strategy, to be in place as soon as possible, that reflects science-based and data-based decision making with respect to testing and quarantine measures, and which will enable a phased re-opening of international air travel and provide a clear path forward for the re-opening of domestic travel.

Recommendation 10 — Duration of Quarantine

That the Government of Canada, in consultation with public health and the airline industry, review the relationship between screening and quarantine of passengers to determine if it would be feasible to reduce the length of quarantine to 10 or 7 days instead of 14 days.

Recommendation 11 — Rapid Tests

That the Government of Canada, in collaboration with public health, airport authorities and air sector workers, consider further integration of rapid testing of passengers at airports before boarding.

Recommendation 12 — Strengthen Quarantine Requirements

That the Government of Canada improve the standards for hotel quarantine and ensure robust quarantine requirements for all arriving international air passengers.

Recommendation 13 — Pilot Projects

That the Government of Canada, with direction from public health officials, apply learnings from rapid testing pilot projects to all Canadian airports.

Recommendation 14 — Conditions for Financial Support

That the Government of Canada extend support to the air sector as soon as possible but on condition that (a) airlines reimburse customers who were unable to complete their itineraries due to pandemic; (b) regional routes are restored in order to reconnect communities who lost air service during the pandemic; (c) contracts are honoured with Canadian aerospace companies; (d) independent travel agents are not penalized by losing their commissions when airline passengers are reimbursed; (e) any financial support received is not used for any enhanced executive compensation; stock buy-backs; or dividends for shareholders; (f) financial relief is directly tied to protecting jobs and re-hiring workers and (g) the maintenance of Canadian airlines' aircraft takes place in Canada.

Recommendation 15 — Equity Stake in Canadian Airlines

That the Government of Canada consider acquiring an equity stake in any Canadian airlines that receive public money to better mandate activities in the public interest.

Recommendation 16 — Protect Jobs

That any financial relief provided by the Government of Canada to the aviation sector, as part of its restart strategy, be directly tied to protecting jobs and re-hiring workers.

Recommendation 17 — Involvement of Unions

That the Minister of Transport work closely with union representatives in devising and negotiating sectoral support for the aviation industry.

Recommendation 18 — Extension of the Wage Subsidy

That the government of Canada extend the wage subsidy to the air sector beyond June to reflect the reality that it will take some time for the sector to recover even after mass vaccination.

Recommendation 19 — Rent Relief

That the Government of Canada consider extending rent relief for large and medium-sized airports beyond 2020-21, until the airline industry has recovered from the effects of the COVID-19 pandemic.

Recommendation 20 — Review of the Legislative Framework

That the Government of Canada amend air passenger protection legislation and regulations to make explicit passengers' pre-existing right to receive reimbursement in circumstances where the airlines are unable to complete the client's itinerary in a reasonable period of time, even in cases beyond the control of the airlines (such as a major public health emergency).

Recommendation 21 — Prevent Regulatory Capture at the Canadian Transportation Agency

That the Canadian Transportation Agency be required to explain what measures it takes to prevent regulatory capture.

Recommendation 22 — Recognition of Passengers' Rights to a Refund

That the Government of Canada recognize that a fundamental right to a refund for passengers of cancelled flights exists beyond the protections found in the Air Passenger Protection Regulations.

Recommendation 23 — Full Refunds

That the Government of Canada immediately require that all Canadian airlines fully refund passengers for flights they were unable to take due to the pandemic.

Recommendation 24 — Bill C-249

That the Committee recommend to the House of Commons that Bill C-249 be considered as soon as possible with a view to its speedy passage to ensure the protection of passengers' rights to a refund.

Recommendation 25 — Support for Regional Routes

That the Government of Canada ensure that remote and northern regions have access to reliable, efficient and affordable air service, and that financial and structural support for air carriers is equitable and allows smaller players to compete with larger ones.

Recommendation 26 — Equity in Financial Support

That any financial relief provided by the Government of Canada to the aviation sector be proportional and fair amongst all airline carriers to provide help to small and regional carriers.

Recommendation 27 — Financial Support to Small and Regional Airports

That the Government of Canada explore means to provide financial support to small and regional airports who have seen revenue reductions due to flight suspensions.

Recommendation 28 — Development of a National Aerospace Strategy

That the Government of Canada work in partnership with the aerospace industry to develop a national aerospace strategy that addresses the civil, military and space sectors, with a specific focus on retaining and developing skilled workers and assisting in the transition to new technologies, including sustainable, low carbon technologies.

Recommendation 29 — Emergency Funding for NAV CANADA

That the Government of Canada consider providing emergency funding to NAV CANADA to allow it to continue operations through the pandemic until flights return to previous levels.

Recommendation 30 — Alternative Methods of Funding for NAV CANADA

That the Government of Canada explore alternative methods of funding NAV CANADA operations that provide greater stability in the event of declines in passenger traffic, preserve access for essential flights, and provide greater accountability of decision making, including by restricting the circumstances under which NAV CANADA may reduce staff levels or worker compensation.

Recommendation 31 — Reflect on Lessons Learned

That Transport Canada draft a "lessons learned" report with recommendations on how to respond in the event of future emergency situations like the COVID-19 crisis which lead to extended restrictions on travel.

EMERGING FROM THE CRISIS: A STUDY OF THE IMPACT OF THE COVID-19 PANDEMIC ON THE AIR TRANSPORT SECTOR

INTRODUCTION

Following the worldwide implementation of travel restrictions in March 2020, commercial airlines have experienced significant decreases in passenger traffic and revenue. The International Air Transport Association (IATA) estimates that air traffic fell by 66% in 2020 compared with 2019, "by far the sharpest traffic decline in aviation history."[1]

Since 13 March 2020, the Government of Canada has advised travellers to avoid all non-essential travel outside of Canada to limit the introduction and spread of COVID-19 within the country.[2] Canadian airlines have cancelled most of their international flights and significantly curtailed their scheduled domestic flights; some companies suspended their operations either temporarily or indefinitely.

This substantial reduction in aviation activity brought with it major upheavals in employment in the sector. Airlines resorted to temporary or permanent layoffs, or reductions in salary or hours. The decrease in air traffic also significantly affected airport revenues and airport service providers, such as NAV CANADA. Anticipating a drop in demand for their products, many aerospace companies also reduced their workforces.

In this context, the House of Commons Standing Committee on Transport, Infrastructure and Communities (the Committee) adopted the following motion on 29 October 2020:

> That, pursuant to Standing Order 108(2), the committee undertake a broad study on the impact of COVID-19 on the aviation sector; and that no fewer than eight meetings be set aside for this study, and that the impact of the Air Transat sale on the sector be the first item considered as part of the study.

1 International Air Transport Association [IATA], *2020 Worst Year in History for Air Travel Demand*, News release, 3 February 2021.

2 Global Affairs Canada, *Government of Canada advises Canadians to avoid non-essential travel abroad*, 13 March 2020.

As part of this study, the Committee held 12 meetings, heard 60 witnesses and received 8 briefs. The study was already underway when, on 8 November 2020, the Minister of Transport announced plans to roll out a package of assistance to Canadian airlines, airports and the aerospace sector.[3] This assistance would be subject to strict conditions, including reimbursing airfares for cancelled flights and maintaining regional connectivity.

AN UNPRECEDENTED CRISIS

> **"Last year [2020] was a catastrophe. There is no other way to describe it. What recovery there was over the Northern hemisphere summer season stalled in autumn and the situation turned dramatically worse over the year-end holiday season, as more severe travel restrictions were imposed in the face of new outbreaks and new strains of COVID-19."**
>
> Alexandre de Juniac
> Director General and CEO, International Air Transport Association

Travel Restrictions

On 25 March 2020, the federal Minister of Health announced a 14-day mandatory self-isolation order for people entering Canada, whether or not they are showing symptoms of COVID-19.[4] Since 7 January 2021, air travellers entering Canada must also provide proof of a negative laboratory test result for COVID-19 to their airline.[5]

In addition to these measures, all flights from Canadian air carriers flying to and from Mexico and the Caribbean were suspended as of 31 January 2021.[6] The Government of Canada also suspended all commercial and private passenger flights from Pakistan and

3 Transport Canada, *Statement by Minister Garneau on measures to protect Canadians from the impacts of COVID-19 on the air travel sector*, Statement, 8 November 2020.

4 *Minimizing the Risk of Exposure to COVID-19 in Canada Order (Mandatory Isolation)*, 2020-0175.

5 Transport Canada, *New pre-departure COVID-19 testing requirements come into effect for all air travellers flying into Canada*, News release, 6 January 2021.

6 At the time it was announced, on 29 January 2021, this measure was scheduled to remain in effect until 30 April 2021. Government of Canada, Government of Canada introduces further restrictions on international travel, News release, 29 January 2021.

India as of 22 April 2021.[7] As a further precaution, all international flights to Canada since 3 February 2021 can land only at the Toronto, Montreal, Calgary and Vancouver international airports.[8] Lastly, since 22 February 2021, air travellers arriving in Canada must take a COVID-19 test upon arrival, in addition to the pre-arrival testing requirement. Travellers must also reserve a room in a Government of Canada-approved hotel for three nights while awaiting their test results. The test and the hotel stay are at their own cost. If the result is negative, travellers can finish their quarantine period at home. If the result is positive, they are directed to a public health centre designated by the federal government.

Since March 2020, some provinces and territories have also implemented their own travel restrictions. For example, the Atlantic provinces agreed to establish an Atlantic travel "bubble" between 3 July and 23 November 2020: residents could move freely between the four provinces and people entering the bubble from another region were subject to screening.[9] Every person entering the bubble was required to quarantine for 14 days, with no exceptions. The restrictions within these provinces have changed since then, but interprovincial travellers are still subject to entry restrictions.

Protecting Air Passengers and Workers

As of 20 April 2020, Transport Canada has required passengers on flights departing or arriving at Canadian airports to demonstrate they have a non-medical mask or face covering during the boarding process.[10] Travellers over the age of two are required to cover their faces when they are unable to keep two metres of separation between them. On 3 June 2020, the Minister of Transport unveiled new regulations requiring employees in the aviation sector, including airline agents and airport screening officers, to wear a non-medical face mask or covering in the restricted areas of an airport.[11]

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7 At the time it was announced, on 22 April 2021, this measure was scheduled to remain in effect for 30 days. Transport Canada, *Government of Canada suspends flights from India and Pakistan*, News release, 22 April 2021.

8 The airports in question are the Toronto Pearson International Airport, the Montreal Pierre-Elliott-Trudeau International Airport, the Calgary International Airport and the Vancouver International Airport.

9 Prince Edward Island, *PEI to participate in Atlantic travel bubble starting July 3*, News release, 24 June 2020.

10 Transport Canada, *New measures introduced for non-medical masks or face coverings in the Canadian transportation system*, News release, 17 April 2020.

11 Transport Canada, *Backgrounder: New measures introduced for the use of face coverings in the Canadian transportation sector*.

On 14 August 2020, the federal government announced *Canada's Flight Plan for Navigating COVID-19*, the foundation for Canada's current and future efforts to reduce the public health risks of COVID-19 while travelling by air.[12] This plan outlined a series of safety measures, including the following:

- temperature screening at the busiest Canadian airports and at points of origin for all incoming flights to Canada;
- restricted services and passenger movement during flights; and
- enhanced cleaning and sanitation protocols and practices.[13]

Various stakeholders in the Canadian airline sector introduced their own health and sanitation initiatives. For example, when Air Canada and WestJet representatives appeared before the Committee, they mentioned that they had developed policies and programs that sometimes exceeded the minimum federal requirements in order to protect the health and safety of passengers and crew.[14] However, Wesley Lesosky, President of the Air Canada Component of the Canadian Union of Public Employees, believes the Government of Canada should "better protect the rights of airline workers to a healthy and safe work environment, including the right to refuse unsafe work." He made the following point about the early months of the pandemic:

> Our members went through hell in the early months of the pandemic, and we had a regulator that refused to act when we tried to push for protections to make our jobs safer.

12 Transport Canada, *Canada's Flight Plan for Navigating COVID-19*.

13 Transport Canada, *Government of Canada releases Canada's Flight Plan for safe air travel*, News release, 14 August 2020.

14 Standing Committee on Transport, Infrastructure and Communities [TRAN], *Evidence*, 2nd Session, 43rd Parliament: David Rheault (Managing Director, Government Affairs and Community Relations, Air Canada); and Andy Gibbons (Director, Government Relations and Regulatory Affairs, WestJet Airlines Ltd. [WestJet]).

A Sector That Connects Canadians to Each Other and the Wider World

> **"If you turn off the tap on aviation, you don't want to unintentionally turn off the supply chain of vital goods to Canadians, including mail, personal protective equipment, pharmaceuticals and other goods."**
>
> Rob Giguère
> Chief Executive Officer, Air Canada Pilots Association

Canada is a vast country with a scattered population stretching from coast to coast. It needs an efficient air transport network connected to major cities, not only to enable Canadians to travel within the country, but also to ensure that Canadians can travel abroad and international travellers can visit Canada. Many remote and Northern communities rely on air transport to get workers to job sites, as is the case in the mining industry, or to ship essential goods, such as food and medicine.[15] At certain times of the year, air transport can be the only viable way to supply some regions of the country.[16]

According to IATA, the air transport sector supports 633,000 direct and indirect jobs in Canada.[17] It estimates that 3.2% of the country's GDP (approximately US$49 billion) is generated by the air transport sector if spending by foreign tourists is included.

Domestically, Air Canada and its subsidiaries account for 54% of available seat kilometres (ASKs), while WestJet accounts for 32% of ASKs.[18] Air Transat and Sunwing Airlines are the two biggest leisure carriers in Canada, offering flights primarily to sun destinations. The busiest airports in terms of passenger volumes are the Toronto (Pearson), Vancouver, Montreal (Trudeau) and Calgary airports.

When he appeared before the Committee, Mike Mueller, Senior Vice-President at the Aerospace Industries Association of Canada, emphasized that Canada is a world leader

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15 TRAN, *Evidence*: Julian Roberts (President and Chief Executive Officer, Pascan Inc. [Pascan]).

16 TRAN, *Evidence*: Lawrence Hanson (Assistant Deputy Minister, Policy, Department of Transport [Transport Canada]).

17 IATA, *The Importance of Air Transport to Canada*, IATA Economics.

18 Transport Canada. *Transportation in Canada 2019: Statistical Addendum*, 2020. Note that the 2019 Statistical Addendum is available only on request.

in the aerospace industry. Most aerospace manufacturing jobs are located in Quebec (51%) and Ontario (30%), while most aerospace maintenance, repair and overhaul jobs (commonly referred to as MRO services) are in the Western provinces (41%).[19]

Reduced Air Traffic and Its Effects

> **"Operations are at levels 80% to 90% lower than one year ago. Some operators have suspended operations altogether. Tens of thousands of jobs have been lost. There's hardly enough revenue to meet our short-term obligations."**
>
> John McKenna
> President and Chief Executive Officer, Air Transport Association of Canada

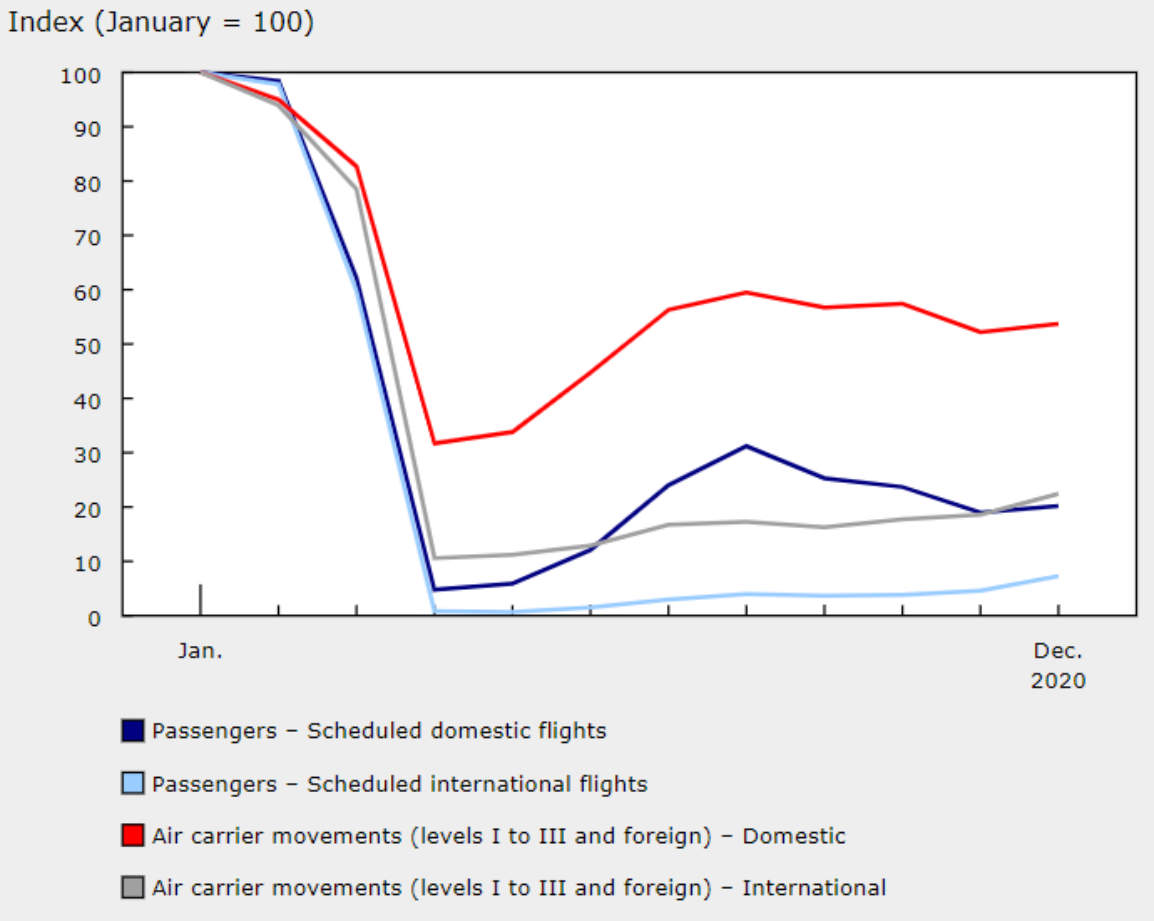
Following the border closures in March 2020, Level I air carriers[20] saw a 97% drop in the number of passengers carried in the month of April 2020 compared with April 2019.[21] Demand for air travel increased slightly during the summer, although it was still well below 2019 levels, and then stalled in the fall.

19 Innovation, Science and Economic Development Canada and the Aerospace Industries Association of Canada [AIAC], *State of Canada's Aerospace Industry 2019 Report*.

20 Level I air carriers transport at least 2 million revenue passengers or at least 400,000 tonnes of cargo per year.

21 Statistics Canada, *Monthly civil aviation statistics, December 2020*, 25 February 2021.

Figure 1—Indexes of Passengers Carried and Air Carrier Movements, Domestic and International, January to December 2020



Source: Statistics Canada, *Monthly civil aviation statistics, December 2020*, 25 February 2021.

Some witnesses reported that passenger volumes had decreased by roughly 90% since the beginning of the pandemic.[22] As an example, Hillary Marshall, Vice-President of Stakeholder Relations and Communications at the Greater Toronto Airports Authority (GTAA), explained that passenger traffic at Toronto Pearson was down 88% in the third quarter of 2020 compared with the third quarter of 2019. Revenues dropped 63% as a

22 TRAN, *Evidence*: Brian Grant (Chair, Regional Community Airports of Canada [RCAC]); Daniel-Robert Gooch (President, Canadian Airports Council [CAC]); John McKenna (President and Chief Executive Officer, Air Transport Association of Canada [ATAC]); Hillary Marshall (Vice-President, Stakeholder Relations and Communications, Greater Toronto Airports Authority [GTAA]); Hanson (Transport Canada); and Chorus Aviation inc., Brief.

result, which led the GTAA to reduce its workforce by 27% in July 2020. It also dramatically decreased its operating and capital expenditures.

Lawrence Hanson, Assistant Deputy Minister of Policy at the Department of Transport, pointed out that the Canadian air transport sector has traditionally operated under a user-pay system. Therefore, in the current context, airports and airlines must continue to pay significant fixed costs while they have had little or no off-setting revenue since March 2020. Gerry Bruno, Executive Advisor to the President and Chief Executive Officer at the Vancouver Airport Authority, said that the Vancouver Airport Authority has reduced expenses as much as possible, but it still had to secure a $600-million loan to ensure it could continue operating for the next two years. He said the airport was operating "on borrowed money."

With the arrival of COVID-19 variants in Canada and the introduction of new quarantine and testing measures for travellers entering the country in early 2021, it is difficult to predict when the aviation sector will return to 2019 air traffic levels. The IATA estimated that demand in 2021 would be 43% of 2019 demand.[23] Some witnesses mentioned that it may take three to five years for air traffic to return to 2019 volumes.[24] Andy Gibbons, Director of Government Relations and Regulatory Affairs at WestJet Airlines Ltd., said that WestJet would need six and a half years to achieve its 2019 bookings, but he reminded the Committee that it is difficult to predict the future in the current context.

Uncertainty About the Fate of Workers

> **"Around three-quarters of our members are currently laid off, and wondering if there will even be an industry to return to once the pandemic dust settles. Needless to say, it has been a difficult year for us."**
>
> Wesley Lesosky
> President, Air Canada Component of the Canadian Union of Public Employees

23 IATA regularly updates its predictions for 2021 based on the progression of the public health crisis. The analysis mentioned above was released on 21 April 2021. IATA, *Reduced Losses but Continued Pain in 2021*, News release, 21 April 2021.

24 TRAN, *Evidence*: Rheault (Air Canada); Gooch (CAC); Ray Bohn (President and Chief Executive Officer, NAV CANADA); and Derek Ferguson (Representative, Grand Lodge, International Association of Machinists and Aerospace Workers in Canada [IAMAW Canada]).

Because of the sharp decline in air traffic and the need to cut spending, aviation sector employers – including airport authorities, airlines and aerospace companies – have laid off employees either temporarily or permanently and reduced wages. Air Canada said it had laid off over 20,000 employees since the beginning of the pandemic, while WestJet informed the Committee that it had 5,600 active employees remaining, with 1,000 on leave and another 4,000 that had left permanently since the beginning of the pandemic.[25] Christopher Rauenbusch, President of the Canadian Union of Public Employees – Local 4070 and a WestJet flight attendant for 19 years, told the Committee he had narrowly avoided being laid off. He said that, as of 26 January 2021, no WestJet flight attendants with fewer than 17 years of service were actively flying.

Some witnesses expressed concerns about the fact that pilots have been on leave for several months; some thought that it could get harder to recruit new pilots if jobs are no longer guaranteed.[26] This would exacerbate the severe pilot shortage the industry was experiencing before the COVID-19 pandemic.[27] Witnesses were also worried about how furloughed or inactive pilots would maintain their skills. Similar concerns were raised about air traffic controllers and electronics technologists.

NAV CANADA, the private not-for-profit provider of civil air navigation services in Canada, has cut more than 720 positions, representing 14% of its workforce, since the pandemic began.[28] According to Doug Best, President and Chief Executive Officer of the Canadian Air Traffic Control Association, air traffic controllers were short-staffed by 13% before the pandemic hit, and NAV CANADA was paying over $100 million in overtime. Debi Daviau, President of the Professional Institute of the Public Service of Canada (PIPSC), added that, even though air traffic has decreased significantly, the workload has not changed for active employees, who “have to work that much harder” to make up for the staff shortage. In addition to cutting positions, NAV CANADA also terminated most of its trainees. This move could have long-term consequences, given that it takes two to three years of training to become an air traffic controller.[29]

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25 TRAN, *Evidence*: Rheault (Air Canada); and Gibbons (WestJet).

26 TRAN, *Evidence*: Rob Giguere (Chief Executive Officer, Air Canada Pilots Association [ACPA]); Captain Tim Perry (President, Air Line Pilots Association Canada, Air Line Pilots Association International); and Jerry Dias (National President, Unifor).

27 TRAN, *Supporting Canada’s Flight Schools*, 29th Report, April 2019.

28 Bohn (NAV CANADA).

29 TRAN, *Evidence*: Doug Best (President and Chief Executive Officer, Canadian Air Traffic Control Association [CATCA]); and Association des pilotes et des propriétaires de hangar de Saint-Jean-sur-Richelieu, Brief.

Similarly, Matt Wayland, Executive Assistant to the International Vice-President and Canadian Director of Government Relations at the International Brotherhood of Electrical Workers, informed the Committee that electronics technologists who were laid off by NAV CANADA could be recruited to work in other sectors in Canada and around the globe since their skills and expertise are in high demand. Similar concerns were raised by representatives of the aerospace industry, who pointed out that one of the industry's top competitive advantages is its highly skilled workforce.[30]

NAV CANADA and Level of Service Reviews

> **"An important reality for all members of Parliament … to consider is that air traffic control in Canada has only one provider, NAV CANADA. Responsibility over air traffic control is not done by any other entity in Canada. NAV CANADA has no counterparts, no competitors."**
>
> Debi Daviau
> President, Professional Institute of the Public Service of Canada

In addition to providing air traffic control and flight information services from coast to coast, NAV CANADA provides communications, navigation and surveillance infrastructure, as well as 24/7 advanced air traffic management systems.[31] NAV CANADA is subject to the *Civil Air Navigation Services Commercialization Act* and covers its operating costs with service charges paid by its customers: airlines and aircraft operators. Given that air traffic in Canada has plummeted by roughly 90% since March 2020, NAV CANADA's revenues dropped considerably as well.[32] In response, the corporation cut spending, reduced the size of its workforce and increased its service charges by approximately 30% for the 2021 fiscal year.

Witnesses made a point of mentioning NAV CANADA's excellent safety record, but were concerned about how workforce reductions and reduced capacity would affect safety when air traffic picks up again.[33] NAV CANADA launched level of service studies for

30 TRAN, *Evidence*: Mike Mueller (Senior Vice-President, Aerospace Industries Association of Canada [AIAC]); and Andrew Petrou (Chairman of the Board, Downsview Aerospace Innovation and Research).

31 TRAN, *Evidence*: Bohn (NAV CANADA).

32 TRAN, *Evidence*: Bohn (NAV CANADA).

33 TRAN, *Evidence*: Joseph Sparling (President, Air North); Paul Cameron (Business Manager and Financial Secretary, International Brotherhood of Electrical Workers [IBEW]); Matt Wayland (Executive Assistant to

seven control towers, and employees received letters of vulnerability indicating their jobs could potentially be at risk if service levels were to decrease.[34] To protect jobs and ensure safety in Canadian airspace, some witnesses, including the Association des pilotes et propriétaires de hangar de l'Aéroport de Saint-Jean-sur-Richelieu, are in favour of suspending these studies and any closures of air traffic control towers until further notice.[35]

David Rheault, Managing Director of Government Affairs and Community Relations for Air Canada, said that losing a control tower could make operations more complex, cause more diversions to other airports and increase costs for carriers.

Ray Bohn, President and Chief Executive Officer of NAV CANADA, argued that the level of service studies for control towers are based on air traffic levels seen before the pandemic and expected after the pandemic. He also assured the Committee that safety would remain at the forefront, no matter the result of these reviews.[36] Michael Keenan, Deputy Minister at the Department of Transport, stated that NAV CANADA could not change its service levels unless "Transport Canada reviews the proposed change and concurs that it doesn't sacrifice safety."[37]

Concern for Isolated Regions

> **"The COVID-19 pandemic has inflicted debilitating effects on passenger traffic and business sustainability in all sectors of aviation, particularly on the regional components of the system."**
>
> Brian Grant
> Chair, Regional Community Airports of Canada

the International Vice-President and Canadian Director of Government Relations, IBEW); Debi Daviau (President, Professional Institute of the Public Service of Canada [PIPSC]); Best (CATCA); and Dias (Unifor).

34 TRAN, *Evidence*: Best (CATCA); and Bohn (NAV CANADA).

35 TRAN, *Evidence*: Best (CATCA); and Wayland (IBEW).

36 TRAN, *Evidence*: Bohn (NAV CANADA).

37 On 15 April 2021, NAV CANADA announced that it would maintain air traffic control service to some Canadian communities, including Fort McMurray, Whitehorse and Saint-Jean-sur-Richelieu. NAV CANADA, *Air traffic control services to continue for Canadian communities*, News release, 15 April 2021.

While most witnesses who participated in the Committee's study agreed that it was important for a country as large as Canada to have an efficient and reliable regional air transport network, some were particularly concerned that the COVID-19 pandemic could have negative repercussions on regional connectivity in Canada.[38] Brian Grant, Chair of the Regional Community Airports of Canada, said that the vast majority of regional and municipal airports saw a loss of over 90% in passenger volumes and over 70% in revenues since the start of the pandemic. The decreased demand for inter-regional air transport led some air carriers, including Air Canada and WestJet, to temporarily or permanently suspend flights on some routes.[39] Porter Airlines, whose routes focus on business travel within Canada and between Canada and the United States, temporarily suspended all its flights on 21 March 2020.[40]

Monette Pasher, Executive Director of the Atlantic Canada Airports Association, explained that in recent months Atlantic airports have been drawing from their cash reserves, built up over two decades, to survive, when normally these funds would be earmarked for safety infrastructure projects. The situation is critical for some communities in the region, such as Sydney, Nova Scotia: it no longer has air service, and it is several hours by road to the nearest airport, in Halifax.[41]

Bruce Rodgers, Executive Director of the Canadian International Freight Forwarders Association, said that suspending passenger flights in remote regions also affects freight capacity, as approximately half of air cargo is transported in the belly hold of passenger aircraft.

Regular regional service helps connect remote communities to each other and connect passengers to major Canadian airports.[42] Large carriers are not necessarily in direct competition with small carriers at the regional level, because they offer different services that may be complementary. For this reason, many witnesses from the regional airline community stressed the importance of not forcing large carriers back into the region to compete with smaller carriers. Yani Gagnon, Vice-President and Chief Financial

38 TRAN, *Evidence*: Gooch (CAC); McKenna (ATAC), Mike McNaney (President and Chief Executive Officer, National Airlines Council of Canada [NACC]); Brian Grant (RCAC); Christopher Rauenbusch (President, Canadian Union of Public Employees – Local 4070 [CUPE, Local 4070]); Monette Pasher (Executive Director, Atlantic Canada Airports Association [ACAA]); and Ferguson (IAMAW).

39 TRAN, *Evidence*: Rheault (Air Canada); and Gibbons (WestJet).

40 TRAN, *Evidence*: Robert Deluce (Executive Chairman, Porter Airlines Inc. [Porter]).

41 TRAN, *Evidence*: Pasher (ACAA).

42 TRAN, *Evidence*: Serge Larivière (Director General, Coopérative de transport régional du Québec [TREQ]); Grant (RCAC); and Rauenbusch (CUPE, Local 4070).

Officer at Pascan Inc. said that "[s]ubsidizing Air Canada or other major air carriers, which will compete on regional markets, makes zero sense."

In addition, some witnesses pointed out that Air Canada has been part of the problem rather than part of the solution in regional air transportation in recent years. Serge Larivière, Director General of the Coopérative de transport régional du Québec, made the following comment about Air Canada:

> A business with $18 billion in annual sales need only start a price war and the competition is gone just like that. That's been the problem for the last 30 years.

Similarly, Mr. Larivière, agreed that the current crisis, combined with large carriers pulling out of some regions, could be an opportunity to rethink regional transport in eastern Canada. In his opinion, regional supply was low in Quebec and the Atlantic provinces well before the pandemic.[43]

Competitiveness of the Canadian Aviation Sector

> **"[W]e have now begun to see foreign carriers that have received liquidity support from their governments taking international market share from Canadian operators. This is a direct threat to the future competitiveness of the sector and may roll back years of successful international expansion."**
>
> Mike McNaney
> President and Chief Executive Officer, National Airlines Council of Canada

A number of witnesses pointed out that Canada is one of the only industrialized countries that has not yet put in place a specific national recovery plan for the aviation industry.[44] Some were concerned that foreign aviation companies that had received significant financial support from their governments would take international market share from Canadian companies.[45] Witnesses also pointed out the importance of

43 TRAN, *Evidence*: Larivière (TREQ), 3 December 1720.

44 TRAN, *Evidence*: Wesley Lesosky (President, Air Canada Component of the Canadian Union of Public Employees); Rauenbusch (CUPE, Local 4070); Dias (Unifor); Giguere (ACPA); Gibbons (WestJet); McNaney (NACC); Gerry Bruno (Executive Advisor to the President and Chief Executive Officer, Vancouver Airport Authority [YVR]); and Rheault (Air Canada).

45 TRAN, *Evidence*: Rheault (Air Canada); and McNaney (NACC).

Canadian airports being able to compete with American ones.[46] If Canadian operators lose market share, it will undermine the years of effort and billions of dollars they have invested to improve Canada's connections with the rest of the world.

Fearing a drop in research and technology spending, as well as an exodus of workers to foreign countries that are investing heavily in the sector, Andrew Petrou, Chairman of the Board of Downsview Aerospace Innovation and Research, explained his view that Canada's status as a leader in the aerospace industry is at risk. In his opinion, the Canadian aerospace industry will become less and less competitive, and the effects of the COVID-19 pandemic will only accelerate its decline, unless a massive investment is made in the sector. In the same vein, Mr. Mueller offered the following caution:

> While the government's emergency measures have been appreciated and helpful, they're just not enough, not when aviation and aerospace are facing unprecedented challenges, and not when other leading aerospace countries, our competitors, began taking action early on. … These countries … have positioned their sectors for the future. Canada needs to do the same. The future is bleak for aerospace if its customers, the airlines, can't buy its products and services.

Sale of Transat A.T. Inc.

> **"If there isn't enough airline choice in Canada, and they are forced to choose between Air Canada and Air Canada, they risk going to an airline outside of Canada, which can result in a reduction in market share for Canadian companies."**
>
> Jacob Charbonneau
> President and Chief Executive Officer, Late Flight Claim Canada Inc.

On 27 June 2019, Transat A.T. Inc. and Air Canada reached an agreement that Air Canada would acquire Transat. On 11 August 2019, it was announced that the transaction was valued at $720 million ($18 per share). On 10 October 2020, Transat announced that its board of directors had approved a revised transaction in which Air Canada would acquire Transat shares for $5 per share, which is $13 less than the agreement reached in

46 TRAN, *Evidence*: Bruno (YVR); and Marshall (GTAA).

August 2019.[47] Transat shareholders approved the revised transaction details on 15 December 2020.[48]

In his report on the transaction, the Commissioner of Competition (the Commissioner) stated that the transaction would likely lead to "substantial anti-competitive effects" due to the elimination of rivalry between the two carriers in certain parts of their networks.[49] Specifically, competition would be eliminated or reduced on 83 routes between Canada and Europe, Mexico, Central America, the Caribbean, Florida and South America. In addition, the two carriers were the only ones offering non-stop service on 22 of these 83 routes. The Commissioner found that the transaction would likely lead to increased prices, less choice, decrease in service, and a significant reduction in travel.

Echoing the Commissioner, some witnesses expressed concerns about how the proposed transaction between these two carriers would affect competition in the Canadian market.[50] During their appearances, Omar Alghabra, Minister of Transport, and representatives of Transport Canada informed the Committee that the department had taken into account the competition issues raised in the Commissioner's report before reaching its decision, and that other matters of public interest had also been considered. These factors included protecting jobs, maintaining a head office in Quebec and ensuring the financial health of the aviation sector.[51]

The Government of Canada announced on 11 February 2021 that it approved the transaction, subject to certain terms and conditions, including preserving the Transat A.T. head office and brand in Quebec.[52] However, after being advised that the European

47 Transat A.T. Inc., *Transat A.T. Inc. Announces Revised Acquisition Transaction with Air Canada*, News release, 10 October 2020.

48 Transat A.T. Inc., *Transat's Shareholders Overwhelmingly Approve the Arrangement with Air Canada*, News release, 15 December 2020.

49 Competition Bureau of Canada, "*Report to the Minister of Transport and the Parties to the Transaction Pursuant to Subsection 53.2(2) of the Canada Transportation Act*," *Technical guidance documents*, 27 March 2020.

50 TRAN, *Evidence*: Gibbons (WestJet); and Jacob Charbonneau (President and Chief Executive Officer, Late Flight Claim Canada Inc. [Late Flight Claim]).

51 TRAN, *Evidence*: Michael Keenan (Deputy Minister, Transport Canada).

52 Transport Canada, *Government of Canada approves proposed purchase of Transat A.T. Inc. by Air Canada*, News release, 11 February 2021.

Commission would not approve the transaction, Air Canada and Transat A.T. announced on 2 April 2021 that the agreement was being terminated by mutual consent.[53]

A PLAN TO ENSURE THE CANADIAN AVIATION INDUSTRY SURVIVES AND RECOVERS

> **"Critical decisions must be made now if Canada's travel and tourism sector is to start recovery next summer, as we expect it will in other northern hemisphere countries. Summer 2021 simply cannot look like summer 2020."**
>
> Daniel-Robert Gooch
> President, Canadian Airports Council

While witnesses proposed different measures to ensure the survival and recovery of the aviation sector based on their own priorities and circumstances, they all agreed that significant financial investment is needed in the sector. Many witnesses said it is important for the federal government to ensure that the assistance provided is equitable and goes to more than just the largest players in the industry.

A number of witnesses said that, regardless of the measures that have been taken – or will be taken – in response to the COVID-19 pandemic, the health and safety of passengers, crew and the Canadian public should remain the top priority for the various stakeholders in the sector. Canadians must feel safe in airports and on planes before they will consider travelling again, and this requires a clear, consistent COVID-19 testing framework.[54]

53 Transat A.T. Inc., *The parties having concluded that European Commission approval would not be obtained – The Arrangement Agreement between Transat and Air Canada is Terminated by Mutual Consent*, News release, 2 April 2021.

54 TRAN, *Evidence*: Marshall (GTAA); Rauenbusch (CUPE, Local 4070); and Derrick Stanford (President, ACAA).

Finding a Balance Between Ensuring Public Health and Resuming Travel

> **"[Canada must implement a] national, scientifically based COVID-19 testing regime. [The aviation sector] can't wait until all Canadians are vaccinated to restore travel. People need to feel that flying is safe."**
>
> Chorus Aviation Inc., Brief

During her testimony, Brigitte Diogo, Vice President of the Health Security Infrastructure Branch at the Public Health Agency of Canada, explained that air travel is quite safe, particularly due to universal masking and ventilation.[55] According to Dr. Isaac Bogoch, Physician and Scientist with the Toronto General Hospital and University of Toronto, data indicates that the stages leading up to the flight and those following it are probably riskier from a transmission standpoint than the flight itself.

Like many witnesses from the aviation sector, Dr. Bogoch and Dr. Zain Chagla, Assistant Professor in the Division of Infectious Diseases at McMaster University's Faculty of Health Sciences, believe it is important to implement rapid testing in airports, using antigen tests that provide results in under one hour.[56] These tests could be given to passengers just before boarding.

In her testimony, Monique Frison, Acting Assistant Deputy Minister of Programs and Implementation at the Department of Health, indicated that rapid tests are not as accurate as lab-based tests, which are the gold standard, but other factors, such as ease of use, can compensate. Patrick Taylor, Global Business Development Director of New Markets at LuminUltra Technologies Ltd., informed the Committee that some portable PCR testing units can run samples in under two hours, making them an option for airports.[57]

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55 These views are shared by Dr. Zain Chagla (Assistant Professor, Division of Infectious Diseases, Faculty of Health Sciences, McMaster University, [McMaster University]); and Patrick Taylor (Global Business Development Director, New Markets, LuminUltra Technologies Ltd.).

56 TRAN, *Evidence*: McKenna (ATAC); Gooch (CAC); Lesosky (Air Canada Component of CUPE); Dias (Unifor); Deluce (Porter); and Sparling (Air North).

57 PCR tests are also known as molecular diagnostic tests or nucleic acid tests. According to Health Canada, PCR tests are used by the Public Health Agency of Canada's laboratories and other labs around the world to diagnose COVID-19.

According to Dr. Chagla, another promising option is serial testing, such as the pilot project launched on 2 November 2020 at Calgary International Airport. International travellers and Canadians returning from abroad who participated in the pilot project were required to take a test at the airport. If they got a negative result (approximately 48 hours later), their mandatory quarantine period would be shortened, as long as they committed to taking a second test six or seven days later.[58] The pilot project was updated to release travellers from their quarantine only after they had obtained a negative result from the second test. The project was suspended on 21 February 2021 following the implementation of additional quarantine and testing measures by the federal government.

Meanwhile, Air Canada partnered with the Greater Toronto Airports Authority and McMaster HealthLabs to assess whether self-collection COVID-19 testing was effective and whether the quarantine period could safely be reduced for international travellers. The pilot project ran from 3 September to 14 November 2020. The interim results indicate that most positive cases of COVID-19 are identified upon arrival at the airport or within seven days.[59] However, Dr. Chagla said that "the rate of people who test positive at day seven who don't test positive on the day of arrival is still not insignificant."

When they appeared before the Committee, representatives from the Department of Transport and the Department of Health explained their roles as partners in the pilot projects, and clarified that the purpose of these projects was to gather science-based data that will inform the government and public health on how best to reopen borders.[60]

Some witnesses called for the relationship between testing and quarantine to be reviewed in order to determine whether quarantine times could be decreased to 10 or 7 days, similar to the pilot project at Calgary International Airport.[61] Mr. Gibbons

58 Government of Canada, *Alberta COVID-19 Border Testing Pilot Program*, News release, 22 October 2020.

59 McMaster HealthLabs, "Canadian International COVID-19 Surveillance Border Study," *Interim Results Backgrounder*, 17 November 2020.

60 TRAN, *Evidence*: Monique Frison (Acting Assistant Deputy Minister, Programs and Implementation, Department of Health); and Aaron McCrorie (Associate Assistant Deputy Minister, Safety and Security, Department of Transport).

61 TRAN, *Evidence*: Dr. Chagla (McMaster University); Dr. Isaac Bogoch (Physician and Scientist, Toronto General Hospital and University of Toronto, As an Individual); McKenna (ATAC); McNaney (NACC); Rheault (Air Canada); Dr. Jim Chung (Chief Medical Officer, Air Canada); Gibbons (WestJet); Dias (Unifor); and the Association of Canadian Independent Travel Advisors [ACITA], Brief.

suggested that the pilot project could be developed into a national policy and that funding for the transition could be included in the upcoming federal budget.

Financial Assistance on Par with Pandemic Losses

> **"Canada depends on air transportation perhaps more than other countries in the world. It's in the public interest that the industry not only survives but is in a position to thrive when COVID is behind us. I think it should go without saying that an industry that has the capacity to invest in its future remain environmentally, socially and financially sustainable, and then is able to recover, is in everyone's interest."**
>
> Captain Tim Perry
> President, Air Line Pilots Association Canada, Air Line Pilots Association International

On 8 November 2020, the Government of Canada announced that it planned to implement a package of assistance for airlines, airports and the aerospace sector.[62] The funding provided would include amounts for major airlines such as loans and other financial supports. However, this financial assistance would be conditional on Canadian travellers getting refunds for flights they booked but did not take because of the pandemic, and would ensure that "regional communities retain air connections to the rest of Canada, and that Canadian air carriers maintain their status as key customers of Canada's aerospace industry."

A number of witnesses were upset about the time required for the federal government to put an action plan in place specifically to rebuild and stimulate the aviation sector, given the time-sensitive nature of the industry's needs.[63] During his testimony, Minister Alghabra stressed his commitment to finding an arrangement as quickly as

62 Transport Canada, *Statement by Minister Garneau on measures to protect Canadians from the impacts of COVID-19 on the air travel sector*, News release, 8 November 2020.

63 TRAN, *Evidence*: Unifor, Brief; Gooch (CAC); Ferguson (IAMAW); Rauenbusch (CUPE, Local 4070); Lesosky (Air Canada Component of CUPE); Giguere (ACPA); McNaney (NACC); Bruno (YVR); Rheault (Air Canada); and McKenna (ATAC).

possible and assured the Committee that negotiations were underway with sector representatives.

Financial Assistance Appreciated, But Insufficient

> **"[T]he current financial aid available to all employers in and outside the aviation industry is proving to be inadequate. Consequently, Canada's air transportation industry is facing massive layoffs and even failure as the crisis continues."**
>
> Unifor, Brief

Since the start of the pandemic, the federal government has announced a number of assistance measures specific to the aviation sector, including $191.3 million for remote communities that depend on air transport, as well as rent relief for the 21 airport authorities that have ground leases with the federal government.[64] In the Fall Economic Statement 2020, the government announced additional financial support of approximately $1.1 billion for the aviation sector, to be allocated through several programs, including $186 million for the Airports Capital Assistance Program (ACAP), $206 million to create the Regional Air Transportation Initiative and $500 million for safety, security and transit infrastructure in large airports.[65]

A number of employers in the aviation sector also applied for programs that were available to all economic sectors, such as the Canada Emergency Wage Subsidy (CEWS) and the Large Employer Emergency Financing Facility (LEEFF). During his appearance before the Committee, Minister Alghabra said that the aviation sector alone had collected between $1.7 billion and $1.8 billion from the wage subsidy.

Most witnesses told the Committee that the programs put in place by the federal government since the beginning of the pandemic were greatly appreciated. However, they also agreed that most programs were insufficient, given the extent of the crisis for the air transport industry and the expected slow recovery.

64 TRAN, *Evidence*: The Hon. Omar Alghabra (Minister of Transport).

65 Department of Finance Canada, *Supporting Canadians and Fighting COVID-19*, Fall Economic Statement 2020, p. 32.

During his appearance before the Committee, Daniel-Robert Gooch, President of the Canadian Airports Council, commented on the suite of measures for airports outlined in the Fall Economic Statement 2020. In his opinion, the $500 million earmarked for safety, security and public transit infrastructure is inadequate, given the extent of the sector's needs. However, he was pleased that $206 million would be invested in the new Regional Air Transportation Initiative and hoped for more details. He also pointed out that ACAP funding is valuable for small airports, but expressed concern about how they will be able to use these funds if they cannot pay their share, considering they have run down their cash reserves.[66] Similarly, noting that small airports are not eligible for most assistance programs, Mr. Grant called for permanent funding for rural and regional airports and a $95-million annual increase to the ACAP for small airports.[67]

With regard to rent relief, Mr. Gooch was disappointed that the largest airports were granted only a deferral on 2021 rent, which they will then have to repay over 10 years, beginning in 2024. He also argued that the rent relief for mid-sized (2021) and small airports (2021–2023) should be extended, given that recovery will take several years. In his opinion, airports with federal leases should not have to pay rent beyond 2020, until the sector recovers. Ms. Marshall explained to the Committee that the Greater Toronto Airports Authority has been asking for months for its 2021 rent to be waived. As for the many small airports that do not pay rent, Mr. Gooch called for interest-free loans or direct operational support. Lastly, several other witnesses called for the government to address cash flow problems across the industry, with measures for airports of all sizes, small and large airlines, and service providers.[68]

For his part, Joseph Starling, President of Air North, said he was satisfied with the funding programs that were outlined in the Fall Economic Statement for essential air services in the North. In his opinion, Air North and other Northern carriers would not need as much support from the federal government if they could increase their passenger numbers, which would mean streamlining market capacity in the North. He believes that financial assistance should not go to pay for empty seats, which is what is

66 Funding through the Airports Capital Assistance Program (ACAP) is determined based on the amount of airport activity. For example, the percentage of ACAP funding for an airport that receives between 225,000 and 249,999 passengers annually is 60%. Transport Canada, *Information for ACAP applicants*.

67 The current figure is $38 million annually. Transport Canada, *Airports Capital Assistance Program*, General information.

68 TRAN, *Evidence*: McNaney (NACC); McKenna (ATAC); Grant (RCAC); Lesosky (Air Canada Component of CUPE); Dias (Unifor); Giguere (ACPA); Stanford (ACAA); Deluce (Porter); Unifor, Brief; and NACC, CAC, ATAC, AIAC and ACAA, Brief.

happening now. His proposal, to introduce interline agreements between carriers, is addressed later in this report, in the section on regional air transport.

Some witnesses were critical of assistance programs that were available to all sectors, as they did not address issues specific to the aviation sector. Mr. Gooch gave the example of the Highly Affected Sectors Credit Availability Program (HASCAP), announced in the Fall Economic Statement 2020. In his view, the $1 million cap means that it fails to meet the needs of many airports.

Likewise, Mr. McNaney thought that the LEEFF program implemented by the federal government did not take into account the challenges in the aviation sector. Its conditions, particularly the high interest rate, make it less attractive for a sector with a slow road to recovery ahead.[69] In its brief, Unifor expressed similar views, saying that the industry needs access to long-term loans at low interest rates, which would be "an improvement over the LEEFF."

Some witnesses recognized that the CEWS was a lifeline for many employees and employers in the aviation sector in the spring of 2020.[70] However, some indicated that employers are using the program to pay for active employees, not to keep inactive employees on the payroll, which is not in keeping with the intended purpose of the CEWS.[71] Mr. Grant expressed disappointment that many small airports under the jurisdiction of provincial, territorial or municipal governments are not eligible for the wage subsidy. He believes the CEWS eligibility criteria should be amended to include airports, no matter how they are governed.

Derek Ferguson, Representative of the Grand Lodge of the International Association of Machinists and Aerospace Workers in Canada (IAMAW Canada), noted that the CEWS was beneficial to IAMAW Canada members early on, but over time most employers stopped paying the 25% top-up and used the program only for active employees.[72] According to Mr. Lesosky, the federal government should change the terms and

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69 The Large Employer Emergency Financing Facility has an interest rate of 5%, which increases to 8% after one year, and by a further 2% per annum each year thereafter. Innovation, Science and Economic Development Canada, *Large Employer Emergency Financing Facility*, Factsheet.

70 TRAN, *Evidence*: Mueller (AIAC); Ferguson (IAMAW); Gibbons (WestJet); Rheault (Air Canada); Rauenbusch (CUPE, Local 4070); McNaney (NACC).

71 TRAN, *Evidence*: Lesosky (Air Canada Component of CUPE); and Ferguson (IAMAW).

72 The maximum wage subsidy for active employees is 75%. Government of Canada, *Canada Emergency Wage Subsidy (CEWS)*.

conditions of the CEWS so that employers using it for active employees are also required to use it for inactive, laid-off and furloughed employees.

Financial Assistance That Is Not a Blank Cheque

> **"[G]overnment financial assistance is genuinely welcome by airlines and other travel businesses. Ensuring that airlines like Porter, and others that are much smaller, are in a position to contribute to economic recovery, sustain regional connections and provide competition is a benefit to the entire country."**
>
> Robert Deluce
> Executive Chairman, Porter Airlines Inc.

Beyond financial assistance, some witnesses mentioned that the aviation sector and government officials need to work together to rebuild passenger confidence so they are comfortable flying in the future. In their opinion, it is important to ensure that passengers view air travel as safe and secure and also that passengers get reimbursed for flights that were cancelled because of the COVID-19 pandemic.[73]

When asked about executive compensation and returns to shareholders, Jerry Dias, National President of Unifor, said they should not benefit financially from federal assistance measures. While acknowledging the importance of having a strong airline industry to ensure a post-pandemic economic recovery in Canada, he emphasized that the funding must go to putting people to work.[74]

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73 TRAN, *Evidence*: Gábor Lukács (President, Air Passenger Rights); Ian Jack (Vice-President, Public Affairs, Canadian Automobile Association [CAA]); John Lawford (Executive Director and General Counsel, Public Interest Advocacy Centre); Sylvie De Bellefeuille (Lawyer, Budget and Legal Advisor, Option consommateurs); Ian Clarke (Chief Financial Officer, GTAA); and Chorus Aviation Inc., Brief.

74 As of 29 April 2021, the Government of Canada had reached financing agreements with Air Canada and Transat A.T. Inc. The two agreements are different, but include similar conditions, such as refunds for plane tickets and restrictions on executive compensation. Air Canada, *Air Canada and Government of Canada Conclude Agreements on Liquidity Program*, News release, 12 April 2021. Transat A.T. Inc, *Transat secures $700 million in funding from the Government of Canada*, News release, 29 April 2021.

Refunding Consumers for Services Not Rendered

On 25 March 2020, the Canadian Transportation Agency (CTA), the independent body responsible for enforcing Canadian transportation regulations, released a statement indicating that airlines would be meeting their obligations under Canadian law if they offered passengers affected by cancellations vouchers or credits for future travel, as long as they do not expire in an unreasonably short time.[75] However, the CTA noted that it would examine any specific situation brought before it on its merits. On 22 April 2020, the CTA provided additional clarifications, stating that Canadian law requires only that airlines ensure passengers can complete their itineraries, and it does not obligate airlines to issue refunds if a flight is cancelled or delayed for reasons beyond their control.[76]

According to Gábor Lukács, President of Air Passenger Rights, the message of 25 March 2020 misled members of the public about their rights. He said it is unacceptable for the CTA to have issued a public statement on a matter (refunds) that is so contested. In its brief, the organization Air Passenger Rights argued that airlines, travel agencies, credit card issuers and travel insurers used the CTA's statement as an excuse to deprive passengers of refunds for flights the airlines chose to cancel. When he appeared before the Committee, Scott Streiner, Chair and CEO of the CTA, said that the statement does not change the obligations of the airlines or the rights of passengers; it simply gave suggestions and should not be interpreted as a binding decision. Mr. Lukács and Jacob Charbonneau, President and Chief Executive Officer of Late Flight Claim Canada Inc., both expressed concerns that the CTA favours airline companies over consumers.

With regard to the obligations of airlines, Mr. Streiner expressed the following opinion:

> Because the statutory framework does not include a general obligation around refunds for flight cancellations beyond airlines' control, any passenger entitlements in this regard depend on the wording of each airline's applicable tariff.

Some witnesses stated that the current legislative framework, particularly the *Air Passenger Protection Regulations* (APPR), does not do enough to protect consumers.[77] According to Mr. Charbonneau, the complexity of the current protection regime opens the door to a number of interpretations and protects airline companies more than consumers. In a move to help address this situation, the Minister of Transport issued a

75 Canadian Transportation Agency [CTA], *Statement on Vouchers*.

76 CTA, *FAQs: Statement on Vouchers*.

77 TRAN, *Evidence*: Charbonneau (Late Flight Claim); and Jack (CAA).

ministerial directive on 17 December 2020, directing the CTA to make a regulation respecting air carriers' obligations to refund passengers when flights are cancelled because of situations outside their control.[78] However, in a news release issued on 21 December 2020, the Minister of Transport specified that the new regulation would address future flight cancellations.[79]

While he believes the APPR lacks detail on the matter of refunds, Mr. Lukács does not think there is anything in the legislation that would contradict the "fundamental right [of passengers] to a refund."[80] Similarly, Sylvie De Bellefeuille, Lawyer and Budget and Legal Advisor for Option consommateurs, asserted that other statutes, including the *Canada Transportation Act* and its regulations, outline obligations for air carriers and give authorities the power to act. In its brief, Option consommateurs explained its view that, while transportation activities fall under federal jurisdiction, airline company contracts are also subject to provincial legislation on consumer protection.

A number of witnesses, as well as Minister Alghabra, supported refunding plane tickets for Canadian consumers.[81] Some also argued that travel credits or vouchers are not equivalent to a refund.[82] For example, Ms. De Bellefeuille explained that travel credits do not guarantee future prices and may not be enough to cover the cost of a future trip. According to John Lawford, Executive Director and General Counsel at the Public Interest Advocacy Centre, if the federal government plans to bail out airlines, it must ensure that passengers get refunded for flight cancellations. Otherwise, they will be penalized twice: once as a passenger and once as a taxpayer.

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78 *Direction Respecting Flight Cancellations for Situations Outside of a Carrier's Control*, SOR/2020-283, 17 December 2020, in the *Canada Gazette*, Part II, 6 January 2021.

79 Transport Canada, *Minister Garneau directs the Canadian Transportation Agency to develop a new regulation to address future large-scale flight cancellations*, Statement, 21 December 2020.

80 Mr. Lukács was referring to the *Canada Transportation Act* and the *Air Transportation Regulations*.

81 TRAN*, Evidence*: Lukács (Air Passenger Rights); De Bellefeuille (Option consommateurs); Lawford (Public Interest Advocacy Centre); Jack (CAA); Charbonneau (Late Flight Claim); Dias (Unifor); Yani Gagnon (Vice-President and Chief Financial Officer, Pascan Inc.); Gibbons (WestJet); Rheault (Air Canada); Deluce (Porter); and ACITA, Brief.

82 TRAN*, Evidence*: De Bellefeuille (Option consommateurs); Lawford (Public Interest Advocacy Centre); and Lukács (Air Passenger Rights).

In addition, some witnesses pointed out that the adoption of Bill C-249 would be a good way to address the current situation of non-refundable tickets by airlines[8384]. Mr. Lukács offered the following opinion on Bill C-249:

> Bill C-249 is going to fix just the basics. The most important principle in every commercial transaction, that if you don't receive what you paid for, you get your money back, is a vital step for the entire sector's recovery.

In its brief, the Association of Canadian Independent Travel Advisors (ACITA) said it supports consumer refunds, but called on the federal government to protect travel agents from commissions being returned, as commissions are their sole source of income. The brief explains that, when an airline refunds a passenger, they first notify the travel agent who booked the trip, if applicable, and the agent must return their commission in order for the consumer to receive a refund. ACITA indicated that, in the current context, returning commissions would have undesirable outcomes, as most travel agencies would not be able to survive the blow. Furthermore, as noted by Ian Jack, Vice-President of Public Affairs at the Canadian Automobile Association, travel agents did their work and deserve to keep the commission they were paid. As ACITA explained, travel agents "worked on the trip, sold the airline's product to the consumer and received a commission for the sale."

During their testimony, Mr. Rheault and Mr. Gibbons said they were aware that mandatory refunds could affect the commissions of travel agents. Minister Alghabra and Transport Canada officials confirmed that this issue was being addressed in their discussions with the major air carriers regarding a package of assistance.[85]

Boosting Regional Air Transport

Many witnesses agreed that it was important for remote and Northern regions to have access to reliable, efficient and affordable air service. As mentioned above, a number of witnesses argued that it was important for federal government assistance for the aviation sector to be fair for all stakeholders, large and small. Given that major airlines like Air Canada and WestJet suspended many domestic flights in March 2020 owing to a

83 Bill C-249, An Act to amend the Canada Transportation Act (refund – cancelled air service), 43rd Parliament, 2nd Session.

84 TRAN, *Evidence*: De Bellefeuille (Option consommateurs); Lukács (Air Passenger Rights); and Lawford (Public Interest Advocacy Centre).

85 TRAN, *Evidence*: Keenan (Transport Canada); and Hanson (Transport Canada).

drop in passenger volumes, some witnesses questioned what regional air transport would look like in the future.

In a statement issued on 8 November 2020, the federal government indicated that financial support for Canadian airlines would include conditions ensuring that regional communities maintain their connectivity.[86] However, according to Mr. Larivière and Mr. Gagnon, the government should not force large air carriers to serve outlying regions when smaller carriers are ready to fill the gap. Mr. Larivière believes that the government's role is to "maintain healthy market conditions."

To illustrate the role of small carriers in the Canadian market, Robert Deluce, Executive Chairman of Porter Airlines Inc., said that historically airfares drop by 60% or more when Porter enters a market, particularly when these markets were previously served by only one airline. Ms. Pasher stated that, prior to the pandemic, the Atlantic provinces were served by a number of companies of different sizes, including Air Canada, WestJet, Porter and PAL Airlines, and that competition and fares in the region were "good." She mentioned that small regional carriers are important and that the biggest issue is collaborating with national carriers to connect the Atlantic provinces to the rest of Canada and the world.

When they appeared before the Committee, representatives of WestJet and Air Canada said they hope to re-establish services that have been suspended because of the pandemic.[87] However, they pointed out that they need more passengers before they can restore service, which means that some travel restrictions would have to be lifted first.

According to Mr. Sparling, the large air carriers offer limited services in Northern regions, as the smaller connections are often served by small carriers. To ensure that small carriers survive and to maintain the essential services they provide to remote communities, he suggested that the federal government should temporarily limit mainline carrier capacity in Northern gateway markets. He believes that, given the current lack of passenger volume, the federal government should not be subsidizing multiple carriers flying the same routes.

In the future, Mr. Sparling would like to see more interline agreements, which are mutually beneficial arrangements between the large carriers and smaller ones. In its brief, Air North explained the advantages of these agreements for passengers, such as being able to make a single booking with flights offered by multiple carriers and being

86 Transport Canada, *Statement by Minister Garneau on measures to protect Canadians from the impacts of COVID-19 on the air travel sector*, Statement, 8 November 2020.

87 TRAN, *Evidence*: Rheault (Air Canada); and Gibbons (WestJet).

able to make connections without having to collect their bags between each flight. Mr. Sparling believes the federal government should mandate that airlines link themselves together, which would ensure more communities across Canada are connected.

Ensuring the Competitiveness of the Canadian Aerospace Industry

As mentioned above, witnesses representing Canada's aerospace industry were concerned about the future competitiveness of the sector internationally. To reverse the downward trend, Mr. Mueller called on the federal government to invest significantly in the sector so it can be part of Canada's economic recovery.[88] This assistance should also help industries transition to new technologies for a greener future. In his view, a national strategy is needed to secure the future of the aerospace sector. He explained that the national strategy should cover the civil, defence and space sectors.

Likewise, Samantha Anderton, Executive Director of Downsview Aerospace Innovation and Research, called on the federal government to adopt a top-down approach to supporting commercial airlines. This would mean support would flow through the supply chain, including to aircraft maintenance companies. Like Mr. Mueller, she would like to see the federal government support research and development, particularly for sustainable technologies.

With regard to aircraft maintenance, Mr. Ferguson called for a repatriation plan to secure the jobs of Canadian aircraft maintenance and technical operations workers. Many Canadian airlines have aircraft that were grounded outside the country, which means the maintenance is being done outside of Canada as well, but he believes it should be done in Canada by Canadian workers. Mr. Rheault assured the Committee members that many Air Canada aircraft were being maintained in Canada.

Supporting NAV CANADA Financially

As mentioned above, one of the measures NAV CANADA took to address its significant drop in revenue resulting from the decline in air traffic was to increase its service charges by approximately 30% for the 2021 fiscal year. When he appeared before the

88 In Budget 2021, the Government of Canada proposes to provide $2 billion in support for Canada's aerospace sector. This includes $1.75 billion through the Strategic Innovation Fund and $250 million over three years for regional development agencies to deliver an Aerospace Regional Recovery Initiative. Department of Finance Canada, *A Recovery Plan for Jobs, Growth, and Resilience*, Budget 2021, p. 135.

Committee, Mr. Bohn explained that NAV CANADA's requests for financial assistance from the federal government had not been successful to date.

In a letter to the Committee, several organizations in the aviation sector argued that the user-pay model for service providers such as NAV CANADA is not appropriate in the current context to "adequately fund and maintain infrastructure and services," given that it will take years for passenger volumes to recover. They suggested temporarily suspending this model and providing financial assistance to NAV CANADA.

Some witnesses representing NAV CANADA workers believe the government should provide $750 million in funding over two years to the corporation so that its jobs, services and excellent safety record can be maintained.[89] According to Ms. Daviau, funding should be subject to a moratorium on layoffs.

CONCLUSION

Throughout the Committee's study, witnesses from various sectors of the Canadian aviation industry called on the Government of Canada to implement an industry-specific assistance plan so they could contribute to Canada's economic recovery. They also highlighted the importance of air transport for regions across Canada, particularly remote and Northern communities that rely on air transport not only to travel, but also to have essential supplies delivered.

Some witnesses were concerned about the future competitiveness of the industry and the fate of workers, as many of them have been inactive for months without knowing whether or when they will return to work. While they agreed that the health and safety of Canadian workers, passengers and the public were the top priority, they also agreed that the industry's current financial situation is not viable in the long run.

89 TRAN, *Evidence*: Best (CATCA); Wayland (IBEW); and Daviau (PIPSC).

APPENDIX A
LIST OF WITNESSES

The following table lists the witnesses who appeared before the committee at its meetings related to this report. Transcripts of all public meetings related to this report are available on the committee's webpage for this study.

Organizations and Individuals	Date	Meeting
Canadian Transportation Agency	2020/12/01	8
Marcia Jones, Chief Strategy Officer		
Valérie Lagacé, Senior General Counsel and Secretary		
Scott Streiner, Chair and Chief Executive Officer		
Department of Health	2020/12/01	8
Monique Frison, Acting Assistant Deputy Minister Programs and Implementation		
Department of Transport	2020/12/01	8
Christian Dea, Director General Transportation and Economic Analysis and Chief Economist		
Lawrence Hanson, Assistant Deputy Minister Policy		
Aaron McCrorie, Associate Assistant Deputy Minister Safety and Security		
Nicholas Robinson, Director General Civil Aviation		
Colin Stacey, Director General Air Policy		
Public Health Agency of Canada	2020/12/01	8
Brigitte Diogo, Vice President Health Security Infrastructure Branch		
Air Transport Association of Canada	2020/12/03	9
John McKenna, President and Chief Executive Officer		
Canadian Airports Council	2020/12/03	9
Daniel-Robert Gooch, President		

Organizations and Individuals	Date	Meeting
Coopérative de transport régional du Québec	2020/12/03	9
Serge Larivière, Director General		
National Airlines Council of Canada	2020/12/03	9
Mike McNaney, President and Chief Executive Officer		
Regional Community Airports of Canada	2020/12/03	9
Brian Grant, Chair		
Air North	2020/12/08	10
Joseph Sparling, President		
Air Passenger Rights	2020/12/08	10
Gábor Lukács, President		
Canadian Automobile Association	2020/12/08	10
Ian Jack, Vice-President Public Affairs		
Jason Kerr, Senior Director Government Relations		
Late Flight Claim Canada Inc.	2020/12/08	10
Jacob Charbonneau, President and Chief Executive Officer		
Option consommateurs	2020/12/08	10
Sylvie De Bellefeuille, Lawyer, Budget and Legal Advisor		
Public Interest Advocacy Centre	2020/12/08	10
John Lawford, Executive Director and General Counsel		
As an individual	2020/12/10	11
Dr. Isaac I. Bogoch, Physician and Scientist Toronto General Hospital and University of Toronto		
Dr. Zain Chagla, Assistant Professor, Division of Infectious Diseases, Faculty of Health Sciences McMaster University		
LuminUltra Technologies Ltd.	2020/12/10	11
Patrick Taylor, Global Business Development Director New Markets		
Air Canada Component of the Canadian Union of Public Employees	2021/01/26	12
Wesley Lesosky, President		

Organizations and Individuals	Date	Meeting
Air Line Pilots Association International	2021/01/26	12
Tim Perry, President Air Line Pilots Association Canada		
Canadian Union of Public Employees—Local 4070	2021/01/26	12
Christopher Rauenbusch, President		
International Brotherhood of Electrical Workers	2021/01/26	12
Paul Cameron, Business Manager and Financial Secretary		
Matt Wayland, Executive Assistant to the International Vice-President and Canadian Director of Government Relations		
Professional Institute of the Public Service of Canada	2021/01/26	12
Debi Daviau, President		
Emily Watkins, Senior Advisor to the President		
Unifor	2021/01/26	12
Jerry Dias, National President		
Kaylie Tiessen, National Representative Research Department		
Aerospace Industries Association of Canada	2021/01/28	13
Mike Mueller, Senior Vice-President		
Air Canada Pilots Association	2021/01/28	13
Rob Giguere, Chief Executive Officer		
Atlantic Canada Airports Association	2021/01/28	13
Monette Pasher, Executive Director		
Derrick Stanford, President		
Canadian Air Traffic Control Association	2021/01/28	13
Doug Best, President and Chief Executive Officer		
International Association of Machinists and Aerospace Workers	2021/01/28	13
Derek Ferguson, Representative Grand Lodge		
Vancouver Airport Authority	2021/01/28	13
Gerry Bruno, Executive Advisor to the President and Chief Executive Officer		

Organizations and Individuals	Date	Meeting
Canadian International Freight Forwarders Association	2021/02/02	14
Julia Kuzeljevich, Public Affairs Manager		
Bruce Rodgers, Executive Director		
Downsview Aerospace Innovation and Research	2021/02/02	14
Samantha Anderton, Executive Director		
Andrew Petrou, Chairman of the Board		
Greater Toronto Airports Authority	2021/02/02	14
Ian Clarke, Chief Financial Officer		
Hillary Marshall, Vice-President Stakeholder Relations and Communications		
Nav Canada	2021/02/02	14
Jonathan Bagg, Director Stakeholder and Industry Relations		
Ray Bohn, President and Chief Executive Officer		
Pascan inc.	2021/02/02	14
Yani Gagnon, Vice-President and Chief Financial Officer		
Julian Roberts, President and Chief Executive Officer		
Porter Airlines Inc.	2021/02/02	14
Robert J. Deluce, Executive Chairman		
Air Canada	2021/02/04	15
Jim Chung, Chief Medical Officer		
David Rheault, Managing Director Government Affairs and Community Relations		
WestJet Airlines Ltd.	2021/02/04	15
Andy Gibbons, Director Government Relations and Regulatory Affairs		

Organizations and Individuals	Date	Meeting
Department of Transport	2021/02/18	17
Hon. Omar Alghabra, C.P., M.P., Minister of Transport		
Kevin Brosseau, Assistant Deputy Minister Safety and Security		
Lawrence Hanson, Assistant Deputy Minister Policy		
Michael Keenan, Deputy Minister		
Anuradha Marisetti, Assistant Deputy Minister Programs		

APPENDIX B
LIST OF BRIEFS

The following is an alphabetical list of organizations and individuals who submitted briefs to the committee related to this report. For more information, please consult the committee's webpage for this study.

Aerospace Industries Association of Canada

Air North

Air Passenger Rights

Air Transport Association of Canada

Association des Pilotes et des Propriétaires de Hangar de Saint-Jean-sur-Richelieu

Association of Canadian Independent Travel Advisors

Atlantic Canada Airports Association

Canadian Airports Council

Chorus Aviation Inc.

National Airlines Council of Canada

Option consommateurs

Unifor

REQUEST FOR GOVERNMENT RESPONSE

Pursuant to Standing Order 109, the committee requests that the government table a comprehensive response to this Report.

A copy of the relevant *Minutes of Proceedings* (Meetings Nos. 8–15, 17 and 34–36) is tabled.

Respectfully submitted,

Vance Badawey
Chair

Supplementary Opinion of the Bloc Québécois on the Out of the Crisis report: a study of the impact of COVID-19 in the air transport sector

June 10, 2021

Introduction

First of all, the Bloc Québécois salutes the members of the Committee as well as the staff of the Library of Parliament for the professionalism they have shown and the work they have accomplished throughout this study and thanks all the witnesses and citizens who fueled the debate on what needs to be done to enable the air transport sector to emerge from the crisis.

However, it is the opinion of the Bloc Québécois that this report has omitted certain crucial elements which would have made it possible to clearly define what must be done to put in place a healthy environment for consumers and workers in the air transport sector at the end of this long troubled period.

The next few lines will serve to outline what we believe should have appeared in this report in addition to what is already there. First, a request for a firm commitment from the federal government to work with the government of Quebec and its municipalities to set up an air transport service for the regions of Quebec. Second, we should see a clear desire to strengthen protections against the anti-competitive actions of some players in the industry. And ultimately a real consideration for the issue of the sale of Air Transat.

Work with Quebec, a concept absent from consideration

It is deplorable to note that the report completely omits the need to work in collaboration with Quebec, particularly in air transport in the regions. While Quebecers living in the regions are the ones who know best what they need most in terms of air transport, this report once again vividly demonstrates the propensity of federalist parties to "Ottawa knows best".

The Quebec government and municipalities formed a task force on the revival of regional air services in Quebec to study the problems caused by the abandonment of Air Canada's regional services and provide recommendations. However, the federal government seems to completely ignore these actions taken by the people directly affected by the current crisis and prefers to act, or not to act in many cases, unilaterally and solely on the basis of what he considers good or not.

The least thing would have been to recommend that the government work in collaboration with the Government of Quebec and the municipalities to put in place solutions that really meet the needs of the community. Unfortunately, no consideration has been given to this issue.

Strengthen the fight against anti-competitive actions, an emergency for the regions of Quebec

During the committee's studies, many witnesses from Quebec highlighted Air Canada's anti-competitive practices in the regions. Although the report mentions these concerns, particularly from Mr. Yani Gagnon (Pascan), and Mr. Serge Larivière (TREQ[1]), no recommendation directly addresses this issue.

Admittedly, the committee expressed the wish that the government create a competitive environment in the air transport sector, but let us recall that before the pandemic, the Government of Canada had let Air Canada make rain or shine in the regions of Quebec and this for several years. To name only one of anti-competitive practices of Air Canada, when a competitor enters the market, Air Canada "is dumping" until said competitor is forced to leave the market. Once the result achieved, Air Canada is quick to bring its prices to a prohibitive level for many citizens in the regions.

As this situation continued for several decades [2], it would have been important for the committee to adopt a clear recommendation to ban such practices. It is to the federal government to intervene to put an end to this situation. The action could be articulated around several measures such as strengthening the powers of the Commissioner of Competition so that he can intervene quickly when this kind of situation arises or even foresee serious consequences for carriers doing so.

In short, it seems obvious to us that the committee erred in failing to include recommendations on this subject in its report. Once again, this is a situation where the reality of Quebec is ignored by Ottawa.

Lack of interest from federalist parties in the sale of Air Transat

The wording of the study motion reads as follows: "That, pursuant to order 108 (2), the Committee undertake a comprehensive study of the effects of Covid-19 on the airline industry; that at least eight meetings be scheduled for this study; **that the impact of Air Transat's sale on the sector be the first point examined in the context of this study**."

Unfortunately, this last portion of the motion never materialized, as the federalist parties present at the committee preferred to evade the issue as much as possible. On each occasion that the subject was raised during the various meetings of the committee, we were given a host of excuses to avoid getting to the bottom of things, for not discussing the subject or to not handing over relevant documents to the committee. However, the sale of this Quebec flagship represented a key issue in Quebec. So, it does not make sense, in our opinion, that the committee did not take this seriously into consideration.

As part of this transaction, thousands of jobs, a major head office and even competition in the market were at stake. Unfortunately, the Liberals and Conservatives have made every effort to ensure that the subject is never studied, preferring to protect the Minister of Transport so that he can make his own decision, without us having been able to get hold of all the information he had in his possession.

In our democracy, the role of the opposition is to hold the government to account for its decisions. This role is based on a principle of transparency which is crucial for public confidence in our institutions. By refusing to carefully consider the issue as part of the study, the committee has failed in one of its main objectives: to provide a space for accountability on the part of the government on the issues entrusted to it.

Faced with this observation, we can only be critical of the functioning of the Government of Canada where the Liberal and Conservative parties are only exchanging power without ever taking into consideration what matters to Quebec. This ongoing situation since the beginning of the confederation is only one more reason for Quebec to leave Canada in order to be able to look after its own interests without having to depend on a political system that only exists to perpetuate itself. The Air Transat sale case in this study is just one more example of this situation.

Conclusion

Finally, this report will have neglected three important elements in the context of this study, thus demonstrating Canada's lack of consideration towards Quebec for many issues which are dear to

it. Quebec's interests in these matters would have been better served by an independent Quebec that would not have ignored these important issues.

However, we owe it to ourselves to highlight the other elements of the report which provide recommendations that we believe to be sound, particularly regarding the reimbursement of airline tickets and aid to the air and aerospace sector. Consequently, we now wish to see the government act to enable air transport to recover from this crisis and respond favourably to the elements of this report and of this supplementary opinion.

Recommendations of the Bloc Québécois

That the Government of Canada works in collaboration with the Government of Quebec to establish priorities for solid regional air transport containing a significant amount of competition.

That the Government of Canada intervenes to prevent Air Canada and other large carriers from engaging in practices that undermine regional air competition.

This is **Exhibit "12"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

_____

Signature

From the Ground Up: Revamping Canada's Air Passenger Protection Regime

Submissions to the House of Commons' Standing Committee on Transport, Infrastructure and Communities

December 2022

Halifax, NS • AirPassengerRights.ca

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About *Air Passenger Rights*

Air Passenger Rights [**APR**] is an independent nonprofit organization of volunteers, devoted to empowering travellers through education, advocacy, investigation, and litigation. APR is in a unique position to comment on behalf of the public interest on revamping Canada's air passenger protection regime:

- **Experience based.** APR's submissions are based on the expertise and experience accumulated through assisting passengers daily in enforcing their rights.
- **Independent.** APR takes no government or business funding.
- **No business interest.** APR has no business interest in the aviation sector.

APR's presence on social media includes the Air Passenger Rights (Canada) Facebook group, with over 90,600 members, and the @AirPassRightsCA Twitter feed.

APR was founded and is led by Dr. Gábor Lukács, a Canadian air passenger rights advocate, who volunteers his time and expertise for the benefit of the travelling public.

Gábor Lukács, PhD (President)

Since 2008, Dr. Lukács has filed more than two dozen successful complaints[1] with the Canadian Transportation Agency [**Agency**], challenging the terms, conditions, and practices of air carriers, resulting in orders directing them to amend their conditions of carriage and offer better protection to passengers. In 2013, the Consumers' Association of Canada awarded Dr. Lukács its Order of Merit for singlehandedly initiating legal action resulting in the revision of Air Canada's unfair practices regarding overbooking.

Dr. Lukács's advocacy in the public interest and his expertise and experience in the area of passenger rights have been recognized by the transportation bar,[2] the academic community,[3] and the judiciary.[4] Dr. Lukács has appeared before courts across Canada, including the Federal Court of Appeal and the Supreme Court of Canada,[5] in respect of air passenger rights. He successfully challenged the Agency's lack of transparency and the reasonableness of the Agency's decisions. In 2020, the Federal Court of Appeal allowed Dr. Lukács to intervene in the airlines' challenge to the *Air Passenger Protection Regulations*, noting that he "would defend the interests of airline passengers in a way that the parties cannot."[6]

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1 See Appendix A.
2 Carlos Martins: Aviation Practice Area Review (September 2013), WHO'SWHOLEGAL.
3 Air Passenger Rights Advocate Dr. Gabor Lukacs lectures at the IASL, Institute for Air and Space Law, October 2018.
4 *Lukács v. Canada*, 2015 FCA 140 at para. 1; *Lukács v. Canada*, 2015 FCA 269 at para. 43; and *Lukács v. Canada*, 2016 FCA 174 at para. 6.
5 *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2.
6 Order of the Federal Court of Appeal (Near, J.A.), dated March 3, 2020 in File No. A-311-19; see also *International Air Transport Association v. Canadian Transportation Agency*, 2022 FCA 211 at para. 8.

Executive Summary

In 2017, the air passenger protection framework created by the *Transportation Modernization Act* [***TMA***] was predicted to "double the amount of compensation that passengers are not going to receive."[7]

By 2022, that prediction has proven to be an underestimate. The soaring backlog of 30,000 passenger complaints at the Canadian Transportation Agency [**CTA**][8] shows that the *TMA*'s framework is incapable of providing Canadians with meaningful protection comparable to the European Union's gold standard.[9]

The *Air Passenger Protection Regulations* [**APPR**], promulgated to implement the *TMA*'s framework, create an undue hurdle for passengers seeking compensation and require a complex evidentiary record whose consideration consumes disproportionately large resources compared to the amounts at stake. Barriers to access to justice that the *APPR* creates have been aptly identified by the Nova Scotia Small Claims Court:

> 2. When consumer protection is the intended outcome of a regulatory regime, it should be assumed the regime will be in plain language, easy to understand and supports a simple claims process. The APPR, which was intended to accomplish enhanced passenger rights, accomplishes none of these. The language is complex and legalistic; one needs detailed or specific knowledge to invoke the claims system; and the process to seek compensation, once invoked, does not lend itself to quick resolution. This case illustrates that complexity, as lengthy pre-hearing processes involved the issuance of subpoenas to obtain detailed records from the Defendant about aircraft fleet information, maintenance records and other matters to support the Claim.
>
> 3. Few individuals would undertake such efforts to seek a few hundred dollars in compensation. Even if they wanted to, fewer could undertake such a claim. Close to 1000 pages of paper were exchanged, in a $400 claim.[10]

These design flaws of the *APPR*, which largely emanate from the *TMA*'s misguided framework, make determining whether compensation is owed to a passenger unnecessarily labour-intensive, and have also contributed to the CTA's soaring backlog of passenger complaints in spite of substantial additional temporary funds announced in the 2022 budget and reduced travel during the pandemic.[11] In addition, the CTA's systemic failure to use its existing powers to impose meaningful Administrative Monetary Penalties (fines) on airlines that disobey the *APPR* make violating passengers' rights more profitable than obeying the law.

The *status quo* is untenable. The *TMA*'s framework should be harmonized with the European Union's passenger protection regime, which has been tested and proven to work for more than 16 years.

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7 Standing Committee on Transport, Infrastructure and Communities, Evidence (Sep. 14, 2017) at 1905 (emphasis added).
8 Standing Committee on Transport, Infrastructure and Communities, Evidence (Nov. 28, 2022) at 1605.
9 *Regulation (EC) 261/2004*.
10 *Geddes v. Air Canada*, 2021 NSSM 27 at paras. 2-3 (emphasis added); aff'd: 2022 NSSC 49.
11 Standing Committee on Transport, Infrastructure and Communities, Evidence (Nov. 28, 2022) at 1545.

Simple Criteria for Automatic Standardized Compensation. Parliament should adopt the EU's classification for flight disruptions and reduce the number of categories from three to two: (1) ordinary disruptions; and (2) disruptions caused by extraordinary circumstances not inherent to the normal exercise of the airline's activity and beyond the airline's control, which could not have been avoided even if all reasonable measures had been taken.

Ordinary disruptions should include those caused by circumstances that were known or should have reasonably been known to the airline before the ticket was sold, all crew shortages, and all aircraft maintenance and/or safety issues except those caused by acts of sabotage or terrorism or by a manufacturing defect in an aircraft identified by the aircraft's manufacturer or a competent state authority.

In the event of an ordinary disruption, the airline should pay affected passengers a standardized compensation for their inconvenience automatically, without the passengers having to make a claim.

Clear Burden of Proof. Parliament should seal the debate on burden of proof under the *APPR* by declaring that it is the airline and not the passenger that has to prove all facts relating to the reasons for a flight's delay or cancellation, or denial of boarding. Canada's *Carriage by Air Act*, which incorporates international treaties such as the *Montreal Convention*, and the EU's *Regulation (EC) 261/2004* both place the onus on the airline to prove extenuating circumstances to relieve itself from compensating passengers. Indeed, common sense and fairness dictate that it is the airline that should be required to present evidence of this nature, which is normally within the airline's exclusive control. It should be clarified that the law is the same with respect to the *APPR*.

Common Sense Definitions. Parliament should define the terms "flight cancellation" and "denial of boarding" in a manner that comports to common sense and harmonizes with the EU's *Regulation (EC) 261/2004*. The *APPR* restricts the meaning of "denial of boarding" to situations caused by overbooking, leaving passengers denied boarding for no fault of their own but for reasons other than overbooking unprotected. Furthermore, some airlines mislead passengers by referring to flight cancellations as a "schedule change."

Right to a Refund. Parliament should enshrine in primary legislation passengers' fundamental right to a refund in the original form of payment of the unused portion of any itinerary a passenger chooses to forego due to a flight's cancellation or delay, or denial of boarding. The September 2022 amendments to the *APPR* backpedal on passengers' well-established right to a refund for flights cancelled by the airlines, which even the CTA had recognized for decades. The amendments appear to force passengers to accept alternate transportation even if doing so defeats the passengers' purpose for travel.

Enforcement by Administrative Monetary Penalties. Obeying the *APPR*, and more generally, provisions of the *Canada Transportation Act*, should be made more profitable than disobeying them. To achieve this objective, Parliament should introduce: (1) mandatory notices of violation and Administrative Monetary Penalties (fines) for violations instead of discretionary ones; (2) prescribed minimum penalties for violations; (3) higher maximum penalties; and (4) a higher, 36-month, limitation period.

Summary of Recommended Legislative Amendments

Criteria for Automatic Standardized Compensation and Right to Refund

1. Replace paragraph 86.11(1)(b) of the *Canada Transportation Act* with:

> (b) respecting the carrier's obligations in the case of flight delay, flight cancellation or denial of boarding, including
>
> (i) the minimum standardized monetary compensation the carrier is required to pay to each affected passenger, promptly and without the passenger having to request payment, for inconvenience for ordinary delay, cancellation or denial of boarding, as defined in this Act;
>
> (ii) the minimum standards of treatment of passengers that the carrier is required to meet, irrespective of the reasons for the delay, cancellation or denial of boarding;
>
> (iii) the carrier's obligation to provide timely information and assistance to passengers, irrespective of the reasons for the delay, cancellation or denial of boarding; and
>
> (iv) the carrier's obligation to refund in the original form of payment the cost of all unused services purchased in connection with a passenger's original ticket, irrespective of the reasons for the delay, cancellation or denial of boarding, if the passenger chooses not to travel;

2. Add the following definitions to section 55(1) of the *Canada Transportation Act*:

> **ordinary delay, cancellation, or denial of boarding** means a flight delay, flight cancellation or denial of boarding that is not extraordinary;
>
> **extraordinary delay, cancellation, or denial of boarding** means a flight delay, flight cancellation or denial of boarding that could not have been avoided even if all reasonable measures had been taken, and is simultaneously:
>
> (1) caused in whole by extraordinary circumstances not inherent to the normal exercise of the airline's activity and beyond the airline's control; and
>
> (2) not caused, in whole or in part, directly or indirectly, by one or more of
>
> i. acts or omissions of the carrier, its agents or servants, or any third party with whom the carrier has a contractual relationship;
>
> ii. crew shortage, including but not limited to missing crew members;
>
> iii. any circumstances that were known or should have reasonably been known to the carrier before the ticket was sold to the passenger; or

iv. aircraft maintenance and/or safety issues, except those due to acts of sabotage or terrorism or a manufacturing defect in an aircraft identified by the aircraft's manufacturer or a competent state authority;

Burden of Proof

3. Add subsection 86.11(1.1) to the *Canada Transportation Act*:

A flight delay, flight cancellation, or denial of boarding is deemed to be ordinary unless the carrier proves otherwise on a balance of probabilities.

Definitions

4. Add the following definitions to section 55(1) of the *Canada Transportation Act*:

ticket means a document entitling a passenger to transportation, or anything equivalent in paperless form, including electronic form, issued or authorized by the carrier or its authorized agent;

booking means the fact that the passenger has a ticket or other proof that indicates that the booking has been accepted by the carrier;

denied boarding means the refusal to carry a passenger on a flight on which the passenger previously held a booking, including the transfer of the passenger from the flight on which they previously held a booking to another flight, for reasons other than the passenger's failure to present themselves at the airport for check-in by the time prescribed in the applicable tariff, the passenger posing a health, safety, or security risk, or the passenger lacking adequate travel documents;

flight cancellation means the failure to operate a flight that was previously planned and on which at least one passenger previously held a booking;

Enforcement

5. Replace the words "the enforcement officer may issue" with "the enforcement officer shall issue" in section 180 of the *Canada Transportation Act*.

6. Replace the words "prescribe the maximum amount payable" with "prescribe the minimum and maximum amount payable" in subsection 177(1)(b) of the *Canada Transportation Act*.

7. Increase the maximum amount payable for each violation to $50,000 in the case of an individual and $250,000 in the case of a corporation, respectively, in section 174 and subsection 177(1)(b) of the *Canada Transportation Act*.

8. Replace the words "twelve months" with "thirty-six months" in sections 176 and 181 of the *Canada Transportation Act*.

1. Criteria for Compensation

Canada's *APPR* has been rightly criticized by the courts for its complex and legalistic language, the need for specific knowledge to invoke the claims system, and a labour- and evidence-intensive process requiring detailed records from the airline about fleet information and maintenance. Claims under the *APPR* do not lend themselves to quick resolution, and require disproportionately large resources compared to the amounts at stake, thereby also posing a barrier to access to justice[12] and wasting scarce judicial resources.

There is mounting evidence of airlines abusing the *APPR*'s unnecessary complexity, vagueness, and its various loopholes to skirt their obligations to compensate passengers for travel disruptions that were foreseeable and could have been prevented had the airline exercised due diligence. Air Canada and WestJet have been arguing about travel disruptions caused by their own crew shortages, claiming that these disruptions are "outside the carrier's control" or were "for safety purposes," and therefore no standardized compensation was owed to affected passengers under the *APPR*. The incidents ultimately spawned expensive and time-consuming litigation, where the airlines square off with lay passengers in the Federal Court of Appeal about the *APPR*'s interpretation.[13] These disputes would have been unlikely under the European Union's simple and clear eligibility criteria for compensation.

In contrast, the European Union's *Regulation (EC) 261/2004* is a prominent example of a functional air passenger protection regime that does not suffer from the same shortcomings as the *APPR* does. It also highlights that the *APPR*'s unnecessarily complicated classification of travel disruptions and eligibility criteria for compensation is partly responsible for the CTA's backlog of 30,000 passenger complaints,[14] which continues to soar in spite of substantial additional temporary funds the CTA has received.[15]

This point can be further illuminated by estimating how long it would take a team of 60 analysts or decision-makers to clear up the CTA's 30,000-complaint backlog. If the eligibility criteria are so complex that it takes 8 working hours (1 working day) on average to resolve a complaint, then clearing up the backlog will take 500 working days, which is almost two calendar years.[16] If the criteria were only moderately complex, requiring 2 working hours on average to resolve a complaint, then clearing up the backlog would take 125 working days, which is approximately six calendar months. If the criteria were so simple that a complaint could be resolved in 30 minutes on average, then the entire backlog could be cleared in less than 32 working days, which is less than seven calendar weeks.

Canada should harmonize its air passenger protection regime with that of the European Union. It has been tested and proven to work for more than 16 years.

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[12] *Geddes v. Air Canada*, 2021 NSSM 27 at paras. 2-3; aff'd: 2022 NSSC 49.

[13] "Air Canada, WestJet launch legal battles to overturn orders to compensate passengers for cancelled flights," CBC News (Nov. 4, 2022).

[14] Standing Committee on Transport, Infrastructure and Communities, Evidence (Nov. 28, 2022) at 1605.

[15] Standing Committee on Transport, Infrastructure and Communities, Evidence (Nov. 28, 2022) at 1545.

[16] There are about 260 working days in a calendar year.

A. Eligibility for Standardized Compensation: European Union vs. Canada

Canada's *APPR* categorizes flight delay, cancellation, and denial of boarding into three categories that mirror subparagraphs 86.11(1)(i)-(iii) of the *Canada Transportation Act*, albeit in reverse order:

(i) due to situations outside the carrier's control (s. 10);
(ii) within the carrier's control but required for safety purposes (s. 11); and
(iii) within the carrier's control but not required for safety purposes (s. 12).

The airline must pay standardized monetary compensation to passengers only if the disruption falls in the *residual* category of "within the carrier's control but not required for safety purposes." This classification makes denial of compensation the norm—and payment of compensation the exception.

To conclude that compensation is owed, a passenger, analyst, or decision-maker must first rule out that the disruption was "due to situations outside the carrier's control," and then must rule out that it was "required for safety purposes." Doing so also requires considering potential knock-on effects of previous disruptions (*APPR*, ss. 10(2) and 11(2)). Addressing these alternatives requires voluminous evidence, such as historic weather information records, airline fleet information, and aircraft maintenance records. As the Nova Scotia Small Claims Court aptly observed:

> Few individuals would undertake such efforts to seek a few hundred dollars in compensation. Even if they wanted to, fewer could undertake such a claim. Close to 1000 pages of paper were exchanged, in a $400 claim.[17]

In contrast, *Regulation (EC) 261/2004* requires the carrier to pay standardized compensation for denial of boarding irrespective of the cause, and establishes payment of compensation as the norm in the event of flight delay and flight cancellation. Under the EU's regime, the airline can avoid paying compensation only in exceptional cases where the airline proves that the flight delay or cancellation was caused by "extraordinary circumstances,"[18] a narrow concept reserved for events such as volcanic eruptions, and which excludes situations that are inherent to the normal exercise of the airline's activity.

Notably, under the EU's regime, aircraft maintenance and/or safety issues are not considered to be "extraordinary circumstances" *unless* they are caused by acts of sabotage or terrorism or a manufacturing defect identified by the manufacturer or a competent state authority.[19] Similarly, having crew members missing was held to be part of the normal exercise of the airline's activity and outside the narrow scope of "extraordinary circumstances."[20] In short, maintenance issues and crew shortages do not relieve airlines from paying passengers standardized compensation for the resulting travel disruptions in the EU or the United Kingdom, which adopted the EU's regime as its own following Brexit.

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[17] *Geddes v. Air Canada*, 2021 NSSM 27 at para. 3; aff'd: 2022 NSSC 49.
[18] *Regulation (EC) 261/2004*, Article 5(3).
[19] *Wallentin-Hermann v. Alitalia*, European Court of Justice, Case C-549/07 at para. 26.
[20] *Lipton & Anor v. BA City Flyer Ltd*, [2021] EWCA Civ 454.

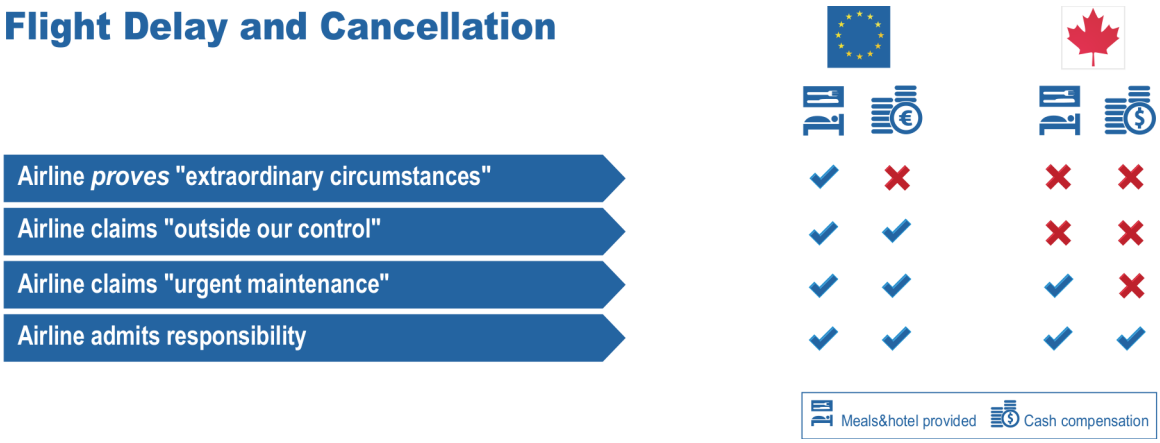

Figure 1. Flight Delay and Cancellation: European Union vs. Canada

To determine whether standardized compensation is owed to a passenger under *Regulation (EC) 261/2004*, in the vast majority of cases only limited information and minimal documentary evidence is required: the arrival time shown on the passenger's original ticket, the passenger's actual arrival time at their destination, and some publicly available information on the rare and exceptional events that could possibly fall within the narrow scope of "extraordinary circumstances."

Determinations of eligibility for compensation under the the EU's regime lend themselves to automatization. Indeed, unlike the *APPR*, *Regulation (EC) 261/2004* requires airlines to pay passengers standardized compensation for flight delay and flight cancellation without the passenger having to submit a claim in writing to the airline.

B. A Case Study

Owen Lareau was originally scheduled to travel on WestJet flights from Regina to Ottawa via Toronto in July 2021. His flight from Regina to Toronto was cancelled on the day of departure because of a crew shortage. WestJet rebooked Mr. Lareau to travel the following day. He arrived at his destination 21 hours later than originally scheduled. WestJet refused to pay Mr. Lareau standardized compensation pursuant to the *APPR* on the basis that his flight was cancelled due to crew member availability, and that this cancellation was required for safety purposes.[21]

Ultimately, the CTA ordered WestJet to pay Mr. Lareau $1,000 standardized compensation owed under the *APPR*.[22] The CTA reasoned that "disruptions within the carrier's control but required for safety purposes should be limited to events that cannot be foreseen nor prevented or, in other words, that cannot be prevented by a prudent and diligent carrier."[23] The CTA went on to hold that:

[21] *Lareau v. WestJet*, CTA Decision No. 89-C-A-2022 at paras. 1-2.
[22] *Ibid* at para. 15.
[23] *Ibid* at para. 9 (emphasis added).

> The carrier must demonstrate that it could not have reasonably prevented the disruption despite proper planning. This includes not only contingency planning, but also advance planning to ensure that the carrier has enough staff available to operate the services it offers for sale, considering that various events can affect a carrier's day-to-day operations.
>
> [...] Nonetheless, if a crew shortage is due to the actions or inactions of the carrier, the disruption will be considered within the carrier's control for the purposes of the APPR. Indeed, a disruption caused by a crew shortage should not be considered "required for safety purposes" when it is the carrier who caused the safety issue as a result of its own actions.[24]

This reasoning undoubtedly reflects a fair common sense approach to passenger protection; nevertheless, Mr. Lareau is having to pay a high price for the legislative drafting omission of failing to spell out these basic principles in the *Canada Transportation Act* and the *APPR*.

WestJet applied for leave to appeal the CTA's decision to the Federal Court of Appeal. WestJet argued that the CTA erred in holding that the airline's own crew shortage falls outside the "within the carrier's control but required for safety purposes" category under the *APPR* and in expecting the airline to present evidence about its own crew situation. The court concluded that WestJet raised a fairly arguable case, and agreed to hear WestJet's appeal.[25] So, by the end of the day, Mr. Lareau, a lay passenger, has to square off with WestJet in the Federal Court of Appeal about the *APPR*'s interpretation—over a $1,000 compensation.

C. Simplifying the Canadian Criteria and Compensation Process

Airline tickets are unique in that they are purchased days, weeks, and often months before the services' delivery date, and their price tends to increase as the travel date approaches. This means that a mere refund of an airfare paid months in advance is unlikely to cover the costs of purchasing alternate transportation or other consequences of a travel disruption that is discovered only a few days before or on the day of travel.

Requiring airlines to pay passengers standardized compensation for travel disruptions, being the only means to financially incentivize airlines to minimize loss of productivity to society caused by such disruptions, is an economically necessary mechanism to optimize the use of society's resources.

Optimal use of society's resources also includes considerations of judicial economy: how scarce and valuable judicial and quasi-judicial resources are being expended. Accordingly, the eligibility criteria and payment of standardized compensation must lend itself to quick resolution.

Determination of a passenger's entitlement to a $400 to $1,000 compensation should require only readily-available information and minimal documentary evidence, so as to permit a decision to be made within 30 minutes or less on average.

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[24] *Ibid* at paras. 11-12 (emphasis added).
[25] Order of the Federal Court of Appeal (Oct. 12, 2022) in File No. 22-A-12.

Fortunately, Canada does not need to reinvent the wheel. The European Union's *Regulation (EC) 261/2004*, rightly dubbed a gold standard of air passenger protection, already meets the bill: it is simple, straightforward, and fair to both passengers and airlines. The strengths of the EU's regime were recognized by the United Kingdom's choice to retain and adopt that regime even in the strong post-Brexit EU-adverse political climate.[26]

We recommend that Canada follow course, and adopt key elements of the EU's regime. First, the number of categories for travel disruptions should be reduced from three to two: ordinary and extraordinary, with standardized compensation payable for ordinary disruptions.

Second, the delineation between ordinary and extraordinary disruptions should incorporate the European Union's common sense approach. Ordinary disruptions should include those caused by circumstances that were known or should have reasonably been known to the airline before the ticket was sold, all crew shortages, and all aircraft maintenance and/or safety issues except those caused by acts of sabotage or terrorism or by a manufacturing defect identified by the aircraft's manufacturer or a competent state authority. Extraordinary disruptions should only be those extraordinary circumstances that are not inherent to the normal exercise of the airline's activity and beyond the airline's control, and which could not have been avoided even if all reasonable measures had been taken.

Third, in the event of an ordinary disruption, the airline should pay affected passengers a standardized compensation for their inconvenience automatically, without the passengers having to make a claim.

Incorporating these sound principles into the *Canada Transportation Act*'s legislative text would also nip in the bud expensive and time-consuming legal debates about statutory interpretation of the kind that Mr. Lareau has been caught up in with WestJet.

Recommended Legislative Amendments

1. Replace paragraph 86.11(1)(b) of the *Canada Transportation Act* with:

> (b) respecting the carrier's obligations in the case of flight delay, flight cancellation or denial of boarding, including
>
> (i) the minimum standardized monetary compensation the carrier is required to pay to each affected passenger, promptly and without the passenger having to request payment, for inconvenience for ordinary delay, cancellation or denial of boarding, as defined in this Act;
>
> (ii) the minimum standards of treatment of passengers that the carrier is required to meet, irrespective of the reasons for the delay, cancellation or denial of boarding;

[26] *Lipton & Anor v. BA City Flyer Ltd*, [2021] EWCA Civ 454.

(iii) the carrier's obligation to provide timely information and assistance to passengers, irrespective of the reasons for the delay, cancellation or denial of boarding; and [...]

2. Add the following definitions to section 55(1) of the *Canada Transportation Act*:

ordinary delay, cancellation, or denial of boarding means a flight delay, flight cancellation or denial of boarding that is not extraordinary;

extraordinary delay, cancellation, or denial of boarding means a flight delay, flight cancellation or denial of boarding that could not have been avoided even if all reasonable measures had been taken, and is simultaneously:

(1) caused in whole by extraordinary circumstances not inherent to the normal exercise of the airline's activity and beyond the airline's control; and

(2) not caused, in whole or in part, directly or indirectly, by one or more of

i. acts or omissions of the carrier, its agents or servants, or any third party with whom the carrier has a contractual relationship;

ii. crew shortage, including but not limited to missing crew members;

iii. any circumstances that were known or should have reasonably been known to the carrier before the ticket was sold to the passenger; or

iv. aircraft maintenance and/or safety issues, except those due to acts of sabotage or terrorism or a manufacturing defect in an aircraft identified by the aircraft's manufacturer or a competent state authority;

2. Burden of Proof

The question of whether it is the passenger or the airline that has to prove the reasons for a flight delay, flight cancellation, or denial of boarding has been a source of confusion and a barrier to compensation for passengers. Since airlines normally have exclusive control over evidence of this nature, common sense, fairness, and international norms dictate that the burden of proof is on the airline to present such evidence. However, the *Canada Transportation Act*'s and the *APPR*'s failure to expressly address this salient point has turned the question of burden of proof into a central battleground.

Parliament should end this debate by harmonizing Canada's regime with international standards, and declaring that it is the airline and not the passenger that has to prove all facts relating to the reasons for a flight's delay or cancellation, or denial of boarding.

A. The *Carriage by Air Act*, the *Montreal Convention*, and *Regulation (EC) 261/2004*

Schedule VI to the the *Carriage by Air Act*, also known as the *Montreal Convention*, creates a presumption of liability for the airline and the obligation to compensate the passenger in the event of flight delays on most international itineraries to and from Canada. The airline can exonerate itself from liability and payment of compensation only if it establishes an affirmative defence:

> **Article 19 - Delay**
>
> The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.[27]

The principle that the burden of proof to establish extenuating circumstances is on the airline and not the passenger is the law not only in Canada,[28] but in all 139 signatory states to the *Montreal Convention*, an international treaty governing the rights of passengers travelling on international itineraries. Drafters of the *Montreal Convention* recognized that the carrier is in the best position to present evidence on the circumstances of a delay or cancellation and any facts that may relieve it from liability.

Regulation (EC) 261/2004 of the European Union is based on the same fundamental principle. Payment of compensation to passengers for travel disruption is the norm, while the airline has to establish exceptional circumstances to exonerate itself from the obligation to compensate passengers:

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[27] *Carriage by Air Act*, Schedule VI ("*Montreal Convention*"), Article 19 (emphasis added).
[28] *Carriage by Air Act*, s. 2(2.1).

> 3. An operating air carrier shall not be obliged to pay compensation in accordance with Article 7, if it can prove that the cancellation is caused by extraordinary circumstances which could not have been avoided even if all reasonable measures had been taken.
>
> 4. The burden of proof concerning the questions as to whether and when the passenger has been informed of the cancellation of the flight shall rest with the operating air carrier.[29]

B. Burden of Proof Under the *APPR*

The CTA's longstanding position has been that passengers bear the burden of proving facts necessary to establish that the airline failed to comply with its obligations.[30] This could mean that passengers seeking compensation under the *APPR* need to prove, on balance of probabilities, that their travel disruption was *not* caused by reasons outside the carrier's control *nor* was it necessary for safety purposes.

The Nova Scotia Small Claims Court correctly recognized the unfairness caused by this state of affairs:

> It would not be fair, especially in interpreting legislation that is designed to provide consumer protection for airline passengers, for a claimant to be required prove anything about the reasons for a cancellation.[31]

In *Lareau v. WestJet*, the CTA held that "when a carrier claims that a disruption was within its control but required for safety purposes, or outside its control, it must establish this claim."[32] While this may be indicative of a shift in the CTA's approach to disputes of such nature, the Federal Court of Appeal's decision to hear WestJet's appeal on this point of law is indicative of the difficulty created by the *Canada Transportation Act*'s and the *APPR*'s silence on burden of proof.

We recommend that Parliament seal this debate by bringing burden of proof under the *APPR* in line with the existing and internationally accepted standards for burden of proof set out in the *Carriage by Air Act*, incorporating the *Montreal Convention*, and the European Union's regime.

Recommended Legislative Amendments

3. Add subsection 86.11(1.1) to the *Canada Transportation Act*:

> A flight delay, flight cancellation, or denial of boarding is deemed to be ordinary unless the carrier proves otherwise on a balance of probabilities.

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[29] *Regulation (EC) 261/2004*, Articles 5(3) and 5(4).
[30] *Nawrots v. Sunwing*, Decision 432-C-A-2013, para. 38.
[31] *Geddes v. Air Canada*, 2021 NSSM 27 at para. 44; aff'd: 2022 NSSC 49.
[32] *Lareau v. WestJet*, CTA Decision No. 89-C-A-2022 at para. 7.

3. Definitions and Absence Thereof

Clear definitions that reflect common sense are essential to every regulatory regime. The *Canada Transportation Act* fails to define key concepts such as "flight cancellation" and "denial of boarding" at all. The *APPR* is also silent about the meaning of "flight cancellation" and represents a step backwards in defining "denial of boarding" unreasonably narrowly.

The lack of definition of "flight cancellation" enables airlines to mislead passengers about their rights by euphemistically referring to flight cancellations as a "schedule change." The unreasonably narrow definition of "denial of boarding" deprives passengers of compensation in many cases where compensation would have been owed prior to the *APPR* and continues to be owed under the European Union's regime.

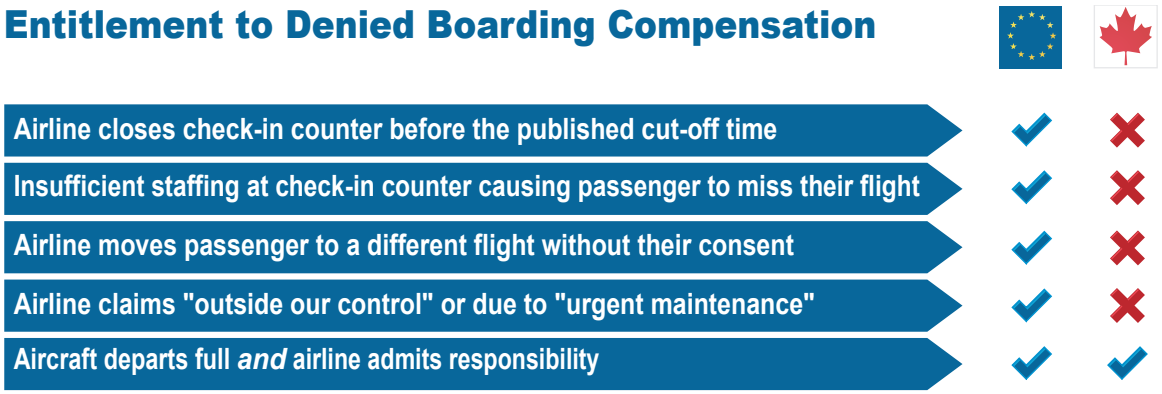

Figure 2. Denied Boarding Compensation: European Union vs. Canada

Canada should harmonize its definitions with those of the European Union, which are also more consistent with Canada's broader interpretation of denial of boarding prior to the *APPR*.

A. Denied Boarding Compensation Under *Regulation (EC) 261/2004*

In sharp contrast with the *APPR*, *Regulation (EC) 261/2004* defines "denied boarding" as an outcome, based on simple facts that are within the passenger's knowledge, irrespective of causes that are within the airline's exclusive knowledge:

> **2(j)** "denied boarding" means a refusal to carry passengers on a flight, although they have presented themselves for boarding under the conditions laid down in Article 3(2), except where there are reasonable grounds to deny them boarding, such as reasons of health, safety or security, or inadequate travel documentation;

> **3(2)** Paragraph 1 shall apply on the condition that passengers:
>
> (a) have a confirmed reservation on the flight concerned and, except in the case of cancellation referred to in Article 5, present themselves for check-in,
>
> — as stipulated and at the time indicated in advance and in writing (including by electronic means) by the air carrier, the tour operator or an authorised travel agent,
>
> or, if no time is indicated,
>
> — not later than 45 minutes before the published departure time; or
>
> (b) have been transferred by an air carrier or tour operator from the flight for which they held a reservation to another flight, irrespective of the reason.

In other words, under the EU's regime, a passenger who is refused transportation does not have to prove that the flight was overbooked, but only has to prove that they held a "confirmed reservation" and that they "presented themselves for check-in" on time or that they "have been transferred" by the airline to a different flight. Both of these are within the knowledge of a passenger and can reasonably be proven.

B. Denied Boarding Compensation Before and Under the *APPR*

In 2013, before the *Transportation Modernization Act* [***TMA***] was enacted and the *APPR* was promulgated, the CTA held that:

> [84] Where a carrier fails to check in passengers because of the absence of personnel at the counter prior to the cut-off time for check in, the Agency is of the opinion that it is reasonable that compensation be tendered:
>
> - when passengers holding confirmed and ticketed reservations can demonstrate that they presented themselves at the ticket counter prior to the cut-off time for check in; and,
>
> - when the ticket counter was closed.
>
> [85] For greater clarity, where such passengers present themselves for boarding before the cut-off time, only to discover that the check-in counter has been closed, the carrier cannot avoid paying denied boarding compensation, regardless of whether or not the flight is fully booked, nor can it avoid liability by closing the check-in counter early.[33]

Similarly, in 2016, also before the *TMA* and the *APPR*, the CTA coined the notion of *de facto* or constructive denied boarding, and confirmed passengers' entitlement to compensation in such situations:

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[33] *Nawrots v. Sunwing*, Decision 432-C-A-2013, paras. 84-85 (emphasis added).

> [19] The Agency agrees with the applicants that the affected passengers had previously confirmed space on a flight, and then were subsequently denied seats on that flight because of a lack of available seats on the aircraft. According to Air Transat, Flight No. TS246 departed with only one empty seat, and Flight No. TS247 departed with no empty seats. The fact that Air Transat notified the passengers in advance about having moved them to other flights does not relieve Air Transat of the obligation to pay denied boarding compensation. The fact is that there were insufficient seats to accommodate the applicants, despite the fact that they had previously confirmed seats, and that they were involuntarily moved to another flight. This is a case of *de facto* or constructive denied boarding.
>
> [20] The Agency appreciates that this situation may be unique, and not a typical case of denied boarding that normally occurs at the gate. However, effectively, the applicants were involuntarily denied boarding on their original flight because Air Transat elected, unilaterally, to give preference to other passengers who had been moved to their flight with the effect that the flight became oversold, resulting in prejudice to the applicants. Rather than wait for the applicants to arrive at the airport and deny them boarding at that time, they were instead moved, without their consent, to another flight in advance. The effect is the same. The applicants were not permitted to board their original flight because there was no longer room for them. It was oversold and they were "bumped".[34]

The *APPR* has substantially narrowed the definition of "denial of boarding" by superimposing the requirement that the flight is actually *overbooked* at the time of boarding:

> For the purpose of these Regulations, there is a denial of boarding when a passenger is not permitted to occupy a seat on board a flight because the number of seats that may be occupied on the flight is less than the number of passengers who have checked in by the required time, hold a confirmed reservation and valid travel documentation and are present at the boarding gate at the required boarding time.[35]

Under the *APPR*'s narrow definition, *de facto* or constructive denied boarding are not considered "denied boarding" because the unilateral change to the passengers' itinerary happens in advance and not at the airport, and the number of passengers present at the boarding gate is not greater than the number of seats available. This provides a loophole for airlines and offers no protection to passengers in these situations.

A Case Study

Mia and Joel Mackoff held confirmed bookings on an Air Canada flight to Vancouver. Yet, when they presented themselves for check-in, they were refused boarding, because the airline's agent mistakenly believed that they did not meet some travel requirements. As a matter of fact, they were both eligible to travel. Air Canada refused to pay the Mackoffs denied boarding compensation under the *APPR*, because overbooking was not the reason for their denial of boarding.[36]

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[34] *Janmohamed v. Air Transat*, Decision No. 95-C-A-2016, paras. 19-20 (emphasis added).
[35] *APPR*, s. 1(3) (emphasis added).
[36] *Mackoff v. Air Canada*, 2022 BCCRT 1121 at paras. 2 and 12-19.

Common sense would dictate that the Mackoffs should have been paid denied boarding compensation. Indeed, had the Mackoffs' case happened at an airport in the European Union, they would have undoubtedly been eligible for denied boarding compensation under *Regulation (EC) 261/2004*.

The British Columbia Civil Resolutions Tribunal [**CRT**], however, concluded that "denial of boarding" in the *APPR* can only be interpreted to mean denial of boarding *due to overbooking*, and agreed with Air Canada that no denied boarding compensation was owed to the Mackoffs under the *APPR*.[37]

The CRT's analysis demonstrates the significant tension between the *APPR*'s terminology and common sense, which cries for Parliament's intervention.

Recommended Legislative Amendments

4. Add the following definitions to section 55(1) of the *Canada Transportation Act*:

> **ticket** means a document entitling a passenger to transportation, or anything equivalent in paperless form, including electronic form, issued or authorized by the carrier or its authorized agent;
>
> **booking** means the fact that the passenger has a ticket or other proof that indicates that the booking has been accepted by the carrier;
>
> **denied boarding** means the refusal to carry a passenger on a flight on which the passenger previously held a booking, including the transfer of the passenger from the flight on which they previously held a booking to another flight, for reasons other than the passenger's failure to present themselves at the airport for check-in by the time prescribed in the applicable tariff, the passenger posing a health, safety, or security risk, or the passenger lacking adequate travel documents;
>
> **flight cancellation** means the failure to operate a flight that was previously planned and on which at least one passenger previously held a booking;

[37] *Ibid* at paras. 26-29.

4. Right to a Refund

For close to twenty years, it has been settled law in Canada that passengers whose flights were cancelled by the airline for any reason are entitled to a refund of all amounts paid for unused services. This common sense principle, coined a "fundamental right,"[38] is deeply rooted in the common law and provincial and federal legislation, and has been expressly recognized in this Committee's recent report.[39]

Yet, passengers' fundamental right to a refund has not been consolidated in the *APPR*. The *APPR*'s September 2022 amendments compound the confusion by purporting to backpedal on passengers' well-established right to a refund, and appearing to force passengers to accept alternate transportation even if doing so defeats the passengers' purpose for travel. This state of affairs not only creates confusion, but is also inconsistent with the standards of not only the European Union or the United States, but also of Israel, and even Turkey.

Parliament should bring Canada in line with other jurisdictions by codifying in primary legislation passengers' fundamental right to a refund in the original form of payment of the unused portion of any itinerary a passenger chooses to forego due to a flight's cancellation or delay, or denial of boarding.

A. The State of the Law Before and After the Original *APPR*

Passengers' fundamental right to a refund had already been established well before the *APPR*. The legislative provisions giving effect to this right are found in the *Canada Transportation Act* and the *Air Transportation Regulations*. Every air carrier operating an air service within, to, and from Canada must establish a "tariff,"[40] setting out clearly the airlines' policies with respect to certain enumerated matters, including:

> refunds for services purchased but not used, whether in whole or in part, either as a result of the client's unwillingness or inability to continue or the air carrier's inability to provide the service for any reason,[41]

The tariff operates as the contract of carriage between the air carrier and passengers. The terms and conditions set out in the tariff are legally binding on the air carrier.[42] The terms and conditions are subject to the statutory requirement that they must be just and reasonable.[43]

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[38] *Lukács v. Sunwing Airlines*, CTA Decision No. 313-C-A-2013 at para. 15.
[39] Emerging from the Crisis: A Study of the Impact of the COVID-19 Pandemic on the Air Transport Sector, Report of the Standing Committee on Transport, Infrastructure and Communities (June 2021), p. 6, Recommendations 22-24.
[40] *Canada Transportation Act*, s. 67(1); *Air Transportation Regulations*, SOR/88-58, s. 110(1).
[41] *Air Transportation Regulations*, SOR/88-58, ss. 107(1)(n)(xii) and 122(c)(xii) (emphasis added).
[42] *Canada Transportation Act*, s. 67(3); *Air Transportation Regulations*, SOR/88-58, s. 110(4).
[43] *Canada Transportation Act*, s. 67.2(1); *Air Transportation Regulations*, SOR/88-58, s. 111(1).

In 2004, some 15 years before the *APPR*, the CTA already formally recognized that the aforementioned legislative provisions give rise to the right to a refund for passengers whose flights were cancelled by the airline for any reason.[44] In 2013, the CTA reaffirmed this right, and coined it a "fundamental right."[45] In a second decision from 2013, the CTA reaffirmed this right again, and held that:

> [...] it is unreasonable for [the airline] to refuse to refund the fare paid by a passenger because of its cancellation of a flight, even if the cause is an event beyond [the airline's] control.[46]

In a subsequent 2014 decision, the CTA reinforced this conclusion:

> [33] The Agency finds that as they allow [the airline] to refuse the tendering of refunds when a flight is cancelled for reasons outside the passenger's control, Existing Tariff Rules 3.4 and 15 are unreasonable within the meaning of subsection 111(1) of the ATR. The Agency finds that the Rules fail to strike a balance between the passengers' rights to be subject to reasonable terms and conditions of carriage and [the airline's] statutory, commercial and operational obligations.[47]

At the time the *APPR* was drafted, we expressed serious concerns about the *APPR*'s silence on passengers' existing fundamental right to a refund. We predicted that this omission would cause confusion and enable abuse by the airlines.[48] Regrettably, the CTA failed to follow our recommendation to consolidate this right into the *APPR*.

The omission of passengers' fundamental right to a refund from the *APPR* does not negate that right, because the *APPR* is not a complete code. The provisions of the *Canada Transportation Act* and the *Air Transportation Regulations* giving rise to passengers' fundamental right to a refund were not amended or negated by the *TMA* nor by the *APPR*, and remain in full force. In short, passengers' fundamental right to a refund has always been and remained the law, and part of the parties' contracts. Parliament should put to rest any confusion by enshrining the right to refund in primary legislation.

B. The Government's Disinformation Campaign About Passengers' Right to Refunds

At the beginning of the COVID-19 pandemic, the Government of Canada engaged in a calculated disinformation campaign to defeat passengers' fundamental right to a refund under federal and provincial legislation, and to thereby unlawfully secure financial benefits for airlines. For example, on March 18, 2020, Mr. Colin Stacey, the Director General of Air Policy at Transport Canada, wrote to Ms. Marcia Jones, the former Chief Strategy Officer at the CTA, that:

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[44] *Re: Air Transat*, CTA Decision No. 28-A-2004.
[45] *Lukács v. Sunwing*, CTA Decision No. 313-C-A-2013 at para. 15.
[46] *Lukács v. Porter*, CTA Decision No. 344-C-A-2013 at para. 88 (emphasis added).
[47] *Lukács v. Porter*, CTA Decision No. 31-C-A-2014 at para. 33 (emphasis added).
[48] Deficiencies of the Proposed Air Passenger Protection Regulations, pp. 42-44 (February 2019).

> Air Transat are telling us that they are getting pressure from creditors who are pushing on the airlines for cash. They will request that we officially let them to provide vouchers to passengers instead of providing them cash because they literally do not have enough cash to give refunds.[49]

Subsequently, both Air Canada and Air Transat submitted lists of "asks" to the CTA that included the CTA stating publicly that passengers were not owed refunds for flights the airlines cancelled.[50]

On March 25, 2020, the CTA published its "Statement on Vouchers" that told the public, without any basis or authority, that airlines do not have to refund cancelled flights, but may provide an I-owe-you instead. The CTA advanced pseudolegal propositions that conflate a "refund" with "compensation for inconvenience." The CTA conceded that the "Statement on Vouchers" was not legally binding and did not alter passengers' rights to a refund only after it was directed to explain itself by the Federal Court of Appeal. Yet, the Agency continued to display an amended version of the "Statement on Vouchers" on its website.

In December 2020, the Government of Canada continued its disinformation campaign by stating that the COVID-19 pandemic highlighted a "gap" in the *APPR*,[51] and the Transport Minister directing the CTA to enact further regulations to close this purported gap.[52] These were nothing more than face-saving measures to excuse the government's failure to enforce passengers' fundamental right.

There was no gap in the laws of Canada nor in the obligations of airlines in terms of refunding passengers for flights cancelled by the airlines, irrespective of the reasons for the cancellation. These well-established obligations flow from provisions of the *Canada Transportation Act* and the *Air Transportation Regulations*, and were previously recognized by the CTA in multiple decisions.

C. The *APPR*'s September 2022 Amendments Create Even More Confusion

The *APPR*'s September 2022 amendments address flight delays and cancellations that are classified as being "outside the carrier's control." They require airlines to offer passengers the choice between a refund in the original form of payment and alternate transportation only if no alternate transportation is available within 48 hours.

The amended *APPR* offers no protection to passengers whose flight is cancelled due to reasons outside the carrier's control, but for whom travelling 6 or 12 or 24 hours later defeats the purpose of their travel. Instead, they create even more confusion. While passenger may be able to enforce their right to a refund in small claims courts, airlines will undoubtedly argue that the *APPR*'s amendments permit the airline to keep passengers' money if they are able to offer alternate transportation departing within 48 hours.

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[49] Mr. Stacey's Email dated March 18, 2020 at 2:57 PM (emphasis).
[50] Asks.docx, CTA disclosure dated July 21, 2022 in Federal Court File No. A-102-20.
[51] Consultation paper: Development of new airline refund requirements, CTA's website.
[52] *Direction Respecting Flight Cancellations for Situations Outside of a Carrier's Control*, SOR/2020-283.

i. Impact on Weekend Travel: Example

Alex lives in Toronto, and works during the week. With the exception of paid vacation days, weekends are Alex's only opportunity to travel. Alex booked a round-trip ticket, leaving from Toronto to Boston on Friday at 17:00, and leaving Boston on Sunday afternoon at 15:00.

On Friday, Alex's flight from Toronto to Boston is cancelled due to bad weather; it is clearly outside the airline's control. The airline offers Alex alternate transportation on a flight departing Toronto at 10:30 on Sunday morning and arriving in Boston at 12:15.

The itinerary no longer serves any purpose for Alex. By the time Alex arrives in Boston, Alex would have to check-in to the 15:00 return flight. Alex, who works five days a week, cannot defer the return flight until Tuesday.

The *APPR*, as amended, offers Alex no right to a refund, because the airline offered alternate transportation that departs within 48 hours of the departure time indicated on Alex's ticket.

ii. Impact on Holiday Travel: Example

Sam studies in Vancouver. Sam's family in Montreal booked a ticket for Sam to come home for New Year's Eve, departing Vancouver on December 30 at 23:20, and arriving in Montreal at 06:40 on December 31, the next day, and departing Montreal at 10:30 on January 2.

On December 30, Sam's flight is cancelled due to a snow storm; it is clearly outside the airline's control. The airline offers to transport Sam on January 1 at 15:00, arriving in Montreal at 22:30.

The itinerary no longer serves any purpose for Sam. If Sam were to accept the alternate itinerary, Sam would not be spending New Year's Eve and New Year's Day with their family, and would be spending a mere 12 hours in Montreal.

The *APPR*, as amended, does not provide Sam (or Sam's family) with a right to a refund, because the airline offered alternate transportation departing within 48 hours of the time indicated on Sam's ticket.

iii. Travel is Time-Sensitive

Alex and Sam are average passengers, who exemplify common time constraints present in the lives of virtually every person in a contemporary Western society. The travel of passengers attending a wedding, a funeral, a business meeting, a conference, or a court hearing is even more time-sensitive.

Canada's treatment of passengers' fundamental right to a refund is an outlier. Alex and Sam would have no difficulty obtaining a refund in the original form of payment not only in the European Union or the United States, but also in Israel or even Turkey.

D. Passengers' Fundamental Right to a Refund in Other Jurisdictions

Passengers' fundamental right to a refund for flights cancelled by airlines, irrespective of the reasons for the cancellation, is a universal commercial standard that is widely recognized outside Canada.

European Union. The key provisions of *Regulation (EC) 261/2004* on passengers' fundamental right to a refund are as follows:[53]

- *Eligibility:* Flight is cancelled or delayed by more than 5 hours (irrespective of reasons).
- *Rights:* Refund and transportation to point of departure.
- *Time Line for Refund:* Within 7 days.
- *Form of Refund:* Cash, electronic bank transfer, bank orders or bank cheques or, with the signed agreement of the passenger, in travel vouchers and/or other services.

United States. The United States Department of Transportation's longstanding position has been that airlines must promptly refund tickets when the airline cancels the passenger's flight or makes a significant change in the schedule and the passenger chooses not to accept the alternative offered by the carrier:

> Since at least the time of an Industry Letter of July 15, 1996 [...] the Department's Aviation Enforcement Office has advised carriers that refusing to refund a non-refundable fare when a flight is canceled and the passenger wishes to cancel is a violation of 49 U.S.C. 41712 (unfair or deceptive practices) and would subject a carrier to enforcement action.[54]

On April 3, 2020, the United States Department of Transportation issued an Enforcement Notice reminding airlines of their obligation to promptly refund passengers for cancelled flights, reaffirmed the aforementioned principles,[55] and reinforced its position in a subsequently issued FAQ:

> Airlines and ticket agents are required to make refunds promptly. For airlines, prompt is defined as being within 7 business days if a passenger paid by credit card, and within 20 days if a passenger paid by cash or check.[56]

In November 2021, Air Canada agreed to pay a record US$4.5 million fine for having breached passengers' fundamental right to a refund in the United States.[57]

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[53] *Regulation (EC) 261/2004*, Articles 5(1)(a), 6(1)(iii), 8(1)(a), and 7(3).

[54] Enhancing Airline Passenger Protections, 76 Fed. Reg. 23110-01, at 23129 (Apr. 25, 2011) (emphasis added).

[55] Enforcement Notice Regarding Refunds by Carriers Given the Unprecedented Impact of the COVID-19 Public Health Emergency on Air Travel, US DOT (April 3, 2020).

[56] Frequently Asked Questions Regarding Airline Ticket Refunds Given the Unprecedented Impact of the COVID-19 Public Health Emergency on Air Travel, US DOT (May 12, 2020) (emphasis added).

[57] Air Canada agrees to $4.5-million settlement over delayed U.S. passenger refunds, Financial Post (Nov. 22, 2021); see also Joint Motion for Approval of Proposed Settlement Agreement (Nov. 22, 2021).

The United States Department of Transportation is currently conducting consultations to not only codify passengers' fundamental right to a refund of flights that are cancelled or significantly delayed by the airline, but to include situations where a flight does operate on time but a passenger decides to forego travel due to circumstances related to a serious communicable disease.[58]

Israel. In 2012, Israel passed the *Aviation Service Law (Compensation and Assistance for Flight Cancellation or Change of Conditions), 5772-2012* [***ASL***],[59] whose key provisions on passengers' fundamental right to a refund are as follows:

- *Eligibility:* Flight is cancelled or delayed by more than 8 hours (irrespective of reasons).
- *Rights:* Reimbursement of consideration (including fees, levies, taxes and other obligatory payments) or replacement ticket, at the passenger's choice.
- *Time Line for Reimbursement:* Within 21 days.
- *Form of Reimbursement:* Original form of payment.

Turkey. In 2012, Turkey adopted its Regulation on Air Passenger Rights (SHY-Passenger), which mirrors the European Union's *Regulation 261/2004*.[60]

We recommend that Parliament grant Canadian passengers the same rights and protections that European, American, Israeli, and even Turkish passengers have been enjoying for years.

Recommended Legislative Amendments

1.* Add to proposed paragraph 86.11(1)(b) of the *Canada Transportation Act* set out in Recommended Legislative Amendment No. 1:

> (b) respecting the carrier's obligations in the case of flight delay, flight cancellation or denial of boarding, including
>
> [...]
>
> (iv) the carrier's obligation to refund in the original form of payment the cost of all unused services purchased in connection with a passenger's original ticket, irrespective of the reasons for the delay, cancellation or denial of boarding, if the passenger chooses not to travel;

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[58] Airline Ticket Refunds and Consumer Protections, 87. Fed. Reg. 51550-01, at 51576-51579 (Aug. 22, 2022).

[59] *Aviation Service Law (Compensation and Assistance for Flight Cancellation or Change of Conditions), 5772-2012* in English.

[60] SHY-Passenger in English, Articles 6(1)(a), 7(1)(3), and 9(1)(a).

5. Enforcement: Efficiency and Lack Thereof

In addition to the CTA's well-documented cozy relationship with the airline industry and well-founded concerns about its impartiality, the CTA is also caught in a "graveyard spiral" with respect to enforcement.

The CTA's enforcement actions are virtually nonexistent. The few notices of violation and the attached Administrative Monetary Penalties are merely symbolic, making it more profitable for airlines to systematically disobey the *APPR* rather than obeying it. Due to the systemic violations of the *APPR*, the CTA is overwhelmed with a ballooning number of passenger complaints. Soaring passenger complaints tie up more and more of the CTA's resources, thereby further undermining any real prospect of meaningful enforcement actions, and causing unnecessary waste of taxpayer dollars.

Parliament's intervention is sorely needed to break this vicious circle.

A. Requirements of an Effective Enforcement Mechanism

Statutes and regulations must be supported by *effective* enforcement mechanisms that not only correct non-compliance, but also create sufficient disincentives for disobeying the law to keep violations down to manageable levels. For example, if the only consequence for theft were having to return the stolen goods and only when caught, theft would become rampant and the police would be hopelessly overwhelmed.

This principle applies with greater force to regulatory legislation, whose purpose is to protect broad segments of the public, such as consumers, from the potentially adverse effects of otherwise *lawful* activity.[61] While stiffer penalties are known to have little to no effect in curbing crime, they are powerful tools in enforcing regulatory legislation.

When the objective of a regulatory regime is behaviour modification of profit-oriented activities, the disincentives for disobeying the law must be significant enough to make obeying the regime more profitable than risking being caught disobeying it. If the odds and the costs of being caught are too small compared to the cost of compliance, then it is more profitable to disobey the law and treat the penalties as merely the cost of doing business.

For example, if the cost of obeying the law is $4 per transaction and the odds of being caught disobeying the law is 2% (1 out of 50 transactions), then the penalty has to exceed 50 × $4 = $200 per violation to make obeying the law the more profitable option. While a penalty in excess of $200 may appear harsh at first sight in the context of a transaction where the cost of compliance is only $4, any lesser penalty makes unlawful behaviour a net cost saver, and incentivizes all rational actors who seek to maximize profits to disobey the law.

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[61] *R. v. Wholesale Travel Group Inc.*, [1991] 3 SCR 154 (*per* Cory, J.).

B. The *Canada Transportation Act*'s Enforcement Provisions and Their Points of Failure

Contravening any provision of *Canada Transportation Act* [***Act***] and any regulation made under the *Act*, such as the *APPR*, is a summary conviction offence punishable by a fine of up to $5,000 in the case of an individual, and up to $25,000 in the case of a corporation (s. 174).

The CTA may also designate provisions of the *Act* and of regulations made under the *Act* as provisions the contravention of which may be dealt with by way of a notice of violation and an Administrative Monetary Penalty of up to $5,000 per violation in the case of an individual, and up to $25,000 per violation in the case of a corporation (s. 177). Once a provision has been designated, it is up to the discretion of a Designated Enforcement Officer of the CTA whether to issue a notice of violation and a corresponding penalty (s. 180).

Both enforcement mechanisms are discretionary, with no prescribed minimum but only maximum penalties, and proceedings must be commenced within twelve (12) months of the violation (ss. 176 and 181).

The vast majority of the *APPR*'s provisions have been designated as provisions the contravention of which may be dealt with by way of a notice of violation and an Administrative Monetary Penalty of up to $5,000 for an individual and $25,000 for a corporation, per violation.[62] Yet, no notice of violation nor Administrative Monetary Penalty has ever been issued to any airline for contravening the *APPR*'s key provisions about providing passengers with alternate transportation[63] or the payment of monetary compensation for inconvenience.[64]

The only marginally relevant notice of violation to date was issued to WestJet on September 13, 2022 for fifty-five (55) contraventions of subsection 19(4) of the *APPR* that all took place on January 18-30, 2022, for not providing prescribed compensation or an explanation as to why compensation was not payable within 30 days after receiving the passenger's request for compensation. WestJet was issued a **$200** Administrative Monetary Penalty per violation, for a total of $11,000 for the 55 violations.[65]

WestJet's notice of violation is symptomatic of the points of failure of the *Act*'s enforcement provisions. First, given that 55 contraventions were found within the 12-day period from January 18 to 30, 2022, these are likely a small fraction of WestJet's violations of just one provision of the *APPR*. Yet, because notices of violation are discretionary and proceedings must be commenced within twelve months of the violation, a large number of violations likely had no consequences for WestJet.

Second, and perhaps more importantly, the penalty of $200 is grossly inadequate for violations where the gain from disobeying the law is between $400 and $1,000 per violation, as it is in the case for failing to pay standardized compensation owed under the *APPR*.

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[62] *APPR*, s. 32.
[63] *APPR*, s. 17(1).
[64] *APPR*, ss. 19(1)-(2) and 20(1).
[65] WestJet Contravention, Canadian Transportation Agency's Website.

As noted earlier, if the odds of the airline being caught and issued a notice of violation is 2% (1 out of 50 actual contraventions), then the penalty has to exceed 50 × $400 = $20,000 per violation to make obeying the *APPR* more profitable than refusing to compensate passengers. By the same logic, if the odds of being caught are lower, say 1% (1 out of 100 actual contraventions), then the penalty has to exceed 100 × $400 = $40,000 per violation. Notably, this is more than what the *Act* currently permits. Yet, any lesser penalty makes unlawful behaviour a net cost saver, and incentivizes airlines to disobey the *APPR* and pay the few Administrative Monetary Penalties that are actually issued.

The presence of a financial incentive for airlines to disobey the *APPR* is also evidenced by, and explains in part, the CTA's backlog of 30,000 passenger complaints,[66] which continues to soar in spite of substantial additional temporary funds the CTA has received.[67]

We are of the view that Parliament's intervention is needed to correct this state of affairs. First, issuance of notices of violation and Administrative Monetary Penalties for contraventions should be mandatory and not a matter of discretion. Second, minimum penalties should be introduced so that obeying provisions of the *Act* and regulations made under the *Act* is more profitable than disobeying them. Third, the maximum penalties should be raised to match the levels for violations of the *Accessible Canada Act* (s. 177(3)).

Lastly, bearing in mind that it currently takes 18-24 months from the filing of a complaint with the CTA until it is actually reviewed, the limitation period for commencing proceedings for violations should be raised to thirty-six (36) months.

Recommended Legislative Amendments

5. Replace the words "the enforcement officer may issue" with "the enforcement officer shall issue" in section 180 of the *Canada Transportation Act*.

6. Replace the words "prescribe the maximum amount payable" with "prescribe the minimum and maximum amount payable" in subsection 177(1)(b) of the *Canada Transportation Act*.

7. Increase the maximum amount payable for each violation to $50,000 in the case of an individual and $250,000 in the case of a corporation, respectively, in section 174 and subsection 177(1)(b) of the *Canada Transportation Act*.

8. Replace the words "twelve months" with "thirty-six months" in sections 176 and 181 of the *Canada Transportation Act*.

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[66] Standing Committee on Transport, Infrastructure and Communities, Evidence (Nov. 28, 2022) at 1605.
[67] Standing Committee on Transport, Infrastructure and Communities, Evidence (Nov. 28, 2022) at 1545.

Appendix

A. Final Decisions Arising from Dr. Lukács's Successful Complaints (Highlights)

1. *Lukács v. Air Canada*, Decision No. 208-C-A-2009;
2. *Lukács v. WestJet*, Decision No. 313-C-A-2010;
3. *Lukács v. WestJet*, Decision No. 477-C-A-2010
(leave to appeal denied, Federal Court of Appeal File No.: 10-A-41);
4. *Lukács v. WestJet*, Decision No. 483-C-A-2010
(leave to appeal denied, Federal Court of Appeal File No.: 10-A-42);
5. *Lukács v. Air Canada*, Decision No. 291-C-A-2011;
6. *Lukács v. WestJet*, Decision No. 418-C-A-2011;
7. *Lukács v. United Airlines*, Decision No. 182-C-A-2012;
8. *Lukács v. Air Canada*, Decision No. 250-C-A-2012;
9. *Lukács v. Air Canada*, Decision No. 251-C-A-2012;
10. *Lukács v. Air Transat*, Decision No. 248-C-A-2012;
11. *Lukács v. WestJet*, Decision No. 249-C-A-2012;
12. *Lukács v. WestJet*, Decision No. 252-C-A-2012;
13. *Lukács v. United Airlines*, Decision No. 467-C-A-2012;
14. *Lukács v. Porter Airlines*, Decision No. 16-C-A-2013;
15. *Lukács v. Air Canada*, Decision No. 204-C-A-2013;
16. *Lukács v. WestJet*, Decision No. 227-C-A-2013;
17. *Lukács v. Sunwing Airlines*, Decision No. 249-C-A-2013;
18. *Lukács v. Sunwing Airlines*, Decision No. 313-C-A-2013;
19. *Lukács v. Air Transat*, Decision No. 327-C-A-2013;
20. *Lukács v. Air Canada*, Decision No. 342-C-A-2013;
21. *Lukács v. Porter Airlines*, Decision No. 344-C-A-2013;
22. *Lukács v. British Airways*, Decision No. 10-C-A-2014;
23. *Lukács v. Porter Airlines*, Decision No. 31-C-A-2014;
24. *Lukács v. Porter Airlines*, Decision No. 249-C-A-2014;
25. *Lukács v. WestJet*, Decision No. 420-C-A-2014; and
26. *Lukács v. British Airways*, Decision No. 49-C-A-2016.

This is **Exhibit "13"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

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Signature

Losing Ground: Erosion of Canada's Air Passenger Protection Regime

Submissions to the Standing Senate Committee on Transport and Communications

May 2023

Halifax, NS • AirPassengersRights.ca

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About *Air Passenger Rights*

Air Passenger Rights [**APR**] is an independent nonprofit organization of volunteers, devoted to empowering travellers through education, advocacy, investigation, and litigation.

APR has a track record of successfully predicting shortcomings and loopholes in legislation relating to air passenger rights.

- In 2017, APR appeared before the House of Commons Standing Committee on Transport, Infrastructure and Communities [**TRAN**] and submitted a brief, cautioning that the *Transportation Modernization Act* (Bill C-49) was inadequate.
- In 2018, APR appeared before the Standing Senate Committee on Transport and Communications and submitted a brief, cautioning again that the *Transportation Modernization Act* was inadequate.
- In 2019, APR published a 52-page report entitled "Deficiencies of the Proposed Air Passenger Protection Regulations" about how airlines would exploit the *APPR*'s shortcomings and loopholes.
- In 2020, APR appeared before the TRAN and in 2021 submitted a brief entitled "Withheld Passenger Refunds: A Failure by Design" on the refunding of flights cancelled by airlines.
- In November 2022, APR appeared before the TRAN and in December 2022, mere days before the 2022 holiday season air travel meltdown, APR submitted a 29-page brief entitled "From the Ground Up: Revamping Canada's Air Passenger Protection Regime" setting out detailed recommendations for legislative amendments.
- In 2023, following the 2022 holiday season air travel meltdown, APR appeared before the TRAN again as part of the study of the *Air Passenger Protection Regulations*.

APR's key predictions about the shortcomings and loopholes created by the *Transportation Modernization Act* and the *Air Passenger Protection Regulations* have been validated in the four years that have passed since the regulations came into force.

APR's success in predicting shortcomings and loopholes in consumer protection legislation in the air travel sector is grounded in three factors:

- **Experience based.** APR's predictions and submissions are based on the expertise and experience accumulated through assisting passengers daily in enforcing their rights.
- **Independent.** APR takes no government or business funding.
- **No business interest.** APR has no business interest in the aviation sector.

APR's presence on social media includes the Air Passenger Rights (Canada) Facebook group, with over 111,000 members, and the @AirPassRightsCA Twitter feed.

APR was founded and is led by Dr. Gábor Lukács, a Canadian air passenger rights advocate, who volunteers his time and expertise for the benefit of the travelling public.

Gábor Lukács, PhD (President)

Since 2008, Dr. Lukács has filed more than two dozen successful complaints with the Canadian Transportation Agency [**Agency**], challenging the terms, conditions, and practices of air carriers, resulting in orders directing them to amend their conditions of carriage and offer better protection to passengers. In 2013, the Consumers' Association of Canada awarded Dr. Lukács its Order of Merit for singlehandedly initiating legal action resulting in the revision of Air Canada's unfair practices regarding overbooking.

Dr. Lukács's advocacy in the public interest and his expertise and experience in the area of passenger rights have been recognized by the transportation bar,[1] the academic community,[2] and the judiciary.[3] Dr. Lukács has appeared before courts across Canada, including the Federal Court of Appeal and the Supreme Court of Canada,[4] in respect of air passenger rights. He successfully challenged the Agency's lack of transparency and the reasonableness of the Agency's decisions. In 2020, the Federal Court of Appeal allowed Dr. Lukács to intervene in the airlines' challenge to the *Air Passenger Protection Regulations*, noting that he "would defend the interests of airline passengers in a way that the parties cannot."[5]

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1 Carlos Martins: Aviation Practice Area Review (September 2013), WHO'SWHOLEGAL.

2 Air Passenger Rights Advocate Dr. Gabor Lukacs lectures at the IASL, Institute for Air and Space Law, October 2018.

3 *Lukács v. Canada*, 2015 FCA 140 at para. 1; *Lukács v. Canada*, 2015 FCA 269 at para. 43; and *Lukács v. Canada*, 2016 FCA 174 at para. 6.

4 *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2.

5 Order of the Federal Court of Appeal (Near, J.A.), dated March 3, 2020 in File No. A-311-19; see also *International Air Transport Association v. Canadian Transportation Agency*, 2022 FCA 211 at para. 8.

Executive Summary

In 2017, the air passenger protection framework created by the *Transportation Modernization Act* [***TMA***] was predicted to "double the amount of compensation that passengers are not going to receive."[6]

By 2023, that prediction has proven to be an underestimate. The soaring backlog of 45,000 passenger complaints at the Canadian Transportation Agency [**CTA**][7] shows that the *TMA*'s framework is incapable of providing Canadians with meaningful protection comparable to the European Union's gold standard.[8]

Today, it is clear to everyone that the *status quo* is untenable, and even the government acknowledges that Canada's air passenger protection regime needs to be substantially strengthened. The question is how.

In March 2023, MP Taylor Bachrach tabled the *Strengthening Air Passenger Protection Act* (Bill C-327), a private member's bill to harmonize Canada's air passenger protection regime with the European Union's gold standard. Bill C-327 has been endorsed by Canada's leading consumer protection organizations.

Instead of adopting the *Strengthening Air Passenger Protection Act* (Bill C-327) as a government bill and listening to thousands of Canadians who signed a House of Commons petition, the government has put forward legislative amendments in the *Budget Implementation Act* [***BIA***] that have the opposite effect.

Encroachment on Fundamental Rights. The *BIA* proposes to create a secretive, Star Chamber-like process for binding adjudication of consumer disputes between passengers and airlines, deeming all information used in the process confidential, and excluding public and media access (clause 459, s. 85.09). The proposed amendment infringes upon Canadians' freedom of expression and the open court principle guaranteed by s. 2(b) of the *Charter*. In addition, binding orders would be issued on the basis of mere "information" rather than evidence (clause 459, s. 85.06(1)), thereby violating the right to a fair hearing in accordance with the principles of fundamental justice, protected by s. 2(e) of the *Canadian Bill of Rights*.

No Statutory Right of Appeal. The *BIA* unwittingly removes the existing statutory right of appeal from binding orders in consumer disputes between passengers and airlines (clause 459, s. 86.06(2)).

Bypassing the System of Checks and Balances: Henry VIII Clause. The *BIA* proposes to add a "Henry VIII clause" that allows the Agency to change the law in the guise of legally binding guidelines (clause 459, s. 85.12) while bypassing the system of checks and balances set out in the *Statutory Instruments Act*. The Agency will be able to make and modify overnight guidelines affecting Canadian passengers' rights overnight, **without** examination by the Clerk of the Privy Council and the Deputy Minister of Justice, **without** publication in the *Canada Gazette*, and **without** scrutiny by Parliament's committees.

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6 Standing Committee on Transport, Infrastructure and Communities, Evidence (Sep. 14, 2017) at 1905 (emphasis added).
7 "Customer satisfaction with Air Canada and WestJet falls below average, survey finds," Canadian Press (May 10, 2023).
8 *Regulation (EC) 261/2004*.

Perpetuation of Existing and Creation of New Loopholes. The "required for safety purposes" excuse for airlines to avoid paying passengers compensation is a made-in-Canada loophole that has unnecessarily and disproportionately complicated adjudication of disputes between passengers and airlines. The *BIA* retains this loophole (clause 459, ss. 85.07(2), 85.08, and 85.14(1)(iii)) and creates a new loophole that allows airlines that sign a so-called "compliance agreement" to avoid paying penalties for violating passengers' rights (clauses 467-470).

Summary of Recommended Legislative Amendments

Protection of Fundamental Rights

1. In clause 459 of Bill C-47, delete proposed ss. 85.09 and 85.14, and delete clause 462 of the Bill.

2. In clause 459 of Bill C-47, amend proposed s. 85.06(1) by replacing the word "information" with "evidence."

Retaining the Statutory Right of Appeal

3. In clause 459 of Bill C-47, amend proposed s. 85.06(2) to read:

> An order referred to in subsection (1) is an order of the Agency.

Maintaining the System of Checks and Balances

4. In clause 459 of Bill C-47, delete proposed s. 85.12, and in proposed s. 85.1 remove reference to s. 85.12. Alternatively, amend proposed s. 85.12(4) by replacing "does not apply" with "applies."

Closing Loopholes Without Creating New Ones

5. Amend clauses 465(1)-(3) of Bill C-47 to read as clauses 4(1)-(3) of Bill C-327.

6. In clause 459 of Bill C-47, amend proposed s. 85.07(2) to read as proposed s. 85.2 in clause 3 of Bill C-327:

> For greater certainty, the burden is on the carrier to establish, on a balance of probabilities, the cause of a flight delay, flight cancellation or denial of boarding.

As a consequential amendment, delete clause 460 in Bill C-47.

7. Delete clauses 467-470 in Bill C-47.

1. Encroachment on Fundamental Rights

Clause 459 introduces a new process for adjudication of disputes between passengers and airlines that encroaches on two fundamental rights of Canadians: freedom of expression and the right to a fair hearing.

A. Freedom of Expression and the Open Court Principle

The century-old open court principle provides that legal proceedings are presumptively open to the public. Citizens and the media have the right to access court proceedings and the same evidence that the court relied on. The open court principle is a hallmark of a democratic society, which permits the public to discuss and put forward opinions and criticisms of legal practices and proceedings. The open court principle is inextricably tied to freedom of expression and the press guaranteed by section 2(b) of the *Charter*.[9]

Curtailment of public access to legal proceedings can only be justified where there is the need to protect social values of superordinate importance, such as if disclosure would subvert the ends of justice or unduly impair its proper administration, or to protect a vulnerable party from revictimization.[10] Generic privacy concerns, which do not rise to the level of posing a threat to a person's dignity or physical safety, are insufficient to displace the presumption of openness in legal proceedings.[11]

The open court principle was held to apply to tribunals engaged in adjudication of disputes between parties in an adversarial setting in the context of immigration, labour relations, automobile injuries, whistleblower protection, and human rights.[12] Ontario's *Freedom of Information and Protection of Privacy Act* was found to infringe on s. 2(b) of the *Charter* and declared to have no force or effect to the extent it prevented public disclosure of adjudicative records of tribunals that adjudicate disputes in an adversarial setting.[13]

Currently, the Agency is required to follow the open court principle. Documents filed in the Agency in the course of adjudication of consumer disputes between passengers and airlines, such as submissions and evidence, are placed on the public record, unless the Agency makes a confidentiality order on the basis of the same strict legal test used by the courts. In 2015, the Federal Court of Appeal held that it was "impermissible" for the Agency to refuse to provide such documents to members of the public in the absence of a confidentiality order, on the mere basis of generic privacy concerns.[14]

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[9] *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 SCR 480 at paras. 21-23; and *Named Person v. Vancouver Sun*, 2007 SCC 43 at paras. 31-34.

[10] *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41 at paras. 4-5; *A.B. v. Bragg Communications Inc.*, 2012 SCC 46 at paras. 14 and 27; *Sherman Estate v. Donovan*, 2021 SCC 25 at para. 30.

[11] *Sherman Estate v. Donovan*, 2021 SCC 25 at para. 85.

[12] *Southam Inc. v. Canada (Minister of Employment and Immigration)*, [1987] 3 FC 329; *Tipple v. Deputy Head (Department of Public Works and Government Services)*, 2009 PSLRB 110; *Germain v. Automobile Injury Appeal Commission*, 2009 SKQB 106 at para. 104; *El-Helou v. Courts Administration Service*, 2012 CanLII 30713 (CA PSDPT) at paras. 59-60; *Woodgate v. RCMP*, 2022 CHRT 27 at para. 12.

[13] *Toronto Star v. AG Ontario*, 2018 ONSC 2586.

[14] *Lukács v. Canada (Transport, Infrastructure and Communities)*, 2015 FCA 140 at para. 80.

Proposed section 85.09 in clause 459 of Bill C-47 creates a presumption of secrecy and covertness for the new process of adjudication of consumer disputes between passengers and airlines, contrary to s. 2(b) of the *Charter*. If s. 85.09(1) becomes law, all information provided by passengers and the airlines for adjudication would be confidential unless the party providing the information agrees otherwise.

The practical effect of s. 85.09 is a Star Chamber-like process, where the public and the media have no access to the evidence used by the decision maker to determine whether the airline owes compensation to the passenger, and even the reasons for the decision will remain secret. Instead, only bald bottom-line conclusions will be published pursuant to proposed s. 85.14. This, in turn, would shield from public scrutiny both the Agency's conduct in adjudicating disputes and the airlines' treatment of passengers.

Proposed s. 85.09 offends s. 2(b) of the *Charter*. While parties are at liberty to participate in mediation in private, binding adjudication of their disputes by a tribunal remains subject to the open court principle.

We ask the Senate to apply sober second thought, and not permit a provision that raises such constitutional concerns to become law.

B. Right to Fair Hearing in Accordance with the Principles of Fundamental Justice

Currently, disputes between passengers and airlines are adjudicated on the basis of evidence: documents and signed statements whose authenticity and veracity are capable of being tested. Passengers can also seek an order to compel airlines to answer questions and produce documents necessary for the adjudication.[15]

Proposed subsection 85.06(1) in clause 459 of Bill C-47 would permit binding decisions to be made in consumer disputes between passengers and airlines on the basis of mere "information" (i.e., an airline's say-so) instead of evidence. This will further lower the evidentiary threshold for airlines to avoid paying passengers compensation, and will violate passengers' right to a fair hearing in accordance with the principles of fundamental justice, guaranteed by s. 2(e) of the *Canadian Bill of Rights*.

We recommend retaining the requirement that binding decisions are made on the basis of evidence.

Recommended Legislative Amendments

1. In clause 459 of Bill C-47, delete proposed ss. 85.09 and 85.14, and delete clause 462 of the Bill.

2. In clause 459 of Bill C-47, amend proposed s. 85.06(1) by replacing the word "information" with "evidence."

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[15] *Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)*, s. 24.

2. Removal of the Statutory Right of Appeal

A statutory right of appeal is an error-correction mechanism to ensure that passenger protection laws are applied fairly and consistently by administrative decision makers. In addition, it signals to the courts that decisions made under the statutory scheme must not only be *reasonable*, but also *correct* at law.[16]

Section 41 of the *Canada Transportation Act* provides a statutory right of appeal from any decision or order of the Agency to the Federal Court of Appeal [**FCA**] on questions of law and jurisdiction, subject to the requirement of being granted leave to appeal by the FCA, which operates as a screening mechanism.

Currently, the adjudication of disputes between passengers and airlines by the Agency are concluded with decisions and orders of the Agency, which are therefore subject to the aforementioned statutory right of appeal under s. 41 of the *Canada Transportation Act*.

Proposed subsection 85.06(2) in clause 459 of Bill C-47 provides that an order made under the newly minted adjudication process "**is not** an order or decision of the Agency" (emphasis added). The practical effect of proposed s. 85.06(2) is that it removes the statutory right of appeal from binding decisions and orders in consumer disputes between passengers and airlines.

If proposed s. 85.06(2) becomes law, passengers and airlines dissatisfied with an order may bring a judicial review application in the Federal Court, without the requirement of having to obtain leave first. The grounds of review will not be confined to questions of law and jurisdiction. The Federal Court will have to review the decision maker's findings of fact and law on the *reasonableness* standard instead of *correctness*.

Proposed s. 85.06(2) is therefore expected to result not only in an inconsistent application of passenger protection laws, but it may also open the floodgate for judicial review applications in the Federal Court. Given the imbalance of resources between airlines and passengers, this is likely to favour airlines that can afford the costs and risk of challenging unfavourable decisions in this way.

We recommend retaining the existing statutory right of appeal for decisions and orders in disputes between passengers and airlines by deeming an order under proposed s. 85.06(1) to be an order of the Agency. Doing so would also be consistent with and obviate proposed s. 85.07(3).

Recommended Legislative Amendments

3. In clause 459 of Bill C-47, amend proposed s. 85.06(2) to read:

> An order referred to in subsection (1) is an order of the Agency.

[16] *Canada (MCI) v. Vavilov*, 2019 SCC 65 at para. 37.

3. Bypassing the System of Checks and Balances: Henry VIII Clause

The rule of law requires that all legislation be enacted in the manner and form prescribed by law. Proposed section 85.12 is a Henry VIII clause-like provision that allows the executive branch to bypass the proper legislative process in amending passenger protection laws.

When Parliament delegates legislative power to the executive branch, the exercise of those powers is subject to the system of checks and balances set out in the *Statutory Instruments Act* [***SIA***]: proposed regulations must be examined by the Clerk of the Privy Council and the Deputy Minister of Justice (s. 3); regulations must be published in the *Canada Gazette*, (s. 11); and regulations stand permanently referred to any Committee of the House of Commons, of the Senate, or of both Houses of Parliament that may be established for the purpose of reviewing and scrutinizing statutory instruments (s. 19), which may make a report to revoke said regulations (s. 19.1).

Proposed section 85.12 allows the Agency to make and modify legally binding "guidelines" that *de facto* amend passenger protection laws overnight, and bypasses the system of checks and balances set out in the *SIA*. Pursuant to s. 85.12(1)(b), the guidelines would set out "the extent to which and the manner in which [...] any provision of the regulations applies with regard to complaints." Proposed s. 85.12(4) provides that the *SIA* **does not** apply to these "guidelines."

The practical effect of proposed s. 85.12 is that the Agency could change the law on whether airlines owe passengers compensation or refunds in certain circumstances **without** examination by the Clerk of the Privy Council and the Deputy Minister of Justice, **without** publication in the *Canada Gazette*, and **without** scrutiny by Parliament's committees.

While Henry VIII clauses are constitutionally objectionable,[17] they may not be unconstitutional in Canada, and the debate about the constitutional limits on delegation of power remains unsettled. Justice Côté's powerful and comprehensive dissent in *References re Greenhouse Gas Pollution Pricing Act* provides ample arguments in support of the proposition that legislature should avoid enacting Henry VIII clauses.[18]

We recommend retaining the existing regulation-making powers of the Agency that are subject to the *SIA*, and not conferring new Henry VIII clause-like guideline-making powers for amending substantive rights in a manner that bypasses the system of checks and balances set out in the *SIA*.

Recommended Legislative Amendments

4. In clause 459 of Bill C-47, delete proposed s. 85.12, and in proposed s. 85.1 remove reference to s. 85.12. Alternatively, amend proposed s. 85.12(4) by replacing "does not apply" with "applies."

[17] Dr. Paul Daly, University of Cambridge and Queens' College, Cambridge – Written evidence.
[18] *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11 at paras. 241-293.

4. Perpetuation of Existing and Creation of New Loopholes

"Required for Safety Purposes." The *Transportation Modernization Act* created a middle category of flight disruptions "within the carrier's control, but is required for safety purposes, including in situations of mechanical malfunctions." If a flight disruption falls within this category, the airline does not have to pay passengers lump sum compensation under the existing Canadian scheme.[19]

This made-in-Canada loophole has contributed to the undue hurdle of passengers seeking compensation. Deciding whether a disruption falls within this middle category requires a complex evidentiary record whose consideration consumes disproportionately large resources compared to the amounts at stake.[20] It has also given rise to specious claims that flight cancellations due to the airline's own crew shortage falls within the category of "required for safety purpose" because it is illegal to fly with insufficient crew.[21]

The emerging consensus is that Canada should close this loophole by harmonizing its regime with the European Union's gold standard embodied by *Regulation (EC) 261/2004*. The EU's regime establishes compensating passengers for flight disruptions as the norm, and allows airlines to avoid paying compensation only in narrowly construed *extraordinary circumstances*. The EU's regime is simple, straightforward, and fair to both passengers and airlines. The strengths of the EU's regime were recognized by the UK's choice to retain and adopt that regime even in the strong post-Brexit EU-averse political climate.[22]

In March 2023, MP Taylor Bachrach tabled the *Strengthening Air Passenger Protection Act* (Bill C-327), a private member's bill to harmonize Canada's air passenger protection regime with the European Union's gold standard. Bill C-327 has been endorsed by Canada's leading consumer protection organizations.

Unfortunately, contrary to the government's public promises to close the "required for safety purposes" loophole, Bill C-47 does not do so, and references the term "required for safety purposes" four times (in proposed ss. 85.07(2), 85.08, and 85.14(1)(iii)). Clauses 465(1)-(2) of Bill C-47, which will come into force later (clause 474(2)), relocate the exceptions to the obligation to compensate passengers from the primary legislation (*Canada Transportation Act*) to the regulations (*Air Passenger Protection Regulations*). Bill C-47 contains no provision to preclude the Agency from retaining the loophole's substance.

Burden of Proof. The question of whether it is the passenger or the airline that has to prove the reasons for a flight delay, flight cancellation, or denial of boarding has been a source of confusion and a barrier to compensation for passengers. Since airlines normally have exclusive control over evidence of this nature, common sense, fairness, and international norms dictate that the burden of proof is on the airline to present such evidence. However, the *Canada Transportation Act*'s and the *APPR*'s failure to expressly address this salient point has turned the question of burden of proof into a central battleground.

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[19] *Canada Transportation Act*, s. 86.11(1)(b)(ii).
[20] *Geddes v. Air Canada*, 2021 NSSM 27 at paras. 2-3 (emphasis added); aff'd: 2022 NSSC 49.
[21] *Lareau v. WestJet*, CTA Decision No. 89-C-A-2022; and *Crawford v. Air Canada*, CTA Decision No. 107-C-A-2022.
[22] *Lipton & Anor v. BA City Flyer Ltd*, [2021] EWCA Civ 454.

Common sense dictates that the burden of proof to establish the cause of a flight disruption should always be on the carrier, regardless of the forum where the dispute is being adjudicated. Such a reverse onus already exists not only in the European Union's passenger protection scheme, but also in the laws of Canada. The *Montreal Convention* is an international treaty governing airline liability for flight delays on most international itineraries to and from Canada. The *Montreal Convention* is implemented as Schedule VI to the federal *Carriage by Air Act*. Article 19 of the *Montreal Convention* also imposes the burden of proof with respect to the circumstances of flight delays on the airline rather than the passenger.

While proposed subsection 85.07(2) in clause 459 aims to do the same, its scope is confined to the new process for adjudication of consumer disputes between passengers and airlines, and fails to address the burden of proof in claims advanced under the *APPR* in small claims courts, provincial superior courts, or the Federal Courts. This shortcoming will likely result in the waste of valuable judicial resources, because it may seriously hinder the use of class proceedings against airlines that systematically violate the *APPR*.

A New Loophole for Avoiding Administrative Monetary Penalties. Currently, ss. 177-181 of the *Canada Transportation Act* confer discretionary power on the Agency's designated enforcement officers to issue notices of violations and impose Administrative Monetary Penalties of up to $25,000 per violation on airlines that violate certain regulatory provisions, including the *APPR*.

Clauses 467-470 of Bill C-47 create a new loophole whereby an airline can avoid paying Administrative Monetary Penalties for violating the *APPR* if they sign a so-called "compliance agreement."

Compliance agreements may be a useful tool to foster cooperation and compliance in areas that require case-by-case consideration of a small number of complex cases, such as accommodation of disabilities; however, they are inappropriate and inefficient in matters involving a high volume of straightforward cases, where the reason for non-compliance is not lack of training or inexperience of the regulated entity, but rather a calculated economic decision (i.e., it is more profitable to break the law than to comply).

Recommended Legislative Amendments

5. Amend clauses 465(1)-(3) of Bill C-47 to read as clauses 4(1)-(3) of Bill C-327.

6. In clause 459 of Bill C-47, amend proposed s. 85.07(2) to read as proposed s. 85.2 in clause 3 of Bill C-327:

> For greater certainty, the burden is on the carrier to establish, on a balance of probabilities, the cause of a flight delay, flight cancellation or denial of boarding.

As a consequential amendment, delete clause 460 in Bill C-47.

7. Delete clauses 467-470 in Bill C-47.

This is **Exhibit "14"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

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Signature

World Health Organization

WHO Director-General's opening remarks at the media briefing on COVID-19 - 11 March 2020

11 March 2020

Good afternoon.

In the past two weeks, the number of cases of COVID-19 outside China has increased 13-fold, and the number of affected countries has tripled.

There are now more than 118,000 cases in 114 countries, and 4,291 people have lost their lives.

Thousands more are fighting for their lives in hospitals.

In the days and weeks ahead, we expect to see the number of cases, the number of deaths, and the number of affected countries climb even higher.

WHO has been assessing this outbreak around the clock and we are deeply concerned both by the alarming levels of spread and severity, and by the alarming levels of inaction.

We have therefore made the assessment that COVID-19 can be characterized as a pandemic.

Pandemic is not a word to use lightly or carelessly. It is a word that, if misused, can cause unreasonable fear, or unjustified acceptance that the fight is over, leading to unnecessary suffering and death.

Describing the situation as a pandemic does not change WHO's assessment of the threat posed by this virus. It doesn't change what WHO is doing, and it doesn't change what countries should do.

We have never before seen a pandemic sparked by a coronavirus. This is the first pandemic caused by a coronavirus.

And we have never before seen a pandemic that can be controlled, at the same time.

WHO has been in full response mode since we were notified of the first cases.

And we have called every day for countries to take urgent and aggressive action.

We have rung the alarm bell loud and clear.

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As I said on Monday, just looking at the number of cases and the number of countries affected does not tell the full story.

Of the 118,000 cases reported globally in 114 countries, more than 90 percent of cases are in just four countries, and two of those – China and the Republic of Korea - have significantly declining epidemics.

81 countries have not reported any cases, and 57 countries have reported 10 cases or less.

We cannot say this loudly enough, or clearly enough, or often enough: all countries can still change the course of this pandemic.

If countries detect, test, treat, isolate, trace, and mobilize their people in the response, those with a handful of cases can prevent those cases becoming clusters, and those clusters becoming community transmission.

Even those countries with community transmission or large clusters can turn the tide on this virus.

Several countries have demonstrated that this virus can be suppressed and controlled.

The challenge for many countries who are now dealing with large clusters or community transmission is not whether they **can** do the same – it's whether they **will**.

Some countries are struggling with a lack of capacity.

Some countries are struggling with a lack of resources.

Some countries are struggling with a lack of resolve.

We are grateful for the measures being taken in Iran, Italy and the Republic of Korea to slow the virus and control their epidemics.

We know that these measures are taking a heavy toll on societies and economies, just as they did in China.

All countries must strike a fine balance between protecting health, minimizing economic and social disruption, and respecting human rights.

WHO's mandate is public health. But we're working with many partners across all sectors to mitigate the social and economic consequences of this pandemic.

This is not just a public health crisis, it is a crisis that will touch every sector – so every sector and every individual must be involved in the fight.

I have said from the beginning that countries must take a whole-of-government, whole-of-society approach, built around a comprehensive strategy to prevent infections, save lives and minimize impact.

Let me summarize it in four key areas.

First, prepare and be ready.

Second, detect, protect and treat.

Third, reduce transmission.

Fourth, innovate and learn.

I remind all countries that we are calling on you to activate and scale up your emergency response mechanisms;

Communicate with your people about the risks and how they can protect themselves – this is everybody's business;

Find, isolate, test and treat every case and trace every contact;

Ready your hospitals;

Protect and train your health workers.

And let’s all look out for each other, because we need each other.

===

There’s been so much attention on one word.

Let me give you some other words that matter much more, and that are much more actionable.

Prevention.

Preparedness.

Public health.

Political leadership.

And most of all, people.

We’re in this together, to do the right things with calm and protect the citizens of the world. It’s doable.

I thank you.

This is **Exhibit "15"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

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Signature

Government of Canada / Gouvernement du Canada

Government of Canada advises Canadians to avoid non-essential travel abroad

From: Global Affairs Canada

News release

March 13, 2020 - Ottawa, Ontario - Global Affairs Canada

The Honourable François-Philippe Champagne, Minister of Foreign Affairs, today announced that Canada has issued an official global travel advisory to avoid non-essential travel abroad.

In an attempt to limit the spread of the coronavirus (COVID-19), many governments have implemented special entry and exit and movement restrictions for their territories. New restrictions could be imposed, and could severely disrupt Canadians' travel plans.

As a result, the Government of Canada is advising Canadians to avoid non-essential travel outside of Canada until further notice.

Canadians currently outside the country should find out what commercial options are still available and consider returning to Canada earlier than planned if these options are becoming more limited.

We encourage Canadians abroad to register with the Registration of Canadians Abroad service.

Canadians abroad in need of emergency consular assistance can call Global Affairs Canada's 24/7 Emergency Watch and Response Centre in Ottawa at +1 613-996-8885 (collect calls are accepted where available) or email sos@international.gc.ca.

Quotes

"We are monitoring the situation abroad to provide credible and timely information to Canadians to help them make well-informed decisions regarding their travel. We also continue to work around the clock to provide assistance and consular services to Canadians abroad affected by COVID-19."

- François-Philippe Champagne, Minister of Foreign Affairs

Associated links

- Travel Advice and Advisories
- Canadian travellers: Avoid all cruise ship travel due to COVID-19
- Coronavirus disease (COVID-19): Outbreak update
- Coronavirus disease (COVID-19): Resources for Canadian businesses

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Search for related information by keyword: GV Government and Politics |

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Global Affairs Canada | Canada | Canada and the world | general public | news releases | Hon. François-Philippe Champagne

Date modified:
2020-03-13

This is **Exhibit "16"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

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Signature

Canada closes borders, says people should stay at home to stop virus- PM Trudeau

REUTERS

REUTERS

March 16, 2020
2:06 PM EDT

Filed under
PMN Health

OTTAWA — Canada closed its borders to all foreign nationals, except U.S. citizens, on Monday, and Prime Minister Justin Trudeau urged people to stay at home to help stem the spread of the new coronavirus.

"We will be denying entry into Canada to people who are not Canadian citizens or permanent residents," Trudeau told reporters at a news conference outside his home, where he is under quarantine. (Reporting by Kelsey Johnson and David Ljunggren, writing by Steve Scherer Editing by Chizu Nomiyama)

RELATED STORIES:

Trudeau remaining in isolation longer despite wife recovering from COVID-19

Canada faces 'critical week' in coronavirus crisis, death toll jumps

Canada's Trudeau wants to recall MPs to back massive coronavirus aid package

This is **Exhibit "17"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

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Signature

Route updates

March 22, 2020

We will continue to operate domestic and international flights with a reduced schedule for the month of April. Find below a full list of operating routes. The schedule is subject to change, as we continue to monitor demand and government restrictions on travel.

Our operating schedule from April 1 to April 30

North America

Within Canada

Route	Frequencies
Calgary - Castlegar	6 flights per week
Calgary - Edmonton	4 flights per day
Calgary - Fort McMurray	3 flights per day
Calgary - Grande Prairie	2 flights per day

Route	Frequencies
Calgary - Kelowna	1 flight per day
Calgary - Ottawa	1 flight per day
Calgary - Regina	2 flights per day
Calgary - Saskatoon	2 flights per day
Calgary - Winnipeg	2 flights per day
Deer Lake - Goose Bay	1 flight per day
Edmonton - Yellowknife	1 flight per day
Goose Bay - Gander	1 flight per day
Goose Bay - Wabush	1 flight per day
Halifax - Charlottetown	4 flights per day
Halifax - Fredericton	4 flights per day
Halifax - Goose Bay	1 flight per day

Route	Frequencies
Halifax - Moncton	3 flights per day
Halifax - St. John	4 flights per day
Halifax - St. John's	2 flights per day
Halifax - Sydney	2 flights per day
Montreal - Bagotville	1 flight per day
Montreal - Calgary	2 flights per day
Montreal - Charlottetown	1 flight per day
Montreal - Edmonton	2 flights per day
Montreal - Fredericton	2 flights per day
Montreal - Halifax	3 flights per day
Montreal - Moncton	2 flights per day
Montreal - Ottawa	5 flights per day

Route	Frequencies
Montreal - Quebec City	4 flights per day
Montreal - Sept Iles	1 flight per day
Montreal - St. John	2 flights per day
Montreal - St. John's	2 flights per day
Montreal - Toronto City	5 flights per day
Montreal - Vancouver	2 flights per day
Montreal - Winnipeg	1 flight per day
Ottawa - Edmonton	1 flight per day
Ottawa - Fredericton	6 flights per week
Ottawa - Halifax	2 flights per day
Sept Iles - Wabush	1 flight per day
St. John's - Deer Lake	3 flights per day

Route	Frequencies
St. John's - Gander	3 flights per day
St. John's - Goose Bay	1 flight per day
Toronto - Calgary	5 flights per day
Toronto - Edmonton	4 flights per day
Toronto - Halifax	4 flights per day
Toronto - London	3 flights per day
Toronto - Moncton	2 flights per day
Toronto - Montreal	9 flights per day
Toronto - Ottawa	8 flights per day
Toronto - Regina	2 flights per day
Toronto - Saskatoon	2 flights per day

Route	Frequencies
Toronto - Sault Ste. Marie	3 flights per day
Toronto - St. John's	2 flights per day
Toronto - Sudbury	1 flight per day
Toronto - Thunder Bay	2 flights per day
Toronto - Timmins	3 flights per day
Toronto - Vancouver	6 flights per day
Toronto - Windsor	3 flights per day
Toronto - Winnipeg	4 flights per day
Toronto - Quebec City	2 flights per day
Vancouver - Calgary	5 flights per day
Vancouver - Edmonton	4 flights per day
Vancouver - Fort St. John	2 flights per day

Route	Frequencies
Vancouver - Kelowna	4 flights per day
Vancouver - Nanaimo	3 flights per day
Vancouver - Ottawa	1 flight per day
Vancouver - Prince George	2 flights per day
Vancouver - Regina	1 flight per day
Vancouver - Saskatoon	1 flight per day
Vancouver - Terrace	2 flights per day
Vancouver - Victoria	5 flights per day
Vancouver - Whitehorse	1 flight per day
Vancouver - Winnipeg	1 flight per day
Winnipeg - Regina	1 flight per day

To U.S

Route	Frequencies
Montreal - Boston	3 flights per day
Montreal - Chicago	3 flights per day
Montreal - Fort Lauderdale	1 flight per day
Montreal - Houston	1 flight per day
Montreal - Los Angeles	1 flight per day
Montreal - New York/LaGuardia	3 flights per day
Montreal - Newark	2 flights per day
Montreal - Orlando	1 flight per day
Montreal - Washington/Dulles	1 flight per day
Montreal - Washington/National	2 flights per day

Route	Frequencies
Toronto - Boston	3 flights per day
Toronto - Chicago	3 flights per day
Toronto - Denver	2 flights per day
Toronto - Fort Lauderdale	1 flight per day
Toronto - Houston	2 flights per day
Toronto - Los Angeles	2 flights per day
Toronto - New York/LaGuardia	3 flights per day
Toronto - Newark	3 flights per day
Toronto - Orlando	1 flight per day
Toronto - San Francisco	2 flights per day
Toronto - Washington/Dulles	2 flights per day
Toronto - Washington/National	3 flights per day

Route	Frequencies
Vancouver - Denver	1 flight per day
Vancouver - Los Angeles	2 flights per day
Vancouver - San Francisco	2 flights per day
Vancouver - Seattle	3 flights per day

Atlantic

Route	Frequencies
Montreal - Frankfurt	7 flights per week
Montreal - London	3 flights per week
Montreal - Paris	7 flights per week
Toronto - Delhi	7 flights per week from April 1-19 5 flights per week from April 20-29

Route	Frequencies
Toronto - Frankfurt	7 flights per week
Toronto - London	7 flights per week
Vancouver - Delhi	6 flights per week from April 1-19 4 flights per week from April 20-29
Vancouver - London	4 flights per week

Pacific

Route	Frequencies
Vancouver - Hong Kong	3 flights per week
Vancouver - Tokyo/Narita	3 flights per week

Caribbean / Mexico

Route	Frequencies
Toronto - Barbados	2 flights per week
Toronto - Cancun	2 flights per week
Toronto - Mexico City	4 flights per week

We continue to adapt our schedule and capacity in response to COVID-19 and have postponed launches or extended the temporary suspension of several routes. Find below a full list of route updates.

Air Canada will continue to monitor this evolving situation closely in consultation with the Public Health Agency of Canada, Transport Canada and Global Affairs and will adjust its schedule as appropriate.

March 23 to 31 operating schedule and route suspensions

North America

Within Canada

Affected route	Route update
Calgary - Kamloops	Temporary suspension from March 23 until April 30
Calgary - Nanaimo	Temporary suspension from March 23 until April 30
Calgary - Victoria	Temporary suspension from March 23 until April 30
Calgary - Yellowknife	Temporary suspension from March 23 until April 30
Edmonton – Fort McMurray	Temporary suspension from March 23 until April 30
Edmonton – Grande Prairie	Temporary suspension from March 23 until April 30
Edmonton – Kelowna	Temporary suspension from March 23 until April 30
Edmonton - Winnipeg	Remaining operations from Winnipeg: daily flights until March 31

Affected route	Route update
	Temporary suspension from April 1 until April 30
Halifax - Deer Lake	Remaining operations from Deer Lake: daily flights until March 31 Temporary suspension from April 1 until April 30
Halifax - Gander	Temporary suspension from March 23 until April 30
Montreal - Baie Comeau	Temporary suspension from March 23 until April 30
Montreal – Bathurst	Temporary suspension from March 23 until April 30
Montreal – London	Temporary suspension from March 23 until April 30
Montreal - Windsor	Temporary suspension from March 21 until April 30
Montreal – Val d'Or – Rouyn-Noranda	Remaining operations from Val d'Or – Rouyn-Noranda: daily flights until March 31 Temporary suspension from April 1 until April 30

Affected route	Route update
Ottawa – Quebec City	Temporary suspension from March 23 until April 30
Ottawa - Moncton	Temporary suspension from March 20 until April 30
Ottawa - Winnipeg	Temporary suspension from March 23 until April 30
Ottawa – London	Temporary suspension from March 22 until April 30
Quebec City – Gaspé – Iles-de-la-Madeleine	Remaining operations from Gaspé – Iles-de-la-Madeleine: daily flights until March 31 Temporary suspension from April 1 until April 30
Quebec City – Sept Iles	Remaining operations from Sept Iles: daily flights until March 31 Temporary suspension from April 1 until April 30
Toronto – Charlottetown	Remaining operations from Charlottetown: daily flights until March 31 Temporary suspension from April 1 until April 30

Affected route	Route update
Toronto - Deer Lake	Remaining operations from Deer Lake: daily flights until March 31 Temporary suspension from April 1 until April 30
Toronto - Fredericton	Remaining operations from Fredericton: daily flights until March 31 Temporary suspension from April 1 until April 30
Toronto - Kelowna	Temporary suspension from March 23 until April 30
Toronto - Kingston	Temporary suspension from March 23 until April 30
Toronto - Mont-Tremblant	Temporary suspension from March 23 until April 30
Toronto - North Bay	Temporary suspension from March 23 until April 30
Toronto - Sarnia	Temporary suspension from March 23 until April 30
Toronto - St. John	Temporary suspension from March 23 until April 30

Affected route	Route update
Toronto - Sydney, Nova Scotia	Temporary suspension from March 23 until April 30
Toronto - Victoria	Temporary suspension from March 23 until April 30
Vancouver - Castlegar	Remaining operations from Castlegar: daily flights until March 31 Temporary suspension from April 1 until April 30
Vancouver - Comox	Remaining operations from Comox: daily flights until March 31 Temporary suspension from April 1 until April 30
Vancouver - Cranbrook	Remaining operations from Cranbrook: daily flights until March 31 Temporary suspension from April 1 until April 30
Vancouver - Kamloops	Remaining operations from Kamloops: daily flights until March 31 Temporary suspension from April 1 until April 30
Vancouver - Penticton	Remaining operations from Penticton: daily flights until March 31

Affected route	Route update
	Temporary suspension from April 1 until April 30
Vancouver - Prince Rupert	Remaining operations from Prince Rupert: daily flights until March 31 Temporary suspension from April 1 until April 30
Vancouver – Sandpit	Temporary suspension from March 23 until April 30
Vancouver - Smithers	Remaining operations from Smithers: daily flights until March 31 Temporary suspension from April 1 until April 30
Vancouver - Yellowknife	Remaining operations from Yellowknife: daily flights until March 31 Temporary suspension from April 1 until April 30

To U.S

Affected route	Route update
Calgary - Houston	Temporary suspension from March 23 until April 30

Affected route	Route update
Calgary - Kahului / Maui	Remaining operation from Kahului/Maui: March 23 Temporary suspension from March 24 until April 30
Calgary - Las Vegas	Temporary suspension from March 23 until April 30
Calgary - Los Angeles	Temporary suspension from March 23 until April 30
Calgary - Newark	Remaining operations from Newark: March 27, 28, 29, 31 Temporary suspension from April 1 until April 30
Calgary - Phoenix	Temporary suspension from March 22 until April 30
Calgary - Portland	Temporary suspension from March 23 until April 30
Calgary - San Francisco	Temporary suspension from March 23 until April 30
Edmonton - San Francisco	Temporary suspension from March 23 until April 30

Affected route	Route update
Halifax - Boston	Remaining operations from Boston: March 24, 25, 26, 27, 28, 29, 31 Temporary suspension from April 1 until April 30
Halifax - Orlando	Temporary suspension from March 23 until April 30
Halifax - Tampa	Remaining operations from Tampa: March 23, 24 Temporary suspension from March 25 until April 30
Montreal - Baltimore-Washington	Temporary suspension from March 23 until April 30
Montreal - Dallas-Fort Worth	Temporary suspension from March 23 until April 30
Montreal - Fort Myers	Temporary suspension from March 22 until April 30
Montreal - Hartford	Temporary suspension from March 23 until April 30
Montreal - Las Vegas	Temporary suspension from March

Affected route	Route update
	23 until April 30
Montreal - Miami	Temporary suspension from March 22 until April 30
Montreal - Philadelphia	Temporary suspension from March 23 until April 30
Montreal - Phoenix	Temporary suspension from March 23 until April 30
Montreal - Pittsburgh	Temporary suspension from March 23 until April 30
Montreal - Raleigh–Durham	Temporary suspension from March 23 until April 30
Montreal - San Francisco	Temporary suspension from March 23 until April 30
Montreal - Tampa	Remaining operations from Tampa: March 23, 24 Temporary suspension from March 25 until April 30
Montreal - West Palm Beach	Temporary suspension from March 23 until April 30

Affected route	Route update
Ottawa - Boston	Temporary suspension from March 23 until April 30
Ottawa - Fort Lauderdale	Remaining operations from Fort Lauderdale: March 23, 24 Temporary suspension from March 25 until April 30
Ottawa - Newark	Remaining operations from Newark: daily flights until March 31 Temporary suspension from April 1 until April 30
Ottawa - Orlando	Temporary suspension from March 22 until April 30
Ottawa - Tampa	Temporary suspension from March 22 until April 30
Ottawa - Washington DC, Reagan Washinton National (DCA)	Temporary suspension from March 23 until April 30
Toronto - Atlanta	Remaining operations from Atlanta: daily flights until March 31 Temporary suspension from April 1 until April 30

Affected route	Route update
Toronto - Austin	Temporary suspension from March 23 until April 30
Toronto - Baltimore-Washington	Temporary suspension from March 23 until April 30
Toronto - Charlotte	Temporary suspension from March 23 until April 30
Toronto - Cincinnati	Temporary suspension from March 23 until April 30
Toronto - Cleveland	Temporary suspension from March 23 until April 30
Toronto - Columbus	Temporary suspension from March 23 until April 30
Toronto - Dallas-Fort Worth	Temporary suspension from March 23 until April 30
Toronto - Detroit	Temporary suspension from March 23 until April 30
Toronto - Fort Myers	Remaining operations from Fort Myers: March 23, 24, 25

Affected route	Route update
	Temporary suspension from March 26 until April 30
Toronto - Hartford	Temporary suspension from March 23 until April 30
Toronto - Honolulu	Temporary suspension from March 22 until April 30
Toronto - Indianapolis	Temporary suspension from March 23 until April 30
Toronto - Kansas City	Temporary suspension from March 23 until April 30
Toronto - Las Vegas	Remaining operations from Las Vegas: daily flights until March 31 Temporary suspension from April 1 until April 30
Toronto - Memphis	Temporary suspension from March 23 until April 30
Toronto - Miami	Remaining operations from Miami: March 23 Temporary suspension from March 24 until April 30

Affected route	Route update
Toronto - Milwaukee	Temporary suspension from March 23 until April 30
Toronto - Minneapolis	Temporary suspension from March 23 until April 30
Toronto - Nashville	Temporary suspension from March 23 until April 30
Toronto - New Orleans	Temporary suspension from March 23 until April 30
Toronto - Palm Springs	Remaining operations from Palm Springs: March 23, 24, 25 Temporary suspension from March 26 until April 30
Toronto - Philadelphia	Remaining operations from Philadelphia: daily flights until March 31 Temporary suspension from April 1 until April 30
Toronto - Phoenix	Remaining operations from Phoenix: daily flights until March 31 Temporary suspension from April 1 until April 30

Affected route	Route update
Toronto - Pittsburgh	Temporary suspension from March 23 until April 30
Toronto - Raleigh–Durham	Remaining operations from Raleigh: daily flights until March 31 Temporary suspension from April 1 until April 30
Toronto - San Diego	Temporary suspension from March 22 until April 30
Toronto - Sarasota	Remaining operations from Sarasota: March 23, 24, 25 Temporary suspension from March 26 until April 30
Toronto - Savannah	Temporary suspension from March 23 until April 30
Toronto - Seattle	Temporary suspension from March 23 until April 30
Toronto - St. Louis	Temporary suspension from March 23 until April 30
Toronto - Tampa	Remaining operations from Tampa: daily flights until March 31

Affected route	Route update
	Temporary suspension from April 1 until April 30
Toronto - West Palm Beach	Remaining operations from West Palm Beach: March 23, 24 Temporary suspension from March 25 until April 30
Vancouver - Chicago	Temporary suspension from March 23 until April 30
Vancouver - Dallas-Fort Worth	Temporary suspension from March 23 until April 30
Vancouver - Honolulu	Remaining operations from Honolulu: March 23, 24 Temporary suspension from March 25 until April 30
Vancouver - Kahului / Maui	Remaining operations from Kahului/Maui: March 23, 24 Temporary suspension from March 25 until April 30
Vancouver - Kona	Temporary suspension from March 22 until April 30
Vancouver - Las Vegas	Remaining operations from Las Vegas: daily flights until March 29

Affected route	Route update
	Temporary suspension from April 1 until April 30
Vancouver - Newark	Remaining operations from Newark: daily flights until March 30 Temporary suspension from April 1 until April 30
Vancouver - Palm Springs	Remaining operations from Palm Springs: March 23, 24, 25 Temporary suspension from March 26 until April 30
Vancouver - Phoenix	Remaining operations from Phoenix: daily flights until March 31 Temporary suspension from April 1 until April 30
Vancouver - Portland	Temporary suspension from March 23 until April 30
Vancouver - Sacramento	Remaining operations from Sacramento: March 23, 24, 26, 27, 28, 29, 30, 31 Temporary suspension from April 1 until April 30
Vancouver - San Diego	Remaining operations fromSan Diego: daily flights until March 30

Affected route	Route update
	Temporary suspension from April 1 until April 30
Vancouver - San Jose, California	Temporary suspension from March 23 until April 30

Atlantic

Affected route	Route update
Calgary- Frankfurt	Temporary suspension from March 22 until April 30
Calgary - London	Remaining operation from London: March 23 Temporary suspension from March 24 until April 30
Montreal- Athens	Seasonal startup delayed until May 1
Montreal- Barcelona	Seasonal startup delayed until May 1
Montreal- Bordeaux	Full summer suspension

Affected route	Route update
Montreal- Brussels	Remaining operations from Brussels: March 23, 24, 25, 26, 27, 28 Temporary suspension from March 29 until April 30
Montreal- Casablanca	Temporary suspension from March 17 until April 30
Montreal- Geneva	Temporary suspension from March 21 until April 30
Montreal- Lyon	Temporary suspension from March 15 until April 30
Montreal- Marseille	Full summer suspension
Montreal- Rome	Temporary suspension from March 9 until April 30
Montreal- Venice	Full summer suspension
Ottawa - London (Heathrow)	Temporary suspension from March 17 to April 30.
Toronto - Amsterdam	Remaining operations from Amsterdam: March 23, 25

Affected route	Route update
	Temporary suspension from March 26 until April 30
Toronto - Athens	Seasonal startup delayed until May 1
Toronto - Barcelona	Seasonal startup delayed until May 1
Toronto - Brussels	New route launch postponed to June 3
Toronto - Budapest	Seasonal startup delayed until May 2
Toronto - Copenhagen	Temporary suspension from March 17 until April 30
Toronto - Delhi	Temporary suspension from March 22 until March 27
Toronto - Dubai	Temporary suspension from March 23 until May 4. Last flight from Dubai departs on March 23.
Toronto - Dublin	Remaining operations from Dublin: March 23, 26, 28 Temporary suspension from March 29 until April 30
Toronto - Lisbon	Seasonal startup delayed until May 1

Affected route	Route update
Toronto - Madrid	Temporary suspension from March 19 until April 30
Toronto - Milan	Seasonal startup delayed until June 4
Toronto - Mumbai	Temporary suspension from March 22 to March 28
Toronto - Munich	Remaining operations from Munich: March 23, 25, 27, 28 Temporary suspension from March 29 until April 30
Toronto - Paris	Temporary suspension from March 18 until April 30
Toronto - Rome	Temporary suspension from March 11 until April 30
Toronto - Tel Aviv	Temporary suspension from March 18 until April 30
Toronto - Vienna	Temporary suspension from March 19 until April 30
Toronto - Zurich	Remaining operations from Zurich: March 23, 25, 27

Affected route	Route update
	Temporary suspension from March 28 until April 30
Vancouver- Delhi	Temporary suspension from March 22 until March 27

Pacific

Affected route	Route update
Montreal - Shanghai	Temporary suspension from February 3 until April 30
Montreal - Tokyo (Narita)	Remaining operations from Tokyo (Narita): March 25, 27 Temporary suspension from March 28 until April 30
Toronto - Beijing	Temporary suspension from February 3 until April 30
Toronto - Hong Kong	Temporary suspension from March 2 until May 30

Affected route	Route update
Toronto - Seoul (Incheon)	Temporary suspension from March 17 until May 31
Toronto - Shanghai	Temporary suspension from February 3 until April 30
Toronto - Tokyo (Haneda)	Remaining operations from Tokyo (Haneda): March 24, 26, 28 Temporary suspension from March 29 until April 30
Vancouver - Beijing	Temporary suspension from February 3 until April 30
Vancouver - Brisbane	Remaining operations from Brisbane: March 24, 25, 26, 27, 28 Temporary suspension from March 29 until April 30
Vancouver - Melbourne	Remaining operations from Melbourne: March 23, 25, 27, 29 Temporary suspension from March 30 until April 30
Vancouver - Seoul (Incheon)	Remaining operations from Seoul: March 23, 24, 27, 28, 30, 31 Temporary suspension from April 1 until April 30

Affected route	Route update
Vancouver - Shanghai	Temporary suspension from February 3 until April 30
Vancouver - Sydney, Australia	Remaining operations from Sydney: March 23, 25, 26, 27, 28, 30, 31 and April 1-12. Temporary suspension from April 13 until April 30
Vancouver - Taipei	Remaining operations from Taipei: March 23, 24, 25, 28 Temporary suspension from March 29 until April 30

South America

Affected route	Route update
Montreal - Lima	Temporary suspension from March 18 until April 30
Santiago - Buenos Aires	Remaining operations from Buenos Aires: March 23, 25, 27 Temporary suspension from March 28 until April 30

Affected route	Route update
Toronto - Bogotá	Temporary suspension from March 23 until April 30
Toronto - Cartagena	Temporary suspension from March 22 until April 30
Toronto - Lima	Temporary suspension from March 17 until April 30
Toronto - Quito	Temporary suspension from March 16 until April 30
Toronto - Santiago / Buenos Aires	Remaining operations from Santiago / Buenos Aires: March 23, 25, 27 Temporary suspension from March 28 until April 30
Toronto - São Paulo	Remaining operations from São Paulo: March 23, 24, 25, 26, 27 Temporary suspension from March 28 until April 30

Caribbean / Mexico / Central America

Affected route	Route update
Calgary - Cancun	Temporary suspension from March 22 until April 30
Calgary - Puerto Vallarta	Temporary suspension from March 17 until April 30
Calgary - San José del Cabo	Temporary suspension from March 17 until April 30
Halifax - Cancun	Temporary suspension from March 23 until April 30
Halifax - Cayo Coco	Temporary suspension from March 21 until April 30
Halifax - Punta Cana	Temporary suspension from March 22 until April 30
Montreal - Barbados	Remaining operation from Barbados: March 23 Temporary suspension from March 24 until April 30
Montreal - Cancun	Remaining operations from Cancun: March 23, 24, 25, 26, 27, 28

Affected route	Route update
	Temporary suspension from March 29 until April 30
Montreal - Cayo Coco	Temporary suspension from March 23 until April 30
Montreal - Cozumel	Temporary suspension from March 21 until April 30
Montreal - Curaçao	Temporary suspension from March 21 until April 30
Montreal - Fort- de-France	Remaining operations from Fort-de-France: March 24 Temporary suspension from March 25 until April 30
Montreal - Holguín	Temporary suspension from March 20 until April 30
Montreal - Ixtapa	Remaining operation from Ixtapa: March 28 Temporary suspension from March 29 until April 30
Montreal - Liberia	Remaining operation from Liberia: March 25

Affected route	Route update
	Temporary suspension from March 26 until April 30
Montreal - Montego Bay	Temporary suspension from March 21 until April 30
Montreal - Nassau	Temporary suspension from March 22 until April 30
Montreal - Pointe-à-Pitre	Remaining operation from Pointe-à-Pitre: March 23 Temporary suspension from March 24 until April 30
Montreal - Providenciales	Temporary suspension from March 20 until April 30
Montreal - Puerto Plata	Temporary suspension from March 23 until April 30
Montreal - Puerto Vallarta	Remaining operations from Puerto Vallarta: March 25, 27, 29 Temporary suspension from March 30 until April 30
Montreal - Punta Cana	Temporary suspension from March 23 until April 30

Affected route	Route update
Montreal - Samaná	Temporary suspension from March 22 until April 30
Montreal - San José	Remaining operation from San José: March 23 Temporary suspension from March 24 until April 30
Montreal - San Juan	Temporary suspension from March 16 until April 30
Montreal - San Salvador (Bahamas)	Temporary suspension from March 18 until April 27
Montreal - Santa Clara	Temporary suspension from March 22 until April 30
Montreal - Varadero	Temporary suspension from March 22 until April 30
Ottawa - Cancun	Temporary suspension from March 21 until April 30
Ottawa - Punta Cana	Temporary suspension from March 22 until April 30

Affected route	Route update
Ottawa - Varadero	Temporary suspension from March 17 until April 30
Quebec City - Cancun	Temporary suspension from March 22 until April 30
Quebec City - Punta Cana	Temporary suspension from March 16 until April 30
Toronto - Antigua	Remaining operations from Antigua: March 24, 26 Temporary suspension from March 27 until April 30
Toronto - Aruba	Temporary suspension from March 23 until April 30
Toronto - Barbados	Remaining operations from Barbados: March 23, 24, 25, 26, 28, 30, 31 Flights on Saturdays and Sundays in April
Toronto - Belize City	Remaining operation from Belize City: March 23 Temporary suspension from March 24 until April 30
Toronto - Bermuda	Temporary suspension from March 21

Affected route	Route update
	until April 30
Toronto - Cayo Coco	Temporary suspension from March 23 until April 30
Toronto - Cozumel	Temporary suspension from March 22 until April 30
Toronto - Curaçao	Remaining operations from Curaçao: March 29, 30 Temporary suspension from March 31 until April 30
Toronto - George Town	Remaining operation from George Town: March 28 Temporary suspension from March 29 until April 30
Toronto - Grand Cayman	Temporary suspension from March 22 until April 30
Toronto - Grenada	Remaining operations from Grenada: March 24, 26, 28, 31 Temporary suspension from April 1 until April 30
Toronto - Havana	Remaining operations from Havana: March 23, 24, 25

Affected route	Route update
	Temporary suspension from March 26 until April 30
Toronto - Holguín	Temporary suspension from March 21 until April 30
Toronto - Huatulco	Temporary suspension from March 23 until April 30
Toronto - Ixtapa	Remaining operation from Ixtapa: March 28 Temporary suspension from March 29 until April 30
Toronto - Kingston	Remaining operations from Kingston: March 23, 24, 25, 27 Temporary suspension from March 28 until April 30
Toronto - Liberia	Remaining operations from Liberia: March 24, 25 Temporary suspension from March 26 until April 30
Toronto - Montego Bay	Remaining operations from Montego Bay: March 24, 25 Temporary suspension from March 26 until April 30

Affected route	Route update
Toronto - Nassau	Remaining operations from Nassau: March 23, 26, 27 Temporary suspension from March 28 until April 30
Toronto - Panama City	Temporary suspension from March 23 until April 30
Toronto - Port of Spain	Temporary suspension from March 23 until April 30
Toronto - Providenciales	Remaining operation from Providenciales: March 23 Temporary suspension from March 24 until April 30
Toronto - Puerto Plata	Temporary suspension from March 22 until April 30
Toronto - Puerto Vallarta	Remaining operations from Puerto Vallarta: daily flights until April 11 Temporary suspension from April 12 until April 30
Toronto - Punta Cana	Temporary suspension from March 23 until April 30

Affected route	Route update
Toronto - Samaná	Temporary suspension from March 23 until April 30
Toronto - San José del Cabo	Remaining operations from San José del Cabo: March 23, 25 Temporary suspension from March 26 until April 30
Toronto - San José	Remaining operations from San José: daily flights until March 31 Temporary suspension from April 1 until April 30
Toronto - San Juan	Temporary suspension from March 23 until April 30
Toronto - Santa Clara	Temporary suspension from March 20 until April 30
Toronto - St. Kitts	Remaining operation from St. Kitts: March 24 Temporary suspension from March 25 until April 30
Toronto - St. Lucia	Remaining operations from St. Lucia: March 23 Temporary suspension from March 24 until April 30

Affected route	Route update
Toronto - St. Maarten	Remaining operation from St. Maarten: March 28 Temporary suspension from March 29 until April 30
Toronto - St. Vincent	Remaining operations from St. Vincent: March 26 Temporary suspension from March 27 until April 30
Toronto - Varadero	Temporary suspension from March 23 until April 30
Vancouver - Cancun	Remaining operation from Cancun: March 23 Temporary suspension from March 24 until April 30
Vancouver - Ixtapa	Remaining operations from Ixtapa: March 25, 28 Temporary suspension from March 29 until April 30
Vancouver- Mexico City	Remaining operations from Mexico City: daily flights until March 31 Temporary suspension from April 1 until April 30
Vancouver - Puerto Vallarta	Remaining operations from Puerto Vallarta: March 24, 25, 27, 29

Affected route	Route update
Vancouver - San José del Cabo	Remaining operations from San José del Cabo: March 23, 26, 28 Temporary suspension from March 29 until April 30
Winnipeg - Cancun	Temporary suspension from March 23 until April 30

More information

My flight has been cancelled. What are my options?

If your flight has been cancelled, and you want to travel in the next few days, please contact your travel agent or call us at 1-888-247-2262 (click here for international and other numbers). For Aeroplan redemption bookings, please call 1-800-361-5373.

I'm booked on a flight to/from one of the above destinations, but my flight has NOT been cancelled, can I rebook my flight or get a refund?

- Customers whose flights have been cancelled will be notified.
- If you wish to rebook, please contact your travel agent or call us at 1-888-247-2262 (click here for international and other numbers) to discuss your options. For Aeroplan redemption bookings, please call 1-800-361-5373.
- Details regarding refund eligibility and options can be found in your flight booking. Enter your information here to access it.

This is **Exhibit "18"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

_____

Signature

Route updates

April 13, 2020

We're working hard to bring Canadians home safely.

The schedule is subject to change, as we continue to monitor this evolving situation closely in consultation with the Public Health Agency of Canada, Transport Canada and Global Affairs.

Special flights information

Air Canada, in collaboration with the Canadian Government, operates flights from Morocco, Ecuador, Peru, Algeria, Spain, Colombia and Argentina to bring Canadians back home. The details are:

Completed flights:

- Algiers-Montreal: March 31& April 4, 10
- Barcelona-Montreal: March 25
- Bogota-Toronto: April 3
- Buenos Aires-Toronto: April 5
- Casablanca-Montreal: March 21, 23, & 25
- Lima-Toronto: March 24, 26, 27 & April 1, 2, 4
- Quito-Toronto: March 25, 27, 29, & 31

Upcoming flights:

- Algiers-Montreal: April 17

- Lima-Toronto : April 16

We will continue to operate domestic and international flights with a reduced schedule. Find below a full list of operating routes until May 31, 2020. The schedule is subject to change, as we continue to monitor demand and government restrictions on travel.

Operating schedule until May 31

North America

Within Canada

Route	April Frequencies	May Frequencies
Calgary - Edmonton	1 flight per day	1 flight per day
Calgary - Fort McMurray	3 flights per week	4 flights per week
Calgary - Grande Prairie	3 flights per week	3 flights per week
Calgary - Regina		4 flights per week
Calgary - Saskatoon		4 flights per week

Route	April Frequencies	May Frequencies
Calgary - Winnipeg	3 flights per week	4 flights per week
Edmonton - Yellowknife	3 flights per week	4 flights per week
Goose Bay - Wabush		1 flight per day
Halifax - St. John's	4 flights per week	1 flight per day
Montreal - Calgary		1 flight per day
Montreal - Charlottetown	5 flights per week	1 flight per day
Montreal - Fredericton	1 flight per day	2 flights per day
Montreal - Halifax	5 flights per week	1 flight per day
Montreal - Ottawa	2 flights per day	3 flights per day
Montreal - Quebec City	1 flight per day	3 flights per day
Montreal - St. John's	5 flights per week	1 flight per day

Route	April Frequencies	May Frequencies
Montreal - Vancouver	5 flights per week	2 flights per day
Toronto - Calgary	2 flights per day	4 flights per day
Toronto - Edmonton	1 flight per day	2 flights per day
Toronto - Halifax	1 flight per day	2 flights per day
Toronto - Montreal	up to 5 flights per day	up to 7 flights per day
Toronto - Ottawa	up to 5 flights per day	up to 6 flights per day
Toronto - Quebec City		1 flight per day
Toronto - Regina	4 flights per week	1 flight per day
Toronto - Saskatoon	4 flights per week	1 flight per day
Toronto - St. John's	1 flight per day	1 flight per day
Toronto - Sudbury	up to 7 flights per week	1 flight per day

Route	April Frequencies	May Frequencies
Toronto - Thunder Bay	5 flights per week	5 flights per week
Toronto - Timmins	4 flights per week	4 flights per week
Toronto - Vancouver	up to 3 flights per day	up to 4 flights per day
Toronto - Winnipeg	1 flight per day	1 flight per day
Vancouver - Calgary	2 flights per day	3 flights per day
Vancouver - Edmonton	2 flights per day	2 flights per day
Vancouver - Kelowna	1 flight per day	3 flights per day
Vancouver - Nanaimo	1 flight per day	2 flights per day
Vancouver - Prince George	3 flights per week	4 flights per week
Vancouver - Regina	4 flights per week	1 flight per day

Route	April Frequencies	May Frequencies
Vancouver - Saskatoon	4 flights per week	1 flight per day
Vancouver - Terrace	4 flights per week	4 flights per week
Vancouver - Victoria	2 flights per day	2 flights per day
Vancouver - Whitehorse	3 flights per week	4 flights per week
Vancouver - Winnipeg	5 flights per week	6 flights per week

To U.S

Route	April Frequencies	May Frequencies
Montreal - Boston		1 flight per day
Montreal - Chicago	5 flights per week	1 flight per day
Montreal - Fort Lauderdale	3 flights per week	3 flights per week

Route	April Frequencies	May Frequencies
Montreal - Los Angeles		3 flights per week
Montreal - New York/LaGuardia		1 flight per day
Montreal - Newark		1 flight per day
Montreal - Orlando	3 flights per week	2 flights per week
Montreal - Washington/National		1 flight per day
Toronto - Boston	1 flight per day	2 flights per day
Toronto - Chicago	1 flight per day	2 flights per day
Toronto - Denver		1 flight per day
Toronto - Fort Lauderdale	3 flights per week	3 flights per week
Toronto - Houston	4 flights per	1 flight per day

Route	April Frequencies	May Frequencies
	week	
Toronto - Los Angeles	4 flights per week	1 flight per day
Toronto - New York/LaGuardia		1 flight per day
Toronto - Newark		1 flight per day
Toronto - Orlando	3 flights per week	3 flights per week
Toronto - San Francisco	3 flights per week	1 flight per day
Toronto - Washington/Dulles	1 flight per day	1 flight per day
Toronto - Washington/National		1 flight per day
Vancouver - Los Angeles	1 flight per day	10 flights per week

Route	April Frequencies	May Frequencies
Vancouver - San Francisco	1 flight per day	10 flights per week
Vancouver - Seattle	1 flight per day	1 flight per day

Atlantic

Route	April Frequencies	May Frequencies
Montreal - Brussels		4 flights per week
Montreal - Frankfurt	4 flights per week	1 flight per day
Montreal - London	2 flights per week	5 flights per week
Montreal - Paris	up to 7 flights per week	1 flight per day
Toronto - Frankfurt	7 flights per week	1 flight per day

Route	April Frequencies	May Frequencies
Toronto - London	7 flights per week	2 flights per day
Toronto - Zurich		4 flights per week
Vancouver - London	3 flights per week	4 flights per week

Pacific

Route	April Frequencies	May Frequencies
Toronto - Tokyo/Haneda		4 flights per week
Vancouver - Hong Kong	2 flights per week	5 flights per week
Vancouver - Seoul/Incheon		4 flights per week
Vancouver - Tokyo/Narita		5 flights per

Route	April Frequencies	May Frequencies
		week

South America

Route	April Frequencies	May Frequencies
Toronto – Bogota		3 flights per week

Caribbean / Mexico

Route	April Frequencies	May Frequencies
Montreal - Fort- de-France		1 flight per week
Montreal - Pointe-à-Pitre		1 flight per week
Toronto - Barbados	1 flight per week	1 flight per week
Toronto - Mexico City	4 flights per week	1 flight per day

Route	April Frequencies	May Frequencies

We continue to adapt our schedule and capacity in response to COVID-19 and have postponed launches or extended the temporary suspension of several routes. Find below a full list of route updates.

Route suspensions

North America

Within Canada

Affected route	Route update
Calgary - Castlegar	Temporary suspension from March 23 until May 31
Calgary - Kamloops	Temporary suspension from March 23 until May 31
Calgary - Kelowna	Temporary suspension from March 24 until May 31

Affected route	Route update
Calgary - Nanaimo	Temporary suspension from March 23 until May 31
Calgary - Ottawa	Temporary suspension from March 26 until May 31
Calgary – Regina	Temporary suspension from April 2 until April 30
Calgary – Saskatoon	Temporary suspension from April 2 until April 30
Calgary - Victoria	Temporary suspension from March 23 until May 31
Calgary - Yellowknife	Temporary suspension from March 23 until May 31
Edmonton - Fort McMurray	Temporary suspension from March 23 until May 31
Edmonton - Grande Prairie	Temporary suspension from March 23 until May 31
Edmonton - Kelowna	Temporary suspension from March 23 until May 31

Affected route	Route update
Edmonton - Winnipeg	Temporary suspension from March 24 until May 31
Goose Bay – Deer Lake	Temporary suspension from April 6 until May 31
Goose Bay – Gander	Temporary suspension from April 6 until May 31
Goose Bay – Wabush	Temporary suspension from April 6 until May 31
Halifax - Deer Lake	Temporary suspension from April 1 until May 31
Halifax – Fredericton	Temporary suspension from April 6 until May 31
Halifax - Gander	Temporary suspension from March 23 until May 31
Halifax - Goose Bay	Temporary suspension from March 26 until May 31
Halifax – Moncton	Temporary suspension from April 6 until May 31

Affected route	Route update
Halifax – St. John	Temporary suspension from April 6 until May 31
Halifax – Sydney	Temporary suspension from April 2 until May 31
Montreal – Bagotville	Temporary suspension from April 2 until May 31
Montreal - Baie Comeau	Temporary suspension from March 23 until May 31
Montreal - Bathurst	Temporary suspension from March 23 until April 30
Montreal - Calgary	Temporary suspension from April 7 until April 30
Montreal – Edmonton	Temporary suspension from April 2 until May 31
Montreal - London	Temporary suspension from March 23 until May 31
Montreal – Moncton	Temporary suspension from April 2 until May 31

Affected route	Route update
Montreal – Sept-Îles	Temporary suspension from April 2 until May 31
Montreal – St. John	Temporary suspension from April 2 until May 31
Montreal – Toronto City (YTZ)	Temporary suspension from March 28 until May 31
Montreal - Val d'Or - Rouyn-Noranda	Temporary suspension from March 23 until May 31
Montreal - Windsor	Temporary suspension from March 21 until May 31
Montreal - Winnipeg	Temporary suspension from March 26 until May 31
Ottawa - Edmonton	Temporary suspension from March 25 until May 31
Ottawa - Fredericton	Temporary suspension from March 20 until May 31
Ottawa - Halifax	Temporary suspension from March 24 until May 31

Affected route	Route update
Ottawa - London	Temporary suspension from March 23 until May 31
Ottawa - Moncton	Temporary suspension from March 20 until May 31
Ottawa - Quebec City	Temporary suspension from March 23 until May 31
Ottawa - Winnipeg	Temporary suspension from March 22 until May 31
Quebec City - Gaspé - Iles-de-la-Madeleine	Temporary suspension from April 1 until May 31
Quebec City - Sept Iles	Temporary suspension from March 24 until May 31
Sept-Îles – Wabush	Temporary suspension from April 2 until May 31
St. John's – Deer Lake	Temporary suspension from April 6 until May 31
St. John's – Gander	Temporary suspension from April 6 until May 31

Affected route	Route update
St. John's – Goose Bay	Temporary suspension from April 2 until May 31
Toronto - Charlottetown	Temporary suspension from April 1 until May 31
Toronto - Deer Lake	Temporary suspension from March 27 until May 31
Toronto - Fredericton	Temporary suspension from March 24 until May 31
Toronto - Kelowna	Temporary suspension from March 23 until May 31
Toronto - Kingston	Temporary suspension from March 23 until May 31
Toronto – London	Temporary suspension from April 2 until May 31
Toronto - Moncton	Temporary suspension from March 24 until May 31
Toronto - North Bay	Temporary suspension from March 23 until May 31

Affected route	Route update
Toronto - Quebec City	Temporary suspension from March 26 to April 30
Toronto - Sarnia	Temporary suspension from March 23 until May 31
Toronto – Sault Ste. Marie	Temporary suspension from April 2 until May 31
Toronto - St. John	Temporary suspension from March 23 until May 31
Toronto - Sydney	Temporary suspension from March 23 until May 31
Toronto - Victoria	Temporary suspension from March 23 until May 31
Toronto – Windsor	Temporary suspension from April 2 until May 31
Vancouver - Castlegar	Temporary suspension from March 23 until May 31
Vancouver - Comox	Temporary suspension from March 31 until May 31

Affected route	Route update
Vancouver - Cranbrook	Temporary suspension from March 24 until May 31
Vancouver – Fort St. John	Temporary suspension from April 2 until May 31
Vancouver - Kamloops	Temporary suspension from April 1 until May 31
Vancouver - Ottawa	Temporary suspension from March 26 until May 31
Vancouver - Penticton	Temporary suspension from March 26 until May 31
Vancouver - Prince Rupert	Temporary suspension from March 26 until May 31
Vancouver – Sandspit	Temporary suspension from March 23 until May 31
Vancouver - Smithers	Temporary suspension from March 26 until May 31
Vancouver - Yellowknife	Temporary suspension from March 31 until May 31

Affected route	Route update
Winnipeg - Regina	Temporary suspension from March 25 until April 30

To U.S

Affected route	Route update
Calgary - Houston	Temporary suspension from March 23 until May 31
Calgary - Kahului / Maui	Temporary suspension from March 24 to April 30 Winter seasonal service resumes October 25
Calgary - Las Vegas	Temporary suspension from March 23 until May 31
Calgary - Los Angeles	Temporary suspension from March 23 until May 31
Calgary - Newark	Temporary suspension from March 24 until May 31
Calgary - Phoenix	Temporary suspension from

Affected route	Route update
	March 22 until May 31
Calgary - Portland	Temporary suspension from March 23 until May 31
Calgary - San Francisco	Temporary suspension from March 23 until May 31
Edmonton - San Francisco	Temporary suspension from March 23 until May 31
Halifax - Boston	Temporary suspension from March 24 until May 31
Halifax - Orlando	Temporary suspension from March 23 to April 30 Winter seasonal service resumes October 31
Halifax - Tampa	Temporary suspension from March 25 to April 30 Winter seasonal service resumes December 17
Montreal - Baltimore-Washington	Temporary suspension from March 23 until May 31

Affected route	Route update
Montreal – Boston	Temporary suspension from April 6 until April 30
Montreal - Dallas-Fort Worth	Temporary suspension from March 23 until May 31
Montreal - Denver	Temporary suspension from March 25 until May 31
Montreal - Fort Myers	Temporary suspension from March 22 to April 30 Winter seasonal service resumes October 25
Montreal - Hartford	Temporary suspension from March 23 until May 31
Montreal - Houston	Temporary suspension from April 1 until May 31
Montreal - Las Vegas	Temporary suspension from March 23 until May 31
Montreal – Los Angeles	Temporary suspension from March 25 until April 30

Affected route	Route update
Montreal - Miami	Temporary suspension from March 22 until May 31
Montreal - Newark	Temporary suspension from April 6 until April 30
Montreal - New York/LaGuardia	Temporary suspension from April 1 until April 30
Montreal - Philadelphia	Temporary suspension from March 23 until May 31
Montreal - Phoenix	Temporary suspension from March 23 until May 31
Montreal - Pittsburgh	Temporary suspension from March 23 until May 31
Montreal - Raleigh–Durham	Temporary suspension from March 23 until May 31
Montreal - San Francisco	Temporary suspension from March 23 until May 31
Montreal - Tampa	Temporary suspension from March 25 to April 30

Affected route	Route update
	Winter seasonal service resumes October 25
Montreal - Washington Dulles	Temporary suspension from March 24 until May 31
Montreal-Washington/National	Temporary suspension from April 6 to April 30
Montreal - West Palm Beach	Temporary suspension from March 23 to April 30 Winter seasonal service resumes October 26
Ottawa - Boston	Temporary suspension from March 23 until May 31
Ottawa - Fort Lauderdale	Temporary suspension from March 25 to April 30 Winter seasonal service resumes October 25
Ottawa - Newark	Temporary suspension from March 28 until May 31
Ottawa - Orlando	Temporary suspension from March 22 to April 30

Affected route	Route update
	Winter seasonal service resumes October 25
Ottawa - Tampa	Temporary suspension from March 22 to April 30 Winter seasonal service resumes December 17
Ottawa - Washington DC, Reagan Washington National (DCA)	Temporary suspension from March 23 until May 31
Toronto - Atlanta	Temporary suspension from April 1 until May 31
Toronto - Austin	Temporary suspension from March 23 until May 31
Toronto - Baltimore-Washington	Temporary suspension from March 23 until May 31
Toronto - Charlotte	Temporary suspension from March 23 until May 31
Toronto - Cincinnati	Temporary suspension from March 23 until May 31
Toronto - Cleveland	Temporary suspension from

Affected route	Route update
	March 23 until May 31
Toronto - Columbus	Temporary suspension from March 23 until May 31
Toronto - Dallas-Fort Worth	Temporary suspension from March 23 until May 31
Toronto – Denver	Temporary suspension from April 1 until April 30
Toronto - Detroit	Temporary suspension from March 23 until May 31
Toronto - Fort Myers	Temporary suspension from March 26 until June 3
Toronto - Hartford	Temporary suspension from March 23 until May 31
Toronto - Honolulu	Temporary suspension from March 22 to April 30 Winter seasonal service resumes December 10
Toronto - Indianapolis	Temporary suspension from March 23 until May 31

Affected route	Route update
Toronto - Kansas City	Temporary suspension from March 23 until May 31
Toronto - Las Vegas	Temporary suspension from March 23 until May 31
Toronto - Memphis	Temporary suspension from March 23 until May 31
Toronto - Miami	Temporary suspension from March 24 until May 31
Toronto - Milwaukee	Temporary suspension from March 23 until May 31
Toronto - Minneapolis	Temporary suspension from March 23 until May 31
Toronto - Nashville	Temporary suspension from March 23 until May 31
Toronto - New Orleans	Temporary suspension from March 23 until May 31
Toronto – Newark	Temporary suspension from April 18 to April 30

Affected route	Route update
Toronto – New York/LaGuardia	Temporary suspension from April 6 until April 30
Toronto - Palm Springs	Temporary suspension from March 26 to April 30 Winter seasonal service resumes December 18
Toronto - Philadelphia	Temporary suspension from April 1 until May 31
Toronto - Phoenix	Temporary suspension from April 1 until May 31
Toronto - Pittsburgh	Temporary suspension from March 23 until May 31
Toronto - Raleigh–Durham	Temporary suspension from March 28 until May 31
Toronto - San Diego	Temporary suspension from March 22 until May 31
Toronto - Sarasota	Temporary suspension from March 26 to April 30 Winter seasonal service resumes October 25

Affected route	Route update
Toronto - Savannah	Temporary suspension from March 23 until May 31
Toronto - Seattle	Temporary suspension from March 23 until May 31
Toronto - St. Louis	Temporary suspension from March 23 until May 31
Toronto - Tampa	Temporary suspension from April 1 until May 31
Toronto – Washington/National	Temporary suspension from April 13 to April 30
Toronto - West Palm Beach	Temporary suspension from March 25 to April 30 Winter seasonal service resumes October 25
Vancouver - Chicago	Temporary suspension from March 23 until May 31
Vancouver - Dallas-Fort Worth	Temporary suspension from March 23 until May 31

Affected route	Route update
Vancouver – Denver	Temporary suspension from April 1 until May 31
Vancouver - Honolulu	Temporary suspension from March 25 until May 31
Vancouver - Kahului / Maui	Temporary suspension from March 25 until June 1
Vancouver - Kona	Temporary suspension from March 22 to April 30 Winter seasonal service resumes December 12
Vancouver - Las Vegas	Temporary suspension from March 26 until May 31
Vancouver - Newark	Temporary suspension from March 26 until May 31
Vancouver - Palm Springs	Temporary suspension from March 26 to April 30 Winter seasonal service resumes October 25
Vancouver - Phoenix	Temporary suspension from April 1 until May 31

Affected route	Route update
Vancouver - Portland	Temporary suspension from March 23 until May 31
Vancouver - Sacramento	Temporary suspension from March 28 until May 31
Vancouver - San Diego	Temporary suspension from March 31 until May 31
Vancouver - San Jose, California	Temporary suspension from March 23 until May 31

Atlantic

Affected route	Route update
Calgary - Frankfurt	Temporary suspension from March 22 until May 31
Calgary - London	Temporary suspension from March 24 until May 31
Montreal - Athens	Seasonal startup delayed until June 1

Affected route	Route update
Montreal - Barcelona	Seasonal startup delayed until June 3
Montreal - Bordeaux	Full summer suspension
Montreal - Brussels	Temporary suspension from March 29 until April 30
Montreal - Casablanca	Temporary suspension from March 17 until May 31
Montreal - Dublin	Seasonal startup delayed until June 2
Montreal - Geneva	Temporary suspension from March 21 until May 31
Montreal - Lyon	Temporary suspension from March 15 until May 31
Montreal - Lisbon	Seasonal startup delayed until June 1
Montreal - Marseille	Full summer suspension
Montreal - Nice	Seasonal startup delayed until June 1

Affected route	Route update
Montreal - Rome	Temporary suspension from March 9 until June 2
Montreal - Venice	Full summer suspension
Ottawa - London (Heathrow)	Temporary suspension from March 17 to May 31
Toronto - Amsterdam	Temporary suspension from March 26 until May 31
Toronto - Athens	Seasonal startup delayed until June 1
Toronto - Barcelona	Seasonal startup delayed until June 1
Toronto - Berlin	Seasonal startup delayed until June 1
Toronto - Brussels	New route launch postponed to June 3
Toronto - Budapest	Seasonal startup delayed until June 1
Toronto - Copenhagen	Temporary suspension from March 17 until May 31

Affected route	Route update
Toronto - Delhi	Temporary suspension from March 22 until May 31
Toronto - Dubai	Temporary suspension from March 23 until June 1
Toronto - Dublin	Temporary suspension from March 29 until May 31
Toronto - Lisbon	Seasonal startup delayed until June 1
Toronto - Madrid	Temporary suspension from March 19 until May 31
Toronto - Manchester	Seasonal startup delayed until June 2
Toronto - Milan	Seasonal startup delayed until June 4
Toronto - Mumbai	Winter seasonal service resumes October 25
Toronto - Munich	Temporary suspension from March 29 until May 31

Affected route	Route update
Toronto - Paris	Temporary suspension from March 18 until May 31
Toronto - Prague	Seasonal startup delayed until June 3
Toronto - Rome	Temporary suspension from March 11 until May 31
Toronto - Tel Aviv	Temporary suspension from March 18 until May 31
Toronto - Venice	Seasonal startup delayed until June 3
Toronto - Vienna	Temporary suspension from March 19 until May 31
Toronto - Zurich	Temporary suspension from March 28 until May 4
Vancouver - Dublin	Seasonal startup delayed until June 1
Vancouver - Delhi	Temporary suspension from March 22 until May 31
Vancouver - Frankfurt	Seasonal startup delayed until June 1

Affected route	Route update
Vancouver - Paris	Seasonal startup delayed until June 16

Pacific

Affected route	Route update
Montreal - Shanghai	Temporary suspension from February 3 until May 31
Montreal - Tokyo (Narita)	Temporary suspension from March 28 until May 31
Toronto - Beijing	Temporary suspension from February 3 until May 31
Toronto - Hong Kong	Temporary suspension from March 2 until May 31
Toronto - Seoul (Incheon)	Temporary suspension from March 17 until May 31
Toronto - Shanghai	Temporary suspension from February 3 until May 31

Affected route	Route update
Toronto - Tokyo (Haneda)	Temporary suspension from March 29 until April 30
Vancouver – Auckland	Temporary suspension from March 28 to April 30 Winter seasonal service resumes on November 28
Vancouver - Beijing	Temporary suspension from February 3 until May 31
Vancouver - Brisbane	Temporary suspension from March 29 until May 31
Vancouver - Melbourne	Temporary suspension from March 30 until April 30 Service resumes on November 27
Vancouver - Seoul (Incheon)	Temporary suspension from April 1 until April 30
Vancouver - Shanghai	Temporary suspension from February 3 until May 31
Vancouver - Sydney, Australia	Remaining operations from Sydney: April 1 to 6

Affected route	Route update
	Temporary suspension from April 7 until May 31
Vancouver - Taipei	Temporary suspension from March 29 until June 2
Vancouver – Tokyo/Narita	Temporary suspension from April 9 until April 30

South America

Affected route	Route update
Santiago - Buenos Aires	Temporary suspension from March 23 until June 1
Toronto - Bogotá	Temporary suspension from March 23 until April 30
Toronto - Cartagena	Temporary suspension from March 22 until April 30 Winter seasonal service resumes December 12

Affected route	Route update
Toronto - Lima	Temporary suspension from March 17 until June 2
Toronto - Quito	Temporary suspension from March 16 until May 11 Winter seasonal service resumes December 2
Toronto - Santiago	Temporary suspension from March 28 until May 31
Toronto - São Paulo	Temporary suspension from March 29 until May 31

Caribbean / Mexico / Central America

Affected route	Route update
Calgary – Cancun	Temporary suspension from March 22 until June 5
Calgary – Puerto Vallarta	Temporary suspension from March 17 to April 30 Winter seasonal service resumes October 31

Affected route	Route update
Calgary – San José del Cabo	Temporary suspension from March 17 to April 30 Winter seasonal service resumes October 25
Halifax - Cancun	Temporary suspension from March 23 to April 30 Winter seasonal service resumes December 20
Halifax – Cayo Coco	Temporary suspension from March 21 to April 30 Winter seasonal service resumes February 5
Halifax – Punta Cana	Temporary suspension from March 22 to April 30 Winter seasonal service resumes December 19
Montreal – Barbados	Temporary suspension from March 24 to April 30 Winter seasonal service resumes December 12
Montreal – Cancun	Temporary suspension from March 29 until May 31
Montreal – Cayo Coco	Temporary suspension from March 23

Affected route	Route update
	until May 31
Montreal – Cozumel	Temporary suspension from March 21 until June 4
Montreal – Curaçao	Temporary suspension from March 21 to April 30 Winter seasonal service resumes December 18
Montreal – Fort- de- France	Temporary suspension from March 25 until May 2
Montreal – Holguín	Temporary suspension from March 20 to April 30 Winter seasonal service resumes October 29
Montreal – Ixtapa	Temporary suspension from March 29 to April 30 Winter seasonal service resumes December 19
Montreal – Liberia	Temporary suspension from March 26 to April 30 Winter seasonal service resumes October 25
Montreal – Montego Bay	Temporary suspension from March 21 until June 2

Affected route	Route update
Montreal – Nassau	Temporary suspension from March 22 until June 5
Montreal – Pointe-à-Pitre	Temporary suspension from March 24 until May 1
Montreal – Providenciales	Temporary suspension from March 20 until June 6
Montreal – Puerto Plata	Temporary suspension from March 23 until June 4
Montreal – Puerto Vallarta	Temporary suspension from March 30 to April 30 Winter seasonal service resumes October 25
Montreal – Punta Cana	Temporary suspension from March 23 until June 3
Montreal – Samaná	Temporary suspension from March 22 until May 31
Montreal - San José	Temporary suspension from March 24 to April 30 Winter seasonal service resumes October 31

Affected route	Route update
Montreal – San Juan	Temporary suspension from March 16 to April 30 Winter seasonal service resumes December 12
Montreal – San Salvador (Bahamas)	Temporary suspension from March 18 until June 1
Montreal – Santa Clara	Temporary suspension from March 22 until June 2
Montreal – Varadero	Temporary suspension from March 22 until June 1
Ottawa – Cancun	Temporary suspension from March 21 to April 30 Winter seasonal service resumes November 6
Ottawa – Punta Cana	Temporary suspension from March 22 to April 30 Winter seasonal service resumes October 31
Ottawa – Varadero	Temporary suspension from March 17 to April 30 Winter seasonal service resumes December 21

Affected route	Route update
Quebec City – Cancun	Temporary suspension from March 22 to April 30 Winter seasonal service resumes December 19
Quebec City – Punta Cana	Temporary suspension from March 16 to April 30 Winter seasonal service resumes December 20
Toronto – Antigua	Temporary suspension from March 27 until June 5
Toronto – Aruba	Temporary suspension from March 23 until June 5
Toronto – Belize City	Temporary suspension from March 24 to April 30 Winter seasonal service resumes December 11
Toronto – Bermuda	Temporary suspension from March 21 until May 31
Toronto – Cancun	Temporary suspension from April 1 until May 31

Affected route	Route update
Toronto – Cayo Coco	Temporary suspension from March 23 until May 31
Toronto – Cozumel	Temporary suspension from March 22 to April 30 Winter seasonal service resumes October 31
Toronto – Curaçao	Temporary suspension from March 30 until June 6
Toronto - George Town	Temporary suspension from March 29 to April 30 Winter seasonal service resumes October 31
Toronto – Grand Cayman	Temporary suspension from March 22 until June 5
Toronto – Grenada	Temporary suspension from April 1 until May 31
Toronto – Havana	Temporary suspension from March 26 until May 31
Toronto – Holguín	Temporary suspension from March 21 until June 2

Affected route	Route update
Toronto – Huatulco	Temporary suspension from March 23 to April 30 Winter seasonal service resumes October 31
Toronto – Ixtapa	Temporary suspension from March 29 to April 30 Winter seasonal service resumes October 31
Toronto – Kingston	Temporary suspension from March 28 until May 31
Toronto – Liberia	Temporary suspension from March 26 until June 1
Toronto – Montego Bay	Temporary suspension from March 26 until May 31
Toronto – Nassau	Temporary suspension from March 28 until May 31
Toronto – Panama City	Temporary suspension from March 23 until June 2
Toronto – Port of Spain	Temporary suspension from March 23 until June 1

Affected route	Route update
Toronto – Providenciales	Temporary suspension from March 24 until June 5
Toronto – Puerto Plata	Temporary suspension from March 22 to April 30 Winter seasonal service resumes October 27
Toronto – Puerto Vallarta	Temporary suspension from April 12 to April 30 Winter seasonal service resumes October 25
Toronto – Punta Cana	Temporary suspension from March 23 until May 31
Toronto – Samaná	Temporary suspension from March 23 to April 30 Winter seasonal service resumes October 25
Toronto – San José del Cabo	Temporary suspension from March 26 to April 30 Winter seasonal service resumes October 25
Toronto – San José	Temporary suspension from April 1 until June 2

Affected route	Route update
Toronto – San Juan	Temporary suspension from March 23 to April 30 Winter seasonal service resumes October 25
Toronto – Santa Clara	Temporary suspension from March 20 until June 2
Toronto – St. Kitts	Temporary suspension from March 25 to April 30 Winter seasonal service resumes October 31
Toronto – St. Lucia	Temporary suspension from March 24 until June 1
Toronto – St. Maarten	Temporary suspension from March 29 to April 30 Winter seasonal service resumes December 12
Toronto – St. Vincent	Temporary suspension from March 27 until June 3
Toronto – Varadero	Temporary suspension from March 23 until May 31

Affected route	Route update
Vancouver – Cancun	Temporary suspension from March 24 to April 30 Winter seasonal service resumes October 26
Vancouver – Ixtapa	Temporary suspension from March 29 to April 30 Winter seasonal service resumes October 31
Vancouver- Mexico City	Temporary suspension from April 1 until May 31
Vancouver – Puerto Vallarta	Temporary suspension from March 30 until June 5
Vancouver – San José del Cabo	Temporary suspension from March 29 to April 30 Winter seasonal service resumes October 27
Winnipeg – Cancun	Temporary suspension from March 29 to April 30 Winter seasonal service resumes October 31

North America

Canada

Affected Airport	Operation Suspension Dates
Bagotville - YBG	Temporary suspension until May 31
Baie Comeau - YBC	Temporary suspension until May 31
Bathurst - ZBF	Temporary suspension until May 31
Castlegar - YCG	Temporary suspension until May 31
Comox - YQQ	Temporary suspension until May 31
Cranbrook - YXC	Temporary suspension until May 31
Deer Lake - YDF	Temporary suspension until May 31
Fort St.John - YXJ	Temporary suspension until May 31

Affected Airport	Operation Suspension Dates
Gander - YQX	Temporary suspension until May 31
Goose Bay - YYR	Temporary suspension until May 31
Gaspé - YGP	Temporary suspension until May 31
Îles-de-la-Madeleine -YGR	Temporary suspension until May 31
Kamloops - YKA	Temporary suspension until May 31
Kingston - YGK	Temporary suspension until May 31
London - YXU	Temporary suspension until May 31
Moncton - YQM	Temporary suspension until May 31
Mont Joli - YYY	Temporary suspension until May 31
North Bay - YYB	Temporary suspension until May 31
Penticton - YYF	Temporary suspension until May 31
Prince Rupert - YXS	Temporary suspension until May 31

Affected Airport	Operation Suspension Dates
Rouyn-Noranda - YUY	Temporary suspension until May 31
Saint John - YSJ	Temporary suspension until May 31
Sandpit - YZP	Temporary suspension until May 31
Sarnia - YZR	Temporary suspension until May 31
Sault Ste Marie - YAM	Temporary suspension until May 31
Sept-Îles - YZV	Temporary suspension until May 31
Smithers - YYD	Temporary suspension until May 31
Sydney - YQY	Temporary suspension until May 31
Toronto Island - YTZ	Temporary suspension until May 31
Wabush - YWK	Temporary suspension until May 31
Windsor - YQG	Temporary suspension until May 31
Val d'Or - YVO	Temporary suspension until May 31

Affected Airport	Operation Suspension Dates
Anchorage - ANC	Temporary suspension until May 31
Atlanta - ATL	Temporary suspension until May 31
Austin - AUS	Temporary suspension until May 31
Baltimore - BWI	Temporary suspension until May 31
Charlotte - CLT	Temporary suspension until May 31
Cincinnati - CVG	Temporary suspension until May 31
Cleveland - CLE	Temporary suspension until May 31
Columbus - CMH	Temporary suspension until May 31
Dallas Fort Worth - DFW	Temporary suspension until May 31
Detroit - DTW	Temporary suspension until May 31

Affected Airport	Operation Suspension Dates
Denver - DEN	Temporary suspension until April 30
Fort Myers - RSW	Temporary suspension until May 31
Hartford - BDL	Temporary suspension until May 31
Honolulu - HNL	Temporary suspension until May 31
Indianapolis - IND	Temporary suspension until May 31
Kahului/Maui - OGG	Temporary suspension until May 31
Kansas City - MCI	Temporary suspension until May 31
Kona - KOA	Winter seasonal service resumes December 12
Las Vegas - LAS	Temporary suspension until June 1
Lihue - LIH	Winter seasonal service resumes December 17
Memphis - MEM	Temporary suspension until May 31

Affected Airport	Operation Suspension Dates
Miami - MIA	Temporary suspension until May 31
Milwaukee - MKE	Temporary suspension until May 31
Minneapolis - MSP	Temporary suspension until May 31
Nashville - BNA	Temporary suspension until May 31
Newark - EWR	Temporary suspension from April 18 to April 30
New Orleans - MSY	Temporary suspension until May 31
New York - LGA	Temporary suspension until April 30
Palm Springs - PSP	Winter seasonal service resumes October 25
Philadelphia - PHL	Temporary suspension until May 31
Pittsburgh - PIT	Temporary suspension until May 31
Phoenix - PHX	Temporary suspension until May 31

Affected Airport	Operation Suspension Dates
Portland - PDX	Temporary suspension until May 31
Providence - PVD	Temporary suspension until May 31
Raleigh Durham - RDU	Temporary suspension until May 31
Sacramento - SMF	Temporary suspension until May 31
San Diego - SAN	Temporary suspension until May 31
San Jose - SJC	Temporary suspension until May 31
Santa Ana - SNA	Temporary suspension until June 15
Savannah - SAV	Temporary suspension until May 31
Sarasota - SRQ	Winter seasonal service resumes October 25
St Louis - STL	Temporary suspension until May 31
Tampa - TPA	Temporary suspension until May 31

Affected Airport	Operation Suspension Dates
Washington - DCA	Temporary suspension from April 13 to April 30
West Palm Beach - PBI	Winter seasonal service resumes October 25

Atlantic

Affected Airport	Operation Suspension Dates
Algiers - ALG	Temporary suspension until June 5
Amsterdam - AMS	Temporary suspension until June 1
Athens - ATH	Temporary suspension until June 1
Barcelona - BCN	Temporary suspension until June 1
Berlin - TXL	Temporary suspension until June 1
Brussels - BRU	Temporary suspension until May 2

Affected Airport	Operation Suspension Dates
Bucharest - OTP	Temporary suspension until June 4
Budapest - BUD	Temporary suspension until June 1
Casablanca - CMN	Temporary suspension until June 1
Copenhagen - CPH	Temporary suspension until June 1
Delhi - DEL	Temporary suspension until June 1
Dubai - DXB	Temporary suspension until June 3
Dublin - DUB	Temporary suspension until June 1
Edinburgh - EDI	Temporary suspension until June 5
Geneva - GVA	Temporary suspension until June 1
Glasgow - GLA	Temporary suspension until June 13
Lisbon - LIS	Temporary suspension until June 1
Lyon - LYS	Temporary suspension until June 1

Affected Airport	Operation Suspension Dates
Madrid - MAD	Temporary suspension until June 1
Manchester - MAN	Temporary suspension until June 2
Marseille - MRS	Temporary suspension until June 2021
Milan - MXP	Temporary suspension until June 4
Mumbai - BOM	Winter seasonal service resumes October 25
Munich - MUC	Temporary suspension until June 1
Nice - NCE	Temporary suspension until June 1
Porto - OPO	Temporary suspension until June 19
Prague - PRG	Temporary suspension until June 3
Reykjavik - KEF	Temporary suspension until June 4
Rome - FCO	Temporary suspension until June 1

Affected Airport	Operation Suspension Dates
Shannon - SNN	Temporary suspension until June 2021
Tel Aviv - TLV	Temporary suspension until June 1
Venice - VCE	Temporary suspension until June 3
Vienna - VIE	Temporary suspension until June 1
Warsaw - WAW	Temporary suspension until June 3
Zagreb - ZAG	Temporary suspension until June 4
Zurich - ZRH	Temporary suspension until May 5

Pacific

Affected Airport	Operation Suspension Dates
Auckland - AKL	Winter seasonal service resumes November 29
Beijing - PEK	Temporary suspension until June 1

Affected Airport	Operation Suspension Dates
Brisbane - BNE	Temporary suspension until June 2
Melbourne - MEL	Temporary suspension until November 28
Osaka - KIX	Temporary suspension until June 5
Seoul - ICN	Temporary suspension until May 1
Shanghai - PVG	Temporary suspension until May 31
Sydney - SYD	Temporary suspension until June 2
Taipei - TPE	Temporary suspension until June 2
Tokyo/Haneda - HND	Temporary suspension until May 1
Tokyo/Narita - NRT	Temporary suspension until April 30

South America

Affected Airport	Operation Suspension Dates
Buenos Aires - EZE	Temporary suspension until June 1
Bogota - BOG	Temporary suspension until April 30
Cartagena - CTG	Winter seasonal service resumes December 12
Lima - LIM	Temporary suspension until June 2
Santiago - SCL	Temporary suspension until June 1
São Paulo - GRU	Temporary suspension until June 1
Quito - UIO	Winter seasonal service resumes November 28

Caribbean / Mexico / Central America

Affected Airport	Operation Suspension Dates
Antigua - ANU	Temporary suspension until June 5

Affected Airport	Operation Suspension Dates
Aruba - AUA	Temporary suspension until June 5
Belize - BZE	Temporary suspension until December 10
Bermuda - BDA	Temporary suspension until May 31
Cancun - CUN	Temporary suspension until May 31
Cayo Coco - CCC	Temporary suspension until May 31
Cozumel - CZM	Temporary suspension until June 4
Curacao - CUR	Temporary suspension until June 6
Fort-de-France - FDF	Temporary suspension until May 2
George Town - GGT	Winter seasonal service resumes October 31
Grand Cayman Island - GCM	Temporary suspension until June 5
Grenada - GND	Temporary suspension until May 31

Affected Airport	Operation Suspension Dates
Havana - HAV	Temporary suspension until May 31
Holguin - HOG	Temporary suspension until June 2
Huatulco - HUX	Winter seasonal service resumes October 31
Ixtapa - ZIH	Winter seasonal service resumes October 31
Kingston - KIN	Temporary suspension until May 31
Liberia - LIR	Temporary suspension until June 1
Montego Bay - MBJ	Temporary suspension until May 31
Nassau - NAS	Temporary suspension until May 31
Panama City - PTY	Temporary suspension until June 2
Pointe-à-Pitre - PTP	Temporary suspension until May 1
Port of Spain - POS	Temporary suspension until June 1

Affected Airport	Operation Suspension Dates
Providenciales - PLS	Temporary suspension until June 5
Puerto Plata - POP	Temporary suspension until June 3
Puerto Vallarta - POP	Temporary suspension until June 5
Punta Cana - PUJ	Temporary suspension until May 31
Samana - AZS	Temporary suspension until May 31
San Jose - SJO	Temporary suspension until June 2
San Jose del Cabo - SJD	Winter seasonal service resumes October 25
San Juan - SJU	Winter seasonal service resumes October 25
St.Kitts - SKB	Winter seasonal service resumes October 31
St.Lucia - UVF	Temporary suspension until June 1

Affected Airport	Operation Suspension Dates
St.Maarten - SXM	Winter seasonal service resumes December 12
St.Vincent - SVD	Temporary suspension until June 3
Santa Clara - SNU	Temporary suspension until June 2
Varadero - VRA	Temporary suspension until May 31

This is **Exhibit "19"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

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Signature

Transat announces a gradual suspension of its flights

MONTREAL, March 18, 2020 /CNW Telbec/ - Transat A.T. Inc. announces today the gradual suspension of Air Transat flights until April 30.

This decision follows the Government of Canada's announcement that the country is closing its borders to foreign nationals, as well as similar decisions by several other countries where Transat operates.

Sales for departures until April 30 are suspended immediately from and to most destinations in Europe and the United States. Repatriation flights will still be operated during the next two weeks, in order to bring Transat customers back to their home country. So as to allow as many repatriations as possible, sales will, however, remain temporarily open in both directions between Montreal and Paris and Lisbon and between Toronto and London and Lisbon. A date for a full halt to operations will be announced soon.

Sales are also halted immediately from and to the Caribbean and Mexico. Again, flights will continue for a few more days in order to repatriate Transat customers to Canada. Transat is advising its Canadian customers who were scheduled to depart in the coming days to heed the government's recommendations and postpone their departure.

For domestic flights, clients are encouraged to check that their flight is maintained on the website.

Transat customers who are currently at destinations are asked to check the company's website, where necessary information for the organization of their return will be made available. There will be no booking fee and passengers will not have to pay any price difference. It is of the utmost importance to Transat to bring everyone back.

All customers who were unable to travel because their flight is cancelled will receive a credit for future travel, to be used within 24 months of their original travel date.

"This is an unprecedented situation, beyond our control, which is forcing us to briefly suspend all of our flights to contribute to the effort to fight the pandemic, protect our customers and employees and safeguard the

company," said Transat President and Chief Executive Officer Jean-Marc Eustache. "We are doing everything we can so that this has as little impact as possible on our employees and customers, whom we make sure to bring back home."

In addition to the cost-cutting measures already implemented in recent weeks, we will be moving ahead in the coming days with measures to reduce staffing. These measures will include temporary layoffs and reduction of work time or salary that will unfortunately affect a significant portion of our employees. The company's senior executives and members of the Board of Directors are also taking pay cuts.

About Transat

Transat A.T. Inc. is one of the world's largest integrated tourism companies and Canada's holiday travel leader. It offers vacation packages, hotel stays and air travel under the Transat and Air Transat brands to some 60 destinations in more than 25 countries in the Americas and Europe. Transat is firmly committed to sustainable tourism development, as reflected in its multiple corporate responsibility initiatives over the past 12 years, and was awarded Travelife certification in 2018. Based in Montreal, the company has 5,000 employees (TSX: TRZ).

SOURCE Transat A.T. Inc.

Media: Christophe Hennebelle, Vice-President, Human Resources and Corporate Affairs, 514 987-1660, ext. 4584

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24 hours a day
7 days a week

Find a Transat Travel, Voyages Transat, Marlin Travel or Club Voyages agency

Prices for packages are per person,
based on double occupancy.

This is **Exhibit "20"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

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Signature

Travel advisory Latest updates

April 13, 2020 - CORONAVIRUS UPDATES

Due to the coronavirus pandemic, we are temporarily suspending our flights until May 31, 2020.

If you were unable to travel due to the cancellation of your flight, you will receive a credit for future travel to be used within 24 months of your original return dates. You do not need to contact us to obtain this credit, it will be automatically applied to your account.

Coronavirus (COVID-19)

Temporary suspension of our flights

Due to the coronavirus pandemic, we are temporarily suspending our flights until May 31, 2020.

If you were unable to travel due to the cancellation of our flights, we are providing a flight credit for travel within 24 months of your original return date.

These are extraordinary circumstances, when all airlines and travel companies have been forced to temporarily halt or drastically reduce their operations while governments have decided to close their borders.

This unprecedented situation is well beyond our control; we believe that the 24-month credit is an acceptable solution, and we are confident that our customers will be able to travel again in the near future, once the crisis passes.

FAQ - Answers to Your Questions (COVID-19)

Transat cancelled my flight/package. Will I get a refund?

No. Since the cancellation is the result of exceptional circumstances surrounding the COVID-19 pandemic,

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you will not get a refund. Instead, you will receive a credit for the value of your flight/package, applicable to your next trip with Transat.

- Your travel credit will be valid for 24 months after your original return date.
- You don't need to contact us to receive this credit; Transat will automatically apply a credit to all cancelled bookings.
- Processing the credit may take some time, as we have a lot of bookings to process.
- The credit may be processed in several steps: for instance, one passenger at a time, or your seat selection in a second step. But rest assured that the full amount of your booking will be credited.

If you booked directly with Transat (via www.airtransat.com or www.transat.com or our contact centre):

- You will receive a confirmation email as soon as your booking has been credited.

If you booked with a travel agent or via a website other than www.airtransat.com or www.transat.com:

- Your travel agent or Web intermediary will receive a confirmation email from Transat as soon as your booking has been credited, and they will then notify you.

Important: If you had a group booking for 10 people or more, the terms and conditions of the flexibility policy may differ. Contact our groups department or your travel agent.

I didn't show up at the airport for my Air Transat flight but didn't notify you in advance that I would not be taking my flight. Am I entitled to a refund or credit?

No. To be eligible for a travel credit, you had to notify us of your intention not to travel at least 24 hours before departure, in one of two ways:

- By calling us
- By filling out our online form

I notified you between March 12 and March 31 that I would not be travelling. Am I entitled to a refund or credit?

You're eligible for a travel credit (for your full trip or the unused portion of it)—valid for 24 months after your original return date—if you notified us of your intention not to travel at least 24 hours before departure, in one of two ways:

- By calling us
- By filling out our online form

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I would like to cancel my trip scheduled for travel after May 31. What do I need to do?

At this time, our flights/packages scheduled for travel after May 31 remain valid. If you still decide to cancel your trip right now, our regular terms and conditions will apply.

As the situation is changing rapidly, we suggest that you wait a little before modifying your booking. Check our coronavirus web page regularly for updates.

Can I make a new booking for a later departure in 2020?

Yes, you can book with peace of mind for a later departure in 2020. We know that plans may change due to unforeseen events like COVID-19. That's why any new booking of a South package or flight to an Air Transat destination made between April 13 and 30 can be changed at no charge (only once), regardless of your travel dates. If you choose to cancel your trip and your ticket is non-refundable, you'll receive a travel credit for your next trip. The travel credit is valid for 12 months after your original return date.

See the terms and conditions of this flexibility policy and book with peace of mind.

You can make a booking on www.airtransat.com or www.transat.com, by calling our Contact Centre at 1-877-872-6728 or +1-514-636-3630, or through your travel agent.

How can I know if I travelled on the same flight as people infected with COVID-19?

For information on flights operated since March 15, 2020, that had confirmed cases of COVID-19 on board, please consult the official list published on the Government of Canada website.

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I'm a Canadian still abroad and can't find a flight back to Canada. What can I do?

All Air Transat flights have been cancelled until May 31.

Canadians who are still abroad and require emergency assistance should contact Global Affairs Canada, open 24/7, in one of the following ways:

- By completing this form: https://travel.gc.ca/assistance/emergency-assistance/emergency-contact-form
- By calling one of these toll-free numbers: https://travel.gc.ca/assistance/emergency-assistance/toll-free-numbers
- By emailing sos@international.gc.ca

Canadians can also refer to the embassies and consulates directory (https://travel.gc.ca/assistance/embassies-consulates), which contains contact information for government offices that provide consular services to Canadians abroad.

I need cancellation confirmation for my insurance. How do I get it?

Check with your insurance company to find out exactly what type of document or confirmation you need. You can then request it by calling our contact center at 1-877-872-6728 or +1-514-636-3630 or through your travel adviser if you booked with a travel agency.

How do I redeem my travel credit for a new booking?

When you're ready to make the new reservation, simply mention your intention to apply the credit to your purchase. Have your initial booking number on hand as it will be used as for reference purposes.

- If you booked directly with Transat (on www.airtransat.com or www.transat.com, or through our Customer Contact Centre): please call our Customer Contact Centre at 1-877-872-6728 or +1-514-636-3630.
- If you booked with a travel agent or on a third-party website (other than www.airtransat.com or www.transat.com): please contact the travel agency you originally booked with.

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Contact Centre

Canada:
1-877-TRANSAT
(1-877-872-6728)

Other Countries:
+1-514-636-3630

4 a.m. - 8 p.m.
(EDT)
7 days a week

Air Transat has been named the 2019 World's Best Leisure Airline

Vote for us in 2020

This is **Exhibit "21"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

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Signature

COVID-19 Policies

Please note: at this time, we are only accepting calls from customers who are currently in destination returning home, or those who wish to cancel, book or amend a booking for departure dates from May 1st onwards. **If you have a booking with a departure date up to, and including, April 30th 2020 you will receive a travel credit, and no action on your part will be required.**

The health and safety of our passengers and our employees is of paramount importance and we are working tirelessly to assist our customers in light of the COVID-19 outbreak.

March 18, 2020: New government travel regulations were introduced this morning that affect anyone returning to Canada, please click here (https://web.archive.org/web/20200321203004/https://www.sunwing.ca/en/promotion/packages/sunwing-operational-updates)for more information.

If you are currently in destination please click here (https://web.archive.org/web/20200321203004/https://www.sunwing.ca/en/promotion/packages/sunwing-operational-updates)for more information.

March 17th to April 30th

Sunwing is suspending all southbound flights between March 17th and April 30th.

Customers with departure dates for flights or vacation packages between March 17th and April 30th are eligible to receive a future travel credit in the value of the original amount paid. No action needed. Your original booking number will be the code of your future travel credit. We will communicate formally via the email address we have on file (including group travel bookings). You do not need to contact us.

This credit can be redeemed against future travel for travel up to 24 months from original departure date to anywhere Sunwing Airlines operates.

May 1, 2020 onwards

Standard terms and conditions apply to changes and cancellations.

For bookings with Cancellation Insurance

If you have purchased the Sunwing Worry Free Cancellation Waiver you can cancel your vacation. click here

If you have travel insurance not purchased through Sunwing, you can go to Sunwing My Booking (https://web.archive.org/web/20200321203004/https://www2.sunwing.ca/mybooking?lang=en) to cancel your trip and make a claim with your insurance provider.

**Future travel credit are non-transferable, non-refundable and hold no cash value.*

Vacation deals

All inclusive vacation packages (/web/20200321203004mp_/https://www.sunwing.ca/en/promotion/packages/all-inclusive-vacation-packages)

Cruise vacations (/web/20200321203004mp_/https://www.sunwing.ca/en/cruise-travel/)

Departures from your doorstep (/web/20200321203004mp_/https://www.sunwing.ca/en/promotion/packages/vacations-from-your-doorstep)

Last minute vacations (/web/20200321203004mp_/https://www.sunwing.ca/en/promotion/packages/last-minute-vacations)

Signature Collections (/web/20200321203004mp_/https:

Flight deals

Flights to Costa Rica (/web/20200321203004mp_/https://www.sunwing.ca/en/promotion/flights/costa-rica)

Flight deals to Jamaica (/web/20200321203004mp_/https://www.sunwing.ca/en/promotion/flights/jamaica)

Flights to Cuba (/web/20200321203004mp_/https://www.sunwing.ca/en/promotion/flights/cuba)

Flight deals to Mexico (/web/20200321203004mp_/https://www.sunwing.ca/en/promotion/flights/mexico)

Flights to the D.R. (/web/20200321203004mp_/https://www.sunwing.ca/en/promotion/flights/dominican-republic)

Flights to Florida (/web/20200321203004mp_/https://www.sunwing.ca/en/promotion/flights/florida-flights)

//www.sunwing.ca/en/promotion/packages/signature-collections)

Summer vacation deals (/web/20200321203004mp_/https://www.sunwing.ca/en/promotion/packages/summer-steals)

Top-rated Adult resorts (/web/20200321203004mp_/https://www.sunwing.ca/en/promotion/packages/adult-vacations/)

Top-rated Family resorts (/web/20200321203004mp_/https://www.sunwing.ca/en/promotion/packages/family-vacations)

Two week vacations (/web/20200321203004mp_/https://www.sunwing.ca/en/promotion/packages/two-week-vacations)

Short Stay Vacations (/web/20200321203004mp_/https://www.sunwing.ca/en/promotion/packages/short-stay-vacations)

Winter vacation deals (/web/20200321203004mp_/https://www.sunwing.ca/en/promotion/packages/winter-vacation-deals)

Flights within Canada (/web/20200321203004mp_/https://www.sunwing.ca/en/promotion/flights/canada-flights)

Popular destinations

Antigua (/web/20200321203004mp_/https://www.sunwing.ca/en/destinations/antigua)

The Bahamas (/web/20200321203004mp_/https://www.sunwing.ca/en/destinations/bahamas)

Caribbean vacations (/web/20200321203004mp_/https://www.sunwing.ca/en/promotion/packages/caribbean-vacations)

Cuba (/web/20200321203004mp_/https://www.sunwing.ca/en/destinations/cuba)

Dominican Republic (/web/20200321203004mp_/https://www.sunwing.ca/en/destinations/dominican-republic)

Grand Cayman (/web/20200321203004mp_/https://www.sunwing.ca/en/destinations/cayman-islands/grand-cayman)

Jamaica (/web/20200321203004mp_/https://www.sunwing.ca/en/destinations/jamaica)

Mexico (/web/20200321203004mp_/https://www.sunwing.ca/en/destinations/mexico)

Saint Lucia (/web/20200321203004mp_/https://www.sunwing.ca/en/destinations/saint-lucia)

United States (/web/20200321203004mp_/https://www.sunwing.ca/en/destinations/united-states)

Holiday types

Cruise vacations (/web/20200321203004mp_/https://www.sunwing.ca/en/cruise-travel/)

Boutique vacations (/web/20200321203004mp_/https://www.sunwing.ca/en/promotion/packages/boutique-hotels)

Destination Weddings (https://web.archive.org/web/20200321203004mp_/https://www.weddingvacations.com/?utm_source=sunwing%20group%20banner%20ad&utm_medium=referral&utm_campaign=footer)

Dive vacations (/web/20200321203004mp_/https://www.sunwing.ca/en/featured-offer/divecations)

Golf vacations (/web/20200321203004mp_/https://www.sunwing.ca/en/promotion/packages/golf-vacations)

Honeymoons (/web/20200321203004mp_/https://www.sunwing.ca/en/promotion/packages/honeymoon-vacations/)

Single parent vacations (/web/20200321203004mp_/https://www.sunwing.ca/en/promotion/packages/single-parent-vacations)

Spa vacations (/web/20200321203004mp_/https://www.sunwing.ca/en/promotion/packages/spa-vacations)

Vacations for singles (/web/20200321203004mp_/https://www.sunwing.ca/en/promotion/packages/solo-travel)

More destination deals (/web/20200321203004mp_/https://www.sunwing.ca/en/destinations)

Corporate

About us (/web/20200321203004mp_/https://www.sunwing.ca/pages/en/about-us)

Accessibility policy (https://web.archive.org/web/20200321203004mp_/https://www.sunwing.ca/pages/en/sunwing-airlines/special-assistance)

Careers (https://web.archive.org/web/20200321203004mp_/http://www.sunwingtravelgroup.com/en/Careers/Join-our-winning-team)

Press releases (https://web.archive.org/web/20200321203004mp_/http://www.sunwingtravelgroup.com/en/Media-Room/Latest-News)

Privacy policy (/web/20200321203004mp_/https://www.sunwing.ca/Pages/en/mobileprivacy)

Terms and conditions (/web/20200321203004mp_/https://www.sunwing.ca/Pages/en/terms-and-conditions)

(https://web.archive.org/web/20200321203034/http://www.tico.ca)

Click for Review (https://web.archive.org/web/20200321203034/http://www.bbb.org/kitchener/business-reviews/tours-operators-and-promoters/sunwing-vacations-in-etobicoke-on-1133128#sealclick)

Our sites

(/web/20200321203004mp_/https://www.sunwing.ca/) (https://web.archive.org/web/20200321203034/https://www.sunwing.com/?forceRedir=0)

Useful links

Airline travel information (/web/20200321203004mp_/https://www.sunwing.ca/pages/en/sunwing-airlines)

Protect your vacation (/web/20200321203004mp_/https://www.sunwing.ca/pages/en/be-worry-free)

Brochures (/web/20200321203004mp_/https://www.sunwing.ca/Pages/en/e-brochures)

Contact us (https://web.archive.org/web/20200321203004mp_/https://www.sunwingcares.ca/hc/en-us/articles/115000183534-Contact-us)

FAQs (https://web.archive.org/web/20200321203004mp_/https://www.sunwingcares.ca/hc/en-us/sections/204950908)

Flight status and alerts (/web/20200321203004mp_/https://www.sunwing.ca/Pages/en/flight-status-alerts)

Optional services (/web/20200321203004mp_/https://www.sunwing.ca/pages/en/optional-services-sunwing-airlines)

Web check-in (/web/20200321203004mp_/https://www.sunwing.ca/pages/en/flight-check-in)

Win a vacation (/web/20200321203004mp_/https://www.sunwing.ca/en/contest/win-a-holiday)

Vacation Better (/web/20200321203004mp_/https://www.sunwing.ca/en/vacation-inspiration)

Social media

(https://web.archive.org/web/20200321203034/http://www.facebook.com/SunwingVacations)

(https://web.archive.org/web/20200321203034/http://twitter.com/#!/SunwingVacay)

(https://web.archive.org/web/20200321203034/http://www.youtube.com/user/SunwingTV)

(https://web.archive.org/web/20200321203034/https://www.instagram.com/sunwingvacations)

This is **Exhibit "22"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

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Signature

COVID-19 Policies

We apologize if your travel plans have been disrupted as a result of COVID-19 and we understand that you likely have many questions during this unprecedented time . Our team is working around the clock to assist you. Although we can't anticipate all your questions, we've tried our best to answer many of them on our FAQ page. Current call wait times are longer than usual so please check our FAQ to see if your question has been answered before contacting us. We appreciate your patience and understanding at this time. Please view our FAQ here (https://web.archive.org/web/20200414061203/https://www.sunwingcares.ca/hc/en-us/articles/360042892693-COVID-19-)

If you have a booking with us please see the chart below regarding our cancellation policies:

March 17th to May 31st

Sunwing is suspending all southbound flights between March 17th and May 31st.

Customers with departure dates for flights or vacation packages between March 17th and May 31st are eligible to receive a future travel credit in the value of the original amount paid. No action needed. Your original booking number will be the code of your future travel credit. We will communicate formally via the email address we have on file (including group travel bookings). You do not need to contact us.

This credit can be redeemed against future travel for departures up to June 20, 2022 to anywhere Sunwing Airlines operates.

June 1, 2020 onwards

Standard terms and conditions apply to changes and cancellations.

For bookings with Cancellation Insurance

If you have purchased the Sunwing Worry Free Cancellation Waiver you can cancel your vacation. click here

If you have travel insurance not purchased through Sunwing, you can go to Sunwing My Booking (https://web.archive.org/web/20200414061203/https://www2.sunwing.ca/mybooking?lang=en) to cancel your trip and make a claim with your insurance provider.

Flexible Final Payment Due Date

Effective March 25, 2020, final payments will now be due 25 days before the departure date (instead of the usual 45 days) for departures from June 1 - 30, 2020. This change to our policy is temporary and conditions will apply*. In addition, our air and package cancellation terms will also be aligned** with these amended final payment conditions. All other terms and conditions remain the same.

*Individual bookings only (not applicable to group bookings). Applicable on all air only and packages purchased via Sunwing **Cancellation fees: 25 days or more before departure: loss of deposit. 24 to 22 days before departure: 50% of the total amount. 21 days and less before departure: 100% of the total amount.

**Future travel credit are non-transferable, non-refundable and hold no cash value.*

Vacation deals

Flight deals

Flights to Costa Rica (/web/20200414061203mp_/https://www.sunwing.ca/en/promotion/flights/costa-rica)

All inclusive vacation packages (/web/20200414061203mp_/https://www.sunwing.ca/en/promotion/packages/all-inclusive-vacation-packages)

Cruise vacations (/web/20200414061203mp_/https://www.sunwing.ca/en/cruise-travel/)

Departures from your doorstep (/web/20200414061203mp_/https://www.sunwing.ca/en/promotion/packages/vacations-from-your-doorstep)

Last minute vacations (/web/20200414061203mp_/https://www.sunwing.ca/en/promotion/packages/last-minute-vacations)

Signature Collections (/web/20200414061203mp_/https://www.sunwing.ca/en/promotion/packages/signature-collections)

Summer vacation deals (/web/20200414061203mp_/https://www.sunwing.ca/en/promotion/packages/summer-steals)

Top-rated Adult resorts (/web/20200414061203mp_/https://www.sunwing.ca/en/promotion/packages/adult-vacations/)

Top-rated Family resorts (/web/20200414061203mp_/https://www.sunwing.ca/en/promotion/packages/family-vacations)

Two week vacations (/web/20200414061203mp_/https://www.sunwing.ca/en/promotion/packages/two-week-vacations)

Short Stay Vacations (/web/20200414061203mp_/https://www.sunwing.ca/en/promotion/packages/short-stay-vacations)

Winter vacation deals (/web/20200414061203mp_/https://www.sunwing.ca/en/promotion/packages/winter-vacation-deals)

Flight deals to Jamaica (/web/20200414061203mp_/https://www.sunwing.ca/en/promotion/flights/jamaica)

Flights to Cuba (/web/20200414061203mp_/https://www.sunwing.ca/en/promotion/flights/cuba)

Flight deals to Mexico (/web/20200414061203mp_/https://www.sunwing.ca/en/promotion/flights/mexico)

Flights to the D.R. (/web/20200414061203mp_/https://www.sunwing.ca/en/promotion/flights/dominican-republic)

Flights to Florida (/web/20200414061203mp_/https://www.sunwing.ca/en/promotion/flights/florida-flights)

Flights within Canada (/web/20200414061203mp_/https://www.sunwing.ca/en/promotion/flights/canada-flights)

Popular destinations

Antigua (/web/20200414061203mp_/https://www.sunwing.ca/en/destinations/antigua)

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Dominican Republic (/web/20200414061203mp_/https://www.sunwing.ca/en/destinations/dominican-republic)

Grand Cayman (/web/20200414061203mp_/https:

Holiday types

Cruise vacations (/web/20200414061203mp_/https://www.sunwing.ca/en/cruise-travel/)

Boutique vacations (/web/20200414061203mp_/https://www.sunwing.ca/en/promotion/packages/boutique-hotels)

Destination Weddings (https://web.archive.org/web/20200414061203mp_/https://www.weddingvacations.com/?utm_source=sunwing%20group%20banner%20ad&utm_medium=referral&utm_campaign=footer)

Dive vacations (/web/20200414061203mp_/https://www.sunwing.ca/en/featured-offer/divecations)

Golf vacations (/web/20200414061203mp_/https:

//www.sunwing.ca/en/destinations/cayman-islands/grand-cayman)

Jamaica (/web/20200414061203mp_/https://www.sunwing.ca/en/destinations/jamaica)

Mexico (/web/20200414061203mp_/https://www.sunwing.ca/en/destinations/mexico)

Saint Lucia (/web/20200414061203mp_/https://www.sunwing.ca/en/destinations/saint-lucia)

United States (/web/20200414061203mp_/https://www.sunwing.ca/en/destinations/united-states)

More destination deals (/web/20200414061203mp_/https://www.sunwing.ca/en/destinations)

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Accessibility policy (https://web.archive.org/web/20200414061203mp_/https://www.sunwing.ca/pages/en/sunwing-airlines/special-assistance)

Careers (https://web.archive.org/web/20200414061203mp_/http://www.sunwingtravelgroup.com/en/Careers/Join-our-winning-team)

Press releases (https://web.archive.org/web/20200414061203mp_/http://www.sunwingtravelgroup.com/en/Media-Room/Latest-News)

Privacy policy (/web/20200414061203mp_/https://www.sunwing.ca/Pages/en/mobileprivacy)

Terms and conditions (/web/20200414061203mp_/https://www.sunwing.ca/Pages/en/terms-and-conditions)

(https://web.archive.org/web/20200412015128/http://www.tico.ca)

Click for Review (https://web.archive.org/web/20200412015128/http://www.bbb.org/kitchener/business-reviews/tours-operators-and-promoters/sunwing-vacations-in-etobicoke-on-1133128#sealclick)

Our sites

//www.sunwing.ca/en/promotion/packages/golf-vacations)

Honeymoons (/web/20200414061203mp_/https://www.sunwing.ca/en/promotion/packages/honeymoon-vacations/)

Single parent vacations (/web/20200414061203mp_/https://www.sunwing.ca/en/promotion/packages/single-parent-vacations)

Spa vacations (/web/20200414061203mp_/https://www.sunwing.ca/en/promotion/packages/spa-vacations)

Vacations for singles (/web/20200414061203mp_/https://www.sunwing.ca/en/promotion/packages/solo-travel)

Useful links

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Protect your vacation (/web/20200414061203mp_/https://www.sunwing.ca/pages/en/be-worry-free)

Brochures (/web/20200414061203mp_/https://www.sunwing.ca/Pages/en/e-brochures)

Contact us (https://web.archive.org/web/20200414061203mp_/https://www.sunwingcares.ca/hc/en-us/articles/115000183534-Contact-us)

FAQs (https://web.archive.org/web/20200414061203mp_/https://www.sunwingcares.ca/hc/en-us/sections/204950908)

Flight status and alerts (/web/20200414061203mp_/https://www.sunwing.ca/Pages/en/flight-status-alerts)

Group Travel (/web/20200414061203mp_/https://www.sunwing.ca/en/grouptravel)

Optional services (/web/20200414061203mp_/https://www.sunwing.ca/pages/en/optional-services-sunwing-airlines)

Web check-in (/web/20200414061203mp_/https://www.sunwing.ca/pages/en/flight-check-in)

Win a vacation (/web/20200414061203mp_/https://www.sunwing.ca/en/contest/win-a-holiday)

Vacation Better (/web/20200414061203mp_/https://www.sunwing.ca/en/vacation-inspiration)

Social media

542

/web/20200412015128
/https:
//www.instagram.com
/sunwingvacations)

This is **Exhibit "23"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

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Signature

544

Swoop Suspends all International Flights, Commits to Bringing Home 2,349 Canadian Travellers

CALGARY, AB - March 19, 2020

Swoop is altering its international operations to help with the global efforts to combat the spread of COVID-19. At the end of the operating day on Sunday, March 22, Swoop is suspending all international and transborder flights, with the exception of some select Montego Bay flights, and will begin its efforts to bring home the 2,349 Swoop travellers who are currently outside of Canada. This suspension will be in place until October 24, 2020.

> *"These are extraordinary times, and we want to be sure our Swoop travellers are safe at home in Canada," says Bert van der Stege, Head of Commercial, Swoop. "Our priority is to bring Canadian travellers home, ensuring the safety of our travellers, crew and aircraft. We have put these suspensions and subsequent repatriation efforts in place to continue to deliver on that."*

On Monday, March 23, extra flights will begin operating for those Canadians abroad. There will be a total of 9 flights operating over three days to repatriate 2,349 Swoop travellers to Canada.

Impacted travellers are being contacted via email with more specific information on how to re-book on these repatriation flights, as well as how to cancel any upcoming international travel.

> *"As a result of how quickly the COVID-19 outbreak is changing demand for international air travel, we are in constant communication with our travellers through our various channels. We apologize for longer than average response times as we work through these changes," van der Stege states.*

Swoop is committed to helping Canadians get to where they need to be, whether that be home to Canada or within the domestic network. The airline prides itself on making all seats available at fair fares to support Canadians through these unsettling times.

About Swoop

Swoop is on a mission to make travel more affordable and accessible for all Canadians. Established in 2018 as an independent subsidiary of the WestJet Group of Companies, Swoop is Canada's ultra-not-expensive airline. Offering scheduled service to destinations in Canada, the U.S., Mexico and the Caribbean, Swoop's unbundled fares put travellers in control of purchasing only the products and services they desire.

Swoop's fleet of ten Boeing 737-800 NG aircraft expanded this year to add six Boeing 737 MAX 8 aircraft, for a total of 16 aircraft.

At FlySwoop.com travellers can quickly and easily book flights, manage bookings, check-in, view boarding passes, track flights and access Wi-Fi service in-flight.

For Swoop media relations, please contact media@flyswoop.com

For Swoop media relations, please contact: media@flyswoop.com

About Swoop

Swoop 101

Where we fly

Jobs

Newsroom

Media library

Sitemap

Travel Agent Sign-in

Legal and Fees

Terms of use

Privacy policy

Tariffs

Canadian flight and service disruptions

U.S. flight and service disruptions

Travel terms and conditions

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Flight interruptions and passenger rights

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Blog

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affirmed before me on September 7, 2023

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Signature

WestJet statement on operations and network from Ed Sims, President and CEO

Today, Prime Minister Trudeau made an explicit declaration to all Canadians abroad that it is time to come home. Based on this statement and the recommendations to Canadians to control the spread of the coronavirus COVID-19, we have made impactful decisions related to our operations.

On Sunday, March 22 at 11:59 p.m. MDT, we will suspend scheduled commercial operations for all international and transborder flights for a 30 day period. To be clear, this means our final commercially scheduled flights from international and transborder destinations will launch on Sunday night by 11:59 p.m. local time; after that, we will be operating rescue and repatriation flights with our partners. As of tonight, international and transborder tickets are no longer available for sale during this 30 day period.

On Wednesday, March 18 at 11:59 p.m. MDT, WestJet will suspend all outbound international ticket sales for travel until Sunday, March 22 at 11:59 p.m. MDT, so we are no longer sending Canadians out of the country and can instead focus on bringing them home.

To assist Canadians in returning home on short notice, we are in the process of lowering prices on our remaining seats into Canada in all cabins.

In addition, we will also reduce our domestic schedule by approximately 50 per cent. At this point, all network changes are in place for the next 30 days.

WestJetters are known for our level of care and this situation is no different. While this is a difficult time, we now have the responsibility as a Canadian airline to bring our citizens home.

-Statement from Ed Sims, WestJet President and Chief Executive Officer

For more details, and to understand how this may impact you, visit Options for WestJet guests.

This is **Exhibit "25"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

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Signature

WestJet updates domestic flight schedule from May 5 through June 4 - WestJet Blog

WestJet is making changes to its domestic flight schedule, removing approximately 4,000 weekly flights or 600 daily flights from May 5 through June 4, 2020. These changes are required to address significantly reduced guest demand during the COVID-19 crisis.

While some city pairings have been temporarily removed, we continue to serve the 38 Canadian airports to which we currently operate, ensuring that those with essential travel requirements can get where they need to be and that cargo goods like blood, medical products and food supplies can continue to flow.

The overall demand for travel remains fluid during this ongoing pandemic and we continue to evaluate further reductions. Bookings and full schedule details are available at westjet.com. All transborder and international routes remain suspended at this time through June 4, 2020.

For guests with travel booked after May 5 through June 4, we are proactively notifying them of their options.

The following city pairs have been temporarily removed from May 5-June 4, 2020:

This is **Exhibit "26"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

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Signature

From: Air Canada Flash <communications@emails.agents.aircanada.com>
Sent: March 18, 2020 4:53 PM
[redacted]
Subject: Update to Schedule Change policy in response to COVID-19 | Air Canada Provides Update on Ongoing COVID-19 Response

AIR CANADA

Email not displaying correctly?
View t in your browser.

FLASH Canada - March 18, 2020

Update to Schedule Change Policy In Response To COVID-19

Air Canada said today that it will gradually suspend the majority of its international and U.S. transborder flights by March 31, 2020 in response to decisions by national governments, including Canada and the United States, to close borders and restrict commercial aviation as a result of the COVID-19 crisis. As a result, you will start to receive these Schedule Change notifications in your GDS queues tomorrow March 19, 2020.

Affected customers whose flights are cancelled will be able to receive a full credit, regardless of fare type, valid for 24 months. We will be providing

you additional information shortly on how to process the 24-month validity. At this time, **we ask that you refrain from actioning or refunding tickets affected by this schedule change**.

This new change in schedule change policy will take effect tomorrow March 19, 2020 for all schedule changes implemented as of tomorrow March 19, 2020. Kindly note, any schedule changes made by Air Canada prior to March 19, 2020 are covered by our standard Schedule Change policy, which includes the option for a full refund for all fare brands.

Additionally, in order to make seats available to customers that need to get home, please note that existing PNRs with International segments and without ticket numbers, regardless of original Ticket Time Limit (TTL) will be cancelled.

Thank you again for your continued support.

Air Canada Provides Update on Ongoing COVID-19 Response

Air Canada said today that it will gradually suspend the majority of its international and U.S. transborder flights by March 31, 2020 in response to decisions by national governments, including Canada and the United States, to close borders and restrict commercial aviation as a result of the COVID-19 crisis. Subject to further government restrictions, the airline intends to continue to serve a small number of international and U.S. trans-border destinations from select Canadian cities after April 1, 2020. The airline also intends to continue serving all provinces and territories of Canada after that date, albeit with a significantly reduced network.

All schedule changes can be found at www.aircanada.com.

International and U.S. transborder services

In order to facilitate the continued repatriation of citizens to their home countries, including Canadians back to Canada, and to support the essential movement of needed goods and cargo during the crisis, Air Canada intends to continue to operate a limited number of international “air bridges” between one or more of its Canadian hubs and the cities of

London, Paris, Frankfurt, Delhi, Tokyo and Hong Kong from April 1 until at least April 30. This will reduce its international network from 101 airports to six.

As to U.S. transborder services, given the decision by the U.S. and Canadian governments today, from April 1, Air Canada will reduce its transborder network from 53 airports to 13, subject to further reductions based on demand or government edicts. The cities with continued service will be: New York (LGA and EWR), Boston, Washington, D.C. (IAD and DCA), Chicago, Houston, Seattle, San Francisco, Los Angeles, Denver, Orlando and Fort Lauderdale.

Domestic Canada network

Air Canada intends to continue to serve all provinces and territories of Canada, reducing its domestic network from 62 airports to 40 through a reduced network during the period April 1 to 30, subject to further reductions based on demand or government edict.

For information on Air Canada's schedule beginning April 1, 2020 please see www.aircanada.com.

"The restrictions on travel imposed by governments worldwide, while understandable, are nonetheless having a cataclysmic effect upon the global airline industry. Our immediate focus is on ensuring the safety and well-being of our employees, customers and communities. At the same time, we are exploring with the Government of Canada possibilities to maintain essential operations to enable as many Canadians as possible to return to Canada, and to support other vital transport needs, including the shipment of goods and cargo during the crisis as required in any state of emergency. We are working around the clock to deal with the impact for our customers and our business of the various travel restrictions that are being made by governments at unprecedented speed without advance warning. We will also look at helping Canadians to return home by operating a limited number of charters from international destinations and exploring with the Government of Canada avenues in this regard. We will provide updates as details are finalized," said Calin Rovinescu, President and Chief Executive of Air Canada.

For Affected Customers

The airline will gradually suspend some of its scheduled flights between now and March 31 as demand for Canadians to return to Canada from a number of destinations reduces. Please check Air Canada's website for details given the rapidly evolving situation.

Affected customers, including those with Air Canada Vacations packages, whose flights are cancelled will receive a full credit valid for 24 months. There is no requirement to contact Air Canada as customers will be contacted directly.

The airline has also put in place temporary, one-way fares to Canada to enable customers abroad to return home. Customers seeking to contact Air

Canada are advised that contact centre wait times are elevated, so the airline has put in place a number of self-service tools to enable customers to manage their travel online. For more information please consult our COVID-19 webpage at www.aircanada.com.

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AIR CANADA rouge

AIR CANADA
A STAR ALLIANCE MEMBER
MEMBRE DU RÉSEAU STAR ALLIANCE

Voted Best Airline in North America
Élue meilleur transporteur aérien en Amérique du Nord

Flights operated by Air Canada Rouge. For more information, visit flyrouge.com.

This email was sent because you represent or are an agent of a company or other legal entity engaged in the sale of air services that has a relationship with Air Canada.

Prices, schedules, terms and conditions are subject to change. All taxes, fees and charges are subject to change.

For online bookings, please refer to the booking flow by clicking on the search option in order to see the final price/breakdown or contact Air Canada Reservations at 1-888-247-2262. Certain international destinations may have taxes, fees or charges that must be paid at the point of origin or at departure. Please contact the nearest foreign government office of the country you plan to visit for definitive, up-to-date information. Country-specific and interactive passenger-specific information is also available at iatatravelcentre.com and travel.gc.ca. Fees for optional services, such as itinerary changes, additional baggage, advance seat selection, or certain special service requests may increase overall cost. For more information, please consult aircanada.com/us/en/aco/home/legal/products-and-services.html

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Please do not reply to this email, as this inbox is not monitored. If you have any questions please send an email to flashsubscription@aircanada.ca or you can write to Air Canada, PO Box 64239, RPO Thorncliffe, Calgary Alberta, T2K 6J7

Update subscription preferences.

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affirmed before me on September 7, 2023

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Signature

COVID-19 Updates

To Canadians abroad: For customers concerned about their travel plans, our flights continue to operate. Please check your flight status here.

Thank you for your patience and understanding during these times of rapid change.

If you booked directly with Air Canada (including aircanada.com, Air Canada Mobile App, Air Canada for Business, or our Contact Centres), please follow the questions below for help with your booking.

If you booked with Kayak, Google Flights, or Skyscanner, please follow the questions below for help with your booking.

Otherwise, if you booked with a travel agent or any other online travel agency (for example, Expedia or Priceline), kindly contact them directly for changes or cancellations. Each partner has a unique booking system that we are unable to access in order to adjust your booking.

What do you want to do?

I want to cancel an existing booking

If you made a flight booking before March 31st, 2020, and you want to cancel it, you can do so with no cancellation fee. You will receive full credit, which you can use towards future travel. This credit is valid for travel before March 31st, 2021.

Here's how:

- If you booked on aircanada.com, the Air Canada mobile app, through the Air Canada Contact Centre; or on Kayak, Google Flights or Skyscanner; you can go online for the fastest outcome:
- Sign in to aircanada.com, and select 'My Bookings'
- Enter the booking reference number and passenger information
- Select 'Cancel booking'
- When you confirm, if any change fee is displayed, it will be waived
- Please ensure that you hold on to your ticket number, which can be found in your original booking itinerary. When you are ready to travel again, please call us at 1-888-247-2262, with your ticket number, to book your future flight. Future travel using your travel credit must be completed before March 31st, 2021.
- If you booked your ticket through a travel agent or online travel agency (for example Expedia or Priceline), please contact them for assistance. Remember that tickets sold through a travel agency cannot be changed online.
- Click here if your booking is an Aeroplan flight reward.
- For all vacation packages purchased before March 31st, 2020, Air Canada Vacations please visit AirCanadaVacations.com
- If you booked in 2019, call us before the one-year anniversary of your original ticket purchase date and we will extend the

waiver through March 31st, 2021.

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Terms and conditions

- You must use your future flight credit for travel before March 31st, 2021.
- Tickets must have been purchased directly from Air Canada, Kayak, Google Flights, Skyscanner or through your travel agent before March 31st, 2020.
- Air Canada tickets can be identified by a 13-digit ticket number beginning with Air Canada's code "014". Tickets issued by other airlines with a different carrier code (ticket numbers not beginning with "014") are subject to the waiver policy of the other airline.
- When booking a new flight with your flight credit, any fare difference will apply if the new flight is more expensive. If the new flight is less expensive, any residual value resulting from a lower fare will be lost.
- Air Canada Vacations is offering its CareFlex travel protection plan for free on bookings made between March 5 and March 31, 2020. If you purchased your vacation package with Air Canada Vacations and would like to make changes to your booking, please contact your travel agent directly or Customer Care at 1 800 296-3408 for packages to Mexico, the Caribbean, Las Vegas or Hawaii, or at 1 877 752-7710 for tours in Europe.

I have an existing booking, and I want to change my flight

- Did you book on or before March 4th, 2020?
- Did you book after March 4th, 2020?

I am thinking about making a new booking

Book any flight with confidence now, knowing that if the situation with COVID-19 changes, you can adjust your travel plans accordingly. Any booking made until March 31st, 2020, for travel until December 31st 2020, can be changed without a fee. For non-refundable fares, you will get a credit towards future travel. Note that travel must be completed by December 31, 2020.

Click here for full details.

I want to check whether my flight is still scheduled

Regardless of how you booked, you can go online to check if your booking has been cancelled:

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- Sign in to aircanada.com, and select 'My Bookings'
- Enter the booking reference number and passenger information
- Once there, you can see if there have been any changes made to your upcoming flights

You can also visit the list of countries where we've suspended routes.

My flight has been cancelled What should I do?

If your flight has been cancelled, you will receive full credit, which you can use towards future travel. This credit is valid for travel within 24 months of your flight cancellation date.

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Here's how:

- You will receive an email notifying you that your flight has been cancelled and outlining next steps to process your flight credit.
- If you booked on aircanada.com, the Air Canada mobile app, through the Air Canada Contact Centre; or on Kayak, Google Flights or Skyscanner; you can go online for the fastest outcome:
  - Sign in to aircanada.com, and select 'My Bookings'
  - Enter the booking reference number and passenger information
  - **Select 'Cancel booking'**
  - When you confirm, if any change fee is displayed, it will be waived
  - Please ensure that you hold on to your ticket number, which can be found in your original booking itinerary. When you are ready to travel again, please call us at 1-888-247-2262, with your ticket number, to book your future flight. Future travel using your travel credit must be completed within 24 months from the date your flight was cancelled.
- If you booked your ticket through a travel agent or online travel agency (for example Expedia or Priceline), please contact them for assistance. Tickets sold through a travel agency cannot be changed online.
- Click here if your booking is an Aeroplan flight reward.
- For all Air Canada Vacations bookings cancelled between March 19, 2020 and April 30, 2020, please visit AirCanadaVacations.com

Terms and conditions

- You must use your future flight credit for travel within 24 months of your flight cancellation date
- Tickets must have been purchased directly from Air Canada, Kayak, Google Flights, Skyscanner or through your travel agent before March 31st, 2020.
- Air Canada tickets can be identified by a 13-digit ticket number beginning with Air Canada's code "014". Tickets issued by other airlines with a different carrier code (ticket numbers not beginning with "014") are subject to the waiver policy of the other airline.
- When booking a new flight with your flight credit, any fare difference will apply if the new flight is more expensive. If the new flight is less expensive, any residual value resulting from a lower fare will be lost.
- Exceptions may apply per government regulations

I am stranded abroad and need information on special flights operated by Air Canada

If you are seeking information about special flights on behalf of the Canadian Government, please register at the local Embassy or online at: https://travel.gc.ca/travelling/registration

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Important information for you to know

Route suspensions

Find out more

Preventive measures

Find out more

Government-imposed entry requirements

Find out more

Service offering changes

Find out more

Latest Updates

- Travellers who have visited the E.U.
- Flight suspension to/from Israel
- Change your existing booking
- Flight suspension to/from Italy
- Book without change fees

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A message from Calin Rovinescu, President and Chief Executive Officer, Air Canada

Our industry has always been a fast-changing one and these times are no different...

Read the full message.

Useful resources

We encourage our customers to stay informed about the facts surrounding COVID-19 and recommend the following links to qualified authorities:

Centers for Disease Control and Prevention (CDC)
Sharing background information about COVID-19 and news about cases in the United States.
Read more.

The World Health Organization (WHO)
Has the latest updates and a Q&A about COVID-19.
Read more.

The Government of Canada
Providing outbreak updates within Canada and around the world.
Read more.

International Air Transport Association (IATA)
Publishing the latest travel restrictions.
Read more.

This is **Exhibit "28"** to the Affidavit of Dr. Gábor Lukács

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Signature

Making changes to your flight

Are you looking to make a change to your flight? Call center wait times are higher than expected. **Please only call if your travel is within 72 hours**.
Change/cancellation options are available for **online self-service**.

Flight Refunds will be returned as a future travel credit in the form of a Swoop Credit, valid for 24 months. We are not processing refunds to original form of payment at this time,

Click for instructions on how to make changes

Did you receive an email from Swoop about a change to your flight?

- Follow the instructions in the email, to make changes to your flight, or to cancel for a credit to be used for future travel at FlySwoop.com.
- Can't find the email? You can log into Manage My Booking with your reservation code and the last name of the lead traveller on your booking to review your options.
- Follow the instructions here to process your credit.

Are you travelling within Canada?

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- There are currently no domestic travel restrictions.
- If your departure date is more than 7 days out, you can add ModiFly for free to your booking, to make a one-time date change.
    - Click here to learn more.
- If your departure date is between 3 – 7 days out, you can still make a change for a fee. Log into Manage My Booking to review your options.

Are you travelling to the U.S., Mexico, and/or Jamaica before May 31, 2020?

- Log into Manage My Booking and cancel your flight reservation for a credit. For instructions on how, click here

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Mobile app

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Instructions on how to cancel for credit

Swoop flight cancellations, Cancel for credit steps.

1 **Make sure you're eligible for cancel for credit!**

Travel booked between Canada and the United States, Mexico and/or Jamaica for travel before May 31st, 2020 or flights that have been changed or cancelled by Swoop.

2 **Once you've confirmed you're eligible,** you should have received an email from Swoop with instructions on how to access your credit.

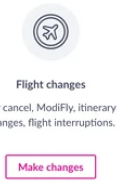
Check your junk/spam folder if you haven't received an email.

3 If you cannot find the email, you can still access your credit as long as you can log into **Manage My Booking** with your reservation code (6 digit alpha-numeric code) and the last name of the first traveller listed on your reservation (note: this could be different from the person who made the booking).

4 If you don't have a Swoop account, please create one. You'll need an account for your credit to be stored in. **The name on the Swoop account must exactly match the first**

5 Once you're logged into **Manage My Booking:**

1. Select 'Flight Changes.'



2. Select 'Flight Interruptions.'
3. Hit 'cancel.'

6 If you want to confirm your credit is available, you can view your available credits through your **Swoop Account.**

and last name of the first traveller on the itinerary.

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Signature

From: Christopher Brothers <Christopher.Brothers@westjet.com>
Sent: March 18, 2020 7:35 PM
Subject: Updated cancellation policy

Updated cancellation policy

As a result of the coronavirus COVID-19 situation, WestJet and WestJet Vacations are not processing refunds to original form of payment at this time. This applies to WestJet air-only, WestJet Vacations, Groups and group claims bookings.

Effective immediately, WestJet 838 air tickets booked via GDS and WestJet Agent will remain as open/unused tickets for future travel. This includes all existing tickets and any new tickets issued. WestJet Vacations cancellations will be refunded to WestJet dollars if full payment has been made or if a deposit has been provided.

If your clients prefer a refund to original form of payment, we will provide information about when that can be requested at a later date.

What's changing?

- **WestJet 838 air-only cancellations:** WestJet air tickets will remain as open/unused tickets for future travel. This change includes fares where refund to original form of payment previously applied (i.e. PremiumFlex and BusinessFlex), and for tickets paid with multiple forms of payment (i.e. WestJet dollars, gift card). Tickets are valid for 13 months from first coupon date.

- **WestJet Vacations cancellations (including land only):** The value of the package will be refunded to WestJet dollars and will be valid for 24 months from date of issue.

- **WestJet 838 contracted and private fare programs:** All WestJet contracted rates and private fares will remain as open/unused tickets for future travel. This change includes contracted or private fares where refund to original form of payment was

previously permitted.

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Coronavirus (COVID-19)

Recently we announced the suspension of our commercial operations for all transborder (United States, including Hawaii) and international (Europe, Mexico, Caribbean, Central America) flights as of Sunday, March 22 for a 30-day period.

Whether we are flying or not, we are always here for our guests. During this downtime, we will be doing everything we can to accommodate your changing travel needs. We will also continue to ensure our aircraft meet the highest safety and health standards.We are ready to fly when you are.

Since the situation with Coronavirus (COVID-19) is evolving day by day, we have implemented a flexible change policy (/web/20200321203000/https://www.westjet.com/en-ca/travel-info/advisories#tabpane-1462317543748-1) so you can adjust your travel plans without worry.

What you need to know

Change/cancel | Flights home

Info to travel | FAQs

Change or cancel your flight online

Call centre wait times are higher than expected. Please call only if your travel is within 72 hours. Change/cancel up to 2 hours before your flight.

Change/cancel your flights online (/web/2

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CORONAVIRUS UPDATES

Flexible change/cancel policy (/web/2020(

Flight refunds will be returned as a future travel credit in the form of a Travel Bank, valid for 24 months. Vacation refunds will be returned as WestJet dollars, valid for 24 months. We are not processing refunds to original form of payment at this time.

- Learn about flights that can only be changed or cancelled by an agent (/web/20200321203000/https://www.westjet.com/en-ca/my-trips/index#change)
- Request to cancel a flight form (/web/20200321203000/https://www.westjet.com/en-ca/travel-info/advisories/cancel-booking)
- Request to cancel a vacation form (/web/20200321203000/https://www.westjet.com/en-ca/travel-info/advisories/WVI-cancel-booking)
- If you were unable to reach us before your flight and decided not to fly due to Coronavirus (COVID-19), you may be eligible for a credit (/web/20200321203000/https://www.westjet.com/en-ca/travel-info/advisories/no-show-credit-request).

If you booked through a Travel Agent (online or directly), Corporate Travel arranger, or another airline, please contact them directly.

Please DO NOT go to the airport to cancel or change a future flight as this may result in delays for guests who are departing on their scheduled flights.

Bringing Canadians home

We're adding seats to bring more Canadians home

New flights

20 MAR / DEP 12:40 pm London (LGW) / ARR 4:27pm Toronto (YYZ)

Full 20 MAR / DEP 3:42 p.m. Puerto Vallarta (PVR) / ARR Calgary (YYC) 8:39 p.m.

Full 20 MAR / DEP 4:12 p.m. Puerto Vallarta (PVR) / ARR Calgary (YYC) 9:09 p.m.

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Book now (/web/20200321203000/https:/

Suspension of transborder and international flights

On Sunday, March 22, 2020 at 11:59pm local time, we are suspending flights to the United States (including Hawaii), Europe, Mexico, Caribbean, and Central America.

1. Booked flights within Canada that departs anytime -- no action is required.
2. Booked international flights with all connections departing before 11:59 p.m. -- no action is required.
3. International flights that depart after 11:59 p.m.
   a. Change/cancel your existing flight online with Manage trips (/web/20200321203000/https://www.westjet.com/en-ca/my-trips/index#managetrip)
   b. We will contact you if your flight is not eligible for change/cancel online
   c. Book a new flight
   d. if you are unable to secure a flight back to Canada on WestJet, please contact the Canadian Government via travel.gc.ca to register.

Read the announcement regarding the suspension of flights.

Travel help and resources

Helpful resources

Government Travel Advice and Advisories

World Health Organization

IATA – Air transport & communicable diseases

Public Health Agency of Canada

See all travel advisories (/web/20200321203000/https://www.westjet.com/en-ca/travel-info/advisories)

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CORONAVIRUS UPDATES

NOTICE: Affected WestJet Flights

Find out more regarding WestJet's latest Coronavirus (COVID-19) operational updates here.

See updates (https://web.archive.org/web

Cleaning our aircraft

We hold ourselves to the highest standard and strive to create an environment as clean as possible. In response to Coronavirus (COVID-19), we are doing more to keep you and your WestJet crew safe.

How we clean (https://web.archive.org/w

Preventative tips for your travel

- Travel with your own regulation-size hand sanitizers or disinfectant wipes (in containers 100 ml/100 g or less)
- Wash your hands often with soap and water for at least 20 seconds
- Avoid touching your eyes, nose, or mouth with unwashed hands
- Stay home if you are sick
- When coughing or sneezing:
  - Cover your mouth and nose with your arm or tissues to reduce the spread of germs
  - Immediately dispose of any tissues you have used into the garbage as soon as possible and wash your hands afterwards

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CORONAVIRUS UPDATES

Frequently asked questions

1. Is it safe to travel?
   Safety is WestJet's top priority and we are committed to providing our guests and WestJetters a safe travel and work environment. The health risk at this time remains low for Canada and for Canadian travellers. WestJet continues to monitor the situation closely.
2. How are WestJet aircraft cleaned?
   WestJet has taken additional precautionary measures to expand and increase frequency of our aircraft sanitization at busiest bases.
3. Can I cancel my flight?
   We have relaxed our cancellation policy for all fare types, so for new bookings, or existing bookings for travel in March or April, you can change or cancel your flight one time, without a fee.
4. What if I'm travelling on a flight with one of WestJet's partner airlines? Where can I find out more information?
   Our global partners are working diligently to provide guests with the most up-to-date information. You can find out more from their pages directly below.
   Delta
   Air France
   Qantas
   Aeromexico

More questions? (https://web.archive.org/web/20200321203000/https://blog.westjet.com/questions-and-answers-for-our-guests-on-coronavirus-covid-19)

English Contact us (/web/20200321203000/https://www.westjet.com/en-ca/contact-us/index)

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BOOKING OPTIONS

Business travel (/web/20200321203000/https://www.westjet.com/en-ca/book-trip/business-travel/index)

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Groups and conventions (/web/20200321203000/https://www.westjet.com/en-ca/book-trip/groups-charters/index)

Direct flights (/web/20200321203000/https://www.westjet.com/en-ca/book-trip/direct-flights/index)

Hold the fare (/web/20200321203000/https://www.westjet.com/en-ca/travel-info/payment/hold-fare)

Book with a companion voucher (https://web.archive.org/web/20200321203000/https://www.westjet.com/en-ca/book-trip/flight?iscompanionvoucher=true)

Book with WestJet dollars (https://web.archive.org/web/20200321203000/https://www.westjet.com/en-ca/book-trip/flight?iswestjetdollars=true)

Fares, taxes and fees (/web/20200321203000/https://www.westjet.com/en-ca/travel-info/fares/index)

Car rental (https://web.archive.org/web/20200321203000/https://autos.westjet.com/en/?clientID=443464#/searchcars)

Hotel (https://web.archive.org/web/20200321203000/https://hotels.westjet.com/en-ca?utm_source=westjet-hp&utm_medium=mega-nav_book_a_hotel_en-ca&utm_source=westjet-hp&utm_medium=mega-nav_book_a_hotel_en)

Destinations (/web/20200321203000/https://www.westjet.com/en-ca/book-trip/destination-guide)

BEFORE YOU GO

Baggage allowance (/web/20200321203000/https://www.westjet.com/en-ca/travel-info/baggage/index)

Seat selection (/web/20200321203000/https://www.westjet.com/en-ca/travel-info/seats/index)

Children and family (/web/20200321203000/https://www.westjet.com/en-ca/travel-info/children/index)

Pets (/web/20200321203000/https://www.westjet.com/en-ca/travel-info/pets)

Special needs (/web/20200321203000/https://www.westjet.com/en-ca/travel-info/special-needs/index)

Travel documents (/web/20200321203000/https://www.westjet.com/en-ca/travel-info/check-in/id-requirements)

Travel insurance (/web/20200321203000/https://www.westjet.com/en-ca/lowfaresandmore/extras/travel-insurance)

Download/update the app (/web/20200321203000/https://www.westjet.com/en-ca/about-us/mobile-app/index)

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AT THE AIRPORT

Lounges (/web/20200321203000/https://www.westjet.com/en-ca/book-trip/business-travel/airport-lounges)

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Priority services (/web/20200321203000/https://www.westjet.com/en-ca/travel-info/airport-experience/priority-services)

Security screening (/web/20200321203000/https://www.westjet.com/en-ca/travel-info/check-in/security-screening)

Travel advisories (/web/20200321203000/https://www.westjet.com/en-ca/travel-info/advisories)

Parking (/web/20200321203000/https://www.westjet.com/en-ca/lowfaresandmore/extras/airport-parking)

IN THE AIR

Food and beverage (/web/20200321203000/https://www.westjet.com/en-ca/travel-info/inflight/buy-on-board)

Entertainment (/web/20200321203000/https://www.westjet.com/en-ca/travel-info/inflight/entertainment)

Our aircraft (/web/20200321203000/https://www.westjet.com/en-ca/about-us/fleet/index)

Cabins (/web/20200321203000/https://www.westjet.com/en-ca/travel-info/inflight/index)

AT YOUR DESTINATION

Lost and found (https://web.archive.org/web/20200321203000/https://www.chargerback.com/reportlostitemcbembed.asp?customerid=16885&languagecode=en-US)

Lost luggage (/web/20200321203000/https://www.westjet.com/en-ca/travel-info/baggage/lost-delayed-damaged)

WestJet Magazine (https://web.archive.org/web/20200321203000/https://www.westjetmagazine.com/)

WestJet App (/web/20200321203000/https://www.westjet.com/en-ca/about-us/mobile-app/index)

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ABOUT WESTJET

About us (/web/20200321203000/https://www.westjet.com/en-ca/about-us/index)

Awards (/web/20200321203000/https://www.westjet.com/en-ca/about-us/history/awards)

History (/web/20200321203000/https://www.westjet.com/en-ca/about-us/history)

Sponsorship (/web/20200321203000/https://www.westjet.com/en-ca/contact-us/service-requests/sponsorship/index)

Community Investment (/web/20200321203000/https://www.westjet.com/en-ca/about-us/community-investment/index)

Media relations (/web/20200321203000/https://www.westjet.com/en-ca/about-us/media-relations/index)

Great jobs (/web/20200321203000/https://www.westjet.com/en-ca/about-us/jobs/index)

Our airline partners (/web/20200321203000/https://www.westjet.com/en-ca/about-us/airline-partners)

WestJet RBC® credit cards (/web/20200321203000/https://www.westjet.com/en-ca/rewards/rbc-mastercard/index)

FAQs (/web/20200321203000/https://www.westjet.com/en-ca/contact-us/faqs/index)

Sitemap (/web/20200321203000/https://www.westjet.com/en-ca/site-map)

WESTJET VACATIONS

Featured vacation packages (/web/20200321203000/https://www.westjet.com/en-ca/lowfaresandmore/vacations/index)

Exclusive vacation packages (/web/20200321203000/https://www.westjet.com/en-ca/book-trip/vacation/exclusive-vacation-packages)

Family vacation packages (/web/20200321203000/https://www.westjet.com/en-ca/book-trip/vacation/family-vacation-packages)

Why WestJet Vacations? (/web/20200321203000/https://www.westjet.com/en-ca/contact-us/faqs/vacations)

SERVICES

WestJet biz (https://web.archive.org/web/20200321203000/https://westjetbiz.westjet.com/login.html)

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WestJet Cargo (/web/20200321203000/https://www.westjet.com/en-ca/book-trip/westjet-cargo/index)

Travel agents (https://web.archive.org/web/20200321203000/http://www.westjettravelagents.com/)

Accessibility (/web/20200321203000/https://www.westjet.com/en-ca/travel-info/special-needs/index)

WestJet Flight Light (/web/20200321203000/https://www.westjet.com/en-ca/about-us/flightlight)

LEGAL

Tariffs and conditions of carriage (/web/20200321203000/https://www.westjet.com/en-ca/about-us/legal/tariffs/index)

Privacy policy (/web/20200321203000/https://www.westjet.com/en-ca/about-us/legal/privacy-policy)

Flight interruptions and passenger rights (/web/20200321203000/https://www.westjet.com/en-ca/travel-info/flight-interruptions-passenger-rights/index)

US flight and service disruptions (/web/20200321203000/https://www.westjet.com/en-ca/travel-info/flight-interruptions/us-service-plan)

Legal (/web/20200321203000/https://www.westjet.com/en-ca/about-us/legal/index)

This is **Exhibit "32"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

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Signature

CANADIAN TRANSPORTATION AGENCY

Determination No. A-2020-42

March 13, 2020

DETERMINATION by the Canadian Transportation Agency relating to COVID-19 pandemic – Temporary exemptions to certain provisions of the *Air Passenger Protection Regulations*, SOR/2019-150 (APPR).

Case number: 20-02750

[1] On March 11, 2020, the World Health Organization assessed the outbreak of COVID-19 as a pandemic.

[2] Since the outbreak of the virus, a number of countries, including Canada, have imposed travel bans, restrictions, or advisories.

[3] Public health experts have also recommended behaviours, such as enhanced hygiene practices and social distancing, to mitigate the spread of the virus.

[4] The situation is evolving rapidly, and further restrictions relating to travel may be implemented.

[5] The pandemic is causing a significant decrease in demand for air travel. Flying with many empty aircraft seats can result in significant financial difficulties for air carriers, which may therefore decide to cancel or consolidate flights. Due to the evolving nature of the situation and public behaviours, these decisions may need to be made much closer to a scheduled flight day than would normally be the case.

[6] Other aspects of air carrier operations may also be impacted by the pandemic, including but not limited to staff shortages due to quarantines or refusals to work, additional hygiene practices onboard the aircraft, and passenger health screenings. These factors may result in flight delays.

[7] Under the APPR, air carriers have minimum obligations to passengers when flights are cancelled or delayed. Those obligations depend on whether the disruption was within the control of the air carrier, within the air carrier's control but required for safety, or outside the carrier's control:

- Situations within the air carrier's control: keep the passenger informed, provide standards of treatment (such as food and water), compensate the passenger for inconvenience, and rebook or refund the passenger.
- Situations within the air carrier's control but required for safety: keep the passenger informed, provide standards of treatment, and rebook or refund the passenger.
- Situations outside the air carrier's control: keep the passenger informed and rebook the passenger so the passenger can complete their itinerary.

[8] Section 10 of the APPR provides a non-exhaustive list of situations considered outside the air carrier's

control (the third category above). These include medical emergencies and orders or instructions from state officials. In the context of the COVID-19 pandemic, the following would be considered outside a carrier's control:

- flight disruptions to locations that are covered by a government advisory against travel or unnecessary travel due to COVID-19;
- employee quarantine or self-isolation due to COVID-19;
- employee refusal to work under Part II of the *Canada Labour Code,* R.S.C, 1985, c. L-2*,* (or equivalent law) due to COVID-19; and
- additional hygiene or passenger health screening processes put in place due to COVID-19.

[9] Beyond such situations, air carriers may make decisions that are influenced by the pandemic, including decisions to cancel and consolidate flights due to dropping passenger volumes. Whether such situations are within or outside carrier control would have to be assessed on a case-by-case basis. If the disruption was within the air carrier's control, the air carrier would be subject to more onerous obligations.

[10] In the extraordinary context of this pandemic, reasonable expectations regarding air travel have changed, taking into account government travel bans, restrictions, and advisories; public health practices; and impacts on travel demand and air carrier operations.

CONCLUSION

[11] The Agency finds that, in the context of the significant declines in passenger volumes and disruptions to air carrier operations caused by the COVID-19 pandemic, temporary exemptions to the APPR should be made to provide air carriers with increased flexibility to adjust flight schedules without facing prohibitive costs.

[12] Specifically, the Agency finds it undesirable, in the current extraordinary circumstances, that carriers be obligated to provide compensation for inconvenience to passengers who were informed of a flight delay or a flight cancellation more than 72 hours before their original scheduled departure or to passengers who were delayed at destination by less than six hours. The Agency further finds it undesirable that carriers be required to offer alternative travel arrangements that include flights on other air carriers with which they have no commercial agreement.

ORDER

[13] The Agency orders that all air carriers be exempted from:

- the obligation, under paragraphs 19(1)(a) and 19(1)(b) of the APPR, to pay compensation for inconvenience
    - 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; or,
    - if the flight delay or the flight cancellation is communicated to the passengers within 72 hours of the departure time indicated on the original ticket, on condition that the carrier pays the passengers the following compensation for inconvenience;in the case of a large carrier,
        - in the case of a large carrier,

            - $400, if the arrival of the passenger's flight at the destination that is indicated on the original ticket is delayed by six hours or more, but less than nine hours, or

- $700, if the arrival of the passenger's flight at the destination that is indicated on the original ticket is delayed by nine hours or more; and

  - in the case of a small carrier,

    - $125, if the arrival of the passenger's flight at the destination that is indicated on the original ticket is delayed by six hours or more, but less than nine hours, or

    - $250, if the arrival of the passenger's flight at the destination that is indicated on the original ticket is delayed by nine hours or more.

- the 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;
- the obligation, under paragraphs 17(1)(a)(ii),17(1)(a)(iii), and 18(1)(a)(ii) of the APPR to provide a confirmed reservation on a flight operated by a carrier with which the carrier does not have any commercial agreement.

[14] The exemption is effective immediately, will remain valid until April 30, 2020, and may be extended by a further determination of the Agency, if required.

Member(s)

Scott Streiner
Elizabeth C. Barker

Back to rulings

Date modified:
2020-03-13

This is **Exhibit "33"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

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Signature

CANADIAN TRANSPORTATION AGENCY

Determination No. A-2020-47

March 25, 2020

DETERMINATION by the Canadian Transportation Agency relating to COVID-19 pandemic – Additional temporary exemptions to certain provisions of the *Air Passenger Protection Regulations*, SOR/2019-150 (APPR) and extension of the temporary exemption period.

Case number: 20-03254

[1] On March 11, 2020, the World Health Organization assessed the outbreak of COVID-19 as a pandemic.

[2] On March 13, 2020, the Canadian Transportation Agency (Agency) found in Determination No. A-2020-42 that it is undesirable that carriers be obligated to follow certain requirements of the APPR in these circumstances.

[3] Specifically, in the context of the significant declines in passenger volumes and disruptions to air carrier operations caused by the COVID-19 pandemic, the Agency granted temporary exemptions from APPR requirements related to compensation for inconvenience and to rebooking with competitors, to provide air carriers with increased flexibility to adjust flight schedules without facing prohibitive costs.

[4] To allow air carriers to continue focusing on immediate and urgent operational demands, including bringing Canadians home from abroad, the Agency considers it temporarily undesirable for air carriers to have to meet the APPR's 30-day deadline to respond to passengers' claims for the payment of compensation for inconvenience.

[5] Further, considering that the major impacts of the COVID-19 pandemic on the air sector are unlikely to be resolved by April 30, 2020, the Agency finds it appropriate to extend the duration of the exemptions in Determination No. A-2020-42.

ORDER

[6] Pursuant to subsection 80(1) of the *Canada Transportation Act*, S.C., 1996, c. 10, as amended, the Agency orders that all air carriers be exempted from the requirement under subsection 19(4) of the APPR to respond to requests for compensation, on the condition that air carriers respond to such requests within 120 day of the expiry of this order.

[7] This Order is effective immediately and will remain valid until June 30, 2020.

[8] The Agency further orders that the exemptions granted by Determination No. A-2020-42 remain valid until June 30, 2020.

[9] Exemptions granted under this determination and Determination No. A-2020-42 may be extended by a further determination of the Agency, if required.

Member(s)

Scott Streiner
Elizabeth C. Barker

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2020-03-25

This is **Exhibit "34"** to the Affidavit of Dr. Gábor Lukács

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CANADIAN TRANSPORTATION AGENCY

Order No. 2020-A-32

March 18, 2020

IN THE MATTER OF an immediate and temporary stay of all dispute proceedings involving air carriers.

Case number: 20-02915

On March 11, 2020, the World Health Organization assessed the outbreak of COVID-19 as a pandemic. Since the outbreak of the virus, a number of countries, including Canada, have imposed travel bans, restrictions, or advisories. On March 13, 2020, in Determination No. A-2020-42, the Agency ordered that all air carriers be temporarily exempted from certain provisions of the *Air Passenger Protection Regulations*, SOR/2019-150. On March 16, 2020, the Government of Canada announced several new COVID 19 responses which directly affect air carriers. Air carriers are now required to conduct a basic health assessment of all passengers, and to deny boarding for international flights to Canada to passengers who present COVID-19 symptoms, and to many non citizens and non-residents. As of March 18, 2020, arrivals of international flights are restricted to four airports in Canada.

The impact of the COVID-19 pandemic on air carriers and passengers is significant and continues to evolve. Air carrier resources are highly stretched as carriers work to bring Canadians home from abroad, implement new Government of Canada directions, and adjust to rapidly dropping passenger volumes and travel restrictions.

The Agency finds that in light of these extraordinary circumstances, it would be just and reasonable to temporarily stay dispute proceedings involving air carriers to permit them to focus on immediate and urgent operational demands.

ORDER

Pursuant to subsection 5(2), paragraph 41(1)(d), and section 6 of the *Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings*), SOR/2014-104, the Agency, on its own motion, orders that all dispute proceedings before the Agency involving air carriers be stayed until April 30, 2020. The stay is effective immediately and applies to all current applications currently before the Agency, as well as any applications received for dispute adjudication during the stay period. On or before April 30, 2020, the Agency will determine if the stay should end on that date or be extended to a later date. In exceptional circumstances, the Agency may lift the stay on individual cases sooner, where necessary in the interests of justice.

Member(s)

Scott Streiner
Elizabeth C. Barker
J. Mark MacKeigan
Heather Smith
Mary Tobin Oates
Gerald Dickie
Lenore Duff

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2020-03-18

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affirmed before me on September 7, 2023

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CANADIAN TRANSPORTATION AGENCY

Order No. 2020-A-37

March 25, 2020

IN THE MATTER OF an extension of the stay of proceedings ordered in Order No. 2020-A-32.

Case number: 20-03246

On March 11, 2020, the World Health Organization assessed the outbreak of COVID-19 as a pandemic.

On March 18, 2020, the Canadian Transportation Agency (Agency) found that in light of these extraordinary circumstances related to the pandemic, it would be just and reasonable to temporarily stay dispute proceedings involving air carriers to permit them to focus on immediate and urgent operational demands.

Considering that the major impacts of the COVID-19 pandemic on the air sector are unlikely to be resolved by April 30, 2020, the Agency finds it is just and reasonable to extend the duration of the stay of proceedings ordered in Order No. 2020 A-32 until June 30, 2020.

ORDER

Pursuant to subsection 5(2), paragraph 41(1)(d), and section 6 of the Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings), SOR/2014-104, the Agency, on its own motion, orders that all dispute proceedings before the Agency involving air carriers be stayed until June 30, 2020, including any applications received for dispute adjudication during the stay period.

On or before June 30, 2020, the Agency will determine if the stay should end on that date or be extended to a later date. In exceptional circumstances, the Agency may lift the stay on individual cases sooner, where necessary in the interests of justice.

Member(s)

Scott Streiner
Elizabeth C. Barker
J. Mark MacKeigan
Mary Tobin Oates
Heather Smith
Gerald Dickie
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CANADIAN TRANSPORTATION AGENCY

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.

Date modified:
2020-03-25

This is **Exhibit "37"** to the Affidavit of Dr. Gábor Lukács

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CANADIAN TRANSPORTATION AGENCY

Home

Important Information for Travellers During COVID-19

Official Global Travel Advisory from the Government of Canada

Suspension of all air dispute resolution activities

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 can continue to file air passenger 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.

Air Passenger Protection Obligations During COVID-19 Pandemic

On March 11, 2020, the World Health Organization assessed the outbreak of COVID-19 as a pandemic. Since the outbreak of the virus, a number of countries, including Canada, have imposed travel bans, restrictions, or advisories. Officials have also recommended behaviours, such as enhanced hygiene practices and social distancing, to mitigate the spread of the virus. The situation is evolving rapidly, and further restrictions relating to travel may be implemented.

The Canadian Transportation Agency (CTA) has taken steps to address the major impacts that the COVID-19 pandemic is having on the airline industry by making temporary exemptions to certain requirements of the *Air Passenger Protection Regulations* (APPR) that apply **from March 13, 2020 until June 30, 2020**.

This guide explains these temporary changes and how the APPR apply to certain flight disruptions related to COVID-19.

In addition to the APPR, carriers must also follow their tariffs. In light of the COVID-19 Pandemic, CTA has issued a Statement on Vouchers.

Related Links

Air carriers - Exemptions due to COVID-19 pandemic
A-2020-42 | Determination | 2020-03-13

Air Canada also carrying on business as Air Canada rouge and as Air Canada Cargo - temporary exemption from the advance notice requirements of section 64 of the CTA
2020-A-36 | Order | 2020-03-25

Extension of stay - COVID-19 - immediate and temporary stay of all dispute proceedings involving air carriers
2020-A-37 | Order | 2020-03-25

Air carriers - further exemptions due to COVID-19 pandemic
A-2020-47 | Determination | 2020-03-25

Delays and Cancellations

The APPR set airline obligations to passengers that vary depending on whether the situation is **within the airline's control, within the airline's control and required for safety purposes, or outside the airline's control**. Descriptions of these categories can be found in Types and Categories of Flight Disruption: A Guide.

The CTA has identified a number of situations related to the COVID-19 pandemic that are considered outside the airline's control. These include:

- flight disruptions to locations that are covered by a government advisory against travel or unnecessary travel due to COVID-19;
- employee quarantine or self-isolation due to COVID-19; and
- additional hygiene or passenger health screening processes put in place due to COVID-19.

Airlines may make decisions to cancel or delay flights for other reasons. Whether these situations are within or outside the airline's control would have to be assessed on a case-by-case basis.

Airline obligations

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. Airlines must also always make sure the passengers reach their destinations (re-booking them on other flights).

If the cause of the disruption is within an airline's control, there are additional obligations, as outlined below.

Situations outside airline control (including COVID-19 related situations mentioned above)

In these situations, airlines must:

- Rebook passengers on the next available flight operated by them or a partner airline.
  - *For disruptions between March 13, 2020 and June 30, 2020, airlines do not have to follow APPR requirements to rebook passengers using an airline with which they have no commercial agreement.*
  - Please refer to the CTA's Statement on Vouchers.
  - This obligation does not require air carriers to rebook passengers who have already completed

their booked trip (including by other means such as a repatriation flight).

Situations within airline control

In these situations, airlines must:

- **Meet** standards of treatment
- Rebook passengers on the next available flight operated by them or a partner airline or a refund, if rebooking does not meet the passenger's needs;
    - *For disruptions between March 13, 2020 and June 30, 2020, airlines do not have to follow APPR requirements to rebook passengers using an airline with which they have no commercial agreement.*
    - Please refer to the CTA's Statement on Vouchers.
    - This obligation does not require air carriers to rebook passengers who have already completed their booked trip (including by other means such as a repatriation flight).
- **Provide compensation:** *For disruptions between March 13, 2020 and June 30, 2020, different compensation requirements are in effect*. If the airline notified the passengers of the delay or cancellation less than 72 hours in advance, they must provide compensation based on how late the passenger arrived at their destination (unless the passenger accepted a ticket refund):
    - *Large airline:*
        - 6-9 hours: $400
        - 9+ hours: $700
    - *Small airline:*
        - 6-9 hours: $125
        - 9+ hours: $250
- Effective March 25, 2020, the deadline for a carrier to respond to claims filed by passengers for payment of the compensation for inconvenience is suspended until June 30, 2020 (or any further period that the Agency may order). Once the suspension is over, carriers will have 120 days to respond to claims received before or during the suspension.

Situations within airline control, but required for safety

In these situations, the airline must:

- **Meet** standards of treatment;
- Rebook passengers on the next available flight operated by them or a partner airline or a refund, if rebooking does not meet the passenger's needs.
    - *For disruptions between March 13, 2020 and June 30, 2020, airlines do not have to follow APPR requirements to rebook passengers using an airline with which they have no commercial agreement.*
    - Please refer to the CTA's Statement on Vouchers.
    - This obligation does not require air carriers to rebook passengers who have already completed their booked trip (including by other means such as a repatriation flight).

Other APPR requirements

All other air passenger entitlements under the APPR remain in force, including clear communication, tarmac delays and seating of children. For more information visit the CTA's Know Your Rights page.

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Refusal to transport

The Government of Canada has barred foreign nationals from all countries other than the United States from entering Canada (with some exceptions). Airlines have also been instructed to prevent all travellers who present COVID-19 symptoms, regardless of their citizenship, from boarding international flights to Canada.

The APPR obligations for flight disruptions would not apply in these situations.

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CANADIAN TRANSPORTATION AGENCY

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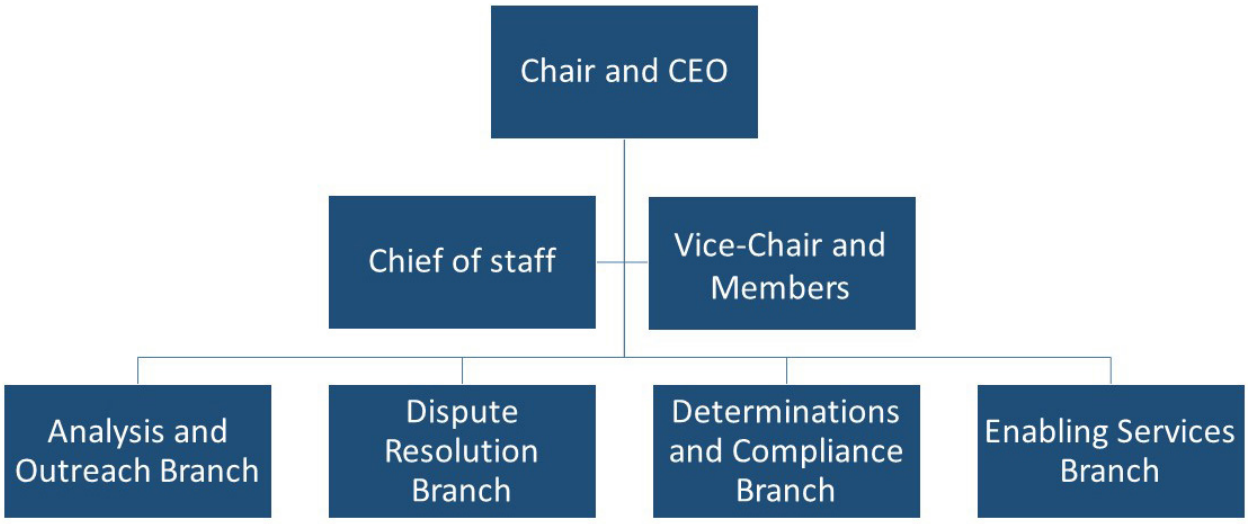
Organizational chart



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

Date modified:
2016-04-01

This is **Exhibit "39"** to the Affidavit of Dr. Gábor Lukács

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Signature

CANADIAN TRANSPORTATION AGENCY

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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

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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.

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Date modified:

2019-05-02

This is **Exhibit "40"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

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Signature

CANADIAN TRANSPORTATION AGENCY

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

This is **Exhibit "41"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

_____

Signature

CANADIAN TRANSPORTATION AGENCY

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Home

Organization and mandate

Our organization and mandate

Strategic Framework 2021–2024

Statement regarding the independence of the Canadian Transportation Agency

Members

Members Code of Conduct

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 provide consumer protection for air passengers.
- We protect the human right of persons with disabilities to an accessible transportation network.

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
- Lenore Duff, temporary Member

France Pégeot, Chair and CEO

France Pégeot was appointed Chair and CEO of the Canadian Transportation Agency (CTA) on June 1, 2021.

Highly committed to public service for over 30 years, and an agent of change within the organizations where she works, she has diversified management experience, including in the fields of regulation and economic development.

Before joining the CTA, Ms. Pégeot most recently served as Executive Vice-President of the

Canadian Food Inspection Agency.

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Prior to that, she has held Assistant Deputy Minister positions in the following departments: Agriculture and Agri-Food Canada, Justice Canada, Fisheries and Oceans Canada, Industry Canada and Economic Development for the Quebec Regions.

Prior to becoming Assistant Deputy Minister, Ms. Pégeot participated in an Interchange assignment with Encana Corp. in Calgary 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

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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.

Lenore Duff, temporary Member

Lenore Duff returned to the Canadian Transportation Agency after having served as a temporary Member from 2018-2020. She 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 "42"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

_____

Signature

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: Air Transat

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.

I would assume that writ large this situation is outside of the carrier's control.

If a flight cancellation is within the carrier's control, or within the carrier's control but required for safety, a refund is required and a voucher would not be compliant. Again, this does not seem to be relevant here.

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: Air Transat

Hi Marcia,

Air Transat are telling us that they are getting pressure from creditors who are pushing on the airlines for cash. They will request that we officially let them to provide vouchers to passengers instead of providing them cash because they literally do not have enough cash to give refunds.

Have you heard anything about this? Are you available to discuss?

Thanks,

cs

This is **Exhibit "43"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

_____

Signature

Transport Canada

Transports Canada

Director General
Air Policy

Directeur général
Politique aérienne

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June 8th, 2023

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Kevin Shaar
Counsel, Legal Services and Secretariat Branch
Canadian Transportation Agency /
Government of Canada
kevin.shaar@otc-cta.gc.ca
Counsel for the Intervenor CTA

Re: Air Passenger Rights v AGC, Court File No.: A-102-20
Subpoena received May 26, 2023 - documents

Counsel,

I, the undersigned, in my capacity as an employee of Transport Canada, do confirm that Transport Canada has performed a search of documents in its possession and control, in compliance with the May 26, 2023, subpoena received in respect of Federal Court of Appeal file number A-102-20.

I do further confirm that in respect of items '1' and '3' of the subpoena, no compliant documents have been identified, and that a single document has been identified in respect of item '2', a March 18, 2020, email, attached hereto.

Sincerely,

Colin Stacey
Director General, Air Policy
Directeur général, Politique aérienne

c.c.: Lorne Ptak and Sandy Graham, Counsel for the Respondent

Canada

From: Millette, Vincent
Sent: Wednesday, March 18, 2020 5:14 PM
To: Caitlin Hurcomb <Caitlin.Hurcomb@otc-cta.gc.ca>
Subject: FW: From MinO: Air Transat

Hi Cait – we have a question from our MinO. Would that be contrary to the APPRs to provide vouchers instead of cash for tickets refunds?

Colin has been in touch with Marcia but I don't think she responded.

Many Thanks!

From: Stacey, Colin
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: Air Transat

Hi Marcia,

Air Transat are telling us that they are getting pressure from creditors who are pushing on the airlines for cash. They will request that we officially let them to provide vouchers to passengers instead of providing them cash because they literally do not have enough cash to give refunds.

Have you heard anything about this? Are you available to discuss?

Thanks,

cs

This is **Exhibit "44"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

_____

Signature

Meredith Desnoyers

From: Caitlin Hurcomb
Sent: Friday, March 20, 2020 9:39 AM
To: Valérie Lagacé
Subject: FW: From MinO: Air Transat

Hi Val,
Just looping you in on this exchange with TC, in case there was anything you felt needed discussing with TC Legal.
I believe this information was requested by Finance to inform decisions about potential support for airlines. Happy to give more context.

Thanks!
Cait

From: Caitlin Hurcomb
Sent: Friday, March 20, 2020 8:21 AM
To: 'Millette, Vincent'
Subject: RE: From MinO: Air Transat

Hi Vincent,

All carriers with an international license with the Agency must file a tariff with us. To make changes to conditions in its tariff:

- Generally speaking, the carrier would need to file a new tariff, which would only take effect after the statutory notice period, which is 45 days.
- If necessary, a carrier may make a request to the Agency for the tariff to be in effect earlier than 45 days, especially if beneficial to the travelling public.
- The carrier could also ask to be exempt from the statutory period under section 80 of the Act, if the carrier can justify that "compliance with the provision by the person is unnecessary, undesirable or impractical."

The CTA's Tariff and Research Division can provide further guidance to carriers on this, as required.

Obviously I can't speak for senior management or decision-makers at the Agency, but I think there would be some concern here if carriers were looking to change their tariffs in a way that would leave passengers without recourse. I am not sure there would be appetite to waive the statutory requirements in those circumstances. I'll also note that the reasonableness of a carrier's tariff can be reviewed by Agency members.

Feel free to contact me if you have any questions.

Thanks!

Cait Hurcomb

Chef d'équipe et Conseillère principale en politiques, Affaires réglementaires
Office des transports du Canada | Gouvernement du Canada
Caitlin.Hurcomb@otc-cta.gc.ca | 613-853-3381

Team Lead and Senior Policy Advisor, Regulatory Affairs
Canadian Transportation Agency | Government of Canada
Caitlin.Hurcomb@otc-cta.gc.ca | 613-853-3381

From: Millette, Vincent [mailto:vincent.millette@tc.gc.ca]
Sent: Thursday, March 19, 2020 4:53 PM
To: Caitlin Hurcomb <Caitlin.Hurcomb@otc-cta.gc.ca>
Subject: RE: From MinO: Air Transat

Would you know what would be involved in terms of process and timelines if a carrier wanted to quickly change certain conditions of its tariff.

Thanks

From: Caitlin Hurcomb [mailto:Caitlin.Hurcomb@otc-cta.gc.ca]
Sent: Thursday, March 19, 2020 1:24 PM
To: Millette, Vincent <vincent.millette@tc.gc.ca>
Subject: RE: From MinO: Air Transat

Hi Vincent,
Spoke with Tariffs Division and they confirm that airlines must follow the policies in their tariffs and if they wanted to follow different policies, they would have to amend their tariff.

I hope this helps – let me know if you have any other questions.

Thanks!
Cait

From: Millette, Vincent [mailto:vincent.millette@tc.gc.ca]
Sent: Wednesday, March 18, 2020 5:32 PM
To: Caitlin Hurcomb <Caitlin.Hurcomb@otc-cta.gc.ca>
Subject: RE: From MinO: Air Transat

That would be great – thanks!

From: Caitlin Hurcomb [mailto:Caitlin.Hurcomb@otc-cta.gc.ca]
Sent: Wednesday, March 18, 2020 5:31 PM
To: Millette, Vincent <vincent.millette@tc.gc.ca>
Subject: RE: From MinO: Air Transat

Marcia just responded to the original question.

Yes, policies on cancellations by the passenger would be an airline tariff/fare rules issue. I can ask my colleagues in the Tariffs about your last question.

From: Millette, Vincent [mailto:vincent.millette@tc.gc.ca]
Sent: Wednesday, March 18, 2020 5:28 PM

To: Caitlin Hurcomb <Caitlin.Hurcomb@otc-cta.gc.ca>
Subject: RE: From MinO: Air Transat

641

Refunds under the APPR.

Refunds for trips cancelled by the passenger would be dealt with accordingly with the carriers' tariff? If the tariff allows it, then they can do it. What if the tariff says they reimburse cash but now they want to do vouchers, do they need to amend their tariff?

Thanks

From: Caitlin Hurcomb [mailto:Caitlin.Hurcomb@otc-cta.gc.ca]
Sent: Wednesday, March 18, 2020 5:24 PM
To: Millette, Vincent <vincent.millette@tc.gc.ca>
Subject: RE: From MinO: Air Transat

Yeah, that happens for some reason on encrypted replies between TC and CTA. Not sure why.
Wanted to ask – are we talking about refunds under the APPR or refunds for trips cancelled by the passenger?

Also – I think Marcia is on her way back from T.O.

From: Millette, Vincent [mailto:vincent.millette@tc.gc.ca]
Sent: Wednesday, March 18, 2020 5:21 PM
To: Caitlin Hurcomb <Caitlin.Hurcomb@otc-cta.gc.ca>
Subject: RE: From MinO: Air Transat

Hi Cait – I don't know if you meant to reply something but your message below was empty

---

From: Caitlin Hurcomb [mailto:Caitlin.Hurcomb@otc-cta.gc.ca]
Sent: Wednesday, March 18, 2020 5:16 PM
To: Millette, Vincent <vincent.millette@tc.gc.ca>
Subject: RE: From MinO: Air Transat

This is **Exhibit "45"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

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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.

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

This is **Exhibit "46"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

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Signature

Amanda Hamelin

Subject:	Special EC - COVID19 - Daily updates
Location:	(514) 938-6569,,935311571# (then press #)
Start:	Mon 3/16/2020 2:00 PM
End:	Mon 3/16/2020 2:30 PM
Recurrence:	Daily
Recurrence Pattern:	every day from 2:00 PM to 2:30 PM
Meeting Status:	Accepted
Organizer:	Scott Streiner
Required Attendees:	Alysia Lau; Douglas Smith; Lesley Robertson; Liz Barker; Marcia Jones; Mireille Drouin; Sébastien Bergeron; Tom Oommen; Valérie Lagacé
Optional Attendees:	Allan Burnside; Simon-Pierre Lessard
Importance:	High

Chair's Boardroom & by CBCI teleconference: dial 1 514 938 6569 call ID: 935311571# then # again

Alysia will HOST.

This is **Exhibit "47"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

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Signature

Meeting - Mar. 19

Thursday, March 19, 2020 9:03 AM

Attendance

- Scott Streiner
- Liz Barker
- Mireille Drouin
- Doug Smith
- Marcia Jones
- Tom Oommen
- Valérie Lagacé

- Sébastien Bergeron
- Alysia Lau

Debriefs - External

- MJ: Debriefed on suspension order and APPR determination. Air carrier tone is nothing within their control. Want Agency to clarify that they are not required to refund carriers. Air carriers don't have resources to turn to implementing ATPDR.
- SS: ATPDR largely reflect previous codes, so not reasonable to delay coming-into-force wholesale.

- SS: Other issue is air carriers refusing to provide refund or voucher to passengers.
- SS: Considering issuing statement - current context very different from regulations, Agency view is it would be reasonable that air carriers provide refunds or vouchers to passengers affected by mass cancellations.
- DS: Prefer vouchers given cash flow issues.
- LB: Vouchers would need to include reasonable conditions.
- VL: Could offer suspension of compensation requirements altogether. SS: Could imply that these types of situations are outside air carrier control.
- SS and SB: What if government provides bailout?

- MD: Have already communicated with employees who need to come in, other staff have come in to take equipment home.

- MD: BCP - must inform PCO of additional critical service.
- LB: Thought the Act already allowed for coasting trade to take place without permits for emergency operations. ***VL to examine this provision.**
- SS: Why would this be included in the first place? TO: Some urgency to processing applications even if for several months down the road.

- MD: BCP - what happens to non-critical services and comms plan. ***MD Will provide this tomorrow.**
- SS: Reached out to Ian Stewart from HFA.

- TO: Discontinuance of service. Sent potential conditions to Chair:
    - Shortening notification period to 2 weeks
    - Exemption will only apply during "crisis" pandemic period
    - Denial of discontinuance of service in remote communities with no other viable transportation service
    - APPR continue to apply
- TO: Rather than grant blanket exemption, seek specific routes from air carriers.
- SS: No need to specify APPR as condition.
- LB: Agree with proposed conditions.
- ***Decision: TO and VL to draft s. 80 decision applicable to all air carriers with conditions proposed (and requiring air carriers to identify routes).**

Internal Approach

- MD: Would like today's message to express maintaining telework until further notice. ***Approved**
- DS: Should we continue with compressed work weeks? SS: Should give employees flexibility in line with Central Agencies.
- MD: As of tomorrow, doors at 15 Eddy will be locked. Staff can enter with passes. MD to inform staff.
- MD: NB will accompany cleaners so they can empty trash cans in all closed offices.
- MD: There's been confirmed COVID-19 case in INAC in Vancouver.

- SS: Messages from Centre regarding flexibility, even in budget uncertainty. At some point, may need to seek signal from TBS/PCO regarding budget so we know what commitments we can make to employees. DRB terms extended until September.
- SS: Draft letter from TBS Secretary. MD: Main concern. ***MD to reach out to TBS regarding needed flexibility with respect to deliveries.**
- SS: Encourage Branch Heads and managers to be in regular contact with staff.

Varia

- VL: Secretariat still receiving filings for stayed cases. ***VL will share options for action with DS, SS and LB**.
- VL: Have a casual to take on administrative tasks for staff going on mat leave. Will present appointment to EC tomorrow.
- DS: Also have casuals that will come up over next few weeks. ****SS: No need for full-blown submission, instead Branch Heads should consult MD and NB first, then draft short email for EC in advance of meeting.**
-

This is **Exhibit "48"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

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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

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

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

This is **Exhibit "49"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

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Signature

From: Marcia Jones
Sent: March 20, 2020 12:18 PM
To: Allan Burnside; Caitlin Hurcomb
Subject: Fwd: Air passengers and financial stress
Attachments: Air passengers and financial stress (Mar.19.20).pdf

Follow Up Flag: Assurer un suivi
Flag Status: Flagged

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

-------- Original message --------
From: Scott Streiner
Date: 2020-03-20 12:08 PM (GMT-05:00)
To: +_EC
Subject: FW: Air passengers and financial stress

From: Jason Kerr
Sent: Thursday, March 19, 2020 7:21 PM
To: MINTC@TC.GC.CA
Cc: Scott Streiner ; Hill, Miled ; Sébastien Bergeron ; Ian Jack
Subject: Air passengers and financial stress

Dear Minister,

We are writing to you this evening concerning two issues of importance to many thousands of Canadian air travellers affected by government actions in response to the COVID-19 crisis. If you or your staff have any questions, they may contact me for additional information.

Thank you,
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

March 19, 2020

The Honourable Marc Garneau, P.C., M.P.
Minister of Transport
330 Sparks Street
Ottawa, ON
K1A 0N5

Subject: Air passengers and financial stress

Dear Minister,

I am writing today concerning two issues of importance to many thousands of Canadian air travellers affected by government actions in response to the COVID-19 virus.

Let me first salute your government for its rapid response to this global pandemic, and acknowledge the extraordinary and complex work that is being undertaken by government and its private-sector partners, such as the airlines, to cope with the sudden and systemic shocks that have resulted.

That said, cases that our travel agent network have dealt with, as well as numerous media reports, show that in recent days many, many Canadians have had to pay thousands of dollars over regular prices in order to buy tickets to comes back to Canada, as requested by the federal government. In a related issue, many carriers are offering only credits for future flights, most of which expire within a year, for flights cancelled due to government advisories or orders not to fly to certain destinations. In contrast, Via Rail Canada is offering full refunds to consumers wishing to cancel travel, regardless of when the ticket was purchased.

We believe these government actions are reasonable and warranted for public health reasons. But we equally believe that Canadians should not be hit with large financial penalties for decisions out of their hands, especially at a time when unexpected economic stress has become a fact of life for most Canadians.

We understand the industry is under immense financial pressure itself, and we accept that the enormous fares – as high as $14,000 to fly from Australia – may have been an unintentional booking anomaly driven by a frantic surge in demand. But the result is still a huge and often unaffordable bill to affected consumers. We note the $5,000 the government has made available to Canadians who need to book tickets urgently, and thank you for this measure. But we also know that this is not a grant – it is a repayable loan.

As for credits, we note that European Union policy in this area is clear, different than Canada's, and much better for travellers. It requires that airlines offer a full refund

500–1545 ave Carling Ave, Ottawa, ON K1Z 8P9 Tel/Tél 613.247.0117 Fax/Télec 613.247.0118 CAA.ca

(https://ec.europa.eu/transport/sites/transport/files/legislation/c20201830.pdf). Customers may choose to accept a credit for future flight, but they should not be forced to. Again, we support a balanced approach that does not unduly further destabilize the carriers. It may well be that their systems are overwhelmed right now, they are properly focused on repatriating Canadians with special flights, and their cash flow cannot withstand a stream of cash refunds at the moment. But it is not fair to expect passengers to shoulder this either. They should be able to access a cash refund, if not now then in the coming months, whether it is the carriers 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 a year before a Canadian's financial situation is good enough for her or him to contemplate another trip.

We know from the Prime Minister's social media feed that he talked yesterday with the CEOs of Air Canada and WestJet. Such dialogue is important. We request that you raise these issues with the carriers, and also consider whether some government relief is in order. We understand the carriers themselves may need financial relief, and we support this – but would expect that consumer concerns are taken into account too.

A signal now from the Government that these issues will be addressed, even if not for a few weeks, would go a long way towards relieving many thousands of Canadian travellers of the undue financial anxiety that these needed public health measures have imposed on them.

We are in the middle of an unprecedented crisis for everyone, including carriers, but as things stand now many consumers are getting sideswiped in the process. You have always been a champion of the Canadian traveller, Minister Garneau, and we ask you to step up once again.

We would be happy to answer any questions you or your staff might have. Please do not hesitate to contact me by telephone at (613) 863-2590 or email at ijack@national.caa.ca.

Sincerely,

Ian Jack
Vice President, Public Affairs
Canadian Automobile Association (CAA)

CC: Scott Streiner, Chair and Chief Executive Officer, Canadian Transportation Agency

This is **Exhibit "50"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

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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 "51"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

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Signature

From: Marcia Jones
Sent: March 21, 2020 4:19 PM
To: Allan Burnside; Caitlin Hurcomb; Timothy Zarins
Subject: Fwd: communique´de presse-arrêt ministériel-20-03-2020.pdf.pdf.pdf.pdf
Attachments: communique´de presse-arrêt ministériel-20-03-2020.pdf.pdf.pdf.pdf

Fyi

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

-------- Original message --------
From: George Petsikas
Date: 2020-03-21 12:30 PM (GMT-05:00)
To: Marcia Jones
Cc: Bernard Bussières , Howard Liebman
Subject: Fwd: communiqué de presse-arrêt ministériel-20-03-2020.pdf.pdf.pdf.pdf

Hi Marcia,

In relation to what we have discussed recently, please see attached from Belgium. This is in addition to similar measures already taken by France and Italy.

As you can see, we are not alone in our concerns and that this option is essential to avoid a catastophic run on carrier cash reserves not just from consumers but from credit card chargeback refunds that the big banks want us to pay for.

I await news regarding our urgent request of earlier this week to this end.

Thx - GP

Get Outlook for Android

L'utilisation de bons à valoir en cas d'annulation dans le cadre de la crise COVID-19 est approuvée par Arrêté ministériel

Le 20 mars 2020 – Le Cabinet de la ministre Muylle confirme que la proposition commune du secteur du voyage organisé d'utiliser des bons à valoir en cas d'annulation dans le cadre de la crise COVID-19 — que ce soit par le voyageur ou par l'organisateur de voyages — a été approuvée. Cette proposition a également été ratifié aujourd'hui et l'Arrêté ministériel a été publié au Moniteur Belge. Il existe désormais un cadre juridique dans lequel le bon à valoir est devenu un moyen de paiement légalement reconnu.

Ce système de bons à valoir donne au secteur du voyage organisé, l'un des plus durement touchés par le coronavirus, le répit nécessaire pour surveiller ses flux de trésorerie, tout en étant en mesure d'aider le client.

Cette initiative fait suite à la demande des différentes associations professionnelles représentant les différents acteurs du secteur du voyage organisé.

Sans ce système, le secteur du voyage organisé ne pouvait pas survivre longtemps. Dans les circonstances actuelles d'annulation massive et obligatoire des contrats de voyage à forfait, les liquidités disponibles sont insuffisantes pour assurer le remboursement des voyageurs sous les conditions classiques.

Grâce au système de bons à valoir, le voyageur conserve le droit de réserver à nouveau son voyage à une date ultérieure et le secteur du voyage organisé préserve les liquidités nécessaires pour survivre dans cet état d'urgence.

Le secteur remercie la ministre Muylle et son cabinet pour cette action rapide et la bonne coopération dans le cadre de ce dossier.

Le secteur du voyage maintient sa demande de mesures de soutien supplémentaires au gouvernement

En plus de ce système de bons à valoir, le secteur du voyage organisé demande entre autres qu'un système équitable soit élaboré au sein de la Loi voyages qui donne possibilité à l'organisateur de voyages d'invoquer un cas de force majeure lorsque leurs fournisseurs y font appel, ce qui les préserverait de devoir rembourser les sommes reçues.

Actuellement, les entreprises du secteur du voyage organisé ont payé leurs fournisseurs étrangers, mais ne reçoivent pas de remboursement pour les annulations en cours, alors que la législation actuelle les oblige à rembourser toutes les sommes versées. Ce système est intenable dans les circonstances actuelles. C'est pourquoi le secteur réclame d'urgence la création d'un fonds de calamités pour protéger les voyageurs et le secteur dans ces cas précis.

Regard vers l'avenir: des annulations ne sont pas à l'ordre du jour

En tant que secteur, nous regardons également pleinement vers l'avenir. Bien sûr, nous voulons que les gens reviennent le plus tôt possible et le secteur gèrera ceci comme il l'a toujours fait de manière responsable, en tenant compte des directives belges et locales. Annuler ces voyages pour les vacances d'été n'est donc pas du tout à l'ordre du jour. Au contraire, nous espérons à ce moment-là être en mesure d'amener de nombreux voyageurs en toute sécurité vers des destinations de vacances sûres.

Contact pour la presse[i]:

- **Pour ABTO – Association of Belgian Travel Organisers, BTO – Belgian Travel Organisation en VLARA – Vlaamse Associatie van Reisagenten :**

  Pierre Fivet, porte-parole – T: 0479 99 43 91 – E: pfivet@vacansoleil.com

- **Pour l'UPAV — Union Professionnelle des Agences de Voyages :**

  Anne-Sophie Snyers, secrétaire générale — T : 0471 88 45 42 — E : anne-sophie@upav.be

- **Pour la VVR — Vereniging Vlaamse Reisbureaus :**

  Koen van den Bosch, administrateur délégué — T : 050 25 00 60 — E : koen@vvr.be

[i] Il s'agit d'une initiative de l'ensemble du secteur du voyage, ces associations ont été désignées comme porte-parole.

This is **Exhibit "52"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

_____

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 "53"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

_____

Signature

Amanda Hamelin

Subject:	Urgent Debrief - Please confirm attendance ASAP
Location:	CBCI teleconference: dial 1 514 938 6569 call ID: 935311571# then # again
Start:	Sun 3/22/2020 10:30 AM
End:	Sun 3/22/2020 11:00 AM
Recurrence:	(none)
Meeting Status:	Accepted
Organizer:	Scott Streiner
Required Attendees:	sebastien bergeron (Sebastien.Bergeron@otc-cta.gc.ca); Marcia Jones; Tom Oommen; Valérie Lagacé; Liz Barker
Importance:	High

Seb will host

This is **Exhibit "54"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

_____

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

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 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 "55"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

_____

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.

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

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 "56"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

_____

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,

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 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*.

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 "57"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

_____

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 "58"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

_____

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.

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

This is **Exhibit "59"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

_____

Signature

Amanda Hamelin

From: Liz Barker
Sent: Sunday, March 22, 2020 6:42 PM
To: Scott Streiner; +_EC
Subject: RE: Revised statement

This looks good Scott.
Liz

From: Scott Streiner
Sent: March-22-20 2:57 PM
To: +_EC
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 "60"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

_____

Signature

Amanda Hamelin

From: Scott Streiner
Sent: Sunday, March 22, 2020 4:42 PM
To: Lenore Duff; Liz Barker; Mark MacKeigan; Heather Smith; Mary Tobin Oates; Gerald Dickie
Subject: RE: Statement

Thanks for the quick replies. Most of the suggestions have been incorporated. I'll explain more during our call on Tuesday.

S

-------- Original message --------
From: Lenore Duff
Date: 2020-03-22 1:11 p.m. (GMT-05:00)
To: Scott Streiner , Liz Barker , Mark MacKeigan , Heather Smith , Mary Tobin Oates , Gerald Dickie
Subject: Statement

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

This is **Exhibit "61"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

_____

Signature

Nadine Landry

From: Millette, Vincent <vincent.millette@tc.gc.ca>
Sent: Tuesday, March 24, 2020 12:40 PM
To: Caitlin Hurcomb
Subject: RE: CTA announcement tomorrow

thanks

From: Caitlin Hurcomb [mailto:Caitlin.Hurcomb@otc-cta.gc.ca]
Sent: Tuesday, March 24, 2020 12:31 PM
To: Millette, Vincent <vincent.millette@tc.gc.ca>
Subject: RE: CTA announcement tomorrow

At this point, I've not received confirmation of what the timing will be.

> **From:** Millette, Vincent [mailto:vincent.millette@tc.gc.ca]
> **Sent:** Tuesday, March 24, 2020 12:28 PM
> **To:** Caitlin Hurcomb <Caitlin.Hurcomb@otc-cta.gc.ca>
> **Subject:** RE: CTA announcement tomorrow
>
> Just out of my personal curiosity, do you know why it is delayed?
>
> **From:** Caitlin Hurcomb [mailto:Caitlin.Hurcomb@otc-cta.gc.ca]
> **Sent:** Tuesday, March 24, 2020 12:25 PM
> **To:** Millette, Vincent <vincent.millette@tc.gc.ca>
> **Subject:** RE: CTA announcement tomorrow
>
> Hi Vincent,
> I anticipate it will be in the next day or two, but I've not received confirmation.
>
> > **From:** Millette, Vincent [mailto:vincent.millette@tc.gc.ca]
> > **Sent:** Tuesday, March 24, 2020 12:07 PM
> > **To:** Caitlin Hurcomb <Caitlin.Hurcomb@otc-cta.gc.ca>
> > **Subject:** RE: CTA announcement tomorrow
> >
> > Hi Cait – do you know when the Agency will be issuing this statement?
> >
> > Thanks
> >
> > **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. It's not our intention to take enforcement actions against one of these airlines if this practice is not followed, in alignment with their tariff.

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 Minister's Chief of Staff 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.

He understood, based on a conversation with Marcia, that the measure you would announce may have an adverse impact on the larger carriers like AC or WestJet.

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 "62"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

_____

Signature

Our Deputy Minister

696

From: Transport Canada

Michael Keenan

Deputy Minister

Transport Canada

697

Michael Keenan was appointed Deputy Minister of Transport on March 14, 2016.

Michael has extensive experience in management, engagement, economic analysis and policy development in the Government of Canada.

Before joining Transport Canada, he served as Associate Deputy Minister at Natural Resources Canada.

Before that, at Environment Canada he was responsible for strategic policy development, economic analysis of environmental policy and regulatory initiatives, coordination of federal/provincial relations, and the Federal Sustainable Development Strategy. He also served as the Vice-President of Organizational Leadership at the Canada School of Public Service and as the Director General of Economic Analysis at Agriculture and Agri-Food Canada, where he also chaired of the OECD Committee of Agriculture.

Earlier in his public service career, Michael worked in central agencies, in the Priorities and Planning Secretariat at the Privy Council Office, in various positions at Finance Canada and at the British Columbia Ministry of Finance.

Michael holds a B.A. (Honours) from Saint Francis Xavier University and an M.A. in economics from Queen's University.

For information on COVID-19 updates, please visit **Canada.ca/coronavirus**.

Date modified:

2019-01-11

This is **Exhibit "63"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

_____

Signature

Our Deputy Minister

700

From: Transport Canada

Arun Thangaraj
Deputy Minister
Transport Canada

Arun Thangaraj was appointed Deputy Minister of Transport on February 20, 2023.

Before joining Transport Canada, Arun was the Associate Deputy Minister at Immigration, Refugees and Citizenship Canada, following two years as the Associate Deputy Minister at Transport Canada.

Before these roles, he was Assistant Deputy Minister and Chief Financial Officer at Global Affairs Canada and was the Deputy Chief Financial Officer at the former Canadian International Development Agency. He also brings experience and knowledge on transportation issues, from his time at the Canadian Transportation Agency from 2002 to 2011.

701

Arun received the Queen Diamond Jubilee Medal in 2013 for his contribution to the federal public service and to his community. He has served on various governance boards and is a sessional lecturer in the School of Public Administration at Carleton University.

Arun is a Chartered Professional Accountant and holds a Master of Arts in Public Administration from Carleton University, a Master of Business Administration from the University of Ottawa, and an Honours BA in Political Science from the University of Toronto.

Date modified:
2019-01-11

This is **Exhibit "64"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

_____

Signature

703

Marc Roy

Vice President, Public Affairs and Business Development- Sandstone Group

Ottawa, Ontario, Canada

781 followers · 500+ connections

Join to follow

Sandstone Group

Personal Website

About

Sandstone Group, based in Ottawa, specializes in providing strategic advice to corporate executives in matters of public affairs, government relations, crisis communications and issues management, procurement, public policy, and on legislation before Parliament.

We specialize in helping our clients succeed on what might be viewed as difficult files by providing effective, efficient and winning strategies.

704

Experience

Vice President, Public Affairs and Business Development
Sandstone Group

Mar 2022 - Present · 9 months

Ottawa, Ontario, Canada

Transport Canada - Transports Canada
5 years 4 months

Chief Of Staff
Jun 2018 - Feb 2021 · 2 years 9 months

Ottawa, Ontario, Canada

Chief of Staff to the Minister of Transport Marc Garneau

Director Of Communications
Nov 2015 - Jun 2018 · 2 years 8 months

Ottawa, Ontario, Canada

Director of Communications to Minister of Transport Marc Garneau

Director Of Communications
Senate of Canada | Sénat du Canada

Aug 2006 - Oct 2015 · 9 years 3 months

Ottawa, Ontario, Canada

Director of Communications to the Leader of the Opposition in the Senate

Associate Director Of Communications
Office of the Prime Minister of Canada | Cabinet du premier ministre du Canada

Jul 2004 - Feb 2006 · 1 year 8 months

Ottawa, Ontario, Canada

Director Of Communications
Patrimoine canadien -- Canadian Heritage

705

Dec 2003 - Jun 2004 · 7 months

Ottawa, Ontario, Canada

Director of Communications to the Minister of Canadian Heritage

Director Of Communications

House of Commons of Canada Chambre des communes du Canada

Aug 1998 - Dec 2003 · 5 years 5 months

Ottawa, Ontario, Canada

Director Of Communications to the House of Commons Government House Leader

View Marc’s full profile

See who you know in common

Get introduced

Contact Marc directly

Join to view full profile

This is **Exhibit "65"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

_____

Signature

Contact

www.linkedin.com/in/lawrence-hanson-7a1b6498 (LinkedIn)

Top Skills

Policy
Policy Analysis
Public Policy

Lawrence Hanson

Associate Deputy Minister at Environment and Climate Change Canada
Canada

Experience

Environment and Climate Change Canada
Associate Deputy Minister
November 2022 - Present (4 months)

Fisheries and Oceans Canada
Associate Deputy Minister
March 2021 - Present (2 years)

Government of Canada
Assistant Deputy Minister, Policy, Transport Canada
June 2017 - March 2021 (3 years 10 months)
Ottawa, Canada Area

Industry Canada
4 years

Assistant Deputy Minister, Science and Innovation
November 2014 - June 2017 (2 years 8 months)
Ottawa, Ontario

Assistant Deputy Minister, Spectrum, Information Technologies and Telecommunications
July 2013 - November 2014 (1 year 5 months)

Environment Canada
8 years 9 months

Director General, Strategic Policy
May 2006 - July 2013 (7 years 3 months)

Director, Policy Planning and Integraion
November 2004 - May 2006 (1 year 7 months)

Government of Canada
Director, Employment Policy, Human Resources Development Canada
May 2002 - November 2004 (2 years 7 months)

Education

The University of British Columbia

Master's degree, Political Science · (1991 - 1993)

University of Saskatchewan

Bachelor's Degree (Hons.), Political Studies · (1987 - 1991)

This is **Exhibit "66"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

_____

Signature

Chaar, Pascale

From: Millette, Vincent
Sent: Wednesday, March 18, 2020 4:54 PM
To: Stacey, Colin
Subject: RE: From MinO: Air Transat

Oh – I did not since you emailed Marcia at the same time.

I'll do it now

From: Stacey, Colin
Sent: Wednesday, March 18, 2020 4:51 PM
To: Millette, Vincent <vincent.millette@tc.gc.ca>
Subject: RE: From MinO: Air Transat

Thanks. Please let me know what you hear.

cs

Colin Stacey
Director General, Air Policy
Directeur général, Politique aérienne
Transport Canada / Transports Canada
T: 613-993-0054 / C 613-355-0749 / 1-888-675-6863

From: Millette, Vincent
Sent: Wednesday, March 18, 2020 2:57 PM
To: Stacey, Colin <colin.stacey@tc.gc.ca>
Subject: RE: From MinO: Air Transat

I'll get in touch with Cait

From: Stacey, Colin
Sent: Wednesday, March 18, 2020 2:49 PM
To: Hanson, Lawrence <lawrence.hanson@tc.gc.ca>
Cc: Millette, Vincent <vincent.millette@tc.gc.ca>
Subject: FW: From MinO: Air Transat

Lawrence:

Should we be reaching out to the Agency about this?

cs

Colin Stacey
Director General, Air Policy
Directeur général, Politique aérienne
Transport Canada / Transports Canada
T: 613-993-0054 / C 613-355-0749 / 1-888-675-6863

From: Millette, Vincent
Sent: Wednesday, March 18, 2020 2:48 PM
To: Stacey, Colin <colin.stacey@tc.gc.ca>
Cc: Davis, Mark <mark.davis@tc.gc.ca>; Dawson, Dave <dave.dawson@tc.gc.ca>; Rioux, Marc <marc.rioux@tc.gc.ca>; Herdsman, Sophie <Sophie.Herdsman@tc.gc.ca>
Subject: RE: From MinO: Air Transat

The APPRs requires cash refund unless the passenger agrees to an alternative method of payment (points, vouchers, etc…) and that its nominal value is at least equal to the cash refund

From: Stacey, Colin
Sent: Wednesday, March 18, 2020 2:02 PM
To: Millette, Vincent <vincent.millette@tc.gc.ca>
Cc: Davis, Mark <mark.davis@tc.gc.ca>; Dawson, Dave <dave.dawson@tc.gc.ca>; Rioux, Marc <marc.rioux@tc.gc.ca>
Subject: FW: From MinO: Air Transat

Vince:

Any thoughts on this? Do the APPRs require cash refunds?

Thanks,

cs

Colin Stacey
Director General, Air Policy
Directeur général, Politique aérienne
Transport Canada / Transports Canada
T: 613-993-0054 / C 613-355-0749 / 1-888-675-6863

From: Little, Jennifer
Sent: Wednesday, March 18, 2020 1:49 PM
To: Keenan, Michael <michael.keenan@tc.gc.ca>; Hanson, Lawrence <lawrence.hanson@tc.gc.ca>; Stacey, Colin <colin.stacey@tc.gc.ca>
Cc: Maheu, Caroline <Caroline.Maheu@tc.gc.ca>; Langlois, Alain <alain.langlois@tc.gc.ca>; Brosseau, Kevin <Kevin.Brosseau@tc.gc.ca>; McCrorie, Aaron <aaron.mccrorie@tc.gc.ca>; Phillips, Alyssa <alyssa.phillips@tc.gc.ca>; Arcand, Annie <annie.arcand@tc.gc.ca>
Subject: From MinO: Air Transat

MinO has let us know that Transat is telling them:

Air Transat will be sending a formal letter to the Minister for financial assistance. They provided no other details to us at this time.

Jennifer

This is **Exhibit "67"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

_____

Signature

VL

714

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 [redacted]

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 "68"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

_____

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 <u>all</u> 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 <u>no refunds to passengers are required under the APPR</u>. 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 <u>minimum</u> 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 "69"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

_____

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:

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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.

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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.

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- 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

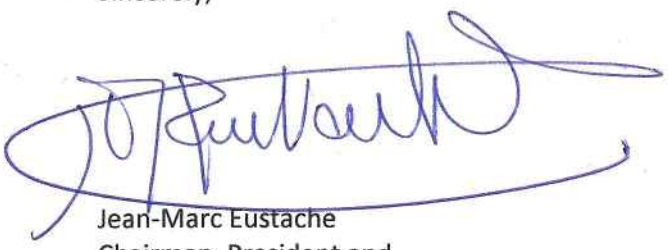
- Ensure that all exemptions ordered by the Agency, including those found in Determination No. A-2020-42, are in effect until such time as the industry has fully recovered, which is expected to take longer than April 30, 2020, and at the very least, 90 days.

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 "70"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

_____

Signature

From: Heather Craig-Peddie <HCraig-Peddie@acta.ca>
Sent: March 22, 2020 7:49 PM
To: Caitlin Hurcomb
Cc: Heather Craig-Peddie
Subject: CTA Suspension of air dispute resolution activities

Importance: High

Follow Up Flag: Follow up
Flag Status: Flagged

Hello Caitlin,
I do hope that you and your family are keeping well.
Caitlin, ACTA has received numerous responses from our Travel Agency Members concerned about the messaging that Gabor Lukas is reciting in main stream media. While the CTA has suspended all air dispute resolution activities, and airlines are not allowing for refunds to occur (only travel credits/vouchers), this puts tremendous pressure on travel agencies especially in the regulated provinces of BC, ON and QC. For example, Section 45 of the Ontario Travel Industry Act references that consumers must receive a refund if they do not get their product. The travel industry is on the brink. We anticipate 90% of travel agency businesses to temporarily close operations in the next 7 to 21 days. Recovery will be slow until consumers feel confident in traveling again. The industry will not recover if we have to adhere to these regulations.
Is the CTA in any position to assist the retail Canadian travel industry to work with the federal and provincial governments to quell Mr. Lukas's damaging messaging (difficult I know with freedom of speech), and/or assist with going to the banks and credit card companies for prevention of credit card chargebacks during this time. Globally, governments are putting measures in place to stem the tide of refunds. Below is an excerpt from Belgium law:
The Belgian decree is now official and will be published in the official gazette this afternoon (Google translate) :
Article 1. § 1. When a package travel contract as provided in Article 2, 3 °, of the Law of 21 November 2017 on the sale of package holidays, linked travel arrangements and travel services is canceled due to the corona crisis, either by the tour operator or by the traveler, the tour operator is entitled to provide him with a voucher worth the amount paid instead of a refund.
This voucher meets the following conditions:
1 ° the voucher represents the full value of the amount already paid by the traveler;
2 ° no costs will be charged to the traveler for the delivery of the voucher;
3 ° the voucher has a validity of at least one year;
4 ° the voucher explicitly states that it was delivered as a result of the corona crisis.
§ 2. The traveler cannot refuse the voucher that meets the conditions referred to in paragraph 1.
Art. 2. The travel organizers keep a permanent record of all issued vouchers, their value and their holder.
Art. 3. The insurance contract referred to in Article 3 of the Royal Decree of 29 May 2018 on the protection against insolvency in the sale of package holidays, linked travel arrangements and travel services covers the reimbursement of the vouchers referred to in Article 1.
Art. 4. This Decree shall enter into force on the day of its publication in the Belgian Official Gazette and shall cease to have effect three months after its entry into force.
I appreciate your urgent response to our serious concerns.
With kind regards,
Heather

This is **Exhibit "71"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

_____

Signature

Nadine Landry

From: Liz Barker
Sent: Monday, March 23, 2020 9:52 AM
To: Marcia Jones; Sébastien Bergeron; Valérie Lagacé; Tom Oommen; Scott Streiner; +_EC
Subject: RE: Revised statement

I agree with Marcia. The EU is sticking with its regime, so refunds are available in all instances where the carrier cancels the flight for whatever reason. However, where the passenger cannot travel/cancels their travel, they are stuck with the rules attached to their ticket.
Liz

> **From:** Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
> **Sent:** March-23-20 9:47 AM
> **To:** Liz Barker <Liz.Barker@otc-cta.gc.ca>; Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>; 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
>
> 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 <Liz.Barker@otc-cta.gc.ca>
> > **Sent:** Monday, March 23, 2020 9:38 AM
> > **To:** Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>; 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 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

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> **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

This is **Exhibit "72"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

_____

Signature

Press release | 18 March 2020 | Brussels

COVID-19: Commission provides guidance on EU passenger rights

In our efforts to mitigate the economic impacts of the COVID-19 pandemic, the Commission has today published guidelines to ensure EU passenger rights are applied in a coherent manner across the EU.

National governments have introduced different measures, including travel restrictions and border controls. The purpose of these guidelines is to reassure passengers that their rights are protected.

Commissioner for Transport Adina **Vălean** said: *"In light of the mass cancellations and delays passengers and transport operators face due to the COVID-19 pandemic, the Commission wants to provide legal certainty on how to apply EU passenger rights. In case of cancellations the transport provider must reimburse or re-route the passengers. If passengers themselves decide to cancel their journeys, reimbursement of the ticket depends on its type, and companies may offer vouchers for subsequent use. Today's guidelines will provide much-needed legal certainty on how to apply EU passenger rights in a coordinated manner across our Union. We continue to monitor the rapidly evolving situation, and, if need be,*

further steps will be taken."

This guidance will help passengers, the industry and national authorities in this unprecedented situation, with important passenger travel restrictions imposed by national governments and knock-on effects on transport services across the EU. By introducing clarity, the guidelines are also expected to help reduce costs for the transport sector, which is heavily affected by the outbreak. The guidelines cover the rights of passengers when travelling by air, rail, ship or bus/coach, maritime and inland waterways, as well as the corresponding obligations for carriers.

If passengers face the cancellation of their journey, for example, they can choose between reimbursement of the ticket price or re-routing to reach their final destination at a later stage. At the same time, the guidelines clarify that the current circumstances are "extraordinary", with the consequence that certain rights – such as compensation in case of flight cancellation less than two weeks from departure date – may not be invoked.

Background

The EU is the only area in the world where citizens are protected by a full set of passenger rights – whether they travel by air, rail, ship, bus or coach. Carriers have to offer reimbursement (refund of tickets) or re-routing to passengers whose service has been cancelled. Carriers must also offer care in terms of meals and accommodation. In respect of compensation, the rules differ between transport modes.

More Information

Interpretative Guidelines on EU passenger rights regulations in the context of the developing situation with Covid-19

EU Passenger Rights

Overview of national measures by country

EU response to Coronavirus outbreak

735

#coronavirus

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If you do not work for a media organisation, you are welcome to contact the EU through Europe Direct in writing or by calling 00 800 6 7 8 9 10 11.

IP/20/485

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736

This is **Exhibit "73"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

_____

Signature

EUROPEAN
COMMISSION

Brussels, 18.3.2020
C(2020) 1830 final

COMMUNICATION FROM THE COMMISSION

Commission Notice
Interpretative Guidelines on EU passenger rights regulations in the context of the developing situation with Covid-19

COMMISSION NOTICE

Interpretative Guidelines on EU passenger rights regulations in the context of the developing situation with Covid-19

Passengers and the European transport industry are hit hard by the Covid-19 outbreak. Containment measures of authorities, such as travel restrictions, lock-downs and quarantine zones, imply that transport may be one of the most severely affected sectors of this pandemic. The situation is stressful for many passengers, whose travel arrangements have been cancelled and/or who do not wish or are not allowed to travel anymore.

The European Union (EU) is the only area in the world where citizens are protected by a full set of passenger rights, whether they travel by air, rail, bus and coach or ship.

Given the unprecedented situation Europe has been experiencing due to the Covid-19 outbreak, the European Commission believes it would be helpful to clarify in this context the rights of passengers when travelling by air, rail, bus and coach or ship, as well as the corresponding obligations for carriers.

1. PURPOSE

These interpretative guidelines aim at clarifying how certain provisions of the EU passenger rights legislation apply in the context of the Covid-19 outbreak, notably with respect to cancellations and delays.

The guidelines complement the guidelines previously published by the Commission[1] and are without prejudice to the interpretation of the Court of Justice.

The guidelines cover the following passenger rights legislation:

- Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation (EEC) No 295/91[2]
- Regulation (EC) No 1371/2007 of the European Parliament and of the Council of 23 October 2007 on rail passengers' rights and obligations[3];
- Regulation (EU) No 1177/2010 of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004[4],

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1 Commission Notice — Interpretative Guidelines on Regulation (EC) No 261/2004 of the European Parliament and of the Council establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights and on Council Regulation (EC) No 2027/97 on air carrier liability in the event of accidents as amended by Regulation (EC) No 889/2002 of the European Parliament and of the Council, OJ C 214, 15.6.2016, p. 5.; Communication from the Commission — Interpretative Guidelines on Regulation (EC) No 1371/2007 of the European Parliament and of the Council on rail passengers' rights and obligations, OJ C 220, 4.7.2015, p. 1.

2 OJ L 46, 17.2.2004, p. 1.

3 OJ L 315, 3.12.2007, p. 14.

4 OJ L 334, 17.12.2010, p. 1.

- Regulation (EU) No 181/2011 of the European Parliament and of the Council of 16 February 2011 concerning the rights of passengers in bus and coach transport and amending Regulation (EC) No 2006/2004[5].

These guidelines do not cover Directive (EU) 2015/2302 on package travel and linked travel arrangements. [6]

2. GUIDANCE ACROSS TRANSPORT MODES

2.1. Right to choose between reimbursement and rerouting

The four Regulations make specific provisions for this right in the case of cancellation or of certain delays.

As regards re-routing[7], the circumstances of the COVID-19 outbreak may have an incidence on the right to choose re-routing at the "earliest opportunity".[8] Carriers may find it impossible to re-route the passenger to the intended destination within a short period of time. Moreover, it may not be clear for some time when re-routing will become possible. This situation may for example arise where a Member State suspends flights or stops trains, buses, coaches or ships arriving from certain countries. Depending on the case, therefore, the "earliest opportunity" for re-routing may be considerably delayed and/or subject to considerable uncertainty. Reimbursement of the ticket price or a re-routing at a later stage "at the passenger's convenience" might therefore be preferable for the passenger. Details are set out further below for each transport mode.

2.2. Situations where passengers cannot travel or want to cancel a trip

The EU's passenger rights regulations do not address situations where passengers cannot travel or want to cancel a trip on their own initiative. Whether or not a passenger is reimbursed in such cases depends on the type of ticket (reimbursable, possibility to rebook) as specified in the carrier's terms & conditions.

It appears that various carriers are offering vouchers to passengers, who do not want to (or are not authorised to) travel any more as a result of the outbreak of Covid-19. Passengers can use these vouchers for another trip with the same carrier within a timeframe established by the carrier.

This situation has to be distinguished from the situation where the carrier cancels the journey and offers only a voucher instead of the choice between reimbursement and re-routing. If the carrier proposes a voucher, this offer cannot affect the passenger's right to opt for reimbursement instead.

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5 OJ L 55 28.2.2011, p. 1.

6 Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC, OJ L 326, 11.12.2015, p. 1–33.

7 Some instruments also refer in parallel to a "continuation of the journey".

8 Points (a) and (b) of Article 8(1) of Regulation (EC) No 261/2004; points (a) and (b) of Article 16 of Regulation (EC) No 1371/2007; points (a) and (b) of Article 18(1) of Regulation (EU) No 1177/2010; points (a) and (b) of Article 19(1) of Regulation (EU) No 181/2011.

2.3. Specific national rules in the context of the Covid-19 outbreak

In some cases specific national rules have been adopted in the context of the Covid-19 outbreak, which create the obligation for carriers to refund passengers or issue a voucher to passengers in case the passenger could not take a flight that has been operated.

Such national measures do not fall under the scope of the EU passenger rights regulations. They are not addressed in these guidelines, which deal only with the interpretation of the rules on passenger rights adopted by the Union.

3. AIR PASSENGER RIGHTS (REGULATION (EC) NO 261/2004)

3.1. Information to passengers

Apart from the rules regarding information on the rights available, Regulation (EC) No 261/2004 does not contain specific provisions on information on travel disruptions. However, rights to compensation in case of cancellation are linked to the carrier failing to give notice sufficiently in advance. This aspect is thus covered by the considerations below on rights to compensation.

3.2. Right to reimbursement or re-routing

In the case of a flight cancellation by the airlines (no matter what the cause is), Article 5 obliges the operating air carrier to offer the passengers the choice among:

a) reimbursement (refund);
b) re-routing at the earliest opportunity, or
c) re-routing at a later date at the passenger's convenience.

Regarding reimbursement, in cases where the passenger books the outbound flight and the return flight separately and the outbound flight is cancelled, the passenger is only entitled to reimbursement of the cancelled flight, i.e. here the outbound flight.

However, if the outbound flight and the return flight are part of the same booking, even if operated by different air carriers, passengers should be offered two options if the outbound flight is cancelled: to be reimbursed for the whole ticket (i.e. both flights) or to be re-routed on another flight for the outbound flight (Interpretative Guidelines, Point 4.2).

As regards re-routing, and as explained above, “the earliest opportunity” may under the circumstances of the COVID-19 outbreak imply considerable delay, and the same may apply to the availability of concrete information on such “opportunity” given the high level of uncertainty affecting air traffic.

The application of Article 5 of Regulation (EC) No 261/2004 may have to take into consideration these circumstances. However, at any rate:

First, passengers should be informed about delays and/or uncertainties linked to them choosing re-routing instead of reimbursement.

Second, should a passenger choose nonetheless re-routing at the earliest opportunity, the carrier should be considered to have fulfilled its information obligation towards the

passenger if it communicated on its own initiative, as soon as possible and in good time, the flight available for rerouting.

3.3. Right to care

According to Article 9 of the Regulation, which provides all relevant details, passengers who are affected by a flight cancellation must also be offered care by the operating air carrier, free of charge. This consists of meals and refreshments in a reasonable relation to the waiting time; hotel accommodation if necessary, and transport to the place of accommodation. Moreover, airports are to provide assistance to disabled passengers and passengers with reduced mobility in accordance with Regulation 1107/2006[9].

It is worth recalling that when the passenger opts for reimbursement of the full cost of the ticket, the right to care ends. The same happens when the passenger chooses re-routing at a later date at the passenger's convenience (Article 5(1)(b) in conjunction with Article 8(1)(c)).

The right to care subsists only as long as passengers have to wait for a rerouting at the earliest convenience (Article 5(1)(b) in conjunction with Article 8(1)(b)).

The intention underlying the Regulation is that the needs of passengers waiting for their return flight or re-routing are adequately addressed. The extent of adequate care will have to be assessed on a case-by-case basis, taking into account the needs of passengers in the circumstances and the principle of proportionality (i.e.: according to the waiting time). The price paid for the ticket or the length of the inconvenience suffered should not interfere with the right to care (Interpretative Guidelines Point 4.3.2).

According to the Regulation, the air carrier is obliged to fulfil the obligation of care even when the cancellation of a flight is caused by extraordinary circumstances, that is to say circumstances that could not have been avoided even if all reasonable measures had been taken.

The Regulation contains nothing that recognises a separate category of 'particularly extraordinary' events, beyond the 'extraordinary circumstances' referred to in Article 5(3) of the Regulation. The air carrier is therefore not exempted from all of its obligations, including those under Article 9 of the Regulation, even during a long period. Passengers are especially vulnerable in such circumstances and events.[10] In exceptional events, the intention of the Regulation is to ensure that adequate care is provided in particular to passengers waiting for re-routing under Article 8(1)(b) of the Regulation.

3.4. Right to compensation

Regulation 261/2004 also provides for fixed sum compensations in some circumstances. This does not apply to cancellations made more than 14 days in advance or where the cancellation is caused by 'extraordinary circumstances' that could not have been avoided

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9 Regulation (EC) No 1107/2006 of the European Parliament and of the Council of 5 July 2006 concerning the rights of disabled persons and persons with reduced mobility when travelling by air, OJ L 204, 26.7.2006, p. 1–9.

10 Case C-12/11, McDonagh, ECLI:EU:C:2013:43, paragraph 30 and Point 4.3.3. of the Interpretative Guidelines.

even if all reasonable measures had been taken. For details, see Article 5(1) and Article 7 of the Regulation.

The Commission considers that, where public authorities take measures intended to contain the Covid-19 pandemic, such measures are by their nature and origin not inherent in the normal exercise of the activity of carriers and are outside their actual control.

Article 5(3) waives the right to compensation on condition that the cancellation in question "is caused" by extraordinary circumstances, which could not have been avoided even if all reasonable measures had been taken.

This condition should be considered fulfilled, where public authorities either outright prohibit certain flights or ban the movement of persons in a manner that excludes, *de facto,* the flight in question to be operated.

This condition may also be fulfilled, where the flight cancellation occurs in circumstances where the corresponding movement of persons is not entirely prohibited, but limited to persons benefitting from derogations (for example nationals or residents of the state concerned).

Where no such person would take a given flight, the latter would remain empty if not cancelled. In such situations, it may be legitimate for a carrier not to wait until very late, but to cancel the flight in good time (and even without being certain about the rights of the various passengers to travel at all), in order for appropriate organisational measures to be taken, including in terms of care for passengers owed by the carrier. In cases of the kind, and depending on the circumstances, a cancellation may still be viewed as "caused" by the measure taken by the public authorities. Again, depending on the circumstances, this may also be the case in respect of flights in the direction opposite to the flights directly concerned by the ban on the movement of persons.

Where the airline decides to cancel a flight and shows that this decision was justified on grounds of protecting the health of the crew, such cancellation should also be considered as "caused" by extraordinary circumstances.

The above considerations are not and cannot be exhaustive in that other specific circumstances in relation to Covid-19 may also fall under the ambit of Article 5(3).

4. RAIL PASSENGER RIGHTS (REGULATION (EC) NO 1371/2007)

4.1. Right to be informed

Before selling a ticket, railway undertakings and ticket vendors must provide passengers, upon request, with pre-journey information - including information on any activities likely to disrupt or delay services. Railway undertakings must also provide passengers with information during the journey – including information on delays, security and safety issues. Moreover, where railway undertakings and competent authorities, responsible for public service railway contracts, decide to discontinue a rail service, they must make the decision public and before it is implemented. Details of the right to travel information are set out in Article 8 and Annex II of Regulation (EC) No 1371/2011.

4.2. Right to reimbursement or continuation of the journey / re-routing

Article 16 of Regulation (EC) No 1371/2007 sets out the rights in respect of this matter. In summary the following can be retained. Where it can reasonably be expected that the delay in the arrival at the final destination will be more than 60 minutes, passengers have the choice between reimbursement of the ticket price or to continue the journey or re-routing. In particular:

a) the right to the reimbursement concerns the cost of the ticket for the part or parts of the journey not made and for the parts of the journey already made if the journey is no longer serving the purpose for which the passenger was planning it, together with (where relevant) a return service to the first point of departure;
b) continuation of the journey or re-routing have to take place under comparable transport conditions. At the passenger's choice, they have to take place either at the earliest opportunity or at another point in time at his/her convenience.

As regards continuation of the journey/ re-routing, and as explained above, "the earliest opportunity" may under the circumstances of the COVID-19 outbreak imply considerable delay, and the same may apply to the availability of concrete information on such "opportunity" given the high level of uncertainty affecting rail traffic.

First, passengers should be informed about delays and/or uncertainties when offering them the choice between the two possibilities.

Second, should a passenger choose nonetheless continuation of the journey or re-routing at the earliest opportunity, the carrier should be considered to have fulfilled its information obligation towards the passenger if it communicated on its own initiative, as soon as possible and in good time, the train available for continuation or rerouting.

4.3. Right to assistance

In the case of a delay in arrival or departure, passengers have the right to receive information on the situation and the estimated departure and arrival time as soon as this information becomes available. In case of a delay exceeding 60 minutes, they also have the right to receive meals and refreshments within reasonable limits; accommodation where a stay of one or more nights becomes necessary where and when physically possible; transport to the railway station or to the alternative departure point or to the final destination, where and when physically possible, if the train is blocked on the track. Details are set out in Article 18(2) of Regulation (EC) No 1371/2007.

According to the Regulation, the railway undertaking is obliged to fulfil the above obligations even when the cancellation of a train is caused by circumstances such those linked to Covid-19. The Regulation contains nothing that would allow the conclusion that, under particular circumstances, the railway undertaking is exempted from its obligation to provide assistance in accordance with Article 18(2) of Regulation (EC), which may be required even during a long period where relevant. The intention of the Regulation is to ensure that adequate assistance is provided in particular to passengers waiting for re-routing at the earliest opportunity under Article 16. Regulation (EC) No 1371/2007 provides that assistance to persons with disabilities and persons with reduced mobility must be adapted to the needs of those passengers, including as regards the information referred to above.

4.4. Right to compensation

Where passengers have not opted for reimbursement but ask for the continuation of the journey or re-routing, passengers have also the right to compensation. For delays of 60 to 119 minutes the compensation amounts to 25% of the ticket price, whereas for delays of 120 minutes and more the compensation is 50% of the ticket price. Details are set out in Article 17 of Regulation (EC) No 1371/2007,

Unlike in other transport modes, the existence of extraordinary circumstances, if any, does not affect the right to compensation in cases of delays (including those entailed by cancellations). [11]

5. BUS PASSENGER RIGHTS (REGULATION (EU) NO 181/2011)[12]

5.1. Right to be informed

According to Article 24 of the Regulation, carriers and bodies that manage terminals must, within their respective areas of competence, provide passengers with adequate information throughout their travel. Article 20 of the Regulation contains detailed provisions regarding information to be provided in case of cancellation or delay in departure.

5.2. Right to continuation of the journey / re-routing or reimbursement

In case of regular bus services with a scheduled distance of 250 km or more, Regulation (EU) No 181/2011 provides for rerouting or reimbursement in certain cases as specified in Article 19. Thus, notably, where a carrier reasonably expects the departure of a regular service from a terminal to be cancelled or delayed for more than 120 minutes, passengers have the right to choose between continuation or re-routing to the final destination at no additional cost at the earliest opportunity under comparable conditions or reimbursement of the full ticket price. This can be combined, where relevant, with a free of charge return service at the earliest opportunity to the first point of departure set out in the transport contract. The same choice is available to the passenger if the departure is cancelled or delayed from a bus stop.

As regards continuation of the journey/ re-routing, and as explained above, “the earliest opportunity” may under the circumstances of the COVID-19 outbreak imply considerable delay, and the same may apply to the availability of concrete information on such “opportunity” given the high level of uncertainty affecting bus and coach traffic.

First, passengers should be informed about delays and/or uncertainties when offering them the choice between continuation of the journey / re-routing and reimbursement.

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11 See Case C-509/11 *ÖBB Personenverkehr* ECLI:EU:C:2013:613.

12 The rights to re-routing or reimbursement (point 4.2) and the right to care (point 4.3) and the right to compensation (point 4.4) does not apply to domestic services in Croatia, Estonia, Hungary, Latvia, Portugal, Slovakia, Slovenia, and to services with a significant part of the service (including at least one scheduled stop) operated outside the European Union in case of Croatia, Estonia, Greece, Finland, Hungary, Latvia, Slovakia and Slovenia.

Second, should a passenger choose nonetheless re-routing at the earliest opportunity, the carrier should be considered to have fulfilled its information obligation towards the passenger if it communicated on its own initiative, as soon as possible and in good time, the service available for continuation or rerouting.

5.3. Right to assistance

Rights to assistance are set out in Article 21 of Regulation (EU) No 181/2011, and the following can be retained in summary. Where the departure of a long-distance service with a scheduled duration of more than 3 hours is cancelled or delayed for more than 90 minutes, passengers are entitled to snacks, meals or refreshments, in reasonable relation to the waiting time, provided they are available on the bus or in the terminal or can reasonably be supplied. Accommodation needs to be provided if passengers have to stay overnight – for up to 2 nights, at a maximum rate of €80 per night – and transport to their accommodation and return to the terminal.

This Regulation contains nothing that would allow the conclusion that the carrier can be exempted from all its obligations, including those for assistance. The intention of the Regulation is to ensure that adequate care is provided in particular to passengers waiting for re-routing under Article 21.

5.4. Right to compensation

In the case of bus services, the passenger has a right to compensation under the conditions set out in Article 19(2) of Regulation (EC) No 181/2011. It amounts to 50 % of the ticket price in case the service is cancelled, but is available only if the carrier fails to offer the passenger the choice between reimbursement and rerouting.

6. MARITIME AND INLAND WATERWAY PASSENGER RIGHTS (REGULATION (EU) NO 1177/2010)

6.1. Right to be informed

As further specified in detail in Article 16 of Regulation (EU) No 1177/2010, passengers must be informed of the situation as soon as possible and in any event not later than 30 minutes after the scheduled time of departure and of the estimated departure time and estimated arrival time as soon as that information is available.

6.2. Right to re-routing or reimbursement

Where a carrier reasonably expects a passenger service to be cancelled or delayed in departure from a port terminal for more than 90 minutes, the carrier must offer passengers a choice between two possibilities:

- re-routing to the final destination under comparable conditions, as set out in the transport contract, at the earliest opportunity and at no additional cost or
- reimbursement of the ticket price and, where relevant, a return service free of charge to the first point of departure, as set out in the transport contract, at the earliest opportunity.

Details are set out in Article 18 of Regulation (EU) No 1177/2010.

As regards continuation of the journey/ re-routing, and as explained above, "the earliest opportunity" may under the circumstances of the COVID-19 outbreak imply considerable delay, and the same may apply to the availability of concrete information on such "opportunity" given the high level of uncertainty affecting sea and inland waterway traffic.

First, passengers should be informed about delays and/or uncertainties when offering them the choice between re-routing and reimbursement.

Second, should a passenger choose nonetheless re-routing at the earliest opportunity, the carrier should be considered to have fulfilled its information obligation towards the passenger if it communicated on its own initiative, as soon as possible and in good time, the service available for rerouting.

The provisions on re-routing and reimbursement as well as compensation do not apply to cruise ships (Article 2 (1)(c)).

6.3. Right to assistance

Under the conditions set out in Article 17 of Regulation (EU) No 1177/2010, passengers are entitled to 1) assistance in the form of snacks, meals or refreshments, in proportion to the waiting time, provided they are available or can reasonably be supplied and 2) accommodation if passengers where a stay of one or more nights or a stay additional to that intended by the passenger becomes necessary – for up to 3 nights, at a maximum rate of €80 per night – and 3) transport to the accommodation and return to the terminal.

6.4. Right to compensation

Without losing the right to transport, passengers may request compensation from the carrier if they are facing a delay in arrival at the final destination as set out in the transport contract. The minimum level of compensation must be 25 % of the ticket price for varying delays, in function of the scheduled duration of the journey. If the delay exceeds double that duration, the compensation must be 50 % of the ticket price. Details are set out in Article 19 of Regulatin (EU) No 1177/2010.

Article 20(4) of Regulation (EU) No 1177/2010 provides for certain exemptions from the right to compensation, among other things, on account of extraordinary circumstances.

The Commission considers that, where public authorities take measures intended to contain the Covid-19 pandemic, such measures are by their nature and origin not inherent in the normal exercise of the activity of carriers and are outside their actual control.

Article 20(4) waives the right to compensation on condition that the cancellation in question "is caused" by extraordinary circumstances, hindering the performance of the passenger service which could not have been avoided even if all reasonable measures had been taken.

This condition should be considered fulfilled, where public authorities either outright prohibit certain transport services or ban the movement of persons in a manner that excludes, *de facto,* the transport service in question to be operated.

This condition may also be fulfilled, where the cancellation occurs in circumstances where the corresponding movement of persons is not entirely prohibited, but limited to

persons benefitting from derogations (for example nationals or residents of the state concerned).

Where no such person would travel, the vessel or ship would remain empty if the service is not cancelled. In such situations, it may be legitimate for a carrier not to wait until very late, but to cancel the transport service in good time (and even without being certain about the rights of the various passengers to travel at all), in order for appropriate organisational measures to be taken, including in terms of care for passengers owed by the carrier. In cases of the kind, and depending on the circumstances, a cancellation may still be viewed as "caused" by the measure taken by the public authorities. Again, depending on the circumstances, this may also be the case in respect of transport services in the direction opposite to the services directly concerned by the ban on the movement of persons.

Where the carrier decides to cancel a transport service and shows that this decision was justified on grounds of protecting the health of the crew, such cancellation should also be considered as "caused" by extraordinary circumstances.

The above considerations are not and cannot be exhaustive in that other specific circumstances in relation to Covid-19 may also fall under the ambit of Article 20(4).

This is **Exhibit "74"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

_____

Signature

Amanda Hamelin

From: Scott Streiner
Sent: Monday, March 23, 2020 1:26 PM
To: +_EC
Subject: FW: Letter from Air Canada
Attachments: L_Suspension of APPR and ATPDR.pdf

For discussion during our 2:30 call.

S

From: Nathalie Ozumit
Sent: Monday, March 23, 2020 1:24 PM
To: Scott Streiner
Cc: Minister Marc Garneau (mintc@tc.gc.ca) ; Ferio Pugliese ; David Shapiro
Subject: Letter from Air Canada

SENT ON BEHALF OF DAVID J. SHAPIRO, EXECUTIVE VICE PRESIDENT, INTERNATIONAL & REGULATORY AFFAIRS & CHIEF LEGAL OFFICER

Dear Mr. Streiner,

Please see attached letter.

Kind regards,

AIR CANADA

Nathalie Ozumit
Adjointe de direction – Bureau du vice-président général – Affaires internationales et réglementaires et chef des Affaires juridiques
Executive Assistant – Office of the Executive Vice President, International and Regulatory Affairs and Chief Legal Officer

T 514 422-6104 | F 514 422-4147
nathalie.ozumit@aircanada.ca

AIR CANADA

751

David J. Shapiro
Executive Vice President, International & Regulatory Affairs & Chief Legal Officer
Vice-président général, Affaires internationales et réglementaires et chef des affaires juridiques

Centre Air Canada 1270
P.O. Box 7000, YUL 1276
Dorval, Québec, Canada H4Y 1J2

Direct Line: 514 422 5834
Facsimile: 514 422 0285
Email: david.shapiro@aircanada.ca

March 23, 2020

Private and Confidential
By E-mail

Mr. Scott Streiner
Office of the CEO
Canadian Transportation Agency
15 Eddy Street, 17th Floor
Gatineau, Quebec J8X 4B3

RE: Request for Exemption from the *Air Passenger Protection Regulations* ("APPR"), and from the Entry into Force of Certain Provisions of the *Accessible Transportation for Persons with Disabilities Regulations* ("ATPDR")

Dear Mr. Streiner,

I regret that I have to be writing with the degree of urgency that I am to request immediate relief from the ongoing application of APPR, and the imminent entry into force of ATPDR on June 25, 2020, as a result of the devastating impact that the COVID-19 crisis is having on airlines. These concerns were raised during the Agency's technical briefing on March 19th, 2020, and we were invited to put them in writing.

1- UNPRECEDENTED IMPACT ON AIRLINES

As you are well aware, with the world's borders being progressively shut down and a growing proportion of the world's population self-isolating, working from home and practising social distancing, the global airline industry is on the front line and has by and large come to a standstill. The COVID-19 crisis has already had a devastating impact on airline revenues, yet it seems that we may be only in the early stages of the deterioration. Like all airlines, Air Canada has had to implement drastic and unprecedented cost cutting measures, rapidly suspending the majority of its flights, internationally and transborder, and significantly reducing its domestic network as a direct result of the crisis.

2- APPR

Inadequacy of Determination No. A-2020-42

While the Agency's initiative[1] to exempt carriers from certain, specified provisions of APPR is appreciated, it stops well short of what is required to address the magnitude of the crisis we are confronting or to contribute to providing the real and tangible relief that airlines desperately need.

[1] Determination No. A-2020-42 of March 13, 2020.

First, by not clearly and unequivocally recognising that the scope and magnitude of the crisis is deeply affecting virtually *everything*[2] and that *no* airline operational decision is being made in isolation of it, without regard and responding to it, or without a heavy impact from it, the Agency fails to adequately account for the reality that *all* changes to schedules are measures needed to manage the devastating and overriding impact of the crisis and are a *direct result* of the crisis, as are *all* operational decisions impacting customers. In this environment, which has never been witnessed before and could not have been anticipated, and still cannot be planned for, virtually every operational occurrence addressed by APPR is driven by the crisis and therefore not within carriers' control.

It follows, therefore, that the narrow scope of the exemption (limited as it is to providing relief for situations *within* carriers' control) is equally problematic. Our staff has almost *no* ability to provide alternative travel arrangements, and our Customer Relations team *do not* have the capacity to respond to compensation requests within 30 days[3].

In these circumstances, compliance with APPR is not only impractical and unrealistic, but is, for the most part, impossible.

Request

Therefore, pursuant to s. 80 of the Canada Transportation Act ("Act"), we request that the Agency declare a complete suspension of the application of all obligations under APPR until further notice.

If this most sensible measure in these unprecedented circumstances is, for whatever reason, deemed not feasible, we request that the Agency at a minimum:

- Clearly recognize that all delays, cancellations, and denied boarding occurring at this time of crisis are **outside of airlines' control,** with no exceptions;

- Clarify that the uncontrollable nature of the crisis means that no refunds to passengers are required under APPR[4]. While this may be clear to the Agency and in Air Canada's tariffs, it is increasingly evident that it is not clear to the general public. Failure to clarify this will inevitably lead to a sharp and unnecessary increase in complaints and meritless lawsuits;

- Exempt airlines from the obligation to respond to compensation claims within 30 days[5];

- 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, by all accounts, expected to take significantly longer than April 30, 2020, and at the very least, 90 days.

[2] Surprisingly, the Agency stated that whether "decisions that are influenced by the pandemic, including decisions to cancel and consolidate flights due to dropping passenger volumes (…) are within or outside carrier control would have to be assessed on a case-by-case basis". Given the extent of the pandemic and its impact on the industry, this could potentially result in literally millions of cases for the CTA and small claims courts to assess.
[3] As required under section 19(4) APPR.
[4] While para. 7 of Determination No. A-2020-42 does read that only rebooking obligations apply to situations outside carrier's control, a clear statement that no refunds apply would be extremely helpful in light of the current state of confusion in the public sphere.
[5] Section 19(4) APPR.

3- ATPDR

Air Canada has deployed its best efforts and made very significant progress over the intervening months to ensure compliance with ATPDR by June 25, 2020 while also managing many other competing regulatory initiatives[6] and operational urgencies such as the unforeseen and abrupt grounding of the Boeing 737 MAX (which as real and intense as it was, now pales as a crisis in comparison). Air Canada's resources, which have been stretched by these challenges for some time, are now stretched beyond any imaginable limits in managing the present crisis[7], so that work on necessary ATPDR changes is now, inevitably and definitively severely delayed through no fault of ours. Therefore, we request that the compliance deadlines be suspended (or, otherwise, at least, extended significantly).

Air Canada estimates that it is 95% compliant with the June 25, 2020 requirements. However, the cost and effort needed to comply with the remaining 5% is significant: it includes in-flight entertainment upgrades for systems that are already being phased out in the next few years, as well as training requirements that have such broad impact on front-line staff that costly external consultant support is required.

An essential precursor to adjusting and delivering our training material is the review of a number of policies, procedures and processes throughout many departments. To say that devoting time and resources now to this endeavor is wholly unrealistic is an understatement: in no realm of realty are any of our key resources responsible for these changes available to do so at this time of crisis. That would entail taking them away from managing the current crisis, which simply is not an option. So, irrespective of the cost of training, the initial design of training material is now inevitably significantly delayed.

Even if training were designed and ready to be delivered, the current environment is not one conducive to learning and absorbing new regulations and complex requirements. The purpose of ATPDR is to accomplish a culture change and commitment to accessibility. True change management requires a mindset shift and takes time, energy, focus and investment to achieve. All of these are, understandably, now in short supply.

Request

We therefore request, pursuant to s. 170(3) or 170(4) of the Act, that the Agency extend the deadline for compliance with ATPDR until further notice, or at the very least by 90 days.

Air Canada remains committed to fully meeting the obligations of ATPDR once the industry has firmly recovered from the COVID-19 crisis. Even during the crisis, Air Canada will attempt to continue its implementation efforts to the extent practicable in the circumstances. In compliance with the test set out in s. 170(4), we *will* take the necessary measures to comply as soon as we are able.

If for any reason a full suspension is deemed not feasible, even appreciating that we may not fully be in a position to comply, we request that the Agency indefinitely suspend all initiatives that require IT development, sizable investment, new and complex procedures, and significant change management. These are: allowing reservations to be made by email,[8] training,[9] accommodating manual folding

[6] Such initiatives include the *Regulations Amending the Transportation Information Regulations (Air Travel Performance Data Collection)*, the *Regulations Amending the Canadian Aviation Regulations (Parts I, VI and VII — Flight Crew Member Hours of Work and Rest Periods)*, and *Air Passenger Protection Regulations.*

[7] Including personnel from the MEDA Desk, AC Medical, Airports, Call Centres, eCommerce, In-Flight Services, System Operations Control, Customer Relations, Operations Excellence, Passenger Movement, Customer Journey Management and Legal

[8] S. 7-8 ATPDR.

[9] S. 15-23 ATPDR.

wheelchairs on board,[10] *accessible IFE,*[11] *written confirmation of services*[12]*, and retention of medical information or documents*.[13]

For the many of the same reasons cited above, ***we also request an equivalent extension of the deadline to provide comments on the draft guidance materials on ATPDR, and that all work on Phase II of ATPDR be halted*** until the industry has fully recovered from the devastating effects of COVID-19. Any cost-benefit analysis for Phase II will have to recognise airlines' newly constrained capacity to take on additional costs in the current landscape.

4- Enforcement Leniency

Finally, in addition to the above, ***Air Canada requests the implementation of an explicit one-year period of leniency from enforcement action and fines for non-compliance on APPR and ATPDR,*** so that our workforce is free to focus on managing the overwhelming crisis at hand without being burdened or slowed by having to balance complex regulatory requirements. The Government of Canada has already established a solid precedent for the type of regulatory relief we are seeking.[14]

We have contacted Transport Canada and the Government of Canada with these requests and hope that all branches of government will work together to protect the sustainability of our industry.

We trust that you are sensitive to the importance and urgency of these matters and look forward to the Agency's full support during these exceedingly difficult times. Please do not hesitate to call to discuss if that might be useful.

Sincerely,

David J. Shapiro

cc: The Honorable Minister Marc Garneau, P.C., M.P.
Ferio Pugliese, Senior Vice President, Air Canada Express and Government Relations

[10] S. 43 ATPDR.
[11] S. 39 and 81 ATPDR.
[12] S. 58 ATPDR.
[13] S. 59 ATPDR.
[14] On March 13, 2020 the Department of Finance issued a statement of measures to support the economy and the financial sector. In that document, it said "In the face of current global developments, financial institutions should focus on managing this uncertainty rather than devoting resources to previously announced regulatory changes." It also granted other relief from current regulatory requirements, including lowering the Domestic Stability Buffer requirement for domestic systemically important banks OSFI also announced it will suspend all consultations on regulatory matters. https://www.canada.ca/en/department-finance/news/2020/03/canada-outlines-measures-to-support-the-economy-and-the-financial-sector.html

This is **Exhibit "75"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

_____

Signature

Meeting - Mar. 23

Friday, March 20, 2020 3:40 PM

Attendance
- Scott Streiner
- Liz Barker
- Mireille Drouin
- Doug Smith
- Marcia Jones
- Tom Oommen
- Valérie Lagacé & Simon-Pierre Lessard

- Sébastien Bergeron
- Alysia Lau

Guests
- Tim Hillier

Debriefs
- SS: TC indicated Agency moved faster than they expected. Other travel restrictions expected. Agreement between SS and MK that agencies/departments should not issue piecemeal decisions. Call this evening between TC and Agency officials.

Messaging on CTA services
- SS: Where message says CTA pausing air disputes, should specify that Agency still receiving complaints.
- LB: Maintaining Agency services "to the extent possible" too vague and signaling slowdown of services when not true. Need to be more specific.
- ***TH to revise messaging - continuing normal activity, with exception of... passengers can file complaints, but response times may be different. Do not want to solicit air travel complaints.**

Air carrier requests for additional measures
- SS prepared table comparing AC and AT asks.
- ***Statement that all situations in COVID context = Category 3 should be discussed at Members meeting.**

Official languages considerations
- Official Language Commissioner wrote to all departments/agencies noting some information coming from departments only in one language. Reminder for Agency to be aware.

ATPDR Guidance Consultations
- MJ: Signal check on continuing consultations on ATPDR guidance.
- LB: ***Should not address this until AC request on all APPR/ATPDR is resolved.**

Alysia Lau

Additional projects for staff
- MD: Training opportunities
- TO: DCB staff will focus on catching up on tasks.
- DS: Gathering information from staff nearing retirement or other long-time Agency employees.
- LB: Annotations of other pieces of legislation or regulations. SS: Challenge is having Legal participate/supervise.
- ***Chair's Office to develop list of projects. Tomorrow: start develop list of staff that would be suitable for each project. Branch Heads should inform managers this is coming.**

Members Committee
- APPR supplementary guidance - MJ: yes, proposed approach to reflect comments SS and LB.
- Low impact amendments package - MJ: Yes, prepared to make presentation.
- **SS to reflect on item 4. Leave on agenda.**
- **LB would like to postpone item 5. Would like more time to re-examine legal opinion.**
- **Stylist options - SPL asking to postpone this item**
- SS: May not need a lot of in camera time - 15 min. + MJ's two items.

Haiku Contest
- SS: How to proceed? ***Should solicit, put it in staff update, Chair's Office to coordinate with Cynthia's team.**
- DS: Suggest managers should share haiku contest, not Chair's Office. SS: Or Social Committee involvement? ***DS to ask Tammy Chrusch if she would like to partner with AL and Comms to develop this.**

Other internal matters
- MD: School closures in Quebec until May 1. Should include this in daily staff update.
- Construction sites will be closed for 3 weeks.
- Year-end contracts: Current situation should not have impact on year-end. Should be normal year-end. Will issue communique to Branch Heads.
- 15 Eddy - will perform preventative bed bug inspections tomorrow.
- DS: Annual report. Directors still working on it but delayed. MJ: Intention is to keep regular sections of AR with additional section on response to COVID-19. Team is on track, looking to move draft along, but checking with TC to discuss delaying of timelines. SS: Should keep AR moving.

Varia
- TO: We received two requests for tariffs information. SS: Summary of what tariffs say about refunds/vouchers. MJ: Asked that tariffs team prioritize WJ, AC and AT tariffs.
- DS: VPN seemed spotty today. We have discussed rotating access to VPN. ***SB to reach out to MD to discuss VPN options.**

This is **Exhibit "76"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

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Signature

Amanda Hamelin

From: Scott Streiner
Sent: Monday, March 23, 2020 2:19 PM
To: +_EC
Subject: Summary of asks
Attachments: Asks.docx

Hi, all. Please have a look at the attached table and let me know during our 2:30 call if you think any key points from either letter have been missed. 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

Item	AT	AC
APPR		Issue a blanket exemption from all APPR, or take the steps below
Classification of flight disruptions	State that all current disruptions are category 3	Same
Refunds	State that no refunds are owed	Same
Vouchers	Signal that vouchers are acceptable in lieu of cash refunds	
Response time	Exempt airlines from the 30 day timeline	Same
Alternative travel arrangements	Exempt airlines from any obligation to provide alternative travel arrangements	Same
April 30	Extend the current exemptions for at least 90 days	Same
Enforcement	Suspend for 1 year	Same
ATPDR		A 90-day or longer delay to the "deadline for compliance" or, at least, to certain provisions

This is **Exhibit "77"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

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Signature

Carrier Asks 24 March 2020

Tuesday, March 24, 2020 11:26 AM

Carrier Asks

Item	AT	AC
APPR		Issue a blanket exemption from all APPR, or take the steps below
Classification of flight disruptions	State that all current disruptions are category 3	Same
Refunds	State that no refunds are owed	Same
Vouchers	Signal that vouchers are acceptable in lieu of cash refunds	
Response time	Exempt airlines from the 30 day timeline	Same
Alternative travel arrangements	Exempt airlines from any obligation to provide alternative travel arrangements	Same
April 30	Extend the current exemptions for at least 90 days	Same
ATPDR		Provide a 90-day or longer delay to the "deadline for compliance" for, at least, certain provisions
Enforcement of APPR and ATPDR	Suspend for 1 year	Same
Advance notice for service changes on domestic routes		Exempt AC from the 120-day notice requirement

Not a reasonable request — Heather Smith

Already addressed through the Agency's statement — Heather Smith

Agree to suspend until end of June — Heather Smith

Agree to extend until the end of June — Heather Smith

Not a reasonable ask — Heather Smith

OK for temporary suspensions, but not going to agree to permanent changes — Heather Smith

This is **Exhibit "78"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

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Signature

From: Scott Streiner
Sent: March 24, 2020 9:15 AM
To: Marcia Jones
Cc: Sébastien Bergeron; Caitlin Hurcomb; Allan Burnside; Valérie Lagacé
Subject: RE: message to carriers - signals check

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.

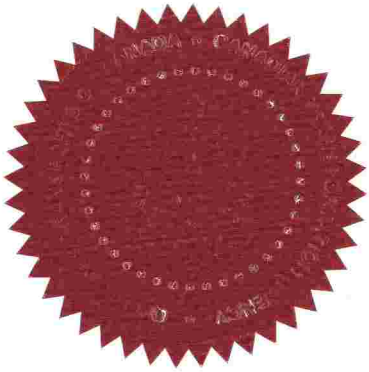
In addition, the CTA has released a statement providing guidance for addressing the mass flight cancellations taking place worldwide. In order to balance passenger protection and airline operating

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 "79"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

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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 "80"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

_____

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 "81"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

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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

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 "82"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

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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

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~~ may have clauses that airlines believe relieve them ~~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 "83"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

_____

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.

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 <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.

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 "84"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

_____

Signature

Nadine Landry

From: Liz Barker
Sent: Wednesday, March 25, 2020 11:04 AM
To: Scott Streiner
Subject: RE: Answer

I understand Seb's point, to try to frame this, and your response, that it might overstate it. But given that it is consistent with your intent, that this be seen as guidance by all, it might be ok to overstate it slightly.
Liz

From: Scott Streiner <Scott.Streiner@otc-cta.gc.ca>
Sent: March-25-20 10:43 AM
To: Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>; Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Cc: Liz Barker <Liz.Barker@otc-cta.gc.ca>
Subject: RE: Answer

Not sure we should call this guidance. That might slightly overstate it.

-------- Original message --------
From: Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>
Date: 2020-03-25 10:26 a.m. (GMT-05:00)
To: Scott Streiner <Scott.Streiner@otc-cta.gc.ca>, Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
Cc: Liz Barker <Liz.Barker@otc-cta.gc.ca>
Subject: RE: Answer

Scott,

I also like the tone of these lines. I like the fact that the emphasis is put on passengers, and that it clarifies what we want to do for them (first paragraph).

My only small suggestion would be as follows:

1. Sentence number one now says " we think passengers protection is essential" and the second sentence says, "so we issued a statement". I think we should use the word "guidance" instead of " statement" as it carries more weight. Going with something like "guidance in the form of a statement" could also make sense here. One downside of using "guidance" is that the end if this sentence now says "…may be appropriate", which could be deemed too vague to be considered "guidance".

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 : Scott Streiner <Scott.Streiner@otc-cta.gc.ca>
Envoyé : 25 mars 2020 09:53
À : Marcia Jones <Marcia.Jones@otc-cta.gc.ca>; Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>
Cc : Liz Barker <Liz.Barker@otc-cta.gc.ca>
Objet : 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 <Marcia.Jones@otc-cta.gc.ca>
Sent: Tuesday, March 24, 2020 8:53 PM
To: Scott Streiner <Scott.Streiner@otc-cta.gc.ca>; Sébastien Bergeron <Sebastien.Bergeron@otc-cta.gc.ca>
Subject: RE: Answer

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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 <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. **784**

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 "85"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

_____

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

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.

This is **Exhibit "86"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

_____

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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This is **Exhibit "87"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

_____

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

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

destinataire indiqué, soyez avisé que tout examen, divulgation, copie, impression, reproduction, distribution, autre utilisation de ce message et de ses pièces jointes est strictement interdit. Si vous avez reçu ce message alors que vous n'êtes pas un destinataire désigné, veuillez en aviser immédiatement l'émetteur et détruire ce message et les pièces jointes.

794

Confidentiality Warning:
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This is **Exhibit "88"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

_____

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

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,
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- 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.
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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
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(613) 864-9918
marcia.jones@otc-cta.gc.ca

_____

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- 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;
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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
(613) 864-9918
marcia.jones@otc-cta.gc.ca

This is **Exhibit "89"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

_____

Signature

From: Vincent Turgeon
Sent: March 25, 2020 4:05 PM
To: Tim Hillier; Marcia Jones
Subject: FW: Media Inquiry-URGENT

Importance: High

Hi Marcia and Tim, please advise. We just received this. We could simply respond that it is a clarification offered by the CTA.

Vincent

From: YVONNE COLBERT
Sent: Wednesday, March 25, 2020 3:53 PM
To: media
Subject: Media Inquiry-URGENT

Hello,
I am following up a voicemail I just left on your media line.
I am working on a story today about the airlines and their positions on providing credits versus refunds for tickets on flights that were cancelled by the airlines.

Is this from the CTA?

https://www.otc-cta.gc.ca/eng/statement-vouchers

It has no name attached to it and I would like to know who to attribute it to and on what legislative basis it is endorsing credits and not refunds?

I ask because the CTA has issued decisions that say airlines must refund passengers, even when the cancellation is beyond the airlines' control.

An August 29, 2013 decision from the Canadian Transport Agency states “The Agency agrees with Mr. Lukács, and finds that it is unreasonable for Porter to refuse to refund the fare paid by a passenger because of its cancellation of a flight, even if the cause is an event beyond Porter’s control.” I must finish my story today but I need confirmation from you that this link is legitimate and the release is from the CTA. I am hoping you can respond to my questions within the next few hours. Regards, Yvonne

https://www.otc-cta.gc.ca/eng/statement-vouchers

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Yvonne Colbert
Consumer Watchdog
CBC Nova Scotia

902-420-4559 office
902-478-6425 cell
902-420-4116 newsroom
yvonne.colbert@cbc.ca

This is **Exhibit "90"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

_____

Signature

803

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.

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.

Q5. How do the *Air Passenger Protection Regulations* (APPR) apply to flight delays or cancellations during this pandemic?

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.

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)

Q6. I've made a claim for compensation with an airline – don't they have to respond within 30 days?

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.

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)

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.

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

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.

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 "91"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

_____

Signature

Registration - In-house Corporation

809

All Monthly Communication Reports for Transat A.T. Inc.

Annick Guérard, President & Chief Executive Officer (Corporation)

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Registrants are required to submit a monthly communication report for each oral and arranged communication with a designated public office holder. The name of the most senior paid officer (i.e. the registrant) will appear on all in-house monthly communication reports, whether or not he/she participated in the communication.

Note: Monthly Communication Reports are due on the 15th day of each month for communications that took place in the previous month.

Results below are sorted by posted date, beginning with the most recent.

Transat A.T. Inc.
In-house Corporation

Designated Public Office Holders who participated in the communication:

- **Arun Thangaraj**, Deputy Minister | Transport Canada (TC)

Subject Matter of the communication: **Transportation**
Communication date: **2023-07-18**
Posted date: **2023-08-15**
Communication number: **5101-574929**

View associated registration

Transat A.T. Inc.

In-house Corporation
Designated Public Office Holders who participated in the communication:

- **Pablo Rodriguez**, Minister of Heritage & Quebec Lieutenant | Canadian Heritage (PCH)

Subject Matter of the communication: **Transportation**
Communication date: **2023-07-06**
Posted date: **2023-08-15**
Communication number: **5101-574926**

View associated registration

Transat A.T. Inc.

In-house Corporation
Designated Public Office Holders who participated in the communication:

- **Bud Sambasivam**, Director, Policy | Office of the Minister of Finance | Finance Canada (FIN)
- **Blake Oliver**, Senior Policy Advisor | Office of the Deputy Prime Minister and Minister of Finance of Canada | Finance Canada (FIN)
- **Greg Reade**, Assistant Deputy Minister | Finance Canada (FIN)

Affairs | Global Affairs Canada (GAC)

Subject Matter of the communication: **Industry, International Relations, Tourism, Transportation**
Communication date: **2020-06-02**
Posted date: **2020-06-16**
Communication number: **5101-476143**

View associated registration

Transat A.T. Inc.

In-house Corporation
Designated Public Office Holders who participated in the communication:

- **Aneil Jaswal**, Senior Policy Advisor, Office of the Minister of Finance | Finance Canada (FIN)

Subject Matter of the communication: **Industry, Taxation and Finance, Transportation**
Communication date: **2020-05-07**
Posted date: **2020-06-16**
Communication number: **5101-476141**

View associated registration

Transat A.T. Inc.

In-house Corporation
Designated Public Office Holders who participated in the communication:

- **Taras Zalusky**, Chief of staff, Office of the Minister of Employment, Workforce Development and Disability Inclusion | Employment and Social Development Canada (ESDC)

Subject Matter of the communication: **Transportation, Employment and Training**
Communication date: **2020-05-07**

Posted date: **2020-06-16**
Communication number: **5101-476140**

View associated registration

Transat A.T. Inc.

In-house Corporation
Designated Public Office Holders who participated in the communication:

- **Jean-Yves Duclos**, President of the Treasury Board | Treasury Board Of Canada Secretariat (TBS)

Subject Matter of the communication: **Industry, Taxation and Finance, Transportation**
Communication date: **2020-03-28**
Posted date: **2020-04-17**
Communication number: **5101-471347**

View associated registration

Transat A.T. Inc.

In-house Corporation
Designated Public Office Holders who participated in the communication:

- **Justin Trudeau**, Prime Minister | Prime Minister's Office (PMO)

Subject Matter of the communication: **Industry, Taxation and Finance, Transportation**
Communication date: **2020-03-25**
Posted date: **2020-04-17**
Communication number: **5101-471346**

View associated registration

Transat A.T. Inc.

In-house Corporation
Designated Public Office Holders who participated in the

Designated Public Office Holders who participated in the communication:

- **Francois-Philippe Champagne**, Minister of Foreign Affairs | Global Affairs Canada (GAC)

Subject Matter of the communication: **Industry, Transportation**
Communication date: **2020-03-21**
Posted date: **2020-04-17**
Communication number: **5101-471344**

View associated registration

Transat A.T. Inc.

In-house Corporation
Designated Public Office Holders who participated in the communication:

- **Bill Morneau**, Minister of Finance | Finance Canada (FIN)

Subject Matter of the communication: **Industry, Taxation and Finance, Transportation**
Communication date: **2020-03-19**
Posted date: **2020-04-17**
Communication number: **5101-471343**

View associated registration

Transat A.T. Inc.

In-house Corporation
Designated Public Office Holders who participated in the communication:

- **Steven Guilbeault**, Member of Parliament for Laurier-Sainte Marie | House of Commons

Subject Matter of the communication: **Industry, Transportation**
Communication date: **2020-03-05**

Communication date: **2020-03-05**
Posted date: **2020-03-06**
Communication number: **5101-466172**

View associated registration

Transat A.T. Inc.

In-house Corporation
Designated Public Office Holders who participated in the communication:

- **Anthony Housefather**, Member of Parliament for Mount-Royal | House of Commons

Subject Matter of the communication: **Labour**
Communication date: **2020-03-03**
Posted date: **2020-03-06**
Communication number: **5101-466173**

View associated registration

Transat A.T. Inc.

In-house Corporation
Designated Public Office Holders who participated in the communication:

- **Marc Garneau**, Minister of Transport | Transport Canada (TC)
- **Miled Hill**, Policy Advisor | Office of the Hon. Marc Garneau, PC, MP | Transport Canada (TC)

Subject Matter of the communication: **Industry, Transportation**
Communication date: **2020-03-02**
Posted date: **2020-03-06**
Communication number: **5101-466170**

View associated registration

Transat A.T. Inc.

In-house Corporation
Designated Public Office Holders who participated in the communication:

- **Tony Baldinelli**, Member of Parliament for Niagara-Falls | House of Commons

Subject Matter of the communication: **Industry, Transportation**
Communication date: **2020-02-27**
Posted date: **2020-03-06**
Communication number: **5101-466169**

View associated registration

Transat A.T. Inc.

In-house Corporation
Designated Public Office Holders who participated in the communication:

- **Todd Doherty**, Member of Parliament for Cariboo-Prince George | House of Commons

Subject Matter of the communication: **Industry, Transportation**
Communication date: **2020-02-27**
Posted date: **2020-03-06**
Communication number: **5101-466168**

View associated registration

Transat A.T. Inc.

In-house Corporation
Designated Public Office Holders who participated in the communication:

- **Paul Halucha**, Assistant Secretary to the Cabinet, Economic and Regional Development Policy | Privy Council Office (PCO)

Subject Matter of the communication: **Industry, Transportation**
Communication date: **2020-02-11**
Posted date: **2020-03-06**
Communication number: **5101-466171**

View associated registration

Transat A.T. Inc.

In-house Corporation
Designated Public Office Holders who participated in the communication:

- **Francis Scarpaleggia**, Member of Parliament for Lac-St-Louis | House of Commons

Subject Matter of the communication: **Industry, Transportation**
Communication date: **2020-01-09**
Posted date: **2020-01-09**
Communication number: **5101-462277**

View associated registration

Transat A.T. Inc.

In-house Corporation
Designated Public Office Holders who participated in the communication:

- **Mitch Davies**, Senior Assistant Deputy Minister | Industry Sector | Innovation, Science and Economic Development Canada (ISED)
- **Mary Gregory**, Acting Assistant Deputy Minister | Industry Sector | Innovation, Science and Economic Development Canada (ISED)

Subject Matter of the communication: **Industry, Transportation**
Communication date: **2020-01-08**

This is **Exhibit "92"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

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Signature

Registration - In-house Corporation

818

All Monthly Communication Reports for Air Canada

Michael Rousseau, President and Chief Executive Officer (Corporation)

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Registrants are required to submit a monthly communication report for each oral and arranged communication with a designated public office holder. The name of the most senior paid officer (i.e. the registrant) will appear on all in-house monthly communication reports, whether or not he/she participated in the communication.

Note: Monthly Communication Reports are due on the 15th day of each month for communications that took place in the previous month.

Results below are sorted by posted date, beginning with the most recent.

Air Canada
In-house Corporation

Designated Public Office Holders who participated in the communication:

- **Raymond Theberge**, Commissioner of Official Languages | Office of the Commissioner of Official Languages (OCOL)

Subject Matter of the communication: **Bilingualism/Official Languages**
Communication date: **2023-06-21**
Posted date: **2023-07-15**
Communication number: **15009-572227**

View associated registration

Air Canada

In-house Corporation
Designated Public Office Holders who participated in the communication:

- **Angad Dhillon**, Chief of Staff to the Minister | Office of the Minister of Transport | Transport Canada (TC)
- **Angad Dhillon**, Chief of Staff to the Minister | Office of the Minister of Transport | Transport Canada (TC)

Subject Matter of the communication: **Transportation**
Communication date: **2023-06-14**
Posted date: **2023-07-15**
Communication number: **15009-572223**

View associated registration

Air Canada

In-house Corporation
Designated Public Office Holders who participated in the communication:

- **Jennifer May**, Ambassador to the People's Republic of China | Global Affairs Canada (GAC)

Communication date: **2020-06-16**
Posted date: **2020-07-15**
Communication number: **15009-477749**

View associated registration

Air Canada

In-house Corporation
Designated Public Office Holders who participated in the communication:

- **Miled Hill**, Senior Policy Advisor | Transport Canada (TC)

Subject Matter of the communication: **Transportation**
Communication date: **2020-06-01**
Posted date: **2020-07-15**
Communication number: **15009-477746**

View associated registration

Air Canada

In-house Corporation
Designated Public Office Holders who participated in the communication:

- **Francois-Philippe Champagne**, Minister Foreign Affairs | Global Affairs Canada (GAC)
- **Marta Morgan**, Deputy Minister | Global Affairs Canada (GAC)
- **Bruce Christie**, Associate Assistant Deputy Minister | Global Affairs Canada (GAC)
- **Heather Jeffrey**, Assistant Deputy Minister | Global Affairs Canada (GAC)

Subject Matter of the communication: **Transportation**
Communication date: **2020-05-21**
Posted date: **2020-06-15**
Communication number: **15009-476003**

View associated registration

Air Canada

In-house Corporation
Designated Public Office Holders who participated in the communication:

- **Mary Ng**, Minister of Small Business, Export Promotion and International Trade | Global Affairs Canada (GAC)

Subject Matter of the communication: **Transportation**
Communication date: **2020-05-13**
Posted date: **2020-06-15**
Communication number: **15009-475999**

View associated registration

Air Canada

In-house Corporation
Designated Public Office Holders who participated in the communication:

- **Lawrence Hanson**, Assistant Deputy Minister, Policy | Transport Canada (TC)

Subject Matter of the communication: **Transportation**
Communication date: **2020-05-06**
Posted date: **2020-06-15**
Communication number: **15009-475998**

View associated registration

Air Canada

In-house Corporation
Designated Public Office Holders who participated in the communication:

- **Melanie Joly**, Minister Economic Development & Official Languages | Innovation, Science and

Official Languages | Innovation, Science and Economic Development Canada (ISED)

Subject Matter of the communication: **Transportation**
Communication date: **2020-05-05**
Posted date: **2020-06-15**
Communication number: **15009-475996**

View associated registration

Air Canada

In-house Corporation
Designated Public Office Holders who participated in the communication:

- **Ben Chin**, Senior Advisor | Prime Minister's Office (PMO)

Subject Matter of the communication: **Transportation**
Communication date: **2020-05-04**
Posted date: **2020-06-15**
Communication number: **15009-475994**

View associated registration

Air Canada

In-house Corporation
Designated Public Office Holders who participated in the communication:

- **Kevin Brosseau**, Assistant Deputy Minister, Safety & Security | Transport Canada (TC)
- **Aaron McCrorie**, Associate Assistant Deputy Minister, Safety & Security | Transport Canada (TC)

Subject Matter of the communication: **Transportation**
Communication date: **2020-05-04**
Posted date: **2020-06-15**
Communication number: **15009-475992**

View associated registration

View associated registration

Air Canada

In-house Corporation
Designated Public Office Holders who participated in the communication:

- **Lawrence Hanson**, Assistant Deputy Minister, Policy | Transport Canada (TC)
- **Ailish Campbell**, Chief Trade Commissioner and ADM | Global Affairs Canada (GAC)
- **Bruce Christie**, Associate Assistant Deputy Minister | Global Affairs Canada (GAC)
- **Heather Jeffrey**, Assistant Deputy Minister | Global Affairs Canada (GAC)
- **Louis Marcotte**, Chief Air Negotiator/Director General | Global Affairs Canada (GAC)
- **Kevin Brosseau**, Assistant Deputy Minister, Safety & Security | Transport Canada (TC)
- **Aaron McCrorie**, Associate Assistant Deputy Minister, Safety & Security | Transport Canada (TC)

Subject Matter of the communication: **Transportation**
Communication date: **2020-05-04**
Posted date: **2020-06-15**
Communication number: **15009-475968**

View associated registration

Air Canada

In-house Corporation
Designated Public Office Holders who participated in the communication:

- **Chrystia Freeland**, Deputy Prime Minister and Minister for Intergovernmental Affairs | Privy Council Office (PCO)

Subject Matter of the communication: **International Trade, Transportation, Taxation and Finance**
Communication date: **2020-04-28**
Posted date: **2020-05-15**
Communication number: **15009-473529**

View associated registration

Air Canada

In-house Corporation
Designated Public Office Holders who participated in the communication:

- **Navdeep Bains**, Minister of Innovation, Science and Economic Development | Innovation, Science and Economic Development Canada (ISED)

Subject Matter of the communication: **International Trade, Transportation, Taxation and Finance, Industry**
Communication date: **2020-04-27**
Posted date: **2020-05-15**
Communication number: **15009-473528**

View associated registration

Air Canada

In-house Corporation
Designated Public Office Holders who participated in the communication:

- **William Morneau**, Minister of Finance | Finance Canada (FIN)

Subject Matter of the communication: **Labour, Transportation, Taxation and Finance**
Communication date: **2020-04-26**
Posted date: **2020-05-15**
Communication number: **15009-473527**

View associated registration

Air Canada

In-house Corporation
Designated Public Office Holders who participated in the communication:

- **Aneil Jaswal**, Senior Policy advisor | Minister's Office | Finance Canada (FIN)

Subject Matter of the communication: **Labour, Taxation and Finance**
Communication date: **2020-04-24**
Posted date: **2020-05-15**
Communication number: **15009-473534**

View associated registration

Air Canada

In-house Corporation
Designated Public Office Holders who participated in the communication:

- **Kevin Brosseau**, Associate Deputy Minister | Safety and Security | Transport Canada (TC)

Subject Matter of the communication: **Transportation, National Security/Security**
Communication date: **2020-04-23**
Posted date: **2020-05-15**
Communication number: **15009-473535**

View associated registration

Air Canada

In-house Corporation
Designated Public Office Holders who participated in the communication:

- **Marc Garneau**, Minister of Transportation | Transport Canada (TC)

Subject Matter of the communication: **International Trade, Transportation, Taxation and Finance**
Communication date: **2020-04-23**
Posted date: **2020-05-15**
Communication number: **15009-473526**

View associated registration

Air Canada

In-house Corporation
Designated Public Office Holders who participated in the communication:

- **Aneil Jaswal**, Senior Policy Advisor | Minister's Office | Finance Canada (FIN)

Subject Matter of the communication: **Labour, Taxation and Finance**
Communication date: **2020-04-20**
Posted date: **2020-05-15**
Communication number: **15009-473533**

View associated registration

Air Canada

In-house Corporation
Designated Public Office Holders who participated in the communication:

- **Heather Jeffrey**, Assistant Deputy Minister | Global Affairs Canada (GAC)
- **Richard Botham**, Assistant Deputy Minister | Finance Canada (FIN)
- **Lawrence Hanson**, Assistant Deputy Minister | Policy | Transport Canada (TC)

Subject Matter of the communication: **International Relations, International Trade, Transportation**

Communication date: **2020-04-20**
Posted date: **2020-05-15**
Communication number: **15009-473524**

View associated registration

Air Canada

In-house Corporation
Designated Public Office Holders who participated in the communication:

- **Griffin Marsh**, Chief of Staff | Minister's Office | Indigenous Services Canada (ISC)
- **Katherine Koostachin**, Senior Policy Advisor | Minister's Office | Indigenous Services Canada (ISC)

Subject Matter of the communication: **Transportation, Consumer Issues, Industry**
Communication date: **2020-04-17**
Posted date: **2020-05-15**
Communication number: **15009-473531**

View associated registration

Air Canada

In-house Corporation
Designated Public Office Holders who participated in the communication:

- **Heather Jeffrey**, Assistant Deputy Minister | Global Affairs Canada (GAC)

Subject Matter of the communication: **International Relations, International Trade, Transportation**
Communication date: **2020-04-17**
Posted date: **2020-05-15**
Communication number: **15009-473523**

View associated registration

Air Canada

In-house Corporation
Designated Public Office Holders who participated in the communication:

- **Michael Keenan**, Deputy Minister | Transport Canada (TC)

Subject Matter of the communication: **International Trade, Transportation, Taxation and Finance**
Communication date: **2020-04-16**
Posted date: **2020-05-15**
Communication number: **15009-473525**

View associated registration

Air Canada

In-house Corporation
Designated Public Office Holders who participated in the communication:

- **Paul Thoppil**, Assistant Deputy Minister | Asia | Global Affairs Canada (GAC)

Subject Matter of the communication: **International Relations, International Trade, Transportation**
Communication date: **2020-04-16**
Posted date: **2020-05-15**
Communication number: **15009-473522**

View associated registration

Air Canada

In-house Corporation
Designated Public Office Holders who participated in the communication:

- **Lawrence Hanson**, Assistant Deputy Minister | Policy | Transport Canada (TC)

Subject Matter of the communication: **Transportation**
Communication date: **2020-04-15**
Posted date: **2020-05-15**
Communication number: **15009-473521**

View associated registration

Air Canada

In-house Corporation
Designated Public Office Holders who participated in the communication:

- **Lawrence Hanson**, Assistant Deputy Minister | Policy | Transport Canada (TC)
- **Bruce Christie**, Associate Assistant Deputy Minister | Trade Policy and Negotiations | Global Affairs Canada (GAC)

Subject Matter of the communication: **International Relations, International Trade, Transportation**
Communication date: **2020-04-14**
Posted date: **2020-05-15**
Communication number: **15009-473520**

View associated registration

Air Canada

In-house Corporation
Designated Public Office Holders who participated in the communication:

- **Andrew Marsland**, Senior Assistant Deputy Minister | Finance Canada (FIN)
- **Miodrag Jovanovic**, Associate Assistant Deputy Minister | Finance Canada (FIN)
- **Brian Ernewein**, Assistant Deputy Minister | Tax Legislation | Finance Canada (FIN)
- **Richard Botham**, Assistant Deputy Minister | Finance

Canada (FIN)

Subject Matter of the communication: **Labour, Transportation**
Communication date: **2020-04-07**
Posted date: **2020-05-15**
Communication number: **15009-473519**

View associated registration

Air Canada

In-house Corporation
Designated Public Office Holders who participated in the communication:

- **Lawrence Hanson**, Assistant Deputy Minister | Policy | Transport Canada (TC)

Subject Matter of the communication: **International Relations, International Trade, Transportation**
Communication date: **2020-04-06**
Posted date: **2020-05-15**
Communication number: **15009-473518**

View associated registration

Air Canada

In-house Corporation
Designated Public Office Holders who participated in the communication:

- **Richard Botham**, Assistant Deputy Minister | Finance Canada (FIN)
- **Andrew Marsland**, Senior Assistant Deputy Minister | Finance Canada (FIN)
- **Brian Ernewein**, Assistant Deputy Minister | Tax Legislation | Finance Canada (FIN)

Subject Matter of the communication: **International**

Relations, Labour, International Trade, Transportation, Taxation and Finance
Communication date: **2020-04-03**
Posted date: **2020-05-15**
Communication number: **15009-473530**

View associated registration

Air Canada

In-house Corporation
Designated Public Office Holders who participated in the communication:

- **Lawrence Hanson**, Assistant Deputy Minister | Policy | Transport Canada (TC)

Subject Matter of the communication: **International Relations, International Trade, Transportation**
Communication date: **2020-04-03**
Posted date: **2020-05-15**
Communication number: **15009-473516**

View associated registration

Air Canada

In-house Corporation
Designated Public Office Holders who participated in the communication:

- **Lawrence Hanson**, Assistant Deputy Minister | Policy | Transport Canada (TC)

Subject Matter of the communication: **International Relations, International Trade, Transportation**
Communication date: **2020-04-03**
Posted date: **2020-05-15**
Communication number: **15009-473515**

View associated registration

Air Canada

In-house Corporation
Designated Public Office Holders who participated in the communication:

- **Lawrence Hanson**, Assistant Deputy Minister | Policy | Transport Canada (TC)

Subject Matter of the communication: **International Relations, International Trade, Transportation**
Communication date: **2020-04-02**
Posted date: **2020-05-15**
Communication number: **15009-473513**

View associated registration

Air Canada

In-house Corporation
Designated Public Office Holders who participated in the communication:

- **Paul Rochon**, Deputy Minister | Finance Canada (FIN)

Subject Matter of the communication: **Transportation, Taxation and Finance, Industry**
Communication date: **2020-03-26**
Posted date: **2020-04-15**
Communication number: **15009-471126**

View associated registration

Air Canada

In-house Corporation
Designated Public Office Holders who participated in the communication:

- **Lawrence Hanson**, Assistant Deputy Minister, Policy | Transport Canada (TC)
- **Heather Jeffreys**, Assistant Deputy Minister | Global

Affairs Canada (GAC)
- **Elissa Golberg**, Assistant Deputy Minister | Global Affairs Canada (GAC)

Subject Matter of the communication: **Transportation, Industry**
Communication date: **2020-03-20**
Posted date: **2020-04-15**
Communication number: **15009-471107**

View associated registration

Air Canada

In-house Corporation
Designated Public Office Holders who participated in the communication:
- **Jude Welch**, Chief of Staff | Minister's Office Labour | Employment and Social Development Canada (ESDC)
- **Miles Hopper**, Policy Advisor | Minister's Office Labour | Employment and Social Development Canada (ESDC)

Subject Matter of the communication: **Transportation, Taxation and Finance, Industry, Employment and Training**
Communication date: **2020-03-20**
Posted date: **2020-04-15**
Communication number: **15009-471100**

View associated registration

Air Canada

In-house Corporation
Designated Public Office Holders who participated in the communication:
- **Bill Morneau**, Finance Minister | Finance Canada (FIN)

Subject Matter of the communication: **Transportation, Taxation and Finance, Industry**
Communication date: **2020-03-19**
Posted date: **2020-04-15**
Communication number: **15009-471123**

View associated registration

Air Canada

In-house Corporation
Designated Public Office Holders who participated in the communication:

- **Justin Trudeau**, Prime Minister | Prime Minister's Office (PMO)

Subject Matter of the communication: **Transportation, Taxation and Finance, Industry**
Communication date: **2020-03-18**
Posted date: **2020-04-15**
Communication number: **15009-471120**

View associated registration

Air Canada

In-house Corporation
Designated Public Office Holders who participated in the communication:

- **Emmanueal Dubourg**, Member of Parliament | House of Commons

Subject Matter of the communication: **Bilingualism/Official Languages**
Communication date: **2020-03-12**
Posted date: **2020-04-15**
Communication number: **15009-471115**

View associated registration

View associated registration

Air Canada

In-house Corporation
Designated Public Office Holders who participated in the communication:

- **Bill Morneau**, Finance Minister | Finance Canada (FIN)

Subject Matter of the communication: **Taxation and Finance, Industry**
Communication date: **2020-03-09**
Posted date: **2020-04-15**
Communication number: **15009-471119**

View associated registration

Air Canada

In-house Corporation
Designated Public Office Holders who participated in the communication:

- **Lawrence Hanson**, Assistant Deputy Minister, Policy | Transport Canada (TC)

Subject Matter of the communication: **Transportation, Industry**
Communication date: **2020-03-05**
Posted date: **2020-04-15**
Communication number: **15009-471097**

View associated registration

Air Canada

In-house Corporation
Designated Public Office Holders who participated in the communication:

- **Paul Halucha**, Assistant Secretary to the Cabinet | Privy Council Office (PCO)

Privy Council Office (PCO)

Subject Matter of the communication: **Transportation, Consumer Issues, Industry**
Communication date: **2020-02-11**
Posted date: **2020-03-16**
Communication number: **15009-468372**

View associated registration

Air Canada

In-house Corporation
Designated Public Office Holders who participated in the communication:

- **Marie-France Lalonde**, MP | House of Commons

Subject Matter of the communication: **Bilingualism/Official Languages**
Communication date: **2020-02-11**
Posted date: **2020-03-16**
Communication number: **15009-467385**

View associated registration

Air Canada

In-house Corporation
Designated Public Office Holders who participated in the communication:

- **Miles Hopper**, Senior Policy Advisor | Employment and Social Development Canada (ESDC)
- **Ashley Michnowski**, Policy Advisor | Employment and Social Development Canada (ESDC)

Subject Matter of the communication: **Labour**
Communication date: **2020-02-05**
Posted date: **2020-03-16**
Communication number: **15009-467384**

View associated registration

Air Canada

In-house Corporation
Designated Public Office Holders who participated in the communication:

- **Raymond Theberge**, Commissioner of Official Languages | Office of the Commissioner of Official Languages (OCOL)
- **Ghislaine Saikaley**, Assistant Commissioner | Office of the Commissioner of Official Languages (OCOL)
- **Pierre Leduc**, Assistant Commissioner | Office of the Commissioner of Official Languages (OCOL)

Subject Matter of the communication: **Bilingualism/Official Languages**
Communication date: **2020-02-03**
Posted date: **2020-03-16**
Communication number: **15009-467375**

View associated registration

Air Canada

In-house Corporation
Designated Public Office Holders who participated in the communication:

- **Dominic Cormier**, Policy Advisor | Prime Minister's Office (PMO)

Subject Matter of the communication: **Bilingualism/Official Languages**
Communication date: **2020-01-24**
Posted date: **2020-02-15**
Communication number: **15009-464377**

View associated registration

This is **Exhibit "93"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

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Signature

Registration - In-house Organization

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All Monthly Communication Reports for Association of Canadian Travel Agencies / association canadienne des agences de voyages

Wendy Paradis, President (Organization)

▼ Learn more...

Registrants are required to submit a monthly communication report for each oral and arranged communication with a designated public office holder. The name of the most senior paid officer (i.e. the registrant) will appear on all in-house monthly communication reports, whether or not he/she participated in the communication.

Note: Monthly Communication Reports are due on the 15th day of each month for communications that took place in the previous month.

Results below are sorted by posted date, beginning with the most recent.

Association of Canadian Travel Agencies
In-house Organization
Designated Public Office Holders who participated in the communication:
- **Riley Schnurr**, Senior Policy Advisor | Minister's Office | Innovation, Science and Economic Development Canada (ISED)
- **Randy Boissonnault**, Minister of Tourism and Associate Minister of Finance | Innovation, Science and Economic Development Canada (ISED)

Subject Matter of the communication: **Tourism**
Communication date: **2022-08-03**
Posted date: **2022-08-03**
Communication number: **6003-539028** View associated registration

Association of Canadian Travel Agencies
In-house Organization
Designated Public Office Holders who participated in the communication:
- **Krista Apse**, Director General | Innovation, Science and Economic Development Canada (ISED)

Subject Matter of the communication: **Economic Development**
Communication date: **2022-03-14**
Posted date: **2022-04-13**
Communication number: **6003-528609** View associated registration

Association of Canadian Travel Agencies

Communication number: **6003-482079** View associated registration

Association of Canadian Travel Agencies
In-house Organization
Designated Public Office Holders who participated in the communication:

- **Greg McLean**, Member of Parliament | House of Commons

Subject Matter of the communication: **Tourism, Small Business**
Communication date: **2020-07-24**
Posted date: **2020-08-14**
Communication number: **6003-479856** View associated registration

Association of Canadian Travel Agencies
In-house Organization
Designated Public Office Holders who participated in the communication:

- **Kelsey MacDonald**, Senior Policy Advisor | Office of Minister Melanie Joly | Rural Economic Development (Minister's Office)

Subject Matter of the communication: **Tourism, Small Business**
Communication date: **2020-05-22**
Posted date: **2020-06-15**
Communication number: **6003-475466** View associated registration

Association of Canadian Travel Agencies
In-house Organization
Designated Public Office Holders who participated in the communication:

- **Miled Hill**, Senior Policy Advisor | Office of the Honourable Marc Garneau, Minister of Transport | Transport Canada (TC)

Subject Matter of the communication: **Transportation, Tourism**
Communication date: **2020-05-07**
Posted date: **2020-06-15**
Communication number: **6003-475460** View associated registration

Association of Canadian Travel Agencies
In-house Organization
Designated Public Office Holders who participated in the communication:

- **Natacha Engel**, Senior Policy Advisor | Minister of Small Business, Export Promotion and International Trade Office | Innovation, Science and Economic Development Canada (ISED)

Subject Matter of the communication: **Tourism, Small Business**
Communication date: **2020-05-06**
Posted date: **2020-06-15**
Communication number: **6003-475455** View associated registration

Association of Canadian Travel Agencies
In-house Organization

Designated Public Office Holders who participated in the communication:

- **Brad Vis**, Member of Parliament | House of Commons

Subject Matter of the communication: **Tourism, Small Business**
Communication date: **2020-05-04**
Posted date: **2020-06-15**
Communication number: **6003-475449** View associated registration

Association of Canadian Travel Agencies

In-house Organization
Designated Public Office Holders who participated in the communication:

- **Tony Baldinelli**, Member of Parliament | House of Commons

Subject Matter of the communication: **Transportation, Tourism, Small Business**
Communication date: **2020-05-01**
Posted date: **2020-06-14**
Communication number: **6003-475259** View associated registration

Association of Canadian Travel Agencies

In-house Organization
Designated Public Office Holders who participated in the communication:

- **Blake Richards**, M.P. | House of Commons

Subject Matter of the communication: **Taxation and Finance, Transportation, Tourism**
Communication date: **2020-04-20**
Posted date: **2020-06-15**
Communication number: **6003-472875** View associated registration

Association of Canadian Travel Agencies

In-house Organization
Designated Public Office Holders who participated in the communication:

- **Arthur Lam**, Senior Policy Advisory in Minister Mary Ng's office | Export Development Canada (EDC)
- **Yash Nanda**, Special Assistanct Policy at Office of the Minister of Small Business, Export Promotion & International Trade | Export Development Canada (EDC)

Subject Matter of the communication: **Taxation and Finance, Transportation, Tourism, Small Business**
Communication date: **2020-04-09**
Posted date: **2020-06-15**
Communication number: **6003-472865** View associated registration

Association of Canadian Travel Agencies

In-house Organization
Designated Public Office Holders who participated in the communication:

- **Tony Clement**, M.P. | House of Commons

Subject Matter of the communication: **Taxation and Finance, Transportation, Tourism,**

842

Small Business
Communication date: **2020-04-03**
Posted date: **2020-06-15**
Communication number: **6003-472862** View associated registration

Association of Canadian Travel Agencies

In-house Organization
Designated Public Office Holders who participated in the communication:

- **Patricia Bovey**, Senator | Standing Committee on Transport and Communications | Transport Canada (TC)
- **Pierre-Hugues Boisvenu**, Senator | Standing Committee on Transport and Communications | Transport Canada (TC)
- **Leo Housakos**, Senator | Standing Committee on Transport and Communications | Transport Canada (TC)
- **David Tkachuk**, Senator | Standing Committee on Transport and Communications | Transport Canada (TC)
- **Dennis Dawson**, Senator | Standing Committee on Transport and Communications | Transport Canada (TC)
- **Raymonde Gagne**, Senator | Standing Committee on Transport and Communications | Transport Canada (TC)
- **Grant Mitchell**, Senator | Standing Committee on Transport and Communications | Transport Canada (TC)
- **Terry Mercer**, Senator | Standing Committee on Transport and Communications | Transport Canada (TC)
- **Rene Cormier**, Senator | Standing Committee on Transport and Communications | Transport Canada (TC)

Subject Matter of the communication: **Consumer Issues, Transportation**
Communication date: **2018-02-28**
Posted date: **2018-04-10**
Communication number: **6003-423406 (amended from 6003-422588)**
View associated registration

Association of Canadian Travel Agencies

In-house Organization
Designated Public Office Holders who participated in the communication:

- **Marc Garneau**, Minister of Transport | Transport Canada (TC)
- **Omar Alghabra**, MP Mississauga Centre | Global Affairs Canada (GAC)
- **Adel Boulazreg**, Policy Advisor, Minister's Office | Transport Canada (TC)
- **Michael Stephenson**, Regional Affairs, Ministerial Regional Office, Ontario | Transport Canada (TC)
- **Hector Lopez-Negrete**, Executive Assistant to Omar Alghabra | Global Affairs Canada (GAC)
- **Naila Mahmood**, Communications and Outreach Assistant to Omar Alghabra | Global Affairs Canada (GAC)

Subject Matter of the communication: **Consumer Issues, International Relations, National Security/Security, Taxation and Finance, Transportation, Tourism**
Communication date: **2017-08-15**

This is **Exhibit "94"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

_____

Signature

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"please refer to this link that will answer your question

Top Latest People Photos Videos

CTA.gc.ca @CTA_gc · Mar 25
Replying to @johnpeterc88 @TV_SteveWilks and @AirCanada
Good afternoon, **please refer to this link that will answer your question**: otc-cta.gc.ca/eng/statement-... Thank you. CTA social media
1

CTA.gc.ca @CTA_gc · Mar 25
Replying to @asha_jibril @TravelGoC and 2 others
Good afternoon, **please refer to this link that will answer your question**: otc-cta.gc.ca/eng/statement-... Thank you. CTA social media
2

CTA.gc.ca @CTA_gc · Mar 25
Replying to @FerrisCatWheel @libbyconser and 5 others
Good afternoon, **please refer to this link that will answer your question**: otc-cta.gc.ca/eng/statement-... Thank you. CTA social media
2

CTA.gc.ca @CTA_gc · Mar 25
Replying to @ungraceful_mi and @airtransat
Good afternoon, **please refer to this link that will answer your question**: otc-cta.gc.ca/eng/statement-... Thank you. CTA social media
1

CTA.gc.ca @CTA_gc · Mar 25
Replying to @Ian_saucy and @WestJet
Good afternoon, **please refer to this link that will answer your question**: otc-cta.gc.ca/eng/statement-... Thank you. CTA social media

845







This is **Exhibit "95"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

_____

Signature

Nicole Beart
@Memory_Catcher

@OTC_gc - What recourse do people have to get their money back from #airlines? #Coronavirus has flights cancelled, borders closing, and yet the airlines are keeping the money of everyone who had #springbreak travel plans. @TravelGoC @Transport_gc

2:34 PM · Mar 21, 2020 · Twitter Web App

Tweet your reply

Reply

OTC.gc.ca @OTC_gc · Mar 25, 2020

Replying to @Memory_Catcher

Good afternoon, please refer to this link that will answer your question: otc-cta.gc.ca/eng/statement-... Thank you. CTA social media

J.P. Cavalier
@johnpeterc88

En réponse à @CTA_gc @TV_SteveWilks et @AirCanada

AC cancelled my flight (it was them, not me) and they still refuse to refund. You guys need to get your act together and actually protect consumers, not the airlines. This is ridiculous.

Traduire le Tweet

3:56 PM · 24 mars 2020 · Twitter Web App

2 J'aime

Tweetez votre réponse.

Répondre

CTA.gc.ca @CTA_gc · 25 mars 2020

En réponse à @johnpeterc88 @TV_SteveWilks et @AirCanada

Good afternoon, please refer to this link that will answer your question: otc-cta.gc.ca/eng/statement-... Thank you. CTA social media

Sleepyhead Sam ☀️
@freckletoxo

En réponse à @ @NachoGreg et 4 autres personnes

no, we purchased in January for April 11th and refused a cash refund. Even though the border is closed.

Traduire le Tweet

1:57 PM · 23 mars 2020 · Twitter for iPhone

1 J'aime

Tweetez votre réponse. Répondre

CTA.gc.ca @CTA_gc · 25 mars 2020

En réponse à @freckletoxo @FerrisCatWheel et 5 autres personnes

Good afternoon, please refer to this link that will answer your question: otc-cta.gc.ca/eng/statement-... Thank you. CTA social media

2

Canadian Dad @JBully17 · 25 mars 2020

@CP24 I know you recently shared a great article about @SunwingVacay flying back stranded Canadians but those who should be praised should be the Canadians at home that Sunwing won't refund their money. Get a reporter to look into it!
#covid19Canada

3 2

CTA.gc.ca @CTA_gc · 25 mars 2020

En réponse à @JBully17

Good afternoon, please refer to this link that will answer your question: otc-cta.gc.ca/eng/statement-... Thank you. CTA social media

6

J.P. Cavalier
@johnpeterc88

En réponse à @CTA_gc @TV_SteveWilks et @AirCanada

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Traduire le Tweet

3:56 PM · 24 mars 2020 · Twitter Web App

2 J'aime

Tweetez votre réponse.

Répondre

CTA.gc.ca @CTA_gc · 25 mars 2020

En réponse à @johnpeterc88 @TV_SteveWilks et @AirCanada

Good afternoon, please refer to this link that will answer your question: otc-cta.gc.ca/eng/statement-... Thank you. CTA social media

1

Sleepyhead Sam ☀️
@freckletoxo

En réponse à @ @NachoGreg et 4 autres personnes

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Traduire le Tweet

1:57 PM · 23 mars 2020 · Twitter for iPhone

1 J'aime

Tweetez votre réponse. Répondre

CTA.gc.ca @CTA_gc · 25 mars 2020

En réponse à @freckletoxo @FerrisCatWheel et 5 autres personnes

Good afternoon, please refer to this link that will answer your question: otc-cta.gc.ca/eng/statement-... Thank you. CTA social media

2

@CTA_gc
Please assit us seeing a full refund from Air Canada regarding upcoming flights in April.
A voucher/credit is not what we need, a full refund is the only option during COVID19.

Traduire le Tweet

East Yorker @eastyorker_ · 17 mars 2020
@AirCanada @HarveyCashore
We have a state of emergency in Ontario, Air Canada won't issue a refund to families booked on flights in April.
So not Canadian, unjust and outside what one would expect in these times.
twitter.com/TorontoStar/st…

8:06 AM · 23 mars 2020 · Twitter for Android

Tweetez votre réponse. Répondre

CTA.gc.ca @CTA_gc · 25 mars 2020
En réponse à @eastyorker_
Good afternoon, please refer to this link that will answer your question: otc-cta.gc.ca/eng/statement-… Thank you. CTA social media

1

Mimi Nguyen
@ungraceful_mi

En réponse à @ungraceful_mi et @airtransat

The PASSENGER chooses how they get refunded. I believe this is a #lawsuit waiting to happen if you willfully make passengers take a credit that will expire in 12 months. @CTA_gc you may want to look into this company.

Traduire le Tweet

1:34 PM · 22 mars 2020 · Twitter for Android

1 J'aime

Tweetez votre réponse. Répondre

CTA.gc.ca @CTA_gc · 25 mars 2020

En réponse à @ungraceful_mi et @airtransat

Good afternoon, please refer to this link that will answer your question: otc-cta.gc.ca/eng/statement-... Thank you. CTA social media

1

This is **Exhibit "96"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

_____

Signature

From: Info <Info@otc-cta.gc.ca>
Date: March 27, 2020 at 10:25:26 AM PDT
To: Tammy 2019 <tammylyn2019@gmail.com>
Subject: RE: SWOOP AIRLINES

Hello Tammy,

Thanks for following up.

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 may relieve the airline of such obligations in force majeure situations.

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).

Best,

info@ Team
Office des transports du Canada / Gouvernement du Canada
info@otc-cta.gc.ca / Tél: 1-888-222-2592 / ATS: 1-800-669-5575
Suivez-nous : Twitter / YouTube

Canadian Transportation Agency / Government of Canada
info@otc-cta.gc.ca / Telephone 1-888-222-2592
Follow us: Twitter / YouTube

-----Original Message-----
From: Tammy 2019 <tammylyn2019@gmail.com>
Sent: Friday, March 20, 2020 11:25 AM
To: Info <Info@otc-cta.gc.ca>
Subject: Re: SWOOP AIRLINES

Hello,

Thank you for your response, but I don't understand the answer.

"However, they would have to make sure the passenger completes their itinerary." If the carrier doesn't - what form of compensation am I entitled to? A refund in the form of a future credit or a refund in the original form of payment?

I have them my money in exchange for a service they are unable to provide. This is also outside of my control and a financial burden to me. All I want is my money returned.

Any info/clarification would be appreciated.

Thank you.

Sent from my iPhone

On Mar 20, 2020, at 7:43 AM, Info <Info@otc-cta.gc.ca> wrote:

Hello Tammy,

Thanks for contacting the Canadian Transportation Agency.

Air Passenger Protection Regulations provide a list of situations considered 'outside the air carrier's control', including medical emergencies and orders or instructions from state officials. The CTA has identified a number of situations related to this pandemic that are considered 'outside of the air carrier's control'. These include flight disruptions to locations that are covered by a government advisory against travel or unnecessary travel due to COVID-19; https://rppa-appr.ca/eng/obligations-and-level-control

In these situations, air carriers would not be required to provide standards of treatment or compensation for inconvenience. However, they would have to make sure the passenger completes their itinerary.

Until April 30th, the time at which passengers will be entitled to compensation for inconvenience related to flight cancellations or delays will be adjusted, to provide air carriers with more flexibility to modify schedules and combine flights. Air carriers will be allowed to make schedule changes without owing compensation to passengers until 72 hours before a scheduled departure time (instead of 14 days), and air carriers will be obligated to compensate passengers for delays on arrival that are fully within the air carrier's control once those delays are 6 hours or more in length (instead of 3 hours).

The CTA has also exempted air carriers from offering alternative travel arrangements that include flights on other air carrier's with which they have no commercial agreement.

Best,

info@ Team

Office des transports du Canada / Gouvernement du Canada

info@otc-cta.gc.ca / Tél: 1-888-222-2592 / ATS: 1-800-669-5575

Suivez-nous : Twitter / YouTube

Canadian Transportation Agency / Government of Canada

info@otc-cta.gc.ca / Telephone 1-888-222-2592

Follow us: Twitter / YouTube

-----Original Message-----

From: Tammy 2019 <tammylyn2019@gmail.com>

Sent: Friday, March 20, 2020 1:08 AM

To: Info <Info@otc-cta.gc.ca>

Subject: SWOOP AIRLINES

Hello,

I booked a flight with Swoop Airlines for next month and they are cancelling the flight and only offering me a future credit. The flight is from Abbotsford, B.C. to Las Vegas, Nevada and return.

Am I not entitled to a refund back to my card?

Thank you,

Tammy Pedersen

604-308-6926

This is **Exhibit "97"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

_____

Signature

From: Info <Info@otc-cta.gc.ca>
Date: March 27, 2020 at 1:57:05 PM EDT
To: Jenn Mossey <themosseys@rogers.com>
Subject: RE: trip cancelled

Hello,

Thanks for contacting the Canadian Transportation Agency.

The CTA has taken steps to address the major impact that the COVD-19 pandemic is having on the airlines industry by making temporary exemptions to certain requirements of the Air Passenger Protection Regulations (APPR). These exemptions apply to flight disruptions that occur from March 13, 2020 until June 30, 2020.

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 may relieve the airline of such obligations in force majeure situations.

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).*

You should first contact your airline to try and resolve the issues you have raised. Given circumstances, please be patient and provide your airline time to respond to you – a minimum of 30 days. If you do not hear back from your airline, or you are dissatisfied with the response you receive, you may file a complaint with the CTA.

If you decide to file, or have already filed, a complaint with the CTA, please note that in light of the extraordinary circumstances resulting from the COVID-19 pandemic, the CTA has decided to temporarily pause communications with airlines on complaints against them. This includes all new complaints received, as well as those currently in the facilitation process. The pause is currently set to continue until June 30, and is aimed at allowing the airlines to focus on immediate and urgent operational demands, like getting Canadians home.

Also, effective March 25, 2020, the deadline for a carrier to respond to claims filed by passengers for payment of the compensation for inconvenience is suspended until June 30, 2020 (or any further period that the Agency may order). Once the suspension is over, carriers will have 120 days to respond to claims received before or during the suspension.

Rest assured that once the pause is lifted, we will deal with every complaint. The delay will not change the outcome of our review.

Best,

info@ Team

Office des transports du Canada / Gouvernement du Canada

info@otc-cta.gc.ca / Tél: 1-888-222-2592 / ATS: 1-800-669-5575

Suivez-nous : Twitter / YouTube

Canadian Transportation Agency / Government of Canada

info@otc-cta.gc.ca / Telephone 1-888-222-2592

Follow us: Twitter / YouTube

From: Jenn Mossey <themosseys@rogers.com>
Sent: Friday, March 27, 2020 1:08 PM
To: Info <Info@otc-cta.gc.ca>
Subject: trip cancelled

Good Afternoon,

My trip was cancelled by Sunwing vacations. At which point they were offering a refund (they did this for ONE day).

I filled out the form online and got confirmation that I would be

getting a refund as did I get the same paperwork from I-travel 2000.

They are now telling me that I will not be getting a refund but a voucher.

This was BEFORE you changed the policy to (in my opinion) suit the airlines.

We need our money back since we can’t afford to have that money tied up right now because my husband may lose his job permanently after all of this, so there will be no vacations.

Once something is in writing (an email) and they post the policy and you do what you are told during the posted policy you are owed the money.

I am attaching my documentation of confirmation and the policy that was posted when I completed my refund request.

I would like your assistance during these uncertain times.

My husband and I both work in trucking and are currently still working to keep goods flowing.

Jennifer Mossey

519-471-9949

Sent from my iPhone

This is **Exhibit "98"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

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Signature

From: **Info** <Info@otc-cta.gc.ca>
Date: Wed., Apr. 8, 2020, 10:57 a.m.
Subject: RE: Complaint about CTA Conduct
To: Trevor Smith <trevorsmith.gc@gmail.com>

Hello Trevor,

Thank you for sharing your concerns with us. We understand that air passengers are experiencing challenges and frustrations during these difficult times.

The situation passengers and airlines face as a result of the COVID-19 pandemic is without precedent. When the existing legislation, regulations, and airline tariffs were developed, none anticipated a once-in-a-century pandemic, worldwide disruptions in air travel, huge drops in passenger volumes, and mass layoffs across the airline sector.

Canada's legislative framework, which differs from those of other jurisdictions such as the United States and European Union, does not impose as a minimum obligation the requirement to refund passengers if a flight is cancelled due to situations outside of the airline's control, such as a global pandemic. We recognize, however, that in the context of widespread flight cancellations, passengers who have no prospect of completing their planned travels could be left out-of-pocket for the cost of cancelled flights.

In these extraordinary circumstances, it would not be unreasonable for airlines to provide vouchers or credits, even if this is not clearly required in certain situations, and for passengers to accept them.

This approach strikes a balance between passenger protection and airlines' operational realities during this unprecedented situation. It could help ensure that passengers do not simply lose the full value of their flights and that, over the longer term, the air sector is able to continue providing diverse services.

Any complaint filed with the CTA will, of course, be assessed on its merits, taking into consideration all relevant facts and the law.

If you would like more information, please consult the statement the CTA issued on March 25, 2020.

Thank you again for your message.

Best,

info@ Team

Office des transports du Canada / Gouvernement du Canada

info@otc-cta.gc.ca / Tél: 1-888-222-2592 / ATS: 1-800-669-5575

Suivez-nous : Twitter / YouTube

Canadian Transportation Agency / Government of Canada

info@otc-cta.gc.ca / Telephone 1-888-222-2592

Follow us: Twitter / YouTube

From: Trevor Smith <trevorsmith.gc@gmail.com>
Sent: Friday, March 27, 2020 2:48 PM
To: Info <Info@otc-cta.gc.ca>
Subject: Complaint about CTA Conduct

This is an official complaint in regards to the recent action of the Canadian Transportation Agency. The statement titled "Statement on Vouchers" dated March 25, 2020 is reckless and irresponsible. The statement is not based on any case law and/or Tribunal decisions, and clearly lacks any merit. It willfully disregards the rights of Canadian consumers and shows a clear bias towards the airline industry.

Please, tell me what guarantees we have as consumers that these vouchers will be worth anything in the next 24 months? Will the Canadian government repay the millions of dollars consumers lose when the vouchers are worthless? Doubtful.

Show me within case law where Force Majeure has ever been applied to circumstances such as these. Show me a ruling where Force Majeure has been applied to events in the future, where a customer is not actually sitting in an airport, staying at a resort, or enroute to a destination when an unforeseeable event occurs.

Explain to me why you feel a business would be allowed to sit on a consumer's money for years without providing a service? I must have missed the memo where we became

banks for airlines. I must have also missed the memo that we are on the hook to keep airlines afloat during unprecedented times. I have to put food on my table during these unforeseen times and now you expect me to borrow an airline my money for the next two years and trust that they will pay me back. Give me a break. It is not a sensible balance to allow airlines to keep our money so they can pay their executives and lay off thousands of employees. If you want to protect the airline industry, then allow Canadians to choose to support the industry. Don't tell them they have to when they don't. It is the choice of Canadian's to use the services of an airline in the future, not yours. **It is also very much our money, not yours or the airlines!!!!**

The CTA hasn't honoured the mandate they swore to uphold in the slightest. **Instead, the Canadian Transportation Agency just helped large airlines bully their customers into waiving their rights.**

Bottom line, there is no legal support for this statement. I am demanding this statement be retracted and that the Canadian Transportation Agency issue a written apology to Canadian consumers.

Sincerely,

Trevor Smith

From: Info <Info@otc-cta.gc.ca>
Date: April 14, 2020 at 10:23:15 AM MDT
To: dale smith <smith_d@shaw.ca>
Subject: RE: Airtransat Will not Refund $$$ Formal complaint

Hello Dale,

Thank you for sharing your concerns with us. We understand that air passengers are experiencing challenges and frustrations during these difficult times.

The situation passengers and airlines face as a result of the COVID-19 pandemic is without precedent. When the existing legislation, regulations, and airline tariffs were developed, none anticipated a once-in-a-century pandemic, worldwide disruptions in air travel, huge drops in passenger volumes, and mass layoffs across the airline sector.

Canada's legislative framework, which differs from those of other jurisdictions such as the United States and European Union, does not impose as a minimum obligation the requirement to refund passengers if a flight is cancelled due to situations outside of the airline's control, such as a global pandemic. We recognize, however, that in the context of widespread flight cancellations, passengers who have no prospect of completing their planned travels could be left out-of-pocket for the cost of cancelled flights.

In these extraordinary circumstances, it would not be unreasonable for airlines to provide vouchers or credits, even if this is not clearly required in certain situations, and for passengers to accept them.

This approach strikes a balance between passenger protection and airlines' operational realities during this unprecedented situation. It could help ensure that passengers do not simply lose the full value of their flights and that, over the longer term, the air sector is able to continue providing diverse services.

Any complaint filed with the CTA will, of course, be assessed on its merits, taking into consideration all relevant facts and the law. If you would like to file an air travel complaint with the CTA, you may do so here; https://rppa-appr.ca/eng/file-air-travel-complaint

If you would like more information, please consult the statement the CTA issued on March 25, 2020; https://otc-cta.gc.ca/eng/statement-vouchers

Thank you again for your message.

Yours truly,
The CTA Team

-----Original Message-----
From: dale smith <smith_d@shaw.ca>
Sent: Sunday, April 5, 2020 2:52 PM
To: Info <Info@otc-cta.gc.ca>
Subject: Airtransat Will not Refund $$$ Formal complaint

o Whom It May Concern:

My Wife and I had a Holiday booked through Amore Away Travel Consultant Cherie Weber and Air Transat for the booking of April 10, 2002 to April 17, 2020 to Cancun Mexico.

Obviously the flight was cancelled by Air Transat due to the Convid Pandemic and they are not refunding our monies in the amount of $4,160.00.

I would like to point out the the US issued the following ruling to the Air Lines to refund customers due to flight cancellations:

https://www.transportation.gov/briefing-room/us-department-transportation-issues-enforcement-notice-clarifying-air-carrier-refund

I would like to submit this formal complaint to Canadian Tranportation Agency and have them look into the Flight Cancellations for many Canadians and rule that the Canadian Airlines refund clients in which their flights were cancelled.

I have submitted a registered letter the Air Transat requesting a refund but have not heard anything back as of yet. They are saying they will issue travel vouchers, this should not be the only option as they have received our monies and we should expect a refund as they have cancelled our Flights and this was out of our control.

Thank-You,
Dale Smith
Medicine ,Alberta
smith_d@shaw.ca

From: **Info** <Info@otc-cta.gc.ca>
Date: Fri, Apr 17, 2020 at 9:50 AM
Subject: RE: CTA statement regarding vouchers and refunds
To: Richard T <richardswtang@gmail.com>

Hello Richard,

Thank you for sharing your concerns with us. We understand that air passengers are experiencing challenges and frustrations during these difficult times.

The situation passengers and airlines face as a result of the COVID-19 pandemic is without precedent. When the existing legislation, regulations, and airline tariffs were developed, none anticipated a once-in-a-century pandemic, worldwide disruptions in air travel, huge drops in passenger volumes, and mass layoffs across the airline sector.

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This approach strikes a balance between passenger protection and airlines' operational realities during this unprecedented situation. It could help ensure that passengers do not simply lose the full value of their flights and that, over the longer term, the air sector is able to continue providing diverse services.

Any complaint filed with the CTA will, of course, be assessed on its merits, taking into consideration all relevant facts and the law.

If you would like more information, please consult the statement the CTA

issued on March 25, 2020; https://otc-cta.gc.ca/eng/statement-vouchers

Thank you again for your message.

Yours truly,

The CTA Team

From: Richard T <richardswtang@gmail.com>
Sent: Friday, April 3, 2020 3:34 PM
To: Info <Info@otc-cta.gc.ca>
Subject: CTA statement regarding vouchers and refunds

Hi there,

Considering that the CTA released a statement that was neither an official decision, and in fact goes against current CTA decisions in place, various transborder tariffs, Air Passenger Rights section 17(2) and 17(7), and also various provincial laws that indicate refund in the form of original payment should be issued, why has CTA gone against these regulations? Considering that thousands of Canadian families are now being laid off, the money could be used to support themselves during this Covid-19 crisis. Your statement, while not legally binding, on March 25 has effectively made all airlines and credit card companies to work together and deny refunds and chargebacks. Your ill advised statement has effectively caused further financial difficulty for thousands of Canadians. You should follow in the steps as the US Department of Transportation and order airlines to uphold their tariffs, provincial law, the existing CTA decisions, as they in effect are breaking the law. CTA you are behind in the times and a government agency that does not support Canadians when in need. It is very clear. The reality while this global event is something that was unforeseen, it is the cost of doing business, and they cannot go back on the contracts and laws they've agreed.

Please respond accordingly, and hope you go back on your statement and inform all airlines they have an obligation to fulfill. I did not authorize my credit card to be charge for future credit. CTA effectively made that happen.

Richard

From: Info <Info@otc-cta.gc.ca>
Date: April 20, 2020 at 11:56:45 AM EDT
To: Paola Ferguson <fergusonpjc@hotmail.com>
Subject: RE: Airlines refusing refund in original form of payment

Hello,

Thank you for sharing your concerns with us. We understand that air passengers are experiencing challenges and frustrations during these difficult times.

The situation passengers and airlines face as a result of the COVID-19 pandemic is without precedent. When the existing legislation, regulations, and airline tariffs were developed, none anticipated a once-in-a-century pandemic, worldwide disruptions in air travel, huge drops in passenger volumes, and mass layoffs across the airline sector.

Canada's legislative framework, which differs from those of other jurisdictions such as the United States and European Union, does not impose as a minimum obligation the requirement to refund passengers if a flight is cancelled due to situations outside of the airline's control, such as a global pandemic. We recognize, however, that in the context of widespread flight cancellations, passengers who have no prospect of completing their planned travels could be left out-of-pocket for the cost of cancelled flights.

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Any complaint filed with the CTA will, of course, be assessed on its merits, taking into consideration all relevant facts and the law.

If you would like more information, please consult the statement the CTA issued on March 25, 2020; https://otc-cta.gc.ca/eng/statement-vouchers

Thank you again for your message.

Yours truly,
The CTA Team

-----Original Message-----
From: Paola Ferguson <fergusonpjc@hotmail.com>
Sent: Thursday, April 16, 2020 3:56 PM
To: Info <Info@otc-cta.gc.ca>
Subject: Airlines refusing refund in original form of payment

Good Afternoon,

I am writing to you about the issue regarding airlines refusing to issue a refund to Canadian consumers who either have had their flights cancelled or who no longer wish to travel due to the current pandemic. Other federal governments in other countries, like the United States, have already directed airlines to refund money to consumers in the original form of payment as is outlined in the signed contracts all consumers possess.
https://www.cnn.com/2020/04/03/politics/airlines-canceled-flights-refunds/index.html

Your organization can help all Canadians deal with the economic hardships this pandemic has caused. Many people have lost jobs and airlines, who are protecting their businesses, are holding these funds unfairly. What is the plan of the CTA to address this issue?

Thank you for your attention to this matter. Please email me at fergusonpjc@hotmail.com or call me at the number below.

Sent from my iPhone

This is **Exhibit "99"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

_____

Signature

Fwd: Air travel complaint: 20-84843

Reine Desrosiers <reinedesrosiers@gmail.com> Mon, Apr 20, 2020 at 2:58 PM
To: Gabor Lukacs <lukacs@airpassengerrights.ca>

---------- Forwarded message ---------
From: **Canadian Transportation Agency** <pta-atc@otc-cta.gc.ca>
Date: Mon., Apr. 6, 2020, 7:05 p.m.
Subject: Air travel complaint: 20-84843
To: <reinedesrosiers@gmail.com>

Thank you. We have successfully received your complaint. Your case number is 20-84843

Suspension of all air dispute resolution activities

CTA Operations during the COVID-19 crisis

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.

Dispute resolutions involving air carriers during the COVID-19 crisis

If you have not already done so, you should first contact your airline to try and resolve the issues you have raised. Given circumstances, please be patient and provide your airline time to respond to you – a minimum of 30 days. If you do not hear back from your airline, or you are dissatisfied with the response you receive, you may file a complaint with the CTA.

Please note 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 can continue to file air passenger 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.

Also, effective March 25, 2020, the deadline for a carrier to respond to claims filed by passengers for payment of the compensation for inconvenience is suspended until June 30, 2020 (or any further period that the Agency may order). Once the suspension is over, carriers will have 120 days to respond to claims received before or during the suspension.

Air carriers' obligations during the global COVID-19 pandemic

The CTA has taken steps to address the major impact that the COVD-19 pandemic is having on the airlines industry by making temporary exemptions to certain requirements of the Air Passenger Protection Regulations (APPR). These exemptions apply to flight disruptions that occur from March 13, 2020 until June 30, 2020.

Statement on Vouchers for flight disruptions

Status of Your Complaint

You can check the status of your complaint online. Please note it can take up to 24 hours for your case to process before your status is available online.

Need immediate help during your trip?

Official Global Travel Advisory from the Government of Canada

IMPORTANT NOTICE FOR BAGGAGE COMPLAINTS – TIME LIMITS IN EFFECT

- **7 day time limit for damaged baggage or missing items:**
  You must submit a written claim with your airline within 7 days of receipt of your baggage if your claim relates to damaged baggage or missing items.

- **21 day time limit for lost baggage:**
  You must submit a written claim with your airline within 21 days for baggage that is potentially lost.

Failure to submit a written claim to the airline within the set time limits could result in the carrier denying your claim. All claims are subject to proof of loss so be sure

to include all out of pocket expenses.

Note: You can update your case file by emailing pta-atc@otc-cta.gc.ca or by faxing 819-953-6019.

20-84843_2020-04-06T185531.pdf
382K

This is **Exhibit "100"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

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Signature

sunwing

Travel Agent Special Update

March 27, 2020

Dear travel agents,

We would like to thank you for your continued support and patience. As you can imagine, we are moving quickly during this unprecedented time. That is why, as part of our efforts to keep our employees and customers safe, we were the first airline in Canada to suspend all southbound flights and focus solely on bringing our customers home.

Last week, we expanded our repatriation efforts to offer vacant seats free to any Canadian stranded in destination on our ongoing northbound flights. On March 23rd, we completed our repatriation efforts by bringing home more than 60,000 people including 3,300 stranded Canadians that were non-Sunwing customers.

Initially, we offered customers booked on our flights during this suspension the choice between a future travel credit valid for 12 months and a full cash refund. However, after the Government of Canada's non-essential travel advisory, we adjusted our policy to be aligned with all other Canadian airlines and tour operators. This decision is also consistent with the ruling made by the Canadian Transportation Agency on March 26, 2020. All customers booked on our flights will receive a future travel credit and, as a further gesture, we have extended the validity of this credit for two years. Your commission for bookings will be protected; however, no further commission will be paid when customers re-book using their future travel credit.

While we understand that some customers would have preferred a refund, we are confident that during the next two years they will be able to take the flights or vacations they had planned.

We want to reiterate that any customer who purchased travel insurance is still eligible for a refund in accordance with the terms of their policy. Customers that purchased the Worry Free Cancellation Waiver may be entitled to a partial refund with their future travel credit. These partial refunds will be processed as quickly as possible as we continue to work through adjusting thousands of backlogged files. We ask for your patience as we work through our backlog.

As a reminder, all our southbound flights up to and including April 30, 2020, have been cancelled. We have introduced a new flexible policy for departures between May 1 and June 30, 2020 where final payments can be provided up to 25 days before the departure date (as opposed to the standard 45 days).

Please continue to check our website for important updates.

Thank you for your continued support and stay well.

This is **Exhibit "101"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

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Signature

sunwing

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Travel Agent Special Update
March 27, 2020

COVID-19 Frequently Asked Questions

Where can I find more information about COVID-19?

Canadians are encouraged to consult the destination page on www.travel.gc.ca for the latest advice – the Public Health Agency of Canada (PHAC) is constantly updating this page with advice for travellers based on the latest science available. Anyone travelling should also register with the Government of Canada at www.travel.gc.ca/register prior to travel.

I've tried emailing and calling, why is it taking so long for someone to get back to me?

We know that it can be frustrating waiting for a reply, and we apologize for the long delays. As you can imagine, we have been inundated with calls and emails from concerned customers. Over the past few weeks we have handled over 77,000 calls. Our focus has been ensuring the safety of all our passengers and staff during this challenging time and bringing Canadians home. All our operations were moved from our head offices in Toronto and Montreal to be home-based in order to keep our employees safe per government recommendations regarding social distancing. Now that our repatriation efforts are completed and we have ensured the safety of our employees, we're answering your calls and messages as quickly as possible. Please note that all files with departures between March 17th and April 30th are being processed by our finance team as quickly as possible and there is no need to contact us.

My clients are scheduled to travel between now and April 30, 2020 – what do I need to do?

Customers with departure dates for flights or vacation packages between March 17th and April 30th are eligible to receive a future travel credit in the value of the original amount paid. No action is needed from you or your customers to receive this. Their original booking number will be the code of their future travel credit. We will communicate formally via the email address we have on file (including group travel bookings). You and your client do not need to contact us. This credit can be redeemed against future travel for travel up to 24 months from original departure date to anywhere Sunwing Airlines operates.

Why are my clients receiving a future travel voucher instead of a full cash refund?

While we initially offered customers booked on our flights a choice between a future travel credit valid for 12 months and a full cash refund, after the announcement of the Government of Canada's non-essential travel advisory, we adjusted our policy to be aligned with all other Canadian airlines and tour operators. This decision is also consistent with the ruling made by the Canadian Transportation Agency on March 26, 2020. All customers booked on our flights will be offered a future travel credit, and as a further gesture, we have extended the validity of this credit to two years.

My clients submitted a request for a refund before the policies changed – will they still receive a refund?

All non-processed refund requests were automatically transferred over to our new policy and customers will be receiving a future travel credit. We understand that some customers would have preferred a refund, but we are confident that during the next two years they will be able to take the flights or vacations they had planned.

sunwing

COVID-19 Frequently Asked Questions

What is the future travel credit process and how does it work?

We've made the travel credit process quite simple for our customers to redeem. When your clients are ready to rebook their vacation, the previous booking number is the key to their credit. Customers will only need to answer security questions to access and apply this credit to their new booking. If they do not use the full amount, it will remain as a credit on file and can be used at a later date.

When will booking cancellations be processed?

Our finance team has been working around the clock to process thousands of files. We hope to have the majority of them complete by April 9, 2020.

My clients purchased the Worry Free Cancellation Waiver – will they receive a refund?

Sunwing's Worry Free Cancellation Waiver lets customers cancel their vacation for any reason up to three hours prior to departure. Depending on when your clients cancelled, they may be entitled to a partial refund in combination with a future travel voucher. Please see our website for full terms and conditions. These partial refunds will be processed as quickly as possible as we continue to work through adjusting thousands of backlogged files. We ask for your patience as we work through our backlog.

What are my clients' next steps if they purchased travel insurance through an insurance provider?

Once your clients' file has been processed, we will let them know via the email address on file. At that point, they can then provide this document to their insurance provider who will guide them through next steps.

My clients made a deposit on a vacation departing after May 1 – what are their options?

We have adjusted our policy to make it more flexible for customers on final payment. We have introduced a new flexible policy for departures between May 1 and June 30, 2020 where final payments can be provided up to 25 days before the departure date (as opposed to the standard 45 days). By extending our final payment window, your clients can make a more informed decision about their travel. Please note that all other terms and conditions apply and cancelling will result in the loss of your clients' deposit.

When will I receive my commission?

All commissions are paid 21 days prior to departure dates and all bookings with unpaid commissions will be looked at in the next couple of weeks. We need to finalize all booking cancellations before we can issue commissions payments and we appreciate your patience.

Is my commission protected with future travel credits?

Your commission for bookings will be protected; however, no further commission will be paid when customers rebook using their future travel credit.

Can my clients still make a future booking?

Of course! Our sales centre and website are fully operational with our schedule for the upcoming summer and winter seasons in place and up to date. Our team is also ready to assist with all you group and wedding bookings. New bookings can be made on available packages departing from May 1, 2020 onwards.

This is **Exhibit "102"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

_____

Signature

Chats

Search

Your Story | Donald | Chrystal | Karina

WestJet
We understand the c... · 10:01 pm

FlySwoop
To talk to an agent, pl... · 3:29 pm

Maureen Bowman
sorry the link won't w... · 3:13 pm

Alan Jackson
Alan sent a photo. · 1:55 pm

Kalpna Joshi
Kalpna sent a photo. · 8:15 am

Dave Christopher
Dave sent an attachment. · Mon

WestJet

883

canceled theses flights and have actually broken our contract for the services we agreed to when I booked. It's in your service agreement for my refund,the Ontario service laws and the new government laws too. Please I do understand it's a crazy time for all of you too,but I am requesting a refund because my children are having to also deal with the fallout of this through thier employment . Yes things are changing daily so if we have to help them we would like to,since we are retired and on a budget too

We understand the challenges our guest have been faced with. However, the Canadian Transport Agency has approved us to issue refunds to travel bank. We have extended the travel bank to 24-months, when normally it is 12 months, therefore giving guest more flexibility to book with us in the future.

Aa

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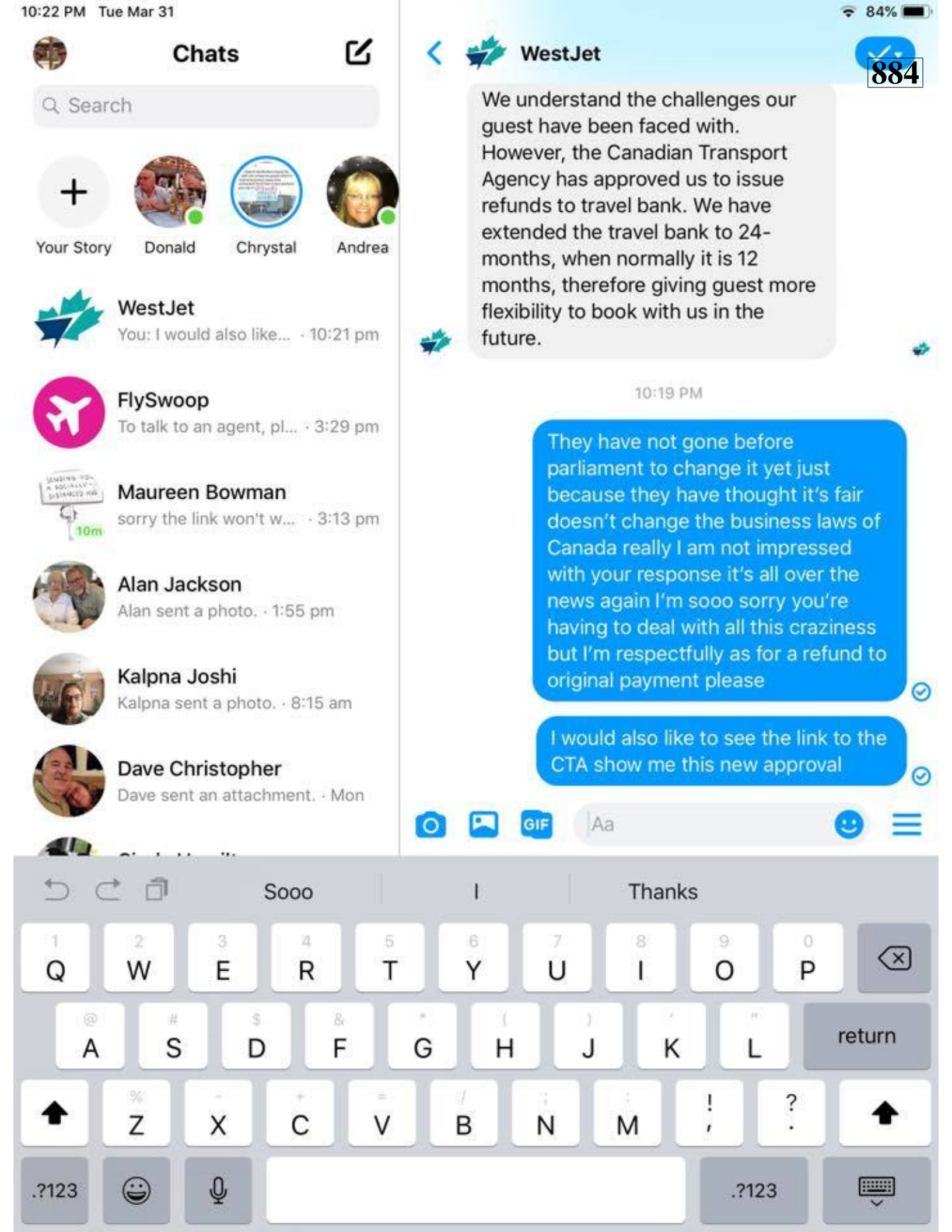
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Your Story
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Chrystal
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WestJet
You: I would also like... · 10:21 pm
FlySwoop
To talk to an agent, pl... · 3:29 pm
Maureen Bowman
sorry the link won't w... · 3:13 pm
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Alan Jackson
Alan sent a photo. · 1:55 pm
Kalpna Joshi
Kalpna sent a photo. · 8:15 am
Dave Christopher
Dave sent an attachment. · Mon
WestJet
884
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10:19 PM
They have not gone before parliament to change it yet just because they have thought it's fair doesn't change the business laws of Canada really I am not impressed with your response it's all over the news again I'm sooo sorry you're having to deal with all this craziness but I'm respectfully as for a refund to original payment please
I would also like to see the link to the CTA show me this new approval
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Thanks
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Sure, one second pl... · 10:22 pm
FlySwoop
To talk to an agent, pl... · 3:29 pm
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sorry the link won't w... · 3:13 pm
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Alan Jackson
Alan sent a photo. · 1:55 pm
Kalpna Joshi
Kalpna sent a photo. · 8:15 am
Dave Christopher
Dave sent an attachment. · Mon
WestJet
flexibility to book with us in the future.
10:19 PM
They have not gone before parliament to change it yet just because they have thought it's fair doesn't change the business laws of Canada really I am not impressed with your response it's all over the news again I'm sooo sorry you're having to deal with all this craziness but I'm respectfully as for a refund to original payment please
I would also like to see the link to the CTA show me this new approval
Our apologies, but we are unable to accept that request. If you wish to further discuss, you may reach out to the Canadian Transport Agency, or your insurance provider. Thank you.
Sure, one second please.
GIF
Aa
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I
Thanks
return
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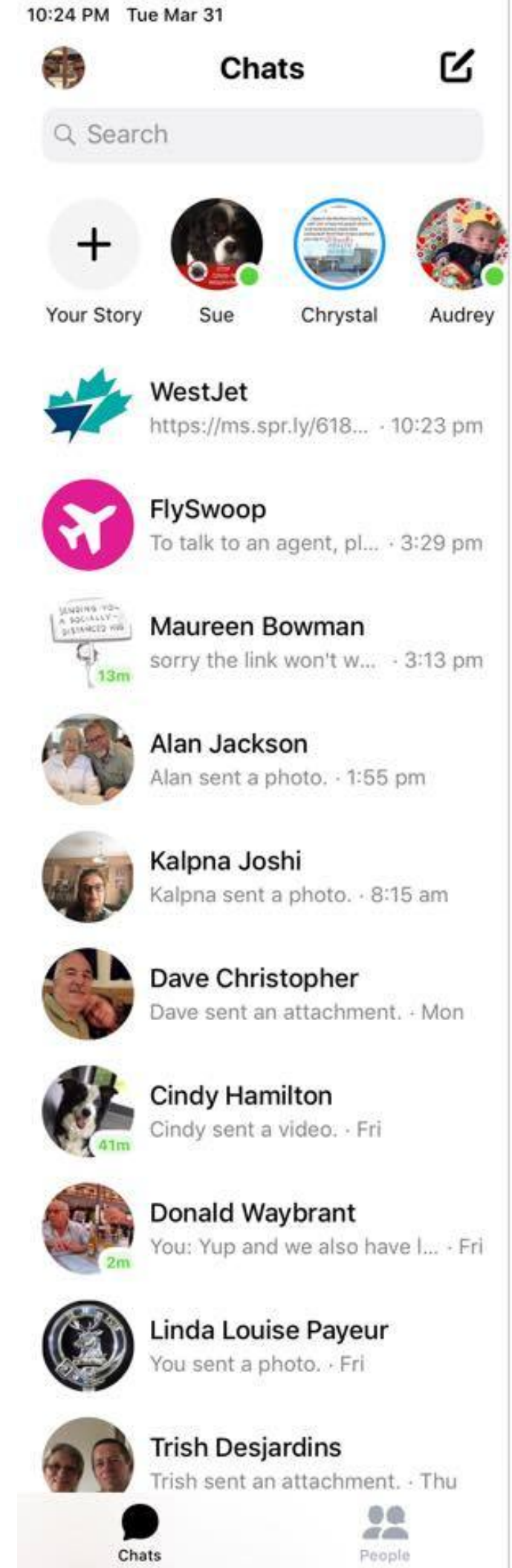
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Sue
Chrystal
Audrey
WestJet
https://ms.spr.ly/618... · 10:23 pm
FlySwoop
To talk to an agent, pl... · 3:29 pm
Maureen Bowman
sorry the link won't w... · 3:13 pm
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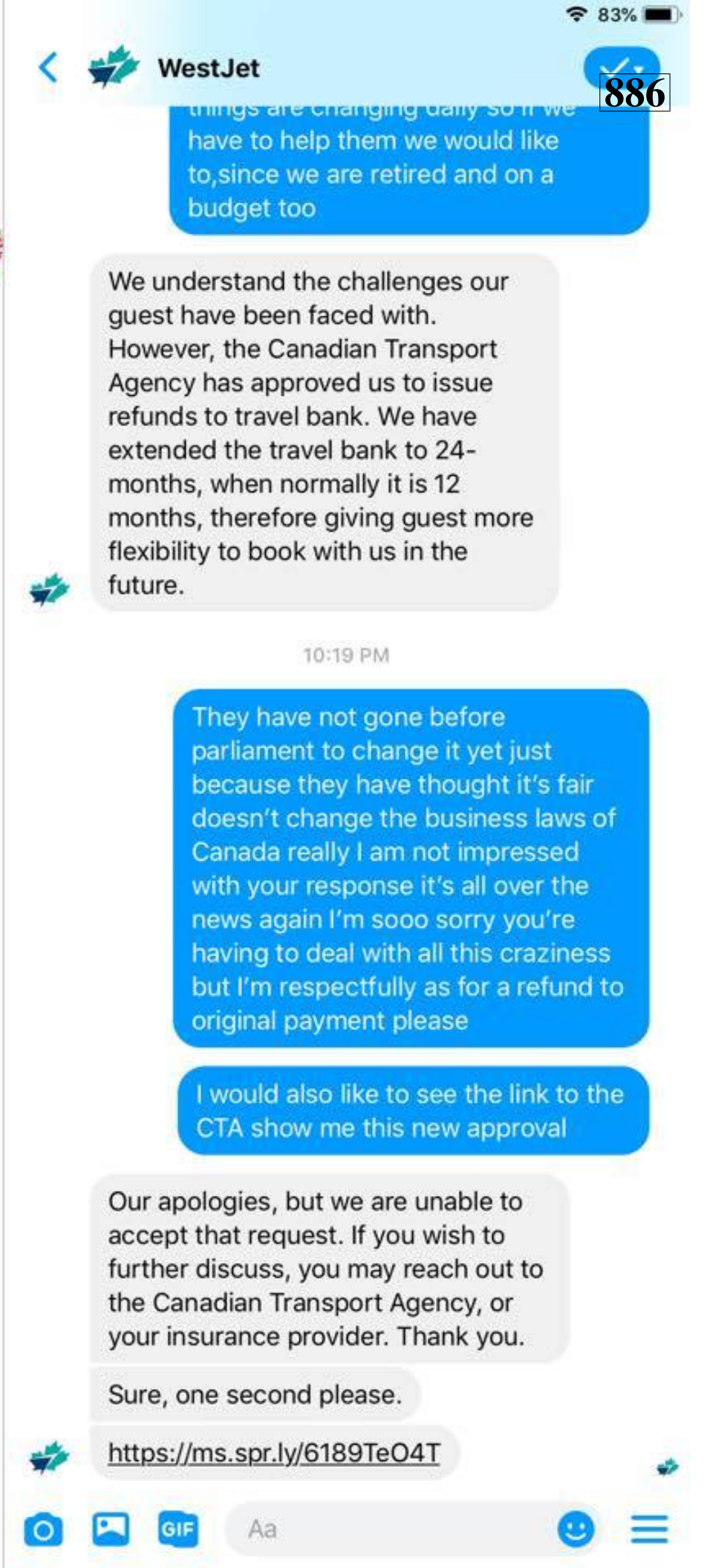
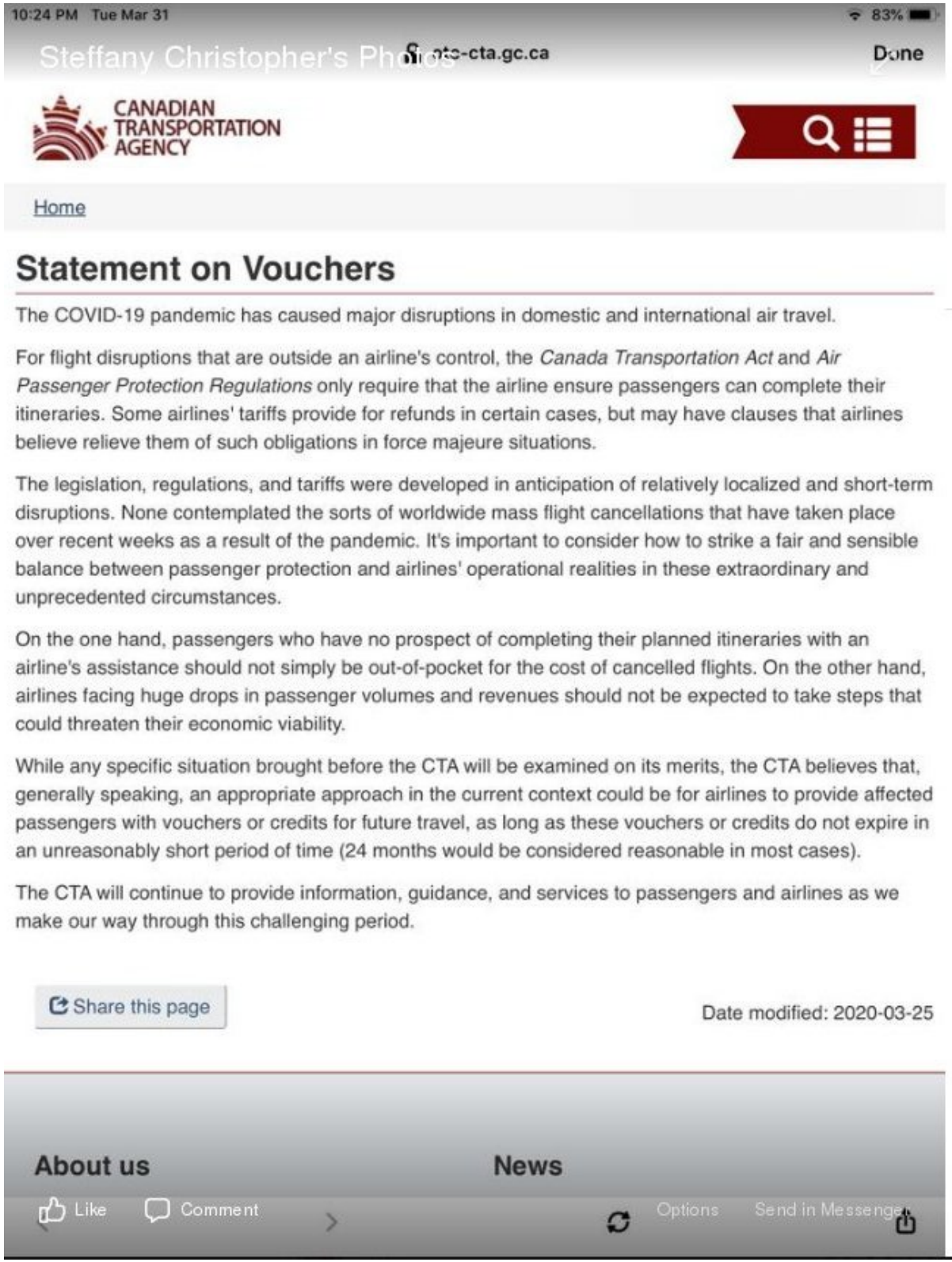
Alan Jackson
Alan sent a photo. · 1:55 pm
Kalpna Joshi
Kalpna sent a photo. · 8:15 am
Dave Christopher
Dave sent an attachment. · Mon
Cindy Hamilton
Cindy sent a video. · Fri
41m
Donald Waybrant
You: Yup and we also have l... · Fri
2m
Linda Louise Payeur
You sent a photo. · Fri
Trish Desjardins
Trish sent an attachment. · Thu
Chats
People


83%
WestJet
have to help them we would like to,since we are retired and on a budget too
We understand the challenges our guest have been faced with. However, the Canadian Transport Agency has approved us to issue refunds to travel bank. We have extended the travel bank to 24-months, when normally it is 12 months, therefore giving guest more flexibility to book with us in the future.
10:19 PM
They have not gone before parliament to change it yet just because they have thought it's fair doesn't change the business laws of Canada really I am not impressed with your response it's all over the news again I'm sooo sorry you're having to deal with all this craziness but I'm respectfully as for a refund to original payment please
I would also like to see the link to the CTA show me this new approval
Our apologies, but we are unable to accept that request. If you wish to further discuss, you may reach out to the Canadian Transport Agency, or your insurance provider. Thank you.
Sure, one second please.
https://ms.spr.ly/6189TeO4T
GIF
Aa


10:24 PM Tue Mar 31
83%
Steffany Christopher's Photos
cts-cta.gc.ca
Done
CANADIAN TRANSPORTATION AGENCY
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.
Share this page
Date modified: 2020-03-25
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News
Like
Comment
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Send in Messenger


Steffany Christopher
9 mins
When I opened it
1 Comment
Like

This is **Exhibit "103"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

_____

Signature

From: Air Canada Concierge <concierge@aircanada.ca>
Date: April 1, 2020 at 12:29:49 EDT
To: Michael Foulkes <Michael.foulkes@rogers.com>
Subject: Re: Booking MMHHTM

Hello / Bonjour Mr. Foulkes,

I would like to attach two links from the Canadian Transportation Agency website as they may help clarify some of your questions. The CTA has issued temporary exemptions to the Air Passenger Protection Regulations regarding refund request and extension of ticket validity.

https://www.otc-cta.gc.ca/eng/content/canadian-transportation-agency-issues-temporary-exemptions-certain-air-passenger-protection

https://otc-cta.gc.ca/eng/statement-vouchers

Kind Regards.

Yda

Air Canada
Concierge Desk / Bureau Concierge
concierge@aircanada.ca

From: Michael Foulkes <michael.foulkes@rogers.com>
Sent: Wednesday, April 1, 2020 12:24
To: Air Canada Concierge <concierge@aircanada.ca>
Subject: Re: Booking MMHHTM

Thank you for your prompt reply.

I don't believe these options are in accordance with applicable tariffs or Canadian or EU regulations. Before choosing which way to proceed I will look into this more closely, as well as consult with both the Expedia for TD and TD Visa where the booking was made.

Thank you again for your response. Best personal regards for your well-being.

Michael Foulkes

MICHAEL A FOULKES | 67 THORNCREST ROAD ETOBICOKE ONTARIO CANADA M9A 1S8 | TEL: +1-416-999-9422 | FAX: +1-416-234-9618 | MICHAEL.FOULKES@ROGERS.COM

On Apr 1, 2020, at 9:53 AM, Air Canada Concierge <concierge@aircanada.ca> wrote:

Hello / Bonjour Mr. Foulkes,

Thank you for contacting the Air Canada Concierge Desk.

I am sorry hear that your return flight was cancelled. Due to the COVID-19 crisis, our schedule change policy has been modified. Itineraries that have been affected by an schedule change (in your case cancel flight) actioned after the 19th of March are not refunded. Your flight was cancelled on the 27th of March. We can offer you two options:

- Put your reservation aside for future use. You will have no change fee for the first re-booking (which is 500cad per passenger). You have 24 months to use this credit since the day of the schedule change; in this case 27 March 2022.
- Refund your ticket with a cancellation penalty of 600cad per passenger.

Please let me know how you will like to proceed.

Kind Regards.

Yda

Air Canada

Concierge Desk / Bureau Concierge
concierge@aircanada.ca

From: Michael Foulkes <michael.foulkes@rogers.com>
Sent: Wednesday, April 1, 2020 09:32
To: Air Canada Concierge <concierge@aircanada.ca>
Subject: Booking MMHHTM

I received the attached email from Air Canada on Monday regarding a previously booked flight. I would appreciate your assistance in having this reservation refunded.

I request a full refund for this reservation as the return portion has apparently already been cancelled by Air Canada. I have not received any formal notification of the cancellation, but the May 31 return from Dublin Ireland (on the same booking reference) has disappeared from my Air Canada App itinerary and is no longer shown on your schedule. It is my understanding that under these circumstances, a cash refund is applicable and I would appreciate it you could direct this request to the appropriate area to have it processed.

If this is not possible, I would appreciate a written explanation.

Thank you.

Michael Foulkes
718-542-434

MICHAEL A FOULKES | 67 THORNCREST ROAD ETOBICOKE ONTARIO CANADA M9A 1S8 | TEL: +1-416-999-9422 | FAX: +1-416-234-9618 | MICHAEL.FOULKES@ROGERS.COM

Begin forwarded message:

From: "Air Canada" <communications@Mail.aircanada.com>
Subject: Confirm or cancel your booking / Confirmation ou annulation de votre réservation
Date: March 30, 2020 at 8:00:16 PM EDT
To: <MICHAEL.FOULKES@ROGERS.COM>
Reply-To: "Air Canada" <communications@Mail.aircanada.com>

Web version

AIR CANADA

VERSION FRANÇAISE

Confirm or cancel your booking

Booking reference: MMHHTM

As the global impact of COVID-19 continues to evolve, we would like to know whether this has impacted your travel plans.

I wish to confirm my booking
If you still plan to fly from Toronto (YYZ) to London (LHR), please review any applicable entry requirements here. If you are eligible to fly, please confirm below:

CONFIRM MY BOOKING

I wish to cancel my booking
Alternatively, we can appreciate that you may wish to alter your upcoming trip from Toronto (YYZ) to London (LHR), or are not able to travel due to new entry restrictions found here.

To give you more flexibility, we've waived change fees and are making an exception on non-refundable fares by providing the unused ticket value to be used towards a future ticket purchase. If you would like to cancel your booking but have been unable to reach your travel agency, you may be able to do so directly on our easy Air Canada self-service form.

Can I cancel my Travel Agency flight booking online with Air Canada directly?

I purchased a flight only:

• Yes, you can cancel your flight and receive **100% of the unused value of your ticket** as a future travel credit. This credit is valid for travel before March 31, 2021.

CANCEL MY BOOKING

I purchased a package (flight + hotel, car rental, etc.):

• No, unfortunately you will need to connect directly with your travel agency.

Your patience and understanding is greatly appreciated as we continue to adapt to this dynamic situation.

ENGLISH VERSION ↑

Confirmation ou annulation de votre réservation

Numéro de réservation : MMHHTM

Alors que l'impact mondial de la COVID-19 continue d'évoluer, nous souhaitons savoir si la pandémie a des conséquences sur vos plans de voyage.

Je souhaite confirmer ma réservation
Si vous prévoyez toujours de voyager au départ de Toronto (YYZ) et à destination de Londres (LHR), veuillez passer en revue ici les exigences d'entrée applicables. Si vous êtes autorisé à voyager, veuillez le confirmer ci-dessous :

CONFIRMER MA RÉSERVATION

Je souhaite annuler ma réservation
Il se peut aussi que vous souhaitiez annuler la réservation de votre voyage à venir au départ de Toronto (YYZ) et à destination de Londres (LHR), ou que vous ne puissiez voyager en raison des nouvelles restrictions d'entrée que vous trouverez ici.

Pour vous donner plus de flexibilité, nous avons annulé les frais de modification et faisons une exception pour les tarifs non remboursables : vous pouvez obtenir un crédit intégral à utiliser pour un prochain voyage. Si vous souhaitez annuler votre réservation, mais que vous n'êtes pas en mesure de communiquer avec votre agence de voyages, vous pouvez le faire directement au moyen du formulaire en libre-service d'Air Canada, facile à utiliser.

Puis-je annuler en ligne, directement auprès d'Air Canada, ma réservation faite à l'origine par une agence de voyages?

J'ai uniquement acheté un billet d'avion :

• Oui, vous pouvez annuler votre vol et recevoir **la valeur intégrale de votre billet inutilisé** sous la forme d'un crédit pour un voyage effectué d'ici le 31 mars 2021.

ANNULER MA RÉSERVATION

J'ai acheté un forfait (vol + hôtel, voiture de location, etc.) :

• Non, vous devez malheureusement communiquer directement avec votre agence de voyages.

Nous vous remercions de votre patience et de votre compréhension dans ce contexte de changements rapides.

This is **Exhibit "104"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

_____

Signature

From: **AC Medical** <acmedical@aircanada.ca>
Date: Fri., Mar. 27, 2020, 1:30 p.m.
Subject: 21MAR BELISLE AHREN N4N4CA additional information
To: Ahren Belisle <belisle.ahren@gmail.com>

Good day Mr. Belisle,

Thank you for your email.

Please be advised that we will not be able to accommodate your request.

As mention previously the maximum we can provide is to keep your ticket as a credit for 24 months (2 years).

If I look at this link you provided this seems to be a law for resale agency we are an direct seller and provider as an airline.

The policy we follow at the moment is supported by the CTA (Canadian air transportation agency).

Please contact customer relation directly for any additional question as this is not something the medical desk can assist you with any further.

https://accc-prod.microsoftcrmportals.com/en-CA/air-canada-contact-us/

Best regards,

Nancy

AC_logo

Medical Desk/ Bureau Médical

T 1-800-667-4732 **|** 514-369-7039 **| F** 1-888-334-7717

MON-FRI: 6AM – 8PM ET **|** SAT-SUN: 6AM - 6PM ET

LUN-VEN: 0600-2000 **|** SAM-DIM: 0600-1800 heure de l'est

ACmedical@aircanada.ca

From: Ahren Belisle <belisle.ahren@gmail.com>
Sent: Thursday, March 26, 2020 3:11 PM
To: AC Medical <acmedical@aircanada.ca>
Subject: Re: Verbal disability NANCY WILL SPEAK TO GABE ON 27MAR

How do I get this cert? What tangible Code do I get?

I request a refund or a gift card with no expiry instead.

I've attached the law

Kind Regards,

Ahren Belisle

On Wed., Mar. 25, 2020, 2:11 p.m. AC Medical, <acmedical@aircanada.ca> wrote:

> Good day,
>
> The credit is valid for **24 Months (2 years).**
>
> This is the policy we have been given, if you wish to communicate with customer relations in regards to this policy you can do so by emailing then via the Air Canada website.
>
> Regards,
>
> Jesyka
>
> **From:** Ahren Belisle <belisle.ahren@gmail.com>
> **Sent:** Wednesday, March 25, 2020 11:53 AM
> **To:** AC Medical <acmedical@aircanada.ca>
> **Subject:** Re: Verbal disability
>
> I actually meant 2021 in my original email. A voucher that is only good until December 2020 is not sufficent in this crisis as I will not be traveling by then.
>
> My flights got cancelled by the airline and as per the law, I am entitled to a full refund.
>
> I will accept a gift card with no expiry date, or a refund. A voucher that must be used by December is not sufficent. Please respond.
>
> Kind Regards,
>
> Ahren Belisle
>
> On Mon., Mar. 16, 2020, 4:46 p.m. AC Medical, <acmedical@aircanada.ca> wrote:
>
> > Good day,
> >
> > Thank you for your email.

Air Canada's good will policy is applicable.

We are waiving a 1 time change fee, any fare difference is applicable.

You must begin travel by 18 December 2020.

The flights have been cancelled, and the ticket is being held as a credit.

You may refer to your booking reference N4N4C when rebooking.

Best regards,

Linda

Medical Desk/ Bureau Médical

T 1-800-667-4732 **|** 514-369-7039 **| F** 1-888-334-7717

MON-FRI: 6AM – 8PM ET **|** SAT-SUN: 6AM - 6PM ET

LUN-VEN: 0600-2000 **|** SAM-DIM: 0600-1800 heure de l'est

ACmedical.aircanada.ca

From: Ahren Belisle <belisle.ahren@gmail.com>
Sent: Monday, March 16, 2020 4:37 PM
To: AC Medical <acmedical@aircanada.ca>
Subject: Verbal disability

Hello, I have a speech disability and I would like to cancel my flight from yyz to yvr on Saturday.

Reservation code n4n4ca

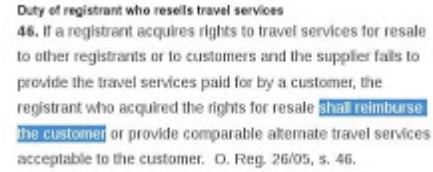
Last name Belisle.

I will accept credit for future travel in 2020. Can you help me in this medium?

cheers,

Ahren Belisle

3 attachments


Duty of registrant who resells travel services

46. If a registrant acquires rights to travel services for resale to other registrants or to customers and the supplier fails to provide the travel services paid for by a customer, the registrant who acquired the rights for resale shall reimburse the customer or provide comparable alternate travel services acceptable to the customer. O. Reg. 26/05, s. 46.

FB_IMG_1585249781078.jpg
18K

image001.jpg
4K

image001.jpg
4K

This is **Exhibit "105"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

_____

Signature

Gmail

Air Transat (@airtransat) has sent you a Direct Message on Twitter!

1 message

Air Transat (via Twitter) <notify@twitter.com> Thu, Mar 26, 2020 at 3:55 PM
To: Adam Bacour <flitox@laposte.net>

Air Transat sent you a Direct Message.

Hello, Sorry for the late reply. As you can imagine, we've been receiving high volumes of messages in the past few days, and we're working hard to respond as soon as possible. We strongly believe that the 24-month credit offered to our customers to compensate for their cancelled travel plans is a flexible proposition in these exceptional circumstances. We also continue to be flexible in our payment terms to meet the needs of our customers. In this regard, the Canadian Transportation Agency recently issued an opinion on the subject, which supports our decision and emphasizes that the solution proposed by Transat, among others,

is appropriate given the current situation. Jessica_AirTransat

Reply

This is **Exhibit "106"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

_____

Signature

From: Swoop <support@flyswoop.freshdesk.com>
Sent: March 28, 2020 4:44 AM
To: susanannsimpson@msn.com <susanannsimpson@msn.com>
Subject: Re: REFUND ON CREDIT CARD NOT A CREDIT VOUCHER

Hi Susan,

Thank you for reaching out.
We do understand that a refund would be preferred, however we are only offering Swoop credits at this time for cancelled flights.

On March 25, the Canadian Transportation Agency clarified its position on providing credit for travel due to the uncertain times we are in. This clarification stated that airlines could offer travel credit for cancelled flights, and the credit should be valid for a reasonable amount of time, which was indicated to be 24 months. If you would like more information please visit the CTA's website here: https://otc-cta.gc.ca/eng/statement-vouchers

Kind regards,

Aris
Traveller Support
Swoop Inc. | FlySwoop.com

> On Wed, 25 Mar at 9:00 AM , Susan Simpson <susanannsimpson@msn.com> wrote:
> I have e-mailed you 8 times to privacy@flyswoop.com and as of today, Wednesday March 25th I have not heard a word from you either by e-mail or phone.
> I HAD NOT PURCHASED A TRAVEL CREDIT/VOUCHER. TRAVEL CREDIT IS IRRELEVANT TO THIS DISCUSSION. THE GOVERNMENT HAS ISSUED A WARNING TO ALL NOT TO TRAVEL ... I AM TAKING THIS SERIOUSLY ALONG WITH EVERYONE ELSE. I HAVE COPIES OF ALL MY OTHER E-MAILS THAT I HAVE SENT TO YOU AND WOULD GLADLY FORWARD THEM ON TO YOU. MY E-MAIL ADDRESS IS: susanannsimpson@msn.com
> Here is a copy of my last e-mail I sent you on March 23rd at 10:57a.m.
> Susan Simpson
> Mon 2020-03-23 10:57 AM
>
> - privacy@flyswoop.com
>
> Here I am again....still no reply from you on my other 7 e-mails.
> I called you again this morning and on hold for 31 minutes and was

then cut off.
I can't afford these calls from Cambridge, Ontario to Calgary.
I am really angry now and so frustrated with your Public Relations...
As I've said before I totally understand you are overwhelmed with all of this Covid-19.
But even an e-mail or call to say that you will at least look into my file would be common courtesy.
I will not be travelling to Tampa or anywhere that Swoop flies so therefore I would like my FULL REFUND that I am entitled to.
Under the advice from the Government we have been told NOT to travel and I am taking that seriously like many others.
As I mentioned before I accepted the Terms and Conditions when I cancelled my flight for Sunday, March 22nd (you cancelled my return on April 6) because I had no other choice. YOU CAN HAVE YOUR VOUCHER BACK ALL I WANT IS MY REFUND ON MY CREDIT CARD.
I have been given counsel and I am ENTITLED to a FULL REFUND ON MY CREDIT CARD.
The Ontario's Frustrated Contracts Act states that I should be able to get a FULL REFUND on my credit card and NOT a CREDIT VOUCER, that will be of no use to me at all.
I WOULD GREATLY APPRECIATE A REPLY FROM A SUPERVISOR!!
Thank you
Susan Simpson
1-519-623-7610
Reservation Code: X4K2RF

This is **Exhibit "107"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

_____

Signature

TravelOnly
@travelonly

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TravelOnly
March 25 at 5:12 PM ·

To all of our amazing clients - thank you for putting your trust in TravelOnly and our amazing advisors. Over the course of the past two weeks, our advisors have been on hold for upwards of 12+ hours to help you get home or cancel or rebook your trips. No doubt this will continue for the foreseeable future -- we are here for you and hope that you will remember the value of using a travel advisor in the future!

Some of you have reached out to enquire how the new Air Passenger Protection Regulations would impact the requirements of airlines when flights were cancelled and/or rebooked.

The Canadian Transportation Agency has provided a statement which provides direction for you and your travel advisor regarding the issuing of future travel vouchers. In summary, the CTA believes that providing affected passengers with vouchers or credits for future travel is appropriate and reasonable. We understand that you may have questions on your voucher and how to use it for future travel and we encourage you to reach out to your TravelOnly advisor or our offices for assistance at any time. Please note that most vouchers will be issued within the next 4-6 weeks depending on the airline and travel supplier.

https://otc-cta.gc.ca/eng/statement-vouchers

NADIAN
ANSPORT
ENCY

OTC-CTA.GC.CA
Statement on Vouchers | Canadian Transportation Agency
The COVID-19 pandemic has caused major disruptions in domestic and international air travel. For flight disruptions that are outside an airline's...

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Write a post...

4.6 **4.6 out of 5** · Based on the opinion of 81 people

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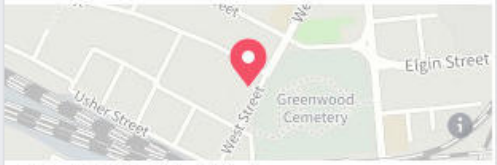
7,778 people like this
7,728 people follow this
45 check-ins

About See All



202-325A West Street
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www.travelonly.com
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Suggest Edits

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Facebook is showing information to help you better understand the purpose of a Page. See actions taken by the people who manage and post content.

Page created - February 6, 2012

Pages Liked by This Page

This is **Exhibit "108"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

_____

Signature

Tactful and tough, agents have effective strategies for dealing with refund demands

Friday, April 3, 2020
Posted by Kathryn Folliott

This story originally ran in the April 2, 2020 issue of Travelweek magazine. To get Travelweek delivered to your agency for free, subscribe here.

TORONTO — Financial concerns are mounting. Work and stress levels are at all-time highs. The retail travel sector is facing never-before-seen challenges amid the coronavirus pandemic. And unbelievably this has all come to a head in just a few short weeks.

Not surprising then that the last thing any travel agent wants to hear from a client right now is 'forget the voucher, I want a refund'.

Thankfully unprecedented times call for unprecedented measures and in recent days both the Canadian Transportation Agency (CTA) and the Ontario government have come out with new directives in favour of vouchers / future travel credits, aimed at mitigating the impact of the hundreds of thousands of cancellations brought on by the coronavirus pandemic.

Travel agents understand that clients want refunds. They also understand that if suppliers and retailers are on the hook for refunds amid a global health crisis, with all of the worldwide border closures and travel restrictions that have followed in its wake, then an entire industry will be on the brink of collapse.

Some say travel advisors who have been in the habit of taking the client's side in any dispute with a supplier may have to think twice before doing that this time, adding that there's a fine line to be walked, between client and supplier, if the advisor's relationship with both is to survive this pandemic.

Agents facing a financial hit with commission recalls or worse when clients pursue refunds or credit card chargebacks say they're using every skill at their disposal, from tact to tough talk, to deal with refund requests.

"SUPPLIERS HAVE BEEN VERY GENEROUS, ESPECIALLY THE CRUISE LINES"

Uniglobe Travel's Michelle Whalen knows first-hand the disappointment of missing out on a trip. Her own anniversary cruise was cancelled amid the coronavirus pandemic. "I see all these suppliers and their staff layoffs and partners I've come to have a good rapport with, they will lose their jobs. The Caribbean countries who rely on tourism dollars. My heart goes out to them. I'm not in any way going to demand a refund."

Whalen says most of her clients are willing to accept vouchers and even happier when they saw that some suppliers were extending the expiry date to up to 24

months. “Many of my clients are keen travellers and will be travelling again at some point. Suppliers have been very generous, especially the cruise lines.”

The downside of the vouchers is that the pricing, itinerary and availability “may not be as desirable” as when clients first booked. Explaining the situation to a client, Whalen says: “I gently said I know it’s disappointing you’re not getting the same trip next time at the same price but they are being flexible, they’re offering a 10% bonus.”

Whalen adds: “I explained that [suppliers] can’t possibly refund everyone’s money at once or the companies would be bankrupt making future travel even more difficult. I’ve tried to highlight to clients that it’s not about the almighty dollar – these suppliers really do care about helping people.”

More news: [Air Canada to reduce capacity and temporarily reduce workforce in Q2]

“Airline staff, tour operator staff are experiencing layoffs just like my clients’ workplaces – they have bills to pay, families to feed as well.”

“NONE CONTEMPLATED THE WORLDWIDE MASS FLIGHT CANCELLATIONS”

The small but vocal minority of travellers pursuing refunds has made its case for refunds in consumer media and Facebook groups. Earlier this week came word of a class action suit against airlines including Air Canada, WestJet, Swoop, Sunwing and Transat.

On March 25 the Canadian Transportation Agency waded into the fray, issuing a special statement saying that while specific cases may get further analysis, in general, vouchers are appropriate in these extraordinary circumstances.

The CTA added that legislation, regulations, and tariffs currently on the books “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.”

Striking a fair and sensible balance between passenger protection and airlines’ operational realities is key, said the CTA.

COMP FUND IS STILL OUT OF DATE AND INADEQUATE: ACTA

This week in Ontario the provincial government announced a number of regulatory amendments to the Travel Industry Act, 2002. In addition to measures aimed at reducing the burden on TICO registrants, the updates include a time-limited exemption that would allow registrants to choose to provide only a voucher in cases where a supplier failed to provide travel services. Also new, eligibility for Comp Fund reimbursements will be expanded to cover consumers with vouchers who do not receive their travel services, potentially due to the failure of a registrant.

ACTA applauded the moves, while cautioning that the funding model for the Comp Fund is still out of date and inadequate. “The COVID-19 pandemic has highlighted the vulnerability of the significantly inadequate Fund, and as such, ACTA will continue to lobby for recommended changes for the benefit of Ontario travel agencies, and the consumers they represent,” says ACTA President Wendy Paradis.

“IT IS NOT POSSIBLE FOR OUR SUPPLIERS TO ABSORB THESE LOSSES”

Tripcentral.ca President Richard Vanderlubbe says: “While it is understandable that customers are expecting refunds, and from a ‘moral’ point of view, they have paid for something that they have not received, this is not how the global travel industry functions.”

Vanderlubbe, who served on the TICO board for many years and who is a long-time advocate for modernizing the Comp Fund, adds: “It is not possible for our suppliers to absorb these losses, and if they were required to provide refunds, it would bankrupt most of them. Bankrupt suppliers will cause cascading losses for travel agencies due to non-payment of outstanding commissions, and damage future travel plans on the books. Further, bankruptcies will hurt us all by reducing consumer confidence.”

More news: **Holland America CEO speaks out as Zaandam, Rotterdam still stranded**

For this reason, he says, “we support suppliers policies of future travel credit, and point out that the federal government, TICO and others are supporting. The

best thing for our customers and the industry is that all of our businesses remain solvent."

"YOU HAD THE OPPORTUNITY TO PURCHASE CANCELLATION INSURANCE ... AND YOU DECLINED TO DO SO"

A letter that Vanderlubbe and his team have ready for any client making persistent refund requests or launching credit card chargebacks is strongly worded but fair, and explains the situation from the retailer's side. The letter cites the CTA statement and reads, in part: "We too are experiencing financial damage from the COVID19 pandemic, paying our staff for more than 5 weeks now with little or no revenue coming, in order to help our customers return home, process future travel credits, and we will be re-booking for months later."

The letter also notes: "The Federal Government has issued a plain language statement which you can read from the link below [https://otc-cta.gc.ca/eng/statement-vouchers] that states that, as far as the air travellers protection regime goes, it was never intended to cover acts of God, or a force majeure situation. In short, they state that a future travel credit for 2 years is sufficient compensation under this circumstance.

"Further, the Travel Industry Council of Ontario, that administers the Ontario Travel Industry Act, has issued a statement that 'under Ontario law, there is no requirement for a travel company to refund or offer alternative travel services if a government travel advisory is in effect'. In short, our suppliers are not even obligated to provide a future travel credit, but they are.

"Your chargeback through your credit card is unreasonable given that you are being offered a travel credit good for two years, and that you had the opportunity to purchase cancellation insurance at the time of booking, and you declined to do so.

"We ask that you contact your credit card company and 'reverse the chargeback request'. We need evidence of this in order to process your future travel credit."

TICO has issued a FAQ for consumers inquiring about voucher use, a FAQ that's helpful for retailer and supplier registrants as well. The FAQ can be found at

TICO's website at tico.ca.

Tags: COVID-19, TICO

Next Post >>

This is **Exhibit "109"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

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Signature

Source: *Canadian Life and Health Insurance Association*

April 01, 2020 16:34 ET

Advisory: Travel cancellation insurance and airline vouchers or credits

TORONTO, April 01, 2020 (GLOBE NEWSWIRE) -- Some travel insurance policies provide coverage that may pay for costs that consumers cannot recover when trips are cancelled. In past, travel service providers usually provided consumers with refunds where the service provider was unable to provide service. Over the past month, many service providers have changed this practice and are now offering vouchers or credits that consumers can use for future travel.

On March 25, 2020, the Canadian Transportation Agency updated its endorsement of the use of vouchers or credits as an appropriate approach for Canada's airlines as long as these vouchers or credits do not expire in an unreasonably short period of time.

Travel insurers are advising policyholders that if you have been offered this type of full credit, or voucher for future use by an airline, train or other travel provider, in many instances, under the terms of your insurance policy you will not be considered to have suffered an insurable loss.

Customers are encouraged to consider the above and review the terms of your policy prior to submitting a claim for trip cancellation coverage. You should also check your insurer's website for guidance that may be posted. Each insurer will assess the particulars of each circumstance in accordance with the terms and conditions of your policy.

Disputes over refunds and credits should be directed to your travel service provider, transportation carrier or the Canadian Transportation Agency.

You can find the contact information for your insurer in your contract or at: https://www.olhi.ca/for-insurers/member-list/

About the CLHIA

The CLHIA is a voluntary association whose member companies account for 99 per cent of Canada's life and health insurance business. The industry provides a wide range of financial security products such as life insurance, annuities (including RRSPs, RRIFs and pensions) and supplementary health insurance to almost 29 million Canadians. It

also holds over $850 billion in assets in Canada and employs more than 156,000 Canadians.

For more information:

Kevin Dorse
Assistant Vice President, Strategic Communications and Public Affairs
(613) 691-6001 / kdorse@clhia.ca

This is **Exhibit "110"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

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Signature

Halifax, NS

lukacs@AirPassengerRights.ca

March 30, 2020

VIA EMAIL and FAX

Canadian Transportation Agency

Dear Madam or Sir:

Re: "Statement on Vouchers" – Cease and Desist

It has come to our attention that on or around March 25, 2020, the Canadian Transportation Agency [**CTA**] published a "Statement on Vouchers" on its website purporting to offer unsolicited opinions on an ongoing controversy between passengers and airlines:

https://otc-cta.gc.ca/eng/statement-vouchers

Said statement creates the false impression of a legally binding determination by the CTA, and misleads consumers about their rights. Indeed, it has been represented and/or used in such a manner by various air carriers in their dealings with passengers.

This is unacceptable.

We request that the CTA remove the aforementioned statement from its website without delay and inform the public that the statement is not a legal ruling whatsoever, by no later than **Tuesday, March 31, 2020** at noon Eastern Time.

We look forward to hearing from you.

Yours very truly,

Dr. Gábor Lukács

Enclosed: "Statement on Vouchers"

CANADIAN TRANSPORTATION AGENCY

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.

Share this page

Date modified:
2020-03-25

This is **Exhibit "111"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

_____

Signature

RE: "Statement of Vouchers" -- Cease and Desist

secretariat <Secretariat.Secretariat@otc-cta.gc.ca> Mon, Mar 30, 2020 at 5:35 PM
To: Gabor Lukacs <lukacs@airpassengerrights.ca>
Cc: "Services Juridiques / Legal Services (OTC/CTA)" <Servicesjuridiques/LegalServicesOTC/CTA@otc-cta.gc.ca>, Scott Streiner <Scott.Streiner@otc-cta.gc.ca>

The Agency acknowledges receipt of your submission.

Your submission will be reviewed and ?you will be contacted if it is incomplete or otherwise inadequate.

Kind regards,

Secrétariat
Office des transports du Canada / Gouvernement du Canada
secretariat@otc-cta.gc.ca / Site Web www.otc-cta.gc.ca
Tél. : 819-997-7047 / Télécopieur 819-953-5253 / ATS : 1-800-669-5575

Secretariat
Canadian Transportation Agency / Government of Canada
secretariat@otc-cta.gc.ca / Web site www.otc-cta.gc.ca
Tel: 819-997-7047 / Facsimile 819-953-5253 / TTY: 1-800-669-5575

-----Original Message-----
From: Gabor Lukacs <lukacs@AirPassengerRights.ca>
Sent: Monday, March 30, 2020 3:43 PM
To: secretariat <Secretariat.Secretariat@otc-cta.gc.ca>; Services Juridiques / Legal Services (OTC/CTA) <Servicesjuridiques/LegalServicesOTC/CTA@otc-cta.gc.ca>; Scott Streiner <Scott.Streiner@otc-cta.gc.ca>
Subject: "Statement of Vouchers" -- Cease and Desist

Dear Madam or Sir,

Please refer to the attached letter.

Yours very truly,
Dr. Gabor Lukacs

--
Dr. Gabor Lukacs, Founder and Coordinator
Air Passenger Rights
Tel : (647) 724 1727
Web : http://AirPassengerRights.ca
Twitter : @AirPassRightsCA
Facebook: https://www.facebook.com/AirPassengerRights/

This is **Exhibit "112"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

_____

Signature

The latest general information on the Coronavirus Disease 2019 (COVID-19) is available on Coronavirus.gov. For USDOT specific COVID-19 resources, please visit our page.

In This Section

Contact Us

Office of Aviation Enforcement and Proceedings
Aviation Consumer Protection Division
1200 New Jersey Ave, SE
Washington, DC 20590
United States
Phone: (202) 366-2220
TTY / Assistive Device Number:
(202) 366-0511
Business Hours:
8:30am-5:00pm ET, M-F

Fly Rights

A Consumer Guide to Air Travel

CONTENTS

Notice: We make every effort to keep *Fly-Rights* up to date, but airlines frequently change the way they do business. So by the time you read this, a few procedures we explain may be different.

Introduction

The elimination of government regulation of airline fares and routes has resulted in lower fares and a wide variety of price/service options. In this new commercial environment, consumers have had to take a more active role in choosing their air service by learning to ask a number of questions:

- Am I more concerned with price or with schedule? Am I willing to fly at a less convenient time if it means saving $25?
- Will the airline penalize me for changing my reservation/
- Will I have to pay extra for checked bags or for seat assignments?
- What will the airline do for me if it cancels my flight?
- This booklet is designed to explain your rights and responsibilities as an air traveler and to show you how to avoid problems. We hope it helps you become a more resourceful consumer.

Air Fares

Because of the emphasis on price competition, consumers may choose from a wide variety of air fares. It is easy to compare fares and schedules on the Web, using airline web sites or third-party reservation services. You can also contact a travel agent, another ticket outlet, or the airlines serving the places you want to travel to. (Some airlines and other outlets charge a fee for tickets purchased by means other than the Web. On the other hand, a few airlines may charge a fee for tickets that are purchased via the Web.) You can also be alert to newspaper and radio ads, where airlines advertise many of the discounts available in your city. Finally, be alert to new companies serving the market. They may offer lower fares or different services than older established airlines. Here are some tips to help you decide among air fares:

- Be flexible in your travel plans in order to get the lowest fare. The best deals may be limited to travel on certain days of the week (particularly midweek or Saturday) or certain hours of the day (e.g., early-morning flights or overnight "red eyes"). When searching flights and fares on the Web you can usually specify whether your dates are flexible, and in the search results the fares are generally listed from lowest to highest. If you are shopping by phone or in person, after you get a fare quote ask the reservations agent if you could save even more by leaving a day earlier or later, or by taking a different flight on the same day.
- Plan as far ahead as you can. Some airlines set aside only a few seats on each flight at the lower rates. The real bargains often sell out very quickly. On the other hand, air carriers sometimes make more discount seats available later. If you had decided against a trip because the price you wanted was not available when you first inquired, try again, especially just before the advance-purchase deadline. Flights for holiday periods may sell out months ahead of time, although in many cases you can find a seat if you elect to travel on the holiday itself, e.g. Christmas Day or Thanksgiving Day.
- Some airlines may have discounts that others don't offer. In a large metropolitan area, the fare could depend on which airport you use. Also, a connection (change of planes) or a one-stop flight is sometimes cheaper than a nonstop.
- Be aware that many airlines charge extra for checked baggage, advance seat assignments, meals, or other services. Airlines include information on these fees on their web sites.
- If you have a connection involving two airlines, ask whether your bags will be transferred. Ask whether your ticket will be good on another carrier at no extra charge if your flight is canceled or experiences a lengthy delay, and whether the first airline will pay for meals or a hotel room during the wait.
- Most discount fares are non-refundable; if you buy one of these fares and you later cancel your trip, you will not get your money back. In many cases you can apply your ticket to another trip in the future, but there may be a steep fee. Many fares also have a penalty for changing flights or dates even if you don't want a refund. You may also have to pay any difference in air fares if your fare-type is not available on the new flight.
- After you buy your ticket, call the airline or travel agent once or twice before departure to check the fare. Fares change all the time, and if the fare you paid goes down before you fly, some airlines will refund the difference (or give you a transportation credit for that amount). But you have to ask.
- Differences in air fares can be substantial. Careful comparison shopping among airlines does take time, but it can lead to real savings.

Schedules and Tickets

Once you decide when and where you want to go, and which airline you want to use, you will usually have to purchase a ticket in order to hold a confirmed seat. However, many large airlines will hold a reservation for 24 hours or so without payment. Others require payment at the time you make a reservation but will provide a full refund if you cancel in the first day or so. When available, both of these procedures permit you to hold a seat and a fare for a short time while continuing to shop for a better deal. Be aware of the following considerations when selecting a flight and buying a ticket:

- Check the on-time performance percentage for flights that you are considering. On-time performance percentages for individual flights of the larger U.S. airlines are available by phone from those airlines upon request. These airlines are also required to post this information on their web sites, with special notice for flights that experienced serious delays or cancellations. If you are deciding between two flights with similar schedules and fares, you may want to choose the one with the better on-time record. (Only the largest U.S. airlines are required to maintain and provide on-time performance data.) You can see aggregate information about airline and airport on-time performance and a list of the most frequently delayed flights in DOT's monthly *Air Travel Consumer Report*. Also, the web site of DOT's Bureau of Transportation Statistics (www.bts.gov) contains detailed on-time performance data for the large U.S. airlines that are required to report this information.
- When you buy a ticket, be sure all of the information is recorded accurately. Before you click "Submit" or make a final commitment to a reservations agent, review all of the essential information ? the spelling of your name, the flight numbers and travel dates, and the cities you are traveling between. Use the form of your name that is on the photo ID that you will show at the airport. (For an international flight, this will be your passport.) If there is more than one airport at either city, be sure you check which one you'll be using. It's also important to give the airline more than one telephone number and an email address so they can let you know if there is any change in its schedule.
- A "direct" (or "through") flight with a single flight number can have one or more intermediate stops. A connection (change of planes) nearly always has a separate flight number for each flight, but sometimes the two flights are listed on the same line in schedules. Look carefully at the "Stops" column and the departure and arrival times to determine whether the flight suits your needs.
- If you are flying to a small city and your flight number has four digits, you may be booked on a commuter airline that has an agreement with the major carrier in whose name the flight is advertised and sold. Look for disclosures of these so-called "code-share" flights in the schedules, or ask the reservations agent. DOT requires that you be provided this information.
- As soon as you receive your ticket or email confirmation, check to make sure all the information on it is correct, especially your name, the airports (if any of the cities have more than one) and the flight dates. Pursue any necessary corrections immediately.
- You will need to show a government-issued photo I.D. when you fly. It is important that your name as it appears on the ticket is the same as it appears on the I.D. you will be using. If your name has recently changed and the name on your ticket and your I.D. are different (or will be different by the time of your trip), bring documentation of the change (e.g., a marriage certificate or court order).
- Many European countries ("the Schengen states") require that your passport be valid for at least three months beyond your planned date of departure from the Schengen area. For more information see the Department of State's Schengen web page at http://travel.state.gov/content/passports/en/go/schengen-fact-sheet.html.
- Re-check the departure and arrival times of your flights a few days before your trip; schedules sometimes change. On international trips, some airlines may require that you reconfirm your onward or return reservations at least 72 hours before each flight. If you don't, your reservations may be canceled.
- Bring your ticket or printed confirmation to the airport. You may also be able to print your boarding pass from the carrier's web site within 24 hours of departure. This speeds your check-in and helps you avoid some of the tension you might otherwise feel if you had to wait in a slow-moving line at the airport.
- Payment by credit card provides certain protections under federal credit laws. When a refund is due, the airline must forward a credit to your card company within seven business days after receiving a complete refund application; however, the credit may take a month or two to appear on your statement. If you paid by credit card for a refundable fare and you have trouble getting a refund that you are due (e.g., you have a refundable fare, or you have a nonrefundable fare and the airline canceled your flight and you did not travel as a result), report this in writing to your credit card company. If you write to them within 60 days from the time that they mailed your first monthly statement showing the charge for the airline ticket, the card company should credit your account even if the airline doesn't. This procedure is particularly useful if your airline ceases operations before your flight.

NOTE: In some cases tickets purchased overseas in foreign currency can only be refunded in that same currency and country, due to foreign government monetary restrictions. Keep this in mind if you are considering buying a ticket in a foreign country.

Delayed and Cancelled Flights

Airlines don't guarantee their schedules, and you should realize this when planning your trip. There are many things that can-and often do-make it impossible for flights to arrive on time. Some of these problems, like bad weather, air traffic delays, and mechanical issues, are hard to predict and often beyond the airlines' control.

If your flight is delayed, try to find out how late it will be. But keep in mind that it is sometimes difficult for airlines to estimate the total duration of a delay during its early stages. In so- called "creeping delays," developments occur which were not anticipated when the carrier made its initial estimate of the length of the delay. Weather that had been forecast to improve can instead deteriorate, or a mechanical problem can turn out to be more complex than initially evaluated. If the problem is with local weather or air traffic control, all flights will probably be late and there's not much you or the airline can do to speed up your departure. If your flight is experiencing a lengthy delay, you might be better off trying to arrange another flight, as long as you don't have to pay a cancellation penalty or higher fare for changing your reservations. (It is sometimes easier to make such arrangements by phone than at a ticket counter.) If you find a flight on another airline, ask the first airline if it will endorse your ticket to the new carrier; this could save you a fare collection. Remember, however, that there is no rule requiring them to do this.

If your flight is canceled, most airlines will rebook you on their first flight to your destination on which space is available, at no additional charge. If this involves a significant delay, find out if another carrier has space and ask the first airline if they will endorse your ticket to the other carrier. Finding extra seats may be difficult, however, especially over holidays and other peak travel times.

Each airline has its own policies about what it will do for delayed passengers waiting at the airport; there are no federal requirements. If you are delayed, ask the airline staff if it will pay for meals or a phone call. Some airlines, often those charging very low fares, do not provide any amenities to stranded passengers. Others may not offer amenities if the delay is caused by bad weather or something else beyond the airline's control. Contrary to popular belief, for domestic itineraries airlines are not required to compensate passengers whose flights are delayed or canceled. As discussed in the chapter on overbooking, compensation is required by law on domestic trips only when you are "bumped" from a flight that is oversold. On international itineraries, passengers may be able to recover reimbursement under Article 19 of the Montreal Convention for expenses resulting from a delayed or canceled flight by filing a claim with the airline. If the claim is denied, you may pursue the matter in court if you believe that the carrier did not take all measures that could reasonably be required to avoid the damages caused by the delay.

If the purpose of your trip is to close a potentially lucrative business deal, give a speech or lecture, attend a family function, or connect to a cruise, you might want to allow a little extra leeway and take an earlier flight. In other words, airline delays aren't unusual, and defensive planning is a good idea when time is your most important consideration.

Some flights are delayed on the airport "tarmac" before taking off or after landing. DOT rules prohibit most U.S. airlines from allowing a domestic flight to remain on the tarmac for more than three hours unless:

- the pilot determines that there is a safety or security reason why the aircraft cannot taxi to the gate and deplane its passengers, or
- Air traffic control advises the pilot that taxiing to the gate (or to another location where passengers can be deplaned) would significantly disrupt airport operations.

U.S. airlines operating international flights to or from most U.S.airports must each establish and comply with their own limit on the length of tarmac delays on those flights. On both domestic and international flights, U.S. airlines must provide passengers with food and water no later than two hours after the tarmac delay begins. While the aircraft remains on the tarmac lavatories must remain operable and medical attention must be available if needed.

When booking your flight remember that a departure early in the day is less likely to be delayed than a later flight, due to "ripple" effects of delays throughout the day. Also, if an early flight does get delayed or canceled, you have more rerouting options. If you book the last flight of the day and it is canceled, you could get stuck overnight. You may select a connection (change of planes) over a nonstop or direct flight because of the convenient departure time or lower fare. However, a change of planes always involves the possibility of a misconnection. If you have a choice of connections and the fares and service are equivalent, choose the one with the least-congested connecting airport, so it will be easier to get to your second flight. You may wish to take into consideration the potential for adverse weather if you have a choice of connecting cities. When making your reservation for a connection, always check the amount of time between flights. Ask yourself what will happen if the first flight is delayed; if you don't like the answer, pick another flight or "construct" a connection that allows more time.

Overbooking

Overbooking is not illegal, and most airlines overbook their scheduled flights to a certain extent in order to compensate for "no-shows." Passengers are sometimes left behind or "bumped" as a result. When an oversale occurs, the Department of Transportation (DOT) requires airlines to ask people who aren't in a hurry to give up their seats voluntarily, in exchange for compensation. Those passengers bumped against their will are, with a few exceptions, entitled to compensation.

Voluntary Bumping

Almost any planeload of airline passengers includes some people with urgent travel needs and others who may be more concerned about the cost of their tickets than about getting to their destination on time. DOT rules require airlines to seek out people who are willing to give up their seats for compensation before bumping anyone involuntarily. Here's how this works. At the check-in or boarding area, airline employees will look for volunteers when it appears that the flight has been oversold. If you're not in a rush to arrive at your next destination, you can give your reservation back to the airline in exchange for compensation and a later flight. But before you do this, you may want to get answers to these important questions:

- When is the next flight on which the airline can confirm your seat? The alternate flight may be just as acceptable to you. On the other hand, if the airline offers to put you on standby on another flight that's full, you could be stranded.
- Will the airline provide other amenities such as free meals, a hotel room, transfers between the hotel and the airport, and a phone card? If not, you might have to spend the money it offers you on food or lodging while you wait for the next flight.

DOT has not mandated the form or amount of compensation that airlines offer to volunteers. DOT does, however, require airlines to advise any volunteer whether he or she might be involuntarily bumped and, if that were to occur, the amount of compensation that would be due. Carriers can negotiate with their passengers for mutually acceptable compensation. Airlines generally offer a free trip or other transportation benefits to prospective volunteers. The airlines give employees guidelines for bargaining with passengers, and they may select those volunteers willing to sell back their reservations for the lowest price. If the airline offers you a free ticket or a transportation voucher in a certain dollar amount, ask about restrictions. How long is the ticket or voucher good for? Is it "blacked out" during holiday periods when you might want to use it? Can it be used for international flights?

Involuntary Bumping

DOT requires each airline to give all passengers who are bumped involuntarily a written statement describing their rights and explaining how the carrier decides who gets on an oversold flight and who doesn't. Those travelers who don't get to fly are frequently entitled to denied boarding compensation in the form of a check or cash. The amount depends on the price of their ticket and the length of the delay:

- If you are bumped involuntarily and the airline arranges substitute transportation that is scheduled to get you to your final destination (including later connections) within one hour of your original scheduled arrival time, there is no compensation.
- If the airline arranges substitute transportation that is scheduled to arrive at your destination between one and two hours after your original arrival time (between one and four hours on international flights), the airline must pay you an amount equal to 200% of your one-way fare to your final destination that day, with a $675 maximum.
- If the substitute transportation is scheduled to get you to your destination more than two hours later (four hours internationally), or if the airline does not make any substitute travel arrangements for you, the compensation doubles (400% of your one-way fare, $1350 maximum).
- If your ticket does not show a fare (for example, a frequent-flyer award ticket or a ticket issued by a consolidator), your denied boarding compensation is based on the lowest cash, check or credit card payment charged for a ticket in the same class of service (e.g., coach, first class) on that flight.
- You always get to keep your original ticket and use it on another flight. If you choose to make your own arrangements, you can request an "involuntary refund" for the ticket for the flight you were bumped from. The denied boarding compensation is essentially a payment for your inconvenience.
- If you paid for optional services on your original flight (e.g., seat selection, checked baggage) and you did not receive those services on your substitute flight or were required to pay a second time, the airline that bumped you must refund those payments to you.

Like all rules, however, there are a few conditions and exceptions:

- To be eligible for compensation, you must have a confirmed reservation. A written confirmation issued by the airline or an authorized agent or reservation service qualifies you in this regard even if the airline can't find your reservation in the

computer, as long as you didn't cancel your reservation or miss a reconfirmation deadline.
- Each airline has a check-in deadline, which is the amount of time before scheduled departure that you must present yourself to the airline at the airport. For domestic flights most carriers require you to be at the departure gate between 10 minutes and 30 minutes before scheduled departure, but some deadlines can be an hour or longer. Check-in deadlines on international flights can be as much as three hours before scheduled departure time. Some airlines may simply require you to be at the ticket/baggage counter by this time; most, however, require that you get all the way to the boarding area. Some may have deadlines at both locations. If you miss the check-in deadline, you may have lost your reservation and your right to compensation if the flight is oversold.

As noted above, no compensation is due if the airline arranges substitute transportation which is scheduled to arrive at your destination within one hour of your originally scheduled arrival time.

If the airline must substitute a smaller plane for the one it originally planned to use, the carrier isn't required to pay people who are bumped as a result. In addition, on flights using aircraft with 30 through 60 passenger seats, compensation is not required if you were bumped due to safety-related aircraft weight or balance constraints.

The rules do not apply to charter flights, or to scheduled flights operated with planes that hold fewer than 30 passengers. They don't apply to international flights inbound to the United States, although some airlines on these routes may follow them voluntarily. Also, if you are flying between two foreign cities -- from Paris to Rome, for example -- these rules will not apply. The European Commission has a rule on bumpings that occur in an EC country; ask the airline for details, or go to http://ec.europa.eu/transport/passengers/air/air_en.htm.

Airlines set their own "boarding priorities" -- the order in which they will bump different categories of passengers in an oversale situation. When a flight is oversold and there are not enough volunteers, some airlines bump passengers with the lowest fares first. Others bump the last passengers to check in. Once you have purchased your ticket, the most effective way to reduce the risk of being bumped is to get to the airport early. For passengers in the same fare class the last passengers to check in are usually the first to be bumped, even if they have met the check-in deadline. Allow extra time; assume that the roads are backed up, the parking lot is full, and there is a long line at the check-in counter.

Airlines may offer free tickets or dollar-amount vouchers for future flights in place of a check for denied boarding compensation. However, if you are bumped involuntarily you have the right to insist on a check if that is your preference. Once you cash the check (or accept the free flight), you will probably lose the ability to pursue more money from the airline later on. However, if being bumped costs you more money than the airline will pay you at the airport, you can try to negotiate a higher settlement with their complaint department. If this doesn't work, you usually have 30 days from the date on the check to decide if you want to accept the amount of the check. You are always free to decline the check (e.g., not cash it) and take the airline to court to try to obtain more compensation. DOT's denied boarding regulation spells out the airlines' minimum obligation to people they bump involuntarily. Finally, don't be a "no-show." If you are holding confirmed reservations you don't plan to use, notify the airline. If you don't, they will cancel all onward or return reservations on your trip.

Baggage

Between the time you check your luggage in and the time you claim it at your destination, it may have passed through a maze of conveyor belts and baggage carts. Once airborne, baggage may tumble around the cargo compartment if the plane hits rough air. In all fairness to the airlines, however, relatively few bags are damaged or lost. With some common-sense packing and other precautions, your bags will likely be among the ones that arrive safely.

Packing

You can pack to avoid problems. Certain items should never be put into a piece of luggage that you plan to check into the baggage compartment:

- Small valuables: cash, credit cards, jewelry, an expensive camera.
- Critical items: medicine, keys, passport, tour vouchers, business papers.
- Irreplaceable items: manuscript, heirlooms.
- Fragile items: eyeglasses, glass containers, liquids.

Things like this should be carried on your person or packed in a carry-on bag. Remember, the only way to be sure your valuables are not damaged or lost is to keep them with you. Full flights sometimes run out of room in the cabin for full-size carry-on bags. In

those situations the airline must sometimes "gate check" the carry-on baggage of the last passengers to board the flight. This happens near the door to the aircraft. Pack your carry-on bag in a manner so that if it must be gate-checked you can quickly remove the fragile, valuable and critical items described above. For example, consider packing all such items in a small, soft bag that will fit under the seat in front of you, and make sure that this small bag is easily accessible in your carry-on bag.

Although only a tiny percentage of checked bags are permanently lost, your bag might be delayed for a day or two. Don't put perishables in a checked bag; they may spoil if it is delayed. It is wise to put items that you will need during the first 24 hours in a carry-on bag (e.g. toiletries, a change of underwear). Check with the airline for its limits on the size, weight, and number of carry-on pieces. As of this writing, on most flights you are allowed to carry on one bag plus one personal item (e.g., purse, briefcase, camera bag, laptop computer bag).

If you are using more than one airline, check with all of them. Inquire about your flight; different airplanes can have different limits. Don't assume that the flight will have closet space for every carry-on garment bag; yours may have to be checked. If you plan to go shopping at your destination and bring your purchases aboard as carry-on, keep the limits in mind. If you check these purchases, however, carry the receipts separately; they may be necessary for a claim if the merchandise is lost or damaged. Don't put anything into a carry-on bag that could be considered a weapon (e.g. certain scissors, pocket knives). Check the web site of the Transportation Security Administration (TSA) for restrictions on carry-on baggage by click "Travelers."

As with carry-ons, checked baggage is subject to limits. Some airlines permit one or two checked bags at no charge; other carriers charge for even one checked bag. There can also be an extra charge if you exceed the airline's limits on the size, weight or number of the bags.

On some flights between two foreign cities, your allowance may be lower and may be based primarily on the weight of the checked bags rather than the number of pieces. The same two bags that cost you nothing to check when you started your trip could result in expensive excess-baggage charges under a weight system. Ask the airlines about the limit for every segment of your international trip before you leave home, especially if you have a stopover of a day or two or if you are changing carriers.

The bags you check should be labeled ? inside and out ? with your name and phone number. Add the name and phone number of a person to contact at your destination if it's practical to do so. Almost all of the bags that are misplaced by airlines do turn up sooner or later. With proper labeling, the bag and its owner can usually be reunited within a few hours.

Don't overpack a bag. This puts pressure on the latches, making it easier for them to pop open. If you plan to check any glassware, musical instruments or other fragile items, they should be packed in a container specifically designed to survive rough handling, preferably a factory-sealed carton or a padded hard-shell carrying case.

Check-in

Don't check in at the last minute. Even if you make the flight, your bag may not. If you miss the airline's check-in deadline, the carrier might not assume liability for your bag if it is delayed or lost. If you have a choice, select flights that minimize the potential for baggage disruption. The likelihood of a bag going astray increases from #1 to #4 below (i.e., #1 is safest): 1) nonstop flight; 2) direct or 'through' flight (one or more stops, but no change of aircraft); 3) online connection (change of aircraft but not airlines); and 4) interline connection (change of aircraft and airlines)

When you check in, remove straps and hooks from garment bags that you are sending as checked baggage. These can get caught in baggage processing machinery, causing damage to the bag.

The airline will put baggage destination tags on your luggage and give you the stubs to use as claim checks. Make sure you get a stub for every bag. Don't throw them away until after you get your bags back and you check the contents. Not only will you need them if a claim is necessary, but you may need to show them to security upon leaving the baggage-claim area.

Your bags may only be checked to one of your intermediate stops rather than your destination city if you must clear Customs short of your final destination, or if you are taking a connection involving two airlines that don't have an interline agreement. Be sure all of the tags from previous trips are removed from your bag, since they may cause your bag to go astray.

Claiming your bags

Many bags look alike. After you pull what you think is your bag off the carousel, check the name tag or the bag tag number. If your bag arrives open, unlocked or visibly damaged, check right away to see if any of the contents are missing or damaged. Report any

problems to the airline before leaving the airport; insist on having a report created. Open your suitcase immediately when you get to where you are staying. Any damage to the contents or any pilferage should be immediately reported to the airline by telephone. Make a note of the date and time of the call, and the name and telephone number of the person you spoke with. Follow up as soon as possible with a certified letter to the airline.

Damage

If your suitcase arrives smashed or torn, the airline will usually pay for repairs. If it can't be fixed, they will negotiate a settlement to pay you its depreciated value. The same holds true for belongings packed inside. Airlines may decline to pay for damage caused by the fragile nature of the broken item or inadequate packing, rather than the airline's rough handling. Air carriers might also refuse to compensate you for damaged items inside the bag when there's no evidence of external damage to the suitcase. When you check in, airline personnel may let you know if they think your suitcase or package may not survive the trip intact. Before accepting a questionable item, they may ask you to sign a statement in which you agree to check it at your own risk. But even if you do sign this form, the airline might be liable for damage if it is caused by its own negligence shown by external injury to the suitcase or package.

Delayed bags

If you and your suitcase don't connect at your destination, don't panic. The airlines have very sophisticated systems that track down the vast majority of misplaced bags and return them to their owners within hours. In many cases they will absorb reasonable expenses you incur while they look for your missing belongings. You and the airline may have different ideas of what's reasonable, however, and the amount it will pay is subject to negotiation.

If your bags don't come off the conveyor belt, report this to airline personnel before you leave the airport. Insist that they create a report and give you a copy, even if they say the bag will be in on the next flight. Get an appropriate phone number for following up (not the Reservations number). Don't assume that the airline will deliver the bag without charge when it is found; ask the airline about this. Most carriers set guidelines for their airport employees that allow them to disburse some money at the airport for emergency purchases. The amount depends on whether or not you're away from home and how long it takes to track down your bags and return them to you. If the airline does not provide you a cash advance, it may still reimburse you later for the purchase of necessities. Discuss with the carrier the types of articles that would be reimbursable, and keep all receipts. If the airline misplaces sporting equipment, it will sometimes pay for the rental of replacements. For replacement clothing or other articles, the carrier might offer to absorb only a portion of the purchase cost, on the basis that you will be able to use the new items in the future. (The airline may agree to a higher reimbursement if you turn the articles over to them.)

When you've checked in fresh foods or any other perishable goods and they are ruined because their delivery is delayed, the airline won't reimburse you. Carriers may be liable if they lose or damage perishable items, but they won't accept responsibility for spoilage caused by a delay in delivery.

Airlines are liable for provable consequential damages up to the amount of their liability limit (see below) in connection with the delay. If you can't resolve the claim with the airline's airport staff, keep a record of the names of the employees with whom you dealt, and hold on to all travel documents and receipts for any money you spent in connection with the mishandling. (It's okay to surrender your baggage claim tags to the airline when you fill out a form at the airport, as long as you get a copy of the form and it notes that you gave up the tags.) Contact the airline's baggage claims office or consumer office when you get home.

Lost luggage

Once your bag is declared (permanently) lost, you will have to submit a claim. This usually means you have to fill out a second, more detailed form. Check on this; failure to complete the second form when required could delay your claim. Missing the deadline for filing it could invalidate your claim altogether.

The airline will usually refer your claim to a central office, and the negotiations between you and the airline will begin. If your flight was a connection involving two carriers, the final carrier is normally the one responsible for processing your claim even if it appears that the first airline lost the bag. Airlines don't automatically pay the full amount of every claim they receive. First, they will use the information on your form to estimate the value of your lost belongings. Like insurance companies, airlines consider the depreciated value of your possessions, not their original price or the replacement costs. If you're tempted to exaggerate your claim, don't. Airlines may completely deny claims they feel are inflated or fraudulent. They often ask for sales receipts and other documentation to back up claims, especially if a large amount of money is involved. If you don't keep extensive records, you can expect to negotiate with the airline over the value of your goods. Generally, it takes an airline anywhere from four weeks to three months to pay

passengers for their lost luggage. When airlines tender a settlement, they may offer you the option of free tickets on future flights in a higher amount than the cash payment. Ask about all restrictions on these tickets, such as "blackout" periods.

Limits on liability

Airlines assert a limit on their liability for delayed, lost or damaged checked baggage. When your luggage and its contents are worth more than the liability limit, you may want to purchase "excess valuation," if available, from the airline as you check in. This is not insurance, but it will increase the carrier's potential liability. The airline may refuse to sell excess valuation on some items that are especially valuable or breakable, such as antiques, musical instruments, jewelry, manuscripts, negotiable securities and cash.

On domestic trips, the airline can invoke a liability ceiling that is regulated by DOT and that is adjusted for inflation every two years. That limit is currently $3,500 per passenger.

On international round trips that originate in the United States, the liability limit is set by a treaty called the Montreal Convention. This treaty also governs liability on international round trips that originate in another country that has ratified this Convention, and one-way trips between the U.S. and such a country. This international limit is reviewed for inflationary adjustment every five years; it is currently 1,131 Special Drawing Rights. The SDR is a currency surrogate that floats daily; check with the International Monetary Fund (IMF) to see the current exchange rate. At this writing 1,131 SDRs was worth about $1,545. The international limit applies to domestic segments of an international journey. In certain very limited circumstances, this may be the case even if the domestic and international flights are on separate tickets and you claim and re-check your bag between the two flights.

Keep in mind that the liability limits are maximums. If the depreciated value of your property is worth less than the liability limit, this lower amount is what you will be offered. If the airline's settlement doesn't fully reimburse your loss, check your homeowner's or renter's insurance; it sometimes covers losses away from the residence. Some credit card companies and travel agencies offer optional or even automatic supplemental baggage coverage.

Special liability requirements apply to the domestic transportation of assistive devices used by passengers with disabilities. For more information, read our page about wheelchairs and assistive devices or the publication *New Horizons: Information for the Air Traveler with a Disability*.

Hazardous Items

There are restrictions on carrying materials that could be hazardous in an aircraft environment. For example, matches are not permitted in checked bags. For details on hazardous materials, go to www.faa.gov >> Travelers, and www.tsa.gov >> Travelers.

Smoking

Under U.S. government rules, smoking is prohibited on all scheduled-service flights of U.S. airlines. As a general matter, foreign airlines must also ban smoking on all scheduled-service flight segments in, to and from the United States. Cigar and pipe smoking is banned on all U.S.-carrier flights (both scheduled and charter).

On flights where smoking is not banned by law (e.g., charter flights), airlines must have a non-smoking section and must accommodate in that section every passenger who has complied with the airline's check-in deadline and who wishes to be seated there. On these flights, carriers are not required to have a smoking section. An airline is free to ban smoking on a particular flight, or on all of its flights.

None of the regulations described in this chapter apply to charter flights performed with small aircraft by on-demand air taxi operators.

Passengers with Disabilities

The Air Carrier Access Act and the DOT rule that implements it set out procedures designed to ensure that individuals with disabilities have the same opportunity as anyone else to enjoy a pleasant flight. For information about these provisions, see the DOT publication *New Horizons: Information for the Air Traveler With a Disability*.

Frequent-Traveler Programs

Most if not all major airlines participate in frequent-traveler plans. These programs allow you to earn free trips, upgrades (e.g., from Coach to First Class) or other awards based on how often you fly on that airline or its partner carriers. In most programs you can also earn credit by using specified hotels, rental car companies, credit cards, etc. It doesn't cost anything to join a program, and you

can enroll in the programs of any number of different airlines. However, you will want to determine which program best suits your needs before you accumulate a lot of miles. Here are some things to look at when selecting a frequent-traveler program.

- Does the airline fly where you're likely to want to go?
- Are there tie-ins with other carriers, especially those with international routes? Is some of the airline's service provided by commuter-carrier "partners"? In both cases, can you earn credits and use awards on those other airlines?
- How many miles (or trips) are required for particular awards?
- Is there a minimum award per flight (e.g., you are only flying 200 miles but the airline always awards at least 500)?
- Is there a deadline for using accumulated miles?
- Carefully examine the number and length of any "blackout periods" during which awards cannot be used. For example, on some carriers the Thanksgiving blackout may last a week.
- If you are planning a big trip involving air travel and are thinking about joining that airline's frequent-flyer program, enroll before you travel. Airlines usually won't credit mileage that was flown before you became a member.

After you join a program, there are other things that you should know:

- Airlines reserve the right to make changes to their programs, sometimes on short notice. The number of miles required for particular awards might be raised, requiring you to use your old mileage (i.e., your current balance) under the more restrictive new rules. The airline may cease service on a route that you were particularly interested in, or it may even stop serving the city you live in. The carrier may eliminate attractive frequent-flyer tie-ins with particular airlines or hotel chains.
- Cashing in your mileage frequently will limit your losses in case the carrier changes the rules, merges, or goes out of business. Accumulating a larger mileage balance will entitle you to bigger awards, however.
- Carriers often limit the number of seats on each flight for which frequent-flyer awards can be used. You may not be able to get reservations on your first- or second-choice dates or flights.
- Awards can often be issued in the name of immediate family members. However, if you sell or give an award to someone not named on the award or the travel document and the airline finds out, the recipient could have his or her ticket confiscated, and the carrier may penalize the program member's account balance.
- Ask the airline how mileage is registered; you will probably have to identify yourself as a program member when you book your flight or when you check in.
- Keep your ticket (or email confirmation) and your boarding passes until you receive a statement from the frequent-flyer program reflecting the correct mileage earnings for that trip. If a problem arises, get the names of the people you speak with and keep notes of your conversations.

Contract Terms

Throughout this booklet, we have tried to provide you general information about airline travel. It is important to realize, however, that each airline has specific rules that make up your contract of carriage. These rules may differ among carriers. They include provisions such as check-in deadlines, refund procedures, responsibility for delayed flights, and many other things.

Domestic Travel

For domestic travel, an airline may provide all of its contract terms on or with your ticket at the time you buy it. Some small "commuter" carriers use this system. Other airlines may elect to "incorporate terms by reference." This means that you are not given all the airline's rules with your ticket [The proof has a weird symbol here; it should be a dash] most of them are contained in a separate document which you can inspect on request or on the airline’s web site. If an airline elects to "incorporate by reference" it must provide conspicuous written notice with each ticket that: 1) it incorporates terms by reference, and 2) these terms may include liability limitations, claim-filing deadlines, check-in deadlines, and certain other key terms. The airline must also:

- Ensure that passengers can receive an explanation of key terms identified on the ticket from any location where the carrier's tickets are sold, including travel agencies;
- Make available for inspection the full text of its contract of carriage at each of its own airport and city ticket offices;
- Mail a free copy of the full text of its contract of carriage upon request.

DOT also requires most U.S.airlines to post their contracts of carriage on their web site, if they have one.

There are additional notice requirements for contract terms that affect your air fare. Airlines must provide a conspicuous written notice on or with the ticket concerning any "incorporated" contract terms that restrict refunds, impose monetary penalties, or permit the airline to raise the price after you've bought the ticket.

If an airline incorporates contract terms by reference and fails to provide you the required notice about a particular rule, you will not be bound by that rule. In addition, a DOT rule prohibits airlines from changing a term in your contract after you buy your ticket if the change will have a significant negative effect on you.

International Travel

Not all of the detailed requirements for disclosing domestic contract terms apply to international travel. Where they do not, the airline must keep a copy of its "tariff" rules at its airport and city ticket offices. On flights to or from the U.S., you have a right to examine these rules.

The most important point to remember, whether your travel is domestic or international, is that you should not be afraid to ask questions about a carrier's rules. You have a right to know the terms of your contract of carriage. It is in your best interest, as well as that of the airline, for you to ask in advance about any matters of uncertainty.

Travel Scams

Unlike most products, travel services usually have to be paid for before they are delivered. This creates opportunities for disreputable individuals and companies. Some travel packages turn out to be very different from what was presented or what the consumer expected. Some don't materialize at all! If you receive an offer by phone or mail for a free or extremely low-priced vacation trip to a popular destination (often Hawaii or Florida), there are a few things you should look for:

- Does the price seem too good to be true? If so, it probably is.
- Are you pressured to make an immediate decision?
- Is the carrier simply identified as "a major airline," or does the representative offer a collection of airlines without being able to say which one you will be on?
- Is the representative unable or unwilling to give you a street address for the company?
- Are you told you can't leave for at least two months? (The legal deadline for disputing a credit card charge is 60 days, and most scam artists know this.)

If you encounter any of these symptoms, proceed cautiously. Ask for written information to be sent to you; any legitimate travel company will be happy to oblige. If they don't have a brochure, ask for a day or two to think it over; most bona fide deals that are good today will still be good two days from now. If they say no to both requests, this probably isn't the trip for you. Some other advice:

- If you are told that you've won a free vacation, ask if you have to buy something else in order to get it. Some packages have promoted free air fare, as long as you buy expensive hotel arrangements. Others include a free hotel stay, but no air fare.
- If you are seriously considering the vacation offer and are confident you have established the full price you will pay, compare the offer to what you might obtain elsewhere. Frequently, the appeal of free air fare or free accommodations disguises the fact that the total price is still higher than that of a regular package tour.
- Get a confirmed departure date, in writing, before you pay anything. Eye skeptically any promises that an acceptable date will be arranged later. If the package involves standby or waitlist travel, or a reservation that can only be provided much later, ask if your payment is refundable if you want to cancel, and don't pay any money you can't afford to lose.
- If the destination is a beach resort, ask the seller how far the hotel is from the beach. Then ask the hotel.
- Determine the complete cost of the trip in dollars, including all service charges, taxes, processing fees, etc.
- If you decide to buy the trip after checking it out, paying by credit card gives you certain legal rights to pursue a chargeback (credit) if promised services aren't delivered.

For further advice, see "Other Sources of Information" at the end of this brochure for details on how to order the Federal Trade Commission's pamphlet Telemarketing Travel Fraud.

To Your Health

Flying is a routine activity for millions of Americans, and raises no health considerations for the great majority of them. However, there are certain things you can do to ensure that your flight is as comfortable as possible. Changes in pressure can temporarily block the Eustachian tube, causing your ears to 'pop' or to experience a sensation of fullness. To equalize the pressure, swallow frequently; chewing gum sometimes helps. Yawning is also effective. Avoid sleeping during descent; you may not swallow often enough to keep ahead of the pressure change.

Babies are especially troubled by these pressure changes during descent. Having them feed from a bottle or suck on a pacifier will

often provide relief. Avoid flying if you have recently had abdominal, eye or oral surgery, including a root canal. The pressure changes that occur during climb and descent can result in discomfort. If you have an upper respiratory or sinus infection, you may also experience discomfort resulting from pressure changes. Postpone your trip if possible. (Check to see if your fare has cancellation or change penalties.) A final tip on pressure changes: they cause your feet to swell. Try not to wear new or tight shoes while flying.

Alcohol and coffee both have a drying effect on the body. Airliner cabin air is relatively dry to begin with, and the combination can increase your chances of contracting a respiratory infection. If you wear contact lenses, the low cabin humidity and/or consumption of alcohol or coffee can reduce your tear volume, leading to discomfort if you don't blink often enough. Lens wearers should clean their lenses thoroughly before the flight, use lubricating eye drops during the flight, read in intervals, and take the lenses out if they nap. (This may not apply to extended wear lenses; consult your practitioner.) If you take prescription medications, bring enough to last through your trip. Take along a copy of the prescription, or your doctor's name and telephone number, in case the medication is lost or stolen. The medicine should be in the original prescription bottle in order to avoid questions at security or Customs inspections. Carry it in a pocket or a carry-on bag; don't pack it in a checked bag, in case the bag is lost.

You can minimize the effects of jet lag in several ways:

- Get several good nights' sleep before your trip.
- Try to take a flight that arrives at night, so you can go straight to bed.
- Sleep on the plane (although not during descent).
- During the flight do isometric exercises, eat lightly, and drink little or no alcohol.

A condition known as Deep Venous Thrombosis can occur in some people who don’t exercise their legs for several hours ? for example, during an airline flight. Consider walking up and down the aisle once or twice, and search the web for exercises that you can do at your seat to minimize the risk of developing this condition during a flight.

Try to use a rest room in the airport terminal before departure. On some flights the cabin crew begins beverage service shortly after the "Fasten Seat Belts" sign is turned off, and the serving cart may block access to the lavatories.

Airline Safety and Security

Air travel is so safe you'll probably never have to use any of the advice we're about to give you. But if you ever do need it, this information could save your life. Airline passengers usually take safety for granted when they board an airplane. They tune out the crew's pre-flight announcements or reach for a magazine instead of the cards that show how to open the emergency exit and what to do if the oxygen mask drops down. Because of this, people may be needlessly hurt or killed in accidents they could survive. Every time you board a plane, here are some things you should do:

- Carry-on bags must be properly stowed in overhead bins or under the seat in front of you. Be careful about what you put into the storage bins over your seat. Their doors may pop open during an accident or even a hard landing, spilling their contents. Also, passengers in aisle seats have been injured by heavy items falling out of these compartments when people are stowing or retrieving belongings at the beginning or end of a flight.
- As soon as you sit down, fasten and unfasten your seat belt a couple of times. Watch how it works. In an emergency you don't want to waste time fumbling with the buckle.
- Before take-off, there will be a briefing about safety procedures, pointing out emergency exits and explaining seat belts, life vests and oxygen masks. Listen carefully and if there's anything you don't understand ask the flight attendants for help.

The plastic card in the seat pocket in front of you will review some of the safety information announced by the flight attendant. Read it. It also tells you about emergency exits and how to find and use emergency equipment such as oxygen masks. As you're reading the card look for your closest emergency exit, and count the number of rows between yourself and this exit. Remember, the closest exit may be behind you. Have a second escape route planned in case the nearest exit is blocked. This is important because people sometimes head for the door they used to board the plane, usually in the front of the first class cabin. This wastes time and blocks the aisles. If the oxygen masks should drop, you must tug the plastic tube slightly to get the oxygen flowing. If you don't understand the instructions about how the mask works, ask a flight attendant to explain them to you.

When the plane is safely in the air, the pilot usually turns off the "fasten seat belt" sign. He or she usually suggests that passengers keep their belts buckled anyway during the flight in case the plane hits rough air. This is a good idea; there have been a number of instances of unexpected turbulence in which unbelted passengers were seriously injured and even killed when they were thrown about the cabin. Just as seat belts should always be worn in cars, in airplanes they should always be fastened when you are in your seat.

If you are ever in an aviation accident, you should remember these things:

- Stay calm.
- Listen to the crew members and do what they say. The cabin crew's most important job is to help you evacuate safely.
- Before you try to open any emergency exit yourself, look outside the window. If you see a fire outside the door, don't open it or the flames may spread into the cabin. Try to use your alternate escape route.
- Remember, smoke rises. So try to stay down if there's smoke in the cabin. Follow the track of emergency lights embedded in the floor; they lead to an exit. If you have a cloth, put it over your nose and mouth.

After an air accident, the National Transportation Safety Board always talks to survivors to try to learn why they were able to make it through safely. They've discovered that, as a rule, it does help to be prepared. Avoiding serious injury or surviving an air accident isn't just a matter of luck; it's also a matter of being informed and thinking ahead.

Are you one of those people who jumps up while the aircraft is still taxiing, gathers up coat, suitcase and briefcase, and gets ready to sprint? If so, resist the urge. Planes sometimes make sudden stops when they are taxiing to the airport gate, and passengers have been injured when they were thrown onto a seat back or the edge of a door of an overhead bin. Stay in your seat with your belt buckled until the plane comes to a complete halt and the 'fasten seat belt' sign is turned off.

Never smoke in airplane restrooms. Smoking was banned there after an accident killed 116 people in only 4 minutes, apparently because a careless smoker left a burning cigarette butt in the trash bin. There is a steep fine for disabling a lavatory smoke detector.

Security procedures are administered by the Transportation Security Administration, an agency of the Department of Homeland Security. For more information, go to www.tsa.gov and click "For Travelers." Note in particular the identification provisions, and restrictions concerning carry-on baggage (particularly the "3-1-1" procedure for liquids and gels in carry-on bags), and the list of prohibited items. At this writing, cabin baggage is generally limited to one carry-on bag plus one personal item (e.g. purse, briefcase, camera bag, laptop computer).

Complaining

DOT rules require U.S. airlines to provide information on how to file a complaint with the carrier. This information must appear on their web sites, on all e-ticket confirmations, and upon request at any of the airline's ticket counters or gates. When passengers comment on airline service, most airlines do listen. They track and analyze the complaints and compliments they receive and use the information to determine what the public wants and to identify problem areas that need attention. They also try to resolve individual complaints. A DOT rule requires that airlines acknowledge a written complaint within 30 days and send a substantive response within 60 days of receiving the complaint.

Like other businesses, airlines have a lot of discretion in how they respond to problems. While you do have certain rights as a passenger, your demands for compensation will probably be subject to negotiation and the kind of action you get often depends in large part on the way you go about complaining. Start with the airline. Before you contact DOT for help with an air travel problem, you should give the airline a chance to resolve it. As a rule, airlines have trouble-shooters at the airports (they're usually called Customer Service Representatives) who can take care of many problems on the spot. They can often arrange meals and hotel rooms for stranded passengers, write checks for denied boarding compensation, arrange luggage resolutions, and settle other routine claims or complaints

If you can't resolve the problem at the airport and want to file a complaint, it's best to write or email the airline's consumer office at its corporate headquarters. DOT requires most U.S. airlines to state on their web sites how and where complaints can be submitted. There may be a form on the airline's web site for this purpose. Take notes at the time the incident occurred and jot down the names of the carrier employees with whom you dealt. Keep all of your travel documents (ticket or confirmation, baggage check stubs, boarding pass, etc.) as well as receipts for any out-of-pocket expenses that were incurred as a result of the mishandling. Here are some helpful tips should you choose to write.

- If you send a letter, type it and, if at all possible, limit it to two pages.
- Include your daytime telephone number (with area code).
- No matter how angry you might be, keep your letter or email businesslike in tone and don't exaggerate what happened. If the complaint sounds very vehement or sarcastic, you might wait a day and then consider revising it.
- Describe what happened, and give dates, cities, and flight numbers or flight times.
- Where possible, include copies, never the originals, of tickets and receipts or other documents that can back up your claim.
- Include the names of any employees who were rude or made things worse, as well as anyone who might have been especially helpful.
- Don't clutter your complaint with a litany of petty gripes that can obscure what you're really angry about.
- Let the airline know if you've suffered any special inconvenience or monetary losses.
- Say just what you expect the carrier to do to make amends. An airline may offer to settle your claim with a check or some other kind of compensation, possibly free transportation. You might want a written apology from a rude employee or reimbursement for some loss you incurred ? but the airline needs to know what you want before it can decide what action to take.
- Be reasonable. If your demands are way out of line, you are rude or sarcastic, or you use vulgar language, at best your letter might earn you a polite apology and a place in the airline's crank files.

If you follow these guidelines, the airlines will probably treat your complaint seriously. Your letter will help them to determine what caused your problem, as well as to suggest actions the company can take to keep the same thing from happening to other people.

Contacting the Department of Transportation (DOT)

Complaints about airline service may be registered with DOT's Aviation Consumer Protection Division (ACPD). You can call, write or use our web-based complaint form.

You may call the ACPD 24 hours a day at 202-366-2220 (TTY 202-366-0511) to record your complaint. You may send us a letter at:

Aviation Consumer Protection Division, C-75
U.S. Department of Transportation
1200 New Jersey Ave, S.E.
Washington, D.C. 20590

To send us a complaint, comment or inquiry electronically, please use our web form at: /airconsumer/file-consumer-complaint

If you write, please be sure to include your address and a daytime telephone number, with area code. Complaints from consumers help us spot problem areas and trends in the airline industry. We use our complaint files to document the need for changes in DOT's consumer protection regulations and, where warranted, as the basis for enforcement action (i.e., where a serious breach of the law has occurred). In addition, every month we publish a report with information about the number of complaints we receive about each airline and what problems people are having. You can find this Air Travel Consumer Report on our web site. That publication also has statistics that the airlines file with us on flight delays, oversales and mishandled baggage.

If your complaint is about something you feel is a safety hazard, write to the Federal Aviation Administration at:

Federal Aviation Administration
Aviation Safety Hotline, AAI-3
800 Independence Avenue, SW
Washington, DC 20591

Or call 1-866-TELL-FAA (1-866-835-5322).

Questions or concerns about aviation security should be directed to the **Transportation Security Administration**:

Phone (toll-free): 1-866-289-9673

E-mail: TSA-ContactCenter@dhs.gov

Or write to:

Transportation Security Administration

601 South 12th Street
Arlington, VA 20598

Your Last Resort

If nothing else works, small claims court might be the best way for you to help yourself. Many localities have these courts to settle disputes involving relatively small amounts of money and to reduce the red tape and expense that people generally fear when they sue someone. An airline can generally be sued in small claims court in any jurisdiction where it operates flights or does business. You can usually get the details of how to use the small claims court in your community by contacting your city or county office of consumer affairs, or the clerk of the court. As a rule, small claims court costs are low, you don't need a lawyer, and the procedures are much less formal and intimidating than they are in most other types of courts. See the DOT publication *Tell It to the Judge*.

Last updated: Friday, October 4, 2019

Office of the Assistant Secretary for Research and Technology

Bureau of Transportation Statistics

Volpe Center

PRIORITIES

Safety

Innovation

Infrastructure

POLICIES, RIGHTS, AND LEGAL

USA.gov

Privacy Policy

FOIA

Budget and Performance

No FEAR Act

Ethics

Web Policies and Notices

Accessibility

This is **Exhibit "113"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

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Signature

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

ENFORCEMENT NOTICE REGARDING REFUNDS BY CARRIERS GIVEN THE UNPRECEDENTED IMPACT OF THE COVID-19 PUBLIC HEALTH EMERGENCY ON AIR TRAVEL

The U.S. Department of Transportation's Office of Aviation Enforcement and Proceedings (Aviation Enforcement Office), a unit within the Office of the General Counsel, is issuing this notice to remind the traveling public, and U.S. and foreign carriers, operating at least one aircraft having a seating capacity of 30 or more seats, that passengers should be refunded promptly when their scheduled flights are cancelled or significantly delayed. Airlines have long provided such refunds, including during periods when air travel has been disrupted on a large scale, such as the aftermath of the September 11, 2001 attacks, Hurricane Katrina, and presidentially declared natural disasters. Although the COVID-19 public health emergency has had an unprecedented impact on air travel, the airlines' obligation to refund passengers for cancelled or significantly delayed flights remains unchanged.

The Department is receiving an increasing number of complaints and inquiries from ticketed passengers, including many with non-refundable tickets, who describe having been denied refunds for flights that were cancelled or significantly delayed. In many of these cases, the passengers stated that the carrier informed them that they would receive vouchers or credits for future travel. But many airlines are dramatically reducing their travel schedules in the wake of the COVID-19 public health emergency. As a result, passengers are left with cancelled or significantly delayed flights and vouchers and credits for future travel that are not readily usable.

Carriers have a longstanding obligation to provide a prompt refund to a ticketed passenger when the carrier cancels the passenger's flight or makes a significant change in the flight schedule and the passenger chooses not to accept the alternative offered by the carrier.[1] The longstanding obligation of carriers to provide refunds for flights that carriers cancel or significantly delay does not cease when the flight disruptions are outside of the carrier's control (e.g., a result of government restrictions).[2] The focus is not on whether the flight disruptions are within or outside the carrier's

[1] *See* Enhancing Airline Passenger Protections, 76 Fed. Reg. 23110-01, at 23129 (Apr. 25, 2011) ("We reject . . . assertions that carriers are not required to refund a passenger's fare when a flight is cancelled if the carrier can accommodate the passenger with other transportation options after the cancellation. We find it to be manifestly unfair for a carrier to fail to provide the transportation contracted for and then to refuse to provide a refund if the passenger finds the offered rerouting unacceptable (e.g., greatly delayed or otherwise inconvenient) and he or she no longer wishes to travel.")

[2] U.S. Dept. of Transportation, Aviation Consumer Protection, Refunds, https://www.transportation.gov/individuals/aviation-consumer-protection/refunds (March 4, 2020) ("Am I Entitled to a Refund? When the airline is at fault: Passengers are often entitled to a refund of the ticket price and associated fees when the airline is at fault. . . . Cancelled Flight – A passenger is entitled to a refund if the airline cancelled a flight, regardless of the reason, and the passenger chooses not to be rebooked on a new flight on that airline. . . . Schedule Change/Significant Delay – A passenger is entitled to a refund if the airline made a significant schedule change and/or significantly delays a flight and the passenger chooses not to travel.").

control, but rather on the fact that the cancellation is through no fault of the passenger. [3] Accordingly, the Department continues to view any contract of carriage provision or airline policy that purports to deny refunds to passengers when the carrier cancels a flight, makes a significant schedule change, or significantly delays a flight to be a violation of the carriers' obligation that could subject the carrier to an enforcement action.[4]

In recognition of the fact that the COVID-19 public health emergency has had major impacts on the airline industry, the Aviation Enforcement Office will exercise its prosecutorial discretion and provide carriers an opportunity to become compliant before taking further action. Specifically, the Aviation Enforcement Office will refrain from pursuing an enforcement action against a carrier that provided passengers vouchers for future travel in lieu of refunds for cancelled or significantly delayed flights during the COVID-19 public health emergency so long as: (1) the carrier contacts, in a timely manner, the passengers provided vouchers for flights that the carrier cancelled or significantly delayed to notify those passengers that they have the option of a refund; (2) the carrier updates its refund policies and contract of carriage provisions to make clear that it provides refunds to passengers if the carrier cancels a flight or makes a significant schedule change; and (3) the carrier reviews with its personnel, including reservationists, ticket counter agents, refund personnel, and other customer service professionals, the circumstances under which refunds should be made.

The Aviation Enforcement Office will monitor airline policies and practices and take enforcement action as necessary.

Questions regarding this notice may be addressed to the Office of Aviation Enforcement and Proceedings (C-70), U.S. Department of Transportation, 1200 New Jersey Avenue, S.E., Washington, D.C. 20590.

By:

Blane A. Workie
Assistant General Counsel for
Aviation Enforcement and Proceedings

Dated: April 3, 2020

An electronic version of this document is available at http://www.dot.gov/airconsumer

[3] *Id.*

[4] *See* Enhancing Airline Passenger Protections, 76 Fed. Reg. 23110-01, at 23129 (Apr. 25, 2011) (*citing* July 15, 1996 Industry Letter which advises carriers that "applying . . . nonrefundability/penalty provisions in situations in which the change of flight time or travel date has been necessitated by carrier action or 'an act of god', e.g., where the carrier cancels a flight for weather or mechanical reasons . . . is grossly unfair and it violates 49 U.S.C. 41712, as would any contract of carriage or tariff provision mandating such a result" and putting carriers on notice that the Department "will aggressively pursue any cases of this type that come to our attention").

This is **Exhibit "114"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

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Signature

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

FREQUENTLY ASKED QUESTIONS REGARDING AIRLINE TICKET REFUNDS GIVEN THE UNPRECEDENTED IMPACT OF THE COVID-19 PUBLIC HEALTH EMERGENCY ON AIR TRAVEL

The U.S. Department of Transportation (Department) is continuing to receive a high volume of air travel service complaints and inquiries given the unprecedented impact of the Coronavirus Disease 2019 (COVID-19) public health emergency on air travel. In a typical month, the Department receives approximately 1,500 air travel service complaints and inquiries. However, in March 2020 and April 2020, more than 25,000 air travel service complaints and inquiries were filed,[1] many of which concern refunds.[2] Airlines and ticket agents have also requested guidance about their refund obligations.

The Department's Office of Aviation Enforcement and Proceedings (Aviation Enforcement Office), a unit within the Office of the General Counsel, is providing answers to some of the most common questions about refunds to help consumers understand their rights and to ensure airlines and ticket agents are complying with aviation consumer protection requirements. To the extent this notice includes guidance on how regulated entities may comply with existing regulations, it does not have the force and effect of law and is not meant to bind the regulated entities in any way. Regulated entities may rely on this document as a safeguard from Departmental enforcement as described herein.

1. What rights do passengers have if an airline cancels a flight or makes a significant schedule change? What is a "significant change" or "cancellation" requiring a refund?

As explained in the Department's Enforcement Notice issued on April 3, 2020, airlines have an obligation to provide a refund to a ticketed passenger when the carrier cancels or significantly changes the passenger's flight, and the passenger chooses not to accept an alternative offered by the carrier.[3] However, neither the term "significant change" nor "cancellation" is defined in regulation or statute. Based on the Aviation Enforcement Office's review of the refund policies and practices of U.S. and foreign air carriers, airlines define "significant change" and "cancellation" differently when fulfilling their obligation to provide refunds.

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[1] The Department will provide information about the number of air travel service complaints and inquiries received in March 2020 through its Air Travel Consumer Report (ATCR) to be issued later this month. The number of air travel service complaints received in April 2020 will be available in the ATCR issued in June 2020. The ATCR is normally released by the end of the second week of each month and is available at www.transportation.gov/individuals/aviation-consumer-protection/air-travel-consumer-reports.

[2] The monthly ATCR contains a table that displays the categories of complaints received, including a separate category for refund complaints. The refund complaint data for March 2020 will be available in the May 2020 ATCR, and the refund complaint data for April 2020 will be available in the June 2020 ATCR.

[3] Enforcement Notice Regarding Refunds by Carriers Given the Unprecedented Impact of the COVID-19 Public Health Emergency on Air Travel (April 3, 2020) at www.transportation.gov/airconsumer/enforcement_notice_refunds_apr_3_2020. *See also* 14 CFR § 259.5(b)(5), and Enhancing Airline Passenger Protections, 76 Fed. Reg. 23110-01, at 23129 (Apr. 25, 2011).

Because "cancellation" and "significant change" are not defined in the context of ticket refunds, airlines may develop reasonable interpretations of those terms.[4] However, the Aviation Enforcement Office expects carriers to honor those reasonable interpretations in implementing their refund obligations and will focus its enforcement actions on instances where a carrier has disregarded the requirement to offer refunds, failed to honor its refund policies, or where it is determined that the carrier's refund policies or practices are otherwise "unfair or deceptive" within the meaning of 49 U.S.C. § 41712.[5]

2. What rights do passengers have if they choose not to travel due to safety or health concerns related to the COVID-19 public health emergency?

Passengers who purchase a non-refundable ticket on a flight to, within, or from the United States that is still being operated without a significant change, but would like to change or cancel their reservation, are generally not entitled to a refund or a travel voucher for future use on the airline. This is true even if the passenger wishes to change or cancel due to concerns related to the COVID-19 public health emergency. Although not required, many airlines are providing travel credits or vouchers that can be used for future travel for those passengers electing to cancel their travel due to health or safety concerns related to COVID-19. In reviewing refund complaints against airlines, the Department will closely examine any allegation that an airline misled a passenger about the status of a flight to avoid having to offer a refund.

3. What rights do passengers have if they purchased their airline ticket from an online travel agency?

Ticket agents are required to make "proper" refunds when service cannot be performed as contracted on a flight to, within, or from the United States.[6] The Department interprets the requirement for ticket agents to provide "proper" refunds to include providing refunds in any instance when the following conditions are met: (i) an airline cancels or significantly changes a flight, (ii) an airline acknowledges that a consumer is entitled to a refund, and (iii) passenger funds are possessed by a ticket agent. In enforcing the requirement for ticket agents to make "proper" refunds, the Aviation Enforcement Office will focus on the totality of the circumstances.

4. May airlines and ticket agents retroactively apply new refund policies?

The Department interprets the statutory prohibition against unfair or deceptive practices to cover actions by airlines and ticket agents applying changes retroactively to their refund policies that affect consumers negatively. The refund policy in place at the time the passenger purchased the ticket is the policy that is applicable to that ticket. The Aviation Enforcement Office would consider the denial of refunds in contravention of the policies that were in effect at the time of the ticket purchase to be an unfair and deceptive practice.[7]

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[4] The Aviation Enforcement Office would consider a practice of retroactively applying a new definition of cancellation or significant change that disadvantages passengers who purchased tickets under a more generous cancellation or significant change definition to be unfair and deceptive.

[5] Under 49 USC § 41712, the Department is authorized to investigate and decide whether a U.S. air carrier, foreign air carrier, or ticket agent engaged in an unfair or deceptive practice in air transportation or the sale of air transportation. The Department is also authorized to issue orders to stop an unfair or deceptive practice after notice and opportunity for a hearing.

[6] *See* 14 CFR § 399.80(l), which states that a ticket agent's failure or refusal to make proper refunds promptly when service cannot be performed as contracted, or a ticket agent's representation that such refunds are obtainable only at some other point, constitutes an unfair or deceptive practice.

[7] The Department considers a practice to be unfair to consumers if it (1) causes or is likely to cause substantial injury to consumers, (2) cannot be reasonably avoided by consumers, and (3) is not outweighed by countervailing benefits to consumers or to competition. The Department considers a practice to be "deceptive" to consumers if it is likely to mislead a consumer, acting reasonably under the circumstances, with respect to a material matter.

5. May airlines or ticket agents offer credits or vouchers to consumers in lieu of refunds?

Airlines and ticket agents can offer consumers alternatives to a refund, such as credits or vouchers, so long as the option of a refund is also offered and clearly disclosed if the passenger is entitled to a refund. Further, any restrictions that apply to the credits and vouchers, such as the period in which credits must be used or any fees charged for using the credit, must be clearly disclosed to consumers. If an airline, by representation or omission, engages in conduct that is likely to mislead consumers about their right to a refund, or the value of a voucher or credit that is offered, the Aviation Enforcement Office would deem such conduct to be a deceptive practice.[8]

6. How quickly must airlines and ticket agents process refunds?

Airlines and ticket agents are required to make refunds promptly. For airlines, prompt is defined as being within 7 business days if a passenger paid by credit card, and within 20 days if a passenger paid by cash or check.[9] For ticket agents, prompt is not defined.[10] The Aviation Enforcement Office recognizes that, given the significant volume of refund requests resulting from the COVID-19 public health emergency, processing refunds may take longer than normal and will determine the timeliness of refund processing for ticket agents based on the totality of the circumstances, such as the volume of incoming refund requests and steps taken to address the increased volume. Also, the Aviation Enforcement Office will use its enforcement discretion and not take action against airlines for not processing refunds within the required timeframes if, under the totality of the circumstances, they are making good faith efforts to provide refunds in a timely manner.

7. What is the enforcement approach of the Aviation Enforcement Office?

Given the unprecedented impact of the COVID-19 public health emergency on the aviation industry, the Aviation Enforcement Office intends to exercise its enforcement discretion and first provide carriers and ticket agents an opportunity to become compliant. The Aviation Enforcement Office will continue to monitor airline policies and practices and take enforcement action as necessary and appropriate.

Questions regarding this notice may be addressed to the Office of Aviation Enforcement and Proceedings (C-70), U.S. Department of Transportation, 1200 New Jersey Avenue, S.E., Washington, D.C. 20590. You may also send questions regarding this notice by email at C70Notice@dot.gov.

By:

Blane A. Workie
Assistant General Counsel for
Aviation Enforcement and Proceedings

Dated: May 12, 2020

An electronic version of this document is available at http://www.dot.gov/airconsumer.

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[8] *Id.*

[9] 14 CFR § 259.5(b)(5).

[10] The Department has initiated a rulemaking that would, among other things, require large travel agencies to adopt certain minimum customer service standards that provide a consistent level of consumer protection regardless of where consumers purchase airline tickets and related air transportation services. See www.reginfo.gov/public/do/eAgendaViewRule?pubId=201910&RIN=2105-AE57.

This is **Exhibit "115"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

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Signature

CANADIAN TRANSPORTATION AGENCY

Home

FAQs: Statement on Vouchers

The CTA has been asked a number of questions about its Statement on Vouchers. Below are answers to the most frequently-posed questions.

What is the purpose of the Statement on Vouchers?

The Statement on Vouchers, although not a binding decision, offers suggestions to airlines and passengers in the context of a once-in-a-century pandemic, global collapse of air travel, and mass cancellation of flights for reasons outside the control of airlines.

This unprecedented situation created a serious risk that passengers would simply end up out-of-pocket for the cost of cancelled flights. That risk was exacerbated by the liquidity challenges faced by airlines as passenger and flight volumes plummeted.

For flights cancelled for reasons beyond airlines' control, the *Air Passenger Protection Regulations*, which are based on legislative authorities, require that airlines ensure passengers can complete their itineraries but do not obligate airlines to include refund provisions in their tariffs.

The statement indicated that the use of vouchers could be a reasonable approach in the extraordinary circumstances resulting from the COVID-19 pandemic, when flights are cancelled for reasons outside airlines' control and passengers have no prospect of completing their itineraries. Vouchers for future travel can help protect passengers from losing the full value of their flights, and improve the odds that over the longer term, consumer choice and diverse service offerings -- including from small and medium-sized airlines -- will remain in Canada's air transportation sector. Of course, as noted in the statement, passengers can still file a complaint with the CTA and each case will be decided on its merits.

Why did the CTA talk about vouchers when US and EU regulators have said that airlines should give refunds?

The American and European legislative frameworks set a minimum obligation for airlines to issue refunds when flights are cancelled for reasons outside their control. Canada's doesn't. That's the reason for the difference in the statements.

Some jurisdictions have relaxed the application or enforcement of requirements related to refunds in light of the impacts of the COVID-19 pandemic, including European countries that have approved the issuance of vouchers instead of refunds.

Do I have to accept a voucher if I think I'm owed a refund?

The Statement on Vouchers suggests what could be an appropriate approach in extraordinary circumstances, but doesn't affect airlines' obligations or passengers' rights.

Some airline tariffs might not provide for a refund and others might include *force majeure* exceptions to

refund provisions.

If you think that you're entitled to a refund for a flight that was cancelled for reasons related to the COVID-19 pandemic and you don't want to accept a voucher, you can ask the airline for a refund.

Sometimes, the airline may offer a voucher that can be converted to a refund if the voucher hasn't been used by the end of its validity period. This practice reflects the liquidity challenges airlines are facing as a result of the collapse of air travel while giving passengers added protection in the event that they ultimately can't take advantage of the voucher.

If you think you are entitled to a refund and the airline refuses to provide one or offers a voucher with conditions you don't want to accept, you can file a complaint with the CTA, which will determine if the airline complied with the terms of its tariff. Each case will be decided on its merits.

Date modified:
2020-04-22

This is **Exhibit "116"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

_____

Signature

Abou-Hamad, Betricia

From: Keenan, Michael <michael.keenan@tc.gc.ca>
Sent: Wednesday, April 22, 2020 9:48 AM
To: Roy, Marc; Butcher, Amy; McCloskey, Shane; Hill, Miled
Subject: FW: FAQs
Attachments: FAQs on statement.docx; ATT00001.htm

From: Hanson, Lawrence
Sent: Tuesday, April 21, 2020 7:21 PM
To: Keenan, Michael <michael.keenan@tc.gc.ca>
Cc: Stacey, Colin <colin.stacey@tc.gc.ca>; Millette, Vincent <vincent.millette@tc.gc.ca>; Little, Jennifer <jennifer.little@tc.gc.ca>; Maheu, Caroline <Caroline.Maheu@tc.gc.ca>
Subject: Fwd: FAQs

FYI
Sent from my iPhone

Begin forwarded message:

> **From:** Marcia Jones <Marcia.Jones@otc-cta.gc.ca>
> **Date:** April 21, 2020 at 7:07:14 PM EDT
> **To:** "Hanson, Lawrence" <lawrence.hanson@tc.gc.ca>
> **Subject: FAQs**
>
> Hi Lawrence,
> I just wanted to give you a heads up the CTA intends to post these tomorrow. The Chair's office is also advising MINO about these.
>
> The intent is to diffuse legal risk head on, in relation to litigation that has been launched by a consumer advocate. The FAQs also clarify some misperceptions.
>
> Please let me know if you have any questions or wish to discuss.
>
> Thanks,
> Marcia

FAQs

The CTA has been asked a number of questions about its Statement on Vouchers. Below are answers to the most frequently-posed questions.

What is the purpose of the Statement on Vouchers?

The Statement on Vouchers, although not a binding decision, offers suggestions to airlines and passengers in the context of a once-in-a-century pandemic, global collapse of air travel, and cancellation of many flights for reasons outside the control of airlines.

This unprecedented situation created a serious risk that passengers would simply end up out-of-pocket for the cost of cancelled flights That risk was exacerbated by the liquidity challenges faced by airlines as passenger and flight volumes plummeted.

The Air Passenger Protection Regulations, which were developed based on legislative authorities, do not require airlines to include refund provisions in their tariffs for flights that are cancelled for reasons outside their control. Given this, the statement indicated that the use of vouchers could be a reasonable approach in these extraordinary circumstances when flights are cancelled for reasons outside of an airline's control. Vouchers for future travel can help protect passengers from losing the full value of their flights, and improve the odds that over the longer term, consumer choice and diverse service offerings -- including from small and medium-sized airlines -- will remain in Canada's air transportation sector. Of course, as noted in the Statement, passengers can file a complaint with the CTA and each case will be heard on its merits.

Why did the CTA talk about vouchers when US and EU regulators have said that airlines should give refunds?

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Do I have to accept a voucher if I think I'm owed a refund?

The Statement on Vouchers suggests what could be an appropriate approach in extraordinary circumstances, but doesn't affect airlines' obligations or passengers' rights.

Some airline tariffs might not provide for a refund and others might include *force majeure* exceptions to refund provisions.

If you think that you're entitled to a refund for a flight that was cancelled for reasons related to the COVID-19 pandemic and you don't want to accept a voucher, you can ask the airline for a refund.

Sometimes, the airline may offer a voucher that can be converted to a refund if the voucher hasn't been used by the end of its validity period. This practice reflects the liquidity challenges airlines are facing as a result of the collapse of air travel while giving passengers added protection in the event that they ultimately can't take advantage of the voucher.

If the airline refuses to provide a refund and you think you are entitled to one, or offers a voucher with conditions you don't want to accept, you can file a complaint with the CTA, which will determine if the airline complied with the terms of its tariff. Each case will be determined on its merits.

This is **Exhibit "117"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

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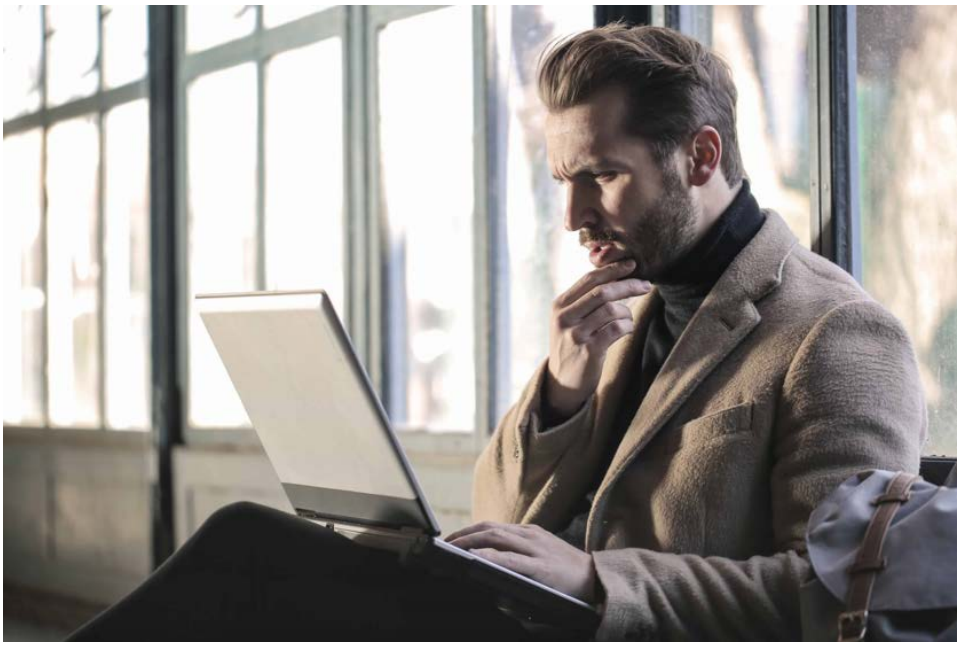
Signature

The CTA Says Their Previous Statement On Refunds Essentially Meant Nothing



Andrew D'Amours (https://flytrippers.com/author/andrew/) - April 24, 2020 - Canada News (https://flytrippers.com/category/travel-news/canada-news/) / Travel News (https://flytrippers.com/category/travel-news/) - 1 Comment (https://flytrippers.com/cta-statement-refunds-update/#comments)

Andrew D'Amours (https://flytrippers.com/author/andrew/)
Flytrippers cofounder

Earlier this month, the Canadian Transportation Agency (CTA) opted to be complicit in the airlines' ploy to give you travel credits (instead of the refunds you are entitled to if they cancel your flight). But exactly as we predicted after they made their first statement, the CTA just put out a new page saying that the first statement essentially meant nothing.

Confused?

Many of you are… for everything that relates to refunds. That's normal, it's complicated. We'll make this new information as simple as it can be.

And we'll soon clarify things with new and improved content with clear bullet point step-by-steps on how to get a refund, **so you can do it yourself**. And at our readers' request, we'll offer an affordable assistance service **to do everything for you** (which will be risk-free: no refund = no payment) if you don't have time or don't want to do it.

You can sign up to get the free content first or add your name to our waitlist (https://forms.gle/Edr6vwJU6fEHNZt79) for the service.

Contents [hide]

Refunds Basics

If you already know everything, you can skip this quick overview, but I want to **very clearly summarize** the key facts about refunds, and clarify what many people seem to not be sure about (based on the messages we receive).

The fact is, **DESPITE WHAT AIRLINES TELL YOU**, you are 100% entitled to full cash refunds for:

- flights **to or from** the United States (on ANY airline)
- **return** flights from the European Union (on ANY airline)
- flights **to or from** the European Union (on EU airlines)

There is NO debate or grey area.

Just because the airline is telling you that they don't have to refund… does not mean it's true. It's absolutely not. Obviously you shouldn't just take their word for it.

Warning: we are not saying it will necessarily be easy or quick (and we never did). We are saying that the regulation is clear and yes you are owed a refund.

Of course, airlines don't want to pay, it's a huge cost… and they know most passengers will just give up. **They're counting on it.** That's exactly why we'll offer that risk-free service (https://forms.gle/Edr6vwJU6fEHNZt79) to do the work for you if a travel credit is not what you want.

By the way, I've said it before, I love airlines (https://flytrippers.com/refund-not-airline-credit-coronavirus/) and I completely understand that it's a horrible situation for them… but it's horrible for travelers too. If airlines want help in the form of taxpayer money, that's

one thing. But that has absolutely nothing to do with the money that belongs to travelers who didn't get the service they paid for.

You should also be eligible for full refunds for all other flights from Canada too… but our government wanted you to be in the business of providing interest-free loans to multi-billion corporations, whether you want to or not. Despite previous rulings and general contractual laws.

That is what our infographic told you on April 6th:

See what we wrote about Canadian airlines, apart from US & EU flights? "**For now** only travel credits, but wait as long as you can: this **might change**."

Here we are (sort of).

CTA Situation Reminder

While Canada says it is a leader in consumer protection, here's what happened.

European Union: they published a statement reaffirming that the "no matter the reason" in the "refunds are owed when a flight is canceled by the airline no matter the reason" regulation actually meant "no matter the reason". What a shocking concept, I know.

USA: The US Department of Transportation came out with a very strongly-worded statement reaffirming the right to refunds for US flights, on US and foreign carriers. Yes, even the US, the country that everyone assumes always sides with corporations.

Canada? The CTA put out an unsigned, vague statement legitimizing travel credits and allowing airlines to confiscate the money travelers are entitled to. Despite their own previous rulings saying that refunds are owed even when the reason for cancelation is outside the airline's control.

And it didn't get better.

The CTA Backtracks (But Not Really)

We told you that the CTA's initial "statement on vouchers (https://flytrippers.com/canadian-airlines-get-the-right-to-offer-credits-instead-of-the-refund-you-should-get/)" was not binding and that it was not a decision. That's why our headline was that airlines had gotten the "right" to give vouchers (with rights in quotation marks—because it wasn't really the case) when most gave the impression that you should give up and let airlines keep your money.

(We also told you it seemed like a way to buy some time for airlines, so we told you to wait before doing anything if your flight was not imminent, since there's absolutely no point in canceling in advance anyway (https://flytrippers.com/canceling-trips-covid-19/)).

So now the CTA has confirmed that **it wasn't a binding decision**. But that's pretty much it, sadly. Back to square one…

Some media outlets shared this new information with headlines about the CTA changing its position. It's not quite a change… the CTA is just saying that the first position meant nothing. But nothing has "changed".

The CTA has just added a new page on its website: "FAQs: Statement on Vouchers (https://otc-cta.gc.ca/eng/faqs-statement-vouchers)".

Heres' the first FAQ (emphasis is mine):

> *What is the purpose of the Statement on Vouchers?*
>
> *The Statement on Vouchers, although not a binding decision,* ***offers suggestions*** *to airlines and passengers*

Great right? When you need to get your money back (many have lost income due to the crisis), the public organization whose mandate includes "providing consumer protection for air passengers" is just casually giving "suggestions" instead of doing what its US and EU counterparts have done weeks ago (telling airlines to refund you).

Here is another FAQ (emphasis is mine):

> *Do I have to accept a voucher if I think I'm owed a refund?*
>
> *The Statement on Vouchers suggests what could be an appropriate approach in extraordinary circumstances, but* ***doesn't affect airlines' obligations or passengers' rights***

The CTA's initial statement "doesn't affect" anything, so in other words, it meant nothing. And instead of now saying something that means something, or fully retracting their initial statement that essentially meant nothing, now they're publishing FAQs to tell you that it essentially meant nothing.

That's it.

They are using the excuse that our regulation is not as explicit as it is elsewhere, but we debunked that in great detail in the first post (https://flytrippers.com/canadian-airlines-get-the-right-to-offer-credits-instead-of-the-refund-you-should-get/#rulings).

Finally, here's what the CTA says at the very very end, in the 5th and last paragraph of the last FAQ (bolding is mine):

> *If you think you are entitled to a refund and the airline refuses to provide one or offers a voucher with conditions you don't want to accept,* ***you can file a complaint with the CTA,*** *which will determine if the airline complied with the terms of its tariff. Each case will be decided on its merits.*

Their initial statement never even mentioned the word "complaint".

The bottom line is that the CTA had a second chance to do the right thing and simply require refunds. But they instead opted for another page full of meaningless mumbo jumbo to lull consumers, and they made sure it looked just as complicated. It seems clear that they are strongly hoping that most just get discouraged and give up.

But we will be here to make sure that's not the case, and won't let this go. Personally, I find it almost insulting. We expect this from airlines and their lobby, but it's embarrassing from the agency that is supposed to also defend travelers.

What This Means For You

In short, I want to be very upfront: it's still **not** a slam-dunk, unlike for US and EU flights, unfortunately.

For those two jurisdictions, it's very clear that you are entitled to a refund. For all other destinations, Canadian airlines will definitely keep telling you that they won't give you a refund (in fact, they are still even saying that for EU and US flights even though it's an even more blatant lie).

Yes, this new information by the CTA confirms the first statement meant nothing… but we already knew that. And it sadly doesn't clarify things as well as the EU & US governments did.

The CTA could literally not have taken a more passive position. Thanks for nothing.

They happen to refer to each airline's "tariff" (the "contract of carriage"), again letting airlines decide what protection passengers get from airlines.

(Disappointing? Yes. Surprising? No. The Canadian government was so proud to launch passenger compensation regulation in 2019 (https://flytrippers.com/airline-passenger-compensation-in-canada/), but those rules are much better for airlines that they are for passengers. Not to mention they don't even explicitly include the right to a refund, unlike in the US and EU.)

Some common complaints about airlines are exaggerated… but we can all agree that airlines are not going to put the passenger's interest before theirs in a time of crisis. Which is exactly why a time of crisis is when we need the CTA to defend passengers more than ever.

We are nothing against these huge corporations. But yes, it's still possible to stand your ground.

Since this new information was just published, we'll **look more into this** and put together an up-to-date step-by-step on **how to get a refund for this particular case** as well. We'll have that ready for you very quickly. There are also petitions and class actions being organized around Canada. We'll tell you about those too.

Sign up to be the first to get updates and all our refund tips

Summary

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The CTA just published a page to confirm that their initial statement on refunds was not a binding decision, that it was just a suggestion, and that it affects nothing. In other words, this update is just to let you know that the first statement essentially meant nothing. And now it's still not clear at all, because we're back to square one.

What do you think of this update? Tell us in the comments below.

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Cover image: *confused man (photo credit: Bruce Mars)*

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(https://flytrippers.com/author/andrew/)

Andrew D'Amours (Https://Flytrippers.com/Author/Andrew/)

Andrew is the co-founder of Flytrippers. He is passionate about traveling the world but also, as a former management consultant, about the travel industry itself. He shares his experiences to help you save money on travel. As a very cost-conscious traveler, he loves finding deals and getting free travel thanks to travel rewards points... to help him visit every country in the world (current count: 64/193 Countries, 47/50 US States & 9/10 Canadian Provinces).

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This Mediterranean Island Will Pay For Your Healthcare And Hotel If You Are Infected (https://flytrippers.com/cyprus-pay-for-travelers-healthcare-coronavirus/)

June 1, 2020

(https://flytrippers.com/how-canadians-travel-united-states/)

How Canadians can travel to the United State (entry rules for all nationalities) (https://flytrippers.com/how-canadians-travel-united-states/)

May 1, 2023

THIS POST HAS ONE COMMENT

Maryam APRIL 26, 2020 REPLY

This is very informative thank you. I have booked a trip to Portugal for July for a reunion that won't happen anymore and am hoping to get a refund. I would like to know how to go about it. I know that the other travellers won't make it either at a later date. So a credit won't be a satisfactory solution.

Leave a Reply

962

Your comment here...

Name (required) Email (required) Website

Notify me of follow-up comments by email.

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This is **Exhibit "118"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

_____

Signature

Ricky Zhang • April 24, 2020

Refunds on Cancelled Flights: What's the Latest in Canada?

One developing story that I've had my eyes on in the midst of the pandemic is the response of Canada's airlines to customers who have been affected by flights that have been cancelled by the airline.

As I wrote about a few weeks ago, while customers are entitled to a full refund to the original form of payment under the law, the airlines have banded together to offer only travel credits that are valid for the next 24 months instead.

Spearheaded by Dr. Gabor Lukacs of the Air Passenger Rights organization, Canadian travellers had no choice but to stand up for their rights, both by resorting to credit card chargebacks to obtain their rightful refunds and by drawing an increasing amount of media attention to the matter.

So, how have things played out over the last few weeks?

Canada's Airlines Have Not Covered Themselves in Glory

Longtime readers will know that I do my best to take a balanced view of any contentious issue, giving due consideration to both sides' perspectives and looking at the bigger picture whenever possible.

And when it first became apparent that Canada's airlines were refusing to provide refunds, I was keen to remind readers that they were doing so as a matter of survival: put simply, if they paid out refunds to everyone who was due a refund, they would run out of cash and liquidate, and there wouldn't be any airlines left.

However, I've been thoroughly disappointed by how our airlines have acted throughout the whole ordeal, and while I'd still encourage travellers to think about the long-term well-being of the travel industry before initiating chargebacks, I must say that my sympathy for the airlines is dwindling day by day the longer that their anti-consumer policies drag on.

We've seen many other airlines around the world working with customers by offering creative incentives to accept travel vouchers, such as a 15% or 20% increase in the value of the vouchers compared to the original ticket, or perhaps a token amount of frequent flyer miles in exchange for the inconvenience of accepting vouchers.

On the other hand, Canada's airlines have been steadfast in their position, even going to such lengths as unilaterally issuing travel vouchers without communicating with customers at all, as well as misleading customers by citing a "Statement on Vouchers" by the Canadian Transport Agency (CTA) as though it was a legally binding ruling, which it is not.

What exactly is this "Statement on Vouchers", you ask?

The Canadian Transport Agency Posts a Statement...

On March 25, the CTA posted the Statement on Vouchers on its website, **which you can read here**. The relevant section, which comments on the airlines' practice of providing 24-month travel vouchers in lieu of refunds, reads as follows:

> *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).*

Needless to say, it was highly disappointing to see the CTA siding with the airlines on this one.

Don't forget: the Department of Transportation in the USA were quick to remind the airlines of their responsibilities under the law to provide refunds. Considering the unprecedented situation, the DOT was happy to give airlines some leeway in terms of the *timing* of the refunds, but still clarified that the refunds must be issued eventually, and that 24-month travel vouchers were certainly not a reasonable alternative if the customer did not accept them.

Meanwhile, the European Union issued a similar directive, clarifying that "in case of cancellations, the transport provider must reimburse or re-route the passengers," and rejecting airlines' calls for an exemption to the legislation in light of the circumstances.

And yet, here we are in Canada, where the CTA's Statement on Vouchers, despite being merely an impulsive, unattributed statement with no legal grounding, nevertheless gave readers the *illusion* of a legally binding ruling. It therefore served no purpose other than to give the airlines further ammunition to reinforce their unlawful position when dealing with customers.

As soon as the statement was published on March 25, airlines began referencing it when telling customers that they were not entitled to refunds, even though the statement was by no means a legally binding ruling. Similarly, and perhaps even more worryingly, we've seen travel insurance providers cite the statement and deny insurance claims on the basis that airlines providing travel vouchers are taking an "appropriate approach" as per the CTA.

(Having said that, most instances of credit card chargeback claims seem to be grounded in the law rather than the Statement of Vouchers, which is at least good news.)

For an agency with a **self-proclaimed commitment** to "ensuring effective monitoring and enforcement of industry compliance with legislative and regulatory provisions", the CTA's stance on vouchers is laughable to say the least.

...But Is Forced to Backtrack

Thankfully, Canadian travellers did not put up with the CTA's efforts to mislead the public. Quite incredibly, the **Air Passenger Rights** organization swiftly issued a cease-and-desist letter to the CTA, which was then **expedited by the Federal Court of Appeal**.

Feeling the heat, the CTA has since clarified its statement in its April 22 release titled **"FAQs: Statement on Vouchers"**, in which it says very little of actual value, but at least clearly backs away from its original position; perhaps the most noteworthy snippet is the CTA conceding that the original Statement on Vouchers was "not a binding decision".

However, further portions of the CTA's FAQs continue to mislead, such as falsely citing "European countries that have approved the issuance of vouchers instead of refunds", as well as these paragraphs under the title **"Do I have to accept a voucher if I think I'm owed a refund?"**:

> *If you think that you're entitled to a refund for a flight that was cancelled for reasons related to the COVID-19 pandemic and you don't want to accept a voucher, you can ask the airline for a refund.*
>
> *Sometimes, the airline may offer a voucher that can be converted to a refund if the voucher hasn't been used by the end of its validity period. This practice reflects the liquidity challenges airlines are facing as a result of the collapse of air travel while giving passengers added protection in the event that they ultimately can't take advantage of the voucher.*
>
> *If you think you are entitled to a refund and the airline refuses to provide one or offers a voucher with conditions you don't want to accept, you can file a complaint with the CTA, which will determine if the airline complied with the terms of its tariff. Each case will be decided on its merits.*

Telling customers that "you can ask the airline for a refund", when the airlines have spent the past month boldly denying customers' refund requests, is willful ignorance at best.

And inviting customers to "file a complaint with the CTA" if they aren't satisfied... well, it shouldn't take a genius to figure out what the likely outcome of such a complaint would be, given the CTA's clear and obvious bias in favour of the airlines, would it?

It's quite telling that the CTA makes no reference to the single most effective channel for claiming the full refund that you're legally entitled to, which is to **file a credit card chargeback for services not delivered**.

While there were initially a few reports that credit card companies were refusing to initiate chargebacks related to air travel (perhaps due to being overwhelmed by the volume of requests), most instances in the past few weeks have worked out in favour of the customer, with the credit card company crediting the amount back to the traveller's credit card while the dispute is being assessed.

Of course, it's still too early to say how the airlines are responding to credit card chargebacks, as merchants generally have 45 days to respond with evidence on their side.

We'll therefore continue to mark this story as "developing", although there are early signs that, through a combination of making use of the consumer protection measures at their disposal and the relentless advocacy by **Air Passenger Rights**, Canadian travellers are slowly turning the tide against our airlines' unlawful policies regarding refunds on cancelled flights.

Once again, my sincere thanks and admiration go out to Dr. Gabor Lukacs for his tireless work, and I'd encourage you to join the **Air Passenger Rights Facebook group** if you're seeking help with getting a refund of your own, as well as to leave a comment below if you've gone through the experience of pursuing a refund so that your fellow passengers may benefit from it.

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Refunds on Cancelled Flights

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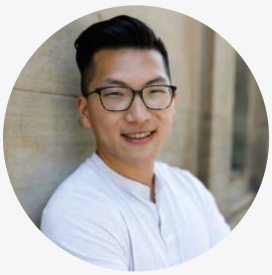
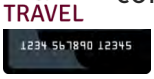
Have a question? Just ask.



Ricky Zhang
Ricky's love for travelling and learning more about the world is unbounded. He's on a mission to document and understand every square inch of the globe, and travelling on points will be an essential tool along his journey.

Top Offers

Business Platinum Card from American Express
100,000 MR points



90,000 Aeroplan points

American Express Platinum Card

90,000 MR points

TD® Aeroplan® Visa Infinite Privilege* Card

115,000 Aeroplan points†

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Recent Discussion

Unfortunately, Westjet has essentially stopped flying to Europe from Canadian airports east of Calgary. After accumulating about 1000 Westjet dollars they are unusable. Can't even use them on Air France's...

Ron • 20 hours ago

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No so long ago I could regularly book transocean business class on Aeroplan from Vancouver with no problem. But that was then. Since the dynamic pricing model was introduced it...

Bob • 2 days ago

Upcoming Changes to MBNA Alaska Airlines Mastercards

Still no word on really any partnership with AA. If there was an existing relationship, it would have been marketed right at the bat. I dont want to spend $120...

Mike • 2 days ago

Amex Membership Rewards Cards: 25% Points Back on Redemptions

Thanks the work you guys do!

Der • 2 days ago

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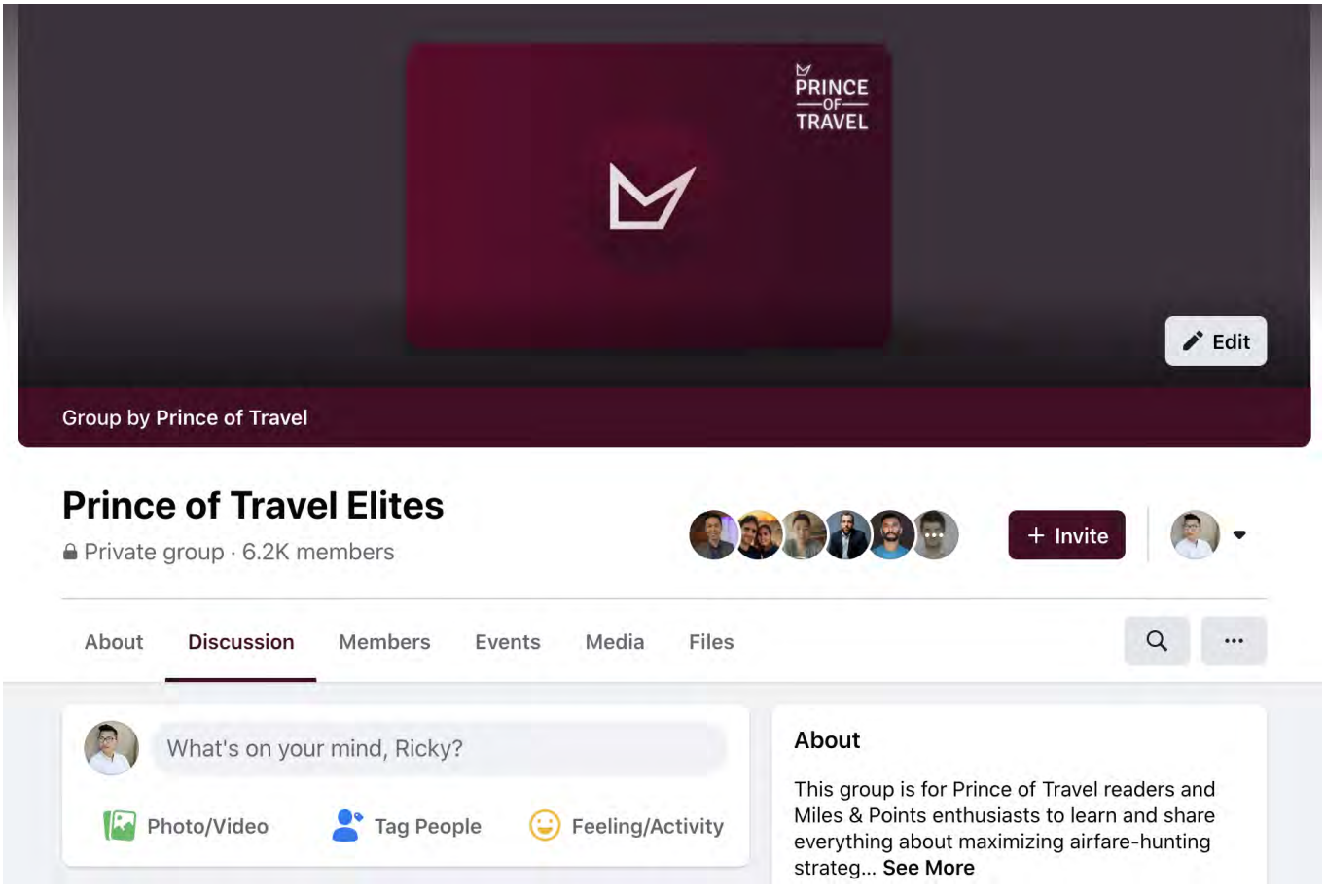
has there ever been an amex transfer to flying blue for Canadian mr amex holders?

Prince of Travel Elites



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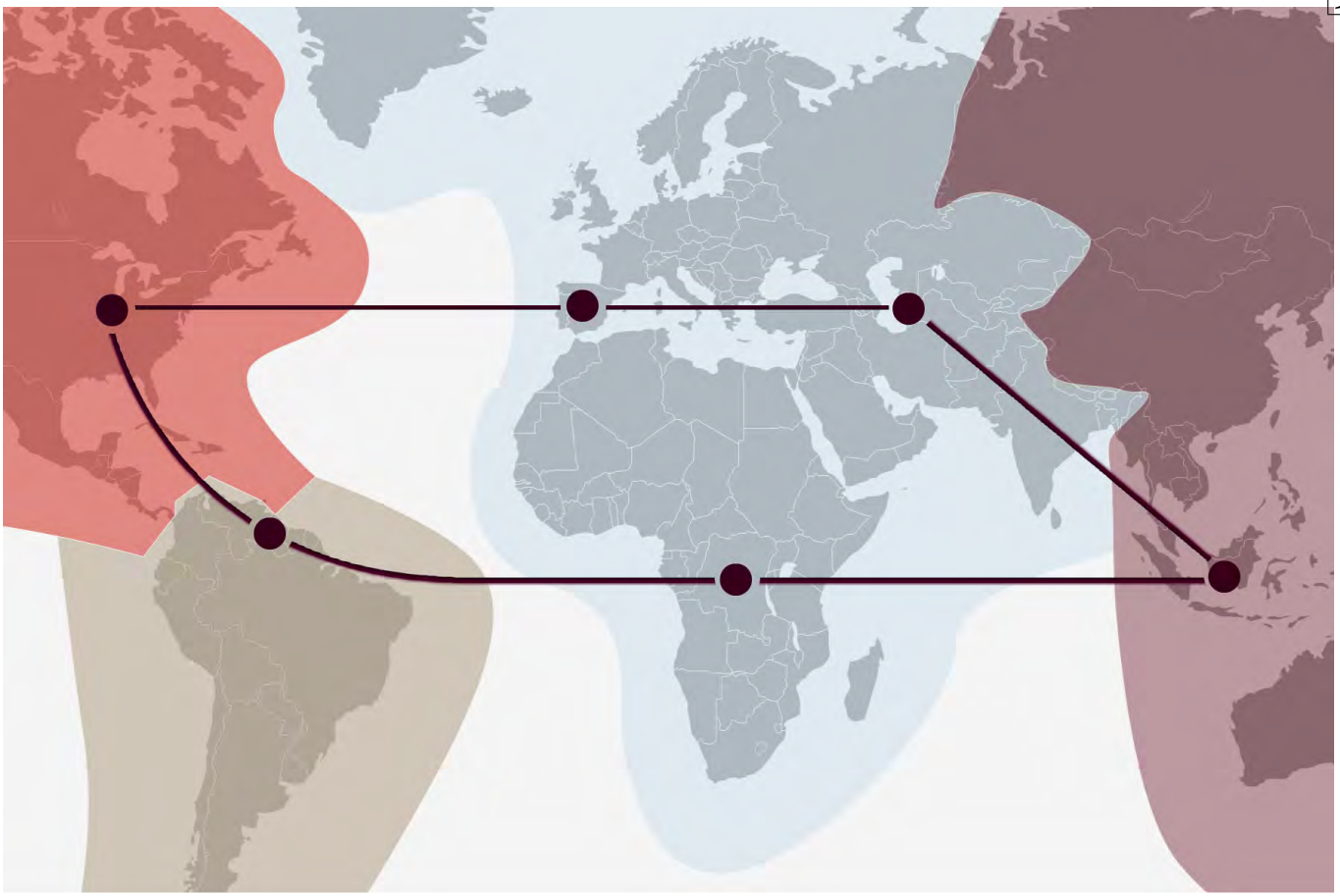

This is **Exhibit "119"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

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Signature

CANADIAN TRANSPORTATION AGENCY

Home

Statement on Vouchers

This non-binding statement on vouchers was issued on March 25, 2020, in the face of unprecedented and extraordinary circumstances impacting domestic and international air travel. Because the law does not require airlines to include refund provisions in their tariffs for flights that are cancelled for reasons beyond their control, there was a real risk that many passengers would end up getting nothing for cancelled flights. This statement was intended to help ensure that didn't happen.

This statement changes nothing with respect to airline obligations and passenger rights under individual airline tariffs. Any passenger who believes they're owed a refund under the relevant tariff and hasn't received one can file a complaint with us. All complaints are dealt with on their merits.

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.

FAQs: Statement on Vouchers

The CTA has been asked a number of questions about its Statement on Vouchers. Below are answers to the most frequently-posed questions.

What is the purpose of the Statement on Vouchers?

The Statement on Vouchers, although not a binding decision, offers suggestions to airlines and passengers in the context of a once-in-a-century pandemic, global collapse of air travel, and mass cancellation of flights for reasons outside the control of airlines.

This unprecedented situation created a serious risk that passengers would simply end up out-of-pocket for the cost of cancelled flights. That risk was exacerbated by the liquidity challenges faced by airlines as passenger and flight volumes plummeted.

For flights cancelled for reasons beyond airlines' control, the *Air Passenger Protection Regulations*, which are based on legislative authorities, require that airlines ensure passengers can complete their itineraries but do not obligate airlines to include refund provisions in their tariffs.

The statement indicated that the use of vouchers could be a reasonable approach in the extraordinary circumstances resulting from the COVID-19 pandemic, when flights are cancelled for reasons outside airlines' control and passengers have no prospect of completing their itineraries. Vouchers for future travel can help protect passengers from losing the full value of their flights, and improve the odds that over the longer term, consumer choice and diverse service offerings -- including from small and medium-sized airlines -- will remain in Canada's air transportation sector. Of course, as noted in the statement, passengers can still file a complaint with the CTA and each case will be decided on its merits.

Why did the CTA talk about vouchers when US and EU regulators have said that airlines should give refunds?

The American and European legislative frameworks set a minimum obligation for airlines to issue refunds when flights are cancelled for reasons outside their control. Canada's doesn't. That's the reason for the difference in the statements.

Some jurisdictions have relaxed the application or enforcement of requirements related to refunds in light of the impacts of the COVID-19 pandemic, including European countries that have approved the issuance of vouchers instead of refunds.

Do I have to accept a voucher if I think I'm owed a refund?

The Statement on Vouchers suggests what could be an appropriate approach in extraordinary circumstances, but doesn't affect airlines' obligations or passengers' rights.

Some airline tariffs might not provide for a refund and others might include force majeure exceptions to refund provisions.

If you think that you're entitled to a refund for a flight that was cancelled for reasons related to the COVID-19 pandemic and you don't want to accept a voucher, you can ask the airline for a refund.

Sometimes, the airline may offer a voucher that can be converted to a refund if the voucher hasn't been used by the end of its validity period. This practice reflects the liquidity challenges airlines are facing as a result of the collapse of air travel while giving passengers added protection in the event that they ultimately can't take advantage of the voucher.

If you think you are entitled to a refund and the airline refuses to provide one or offers a voucher with conditions you don't want to accept, you can file a complaint with the CTA, which will determine if the airline complied with the terms of its tariff. Each case will be decided on its merits.

Date modified:

2020-03-25

This is **Exhibit "120"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

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Signature

979

CSD OUT

The following information will be included on the electronic submission to MasterCard.

ARN	[redacted]
Cardholder Number	
Chargeback Reference Number	
Amount	9365.48
Sender Memo	See Merchant Response
IPM	2700

[redacted]

DISPUTE RESPONSE - R

Merchant #: 82036670016 [redacted] Reason Code: 53 Amount: 9365.48

___ Accept dispute: By selecting this action, you are accepting **FULL** financial liability for this dispute.
___ Credit Issued: Credit Date (MM/DD/CCYY): __/__/___ Credit Amount: _____

Check all conditions that apply to your response and include supporting documentation as required by the Issuer.Please ensure the case number is written in the upper right hand corner of each page.

___ Copy of a Signed and/or Electronically captured sales slip
___ Copy of a Signed cancellation policy or order form
___ Copy of a Signed order form
___ AVS of Y or M and SIGNED proof of delivery to AVS confirmed address
___ Signed rental agreement or Hotel/Motel folio
___ Copy of the Recurring billing agreement
___ T & E Documentation showing loyalty transactions related to this purchase
___ T & E – Documentation showing subsequent purchases made throughout the service period
___ Proof that the ticket was received for passenger transport
___ Proof the name on the flight manifest matches the Cardholder name on purchased itinerary
___ Proof of CVC2 in lieu of imprint
___ Proof of authorization
___ Proof of Verified by Visa, MasterCard Secure Code, AMEX Safe Key, or Discover Protect Buy
_x_ Other Documentation (Please Describe): PAX ARE ELIGIBLE FOR CREDIT

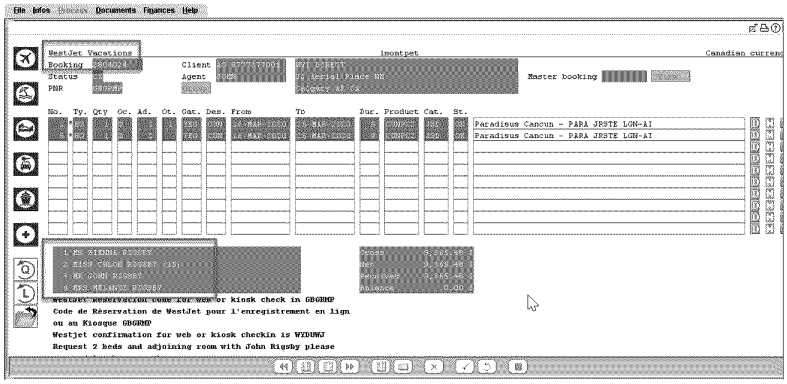
Merchant Comments

WestJet Vacations bookings are non-refundable. Due to the current situation with COVID-19, exceptions are being made to return the full cost of cancelled tickets to the customers in the form of WestJet Dollars, valid for 24 months from the date of issue. However, all tickets are still non-refundable. The customer is entitiled to receive a credit in the amount of 9365 WestJet Dollars, valid for 24 months. According to the Canadian Transportation Agency, a future travel credit or Airline Dollars is an acceptable form of refund during this global crisis. https://otc-cta.gc.ca/eng/statement-vouchers SN

CB387844525

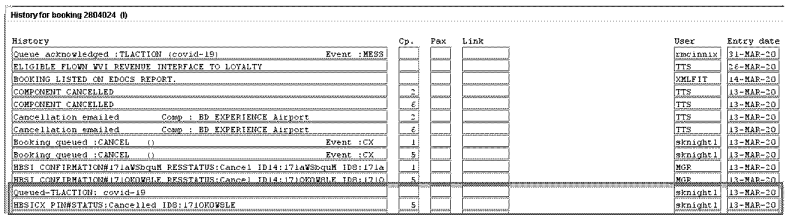
COVID-19 FLEXIBLE CHANGE/CANCEL POLICY AVAILABLE.

This transaction is associated with a WestJet Vacations package for the RIGSBY family to travel from Edmonton to Cancun from March 16 – 25, 2020.



Pax	Last name	First name	Middle name	Title	G	Telephone	Age	Birthdate	Traveller number
1	RIGSBY	SIENNA		MS	F	(250)719-3541		24-APR-1999	
2	RIGSBY	CHLOE		MISS	F	(250)719-3541	15	08-SEP-2004	
3	RIGSBY	JOHN		MR	M	(250)719-3541		05-DEC-1974	603015060
4	RIGSBY	MELANIE		MRS	F	(250)719-3541		07-JUL-1970	

Due to the COVID-19 pandemic, this reservation was cancelled on March 13, 2020.


History for booking 2604024 (I)

History	Cp.	Pax	Link	User	Entry date
Queue acknowledged :TLACTION (covid-19) Event :MESS				rmcinnis	31-MAR-20
ELIGIBLE FLOWN WVI REVENUE INTERFACE TO LOYALTY				TTS	26-MAR-20
BOOKING LISTED ON EDOCS REPORT.				XMLFIT	14-MAR-20
COMPONENT CANCELLED	2			TTS	13-MAR-20
COMPONENT CANCELLED	6			TTS	13-MAR-20
Cancellation emailed Comp : BD EXPERIENCE Airport	2			TTS	13-MAR-20
Cancellation emailed Comp : BD EXPERIENCE Airport	6			TTS	13-MAR-20
Booking queued :CANCEL () Event :CX	1			sknight1	13-MAR-20
Booking queued :CANCEL () Event :CX	5			sknight1	13-MAR-20
HBSI CONFIRMATION#171aWSbquM RESSTATUS:Cancel ID14:171aWSbquM ID8:171a	1			MGR	13-MAR-20
HBSI CONFIRMATION#171OKOWSLE RESSTATUS:Cancel ID14:171OKOWSLE ID8:171O	5			MGR	13-MAR-20
Queued-TLACTION: covid-19				sknight1	13-MAR-20
HBSICX PIN#STATUS:Cancelled ID8:171OKOWSLE	5			sknight1	13-MAR-20

Due to the COVID-19 pandemic, WestJet Vacations implemented a flexible change and cancel policy for existing bookings.

CB387844525

Flexible change and cancel policy for existing WestJet Vacations bookings

For vacation packages booked prior to March 3rd for travel in April, May or June 2020:

- $0 one-time fee waiver for changes or cancellations
- Value of cancelled vacations will be returned in the form of WestJet Dollars, valid for 24 months from the date of issue
- If you change your vacation, the difference in price will apply if the new package is higher value

Please contact us to change or cancel your flight. If you initially booked through a third party, please contact your travel agent directly.

Note:

- Changes or cancellations more than 24 hours from purchase, will be returned as WestJet dollars, valid for 24 months from date of issue.
- Policy does not apply to Group bookings.
- March and April, no hotel restrictions.
- Policy cannot be applied to packages with the following hotels in May: Disney, Universal, Hard Rock Resorts, Playa Resorts, Atlantis, Sandals Resorts, Beaches Resorts, and Grand Pineapple Resorts.

After your $0 one-time change, if you cancel your booking:

- more than 45 days prior to departure, there will be a $250 CAD cancellation fee per person with the balance refunded to Westjet dollars.
- 44-22 days prior to departure, there will be a 50% cancel fee per person with the balance refunded to Westjet dollars.
- within 21 days prior to departure will be a full forfeit.
- These terms and conditions apply to Economy, Premium and Business cabin bookings.

After your $0 one-time change, any additional change must be made at least 21 days prior to departure, for a $100 CAD change fee per person plus any difference in package price (if new package price is lower the amount is forfeited)

https://www.westjet.com/en-ca/travel-info/advisories#coronavirus

WestJet Vacations bookings are non-refundable. Due to the current situation with COVID-19, exceptions are being made to return the full cost of cancelled tickets to the customers in the form of WestJet Dollars, valid for 24 months from the date of issue. However, all tickets are still non-refundable.

The customer is entitiled to receive a credit in the amount of 9365 WestJet Dollars, valid for 24 months.

According to the Canadian Transportation Agency, a future travel credit or Airline Dollars is an acceptable form of refund during this global crisis.

https://otc-cta.gc.ca/eng/statement-vouchers

CB387844525

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.

Share this page

Date modified: 2020-03-25

The customer is encouraged to contact their travel agency or WestJet Vacations at their earliest convenience to set up their credit.

WestJet believes refunding with travel credits or WestJet Dollars is an appropriate and responsible approach in extraordinary circumstances such as the COVID-19 crisis. WestJet has consistently provided our guests with options when their travel has been impacted by the COVID-19 crisis. WestJet's policy is in line with the Canadian Transportation Agency's guidelines.

There are no exceptions at this time. Therefore, a refund to the original form of payment is not due.

May 5, 2020

To Whom It May Concern,

I am writing you today regarding the chargeback you processed related to WestJet Vacations booking 2802024 for the Rigsby family.

Based on the Canadian Government's recommendations to help stop the spread of COVID-19, WestJet made critical decisions to suspend our transborder and international flights through May 4. These decisions were made in the best interest of our country, our guests and our employees. As a result of the coronavirus COVID-19 situation we implemented a non-refundable cancellation policy, whereby flight refunds will be returned as a Travel Bank credit, valid for 24 months, and vacation refunds will be returned as WestJet dollars, also valid for 24 months.

Not only is this policy in line with other tour operators experiencing similar repercussions, but recently the Canadian Transportation Agency (CTA) released a statement which supports the manner in which Canadian airlines are addressing the mass flight cancellations taking place. They indicate that credits for future travel are an acceptable form of refund as long as the credit is available for a reasonable amount of time, and they have stated 24 months is considered reasonable. We are following their guidelines and their statement on this situation can be found on the following page of their website, https://otc-cta.gc.ca/eng/statement-vouchers.

We have already received, and processed, thousands of cancellations. Where we have been provided WestJet Rewards account numbers, we have deposited the ***full value of the trip*** to either a travel bank (for air only itineraries), or a WestJet Dollars account (for WestJet Vacations package bookings), which of course will be available for 2 years. **For guests who do not have a WestJet Rewards account, we have requested that they create one so we can provide them this same reimbursement.** We understand some guests may prefer a different form of refund, however in order to be fair to everyone who finds themselves in this same situation, we cannot make exceptions for some and not to others.

In this case, and given the circumstances, we kindly request you reverse the chargeback so that we can provide this guest the same resolution that all other guests have received, and accepted. Upon receiving the guest's WestJet Rewards account number, we will in good faith, provide them the value of their trip in a credit available to them for 24 months.

Thank you for your cooperation and understanding.

Sabrina #5041
Manager, Payment Fraud Operations
WESTJET Love Where You're Going

Canada-U.S. Border Restrictions

On March 21, 2020, the Government of Canada implemented a restriction on all non-essential travel at the Canada-U.S. border. Currently, this restriction has been extended until May 21, 2020.

https://www.canada.ca/en/public-health/services/diseases/2019-novel-coronavirus-infection/latest-travel-health-advice.html#_Canada-U.S._border_restrictions_1

Canada-U.S. border restrictions

As of April 22, 2020, the 30-day restriction on all non-essential (discretionary) travel at the Canada-U.S. border that was implemented on March 21, 2020, was extended for an additional 30 days until May 21, 2020. Examples of non-essential travel include:

- tourism
- recreation
- entertainment

If you are healthy and must cross the border for work or other essential (non-discretionary) purposes, you may continue to do so. Some examples of essential travel purposes are:

- work and study
- critical infrastructure support
- economic services and supply chains
- shopping for essential goods, such as:
  - medication
  - items necessary for the health and safety of an individual or family
- health, immediate medical care, safety and security

Some persons working in the health care field are considered exempt from the border prohibition. This is the case as long as they do not provide direct care for people over 65 years of age within the first 14 days of their entry into Canada.

Official Global Travel Advisory

As per the Government of Canada, there is an advisory to avoid ALL non-essential travel outside of Canada until futher notice.

https://travel.gc.ca/travelling/advisories#wb-cont

Government of Canada | Gouvernement du Canada

Français

Search Travel.gc.ca

MENU

Home > Travel > Travel abroad

Official Global Travel Advisory

Avoid non-essential travel outside of Canada until further notice.

As foreign governments implement strict travel restrictions and as fewer international transportation options are available, you may have difficulty returning to Canada or may have to remain abroad for an indeterminate period.

If you are outside of Canada:

- you may have difficulty obtaining essential products and services
- you may face strict movement restrictions and quarantines
- your insurance may not cover your travel or medical expenses
- we may have limited capacity to offer you consular services.

If you are currently outside Canada or you are returning home, see COVID-19 safety and security advice for Canadians abroad.

If you need financial help to return to Canada, see COVID-19: Financial help for Canadians outside Canada.

WestJet's Position on the COVID-19 Pandemic

On March 22, 2020, WestJet annouced the suspension of commerical operations for ALL transborder and international flights. Currently, there are no mandatory restrictions on domestic flights within Canada.

https://www.westjet.com/en-ca/travel-info/coronavirus

Coronavirus | COVID 19

Recently we announced the suspension of our commercial operations for all transborder (United States, including Hawaii) and international (Europe, Mexico, Caribbean, Central America) flights as of Sunday, March 22.

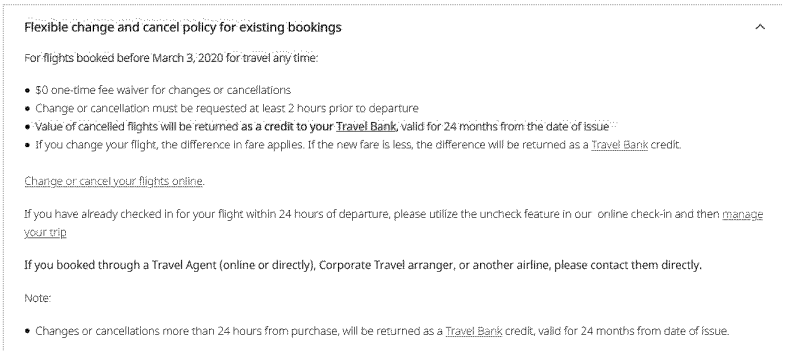
Whether we are flying or not, we are always here for our guests. During this downtime, we will be doing everything we can to accommodate your changing travel needs. We will also continue to ensure our aircraft meet the highest safety and health standards. We are ready to fly when you are.

Since the situation with Coronavirus (COVID-19) is evolving day by day, we have implemented a flexible change policy so you can adjust your travel plans without worry.

WestJet implemented a flexible Change/Cancel policy for all existing and new bookings.

https://www.westjet.com/en-ca/travel-info/advisories#coronavirus

For ALL flights booked before March 3, 2020 for travel any time, the value of cancelled flights will be returned as a WestJet credit, valid for 24 months from the date of issue.



Flexible change and cancel policy for existing bookings

For flights booked before March 3, 2020 for travel any time:

- $0 one-time fee waiver for changes or cancellations
- Change or cancellation must be requested at least 2 hours prior to departure
- Value of cancelled flights will be returned as a credit to your Travel Bank, valid for 24 months from the date of issue
- If you change your flight, the difference in fare applies. If the new fare is less, the difference will be returned as a Travel Bank credit.

Change or cancel your flights online.

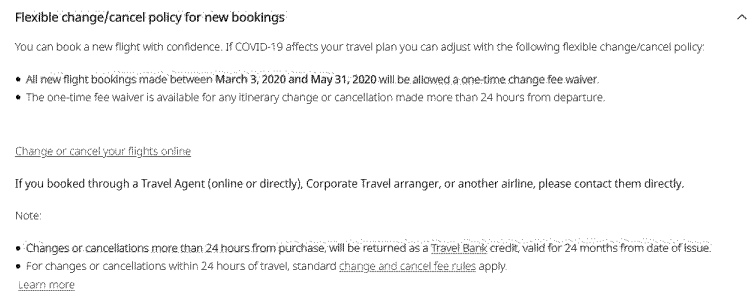
If you have already checked in for your flight within 24 hours of departure, please utilize the uncheck feature in our online check-in and then manage your trip

If you booked through a Travel Agent (online or directly), Corporate Travel arranger, or another airline, please contact them directly.

Note:

- Changes or cancellations more than 24 hours from purchase, will be returned as a Travel Bank credit, valid for 24 months from date of issue.

All new flight bookings made after March 3, 2020 may be cancelled and returned as a WestJet credit, valid for 24 months from the date of issue.



Flexible change/cancel policy for new bookings

You can book a new flight with confidence. If COVID-19 affects your travel plan you can adjust with the following flexible change/cancel policy:

- All new flight bookings made between March 3, 2020 and May 31, 2020 will be allowed a one-time change fee waiver.
- The one-time fee waiver is available for any itinerary change or cancellation made more than 24 hours from departure.

Change or cancel your flights online

If you booked through a Travel Agent (online or directly), Corporate Travel arranger, or another airline, please contact them directly.

Note:

- Changes or cancellations more than 24 hours from purchase, will be returned as a Travel Bank credit, valid for 24 months from date of issue.
- For changes or cancellations within 24 hours of travel, standard change and cancel fee rules apply

Learn more

The decision to issue a WestJet credit instead of a refund to the original form of payment is in accordance with the Canadian Transportation Agency's guidelines.

https://otc-cta.gc.ca/eng/statement-vouchers

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.

Share this page

Date modified: 2020-03-25

This is **Exhibit "121"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

_____

Signature

Servus CU
PO Box 30495
Tampa, FL 33630-3495
1-800-600-5249, FAX 1-800-253-1220

Account #: [redacted]
2nd Account #:
Claim Number: [redacted]

990

MADDISON R TOPPE
[redacted]

06/19/2020

Dear MADDISON R TOPPE:

Thank you for your recent inquiry regarding the transaction(s) noted on the last page of this letter.

We have completed our investigation of the dispute which included a thorough review of all applicable transaction details as well as the documents that may have been received by you or the merchant. Additionally, we have exercised all investigation and resolution options available to us through the Dispute Resolution Process.

Due to the nature of the dispute, we are required to obtain additional information and/or documentation to pursue a chargeback. We previously requested this information from you but, as of this date, we have not received it. See the attached letter copy showing this request. Based on the information we have available, we have concluded that the transaction is valid.

You were previously issued a conditional credit. Due to the above listed reason, we must reapply the $800.00 charge to your account. The debit will be included in your balance and will be due for payment as reflected on your next statement.

We regret that we are unable to offer additional assistance. If you have not done so already, you may wish to contact the merchant to attempt to resolve this dispute directly with them. Please retain a copy of this letter and all documentation relative to your claim for your records. If you have any additional questions please contact us and reference your claim number. We appreciate the opportunity to be of service.

[redacted]

You have the right to request a copy of any document(s) that we relied upon in making our determination. Upon your request, we shall promptly provide a copy of the document(s).

991

Sincerely,
Chargeback Services

[redacted]

TXN Date	Merchant Name	TXN Amount	Reference Number	TXN ID
02/24/2020	WESTJET	$800.00	55503800056004034282586	221657249
02/27/2020	WESTJET	$749.79	55503800059004032277031	221657254

[redacted]

Servus CU
PO Box 30495
Tampa, FL 33630-3495
1-800-600-5249, FAX 1-800-253-1220

Account #: XXXXXXXXXXXX9394
2nd Account #:
Claim Number: D2010501672

993

MADDISON R TOPPE
[redacted]

06/02/2020

Dear MADDISON R TOPPE:

Thank you for your recent inquiry regarding the transaction(s) noted on the last page of this letter.

You received provisional credit for this transaction in the amount of $749.79.

The merchant has provided information concerning your claim: The merchant has provided information where they believe no error has occurred. Please carefully review the attached documents the merchant has provided. The merchant has stated a refund should not be granted due to the agreement, however has provided a credit voucher valid for up to two years. Does this resolve your dispute? Were you aware of the merchant's policy? If not, please provide any policies described initially at the time of purchase, concerning refunds, cancellations, or other policies described. Also, if you have been in recent contact with the merchant, please include correspondence between you and the merchant, including dates/attempted dates of contact with specific merchant responses. Please provide proof of your cancellation including the method and the date of your cancellation, as well as the credit slip showing you are due a refund.

1. Please notify us if you have concerns with the information provided by the merchant. If you have additional documentation that supports your claim, please provide it with your response. You may contact us at the phone number listed above or notify us in writing by mail or fax. Please use a copy of this letter as your coversheet if notifying by mail or fax.

2. If you agree that this is a valid charge, please notify our office referencing your claim

[redacted]

number by 06/12/2020, at 1-800-600-5249 to confirm the charge.

If a response is not received by 06/12/2020, we will conclude our investigation and make a decision on your claim based on the information that we currently have available.

Please retain a copy of this letter and all documentation relative to your claim for your records. If you have any additional questions, please contact us and reference your claim number. We appreciate the opportunity to be of service.

Sincerely,
Chargeback Services

TXN Date	Merchant Name	TXN Amount	Reference Number	TXN ID
02/24/2020	WESTJET	$800.00	55503800056004034282586	221657249
02/27/2020	WESTJET	$749.79	55503800059004032277031	221657254

[redacted]

DISPUTE RESPONSE - R

Merchant #: 82036670024 Case #: 387984347 Reason Code: 53 Amount: 749.79

___ Accept dispute: By selecting this action, you are accepting **FULL** financial liability for this dispute.
___ Credit Issued: Credit Date (MM/DD/CCYY): __/__/____ Credit Amount: _____

Check all conditions that apply to your response and include supporting documentation as required by the Issuer.Please ensure the case number is written in the upper right hand corner of each page.

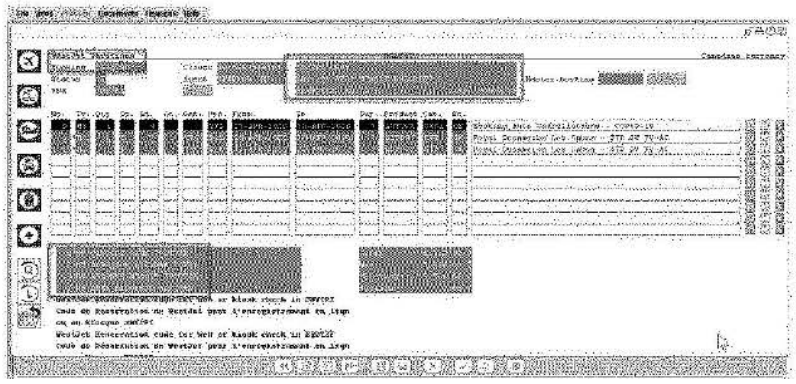
___ Copy of a Signed and/or Electronically captured sales slip
___ Copy of a Signed cancellation policy or order form
___ Copy of a Signed order form
___ AVS of Y or M and SIGNED proof of delivery to AVS confirmed address
___ Signed rental agreement or Hotel/Motel folio
___ Copy of the Recurring billing agreement
___ T & E Documentation showing loyalty transactions related to this purchase
___ T & E – Documentation showing subsequent purchases made throughout the service period
___ Proof that the ticket was received for passenger transport
___ Proof the name on the flight manifest matches the Cardholder name on purchased itinerary
___ Proof of CVC2 in lieu of imprint
___ Proof of authorization
___ Proof of Verified by Visa, MasterCard Secure Code, AMEX Safe Key, or Discover Protect Buy
_x_ Other Documentation (Please Describe): PAX IS ELIGIBLE FOR CREDIT

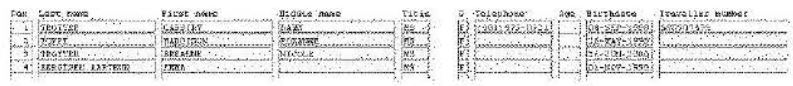
Merchant Comments
WestJet Vacations bookings are non-refundable. Due to the current situation with COVID-19, exceptions are being made to return the full cost of cancelled tickets to the customers in the form of WestJet Dollars, valid for 24 months from the date of issue. However, all tickets are still non-refundable. The customer is entitled to receive a credit for the full value of the amount paid in the form of WestJet Dollars, valid for 24 months. According to the Canadian Transportation Agency, a future travel credit or Airline Dollars is an acceptable form of refund during this global crisis. https://otc-cta.gc.ca/eng/statement-vouchers

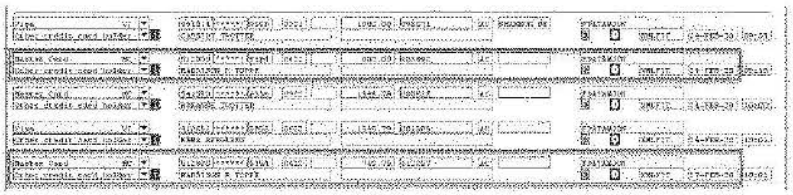
CB387984347

COVID-19 FLEXIBLE CHANGE/CANCEL POLICY AVAILABLE.

This transaction is associated with a WestJet Vacations package for 4 passengers, including Ms. Maddison Toppe to travel from Calgary to San Jose del Cabo from April 23 – 30, 2020.



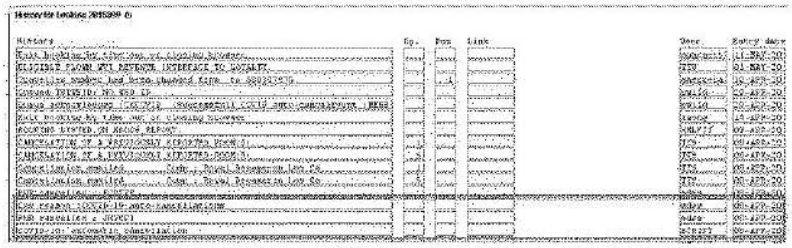




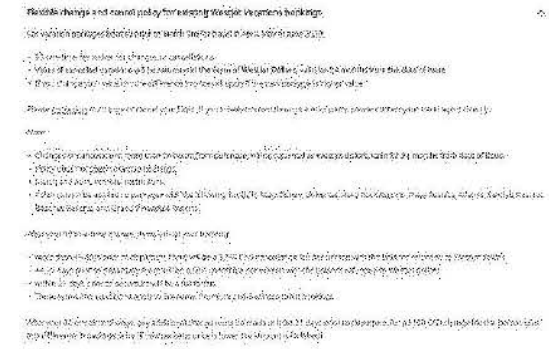
The reservation was made through a travel agency, TRAVEL ONLY.

Due to the COVID-19 pandemic, this reservation was cancelled on April 8, 2020.

CB387984347



Due to the COVID-19 pandemic, WestJet Vacations implemented a flexible change and cancel policy for existing bookings.



https://www.westjet.com/en-ca/travel-info/advisories#coronavirus

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The customer is entitled to receive a credit for the full value of the amount paid in the form of WestJet Dollars, valid for 24 months.

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https://otc-cta.gc.ca/eng/statement-vouchers

CB387984347

Statement on Vouchers

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

Share this page

Date modified: 2020-03-25

The customer is encouraged to contact their travel agency or WestJet Vacations at their earliest convenience to set up their credit.

WestJet believes refunding with travel credits or WestJet Dollars is an appropriate and responsible approach in extraordinary circumstances such as the COVID-19 crisis. WestJet has consistently provided our guests with options when their travel has been impacted by the COVID-19 crisis. WestJet's policy is in line with the Canadian Transportation Agency's guidelines.

There are no exceptions at this time. Therefore, a refund to the original form of payment is not due.

1000

WESTJET

May 14, 2020

To Whom It May Concern,

I am writing you today regarding the chargeback you processed related to Ms. Maddison Toppe's WestJet Vacations booking [redacted]

Based on the Canadian Government's recommendations to help stop the spread of COVID-19, WestJet made critical decisions to suspend our transborder and international flights through May 4. These decisions were made in the best interest of our country, our guests and our employees. As a result of the coronavirus COVID-19 situation we implemented a non-refundable cancellation policy, whereby flight refunds will be returned as a Travel Bank credit, valid for 24 months, and vacation refunds will be returned as WestJet dollars, also valid for 24 months.

Not only is this policy in line with other tour operators experiencing similar repercussions, but recently the Canadian Transportation Agency (CTA) released a statement which supports the manner in which Canadian airlines are addressing the mass flight cancellations taking place. They indicate that credits for future travel are an acceptable form of refund as long as the credit is available for a reasonable amount of time, and they have stated 24 months is considered reasonable. We are following their guidelines and their statement on this situation can be found on the following page of their website, https://otc-cta.gc.ca/eng/statement-vouchers.

We have already received, and processed, thousands of cancellations. Where we have been provided WestJet Rewards account numbers, we have deposited the ***full value of the trip*** to either a travel bank (for air only itineraries), or a WestJet Dollars account (for WestJet Vacations package bookings), which of course will be available for 2 years. **For guests who do not have a WestJet Rewards account, we have requested that they create one so we can provide them this same reimbursement.** We understand some guests may prefer a different form of refund, however in order to be fair to everyone who finds themselves in this same situation, we cannot make exceptions for some and not to others.

In this case, and given the circumstances, we kindly request you reverse the chargeback so that we can provide this guest the same resolution that all other guests have received, and accepted. Upon receiving the guest's WestJet Rewards account number, we will in good faith, provide them the value of their trip in a credit available to them for 24 months.

Thank you for your cooperation and understanding.

Sabrina #5041
Manager, Payment Fraud Operations
WESTJET Love Where You're Going

This is **Exhibit "122"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

_____

Signature

FINANCIAL

1002

2020-06-13

Case Number: [redacted]

*0000057

BYRON THORBURN

[redacted]

Re: Credit Card account number ending in 1857

Dear BYRON THORBURN,

This letter is in response to your inquiry, received 2020-04-21, and regarding your request for an investigation of the transaction listed below.

Case Amount	Merchant Name	Transaction Date
4,570.00	WESTJET Q19	2020-01-09

As part of the investigation regarding the disputed transaction mentioned above the merchant has responded in an attempt to resolve your inquiry. Please review the attached information and determine if you now agree that the charge is valid.

If you do not agree, further supporting documentation is required from you. Please provide a letter negating the merchant's rebuttal; the letter must be signed and dated, as per the MasterCard Worldwide rules that we are required to follow. Please keep copies of the documentation that you are sending, along with fax confirmation, or registered mail/courier tracking number.

It is very important that your valid supporting documentation be received prior to 2020-06-21 in order for us to proceed with your dispute. If it is not received by the date stated, we will be unable to assist you further and will consider this case closed. The disputed transaction will be reposted to your account and appear on your next statement. After this time, if you choose to pursue this matter further, you must contact the merchant directly as indicated in your Cardholder Agreement.

Please provide the requested documentation promptly so that we may continue to assist you. If you have any further questions please call 1-866-223-9111.

Thank you for your continued use of your President's Choice Financial® MasterCard®.

Sincerely,

Dispute Representative
President's Choice Financial MasterCard

PS 421076

DISPUTE RESPONSE - R

1003

Merchant #: 82036670016 Case #: [redacted] Reason Code: 53 Amount: 4570.00

___ Accept dispute: By selecting this action, you are accepting **FULL** financial liability for this dispute.
___ Credit Issued: Credit Date (MM/DD/CCYY): __/__/___ Credit Amount: _____

Check all conditions that apply to your response and include supporting documentation as required by the Issuer.Please ensure the case number is written in the upper right hand corner of each page.

___ Copy of a Signed and/or Electronically captured sales slip
___ Copy of a Signed cancellation policy or order form
___ Copy of a Signed order form
___ AVS of Y or M and SIGNED proof of delivery to AVS confirmed address
___ Signed rental agreement or Hotel/Motel folio
___ Copy of the Recurring billing agreement
___ T & E Documentation showing loyalty transactions related to this purchase
___ T & E – Documentation showing subsequent purchases made throughout the service period
___ Proof that the ticket was received for passenger transport
___ Proof the name on the flight manifest matches the Cardholder name on purchased itinerary
___ Proof of CVC2 in lieu of imprint
___ Proof of authorization
___ Proof of Verified by Visa, MasterCard Secure Code, AMEX Safe Key, or Discover Protect Buy
_x_ Other Documentation (Please Describe): PAX ARE ENTITLED TO CREDIT

Merchant Comments

WestJet Vacations bookings are non-refundable. Due to the current situation with COVID-19, exceptions are being made to return the full cost of cancelled tickets to the customers in the form of WestJet Dollars, valid for 24 months from the date of issue. However, all tickets are still non-refundable. Therefore, a refund is not due. We have included a letter of intent with intructions on how the passengers can obtain their credit. According to communications regarding Best Practices issued by acquirers, Issuers should recommend that the cardholder attempt to contact the affected merchant to resolve the dispute. SN

WESTJET

June 8, 2020

To Whom It May Concern,

I am writing you today regarding the chargeback you processed related to Thornburn family's WestJet Vacations booking 2774293.

Based on the Canadian Government's recommendations to help stop the spread of COVID-19, WestJet made critical decisions to suspend our transborder and international flights through June 30, 2020. These decisions were made in the best interest of our country, our guests and our employees. As a result of the coronavirus COVID-19 situation we implemented a non-refundable cancellation policy, whereby flight refunds will be returned as a Travel Bank credit, valid for 24 months, and vacation refunds will be returned as WestJet dollars, also valid for 24 months.

Not only is this policy in line with other tour operators experiencing similar repercussions, but recently the Canadian Transportation Agency (CTA) released a statement which supports the manner in which Canadian airlines are addressing the mass flight cancellations taking place. They indicate that credits for future travel are an acceptable form of refund as long as the credit is available for a reasonable amount of time, and they have stated 24 months is considered reasonable. We are following their guidelines and their statement on this situation can be found on the following page of their website, https://otc-cta.gc.ca/eng/statement-vouchers.

We have already received, and processed, thousands of cancellations. Where we have been provided WestJet Rewards account numbers, we have deposited the ***full value of the trip*** to either a travel bank (for air only itineraries), or a WestJet Dollars account (for WestJet Vacations package bookings), which of course will be available for 2 years. **For guests who do not have a WestJet Rewards account, we have requested that they create one so we can provide them this same reimbursement.** We understand some guests may prefer a different form of refund, however in order to be fair to everyone who finds themselves in this same situation, we cannot make exceptions for some and not to others.

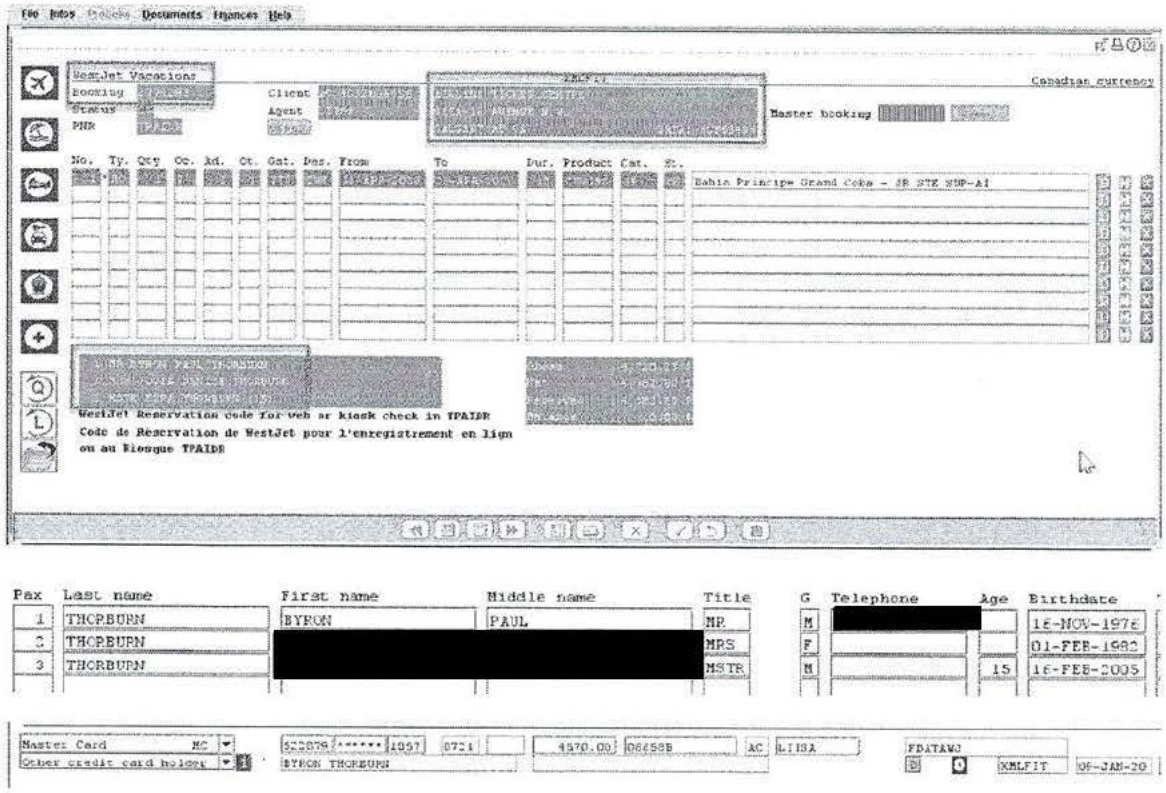
In this case, and given the circumstances, we kindly request you reverse the chargeback so that we can provide this guest the same resolution that all other guests have received, and accepted. Upon receiving the guest's WestJet Rewards account number, we will in good faith, provide them the value of their trip in a credit available to them for 24 months.

Thank you for your cooperation and understanding.

Sabrina #5041
Manager, Payment Fraud Operations
WESTJET Love Where You're Going

COVID-19 FLEXIBLE CHANGE/CANCEL POLICY AVAILABLE.

This transaction is associated with a WestJet Vacations package for the THORNBURN family to travel from Calgary to Cancun from April 13 – 23, 2020.



The reservation was booked through a travel agency, AIRLINE TICKET CENTRE.

Agency	40328966560 IATA 60563436
Name	AIRLINE TICKET CENTRE
Address	9172-16 AVENUE N.E.
Zip Code	T2M 0K3
City	CALGARY
Country	Canada CA
Province/State	Alberta AB
E-mail	fly@airlineticketcentre.ca
Web site	

Due to the COVID-19 pandemic, this reservation was cancelled by WestJet Vacations on March 27, 2020.

This is **Exhibit "123"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

_____

Signature

CSD OUT

The following information will be included on the electronic submission to MasterCard.

ARN	55503800061004036318399
Cardholder Number	[redacted]
Chargeback Reference Number	9019417993
Amount	4098.00
Sender Memo	See Merchant Response
IPM	2700

1008

DISPUTE RESPONSE - R

Merchant #: 82036670016 Case #: [redacted] Reason Code: 53 Amount: 4098.00

___ Accept dispute: By selecting this action, you are accepting **FULL** financial liability for this dispute.
___ Credit Issued: Credit Date (MM/DD/CCYY): __/__/___ Credit Amount: _____

Check all conditions that apply to your response and include supporting documentation as required by the Issuer.Please ensure the case number is written in the upper right hand corner of each page.

___ Copy of a Signed and/or Electronically captured sales slip
___ Copy of a Signed cancellation policy or order form
___ Copy of a Signed order form
___ AVS of Y or M and SIGNED proof of delivery to AVS confirmed address
___ Signed rental agreement or Hotel/Motel folio
___ Copy of the Recurring billing agreement
___ T & E Documentation showing loyalty transactions related to this purchase
___ T & E – Documentation showing subsequent purchases made throughout the service period
___ Proof that the ticket was received for passenger transport
___ Proof the name on the flight manifest matches the Cardholder name on purchased itinerary
___ Proof of CVC2 in lieu of imprint
___ Proof of authorization
___ Proof of Verified by Visa, MasterCard Secure Code, AMEX Safe Key, or Discover Protect Buy
_x_ Other Documentation (Please Describe): PAX ARE ELIGIBLE FOR CREDIT

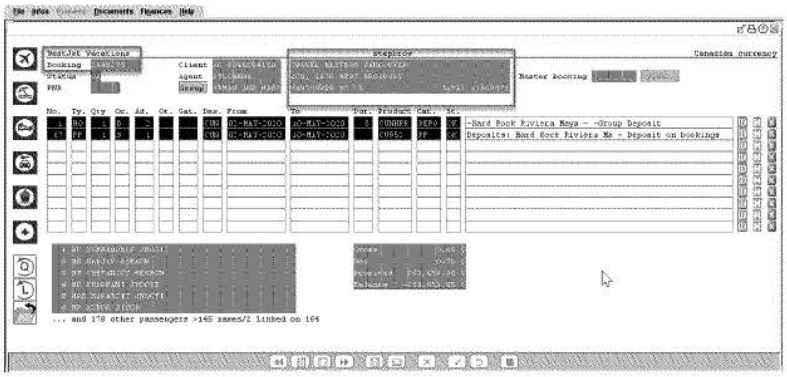
Merchant Comments

Based on the Canadian Government's recommendations to help stop the spread of COVID-19, WestJet made critical decisions to suspend our transborder and international flights through July 21, 2020. These decisions were made in the best interest of our country, our guests and our employees. As a result of the coronavirus COVID-19 situation we implemented a non-refundable cancellation policy, whereby flight refunds will be returned as a Travel Bank credit, valid for 24 months, and vacation refunds will be returned as WestJet dollars, also valid for 24 months.

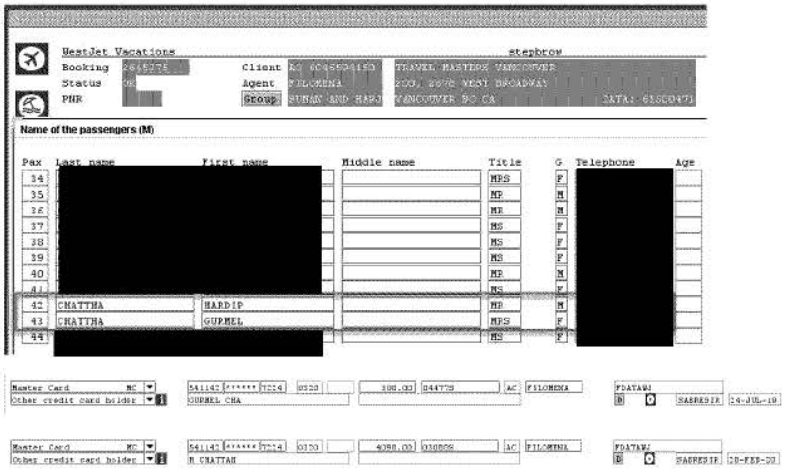
CB388970675

COVID-19 FLEXIBLE CHANGE/CANCEL POLICY AVAILABLE.

This transaction is associated with a WestJet Vacations package for a group booking listed under SUMAN & HARJ WEDDING to travel to Cancun from May 2 – 10, 2020.



The cardholder is listed as GURMEL & HARDIP CHATTHA.



The reservation was booked through a travel agency, TRAVEL MASTERS VANCOUVER.

CB388970675

Agency	6046594150	IATA	61500471
Name	TRAVEL MASTERS VANCOUVER		
Address	200, 2678 WEST BROADWAY		
Zip Code	V6K2G3		
City	VANCOUVER		
Country	Canada CA		
Province/State	British Columbia BC		
E-mail	vancouver@travelmasters.ca		
Web site			

Due to the COVID-19 pandemic, this reservation was cancelled on April 6, 2020.

History for booking 2645275 (I)

History	Cp.	Pax	Link	User	Entry date
Exit booking by time out or closing browser				cdemanti	15-JUN-20
Exit booking by time out or closing browser				stepbrow	28-APR-20
Exit booking by time out or closing browser				stepbrow	06-APR-20
Booking queued :CANCEL () Event :CX		35		stepbrow	06-APR-20

Due to the COVID-19 pandemic, WestJet Vacations implemented a flexible change and cancel policy for existing bookings.

Flexible change and cancel policy for existing WestJet Vacations bookings

For vacation packages booked prior to March 3rd for travel in April, May or June 2020:

- $0 one-time fee waiver for changes or cancellations
- Value of cancelled vacations will be returned in the form of WestJet Dollars, valid for 24 months from the date of issue
- If you change your vacation, the difference in price will apply if the new package is higher value

Please contact us to change or cancel your flight. If you initially booked through a third party, please contact your travel agent directly.

Note:

- Changes or cancellations more than 24 hours from purchase, will be returned as WestJet dollars, valid for 24 months from date of issue.
- Policy does not apply to Group bookings.
- March and April, no hotel restrictions.
- Policy cannot be applied to packages with the following hotels in May: Disney, Universal, Hard Rock Resorts, Playa Resorts, Atlantis, Sandals Resorts, Beaches Resorts, and Grand Pineapple Resorts.

After your $0 one-time change, if you cancel your booking:

- more than 45 days prior to departure, there will be a $250 CAD cancellation fee per person with the balance refunded to Westjet dollars.
- 44-22 days prior to departure, there will be a 50% cancel fee per person with the balance refunded to Westjet dollars.
- within 21 days prior to departure will be a full forfeit.
- These terms and conditions apply to Economy, Premium and Business cabin bookings.

After your $0 one-time change, any additional change must be made at least 21 days prior to departure, for a $100 CAD change fee per person plus any difference in package price (if new package price is lower the amount is forfeited)

https://www.westjet.com/en-ca/travel-info/advisories#coronavirus

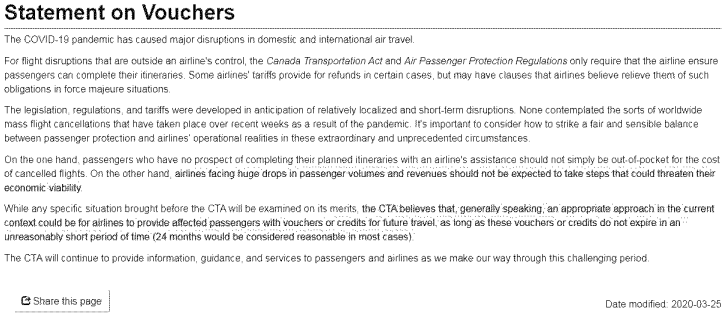
WestJet Vacations bookings are non-refundable. Due to the current situation with COVID-19, exceptions are being made to return the full cost of cancelled tickets to the customers in the form of WestJet Dollars, valid for 24 months from the date of issue. However, all tickets are still non-refundable.

CB388970675

The customer is entitiled to receive a credit for the full transaction amount in WestJet Dollars, valid for 24 months.

According to the Canadian Transportation Agency, a future travel credit or Airline Dollars is an acceptable form of refund during this global crisis.

https://otc-cta.gc.ca/eng/statement-vouchers



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.

Share this page

Date modified: 2020-03-25

The customer is encouraged to contact their travel agency or WestJet Vacations at their earliest convenience to set up their credit.

WestJet believes refunding with travel credits or WestJet Dollars is an appropriate and responsible approach in extraordinary circumstances such as the COVID-19 crisis. WestJet has consistently provided our guests with options when their travel has been impacted by the COVID-19 crisis. WestJet's policy is in line with the Canadian Transportation Agency's guidelines.

There are no exceptions at this time. Therefore, a refund to the original form of payment is not due.

July 17, 2020

To Whom It May Concern,

I am writing you today regarding the chargeback you processed related to WestJet Vacations booking #2645275, for Gurmel & Hardip Chattha.

Based on the Canadian Government's recommendations to help stop the spread of COVID-19, WestJet made critical decisions to suspend our transborder and international flights through July 21, 2020. These decisions were made in the best interest of our country, our guests and our employees. As a result of the coronavirus COVID-19 situation we implemented a non-refundable cancellation policy, whereby flight refunds will be returned as a Travel Bank credit, valid for 24 months, and vacation refunds will be returned as WestJet dollars, also valid for 24 months.

Not only is this policy in line with other tour operators experiencing similar repercussions, but recently the Canadian Transportation Agency (CTA) released a statement which supports the manner in which Canadian airlines are addressing the mass flight cancellations taking place. They indicate that credits for future travel are an acceptable form of refund as long as the credit is available for a reasonable amount of time, and they have stated 24 months is considered reasonable. We are following their guidelines and their statement on this situation can be found on the following page of their website, https://otc-cta.gc.ca/eng/statement-vouchers.

We have already received, and processed, thousands of cancellations. Where we have been provided WestJet Rewards account numbers, we have deposited the ***full value of the trip*** to either a travel bank (for air only itineraries), or a WestJet Dollars account (for WestJet Vacations package bookings), which of course will be available for 2 years. **For guests who do not have a WestJet Rewards account, we have requested that they create one so we can provide them this same reimbursement.** We understand some guests may prefer a different form of refund, however in order to be fair to everyone who finds themselves in this same situation, we cannot make exceptions for some and not to others.

In this case, and given the circumstances, we kindly request you reverse the chargeback so that we can provide this guest the same resolution that all other guests have received, and accepted. Upon receiving the guest's WestJet Rewards account number, we will in good faith, provide them the value of their trip in a credit available to them for 24 months.

Thank you for your cooperation and understanding.

Sabrina #5041
Manager, Payment Fraud Operations
WESTJET Love Where You're Going

This is **Exhibit "124"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

_____

Signature

CIBC

JOANNE PHILLIPS
[redacted]

July 17, 2020

Dear JOANNE PHILLIPS,

Subject: Disputed Credit Card Transaction *(Time Sensitive)*
Credit Card Number ending in 5140

We are following up regarding the transaction billed to your CIBC credit card account for $1,723.32 by WESTJET, on MAR 01, 2020. We want to help resolve this matter for you.

Temporary credit given while investigating
After you brought this transaction to our attention, we applied a credit on JUN 19, 2020 to your CIBC credit card account statement. We then asked for proof of the transaction from the merchant.

Please review and choose a course of action
The merchant has now provided us with a copy of the transaction receipt, which is enclosed for your records.

- **Reply:** If you would like to dispute this transaction, please use one of these options:
  1. Complete and sign the attached 'Dispute Letter'. Return it by AUG 01, 2020 to:

     CIBC Credit Card Services
     PO Box 4058, Station A
     Toronto ON
     M5W 1L8

     Once we receive it we can investigate this matter further for you.
  2. Call us at 1 866 385-1344 (in Canada and the U.S.) or 416 256-6871 (from elsewhere) to start the investigation right away.
- **Don't Reply:** If we do not receive a response from you by AUG 01, 2020, we will consider this matter resolved. We will then re-apply the transaction amount to your credit card account which will appear as an amount owing on your next statement and we will close our file.

For more information
It is always a good idea to keep an eye on your credit card purchases. To learn more about what to do for a transaction that you do not believe is valid, or for information about disputed transactions, please visit our website at www.cibc.com/charges.

Case ID: D-1430721

July 17, 2020

RE: Credit Card Number ending in 5140

It is extremely important that only **one** option is selected, the required information is completed, and the wording is not altered. Be sure to include any supporting documentation. If section 2 is selected, you also need to provide specific details on how you attempted to contact and resolve the dispute with the merchant, including the merchant's response to your attempt to resolve the dispute.

Merchant: WESTJET
Transaction Amount: $1,723.32
Transaction Date: MAR 01, 2020

Section 1

☐ I certify that I have reviewed the evidence provided, including any new details and/or merchant name, and I state that I **did not make, authorize, or participate** in this transaction nor did I authorize anyone else to make this transaction to my account.

Note: Selecting this option requires cancellation of your card and reissuance of a new credit card and account number.

Section 2

I certify that I did make a purchase with this merchant. However, I was unsuccessful in resolving a dispute with the merchant, and:

☐ I have **not received any goods or services**, which were expected to be received/performed on _____ (date). I enclose a copy of my agreement with the merchant and the invoice.

☐ The **amount has been altered.** I authorized the merchant to charge my CIBC credit card account in the amount of $ _____ . Enclosed is my copy of the transaction receipt to support this claim.

☐ I **paid for the purchase by other means** (e.g., cash, traveller's cheques, money order). I enclose a copy of my receipt as proof to support my claim.

☐ I **returned the merchandise** on _____ (date) and asked the merchant for a full credit. Enclosed is a copy of the return slip and/or credit slip.

☐ I notified the merchant of the **cancelled reservation** on _____ (date). The cancellation number provided by the merchant is _____ . No services have been received for this transaction and a credit has not been issued to my CIBC credit card account.

OR

☐ I did make a purchase with this merchant in the amount of $ _____ . However, **I did not make, authorize or participate in the transaction** I am disputing above. My credit card was in my possession at the time this transaction occurred. Enclosed is my receipt for the purchase I did make for $ _____ .

If we do not receive a response by AUG 01, 2020, we will consider this transaction to be valid and payable by you.

Date *(mmm/dd/yyyy)*	Print Name		Signature *(sign within box)*
	JOANNE PHILLIPS	X	

Date *(mmm/dd/yyyy)*	Name of Authorized User *(if applicable)*		Authorized User's Signature *(if applicable)* *(sign within box)*
		X	

[redacted]

Case ID: [redacted]

Acquirer Collaboration Dispute Response Questionnaire - Consumer Disputes
Dispute Reason Code 13.1, 13.2, 13.3, 13.4, 13.5, 13.6, 13.7, 13.8, 13.9

ROL Case Number: [redacted]

Transaction Information

Cardholder Account Number: [redacted]
Transaction Amount: 1723.32
TransDate (MM/DD/YY): 03/01/2020
Dispute Reason Code: 13
MO/TO / ECI Indicator: 7
Transaction Identifier:

Tran type: D
Acquirer Reference Number: 74450770062004029376782
Chargeback CPD (MM/DD/YY): 06/20/2020
Dispute Condition Code: 1
Merchant Category Code: 3180
Jurisdiction: Visa Canada Domestic

Dispute Response Information :

___ Accept Partial
_x_ Decline
Acceptance Amount: 0.00
Why are you not accepting full liability?
COMP EVID

Response Reason :

_x_ Compelling Evidence
___ Credit Processed
___ Invalid Dispute

Invalid dispute reason:

Explanation:
See attachment

Credit Information

Credit Date (CCYY-MM-DD): Acquirer Reference Number: Credit Amount:

DISPUTE RESPONSE 1017

Merchant #: 82036670016 Case #: [redacted] Reason Code: 1310 Amount: 1723.32

___ Accept dispute: By selecting this action, you are accepting **FULL** financial liability for this dispute.
___ Credit Issued: Credit Date (MM/DD/CCYY): ____/____/_____ Credit Amount: _____

Select all conditions that apply to your response and include supporting documentation as required by the Issuer.
Please ensure the case number is written in the upper right hand corner of each page.

_x_ 01 - Documentation to prove the cardholder is in possession of and/or using the merchandise
___ 02 - Signed Delivery form, copy of cardholder identification as proof goods were picked up at merchant location
___ 03- Address Verification Method, or AVS of Y or M and proof of delivery
___ 04 - Digital goods download, Download Date (MM/DD/CCYY)*: Time (HH:MM)*:

(2 or more optional selections must be selected):

___ Purchaser IP Address: and Device Geographic Location:

___ Device ID: and Device Name:

___ Purchaser Name: and Purchaser Email:

___ Profile Setup or Application Access
___ Merchant Website or Application Access
___ Same Device and Previous Transaction on Same Card Not Disputed
ARN*: Transaction Date (MM/DD/CCYY)*:

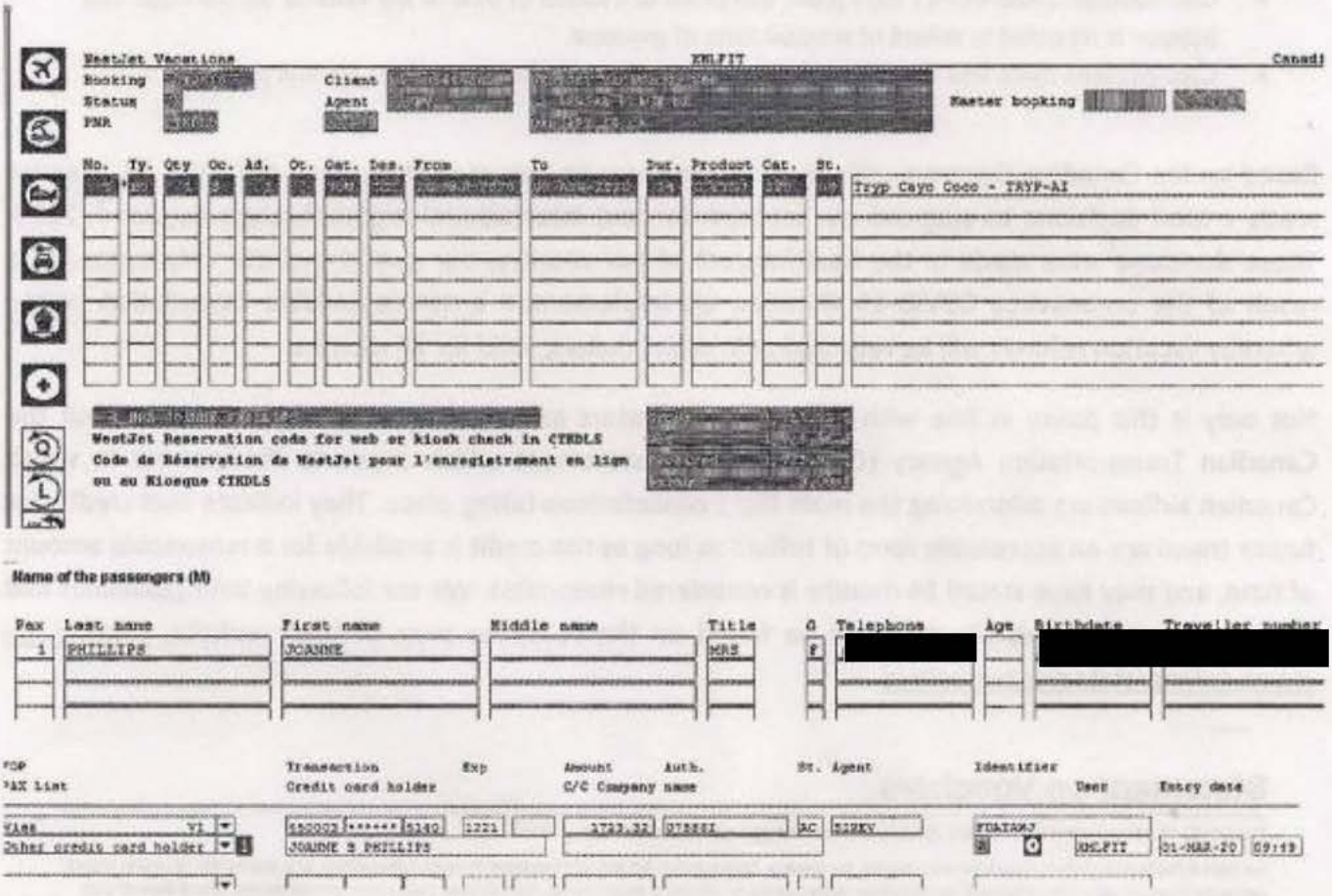
___ 05 - Delivery to cardholder at place of employment
___ 06 - T & E Loyalty transactions related to purchase
___ 07 - T & E Subsequent purchases made throughout service period
___ 08 - Passenger Transport proof ticket received, scanned at gate or other information (e.g. frequent flyer miles)
___ 10 - Authorized signer known by the cardholder

***- Input data required if corresponding option is selected (checked off).**

Merchant Comments
GUEST IS ELIGIBLE FOR FULL TRAVEL CREDIT AS PER FLEXIBLE POLICY AND CANADIAN TRANSPORTATION AGENCY GUIDELINES. PLS SEE ATTACHED -SM

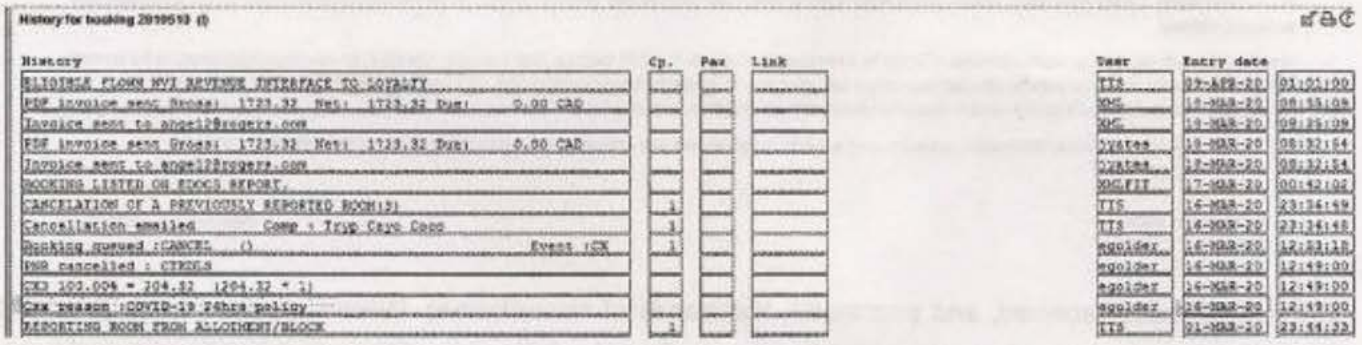
NON-REFUNDABLE BOOKING. COVID-19 FLEXIBLE CHANGE/CANCEL POLICY AVAILABLE.

This transaction is associated with an ALL INCLUSIVE WestJet Vacations package for JOANNE PHILLIPS who was scheduled to travel from Ottawa to Cayo Coco o March 25, returning on April 8, 2020.



The reservation was booked on March 1, 2020 directly by the customer on WestJet Vacations' website.

Due to the COVID-19 pandemic, this reservation was cancelled on March 16, 2020.



COVID-19 PANDEMIC FLEXIBLE POLICY

The customer agreed to the following terms and conditions when the reservation was completed:

- Cancellations 45 days or more are subject to a $250 CAD cancellation fee per guest. All remaining funds with the exception of any supplier rates and non-refundable EBB(s), if applicable, are refunded to original form of payment. The fee is waived for Premium/Business packages when at least one flight segment is booked in Premium or Business.
- Cancellations made 44 - 21 days prior, will result in a forfeit of 50% of the value of the package. The balance is refunded to refund of original form of payment.
- Cancellations made less than 21 days prior will result in 100% forfeit of the amount paid.

Based on the Canadian Government's recommendations to help stop the spread of COVID-19, WestJet made critical decisions to suspend our transborder and international flights through August 4, 2020. These decisions were made in the best interest of our country, our guests and our employees. As a result of the coronavirus COVID-19 situation we implemented a non-refundable cancellation policy, whereby vacation refunds will be returned as WestJet dollars, valid for 24 months.

Not only is this policy in line with other tour operators experiencing similar repercussions, but the Canadian Transportation Agency (CTA) released a statement which supports the manner in which Canadian airlines are addressing the mass flight cancellations taking place. They indicate that credits for future travel are an acceptable form of refund as long as the credit is available for a reasonable amount of time, and they have stated 24 months is considered reasonable. We are following their guidelines and their statement on this situation can be found on the following page of their website, https://otc-cta.gc.ca/eng/statement-vouchers.

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.

Share this page

Date modified: 2020-03-25

We have already received, and processed, thousands of cancellations. Where we have been provided WestJet Rewards account numbers, we have deposited the ***full value of the trip*** to either a travel bank (for air only itineraries), or a WestJet Dollars account (for WestJet Vacations package bookings), which will be available for 2 years. We understand some guests may prefer a different form of refund, however

This is **Exhibit "125"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

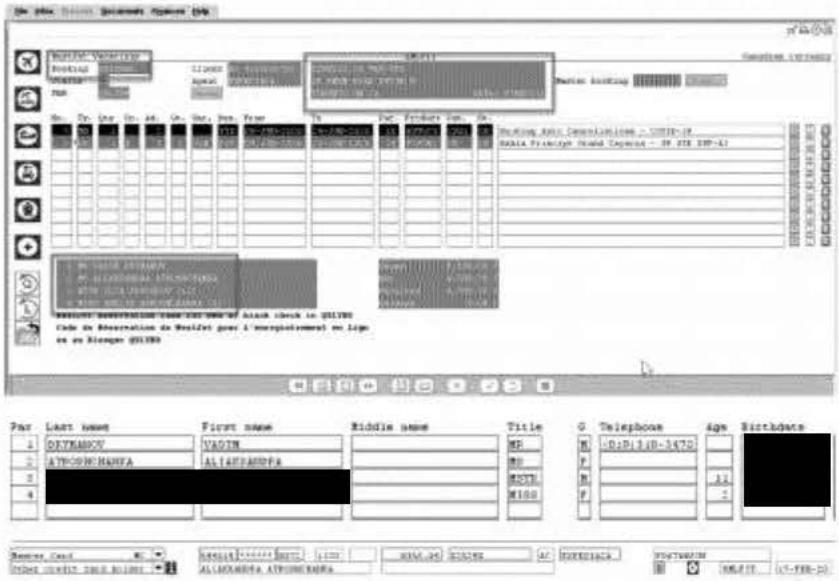
_____

Signature

Merchant Comments
Due to the current situation with COVID-19, exceptions are being made to return the full cost of cancelled tickets to the customers in the form of WestJet Dollars, valid for 24 months from the date of issue. However, all tickets are still non-refundable. Uncontrollable schedule irregularity means a flight delay, cancellation or diversion that is considered to be not within the carrier's control including but not limited to situations of force majeure. This information is available in our Tariffs, which are located on our website www.westjet.com under https://www.westjet.com/assets/wj-web/documents/en/about-us/legal/international-transborder(us)-tariff.pdf SN

ON-REFUNDABLE BOOKING. COVID-19 FLEXIBLE CHANGE/CANCEL POLICY AVAILABLE.

This transaction is associated with a WestJet Vacations package for the Dryhanov – Atroschanka party to travel from Ottawa to Puerto Plata from June 9 – 23, 2020.



The reservation was booked through a travel agency, EXPEDIA.CA

Due to the COVID-19 pandemic, this reservation was cancelled on May 13, 2020.

History for booking 2[illegible]

History	Cp.	Pax	Link	User	Entry date
BOOKING LISTED ON EPOCH REPORT.				ONLFIT	[illegible]
CANCELLATION OF A PREVIOUSLY REPORTED BOOKING	1			TTS	[illegible]
Cancellation emailed Comp : [illegible]	1			TTS	[illegible]
[illegible]				[illegible]	[illegible]
[illegible]				[illegible]	[illegible]
PNR cancelled : [illegible]				[illegible]	[illegible]
Cxl reason :COVID-19 auto-cancellation				[illegible]	[illegible]
COVID-19: automatic cancellation				SCRIPT	[illegible]

COVID-19 PANDEMIC FLEXIBLE POLICY

Due to the COVID-19 pandemic, WestJet Vacations implemented a flexible change and cancel policy for existing bookings.

Flexible change and cancel policy for existing WestJet Vacations bookings

For vacation packages booked prior to March 3rd for travel through August 4, 2020:

- $0 one-time fee waiver for changes or cancellations
- Change or cancel up to 24 hours from departure
- Value of cancelled vacations will be returned **in the form of WestJet Dollars,** valid for 24 months from the date of issue
- If you change your vacation, the difference in price will apply if the new package is higher value

Please contact us to change or cancel your vacation package.

If you booked through a Travel Agent (online or directly), Corporate Travel arranger, or another airline, please contact them directly.

Note:

- Policy does not apply to Group bookings
- Policy cannot be applied to packages with the following hotels: Disney, Universal, Hard Rock Resorts, Atlantis, Sandals Resorts, Beaches Resorts, and Grand Pineapple Resorts.

After your $0 one-time change/cancel, standard terms and conditions apply.

https://www.westjet.com/en-ca/travel-info/advisories#coronavirus

Due to the current situation with COVID-19, exceptions are being made to return the full cost of cancelled tickets to the customers in the form of WestJet Dollars, valid for 24 months from the date of issue. However, all tickets are still non-refundable.

Uncontrollable schedule irregularity means a flight delay, cancellation or diversion that is considered to be not within the carrier's control including but not limited to situations of force majeure.
This information is available in our Tariffs, which are located on our website www.westjet.com under https://www.westjet.com/assets/wj-web/documents/en/about-us/legal/international-transborder(us)-tariff.pdf

The customer is entitled to receive a credit for the full transaction amount in WestJet Dollars, valid for 24 months.

According to the Canadian Transportation Agency, a future travel credit or Airline Dollars is an acceptable form of refund during this global crisis.

https://otc-cta.gc.ca/eng/statement-vouchers

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.

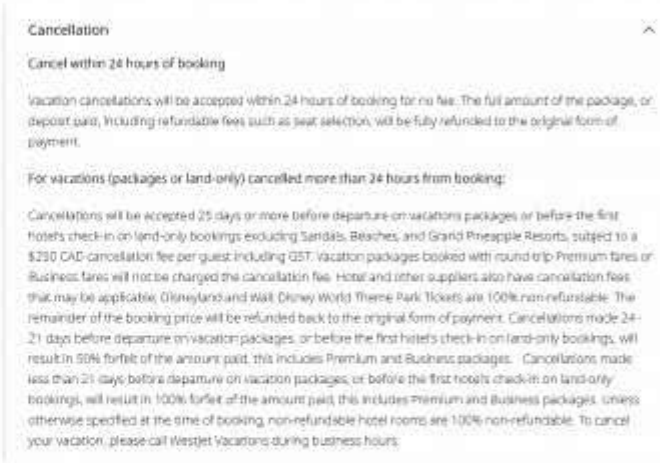
Share this page

Date modified: 2020-03-25

WestJet believes refunding with travel credits or WestJet Dollars is an appropriate and responsible approach in extraordinary circumstances such as the COVID-19 crisis. WestJet has consistently provided our guests with options when their travel has been impacted by the COVID-19 crisis. WestJet's policy is in line with the Canadian Transportation Agency's guidelines.

The customer is encouraged to contact their travel agency or WestJet Vacations at their earliest convenience to set up their credit.

Should the customer wish to not accept a credit, WestJet has implemented a $0 one-time change/cancel policy to all existing bookings. After the $0 one-time change/cancel, the standard terms and conditions on cancellations are:



Cancellation

Cancel within 24 hours of booking

Vacation cancellations will be accepted within 24 hours of booking for no fee. The full amount of the package, or deposit paid, including refundable fees such as seat selection, will be fully refunded to the original form of payment.

For vacations (packages or land-only) cancelled more than 24 hours from booking:

Cancellations will be accepted 25 days or more before departure on vacations packages or before the first hotel's check-in on land-only bookings excluding Sandals, Beaches, and Grand Pineapple Resorts, subject to a $250 CAD cancellation fee per guest including GST. Vacation packages booked with round trip Premium fares or Business fares will not be charged the cancellation fee. Hotel and other suppliers also have cancellation fees that may be applicable. Disneyland and Walt Disney World Theme Park Tickets are 100% non-refundable. The remainder of the booking price will be refunded back to the original form of payment. Cancellations made 24-21 days before departure on vacation packages, or before the first hotel's check-in on land-only bookings, will result in 50% forfeit of the amount paid, this includes Premium and Business packages. Cancellations made less than 21 days before departure on vacation packages, or before the first hotel's check-in on land-only bookings, will result in 100% forfeit of the amount paid, this includes Premium and Business packages. Unless otherwise specified at the time of booking, non-refundable hotel rooms are 100% non-refundable. To cancel your vacation, please call Westjet Vacations during business hours.

For all Sandals, Beaches, Grand Pineapple Resort (packages or land-only) bookings:

Cancellations will be accepted 45 days or more before departure on vacation packages, or before the first hotel's check-in on land-only bookings, subject to a $250 CAD cancellation fee per guest including GST. Vacation packages booked with round-trip Premium fares or Business fares will not be charged the cancellation fee. Hotel and other suppliers also have cancellation fees that may be applicable. The remainder of the booking price will be refunded back to the original form of payment. Cancellations made 44 - 21 days before departure on vacation packages, or before the first hotel's check-in on land-only bookings, will result in 50% forfeit of the amount paid, this includes Premium and Business packages. Cancellations made less than 21 days before departure on vacation packages, or before the first hotel's check-in on land-only bookings, will result in 100% forfeit of the amount paid, this includes Premium and Business packages. Unless otherwise specified at the time of booking, non-refundable hotel rooms are 100% non-refundable. To cancel your vacation, please call Westjet Vacations during business hours.

In summary, the customer may cancel the booking 25 days prior to departure for a refund to the original form of payment, minus a cancellation fee of $250 per person including GST. If the customer cancels 24-21 days prior to departure, there is a 50% forfeit of the amount paid and the rest will be refunded to the original form of payment. If the customer cancels less than 21 days prior to departure, there is a 100% forfeit of the amount paid.

At this time, there are no exceptions being made to refund the FULL amount paid to the original form of payment. Therefore, a full refund is not due.

WESTJET

July 30, 2020

To Whom It May Concern,

I am writing you today regarding the chargeback you processed related to WestJet Vacations Booking #2810960, for the Dryhanov – Atroschanka party.

Based on the Canadian Government's recommendations to help stop the spread of COVID-19, WestJet made critical decisions to suspend our transborder and international flights through August 21, 2020. These decisions were made in the best interest of our country, our guests and our employees. As a result of the coronavirus COVID-19 situation we implemented a non-refundable cancellation policy, whereby flight refunds will be returned as a Travel Bank credit, valid for 24 months, and vacation refunds will be returned as WestJet dollars, also valid for 24 months.

Not only is this policy in line with other tour operators experiencing similar repercussions, but recently the Canadian Transportation Agency (CTA) released a statement which supports the manner in which Canadian airlines are addressing the mass flight cancellations taking place. They indicate that credits for future travel are an acceptable form of refund as long as the credit is available for a reasonable amount of time, and they have stated 24 months is considered reasonable. We are following their guidelines and their statement on this situation can be found on the following page of their website, https://otc-cta.gc.ca/eng/statement-vouchers.

We have already received, and processed, thousands of cancellations. Where we have been provided WestJet Rewards account numbers, we have deposited the ***full value of the trip*** to either a travel bank (for air only itineraries), or a WestJet Dollars account (for WestJet Vacations package bookings), which of course will be available for 2 years. **For guests who do not have a WestJet Rewards account, we have requested that they create one so we can provide them this same reimbursement.** We understand some guests may prefer a different form of refund, however in order to be fair to everyone who finds themselves in this same situation, we cannot make exceptions for some and not to others.

In this case, and given the circumstances, we kindly request you reverse the chargeback so that we can provide this guest the same resolution that all other guests have received, and accepted. Upon receiving the guest's WestJet Rewards account number, we will in good faith, provide them the value of their trip in a credit available to them for 24 months.

Thank you for your cooperation and understanding.

Sabrina #5041
Manager, Payment Fraud Operations
WESTJET Love Where You're Going

Please note the cancellation of this reservation falls under force majeure. This information is available in our Tariffs, which are located on our website www.westjet.com under https://www.westjet.com/assets/wj-web/documents/en/about-us/legal/international-transborder[us]-tariff.pdf :

- Event of force majeure means any unforeseeable circumstances beyond the carrier's control, the consequences of which could not have been avoided even if all due care had been exercised including, but without limitation, meteorological and geological conditions, acts of god, strikes, riots, civil commotions, embargoes, wars, hostilities, disturbances, unsettled international conditions, shortage of fuel or facilities, or labour disputes, either actual, threatened or reported.
- Uncontrollable schedule irregularity means a flight delay, cancellation or diversion that is considered to be not within the carrier's control including but not limited to situations of force majeure.
- In the event of a conflict between traveller's rights provisions and those of any other rule in this tariff, the traveller's rights provisions rule shall prevail, except with respect to force majeure. The traveller's rights provisions do not make the airline responsible for acts of nature or the acts of third parties. The carrier is legally obligated to maintain the highest standards of aviation safety and cannot be encouraged to fly when it is not safe to do so. Similarly, the carrier cannot be help responsible for inclement weather or the actions of third parties such as acts of government or air traffic control, airport authorities, security agencies, law enforcement or customs and immigration officials.
- The carrier will not guarantee and will not be held liable for cancellations or changes to times that appear on the passenger's tickets due to force majeure. However, in the case of international transportation, a passenger may invoke the provisions of the convention regarding liability in the case of passenger delay. (see rule 55).
- The carrier will not guarantee and will not be held liable for cancellations or changes to flight times that appear on guests' tickets due to an event of force majeure.

This is **Exhibit "126"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

_____

Signature

FINANCIAL

1028

2020-08-05

Case Number: [redacted]

*0000091
ANTHONY M MCCULLOUGH
[redacted]

Re: Credit Card account number ending in 7528

Dear ANTHONY M MCCULLOUGH,

This letter is in response to your inquiry, received 2020-05-13, and regarding your request for an investigation of the transaction listed below.

Case Amount	Merchant Name	Transaction Date
2,283.72	WESTJET	2020-03-08

As part of the investigation regarding the disputed transaction mentioned above the merchant has responded in an attempt to resolve your inquiry. Please review the attached information and determine if you now agree that the charge is valid.

If you do not agree, further supporting documentation is required from you. Please provide A progressive letter is required negating the merchant's rebuttal; the letter must be signed and dated., as per the MasterCard Worldwide rules that we are required to follow. Please keep copies of the documentation that you are sending, along with fax confirmation, or registered mail/courier tracking number.

It is very important that your valid supporting documentation be received prior to 2020-08-13 in order for us to proceed with your dispute. If it is not received by the date stated, we will be unable to assist you further and will consider this case closed. The disputed transaction will be reposted to your account and appear on your next statement. After this time, if you choose to pursue this matter further, you must contact the merchant directly as indicated in your Cardholder Agreement.

Please provide the requested documentation promptly so that we may continue to assist you. If you have any further questions please call 1-866-223-9111.

Thank you for your continued use of your President's Choice Financial® MasterCard®.

Sincerely,

Dispute Representative
President's Choice Financial MasterCard

PS 421076

Cancellation

Cancel within 24 hours of booking

Vacation cancellations will be accepted within 24 hours of booking for no fee. The full amount of the package or deposit paid, including refundable fees such as seat selection, will be fully refunded to the original form of payment.

For vacations (packages or land-only) cancelled more than 24 hours from booking:

Cancellations will be accepted 25 days or more before departure on vacations packages or before the first hotel's check-in on land-only bookings excluding Sandals, Beaches, and Grand Pineapple Resorts, subject to a $250 CAD cancellation fee per guest including GST. Vacation packages booked with round-trip Premium fares or Business fares will not be charged the cancellation fee. Hotel and other suppliers also have cancellation fees that may be applicable. Disneyland and Walt Disney World Theme Park Tickets are 100% non-refundable. The remainder of the booking price will be refunded back to the original form of payment. Cancellations made 24 - 21 days before departure on vacation packages, or before the first hotel's check-in on land-only bookings, will result in 50% forfeit of the amount paid, this includes Premium and Business packages. Cancellations made less than 21 days before departure on vacation packages, or before the first hotel's check-in on land-only bookings, will result in 100% forfeit of the amount paid, this includes Premium and Business packages. Unless otherwise specified at the time of booking, non-refundable hotel rooms are 100% non-refundable. To cancel your vacation, please call WestJet Vacations during business hours.

For all Sandals, Beaches, Grand Pineapple Resort (packages or land-only) bookings:

Cancellations will be accepted 45 days or more before departure on vacation packages, or before the first hotel's check-in on land-only bookings, subject to a $250 CAD cancellation fee per guest including GST. Vacation packages booked with round-trip Premium fares or Business fares will not be charged the cancellation fee. Hotel and other suppliers also have cancellation fees that may be applicable. The remainder of the booking price will be refunded back to the original form of payment. Cancellations made 44 - 21 days before departure on vacation packages, or before the first hotel's check-in on land-only bookings, will result in 50% forfeit of the amount paid, this includes Premium and Business packages. Cancellations made less than 21 days before departure on vacation packages, or before the first hotel's check-in on land-only bookings, will result in 100% forfeit of the amount paid, this includes Premium and Business packages. Unless otherwise specified at the time of booking, non-refundable hotel rooms are 100% non-refundable. To cancel your vacation, please call WestJet Vacations during business hours.

In summary, the customer may cancel the booking 25 days prior to departure for a refund to the original form of payment, minus a cancellation fee of $250 per person including GST. If the customer cancels 24-21 days prior to departure, there is a 50% forfeit of the amount paid and the rest will be refunded to the original form of payment. If the customer cancels less than 21 days prior to departure, there is a 100% forfeit of the amount paid.

According to the Canadian Transportation Agency, a future travel credit or Airline Dollars is an acceptable form of refund during this global crisis.

https://otc-cta.gc.ca/eng/statement-vouchers

Statement on Vouchers

Share this page

Date published: 2020-03-25

WestJet believes refunding with travel credits or WestJet Dollars is an appropriate and responsible approach in extraordinary circumstances such as the COVID-19 crisis. WestJet has consistently provided our guests with options when their travel has been impacted by the COVID-19 crisis. WestJet's policy is in line with the Canadian Transportation Agency's guidelines.

The customer is encouraged to contact their travel agency or WestJet Vacations at their earliest convenience to set up their credit.

Should the customer wish to not accept a credit, WestJet has implemented a $0 one-time change/cancel policy to all existing bookings. After the $0 one-time change/cancel, the standard terms and conditions on cancellations are:

Due to the COVID-19 pandemic, this reservation was cancelled May 13, 2020.

History for booking 2822968 (I)

History	Cp.	Pax	Link	User	Entry date
BOOKING LISTED ON EDOCS REPORT				XMLFIT	14-MAY-20
CANCELATION OF A PREVIOUSLY REPORTED ROOM(S)	1			TTS	13-MAY-20
Cancellation emailed Comp : Occidental at Xcaret D	1			TTS	13-MAY-20
Queue acknowledged :CXLCAMD - (successful) COVID auto-cancelEvent :HE35				[illegible]	13-MAY-20
PNR cancelled : DXUDHI				aden	13-MAY-20
CXL reason :(COVID-19 auto-cancellation)				aden	13-MAY-20
COVID-19: automatic cancellation				SCRIPT	13-MAY-20

COVID-19 PANDEMIC FLEXIBLE POLICY

Due to the COVID-19 pandemic, WestJet Vacations implemented a flexible change and cancel policy for existing bookings.

Flexible change and cancel policy for existing WestJet Vacations bookings

For vacation packages booked prior to March 3rd for travel through August 4, 2020

- $0 one-time fee waiver for changes or cancellations
- Change or cancel up to 24 hours from departure
- Value of cancelled vacations will be returned **in the form of WestJet Dollars**, valid for 24 months from the date of issue
- If you change your vacation, the difference in price will apply if the new package is higher value

Please contact us to change or cancel your vacation package.

If you booked through a Travel Agent (online or directly), Corporate Travel arranger, or another airline, please contact them directly.

Note:

- Policy does not apply to Group bookings.
- Policy cannot be applied to packages with the following hotels: Disney, Universal, Hard Rock Resorts, Atlantis, Sandals Resorts, Beaches Resorts, and Grand Pineapple Resorts.

After your $0 one-time change/cancel, standard terms and conditions apply.

https://www.westjet.com/en-ca/travel-info/advisories#coronavirus

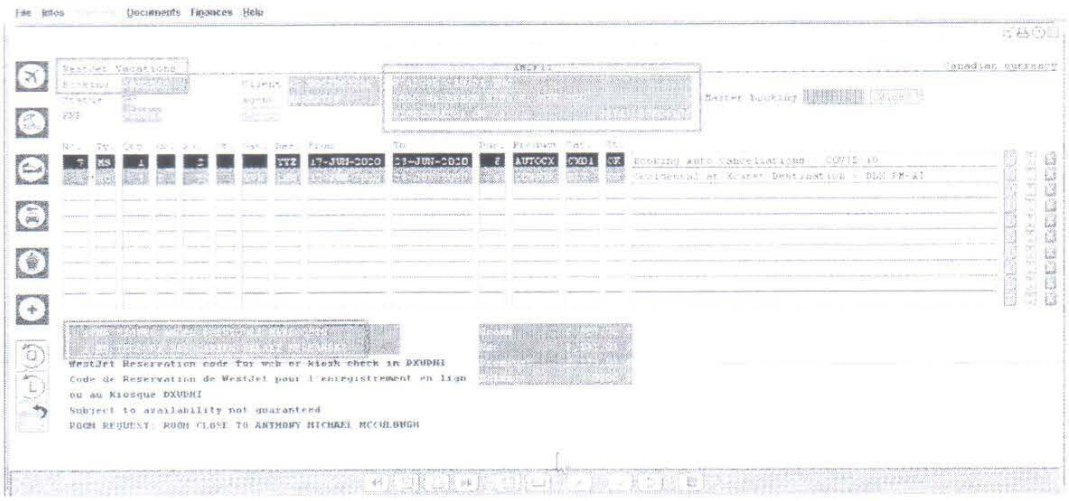
Due to the current situation with COVID-19, exceptions are being made to return the full cost of cancelled tickets to the customers in the form of WestJet Dollars, valid for 24 months from the date of issue. However, all tickets are still non-refundable.

Uncontrollable schedule irregularity means a flight delay, cancellation or diversion that is considered to be not within the carrier's control including but not limited to situations of force majeure.
This information is available in our Tariffs, which are located on our website www.westjet.com under https://www.westjet.com/assets/wj-web/documents/en/about-us/legal/international-transborder(us)-tariff.pdf

The customer/cardholder is entitled to receive a credit for the full transaction amount in WestJet Dollars, valid for 24 months.

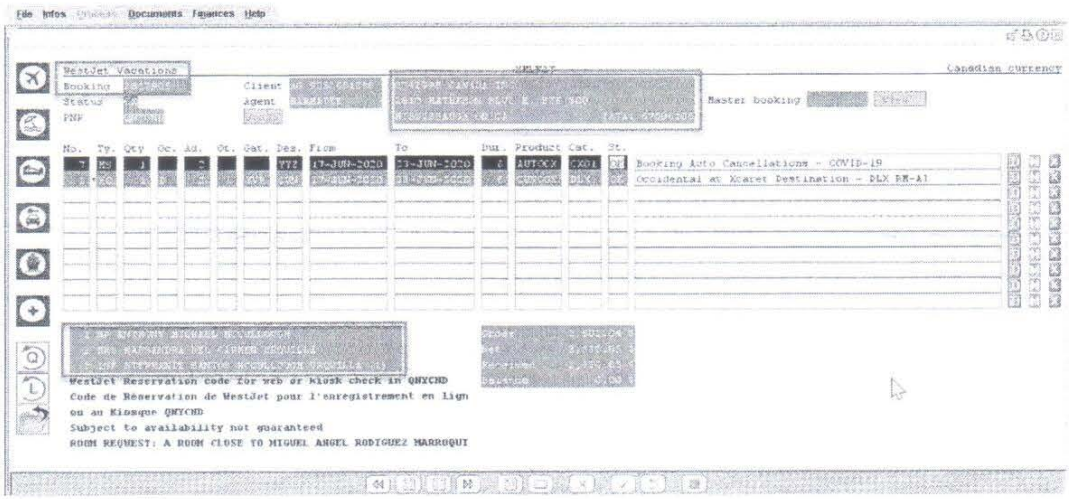
NON-REFUNDABLE BOOKING. COVID-19 FLEXIBLE CHANGE/CANCEL POLICY AVAILABLE.

This transaction is associated with an ALL INCLUSIVE WestJet Vacations package MIGUEL MARROQUIN & TEODORA HERNANDEZ to travel from Vancouver to Cancun from June 17 – 23, 2020.



Pax	Last name	First name	Middle name	Title	G	Telephone	Age	Birthdate
1	RODRIGUEZ MARROQUIN	MIGUEL	ANGEL	MR	M	(778)982-9092		03-NOV-1965
2	PELAEZ HERNANDEZ	TEODORA	DEL CARMEN	MS	F			22-MAR-1963

The reservation was paid for by ANTHONY MCCULLOUGH, who was scheduled to travel on the same itinerary on another reservation.



WESTJET

July 28, 2020

To Whom It May Concern,

I am writing you today regarding the chargeback you processed related to WestJet Vacations Booking #2822968, with the cardholder is listed as Anthony McCullough.

Based on the Canadian Government's recommendations to help stop the spread of COVID-19, WestJet made critical decisions to suspend our transborder and international flights through August 21, 2020. These decisions were made in the best interest of our country, our guests and our employees. As a result of the coronavirus COVID-19 situation we implemented a non-refundable cancellation policy, whereby flight refunds will be returned as a Travel Bank credit, valid for 24 months, and vacation refunds will be returned as WestJet dollars, also valid for 24 months.

Not only is this policy in line with other tour operators experiencing similar repercussions, but recently the Canadian Transportation Agency (CTA) released a statement which supports the manner in which Canadian airlines are addressing the mass flight cancellations taking place. They indicate that credits for future travel are an acceptable form of refund as long as the credit is available for a reasonable amount of time, and they have stated 24 months is considered reasonable. We are following their guidelines and their statement on this situation can be found on the following page of their website, https://otc-cta.gc.ca/eng/statement-vouchers.

We have already received, and processed, thousands of cancellations. Where we have been provided WestJet Rewards account numbers, we have deposited the ***full value of the trip*** to either a travel bank (for air only itineraries), or a WestJet Dollars account (for WestJet Vacations package bookings), which of course will be available for 2 years. **For guests who do not have a WestJet Rewards account, we have requested that they create one so we can provide them this same reimbursement.** We understand some guests may prefer a different form of refund, however in order to be fair to everyone who finds themselves in this same situation, we cannot make exceptions for some and not to others.

In this case, and given the circumstances, we kindly request you reverse the chargeback so that we can provide this guest the same resolution that all other guests have received, and accepted. Upon receiving the guest's WestJet Rewards account number, we will in good faith, provide them the value of their trip in a credit available to them for 24 months.

Thank you for your cooperation and understanding.

Sabrina #5041
Manager, Payment Fraud Operations
WESTJET Love Where You're Going

Please note the cancellation of this reservation falls under force majeure. This information is available in our Tariffs, which are located on our website www.westjet.com under https://www.westjet.com/assets/wj-web/documents/en/about-us/legal/international-transborder(us)-tariff.pdf :

- Event of force majeure means any unforeseeable circumstances beyond the carrier's control, the consequences of which could not have been avoided even if all due care had been exercised including, but without limitation, meteorological and geological conditions, acts of god, strikes, riots, civil commotions, embargoes, wars, hostilities, disturbances, unsettled international conditions, shortage of fuel or facilities, or labour disputes, either actual, threatened or reported.
- Uncontrollable schedule irregularity means a flight delay, cancellation or diversion that is considered to be not within the carrier's control including but not limited to situations of force majeure.
- In the event of a conflict between traveller's rights provisions and those of any other rule in this tariff, the traveller's rights provisions rule shall prevail, except with respect to force majeure. The traveller's rights provisions do not make the airline responsible for acts of nature or the acts of third parties. The carrier is legally obligated to maintain the highest standards of aviation safety and cannot be encouraged to fly when it is not safe to do so. Similarly, the carrier cannot be help responsible for inclement weather or the actions of third parties such as acts of government or air traffic control, airport authorities, security agencies, law enforcement or customs and immigration officials.
- The carrier will not guarantee and will not be held liable for cancellations or changes to times that appear on the passenger's tickets due to force majeure. However, in the case of international transportation, a passenger may invoke the provisions of the convention regarding liability in the case of passenger delay. (see rule 55).
- The carrier will not guarantee and will not be held liable for cancellations or changes to flight times that appear on guests' tickets due to an event of force majeure.

DISPUTE RESPONSE - R

1035

Merchant #: 820366700124 Case #: [redacted] Reason Code: 53 Amount: 2283.72

___ Accept dispute: By selecting this action, you are accepting **FULL** financial liability for this dispute.
___ Credit Issued. Credit Date (MM/DD/CCYY): __/__/___ Credit Amount: _____

Check all conditions that apply to your response and include supporting documentation as required by the Issuer.Please ensure the case number is written in the upper right hand corner of each page.

___ Copy of a Signed and/or Electronically captured sales slip
___ Copy of a Signed cancellation policy or order form
___ Copy of a Signed order form
___ AVS of Y or M and SIGNED proof of delivery to AVS confirmed address
___ Signed rental agreement or Hotel/Motel folio
___ Copy of the Recurring billing agreement
___ T & E Documentation showing loyalty transactions related to this purchase
___ T & E – Documentation showing subsequent purchases made throughout the service period
___ Proof that the ticket was received for passenger transport
___ Proof the name on the flight manifest matches the Cardholder name on purchased itinerary
___ Proof of CVC2 in lieu of imprint
___ Proof of authorization
___ Proof of Verified by Visa, MasterCard Secure Code, AMEX Safe Key, or Discover Protect Buy
_X_ Other Documentation (Please Describe): CARDHOLDER IS ENTITLED TO CREDIT

Merchant Comments

Due to the current situation with COVID-19, exceptions are being made to return the full cost of cancelled tickets to the customers in the form of WestJet Dollars, valid for 24 months from the date of issue. However, all tickets are still non-refundable. Uncontrollable schedule irregularity means a flight delay, cancellation or diversion that is considered to be not within the carrier's control including but not limited to situations of force majeure. This information is available in our Tariffs, which are located on our website www.westjet.com under https://www.westjet.com/assets/wj-web/documents/en/about-us/legal/international-transborder(us)-tariff.pdf SN

This is **Exhibit "127"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

_____

Signature

DISPUTE RESPONSE - R

Merchant #: 82036670016 Case #: [redacted] Reason Code: 53 Amount: 4441.26

___ Accept dispute: By selecting this action, you are accepting **FULL** financial liability for this dispute.
___ Credit Issued: Credit Date (MM/DD/CCYY): __/__/___ Credit Amount: _____

Check all conditions that apply to your response and include supporting documentation as required by the Issuer.Please ensure the case number is written in the upper right hand corner of each page.

___ Copy of a Signed and/or Electronically captured sales slip
___ Copy of a Signed cancellation policy or order form
___ Copy of a Signed order form
___ AVS of Y or M and SIGNED proof of delivery to AVS confirmed address
___ Signed rental agreement or Hotel/Motel folio
___ Copy of the Recurring billing agreement
___ T & E Documentation showing loyalty transactions related to this purchase
___ T & E – Documentation showing subsequent purchases made throughout the service period
___ Proof that the ticket was received for passenger transport
___ Proof the name on the flight manifest matches the Cardholder name on purchased itinerary
___ Proof of CVC2 in lieu of imprint
___ Proof of authorization
___ Proof of Verified by Visa, MasterCard Secure Code, AMEX Safe Key, or Discover Protect Buy
_x_ Other Documentation (Please Describe): PAX HAS BEEN CREDITED

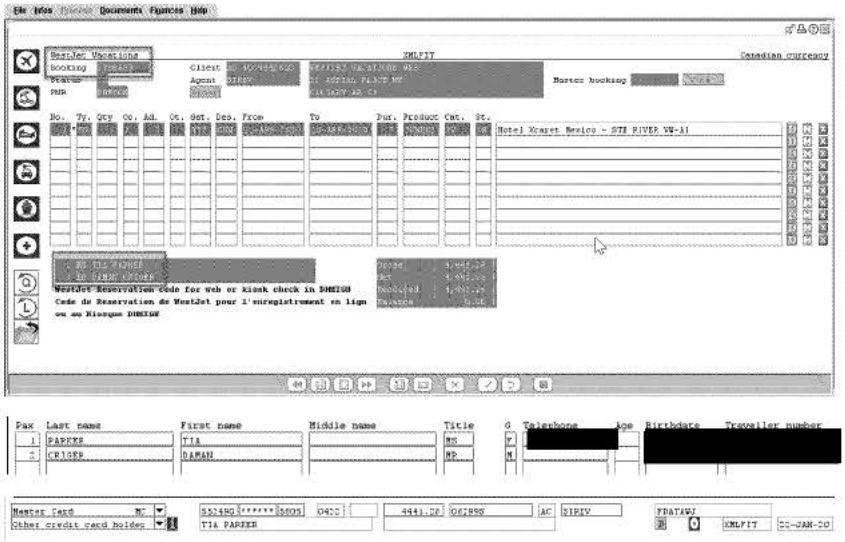
Merchant Comments

Due to the current situation with COVID-19, exceptions are being made to return the full cost of cancelled tickets to the customers in the form of WestJet Dollars, valid for 24 months from the date of issue. However, all tickets are still non-refundable. Uncontrollable schedule irregularity means a flight delay, cancellation or diversion that is considered to be not within the carrier's control including but not limited to situations of force majeure. This information is available in our Tariffs, which are located on our website www.westjet.com under https://www.westjet.com/assets/wj-web/documents/en/about-us/legal/international-transborder(us)-tariff.pdf In accordance with WestJet Vacations' flexible cancellation policy, this reservation was cancelled. The full amount was returned to the customers in the form of WestJet Dollars. The amount of $4442 was deposited in account # 545711633, under the name TIA PARKER. The funds are valid for 24 months. SN

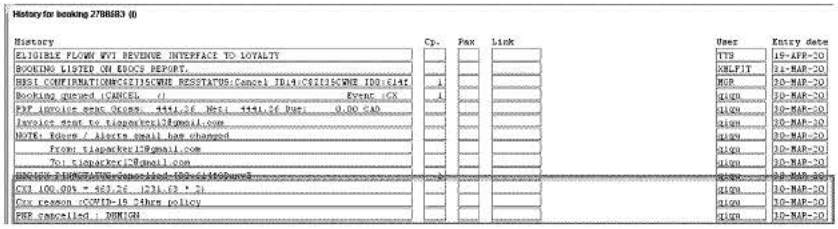
CB389648726

COVID-19 FLEXIBLE POLICY APPLIED TO THIS RESERVATION.

This transaction is associated with a WestJet Vacations package for TIA PARKER & DAMAN CRIGER to travel from Toronto to Cancun from April 11 – 18, 2020.



This reservation was cancelled on March 30, 2020 due to the COVID-19 pandemic. A credit was issued, in the form of WestJet Dollars and deposited into the account under the name TIA PARKER.



Credited Tia Parker 545711631 4442 WSD. Removed from tracker.

By morawfor
Date created 07-APR-2020
Time created 15:19:38

CB389648726

Due to the COVID-19 pandemic, WestJet Vacations implemented a flexible change and cancel policy for existing bookings.

Flexible change and cancel policy for existing Westjet Vacations bookings

For vacation packages booked prior to March 3rd for travel in April, May or June 2020:

- $0 one-time fee waiver for changes or cancellations
- Value of cancelled vacations will be returned in the form of Westjet Dollars, valid for 24 months from the date of issue
- If you change your vacation, the difference in price will apply if the new package is higher value

Please contact us to change or cancel your flight. If you initially booked through a third party, please contact your travel agent directly.

Note:

- Changes or cancellations more than 24 hours from purchase, will be returned as Westjet dollars, valid for 24 months from date of issue.
- Policy does not apply to Group bookings.
- March and April, no hotel restrictions.
- Policy cannot be applied to packages with the following hotels in May: Disney, Universal, Hard Rock Resorts, Playa Resorts, Adamils, Sandals Resorts, Beaches Resorts, and Grand Pineapple Resorts.

After your $0 one-time change, if you cancel your booking:

- more than 45 days prior to departure, there will be a $250 CAD cancellation fee per person with the balance refunded to Westjet dollars
- 44-22 days prior to departure, there will be a 50% cancel fee per person with the balance refunded to Westjet dollars
- within 21 days prior to departure will be a full forfeit.
- These terms and conditions apply to Economy, Premium and Business cabin bookings.

After your $0 one-time change, any additional change must be made at least 21 days prior to departure, for a $100 CAD change fee per person plus any difference in package price (if new package price is lower the amount is forfeited)

https://www.westjet.com/en-ca/travel-info/advisories#coronavirus

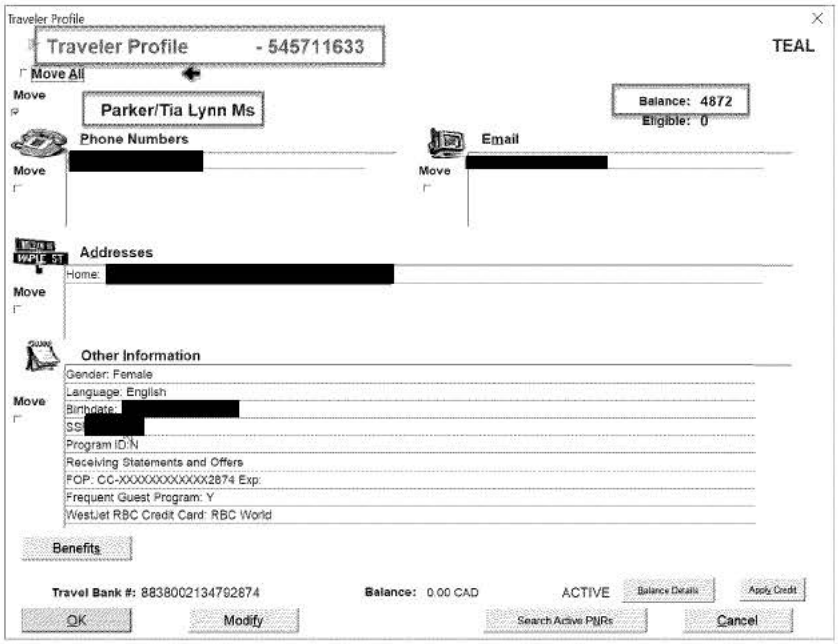
Due to the current situation with COVID-19, exceptions are being made to return the full cost of cancelled tickets to the customers in the form of WestJet Dollars, valid for 24 months from the date of issue. However, all tickets are still non-refundable.

Uncontrollable schedule irregularity means a flight delay, cancellation or diversion that is considered to be not within the carrier's control including but not limited to situations of force majeure.
This information is available in our Tariffs, which are located on our website www.westjet.com under https://www.westjet.com/assets/wj-web/documents/en/about-us/legal/international-transborder(us)-tariff.pdf

In accordance with WestJet Vacations' flexible cancellation policy, this reservation was cancelled. **The full amount was returned to the customers in the form of WestJet Dollars.**

The amount of $4442 was deposited in account # [redacted] under the name TIA PARKER. The funds are valid for 24 months.

CB389648726



According to communications regarding Best Practices issued by acquirers, Issuers should recommend that the cardholder attempt to contact the affected merchant to resolve the dispute.

Airlines

Example: An airline is unable to provide services to or from the affected areas and credit is not issued.

Issuers are reminded that cardholders must first attempt to resolve the dispute with the merchant. If the dispute cannot be resolved with the merchant, the acquirer is responsible for services not rendered.

WestJet has made every attempt to offer a reasonable solution for all parties involved by offering free changes or free cancellations with a full credit for future use.

According to the Canadian Transportation Agency, a future travel credit or Airline Dollars is an acceptable form of refund during this type of global crisis.

https://otc-cta.gc.ca/eng/important-information-travellers-during-covid-19

CB389648726

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 *Canadian Transportation Act* and *Air Passenger Protection Regulations* require that airlines 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 reasonable 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.

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.

Share this page

Date modified: 2020-03-25

Full details of the flexible change and cancel policy can be found on WestJet's website.

https://www.westjet.com/en-ca/about-us/legal/travel-terms-conditions/westjet-vacations

WestJet urges your financial institution not to institute any chargebacks and to decline the request for several compelling reasons discussed in detail below:

- WestJet fully complied with all applicable regulations governing passenger refunds, including those of the Canadian Transportation Agency (CTA).
- WestJet fully complied with its contract of carriage as set forth in WestJet's applicable Tariff[1] (collectively, the Tariff).
- The Tariff did not require a cash/credit card refund to the guest, and consequently there is no basis for a chargeback.

A. Background

The COVID-19 global pandemic has had drastic and unprecedented effects on the global airline industry. The devastating impacts have affected Canada and the world and, as a result, the Canadian government instituted measures to stop the spread of COVID-19.

The Canadian government implemented several restrictions. Many non-Canadian nationals were banned from entering Canada, including those travelling for an optional or discretionary purpose, including tourism, recreation, and entertainment. Those who could travel to/from Canada and Canadian citizens were subject to quarantine or isolation on arrival. It has also urged its citizens to avoid all non-essential travel outside of Canada.

COVID-19 and the resulting travel bans, restrictions, recommendations, and advisories from the various governments were outside of WestJet's control, as the CTA has acknowledged.[2] They essentially shut-down most passenger traffic, particularly with respect to discretionary, leisure travelers who are, by far, the largest segment of WestJet travellers.

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1 See https://www.westjet.com/en-ca/about-us/legal/tariffs/index .

2 See *Canadian Transportation Agency issues temporary exemptions to certain Air Passenger Protection Regulations provisions to address the COVID-19 pandemic,* CTA, dated March 13, 2020 ("APPR also provide a list of situations considered 'outside the air carrier's control', including medical emergencies and orders or instructions from state officials. The CTA has identified a number of situations related to this pandemic that are considered 'outside of the air carrier's control'. These include flight disruptions to locations that are covered by a government advisory against travel or unnecessary travel due to COVID-19."), available at https://rppa-appr.ca/eng/notice/canadian-transportation-agency-issues-temporary-exemptions-certain-air-passenger-protection-0

As a result, like large and small airlines around the world, WestJet was compelled to significantly reduce its flight schedules and workforce. In order to conserve liquidity, WestJet was also compelled to reduce certain goodwill guest service policies that went above and beyond what passengers were entitled to under the applicable regulations and the Tariff. Rather, WestJet strictly followed the terms of its Tariff, applicable fare rules, and CTA regulations.

However, in the spirit of goodwill to our guests, WestJet went above and beyond its Tariff by providing credit refunds to guests who were not entitled to any refunds. Thus, WestJet provided guests whose ***non-refundable*** flight reservations were cancelled on or after March 18, 2020, due to COVID-19 force majeure circumstances, with Travel Bank credits.

As explained further below, the Tariff permits WestJet to provide a credit rather than a refund in the original form of payment, as WestJet is not liable for such cancellations due to a "force majeure" event (as was the case here).

WestJet's COVID-19 refund policy, wherein it provides a travel credit for non-refundable tickets of cancelled flights and may potentially provide the option for a full refund in the original form of payment at a later date, is an approach that was established as a matter of goodwill for guests. But, WestJet is not required to provide cash refunds for non-refundable tickets under the Tariff in force majeure circumstances beyond its control.

B. WestJet Complied With Applicable Governmental Regulations.

Despite the challenges and airline industry turmoil resulting from the global COVID-19 pandemic, WestJet complied with applicable regulations of the CTA. WestJet's policy of offering travel vouchers as travel bank credits for cancelled, non-refundable tickets under

these force majeure circumstances is consistent with the CTA's Air Passenger Protection Regulations ("APPR"), its policies[3].

The APPR establish airline obligations toward passengers, including minimum compensation levels, standards of treatment, and possible administrative monetary penalties for non-compliance.[4] APPR Section 10 enumerates situations where a flight has been delayed or cancelled for reasons "outside the carrier's control, including but not limited to the following:

> . . .
> (f) a security threat;
> (g) airport operation issues;
> (h) a medical emergency;
> . . . and
> (I) an order or instruction from an official of a state or a law enforcement agency or from a person responsible for airport security."[5]

When there is a delay or cancellation "due to situations ***outside the carrier's control***, it must:

> (a) provide passengers with the information set out in section 13;
> (b) in the case of a delay of three hours or more, provide alternate travel arrangements, in the manner set out in section 18, to a passenger who desires such arrangements; and
> (c) ***in the case of a cancellation or a denial of boarding, provide alternate travel arrangements in the manner set out in section 18***."[6]

Notably, APPR Section 18 – which governs alternate travel arrangements in situations outside of a carrier's control – does not require a cash/credit card refund for cancellations beyond the control of the carrier. It requires carriers to provide "alternate travel arrangements free of charge" as set forth therein "to ensure that passengers complete their itinerary as soon as feasible."[7] The CTA recently reaffirmed that position:

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[3] See *Statement on Vouchers*, CTA, March 25, 2020 ("Statement on Vouchers"), available at https://otc-cta.gc.ca/eng/statement-vouchers
[4] See generally https://laws.justice.gc.ca/eng/regulations/SOR-2019-150/index.html
[5] APPR, Section 10(1).
[6] APPR, Section 10(3) (emphasis added).
[7] APPR, Section 18(1).

> "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."[8]

> "For flights cancelled for reasons beyond airlines' control, the *Air Passenger Protection Regulations*, which are based on legislative authorities, require that airlines ensure passengers can complete their itineraries but do not obligate airlines to include refund provisions in their tariffs."[9]

Even when a cash/credit card refund is warranted (*which is not the case here*), the CTA has recognized that in light of the unprecedented challenges resulting from the COVID-19 pandemic:

> "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)."[10]

And, the CTA has granted "air carriers an extension to the required timeline to respond to passenger requests for compensation. Airlines have until October 28, 2020, to respond to all compensation requests that were pending as of March 25, 2020, or submitted between March 25, 2020, and September 29, 2020."[11]

C. WestJet Fully Complied with Its Applicable Tariff.

WestJet has provided travel credits to guests who purchased non-refundable tickets for flights cancelled due to the COVID-19 global pandemic, government travel restrictions, and health/safety concerns. Because WestJet's actions are explicitly permitted under the Tariff, there is no basis for instituting a chargeback against WestJet.

WestJet's Tariff contains its contract of carriage and governs the relationship between its guests and WestJet. The Tariff negates any liability on behalf of WestJet with respect to this chargeback.

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8 *Statement on Vouchers.*
9 *FAQs: Statement on Vouchers*, available at https://otc-cta.gc.ca/eng/faqs-statement-vouchers
10 *Statement on Vouchers.*
11 See https://rppa-appr.ca/eng/notice/important-information-travellers-during-covid-19

The impacts of COVID-19, including travel bans forcing WestJet to cancel its flights, were not foreseeable and were completely beyond WestJet's control, as the CTA has recognized. These circumstances qualify as "force majeure" events under the Tariff. The Tariff provides that nothing makes "the airline responsible for acts of nature or the acts of third parties," and it states that "the carrier cannot be hel[d] responsible for inclement weather or the actions of third parties such as acts of government or air traffic control, airport authorities, security agencies, law enforcement or customs and immigration officials." Under the Tariff, WestJet can "refuse to transport" any guest when "it is necessary or advisable to: (a) Comply with any government regulation. . . . [or] (c) Address events of force majeure." COVID-19-related flight cancellations fall under both the "force majeure" and government regulation/order provisions.

Of critical importance, the Tariff is clear – in multiple provisions – that there is no liability for cancellations caused by "force majeure" events. With respect to liability for "force majeure" events, the Tariff states: "The carrier will not guarantee and will not be held liable for cancellations or changes to flight times that appear on guests' tickets due to an event of force majeure." Although these provisions establish that WestJet has no liability for COVID-19-related cancellations, WestJet nevertheless provided Guest with Travel Bank credits for the full value of his cancelled tickets. This was well within WestJet's contractual rights and indeed beyond WestJet's contractual obligations.

Not only is there clear language excusing WestJet from liability for force majeure events, but a chargeback is not appropriate because these were non-refundable tickets. But, any provision in the Tariff pertaining to refunds would apply in situations when there are cancellations outside the airline's control only where the passenger has purchased refundable tickets. Any such refund provision would not apply to non-refundable tickets.

Guests often choose to purchase non-refundable fares because they are sold at a lower price point, but they carry certain risks in the event the travel does not occur. The lower

price for non-refundable tickets is often a trade-off for passengers agreeing to a restriction that allows carriers to manage inventory and cash flow.

In short, the Tariff and Terms and Conditions govern the relationship between WestJet and our guests. WestJet complied with its Tariff and its Terms and Conditions.

This is **Exhibit "128"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

_____

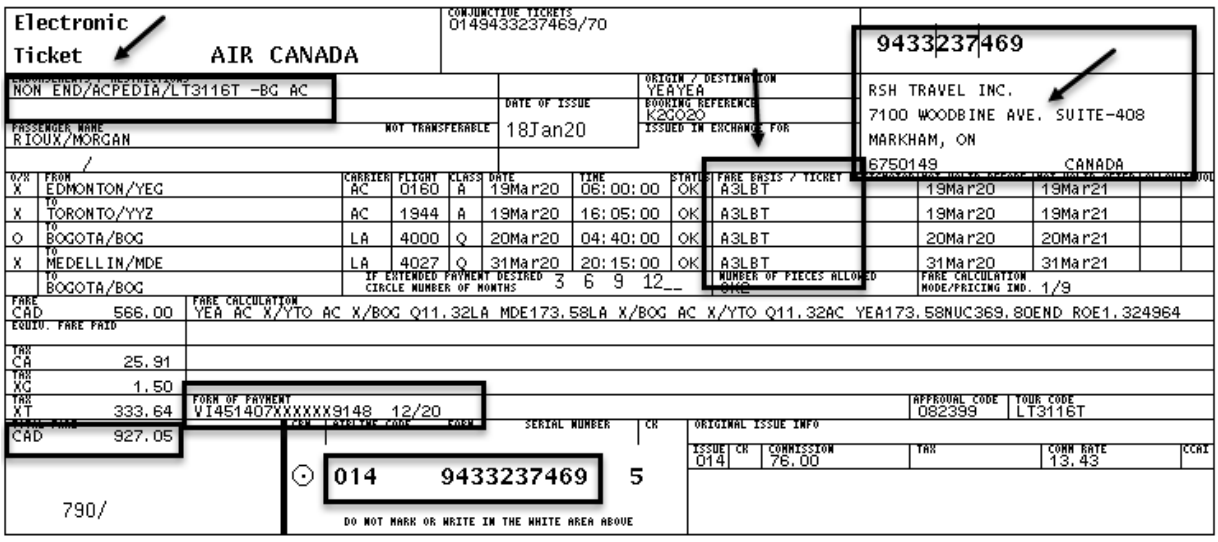
Signature

Case [redacted] **Reject 927.05CAD**

Please reverse these chargebacks. Ticket 0149433237469 are unused **and nonrefundable**. The cardholder purchased the tickets on the Royal Scenic Holiday website and had to ***click 'I accept, purchase'*** accepting **the nonrefundable/no changes** fare rules.. Due to Government travel restrictions, Air Canada has implemented a COVID-19 Goodwill Policy**- passengers can still use the full value of the ticket for future travel** (additional fare may apply). It is imperative the passenger retains their ticket number to use as a credit for future travel**.**
The nonrefundable fare rules are applicable if the passenger **does NOT** take advantage of Air Canada's COVID-19 Goodwill Policy. As these tickets were booked online, any ticket changes can also be done on Air Canada's website.
Attached is a copy of the ticket, the nonrefundable fare rules, the online ***click 'I accept, purchase'***, the nonrefundable/no changes fare rules and Air Canada's COVID-19 Goodwill Policy.

We confirm that flights were cancelled for reasons listed below:
"As and from February 1, 2020, all of Air Canada's route suspensions were directly caused by the factors beyond its control, principally the COVID-19 pandemic and the government measures put in place to contain its spread. As a result, Air Canada's policy of issuing long term credits with respect to non-refundable tickets for the flight cancellations relating to those suspended routes is compliance with applicable law (as confirmed in the Canadian Transport Agency's guidance updated March 25, 2020, …"… 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…" (https://otc-cta.gc.ca/eng/statement-vouchers))"

Copy of the original tickets purchased: +



Electronic Ticket AIR CANADA

CONJUNCTIVE TICKETS 0149433237469/70

9433237469

NON END/ACPEDIA/LT3116T -BG AC

ORIGIN / DESTINATION YEAYEA

RSH TRAVEL INC.
7100 WOODBINE AVE. SUITE-408
MARKHAM, ON
6750149 CANADA

PASSENGER NAME RIOUX/MORGAN

NOT TRANSFERABLE

DATE OF ISSUE 18Jan20

BOOKING REFERENCE K2GO2O

ISSUED IN EXCHANGE FOR

O/W	FROM / TO	CARRIER	FLIGHT	CLASS	DATE	TIME	STATUS	FARE BASIS / TICKET			
X	EDMONTON/YEG	AC	0160	A	19Mar20	06:00:00	OK	A3LBT		19Mar20	19Mar21
X	TORONTO/YYZ	AC	1944	A	19Mar20	16:05:00	OK	A3LBT		19Mar20	19Mar21
O	BOGOTA/BOG	LA	4000	Q	20Mar20	04:40:00	OK	A3LBT		20Mar20	20Mar21
X	MEDELLIN/MDE	LA	4027	Q	31Mar20	20:15:00	OK	A3LBT		31Mar20	31Mar21
	BOGOTA/BOG										

IF EXTENDED PAYMENT DESIRED CIRCLE NUMBER OF MONTHS 3 6 9 12__

NUMBER OF PIECES ALLOWED OKE

FARE CALCULATION MODE/PRICING IND. 1/9

FARE CAD 566.00

FARE CALCULATION YEA AC X/YTO AC X/BOG Q11.32LA MDE173.58LA X/BOG AC X/YTO Q11.32AC YEA173.58NUC369.80END ROE1.324964

EQUIV. FARE PAID

TAX CA 25.91

TAX XG 1.50

TAX XT 333.64

FORM OF PAYMENT VI451407XXXXXX9148 12/20

APPROVAL CODE 082399

TOUR CODE LT3116T

TOTAL FARE CAD 927.05

CRN SYS TKT CODE FORM SERIAL NUMBER CR

ORIGINAL ISSUE INFO

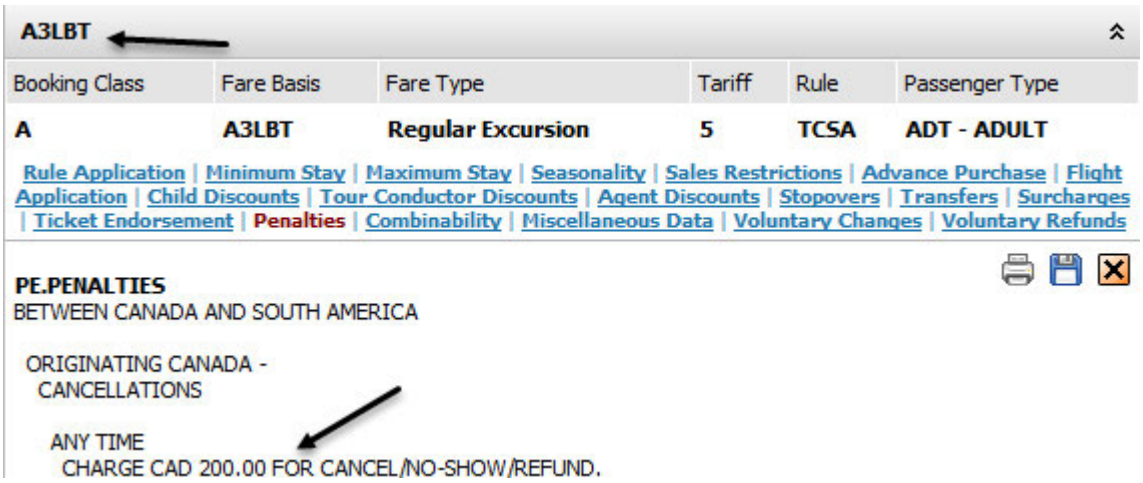
ISSUE	CR	COMMISSION	TAX	COMM RATE	CCAI
014		76.00		13.43	

790/

014 9433237469 5

DO NOT MARK OR WRITE IN THE WHITE AREA ABOVE

Fare rules accepted at time of booking:



A3LBT

Booking Class	Fare Basis	Fare Type	Tariff	Rule	Passenger Type
A	A3LBT	Regular Excursion	5	TCSA	ADT - ADULT

Rule Application | Minimum Stay | Maximum Stay | Seasonality | Sales Restrictions | Advance Purchase | Flight Application | Child Discounts | Tour Conductor Discounts | Agent Discounts | Stopovers | Transfers | Surcharges | Ticket Endorsement | Penalties | Combinability | Miscellaneous Data | Voluntary Changes | Voluntary Refunds

PE.PENALTIES
BETWEEN CANADA AND SOUTH AMERICA

ORIGINATING CANADA -
CANCELLATIONS

ANY TIME
CHARGE CAD 200.00 FOR CANCEL/NO-SHOW/REFUND.

AIR CANADA'S UPDATED GOODWILL POLICY:

Guidance for obtaining the Goodwill credit for future travel can be found on Air Canada.com under the Covid 19 policies.

https://www.aircanada.com/ca/en/aco/home/book/travel-news-and-updates/2020/covid-19.html

We have implemented highly flexible and expanded booking options. You can make a one-time change without a fee for all new or **existing bookings** made through June 30, 2020 **for original travel between March 1, 2020 and June 30, 2021**. If you booked directly with Air Canada and you need to cancel for any reason, you can convert your ticket to an Air Canada Travel Voucher that has no expiry date or to Aeroplan Miles with an additional 65% bonus miles.

You can make a one-time change without a fee or cancel your existing booking and rebook later if your **original travel is between March 1, 2020 and June 30, 2021.**

If you booked with a travel agent or any online travel agency (for example, Expedia or Priceline), kindly contact them directly for changes or cancellations. Each partner has a unique booking system that we are unable to access in order to adjust your booking.

If you booked directly with Air Canada (including aircanada.com, the Air Canada Mobile App, and our Contact Centres) or Kayak, Google Flights, and Skyscanner, you can change or cancel your booking by visiting Manage My Booking.

Terms and Conditions

- Ticket must be issued on or before June 30, 2020.
- **For original travel between March 1, 2020 and June 30, 2021.**
- If you need to change any flight, your new travel must be completed by June 30, 2022. **No change fee will apply.**
- If you booked directly with Air Canada and you need to cancel any flight, you can convert the remaining value of all tickets in a booking to an Air Canada Travel Voucher that is fully transferrable and never expires or to Aeroplan Miles with an additional 65% bonus miles as of June 1, 2020. No change fee will apply. Learn more.
- Booking can be changed or cancelled up to 2 hours prior to departure.
- Refundable tickets will be refunded as per the fare rules; a cancellation fee may still apply.

This is **Exhibit "129"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

_____

Signature

CIBC

MARLAINA BOSKERS
[redacted]

May 27, 2020

Dear MARLAINA BOSKERS,

Subject: Disputed Credit Card Transaction *(Time Sensitive)*
Credit Card Number ending in [redacted]

We are following up regarding the transaction billed to your CIBC credit card account for $994.10 by SWOOP RESERVATION, on JAN 28, 2020. We want to help resolve this matter for you.

Temporary credit given while investigating
After you brought this transaction to our attention, we applied a credit on MAY 05, 2020 to your CIBC credit card account statement. We then asked for proof of the transaction from the merchant.

Please review and choose a course of action
The merchant has now provided us with a copy of the transaction receipt, which is enclosed for your records.

- **Reply:** If you would like to dispute this transaction, please use one of these options:
  1. Complete and sign the attached 'Dispute Letter'. Return it by JUN 11, 2020 to:

     CIBC Credit Card Services
     PO Box 4058, Station A
     Toronto ON
     M5W 1L8

     Once we receive it we can investigate this matter further for you.
  2. Call us at 1 866 385-1344 (in Canada and the U.S.) or 416 256-6871 (from elsewhere) to start the investigation right away.
- **Don't Reply:** If we do not receive a response from you by JUN 11, 2020, we will consider this matter resolved. We will then re-apply the transaction amount to your credit card account which will appear as an amount owing on your next statement and we will close our file.

For more information
It is always a good idea to keep an eye on your credit card purchases. To learn more about what to do for a transaction that you do not believe is valid, or for information about disputed transactions, please visit our website at www.cibc.com/charges.

[redacted]

Case ID: D-1311760

May 27, 2020

We're always here to help
If you wish to proceed, please let us know soon. If you have any questions, please contact us at 1 866 629-8397 (in Canada and the U.S.) or 416 784-7100 (from elsewhere) and one of our Representatives will be pleased to assist you.

Thank you for relying on your CIBC credit card. CIBC is committed to providing banking that fits your life, and we look forward to serving you.

Sincerely,

Adrienne Kelly
Director
CIBC Credit Card Client Service Operations

May 27, 2020

RE: Credit Card Number ending in [redacted]

It is extremely important that only **one** option is selected, the required information is completed, and the wording is not altered. Be sure to include any supporting documentation. If section 2 is selected, you also need to provide specific details on how you attempted to contact and resolve the dispute with the merchant, including the merchant's response to your attempt to resolve the dispute.

Merchant: SWOOP RESERVATION
Transaction Amount: $994.10
Transaction Date: JAN 28, 2020

Section 1

☐ I certify that I have reviewed the evidence provided, including any new details and/or merchant name, and I state that I **did not make, authorize, or participate** in this transaction nor did I authorize anyone else to make this transaction to my account.

Note: Selecting this option requires cancellation of your card and reissuance of a new credit card and account number.

Section 2

I certify that I did make a purchase with this merchant. However, I was unsuccessful in resolving a dispute with the merchant, and:

☐ I have **not received any goods or services**, which were expected to be received/performed on _____ (date). I enclose a copy of my agreement with the merchant and the invoice.

☐ The **amount has been altered.** I authorized the merchant to charge my CIBC credit card account in the amount of $ _____ . Enclosed is my copy of the transaction receipt to support this claim.

☐ I **paid for the purchase by other means** (e.g., cash, traveller's cheques, money order). I enclose a copy of my receipt as proof to support my claim.

☐ I **returned the merchandise** on _____ (date) and asked the merchant for a full credit. Enclosed is a copy of the return slip and/or credit slip.

☐ I notified the merchant of the **cancelled reservation** on _____ (date). The cancellation number provided by the merchant is _____ . No services have been received for this transaction and a credit has not been issued to my CIBC credit card account.

OR

☐ I did make a purchase with this merchant in the amount of $ _____ . However, **I did not make, authorize or participate in the transaction** I am disputing above. My credit card was in my possession at the time this transaction occurred. Enclosed is my receipt for the purchase I did make for $ _____ .

If we do not receive a response by JUN 11, 2020, we will consider this transaction to be valid and payable by you.

Date *(mmm/dd/yyyy)*	MARLAINA BOSKERS Print Name	X	Signature *(sign within box)*
Date *(mmm/dd/yyyy)*	Name of Authorized User *(if applicable)*	X	Authorized User's Signature *(if applicable)* *(sign within box)*

Case ID: D-1311760

Acquirer Collaboration Dispute Response Questionnaire - Consumer Disputes
Dispute Reason Code 13.1, 13.2, 13.3, 13.4, 13.5, 13.6, 13.7, 13.8, 13.9

1056

ROL Case Number: [redacted]

Transaction Information

Cardholder Account Number: [redacted]
Transaction Amount: 994.10
TransDate (MM/DD/YY): 01/28/2020
Dispute Reason Code: 13
MO/TO / ECI Indicator: 7
Transaction Identifier:

Tran type: D
Acquirer Reference Number: 74450770029004032016211
Chargeback CPD (MM/DD/YY): 05/06/2020
Dispute Condition Code: 1
Merchant Category Code: 4511
Jurisdiction: Visa Canada Domestic

Dispute Response Information :

___ Accept Partial
_x_ Decline
Acceptance Amount: 0.00
Why are you not accepting full liability?
COMP EVID

Response Reason :

_x_ Compelling Evidence
___ Credit Processed
___ Invalid Dispute

Invalid dispute reason:

Explanation:
See attachment

Credit Information

Credit Date (CCYY-MM-DD): Acquirer Reference Number: Credit Amount:

DISPUTE RESPONSE - C

1057

Merchant #: 82041880014 Case #[redacted] Reason Code: 1310 Amount: 994.10

___ Accept dispute: By selecting this action, you are accepting **FULL** financial liability for this dispute.
___ Credit Issued: Credit Date (MM/DD/CCYY): ____/____/_____ Credit Amount: _____

Select all conditions that apply to your response and include supporting documentation as required by the Issuer.
Please ensure the case number is written in the upper right hand corner of each page.

_x_ 01 - Documentation to prove the cardholder is in possession of and/or using the merchandise
___ 02 - Signed Delivery form, copy of cardholder identification as proof goods were picked up at merchant location
___ 03- Address Verification Method, or AVS of Y or M and proof of delivery
___ 04 - Digital goods download, Download Date (MM/DD/CCYY)*: Time (HH:MM)*:
(2 or more optional selections must be selected):
___ Purchaser IP Address: and Device Geographic Location:

___ Device ID: and Device Name:

___ Purchaser Name: and Purchaser Email:

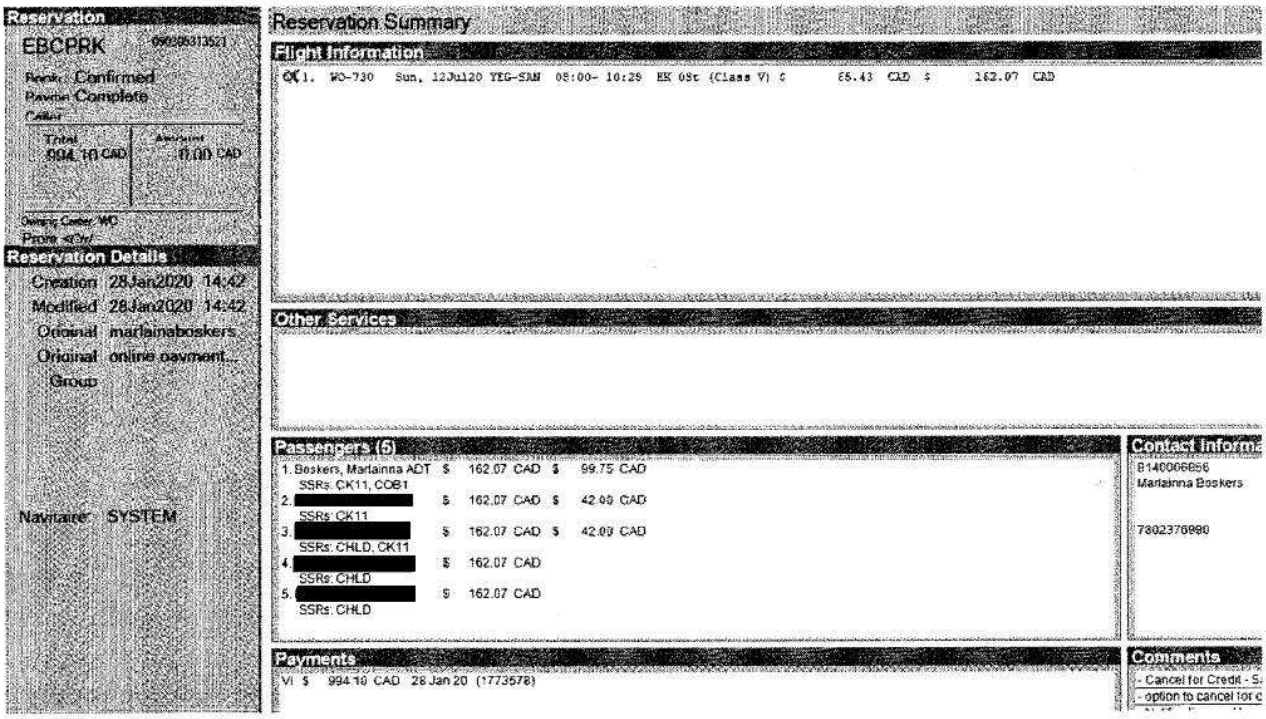
___ Profile Setup or Application Access
___ Merchant Website or Application Access
___ Same Device and Previous Transaction on Same Card Not Disputed
ARN*: Transaction Date (MM/DD/CCYY)*:
___ 05 - Delivery to cardholder at place of employment
___ 06 - T & E Loyalty transactions related to purchase
___ 07 - T & E Subsequent purchases made throughout service period
___ 08 - Passenger Transport proof ticket received, scanned at gate or other information (e.g. frequent flyer miles)
___ 10 - Authorized signer known by the cardholder

***- Input data required if corresponding option is selected (checked off).**

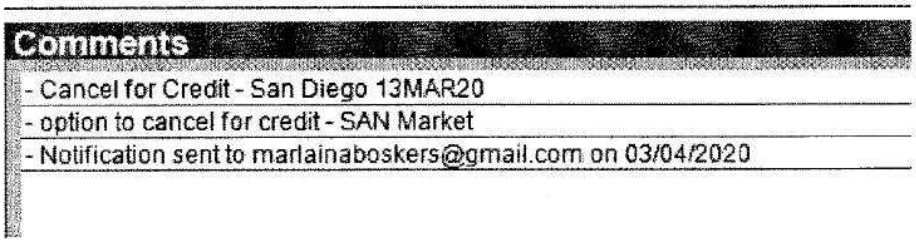
Merchant Comments
This is a non refundable ticket. Due to COVID-19 and subsequent travel bans and border closures, Swoop has implemented a flexible change and cancel policy. As per the flexible policy, full value of the booking has been placed into a travel credit valid for 2 years from the date of creation. No refund is due. AG Fraud

COVID-19 FLEXIBLE CHANGE/CANCEL POLICY APPLIED. Non-refundable fare.

This transaction is associated to a flight reservation for The BOSKERS family who were scheduled to travel from Edmonton to San Diego on July 12, 2020.



Due to the COVID-19 pandemic and/or travel bans imposed by the governments, this reservation receieved email notification of cancellation of the San Diego destination and the opportunity to place this non-refundable ticket into a travel credit.



Coronavirus (COVID-19) outbreak:

Due to the COVID-19 pandemic, Swoop has suspended all international and transborder flights. This decision was made following Prime Minister Justin Trudeau's announcement imposing travel restrictions for all flights entering Canada to reduce the spread of COVID-19. At this time, the suspension will be in place until June 30, 2020.

Operational Updates

Effective March 18th, The Government of Canada has imposed travel restrictions for all flights entering reduce the spread of COVID-19. Any foreign individual, who has been present outside of Canada or the Ur the last 14 days will be prohibited entry and will be denied boarding. This does not apply to Canadian Citize Permanent Residents, Immediate Family Members and certain exempt persons, so long as no person is COVID-19 symptoms.

Beginning on Sunday, March 22, 2020, at 11:59 p.m., we will suspend all our international and transborder suspension follows Prime Minister Justin Trudeau's announcement imposing travel restrictions for all flig Canada to reduce the spread of COVID-19. The suspension will be in place until June 30, 2020

Travellers booked on flights between Canada and the United States, Mexico and Jamaica, scheduled to operate before June 30, 2020 may cancel for a Swoop credit, valid for 24 months. All travellers who fall in this category have been contacted with instructions on how to cancel for a credit.

Swoop flight cancellations, Cancel for credit steps.

1. Make sure you're eligible for cancel for credit!

   Travel booked between Canada and the United States, Mexico and/or Jamaica for travel before June 30th, 2020 or flights that have been changed or cancelled by Swoop.

2. Once you've confirmed you're eligible, you should have received an email from Swoop with instructions on how to access your credit.

   Check your junk/spam folder if you haven't received an email.

3. If you cannot find the email, you can still access your credit as long as you can log into **Manage My Booking** with your reservation code (6 digit alpha-numeric code) and the last name of the first traveller listed on your reservation (note: this could be different from the person who made the booking).

5. Once you're logged into Manage My Booking:

   1. Select 'Flight Changes

   2. Select 'Flight Interrup

   3. Hit 'cancel.'

6. If you want to confirm y available, you can view y credits through your Sw

Cancel for Credit Terms and Conditions

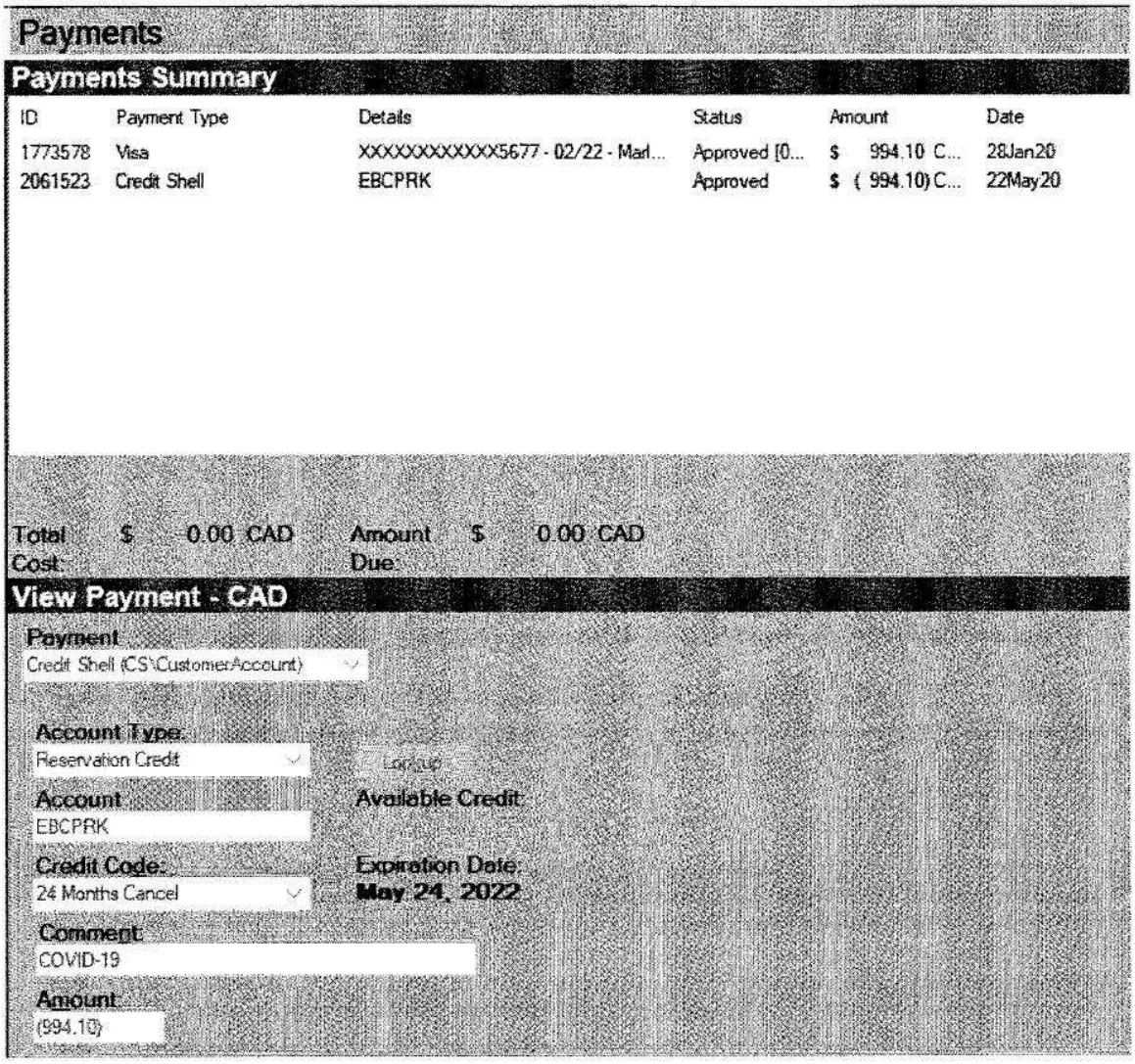
Swoop's one-time offer to cancel for credit applies to existing bookings that r following criteria: Existing flights booked for travel before June 30, 2020 bet Canada and the US, Mexico and Jamaica; existing flight reservations which ar or changed by Swoop.

Customers have the ability to cancel their reservation for a credit through M. Booking. The credit is available for use for up to 24 months after the date on cancellation occurs. Credit must be used within 24 months. The entire value booking will be applied to a credit on the profile of the first traveller on the re (in the event there are more than 1 travellers on a booking). A traveller profil created in order for credit to be issued. If Extras (seats, bags, etc.) were purch initial booking, the value of those Extras will be credited back to the traveller of Extras can be used towards either base fare or additional Extras on the sul booking. The credit can be used towards more than one subsequent booking. of the credit exceeds the value of the subsequent booking, the remaining diff value will remain available to the traveller within their Swoop account. If the subsequent booking exceeds the value of the credit, the traveller will be resp pay the difference. The credit can be used for any new travel purchase, even

Full details concerning the Coronavirus and available change/cancel options can be found on Swoop's website here:

https://www.flyswoop.com/making-changes-to-your-flight/
https://www.flyswoop.com/cancel-for-credit/

In accordance with Swoop's flexible cancellation policy, a credit in the amount of $994.10 has been issued to the customer. The credit is valid for 24 months from the date it was issued, expiring May 24, 2022.



Payments

Payments Summary

ID	Payment Type	Details	Status	Amount	Date
1773578	Visa	XXXXXXXXXXXX5677 - 02/22 - Marl...	Approved [0...	$ 994.10 C...	28Jan20
2061523	Credit Shell	EBCPRK	Approved	$ (994.10) C...	22May20

Total Cost: $ 0.00 CAD

Amount Due: $ 0.00 CAD

View Payment - CAD

Payment: Credit Shell (CS\CustomerAccount)

Account Type: Reservation Credit

Account: EBCPRK

Available Credit:

Credit Code: 24 Months Cancel

Expiration Date: May 24, 2022

Comment: COVID-19

Amount: (994.10)

According to the **Canadian Transportation Agency**, a future travel credit or Airline Dollars is an acceptable form of refund during this global crisis.

https://otc-cta.gc.ca/eng/important-information-travellers-during-covid-19

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 re passengers can complete their itineraries. Some airlines' tariffs provide for refunds in certain cases, but may have clauses that airlines bel obligations in force majeure situations.

The legislation, regulations, and tariffs were developed in anticipation of relatively localized and short-term disruptions. None contemplate 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 fai 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 t of cancelled flights. On the other hand, airlines facing huge drops in passenger volumes and revenues should not be expected to take ste economic viability.

While any specific situation brought before the CTA will be examined on its merits, the CTA believes that, generally speaking, an appropri context could be for airlines to provide affected passengers with vouchers or credits for future travel, as long as these vouchers or credits unreasonably short period of time (24 months would be considered reasonable in most cases).

Swoop has made every attempt to offer a reasonable solution for all parties involved. Swoop is willing and able to offer services at a later date by providing a travel credit for future use.

There are no exceptions at this time. Therefore, a refund to the original form of payment is not due.

From: [redacted]
To: Credit Card Dispute, Mailbox
Cc: [redacted]
Subject: RE: Secure message from CIBC - D-1311760 12514
Date: Thursday, April 30, 2020 12:26:05 PM
Attachments: SWOOP_REFUND.pdf

[EXTERNAL]

Hello,

I am requesting a chargeback for a transaction in which the merchant has conveyed to me in writing that they are declining to render the services which this transaction on my credit card paid for. On Jan 28 I purchased 5 airline tickets from Swoop to fly from Edmonton to San Diego leaving on July 12. ($994.10). I received an email from Swoop on March 20th that my flights had been cancelled. On April 2nd I spoke to an agent via Swoop's live chat. I noticed that Swoop no longer offers flights to San Diego, which is my family's travel destination because we have accommodations and family there. I asked for a refund, and got denied. On April 3rd I continued the communications via live chat and again requested a refund. I was denied. April 22 I sent an email to Swoop requesting a refund, but I never got a reply. April 22 I sent another message via their live chat requesting a refund and again, got denied. Attached are screenshots of our communications.

Not only do Swoop credits not satisfy a legal obligation to a refund-but these credits have absolutely NO value to me now that they no longer fly to San Diego!! Swoop has failed to provide the services contracted in the tickets that I have purchased by cancelling our flights.Swoop is bound by it's tariff, which requires Swoop to provide a full refund to the original form of payment if it cannot provide the services paid for, EVEN in the case of force majeure! They denied me the refund to which I am entitled under sections 17(2) and 17(7) of Canada's Air Passenger Protection Regulations and relate case law.

Thank you,

Marlaina Boskers

From: Credit Card Dispute, Mailbox

Sent: Wed, 29 Apr 2020 16:22:58 +0000

To: [redacted]

Cc:

Subject: Secure message from CIBC - D-1311760 12514

April 29, 2020

Dear Mrs Marlaina Boskers:

Email address: [redacted]

This notification is being sent to the email address provided in accordance with your earlier verbal or written consent to obtain documents electronically. Please review the enclosed documents carefully and print or save them for future reference as they provide important information about your CIBC product(s).

Subject: Credit Card Number Ending in 5677

Recently, you asked us about the transaction billed to your CIBC credit card account for $994.10 by SWOOP RESERVATION, on January 30, 2020. We need your help to investigate this matter for you.

Please provide documentation by May 14, 2020

We are currently looking into this transaction for you. In order for us to dispute this transaction for you, please send us the supporting documentation as indicated below by May 14, 2020:

Services/Merchandise Not Rendered –A summary describing what was purchased and what was received including the merchant's response to your inquiry.

Please send the information promptly

You can provide the supporting documentation in writing via one of the following options:

- Scan and attach completed signed document and select reply through this secure email; or
- Fax the details to us at 1 888 595-8543; or,
- Mail the details to:
- CIBC Credit Card Services
- PO Box 4058, Station A
- Toronto ON
- M5W 1L8

Please make sure to provide the documentation before May 14, 2020. If we have not heard from you by then we will consider the matter resolved to your satisfaction and our file will be closed. So don't wait – please send it soon.

For more information

It is always a good idea to keep an eye on your credit card purchases. To learn more about what to do for a transaction that you do not believe is valid, or for information about disputed transactions, please visit our website at www.cibc.com/charges.

We're always here to help

Thank you for your patience while we investigate this matter for you. If you ever see a transaction that raises questions, remember we're ready to help. If you have any other questions, please call us at 1 866 629-8397 (in Canada and the U.S.) or 416 784-7100 (from elsewhere) and one of our Representatives will be pleased to assist you.

CIBC is committed to providing banking that fits your life, and we look forward to serving you.

Sincerely,

Adrienne Kelly

CIBC Credit Card Client Service Operations

D-1311760 12514

This mailbox is for the submission of the requested documents only. All other emails will not be retrieved.

This is **Exhibit "130"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

_____

Signature

[redacted]

Amex Bank of Canada
PO Box 3204 STN F
Toronto, Ontario,
M1W 3W7, Canada
Tel: 1 800 869 3016
Fax: 1 888 843 9523
Web: americanexpress.ca
April 28, 2020

Reference Number: [redacted]

Merchant Name: TRANSAT TOURS CANADA IN ETOBICOKE

Transaction Amount: CAD 500.00

Transaction Date: August 21, 2019

Dear SERENA UPPAL,

We are writing to you with important information about the inquiry you previously filed with us from TRANSAT TOURS CANADA IN ETOBICOKE for CAD 500.00.

When we contacted you on April 3, 2020 we informed you that a CAD 500.00 credit had been applied to your unbilled statement as ?Credit for disputed charge?.

The merchant has sent us a copy of the documentation, which we have enclosed for your reference. This documentation appears to support that the transaction was valid. As a result, the previously issued credit has been reversed. You will see this reversal of credit reflected on your next billing statement.

Thank you for your Cardmembership.

Yours sincerely,

American Express Customer Care

P000000047-C000000688-1/22-WP / S E L /

Canadian Transportation Agency – Statement on Vouchers

No refund to credit card is due as passenger is credited with future travel credit valid for 24 months.

Please reverse chargeback in favour of merchant.

Transat Accounting

1. [redacted] See Canada's travel advisories banning all unnecessary travel due to the COVID-19 pandemic regardless of destination as early as March 13th, 2020: https://travel.gc.ca/destinations/dominica and https://travel.gc.ca/travelling/advisories. In addition, Canada effectively closed its borders to most air travel as announced by Canada's Prime Minister on March 16th, 2020 and implemented by Transport Canada. See https://pm.gc.ca/en/news/news-releases/2020/03/16/prime-minister-announces-new-actions-under-canadas-covid-19-response and https://www.tc.gc.ca/en/initiatives/covid-19-measures-updates-guidance-tc/aviation-measures.html. Finally, the Government of Canada through the Canadian Transportation Agency ***has ordered various measures applicable to all carriers***; including that ALL CARRIERS may issue refunds via travel credits for the time being. See these ***orders*** under Determination No. A-2020-42 at https://otc-cta.gc.ca/eng/ruling/a-2020-42 and Determination No. A-2020-47 at https://otc-cta.gc.ca/eng/ruling/a-2020-47, and Order No. 2020-A-37 at https://otc-cta.gc.ca/eng/ruling/2020-a-37

CANADIAN TRANSPORTATION AGENCY

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.

Date modified:

INQUIRY

AMEX

DATE: 20-APR-2020

[redacted]

Cardholder: The Cardmember has requested a Credit for goods / services that were not received from your business. Please issue a Credit or provide Proof of Delivery, or a copy of the purchase agreement indicating the cancellation policy and an explanation of why a Credit is not due.

Merchant:

Please find attached, Transat rebuttal for charge back indicated.

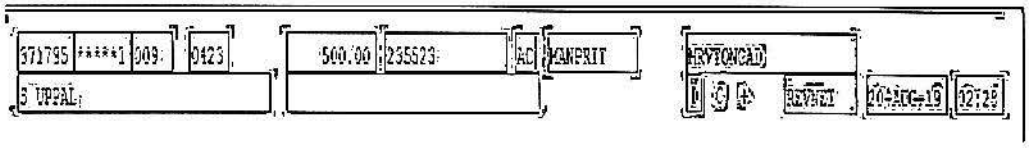
Passengers booked with Transat for departures to May31,2020 and affected by cancellations as result of the COVID -19 global situation have been offered to change their travel dates or who wish to cancel their reservation, can use their **credit towards future travel valid for 24 months**.

Passengers: Serena Uppal - part of a larger group booked with TRAVELONLY INC. agency.

Cancelled itinerary: Toronto/Punta Cana/Toronto April 29, 2020/May06,2020

We are responding to the inquiry in accordance with Federal and Provincial impositions during covid-19 Global outbreak and situation.

I have attached a copy of the invoice reflecting the credit amount available to the cardholder which is what was paid to Transat on Amex shown below. The cardholder credit is the value paid **NET $500.00 for the amount in question of inquiry.**



Additional attachments:

Transat Terms and Conditions – Force Majeure

This is **Exhibit "131"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

_____

Signature

Amex Bank of Canada
PO Box 3204 STN F
Toronto, Ontario,
M1W 3W7, Canada
Tel: 1 800 869 3016
Fax: 1 888 843 9523
Web: americanexpress.ca
May 16, 2020

000045

HEATHER STEVENS
[redacted]

Reference Number: [redacted]
Transaction Amount: CAD 5157.78

Merchant Name: WESTJET CALGARY
Transaction Date: December 4, 2019

Dear HEATHER STEVENS,

We are writing to you with important information about the inquiry you previously filed with us from WESTJET CALGARY for CAD 5,157.78.

When we contacted you on April 9,2020, we informed you that a CAD 5,157.78 credit had been applied to your April statement as ?Credit for disputed charge?.

The merchant has sent us a copy of the documentation, which we have enclosed for your reference. Please be advised that as per the merchant policy presented by the merchant in the enclosed documentation, on page 4, indicates that value of the cancelled flight will be returned as credit to your travel bank, valid for 24 months from the date of issue. The merchant documentation appears to support that the transaction was valid. As a result, previously issued credit has been reversed. You will see this adjustment reflected on your next billing statement.

It is worth noting that the Canadian Transportation Agency (CTA) has stated 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. However, if you think you are entitled to a refund and the airline refuses to provide one or offers a voucher with conditions you don't want to accept, the CTA has indicated that you can file a complaint with them directly, and they will determine if the airline complied with the terms of its tariff on a case-by-case basis in due course.

Thank you for your Cardmembership.

Yours sincerely,

American Express Customer Care

[redacted]

[redacted]

[redacted]

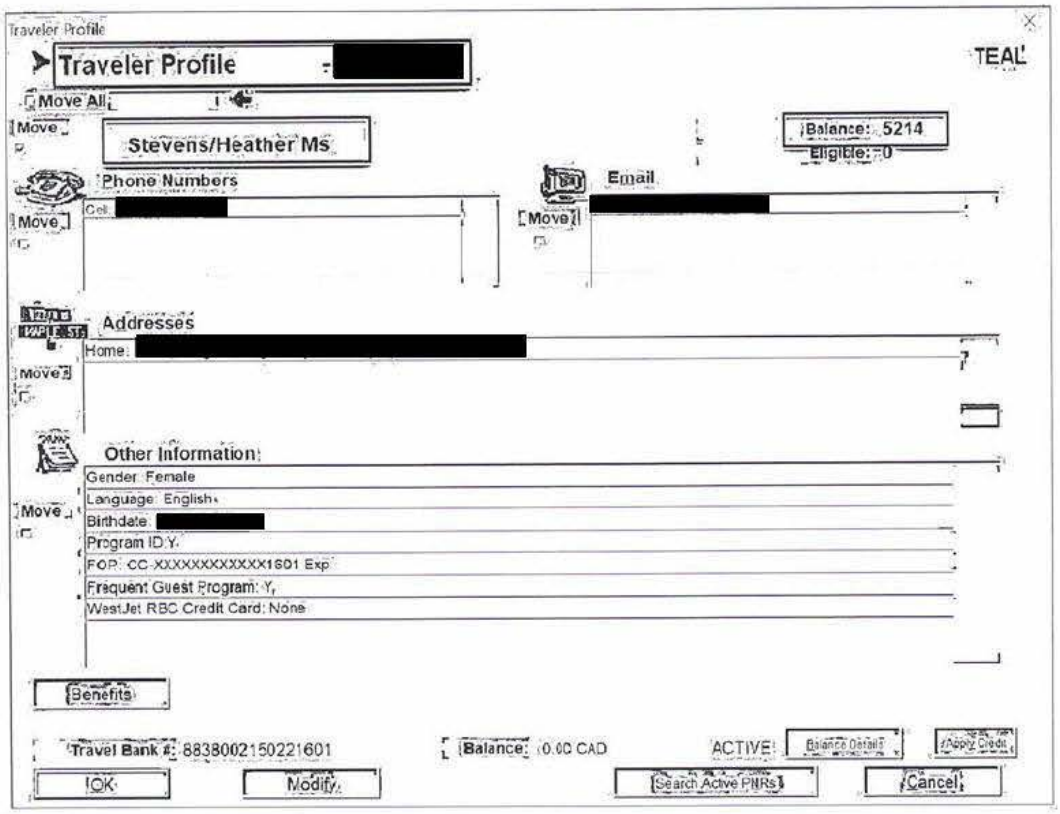
[redacted]

,PO Box 3204 STN F, Toronto, Ontario, M1W 3W7, Canada
ISS00120
INTUNGDMDIS0003EN

P000000045-C000000057-1/5-VIP / S E L /

Case # [redacted]

Merchant # 9322289969



Airlines

Example: An airline is unable to provide services to or from the affected areas and credit is not issued.

Issuers are reminded that cardholders must first attempt to resolve the dispute with the merchant. If the dispute cannot be resolved with the merchant, the acquirer is responsible for services not rendered.

According to the Canadian Transportation Agency, a future travel credit or Airline Dollars is an acceptable form of refund during this type of global crisis.

https://otc-cta.gc.ca/eng/important-information-travellers-during-covid-19

Case # [redacted]

Merchant # 9322289969

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.

Share this page

Date modified: 2020-03-25

Full details of the flexible change and cancel policy can be found on WestJet's website.

https://www.westjet.com/en-ca/about-us/legal/travel-terms-conditions/westjet-vacations

Case # [redacted]

Merchant # 9322289969

Flexible change and cancel policy for existing WestJet Vacations bookings

For vacation packages booked prior to March 3rd for travel in April, May or June 2020:

- $0 one-time fee waiver for changes or cancellations
- Value of cancelled vacations will be returned in the form of WestJet Dollars
- If you change your vacation, the difference in price will apply if the new package is higher value.

Please contact us to change or cancel your flight. If you initially booked through a third party, please contact your travel agent directly.

Note:

- Changes or cancellations more than 24 hours from purchase will be returned as WestJet dollars, valid for 24 months from date of issue. We are not processing refunds to original form of payment at this time. We will update this information when it is available.
- Policy does not apply to Group bookings.
- March and April, no hotel restrictions.
- Policy cannot be applied to packages with the following hotels in May: Disney, Universal, Hard Rock Resorts, Playa Resorts, Atlantis, Sandals Resorts, Beaches Resorts, and Grand Pineapple Resorts.

After your $0 one-time change if you cancel your booking:

- more than 45 days prior to departure, there will be a $250 CAD cancellation fee per person with the balance refunded to WestJet dollars.
- 44-22 days prior to departure, there will be a 50% cancel fee per person with the balance refunded to WestJet dollars
- within 21 days prior to departure will be a full forfeit.
- These terms and conditions apply to Economy, Premium and Business cabin bookings.

https://www.westjet.com/en-ca/travel-info/advisories#coronavirus

WestJet Vacations bookings are non-refundable. Due to the current situation with COVID-19, exceptions are being made to return the full cost of cancelled tickets to the customers in the form of WestJet Dollars, valid for 24 months from the date of issue. However, all tickets are still non-refundable. Therefore, a refund is not due.

In accordance with WestJet Vacations' flexible cancellation policy, this reservation was cancelled. **The full amount was returned to the customers in the form of WestJet Dollars.** The funds are valid for 24 months.

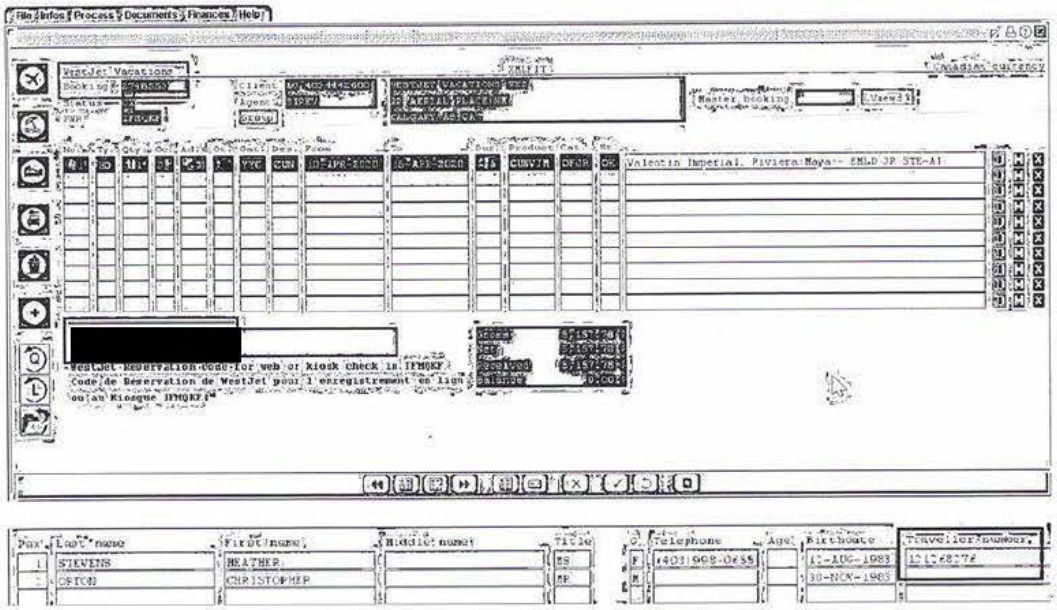
The amount of 5188 WestJet Dollars are now sitting in the customer's profile, 571221254, under the name HEATHER STEVENS. The funds are valid for 24 months.

Case # [redacted]

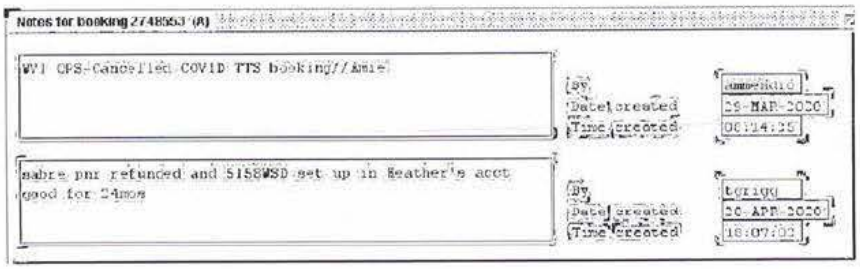
Merchant # 9322289969

COVID-19 FLEXIBLE POLICY APPLIED TO THIS RESERVATION.

This transaction is associated with a WestJet Vacations package for HEATHER STEVENS [redacted] to travel from Calgary to Cancun from April 10 – 15, 2020.



The booking was canceled on March 29, 2020 by the passengers due to the COVID-19 pandemic. On April 20, 2020, the full value of the reservation was credited in the form of WestJet Dollars to the account under the name HEATHER STEVENS.



Due to the COVID-19 pandemic, WestJet Vacations implemented a flexible change and cancel policy for existing bookings.

This is **Exhibit "132"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

_____

Signature

Amex Bank of Canada
PO Box 3204 STN F
Toronto, Ontario,
M1W 3W7, Canada
Tel: 1 800 869 3016
Fax: 1 888 843 9523
Web: americanexpress.ca
May 27, 2020

000581

TIM WILLMS
[redacted]

Reference Number: [redacted]
Transaction Amount: CAD 1510.00

Merchant Name: SUNWING VACATIONS ETOBICOKE
Transaction Date: February 21, 2020

Dear TIM WILLMS,

We?re writing in regard to your inquiry about the CAD 1,510.00 charge from SUNWING VACATIONS ETOBICOKE.

We suggest you work directly with the merchant to resolve this matter. Please bear in mind that American Express acts solely as a billing agent and only the merchant is able to issue a credit to your account.

It is worth noting that the Canadian Transportation Agency (CTA) has stated 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. However, if you think you are entitled to a refund and the airline refuses to provide one or offers a voucher with conditions you don't want to accept, the CTA has indicated that you can file a complaint with them directly, and they will determine if the airline complied with the terms of its tariff on a case-by-case basis in due course.

We value your membership and hope you understand our position in this matter.

Thank you for your Cardmembership.

Yours sincerely,

American Express Customer Care

This is **Exhibit "133"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

_____

Signature

Amex Bank of Canada
PO Box 3204 STN F
Toronto, Ontario,
M1W 3W7, Canada
Tel: 1 800 869 3016
Fax: 1 888 843 9523
Web: americanexpress.ca
May 28, 2020

000015

CARLA R PARADISI
[redacted]

Reference Number: [redacted]

Transaction Amount: CAD 524.51

Merchant Name: WESTJET AIRLINES 410000 CAMBRIDGE BAY
Transaction Date: January 13, 2020

Dear CARLA R PARADISI,

We are writing to you with important information about the inquiry you previously filed with us from WESTJET AIRLINES 410000 CAMBRIDGE BAY for CAD 524.51.

When we contacted you on April 28, 2020 we informed you that a CAD 524.51 credit had been applied to your May 2020 statement as ?Credit for disputed charge?.

The merchant has sent us a copy of the documentation, which we have enclosed for your reference. This documentation appears to support that the transaction was valid. Please be advised as per the merchant policy presented by the merchant in the enclosed documentation, on page 1, indicates value of the cancelled flights will be returned as a credit to your Travel Bank, valid for 24 months from the date of issue. As a result, previously issued credit has been reversed. You will see this adjustment reflected on your next billing statement.

It is worth noting that the Canadian Transportation Agency (CTA) has stated 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. However, if you think you are entitled to a refund and the airline refuses to provide one or offers a voucher with conditions you don't want to accept, the CTA has indicated that you can file a complaint with them directly, and they will determine if the airline complied with the terms of its tariff on a case-by-case basis in due course

Thank you for your Cardmembership.

Yours sincerely,

American Express Customer Care

000000015 /SEL/

This is **Exhibit "134"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

_____

Signature

Amex Bank of Canada
PO Box 3204 STN F
Toronto, Ontario,
M1W 3W7, Canada
Tel: 1 800 869 3016
Fax: 1 888 843 9523
Web: americanexpress.ca
June 21, 2020

000593

KELSEY PRUSE
[redacted]

Reference Number: D-[redacted]

Merchant Name: Air Canada VOYAGES A LA Saint Laurent

Transaction Amount: CAD 725.84

Transaction Date: February 11, 2020

Dear KELSEY PRUSE,

We are writing to you with important information about the inquiry you previously filed with us from Air Canada VOYAGES A LA Saint Laurent for CAD 725.84.

When we contacted you on May 16, 2020 we informed you that a CAD 725.84 credit had been applied to your May 2020 statement as ?Credit for disputed charge?.

The merchant has sent us a copy of the documentation, which we have enclosed for your reference. This documentation appears to support that the transaction was valid.Please be advised as per the merchant policy presented by the merchant in the enclosed documentation, on page 01, indicates that Air Canada is offering a full value credit for future travel with a one time change fee waiver. As a result, previously issued credit has been reversed. You will see this adjustment reflected on your next billing statement.

It is worth noting that the Canadian Transportation Agency (CTA) has stated 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. However, if you think you are entitled to a refund and the airline refuses to provide one or offers a voucher with conditions you don't want to accept, the CTA has indicated that you can file a complaint with them directly, and they will determine if the airline complied with the terms of its tariff on a case-by-case basis in due course

Thank you for your Cardmembership.

Yours sincerely,

American Express Customer Care

P000000593-C000000593-1-AMP / 1311 /

This is **Exhibit "135"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

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Signature

Amex Bank of Canada
PO Box 3204 STN F
Toronto, Ontario,
M1W 3W7, Canada
Tel: 1 800 869 3016
Fax: 1 888 843 9523
Web: americanexpress.ca
June 26, 2020

000507

NUO LI

Reference Number: I[redacted]
Transaction Amount: CAD 888.00

Merchant Name: Air Canada TEH CANADA Toronto
Transaction Date: January 9, 2020

Dear NUO LI,

We are writing to you with important information about the inquiry you previously filed with us from Air Canada TEH CANADA Toronto for CAD 888.00.

When we contacted you on June 4, 2020 we informed you that a CAD 888.00 credit had been applied to your upcoming statement as ?Credit for disputed charge?.

The merchant has sent us a copy of the documentation, which we have enclosed for your reference. This documentation appears to support that the transaction was valid. Please be advised as per the merchant policy presented by the merchant in the enclosed documentation, on page 02, indicates that Air Canada is offering a full value credit for future travel with a one time change fee waiver. As a result, previously issued credit has been reversed. You will see this adjustment reflected on your next billing statement.

It is worth noting that the Canadian Transportation Agency (CTA) has stated 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. However, if you think you are entitled to a refund and the airline refuses to provide one or offers a voucher with conditions you don't want to accept, the CTA has indicated that you can file a complaint with them directly, and they will determine if the airline complied with the terms of its tariff on a case-by-case basis in due course

Thank you for your Cardmembership.

Yours sincerely,

American Express Customer Care

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Signature

Questions about travel plans and COVID-19?

Last updated: March 16, 2020

We've been getting questions from consumers and licensed travel agents about the Coronavirus (COVID-19) and travel bookings that were previously made. We understand that the situation is evolving. This information is intended to help you make informed decisions for you, your family, your customers, and your business.

The Government of Canada advises that any non-essential travel outside of Canada be avoided until further notice. Read their advisory.

For our licensed travel agents & wholesalers

Offering a refund to your customers for booked travel is your decision and must follow your business refund policy. Remember that your refund policy should be clear to your customers when booking travel.

Be informed about what BC's Travel Assurance fund covers. The Fund does not apply:

- If travel bookings are cancelled voluntarily
- During a natural disaster or a "force majeure", which is an unforeseeable circumstance that prevents someone from fulfilling a contract. COVID-19 is considered a "force majeure".

Find out more about the Travel Assurance Fund

Is your business being financially impacted?

If you believe that your business is being financially impacted and is at risk of ceasing operations, please contact us so that we can anticipate any possible impact on your clients.

If you are thinking of not renewing your travel licence with us, understand that:

- You are not allowed to operate in BC without a licence.
- You and your customers may not be eligible to claim against the Travel Assurance Fund
- You would pay more for a new licence and you would need to contribute to the Travel Assurance Fund again.

Advice for your customers if their travel has been cancelled by another supplier.

If your customers have been impacted by a cancellation made by a third party, you can offer these suggestions:

- Ask about the options: many airlines and wholesalers are offering options for re-booking. While your customers may not receive the travel services on the desired date, they may be able to rebook travel services on another date or possibly receive a refund. Be aware that in some cases, they may be required to pay the difference between the original booking and the new booking.
- Confirm cancellation rights: If travel services resume but your client still wishes wish to cancel, refer to the travel service provider's terms and conditions on cancellation.
- Review the Itinerary: While many people may remember to check flights, remind them to contact any accommodation providers and tours that may have been booked to find out cancellation rights and responsibilities.
- Understand the travel insurance policy: If travel insurance was purchased, your customer should contact their insurance provider to find out their policy on cancellation due to COVID-19.
- Check with the credit card provider: If your customer's travel services are not provided and services were paid for by credit card, the credit card company may provide a refund for the travel services that were not provided.

For travelers

We understand that this is a confusing time and you may find yourself faced with a variety of decisions related to your travel bookings.

Cancelling your travel?

- While many airlines are offering cancellation options, understand that if you are voluntarily cancelling your travel bookings, you may not get your money back.
- Read the terms and conditions on your travel insurance carefully to understand your cancellation rights. Several insurance providers have said that they will no longer cover new customers who need to cancel their trips due to

COVID-19 as it is now a “known issue”.

- BC’s Travel Assurance Fund does not cover voluntary cancellation or a force majeure (such as a natural disaster or a situation like COVID-19). Find out more about the Travel Assurance Fund.
- Contact your licensed travel agent to explore your options.

Have your travel plans been cancelled?

- Some airlines and wholesalers are offering options for re-booking. While you may not receive the travel services on the desired date; you may be able to re-book travel services on another date or maybe even get a partial refund.
- Contact your travel service provider to find out their policy on cancellations and re-booking. Be aware that in some cases, you may be required to pay the difference between the original booking and the new booking or a cancellation fee.
- While you may remember to check your flights, don’t forget to contact your accommodation providers and any tours you may have booked to find out your cancellation rights and responsibilities.
- If you booked with a licensed travel agent, contact your booking agent for assistance. They will be able to help you with your options for re-booking.
- If travel services are not provided and you paid by credit card, check with your credit card company to see if they will provide a refund for the travel services that were not provided.

Whenever you are booking travel, always book with a licensed travel agent or wholesaler. If you aren’t sure if a business is licensed, check with us.

Check a licence.

We continue to monitor the situation and will share relevant information with you as quickly as we can.

Get reliable information about COVID-19

Reliable sources for information about COVID-19, including practical guidance about travel, preventing the contraction and spread of the virus, are:

- World Health Organization
- BC Centre for Disease Control
- Government of Canada outbreak update
- Government of Canada travel advice and general advisories

This is **Exhibit "137"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

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Signature

Information for consumers: travel vouchers and refunds

Last updated: May 25, 2020

We continue to get questions about consumer transactions in the time of COVID-19 including travel bookings and other types of businesses offering vouchers for future goods or services.

Many travel plans and other services have been disrupted over the last few months. When trying to resolve an issue, we encourage you to always start by contacting the business – in the case of travel, talk to your licensed travel agent, travel service provider or airline to find out what your options are. Please read all the fine print to fully understand the implications with any consumer contract.

The following information is focused on travel-related bookings, but the rules apply to any business offering vouchers, credits or gift cards, or anyone who has purchased a good or service online or by phone. Please note that these rules apply to not only to BC-based businesses and but also to any business dealing with a BC consumer.

Vouchers & credits

It's our understanding that many businesses are offering vouchers to accommodate their customers. Consumer protection laws do not address whether vouchers or credits are an appropriate method of refund. A business can offer you the option of a voucher and in most cases, it's your choice whether to accept it or not.

Vouchers and expiry dates

What to do if your voucher expires but it shouldn't

Read the *Business Practices and Consumer Protection Act*.
Read about the gift card/voucher rules in BC's Prepaid Purchase Card Regulation.

Trying to get a refund

If you wish to pursue a refund instead of a voucher, keep trying to get a refund directly from the business. If that doesn't

work, there are some other options to consider.

Request a credit card chargeback

If your travel dates have passed and the business did not provide the service (as opposed to you choosing not to go) or if you have been informed by the business that your future travel has been cancelled, and you paid by credit card, check with your credit card company to request that the charges on the card be cancelled/reversed. If you are denied by your credit card company, you will need to go to the Civil Resolution Tribunal or court (depending on the dollar amount) to seek compensation from the business.

Did you book online or over the phone?

If you booked your travel online or by phone and didn't get your services (as opposed to you choosing not to go), you can cancel your contract under BC's distance sales contracts provisions and be entitled to a refund from the business or chargeback from the credit card company. There are several steps to this process, waiting periods, and the remedy only kicks in 30 days after you don't get the service you bought (which means the date that you were supposed to travel). To understand and follow the process, visit the "Problem with an online purchase" page on our website, and follow these steps:

- Step 1: Read the section called "My product never arrived" and follow the instructions using the cancellation form. If the business doesn't respond to issue you a refund within 15 days, go to step 2.
- Step 2: Read the section called "I tried to cancel but didn't get a refund" and follow those instructions to obtain a reversal or cancellation of the charges from your credit card provider.
- Step 3: If the business and the credit card company both fail to provide you a refund, contact us to file a complaint. (Please follow all the steps above first.)

Remember that these options apply to any transaction done over the phone or online, it is not limited to travel bookings.

Read about distance sales in the *Business Practices and Consumer Protection Act*.

Non-essential travel is still to be avoided. Stay up to date on travel advice from the Government of Canada:

- Government of Canada's travel advisories
- Coronavirus disease (COVID-19): Travel restrictions, exemptions and advice

When booking travel, always book with a licensed travel agent or wholesaler. If you aren't sure if a business is licensed, check with us.

Check a licence.

We will continue to monitor the situation and will share relevant information with you as quickly as we can**.**

This is **Exhibit "138"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

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Signature

FAQ: Refunds for cancelled travel services

Posted in COVID-19, Travel on 2021-04-30 by Amanda :: Add a new comment

Looking for a refund for travel services that were cancelled by your airline, cruise line or other travel provider? Here are some of the most common questions we get on this topic along with our answers.

What you need to know

After over a year of cancelled travel plans, many consumers have had issues getting refunds from travel suppliers. As a BC regulator, one of the laws we oversee gives you cancellation and refund rights when you don't receive the services you paid for online or over the phone. If you're eligible, you may be owed a refund under BC law.

There's a lot to know, and a number of steps to follow to get your refund, so we recommend you start by reading this page: COVID-19 and refunds for cancelled travel.

Read it carefully, as it has detailed information about eligibility, what forms to use, and the steps needed to request a refund properly. Please be aware that the laws we oversee when it comes to these transactions are very specific and not everyone will be eligible to go through the process for a refund.

Still have questions? Here are some answers.

Frequently asked questions

Q: What if I cancelled my travel plans myself?
A: If you cancelled the travel plans yourself, you are not eligible to go through our refund process. If your travel service was available to you, but you decided not to go, the cancellation and refund laws we oversee do not apply. In these cases, we would suggest you try and reach a solution with the business based on what their cancellation policy allows.

Q: What if I cancelled my travel plans because of the Government travel restrictions?
A: You are not eligible to go through our process for a refund if the travel service was available to you and you decided not to travel – even if it was because of COVID-19 travel restrictions. In these cases, you are bound to the cancellation policy you signed when you booked the travel. Review the cancellation policy to find out what the terms and conditions of your contract allow.

Q: The travel provider I booked with is not based in BC. Do they have to follow these rules?
A: If businesses are doing business with people who live in BC, they must follow the laws in our province. If you live in BC, you can follow our process for a refund, assuming you meet the other eligibility requirements.

Q: What if I don't live in BC?
A: If you don't live in BC but booked your travel with a BC-based travel provider, they are required to follow the laws of this province. You can follow our process for a refund, assuming you meet the other eligibility requirements.

Q: The travel supplier (airline, hotel, cruise, etc.) has given me a voucher. Does that count as a refund?
A: No. If you are eligible for a refund under our laws, you must be refunded in the same way you paid. A voucher is not an appropriate refund method unless that is what you would prefer or if you have clearly consented to accepting a voucher.

Here are some examples where a voucher is permissible, meaning you would not be eligible to go through our refund process: The travel supplier had a promotion or incentive of some kind to take a voucher and you agreed to it. Or you and the travel supplier agreed over email that a voucher was an acceptable resolution.

But if the supplier cancelled the travel service, and simply gave you a voucher or informed you that you were being given a voucher (without you agreeing to it), that is not consent and you may be eligible to follow our refund process.

Q: If I am owed a refund by the business, do I get all the fees back too?
A: Yes, if you are eligible, you should get a full refund. This includes all fees, charges, taxes and interest that may have been charged.

Q: The travel provider says that their policy does not allow for refunds/full refunds. Can they refuse me a full refund?
A: If you are eligible for a refund under the distance sales law, it does not matter what the business's refund/cancellation policy is – you should still receive a full refund.

Q: My travel agent is keeping their commission/charging me a fee for cancellation. Is this allowed?
A: No. If you are eligible for a refund and followed the proper steps, your travel agent is required to provide a full refund to you. They cannot withhold their commissions or charge you fees. If they are not following the rules around this, you can submit a complaint to our office.

Q: The travel provider offered me different dates in place of the original travel plans (such as a different flight), but that won't work for me. Can I get a refund?
A: If the business offered alternate dates within 30 days of the original travel, they are considered to have provided the service according to the law (even if that timeline does not work for you). The contract is still fulfilled, and you would have no ability to exercise cancellation and refunds rights under our laws.

Going through our refund process

The process includes three parts, officially cancelling your contract with the suppliers, if that doesn't work then you try to get a reversal of charges from your credit card provider, and if you are still unsuccessful, you can submit a complaint to us.

Q: I've already tried to get my money back from the business – do I have to go through the whole process again by using your forms?
A: Yes – to go through our process for a refund, you must follow all the steps on our website. We recommend you use our official forms, even if you've already tried to get your money back from the business. This is because what you send to the business/credit card provider needs to include very specific information to be legal and our forms make sure that all that is covered. This gives you the best chance at getting a refund.

Q: I booked my travel plans through a booking platform/travel agency. Who should I cancel my contract with– the booking platform/travel agency OR the airline/hotel/business providing the travel services?
A: To cover your bases, we suggest sending our contract cancellation form to both suppliers. If you get to the stage where you need to submit a complaint to our office, when we ask for the name of the supplier, use the airline/cruise line/hotel (the business that was ultimately providing the services).

Q: How long will this process take?
A: The refund process has several steps and each one has required waiting times. This means that getting your refund this way can take months. If your travel supplier has a new refund process in place, like Air Canada, we suggest you try that first before coming to us.

Starting the process for a refund

Do you think you're eligible for a refund for cancelled travel plans? Learn more and start the refund process.

Other resources on this topic

COVID-19 and travel refunds

About Consumer Protection BC

We are responsible for regulating specific industries and certain consumer transactions in British Columbia. If your

concern is captured under the laws we enforce, we will use the tools at our disposal to assist you. If we can't help you directly, we will be happy to provide you with as much information as possible. Depending on your concern, another organization may be the ones to speak to; other times, court or legal assistance may be the best option. Explore our website at www.consumerprotectionbc.ca.

Leave a Reply

Your email address will not be published. Required fields are marked *

Comment

Name *

Email *

Save my name, email, and website in this browser for the next time I comment.

Post Comment

Could not connect to the reCAPTCHA service. Please check your internet connection and reload to get a reCAPTCHA challenge.

This is **Exhibit "139"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

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Signature

OBSI OMBUDSMAN FOR BANKING SERVICES AND INVESTMENTS

Consumer pursues credit card refund for vacation cancelled due to COVID-19

Show More

Posted Tuesday, January 11, 2022

Back to Search

Key lessons

- Whenever you buy goods and services, especially for future delivery, be sure to pay careful attention to the terms and conditions of the purchase. Return and refund policies vary, so before you agree to buy, it's important to understand what you will be entitled to if the goods are damaged, or the services are cancelled.
- Many provinces have specific consumer protection laws to protect consumers against improper business practices and give them certain rights when they purchase goods and services with a credit card. These laws set out very specific rules and timelines that need to be met for their protections to apply.

Consumer seeks refund when travel plans are cancelled

In early 2020, Ms. Z booked an all-inclusive family vacation for the upcoming March Break through her travel agency. She paid the travel agency $5,600 using her credit card. A week before Ms. Z's departure, the travel agency cancelled her trip due to the COVID-19 lockdown that began in mid March.

Ms. Z thought she would get a refund for the cancelled vacation. Instead, the travel agency offered her a voucher for future travel. Shortly afterwards, she contacted them to request a full refund on her credit card. When the travel agency refused, she contacted her bank to dispute the charge. The bank agreed to process a temporary chargeback for the full amount on Ms. Z's credit card while they investigated.

During the bank's investigation, the travel agency said that it refused Ms. Z's request because its agreement with the bank stated that consumers did not have dispute rights when their vacations were cancelled due to a government regulation. Additionally, the travel agency said their refund policy permitted them to provide travel credit for the value of a cancelled vacation.

Bank declines consumer's chargeback request

After speaking to Ms. Z's travel agency, the bank declined to refund the charge for Ms. Z's vacation and reversed the temporary chargeback it had processed earlier. The full amount of the charge for Ms. Z's vacation was rebilled to her credit card account.

Ms. Z was concerned that her consumer rights had not been respected. She consulted her local consumer protection office

about her situation and requested more information about the protections in place for credit card users in her province. Based on the guidance she received, Ms. Z followed the steps required to request a reversal of the charges under her province's consumer protection law. These steps included sending formal requests to the travel agency and the bank containing specific information within specific time limits.

The bank again declined to reverse the credit card charges, maintaining that Ms. Z was responsible for the transaction because she had authorized it and agreed to its terms and conditions.

Dissatisfied with the bank's response, Ms. Z contacted OBSI for help.

Our findings

During our investigation, we interviewed Ms. Z and reviewed the details of the bank's investigation that led to its decision not to process the chargeback for her vacation. We found that the bank had appropriately applied its own policies and procedures and the rules for credit card chargebacks. However, when we reviewed the applicable consumer protection laws, we found that Ms. Z had complied with all the requirements and timelines for the charge to be cancelled or reversed under her provincial consumer protection law. As a result, we recommended that the bank process a refund for Ms. Z's vacation along with any associated interest.

The outcome

The bank agreed with our recommendation because it could confirm that Ms. Z had followed all the required steps when she initially requested a charge reversal under her provincial consumer protection law. The bank offered to cancel the $5,600 charge on Ms. Z's credit card, plus any interest accrued. Ms. Z accepted the bank's offer.

Toll-Free Telephone: 1 (888) 451-4519
Greater Toronto Area: (416) 287-2877
TTY Telephone: 1 (844) 358-3442

Toll-Free Fax: 1 (888) 422-2865
Greater Toronto Area Fax: (416) 225-4722

This is **Exhibit "140"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

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Signature

HOUSE OF COMMONS
CHAMBRE DES COMMUNES
CANADA

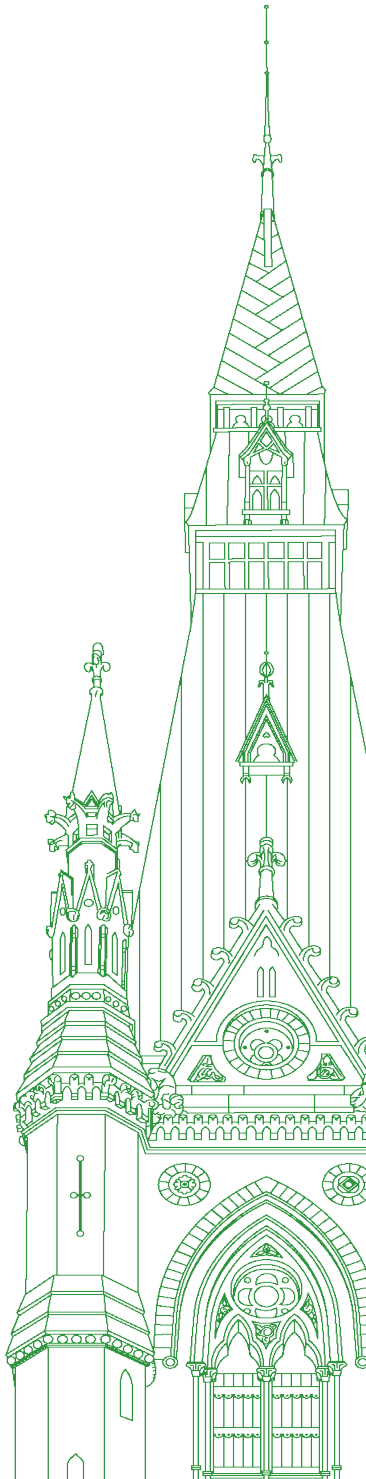
43rd PARLIAMENT, 1st SESSION

Special Committee on the COVID-19 Pandemic

EVIDENCE

NUMBER 013

Thursday, May 28, 2020



Chair: The Honourable Anthony Rota

At the beginning of the crisis, the government called on entrepreneurs in Quebec and Canada, inviting them to set an example in the situation we are experiencing. Many of them turned to the supplemental unemployment benefit (SUB) plan to maintain the employment relationship and to preserve some security, enabling their employees to get through this difficult period with more peace of mind.

However, on May 22, despite the fact that these entrepreneurs had made sure that the SUB program would still be in place when the CERB was introduced, they were surprised. Employees were told at that time that they would have to repay the CERB because of the alleged gains they had made under the SUB program. At SOPREMA, one of the large employers in the Drummondville region, 150 employees are affected. At Bridgestone, in Joliette, 1,100 employees are affected by this decision. At Goodyear, in Valleyfield, 150 employees are affected, and there are dozens more.

Does the minister intend to correct this mistake so that employers who are able and willing to do so can treat their employees better during this difficult period?

● (1315)

[*English*]

Hon. Carla Qualtrough: When we put in place the Canada emergency response benefit, the underlying goal was to make sure that every worker who needed it had access to income support as they were losing their employment for COVID reasons. We understood that meant some workers would not have access moving forward, although let me clarify that SUB plans that existed prior to March 15 are definitely in place. We consider the fact that workers have access to $1,000 a month in addition to CERB—and we've spoken with employers about this—to permit employers to assist their employees in an equitable way.

[*Translation*]

The Chair: Mr. Champoux, you have 15 seconds for your question.

Mr. Martin Champoux: Mr. Chair, employers received absolutely no news from the government before this measure was implemented, despite the fact that they were assured that this measure would be transferred to the CERB. That's not an answer when those folks acted honestly and in good faith. They feel cheated, and rightly so.

Does the government intend to fix this mistake, which would simply be the right thing to do?

[*English*]

Hon. Carla Qualtrough: Mr. Chair, I can assure the member opposite that the SUB plans that were in place prior to March 15 are indeed in place now. In addition, employees who are now on the CERB as an alternative have access to $1,000 of income in addition to their CERB. We are working with employers to perhaps provide the $1,000 in lieu of the SUB plans.

[*Translation*]

The Chair: We will continue with you, Mr. Barsalou-Duval.

Mr. Xavier Barsalou-Duval (Pierre-Boucher—Les Patriotes—Verchères, BQ): Thank you, Mr. Chair.

On April 27, Option consommateurs sent a letter to the Minister of Transport to warn him that the airlines' refusal to reimburse their customers for cancelled flights was contrary to Quebec's laws.

What is the minister going to do to put an end to this situation?

Hon. Marc Garneau (Minister of Transport): Mr. Chair, I sympathize with the people who would have preferred to get a refund, and I understand their frustration. It is not an ideal situation. The airlines are going through a very difficult time right now. If they were forced to refund their customers immediately, many of them would go bankrupt.

Mr. Xavier Barsalou-Duval: Mr. Chair, the minister sounds like a broken record.

A few hours ago, the following motion was passed unanimously: "THAT the National Assembly ask the Government of Canada to order airlines and other carriers under federal jurisdiction to allow customers whose trips have been cancelled because of the current pandemic to obtain a refund."

What will the Minister of Transport tell the National Assembly of Quebec?

Hon. Marc Garneau: Mr. Chair, as my hon. colleague knows, the Canadian Transportation Agency has ruled on this issue and has ruled that, in the present circumstances and in a non-binding way, it is acceptable for airlines to offer credits for up to two years. In the case of Air Canada, the credit has no expiry date.

The Chair: Mr. Barsalou-Duval, you have about 15 seconds for a question.

Mr. Xavier Barsalou-Duval: Mr. Chair, I find it rather odd that the Minister of Transport and the Canadian Transportation Agency are telling the airlines that Quebec's regulations and laws are not important and that they can override them. It seems to me that this is a strange way to operate. Theoretically, under the famous Canadian Constitution, which they imposed on us, that is not how it should work.

Can they uphold their own constitution?

The Chair: The hon. minister can answer in 15 seconds or less, please.

Hon. Marc Garneau: Mr. Chair, as my hon. colleague probably knows, the Canadian Transportation Agency is a quasi-judicial body that operates at arm's length from Transport Canada and the Government of Canada.

The Chair: We will now take a short break.

[*English*]

We're going to take a short break to allow employees supporting the meeting to switch in safety, including myself.

The Acting Chair (Mr. Bruce Stanton (Simcoe North, CPC)): We will now carry on with Mr. Baker for Etobicoke Centre.

Mr. Baker, go ahead.

This is **Exhibit "141"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on September 7, 2023

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Signature

HOUSE OF COMMONS
CHAMBRE DES COMMUNES
CANADA

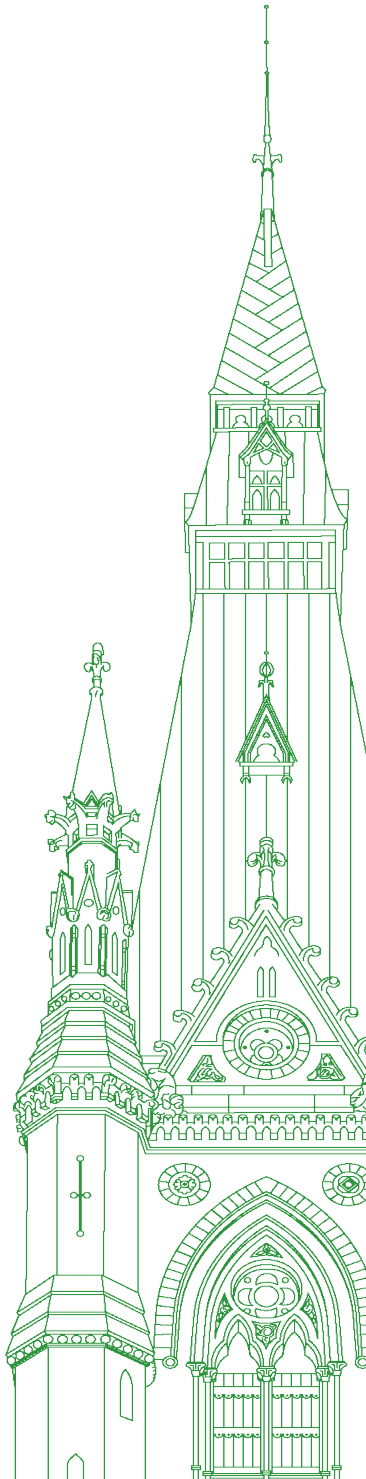
43rd PARLIAMENT, 2nd SESSION

Standing Committee on Transport, Infrastructure and Communities

EVIDENCE

NUMBER 008

Tuesday, December 1, 2020



Chair: Mr. Vance Badawey

Standing Committee on Transport, Infrastructure and Communities

Tuesday, December 1, 2020

● (1535)

[*English*]

The Chair (Mr. Vance Badawey (Niagara Centre, Lib.)): I call this meeting to order. Welcome to Meeting number eight of the House of Commons Standing Committee on Transport, Infrastructure and Communities.

Today's meeting is taking place in a hybrid format, pursuant to the House order of September 23. The proceedings will be made available via the House of Commons website. So that you are aware, the webcast will always show the person speaking, rather than the entire committee.

To ensure an orderly meeting, I would like to outline a few rules to follow. Members and witnesses may speak in the official language of their choice. Interpretation services are available for this meeting. You have the choice at the bottom of your screen of either the floor, English or French.

For members participating in person, proceed as you usually would when the whole committee is meeting in person in a committee room. Keep in mind the directives from the Board of Internal Economy regarding masking and health protocols.

Before speaking, please wait until I recognize you by name. If you are on video conference, please click on the microphone icon to unmute yourself. For those in the room, your microphone will be controlled as normal by the proceedings and verification officer. I will remind you that all comments by members and witnesses should be addressed through the chair. When you are not speaking, your mike should be on mute. With regard to a speaking list, the committee clerk and I will do the best we can to maintain the order of speaking for all members, whether they be participating virtually or in person.

Members, pursuant to Standing Order 108(2), the committee is meeting today to begin its study on the impact of COVID-19 on the aviation sector.

Now I would like to welcome our witnesses. Between 3:30 and 4:30, we have from the Canadian Transportation Agency, the CTA, Scott Streiner, chair and chief executive officer; Valérie Lagacé, senior general counsel and secretary; and Marcia Jones, chief strategy officer. From the Department of Transport, we have Lawrence Hanson, assistant deputy minister, policy; Aaron McCrorie, associate assistant deputy minister, safety and security; Nicholas Robinson, director general, civil aviation; Colin Stacey, director general, air policy; Christian Dea, director general, transportation and economic analysis and chief economist. Welcome, all you folks.

With that, I'm going to move to our witnesses. I'm not sure who has been queued to start us off with their five-minute presentation. I'll leave that up to you folks. The floor is yours.

● (1540)

Mr. Lawrence Hanson (Assistant Deputy Minister, Policy, Department of Transport): Thank you, Chair, I will begin.

Honourable members, thank you for the invitation to speak to you about the impact of the COVID-19 pandemic on the air transport sector in Canada.

My name is Lawrence Hanson, and I'm the ADM of policy at Transport.

Owing to the fact that Canada is a very large country with a widely dispersed population, and has a material number of people for whom the air mode is the only viable source of supply for parts of the year, we rely on air travel more than many other countries.

Canada has built a strong and effective air transport system that connects Canadians to each other and the world. It supports tourism, regional economic development, and an aerospace supply chain that produces aircraft with world-leading environmental performance.

The air sector employs about 108,000 people in Canada. Although the pandemic has had an impact on every sector of the economy, the decline in the air sector has been the most severe, and its recovery is expected to take relatively longer. Eight months into the pandemic, passenger levels are still down almost 90% from the same period last year.

Canada's air system has been traditionally funded by passengers themselves. Currently, however, we have a user-pay system that has almost no users. Consequently, airlines and airports continue to face significant fixed costs with little or no off-setting revenue.

Inevitably, this has led to efforts by key players to either find new revenue or, more likely, cut costs. There have been widespread layoffs, route suspensions and cancellations by airlines. Airports and the non-profit corporation that provides air navigation services, Nav Canada, have raised rates and fees.

Over and above these negative outcomes, Canadians across the country have received vouchers in lieu of refunds for travel cancelled due to the pandemic, and they are understandably angry.

To mitigate the severe impact and instability caused by the pandemic across all sectors, the government has implemented broad-based measures like the Canada emergency wage subsidy. These have been helpful in providing initial stability for air operators.

In addition, in March, the government waived payments for airport authorities that lease airports from the federal government for the remainder of 2020. The government also took action to ensure service to remote communities that rely on air transport for essential goods and services, with funding of up to $174 million announced in August, and a separate program of $17.3 million announced in April for the territories alone.

However, the impacts on the air sector during COVID-19 are without precedent, and service providers are unable to respond to these ongoing challenges on their own. This threatens the ability of Canadians to access reasonable air transport services at a reasonable cost, and these impacts could have important implications for communities, regions and the wider economy. It also threatens the many jobs in air transport and in the industries that rely upon it.

That is why, on November 8, Minister Garneau announced that in order to protect the interests of Canadians, the government is developing an assistance package for Canadian airlines, airports and the aerospace sector. Yesterday's fall economic statement provided additional information regarding rent and infrastructure support that will be provided to airports.

The minister's statement made it clear that support to air carriers would be dependent on securing real outcomes for Canadians, including the provision of refunds in place of vouchers, maintaining regional connectivity, and remaining good customers of the Canadian aerospace industry.

Helping to ensure the economic viability of the sector, and protecting the interests of Canadians is a necessary but not a sufficient condition for the successful restart of the air industry. It will also be important to ensure that air travel remains safe and secure, and addresses the added public health dimension created by the pandemic.

For that and related issues, I will turn to my colleague, the associate assistant deputy minister of safety and security at Transport, Aaron McCrorie.

The Chair: Mr. McCrorie, the floor is yours.

Mr. Aaron McCrorie (Associate Assistant Deputy Minister, Safety and Security, Department of Transport): Thank you, Mr. Chair.

Good afternoon. It's a pleasure to be here.

I'm Aaron McCrorie, the associate assistant deputy minister for safety and security at Transport Canada.

Since the outbreak of the COVID-19 pandemic, guided by the latest public health advice, Transport Canada has worked hard to respond quickly to ensure that Canadians remain safe while supporting the ongoing flow of critical goods and services across the country.

To reduce the risk of transmission of COVID throughout the aviation sector, Transport Canada has worked with partner departments, public health authorities, provinces and territories and the transportation industry to implement a system of layered measures, guidance, and requirements to ensure that transportation operations are safe for workers and passengers.

These include health screening measures and temperature checks to prevent symptomatic passengers from boarding flights to, from and within Canada. Workers at the 15 busiest airports in Canada are also subject to temperature checks before entering restricted areas. In addition, passengers on all flights departing or arriving at Canadian airports must have an appropriate mask or face covering when going through security checkpoints, when boarding and deplaning and on board the aircraft. These requirements also apply to some air crew members and airport workers.

The department also issued a notice restricting most overseas flights to landing at four airports in Canada: Montreal-Trudeau, Toronto-Pearson, Calgary, and Vancouver. This was done to support the work of health authorities to conduct medical assessments of symptomatic passengers and to notify passengers of the need to self-isolate for a period of 14 days. Transport Canada acted quickly to protect Canadians and air travel passengers to reduce the risk of transmission on an aircraft and the risk of importation. Making sure air travel is safe is a key factor in supporting the recovery of the air sector.

On August 14, Transport Canada released “Canada's Flight Plan for Navigating COVID-19”. This document is the foundation for aligning Canada's current and future efforts to address the safety impacts of COVID-19 on the aviation sector and was developed in close collaboration with industry partners. It demonstrates to Canadians the extensive and multi-layered system of measures that have been implemented to support public health, including temperature checks, health checks and face coverings as well as measures implemented by industry such as increased cleaning and disinfecting protocols, enhanced air conditioning and filtration systems and new protocols to encourage physical distancing.

Canada's flight plan is based on the comprehensive standards and recommendations from the International Civil Aviation Organization's Council Aviation Recovery Task Force, or CART, in order to ensure that Canada is aligned with the gold standard of international best practices. This document will be refined as we continue to learn more about COVID-19 and as guidance and public health measures evolve at the local, provincial, national and international levels.

Preventing the spread of the pandemic has been and remains the top priority of the government. The various regulatory requirements that were put in place will likely remain for the foreseeable future; however, there is room for adjustment to support the restart of the air sector. Transport Canada will actively assess orders that have been issued to see what can be done and will be consulting with industry on possible amendments as we move forward.

The department is also working closely with other federal departments to explore risk-based opportunities that will allow Canada to ease travel restrictions and reopen our borders. This includes implementing a sustainable approach to reducing public health risks today and building resilience to safeguard the system against similar risks in the future. For example, by leveraging opportunities for safe, contactless processing of passengers, these approaches will help rebuild public confidence in the safety of air travel.

Health Canada and the Public Health Agency of Canada, working with other key federal departments such as Global Affairs Canada, Transport Canada and the Canadian Border Services Agency, are responsible for making decisions related to the lifting of travel and quarantine restrictions. Presently, testing pilot projects are under way or in development across Canada to establish a good base of evidence for possible reduction of quarantine requirements. For example, Air Canada and the Greater Toronto Airports Authority, in partnership with McMaster University, launched a testing project in September focused on testing passengers arriving in Canada.

The Public Health Agency of Canada, in partnership with the Province of Alberta, launched a testing project in November for passengers and workers arriving by land at Coutts border crossing and by air at the Calgary International Airport.

● (1545)

The Chair: You have one minute, Mr. McCrorie.

Mr. Aaron McCrorie: Thank you, Mr. Chair.

It's clear that ensuring a healthy and safe transportation sector is essential for reopening borders, restarting the tourism industry, and for the safety and security of Canadians at large. Transportation will play a vital role in supporting the country's economic recovery. Continued collaboration and shared insights are crucial in overcoming the challenges this pandemic has brought to the air sector. That is why the department will continue its important engagement with stakeholders and other partners as we work to address challenges faced by the air sector in Canada today and to ensure that we have a strong industry into the future.

Thank you very much.

The Chair: Thank you, Mr. McCrorie, and thank you, Mr. Hanson.

Do we have other witnesses who wish to speak? Is anybody speaking from the CTA?

Mr. Streiner, the floor is yours for five minutes.

You are on mute, Mr. Streiner.

● (1550)

Mr. Scott Streiner (Chair and Chief Executive Officer, Canadian Transportation Agency): Okay: Can you hear me now?

The Chair: You're good to go.

Mr. Scott Streiner: All right. This is our lives now, eh? We have to overcome all these technical issues.

I will start again. Thank you, Mr. Chair.

The Chair: Thank you, Mr. Streiner.

[*Translation*]

Mr. Scott Streiner: I want to thank the committee for inviting my colleagues and me to appear today.

We're living through an unusual and difficult time. I hope all of you and your loved ones have remained healthy and safe over the last nine months. While we have our respective roles to play, we are, first and foremost, fellow citizens.

I have the privilege to lead the Canadian Transportation Agency. The CTA was established in 1904 and is Canada's second-largest independent, quasi-judicial tribunal and regulator.

[*English*]

At no time in the century since the dawn of commercial aviation have airlines and their customers gone through the sorts of events we have witnessed since mid-March. Canadian airlines carried 85% fewer passengers between March and September 2020 than during the same period in 2019. Such a collapse in volumes is without precedent.

Through this turmoil, the Canadian Transportation Agency has worked to protect air passengers. Despite the fact that almost every CTA employee has worked from home since the pandemic struck, the 300 dedicated public servants who make up the organization have spared no effort to continue providing services to Canadians.

Immediately after the crisis began, we updated our website with key information for travellers so that those scrambling to get home would know their rights. We temporarily paused adjudications involving airlines to give them the ability to focus on repatriating the Canadians stranded abroad. We took steps to ensure that no Canadian who bought a non-refundable ticket would be left out-of-pocket for the value of their cancelled flights. We worked around the clock to process and issue the air licences and permits required for emergency repatriation flights and cargo flights to bring urgently needed PPE to Canada.

In the subsequent months, we invested substantial resources and long hours to deal with the unprecedented tsunami of complaints filed since 2019. Between the full coming into force on December 15, 2019, of the air passenger protection regulations, the APPR, and the start of the pandemic three months later, the CTA received around 11,000 complaints—a record. Since then we've received another 11,000.

[*Translation*]

To put these numbers in perspective, in all of 2015, just 800 complaints were submitted. In other words, we've been getting more complaints every two to four weeks than we used to get in a year.

We've already processed 6,000 complaints since the pandemic reached Canada. By early 2021, we'll start processing complaints filed during the pandemic, including those related to the contentious issue of refunds. If the recently announced negotiations between the government and airlines result in the payment of refunds to some passengers, a portion of those complaints may be quickly resolved.

[*English*]

On the topic of refunds, it's important to understand that the reason the air passenger protection regulations don't include a general obligation for airlines to pay refunds when flights are cancelled for reasons outside their control is that the legislation only allows the regulations to require that airlines ensure that passengers can complete their itineraries. As a result, the APPR's refund obligation applies exclusively to flight cancellations within airlines' control.

No one realized at the time how important this gap was. No one foresaw mass, worldwide flight cancellations that would leave passengers seeking refunds frustrated; airlines facing major liquidity issues; and tens of thousands of airline employees without jobs.

Because the statutory framework does not include a general obligation around refunds for flight cancellations beyond airlines' control, any passenger entitlements in this regard depend on the wording of each airline's applicable tariff. Every refund complaint will be examined on its merits, taking the relevant tariff language into account.

● (1555)

The Chair: You have one minute, Mr. Streiner.

Mr. Scott Streiner: Thank you, Mr. Chair.

The APPR rules are among the strongest air passenger protection rules in the world. They cover a wider range of passenger concerns than any other regime, but we now know that the gap highlighted by the pandemic is significant. If and when the CTA is given the authority to fix that gap, we'll act quickly.

Just before wrapping up, Mr. Chair, I'd like to mention one more area where the CTA has been active: accessibility.

Since the groundbreaking accessible transportation regulations came into effect last June, we've been providing guidance to Canadians with disabilities and to industry to ensure that these new rules are well understood and respected, and we've continued to play a leading role in encouraging the aviation sector in Canada and around the world to integrate accessibility into the rebuilding process. Persons with disabilities should not be left behind as air travel gradually recovers.

Let me conclude, Mr. Chair, by noting that because of the CTA's independent status and the quasi-judicial nature of our adjudications, it would not be appropriate for me to comment on government policy or on any matters that are currently before the CTA, but within those limits, my colleagues and I would be happy to respond to any questions the committee may have.

Thank you, Mr. Chair.

The Chair: Thank you, Mr. Streiner, and to all our witnesses, thank you.

Are there any more witnesses who would like to speak? I see none.

We're now going to our first round of members' questions for six minutes, starting off with the Conservative Party and Ms. Kusie, followed by the Liberal Party and Mr. Rogers, and then the Bloc Québécois, with Mr. Barsalou-Duval, and the New Democratic Party, with Mr. Taylor Bachrach.

Ms. Kusie, you have six minutes. The floor is yours.

Mrs. Stephanie Kusie (Calgary Midnapore, CPC): Thank you, Chair. I appreciate the opportunity to have these witnesses before us today.

Thank you very much for being here.

I'm going to start by going back to Mr. McCrorie's comments regarding rapid testing.

As he mentioned, there's currently a pilot project going on in my hometown of Calgary, in my home province of Alberta, a project in YYC and Alberta that we are very proud of. What it allows individuals to do, of course is to take the COVID test upon arrival and, if they receive a negative test, to reduce their quarantine going forward.

I'm wondering if I can get some information as to how long it took Transport Canada, as well as other various governmental departments, to get this pilot project under way.

Mr. Aaron McCrorie: Thank you for the question, Mr. Chair.

When it comes to the pilot projects, the testing projects, we've been playing a supporting role. I hate to defer the question, but I think for you to get a sense of the timelines and the level of effort to get it launched, you'd probably be better off asking our colleagues from the Public Health Agency of Canada and Health Canada, who are joining you, I believe, after this session. They were the leads in terms of putting the pilot in place.

I can say that Transport has played a supporting role over the last several months, in particular in working as a liaison between PHAC and Health Canada and the airport authority and the airlines involved and helping to facilitate those relationships. The actual implementation of the test and the design of it fell to our colleagues in the Health portfolio.

Mrs. Stephanie Kusie: Okay. Thank you very much, Mr. Chair.

Can you confirm, though, that you are in the process of implementing this at other airports across the country?

Mr. Aaron McCrorie: Again, when it comes to the implementation of the pilots themselves, typically it's going to be Health Canada and PHAC that are the leads, but there are other pilot projects that are being contemplated. The Vancouver airport is contemplating a pilot project, for example, and I believe Montreal is. There is a series of pilot projects that are being contemplated, and we're doing our best to support them.

Mrs. Stephanie Kusie: Okay. I'm going to go, then, to the announcement yesterday in the fall economic statement, which said:

> To further assist airports to manage the financial implications of reduced air travel, the government proposes to provide $65 million in additional financial support to airport authorities in 2021-22.

Would you, Mr. McCrorie or Mr. Hansen, be able to provide any further information as to how these funds will be distributed and when they'll be distributed, and again, as you mentioned briefly, I believe, in the opening, the conditions tied to the money?

Mr. Lawrence Hanson: Thank you very much, Chair.

With regard to the FES announcement yesterday, I'm not really in a position to give any additional details beyond what the Minister of Finance laid out yesterday. I would note that the conditional points really related more to a potential agreement and support for airlines, as opposed to yesterday's funding, which was more exclusively directed toward airports.

● (1600)

Mrs. Stephanie Kusie: Okay. I appreciate that.

Of course, I'm sure you saw across the media that there was widespread disappointment from the airline sector. It certainly fell significantly short of the October 1 ask of $7 billion.

I was wondering if the government had conducted a comparative analysis of how Canada could support the sector compared with other nations and, if so, what it concluded. Are there supports for the airline sector that we've seen in other nations compared with what was offered to the Canadian airline sector yesterday?

Mr. Lawrence Hanson: Thank you, Chair.

Certainly, we have looked at what other countries have done. The comparisons are different, of course, because sometimes it's in support for individuals versus support for carriers. Some countries have taken equity positions in carriers. We have done those comparisons. It's not always easy to get to an apples to apples comparison.

When it comes to a final comparison with what's done in the airline sector, obviously it will ultimately be dependent on what the eventual terms of an agreement with the air carriers looks like.

Mrs. Stephanie Kusie: Would you be able to table your research and the conclusion up to this point of what has been evaluated versus what was offered yesterday and versus what will be offered in the future?

Mr. Lawrence Hanson: Chair, we would be happy to provide information on what we have learned about other countries' supports. To be candid, we have compiled information that is quite largely publicly available.

Obviously, we can't speculate on what future support might look like here in Canada.

Mrs. Stephanie Kusie: Thank you, Chair.

Mr. Streiner, the APPR gives airlines 30 days to respond to customer complaints. Why can't your own agency meet that standard?

You have said today you have a backlog. Why do you think any Canadian, or anyone for that matter, would complain to your agency and wait when they can complain to a carrier and get an answer in 30 days?

Mr. Scott Streiner: Mr. Chair, I think the folks seeking compensation should and, under the APPR, must turn to the airline to make their claims.

If we're talking about compensation, or the inconvenience associated with flight delays or cancellations, the regulations state that a claim should be made with the airline. But if they can't resolve that claim with the airline, then they can file a complaint with the CTA. We deal with all of those complaints on their merit, as I have said.

As far as the backlog goes, obviously the CTA wants to get through complaints as quickly as it can. As I noted in my opening comments, we received an unprecedented and extraordinary number of complaints after the APPR came into force, 11,000 complaints and another 11,000 since the pandemic began. It's unheard of for a quasi-judicial tribunal to receive 22,000 complaints when just five years earlier it was receiving 800.

We are absolutely mobilizing to get through those complaints as quickly as possible. We have already cleared 6,000 of them since the pandemic began, and we will continue to do everything we can to provide timely service to Canadians.

The Chair: Thank you, Mr. Streiner, and thank you, Ms. Kusie.

Mrs. Stephanie Kusie: Thank you, Mr. Chair.

[*Translation*]

Thank you to the witnesses, too.

[*English*]

The Chair: We're now going to move on for six minutes to Mr. Rogers of the Liberal party.

Mr. Churence Rogers (Bonavista—Burin—Trinity, Lib.): Thank you, Mr. Chair.

I welcome all the guests today.

A few of my questions may fall under transport or the health sector, but I will leave it to our guests to decide if they want to respond to some of the questions.

For the last number of weeks and months, all of us MPs have been meeting with airline officials, airport security people, airport CEOs, regional airlines, large airlines, and many of them have been advocating for support for the industry.

Interestingly enough, rapid testing was certainly a big part of what I was lobbied for by many people. There were other supports such as rent relief and fees that are charged across the country to airports and airlines. Many of these proposed solutions were broad ranging. Ms. Kusie referred to some of the numbers in the area of $7 billion, but also, of course, the industry was suggesting that maybe some of that might be in the form of loan guarantees, non-repayable grants and a whole slew of possible solutions.

I want to focus a little on rapid testing in particular, because interestingly enough, many of the people I talked to really focused on that and said that things like that were more important than some of the money they were requesting.

Can you tell me how many rapid tests have been deployed by the federal government to the provinces so far, and whether or not these are still being deployed across the country?

● (1605)

Mr. Aaron McCrorie: Mr. Chair, perhaps I could take that question.

The Chair: Go ahead, Mr. McCrorie.

Mr. Aaron McCrorie: In terms of the number of tests that have been deployed, we'd have to defer to our colleagues at Health Canada and the Public Health Agency of Canada.

I could note that from a Transport Canada perspective, we saw that the restrictions at the border, obviously at the outset of the pandemic, were very effective in limiting the importation of COVID-19. We are, as I've noted, working with our partners to look at what measures could be put in place to reduce or change some of those border restrictions, in particular via testing. The pilot projects are a great example of gathering evidence to support, perhaps, a national program of testing as an alternative to quarantine. Ultimately, it will be our colleagues in the health sector who will make decisions about which tests are used, when to apply them and how to apply them.

Again, I think we play a really important role from a facilitation point of view. We've done some work with airports to look at what a testing regime would look like logistically and how you would set it up in your airport, for example. We've developed what is called an "operational plan" to support that, if and when a decision for testing is made. We've worked with the International Civil Aviation Organization and other international partners to look at some of the international standards or best practices for a testing regime, if we go down that path.

Again, as I've suggested, we've been working with domestic partners like the Calgary airport and the Vancouver airport as well as the airlines to help them set up the testing pilot projects that are being led by our health colleagues.

Mr. Churence Rogers: I'd like to ask you a follow-up question.

Can rapid testing at airports and other types of border crossings affect traffic? Is rapid testing going to be an option to consider for boosting the tourist industry and attracting international travellers?

Finally, what are the COVID-19 screening best practices at airports around the world that you might be familiar with?

The Chair: You're on mute, Mr. McCrorie.

Mr. Aaron McCrorie: Sorry about that, Mr. Chair. I was hoping I'd go through my career without being told I was on mute, but apparently not.

The Chair: No problem.

Mr. Aaron McCrorie: Again, the idea of the pilot projects is exactly to determine the most effective types of tests to use and where to apply them. There are concerns, obviously, if you're looking at the land border, about what that might mean from a congestion point of view. Consideration is even being given to testing prior to departure so that we can look at reduced congestion at the airport.

I talked a bit about trying to build a touchless journey. What we're really trying to do is to make sure that we can maintain physical distancing in an airport environment and reduce that congestion.

The pilot projects are giving us good information about what tests to use and where to apply them, and we're really proud to be working with our health colleagues on that. In terms of which specific test to use under what circumstances, I'd have to defer to my health colleagues for that.

Mr. Churence Rogers: I have one final question for you.

Based on your experience and that of the travel industry and what you know about rapid testing, do you think it's one of the key solutions for getting people back in the aircrafts and flying again so that we can have people moving across the country for the benefit of the tourism industry?

Mr. Aaron McCrorie: We tried to look at it from an aviation safety and security point of view, or even a transportation safety and security point of view. We look at layers of measures. It's about building layers of measures that protect...but also as we make adjustments, putting in place different layers of measures. Testing of some kind or another, I think, is showing a lot of promise as an alternative to quarantine. We're not there yet, but the pilot projects are helping us build that evidence base that will allow us to make that decision down the road. I think some changing of the measures is going to be key to the successful relaunch of the aviation industry.

● (1610)

The Chair: Thank you, Mr. McCrorie.

Thank you, Mr. Rogers.

We're now going to move on for six minutes to the Bloc Québécois.

Mr. Barsalou-Duval, the floor is yours.

[*Translation*]

Mr. Xavier Barsalou-Duval (Pierre-Boucher—Les Patriotes—Verchères, BQ): Thank you very much, Mr. Chair.

My first question is for Mr. Streiner of the Canadian Transportation Agency.

I'd like to know if you and the Canadian Transportation Agency are very familiar with the Air Transportation Regulations.

Mr. Scott Streiner: Thank you for your question, Mr. Barsalou-Duval. The answer is very short: yes.

Mr. Xavier Barsalou-Duval: Thank you very much, Mr. Streiner.

Actually, I'd like to know if you are familiar with subparagraph 122(c)(xii), which talks about the right to obtain a refund when the carrier fails to provide transportation for any reason.

In your opening remarks, you mentioned that nowhere in the legislation does it state that companies had to make these refunds. However, subparagraph 122(c)(xii) states the opposite:

> (xii) refunds for services purchased but not used, whether in whole or in part, either as a result of the client's unwillingness or inability to continue or the air carrier's inability to provide the service for any reason...

Mr. Scott Streiner: In fact, this provision and regulation requires that the carrier or the airline specify its terms and conditions of services. This regulation doesn't specifically require terms and conditions of service. In other words, there is no minimum obligation in this regulation to refund customers in these situations.

Mr. Xavier Barsalou-Duval: Thank you, Mr. Streiner. However, if we read paragraph 122(c) correctly, what I just mentioned is one of the minimum conditions that tariffs must contain. So it's contained in the price of all tickets and in all carrier fares. This regulation applies to everyone, doesn't it?

Mr. Scott Streiner: This regulation applies, but it says that the airline must specify its terms and conditions of service. It does not specify exactly what conditions of service the tariffs must contain. It does not establish a minimum obligation.

Mr. Xavier Barsalou-Duval: Mr. Streiner, paragraph 122(c) states that, “Every tariff shall contain … the following matters, namely”, among which is noted that there must be a refund if the service is not provided. I think it's pretty clear that there has to be a refund.

Mr. Scott Streiner: It's clear that carriers must explain to passengers the terms and conditions of service contained in their tariffs. The interpretation of this regulation is clear. I don't want to repeat myself, but this regulation does not specify the exact content of tariffs.

Mr. Xavier Barsalou-Duval: I think we're playing word games.

Are you able to name a single case in the jurisprudence that supports the interpretation that passengers aren't entitled to a refund in these circumstances?

Mr. Scott Streiner: As a quasi-judicial tribunal, we make decision case by case based on the facts and on the relevant act and regulations. This means that we consider all terms and conditions and all circumstances.

It's a question of interpretation of the legislation. I think all the honourable members understand that it isn't appropriate for me, as chair of the Canadian Transportation Agency, to interpret the legislation here or make formal rulings. There is a legal process for that.

Mr. Xavier Barsalou-Duval: I'd like to know if the people who work at the Canadian Transportation Agency know the provisions of the Quebec civil code relating to consumers.

Mr. Scott Streiner: I suppose some of them do.

It's provincial legislation. We're responsible for applying federal legislation.

Mr. Xavier Barsalou-Duval: According to the Quebec civil code, when a service has not been rendered, it must be refunded. It would be interesting if federal institutions, such as the Canadian Transportation Agency, could recognize and enforce the legislation that already exists.

I have another question. The Canadian Transportation Agency recently released new details about its statement on vouchers. You say that this statement isn't a binding decision. I'm trying to understand.

Does the Canadian Transportation Agency have the power to issue a statement that is unenforceable but in conflict with the legislation?

● (1615)

Mr. Scott Streiner: The agency has the power to issue statements and guidance material on any topic within its scope.

As you specified, the statement does not change the obligations of the airlines or the rights of the passengers. The statement contains suggestions, and only suggestions. It isn't a binding decision.

Mr. Xavier Barsalou-Duval: Does the Canadian Transportation Agency have the power to change the legislation?

Mr. Scott Streiner: Of course not. The legislation exists, and our responsibility is to enforce it, which we always do impartially and objectively.

Mr. Xavier Barsalou-Duval: Don't you think the positions that have been taken by the Canadian Transportation Agency call into question its impartiality?

Mr. Scott Streiner: Not at all.

Mr. Xavier Barsalou-Duval: But that's the impression many people have.

The Canadian Transportation Agency is currently nearly two years behind in processing the various complaints. Last spring, the agency also said that none of the complaints regarding air travel and ticket refunds would be dealt with until September.

What kind of message does it send to the airlines when it says that it won't deal with travel complaints? Are they being told not to issue refunds to their customers, because they're not going to get a slap on the wrist anyway?

Mr. Scott Streiner: With all due respect, I must say that our employees work very hard to deal with all the complaints received. It should be noted that 99% of these complaints were submitted to the agency as of December 15. So there isn't a two-year delay in processing. The processing of complaints takes a long time, I agree. It would be preferable to do it faster, but it's a matter of volume. The volume is unprecedented: we've received 22,000 complaints since December 15. We're working very hard to deal with all these complaints.

With respect to the complaints that were received during the pandemic, we will begin processing them in early 2021. The number of complaints is remarkable and challenging. We're working very hard on it.

Mr. Xavier Barsalou-Duval: I'd like your opinion on the following situation. Let's say that I manage a complaints department—

[*English*]

The Chair: Thank you, Mr. Barsalou-Duval and Mr. Streiner.

We're now going to move to Mr. Bachrach, for six minutes.

Mr. Taylor Bachrach (Skeena—Bulkley Valley, NDP): Thank you, Mr. Chair, and thank you to our witnesses.

During this pandemic, Canadians have been hurt financially in so many ways. I hear from constituents all the time who've lost their income, who are in financial distress and having trouble paying their bills. Now, a relatively modest number of Canadians were in a very specific situation where they bought airplane tickets, some of these very expensive in the thousands of dollars, from airlines that up until the pandemic were doing very well.

The airlines are huge corporations that in 2019 were celebrating billions of dollars in profits, and had access to billions of dollars in liquidity. We're being told by the government that these Canadians, who purchased these airfares, are not able to get a refund, because the government is concerned that the airline corporations are going to go bankrupt.

You're putting citizens in a situation where they're essentially involuntary or unwilling creditors to these huge corporations. To either Mr. Streiner or Mr. Hanson, how could you possibly construe this as a fair situation?

Mr. Lawrence Hanson: Mr. Chair, I'd be happy to take this question.

I would direct the member's attention to the statement by Minister Garneau on November 8, which was quite explicit on this point. Although the government is prepared to consider assistance for air carriers, given the significant pressures on their liquidity, it is not prepared to do so unless Canadians, whose flights were cancelled due to the pandemic, receive a refund rather than a voucher.

● (1620)

The Chair: Mr. Bachrach.

Mr. Taylor Bachrach: Mr. Hanson, is it fair to say the government has been forced into supporting a situation that is profoundly unfair for those Canadians who are out of pocket from an airfare?

Mr. Lawrence Hanson: The government has always recognized the difficult situation, on the one hand, of individuals whose flights were cancelled as a result of the pandemic, and on the other hand, a situation where air carriers themselves have very constrained liquidity and cash flow because their revenues have collapsed. That's why it's come forward with an approach that says that it's prepared to provide support for the airlines, but putting conditionality on it in terms of refunds for passengers.

Mr. Taylor Bachrach: Mr. Streiner, in your opening remarks, if I understood you correctly, you indicated that the CTA was somewhat caught off guard by this gap in the regulation, and that in hindsight, this should have been rectified.

Is it fair to say you weren't aware of a gap in the air passenger protection regulations that could have avoided this situation?

Mr. Scott Streiner: I don't think anybody identified the gap. To be clear, the gap stems from the legislation. The legislation gave the CTA the authority to make the air passenger protection regulations.

If you read the relevant section related to cancellations that are outside the control of airlines, it constrains our ability to make regulations to only requiring that airlines ensure that passengers can complete their itineraries.

Frankly, if the section had been more permissive, we might well have established a refund obligation as we did for cancellations within the control of airlines, but we were constrained by the language of the legislation. I don't think anybody at the time, not parliamentarians, nor consumer rights advocates, recognized that the gap in the legislation and regulations could be as significant as we now realize it is.

Mr. Taylor Bachrach: Mr. Streiner, the reason I mention this is because the organization Air Passenger Rights wrote to the CTA during the crafting of those regulations and said very specifically:

> APR is deeply concerned about the omission of a number of important issues from the Proposed Regulations. This state of affairs creates the incorrect impression that airlines are free to do as they please in these areas. APR strongly believes this was not Parliament's intent.

So here they are; they've identified the gap and they're bringing it to your attention. Was there nothing that the CTA could do to address the situation in the regulations?

Mr. Scott Streiner: In terms of establishing a refund obligation—I assume that's the question—for flight cancellations beyond airline control, the answer is no. The legislation constrained us. There was no way we could establish that obligation in the regulations given the wording of the legislation.

Mr. Taylor Bachrach: Picking up where Mr. Barsalou-Duval left off, I did not get clarity on this in the answers to his questions, so I'm going to ask them again.

Mr. Scott Streiner: Certainly.

Mr. Taylor Bachrach: In the air transportation regulations, it very specifically speaks to the refunds issue, yet the statement on vouchers says, “The law does not require airlines to include refund provisions in their tariffs for flights that are cancelled for reasons beyond their control.”

If you read the regulations, section 122, which Mr. Barsalou-Duval read earlier, it very clearly says:

> Every tariff shall contain...(xii) refunds for services purchased but not used, whether in whole or in part, either as a result of the client’s unwillingness or inability to continue or the air carrier’s inability to provide the service for any reason

These seem to be in direct conflict with each other. How do you explain this?

Mr. Scott Streiner: The air transportation regulations in the section that you and your colleague referred to outline the areas or topics that must be addressed by an airline's tariff. They don't establish the minimum obligations. They don't establish what the terms are; they simply indicate that terms must be established in these areas. Therefore, they don't establish a minimum obligation to pay compensation or to pay refunds in situations beyond airlines' control, only that a tariff has to address those questions.

The Chair: Thank you, Mr. Streiner, and Mr. Bachrach.

We're now going to to our second round of five minutes each from Mr. Soroka of the Conservative Party, as well as Mr. El-Khoury from the Liberal Party, and we have two and a half minutes each for Mr. Barsalou-Duval of the Bloc and Mr. Bachrach of the NDP.

Mr. Soroka, for five minutes you have the floor.

Mr. Gerald Soroka (Yellowhead, CPC): Thank you, Mr. Chair.

I'm not trying to put words in Mr. Hanson's mouth but it sounds like if the federal government gives support to airlines, there will be a condition that they have to refund passengers their money if the passenger wants that. If that's the case, if there's going to be a time frame attached to that, how long will you give airlines to refund all passengers who have had their trips cancelled so that the airlines can comply with the conditions the federal government has set?

● (1625)

Mr. Lawrence Hanson: Yes, I think when we get to the point of the payment of refunds, there would certainly need to be some sort of approach for detailing the manner and timing in which they would be provided.

Mr. Gerald Soroka: But you don't have a time frame right now as to what that will look like. Is it still in its infancy?

Mr. Lawrence Hanson: I don't have a timeline. I think I will that say that a lot of people will be contacted individually. A lot of people, as you are probably aware, purchase their tickets through third-party vendors online, companies like Expedia and Travelocity, etc., but we would obviously be pushing for this to be done in a very timely fashion, because lengthy delays in getting refunds are not consistent with the idea of providing Canadians refunds that they're expecting.

Mr. Gerald Soroka: I recently held a Zoom call with several independent travel advisers. That association has over 1,200 members across Canada and each one of them owns or operates a small business. They are self-employed. Independent travel advisers work on 100% commission and have been hit very hard by COVID. Many in my riding do not qualify for existing CERB programs as well, so does the department have a plan in place to ensure that travel advisers won't be collateral damage from airline passengers getting refunded by airlines clawing back their commissions? Do you think that will be part of the conditions as well when you're negotiating or not?

Mr. Lawrence Hanson: That is a great question. It points out some of the challenges associated with this and the need to get it right, because, as you say, there is a potential spinoff consequence for travel agents who suddenly see a collapse in commissions as a result of a massive wave of air refunds.

What I can tell the member is that we are aware of this issue. We are discussing it with our colleagues at ISED who work more with the sector than we do. Obviously, I can't say what solution we will arrive at, but I can assure the member that it's very much on the radar.

Mr. Gerald Soroka: Yes, it's very good to hear that you're at least aware of that and trying to work towards some kind of solution.

You also spoke about how there could be different types of conditions on travel. Currently we have face masks and temperature checking. Do you think that will now become a standard practice in airports? Is this just an anomaly, or will this continue after the COVID crisis is over?

The Chair: Go ahead, Mr. Hanson.

Mr. Aaron McCrorie: If I may, Mr. Chair, perhaps I could take that question.

The Chair: Go ahead, Mr. McCrorie.

Mr. Aaron McCrorie: We're constantly reassessing the measures that we have put in place from a health point of view, and we're adapting them as we go along based on the latest health guidance that we get. Depending on how the pandemic plays out over the weeks and months to come, and how, for example, a vaccine testing regime is implemented, we may be able to move away from some of these measures as new measures come into place or as the pandemic comes under control, but I think the bottom line is that we have the flexibility to adapt to changing health conditions and respond to the changing health advice.

A good example is how our requirements around face masks have evolved over time. We have adjusted them from the initial requirements in the spring to more recent requirements based on the latest health guidance that has provided more flexibility for parents travelling with younger children when using face masks.

We will evolve over time based on the latest information.

Mr. Gerald Soroka: Okay, that's quite interesting. It kind os sounds like a yes or a no. I know it's a hard decision to come forward right now.

I get a lot of residents with conspiracy theories about vaccinations and all of these kinds of stories. Do you think this will be a condition for travel where, if they do not take the vaccine, they will not be allowed to travel? Is there the potential for that?

Please alleviate my fears, because I have to deal with this on a regular basis.

Mr. Aaron McCrorie: I'm sorry, Mr. Chair, I missed the beginning part of the question, but I think it was if vaccination will be a standing requirement for travel.

The Chair: That's correct.

● (1630)

Mr. Aaron McCrorie: Again, it's premature to know for sure. Our colleagues from Health Canada may have some views on that as well, but it's certainly, I would say, in the repertoire of tools that we can bring to bear to manage the health risk.

For example, we talked about testing looking at people coming into the country and if there would be a requirement for a test prior to departure. Would we be looking for proof of vaccination prior to people getting on an aircraft? Those are certainly all options we're looking at, but it's premature to make any declarations at this point in time.

The Chair: Thank you, Mr. McCrorie.

Thank you, Mr. Soroka.

We're now going to move on to Mr. El-Khoury for five minutes.

Mr. El-Khoury, the floor is yours.

[*Translation*]

Mr. Fayçal El-Khoury (Laval—Les Îles, Lib.): Thank you, Mr. Chair.

I'd like to thank the witnesses. Their being here with us is really important and useful to the committee.

We are in the middle of a really complicated and dangerous situation. The impact of the pandemic on the airline industry is unprecedented. Here, in Canada, we rely heavily on our airline industry, much more so than most other countries.

My first question is for Mr. Streiner.

Mr. Streiner, you explained the provisions of the Air Transportation Regulations regarding the obligation to refund—or not—customers. Could you tell us what happens in case of a force majeure? And can the pandemic be called a force majeure?

Mr. Scott Streiner: I thank the honourable member for his question.

I can't really answer that question, for one simple reason: as a quasi-judicial tribunal, we might have to deal with this issue. It's a matter of interpretation of the situation, the facts and the legislation. In order to maintain our impartiality, it's important to wait for the decision-making process before answering this important question.

Mr. Fayçal El-Khoury: Can you tell us how the pandemic has affected independent travel agents?

Mr. Scott Streiner: If this question is for me, I would say that travel agents aren't under federal jurisdiction. From what we've read in the media, they fall under provincial jurisdiction.

Mr. Fayçal El-Khoury: If you had issued an order stipulating that the airlines had to refund customers, this would still have been legal, given the terms and conditions of service in the airlines' tariffs. I am thinking here of the provisions that apply in cases of a force majeure and the distinction made at the time of purchase between refundable and non-refundable tickets

[*English*]

The Chair: Mr. Streiner.

[*Translation*]

Mr. Scott Streiner: Thank you, Mr. Chair.

It's true that these distinctions can be important. Some Canadians have purchased refundable tickets, while others have purchased non-refundable tickets. The provisions for a force majeure may be relevant to this discussion. That said, all of these issues must be dealt with in a quasi-judicial process of formal decision-making. These are the kinds of issues we will be addressing in our discussions and decision-making processes.

Mr. Fayçal El-Khoury: In the context of this pandemic, in your opinion, Mr. Streiner, what would have happened to the airlines if they had been required to pay cash refunds to all passengers who applied for them? And what might have been the impact on Canadian travellers and communities?

Mr. Scott Streiner: Once again, I think this question should be directed more to my colleagues at Transport Canada, but I'll give a bit of an answer anyway.

We know that this crisis is unprecedented, but we don't know exactly what the consequences might have been in the situation you describe. Our role is simply to determine what the obligations of airlines are and what the rights of air passengers are under the law. These are the issues we are dealing with. I don't want to speculate by commenting on hypothetical situations.

● (1635)

Mr. Fayçal El-Khoury: Why did you issue directives that credits may be an acceptable alternative to cash reimbursement for travellers whose flights have been cancelled due to COVID-19?

Mr. Scott Streiner: The reason is simple: we did it to reduce the risk of air passengers ending up without any compensation. As I said, the legislation refers to this great variability in the conditions of service of different airlines; that's what creates this risk for air passengers. The objective of our Statement on Vouchers was to reduce this risk.

Mr. Fayçal El-Khoury: When you say—

[*English*]

The Chair: Thank you, Mr. Streiner and Mr. El-Khoury.

[*Translation*]

Mr. Fayçal El-Khoury: Thank you.

[*English*]

The Chair: We will now move on for two and a half minutes to Mr. Barsalou-Duval of the the Bloc.

Mr. Barsalou-Duval, the floor is yours.

[*Translation*]

Mr. Xavier Barsalou-Duval: Thank you, Mr. Chair.

Mr. Streiner, it was mentioned earlier that there is currently a long wait for complaints to be processed. I have a question for you. If I ran a complaints department and there was a two-year wait for complaints to be processed, and I hadn't processed any complaints in the last nine months, do you think I would keep my job?

Mr. Scott Streiner: I'm sorry; could you repeat the question?

Mr. Xavier Barsalou-Duval: If I ran a complaints department, had two years of backlogged complaints on my desk, and hadn't processed any complaints in the last nine months, would I lose my job?

Mr. Scott Streiner: For me, the question would be whether all employees work hard and come together to deal with complaints. If it were employees of the Canadian Transportation Agency, the answer would be yes. Everybody is rallying to deal with complaints. As I said, we've managed to handle 6,000 complaints since—

Mr. Xavier Barsalou-Duval: Thank you. I'm sorry for interrupting you, but I have only two and a half minutes.

Mr. Scott Streiner: Yes, that's fine.

Mr. Xavier Barsalou-Duval: You still announced that you wouldn't deal with any complaints about cancelled airline tickets until September 2020, and then you postponed it until 2021.

In March, the Canadian Transportation Agency released the Statement on Vouchers, which was recently revised. I'd like to know if you had any input into this statement.

Mr. Scott Streiner: All statements, guidelines and guidance material are written by the organization and, as head of the organization, I am always involved, of course.

Mr. Xavier Barsalou-Duval: Have there been any communications where the office of the Minister of Transportation has expressed a willingness to consider the direction the agency might take or the issue of ticket refunds?

Mr. Scott Streiner: We have communicated with the office of the Minister of Transportation throughout the crisis. Indeed, coordination is important in a crisis like this. It's a question of transparency. The purpose of these communications wasn't to obtain permissions or receive instructions, but to ensure that we don't create confusion in this time of crisis.

[*English*]

The Chair: Thank you, Mr. Streiner and Mr. Barsalou-Duval.

We're now going to move on to the NDP with Mr. Bachrach, for two and a half minutes.

The floor is yours.

Mr. Taylor Bachrach: Thank you, Mr. Chair.

Mr. Streiner, which individuals authored and approved the March 25 statement on vouchers?

Mr. Scott Streiner: With regard to the statement on vouchers, like all guidance material posted by the CTA—and we post a great deal of non-binding guidance material, policy statements and information—there are many people who participate in its preparation, in its drafting and in its review, so it's a large number of employees who contributed to that.

Mr. Taylor Bachrach: Who approved it?

Mr. Scott Streiner: Ultimately, every statement like this is an expression of the organization's guidance. As I emphasized earlier, the statement on vouchers, like these other documents, was non-binding in nature, and it's an expression of guidance or a suggestion to the travelling public by the institution.

Mr. Taylor Bachrach: An email from a policy adviser at Transport Canada to Member of Parliament Erskine-Smith revealed that the CTA's members, vice-chair and chair would have approved the statement on vouchers, which gave airlines clearance to refuse refunds.

Is this correct?

Mr. Scott Streiner: Mr. Chair, I'm not sure about that email. I haven't seen the email. It's not in front of me.

The office of the Minister of Transport would not have been privy to the internal decision-making processes at the CTA, and I would simply reiterate that every statement—non-binding—that's made by the CTA, every guidance document is a reflection of institutional guidance and of course is reviewed by senior members of the organization.

● (1640)

Mr. Taylor Bachrach: Mr. Streiner, will you commit to providing this committee with all internal documents, memos and emails concerning the March 25 statement on vouchers and the subsequent clarification?

Mr. Scott Streiner: The CTA is subject to the same access to information rules as any other organization. We have a policy of transparency, and so we try to come forward. I will commit to certainly providing the committee with those documents that it's appropriate to provide, but we are a quasi-judicial tribunal, an independent regulator, and certain material is privileged.

Mr. Taylor Bachrach: The challenge here, Mr. Streiner, as I'm sure you can guess from this line of questioning, is that as a quasi-judicial body, the CTA is in a position to fairly and without prejudice adjudicate these complaints that have come in from air passengers. Does this statement on vouchers not prejudice that process? This very clearly sets out the outcome of those complaints related to refunds. You've already said that it's reasonable, so why adjudicate the specific complaint if you've already said that it's a reasonable approach?

Mr. Scott Streiner: I want to give a very clear response to this question. The non-binding statement on vouchers was issued in order to protect passengers from ending up with nothing at all as a result of this situation, in part because of the legislative gap that I spoke about earlier. Nothing in that non-binding statement in any way affected or affects the rights of anybody who brings a complaint before us. The Federal Court of Appeal has already recognized that passengers' rights aren't affected. Right in the body of the statement, we said that every complaint would be considered on its merit. Every complaint will be considered on its merit, impartially, based on the evidence and the law.

The Chair: Thank you, Mr. Streiner and Mr. Bachrach.

Mr. Taylor Bachrach: Thank you, Mr. Chair.

The Chair: Thank you to the witnesses.

[*Translation*]

Mr. Xavier Barsalou-Duval: Excuse me, Mr. Chair.

[*English*]

The Chair: Yes, go ahead.

[*Translation*]

Mr. Xavier Barsalou-Duval: I'd like to put forward a motion about what was discussed. Is it possible to do that now?

[*English*]

The Chair: Go ahead.

[*Translation*]

Mr. Xavier Barsalou-Duval: That's perfect, Mr. Chair.

Actually, I'd like to put forward a motion that has already been tabled at committee on October 26. The motion is as follows:

> That, pursuant to Standing Order 108(1)(a), an Order of the Committee do issue for correspondence between Transport Canada, including the Minister of Transport and his staff, and the Canadian Transportation Agency regarding cancelled plane tickets and the right of air passengers to be reimbursed, and that these documents be provided to the Committee Clerk within 15 days following the adoption of this motion.

[*English*]

The Chair: Okay, I'm assuming, Mr. Barsalou-Duval, that this is the motion you presented a few days ago, which you distributed.

Do you want to put on the table right now?

[*Translation*]

Mr. Xavier Barsalou-Duval: Mr. Chair, it is not the motion on Air Transat, it's actually the one about the Canadian Transportation Agency. So it's a different motion and it pertains to today's meeting.

The motion I have just read to you has already been introduced, but the committee has not discussed it.

[*English*]

The Chair: Mr. Clerk, does the committee have a copy of that motion?

The Clerk of the Committee (Mr. Michael MacPherson): I'm just going to double-check, but I do believe that it was distributed.

The Chair: Members, while we check, I would like to get some clarification from Mr. Hanson regarding Mr. Soroka's question, even though this might not be the norm for a chair to do. Mr. Soroka asked a question about travel agents, and it's within this committee's interest. The importance of this issue has been discussed previously, too, by members of the committee because sometimes it can fall through the cracks, or these folks, travel agents, maybe seemed to have fallen through the cracks. I thought Mr. Soroka brought up a great point, a great question, with respect to that. I just want to get clarity from you to declare the travel agents.... Do you see them in a similar way as you would see the passengers who are unable to get refunds?

Mr. Lawrence Hanson: Thanks. It's a very fair question, Mr. Chair. I don't know if I'm in a position where I could declare that it would be policy to see them as analogous. That would be for someone other than me. I think what I can say is that the reality is that a mass kind of series of refunds done all at the same time would have implications for those travel agents. I think we need to understand that better, but I think I would kind of be creating policy on the fly to say that it is analogous to something else. I think I would really just be saying that we absolutely recognize that this issue is a consequence of the refund issue and that we have to be looking at it. I'm sorry that I can't be more precise than that, Mr. Chair.

The Chair: Okay. Thank you, Mr. Hanson.

Thank you to all of the other witnesses too.

We're now going to suspend for five minutes. Thank you, ladies and gentlemen.

● (1640)

_____(Pause)_____

● (1640)

The Chair: We have that notice of motion by Mr. Barsalou-Duval that was distributed Monday, October 26, 2020.

Mr. Barsalou-Duval, is that the motion you are putting on the floor?

[*Translation*]

Mr. Xavier Barsalou-Duval: Yes, Mr. Chair.

[*English*]

The Chair: Thank you, Mr. Barsalou-Duval.

Mr. Clerk, I am going to be asking for a vote by the committee to actually debate this now, as it is now being placed on the floor.

Members of the committee, Mr. Barsalou-Duval wishes to place this on the floor for debate. I'll take it, first of all, as a motion to debate it. First off, I'm going to be asking for a vote to place it on the floor for debate. All those in favour?

The clerk is telling me that we don't need a vote to get it on the floor. That's fine.

Debate has begun for this motion. Mr. Barsalou-Duval, I'll give you the floor.

● (1650)

[*Translation*]

Mr. Xavier Barsalou-Duval: Thank you very much, Mr. Chair.

The discussions we had today with the official from the Canadian Transportation Agency actually support the reason why this motion was introduced. The goal of the motion is to better understand where the agency's statement on travel credits came from. It will tell us what interaction it had with the government and whether any directives were given during those interactions. Specifically, it would be helpful to find out whether there was a desire on the government's part to influence a judicial or quasi-judicial tribunal. That would be most unwelcome.

This is something that has an impact on thousands of families. Thousands of dollars are at stake. This has been a highly publicized issue. I hope that all members of the committee will want to obtain that information.

[*English*]

The Chair: Thank you, Mr. Barsalou-Duval.

I will now go to Mr. Sidhu.

Mr. Sidhu, you have the floor.

Mr. Maninder Sidhu (Brampton East, Lib.): Thank you, Mr. Chair.

Yes, I do understand the importance, but I also understand the importance of the witnesses being here. We're ready to ask them the questions that we have. There's a lot of important information. I know my constituents are waiting on answers in terms of rapid testing and a lot of other important matters.

With respect to our witnesses, we need to hear from them. They took the time; we prepared our questions. I think that's what we need to do here.

Thank you.

The Chair: Thank you, Mr. Sidhu.

I have Mrs. Kusie, Mr. El-Khoury and Ms. Jaczek.

Mrs. Kusie, the floor is yours.

Mrs. Stephanie Kusie: I support what Mr. Sidhu said, in particular, in the light that the witnesses from the first hour were.... When I say were not prepared, I mean did not feel comfortable responding to questions better directed to the Department of Health and the Public Health Agency.

I would ask that we return to the witnesses at this time. As well, I would ask the clerk if he could possibly redistribute the motion, if he has not done so already. I am attempting to locate it within my documents, and I'm struggling to do that. I would go out on a limb and say that I'm not alone.

Thank you.

● (1655)

The Chair: Thank you, Mrs. Kusie.

I have Mr. Bittle, followed by Mr. El-Khoury, Ms. Jaczek and Mr. Bachrach.

Mr. Bittle, the floor is yours.

Mr. Chris Bittle (St. Catharines, Lib.): I thank Mrs. Kusie, and I agree with her sentiment. I move that debate now be adjourned.

The Chair: Thank you, Mr. Bittle.

With no questions or no debate on that motion, Mr. Clerk, perhaps you can do roll call.

(Motion agreed to: yeas 9; nays 2)

The Chair: Thank you, Mr. Clerk, and thank you, members.

We're now going to move on to our next session.

Mr. Clerk, I believe all witnesses are on board.

While we're waiting, the next round is going to start with the Conservatives with Mrs. Kusie for six minutes, followed by Ms. Jaczek for six minutes for the Liberal Party, followed by the Bloc and Mr. Barsalou-Duval for six minutes and Mr. Bachrach of the NDP for six minutes as well.

Once we get the witnesses on board and the sound checks done, we'll be ready to go.

Mr. Clerk, I'll leave it to you.

I will suspend for three minutes.

● (1655)

_____(Pause)_____

● (1700)

The Chair: We are now going to be entering the second part of our session.

From the Department of Health we have Ms. Frison, the acting assistant deputy minister, programs and implementation. From the Public Health Agency of Canada we have Ms. Diogo, vice president, health security infrastructure branch.

I'm going to ask both witnesses to be brief because we only have half an hour and I'm being told by the House that we have until 5:30 because we have 6:30 committees and we don't want to take away the resources from them. If you can be as brief as possible that will allow for more questions from members and that would be wonderful.

Ms. Frison, go ahead. The floor is yours.

Ms. Monique Frison (Acting Assistant Deputy Minister, Programs and Implementation, Department of Health): Thank you, Mr. Chair.

I want to begin by thanking the committee for the opportunity to speak to you today.

I work at Health Canada in the testing, contact tracing and data management secretariat. We know that COVID-19 has had devastating impacts right across the country, and the aviation sector is no exception. I'm sure the efforts of this committee to examine the consequences of this pandemic will undoubtedly shape the efforts to strengthen that sector, which is so vital to the Canadian economy and the lives of Canadians.

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FEDERAL COURT OF APPEAL

B E T W E E N:

AIR PASSENGER RIGHTS

Applicant

- and -

ATTORNEY GENERAL OF CANADA

Respondent

- and -

CANADIAN TRANSPORTATION AGENCY

ORIGINAL

Intervener

****

CROSS-EXAMINATION OF BARBARA CUBER on Affidavit sworn April 21, 2022, pursuant to an appointment made on consent of the parties, to be reported by E.M. Gillespie Court Reporting, on September 16, 2022, commencing at the hour of 10:00 in the forenoon.

****

APPEARANCES:

Simon Lin, for the Applicant
Lorne Ptack, for the Respondent
Kevin Shaar, for the Intervener

The Examination was reported by E.M. Gillespie Court Reporting via video conference, having been duly appointed for the purpose.

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DATE TRANSCRIPT COMPLETED: OCTOBER 4, 2022

MR. PTACK: I am Lorne Ptack, counsel for the Respondent, Attorney General of Canada, in this matter. In the present instance, there is no one else available to swear in the witness so I will be doing so. Would the witness please identify herself for the record?

THE WITNESS: My name is Barbara Cuber.

MR. PTACK: Would you prefer to be sworn on a Bible or take an oath?

THE WITNESS: An oath, please.

MR. PTACK: Do you solemnly declare that your responses you give today are the truth, to the best of your knowledge and ability?

THE WITNESS: Yes, I do.

MR. PTACK: Thank you, very much.

BARBARA CUBER, AFFIRMED:

EXAMINATION BY MR. LIN: Thank you for coming today, Ms. Cuber. As you know, my name is Simon Lin. I am counsel for the Applicant on this matter and I will be asking you some questions today, primarily about your affidavit that you swore on this proceeding.

Counsel, just for clarity, today is a cross-examination set by the Applicants. As such, I kindly ask that counsel for the Intervener refrain from answering questions on behalf of the affiant, and furthermore, since the Attorney General of Canada did not serve a Direction

to Attend and also not adverse in interest to the CTA, we understand that the AGC is only attending today as an observer.

Just for shorthand I will refer to the Canadian Transportation Agency as the CTA and the Respondent, the Attorney General of Canada, as AGC for shorthand.

MR. PTACK: Mr. Lin, if I may chime in here briefly? The AGC is here as the Respondent. I am here as the Respondent's counsel, not as an observer, and as such I do reserve the right to participate or interject as may be necessary. I acknowledge I have not served a Direction to Attend on this witness. Of course there was no requirement for us to do so, and while I don't expect to be interjecting or participating in any particularly active point, I do have to disagree with your suggestion that I am only here as an observer.

MR. LIN: We can agree to disagree about that. We're moving on. Thank you.

MR. PTACK: Certainly and I'm happy to do so but on the record, should it be an issue later, let it be stated for the record that that is not the status the AGC accepts in this matter. Please proceed.

MR. LIN:

1. Q. Before we launch onto questions, Ms. Cuber, can you confirm what documents you have before you for

this cross-examination?

A. Sorry? What exhibits I have? I just wanted to answer – you had asked me previously if I understood the instructions that you said about, for instance, the CTA being the shorthand for Canadian Transportation Agency and AGC, and you asked if I understood and I didn't get an opportunity to respond. I just wanted to say that I did understand. I have the exhibits that you sent at 9:53 this morning. They're not in – would you like me to --

2. Q. No. We know there are 17 documents in there. Other than that, do you have any other items before you?

A. I only have my affidavit with the three exhibits of my affidavit before me.

3. Q. What else do you have open on your screen besides this Zoom meeting?

A. I'm happy you asked that because you since you sent the exhibits by email, I have my email account open. I don't know if you prefer that I close that and that you will show me the exhibits as they arise. I closed any messaging services and I had intended to close my email account on my desktop so I'm not --

4. Q. We would suggest that you can download the 17 exhibits and then have the email account closed so there won't be any interruptions, if that's okay.

A. Yes. It's just going to take me a minute to

do that.

5. Q. While you do that, can I ask you is there anyone else in the same room as you at the moment?

A. No, there is no one else. My phone is off and I don't have any messaging services and momentarily I will not have any email open. I believe I have them now so I am closing Outlook. If I happen to see an email pop up, is it alright with you if I just stop so that I can figure out how to make sure that I am not receiving any messages? Is that all right? If I see something pop up, I'll just let you know. I've closed my Outlook.

6. Q. Yes. I understand what you are referring to. Are we ready to begin?

A. Yes.

7. Q. I understand you are familiar with the Order issued my Madam Justice Gleason on October 15th, 2021, in this file?

A. Yes.

MR. LIN: I will refer to this October 15th Order as the October Order. For clarity, that's the first document, number one, that was sent out this morning. I would like to ask Madam Court Reporter to mark Exhibit 1 the Order of Madam Justice Gleason, dated October 15th, 2021.

EXHIBIT NO. 1: Order of Justice Gleason, October

15, 2021.

8. Q. I understand that you are familiar with the Order issued by Madam Justice Gleason on April 11th, 2022, in this file?

A. Yes.

MR. LIN: I will refer to this as the April Order and I will also ask that this be marked as an exhibit, Exhibit 2.

EXHIBIT NO. 2: Order of Justice Gleason, April 11, 2022.

9. Q. I understand, Ms. Cuber, you are familiar with another order that was recently issued by Madam Justice Gleason on July 19th, 2022, for this file?

A. Yes.

MR. LIN: I will refer to this as the July Order for shorthand and I will also ask that this be marked as Exhibit 3.

EXHIBIT NO. 3: Order of Justice Gleason, July 19, 2022.

10. Q. Next I understand that on April 11th, 2022, Ms. Cuber, you swore an affidavit for this application as ordered by the court?

A. I don't think it was April 11th. I think it was April 21st. I'll just look.

11. Q. I misspoke. It is April 21st.

A. Yes.

MR. LIN: That affidavit is the fourth document that was sent out and I will ask that to be marked as Exhibit 4, please.

EXHIBIT NO. 4: Affidavit of Barbara Cuber, sworn April 21, 2022.

12. Q. Ms. Cuber, I understand you also received our Direction to Attend on or around August 29th, 2022, which includes a cover letter and that is the fifth document?

A. Yes.

MR. LIN: We would like to mark that as Exhibit 5, please, the Direction to Attend and cover letter.

EXHIBIT NO. 5: Direction to Attend and cover letter, August 29, 2022.

13. Q. If we could have Exhibit 5, the Direction to Attend, open, please? That would be great. Ms. Cuber, do you have that open?

A. Yes, I do.

14. Q. Perfect. Did you bring any of the documents listed in the Direction to Attend, other than items 9, 12, and 13 which were the subject of an undertaking on August 5th, 2022?

A. No.

15. Q. You received our Direction to Attend, correct?

A. Yes.

16. Q. While we realise items 1 to 25 were subject to debate in the July Order, items 26 to 30 were added to this Direction to Attend. Did you bring items 26 to 30?

A. No.

17. Q. You are aware that the Federal Court Rules require you to produce documents today at cross-examination, and in particular, items 26 to 30?

A. Yes.

18. Q. Why did you not bring items 26 to 30?

A. I have to go back. It's certainly the case that some of them do not exist.

MR. SHAAR: Perhaps we should go through each one?

THE WITNESS: Yes. I didn't memorise them.

MR. LIN:

19. Q. Let's start with 26. Can you tell us why you did not bring item 26 on the Direction to Attend?

A. Item 26, it's not possible for me to give you a list of the attendees at the March 24th Executive Committee Meeting because we don't know who attended. There were just the participants which is the ordinary list of participants at Executive Committee Meetings and so we don't have anything further to produce on that front, as far as I understand it.

20. Q. Are you saying there is a list of participants but there is not a list of attendees?

A. I believe the Agency produced the schedule for that item and there is no list of attendees so there is nothing further that can be produced, as far as I understand it.

21. Q. How about item 27?

A. This doesn't exist because OneNote documents can't be saved in RDIMS. If I understand this item correctly, in order to be in existence, it would require that OneNotes could be saved in RDIMS and they can't.

22. Q. How about item 29?

A. For 29(a), I believe that we produced the March 24th, 2020, schedule for the Members' Meeting that the Agency has in its possession and we have no further items for 29(a).

29(b) is a request for printouts from the Outlook calendar for Ms. Lesley Robertson showing whether her calendar had any scheduled events on March 24th, 2020, at 10:30 am EST. The difficulty with that is that we verified in Outlook and Ms. Robertson doesn't appear as an attendee on Members' Meeting of In-Camera Members' Committee Meeting like the one that happened on March 24th, 2020. That doesn't exist in the sense that she has a calendar but she wouldn't have been involved in the Members' Committee Meeting.

MR. SHAAR: We're going to object to this document

on the basis of relevance. Lesley Robertson isn't a member of the Executive Committee so it won't appear on her calendar because she wasn't invited. *O*

THE WITNESS: I just want to make sure that I describe as best as I can. It is my understanding when Ms. Robertson makes these meetings, she doesn't make them by her own calendar. She would make them through calendars that she controls like the Chair's calendar, for instance. She wouldn't appear as an attendee or a participant.

MR. LIN:

23. Q. She would be an organiser of whatever event? Is that correct?

A. I don't know that.

MR. SHAAR: It's not in her calendar which is why I'm objecting.

THE WITNESS: She wouldn't appear on any scheduled events in the sense that her calendar wouldn't show that she had an event.

MR. LIN:

24. Q. Thank you, Ms. Cuber, for clarifying. How about item 30?

A. We have provided the scheduler for the Members' Meeting that occurred on March 24th, 2020, at 11:00 am. That is all we have.

25. Q. How about at 10:30 am?

A. We have made verifications and there was no meeting at 10:30 am on March 24th, 2020.

26. Q. Do you know why there was no meeting at 10:30 when the Chair had made reference to talking at 10:30?

A. I spoke with Lesley Robertson about this and the explanation I received was that there was often trouble connecting to meetings at that time because there was high traffic, technical difficulties, and so it was not uncommon that when this was occurring, Ms. Robertson would re-schedule the meeting for 30 minutes later in order to try perhaps a different line or the same line at a different time so that participants might be able to join at that time.

Her explanation was that she likely would have just moved the meeting forward half an hour which was her practice at the time and that seemed like a reasonable explanation because you can see that one of the members, I believe it was Heather Smith, actually wrote that she was having trouble connecting at that time.

In addition to speaking to Ms. Robertson, I checked the scheduler of members for March 24th, 2020, at 10:30 am for the members that are at the Agency and I noted that they did not have a meeting at 10:30 scheduled in their schedulers but they did have a meeting scheduled

at 11:00 am.

27. Q. Just following on one point you mentioned, you said members that are at the Agency. What do you mean by members that are at the Agency?

A. We can't check the schedulers of members who are no longer at the Agency because Outlook accounts are closed after personnel leave the Agency.

28. Q. Can you elaborate on what you mean by Outlook accounts are closed?

A. Sure. The Agency's policy about information management requires staff to save their records of business value, including records that are subject to litigation holds or records that are subject of ATIP requests into the corporate repository, and when they leave, their documents must all be saved in the corporate repository in the RDIMS because Outlook accounts are not kept after Agency personnel leave because Outlook accounts are not a corporate repository,

29. Q. I assume that applies to members and employees? Is that correct?

A. Yes.

30. Q. Are you saying that Mr. Scott Streiner and Ms. Marcia Jones's email accounts were wiped?

A. I'm not saying that they were wiped. I'm saying that they were closed after they saved records of

business value, records that were subject to litigation holds, and records that were subject to ATIP requests into RDIMS.

31. Q. Closed means they still exist? Is that correct?

A. They are no longer available. They are no longer available after they leave. I don't know exactly what they do with them but they're not available.

32. Q. What do you mean by they? You said you don't know what they do with them. Who is they?

A. Information Technology staff have explained to me that the email accounts are not kept.

33. Q. So they have been wiped? Is that correct?

A. They're not kept. I hesitate to – I don't agree with the word wiped because I don't agree in the sense that wiped makes it sound like important things were deleted whereas in fact, the recordkeeping practices that Agency personnel are required to adhere to on a regular basis, and certainly before departure, require them to move all of their records of business value, all records that are subject litigation hold, and all records that are subject to ATIP requests into the corporate repository so that they are preserved there and then any records that are transitory are supposed to be deleted before, over the course of their day-to-day work, and then those will be

removed from the account before they leave. IT doesn't wipe the account.

34. Q. Let's take a step back here while we're on this topic. In terms of Mr. Scott Shreiner and Ms. Marcia Jones, they are no longer at the Agency? Is that correct?

A. That's correct.

35. Q. Do you recall the approximate date that they left?

A. They both left in May 2021.

36. Q. So it was about a year ago. At the time, who decided which emails from their Outlook account had to be saved in the corporate repository?

A. They would have to decide which emails are saved in the corporate repository. Ms. Jones would have to decide which of her emails are saved in the corporate repository and Mr. Streiner would also have to decide which emails are saved in the corporate repository but it is my understanding that Ms. Robertson would probably be the one saving Mr. Streiner's items into the corporate repository but I can't confirm that Mr. Streiner did not also personally save his documents into RDIMS which is the corporate repository. If it's okay, I'll just call it RDIMS.

37. Q. Go ahead, please. Is it correct to say that there was no oversight in this scenario? It was the

person themselves deciding for themselves what to save?

A. Well, I believe that everybody who – it's my understanding that everybody who saves their items into RDIMS has to have a list of people who will approve or sign a departure form that will confirm that they have saved all of their items into RDIMS and I've spoken with our IT staff who have said that that they do sort of checks on departing personnel, not to check every single item but just to verify that the number of items that are saved under that person's name seems to be an appropriate number of items given that people will produce documents of business value so if there are only two then it seems like they probably didn't save their documents of business value into the corporate repository.

38. Q. In the case of Mr. Streiner, who signed that departure form?

A. I don't know who signed his departure form.

39. Q. How about Ms. Jones? Who signed her departure form?

A. I don't know. I don't know who actually signed her departure form but I believe that Mr. Shreiner would be the person who would have signed it.

40. Q. In the case of Mr. Streiner, would you undertake to find out who signed the departure form and let us know?

MR. SHAAR: We will take it under advisement. *A*

MR. LIN: Is that a yes or a no, Mr. Shaar?

MR. SHAAR: That's neither. We'll take it under advisement. We're under no obligation to make any undertakings so we will consider your question and get back to you.

MR. LIN: In that case if we don't have your answer, we, of course, reserve the right to recall the cross-examination in that you refused to provide information.

MR. SHAAR: The witness hasn't provided any information. You've asked if there was an undertaking to produce the document. The Agency is under no obligation to provide undertakings. My answer is I will look at your request and we'll get back to you at a later date.

MR. LIN:

41. Q. Ms. Cuber, at the time Mr. Streiner and Ms. Jones left the CTA, you were the main counsel on this application, correct?

A. Yes.

42. Q. At the time, you were aware that they were departing from the CTA?

A. Yes – well, not Ms. Jones. I mean I knew that Mr. Streiner's term was up.

43. Q. Did you participate at all in reviewing the

documents that you save on RDIMS before his departure?

A. Before whose departure?

44. Q. Before his departure, Mr. Streiner's departure?

A. No, I didn't participate in the review of documents before he left. It was my understanding that documents related to this matter would have already been preserved as part of the pre-existing Access to Information request.

MR. LIN: Just to take a step back, the undertaking that we asked for for Mr. Streiner, we'll ask the same for Ms. Jones's departure form. Mr. Shaar, I assume you have that noted?

MR. SHAAR: Yes. *A*

MR. LIN:

45. Q. When Mr. Streiner left the CTA, is it fair to say that the departure form was the only step that the CTA took to ensure the data on his computer or mobile devices were preserved?

MR. SHAAR: Mr. Lin, what does this have to do with the affiant's search for documents in order to find documents that were responsive to the court orders? It seems to me that we're getting a little far away from the scope of the cross-examination and we're getting into what was done in the context of a departure and what that

process is. We're not actually dealing with the orders that were given or what the affiant did to respond to those orders but in things that happened before the orders were given. *O*

MR. LIN: Mr. Shaar, I understand that you are objecting. We know that there are various emails that are no longer in existence or were deleted and the court has specifically provided that in the number of topics that we intend to explore and that is, why the emails were deleted, and this goes to that line of enquiry. Why were they not preserved? We know the emails exist.

MR. SHAAR: Then put that question to her because if we're dealing with things that happened before the October Order then it's hard for Ms. Cuber to say what she did to respond to that order.

MR. LIN: We are asking the witness questions in terms of what she did in terms of preservation and unless you have a specific objection, Mr. Shaar, we ask that you not interject.

46. Q. Ms. Cuber, back to the question. Is it fair to say that when Mr. Streiner left the CTA, the only step that the CTA took to preserve data on his computer or mobile devices was the departure form?

A. That is the only step that I am aware of but Mr. Streiner was aware of this litigation and he was

provided with a notice to preserve documents on April 14th, 2020, when the litigation began. He was aware of the motion under Rule 318 that was filed and served on the Agency on or around January 4th, 2021, and he was very aware of this litigation. He didn't have a lack of awareness and the departure form specifically refers to the need to preserve documents that are subject to a litigation hold.

47. Q. Ms. Cuber, thank for the explanation but my question is that was the only step the CTA took, the departure form? There was no oversight in terms of what Mr. Streiner had saved and you were not involved in overseeing it?

A. I can only say that I was not involved in overseeing it. I don't know if there were other steps taken. I'm not aware of any other steps taken.

48. Q. Thank you. We asked the same question for Ms. Jones's departure. The departure form was the only step that was taken to ensure that the data on her computer or mobile devices were preserved in RDIMS? Is that correct?

A. I'm not aware of any other steps that were taken. I am aware that Ms. Jones was informed of the litigation. I was not able to find a written record of her being informed or the need to preserve documents but I was able to find a written record of her being informed of

the ATIP request that came in in May 2020 and I had a discussion with her on January 5th, 2021, about the motion under Rule 318 and she told me during our exchange where to find her responsive documents and what she had no knowledge of.

49. Q. Taking a step back to the departure forms, is that part of the CTA's policy for departing employees?

A. I don't have any other information. I requested information retention or record retention policies from Information Technology. I think that was one of the items in the Direction to Attend. There was nothing that was given to me. The only thing I'm aware of is the departure form.

50. Q. You've just talked about your discussion with Ms. Marcia Jones. How can you be so sure of the date that you spoke with her?

A. It was a written exchange. I should have said exchange. I apologise for that. It was a written exchange between us.

51. Q. Written exchange in the form of email?

A. Yes.

52. Q. Will you undertake to produce that email to us?

MR. SHAAR: The Agency is under no obligation to make undertakings but we will take your request under

advisement and get back to you. *A*

MR. LIN:

53. Q. On the topic of the departure form, can you describe it? Have you seen it personally?

A. Yes, I have seen the departure form. I have used departure forms myself and I believe I asked whether Mr. Streiner had signed a departure form and I was told that he had but I can't remember if I saw it.

54. Q. How about Ms. Jones's departure form? Have you seen that yourself?

A. No, I have not.

55. Q. Do you know if she actually signed a departure form?

A. I don't. It's required of every departing employee so I have to assume that she did but I don't know.

56. Q. I assume you have seen a blank departure form before?

A. Yes.

57. Q. Can you describe to us what it looks like, what the contents are?

A. I'm going to say this based on my vague recollection. I don't want to misrepresent the state of my recollection of what the departure form contains. I might be wrong. I'm going on the basis of what I recall.

If it's understood that that's what I'm doing then I will respond.

58. Q. Please.

A. I believe that the departure form contains different boxes and in the boxes personnel have to acknowledge that they have returned all equipment, that they have returned anything that they have taken from Information Management or the library. They have to sign that they have saved in RDIMS, like I said, all records of business value, all records that are subject to any Access to Information or Privacy requests, all records that are subject to a litigation hold. They have to sign that they have given back any credit cards, that they have given back any keys.

The people that are in charge of each of these elements, so IM, IT, Security, et cetera, have to sign off that each of these steps have been taken before an employee is allowed to depart. I think that is what it looks like.

59. Q. Is this a form that is from the CTA or from the Treasury Board?

A. I don't know. It is a CTA form and it's my understanding that this form is in line with government policy. I have personally had to sign this form at any government that I have had. It is the same sort of form.

I've worked at three different places at the government and I've had to sign that very type of form three times.

60. Q. Have you enquired with the IT what happens with employees' electronic devices, including computer and mobile devices, after they are returned?

A. I only asked if there was a policy and I didn't receive a policy so I don't know what – I mean I personally have received other people's phones so I assume that – I'm talking about when I have returned a phone.

61. Q. I am asking specifically about Mr. Streiner and Ms. Jones's situation.

A. I don't know. It's my understanding that phones are re-issued to employees. As for Mr. Streiner's and Ms. Jones's phones, I don't know.

62. Q. Do you know if they actually returned it?

A. They have to return it in order to be able to leave the Agency. You're not allowed to take phones or computers with you when you leave.

63. Q. I understand what the policy is but what I'm asking is if in fact are you aware if they actually returned their mobile devices.

A. No.

64. Q. Thank you. On this point of whether Ms. Jones and Mr. Streiner actually returned their phones, we'll actually request an undertaking that you verify they in

fact had returned their phones and what has been done with the phones thereafter.

MR. SHAAR: We won't be making any undertakings today, Mr. Lin. We will take your request under advisement and get back to you. *A*

MR. LIN: Thank you. I would ask the same for their computers as well, not just their phones. Mr. Shaar, you have that noted?

MR. SHAAR: Yes. *A*

MR. LIN: Thank you.

65. Q. Ms. Cuber, you did mention a notification that was sent out April 2020? Is that correct?

A. Yes. About the litigation, yes.

66. Q. You sent out that notification?

A. There are two notifications. One notification is sent out whenever litigation is begun and then in this instance, there was a separate notification to preserve documents that were sent. Both of those notifications were sent by Allan Matte.

67. Q. Do you know what date?

A. Yes. For both of them?

68. Q. For both of them. They were sent separately?

A. Yes. The first notification that went out was sent on April 10th and legal counsel at the Agency has a reporting policy so all of the heads of the branches and

all members and the Chair and the Director of Communications are notified of new litigation and so that notification was sent out. I think it was on April 10th, 2020. Separate notifications were sent out on April 14th, 2020, to notify staff that was identified at that time or personnel that was notified or was thought to be relevant at that time of the need to preserve documents. That was April 14th.

69. Q. The April 14th notification that you just mentioned, that's at paragraph 8 of your affidavit?

A. Yes.

70. Q. There you mentioned "to relevant Agency personnel." Can you describe in this instance who the relevant Agency personnel are?

A. Yes. The persons who were notified in fact were the Chair, the Chief of Staff, and all members of the Agency. That was one notification. A notification was sent to the senior general counsel and secretary. That was another notification. A notification was sent to the Director of Secretariat and Registry Services, Patrice Bellerose, and then the Director of Communications, which I believe was Tim Hillier, was notified. I regret it was unclear when I was first reviewing the documents for this affidavit whether the Analysis and Outreach Branch had been contacted but I wasn't able to find a written

notification that the Analysis and Outreach Branch was notified and that would be Marcia Jones's branch and so I regret that it seems misleading in my affidavit but that's not intended. It was not clear at the time but I was not able to find a written notification to Ms. Jones or the Analysis and Outreach Branch.

71. Q. You listed six different branches or departments for the notification. Was Mr. Matte's notification in one email or was it six separate emails?

A. I don't know if it was six. Hold on. I think it might have been four and they were separate.

72. Q. Ms. Cuber, I know you said you needed to check. Are you reviewing the email on your screen?

A. No. I was counting on my fingers. I was naming the people like a kindergartener.

73. Q. You were not able to find any written notification to the Analysis and Outreach Branch?

A. No, I was not.

74. Q. Taking a step back, on the April 10th notification that Mr. Matte sent out for litigation, who were the recipients of that?

A. The recipients of that would have been the Chair, all members, and then the heads of each branch so there would have been – I don't have it in front of me but I mean it would be Marcia Jones, Douglas Smith. Ms.

Lagacé would have received it. Like I said, the Director of Communications would have received it. I'm not sure who else. Everyone in Legal Services would have received it and Secretariat, I believe, would have received that notification as well.

75. Q. When you say everyone in Legal Services would have received it, I assume you received it as well?

A. I wasn't working at the Agency at the time so I did not receive it.

76. Q. Have you seen, yourself, the notification that Mr. Matte sent on April 10th?

A. Yes. I didn't see the original. What was saved in RDIMS was the original and then another email. It was sort of together so I saw what he sent but then another email as well that were in a string.

77. Q. In the email that Mr. Matte sent out, did he attach a Notice of Application?

A. I don't know. That's why I want to be careful. It is the practice of Legal Services to attach a notification, to attach the document, but I don't know that he did. What I can say is when I received the motion under Rule 318 on January 4th, 2021, I sent a copy of that to Ms. Jones and she reviewed that. She reviewed the motion on January 5th, 2021.

78. Q. Thank you. In the notification Mr. Matte sent

on April 10th, does it make reference to preserving documents?

A. No, I don't recall that it did.

79. Q. Did it mention what the substance of the case was?

A. Yes.

80. Q. Can you tell us briefly what was said in terms of the substance of the case?

A. It was a description of what was contained in the Notice of Application, a summary.

81. Q. It would have been clear to a recipient what the Notice of Application was about?

A. Yes.

82. Q. We started at the Direction to Attend and then went forward a little bit. I want to take a few steps back. What is your current title at the CTA?

A. I am a senior counsel.

83. Q. How long have you been in this role at the CTA?

A. Since August 2020.

84. Q. To whom do you directly report to at the CTA?

A. Valérie Lagacé.

85. Q. Who does Ms. Lagacé report to?

A. The Chairperson.

86. Q. Have you have reported to Mr. Allan Matte?

A. No. Well, no. Sorry. I'm trying to remember when he – no, I have never reported to Allan Matte.

87. Q. Were you the one tasked with ensuring that all the documents in the October Order, the April Order, and July Order are produced?

A. No.

88. Q. Who was tasked with ensuring that all documents of the October Order, the April Order, and July Order were produced?

A. I was tasked with ensuring that all documents under the October Order were produced and then I stopped being assigned to the case because I became an affiant and so the responsibility for the April Order shifted between – I don't actually know the chain of command for who was responsible for the April Order. I informed myself about what was done. I know that Amanda Hamelin was responsible for collecting the responsive documents and so I suppose it would be Amanda Hamelin, but it was not me.

Compliance with the July Order, I don't know that anybody was specifically tasked with that. Legal counsel undertook to provide the documents. I don't know that the tasking was very clear.

89. Q. So is it correct to say you were not directly involved in the gathering of documents and reviewing documents for the April Order and the July Order?

A. That is correct. I was involved in a part of the compliance with the July Order. Namely I was asked, simply because others were on holiday, to verify whether there were any additional members' notes for the Members' Meeting that was in issue. It was March 24th of 2020. To the extent that I participated, it was just to verify that there were no other members' notes.

90. Q. Thank you. Who at the CTA provided you with the authority to gather documents for the October Order?

A. I don't know that I had authority. It was simply because I had carriage of the file, it fell upon me to gather the documents, but I wasn't given a special authority of any kind.

91. Q. Is it fair to say that whoever has carriage of the file will be the one tasked with complying with the order?

A. That's the de facto, I guess, responsibility but yes. This situation was a little bit unique. I was responsible for complying with the October Order. That's what I can say. I was given no special authority or permissions or powers in order to do that.

92. Q. After the April Order was issued, you became an affiant and for a period of time Mr. Matte took over the file? Do you recall?

A. Yes.

93. Q. And then Mr. Sharpe? Sorry. Please continue.

A. Mr. Matte took over carriage of the file for a short while and then Mr. Sharpe.

94. Q. I am going to move back to the notification that Mr. Matte sent on April 14th, 2020. Were you involved at all in preserving documents in relation to that notification?

A. No. There were no documents preserved at that time in relation to that order. I'm sorry. There were no documents collected at that time in relation to that order. The instruction was simply to preserve the documents.

95. Q. You said order. I assume you are referring to the notification?

A. Right. I thought you said the order. I misspoke. There was a notification that went out that advised of the need to preserve documents in connection with the Notice of Application.

96. Q. It's fair to say that there were no active steps taken to actually preserve the documents? It was only the notification that was sent out?

A. I don't know what individuals – individuals were told to preserve documents. There were no active steps taken to collect documents but the notification was to preserve documents. Custodians of documents are to

preserve them.

97. Q. It was up to the individual recipient themselves to take steps to preserve the documents? Is that correct?

A. In the sense of not deleting them.

98. Q. Is that a yes? It is up to the individual recipients themselves?

A. As far as I understand it but I don't know that I – I didn't see any other instructions actually so I might be making an assumption. I didn't see any further instructions other than to notify personnel of the existence of the Notice of Application and of the need to preserve documents but I don't have any further information about that. That's what I know of.

99. Q. Do you know if Mr. Matte took any other steps in terms of preserving the documents besides sending out the notification?

A. No.

100. Q. Did you speak with Mr. Matte specifically about this topic?

A. I spoke with him and I understand that he notified personnel to preserve documents but took no steps to collect them.

101. Q. Did he take any steps to confirm that documents are being preserved?

A. I didn't ask that but – I didn't ask him that.

102. Q. So it's fair to say that the only step he took was to send out the April 10th notification and the April 14th notification about preserving documents?

A. Those are the two notifications of which I am aware and that I was given when I requested documents on that topic.

103. Q. Do you know if any of Agency personnel responded to Mr. Matte's April 14th notification?

A. I am aware that there were – I think I saw two. I am aware that there were responses. I can think of two.

104. Q. Do you recall who those two were?

A. Ms. Bellerose responded and Mr. Hillier, who was the Director of Communication.

105. Q. Did you see any other responses besides those two?

A. I can't remember any other responses. It's possible that there were but those are the two that I recall.

106. Q. And you personally have seen their responses?

A. Yes, I have.

107. Q. We'll ask for an undertaking that you produce those two responses.

MR. SHAAR: We'll take it under advisement and get

back to you. *A*

MR. LIN:

108. Q. I'll take a step back. We just asked you about the April 14th notification. About the April 10th notification Mr. Matte sent out, was there any response to that notification?

A. I didn't see any response to that notification. That notification was saved on RDIMS because it's a record of business value. I didn't receive that information directly from Mr. Matte so I didn't see anything else saved in the corporate repository but I also did not ask Mr. Matte if anybody responded.

109. Q. Can I refer you to the Direction to Attend, please? Number 1, we ask for the original notification that was sent on April 14th, 2020, including the names of the recipients. Number 2 is all the responses from the recipients in respect of the notification mentioned therein. Will you undertake to do search and produce number 1 and number 2 to us?

MR. SHAAR: No, we won't make such an undertaking. The Agency has already objected to the production of these documents and the court has ruled on it. *R*

MR. LIN: Your objection is solely that the court has ruled on it?

MR. SHAAR: I'm not objecting. I've already

objected and the court has already ruled on it.

MR. LIN: I guess we will have to debate that in court. Just to be clear, our position, the Applicant's position is the court did not rule on it. The court permitted the Applicant to question about these documents and seek an order accordingly.

110. Q. Can I refer you to paragraph 12 of the Direction to Attend, please? That is the Outlook system logs showing when the following emails were deleted from Ms. Marcia Jones's Outlook account; the first email being a March 18th email from Mr. Colin Stacey and the second email being email sent by Ms. Jones on March 25th, 2020. Ms. Cuber, did you bring those two emails with you today?

A. The emails?

111. Q. Yes, the March 18th, 2020, and the March 25th, 2020.

A. I didn't bring the emails. The Direction to Attend asks for the Outlook system logs.

112. Q. Did you bring the Outlook system logs with you today?

A. No.

113. Q. Why not?

A. Because we don't have them. I can explain. I contacted our Information Technology division twice. The first time I contacted IT was on or around May 4th and I

was told at that time that we don't keep, that the Agency doesn't keep, Outlook system logs to that level of specificity and then I verified that answer again with IT on September 13th and they again confirmed that the Agency doesn't keep Outlook system logs to that level of specificity, that when emails are deleted, if I understand, when emails are deleted, they are kept for a couple – a log is kept for a couple of minutes in the form alphanumeric text which would be unreadable to use for an outside observer and then they are deleted. We can't keep the logs of that sort to that level of specificity.

114. Q. You said that level of specificity. Did IT tell you what level of specificity logs are kept to?

A. No because the Direction to Attend said Outlook system logs showing when the following emails were deleted from Ms. Marcia Jones's Outlook account and so I asked them whether Outlook system logs can show when emails were deleted from an individual's Outlook account.

115. Q. Did you ask IT if there are any other ways to determine when an email has been deleted from an Outlook account?

A. I didn't ask that question. I am aware that the Agency keeps backup tapes but for a very limited period of time, as outlined in my affidavit. I can explain that, if you would like, or I can leave it for a

question.

116. Q. Please explain it?

A. As it was explained to me, the backup tapes that we usually have are kept on site for a period of 10 days and they are only meant for disaster recovery purposes. Within that period, it might be possible to locate an email that's been deleted if you know exactly what it is you're looking for but it would be very difficult to find, but as far as I understand it, it is possible. After that 10-day period, the backup tapes are moved off site and stored for a period of 12 weeks and then they are returned to the Agency and the Agency records over them again.

117. Q. In this instance, have you verified whether the emails from March 9th to 28th, 2020, are still on the Outlook tapes, the backup tapes?

A. No. No, I didn't because I believe that they wouldn't be there because the October Order came out more than 12 weeks after Ms. Jones left the Agency and there were no signs of the email in the corporate repository RDIMS and there were no signs of the email in the 3,000 emails that I reviewed or 5,099 pages of working copies that I reviewed. Those were the steps I took to check for the email but I didn't check on the backup tapes because I didn't think that they would exist there because they

would have been recorded over.

118. Q. But there would have been a notification sent out by Mr. Matte on April 14th, 2020, to preserve documents, correct?

A. Yes, there would have been an email sent out by Mr. Matte to preserve documents. That email was not sent to Ms. Jones but the other difficulty in this is that the majority of emails that are part of this litigation could very well be considered to be transitory records and so in the normal information practices, it could have been perfectly normal for a person to delete the emails at the end of the their day, at the end of the week, at the end of the month.

119. Q. Just to take a step back on the April 14th, 2020 notification, you mentioned that a senior general counsel of the Agency, Ms. Lagacé, would have received that notification?

A. Yes.

120. Q. And she also was Secretary of the Agency? Is that correct?

A. Yes.

121. Q. And she would have oversight over the IT department, correct?

A. I don’t think – I don’t know that that is true. I don’t know.

122. Q. Who has oversight over the IT department?

A. I don't know what the chain of command is off the top of my head. I don't know.

123. Q. Are you suggesting that the IT would have overwritten on the tapes even though there is a notification to preserve documents?

A. Sorry. I don't understand the question. Can you repeat the question?

124. Q. Are you suggesting that IT has already written over the tapes despite there being a notification on April 14th, 2020?

A. Well, I have no knowledge that those tapes were preserved because of the litigation hold. I spoke with IT and Ms. Bellerose about whether, for instance, Access to Information requests will check back on tapes and it's my understanding that it is not the practice that backup tapes are searched in that context but I don't know. I don't believe that we have backup tapes.

125. Q. Is it fair to say you haven't actually searched the backup tapes for the March 18th, 2020, email sent from Mr. Colin Stacey and the March 25th, 2020, email sent by Ms. Marcia Jones that are mentioned in paragraph 12 of our Direction to Attend?

A. No, I have not searched the backup tapes because for the March 18th email, there was no sign that

the email – I didn't check it for the March 18th email. What I can say is that for the March 25th email, it was clearly – they were both clearly deleted. I did not check backup tapes, no.

126. Q. You say clearly deleted. How can you be so sure they were clearly deleted?

A. For the March 25th, 2020, email, that email contained search terms that would have been captured by electronic searches of Outlook boxes, most specifically Ms. Jones's Sent box, and so the items that were captured in her Sent box did not reveal that email and that email was not found in any other search results that were obtained by Access to Information and so I think it's pretty clear that it was deleted because otherwise it would have been found.

For the March 18th email, it was not found through any searches, nor was it located in RDIMS.

I would just add that both of those emails could easily have been considered transitory records that did not need to be kept because they were not records of business value.

127. Q. Thank you. On the topic of the March 25th, 2020, email, how can you conclude that it's not of business value when it's so detailed and lengthy and it appears to be an announcement to third parties? How can

you conclude it's only transitory?

A. My understanding of transitory records is that – sorry, records of business value – is that they have to advance sort of the policy or a policy objective or advance the work of a government organisation, and each branch or department within the organisation will determine what transitory records means to them. A notification that something that has gone up on the website and two decisions have been issued might not be considered to be of business value. What would be considered to be of business value are the decisions that are cited in that notice and the item that was posted on the website.

128. Q. Are you saying there is no consistent interpretation or view of what transitory stands for and it lies in the hands of the individual department heads to decide?

A. No, I'm not saying that. There are obviously definitions of what transitory records are but they can't get into a level of detail. There is clear definitions for what transitory records are and that is set out in our Information Management policies and it's also, I believe, based on Treasury Board policies but of course, whether an individual record in an individual case will be transitory or of business value will of course need to be determined

in context and the context that makes sense for that is for the organisation to have an understanding and then each branch that performs functions within the organisation will have to have a common understanding of what constitutes transitory records and records of business value. The Agency certainly has sort of rules about what records of business value are that are common across the entire organisation and then there are specific instances where of course, based on the type of work you do, something will or will not be of business value.

129. Q. Since you mentioned that, in your view, the two emails in paragraph 12 of the Direction to Attend were clearly deleted, did you enquire with IT on whether those emails could be searched or found in another fashion, whether they could be restored?

A. I did not ask IT about that. I confirmed with Patrice Bellerose that they were deleted and that they couldn't be found. I had a conversation with IT about backup tapes in the winter of 2021, I'm not sure exactly when, about backup tapes. I imagine it would have been after you sent a deficiency letter, I had a discussion with them about backup tapes. It was my understanding at that time that backup tapes could not be searched for these documents.

130. Q. Why did they say backup tapes could not be

searched for these documents?

A. Because they are only kept for a matter of 12 weeks and then they are returned to the Agency and recorded over.

131. Q. But there was no actual review of the tapes to confirm whether that was indeed the case, correct?

A. No because it wouldn't have revealed the emails which were sent in 2020 when Ms. Jones left the Agency in May 2021. By the time I enquired about this in December 2021, 12 weeks had elapsed.

132. Q. Did IT advise on any other way that emails could be restored?

A. No. It's my understanding that there is no other way. Unless it's saved in the corporate repository, it can't be restored.

133. Q. Please continue.

A. We have emails that were saved as a result of Access to Information searches that were done and so those are emails that could also – I said unless it's saved in the corporate repository but I should have added that because there is sort of a snapshot taken of documents at a point in time when they are searched, those can also be reviewed and those were reviewed.

134. Q. Just at the start of today's cross-examination you mentioned that former employees' Outlook accounts are

closed after they depart. Do you recall that?

A. Yes.

135. Q. Did you ask IT to specifically search Ms. Jones's closed Outlook account after learning that these two emails were deleted?

A. No. I asked IT what could be searched and her accounts cannot be searched. It is closed. It cannot be the subject of a search.

136. Q. What do you mean it cannot be subject of a search?

A. It's closed. They can't – I guess like the account is closed. She would have been required under existing Information Management policies and IT policies to save her records of business value in RDIMS to have preserved – her records were collected in the context of two Access to Information requests and preserved and she would have been required to delete all of her transitory records before leaving the agency such that the closure of the account would, if it contained anything, contain only transitory records or records that have otherwise been saved in the corporate repository,

137. Q. The closed accounts, the contents are deleted? Is that correct?

A. Well, the account is no longer accessible. I guess you could say deleted. What I'm saying is the

contents of the account are supposed to be managed such that records of business value are saved in the corporate repository. Transitory records are deleted in the course of ordinary information management per our policies and then the account is closed so that there is nothing in it. When an employee leaves, the account should contain nothing in it.

138. Q. Have you checked with IT whether a closed account can be restored?

A. I have asked whether Marcia Jones and Scott Streiner's accounts can be searched and they cannot.

139. Q. I am not asking whether they can be searched. I'm asking whether they can be restored.

A. I didn't use the word restored but it is my understanding that they cannot.

140. Q. So they are permanently deleted? Is that what you are saying?

A. I can't answer that. It's my understanding that they can't be searched so as far as I understand, the accounts are permanently closed.

141. Q. Ms. Cuber, my question is not closed or not. It's whether they --

MR. SHAAR: We've done the tour of the question. She has answered. She's not an IT specialist. She has answered in the vocabulary that she understands on the

subject. I mean you've asked the same questions three or four times now. Can we please move on? *O*

MR. LIN:

142. Q. Ms. Cuber, the understanding is that closed would mean that the account is permanently deleted?

MR. SHAAR: Again you are just repeating your questions, Mr. Lin. She has answered you in the way that she understands it. She is not an IT specialist so I don't see how it is useful to just keep repeating the same question and expecting a different answer. *O*

MR. LIN:

143. Q. Ms. Cuber, were you about to answer a question?

MR. SHAAR: She has answered your question.

MR. LIN: I believe she was about to say something.

144. Q. Can you please finish your sentence?

A. It's just that my knowledge of information technology is based on the questions that I asked of Information Technology. It was my understanding that as per our Information Management policies, Outlook accounts are not corporate repositories and therefore when departing employees are leaving, they have to save all of their records of business value in the corporate repository, delete any transitory records. After that,

their accounts are closed and they are no longer available. I can't use synonyms for words because I'm not sure what the implication – I'm telling you what I have been told and that it was not possible to search in their accounts and that is what I know. It was not possible to search backup tapes because they would have been deleted over and they would not have yielded any results and that as per Information Management policies, both Ms. Jones and Mr. Streiner were required to save their records of business value in RDIMS.

145. Q. Between October 15, 2021, and the present, have you attempted to contact Mr. Scott Streiner to request documents or request his assistance in providing or locating documents for the October Order or the April Order or the July Order?

A. No.

146. Q. Between October 15, 2021, and the present, did you attempt to contact Ms. Marcia Jones to request documents or request her assistance in providing or locating documents for the October Order, April Order, or July Order?

A. No because we had already had an exchange in January 2021 and I knew where to find responsive documents and I knew the documents that she didn't have knowledge of.

147. Q. What do you mean documents she didn't have knowledge of?

A. She indicated that she had no knowledge of anything like meeting minutes or memos on the subject of the Statement on Vouchers and that responsive documents had been collected in the context of Access to Information searches.

148. Q. Did you confirm with Ms. Jones specifically about the March 18th and 25th emails?

A. No because I had no knowledge of those in January 2021.

149. Q. To take a step back, why did you not reach out to Mr. Scott Streiner to seek his assistance in gathering documents or finding documents?

A. He was not with the Agency anymore and I had no reason to believe that he would have access to any documents after his departure. I was tasked with finding documents in the Agency's possession.

150. Q. In terms of Ms. Jones, after you learned that those two emails were clearly deleted, have you made any attempts to contact her to ask her if she could provide assistance in locating the document or maybe she kept a backup?

A. No because I had no reason to believe that she would have kept a backup of those documents. I did not.

I didn't contact her.

151. Q. So you would not know when she deleted them or why she deleted them, correct?

A. No but there are many reasons why somebody might delete an email such as if they consider the email to be --

152. Q. Ms. Cuber, we are not asking you to --

MR. SHAAR: I'm going to object because you're asking the witness whether she knew what was in the state of someone else's mind who deleted email. I think that is a little beyond what we're here for today, Mr. Lin. *O*

MR. LIN: Mr. Shaar, Ms. Cuber provided an answer and I only objected because Ms. Cuber appears to be speculating.

MR. SHAAR: Your question was speculative so let's just leave it at that and move on, please.

MR. LIN: We disagree that the question was speculative. Anyway, we'll ask our next question.

153. Q. Do you know if anyone else at the CTA contacted Mr. Shreiner or Ms. Jones in regards to gathering documents for the October Order, April Order, or July Order?

A. I do not believe that anybody contacted Ms. Jones or Mr. Streiner with respect to any of the orders.

154. Q. Let me move to your affidavit, paragraph 33.

Do you have that in front of you, Ms. Cuber?

A. Yes, I do.

155. Q. Here you say, "In addition to reviewing documents from these three searches, on October 26th, 2021, I contacted Lesley Robertson, Executive Coordinator of the Office of the Chair and CEO of the Agency. Ms. Robertson worked directly with the Chair, Scott Streiner, in March 2020."

You made that statement in your affidavit?

A. Yes.

156. Q. Can you tell us what Ms. Lesley Robertson's work duties entailed back in March 2020?

A. I don't know exactly what her duties entailed but I know that she had access to Mr. Streiner's scheduler and that she also had access to documents and that in practice she would have saved records into RDIMS and that she would have access to correspondence involving Mr. Streiner.

157. Q. You say access to Mr. Streiner's scheduler. What is a scheduler?

A. I'm sorry. His Outlook calendar. I apologise. She also had access to other members' calendars so that's why I contacted her.

158. Q. At the time that you contacted her on October 26th, 2021, she still had access to Mr. Streiner's Outlook

calendar? Is that correct?

A. No.

159. Q. You just stated that she had access to Mr. Streiner's Outlook calendar.

A. You asked me what her responsibilities were in March 2020 and I am responding to your question which is about what happened in October 2021. That's my understanding of the flow of what was asked.

160. Q. Are you suggesting in October 26, 2021, when you enquired with Ms. Robertson, did she have access to Mr. Scott Streiner's calendar?

A. No.

161. Q. Why not?

A. Because his Outlook account was closed. It was not there anymore.

162. Q. When you reached out to Ms. Lesley Robertson around October 26, 2021, were you asking her to search for anything in particular?

A. Yes, I was.

163. Q. What were they?

A. I asked Ms. Robertson – I explained to her what the October Order was about and I also specifically pointed to interest in meetings that would have occurred the weekend of October 21-22 – sorry. I apologise. It would have been March – I might need a break to get some

water – March 21-22, 2020, which was the weekend meetings that had been referred to and so I was trying to obtain information about those, the general scope of the order, and also in particular meetings that might have occurred on that weekend.

164. Q. What was Ms. Robertson's response in terms your enquiry about the March 21 to 22 weekend meetings?

A. What was her response?

165. Q. Yes. What did she say?

A. She provided documents to me and I reviewed the documents to determine if any of them were responsive to the October Order.

MR. LIN: I know you mentioned that you needed a break so maybe now is a good time to take a short break. Just before we get off record, I just want to remind the witness that you are still under cross-examination and we ask that you not speak to anyone else about your evidence. Would 10 minutes be sufficient?

THE WITNESS: That would be great.

MR. LIN: Let's return at 11:37. Thank you.

(SHORT RECESS)

MR. LIN:

166. Q. Ms. Cuber, document number 6 that I sent out this morning, the CTA's Written Representations on February 1st, 2022, you were counsel on this file at the

time?

A. Yes.

MR. LIN: Can we mark the Written Representations as Exhibit 6, please?

EXHIBIT NO. 6: Written Representations of the Intervener, Canadian Transportation Agency (Pursuant to January 26, 2022, Direction of Justice Gleason), February 1, 2022.

167. Q. Going back to your enquiry with Ms. Robertson on October 26th, 2021, paragraph 33 of your affidavit, you mention there at paragraph 34 that from your exchange with Ms. Robertson she provided five documents, one of them being from Air Transat on March 22nd, 2020. Can you describe to us what other four documents were?

MR. SHAAR: Objection. Relevance. *O*

MR. LIN:

168. Q. Ms. Cuber, is it correct to say you presented Ms. Robertson with the October Order?

A. Yes. I explained to her what the October Order contained so she had an idea. She knew what the October Order was searching for and I also described in addition to that the specific elements that your client was interested in finding.

169. Q. Based on the search parameters that you provided to Ms. Robertson, she returned with five

documents? Is that correct?

A. Yes.

170. Q. Referring to paragraph 35, you say you reviewed each of these documents and determined that one of the documents was responsive to the October Order?

A. Yes.

171. Q. On what basis did you conclude that they were not responsive to the October Order?

A. On the basis of out of the temporal scope of the Order or not being related to the Statement on Vouchers. I will say though just out of transparency that one of the documents was the scheduler for the Members' Meeting on March 24th which I told in submissions to the court I disclosed the existence of but at the time, based on the review and searches that I had done at the time, it appeared to be non-responsive but I disclosed its existence.

172. Q. After the April Order was issued, did you go back and revisit whether any of those four documents would be responsive to the April Order?

A. Yes.

173. Q. And were they responsive to the April Order?

A. No.

174. Q. After the July Order was issued, did you go back to confirm whether those four documents would be

responsive to the July Order?

A. No. There was no need to.

175. Q. Why do you say there was no need to?

A. The scheduler for the March 24th Members' Meeting I believe was disclosed in response to the April Order but no, there was nothing in the July Order that changed or required a revisiting of those documents.

176. Q. Did those four documents mention any meetings with Transport Canada between March 21st --

MR. SHAAR: Objection. Relevance. *O*

MR. LIN: I haven't finished my question, Mr. Shaar.

MR. SHAAR: I know but you're getting into the contents of the four documents that weren't ordered produced by this court.

MR. LIN: Mr. Shaar, the witness --

MR. SHAAR: I'm finishing my objection, Mr. Lin. We've already objected to the production of the contents of your original request for them in the Notice to Attend. The court has ruled on that. These are documents that were deemed not responsive. The scope of this cross-examination is supposed to be the steps that were taken so if you want to ask about the steps, go right ahead, but if you want to get into the content of non-responsive documents then we are embarking on a fishing expedition

and that's not what this cross-examination is for.

MR. LIN: Mr. Shaar, I had not finished my question and the question is clearly within the scope of cross-examination.

177. Q. Ms. Cuber, did any of those four documents mention any meetings with Transport Canada between March 21st and 22nd, 2020? Yes or no?

A. No.

178. Q. And you have reviewed those documents and you are certain of that?

A. Sorry?

179. Q. You have reviewed those four documents and you are certain that there was no reference to meetings between March 21st and 22nd with Transport Canada?

A. I conducted a search for those documents and my search revealed no such documents. I searched for documents that were responsive to the order and I was aware of the interest in the meetings that you are describing and my search revealed no such documents on that weekend.

180. Q. You say no documents on that weekend?

A. Well, you're asking about that weekend so I am responding about that weekend.

181. Q. Let's go back to Ms. Robertson. Is it fair to say she's responsible for coordinating Mr. Streiner's

calendar?

A. It is my understanding but I don't know that she is exclusively in control or in charge of the calendar.

182. Q. But she would have access to it and she would have assisted Mr. Streiner accordingly, correct?

A. That would have been one of her roles, yes. This is why I approached her.

183. Q. Can we go to the Direction to Attend, please, Exhibit 5, paragraph 14? The request that we made was with reference to paragraph 38 of the affidavit, printouts from the Outlook calendars for Mr. Scott Streiner and Ms. Marcia Jones of the scheduled events between March 18th to 25th, 2020, including the weekend of the 21st and 22nd. Did you bring those printouts with you today?

MR. SHAAR: We weren't required to bring them, pursuant to the court's order.

MR. LIN:

184. Q. Ms. Cuber, have you made any enquiry with Ms. Robertson on what events occurred on March 21st and 22nd, 2020, on Mr. Streiner's calendar?

A. When I approached Ms. Robertson, I was looking for responsive documents and specifically those types of responsive documents.

185. Q. Did you ask Ms. Robertson if she has any

specific recollection on meetings that occurred that March 21st to March 22nd weekend?

A. Did I ask her if she had any recollection?

186. Q. If she had any recollection whether Mr. Streiner had meetings that weekend?

A. I asked her for documents and she returned documents. That's what I asked her. I presented her with the Order. She was aware that I was looking for documents and she provided the documents that she had.

187. Q. My question is did you ask her if she has any recollection of whether Mr. Streiner had meetings during that March 21st to 22nd, 2020, weekend. That's my question.

A. I didn't ask if she had any recollection.

188. Q. Did you ask her if she has any other records or maybe a physical printout of meetings that occurred that weekend?

A. In none of my searches was I specific as to the format that I was looking for. I was searching for documents and I wasn't restrictive in any way about the format of documents. I was never restrictive about other formats or other – I was looking for responsive documents and I obtained the documents from Ms. Robertson that she gave me that I then reviewed.

In addition to that, I made requests for IT to search across all Agency accounts in order to find

responsive documents. I'm sure we'll get to that but I was searching for responsive documents from the people who might have them and also in the broadest possible number of places.

189. Q. Is it fair to say you didn't specifically ask Ms. Robertson whether she has any records on March 21st or March 22nd, 2020?

A. I absolutely asked that.

190. Q. Let's go back to your affidavit, paragraphs 32 to 36. At paragraph 36 you say there is a letter from Air Transat dated March 22nd, 2020. Do you see that?

A. Yes, I do.

191. Q. I will also refer you to the seventh document that I sent out this morning. Is this a letter that was referred to in paragraph 36 of your affidavit?

A. This looks like the letter.

MR. LIN: Can we have this marked as Exhibit 7, please?

EXHIBIT NO. 7: Letter from Jean-Marc Eustache of Air Transat to Scott Streiner, March 22, 2020.

192. Q. Going back to your affidavit at paragraph 33, you say, "In addition to reviewing documents from these three searches." What are "these three searches" you are referring to?

A. I am referring to the – sorry. I'm just going

back into my affidavit. I was referring to the two Access to Information requests that were made in 2020 that concerned the Statement on Vouchers as well as the Standing Committee on Transport documents that were in our corporate repository.

193. Q. The two Access to Information searches are paragraphs 17 and 21 of your affidavit and the Standing Committee on Transportation search was at 29 of your affidavit?

A. Yes but the text is at paragraph 18 for the first Access to Information request. The paragraph 23 is the second one but yes, I am referring to it at 21 and then 29 and 30 is the text of the Standing Committee motion.

194. Q. Thank you. I will refer to paragraph 37 and 38 of your affidavit, please. Is Mr. Guindon the manager of IT Services?

A. Yes. This is my understanding of his title.

195. Q. What is the difference between IT and Information Management? Can you describe, please?

A. For the purposes of searching, Information Technology searches in Outlook accounts and I believe that Information Management searches in RDIMS for the purposes of conducting searches but I'm not sure if your question is broader than that.

196. Q. No. Thank you. Was Mr. Guindon the person responsible for conducting the search of Outlook accounts of Agency staff members?

A. Yes. I was put in touch with him in order to conduct a search of that nature so yes.

197. Q. Can we look at document number 8, please? Please let me know when you have it in front of you.

A. I have it.

198. Q. At the top we see your name there and then there is a date, November 26th, 2021?

A. Yes.

199. Q. Our understanding is this corresponds to item number 9 of the Direction to Attend that was provided to us. Do you recognise this document?

A. I recognise the document. I believe it does relate to item 9.

MR. LIN: Can we have this marked as Exhibit 8, please?

EXHIBIT NO. 8: Outlook Search Report for November 26, 2021 search.

200. Q. While we're on this document, you see near the middle of the page there's Items and then there's "799, Estimated number of items was 799"?

A. Yes.

201. Q. Is that the same 799 that's mentioned at

paragraph 39 of your affidavit?

A. Yes.

202. Q. I understand this Exhibit 8 is an Outlook search report. Is that correct?

A. Yes.

203. Q. Was this the only Outlook search report that you had been working with for your document search?

A. This was the only search that I conducted and this is the only search document that I am aware of for – I don't know what "working with" means.

204. Q. Was this the only Outlook search report that you relied on for your document gathering?

A. Yes.

205. Q. Thank you. Looking at this report, there's a start time and there's an end time, November 26, 2021, 4:11 pm, and then end time is the same date at 4:14 pm. Do you see that?

A. Yes.

206. Q. Based this start and end time, would you believe that an Outlook search is rather simple to do?

A. I guess.

207. Q. Can I refer you to document number 9 that we sent out this morning? The title in English is IM-IT ATIP Records Retrieval Form?

A. Yes.

208. Q. Do you recognise this document?

A. Yes.

209. Q. Did you complete this document?

A. Yes, I did.

MR. LIN: Can we have this marked as Exhibit 9, please?

EXHIBIT NO. 9: IM-IT ATIP Records Retrieval Form for March 25, 2020 search.

210. Q. Now I will be asking you questions about Exhibits 8 and 9 so if you have those handy, that would be great. Just about this Exhibit 9, on what date did you complete this form? Do you recall?

A. Hold on now. I sent it. It was a Friday at the end of the day so I think it was November 19th. I sent sort of a draft to IT for them to review because I had never filled out a form like that before. I followed up with them on November 22nd and then made some changes to the form as a result of their comments. I would say I completed it on November 22nd, 2021.

211. Q. The version that we have before us, is it the version with IT's comments or the first version that you completed?

A. No. This was the version with IT's comments or as a result of IT's feedback.

212. Q. What was changed after IT provided their

feedback? Do you recall?

A. I added search terms in French.

213. Q. And that was the only change that was made from before?

A. As far as I can recall.

214. Q. Just to go back to the form itself, there is French terms highlighted in yellow. Those are additions from IT? Is that correct?

A. I put the proposed additions in and highlighted them in yellow so that they could be easy to see.

215. Q. Thank you. On this form at the very bottom, there is two what I understand are signature lines. Is that correct?

A. Yes.

216. Q. Why is there no signature at the bottom from IT or IM?

A. I don't know why there is no signature at the bottom. What I can say is that in a search of this sort for a litigation file is not the usual – like we don't have a form for searching for things in litigation so I used the ATIP form that they ordinarily use so it wasn't signed. It just was IT needed a form.

217. Q. On the form on the second row is "MS Outlook distribution list that represent the OPI group, Members of

this group will be included in the MS Outlook (MS Exchange) search." What does OPI stand for? Do you know?

A. In Access to Information terms, I believe OPI stands for Office of Primary Interest which means the branch or division or section of the Agency that would be most likely to have response documents.

218. Q. In this row, you specify Agency-wide? Is that correct?

A. Yes.

219. Q. Who would this include?

A. All staff and members.

220. Q. Does that include former staff or members?

A. No.

221. Q. Going to the search terms in green on the form, other than the one highlighted in yellow, who drafted those search parameters?

A. I wrote them down so I guess I drafted the search parameters but I had an exchange with Information Technology and I believe I had – no, I might not have had verbal discussions. I had exchanges with them in order to try to target what I was looking for.

222. Q. Is it fair to say they assisted you in coming up with these search terms?

A. I asked for their assistance because I didn't know how the searches worked and I wanted to have – I had

no idea how the search would work and so I needed assistance just in understanding technically how it worked and also I was expressing to them the sort of results that I was looking for and I didn't know how to formulate how to achieve those or how to express the results and they basically needed a form to work with that would kind of capture what was being sought and so to that extent, they assisted.

223. Q. I'm looking back at search results, Exhibit 8. The Query line is Refund or Voucher and in French the same terms and COVID or Corona or Pandemic. That is reflected in the first and second line of the parameters that you provided. Do you see that?

A. Yes.

224. Q. How about the third, fourth, and fifth line? Were separate searches run for those?

A. No, they were not run for those because as I understood it, IT couldn't – well, no, they were not run for those. They looked for the search terms and then if anything came up, it would come up using the search term.

225. Q. So there was no specific search run for let's say correspondence with Transport Canada during the weekend of March 21st or 22nd, 2020?

A. Not in this search. It would have captured anything that contained the search terms.

226. Q. But if it didn't contain the search terms as drafted then it wouldn't be captured from this Outlook search?

A. Exactly.

227. Q. Is it correct to say that this search form only searched Outlook as it existed and it won't search the Outlook backup tapes?

A. Exactly. That is correct.

228. Q. Let's go back to Exhibit 8 and in particular the results row. I see in my version it's redacted. Can you describe to us what has been redacted?

A. Yes, I can describe to you what's been redacted. What's been redacted is an alphanumerical line, the entirety of which taken together contains sensitive IT information that could be used for hacking.

229. Q. Would it be fair to say that this deals with search results?

A. I spoke with Information Technology about this on two occasions and I raised that very concern with them. I spoke to them on September 9th about what it was that was sensitive in those lines, so I obtained an explanation of that but when I returned to them to confirm that on September 13th, I raised the question of the unfortunate term results and they agreed that a better term for that would be path but this is a search term or that the

parameters on the left-hand side of that report are determined by Microsoft and not by them.

230. Q. You say you received an explanation from IT about it being sensitive. What was their explanation? Can you tell us?

A. Yes. I can tell you that the first part of the line contains a path that would give information about the Agency's infrastructure and the second part of the line contains a link to the mailboxes or mailbox in which search results like this are kept and those mailboxes have restricted access so that not everybody can look at them. The first part of the line is a pathway towards infrastructure that is apparently custom made by the Agency and the second part of the line contains a pathway towards a mailbox.

231. Q. Whose mailbox or mailboxes would that be in this case?

A. As I understand it, it's the search mailbox so when IT does searches like this in Outlook accounts, the search results go into this mailbox and then only certain people are permitted to look at the results. I was given access to the search results in this mailbox and so the line contains information about that, about where in the infrastructure and where the mailbox is.

232. Q. The path would only be accessible from within

the CTA? Is that correct?

A. I have no idea. I can't answer that. They told me that it would present a hacking risk so I assumed that it should not be made public. I don't presume that it should not be made public. I discussed with them whether there was something sensitive from a public perspective and that's what they told me so I have to assume it has sensitive information that presented a hacking risk to the public.

233. Q. Let's move further down the first page of the form. There's a start date and there's an end date there. Do you see that?

A. Yes.

234. Q. The start date is March 9th, 2020, and the end date is March 25th, 2020?

A. Yes.

235. Q. Those correspond to the date range that you provided on the form? Do you see that on the form on the left side?

A. Yes.

236. Q. Going back to the search results, the start date March 9th, 2020, at 4:00, -4, end date March 25th, 4:00:59 am, -4, -4 time zone, that would be the Eastern Time Zone? Do you agree?

A. I guess so. I defer to you.

237. Q. We understand from the records that have been disclosed that the Statement on Vouchers was published or released sometime in the afternoon on March 25th, 2020. Would you agree?

A. Yes. I don't know the exact time but it was in the afternoon.

238. Q. Perhaps to put this in context, document number 10, we have an email from Mr. Streiner on March 25th, 2020, at 1:35 pm, with final edits on the Statement on Vouchers. Do you see that?

A. Where are you looking?

239. Q. Document number 10.

A. Yes.

240. Q. On the second page there is a line that appears to be a tracked change that was added "24 months would be considered reasonable in most cases." This was sent out at 1:35 pm on March 25th, 2020?

A. Yes.

MR. LIN: Could we have this marked as Exhibit 10, please?

EXHIBIT NO. 10: Email from Scott Streiner to Marcia Jones, March 25, 2020, 1:35 pm, Statement on Vouchers.

241. Q. Let's go back to the search results. Ms. Cuber, just on the topic of Exhibit 10, you recall seeing

this document previously, this email?

A. I believe this document was released as part of the December 14th disclosure so I must have seen it. It's out of context but I believe I would have.

242. Q. Fair enough. Let's go back to Exhibit 8, the search results. Based on the end date here, March 25th, 2020, 4:00 am Eastern Time Zone, this Outlook search would not have captured any activity after 4:01 am on March 25th? Would you agree?

A. That's probably true.

243. Q. Why was the end time set at 4:00 am on March 25, 2020?

A. I don't know. I didn't ask for that but I didn't – I don't know.

244. Q. When did you first learn that it was set at 4:00 am?

A. Moments ago.

245. Q. I assume there was no request to IT to ensure that the search captured the full day of March 25th, 2020? Is that correct?

A. No. I assumed that – I didn't know that they would pick time so I just put the date range. If I can – anyway, you might get to it in your questions.

I would note that that document was found as a result of previous electronic searches that span all the

way into April at the very least, so April 8th or 9th, so as a result of other searches that were done, that document was found.

246. Q. To be clear, those other searches you are referring to, you are referring to the ATIP searches?

A. Yes.

247. Q. And those had different search terms? Do you agree?

A. Yes.

248. Q. In terms of search terms that you drafted, Refund or Voucher, same terms in French, and COVID or Corona or Pandemic, that search did not capture the whole time period that the court had required?

A. I guess that's true.

249. Q. Let's go back to the search query. I'm looking at the search query on Exhibit 8. The query says Refund of Voucher, the same in French, and COVID or Corona or Pandemic. Do you know if this search was limited only to the subject field of Outlook items or the body of emails or did it also include the content of attachments?

A. It included the subject, the body, and the content of attachments.

250. Q. Thank you. You might need to zoom in a little bit to see this but let's look at the query. There is no space between the Refund and the Or. Have you enquired

with IT whether this would affect search results in any way? It's presumably a different word.

A. Yes, I have enquired with IT about whether that would have affected the search results and indeed it would have. It would have looked for the word Refund*Or.

251. Q. When did you make that enquiry?

A. I was enquiring about this last week when I noticed it.

252. Q. After you learned about it and enquired, did you run a further search with the proper spacing?

A. No. I didn't think it was necessary because there were over 3,000 emails that had been collected and reviewed in the context of complying with the court's order. There was a 5,099-page working copy of documents concerning or containing the word Voucher or Statement that had been collected in different ways in the context of ATIP searches. There were additional searches done in April in response to the April Order and I had made enquiries with various people in the Agency and so no additional search was done.

253. Q. You said there was an additional search in April. Who conducted that search?

A. Amanda Hamelin conducted the search.

254. Q. Do you know if she ran a similar Outlook search like the one we see here?

A. No. She ran a different type of search.

255. Q. What was the different type of search? Can you describe it?

A. Yes, I can. She contacted the invitees to Executive Committee Meetings and Members' Committee Meetings and she asked a series of questions aimed at obtaining responses and documents.

256. Q. Did she get responses from every one of those invitees?

A. Everyone who works at the Agency, yes. She ensured that each person who was contacted provided their response, yes.

257. Q. Did those people provide documents in response?

A. Yes, if they had documents but if they didn't have documents, they said, "I have no documents."

258. Q. And those documents were reviewed?

A. Yes.

259. Q. Who reviewed them?

A. Counsel reviewed them.

260. Q. Would that be you?

A. No.

261. Q. I assume that would be Mr. Sharpe?

A. I think it would have been Mr. Matte. Actually, I don't know. I wasn't – I think it would have

been Mr. Matte.

262. Q. Taking a step back on this Outlook search that you've conducted, do you know if this Outlook search would have captured calendar items or is it just emails?

A. Yes. I specifically ensured that it would have captured calendar items.

263. Q. Thank you. Let's go to document number 11, please. We had some brief discussions about it earlier today. It's an email to Colin Stacey, March 18th, 2020, at 5:28 pm. Do you see that?

A. Yes.

264. Q. Do you recall this email being disclosed as part of the disclosure from the Agency?

A. Yes. I believe it was disclosed – it was part of the December 14th disclosure but I can't remember if this was disclosed a little bit later than that because of possible privilege claims but yes, I recognise this. It was in response to the October Order.

MR. LIN: Can we have this marked as Exhibit 11, please?

EXHIBIT NO. 11: Email from Marcia Jones to Colin Stacey, March 18, 2020, 5:28 pm.

265. Q. Just scrolling down, we see an email from Mr. Stacey March 18th, 2020, at 2:57 pm. Do you see that?

A. Yes, I do.

266. Q. This is the email that's described at paragraph 12(a) of the Direction to Attend? The Direction to Attend is Exhibit 5.

A. Yes.

267. Q. You agree that's the email that is described at 12(a)?

A. The 2:57 pm email, it is my understanding that that is what you are referring to at 12(a).

268. Q. The email that Mr. Stacey sent out at 2:57 pm?

A. Yes.

269. Q. We had this discussion earlier that this original email from Mr. Stacey was clearly deleted. Do you recall that?

A. Yes.

270. Q. Let's go back to the search terms in Exhibit 8, the search query. Would you agree with me that this query would not have captured, would not have found the original email because Mr. Stacey's email does not contain the word COVID or Corona or Pandemic?

A. I think you're right. It would not have captured that email with those search terms. What I did to make sure that I wasn't wrong in saying that the email was deleted was that I looked through the documents that we had collected and I looked myself and spoke with staff to ensure that looking for the actual names Colin Stacey

and Marcia Jones in RDIMS would reveal whether there was the original email in RDIMS and I also searched by using "From MinO" because you see the title is kind of an usual title that wouldn't be expected to get very many hits if searched in RDIMS and the only search I had was the document that was disclosed.

271. Q. You mentioned that you search "From MinO." Why did you conduct that search?

A. If you look at the title, it says "Forward: From MinO," the subject line. I searched for any document that would contain that and I got search results but it was just this.

272. Q. You're saying you did a search but are you saying you searched within the body of documents you already had or are you conducting a new search in RDIMS or --

A. In the corporate repository of RDIMS.

273. Q. But you did not conduct a new Outlook search based on "From MinO," correct?

A. No, I did not.

274. Q. And you also did not conduct a search for Colin Stacey or just Stacey during that time period, March 9th to 25th, 2020, correct?

A. No because Marcia Jones's account would not have been searchable so the places to look would have been

in the existing documents that she referred me to when she was still employed at the Agency which were the ATIP documents and then the RDIMS repository in case there was anything that was placed in there.

275. Q. If we look back at Exhibit 11, yes, the original email Ms. Jones was the only recipient but thereafter Ms. Jones seems to have copied a number of individuals. Some of them appear to be employees of the Agency, correct?

A. Yes.

276. Q. Can you tell us for certain that Mr. Stacey did not respond to this March 18th, 2020, email?

A. What would have come up in a search – actually, it's very unfortunate that the "Refund or" wasn't captured because of the typo but what ended up being captured was the word Credit in English because you will see in French the word Crédit means voucher and the system can't actually account for any accents so it looks for the word Credit and so I assume it would have captured the word Creditors which is in Mr. Stacey's email and it didn't capture that because there is the word COVID in the top here, COVID-19, and there's the word Creditors down here. Presumably it would have captured anything else that was in anybody's Outlook account at that time.

277. Q. But the word Refund was not searched, correct?

A. No. That's true at that time but there were other searches done and in different ways, both by asking individuals for responsive document and by searching for other search terms.

278. Q. But this specific query that you asked to be searched would only have the word Voucher and Rembourse or Crédit in French and COVID, Corona, or Pandemic, correct?

A. This search contained those search terms.

279. Q. And there were no specific searches for emails to and from Mr. Stacey during the March 9th to 25th, 2020, time period?

A. There was a specific search done in the corporate repository.

280. Q. But there was no specific search done for Outlook?

A. No.

281. Q. Have you taken steps to enquire of Mr. Stacey about retrieving that original email that Mr. Stacey sent at 2:57 pm on March 18th, 2020?

A. No, I have not.

282. Q. Why not?

A. Because that email was found in the collection of documents that Transport Canada had provided as part of the Standing Committee disclosure and so presumably if he had the original, he would have produced it as part of

that disclosure package since they produced this document.

283. Q. But you have not made a specific enquiry with Mr. Stacey or with Transport Canada about the original of this email, correct?

A. No because my interpretation of my role was that under Rules 317 and 318 of the Federal Court Rules was that I was to produce documents in the Agency's possession and so I wouldn't possess Mr. Stacey's documents.

284. Q. I understand the answer is that you did not make a specific enquiry.

A. No.

285. Q. Thank you.

A. Of Mr. Stacey, I did not.

286. Q. How about anyone else at Transport Canada? Did you make a specific enquiry?

A. I made no enquiries with anyone at Transport Canada.

287. Q. You assumed that Transport Canada didn't have the original email just because they did not produce it in their disclosure bundle? Is that correct?

A. I can say that they didn't produce it. I didn't contact them because that wasn't my job but I noted that that email wasn't part of their bundle and it also wasn't part of any of the search results that I had or any

of the searches that were conducted.

288. Q. So based on that, you presumed that the original did no longer exist?

A. I guess I shouldn't have presumed that. That might have been wrong of me to have. I think I might have said that. I think I said I knew that it would have been disclosed if they had it but I have no knowledge of what Transport Canada does so maybe I was talking out of school.

289. Q. Let's go back to Exhibit 11. At the top it says, "Hi Colin. I am sending this unencrypted as our remote network access is patchy and we are not able to open encrypted emails on our Samsungs at the Agency."

Do you see that?

A. Yes.

290. Q. Did you look into why Ms. Jones was referring to encryption there?

A. No.

291. Q. Did you enquire with IT why there is reference to encryption?

A. No.

292. Q. Is it the CTA's policy to send emails encrypted?

A. I am aware of no policy by which the Agency sends encrypted email.

293. Q. Right here we see Ms. Jones saying, "I am sending this unencrypted as our remote network access is patchy." It seems to suggest that Ms. Jones would have sent encrypted emails on her own previously. Do you agree?

A. I can't make that assumption. I don't know why she said that. I can't speak to why she said that.

294. Q. Did you enquire with IT what the policy is in terms of encrypting emails?

A. No.

295. Q. Did any of the search results that were returned, the 799 search results, did they reveal any encrypted emails?

A. I'm not aware of the distinction between encrypted and unencrypted emails. I read the document and I don't know if I would be able to tell the difference between an encrypted and unencrypted email based on the search results that I received. I didn't have to unencrypt any emails in the search results that I obtained.

296. Q. Just to be clear, you did not enquire with IT about encrypted emails? Is that correct?

A. I didn't enquire with IT about this email and its encryption. I just got email results and I looked at the email results and I am not aware of whether there are

encrypted or unencrypted emails from among the search results. Like I don't know how I would tell the – I don't know how to tell the difference from within the search results that I obtained.

297. Q. You said from the search results you obtained you didn't have to unencrypt anything. Is it fair to say that the search results you received were all unencrypted emails?

A. I don't know because I received things that were in PDF format and I received – I didn't receive just emails. I received packages of documents and there were collections in RDIMS and so I don't know if I would tell if one of those were encrypted or not. I reviewed all emails and I have no knowledge that any document was an encrypted document or not.

298. Q. Just to be clear, I'm referring to the Outlook search that you requested that is at Exhibit 8. In your review of that search, there was no requirement for you to unlock or unencrypt any of the Outlook items, correct?

A. Correct. I don't recall having to unlock any encrypted items.

299. Q. No enquiries were ever made with IT about searching encrypted emails? Is that correct?

A. I didn't have to make an enquiry with IT about searching encrypted emails because I didn't come across

any encrypted email.

300. Q. From what we see here in Ms. Jones's response, it is suggesting that Mr. Stacey's original email was encrypted. Do you agree?

A. That could be the case.

MR. SHAAR: You seem to be getting into the content of documents and not the search that was performed by the affiant. If you want to phrase your question as a search that was being performed then I think she has answered you anyway but now we're getting into the contents of documents which I think exceeds the scope of this cross-examination.

MR. LIN: Mr. Shaar, respectfully, we're asking about encrypted versus non-encrypted emails and that is well within the scope of --

MR. SHAAR: Then you can ask her about those but if you want to talk about what the content of this email says – again, feel free to ask about encrypted emails. I think she has answered you the best she can but you're going into a specific email and you're asking her to confirm or not confirm what's written in this email. I think getting into the content of the documents here is outside the scope of what she did to answer the court's orders.

MR. LIN:

301. Q. Ms. Cuber, is it correct to say that you did not ask IT to do a specific search for encrypted emails?

A. I did not ask them to do a specific search for encrypted emails.

302. Q. Do you know if IT has any policy in terms of encrypted emails?

A. No.

303. Q. Were you informed of any policies in regards to encrypted emails?

A. No.

MR. LIN: I see that we're heading into lunchtime so maybe this is a good time to break for lunch. Would 45 minutes be sufficient?

MR. SHAAR: That's fine with me.

MR. LIN: Is everyone else okay with 45 minutes?

THE WITNESS: Yes.

MR. LIN: How about we return 45 minutes from now, 1:15 Toronto time? Just before we break for lunch, Ms. Cuber, same thing as before. We ask that you not speak with anyone about the evidence. Thank you.

(LUNCH RECESS)

MR. LIN:

304. Q. Ms. Cuber, can we go back to Exhibit 8, please, the search results? From our discussion before lunch, we know that there were some concerns with these

search results, namely the query Refund*Or, an issue with the spacing, and also the end date not capturing the full extent of the time, namely March 25th, the day when the Statement on Vouchers was issued. Also in looking at Mr. Colin Stacey's March 18th email, we noticed that his original email did not have the key words COVID, Corona, or Pandemic. Do you recall that?

A. Yes. I'm looking for that email.

305. Q. His email is Exhibit 11 at the bottom. We see those three concerns, one being the spacing between Refund*Or and the additional parameters COVID, Corona and Pandemic, and the end date not capturing the full time period, those three concerns. We are requesting an undertaking to do an Outlook search with these three issue rectified, namely the spacing between Refund*Or with proper spacing, without the additional parameters COVID, Corona, Pandemic, and also the end date being March 25th, 11:59 pm in that triple time zone. Mr. Shaar, I assume you have that noted?

MR. SHAAR: Can you repeat it? I'm taking it down.

MR. LIN: A new Outlook search similar to Exhibit 8 but without the three issues that I identified, one being the spacing between Refund*Or, and without the parameters COVID or Corona or Pandemic, and also with the

correct time period up until the end of day March 25th, 2020. We request that you do a search with the revised parameters and produce to us any documents from the search that have not already been produced.

MR. SHAAR: We'll take it under advisement. I have concerns that if the search terms are limited to Voucher or Refund, that that is going to include an incredible amount of documents at the Agency given the nature of our business. I would also point out looking at the email that the word Voucher is included so the email from Mr. Stacey would have been captured by the search in its current terms. We will take it under advisement but I raise those concerns with you now. *A*

MR. LIN: Mr. Shaar, just to be clear, Mr. Stacey's email did not have the terms COVID, Corona, or Pandemic so Mr. Stacey's original email or emails similar to Mr. Stacey's would not have been captured in this search.

MR. SHAAR: It was nonetheless produced.

MR. LIN: Well, we can't say what other emails would there be without actually doing the search and that is our request. If there is any concern about there being an excessive amount, we see that the time required to do the initial search does not seem to be significant. It takes three minutes, according to the search. That is our

request on the record. We request an undertaking for that.

MR. SHAAR: I'll take it under advisement and we'll look into your request.

MR. LIN: We are certainly open to revising the undertaking if it produces too many results.

306. Q. Ms. Cuber, can we go to document number 12, please? This is an email from Mr. George Petsikas, March 25th, 2020, at 3:18 pm, to Ms. Jones. Do you recall this email?

A. I believe that it was produced in December 2021.

MR. LIN: Can we have this marked as Exhibit 12, please?

EXHIBIT NO. 12: Email from George Petsikas to Marcia Jones, March 25, 2020, 3:18 pm.

307. Q. When we scroll to the bottom below Mr. George Petsikas's response, we see an email from Ms. Jones at 2:34 pm that is sent from Ms. Jones to herself, copied to Ms. Caitlin Hurcomb and Mr. Allan Burnside. Do you see that?

A. Yes.

308. Q. This is the email that is referred to in paragraph 12(b) of the Direction to Attend? Is that correct?

A. Yes.

309. Q. We see here that Mr. George Petsikas was not in the To recipients list or the CC recipients list. Do you agree?

A. Yes.

310. Q. Also look at document 13, please. This is an email from Jason Kerr at CAA on March 25th at 4:11 pm. Do you recall seeing this email previously?

A. I believe this was also produced in December 2021.

311. Q. When we scroll down, we also see an email, this time from Air Consultations?

A. Yes.

312. Q. It is sent March 25th, 2020, at 4:01 pm?

A. Yes.

313. Q. We also see that Mr. Kerr was not on the To list or the CC list. Do you agree?

A. Yes, I agree.

314. Q. Do you agree that this email would be captured by paragraph 12(b) of the Direction to Attend?

A. The email --

315. Q. Exhibit 13.

A. Yes. Well, hold on. It is certainly an update. I had never noticed that it was sent by Air Consultations.

MR. LIN: That's my next question. Before we do that, can we mark Exhibit 13, please?

EXHIBIT NO. 13: Email from Jason Kerr to Marcia Jones, March 25, 2020, 4:11 pm.

316. Q. We see between Exhibit 12 and 13 that the time was a little different. The first one, Exhibit 12, was sent at 2:34 pm from Ms. Jones's account directly and then Exhibit 13 was sent from Air Consultations about an hour and a half later. Do you see that?

A. That would appear to be so, yes.

317. Q. Was it your understanding previously that it was only an email sent from Ms. Jones? I see that you were a bit surprised when we looked at the Air Consultations reference.

A. Yes. I had never noticed that. In any event, the reason I produced these documents was because they were responsive to the court's order but I didn't – they would have been responsive to the court's order no matter what so they were produced.

318. Q. Just taking a step back, Exhibit 13, Air Consultations, what is that precisely? Do you know?

A. No, I don't know.

319. Q. Who controls that mailbox? Do you know?

A. No, I don't know.

320. Q. Do you know which department would have

controlled that mailbox?

A. No, I don't know.

321. Q. We know that Ms. Marcia Jones left the CTA but do you know if this Air Consultations mailbox is still active?

A. No.

322. Q. You don't know --

A. I don't know but this email should have come in an electronic search that was done in November 2020 because it contains search terms that were used for an electronic search of mailboxes at that time. I mean I presume that it would have been captured but I don't know that mailbox. I just looked for documents and produced the ones that were responsive.

323. Q. We will request an undertaking that you search this mailbox for the original email that we sent March 25th, 2020, at 4:01 pm, that would contain the BCC list of recipients. Mr. Shaar, I assume you noted that request?

MR. SHAAR: Yes. We'll take it under advisement. *A*

MR. LIN: A further request is we see that there is two emails, one documented in Exhibit 12 and one documented in Exhibit 13. I would ask that you also confirm how many such emails with this subject line, "Update: CTA measures" --

MR. SHAAR: Can you slow down a bit, please, Mr.

Lin?

MR. LIN: Sure. We see from Exhibit 12 and 13 that there is at least two emails sent out under this subject line.

MR. SHAAR: Let's start with Exhibit 12. What is it you want from Exhibit 12? *A*

MR. LIN: It's not specific to Exhibit 12. Can you let me finish, please?

MR. SHAAR: Yes.

MR. LIN: From the two exhibits we see, there's two emails sent out during the course of March 25th, 2020, with this subject line. Our request is for you to confirm how many such emails were sent out and whether these two were the only two emails that were sent out. In other words, did Ms. Jones send out another email on that day at a different time with this subject line or did Air Consultations send out the same email with the same subject line on that day, and to produce to us the original copy of those emails.

324. Q. Ms. Cuber, based on your reaction earlier, is it correct to say that you haven't specifically searched in the Air Consultations mailbox?

A. I haven't specifically searched in the Air Consultations mailbox. What was searched was the words Statement On Vouchers and Statement and Vouchers

throughout the corporate repository and in Agency mailboxes, and individuals at the Agency were asked to provide their responsive documents. That's what was done. I have not specifically looked in that mailbox and I don't know what it – I don't have details about it.

325. Q. Do you know if it's still active and operational?

A. I don't know anything about that mailbox.

326. Q. But you knew that mailbox existed? Is that correct?

A. No, I didn't know that mailbox – like I don't know anything about that mailbox. I didn't notice the fact that it was from that mailbox until now, and in fact, your Direction to Attend refers to the original and your deficiencies have consistently referred to Marcia Jones's original email out and so that's what I was looking for in order to address your concerns about deficiencies.

327. Q. Respectfully, at the bottom of Exhibit 13 we see Ms. Jones's signature at the bottom so it is obviously an email that she sent. Would you agree? At the very bottom it has her contact details and her signature.

A. Yes but your deficiency says email, single, sent by Marcia Jones on March 25th, 2020, with the subject line, "Update: CTA measures/Mise à jour: mesures prises par l'OTC," so that's what the focus of attention was.

328. Q. You're stating that there was no specific search conducted in relation to this Exhibit 13 email that was from Air Consultations, correct?

A. I know that there were searches done for words that would have captured those terms and that people were asked to provide responsive emails in the context of ATIP searches. I can't say that there was no search done and whatever searches were done did reveal this, the response back, so I can't say one way or another. I mean nothing was specifically targeted to that but I think that the searches were sufficiently broad that if there were something, they would have included that email.

329. Q. We've made our request and we will wait to hear back from Mr. Shaar.

A. Can I just check one thing? My apologies. I just want to check one thing just so that I get a clear – may I just have a moment with this exhibit?

330. Q. Sure. Which exhibit are you talking about, 12 or 13?

A. I'm looking at Exhibit 13 but even in the Air Consultations – no. I see what you're saying because it was on March 25th. Okay.

331. Q. Let's go to document number 14. Sorry. Let's take a step back to Exhibits 12 and 13. Can you tell us, Exhibit 12, which search this email came from?

A. I don't remember and there were a lot of redundancies in the searches so I can't specifically recall. There were a lot of repeat hits throughout the searches. It may have been more than one.

332. Q. How about Exhibit 13? Do you recall which search results this came from?

A. Exhibit 13? I mean it must have been – if I go by your logic, it probably wasn't the search that I asked IT to conduct because that email would have come in after, as you pointed out, after the timeframe of the search since it ended at midnight so it probably wasn't that search. I would imagine that it was the search that was done previously in November 2020 using the words Statement On Vouchers and Statement and Vouchers since those terms are – it contained the word Statement and it contained the word Vouchers so it must have been in a previous search. It probably wasn't in the search that I asked to be conducted in November 2021. It would have been in ATIP searches.

333. Q. Did the search results indicate who saved these emails?

A. No. I don't even know how to --

334. Q. Actually, let me reframe. For Exhibit 12 and 13, we would ask that you confirm for us whether these were saved on RDIMS and also who saved them on RDIMS.

A. I'm sorry, no. They wouldn't have been saved in RDIMS. Well, they could have been saved in RDIMS. Sorry. What I can say is that I searched Marcia's personal Sent box hits in Outlook searches so they were not in RDIMS. They were contained in Outlook searches and I was careful to ensure that by looking at the Sent hits from the search that I was looking through, that if there was no hit, it is because that document had been deleted from the Sent box for Marcia so I was quite confident that – because it would have been captured if it were in her Sent box. It would have been captured because it would have taken a snapshot.

In November 2020, her email out was certainly deleted and then it was not found in RDIMS either but I don't know about the other In box but I didn't see a message out at any other time. That's all I can say for now.

335. Q. Just following up on what you said, you said you searched Ms. Jones's Out box. When did that occur?

A. In November 2020, there was a search done in Outlook accounts and it takes a snapshot and it will save responsive documents according to where they are in a person's Outlook account. It would say "Marcia Jones" and then it would say "Calendar" and then you could open the calendar and you could see the hits for that day or it

would say "In box" and then you would get all the hits containing just those search terms.

It's not a snapshot of her entire In box but it is a snapshot of what was sent out that contains those search terms, what was in the In box that contains those search terms, what was in the calendar that contains those search terms in November 2020. A similar exercise had been performed in May 2020.

336. Q. Are you saying that were similar search results pages like the one in Exhibit 8 in May 2020 and also November 2020?

A. There were similar – yes. There were similar results of the type I've just described for – I want to be careful because it related to a May 2020 Access to Information request but I don't know that the search was actually conducted in May 2020. When I say May 2020, I'm just saying in relation to the May 2020 Access to Information request. A snapshot of responsive hits was taken in May and a snapshot of responsive hits was taken in November for search terms that had been used for those ATIP requests.

337. Q. A search result like the one in Exhibit 8 would have been produced for each of those two searches? Is that correct?

A. No, I didn't see – I don't think the first

search would have – I don't remember seeing it in the first collection of searches. I can't remember actually. I don't know.

338. Q. We'll make a request that you verify whether there were similar search results documents like the one in Exhibit 8 for the two searches that you just mentioned, May 2020 and November 2020. If those exist, we ask that you produce them to us. Mr. Shaar, I assume you have it noted?

MR. SHAAR: We'll take it under advisement and get back to you. *A*

MR. LIN:

339. Q. Let's go to document 14, please. Ms. Cuber, do you recognise this document?

A. Yes.

340. Q. Do you agree that this corresponds to item 13 in the Direction to Attend?

A. Yes.

MR. LIN: Can we mark this as Exhibit 14, please?

EXHIBIT NO. 14: IM-IT ATIP Records Retrieval Form for November 13, 2020 search.

341. Q. With reference to your affidavit, is this the search that is referred to in paragraph 13 of your affidavit?

A. It's only one search. There were many

searches done in RDIMS but this is the only document that would show what was actually searched. When an individual looks in RDIMS for responsive documents such as in this case if counsel asked someone to look for responsive documents and they perform a search in RDIMS to retrieve responsive documents, that's not documented on any piece of paper so there is largely no way to produce documentation about RDIMS searches but this was an exception and so I considered it to be responsive to the item in the Direction to Attend. To answer your question, it doesn't represent all the searches that were done in RDIMS by any means.

342. Q. Going by this document – my question was very simple – this search form is the search that you refer to in paragraph 13 of your affidavit? Is that correct?

A. No because it's only one search. I said RDIMS was searched for responsive documents and this relates to that but it doesn't complete that sentence. Like this doesn't represent the entirety of RDIMS searches so I have to say no.

343. Q. Do you have a record of all the RDIMS searches that were made in relation to this Access to Information request?

A. In relation to this Access to Information request, no.

344. Q. Just going back to this form, I'm at the very top, third row, "MS Outlook distribution list that represent the OPI group." There's five listed there. Can you explain to us what AOB is?

A. The Analysis and Outreach Branch. That would be what would have been Marcia Jones's branch.

345. Q. How about the next one, ESB_LS?

A. That's Legal Services.

346. Q. What does ESB stand for?

A. Enabling Services Branch. It's sort of an internal services branch at the Agency that provides internal support services. Legal Services falls into that.

347. Q. How about the next one, OCC?

A. The Office of the Chair and CEO. That would involve the Chair and members.

348. Q. How about the fourth one, Doug Smith?

A. He was a branch head. I think he was the Dispute Resolution Branch head. He would have been a member of the Executive Committee.

349. Q. How about Tom Oommen?

A. Tom Oommen I believe at that time I believe he was the head of the Compliance and Enforcement Branch. He is also a member of the Executive Committee.

350. Q. We see there are only five branches or

individuals listed here. Is it fair to say that this search was not Agency-wide?

A. This search does not appear to be Agency-wide. It would have captured, I guess, what was regarded as the most implicated accounts related to the Statement on Vouchers.

351. Q. Does this include the members?

A. Yes.

352. Q. Under which of the five?

A. Office of the Chair and CEO.

353. Q. Scroll to the bottom of the form, please. On page 1, three lines above the signature lines, we see that there is a box marked "Emails were found."

A. Yes.

354. Q. Can you tell us about that? How many emails were found?

A. 1,417 I think is the number I put in my affidavit. I believe that's the number of emails that were found.

355. Q. How did you come up with the 1,417 number?

A. Because I looked at the search results and it says how many items there are in total in relation to that search.

356. Q. This would have generated similar search results as the one in Exhibit 8, correct?

A. It would have a search results page.

357. Q. Like Exhibit 8?

A. You're talking about the report or are you talking about the results?

358. Q. I'm asking you because you say very confidently there was 1,417 Outlook items and I'm asking you how you got the 1,417. I'm asking you is it because there is a similar --

A. No. I know that because there was a – every ATIP request search in Outlook will generate like a folder of results and when you look at the bottom of the folder, it will say how many results there are. That's how I know how many results there are.

359. Q. Let's do a quick comparison between this Exhibit 14, the search terms in Exhibit 14, and the search terms in Exhibit 9. Would you agree that the search query is different between Exhibit 9 and Exhibit 14?

A. Yes.

360. Q. Specifically on the one in Exhibit 14, if the word Statement does not show up, if the word Statement is not in the document then it will not be returned in these search results, correct?

A. Right.

361. Q. Is it fair to say this search in Exhibit 14 is narrower than the one in Exhibit 9?

A. Narrower?

362. Q. Narrower in the sense that it requires the word Statement to be present?

A. I don't know if it would be. I guess yes, I suppose in the sense that Statement has to be present.

363. Q. This one also does not contain the word Credit, correct?

A. No, it doesn't contain the word Credit.

364. Q. If there were documents that only mentioned Vouchers, Credits, or Refund but does not have the word Statement then it will not be captured by this Exhibit 14 search, correct?

A. No but there were other searches done. This was not the only search done in relation to that request. This does not represent the – I just want it to be clear that these searches are cumulative. There are different searches done using different terms over time. This search required the word Statement. Other searches did not. There were other ways of searching as well. This does not represent the entirety of search results in relation to ATIP requests. I just want that to be clear.

365. Q. Can you tell us exhaustively what search terms were used?

A. What I can tell you is that in relation to the first ATIP request that was received in May 2020, the

Office of the Chair and CEO and the Analysis and Outreach Branch were asked to produce their own responsive documents and so they would have determined which documents were responsive to the Statement on Vouchers' development. Those search results from that sort of search among custodians were imported into the working document for this second Access to Information request that came from Gábor Lukács.

There were different ways of searching and there was also a search done in RDIMS and so there were different ways of searching and there was also an RDIMS search done in relation to the first ATIP request that was also imported, to the extent that it was relevant, into the second Access to Information request.

366. Q. You mentioned the custodians of each branch. It would be up to the heads or custodians of each of those branches to provide the responsive documents? Is that what you're suggesting?

A. I am not suggesting that. I am saying that the office of primary interest will be – in that case, it will be the Analysis and Outreach Branch, and it would be the Office of the Chair and CEO would be notified of the Access to Information request and then they have a process in order to have individuals produce their responsive documents at that time and those are collected. I don't

know who approves or is responsible for, in the chain of command, what the organisational structure of that process is.

367. Q. Let's take a step back. This form, Exhibit 14, from my understanding, it looks like it was from the November ATIP search. For the May ATIP search --

A. 2020.

368. Q. For the May 2020 ATIP search, did it cover the Analysis and Outreach Branch?

A. I don't know. I don't have – well, yes. The May 2020 searches covered the Analysis and Outreach Branch, yes. I don't have details on the electronic searches that were done. I know that the request to provide documents from individuals was addressed to the Analysis and Outreach Branch but I don't have details on the electronic searches that were done.

369. Q. Is it correct to say that there would have been a similar form for the May 2020 request?

A. I've looked for a form and I asked for a form but it wasn't documented in the same way as the others. They didn't have a form like this. I provided the forms that I had.

370. Q. You said they didn't document it this way. In what way did they document the May 2020 request?

A. They didn't document – like I don't have

documents that would – I mean I don't have documents that would show what was actually inputted or what was – I don't have those details.

371. Q. But you know for certain that the Analysis and Outreach Branch was notified in May 2020 of that Access to Information request?

A. Yes. I've seen the email to tell them that they had to look for documents and I know that documents were produced and then they were put into the second Access to Information request search results and that's where I saw them.

372. Q. The May 2020 Access to Information request, this is the one in paragraph 18 of your affidavit?

A. Yes.

373. Q. Would it be fair to say that Ms. Jones's department would have known of this request here on or around May 5th, 2020?

A. Yes. I think they were told towards the end of May. I don't know if she was told before that but I know that they were asked to provide documents around the end of May 2020.

374. Q. You say you know they were asked. Was it in an email? Was it in a memo?

A. It was an email.

375. Q. And you saw that email?

A. Yes.

376. Q. Can you tell us what that email said specifically in terms of the request?

A. It reproduces the text of the request and then it provided a long list of instruction for how to provide responsive documents, collect and provide responsive documents.

377. Q. Other than email, was there any other emails to the Analysis and Outreach Branch in relation to this May 2020 ATIP?

A. I haven't seen any.

378. Q. Will you undertake to provide us that email that we were just talking about that was sent to the Analysis and Outreach Branch?

MR. SHAAR: We'll take it under advisement and get back to you. *A*

MR. LIN:

379. Q. On this May 2020 ATIP request, can you tell us what search terms were used?

A. I don't know.

380. Q. Do you know who conducted the search or who was responsible for the search?

A. ATIP was responsible for the search and there was a search in Outlook accounts and there was a search in RDIMS and there was a request made, as I described, to

those two groups, AOB and the Office of the Chair and CEO, to provide documents.

381. Q. Do you know if there were search results prepared from Outlook?

A. Yes, there were search results from Outlook.

382. Q. How many were there? Do you know?

A. 683.

383. Q. Is that in your affidavit?

A. Yes. That's the 683 I refer to at paragraph 20.

384. Q. That refers to Outlook, correct?

A. Yes.

385. Q. How about RDIMS? How many were there from RDIMS?

A. I don't know because I was given the search results that were relevant to the Statement on Vouchers as part of the search results in the second Access to Information request so I'm not able to actually distinguish between the – like I don't know how many because I was given that in a 5,099-page working document and it doesn't distinguish between what came from where.

386. Q. Who decided what to transpose from the May 2020 ATIP request to the November 2020 ATIP request?

A. ATIP staff.

387. Q. They were the ones that determined what was

relevant and what was not?

A. Yes. Actually, I don't know. I'm sorry. I don't know. I can't answer that question because I don't know what the – actually, I don't know.

388. Q. Is it fair to say that your review of documents responsive to the October Order and April Order and July Order were limited to what was filtered to you through the ATIP requests?

A. No, I don't think it's fair to say that because I relied on the ATIP requests that were done in various ways and then I also asked for my own search to be done which although flawed, still produced 799 documents among which there were responsive documents and I also asked the Chair's Executive Coordinator for responsive documents and I also spoke to members of the Executive Committee and I also spoke to – we also conducted an additional search in April talking to members of the Executive Committee and members in order to produce responsive documents so I would not say that it's accurate to say that the only search results I looked at for October, April, and July were filtered to me through ATIP. In any event, the search results are raw search results, not search results that ATIP determined to be responsive.

389. Q. Thank you. Let's go back to Exhibit 9, the search that you prepared. Here we see that there was only

a box for "Emails were found" but there was no indication that RDIMS was searched. Why did you not request an RDIMS search?

A. Because there had been searches done in RDIMS. I had spoken to Marcia Jones who told me that responsive search results would be found in the ATIP search results, that she had no knowledge of other minutes or memos. I asked individuals like Lesley Robertson to look into responsive search results and she looked into RDIMS in order to find them.

390. Q. When did you speak with Ms. Jones? You mentioned a discussion with Ms. Jones.

A. January 5th, 2021. I keep saying speak but I exchanged with her. I think we had a discussion but it certainly began as a written exchange and I don't know that we had a discussion. I have evidence of a written exchange.

391. Q. I'm not sure if I made this request initially but if not then we request an undertaking that you provide to us the email that you exchanged with Ms. Jones, the quote, unquote, discussion about this.

My question was why you did not request an RDIMS search and you provided an answer but let's take a step back. The query terms that you formulated were different from the ones that were in previous searches like the

November ATIP search. Would you agree with that with different terms, you would get different search results?

A. Yes. With different terms, you get different search results.

392. Q. On that basis we also request an undertaking that you do a search of RDIMS using the search terms in the form that you completed in Exhibit 9 and of course, with the three concerns that we had previously, namely the spacing, and with the COVID, Corona, Pandemic reference, and also with the appropriate time range. Our request is that you conduct a search in RDIMS for Refund* or Voucher* within the March 9th, 2020, to March 25th, 2020 timeframe.

A. Is it possible for me to make a comment on that just for better understanding?

393. Q. Please.

A. The difficulty with making a search using the terms Refund and Voucher in RDIMS is that it will return search results across the Agency and so because the terms Refund and Voucher are very common terms in the Agency's day-to-day work, like an air travel complaint, they will return any complaint across the repository that contains those words and so it will produce – that is why when Gábor Lukács had made his Access to Information request, he received an email from Access to Information staff at the Agency saying that the search returned over 10,000

pages of documents. This is because generic search terms of that sort will return an enormous number of documents that they have to be manually gone through.

If I may editorialise, I don't know that that's required from a reasonable search. It's just an exponential number of documents that get produced.

394. Q. Thank you, Ms. Cuber, for providing the clarification. I would assume that RDIMS could be capable of filtering out searches for, let's say, passenger complaints only. Is that correct?

A. I mean if you want it to be a thorough search, no. I don't know that it has that functionality. What I know is that the difficulty that ATIP ran into just in terms of ATIP, the difficulty that is faced by looking in RDIMS, is precisely this difficulty, that if you would like to get the largest number of hits possible, you get an outrageous number of hits and you have to look through them yourself in order to determine what is in fact relevant to what you're looking for.

395. Q. In RDIMS is there an advance search feature or a filter feature to exclude passenger complaints or complaint files?

A. If we do that then we end up back here being told that we shouldn't have done that, right? I mean --

396. Q. Yes, the court's order includes all third

parties but what we're asking – if you're saying that it will return those kind of search results then perhaps it could be refined to exclude passenger complaints and focus on Agency communications?

A. We tried with Twitter messages and info@ messages and were told that your position was that those were not responsive so it becomes very difficult for us to filter things down without being told that we're not performing adequate searches.

397. Q. We're presenting a suggestion that would address that concern. For this particular search, we're asking that you do an RDIMS search for Refund* or Vouchers* or Credit* within that time period and if there is a method in RDIMS to filter out passenger complaints, we ask that you do so and we trust that should address your concern about voluminous documents being returned.

MR. SHAAR: We'll take your request under advisement. I don't know that RDIMS has that capability but again I am going to express my same concern that I did before and that Mrs. Cuber has again here, that it creates an extreme amount of material that is not relevant to this case and requires a lot of time and manpower to go through them when there has already been several searches. I'll take it under advisement. We have serious concerns regarding this request. *A*

MR. LIN: Again I propose the suggestion to address concerns which is to filter or use advanced searches to exclude passenger complaints.

MR. SHAAR: I don't know if we have that capability but I'll look into it.

MR. LIN: Thank you.

398. Q. On the topic of RDIMS, is RDIMS the only corporate repository used at the CTA?

A. It's the corporate repository, yes.

399. Q. Do you know if individual branches would have their own separate repositories?

A. No, I don't know whether they have their own separate repositories. I believe to the extent that they might use other apps, they connect with RDIMS.

400. Q. What do you mean by separate apps?

A. Like I mean there's like a – this is too complicated for me. What I have in my mind right now is not a document repository. It's just sort of like a function on the system where you can look at the status of cases before the Agency but those are given a case number and the case number can be – you would have to go into RDIMS with the case number in order to get documents in relation to that. To my knowledge, no, but I hesitate to say anything more. RDIMS is the corporate repository for the Agency.

401. Q. Back to my question. Do you know if the Analysis and Outreach Branch would have their own separate repository?

A. I do not believe that they would, no.

402. Q. How about the Office of the Chair and the CEO?

A. No. Everybody saves their items into RDIMS. That's where you would save your items.

403. Q. But for individual branches' documents, do you know if they would be saving them in a separate repository as well?

A. No because RDIMS is the corporate repository.

404. Q. Please go ahead.

A. Everything that is given to IM that is not in digital form or whatever will be digitised and put into RDIMS like our old cases and things like that. RDIMS is the corporate repository and that is where you are supposed to keep your electronic documents. There might be like a library that might be considered a repository for library things but in terms of records of business value for the Agency, to my knowledge, there is just RDIMS. I have never been directed to another repository that constitutes the corporate repository for the Agency.

405. Q. When you say library, what do you mean by that?

A. Like a library where you keep books.

406. Q. Do you know if any of the individual branches would have their own SharePoint, for example?

A. I don't know what SharePoint is.

407. Q. Microsoft SharePoint for storing documents and sharing notes?

A. I do not know.

408. Q. Is it fair to say you did not specifically enquire with individual branches on whether they have a separate repository or location to store some electronic documents?

A. No, I did not ask because – no, I did not ask. I had understood that the place to go would be the ATIP search results and I didn't ask about SharePoint or anything like that.

409. Q. How did you first know that the place to go would be the ATIP search results?

A. Well, the motion under Rule 318 provided a redacted copy of the release package from Access to Information Request A-2020-00029, along with all of the correspondence from ATIP staff at the Agency that referenced the fact that 10,000 pages of documents had been returned as a result of a search that had been done and so that was a good starting point because that was also retained by Justice Gleason in her October Order and it appears to have been repeated in subsequent orders,

that there were many search results found and Justice Gleason in October even said that if we needed more time to go through all those search results, you could ask for more time. A lot of the request was framed around that Access to Information request so that's where I started.

410. Q. How about Standing Committee Motion? Who gathered documents for that?

A. Transport Canada.

411. Q. And the CTA was simply provided a copy of what Transport Canada had presented to this Standing Committee? Is that correct?

A. That's what my understanding is, yes, so that in addition to internal document searches, we also have a collection of documents that Transport Canada has kept on the subject of communications between the Agency and Transport Canada, including the Minister's office. I reviewed those notes as well in the course of my search – not notes but rather documents.

412. Q. Are you saying there is a separate folder for storing Transport Canada and Agency communications?

A. No, I'm not. I'm saying that there was a separate folder for those specific search results from that Standing Committee Motion. There is not a separate folder for Transport Canada and Agency communications.

413. Q. The CTA was not involved in compiling the

Standing Committee Motion documents, correct?

A. That's correct.

414. Q. Did Transport Canada provide a listing or summary of what is in that package?

A. I am not aware of any listing or summary.

415. Q. How many documents were in that package? Do you know?

A. I don't know.

416. Q. You reviewed that package?

A. I did. I don't remember how many documents are in it. I can't estimate. I don't know.

417. Q. Did that document include emails?

A. Yes, it did.

418. Q. I'm moving to a different topic, Mr. Streiner's Outlook calendar for scheduled events between March 18th, 2020, to 25th, 2020. Did you personally review his Outlook calendar?

A. No.

419. Q. How about Ms. Jones's Outlook calendar for that time period, March 18th to 25th, 2020?

A. No.

420. Q. Let's go to your affidavit, paragraph 58, please. You state here that "No. These meetings were not recorded." How do you know these meetings were not recorded? Can you explain?

A. Yes, I can. In preparing in relation to the October Order, I spoke with Sébastien Bergeron, who is the Chief of Staff of the Agency, with respect to whether Executive Committee Meetings were recorded and he said no. I spoke Lesley Robertson, who is, again, the executive Coordinator of the Chair's Office, about whether in-camera Members' Meetings like the one that took place on March 24th were recorded and she said no. Then in response to the April Order, Amanda Hamelin wrote to each person invited to Executive Committee Meetings between March 19th and 24th and asked whether any of them had records of the meetings and each person said no. She also wrote to each member of the Agency and asked whether they had recordings of the March 24th, 2020, in-camera Members' Meeting and they all said no.

421. Q. Is it correct to say that you did not check directly with the teleconferencing provider to see if there is any recording stored?

A. I did not. I thought that that was adequate to address that concern. I --

422. Q. Please continue.

A. I think that there was a technical reason why nothing – in addition to the fact that it's not the practice, there is also a technical reason about storing recordings on teleconferencing services but my knowledge

of that is a little bit limited. I think from my perspective, suffice to say, every single person was asked if there was a recording and the answer was no.

423. Q. Were you given access to the teleconference system in order to verify there was no recording?

A. No.

424. Q. Were you able to access the list of conferences that were held by Mr. Streiner between March 9th to 25th, 2020, using his dial-in code?

A. No.

425. Q. You never requested access to his list of conferences?

A. No. I don't know how I would have gotten information from that. It would require a level of technical knowledge that I wouldn't have. I would have to figure how to do that. I contented myself with the 3,000 emails and 5,099 pages of search results and speaking to people who would have information and then I guess we contented ourselves also with asking every individual for their individual notes from meetings that took place – not notes but documents from meetings that took place in response to the April Order.

426. Q. You mentioned we a number of times. Who is we?

A. I might be getting tired so I might be saying

we. I can't remember exactly what I said. I don't remember what I said.

MR. SHAAR: Maybe we should take a break.

MR. LIN: If the witness requires a break, please let us know. Ms. Cuber, are you --

THE WITNESS: Yes, but is there a way to have what I just said sort of read back so that I can clarify what I meant by we? I think I might have just been getting a little sloppy. I apologise.

MR. LIN: Let's finish this question and then we can take a break. Madam Reporter, can we have the witness's answer read back to her so she knows what we was in the context?

THE REPORTER: You have to give me a quick moment to get back up there.

MR. LIN: Sure, please.

THE REPORTER: I have to apologise here. It's not allowing me to scroll back up there to see. It's just keeping me updated with the most recent line of typing. I'm not sure with this program how to get back up there without closing everything and letting it mirror itself over.

THE WITNESS: If I can? It's possible that I used we in the way that we always use we when we talk about the Agency where we say we but it means as an Agency this was

done. I don't want me using a term of phrase that is commonly used in speaking about things that happen in the workplace as meaning that I was involved in something when I wasn't. It's just that we is a very common way of speaking about things that have happen at the Agency. We collected…, like we did…, we should… It wasn't intentionally – I don't remember what I said and it certainly wasn't intentional.

MR. LIN:

427. Q. Ms. Cuber, looking back at my notes, you said, "We contented ourselves with," et cetera, et cetera.

A. What I meant by that is that I looked in relation to the October Order and Amanda looked in relation to the April Order and collectively, nothing further was done.

MR. LIN: On that note, maybe we could take a quick 10-minute break. The same request, Ms. Cuber. You are still under cross-examination. Let's return at 2:33. Thank you.

(SHORT RECESS)

MR. LIN:

428. Q. Ms. Cuber, may I refer you to the Direction to Attend, please? That's Exhibit 5. At paragraph 15, with reference to the April 20, 2022 documents, the first page of Appendix C1 shows the meeting invite from Mr. Streiner

with his dial-in code of 935311571. We requested a printout from the teleconferencing platform showing all conferences that were hosted using this dial-in code between March 9th and 25th, 2020, including the weekend of March 21st to 22nd. Do you see that?

A. Yes.

429. Q. Have you accessed this teleconference system and printed out a list of conference during that time period for us?

A. No.

430. Q. Why not? We made a request here that you access the teleconference system. You have made no attempts to access it?

A. This is the Direction to Attend and this was objected to and the court didn't order us to produce it. Is that what you are referring to?

431. Q. I'm referring to paragraph 15 of the Direction to Attend. I'm asking why you did not attempt to access the teleconference system to printout that list.

A. I didn't – I was not required to bring that for this cross-examination. I don't know if that exists. I can't remember anymore the list of things that may or may not exist. I don't know if that's one of them. I can't recall.

432. Q. You say you don't know if it exists. Have you

made any attempts to confirm if it exists on the teleconferencing platform?

A. Anything on this list where I didn't know if it existed or not, I mean the list of it would be in the Agency's submissions and I didn't memorise it. If you're asking me if I have consulted in the context with complying with the October Order, I did not. I looked for documents. I didn't think that looking at a printout from the teleconferencing platform showing all conferences that were hosted using that dial-in code between March 9th and 25th, 2020, including the weekend of March 21 to 22, 2020, would – I instead looked for documents and I don't know what I would have made of that list. I don't know what it would have shown me. It's not something that I could read on my own. I looked for documents and I don't know that teleconferencing numbers are something that I thought of to look at.

433. Q. Ms. Cuber, thank you for the answer. Really my question is really simple. You did not make any enquiry with IT about access the teleconferencing platform, correct?

A. No, I did not.

434. Q. And you did not do so because you did not believe that it would be relevant, correct?

MR. SHAAR: Mr. Lin, can I ask you to make a

clarification? What time period are you talking about? Are you talking about before or after the Direction to Attend was sent?

MR. LIN:

435. Q. Before the Direction to Attend, Ms. Cuber?

A. No. That wasn't part of my search. That wasn't part of my search. I searched for documents by asking people and looking at search results and asking for searches to be done.

436. Q. How about after the Direction to Attend was issued, not this one, the previous one?

A. I can't recall anymore the steps I took. I know I had a discussion about teleconferencing platforms but I didn't gain access. I had a discussion but I don't remember the contents of what was said but I certainly didn't ask for that to be provided to me.

437. Q. Who did you have a discussion with?

A. I had a discussion with Ms. Lesley Robertson because she was at the outset of the pandemic having a lot of trouble with teleconferencing platforms and so we had a discussion about teleconferencing platforms but I don't remember the entire content of the – like I don't remember the content of the discussion enough. I know that I talked to her about it but I certainly didn't ask for the platform numbers.

438. Q. When you say discussion and talked to her, was it via email or was it verbal discussion?

A. We had a verbal discussion.

439. Q. Did you make any enquiries with Transport Canada on any meetings that may have occurred between March 20th, 2020, and March 22nd, 2020, in respect to the Statement on Vouchers?

MR. SHAAR: Objection, Mr. Lin. Our obligation is documents that are in our control and possession. *O*

MR. LIN:

440. Q. Let's go back to the ATIP searches. We know there is a May 2020 ATIP search and a November 2020 ATIP search. Do you know if Mr. Streiner or anyone at the Chair's Office reviewed those searches?

A. I don't know.

441. Q. Do you know if Ms. Jones reviewed those searches?

A. I know that Ms. Jones was familiar with the content of the records. I know that Ms. Jones was familiar with the contents of the ATIP requests or she was familiar with the ATIP requests.

442. Q. Was she involved in the document search or gathering?

A. She was responsible for – well, not responsible. She was involved in gathering documents for

the first Access to Information request and I don't know if she was involved in gathering documents in relation to the second Access to Information request. I don't know if she was involved in that but I know she was familiar with the Access to Information requests.

443. Q. You say she was involved in the first request on May 2020?

A. Sorry. The Analysis and Outreach Branch was involved and by that I assumed that she was involved. I consider the Analysis and Outreach Branch was involved so she would have been contacted in order to gather and provide those responsive documents in that context and that's what I mean.

444. Q. And that would be in May 2020, correct?

A. Yes.

445. Q. That would still be within the time period that the Outlook tapes would still contain all the emails from March 2020, correct?

A. Access to Information doesn't search backup tapes.

446. Q. What I'm asking is it's still within the time period? Yes or no?

A. Yes, I think it would be within the 12 weeks.

447. Q. Ms. Jones was put on notice that she had to provide responsive documents in that ATIP request,

correct?

A. Yes. When an ATIP request is received, one is not allowed to delete any records once the ATIP request is received but if you have deleted records and you emptied out your trash before an ATIP request comes in then the record is, from ATIP's perspective, as I understand it, gone. Once the notification is received, everything has to be preserved from that point on.

448. Q. From our discussion just now, we know that it would still exist on the Outlook tapes, correct?

A. It is within the timeframe.

449. Q. Do you know if Ms. Jones made any enquiries about retrieving any emails that she may have deleted from those Outlook tapes?

A. I have no knowledge that she would have done that.

450. Q. Do you know if the ATIP team, in relation to the first ATIP request, did any searches or enquiries in relation to the Outlook tapes?

A. I was not employed at the Agency at that time so I don't have any direct knowledge and I don't have any knowledge otherwise.

451. Q. Do you know who would have knowledge about this?

A. No because I think that the answer to the

question is that ATIP doesn't search backup tapes. They are there for disaster recovery purposes only, not for responding to Access to Information requests when items have been deleted from a mailbox. The obligation to preserve documents exists, one, when they are records of business value at all times, and two, they apply to all documents, whether transitory or of business value when notified of an Access to Information request but not before then.

452. Q. Have you enquired with Ms. Marcia Jones at all in relation to the March 25th, 2020, email that was deleted or the March 18th, 2020, email that was deleted?

A. No, I have not.

453. Q. So you have not enquired with her on when she deleted them and why she deleted them?

A. No but I thought that was covered when you asked me if I had contact with her, but no. I think you asked that question and I answered it.

454. Q. I'm just going back to you mentioned business value a number of times. I'm just going back to, for example, Exhibit 12. If this email was preserved because there was business value, why wasn't the email Ms. Jones sent out preserved? That email is lengthier and appears to have more business value that the response.

A. The document wasn't preserved in RDIMS. The

document was located in an Outlook account which is not a corporate repository where documents of business value are kept. When an ATIP request comes in and a search is done, that search will cover all documents whether they are transitory in nature or not. If a person has left a document in their email account at the moment that a search is made, it's captured by the ATIP request but this doesn't mean that that document that you are referring to has been preserved because it's of business value. It just means it was in an email account and so it was captured by the ATIP request, it hadn't been placed in RDIMS as far as I know, and it just was there. It doesn't mean anything in terms of whether it was preserved or kept because it has business value. It wasn't in RDIMS.

455. Q. Thank you for clarifying. Just going back to Mr. Matte's notification on April 14th, 2020, to preserve documents, why wasn't any steps taken to actually secure the documents and keep a copy at that time?

A. I don't know.

456. Q. What is the usual policy when any documents are requested in litigation?

A. When we get a request under Rule 318, it relates to an order or a decision of the Agency and the documents that form part of the record are very easily locatable because they are part of a record that is kept

by the Agency and so they will consist of very clear items that are easily retrievable but in this case, the request was for all documents across the Agency for a matter that has no associated record so there was no obligation to keep this or that document on the record of this matter because there was no record. To answer your question, there is no usual practice for finding documents in relation to this type of matter.

457. Q. What is the usual policy – please continue.

A. When there are litigation holds that are required by, for example, class actions, there are instructions that are provided by the Department of Justice. In this case, this was a 318 request and our usual practice for a 318 request didn't apply. In this case what was done was that documents were asked to be preserved and then the actions to collect them would happen later.

458. Q. So is it correct to say the usual practice with a 318 request is to preserve the documents immediately?

A. No because with a 318 request, there is no obligation to preserve any documents because the documents that are ordinarily at issue in a 318 are preserved as records as a matter of course. There is a fixed list of items that will be on the record because a 318 will

usually be the submissions and the decision and that's what a Rule 318 request usually involves because usually you are contesting an order or a decision of the Agency where there are clear filings involved.

In this case, there were no clear filings because it wasn't like that sort of – it wasn't a case before the Agency. There was no decision. It was just whatever documents that were not kept in a tidy place as one would for, let's say, a complaint, an air travel complaint or an application or a rail complaint where the process is very straightforward because the record is preserved as a matter of course, regardless of whether there is a 318 request.

459. Q. Do you know if anyone reached out to Mr. Matte to request clarification of what needs to be preserved?

A. No. There were responses but I don't remember there being a request for clarification.

460. Q. What were the responses? How many were there?

A. I believe you asked me earlier and I could recall that there were two responses and I don't know if I can get into the details of those responses because I think that that might be privileged. I'm having difficulty understanding how I should answer this question. He obtained responses from two people, to my knowledge. He was asking questions so he obtained

responses to his questions and that's what I can recall. I have seen them and he did obtain two responses and at least one was a response to a question.

At that time, the 318 request was a little bit different and it involved technical matters and so it looked a little bit different than what the October Order actually ended up being.

461. Q. Now I will move to a slightly different topic, document number 15, please. It's a letter dated August 8th, 2022. Do you see that?

A. Yes.

462. Q. Do you recognise this letter and the enclosures?

A. Yes.

MR. LIN: Could we have this marked as Exhibit 15, please?

EXHIBIT NO. 15: Letter from Kevin Shaar to the Judicial Administrator, Federal Court of Appeal, August 8, 2022, with enclosures.

463. Q. On the face of the letter, the second paragraph, it says, "The Agency has discovered that the Statement on Vouchers may have been discussed on March 24th, 2020, at an EC meeting." Do you see that?

A. Yes, I do.

464. Q. There were some requests made in the Direction

to Attend, items 26 and 28. We went through that at the very beginning of the session. My question is we see here on page 2 of this PDF file, Exhibit 15, there is a list of required attendees and optional attendees?

A. Yes.

465. Q. Did you make any enquiries with Ms. Alysia Lau to see if she attended this March 24th, 2020, meeting?

A. I did have a discussion with Ms. Lau about this meeting.

466. Q. The March 24th, 2020, meeting, correct?

A. March 24th, 2020, yes.

467. Q. Did you ask Ms. Lau whether she kept notes of that meeting?

A. Yes.

468. Q. Have those notes been produced to us?

A. No because no notes were found. I asked her if she kept notes. You asked me if I asked her if she kept notes and I did ask her.

469. Q. Did she take notes that day?

A. She doesn't recall if she took notes that day. She gave her notes to Ms. Hamelin and Ms. Lau has left the Agency so she didn't have her notes anymore and couldn't recall and she advised me that she had left her notes with Ms. Hamelin, Amanda Hamelin.

470. Q. When did Ms. Lau leave the Agency?

A. Sometime in the summer but I don't recall when.

471. Q. Did you review the documents that Ms. Lau provided to Ms. Hamelin?

A. No, I didn't. Ms. Hamelin was simply asked whether she had notes and she searched and she concluded that she didn't have notes.

472. Q. I'm looking at the Direction to Attend, paragraph 27 in particular. The answer that we received this morning was that there were no responsive documents on RDIMS because RDIMS cannot store Microsoft OneNote documents. Do you remember that?

A. Yes.

473. Q. From what you said about Ms. Hamelin, is it correct to say that Ms. Hamelin would have the Microsoft OneNote document that Ms. Lau would have provided to her?

A. Ms. Lau told me, "I gave my notes to Amanda Hamelin," so Ms. Hamelin would have her notes. Ms. Hamelin was approached, not by me, and asked if she had notes for that day and she searched and she did not have notes and so no notes were produced.

474. Q. But you did not personally review the files that Ms. Hamelin was provided from Ms. Lau, correct?

A. No and nor did anyone else. We just – not we. She was asked for her notes and there were no notes to be

produced.

475. Q. Our next request would be that we ask that you review the notes and documents that Ms. Lau provided to Ms. Hamelin and verify whether Ms. Lau had taken any notes for the March 24th EC meeting.

MR. SHAAR: We've already done that search, Mr. Lin.

MR. LIN: Our request is that Ms. Cuber actually obtain the documents and notes from Ms. Hamelin and do the review herself, not ask Ms. Hamelin whether there are notes.

MR. SHAAR: And that will change what?

MR. LIN: We don't know if Ms. Hamelin may have overlooked or mistaken. Ms. Cuber is the main person tasked with complying with the orders so we ask that she review it personally and satisfy herself that there were no notes on March 24th, 2020.

MR. SHAAR: We'll take it under advisement and get back to you. *A*

MR. LIN:

476. Q. When did you do the enquiry with Ms. Lau?

A. I can't recall if it was at the – it would either have been – I think it would have been shortly before July 22nd – it must have been or on July 22nd, somewhere around there.

477. Q. Was that before or after she left?

A. She had left already.

478. Q. Even though she left, you reached out to her for assistance? Is that correct?

A. Yes. She was a former colleague in the Legal Services Department and she had just left and we knew that her notes were someplace but we didn't know where so we asked.

479. Q. Going back to paragraph 27 of the Direction to Attend, we understand your position that Microsoft OneNote documents cannot be checked in to RDIMS.

A. Yes.

480. Q. Can PDF documents be checked in?

A. I think PDF documents can be checked in.

481. Q. Have you attempted to search on RDIMS for documents checked in by Ms. Alysia Lau with those search strings?

A. No.

482. Q. Could it be possible that Ms. Lau would have converted her Microsoft OneNote files to PDF and checked them in?

A. But I think she would have told me that when I spoke with her on the telephone because I asked her where her notes were and she said that she had given them to Ms. Hamelin.

483. Q. Did you specifically ask her if she uploaded or checked in her notes to RDIMS?

A. No but I asked her where we could find her notes and she said, "I gave them to Ms. Hamelin." If I asked her, "Did you put them in RDIMS," I already got my answer.

484. Q. What is Ms. Hamelin's position?

A. She works in the Information Technology division and I believe she has a management position there.

485. Q. Let's take a look at your written submissions, please, Exhibit 6, paragraph 83 to 84. Do you know how many members were in attendance on that March 24th, 2020, meeting?

A. No, I don't. I know that all members are invited and I don't know who attended. I don't know offhand who attended.

486. Q. Do you know if the March 24th, 2020, Members' Meeting was in-camera or not in-camera?

A. Yes. It was in-camera.

487. Q. Will you refer to document 16, please? This is a letter from Mr. Shaar, July 22nd, 2022. Do you recognise this letter and the enclosures?

A. I've read them. I probably have seen it before. I don't have a specific recollection of this.

MR. LIN: Could we have this marked as Exhibit 16, please?

EXHIBIT NO. 16: Letter from Kevin Shaar to the Judicial Administrator, Federal Court of Appeal, July 22, 2022, with enclosures.

488. Q. Could we go to the very last page of this PDF file? Is this the quote, unquote, scheduler that you refer to in paragraph 83 of your submissions?

A. Yes, I believe it is.

489. Q. Let's go to page 4 to 7 of this PDF file. It's a letter from Air Canada. Do you see that?

A. Yes, I do.

490. Q. Do you have an explanation why this Air Canada letter was not produced to us when the court initially issued the Order in October?

A. I do. This letter didn't come up in any of the search results that I had reviewed from the Access to Information request. It hadn't been provided to me otherwise in my searches in relation to the October Order and it should have been captured by the electronic search that was done in November because this letter has the word Refund in it but because there was a typo, that letter was not collected and I didn't find it in any other search results. It came up for the first time as a result of the April search and so when it was found, it was produced.

491. Q. Can I direct you to page 3 of the PDF, please? This is an email from Mr. Bergeron to all the members of the CTA, attaching both the Air Canada and the Air Transat letters.

A. Yes.

492. Q. This email attaches side by side as attachments the Air Canada letter and the Air Transat letter. Do you see that?

A. Yes, I do.

493. Q. The Air Transat letter would have been captured through your searches? Do you agree?

A. But it wasn't captured. I didn't receive the letter through that search. I received the Air Transat letter from Ms. Robertson. I don't actually know – I mean this letter was produced because it was given over by an individual. It wasn't eventually produced because it – I don't know. I don't have an explanation actually for that. I hadn't noticed that.

494. Q. So you don't have an explanation of why Mr. Bergeron's email on page 3 was not produced to us initially?

A. I can say to you the reason it wasn't produced is because I hadn't seen it. Like I didn't see this letter. Had I see the Air Canada letter, I certainly would have produced it in the same way that I produced the

Air Transat letter but I didn't see this letter in any of the search results and that is why it was not produced but as soon as the Air Canada letter was found and as soon as this letter from Sébastien Bergeron was found, they were produced to the parties. I didn't see it. It's not that I saw it and didn't produce it. I produced the Air Transat letter and would have produced the Air Canada letter as well had I seen it.

495. Q. Can you explain to us how this email from Mr. Bergeron was ultimately found?

A. Yes. In response to the April Order, Amanda Hamelin asked all members who were on the list of attendees for the March 24th, 2020, in-camera Members' Meeting to produce documents in relation to that meeting and to answer questions about that meeting, and so individuals provided their documents to Ms. Hamelin and I don't know where they got the documents from. I don't know if they had saved them somewhere on their desktop or if they were sitting in their In boxes or they were saved in RDIMS. I don't know. They were just produced by the individuals when they were requested.

496. Q. From what appears on page 3, it looks like a printout from Microsoft Outlook. Do you agree?

A. Yes but I mean that can be – I don't know. I'm speculating now. Yes. What I can say is I did not

find this letter. It was not in the search results and that's why I didn't produce it. I didn't see it and not produce it. I didn't have the letter but when it was found in April, it was produced to the parties. It's certainly an email.

497. Q. Let me take a step back here. When we looked at the search results in Exhibit 8, we understand that search would search both the subject line, the body, and even attachments. We see here that there are two attachments on this email from Mr. Bergeron, the Air Transat letter and Air Canada letter. They seem to contain the search terms; for example, the word COVID and the word Voucher.

A. Yes.

498. Q. Would you agree with me that this should have appeared in the search results that you reviewed, Exhibit 8?

A. It should have appeared in the search results and if it was still in Outlook. If somebody had, for example, put things aside like in a folder or something on their desktop then maybe it wouldn't appear in Outlook but it should have come up in the search results and it did not.

499. Q. You're saying someone putting things aside in a separate folder. Is that common practice?

A. No. I have no idea. I'm just saying – what I'm telling you is I didn't see the Air Canada letter before and I thought that it was just because the search was faulty that was done in November 2021 but you're quite right that if the Air Transat letter – well, no, you're not because I didn't get the Air Transat letter from an electronic search either. I got it from Ms. Robertson. I didn't find another copy of the Air Transat letter in the electronic search results so perhaps there is some other explanation but the fact remains that the place from which I got the Air Transat letter was directly from Ms. Robertson and I didn't see the Air Transat letter in electronic search results and I didn't see the Air Canada letter in electronic search results but as soon as they were found and identified in April, they were disclosed to the parties.

500. Q. You say you got the Air Transat letter initially from Ms. Robertson. Do you know if she had the Air Canada letter as well?

A. She didn't give me the Air Canada letter so I don't know if she – I mean she looked and she gave me responsive documents and this was not among them.

501. Q. Let's go to page 12 of this PDF file. It's an email from Mr. Streiner at 8:36 am, responding to his own email at 8:31 am. Do you see that?

A. Yes.

502. Q. Here we see there's two bullet points from Mr. Streiner. One is special measures in respect of the air industry and the second one is the agenda for Thursday's Members' Meeting. Do you see that?

A. Yes, I see that.

503. Q. In the submissions that you make in the court, at paragraph 83 you said, "The Agency has in its possession a single document in relation to this meeting, namely a scheduler."

We see here that there is actually email with agenda of at least two meeting agenda items. Can you explain why this email was not mentioned in your submissions?

A. I didn't see this email and it was located in April. That's when it was found. When it was found, it was disclosed to the parties. At the time when I was looking for documents, I had a discussion with Ms. Robertson about whether it was likely or – I was looking for agendas and I was told that it was not the practice to keep agendas for in-camera Members' Meetings at that time and so I didn't look any further.

In any event, this document was not among the documents that I saw or that I had in my search results when I was looking for documents in compliance with the

October Order. It was only found in April and then it was disclosed.

504. Q. Let's go back to page 3 again, Mr. Bergeron's email. We see that the two attachments contain the key words from your search in November 2021, namely the words Voucher and COVID, Corona, or Pandemic. Are you sure this email did not appear in the search results that you reviewed, namely the one in Exhibit 8?

A. It did not appear in the search result. I was surprised to see this letter, not this specific email. I saw the Air Canada letter. It was put to me in April when I was no longer doing the searches and I was very surprised and upset that I hadn't seen it before and I went back into the search results in order to make sure that I hadn't overlooked something but I didn't find it in there. I did not find this document, this letter, in the search results and I looked for the letter in relation to individuals who I had seen obtain the letter and I didn't see this email and I didn't find the letter anywhere. I mean you can ask me many, many questions but the fact is I didn't see it. It was found in April. I was mortified and then it was released.

505. Q. In relation to the October Order, did you enquire with any of the CTA members about responsive documents?

A. No. I had not asked them about notes for the meeting and I didn't approach them about – we looked in sort of the corporate repository or in Outlook accounts but we didn't ask them personally for any of their responsive documents. At the time, I had the explanation that agendas were not kept and ordinarily notes were not kept for these sorts of meetings but I imagine because there was a transition to COVID, things started to – maybe they had an agenda in this case but it wasn't the practice. When I was looking for documents, it didn't seem unusual that not much came up and so I didn't enquire further but further enquiries were made in April and then the responsive documents were produced from individual members.

506. Q. In paragraph 84 of your submission you said that "In relation to this item, the Applicant has requested production of notes taken by or on behalf of participants at the meeting. The Agency submits that if personal notes were taken and kept by members, they are not in the Agency's possession."

Is it correct to say that you actually enquired with the members in regards to notes?

A. We said we didn't enquire with regards to notes with members when I made the submissions in February. The enquiry was made after the April Order.

507. Q. Why didn't you make an enquiry with the members?

A. Because I looked for notes in the repository and at the time, the Agency's position was that members' notes don't belong to the Agency and that was the position that was taken but after the April Order, the decision was made to enquire from among members whether they had any notes and then they were produced.

508. Q. Are you saying that you did not enquire with the members back in relation to the October Order because you didn't believe that it was required? Is that what you're saying?

A. The position as stated in the Agency's submissions was that if members took notes during those meetings, they were not in the Agency's possession so that we wouldn't ask them if they had notes in relation to that meeting but after the April Order, the Agency did or Agency staff, specifically Amanda Hamelin, did ask members if they had notes. Then whatever notes there were were produced.

509. Q. Just going back to page 3 of this Exhibit 16, Mr. Bergeron's email on March 24th, 2020, how was this found?

A. This was found because after the April Order, Amanda Hamelin wrote to each member at the Agency and

asked them a series of questions in relation to March 24th, 2020, in-camera Members' Meeting and the questions included: Do you remember if the Statement on Vouchers was discussed; Do you have any notes; Do you have an agenda; Do you have a scheduler; Do you have any emails to set up or schedule the meeting; Do you have any correspondence about the decisions or deliverables?

Whatever was in your client's deficiency notice in relation to this meeting was put to each member as a question as well as, I think, Mr. Bergeron, and then this email was provided as part of that process.

510. Q. Thank you for the clarification. Earlier we did cover that it was not in the search results in Exhibit 8, correct, this email?

A. It was not in the search results, no. I would have put it in if it had been.

511. Q. We understand that. Did you investigate why it did not appear in the search results?

A. Yes. I didn't focus on this email. I wasn't focusing on this email. I was focusing on the Air Canada letter and so I enquired with IT and there were a number of possible explanations that they investigated but they eliminated the possibility that attachments wouldn't be included in search results and then landed on the probability that it was due to the typographical error in

the search terms used in November 2021; that is to say, the missing space between Refund and Or. I didn't think of this correspondence and so I didn't put that to them.

The only thing I would note is that the Air Transat letter didn't come up in any electronic searches either. I didn't have the Air Transat letter in any other search results. I only had it because of Ms. Robertson giving it to me. I don't know if it perhaps is not in Outlook accounts anymore but maybe it was stored somewhere. I don't know.

512. Q. Was the Air Transat letter or the Air Canada letter in any of the ATIP search results? Do you recall?

A. It was not. I didn't see it in the ATIP search results. I have given that letter by Ms. Robertson. No, I don't recall seeing it anywhere else. I remember being given that letter from Ms. Robertson and then when you asked for the cover letter, I had to go back to Ms. Robertson and I believe she obtained those letters, those documents, from RDIMS or from someplace. I don't know where she got them from actually. I think she got them from RDIMS but I can't be certain. She had them somewhere.

513. Q. Earlier you said it could have been possible someone saved the Air Canada letter or Mr. Bergeron's email in a separate folder. Do you remember saying that?

A. Yes, I do.

514. Q. It is possible that an RDIMS and Outlook search would not be comprehensive? There would be alternative locations where people could have stored various documents like the Air Transat letter and the Air Canada letter, correct?

A. Well, I did obtain the Air Transat letter from Ms. Robertson and we did obtain the Air Canada letter from a subsequent search from among members and so I think that to the extent that the electronic search didn't bring up those letters, the searches that involved speaking directly to people and obtaining documents from them would have remedied that.

515. Q. Earlier you said you were mortified when learning about the Air Canada letter. Why was that?

A. Because I of course would have produced it and in the context of having accusations levied against people of contempt, it's mortifying to know that perhaps if the search terms had not contained a typo, this would have been produced earlier instead of later. I try to do a good job and it affects me when things like this happen. You know what? That's just true.

516. Q. When you say that's just true, what do you mean?

A. It's difficult --

MR. SHAAR: We're away from the search of documents.

MR. LIN: The witness offered the statement --

THE WITNESS: The intent was to do a thorough search and when additional documents are found through additional searches, it's regrettable for me that I didn't find those documents in a timely fashion. It was not for lack of trying. I guess that's all I'm trying to say.

MR. LIN:

517. Q. You would agree that the initial electronic searches that you made were not comprehensive?

A. No. I think that the electronic searches that were made were more than adequate to bring up 3,000 emails and 5,099 pages of working copy results and other documents that were found through other means. I think that responsive documents were found and they were produced and that additional searches done later in a different way produced further documents which were also disclosed.

518. Q. The fact that the Air Transat letter and the Air Canada letter did not appear in your electronic searches, would you say that that is demonstration that the electronic search was not comprehensive? Do you agree?

A. But the Air Transat letter was found through

other means and disclosed. When an electronic search doesn't do what it's supposed to, other means can come and correct for that. In the end, pursuant to the April Order, these documents were found and then they were disclosed.

519. Q. I guess we're getting to the heart of the problem. Why were they not found initially and required a second order from the --

MR. SHAAR: We've already done the tour of this question. I think the affiant has responded to these questions several times over now. In the interest of getting out of here at a reasonable hour today, maybe we can move on. *O*

MR. LIN:

520. Q. Let's go back to Exhibit 16, please, page 12. How was this email found? Can you tell us?

A. This email was found because Amanda Hamelin wrote to each member of the Agency with respect to the March 24th in-camera Members' Meeting and requested that they respond to a series of questions and produce responsive documents, which they did. This document was found in the context of that search and then disclosed.

521. Q. In Ms. Hamelin's enquiry with the members, the members acknowledged that the Statement on Vouchers was discussed on the March 24th, 2020, Members' Meeting? Is

that correct?

A. I don't know if they confirmed that it was but certainly when the question was asked, documents that were produced were handed over, even if individual members didn't have a specific recollection of whether the matter was discussed but I believe – anyway, it must have been responsive.

522. Q. Is it correct to say that all the members responded to Ms. Hamelin's enquiry?

A. Yes. All the members that she contacted responded to Ms. Hamelin. Sorry. That was ambiguous. She contacted everybody on this list who is at the Agency and they all provided documents. If somebody wasn't at the Agency anymore then they weren't contacted. I should make that clear.

523. Q. Thank you for the clarification. Was the contact in an email?

A. Yes. It was in writing.

524. Q. Did you review the email that Ms. Hamelin sent out and the responses that she received?

A. I reviewed the email that she sent out and I did review the responses she received because I was asked to verify that there were no other notes that needed to be produced pursuant to the July Order. In that context, I did review the responses received.

525. Q. Those responses, did the members indicate whether the Statement on Vouchers was discussed?

A. They would have responded to that question because that was a question that was put to them but I didn't memorise the responses. Presumably if these documents were disclosed, it's because there was a chance that it was discussed. It was determined that they were responsive.

526. Q. Can we go to page 1 of Exhibit 16, please? Here we have Mr. Shaar's letter saying, "This letter is in response to the Order issued by Madam Justice Gleason on July 19th, 2022, more specifically paragraph 6 of that Order." Do you see that?

A. Yes.

527. Q. Can you confirm what search was done in relation to paragraph 6 of that Order?

A. Documents had already been collected in April in respect of this meeting and it had already been clear to the Agency at that time – I don't know what paragraph 6 of the Order specifically says so maybe I should --

528. Q. The July Order, Exhibit 3, documents associated with the March 24th, 2020, call.

A. And then the Reasons for the Order are – so you have the Reasons for the Order in paragraphs 42 and 43?

529. Q. It's in Madam Justice Gleason's Reasons. Paragraph 42 says, "From the response received from the CTA, it is unclear whether there were additional notes taken by CTA members, its Chairperson, or Vice Chairperson during the call beyond those that have been disclosed. Within five days of this Order that accompanies these Reasons, the CTA shall advise the parties and the court whether it has been able to determine if any such additional notes were taken. If the Respondent asserts a claim of privilege over any such documents within 10 days of the date of the Order that accompanies these Reasons, they shall make a motion for a ruling on its privilege claim following a procedure above."

Paragraph 43 is, "Following resolution of the issues with respect to notes taken during this call, I will rule on the balance of the Applicant's disclosure request made in respect of the March 24th, 2020, call if the CTA does not voluntarily disclose the additional documents sought by the Applicant in respect of that call. The Applicant shall forthwith advise the court if a ruling on the remainder of its disclosure request in respect of the March 24th, 2020, call is required following resolution of the issues in respect to the notes taken during this call."

A. Those two paragraphs, if I understand them,

refer to members' notes and as I understand it, it was clear to the Agency that the only notes collected from members in April were those that were already disclosed and so because each member had already been asked if they had taken notes and each member had responded and all responsive documents had already been disclosed as a result of the April Order. It only rested on – the only remaining thing to do was to double check that there were nothing in the collected documents from the April request to confirm that no notes remained.

That verification, that double checking was done but from the get-go, it had been that the notes were responsive had already been disclosed in April. We just double checked to make absolutely sure. By double check, I meant we looked back into the documents that had been received in response to the request that Ms. Hamelin had made.

530. Q. Can we go to document number 17, please? This is a document that has Meeting - March 23rd. Do you recall seeing this document previously?

A. Yes.

MR. LIN: Can we mark this as Exhibit 17, please?

EXHIBIT NO. 17: OneNote document of Alysia Lau entitled Meeting – Mar. 23.

531. Q. Can you tell me in what context you saw this

document?

A. Yes. I saw it after the additional search was done in response to the April Order.

532. Q. In terms of the third heading, Debriefs, there's the initials SS there. Do you have an idea who SS is?

A. That was likely Scott Streiner.

533. Q. In that same line, there's mention of TC. Any idea what TC stands for?

A. Likely Transport Canada.

534. Q. The whole line reads as follows, "TC indicated Agency moved faster than they expected. Other travel restrictions expected. Agreement between SS and MK that agencies/departments should not issue piecemeal decisions. Call this evening between TC and Agency officials."

Do you know who MK is?

A. I think possibly Michael Keenan.

535. Q. From Transport Canada?

A. I would think.

536. Q. These notes were from March 23rd, 2020, and here we see, "Call this evening between Transport Canada and Agency officials." Do you see that?

A. Yes.

537. Q. Did you enquire into whether there were discussions about the Statement on Vouchers or refunds at

that evening meeting on March 23rd?

A. Yes.

538. Q. When did you make that enquiry?

A. I made that enquiry in response to the October Order. There had been a scheduler and so I made an enquiry about what the contents of the discussion that took place between TC and the Agency were. I concluded that it was not, in fact, a responsive document and then I made a subsequent enquiry in April to double check my findings and I concluded that it was not a responsive document.

539. Q. On what basis did you conclude that it was not a responsive document?

A. That the Statement on Vouchers – it was not possible to confirm that the Statement on Vouchers had been actually discussed at that meeting. It appears that there was a different discussion.

540. Q. You say a different discussion. What was the discussion then?

A. My understanding at that time is that there was a need to share information on a number of topics because it was the beginning of a crisis and so there were topics that could be discussed such as the repatriation of passengers who were stranded abroad and that there would be a need to potentially share information or receive

information and I was not able to conclude that this was a responsive document but I did make the enquiry twice.

541. Q. You mentioned that there was a quote, unquote, scheduler. That's an Outlook calendar invite?

A. Yes.

542. Q. You were the attendees on that meeting? Do you recall?

MR. SHAAR: Are we getting into documents that haven't been disclosed because they are not responsive?

MR. LIN: I am asking Ms. Cuber because she said she reviewed it and we want to establish --

MR. SHAAR: You want to establish that it was responsive so you can ask her about who the attendees were.

MR. LIN:

543. Q. Ms. Cuber, what were the agenda items on the scheduler?

A. There was no agenda items.

544. Q. You say there could be a number of topics that could be discussed because it was at the beginning of the crisis, including repatriation. How would the CTA be involved in repatriation of Canadian passengers?

A. I don't know but I'm providing you with information that I received that helped me to determine that the document was non-responsive.

545. Q. Did you enquire with Transport Canada specifically about the meeting that occurred on March 23rd?

MR. SHAAR: Objection. She didn't enquire with anybody from Transport Canada. She enquired with people from the Agency. *O*

MR. LIN:

546. Q. Who at the Agency did you enquire with?

A. There were two people who provided me with information about that meeting. One of them was Ms. Robertson and one of them was Ms. Lagacé.

547. Q. Were they attendees of that meeting?

A. They were invited to the meeting and that's why I spoke to them to see if they had information that I could acquire about the topics or what the nature of the meeting was but like I said, on two separate occasions I was not able to determine that this was a responsive document but I made the enquiry twice.

548. Q. You say Ms. Lagacé and Ms. Robertson were invited to the meeting. Do you know if they attended?

A. I know that Ms. Lagacé attended the meeting but I do not know --

549. Q. What about Ms. Robertson?

A. I don't think she did attend the meeting.

550. Q. Do you know who else from the Agency would have attended the meeting?

A. I don't know who else from the Agency attended the meeting. I don't recall who was on the invitee list and I don't know who attended.

551. Q. Based on your enquiry with Ms. Lagacé, what was discussed at that meeting?

MR. SHAAR: Objection. Relevance. *O*

MR. LIN:

552. Q. Was the topic of refunds – sorry, Ms. Cuber. Go ahead.

A. I asked – I had a discussion about the responsiveness of this item because the document was before me but I was not able to conclude based on our discussions that it was a responsive document and so I could not produce it.

553. Q. Did you ask Ms. Lagacé if the topic of refunds was discussed at that meeting?

A. I had a discussion with her. She understood the scope of the order and I had a discussion with her about whether it was a responsive document and the conclusion was that it was not.

554. Q. Did you ask her if the issue of credit card chargebacks was discussed at that meeting?

MR. SHAAR: Objection. Relevance. *O*

MR. LIN: How is it irrelevant? The Air Canada and Air Transat letters both deal with that subject

matter.

MR. SHAAR: We're not getting into the merits here. We're talking about the search for documents.

MR. LIN: Yes. That's why I'm asking Ms. Cuber if she asked Ms. Lagacé if the topic of credit card chargebacks was discussed at the meeting with Transport Canada.

MR. SHAAR: I'm objecting. My witness is not going to answer the question. The only questions that are relevant here was what Ms. Cuber did to determine if this was responsive to the court's order and she told you that's what she did and that it wasn't. Now you're trying to delve into the contents of discussions surrounding the meeting that is not responsive. This is starting to look like a fishing expedition. We're not going to get into meetings that have nothing to do with the Statement on Vouchers. Credit card chargebacks is not the Statement on Vouchers. *O*

MR. LIN: I don't think we will be debating on that here. Certainly if Ms. Cuber does not wish to answer the question, we can bring an objections motion. Credit card chargebacks and the Statement on Vouchers are clearly well related.

MR. SHAAR: We maintain our objection.

MR. LIN: I refer you back you Exhibit 11 where

there is clear reference to the Air Transat getting pressure from creditors pushing the airlines for cash and requests that they be officially allowed to provide vouchers to passengers.

MR. SHAAR: Ms. Cuber told you about the enquiries she made to determine whether or not the Statement on Vouchers was discussed and she came to the conclusion that it wasn't so we're not going to talk about what was discussed if the Statement on Vouchers wasn't discussed.

MR. LIN:

555. Q. Ms. Cuber, I don't think I had a clear answer in terms of whether the topic of refunds to passengers was discussed at that Transport Canada meeting.

A. The discussion that I had was in light of the court's October Order and whether or not this was a responsive document. The discussion was is this responsive to the court's order and I concluded at the close of that discussion that it was not responsive to the court's order. I made a subsequent enquiry and the same conclusion was made. The discussion was in light of the court's order from October 15.

556. Q. Ms. Cuber, respectfully, you are not answering the question. You are stating the conclusion you had. The question was was the topic of refunds to passengers discussed at that Transport Canada meeting. Yes or no?

A. I guess I don't know. The conclusion that I came to was that the Statement on Vouchers was not the topic of discussion and it was not a meeting concerning – I could not conclude that this was a responsive document to the court's October Order.

557. Q. Did you ask Ms. Lagacé whether the topic of refunds to passengers was discussed at that meeting?

MR. SHAAR: Objection. We're not going to get into the topic of discussion between two counsel members. *O*

MR. LIN: Ms. Cuber has been discussing her discussions with Ms. Lagacé at length over the --

MR. SHAAR: Both are familiar with what was required by the April Order, that it was discussed, and they came to the conclusion that it was not a responsive document.

MR. LIN: We're not asking about Ms. Cuber's conclusion. We're asking about Ms. Cuber, "Did you ask Ms. Lagacé whether the topic of refunds to passengers was discussed at that Transport Canada meeting?" It's a yes or no answer. We are asking for facts, not legal opinion.

MR. SHAAR: If that would make it responsive then she asked that and concluded it was not responsive.

MR. LIN: Mr. Shaar, you can't answer for the witness. We're asking --

MR. SHAAR: You seem to be asking the same

question over and over again and you're unsatisfied with the answer that the affiant is giving. You might not like the answer but she's giving you her answer on the question so I don't see how circling around it and asking the question over and over again is productive.

MR. LIN: We're entitled to ask the question --

MR. SHAAR: And you've asked the question.

MR. LIN: And we haven't received an answer.

558. Q. Ms. Cuber, did you specifically ask Ms. Lagacé whether refunds to passengers was discussed at that Transport Canada meeting on the evening of March 23rd, 2020? Yes or no?

A. I didn't ask her if the topic of refunds were discussed. I talked to her about the topic of the meeting and about whether this document was a responsive document. As with many of the questions you asked, I didn't ask to a level of minute detail when it wasn't necessary.

559. Q. Why did you conclude it was not necessary?

A. Because I concluded that this was not a responsive document. I had a discussion with Ms. Lagacé and the conclusion that we came to was that this was not responsive. I was not able to find any other documents that would suggest that it was a responsive document and then I revisited the matter in April and the same conclusion was reached.

560. Q. You're saying, "We came to the conclusion." You and Ms. Lagacé collectively decided the conclusion? Is that what you're saying?

A. No. I mean I obtained the information and it made the answer apparent.

561. Q. What do you mean by "made the answer apparent"?

A. It wasn't a responsive document. I can't produce documents when I have no way to say this is responsive. I can't produce a document just because it's interesting. I have to produce responsive documents.

562. Q. It seems the conclusion is circular. You're saying it's not responsive and therefore it's not responsive and that's why you don't need to enquire. Isn't the object of an enquiry to determine whether something is responsive so you ask questions? What was discussed? Was this topic discussed? Was that topic discussed? Would you agree that's proper --

A. No. We discussed – I brought up the document. We had a discussion about whether it was responsive to the court's order and as a result of that discussion, the document was not produced because it was not responsive.

563. Q. Who determined it was not responsive?

A. I don't – I guess I determined based on our discussion that it was a not a responsive document and I

discussed it again.

564. Q. The document we are referring to is the schedule for that meeting, correct?

A. Yes.

565. Q. Did Ms. Lagacé refer to any other documents that were sent or received in relation to that meeting?

A. No.

566. Q. Was there an agenda for that meeting?

A. No. You've asked and I said that there was no agenda. There was no information. I had a discussion about it because there was no information about the contents – there was no agenda for the meeting that would lead me – I asked about it for that reason.

MR. LIN: I see the time right now. I propose we take a short 10-minute break and I'll review my notes in the meantime and hopefully we can wrap up shortly after the break. Does that work for everybody?

MR. SHAAR: Yes.

MR. LIN: Ten minutes, please. Just before we go off the record, Ms. Cuber, same reminder that you are still under cross-examination. Thank you, everyone.

(SHORT RECESS)

MR. LIN:

567. Q. Ms. Cuber, going back to this document again, Exhibit 17, when did you first come across this document?

A. I came across this document in April.

568. Q. April of this year?

A. Yes.

569. Q. We were talking about the bullet point just under Debriefs before our break. My next question also deals with that bullet point. It says there, "TC indicated Agency moved faster than they expected."

Did you make any enquiries into what that is referring to? What did Transport Canada mean by --

MR. SHAAR: Objection. This is going beyond the search for documents. This is beyond the scope of the cross-examination. You're getting into the content of material what Mrs. Cuber was not the author of. *O*

MR. LIN: Mr. Shaar, respectfully, the documents refer to the events that occurred and those lead to a trail of enquiry and that's why we're asking Ms. Cuber did she turn her mind to what that line says. That is the question.

MR. SHAAR: I think this goes beyond the scope of the search for documents. I maintain my objection.

MR. LIN:

570. Q. Ms. Cuber, did that line cause you to do any further enquiries?

MR. SHAAR: I've objected to the question. Mrs. Cuber's role was not to read every document that she

spotted and then make interpretations as to what other people had said. There is no indication in that line that there are other documents so there was no reason for Mrs. Cuber to pursue an investigation regarding that line. I suspect you're getting into the merits here so I am going to maintain my objection. *O*

MR. LIN: We'll certainly debate that on an objections motion.

571. Q. Let's take a step back. March 23rd, 2020, was a Monday. Do you agree, Ms. Cuber?

A. I don't disagree. I imagine that if March 21-22 was the weekend then the 23rd would have been a Monday.

572. Q. I guess we can agree on that. In terms of any meetings that occurred between Mr. Streiner or Ms. Jones and Transport Canada over that weekend, what enquiries have you made to find documents in relation to those meetings?

A. I've already described the enquiries that I made. I spoke with Ms. Robertson. I think I described that quite a lot. I asked Ms. Robertson if she had any documents that would be responsive to that component of the order in particular but not exclusively because as the Executive Coordinator of the Chair's Office, she might be best placed to answer that question or not answer the question but provide documents that might be responsive.

573. Q. Can you tell us how Ms. Streiner or Ms. Jones was able to schedule meetings with Transport Canada? This is about any written record in the Agency's possession.

MR. SHAAR: Objection. Relevance. How they were able to schedule meetings has nothing to do with Mrs. Cuber's search for documents. *O*

MR. LIN:

574. Q. Ms. Cuber, do you agree that your search for documents would encompass any documents in relation to the meetings Mr. Streiner or Ms. Jones would have had with Transport Canada officials during that weekend?

A. Yes. The October Order required disclosure of documents or documents sent to or from third parties or relating to any meetings attended by Agency members at which the subject matter of the Statement on Vouchers was discussed so yes.

575. Q. What did you do to satisfy yourself in terms of meetings with Transport Canada that weekend that there were no responsive documents?

A. I reviewed the 3,000 emails that we had. I reviewed the working copy from ATIP. I spoke with Lesley Robertson. I asked for an additional search to be done and I reviewed the documents that Transport Canada themselves had produced on the topic of meetings between the Agency and Transport Canada in order to see if there

was any evidence of meetings on that weekend and those were the steps that I took in order to try to determine whether there were any meetings that weekend. I also – those were the steps I took.

576. Q. But you did not directly ask Mr. Streiner or Ms. Jones whether there were meetings that weekend, correct?

A. I did not contact Mr. Streiner or Ms. Jones.

577. Q. Based on email chains that we have seen that the CTA has discussed, there were references to discussions over the weekend. Do you recall that?

A. I recall that there were references to discussion from the documents that we disclosed to you.

578. Q. To be clear, what we mean by discussion is discussions with officials at Transport Canada.

MR. SHAAR: Perhaps you can refer us to the document, Mr. Lin?

MR. LIN: It's the Agency documents, documents the Agency has disclosed. There was the email, for example, on March 20th, 2020, at 11:00 am, CTA Announcement Tomorrow. This was appended to the Agency's Motion Record for an informal motion to extend time on December 14th, 2021. That was when Ms. Cuber still had conduct of the file.

579. Q. Ms. Cuber, do you recall that motion, the

informal motion made by the AGC for extension of time?

A. Yes.

580. Q. In there they request an extension of time in relation to this email exchange between CTA and Transport Canada. Do you recall that?

MR. SHAAR: It's very difficult when you're not putting the email to the witness or so that I can see it myself.

MR. LIN: We can certainly send it out right away. Just one second. We'll send out the whole Motion Record.

581. Q. Ms. Cuber, you recall this informal motion that was made by the AGC, correct?

A. Yes.

MR. LIN: Can we have this marked as Exhibit 18, please?

EXHIBIT NO. 18: Motion Record of the Attorney General of Canada, Informal motion in writing for an extension of time to claim privilege over portions of two documents, December 14, 2021.

582. Q. When we go to page 9 of this PDF file, at the bottom, Caitlin Hurcomb's email on Monday, March 23rd at 10:15 am says, "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." Do you see that?

A. Yes.

583. Q. It is obvious from Ms. Hurcomb's email that she is referring to the Statement of Vouchers that would be issued on March 25th. Do you agree?

A. Yes, I think so.

584. Q. There is explicit reference here to Ms. Jones speaking with transport Canada's ADM over the weekend. Do you agree?

A. Yes.

585. Q. And then below on page 10, the initial email from Vincent Millette says, "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."

That is in relation to the Statement on Vouchers, do you agree?

A. Yes. I think so.

586. Q. Here we see there is reference in the email above to Ms. Jones having spoken to Transport Canada's ADM over the weekend in relation to the Statement on Vouchers topic. What steps did you take to find all documents

relating to that meeting Ms. Jones had with the ADM? Can you please explain?

A. I reviewed the documents that had been provided in the context of the Access to Information request and that included documents that would have been provided by the Analysis and Outreach Branch of which Marcia Jones was the branch head. If she had responsive documents then presumably they would have been provided at that time and then I asked for an additional search to be run in November of 2021 to see if there could be any other documents using search terms. Those were the main steps that I took. Those were the steps I took.

587. Q. Did you enquire on how Ms. Hurcomb would have known about Ms. Jones's discussion with the Transport Canada ADM?

A. No. I believe Caitlin Hurcomb left the Agency in September 2021. I know that she left the Agency and I believe it was in September 2021.

588. Q. Going back to the email on Sunday, March 22nd, the one immediately below from Mr. Millette, he is referencing the Statement on Vouchers on Sunday, March 22nd. It seems obvious that Transport Canada learned about the Statement on Vouchers that the Agency was developing during that weekend. Do you agree?

MR. SHAAR: Objection. When somebody from

Transport Canada learned about the Statement of Vouchers is a little bit beyond what the scope of what Mrs. Cuber is here to testify on. She can't testify as to when somebody learned something. *O*

MR. LIN: Mr. Shaar, respectfully, the October Order deals with documents and meetings with third parties and --

MR. SHAAR: I'm not disputing that. I'm disputing your last question which asks the affiant to say when Transport Canada learned about something.

MR. LIN: We're not asking Ms. Cuber exactly when Transport Canada learned of it. We're asking her did she take any steps to figure out how Transport Canada learned about this. What search have you conducted? Did you conduct specific --

MR. SHAAR: Why would she search for something about how Transport Canada learned about this? Her search was for responsive documents pursuant to a court order. None of those required her to learn how Transport Canada learned about this.

MR. LIN: When the CTA notified Transport Canada that the Statement on Vouchers was being issued, that would be a responsive document because it's a document to a third party in relation to the Statement on Vouchers.

MR. SHAAR: If the document existed, it would be

disclosed. Asking her to say when Transport Canada learned is not the same question.

MR. LIN:

589. Q. Ms. Cuber, did you make any specific searches – I'm not talking about the general searches like the November 2021 search you did or reviewing ATIP. We see here there is clear indication Transport Canada knew about the Statement on Vouchers as early as the weekend of March 22nd, 2020. What steps have you taken to search for documents during that weekend in relation to the Statement on Vouchers and notification to Transport Canada?

A. The steps that I took were to review the documents that we had from the Access to Information request that had been gathered at different times and in different ways in May and in November 2020, using searches in RDIMS, using requests to the Analysis and Outreach Branch and the Office of the Chair and CEO to provide responsive documents, and searches in Outlook. I relied on those.

I looked through the working copy that was 5,099 pages long. I asked Lesley Robertson specifically for information that she might have on this topic and I asked for IT to run an additional search with different search terms in order to see if there were any documents or hits in anybody else's email account that might still be

remaining and that might be responsive to this particular issue and to the order in general.

590. Q. You are stating that amongst the documents that you reviewed, you did not see documents where the CTA notified Transport Canada about the Statement on Vouchers?

A. I didn't see any document on this issue that wasn't produced. Every document that I found on this issue, which I searched for, every document that I found was produced to the parties.

591. Q. Let me ask you, you as the lawyer that's searching for documents, we see here that there's a reference to Transport Canada learning about the Statement on Vouchers on March 22nd. Would be reasonable for you to do further searches into what communications occurred between Transport Canada and the CTA during that weekend?

A. That was the one of the intentions of my search was to look for documents of that sort and I thought that the best way to do that was to carefully look through the already-gathered documents and to see if Ms. Robertson had any specific documents because she, as the Executive Coordinator of the Chair's Office, would be best placed to be able to provide any documents that might exist and she produced no – I produced the responsive documents that she gave me. I didn't have any documents on this topic that I didn't produce to the parties. These

are the documents that existed that were responsive to the court's order.

MR. LIN: Can we take a short break, maybe two minutes? I just want to review my notes off camera. Is that okay? I see Mr. Shaar nodding. Thank you.

(SHORT RECESS)

MR. LIN: Ms. Cuber, thank you for attending today. Subject to the requests that we made on the record and the objections, we will be adjourning today's cross-examination. Thank you.

-- THE EXAMINATION ADJOURNED AT THE HOUR OF 4:29 IN THE AFTERNOON.

WE HEREBY CERTIFY THAT the foregoing was transcribed to the best of our skill and ability.

.....

E.M. GILLESPIE / S.L. / S.P.

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

APPLICANT'S RECORD

VOLUME 2 of 3

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Court File No.: A-102-20

FEDERAL COURT OF APPEAL

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CANADIAN TRANSPORTATION AGENCY

Intervener

MEMORANDUM OF FACT AND LAW OF THE APPLICANT

PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. In March 2020, the Canadian Transportation Agency [**CTA**] and its appointed Members incepted and widely disseminated a misleading statement entitled "Statement on Vouchers" [**Statement on Vouchers**], purporting to be guidance, misinforming the public about passengers' legal rights to refunds for flights cancelled by airlines.

2. The CTA, including its appointed Members, acted for the improper purposes of:

(a) interfering with legal rights under provincial consumer protection laws and/or cardholder agreements to a credit card chargeback for services not received; and

(b) aiding airlines in withholding funds paid by passengers for flights the airlines already cancelled, and retaining that cash to shore up the airlines' balance sheets.

3. By giving the public a false sense of legitimacy to the airlines' unlawful actions, the CTA's Statement on Vouchers defeated existing federal laws for refunds and unlawfully interfered with passengers' credit card chargebacks and travel insurance claims.

4. The CTA's Statement on Vouchers was prompted by a Transport Canada email, forwarding Air Transat's request for an official endorsement of the airline withholding cash refunds, and subsequent requests by Air Canada and Air Transat that the CTA publicly state that "no refunds to passengers are required under the *APPR*." Senior CTA personnel had advised the CTA's chairperson and vice-chairperson that the CTA's endorsement would result in passengers receiving "useless vouchers" instead of refunds.

5. This Honourable Court should rebuke the conduct of the CTA and its Members, and protect the public interest in ensuring government bodies are acting in the interest of Canadians, and not the private financial interests of regulated for-profit businesses.

6. The Applicant, Air Passenger Rights [**APR**], is a non-profit entity that advocates for the rights of air passengers. APR seeks judicial review, in the public interest, of the CTA's Statement on Vouchers on two distinct grounds:

(a) **Reasonable Apprehension of Bias Ground** [**RAB Ground**] — the inception and/or dissemination of the Statement on Vouchers was contrary to the CTA's *Code of Conduct*, and/or gave rise to a reasonable apprehension of bias for the CTA as a whole, or the CTA's Members that endorsed the statement; and

(b) **Misinformation Ground** — the Statement on Vouchers misled the public about passengers' legal rights to refunds for flights already cancelled by the airlines.

7. The RAB Ground of judicial review is twofold: firstly, the pre-judgement by the CTA as an institution, or by its Members, regarding passengers' entitlement to refunds for flights already cancelled by airlines; and secondly, external third-party influence for the inception of the Statement on Vouchers, including airlines and Transport Canada.[1]

8. The Applicant seeks an order that the CTA retract the Statement on Vouchers and issue a corresponding correction notice, as well as an injunction enjoining the CTA and/or its Members from dealing with complaints relating to passenger refunds from the COVID-19 pandemic. Alternatively, the Applicant seeks declaratory relief.

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[1] *APR v. Canada (A.G.)*, 2021 FCA 201 at para. 17 [Tab 8, p. 1526].

B. The CTA, its Appointed Members, and the Members' *Code of Conduct*

9. The CTA is a body created by the *Canada Transportation Act* that administers regulatory schemes for transportation. In respect of air travel, the CTA has two main roles under the *Canada Transportation Act*: (i) as a quasi-judicial tribunal, it adjudicates consumer disputes between passengers and airlines; and (ii) as the economic regulator, it regulates entrants into the air travel industry through its statutory powers to issue operating licenses or permits to airlines.[2]

10. The CTA's enabling statute prescribes that the CTA is composed exclusively of its appointed Members, appointed by the Governor in Council. Appointed Members exercise the powers conferred upon the CTA by its enabling statute.[3] Appointed Members of the CTA are assisted by a roster of civil service staff, who are supervised by the appointed Members[4] and do not have independent authority to act on the CTA's behalf.

11. Two of the CTA's Members are designated as the chairperson and vice-chairperson.[5] The chairperson is also the chief executive officer, who has supervision over and direction of the work of the appointed Members and civil service staff.[6] At the material times for the impugned Statement on Vouchers, the CTA's chairperson was Mr. Scott Streiner and the CTA's vice-chairperson continues to be Ms. Elizabeth (Liz) Barker.

12. As a quasi-judicial body with substantial powers, the CTA's appointed Members must conform to a high standard of conduct similar to judicial members of a court, including maintaining independence, impartiality, and public confidence in their work.

13. The CTA's *Code of Conduct*, created pursuant to the *Public Servants Disclosure Protection Act*,[7] further reinforces the standard statutory and common law rules with specific safeguards of the appointed Members' independence, and prohibitions against

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2 *Lukács v. Canada (Transp. Agency)*, 2014 FCA 76 at paras. 50-52 [Tab 32, p. 2128].
3 *Canada Transportation Act*, ss. 7(2) and 16 [Appendix A, pp. 1353 and 1355].
4 *Canada Transportation Act*, s. 19 [Appendix A, p. 1356].
5 *Canada Transportation Act*, s. 7(3) [Appendix A, p. 1353].
6 *Canada Transportation Act*, s. 13 [Appendix A, p. 1354].
7 *Public Servants Disclosure Protection Act*, s. 6 [Appendix A, p. 1385].

outside influence and conduct that might create a reasonable apprehension of bias:

> (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.
>
> (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.[8]

14. In addition, the CTA's *Code of Values and Ethics* acknowledges that the CTA is guided by "**Integrity** - We act with honesty, fairness, impartiality and transparency."[9]

C. Relevant Background for this Judicial Review Application

i. Airlines' Cancellation of Flights Without Refunds to Passengers

15. On March 11, 2020, the World Health Organization declared COVID-19 a global pandemic. Two days later, on March 13, the Government of Canada issued a travel advisory against non-essential travel abroad and also restricted entry of foreign nationals into Canada. At the same time, the Government of Canada also urged Canadians to stay home unless absolutely necessary, in order to stem the spread of COVID-19.[10]

16. Between around March 16-22, 2020, major Canadian airlines announced the cancellation of some or all of their flights. On March 16, 2020, WestJet announced

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[8] *Code of Conduct for Members of the Agency*, paras. 9 and 39-40 – Lukács Affidavit, Exhibit "40" (emphasis added) [Tab 2(40), p. 624].

[9] Lukács Affidavit, Exhibit "41" (emphasis added) [Tab 2(41), p. 628].

[10] Lukács Affidavit, Exhibits "14"-"16" [Tabs 2(14)-2(16), pp. 392-401]

it was cancelling transborder and international flights as of March 22, 2020. Around March 17, 2020, Sunwing cancelled all southbound flights up to April 30, 2020. On March 18, 2020, Air Transat announced it was cancelling flights until April 30, 2020. On March 19, 2020, Swoop (a subsidiary of WestJet) announced it was cancelling transborder and international flights until October 24, 2020. On or around March 22, 2020, Air Canada announced cancellation of some of its flights.[11]

17. Between March 18-21, 2020, major Canadian airlines announced that they would be issuing vouchers with a two-year validity period for cancelled flights:

(a) On March 18, 2020, Air Transat announced that passengers whose flights were cancelled would receive a credit with 24-month expiry.[12]

(b) On March 18, 2020, Air Canada advised travel agents of a change to its cancellation policy and passengers with cancelled flights would instead receive a credit with 24-month expiry. Air Canada also urged travel agents to "refrain from actioning or refunding tickets affected by this schedule change."[13]

(c) On March 18, 2020, WestJet advised travel agents that WestJet was updating its existing cancellation policy and was "not processing refunds to original form of payment at this time." On or before March 21, 2020, WestJet announced that passengers with cancelled flights would receive a credit with 24-month expiry.[14] Although WestJet already announced its flight cancellations on March 16, 2020, WestJet claimed that it was still up to passengers to cancel their reservations.[15] Swoop also announced a substantially similar policy as WestJet.[16]

(d) On or before March 21, 2020, Sunwing stated that passengers would receive a credit valid for 24 months, and not a refund in the original form of payment.[17]

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[11] Lukács Affidavit, Exhibits "17"-"25" [Tabs 2(17)-2(25), pp. 403-551].
[12] Lukács Affidavit, Exhibit "19" [Tab 2(19), p. 519].
[13] Lukács Affidavit, Exhibits "26"-"27" [Tabs 2(26)-2(27), pp. 553-559].
[14] Lukács Affidavit, Exhibits "30"-"31" [Tabs 2(30)-2(31), pp. 574-577].
[15] Lukács Affidavit, Exhibits "24" &"31" [Tabs 2(24) & 2(31), pp. 548 & 577].
[16] Lukács Affidavit, Exhibits "23" & "28"-"29" [Tabs 2(23) & 2(28)-2(29), pp. 543 and 566-570].
[17] Lukács Affidavit, Exhibit "21" [Tab 2(21), p. 530].

ii. Federal Laws on Passenger Refunds in March 2020

18. The regulatory scheme governing the transportation of passengers within, to, and from Canada requires each airline to establish a tariff setting out its terms and conditions.[18] The tariff is a contract between the airline and its passengers.[19]

19. Since at least 1988, the tariff must include terms and conditions relating to:

> refunds for services purchased but not used, whether in whole or in part, either as a result of the client's unwillingness or inability to continue or the air carrier's inability to provide the service **for any reason**;[20]

20. The *Act* and the *ATR* stipulate that an airline's tariff provisions must be reasonable.[21] As part of its quasi-judicial function, the CTA has rendered decisions on whether airlines' tariff provisions are reasonable.[22] Such decisions may be registered with the Federal Court and be given the force of a judgment of that court.[23]

21. Since 2004, the CTA has rendered four quasi-judicial decisions reiterating that an airline's tariff is not reasonable if it does not respect a passenger's "fundamental right" to a refund for unused portions of a ticket when the airline is unable to provide the services within a reasonable time [**CTA Refund Jurisprudence**]:[24]

(a) *Re: Air Transat*, CTA Decision No. 28-A-2004;[25]

(b) *Lukács v. Sunwing Airlines Inc.*, CTA Decision No. 313-C-A-2013;[26]

(c) *Lukács v. Porter Airlines Inc.*, CTA Decision No. 344-C-A-2013;[27] and

(d) *Lukács v. Porter Airlines Inc.*, CTA Decision No. 31-C-A-2014.[28]

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[18] *Air Transportation Regulations* [***ATR***], s. 111(1) [Appendix A, p. 1346]; and *Canada Transportation Act* [***Act***], s. 67.2(1) [Appendix A, p. 1365].
[19] *Lukács v. Canada (CTA)*, 2015 FCA 269 at para. 20 [Tab 33, p. 2133].
[20] *ATR*, ss. 107(1)(n)(xii) and 122(c)(xii) (emphasis added) [Appendix A, pp. 1344 and 1348].
[21] *ATR*, s. 111(1) [Appendix A, p. 1346]; and *Act*, s. 67.2(1) [Appendix A, p. 1365].
[22] *ATR*, s. 113 [Appendix A, p. 1347]; and *Act*, s. 67.2(1) [Appendix A, p. 1365].
[23] *Act*, s. 33 [Appendix A, p. 1358].
[24] Lukács Affidavit, paras. 14-15, containing key excerpts [Tab 2, pp. 19-21].
[25] Lukács Affidavit, Exhibit "6" [Tab 2(6), p. 204].
[26] Lukács Affidavit, Exhibit "3" [Tab 2(3), p. 124].
[27] Lukács Affidavit, Exhibit "4" [Tab 2(4), p. 132].
[28] Lukács Affidavit, Exhibit "5" [Tab 2(5), p. 160].

22. The CTA Refund Jurisprudence has not been overtaken or otherwise overturned, and the legislative provisions underlying the interpretation remain in full force and effect. The *Air Passenger Protection Regulations* [***APPR***], promulgated in 2019, are deemed to form part of an airline's tariff in so far as the tariff does not provide more advantageous terms and conditions of carriage than those obligations specified in the *APPR*.[29] An airline's underlying legal obligation to clearly set out in the tariff reasonable terms and conditions relating to refunds due to "the air carrier's inability to provide the service for any reason" has remained unchanged, although it was renumbered.[30]

iii. Quebec-based Airlines are Trustees of Passengers' Funds

23. Both Air Canada and Air Transat are headquartered and based in the province of Quebec. The Quebec *Consumer Protection Act* stipulates that:

> **256.** Any sum of money collected from a consumer by a merchant under a contract that stipulates that the principal obligation of the merchant is to be performed more than two months after the contract is made shall be transferred in trust. The merchant is the trustee of the sum and must deposit it in a trust account until the principal obligation has been performed.[31]

iv. Rights to a Credit Card Chargeback for Services Not Performed

24. Passengers who purchased air travel using their credit cards and who did not receive the services they paid for have recourse in two manners. The standard cardholder agreements between a credit card company and a consumer typically include a right for the consumer to a chargeback of the funds if the merchant does not provide the service and refuses to provide a refund [**Contractual Chargeback**].[32] In addition, consumer protection laws in every province, except PEI and NB, provide consumers with a statutory right to a chargeback in various circumstances [**Statutory Chargeback**].[33]

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[29] *Act*, s. 86.11(4) [Appendix A, p. 1368].
[30] *ATR*, ss. 107(1)(n)(xii) and 122(c)(xii) (emphasis added) [Appendix A, pp. 1344 and 1348].
[31] *Consumer Protection Act*, CQLR c. P-40.1, s. 256 [Appendix A, pp. 1431 and 1437].
[32] Lukács Affidavit, paras. 93 and 208 [Tab 2, pp. 48 and 103].
[33] See excerpts of provincial laws [Appendix A, pp. 1387-1448]; see also discussion on the Internet Sales Contract Harmonization Template [Tab 47, p. 2393].

D. The CTA's Inception of the Statement on Vouchers

25. Around the same time as the airlines were uniformly announcing a new practice of issuing vouchers with 24-month validity instead of a refund for flights that they cancelled,[34] the CTA received multiple requests from airlines and the travel industry that the CTA publicly state that passengers have no right to refunds for flights cancelled by the airlines and that the CTA endorse the airlines' new practices [**Industry Requests**].[35]

26. The CTA knew that the purpose of the Industry Requests was to defeat passengers' right to credit card chargebacks.[36] Some CTA Members were advised that obliging the Industry Requests would leave affected passengers with "useless vouchers."[37]

27. After internal and external communications detailed below, which included undocumented meetings with Transport Canada [**TC**] over the weekend of March 21-22, 2020, the CTA obliged the Industry Requests by issuing the Statement on Vouchers.

i. External Requests from Air Transat and TC (Mar. 18, 2020)

28. The CTA received an encrypted email from TC conveying Air Transat's request that "we officially let [Air Transat] to provide vouchers to passengers instead of providing [passengers] cash because they literally do not have enough cash to give refunds."[38]

29. Shortly after TC's email, CTA and TC personnel had a "side exchange" about Air Transat possibly amending its tariff to stipulate the issuance of vouchers instead of cash refunds. The CTA personnel noted the 45-day statutory notice period before an amended tariff takes effect, and that an amended tariff must still be reasonable.[39]

30. On the evening of March 18, 2020, Mr. George Petsikas (Transat A.T.'s Senior

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[34] See paragraph 17, *supra*.
[35] Lukács Affidavit, paras. 88, 93, 117, 119, and 126 [Tab 2, pp. 44, 48, 60, 61, and 65].
[36] Lukács Affidavit, paras. 93, 103, 117, and 119 [Tab 2, pp. 48, 53, 60, and 61].
[37] Lukács Affidavit, paras. 121-122 [Tab 2, pp. 62-63].
[38] Lukács Affidavit, para. 88 (emphasis added) [Tab 2, p. 44].
[39] Lukács Affidavit, para. 91 [Tab 2, p. 46].

Director of Government and Industry Affairs) had a lengthy call with Ms. Marcia Jones, the CTA's then Chief Strategy Officer. Mr. Petsikas requested that the CTA recognize vouchers to pre-empt passengers from making credit card chargebacks.[40] Mr. Petsikas's call with Ms. Jones, and the nearly contemporaneous email documenting that call, was not disclosed in the Communication Reports filed with the Lobbying Commissioner.[41]

31. For Transat A.T.'s request, the CTA's then chairperson, Mr. Streiner, stated that "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."[42] Transat A.T.'s request would be discussed at the daily Executive Committee [**EC**] meeting the next day.

ii. CTA's EC Meeting Discussion about Airline Refunds (Mar. 19, 2020)

32. At the CTA's EC meeting, as part of the "Debriefs - External", the meeting notes state that air carriers were claiming that nothing was within their control and that the air carriers wanted the CTA "to clarify that they are not required to refund." At the same meeting, the CTA's Senior Special Project Officer also noted the preference for vouchers given airlines' cash flow issues. The EC meeting notes indicate that no discussion or consideration took place at that meeting about the unfairness for passengers to be deprived of their cash.[43]

33. Mr. Petsikas followed up with Ms. Jones on Transat A.T.'s urgent request from the previous evening. Ms. Jones indicated that "[p]lease rest assured we are looking into this [...] We do appreciate how much pressure you are facing." She promised to provide Mr. Petsikas with any updates.[44] The exchange between Mr. Petsikas and Ms. Jones was not disclosed in the Communication Reports filed with the Commissioner of Lobbying.[45]

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[40] Lukács Affidavit, paras. 92-93 [Tab 2, pp. 47-48].
[41] Lukács Affidavit, paras. 148(a) and 149 [Tab 2, p. 76].
[42] Lukács Affidavit, para. 94 [Tab 2, p. 49].
[43] Lukács Affidavit, para. 96 [Tab 2, p. 50].
[44] Lukács Affidavit, paras. 97-98 [Tab 2, p. 51].
[45] Lukács Affidavit, paras. 148(a) and 149 [Tab 2, p. 76].

iii. The Statement on Vouchers Initiative is Parked (Mar. 20, 2020)

34. At the daily EC meeting on March 20, 2020, Ms. Jones was assigned the task to "[p]repare and circulate draft statement with respect to air passenger refunds and vouchers during COVID-19." However, at 5:00 p.m. Mr. Streiner instructed to remove this task "since we're not quite sure yet what will be done on this front or how."[46]

iv. Air Transat Repeats its Request to the CTA (Mar. 21, 2020)

35. Mr. Petsikas followed up again with Ms. Jones regarding Transat A.T.'s request, stating that recognizing the newly announced practice of providing vouchers for flights the airline cancelled was essential to avoid credit card chargebacks from passengers. There was no record of a response from Ms. Jones, but Ms. Jones circulated Mr. Petsikas's email to other CTA personnel.[47] Mr. Petsikas's further follow-up was not recorded in the Communication Reports filed with the Commissioner of Lobbying.[48]

v. CTA's Weekend Meetings with Transport Canada (Mar. 21-22, 2020)

36. Around the weekend of March 21-22, 2020, after Mr. Streiner had already parked the idea of drafting the Statement on Vouchers, a number of undocumented meetings occurred between CTA's personnel and officials at TC regarding the Statement on Vouchers [**TC-CTA Weekend Meetings**]:

(a) Mr. Streiner met with the Deputy Minister [**DM**] of Transport, Mr. Michael Keenan, and the Minister of Transport's Chief of Staff, Mr. Marc Roy.[49]

(b) Ms. Jones met with the Assistant DM of Transport, Mr. Lawrence Hanson.[50]

37. The occurrence of the meetings between TC and CTA are corroborated by other CTA and TC records. In the early afternoon of Sunday March 22, 2020, TC officials indicated they already knew about the draft Statement on Vouchers that Mr. Streiner

[46] Lukács Affidavit, paras. 101-102 [Tab 2, p. 53].
[47] Lukács Affidavit, para. 103 [Tab 2, p. 53].
[48] Lukács Affidavit, paras. 148(a) and 149 [Tab 2, p. 76].
[49] Lukács Affidavit, paras. 111 and 112(a)-(b) [Tab 2, pp. 57-58].
[50] Lukács Affidavit, paras. 111 and 112(c) [Tab 2, pp. 57-58].

circulated within the CTA that same morning.[51] There was no paper trail on how TC learned about it. At the Monday March 23, 2020 EC meeting, Mr. Streiner provided a debrief of his meeting and Mr. Streiner's "agreement" with Mr. Keenan. Mr. Streiner also conveyed TC's praise for the CTA acting faster than TC had expected.[52]

vi. CTA Members Approve Draft Statement on Vouchers (Mar. 22, 2020)

38. Mr. Streiner circulated the first draft of the Statement on Vouchers to senior CTA personnel early on Sunday morning. Around the same time, Mr. Streiner scheduled an "Urgent Debrief" with the senior CTA personnel for 10:30 a.m. on that morning.[53]

39. After the "Urgent Debrief" with senior CTA personnel, Mr. Streiner circulated the draft Statement on Vouchers to the CTA's Members for their comment and approval. Mr. Streiner noted that *after* **"discussion with other federal players"** the CTA was considering issuing the Statement on Vouchers. On the same day, the CTA's Members commented on the draft Statement on Vouchers and expressed their approval thereof.[54]

40. Mr. Streiner and Ms. Barker, who were part of the CTA's EC and also Members, were fully aware that it would be unfair for passengers to be deprived of a cash refund.[55]

vii. Further Industry Requests to Endorse Vouchers (Mar. 22-23, 2020)

41. On the afternoon of Sunday March 22, the Chairman, President, and CEO of Transat A.T. (Mr. Jean-Marc Eustache) substantially repeated Mr. Petsikas's request from March 18, 2020 that the CTA assist in pre-empting credit card chargebacks by publicly recognizing that: (1) all cancellations were outside of the airlines' control and no refunds were required under the *APPR*; and (2) vouchers in lieu of cash refunds was acceptable.[56] Upon receipt, Mr. Streiner forwarded Transat A.T.'s request to the EC.[57]

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[51] Lukács Affidavit, paras. 110 and 104 [Tab 2, pp. 56 and 54].
[52] Lukács Affidavit, para. 128 [Tab 2, p. 66].
[53] Lukács Affidavit, paras. 104-105 [Tab 2, p. 54].
[54] Lukács Affidavit, paras. 106-108 [Tab 2, pp. 54-56].
[55] Lukács Affidavit, para. 109 [Tab 2, p. 56].
[56] Lukács Affidavit, para. 117 [Tab 2, p. 60].
[57] Lukács Affidavit, para. 118 [Tab 2, p. 61].

42. On Monday March 23, the Executive Vice President, International & Regulatory Affairs & Chief Legal Officer of Air Canada (Mr. David Shapiro) sent Mr. Streiner a "Private and Confidential" letter substantially repeating Transat A.T.'s aforementioned request, using identical wording as Transat A.T.[58]

43. On the evening of Sunday March 22, the Vice President of Advocacy and Member Relations of the Association of Canadian Travel Agencies [**ACTA**], Ms. Heather Craig-Peddle, requested the CTA to "assist with going to the banks and credit card companies for prevention of credit card chargebacks [...]."[59] Although the CTA marked ACTA's email for follow-up, there is no record of the CTA refusing ACTA's inappropriate request nor of any other effort by the CTA to distance itself from that request.

44. Transat A.T.'s request, Air Canada's request, and ACTA's request were not disclosed in the Communication Reports filed with the Commissioner of Lobbying.[60]

viii. CTA's Discussions on "Useless Vouchers" and Discouraging Passenger Complaints (Mar. 23, 2020)

45. On the morning of March 23, after the airlines already uniformly announced a new practice of issuing vouchers with 24-month validity instead of a refund for flights that the airlines themselves already cancelled,[61] Mr. Streiner started a discussion about what the CTA would say in the Statement on Vouchers regarding expiry of vouchers.

46. As part of the CTA's discussion on expiry of vouchers, at least two senior CTA personnel referred to airlines issuing "useless vouchers" and the CTA's Chief of Staff, Mr. Sebastien Bergeron, noted "[a]llowing airlines to give vouchers instead of cash is already a big move."[62] The CTA's EC personnel also emphasized that they "[d]o not want to solicit air travel complaints."[63]

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[58] Lukács Affidavit, paras. 126 and 118 [Tab 2, pp. 65 and 61].
[59] Lukács Affidavit, para. 119 (emphasis added) [Tab 2, p. 61].
[60] Lukács Affidavit, paras. 149-151 [Tab 2, pp. 76-77].
[61] See paragraph 17, *supra*.
[62] Lukács Affidavit, Exhibit "71" (emphasis added) [Tab 2(71), p. 728].
[63] Lukács Affidavit para. 128 [Tab 2, p. 66].

ix. CTA Members Meeting about "Asks" from Airlines (Mar. 24, 2020)

47. Mr. Streiner circulated a comparison table of the "asks" from both Transat A.T.'s and Air Canada's letters.[64] This table was before the CTA Members at their March 24 meeting. One of the CTA Members annotated the table stating that the airlines' ask that flight cancellations be recognized as being outside of the airlines' control and that no refunds were required were "[a]lready addressed through the Agency's statement."[65]

x. The CTA Publishes the Statement on Vouchers (Mar. 25, 2020)

48. Prior to the publication of the Statement on Vouchers and after considering the airlines' "asks", Mr. Streiner (Chair) and Ms. Barker (Vice-Chair) summarily concluded that the Statement on Vouchers encapsulated "the sort of interpretation the Agency might could [*sic*] conceivably in future adjudications."[66]

49. Both Mr. Streiner and Ms. Barker knew that the Statement on Vouchers was not a regulatory guidance, but Ms. Barker supported exaggerating the character of the Statement on Vouchers so that members of the public would perceive it as guidance.[67]

50. Mr. Streiner made one final addition to the Statement on Vouchers regarding expiry dates that "24 months would be considered reasonable in most cases," echoing the airlines' recently announced practice of issuing vouchers with 24-month expiry.[68]

51. Ultimately, the Statement on Vouchers was published on the CTA's website at approximately 2:00 p.m.[69] Immediately thereafter, Ms. Jones announced to various industry stakeholders, including Mr. Petsikas (Transat A.T.), that "the CTA has released a statement providing guidance." Mr. Petsikas promptly thanked the CTA "for turning this around and getting it out the door" (emphasis added).[70]

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[64] Lukács Affidavit, Exhibit "76" [Tab 2(76), p. 757].
[65] Lukács Affidavit, Exhibit "77" [Tab 2(77), p. 760].
[66] Lukács Affidavit, para. 138 [Tab 2, p. 72].
[67] Lukács Affidavit, paras. 139-140 [Tab 2, p. 73].
[68] Lukács Affidavit, para. 141 [Tab 2, p. 73].
[69] Lukács Affidavit, para. 76 [Tab 2, p. 39].
[70] Lukács Affidavit, para. 143 and Exhibit "87" [Tabs 2 and 2(87), pp. 74 and 791].

52. At 3:53 p.m., the CTA received an urgent media inquiry from the CBC, requesting authentication of the Statement on Vouchers, as the statement had no name attached to it and did not state "on what legislative basis it is endorsing credits and not refunds." The CBC reporter also brought to the CTA's attention passengers' fundamental right to a refund, recognized in the CTA Refund Jurisprudence. The CBC's urgent inquiry was forwarded to senior CTA personnel, but there is no record of any action being taken thereafter.[71] There is no record of any discussion within the CTA about the CTA Refund Jurisprudence before the Statement on Vouchers was issued either.

E. The CTA's Partial Backtracking After this Application was Filed

53. On April 22, 2020, the CTA published a new Frequently Asked Questions page [**New FAQs Page**] for the Statement on Vouchers,[72] and added a URL to it at the bottom of the Statement on Vouchers. The New FAQs Page is inconsistent with the facts at the time the Statement on Vouchers was published and introduces further contradictions.

(a) The New FAQs Page claims that the Statement on Vouchers "offers suggestions to airlines and passengers," when the CTA stated internally that the Statement on Vouchers was intended to be perceived as regulatory guidance.[73]

(b) The New FAQs Page claims that the Statement on Vouchers was to protect passengers from "a serious risk that passengers would simply end up out-of-pocket" for flights the airlines cancelled, but the airlines were already issuing 24-month vouchers *before* the Statement on Vouchers was contemplated.[74]

(c) The New FAQs Page's stated purpose was to answer frequent questions, but its true purpose was to "diffuse legal risk head on" in relation to this Application.[75]

(d) The New FAQs Page claims that the USA and the EU impose a "minimum obligation for airlines to issue refunds when flights are cancelled for reasons outside

[71] Lukács Affidavit, paras. 145-146 [Tab 2, pp. 74-75].
[72] Lukács Affidavit, Exhibit "115" [Tab 2(115), p. 946].
[73] Lukács Affidavit, paras. 139-140 (emphasis added) [Tab 2, p. 73].
[74] See paragraph 17, *supra*.
[75] Lukács Affidavit, paras. 178-180 [Tab 2, p. 89].

their control" but no such obligations exist in Canada. The CTA was aware of the CTA Refund Jurisprudence on the "fundamental right" to a refund.[76]

(e) The New FAQs Page claims that each case will be decided on its merits, but at the same time presumed or assumed that the flights the airlines themselves cancelled were cancelled "for reasons beyond airlines' control" under the *APPR*.

54. On or about November 16, 2020, the CTA changed the Statement on Vouchers again [**Revamped Statement on Vouchers**]. The Revamped Statement on Vouchers incorporated the New FAQs Page immediately below the Statement on Vouchers rather than as a separate URL link. The Revamped Statement on Vouchers also added a new textbox emphasizing that the Statement on Vouchers was a "non-binding statement."[77]

55. The Revamped Statement on Vouchers continued to (mis)represent that "the law does not require airlines to include refund provisions in their tariffs for flights that are cancelled for reasons beyond their control," when the CTA was aware of the CTA Refund Jurisprudence and ss. 107(1)(n)(xii) and 122(c)(xii) of the *ATR*.[78]

56. The CTA did not update the modified date for the Statement on Vouchers when the New FAQs Page or the Revamped Statement on Vouchers were introduced.[79]

57. Although some non-mainstream media learned about the New FAQs Page,[80] there is no evidence of the CTA announcing the New FAQs Page to any of its stakeholders (i.e., the airlines and travel industry). There is similarly no evidence of any attempt by the CTA to announce the Revamped Statement on Vouchers.

58. Mr. Streiner acknowledged to a Parliamentary committee that "[t]he statement contains suggestions, and only suggestions" and that it was not appropriate for him to provide an interpretation of legislation outside the CTA's quasi-judicial process.[81]

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[76] See paragraph 21, *supra*.
[77] Lukács Affidavit, paras. 183-185 [Tab 2, pp. 90-91].
[78] Lukács Affidavit, para. 186 [Tab 2, p. 91]; see also paragraphs 19-21, *supra*.
[79] Lukács Affidavit, para. 187 [Tab 2, p. 92].
[80] Lukács Affidavit, paras. 181-182 [Tab 2, p. 90].
[81] Lukács Affidavit, para. 213 [Tab 2, p. 106].

F. The Statement on Vouchers' Prejudice to and Impacts on Passengers

59. The CTA's Statement on Vouchers was published near the start of the COVID-19 pandemic when Canadians were facing unemployment and significant economic uncertainty due to lockdowns from coast to coast. The CTA's broad dissemination of the Statement on Vouchers created a ripple effect of passengers being denied any non-judicial recourse for the airlines' refusal to refund their monies, including being denied credit card chargebacks and travel insurance claims being put into disarray.

i. CTA's Broad Dissemination of the Statement on Vouchers

60. Once the Statement on Vouchers was published, the CTA sent a template response regurgitating it in reply to passengers emailing for assistance, without directly answering passengers' specific questions.[82] The CTA also began to indiscriminately respond to passengers' public social media posts by stating "please refer to this link that will answer your question [...]," with a URL link to the Statement on Vouchers.[83]

61. The CTA included in its automated acknowledgment of receipt of formal complaints from passengers a link entitled "Statement on Vouchers for flight disruptions" under the heading "Air carriers' obligations during the global COVID-19 pandemic."[84]

ii. Airlines Using the Statement on Vouchers to Stonewall Passengers

62. The major Canadian airlines began citing the Statement on Vouchers to passengers as justification for refusing refunds for flights the airlines themselves cancelled.

(a) Sunwing's FAQ to its travel agents claimed that the Statement on Vouchers was a CTA ruling that supported Sunwing in refusing refunds to passengers.[85]

(b) WestJet represented that the CTA approved vouchers instead of refunds.[86]

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[82] Lukács Affidavit, paras. 153-159 [Tab 2, pp. 78-80].
[83] Lukács Affidavit, para. 152 [Tab 2, p. 77].
[84] Lukács Affidavit, para. 160 [Tab 2, p. 80].
[85] Lukács Affidavit, para. 161 [Tab 2, p. 81].
[86] Lukács Affidavit, para. 162 [Tab 2, p. 82].

(c) Air Canada simply referred passengers to the Statement on Vouchers, and stated that Air Canada's policy was supported by the CTA.[87]

(d) Air Transat stated that the CTA had issued an opinion supporting Air Transat's approach to issuing vouchers instead of refunds.[88]

iii. Travel and Insurance Industry Citing the Statement on Vouchers

63. An article entitled "Tactful and tough, agents have effective strategies for refund demands" appeared in travel agents' trade publications, outlining how travel agents can use the Statement on Vouchers to coerce a passenger to forego their credit card chargeback, and blaming passengers for not purchasing travel cancellation insurance.[89]

64. The insurance industry also released an advisory stating that the Statement on Vouchers would in many instances negate any insurable loss under the travel cancellation insurance policies and recommending to refer the policyholder back to the CTA or the travel provider.[90]

iv. Credit Card Chargebacks Derailed by the Statement on Vouchers

65. Major Canadian airlines invoked the Statement on Vouchers to dispute passengers' credit card chargebacks for flights that the airlines themselves cancelled.

66. WestJet responded to credit card chargebacks using a template letter invoking the Statement on Vouchers [**WestJet Template Letter**]. The WestJet Template Letter acknowledged that WestJet cancelled the flights and stated that WestJet was "following [the CTA's] guidelines" (i.e., the Statement on Vouchers) that endorsed issuing of vouchers instead of providing cash refunds. The WestJet Template Letters were sent after the CTA's New FAQs Page was published on April 22, 2020, but WestJet provided credit card companies a copy of the outdated March 25, 2020 Statement on Vouchers.[91]

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[87] Lukács Affidavit, paras. 163-164 [Tab 2, p. 82].
[88] Lukács Affidavit, para. 165 [Tab 2, p. 83].
[89] Lukács Affidavit, para. 168 [Tab 2, p. 84].
[90] Lukács Affidavit, para. 169 [Tab 2, p. 86].
[91] Lukács Affidavit, paras. 190-192 [Tab 2, pp. 93-95].

67. On or around September 10, 2020, WestJet responded to at least one credit card chargeback with a set of lengthy legal submissions that repeatedly invoked the Statement on Vouchers claiming that, according to the CTA, vouchers "is an acceptable form of refund" and that it was part of the CTA's policies.[92]

68. Similarly to WestJet, Swoop also claimed in response to a credit card charge-back that "[a]ccording to the [CTA], a future travel credit or Airline Dollars is an acceptable form of refund [...]."[93]

69. Air Canada invoked the Statement on Vouchers in response to a credit card chargeback, and touted it as "the [CTA]'s guidance" that supports Air Canada's policy to withhold refunds from passengers whose flights Air Canada itself had cancelled.[94]

70. In response to a credit card chargeback, Transat A.T. claimed that "no refund to credit card is due as passenger is credited with future travel credit valid for 24 months" and cited the CTA's Statement on Vouchers in support of its position.[95]

71. Some credit card issuers, such as Amex, relied on the CTA's Statement on Vouchers for the proposition that passengers who were offered vouchers cannot seek a credit card chargeback. Amex even inserted text from the Statement on Vouchers into its template letters refusing customers' credit card chargebacks.[96]

PART II – STATEMENT OF THE POINTS IN ISSUE

72. The four issues to be decided on this Application are:

(a) whether Air Passenger Rights should be granted public interest standing;

(b) whether the inception and/or issuance of the Statement on Vouchers gave rise to a reasonable apprehension of bias;

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92 Lukács Affidavit, paras. 193-195 [Tab 2, pp. 95-96].
93 Lukács Affidavit, para. 197 [Tab 2, p. 97].
94 Lukács Affidavit, para. 196 [Tab 2, p. 96].
95 Lukács Affidavit, para. 198 [Tab 2, p. 97].
96 Lukács Affidavit, paras. 199-204 [Tab 2, pp. 97-98].

(c) whether the Statement on Vouchers misinformed the public and/or passengers on the right to a refund from air carriers; and

(d) the appropriate remedies to be granted on this Application.

PART III – STATEMENT OF SUBMISSIONS

A. Air Passenger Rights Should Be Granted Public Interest Standing

73. The principle that all holders of public power are to be accountable for their exercise of power rests at the heart of Canadian democracy and the rule of law.[97] "L'etat, c'est moi" and "trust us, we got it right" have no place in Canadian democracy. Those who wield public power cannot be a law unto themselves, immunized from truly independent review and shielded from meaningful scrutiny.[98]

74. Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure they do not overstep their legal authority. Judicial review therefore functions to uphold the rule of law and maintain legislative supremacy.[99]

75. Public interest standing is a means of upholding the principle of legality, which requires that state action must conform to statutory authority and that there must be practical and effective ways to challenge the legality of state action. Public interest standing ensures that state action is not immunized from judicial review.[100]

76. The legal test for public interest standing is the one formulated by the Supreme Court of Canada in *Downtown Eastside*, calling for the examination of three factors:

(i) whether there is a serious justiciable issue;

(ii) whether the party has a real stake or a genuine interest in the issue; and

(iii) whether the proceeding is a reasonable and effective means of bringing the issue before the courts.

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[97] *Tsleil-Waututh Nation v. Canada (A.G.)*, 2017 FCA 128 at para. 78 [Tab 40, p. 2276].
[98] *Canada (CI) v. Tennant*, 2018 FCA 132 at paras. 23-24 [Tab 17, p. 1718].
[99] *Dunsmuir v. New Brunswick*, 2008 SCC 9 at paras. 27-30 [Tab 26, pp. 1926-1927].
[100] *Downtown Eastside* at paras. 31-33 [Tab 25, p. 1906].

77. These factors should not be treated as technical requirements, and the principles governing the exercise of discretion to grant public interest standing should be interpreted in a flexible, liberal, and generous manner.[101] The factors are interrelated considerations to be weighed cumulatively, flexibly, and purposively, not individually.[102]

i. There are Serious Justiciable Issues in this Application

78. An "arguable case" meets the first factor of the public interest standing test.[103] Although not binding on the panel, at least three justices of this Honourable Court have accepted or determined that the underlying application raises an arguable case.[104]

79. Underlying the first factor are two distinct concerns about the traditional restrictions on standing: whether the issue is "justiciable" and whether it is "serious."[105]

80. An issue is "justiciable" if it is appropriate for judicial determination and consistent with the court's constitutional and judicial review role. Where there is an issue that is appropriate for judicial determination, a court should not decline to determine it on the ground that—because of its policy context or implications—it might be better left for review by the legislative or executive branches of government.[106]

81. The RAB Ground of judicial review (i.e., para. 6(a), *supra*) relates to whether the CTA and/or its constituent Members have engaged in improper conduct relating to the Statement on Vouchers, giving rise to a reasonable apprehension of bias.[107] Such legal issues fall squarely within the core mandate of a supervising court conducting judicial review, and are clearly appropriate for judicial determination.[108]

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[101] *Downtown Eastside* at para. 35 [Tab 25, p. 1907]; and *British Columbia (A.G.) v. Council of Canadians with Disabilities*, 2022 SCC 27 [***CCD***] at para. 59 [Tab 13, p. 1626].
[102] *Downtown Eastside* at para. 36 [Tab 25, p. 1907]; and *CCD* at para. 97 [Tab 13, p. 1634].
[103] *Lukács v. Canada (CTA)*, 2016 FCA 174 at para. 6 [Tab 34, p. 2144].
[104] *APR v. Canada (A.G.)*, 2021 FCA 201 at paras. 5-6 [Tab 8, pp. 1522-1523].
[105] *Downtown Eastside* at para. 39 [Tab 25, p. 1907].
[106] *Downtown Eastside* at paras. 30 and 40 [Tab 25, pp. 1905 and 1908].
[107] *APR v. Canada (A.G.)*, 2021 FCA 201 at paras. 17 and 24-25 [Tab 8, pp. 1526 and 1528-1529].
[108] *Tsleil-Waututh Nation v. Canada (A.G.)*, 2017 FCA 128 at para. 99 [Tab 40, pp. 2279-2280] citing *Roncarelli v. Duplessis*, [1959] SCR 121 [Tab 37, p. 2167].

82. The Misinformation Ground of judicial review (i.e., para. 6(b), *supra*) relates to whether the Statement on Vouchers approved by the CTA's constituent members:[109]

(a) misinformed the public as to the passengers' rights to refunds under federal or provincial laws; and/or

(b) misinformed passengers and the public by concealing from them that the true purpose of the Statement on Vouchers was to assist airlines in deflecting their financial obligations, rather than protecting and upholding passengers' rights.

83. The aforementioned three issues relate to whether an administrative decision-maker's public statements were made outside its statutory mandate and/or for an improper purpose—these are questions appropriate for judicial determination.[110]

84. An issue is "serious" when it is "far from frivolous." An issue will be considered "serious" unless it is so unlikely to succeed that its result would be seen as a "foregone conclusion." Public interest standing should not be denied if at least one serious issue is raised, and it is not necessary to examine each issue in detail.[111]

85. The evidence discussed above and the submissions below clearly demonstrate that the issues are "serious." In respect of the RAB Ground, justices of this Honourable Court have accepted that it was a serious issue, and this issue was also carefully examined by Gleason J.A. before issuing a number of production orders against the CTA.[112]

ii. Air Passenger Rights Has Demonstrated Genuine Interest

86. This factor relates to concern for economical use of scarce judicial resources. Courts typically assess the party's "engagement" by examining their reputation, continuing interest, and link with the issue.[113]

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[109] *APR v. Canada (A.G.)*, 2021 FCA 112 at para. 1 [Tab 7, p. 1512].
[110] *Apotex Inc. v. Canada (Health)*, 2015 FC 1161 [***Apotex***] at paras. 95-107 and 159-166 [Tab 12, pp. 1588-1591 and 1600-1602].
[111] *Downtown Eastside* at para. 42 [Tab 25, pp. 1908] and *CCD* at para. 49 [Tab 13, p. 1624].
[112] *APR v. Canada (A.G.)*, 2021 FCA 201 at paras. 5-6 [Tab 8, pp. 1522-1523].
[113] *Downtown Eastside* at paras. 43 and 58 [Tab 25, pp. 1908-1909 and 1913].

87. In another case, this Court held that Dr. Lukács, APR's President, "would defend the interests of airline passengers in a way that the parties [i.e., AGC and the CTA] cannot," and granted leave to intervene in a public interest capacity.[114] This Court also previously found that "[i]t is undisputed that Dr. Lukács is an air passenger rights advocate, who has frequently brought applications to this Court in respect of Agency decisions, and therefore does have a genuine interest in the issues raised [...]."[115]

88. The Applicant, APR, is a registered non-profit organization that was established to continue the extensive public interest advocacy work undertaken by Dr. Lukács over the past fifteen years primarily using the banner "Air Passenger Rights."[116]

89. APR's mandate and activities include: (a) educating air passengers and the public of their rights and enforcement thereof via the media and online platforms, including a Facebook group that has approximately 133,200 members;[117] (b) appearing before Parliamentary committees by invitation, and giving evidence and making submissions on the issue of air passenger protection; (c) participating in the CTA's consultation processes for the *APPR* by the CTA's invitation as a stakeholder of the topic;[118] and (d) continuing the public interest litigation work of Dr. Lukács by initiating or intervening in judicial proceedings about airlines' obligations to passengers.[119]

90. APR has a strong and continuing interest in the issue of passenger rights in general, and refunds for flights cancelled by the airlines during the COVID-19 pandemic in particular. APR has directly engaged with passengers who had refunds withheld from them.[120] During the pandemic, APR also appeared on numerous occasions at Parliamentary committees on refunds for flights cancelled by the airlines during the COVID-19 pandemic and provided written submissions to assist the members of Parliament.[121]

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[114] Lukács Affidavit, para. 22 [Tab 2, p. 23].
[115] *APR v. Canada (A.G.)*, 2021 FCA 201 at para. 6 [Tab 8, p. 1523].
[116] Lukács Affidavit, paras. 2-3 [Tab 2, pp. 16-17].
[117] Lukács Affidavit, paras. 35-38 [Tab 2, pp. 27-28].
[118] Lukács Affidavit, paras. 23-34 [Tab 2, pp. 24-27].
[119] Lukács Affidavit, paras. 5(a), 13-22, and 39-40 [Tab 2, pp. 17, 19-23, and 28-29].
[120] Lukács Affidavit, paras. 2, 14, 65-69, and 188-204 [Tab 2, pp. 16, 19, 35-37, and 92-98].
[121] Lukács Affidavit, paras. 27-29 [Tab 2, pp. 25-26].

iii. Reasonable and Effective Means to Bring the Issue Before the Court

91. This factor concerns whether the proposed proceeding is an economical use of judicial resources, whether the issues are presented in a context suitable for judicial determination in an adversarial setting, and whether permitting the proceeding to go forward "will serve the purpose of upholding the principle of legality." These considerations are to be analyzed in light of the *realistic* alternatives.[122]

92. This factor is to be applied purposively, flexibly, and generously. This factor, like others, should be applied from a "practical and pragmatic point of view." In applying this factor, four non-exhaustive questions are considered: (a) the Applicant's capacity to bring the case forward; (b) whether the case is of public interest; (c) whether there are alternative means; and (d) the potential impact of the proceeding on others.[123]

93. ***The Applicant's Capacity to Bring the Case Forward.*** The Applicant's affidavit presents a sufficiently concrete and well-developed factual setting. The Applicant's diligence in seeking disclosure of the necessary evidence from the CTA through this Court's procedures shows that the Applicant has the necessary resources and expertise.

94. ***The Case is in the Public Interest.*** There is a significant public interest in ensuring that the CTA's actions are confined to the four corners of its statutory mandate, in accordance with the rule of law, and are not subverted for improper purposes.[124] Members of the Canadian public have an interest in ensuring that the CTA, as a quasi-judicial body, not only conducts its work impartially but is actually perceived to be impartial.

95. ***Realistic Alternative Means.*** Public interest standing should not be denied on the basis that others, including those who may have standing as of right, could *hypothetically* bring a claim.[125] In this case, the Respondent led no evidence of any alternative proceedings underway that could address the serious issues raised in this Application.

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[122] *Downtown Eastside* at para. 50 (emphasis added) [Tab 25, p. 1910].
[123] *CCD* at paras. 54-55 [Tab 13, pp. 1625-1626].
[124] *Apotex* at para. 96 [Tab 12, p. 1589].
[125] *Downtown Eastside* at paras. 47 and 51 [Tab 25, pp. 1909-1911].

96. This third factor only requires that the Application be *one* of possibly several reasonable and effective means of bringing the issue before the court. It is not required to be the *only* reasonable and effective means.[126] Other than judicial review in this Court,[127] the only other avenue for judicial oversight of the CTA's actions is via the statutory right of appeal on a question of law or jurisdiction, subject to leave, under s. 41 of the *Canada Transportation Act*. This alternative is clearly impractical as no reasonable passenger would expend significant resources to amass the same evidence as the Applicant had. It is also a Catch-22 because the Statement on Vouchers, on its face, gives an impression that the CTA is leaning towards the airlines, thereby dissuading some passengers from filing a CTA complaint and cutting off the route to an appeal. Just because the CTA says "trust us, we will be fair" cannot undo the overall perception.

97. ***Potential Impact on Others.*** Passengers with complaints about refunds from airlines during the COVID-19 pandemic will benefit from this Court's decision, one way or another. If the Court finds in the Respondent's favour, it will "clear the air" and help re-establish public confidence in the administration of justice by the CTA. On the other hand, if the Court finds in the Applicant's favour, then affected passengers would be spared from having a tainted quasi-judicial body adjudicate their complaints.

iv. Conclusion on Public Interest Standing

98. The Applicant submits that the aforementioned factors support this Honourable Court exercising its discretion in favour of granting public interest standing, to ensure that the conduct of the CTA and its appointed Members is not immunized from judicial scrutiny of this Court. It will also ensure that the CTA and its appointed Members act within their statutory mandate, only for proper purposes, free from outside influences, and are perceived by the public as independent and impartial.

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[126] *Downtown Eastside* at para. 44 [Tab 25, p. 1909]; applied in *Democracy Watch v. Canada (A.G.)*, 2018 FCA 194 at paras. 20-22 [Tab 24, pp. 1887-1888].
[127] *Federal Courts Act*, s. 28(1)(k) [Appendix A, p. 1377].

B. The Statement on Vouchers Gave Rise to Reasonable Apprehension of Bias

99. The test for assessing an allegation of reasonable apprehension of bias, like in this case, is well known and involves asking: "[W]hat would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would [that person] think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly." A claim that circumstances give rise to a reasonable apprehension of bias must be evaluated "through the eyes of the reasonable, informed, practical and realistic person who considers the matter in some detail," considered contextually and on a fact-specific basis.[128]

100. The CTA's expression of views and activities must be carefully reviewed in light of the entire context. Each case is fact driven, with no shortcuts or textbook examples. Evidence of actual bias is not required to show a reasonable apprehension of bias.[129]

101. While the CTA's appointed Members enjoy a presumption of impartiality and the threshold for a finding of a reasonable apprehension of bias is high, it is submitted that the evidence in this case amply meets that threshold in any of the following ways:

(i) Through the Statement on Vouchers, Members expressed opinions on a matter that would come before them, contrary to para. 40 of the *Code of Conduct*.

(ii) Prior to issuing the Statement on Vouchers, the CTA's then-chair (Mr. Streiner) met with third parties external to the CTA, including the Transport Minister's Chief of Staff (a political actor) and Transport Canada officials, regarding the Statement on Vouchers, contrary to paragraph 39 of the *Code of Conduct*.

(iii) The statement was incepted for the purpose of endorsing the airlines' new practice of withholding refunds from passengers whose flights were cancelled by the airlines, and interfering with passengers' remedies under provincial laws and extra-judicial remedies via credit card chargebacks.

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[128] *Colel Chabad Lubavitch Foundation of Israel v. Canada (NR)*, 2022 FCA 108 at paras. 36-37 [Tab 22, pp. 1821-1822].

[129] *Wewaykum Indian Band v. Canada*, 2003 SCC 45 at paras. 64-77 [Tab 43, pp. 2343-2346].

i. Public Expression of Opinions Contrary to the *Code of Conduct*

102. The CTA's *Code of Conduct*, which was enacted as mandated by the *Public Servants Disclosure Protection Act*,[130] provides that:

> (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.[131]

103. The Statement on Vouchers is an expression of an extra-judicial opinion, by those appointed Members of the CTA who supported and/or approved it, on an issue that was, is, or could come before the CTA in its quasi-judicial capacity. The Statement on Vouchers *ipso facto* acknowledged the obvious possibility of passengers filing complaints via the CTA's quasi-judicial process. Mr. Streiner, in his capacity as the CTA's Chair at the time, subsequently represented to a Parliamentary committee that it is inappropriate to comment on whether the law requires passengers to be given a refund and that, as a quasi-judicial tribunal, "[t]here is a legal process for [interpreting the law]."[132]

104. The CTA speaks on issues of substantive law through its quasi-judicial decisions, similarly to how courts would express their views on the applicable law through formal decisions. While nearly every court would have *procedural* guidelines or practice directives published, those deal strictly with procedural topics. It is also not unusual for courts to issue a press release or "Coles Notes" regarding formal decisions that are of public interest, but in such situations there is a legally-binding decision underpinning those expressions. In sharp contrast, the Statement on Vouchers is purely an expression of an opinion without any legal support, and untethered to any quasi-judicial decision.

105. The Applicant accepts that administrative tribunals may issue guidance materials. However, the scope of such guidance is necessarily limited by the CTA's *Code of Conduct*, which codifies the sound principle of impartiality. Members must not, under the guise of guidance, stray into providing extra-judicial opinions on controversial

[130] *Public Servants Disclosure Protection Act*, s. 6 [Appendix A, p. 1385].
[131] Lukács Affidavit, Exhibit "40" (emphasis added) [Tab 2(40), p. 624].
[132] Lukács Affidavit, paras. 213-215 [Tab 2, pp. 106-109].

issues that are or would likely come before the CTA in its quasi-judicial capacity.

106. The CTA's affidavit provides helpful examples of *bona fide* guidance materials by the CTA in the past that fundamentally differ from the Statement on Vouchers.

(a) ***Interpretation Note for Interline Baggage Rules.*** As an economic regulator, on April 15, 2014, the CTA issued a legally binding Decision No. 144-A-2014 about interline baggage rules. Subsequently, the CTA issued an interpretation note in its regulatory capacity, not its capacity as a quasi-judicial tribunal, that explains the CTA's underlying decision.[133] In sharp contrast with the Statement on Vouchers, the Interpretation Note was tethered to a legally binding decision, and was not related to a live controversy that was or would likely come before the CTA in its quasi-judicial capacity.

(b) ***Notice to Industry about Section 59.*** This Notice to Industry is comparable to a court's practice directive, setting the procedural requirements and considerations for the exercise of the CTA's discretionary power to grant exemptions from an economic regulatory provision of the *Canada Transportation Act* about licensing requirements. The Notice to Industry does not suggest any conclusions, and does not relate to any controversial issues between passengers and airlines that were or would likely come before the CTA in its quasi-judicial capacity.[134]

(c) ***Guide to Canadian Ownership.*** This guide relates to an indispensable licensing requirement for operating an air service within Canada, and the exercise of a core economic regulation function of the CTA in ensuring compliance with same. The guide provides information, based on the CTA's past legally binding decisions (Annex D), to potential entrants about the principles followed (Annex B) and the factors considered (Annex C) by the CTA.[135] This guide does not purport to provide information or suggestions on controversial issues of a quasi-judicial nature that would give a perception of partiality.

[133] Desnoyers Affidavit, Exhibit "A".
[134] Desnoyers Affidavit, Exhibit "B".
[135] Desnoyers Affidavit, Exhibit "C".

107. Unlike the above materials, the CTA's Statement on Vouchers speaks to the merits or likely outcomes of pending or imminently to be filed complaints, contrary to paragraph 40 of the *Code of Conduct*. Moreover, the CTA was fully aware that the Statement on Vouchers was not only lacking any legally binding decision(s) underpinning it,[136] but was actually contradicting the body of CTA Refund Jurisprudence.[137]

ii. Communications and Meetings Contrary to the *Code of Conduct*

108. The *Canada Transportation Act* contemplates the Governor in Council's powers to issue directions or orders to be done transparently and to respect the principles of democracy and Parliamentary supremacy under the Westminster system.

(a) Policy directions from the Governor-in-Council, on any matter that comes within the CTA's jurisdiction, must undergo Parliamentary review and *cannot* affect complaints that are already before the CTA.[138]

(b) Governor-in-Council orders to stabilize Canada's transportation system in the event of extraordinary disruptions—when failure to act would be contrary to the interest of the users and operators of the system and no other federal law would be sufficient or appropriate to remedy the anticipated damage to the system—are still subject to specific Parliamentary review and oversight.[139]

109. Paragraph 39 of the CTA's *Code of Conduct* reinforces the requirement that in the absence of specific Governor-in-Council directions or orders, the CTA must act independently and be free from political and outside influences:

> (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.[140]

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[136] Lukács Affidavit, paras. 145-146 [Tab 2, pp. 74-75].
[137] See paragraph 21, *supra*.
[138] *Canada Transportation Act*, ss. 43-46 [Appendix A, p. 1362].
[139] *Canada Transportation Act*, s. 47 [Appendix A, pp. 1362-1364].
[140] Lukács Affidavit, Exhibit "40" (emphasis added) [Tab 2(40), p. 624].

110. It is undisputed that the Governor-in-Council did not issue formal directions under s. 43, nor any order under s. 47, directing the CTA to publish the Statement on Vouchers. Nevertheless, the CTA's Statement on Vouchers was a product of extensive informal communications and/or meetings between the CTA and Transport Canada officials or the Transport Minister's Chief of Staff, which lacked the necessary Parliamentary oversight, and were contrary to paragraph 39 of the CTA's *Code of Conduct.*

(a) On March 18, 2020, TC sent an encrypted email to the CTA emphasizing Air Transat's request that they officially permit Air Transat to issue vouchers instead of refunds, a request that was re-sent by Air Transat that evening and promptly made its way to Mr. Streiner and the EC. After the encrypted email, a CTA personnel also engaged in a "side exchange" with a TC official on this issue.[141]

(b) At the Friday March 20, 2020 EC meeting, Ms. Jones was tasked to draft a Statement on Vouchers due the following week. That afternoon, Mr. Streiner parked the idea of issuing such a statement "since we're not quite sure yet what will be done on this front or how."[142] Then on the early morning of Sunday March 22, 2020, Mr. Streiner circulated a draft Statement on Vouchers and scheduled an "Urgent Debrief" with key CTA personnel, and also informed the CTA Members that the draft Statement on Vouchers was incepted *after* **"discussion with other federal players."**[143] It was known within the CTA that Mr. Streiner had a meeting over that weekend with the Deputy Minister of Transport and the Transport Minister's Chief of Staff regarding the Statement on Vouchers.[144]

111. It is plain that Mr. Streiner changed his mind sometime between 5:00 p.m. of March 20, 2020 and the early morning of Sunday March 22, 2020 after learning "what will be done on this front or how." Although a litigation hold was promptly placed and brought to the attention of key CTA personnel,[145] the CTA failed to maintain a paper

[141] See paragraphs 28-30, *supra*.
[142] See paragraph 34, *supra*.
[143] See paragraphs 38-39, *supra*.
[144] Lukács Affidavit, paras. 111, 112(a)-(b), and 128 [Tab 2, pp. 57-58 and 66].
[145] Cuber Cross-Examination, Q65-Q81 [Tab 3, pp. 1142-1146].

trail on what caused Mr. Streiner to change his mind over the weekend on the Statement on Vouchers and details of the weekend meeting between Mr. Streiner and the Deputy Minister of Transport and the Transport Minister's Chief of Staff. Notably, although this weekend meeting occurred, it was not even documented in Mr. Streiner's calendar.[146]

112. It is within this Court's discretion to draw an adverse inference that Mr. Streiner received directions or instructions for the Statement on Vouchers from TC at the weekend meeting. On an evaluation of all of the evidence, it is plain that such inference is not based on uncertainty or speculation.[147] On Friday afternoon, Mr. Streiner was waiting for some clarity or instruction. On Sunday morning, Mr. Streiner scheduled an "Urgent Debrief" about the statement whose text speaks for itself, and the idea of such a statement was not new. That morning, Mr. Streiner then informed the CTA Members that the draft statement was incepted after **"discussion with other federal players."** At the EC debrief on Monday, Mr. Streiner mentioned the discussions and agreements with, and praise from, TC. There was no paper trail of the CTA conducting any independent analysis about the issue of refunds and vouchers during that weekend.

iii. The Statement on Vouchers was Incepted for Improper Purposes

113. The purpose for which an administrative body issues a public statement is judicially reviewable. A supervising court may order the full retraction of public statements that were issued in response to political pressure or outside influences rather than carrying out the administrative body's statutory mandate for the benefit of the public.[148] An improper purpose for a public statement may be found on the basis of correspondences and documents sent or received by the administrative body.[149]

114. In this case, the CTA and/or its appointed Members were acting for the purpose of stifling passengers' credit card chargebacks that airlines faced. This dissuaded credit card companies from making financial demands from airlines such as Air Transat.

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[146] Cuber Cross-Examination, Q179-189 [Tab 3, pp. 1174-1177].
[147] *Voltage Holdings, LLC v. Doe #1,* 2023 FCA 194 at paras. 55-57 [Tab 42, p. 2314].
[148] *Apotex* at paras. 97-102 and 159-168 [Tab 12, pp. 1589-1590 and 1600-1602].
[149] *Apotex* at paras. 98 and 102-103 [Tab 12, pp. 1589-1590].

115. The Statement on Vouchers directly responded to Air Transat's request that it be permitted to issue vouchers instead of providing a refund.[150] Air Canada also made a request similar to Air Transat's in urging the CTA to publicly state that no refunds are owed to passengers.[151] The requests from Air Canada and Air Transat were placed before the CTA's appointed Members at their March 24, 2020 meeting, the day before the Statement on Vouchers was issued. In the course of drafting the statement, the CTA's Chief of Staff (Mr. Bergeron) noted that "[a]llowing airlines to give vouchers instead of cash is already a big move."[152] One Member's meeting notes indicated that these airlines' requests were "[a]lready addressed through the Agency's statement."[153]

116. The purpose for the Statement on Vouchers being incepted is outside the CTA's statutory mandate. The CTA's mandate is limited to resolving passenger-airline disputes in a quasi-judicial fashion, and, as an economic regulator, regulating entry into the Canadian transportation market through issuing of licenses to operators.[154] Neither of these mandates permitted the CTA to extra-judicially meddle with private disputes between passengers and airlines, or to assist airlines with their alleged financial woes.

117. The CTA's role is to carry out policies formulated by the Governor-in-Council with Parliamentary oversight.[155] It is not the CTA's role to formulate policy.[156]

118. In 2007, Parliament removed the "economic viability" of modes of transportation from the "National Transportation Policy" in the *Canada Transportation Act.*[157]

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[150] Lukács Affidavit, para. 88 [Tab 2, p. 44].
[151] Lukács Affidavit, paras. 126 and 118 [Tab 2, pp. 65 and 61].
[152] Lukács Affidavit, Exhibit "71" (emphasis added) [Tab 2(71), p. 728].
[153] Lukács Affidavit, Exhibit "77" [Tab 2(77), p. 760].
[154] *Lukács v. Canada (Transp. Agency)*, 2014 FCA 76 at paras. 50-52 [Tab 32, p. 2128].
[155] *A.G. v. De Keyser's Royal Hotel, Ltd.*, [1920] A.C. 508, cited in: *Breckenridge Speedway Ltd. v. R.*, 1967 CarswellAlta 58 at paras. 181-182 [Tab 15, p. 1693]; *Canada Transportation Act*, ss. 24 and 43-47 [Appendix A, pp. 1357 and 1362-1364].
[156] *Lukács v. Canadian Transportation Agency*, 2016 FCA 220 at para. 19 [Tab 35, p. 2151]; var'd on other grounds: *Delta Air Lines v. Lukács*, 2018 SCC 2.
[157] *Canada Transportation Act*, s. 5 **current version** [Appendix A, pp. 1351-1352] *vs.* **original version** [Appendix A, p. 1371]; legislative history of s. 5: *Jackson v. Canadian National Railway*, 2012 ABQB 652 at paras. 57, 59, and 60 [Tab 30,

Hence, ensuring "economic viability" was no longer part of the CTA's role. In any event, an economic regulator's role does not extend to ensuring the "economic viability" (i.e., cash flow and profitability) of the entity being regulated.[158] The "economic viability" of a business is within the exclusive purview of the business owner.

119. The CTA cannot "bootstrap" reasons for the Statement on Vouchers that were not considered before the statement was drafted. Had there been a genuine concern about an airline's financial situation, it would have been the Governor-in-Council's role to issue an order under s. 47 of the *Canada Transportation Act*.[159] Alternatively, it would be the role of provincial superior courts to issue protection orders pursuant to the federal insolvency or creditor arrangement legislation, which are well known to the CTA and its Members.[160] Indeed, Mr. Streiner expressly acknowledged that it may not be the CTA's role to get involved in airlines' disputes with credit card companies.[161]

iv. Conclusion on Reasonable Apprehension of Bias

120. The Statement on Vouchers was contrary to paragraph 40 of the CTA's *Code of Conduct* in that it expressed an opinion on a matter that was, is, or, could come before the CTA, and gives the perception that the CTA would not act impartially. The Statement on Vouchers also involved meetings with external third parties, contrary to paragraph 39 of the same code, and gives a further perception that the CTA was not acting independently. The underlying purpose for drafting the Statement on Vouchers was a purpose entirely extraneous to the CTA's statutory mandate, amounting to an improper purpose that is also antithetical to the CTA's consumer protection mandate.

121. The CTA's broad dissemination of the Statement on Vouchers, including as part of an auto-response to passenger complaints, exacerbated the perception of the CTA's

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pp. 2071-2074]; see also: *Canadian National Railway v. Moffatt*, 2001 FCA 327 at para. 27 [Tab 21, p. 1793].

[158] *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2014 FCA 84 at para. 84 [Tab 19, p. 1771] (rev'd on other grounds: 2015 SCC 57).

[159] *Canada Transportation Act*, s. 47 [Appendix A, pp. 1362-1364].

[160] Decision No. 389-A-2015 [Tab 45, p. 2388]; and Decision No. 44-C-A-2016 [Tab 46, p. 2391].

[161] Lukács Affidavit, para. 94 [Tab 2, p. 49].

lack of impartiality and independence, and reinforces the view that the CTA was not acting to protect the travelling public, but doing the opposite in endorsing the airlines' unlawful policies that were introduced immediately before the Statement on Vouchers.

C. The Statement on Vouchers Misinformed the Public and/or Passengers

122. The CTA is required by law to act in good faith, and knowingly misinforming the public is contrary to the CTA's mandate and the duty to act in good faith.[162]

123. The Misinformation Ground is a further ground of judicial review on the basis that the Statement on Vouchers, on its face, misinformed the reader in at least two ways:

(a) it misinformed the public as to the passengers' rights to refunds under federal or provincial laws; and/or

(b) it misinformed passengers and the public in claiming that the Statement on Vouchers was to protect passengers from getting nothing for flights that airlines have already cancelled.

i. Misinforming the Public about Passengers' Legal Rights

124. In the Statement on Vouchers, the CTA misinformed passengers as to their rights or avenues to a refund for flights cancelled by airlines, in at least the four manners below.

125. ***CTA Refund Jurisprudence.*** For nearly two decades, the CTA's own considered and consistent opinion, expressed in legally binding quasi-judicial decisions interpreting the *Canada Transportation Act* and the *Air Transportation Regulations*, has been to recognize that passengers have a "fundamental right" to refunds for unused airfares when airlines do not provide the services for *any* reason, including for reasons outside the airlines' control.[163] The CTA's failure to acknowledge its own legally binding decisions, even when they were specifically brought to the CTA's attention,[164] is misleading.

[162] *Roncarelli v. Duplessis*, [1959] SCR 121 [Tab 37, p. 2167].
[163] See paragraphs 21-22, *supra*.
[164] Lukács Affidavit, paras. 145-146 [Tab 2, pp. 74-75].

126. ***APPR is Not the Only Source of Legal Rights.*** The Statement on Vouchers misrepresented that "the *Canada Transportation Act* and [*APPR*] only require that the airline ensure passengers can complete their itineraries." The CTA was aware that federal law requires airlines' tariffs to have terms for "refunds for services purchased but not used, whether in whole or in part, either as a result of the client's unwillingness or inability to continue or the air carrier's inability to provide the service for any reason."[165] Failure to include such terms is against the law and renders the tariff unreasonable.

127. ***Passengers' Entitlement to Credit Card Chargebacks.*** Consumers who pay using a credit card and do not receive the services can initiate a Contractual Chargeback, directly with the credit card company pursuant to the cardholder agreement.[166] The Statement on Vouchers omitted this simple extra-judicial recourse that passengers were already pursuing, when courts across Canada had suspended operations and the CTA also suspended the processing of complaints. However, the statement was carefully designed to impede the passengers' extra-judicial recourse, so that Air Transat and other airlines would be freed from their financial obligations to passengers and banks.

128. ***Omission that Provincial Consumer Protection Laws Would Apply.*** In Quebec, Air Canada and Air Transat were required to deposit the funds paid by passengers into a trust account, if the service is intended to be performed more than two months later.[167] In addition, most provinces have laws providing for Statutory Chargeback on their credit cards in various circumstances, including when the services are not performed, or when the consumer cancels the contract by giving formal notice(s).[168] While the CTA was aware that provincial consumer laws apply to passengers,[169] the CTA misinformed the public through the CTA's careful omission of the fact that provincial consumer protection laws always apply and may offer passengers further protection.[170]

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[165] See paragraphs 19-20, *supra*.
[166] See paragraph 24, *supra*.
[167] See paragraph 23, *supra*.
[168] See paragraph 24, *supra*.
[169] Lukács Affidavit, Exhibit "58" [Tab 2(58), p. 684].
[170] *Unlu v. Air Canada*, 2013 BCCA 112 [Tab 41, p. 2293]; leave to appeal ref'd: 2013 CanLII 51818 (SCC).

ii. Misinforming Readers on the Purpose of the Statement on Vouchers

129. In the Statement on Vouchers published on March 25, 2020, the CTA did not expressly reveal the CTA's purpose for issuing the Statement on Vouchers, but noted that passengers "should not simply be out-of-pocket for the cost of cancelled flights." Subsequently, on April 22, 2020, in an attempt to "diffuse legal risk head on," the CTA claimed that there was "a serious risk that passengers would simply end up out-of-pocket for the cost of cancelled flights."[171] Then, in the Revamped Statement on Vouchers published around November 16, 2020, the CTA re-emphasized that "there was a real risk that many passengers would end up getting nothing for cancelled flights."[172]

130. The CTA's claim that it was protecting passengers from being out-of-pocket was a smokescreen to conceal the CTA's and its appointed Members' true and improper purpose in incepting and disseminating the Statement on Vouchers, which was to stifle passengers' legitimate credit card chargebacks that airlines faced. The Statement on Vouchers acted as a shield for airlines from financial institutions making demands to cover passengers' legitimate chargebacks for services not delivered.

131. Even before the CTA began to draft the Statement on Vouchers or decided to publish it, all major Canadian airlines had already changed their policies to issue passengers vouchers valid for 24-months instead of a refund for flights the airlines themselves cancelled.[173] The CTA's claim that it was helping to ensure that passengers would at least get a voucher instead of nothing is akin to gonzo logic, because the airlines had *already* pocketed the passengers' monies and were issuing vouchers instead of refunds to the original form of payment. The CTA's after-the-fact Statement on Vouchers did *nothing* to protect the passengers, but rather it was, per the airlines' request, a doubling-down with an endorsement of the airlines' new and unlawful policies that were forced upon the passengers. The CTA was not giving a "suggestion" to airlines and passengers, but assisting airlines in forcing passengers to accept vouchers instead of a refund.

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[171] Lukács Affidavit, paras. 178-180 [Tab 2, p. 89].
[172] See paragraph 54, *supra*.
[173] See paragraph 17, *supra*.

D. Remedies on this Judicial Review Application

i. Order to Retract the Statement on Vouchers and Correction Notice

132. The Statement on Vouchers created chaos for an otherwise straightforward common sense commercial norm of providing a refund when services could not be delivered. No business in Canada would be permitted to pocket consumers' money and unilaterally issue I-Owe-Yous for services the merchant could not deliver on the basis of retroactive policy changes—and airlines are no exception. Other than passengers, the Statement on Vouchers sowed significant confusion among stakeholders in the transactions, including travel agencies, financial institutions, and travel insurance companies.

133. The evidence establishes that the Statement on Vouchers was issued for improper purposes and/or was designed to misinform the public and affected passengers.

134. In closely analogous circumstances, the Federal Court ordered retraction of public statements pursuant to subsection 18.1(3) of the *Federal Courts Act*, even when the public statement was not a legally-binding decision.[174] An order compelling the CTA to publicly retract the Statement on Vouchers would serve the purpose of putting to rest the confusion, diffusing the chaos that affected the underlying transactions, and formally vindicating the passengers that were prejudiced by the CTA's conduct.

135. As part of the retraction, the CTA should also be required to issue a correction notice to ensure that those who have seen, or been affected by, the Statement on Vouchers are aware of this Honourable Court's judgment. The correction notice should be issued through the same channels the CTA used to disseminate the statement, including the CTA's website and Twitter account, and direct email to affected passengers.

ii. Injunctive Relief Against the CTA and/or its Members

136. The evidence establishes that the Statement on Vouchers gave rise to a reasonable apprehension of bias for the CTA and/or its Members. It also establishes that the Statement on Vouchers was issued contrary to the CTA's *Code of Conduct*.

[174] *Apotex* at paras. 159-168 [Tab 12, pp. 1600-1602].

137. This Court has plenary powers to grant an injunction on a judicial review.[175]

138. *E.A. Manning*, and the related *Ainsley* case, strikingly resemble the circumstances herein.[176] In *Ainsley*, the courts concluded that a tribunal acted inappropriately and outside of its statutory powers by issuing a non-binding "policy guidance" about the sales practice of penny stock dealers.[177] The Ontario Divisional Court then held in *E.A. Manning* that the illegitimate issuance of the "policy guidance" constituted pre-judgment, and on that basis the court restrained **all tribunal members** who participated in issuing that "policy guidance" from adjudicating a case on penny stock dealers.[178]

139. The court also found in *E.A. Manning* that the tribunal's wading into the merits of the stock dealers' case in *Ainsley* was beyond the tribunal's role as an impartial arbiter.[179] The extra-judicial wading of the CTA and its Members into the controversial refunds matter between airlines and passengers, at the behest of the airlines, is even more egregious than the conduct in *E.A. Manning* and *Ainsley*. These lines of authorities were widely adopted by courts across Canada, including the federal courts.[180]

140. The evidence firmly supports enjoining *both* the CTA's Members and the CTA as a whole from dealing with passengers' refund complaints relating to the pandemic.

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[175] *Canada (HRC) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626 at paras. 36-37 [Tab 18, p. 1739]. See also: *H.J. Heinz Co. of Canada Ltd. v. Canada*, 2006 SCC 13 at para. 44 [Tab 29, p. 2021]; *Toutsaint v. Canada (AG)*, 2019 FC 817 at para. 65 [Tab 39, p. 2249]; *Bilodeau-Massé v. Canada (PG)*, 2017 FC 604 at para. 78 [Tab 14, pp. 1662-1663]; *Martell v. Canada (AG)*, 2019 FC 737 at paras. 24-28 [Tab 36, p. 2160]; and *Canadian Council for Refugees v. R.*, 2006 FC 1046 at paras. 8-9 [Tab 20, p. 1779].

[176] *Alberta (SC) v. Workum*, 2010 ABCA 405 at para. 63 [Tab 11, p. 1570].

[177] *Ainsley Financial Corp. v. Ontario (SC)*, 1993 CarswellOnt 150 at paras. 1, 3, 25, 34, 36, 69, and 70 [Tab 9, pp. 1536, 1542, 1544, and 1552]; aff'd: 1994 CarswellOnt 1021 at paras. 3, 5, 14, and 17-19 [Tab 10, pp. 1558-1559 and 1561-1563].

[178] *E.A. Manning Ltd. v. Ontario (SC)*, 1994 CarswellOnt 1015 at paras. 51-55 [Tab 27, pp. 1983-1984]; aff'd: 1995 CarswellOnt 1057 [Tab 28, pp. 1987].

[179] *E.A. Manning Ltd. v. Ontario (SC)*, 1994 CarswellOnt 1015 at para. 52 [Tab 27, p. 1984].

[180] *Sander Holdings Ltd. v. Canada (AG)*, 2005 FCA 9 at paras. 50 and 53 [Tab 38, p. 2230]; *Latimer v. Canada (AG)*, 2010 FC 806 at para. 53 [Tab 31, p. 2105]; and *Delisle c. Canada (PG)*, 2006 FC 933 at para. 128 [Tab 23, pp. 1870-1871].

141. ***Enjoining CTA Members.*** The CTA's current Members, with the exception of Mr. Streiner who was replaced, all served in March 2020 and they all approved the Statement on Vouchers and Mr. Streiner's conduct in answering the airlines' pleas.

142. ***Enjoining the CTA as a Whole.*** Institutional reasonable apprehension of bias depends on the decision-making process and the decision-maker's role in that process, and there are no hard and fast rules.[181] This Court's decision in *Zündel* supports a finding of institutional reasonable apprehension of bias when there is evidence that all members of a tribunal approved the questionable statements or conduct,[182] which is precisely the case here. The evidence further shows that the CTA's senior executives (i.e., EC) also participated in formulating the Statement on Vouchers and Q&As for it.

143. The CTA's current chair was not at the CTA in March 2020 when the Statement on Vouchers was issued. However, reasonably informed members of the public would not find that the new chair's appointment alone could "untaint" the existing Members and an organization whose senior executives were *actively* involved in approving or otherwise justifying the Statement on Vouchers, and were not mere passive observers.

144. At the interlocutory injunction motion, Mactavish J.A. correctly stated the law for injunctions to remedy the lack of impartiality of administrative tribunals. However, Her Ladyship's decision turned on the absence of evidence before her about the CTA Members' involvement on the Statement on Vouchers,[183] evidence which has since come to light as a result of this Court's multiple disclosure orders against the CTA.

iii. Alternatively, Declaratory Relief

145. As an *alternative* to the injunctive relief and order for retraction and correction, the Applicant is seeking three declarations relating to the Statement on Vouchers.

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[181] *101115379 Saskatchewan Ltd. v Saskatchewan (FCAA)*, 2019 SKCA 31 at paras. 203-213 [Tab 5, pp. 1493-1496].
[182] *Zündel v. Citron*, 2000 CanLII 17137 (FCA) at paras. 47-50 [Tab 44, p. 2379].
[183] *APR v. Canada (CTA)*, 2020 FCA 92 at paras 33-35 [Tab 6, pp 1507-1508].

146. ***The Statement Has No Legal Effect.*** The Statement on Vouchers was designed to give the appearance that it had some legal effect and to give credence to the airlines' conduct.[184] Prior to filing this Application, the CTA was made aware of serious concerns about its statement, but the CTA took no action.[185] The CTA backtracking after this Application was filed, with a separate FAQ claiming that the statement was "not a binding decision", was not a genuine attempt to resolve the matter and did not put to rest the perception that had already been created. The Transport Minister still claimed that the statement was a ruling "in a non-binding way,"[186] and airlines and banks continued relying on the statement as an authority. Unless the Respondent accepts a retraction and correction to put to rest the broad confusion the CTA created, a judicial pronouncement is needed to formally declare that the CTA's statement holds no legal value.

147. ***Incepting or Publishing the Statement was Contrary to the Code of Conduct.*** The CTA's *Code of Conduct* is a legal instrument that continues to be in effect, and almost all of the same Members are still at the CTA. Even after a new chairperson was appointed in June 2021, there is no evidence that the CTA took action to hold to account the Members who approved the statement for acting contrary to the *Code of Conduct*. A judicial pronouncement is required to hold the Members accountable, or to clear the air. The travelling public deserves clarity on the level of independence and impartiality that the Court expects from the CTA and its Members. If the conduct is not kept in check at this point, it would indirectly normalize improper behaviour going forward.

148. ***RAB and Loss of Jurisdiction.*** Should the Court find that an injunction is not suitable in the circumstances, a suitable alternative remedy would be a declaration that the CTA and/or its Members' conduct gave rise to a reasonable apprehension of bias and therefore they lost their jurisdiction. This enables passengers to elect to waive their objection in order to continue their complaints at the CTA or, alternatively, rely on this Court's declaration to pursue other recourses (e.g., transfer to a court with jurisdiction).

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[184] Lukács Affidavit, paras. 75-78, 143-144, and 160 [Tab 2, pp. 39-40, 74, and 80].
[185] Lukács Affidavit, paras. 170-172 [Tab 2, pp. 86-87].
[186] Lukács Affidavit, para. 209 [Tab 2, p. 104].

PART IV – ORDER SOUGHT

149. The Applicant, Air Passenger Rights, is seeking:

(a) an order for a **retraction and correction notice**, namely, that the CTA:

i. fully retract its Statement on Vouchers and replace it with this Honourable Court's judgment and reasons thereof; and

ii. bring this Honourable Court's judgment, including reasons thereof, to the public's attention, in a manner this Court finds just;

(b) **injunctive relief** enjoining the CTA, or alternatively its Members who supported the Statement on Vouchers, from dealing with any complaint about carriers' refusal to refund passengers in respect of the COVID-19 pandemic;

(c) alternatively to (a) or (b), **declaratory relief**, namely, declarations that:

i. the Statement on Vouchers has no force or effect of law;

ii. the inception and/or publication of the Statement on Vouchers was contrary to the CTA's *Code of Conduct*; and

iii. the Statement on Vouchers gave rise to a reasonable apprehension of bias for the CTA and/or its Members who supported it and lost jurisdiction over passenger refund complaints from the COVID-19 pandemic;

(d) leave to make submissions on costs after judgment is issued; and

(e) such further relief as counsel may request and this Court deems just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

November 21, 2023

SIMON LIN
Counsel for the Applicant,
Air Passenger Rights

PART V – LIST OF AUTHORITIES

Federal Statutes and Regulations

Air Transportation Regulations, SOR/88-58,
ss. 107, 111, 113, and 122

Canada Transportation Act, S.C. 1996, c. 10,
ss. 5, 7(2), 13, 16, 19, 24, 33, 41, 43-47, 67.2, and 86.11

Original text of the *Canada Transportation Act*, S.C. 1996, c. 10,
s. 5(h)

Federal Courts Act, R.S.C., 1985, c. F-7,
ss. 18, 18.1, 28, and 44

Public Servants Disclosure Protection Act, S.C. 2005, c. 46,
ss. 2, 5, and 6

Provincial Statutes and Regulations

Internet Sales Contract Regulation, Alta. Reg. 81/2001

Business Practices and Consumer Protection Act, S.B.C. 2004, c. 2,
ss. 49 and 52

The Consumer Protection Act, C.C.S.M. c. C200,
ss. 127-135

Consumer Protection and Business Practices Act, S.N. 2009, c. C-31.1,
ss. 32 and 35

Internet Sales Contract Regulations, N.S. Reg. 91/2002

Consumer Protection Act, 2002, S.O. 2002, c. 30, Sched. A,
ss. 26, 92, and 99

Consumer Protection Act, C.Q.L.R. c. P-40.1,
ss. 54.1-54.16 and 256

The Consumer Protection and Business Practices Regulations, R.R.S. c. C-30.2 Reg 1,
ss. 3-4 – 3-14

Case Law

101115379 Saskatchewan Ltd. v. Saskatchewan (Financial and Consumer Affairs Authority), 2019 SKCA 31

Air Passengers Rights v. Canada (Transportation Agency), 2020 FCA 92 (CanLII)

Air Passenger Rights v. Attorney General of Canada, 2021 FCA 112

Air Passenger Rights v. Canada (Attorney General), 2021 FCA 201

Ainsley Financial Corp. v. Ontario (Securities Commission), 1993 CarswellOnt 150

Ainsley Financial Corp. v. Ontario (Securities Commission), 1994 CarswellOnt 1021

Alberta (Securities Commission) v. Workum, 2010 ABCA 405

Apotex Inc. v. Canada (Minister of Health), 2015 FC 1161

British Columbia (Attorney General) v. Council of Canadians with Disabilities, 2022 SCC 27

Bilodeau-Massé v. Canada (Procureur général), 2017 FC 604

Breckenridge Speedway Ltd. v. R., 1967 CarswellAlta 58

Breckenridge Speedway Ltd. v. R., [1970] S.C.R. 175

Canada (Citizenship and Immigration) v. Tennant, 2018 FCA 132

Canada (Human Rights Commission) v. Canadian Liberty Net, [1998] 1 S.C.R. 626

Canadian Broadcasting Corp. v. SODRAC 2003 Inc., 2014 FCA 84

Canadian Council for Refugees v. R., 2006 FC 1046

Canadian National Railway v. Moffatt, 2001 FCA 327

Colel Chabad Lubavitch Foundation of Israel v. Canada (National Revenue), 2022 FCA 108

Delisle c. Canada (Procureur général), 2006 FC 933

Democracy Watch v. Canada (Attorney General), 2018 FCA 194

Doctrine

Regulating distance contracts: Time to take stock. Office of Consummer's Affairs (Government of Canada)/Union des consommateurs 2014

Appendix A

Statutes and Regulations

CANADA

CONSOLIDATION

CODIFICATION

Air Transportation Regulations

Règlement sur les transports aériens

SOR/88-58

DORS/88-58

Current to April 21, 2020

Last amended on July 15, 2019

À jour au 21 avril 2020

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Exception

106 The holder of a domestic licence in respect of a domestic service that serves the transportation needs of the bona fide guests, employees and workers of a lodge operation, including the transportation of luggage, materials and supplies of those guests, employees or workers, is excluded, in respect of the service of those needs, from the requirements of section 67 of the Act.

SOR/96-335, s. 53.

Exception

106 Le titulaire d'une licence intérieure pour l'exploitation d'un service intérieur servant à répondre aux besoins de transport des véritables clients, employés et travailleurs d'un hôtel pavillonnaire, y compris le transport de leurs bagages, matériel et fournitures, est exempté des exigences de l'article 67 de la Loi à l'égard de ce service.

DORS/96-335, art. 53.

Contents of Tariffs

107 (1) Every tariff shall contain

(a) the name of the issuing air carrier and the name, title and full address of the officer or agent issuing the tariff;

(b) the tariff number, and the title that describes the tariff contents;

(c) the dates of publication, coming into effect and expiration of the tariff, if it is to expire on a specific date;

(d) a description of the points or areas from and to which or between which the tariff applies;

(e) in the case of a joint tariff, a list of all participating air carriers;

(f) a table of contents showing the exact location where information under general headings is to be found;

(g) where applicable, an index of all goods for which commodity tolls are specified, with reference to each item or page of the tariff in which any of the goods are shown;

(h) an index of points from, to or between which tolls apply, showing the province or territory in which the points are located;

(i) a list of the airports, aerodromes or other facilities used with respect to each point shown in the tariff;

(j) where applicable, information respecting prepayment requirements and restrictions and information respecting non-acceptance and non-delivery of goods, unless reference is given to another tariff number in which that information is contained;

(k) a full explanation of all abbreviations, notes, reference marks, symbols and technical terms used in the tariff and, where a reference mark or symbol is used on a page, an explanation of it on that page or a

Contenu des tarifs

107 (1) Tout tarif doit contenir :

a) le nom du transporteur aérien émetteur ainsi que le nom, le titre et l'adresse complète du dirigeant ou de l'agent responsable d'établir le tarif;

b) le numéro du tarif et son titre descriptif;

c) les dates de publication et d'entrée en vigueur ainsi que la date d'expiration s'il s'applique à une période donnée;

d) la description des points ou des régions en provenance et à destination desquels ou entre lesquels il s'applique;

e) s'il s'agit d'un tarif pluritransporteur, la liste des transporteurs aériens participants;

f) une table des matières donnant un renvoi précis aux rubriques générales;

g) s'il y a lieu, un index de toutes les marchandises pour lesquelles des taxes spécifiques sont prévues, avec renvoi aux pages ou aux articles pertinents du tarif;

h) un index des points en provenance et à destination desquels ou entre lesquels s'appliquent les taxes, avec mention de la province ou du territoire où ils sont situés;

i) la liste des aérodromes, aéroports ou autres installations utilisés pour chaque point mentionné dans le tarif;

j) s'il y a lieu, les renseignements concernant les exigences et les restrictions de paiement à l'avance ainsi que le refus et la non-livraison des marchandises; toutefois, ces renseignements ne sont pas nécessaires si un renvoi est fait au numéro d'un autre tarif qui contient ces renseignements;

reference thereon to the page on which the explanation is given;

(l) the terms and conditions governing the tariff, generally, stated in such a way that it is clear as to how the terms and conditions apply to the tolls named in the tariff;

(m) any special terms and conditions that apply to a particular toll and, where the toll appears on a page, a reference on that page to the page on which those terms and conditions appear;

(n) the terms and conditions of carriage, clearly stating the air carrier's policy in respect of at least the following matters, namely,

(i) the carriage of persons with disabilities,

(ii) the carriage of children,

(iii) unaccompanied minors, including those who are travelling under the carrier's supervision,

(iv) the assignment of seats to children who are under the age of 14 years,

(v) failure to operate the service or failure to operate the air service according to schedule,

(vi) flight delay,

(vii) flight cancellation,

(viii) delay on the tarmac,

(ix) denial of boarding,

(x) the re-routing of passengers,

(xi) whether the carrier is bound by the obligations of a large carrier or the obligations of a small carrier that are set out in the *Air Passenger Protection Regulations*,

(xii) refunds for services purchased but not used, whether in whole or in part, either as a result of the client's unwillingness or inability to continue or the air carrier's inability to provide the service for any reason,

(xiii) ticket reservation, cancellation, confirmation, validity and loss,

(xiv) refusal to transport passengers or goods,

(xv) method of calculation of charges not specifically set out in the tariff,

k) l'explication complète des abréviations, notes, appels de notes, symboles et termes techniques employés dans le tarif et, lorsque des appels de notes ou des symboles figurent sur une page, leur explication sur la page même ou un renvoi à la page qui en donne l'explication;

l) les conditions générales régissant le tarif, énoncées en des termes qui expliquent clairement leur application aux taxes énumérées;

m) les conditions particulières qui s'appliquent à une taxe donnée et, sur la page où figure la taxe, un renvoi à la page où se trouvent les conditions;

n) les conditions de transport, dans lesquelles est énoncée clairement la politique du transporteur aérien concernant au moins les éléments suivants :

(i) le transport des personnes handicapées,

(ii) le transport des enfants,

(iii) les mineurs non accompagnés, notamment ceux qui voyagent sous la supervision du transporteur,

(iv) l'attribution de sièges aux enfants de moins de quatorze ans,

(v) l'inexécution du service aérien ou le non-respect de l'horaire prévu pour le service aérien,

(vi) les vols retardés,

(vii) les vols annulés,

(viii) les retards sur l'aire de trafic,

(ix) les refus d'embarquement,

(x) le réacheminement des passagers,

(xi) si le transporteur est tenu de respecter les obligations applicable aux gros transporteur ou aux petits transporteurs qui sont prévues par le *Règlement sur la protection des passagers aériens*,

(xii) le remboursement des services achetés mais non utilisés, intégralement ou partiellement, par suite de la décision du client de ne pas poursuivre son trajet ou de son incapacité à le faire, ou encore de l'inaptitude du transporteur aérien à fournir le service pour une raison quelconque,

(xiii) la réservation, l'annulation de vol, la confirmation, la validité et la perte des billets,

(xvi) the carriage of baggage including the loss, delay or damaging of baggage,

(xvii) the transportation of musical instruments,

(xviii) limits of liability respecting passengers and goods,

(xix) exclusions from liability respecting passengers and goods,

(xx) procedures to be followed, and time limitations, respecting claims, and

(xxi) any other terms and conditions deemed under subsection 86.11(4) of the Act to be included in the tariff;

(o) the tolls, shown in Canadian currency, together with the names of the points from, to or between which the tolls apply, arranged in a simple and systematic manner with, in the case of commodity tolls, goods clearly identified;

(p) the routings related to the tolls unless reference is made in the tariff to another tariff in which the routings appear; and

(q) the official descriptive title of each type of passenger fare, together with any name or abbreviation thereof.

(2) Every original tariff page shall be designated "Original Page", and changes in, or additions to, the material contained on the page shall be made by revising the page and renumbering it accordingly.

(3) Where an additional page is required within a series of pages in a tariff, that page shall be given the same number as the page it follows but a letter shall be added to the number.

(4) and (5) [Repealed, SOR/96-335, s. 54]

SOR/93-253, s. 2; SOR/93-449, s. 1; SOR/96-335, s. 54; SOR/2017-19, s. 7(F); SOR/2019-150, s. 40.

Interest

107.1 Where the Agency, by order, directs an air carrier to refund specified amounts to persons that have been

(xiv) le refus de transporter des passagers ou des marchandises,

(xv) la méthode de calcul des frais non précisés dans le tarif,

(xvi) le transport des bagages, y compris la perte, le retard ou le endommagement de ceux-ci,

(xvii) le transport des instruments de musique,

(xviii) les limites de responsabilité à l'égard des passagers et des marchandises,

(xix) les exclusions de responsabilité à l'égard des passagers et des marchandises,

(xx) la marche à suivre ainsi que les délais fixés pour les réclamations,

(xxi) toute autre modalité réputée figurer au tarif du transporteur au titre du paragraphe 86.11(4) de la Loi;

o) les taxes, exprimées en monnaie canadienne, et les noms des points en provenance et à destination desquels ou entre lesquels elles s'appliquent, le tout étant disposé d'une manière simple et méthodique et les marchandises étant indiquées clairement dans le cas des taxes spécifiques;

p) les itinéraires visés par les taxes; toutefois, ces itinéraires n'ont pas à être indiqués si un renvoi est fait à un autre tarif qui les contient;

q) le titre descriptif officiel de chaque type de prix passagers, ainsi que tout nom ou abréviation servant à désigner ce prix.

(2) Les pages originales du tarif doivent porter la mention «page originale» et, lorsque des changements ou des ajouts sont apportés, la page visée doit être révisée et numérotée en conséquence.

(3) S'il faut intercaler une page supplémentaire dans une série de pages d'un tarif, cette page doit porter le même numéro que la page qui la précède, auquel une lettre est ajoutée.

(4) et (5) [Abrogés, DORS/96-335, art. 54]

DORS/93-253, art. 2; DORS/93-449, art. 1; DORS/96-335, art. 54; DORS/2017-19, art. 7(F); DORS/2019-150, art. 40.

Intérêts

107.1 Dans le cas où, en vertu de l'alinéa 66(1)c) de la Loi, l'Office enjoint, par ordonnance, à un transporteur

(b) the toll has been disallowed or suspended by the Agency.

(4) Where a tariff is filed containing the date of publication and the effective date and is consistent with these Regulations and any orders of the Agency, the tolls and terms and conditions of carriage in the tariff shall, unless they are rejected, disallowed or suspended by the Agency or unless they are replaced by a new tariff, take effect on the date stated in the tariff, and the air carrier shall on and after that date charge the tolls and apply the terms and conditions of carriage specified in the tariff.

(5) No air carrier or agent thereof shall offer, grant, give, solicit, accept or receive any rebate, concession or privilege in respect of the transportation of any persons or goods by the air carrier whereby such persons or goods are or would be, by any device whatever, transported at a toll that differs from that named in the tariffs then in force or under terms and conditions of carriage other than those set out in such tariffs.

SOR/96-335, s. 56; SOR/98-197, s. 6(E).

111 (1) All tolls and terms and conditions of carriage, including free and reduced rate transportation, that are established by an air carrier shall be just and reasonable and shall, under substantially similar circumstances and conditions and with respect to all traffic of the same description, be applied equally to all that traffic.

(2) No air carrier shall, in respect of tolls or the terms and conditions of carriage,

(a) make any unjust discrimination against any person or other air carrier;

(b) give any undue or unreasonable preference or advantage to or in favour of any person or other air carrier in any respect whatever; or

(c) subject any person or other air carrier or any description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatever.

(3) The Agency may determine whether traffic is to be, is or has been carried under substantially similar circumstances and conditions and whether, in any case, there is or has been unjust discrimination or undue or unreasonable preference or advantage, or prejudice or disadvantage, within the meaning of this section, or whether in any case the air carrier has complied with the provisions of this section or section 110.

SOR/93-253, s. 2; SOR/96-335, s. 57.

(4) Lorsqu'un tarif déposé porte une date de publication et une date d'entrée en vigueur et qu'il est conforme au présent règlement et aux arrêtés de l'Office, les taxes et les conditions de transport qu'il contient, sous réserve de leur rejet, de leur refus ou de leur suspension par l'Office, ou de leur remplacement par un nouveau tarif, prennent effet à la date indiquée dans le tarif, et le transporteur aérien doit les appliquer à compter de cette date.

(5) Il est interdit au transporteur aérien ou à ses agents d'offrir, d'accorder, de donner, de solliciter, d'accepter ou de recevoir un rabais, une concession ou un privilège permettant, par un moyen quelconque, le transport de personnes ou de marchandises à une taxe ou à des conditions qui diffèrent de celles que prévoit le tarif en vigueur.

DORS/96-335, art. 56; DORS/98-197, art. 6(A).

111 (1) Les taxes et les conditions de transport établies par le transporteur aérien, y compris le transport à titre gratuit ou à taux réduit, doivent être justes et raisonnables et doivent, dans des circonstances et des conditions sensiblement analogues, être imposées uniformément pour tout le trafic du même genre.

(2) En ce qui concerne les taxes et les conditions de transport, il est interdit au transporteur aérien :

a) d'établir une distinction injuste à l'endroit de toute personne ou de tout autre transporteur aérien;

b) d'accorder une préférence ou un avantage indu ou déraisonnable, de quelque nature que ce soit, à l'égard ou en faveur d'une personne ou d'un autre transporteur aérien;

c) de soumettre une personne, un autre transporteur aérien ou un genre de trafic à un désavantage ou à un préjudice indu ou déraisonnable de quelque nature que ce soit.

(3) L'Office peut décider si le trafic doit être, est ou a été acheminé dans des circonstances et à des conditions sensiblement analogues et s'il y a ou s'il y a eu une distinction injuste, une préférence ou un avantage indu ou déraisonnable, ou encore un préjudice ou un désavantage au sens du présent article, ou si le transporteur aérien s'est conformé au présent article ou à l'article 110.

DORS/93-253, art. 2; DORS/96-335, art. 57.

112 (1) All air carriers having joint tolls shall establish just and reasonable divisions thereof between participating air carriers.

(2) The Agency may

(a) determine and fix just and equitable divisions of joint tolls between air carriers or the portion of the joint tolls to be received by an air carrier;

(b) require an air carrier to inform the Agency of the portion of the tolls in any joint tariff filed that it or any other carrier is to receive or has received; and

(c) decide that any proposed through toll is just and reasonable notwithstanding that an amount less than the amount that an air carrier would otherwise be entitled to charge may be allotted to that air carrier out of that through toll.

113 The Agency may

(a) suspend any tariff or portion of a tariff that appears not to conform with subsections 110(3) to (5) or section 111 or 112, or disallow any tariff or portion of a tariff that does not conform with any of those provisions; and

(b) establish and substitute another tariff or portion thereof for any tariff or portion thereof disallowed under paragraph (a).

SOR/93-253, s. 2; SOR/96-335, s. 58.

113.1 (1) If an air carrier that offers an international service fails to apply the fares, rates, charges or terms and conditions of carriage set out in the tariff that applies to that service, the Agency may, if it receives a written complaint, direct the air carrier to

(a) take the corrective measures that the Agency considers appropriate; and

(b) pay compensation for any expense incurred by a person adversely affected by its failure to apply the fares, rates, charges or terms and conditions that are applicable to the service it offers and that were set out in the tariff.

(2) If the written complaint is with respect to a term or condition of carriage concerning an obligation prescribed by regulations made under subsection 86.11(1) of the Act, it must have been filed by a person adversely affected by the failure to apply the term or condition.

112 (1) Les transporteurs aériens qui appliquent des taxes pluritransporteurs doivent établir une répartition juste et raisonnable de ces taxes entre les transporteurs aériens participants.

(2) L'Office peut procéder de la façon suivante :

a) déterminer et fixer la répartition équitable des taxes pluritransporteurs entre les transporteurs aériens, ou la proportion de ces taxes que doit recevoir un transporteur aérien;

b) enjoindre à un transporteur aérien de lui faire connaître la proportion des taxes de tout tarif pluritransporteur déposé que lui-même ou tout autre transporteur aérien est censé recevoir ou qu'il a reçue;

c) décider qu'une taxe totale proposée est juste et raisonnable, même si un transporteur aérien s'en voit attribuer une portion inférieure à la taxe qu'il serait autrement en droit d'exiger.

113 L'Office peut :

a) suspendre tout ou partie d'un tarif qui paraît ne pas être conforme aux paragraphes 110(3) à (5) ou aux articles 111 ou 112, ou refuser tout tarif qui n'est pas conforme à l'une de ces dispositions;

b) établir et substituer tout ou partie d'un autre tarif en remplacement de tout ou partie du tarif refusé en application de l'alinéa a).

DORS/93-253, art. 2; DORS/96-335, art. 58.

113.1 (1) Si un transporteur aérien n'applique pas les prix, taux, frais ou conditions de transport applicables au service international qu'il offre et figurant à son tarif, l'Office peut, suite au dépôt d'une plainte écrite, lui enjoindre :

a) de prendre les mesures correctives qu'il estime indiquées;

b) de verser des indemnités à quiconque pour toutes dépenses qu'il a supportées en raison de la non-application de ces prix, taux, frais ou conditions de transport applicables aux services offerts et prévus au tarif.

(2) Lorsqu'une plainte écrite porte sur une condition de transport visant une obligation prévue par un règlement pris en vertu du paragraphe 86.11(1) de la Loi, cette plainte est déposée par la personne lésée.

Contents of Tariffs

122 Every tariff shall contain

(a) the terms and conditions governing the tariff generally, stated in such a way that it is clear as to how the terms and conditions apply to the tolls named in the tariff;

(b) the tolls, together with the names of the points from and to which or between which the tolls apply, arranged in a simple and systematic manner with, in the case of commodity tolls, goods clearly identified;

(c) the terms and conditions of carriage, clearly stating the air carrier's policy in respect of at least the following matters, namely,

(i) the carriage of persons with disabilities,

(ii) the carriage of children,

(iii) unaccompanied minors, including those who are travelling under the carrier's supervision,

(iv) the assignment of seats to children who are under the age of 14 years,

(v) failure to operate the service or failure to operate the air service according to schedule,

(vi) flight delay,

(vii) flight cancellation,

(viii) delay on the tarmac,

(ix) denial of boarding,

(x) the re-routing of passengers,

(xi) whether the carrier is bound by the obligations of a large carrier or the obligations of a small carrier that are set out in the *Air Passenger Protection Regulations*,

(xii) refunds for services purchased but not used, whether in whole or in part, either as a result of the client's unwillingness or inability to continue or the air carrier's inability to provide the service for any reason,

(xiii) ticket reservation, cancellation, confirmation, validity and loss,

(xiv) refusal to transport passengers or goods,

Contenu des tarifs

122 Les tarifs doivent contenir :

a) les conditions générales régissant le tarif, énoncées en des termes qui expliquent clairement leur application aux taxes énumérées;

b) les taxes ainsi que les noms des points en provenance et à destination desquels ou entre lesquels elles s'appliquent, le tout étant disposé d'une manière simple et méthodique et les marchandises étant indiquées clairement dans le cas des taxes spécifiques;

c) les conditions de transport, dans lesquelles est énoncée clairement la politique du transporteur aérien concernant au moins les éléments suivants :

(i) le transport des personnes handicapées,

(ii) le transport des enfants,

(iii) les mineurs non accompagnés, notamment ceux qui voyagent sous la supervision du transporteur,

(iv) l'attribution de sièges aux enfants de moins de quatorze ans,

(v) l'inexécution du service aérien ou le non-respect de l'horaire prévu pour le service aérien,

(vi) les vols retardés,

(vii) les vols annulés,

(viii) les retards sur l'aire de trafic,

(ix) les refus d'embarquement,

(x) le réacheminement des passagers,

(xi) si le transporteur est tenu de respecter les obligations applicable aux gros transporteur ou aux petits transporteurs qui sont prévues par le *Règlement sur la protection des passagers aériens*,

(xii) le remboursement des services achetés mais non utilisés, intégralement ou partiellement, par suite de la décision du client de ne pas poursuivre son trajet ou de son incapacité à le faire, ou encore de l'inaptitude du transporteur aérien à fournir le service pour une raison quelconque,

(xiii) la réservation, l'annulation de vol, la confirmation, la validité et la perte des billets,

(xv) method of calculation of charges not specifically set out in the tariff,

(xvi) the carriage of baggage including the loss, delay or damaging of baggage,

(xvii) the transportation of musical instruments,

(xviii) limits of liability respecting passengers and goods,

(xix) exclusions from liability respecting passengers and goods,

(xx) procedures to be followed, and time limitations, respecting claims, and

(xxi) any other terms and conditions deemed under subsection 86.11(4) of the Act to be included in the tariff; and

(d) a policy respecting the refusal to transport a person who is less than five years old unless that person is accompanied by their parent or a person who is at least 16 years old.

SOR/93-253, s. 2; SOR/96-335, s. 65; SOR/2019-150, s. 42.

123 [Repealed, SOR/96-335, s. 65]

Supplements

124 (1) A supplement to a tariff on paper shall be in book or pamphlet form and shall be published only for the purpose of amending or cancelling that tariff.

(2) Every supplement shall be prepared in accordance with a standard form provided by the Agency.

(3) Supplements are governed by the same provisions of these Regulations as are applicable to the tariff that the supplements amend or cancel.

SOR/93-253, s. 2(F); SOR/96-335, s. 66.

Symbols

125 All abbreviations, notes, reference marks, symbols and technical terms shall be defined at the beginning of the tariff.

SOR/96-335, s. 66; SOR/2017-19, s. 9(E).

(xiv) le refus de transporter des passagers ou des marchandises,

(xv) la méthode de calcul des frais non précisés dans le tarif,

(xvi) le transport des bagages, y compris la perte, le retard ou le endommagement,

(xvii) le transport des instruments de musique,

(xviii) les limites de responsabilité à l'égard des passagers et des marchandises,

(xix) les exclusions de responsabilité à l'égard des passagers et des marchandises,

(xx) la marche à suivre ainsi que les délais fixés pour les réclamations,

(xxi) toute autre modalité réputée figurer au tarif du transporteur au titre du paragraphe 86.11(4) de la Loi;

d) la politique concernant le refus de transport d'un enfant de moins de cinq ans à moins qu'il ne soit accompagné par son parent ou par une personne âgée de seize ans ou plus.

DORS/93-253, art. 2; DORS/96-335, art. 65; DORS/2019-150, art. 42.

123 [Abrogé, DORS/96-335, art. 65]

Suppléments

124 (1) Les suppléments à un tarif sur papier doivent être publiés sous forme de livres ou de brochures et ne doivent servir qu'à modifier ou annuler le tarif.

(2) Les suppléments doivent être conformes au modèle fourni par l'Office.

(3) Les suppléments sont régis par les dispositions du présent règlement qui s'appliquent aux tarifs qu'ils modifient ou annulent.

DORS/93-253, art. 2(F); DORS/96-335, art. 66.

Symboles

125 Les abréviations, notes, appels de notes, symboles et termes techniques doivent être définis au début du tarif.

DORS/96-335, art. 66; DORS/2017-19, art. 9(A).

CANADA

CONSOLIDATION

CODIFICATION

Canada Transportation Act

Loi sur les transports au Canada

S.C. 1996, c. 10

L.C. 1996, ch. 10

Current to March 5, 2020

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Parliament in respect of that particular mode of transportation, the order or regulation made under this Act prevails.

Competition Act

(2) Subject to subsection (3), nothing in or done under the authority of this Act, other than Division IV of Part III, affects the operation of the *Competition Act*.

International agreements respecting air services

(3) In the event of any inconsistency or conflict between an international agreement or convention respecting air services to which Canada is a party and the *Competition Act*, the provisions of the agreement or convention prevail to the extent of the inconsistency or conflict.

1996, c. 10, s. 4; 2007, c. 19, s. 1.

Loi sur la concurrence

(2) Sous réserve du paragraphe (3), les dispositions de la présente loi — sauf celles de la section IV de la partie III — et les actes accomplis sous leur régime ne portent pas atteinte à l'application de la *Loi sur la concurrence*.

Conventions ou accords internationaux sur les services aériens

(3) En cas d'incompatibilité ou de conflit entre une convention internationale ou un accord international sur les services aériens dont le Canada est signataire et les dispositions de la *Loi sur la concurrence*, la convention ou l'accord l'emporte dans la mesure de l'incompatibilité ou du conflit.

1996, ch. 10, art. 4; 2007, ch. 19, art. 1.

National Transportation Policy

Declaration

5 It is declared that a competitive, economic and efficient national transportation system that meets the highest practicable safety and security standards and contributes to a sustainable environment and makes the best use of all modes of transportation at the lowest total cost is essential to serve the needs of its users, advance the well-being of Canadians and enable competitiveness and economic growth in both urban and rural areas throughout Canada. Those objectives are most likely to be achieved when

(a) competition and market forces, both within and among the various modes of transportation, are the prime agents in providing viable and effective transportation services;

(b) regulation and strategic public intervention are used to achieve economic, safety, security, environmental or social outcomes that cannot be achieved satisfactorily by competition and market forces and do not unduly favour, or reduce the inherent advantages of, any particular mode of transportation;

(c) rates and conditions do not constitute an undue obstacle to the movement of traffic within Canada or to the export of goods from Canada;

(d) the transportation system is accessible without undue obstacle to the mobility of all persons;

Politique nationale des transports

Déclaration

5 Il est déclaré qu'un système de transport national compétitif et rentable qui respecte les plus hautes normes possibles de sûreté et de sécurité, qui favorise un environnement durable et qui utilise tous les modes de transport au mieux et au coût le plus bas possible est essentiel à la satisfaction des besoins de ses usagers et au bien-être des Canadiens et favorise la compétitivité et la croissance économique dans les régions rurales et urbaines partout au Canada. Ces objectifs sont plus susceptibles d'être atteints si :

a) la concurrence et les forces du marché, au sein des divers modes de transport et entre eux, sont les principaux facteurs en jeu dans la prestation de services de transport viables et efficaces;

b) la réglementation et les mesures publiques stratégiques sont utilisées pour l'obtention de résultats de nature économique, environnementale ou sociale ou de résultats dans le domaine de la sûreté et de la sécurité que la concurrence et les forces du marché ne permettent pas d'atteindre de manière satisfaisante, sans pour autant favoriser indûment un mode de transport donné ou en réduire les avantages inhérents;

c) les prix et modalités ne constituent pas un obstacle abusif au trafic à l'intérieur du Canada ou à l'exportation des marchandises du Canada;

(d.1) the transportation system is accessible without barriers to persons with disabilities; and

(e) governments and the private sector work together for an integrated transportation system.

1996, c. 10, s. 5; 2007, c. 19, s. 2; 2019, c. 10, s. 166.

Interpretation

Definitions

6 In this Act,

Agency means the Canadian Transportation Agency continued by subsection 7(1); (*Office*)

carrier means a person who is engaged in the transport of goods or passengers by any means of transport under the legislative authority of Parliament; (*transporteur*)

Chairperson means the Chairperson of the Agency; (*président*)

class 1 rail carrier means

(a) the Canadian National Railway Company,

(b) the Canadian Pacific Railway Company,

(c) BNSF Railway Company,

(d) CSX Transportation, Inc.,

(e) Norfolk Southern Railway Company,

(f) Union Pacific Railroad Company, and

(g) any *railway company*, as defined in section 87, that is specified in the regulations; (*transporteur ferroviaire de catégorie 1*)

goods includes rolling stock and mail; (*marchandises*)

member means a member of the Agency appointed under subsection 7(2) and includes a temporary member; (*membre*)

Minister means the Minister of Transport; (*ministre*)

radioactive material has the same meaning as in subsection 1(1) of the *Packaging and Transport of Nuclear Substances Regulations, 2015*. It includes a dangerous good with any of UN numbers 2908 to 2913, 2915 to 2917, 2919, 2977, 2978, 3321 to 3333 and 3507 that are set out in

d) le système de transport est accessible sans obstacle abusif à la circulation de tous;

d.1) le système de transport est accessible sans obstacle aux personnes handicapées;

e) les secteurs public et privé travaillent ensemble pour le maintien d'un système de transport intégré.

1996, ch. 10, art. 5; 2007, ch. 19, art. 2; 2019, ch. 10, art. 166.

Définitions

Définitions

6 Les définitions qui suivent s'appliquent à la présente loi.

cour supérieure

a) La Cour supérieure de justice de l'Ontario;

b) la Cour supérieure du Québec;

c) la Cour du Banc de la Reine du Nouveau-Brunswick, du Manitoba, de la Saskatchewan ou de l'Alberta;

d) la Cour suprême de la Nouvelle-Écosse, de la Colombie-Britannique, de l'Île-du-Prince-Édouard, du Yukon ou des Territoires du Nord-Ouest;

e) la Section de première instance de la Cour suprême de Terre-Neuve-et-Labrador;

f) la Cour de justice du Nunavut. (*superior court*)

expéditeur Personne qui expédie des marchandises par transporteur, ou en reçoit de celui-ci, ou qui a l'intention de le faire. (*shipper*)

jour de séance Tout jour où l'une ou l'autre chambre du Parlement siège. (*sitting day of Parliament*)

marchandises Y sont assimilés le matériel roulant et le courrier. (*goods*)

matériel roulant Toute sorte de voitures et de matériel muni de roues destinés à servir sur les rails d'un chemin de fer, y compris les locomotives, machines actionnées par quelque force motrice, voitures automotrices, tenders, chasse-neige et *flangers*. (*rolling stock*)

matière radioactive S'entend au sens du paragraphe 1(1) du *Règlement sur l'emballage et le transport des substances nucléaires (2015)*. Sont notamment visées par la présente définition les marchandises dangereuses dont le numéro ONU — indiqué à la colonne 1 de la Liste des

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.

Continuation in office

(3) If a member appointed under subsection 7(2) ceases to hold office, the Chairperson may authorize the member to continue to hear any matter that was before the member on the expiry of the member's term of office and that member is deemed to be a member of the Agency, but that person's status as a member does not preclude the appointment of up to five members under subsection 7(2) or up to three temporary members under subsection 9(1).

1996, c. 10, s. 8; 2007, c. 19, s. 4; 2015, c. 3, s. 31(E).

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.

Continuation de mandat

(3) Le président peut autoriser un membre nommé en vertu du paragraphe 7(2) qui cesse d'exercer ses fonctions à continuer, après la date d'expiration de son mandat, à entendre toute question dont il se trouve saisi à cette date. À cette fin, le membre est réputé être membre de l'Office mais son statut n'empêche pas la nomination de cinq membres en vertu du paragraphe 7(2) ou de trois membres temporaires en vertu du paragraphe 9(1).

1996, ch. 10, art. 8; 2007, ch. 19, art. 4; 2015, ch. 3, art. 31(A).

within three months after the vesting, absolutely dispose of the interest.

1996, c. 10, s. 10; 2015, c. 3, s. 32(E).

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).

Chairperson

Duties of Chairperson

13 The Chairperson is the chief executive officer of the Agency and has the supervision over and direction of the 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.

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.

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).

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 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.

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.

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.

Rules

Rules

17 The Agency may make rules respecting

(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.

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) 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.

Règles

Règles

17 L'Office peut établir des règles concernant :

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.

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.

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

(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

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.

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.

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) 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

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.

fixés par celui-ci, des copies certifiées conformes des règles, arrêtés, règlements ou autres documents de l'Office.

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.

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.

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.

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.

Powers of Agency

Attributions de l'Office

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.

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.

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.

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.

Power to award costs

25.1 (1) Subject to subsections (2) to (4), the Agency has all the powers that the Federal Court has to award costs in any proceeding before it.

Pouvoirs relatifs à l'adjudication des frais

25.1 (1) Sous réserve des paragraphes (2) à (4), l'Office a tous les pouvoirs de la Cour fédérale en ce qui a trait à l'adjudication des frais relativement à toute procédure prise devant lui.

Costs may be fixed or taxed

(2) Costs may be fixed in any case at a sum certain or may be taxed.

Frais fixés ou taxés

(2) Les frais peuvent être fixés à une somme déterminée, ou taxés.

Payment

(3) The Agency may direct by whom and to whom costs are to be paid and by whom they are to be taxed and allowed.

Paiement

(3) L'Office peut ordonner par qui et à qui les frais doivent être payés et par qui ils doivent être taxés et alloués.

an extension or this Act or a regulation made under subsection (2) provides otherwise.

Period for specified classes

(2) The Governor in Council may, by regulation, prescribe periods of less than one hundred and twenty days within which the Agency shall make its decision in respect of such classes of proceedings as are specified in the regulation.

Pending proceedings

30 The fact that a suit, prosecution or proceeding involving a question of fact is pending in any court does not deprive the Agency of jurisdiction to hear and determine the same question of fact.

Fact finding is conclusive

31 The finding or determination of the Agency on a question of fact within its jurisdiction is binding and conclusive.

Review of decisions and orders

32 The Agency may review, rescind or vary any decision or order made by it or may re-hear any application before deciding it if, in the opinion of the Agency, since the decision or order or the hearing of the application, there has been a change in the facts or circumstances pertaining to the decision, order or hearing.

Enforcement of decision or order

33 (1) A decision or order of the Agency may be made an order of the Federal Court or of any superior court and is enforceable in the same manner as such an order.

Procedure

(2) To make a decision or order an order of a court, either the usual practice and procedure of the court in such matters may be followed or the Secretary of the Agency may file with the registrar of the court a certified copy of the decision or order, signed by the Chairperson and sealed with the Agency's seal, at which time the decision or order becomes an order of the court.

Effect of variation or rescission

(3) Where a decision or order that has been made an order of a court is rescinded or varied by a subsequent decision or order of the Agency, the order of the court is deemed to have been cancelled and the subsequent decision or order may be made an order of the court.

toute la diligence possible dans les cent vingt jours suivant la réception de l'acte introductif d'instance.

Délai plus court

(2) Le gouverneur en conseil peut, par règlement, imposer à l'Office un délai inférieur à cent vingt jours pour rendre une décision à l'égard des catégories d'affaires qu'il indique.

Affaire en instance

30 L'Office a compétence pour statuer sur une question de fait, peu importe que celle-ci fasse l'objet d'une poursuite ou autre instance en cours devant un tribunal.

Décision définitive

31 La décision de l'Office sur une question de fait relevant de sa compétence est définitive.

Révision, annulation ou modification de décisions

32 L'Office peut réviser, annuler ou modifier ses décisions ou arrêtés, ou entendre de nouveau une demande avant d'en décider, en raison de faits nouveaux ou en cas d'évolution, selon son appréciation, des circonstances de l'affaire visée par ces décisions, arrêtés ou audiences.

Homologation

33 (1) Les décisions ou arrêtés de l'Office peuvent être homologués par la Cour fédérale ou une cour supérieure; le cas échéant, leur exécution s'effectue selon les mêmes modalités que les ordonnances de la cour saisie.

Procédure

(2) L'homologation peut se faire soit selon les règles de pratique et de procédure de la cour saisie applicables en l'occurrence, soit au moyen du dépôt, auprès du greffier de la cour par le secrétaire de l'Office, d'une copie certifiée conforme de la décision ou de l'arrêté en cause, signée par le président et revêtue du sceau de l'Office.

Annulation ou modification

(3) Les décisions ou arrêtés de l'Office qui annulent ou modifient des décisions ou arrêtés déjà homologués par une cour sont réputés annuler ces derniers et peuvent être homologués selon les mêmes modalités.

Option to enforce

(4) The Agency may, before or after one of its decisions or orders is made an order of a court, enforce the decision or order by its own action.

1996, c. 10, s. 33; 2002, c. 8, s. 122; 2006, c. 11, s. 17; 2007, c. 19, s. 6.

Fees

34 (1) The Agency may, by rule, fix the fees that are to be paid to the Agency in respect of applications made to it, including applications for licences or permits and applications for amendments to or for the renewal of licences or permits, and any other matters brought before or dealt with by the Agency.

Advance notice to Minister

(2) The Agency shall give the Minister notice of every rule proposed to be made under subsection (1).

Fees for witnesses

35 Every person summoned to attend before the Agency under this Part or before a person making an inquiry under this Part shall receive the fees and allowances for so doing that the Agency may, by regulation, prescribe.

Approval of regulations required

36 (1) Every regulation made by the Agency under this Act must be made with the approval of the Governor in Council.

Advance notice of regulations

(2) The Agency shall give the Minister notice of every regulation proposed to be made by the Agency under this Act.

Mediation

Request by parties

36.1 (1) If there is a dispute concerning a matter within the Agency's jurisdiction, all the parties to the dispute may, by agreement, make a request to the Agency for mediation. On receipt of the request, the Agency shall refer the dispute for mediation.

Appointment of mediator

(2) When a dispute is referred for mediation, the Chairperson shall appoint one or two persons to mediate the dispute.

Faculté d'exécution

(4) L'Office peut toujours faire exécuter lui-même ses décisions ou arrêtés, même s'ils ont été homologués par une cour.

1996, ch. 10, art. 33; 2002, ch. 8, art. 122; 2006, ch. 11, art. 17; 2007, ch. 19, art. 6.

Droits

34 (1) L'Office peut, par règle, établir les droits à lui verser relativement aux questions ou demandes dont il est saisi, notamment les demandes de licences ou de permis et les demandes de modification ou de renouvellement de ceux-ci.

Préavis

(2) L'Office fait parvenir au ministre un avis relativement à toute règle qu'il entend prendre en vertu du paragraphe (1).

Indemnité des témoins

35 Il est alloué à toute personne qui se rend à la convocation de l'Office ou d'un enquêteur, dans le cadre de la présente partie, les indemnités que l'Office peut fixer par règlement.

Agrément du gouverneur en conseil

36 (1) Tout règlement pris par l'Office en vertu de la présente loi est subordonné à l'agrément du gouverneur en conseil.

Préavis au ministre

(2) L'Office fait parvenir au ministre un avis relativement à tout règlement qu'il entend prendre en vertu de la présente loi.

Médiation

Demande des parties

36.1 (1) Les parties entre lesquelles survient un différend sur toute question relevant de la compétence de l'Office peuvent d'un commun accord faire appel à la médiation de celui-ci. Le cas échéant, l'Office renvoie sans délai le différend à la médiation.

Nomination d'un médiateur

(2) En cas de renvoi à la médiation par l'Office, le président nomme une ou deux personnes pour procéder à celle-ci.

Parliament that is administered in whole or in part by the Agency.

Appointment of person to conduct inquiry

38 (1) The Agency may appoint a member, or an employee of the Agency, to make any inquiry that the Agency is authorized to conduct and report to the Agency.

Dealing with report

(2) On receipt of the report under subsection (1), the Agency may adopt the report as a decision or order of the Agency or otherwise deal with it as it considers advisable.

Powers on inquiry

39 A person conducting an inquiry may, for the purposes of the inquiry,

(a) enter and inspect any place, other than a dwelling-house, or any structure, work, rolling stock or ship that is the property or under the control of any person the entry or inspection of which appears to the inquirer to be necessary; and

(b) exercise the same powers as are vested in a superior court to summon witnesses, enforce their attendance and compel them to give evidence and produce any materials, books, papers, plans, specifications, drawings and other documents that the inquirer thinks necessary.

Review and Appeal

Governor in Council may vary or rescind orders, etc.

40 The Governor in Council may, at any time, in the discretion of the Governor in Council, either on petition of a party or an interested person or of the Governor in Council's own motion, vary or rescind any decision, order, rule or regulation of the Agency, whether the decision or order is made *inter partes* or otherwise, and whether the rule or regulation is general or limited in its scope and application, and any order that the Governor in Council may make to do so is binding on the Agency and on all parties.

Appeal from Agency

41 (1) An appeal lies from the Agency to the Federal Court of Appeal on a question of law or a question of jurisdiction on leave to appeal being obtained from that Court on application made within one month after the date of the decision, order, rule or regulation being appealed from, or within any further time that a judge of that Court under special circumstances allows, and on notice to the parties and the Agency, and on hearing those of them that appear and desire to be heard.

Délégation

38 (1) L'Office peut déléguer son pouvoir d'enquête à l'un de ses membres ou fonctionnaires et charger ce dernier de lui faire rapport.

Connaissance du rapport

(2) Sur réception du rapport, l'Office peut l'entériner sous forme de décision ou d'arrêté ou statuer sur le rapport de la manière qu'il estime indiquée.

Pouvoirs de la personne chargée de l'enquête

39 Toute personne chargée de faire enquête peut, à cette fin :

a) procéder à la visite de tout lieu autre qu'une maison d'habitation — terrain, construction, ouvrage, matériel roulant ou navire —, quel qu'en soit le propriétaire ou le responsable, si elle l'estime nécessaire à l'enquête;

b) exercer les attributions d'une cour supérieure pour faire comparaître des témoins et pour les contraindre à témoigner et à produire les pièces — objets, livres, plans, cahiers des charges, dessins ou autres documents — qu'elle estime nécessaires à l'enquête.

Révision et appel

Modification ou annulation

40 Le gouverneur en conseil peut modifier ou annuler les décisions, arrêtés, règles ou règlements de l'Office soit à la requête d'une partie ou d'un intéressé, soit de sa propre initiative; il importe peu que ces décisions ou arrêtés aient été pris en présence des parties ou non et que les règles ou règlements soient d'application générale ou particulière. Les décrets du gouverneur en conseil en cette matière lient l'Office et toutes les parties.

Appel

41 (1) Tout acte — décision, arrêté, règle ou règlement — de l'Office est susceptible d'appel devant la Cour d'appel fédérale sur une question de droit ou de compétence, avec l'autorisation de la cour sur demande présentée dans le mois suivant la date de l'acte ou dans le délai supérieur accordé par un juge de la cour en des circonstances spéciales, après notification aux parties et à l'Office et audition de ceux d'entre eux qui comparaissent et désirent être entendus.

Time for making appeal

(2) No appeal, after leave to appeal has been obtained under subsection (1), lies unless it is entered in the Federal Court of Appeal within sixty days after the order granting leave to appeal is made.

Powers of Court

(3) An appeal shall be heard as quickly as is practicable and, on the hearing of the appeal, the Court may draw any inferences that are not inconsistent with the facts expressly found by the Agency and that are necessary for determining the question of law or jurisdiction, as the case may be.

Agency may be heard

(4) The Agency is entitled to be heard by counsel or otherwise on the argument of an appeal.

Report of Agency

Agency's report

42 (1) Each year the Agency shall, before the end of July, make a report on its activities for the preceding year and submit it, through the Minister, to the Governor in Council describing briefly, in respect of that year,

(a) applications to the Agency and the findings on them; and

(b) the findings of the Agency in regard to any matter or thing respecting which the Agency has acted on the request of the Minister.

Additional content

(2) The Agency shall include in every report referred to in subsection (1)

(a) the Agency's assessment of the operation of this Act and any difficulties observed in the administration of this Act;

(b) in respect of the year to which the report relates, information about, including the number of, the following:

(i) inspections conducted under this Act for a purpose related to verifying compliance or preventing non-compliance with any provision of regulations made under subsection 170(1) or with any of sections 60 to 62 of the *Accessible Canada Act*,

(ii) orders made under section 181.2,

Délai

(2) Une fois l'autorisation obtenue en application du paragraphe (1), l'appel n'est admissible que s'il est interjeté dans les soixante jours suivant le prononcé de l'ordonnance l'autorisant.

Pouvoirs de la cour

(3) L'appel est mené aussi rapidement que possible; la cour peut l'entendre en faisant toutes inférences non incompatibles avec les faits formellement établis par l'Office et nécessaires pour décider de la question de droit ou de compétence, selon le cas.

Plaidoirie de l'Office

(4) L'Office peut plaider sa cause à l'appel par procureur ou autrement.

Rapport de l'Office

Rapport de l'Office

42 (1) Chaque année, avant la fin du mois de juillet, l'Office présente au gouverneur en conseil, par l'intermédiaire du ministre, un rapport de ses activités de l'année précédente résumant :

a) les demandes qui lui ont été présentées et ses conclusions à leur égard;

b) ses conclusions concernant les questions ou les objets à l'égard desquels il a agi à la demande du ministre.

Contenu

(2) Le rapport contient notamment :

a) l'évaluation de l'Office de l'effet de la présente loi et des difficultés rencontrées dans l'application de celle-ci;

b) les renseignements, au regard de l'année en cause, concernant les éléments ci-après, y compris leur nombre :

(i) les inspections menées, au titre de la présente loi, à toute fin liée à la vérification du respect ou à la prévention du non-respect des dispositions des règlements pris en vertu du paragraphe 170(1) ou de l'un des articles 60 à 62 de la *Loi canadienne sur l'accessibilité*,

(ii) les arrêtés pris en vertu de l'article 181.2,

Governor in Council

Directions to Agency

Policy directions

43 (1) The Governor in Council may, at the request of the Agency or of the Governor in Council's own motion, issue policy directions to the Agency concerning any matter that comes within the jurisdiction of the Agency and every such direction shall be carried out by the Agency under the Act of Parliament that establishes the powers, duties and functions of the Agency in relation to the subject-matter of the direction.

Limitation on directions

(2) A direction issued under subsection (1) shall not affect a matter that is before the Agency on the date of the direction and that relates to a particular person.

Delay of binding effect

44 A direction issued under section 43 is not binding on the Agency until the expiration of the thirtieth sitting day of Parliament after the direction has been laid before both Houses of Parliament by or on behalf of the Minister, unless the direction has been previously laid before both Houses of Parliament in proposed form by or on behalf of the Minister and thirty sitting days of Parliament have expired after the proposed direction was laid.

Referral to committee

45 Where a direction referred to in section 43 is issued or a proposed direction referred to in section 44 is laid before a House of Parliament, it shall be referred without delay by that House to the committee of that House that it considers appropriate to deal with the subject-matter of the direction or proposed direction.

Consultation required

46 Before a direction referred to in section 43 is issued or a proposed direction referred to in section 44 is laid before a House of Parliament, the Minister shall consult with the Agency with respect to the nature and subject-matter of the direction or proposed direction.

Extraordinary Disruptions

Governor in Council may prevent disruptions

47 (1) Where the Governor in Council is of the opinion that

Gouverneur en conseil

Directives à l'Office

Directives générales

43 (1) Le gouverneur en conseil peut, à la demande de l'Office ou de sa propre initiative, donner des directives générales à l'Office sur toute question relevant de la compétence de celui-ci; l'Office exécute ces directives dans le cadre de la loi fédérale qui détermine ses attributions relatives au domaine visé par les directives.

Restrictions

(2) Les directives visées au paragraphe (1) n'ont pas d'effet sur les questions relatives à des personnes déterminées et dont l'Office est déjà saisi à la date où elles sont données.

Dépôt au Parlement

44 Pour que les directives visées à l'article 43 lient l'Office, il faut que trente jours de séance se soient écoulés depuis leur dépôt, sous forme définitive ou sous forme de projet, devant chaque chambre du Parlement par le ministre ou pour son compte.

Renvoi en comité

45 Dès le dépôt des directives générales sous forme définitive ou sous forme de projet devant une chambre du Parlement, celle-ci les renvoie à celui de ses comités qu'elle estime compétent dans le domaine qu'elles touchent.

Consultation

46 Avant que soient données les directives visées à l'article 43 ou qu'elles soient déposées sous forme de projet devant une chambre du Parlement, le ministre consulte l'Office sur leur nature et leur objet.

Perturbations extraordinaires

Mesures d'urgence prises par le gouverneur en conseil

47 (1) Le gouverneur en conseil peut, par décret, sur recommandation du ministre et du ministre responsable du Bureau de la politique de concurrence, prendre les mesures qu'il estime essentielles à la stabilisation du

(a) an extraordinary disruption to the effective continued operation of the national transportation system exists or is imminent, other than a labour disruption,

(b) failure to act under this section would be contrary to the interests of users and operators of the national transportation system, and

(c) there are no other provisions in this Act or in any other Act of Parliament that are sufficient and appropriate to remedy the situation and counter the actual or anticipated damage caused by the disruption,

the Governor in Council may, on the recommendation of the Minister and the minister responsible for the Bureau of Competition Policy, by order, take any steps, or direct the Agency to take any steps, that the Governor in Council considers essential to stabilize the national transportation system, including the imposition of capacity and pricing restraints.

réseau national des transports ou ordonner à l'Office de prendre de telles mesures et, notamment, imposer des restrictions relativement à la capacité et aux prix s'il estime :

a) qu'une perturbation extraordinaire de la bonne exploitation continuelle du réseau des transports — autre qu'en conflit de travail — existe ou est imminente;

b) que le fait de ne pas prendre un tel décret serait contraire aux intérêts des exploitants et des usagers du réseau national des transports;

c) qu'aucune autre disposition de la présente loi ou d'une autre loi fédérale ne permettrait de corriger la situation et de remédier à des dommages ou en prévenir.

Minister may consult affected persons

(2) Before recommending that an order be made under this section, the Minister may consult with any person who the Minister considers may be affected by the order.

Consultations

(2) Avant de recommander un décret aux termes du présent article, le ministre peut consulter les personnes qu'il croit susceptibles d'être touchées par celui-ci.

Order is temporary

(3) An order made under this section shall have effect for no more than ninety days after the order is made.

Mesure temporaire

(3) Le décret pris aux termes du présent article ne vaut que pour une période de quatre-vingt-dix jours.

Order to be tabled in Parliament

(4) The Minister shall cause any order made under this section to be laid before both Houses of Parliament within seven sitting days after the order is made.

Dépôt du décret au Parlement

(4) Le ministre fait déposer le décret devant chaque chambre du Parlement dans les sept premiers jours de séance suivant sa prise.

Reference to Parliamentary Committee

(5) Every order laid before Parliament under subsection (4) shall be referred for review to the Standing committee designated by Parliament for the purpose.

Renvoi en comité

(5) Le décret est renvoyé pour examen au comité permanent désigné à cette fin par le Parlement.

Resolution of Parliament revoking order

(6) Where a resolution directing that an order made under this section be revoked is adopted by both Houses of Parliament before the expiration of thirty sitting days of Parliament after the order is laid before both Houses of Parliament, the order shall cease to have effect on the day that the resolution is adopted or, if the adopted resolution specifies a day on which the order shall cease to have effect, on that specified day.

Résolution de révocation

(6) Tout décret pris aux termes du présent article cesse d'avoir effet le jour de l'adoption d'une résolution de révocation par les deux chambres du Parlement ou, le cas échéant, le jour que prévoit cette résolution, si celle-ci est adoptée dans les trente jours de séance suivant le jour du dépôt du décret devant les deux chambres du Parlement.

Competition Act

(7) Notwithstanding subsection 4(2), this section and anything done under the authority of this section prevail over the *Competition Act*.

Loi sur la concurrence

(7) Malgré le paragraphe 4(2), le présent article et les mesures prises sous son régime l'emportent sur la *Loi sur la concurrence*.

Offence

(8) Every person who contravenes an order made under this section is guilty of an offence and liable on summary conviction

(a) in the case of an individual, to a fine not exceeding $5,000, and

(b) in the case of a corporation, to a fine not exceeding $100,000,

for each day the person contravenes the order.

Minister

48 [Repealed, 2018, c. 10, s. 7]

Inquiries

Minister may request inquiry

49 (1) The Minister may direct the Agency to inquire into any matter or thing concerning transportation to which the legislative authority of Parliament extends and report the findings on the inquiry to the Minister as and when the Minister may require.

Powers

(2) For greater certainty, sections 38 and 39 apply in respect of an inquiry.

Summary of findings

(3) The Agency shall make public a summary of its findings that does not include any confidential information.

1996, c. 10, s. 49; 2018, c. 10, s. 8.

Transportation Information

Regulations re information

50 (1) The Governor in Council may make regulations requiring any persons referred to in subsection (1.1) who are subject to the legislative authority of Parliament to provide information, other than personal information as defined in section 3 of the *Privacy Act*, to the Minister, when and in the form and manner that the regulations may specify, for the purposes of

(a) national transportation policy development;

(b) reporting under section 52;

(c) operational planning;

Infraction à un décret

(8) L'inobservation d'un décret pris au titre du présent article constitue une infraction passible, sur déclaration de culpabilité par procédure sommaire :

a) dans le cas d'une personne physique, d'une amende maximale de 5 000 $ pour chaque jour que dure l'infraction;

b) dans le cas d'une personne morale, d'une amende maximale de 100 000 $ pour chaque jour que dure l'infraction.

Ministre

48 [Abrogé, 2018, ch. 10, art. 7]

Enquêtes

Enquêtes ordonnées par le ministre

49 (1) Le ministre peut déléguer à l'Office la charge d'enquêter sur toute question de transport relevant de la compétence législative du Parlement et de lui faire rapport de ses conclusions selon les modalités et dans le délai qu'il fixe.

Pouvoirs

(2) Il est entendu que les articles 38 et 39 s'appliquent à l'égard de l'enquête.

Résumé des conclusions

(3) L'Office rend public un résumé de ses conclusions qui ne contient aucun renseignement confidentiel.

1996, ch. 10, art. 49; 2018, ch. 10, art. 8.

Renseignements relatifs aux transports

Règlements relatifs aux renseignements

50 (1) Le gouverneur en conseil peut, par règlement, exiger des personnes visées au paragraphe (1.1) qui sont assujetties à la compétence législative du Parlement qu'elles fournissent au ministre des renseignements, autres que les renseignements personnels au sens de l'article 3 de la *Loi sur la protection des renseignements personnels*, aux dates, en la forme et de la manière que le règlement peut préciser, en vue :

a) de l'élaboration d'une politique nationale des transports;

b) de l'établissement du rapport prévu à l'article 52;

(c) retain a record of its tariffs for a period of not less than three years after the tariffs have ceased to have effect.

Prescribed tariff information to be included

(2) A tariff referred to in subsection (1) shall include such information as may be prescribed.

No fares, etc., unless set out in tariff

(3) The holder of a domestic licence shall not apply any fare, rate, charge or term or condition of carriage applicable to the domestic service it offers unless the fare, rate, charge, term or condition is set out in a tariff that has been published or displayed under subsection (1) and is in effect.

Copy of tariff on payment of fee

(4) The holder of a domestic licence shall provide a copy or excerpt of its tariffs to any person on request and on payment of a fee not exceeding the cost of making the copy or excerpt.

1996, c. 10, s. 67; 2000, c. 15, s. 5; 2007, c. 19, s. 20.

Fares or rates not set out in tariff

67.1 If, on complaint in writing to the Agency by any person, the Agency finds that, contrary to subsection 67(3), the holder of a domestic licence has applied a fare, rate, charge or term or condition of carriage applicable to the domestic service it offers that is not set out in its tariffs, the Agency may order the licensee to

(a) apply a fare, rate, charge or term or condition of carriage that is set out in its tariffs;

(b) compensate any person adversely affected for any expenses they incurred as a result of the licensee's failure to apply a fare, rate, charge or term or condition of carriage that was set out in its tariffs; and

(c) take any other appropriate corrective measures.

2000, c. 15, s. 6; 2007, c. 19, s. 21.

When unreasonable or unduly discriminatory terms or conditions

67.2 (1) If, on complaint in writing to the Agency by any person, the Agency finds that the holder of a domestic licence has applied terms or conditions of carriage applicable to the domestic service it offers that are unreasonable or unduly discriminatory, the Agency may suspend or disallow those terms or conditions and substitute other terms or conditions in their place.

Renseignements tarifaires

(2) Les tarifs comportent les renseignements exigés par règlement.

Interdiction

(3) Le titulaire d'une licence intérieure ne peut appliquer à l'égard d'un service intérieur que le prix, le taux, les frais ou les conditions de transport applicables figurant dans le tarif en vigueur publié ou affiché conformément au paragraphe (1).

Exemplaire du tarif

(4) Il fournit un exemplaire de tout ou partie de ses tarifs sur demande et paiement de frais non supérieurs au coût de reproduction de l'exemplaire.

1996, ch. 10, art. 67; 2000, ch. 15, art. 5; 2007, ch. 19, art. 20.

Prix, taux, frais ou conditions non inclus au tarif

67.1 S'il conclut, sur dépôt d'une plainte, que le titulaire d'une licence intérieure a, contrairement au paragraphe 67(3), appliqué à l'un de ses services intérieurs un prix, un taux, des frais ou d'autres conditions de transport ne figurant pas au tarif, l'Office peut, par ordonnance, lui enjoindre :

a) d'appliquer un prix, un taux, des frais ou d'autres conditions de transport figurant au tarif;

b) d'indemniser toute personne lésée des dépenses qu'elle a supportées consécutivement à la non-application du prix, du taux, des frais ou des autres conditions qui figuraient au tarif;

c) de prendre toute autre mesure corrective indiquée.

2000, ch. 15, art. 6; 2007, ch. 19, art. 21.

Conditions déraisonnables

67.2 (1) S'il conclut, sur dépôt d'une plainte, que le titulaire d'une licence intérieure a appliqué pour un de ses services intérieurs des conditions de transport déraisonnables ou injustement discriminatoires, l'Office peut suspendre ou annuler ces conditions et leur en substituer de nouvelles.

Prohibition on advertising

(2) The holder of a domestic licence shall not advertise or apply any term or condition of carriage that is suspended or has been disallowed.

2000, c. 15, s. 6; 2007, c. 19, s. 22(F).

Person affected

67.3 Despite sections 67.1 and 67.2, a complaint against the holder of a domestic license related to any term or condition of carriage concerning any obligation prescribed by regulations made under subsection 86.11(1) may only be filed by a person adversely affected.

2018, c. 10, s. 17.

Applying decision to other passengers

67.4 The Agency may, to the extent that it considers it appropriate, make applicable to some or to all passengers of the same flight as the complainant all or part of its decision respecting a complaint related to any term or condition of carriage concerning any obligation prescribed by regulations made under paragraph 86.11(1)(b).

2018, c. 10, s. 17.

Non-application of fares, etc.

68 (1) Sections 66 to 67.2 do not apply in respect of fares, rates or charges applicable to a domestic service provided for under a contract between a holder of a domestic licence and another person whereby the parties to the contract agree to keep its provisions confidential.

Non-application of terms and conditions

(1.1) Sections 66 to 67.2 do not apply in respect of terms and conditions of carriage applicable to a domestic service provided for under a contract referred to in subsection (1) to which an employer is a party and that relates to travel by its employees.

Provisions regarding exclusive use of services

(2) The parties to the contract shall not include in it provisions with respect to the exclusive use by the other person of a domestic service operated by the holder of the domestic licence between two points in accordance with a published timetable or on a regular basis, unless the contract is for all or a significant portion of the capacity of a flight or a series of flights.

Retention of contract required

(3) The holder of a domestic licence who is a party to the contract shall retain a copy of it for a period of not less than three years after it has ceased to have effect and, on request made within that period, shall provide a copy of it to the Agency.

1996, c. 10, s. 68; 2000, c. 15, s. 7; 2007, c. 19, s. 23.

Interdiction d'annoncer

(2) Il est interdit au titulaire d'une licence intérieure d'annoncer ou d'appliquer une condition de transport suspendue ou annulée.

2000, ch. 15, art. 6; 2007, ch. 19, art. 22(F).

Personne lésée

67.3 Malgré les articles 67.1 et 67.2, seule une personne lésée peut déposer une plainte contre le titulaire d'une licence intérieure relativement à toute condition de transport visant une obligation prévue par un règlement pris en vertu du paragraphe 86.11(1).

2018, ch. 10, art. 17.

Application de la décision à d'autres passagers

67.4 L'Office peut, dans la mesure qu'il estime indiquée, rendre applicable à une partie ou à l'ensemble des passagers du même vol que le plaignant, tout ou partie de sa décision relative à la plainte de celui-ci portant sur une condition de transport visant une obligation prévue par un règlement pris en vertu de l'alinéa 86.11(1)b).

2018, ch. 10, art. 17.

Non-application de certaines dispositions

68 (1) Les articles 66 à 67.2 ne s'appliquent pas aux prix, taux ou frais applicables au service intérieur qui fait l'objet d'un contrat entre le titulaire d'une licence intérieure et une autre personne et par lequel les parties conviennent d'en garder les stipulations confidentielles.

Non-application aux conditions de transport

(1.1) Les articles 66 à 67.2 ne s'appliquent pas aux conditions de transport applicables au service intérieur qui fait l'objet d'un contrat visé au paragraphe (1) portant sur les voyages d'employés faits pour le compte d'un employeur qui est partie au contrat.

Stipulations interdites

(2) Le contrat ne peut comporter aucune clause relative à l'usage exclusif par l'autre partie des services intérieurs offerts entre deux points par le titulaire de la licence intérieure, soit régulièrement, soit conformément à un horaire publié, sauf s'il porte sur la totalité ou une partie importante des places disponibles sur un vol ou une série de vols.

Double à conserver

(3) Le titulaire d'une licence intérieure est tenu de conserver, au moins trois ans après son expiration, un double du contrat et d'en fournir un exemplaire à l'Office pendant cette période s'il lui en fait la demande.

1996, ch. 10, art. 68; 2000, ch. 15, art. 7; 2007, ch. 19, art. 23.

Regulations may prescribe

(3) Without limiting the generality of subsection (1), the regulations may prescribe what are costs, fees, charges and taxes for the purposes of subsection (2).

2007, c. 19, s. 27.

Regulations — carrier's obligations towards passengers

86.11 (1) The Agency shall, after consulting with the Minister, make regulations in relation to flights to, from and within Canada, including connecting flights,

(a) respecting the carrier's obligation to make terms and conditions of carriage and information regarding any recourse available against the carrier, as specified in the regulations, readily available to passengers in language that is simple, clear and concise;

(b) respecting the carrier's obligations in the case of flight delay, flight cancellation or denial of boarding, including

(i) the minimum standards of treatment of passengers that the carrier is required to meet and the minimum compensation the carrier is required to pay for inconvenience when the delay, cancellation or denial of boarding is within the carrier's control,

(ii) the minimum standards of treatment of passengers that the carrier is required to meet when the delay, cancellation or denial of boarding is within the carrier's control, but is required for safety purposes, including in situations of mechanical malfunctions,

(iii) the carrier's obligation to ensure that passengers complete their itinerary when the delay, cancellation or denial of boarding is due to situations outside the carrier's control, such as natural phenomena and security events, and

(iv) the carrier's obligation to provide timely information and assistance to passengers;

(c) prescribing the minimum compensation for lost or damaged baggage that the carrier is required to pay;

(d) respecting the carrier's obligation to facilitate the assignment of seats to children under the age of 14 years in close proximity to a parent, guardian or tutor at no additional cost and to make the carrier's terms and conditions and practices in this respect readily available to passengers;

Précisions

(3) Les règlements peuvent également préciser, pour l'application du paragraphe (2), les types de coûts, frais, droits et taxes visés à ce paragraphe.

2007, ch. 19, art. 27.

Règlements — obligations des transporteurs aériens envers les passagers

86.11 (1) L'Office prend, après consultation du ministre, des règlements relatifs aux vols à destination, en provenance et à l'intérieur du Canada, y compris les vols de correspondance, pour :

a) régir l'obligation, pour le transporteur, de rendre facilement accessibles aux passagers en langage simple, clair et concis les conditions de transport — et les renseignements sur les recours possibles contre le transporteur — qui sont précisés par règlements;

b) régir les obligations du transporteur dans les cas de retard et d'annulation de vols et de refus d'embarquement, notamment :

(i) les normes minimales à respecter quant au traitement des passagers et les indemnités minimales qu'il doit verser aux passagers pour les inconvénients qu'ils ont subis, lorsque le retard, l'annulation ou le refus d'embarquement lui est attribuable,

(ii) les normes minimales relatives au traitement des passagers que doit respecter le transporteur lorsque le retard, l'annulation ou le refus d'embarquement lui est attribuable, mais est nécessaire par souci de sécurité, notamment en cas de défaillance mécanique,

(iii) l'obligation, pour le transporteur, de faire en sorte que les passagers puissent effectuer l'itinéraire prévu lorsque le retard, l'annulation ou le refus d'embarquement est attribuable à une situation indépendante de sa volonté, notamment un phénomène naturel ou un événement lié à la sécurité,

(iv) l'obligation, pour le transporteur, de fournir des renseignements et de l'assistance en temps opportun aux passagers;

c) prévoir les indemnités minimales à verser par le transporteur aux passagers en cas de perte ou d'endommagement de bagage;

d) régir l'obligation, pour le transporteur, de faciliter l'attribution, aux enfants de moins de quatorze ans, de sièges à proximité d'un parent ou d'un tuteur sans

(e) requiring the carrier to establish terms and conditions of carriage with regard to the transportation of musical instruments;

(f) respecting the carrier's obligations in the case of tarmac delays over three hours, including the obligation to provide timely information and assistance to passengers, as well as the minimum standards of treatment of passengers that the carrier is required to meet; and

(g) respecting any of the carrier's other obligations that the Minister may issue directions on under subsection (2).

e) exiger du transporteur qu'il élabore des conditions de transport applicables au transport d'instruments de musique;

f) régir les obligations du transporteur en cas de retard de plus de trois heures sur l'aire de trafic, notamment celle de fournir des renseignements et de l'assistance en temps opportun aux passagers et les normes minimales à respecter quant au traitement des passagers;

g) régir toute autre obligation du transporteur sur directives du ministre données en vertu du paragraphe (2).

Ministerial directions

(2) The Minister may issue directions to the Agency to make a regulation under paragraph (1)(g) respecting any of the carrier's other obligations towards passengers. The Agency shall comply with these directions.

Directives ministérielles

(2) Le ministre peut donner des directives à l'Office lui demandant de régir par un règlement pris en vertu de l'alinéa (1)g) toute autre obligation du transporteur envers les passagers. L'Office est tenu de se conformer à ces directives.

Restriction

(3) A person shall not receive compensation from a carrier under regulations made under subsection (1) if that person has already received compensation for the same event under a different passenger rights regime than the one provided for under this Act.

Restriction

(3) Nul ne peut obtenir du transporteur une indemnité au titre d'un règlement pris en vertu du paragraphe (1) dans le cas où il a déjà été indemnisé pour le même événement dans le cadre d'un autre régime de droits des passagers que celui prévu par la présente loi.

Obligations deemed to be in tariffs

(4) The carrier's obligations established by a regulation made under subsection (1) are deemed to form part of the terms and conditions set out in the carrier's tariffs in so far as the carrier's tariffs do not provide more advantageous terms and conditions of carriage than those obligations.

2018, c. 10, s. 19.

Obligations réputées figurer au tarif

(4) Les obligations du transporteur prévues par un règlement pris en vertu du paragraphe (1) sont réputées figurer au tarif du transporteur dans la mesure où le tarif ne prévoit pas des conditions de transport plus avantageuses que ces obligations.

2018, ch. 10, art. 19.

Regulations and orders

86.2 A regulation or order made under this Part may be conditional or unconditional or qualified or unqualified and may be general or restricted to a specific area, person or thing or group or class of persons or things.

2007, c. 19, s. 27.

Textes d'application

86.2 Les textes d'application de la présente partie peuvent être conditionnels ou absolus, assortis ou non de réserves, et de portée générale ou limitée quant aux zones, personnes, objets ou catégories de personnes ou d'objets visés.

2007, ch. 19, art. 27.

45 ELIZABETH II

45 ELIZABETH II

CHAPTER 10

CHAPITRE 10

An Act to continue the National Transportation Agency as the Canadian Transportation Agency, to consolidate and revise the National Transportation Act, 1987 and the Railway Act and to amend or repeal other Acts as a consequence

Loi maintenant l'Office national des transports sous le nom d'Office des transports du Canada, codifiant et remaniant la Loi de 1987 sur les transports nationaux et la Loi sur les chemins de fer et modifiant ou abrogeant certaines lois

[*Assented to 29th May, 1996*]

[*Sanctionnée le 29 mai 1996*]

Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

Sa Majesté, sur l'avis et avec le consentement du Sénat et de la Chambre des communes du Canada, édicte :

SHORT TITLE

TITRE ABRÉGÉ

Short title

1. This Act may be cited as the *Canada Transportation Act.*

1. *Loi sur les transports au Canada.*

Titre abrégé

HER MAJESTY

SA MAJESTÉ

Binding on Her Majesty

2. This Act is binding on Her Majesty in right of Canada or a province.

2. La présente loi lie Sa Majesté du chef du Canada ou d'une province.

Obligation de Sa Majesté

APPLICATION

APPLICATION

Application generally

3. This Act applies in respect of transportation matters under the legislative authority of Parliament.

3. La présente loi s'applique aux questions de transport relevant de la compétence législative du Parlement.

Champ d'application

Conflicts

4. (1) Subject to subsection (2), where there is a conflict between any order or regulation made under this Act in respect of a particular mode of transportation and any rule, order or regulation made under any other Act of Parliament in respect of that particular mode of transportation, the order or regulation made under this Act prevails.

4. (1) Sous réserve du paragraphe (2), les arrêtés ou règlements pris sous le régime de la présente loi à l'égard d'un mode de transport l'emportent sur les règles, arrêtés ou règlements incompatibles pris sous celui d'autres lois fédérales.

Incompatibilité

Competition Act

(2) Nothing in or done under the authority of this Act affects the operation of the *Competition Act.*

(2) La présente loi et les actes accomplis sous son régime ne portent pas atteinte à la *Loi sur la concurrence.*

Loi sur la concurrence

NATIONAL TRANSPORTATION POLICY

Declaration

5. It is hereby declared that a safe, economic, efficient and adequate network of viable and effective transportation services accessible to persons with disabilities and that makes the best use of all available modes of transportation at the lowest total cost is essential to serve the transportation needs of shippers and travellers, including persons with disabilities, and to maintain the economic well-being and growth of Canada and its regions and that those objectives are most likely to be achieved when all carriers are able to compete, both within and among the various modes of transportation, under conditions ensuring that, having due regard to national policy, to the advantages of harmonized federal and provincial regulatory approaches and to legal and constitutional requirements,

(*a*) the national transportation system meets the highest practicable safety standards,

(*b*) competition and market forces are, whenever possible, the prime agents in providing viable and effective transportation services,

(*c*) economic regulation of carriers and modes of transportation occurs only in respect of those services and regions where regulation is necessary to serve the transportation needs of shippers and travellers and that such regulation will not unfairly limit the ability of any carrier or mode of transportation to compete freely with any other carrier or mode of transportation,

(*d*) transportation is recognized as a key to regional economic development and that commercial viability of transportation links is balanced with regional economic development objectives so that the potential economic strengths of each region may be realized,

(*e*) each carrier or mode of transportation, as far as is practicable, bears a fair proportion of the real costs of the resources, facilities and services provided to that carrier or mode of transportation at public expense,

POLITIQUE NATIONALE DES TRANSPORTS

Déclaration

5. Il est déclaré que, d'une part, la mise en place d'un réseau sûr, rentable et bien adapté de services de transport viables et efficaces, accessibles aux personnes ayant une déficience, utilisant au mieux et aux moindres frais globaux tous les modes de transport existants, est essentielle à la satisfaction des besoins des expéditeurs et des voyageurs — y compris des personnes ayant une déficience — en matière de transports comme à la prospérité et à la croissance économique du Canada et de ses régions, et, d'autre part, que ces objectifs sont plus susceptibles de se réaliser en situation de concurrence de tous les transporteurs, à l'intérieur des divers modes de transport ou entre eux, à condition que, compte dûment tenu de la politique nationale, des avantages liés à l'harmonisation de la réglementation fédérale et provinciale et du contexte juridique et constitutionnel :

a) le réseau national des transports soit conforme aux normes de sécurité les plus élevées possible dans la pratique;

b) la concurrence et les forces du marché soient, chaque fois que la chose est possible, les principaux facteurs en jeu dans la prestation de services de transport viables et efficaces;

c) la réglementation économique des transporteurs et des modes de transport se limite aux services et aux régions à propos desquels elle s'impose dans l'intérêt des expéditeurs et des voyageurs, sans pour autant restreindre abusivement la libre concurrence entre transporteurs et entre modes de transport;

d) les transports soient reconnus comme un facteur primordial du développement économique régional et que soit maintenu un équilibre entre les objectifs de rentabilité des liaisons de transport et ceux de développement économique régional en vue de la réalisation du potentiel économique de chaque région;

e) chaque transporteur ou mode de transport supporte, dans la mesure du possible, une juste part du coût réel des ressources, installations et services mis à sa disposition sur les fonds publics;

(*f*) each carrier or mode of transportation, as far as is practicable, receives fair and reasonable compensation for the resources, facilities and services that it is required to provide as an imposed public duty,

(*g*) each carrier or mode of transportation, as far as is practicable, carries traffic to or from any point in Canada under fares, rates and conditions that do not constitute

(i) an unfair disadvantage in respect of any such traffic beyond the disadvantage inherent in the location or volume of the traffic, the scale of operation connected with the traffic or the type of traffic or service involved,

(ii) an undue obstacle to the mobility of persons, including persons with disabilities,

(iii) an undue obstacle to the interchange of commodities between points in Canada, or

(iv) an unreasonable discouragement to the development of primary or secondary industries, to export trade in or from any region of Canada or to the movement of commodities through Canadian ports, and

(*h*) each mode of transportation is economically viable,

and this Act is enacted in accordance with and for the attainment of those objectives to the extent that they fall within the purview of subject-matters under the legislative authority of Parliament relating to transportation.

f) chaque transporteur ou mode de transport soit, dans la mesure du possible, indemnisé, de façon juste et raisonnable, du coût des ressources, installations et services qu'il est tenu de mettre à la disposition du public;

g) les liaisons assurées en provenance ou à destination d'un point du Canada par chaque transporteur ou mode de transport s'effectuent, dans la mesure du possible, à des prix et selon des modalités qui ne constituent pas :

(i) un désavantage injuste pour les autres liaisons de ce genre, mis à part le désavantage inhérent aux lieux desservis, à l'importance du trafic, à l'ampleur des activités connexes ou à la nature du trafic ou du service en cause,

(ii) un obstacle abusif à la circulation des personnes, y compris les personnes ayant une déficience,

(iii) un obstacle abusif à l'échange des marchandises à l'intérieur du Canada,

(iv) un empêchement excessif au développement des secteurs primaire ou secondaire, aux exportations du Canada ou de ses régions, ou au mouvement des marchandises par les ports canadiens;

h) les modes de transport demeurent rentables.

Il est en outre déclaré que la présente loi vise la réalisation de ceux de ces objectifs qui portent sur les questions relevant de la compétence législative du Parlement en matière de transports.

INTERPRETATION

Definitions

6. In this Act,

"Agency" « *Office* »

"Agency" means the Canadian Transportation Agency continued by subsection 7(1);

"carrier" « *transporteur* »

"carrier" means a person who is engaged in the transport of goods or passengers by any means of transport under the legislative authority of Parliament;

"Chairperson" « *président* »

"Chairperson" means the Chairperson of the Agency;

"goods" « *marchandises* »

"goods" includes rolling stock and mail;

DÉFINITIONS

Définitions

6. Les définitions qui suivent s'appliquent à la présente loi.

« cour supérieure »

« cour supérieure » "*superior court*"

a) La Cour de l'Ontario (Division générale);

b) la Cour supérieure du Québec;

c) la Cour du Banc de la Reine du Nouveau-Brunswick, du Manitoba, de la Saskatchewan ou de l'Alberta;

CANADA

CONSOLIDATION

CODIFICATION

Federal Courts Act

Loi sur les Cours fédérales

R.S.C., 1985, c. F-7

L.R.C. (1985), ch. F-7

Current to June 28, 2021

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(c) there is a claim against the Crown for injurious affection; or

(d) the claim is for damages under the *Crown Liability and Proceedings Act*.

Crown and subject: consent to jurisdiction

(3) The Federal Court has exclusive original jurisdiction to hear and determine the following matters:

(a) the amount to be paid if the Crown and any person have agreed in writing that the Crown or that person shall pay an amount to be determined by the Federal Court, the Federal Court — Trial Division or the Exchequer Court of Canada; and

(b) any question of law, fact or mixed law and fact that the Crown and any person have agreed in writing shall be determined by the Federal Court, the Federal Court — Trial Division or the Exchequer Court of Canada.

Conflicting claims against Crown

(4) The Federal Court has concurrent original jurisdiction to hear and determine proceedings to determine disputes in which the Crown is or may be under an obligation and in respect of which there are or may be conflicting claims.

Relief in favour of Crown or against officer

(5) The Federal Court has concurrent original jurisdiction

(a) in proceedings of a civil nature in which the Crown or the Attorney General of Canada claims relief; and

(b) in proceedings in which relief is sought against any person for anything done or omitted to be done in the performance of the duties of that person as an officer, servant or agent of the Crown.

Federal Court has no jurisdiction

(6) If an Act of Parliament confers jurisdiction in respect of a matter on a court constituted or established by or under a law of a province, the Federal Court has no jurisdiction to entertain any proceeding in respect of the same matter unless the Act expressly confers that jurisdiction on that court.

R.S., 1985, c. F-7, s. 17; 1990, c. 8, s. 3; 2002, c. 8, s. 25.

Extraordinary remedies, federal tribunals

18 (1) Subject to section 28, the Federal Court has exclusive original jurisdiction

d) une demande en dommages-intérêts formée au titre de la *Loi sur la responsabilité civile de l'État et le contentieux administratif*.

Conventions écrites attributives de compétence

(3) Elle a compétence exclusive, en première instance, pour les questions suivantes :

a) le paiement d'une somme dont le montant est à déterminer, aux termes d'une convention écrite à laquelle la Couronne est partie, par la Cour fédérale — ou l'ancienne Cour de l'Échiquier du Canada — ou par la Section de première instance de la Cour fédérale;

b) toute question de droit, de fait ou mixte à trancher, aux termes d'une convention écrite à laquelle la Couronne est partie, par la Cour fédérale — ou l'ancienne Cour de l'Échiquier du Canada — ou par la Section de première instance de la Cour fédérale.

Demandes contradictoires contre la Couronne

(4) Elle a compétence concurrente, en première instance, dans les procédures visant à régler les différends mettant en cause la Couronne à propos d'une obligation réelle ou éventuelle pouvant faire l'objet de demandes contradictoires.

Actions en réparation

(5) Elle a compétence concurrente, en première instance, dans les actions en réparation intentées :

a) au civil par la Couronne ou le procureur général du Canada;

b) contre un fonctionnaire, préposé ou mandataire de la Couronne pour des faits — actes ou omissions — survenus dans le cadre de ses fonctions.

Incompétence de la Cour fédérale

(6) Elle n'a pas compétence dans les cas où une loi fédérale donne compétence à un tribunal constitué ou maintenu sous le régime d'une loi provinciale sans prévoir expressément la compétence de la Cour fédérale.

L.R. (1985), ch. F-7, art. 17; 1990, ch. 8, art. 3; 2002, ch. 8, art. 25.

Recours extraordinaires : offices fédéraux

18 (1) Sous réserve de l'article 28, la Cour fédérale a compétence exclusive, en première instance, pour :

(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.

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.

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.

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.

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.

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.

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.

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.

Reference by federal tribunal

18.3 (1) A federal board, commission or other tribunal may at any stage of its proceedings refer any question or issue of law, of jurisdiction or of practice and procedure to the Federal Court for hearing and determination.

Reference by Attorney General of Canada

(2) The Attorney General of Canada may, at any stage of the proceedings of a federal board, commission or other tribunal, other than a service tribunal within the meaning of the *National Defence Act*, refer any question or issue of the constitutional validity, applicability or operability of an Act of Parliament or of regulations made under an Act of Parliament to the Federal Court for hearing and determination.

1990, c. 8, s. 5; 2002, c. 8, s. 28.

Hearings in summary way

18.4 (1) Subject to subsection (2), an application or reference to the Federal Court under any of sections 18.1 to 18.3 shall be heard and determined without delay and in a summary way.

Exception

(2) The Federal Court may, if it considers it appropriate, direct that an application for judicial review be treated and proceeded with as an action.

1990, c. 8, s. 5; 2002, c. 8, s. 28.

Exception to sections 18 and 18.1

18.5 Despite sections 18 and 18.1, if an Act of Parliament expressly provides for an appeal to the Federal Court, the Federal Court of Appeal, the Supreme Court of Canada, the Court Martial Appeal Court, the Tax Court of Canada, the Governor in Council or the Treasury Board from a decision or an order of a federal board, commission or other tribunal made by or in the course of proceedings before that board, commission or tribunal, that decision or order is not, to the extent that it may be so appealed, subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with, except in accordance with that Act.

1990, c. 8, s. 5; 2002, c. 8, s. 28.

Intergovernmental disputes

19 If the legislature of a province has passed an Act agreeing that the Federal Court, the Federal Court of Canada or the Exchequer Court of Canada has jurisdiction in cases of controversies between Canada and that province, or between that province and any other province or provinces that have passed a like Act, the Federal Court has jurisdiction to determine the controversies.

R.S., 1985, c. F-7, s. 19; 2002, c. 8, s. 28.

Renvoi d'un office fédéral

18.3 (1) Les offices fédéraux peuvent, à tout stade de leurs procédures, renvoyer devant la Cour fédérale pour audition et jugement toute question de droit, de compétence ou de pratique et procédure.

Renvoi du procureur général

(2) Le procureur général du Canada peut, à tout stade des procédures d'un office fédéral, sauf s'il s'agit d'un tribunal militaire au sens de la *Loi sur la défense nationale*, renvoyer devant la Cour fédérale pour audition et jugement toute question portant sur la validité, l'applicabilité ou l'effet, sur le plan constitutionnel, d'une loi fédérale ou de ses textes d'application.

1990, ch. 8, art. 5; 2002, ch. 8, art. 28.

Procédure sommaire d'audition

18.4 (1) Sous réserve du paragraphe (2), la Cour fédérale statue à bref délai et selon une procédure sommaire sur les demandes et les renvois qui lui sont présentés dans le cadre des articles 18.1 à 18.3.

Exception

(2) Elle peut, si elle l'estime indiqué, ordonner qu'une demande de contrôle judiciaire soit instruite comme s'il s'agissait d'une action.

1990, ch. 8, art. 5; 2002, ch. 8, art. 28.

Dérogation aux art. 18 et 18.1

18.5 Par dérogation aux articles 18 et 18.1, lorsqu'une loi fédérale prévoit expressément qu'il peut être interjeté appel, devant la Cour fédérale, la Cour d'appel fédérale, la Cour suprême du Canada, la Cour d'appel de la cour martiale, la Cour canadienne de l'impôt, le gouverneur en conseil ou le Conseil du Trésor, d'une décision ou d'une ordonnance d'un office fédéral, rendue à tout stade des procédures, cette décision ou cette ordonnance ne peut, dans la mesure où elle est susceptible d'un tel appel, faire l'objet de contrôle, de restriction, de prohibition, d'évocation, d'annulation ni d'aucune autre intervention, sauf en conformité avec cette loi.

1990, ch. 8, art. 5; 2002, ch. 8, art. 28.

Différends entre gouvernements

19 Lorsqu'une loi d'une province reconnaît sa compétence en l'espèce, — qu'elle y soit désignée sous le nom de Cour fédérale, Cour fédérale du Canada ou Cour de l'Échiquier du Canada — la Cour fédérale est compétente pour juger les cas de litige entre le Canada et cette province ou entre cette province et une ou plusieurs autres provinces ayant adopté une loi semblable.

L.R. (1985), ch. F-7, art. 19; 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.

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.

Hearing in summary way

(1.4) An appeal under subsection (1.2) shall be heard and determined without delay and in a summary way.

Procédure sommaire

(1.4) L'appel interjeté en vertu du paragraphe (1.2) est entendu et tranché immédiatement et selon une procédure sommaire.

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.

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.

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.

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.

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.

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.

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*;

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

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.

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

Dispositions de fond

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.

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 counter-claim.

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

CANADA

CONSOLIDATION

CODIFICATION

Public Servants Disclosure Protection Act

Loi sur la protection des fonctionnaires divulgateurs d'actes répréhensibles

S.C. 2005, c. 46

L.C. 2005, ch. 46

Current to April 2, 2020

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Short Title

Short title

1 This Act may be cited as the *Public Servants Disclosure Protection Act*.

Interpretation

Definitions

2 (1) The following definitions apply in this Act.

Agency [Repealed, 2010, c. 12, s. 1678]

chief executive means the deputy head or chief executive officer of any portion of the public sector, or the person who occupies any other similar position, however called, in the public sector. (*administrateur général*)

Commissioner means the Public Sector Integrity Commissioner appointed under subsection 39(1). (*commissaire*)

investigation means, for the purposes of sections 24, 25, 26 to 31, 33, 34, 36 and 37, an investigation into a disclosure and an investigation commenced under section 33. (*enquête*)

member of the Royal Canadian Mounted Police means a person who is a member or a special constable of the Royal Canadian Mounted Police or who is employed by that force under terms and conditions substantially the same as those of one of its members. (*membre de la Gendarmerie royale du Canada*)

Minister [Repealed, 2010, c. 12, s. 1678]

protected disclosure means a disclosure that is made in good faith and that is made by a public servant

(a) in accordance with this Act;

(b) in the course of a parliamentary proceeding;

(c) in the course of a procedure established under any other Act of Parliament; or

(d) when lawfully required to do so. (*divulgation protégée*)

public sector means

(a) the departments named in Schedule I to the *Financial Administration Act* and the other portions of the federal public administration named in Schedules I.1 to V to that Act; and

Titre abrégé

Titre abrégé

1 *Loi sur la protection des fonctionnaires divulgateurs d'actes répréhensibles*.

Définitions

Définitions

2 (1) Les définitions qui suivent s'appliquent à la présente loi.

acte répréhensible Acte visé à l'article 8. (*wrongdoing*)

administrateur général Sont assimilés à l'administrateur général le premier dirigeant d'un élément du secteur public et le titulaire d'un poste équivalent. (*chief executive*)

Agence [Abrogée, 2010, ch. 12, art. 1678]

agent supérieur Agent désigné en application du paragraphe 10(2). (*senior officer*)

commissaire Le commissaire à l'intégrité du secteur public, nommé au titre du paragraphe 39(1). (*Commissioner*)

divulgation protégée Divulgation qui est faite de bonne foi par un fonctionnaire, selon le cas :

a) en vertu de la présente loi;

b) dans le cadre d'une procédure parlementaire;

c) sous le régime d'une autre loi fédérale;

d) lorsque la loi l'y oblige. (*protected disclosure*)

enquête Pour l'application des articles 24, 25, 26 à 31, 33, 34, 36 et 37, toute enquête menée sur une divulgation ou commencée au titre de l'article 33. (*investigation*)

fonctionnaire Toute personne employée dans le secteur public, tout membre de la Gendarmerie royale du Canada et tout administrateur général. (*public servant*)

membre de la Gendarmerie royale du Canada Membre ou gendarme auxiliaire de la Gendarmerie royale du Canada, ou personne qui y est employée sensiblement aux mêmes conditions que ses membres. (*member of the Royal Canadian Mounted Police*)

ministre [Abrogée, 2010, ch. 12, art. 1678]

(b) the Crown corporations and the other public bodies set out in Schedule 1.

However, subject to sections 52 and 53, ***public sector*** does not include the Canadian Forces, the Canadian Security Intelligence Service or the Communications Security Establishment. (*secteur public*)

public servant means every person employed in the public sector, every member of the Royal Canadian Mounted Police and every chief executive. (*fonctionnaire*)

reprisal means any of the following measures taken against a public servant because the public servant has made a protected disclosure or has, in good faith, cooperated in an investigation into a disclosure or an investigation commenced under section 33:

(a) a disciplinary measure;

(b) the demotion of the public servant;

(c) the termination of employment of the public servant, including, in the case of a member of the Royal Canadian Mounted Police, a discharge or dismissal;

(d) any measure that adversely affects the employment or working conditions of the public servant; and

(e) a threat to take any of the measures referred to in any of paragraphs (a) to (d). (*représailles*)

senior officer means a senior officer designated under subsection 10(2). (*agent supérieur*)

Tribunal means the Public Servants Disclosure Protection Tribunal established under subsection 20.7(1). (*Tribunal*)

wrongdoing means a wrongdoing referred to in section 8. (*acte répréhensible*)

représailles L'une ou l'autre des mesures ci-après prises à l'encontre d'un fonctionnaire pour le motif qu'il a fait une divulgation protégée ou pour le motif qu'il a collaboré de bonne foi à une enquête menée sur une divulgation ou commencée au titre de l'article 33 :

a) toute sanction disciplinaire;

b) la rétrogradation du fonctionnaire;

c) son licenciement et, s'agissant d'un membre de la Gendarmerie royale du Canada, son renvoi ou congédiement;

d) toute mesure portant atteinte à son emploi ou à ses conditions de travail;

e) toute menace à cet égard. (*reprisal*)

secteur public

a) Les ministères figurant à l'annexe I de la *Loi sur la gestion des finances publiques* et les autres secteurs de l'administration publique fédérale figurant aux annexes I.1 à V de cette loi;

b) les sociétés d'État et autres organismes publics figurant à l'annexe 1.

Sous réserve des articles 52 et 53, la présente définition ne s'applique toutefois pas au Service canadien du renseignement de sécurité, au Centre de la sécurité des télécommunications et aux Forces canadiennes. (*public sector*)

Tribunal Le Tribunal de la protection des fonctionnaires divulgateurs d'actes répréhensibles constitué par le paragraphe 20.7(1). (*Tribunal*)

Taking a reprisal

(2) Every reference in this Act to a person who has taken a reprisal includes a person who has directed the reprisal to be taken.

2005, c. 46, ss. 2, 59; 2006, c. 9, s. 194; 2010, c. 12, s. 1678.

Prise de représailles

(2) Pour l'application de la présente loi, la mention de la personne ayant exercé des représailles vaut mention de la personne qui en a ordonné l'exercice.

2005, ch. 46, art. 2 et 59; 2006, ch. 9, art. 194; 2010, ch. 12, art. 1678.

2.1 [Repealed before coming into force, 2006, c. 9, s. 195]

2.1 [Abrogé avant d'entrer en vigueur, 2006, ch. 9, art. 195]

Amending the Schedules

Amending the schedules

3 The Governor in Council may, by order, amend

(a) Schedule 1 by adding the name of any Crown corporation or other public body;

(b) Schedule 2 by adding or deleting the name of any portion of the public sector that has a statutory mandate to investigate other portions of the public sector; and

(c) Schedule 3 by adding or deleting any provision of any Act of Parliament.

2005, c. 46, s. 3; 2006, c. 9, s. 196.

Modification des annexes

Modification des annexes

3 Le gouverneur en conseil peut, par décret :

a) ajouter à l'annexe 1 le nom de toute société d'État ou de tout organisme public;

b) ajouter à l'annexe 2 ou en retrancher le nom de tout élément du secteur public habilité par la loi à mener des enquêtes sur d'autres éléments du secteur public;

c) ajouter à l'annexe 3 ou en retrancher toute disposition de toute loi fédérale.

2005, ch. 46, art. 3; 2006, ch. 9, art. 196.

Promoting Ethical Practices

Promotion of ethical practices and dissemination of information

4 The President of the Treasury Board must promote ethical practices in the public sector and a positive environment for disclosing wrongdoings by disseminating knowledge of this Act and information about its purposes and processes and by any other means that he or she considers appropriate.

2005, c. 46, s. 4; 2010, c. 12, s. 1682.

Sensibilisation

Diffusion de renseignements

4 Le président du Conseil du Trésor encourage, dans les lieux de travail du secteur public, des pratiques conformes à la déontologie et un environnement favorable à la divulgation des actes répréhensibles, par la diffusion de renseignements sur la présente loi, son objet et son processus d'application, ainsi que par tout autre moyen qui lui semble indiqué.

2005, ch. 46, art. 4; 2010, ch. 12, art. 1682.

Code of Conduct

Obligation to establish — Treasury Board

5 (1) The Treasury Board must establish a code of conduct applicable to the public sector.

Other provisions do not apply

(2) The Treasury Board's obligation under subsection (1) applies despite the provisions of the *Financial Administration Act* and of any other Act of Parliament that otherwise restrict the powers of the Treasury Board.

Consultation with organizations

(3) Before the code of conduct is established, the President of the Treasury Board must consult with the employee organizations certified as bargaining agents in the public sector.

Code to be tabled

(4) The President of the Treasury Board must cause the code of conduct established by the Treasury Board to be

Code de conduite

Obligation du Conseil du Trésor

5 (1) Le Conseil du Trésor établit un code de conduite applicable au secteur public.

Dérogation

(2) L'obligation du Conseil du Trésor s'exerce par dérogation aux dispositions de la *Loi sur la gestion des finances publiques* et de toute autre loi fédérale qui limitent ses pouvoirs de toute autre façon.

Consultation

(3) Avant l'établissement du code de conduite, le président du Conseil du Trésor consulte les organisations syndicales accréditées à titre d'agents négociateurs dans le secteur public.

Dépôt du code de conduite au Parlement

(4) Le président du Conseil du Trésor fait déposer le code de conduite que le Conseil du Trésor établit devant

tabled before each House of Parliament at least 30 days before it comes into force.

2005, c. 46, s. 5; 2010, c. 12, s. 1682.

chaque chambre du Parlement au moins trente jours avant sa date d'entrée en vigueur.

2005, ch. 46, art. 5; 2010, ch. 12, art. 1682.

Chief executives shall establish codes of conduct

6 (1) Every chief executive shall establish a code of conduct applicable to the portion of the public sector for which he or she is responsible.

Consistency

(2) The codes of conduct established by chief executives must be consistent with the code of conduct established by the Treasury Board.

Pouvoir de l'administrateur général

6 (1) L'administrateur général établit un code de conduite applicable à l'élément du secteur public dont il est responsable.

Compatibilité

(2) Le code de conduite établi par l'administrateur général doit être compatible avec celui qui est établi par le Conseil du Trésor.

Application

7 (1) The codes of conduct applicable to a portion of the public sector apply to every public servant employed in that portion of the public sector.

Conflict — RCMP

(2) In the event of a conflict between the code of conduct established under subsection 5(1) or 6(1) and the code of conduct established under section 38 of the *Royal Canadian Mounted Police Act*, the code of conduct established under that section prevails to the extent of the conflict.

Application

7 (1) Les codes de conduite applicables à un élément du secteur public s'appliquent à tous les fonctionnaires affectés à cet élément.

Incompatibilité — Gendarmerie royale du Canada

(2) En cas de conflit entre les dispositions des codes de conduite établis en vertu des paragraphes 5(1) ou 6(1) et celles du code établi en vertu de l'article 38 de la *Loi sur la Gendarmerie royale du Canada*, celles-ci l'emportent.

Wrongdoings

Wrongdoings

8 This Act applies in respect of the following wrongdoings in or relating to the public sector:

(a) a contravention of any Act of Parliament or of the legislature of a province, or of any regulations made under any such Act, other than a contravention of section 19 of this Act;

(b) a misuse of public funds or a public asset;

(c) a gross mismanagement in the public sector;

(d) an act or omission that creates a substantial and specific danger to the life, health or safety of persons, or to the environment, other than a danger that is inherent in the performance of the duties or functions of a public servant;

(e) a serious breach of a code of conduct established under section 5 or 6; and

(f) knowingly directing or counselling a person to commit a wrongdoing set out in any of paragraphs (a) to (e).

Actes répréhensibles

Actes répréhensibles

8 La présente loi s'applique aux actes répréhensibles ci-après commis au sein du secteur public ou le concernant :

a) la contravention d'une loi fédérale ou provinciale ou d'un règlement pris sous leur régime, à l'exception de la contravention de l'article 19 de la présente loi;

b) l'usage abusif des fonds ou des biens publics;

c) les cas graves de mauvaise gestion dans le secteur public;

d) le fait de causer — par action ou omission — un risque grave et précis pour la vie, la santé ou la sécurité humaines ou pour l'environnement, à l'exception du risque inhérent à l'exercice des attributions d'un fonctionnaire;

e) la contravention grave d'un code de conduite établi en vertu des articles 5 ou 6;

f) le fait de sciemment ordonner ou conseiller à une personne de commettre l'un des actes répréhensibles visés aux alinéas a) à e).

(g) [Repealed, 2006, c. 9, s. 197]

2005, c. 46, s. 8; 2006, c. 9, s. 197.

(g) [Abrogé, 2006, ch. 9, art. 197]

2005, ch. 46, art. 8; 2006, ch. 9, art. 197.

Disciplinary action

9 In addition to, and apart from, any penalty provided for by law, a public servant is subject to appropriate disciplinary action, including termination of employment, if he or she commits a wrongdoing.

Sanction disciplinaire

9 Indépendamment de toute autre peine prévue par la loi, le fonctionnaire qui commet un acte répréhensible s'expose à des sanctions disciplinaires pouvant aller jusqu'au licenciement.

Disclosure of Wrongdoings

Divulgation

Establishment of internal disclosure procedures

10 (1) Each chief executive must establish internal procedures to manage disclosures made under this Act by public servants employed in the portion of the public sector for which the chief executive is responsible.

Mécanismes applicables aux divulgations

10 (1) L'administrateur général est tenu d'établir des mécanismes internes pour s'occuper des divulgations que peuvent faire en vertu de la présente loi les fonctionnaires faisant partie de l'élément du secteur public dont il est responsable.

Designation of senior officer

(2) Each chief executive must designate a senior officer to be responsible for receiving and dealing with, in accordance with the duties and powers of senior officers set out in the code of conduct established by the Treasury Board, disclosures of wrongdoings made by public servants employed in the portion of the public sector for which the chief executive is responsible.

Désignation de l'agent supérieur

(2) Il désigne un agent supérieur chargé de prendre connaissance des divulgations et d'y donner suite d'une façon qui soit compatible avec les attributions qui lui sont conférées par le code de conduite établi par le Conseil du Trésor.

Senior officer from other portion of public sector

(3) A chief executive may designate as a senior officer for the portion of the public sector for which the chief executive is responsible a person who is employed in any other portion of the public sector.

Agent d'un autre élément du secteur public

(3) L'agent supérieur désigné peut faire partie d'un autre élément du secteur public que celui dont l'administrateur général est responsable.

Exception

(4) Subsections (1) and (2) do not apply to a chief executive if he or she declares, after giving notice to the Chief Human Resources Officer appointed under subsection 6(2.1) of the *Financial Administration Act*, that it is not practical to apply those subsections given the size of that portion of the public sector.

2005, c. 46, s. 10; 2006, c. 9, s. 198; 2010, c. 12, s. 1679; 2011, c. 24, s. 177.

Rapport envoyé au dirigeant principal des ressources humaines

(4) Les paragraphes (1) et (2) ne s'appliquent pas à l'administrateur général qui, après en avoir donné avis au dirigeant principal des ressources humaines nommé en vertu du paragraphe 6(2.1) de la *Loi sur la gestion des finances publiques*, déclare que l'élément du secteur public dont il est responsable ne se prête pas, en raison de sa taille, à l'application efficace de ces paragraphes.

2005, ch. 46, art. 10; 2006, ch. 9, art. 198; 2010, ch. 12, art. 1679; 2011, ch. 24, art. 177.

Duty of chief executives

11 (1) Each chief executive must

(a) subject to paragraph (c) and any other Act of Parliament and to the principles of procedural fairness and natural justice, protect the identity of persons involved in the disclosure process, including that of persons making disclosures, witnesses and persons alleged to be responsible for wrongdoings;

Obligations de l'administrateur général

11 (1) L'administrateur général veille à ce que :

a) sous réserve de l'alinéa c) et de toute autre loi fédérale applicable, de l'équité procédurale et de la justice naturelle, l'identité des personnes en cause dans le cadre d'une divulgation soit protégée, notamment celle du divulgateur, des témoins et de l'auteur présumé de l'acte répréhensible;

Province of Alberta

CONSUMER PROTECTION ACT

INTERNET SALES CONTRACT REGULATION

Alberta Regulation 81/2001

With amendments up to and including Alberta Regulation 76/2023

Current as of April 1, 2023

Office Consolidation

Alberta King's Printer
Suite 700, Park Plaza
10611 - 98 Avenue
Edmonton, AB T5K 2P7
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E-mail: kings-printer@gov.ab.ca
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(Consolidated up to 76/2023)

ALBERTA REGULATION 81/2001

Consumer Protection Act

INTERNET SALES CONTRACT REGULATION

Table of Contents

Definitions

1 In this Regulation,

(a) "Act" means the *Consumer Protection Act*;

(b) "Court" means the Court of King's Bench or, subject to the jurisdiction of the Court of Justice, the Court of Justice;

(c) "Internet" means the decentralized global network connecting networks of computers and similar devices to each other for the electronic exchange of information using standardized communication protocols;

(d) "Internet sales contract" means a consumer transaction that is a contract in which

(i) the consideration for the goods or services exceeds $50, and

(ii) the contract is formed by text-based Internet communications.

AR 81/2001 s1;56/2019;218/2022;76/2023

Application

2 This Regulation applies to the following Internet sales contracts:

(a) a contract in which the supplier or consumer is a resident of Alberta;

(b) a contract in which the offer or acceptance is made in or is sent from Alberta.

Exemption

3 This Regulation does not apply to the following classes of business:

(a) the business of trading in real estate by a person authorized under the *Real Estate Act* to act as a real estate broker;

(b) the business of dealing in mortgages by a person authorized under the *Real Estate Act* to act as a mortgage broker;

(c) the business of maintaining or operating a school or providing correspondence courses for the purpose of giving instruction or training in a vocation by a person who is licensed under the *Private Vocational Schools Act*, or by an agent of that person;

(d) the business of selling, leasing or renting or offering for sale, lease or rent a lot, plot, compartment, crypt or other space in a cemetery, columbarium or mausoleum by a person who is licensed under the *Cemeteries Act*;

(e) the business of undertaking to provide or make provision for another's funeral services under a funeral services contract or soliciting another person to enter into a funeral services contract by a person who is licensed under the *Funeral Services Act*;

(f) the business of selling cut flowers;

(g) the business of selling food or food products that are in a perishable state at the time of delivery to the consumer;

(h) the business of providing goods and services by an insurer or reciprocal insurance exchange acting under the

authority of a licence issued under the *Insurance Act* or a person acting under a certificate of authority issued under that Act;

(i) the business of carrying out a gaming activity under the *Gaming, Liquor and Cannabis Act*;

(j) the business of trading in securities or exchange contracts by a person who is registered under the *Securities Act*;

(k) the business of carrying out an activity authorized under the *Bank Act* (Canada) by a bank;

(l) the business of carrying out an activity authorized under the *Loan and Trust Corporations Act* by a loan corporation or a trust corporation;

(m) the business of carrying out an activity authorized under the *Credit Union Act* by a credit union;

(n) the business of carrying out an activity authorized under the *Alberta Treasury Branches Act* by the Alberta Treasury Branches;

(o) the business of marketing electricity or gas under the *Energy Marketing and Residential Heat Sub-metering Regulation* (AR 246/2005);

(p) repealed AR 246/2005 s28;

(p.1) the activities of offering, soliciting, negotiating or concluding time share contracts or points-based contracts by a person who is licensed under the *Time Share and Points-based Contracts and Business Regulation*;

(q) the business of public auctions under Part 12 of the Act and the *Public Auctions Regulation* (AR 196/99);

(r) the activity of offering, arranging or providing payday loans as defined in the *Payday Loans Regulation* by a person who is licensed under that Regulation.

AR 81/2001 s3;10/2004;246/2005;227/2009;105/2010;
140/2014;56/2019

Disclosure of information

4(1) A supplier must do the following before a consumer enters into an Internet sales contract:

(a) disclose to the consumer the following information:

(i) the supplier's name and, if different, the name under which the supplier carries on business;

(ii) the supplier's business address and, if different, the supplier's mailing address;

(iii) the supplier's telephone number and, if available, the supplier's e-mail address and facsimile number;

(iv) a fair and accurate description of the goods or services being sold to the consumer, including any relevant technical or system specifications;

(v) an itemized list of the price of the goods or services being sold to the consumer and any associated costs payable by the consumer, including taxes and shipping charges;

(vi) a description of any additional charges that may apply to the contract, such as customs duties and brokerage fees, whose amounts cannot reasonably be determined by the supplier;

(vii) the total consideration payable by the consumer to the supplier under the contract or, where the goods or services are being purchased over time, the amount of the periodic payments under the contract;

(viii) the currency in which amounts owing under the contract are payable;

(ix) the terms, conditions and method of payment;

(x) the date when the goods are to be delivered or the services are to begin, or both;

(xi) the supplier's delivery arrangements, including the identity of the shipper, the mode of transportation and the place of delivery;

(xii) the supplier's cancellation, return, exchange and refund policies, if any;

(xiii) any other restrictions, limitations or conditions of purchase that may apply;

(b) provide the consumer with an express opportunity to accept or decline the contract and to correct errors immediately before entering into it.

(2) For the purposes of subsection (1), a supplier is considered to have disclosed to the consumer the information described in subsection (1)(a) if the information is

(a) prominently displayed in a clear and comprehensible manner, and

(b) made accessible in a manner that ensures that

(i) the consumer has accessed the information, and

(ii) the consumer is able to retain and print the information.

Copy of Internet sales contract

5(1) A supplier must provide a consumer who enters into an Internet sales contract with a copy of the contract in writing or electronic form within 15 days after the contract is entered into.

(2) The copy of the Internet sales contract under subsection (1) must include

(a) the information described in section 4(1)(a),

(b) the consumer's name, and

(c) the date the contract was entered into.

(3) For the purposes of subsection (1), a supplier is considered to have provided the consumer with a copy of the Internet sales contract if the copy is

(a) sent by e-mail to the e-mail address provided by the consumer to the supplier for the provision of information related to the contract,

(b) sent by facsimile to the facsimile number provided by the consumer to the supplier for the provision of information related to the contract,

(c) mailed or delivered to an address provided by the consumer to the supplier for the provision of information related to the contract,

(d) actively transmitted to the consumer in a manner that ensures that the consumer is able to retain the copy, or

(e) provided to the consumer in any other manner by which the supplier can prove that the consumer has received the copy.

Cancellation of Internet sales contract

6(1) A consumer may cancel an Internet sales contract in the following circumstances:

(a) at any time from the date the contract is entered into until 7 days after the consumer receives a copy of the contract if

(i) the supplier does not disclose to the consumer the information described in section 4(1)(a), or

(ii) the supplier does not provide to the consumer an express opportunity to accept or decline the contract or to correct errors immediately before entering into it;

(b) within 30 days from the date the contract is entered into if the supplier does not provide the consumer with a copy of the contract pursuant to section 5.

(2) In addition to the cancellation rights under subsection (1), a consumer may cancel an Internet sales contract at any time before delivery of the goods or the commencement of the services under the contract if

(a) in the case of goods, the supplier does not deliver the goods within 30 days from the delivery date specified in the contract or an amended delivery date agreed on by the consumer and the supplier, either in writing or in electronic form,

(b) in the case of travel, transportation or accommodation services, the supplier does not begin the services on the commencement date specified in the contract or an amended commencement date agreed on by the consumer and the supplier, either in writing or in electronic form, or

(c) in the case of services other than those services described in clause (b), the supplier does not begin the services within 30 days from the commencement date specified in the contract or an amended commencement date agreed on by the consumer and the supplier, either in writing or in electronic form.

(3) If the delivery date or commencement date is not specified in the Internet sales contract, a consumer may cancel the contract at any time before the delivery of the goods or the commencement of the services under the contract if the supplier does not deliver the goods or begin the services within 30 days from the date the contract is entered into.

(4) For the purposes of subsections (2) and (3),

(a) a supplier is considered to have delivered the goods under an Internet sales contract if

(i) delivery was attempted but was refused by the consumer at the time that delivery was attempted, or

(ii) delivery was attempted but not made because no person was available to accept delivery for the consumer on the day for which reasonable notice was given to the consumer that the goods were available to be delivered;

(b) a supplier is considered to have begun the services under an Internet sales contract if

(i) commencement was attempted but was refused by the consumer at the time that commencement was attempted, or

(ii) commencement was attempted but did not occur because no person was available to enable the services to begin on the day for which reasonable notice was given to the consumer that the services were available to begin.

AR 81/2001 s6;118/2001

Court may provide relief against cancellation

7 If in the opinion of the Court it would be inequitable for an Internet sales contract to be cancelled under section 6, the Court may make any order it considers appropriate.

Notice of cancellation

8(1) An Internet sales contract is cancelled under section 6 on the giving of a notice of cancellation in accordance with this section.

(2) A notice of cancellation may be expressed in any way as long as it indicates the intention of the consumer to cancel the Internet sales contract.

(3) The notice of cancellation may be given to the supplier by any means, including, but not limited to, personal service, registered mail, telephone, courier, facsimile and e-mail.

(4) Where the notice of cancellation is given other than by personal service, the notice of cancellation is deemed to be given when sent.

Effect of cancellation

9(1) A cancellation of an Internet sales contract under section 6 operates to cancel the contract as if the contract had never existed.

(2) A cancellation of an Internet sales contract under section 6 also operates to cancel

(a) any related consumer transaction,

(b) any guarantee given in respect of consideration payable under the contract, and

(c) any security given by the consumer or a guarantor in respect of consideration payable under the contract,

as if the contract had never existed.

(3) Where credit is extended or arranged by the supplier, the credit contract is conditional on the Internet sales contract whether or not the credit contract is a part of or attached to the Internet sales contract, and if the Internet sales contract is cancelled, that cancellation has the effect of cancelling the credit contract as if the Internet sales contract had never existed.

Responsibilities on cancellation

10(1) If an Internet sales contract is cancelled under section 6, the supplier must, within 15 days from the date of cancellation, refund to the consumer all consideration paid by the consumer under the contract and any related consumer transaction, whether paid to the supplier or another person.

(2) If goods are delivered to a consumer under an Internet sales contract that is cancelled under section 6, the consumer must, within 15 days from the date of cancellation or delivery of the goods, whichever is later, return the goods to the supplier unused and in the same condition in which they were delivered.

(3) The consumer may return the goods under subsection (2) by any method that provides the consumer with confirmation of delivery to the supplier.

(4) The supplier must accept a return of goods by a consumer under subsection (2).

(5) The supplier is responsible for the reasonable cost of returning goods under subsection (2).

(6) Goods that are returned by the consumer under subsection (2) otherwise than by personal delivery are deemed for the purposes of

that subsection to have been returned when sent by the consumer to the supplier.

(7) Any breach of the consumer's obligations under this section is actionable by the supplier as a breach of statutory duty.

Recovery of refund

11 If a consumer has cancelled an Internet sales contract under section 6 and the supplier has not refunded all of the consideration within the 15-day period referred to in section 10(1), the consumer may recover the consideration from the supplier as an action in debt.

Consumer's recourse re credit card charges

12(1) A consumer who has charged to a credit card account all or any part of the consideration payable under an Internet sales contract or related consumer transaction may request the credit card issuer to cancel or reverse the credit card charge and any associated interest or other charges where the consumer has cancelled the contract under section 6 and the supplier has not refunded all of the consideration within the 15-day period referred to in section 10(1).

(2) A request under subsection (1) must be in writing or electronic form and contain the following information:

(a) the consumer's name;

(b) the consumer's credit card number;

(c) the expiry date of the consumer's credit card;

(d) the supplier's name;

(e) the date the Internet sales contract was entered into;

(f) the amount of consideration charged to the credit card account in respect of the Internet sales contract and any related consumer transaction;

(g) a description of the goods or services sufficient to identify them;

(h) the reason for cancellation of the Internet sales contract under section 6;

(i) the date and method of cancellation of the Internet sales contract;

(j) a statement that the consumer did not receive a refund from the supplier in accordance with section 10(1).

(3) The credit card issuer must

(a) acknowledge the consumer's request within 30 days of receiving it, and

(b) if the request meets the requirements of subsection (2), cancel or reverse the credit card charge and any associated interest or other charges within 2 complete billing cycles of the credit card issuer or 90 days, whichever first occurs.

(4) A request under subsection (1) may be given to the credit card issuer by any means, including, but not limited to, personal service, registered mail, courier, facsimile and e-mail.

(5) Where the request is given other than by personal service, the request is deemed to be given when sent.

Offence

13 A contravention of section 10(1) or 12(3) is an offence for purposes of section 162 of the Act.

Expiry

14 For the purpose of ensuring that this Regulation is reviewed for ongoing relevancy and necessity, with the option that it may be repassed in its present or an amended form following a review, this Regulation expires on September 30, 2028.

AR 81/2001 s14;15/2006;140/2016;173/2018;245/2020;223/2022

Coming into force

15 This Regulation comes into force on October 15, 2001.

B.C. Statutes
Business Practices and Consumer Protection Act

S.B.C. 2004, c. 2

Currency

S.B.C. 2004, c. 2 [ss. 61(2)(a), 91(1)(h) not in force at date of publication.], as am. S.B.C. 2004, c. 2, ss. 236, 237; 2004, c. 41, s. 48; 2004, c. 42, s. 138; 2004, c. 45, s. 78; 2005, c. 35, ss. 3, 4 [ss. 3 as it enacts s. 142.1(2)(e), 4 not in force at date of publication.] [s. 3 amended 2007, c. 30, s. 56.] [s. 4(a)-(d), (f)-(i) repealed 2019, c. 22, s. 22.]; B.C. Reg. 346/2006, s. 1(a) (Sched., item 1); 2007, c. 8, s. 5 [Not in force at date of publication.]; 2007, c. 14, s. 7; 2007, c. 19, s. 1; 2007, c. 35 [ss. 5, 6 not in force at date of publication. Repealed 2019, c. 22, s. 21.]; 2008, c. 15, ss. 1-4; 2010, c. 2, s. 9; 2010, c. 6, ss. 25, 94 (Sched. 4, item 1); 2011, c. 19, s. 100; 2011, c. 24, s. 1; 2012, c. 13, s. 35; 2013, c. 13, s. 12; 2014, c. 16, s. 106; 2015, c. 1, s. 87; 2015, c. 5, s. 84; 2015, c. 6, ss. 1-13; 2015, c. 14, s. 69; 2016, c. 5, s. 39 (Sched. 1, item 4); 2017, c. 10, s. 61 (Sched. 2, item 2); 2018, c. 29, s. 142; 2018, c. 47, s. 138 [Not in force at date of publication. Repealed 2022, c. 19, s. 58.]; 2018, c. 49, s. 90 (Sched. 2, item 2) [Not in force at date of publication.]; 2019, c. 14, s. 28 (Sched. 1, item 1); 2019, c. 22, ss. 1-19 [ss. 1(b), 7, 10 as it enacts s. 112.21(2)(k), 16 as it enacts s. 189(4)(v), 17 not in force at date of publication.]; 2021, c. 25, s. 45 [Not in force at date of publication.]; 2021, c. 27, ss. 35-37; 2022, c. 19, s. 63; 2022, c. 43, s. 550 [Not in force at date of publication.]; 2023, c. 10, ss. 42-44; 2023, c. 13, s. 43.

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts as follows:

Currency
British Columbia Current to Gazette Vol. 66:3 (February 14, 2023)

B.C. Statutes
Business Practices and Consumer Protection Act
Part 4 — Consumer Contracts (ss. 17-56)
Division 4 — Distance Sales Contracts

S.B.C. 2004, c. 2, s. 49

s 49. Cancellation of distance sales contract

Currency

49.Cancellation of distance sales contract

49(1) A consumer may cancel a distance sales contract by giving notice of cancellation to the supplier

(a) not later than 7 days after the date that the consumer receives a copy of the contract if

(i) the supplier does not comply with section 47 *[distance sales contract in electronic form]*, or

(ii) the contract does not comply with section 48(2) *[required contents of contract]*,

(b) not later than 30 days after the date that the contract is entered into if the supplier does not provide the consumer with a copy of the contract in accordance with section 48(1),

(c) at any time before the goods or services are delivered if the goods or services to be delivered under the contract are not delivered to the consumer within 30 days of the supply date, or

(d) at any time before the goods or services are delivered if the supply date is not specified in the contract and the supplier does not deliver the goods or services within 30 days from the date the contract is entered into.

49(2) If a distance sales contract is cancelled under subsection (1), the following are also cancelled:

(a) any other related consumer transaction;

(b) any guarantee given in respect of the total price under the contract;

(c) any security given by the consumer in respect of the total price under the contract;

(d) if credit is extended or arranged by the supplier in respect of a distance sales contract, the credit agreement, as defined in section 57 *[definitions]*, whether or not the credit agreement is a part of or attached to the distance sales contract.

Currency

British Columbia Current to Gazette Vol. 66:3 (February 14, 2023)

B.C. Statutes
Business Practices and Consumer Protection Act
Part 4 — Consumer Contracts (ss. 17-56)
Division 4 — Distance Sales Contracts

S.B.C. 2004, c. 2, s. 52

s 52. Consumer's recourse regarding credit card charges

Currency

52.Consumer's recourse regarding credit card charges

52(1) In this section, **"credit card"** and **"interest"** have the same meaning as in section 57 *[definitions]*.

52(2) A consumer who has charged to a credit card all or any part of the total price under a distance sales contract or any related consumer transaction may request the credit card issuer to cancel or reverse the credit card charge and any associated interest or other charges if the consumer has cancelled the contract under section 49 and the supplier has not refunded all money as required under section 50.

52(3) The request under subsection (2) must contain the following information:

(a) the supplier's name;

(b) the date the distance sales contract was entered into;

(c) the amount charged to the credit card in respect of the distance sales contract and any related consumer transaction;

(d) a description of the goods or services sufficient to identify them;

(e) the reason for cancellation under section 49, of the distance sales contract;

(f) the date and method of cancellation of the distance sales contract.

52(4) The credit card issuer must

(a) acknowledge the consumer's request within 30 days of receiving it, and

(b) if the request meets the requirements of subsection (3), cancel or reverse the credit card charge and any associated interest or other charges within the earlier of

(i) 2 complete billing cycles of the credit card issuer, and

(ii) 90 days.

Currency
British Columbia Current to Gazette Vol. 66:3 (February 14, 2023)

M A N I T O B A

THE CONSUMER PROTECTION ACT

C.C.S.M. c. C200

LOI SUR LA PROTECTION DU CONSOMMATEUR

c. C200 de la *C.P.L.M.*

As of 19 Nov. 2023, this is the most current version available. It is current for the period set out in the footer below.

Le texte figurant ci-dessous constitue la codification la plus récente en date du 19 nov. 2023. Son contenu était à jour pendant la période indiquée en bas de page.

PART XVI

INTERNET AGREEMENTS

"Internet" defined
127 In this Part, **"Internet"** means the open and decentralized global network connecting networks of computers and similar devices to each other for the electronic exchange of information using standardized communication protocols.

S.M. 2000, c. 32, s. 36.

Application
128 This Part applies to retail sale or retail hire-purchase agreements formed by Internet communications.

S.M. 2000, c. 32, s. 36.

Buyer may cancel if not provided information
129(1) If a seller fails to provide prescribed information to a buyer in writing before entering into a retail sale or retail hire-purchase agreement with the buyer, the buyer may cancel the agreement before accepting delivery of the goods or services under the agreement.

Electronic methods of providing information
129(2) For the purpose of subsection (1), a seller shall be considered to have provided the prescribed information to a buyer in writing if

(a) the information is sent to the e-mail address provided by the buyer to the seller for the provision of information related to the retail sale or retail hire-purchase agreement; or

(b) the information is made accessible to the buyer on the Internet in a manner that ensures that

(i) the buyer has accessed the information before entering into the agreement, and

(ii) the information is capable of being retained and printed by the buyer.

S.M. 2000, c. 32, s. 36; S.M. 2001, c. 10, s. 4.

PARTIE XVI

CONVENTIONS INTERNET

Définition de « Internet »
127 Dans la présente partie, **« Internet »** s'entend du réseau mondial ouvert et décentralisé servant à interconnecter des réseaux d'ordinateurs et d'autres appareils analogues en vue de l'échange électronique de renseignements à l'aide de protocoles de communication standardisés.

L.M. 2000, c. 32, art. 36.

Application
128 La présente partie s'applique aux conventions de vente au détail et de location-vente au détail conclues à l'aide de communications Internet.

L.M. 2000, c. 32, art. 36; L.M. 2001, c. 10, art. 3.

Annulation par l'acheteur — renseignements
129(1) L'acheteur peut annuler la convention de vente au détail ou la convention de location-vente au détail qu'il a conclue avec un vendeur, et ce, avant d'accepter les objets ou les services que la convention en question prévoit, si ce dernier ne lui a pas fourni, par écrit, les renseignements prescrits avant la conclusion de la convention en question.

Méthodes électroniques
129(2) Pour l'application du paragraphe (1), le vendeur est réputé avoir fourni par écrit à l'acheteur les renseignements prescrits s'il :

a) les a envoyés à l'adresse électronique que l'acheteur lui a donnée à cette fin;

b) les a mis sur Internet de telle sorte que l'acheteur :

(i) y ait accédé avant de conclure la convention,

(ii) puisse les conserver et les imprimer.

L.M. 2000, c. 32, art. 36; L.M. 2001, c. 10, art. 4.

Buyer may cancel for failure to deliver

130(1) Before accepting delivery of goods or services under a retail sale or retail hire-purchase agreement, the buyer may cancel the agreement if the seller does not

(a) in the case of prescribed goods, deliver the goods by the delivery date specified in the agreement or by any other delivery date agreed to in writing, either on paper or by electronic communication;

(b) in the case of other goods, deliver the goods within 30 days after

(i) the delivery date specified in the agreement or any other delivery date agreed to in writing, either on paper or by electronic communication, or

(ii) if a delivery date cannot be determined under subclause (i), the date of the agreement;

(c) in the case of travel, transportation or accommodation services or prescribed services, begin to provide the services on the commencement date specified in the agreement or any other commencement date agreed to in writing, either on paper or by electronic communication; and

(d) in the case of other services, begin to provide the services within 30 days after the commencement date specified in the agreement or any other commencement date agreed to in writing, either on paper or by electronic communication.

Annulation par l'acheteur — non-livraison

130(1) L'acheteur peut annuler la convention de vente au détail ou la convention de location-vente au détail avant d'accepter les objets ou les services que la convention en question prévoit, si :

a) dans le cas d'objets prévus par règlement, le vendeur n'a pas livré les objets à la date de livraison précisée dans la convention ou toute autre date convenue par écrit, que ce soit sur papier ou par communication électronique;

b) dans le cas d'autres objets, le vendeur n'a pas livré les objets dans les 30 jours qui ont suivi :

(i) la date de livraison précisée dans la convention ou toute autre date convenue par écrit, que ce soit sur papier ou par communication électronique,

(ii) la date de la convention, si la date de livraison ne peut être déterminée en vertu du sous-alinéa (i);

c) dans le cas de services de voyage, de transport ou d'hébergement ou de services prévus par règlement, le vendeur n'a pas commencé à fournir les services à la date précisée dans la convention ou à toute autre date de début de fourniture des services convenue par écrit, que ce soit sur papier ou par communication électronique;

d) dans le cas d'autres services, le vendeur n'a pas commencé à fournir les services dans les 30 jours qui suivent la date précisée dans la convention ou à toute autre date de début de fourniture des services convenue par écrit, que ce soit sur papier ou par communication électronique.

Attempted delivery

130(2) For the purpose of subsection (1), a seller is deemed to have delivered the goods or services under a retail sale or retail hire-purchase agreement

(a) if delivery was attempted but was refused by the buyer, on the day that delivery was attempted; or

Tentative de livraison

130(2) Pour l'application du paragraphe (1), le vendeur est réputé avoir livré les objets ou fourni les services que prévoit la convention de vente au détail ou la convention de location-vente au détail :

a) le jour où il a tenté de les livrer ou de les fournir, le cas échéant, et que l'acheteur les ait refusés;

(b) if delivery was attempted but not made because no person was available to accept delivery for the buyer, on the day that the buyer was given notice that the goods or services are available to be delivered or that the goods are available to be picked up by the buyer.

S.M. 2000, c. 32, s. 36; S.M. 2001, c. 10, s. 5.

b) le jour où il a remis à l'acheteur un avis comme quoi les objets ou les services pouvaient être livrés ou fournis ou que l'acheteur pouvait passer les prendre ou s'en prévaloir, s'il a tenté de les livrer ou de les fournir et qu'il n'ait pu le faire parce qu'il n'y avait personne pour les accepter chez l'acheteur.

L.M. 2000, c. 32, art. 36; L.M. 2001, c. 10, art. 5.

Court may provide relief against cancellation
131 If in the opinion of a court it would be inequitable for an agreement to be cancelled under section 129 or 130, the court may make any order it considers appropriate.

S.M. 2000, c. 32, s. 36.

Levée de l'annulation
131 S'il juge qu'il serait inéquitable qu'une convention soit annulée sous le régime de l'article 129 ou 130, le tribunal peut rendre l'ordonnance qu'il estime indiquée.

L.M. 2000, c. 32, art. 36.

Notice of cancellation
132(1) An agreement is cancelled under section 129 or 130 when a written notice of the cancellation is given in accordance with this section.

Avis d'annulation
132(1) Une convention est annulée sous le régime de l'article 129 ou 130 lorsqu'un avis d'annulation est remis en conformité avec le présent article.

Method of giving notice
132(2) A buyer may provide a notice of cancellation to the seller by personal delivery or by registered mail, fax, e-mail or any other method by which the buyer can obtain confirmation of delivery of the notice.

Méthodes de remise des avis
132(2) L'acheteur peut remettre son avis d'annulation au vendeur en mains propres ou par courrier recommandé, télécopieur, courriel ou autre méthode lui permettant d'obtenir la confirmation de la remise.

Wording of notice of cancellation
132(3) A notice of cancellation is adequate if it indicates the intention of the buyer to cancel the agreement.

Libellé de l'avis d'annulation
132(3) L'avis d'annulation est valable pour autant qu'il indique l'intention de l'acheteur d'annuler la convention.

Effective date of cancellation
132(4) A notice of cancellation that is given otherwise than by personal delivery is deemed to be given when sent.

S.M. 2000, c. 32, s. 36.

Date d'effet de l'annulation
132(4) L'avis d'annulation qui est remis autrement qu'en mains propres est réputé remis le jour de son envoi.

L.M. 2000, c. 32, art. 36.

Effect of cancellation
133(1) If an agreement is cancelled under section 129 or 130,

(a) every obligation of the buyer under the contract is extinguished; and

Effet de l'annulation
133(1) L'annulation d'une convention sous le régime de l'article 129 ou 130 a pour effet :

a) d'éteindre les obligations que l'acheteur avait en vertu de la convention;

(b) the seller must refund to the buyer, within 30 days after the cancellation, all consideration paid by the buyer under the agreement, whether paid to the seller or any other person.

b) d'obliger le vendeur à rembourser à l'acheteur, dans un délai de 30 jours, toutes les contreparties que ce dernier lui a versées directement ou qu'il a versées à une autre personne en vertu de la convention.

Delivery of services after cancellation
133(2) If services are provided to a buyer under an agreement after the buyer has cancelled the agreement under section 129 or 130, the buyer may rescind the notice of cancellation by accepting the services. But the buyer shall not be considered to have rescinded the notice if the services are provided without the buyer being given an opportunity to refuse them.

Prestation des services après l'annulation
133(2) Si des services lui sont fournis en vertu d'une convention qu'il a annulée sous le régime de l'article 129 ou 130, l'acheteur peut, par l'acceptation des services, révoquer son avis d'annulation. Toutefois, cet avis n'est pas réputé révoqué si les services sont fournis sans que l'acheteur ait eu l'occasion de les refuser.

Delivery of goods after cancellation
133(3) If goods are delivered to a buyer under an agreement after the buyer has cancelled the agreement under section 129 or 130, the buyer may

(a) rescind the notice of cancellation by accepting the goods; or

(b) refuse to accept delivery of the goods or, having accepted delivery, return the goods, within 30 days after accepting delivery, to the seller unopened and in the same condition in which they were delivered, by any method that provides the buyer with confirmation of delivery to the seller.

Livraison des objets après l'annulation
133(3) Si des objets lui sont livrés en vertu d'une convention qu'il a annulée sous le régime de l'article 129 ou 130, l'acheteur peut :

a) révoquer son avis d'annulation en acceptant les objets;

b) refuser la livraison des objets ou, s'il l'a acceptée, retourner les objets au vendeur dans les 30 jours qui suivent leur acceptation, sans les ouvrir et dans le même état que celui dans lequel ils étaient lorsqu'il les a reçus, et ce, selon une méthode qui lui permet d'obtenir la confirmation de la livraison des objets au vendeur.

Seller must accept return of goods
133(4) The seller must accept a return of goods that were returned or refused delivery by a buyer under clause (3)(b).

Obligation d'accepter les objets retournés
133(4) Le vendeur est obligé d'accepter les objets que l'acheteur lui retourne ou dont il a refusé la livraison en vertu de l'alinéa (3)b).

Seller responsible for cost of returning goods
133(5) The seller is responsible for the cost of returning goods under clause (3)(b).

Frais engagés pour le retour des objets
133(5) Il appartient au vendeur de payer les frais engagés pour le retour d'objets en vertu de l'alinéa (3)b).

Effective date of return
133(6) Goods that are returned by the buyer under clause (3)(b) otherwise than by personal delivery are deemed for the purpose of that clause to have been returned when sent by the buyer to the seller.

Date du retour
133(6) Les objets que l'acheteur retourne au vendeur en vertu de l'alinéa (3)b), autrement qu'en mains propres, sont, pour l'application de cet alinéa, réputés retournés le jour où l'acheteur les envoie au vendeur.

S.M. 2000, c. 32, s. 36.

L.M. 2000, c. 32, art. 36; L.M. 2001, c. 10, art. 6.

Buyer's recourse re credit card charges

134(1) A buyer who has charged to a credit card account all or any part of the consideration payable under a retail sale or retail hire-purchase agreement may request the credit card issuer to cancel or reverse the credit card charge, and any associated interest or other charges, if

(a) the buyer has cancelled the agreement under section 129 or 130, and the consideration has not been refunded within the 30-day period referred to in clause 133(1)(b); or

(b) the agreement is unenforceable because of subsection 20(3) of *The Electronic Commerce and Information Act* and the consideration has not been refunded to the buyer within 30 days after the buyer notified the seller of the error referred to in that subsection.

Credit card issuer must reverse or cancel charges

134(2) On receiving a request under subsection (1) that satisfies prescribed requirements, the credit card issuer must cancel or reverse the credit card charge and any associated interest or other charges.

Application

134(3) This section applies despite any agreement to the contrary entered into before or after this Part comes into force.

S.M. 2000, c. 32, s. 36.

Other rights not affected

135 The rights of the buyer under this Part in respect of a retail sale or retail hire-purchase agreement are in addition to, and do not affect, any other right or remedy the buyer has under or in respect of the agreement or at law.

S.M. 2000, c. 32, s. 36.

Recours de l'acheteur — frais de carte de crédit

134(1) L'acheteur qui a fait porter au compte de sa carte de crédit la totalité ou une partie de la contrepartie exigible en vertu d'une convention de vente au détail ou d'une convention de location-vente au détail peut demander à l'émetteur de la carte de crédit d'annuler les frais de carte de crédit ainsi que les frais d'intérêt et autres frais connexes :

a) s'il a annulé la convention sous le régime de l'article 129 ou 130 et que la contrepartie n'ait pas été remboursée au cours du délai de 30 jours mentionné à l'alinéa 133(1)b);

b) si la convention ne peut être exécutée en raison du paragraphe 20(3) de la *Loi sur le commerce et l'information électroniques* et que la contrepartie ne lui ait pas été remboursée dans les 30 jours après qu'il a informé le vendeur de l'erreur mentionnée à ce paragraphe.

Obligation d'annuler les frais

134(2) Dès qu'il reçoit une demande que vise le paragraphe (1) et qui satisfait aux exigences prescrites, l'émetteur de la carte de crédit annule les frais de carte de crédit ainsi que les frais d'intérêt et autres frais connexes.

Application

134(3) Le présent article s'applique en dépit de toute convention contraire conclue avant ou après l'entrée en vigueur de la présente partie.

L.M. 2000, c. 32, art. 36.

Autres droits

135 Les droits que la présente partie confère à l'acheteur en ce qui concerne une convention de vente au détail ou une convention de location-vente au détail ne touchent pas aux autres droits ou recours que l'acheteur a en vertu ou à l'égard de la convention ou en droit, mais s'y ajoutent.

L.M. 2000, c. 32, art. 36.

Newfoundland and Labrador Statutes
Consumer Protection and Business Practices Act
Part V — Consumer Contracts (ss. 23-35.16)
Division 2 — Distance Sales Contracts [Heading amended 2012, c. 7, s. 3.]

S.N. 2009, c. C-31.1, s. 28

s 28. Definition

Currency

28.Definition

In this Division and Division 3, **"distance sales contract"** means a contract for the supply of goods or services between a supplier and a consumer that is not entered into in person and, with respect to goods, for which the consumer does not have the opportunity to inspect the goods that are the subject of the contract before the contract is entered into, but does not include a prepaid purchase card.

Amendment History

2012, c. 7, s. 4

Currency

Newfoundland and Labrador Current to Nfld. Reg. 56/23 (August 18, 2023)

Newfoundland and Labrador Statutes
Consumer Protection and Business Practices Act
Part V — Consumer Contracts (ss. 23-35.16)
Division 2 — Distance Sales Contracts [Heading amended 2012, c. 7, s. 3.]

S.N. 2009, c. C-31.1, s. 32

s 32. Cancellation of distance sales contract

Currency

32.Cancellation of distance sales contract

32(1) A consumer may cancel a distance sales contract by giving notice of cancellation to the supplier

(a) not later than 10 days after the date that the consumer receives a copy of the contract where

(i) the supplier does not comply with section 30, or

(ii) the contract does not comply with section 31,

(b) not later than 30 days after the date that the contract is entered into where the supplier does not provide the consumer with a copy of the contract in accordance with subsection 31(1),

(c) before the goods or services are delivered where the goods or services to be delivered under the contract are not delivered to the consumer within 30 days of the supply date, or

(d) before the goods or services are delivered where the supply date is not specified in the contract and the supplier does not deliver the goods or services within 30 days from the date the contract is entered into.

32(2) Where a distance sales contract is cancelled under subsection (1), the following are also cancelled:

(a) another related consumer transaction;

(b) a guarantee given in respect of the total price under the contract;

(c) security given by the consumer in respect of the total price under the contract; and

(d) where credit is extended or arranged by the supplier in respect of a distance sales contract, the credit agreement, whether or not the credit agreement is a part of or attached to the distance sales contract.

Currency

Newfoundland and Labrador Current to Nfld. Reg. 56/23 (August 18, 2023)

Newfoundland and Labrador Statutes
Consumer Protection and Business Practices Act
Part V — Consumer Contracts (ss. 23-35.16)
Division 2 — Distance Sales Contracts [Heading amended 2012, c. 7, s. 3.]

S.N. 2009, c. C-31.1, s. 35

s 35. Consumer's recourse regarding credit card charges

Currency

35.Consumer's recourse regarding credit card charges

35(1) A consumer who has charged to a credit card all or a part of the total price under a distance sales contract or a related consumer transaction may request the credit card issuer to cancel or reverse the credit card charge and associated interest or other charges where the consumer has cancelled the contract under section 32 and the supplier has not refunded all money as required under section 33.

35(2) The request under subsection (1) shall contain the following information:

(a) the supplier's name;

(b) the date the distance sales contract was entered into;

(c) the amount charged to the credit card in respect of the distance sales contract and a related consumer transaction;

(d) a description of the goods or services sufficient to identify them;

(e) the reason for cancellation of the distance sales contract; and

(f) the date and method of cancellation of the distance sales contract.

35(3) The credit card issuer shall

(a) acknowledge the consumer's request within 30 days of receiving it, and

(b) if the request meets the requirements of subsection (2), cancel or reverse the credit card charge and any associated interest or other charges within the earlier of

(i) 2 complete billing cycles of the credit card issuer, and

(ii) 90 days.

Currency
Newfoundland and Labrador Current to Nfld. Reg. 56/23 (August 18, 2023)

Internet Sales Contract Regulations

made under Section 34 of the
Consumer Protection Act
R.S.N.S. 1989, c. 92
O.I.C. 2002-327 (June 28, 2002, effective December 19, 2003), N.S. Reg. 91/2002

Citation

1 These regulations may be cited as the *Internet Sales Contract Regulations*.

Excluded goods and services

2 In addition to the goods and services specified in clause 21W(a) of the Act, Sections 21X to 21AF of the Act do not apply to goods or services received by a consumer in a transaction where the total costs payable by the consumer to the supplier are less than $50.

Disclosure of information

3 For the purposes of Section 21X of the Act, a supplier shall disclose the following information to a consumer before entering into an internet sales contract with the consumer:

(a) the supplier's name and, if different, the name under which the supplier carries on business;

(b) the supplier's business address and, if different, the supplier's mailing address;

(c) the supplier's telephone number and, if available, the supplier's e-mail address and facsimile number;

(d) a fair and accurate description of the goods or services being sold to the consumer, including any relevant technical or system specifications;

(e) an itemized list of the price of the goods or services being sold to the consumer and any associated costs payable by the consumer, including taxes and shipping charges;

(f) a description of any additional charge that may apply to the contract, such as customs duties and brokerage fees, the amount of which cannot reasonably be determined by the supplier;

(g) the total amount of the contract, or, where the goods or services are being purchased over an indefinite period, the amount of the periodic payments under the contract;

(h) the currency in which amounts owing under the contract are payable;

(i) the terms, conditions and method of payment;

(j) the date when the goods are to be delivered or the services are to begin;

(k) the supplier's delivery arrangements, including the identity of the shipper, the mode of transportation and the place of delivery;

(l) the supplier's cancellation, return, exchange and refund policies, if any; and

(m) any other restrictions, limitations or conditions of purchase that may apply.

Information considered disclosed

4 A supplier is considered to have disclosed to a consumer the information required to be disclosed in Section 3 if

(a) the information is prominently displayed in a clear and comprehensible manner; and

(b) the consumer is able to retain or print the information.

Content and delivery of internet sales contract

5 (1) A copy of an internet sales contract provided by a supplier pursuant to Section 21Z of the Act shall include

(a) the information required by Section 3;

(b) the consumer's name or unique identifier; and

(c) the date the contract was entered into.

(2) A copy of an internet sales contract provided by a supplier pursuant to Section 21Z of the Act shall be

(a) sent by e-mail to the e-mail address provided by the consumer to the supplier for the provision of information related to the contract;

(b) sent by facsimile to the facsimile number provided by the consumer to the supplier for the provision of information related to the contract;

(c) mailed or delivered to an address provided by the consumer to the supplier for the provision of information related to the contract; or

(d) provided to the consumer in any other manner by which the supplier can prove that the consumer has received the copy.

Cancellation of internet sales contract

6 (1) A consumer may cancel an internet sales contract

(a) at any time from the date the contract is entered into until 7 days after the consumer receives a copy of the contract if

(i) the supplier did not disclose to the consumer the information in accordance with Section 21X of the Act and Section 3, or

(ii) the supplier did not provide the consumer with an express opportunity to accept or decline the contract and to correct errors in accordance with Section 21Y of the Act;

(b) within 30 days from the date the contract is entered into if the supplier does not provide the consumer with a copy of the contract in accordance with Section 21Z of the Act and subsection 5(2);

(c) at any time before delivery of the goods or the commencement of the services under the contract if the delivery date or commencement date is specified in the contract and

(i) in the case of goods, the supplier does not deliver the goods within 30 days from the delivery date specified in the contract or another delivery date agreed on by the consumer and the supplier, either in writing or in electronic form,

(ii) in the case of transportation, travel or accommodation services, the supplier does not begin the services on the commencement date specified in the contract or another commencement date agreed on by the consumer and the supplier, either in writing or in electronic form, or

(iii) in the case of services, other than those specified in subclause (ii), the supplier does not begin the services within 30 days from the commencement date specified in the contract or another commencement date agreed on by the consumer and the supplier, either in writing or in electronic form;

(d) at any time before the delivery of the goods or the commencement of the services under the contract, if the delivery date or commencement date is not specified in the internet sales contract and if the supplier does not deliver the goods or begin the services within 30 days from the date the contract is entered into.

(2) For the purposes of subsection (1), a supplier is considered to have delivered the goods under an internet sales contract if

(a) delivery was attempted but was refused by the consumer at the time that the delivery was attempted; or

(b) delivery was attempted but was not made because no person was available to accept delivery for the consumer on the day for which reasonable notice was given to the consumer that the goods were available to be delivered.

(3) For the purposes of subsection (1), a supplier is considered to have begun the services under an internet sales contract if

(a) commencement was attempted but was refused by the consumer at the time that commencement was attempted; or

(b) commencement was attempted but did not occur because no person was available to enable the services to begin on the day for which reasonable notice was given to the consumer that the services were available to begin.

Notification of cancellation

7 (1) A consumer may notify a supplier of cancellation of their internet sales contract in any manner or form that indicates the consumer's intent to cancel the contract.

(2) Notification pursuant to subsection (1) may be given to the supplier by any means including, but not limited to, personal service, registered mail, telephone, courier, facsimile and e-mail, and when given other than by personal service, is deemed to be given when sent.

Request to reverse credit charge

8 A request made by a consumer to a credit card issuer pursuant to Section 21AF of the Act to reverse a credit charge shall contain the following information:

(a) the consumer's name;

(b) the consumer's credit card number;

(c) the expiry date of the consumer's credit card;

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(d) the supplier's name;

(e) the date the internet sales contract was entered into;

(f) the dollar amount of consideration charged to the credit card account in respect of the internet sales contract and any related consumer transaction;

(g) a description of the goods or services sufficient to identify them;

(h) the reason for cancellation of the internet sales contract in accordance with Section 6; and

(i) the date and method of notification of the cancellation of the internet sales contract.

Last updated: 10-12-2017

Ontario Statutes
Consumer Protection Act, 2002
Part IV — Rights and Obligations Respecting Specific Consumer Agreements (ss. 20-47.1)
Future Performance Agreements

S.O. 2002, c. 30, Sched. A, s. 26

s 26.

Currency

26.

26(1)Late delivery

A consumer may cancel a future performance agreement at any time before delivery under the agreement or the commencement of performance under the agreement if the supplier,

(a) does not make delivery within 30 days after the delivery date specified in the agreement or an amended delivery date agreed to by the consumer in writing; or

(b) does not begin performance of his, her or its obligations within 30 days after the commencement date specified in the agreement or an amended commencement date agreed to by the consumer in writing.

26(2)Delivery or commencement date not specified

If the delivery date or commencement date is not specified in the future performance agreement, a consumer may cancel the agreement at any time before delivery or commencement if the supplier does not deliver or commence performance within 30 days after the date the agreement is entered into.

26(3)Forgiveness of failure

If, after the period in subsection (1) or (2) has expired, the consumer agrees to accept delivery or authorize commencement, the consumer may not cancel the agreement under this section.

26(4)Deemed delivery or performance

For the purposes of subsections (1) and (2), a supplier is considered to have delivered or commenced performance under a future performance agreement if,

(a) delivery was attempted but was refused by the consumer at the time that delivery was attempted or delivery was attempted but not made because no person was available to accept delivery for the consumer on the day for which reasonable notice was given to the consumer that there was to be delivery; or

(b) commencement was attempted but was refused by the consumer at the time that commencement was attempted or commencement was attempted but did not occur because no person was available to enable commencement on the day for which reasonable notice was given to the consumer that commencement was to occur.

Currency

Ontario Current to S.O. 2023, c. 15 and O. Reg. 267/23 (August 18, 2023)

Ontario Statutes
Consumer Protection Act, 2002
Part IX — Procedures for Consumer Remedies (ss. 91-101)

S.O. 2002, c. 30, Sched. A, s. 92

s 92.

Currency

92.

92(1)Form of consumer notice

If this Act requires a consumer to give notice to a supplier to request a remedy, the consumer may do so by giving notice in accordance with this section.

92(2)Same

The notice may be expressed in any way, as long as it indicates the intention of the consumer to seek the remedy being requested and complies with any requirements that may be prescribed.

92(3)Giving notice

Unless the regulations require otherwise, the notice may be oral or in writing and may be given by any means.

92(4)Notice given when sent

If notice in writing is given other than by personal service, the notice shall be deemed to be given when sent.

92(5)Address

The consumer may send or deliver the notice to the address set out in a consumer agreement or, if the consumer did not receive a written copy of a consumer agreement or the address was not set out in the written agreement, the consumer may send or deliver the notice,

(a) to any address of the supplier on record with the Government of Ontario or the Government of Canada; or

(b) to an address of the supplier known by the consumer.

Amendment History

2004, c. 19, s. 7(35)

Currency
Ontario Current to S.O. 2023, c. 15 and O. Reg. 267/23 (August 18, 2023)

End of Document

Ontario Statutes
Consumer Protection Act, 2002
Part IX — Procedures for Consumer Remedies (ss. 91-101)

S.O. 2002, c. 30, Sched. A, s. 99

s 99.

Currency

99.

99(1)Consumer's recourse re: credit card charges

A consumer who has charged to a credit card account all or any part of a payment described in subsection (2) may request the credit card issuer to cancel or reverse the credit card charge and any associated interest or other charges.

99(2)Types of payment

Subsection (1) applies to,

(a) a payment in respect of a consumer agreement that has been cancelled under this Act or in respect of any related agreement;

(b) a payment that was received in contravention of this Act;

(c) a payment in respect of a fee or an amount that was charged in contravention of this Act; and

(d) a payment that was collected in respect of unsolicited goods or services for which payment is not required under section 13.

99(3)Timing of request

A consumer may make a request under subsection (1) if the consumer has cancelled a consumer agreement or demanded a refund in accordance with this Act, and the supplier has not refunded all of the payment within the required period.

99(4)Request

A request under subsection (1) shall be in writing, shall comply with the requirements, if any, that are prescribed under subsection 92(2), and shall be given to the credit card issuer, in the prescribed period, in accordance with section 92.

99(5)Obligations of credit card issuer

The credit card issuer,

(a) shall, within the prescribed period, acknowledge the consumer's request; and

(b) if the request meets the requirements of subsection (4), shall, within the prescribed period,

(i) cancel or reverse the credit card charge and any associated interest or other charges, or

(ii) after having conducted an investigation, send a written notice to the consumer explaining the reasons why the credit card issuer is of the opinion that the consumer is not entitled to cancel the consumer agreement or to demand a refund under this Act.

99(6)Right of action

A consumer may commence an action against a credit card issuer to recover a payment and associated interest and other charges to which the consumer is entitled under this section.

99(7)Other prescribed payment systems

If a consumer charges all or part of a payment described in subsection (2) to a prescribed payment system, the consumer may request that the charge be cancelled or reversed and this section applies with necessary modifications to the cancellation or reversal of such a charge.

Amendment History

2004, c. 19, s. 7(40)

Currency

Ontario Current to S.O. 2023, c. 15 and O. Reg. 267/23 (August 18, 2023)

Loi de 2002 sur la protection du consommateur

L.O. 2002, CHAPITRE 30
Annexe A

Période de codification : du 1er mars 2022 à la date à laquelle Lois-en-ligne est à jour.

Dernière modification : 2021, chap. 26, annexe 3, art. 65.

Historique législatif : 2004, chap. 19, art. 7; 2006, chap. 17, art. 249; 2006, chap. 21, annexe F, art. 136 (1); 2006, chap. 29, art. 60; 2006, chap. 34, art. 8; 2007, chap. 4, art. 26; 2008, chap. 9, art. 79; 2010, chap. 8, art. 36; 2013, chap. 13, annexe 2; 2014, chap. 9, annexe 1; 2016, chap. 34; 2017, chap. 2, annexe 12, art. 3; 2017, chap. 5, annexe 2, art. 13 à 20; 2018, chap. 3, annexe 5, art. 14 (voir : 2019, chap. 1, annexe 3, art. 5); 2019, chap. 1, annexe 4, art. 12; 2019, chap. 14, annexe 10, art. 4; 2020, chap. 14, annexe 3; 2020, chap. 36, annexe 7, art. 303; 2021, chap. 26, annexe 3, art. 65.

Livraison tardive

26 (1) Le consommateur peut résilier une convention à exécution différée avant la livraison ou le commencement de l'exécution qu'elle prévoit si le fournisseur, selon le cas :

a) ne fait pas la livraison dans les 30 jours de la date qu'elle précise ou de l'autre date dont le consommateur a convenu par écrit;

b) ne commence pas à s'acquitter de ses obligations dans les 30 jours de la date que précise la convention ou de l'autre date dont le consommateur a convenu par écrit. 2002, chap. 30, annexe A, par. 26 (1).

PARTIE IX
PROCÉDURES RELATIVES AUX RÉPARATIONS DEMANDÉES PAR LE CONSOMMATEUR

…

Forme de l'avis du consommateur

92 (1) Le consommateur que la présente loi oblige à donner un avis à un fournisseur pour demander réparation peut le faire conformément au présent article. 2002, chap. 30, annexe A, par. 92 (1).

Idem

(2) L'avis peut être formulé de n'importe quelle manière, pourvu qu'il fasse état de l'intention du consommateur de demander réparation et satisfasse aux exigences prescrites. 2002, chap. 30, annexe A, par. 92 (2).

Remise de l'avis

(3) Sauf exigence contraire des règlements, l'avis peut être donné oralement ou par écrit et être remis de n'importe quelle manière. 2004, chap. 19, par. 7 (35).

Date de remise

(4) L'avis écrit qui n'est pas donné par signification à personne est réputé l'être lors de son envoi. 2004, chap. 19, par. 7 (35).

Adresse

(5) Le consommateur peut envoyer ou remettre l'avis à l'adresse qui figure dans la convention de consommation ou, s'il n'en a pas reçu copie écrite ou que l'adresse n'y figure pas :

a) soit à l'adresse du fournisseur qui figure dans les dossiers du gouvernement de l'Ontario ou du gouvernement du Canada;

b) soit à l'adresse du fournisseur qu'il connaît. 2002, chap. 30, annexe A, par. 92 (5); 2013, chap. 13, annexe 2, art. 6.

…

Recours du consommateur : cartes de crédit

99 (1) Le consommateur qui a débité d'un compte de carte de crédit tout ou partie d'un paiement visé au paragraphe (2) peut demander à l'émetteur de la carte de crédit d'annuler ou de contrepasser le débit et les intérêts ou autres frais connexes. 2002, chap. 30, annexe A, par. 99 (1).

Types de paiements

(2) Le paragraphe (1) s'applique à ce qui suit :

a) les paiements effectués à l'égard d'une convention de consommation résiliée en vertu de la présente loi ou à l'égard d'une convention connexe;

b) les paiements reçus en contravention à la présente loi;

c) les paiements effectués à l'égard de frais ou d'une somme exigés en contravention à la présente loi;

d) les paiements perçus à l'égard de marchandises ou de services non sollicités pour lesquels aucun paiement n'est exigé en application de l'article 13. 2004, chap. 19, par. 7 (40).

Délai de demande

(3) Le consommateur peut présenter une demande en vertu du paragraphe (1) s'il a résilié une convention de consommation ou demandé un remboursement conformément à la présente loi et que le fournisseur n'a pas remboursé en totalité le paiement dans le délai exigé. 2002, chap. 30, annexe A, par. 99 (3).

Demande

(4) La demande visée au paragraphe (1) doit être écrite, être conforme aux exigences prescrites, le cas échéant, en application du paragraphe 92 (2) et être remise à l'émetteur de la carte de crédit dans le délai prescrit, conformément à l'article 92. 2004, chap. 19, par. 7 (40).

Obligation de l'émetteur de la carte de crédit

(5) Dans le délai prescrit, l'émetteur de la carte de crédit :

a) d'une part, accuse réception de la demande du consommateur;

b) d'autre part, si la demande satisfait aux exigences du paragraphe (4) :

(i) soit annule ou contrepasse le débit et les intérêts ou autres frais connexes,

(ii) soit, après avoir enquêté, avise par écrit le consommateur de ses motifs de croire qu'il n'a pas le droit de résilier la convention de consommation ou de demander un remboursement en vertu de la présente loi. 2004, chap. 19, par. 7 (40).

Droit d'introduire une action

(6) Le consommateur peut introduire une action contre l'émetteur de la carte de crédit pour recouvrer le paiement et les intérêts ou autres frais connexes auxquels il a droit en vertu du présent article. 2002, chap. 30, annexe A, par. 99 (6).

Autres systèmes de paiement prescrits

(7) Le consommateur qui débite d'un système de paiement prescrit tout ou partie d'un paiement visé au paragraphe (2) peut demander l'annulation ou la contrepassation du débit, auquel cas le présent article s'applique à celle-ci, avec les adaptations nécessaires. 2002, chap. 30, annexe A, par. 99 (7).

Updated to October 5 2023
This document has official status.

chapter P-40.1

CONSUMER PROTECTION ACT

TABLE OF CONTENTS

DIVISION I.1

DISTANCE CONTRACTS

2006, c. 56, s. 5.

54.1. A distance contract is a contract entered into without the merchant and the consumer being in one another's presence and preceded by an offer by the merchant to enter into such a contract.

A merchant is deemed to have made an offer to enter into a distance contract if the merchant's proposal comprises all the essential elements of the intended contract, regardless of whether there is an indication of the merchant's willingness to be bound in the event the proposal is accepted and even if there is an indication to the contrary.

2006, c. 56, s. 5.

54.2. A distance contract is deemed to be entered into at the address of the consumer.

2006, c. 56, s. 5.

54.3. No merchant who makes an offer to enter into or enters into a distance contract may collect or offer to collect a partial or full payment from the consumer before performing the merchant's principal obligation, unless the consumer may request a chargeback of the payment under this Act or a regulation.

2006, c. 56, s. 5.

54.4. Before a distance contract is entered into, the merchant must disclose the following information to the consumer:

(a) the merchant's name and any other name under which the merchant carries on business;

(b) the merchant's address;

(c) the merchant's telephone number and, if available, the merchant's fax number and technological address;

(d) a detailed description of goods or services that are to be the object of the contract, including characteristics and technical specifications;

(d.1) if applicable, the information required under subparagraph *c* of the second paragraph of section 236.1 and under section 236.3;

(e) an itemized list of the prices of the goods or services that are to be the object of the contract, including associated costs charged to the consumer and any additional charges payable under an Act;

(f) a description of any possible additional charges payable to a third party, such as customs duties and brokerage fees, whose amounts cannot reasonably be determined;

(g) the total amount to be paid by the consumer under the contract and, if applicable, the amount of instalments, the rate applicable to the use of an incidental good or service and the terms of payment;

(h) the currency in which amounts owing under the contract are payable if not Canadian dollars;

(i) the date on which, or the time within which, the merchant's principal obligation must be performed;

(j) if applicable, the mode of delivery, the name of the carrier and the place of delivery;

(k) the applicable cancellation, rescission, return, exchange and refund conditions, if any; and

(l) any other applicable restrictions or conditions.

The merchant must present the information prominently and in a comprehensible manner and bring it expressly to the consumer's attention; in the case of a written offer, the merchant must present the information in a manner that ensures that the consumer is able to easily retain it and print it.

2006, c. 56, s. 5; 2018, c. 14, s. 11.

54.5. Before a distance contract is entered into, the merchant must provide the consumer with an express opportunity to accept or decline the proposal and to correct any errors.

2006, c. 56, s. 5.

54.6. A distance contract must be evidenced in writing and indicate:

(a) the consumer's name and address;

(b) the date the contract is entered into; and

(c) the information described in section 54.4, as disclosed before the contract was entered into.

2006, c. 56, s. 5.

54.7. The merchant must send a copy of the contract to the consumer within 15 days after the contract is entered into, in a manner that ensures that the consumer may easily retain it and print it.

2006, c. 56, s. 5.

54.8. The consumer may cancel the contract within seven days after receiving a copy if

(a) the merchant did not disclose to the consumer the information described in section 54.4 before the contract was entered into, or did not disclose it in accordance with that section;

(b) the merchant did not provide the consumer with an express opportunity, before the contract was entered into, to accept or decline the proposal or to correct any errors;

(c) the contract does not meet the requirements of section 54.6; or

(d) the merchant did not send a copy of the contract in a manner that ensures that the consumer may easily retain it and print it.

However, the cancellation period begins

(a) as of the performance of the merchant's principal obligation if the consumer, at that time, observes that the merchant has not disclosed all the information described in section 54.4 or has not disclosed it in accordance with that section; or

(b) where the consumer paid with a credit card or another payment instrument determined by regulation, as of the receipt of the statement of account if the consumer, at that time, observes that the merchant has not disclosed all the information described in section 54.4 or has not disclosed it in accordance with that section.

If the merchant does not send a copy of the contract to the consumer within the time provided for in section 54.7, the consumer has 30 days, as of the date the contract is entered into, in which to cancel the contract.

2006, c. 56, s. 5; 2017, c. 24, s. 5.

54.9. In addition to the cases provided for in section 54.8, a distance contract may be cancelled by the consumer at any time before performance of the merchant's principal obligation if

(a) the merchant's principal obligation is not performed within 30 days after the date specified in the contract or the later date agreed on in writing by the consumer and the merchant, or within 30 days after the contract is entered into in the case of a contract that does not specify a date or time limit for the merchant's principal obligation to be performed; or

(b) the contract is for transportation, lodging or restaurant services, or for a ticket, and the merchant does not provide the consumer, by the date specified in the contract or the later date agreed on in writing by the consumer and the merchant, with documents enabling the consumer to receive the services or be admitted to the event.

2006, c. 56, s. 5; 2018, c. 14, s. 12.

54.9.1. In addition to the cases provided for in sections 54.8 and 54.9, in the case of a distance contract relating to a resale ticket, the consumer may cancel the contract

(a) at any time after the date on which the event to which the ticket grants admission is cancelled, but before, if applicable, the new scheduled date of the event;

(b) at any time after the merchant has performed his principal obligation, but before the event to which the ticket grants admission, in any of the situations referred to in paragraph *c* of section 236.3.

2018, c. 14, s. 13.

54.10. The merchant's principal obligation is presumed to have been performed if the merchant attempted to perform it on the date specified in the contract, on a later date agreed on in writing by the consumer and the merchant, or on the date specified in a notice sent to the consumer within a reasonable time, but was prevented from doing so by the actions or negligence of the consumer.

2006, c. 56, s. 5.

54.11. The consumer's right to cancel the contract is exercised by sending a notice to that effect to the merchant.

2006, c. 56, s. 5.

54.12. The contract is cancelled by operation of law as of the sending of the cancellation notice.

The cancellation of the contract entails the cancellation of any accessory contract and of any warranty or security given to guarantee the amount payable under the contract.

A contract of credit entered into between the consumer and a third-party merchant under or in relation to a distance contract forms a whole with that contract and, as such, is also cancelled by operation of law if it results from an offer, representation or other action by the merchant who is party to the distance contract.

2006, c. 56, s. 5; 2018, c. 14, s. 14.

54.13. Within 15 days following the cancellation of the contract, the merchant must refund all sums paid by the consumer under the contract and any accessory contract, including sums paid to a third person.

Within 15 days following the cancellation of the contract or following delivery if it postdates cancellation, the consumer must restore the goods that were the object of the contract to the merchant in the same state in which they were received.

The merchant shall assume the reasonable costs of restitution.

2006, c. 56, s. 5.

54.14. If the merchant defaults on the obligation to make a refund under section 54.13 and the consumer has paid by credit card, the consumer may, within 60 days following the default, request the card issuer to chargeback all amounts paid under the contract and any accessory contract, and to cancel all charges made to the consumer's account in relation to those contracts.

2006, c. 56, s. 5.

54.15. A chargeback request must be in writing and contain the following information:

(a) the credit cardholder's name;

(b) the credit card number and expiry date;

(c) the merchant's name;

(d) the date the contract was entered into;

(e) the amount charged to the credit card account and the sums to be refunded by the merchant;

(f) a description of the goods or services that are the object of the contract and for which chargeback is requested;

(g) the reason for cancelling the contract; and

(h) the date of cancellation and the means used to send the cancellation notice.

2006, c. 56, s. 5.

54.16. A credit card issuer that receives a chargeback request must

(a) acknowledge receipt within 30 days;

(b) make the chargeback and cancel all credit card charges in connection with the distance contract and any accessory contract within 90 days or two complete periods, as defined in section 67, following receipt of the request, whichever comes first.

2006, c. 56, s. 5.

DIVISION II

CONTRACTS ENTERED INTO BY ITINERANT MERCHANTS

55. An itinerant merchant is a merchant who, personally or through a representative, elsewhere than at his address,

(a) solicits a particular consumer for the purpose of making a contract; or

(b) makes a contract with a consumer.

1978, c. 9, s. 55.

56. Sections 58 to 65 apply to contracts of sale or lease of goods and to contracts of service entered into by an itinerant merchant, except contracts excluded by regulation.

1978, c. 9, s. 56; 1998, c. 6, s. 1; 1999, c. 40, s. 234.

TITLE III

SUMS TRANSFERRED IN TRUST

1999, c. 40, s. 234.

254. Any sum of money received by a merchant from a consumer before the making of a contract shall be transferred in trust. The merchant is the trustee of the sum, and must deposit it in a trust account until the sum is repaid to the consumer on demand or until the contract is made.

1978, c. 9, s. 254; 1999, c. 40, s. 234.

255. Any sum of money collected from a consumer by a merchant under a contract contemplated in section 56 shall be transferred in trust. The merchant is the trustee of the sum and must deposit it in a trust account until the cancellation period provided for in the first paragraph of section 59 has expired or until the contract is cancelled under that paragraph.

1978, c. 9, s. 255; 1999, c. 40, s. 234; 2017, c. 24, s. 60.

256. Any sum of money collected from a consumer by a merchant under a contract that stipulates that the principal obligation of the merchant is to be performed more than two months after the contract is made shall be transferred in trust. The merchant is the trustee of the sum and must deposit it in a trust account until the principal obligation has been performed.

1978, c. 9, s. 256; 1999, c. 40, s. 234.

257. The merchant shall, at all times, have only one trust account in a chartered bank, financial services cooperative, authorized trust company or other deposit institution authorized under the Deposit Institutions and Deposit Protection Act (chapter I-13.2.2) to receive deposits, to keep the sums of money contemplated in sections 254 to 256.

From the time the account is opened, he must inform the president of the place where such account is kept and the number of such account.

1978, c. 9, s. 257; 2000, c. 29, s. 664; 2018, c. 23, ss. 783 and 786.

258. Every merchant must enter in his books or registers the appropriate accounting items in regard to the amounts he receives from a consumer and that must be transferred in trust under sections 254 to 256.

The merchant must, on demand of the consumer, render account of every sum he has received from him.

1978, c. 9, s. 258; 1999, c. 40, s. 234.

259. Interest on sums deposited in a trust account pursuant to this title belongs to the merchant.

1978, c. 9, s. 259.

260. Where the merchant is a legal person, each director is solidarily liable with the legal person for the sums which are transferred in trust in accordance with sections 254 to 256, unless the director proves that he acted in good faith.

1978, c. 9, s. 260; 1999, c. 40, s. 234.

Québec

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chapitre P-40.1

LOI SUR LA PROTECTION DU CONSOMMATEUR

TABLE DES MATIÈRES

SECTION I.1

CONTRAT CONCLU À DISTANCE

2006, c. 56, a. 5; 2009, c. 51, a. 8.

54.1. Un contrat conclu à distance est un contrat conclu alors que le commerçant et le consommateur ne sont pas en présence l'un de l'autre et qui est précédé d'une offre du commerçant de conclure un tel contrat.

Le commerçant est réputé faire une offre de conclure le contrat dès lors que sa proposition comporte tous les éléments essentiels du contrat envisagé, qu'il y ait ou non indication de sa volonté d'être lié en cas d'acceptation et même en présence d'une indication contraire.

2006, c. 56, a. 5; 2009, c. 51, a. 8.

54.2. Le contrat conclu à distance est réputé conclu à l'adresse du consommateur.

2006, c. 56, a. 5; 2009, c. 51, a. 8.

54.3. Le commerçant qui offre de conclure un contrat à distance ou qui conclut un tel contrat ne peut percevoir un paiement partiel ou total du consommateur ou lui offrir de percevoir un tel paiement avant d'exécuter son obligation principale, à moins qu'il ne s'agisse d'un paiement dont le consommateur peut demander la rétrofacturation en vertu de la présente loi ou d'un règlement.

2006, c. 56, a. 5.

54.4. Avant la conclusion du contrat à distance, le commerçant doit divulguer au consommateur les renseignements suivants:

a) son nom et tout autre nom qu'il utilise dans l'exploitation de son entreprise;

b) son adresse;

c) son numéro de téléphone ainsi que, le cas échéant, son numéro de télécopieur et son adresse technologique;

d) une description détaillée de chaque bien ou service faisant l'objet du contrat, y compris ses caractéristiques et ses spécifications techniques;

d.1*)* le cas échéant, l'information exigée par le paragraphe *c* du deuxième alinéa de l'article 236.1 et par l'article 236.3;

e) un état détaillé du prix de chaque bien ou service faisant l'objet du contrat, des frais connexes qu'il exige, de même que du coût de tout droit exigible en vertu d'une loi;

f) une description de tous les frais supplémentaires qui pourraient être exigibles par un tiers et dont le montant ne peut être raisonnablement calculé, notamment les droits de douane et les frais de courtage;

g) le total des sommes que le consommateur doit débourser en vertu du contrat et, le cas échéant, le montant des versements périodiques, le tarif applicable pour l'utilisation d'un bien ou d'un service accessoire de même que les modalités de paiement;

h) la devise dans laquelle les montants exigibles sont payables, lorsque cette devise est autre que canadienne;

i) la date ou les délais d'exécution de son obligation principale;

j) le cas échéant, le mode de livraison, le nom du transporteur et le lieu de livraison;

k) le cas échéant, les conditions d'annulation, de résiliation, de retour, d'échange ou de remboursement;

l) toutes les autres restrictions ou conditions applicables au contrat.

Le commerçant doit présenter ces renseignements de manière évidente et intelligible et les porter expressément à la connaissance du consommateur; lorsqu'il s'agit d'une offre écrite, il doit présenter ces renseignements de façon à ce que le consommateur puisse aisément les conserver et les imprimer sur support papier.

2006, c. 56, a. 5; 2018, c. 14, a. 11.

54.5. Avant la conclusion du contrat, le commerçant doit donner expressément au consommateur la possibilité d'accepter ou de refuser la proposition et d'en corriger les erreurs.

2006, c. 56, a. 5.

54.6. Le contrat doit être constaté par écrit et indiquer:

a) le nom et l'adresse du consommateur;

b) la date du contrat;

c) les renseignements énumérés à l'article 54.4, tels qu'ils ont été divulgués avant la conclusion du contrat.

2006, c. 56, a. 5.

54.7. Le commerçant doit transmettre au consommateur un exemplaire du contrat dans les 15 jours suivant sa conclusion de façon à garantir que le consommateur puisse aisément le conserver et l'imprimer sur support papier.

2006, c. 56, a. 5.

54.8. Le consommateur peut résoudre le contrat dans les sept jours suivant la réception de l'exemplaire du contrat dans l'un ou l'autre des cas suivants:

a) le commerçant n'a pas, avant la conclusion du contrat, divulgué au consommateur tous les renseignements énumérés à l'article 54.4 ou ne les a pas divulgués conformément à cet article;

b) le commerçant n'a pas, avant la conclusion du contrat, expressément donné au consommateur la possibilité d'accepter ou de refuser la proposition ou d'en corriger les erreurs;

c) le contrat n'est pas conforme aux exigences de l'article 54.6;

d) le commerçant n'a pas transmis un exemplaire du contrat de façon à garantir que le consommateur puisse aisément le conserver et l'imprimer sur support papier.

Ce délai de résolution court toutefois à compter de:

a) l'exécution de l'obligation principale du commerçant lorsque le consommateur constate, à ce moment, que le commerçant n'a pas divulgué tous les renseignements énumérés à l'article 54.4 ou qu'il ne les a pas divulgués conformément à cet article;

b) dans le cas où le consommateur a effectué le paiement au moyen d'une carte de crédit ou d'un autre instrument de paiement déterminé par règlement, la réception de l'état de compte lorsque le consommateur constate, à ce moment, que le commerçant n'a pas divulgué tous les renseignements énumérés à l'article 54.4 ou qu'il ne les a pas divulgués conformément à cet article.

Si le commerçant n'a pas transmis au consommateur un exemplaire du contrat dans le délai prévu à l'article 54.7, le délai de résolution est porté à 30 jours et il court à compter de la conclusion du contrat.

2006, c. 56, a. 5; 2017, c. 24, a. 5.

54.9. Outre les cas prévus à l'article 54.8, le contrat conclu à distance peut être résolu par le consommateur en tout temps avant l'exécution, par le commerçant, de son obligation principale dans l'un ou l'autre des cas suivants:

a) le commerçant n'exécute pas son obligation principale dans les 30 jours suivant la date indiquée au contrat ou la date ultérieure convenue par écrit avec le consommateur pour l'exécution de cette obligation, ou dans les 30 jours suivant la conclusion du contrat si celui-ci ne prévoit pas de date ou de délai pour l'exécution de l'obligation principale du commerçant;

b) le commerçant, s'il s'agit d'un contrat relatif à des services de transport, d'hébergement ou de restauration ou à un billet de spectacle, ne fournit pas, à la date indiquée au contrat ou, encore, à une date ultérieure convenue par écrit avec le consommateur, les documents nécessaires pour que ce dernier puisse recevoir les services ou être admis à l'événement prévus au contrat.

2006, c. 56, a. 5; 2009, c. 51, a. 8; 2018, c. 14, a. 12.

54.9.1. Outre les cas prévus aux articles 54.8 et 54.9, dans le cas d'un contrat conclu à distance relatif à un billet de spectacle qui fait l'objet d'une revente, le consommateur peut résoudre le contrat:

a) en tout temps après la date à laquelle l'événement auquel le billet donne le droit d'être admis est annulé, mais avant, le cas échéant, la nouvelle date prévue pour la tenue de celui-ci;

b) en tout temps après l'exécution, par le commerçant, de son obligation principale, mais avant la tenue de l'événement auquel le billet donne le droit d'être admis, dans l'une ou l'autre des situations visées au paragraphe *c* de l'article 236.3.

2018, c. 14, a. 13.

54.10. Un commerçant est présumé avoir exécuté son obligation principale lorsqu'il a tenté de l'exécuter à la date indiquée au contrat, à la date ultérieure convenue par écrit avec le consommateur ou, encore, à la date figurant dans un avis transmis au consommateur dans un délai raisonnable et qu'il a été empêché de le faire en raison des agissements ou de la négligence du consommateur.

2006, c. 56, a. 5.

54.11. Le consommateur se prévaut de la faculté de résolution en transmettant un avis à cet effet au commerçant.

2006, c. 56, a. 5.

54.12. Le contrat est résolu de plein droit à compter de la transmission de l'avis de résolution.

La résolution du contrat emporte la résolution de tout contrat accessoire et de toute garantie ou cautionnement consentis en considération du montant exigible en vertu du contrat.

Un contrat de crédit conclu par le consommateur avec un tiers commerçant, à l'occasion ou en considération d'un contrat conclu à distance, forme un tout avec ce contrat et est, de même, résolu de plein droit dès lors que le contrat de crédit résulte d'une offre, d'une représentation ou d'une autre forme d'intervention du commerçant partie au contrat conclu à distance.

2006, c. 56, a. 5; 2009, c. 51, a. 8.

54.13. Le commerçant doit, dans les 15 jours suivant la résolution du contrat, rembourser le consommateur de toutes les sommes payées par ce dernier en vertu de ce contrat et de tout contrat accessoire, y compris les sommes payées à un tiers.

Le consommateur doit, dans les 15 jours suivant la résolution du contrat, ou la livraison si celle-ci est postérieure à la résolution, restituer au commerçant, dans l'état où il les a reçus, les biens faisant l'objet du contrat.

Le commerçant assume les frais raisonnables de restitution.

2006, c. 56, a. 5.

54.14. Lorsque le commerçant est en défaut de rembourser le consommateur conformément à l'article 54.13, le consommateur qui a effectué le paiement au moyen d'une carte de crédit peut, dans les 60 jours suivant le défaut, demander à l'émetteur de cette carte la rétrofacturation de toutes les sommes payées en vertu du contrat et de tout contrat accessoire, de même que l'annulation de tous les frais portés à son compte en relation avec ces contrats.

2006, c. 56, a. 5.

54.15. La demande de rétrofacturation doit être faite par écrit et contenir les renseignements suivants:

a) le nom du titulaire de la carte de crédit;

b) le numéro de la carte de crédit ainsi que sa date d'expiration;

c) le nom du commerçant;

d) la date de la conclusion du contrat;

e) le montant débité au compte de la carte de crédit ainsi que les sommes que le commerçant est tenu de rembourser;

f) la description des biens ou services faisant l'objet du contrat et pour lesquels la rétrofacturation est demandée;

g) le motif de la résolution du contrat;

h) la date de la résolution du contrat et le mode de transmission de l'avis de résolution.

2006, c. 56, a. 5.

54.16. L'émetteur d'une carte de crédit qui reçoit une demande de rétrofacturation doit:

a) en accuser réception dans les 30 jours;

b) effectuer la rétrofacturation du montant débité au compte de la carte de crédit et procéder à l'annulation de tous les frais portés au compte de cette carte en relation avec le contrat conclu à distance et tout contrat accessoire à ce contrat soit dans les 90 jours suivant la réception de la demande, soit dans un délai représentant au plus deux périodes complètes visées à l'article 67, selon l'échéance du plus court terme.

2006, c. 56, a. 5; 2009, c. 51, a. 8.

TITRE III

SOMMES TRANSFÉRÉES EN FIDUCIE

1999, c. 40, a. 234.

254. Une somme d'argent reçue par un commerçant d'un consommateur avant la conclusion d'un contrat est transférée en fiducie. Le commerçant est alors fiduciaire de cette somme et doit la déposer dans un compte en fidéicommis jusqu'à ce qu'il la rembourse au consommateur sur réclamation de ce dernier, ou jusqu'à la conclusion du contrat.

1978, c. 9, a. 254; 1999, c. 40, a. 234.

255. Une somme d'argent reçue par un commerçant d'un consommateur, en vertu d'un contrat visé par l'article 56, est transférée en fiducie. Le commerçant est alors fiduciaire de cette somme et doit la déposer dans un compte en fidéicommis jusqu'à l'expiration du délai prévu au premier alinéa de l'article 59 ou jusqu'à la résolution du contrat en vertu de cet alinéa.

1978, c. 9, a. 255; 1999, c. 40, a. 234; 2017, c. 24, a. 60.

256. Une somme d'argent reçue par un commerçant d'un consommateur, par suite d'un contrat en vertu duquel l'obligation principale du commerçant doit être exécutée plus de deux mois après la conclusion de ce contrat, est transférée en fiducie. Le commerçant est alors fiduciaire de cette somme et doit la déposer dans un compte en fidéicommis jusqu'à l'exécution de son obligation principale.

1978, c. 9, a. 256; 1999, c. 40, a. 234.

257. Le commerçant doit, à tout moment, n'avoir qu'un seul compte en fidéicommis dans une banque à charte, une coopérative de services financiers, une société de fiducie autorisée ou une autre institution de dépôts autorisée en vertu de la Loi sur les institutions de dépôts et la protection des dépôts (chapitre I-13.2.2) à recevoir des dépôts, pour y garder les sommes d'argent visées aux articles 254 à 256.

Dès l'ouverture du compte, il doit informer le président de l'endroit où ce compte en fidéicommis est tenu ainsi que du numéro de ce compte.

1978, c. 9, a. 257; 1987, c. 95, a. 402; 1999, c. 40, a. 234; 2000, c. 29, a. 664; 2018, c. 23, a. 783 et 786.

258. Le commerçant doit effectuer dans ses livres ou registres les inscriptions comptables appropriées au sujet des sommes qu'il reçoit d'un consommateur et qui sont transférées en fiducie en vertu des articles 254 à 256.

Le commerçant doit, sur demande du consommateur, lui rendre compte d'une somme qu'il en a reçue.

1978, c. 9, a. 258; 1999, c. 40, a. 234.

259. L'intérêt sur les sommes versées dans un compte en fidéicommis tenu en vertu du présent titre appartient au commerçant.

1978, c. 9, a. 259; 1999, c. 40, a. 234.

260. Lorsque le commerçant est une personne morale, un administrateur est solidairement responsable avec la personne morale des sommes qui doivent être transférées en fiducie conformément aux articles 254 à 256, à moins qu'il ne fasse la preuve de sa bonne foi.

1978, c. 9, a. 260; 1999, c. 40, a. 234.

The Consumer Protection and Business Practices Regulations

being

Chapter C-30.2 Reg 1 (effective September 1, 2014) as amended by Saskatchewan Regulations 72/2015.

DIVISION 2
Internet Sales Contracts, Future Performance Contracts and Remote Contracts

Application of Division

3-3(1) Subject to section 3-4, this Division applies to internet sales contracts, future performance contracts and remote contracts, as defined in Part V of the Act.

(2) If a contract meets the definition of more than one type of contract mentioned in this Division, the following rules apply:

(a) an internet sales contract that is also a future performance contract or a remote contract is deemed to be an internet sales contract;

(b) a remote contract that is also a future performance contract is deemed to be a remote contract.

4 Jly 2014 cC-30.2 Reg 1 s3-3.

Exemptions

3-4(1) This Division does not apply to an internet sales contract, a remote contract or a future performance contract for consumer transactions or financial products or services regulated pursuant to:

(a) the *Bank Act* (Canada);

(b) the *Cooperative Credit Associations Act* (Canada);

(c) *The Credit Union Act, 1985*;

(d) *The Credit Union Act, 1998*;

(e) *The Mortgage Brokerages and Mortgage Administrators Act*;

(f) *The Payday Loans Act*;

(g) *The Real Estate Act*;

(h) *The Saskatchewan Insurance Act*;

(i) *The Securities Act, 1988*;

(j) *The Trust and Loan Corporations Act, 1997*.

(2) In addition to the Acts listed in subsection (1), this Division does not apply to a future performance contract for consumer transactions or financial products or services regulated pursuant to:

(a) *The Cemeteries Act, 1999*;

(b) *The Charitable Fund-raising Businesses Act*;

(c) *The Credit Reporting Act*;

(d) *The Direct Sellers Act*;

(e) *The Funeral and Cremation Services Act*;

(f) *The Hearing Aid Sales and Services Act*;

(g) Part V of these regulations.

(3) The provisions of this Division that apply to future performance contracts do not apply to any of the following:

(a) the supply of a prepaid purchase card, as defined in section 47 of the Act;

(b) the supply of perishable food or a perishable food product;

(c) the supply of accommodation;

(d) the supply of goods and services to one person at the request of another person if:

(i) the goods or services are to be supplied on a single occasion and not on an ongoing basis; and

(ii) the person requesting the supply of the goods or services pays the price in full at the time of the request.

(4) This Division does not apply to an internet sales contract, a future performance contract or a remote contract that is also a personal development services contract or travel club contract.

(5) In subsection (6), **"public utility"** means a system or works used to provide one or more of the following for public consumption, benefit, convenience or use:

(a) water;

(b) sewage disposal;

(c) drainage;

(d) electrical power;

(e) heat;

(f) natural or manufactured gas;

(g) waste management;

(h) residential street or road lighting.

(6) This Division does not apply to an internet sales contract, a future performance contract or a remote contract for the supply of public utilities by a Crown corporation, municipality or municipal district pursuant to:

(a) *The Cities Act*;

(b) *The Municipalities Act*;

(c) *The Northern Municipalities Act, 2010*;

(d) *The Power Corporation Act*; or

(e) *The SaskEnergy Act*.

4 Jly 2014 cC-30.2 Reg 1 s3-4; 28 Aug 2015 SR 72/2015 s3.

Contents of contract

3-5 Every internet sales contract, future performance contract and remote contract is required to contain the following information:

(a) the consumer's name;

(b) the date on which the contract is entered into;

(c) the name of the supplier and, if different, the name under which the supplier carries on business;

(d) the telephone number of the supplier and the address of the premises from which the supplier conducts business with the consumer;

(e) if the supplier conducts business by way of other media, such as fax and email, the other ways by which the consumer can contact the supplier;

(f) a fair and accurate description of the goods, services or goods and services that are the subject of the contract, including any relevant technical specifications;

(g) an itemized list of the prices of the goods, services or goods and services that are the subject of the contract, including taxes and shipping charges;

(h) a description of any additional charges that may apply as a result of the completion of the contract but that the supplier cannot reasonably determine, such as custom duties and brokerage fees;

(i) the total amount payable by the consumer under the contract or, if the goods, services or goods and services that are the subject of the contract are to be supplied during an indefinite period, the amount and frequency of periodic payments on account of the contract;

(j) the currency in which the amounts mentioned in clauses (g) to (i) are expressed, if not in Canadian currency;

(k) the terms and methods of payment on account of the contract;

(l) the date on which the goods, services or goods and services that are the subject of the contract:

(i) will be supplied; or

(ii) will be supplied initially, and the frequency with which they will be supplied thereafter if they are to be supplied during an indefinite period;

(m) if applicable, the date on which the services to be supplied under the contract will be completed;

(n) for goods, the supplier's delivery arrangements, including the name of the carrier, the method of transportation and the place of delivery;

(o) for services, the place where the services will be provided, the person to whom they will be provided and the supplier's method of providing them, including the name of any person who is to provide the services on the supplier's behalf;

(p) the supplier's cancellation, return, exchange and refund policies, if any, related to the contract;

(q) if the contract includes a trade-in arrangement, a description of the trade-in arrangement and the amount of the trade-in allowance;

(r) any other restrictions, limitations and conditions that may apply.

4 Jly 2014 cC-30.2 Reg 1 s3-5.

Disclosure of information

3-6(1) Before entering into an internet sales contract or a remote contract with a consumer, a supplier must:

(a) disclose to the consumer the information contained in clauses 3-5(c) to (r); and

(b) provide to the consumer an express opportunity:

(i) to accept or decline the contract; and

(ii) to correct errors immediately before entering into the contract.

(2) A supplier is considered to have disclosed to the consumer the information required in subsection (1) if the information is:

(a) prominently displayed in a clear and comprehensible manner; and

(b) made accessible in a manner that ensures that the consumer:

(i) can access the information; and

(ii) is able to retain and print the information.

4 Jly 2014 cC-30.2 Reg 1 s3-6.

Copy of contract

3-7 Within 15 days after a supplier and a consumer enter into an internet sales contract, a future performance contract or a remote contract, the supplier must provide to the consumer a copy of the contract:

(a) by sending it by email to the email address the consumer has given the supplier for the purposes of providing information relating to the contract;

(b) by transmitting it by fax to the fax number the consumer has given the supplier for the purposes of providing information relating to the contract;

(c) by mailing it or delivering it to an address the consumer has given the supplier for the purposes of providing information relating to the contract;

(d) by leaving it with the consumer at the time the contract is entered into, if applicable; or

(e) in any other manner that allows the supplier to prove that the consumer received it and that the information relating to the contract is:

(i) prominently displayed in a clear and comprehensible manner; and

(ii) made accessible in a manner that ensures that the consumer:

(A) can access the information; and

(B) is able to retain and print the information.

4 Jly 2014 cC-30.2 Reg 1 s3-7.

Cancellation of contract

3-8(1) A consumer may cancel an internet sales contract or a remote contract at any time after the contract is entered into until seven days after the consumer receives a copy of the contract, if the supplier does not comply with section 3-6.

(2) A consumer may cancel an internet sales contract or a remote contract within 30 days after the date the contract is entered into, if the supplier does not provide to the consumer a copy of the contract in accordance with section 3-7.

(3) A consumer may cancel a future performance contract not later than one year after the date on which the contract is entered into if:

(a) the supplier does not provide to the consumer a copy of the contract in accordance with section 3-7; or

(b) the contract does not contain the information required pursuant to section 3-5.

(4) In addition to the cancellation rights mentioned in subsections (1) to (3), but subject to subsection (5), a consumer may cancel an internet sales contract, a future performance contract or a remote contract at any time before delivery of the goods or commencement of the services under the contract if:

(a) in the case of goods, the supplier does not deliver the goods within 30 days after:

(i) the delivery date specified in the contract; or

(ii) an amended delivery date agreed to in writing by the consumer and the supplier;

(b) in the case of services other than those services mentioned in subsection (5), the supplier does not begin the services within 30 days after:

(i) the commencement date specified in the contract; or

(ii) an amended commencement date agreed to in writing by the consumer and the supplier; or

(c) a delivery date or commencement date is not specified in the contract and the supplier does not deliver the goods or begin the services within 30 days after the date on which the contract is entered into.

(5) Notwithstanding subsection (4), if an internet sales contract or a remote contract is for travel, transportation or accommodation services, or a future performance contract is for travel or transportation services, a consumer may cancel the contract at any time before commencement of the services under the contract if the supplier does not begin the services:

(a) on the commencement date specified in the contract; or

(b) on an amended commencement date agreed to in writing by the consumer and the supplier.

(6) For the purposes of subsections (4) and (5):

(a) a supplier is deemed to have delivered the goods pursuant to an internet sales contract, a future performance contract or a remote contract if:

(i) delivery was attempted but was refused by the consumer at the time delivery was attempted; or

(ii) delivery was attempted but not made because no person was available to accept delivery for the consumer on the day for which reasonable notice was given to the consumer that the goods were available to be delivered; and

(b) a supplier is deemed to have commenced the services pursuant to an internet sales contract, a future performance contract or a remote contract if:

(i) commencement was attempted but refused by the consumer at the time that commencement was attempted; or

(ii) commencement was attempted but did not occur because no person was available to enable the services to begin on the day for which reasonable notice was given to the consumer that the services were available to begin.

4 Jly 2014 cC-30.2 Reg 1 s3-8.

Court may provide relief against cancellation

3-9 If, in the opinion of the court, it would be inequitable for an internet sales contract, a future performance contract or a remote contract to be cancelled pursuant to section 3-8, the court may make any order it considers appropriate.

4 Jly 2014 cC-30.2 Reg 1 s3-9.

Notice of cancellation

3-10(1) An internet sales contract, a future performance contract or a remote contract is cancelled pursuant to section 3-8 on the giving of notice of cancellation in accordance with this section.

(2) A notice of cancellation may be expressed in any way as long as it indicates the intention of the consumer to cancel the contract.

(3) A notice of cancellation of an internet sales contract or a remote contract:

(a) may be given by a consumer to a supplier by any means, including the following:

(i) personal service;

(ii) registered mail;

(iii) courier;

(iv) telephone;

(v) fax;

(vi) email; and

(b) is deemed to be given at the time it is sent or transmitted, as the case may be.

(4) A notice of cancellation of a future performance contract:

(a) may be given by a consumer to a supplier by any of the following means:

(i) personal service;

(ii) registered mail;

(iii) email;

(iv) any other means set out in the contract; and

(b) if given by:

(i) registered mail, is deemed to have been given on the seventh day following the date of its mailing unless the person to whom it was mailed establishes that, through no fault of his or her own, the person did not receive the notice of cancellation or received it at a later date;

(ii) email, is deemed to have been given at the time it is sent or transmitted.

4 Jly 2014 cC-30.2 Reg 1 s3-10.

Effect of cancellation

3-11(1) The cancellation of an internet sales contract, a future performance contract or a remote contract pursuant to section 3-8 operates:

(a) to cancel the contract as if the contract had never existed; and

(b) to cancel, as if the contract had never existed:

(i) any consumer transaction that was related to the contract;

(ii) any guarantee given with respect to the consideration that was payable pursuant to the contract; and

(iii) any security given by the consumer or guarantor with respect to the consideration that was payable pursuant to the contract.

(2) If credit is extended or arranged by a supplier with respect to an internet sales contract, a future performance contract or a remote contract:

(a) the credit contract is conditional on the internet sales contract, future performance contract or remote contract, whether or not the credit contract is part of or attached to the internet sales contract, future performance contract or remote contract; and

(b) if the internet sales contract, future performance contract or remote contract is cancelled, that cancellation has the effect of cancelling the credit contract as if the internet sales contract, future performance contract or remote contract had never existed.

4 Jly 2014 cC-30.2 Reg 1 s3-11.

Responsibilities on cancellation

3-12(1) Within 15 days after an internet sales contract, a future performance contract or a remote contract is cancelled pursuant to section 3-8, the supplier must refund to the consumer all consideration paid by the consumer pursuant to the contract and any related consumer transaction, whether the consideration was paid to the supplier or to another person.

(2) If goods are delivered to a consumer pursuant to an internet sales contract, a future performance contract or a remote contract that is cancelled pursuant to section 3-8, within 15 days after the date of cancellation or delivery of the goods, whichever is later, the consumer must return the goods to the supplier unused and in the same condition in which the goods were delivered to the consumer.

(3) The consumer may return the goods pursuant to subsection (2) by any method that provides the consumer with confirmation of the delivery of the goods to the supplier.

(4) The supplier must accept a return of goods by a consumer pursuant to subsection (2).

(5) The supplier is responsible for the reasonable cost of returning goods pursuant to subsection (2).

(6) Goods that are returned by the consumer pursuant to subsection (2) otherwise than by personal delivery are deemed for the purposes of that subsection to have been returned when sent by the consumer to the supplier.

(7) Any breach of the consumer's obligations pursuant to this section is actionable by the supplier as a breach of statutory duty.

4 Jly 2014 cC-30.2 Reg 1 s3-12.

Recovery of refund

3-13 If a consumer has cancelled an internet sales contract, a future performance contract or a remote contract pursuant to section 3-8 and the supplier has not refunded all of the consideration within the 15-day period mentioned in subsection 3-12(1), the consumer may recover the consideration from the supplier pursuant to section 91 of the Act.

4 Jly 2014 cC-30.2 Reg 1 s3-13.

Cancellation of pre-authorized payments

3-14(1) Subject to subsection (2), if an internet sales contract, a future performance contract or a remote contract is cancelled pursuant to this Division, the supplier must cancel any future payments or charges that have been authorized by the consumer.

(2) Subsection (1) does not apply if:

(a) within 30 days after the cancellation of the contract:

(i) the consumer and supplier enter into a new contract; and

(ii) the new contract is for the supply of the same goods or services that were to be supplied under the cancelled contract; and

(b) the consumer has authorized future payments or charges for those goods or services that the consumer is to receive from the supplier under the new contract.

(3) Notwithstanding subsection (1), a consumer who has charged a credit card account for all or any part of the consideration payable pursuant to an internet sales contract, a future performance contract or a remote contract, or a related consumer transaction, may request that the credit card issuer cancel or reverse the credit card charge and any associated interest or other charges if:

(a) the consumer has cancelled the internet sales contract, future performance contract or remote contract pursuant to section 3-8; and

(b) the supplier has not refunded all of the consideration within the 15-day period mentioned in subsection 3-12(1).

(4) A request made pursuant to subsection (3) must:

(a) be in writing; and

(b) contain the following:

(i) the consumer's name;

(ii) the consumer's credit card number;

(iii) the expiry date of the consumer's credit card;

(iv) the supplier's name;

(v) the date on which the consumer and supplier entered into the internet sales contract, future performance contract or remote contract;

(vi) the dollar amount of the consideration charged to the credit card account with respect to the internet sales contract, future performance contract or remote contract, or the related consumer transaction;

(vii) a description sufficient to identify the goods, services or goods and services that were the subject of the internet sales contract, future performance contract or remote contract that was cancelled;

(viii) the reason for cancellation of the internet sales contract, future performance contract or remote contract pursuant to section 3-8;

(ix) the date and means by which notice of cancellation of the internet sales contract, future performance contract or remote contract was given by the consumer.

(5) A request made pursuant to subsection (3) may be given to the credit card issuer by any means, including the following:

(a) personal service;

(b) registered mail;

(c) courier;

(d) fax;

(e) email.

(6) A request given pursuant to subsection (3) is deemed to be given at the time it is sent or transmitted, as the case may be.

(7) A credit card issuer may require a consumer to verify the content of a request made pursuant to subsection (3) by affidavit or declaration.

(8) The credit card issuer must:

(a) acknowledge a request made pursuant to subsection (3) within 30 days after receiving the request; and

(b) if the request meets the requirements set out in subsection (4), cancel or reverse the credit card charge and any associated interest or other charges within two complete billing cycles of the credit card issuer or within 90 days after receiving the request, whichever occurs first.

4 Jly 2014 cC-30.2 Reg 1 s3-14.

DIVISION 3
Personal Development Services Contracts

Interpretation of Division

3-15 In this Division, **"fee"** means all amounts payable by a consumer to a supplier pursuant to a personal development services contract.

4 Jly 2014 cC-30.2 Reg 1 s3-15.

Application of Division

3-16 This Division applies to personal development services contracts.

4 Jly 2014 cC-30.2 Reg 1 s3-16.

Contract in writing

3-17 Every personal development services contract must be in writing.

4 Jly 2014 cC-30.2 Reg 1 s3-17.

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

APPLICANT'S RECORD

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Appendix "B" – Book of Authorities

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Saskatchewan Court of Appeal

101115379 Saskatchewan Ltd. v. Saskatchewan (Financial and Consumer Affairs Authority)

2019 CarswellSask 139, 2019 SKCA 31, [2019] 8 W.W.R. 67, [2019] S.C.J. No. 106, 306 A.C.W.S. (3d) 458, 51 Admin. L.R. (6th) 226

101115379 Saskatchewan Ltd., 101114386 Saskatchewan Ltd., Cryptguard Ltd., Alena Pastuch, Teamworx Productions Ltd., Idendego Inc. (Appellants) And Financial and Consumer Affairs Authority (Respondent)

101115379 Saskatchewan Ltd., 101114386 Saskatchewan Ltd., Cryptguard Ltd., Alena Pastuch, Teamworx Productions Ltd., Idendego Inc. (Appellants) And Financial and Consumer Affairs Authority (Respondent)

Jackson, Whitmore, Ryan-Froslie JJ.A.

Heard: March 14, 2018
Judgment: March 29, 2019
Docket: CACV2576, CACV2655

Proceedings: reconsideration / rehearing refused *101115379 Saskatchewan Ltd. v. Saskatchewan (Financial and Consumer Affairs Authority)* (2019), 2019 CarswellSask 276, 2019 SKCA 50, Jackson J.A., Ryan-Froslie J.A., Whitmore J.A. (Sask. C.A.)

Counsel: Alena Pastuch, for herself and on behalf of the corporate appellants
Sonne Udemgba, Nathaniel Day, for Respondents

***Ryan-Froslie J.A.*:**

I. INTRODUCTION

1 On July 23, 2014, a panel appointed pursuant to s. 17 of *The Securities Act, 1988*, SS 1988-89, c S-42.2 [*Securities Act*], found Alena Pastuch, 101114386 Saskatchewan Ltd., 101115379 Saskatchewan Ltd., Cryptguard Ltd., Idendego Inc. (also known as Strikeback Ltd.) and Teamworx Productions Ltd. [collectively the appellants] had breached ss. 27(2), 58(1), 44.1(2), 55.1(b), and 135.7(1) and (2) of the *Securities Act* [*Merits Decision*]. In a December 18, 2014, decision, that same hearing panel imposed an administrative penalty against the appellants of $100,000, ordered them to pay up to $100,000 to each person or company that had suffered financial loss as a result of their conduct and assessed costs against the appellants of $46,638. In

addition, Ms. Pastuch, who was the sole director and officer of all the corporate appellants, was prohibited pursuant to s. 134(1)(h.1) from becoming or acting as a registrant, an investment fund manager or a promotor [*Sanctions Decision*].

2 The appellants now appeal both the *Merits Decision* and the *Sanctions Decision* pursuant to s. 11 of the *Securities Act*. The grounds for the appeals are numerous but in essence allege bias or a reasonable apprehension of bias on the part of the chair and the panel, a denial of procedural fairness and that the decisions were unreasonable. The appellants contend these are questions of law, which resulted in a denial of fundamental justice and a breach of their ss. 7, 11 and 15 *Charter* rights.

3 In my view, for the reasons set out herein, the appeals must be dismissed.

II. BACKGROUND

4 Up until October 1, 2012, the *Securities Act* was administered by the Saskatchewan Financial Services Commission. As of that date, the Saskatchewan Financial Services Commission was continued as the Financial and Consumer Affairs Authority for Saskatchewan [FCAA]. In these reasons, FCAA should be taken as referring to the Saskatchewan Financial Services Commission where the context so requires.

5 In January 2008, the FCAA received a request for information with respect to Teamworx Productions Ltd. That inquiry led to an investigation by FCAA staff — April Stadnek, Ed Rodonets and Sandra Novak — as to whether the appellants were operating in contravention of the *Securities Act*. The investigation culminated in a notice of hearing dated August 27, 2010. A public hearing was then held, which began on November 16, 2012, and continued for over a year finally concluding in December 2013. A sanctions hearing followed. During the hearings, Brian Pederson acted as a lay representative for the appellants and also testified on their behalf.

6 The appellants brought numerous applications both prior to and during the merits hearing. Those applications included multiple requests for disclosure, applications to remove the notice of hearing from FCAA's website, motions requiring an investigation into the conduct of FCAA investigators and for removal of the FCAA prosecutor, requests to stay the hearing, motions for the recusal of the chair and the hearing panel, and requests for a closed hearing, publication bans and confidentiality orders. In addition, there were numerous requests for adjournments, many of which related to Ms. Pastuch's medical issues. Appendix A, attached to this judgment, summarizes the most significant of these proceedings.

7 On December 5, 2012, as testimony in the merits hearing was about to begin, Ms. Pastuch requested an adjournment or a stay of proceedings on the basis that full disclosure had not been made by the FCAA. When that request was denied, the appellants decided not to attend the hearing. The chair made two phone calls on the record — one to Mr. Pederson and one to Ms. Pastuch. He

left messages for both inquiring why the appellants had not appeared and advising them that the panel had no option but to proceed with the hearing in their absence.

8 The FCAA called its first witness — Ms. Stadnek. At the end of her testimony, the hearing was adjourned and resumed on December 10, 2012. Mr. Pederson appeared on that date and requested the issuance of 17 subpoena *duces tecum* "to compel disclosure of evidence". He asked that the hearing not proceed until all the material associated with the subpoenas had been provided and reviewed by the appellants. A publication ban was also requested. Mr. Pederson read a statement from Ms. Pastuch regarding her participation and appearance at the hearing. Ms. Pastuch indicated that if the proceedings continued, neither she nor any agent on the appellants' behalf would be able to cross-examine the FCAA witnesses as the appellants had not received full disclosure. She also alleged the hearing panel was not impartial. When the panel took a recess, Mr. Pederson left the proceedings and did not return.

9 The appellants were given notice that the merits hearing would proceed in their absence on numerous occasions including August 27, 2010, April 25, 2012, October 26, 2012, December 10, 2012, December 13, 2012, January 4, 2013, March 20, 2013, April 16, 2013, and May 10, 2013.

10 Other than to bring various applications, the appellants did not participate in the merits hearing until after the FCAA had closed its case. All but one of the FCAA witnesses testified in the absence of the appellants and none of them were cross-examined by the appellants.

11 The appellants attended the merits hearing on June 21, 2013, after being notified by the chair that the panel would proceed to closing arguments if they did not appear and present evidence. The appellants then presented their case, which included testimony from both Mr. Pederson and Ms. Pastuch.

12 On July 12, 2013, Ms. Pastuch indicated that for health reasons she was unable to continue to testify orally. The hearing panel suggested she give the remainder of her testimony-in-chief in writing. Ms. Pastuch agreed. She was given until close of business on July 22, 2013, to provide her written testimony. That deadline was extended to late September. While Ms. Pastuch provided some written testimony-in-chief, she never completed that testimony. By letter dated October 21, 2013, the hearing panel advised Ms. Pastuch there was little to be gained by delaying the hearing further and the parties were directed to and did file written arguments.

13 On July 23, 2014, the hearing panel rendered its decision on the merits. It found the appellants had committed the following breaches of the *Securities Act*: (a) trading in securities without registering as a dealer (s. 27(2)); (b) trading in securities without filing a preliminary or other prospectus and obtaining the Director's receipt (s. 58(1)); (c) engaging in unfair practices (s. 44.1(2)); (d) fraud (s. 55.1); and (e) withholding and concealing information reasonably required for a hearing and hindering or interfering with investigators (s. 135.7).

III. THE PANEL'S DECISIONS

14 Leading up to, and during the course of the merits hearing, the panel rendered numerous decisions on procedural and preliminary matters. Two of those decisions are of particular importance to this appeal. The first is the panel's December 4, 2012, decision pertaining to preliminary motions [*Preliminary Decision*]. It addressed the appellants' request to dismiss the proceedings due to lack of full disclosure. It also addressed the appellants' application to have the panel recuse itself on the basis of bias. The second decision was rendered on September 9, 2013 [*Recusal Decision*], and addressed the appellants' request that the panel chair be recused on the basis of bias.

A. December 4, 2012, Preliminary Decision

15 In its December 4, 2012, *Preliminary Decision*, the panel dealt with a number of procedural complaints made by the appellants, including matters pertaining to disclosure and that the panel and chair should recuse themselves as being biased.

16 The panel first addressed the disclosure issues, which included an allegation that the FCAA had failed to provide the audio recording of an interview of J.K., one of the investors. It found the FCAA had originally failed to provide the appellants with the digital audio recording of that interview because the recording had been lost or misplaced. However, once it had been found it was provided to the appellants.

17 Ms. Pastuch had also complained about a failure to disclose service contracts relating to the appellate companies, which she alleged were in a black binder provided to the FCAA by her legal counsel. The panel determined it was the appellants' legal counsel, not FCAA staff, that had misplaced the black binder. Further, based on the evidence before it, the panel found it was "unclear" whether the service contracts had ever been "handed over" to FCAA investigators or "whether they had been retained with (or misplaced by)" the appellants' legal counsel.

18 With respect to other allegations of inadequate disclosure, including the FCAA's failure to provide to the appellants all the documents in the possession of the appellants' former accountant, Frank Garrett, and the appellants' bank, the panel found there was "insufficient evidence" to support those allegations, which included a failure to provide full disclosure and an assertion that evidence had been spoiled. The hearing panel indicated, however, that it would remain alert to those allegations during the course of the hearing.

19 The panel dismissed the appellants' recusal application. Its reasons for doing so were set out at page 5 of its decision:

The evidence in support of these allegations of bias (or perceived bias) against the Hearing Panel and the Chairperson of the Hearing Panel were based almost exclusively on the Respondents' opinion and perception of facts and events that are substantially different from what the Hearing Panel believed were the facts at the time, or what the Hearing Panel recalled from its collective memory of the particular events. There are two events which illustrate competing apprehensions or perceptions of bias. At one instance, the Hearing Panel through the Commission Secretary requested witness availability from only one party rather than both parties, in deciding on when a hearing would be scheduled. This oversight was improper, even though the canvassed party would be proceeding first with its witnesses. However, that hearing never proceeded on those dates, and no prejudice ensued as a result. The process of canvassing both sides (or neither side) for availability for hearing dates was conducted in a more balanced approach thereafter. On the other hand in the second instance, the Hearing Panel considered an earlier motion by the Respondents for an order to have the Notice of Hearing and Allegations removed from the Commission's website because of concerns about the details contained in it. The Hearing Panel agreed with the Respondents' motion and issued the requested order directing the investigation staff to remove the Notice of Hearing and Allegations.

B. September 9, 2013, Recusal Decision

20 As indicated, the panel's September 9, 2013, decision pertained to a motion by the appellants for recusal of the panel chair. The grounds cited by the appellants as supporting recusal included:

(a) that one of the FCAA witnesses — D.B. — was a brother of one of the chair's law partners;

(b) that there was outstanding civil litigation against one of the appellate corporations — Cryptguard — that involved another partner of the chair's law firm;

(c) that the chair's law firm had prepared an investment contract between D.B. and Cryptguard, one of the appellate corporations;

(d) that the chair had requested Ms. Pastuch's doctor to release medical information without Ms. Pastuch's consent;

(e) that the chair did not protect and keep confidential Ms. Pastuch's medical information;

(f) that the chair had accused Ms. Pastuch of wrongdoing but failed to investigate wrongdoing by counsel and investigators of the FCAA;

(g) that the chair had refused to allow the appellants to recall FCAA witnesses; and

(h) that the chair had refused to permit the presentation of financial documents from the appellants' bank without calling an officer of that bank to identify the documents.

21 The panel concluded that while one of the FCAA witnesses was the brother of a partner in the chair's law firm, neither that witness nor the law partner were parties in the proceedings before the panel. Further, when the witness had testified, the chair did not know who the witness was or that he was a sibling of one of his law partners.

22 The panel found as a fact that there was no active litigation file against Cryptguard involving the chair's law firm.

23 The panel concluded that while the chair's law firm had drafted an investment contract for one investor, the terms of that contract were not in question and the contract itself was "immaterial and irrelevant to the allegations" in issue.

24 The panel found that on August 17, 2011, Ms. Pastuch's doctor had written to the panel to advise there should be "no communication with Pastuch because of unspecified medical reasons" and stated that "no personnel from the Commission could contact Pastuch for any meetings or hearings". In accordance with those instructions, the chair wrote Ms. Pastuch's doctor requesting additional information from him. The chair reminded the doctor at that time that he would require permission from Ms. Pastuch before disclosing any medical information to the panel. In the circumstances, the panel concluded that portion of Ms. Pastuch's application was unfounded.

25 The panel had advised Ms. Pastuch and the appellants' lay representative, Mr. Pederson, that it would be relying upon them to flag any sensitive medical issues that might arise during the hearing and that they believed should be kept out of the public realm. Ms. Pastuch and Mr. Pederson, however, absented themselves for the bulk of the hearing. The panel stated there were times when it "went *in camera* to question counsel about the relevance of the personal information that was being presented. During such *in camera* meetings, counsel was required to justify the need for certain evidence and was instructed on the scope of medical information considered relevant and/or private".

26 The panel also set out the basis for its belief that Ms. Pastuch had brought applications to delay or avoid the merits hearing. They referred to the "inordinate amount of motions, requests and submissions" and the fact that on occasion the information or statements submitted by Ms. Pastuch were inconsistent with other information provided or were factually wrong.

27 The panel was unable to locate any witness list wherein the appellants proposed to call 30 witnesses. The list submitted by the appellants named 17 witnesses, many of whom had already testified for the FCAA. The appellants were not allowed to recall those witnesses as the appellants had decided not to attend the hearing or cross-examine them. Ms. Pastuch had indicated many of the subpoenas requested were not to compel a witness's appearance for the purpose of testifying but rather to obtain documentation. The panel viewed that as an improper use of the subpoenas.

28 Finally, the panel dealt with the appellants' ongoing allegation of incomplete disclosure and the requirement that a bank official attend to introduce bank documents into evidence. The panel noted Ms. Pastuch had signing authority on the relevant bank accounts yet she had not asked for copies of the bank statements. A subpoena was in fact issued for the bank executive but there was no evidence it was served and the bank executive did not testify.

29 As a result of its findings, the panel dismissed the recusal application.

C. The July 23, 2014, Merits Decision

30 The panel identified "balance of probabilities" as the standard of proof to be applied in rendering its decision.

31 The panel determined that all of the corporate appellants had been directed and controlled by Ms. Pastuch. It found the material supplied by the appellants "primarily through written submission, failed to focus on the key elements of the allegations against them ... [t]oo often it contained general statements or a singular example, while failing to address the large number of detailed particulars that supported the allegations against them".

32 The panel went on to conclude at paragraph 22 of its decision that:

> 22. ... In order for the Panel to dismiss the large volume of evidence that was presented in an effort to prove the allegations, it would have to conclude that the investigators were both incompetent and unethical, and that the majority of the witnesses were lying to the Panel during their testimony. ...

33 Based on the evidence, including that of Mr. Pederson and Ms. Pastuch, the panel held that the appellants had traded in securities and that they had done so without being registered under the *Securities Act* in contravention of s. 27(2). Further, the panel found the appellants had not filed prospectuses as required by s. 58 of the *Securities Act*. By way of explanation, Ms. Pastuch had testified that she relied on advice from legal and financial advisors, which proved to be incorrect. The panel viewed that testimony as an admission that s. 58 had been breached.

34 The panel then found the appellants had breached s. 44.1 of the *Securities Act* by engaging in unfair trading practices. Those practices included pressuring investors to make initial purchases quickly and to increase their investments; advising investors not to ask too many questions or they would be removed as investors and subjected to legal action or police investigation; and by falsely advising investors that their funds were "guaranteed" and that a trust fund had been established to cover initial investments. The panel described those tactics as "overly aggressive threats combined with misinformation whenever someone questioned the authenticity of the investment" (*Merits Decision* at para 39).

35 The panel found the appellants had also breached s. 55.1 of the *Securities Act* in that Ms. Pastuch had made misleading and untrue statements that had influenced both potential and existing investors and had lied to them about material facts to influence their perception of the value and security of their investment. As such, the hearing panel concluded Ms. Pastuch had acted in a manner that was deceitful and dishonest and that she had been fraudulent. In effect, the panel found the appellants had sought and accepted people's investment funds under fraudulent and false pretences and used those funds for personal purposes.

36 The panel then turned to the question of whether the appellants had breached s. 135.7 of the *Securities Act*. The panel found Ms. Pastuch had initially failed to provide a full list of investors when requested to do so by FCAA staff and that she had feigned confusion over what she was being asked to provide. The panel also found that it took about a year for Ms. Pastuch to attend a meeting requested by FCAA investigators and for which she had been subpoenaed. The panel further found there had been obvious interference with the investigation as a result of excessive delays in meeting with the investigators and Ms. Pastuch's reluctance to provide complete documentation on the investors. Finally, the panel found Ms. Pastuch had contacted investors about the ongoing investigation and directed them to sign a document refusing to cooperate with the investigators. Based on those findings, the hearing panel convicted the appellants of breaching s. 135.7 of the *Securities Act*.

D. December 18, 2014, Sanctions Decision

37 Before rendering its *Sanctions Decision*, the panel requested and received further submissions from the appellants and the FCAA.

38 The FCAA had requested the panel apply the provisions of s. 135.6(4) of the *Securities Act* as amended by *The Securities Amendment Act, 2012*, SS 2012, c 32, s 21, which removed the maximum limit of $100,000 on financial compensation that can be ordered paid to persons affected by contraventions or non-compliance with the *Securities Act*. The FCAA also requested costs of $71,178.10.

39 The panel was unwilling to apply s. 135.6(4) as amended as to do so would amount to a retroactive application of that section as it had not been in existence when the appellants were served with the notice of hearing.

40 The panel went on to state:

> The Hearing Panel continues to be mindful of the fact that Alena Pastuch has accepted no responsibility for her actions. She continues to blame legal and financial advisors, the FCAA, the investigation staff, the Hearing Panel, and certain investors, among others. At no time did she express remorse for her actions and the impact that her actions had on those who invested

in her business activities. She consistently and persistently initiated steps and proceedings that can only be described as a deliberate abuse of process. On that basis, there are no mitigating factors for the Panel to consider in assessing the appropriate sanctions in this case. These factors influenced the Panel's conclusions in determining the appropriate sanctions as set out below.

41 The panel then imposed the following sanctions:

(a) that the appellants, individually and collectively, cease trading in any securities or exchange contracts pursuant to s. 134(1)(d) of the *Securities Act*;

(b) that the appellants, individually and collectively, cease acquiring securities or exchange contracts pursuant to s. 134(1)(d.l) of the *Securities Act*;

(c) that the appellants, individually and collectively, cease giving advice pursuant to s. 134(l)(e) of the *Securities Act*;

(d) that pursuant to s. 134(1)(h) of the *Securities Act*, Ms. Pastuch:

(i) resign her position as a director or officer of an issuer, registrant or investment fund manager;

(iv) be prohibited from becoming or acting as a director or officer of an issuer, registrant or investment fund manager; and

(v) not be employed by an issuer, registrant or investment fund manager;

(e) that Ms. Pastuch be prohibited from becoming or acting as a registrant, an investment fund manager or a promoter pursuant to s. 134(1)(h.l) of the *Securities Act*;

(f) that the appellants pay an administrative penalty of $100,000 pursuant to s. 135.1 of the *Securities Act*;

(g) that the appellants pay financial compensation of up to $100,000 to each person who, or company that, has suffered a financial loss as a result of the appellants' contravention of and failure to comply with Saskatchewan securities laws pursuant to s. 135.6 of the *Securities Act*; and

(h) that the appellants pay costs of $46,638 with respect to the hearing pursuant to s. 161 of the *Securities Act*.

42 The panel indicated the hearing costs assessed against the appellants were "nominal" and significantly less than the actual costs incurred. The panel made the costs order it did because it did not wish "to have hearing costs negatively impact the potential for those persons who suffered a financial loss to receive the compensation to which they are entitled" pursuant to its decision.

IV. ISSUES

43 Section 11(1) of the *Securities Act* grants a right of appeal to this Court on "matters of law only". Some of the appellants' grounds of appeal, namely, grounds (d) and (f) of their amended notice of appeal with respect to the *Merits Decision* and the costs portion of their sanctions appeal raise matters that do not constitute questions of law. Having said that, insofar as the appellants argue those alleged factual errors demonstrate a reasonable apprehension of bias or procedural unfairness, they will be addressed by this Court.

44 The appellants initiated two appeals — one pertaining to the *Merits Decision* and one pertaining to the *Sanctions Decision*. There was a significant overlap in the grounds for those appeals. Those grounds raise four distinct areas of concern. I would thus frame the issues for determination by this Court as follows:

> (a) whether the appellants were denied procedural fairness (grounds A, E, G, H, J, L and N of the merits appeal and grounds B, D and E of the sanctions appeal);
>
> (b) whether the hearing panel applied the proper standard of proof in arriving at its decision (ground M of the merits appeal);
>
> (c) whether the appellants demonstrated bias or a reasonable apprehension of bias on the part of the chair and panel (grounds B, C, F, I, J and L of the merits appeal and A and B of the sanctions appeal); and
>
> (d) whether there was witness tampering (ground K of the merits appeal).

V. STANDARD OF REVIEW

45 Where an appellate court is considering allegations of procedural fairness and natural justice, the standard of review to be applied is one of correctness. As Binnie J., writing for the Supreme Court in *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12 (S.C.C.) at para 43, [2009] 1 S.C.R. 339 (S.C.C.), stated:

> [43] Judicial intervention is also authorized where a federal board, commission or other tribunal
>
> > (b) *failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;*
>
> **No standard of review is specified. On the other hand, *Dunsmuir* says that procedural issues (subject to competent legislative override) are to be determined by a court on the basis of a correctness standard of review.** Relief in such cases is governed by common law

> principles, including the withholding of relief when the procedural error is purely technical and occasions no substantial wrong or miscarriage of justice (*Pal*, at para. 9). ...
>
> (Emphasis added)

See also *Phillips Legal Professional Corporation v. Vo*, 2017 SKCA 58, [2017] 12 W.W.R. 779 (Sask. C.A.).

46 Claims of bias and reasonable apprehension of bias are facets of procedural fairness. They, too, must be considered with no deference to the tribunal or agency that made the decision under appeal.

VI. PRELIMINARY MATTER

47 The appellants filed two applications for leave to adduce fresh evidence on the hearing of their appeals. Those applications overlap. In effect, the appellants sought leave to adduce the following documents:

> (a) specific records the FCAA had been ordered to produce by Whitmore J.A. of this Court on September 14, 2017;
>
> (b) a report from the Professional Conduct Committee of the Chartered Professional Accountants of Saskatchewan regarding the appellants' former accountant, Mr. Garrett;
>
> (c) Ms. Novak's oath or declaration of office dated January 11, 2002;
>
> (d) a series of emails between Ms. Pastuch and the Financial Planning Standards Council during the period January 8 to October 2, 2015, advising that Ms. Novak had been a CFP professional from October 1, 1996, to March 31, 2012, but was no longer certified;
>
> (e) a calendar regarding FCAA boardroom availability for the period December 12, 2011, to January 11, 2013;
>
> (f) records of contracted services all dated March 22, 2010, between Cryptguard and nine individuals or companies; and
>
> (g) a series of emails between Ms. Pastuch and the appellants' former accountant, Mr. Garrett, dated March 2 to 11, 2009, regarding the scope of work to be done by Mr. Garrett for the appellants.

48 The appellants and counsel for the FCAA argued for and against the admission of this evidence based on the test set out by the Supreme Court of Canada in *R. v. Palmer* (1979), [1980] 1 S.C.R. 759 (S.C.C.) at 775. In my view, however, as a general rule, appeals of administrative decisions should be restricted to the evidentiary record that was before the administrative decision-

maker when it rendered its decision. Key to the application of that rule is what constitutes the "record" for judicial review purposes. In this case, the Legislature in s. 9 of the *Securities Act* saw fit to define the record of a hearing panel acting under the auspices of the *Securities Act*. The relevant portions of that section read as follows:

> 9(8) All oral evidence received shall be taken down in writing or recorded by electronic means.
>
> (9) All the evidence taken down in writing or recorded by electronic means and all documentary evidence and things received in evidence at a hearing or review forms the record of the proceeding.

49 The appellants' application to adduce fresh evidence raises the question of when the hearing panel's record should be "supplemented". That the Legislature envisioned the admission of fresh evidence on appeal is evident from s. 11 of the *Securities Act*, which provides for a right of appeal to this Court:

> 11(3) On an appeal pursuant to this section, the Court of Appeal **may hear evidence** and argument with respect to the matter of appeal.
>
> (Emphasis added)

50 The question is when such evidence should be allowed.

51 In *Saskatchewan (Workers Compensation Board) v. Gjerde*, 2016 SKCA 30, [2016] 4 W.W.R. 423 (Sask. C.A.) [*Gjerde*], this Court had an opportunity to consider when the record of an administrative tribunal should be supplemented. As a general rule, judicial review of an administrative tribunal's decision should be restricted to the evidentiary record before the tribunal when the decision was made. Having said that, as this Court noted at paragraph 41 of *Gjerde*, given the scope of administrative decision-making, which may give rise to judicial review, there can be no "one size fits all" approach to that question. As stated in *Gjerde*:

> [44] ... [T]he appropriate approach to when the "record" should be supplemented on judicial review was set out by Stratas J.A. of the Federal Court of Appeal in *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency*, 2012 FCA 22 at paras 19 and 20, 428 NR 297. After acknowledging the general rule that judicial review should be restricted to the evidentiary record that was before the Board when it made its decision, Stratas J.A. went on to recognize there will be exceptions to that general rule, including evidence (i) that provides general background (as opposed to addressing the merits) in circumstances where that information might assist in understanding the issues for judicial review, (ii) to bring to the attention of the judicial review court procedural defects that cannot be found in the evidentiary record such as fraud, bribery, or bias, and (iii) to highlight the complete absence

> of evidence before the administrative decision maker when making a particular finding. (See also *Keeprite Workers' Independent Union and Keeprite Products Ltd.* (1980), 29 OR (2d) 513 (CA); *Mr. Shredding Waste Management v New Brunswick (Minister of Environment and Local Government)*, 2004 NBCA 69 at para 64, 274 NBR (2d) 340; *Connolly v Canada (Attorney General)*, 2014 FCA 294 at para 20, 466 NR 44.) To these I would add the exception highlighted by *Hartwig* and *SELI* where, in appropriate circumstances, evidence may be received by a reviewing court to elucidate the record upon which the administrative body's reasons were based.

This Court's decision in *Hartwig v. Saskatchewan (Commissioner of Inquiry)*, 2007 SKCA 74, 284 D.L.R. (4th) 268 (Sask. C.A.), is also instructive.

52 The exceptions to the general rule as described by Stratas J.A. in *Assn. of Universities & Colleges of Canada v. Canadian Copyright Licensing Agency*, 2012 FCA 22 (F.C.A.) at paras 19 and 20, (2012), 428 N.R. 297 (F.C.A.), and this Court in *Gjerde* form a non-exhaustive list of when fresh evidence will be allowed on appeal of an administrative decision.

53 With these principles in mind, I turn to consider the evidence now sought to be adduced by the appellants.

54 I begin by noting that the fresh evidence, for the most part, does not relate to the appellants' allegations of bias or procedural fairness but rather is directed at the substance of the hearing panel's merits and sanctions decisions.

A. The Specific Records

55 The appellants contend the FCAA failed to comply with Whitmore J.A.'s September 14, 2017, order for production of certain documents to the appellants. The FCAA attests it complied with that order. This issue is not properly the subject of a fresh evidence application. Rather, it is an issue relating to disclosure and, accordingly, as the FCAA's failure to provide full disclosure is one of the appellants' grounds of appeal, it will be dealt with under that heading in the appeal proper.

B. Report of the Professional Conduct Committee regarding Mr. Garrett

56 The appellants seek to adduce as evidence a report by the accounting profession's Professional Conduct Committee to its Discipline Committee. The report was rendered following the investigation of a complaint laid against Mr. Garrett, the appellants' former accountant. The investigation was conducted pursuant to *The Accounting Profession Act*, SS 2014, c A-3.1. The report is dated March 14, 2016, more than 20 months *after* the *Merits Decision* was rendered.

57 The report was made after an investigation into allegations of discreditable conduct by Mr. Garrett. That alleged conduct included in part that Mr. Garrett had failed to exercise due care in his

engagement with the appellants by failing to prepare or obtain and retain a written agreement as to the nature and scope of his engagement, that he did not explicitly limit the nature and scope of what he understood he was engaged to do and that he did not provide clarification of the separation of duties between himself, the appellants and the appellants' lawyers. Some of the allegations relate to whether Mr. Garrett was engaged to value the appellants' business.

58 The Professional Conduct Committee recommended a hearing be held to determine whether the allegations were well founded.

59 This evidence does not relate to the questions of law raised by this appeal, nor does it assist the Court in understanding the issues before it. It does not elucidate the record, rather it constitutes new evidence tendered to support the appellants' position that Mr. Garrett was the person who had valued the appellants' business. Whether Mr. Garrett valued the business is a question of fact not law. Further, the report merely identifies allegations. There is nothing to suggest those allegations were ever proven. Allegations do not establish that the appellants relied on Mr. Garrett to do a business valuation. Mr. Garrett himself testified and the hearing panel accepted his evidence that he did not prepare such a valuation. Further, the value of the business was only one of several misleading or fraudulent statements attributed to the appellants. The panel found that Ms. Pastuch had lied to investors about the existence of a trust fund; that her statements to investors to the effect their investments were "guaranteed" was also untrue; as was the assertion that "three of us" had injected over a million dollars into the business. Thus, even if the fresh evidence established what the appellants say it does, namely, that it was their accountant, Mr. Garrett, who valued the business at twenty million dollars, the panel's findings of fraud would not be impugned as that was only one of a number of lies the hearing panel found Ms. Pastuch had told to investors to induce them to invest.

C. Ms. Novak's Oath or Declaration of Office

60 The appellants wish to have this document entered as evidence to elucidate how Ms. Novak, in the course of the FCAA investigation, breached her oath of office. However, the appellants have failed to establish this document meets the criteria for admission.

D. Emails between Alana Pastuch and the Financial Planning Standards Council regarding Ms. Novak's CFP Certification

61 This evidence consists of a number of emails exchanged between Ms. Pastuch and the Financial Planning Standards Council regarding whether Ms. Novak was a CFP when she testified before the panel. That evidence goes to Ms. Novak's credibility but, in my view, it does not qualify for admission as fresh evidence in this Court. Ms. Novak was only one of many witnesses who testified at the hearing. The crucial part of her evidence that was referred to by the panel in its decision was verified by independent evidence. Even without her testimony, there was sufficient evidence to convict the appellants on all charges. Again, the appellants have not established any

basis for departing from the general rule that judicial review should be restricted to the evidentiary record before the hearing panel.

E. Calendar regarding FCAA Boardroom Availability — December 12, 2011, to January 11, 2013

62 This evidence relates to the appellants' contention that the costs awarded against them in the *Sanctions Decision* were unreasonable because the disbursement for rented facilities to host the hearing was unnecessary as the FCAA's boardroom could have been used. As indicated earlier in these reasons, the hearing panel's assessment of that disbursement does not raise a question of law. Thus, the evidence is irrelevant to the matters before this Court.

F. Records of Contracted Services

63 The appellants wish to adduce records of contracted services to show they had expenses that were not taken into account by the FCAA investigators. There is no indication, however, who prepared the records, or why or when they were created, which raises concerns as to their admissibility. The records do not provide general background that would enable this Court to understand the issues before it nor do they raise procedural defects, highlight a lack of evidence with respect to any finding by the panel or elucidate the record. In short, the appellants have failed to establish any reason for supplementing the record with these documents.

G. Emails between Ms. Pastuch and Mr. Garrett

64 The emails being tendered consist of a chain of five communications between Mr. Garrett and Ms. Pastuch between March 2 and 11, 2009. In the email sent March 9, 2009, Ms. Pastuch wrote:

> ... You are conducting our business valuation and our documents to raise funds. If we are not on the same page, as to what you are doing, please let me know immediately. ...

65 And then later:

> Bottom line, without losing the info already in there (it should all be contained in that document still), how do we make it a more easy read? without losing any info? and then the documents you are working on are our business valuation and our documents we provide to our investors to raise funds. ...

66 Mr. Garrett's response does not mention the business valuation.

67 Ms. Pastuch then emails Mr. Garrett again on March 11, 2009. In that email she asks:

> When do you think you will have the business valuation that we hired you to conduct, ready for us, to review by?

68 In his reply that same day, Mr. Garrett makes no reference to the business valuation.

69 In her application to adduce fresh evidence, Ms. Pastuch does not indicate, either in her affidavit or the memorandum filed in support thereof, the purpose this email evidence would serve. In my view, the evidence has two potential uses:

(a) it supports the appellants' position that Mr. Garrett valued the business; and

(b) it supports the appellants' position that the FCAA did not provide full disclosure.

70 The email chain reinforces the appellants' contention that Mr. Garrett was retained to provide a valuation of the business. However, whether Mr. Garrett actually did that valuation and, if so the value he attributed to the business, are separate and distinct issues. The panel found as a fact that Mr. Garrett did not value the business. Appeals to this Court are limited to questions of law. Further, the issue of the business valuation relates to the charges against the appellants pertaining to both unfair practices and fraud. Even if Mr. Garrett did the business valuation as contended by the appellants, that would not upset the panel's decision. This is so because there was significant other evidence before the hearing panel that supported a conviction on those charges such as Ms. Pastuch's pressuring investors and making false representations that the investments were guaranteed and that a trust fund had been created to protect initial investments.

71 The second possible use for this email evidence relates to the appellants' continuing assertion that the FCAA did not provide full disclosure. There is evidence that Mr. Garrett provided to the FCAA all of his emails pertaining to the appellants. Mr. Garrett testified to that effect at T10 of the hearing transcript. The appellants take the position they never received those emails as part of the FCAA's disclosure.

72 The emails sought to be adduced were in existence at the time of the hearing. Ms. Pastuch attests she did not have possession of those emails until after the *Merits Decision* was handed down. She does not, however, explain why that was so when she authored three of those emails and was the recipient of the others. While the evidence is relevant to the issue of whether the FCAA made full disclosure and thus to the question of procedural fairness, as my later reasons indicate, those emails would have had no effect on the ultimate result. As such, the evidence will not be admitted by this Court.

H. Documents Not Before the Panel

73 The FCAA raises the fact that the appeal book filed by the appellants contains numerous documents that were not part of the hearing panel's record.

74 The documents objected to were identified on the last page of the FCAA's memorandum of law relating to the appellants' application to adduce fresh evidence. For clarification, a list of

the documents is set out in Appendix B to this judgment. As there was no application to adduce most of those documents as fresh evidence, and as the appellants did not indicate they opposed the FCAA's position with respect to those documents, this Court has disregarded them for the purposes of this appeal.

VII. LEGISLATION

75 The relevant portions of the *Securities Act*, which the appellants were alleged to have breached, are as follows:

> **27**(2) No person or company shall:
>
> (a) act as a dealer or underwriter unless the person or company:
>
> (i) is registered as a dealer; or
>
> (ii) is registered as a representative of a registered dealer and is acting on behalf of the dealer;
>
> (b) act as an adviser unless the person or company:
>
> (i) is registered as an adviser; or
>
> (ii) is registered as a representative of a registered adviser and is acting on behalf of the adviser; or
>
> (c) act as an investment fund manager unless the person or company is registered as an investment fund manager.
>
> . . .
>
> **44.1**(1) In this section, **"unfair practice"** includes:
>
> (a) putting unreasonable pressure on a person to purchase, hold, or sell a security or trade or hold a derivative;
>
> (b) taking advantage of a person's:
>
> (i) inability or incapacity to reasonably protect their own interests because of physical or mental infirmity, ignorance, illiteracy or age; or
>
> (ii) inability to understand the character, nature or the language of any matter relating to a decision to purchase, hold or sell a security or trade or hold a derivative; and
>
> (c) imposing terms, conditions, restrictions or limitations with respect to transactions that are harsh or oppressive.

(2) No person or company shall engage in an unfair practice with the intention of advising or effecting the purchase or sale of a security or trade of a derivative.

. . .

55.11(1) No person or company shall make a statement if that person or company knows or reasonably ought to know that:

(a) the statement either:

(i) is misleading or untrue in a material respect and at the time and in the light of the circumstances under which it is made; or

(ii) does not state a fact required to be stated or that is necessary to make the statement not misleading in a material respect and at the time and in the light of the circumstances under which it is made; and

(b) the statement would reasonably be expected to have a significant effect on the market price or value of a security or derivative.

. . .

58(1) No person or company shall trade in a security on the person's or the company's own account or on behalf of any other person or company where the trade would be a distribution of the security unless:

(a) a preliminary prospectus relating to the distribution of that security has been filed and the Director has issued a receipt for it; and

(b) a prospectus relating to the distribution of that security has been filed and the Director has issued a receipt for it.

. . .

135.7(1) No person or company shall, or shall attempt to, destroy, conceal or withhold any information, property or thing reasonably required for a hearing, review or investigation pursuant to this Act.

(2) No person or company shall hinder or interfere with a member, employee, appointee or agent of the Commission in the performance of his or her powers, functions and duties pursuant to this Act.

(3) A person or company contravenes subsection (1) if the person or company knows or ought reasonably to know that a hearing, review or investigation is to be conducted and takes any action mentioned in subsection (1) before the hearing, review or investigation.

VIII. ANALYSIS

A. Procedural Fairness

76 Administrative decision-makers have a duty of procedural fairness and natural justice. This was recognized by the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.), where Bastarache and LeBel JJ., writing for the majority, stated:

> [79] Procedural fairness is a cornerstone of modern Canadian administrative law. Public decision makers are required to act fairly in coming to decisions that affect the rights, privileges or interests of an individual. ...

77 Given the vast number of administrative decision-makers that exist and the many different ways their decisions are made, what constitutes procedural fairness will vary depending on the nature of the administrative decision-maker and the context in which the decision is made. This was discussed by the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.) [*Baker*]. Justice L'Heureux-Dubé, writing for the majority in *Baker*, set out a non-exhaustive list of factors to be considered in determining the degree of procedural fairness required of an administrative decision-maker:

> (a) the nature of the decision being made and the process followed in making it (the closer an administrative process resembles a judicial process the higher the duty of procedural fairness) (at para 23);
>
> (b) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates (at para 24);
>
> (c) the importance of the decision to the persons affected (at para 25);
>
> (d) the legitimate expectations of the person challenging the decision (at para 26); and
>
> (e) the choices of procedure made by the administrative decision-maker, particularly where the enabling statute gives the decision-maker the ability to choose the process or when the agency has an expertise in determining what procedures are appropriate in the circumstance (at para 27).

78 In my view, all the *Baker* factors weigh in favour of a high degree of procedural fairness in this case. The process involved closely resembles a judicial process. The *Securities Act* gives hearing panels many of the same rights a court has when hearing a civil action including the right to subpoena witnesses and force their attendance through contempt proceedings (s. 9(4) and (5) of the *Securities Act*). The decision in this case had a significant financial impact on the appellants and affected Ms. Pastuch's ability to trade securities. The *Securities Act* generally sets out how hearings are to be conducted but a panel has the ability to choose how it receives evidence and

runs the hearing. The general expectation of persons facing allegations of breaching the *Securities Act* or its *Regulations* is one of procedural fairness.

79 The appellants contend the merits and sanctions hearings were not "procedurally fair". Their complaints may be summarized as follows:

(a) that the FCAA did not provide full disclosure to the appellants;

(b) that the panel imposed "onerous conditions" on the appellants' request to present financial information yet similar conditions were not imposed on the FCAA;

(c) that the appellants were unable to introduce testimony via video conference while the FCAA was allowed to do so;

(d) that the panel set an initial hearing date knowing no disclosure had been made;

(e) that the panel canvassed only the FCAA with respect to witness availability when setting the initial hearing date;

(f) that the panel chair warned the appellants' agent not to make editorial comments about the investigators' motives but provided no similar warning to counsel for the FCAA;

(g) that the panel unfairly "censored" the release of the appellants' testimony and evidence while permitting the release of all of the FCAA's testimony and evidence;

(h) that the panel unfairly refused to issue subpoenas requested by the appellants;

(i) that the panel made false, fraudulent and misleading statements about Ms. Pastuch with respect to her contact with S.B., a partner in the chair's law firm, and with respect to Ms. Pastuch's medical conditions;

(j) that the panel failed to consider the appellants' evidence and submissions;

(k) that the panel disregarded fresh evidence adduced by them;

(l) that the panel curtailed Ms. Pastuch's testimony thus interfering with her right to make full answer and defence and her right to a fair trial;

(m) that the panel denied the appellants the opportunity to cross-examine the FCAA's witnesses; and

(n) that the panel lost jurisdiction when it breached Ms. Pastuch's personal privacy.

80 I will deal with each of these complaints in turn.

a. Disclosure

81 The appellants' first procedural argument relates to disclosure. Specifically, the appellants assert they never received full disclosure from the FCAA and thus they were unable to make full answer and defence to the charges against them. In particular, the appellants contend they did not receive the following:

> (a) all of the wire transfers from the appellants' bank for the period March 2009 to October 2010;
>
> (b) all of the emails in the possession of the appellants' accountant, Mr. Garrett;
>
> (c) contracts with individuals whose services were retained by one or more of the appellants (these contracts were allegedly in a black binder compiled by Ms. Pastuch and copies of the contents of that binder were allegedly turned over by Ms. Pastuch's legal counsel to investigators for the FCAA but the contracts are now missing from the binder);
>
> (d) documents confirming a payment of $11,985 on April 8, 2009, to G.P., an investor;
>
> (e) documents pertaining to the appellants' bank transactions for the period April 1, 2009, to and including April 29, 2009; and
>
> (f) summary notes allegedly referred to by Ms. Novak during her testimony, a copy of which was purportedly ordered to be produced to the appellants by the hearing panel.

82 The appellants argue the FCAA's failure to disclose offends the principles of natural justice, is against the FCAA's policies and is a breach of the appellants' s. 7 *Charter* right to life, liberty and security of the person and their s. 11(d) *Charter* right to a fair and public hearing by an independent and impartial tribunal.

83 The FCAA, on the other hand, maintains they have provided the appellants with full disclosure of everything in their possession.

i. Background

84 From the inception of the charges against them, the appellants have repeatedly complained about disclosure. Those complaints began before the first hearing date was set.

85 On October 25, 2010, the panel ordered the hearing to commence on January 10, 2011, and that "[f]ull disclosure shall be provided to [the appellants' then legal counsel] as soon as practical, so that preparation for the hearing may commence".

86 Disclosure was provided by the FCAA on December 16, 2010, subject to certain specified terms and conditions. Because the appellants did not have an opportunity to review that disclosure, the hearing was adjourned. In addition, the appellants objected to the restrictions imposed by the

FCAA on that disclosure, namely, that it would only be used by the appellants, their witnesses and advisors for hearing purposes. Ms. Pastuch did not agree with that restriction and in April 2011, the appellants applied to vary it and for an order for further disclosure. The panel refused to vary the terms of disclosure and determined that full disclosure had been made based on affidavit evidence filed by the FCAA investigators.

87 On June 20, 2011, before the appellants received the above decision, the appellants filed a further motion requesting a stay of proceedings. One of the grounds for that motion was a lack of full disclosure.

88 On May 18, 2012, the appellants filed yet another application for full and complete disclosure. On May 28, 2012, the panel issued a decision letter denying that request and indicating that the panel would deal with disclosure issues as they arose during the hearing.

89 On September 5, 2012, the appellants brought an application to dismiss the proceedings, one of the grounds of which was that full disclosure had been denied.

90 On December 4, 2012, after hearing *viva voce* evidence with respect to disclosure, the panel rendered a written decision indicating there was "insufficient evidence" upon which to support the appellants' allegations with respect to disclosure and "spoliation" of evidence. The hearing panel, however, indicated it would "remain alert" to those allegations throughout the formal hearing.

91 The appellants then applied to the Court of Queen's Bench for a stay of proceedings but that application was dismissed.

92 On December 5, 2012, at the commencement of the hearing proper, the appellants requested an adjournment or stay of proceedings because full disclosure had not been made. When that request was denied, the appellants decided not to attend the hearing, which then proceeded in their absence. As a result of the appellants' decision, they did not cross-examine any of the FCAA witnesses about disclosure.

ii. The Law

93 Since the Supreme Court of Canada's decision in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 (S.C.C.) (QL) [*Stinchcombe*], it is well settled that in criminal proceedings involving indictable offences the Crown has a duty to disclose to an accused all information in its possession that is reasonably capable of affecting the accused's ability to make full answer and defence. That includes both inculpatory and exculpatory evidence. This is so whether the Crown intends to use that evidence at trial or not (*Stinchcombe* at paras 19 and 29). An accused person's right to make full answer and defence is a fundamental principle of justice (*Stinchcombe* at para 17; *R. v. La*, [1997] 2 S.C.R. 680 (S.C.C.) at para 20).

94 Justice Sopinka, writing for a unanimous court in *Stinchcombe*, indicated disclosure includes the "fruits of the investigation":

> [12] I would add that the fruits of the investigation which are in the possession of counsel for the Crown are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done. ...

95 *Stinchcombe* sets out a number of principles relating to disclosure including:

> (a) The Crown's obligation to disclose is not absolute. Disclosure may be limited by considerations such as relevance, privilege and security of informants. Whether there is a valid reason for not disclosing evidence in any given case is subject to judicial review (*Stinchcombe* at paras 20 and 21).
>
> (b) In determining whether a failure to disclose is justified, trial judges should be guided by the general principle that information ought not to be withheld if there is a reasonable possibility failure to disclose will impair the right of an accused to make full answer and defence. This is, of course, subject to considerations that would support denying disclosure (*Stinchcombe* at para 22).
>
> (c) The onus of establishing full disclosure or that a failure to disclose is justified rests with the Crown (*Stinchcombe* at para 21).
>
> (d) Disclosure issues should be brought to the attention of the trial judge at the earliest opportunity. Failure to do so is a factor to be considered on appeal in determining whether a new trial should be ordered (*Stinchcombe* at para 24).
>
> (e) Disclosure should occur as soon as practicable after charges are laid (*Stinchcombe* at para 28).
>
> (f) The obligation to disclose is an ongoing one (*Stinchcombe* at para 29).
>
> (g) Witness statements should be disclosed even if the individual will not be called by the Crown to testify (*Stinchcombe* at para 33).

96 In *May v. Ferndale Institution*, 2005 SCC 82, [2005] 3 S.C.R. 809 (S.C.C.), the Supreme Court of Canada held that the disclosure principles set out in *Stinchcombe* do not apply to purely administrative decisions (at para 91). Purely administrative decisions, of course, do not involve a hearing process.

97 In *Charkaoui, Re*, 2008 SCC 38, [2008] 2 S.C.R. 326 (S.C.C.), the Supreme Court of Canada found the determination of whether a security certificate issued under the *Immigration and*

Refugee Protection Act, SC 2001, c 27, is reasonable is not a purely administrative measure and thus disclosure was required. The Court stated:

> [59] It is not enough to say that there is a duty to disclose. We must determine exactly how that duty is to be discharged in the context of the procedures relating to the issuance of a security certificate and the review of its reasonableness, and to the detention review.

The Court applied the *Stinchcombe* test of relevance.

98 With modifications as necessary, *Stinchcombe* has been applied to disclosure in the administrative decision-making context where disciplinary proceedings and human rights violations have been involved (*Christian v. Northwestern General Hospital* (1993), 115 D.L.R. (4th) 279 (Ont. Div. Ct.) at paras 22-24; *Hammami v. College of Physicians & Surgeons (British Columbia)*, [1997] 9 W.W.R. 301 (B.C. S.C.); *Howe v. Institute of Chartered Accountants (Ontario)* (1994), 118 D.L.R. (4th) 129 (Ont. C.A.)).

99 In *Ruby v. Canada (Solicitor General)*, 2002 SCC 75 (S.C.C.) at paras 39-40, [2002] 4 S.C.R. 3 (S.C.C.) [*Ruby*], the Supreme Court of Canada stressed the importance of adopting a contextual approach in assessing the rules of natural justice and the degree of procedural fairness to which an individual is entitled before an administrative tribunal. As the Court said in *Ruby*, procedural fairness in the administrative context may include disclosure, depending on the circumstances.

100 Finally, in *Suresh v. Canada (Minister of Citizenship & Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3 (S.C.C.), the Court *per curiam* stated:

> [115] What is required by the duty of fairness — and therefore the principles of fundamental justice — is that the issue at hand be decided in the context of the statute involved and the rights affected: *Baker*, *supra*, at para. 21; *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at p. 682; *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170, *per* Sopinka J. **More specifically, deciding what procedural protections must be provided involves consideration of the following factors: (1) the nature of the decision made and the procedures followed in making it, that is, "the closeness of the administrative process to the judicial process"; (2) the role of the particular decision within the statutory scheme; (3) the importance of the decision to the individual affected; (4) the legitimate expectations of the person challenging the decision where undertakings were made concerning the procedure to be followed; and (5) the choice of procedure made by the agency itself: *Baker*, *supra*, at paras. 23-27.** This is not to say that other factors or considerations may not be involved. This list of factors is non-exhaustive in determining the common law duty of fairness: *Baker*, *supra*, at para. 28. It must necessarily be so in determining the procedures demanded by the principles of fundamental justice.
>
> (Emphasis added)

101 Based on the above jurisprudence, I conclude that the degree of disclosure required in administrative matters will depend on the context in which the issue arises. If the issue of disclosure arises in a proceeding that closely resembles judicial proceedings and the result of the hearing could significantly affect an individual's livelihood or result in significant consequences, the degree of disclosure as an element of procedural fairness will be high. In such circumstances, the principles enunciated in *Stinchcombe* may apply with any modification necessary to fit the proceeding or the statute involved. At the very least, the *Stinchcombe* principles provide guidance.

102 In *Deloitte & Touche LLP v. Ontario (Securities Commission)*, 2003 SCC 61 (S.C.C.) at para 16, [2003] 2 S.C.R. 713 (S.C.C.), the Supreme Court of Canada upheld the Ontario Securities Commission's and the Ontario Court of Appeal's application of the *Stinchcombe* test of what constitutes relevant information for disclosure purposes, namely, any "material that has a reasonable possibility of being relevant to the ability of a defendant to make full answer and defence".

103 In the case under appeal here, the merits hearing was held to determine whether the appellants had breached provisions of the *Securities Act*. Witnesses were called and documentary evidence was presented. The hearing itself closely resembled a trial. The consequences of the panel's decision were significant for the appellants as it affected their ability to operate under the *Securities Act* and resulted in an order requiring them to pay significant financial compensation to investors. Ms. Pastuch was prohibited from being or acting as a registrant, an investment fund manager or a promoter. In my view, given those circumstances, a high degree of procedural fairness was warranted, including full disclosure.

104 Moreover, the FCAA has set out disclosure standards for hearings pursuant to the *Securities Act* in a policy statement — Saskatchewan Policy Statement 12-602 [Policy Statement]. [1] Section 4.3 of the Policy Statement requires parties to hearings to provide each other with copies of all documents they intend to rely on at least 20 days before the commencement of the hearing. Of particular relevance to this appeal is s. 4.3(2), which requires the FCAA to provide copies of all documents and things in its possession or control to other parties so long as they are relevant to the hearing:

> 4.3(2) In the case of a hearing under section 134 of the Act, **Staff will provide to every other party copies of all other documents and things that are in the possession or control of Staff that are relevant to the hearing.** Staff will provide copies as soon as is reasonably practicable after the Notice of Hearing is sent, and in any case at least 20 days before the commencement of the hearing.
>
> (Emphasis added)

Section 4.3(2) is restricted to hearings under s. 134 of the *Securities Act*. The hearing in issue here was held pursuant to s. 134 and orders were made against the appellants with respect to that section.

105 In my view, the Policy Statement required full disclosure by the FCAA of all relevant material in its possession whether or not the FCAA intended to use such material at the hearing.

106 For the purposes of this appeal, it is important to clarify the difference between disclosure and evidence. The obligation to disclose requires the production of all relevant material in a party's possession, whether in hard copy form or electronically, for the examination of another party. This is normally done by providing copies of that material. Just because something is disclosed, however, does not mean it will be used or accepted as evidence at a hearing. Evidence must be admitted by the trier of fact.

iii. Application of the Law in this Case

107 From a review of the hearing record, it is clear some of the appellants' complaints relating to disclosure are unfounded. The $11,985 payment to G.P. was disclosed. Supplementary appeal book at 3262 indicates at item number 905215:

> G.P. Document #5 — bank record for partial return of investment Apr 08 09 $11,985;

While neither this document nor the emails relating to the payment were entered as evidence at the hearing, they were provided by the FCAA to the appellants.

108 Similarly, while the flow chart prepared by the FCAA did not include transactions for the period April 1, 2009, to April 29, 2009, Mr. Garrett, the appellants' accountant, provided logs for those periods. The TD Canada Trust easy web account history for 101115379 Saskatchewan Ltd. also covered that period. Those records were disclosed. Whether they were entered as evidence at the hearing is a separate issue.

109 Some of the appellants' complaints relate to documents that may either have been returned to the person providing them or were never in the FCAA's possession. In either event, those documents could not be disclosed. This would include the TD Bank transfers, Mr. Garrett's emails and the contracts from the black binder.

110 Ms. Novak testified she requested account histories from the TD Bank, these being bank statements showing transactions. She did not request specific documents verifying those transactions such as deposit slips or wire orders. The appellants' assertion that the FCAA did not disclose to them all of the bank's "wire orders" is thus without factual foundation as there is no evidence the FCAA ever had copies of the wire orders in issue.

111 With respect to the service contracts, there was evidence those contracts were not in the black binder when it was given to the FCAA. It goes without saying that the FCAA cannot disclose what it does not possess.

112 Finally, in my view, the record, even if supplemented by the emails between Mr. Garrett and Ms. Pastuch, does not substantiate that the FCAA had possession of those emails or that it failed to disclose them to the appellants.

113 Mr. Rodonets, when testifying at the disclosure hearing, distinguished between what the FCAA labels as exhibits and disclosure. He stated:

> ... Again, we have to go back to what you're — what we're talking about as exhibits and disclosure. Those are two different things totally. These are items that would have been identified from Frank Garrett that were exhibited, given our exhibit numbers and put in an exhibit ledger and identified as exhibits.
>
> There may be other documents out there attributed to Frank Garrett, emails or other documents that weren't made exhibits, but they would have been disclosed. There is nothing that I'm aware of that we possessed and received from Frank Garrett that was not disclosed that we kept and received. Information that we returned is not in here. We didn't disclose it because, in our opinion, we were returning it to Ms. Pastuch because Mr. Garrett was her agent. So it may not — there may be something that's attributed to Frank Garrett which is not exhibited, but it would have been disclosed.

114 An envelope containing documents was returned to Mr. Garrett by the FCAA in April 2011. There was no evidence what documents were in the envelope, which means the emails could have been returned to Mr. Garrett. Further, FCAA exhibit #905412 was an email from Mr. Garrett to Ms. Novak described as "Year 1 Financial Projections" *with attachments*. Some attachments, specifically those contained in exhibit #905412E, were identified as "Other details — not used". Mr. Garrett testified he forwarded to Ms. Novak all his emails (and some financial documents) after his interview by FCAA investigators. This exhibit is the only correspondence in the record from Mr. Garrett to the FCAA. Unfortunately, there is no evidence what was included in the exhibit.

115 The biggest hurdle for the appellants to overcome with respect to the disclosure issue, however, is that the panel accepted the evidence of Ms. Novak and Mr. Rodonets that full disclosure had been made. At the disclosure hearing, Ms. Novak and Mr. Rodonets testified but were never asked if the FCAA had possession of the specific items the appellants say were not disclosed. This was so even though the panel chair told Mr. Pederson he needed to ask those witnesses about specific disclosure the appellants asserted was missing. In the absence of such evidence, there is no identifiable error in the panel's decision to accept Ms. Novak's and Mr. Rodonets' assertions that full disclosure had been made.

116 At the hearing of this appeal, the appellants also complained the FCAA had not complied with the September 14, 2017, disclosure order of Whitmore J.A. The order in issue was made in the context of an appeal management conference and read as follows:

> There will be an order that the FCAA will produce for the appellant:
>
> 1. All correspondence between Frank Garrett and the appellant and/or Dave Bishop and Brian Pederson which is in the possession of the Respondent
>
> 2. Any documents in the Respondent's possession relating to a $35,000 refund from William Seritello to Alena Pastuch
>
> 3. Copies of financial receipts and orders from the sale of products from the Appellant's corporate entities in the possession of the Respondent
>
> 4. Copies of notes and records of Sandy Novak in the Respondent's possession relating to her testimony before the hearing panel
>
> These documents and records will be delivered to the appellant by October 2 2017.
>
> . . .

117 The appellants acknowledge that on September 29, 2017, the FCAA provided them with a package of five CDs. They assert, however, that none of the documents ordered to be produced by Whitmore J.A. are on those CDs. On the other hand, the FCAA contends it provided full disclosure as ordered and that it cannot produce what it does not possess. The problem lies with the FCAA's inability to prove a negative. That is, that it does not have possession of the specific documents in issue.

118 The appellants brought an application for contempt with respect to the FCAA's performance of the order made by Whitmore J.A. in December 2017. A decision with respect to that application was rendered on December 12, 2017. In that decision, Whitmore J.A. determined legal counsel for the FCAA was not in contempt and had not wilfully disobeyed the September 14, 2017, order. He stated:

> [10] In the course of discussions in Court, Mr. Udembga [FCAA's legal counsel] may have said he was in the possession of the disputed documents and that he has seen them. However, I am not satisfied that anything that was said was a deliberate and willful attempt to mislead the Court. In my view, the exchanges between the parties and the Court were part of a process in coming to an order that satisfied the parties and that the parties were able to comply with. The whole of the exchanges were to satisfy the appellants that certain documents be produced and, at the same time, the respondent could only commit to disclose what it had in its possession.

> [11] Thus, the order was clearly limited to documents in Mr. Udembga's possession. I am not satisfied at all in the face of Mr. Udembga's submissions that all documents in his possession have not been disclosed.
>
> [12] Further, I am not satisfied beyond a reasonable doubt that any statements made by Mr. Udembga were made with intent to mislead the Court.

The appellants did not appeal that order. Instead they raised the issue before this Court in what amounts to a collateral attack of Whitmore J.A.'s contempt decision. Such an attack is not permissible.

119 The next issue pertains to the provision of copies of the notes and records used by Ms. Novak in her testimony before the panel. A disclosure issue with respect to those documents arose when Ms. Novak began her testimony before the panel on January 3, 2013. At that point, FCAA legal counsel indicated Ms. Novak would like to refer to a summary she had prepared of what various people had told her [summary notes] as well as a cash flow statement summarizing the banking information.[2] The panel determined that if Ms. Novak was going to refer to that material, it had to be disclosed to the appellants. Legal counsel for the FCAA then indicated he would provide both documents to Ms. Pastuch's lawyer. At that point, Ms. Novak returned her summary notes to the FCAA lawyer indicating they would review whether or not she should rely on them over the lunch hour. The chair indicated that was fine.

120 From a review of the transcript, Ms. Novak did not rely on her summary notes. This was clarified on the record. Moreover, on the morning of January 4, 2013, the FCAA lawyer indicated that Ms. Novak would not be referring to her summary notes and as such it was not necessary to provide copies of them to the appellants. The cash flow statement was referred to by Ms. Novak and it is uncontroverted that it was disclosed to the appellants.

121 In short, Ms. Novak did not rely on her summary notes when testifying and thus neither the panel nor Whitmore J.A.'s order required their production. Those notes were Ms. Novak's notes made in preparation for the hearing and, accordingly, would not normally qualify for disclosure.

b. Onerous Conditions on Financial Evidence

122 Ms. Pastuch wanted to present financial information in the possession of a bank representative located in Calgary. The chair told her she could subpoena the bank executive and enter documents in his possession directly through him or through an "authorized signatory". I note Ms. Pastuch was an authorized signatory and could have entered the documents herself. Ms. Pastuch felt this ruling was unfair because the FCAA did not have to follow the same procedure.

123 Section 12(5)(c) of the *Securities Act* provides that persons appointed to investigate a matter may "compel witnesses to produce documents, records, securities, derivatives and other property". Certified copies of such documents are admissible in evidence pursuant to s. 12(5.1). No similar right is given to any other person.

124 In my view, the chair's comments simply reflect the legislative provisions and, accordingly, were not unfair.

c. Video Conference

125 While the appellants complained they were not allowed to call witnesses using video conferencing, a review of the hearing record does not support that contention. In a decision letter dated June 20, 2011, the panel indicated to both the appellants and the FCAA that it would permit witnesses to testify by video conference on certain conditions, namely:

> (a) that the parties test the technology to ensure it worked;
>
> (b) that the panel had the right to halt the testimony if the method of communication was not satisfactory;
>
> (c) that the parties must give notice to each other and the commission secretary before June 30, 2011, as to which witnesses would be using video conferencing; and
>
> (d) that the FCAA must provide the appellants with summaries of the expected evidence.

126 On May 9, 2013, the appellants requested an expert testify by video conference with respect to Ms. Pastuch's medical condition. The evidence was being tendered in support of an adjournment request by Ms. Pastuch. In a decision letter dated May 10, 2013, the panel refused the request because in its view the physician who was to testify had not been treating Ms. Pastuch and therefore his proposed testimony was not relevant to the issue before the panel. This is the only witness the appellants requested to have testify by video conference. The panel's decision did not disclose any procedural unfairness.

d. Setting Initial Hearing Date without Disclosure

e. Canvassing only FCAA with respect to Witness Availability

127 It is uncontroverted that the panel did set an initial hearing date without disclosure having been made by the FCAA to the appellants and without canvassing the availability of the appellants' witnesses. Rather, the panel consulted only the FCAA with respect to witness availability. Following the setting of that initial hearing date, the appellants applied to adjourn it and the panel granted that adjournment.

128 Later, the panel apologized for setting the hearing without consultation and ordered disclosure.

129 In my view, the panel denied procedural fairness by setting the initial hearing date when disclosure had not been made. That error was cured on October 25, 2010, by the panel setting new dates and ordering that full disclosure be provided by the FCAA "as soon as practical, so that preparation for the hearing may commence". None of the appellants suffered any prejudice as a result of that error.

f. Directive Regarding Editorial Comments

130 The panel has the power to control its own process. Part of that power includes the right to ensure participants in the hearing process are treated with respect and that the hearing focusses on the issues at hand. Editorial comments in any judicial or quasi-judicial forum are to be discouraged as they add nothing to the process. Rather, they serve to drag out the hearing and often heighten tensions between the parties.

131 The fact the panel asked Mr. Pederson and not the FCAA prosecutor to refrain from making editorial comments is not evidence of procedural unfairness. The panel gave both sides considerable latitude. The record supports the fact Mr. Pederson editorialized on numerous occasions and the panel was not unfair in asking him to refrain from doing so.

g. Censoring Documents Released to the Media

132 The appellants submit the panel unfairly "censored" the release of their testimony and evidence while permitting the release of all of the FCAA's testimony and evidence. In support of their position, the appellants refer to emails between a media member and the FCAA Registrar.

133 The FCAA argues the emails referred to are fresh evidence and should not be accepted by this Court. Alternatively, the FCAA submits that even if the emails are considered by the Court, they do not support the conclusion that the panel acted inappropriately.

134 The email dated January 27, 2014, is from a member of the media and is directed to the FCAA Registrar. The media member had sought copies of the parties' written arguments, Ms. Pastuch's written testimony-in-chief and an exhibit. On January 29, 2014, the FCAA Registrar responded to the request advising that a copy of the exhibit was available and that the request for a copy of the written arguments and Ms. Pastuch's written testimony-in-chief had been forwarded to the panel. The panel then considered what level of "redacting" was necessary. The emails in question do not identify who authorized the release of information to the media though they do seem to suggest the decision rested with the panel.

135 Of importance to the panel's response was the fact Ms. Pastuch had repeatedly raised privacy concerns before the panel. She had also opposed the publishing of any hearing materials online. In the circumstances, the appellants' complaint about the censoring of materials is unwarranted. In my view, the release of the requested information as part of a public process cannot, in this instance, be described as procedural unfairness.

h. Refusal to Issue Subpoenas

136 The appellants assert the panel refused to issue subpoenas to their witnesses when requested. The appellants submit they had requested 27 subpoenas but that the panel only issued 3 of them.

137 The record discloses that on December 10, 2012, the appellants brought a motion for 17 subpoenas. The panel responded to this request on December 13, 2012. It stated all but three of the witnesses had testified or would be testifying for the FCAA. As such, only three subpoenas were needed by the appellants. In the circumstances, there is no evidence of an unfair refusal to issue any subpoena.

i. False, Fraudulent and Misleading Statements

138 The appellants contend the panel erred in finding Ms. Pastuch had attempted to directly contact S.B., one of the chair's law partners, regarding possible privacy and *Criminal Code* breaches by the chair (*Recusal Decision* at para 4). This allegation relates to a finding of fact, which is not subject to review by this Court. Even if the panel had erred in arriving at that conclusion, it would not have affected the outcome of the proceedings as it related to a peripheral matter, which was not essential to a determination of any of the issues before the panel.

139 The appellants submit the chair intentionally and falsely accused Ms. Pastuch of not completing medical treatment and of forging a medical note. They also contend the chair fabricated a story regarding Ms. Pastuch's medical specialist. They point to the chair's April 3, 2013, letter to Ms. Pastuch in support of their argument.

140 On January 25, 2013, Ms. Pastuch had been granted an adjournment for medical reasons based on a form completed by her doctor. In the April 3, 2013, letter, the chair reviewed the procedural history of the file regarding adjournments and the panel's request for medical information to justify those adjournments. In the letter, the chair stated that the FCAA's Registrar had contacted Ms. Pastuch's doctor to confirm he had signed the form and that its contents were accurate. The doctor responded by telephone as follows:

> ... he advised that you [Ms. Pastuch] could have attended the hearing, and [Ms. Pastuch] had actually disappeared from the program shortly after he [the doctor] provided you with the signed form. ...

141 The chair's letter does not constitute a fabrication. Rather, it is a description of events that had unfolded to that date coupled with a request for medical verification. There is nothing improper in the panel asking for medical evidence verifying Ms. Pastuch's inability to proceed with the hearing. The granting of adjournments is a discretionary matter within the purview of the panel and it is up to the person requesting an adjournment to satisfy the panel that the adjournment is justified. In my view, there is no procedural unfairness in what occurred in this instance nor is there any evidence of bias.

j. Failure to Consider the Appellants' Evidence and Submissions

142 The appellants contend the panel erred by finding the evidence of the appellants' former accountant, Mr. Garrett, and the evidence of the FCAA investigators — Ms. Stadnek, Ms. Novak and Mr. Rodonets — was credible and in relying on it. It is the appellants' position those witnesses committed perjury and that the FCAA prosecutor aided them to do so.

143 The appellants contend their former accountant perjured himself when he stated he had not been involved in valuing the appellants' business. They maintain there was evidence he was the main author of the valuation.

144 The appellants submit Ms. Stadnek perjured herself when she stated she and the appellants' former legal counsel had spoken frequently. They point to invoices from the lawyer that show they spoke only four times in 2008. The appellants also submit Ms. Novak falsely stated she was a certified financial planner and that she falsely presented the amounts paid back to investors by the appellants, leaving out a $12,000 payment to G.P. and an $8,000 payment to C.K., in the flow chart prepared by her. They further contend Ms. Novak misled the panel with respect to payments made by the appellants to executive and staff and omitted payments for rent and to IT employees in considering the appellants' expenses. Finally, the appellants state Ms. Novak withheld from the panel that one of the investors had admitted to Ms. Novak that she had lied about Ms. Pastuch — a fact that was referenced by Ms. Novak in her investigative report.

145 Finally, the appellants contend Mr. Rodonets falsely stated that $35,000 had been sent to Ms. Pastuch's personal account when the cash flow statement shows it went to her corporate account.

146 The appellants complain the panel gave too much weight to this allegedly false evidence, particularly that of the appellants' former accountant.

147 The panel heard firsthand the testimony of the witnesses in issue. In addition, the panel had before it all of the documentary evidence presented by both the FCAA and the appellants. It was the panel's task to make findings of credibility and to weigh the evidence. The panel could believe all, some or none of a witness's testimony. That the panel did not view the evidence as the appellants wished is not an error of law nor does it amount to procedural unfairness.

k. Disregarding Fresh Evidence

148 The appellants argue the panel disregarded the fresh evidence they were allowed to file.

149 A review of the record indicates that on January 13, 2014, Ms. Pastuch applied to submit fresh evidence before the panel. This application was made after final argument had been submitted with respect to the *Merits Decision*, but before the *Merits Decision* was rendered and before submissions were heard with respect to the issue of sanctions.

150 On January 14, 2014, the panel chair wrote Ms. Pastuch advising her that the panel could not determine whether admitting the fresh evidence would be appropriate without reviewing that evidence. Ms. Pastuch was given an opportunity to submit the evidence for the panel's review. Ms. Pastuch requested additional time to do so and the panel granted an extra day.

151 On January 20, 2014, Ms. Pastuch presented copies of the fresh evidence to the panel and provided written submissions. The evidence attached to her submissions and filed in this appeal included the affidavit of Mr. Garrett, sworn in response to written questions submitted by Ms. Pastuch on December 23, 2013, as part of a civil suit against Mr. Garrett. She also submitted affidavits by Ms. Novak and Mr. Rodonets with respect to disclosure that had already been filed with the panel.

152 There is no indication whether the panel accepted the fresh evidence as it did not refer to it in either its *Merits Decision* or its *Sanctions Decision*. It thus appears the panel may have overlooked that evidence. Having said that, in my view, the evidence would not have affected the outcome of the hearing because it was not, when weighed with the other evidence presented, conclusive or potentially conclusive of any issue before the panel.

153 While the appellants contend the affidavit of Mr. Garrett is evidence that he provided all his emails to the FCAA and that full disclosure of those emails was not made by the FCAA, in my view, that is not a conclusion that can necessarily be drawn from the evidence.

154 It is useful to reproduce the relevant portions of Mr. Garrett's affidavit here:

> 3. Question: Sandy Novak and Ed Rodonets of the FCAA (formerly SFSC) asked you for copies of several different emails in relation to Pastuch and her companies such as but not limited to emails between you (Garrett) and her former legal counsel, between her and yourself in early 2009 (February through to June). Did you provide them with these emails?
>
> Response: Yes.
>
> 4. Question: If yes is answered to question number 3, then which emails did you provide and to whom specifically from the FCAA (SFSC) did you forward these emails to:

Response: All emails were provided to Sandy Novak of SFSC.

. . .

6. Question: Have you ever deleted any emails pertaining to Pastuch or her companies? If so, when and why?

Response: No emails have been deleted.

7. Question: You were served a summons by the SFSC (FCAA) to turn over all documents, emails, communications, etc in regards to Pastuch and her companies. Did you full and legally obey this summons and turn over everything listed [in] it to the SFSC (FCAA)?

Response: I provided to SFSC all emails and electronic documents in my possession. Pastuch had left a small box of accounting records that was examined by SFSC representatives. To my knowledge, none of the documents were removed from my office by SFSC representatives. Later, at the request of the Plaintiff, the documents were couriered to the law firm of MacPherson, Leslie & Tyerman, to the attention of Michael Tocher.

8. Question: To whom specifically did you turn over these documents to from the SFSC (FCAA). Provide a date, item turned over, to whom and provide any and all copies (emails, etc) that can confirm you did indeed turnover said documents to the FCAA (SFSC) entities:

Response: All emails and documents were forwarded to SFSC **on approximately March 19, 2010.**

9. Question: If so, please provide a detailed list along with copies of all emails, written communications, documents that you provided to FCAA that were either authored by Pastuch or were pertaining to Pastuch or/her companies.

Response: All emails and documents provided to SFSC have been included in the documents already disclosed in the Affidavit as to Documents.

10. Question: Did Garrett email or forward emails (pertaining to or authored by Pastuch and her companies to any staff member of the SFSC (now called FCAA)? Provide receipts (copies) of said emails:

Response: **No documents were forwarded to SFSC apart from the documents referred to in question 8.**

(Emphasis added)

155 Mr. Garrett's affidavit must be read in conjunction with the affidavit of documents referred to in it, the disclosure provided by the FCAA including Mr. Garrett's interview by the FCAA investigators, the testimony of the FCAA investigators, as well as the testimony of Mr. Garrett

and Ms. Pastuch. Based on that evidence, Mr. Garrett forwarded "all emails" to Ms. Novak. The FCAA exhibit report shows only one communication from Mr. Garrett to Ms. Novak that being exhibit #905412, which, with its attachments, was discussed earlier in these reasons at paragraphs [64] to [72]. The description of exhibit #905412 does not identify all the documents included in that exhibit. Further, the evidence does not address whether the FCAA retained the emails or whether they were returned to Mr. Garrett in the envelope delivered to him in April 2011.[3] In short, the evidence does not undermine the panel's decision to believe the FCAA investigators who testified full disclosure had been made. In the circumstances, the panel's decision does not amount to procedural unfairness.

l. Curtailing Ms. Pastuch's Testimony

156 The appellants contend that the panel curtailed Ms. Pastuch's testimony thus interfering with her right to provide full answer and defence and her right to a fair trial.

157 The hearing record discloses that Ms. Pastuch was allowed to testify by telephone. She began her testimony on June 27, 2013, and continued testifying on June 28, 2013, following which the proceedings were adjourned to July 12, 2013.

158 On July 12, 2013, the appellants' agent, Mr. Pederson, advised the panel that Ms. Pastuch, for health reasons, was unable to provide further oral testimony.

159 Section 9(7) of the *Securities Act* provides that the legal or technical rules of evidence do not apply to hearings under its auspices. Further, s. 12.4(1) of the Policy Statement, which applies to such hearings, provides that a panel "may conduct any proceeding or part of a proceeding, including motions, by means of a written hearing".

160 Ms. Pastuch agreed to present the remainder of her testimony-in-chief in writing. Accordingly, the hearing panel ordered her to do so by the end of the business day on July 22, 2013, with the intent that Ms. Pastuch would then be cross-examined.

161 Some written testimony was filed by Ms. Pastuch on July 22, 2013, but at the same time she filed a request for an extension with a second written evidence package to be submitted on August 6, 2013, and a third and final evidence package to be submitted on August 16, 2013. Ms. Pastuch then requested four hours of oral testimony to finish her defence.

162 The panel adjourned the hearing to September 10, 2013, and requested medical confirmation that Ms. Pastuch could not type or speak for extended periods of time. The panel wanted the medical specialist to advise what, if any, accommodation might be necessary to support Ms. Pastuch attending as a witness.

163 On August 21, 2013, the FCAA Registrar advised Mr. Pederson that the hearing would proceed on September 10, 2013. It noted that Ms. Pastuch had not filed any further written testimony and the panel directed the remainder of her testimony be filed no later than close of business on September 4, 2013. The panel indicated it would not accept any written testimony from Ms. Pastuch after that date.

164 On September 6, 2013, the appellants brought another motion for an indefinite adjournment for medical reasons. The chair wrote Ms. Pastuch on that same date and requested documentary proof that she had medical appointments for the dates she had specified and that those appointments would prevent her from attending the hearing. He also requested confirmation that the two witnesses for whom subpoenas had been issued were served with those subpoenas and that those witnesses would be available to testify the following Tuesday morning.

165 A response to the chair's September 6, 2013, letter was provided by the appellants' agent, Mr. Pederson, on September 8, 2013. As a result of that response, the hearing was adjourned *sine die* with an order that the panel be updated "at least every two weeks on when Ms. Pastuch is able to provide him [her agent] with instructions and/or assist him in the review of any documents and materials associated with this matter".

166 An update was provided to the panel on September 24, 2013, and the panel requested, through the FCAA Registrar, that additional information be provided by Ms. Pastuch's physician, including a timeframe as to when Ms. Pastuch would be unavailable due to surgery.

167 On October 21, 2013, the panel wrote Mr. Pederson indicating that Ms. Pastuch had not complied with the request for medical information. The panel stated:

> The Respondents have had the opportunity to lead evidence through the preliminary motions stage and through the formal hearing stage, with both verbal and written testimony. They have had the opportunity to cross-examine witnesses called in support of the allegations against them. They have had the opportunity to call additional witness through the use of subpoenas. Some of these opportunities have been seized but many have been refused or squandered. On the last date when evidence was presented before the Hearing Panel (July 12, 2013), the Respondents only had one remaining witness to complete — Ms. Pastuch. Ms. Pastuch has refused to submit the balance of her written testimony within both the initial time agreed upon by her representative, and within the extension period granted by the Hearing Panel. The medical documentation, provided by her doctor, confirmed that she would have been able to verbally participate in the hearing during the time period when she had been granted the extraordinary accommodation to provide written testimony, because the Hearing Panel had been advised by you and Ms. Pastuch that she could not talk for more than a few minutes at a time. The Hearing Panel granted her this extraordinary accommodation to provide her

testimony-in-chief in writing, yet she refused to complete that task within an approximate six-week time frame.

The Hearing Panel has reviewed the testimony from all of the witnesses that it has heard to date, both verbally and in writing. In particular, it has considered the verbal and written testimony of Ms. Pastuch and finds no value (for the purposes of this hearing) in a cross-examination of the limited written and verbal testimony she has provided.

The refusal to provide medical updates and your (and/or Ms. Pastuch's) refusal to follow medical directives, combined with the squandered opportunities to present its case have led the panel to conclude that there is little to be gained by further delaying the hearing. Accordingly, the parties are directed to present written arguments on the basis of the evidence presented before the Hearing Panel in relation to the allegations contained in the Notice of Hearing. Thereafter, the Hearing Panel will consider the submitted written arguments in light of the evidence it has received to date and will advise the parties on the status of the hearing at that point. The written arguments should be considered closing arguments.

168 In my view, the panel's decision to terminate Ms. Pastuch's evidence and proceed with written arguments did not constitute procedural unfairness. Ms. Pastuch was given significant accommodation so that she could complete her testimony-in-chief. She did not take advantage of that accommodation. The medical information provided to the panel did not support Ms. Pastuch's assertion that she was unable to provide testimony, either orally or in writing. The panel could not allow Ms. Pastuch to thwart the hearing process through unwarranted delay (unwarranted as it was not supported by medical evidence). Its decision to proceed with the hearing was supported by the medical evidence and thus cannot be viewed as procedurally unfair. Ms. Pastuch was the author of her own fate. She had two choices. She could have provided the panel with medical evidence to support her inability to testify or she could have completed her testimony-in-chief in writing. She did neither. In the circumstances, this complaint is also without merit.

m. Denial of Cross-Examination of FCAA Witnesses

169 The appellants argue that the panel breached their right to procedural fairness by denying them the opportunity to cross-examine the FCAA's witnesses. The FCAA contends the appellants had that opportunity but chose not to take advantage of it.

170 On December 5, 2012, when the panel was scheduled to begin hearing testimony Mr. Pederson brought a motion on behalf of the appellants requesting, among other things, disclosure and an adjournment. The panel dismissed the application and when it adjourned for a break, Mr. Pederson left the hearing and did not return. The hearing panel attempted unsuccessfully to contact both Ms. Pastuch and Mr. Pederson. They left messages for both those individuals indicating the hearing would proceed in their absence. The panel, after waiting for more than 45 minutes,

continued with the hearing. At the end of the day, the matter was adjourned to December 10, 2012. The appellants were given notice of that adjourned date.

171 On December 10, 2012, Mr. Pederson was again in attendance. He apologized for his absence stating "unfortunately, I was needed for related matters and I wasn't able to be present for the remainder of the day". Mr. Pederson then read a statement from Ms. Pastuch that included the following:

> In closing, with respect to the cross-examination of any witnesses should this proceeding continue, neither I nor any agent on our behalf is able to cross-examine any Commission witness as we do not have full disclosure and we do not believe that the Commission, and in particular this panel, is impartial in these proceedings. This is our position throughout the balance of these proceedings as long as they continue before this tribunal and would be our answer to any and all Commission witnesses called.

172 On the same date, J.M. testified for the FCAA. At the conclusion of her examination-in-chief, the panel chair offered Mr. Pederson the opportunity to cross-examine. Mr. Pederson refused. A recess was then called. Neither Mr. Pederson nor Ms. Pastuch, or in fact any representative of the appellants, returned to the hearing. Thereafter, the appellants absented themselves for the remainder of the FCAA's case, despite receiving notice of the hearing dates and being told the hearing would proceed in their absence.

173 When it came time for the appellants to present their defence, they asked to "recall" the FCAA witnesses. That request was denied.

174 The panel's ruling with respect to the request to recall FCAA witnesses was a procedural one. It was made against a backdrop where the appellants had an opportunity to cross-examine those witnesses but instead of doing so chose not to engage in the process. The appellants cannot now lay blame for the consequences of their decision at the feet of the panel. The appellants were not denied an opportunity to cross-examine the FCAA witnesses; they chose not to do so.

n. Loss of Jurisdiction from Breach of Privacy Rights

175 The appellants contend the panel breached Ms. Pastuch's personal privacy rights contrary to *The Freedom of Information and Protection of Privacy Act*, SS 1990-91, c F-22.01 [*FIPPA*], *The Health Information Protection Act*, SS 1999, c H-0.021, and the FCAA's Policy Statement.

176 The appellants identified the breaches as follows:

> (a) the August 27, 2010, notice of hearing, which was published on the FCAA website, contained personal banking information with respect to the appellants;

(b) personal information pertaining to the appellants' bank accounts was presented at the hearing;

(c) personal information of third parties, who had no involvement in the proceedings (such as Ms. Pastuch's mother), was presented at the hearing; and

(d) the FCAA publicly discussed Ms. Pastuch's private and medical information.

177 I begin by noting the Privacy Commissioner's report, which the appellants had included in their appeal book, was not part of the hearing record and accordingly, for the reasons provided earlier, will not be considered by this Court. The report did not deal with any complaints against the panel.

178 The appellants' complaints with respect to privacy breaches make specific reference to the fact that the notice of hearing was published on the FCAA website.

179 The notice of hearing was not prepared by the panel nor did the panel publish it on the FCAA website. The panel granted the appellants' application to remove the notice from the website. The other complaints relating to breaches of privacy involve the FCAA investigation, not the panel. The panel addressed those complaints and I see no error in the hearing panel's handling of those issues.

180 The panel was alive to the privacy concerns surrounding the hearing and had asked the appellants to advise it if privacy issues arose. This is reflected, for example, in a May 27, 2013, email from the FCAA Registrar to Ms. Pastuch, written in response to a May 23, 2013, motion by the appellants for a *carte blanche* publication ban:

> The Hearing Panel has already ruled on an earlier Motion for a *carte blanch*[*e*] publication ban on the proceedings. Securities Commission hearings are invariably public hearings. **The Hearing Panel was clear in its earlier ruling that it would be relying upon the Respondents to take steps to advise the Hearing Panel whenever testimony was moving in a direction that may be considered sensitive and/or unnecessarily invasive of an individual's privacy. The Respondents chose to be absent from the hearing without regard to the Hearing Panel['s] reliance upon their obligation to alert the Hearing Panel to developing testimony, or specific evidence that may have been deliberately or inadvertently disclosed, in order to protect their individual privacy interests.** The Motion submitted on May 23, 2013 now seeks to remedy their alleged privacy concerns retroactively, disregarding their decision to absent themselves at the appropriate time when the privacy concerns could have been raised and dealt with by the Hearing Panel. The request for a retroactive remedy is therefore denied.
>
> (Emphasis added)

181 The receipt and disclosure of personal information in the course of a hearing is allowed in certain circumstances within the statutory framework. Section 29(2)(u) of *FIPPA* provides that "personal information in the possession or under the control of a government institution may be disclosed ... as prescribed in the regulations". In accordance with the Appendix to *The Freedom of Information and Protection of Privacy Regulations*, RRS c F-22.01 Reg 1 [*FIPPA Regulations*], the FCAA is a government institution.

182 Section 16 of the *FIPPA Regulations* provides:

> **16** For the purposes of clause 29(2)(u) of the Act, personal information may be disclosed:
>
> . . .
>
> (f) for the purpose of commencing or conducting a proceeding or possible proceeding before a court or tribunal;

In other words, the appellants' financial information and Ms. Pastuch's health information could be disclosed for the purpose of conducting the proceedings before the panel.

183 One of the charges against the appellants was fraud. To establish that, detailed evidence of financial transactions was required. In addition, Ms. Pastuch put her health in issue when she requested adjournments for medical reasons.

184 Further, pursuant to s. 9(13) of the *Securities Act*, hearings are "open to the public unless the Commission ... considers it *in the public interest* to order otherwise" (emphasis added). While a hearing or any part thereof may be held in camera, the decision to do so is a discretionary one, which should represent the exception not the rule. In a free and democratic country, the openness of judicial and quasi-judicial proceedings is a cornerstone of the rule of law and an important check on adjudicative authority.

185 The panel was acutely aware of the appellants' privacy concerns and took appropriate steps to protect them. It asked the appellants to raise any privacy issues as the hearing proceeded. Even though the appellants decided not to participate in much of the hearing, the panel took steps to safeguard their privacy interests by going in camera and asking FCAA counsel to justify the admission of personal information. In the circumstances, this ground of appeal must fail.

o. Summary

186 In my view, the appellants' grounds of appeal pertaining to procedural fairness are without merit.

B. Standard of Proof

187 The appellants raised as a ground of appeal that the panel applied the wrong standard of proof. The appellants did not identify, either in their factum or oral argument, what this ground pertains to. In its *Merits Decision*, the panel indicated it had reached its conclusions by assessing the evidence on a balance of probabilities (*Merits Decision* at para 3). That was the correct standard of proof to be applied by the panel and a review of the record does not disclose the application of a different standard.

188 In its December 4, 2012, *Preliminary Decision* dealing with disclosure, the hearing panel at page 4 stated:

> The Hearing Panel has concluded that there was insufficient evidence upon which to support these allegations about the failure to provide full disclosure and the spoliation of evidence. ...

189 It appears from this statement that the panel placed the onus of establishing that full disclosure had not been made on the appellants. This was an error as the burden of proof rested with the FCAA to establish full disclosure had been made (*Stinchcombe* at para 21). Having said that, given the panel had accepted the evidence of the FCAA investigators that full disclosure had been made and that the panel was still prepared to address specific disclosure issues as they arose during the hearing, that error did not prejudice the appellants.

190 This ground of appeal must also fail.

C. Bias and Reasonable Apprehension of Bias

191 The appellants contend the chair and the hearing panel were either biased or that there was a reasonable apprehension of bias because the chair had an ongoing relationship with the law firm that had represented one of the appellants' investors, D.B. That investor testified on behalf of the FCAA.

1. The Law

192 All administrative bodies, no matter their function, owe a duty of fairness to the regulated parties whose interest they must determine (*Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623 (S.C.C.) (WL) at para 21 [*Newfoundland Telephone Co.*]; *Bell Canada v. C.T.E.A.*, 2003 SCC 36 (S.C.C.) at para 21, [2003] 1 S.C.R. 884 (S.C.C.) [*Bell Canada*]; *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3 (S.C.C.) at para 82; *Baker* at paras 21-22; and *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 (S.C.C.) at para 92 [*S.(R.D.)*] (Justice Cory's reasons on this point were accepted by the majority)).

193 One aspect of procedural fairness is that decisions be made by impartial decision-makers. As stated by Cory J. in *Newfoundland Telephone Co.*:

> [22] Although the duty of fairness applies to all administrative bodies, the extent of that duty will depend upon the nature and the function of the particular tribunal. ... The duty to act fairly includes the duty to provide procedural fairness to the parties. That simply cannot exist if an adjudicator is biased. ...

See also *Roberts v. R.*, 2003 SCC 45 (S.C.C.) at para 2, [2003] 2 S.C.R. 259 (S.C.C.) [*Wewaykum*].

194 The right to an impartial decision-maker is enshrined in ss. 7 and 11(d) of the *Charter*. Section 11(d) provides that any person charged with an offence has the right "to be presumed innocent until proven guilty according to law in a fair and public hearing by an *independent and impartial tribunal*" (emphasis added).

195 There is a presumption that judges will act impartially. In *Wewaykum*, the majority described that presumption in these terms:

> [59] Viewed in this light, "[i]mpartiality is the fundamental qualification of a judge and the core attribute of the judiciary" (Canadian Judicial Council, *Ethical Principles for Judges* (1998), at p. 30). It is the key to our judicial process, and must be presumed. As was noted by L'Heureux-Dubé J. and McLachlin J. (as she then was) in *S. (R.D.)*, *supra*, at para. 32, **the presumption of impartiality carries considerable weight, and the law should not carelessly evoke the possibility of bias in a judge, whose authority depends upon that presumption.** Thus, while the requirement of judicial impartiality is a stringent one, the burden is on the party arguing for disqualification to establish that the circumstances justify a finding that the judge must be disqualified.
>
> (Emphasis added)

196 The presumption of impartiality has been applied to members of administrative tribunals (*S. (R.D.)* at para 32). However, the presumption can be rebutted by establishing bias or a reasonable apprehension of bias. The burden of proof in rebutting the presumption lies with the party making the allegation (*Wewaykum* at para 59; and *S. (R.D.)* at para 114).

197 A party alleging actual bias must establish the decision-maker brought or would bring prejudice into consideration as a matter of fact (*Wewaykum* at para 62; and *S. (R.D.)* at paras 103-108). This is difficult to establish because it depends on what is in the mind of the adjudicator. For that reason, most often the allegation is one of a reasonable apprehension of bias as opposed to actual bias (*Newfoundland Telephone Co.* at para 22; and *S. (R.D.)* at para 109).

198 The test for reasonable apprehension of bias was set out by de Grandpré J. in his dissent in *Committee for Justice & Liberty v. Canada (National Energy Board)* (1976), [1978] 1 S.C.R. 369 (S.C.C.) at 394 [*Committee for Justice and Liberty*]:

> [T]he apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. ... [T]hat test is **"what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude.** Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."
>
> (Emphasis added)

199 This test has been endorsed by the Supreme Court of Canada in numerous decisions including *Yukon Francophone School Board, Education Area No. 23 v. Yukon Territory (Attorney General)*, 2015 SCC 25 (S.C.C.) at para 20, [2015] 2 S.C.R. 282 (S.C.C.); *S. (R.D.)* at paras 11, 31 and 111; *Baker* at para 46; *Wewaykum* at para 60; and *Bell Canada* at para 25. See also the decisions of this Court in *Aalbers v. Aalbers*, 2013 SKCA 64 (Sask. C.A.) at para 75, (2013), 417 Sask. R. 69 (Sask. C.A.); and *Agrium Vanscoy Potash Operations v. USW, Local 7552*, 2014 SKCA 79 (Sask. C.A.) at para 42, [2014] 8 W.W.R. 629 (Sask. C.A.).

200 As de Grandpré J. stated in *Committee for Justice and Liberty* at 395, the grounds underpinning such applications must be "substantial". The test for apprehension of bias is not related to the "very sensitive or scrupulous conscience". See also *Wewaykum* at para 76; and *S. (R.D.)* at para 112.

201 Further, a finding of bias or that there is a reasonable apprehension of bias is not ameliorated by the fact the decision arrived at is correct (*Newfoundland Telephone Co.* at para 40; and *Cardinal v. Kent Institution*, [1985] 2 S.C.R. 643 (S.C.C.) at 661).

202 While the requirements of independence and impartiality are related, they are distinct concepts. In *Bell Canada*, McLachlin C.J. and Bastarache J., writing for a unanimous court, described the difference between the two concepts in these terms:

> [18] The requirements of independence and impartiality are not, however, identical. As Le Dain J. wrote in *Valente v. The Queen*, [1985] 2 S.C.R. 673, at p. 685 (cited by Gonthier J. in *2747-3174 Québec Inc. v. Quebec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919, at para. 41):
>
> > Although there is obviously a close relationship between independence and impartiality, they are nevertheless separate and distinct values or requirements. **Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case.** The word "impartial" ... connotes absence of bias, actual or perceived. The word **"independent"** in s. 11(*d*) **reflects or embodies the traditional constitutional value of judicial independence.** As such, it connotes not merely a state

> of mind or attitude in the actual exercise of judicial functions, but a status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees.
>
> (Emphasis added)

Chief Justice McLachlin and Bastarache J. went on at paragraph 19 of *Bell Canada* to indicate that a tribunal's independence pertains to its structure, not its "independence of thought".

203 Where there is a single decision-maker, a finding of bias or a reasonable apprehension of bias necessitates a new trial (*S. (R.D.)* at para 100).

204 Where there are multiple decision-makers, the question becomes whether the disqualification on the bases of bias or a reasonable apprehension of bias of one panel member taints the entire panel.

205 This issue was considered by the Supreme Court of Canada in *Wewaykum*. That case involved an allegation of apprehension of bias against one of the justices of the Court. In concluding the remainder of the panel was not tainted, the Court considered a number of factors including how decisions are made by the Court, the role of each judge on the panel, the number of judges involved and the fact it had been a unanimous decision as opposed to one where the "tainted judge" had cast the deciding vote.

206 In *Mugesera c. Canada (Ministre de la Citoyenneté & de l'Immigration)*, 2005 SCC 39, [2005] 2 S.C.R. 91 (S.C.C.), the Supreme Court of Canada stated:

> [15] ... none of the judges who were scheduled to hear and have now heard the appeal were in any way involved in this case. No reasonable person would think, after Abella J. voluntarily recused herself, that her mere presence on the Court would impair the ability of the balance of its members to remain impartial. **If there is a duty on the part of one member of our Court to recuse him or herself, it is an astounding proposition to suggest that the same duty automatically attaches to the rest of the Court or compromises the integrity of the whole Court. To reach that conclusion would be to ascribe a singular fragility to the impartiality that a judge must necessarily show, and to the ability of judges to discharge the duties associated with impartiality in accordance with the traditions of our jurisprudence.** The Quebec Court of Appeal helpfully noted these principles in a recent decision dismissing a motion to stay proceedings in which bias was alleged against all the judges of the Quebec Superior Court (*Gillet v. Arthur*, [2005] R.J.Q. 42, *per* Robert C.J.Q. and Gendreau and Baudouin JJ.A.).
>
> (Emphasis added)

207 This same reasoning has been adopted with respect to administrative tribunals. For example, the British Columbia Court of Appeal in *Bennett v. British Columbia (Securities Commission)* (1992), 94 D.L.R. (4th) 339 (B.C. C.A.) (WL), held:

> [22] ... **Bias is an attitude of mind unique to an individual. An allegation of bias must be directed against a particular individual alleged, because of the circumstances, to be unable to bring an impartial mind to bear.** No individual is identified here. Rather, the effect of the submissions is that all of the members of the commission appointed pursuant to s. 4 of the *Securities Act*, regardless of who they may be, are so tainted by staff conduct that none will be able to be an impartial judge. Counsel were unable to refer us to a single reported case where an entire tribunal of unidentified members had been disqualified from carrying out statutory responsibilities by reason of real or apprehended bias. We think that not to be surprising. The very proposition is so unlikely that it does not warrant serious consideration.
>
> (Emphasis added)

208 In *Telus Communications Inc. v. T.W.U.*, 2005 FCA 262, 257 D.L.R. (4th) 19 (F.C.A.), the Federal Court of Appeal stated:

> [41] Neither the doctrine of corporate taint nor the subjection of the entire Board to a reasonable apprehension of bias as a result of the Chairperson's alleged comments, applies here. Painting the entire Board with bias as a result of the one board member's alleged comments undermines the presumption of impartiality and fairness that is attributed to each member and compromises the integrity of the entire Board. In *Mugesara*, the Supreme Court articulated the possible consequences if this proposition is adopted. At paragraph 15, it said:
>
> > [15] ... If there is a duty on the part of one member of our Court to recuse him or herself, it is an astounding proposition to suggest that the same duty automatically attaches to the rest of the Court or compromises the integrity of the whole Court. To reach that conclusion would be to ascribe a singular fragility to the impartiality that a judge must necessarily show, and to the ability of judges to discharge the duties associated with impartiality in accordance with the traditions of our jurisprudence.

209 In *Mountain Creeks Ranch Inc. v. Yellowhead (County) Subdivision & Development Appeal Board*, 2006 ABCA 126, 48 Admin. L.R. (4th) 130 (Alta. C.A.) [*Mountain Creeks*], the Court found that bias would be reasonably apprehended where a councillor had sat on the Subdivision and Development Appeal Board and had previously participated in matters involving the appellant. The Alberta Court of Appeal considered whether, as a result, all members of the Subdivision and Development Appeal Board should be disqualified. In finding they should, Ritter J.A., in an oral decision, stated:

> [8] The Supreme Court of Canada in *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 239, 2003 SCC 45 at para. 2, held that allegations that a decision may be tainted by a reasonable apprehension of bias are to be dealt with as serious matters. Parties appearing before administrative tribunals or boards such as the SDAB are entitled to decision-makers who approach the matters before them free of interest. However, there is a presumption that tribunal members will act impartially in the absence of evidence to the contrary: Sara Blake, *Administrative Law in Canada*, 3d ed. (Markham, Ont.: Butterworths, 2001) at 106. The principle of impartiality is so fundamental to a fair hearing that if a single member of an administrative body is disqualified on the basis of bias or reasonable apprehension of bias, the whole proceeding is affected. As a result, the general rule is that the decision will be quashed, regardless of the fact that the biased member's vote may not have been a factor in the outcome: Frederick Laux, *Planning Law and Practice in Alberta*, 3d ed. (Edmonton: Juriliber, 2002) at §7.3(5).

210 *Mountain Creeks* was distinguished by the Alberta Court of Appeal in *Boardwalk Reit LLP v. Edmonton (City)*, 2008 ABCA 176, [2008] 8 W.W.R. 251 (Alta. C.A.) [*Boardwalk Reit*], leave to appeal refused, 2008 CanLII 67835 [2008 CarswellAlta 2024 (S.C.C.)]. Justice Côté, writing for himself and O'Brien J.A., considered whether the disqualification of one appeal judge would result in the whole panel being disqualified. In finding it would not, Côté J.A. distinguished *Mountain Creeks* stating:

> [91] The assessor relies upon a proposition in Professor Laux's text which the Alberta Court of Appeal used in *Mtn. Creeks Ranch v. Yellowhead S.D.A.B.*, 2006 ABCA 126, 48 Admin L.R. (4th) 130. But that case is distinguishable here, because it was
>
> > (a) about lay subdivision and development appeal boards, which often include elected politicians (and the textbook only mentions administrative tribunals),
> >
> > (b) about fixed opinions by a politician, and
> >
> > (c) contrary (as to courts) to the *Wewaykum* case, *supra*, which was decided after the passage was written in the textbook.
>
> The authorities cited by Professor Laux (including authorities which they cite) are all about administrative tribunals, not superior courts. One should recall the presumption from a judge's oath and need for cogent evidence, as discussed in Part B.3, *supra*. And recall that judges routinely hear information which they must then put out of their minds.

211 Justice Côté also described seven dangers which arise where there are unnecessary recusals: (a) judge shopping; (b) delay and expense; (c) tarnished appearance; (d) producing insoluble problems; (e) preventing litigation by judges; (f) litigation over litigation and technicalities; and (g) that some connections are almost unavoidable.

212 In *Beaverford v. Thorhild (County) No. 7*, 2013 ABCA 6, 539 A.R. 373 (Alta. C.A.), the Alberta Court of Appeal again considered whether the entire Subdivision and Development Appeal Board was tainted because one of its members — an elected councillor — had expressed strong opinions on a matter under consideration. Referring to *Mountain Creeks*, the Court noted, at paragraph 32, that the "participation of a single person does not always taint a tribunal".

213 In light of these authorities, I conclude that there is no hard and fast rule whether a panel of decision-makers — judicial or administrative — will be tainted by a finding of bias or apprehension of bias with respect to one of its members. Rather, as stated by the Supreme Court of Canada in *Wewaykum*, the answer to that question will depend on the decision-making process and the role played by the tainted decision-maker in arriving at the decision.

2. Application of Law to this Case

214 The appellants allege the chair of the hearing panel, as well as the panel itself, was biased against them or alternatively that there was a reasonable apprehension of bias given the chair's relationship with one of the witnesses.

215 The facts underpinning the appellants' allegation are that the chair is a partner in a law firm where another partner had represented D.B., an investor in Cryptguard, one of the corporate appellants. D.B., who testified at the hearing on behalf of the FCAA, is the brother of one of the chair's law partners. In addition, documents were prepared by the chair's law firm with respect to both D.B.'s investment in Cryptguard and with respect to loans made by D.B. to Ms. Pastuch personally. The documents admitted as exhibits at the merits hearing included a unanimous shareholder's agreement between Ms. Pastuch, D.B. and Cryptguard dated January 25, 2007; a memorandum of resolution of the directors of Cryptguard; an application for subscription of shares; share certificates for 28.5 shares in Cryptguard; two promissory notes signed by Ms. Pastuch in favour of D.B. dated February 15, 2007, and July 5, 2007, respectively; a March 17, 2008, letter from the law firm to D.B. regarding the sale of property to Ms. Pastuch including a statement of adjustments and an invoice for services rendered; emails from D.B. to the law firm dated March 17, 2008, enclosing emails from Ms. Pastuch; emails between the law firm and D.B. relating to Cryptguard dated July 28 and 29, 2009; correspondence dated December 3, 2008, from the law firm regarding the sale of property to Ms. Pastuch; and a full and final release signed by D.B.

216 While the appellants allege actual bias, there is no evidence to support that allegation. As indicated, allegations of actual bias are difficult to prove because they require proof of an individual's state of mind. The facts as described do not support a finding of actual bias nor do the appellants' complaints relating to the chair or the panel's actions/decisions support such a finding. Those complaints include:

Federal Court of Appeal | Cour d'appel fédérale

Date: 20200522

Docket: A-102-20

Citation: 2020 FCA 92

Present: **MACTAVISH J.A.**

BETWEEN:

AIR PASSENGERS RIGHTS

Applicant

and

CANADIAN TRANSPORTATION AGENCY

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on May 22, 2020.

REASONS FOR ORDER BY: MACTAVISH J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20200522

Docket: A-102-20

Citation: 2020 FCA 92

Present: **MACTAVISH J.A.**

BETWEEN:

AIR PASSENGERS RIGHTS

Applicant

and

CANADIAN TRANSPORTATION AGENCY

Respondent

REASONS FOR ORDER

MACTAVISH J.A.

[1] As is the case with so many other areas of life today, the airline industry and airline passengers have been seriously affected by the COVID-19 pandemic. International borders have been closed, travel advisories and bans have been instituted, people are not travelling for non-essential reasons and airlines have cancelled numerous flights.

[2] In response to this unprecedented situation, the Canadian Transportation Agency (CTA) issued two public statements on its website that suggest that it could be reasonable for airlines to provide passengers with travel vouchers when flights are cancelled for pandemic-related reasons, rather than refunding the monies that passengers paid for their tickets.

[3] Air Passenger Rights (APR) is an advocacy group representing and advocating for the rights of the public who travel by air. It has commenced an application for judicial review of the CTA's public statements, asserting that they violate the CTA's own *Code of Conduct*, and mislead passengers as to their rights when their flights are cancelled. In the context of this application, APR has brought a motion in writing seeking an interlocutory order that, among other things, would require that the statements be removed from the CTA's website. It also seeks to enjoin the members of the CTA from dealing with passenger complaints with respect to refunds on the basis that a reasonable apprehension of bias exists on their part as a result of the Agency's public statements.

[4] For the reasons that follow, I have concluded that APR has not satisfied the tripartite injunctive test. Consequently, the motion will be dismissed.

1. Background

[5] In early 2020, the effects of the COVID-19 coronavirus began to be felt in North America, rapidly reaching the level of a pandemic. On March 25, 2020, the CTA posted a statement on its website dealing with flight cancellations. The statement, entitled "Statement on

Vouchers" notes the extraordinary circumstances facing the airline industry and airline customers because of the pandemic, and the need to strike a "fair and sensible balance between passenger protection and airlines' operational realities" in the current circumstances.

[6] The Statement on Vouchers observes that passengers who have no prospect of completing their planned itineraries "should not be out-of-pocket for the cost of cancelled flights". At the same time, airlines facing enormous drops in passenger volumes and revenues "should not be expected to take steps that could threaten their economic viability".

[7] The Statement on Vouchers states that any complaint brought to the CTA will be considered on its own merits. However, the Statement goes on to state that, generally speaking, the Agency believes that "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 Statement then suggests that a 24-month period for the redemption of vouchers "would be considered reasonable in most cases".

[8] Concurrent with the posting of the Statement on Vouchers, the CTA published an amendment to a notice already on its website entitled "Important Information for Travellers During COVID-19" (the Information Page), which incorporates references to the Statement on Vouchers.

[9] These statements are the subject of the underlying application for judicial review.

2. APR's Arguments

[10] APR submits that there is an established body of CTA jurisprudence that confirms passengers' right to a refund where air carriers are unable to provide air transportation, including cases where flight cancellations are for reasons beyond the airline's control. According to APR, this jurisprudence is consistent with the common law doctrine of frustration, the doctrine of *force majeure* and common sense. The governing legislation further requires airlines to develop reasonable policies for refunds when airlines are unable to provide service for any reason.

[11] According to APR, statements on the Information Page do not just purport to relieve air carriers from having to provide passenger refunds where flights are cancelled for reasons beyond the airlines' control, including pandemic-related situations. They also purport to relieve airlines from their obligation to provide refunds where flights are cancelled for reasons that are within the airlines' control, including where cancellation is required for safety reasons.

[12] APR further contends that the impugned statements by the CTA are tantamount to an unsolicited advance ruling as to how the Agency will treat passenger complaints about refunds from air carriers where flights are cancelled for reasons relating to the COVID-19 pandemic. The statements suggest that the CTA is leaning heavily towards permitting the issuance of vouchers in lieu of refunds, and that it will very likely dismiss passenger complaints with respect to airlines' failure to provide refunds during the pandemic, regardless of the reason for the flight cancellation. According to APR, this creates a reasonable apprehension that CTA members will not deal with passenger complaints fairly.

3. The Test for Injunctive Relief

[13] The parties agree that in determining whether APR is entitled to interlocutory injunctive relief, the test to be applied is that established by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385.

[14] That is, the Court must consider three questions:

1) Whether APR has established that there is a serious issue to be tried in the underlying application for judicial review;

2) Whether irreparable harm will result if the injunction is not granted; and

3) Whether the balance of convenience favours the granting of the injunction.

[15] The *RJR-MacDonald* test is conjunctive, with the result that an applicant must satisfy all three elements of the test in order to be entitled to relief: *Janssen Inc. v. Abbvie Corp.*, 2014 FCA 112, 120 C.P.R. (4th) 385 at para. 14.

4. Has APR Raised a Serious Issue?

[16] The threshold for establishing the existence of a serious issue to be tried is usually a low one, and applicants need only establish that the underlying application is neither frivolous nor vexatious. A prolonged examination of the merits of the application is generally neither necessary nor desirable: *RJR-MacDonald*, above at 335, 337-338.

[17] With this low threshold in mind, I will assume that APR has satisfied the serious issue component of the injunctive test to the extent that it seeks to enjoin members of the CTA from dealing with passenger complaints on the basis that a reasonable apprehension of bias exists on their part. However, as will be explained further on in these reasons, I am not persuaded that APR has satisfied the irreparable harm component of the injunctive test in this regard.

[18] However, APR also seeks mandatory orders compelling the CTA to remove the two statements from its website and directing it to "clarify any misconceptions for passengers who previously contacted the Agency regarding refunds arising from COVID-19, and key stakeholders of the travel industry". It further seeks a mandatory order requiring that the CTA bring this Court's order and the removal or clarification of the CTA's previous statements to the attention of airlines and a travel association.

[19] A higher threshold must be met to establish a serious issue where a mandatory interlocutory injunction is sought compelling a respondent to take action prior to the determination of the underlying application on its merits. In such cases, the appropriate inquiry is whether the party seeking the injunction has established a strong *prima facie* case: ***R. v.*** ***Canadian Broadcasting Corp.***, 2018 SCC 5, [2018] 1 S.C.R. 196 at para. 15. That is, I must be satisfied upon a preliminary review of the case that there is a strong likelihood that APR will be ultimately successful in its application: *C.B.C.*, above at para. 17.

[20] As will be explained below, I am not persuaded that APR has established a strong *prima facie* case here as the administrative action being challenged in its application for judicial review is not amenable to judicial review.

[21] APR concedes that the statements on the CTA website do not reflect decisions, determinations, orders or legally-binding rulings on the part of the Agency. It notes, however, that subsection 18.1(1) of the *Federal Courts Act* does not limit the availability of judicial review to formal decisions or orders, stating rather that applications may be brought "by anyone directly affected by the matter in respect of which relief is sought" [my emphasis].

[22] Not every administrative action gives rise to a right to judicial review. No right of review arises where the conduct in issue does not affect rights, impose legal obligations, or cause prejudicial effects: *Democracy Watch v. Canada (Attorney General)*, 2020 FCA 69, [2020] F.C.J. No. 498 at para. 19. See also *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153, [2019] 2 F.C.R. No. 3, leave to appeal to SCC refused 38379 (2 May 2019); *Democracy Watch v. Canada (Conflict of Interest and Ethics Commissioner)*, 2009 FCA 15, 86 Admin. L.R. (4th) 149.

[23] For example, information bulletins and non-binding opinions contained in advance tax rulings have been found not to affect rights, impose legal obligations, or cause prejudicial effects: see, for example, *Air Canada v. Toronto Port Authority at al*., 2011 FCA 347, 426 N.R. 131; *Rothmans, Benson & Hedges Inc. v. Minister of National Revenue*, [1998] 2 C.T.C. 176, 148 F.T.R. 3. It is noteworthy that in its Notice of Application, APR itself states the CTA's

statements "purport[t] to provide an unsolicited advance ruling" as to how the CTA will deal with passenger complaints about refunds for pandemic-related flight cancellations.

[24] I will return to the issue of the impact of the CTA's statements on APR in the context of my discussion of irreparable harm, but suffice it to say at this juncture that there is no suggestion that APR is itself directly affected by the statements in issue. The statements on the CTA website also do not determine the right of airline passengers to refunds where their flights have been cancelled by airlines for pandemic-related reasons.

[25] Noting the current extraordinary circumstances, the statements simply suggest that having airlines provide affected passengers with vouchers or credits for future travel "could be" an appropriate approach in the present context, as long as these vouchers or credits do not expire in an unreasonably short period of time. This should be contrasted with the situation that confronted the Federal Court in *Larny Holdings Ltd. v. Canada (Minister of Health)*, 2002 FCT 750, relied on by APR, where the statement in issue included a clear statement of how, in the respondent's view, the law was to be interpreted and the statement in issue was intended to be coercive in nature.

[26] As a general principle, CTA policy documents are not binding on it as a matter of law: *Canadian Pacific Railway Company v. Cambridge (City)*, 2019 FCA 254, 311 A.C.W.S. (3d) 416 at para. 5. Moreover, in this case the Statement on Vouchers specifically states that "any specific situation brought before the Agency will be examined on its merits". It thus remains open to affected passengers to file complaints with the CTA (which will be dealt with once the

current suspension of dispute resolution services has ended) if they are not satisfied with a travel voucher, and to pursue their remedies in this Court if they are not satisfied with the Agency's decisions.

[27] It thus cannot be said that the impugned statements affect rights, impose legal obligations, or cause prejudicial effects on either APR or airline passengers. While this finding is sufficient to dispose of APR's motion for mandatory relief, as will be explained below, I am also not persuaded that it has satisfied the irreparable harm component of the test.

5. Irreparable Harm

[28] A party seeking interlocutory injunctive relief must demonstrate with clear and non-speculative evidence that it will suffer irreparable harm between now and the time that the underlying application for judicial review is finally disposed of.

[29] APR has not argued that it will itself suffer irreparable harm if the injunction is not granted. It relies instead on the harm that it says will befall Canadian airline passengers whose flights have been cancelled for pandemic-related reasons. However, while APR appears to be pursuing this matter as a public interest litigant, it has not yet sought or been granted public interest standing.

[30] As a general rule, only harm suffered by the party seeking the injunction will qualify under this branch of the test: *RJR-MacDonald*, above at 341; *Manitoba (Attorney General) v.*

Metropolitan Stores Ltd., [1987] 1 S.C.R. 110, 38 D.L.R. (4th) 321 at 128. There is a limited exception to this principle in that the interests of those individuals dependent on a registered charity may also be considered under this branch of the test: *Glooscap Heritage Society v. Minister of National Revenue*, 2012 FCA 255, 440 N.R. 232 at paras. 33-34; *Holy Alpha and Omega Church of Toronto v. Attorney General of Canada*, 2009 FCA 265, [2010] 1 C.T.C. 161 at para. 17. While APR is a not-for-profit corporation, there is no suggestion that it is a registered charity.

[31] I am also not persuaded that irreparable harm has been established, even if potential harm to Canadian airline passengers is considered.

[32] Insofar as APR seeks to enjoin the CTA from dealing with passenger complaints, it asserts that the statements in issue were published contrary to the CTA's own *Code of Conduct*. This prohibits members from publicly expressing opinions on potential cases or issues relating to the work of the Agency that may create a reasonable apprehension of bias on the part of the member. According to APR, the two statements at issue here create a reasonable apprehension of bias on the part of the CTA's members such that they will be unable to provide complainants with a fair hearing.

[33] Bias is an attitude of mind that is unique to an individual. As a result, an allegation of bias must be directed against a specific individual who is alleged to be unable to bring an impartial mind to bear on a matter: *E.A. Manning Ltd. v. Ontario Securities Commission*, 23 O.R.

(3d) 257, 32 Admin. L.R. (2d) 1 (C.A.), citing *Bennett v. British Columbia (Securities Commission)* (1992), 69 B.C.L.R. (2d) 171, 94 D.L.R. (4th) 339 (C.A.).

[34] As is the case with many administrative bodies, the CTA carries out both regulatory and adjudicative functions. It resolves specific commercial and consumer transportation-related disputes and acts as an industry regulator issuing permits and licences to transportation providers. The CTA also provides the transportation industry and the travelling public with non-binding guidance with respect to the rights and obligations of transportation service providers and consumers.

[35] There is no evidence before me that the members of the CTA were involved in the formulation of the statements at issue here, or that they have endorsed them. Courts have, moreover, rejected the notion that a "corporate taint" can arise based on statements by non-adjudicator members of multi-function organizations: *Zündel v. Citron*, [2000] 4 FC 225,189 D.L.R. (4th) 131 at para. 49 (C.A.); *E.A. Manning Ltd.*, above at para. 24.

[36] Even if it subsequently turns out that CTA members were in fact involved in the formulation of the statements, APR's argument could be advanced in the context of an actual passenger complaint and any bias concerns could be addressed in that context. Relief could then be sought in this Court if the complainant is not persuaded that they have received a fair hearing. The alleged harm is thus not irreparable.

[37] APR also asserts that passengers are being misled by the travel industry as to the import of the CTA's statements, and that airlines, travel insurers and others are citing the statements as a basis to deny reimbursement to passengers whose flights have been cancelled for pandemic-related reasons. If third parties are misrepresenting what the CTA has stated, recourse is available against those third parties and the alleged harm is thus not irreparable.

6. Balance of Convenience

[38] In light of the foregoing, it is unnecessary to deal with the question of the balance of convenience.

7. Other Matters

[39] Because it says that APR's application for judicial review does not relate to a matter that is amenable to judicial review, the CTA argues in its memorandum of fact and law that the application should be dismissed. There is, however, no motion currently before this Court seeking such relief, and any such motion would, in any event, have to be decided by a panel of judges, rather than a single judge. Consequently, I decline to make the order sought.

[40] APR asks that it be permitted to make submissions on the issue of costs once the Court has dealt with the merits of its motion. APR shall have 10 days in which to file submissions in writing in relation to the question of costs, which submissions shall not exceed five pages in length. The CTA shall have 10 days in which to respond with submissions that do not exceed

five pages, and APR shall have a further five days in which to reply with submissions that do not exceed three pages in length.

"Anne L. Mactavish"
J.A.

1511

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-102-20
STYLE OF CAUSE:	AIR PASSENGERS RIGHTS v. CANADIAN TRANSPORTATION AGENCY

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	MACTAVISH J.A.
DATED:	MAY 22, 2020

WRITTEN REPRESENTATIONS BY:

Simon Lin	FOR THE APPLICANT
Allan Matte	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Evolink Law Group Burnaby, British Columbia	FOR THE APPLICANT
Legal Services Directorate Canadian Transportation Agency Gatineau, Quebec	FOR THE RESPONDENT

Federal Court of Appeal | Cour d'appel fédérale

Date: 20210604

Docket: A-102-20

Citation: 2021 FCA 112

Present: **GLEASON J.A.**

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

and

THE ATTORNEY GENERAL OF CANADA

Respondent

REASONS FOR ORDER

GLEASON J.A.

[1] The Court has before it a motion made by the applicant under Rules 369, 318(4), and in the alternative, under Rule 41 of the *Federal Courts Rules*, SOR/98-106, seeking disclosure of documents in the possession, control or power of the Canadian Transportation Agency that relate to statements the Agency made on its website in March 2020. This motion for disclosure has been brought in the context of a pending application for judicial review in which the applicant seeks to challenge the Agency's statements, alleging they are non-binding, violate the Agency's

Code of Conduct and mislead passengers as to their rights. The applicant also claims that the statements give rise to a reasonable apprehension of bias, disqualifying Agency members from ruling on any complaint in which a passenger seeks reimbursement for flights cancelled in relation to the COVID-19 pandemic.

[2] In its response to the disclosure request, the Agency filed detailed submissions, resisting the requested disclosure and setting out its intended position on the various issues that arise in the application, including in respect of the applicant's bias allegations.

[3] On February 19, 2021, this Court issued a Direction, requesting submissions from the parties on whether the Attorney General of Canada should be substituted as the respondent. The Direction noted that this application is not an appeal under section 41 of the *Canada Transportation Act*, S.C. 1996, c. 10, but, rather, an application for judicial review under section 28 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 and that, under paragraph 303(1)(*a*) and subsection 303(2) of the *Federal Courts Rules*, it would appear that the Attorney General ought to have been named as the respondent. A copy of the Direction was forwarded to the Attorney General, who, following receipt, filed a Notice of Appearance.

[4] The Court received submissions from the parties and from the Attorney General of Canada on the issue of the appropriate respondent in this application.

[5] The Attorney General takes the position that it should be substituted for the Agency as it would be inappropriate for the Agency to defend its decision or to take a position on the bias allegations and the Attorney General is the proper respondent under the *Federal Courts Rules*.

[6] The Agency takes the opposite position, asserting that, as it has a statutory right to be heard in respect of appeals brought under section 41 of the *Canada Transportation Act*, it should be afforded standing to participate as the respondent to this application. In the alternative, the Agency requests that it be afforded the opportunity to make a motion to intervene in this application if the Attorney General is substituted as the respondent.

[7] The applicant, for its part, takes the position that the Agency is the appropriate respondent, but submits that the Agency should be strictly circumscribed in the types of submissions it may make to avoid taking inappropriately adversarial positions.

[8] I am of the view that the Attorney General of Canada should be substituted for the Agency as the respondent in this application given the nature of the application and the Attorney General's willingness to appear and act as respondent.

[9] It is true that subsection 41(4) of the *Canada Transportation Act* affords the Agency the right to be heard in the context of an appeal from one of its decisions. However, as the parties acknowledge, the present application is not an appeal of an Agency decision, but, rather, is an application under section 28 of the *Federal Courts Act*.

[10] The proper parties to such applications are governed by the *Federal Courts Rules*, which are regulations passed under the *Federal Courts Act*. Rule 303 provides:

Respondents	Défendeurs
303 (1) Subject to subsection (2), an applicant shall name as a respondent every person	303 (1) Sous réserve du paragraphe (2), le demandeur désigne à titre de défendeur :
(a) directly affected by the order sought in the application, other than a tribunal in respect of which the application is brought; or	a) toute personne directement touchée par l'ordonnance recherchée, autre que l'office fédéral visé par la demande;
(b) required to be named as a party under an Act of Parliament pursuant to which the application is brought.	b) toute autre personne qui doit être désignée à titre de partie aux termes de la loi fédérale ou de ses textes d'application qui prévoient ou autorisent la présentation de la demande.
Application for judicial review	Défendeurs — demande de contrôle judiciaire
(2) Where in an application for judicial review there are no persons that can be named under subsection (1), the applicant shall name the Attorney General of Canada as a respondent.	(2) Dans une demande de contrôle judiciaire, si aucun défendeur n'est désigné en application du paragraphe (1), le demandeur désigne le procureur général du Canada à ce titre.
Substitution for Attorney General	Remplaçant du procureur général
(3) On a motion by the Attorney General of Canada, where the Court is satisfied that the Attorney General is unable or unwilling to act as a respondent after having been named under subsection (2), the Court may substitute another person or body, including the tribunal in respect of which the application is made, as a respondent in the place of the Attorney General of Canada.	(3) La Cour peut, sur requête du procureur général du Canada, si elle est convaincue que celui-ci est incapable d'agir à titre de défendeur ou n'est pas disposé à le faire après avoir été ainsi désigné conformément au paragraphe (2), désigner en remplacement une autre personne ou entité, y compris l'office fédéral visé par la demande.

[11] By virtue of paragraph 303(1)(*a*), it is clear that the Agency should not be named as the respondent. Moreover, as the Attorney General has indicated that he is willing to appear and act as the respondent, there is no basis to substitute any other party as the respondent.

[12] Contrary to what the applicant asserts, it is not necessary to name the Agency to ensure that any order is effective. Judicial review applications proceed regularly before this Court and the Federal Court, with the named respondent being the Attorney General, and the Courts' judgments are effective against the tribunals whose decisions are being reviewed: see for example *Adebogun v. Canada (Attorney General)*, 2017 FCA 242, 2017 CarswellNat 7140 at paras 9, 13-14, *Canada (Attorney General) v. Galderma Canada Inc.*, 2019 FCA 196, 2019 CarswellNat 3012 at paras 1-2, 8, 24, 75, *Bissessar v. Canada (Attorney General)*, 2019 FCA 305, 2019 CarswellNat 7639 at paras 20-24, 29-30.

[13] While the foregoing is sufficient to dispose of this issue, I also note that it is likely more appropriate that submissions on the merits of the issues that arise in this application – and most notably in respect of the bias issue – be made by the Attorney General and not the Agency. In this regard, a tribunal should refrain from embarking into the merits of a decision in such a way as to call into question its impartiality (see, for example, *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44, [2015] 3 S.C.R. 147 at paras 50 and 71, *Canada (Attorney General) v. Quadrini*, 2010 FCA 246, [2012] 2 F.C.R. 3 at para 16, *Northwestern Utilities Ltd. and al. v. Edmonton*, [1979] 1 S.C.R. 684, 89 D.L.R. (3d) 161 at 709-710, *Canadian Pacific Railway Company v. Canada (Transportation Agency)*, 2021 FCA 69, 2021 CarswellNat 1402 at paras 102-103).

[14] Thus, the Attorney General will be substituted as the respondent in this application.

[15] If the Attorney General wishes to make additional submissions in response to those of the applicant on the disclosure issue, including in respect of the applicant's informal motion of May 12, 2021 to add additional materials in support of the disclosure motion, the Attorney General may do so within 30 days of the date of these Reasons. The applicant shall have 15 days to file responding submissions, if it wishes. The informal motion to add additional materials and the disclosure motion shall then be returned to the undersigned, for disposition.

[16] If it still wishes to do so, the Agency may bring a motion, seeking leave to intervene in this application. Should such motion be made, the Agency's materials should demonstrate how its proposed intervention will meet the test for intervention under Rule 109 of the *Federal Courts Rules* and should be mindful of the appropriate scope of tribunal submissions.

"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. ATTORNEY GENERAL OF CANADA

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	GLEASON J.A.
DATED:	JUNE 4, 2021

WRITTEN REPRESENTATIONS BY:

Simon Lin	COUNSEL FOR THE APPLICANT
J. Sanderson Graham	COUNSEL FOR THE RESPONDENT
Allan Matte	COUNSEL FOR THE CANADIAN TRANSPORTATION AGENCY

SOLICITORS OF RECORD:

Evolink Law Group Burnaby, British Columbia	FOR THE APPLICANT
Nathalie G. Drouin Deputy Attorney General of Canada	FOR THE RESPONDENT
Legal Services Directorate Canadian Transportation Agency Gatineau, Quebec	FOR THE CANADIAN TRANSPORTATION AGENCY

Federal Court of Appeal | 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.

Federal Court of Appeal | 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

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

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Legal Services Directorate Canadian Transportation Agency Gatineau, Quebec	FOR THE CANADIAN TRANSPORTATION AGENCY

1993 CarswellOnt 150
Ontario Court of Justice (General Division) [Commercial List]

Ainsley Financial Corp. v. Ontario (Securities Commission)

1993 CarswellOnt 150, [1993] O.J. No. 1830, 106 D.L.R. (4th) 507, 10 B.L.R. (2d) 173, 14 O.R. (3d) 280, 16 O.S.C.B. 4077, 17 Admin. L.R. (2d) 281, 1 C.C.L.S. 1, 42 A.C.W.S. (3d) 165

AINSLEY FINANCIAL CORPORATION, ARLINGTON SECURITIES INC., BREGMAN SECURITIES CORP., E.A. MANNING LTD., GLENDALE SECURITIES INC., GORDON-DALY GRENADIER SECURITIES, MARCHMENT & MCKAY LIMITED, NORWICH SECURITIES LTD., and OXBRIDGE SECURITIES INC. v. ONTARIO SECURITIES COMMISSION and DONALD PAGE

R.A. Blair J.

Judgment: August 13, 1993
Docket: Docs. B46/93, 92-CQ-26469

Counsel: *Bryan Finlay, Q.C.*, *J. Gregory Richards* and *Philip Anisman*, for plaintiffs.
John I. Laskin and *James Doris*, for defendants.

Subject: Securities; Corporate and Commercial; Public

Application for summary judgment.

***R.A. Blair J.*:**

I — Overview

1 These proceedings bring into contention the validity of a policy statement issued by the Ontario Securities Commission and the jurisdiction of the O.S.C. to promulgate such policy statements.

2 O.S.C. Policy Statement 1.10, with which the Commission expects securities dealers to comply, contains very detailed and embracive measures regarding the trading of speculative penny stocks. Trading in such stocks comprises the predominant portion of the plaintiffs' business. They say that Policy 1.10 will drive them out of business and is designed to do just that.

3 The plaintiffs submit that the policy is invalid. As a result, they ask on this motion for:

(1) an order for summary judgment in the form of a declaration that the Commission is without jurisdiction to issue the policy statement; or, in the alternative,

(2) an interlocutory injunction restraining the Commission from requiring any of the plaintiffs to adhere to the policy pending the trial of the action.

4 In the action the plaintiffs seek declaratory and related relief, and damages. They submit:

(a) that the policy is invalid because the Commission has no jurisdiction to issue it; and, in the alternative,

(b) that the policy is invalid because: (i) it fetters the Commission's discretion; (ii) it was adopted for an improper purpose; (iii) it is unreasonable in that it lacks a sufficient evidentiary basis, is unworkable, uncertain and arbitrary; (iv) it was issued in bad faith; (v) it is discriminatory; and, (vi) it is prohibitive in its effect.

II — Facts

5

Securities Dealers

6 The plaintiffs are registered as securities dealers under the Ontario *Securities Act*, R.S.O. 1990, c. S.5 (the "Act").

7 A "securities dealer" is a category of registrant under s. 98(9) of the Regulation made under the Act (R.R.O. 1990, Reg. 1015, as amended). Securities dealers are persons or companies that are registered for trading in securities and that engage in the business of trading in securities in the capacity of agent or principal, but who do not come within another category in s.98 of the Regulation. The securities dealer category does not include "brokers", who are members of the Toronto Stock Exchange ("TSE") or "investment dealers", who are members of the Investment Dealers Association of Canada ("IDA"). The registration and examination requirements for securities dealers are the same as those for members of the TSE and the IDA, and securities dealers are entitled to the same trading rights as members of those organizations.

8 There is, however, no statutory or regulatory requirement that securities dealers be members of a self-regulatory organization such as the TSE or IDA. No such organization exists for securities dealers. Thus, they are governed exclusively by the provisions of the Act, the Regulation and the regulatory supervision of the Commission.

9 While there are approximately 64 securities dealers registered in the province, only the plaintiffs (and one other company which is not affected by the policy) are engaged predominantly

in the business of dealing in the trading of penny stocks. Consequently, it is the plain tiffs which are primarily affected by the promulgation of the policy, and, indeed, there seems to be little controversy that it is the activities of the plaintiff securities dealers which the policy is intent upon reaching.

Policy 1.10

10 Policy Statement 1.10, entitled "Marketing and Sale of Penny Stocks", was issued in its final form on March 25, 1993, to come into effect on June 1, 1993. The Commission has agreed to hold the policy in abeyance pending the release of this decision.

Purpose of the Policy

11 Policy 1.10 was developed by the Commission as result of a growing concern over the employment of high pressure and unfair sales practices by securities dealers on a widespread basis in connection with the marketing and trading of low cost, highly speculative penny stocks in the over-the-counter market. The policy is designed to redress the abuses perceived by the Commission in this respect.

12 The purpose of the policy is stated at some length in the body of the text. I set out that statement of purpose in full, because it is of some importance. The policy asserts:

> **Purpose of this Policy**
>
> The Act and the regulations under the Act (the "Regulations") require, among other things, that registrants "know their clients" and deal "fairly, honestly and in good faith" with their customers and clients. The Commission is concerned that securities dealers engaged in unfair sales practices like those mentioned above are not complying with these obligations and are recommending investments in penny stocks that are highly speculative and often are not appropriate for an investor given his/her personal circumstances, investment experience, investment objectives and financial means. The Commission is also concerned that, as a result of the sales practices employed, investors often purchase penny stocks unaware of the risks involved and without adequate consideration being given to the suitability of the purchase. Losses of a significant portion of an investment in penny stocks are common. The Commission has concluded that these sales practices have a significant adverse impact on the fairness and integrity of the capital markets in Ontario.
>
> The Commission is issuing this Policy as a guide to identify what the Commission believes are appropriate business practices to assist securities dealers and their employees in satisfying their obligations under the Act in connection with the marketing and sale of penny stocks. This Policy is intended to inform interested parties that the Commission will be guided by this Policy in exercising its public interest jurisdiction under subsection 27(1) of the Act and

its general public interest jurisdiction to protect investors and promote and maintain fair, equitable and efficient capital markets in Ontario.

The Commission believes that the business practices set out in this Policy should be adopted by securities dealers when selling penny stocks. The Commission believes that such practices are in the public interest to promote and maintain fair, equitable and efficient capital markets in Ontario and to protect investors from high pressure and other unfair sales practices employed in the marketing and sale of penny stocks and that these business practices are consistent with the duty of securities dealers and their officers, partners, salespersons and directors to deal fairly, honestly and in good faith with their customers and clients. Subsection 27(1) of the Act provides that the Commission, after giving a registrant an opportunity to be heard, may suspend, cancel, restrict or impose terms and conditions upon the registration of or reprimand a registrant where in its opinion such action is in the public interest. In determining whether any failure to comply with this Policy constitutes grounds for the Commission taking action under subsection 27(1) of the Act or any other section of the Act, the Commission will continue to consider the particular facts and circumstances of each case.

This policy is not intended to restrict unduly legitimate investment opportunities in the penny stock market or capital formation for small businesses but merely to regulate the high pressure and other unfair sales practices often employed in the marketing and sale of penny stocks. The Commission believes that this Policy will carry out its purposes without unduly inhibiting legitimate investment opportunities in the penny stock market or capital formation for small businesses.

13 In a section entitled "Appropriate Business Practices", the policy states:

The Commission has concluded that it is in the public interest that the business practices identified in this Policy be adopted by securities dealers in connection with the marketing and sale of penny stocks.

14 The operative portions of Policy 1.10 call for the following, in furtherance of this conclusion and the objectives of the policy:

(1) *the furnishing of a Risk Disclosure Statement* to the client — in Form 1, attached to the policy — together with a sufficient explanation of its contents to the client that the client understands he or she is purchasing a penny stock and is aware of and willing to assume the risks associated with such an investment; and, before any order to purchase a penny stock can be accepted,

(2) *the provision of a Suitability Statement* in Form 2 (also attached to the policy) to the client, completed and signed by the salesperson, together with an explanation of its contents; and

(3) *the return of the Suitability Statement, signed by the client*, to the securities dealer; *and thereafter*,

(4) *an agreement between the client and the securities dealer* with respect to the price of the penny stock to be purchased.

15 *In addition*, Policy 1.10 provides,

(5) that the securities dealer is to disclose to the client in advance of the trade that it is acting as principal or as agent for another securities dealer acting as principal on the transaction where that is so; *and*,

(6) that the securities dealer is to disclose "the nature and amount of all compensation payable to the securities dealer, its salespersons, employees, agents and associates or any other person", including mark-ups, bonuses and commissions.

16 Only one risk disclosure statement is called for — "prior to effecting the first transaction in a penny stock with a client" — and a suitability statement "need not" be provided to or executed by a client after two transactions in penny stocks and the client's election not to have any further suitability statements provided.

Risk Disclosure Statement

17 Form 1, the Risk Disclosure Statement, is essentially a warning to those contemplating an investment in penny stocks, a "red flag", as it were. It states in bold block capitals that "THERE ARE SIGNIFICANT RISKS ASSOCIATED WITH INVESTING IN PENNY STOCKS", and explains under seven different headings the various ways and areas in which this is so, concluding with the bolded admonition in upper case letters:

Remember

IF YOU CANNOT AFFORD TO LOSE YOUR INVESTMENT YOU SHOULD NOT BE INVESTING IN PENNY STOCKS

Suitability Statement

18 Form 2, the Suitability Statement, is more complex and a greater source of concern and object of attack by the plaintiffs. Part A consists of a Client Information section to be completed by the salesperson. Part B is a Suitability Recommendation, also to be completed and signed by the salesperson, to the effect that the investment is suitable for and recommended to the client. Part C, entitled "Dealer Compensation", contains information for the client as to whether the dealer is acting as agent/principal and as to the details of all compensation or remuneration to be received.

Finally, Part D, to be completed and signed by the client, is the Client Acknowledgement stating that the client,

> a) has received a copy of the penny stock risk disclosure statement;
>
> b) has reviewed the client information set out and that it is accurate;
>
> c) has reviewed the suitability recommendation and dealer compensation set out and agrees to purchase the stock in question "subject to agreement with respect to the price of [the securities]".

Exemptions

19 Policy 1.10 is to apply to all trades in penny stocks (as defined under the policy) conducted by securities dealers who are not members of the TSE or the IDA. There are some other exemptions, but they are not relevant. The Commission reserves to itself the right to determine, on what appears to be a transaction by transaction basis, that the practices need not be adopted.

20 The rationale for the exemption of members of the TSE and the IDA from the provisions of the policy is that they are members of self-regulatory organizations, whereas the plaintiffs are not. Accordingly, the plaintiffs are not subject to the wide array of compliance, investigation, enforcement, disciplinary and other rules, regulations, policies and by-laws of such self-regulatory organizations.

21 The plaintiffs submit, on the other hand, that members of the TSE and IDA compete with them in the sale of penny stocks. They argue that the policy is targeted at them, the plaintiffs, for the purpose of putting them out of business or, at least, of driving them into the arms of the TSE or the IDA. Indeed, one of their group, A.C. MacPherson, is not a plaintiff because it has already made application to become a member of the IDA. In support of this contention, the plaintiffs point to the acknowledgement of the Commission itself that such an eventuality is likely. The Commission's minutes of November 19, 1991 reflect that staff was instructed to obtain an outside legal opinion on the *Charter* implications "of an approach which would have a disproportionate adverse impact upon a particular segment of the industry." In addition, the Commission minutes of July 14, 1992, noted "that the Policy could be expected to prompt broker-dealers to apply to become members of the TSE and the IDA."

Review of the Penny Stock Industry by the Commission

22 The Commission argues that Policy 1.10 is a reasonable response to a continuing incidence of investor complaints and mounting evidence of abusive and unfair sales practices employed by securities dealers. Staff and the Commission conducted a comprehensive review of the penny stock industry in Ontario. This examination included, amongst other things,

a) a review of recent Court and Commission decisions involving abusive or unfair practices in the sale of penny stocks by securities dealers;

b) a systematic review of investor complaints;

c) interviews of investors who had lodged complaints, and of registered salespersons formerly employed by securities dealers;

d) a study of the regulatory response in the United States to abusive sales practices in the penny stock industry, including meetings with officials of the S.E.C. and including an examination of the provisions of the U.S. *Penny Stock Act* enacted by Congress and the U.S. Penny Stock Rules arising thereunder; and,

e) meetings with representatives of various groups in the securities industry.

23 With the completion of this review, the Commission was satisfied that it had found cogent evidence of abusive and unfair sales practices in the marketing of penny stocks, and in addition, I think it is fair to say, had concluded that these abuses were centered in the prac tices of the plaintiff securities dealers. It set out to remedy the situation for the reasons and in the manner outlined above.

III — Law and Analysis

24

A. Role and Jurisdiction of the O.S.C.

General

25 The Ontario Securities Commission is a creature of statute. Whatever power and authority it has must be derived from that source: see, for example, *R. v. Greenbaum*, [1993] 1 S.C.R. 674 at pp. 687-689; Wade, *Administrative Law*, 6th ed. (Oxford: Clarendon Press, 1988), at pp. 4-5.

26 As a statutory tribunal, the Commission has no inherent jurisdiction. Under the Ontario *Securities Act*, it has no statutory jurisdiction of a general discretionary nature, nor is there any general "mandating" section of a sweeping nature anywhere in the Act. The Commission has a discretionary jurisdiction, to be sure — and a broad one, at that — but its discretionary powers are to be found in a myriad of specific sections, each delegating to the Commission a particular task in the exercise of its regulatory function in the securities industry.

27 The role of the O.S.C. under the Act, in general terms, is to protect the investing public and to preserve the integrity of the capital markets in Ontario: see, for example, *Gordon Capital Corp. v. Ontario (Securities Commission)* (1991), 1 Admin. L.R. (2d) 199, at p. 208 (Div. Ct.,

per Craig J.). In *W.D. Latimer Co. v. Ontario (Attorney General)* (1973), 2 O.R. (2d) 391 at 393 (Div. Ct.), aff'd (1974), 6 O.R. (2d) 129 (C.A.), Wright J. (in the Divisional Court) described the Commission's mandate as follows:

> The Commission exists by virtue of the *Securities Act*, as amended by 1971, Vol. 2, c. 31. It can be said generally that it is the public agency charged by that statute with specific duties in relation to securities offered to or traded by the public in Ontario. The statute and the Regulations made under it give wide and strong powers of registration, administration, regulation, and investigation to the Commission with regard to securities, stock exchanges, dealers, salesmen, underwriters, promoters, advisers, offerings to the public, take-over bids, company practice, insider trading, financial disclosure and like matters.
>
> I propose to set out the provisions of the *Securities Act* which particularly concern the actions of the Commission here before us. *Before doing so I should state my conclusion from all the terms of that Act that the Commission has been given very wide powers and immunities and very heavy responsibilities and very broad discre tions to control those who seek the money of members of the public for securities or who deal in or are concerned with them. The Securities Act and the Commission are to protect the investing public in Ontario from grave and pressing perils clearly apprehended by the Legislature and calling for potent and unorthodox measures of control and protection*. (emphasis added)

28 These statements, and judicial pronouncements in a host of other decisions, make it abundantly clear that within its discretionary bounds the Commission and its decisions are to be accorded great curial deference. The exercise of its discretionary authority will not be interfered with unless it has been wielded in a fashion which fetters the application of the discretion, and provided it has been exercised in good faith, with an obvious and honest concern for the public interest and with evidence to support its opinion: *C.T.C. Dealer Holdings Ltd. v. Ontario (Securities Commission)* (1987), 37 D.L.R. (4th) 94, at pp. 110-113.

29 The special regulatory character of securities commissions and their paramount obligation to protect the public was commented upon by the Supreme Court of Canada in *Brosseau v. Albert (Securities Commission)* (1989), 57 D.L.R. (4th) 458, where L'Heureux-Dubé J. said, at p. 467:

> Securities Acts in general can be said to be aimed at regulating the market and protecting the general public. This role was recognized by this court in *Gregory & Co. Inc. v. Quebec Securities Com'n* (1961), 28 D.L.R. (2d) 721 at p. 725, [1961] S.C.R. 584 at p. 588, where Fauteux J. observed:
>
> > The paramount object of the Act is to ensure that persons who, in the province, carry on the business of trading in securities or acting as investment counsel, shall be honest and of good repute and, in this way, to protect the public, in the Province or elsewhere,

> from being defrauded as a result of certain activities initiated in the Province by persons therein carrying on such a business.
>
> This protective role, common to all securities commissions, gives a special character to such bodies which must be recognized when assessing the way in which their functions are carried out under their Acts.

30 To attract such judicial deference and to be insusceptible of attack in the courts, however, the Commission must be exercising a public interest discretion entrusted to it by the Act or the regulations. It must be acting within the scope of its statutory mandate. The question for determination in this case is whether it is doing so in the promulgation of Policy 1.10.

31 I have concluded that it is not.

32 Policy 1.10 states that it "is intended to inform interested parties that the Commission will be guided by [the] Policy in exercising its public interest jurisdiction under subsection 27(1) of the Act and its general public interest jurisdiction to protect investors and promote and maintain fair, equitable and efficient capital markets in Ontario". These two sources would appear to be the jurisdictional underpinnings relied upon by the Commission in support of its authority to issue the policy, although in argument Mr. Laskin stated, on behalf of the Commission, that the Commission did not seek to rely upon s. 27(1) for that purpose.

33 In my opinion, the jurisdictional foundation for Policy 1.10 cannot be erected on either footing. The public interest jurisdiction of the Commission under section 27(1) of the Act does not support the promulgation of what is, in effect and by its own language, a regulation. The general public interest jurisdiction on which the Commission purportedly relied does not exist.

Is There a Need for the Policy?

34 Before pursuing this jurisdictional inquiry further, I pause to make the following, perhaps extraneous, observation. In concluding, as I have, that the Commission has exceeded its jurisdiction in issuing Policy 1.10, I am not meaning to suggest there may be no need for some sort of investor protection such as the measures provided for in it. There may, indeed, be such a need.

35 Much was made by the plaintiffs, in argument, of the nature and perceived frailties of the "evidence" relied upon by the Commission in making its determination to issue the policy statement and in devising the contents of that policy. I am satisfied, however, that the information which the Commission had before it, in its various forms, amply justified its concern and was adequate for the Commission's purposes in triggering the Commission's desire to act.

36 What is at issue here is not whether what the Commission proposes to do by way of Policy 1.10 is, or is not, a good idea. The issue is whether it has the jurisdiction to do what it purports to have done.

Does the O.S.C. Possess a General Public Interest Jurisdiction?

37 In arriving at my determination that the Commission has no general jurisdiction to regulate the securities industry in the public interest, I have considered carefully the various provisions of the *Securities Act* and the regulations made thereunder.

38 In a number of specific instances, in addition to s. 27(1), the Legislature has delegated to the Commission a discretion to act in the public interest. For example, the Commission may grant exemptions from prospectus requirements and from the requirements of Part XX dealing with take-over and issuer bids "where it is satisfied that to do so would not be prejudicial to the public interest" (ss. 74 and 104(2)(*c*)). It may order that the continued distribution of securities under a prospectus cease (s. 70) or that trading in a security cease (s. 127), each on a public interest basis. Finally, the Commission has the important power to order that various exemptions granted under the Act do not apply (s. 128) where, in its opinion, it is in the public interest to do so.

39 None of these provisions can support the jurisdiction to promulgate Policy 1.10, however.

40 There is nothing in the Act or the regulations which delegates to the Commission a general jurisdiction to regulate the securities industries in the public interest. Nor is there even a broad-sweeping mandating section of the sort found, for example, in the Quebec counterpart to Ontario's legislation.

41 In Quebec, section 276 of the Quebec *Securities Act*, R.S.Q., c. V-1.1, declares:

> *276.* ...
>
> The function of the [Quebec Securities] Commission is
>
> (1) to promote efficiency in the securities market;
>
> (2) to protect investors against unfair, improper or fraudulent practices;
>
> (3) *to regulate the information that must be disclosed to security holders and to the public in respect of persons engaged in the distribution of securities and of the securities issued by these persons;* (emphasis added)
>
> (4) to define a framework for the professional activities of persons dealing in securities, for associations of such persons and for bodies entrusted with supervising the securities market.

42 In addition, s. 274 of the Quebec statute permits the Quebec Securities Commission to draw up policy statements defining the requirements following from the application of s. 276, within its discretionary powers.

43 Nor does the O.S.C. possess the rule-making power entrusted by Congress to its U.S. counterpart, the S.E.C.

44 Section 5(1) of the *Broadcasting Act*, S.C. 1991, Chap. 11, which provides that the Canadian Radio & Television Commission "shall regulate and supervise all aspects of the Canadian broadcasting system with a view to implementing the broadcasting policy set out in section 3(1) ...", is an example of an open-ended mandating provi sion of the sort which the Ontario *Securities Act* does not contain. It was in the context of this wide mandate under the old *Broadcasting Act* that the Supreme Court of Canada upheld a CRTC policy statement in *Capital Cities Communications Inc. v. Canada (Canadian Radio-Television & Telecommunications Commission)*, [1978] 2 S.C.R. 141.

45 In *Capital Cities Communications*, the appellants alleged an excess of jurisdiction because the CRTC's decision which was under attack had been based on a policy statement and not on law or regulation. Chief Justice Laskin framed the question for the Court in this fashion, at p. 170:

> The issue that arises therefore is whether the [CRTC] or its Executive Committee acting under its licensing authority, is entitled to exercise that authority by reference to policy statements or whether it is limited in the way it deals with licence applications or with applications to amend licenses to conformity with regulations. I have no doubt that if regulations are in force which relate to the licensing function they would have to be followed even if there were policy statements that were at odds with the regulations. The regulations would prevail against any policy statements. However, absent any regulations, is the Commission obliged to act only *ad hoc* in respect of any application for a licence or an amendment thereto, and is it precluded from announcing policies upon which it may act when considering any such applications?

46 The Chief Justice answered that question in the negative as follows (at p. 171):

> In my opinion, *having regard to the embracive objects committed to the Commission under s. 15 of the Act* [now s. 5(1)], objects which extend to the supervision of "all aspect of the Canadian broadcasting system with a view to implementing the broadcasting policy enunciated in section 3 of the Act", it was eminently proper that it lay down *guidelines* from time to time as it did in respect of cable television. The guidelines on this matter were arrived at after extensive hearings at which interested parties were present and made submissions. An overall policy is demanded in the interests of prospective licensees and of the public under such a regulatory regime as is set up by the *Broadcasting Act*. Although one could mature as a result of a succession of applications, there is merit in having it known in advance. (emphasis added)

47 The Commission relies heavily on this authority in support of its position that it possesses a broad power to implement policy statements in the exercise of a general public interest jurisdiction, even in the absence of a specific provision in its constating legislation, or the regulations

thereunder, to that effect. There are a number of distinguishing features between the two situations, however. The first is that the *Securities Act* does not contain any broad mandating section like s. 5 of the *Broadcasting Act*, as I have already noted. The second is that Policy 1.10 is not a "guideline", in my view; it is a mandatory requirement of a regulatory nature. The third is that the CRTC policy statement had been arrived at after extensive hearings involving the interested parties, which is not the case here. I do not find, in the *Capital Cities Communications* decision, authority for the proposition that the O.S.C. has the jurisdiction to proclaim policy statements like Policy 1.10 in the absence of specific statutory authority to do so.

Policy 1.10: Its Mandatory and Regulatory Nature

48 In spite of the efforts of the Commission to cast Policy 1.10 in the light of a mere guideline, the policy is mandatory and regulatory in nature, in my view. Its language, the practical effect of failing to comply with its tenets, and the evidence with respect to the expectations of the Commission and staff regarding its implementation, all confirm this.

49 The policy is not simply, as it purports to be, "a guide to identify what the Commission believes are appropriate business practices to assist securities dealers and their employees in satisfying their obligations under the *Act* in connection with the sale of penny stocks", focusing in that respect on the use of two forms, namely the risk disclosure statement and the suitability statement. Its effect is to impose a positive obligation upon securities dealers to follow those practices, thus *creating their status* as "appropriate practices". Failure to comply raises the spectre of disciplinary proceedings. The juxtaposition between the statement of the Commission's belief that the business practices set out in the policy should be adopted in the public interest — to be found in the section of the policy entitled "Purpose of the Policy" — and the reference to the draconian powers of the Commission under s. 27(1) of the Act — in the same paragraph — is telling in this respect.

50 This is regulation of the conduct of those engaging in the business of trading in penny stocks. Whatever the desirability of such regulation may be, the O.S.C. simply does not have the statutory mandate to regulate in such a fashion.

51 Very revealing as to the regulatory intention of Policy 1.10 is its wording in the final paragraph of the section outlining the purpose of the policy. I repeat the final paragraph here. It states:

> *This Policy is not intended* to restrict unduly legitimate investment opportunities in the penny stock market or capital formation for small businesses but merely to regulate the high pressure and other unfair sales practices often employed in the marketing and sale of penny stocks. The Commission believes that this Policy will carry out its purposes without unduly inhibiting legitimate investment opportunities in the penny stock market or capital formation for small businesses. (emphasis added)

52 As the notice announcing the issuance of Policy 1.10 on March 25, 1993 states, the policy "contemplates that, except in specified circumstances, a penny stock risk disclosure statement *will be provided* ... and that a written suitability statement *will be obtained* ..." (emphasis added).

53 Both the notice and the policy go on to provide that in certain circumstances the contemplated business practices "need not be adopted", implying, at least, that save for the exceptions, those business practices "need" (i.e., "must") be adopted. Indeed, under the heading "Appropriate Business Practices" the Commission states flatly its conclusion "that it is in the public interest that the business practices identified in this Policy *be adopted* by securities dealers in connection with the marketing and sale of penny stocks." Having enunciated such a position, in what conceivable circumstances could the Commission resile therefrom and conclude "on the particular facts and circumstances of each case" — which it says it will continue to consider — that the failure to comply with such business practices did not contravene the public interest? When I asked counsel for the Commission for an example of such a circumstance, no answer was forthcoming.

54 Confirmation of the mandatory nature of the policy may be found in the approach of the Commission staff towards its implementation. In the staff report to the Commission, prior to the announcement of the policy, the following passage is found:

> We believe that *the key to the success of the Policy* in significantly reducing the unfair sales practices by broker/dealers in the sale of penny stocks *is strict enforcement of its terms and provisions*. The Policy provides a framework for enabling staff of the Commission to verify that broker/dealers are complying with their know-your-client and suitability obligations as well as their obligation to deal fairly, honestly and in good faith with their clients. *In this regard it is recommended that the Compliance Unit conduct regular unannounced spot checks* of the various broker/dealers *to determine that suitability statements are being completed in compliance with the requirements of the Policy*. (emphasis added)

55 To conclude, in view of all of the foregoing, that the effect of Policy 1.10 is not to impose standards and a code of conduct upon the securities dealers affected by it, which are obligatory in nature, would be to ignore the plain language of the document itself and the reality of the regulatory environment in which it is to be implemented.

Section 27(1) and the Public Interest

56 The Commission has very broad powers to discipline and to sanction errant registrants. These are found in section 27 of the Act, which provides as follows:

> **Suspension, cancellation, etc.**

> *27. — (1)* The Commission, after giving a registrant an opportunity to be heard, may suspend, cancel, restrict or impose terms and conditions upon the registration or reprimand the registrant where in its opinion such action is in the public interest.

57 Section 27(1) contains the disciplinary teeth for the Commission's regulatory role under the Act and regulations. It is beyond dispute that the Commission is entitled to particular judicial deference and "a particularly broad latitude in formulating its opinion as to the public interest in matters relating to the activities of registrants ... under subs. [27(1)] of the Act": see, *Gordon Capital Corp. v. Ontario (Securities Commission)*, supra, at pp. 208 and 211. Speaking on behalf of the Divisional Court in that case, Craig J. said (at p. 211):

> There is no definition of the phrase "the public interest" in the Act. It is the function and duty of the OSC to form an opinion, according to the exigencies of the individual cases that come before it, as to the public interest and, in so doing, the OSC is given wide powers of discretion: *Ontario (Securities Commission) v. Mitchell* [[1957] O.W.N. 595], at p. 599.
>
> The scope of the OSC's discretion in defining "the public interest" standard under subs. 26(1) [now s. 27(1)] is limited only by the general purpose of the Act, being the regulation of the securities industry in Ontario, and the broad powers of the OSC thereunder to preserve the integrity of the Ontario capital markets and protect the investing public ...

58 In spite of all of this, however, section 27(1) cannot provide the jurisdictional foundation for a policy statement such as Policy 1.10. It requires a hearing. No hearing was held. Indeed, one of the complaints of the plaintiffs in the action is that they were not consulted in any meaningful way, whereas others who would have been affected by the proposed policy — their competitors, the plaintiffs say, the registered brokers and investment dealers — were consulted (and, as an aftermath of the consultation, exempted from the dictates of the policy).

59 Even if the Commission had purported to hold a hearing under s. 27(1) for purposes of entertaining submissions regarding the promulgation of the policy, the section and the hearing would not sup port the jurisdiction for the policy, in my opinion. The Commission's discretionary jurisdiction under s. 27(1) is grounded in the consideration of specific cases. As Craig J. said in *Gordon Capital*, quoted above: "It is the function and duty of the OSC to form an opinion, *according to the exigencies of the individual cases that come before it*, as to the public interest ..." It is in that context in which the Commission's public interest discretion under this provision of the Act, and the broad latitude and judicial deference which the exercise of that discretion is afforded, must be considered. Section 27(1) does not clothe the Commission with authority to make prospective proclamations of general application for all affected registrants.

60 Policy 1.10 is regulatory in nature. Its effect is to set up what are tantamount to mandatory requirements, as I have outlined above. It contemplates — with the sort of vigorous enforcement

support called for in the staff report referred to earlier — that two specific types of forms "will be" utilized by the affected securities dealers and that certain specific information "must be" provided to investors prior to taking an order for the purchase of penny stocks. Included in the "guide" as to the disclosure of information regarding the securities dealer's compensation are instructions as to how the mark-up aspect of that remuneration is to be calculated.

61 To "regulate" is "to control, govern, or direct by rule or regulations; to subject to guidance or restrictions", and "regulation" is "the act of regulating": *The Shorter Oxford English Dictionary*, 3rd ed., p. 1784. Policy 1.10 is regulation.

62 Even if the policy is not mandatory in its nature, as I have concluded, but simply issued "as a guide" which is "intended to inform interested parties that the Commission will be guided by [it] in exercising its public interest jurisdiction under subsection 27(1) of the Act", it still constitutes regulation, or is tantamount thereto, in my view. In either case it is clear that a failure to meet the "expectations" of the policy will attract disciplinary procedures under the Act, or at least carries with it the threat or intimation of such proceedings. Neither those whose activities in the securities industry are the object of the policy, nor their advisors, are likely to lose sight of the reality of the situation. The mere existence of such a state of affairs is a very effective weapon in the regulator's arsenal, of course.

63 It may be said — as the general section of the O.S.C.'s published collection of policy statements says — that "*O.S.C. Policy Statements do not have the force of law and are not intended to have such effect*". In the case of Policy 1.10, however, its language, its contents and its effect make such a statement meaningless. Moreover, the same section goes on to say — in the same passage as that cited above — that the policy statements "are intended to set forth certain basic policies of the Commission relating to securities regulation in the Province of Ontario and the role of the Commission with respect thereto and accordingly the *Commission expects issuers to comply with the O.S.C. Policy Statements unless compliance is waived*" (emphasis added).

64 The difference between something that is intended to have the force and effect of law, and something that is merely expected to be complied with unless compliance is waived by the agency proclaiming it, is a mystery to me.

65 The securities industry is a highly regulated area of endeavour. Provincial and federal legislation, and regulations made under such legislation, weave an intricate — and very necessary — web of legislative and administrative supervision and control over the industry. Ontario's *Securities Act* occupies about 90 pages of the Carswell compilation. Regulation 910, with forms and amending regulations, occupies 321 pages! Of these, Regulation 910 itself takes up 93 pages and the forms about 185. In short, the securities industry is governed by a carefully balanced blend of legislative edict, regulatory standards, and delegated administrative authority. The division of authority in different ways is not accidental.

66 In an interesting article entitled "The Excessive Use of Policy Statements by Canadian Securities Regulators", published in (1992), 1 Corporate Financing 19, an industry periodical, Professor Jeffrey G. MacIntosh emphasized this dichotomy. At p. 20 he wrote:

> It is vitally important to recognize, however, that the "public interest power" was never intended to be, nor could it logically be construed to be unlimited in nature. Had the legislature intended it to be unlimited, then it need not have troubled itself with the task of devising a *Securities Act*. The Ontario legislature, for example, need only have created the Ontario Securities Commission, ceded to it plenary powers, and instructed it to act "in the public interest". It need not have outlined in great detail precisely that which the Lieutenant Governor in Council can (and, implicitly, that which he cannot) do to add to the statutory rules by way of regulation. That the provincial legislatures have both created legislative law and limits to regulatory powers is not merely accidental.
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> While it is clear that the ability to act remedially "in the public interest" cedes *some* residual discretionary authority to the regulators, *it was obviously the intention of the legislature not to delegate to the Ontario Securities Commission the power to make substantive law of a legislative or regulatory character*. Indeed, had the legislature wished to do so, it could have easily accomplished that objective by giving the OSC rule-making authority like that possessed by the SEC in the United States. However much this might be a good idea, it has not been done. *It is thus impossible to escape the conclusion that policy statements must not be used [to] create substantive legal requirements of a legislative or regulatory character. Any other conclusion would be inconsistent with the Rule of Law*. (emphasis added)

67 I agree with this statement.

68 The Ontario Securities Commission is the regulator of the securities industry, but it is not empowered to make the regulations. That power has been delegated by the Legislature to the Lieutenant Governor in Council by the Act. Under s. 143 of the Act, the Lieutenant Governor in Council is granted the power to make regulations. The subject matter of Policy 1.10 falls directly within several of these regulation-making areas. It deals, for instance, with "the furnishing of information to the public ... by a registrant in connection with securities or trades therein": s. 143, No. 8. It involves regulation of "the trading of securities" in the over-the-counter market (i.e. "other than on a stock exchange recognized by the Commission"): No. 10. It prescribes "documents, ... statements, agreements and other information and the form, content and other particulars relating thereto that are required to be filed, furnished or delivered ..." and prescribes "forms for use under [the] Act and the regulations" (s. 143, Nos. 16 and 18). Finally, it encompasses matters "respecting the content and distribution of written, printed or visual material ... that may be distributed or used by a person or company with respect to a security whether in the course of distribution or otherwise" (s. 143, No. 32).

69 Where the Legislature has intended a regulation-making power to be delegated to the Commission, it has expressly said so. For example, in paragraph No. 1 of s. 143, the Lieutenant Governor in Council is entitled to make regulations "prescribing categories ... and the manner of allocating persons and companies to categories, including permitting the Director to make such allocations". Under paragraph 37 of the same section, regulations may be made permitting the Commission or the Director to grant exemptions from the various provisions of the regulations. In section 105 of the Regulation itself, the Commission is authorized to "prescribe conditions of registration" after holding a hearing to afford an opportunity for those affected by the proposed conditions to be heard (it has apparently chosen not to follow this route in paving the way for the introduction of the policy). Nowhere, however, is the Commission delegated the power to make regulations in the areas which are outlined above and which comprise so much of the substance of Policy 1.10.

70 Where the field has been occupied, as it were, by the Legislature or by the Lieutenant Governor in Council pursuant to s. 143 of the Act, the Commission has no authority to adopt measures of a regulatory nature in that occupied area, particularly where the measures have the effect of augmenting or amending what the Act and/or regulations say will suffice: see, *Pezim v. British Columbia (Superintendent of Brokers)* (1992), 96 D.L.R. (4th) 137 (B.C. C.A.); appeal to the Supreme Court of Canada pending [leave to appeal to S.C.C. granted (1993), 75 B.C.L.R. (2d) xxxii (note), 151 N.R. 132 (note)]); *Elizabeth Fry Society of Saskatchewan Inc. v. Saskatchewan (Legal Aid Commission)* (1988), 56 D.L.R. (4th) 95 (Sask. C.A.).

71 In *Pezim*, supra, the British Columbia Court of Appeal had before it a somewhat analogous situation to the case at bar. There, some of the directors and senior management of certain mining corporations were found by the B.C. Securities Commission to have violated the "material change" disclosure requirements of the British Columbia *Securities Act*. During the course of various option transactions they had received information concerning the results of the companies' drilling program but had not issued a press release disclosing that information. The Court concluded that the information in question did not constitute a "material change" in the affairs of the companies. Although possession of the information may have involved knowledge of a "material fact", and although insider trading in the face of such knowledge was forbidden under another section of the Act, there was no requirement under the Act to disclose such a "material fact" to the public. It was argued further, however, that even if this were so, the results from the drilling program were material facts which affected the market price or value of the securities of the companies and, accordingly, that there was an obligation to disclose the information as a result of the standards of the securities business as set out in National Policy No. 40, dealing with "Timely Disclosure".

72 The Court of Appeal rejected this argument for reasons that seem apt to the case at bar. I cite from the majority decision of Lambert J.A., at p. 150:

> Without reaching any decision about whether there is any power in the Commission to inquire into and impose penalties for conduct falling short of what the Commission judges to be a proper standard of conduct for those engaged in the securities business, it is my opinion that where the particular type of conduct that is being considered is conduct that is so closely governed by legislative provisions as is the conduct relating to disclosure of material changes or material facts, the Commission does not have the power to impose different and more exacting standards than those specifically adopted and imposed by the legislature and then to make penal orders for a breach of those standards which is not a breach of the legislative standards.
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> That is not to say that higher standards are not desirable. That is a question of careful policy judgment. But they should not be regarded as mandatory where the legislature, in balancing the policy considerations, has specifically chosen not to make them mandatory.

73 Governance by policy statements and the sweep of such pronouncements have been matters of controversy and the subject of commentary by academics and members of the industry for some time. In addition to the article by Professor MacIntosh cited above, I have read the following: Hudson N. Janisch, "Regulating the Regulator: Administrative Structure of Securities Commissions and Ministerial Responsibility", Law Society of Upper Canada, Special Lectures, 1989, p. 97; James C. Baillie and Victor P. Alboini, "The National Sea Decision — Exploring the Parameters of Administrative Discretion", Canadian Business Law Journal, Vol.2 (1977-1978), 454 at 468; W.J. Braithwaite, "Comment on Healy: National Policy Statement No. 41", Law Society of Upper Canada, Special Lectures, 1989, p. 379; James C. Baillie, "Coercion by Commission" (June 1990), CA Magazine, p. 20; Remarks of Robert J. Wright, "Ticker Club", October 19, 1990 (1990), 13 O.S.C.B. 4326 at 4327; Charles Salter, Q.C., "The Priorities of the O.S.C." (1991), 14 O.S.C.B. 2134 at 2142.

74 The issue of administrative agencies, such as the O.S.C., expanding their regulatory reach through the exercise, or purported exercise, of broad discretionary powers is an important one. The exercise of discretion is an essential tool for the effective supervision of an industry as complex as the securities industry. From a practical point of view, it would be impossible for the Commission to carry out its mandate, in either a long-term or day-to-day sense, without the broad discretionary powers delegated to it by the Act and regulations. And, if those ample discretionary powers are to be exercised, "there is merit", as Chief Justice Laskin noted in *Capital Cities Communications*, supra, at p. 171, "in having it known [how that will be done] in advance."

75 Resort to convenience and practicality can only be justified, however, when the measures adopted by the administrative agency in question fall within the scope of its statutory mandate. Were it otherwise, the carefully constructed legislative schemes governing the powers and conduct

of the O.S.C., and other such agencies, would be rendered meaningless. The rule of law, a central concept in our legal system, would be undermined.

76 The importance of preserving the integrity of the legal framework within which the administrative agency must operate is emphasized in several of the commentaries referred to above, and is well stated in the following passage from Professor Wade's text, *Administrative Law*, supra, at p. 5, as follows:

> The primary purpose of administrative law is to keep the powers of government within their legal bounds so as to protect the citizen against their abuse. The powerful engines of authority must be prevented from running amok. "Abuse", it should be made clear, carries no necessary innuendo of malice or bad faith. Government departments may misunderstand their legal position as easily as may other people, and the law they have to administer is frequently complex and uncertain. Abuse is therefore inevitable, and it is all the more necessary that the law should provide means to check it.

77 Elsewhere in that same text, Professor Wade describes the import of the rule of law in the following terms, which are excerpted from the section of the text at pp. 23-24:

> The rule of law has a number of different meanings and corollaries. Its primary meaning is that everything must be done according to law. Applied to the powers of government, this requires that every government authority which does some act which would otherwise be a wrong ..., or which infringes a [person's] liberty ..., must be able to justify its action as authorised by law — and in nearly every case this will mean authorised by Act of Parliament. *Every act of governmental power*, i.e. every act which affects the legal rights, duties or liberties of any persons, *must be shown to have a strictly legal pedigree*. The affected person may always resort to the courts of law, and *if the legal pedigree is not found to be perfectly in order the court will invalidate the act*, which [the person] can then safely disregard. (emphasis added)
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> The secondary meaning of the rule of law ... is that government should be conducted within a framework of recognised rules and principles which restrict discretionary power ... An essential part of the rule of law, accordingly, is a system of rules for preventing the abuse of discretionary power ... The rule of law requires that the courts should prevent its abuse ...

78 These passages accent the significance of requiring an administrative tribunal to observe its statutory limits.

79 For the foregoing reasons, I am satisfied that the O.S.C. lacks the statutory mandate to provide it with the jurisdiction to issue Policy 1.10. As there are no facts in dispute or other questions on this issue which require a trial for their resolution, this is a proper case for the granting of summary judgment under rule 20.01: see *Irving Ungerman Ltd. v. Galanis* (1991), 1 C.P.C. (3d) 248 (Ont. C.A.); *Pizza Pizza Ltd. v. Gillespie* (1990), 45 C.P.C. (2d) 168 (Ont. Ct. (Gen. Div.)).

Alternative Relief Claimed

80 In view of my disposition of this matter on the jurisdictional point, it is not necessary to deal at length with the alternative submissions made on behalf of the plaintiffs.

81 The plaintiffs' alternative assertions in the action, it will be recalled, are that Policy 1.10 is invalid because: (i) it fetters the Commission's discretion; (ii) it was adopted for an improper purpose; (iii) it is unreasonable in that it lacks a sufficient evidentiary basis, is unworkable, uncertain and arbitrary; (iv) it was issued in bad faith; (v) it is discriminatory; and, (vi) it is prohibitive in its effect. They seek an interlocutory injunction restraining the Commission from implementing the policy pending the trial of these issues.

82 Had I concluded that the promulgation of policy statements such as Policy 1.10 fell within the statutory mandate of the Commission, I would have declined to grant such an injunction.

83 I am satisfied on the materials before me that the plaintiffs have met the threshold test of establishing a serious question to be tried on the merits with respect to at least some of the alternative grounds put forward. This is particularly so, I think, with respect to the argument that the policy fetters the Commission's discretion, for the reasons outlined above regarding jurisdiction; with respect to the argument that it is unworkable in terms of its impact on the way securities dealers are to conduct their business; and with respect to the argument that the policy is discriminatory in that it is targeted at the plaintiffs and does not apply to members of the TSE and the IDA who also engage in the trading of low cost, highly speculative penny stocks.

84 It seems to me, as well, that the plaintiffs are likely to suffer irreparable harm if the policy were to be put into operation wrongly. Having regard to its detailed provisions and the impact they would have upon the plaintiffs' business operations, it is unlikely that any harm they would suffer could be adequately compensated for by the common law remedy of damages.

85 When it comes to a consideration of the balance of convenience and the question of maintaining the status quo, however, the scales tip in favour of declining an interlocutory injunction.

86 Interlocutory injunctions involving a challenge to the constitutional validity of legislation or to the authority of a law enforcement agency stand on a different footing than ordinary cases involving claims for such relief as between private litigants. The interests of the public, which the agency is created to protect, must be taken into account and weighed in the balance, along with the interests of the private litigants.

87 I assume for the purposes of this discussion that the Commission was acting within its jurisdiction in issuing Policy 1.10. In such circumstances the Court should be reluctant to prevent

the exercise of the Commission's statutory power, even where the challenge to the exercise of that authority is a serious one: see *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.* (1987), 38 D.L.R. (4th) 321 (S.C.C.); *Esquimalt Anglers' Assoc. v. R.* (1988), 21 F.T.R. 304 (T.D.).

88 In the *Metropolitan Stores* case the Supreme Court of Canada was asked to consider the propriety of a stay of proceedings before the Manitoba Labour Relations Board. At stake was the constitutional validity of Manitoba's legislation empowering the board to impose a first collective agreement in labour disputes. The Court set aside the stay, applying the same principles that govern the granting of interlocutory injunctions, and holding that no such restraint should have been imposed in the circumstances.

89 Giving judgment on behalf of the Court, Mr. Justice Beetz reviewed the debate over the appropriate test to be applied upon the granting of an interlocutory injunction. He concluded, with respect to constitutional cases, that the "serious question to be tried" formulation of *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396, was sufficient, provided that the public interest is taken into consideration in determining the balance of convenience. The consequences for the public as well as for the parties, of the granting of a stay or an injunction, he held to be "special factors" in assessing the balance of convenience. See pp. 333-334.

90 Cases in which it is sought to enjoin the law enforcement agency or administrative tribunal from enforcing the impugned provisions until their validity has been finally determined, Beetz J. referred to as "suspension cases". With regard to such cases he had this to say, at pp. 338-339:

> Whether or not they are ultimately held to be constitutional, the laws which litigants seek to suspend or from which they seek to be exempted by way of interlocutory injunctive relief have been enacted by democratically elected legislatures and are generally passed for the common good, for instance, ... the controlling of economic activity such as the containing of inflation, the regulation of labour relations, etc. It seems axiomatic that the granting of interlocutory injunctive relief in most suspension cases ... is susceptible temporarily to frustrate the pursuit of the common good.
>
> While respect for the Constitution must remain paramount, *the question then arises whether it is equitable and just to deprive the public, or important sectors thereof, from the protection and advantages of impugned legislation, the invalidity of which is merely uncertain, unless the public interest is taken into consideration in the balance of convenience and is given the weight it deserves. As could be expected, the courts have generally answered this question in the negative. In looking at the balance of convenience, they have found it necessary to rise above the interests of private litigants up to the level of the public interest*, and, in cases involving interlocutory injunctions directed at statutory authorities, they have correctly held it is erroneous to deal with these authorities as if they have any interest distinct from that of the public to which they owe the duties imposed upon them by statute. (emphasis added)

91 While these remarks are made in the context of an attack upon the constitutional validity of provincial legislation, I see no distinction in principle between that kind of situation and one in which what is challenged is the validity of a measure imposed by an administrative tribunal or law enforcement agency acting within its jurisdiction.

92 Assuming as I have, for the purposes of this part of my decision, that the O.S.C. had the power within its statutory mandate to issue Policy 1.10 and that the validity of the measure is attacked on other grounds, I would refuse to grant the interlocutory injunction sought on the ground that the balance of convenience militates against it. In my view, the public interest in having the protection of the impugned provisions would outweigh the interests of the plaintiffs, as private litigants, in having the relief granted.

III — Conclusion

93 It was argued on behalf of the Commission that the plaintiffs' action was premature, and that they should await the bringing of disciplinary proceedings against them before raising the arguments put forward. However, the right of a litigant to challenge the jurisdiction of an administrative body to make rules, regulations or by-laws by bringing an action for a declaration that the administrative body has exceeded its jurisdiction under its enabling statute in issuing the disputed provisions, is well settled; see, *Dyson v. Attorney General*, [1911] 1 K.B. 410 (C.A.) [subsequent proceedings] [1912] 1 Ch 158 (C.A.); *Jones v. Gamache*, [1969] S.C.R. 119; *Turner's Dairy Ltd. v. Lower Mainland Dairy Products Board*, [1941] S.C.R. 573.

94 As I have already indicated, the case is a proper one, in my view, for the granting of summary judgment under the *Rules of Civil Procedure* on the jurisdictional issue. Accordingly, judgment is granted in favour of the plaintiffs in the form of a declaration that Policy 1.10 is invalid, the Commission having exceeded its jurisdiction under its enabling legislation in promulgating it.

95 In view of that disposition, it is not necessary to make any further order in relation to the interlocutory injunctive relief claimed. I may be spoken to with respect to costs.

96 I would like to thank all counsel for their thorough and skilful assistance in this difficult matter.

Application allowed.

1994 CarswellOnt 1021
Ontario Court of Appeal

Ainsley Financial Corp. v. Ontario (Securities Commission)

1994 CarswellOnt 1021, [1994] O.J. No. 2966, 121 D.L.R. (4th) 79, 18 O.S.C.B. 43, 21 O.R. (3d) 104, 28 Admin. L.R. (2d) 1, 52 A.C.W.S. (3d) 453, 6 C.C.L.S. 241, 77 O.A.C. 155

AINSLEY FINANCIAL CORPORATION, ARLINGTON SECURITIES INC., BREGMAN SECURITIES CORP., E.A. MANNING LTD., GLENDALE SECURITIES INC., GORDON-DALY GRENADIER SECURITIES, MARCHMENT & MACKAY LIMITED, NORWICH SECURITIES LTD. and OXBRIDGE SECURITIES INC. v. ONTARIO SECURITIES COMMISSION and DONALD PAGE

Dubin C.J.O., Labrosse and Doherty JJ.A.

Heard: November 28-30, 1994
Judgment: December 21, 1994
Docket: Doc. CA C16489

Counsel: *Dennis O'Connor, Q.C.*, and *James Doris*, for appellants.
Brian Finlay, Q.C., Philip Anisman and *J. Gregory Richards*, for respondents.

Subject: Securities; Public; Corporate and Commercial

Appeal from judgment reported at (1993), 17 Admin. L.R. (2d) 281, 1 C.C.L.S. 1, 16 O.S.C.B. 4077, 14 O.R. (3d) 280, 10 B.L.R. (2d) 173, 106 D.L.R. (4th) 507 (Gen. Div. [Commercial List]) declaring Ontario Securities Commission policy statement invalid.

The judgment of the court was delivered by *Doherty J.A.*:

1 In August of 1992, the Ontario Securities Commission (the Commission) issued Draft Policy Statement 1.10. The statement related to the marketing and sale of penny stocks and was directed at securities dealers like the respondents, who were not members of the Toronto Stock Exchange or the Investment Dealers Association of Canada. The Commission formally adopted the draft with some minor modifications in March of 1993.

2 In September 1992, the respondents commenced an action against the Commission claiming, among other things, that the Commission had no authority to issue Policy Statement 1.10. In April 1993, the respondents brought a motion in their action for summary judgment seeking a declaration

that Policy Statement 1.10 was invalid. After a lengthy hearing, Blair J. granted the motion and declared Policy Statement 1.10 invalid. The Commission appeals from that judgment.

3 Policy Statement 1.10 was held in abeyance pending the decision of Blair J. It has, of course, not been issued in light of that decision. The respondents' action against the Commission continues with respect to the other claims advanced by the respondents.

4 The reasons of Blair J., now reported at (1993), 14 O.R. (3d) 280, 106 D.L.R. (4th) 507 (Gen. Div. [Commercial List]), provide a detailed account of the events culminating in the adoption of Policy Statement 1.10 and make extensive reference to the content of the Policy Statement and related documents. As I agree with the conclu sion reached by Blair J. and am in substantial agreement with his reasons, I will not rework the ground so fully tilled by him. These reasons should be read in conjunction with those of Blair J.

5 Counsel, whose excellent presentations were of great assistance, agree that this appeal turns on the proper characterization of Policy Statement 1.10. The Commission submits that Policy Statement 1.10 is a guide to the business practices which the Commission regards as appropriate for those engaged in the marketing and sale of penny stocks. The Commission submits that the *Securities Act*, R.S.O. 1990, c. S.5 and Regulations passed under that Act impose certain obligations on securities dealers engaged in the marketing and sale of securities. The Commission further submits that Policy Statement 1.10 was put forward to assist security dealers in understanding and complying with those obligations by informing them of the Commission's view as to what constituted appropriate business practices in the context of the marketing and sale of penny stocks. The Commission contends that Policy Statement 1.10 does not forbid any specific practice or declare that the practices set out in the statement are obligatory. Nor, according to the Commission, does Policy Statement 1.10 indicate that non-compliance with the statement will be regarded as per se sanctionable conduct.

6 The respondents submit that Policy Statement 1.10 is mandatory and establishes an onerous and detailed scheme intended to dictate the manner in which the respondents must carry on their business. The respondents further argue that the Commission's reference to its prescribed practices as being "in the public interest" necessarily implies that the failure to follow those practices will render the respondents liable to sanction under the various "public interest" provisions of the *Securities Act*.[1] The respondents contend that Policy Statement 1.10 is de facto legislation and beyond the authority of the Commission.

7 I understand counsel for the respondents to concede the validity of Policy Statement 1.10 if the Commission's characterization of that statement is correct. I also understand counsel for the Commission to concede the invalidity of Policy Statement 1.10 if the respondents' characterization of it is correct.

8 In my opinion, counsel have captured the essence of this appeal.

9 Various statutory provisions charge the Commission with the primary regulatory authority in the securities field. That field is necessarily subject to detailed and far-reaching regulation. The Commission also has a recognized policy-making function: *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 at p. 596. Furthermore, the Commission has an important adjudicative function and is given a broad discretion to take various steps and impose various sanctions where, in the Commission's opinion, the public interest so requires. All of these powers and duties must be exercised with a view to protecting the investing public and enhancing the efficiency and integrity of capital markets: *Pezim*, supra, at p. 589.

10 The Commission performs its duties and exercises its discretion within the framework established by the pertinent statutory provisions and Regulations. These statutory instruments do not, however, tell the whole regulatory story. The Commission has developed various techniques, including policy statements, designed to inform its constituency and further the goals described above. These non-statutory instruments have increased in number and gained in prominence as securities regulation has become more complex and the problems to which the Commission must respond more diverse. Contemporary securities regulation involves an amalgam of statutory and non-statutory pronouncements and seeks to regulate by means of retrospective, ad hoc, fact-specific decision making and prospective statements of policy and principles intended to guide the conduct of those subject to regulation.

11 The authority of a regulator, like the Commission, to issue non-binding statements or guidelines intended to inform and guide those subject to regulation is well established in Canada. The *jurisprudence* clearly recognizes that regulators may, as a matter of sound administrative practice, and without any specific statutory authority for doing so, issue guidelines and other non-binding instruments: *Hopedale Developments Ltd. v. Oakville (Town)*, [1965] 1 O.R. 259 at p. 263 (C.A.); *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2 at pp. 6-7; *Re Capital Cities Communications Inc.* (sub nom. *Capital Cities Communications Inc. v. Canada (Canadian Radio-Television & Telecommunications Commission)*) (1977), 81 D.L.R. (3d) 609 at p. 629 (S.C.C.); *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 at p. 35; *Pezim*, supra, at p. 596; *Law Reform Commission of Canada, Report 26, Report on Independent Administrative Agencies: Framework for Decision Making* (1985), at pp. 29-31.

12 Non-statutory instruments, like guidelines, are not necessarily issued pursuant to any statutory grant of the power to issue such instruments. Rather, they are an administrative tool available to the regulator so that it can exercise its statutory authority and fulfil its regulatory mandate in a fairer, more open and more efficient manner. While there may be considerable merit in providing for resort to non- statutory instruments in the regulator's enabling statute, such a provision is not a prerequisite for the use of those instruments by the regulator. The case law provides ample support

for the opinion expressed by the Ontario Task Force on *Securities Regulation: Responsibility and Responsiveness* (June 1994) at pp. 11-12:

> A sound system of securities regulation is more than legislation and regulations. Policy statements, rulings, speeches, communiqués, and Staff notes are all valuable parts of a mature and sophisticated regulatory system. ...

13 To the extent that the reasons of Blair J. may be read as requiring some statutory authority for the issuing of such guidelines, I must, with respect, disagree with those reasons. Nor, in my view, are pronouncements which are true guidelines rendered invalid merely because they regulate, in the broadest sense, the conduct of those at whom they are directed. Any pronouncement by a regulator will impact on the conduct of the regulated. A guideline remains a guideline even if those affected by it change their practice to conform with the guideline.

14 Having recognized the Commission's authority to use non-statutory instruments to fulfil its mandate, the limits on the use of those instruments must also be acknowledged. A non-statutory instrument can have no effect in the face of contradictory statutory provision or Regulation: *Capital Cities Communications Inc.*, supra, at p. 629; Janisch, "Reregulating the Regulator: Administrative Structure of Securities Commissions and Ministerial Responsibility" (1989), Special Lectures of the Law Society of Upper Canada: Securities Law in the Modern Financial Marketplace, p. 97 at p. 107. Nor can a non-statutory instrument preempt the exercise of a regulator's discretion in a particular case: *Hopedale Developments Ltd.*, supra, at p. 263. Most importantly, for present purposes, a non-statutory instrument cannot impose mandatory requirements enforceable by sanction; that is, the regulator cannot issue de facto laws disguised as guidelines. Iacobucci J. put it this way in *Pezim* at p. 596:

> However, it is important to note that the Commission's policy-making role is limited. By that I mean that their policies cannot be elevated to the status of law; they are not to be treated as legal pronouncements absent legal authority mandating such treatment.

15 If Policy Statement 1.10 has crossed the Rubicon between a non-mandatory guideline and a mandatory pronouncement having the same effect as a statutory instrument, then I agree with Blair J. that the Commission could only issue that statement if it had statutory authority to do so. The Commission concedes that as the legislation stood at the relevant time[2] it had no such statutory authorization.

16 There is no bright line which always separates a guideline from a mandatory provision having the effect of law. At the centre of the regulatory continuum one shades into the other. Nor is the language of the particular instrument determinative. There is no magic to the use of the word "guideline," just as no definitive conclusion can be drawn from the use of the word "regulate." An examination of the language of the instrument is but a part, albeit an important part, of the

characterization process. In analyzing the language of the instrument, the focus must be on the thrust of the language considered in its entirety and not on isolated words or passages.

17 In submitting that Policy Statement 1.10 is a guideline, Mr. O'Connor urged the court to accept the language of Policy Statement 1.10 at face value. He relies on the following passages from the Policy Statement as clearly indicating that it was not intended to either impose specific obligations on those at whom it was directed or fetter the public interest discretion of the Commission:

> This Policy is intended to inform interested parties that the Commission will be guided by this Policy in exercising its public interest jurisdiction under subsection 27(1) of the Act and its general public interest jurisdiction to protect investors and promote and maintain fair, equitable and efficient capital markets in Ontario.
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> Subsection 27(1) of the Act provides that the Commission, after giving a registrant an opportunity to be heard, may suspend, cancel, restrict or impose terms and conditions upon the registration of or reprimand a registrant where in its opinion such action is in the public interest. In determining whether any failure to comply with this Policy constitutes grounds for the Commission taking action under subsection 27(1) of the Act or any other section of the Act, the Commission will continue to consider the particular facts and circumstances of each case.

18 Blair J. considered these passages but ultimately held that Policy Statement 1.10 was mandatory and invalid. Two passages from his reasons capture his conclusion (pp. 294 and 296 O.R.):

> In spite of the efforts of the Commission to cast Policy 1.10 in the light of a mere guideline, the policy is mandatory and regulatory in nature, in my view. Its language, the practical effect of failing to comply with its tenets, and the evidence with respect to the expectations of the Commission and staff regarding its implementation, all confirm this.
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>
> To conclude, in view of all of the foregoing, that the effect of Policy 1.10 is not to impose standards and a code of conduct upon the securities dealers affected by it, which are obligatory in nature, would be to ignore the plain language of the document itself and the reality of the regulatory environment in which it is to be implemented.

19 I agree with Justice Blair's conclusion and also rely on the factors he assembles in support of it (at pp. 294-98 O.R.). Two of those factors are particularly significant. The first factor is the format of the statement. Guidelines connote general statements of principles, standards, criteria or factors intended to elucidate and give direction. Policy Statement 1.10 sets out a minutely detailed regime complete with prescribed forms, exemptions from the regime, and exceptions to the exemptions. Policy Statement 1.10 reads like a statute or Regulation setting down a code of conduct (the phrase

used in the Commission minutes to describe Policy Statement 1.10) and not like a statement of guiding principles.

20 The second factor is the linkage made in Policy Statement 1.10 between the Commission's power to sanction in the public interest and its pronouncement that the practices set out in the policy statement accord with the public interest. That connection gives the Policy Statement a coercive tone. Policy Statement 1.10 suggests that non-compliance could evoke the Commission's sanction powers. The threat of sanction for non-compliance is the essence of a mandatory requirement. The coercive effect of Policy Statement 1.10 is also apparent in the Commission staff's attitude toward the statement as reflected in the Staff Report submitted to the Commissioners. The Report demonstrates that the staff of the Commission, who are the individuals with their fingers on the enforcement trigger, would treat Policy Statement 1.10 as if it were the equivalent of a statutory provision or Regulation.

Conclusion

21 Policy Statement 1.10 must be characterized as mandatory and an attempt by the Commission to impose on the respondents a de facto legislative scheme complete with detailed substantive requirements. The Commission could not impose such a scheme without the ap propriate statutory authority. None existed. Policy Statement 1.10 is invalid. The appeal must be dismissed with costs.

Appeal dismissed.

Footnotes

1 The *Securities Act* was substantially amended and renumbered by the *Financial Services Statute Law Reform Amendment Act, 1994*, S.O. 1994, c. 11. Those amendments came into force in July of 1994. The powers formerly found in s. 27 of the Act are now found in s. 127.

2 Bill 190 presently before the Ontario Legislature will amend the *Securities Act* to permit the Commission to issue statutory instruments referred to as rules (s. 143) and will also recognize the Commission's authority to issue non-statutory instruments referred to as policies (s. 143.8). Paragraph 14 of s. 143(1) gives the Commission the power to make rules with respect to "trading or advising in penny stocks." Section 143.8(1) defines the word "policy."

2010 ABCA 405
Alberta Court of Appeal

Alberta (Securities Commission) v. Workum

2010 CarswellAlta 2478, 2010 ABCA 405, [2010] A.J. No. 1468, [2011] 7 W.W.R. 492, [2011] A.W.L.D. 498, [2011] A.W.L.D. 588, 199 A.C.W.S. (3d) 1353, 21 Admin. L.R. (5th) 12, 327 D.L.R. (4th) 383, 41 Alta. L.R. (5th) 48, 493 A.R. 1, 502 W.A.C. 1

Alberta Securities Commission (Respondent / Applicant) and Peter J. Workum (Appellant / Respondent) and Theodor Hennig, Strategic Investment Fund, Cheshire Capital Inc., Lexington Capital Ltd., Ashland Holdings Corp. and Cofima Finanz AG (Not Parties to the Appeal)

Alberta Securities Commission (Respondent / Applicant) and Peter J. Workum (Appellant / Respondent) and Theodor Hennig, Strategic Investment Fund, Cheshire Capital Inc., Lexington Capital Ltd., Ashland Holdings Corp. and Cofima Finanz AG (Not Parties to the Appeal)

Alberta Securities Commission (Respondent / Applicant) and Theodor Hennig (Appellant / Respondent) and Peter J. Workum, Cheshire Capital Inc. and Strategic Investments Fund (Not Parties to the Appeal)

Elizabeth McFadyen, Clifton O'Brien, J.D. Bruce McDonald JJ.A.

Heard: March 9, 2010
Judgment: December 20, 2010
Docket: Calgary Appeal 0901-0012-AC, 0901-0013-AC, 0901-0019-AC

Counsel: D.A. Young, D.M. Volk for Respondent, Alberta Securities Commission
J. Groia for Appellant, Workum
J.K. Phillips for Appellant, Hennig
R.J. Normey for Intervener, Alberta Justice

Subject: Occupational Health and Safety; Corporate and Commercial; Securities; Public; Human Rights

APPEAL by W and H from decision of Alberta Securities Commission, holding them liable for breaches of *Securities Act* and imposing sanctions.

***J.D. Bruce McDonald J.A.*:**

I. Introduction

1 The appellants, Theodor Hennig (Hennig) and Peter Workum (Workum), were sanctioned by the Alberta Securities Commission (the Commission) for firstly, conduct contrary to the public interest or contraventions of Alberta securities laws arising from financial disclosures related to issuance of certain financial statements by Proprietary Industries Inc. (PPI) which were not prepared in accordance with Generally Accepted Accounting Principles (GAAP) and contained misrepresentations. Secondly, Workum and Hennig were sanctioned for receiving undisclosed financial benefits related to secret commissions, market manipulation, failure to report insider trades and misrepresentations to Alberta Securities Commission staff (ASC Staff). Neither Hennig nor Workum testified at the hearing.

2 The appellants appeal pursuant to section 38 of the *Securities Act*, RSA 2000, c S-4 (the *Securities Act*) from three decisions of the Commission: the Decision dated the 29th day of August, 2005 (the Institutional Bias Ruling), the Decision dated the 7th day of June, 2008 (the Merits Decision) and the Decision dated the 18th day of December, 2008 (the Sanctions Decision).

3 These decisions arise out of two Notices of Hearing, both subsequently amended, issued by the respondent. The first Notice of Hearing was issued on January 31, 2001 (the First Notice of Hearing) and the second was issued on August 21, 2002 (the Second Notice of Hearing). Both were amended on September 19, 2003 and copies of the Amended First Notice of Hearing and Amended Second Notice of Hearing are attached as Schedule "A" and "B" respectively to these reasons.

4 The First Notice of Hearing named as respondents, PPI, Hennig and Workum and related, broadly speaking, to financial disclosure or more properly the lack of proper financial disclosure.

5 The Second Notice of Hearing named as respondents in addition to Hennig and Workum, Chester Cheshire Capital Inc. (Cheshire), Lexington Capital Ltd. (Lexington), Strategic Investments Fund (Strategic) and Ashland Holdings Corp. (Ashland). The Second Notice of Hearing includes allegations of market manipulation, secret commissions, failure to file insider trading reports and misrepresentations. For the reasons set out herein, the appeals are dismissed.

II. Background

6 The appellants were directors and the two most senior officers of PPI, a junior capital pool company which became a reporting issuer in Alberta in 1993. In 2001, PPI described itself as aiming to be a parent holding company and merchant bank for separate public companies with interests in natural resources, banking and real estate.

7 The allegations covered the period 1998-2000. The Merits hearing ran for a total of 38 days, heard 24 witnesses and included a large volume of documentary evidence. As regards the Sanctions

proceeding, the Commission received written submissions from each of ASC Staff, Workum and Hennig.

8 Workum also brought forward a "Notice of Constitutional Question", stating his intention to question the constitutional validity of the application of section 199 of the *Securities Act*. The Attorney General of Alberta made written submissions as an intervener in that matter.

9 The financial disclosure allegations involved three sets of purported transactions, the sales of shares of three companies or interests with gains reported in 1998, 1999 and 2000. The Commission concluded that PPI's financial statements for 1998, 1999 and 2000 were not prepared in accordance with GAAP and contained misrepresentations contrary to the public interest. Furthermore, misrepresentations were made when the statements were reported in other disclosures and the appellants were responsible for these as well.

10 The sales in each year represented almost all of PPI's gains for that particular year. The shares sold in 1998 were reacquired in 2000, documentation was inconsistent and/or incomplete, and the Commission found that there was no expectation that the purchaser would pay PPI any money. In the second and third cases — which were complicated sales involving a number of parties and steps — payment included a promissory note given by the purchaser where that purchaser's ability to satisfy the same was in issue.

11 When new management took over PPI in 2002, these gains were largely or wholly reversed on restated financial statements. Hennig and Workum severed their ties with PPI by the end of the summer of 2002.

12 The Commission heard the expert testimony of its Chief Accountant on the application to the financial statements in question of GAAP and the Handbook of the Canadian Institute of Chartered Accountants. The Commission dismissed objections that the expert witness was in an inherent conflict of interest position as the witness was not a prosecutor and his evidence centered on fundamental principles and was not determinative of the issues. The appellants cross-examined the chief accountant and chose not to call their own expert.

13 The Commission discussed the basis for and policy behind misrepresentations in financial statements and its approach to the contraventions in question. The Commission considered the motivation for the transactions in assessing whether they were bona fide. It concluded that while there were some plausible bona fide motives, the primary motive was accounting, i.e., recording a gain. The Commission further concluded that the transactions lacked essential elements of a sale. It looked in detail at the transactions and found the transactions were misleading and intended to mislead. It concluded PPI's 1998, 1999 and 2000 financial statements were contrary to the public interest because they were not prepared in accordance with GAAP and contained misrepresentations. The Commission further found that the appellants were each responsible for the improper financial disclosures.

14 The undisclosed financial benefits were commissions which were concealed and diverted to accounts of offshore companies. The appellants did not dispute the commissions paid by PPI were directed to accounts of the offshore companies but disclaimed ownership or that they instructed the disbursements. The allegation of ownership was not pursued by ASC Staff but changed to the allegation that the accounts were controlled and directed by the appellants.

15 The Commission found that the appellants each obtained financial benefits, from or through the securities trading accounts of Strategic, Cheshire, Lexington and Ashland (sometimes collectively referred to as the Four Trading Accounts) and the Mandolin Inc. Offshore Bank Account, which were funded by commission payments made by PPI on private placements and other transactions. The Commission, based largely on documentary evidence, found that the appellants exercised control and direction over the securities trading accounts and through that control and direction benefitted personally from the money paid into those accounts. Although this was not in itself necessarily improper, the arrangement was not disclosed as required, and the Commission concluded this was contrary to the public interest. The Commission found some of the evidence indicated that ownership of the accounts was being concealed but held it did not need to determine ownership.

16 The amounts involved were significant. PPI paid a total of at least $5,148,750 in commissions under this arrangement. The Commission concluded that the Mandolin Inc. Offshore Bank Account and the Four Trading Accounts "were operated to funnel money from PPI" to the appellants, (Merits Decision at para 1062), with at least $2 million passing from PPI to the benefit of the appellants.

17 On the allegation of market manipulation, the appellants were found to have directly and indirectly traded and purchased Newmex Minerals Inc. shares knowing it would create an artificial price. The shares purchases were effected through one of the witnesses, Glenn Olnick (Olnick), whom the Commission agreed not to sanction in return for his permanent resignation as a registered investment dealer. The Commission found that the market was manipulated and the appellants enlisted Olnick to undertake the manipulation.

18 The Commission also found that the appellants failed to report insider trades in companies which PPI owned shares and effected through the Four Trading Accounts. The appellants were found to have control and direction over those accounts.

19 The Commission further found that the appellants made numerous misrepresentations to the Commission and ASC Staff orally and in writing. The Commission found this was "a pattern of conduct" and the appellants "repeatedly lied" to ASC Staff (Merits decision at para 1294).

20 In the Sanctions Decision, the Commission ordered Workum to permanently cease trading in any securities or exchange contracts, resign all positions as a director and officer and permanently

prohibited him from acting as a director or officer. He was also ordered to pay an administrative penalty of $750,000 and pay $200,000 of the costs of the investigation and hearing.

21 Hennig was ordered to cease trading for 20 years from the date of the decision, resign all positions as director and officer and prohibited him from becoming a director or officer permanently, and to pay an administrative penalty of $400,000 and $175,000 in costs.

III. Grounds of Appeal

22 Hennig's grounds of appeal as argued in oral submissions before this court were that the Commission erred:

> a) in allowing its Chief Accountant to give expert testimony and in so doing created a reasonable apprehension of bias;
>
> b) its findings relating to the second notice of hearing (secret commissions, market manipulations, insider trading, and misrepresentations to the Commission) were based upon no evidence and as such resulted in an unreasonable finding against Hennig;
>
> c) the reasons given by the Commission, although lengthy, were not adequate as they relate to Hennig and therefore the Commission breached procedural fairness (and can be judged in this regard on the standard of correctness); and
>
> d) in retroactively applying the increased sanctions enacted by amendments to section 199 of the *Securities Act*, RSA 2000, c S-4 (the *Securities Act*) in 2005 when all the conduct complained of predated the date of that amendment.

23 Workum's grounds of appeal as argued in oral submissions before this court were that the Commission erred:

> a) in relying upon the uncorroborated documentary evidence by or from Olnick;
>
> b) in concluding that Workum and Hennig breached section 70.1(b) of the *Securities Act* as it existed at the time, based as it was largely on the testimony of Olnick;
>
> c) in concluding that both Workum and Hennig breached section 144 of the ASC Rules (preparing financial statements in accordance with GAAP); and
>
> d) the actions and the structure of the Commission created a reasonable apprehension of bias.

Counsel for both Workum and Hennig adopted each other's argument before this court.

24 Additionally, both Workum and Hennig had argued that section 199 of the *Securities Act* violated section 1(a) of the *Alberta Bill of Rights*, RSA 2000, C A-14 [*Alberta Bill of Rights*].

speculation along with second or third hand opinion in the form of newspaper articles, legislative debates and the position papers attached to the Affidavits. Not a single witness was called to testify in support of the Institutional Bias application. The panel commented on the insufficiency of the "uncontroverted evidence" at paras 73-79 of its Institutional Bias decision:

> [73] Three types of exhibits to the Monopoli Affidavits touched on the Alleged Controversy. The largest category consisted of copies of media reports or commentary that referred to the Commission, certain of its current or former personnel or its operations. Others were excerpts from Alberta Hansard of comments made in the legislature touching on the same topics. A third category consisted of statements by or on behalf of part-time Commission Members.
>
> [74] As noted, the Respondents pointed to case law to support the admissibility of the news reports. That, though, was not in dispute. We allowed the Monopoli Affidavits (including the appended news reports and other material) into evidence. However, we find that this evidence lacks probity and utility for the following reasons.
>
> [75] The first category of the exhibits to the Monopoli Affidavits involved, with varying degrees of editorial comment, second-or third-hand accounts of various sorts of claims — none proved — apparently levied against certain individuals associated with the Commission. The actual claims, assuming they existed and were reduced to writing, were not in evidence. No actual complainants gave evidence. What we have is, at best, hearsay evidence, sometimes more than once removed, of allegations and suppositions. At most, it is a mixture of speculation, subjective impression and an indication of media and political interest. To the extent this is evidence of anything, it is no more than evidence that various people have spoken of speculation or subjective belief. This is very different from the newspaper evidence in *Newfoundland Telephone*, where the reports contained actual quotations of statements by a hearing panel member specifically referring to the case before him.
>
> [76] The second category of the exhibits to the Monopoli Affidavits involved comments made by legislators. At most we discern from them some questions and answers and expressions of opinion, none in our view demonstrating anything conclusive in support of the Respondents' contentions.
>
> [77] Turning to the third category of the exhibits to the Monopoli Affidavits, the statements of part-time Commission members, those were first person statements made by individuals who did have some direct knowledge of the matters being discussed. In those statements they disavow some of the complaints apparently made. In other words, the Respondents' own evidence shows that the claims of impropriety had been publicly controverted.
>
> [78] Moreover, none of this evidence appended to the Monopoli Affidavits makes any mention whatsoever of the Hearing, the Proceedings, either Respondent or any of the companies with which they were involved or alleged to have been involved.

> [79] The Monopoli Affidavits thus demonstrate, at most, that various sorts of claims have been made; some individuals with knowledge have strongly disputed them; and a variety of sources and commentators further removed have disseminated some of these positions and in some cases added their own views. To the extent that the Monopoli Affidavits reflect the public record, that public record shows interest in and competing views about unproved claims, and no more than that.

60 During his oral submissions, counsel for Workum acknowledged to the Court of Appeal that he did not allege that there was any actual bias on the part of the Commission or ASC Staff. Furthermore, he made it clear that he was not in any way arguing the merits of the Alleged Controversy. He further conceded that he had no specific knowledge that any of the hearings held by the Commission with respect to this matter were in any way referenced in the Mack Report. Nor was there anything raised in Wayne Alford's letter of complaint to Minister Greg Melchin, dated January 9, 2004, (which first broached the Alleged Controversy) that pointed to this particular investigation either.

61 He did however make specific reference to the decision of the Ontario Court of Appeal in *E.A. Manning Ltd. v. Ontario (Securities Commission)* (1995), 23 O.R. (3d) 257, 80 O.A.C. 321 (Ont. C.A.) [Manning]. Briefly stated, the facts in *Manning* were as follows. E.A. Manning Limited (Manning) was a registered securities dealer in Ontario that dealt in penny stocks during the early 1990s. The Ontario Securities Commission (OSC) was concerned at that time about the business practices of penny stock dealers, such as calling citizens at home to solicit sales and using high pressure sales tactics. The OSC created a policy to remedy these abuses. One month after the policy was issued, Manning and other securities dealers commenced an action against the OSC alleging that the policy was *ultra vires*. They were successful in the first instance and the decision was upheld on appeal.

62 Approximately a year after the policy was struck down, the OSC issued notices of hearing against Manning on allegations that it had engaged in high-pressure sales tactics, failing to disclose that they were selling securities as principals instead of agents and failing to disclose that markups were included in the purchase price. Some of the OSC Commissioners set to hear the case had been involved in the adoption of the policy. Manning applied to court to prohibit the OSC from proceeding with the hearings on the basis that the Commissioners involved with the policy were likely to have prejudged the case against Manning.

63 In the first instance before the Ontario Divisional Court, (reported at *E.A. Manning Ltd. v. Ontario (Securities Commission)* (1994), 18 O.R. (3d) 97, 72 O.A.C. 34 (Ont. Div. Ct.)) Manning was partly successful. Montgomery J., speaking for the Divisional Court, found that there was a reasonable apprehension of bias on the part of the Commissioners who had taken part in the adoption of the policy, as they may have closed their minds to the issue of penny stock dealers engaging in unfair sales practices. In addition, the fact that the OSC had defended the policy on

appeal was evidence of prejudgment because it had gone beyond merely defending its jurisdiction, to argue that Manning and others were guilty of unfair practices.

64 However, Montgomery J. found that there was no reasonable apprehension of bias on the part of Commissioners appointed after the adoption of the policy. The application for prohibition was dismissed and the hearings were allowed to proceed before a panel of Commissioners appointed after the adoption of the policy. Manning appealed the dismissal of its application to the Ontario Court of Appeal.

65 Dubin C.J.O., speaking for the Court, considered the statutory framework within which the OSC functioned. Within that framework, the OSC was the investigator, prosecutor and the judge. Absent statutory authority, this structure would normally be found to violate basic principles of fairness. However, quoting the decision of L'Heureux-Dub_ J. in *Barry*, Dubin C.J.O. held that such overlapping functions did not give rise to a reasonable apprehension of bias where the overlap was authorized by statute. The prohibition sought by Manning could not be granted because the structure of the OSC alone did not give rise to a reasonable apprehension of bias.

66 By contrast, the appellants have not pointed to anything in their arguments that the Commission had a particular interest in convicting either or both of them due to the Alleged Controversy. As this court stated in *Ironside* at para 103:

> A bias claimant must do more than make bald assertions of bias or apprehension of bias whether said to rest on (a) institutional concerns or (b) case-specific accusations. Either form of claim requires substance. It is not the perspective of the "very sensitive or scrupulous conscience" ...

The appellants have therefore not established a case of reasonable apprehension of bias arising from the Alleged Controversy. Accordingly, I dismiss this ground of appeal.

The Alberta Bill of Rights

67 During oral submissions, counsel for Hennig rightly acknowledged this to be a weak argument and later went on to abandon it altogether. Therefore it need not be addressed in these reasons.

C. Reasonable apprehension of bias created by the Commission calling its Chief Accountant to give evidence

68 An analysis of this ground of appeal also engages the standard of correctness.

69 During the course of oral submissions, counsel for Hennig argued that in qualifying its own Chief Accountant Snell to testify as an expert on accounting principles, the Commission was biased in favour of his evidence because it was an "institutional impossibility" that the Commission would find against the evidence given by its own Chief Accountant. Counsel for Hennig went on

2015 FC 1161, 2015 CF 1161
Federal Court

Apotex Inc. v. Canada (Minister of Health)

2015 CarswellNat 10848, 2015 CarswellNat 5008, 2015 FC 1161, 2015 CF 1161, [2015] F.C.J. No. 1201, 11 Admin. L.R. (6th) 225, 259 A.C.W.S. (3d) 580

Apotex Inc, Apotex Pharmachem India PVT Ltd and Apotex Research Private Limited, Applicants and Minister of Health and Attorney General of Canada, Respondents

M.D. Manson J.

Heard: September 15-17, 2015
Judgment: October 14, 2015
Docket: T-2223-14

Counsel: Harry B. Radomski, Andrew Brodkin, Nando de Luca, Benjamin Hackett, Michael Watson, for Applicants
John E. Callaghan, Benjamin Na, Laura Van Soelen, for Respondents

***M.D. Manson J.*:**

I. Introduction

1 This is an application for judicial review by Apotex Inc. [Apotex], Apotex Pharmachem India Pvt Ltd. [APIPL] and Apotex Research Private Limited [ARPL] [collectively "the Applicants"] of the decision of the Respondent Minister of Health [the Minister] to impose an Import Ban preventing the importation of drug products into Canada from two of Apotex's manufacturing facilities in India (APIPL and ARPL) on September 30, 2014, and the related issuance by the Minister, on October 2, 2014, of four "EL Letters" which purported to amend Apotex's establishment licences [ELs], prohibiting import of all products, apart from those deemed medically necessary.

2 Apotex commenced this application for judicial review on October 29, 2014, on the basis that the Minister's decision to implement the Import Ban and amend Apotex's ELs was unreasonable and unlawful. They allege that the Minister failed to act in accordance with the principles of natural justice by acting for an improper motive, failing to provide Apotex with notice or an opportunity to be heard, and acting in such a manner so as to give rise to a reasonable apprehension of bias. The Applicants also allege that the Minister acted outside of her regulatory powers conferred under the

Food and Drugs Act, RSC 1985, c F-27 [*FD Act* or *Act]*, the *Food and Drugs Regulations*, CRC, c 870 [*FD Regulations* or *Regulations]* and/or the *Customs Act*, RSC 1985, c 1 (2nd Supp).

3 The Applicants request that the Minister's decision to implement and her implementation of the Import Ban be deemed unlawful and should be quashed, with costs to Apotex. Among other things, they request an order quashing the four letters issued by the Minister on October 2, 2014, which amend Apotex's ELs, and an order compelling the Minister to retract her public statement and requiring her to direct Health Canada to retract their statement released on September 30, 2014.

II. Background

A. Regulatory Regime

4 The *FD Act* and *Regulations* govern the manufacture, import and sale of all drug products in Canada. Various guidelines and policies of Health Canada also help to interpret the *Act* and *Regulations*.

5 Drugs sold in Canada must have a drug identification number [DIN] pursuant to the *FD Regulations* that has not been cancelled. To sell new drugs in Canada, a manufacturer must also possess a notice of compliance [NOC] issued by the Minister when satisfied that the manufacturing process meets the required standards and that the new drug is safe, effective and adequately labelled under the *Regulations*.

6 To fabricate, distribute or import into Canada for sale any drug, the manufacturer must also hold an establishment licence [EL], which is granted when the holder of the EL demonstrates its facilities comply with Good Manufacturing Practices [GMP] and meet the requirements of Part C, Division 2 of the *FD Regulations*.

7 The Regions and Programs Bureau [RAPB] of Health Canada inspects domestic and foreign facilities to evaluate GMP compliance. To assess GMP compliance of foreign manufacturing sites, Health Canada may perform a "desktop" review of documentary evidence gathered by international regulatory partners, external experts or consultants, or it may conduct on-site inspections, at times with other regulatory partners. GMP observations are classified by level of risk and depending on the severity and number of observations, may result in the addition of terms and conditions to the ELs, or a non-compliant rating.

B. The Parties

8 Apotex is the largest pharmaceutical manufacturer in Canada and is affiliated with the Indian companies APIPL and ARPL. Apotex purchases and imports into Canada active pharmaceutical ingredients [APIs] produced by APIPL and finished dosage form [FDF] pharmaceutical products produced by ARPL.

9 The Respondent Minister of Health is responsible, through her delegates at Health Canada, for administering the *FD Act* and *Regulations*.

10 Health Canada is the federal government department that oversees the regulation of drug products in Canada. It consists of various branches, bureaus and offices, most notable to this application: the Minister and Minister's Office; the Health Products and Food Branch [HPFB], which includes the Inspectorate, the branch responsible for compliance and enforcement activities and oversight of establishment licensing for health products; and the RAPB, responsible for inspection.

C. Interlocutory Proceedings

11 Both parties filed motions on September 10, 2015; the Respondents requested dismissal of the application for judicial review as moot, and the Applicants requested that material from the Respondents' record that was not sewed and filed properly or in a timely way be struck from the record. The motions were heard at the outset of the judicial review and orders have been issued separately.

III. Facts

A. Chronological Outline

12 In late January 2014, the United States Food and Drug Administration [FDA] inspected APIPL's manufacturing facility and issued a Form 483, detailing their observations that APIPL was non-compliant with US GMP requirements due to data reliability problems. On April 2, 2014, the FDA issued an Import Alert on all products coming from APIPL, save one medically necessary product. No issues of product quality were cited, nor were any drugs originating from APIPL recalled.

13 Health Canada's receipt of APIPL's Form 483 prompted a desktop review by the RAPB in April 2014. The FDA's observations were classified according to Canadian risk classification ratings and a non-compliant rating was recommended.

14 On April 29, 2014, Health Canada informed Apotex of the non-compliant rating and requested that it cease sale of drugs containing API made by APIPL until new evidence demonstrating GMP compliance was provided. The following day Apotex, through counsel, responded to Health Canada's request, stating that there was no basis for ceasing sale and inviting Health Canada to inspect APIPL itself.

15 At a meeting on June 10, 2014, Apotex provided Health Canada with their corrective action plan for addressing deficiencies outlined in APIPL's Form 483. Further discussions throughout June led to the adoption of a protocol [the Protocol], whereby Apotex would re-test all APIs

produced at APIPL in Canada for quality assurance. The Protocol was intended as an interim measure until Health Canada's on-site inspection of APIPL in August, but was later extended until October 31, 2014.

16 On June 16, 2014, the FDA issued a "warning letter" to Apotex detailing that APIPL's corrective and preventative actions continued to be insufficient to prevent recurrence of GMP deviations. A copy was provided shortly thereafter to Health Canada.

17 With this information, in early August of 2014, Health Canada conducted an on-site inspection of APIPL jointly with Australia's Therapeutic Goods Administration [TGA], with the purpose of verifying that APIPL was indeed implementing corrective actions spurred by the FDA Import Alert [Health Canada-TGA APIPL August Inspection], In a teleconference with the FDA, Canadian and Australian inspectors were informed of the FDA's main concerns from FDA inspections of APIPL and ARPL, to which they specifically followed up on as part of their August inspection. An email to the HPFB summarizing the RAPB's observations indicated that "the deficiencies noted are not critical (no risk 1 observations) that will require immediate action to be taken" (Sharma First Affidavit, Exh 19; AR, Tab 8(19), p 1628).

18 During this same period, there were other developments relating to Apotex's FDF facility, ARPL. In May of 2014, ARPL was issued GMP Certificates of Compliance from both the United Kingdom Medicines and Healthcare Products Regulatory Agency [MHRA] and Health Canada, who had conducted a joint inspection of ARPL in mid-February 2014.

19 In the final week of June 2014, the FDA inspected ARPL, following which they issued a Form 483, finding data integrity problems and deviations from GMP. Health Canada received a copy shortly thereafter and an RAPB inspector who compared the FDA and Health Canada-MHRA inspections recommended a non-compliant rating be assigned to ARPL. This is despite the fact that the Health Canada-MHRA inspection "did not find data integrity / laboratory practices issues," and had assigned a compliant rating just over a month before. The inspector was of the opinion that the scope of the inspections differed, with that of the FDA centering on data integrity issues. He also suggested that follow-up with Apotex would be necessary to "further clarify the issues and determine what corrective actions the company is planning," as per Health Canada's usual practice (Sharma First Affidavit, Exh 22; AR, Tab 8(22), p 1660).

20 Beginning on September 11, 2014, the Toronto Star began to publish a series of articles and editorials highly critical of Health Canada and the Minister, portraying them as inept in comparison to the FDA, particularly in their regulatory approach towards Apotex, and attacking them for failing to protect the health of Canadians against suspect drugs. The articles spurred vigorous questioning of the Minister in the House of Commons.

21 The articles also caused an immediate reaction at Health Canada and in the Minister's Office, as evinced by internal communications between personnel at HPFB, the Inspectorate, the

Minister's Office, the Prime Minister's Office and the Communications and Public Affairs Branch of Health Canada. In an email to Deputy Minister George DaPont, the Minister expressed concern that Health Canada did not "have a strong enough policy response" and wanted to revoke the license of Apotex "if these drugs that are considered harmful by the FDA are still on the Canadian market," to which she was assured by staff that (i) the FDA had not recalled any products, (ii) program experts were confident no risky products were on the market, (iii) all products coming from Apotex were being re-tested in Canada, and that consequently it would be "hard to pull the license at this point" (Rule 318 Record, AR, Vol XVII, Tab 19(c)(27)).

22 On September 22, 2014, the FDA issued an Import Alert for ARPL, except for products deemed medically necessary. No drug products were recalled from the shelves. The following day Health Canada requested that Apotex confirm it would voluntarily quarantine all products made at ARPL by close of business on September 24. This deadline was accelerated to 10:00 am on the 24' after a series of calls and emails between the Minister's Office and Health Canada personnel. Apotex acceded to this request, for one week, requesting that Health Canada undertake a review of the recent ARPL inspections and "provide compelling reasons, with specific factual bases for each affected product," if they wanted to continue the quarantine. Health Canada did not request an extension of the quarantine from Apotex.

23 In an email, Ministerial staff expressed frustration that Apotex had been provided an opportunity to quarantine products voluntarily and indicated that "stronger action" was to be taken in response to ARPL than what had happened with APIPL. The record also reveals that Health Canada was prepared to move to an Import Ban had Apotex disagreed with the quarantine, such that either way, products from APIPL and ARPL would be off the market.

24 Accordingly, up to September 29, 2014, there had been no indication from Health Canada to Apotex that any concerns about GMP compliance at either APIPL or ARPL could result in an Import Ban.

25 In the interim during which ARPL had become the central focus, an internal working group at Health Canada had confirmed the assigned risk ratings from the Health Canada-TGA APIPL August Inspection. On September 25, 2014, Apotex was provided with a draft Inspection Exit Notice, proposing a Compliant with Terms and Conditions rating for APIPL, under which new terms and conditions would require Apotex to re-test APIPL products in Canada.

26 Given the concerns at Health Canada surrounding the Apotex APIPL and ARPL facilities, the RAPB communicated to the Deputy Minister's Office that they would be providing a finalized Exit Notice to APIPL - not ARPL, the subject of the voluntary quarantine - to which they received express instructions to "[p]lease stand down re pressing send on inspection rating" (Rule 318 Record, AR, Vol XVIII, Tab 20(56) & (62)). No explanation was or has been given to Apotex regarding why the Exit Notice was not provided.

27 On September 29, 2014, Health Canada and the FDA held a conference call, from which Health Canada allegedly learned "new information" they claim formed the basis for their regulatory action and resulting Import Ban of products from APIPL and ARPL.

28 On September 30, 2014, without notice, Health Canada communicated to Apotex that the Minister had instructed the Canadian Border Services Agency [CBSA] to immediately restrict importation of drug products from APIPL and ARPL [CBSA Action], An email from the Minister's Office to the Prime Minister's Office conveyed that this move represented that Health Canada was both catching up with the US and going even further, and that the ban as compared to a voluntary quarantine was "largely cosmetic and very useful for pushback" (Rule 318 Record, AR, Vol XVIII, Tab 20(76)). Apotex was informed by way of a telephone call from Health Canada, press releases issued by both Health Canada and by the Minister, and a list of the banned products on Health Canada's website - all on September 30, 2014.

29 In the September 30 phone call, Health Canada maintained it could not rely on data coming from APIPL and ARPL, and that due to the "new information" received from the PDA, it was re-reviewing the compliant status communicated to Apotex by way of the draft Inspection Exit Notice five days earlier, and terms and conditions would be applied to Apotex's ELs [EL Action]. The CBSA Action and EL Action collectively constitute what is hereinafter referred to as the Import Ban.

30 The Minister's public statement conveyed that "Health Canada has taken decisive action today to stop the import into Canada of all drug products from [APIPL and ARPL]," but reassured that "Health Canada has received no evidence that the problems pose an immediate risk," and that like the FDA, no recall would be required. Further, the Minister stated "when trust between a regulator and a company is broken, strong actions are required" (Rule 318 Record, AR, Vol XVIII, Tab 20(90)). Health Canada's statement is to a similar effect.

31 Despite repeated requests for disclosure, Apotex remained unaware of what "new information" prompted Health Canada to immediately impose the Import Ban until after initiation of this judicial review. Health Canada attributes this to their confidentiality agreement with the FDA, which prevented them from sharing the acquired information. The new information that is set out in Dr. Supriya Sharma's First Affidavit at paragraphs 89 to 94, includes;

a) selective reporting of positive test results;

b) the FDA's investigation was more detailed and lengthy than previously appreciated;

c) it would be an in-depth process for the company to rectify serious problems; and

d) the FDA had intercepted at the US Border API subject to the Import Alert "mistakenly" listed with incorrect information (this ended up being a misunderstanding, and was not an issue in the proceeding).

32 During this period, there was no correspondence between Health Canada and Apotex regarding GMP compliance at APIPL or ARPL, nor regarding any clarification of information learned from the FDA.

33 On October *2*, 2014, Apotex received copies of four form letters [the EL Letters], which purported to amend Apotex's ELs by applying new terms and conditions that effectively banned import of all drug products from APIPL and ARPL, save for medically necessary products if re-tested by a third party once in Canada.

34 Neither the TGA nor MHRA, with which Health Canada shares mutual recognition agreements, have implemented import bans for these Indian facilities, despite being aware of the FDA and Health Canada's import bans for APIPL and ARPL products. They claim to have relied on their own inspections and detailed analysis of information to make independent risk-based decisions.

B. Supporting Affidavit Evidence

35 The Affidavits filed by the parties describe in detail communications between Apotex and Health Canada leading up to and following imposition of the Import Ban and amendment of the ELs. The Minister's (and her delegates') actions prior to September 30, 2014, are most pertinent to this proceeding: evidence post-dating the regulatory action taken by Health Canada is of little relevance to the decision under review, save for some contextual significance as to what actions preceded the September 30, 2014 Import Ban.

(1) Applicants' Supporting Affidavits

36 Affidavits were filed by Dr. Jeremy Desai, Mr. Ed Carey and Mr. Kiran Krishnan.

37 Dr. Desai, President and Chief Executive Officer of Apotex Inc., swore two affidavits. He describes Apotex's compliance with the *FD Regulations* for obtaining DINs, NOCs and ELs and affirms that Apotex has continually held valid, unsuspended DINs, NOCs and ELs for the banned products and facilities where the banned products were made, APIPL and ARPL.

38 Dr. Desai's description of events leading up to the Import Ban demonstrates a transparent relationship between Apotex and Health Canada, whereby FDA observations, the corresponding US Import Alert, and Apotex's corrective actions were openly communicated to Health Canada. Dr. Desai asserts that Health Canada did not express concern regarding the safety of products

coming from APIPL or ARPL, and in fact conducted their own inspections of the facilities, which resulted in GMP compliant ratings.

39 Dr. Desai sets out the Toronto Star articles scrutinizing Health Canada. On September 30, 2014, Dr. Desai learned, without warning, that an Import Ban had been placed on drug products coming from APIPL and ARPL. Health Canada told Dr. Desai that "new information" from the FDA constituted the basis for the Ban. In his experience, this was not Health Canada's usual regulatory response, which typically involves communication and cooperation with the companies - as had been happening up until this point.

40 Press releases by Health Canada and the Minister on September 30, 2014, also alleged that trust with Apotex had been broken. This is the only information provided to Apotex until after initiation of the judicial review.

41 Ed Carey, Vice President of Global Quality & Compliance at Apotex Pharmachem Inc., is responsible for compliance and oversight of foreign API manufacturers and works closely with Dr. Desai. In his Affidavit, he claims that Health Canada was fully aware of concerns, claimed to be "new information" since at least January of 2014, as evinced by the following; correspondence with the FDA, Apotex's corrective action plans, investigations by Health Canada with international regulatory partners, and implementation of the Protocol for testing in Canada.

42 The Krishnan affidavit explained a misunderstanding by Health Canada of some information provided by the FDA that has since been clarified. It is no longer relevant to the proceeding, other than to demonstrate that some information upon which Health Canada relied in forming an opinion of mistrust towards Apotex was potentially inaccurate.

(2) Respondents' Supporting Affidavits

43 Each of the Respondents' affiants, Ms. Robin Chiponski and Dr. Supriya Sharma, provided two affidavits.

44 Ms. Chiponski is Director General of the HPFB and is involved in oversight of Health Canada's establishment licensing. Her evidence sets out the events of September 2014, from Health Canada's perspective. It explains that Health Canada reviewed and assessed potential compliance and enforcement approaches for Apotex, including the option of restricting import.

45 Ms. Chiponski claims that information from the FDA led her to believe that the data integrity problems at Apotex were more widespread and deeper-rooted than previously thought. She asserts that Health Canada's restriction of import and imposition of terms and conditions on APIPL and ARPL's ELs stemmed from a concern that products from APIPL and ARPL posed a potential risk to Canadians' health and safety. She does not point to evidence that the banned products constituted a risk to health and safety, apart from GMP non-compliance at the facilities.

46 Ms. Chiponski also explains that Health Canada does not notify a regulated party of import restrictions before they take effect in order to prevent the importer from flooding the market with product prior to the ban.

47 Dr. Sharma is the Senior Medical Advisor at HPFB and at the relevant time held the position of Acting Associate Deputy Minister and Senior Medical Advisor. Her affidavit describes the regulatory framework and outlines the guidelines and policies that set out Health Canada's interpretation of the *FD Act* and *FD Regulations*. Potential compliance and enforcement approaches used in the event of GMP non-compliance are outlined in Health Canada's Compliance and Enforcement policy (POL-0001). A brief summary of the relevant points follows:

a) Non-compliance is brought to the company's attention and the Inspectorate will clarify what is necessary to achieve compliance. Enforcement actions are undertaken when necessary, mainly when the regulated party is unable or unwilling to comply with the *Regulations*.

b) To identify the appropriate enforcement action, Health Canada will consider; the risk to health and safety, compliance history of the regulated party, whether the regulated party acted with indifference or premeditation, the degree of cooperation, whether the problem is systemic, the effectiveness of the response, and the need to maintain public confidence in the programs administered by the HPFB and the Inspectorate.

c) The Inspectorate has broad powers to enforce the *Act* and *Regulations*. If a regulated party does not respond voluntarily, the Inspectorate can consider a variety of measures, including; customs activities, public warning or advisory, seizure and detention, and refusal, suspension or amendment of establishment licences.

d) Fairness is a guiding principle of the policy, requiring that the Inspectorate follow a predictable, uniform, non-discriminatory and unbiased approach to enforcement in Canada for all regulated products.

e) The primary objective of the response strategy is to manage the risk to Canadians and use the most appropriate level of intervention to ensure that the regulated party brings the product or activity into compliance.

48 Dr. Sharma emphasizes the importance of adhering to GMP to ensure the quality, efficacy and safety of drugs. She also highlights the policy considerations weighed by Health Canada in the implementation of regulatory measures. In this case, she claims that Health Canada's regulatory action was spurred by the lengthy history of communication and engagement between Health Canada and Apotex over the course of 2014.

49 After the call with the FDA on September 29, 2014, Dr. Sharma doubted that Health Canada could trust Apotex due to the FDA's data integrity concerns, "all other information Health Canada had about Apotex," and Apotex's insufficient remedial actions to date.

50 That same day, Dr. Sharma discussed the agreed-upon regulatory action, the Import Ban, with Deputy Minister DaPont and Associate Deputy Minister Glover, following which she then spoke with the Minister's office.

51 The Respondents' affiants claim to have received no direction from the Minister or her staff about what regulatory actions to take against Apotex. The record demonstrates that both were included in much of the email correspondence between the Minister's Office and Health Canada following the Toronto Star Articles regarding what to do about Apotex.

52 As a result of the Respondents' motion heard prior to this judicial review, in a separate order I have granted leave to file the affidavit of Laura Van Soelen containing exhibits of correspondence between Health Canada and Apotex, dated August 31, 2015, pertaining to the issuance of new ELs for both APIPL and ARPL (on September 1, 2015). It is of limited relevance, but provides a contextual framework of the ongoing regulatory relationship between the parties up to September 30, 2014.

IV. Relevant Legislation

53 The relevant legislation is attached in Annexes A and B.

V. Issues

54 The issues are:

A. What is the appropriate standard of review of Health Canada's decision?

B. Did the Minister act in accordance with the duty of procedural fairness when she implemented the Import Ban and amended the EL Letters?

C. Did the Minister act beyond or not in accordance with her regulatory powers under the *FD Act*, the *FD Regulations* and/or the *Customs Act?*

i. Are the *Regulations* unconstitutional under paragraph 2(e) of the *Canadian Bill of Rights?*

ii. If the Minister employed the proper regulatory powers, was her decision reasonable?

D. Can this Court grant the relief sought?

VI. Decision Summary

55 The standard of review is correctness for allegations of procedural fairness. A correctness standard should also be applied to the issue of whether the Minister employed the correct statutory mechanisms to carry out the Import Ban (EL Action and CBSA Action). The Minister's actual decision of whether to implement the Import Ban should be reviewed on a standard of reasonableness, as this is a question of mixed fact and law.

56 The Minister acted for an improper purpose and did not act in accordance with the duty of procedural fairness when she implemented the Import Ban and amended the EL Letters. Consequently, the Import Ban should be quashed.

57 For the EL Action, the Minister employed the proper statutory provision to add terms and conditions to Apotex's ELs (subsection C.01A.008(4)). However, in the circumstances, that provision should encompass the procedural fairness afforded to EL holders throughout the rest of the regulatory scheme, requiring at least notice and reasons for the addition of terms and conditions.

58 There is no need to consider the CBSA Action, as the Customs Target has expired and has not been renewed.

59 Paragraph 2(e) of the *Canadian Bill of Rights*, SC 1960, c 44 *[Bill of Rights]* does not apply in the circumstances.

VII. Standard of Review

A. What is the Appropriate Standard of Review of Health Canada's Decision?

(1) Applicants' Submissions

60 The Applicants submit that the appropriate standard of review for determining issues of procedural fairness is correctness *Chrétien v. Gomery*, 2008 FC 802 (F.C.) at paras 65-66, aff'd 2010 FCA 283 (F.C.A.); *Khela v. Mission Institution*, 2014 SCC 24 (S.C.C.) at para 79 *[Khela])*.

61 They claim that correctness also governs the issue of whether the Minister had authority to act and if so, pursuant to which particular legislative provision, as this is a question of jurisdiction (*New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9 (S.C.C.) at para 59 [*Dunsmuir*]; *Burnell v. Nova Scotia (Registrar of Motor Vehicles)*, 2009 NSSC 341 (N.S. S.C.) at paras 5-10, aff'd 2010 NSCA 22 (N.S. C.A.)).

62 Further, recent FCA jurisprudence has determined that the EL Action is to be reviewed on a correctness standard (*Takeda Canada Inc. v. Canada (Minister of Health)*, 2013 FCA 13 (F.C.A.) at paras 26, 111, leave to appeal denied 2013 CarswellNat 1867 (S.C.C.) [*Takeda*]; *Celgene Inc. v. Canada (Minister of Health)*, 2013 FCA 43 (F.C.A.) at paras 34-35 *[Celgene]*.

(2) Respondents' Submissions

63 The Respondents submit that although the appropriate standard of review for procedural matters is generally correctness, a decision-maker's choice of procedure that involves a Ministerial decision related to public health considerations under her own statute is entitled to deference (*Forest Ethics Advocacy Assn. v. National Energy Board*, 2014 FCA 245 (F.C.A.) at para 70 [Forest Ethics]; *Maritime Broadcasting System Ltd. v. Canadian Media Guild*, 2014 FCA 59 (F.C.A.) at para 55 *[Maritime Broadcasting]*).

64 The Respondents also argue that the Minister's decision to implement the Import Ban, and the mechanisms she used to carry it out are reviewable on a reasonableness standard. The need for discretion stems from the Minister's expertise in assessing drug safety and efficacy, and the fact that she is interpreting her home statute - a circumstance for which the Supreme Court has set out a rebuttable presumption of reasonableness (*A.T.A. v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61 (S.C.C.) at para 34 [*A.T.A.*]; *British Columbia (Securities Commission) v. McLean*, 2013 SCC 67 (S.C.C.) at para 21 [*McLean*]).

65 Furthermore, the Respondents argue that issues of fact or mixed fact and law are subject to reasonableness review (*Commissioner of Competition v. CCS Corp.*, 2015 SCC 3 (S.C.C.) at para 39; *Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36 (S.C.C.) at para 50).

66 In my opinion, the standard of review for procedural fairness in the present circumstances is correctness. The Supreme Court has determined that deference is not owed when determining whether the decision-maker's process is fair (*Khela*, above, at para 79).

67 The recent FCA cases suggesting otherwise cited by the Respondents do not aptly apply to the present facts. *Forest Ethics* and *Maritime Broadcasting*, above, contemplate situations where tribunals were given discretion to determine their own procedures. In such a situation, the FCA has found that deference is owed to procedural rulings made by a tribunal with the authority to control its own process. In the present case, the Minister was given no such discretion to control her own process, but instead must comply with the procedures set out in the extensive regulatory regime governed by the *FD Act* and *FD Regulations*.

68 The parties disagree as to the appropriate standard to apply with respect to the review of the Minister's decision. The Applicants argue that the issue is jurisdictional. I disagree. The Supreme Court has expressed serious reservations about the presence of jurisdictional issues: they are narrow and will be exceptional (*A.T.A.*, above, at para 33). Further, the case law cited by the Applicants in support is not applicable on the present facts.

69 The Respondents submit that cases involving public health and safety are reviewed on a reasonableness standard. Although prior jurisprudence has established that the appropriate standard of review of decisions on questions of fact and the exercise of discretion by Health Canada under the *FD Regulations* is reasonableness (*North American Nutriceutical Inc. v. Canada (Attorney General)*, 2012 FC 1044 (F.C.) at para 78 citing *Wellesley Therapeutics Inc. v. Canada (Minister of Health)*, 2010 FC 573 (F.C.) at para 31), the Minister's interpretation of her power under the *FD Regulations* to implement the EL Action, and under the *Customs Act* to carry out the CBSA Action, are not questions of fact or discretion.

70 The issue is best characterized as one of statutory interpretation: the EL Action comes down to the Minister's interpretation of her powers under the *FD Regulations*, specifically whether subsection C.01A.008(4) authorizes her to add terms and conditions to Apotex's ELs; and the CBSA Action involves the Minister's interpretation of her powers under the *Act*, Regulations and the *Customs Act*. Statutory interpretation is a question of law (*Canadian National Railway v. Canada (Attorney General)*, 2014 SCC 40 (S.C.C.) at para 33).

71 Only once it is determined that Minister chose the correct statutory mechanisms would her decision to implement the Import Ban - a policy-based question involving public health considerations - be properly characterized as one of mixed fact and law, with the applicable standard of review at this stage being reasonableness.

72 According to *Dunsmuir*, the Court must first ascertain whether judicial precedents have satisfactorily established the standard of review applicable to the Minister's interpretation of the *FD Act* and *Regulations*. Where prior jurisprudence has not indicated the proper standard, the Court must analyze the .*Dunsmuir* factors.

73 In *Takeda*, above, Justice David Stratas in dissent on a separate issue, and Justice Eleanor Dawson of the FCA, conclude that the Minister's interpretation of the data protection provisions of the *FD Regulations* is correctness. Justice Stratas arrives at correctness by rebutting the Supreme Court's presumption of reasonableness set *by ATA*, through an analysis of the *Dunsmuir* factors. Justice Dawson found that the issue had been determined in recent prior jurisprudence.

74 Although there is no prior jurisprudence setting out the appropriate standard of review on the specific provisions at issue, Justice Stratas' analysis of the *Dunsmuir* factors is helpful: the present facts involve the same Minister and the same regulations. He writes at paras 29 and 30:

> 29 In my view, the presumption [of reasonableness set out in *ATA*] is overcome. All of the factors relevant to determining the standard of review lean in favour of correctness review. In this case, the nature of the question is purely legal. There is no privative clause. The Minister has no expertise in legal interpretation. There is nothing in the structure of the Act, this regulatory regime or this particular legislative provision that suggests that deference should be

accorded to the Minister's decision. This analysis of the factors mirrors that in *Georgia Strait Alliance v. Canada (Minister of Fisheries & Oceans)*, 2012 FCA 40 (F.C.A.) at paragraphs 101-105 (sometimes also referred to as "Georgia Strait"); *Sheldon Inwentash & Lynn Factor Charitable Foundation v. R.*, 2012 FCA 136 (F.C.A.) at paragraphs 18-23.

30 I am comforted in this conclusion by the application of the correctness standard to Ministerial interpretations of the *Patented Medicines (Notice of Compliance) Regulations*, SOR/93-133: *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, 2005 SCC 26, [2005] 1 S.C.R. 533 (S.C.C.) at paragraph 36; *Astrazeneca Canada Inc. v. Canada (Minister of Health)*, 2006 SCC 49, [2006] 2 S.C.R. 560 (S.C.C); *Purdue Pharma v. Canada (Attorney General)*, 2011 FCA 132 (F.C.A.) at paragraph 13. Although different regulations are involved in this case, both concern Minister-administered regimes governing the period before drugs are authorized for sale. It would be anomalous if the standards of review differed.

75 Justice Stratas' analysis applies to the present facts: statutory interpretation is a legal question, the *FD Regulations* contain no privative clause and the Court is as well placed as the Minister to determine the proper statutory interpretation of the *Regulations*, Part C, Division 1A does not confer a large degree of deference to the Minister. Although the particular provision, subsection C.01A.008(4), which the Respondents contend provides statutory authority for the Minister's actions, does provide the Minister with some degree of deference to set out terms and conditions, the contextual and legal scheme for establishment licensing provides little deference to the Minister. Even in situations where the Minister is given some discretion, she is required to consider certain factors and follow specific procedures.

76 While I find that the appropriate standard is correctness, given my decision below, whether one applies the standard of correctness or reasonableness on interpretation, the result would be the same.

VIII. Analysis

A. Did the Minister Afford Adequate Procedural Fairness when she Implemented the Import Ban and Amended the EL Letters?

(1) What Degree of Procedural Fairness is Apotex Entitled to?

77 The Applicants submit that the Minister was under a common law duty to act fairly: her decision affected Apotex's rights and interests - mainly, Apotex's pre-existing authorization to import products from APIPL and ARPL. Consequently, it requires that they be provided the opportunity to present their case fully and fairly, and that decisions are made using a fair, impartial and open process(*Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.) at paras 20, 22, 28 *[Baker])*.

78 The Respondents argue that procedural fairness is not owed under the *Regulations* at the time terms and conditions are imposed. A party disputing the imposition may apply for an amendment under section C.01A.006, and will then be granted procedural protection pursuant to subsection C.01A.010(3) of the *FD Regulations*.

79 The Respondents cite *Baker* as authority for the importance of context to assessing the content of procedural fairness, and analyse the *Baker* factors. They argue that if the Court finds a duty of procedural fairness is owed prior to the imposition of terms and conditions, the factors indicate the duty is low for the following reasons:

> a) Ministerial decisions must ensure legislative policy is implemented (*Cie pétrolière Impériale c. Québec (Tribunal administratif)*, 2003 SCC 58 (S.C.C.) at paras 34, 37-38).
>
> b) In the context of public safety procedural guarantees will be adjusted "in accordance with the degree of risk and urgency" (*Miel Labonté Inc. c. Canada (Procureur général)*, 2006 FC 195 (F.C.) at para 70).
>
> c) The decision was a non-final regulatory decision reached by a non-adjudicative process.
>
> d) The purpose of the *FD Act* and *Regulations* is the protection and promotion of Canadians' health and safety. The Minister is provided discretion to apply her expertise and is statutorily mandated to protect public health.
>
> e) Apotex's interest is purely economic, which cannot outweigh the public interest of having safe products on the market (*Hilbert Honey Co. v. Canadian Food Inspection Agency*, 2009 FC 818 (F.C.) at paras 63 and 120-122).
>
> f) Tribunals with expertise, such as Health Canada in this context, are to be afforded deference in establishing decision-making processes (*Maritime Broadcasting*, at para 56).

80 The Respondents claim that a finding that low procedural fairness is owed to Apotex is consistent with other case law arising under the Regulations (*Canadian Pharmaceutical Technologies International (C.P.T.) Inc. v. Canada (Attorney General)*, 2009 FC 244 (F.C.) at paras 54-55; *Duchesnay Inc. v. Canada (Attorney General)*, 2012 FC 976 (F.C.) at para 64).

81 With regard to some of the above points, on the facts before me, there is no evidence to support the contention that the Minister was concerned about immediate health risks posed by the products subject to the ban, nor that the situation was highly urgent, and that consequently, the level of procedural fairness should be less. Moreover, in terms of the statutory scheme, the Minister is not given "wide discretionary power" under the *Regulations*, in all but few provisions (such as paragraph C.01A.008(4)(b)). Further, the statutory scheme provides procedural protections (notice, reasons and/or the opportunity to be heard) for the licensees in all sections, apart from

those relating to issuance. This indicates that some procedural fairness was intended for the EL scheme.

82 The regulatory regime and the present circumstances suggest procedural fairness should have been afforded prior to implementation of the Import Ban. The Minister made an administrative decision that affected Apotex's rights, privileges and interests. Even at the mid-to-low end of the spectrum, Apotex was entitled to basic participatory rights and the required procedural fairness as set out in the *Regulations*.

83 The Minister was procedurally unfair. She failed to provide any notice and thus denied Apotex an opportunity to be heard before unilaterally imposing the Import Ban on September 30, 2014.

(2) Improper Purpose and Reasonable Apprehension of Bias

(a) Apprehension of Bias

84 Apotex submits that that the Minister and her delegates conducted themselves so as to give rise to a reasonable apprehension of bias, both for lack of impartiality and for lack of independence.

85 The legal test for reasonable apprehension of bias is confirmed in *Baker*, above, at para 46 to be:

> What would an informed person, viewing the matter realistically and practically - and having thought the matter through -conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly?

86 The Applicants allege that this test is met and that a lack of impartiality arose from the Minister's improper motives and the fact that she and her delegates had made a decisive decision to take strong action against Apotex.

87 They cite a September 16, 2014 email from the Minister to her Chief of Staff and the Deputy Minister in which the Minister expresses her concern that they didn't "have a strong enough policy response," and that she wanted to say she would "revoke the license [sic] of [Apotex] if they do not remove these products asap" (Rule 318 Record, Tab 26, AR, Vol XVII, Tab 19(c)(26)).

88 An email from the Minister's Director of Issues Management, Mr. Olsen, to the Prime Minister's Office on September 23, 2014, also indicates that the Minister's Office directed the department (presumably the RAPB) to take "stronger action" (Rule 318 Record, Tab 34, AR, Vol. XVII, Tab 19(C)(34)).

89 Apotex also submits that the Minister (and delegates) lacked independence in the particular circumstances, as there was no one involved in the process of deciding whether or not to implement an import ban who could render an independent decision, free from external pressure. Apotex

claims that by September 29, 2014, everyone who was involved in the issue of what to do about Apotex were tainted by the media coverage and Ministerial pressure.

90 The obligation of impartiality on the Minister is not equivalent to the impartiality that is required of a judge or an administrative decision-maker whose primary function is adjudication, The Minister is dealing with polycentric considerations and has as her duty the protection of the Canadian public's health and safety (*Cie pétrolière Impériale c. Québec (Tribunal administratif)*, 2003 SCC 58 (S.C.C.) at paras 31, 34).

91 While the Minister expressed a desire to pull Apotex's ELs following intense questioning in the House of Commons on September 16, 2014, I do not think an "informed person," looking to context and with information (i) about the events between Health Canada and Apotex from April 2014 onwards, (ii) of APIPL and ARPL's GMP non-compliance, and (iii) considering the complex regulatory interplay of the various Health Canada branches (as evinced by communication between individuals in all departments) would think it is more likely than not that the decision-maker (not solely involving the Minister) would not at least be amenable to persuasion. Legally, the threshold has not been met.

92 With respect to the alleged lack of independence, there is evidence from the record that discussions and meetings were taking place up and down the ladder at Health Canada. However, in considering the regulatory regime and the division of powers at Health Canada, based on the facts before me, the Applicants have not met their burden of demonstrating that no one at Health Canada could render an independent decision free from external pressure.

93 Internal emails indicate that Health Canada was indeed concerned with the Toronto Star articles and what to do about Apotex. As Ms. Chiponski stated in her First Affidavit, it is Health Canada's responsibility to be apprised of information, including from the media, falling within its mandate. The articles were highly critical of Health Canada and of the Minister and it is not unusual or in my opinion probative for demonstrating a lack of independence that Health Canada personnel were discussing same.

94 The Applicants have not met the burden of establishing that the Minister demonstrated a reasonable apprehension of bias, either from a lack of independence or impartiality, given the high threshold for establishing that bias (*Balta v. Canada (Minister of Citizenship & Immigration)*, 2011 FC 1509 (F.C.) at para 18; *Fletcher v. Canada (Minister of Citizenship & Immigration)*, 2008 FC 909 (F.C.) at para 8).

(b) Improper Purpose

95 The evidence does however demonstrate that the Minister acted for an improper purpose.

96 Discretionary decisions are constrained by the confines of the enabling legislation and must be exercised in accordance with the rule of law. It is thus *ultra vires* for a Minister to make a decision for a purpose other than for which that power was granted by the legislature (*Roncarelli c. Duplessis*, [1959] S.C.R. 121 (S.C.C.), at 140, 143).

97 The Applicants allege that the Minister's actions were not motivated by a desire to protect the health and safety of Canadians and ensure compliance with the *FD Regulations*, but were instead for the purpose of easing political pressure stemming from heavy criticism by the media and in the House of Commons.

98 The evidence they assert supports this allegation includes:

a) An email from the Minister's staff expressing frustration with the Inspectorate's decision to offer Apotex the option of voluntary quarantine, thereby precluding any immediate "stronger measures" (Rule 318 Record, Tab 36, AR, Vol XVII, Tab 19(c)(36)).

b) Frequent requests by the Minister's staff for "stronger action," following which they were indeed taken: Health Canada accelerated Apotex's deadline for responding to their request for voluntary quarantine, and then withheld the Exit Notice for APIPL that granted a Compliant with Terms and Conditions rating.

c) When asked why Health Canada's action was more severe than that of the FDA, Health Canada personnel pointed to Toronto Star coverage, not a concern for health and safety.

d) Public assurances by the Minister, Dr. Sharma and Health Canada that there were no health and safety concerns of the banned products, and the fact that no APIPL or ARPL products were recalled,

e) Interactions between Health Canada and Apotex prior and subsequent to the Toronto Star criticism. In April 2014, the FDA Import Alert for APIPL products resulted in discussions between Health Canada and Apotex, further inspection and a jointly agreed upon testing protocol. The FDA alert regarding ARPL products in September - in the midst of media attacks - resulted in a demand for voluntary quarantine and Import Ban.

f) Finally, a FDA Import Alert in 2013 for another foreign manufacturer charged with serious data integrity issues, including fraudulent falsification, did not result in an import ban by Health Canada, but instead ended in cooperation with the company. That situation was not in the wake of highly critical media attention, as was present here.

99 The Applicants emphasize that the motivation behind the Minister's actions was to ease political pressure - clearly unrelated to the intent and purpose of the *FD Act* and *Regulations*,

100 The purpose of the *FD Act* and *Regulations* is the protection and promotion of Canadians' health and safety. It is not contested that Health Canada had concerns about GMP compliance at Apotex's Indian facilities. Nor is it disputed that in order to protect Canadians' health and safety, Health Canada has the option to ban products from facilities found to be non-compliant with GMP, as is set out by their Compliance and Enforcement Policy (POL-0001).

101 However, the issue for the Court is whether, on the facts contained in the record before me, the Import Ban was implemented based on a legitimate concern for protecting Canadians' health and safety, and not to silence criticism in the media or in Parliament, or for any other improper purpose.

102 In my opinion, a consideration of the following facts illustrates that it is more likely than not that an improper purpose was at play. In September of 2014, in the absence of media criticism on the Minister or Health Canada, evidence of the on-going regulatory relationship between Apotex and Health Canada demonstrates that it is unlikely and against past and customary practice that Health Canada would have:

a) suddenly and without explanation withdrawn its own inspectors' Compliant with Terms and Conditions rating for APIPL, which stemmed from an inspection expressly aimed at investigating FDA concerns of the APIPL and ARPL facilities;

b) immediately and without notice ceased the usual pattern of ongoing dialogue for working with regulated parties and taking corrective actions in situations of GMP non-compliance, as outlined by their own policies;

c) banned products from both facilities targeted in the Toronto Star articles, despite the fact that APIPL had just been granted a Compliant with Terms and Conditions rating by Health Canada inspectors and only ARPL had been the subject of the most recent FDA Import Alert; and

d) implemented an Import Ban without first attempting to consult with Apotex regarding the newly learned FDA concerns, or requesting an extension of Apotex's voluntary quarantine.

103 There is nothing in the evidence to suggest that the events of September were so different from the previous six months such that the Import Ban was needed immediately, without notice or any opportunity to be heard, and for both APIPL and ARPL - facilities expressly mentioned in the critical articles.

104 A review of the "new information" obtained by Health Canada on September 29, 2014, also does not explain the urgency of the regulatory action taken. The evidence reveals that Health Canada: had been apprised of the FDA's Form 483s, which detailed their observations and concerns; had been informed of the FDA warning letter to APIPL in June 2014, regarding its

failure to sufficiently correct problems; had come to a mutually agreed upon Protocol for re-testing products; and had conducted an inspection specifically for the purpose of reviewing APIPL's progress in light of the FDA findings. Although in September ARPL came under the spotlight, observations from the FDA inspection outlined in ARPL's Form 483 were not so disparate or egregious to those found for APIPL that such a different course of regulatory action was justified. The way this Import Ban was carried out fell outside Health Canada's customary regulatory practice, but publicly represented that they were going further than the US FDA.

105 Further, if the Import Ban was motivated by the purpose of protecting health and safety. it is curious that the Minister and Health Canada would publicly assure that the banned drug products' were safe and at no point issued any recall for those products available in the Canadian market. Upon cross-examination, the Respondents' affiants stated that there was no evidence that products from APIPL of ARPL produced a risk or threat to the health of consumers.

106 While the Minister is provided some discretion under the *FD Regulations* and has been charged with protecting Canadians' health and safety through her implementation of the *FD Act* and *Regulations*, her discretionary decisions must be prescribed by law and fall within the confines of her mandate. They are also restricted by the requirements of natural justice (*Morton v. Canada (Minister of Fisheries and Oceans)*, 2015 FC 575 (F.C.) at paras 29-31 citing *Comeau's Sea Foods Ltd. v. Canada (Minister of Fisheries & Oceans)*, [1997] 1 S.C.R. 12 (S.C.C.) at para 36).

107 The above facts suggest that the Import Ban was motivated by the Minister's desire to ease pressure triggered from the media and in the House of Commons - a purpose falling outside her delegated authority from the enabling legislation, which must be exercised in accordance with the rule of law. The Minister's actions were therefore *ultra vires* and she erred in her exercise of jurisdiction by implementing an Import Ban on September 30, 2014. The public statements released on September 30, 2014, by the Minister and Health Canada constituted a manifestation of this improper purpose; they were a way for the Minister to publicly convey she was taking strong action and was not weaker than her US regulatory counterpart.

(3) Failure to Act in Accordance with Natural Justice

108 The Respondents submit that Apotex cannot credibly argue it was unaware of Health Canada's concerns. Ongoing correspondence and information exchange between a regulator and regulated party can constitute notice. Thus, the Respondents argue Apotex was aware of Health Canada's concerns of data integrity since April 2014.

109 They further maintain that the Applicants also cannot claim to have been denied an opportunity to be heard: Apotex provided information to Health Canada relating to data integrity issues and the corresponding corrective actions taken, such as re-testing of products once in Canada pursuant to the Protocol.

110 The Respondents also claim that the statutory basis and reasons for the decision were explained in the EL Letters and Health Canada's call with Apotex on September 30, 2014. To the extent the reasons given are inadequate, the Court must look to supplement them, as suggested by Justice Abella in *N.L.N.U. v. Newfoundland & Labrador (Treasury Board)*, 2011 SCC 62 (S.C.C.) at paras 12-16.

111 In addition to reviewing inspection reports of APIPL and ARPL, documents from the Respondents' Rule 318 Response and sworn evidence from Ms. Chiponski and Dr. Sharma demonstrate Health Canada's consideration of all the information provided to it. The Respondents thus claim that the history of engagement and ongoing correspondence between Apotex and Health Canada constituted adequate notice.

112 I disagree.

113 Participatory rights are afforded so that the interested parties have an opportunity to bring evidence and arguments relevant to the decision to be made to the attention of the decisionmaker *{Baker*, above, at paras 22, 28). Although the content of procedural fairness varies with the circumstances, notice is a fundamental element. Its main purpose is to afford those affected with a reasonable opportunity to present their case and to respond to what is presented in opposition. Notice must thus be given sufficiently in advance to allow for preparation and must provide adequate information to allow meaningful participation (Brown and Evans, *Judicial Review of Administrative Action in Canada*, looseleaf (Toronto: Thomson Reuters Canada Limited, 2014) at 9:1100, 9:1200).

114 Apotex is a large pharmaceutical manufacturer that works with various international facilities and functions within a complex regulatory and licensing scheme: they are seemingly in constant correspondence with their regulator. It is obvious they knew of Health Canada's concerns regarding data integrity issues at APIPL and ARPL - they themselves supplied Health Canada with information regarding same and of corrective actions taken in response, and in cooperation with, the FDA. This correspondence does not constitute notice or an opportunity to be heard.

115 The last communication between Apotex and Health Canada prior to the Import Ban was the draft Inspection Exit Notice, conveying that APIPL had received a Compliant with Terms and Conditions rating from Health Canada on September 25, 2014, four days prior to imposition of the Import Ban. If anything, this correspondence conveyed to Apotex that Health Canada's data integrity concerns had lessened and were being addressed, in the ordinary course of the parties' normal, ongoing dialogue in dealing with regulatory concerns.

116 Further, both the Respondents' affiants attest to the fact that "new information" obtained from the FDA on September 29, 2014, called into question the reliability of data coming from APIPL and ARPL and caused concerns that corrective actions to that point "might not be

sufficient" (Sharma Supplementary Affidavit, para 20; AR, Tab 10, p 2466). This conversation and the "new information" do not form part of the ongoing correspondence between Apotex and Health Canada, yet it was a decisive factor in Health Canada's decision to amend Apotex's ELs and detain their products at the border.

117 Apotex was informed of the Import Ban over the phone on September 30, 2014, and via press releases by Health Canada and the Minister that day. This cannot amount to notice, which must be prospective in order to provide a *meaningful* opportunity to be heard.

118 The Respondents also claim that Health Canada took "escalating action" to address problems at APIPL and ARPL and warned that additional steps may be taken in the future. The evidence demonstrates that between April and September of 2014, rather than escalating, the correspondence and actions taken exemplify the cooperative approach outlined in Health Canada's Compliance and Enforcement Policy (POL-0001) whereby non-compliance is brought to the attention of the regulated party and the Inspectorate clarifies what is necessary to achieve compliance (section 8.0, POL-0001) - this is what happened in the context of APIPL. Although non-binding, the policy provides insight into Health Canada's usual regulatory practice. It states:

> When a non-compliance issue is identified, it is brought to the attention of the company or individual involved. Initially, the Inspectorate will clarify what is necessary to achieve compliance. It is then the organization or individual's responsibility to take timely and appropriate action to comply with legislative and regulatory requirements. Enforcement actions will be undertaken by the Inspectorate when necessary, particularly when the regulated party is unable or unwilling to comply with legislative and/or regulatory requirements.

119 Health Canada's warning that they may take "additional steps" if necessary, does not constitute adequate notice, as it did not provide sufficient information to allow Apotex to participate.

120 Consequently, without proper notice Apotex was not provided with a meaningful opportunity to be heard. Although Health Canada had information about Apotex's corrective actions, this preceded the new information conveyed by the FDA, and did not provide an opportunity to be heard on the factors leading to the decision.

121 The Minister did not act in accordance with natural justice and denied Apotex the basic procedural rights required in the circumstances.

B. Did the Minister Act Beyond or Without Legislative Authority?

(1) EL Action

(a) Legislative / Regulatory Scheme

122 While I need not consider whether the Minister acted without legislative authority, given my findings of the Minister's procedural unfairness and acting for an improper purpose, it is an issue that warrants clarification by this Court. The record before me is extensive and a consideration of this issue has consequences for ascertaining future licensees' rights under the *FD Regulations*.

123 The *FD Regulations* create a scheme whereby no person can manufacture, import or sell a drug, except in accordance with an EL. Once the requisite information is provided, section C.01A.008 regulates issuance. Subsection C.01A.008(4) authorizes the Minister to set out terms and conditions in an EL regarding required testing and "any other matters necessary to prevent injury to the health of consumers, including conditions under which drugs are fabricated, packaged/ labelled or tested".

124 The Minister is authorized to amend these terms and conditions under section C.01A.012, if necessary, to prevent injury to the health of the consumer, provided 15 days' notice and the reasons for the amendment are given in writing.

125 The Minister may suspend ELs in respect of any matters indicated in subsection C.01A.008(2) if the Minister has reasonable grounds to believe that (a) the licensee contravened the *Act* or *Regulations;* or (b) the licensee made a false or misleading statement in the application for the EL (section C.01A.016). Under subsection C.01A.016(3), the Minister cannot suspend an EL until the licensee is provided written notice that sets out the reason for the proposed suspension and any required corrective action, and the licensee has been given an opportunity to he heard.

126 Section C.01A.017 grants the Minister power to suspend a licence without providing an opportunity to be heard if necessary to prevent injury to the health of the consumer. Reasons for the suspension must be provided in writing and within 45 days the licensee must be provided an opportunity to be heard if requested.

(b) Analysis

127 Apotex contends that under the *FD Regulations*, the Import Ban (partially carried out via the Minister's amendment of APIPL and ARPL's ELs) could only legitimately be pursued under sections C.01A.016 or C.01A.017, both of which implicate procedural rights that were not provided.

128 On September 30, Health Canada informed Apotex that it was restricting import and would be amending Apotex's ELs. The added terms and conditions effectively prohibit import into Canada of all products from APIPL and ARPL, save those deemed medically necessary by the Minister, which are then subject to additional third-party testing.

129 The Applicants submit that "terms and conditions" were not intended to be interpreted so as to nullify Apotex's right to carry on a designated activity. This amounts to suspension, for which the Minister's power stems from section C.01A.016, and under which she is required to provide Apotex notice, reasons and an opportunity to be heard. Under urgent circumstances, she is still required to provide an opportunity to be heard if requested (section C.01A.017). By effectively suspending Apotex's EL's without complying with the requirements, the Minister acted without legislative authority.

130 Apotex submits that the Minister's claimed reliance on subsection C.01A.008(4) was in error for some of the following reasons:

> a) all of section C.01A.008 addresses the Minister's powers in the context of a fresh application or amendment sought by the licensee - section C.01A.012 grants the Minister authority to amend terms and conditions by her own initiative;
>
> b) the power to set terms and conditions under one subsection cannot be read to include the power to revoke primary rights granted in another.

131 They note that the Court's interpretation of the *FD Regulations* should be reviewed in light of paragraph 2(e) of the *Bill of Rights:* all Canadian laws are to be construed so not to hinder the right to a fair hearing in accordance with the principles of fundamental justice. Alternatively, if subsection C.01A.008(4) is found to authorize the Minister's EL action, it is a decision that includes the common law right to a fair hearing before imposition of the terms and conditions. See the subsequent section for a discussion of the Applicants' argument on paragraph 2(e) of the *Bill of Rights*.

132 The Applicants argue that the Minister also lacked factual basis to implement the Import Ban: she did not believe on reasonable grounds that the amendment was necessary to prevent injury to the health of consumers, as required by the *Regulations*.

133 Despite the Minister's assertion that the new terms and conditions were "necessary to prevent injury to the health of consumers," cross-examinations of Ms. Chiponski and Dr. Sharma reveal that there was no evidence that products from APIPL or ARPL produced an immediate risk or threat to the health of consumers. Also, the Chiponski and Sharma Affidavits speak of a concern with a "potential risk" to the consumer, which does not meet the conditions set out in subsection C.01A.008(4).

134 The Minister is given broad discretion under subsection C.01A.008(4), which states (for ease of reference):

> (4) The Minister may, in addition to the requirements of subsection (2), set out in an establishment licence terms and conditions respecting

> (a) the tests to be performed in respect of a drug, and the equipment to be used, to ensure that the drug is not unsafe for use; and
>
> (b) any other matters necessary to prevent injury to the health of consumers, including conditions under which drugs are fabricated, packaged/labelled or tested.

135 In my opinion, subsection C.01A.008(4) does authorize the Minister to add new terms and conditions to previously issued ELs. However, procedural rights that are provided to EL holders throughout Division 1A of the *Regulations* in similar circumstances should also be afforded when terms and conditions arc added to existing ELs.

136 This is a matter of statutory interpretation, for which the approach set out in *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.) at para 21 is to be followed:

> the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

137 Section C.01A.008 is the only provision falling under the heading "Issuance". It initially appears odd that Ministerial authority to add new terms and conditions to existing ELs at any given time (not just upon issuance or application by the licensee for amendment) would fall within the section dealing with issuance. This is especially so considering Division 1A contains a separate part devoted to "Terms and Conditions," under which section C.01A.012 authorizes the Minister, by her own initiative, to amend (not impose) terms and conditions to an EL if she has reasonable grounds to believe it is necessary.

138 However, Ministerial power to impose new terms and conditions to existing ELs - grammatically and on an ordinary meaning of the words - reasonably falls under the heading "Issuance," as the provision could be interpreted to apply to both issuance of a new EL, as well as issuance of new terms and conditions.

139 The interpretation that subsection C.01A.008(4) does not provide the Minister with authority to add new terms and conditions to existing ELs leads to an absurd result, as the Minister is thus precluded from adding terms and conditions if she did not do so at the outset.

140 Terms and conditions can in fact be added to ELs following an on-site inspection or desktop review. This is what occurred in the present case when Apotex was provided a draft Inspection Exit Notice for APIPL, setting out a Compliant with Terms and Conditions rating. Notably, the statutory basis for adding terms and conditions cited in the Exit Notice was sections C.01A.008(4) and C.01A.012. This Exit Notice was provided by a Health Canada employee, without the knowledge or authorization of the Minister. Nevertheless, the Inspection Exit Notice on which new terms and conditions were imposed pursuant to these sections provides notice and an opportunity to be heard:

> If you disagree with the content of the Inspection Exit Notice, you have ten (10) calendar days to bring your concerns to the attention of the Regional Manager... If you exercise this option, please do so in written submission outlining the basis of the dispute citing the specific sections of the Inspection Exit Notice that are contentious (Desai First Affidavit, Exh I; AR, Tab 3(I), p 242).

141 Thus, if Health Canada is concerned with a licensee's compliance with the *FD Act* or *Regulations*, terms and conditions may be added to ELs following an inspection, and the licensee is provided an opportunity to be heard.

142 Analysis of the suspension provisions (sections C.01A.016, C.01A.017) further supports the interpretation that subsection C.01A.008(4) was intended to provide the Minister power to add terms and conditions to existing ELs. The Applicants claim that suspension may be "in whole or in part," while the Respondents argue that the suspension applies to a category of products - hence why the Minister could not suspend Apotex's licences, as she needed to allow importation of medically necessary products.

143 The Respondents' interpretation is more tenable on a reading of the words in their grammatical and ordinary sense: section C.01A.016 states that the Minister may suspend an EL "in respect of any or all matters indicated in subsection C.01A.008(2)...". The terms "any or all" do not provide that any or all drug products may be suspended, rather they indicate that suspension may stem from contravention of one or more matters listed tinder subsection C.01A.008(2). The matters listed under that subsection include authorized activities, such as importation.

144 An interpretation that subsection C.01A.008(4) was the proper statutory basis authorizing the Minister to impose new terms and conditions to APIPL and ARPL's existing ELs is consistent with the intent of the legislative scheme, as the Minister must be able to impose terms and conditions other than at the time of issuance to protect Canadians' health and safety. However, using this provision to impose new terms and conditions on existing ELs should encompass a right to notice and reasons for the new terms and conditions.

145 If subsection C.01A.008(4) permits adding new terms and conditions to existing ELs, but does not provide notice or reasons, a nonsensical outcome ensues. Under section C.01A.012, when the Minister changes the parameters of an EL by amending existing terms and conditions of an EL, the Minister is required to provide at least 15 days' notice in writing and reasons for the amendment, but when the Minister changes the parameters of an EL by adding new terms and conditions, no notice or reasons are required. There is no logical basis for the requirement for notice and reasons in one of these situations, but not the other.

146 Further support that the some procedural fairness should apply to the Minister's use of subsection C.01A.008(4) to impose terms and conditions on ELs is that the regulatory scheme

provides such procedural rights, even to those not holding an EL: the Minister is required to provide notice, reasons and an opportunity to be heard to applicants for which she has refused to issue an EL (subsection C.01A.010(3)). It would be procedurally unfair that at the very least notice and reasons are not provided to EL holders.

147 Once an EL is issued, the licensee is granted procedural protection for Minister-initiated actions: upon annual licence review under section C.01A.009, if the Minister refuses to issue the EL or amend terms and conditions (as requested by the licensee under section C.01A.006) she is required to notify the licensee and provide an opportunity to be heard (subsection C.01A.010(3)); under section C.01A.012 the Minister may amend terms and conditions on an existing EL, but must provide at least 15 days' notice in writing, as well as reasons; under section C.01A.016, upon suspension the Minister must provide written notice and reasons, if corrective action is required, and provide the licensee an opportunity to be heard; and even when urgent, section C.01A.017 requires the Minister to provide an opportunity to be heard if requested.

148 Basically, anytime the Minister purports to do anything affecting an already-issued EL, the Minister must also provide notice and/or reasons and/or an opportunity to be heard as set out in the *Regulations*. Parliament clearly intended that licensees be afforded at least these components of procedural fairness.

149 The Applicants argue that "terms and conditions" should not be interpreted so as to nullify Apotex's right to carry on a designated activity, and that this amounts to suspension under section C.01A.016. The terms and conditions imposed on Apotex's ELs are stringent; however, if the Minister were to suspend Apotex's ELs to prevent against importation of non-compliant drugs, then she may be putting at risk the health and safety of Canadians if a shortage of essential drugs ensued as a result. The *Regulations* cannot be read so as to frustrate the purpose for which they were enacted.

150 In my opinion, the Minister used the correct statutory mechanism to add terms and conditions to Apotex's ELs. However, in the present circumstances (when the Minister imposes terms and conditions on an existing EL under subsection C.01A.008(4)), the most basic procedural protections, like notice and reasons for imposing the new terms and conditions, should be afforded. This is consistent with the regulatory scheme and Health Canada's own policies.

(c) Are the Regulations Unconstitutional Under Paragraph 2(e) of the Bill of Rights?

151 The Applicants submit that if the *Regulations* are construed to have permitted the Minister to remove Apotex's right to import without a fair hearing it is unconstitutional and thus inoperative for contravening paragraph 2(e) of the *Bill of Rights*.

152 The Respondents counter that paragraph 2(e) of the *Bill of Rights* does not create a right to a hearing where neither the legislation nor the common law require it and since Apotex was not

owed a hearing pursuant to subsection C.01A.008(4) of the *Regulations*, the *Bill of Rights* does not apply (*Amaratunga v. Northwest Atlantic Fisheries Organization*, 2013 SCC 66 (S.C.C.) at para 61 *[Amaratunga])*.

153 The Supreme Court has made it clear that paragraph 2(e) of the *Bill of Rights* does not create a free-standing right to a hearing - it "provides for a fair hearing if and when a hearing is held" (*Amaratunga*, above, at para 61). I have determined that basic procedural fairness should have been provided when Health Canada imposed new terms and conditions on Apotex's ELs, however this is not synonymous with imposing a right to a fair hearing. As clarified by the Supreme Court, the protections afforded by paragraph 2(e) of the *Bill of Rights* are operative only in the application of law to individual rights and obligations in a proceeding before a court, tribunal or similar body (*Authorson (Litigation Guardian of) v. Canada (Attorney General)*, 2003 SCC 39 (S.C.C.) at paras 59-61).

(2) CBSA Action

154 To execute the Import Ban, the Minister stopped import into Canada of all drug products from APIPL and ARPL by way of Lookouts sent to CBSA on September 30, 2014, which cited data reliability problems at APIPL and ARPL as justification.

155 The purported statutory basis for implementing the ban stems from contravention of sections C.02.003, C.02.003.1 and C.02.003.3 of the *FD Regulations*, together with section 101 of the *Customs Act*. Apotex submits the Minister acted without legislative authority and that reliance on these provisions is illegitimate for the following reasons:

> a) There is no legitimate basis to rely on the *Customs Act* and ignore section C.01A.017, which gives the Minister power to prevent importation in urgent circumstances.
>
> b) Section 101 states "[g]oods that have been imported or are about to be exported may be detained." This confers power to detain goods already in Canada, not to "prevent", "prohibit" or "ban" importation of anything.
>
> c) Section 101 is an interim regulatory mechanism; it contemplates detention until the goods have been "dealt with in accordance with" the applicable legislation.
>
> d) Sections 23 to 27 of the *FD Act*, which authorize inspectors to seize products in relation to which the *Regulations* have been contravened, requires the inspector to release the goods under section 26 once satisfied of compliance. If not satisfied, he or she must either obtain consent to their destruction or bring proceedings in a superior court - which affords procedural protections (section 27).

156 The Respondents claim that the Customs Target is not reviewable under section 18.1 of the *Federal Courts Act* because it is not a final determination of admissibility of products under

the *Customs Act* and does not affect the rights or interests of an applicant, as not one Apotex product was seized as a result of the Customs Target. To challenge a final determination of product admissibility from APIPL or ARPL, Apotex must have brought a proceeding under section 106 of the *Customs Act*, which it did not do.

157 The Applicants have requested that the Minister's decision to implement, and her implementation of the Import Ban, be quashed, which includes the CBSA Action. The Customs Target expired on March 31, 2015, and was not renewed. The Applicants argue that the CBSA Action was a vital component of the Import Ban. While this may be true, this facet of the Import Ban does not have continuing effects or lasting repercussions on Apotex's current right to import products from APIPL or ARPL, as the EL Action may. Even should this Court decide that the Minister's decision was without legislative authority and or unreasonable, there is no further remedy the Court may grant, since the Customs Target has expired and is not in force.

C. Was the Minister's Decision Reasonable?

158 The Minister implemented an Import Ban that was motivated by an improper purpose, and without affording Apotex the procedural protections required by law. This is neither a reasonable decision nor a correct one - it is an action taken without legal authority and thus must be quashed.

D. Can this Court Grant the Relief Sought?

159 Under subsection 18.1(3) of the *Federal Courts Act*, RSC 1985, c F-7 [*FCA*] the Court is provided broad powers under (a) to order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed to do or under (b) to "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 proceeding of a federal board, commission or other tribunal".

160 The Respondents argue that this Court cannot grant Apotex's requested order that the Court compel the Minister to retract her statement and that she require Health Canada to retract their statement, both released on September 30, 2014. The Respondents claim that these statements are not amenable to judicial review, as they do not affect Apotex's substantive rights or carry any legal consequences (*Girouard c. Conseil Canadien de la Magistrature*, 2014 FC 1176 (F.C.) [*Girouard*]; *Toronto Coalition to Stop the War v. Canada (Minister of Public Safety & Emergency Preparedness)*, 2010 FC 957 (F.C.) *[Toronto Coalition])*.

161 In *Girouard*, Justice Luc Martineau found that a press release issued by the Canadian Judicial Council [CJC] announcing members of an inquiry committee was not a reviewable decision, as it had no legal effect. The sole purpose of the press releases was to inform the public of the composition of the Inquiry Committee and the name of the CJC's independent counsel.

162 The *Toronto Coalition* case cited by the Respondents involved an informational letter sent by a CBSA employee to the Applicant regarding admissibility to Canada, who did not have statutory authority to make a final decision regarding the Applicant's admissibility. The letter constituted notice, but did not affect rights or carry legal consequences because a final decision on admissibility must be done at the border.

163 The above cases are not applicable to the present facts. While the Minister and Health Canada's public statements do not constitute the decision in and of itself, they form part of the Minister's implementation of the decision that was procedurally unfair and motivated by an improper purpose. The facts suggest that publicly showing strong and decisive action towards Apotex in light of intense media criticism was the motivation behind the import ban - issuing two public statements would help to achieve these ends.

164 Contrary to *Toronto Coalition*, this is not a situation where the decision-maker was not the individual authorized with making such decisions. Further, the public statements cannot be said to embody notice to Apotex about a decision not yet made - it was made clear to Apotex on September 30 that the Import Ban was effective immediately.

165 The Applicants argue that the Minister and Health Canada's statements of September 30, 2014, constitute an "act" under subsection 18.1(3), and request that the Court compel the Minister to retract the statements. Use of the term "matter" under subsection 18.1(1) encompasses a variety of administrative actions, including any matter in respect of which a remedy may be available under section 18 of the FCA (*Krause v. Canada*, [1999] 2 F.C. 476 (Fed. C.A.) at para 21).

166 The Applicants cite *McCabe v. Canada (Attorney General)*, [2001] 3 F.C. 430 (Fed. T.D.) [*McCabe*] to support their argument that information released to the media is judicially reviewable. In that case, Justice Danièle Tremblay-Lamer found that a recommendation by the National Parole Board was not a valid expression of their statutory power in the circumstances and that as a result, the Board acted beyond its jurisdiction in releasing its recommendation to the media. The Court granted the judicial review and ordered that the Board remove all copies of the recommendation from the Applicant's files and declared that the Board acted without jurisdiction in releasing the recommendation to the media.

167 The present facts are analogous: the Minister acted without jurisdiction by implementing the Import Ban for an improper purpose. Thus, the statements released by the Minister and Health Canada conveying the information to the public, which also contained statements potentially harmful to Apotex, were invalid.

168 The Minister and Health Canada acted without jurisdiction in releasing the statements to the media. Nothing in subsection 18.1(3) suggests that if a declaration of invalidity can be ordered,

as in *McCabe*, that a declaration of invalidity and order for retraction of such a statement, made for an improper purpose and without procedural fairness, could not also be part of such a remedy.

Judgment

THIS COURT'S JUDGMENT is that:

1. The Minister's decision of September 30, 2014, made under the 2014 Terms and Conditions applied to Apotex's ELs, to issue an Import Ban on products manufactured, exported, distributed or sold from the APIPL and ARPL facilities to Apotex in Canada, is quashed;

2. The public statements issued by the Minister and her delegates at Health Canada on September 30, 2014, relating to the Import Ban on APIPL and ARPL products imported, distributed and sold by Apotex in Canada shall be retracted on terms to be agreed to by the parties. If no agreement as to form and content is reached, either of the parties may remit the matter back to me for further direction;

3. The Applicants' application is otherwise dismissed;

4. Costs to Apotex: given the complexity of this matter, costs at the higher end of Column IV, Tariff B should be awarded.

Application granted in part.

AnnexA — El Action

Food and Drug Regulations, CRC, c 870.

Part C, Division 1A, Establishment Licences

Prohibition

C.01A.004. (1) Subject to subsection (2), no person shall, except in accordance with an establishment licence,

a) fabricate, package/label or import a drug;

b) perform the tests, including examinations, required under Division 2;

c) distribute a drug as set out in section C.01A.003 that is not an active pharmaceutical ingredient; or

d) wholesale a drug that is not an active pharmaceutical ingredient.

. . .

Application

C.01A.005. (1) A person who wishes to apply for an establishment licence shall submit an application to the Minister, in a form established by the Minister, that contains the following information and documents:

a) the applicant's name, address and telephone number, and their facsimile number and electronic mail address, if any;

b) the name and telephone number, and the facsimile number and electronic mail address, if any, of a person to contact in case of an emergency;

c) each activity set out in Table I to section C.01A.008 for which the licence is requested;

d) each category of drugs set out in Table II to section C.01A.008 for which the licence is requested;

e) each dosage form class in respect of which the applicant proposes to carry out a licensed activity, and whether it will be in a sterile dosage form;

f) whether the applicant proposes to carry out a licensed activity in respect of an active ingredient;

g) the address of each building in Canada in which the applicant proposes to fabricate, package/label, test as required under Division 2 or store drugs, specifying for each building the activities and the categories of drugs and, for each category, the dosage form classes, if any, and whether any drug will be in a sterile form;

h) the address of each building in Canada at which records will be maintained;

i) whether any building referred to in paragraphs (g) and (h) is a dwelling-house;

j) the drug identification number, if any, or a name that clearly identifies the drug,

(i) for each narcotic as defined in the Narcotic Control Regulations or each controlled drug as defined in subsection G.01.001(1) for which the licence is requested, and

(ii) for each other drug within a category of drugs for which the licence is requested, unless the licence is to perform tests required under Division 2, distribute as set out in paragraph C.01A.003(a), or wholesale;

k) if any of the buildings referred to in paragraph (g) have been inspected under the Act or these Regulations, the date of the last inspection;

l) evidence that the applicant's buildings, equipment and proposed practices and procedures meet the applicable requirements of Divisions 2 to 4;

m) in the case of an importer of a drug that is fabricated, packaged/labelled or tested in an MRA country at a recognized building,

(i) the name and address of each fabricator, packager/labeller and tester of the drug and the address of each building in which the drug is fabricated, packaged/labelled or tested, specifying for each building the activities and the categories of drugs and, for each category, the dosage form classes, if any, and whether any drug will be in a sterile form,

(ii) in respect of each activity done in an MRA country at a recognized building, the name of the regulatory authority that is designated under subsection C.01A.019(1) in respect of that activity for that drug and that has recognized that building as meeting its good manufacturing practices standards in respect of that activity for that drug, and

(iii) in respect of any other activities.

A. a certificate from a Canadian inspector indicating that the fabricator's, packager/labeller's or tester's buildings, equipment, practices and procedures meet the applicable requirements of Divisions 2 to 4, or

B. other evidence establishing that the fabricator's, packager/labeller's or tester's buildings, equipment, practices and procedures meet the applicable requirements of Divisions 2 to 4;

n) in the case of any other importer, the name and address of each fabricator, packager/labeller and tester of the drugs proposed to be imported and the address of each building in which the drugs will be fabricated, packaged/labelled and tested, specifying for each building the activities and the categories of drugs and, for each category, the dosage form classes, if any, and whether any drug will be in a sterile form; and

o) in the case of an importer referred to in paragraph (n),

(i) a certificate from a Canadian inspector indicating that the fabricator's, packager/labeller's and tester's buildings, equipment, practices and procedures meet the applicable requirements of Divisions 2 to 4, or

(ii) other evidence establishing that the fabricator's, packager/labeller's and tester's buildings, equipment, practices and procedures meet the applicable requirements of Divisions 2 to 4.

C.01A.006. (1) A person who wishes to amend an establishment licence shall submit an application to the Minister, in a form established by the Minister, that contains the information and documents referred to in section C.01A.005 that relate to the amendment.

(2) An establishment licence must be amended where the licensee proposes

a) to add an activity or category of drugs, as set out in the tables to section C.01A.008;

b) in respect of a category of drugs and activity indicated in the licence, to authorize sterile dosage forms of the category;

c) to add any building in Canada at which drugs are authorized to be fabricated, packaged/labelled, tested as required under Division 2 or stored, or to add, for an existing building, an authorization to fabricate. package/label, test or store a category of drugs, or sterile dosage forms of the category; and

d) in addition to the matters set out in paragraphs (a) to (c), in the case of an importer,

(i) to add a fabricator, packager/labeller or tester of a drug,

(ii) to amend the name or address of a fabricator, packager/labeller or tester indicated in the licence, and

(iii) if the address of the buildings at which drugs are authorized to be fabricated, packaged/labelled or tested is indicated in the licence, to add additional buildings or, for an existing building, to add an authorization to fabricate, package/label or test a category of drugs, or sterile dosage forms of the category.

C.01A.007. (1) The Minister may, on receipt of an application for an establishment licence, an amendment to an establishment licence or the review of an establishment licence, require the applicant to submit further details pertaining to the information contained in the application that are necessary to enable the Minister to make a decision.

(2) When considering an application, the Minister may require that

a) an inspection be made during normal business hours of any building referred to in paragraph C.01A.005(1)(g) or (h); and

b) the applicant, if a fabricator, a packager/labeller, a person who performs tests required under Division 2, a distributor referred to in paragraph C.01A.003(b) or an importer, supply samples of any material to be used in the fabrication, packaging/labelling or testing of a drug.

Issuance

C.01A.008. (1) Subject to section C.01A.010, the Minister shall, on receipt of the information and material required by sections C.01A.005 to C.01A.007, issue or amend an establishment licence.

(2) The establishment licence shall indicate

a) each activity that is authorized and the category of drugs for which each activity is authorized, as set out in the tables to this section, specifying for each activity and category whether sterile dosage forms are authorized;

b) the address of each building in Canada at which a category of drugs is authorized to be fabricated, packaged/labelled, tested as required under Division 2 or stored. specifying for each building which of those activities and for which category of drugs, and whether sterile dosage forms of the category are authorized; and

c) in addition to the matters referred to in paragraphs (a) and (b), in the case of an importer,

(i) the name and address of each fabricator, packager/labeller and tester from whom the importer is authorized to obtain the drug for import, and

(ii) the address of each building at which the drug is authorized to be fabricated, packaged/labelled or tested, specifying for each building the activities and the category of drugs that are authorized, and whether sterile dosage forms are authorized.

d) [Repealed, SOR/2002-368, s.5]

(3) The Minister may indicate in an establishment licence a period for which records shall be retained under Division 2 that, based on the safety profile of the drug or materials, is sufficient to ensure the health of the consumer.

(4) The Minister may, in addition to the requirements of subsection (2), set out in an establishment licence terms and conditions respecting

a) the tests to be performed in respect of a drug, and the equipment to be used, to ensure that the drug is not unsafe for use; and

b) any other matters necessary to prevent injury to the health of consumers, including conditions under which drugs are fabricated, packaged/labelled or tested.

TABLE I (Activities)

1. Fabricate

2. Package/label

3. Perform the tests, including any examinations, required under Division 2

4. Distribute as set out in paragraph C.01A.003(a) a drug that is not an active pharmaceutical ingredient

5. Distribute as set out in paragraph C.01A.003(b)

6. Import

7. Wholesale a drug that is not an active pharmaceutical ingredient

TABLE II (Categories of drugs)

1. Pharmaceuticals

    1.1 Active ingredients

2. Vaccines

3. [Repealed, SOR/2013-179, s. 2]

4. Drugs that are listed in Schedule D to the Act, other than vaccines

5. Drugs listed in Schedule C to the Act

6. Drugs that are prescription drugs, controlled drugs as defined in subsection G.01.001(1) and narcotics as defined in the Narcotic Control Regulations

Annual Licence Review

C.01A.009. (1) The holder of an establishment licence that is not suspended shall submit an application for the review of their licence to the Minister before April 1 of each year and include with it the information and documents referred to in section C.01A.005.

(2) The Minister shall conduct an annual review of the licence on the basis of the information and documents submitted by the holder and any other relevant information in the Minister's possession.

Refusal to Issue

C.01A.010. (1) The Minister may refuse to issue or amend an establishment licence in respect of any or all matters indicated in subsection C.01A.008(2) if

a. the applicant has made a false or misleading statement in relation to the application for the licence; or

b. the applicant has had an establishment licence suspended in respect of the matter.

(2) The Minister shall refuse to issue or amend an establishment licence in respect of any or all matters indicated in subsection C.01A.008(2) if the Minister has reasonable grounds to believe that issuing or amending an establishment licence in respect of the matter would constitute a risk to the health of the consumer,

(3) Where the Minister refuses to issue or amend an establishment licence, the Minister shall

a. notify the applicant in writing of the reasons for the refusal; and

b. give the applicant an opportunity to be heard.

Terms and Conditions

C.01A.011. (1) Every person who holds an establishment licence shall comply with

a. the requirements and the terms and conditions of the establishment licence; and

b. the applicable requirements of Divisions 2 to 4.

(2) [Repealed, SOR/2000-120, s.4]

C.01A.012. (1) The Minister may amend the terms and conditions of an establishment licence if the Minister believes on reasonable grounds that an amendment is necessary to prevent injury to the health of the consumer.

(2) The Minister shall give at least 15 days notice in writing to the holder of the establishment licence of the proposed amendment, the reasons for the amendment and its effective date.

. . .

Suspension

C.01A.016. (1) Subject to subsection (3), the Minister may suspend an establishment licence in respect of any or all matters indicated in subsection C.01A.008(2) if the Minister has reasonable grounds to believe that

a) the licensee has contravened any provision of the Act or these Regulations; or

b) the licensee has made a false or misleading statement in the application for the establishment licence.

(2) Before suspending an establishment licence, the Minister shall consider

a) the licensee's history of compliance with the Act and these Regulations; and

b) the risk that allowing the licence to continue in force would constitute for the health of the consumer.

(3) Subject to subsection C.01A.017(1), the Minister shall not suspend an establishment licence until

a) an inspector has sent the licensee a written notice that sets out the reason for the proposed suspension, any corrective action required to be taken and the time within which it must be taken;

b) if corrective action is required, the time set out in the notice has passed without the action having been taken; and

c) the licensee has been given an opportunity to be heard in respect of the suspension.

C.01A.017. (1) The Minister may suspend an establishment licence without giving the licensee an opportunity to be heard if it is necessary to do so to prevent injury to the health of the consumer, by giving the licensee a notice in writing that states the reason for the suspension.

(2) A licensee may request of the Minister, in writing, that the suspension be reconsidered.

(3) The Minister shall, within 45 days after the date of receiving the request, provide the licensee with the opportunity to be heard.

C.01A.018. The Minister may reinstate an establishment licence after it has been suspended.

Cancellation

C.01A.018.1 The Minister shall cancel an establishment licence in either of the following circumstances:

a) the licence has been suspended for a period of more than 12 months, or

b) the licence holder has failed to submit an application for the review of their licence in accordance with subsection C.01A.009(1).

AnnexB — CBSA Action

Food and Drug Regulations. CRC, c 870.

Part A, Administration

Importations

A.01.040. Subject to section A.01.044, no person shall import into Canada for sale a food or drug the sale of which in Canada would constitute a violation of the Act or these Regulations.

A.01.041. An inspector may examine and take samples of any food or drug sought to be imported into Canada.

A.01.042. Where an inspector examines or takes a sample of a food or drug pursuant to section A.01.041, he may submit the food or drug or sample to an analyst for analysis or examination.

A.01.043. Where an inspector, upon examination of a food or drug or sample thereof or on receipt of a report of an analyst of the result of an analysis or examination of the food or drug or sample, is of the opinion that the sale of the food or drug in Canada would constitute a violation of the Act or these Regulations, the inspector shall so notify in writing the collector of customs concerned and the importer.

Part C, Division 2, Good Manufacturing Practices

Sale

C.02.003. No distributor referred to in paragraph C.01A.003(b) and no importer shall sell a drug unless it has been fabricated, packaged/labelled, tested and stored in accordance with the requirements of this Division.

C.02.003.1 No person shall sell a drug that they have fabricated, packaged/labelled, tested or stored unless they have fabricated, packaged/labelled, tested or stored it in accordance with the requirements of this Division.

Use in Fabrication

C.02.003.3 No person shall use an active ingredient in the fabrication of a drug unless it is fabricated, packaged/labelled, tested and stored in accordance with the requirements of this Division.

Food and Drugs Act (RSC, 1985, c F-27)

Part II Administration and Enforcement

Inspection, Seizure and Forfeiture

Powers of inspectors

23. (1) Subject to subsection (1.1), an inspector may at any reasonable time enter any place where the inspector believes on reasonable grounds any article to which this Act or the regulations apply is manufactured, prepared, preserved, packaged or stored, and may

> (a) examine any such article and take samples thereof, and examine anything that the inspector believes on reasonable grounds is used or capable of being used for that manufacture, preparation, preservation, packaging or storing;

(a. 1) enter any conveyance that the inspector believes on reasonable grounds is used to carry any article to which section 6 or 6.1 applies and examine any such article found therein and take samples thereof;

(b) open and examine any receptacle or package that the inspector believes on reasonable grounds contains any article to which this Act or the regulations apply;

(c) examine and make copies of, or extracts from, any books, documents or other records found in any place referred to in this subsection that the inspector believes on reasonable grounds contain any information relevant to the enforcement of this Act with respect to any article to which this Act or the regulations apply; and

(d) seize and detain for such time as may be necessary any article by means of or in relation to which the inspector believes on reasonable grounds any provision of this Act or the regulations has been contravened.

Definition of "article to which this Act or the regulations apply"

(2) In subsection (1), "article to which this Act or the regulations apply" includes

(a) any food, drug, cosmetic or device;

(b) anything used for the manufacture. preparation. preservation, packaging or storing thereof; and

(c) any labelling or advertising material.

Storage and removal

25. Any article seized under this Part may, at the option of an inspector, be kept or stored in the building or place where it was seized or, at the direction of an inspector, the article may be removed to any other proper place.

Release of seized articles

26. An inspector who has seized any article under this Part shall release it when he is satisfied that all the provisions of this Act and the regulations with respect thereto have been complied with.

Destruction with consent

27. (i) Where an inspector has seized an article under this Part and its owner or the person in whose possession the article was at the time of seizure consents to its destruction, the article is thereupon forfeited to Her Majesty and may be destroyed or otherwise disposed of as the Minister or the Minister of Agriculture and Agri-Food may direct.

Detention of controlled goods

101. Goods that have been imported or are about to be exported may be detained by an officer until he is satisfied that the goods have been dealt with in accordance with this Act, and any other Act of Parliament that prohibits, controls or regulates the importation or exportation of goods, and any regulations made thereunder.

Limitation of action against officer or person assisting

106. (1) No action or judicial proceeding shall be commenced against an officer for anything done in the performance of his duties under this or any other Act of Parliament or a person called on to assist an officer in the performance of such duties more than three months after the time when the cause of action or the subject-matter of the proceeding arose.

Limitation of action to recover goods

(2) No action or judicial proceeding shall be commenced against the Crown, an officer or any person in possession of goods under the authority of an officer for the recovery of anything seized, detained or held in custody or safe-keeping under this Act more than three months after the later of

(a) the time when the cause of action or the subject-matter of the proceeding arose, and

(b) the final determination of the outcome of any action or proceeding taken under this Act in respect of the thing seized, detained or held in custody or safe-keeping.

Stay of action or judicial proceeding

(3) Where, in any action or judicial proceeding taken otherwise than under this Act, substantially the same facts are at issue as those that are at issue in an action or proceeding under this Act, the Minister may file a stay of proceedings with the body before whom that action or judicial proceeding is taken, and thereupon the proceedings before that body are stayed pending final determination of the outcome of the action or proceeding under this Act.

2022 SCC 27, 2022 CSC 27
Supreme Court of Canada

British Columbia (Attorney General) v. Council of Canadians with Disabilities

2022 CarswellBC 1633, 2022 CarswellBC 1634, 2022 SCC 27, 2022 CSC 27, [2022] 8 W.W.R. 1, [2022] S.C.J. No. 27, 2022 A.C.W.S. 491, 470 D.L.R. (4th) 289, 510 C.R.R. (2d) 254, 62 B.C.L.R. (6th) 213, 82 C.P.C. (8th) 219

Attorney General of British Columbia (Appellant / Respondent on cross-appeal) and Council of Canadians with Disabilities (Respondent / Appellant on cross-appeal) and Attorney General of Canada, Attorney General of Ontario, Attorney General of Saskatchewan, Attorney General of Alberta, West Coast Prison Justice Society, Empowerment Council, Systemic Advocates in Addictions and Mental Health, Canadian Civil Liberties Association, Advocacy Centre for Tenants Ontario, ARCH Disability Law Centre, Canadian Environmental Law Association, Chinese and Southeast Asian Legal Clinic, HIV & AIDS Legal Clinic Ontario, South Asian Legal Clinic Ontario, David Asper Centre for Constitutional Rights, Ecojustice Canada Society, Trial Lawyers Association of British Columbia, National Council of Canadian Muslims, Mental Health Legal Committee, British Columbia Civil Liberties Association, Canadian Association of Refugee Lawyers, West Coast Legal Education and Action Fund, Centre for Free Expression, Federation of Asian Canadian Lawyers, Canadian Muslim Lawyers Association, John Howard Society of Canada, Queen's Prison Law Clinic, Animal Justice, Canadian Mental Health Association (National), Canada Without Poverty, Aboriginal Council of Winnipeg Inc., End Homelessness Winnipeg Inc. and Canadian Constitution Foundation (Interveners)

Wagner C.J.C., Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin, Kasirer, Jamal JJ.

Heard: January 12-13, 2022
Judgment: June 23, 2022
Docket: 39430

Proceedings: reversing in part *Council of Canadians with Disabilities v. British Columbia (Attorney General)* (2020), 41 B.C.L.R. (6th) 47, 56 C.P.C. (8th) 231, 2020 BCCA 241, [2021] 6 W.W.R. 88, 451 D.L.R. (4th) 225, 2020 CarswellBC 2078, DeWitt-Van Oosten J.A., Dickson J.A., Frankel J.A. (B.C. C.A.); reversing *MacLaren v. British Columbia (Attorney General)* (2018), 2018 BCSC 1753, 2018 CarswellBC 2723, Hinkson C.J.S.C. (B.C. S.C.)

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Wagner C.J.C. **(Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin, Kasirer and Jamal JJ. concurring):**

I. Overview

1 Access to justice depends on the efficient and responsible use of court resources. Frivolous lawsuits, endless procedural delays, and unnecessary appeals increase the time and expense of litigation and waste these resources. To preserve meaningful access, courts must ensure that their resources remain available to the litigants who need them most — namely, those who advance meritorious and justiciable claims that warrant judicial attention.

2 Public interest standing — an aspect of the law of standing — offers one route by which courts can promote access to justice and simultaneously ensure that judicial resources are put to good use (see, e.g., Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society, 2012 SCC 45, [2012] 2 S.C.R. 524, at para. 23). Public interest standing allows individuals or organizations to bring cases of public interest before the courts even though they are not directly involved in the matter and even though their own rights are not infringed. It can therefore play a pivotal role in litigation concerning the *Canadian Charter of Rights and Freedoms*, where issues may have a broad effect on society as a whole as opposed to a narrow impact on a single individual.

3 In this appeal, the Council of Canadians with Disabilities ("CCD") seeks public interest standing to challenge the constitutionality of certain provisions of British Columbia's mental health legislation. CCD originally filed its claim alongside two individual plaintiffs who were directly affected by the impugned provisions. The individual plaintiffs discontinued their claims, leaving CCD as the sole plaintiff. CCD sought public interest standing to continue the action on its own.

4 The Attorney General of British Columbia ("AGBC") applied for dismissal of CCD's action on a summary trial. He argued that the lack of an individual plaintiff was fatal to CCD's claim for public interest standing because, without such a plaintiff, CCD could not adduce a sufficient factual setting to resolve the constitutional issue. In response, CCD filed an affidavit in which it promised to adduce sufficient facts at trial. The Supreme Court of British Columbia granted the AGBC's application, declined to grant CCD public interest standing, and dismissed CCD's claim. The Court of Appeal allowed CCD's appeal and remitted the matter to the Supreme Court of British Columbia for fresh consideration. The AGBC appeals that decision.

5 For the reasons that follow, I would dismiss the appeal, but grant CCD public interest standing, with special costs in this Court and in the courts below.

II. Facts

A. Council of Canadians with Disabilities

6 CCD is a national not-for-profit organization established "to ensure that the voices of persons with disabilities are heard and to advocate for Canadians with disabilities" (A.R., at p. 88).

During the underlying proceedings, it had 17 national or provincial member organizations, which themselves boasted several hundred thousand members.

7 CCD's mandate is threefold: it promotes the equality, autonomy, and rights of people living with physical and mental disabilities in Canada. It advances this mandate through advocacy, policy development, and rights advancement work (including litigation) on behalf of people with disabilities.

B. Underlying Action

8 On September 12, 2016, CCD and two individual plaintiffs (Mary Louise MacLaren and D.C.) filed a notice of civil claim in which they challenged the constitutionality of British Columbia's mental health legislation. In the notice of civil claim, they alleged that certain provisions in three interrelated statutes — s. 31(1) of the Mental Health Act, R.S.B.C. 1996, c. 288, s. 2(b) and (c) of the Health Care (Consent) and Care Facility (Admission) Act, R.S.B.C. 1996, c. 181, and s. 11(1)(b) and (c) of the *Representation Agreement Act*, R.S.B.C. 1996, c. 405 — violate ss. 7 and 15(1) of the Charter. Together, these provisions permit physicians to administer psychiatric treatment to involuntary patients with mental disabilities without their consent and without the consent of a substitute or supportive decision-maker under certain circumstances.

9 Ms. MacLaren and D.C. were involuntary patients affected by the impugned provisions. In the notice of civil claim, they alleged that they had suffered harm from forced psychiatric treatment, including psychotropic medication and electroconvulsive therapy.

C. Withdrawal of the Individual Plaintiffs and Amended Notice of Civil Claim

10 On October 25, 2017, Ms. MacLaren and D.C. discontinued their claims and withdrew from the litigation, leaving CCD as the sole remaining plaintiff. CCD filed an amended notice of civil claim shortly afterward. In the amended notice, it removed all factual allegations relating to Ms. MacLaren and D.C. and replaced them with similar allegations regarding the nature, administration, and impacts of forced psychiatric treatment on involuntary patients generally. It also added a section in which it pled that it should be granted public interest standing.

D. Notice of Application to Dismiss Filed by Attorney General of British Columbia

11 On January 31, 2018, the AGBC filed an amended response in which he claimed that CCD did not meet the test for public interest standing and could not pursue its *Charter* claims without an individual plaintiff. Approximately six months later, the AGBC filed a notice of application in which he sought an order dismissing CCD's action on the basis that CCD lacked standing to continue the action.

12 CCD responded by filing an affidavit by Melanie Benard, the Chair of CCD's Mental Health Committee. Ms. Benard deposed that:

> 1. throughout her career as a lawyer specializing in mental health law, she gained direct experience with people who have or have had mental health-related disabilities;
>
> 2. CCD is an established advocate for the rights of people with disabilities, including mental disabilities, and has brought or intervened in over 35 court cases dealing with the rights of people with disabilities, including 24 cases at the Supreme Court of Canada;
>
> 3. *Charter* litigation is complex, often protracted, and stressful, and it is not reasonable to expect individuals who have mental disabilities to bring and see through a constitutional challenge; and
>
> 4. CCD "intends to lead evidence from both fact and expert witnesses, including from people with direct experience" of the impact of the impugned provisions (A.R., at p. 236).

13 Ms. Benard was not cross-examined on her affidavit.

E. Subsequent Class Action and Personal Injury Claim

14 In October 2019 — after the Court of Appeal for British Columbia heard the appeal in the case at bar but before it rendered its decision — three private litigants commenced a class action under the Class Proceedings Act, R.S.B.C. 1996, c. 50, in which they challenge the same statutory provisions at issue in this appeal. Ms. MacLaren and another plaintiff brought a similar action for constitutional and personal injury relief, but later discontinued that claim.

15 At present, the proposed class action has not yet been certified. The AGBC opposes certification; on October 30, 2020, he filed a response asserting that the action fails to meet the criteria for certification.

III. Judgments of the Courts Below

A. Supreme Court of British Columbia, 2018 BCSC 1753 (Hinkson C.J.)

16 The chambers judge granted the AGBC's summary trial application, denied CCD standing, and dismissed CCD's claim. In his view, CCD failed to satisfy the three-part test for granting public interest standing set out by this Court in *Downtown Eastside*: (i) whether the claimant has advanced a serious justiciable issue, (ii) whether the claimant has a genuine interest in the issue and (iii) whether, in light of all the circumstances, the proposed suit is a reasonable and effective means of bringing the issue before the courts.

(1) Serious Justiciable Issue

17 The chambers judge determined that CCD failed to raise a justiciable issue because its claim lacked "the indispensable factual foundation that particularizes the claim and permits the enquiry and relief sought" (para. 38 (CanLII)). He remarked that the "fundamental difficulty" with CCD's claim was "the lack of a particular factual context of an individual's case" (para. 37).

(2) Genuine Interest

18 The chambers judge held that CCD's interest "only weakly" met the "genuine interest" criterion, because CCD's work was "more focussed on disability (particularly physical disability) and far less focussed on mental health" (paras. 44 and 53).

(3) Reasonable and Effective Means

19 The chambers judge determined that granting CCD public interest standing would not be a reasonable and effective means of bringing the issue before the courts. He agreed that CCD had the expertise and resources to advance the claim, but remained unpersuaded of its ability to satisfy the "reasonable and effective means" factor for several reasons:

> 1. CCD's undertaking to provide a robust record at trial failed to satisfy its onus to meet the test for public interest standing on summary trial, and the chambers judge doubted that CCD could put forward "a sufficiently concrete and well-developed factual setting" upon which to decide the question it had raised (para. 69);
>
> 2. CCD failed to persuade the chambers judge that it could fairly represent the interests of everyone affected by the impugned provisions, let alone "all residents of British Columbia", to whom it referred in its amended notice of civil claim (para. 76);
>
> 3. CCD's advocacy efforts over the last 40 years did not necessarily commend it as an advocate for those with mental health-related disabilities, given that its engagement in advocacy for mental health-related disabilities, as opposed to physical health-related disabilities, had been relatively limited; and
>
> 4. the Benard affidavit did not explain why it was unrealistic to expect individual plaintiffs who have mental disabilities and who have experienced the impacts of the impugned legislation to bring and see through a challenge to that legislation.

20 Cumulatively weighing the three factors, the chambers judge declined to exercise his discretion to grant public interest standing and dismissed CCD's action.

B. Court of Appeal for British Columbia, 2020 BCCA 241 (B.C. C.A.) , 41 B.C.L.R. (6th) 47 (Frankel, Dickson and DeWitt-Van Oosten JJ.A.)

21 The Court of Appeal for British Columbia allowed the appeal, set aside the order dismissing the action, and remitted the matter to the Supreme Court of British Columbia for fresh consideration.

(1) Access to Justice and the Principle of Legality

22 In its analysis, the Court of Appeal began by commenting on two principles that *Downtown Eastside* highlighted as important features of standing law: (i) the importance of courts upholding the legality principle — the idea that state action must conform to the Constitution and must not be immunized from judicial review — and (ii) the practical realities of providing access to justice for vulnerable and marginalized citizens who are broadly affected by legislation of questionable constitutional validity.

23 In the Court of Appeal's view, these principles "merit particular weight in the balancing exercise a judge must undertake when deciding whether to grant or refuse public interest standing" (para. 79). While other concerns "must also be accounted for", legality and access to justice are "the key components of the flexible and purposive approach mandated in *Downtown Eastside*" (para. 79).

(2) Serious Justiciable Issue

24 The Court of Appeal held that the chambers judge had erred in requiring "a particular factual context of an individua[l] case" or an individual plaintiff for the serious justiciable issue factor (para. 114). It described CCD's claim as a "comprehensive and systemic constitutional challenge to specific legislation that directly affects all members of a defined and identifiable group in a serious, specific and broadly-based manner regardless of the individual attributes or experiences of any particular member of the group" (para. 112). For this reason, the Court of Appeal concluded, it would be possible for CCD to establish its claim by adducing evidence from directly affected non-plaintiff and expert witnesses instead of from an individual co-plaintiff.

(3) Reasonable and Effective Means

25 Given its conclusion on the serious justiciable issue factor, the Court of Appeal did not review the other *Downtown Eastside* factors. It did note, however, that the chambers judge's analysis on the third factor did not comport with the flexible, purposive approach to standing mandated in *Downtown Eastside*. Specifically, it disagreed with any suggestion on the chambers judge's part that, "if possible, it is always preferable for a public interest organization to assist an individual party in the background rather than seek public interest standing" (C.A. reasons, at para. 115 (emphasis deleted)).

(4) Prospect of Duplicative Proceeding

26 The Court of Appeal also commented on the proposed class action. It acknowledged that the prospect of duplicative *Charter* challenges are relevant to — but not determinative of — applications for public interest standing. The Court of Appeal concluded that the Supreme Court of British Columbia was best placed to assess CCD's application for public interest standing upon review of a revised record containing this new information.

IV. Issues

27 This appeal raises three issues:

1. What role do the principles of access to justice and of legality play in the test for public interest standing, and do they merit "particular weight" in the balancing exercise a judge must undertake to grant public interest standing?

2. Without an individual co-plaintiff, how can a litigant seeking public interest standing show that its claim will be presented in a "sufficiently concrete and well-developed factual setting"? If revisiting the issue of standing at a later stage of a proceeding is necessary to ensure this setting is present, under what conditions should parties be permitted to do so?

3. Applying these principles, should CCD be granted public interest standing?

V. Analysis

A. Legality and Access to Justice in the Law of Public Interest Standing

28 The decision to grant or deny public interest standing is discretionary (*Downtown Eastside*, at para. 20). In exercising its discretion, a court must cumulatively assess and weigh three factors purposively and with regard to the circumstances. These factors are: (i) whether the case raises a serious justiciable issue, (ii) whether the party bringing the action has a genuine interest in the matter, and (iii) whether the proposed suit is a reasonable and effective means of bringing the case to court (para. 2).

29 In *Downtown Eastside*, this Court explained that each factor is to be "weighed ... in light of the underlying purposes of limiting standing and applied in a flexible and generous manner that best serves those underlying purposes" (para. 20). These purposes are threefold: (i) efficiently allocating scarce judicial resources and screening out "busybody" litigants; (ii) ensuring that courts have the benefit of the contending points of view of those most directly affected by the issues; and (iii) ensuring that courts play their proper role within our democratic system of government (para. 1).

30 Courts must also consider the purposes that justify *granting* standing in their analyses (*Downtown Eastside*, at paras. 20, 23, 36, 39-43, 49-50 and 76). These purposes are twofold: (i)

giving effect to the principle of legality and (ii) ensuring access to the courts, or more broadly, access to justice (paras. 20, 39-43 and 49). The goal, in every case, is to strike a meaningful balance between the purposes that favour granting standing and those that favour limiting it (para. 23).

31 *Downtown Eastside* remains the governing authority. Courts should strive to balance *all* of the purposes in light of the circumstances and in the "wise application of judicial discretion" (para. 21). It follows that they should not, as a general rule, attach "particular weight" to any one purpose, including legality and access to justice. Legality and access to justice are important — indeed, they played a pivotal role in the development of public interest standing — but they are two of many concerns that inform the *Downtown Eastside* analysis.

32 To demonstrate this, I will define legality and access to justice, review their role in the development of public interest standing, and situate them in the *Downtown Eastside* framework. I conclude that the Court of Appeal was wrong to attach "particular weight" to these principles in its analysis.

(1) Defining the Legality Principle and Access to Justice

33 The legality principle encompasses two ideas: (i) state action must conform to the law and (ii) there must be practical and effective ways to challenge the legality of state action (*Downtown Eastside*, at para. 31). Legality derives from the rule of law: "[i]f people cannot challenge government actions in court, individuals cannot hold the state to account — the government will be, or be seen to be, above the law" (Trial Lawyers Association of British Columbia v. British Columbia (Attorney General), 2014 SCC 59, [2014] 3 S.C.R. 31, at para. 40).

34 Access to justice, like legality, is "fundamental to the rule of law" (*Trial Lawyers* , at para. 39). As Dickson C.J. put it, "[t]here cannot be a rule of law without access, otherwise the rule of law is replaced by a rule of men and women who decide who shall and who shall not have access to justice" (*B.C.G.E.U. v. British Columbia (Attorney General)*, [1988] 2 S.C.R. 214, at p. 230).

35 Access to justice means many things, such as knowing one's rights, and how our legal system works; being able to secure legal assistance and access legal remedies; and breaking down barriers that often prevent prospective litigants from ensuring that their legal rights are respected. For the purposes of this appeal, however, access to justice refers broadly to "access to courts" (see, e.g., G. J. Kennedy and L. Sossin, "Justiciability, Access to Justice and the Development of Constitutional Law in Canada" (2017), 45 Fed. L. Rev. 707, at p. 710).

36 In *Downtown Eastside*, this Court recognized that access to justice is symbiotically linked to public interest standing: the judicial discretion to grant or deny standing plays a gatekeeping role that has a direct impact on access (para. 51). Public interest standing provides an avenue to litigate the legality of government action in spite of social, economic or psychological barriers to access which may preclude individuals from pursuing their legal rights.

(2) Role of Legality and Access to Justice in Developing Public Interest Standing

37 Legality and access to justice are woven throughout the history of public interest standing. In *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138, for example, the Court relied primarily on the principle of legality to recognize the judicial discretion to grant public interest standing (p. 163). In that case, the Court granted a litigant standing to challenge a law that did not directly affect him, reasoning that a constitutional question should not "be immunized from judicial review by denying standing to anyone to challenge the impugned statute" (p. 145).

38 Legality was again at issue in *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265, a case in which the Court granted standing even though it would have been possible for someone more directly affected by the law to initiate private litigation. In that case, the Court permitted a newspaper editor — a member of the public — to challenge censorial powers granted to an administrative body. Theatre owners and operators were more directly affected by the legislation than the general public, but the Court reasoned that challenges from those individuals were unlikely. Since there was "no other way, practically speaking, to subject the challenged Act to judicial review," the Court granted a member of the public standing to seek a declaration that the legislation was constitutionally invalid (p. 271).

39 Access to justice featured alongside the principle of legality in *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607, this Court's first post-*Charter* case on public interest standing. There, the Court granted standing and emphasized "the importance in a federal state that there be some access to the courts to challenge the constitutionality of legislation" (p. 627). It also observed that the rationale behind discretionary standing was the public interest in maintaining respect for "the limits of statutory authority" (pp. 631-32).

40 Finally, in *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236, this Court relied on legality to *deny* public interest standing. The Court underscored "the fundamental right of the public to government in accordance with the law" and acknowledged that the "whole purpose" of public interest standing is "to prevent the immunization of legislation or public acts from any challenge" (pp. 250 and 252). Because the measure had already been "subject to attack" by private litigants, granting public interest standing was "not required" (pp. 252-53).

(3) Current Framework Addresses Legality and Access to Justice

41 The current framework for public interest standing stems from *Downtown Eastside*. Under this framework, courts flexibly and purposively weigh the three *Downtown Eastside* factors in light of the "particular circumstances" and in a "liberal and generous manner" (para. 2, citing *Canadian Council of Churches*, at p. 253).

42 The *Downtown Eastside* framework addresses a number of concerns that underlie standing law. Legality and access to justice are two of these concerns. But the framework also accommodates traditional concerns related to the expansion of public interest standing, including allocating scarce judicial resources and screening out "busybodies", ensuring that courts have the benefit of contending points of view of those most directly affected by the issues, and ensuring that courts play their proper role in our constitutional democracy.

43 It will be helpful to briefly trace each of these concerns, and their place in the *Downtown Eastside* framework. Legality and access to justice are primarily considered in relation to the third factor, but it is useful to review all three.

(a) Traditional Concerns of Standing Law

44 The need to carefully allocate scarce judicial resources relates to the effective operation of the justice system as a whole. As this Court held in *Canadian Council of Churches* , "[i]t would be disastrous if the courts were allowed to become hopelessly overburdened as a result of the unnecessary proliferation of marginal or redundant suits brought by well-meaning organizations pursuing their own particular cases" (p. 252). This concern also relates to a possible multiplicity of suits by "mere busybod[ies]", that is, plaintiffs who seek to use the courts to advance personal agendas and who may undermine other challenges by plaintiffs with a real stake in a matter (*Finlay*, at p. 631).

45 In *Downtown Eastside*, the Court noted that the concern about "busybodies" may be overstated: "[f]ew people, after all, bring cases to court in which they have no interest and which serve no proper purpose" (para. 28). The denial of standing "is not the only, or necessarily the most appropriate means of guarding against these dangers": courts can also screen claims for merit at an early stage, can intervene to prevent abuse and have the power to award costs, all of which may avert a multiplicity of suits from "busybodies" (para. 28).

46 Hearing contending points of view from those most affected by the issues enables the courts to do their job: courts "depend on the parties to present the evidence and relevant arguments fully and skillfully" (*Downtown Eastside*, at para. 29). Without specific facts and argument from affected parties, "both the Court's ability to ensure that it hears from those most directly affected and that *Charter* issues are decided in a proper factual context are compromised" (*Hy and Zel's Inc. v. Ontario (Attorney General)*, [1993] 3 S.C.R. 675, at p. 694).

47 In conformity with the proper role of the courts and with their constitutional relationship to the other branches of state, parties to litigation must raise a question that is appropriate for judicial determination — that is, a justiciable question. A court might not, for example, "have the legitimacy to assist in resolving a dispute about the greatest hockey player of all time, about a bridge player who is left out of his regular weekly game night, or about a cousin who thinks she

should have been invited to a wedding" (Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall, 2018 SCC 26, [2018] 1 S.C.R. 750, at para. 35).

(b) Serious Justiciable Issue

48 The first of the *Downtown Eastside* factors, whether there is a serious justiciable issue, relates to two of the traditional concerns. Justiciability is linked to the concern about the proper role of the courts and their constitutional relationship to the other branches of state. By insisting on the existence of a justiciable issue, the courts ensure that the exercise of their discretion with respect to standing is consistent with their proper constitutional role. Seriousness, by contrast, addresses the concern about the allocation of scarce judicial resources and the need to screen out the "mere busybody". This factor also broadly promotes access to justice by ensuring that judicial resources remain available to those who need them most (see, e.g., Trial Lawyers, at para. 47).

49 A serious issue will arise when the question raised is "far from frivolous" (*Downtown Eastside*, at para. 42, citing *Finlay*, at p. 633). Courts should assess a claim in a "preliminary manner" to determine whether "some aspects of the statement of claim could be said to raise a serious issue as to the validity of the legislation" (*Downtown Eastside*, at para. 42, citing *Canadian Council of Churches*, at p. 254). Once it becomes clear that the statement of claim reveals at least one serious issue, it will usually be unnecessary to minutely examine every pleaded claim to assess standing (*Downtown Eastside*, at para. 42).

50 To be justiciable, an issue must be one that is appropriate for a court to decide, that is, the court must have the institutional capacity and legitimacy to adjudicate the matter (*Highwood Congregation* , at paras. 32-34). Public interest standing hinges on the existence of a justiciable question (*Downtown Eastside*, at para. 30). Unless an issue is justiciable in the sense that it is suitable for judicial determination, it should not be heard and decided no matter who the parties are (*Highwood Congregation* , at para. 33, citing L. M. Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (2nd ed. 2012), at p. 7).

(c) Genuine Interest

51 The second factor, being whether the plaintiff has a genuine interest in the issues, also reflects the concern for conserving scarce judicial resources and the need to screen out the mere busybody. This factor asks "whether the plaintiff has a real stake in the proceedings or is engaged with the issues they raise" (*Downtown Eastside*, at para. 43). To determine whether a genuine interest exists, a court may refer, among other things, to the plaintiff's reputation and to whether the plaintiff has a continuing interest in and link to the claim (see, e.g., *Canadian Council of Churches*, at p. 254).

(d) Reasonable and Effective Means

52 The third factor, reasonable and effective means, implicates both legality and access to justice. It is "closely linked" to legality, since it involves asking whether granting standing is desirable to ensure lawful action by government actors (*Downtown Eastside*, at para. 49). It also requires courts to consider whether granting standing will promote access to justice "for disadvantaged persons in society whose legal rights are affected" by the challenged law or action (para. 51).

53 This factor also relates to the concern about needlessly overburdening the justice system, because "[i]f there are other means to bring the matter before the court, scarce judicial resources may be put to better use" (*Hy and Zel's* , at p. 692). And it addresses the concern that courts should have the benefit of contending views of the persons most directly affected by the issues (*Finlay*, at p. 633).

54 To determine whether, in light of all the circumstances, a proposed suit is a reasonable and effective means of bringing an issue before the court, courts should consider whether the proposed action is an economical use of judicial resources, whether the issues are presented in a context suitable for judicial determination in an adversarial setting, and whether permitting the proposed action to go forward will serve the purpose of upholding the principle of legality (*Downtown Eastside*, at para. 50). Like the other factors, this one should be applied purposively, and from a "practical and pragmatic point of view" (para. 47).

55 The following non-exhaustive list outlines certain "interrelated matters" a court may find useful when assessing the third factor (*Downtown Eastside*, at para. 51):

1. *The plaintiff's capacity to bring the claim forward*: What resources and expertise can the plaintiff provide? Will the issue be presented in a sufficiently concrete and well-developed factual setting?

2. *Whether the case is of public interest*: Does the case transcend the interests of those most directly affected by the challenged law or action? Courts should take into account that one of the ideas animating public interest litigation is that it may provide access to justice for disadvantaged persons whose legal rights are affected.

3. *Whether there are alternative means*: Are there realistic alternative means which would favour a more efficient and effective use of judicial resources and would present a context more suitable for adversarial determination? If there are other proceedings relating to the matter, what will be gained in practice by having parallel proceedings? Will the other proceedings resolve the issues in an equally or more effective and reasonable manner? Will the plaintiff bring a particularly useful or distinctive perspective to the resolution of those issues?

4. *The potential impact of the proceedings on others*: What impact, if any, will the proceedings have on the rights of others who are equally or more directly affected? Could "the failure of

a diffuse challenge" prejudice subsequent challenges by parties with specific and factually established complaints? (para. 51, citing *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086, at p. 1093).

(4) Conclusion on Access to Justice and Legality in Public Interest Standing Law

56 The Court of Appeal was wrong to conclude that the principles of legality and access to justice merit "particular weight" in the *Downtown Eastside* analysis. This Court's case law, and in particular the existing *Downtown Eastside* framework, already addresses these factors in both implicit and explicit fashion. However, it does not assign them a place of principal importance in the analysis.

57 Legality, for example, is taken into account in the context of the "reasonable and effective means" factor (*Downtown Eastside*, at para. 49), and may also be considered in relation to the "interrelated matters" that can assist a court in assessing that factor (para. 51). As for access to justice, it too is taken into consideration in assessing whether a suit is a reasonable and effective means of bringing an issue before the courts. And it is also accounted for in the context of the "serious justiciable issue" factor, which allows courts to screen out unmeritorious claims and ensure that judicial resources remain available to those who need them most.

58 Because legality and access to justice feature most prominently in relation to the third factor, attaching "particular weight" to them would effectively transform the "reasonable and effective means" factor into a determinative one. This Court explicitly warned against such an outcome in *Downtown Eastside*. It encouraged courts to take access to justice and legality into account, but specified that "this should not be equated with a license to grant standing to whoever decides to set themselves up as the representative of the poor or marginalized" (para. 51).

59 In *Downtown Eastside*, the Court endorsed a flexible, discretionary approach to public interest standing. This approach must be guided by *all* the underlying purposes of limiting standing, as well as by legality and access to justice. While access to justice and, in particular, legality were central to the development of the law of public interest standing, and while they are important considerations, they are not the only concerns to take into account. Put another way, no one purpose, principle or factor takes precedence in the analysis.

B. Sufficient Factual Setting For Trial

60 The third *Downtown Eastside* factor requires courts to consider whether, in all the circumstances, a proposed suit is a reasonable and effective means of bringing an issue before the courts. One of the many matters a court is to consider when assessing this factor is "the plaintiff's capacity to bring forward [the] claim" (para. 51). To evaluate the plaintiff's capacity to do so, the court "should examine, amongst other things, the plaintiff's resources, expertise, and whether the issue will be presented in a sufficiently concrete and well-developed factual setting" (para. 51).

61 The dispute in this appeal revolves around this last question: "... whether the issue will be presented in a sufficiently concrete and well-developed factual setting". The AGBC argues that CCD did not — and cannot — adduce a sufficient factual setting because it lacks an individual co-plaintiff, and that standing should therefore be denied.

62 The AGBC's argument invites this Court to consider how public interest litigants can satisfy a court that a sufficient factual setting will exist at trial. Is an individual plaintiff necessary in circumstances like those on appeal? If not, how can a plaintiff satisfy the court that such a setting will be forthcoming where, as here, standing is challenged at a preliminary stage of litigation? And, if it becomes necessary to revisit the issue of standing to ensure that this factual setting exists, under what circumstances should a party be permitted to do so?

(1) Individual Co-plaintiff Not Required

63 At the outset, both parties rightly acknowledge that public interest litigation may proceed in some cases without a directly affected plaintiff (see, e.g., A.F., at para. 59). A statute's very existence, for example, or the manner in which it was enacted can be challenged on the basis of legislative facts alone (see, e.g., *Danson*, at pp. 1100-1101).

64 The AGBC, however, submits that where the impacts of legislation are at issue, evidence from a directly affected plaintiff is *vital* to "ensuring that a factual context suitable for judicial determination is present" before standing is granted (A.F., at para. 60). In such cases, the AGBC maintains, an applicant for public interest standing should be required to (i) explain the absence of an individual plaintiff, (ii) show how it is a suitable proxy for the rights and interests of directly affected plaintiffs, and (iii) demonstrate, "with some specificity", how it will provide a well-developed factual context that compensates for the absence of a directly affected plaintiff (paras. 40 and 66).

65 I would not impose such rigid requirements, for two reasons.

66 First, a directly affected *plaintiff* is not vital to establish a "concrete and well-developed factual setting". Public interest litigants can establish such a setting by calling affected (or otherwise knowledgeable) non-plaintiff *witnesses* (see, e.g., Carterv. Canada (Attorney General), 2015 SCC 5, [2015] 1 S.C.R. 331 (S.C.C.) , at paras. 14-16, 22 and 110; Canada (Attorney General) v. Bedford, 2013 SCC 72, [2013] 3 S.C.R. 1101, at paras. 15 and 54; *Downtown Eastside*, at para. 74). As long as such a setting exists, a directly affected co-plaintiff or a suitable proxy is not required for a public interest litigant to be granted standing. If a directly affected co-plaintiff is not required, then would-be public interest litigants should not have to justify — or compensate for — the absence of one.

67 Second, the AGBC's proposed requirements would thwart many of the traditional purposes underlying standing law. A strict requirement for a directly affected co-plaintiff would pose obstacles to access to justice and would undermine the principle of legality. Constitutional litigation is already fraught with formidable obstacles for litigants. These proposed requirements would also raise unnecessary procedural hurdles that would needlessly deplete judicial resources. Given these concerns, the Court was correct in *Downtown Eastside* to retain the presence of directly affected litigants as a *factor* — rather than a separate legal and evidentiary hurdle — in the discretionary balancing, to be weighed on a case-by-case basis. I would not disturb that conclusion here.

(2) Satisfying a Court on this Factor Will Be Context-Specific

68 The question remains: In the absence of a directly affected co-plaintiff, how might a would-be public interest litigant demonstrate that the issues "*will* be presented in a sufficiently concrete and well-developed factual setting" (*Downtown Eastside*, at para. 51 (emphasis added))? And, in particular, how might such a litigant do so where (as here) standing is challenged at a *preliminary* stage of the litigation?

69 To begin, a few clarifications are in order. As the Court explained in *Downtown Eastside*, none of the factors it identified are "hard and fast requirements" or "free-standing, independently operating tests" (*Downtown Eastside*, at para. 20). Rather, they are to be assessed and weighed cumulatively, in light of all the circumstances. It follows that, where standing is challenged *at a preliminary stage*, whether a "sufficiently concrete and well-developed factual setting" *will* exist at trial may not be dispositive. The trial judge retains the discretion to determine the significance of this consideration at a preliminary stage by taking the particular circumstances into account.

70 That said, *the absence of such a setting will in principle be dispositive at trial*. A court cannot decide constitutional issues in a factual vacuum (*Mackay v. Manitoba*, [1989] 2 S.C.R. 357, at pp. 361-62). Evidence is key in constitutional litigation unless, in exceptional circumstances, a claim may be proven on the face of the legislation at issue as a question of law alone (see, e.g., *Danson*, at pp. 1100-1101, citing *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110, at p. 133). Standing may therefore be revisited where it becomes apparent, after discoveries, that the plaintiff has not adduced sufficient facts to resolve the claim. As I will explain below, however, parties should consider other litigation management strategies before revisiting the issue of standing, given that such strategies may provide a more appropriate route to address the traditional concerns that underlie standing law (*Downtown Eastside*, at para. 64). For example, summary dismissal may be open to a defendant where there is no evidence to support an element of the claim (as in Hryniak v. Mauldin, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 93).

71 With these clarifications in mind, I will now return to the question at hand: What suffices to show that a sufficiently concrete and well-developed factual setting will be forthcoming at trial?

The answer to this question necessarily depends on the circumstances, including (i) the stage of litigation at which standing is challenged, and (ii) the nature of the case and the issues before the court. On the first point, what may, for example, satisfy the court at an early stage may not suffice at a later stage. Likewise, the significance of a lack of evidence will vary with the nature of the claim and the pleadings. Some cases may not be heavily dependent on individual facts — where, for example, the claim can be argued largely on the face of the legislation. In such cases, an absence of concrete evidence at the pleadings stage may not be fatal to a claim for standing. Where a case turns to a greater extent on individual facts, however, an evidentiary basis will weigh more heavily in the balance, even at a preliminary stage of the proceedings.

72 When standing is challenged at a preliminary stage, the plaintiff should not be required to provide trial evidence. That would be procedurally unfair, as it would permit the defendant to obtain evidence before discovery. Generally, however, a mere undertaking or intention to adduce evidence will *not* be enough to persuade a court that an evidentiary basis will be forthcoming. It may be helpful to give some examples of the considerations a court may find relevant when assessing whether a sufficiently concrete and well-developed factual setting will be produced at trial. As was the case in *Downtown Eastside*, for the purposes of its assessment of the "reasonable and effective means" factor, this list is not exhaustive, but illustrative.

1. *Stage of the proceedings*: The court should take account of the stage of the proceedings at which standing is challenged. At a preliminary stage, a concrete factual basis may not be pivotal in the *Downtown Eastside* framework — the specific weight to be attached to this consideration will depend on the circumstances, and ultimately lies within the trial judge's discretion. At trial, however, the absence of a factual basis should generally preclude a grant of public interest standing.

2. *Pleadings*: The court should consider the nature of the pleadings and what material facts are pled. Are there concrete facts with respect to how legislation has been applied that can be proven at trial? Or are there merely hypothetical facts with respect to how legislation might be interpreted or applied? Do the pleadings reveal that the case can be argued largely on the face of the legislation, such that individual facts may not be pivotal? Or does the case turn more heavily on individualized facts?

3. *The nature of the public interest litigant*: The court may also consider whether the litigant — if it is an organization — is composed of or works directly with individuals who are affected by the impugned legislation. If that is the case, it would be reasonable to infer that the litigant has the capacity to produce evidence from directly affected individuals.

4. *Undertakings*: Courts rigorously enforce undertakings, which must be "strictly and scrupulously carried out" (see, e.g., Law Society of British Columbia, *Code of Professional Conduct for British Columbia* (online), rule 5.1-6). An undertaking by a lawyer to provide

evidence might help to persuade a court that a sufficient factual setting will exist at trial, but an undertaking alone will seldom suffice.

5. *Actual evidence*: Though a party is not required to do so, providing actual evidence — or a list of potential witnesses and the evidence they will provide — is a clear and compelling way to respond to a challenge to standing at a preliminary stage. As I explained above, the significance of a lack of evidence will depend on the stage of the litigation, the nature and context of the case, and the pleadings.

(3) Ability to Revisit Standing

73 In *Downtown Eastside*, this Court cautioned against using the "blunt instrument of a denial of standing" where other well-established litigation management strategies could ensure the efficient and effective use of judicial resources (para. 64). For example, courts can screen claims for merit at an early stage by intervening to prevent abuse, and have the power to award costs. A court hearing a preliminary challenge to standing may also defer consideration of the issue to trial (*Finlay*, at pp. 616-17). Any of these tools may provide a more appropriate route to address the traditional concerns that underlie standing law, and courts should take these tools into account when exercising their discretion to grant or deny standing (*Downtown Eastside*, at para. 64). Likewise, parties should generally pursue alternative litigation management strategies first, before seeking to revisit the issue of standing.

74 Courts, however, retain the ability to reconsider standing, even where it was initially granted at a preliminary stage (*Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342). The ability to revisit standing depends on a plaintiff's continued efforts to demonstrate that a sufficiently concrete and well-developed factual setting will be put forward at trial. In this sense, the ability to revisit standing acts as a fail-safe to ensure that the plaintiff does not rest on its laurels.

75 To be clear, the courts' ability to revisit standing is not an open invitation to defendants to challenge standing at every available opportunity. Litigants must not waste judicial resources or unduly hinder the litigation process. For that reason, a defendant wishing to revisit standing may apply to do so only if a material change has occurred that raises a serious doubt that the public interest litigant will be able to put forward a sufficiently concrete and well-developed factual setting, and alternative litigation management strategies are inadequate to address the deficiency. One example of such a material change would be where the plaintiff undertook to provide evidence in response to a previous challenge to standing but failed to do so. By contrast, moving from one stage of the litigation to another does not, by itself, correspond to a material change that would merit revisiting standing.

76 A material change that raises a serious doubt that a plaintiff will be able to put forward a sufficiently concrete and well-developed factual setting is most likely to occur when the parties exchange pleadings or complete the discovery stage. These are the steps in the litigation process

at which the factual setting is most likely to emerge. Unsurprisingly, the importance of the factual setting increases at each step of the process as the litigation progresses. This means that a plaintiff's inability to demonstrate that it will put forward a sufficiently concrete and well-developed factual setting will carry more weight at the close of the discovery stage than after the exchange of pleadings, at which point the absence of concrete evidence would be less significant. Like the initial decision on standing, a decision to revisit standing turns on the particular circumstances of the case (*Downtown Eastside*, at para. 2).

77 While I do not foreclose the possibility of a material change occurring other than at the pleadings and discovery stages, such an occurrence would be rare. One example of an appropriate case would be where the original basis for the plaintiff's standing has been called into question or becomes moot. The latter situation arose in the *Borowski* saga. In 1981, this Court granted Mr. Borowski public interest standing to challenge the prohibition against abortion in the Criminal Code, R.S.C. 1970, c. C-34 (see *Minister of Justice of Canada v. Borowski*, [1981] 2 S.C.R. 575), but the impugned provisions were subsequently struck down in *R. v. Morgentaler*, [1988] 1 S.C.R. 30. In 1989, this Court held that Mr. Borowski lacked standing to continue the case, because he was now asking the court to address a "purely abstract question" about the rights of a foetus, which meant that his challenge now amounted to a "private reference" (*Borowski* (1989), at pp. 365-68).

C. Application to the Facts

78 At the oral hearing, CCD requested leave to cross-appeal the Court of Appeal's order, and urged this Court to rule on the issue of standing. It argued that remitting the matter for reconsideration would only cause further delay. I agree. In my view, it is in the interests of justice to grant leave to cross-appeal in the circumstances, and address the standing issue. Courts may grant public interest standing in the exercise of their inherent jurisdiction whenever it is just to do so (Morgentaler v. New Brunswick, 2009 NBCA 26, 344 N.B.R. (2d) 39, at para. 51).

79 I note that rulings on standing are discretionary, and are thus "entitled to deference on appeal" (Strickland v. Canada (Attorney General), 2015 SCC 37, [2015] 2 S.C.R. 713, at para. 39). In the case at bar, however, there are errors in the decisions of the courts below that justify our intervention.

80 My analysis in this regard will proceed in two parts. First, I will outline the errors made by the courts below. Second, I will apply and weigh each of the *Downtown Eastside* factors before concluding that, cumulatively, these factors favour granting public interest standing in the circumstances.

(1) Errors in the Courts Below

(a) Chambers Judge

81 The chambers judge made a number of errors in his interpretation and application of the *Downtown Eastside* factors.

(i) Errors With Respect to the Serious Justiciable Issue Factor

82 The chambers judge concluded that CCD failed to raise a justiciable issue, but his analysis on this point was insufficient. He (and the Court of Appeal) reduced the inquiry to whether it was necessary for the plaintiff to plead facts relating to specific individuals: the chambers judge held that it was, while the Court of Appeal held that it was not.

83 This approach misses the point of the "justiciability" inquiry, which is directed at maintaining an appropriate boundary between an impermissible "private reference" and a proper grant of public interest standing (see, e.g., *Borowski* (1989), at p. 367). Whether facts relative to specific individuals are or are not pleaded *may* be a relevant factor, but it is not, in itself, the point to be decided, nor is it determinative.

84 As I will explain below, while it is true that purely hypothetical claims are not justiciable, there is an undisputed cause of action here. CCD has alleged facts which, if proven, could support a constitutional claim.

(ii) Errors With Respect to the Genuine Interest Factor

85 The chambers judge also erred in his assessment on the existence of a genuine interest. He found that CCD's interest only "weakly" met the genuine interest criterion, because its work is focused primarily on "disabilities" and not on "mental disabilities". With respect, this distinction between "mental disabilities" and "disabilities" is unhelpful, and unfounded. Mental disabilities are disabilities (Saadati v. Moorhead, 2017 SCC 28, [2017] 1 S.C.R. 543, at paras. 2 and 35).

(iii) Errors With Respect to the Reasonable and Effective Means Factor

86 The chambers judge concluded that CCD failed to establish that its suit was a reasonable and effective means of bringing the issues forward. He voiced four concerns in this regard:

> 1. CCD failed to lead adequate evidence of a "sufficiently concrete and well-developed factual setting" upon which the action could be tried (para. 69);
>
> 2. CCD failed to persuade the chambers judge that it could fairly represent the interests of everyone affected by the impugned provisions (para. 76);
>
> 3. CCD had engaged in "little advocacy for mental illness" in comparison with its advocacy efforts regarding physical disability (para. 74); and

4. CCD failed to explain why it was unrealistic for individuals who have experienced the impacts of the impugned provisions to bring and see through a challenge themselves (paras. 77-95).

87 It was not open to the chambers judge to afford these concerns the decisive weight he did. I will address each concern in turn.

88 The first concern relates to the concrete factual setting needed to resolve constitutional claims. As I noted above, this consideration is one of many a court may take into account when deciding whether a suit is *a* reasonable and effective means of advancing the claim. The chambers judge, however, attached determinative weight, at several points in his reasons, to the alleged absence of a robust factual setting (paras. 37-39, 61, 67 and 69).

89 The chambers judge's approach contradicts *Downtown Eastside*, in which this Court affirmed that *none* of the factors are "hard and fast requirements" or "freestanding, independently operating tests" (para. 20). They are instead to be assessed and weighed cumulatively. It follows that at this early stage, where the question is simply whether a sufficient factual setting *will* exist, this consideration is not determinative on its own.

90 The second concern relates to the interests of others who are affected by the impugned legislation. The chambers judge surmised that CCD was not in a position to "fairly represent" everyone's interests. But public interest standing has never depended on whether the plaintiff represents the interests of all, or even a majority of, directly affected individuals. What matters is whether there is a serious justiciable issue, whether the plaintiff has *a* genuine interest, and whether the suit is *a* reasonable and effective means of litigating the issue.

91 The third concern expressed by the chambers judge relates to CCD's status as an advocate for people with mental disabilities. The chambers judge questioned whether CCD's advocacy efforts "commend[ed] it as an advocate for those with mental health-related disabilities", and mentioned that its argument seemed to focus on "the extent to which mental illness should be considered a disability" (para. 74). This concern rests on the unfounded distinction between mental and physical disabilities which I discussed above.

92 The fourth concern relates to the availability of other individuals who might have direct standing to challenge the claim. The chambers judge considered that some individuals affected by the impugned provisions might be willing or able to participate in CCD's constitutional challenge "if funded and supported by the CCD", and that there were therefore "other reasonable and effective ways to bring the issues" forward (paras. 95 and 97).

93 This final concern is problematic for two reasons. First, *Downtown Eastside* instructs courts to take a "practical" and "pragmatic" approach to the existence of potential plaintiffs. The "practical

prospects" of such plaintiffs bringing the matter to court "should be considered in light of the practical realities, not theoretical possibilities" (para. 51). There was no analysis in this regard in the chambers judge's reasons. Although other plaintiffs have advanced constitutional challenges to these provisions, none of them were able to see their challenges through to completion.

94 Second, the chambers judge's fourth concern attaches undue weight to the importance of an individual plaintiff. But as I explained above, *Downtown Eastside* sets out *no requirement* for such a plaintiff. Instead, it directs courts to consider whether the plaintiff's claim is *a* reasonable and effective means of bringing the case to court, regardless of whether other reasonable and effective means exist (para. 44).

(b) Court of Appeal

95 The Court of Appeal's analysis was limited to a review of the chambers judge's conclusion on the question whether CCD's case raised a serious justiciable issue. The Court of Appeal did not apply *Downtown Eastside* to determine whether, in all the circumstances, the chambers judge's decision to deny standing was justified. Instead, it identified an error with regard to one factor and remitted the matter to the Supreme Court of British Columbia for fresh consideration.

96 This itself was an error. The Court of Appeal dealt with the first *Downtown Eastside* factor individually but did not consider it in conjunction with the other two factors. This approach contradicts *Downtown Eastside*, which requires a court to weigh the three factors cumulatively. In short, the Court of Appeal determined that the trial judge had made a palpable error, but it did not go on to weigh all the factors cumulatively in order to determine whether that error was *overriding*.

(2) Downtown Eastside Framework Favours Granting Standing in the Instant Case

97 These errors require this Court to do what the Court of Appeal did not: weigh *all* of the *Downtown Eastside* factors cumulatively, flexibly and purposively.

(a) Serious Justiciable Issue

98 CCD's pleadings are well drafted, and they raise a serious issue: the constitutionality of laws that implicate — and allegedly violate — the Charter rights of people with mental disabilities. This issue is "far from frivolous", "important", and "substantial" (*Downtown Eastside*, at para. 42, citing Finlay at p. 633, *Borowski* (1981), at p. 589, and *McNeil*, at p. 268).

99 Bearing in mind that CCD's case is still at the pleadings stage, I also find that the issue is justiciable. The amended notice of civil claim sets out material facts outlining the core of the case. These include the following:

1. the impugned provisions permit health care providers to forcibly administer psychotropic medication, electroconvulsive therapy and psychosurgery to involuntary patients even though these treatments carry a number of serious risks and potentially fatal side-effects;

2. health care providers administer these treatments by, among other things, demanding patients' cooperation, using physical force and threatening physical restraint or detention when patients are uncooperative or refuse consent, even where patients are capable of making decisions regarding psychiatric treatment; and

3. the use and threatened use of forced psychiatric treatment can cause physical harm and severe psychological pain and stress.

100 CCD's pleadings reveal an undisputed cause of action. CCD alleges facts which, if proven, could support a constitutional claim: "Where there are aspects of the claim that clearly raise serious justiciable issues, it is better for the purposes of the standing analysis not to get into a detailed screening of the merits of discrete and particular aspects of the claim" (*Downtown Eastside*, at para. 56).

(b) Genuine Interest

101 It is clear to me from the uncontested Bernard affidavit that CCD has a genuine interest in the issues, and in the challenges faced by people with mental disabilities:

1. CCD's work is directed "by and for people with disabilities", including mental disabilities.

2. CCD has a long history of engagement in social, legal, and policy reform initiatives aimed at reducing stereotyping and discrimination and promoting the fundamental equality and human rights of people with disabilities. For example, it acts as a consultant to the Government of Canada on issues relating to disabilities.

3. CCD has repeatedly been recognized by international bodies, governments, and courts as an authoritative and respected voice regarding the rights, autonomy, and equality of people with disabilities, including people with mental disabilities.

4. CCD's board of directors conducts most of its work through committees with special mandates, including the Mental Health Committee, whose members have specific mental health-related expertise and which is responsible for the litigation in the instant case.

5. CCD has participated as a plaintiff or as an intervener in other cases relating to human rights and equality issues under the Charter, all of which involved the rights of people with disabilities.

102 The AGBC argues that CCD's work does not focus narrowly on people with "mental illness" (A.F., at paras. 4, 92 and 98). This argument misses the point: a plaintiff seeking public interest standing has never been required to show that its interests are precisely as narrow as the litigation it seeks to bring. Instead, it must demonstrate a "link with *the claim*" and an "interest in *the issues*" (*Downtown Eastside*, at para. 43 (emphasis added)).

103 I am therefore satisfied that CCD has "a real stake in the proceedings", "is engaged with the issues" and is no "mere busybody" (*Downtown Eastside*, at para. 43).

(c) Reasonable and Effective Means

104 *Downtown Eastside* invites courts to consider a series of "interrelated matters" when assessing the reasonable and effective means factor, including (i) the plaintiff's capacity to bring the claim forward; (ii) whether the case is of public interest and what impact it will have on access to justice; (iii) whether there are alternative means to bring the claim forward, including parallel proceedings; and (iv) the potential impact of the proceedings on the rights of others.

(i) Plaintiff's Capacity to Bring the Claim Forward

105 CCD boasts impressive resources and expertise. It is a sizeable, highly reputable public interest organization represented by excellent pro bono counsel and backed by a law firm that has already committed significant resources to this litigation. There is no doubt that CCD commands the necessary resources and expertise to advance the claim it asserts.

106 Furthermore, I am satisfied that a "sufficiently concrete and well-developed factual setting" will be forthcoming. CCD's work is directed "by and for" people with disabilities, including mental disabilities. It is therefore reasonable to infer that CCD has the capacity to adduce evidence from directly affected individuals. Moreover, the pleadings reveal that this case does not turn on individual facts. Much of the case can be argued on the basis that the legislation is unconstitutional on its face because it authorizes, under certain circumstances, forced psychiatric treatment without the consent of the patient or of a substitute decision-maker. Expert evidence regarding how health care providers treat involuntary patients and evidence with respect to particular patients may provide helpful insight into how the legislation is applied. At this early stage of the litigation, however, information about individual plaintiffs would not add much value.

107 The representations of counsel and Ms. Benard's sworn statement that CCD will adduce evidence, while insufficient on their own, also help to assure this Court that the issues will be litigated in a sufficient factual setting. Counsel for CCD also made an undertaking at the hearing to provide evidence of the concrete circumstances of specific patients. This undertaking helps to alleviate any lingering concerns about the forthcoming nature of a sufficient factual background.

108 Finally, I note that it will still be open to the AGBC to challenge CCD's standing should CCD fail to adduce the factual setting it undertook to adduce. It would make sense in this case to limit such a challenge to the stage following discovery.

109 I would pause to observe that standing is fact- and context-specific. This is an appropriate result in this case; it may not be appropriate in other cases. Rather than using the "blunt instrument" of denying standing, it is appropriate here to use various litigation management tools — like the possibility of revisiting standing — to ensure that the evidence in question is in fact tendered promptly.

(ii) Whether the Case is of Public Interest

110 CCD's claim undoubtedly raises issues of public importance that transcend its immediate interests (see, e.g., *Downtown Eastside*, at para. 73). The litigation has the potential of affecting a large group of people, namely people with mental disabilities. Moreover, granting public interest standing in this case will promote access to justice for a disadvantaged group who has historically faced serious barriers to bringing such litigation before the courts.

(iii) Realistic Alternative Means

111 I must also consider whether there are *realistic* alternative means which would favour a more efficient and effective use of judicial resources and would present a context more suitable for adversarial determination (*Downtown Eastside*, at para. 51). In this regard, the Court of Appeal took notice of an action that has been commenced under the *Class Proceedings Act*, to challenge the same statutory provisions that are at issue in this appeal. As of now, that class action has not yet been certified.

112 The AGBC points to the class action as a better vehicle for bringing these issues to court, but he argues in the class action itself that the action is statute-barred and should therefore not be certified.

113 Although the class action is relevant, it is not determinative (*Downtown Eastside*, at para. 67). In my view, CCD provides two compelling reasons to support its argument that its claim is a reasonable and effective means of bringing the issue before the court despite this parallel proceeding.

114 First, the class action is rife with unknowns: the record does not confirm that the proceeding has been certified. Even if it *is* certified, the certified common issues may not address the constitutionality of the impugned provisions. There is *no* information about the evidence that is to be adduced in the proposed class proceeding. In any case, the primary focus of such proceedings is to obtain damages, which often leads to settlements rather than to rulings on alleged *Charter*

violations. As a result, I cannot conclude that the class action represents a more efficient and effective means of resolving the Charter issues raised by CCD.

115 Second, the uncontested evidence from the Benard affidavit is that individuals directly affected by the impugned provisions face significant barriers to commencing constitutional litigation and seeing it through. In this case, directly affected individuals suffer from mental disabilities that could affect their capacity to bring lengthy, complex litigation and to stay its course. Some may fear reprisals from health care providers who, under the legislation at issue, control their psychiatric treatment. Or they may hesitate to expose themselves to the unfortunate stigma that can accompany public disclosure of their private health information. CCD taking on the role as plaintiff in this litigation alleviates those significant barriers.

116 Though fully capable of advancing litigation, individuals with mental disabilities must overcome significant personal and institutional hurdles to do so. Mindful of this, I would not attach determinative weight to the parallel claim in balancing the factors.

(iv) Potential Impact of the Proceeding on the Rights of Others

117 The AGBC argues that CCD's claim may prejudice people who *support* the impugned provisions. I would attach little weight to this concern. Support for a law should not immunize it from constitutional challenge. If the impugned provisions are unconstitutional, they should be struck down.

(3) Cumulative Weighing

118 Having cumulatively weighed each of the *Downtown Eastside* factors, I would exercise my discretion in favour of granting CCD public interest standing. If CCD fails to promptly adduce the promised factual setting, the AGBC can apply to have the issue of standing reconsidered at the conclusion of the discovery stage. I would again stress that while this result is appropriate in the specific context of this case, it may not be appropriate in others.

D. Special Costs

119 CCD seeks an award of special costs on a full indemnity basis throughout. Special costs are exceptional and discretionary (*Carter*, at paras. 137 and 140). To award special costs, two criteria must be met:

> 1. the case must involve matters of public interest that have a "significant and widespread societal impact" and are "truly exceptional" (*Carter*, at para. 140); and
>
> 2. the plaintiff must show that it has no personal, proprietary or pecuniary interest that would justify the proceedings on economic grounds, and that it would not have been possible to effectively pursue the litigation in question with private funding (*Carter*, at para. 140).

120 CCD's case satisfies both of these criteria. Regarding the first criterion, the scope of public interest standing and the circumstances in which organizations may pursue public interest litigation without an individual plaintiff is a matter of public interest that has a significant and widespread societal impact. The participation of over 20 interveners from across the country representing a range of interests and perspectives with respect to this appeal is a testament to this fact.

121 As for the second criterion, CCD is a not-for-profit organization whose mandate is to promote the equality, autonomy and rights of people with disabilities. It has no personal, proprietary or pecuniary interest in this litigation. Moreover, it would not have been possible for CCD to pursue the litigation effectively with private funding; it has relied upon pro bono counsel to argue its case.

122 CCD has sought to advance the litigation for nearly six years. The substantive issues have yet to be addressed. In such circumstances, having regard to the strict criteria for special costs, it would be "contrary to the interests of justice to ask [CCD and its pro bono counsel] to bear the majority of the financial burden associated with pursuing the claim" (*Carter*, at para. 140).

123 In these exceptional circumstances, and in the exercise of my discretion, I would grant special costs in this Court and in the courts below to place CCD — as far as it is possible to do so financially — in the position it was in when the AGBC called its standing into question.

VI. Disposition

124 For these reasons, I would dismiss the AGBC's appeal. I would grant leave to cross-appeal to CCD, allow its cross-appeal, set aside the order of the Court of Appeal remitting the question of CCD's public interest standing to the Supreme Court of British Columbia, and grant CCD public interest standing. Special costs on a full indemnity basis are awarded to CCD throughout.

Appeal dismissed; cross-appeal allowed.

Pourvoi rejeté; pourvoi incident accueilli.

2017 FC 604, 2017 CF 604
Federal Court

Bilodeau-Massé v. Canada (Procureur général)

2017 CarswellNat 3179, 2017 CarswellNat 3280, 2017 FC 604, 2017 CF 604, 140 W.C.B. (2d) 168, 388 C.R.R. (2d) 66

JIMMY BILODEAU-MASSÉ (demandeur) et PROCUREUR GÉNÉRAL DU CANADA (défendeur)

Luc Martineau J.

Heard: March 27, 2017
Judgment: June 19, 2017
Docket: T-1159-16

Counsel: Me Nadia Golmier, pour le demandeur
Me Marc Ribeiro, Me Virginie Harvey, pour le défendeur

Subject: Constitutional; Criminal; Human Rights

APPLICATION by offender for judicial review of decision of Parole Board Canada maintaining long-term supervision order after offender brought request for in-person post-suspension hearing.

***Luc Martineau J.*:**

[ENGLISH TRANSLATION]

I. Introduction

1 Under subsection 52(1) of the *Constitution Act, 1982*, adopted as Schedule B to the *Canada Act 1982*, 1982, c. 11 (U.K.), the Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect. In this case, does the Federal Court have jurisdiction to rule on the validity of subsections 140(1) and (2) of the *Corrections and Conditional Release Act*, SC 1992, c. 20 [CCRA], and, if it does, would it be appropriate to grant declaratory relief today in this case?

2 At issue is the extent of the obligations of the Parole Board of Canada [the Board] with respect to natural justice, the law and/or the *Canadian Charter of Rights and Freedoms* — Part I of the *Constitution Act, 1982* [*Charter*], when, following the suspension of a long-term supervision order [LTSO], it decides under subsection 135.1(6) of the CCRA to maintain the suspension of

the LTSO and/or to recommend that an information be laid charging the offender with an offence under section 753.3 of the *Criminal Code*, RSC 1985, c. C-46.

3 Subsection 140(1) of the CCRA stipulates that a hearing is mandatory in the cases listed in paragraphs (a) to (e) of subsection (1). However, according to subsection 140(2) of the CCRA, the Board has the discretion to hold a hearing in other cases, which includes a post-suspension hearing following the suspension of an LTSO (section 135.1 of the CCRA).

4 These provisions are reproduced below:

> 140(1) The Board shall conduct the review of the case of an offender by way of a hearing, conducted in whichever of the two official languages of Canada is requested by the offender, unless the offender waives the right to a hearing in writing or refuses to attend the hearing, in the following classes of cases:
>
> (a) the first review for day parole pursuant to subsection 122(1), except in respect of an offender serving a sentence of less than two years;
>
> (b) the first review for full parole under subsection 123(1) and subsequent reviews under subsection 123(5), (5.01) or (5.1);
>
> (c) a review conducted under section 129 or subsection 130(1) or 131(1) or (1.1);
>
> (d) a review following a cancellation of parole; and
>
> (e) any review of a class specified in the regulations.
>
> (2) The Board may elect to conduct a review of the case of an offender by way of a hearing in any case not referred to in subsection (1).
>
> 140(1) La Commission tient une audience, dans la langue officielle du Canada que choisit le délinquant, dans les cas suivants, sauf si le délinquant a renoncé par écrit à son droit à une audience ou refuse d'être présent:
>
> a) le premier examen du cas qui suit la demande de semi-liberté présentée en vertu du paragraphe 122(1), sauf dans le cas d'une peine d'emprisonnement de moins de deux ans;
>
> b) l'examen prévu au paragraphe 123(1) et chaque réexamen prévu en vertu des paragraphes 123(5), (5.01) et (5.1);
>
> c) les examens ou réexamens prévus à l'article 129 et aux paragraphes 130(1) et 131(1) et (1.1);
>
> d) les examens qui suivent l'annulation de la libération conditionnelle;
>
> e) les autres examens prévus par règlement.

(2) La Commission peut décider de tenir une audience dans les autres cas non visés au paragraphe (1).

5 The applicant, Jimmy Bilodeau-Massé, is a long-term offender subject to an LTSO. In this case, the Board maintained the suspension of the LTSO and recommended that an information be laid charging the applicant with an offence under section 753.3 of the *Criminal Code*. In addition, in exercising the discretion conferred upon it under subsection 140(2) of the CCRA, it determined that an oral hearing was not warranted in this case, hence this application for judicial review and declaratory relief.

6 The Attorney General of Canada is the respondent in this case. In accordance with section 57 of the *Federal Courts Act*, RSC 1985, c. F-7, a notice of constitutional question was duly served on the respondent, as well as on the attorney general of each province, though they decided not to participate in the hearing. It is not disputed that subsection 91(27) of the *Constitution Act, 1867* confers on Parliament exclusive jurisdiction over criminal law and procedure (except the constitution of courts of criminal jurisdiction), that the provisions of the CCRA and the *Criminal Code* on the supervision of long-term offenders in the community fall under federal jurisdiction, and that the legality of any decision by the Board may be reviewed by the Federal Court under sections 18 and 18.1 of the *Federal Courts Act*.

7 This Court heard the parties' submissions on the merits concurrently with the application for judicial review and declaratory judgment of another long-term offender regarding a similar decision by the Board, raising the same questions of administrative and constitut ional law (see *Blacksmith v Attorney General of Canada*, 2017 FC 605).

8 At the hearing, counsel for the two applicants stated that the applicants were abandoning any claim regarding the violation of section 9 of the *Charter*, which provides that "[e]veryone has the right not to be arbitrarily detained or imprisoned." Nevertheless, counsel for the applicants argues that the lack of guarantee of a post-suspension hearing violates section 7 of the *Charter* [constitutional question]. For one, the suspension of the LTSO and the resulting reincarceration affect the offender's residual liberty. Moreover, the principles of fundamental justice require that the offender be able, *in all cases*, to appear in person before the Board for a post-suspension hearing. The hearing must be held prior to the expiration of the statutory time limit of 90 days set out in section 135.1 of the CCRA, unless the offender waives this right in writing or refuses to attend the hearing. In addition, the two applicants argue that the Board also breached procedural fairness, or otherwise rendered an unreasonable decision, by refusing to hold a post-suspension hearing, which warrants Court intervention.

9 Although the Federal Court has jurisdiction to decide the constitutional question and make a formal declaration of invalidity, the respondent defends the constitutionality of subsections 140(1) and (2) of the CCRA. The Board acted under the authority of the law. The discretion to hold

a hearing granted to the Board in subsection 140(2) of the CCRA does not violate section 7 of the *Charter*: the offender's freedom is not involved, and the discretion to hold a post-suspension hearing is not incompatible with the principles of fundamental justice. The Court must interpret the legislation in a manner that is consistent with these principles. A hearing is not necessarily required *in all cases*. Because the authority to hold a post-suspension hearing is not removed, subsections 140(1) and (2) of the CCRA do not violate section 7 of the *Charter*. Additionally, any violation is justifiable under section 1. Regardless, there was no breach of procedural fairness, and the impugned decision by the Board is reasonable in all regards.

10 The standard of correctness applies to the review of the constitutional question, to the determination of the legal scope of the rules of natural justice or procedural fairness, as well as to the question as to whether — given the particular facts of the case — the Board breached procedural fairness by maintaining the suspension of the LTSO and recommending that an information be laid charging the offender with an offence under section 753.3 of the *Criminal Code*, without having held a hearing. At the same time, the standard of reasonableness applies to the review of the Board's determinations regarding the case (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] SCJ No. 9; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] SCJ No. 12[*Khosa*]; *Gallone v. Canada (Attorney General)*, 2015 FC 608, [2015] FCJ No. 598at paragraph 7 [*Gallone*]; *Laferrière v. Canada (Attorney General)*, 2015 FC 612, [2015] FCJ No. 578[*Laferrière FC*]).

11 In light of the particular facts of the case and the applicable federal statutory provisions, and having considered all of the parties' submissions and the relevant case law, I am satisfied that the Federal Court has jurisdiction to decide the constitutional question. It is also appropriate to issue a declaratory judgment on the constitutionality of subsections 140(1) and (2) of the CCRA and clarifying the extent of the Board's obligations under the principles of fundamental justice. The immediate result of the declaratory judgment that follows these reasons will be to bind the parties to the case and the tribunal against which it is rendered.

II. Background

12 The applicant is single and has no children. He is currently 24 years old. He has various cognitive limitations and the mental age of a child in elementary school. He has attention deficit hyperactivity disorder, conduct disorders, borderline personality disorder and a potential autism spectrum disorder. He is unable, partially and permanently, to ensure the protection of his person, to exercise his civil rights and to administer his property. Since 2015, the applicant has been under the protection of the Public Curator of Quebec.

13 The applicant's record shows persistent criminal behaviour since his criminal record began in 2008 and a violence problem characterized by a strong, immature and explosive personality. However, despite his intellectual disability, the applicant does not have any psychiatric pathology that could explain his violent behaviour. The problem seems to be that when he gets bored or is

facing a situation he feels is unfair, he tends to break the rules or demonstrate disruptive behaviour. Reintegration potential, accountability and motivation are all assessed as low. That being said, medication plays a key role in managing the risk the applicant poses to himself and society.

14 On January 23, 2012, the applicant was charged with assault with a weapon and assault causing bodily harm against two staff members of the Institut universitaire en santé mentale de Québec. On January 22, 2012, he hit a nurse on the head twice with an iron bar while she was sitting at the station. He was also charged with uttering death threats the following day against another staff member and for failing to comply with an undertaking to be of good behaviour. The applicant pleaded guilty to these criminal charges.

15 On February 25, 2013, the Court of Quebec ordered a pre-sentence psychiatric assessment as well as a dangerous or long-term offender assessment. The applicant was found to be responsible for his actions. On July 17, 2013, the Court of Quebec sentenced him to nine months in prison, in addition to the time already served on remand. At that time, he was declared a long-term offender.

16 The applicant is under the legal authority of the Correctional Service of Canada [Service] and is subject to an LTSO that will expire in 2019. Specifically, the Board imposed on him supervision conditions it considered reasonable and necessary to protect society and facilitate his reintegration. The LTSO, which was amended a few times, stipulates that he must reside at the Martineau Community Correctional Centre [CCC], a specialized centre for offenders with mental health issues; participate in a treatment program to address his risk factors; and take medication as prescribed by a health practitioner. He was released into the community on April 16, 2014.

17 The Service suspended the applicant's community supervision multiple times as a result of various breaches of these conditions. Each time, he was reincarcerated at the Regional Mental Health Centre at Archambault Institution.

18 Although post-suspension interviews were conducted with Service representatives and the applicant's case was referred to the Board three times, he appeared before the Board in person only once. This was in August 2015. On that occasion (the sixth suspension), the Board recommended that an information be laid under section 753.3 of the *Criminal Code*. Charges for breach of LTSO were laid in September 2015. During the applicant's appearance, his counsel requested a reassessment. He was declared fit to appear. In October 2015, the case was postponed, and the applicant was released on a promise to appear. He returned to the Martineau CCC on October 19, 2015, under a residency condition.

19 On October 31, 2015, the applicant's LTSO was suspended a seventh time. The applicant had stolen the medical identity cards of two other offenders and had demonstrated threatening or intimidating behaviour — actions that he later said he regretted. The case was referred to the Board, which agreed to moderate. On January 13, 2016, the Board conducted a paper review and decided to cancel the suspension of the LTSO, while formally advising the applicant that it was

dissatisfied with his behaviour and expected the supervisors not to tolerate any further misconduct. Given the regret the applicant expressed, the Board did not recommend that additional charges be laid against him under section 753.3 of the *Criminal Code*.

20 On March 30, 2016, the Service suspended the applicant's supervision for the eighth time. The applicant had threatened a resident of the unit and had attempted to strangle another. He then fled from the unit. He was found several hours later. While fleeing, he hit and damaged a vehicle.

21 On April 14, 2016, the applicant was confronted with the facts alleged against him during a post-suspension interview conducted by an authorized Service representative. The Service maintained the suspension and referred the case to the Board.

22 On April 22, 2016, the Service prepared an "Assessment for Decision" [Assessment], including a recommendation that an information be laid charging the applicant with an offence under section 753.3 of the *Criminal Code*. The Assessment, which must be read in conjunction with the most recent correctional plan update and the applicant's criminal profile, was shared with the applicant in late May 2016.

23 On June 5, 2016, counsel for the applicant submitted written representations to the Board, while requesting an in-person post-suspension hearing on the ground that the applicant [TRANSLATION] "has limited intellectual abilities, and his situation raises serious questions about the appropriate medication and treatment for his condition." Counsel also submitted the report prepared by Dr. Pierre Gagné, Director of the Clinique médico-légale de l'Université de Sherbrooke, indicating that the applicant's medication was not appropriate for his situation and therefore impeded his ability to comply with his LTSO conditions.

24 The request for a post-suspension hearing was based on two arguments:

> a) Subsection 140(2) of the CCRA — which provides for a discretionary post-suspension hearing for offenders subject to an LTSO — violates sections 7 and 9 of the *Charter* [the *Charter* argument]; and
>
> b) The hearing is all the more important in the applicant's case in order to ensure procedural fairness, because he has limited intellectual abilities and his situation raises serious questions about the appropriate medication and treatment for his condition [the administrative law argument].

25 The Board considered the information in its possession to be [TRANSLATION] "reliable and relevant" and enabled it to make an [TRANSLATION] "informed decision." With regard to the *Charter* and administrative law arguments, the Board said nothing in its June 7, 2016, decision except that it had [TRANSLATION] "read all of the representations from [counsel for the applicant]," but ultimately did not share her opinion because [TRANSLATION] "[i]t finds that a

hearing is not warranted." The Board noted that the specialists agreed that, despite his intellectual disability, the applicant had no psychiatric illness and was responsible for his actions. Examining his behaviour in terms of public safety and the protection of society, the Board maintained the suspension of the LTSO and recommended that a new information be laid under section 753.3 of the *Criminal Code*, finding that no supervision program could adequately protect society against the applicant's risk of recidivism and that, by all appearances, he had failed to comply with his supervision conditions.

26 That decision is the subject of this application.

27 On June 21, 2016, new criminal charges were brought against the applicant for breach of LTSO.

28 On November 10, 2016, the applicant pleaded guilty to those charges and received a concurrent sentence of 18 months in prison.

III. Mootness of certain questions raised or of certain remedies sought by the applicant

29 Recall that under subsection 18(1) of the *Federal Courts Act*, subject to section 28, the Federal Court has exclusive original jurisdiction (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. In addition, subsections 18.1(3) and (4) of the *Federal Courts Act* authorize the Court to declare invalid or unlawful or quash a decision of a federal board, commission or other tribunal and, if applicable, to refer the matter back for determination in accordance with such directions as it considers to be appropriate — meaning that the Court may order that a hearing be held in cases of breach of natural justice or procedural fairness, and particularly of violation of the law.

30 Moreover, in accordance with the well-established principles on prerogative writs and other discretionary remedies, a court of law may refuse to hear an application or to decide a question that has become moot (*Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342[*Borowski*]). And, even when an unlawful act was committed and a dispute still exists between the parties, the appropriate remedy is left to the Court's discretion. For example, the Federal Court may issue a declaration in lieu of any other judicial remedy (*MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] SCJ No. 2at paragraph 43 [*MiningWatch Canada*]; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] SCJ No. 3at paragraphs 2 and 46-47).

31 During the hearing before this Court, counsel for the applicant was confronted with the question as to whether this application for judicial review had become moot — either partially or

totally — following the filing of charges under section 753.3 of the *Criminal Code* and her client's subsequent conviction. The questionable actions that resulted in the suspensions of the LTSO — including the one in spring 2016 that led to the impugned decision in this case — are not really at issue.

32 However, counsel for the applicant argues that her client continues to be subject to an LTSO, meaning that the problematic situation alleged in this application for judicial review and declaratory relief is likely to recur more than once (for proof, one need only look at the number of suspensions of the LTSO in this case). Furthermore, other offenders are in a similar situation, which is notably the case for the applicant in the other case heard concurrently (*Blacksmith v. Attorney General of Canada*, 2017 FC 605). The suspensions of the LTSO are frequent, and the statutory time limit of 90 days for review is very short. In addition, the applicants make it a compelling question of law: because credibility issues are often at play before the Board, the principles of fundamental justice protected under section 7 of the *Charter* require that an oral post-suspension hearing be held when an LTSO is suspended. This is not frivolous: *Charter* and/or administrative law arguments are serious and warrant acknowledgement and an adequate response by this Court.

33 Counsel for the respondent does not challenge this rhetoric that the offender must return to square one if this Court does not clarify the issue raised by the applicants in the meantime.

34 I agree with counsel.

35 Quashing the June 7, 2016 decision and referring the matter back to the Board for redetermination could no longer have any practical or legal effect on what was already accomplished; the fact remains that criminal charges were laid and that the applicant was found guilty of committing the offence set out in section 753.3 of the *Criminal Code*. However, the Court can still do something useful by deciding the real issue in this case: is the offender automatically entitled to an oral hearing as in the cases referred to in subsection 140(1) of the CCRA?

36 The *Charter* and/or administrative law arguments were debated at length at the hearing, so, at first glance, it would seem appropriate to issue a declaratory judgment to clarify the question at issue. More often than not — when it would serve no useful purpose to quash a decision or order the resumption of an administrative process — in exercising judicial discretion, a declaratory judgment is a valid alternative remedy to prevent the repetition of systemic administrative practices that violate the law (*MiningWatch Canada* at paragraphs 50-52), or even the *Charter* or the *Canadian Bill of Rights*, SC 1960, c. 44 (*Singh v. Minister of Employment and Immigration*, [1985] 1 S.C.R. 177at paragraphs 76-79, 81-85 and 124-125 [*Singh*]); *Re Singh and M.E.I.*, 1986 CanLII 3950 (FCA), [1986] 3 FCR 388 at paragraphs 8-9). For a recent example of a declaratory judgment of general application from the Federal Court affecting an entire group of people who challenged the constitutionality and/or validity of certain provisions of the *Citizenship Act*, RSC 1985, c. C-29, as amended by the *Strengthening Canadian Citizenship Act*, SC 2014, c. 22, see: *Hassouna v. Canada*

(Citizenship and Immigration), 2017 FC 473, [2017] FCJ No. 544. In addition to prohibiting the Minister of Citizenship and Immigration from applying subsections 10(3) and (4) of the *Citizenship Act*, RSC 1985, c. C-29, as amended, against the applicants, because those subsections are incompatible with the *Canadian Bill of Rights*, SC 1960, c. 44, the Court declared subsections 10(1), (3) and (4) to be inoperative, because they violate paragraph 2(e) of the *Canadian Bill of Rights* in a manner that cannot be avoided by interpretation. In so doing, the Court stayed judgment for a period of 60 days or for any other period that the Court may authorize at the request of one of the parties.

37 However, a declaration of unconstitutionality is a discretionary remedy (*Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441at page 481 [*Operation Dismantle*], citing *Solosky v. The Queen*, [1980] 1 S.C.R. 821[*Solosky*]) and can be "an effective and flexible remedy for the settlement of real disputes" (*R v. Gamble*, [1988] 2 S.C.R. 595at page 649 [*Gamble*]). Therefore, a court can properly issue a declaratory remedy so long as it has the jurisdiction over the issue at bar, the question before the court is real and not theoretical, and the person raising it has a real interest to raise it (*Canada (Prime Minister) v. Khadr*, 2010 SCC 3at paragraph 46 [*Khadr*]). This Court must first ascertain that it has jurisdiction over the issue, and, if it does, be satisfied that its declaratory judgment may have a useful effect on the application of the CCRA when the Service refers a case to the Board following the suspension of an LTSO.

IV. Federal Court's jurisdiction to grant declaratory relief with respect to a constitutional and administrative issue

38 Firstly, I am satisfied that this Court has jurisdiction to render a declaratory judgment on the constitutional validity, applicability or operability of subsections 140(1) and (2) of the CCRA, as well as on the extent of the Board's obligations under the principles of fundamental justice and/or administrative law.

A. Words conferring jurisdiction

39 The Federal Court, a successor to the Exchequer Court of Canada, established in 1875, was maintained in 1970 as an "additional court of law, equity and admiralty in and for Canada, for the better administration of the laws of Canada" (section 4 of the *Federal Courts Act*). With the status of "a superior court of record having civil and criminal jurisdiction" (section 4 of the *Federal Courts Act*), the Federal Court may grant declaratory relief against any federal board, commission or other tribunal (subsection 18(1) of the *Federal Courts Act*) or against the Crown, including an officer, servant or agent of the Crown for anything done or omitted to be done in the performance of the duties of that person (section 17 of the *Federal Courts Act*). However, to better understand the genesis of the Federal Court's jurisdiction, it is appropriate to review the background, without repeating everything that might have been said on this topic in previous decisions (for example

Felipa v. Canada (Citizenship and Immigration), 2010 FC 89[*Felipa FC*], reversed by 2011 FCA 272 though for reasons unrelated to the historical analysis of the Court's jurisdiction).

40 In 1875, the legislation creating the Exchequer Court gave it concurrent original jurisdiction in "...any matter which might in England be the subject of a suit or action in the Court of Exchequer on its revenue side against the Crown," while the procedure was in principle "regulated by the practice and procedure of Her Majesty's Court of Exchequer at Westminster" (see sections 58 and 61 of the *Supreme and Exchequer Court Act*, SC 1875, c. 11). At that time, in England, the Court of Exchequer was a high court (*Supreme Court of Judicature Act, 1873* (U.K.), 36 & 37 Vict., c. 66, section 3, 4). While the Exchequer Court's jurisdiction was originally limited to revenue-related actions against the federal government, over the years, it gradually extended to actions against the Crown, in addition to admiralty matters, suits between citizens regarding industrial property (now intellectual property), and tax, citizenship and railway cases.

41 Long before the Federal Court was granted statutory jurisdiction in 1970 to review the legality of decisions by a federal board, commission or other tribunal (section 18 of the *Federal Courts Act*), aside from the petition of right procedure, it was possible to obtain a declaratory judgment from the Exchequer Court as additional relief against the Crown, by bringing an ordinary action against the Attorney General of Canada. For example, in *Jones et Maheux v. Gamache*, [1969] S.C.R. 119[*Jones et Maheux*], the Supreme Court of Canada ruled that the Exchequer Court had jurisdiction to issue a declaration of nullity of the General By-laws of the Quebec Pilotage Authority establishing classes of pilots — the pilotage authority for the district of Quebec being the Minister of Transport. In his action, the plaintiff said that important and prejudicial restrictions in the exercise of his profession were inflicted upon him as a direct consequence of the application of the invalid by-laws. Ultimately, the Supreme Court dismissed without costs the action against the individual defendants, but, at the same time, allowed the plaintiff's action against the Minister of Transport as "officer of the Crown for anything done or omitted to be done in the performance of his duty as such officer" (paragraph 29(c) of the *Exchequer Court Act*, RSC 1952, c. 98).

42 The Supreme Court's conclusion in 1968 in *Jones et Maheux* is unsurprising and is consistent with a long line of case law. Initially, the declaratory judgment was a discretionary remedy that could be granted in England by the Courts of equity, long before the adoption in 1850 of the *Chancery Act* (U.K.), 13 & 14 Vict., c. 35 and in 1852 of the *Chancery Procedure Amendment Act* (U.K.), c. 86, as well as the clarifications made in 1883 by the rules committee established under the *Supreme Court of Judicature Act, 1873* (U.K.), 36 & 37 Vict., c. 66, on the declaratory authority of the High Court of Justice. The Court of Exchequer in England also had equitable jurisdiction to issue declaratory judgments against the Crown (Lazar Sarna, *The Law of Declaratory Judgments*, Thomson Carswell, Fourth edition, 2016 at pages 9-10 and 24-25 [Sarna]).

43 That being said, it is important not to confuse the declaratory jurisdiction of the Courts of equity with that of the superior courts in prerogative writs. This important distinction was

highlighted in 1975 by Justice Addy, who explained the following in *B v Canada (Commission of Inquiry Relating to the Department of Manpower and Immigration)*, [1975] FC 602 at paragraphs 14 to 17:

> [14] At common law, the prerogative writs of prohibition, *certiorari* and *mandamus* (i.e., the old prerogative writ of *mandamus* as opposed to equitable *mandamus* to enforce a legal right or as contrasted with the equitable mandatory order or injunction) were granted exclusively by the common law Courts of the King's or Queen's Bench and constituted a class of process by which inferior bodies, including those which are an emanation of the Crown, were answerable to the controlling jurisdiction of superior Courts. The proceedings, leading to the issue of such prerogative writs, could not be instituted by ordinary action for the simple reason that the Courts and the judicial bodies, who were subject to such process being used against them, were not liable to be sued; the only persons liable to be sued were individuals and corporations. Therefore, the proceedings for prerogative writs had to be instituted by special application to the Court by way of motion: see *Rich v. Melancthon Board of Health* (1912), 2 D.L.R. 866, 26 O.L.R. 48, and *Hollinger Bus Lines Ltd. v. Ontario Labour Relations Board*, [1952] 3 D.L.R. 162 at pp. 167-8, [1952] O.R. 366 at p. 379).
>
> [15] On the other hand, relief by way of injunction, declaratory judgment, mandatory injunction or equitable mandatory order were exclusive equitable remedies and the proceedings were instituted in the Court of Chancery by means of a bill in equity. The Exchequer Court in England originally possessed also the equitable jurisdiction to issue declaratory judgments against the Crown.
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> [16] A true distinction between these remedies became obscured to some extent when the Courts of equity and of common law were fused and, in more recent years, the distinction became further obscured because in most jurisdictions all of these remedies, whatever may have been their origin, are now enforceable in the same manner, that is, by way of direct order of the Court. Furthermore, where the proceedings for the prerogative common law remedies, for the reasons previously stated, could be initiated only by special application to the Court, in certain Courts today such as the Federal Court of Canada (see Rule 603), the proceedings may now be instituted by way of a statement of claim.
>
> [17] But neither the fact that all the above-mentioned remedies may now be obtained from the same forum, nor the fact that the relief may be initiated by means of the same type of proceedings, nor the fact that the method of enforcing all of these remedies (by Court order) is identical, in any way changes or alters their basic nature or purpose, and it is still the law that where prohibition or *certiorari* lies neither injunction nor any other equitable remedy such as specific performance, mandatory injunction or equitable mandamus will lie and the converse is equally true: see *Hollinger Bus*, *supra*, and *Howe Sound Co. v. Int'l Union of Mine, Mill & Smelter Workers (Canada), Local 663* (1962), 33 D.L.R. (2d) 1, [1962] S.C.R. 318, 37 W.W.R. 646).

[My emphasis.]

44 Furthermore, declaratory action has been particularly useful in cases where the validity of a procedure or the legality of an action undertaken by the Crown was challenged by a subject. This method was confirmed in *Dyson v. Attorney General*, [1911] 1 K.B. 410 (CA) [*Dyson*], where the Court of Appeal of England declared that a tax notice sent to the plaintiff (and to eight million other people) was not authorized by law. In that case, the defendant was the Attorney General, not the Crown, because for centuries before the English Court of Chancery, and particularly before a court of equity, it was the Attorney General who defended the interests of the Crown (*Jones et Maheux* at pages 129-131, citing *Dyson*). As could be expected, the declaratory action against the Crown became commonplace in Canada, Australia and New Zealand (*Liebmann v. Canada (Minister of National Defence)*, [1994] 2 F.C. 3 (TD). In 1970, in transferring the supervisory jurisdiction over federal boards, commissions or other tribunals, Parliament took care to specify in section 18 of the *Federal Court Act*, RSC 1970 (2nd Supp.), c. 10, that in addition to the prerogative writs mentioned in the Trial Division, the Federal Court could render a declaratory judgment. The declaratory powers of a court of equity and a superior court were then concentrated in one federal court.

45 Incidentally, apart from questions of interest or mootness, the Supreme Court of Canada had already recognized before the patriation of the Constitution, in *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138at pages 157-159, the right of taxpayers to invoke the interposition of a court of equity to challenge the constitutionality of legislation involving expenditure of public money where no other means of challenge was open. This continued with the coming into force of the *Charter*. For example, following the bringing of a declaratory action before the Trial Division, the Federal Court of Appeal allowed the appeal of a taxpayer, who had been unsuccessful at trial, who was challenging the constitutionality of section 231.4 of the *Income Tax Act*, RSC 1985, c. 1 (5th Supp.), and summonses issued by tax authorities pursuant to that provision. The Federal Court of Appeal ruled that they were inoperative under subsection 52(1) of the *Constitution Act, 1982* (*Del Zotto v. Canada*, [1997] 3 F.C. 40, 147 DLR (4th) 457 (CA), rev'd on other grounds, [1999] 1 SCR 3).

46 In *A.G. Can. v. Law Society of B.C.*, [1982] 2 S.C.R. 307[*Jabour*], with regard to the declaratory action, the Supreme Court noted that "[t]his form of action takes on much greater significance in a federal system *where it has been found to be efficient as a means of challenging the constitutionality of legislation*" (page 323) [my emphasis]. While avoiding saying that the Federal Court did not have jurisdiction under section 17 of the *Federal Courts Act* to make a "Dyson" declaration (page 326), the Supreme Court took a pragmatic approach: the jurisdiction found in section 17 does not remove "[t]he jurisdiction of superior courts, and indeed other courts in the provinces, to review the constitutionality of federal statutes" (page 327) [my emphasis].

47 In *Canadian Transit Company v. Windsor (Corporation of the City)*, 2015 FCA 88[*Windsor FCA*], Justice Stratas explains in paragraphs 56 to 58 how the Exchequer Court was able, since its establishment in 1875, like other Canadian courts, to review the validity of legislation for various proceedings against the Crown:

> [56] In 1875, the Exchequer Court of Canada was created. Like all courts, it had to act according to law, interpreting and applying the law. At the time of the Exchequer Court's birth, one law on the books was the *Colonial Laws Validity Act, 1865* (U.K.), 28 & 29 Vict. c. 63. Under section 2 of that Act, all Canadian courts, including the Exchequer Court, had to declare "void and inoperative" any federal or provincial laws inconsistent with those of the Parliament of the United Kingdom, including the *British North America Act, 1867*: see also the discussion in *Re Manitoba Language Rights*, 1985 CanLII 33 (SCC), [1985] 1 S.C.R. 721 at page 746, 19 D.L.R. (4th) 1. The Exchequer Court recognized this power and understood that in appropriate cases it could decline to apply legislation that conflicted with a law of the Parliament of the United Kingdom: see, e.g., *Algoma Central Railway Co. v. Canada* (1901), 7 Ex. C.R. 239 at pages 254-255, rev'd on other grounds (1902), 1902 CanLII 76 (SCC), 32 S.C.R. 277, aff'd [1903] A.C. 478 (P.C.). Even before the Exchequer Court came into existence, other Canadian courts regularly exercised the power to declare legislation invalid or inoperative: see, e.g., *R. v. Chandler* (1868), 2 Cart. 421, 1 Hannay 556 (N.B.S.C.); *Pope v. Griffith* (1872), 2 Cart. 291, 16 L.C.J. 169 (Que. Q.B.); *Ex p. Dansereau* (1875), 2 Cart. 165 at page 190, 19 L.C.J. 210 (Que. Q.B.); *L'Union St. Jacques v. Belisle* (1872), 1 Cart. 72, 20 L.C.J. 29 (Que. Q.B.), rev'd (1874), L.R. 6 P.C. 31 (P.C.). Thus, from the very outset, all Canadian courts, including the Exchequer Court, could measure legislation up against laws of the Parliament of the United Kingdom, including the *British North America Act, 1867*, and determine whether they were invalid or inoperative.
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> [57] From 1875 to 1982, the doctrines of paramountcy and interjurisdictional immunity developed as part of the jurisprudence under sections 91 and 92 of the *British North America Act, 1867*. For example, as early as 1895, the doctrine of paramountcy was described as being "necessarily implied in our constitutional act," one that had to be followed under the *Colonial Laws Validity Act, 1865*: *Huson v. Township of South Norwich* (1895), 1895 CanLII 1 (SCC), 24 S.C.R. 145 at page 149. These constitutional doctrines became part of the law that all Canadian courts, including the Exchequer Court, were bound to apply.
>
> [58] And so the Exchequer Court did. In one case, it found that provincial water rights legislation, the *Water Clauses Consolidation Act, 1897*, R.S.B.C., c. 190, could not apply to lands owned by the federal Crown that fell under exclusive federal jurisdiction under subsection 91(1A) of the *Constitution Act, 1867*: *The Burrard Power Company Limited v. The King* (1909), 12 Ex. C.R. 295, aff'd 1910 CanLII 48 (SCC), [1910] 43 S.C.R. 27, aff'd [1911] A.C. 87 (P.C.). In another case, it found that federal legislation, the *Soldier Settlement*

> *Act, 1917*, 9-10 Geo. V, c. 71, was *intra vires* the federal Parliament and if it conflicted with provincial legislation, it would prevail: *R. v. Powers*, [1923] Ex. C.R. 131 at page 133.

48 In this case, the nexus between the Federal Court and the constitutional issue here arising is obviously the judicial review proceeding under section 18 of the *Federal Courts Act* against the decision by the Board, which in turn arises from the valid LTSO suspension proceedings clearly commenced by the Service pursuant to the CCRA. Devoid of any artifice, this is what enables this Court to intervene in the resolution of the very real dispute between the parties today. And, at the risk of repeating myself, the Federal Court's jurisdiction to grant declaratory relief against the Crown in an action (subsection 17(1) and definition of "relief" in section 2 of the *Federal Courts Act*), or against any federal board, commission or other tribunal in an application for judicial review (section 18 of the *Federal Courts Act*), seems indisputable, unless that jurisdiction is otherwise assigned to the Federal Court of Appeal (subsections 28(1) and (3) of the *Federal Courts Act*).

49 With regard to the judicial review of a Board decision on administrative law grounds, the Federal Court has exclusive original jurisdiction (*Strickland v. Canada (Attorney General)*, 2015 SCC 37, [2015] SCJ No. 37at paragraphs 63-64 [*Strickland*], citing *Canada (Attorney General) v. McArthur*, 2010 SCC 63, [2010] 3 S.C.R. 626at paragraphs 2 and 17, and *Canada v Paul L'Anglais*, [1983] 1 SCR 147 at pages 153-154 and 162 [*Paul L'Anglais*]). Therefore, there is nothing in the law preventing the Federal Court from deciding any constitutional question that could incidentally be raised in this case. Indeed, the case has already been heard: it is not a question today of granting the Federal Court *exclusive* jurisdiction to administer the "laws of Canada" when the validity or applicability of an Act of the Parliament of Canada is disputed by an interested party. Instead, it is a matter of *concurrent* jurisdiction.

50 The Supreme Court also specified the following in *Northern Telecom v. Communication Workers*, [1983] 1 S.C.R. 733at page 741 [*Northern Telecom*]:

> It is inherent in a federal system such as that established under the *Constitution Act*, that the courts will be the authority in the community to control the limits of the respective sovereignties of the two plenary governments, as well as to police agencies within each of these spheres to ensure their operations remain within their statutory boundaries. Both duties of course fall upon the courts when acting within their own proper jurisdiction. ...
>
> [My emphasis.]

51 A final determination has already been made: In spite of section 18 of the *Federal Courts Act*, the provincial superior courts have concurrent jurisdiction with the Federal Court when a plaintiff claiming damages against the Crown needs to attack a law or order by a federal board, commission or other tribunal to establish their cause of action, and adjudication of that allegation is a necessary step in disposing of the claim for relief against the Crown (*Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, [2010] SCJ No. 62at paragraphs 6, 67, 75 and 80). Furthermore, section 18 of

the *Federal Courts Act* does not remove the power of provincial superior courts to grant traditional administrative law remedies for reasons directly related to the division of powers (*Paul L'Anglais* at pages 152-153).

52 It could have ended there. However, questions of jurisdiction are compelling. To avoid a ping-pong effect, it is in the interests of justice that the Federal Court's jurisdiction and powers be clear to all parties, the final adjudicator being the Supreme Court.

B. The Supreme Court's obiter dictum in Windsor

53 Although "[t]he notion that each phrase in a judgment of [the Supreme] Court should be treated as if enacted in a statute is not supported by the cases and is inconsistent with the basic fundamental principle that the common law develops by experience" (*R v. Henry*, 2005 SCC 76), this Court nevertheless raised, on its own initiative, the question of the Federal Court's jurisdiction to render a declaratory judgment on a constitutional issue. This Court also considered the respective positions of the parties in the case on the legal significance, if any, of the Supreme Court of Canada's general comments in *Windsor (City) v. Canadian Transit Co.*, 2016 SCC 54, [2016] 2 S.C.R. 617[*Windsor SCC*], in response to what the Federal Court of Appeal wrote on this subject in its judgment and which was already discussed above.

54 The issue in *Windsor* was related to the application of a municipal by-law to a company operating a federal undertaking. Specifically, the issue was to determine whether the three branches of the test established by the Supreme Court of Canada in *ITO-Int'l Terminal Operators v. Miida Electronics*, [1986] 1 S.C.R. 752[*ITO*] had been met: (1) a statute grants jurisdiction to the Federal Court, (2) federal law nourishes the grant of jurisdiction and is essential to the disposition of the case, and (3) that federal law is constitutionally valid. The Canadian Transit Company [Canadian Transit], incorporated by a special Act of Parliament, was seeking declaratory relief under paragraph 23(c) of the *Federal Courts Act* against the City of Windsor [Windsor]. Windsor had issued over 100 repair orders against 114 properties purchased between 2004 and 2013 as part of a project to expand the Ambassador Bridge. Canadian Transit refused to comply, arguing that the bridge facilities are federal undertakings to which municipal by-laws do not apply. Canadian Transit wanted to obtain a Court declaration that the bridge was to be considered a "federal undertaking" and therefore could not be subject to municipal by-laws. Windsor responded by bringing a motion to strike the application for declaratory relief on the ground that the Property Standards Committee was already dealing with the repair orders, while the Ontario Superior Court of Justice was hearing several appeals by the two parties regarding the demolition orders. The Attorney General of Canada was not the respondent, nor did the case involve the interests of the Crown or the decision of a federal board, commission or other tribunal.

55 The majority of the Supreme Court decided that the Federal Court clearly lacked jurisdiction to hear the application for declaratory relief. Therefore, the trial judge did not err in striking the

notice of application, and the Federal Court of Appeal ought not to have intervened (*Windsor SCC* at paragraph 72). Justices Moldaver and Brown, who were dissenting, were satisfied that paragraph 23(c) of the *Federal Courts Act* provided the required statutory grant of jurisdiction, and that federal law was essential to the disposition of the case. However, the two dissenting judges would have remitted the matter to the Federal Court to determine whether it should stay the proceedings pursuant to section 50 of the *Federal Courts Act* to allow the matter to be litigated in the Ontario Superior Court of Justice (*Windsor SCC* at paragraphs 73 and 119, citing *Strickland* at paragraphs 37-38). Justice Abella, who was also dissenting, found that even though the Federal Court has concurrent jurisdiction with the Ontario Superior Court of Justice, it should not exercise it (*Windsor SCC* at paragraphs 122-131).

56 While it is already established that the Federal Court can make findings of constitutionality at first instance in a case where it has jurisdiction under an Act of Parliament (section 26 of the *Federal Courts Act*), and the Federal Court of Appeal can do the same in an appeal from a judgment by the Federal Court (section 27 of the *Federal Courts Act*), the Supreme Court nevertheless seems to question the existence of the Federal Courts' plenary power to issue a formal declaration of invalidity as sought today by the applicant in his application for judicial review and his notice of constitutional question.

57 Paragraphs 70 and 71 of Justice Karakatsanis' reasons in *Windsor SCC* read as follows:

> [70] Since the *ITO* test is not met, it is also unnecessary to consider the Federal Court of Appeal's holding that the Federal Court has the remedial power to declare legislation to be constitutionally invalid, inapplicable or inoperative. I decline to comment on this issue, except to say this. There is an important distinction between the power to make a constitutional finding which binds only the parties to the proceeding and the power to make a formal constitutional declaration which applies generally and which effectively removes a law from the statute books (see, e.g., *R. v. Lloyd*, 2016 SCC 13 (CanLII), [2016] 1 S.C.R. 130, at para. 15; *Douglas/Kwantlen Faculty Assn. v. Douglas College*, 1990 CanLII 63 (SCC), [1990] 3 S.C.R. 570, at p. 592; *R. v. Big M Drug Mart Ltd.*, 1985 CanLII 69 (SCC), [1985] 1 S.C.R. 295, at p. 316).
>
> [71] The Federal Court clearly has the power, when the *ITO* test is met, to make findings of constitutionality and to give no force or effect in a particular proceeding to a law it finds to be unconstitutional. The Federal Court of Appeal in this case appears to have held that the Federal Court also has the power to make formal, generally binding constitutional declarations. My silence on this point should not be taken as tacit approval of the Federal Court of Appeal's analysis or conclusion.
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> [My emphasis.]

58 These general comments are found at the very end of Justice Karakatsanis' reasons, suggesting they are of high importance. However, here, the Supreme Court's "silence" "should not be taken as tacit approval of the Federal Court of Appeal's analysis or conclusion." The Supreme Court is therefore sending a message to the Federal Courts and all readers of *Windsor SCC*, without formally setting aside or allowing the comments in paragraphs 47 to 70 regarding the opinion of Justice Stratas in *Windsor FCA*. It is an obligatory silence, an aside that encourages reflection and opens the debate on the Federal Court's remedial power to declare legislation to be constitutionally invalid, inapplicable or inoperative. Clearly, this is a significant challenge.

59 Because the doxa — whose precedential value seems to be disputed today — is the Federal Court of Appeal's affirmation in *Windsor FCA* at paragraph 64: "...the ability of the [Federal Courts] to use section 52 of the *Constitution Act, 1982* where the *ITO-Int'l Terminal Operators test* is met is undoubted..." [my emphasis]. However, the Federal Court of Appeal is not alone in saying this. Generally speaking, parties and litigants have not really disputed the ability of the Federal Court (the Federal Courts since 2003) to issue a formal declaration of invalidity since the *Constitution Act, 1982* came into force.

60 To use a metaphor, this Court is now facing a truly Shakespearean dilemma. To be or not to be a superior court: that is the question. From an existential standpoint, this problem ultimately affects the social self and the jurisdiction of this federal court, unique in Canada. It is also a compelling question. Failing to recognize today the ability to use section 52 of the *Constitution Act, 1982* — when the *ITO* test is met — is likely to cause major inconveniences for litigants who come before the Federal Court seeking relief, and serious problems with judicial control above and below, considering that, in the case of a material error, a court of appeal can not only render the judgment that should have been rendered by the trial judge but also refer the case back to them for redetermination if the evidence in the record is insufficient or needs to be supplemented. However, we must not forget that in all *Charter* cases, the issue of justification of the infringement of the protected right, according to the section 1 test, very often requires a factual demonstration from the attorneys general.

61 The problem, as the Attorney General of Canada explains in his additional submissions, is that Supreme Court is itself a court created under section 101 of the *Constitution Act, 1867*. Recall that in 1875, the Supreme Court was constituted and established "in and for the Dominion of Canada [as] a Court of Common Law and Equity..." and which "shall have, hold, and exercise an appellate civil and criminal jurisdiction within and throughout the Dominion of Canada" (sections 1 and 15 of the *Supreme and Exchequer Court Act*). It was maintained as a "court of law and equity...as a general court of appeal for Canada, and as an additional court for the better administration of the laws of Canada" (section 3 of the *Supreme Court Act*, RSC 1985, c. S-26). In addition, the appellate powers of the Supreme Court are limited by federal law in that it must "give the judgment and award the process or other proceedings that the court whose decision is appealed against should

have given or awarded" (section 45 of the *Supreme Court Act*). In other words, its own jurisdiction depends on that of the court appealed against.

62 However, as the Attorney General of Canada points out, a number of constitutional challenges to federal legislation, initiated in Federal Court with no application other than declaratory, have been appealed all the way to the Supreme Court of Canada. It is revealing to note that the Supreme Court then ruled on the constitutionality of the provisions on the basis that it had the required jurisdiction. Specifically, in *Labatt v Canada*, [1980] 1 SCR 914, the Supreme Court rendered a judgment declaring unconstitutional provisions of the *Food and Drugs Act*, RSC 1970, c. F-27, with respect to the division of powers. In *Corbiere v. Canada*, [1999] 2 S.C.R. 203, the Supreme Court rendered a judgment declaring a provision of the *Indian Act*, RSC 1985, c. I-5 unconstitutional under the *Charter*. The declaration of unconstitutionality was suspended for a certain period, though the Supreme Court left no doubt that the declaration would apply to all after the period of suspension expired (see pages 226-227 for the majority; page 284-285 for the minority). In *Egan v. Canada*, [1995] 2 S.C.R. 513, the majority of the Supreme Court rendered a judgment declaring a provision of the *Old Age Security Act*, RSC 1985, c. O-9 constitutional under the *Charter*. The minority — albeit consisting of four judges — would have declared the provision invalid while suspending the unconstitutionality for a certain period after which the declaration would have taken effect against all (page 625).

63 In *Windsor SCC*, since the *ITO* test was not met, the Supreme Court found that section 23 of the *Federal Courts Act* did not allow the Federal Court to grant relief. Moreover, pragmatically, the parties argue that, in this case, the three branches of the *ITO* test are met and that the Federal Court therefore has plenary power to make a declaration of invalidity under section 52 of the *Constitution Act, 1982*:

> a) Firstly, sections 18 and 18.1 of the *Federal Courts Act* provide for judicial review and provide that a declaratory judgment may be granted as relief against any federal board, commission or other tribunal and/or the Attorney General of Canada. This Court's superintending and reforming power with regard to judicial review therefore extends to the Board, which is responsible for reviewing any request to suspend an LTSO for long-term offenders.
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> b) Secondly, the CCRA is a valid federal statute that sets out all of the Board's powers with regard to long-term offenders (sections 99.1 to 135.1 of the CCRA) as well as its obligations of procedural fairness (section 100 and paragraph 101(a) of the CCRA). In this regard, federal law plays an essential role in this case, one that involves the Federal Court's jurisdiction to review the legality of Board decisions.
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> c) Thirdly, although the Constitution is not one of the "laws of Canada" referred to in section 101 of the *Constitution Act, 1867*, the fact remains that the constitutional question raised in this case is directly related to the application of a federal law for which the Federal Court

has jurisdiction. Consequently, the Federal Court has jurisdiction under sections 18 and 18.1 of the *Federal Courts Act* to rule on the constitutionality of subsections 140(1) and (2) of the CCRA in this application for judicial review and to issue a declaration of invalidity, if applicable.

64 I agree with the general reasoning of the parties, which I find difficult to dispute from a statutory and constitutional standpoint.

65 In fact, I am satisfied that all branches of the *ITO* test are met. I would add that the constitutionality of section 18 of the *Federal Courts Act*, which grants the Federal Court original and general supervisory jurisdiction over federal boards, commissions or other tribunals, is not in dispute in this case. Nor does the applicant raise any constitutional questions relating to the division of legislative powers or the application of the constitutional doctrines of interjurisdictional immunity and federal paramountcy, which posed a problem in *Windsor*. Furthermore, the Federal Court's jurisdiction to make constitutional declarations is, of course *concurrent* with that of other provincial superior courts (*Jabour*).

66 It is therefore appropriate to ascribe limited weight to the *obiter* in paragraphs 70 and 71 of *Windsor SCC*. That being said, in the event that there is still doubt as to the Federal Court's statutory or constitutional ability to declare, as a remedy, that legislation is constitutionally invalid, inapplicable or inoperative, I believe it is necessary to demonstrate in this judgment why the Federal Court can indeed make a formal declaration of invalidity even though it is not a "superior court" within the meaning of section 96 of the *Constitution Act, 1867*. It is not a matter of placing particular emphasis on historical happenstance or philosophical or political speculation, but of giving credit to Parliament's legal reason and intent, which only an informed and prospective reading of the Constitution and its guiding principles can magnify.

C. The Federal Court is a "superior court" for the purposes of the exercise of the jurisdiction under section 18 of the Federal Courts Act

67 For present purposes and to avoid burdening the text, the term "Federal Court" may also, depending on the context, refer to the Federal Court of Appeal. There was an obvious practical reason behind the creation of the Exchequer Court in 1875 and the creation, in 1970, of the Federal Court, which has a broader jurisdiction: the better administration of the "laws of Canada." Federal law has no boundaries and can be applied indiscriminately throughout Canada. In this regard, not only is the Federal Court the only court of first instance with national jurisdiction in Canada, but its judgments can be executed throughout the country. This is reflected in the Federal Court's mission, which is to deliver justice and assist parties to resolve their legal disputes throughout Canada, in either official language, in a manner that upholds the rule of law and that is independent, impartial, equitable, accessible, responsive and efficient.

68 Access to justice, an essential pillar of the rule of law, has become the single biggest challenge facing courts across Canada. This reality is well explained by dissenting judges Moldaver and Brown in *Windsor SCC*, in paragraphs 77 to 79:

> [77] The history of the Federal Court reveals that it was intended by Parliament to have broad jurisdiction. The Exchequer Court, created in 1875, initially had limited jurisdiction: it could hear certain claims against the Crown, and eventually, claims relating to patents, copyrights, public lands, and railway debts (*The Supreme and Exchequer Court Act*, S.C. 1875, c. 11; *Exchequer Court Act*, R.S.C. 1970, c. E-11, ss. 17 to 30). During the 20th century, however, it became apparent that the Exchequer Court could not deal with many matters that transcended provincial boundaries, and that confusion, inconsistency, and expense tended to accompany litigation of these national matters in the provincial superior courts.
>
> [78] These problems prompted Parliament in 1970 to replace the Exchequer Court with the Federal Court, and to expand the Federal Court's jurisdiction (*Federal Court Act*, S.C. 1970-71-72, c. 1). According to the Minister of Justice, the Federal Court was designed to achieve two objectives: first, ensuring that members of the public would "have resort to a national court exercising a national jurisdiction when enforcing a claim involving matters which frequently involve national elements"; and second, making it possible for "litigants who may often live in widely different parts of the country to [have] a common and convenient forum in which to enforce their legal rights" (*House of Commons Debates*, vol. V, 2nd Sess., 28th Parl., March 25, 1970, p. 5473).
>
> [79] These purposes are better served by a broad construction of the Federal Court's jurisdiction. We acknowledge that the Federal Court is not without jurisdictional constraints. A broad construction of the Federal Court's statutory grant of jurisdiction cannot exceed Parliament's constitutional limits and intrude on provincial spheres of competence. ...
>
> [My emphasis.]

69 In short, justice is not in competition with itself: access to justice must prevail in every case, which favours a broad construction of the jurisdiction conferred on this Court by the *Federal Courts Act*. In this sense, the Federal Court is part of the solution, and it would be wrong to want to associate it with the problem of the increasing number of jurisdictions. When it created a national court of first instance, Parliament could very well have left it to the courts mentioned in section 129 of the *Constitution Act, 1867*, and to the other provincial courts created under subsection 92(14) of the *Constitution Act, 1867*, to exercise their traditional jurisdiction in civil and criminal matters, while making adjustments over time, if necessary, for the purposes of the "laws of Canada." But what characterizes the Federal Court is not only its nature as a national court (trial and appeal). Its composition also ensures national continuity (section 5.3 of the *Federal Courts Act*) and the maintenance of Canadian bijuralism (common law and civil law). However, like section 6 of the

Supreme Court Act, section 5.4 of the *Federal Courts Act* provides for effective representation of Quebec, with a minimum and large number of judges (at least five judges of the Federal Court of Appeal and at least 10 judges of the Federal Court) who must have been judges of the Court of Appeal or of the Superior Court of Quebec or members of the Bar of Quebec. It is an eloquent legislative demonstration of Parliament's wish to create a pan-Canadian court that is particularly well adapted to Canada's reality and bijuralism.

70 In *Reference re Supreme Court Act, ss. 5 and 6*, 2014 SCC 21, [2014] 1 S.C.R. 433[*Reference re Supreme Court*], the Supreme Court pointed out that section 6 of the *Supreme Court Act* "reflects the historical compromise that led to the creation of the Supreme Court" (paragraph 48), whereas its purpose "is to ensure not only civil law training and experience on the Court, but also to ensure that Quebec's distinct legal traditions and social values are represented on the Court, thereby enhancing the confidence of the people of Quebec in the Supreme Court as the final arbiter of their rights" (paragraph 49). Incidentally, the Supreme Court noted in this regard that section 5.4 of the *Federal Courts Act*, "*in many ways reflects s. 6 of the Supreme Court Act* by requiring that a minimum number of judges on each court be drawn from Quebec institutions. The role of Quebec judges on the federal courts is a vital one" (paragraph 60) [my emphasis].

71 When we consider the role, mission and "implied powers [the Federal Court] and its predecessors have had for almost a century-and-a-half to determine the constitutional validity, operability and applicability of laws before it" (*Windsor FCA* at paragraph 73), we have a better understanding of the Federal Court of Appeal's conclusion in *Windsor FCA*. As Mr. Justice Stratas clearly stated in paragraph 47, "as long as the test in *ITO-Int'l Terminal Operators* is met, the Federal Court has jurisdiction to make declarations in constitutional matters, such as declarations of invalidity." Regarding sections 18 and 28 of the *Federal Courts Act*, in order to truly exercise their superintending and reforming function regarding the legality of decisions by any federal board, commission or other tribunal, the Federal Courts must perforce be able to declare inoperative and/or unconstitutional any provision inconsistent with the Constitution, the supreme law of Canada.

72 The grant of jurisdiction under the *Federal Courts Act* should not be interpreted in a narrow fashion under the pretext that this Court is a statutory court rather than an inherent jurisdiction court (*Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626at paragraphs 24 *et seq*. [*Canadian Liberty Net*]). The historical primacy of the "superior courts" fuels the synecdoche associated with the vague, immanent concept in the judicial sphere of "inherent jurisdiction." But that is not all, because there are many other (federal and provincial) ordinary courts that exercise, at trial or on appeal, concurrent jurisdiction in civil and criminal matters. Moreover, I do not believe that the Federal Courts (Federal Court of Appeal and Federal Court) can be legally equated with provincial inferior courts or specialized federal or provincial administrative tribunals, whose sole remedial power is limited to refusing to apply a law inconsistent with the

Constitution based on the principle of the rule of law (*R v. Lloyd*, 2016 SCC 13, [2016] 1 S.C.R. 130at paragraphs 15-16 [*Lloyd*]).

73 On the one hand, there is the "narrow view" articulated by Madam Justice Wilson in *Roberts* — as previously expressed by Bora Laskin (who later became Chief Justice of Canada) — to the effect that "[the] omnicompetence of provincial superior courts was fed by a decision of the Privy Council [*Board v. Board*, [1919] A.C. 956 (P.C.) [*Board*]], suggestive of inherent superior court jurisdiction, that (to use its words) "if the right exists, the presumption is that there is a Court which can enforce it, for if no other mode of enforcing it is prescribed, that alone is sufficient to give jurisdiction to the [Queen's] Courts of justice"" (cited in *Canadian Liberty Net* at paragraph 29).

74 On the other hand, and this is the one that I retain today, there is the more modern view — which is consistent with the evolving nature of the Constitution — that the "purpose of the doctrine of inherent jurisdiction ... is simply *to ensure that a right will not be without* a superior court forum in which it can be recognized" [my emphasis]. In this case, the Supreme Court in *Canadian Liberty Net*, after distinguishing *Board*, clearly opted for a dynamic and pragmatic interpretation of the Federal Court's legislative jurisdiction. Sections 96 to 101 of the *Constitution Act, 1867* relating to judicature must be read as a coherent whole. It is worthwhile noting that the tenure of "superior court" judges set out in section 99 of the *Constitution Act, 1867* is not limited to judges of the provincial superior courts appointed by the Governor General under section 96 of the *Constitution Act, 1867*. It also includes judges of the Supreme Court of Canada, the Federal Court of Appeal, the Federal Court and the Tax Court of Canada (*Valente v. The Queen*, [1985] 2 S.C.R. 673at paragraph 29). Also, according to subsection 35(1) of the *Interpretation Act*, R.S.C., 1985, c. I-21, the term "superior court" means these four courts mentioned above created under section 101 of the *Constitution Act, 1867*.

75 Canada was still a colony before Confederation. There was an element of unpredictability in 1867 when the Parliament of the United Kingdom adopted the *British North America Act*, 30-31 Vict., c. 3 (U.K.) (which in 1982 became the *Constitution Act, 1867*). Although the provinces of Canada (Ontario and Quebec), Nova Scotia and New Brunswick wanted to establish a Federal Union to form one Dominion (*Puissance*) under the crown of the United Kingdom of Great Britain and Ireland, with a constitution based on the same principles as that of the United Kingdom, the constitution was only repatriated in 1982. In fact, the sovereignty of Canada and the other Dominions was only legally enshrined by the *Statute of Westminster, 1931*, R.S.C 1970, App. II, No. 26. Canada has changed a great deal in 150 years. In other words, if realities change, so do the courts. This is a reflection of Canada, the provinces and the territories. The Supreme Court and the Exchequer Court were both created in 1875 under the same Act, and both courts were able to share the same judges for a few years (see section 60 of *The Supreme and Exchequer Court Act*).

76 Although section 129 of the *Constitution Act, 1867* explicitly provides for the continued existence of the courts in the provinces of Ontario, Quebec, Nova Scotia and New Brunswick at

the time of the union, they may subsequently be repealed, abolished or altered by the competent authorities. The Constitution is "... a living tree capable of growth and expansion within its natural limits", and it should be interpreted as such (*Edwards v Canada (Attorney General)*, [1930] AC 124 at p. 136). This is why the Judicial Committee of the Privy Council (for the United Kingdom) adopted a broad interpretation in 1947 when it confirmed the Parliament of Canada's power to terminate appeals in London (including any direct appeals permitted by provincial legislation). After the provisions of the *Statute of Westminster* came into force, there was no legal impediment, given Parliament's jurisdiction under section 101 of the *Constitution Act, 1867*, that the Supreme Court should exercise exclusive ultimate appellate civil and criminal jurisdiction (*Attorney General for Ontario v Attorney General for Canada*, [1947] AC 127 [*Abolition of Privy Council Appeals Reference*]).

77 Also, it is not disputed in this case that a superior court is one which has supervisory jurisdiction over lower courts and other inferior tribunals. A superior court also has plenary jurisdiction to determine any matter arising out of its original jurisdiction and is subject only to appellate review. In other words, it is not subject to the writs of other superior courts (*Felipa FC* at paragraphs 59-62. This point was not overruled by the Court of Appeal). Not surprisingly, and well before the Constitution was repatriated in 1982, the Supreme Court had already recognized that Parliament had full authority to transfer to a court established under section 101 of the *Constitution Act, 1867* superintending power over federal agencies, which until then had been exercised by the Court of King's Bench, and the Superior Court in Quebec as courts of law (*Three Rivers Boatman Limited c. Conseil Canadien des Relations Ouvrières et al*, [1969] R.C.S. 607at p. 616). The *inherent jurisdiction* of provincial superior courts is meaningful today only because it overlaps with other jurisdictions of federal or provincial legislative origin, and because it is exercised in a *residual manner* if a jurisdiction is not otherwise exercised by another tribunal of the Canadian federation. In short, all of today's Canadian courts came into existence as a result of statutory changes. These changes are exactly what enables them to provide better justice.

78 As a result, as the Supreme Court noted in *Canadian Liberty Net*, "[i]n a federal system, the doctrine of inherent jurisdiction does not provide a rationale for narrowly reading federal legislation which confers jurisdiction on the Federal Court" (at paragraph 35). Thus, because this involves the Federal Court's general administrative jurisdiction over federal administrative tribunals, "[t]his means that where an issue is clearly related to the control and exercise of powers of an administrative agency, which includes the interim measures to regulate disputes whose final disposition is left to an administrative decision-maker, the Federal Court can be considered to have a *plenary jurisdiction*" (*Canadian Liberty Net* at paragraph 36) [my emphasis]. If section 44 of the *Federal Courts Act* gives the Federal Court jurisdiction to grant an injunction in enforcing the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6, this is all the more reason to argue that in the context of an action against the Crown or an application for judicial review, the inherent or residual jurisdiction of the provincial superior courts in matters involving the constitution or

habeas corpus in no way affects the "plenary jurisdiction" exercised by the Federal Court under sections 17 and 18 of the *Federal Courts Act*.

79 In this case, the federal Courts exercise a vital front-line role in the Canadian federation. Federalism and constitutionalism are two fundamental constitutional principles (*Reference re Secession of Quebec*, [1998] 2 S.C.R. 217at paragraph 32). They go hand in hand and are complementary, as are the other unwritten constitutional principles of the Constitution (democracy, rule of law and respect for minorities). Either the inherent jurisdiction theory of the provincial superior courts has the effect of depriving the Federal Court of jurisdiction "over an area where it is otherwise explicitly given extensive powers of supervision" (*Canadian Liberty Net* at paragraph 25); or "the language of the Act is completely determinative of the scope of the Court's jurisdiction" (*Canadian Liberty Net* at paragraph 26 citing *Roberts v Canada*, [1989] 1 SCR at p. 331 [*Roberts*]). In the area of judicial review, the Federal Court plays an essentially interventionist role in all forms of federal government activity, as it must maintain the rule of law, which of course authorizes it to make formal declarations of invalidity.

80 As the Supreme Court pointed out in *Reference re Supreme Court Act* at paragraph 89: "The existence of an impartial and authoritative judicial arbiter is a necessary corollary [of subsection 52(1) of the *Constitution Act, 1982*]. The judiciary has become the "guardian of the Constitution (*Hunter*, at p. 155, *per* Dickson J.)." In Canada, the courts — whose independence is constitutionally protected — exercise supervisory jurisdiction, which is essential to maintaining the democratic character of our institutions and respect for the rule of law. The lower courts must submit to their authority — which of course includes the federal boards. As the Supreme Court pointed out in *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, 2003 SCC 54[*Martin*], the Constitution is the supreme law of Canada and, by virtue of subsection 52(1)the *Constitution Act, 1982*,the question of constitutional validity *inheres* in every legislative enactment. From this principle flows, as a practical corollary, the idea that Canadians should be entitled to assert the rights and freedoms that the Constitution guarantees them in the most accessible forum available, without the need for parallel proceedings before the courts. Consequently, the power to rule on a legal issue is the power to rule on it by applying only valid laws. Thus, in principle, a legislative provision inconsistent with the *Charter* is invalid from the moment it is enacted, and a judicial declaration to this effect is but one remedy amongst others to protect those whom it adversely affects (see *Martin* at paragraphs 28 and 35). Like the other superior courts in Canada, within its jurisdiction, the Federal Court plays an essential and vital role of plenary supervision in the Canadian federation.

81 But it is still true today that a judge of a lower inferior provincial court (*Séminaire de Chicoutimi v. La Cité de Chicoutimi*, [1973] S.C.R. 681, 1972 CanLII 153 (SCC)); *R c Big M Drug Mart Ltd*, 1985 SCC 69, [1985] 1 SCR 295) or an arbitration board exercising powers under provincial legislation (*Douglas/Kwantlen Faculty Assn v. Douglas College*, [1990] 3 S.C.R. 570, 1990 CanLII 63 (SCC)), is not entitled to make a formal declaration of invalidity. This is normal,

because this type of court does not exercise a general supervisory function over government activities. However, this is not the case when a judicial declaration is made by "superior court judges of inherent jurisdiction and courts with statutory authority" (*Lloyd* at paragraph 15).

82 Because this involves the particular jurisdiction granted under the *Federal Courts Act*, professor Lemieux clearly noted that [TRANSLATION]: "The Federal Court can be characterized as a superior court. However, unlike provincial superior courts, this superior court is of legislative origin" (Denis Lemieux, "La nature et la portée du contrôle judiciaire," in Collection de droit 2016-2017, École du Barreau du Québec, vol. 7, *Droit public et administratif*, Cowansville, Éditions Yvon Blais, 2016, at p. 208). I also share the Attorney General of Canada's view that section 96 of the *Constitution Act, 1867* does not constitute a constitutional impediment, because section 101 of the same Act contains the terms: "notwithstanding anything in this Act" (*Abolition of Privy Council Appeals Reference* at paragraph 19). To reason otherwise would mean that a federal institution that plays a leading role in the Canadian federation would be annihilated from the Canadian landscape. Notwithstanding belated constitutional revisionism, as the Supreme Court itself stated in 1984: "[t]o conclude otherwise would, in paraphrase of the *Jabour* decision, *supra*, leave a federal court established 'for the better administration of the laws of Canada' in the position of having to participate in the execution and administration of such laws without the authority, let alone the duty, of first assuring itself that the statute before the Court is a valid part of the 'laws of Canada'" (*Northern Telecom* at p. 744).

83 In conclusion, although it is not a "superior court" within the meaning of section 96 of the *Constitution Act, 1867*, the Federal Court is nevertheless comparable to a superior court when it exercises general supervisory power over federal boards under section 18 of the *Federal Courts Act* (*Commonwealth of Puerto Rico v. Hernandez*, [1975] 1 R.C.S. 228at pp. 232-233, 1973 CanLII 184 (SCC)). The same applies when it deals with a matter under section 17 of the *Federal Courts Act*. The Federal Court therefore has jurisdiction to make a formal declaration of invalidity in a matter where the constitutional question is validly raised, which is the case here.

D. The intention of Parliament expressed in section 57 of the Federal Courts Act is to allow the Federal Courts to grant binding declaratory relief in constitutional matters

84 Canada does not have a single or specialized (provincial or federal) judicial authority that would be responsible for reviewing the legality of laws and regulations to the exclusion of any court with jurisdiction in civil or criminal matters. In enacting section 57 of the *Federal Courts Act*, Parliament established the statutory framework under which, for the better administration of federal laws and regulations, a constitutional question may be validly argued before the Federal Court of Appeal or the Federal Court or a federal board, and consequently — before the Supreme Court itself, when an appeal has been authorized. We can also imagine that the explicit reference in subsection 57(1) of the *Federal Courts Act* to provincial statutes or regulations targets those

particular cases where their application is likely to conflict with a federal law or one of the regulations (*Windsor FCA* at paragraphs 53-54).

85 Service of a notice of constitutional question to the Attorney General of Canada and the attorney general of each province is mandatory (subsection 57(1) of the *Federal Courts Act*). Not only is the attorney general entitled to adduce evidence and make submissions in respect of the constitutional question, once that attorney general has made submissions, *he or she is deemed to be a party to the proceedings* for the purpose of any appeal in respect of the constitutional question (ss. 57(4) and (5) of the *Federal Courts Act*). Section 19.2 of the *Tax Court of Canada Act*, R.S.C., 1985, c. T-2, establishes similar requirements. The requirement for a notice of constitutional question is also set out in several provincial laws, although the requirement to serve a notice, where a federal provision is at issue, is limited to the Attorney General of Canada and the Attorney General of the province in question (for example, in Quebec, see the new sections 76 and 77 of the *Québec Code of Civil Procedure*, CQLR c C-25.01 [CCP], formerly section 95).

86 The statutory notice of constitutional question allows courts of law — whose judges enjoy a guarantee of independence (unlike those of administrative tribunals) — to declare invalid a law or a regulation that contravenes the Constitution. As the Supreme Court of Canada noted in *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241at paragraph 48:

> In our constitutional democracy, it is the elected representatives of the people who enact legislation. While the courts have been given the power to declare invalid laws that contravene the Charter and are not saved under s. 1, this is a power not to be exercised except after the fullest opportunity has been accorded to the government to support its validity. To strike down by default a law passed by and pursuant to the act of Parliament or the legislature would work a serious injustice not only to the elected representatives who enacted it but to the people. Moreover, in this Court, which has the ultimate responsibility of determining whether an impugned law is constitutionally infirm, it is important that in making that decision, we have the benefit of a record that is the result of thorough examination of the constitutional issues in the courts or tribunal from which the appeals arise.
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> [My emphasis.]

87 Furthermore, the Supreme Court of Canada has a well-established discretion, albeit one that is narrow and should be exercised sparingly, to address the merits of a constitutional issue when proper notice of constitutional question has been given at the appeal stage, even though the issue was not properly raised in the courts below (*Guindon v. Canada*, 2015 SCC 41, [2015] 3 S.C.R. 3[*Guindon*]). Since January 1, 2017, the new rule 33 of the *Rules of the Supreme Court of Canada*, SOR/2002-156, provides that in the case of an appeal that raises an issue in respect of the constitutional validity or applicability of a statute, regulation or common law rule, or the inoperability of a statute or regulation, a notice of constitutional question shall be filed.

88 Accordingly, the Parliament of Canada clearly intended to allow the Federal Courts to grant binding declaratory relief in constitutional matters. Otherwise, section 57 of the *Federal Courts Act* would no longer have any practical utility, and the notice of constitutional question required by Parliament to allow the Attorney General to support the validity of the impugned provision and adduce evidence would be supererogatory.

V. Federal Court's discretion to grant declaratory relief with respect to a constitutional and administrative issue

89 Secondly, I am satisfied in this case that this Court should exercise its discretion to grant declaratory relief with respect to the constitutional validity, applicability or operability of subsections 140(1) and (2) of the CCRA, an with respect to the extent of the Board's obligations under the principles of fundamental justice and/or administrative law.

A. General principles

90 Whether this Court should exercise its discretion to grant reparation — including declaratory relief — will depend in particular on its assessment of the respective roles of the courts and administrative bodies, the circumstances of each case and whether there is an adequate alternative (*Strickland* at paragraphs 37-45; *Khosa* at paragraphs 36-40; *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561at p. 575 and *Solosky* at pp. 830-831; *Canada (Auditor General) v. Canada (Minister of Energy, Mines and Resources)*, [1989] 2 S.C.R. 49at pp. 90, 92- 93 and 96; and *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3at pp. 77-80).

91 It is inherent in a federal system such as that established under the *Constitution Act*, that the courts will be the authority in the community to control the limits of the respective sovereignties of the two plenary governments, as well as to police agencies within each of these spheres to ensure their operations remain within their statutory boundaries. Both duties of course fall upon the courts when acting within their own proper jurisdiction. (*Northern Telecom* at paragraph 12). Furthermore, no one questions that s. 18 of the *Federal Courts Act* does not withdraw the authority of the provincial superior courts to grant the traditional administrative law remedies against federal boards, commissions and tribunals on division of powers grounds (*Strickland* at paragraph 64; *Paul L'Anglais* at pp. 152-163), nor the residual power they possess in matters of *habeas corpus*.

92 It is worthwhile noting that in 1875, the Supreme Court itself had "concurrent jurisdiction with the Courts or Judges of several Provinces, to issue the writ of *Habeas Corpus ad subjiciendum*, for the purpose of an enquiry into the cause of commitment, in any criminal case under any Act of the Parliament of Canada, or in any case of demand for extradition" (section 51 of the *Act to establish a Supreme Court, and a Court of Exchequer, for the Dominion of Canada*). But because Parliament in 1970 omitted to mention *habeas corpus* in subsection 18(1) of the *Federal Courts Act* — even if it explicitly stipulated in subsection 18(2), that a writ of *habeas corpus* can be issued

in relation to any member of the Canadian Forces serving outside Canada - we can nevertheless ask ourselves whether this Court should today refuse to rule on the constitutional question given the particular expertise that provincial superior courts may possess in matters of *habeas corpus* (*Strickland* at paragraph 40; *Reza v. Canada*, [1994] 2 S.C.R. 394[*Reza*]).

93 The Supreme Court of Canada already noted in *R v. Miller*, [1985] 2 S.C.R. 613at p. 624 [*Miller*], that Parliament had intended to leave "the jurisdiction by way of *habeas corpus* to review the validity of a detention imposed by federal authority with the provincial superior courts." Considering Parliament's intention and the importance of *certiorari* in aid to the effectiveness of *habeas corpus*, it concluded that provincial superior courts had jurisdiction to issue *certiorari* in aid of *habeas corpus* to determine the validity of an incarceration. In *May v. Ferndale Institution*, 2005 SCC 82, [2005] 3 S.C.R. 809[*May*], the Court reaffirmed this principle, which it did again just recently in *Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 S.C.R. 502[*Khela*].

94 Since the reasonableness of the decision to detain a person should be regarded as an element of its lawfulness, the provincial superior court may consider the reasonableness of a detention in an application for *habeas corpus* — even if in fact, but not in form, it examines the legality of the conduct and the orders of the federal board from the standpoint of administrative law (*Khela* at para. 65). Also, where the offender has chosen to apply for a writ of *habeas corpus*, he may *also* apply to a provincial superior court for a ruling on the constitutionality of the legislative provisions at issue (*Cunningham v. Canada*, [1993] 2 S.C.R. 143[*Cunningham*]). Following the same logic, the Federal Court will be able to do the same when the offender chooses to apply for judicial review of an action of the Service or a final decision of the Board. A conclusion is once again necessary: no court can claim to be in a better position than the other to rule on the question of the constitutional validity of a provision of the CCRA.

B. The appropriate remedial option belongs to the offender

95 Given their vulnerability and the realities of confinement in prisons, offenders must, despite concerns about conflicting jurisdiction, have the ability to choose between the forums and remedies available to them (*May* at paragraphs 66-67; *Khela* at paragraph 44). As the Supreme Court of Canada very succinctly put it in *May*, "[t]he [remedial] option belongs to the applicant" (at paragraph 44).

96 Subject to the possible application of the doctrine of issue estoppel, there is, in principle, nothing that prevents an offender who is subject to an LTSO from concurrently addressing a provincial superior court and the Federal Court, first, to apply for a writ of *habeas corpus* to have the lawfulness of his detention reviewed as a result of a change in an LTSO (*Laferrière c Centre correctionnel communautaire Marcel-Caron*, 2010 QCCS 1677; *Laferrière c Commission des libérations conditionnelles du Canada*, 2013 QCCS 4228; *Laferrière c Commission des libérations conditionnelles du Canada*, 2013 QCCA 1081), and second, to file an application for judicial

review before the Federal Court to challenge the merits of a Board decision restricting his residual liberty as a result of a further review of the conditions of the LTSO (*Laferrière FC*). Of course, the same flexibility also applies to cases of suspension of an LTSO by the Service and post-suspension review by the Board under section 135.1 of the CCRA.

97 Preferring not to apply to the Superior Court of Québec for a writ of *habeas corpus* during the period when he was returned to a penitentiary following the suspension of the LTSO, the applicant addressed the Federal Court to have the Court quash the Board's final decision and make a declaration of invalidity.

98 In this case, the applicant is criticizing the time limits of the current LTSO post-suspension review procedure, which means that the offender cannot, in practice, have a decision to suspend an LTSO quashed when the case is referred to him by the Service. The Service has 30 days from the suspension of the LTSO to submit its assessment to the Board and forward the content to the offender through a Procedural Safeguard Declaration (subsection 135.1(5) of the CCRA). In accordance with the *Decision-Making Policy Manual for Board Members* [Manual], the Board's review will not be completed until at least 15 days from the date on which the Procedural Safeguard Declaration is signed in order to allow the offender or his assistant to make written submissions. The Manual also states that the Board's review of the case will occur as soon as practicable, and within 60 days of the return to custody. Although subsection 135.1(2) of the CCRA limits the reincarceration of an offender to 90 days, the offender's counsel submits that the statutory time limit is almost always reached through the applicable procedures, insofar as the case proceeds to the Board review stage. However, during this 90-day period, the applicant is subject to an order restricting his residual liberty without being guaranteed an in-person hearing, because in-person hearings are held at the Board's discretion.

99 The respondent does not really dispute the time limits at issue or the fact that it may be difficult in practice to obtain a final decision — within 90 days of the suspension of the LTSO. Because of these very short time limits, it is practically impossible for the applicant to apply to the Superior Court of Quebec for a writ of *habeas corpus*, especially since the Court will not have time and will not be in a better position than the Federal Court to make a declaration of unconstitutionality. In practice, a long-term offender who has been returned to custody will return to the community after 90 days, unless the offender has been charged, and a provincial judge has meanwhile ordered the offender's detention pending trial or refused to release the offender on bail. The fact that the offender is in preventive detention following the filing of a criminal charge for the offence set out in section 753.3 of the *Criminal Code*, is, however, extrinsic to the Board's decision under section 135.1 of the CCRA. The Attorney General is not bound by a Board recommendation.

C. The conditions for having a full debate and deciding on the questions of administrative and constitutional law have been met in this case

100 According to case law, this Court can properly issue a declaratory remedy so long as it has the jurisdiction over the issue at bar, the question before the court is real and not theoretical, and the person raising it has a real interest to raise it (*Canada (Prime Minister) v. Khadr*, 2010 SCC 3at paragraph 46 [Khadr]). All of these criteria have been met in this case.

101 First, the lawfulness of the actions of the Service or of the Board's decisions can be reviewed by this Court at first instance under sections 18 and 18.1 of the *Federal Courts Act*. This of course includes the question of whether the enabling legislative or regulatory provisions pursuant to which they initiated an action or made a decision are consistent with the Constitution.

102 Second, the constitutional question raised by the applicant is unprecedented and is not currently being argued before another tribunal. This is not a theoretical question, whereas the constitutionality of the statutory provision — subsection 140(2) of the CCRA — continues to cause problems between the parties.

103 Third, because the offender is subject to an LTSO, the applicant has a genuine interest in having the Court determine the constitutionality of subsections 140(1) and (2) of the CCRA when the Board conducts a post suspension review pursuant to section 135.1 of the CCRA. Also, the declaratory relief sought in this case by the applicant will have immediate practical effect and will apply at once because the Board will have to comply with the ruling. In this case, the Board's position has been forcefully argued by the Attorney General of Canada who is a party to the proceeding.

D. Binding effect of a declaration of constitutional invalidity or inoperability

104 I say this as an aside, but upon closer examination, the *obiter dictum* in paragraph 70 and 71 of *Windsor SCC* also seemed to question the binding character, both at the horizontal and interjurisdictional level, of a constitutional declaration, whatever it may be. If this applies to parties involved in private law litigation, where interests are necessarily limited, the question may nonetheless arise in a public law dispute where the respondent is the Government itself represented by the Attorney General. There is the doctrine of *stare decisis*, but there is also the authority of *res judicata* between both parties. Given that this Court has jurisdiction in this matter and for the other reasons outlined above, I am of the view that it is not necessary to use my discretion and refer the matter to the Superior Court of Québec.

105 The questions asked in *Windsor SCC* reflected some comments in *Strickland*, which was decided a year earlier. In *Strickland*, the appellants brought an application for judicial review in the Federal Court seeking a declaration that the *Federal Child Support Guidelines*, SOR/97-175 were unlawful as they were not authorized by s. 26.1(2) of the *Divorce Act*, R.S.C., 1985, c. 3 (2nd Supp.). In exercising her discretion, the judge at first instance had refused to hear the issue on its merits: in matters of family law, the provincial superior courts were better placed than the Federal

Court to decide whether the Federal Guidelines contravened the *Divorce Act*. In the final analysis, the Supreme Court rejected the appellant's position that the *alternative remedy* of litigation in the provincial superior courts was inefficient and would give rise to multiple proceedings.

106 But beyond a number of practical considerations that are not relevant in this case, Cromwell J. noted in paragraph 53:

> [53] The appellants' position overlooks the fact that a ruling of the Federal Court on this issue would not be binding on any provincial superior court. Thus, regardless of what the Federal Court might decide, before the ruling could have any practical effect, the issue would have to be re-litigated in the superior courts, or, alternatively, litigated up to this Court. Even if there were a binding ruling that the *Guidelines* were unlawful, a proliferation of litigation would be inevitable. It would be for the provincial courts to decide the impact of the illegality of the *Guidelines* on particular support orders and that could only be done in the context of a multitude of individual cases. ...
>
> [My emphasis.]

107 A cogent argument would have to answer the following question, if the roles were reversed and the same constitutional issue were decided by a provincial superior court: to what extent would a declaration of invalidity by a superior court (or provincial court of appeal) *legally* bind other provincial and statutory courts, including the Federal Court and the Federal Court of Appeal? To ask the question is to answer it. The answer is "no" if we consider the question from the standpoint of the doctrine of *stare decisis*. But this does not necessarily mean that the *persuasive character* of a ruling rendered in another jurisdiction will be set aside pursuant to the rules of judicial comity (Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 4th Ed (Markham, Ontario: LexisNexis 2015) [Lange] at pp. 499-500, referring to *Fording Coal Limited v. Vancouver Port Authority*, [2006] BCJ No 900 (CA) at paragraphs 14-17, citing *Morguard Investment Ltd v. De Savoye*, [1990] 3 S.C.R. 1077; *Toronto Auer Light Co v. Colling* (1898), 31 OR 18).

108 If we now consider the verticality of the doctrine of stare decisis, in a unitary state, everyone knows his rank — as in a chain of command. Because, overall, while the doctrine of *stare decisis* provides some legal certainty while permitting the orderly development of the law in incremental steps (*Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] S.C.J. No. 5at paragraph 44, citing *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] S.C.J. No. 72at paragraph 42) — it is more difficult to apply in the Canadian federation because of the limits of the jurisdictional or territorial competence of the Canadian courts. This is why we need a supreme court. But from a horizontal standpoint, as the Supreme Court of Canada pointed out in *Wolf v. The Queen*, [1975] 2 S.C.R. 107at page 109: "A provincial appellate court *is not obliged, as a matter either of law or of practice*, to follow a decision of the appellate court of another province, *unless it is persuaded that it should do so on its merits or for other independent reasons*" [My emphasis]. These comments were echoed after the *Charter* came into force in 1982 by the Court of Appeal of British Columbia

in a criminal case where the accused based his appeal on a declaration of invalidity of a provision of the *Criminal Code* made by the Court of Appeal for Ontario (*R v. Pete*, [1998] BCJ No 65at paragraph 5). Similarly, it can be said that the Federal Court or the Federal Court of Appeal is not bound by the declaration of invalidity of provincial courts of appeal unless it is satisfied that it must follow that decision on the basis of its intrinsic value or other independent reasons.

109 Ultimately, the (provincial or statutory) superior courts and the (provincial or statutory) intermediate courts do not have the final word with respect to the evolution of Canadian law (common law or civil law). The Supreme Court of Canada does. Regarding this point, as the Supreme Court pointed out in *Reference re Supreme Court* at paragraph 85: "Drawing on the expertise of its judges from Canada's two legal traditions, the Court ensured that the common law and the civil law would evolve side by side, while each maintained its distinctive character. The Court thus became central to the functioning of legal systems within each province and, more broadly, to the development of a unified and coherent Canadian legal system." But as the Supreme Court itself explained, the role of the Court of Canada was further enhanced as the 20th century unfolded following the abolition in 1975 of appeals as of right to the Court in civil cases (paragraph 86).

110 But getting back to the present, we are not discussing the evolution of common law or civil law in this case. From a strictly practical point of view, what is essential in an administrative and constitutional matter such as the one before us is that the declaration of invalidity sought by a party can bind the Attorney General of Canada once the Federal Court decision has become final and all appeal mechanisms have been exhausted. In particular, this applicant is complaining about a breach of the *Charter*. As s. 32 of the *Charter* dictates, the *Charter* applies to governments and legislatures: "Its purpose is to provide a measure of protection from the coercive power of the state and a mechanism of review to persons who find themselves unjustly burdened or affected by the actions of government" (*Young v. Young*, 1993 SCC 34, [1993] 4 S.C.R. 3). Under subsection 24(1) of the *Charter*, in the event of a violation of section 7 of the *Charter*, the Federal Court also has jurisdiction to order appropriate remedies with regard to the review of the lawfulness of any decision made by the government or a federal board (*Singh* at paragraphs 75-78; *Operation Dismantle* at paragraphs 28 and 69; *RWDSU v. Dolphin Delivery Ltd.*, 1986 SCC 5, [1986] 2 S.C.R. 573at paragraph 34).

111 We should also revisit the concept of *lis inter partes*, which is essential to the application of *res judicata*, or even issue estoppel or abuse of process, since disputes must eventually come to an end. The Attorney General of Canada is party to this case. Pursuant to subsection 2(2) of the *Department of Justice Act*, R.S.C., 1985, c. J-2, the Minister is *ex officio* Her Majesty's Attorney General of Canada, in that the Minister holds office during pleasure and has the management and direction of the Department. Furthermore, section 4 stipulates that the Minister is the official legal adviser of the Governor General and the legal member of the Queen's Privy Council for Canada and shall see that the administration of public affairs is in accordance with law and advise on

the legislative Acts. Under subsection 4.1(1), the Minister shall examine whether the Bills and regulations are inconsistent with the purposes and provisions of the *Charter*. Finally, paragraph 5(1)(d) dictates that the Attorney General of Canada shall have the regulation and conduct of all litigation for or against the Crown or any department, in respect of any subject within the authority or jurisdiction of Canada. There is really nothing new in this legislative expression. The Attorney General of Canada and the Attorneys General of the provinces, collectively, are the descendants of the Attorney General of England (section 135 of the *Constitution Act, 1867*). An important aspect of the Attorney General of England's traditional constitutional role is to protect the public interest in the administration of justice. However, in Canada, the Attorney General is charged with duties that go beyond the management of prosecutions. Unlike England, the Attorney General is also the Minister of Justice and is generally responsible for drafting the legislation tabled by the government of the day (*Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372at paras. 24-27; *Canada (Attorney General) v. Cosgrove*, 2007 FCA 103, [2007] 4 FCR 714at paras. 34-36 — Supreme Court appeal denied 2007 SCC 66738). This is another notable aspect of the constitutional evolution of Canadian institutions.

112 It is safe to say that in constitutional cases, the effect of declarations of inoperability made by a court of law pursuant to section 52 of the *Constitution Act, 1982* is not trivial (Sarna at pp. 151-153). It goes without saying that the issue of whether such a declaration should be suspended — in order not to create a legislative vacuum — is a consideration in the public interest which may be studied by the trial judge after having heard the representations of the parties, including of course, those of the Attorney General. Eventually, depending on whether a judicial declaration has been made at first instance, a party may appeal to an intermediate court of appeal, and the constitutional question may ultimately be decided by the Supreme Court.

113 Similarly, if the court of law considers, in exercising the remedial power set out in subsection 24(1) of the *Charter* — that a declaration, rather than a particular concrete remedy, is appropriate and just under the circumstances, it should not be assumed that such a judicial declaration will not have any meaningful effect from a practical standpoint. In *Association des parents de l'école Rose-des-vents v. British Columbia (Education)*, [2015] 2 S.C.R. 139, 2015 SCC 21, the Supreme Court pointed out that judicial declarations are often made under section 23 of the *Charter*, the minority language education provision that guarantees minority language rights holders the right to have their children receive primary and secondary school instruction in English or French.

114 At paragraph 65, Karakatsanis J. noted in this regard:

> That said, there is a tradition in Canada of state actors taking *Charter* declarations seriously: see, e.g., P. W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), at p. 40-37. As this Court noted in *Doucet-Boudreau*, "[t]he assumption underlying this choice of remedy is that governments will comply with the declaration promptly and fully" (para. 62). Indeed, this represents one reason why courts often choose to issue declarations in the context of s. 23

(M. Doucet, "L'article 23 de la *Charte canadienne des droits et libertés*" (2013), 62 S.C.L.R. (2d) 421, at pp. 462-63).

[My emphasis.]

115 At the risk of repeating myself, the Attorney General of Canada was *validly* constituted *as the respondent* in this application for judicial review and judicial declaration — which alleges that subsections 140(1) and (2) of the CCRA are inconsistent with the constitutional right guaranteed in section 7 of the *Charter*. In this case, the Government of Canada will be bound by this Court's ruling, once the decision has become final and all appeal mechanisms have been exhausted. I am therefore satisfied that any declaratory relief in this case may have a meaningful effect. If a party is dissatisfied, it can still appeal to the Federal Court of Appeal or even to the Supreme Court.

116 Consequently, it would not be in the best interests of justice to ask the applicant to have the Superior Court of Québec address this point in order to resolve the constitutional question now before the Federal Court. Considering the costs already incurred by the parties and that this Court is equally well placed to settle the question involving the CCRA, this is not a case where the Court should exercise its discretion to stay these proceedings pursuant to section 50 of the *Federal Courts Act*.

VI. Merits of the parties' arguments on the constitutional question

117 It is now a matter of determining whether subsections 140(1) and (2) of the CCRA violate section 7 the *Charter*, which states that everyone has the "right to life, liberty and security of the person" and the right not to be deprived thereof except "in accordance with the principles of fundamental justice."

A. Issue

118 To a large extent, the *Charter* argument and the administrative law argument meet without merging. On the one hand, if the statutory provisions at issue are inconsistent with section 7 and cannot be justified under section 1 of the *Charter*, the Court may provide declaratory relief under section 52 of the *Constitution Act, 1982*. On the other hand, if the legislative discretion to hold a hearing is not in itself inconsistent with section 7 of the *Charter*, and it is rather the Board's use of this discretion that is problematic, the Court may prescribe a remedy that it considers appropriate and just, under subsection 24(1) of the *Charter*, which may include granting declaratory relief under section 18 of the *Federal Courts Act*.

119 In general, the onus is on the applicant to prove two things: first, that he has suffered or may suffer prejudice to his right to life, liberty and security of person; and, second, that the breach violated or did not conform to the principles of fundamental justice. If the claimant succeeds, the government bears the burden of justifying the deprivation under s. 1, which provides that the rights

guaranteed by the *Charter* are subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society (*Charkaoui v. Canada (Citizenship and Immigration)*, 2007 SCC 9, [2007] 1 S.C.R. 350at paragraph 12 [*Charkaoui*]).

B. Positions of the parties

120 At the risk of repeating myself, here is a brief summary of the positions of the parties. The applicant argues that subsection 140 (2) of the CCRA, which gives the Board discretion to hold a hearing, must be declared invalid or inoperative in the case of long-term offenders subject to an LTSO. The respondent counters that the discretion granted under subsection 140(2) of the CCRA is not the problem. Rather, the problem lies with the Board's duty, derived from the principles of fundamental justice, to exercise that power in a manner consistent with section 7 of the *Charter*.

121 As indicated above, the outcome of the dispute depends on the discretion to hold a hearing under subsection 140(2) of the CCRA. The constitutional argument was formally raised by the applicant before the Board, but the Board preferred not to address it in the contested decision. We should keep in mind here that in addition to the judgments rendered by the Superior Court of Québec and the Appeal Court of Québec in *Canada (Procureur général) c Way*, 2015 QCCA 1576 [*Way CA*], confirming 2014 QCCS 4193 [*Way CS*], counsel for the applicant cited in her written submissions of June 5, 2016, in support of her requisition for hearing before the Board, various decisions of the Supreme Court of Canada and the provincial superior or appellate courts (*Gamble*; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817at paragraphs 21-28 [*Baker*]; *R v. Gatza*, 2016 ABPC 37[*Gatza*]; *R v. Bourdon*, 2012 ONCA 256[*Bourdon*]; *Regina v. Cadeddu* (1982), 4 CCC (3d) 97 (Ont. HC) [*Cadeddu*]; *Illes v. The Warden Kent Institution*, 2001 BCSC 1465; *Swan v. Attorney General of British Columbia* (1983), 35 CR (3d) 135) [*Swan*]), and a recent Federal Court decision (*Gallone*) which confirmed the right to an oral hearing in such a case. None of these decisions were considered by the Board in the decision under review.

122 Relying on the case law cited above and the reasoning of the Superior Court and the Court of Appeal of Québec in *Way*, the applicant argues that the same finding of invalidity or inoperability of subsections 140(1) and (2) of the CCRA is required in the case of long-term offenders whose LTSO has been suspended by the Service and whose case has been referred to the Board under section 135.1 of the CCRA. A hearing must be held, unless the offender waives this right in writing or fails to attend the hearing.

123 The respondent counters these arguments by stating that the declaration of invalidity made in *Way* does not apply in this case, because the reasoning of the Superior Court and the Court of Appeal of Québec does not support the applicant's arguments. The respondent notes that an in-person post-suspension hearing was never automatically granted by law to the offender whose LTSO was suspended under section 135.1 of the CCRA. Also, there are major differences between

the suspension of an LTSO and the suspension, cancellation, termination or revocation of parole or statutory release by the Board.

124 The applicant replies that the respondent's narrow interpretation of subsections 140(1) and (2) of the CCRA is inconsistent with the fundamental right to be heard, and submits that in all cases where an LTSO is suspended, the long-term offender's residual liberty is in fact restricted. Also, everything in the case law indicating that it is important that the prisoner be able to submit his own version of the facts to the Board suggests that any type of *ex parte* hearing is very suspect (*Swan*; *Cadeddu*; *Conroy and the Queen*, [1983] 5 CCC (3d) 501, 1983 CanLII 3066 (ONSC); *Re Lowe and the Queen*, [1983] 5 CCC (3d) 535 (BCSC), 1983 CanLII 328 (BCSC).

C. Legal framework governing long-term supervision orders

125 This has already been explained. Actions taken by the Service and decisions made by the Board with respect to supervision of long-term offenders fall within the authority of the Parliament of Canada. The applicable guidelines are found in the *Criminal Code* and the CCRA. An overview follows.

126 First, section 753.1 of the *Criminal Code* allows a judge, at the time of sentencing, to declare a person a "long-term offender" [offender]. At the expiration of the sentence, the offender is then subject to an LTSO for a period that does not exceed 10 years. It is important to note that the purpose of any such conditional release is to contribute to the maintenance of a just, peaceful and safe society by making appropriate decisions as to the timing and conditions of release that will best facilitate the rehabilitation of offenders and their reintegration into the community as law-abiding citizens (section 100 of the CCRA).

127 On the other hand, it is up to the Board to establish the specific conditions of the LTSO. These conditions remain valid for the period that the Board specifies (subsection 134.1(3) of the CCRA). This notwithstanding, the general conditions set out in subsection 161(1) of the *Corrections and Conditional Release Regulations*, SOR/92-620 [Regulations], are applicable, with necessary modifications, to the offender supervised by an LTSO (subsection 134.1(1) of the CCRA).

128 The Board may, at any time during the supervision period, vary or remove any such conditions (subsection 134.1(4) of the CCRA). Additionally, an offender who is required to be supervised, a member of the Board or, on approval of the Board, the offender's parole supervisor, may apply to a superior court of criminal jurisdiction for an order reducing the period of long-term supervision or terminating it on the ground that the offender no longer presents a substantial risk of reoffending and thereby being a danger to the community. The onus of proving that ground is on the applicant (subsection 753.2(3) of the *Criminal Code*).

129 Administrative and penal mechanisms are in place to limit or otherwise control the residual liberty of the offender supervised by an LTSO with a view to ensuring the offender complies with the conditions of the LTSO.

130 First, subsection 134.2(1) of the CCRA provides that an offender supervised by an LTSO shall comply with any instructions given by a member of the Board or a person designated, by name or by position, by the Chairperson of the Board or by the Commissioner, or given by the offender's parole supervisor, respecting any conditions of long-term supervision in order to prevent a breach of any condition or to protect society. Meanwhile, subsection 753.3(1) of the *Criminal Code* provides that an offender who, without reasonable excuse, fails or refuses to comply with long-term supervision is guilty of an indictable offence and liable to imprisonment for a term not exceeding 10 years.

131 Second, when an offender fails to comply with a condition of an LTSO, the Service may suspend the community supervision and authorize the recommitment of the offender to custody for a period not exceeding 90 days (subsections 135.1(1) to (4) of the CCRA). In this circumstance, the Correctional Service Canada *Commissioner's Directive no. 715-2* concerning the post-release decision process [Directive] provides that the Service shall review the case. The LTSO is suspended only when an offender's risk is assessed as unmanageable in the community. If applicable, a warrant of suspension of conditional release is issued. A post-suspension interview is then conducted to advise the offender of the details of the suspension and provide him/her an opportunity to explain his/her conduct.

132 Third, if the Service does not cancel the suspension, the offender's case may be referred to the Board for review (subsection 135.1(5) of the CCRA). Where an officer of the Service finds that the suspension should be continued, the officer forwards to the Board an "Assessment for Decision" and shares any nonconfidential information from the assessment with the offender. The offender may make written representations and request a meeting in person with the Board. However, as explained below, the decision to hold a hearing is discretionary in this case (subsections 140(1) and (2) of the CCRA).

133 The Board shall, on the referral to it of the case, review the case and, before the end of the maximum period of 90 days, may: 1) cancel the suspension, if the Board is satisfied that, in view of the offender's behaviour while being supervised, resumption would not constitute a substantial risk by reason of the offender reoffending before the expiration of the period; 2) where the Board is satisfied that no appropriate program of supervision can be established that would adequately protect society from the risk of the offender reoffending, and that it appears that a breach has occurred, recommend that an information be laid charging the offender with an offence under section 753.3 of the *Criminal Code* (subsection 135.1(6) of the CCRA).

134 If the Board recommends that an information be laid, the Service shall make the recommendation to the Attorney General who has jurisdiction in the place in which the breach of the condition occurred — in other words, the provincial Crown (subsection 135.1(7) of the CCRA). The presumption of innocence applies to this step (subsection 11(d) of the *Charter*), while the person charged has a right not to be denied reasonable bail without just cause (subsection 11(e) of the *Charter*). An offender that does not pose a risk may consequently request conditional release pending the hearing of his/her case.

135 If the offender is found guilty of an offence referred to in section 753.3 of the *Criminal Code*, then the judge is responsible for determining, among the entire range of sentencing options, the sentence proportional to both the gravity of the offence and the degree of responsibility of the offender. The breach of an LTSO is not governed by a separate sentencing code or system. Time spent in preventive detention following indictment of the offender is taken into account although not necessarily time elapsed during the LTSO suspension period (maximum 90 days).

D. Hearing before the Board: Mandatory or discretionary?

136 Section 140 of the CCRA describes the cases in which a hearing before the Board is mandatory or discretionary. The text of section 140 is cited above (paragraph 4).

137 Subsection 140(1) of the CCRA stipulates that a hearing is mandatory in the cases listed in paragraphs (a) to (e) of subsection (1). However, according to subsection 140(2) of the CCRA, a hearing is at the Board's discretion in other cases, which includes a post-suspension hearing following the suspension of an LTSO (section 135.1 of the CCRA).

138 The specific cases in which a hearing is mandatory are set out by the Quebec Court of Appeal in *Way CA* in paragraphs 41 to 48. I am taking the liberty of reproducing this list from *Way CA* while disregarding the footnotes.

139 Under paragraph (a), the Board shall hold a hearing for the first review for day parole of the parties in question. In cases where the offender served a sentence of less than two years, the Board is not required to hold a hearing.

140 Under paragraph (b), the Board shall hold a hearing when reviewing the case of every offender who is serving a sentence of two years or more and who is not within the jurisdiction of a provincial parole board for the purpose of deciding whether to grant full parole. It shall also hold a hearing in relation to further review subsequent to a decision not to grant full parole or day parole or where a review was not conducted because the offender advised the Board that they do not wish to be considered for full parole. This further review is conducted within two years of the decision. The Board also holds a hearing when conducting another review concerning the

cancellation or termination of parole. This further review is also conducted within two years of the cancellation or termination.

141 Under paragraph (c), the Board shall hold a hearing when reviewing the case of an offender "who is serving a sentence of two years or more that includes a sentence imposed for an offence set out in Schedule I or II or an offence set out in Schedule I or II that is punishable under section 130 of the *National Defence Act*." Sections 129, 130 and 131 of the CCRA appear under the "Detention during Period of Statutory Release" heading.

142 Under paragraph (d), the Board shall hold a hearing for "a review following a cancellation of parole." It is to be noted that in 2012, paragraph 140(1)(d) of the CCRA was amended by section 527 of the *Jobs, Growth and Long-term Prosperity Act*, S.C. 2012, c. 19 [2012 amendments]. These legislative changes came into force on December 1, 2012 (see SI/2012-88). Previously, paragraph 140(1)(d) of the CCRA provided that the Board was to hold a hearing for a review following "suspension, cancellation, termination or revocation of parole or following a suspension, termination or revocation of statutory release."

143 Under paragraph (e) and under the Regulations, the Board shall hold a hearing where an offender applies for an unescorted temporary absence if the Board has not yet granted a first unescorted temporary absence or a first day parole and where the offender is serving, in a penitentiary, a sentence of life imprisonment imposed as a minimum punishment or commuted from a sentence of death, or a sentence of detention for an indeterminate period (subsection 164(1) of the Regulations). The Board shall also hold a hearing in cases where an offender applies for an escorted temporary absence on certain specific grounds if the Board has not yet granted a first unescorted temporary absence and the offender is serving a sentence of life imprisonment as a minimum punishment or commuted from a sentence of death (subsection 164(2) of the Regulations).

144 Lastly, neither the Act nor the Regulations define the terms "cancellation," "termination" or "revocation." Cancellation may be said to take place where authorization for release is withdrawn before it takes effect (for example, subsection 124(3) of the CCRA). Termination and revocation occur following release. Termination occurs when "the undue risk to society is due to circumstances beyond the offender's control" (subsection 135(7) of the CCRA), while revocation occurs in all other cases.

E. Declaration of invalidity in Way

145 On August 26, 2014, the Superior Court of Québec granted an application for *habeas corpus* and *mandamus* in aid and declaratory relief submitted by two offenders whose day parole or full parole had been revoked by the Board without calling the offenders to an oral hearing (*Way SC*).

146 In the opinion of the Superior Court, the 2012 amendments represent a significant departure from a longstanding tradition of recognizing and protecting the right of offenders to be heard before major decisions are made concerning their potential re-release. In fact, the Superior Court concludes that the legislative changes of 2012 resulted in deprivation of the two offenders' residual liberty, contrary to principles of fundamental justice. Under these circumstances, detention of the two offenders was illegal. Section 527 of the *Jobs, Growth and Long-term Prosperity Act* and new paragraph 140(1)(d) of the CCRA were consequently declared inoperative on the grounds that these provisions violate section 7 of the *Charter* and cannot be saved pursuant to section 1.

147 On October 1, 2015, the judgment in *Way SC* was affirmed by the Court of Appeal of Québec (*Way CA*). The Court of Appeal noted that [TRANSLATION] "in the implementation of the parole system, every decision has significant impact on an offender's life," while [TRANSLATION] "revocation can have a number of serious consequences, notably a longer period of imprisonment and the loss of employment": *Way* at para 64, citing a comment from Laskin J., dissenting, in *Mitchell v. R.*, [1976] 2 S.C.R. 570on page 584 [*Mitchell*] affirmed by the Supreme Court in *Singh* on pages 209-210.

148 Now, although flexibility must be shown when it comes to analyzing procedural fairness with respect to the parole process (*Mooring v. Canada (National Parole Board)*, [1996] 1 S.C.R. 75at paras 25-26 (SCC) [*Mooring*]), the Court of Appeal of Quebec also notes, at paragraph 72:

> [72] [...] [TRANSLATION] it is difficult not to observe that the amendment set out in section 527 of the [*Jobs, Growth and Long-term Prosperity Act*] creates an arbitrary situation. Apart from the financial savings sought by Parliament, there is no rational basis for making a different procedure applicable to decisions having similar impact on different offenders. Moreover, it is unfair to allow a hearing for an offender whose parole is cancelled before it has begun and to let the [Board] decide without limitation as to this benefit, while an offender's parole is suspended or revoked after the offender has earned this benefit.

149 Ultimately, the Court of Appeal of Québec concludes that there was no analytical error in the Superior Court's reasoning, whether in relation to the violation of section 7 of the *Charter* or its justification pursuant to section 1.

150 On April 21, 2016, the Supreme Court granted leave to appeal the decision in *Way CA*. On June 16, 2016, it formulated two constitutional questions concerning the violation of section 7 of the *Charter* and justification of any such violation pursuant to section 1. On September 7, 2016, however, the Attorney General of Canada withdrew its appeal and the case was closed.

151 On March 27, 2017, at the hearing for the present application for judicial review and declaratory relief, counsel for the respondent indicated that the Board is complying henceforth, across Canada, with the declaration of invalidity in *Way SC* despite the fact that the provisions

declared inoperative by the Superior Court of Québec (section 527 of the *Jobs, Growth and Long-term Prosperity Act* and paragraph 140(1)(d) of the CCRA) had not been officially repealed by Parliament. As a consequence, in practice, the Board automatically holds a hearing in all cases involving the suspension, cancellation, termination or revocation of an offender's parole or statutory release. However, it does not do so in cases referred to it by the Service following the suspension of an LTSO, when the decision as to a post-suspension hearing is made on a case-by-case basis.

152 This Court is not bound by provincial judgments. Notwithstanding this, it examined the persuasive character of the judgments rendered in Quebec in *Way* to determine whether similar reasoning could be applied to the suspension of an LTSO. Although the 2012 amendments to section 140 of the CCRA were declared unconstitutional, in my humble opinion, there are significant reasons for distinguishing the *Way* case from the case at hand.

153 First, in the case of long-term offenders, community supervision is based on the sentence handed down by a court of criminal jurisdiction, not a decision of the Board. The Board can in no way vary of its own motion the sentence passed.

154 Second, whereas parole is, among other factors, granted to an offender for good behaviour during detention, the LTSO is a consequence of the offender's behaviour based on the seriousness of his or her crimes or on the offender's repetitive behaviour (section 753.1 of the *Criminal Code*). Additionally, the procedure applicable to the violation of a condition of an LTSO illustrates the primary objective, this being to protect society from the danger posed by putting the offender back into the community. The LTSO is initially suspended by the Service, which obtains a warrant of recommitment. After meeting in person with the offender, the Service makes a decision as to the continuation or cancellation of the suspension. If the Service opts to continue the suspension, the case is referred to the Board. The Board must render a decision within the statutory time limit of 90 days, after which suspension of the LTSO cannot be continued and the offender must be released (unless, of course, the offender is charged in the meantime and the Attorney General opposes the offender's release).

155 Third, the material evidence in the file of this Court — which appears to be either absent or not considered in *Way* — does not lead me to conclude that any major issues of credibility *remain or are determining factors* in the decision of the Board under section 135.1 of the CCRA. As such, pursuant to section 9.1 of the Manual, when making a determination on whether to cancel the suspension or recommend that an information be laid pursuant to subsection 135.1(6) of the CCRA, Board members assess all relevant information, including:

> a. the offender's progress towards meeting the objectives of the correctional plan, including addressing the risk factors and needs areas;

b. information that the offender has demonstrated behaviour that may present a substantial risk to the community by failing to comply with one or more conditions (including time unlawfully at large and since re-incarceration);

c. reliable and persuasive information that a breach of condition has occurred;

d. whether the offender understood the full implications of the condition, or whether an explanation for failing to comply with the condition could be argued;

e. any documented occurrences of drug use, positive urinalysis results or failures or refusals to provide a sample; and

f. history and circumstances of breaches, suspensions or revocations during this or previous periods of conditional release or long-term supervision and any alternative interventions attempted to manage the risk.

156 Fourth, a recommendation to lay a charge pursuant to section 753.3 of the *Criminal Code* does not bind the Attorney General. More importantly, the offender is entitled to the presumption of innocence. They will have an oral hearing with a judge and may argue all means of defence to have the accusation dropped.

157 Fifth, the 2012 amendments in no way altered the situation of long-term offenders. The illogical nature of these changes was a determining factor in *Way* in terms of questioning the different treatment of offenders already on parole. In this case, the post-suspension hearings were always at the discretion of the Board when a case was referred to it following the suspension of an LTSO.

158 In addition, although this Court considered the conclusions and reasoning of the Superior Court of Québec and the Court of Appeal in *Way*, it must draw its own conclusions concerning the constitutionality of the discretion provided by subsection 140(2) of the CCRA with respect to a post-suspension review concerning a long-term offender whose LTSO has been suspended by the Service.

F. Deprivation of offender's residual liberty

159 To summarize from the start: first, the applicant claims that the suspension of an LTSO by the Service and ensuing recommitment to custody both represent significant restrictions on the residual liberty of the offender under community supervision (*Gallone* at para 17, *R. v. Gamble*, [1988] 2 S.C.R. 585; *Illes v The Warden Kent Institution*, 2001 BCSC 1465). According to the applicant, the right to residual liberty is more important in the context of an LTSO than the right of an offender on day parole or on full parole. This is because an offender under community supervision has finished

serving their sentence, unlike an offender on parole. The applicant cites further the importance of the principle of reintegration into society supporting the long-term supervision system.

160 I generally agree with the applicant. When an LTSO is suspended, the offender's residual liberty is indeed restricted for a period of up to 90 days. The respondent submits that recommitment of a long-term offender to custody is expressly permitted under section 135.1 of the CCRA. Now, the Board's exercise of discretion as to holding a hearing, as provided in subsection 140(2) of the CCRA, does not restrict the offender's residual liberty in any way. In any case, the deprivation of an individual's liberty must be sufficiently serious to justify protection under the *Charter* (*Cunningham v. Canada*, [1993] 2 S.C.R. 143at p. 151). In the present case, any deprivation of the offender's liberty beyond the statutory period of 90 days is not attributable to the Board's recommendation, at least, not significantly enough to claim violation of section 7 of the *Charter* (*Huynh v. Canada*, [1996] 2 FCR 976).

161 The respondent's argument is not convincing. It is not my role to decide whether the restriction of a long-term offender's residual liberty is greater or lesser than that resulting from the suspension of parole. As noted by the Supreme Court of Canada in *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433[*Ipeelee*], the LTSO represents a form of conditional release governed by the CCRA, and its purpose is consequently to contribute to the maintenance of a just, peaceful and safe society, facilitating the rehabilitation and reintegration of offenders (at para 47). In this regard, the Court notes at paragraph 48:

> [48] Reading the *Criminal Code*, the *CCRA* and the applicable jurisprudence together, we can therefore identify two specific objectives of long-term supervision as a form of conditional release: (1) protecting the public from the risk of reoffence, and (2) rehabilitating the offender and reintegrating him or her into the community. The latter objective may properly be described as the ultimate purpose of an LTSO, as indicated by s. 100 of the *CCRA*, though it is inextricably entwined with the former. [...]
>
> [My emphasis.]

162 The mechanisms of the CCRA in relation to community supervision of a long-term offender constitute a whole. The various steps leading to deprivation of an offender's residual liberty cannot be artificially isolated. Suspension of an LTSO, recommitment to custody and even the subsequent indictment of the offender must be considered overall from the viewpoint of their practical effects on the offender. With respect to the first phase of the review required under section 7 of the *Charter*, the issue is not whether the existence of discretion as to holding a hearing goes against the principles of fundamental justice but instead whether the individual's right to liberty is engaged. Such is the case in this instance when considering the adverse application of the legislative mechanisms in question. One day the offender is released under community supervision; the next, following allegations of violation of the LTSO, the Service issues a warrant and the offender is recommitted to custody for a period of up to 90 days.

163 In the present case, even if the Board can ultimately only make a recommendation to prosecute to the Attorney General under paragraph 135.1(6)(c) of the CCRA, it remains responsible for deciding whether suspension of the LTSO by the Service is justified to begin with. The applicant is not stating here that his recommitment to custody is in itself illegal but that the offender has a right to an oral hearing to explain his conduct. If the Board does decide within the 90-day time limit not to suspend the LTSO, then the offender will be released again. Now, paragraph 135.1(6)(a) of the CCRA provides that a suspension may be cancelled if the Board finds, in view of the offender's conduct during the supervision period, that there is not a high risk of reoffending before expiration of this period. The Board may also vary the conditions of an LTSO. Further, I am not convinced that the maximum recommitment to custody of 90 days specified in section 135.1 of the Act should be separated from the application of subsection 140(2) of the Act concerning the holding of a hearing.

164 Having determined that the offender's right to liberty is engaged by application of the mechanisms provided in section 135.1 of the CCRA, it is now appropriate to determine whether the discretionary nature of the power granted under subsection 140(2) of the CCRA as to holding a hearing goes against principles of fundamental justice; first, however, we must identify which principles of fundamental justice are potentially applicable to the case under consideration.

G. Variable content of obligation to act fairly

165 The two parties agree that the Board is required to comply with principles of fundamental justice. However, they have adopted diverging positions on the question as to whether an oral hearing before the Board is necessary *in all cases involving suspension of an LTSO* referred to the Board by the Service.

166 The analysis grid proposed by the Supreme Court in *Baker* for establishing the scope of the obligation to act fairly is well known and not subject to challenge. The first factor is the nature of the decision being made, or the closeness of the administrative process to the judicial process in the process provided for, the function of the decision-making body and the determinations that must be made to reach a decision (*Baker* at para 23). The second factor is the nature of the statutory scheme, or the role of the particular decision within the statutory scheme including, for example, the appeal procedure or whether further requests can be submitted (*Baker* at para 24). The third factor is the importance of the decision to the individuals affected, or its impact on those persons and the scope of the repercussions of the decision (*Baker* at para 25). The fourth factor is the legitimate expectations concerning the procedure required or its outcome (*Baker* at para 26). The fifth factor is the choices of procedure made by the agency itself, considering the agency's expertise and the extent to which the statute leaves to the decision-maker the ability to choose its own procedures (*Baker* at para 27).

167 In two recent instances, *Gallone* and *Laferrière FC*, the Federal Court contributed significantly toward developing the administrative law and the content of the rules of procedural fairness. When an offender under an LTSO exhibits cognitive (psychiatric) problems, or when the reliable and convincing nature of the information examined by the Board cannot be evaluated by simple review of the case, an oral hearing should generally be held.

168 We will begin with the *Gallone* case. Meticulously reviewing each of the five factors mentioned in the *Baker* judgment in light of the plan at issue and the impact of the Board's decision on the residual liberty of the offender whose LTSO had been suspended, Judge Tremblay-Lamer notes in paragraphs 16, 17 and 19:

> [16] In this case, it is true that the PBC acts in neither a judicial nor a quasi-judicial manner (*Mooring v. Canada (Parole Board of Canada)*, [1996] 1 S.C.R. 75at paras 25-26) and that subsection 140(2) of the *Act* provides the PBC with the discretion decide whether to hold a hearing. However, greater procedural protections are required as there is no appeals process for persons subject to a long-term supervision order and the decision is final (sections 99.1 and 147 of the *Act*).
>
> [17] The most significant criterion in this case is the importance of the decision to the person affected. The Supreme Court in *Baker*, wrote "[t]he more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated" (at para 25). In this case, not only was the applicant incarcerated following the suspension of an LTSO, the PBC also recommended that a charge be filed under section 753.3 of the *Criminal Code*. The suspension of the long-term supervision and the ensuing incarceration amount to a curtailment of the applicant's residual liberty. That decision constitutes a significant factor affecting the content of the duty of procedural fairness owed the applicant by the PBC. It is an important factor the the PDC must take into account in deciding whether to hear viva voce testimony.
>
> [...]
>
> [19] In addition, where the assessment of physical or mental capacities may have an impact on the type of conditions to be imposed, a hearing would be appropriate. Here, the Correctional Service's community mental health team, as well as the staff member supervising her, raised concerns about the applicant's cognitive abilities and intellectual limitations. Meeting with the applicant would have certainly allowed for an assessment of the grounds of the staff's concerns, in addition to hearing the applicant's explanations regarding the events leading up to the suspension, a decision which significantly restricted her residual liberty.

169 By applying the analytical framework to the specific facts of the case, Judge Tremblay-Lamer determined that an oral hearing would be necessary. We can thus read in paragraphs 20 to 22:

> [20] To be sure, the nature of the duty of procedural fairness is flexible and depends on the circumstances. A hearing will not be required in every case. However, the factors set out in *Baker* should not remain in the abstract. They must be examined in each case in order to ensure that administrative decisions made are adapted to the type of decision and institutional context.
>
> [21] In this case, the duty of procedural fairness was particularly onerous given that, as the applicant pointed out, she was subject to highly restrictive constraints during her re-admissions (in a maximum security penitentiary, in solitary confinement 23 hours a day, with nothing in her cell but the clothes on her back).
>
> [22] In short, I am of the view that in the circumstances of this case, in particular the questions surrounding the applicant's capacities, the recommendations of the case management team and parole supervisor that the suspension be cancelled, and the significant impact to the applicant of the decision, not only not to cancel the suspension, but to recommend a criminal charge, the PBC should have held an in-person hearing. The submissions made by the applicant's counsel and by her case management team showed that the applicant may have been suffering from a psychiatric or psychological problem, which could obviously have an effect on the decision of the PBC and on the conditions to be imposed. In such circumstances, the PBC lacked sufficient, reliable and convincing information to base its decision on the record.

170 This Court also learned of a second decision that Judge Tremblay-Lamer rendered on the same subject: *Laferrière FC*. In the latter case, the offender contested the legality of a Board decision that modified the conditions to which the applicant had been subjected within the framework of an LTSO. This decision had been made on the record despite the request for a hearing. After evaluating the file, the Board accepted the parole supervisor's recommendation that two of the conditions be lifted: the obligation to be treated by a psychiatrist and the prohibition to enter within a perimeter of 500 metres of his spouse's home or any other location where she might be. However, the Board kept the other conditions in force.

171 Distinguishing this latter situation from *Gallone*, Judge Tremblay-Lamer decided that the written representations were an adequate substitute for an oral hearing. Moreover, the Board has no obligation to hold a hearing at regular intervals. Thus, paragraphs 10 and 11 of *Laferrière FC* state:

> [10] [...] In accordance with the factors set out in *Baker*, this is not a situation where the PBC had to hold a hearing to respect procedural fairness. This was a review of the applicant's

> parole conditions the outcome of which does not have as great an impact as a detention order or the suspension of parole (see *Arlène Gallone c Le procureur général du Canada*, 2015 CF 608). As noted by the Supreme Court in *Baker*, "[t]he more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated" (at para 25). In the matter at bar, the written representations were an adequate substitute for a hearing since no particular reason or no serious issue of credibility was raised by the applicant, either of which could have shed a different light on the PBC's decision.
>
> [11] Moreover, the applicant had no legitimate expectation that the PBC hold a hearing, and because the holding of a hearing is discretionary, the PBC was not obliged to hold a hearing at regular intervals. Also, the absence of reasons for the refusal to hold a hearing is not fatal to the decision in the particular circumstances of this case since the applicant did not raise any specific reason why a hearing should have been held and the PBC had all the required information before it. In accordance with *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61 and *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, the Court may consider that the PBC could have given the fact that there was nothing to justify the holding of a hearing as a reason for its refusal. Consequently, the PBC did not breach procedural fairness by not holding a hearing.

172 As we can see, the scope of the obligation to act fairly has variable content. In terms of section 135.1 of CCRA, although the Board made only a recommendation that is in no way binding on the Attorney General, it remains true that offenders cannot appeal Board decisions to the Court of Appeal. The lack of a right to appeal favours a decisional process carried out with greater respect for principles of procedural fairness. Consequently, a hearing may or may not be necessary, everything depending on the specific circumstances of the file. Considering the legal clarifications made by the Court in 2015 in the *Gallone* and *Laferrière FC* judgments, I am satisfied that before refusing to meet with the offender in person at a post-suspension hearing, the Board must first make sure that the reliable and convincing nature of the file's information allows an informed decision to be made. The question is whether an oral hearing should be convened *in all cases*, or whether, depending on the file's specific facts, written representations would suffice.

H. The discretion specified in subsection 140(2) of CCRA is not in itself incompatible with procedural fairness.

173 In *Mooring*, the Supreme Court confirmed that in evaluating the risk to society, the Board must nevertheless review all the reliable and available information. The Supreme Court concluded that the Board does not play a quasi-judicial role. Far from settling a specific debate between two opposing parties, the Board performs more investigative functions. It is not required to apply the classical rules of evidence or to hear any *viva voce* "testimony" nor does it have the power

to summon witnesses. The Board also acts on the information provided by the offenders and by the Service. In addition, the presumption of innocence does not apply before the Board (*Mooring* at paragraphs 25-26). The Board's recommendation, without being binding upon the Attorney General, may indirectly lead to the extension of confinement, given that the Attorney General may file criminal charges and prevent the offender from being released. As well, the sentence imposed for a charge under subsection 753.3(1) of the *Criminal Code* does not take into consideration the three months spent in detention under the LTSO suspension (*Gatza* at paragraph 46; *Bourdon* at paragraph 17).

174 That being said, section 140 of CCRA does not automatically grant the right to an oral hearing in cases of an LTSO suspension and has never previously granted one. Be that as it may, administratively speaking, the Board's discretion is not absolute. Indeed, its practise is regulated by the Manual. The Manual provides instructions that the Board members cannot ignore when an offender requests an oral hearing. Thus in cases where a hearing is not required by CCRA or policy, Board members may, in any case, choose to conduct a review by way of a hearing, pursuant to subsection 140(2) of CCRA, where they believe, under the specific circumstances of the case, that a hearing is required to clarify relevant aspects of the case. The reasons for holding a discretionary hearing are recorded in the reasons for the Board's decision. In cases where the offender or a person acting in his name has requested a review by way of a hearing, the reasons for which holding a hearing was accepted or refused are also recorded (Manual, chapter 11.1, section 6). Incidentally, it can be said that providing reasons is the proper way to ensure the transparency and intelligibility of the Board's decision.

175 Moreover, the Manual provides a number of concrete examples in which an in-person hearing might be necessary. This may include, in particular, situations in which the reliability and persuasiveness of the information being considered cannot be assessed on a file review, when there is incomplete or discordant information on file, of relevance to the review, that could be clarified at a hearing or when the information on file indicates that the offender has difficulties (cognitive, mental health, physical or other) that prevent him from communicating effectively in writing (Manual, chapter 11.1, section 6). Although the Manual is not mandatory in nature, the examples found in the Manual lead the offender to legitimately expect that he will meet with the Board in person in this type of case — which of course includes cases in which the offender's credibility is questioned.

176 The principles of fundamental justice do not require that an individual benefit from the most favourable procedure; instead they require that the procedure be fair (*Ruby v. Canada (Solicitor General)*, 2002 SCC 75, [2002] 4 S.C.R. 3at paragraph 46 referring to *R v. Lyons*, [1987] 2 S.C.R. 309on p. 362). Contrary to the applicant's claim, section 7 of the *Charter* does not *automatically* and *systemically* require an oral hearing, even if the rights guaranteed by this provision are at issue (*Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1at paragraphs 121-122,

[2002] 1 SCR 3). In addition, I am satisfied that the current administrative mechanisms include genuine guarantees with respect to principles of procedural fairness.

177 Insofar as subsection 140(2) of CCRA does not legally prohibit a hearing, when this can prove necessary in the specific circumstances of the case being reviewed, the existence of such a discretionary power is neutral and does not conflict with the principles of fundamental justice guaranteed by section 7 of the *Charter*.

VII. Conclusion

178 In conclusion, although the residual liberty of a long term offender is limited after an LTSO suspension, section 7 of the *Charter* does not oblige the Board to hold a post-suspension hearing *in all cases* where the Service has referred the file to it. Subsections 140(1) and (2) of CCRA do not prevent the Board from holding a post-suspension hearing in cases where it is asked to exercise the powers set out in section 135.1 of CCRA. The discretion conferred by subsection 140(2) may be applied in a manner that respects the rights guaranteed by the *Charter*, particularly when a question of credibility is a determining factor in the file. Insofar as the source of the problem reported by the applicant is not to be found in the legislation itself, but in the Board's refusal to use its discretion in a manner compatible with the principles of fundamental justice, there is no reason to declare the legislation's provisions invalid (*Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120at paragraphs 77, 130-139). It is enough to state that the Board must, in all respects, comply with the principles of fundamental justice and hold an in-person hearing in cases that have been discussed earlier.

179 For these reasons, the applicant has a right to a declaratory judgment, which is mentioned in the next paragraph.

180 In terms of exercising the jurisdiction set out in section 135.1 of CCRA, the long term offender's residual liberty is limited through the suspension of an LTSO. The Board must act fairly before upholding the LTSO suspension and recommending that a charge referring to section 753.3 of the *Criminal Code* be laid by the Attorney General. The principles of fundamental justice oblige the Board, before it refuses to hold an in-person, post-suspension meeting with the offender, to ensure that the reliable and convincing nature of information in the file enables it to make an informed decision. When the file contains incomplete or contradictory information that is relevant to the case review or that could be clarified by the offender, a post-suspension hearing must be held. This is also the case when the offender has difficulties (cognitive, mental health, physical or other) that prevent him from communicating effectively in writing or when a question of credibility is a determining factor in the file. Any refusal to hold an oral hearing must be given in writing. Consequently, the legislative discretion to hold a post-suspension hearing does not violate section 7 of the *Charter* Subsections 140(1) and (2) of CCRA are not constitutionally invalid or inoperative

in the case of long term offenders whose file is referred to the Board following the suspension of an LTSO.

181 The Court otherwise refuses the other compensation or statements sought by the applicant. Without costs.

JUDGMENT in file T-1159-16

RULING on the merit of this application for judicial review and declaratory judgment;

THE COURT ADJUDGES AND DECLARES:

> In terms of exercising the jurisdiction set out in section 135.1 of the *Corrections and Conditional Release Act*, SC 1992, c. 20 [CCRA], the long term offender's residual liberty is limited by the suspension of a long-term supervision order [LTSO]. The Parole Board of Canada must act fairly before upholding the LTSO suspension and recommending that a charge referring to section 753.3 of the *Criminal Code*, RSC 1985, c. C-46, be laid by the Attorney General. The principles of fundamental justice oblige the Board, before it refuses to hold an in-person, post-suspension meeting with the offender, to ensure that the reliable and convincing nature of information in the file enables it to make an informed decision. When the file contains incomplete or contradictory information that is relevant to the case review or that could be clarified by the offender, a post-suspension hearing must be held. This is also the case when the offender has difficulties (cognitive, mental health, physical or other) that prevent him from communicating effectively in writing or when a question of credibility is a determining factor in the file. Any refusal to hold an oral hearing must be given in writing. The legislative discretion to hold a post-suspension hearing does not violate section 7 of the *Canadian Charter of Rights and Freedoms*. Consequently, subsections 140(1) and (2) of CCRA are not constitutionally invalid or inoperative in the case of long term offenders whose file is referred to the Board following the suspension of an LTSO.

THE COURT REFUSES otherwise the other compensation or statements sought by the applicant;

WITHOUT costs.

Application dismissed.

1967 CarswellAlta 58
Alberta Supreme Court, Appellate Division

Breckenridge Speedway Ltd. v. R.,

1967 CarswellAlta 58, 61 W.W.R. 257, 64 D.L.R. (2d) 488

Breckenridge Speedway Ltd., Green et al (Plaintiffs) Appellants v. Reginam (Defendant) Respondent

Smith, C.J.A., Porter, Johnson, Kane and Allen, JJ.A.

Judgment: September 18, 1967

Counsel: *A. G. Macdonald, Q.C.*, for plaintiffs, appellants.
C. W. Clement, Q.C., for defendant, respondent.

Subject: Corporate and Commercial

***Smith, C.J.A.*:**

1 The plaintiffs have appealed from the judgment of Primrose, J. who dismissed the plaintiffs' action and gave the defendant judgment in accordance with the prayer of her counterclaim.

2 The facts are set out in detail in the reasons of the learned trial judge and in the reasons of my brother Johnson, J.A.

3 Having reviewed the evidence and the reasons of the learned trial judge, I can find no ground for questioning his conclusion that the evidence does not support a claim for rescission of the agreement referred to in par. 7 of the statement of claim, the date of which appears to have been established as Decem ber 8, 1958. Later, however, I shall add my views as to the relief to which the defendant is entitled under her counterclaim.

4 The plaintiffs had had advanced to them, over a period of years, substantial sums of money by one of the treasury branches operated by Her Majesty in the right of the province of Alberta. In November, 1958, the plaintiffs transferred to the defendant several pieces of real property and a lease of a filling station from North Star Oil Co.; the latter is conceded to be a mortgage but issues have arisen as to whether three of the remaining transfers were outright sales which had the effect of reducing the amount of advances owing to the defendant or were simply transfers by way of security and therefore mortgages.

5 The defendant contended that all but one of the transfers were outright sales, and counterclaimed against the plaintiffs for various balances of advances allegedly owing, for possession of several of the properties transferred, for some rentals in respect of the last-mentioned properties and for foreclosure of the mortgage of the North Star Oil Co. lease.

6 In answer to the counterclaim the plaintiffs alleged that the advances and the agreement of December, 1958, were made by the defendant and the transfers and mortgage were accepted by the defendant in the course of carrying on the business of banking; that all of these activities were *ultra vires* the defendant and they contended that consequently the plaintiffs were not liable to repay to the defendant the balances owing of the advances made by the defendant and that some of the properties transferred and the lease mortgaged to the defendant should be returned to the plaintiffs as their property free of any claims of the defendant.

7 The defendant in reply to the defence to counterclaim pleaded that the relevant legislation and the defendant's activities mentioned were within the constitutional powers of the province and that the plaintiffs were estopped from raising or relying on the assertion that the activities and operations of the defendant in question were *ultra vires* the defendant and that it was just and equitable that the plaintiffs should repay the moneys owing with interest and not be unjustly enriched thereby.

8 In my view the first question which calls for consideration in relation to the constitutional aspects of the case is whether it lies in the plaintiffs' mouths to allege that *The Treasury Branches Act*, RSA, 1955, ch. 344, and the activities and operations of the defendant said to consist of carrying on a banking business in the province of Alberta, were *ultra vires* the Queen in the right of this province and that for this reason the plaintiffs are not liable to repay the moneys advanced to them and are entitled to the recovery of their real property free of any securities or claims of the defendant. In other words can a person in the position of the plaintiffs complain "of an act which is ultra vires if he himself has in his pocket at the time he brings the action some of the proceeds of that very ultra vires act:" Vaughan Williams, L.J. in *Towers v. African Tug Co.*, [1904] 1 Ch. 558, at 567, 73 LJ Ch 395.

9 In *Bell Houses Ltd. v. City Wall Properties Ltd.*, [1966] 1 Q.B. 207, [1965] 3 W.L.R. 1065, [1965] 3 All ER 427, Mocatta, J. held that a defendant, when sued on a contract by a company, was entitled to maintain by way of defence that the contract was *ultra vires* the company and void. He found the contract was *ultra vires*. When the case came before the court of appeal [1966] 2 Q.B. 656, [1966] 2 W.L.R. 1323, [1966] 2 All ER 674, the trial judge's decision was reversed and the contract found to be *intra vires* the plaintiff. Salmon, L.J. said at p. 690 of [1966] 2 All ER:

> Having regard to the view which I have formed on this part of the case, it is unnecessary to consider the interesting, important and difficult question which would arise were the contract ultra vires, namely whether, the plaintiff company having fully performed its part under the

177 In *Tennant v. Union Bank of Canada*, [1894] A.C. 31, at 46, 63 LJPC 25, affirming 19 O.A.R. 1, Lord Watson, speaking in relation to the legislative authority of parliament under sec. 91 (15) said:

> It also comprehends 'banking,' an expression which is wide enough to embrace every transaction coming within the legitimate business of a banker.

178 It would seem from the above that the argument that because the government of Canada has not seen fit to expressly prohibit the carrying on of a banking business by anything other than a chartered bank under the *Bank Act* the province may carry on or authorize the carrying on of such a business otherwise than through the medium of a chartered bank, is ineffective. The field of legislation in relation to banking is exclusively vested in the parliament of Canada whether or not it has passed legislation of that nature.

179 It has been argued that although the legislative authority of the province of Alberta may not extend to banking, Her Majesty the Queen in the right of the province of Alberta in exercising the royal prerogative may carry on such a business, as there is no statutory prohibition against her doing so. However, it seems clear enough from *Bonanza Creek Gold Mining Co. v. Attys.-Gen. for Ont., Que., N.S., N.B. and B.C.* (1916) 10 W.W.R. 391, [1916] 1 AC 566, 85 LJPC 114, 34 W.L.R. 177, 25 Que KB 170, reversing 50 S.C.R. 534, 31 W.L.R. 43, in which the judgment of the Privy Council was delivered by Viscount Haldane, that the executive authority or royal prerogative of the crown in the right of the province is co-extensive with its legislative authority. Lord Haldane said at pp. 397-8 (WWR), at pp. 579-80 (AC):

> It is to be observed that *The British North America Act* has made a distribution between the Dominion and the provinces which extends not only to legislative but to executive authority. The Executive Government and authority over Canada are primarily vested in the Sovereign. But the statute proceeds to enact, by s. 12, that all powers, authorities, and functions which by any Imperial statute or by any statute of the provinces of Upper Canada, Lower Canada, Canada, Nova Scotia, or New Brunswick are at the Union vested in or exercisable by the respective Governors or Lieutenant-Governors of these provinces shall, 'as far as the same continue in existence and capable of being exercised after the Union in relation to the government of Canada,' be vested in and exercisable by the Governor-General. S. 65, on the other hand, provides that all such powers, authorities, and functions shall, 'as far as the same are capable of being exercised after the Union in relation to the government of Ontario and Quebec respectively, be vested in and exercisable by the Lieutenant-Governors of Ontario and Quebec respectively.'
>
> . . . . .
>
> The effect of these sections of *The British North America Act* is that, subject to certain express provisions in that Act and to the supreme authority of the Sovereign, who delegates to the

> Governor-General and through his instrumentality to the Lieutenant-Governors the exercise of the prerogative on terms defined in their commissions, the distribution under the new grant of executive authority in substance follows the distribution under the new grant of legislative powers. In relation, for example, to the incorporation of companies in Ontario with provincial objects the powers of incorporation which the Governor-General or Lieutenant-Governor possessed before the Union must be taken to have passed to the Lieutenant-Governor of Ontario so far as concerns companies with this class of objects. Under both s. 12 and s. 65 the continuance of the powers thus delegated is made by implication to depend on the appropriate Legislature not interfering.

180 In *Deputy Sheriff of Calgary v. Walter's Trucking Service Ltd., Atty.-Gen. of Alta. and Atty.-Gen. of Canada* (1965) 51 W.W.R. 407, affirming (1964) 47 W.W.R. 180, Porter, J.A. put it this way at p. 409:

> Every day we see the crown acting in two capacities which we commonly describe as the crown in the right of Canada and the crown in the right of the province. It seems to me that the crown in the right of Canada and the crown in the right of the province have well-defined functions under the respective legislative authorities of parliament and the provincial legislature as those authorities are created and divided by the *B.N.A. Act, 1867*. The crown's authority in the right of Canada and the crown's authority in the right of the province must be co-extensive with the division of the sovereign legislative powers made between Canada and the province by the *B.N.A. Act*, else the crown would be taking advice from the wrong ministers.

181 I think that on this point reference should also be made to *Atty.-Gen. v. De Keyser's Royal Hotel Ltd.*, [1920] A.C. 508, 89 LJ Ch 417. That case would seem to be authority for the proposition that once the crown has submitted its prerogative to legislation then it is bound by such legislation. Lord Atkinson, at p. 538, quotes with approval the following passage from an earlier judgment of the master of the rolls:

> 'Those powers which the executive exercises without Parliamentary authority are comprised under the comprehensive term of the prerogative. Where, however, Parliament has intervened and has provided by statute for powers, previously within the prerogative, being exercised in a particular manner and subject to the limitations and provisions contained in the statute, they can only be so exercised. Otherwise, what use would there be in imposing limitations, if the Crown could at its pleasure disregard them and fall back on prerogative.'

182 It would appear quite clear that the "royal prerogative" is what is known as the "executive authority" in the modern English state: See *Holdsworth's A History of English Law*, vol. 9, p. 6.

183 Therefore, if the province's legislative authority does not extend to a certain matter and that matter is, by competent legislation, assigned to the parliament of Canada, the province cannot undertake that matter through the exercise of the royal prerogative or executive authority.

184 Before leaving the constitutional aspects of this case, I think reference should be made to the judgment of Duff, C.J. in *Reference re Alberta Statutes*, [1938] S.C.R. 100, at 129, affirmed *(*sub nom. *Reference re Alberta Bills; Atty.-Gen. for Alta. v. Atty.-Gen. for Can.)* [1938] 3 W.W.R. 337, [1939] AC 117, 108 LJPC 1, where he said:

> The chartered banks in Alberta exercise their powers under the authority of a Dominion statute, the *Bank Act*. By that statute, a system of banking is set up by the Parliament of Canada and provision is made for the incorporation of individual banks which, on compliance with the statutory conditions, are entitled to carry on business subject to the provisions of the statute. This system of banking has been created by the Parliament of Canada in exercises of its plenary and exclusive authority in relation to that subject, and any legislation by a province which, to quote again the phrase of Lord Haldane, is 'so directed by the provincial Legislatures' as either directly or indirectly to frustrate the intention of the *Bank Act* by preventing banks carrying on their business or controlling them in the exercise of their powers, must be invalid.

185 I have, earlier in this judgment, made reference to the preamble to the *Bank of Canada Act*. Such preamble indicates that it was considered desirable to establish a central Bank of Canada to regulate credit and currency in the best interests of the economic life of the nation, and to control and protect the external value of the national monetary unit. One of the measures adopted to accomplish this objective is the requirement for reserves to be maintained by chartered banks with the Bank of Canada provided for in both the *Bank Act* and the *Bank of Canada Act* and referred to above. The right to prescribe increases and reductions in the amount of the reserves which the chartered banks are obliged to maintain from time to time with the Bank of Canada constitutes one of the effective measures of controlling credit and it is utilized for that purpose. There are no such provisions in *The Treasury Branches Act* and the treasury branches are not controlled by the provisions of the *Bank of Canada Act*. If every province in Canada were to legislate as the province of Alberta has done with regard to the operation of treasury branches with no effective control on the amount of credit which can be extended by these branches, the purposes of important provisions of the *Bank Act* and the *Bank of Canada Act* designed to exercise control of credit, could be frustrated.

186 To put it another way, in enacting *The Treasury Branches Act* and operating the treasury branches thereunder, it may well be urged that the legislature of the province of Alberta is interfering with some of the operations and purposes of the *Bank Act and the Bank of Canada Act*, both being legislation validly enacted by the parliament of Canada in the exercise of its exclusive

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[1970] S.C.R. 175, 70 W.W.R. 481, 9 D.L.R. (3d) 142

Breckenridge Speedway Ltd. et al v. Reginam and Attorney-General of Canada (Intervenant)

Cartwright, C.J., Fauteux, Abbott, Martland,
Judson, Ritchie, Hall, Spence and Pigeon, JJ.

Judgment: October 21, 1969

Counsel: *A. G. MacDonald, Q.C.*, and *R. D. Gillespie*, for appellants.
A. S. Pattillo, Q.C., C. W. Clement, Q.C., and *J. W. Brown*, for respondent.
C. R. O. Munro, Q.C., and *D. W. Kilgour*, for attorney-general of Canada.

Subject: Corporate and Commercial

***Cartwright, C.J., Fauteux*, and *Abbott, JJ.* concur with Martland, J.:**

***Martland, J.*:**

1 The facts of this case have been fully outlined in the reasons of my brother Hall, and it is not necessary to repeat them. A brief review of the pleadings is of some assistance in defining the issues in this appeal. The plaintiffs, appellants, while they alleged that the plaintiff, Green's Garage, had issued cheques totalling $76,031.97 in favour of Consolidated Finance Corporation and certain other finance companies; that the plaintiff, Breckenridge Speedway Ltd., had issued cheques totalling $36,398.49 in favour of certain finance companies; that the plaintiff, Twin Town Motors Ltd., had issued cheques totalling $20,000 in favour of certain finance companies; and that, prior to presentation of any of the said cheques, the plaintiff, Oscar Green, on behalf of all these plaintiffs, had stopped payment of the cheques at the Calder treasury branch, made no claim for relief arising out of such allegations. They were referred to by counsel for the plaintiffs, at trial, as "essential basic history to the whole transaction."

2 With respect to this aspect of the case I agree with my brother Hall that, whether or not the order to stop payment was given, the plaintiffs ratified the payment of the cheques and the learned trial judge correctly so found.

3 The substance of the plaintiffs' claim was for rescission of the agreement made on December 8, 1958, by the plaintiffs Oscar Green, Irene Janet Green and Breckenridge Speedway Ltd., with the provincial treasurer, with respect to accounts at the Calder treasury branch, whereby those plaintiffs agreed to transfer to the provincial treasurer of Alberta properties described as:

(1) The property known as Green's Garage and fixed chattels situated at Wainwright, Alberta.

(2) The property known as Green's Garage, Body Shop and fixed chattels in Edmonton.

(3) The dwelling of Oscar Green and Irene Janet Green in Edmonton.

(4) The Valleyview property at Valleyview, Alberta.

(5) Glenlyon Property and Houses, acreage, Edmonton outskirts.

(6) Assignment of lease with North Star Oil Company of Green's Garage in Edmonton, with fixed chattels.

(7) Transfer in blank of Green's Garage property and fixed chattels in Edmonton.

(8) Assignment of Agreement for Sale, O. E. Campbell, Viking Motors of Viking, Alberta.

4 The provincial treasurer agreed to allow credit on the account of Breckenridge Speedway Ltd., and Green's Garage account with the Calder treasury branch for the amount shown on the transfers of the property at Wainwright, the Green's Garage body shop property in Edmonton, the house of Oscar and Irene Janet Green in Edmonton, and the Valleyview and Glenlyon properties. The provincial treasurer also agreed to lease back the first three properties, above-mentioned, for a five-year term, at a rent equivalent to interest at six per cent on the values shown in the transfers, plus annual taxes. The plaintiffs, in respect of these properties, were to have the right to make additional payments, above the stipulated rental, to be applied toward the purchase back of the properties for the amounts set out in the transfers. It was also agreed that operating credits for a period of five years in an amount of $15,000 would be allowed to the plaintiffs.

5 Transfers of the various properties were executed in November and December 1958, showing values as follows: Wainwright property, $35,000; Green's Garage property, Edmonton, $16,000; Green's house property, Edmonton, $12,000; Valleyview property, $1,500; Glenlyon property, $6,000.

6 The plaintiffs, in their statement of claim, alleged various breaches of this agreement upon the basis of which they sought rescission of the agreement, the return of the various properties, and repayment of moneys received by the defendant pursuant to the agreement.

7 The defendant counterclaimed for moneys owing by the plaintiffs, Oscar Green and Irene Janet Green, for rentals due under the leases of the properties covered by the agreement, and against

Green's Garage and Breckenridge Speedway Ltd., on a promissory note given by the former, and for the amounts due on their current accounts by both of them.

8 It was at this point in the pleadings that the plaintiffs, in their statement of defence to the counterclaim, alleged that all acts performed and agreements entered into by the defendant, relevant to the action, were invalid because they were entered into pursuant to *The Treasury Branches Act*, RSA, 1955, ch. 344 (hereinafter referred to as "the Act") and that the Act was *ultra vires* of the legislature of Alberta.

9 With respect to the plaintiff's claim for rescission, the learned trial judge held: "I have examined all the complaints made by the plaintiffs, but, in analyzing them, find they do not support a claim for damages, nor for rescission." His decision on this point was supported unanimously by the appellate division. In my opinion, this finding should not be disturbed.

10 With respect to the counterclaim, Smith, C.J.A., Johnson and Kane, J.A., were of the opinion that the plaintiffs, as borrowers, were not entitled, in answer to a claim for payment by the defendant, to set up the constitutional invalidity of *The Treasury Branches Act* as a defence (1967) 61 W.W.R. 257. Accordingly, they did not consider it necessary to decide that issue. Porter and Allen, JJ.A., both held that the Act was *ultra vires* of the legislature of Alberta because it related to banking, a matter assigned exclusively to the parliament of Canada.

11 All of the members of the court, other than Porter, J.A., were of the view that some of the transfers of property made pursuant to the agreement of December 8, 1958, represented partial payments of indebtedness, but that the transfers of the Wainwright property, the Green's Garage body shop property and the Green house property, which had been leased back, were given as securities for payment and not as partial payment.

12 In the result, the judgment at trial dismissing the plaintiffs' claim and allowing the defendant's counterclaim was varied by striking out that portion of the judgment which had ordered that the defendant recover possession of those three properties.

13 In my opinion, the judgment of the appellate division was correct, and in reaching that conclusion I do not find it necessary to determine the constitutional validity of the Act. The issues on this appeal are as to the right of the defendant to recover from the plaintiffs moneys advanced to them by the treasury branch, and as to the validity of the agreement of December 8, 1958, under which the defendant received title to certain properties from the plaintiffs, either by way of partial payment, or as security for payment.

14 The plea of *ultra vires*, in relation to the circumstances of this case, amounts to this, that the Act being unconstitutional, as relating to the matter of banking, the provincial treasurer had no legal authority to lend to the plaintiffs the funds which, in fact, were advanced to them. Even if this contention were valid, the authorities cited by my brother Hall, and in the reasons of Smith,

C.J.A. and Johnson, J.A., make it clear that, there being nothing illegal about the transaction, but at most, lack of authority in the provincial treasurer to make the advance, the plaintiffs would have no answer to an action for money had and received. I refer only, among the cases quoted in those judgments, to *Re Coltman; Coltman v. Coltman* (1881) 19 Ch D 64, 51 LJ Ch 3, and *In re K.L. Tractors Ltd.* (1961-62) 106 C.L.R. 318, (1961) ALR 410.

15 The position was, therefore, that, irrespective of the constitutional validity of the Act, the plaintiffs were under a legal obligation to pay back the funds of the defendant which they had received.

16 Having reached this conclusion, I turn now to consider the agreement of December 8, 1958, and the transfers of property made pursuant to it. This was a contract by the plaintiffs to transfer titles to certain properties to the defendant, either as a part payment of their indebtedness or as security for repayment. The transfers were effected in accordance with Alberta law, and title passed to the defendant, as represented by the provincial treasurer. There is nothing in law to prevent the defendant from taking title to Alberta land.

17 The plaintiffs seek an order to compel the re-transfer of the properties from the defendant to them. Their contention is that the agreement was void because it was made in the course of carrying on a banking business, which the provincial legislature could not authorize. However, the substance of that agreement, apart from the promise of an additional credit to the plaintiffs which is not now in issue, was an arrangement for the repayment or the securing of repayment of an outstanding obligation. For the reasons already given, the plaintiffs do not escape that obligation even if the loans were legally unauthorized. That being so, I do not understand how the plaintiffs are in a position to demand back that which they had transferred to repay or to secure repayment of their lawful obligation to the defendant.

18 A somewhat similar problem was dealt with by the Privy Council in *Ayers v. S. Australian Banking Co.* (1871) LR 3 PC 548, 40 LJPC 22, 17 ER 163. In that case, a South Australian statute provided for the creation of a preferential lien upon wool without actual delivery of the wool to the mortgagee. The bank advanced money to a firm on the faith of receiving such a preferential lien. The action was in trover by the bank against the trustee for the creditors of the firm which had borrowed the money to recover the value of the wool. One ground of defence was that the bank's charter contained a provision declaring that it should not be lawful for the bank to advance money on the security of merchandise.

19 The bank's action succeeded. In dealing with this defence, Mellish, L.J. said at p. 558:

> Another objection was taken by Mr. *Manisty* on the terms of the Charter — the clause in the Charter which says, it shall not be lawful for the Bank to make advances on merchandise. Now, unquestionably, a great many questions might be raised on the effect of that clause in the Charter which may be of very great importance, but which also being of great difficulty,

> their Lordships do not think it necessary to give any opinion upon. There may be a question as to what are the transactions which come really within the clause, and whether this particular case does come within it. There may be also a question whether, under any circumstances, the effect of violating such a provision is more than this, that the Crown may take advantage of it as a forfeiture of the Charter, but the only point which it appears to their Lordships is necessary to be determined in the present case is this, that whatever effect such a clause may have, it does not prevent property passing, either in goods or in lands, under a Conveyance or instrument which, under the ordinary circumstances of law, would pass it. The only defence which can be set up here (there is no plea of illegality) is under the plea of not possessed, that the right of property and the right of possession never passed to the Plaintiffs. Their Lordships are of opinion, that whatever other effect it has, it cannot have the effect of preventing the property passing.

20 There are additional circumstances in the present case which are favourable to the defendant. There is no question here as to the rights of other creditors of the plaintiffs. But, more important than that, there is in the present case this added feature. If the Act were unconstitutional, as the plaintiffs allege, the provincial treasurer, a minister of the crown, would be in the position of having exceeded his authority in making advances of money to the plaintiff. The funds advanced were the property of the crown, and the loan made to the plaintiffs would constitute an unauthorized disposition of crown property, in which both the provincial treasurer and the plaintiffs were participants. The unauthorized act of the minister in lending the money could not affect the right of the crown to demand repayment. The transfers of property made by the plaintiffs were not made to the provincial treasurer, but to the crown. They were made either to repay or to secure repayment of the moneys which the plaintiffs are legally obligated to repay. The crown has a valid legal title to these properties.

21 The plaintiffs cannot demand a re-transfer of the properties from the crown unless they can establish that there is no obligation on their part to repay the moneys which the properties were partially to repay, or the repayment of which they were to secure. They cannot establish that fact when, if their contention as to the unconstitutionality of the Act is correct, they are in the position of having received crown moneys through the unauthorized act of the crown's agent, in which they participated.

22 In the result, I am of the opinion that the plea of *ultra vires* would afford no defence to the defendant's counterclaim and, that being so, it is unnecessary to determine whether or not the Act is *ultra vires* of the Alberta legislature.

23 The only remaining issue is as to whether the transfers to the defendant of the lands described as the Wainwright property, Green's Garage body shop property, and Green's house property were outright transfers in part payment of the plaintiffs' obligation or were taken as security for payment.

For the reasons given by Allen, J.A., which were approved by Smith, C.J.A., Johnson and Kane, JJ.A., I would hold that these three transfers were given by way of security.

24 It is my opinion that the judgment of the appellate division should be sustained and, accordingly, I would dismiss the appeal, with costs, and dismiss the cross-appeal, with costs. There should be no costs payable to the intervenant.

Judson and Ritchie, JJ. **concur with Martland, J.:**

Hall, J. **(dissenting):**

25 This is an appeal from the appellate division of the supreme court of Alberta (1967) 61 W.W.R. 257, from a judgment by Primrose, J. The action by the appellants was for rescission of an agreement with the respondent dated December 8, 1958 and the return of certain properties transferred by the appellants to the respondent in May, 1959, and for an accounting claiming that the Calder treasury branch had wrongfully paid certain cheques after payment thereof had been stopped. The respondent counterclaimed for possession of the properties and for judgment for the amount of certain rentals and loans. Primrose, J. dismissed the appellants' action and gave judgment in favour of the respondent for possession of the properties and other relief. In their action the appellants contended that *The Treasury Branches Act*, RSA, 1955, ch. 344, was *ultra vires*. The appellate division, while holding that *The Treasury Branches Act* was *ultra vires*, nevertheless upheld the judgment of Primrose, J., refusing rescission and giving judgment for the amounts claimed in the counterclaim, but held that three of the properties in question in the action had been transferred by way of security and ordered an accounting in respect of those properties. The three properties are known and mentioned throughout the evidence and the judgments as: (a) "Green's body shop property;" (b) "the dwelling house;" (c) "the Wainwright property."

26 The appellants who were plaintiffs in the original action now appeal to this court, claiming that Primrose, J. and the appellate division erred in: (1) Failing to hold that the moneys paid out by the Calder treasury branch in meeting cheques of the appellants presented for payment after payment had been countermanded were not recoverable; (2) Holding that in these circumstances it was inequitable and unjust for the appellants to raise the plea of *ultra vires* on the part of the respondent in entering into agreements and taking security by way of mortgage to enforce the payment of sums paid out on the said countermanded cheques; (3) Failing to hold that in these circumstances the appellants could raise the plea of *ultra vires*; (4) Failing to find that the said agreements were made and security taken by the Calder treasury branch in the course of a banking business carried on by the provincial treasury of the province of Alberta pursuant to, or, alternatively, in excess of the provisions of *The Treasury Branches Act*; (5) Failing to find that the said *Treasury Branches Act* was *ultra vires* the province of Alberta by virtue of the provisions of the *B.N.A. Act, 1867*, ch. 3; (6) Failing to find that the said banking business was *ultra vires* the province of Alberta by virtue of the provisions of the *B.N.A. Act*; (7) Failing to find that the said agreements made and

security taken were *ultra vires* the province of Alberta by virtue of the provisions of the *B.N.A. Act*; (8) Failing to hold that by reason thereof the court would not enforce the said agreements made or security taken; (9) Failing to hold that in the circumstances the appellants were entitled to rescission of the said agreements made.

27 The respondent gave notice of intention to cross-appeal from the judgment of the appellate division in so far as it related to the Wainwright property by restoring the judgment of Primrose, J. on the grounds that the respondent held this property as beneficial owner free from any equity of redemption by the appellant, Breckenridge Speedway Ltd., and that none of the appellants had been in possession of the said property since 1960. On the hearing in this court, leave to amend the cross-appeal was granted to include, in addition to the Wainwright property, the other properties known as "Green's Body Shop" and "the dwelling house."

28 On October 30, 1967, Cartwright, C.J. made the following order:

> It Is Ordered that notice of the constitutional question in the above appeal, together with a copy of the Reasons for Judgment of the Supreme Court of Alberta, Appellate Division and of this Order be served forthwith upon the Attorney General of Canada and upon the Ottawa agents for the Attorneys General of the Provinces, except the Attorney General of the Province of Alberta, already a party herein, which constitutional question may be stated as follows:
>
> 1. Is the Treasury Branches Act, being chap. 344 of the Revised Statutes of Alberta, as amended, ultra vires the Province of Alberta as being legislation in relation to 'banking' contrary to the provisions of the British North America Act?
>
> 2. Is the business carried on by the Treasury Branches of the Province of Alberta ultra vires the Province of Alberta by reason of being a business not duly authorized by legislation?
>
> And It Is Further Ordered that all applications to intervene must be made returnable before the Honourable Chief Justice of Canada in Chambers on Monday the 27th day of November, 1967 at the hour of 10:00 o'clock in the forenoon.

29 The attorney-general of Canada applied to intervene and was given leave to intervene and to be represented by counsel and to file a factum. No province applied to intervene.

30 The facts giving rise to this litigation and to the determination of the constitutional question as aforesaid are involved and in the initial stages in dispute. The appellants, Oscar Green and Irene Janet Green, are husband and wife. At all times material to the litigation, Mrs. Green was proprietor of an automobile garage business in Edmonton, Alta., known as "Green's Garage." The appellant Breckenridge Speedway Ltd. (hereinafter called "Breckenridge") carried on a garage business at Wainwright in the same province. Both Green's Garage and Breckenridge were managed by Oscar Green.

31 In 1956 Green's Garage was selling new and used cars in Edmonton and at other places in Alberta while Breckenridge was selling new and used cars in Wainwright. New cars were obtained by Green's Garage from a sales agency known as "Waterloo Motors" while in Wainwright Breckenridge obtained new cars directly from the Ford Motor Company. The transactions with which this litigation is concerned involved cars financed by a company referred to in the evidence as "Consolidated Finance" (hereinafter called "Consolidated"). When Green's Garage ordered a car from Waterloo, it would be delivered subject to a chattel mortgage for the wholesale price given by Consolidated to Waterloo. Consolidated would then pay out Waterloo and deliver the car to Green's Garage, subject to a chattel mortgage given to secure Consolidated. Such a car was designated as being on "wholesale finance." When Green's Garage sold the car on time under a conditional-sales agreement to a customer, Green's Garage would deliver to Consolidated its cheque to clear the wholesale finance, discharging the chattel mortgage. Consolidated would then give Green's Garage a cheque to cover the proceeds to be received from the customer under the conditional-sales agreement in its favour. If purchasers defaulted under their conditional-sales agreements, the cars would be repossessed and put back on wholesale finance pursuant to the terms of a master agreement between Green's Garage and Consolidated, and the balance would be deducted from the amounts payable to Green's Garage on other conditional-sales agreements delivered to Consolidated. This procedure involving many cars resulted in a dispute or controversy between Green's Garage and Consolidated as to Green's Garage's indebtedness to Consolidated.

32 In September, 1956, Green's Garage concluded that Consolidated was improperly holding back $11,600 in respect of repossessed vehicles. To strengthen its position *vis-à-vis* Consolidated, Green's Garage retained conditional-sales agreements covering cars sold instead of delivering them immediately to Consolidated as had been the practice. Each such agreement had attached to it a cheque from either Green's Garage or Breckenridge to Consolidated for the amount of the "wholesale finance" due in respect of that agreement.

33 The appellant, Oscar Green, testified that Green's Garage intended to hold these conditional-sales agreements and cheques until the dispute over repossessed vehicles was settled with Consolidated. He further testified that during his absence one weekend about the end of September, 1956, a representative from Consolidated came to Green's Garage and took away a boxful of conditional-sales agreements and the cheques attached thereto. Green said he learned of this on his return on Sunday evening. The cheques in question were drawn on the treasury branch established at Calder (a subdivision of Edmonton) by the provincial treasurer of Alberta under the provisions of *The Treasury Branches Act*, RSA, 1942, ch. 29. Throughout 1956 Green's Garage was a depositor at the said Calder branch and had been a depositor from 1950. In 1956, when Breckenridge was incorporated, that company became a depositor at the Calder branch. In 1955 Mr. and Mrs. Green had borrowed money from the treasury branch at Calder and had signed promissory notes for $2,600 and $10,500 in April and November of that year respectively; in effect, the appellants and

Green's Garage, as well as Breckenridge, were doing their banking business at the Calder branch of the treasury department.

34 Oscar Green testified that on the morning after he learned that the representative from Consolidated had taken the conditional-sales agreements and the cheques, he notified one, Skelton, who was manager of the treasury branch in Calder to stop payment of the cheques which had been taken away by Consolidated. Green further testified that despite the explicit stop payment order, Skelton cashed the cheques, remitting the money to Consolidated. The total amount of these cheques was testified to by Green as being $198,985.86 and this produced a large overdraft in Green's Garage account. This overdraft as of October 5, 1956, was $123,322.99. On October 3, 1956, cheques totalling $36,398.49 were charged against the Breckenridge account, but as that account had a substantial credit balance no overdraft resulted.

35 It is clear from the evidence that Skelton did not have authority to extend credit to Green's Garage in the amount represented by the overdraft of October 5, 1956. Skelton continued to honour cheques for Green's Garage so that as of October 20, 1956 Green's Garage was indebted to the treasury branch in the sum of $142,546 and Breckenridge owed $6,680.67.

36 The matter of Green having stopped payment of the cheques taken away by Consolidated is of vital importance in so far as the appellants are concerned. The stop order as testified to by Green was a verbal one. The learned trial judge found as a fact that the stop payment order was given. He said in this regard:

> The matter came to a head when the plaintiffs issued cheques to the finance company and then instructed Skelton to stop payment. I have no doubt he was given these instructions, but a few days later, he went to the plaintiff Green and told him he had put through the cheques for payment.

37 The appellants rely upon this finding of fact as "the key finding, the cornerstone of appellants' case."

38 The evidence supporting this finding is meagre. Skelton did not give evidence at the trial, and it would appear from the evidence of M. H. Pitcher, liquidation officer in the head office of the treasury branches at Edmonton, that Green did not put forward his charge in this respect until December, 1960. Green, on the other hand, testified that he told Pitcher and a Mr. Olive who was a superintendent with the treasury branch in or about October or November, 1956, at a meeting in the office of the supervisor that he had stopped payment of the cheques but that Skelton had cashed them anyway. Nothing more is heard or said about this very important matter until Green referred to it in a letter to Pitcher dated December 17, 1960. However, be that as it may, I am unable to give the finding the effect contended for by the appellants. The evidence clearly establishes that whether or not the stop payment order was given and disobeyed, the appellants ratified the payment of the cheques and the learned trial judge correctly so found. The appellants continued

to do business with the Calder treasury branch on the basis that the moneys represented by these cheques had been received by them and were owing to the treasury branch. On October 20, 1956 they signed notes to the treasury branch for $140,000 representing the overdrafts in the Green's Garage and Breckenridge accounts as of that date. The evidence as of December 8, 1958 and the books of the treasury branch showed an indebtedness by appellants of $150,668.10.

39 At this time an agreement was entered into which will be dealt with later as it has a very important place in determining the rights of the parties, and in particular the rights of the respondent in respect of certain properties which were dealt with at that time. This agreement reads as follows:

> **Mr. Oscar Green, Mrs. Irene Janet GreenAnd Breckenridge Speedway Ltd.Re: Accounts Calder Treasury Branch**
>
> In consideration of the following documents, duly signed by the proper signing officers of the above named parties, to be transferred to the Provincial Treasurer of Alberta by Mr. Oscar Green and Mrs. Irene Janet Green, and Breckenridge Speedway Ltd.
>
> 1) The property known as Green's Garage and fixed chattels situated at Wainwright, Alberta.
>
> 2) The property known as Green's Garage, Body Shop and fixed chattels in Edmonton.
>
> 3) The dwelling of Oscar Green and Irene Janet Green in Edmonton.
>
> 4) The Valleyview property at Valleyview, Alberta.
>
> 5) Glenlyon Property and Houses, acreage, Edmonton outskirts.
>
> 6) Assignment of lease with North Star Oil Company of Green's Garage in Edmonton, with fixed chattels.
>
> 7) Transfer in blank of Green's Garage property and fixed chattels in Edmonton.
>
> 8) Assignment of Agreement for Sale, O. E. Campbell, Viking Motors of Viking, Alberta.
>
> The Treasury Branches will undertake to arrange a separate lease back to Oscar and Irene Janet Green and Breckenridge Speedway Limited all the above named properties, with the exception of Glenlyon; Viking Motors & Valleyview properties, on a five year lease with payments for such lease to be established in an amount sufficient to cover interest at 6% on the value set out in the Transfer and Assignment of these properties to the Provincial Treasurer, plus an amount equal to the yearly taxes on each property. Privilege will be arranged in each lease for Mr. Oscar and Irene Janet Green and Breckenridge Speedway Limited to make a payment over and above the monthly rental payments covering interest and taxes toward purchase back of the said properties for the amount set out in the said Transfer and Lease Assignment.

The Valleyview and Glenlyon properties will not be leased back, but will be put up for sale giving Mr. Oscar Green and Mrs. Irene Janet Green first option to buy these said properties at the same sale price that the Provincial Treasurer is offered for them.

The Provincial Treasurer will further undertake to arrange an operating credit for a period of five years in an amount of $15,000.00 and will receive from Oscar Green and Irene Janet Green and Breckenridge Speedway Limited, Chattel Mortgage covering all stock and movable equipment and book debts as security for the operating credit.

Credit will be allowed by the Treasury Branches on account of Breckenridge Speedway Limited and Green's Garage Account with Calder Treasury Branch for the amount shown on the Transfers on Breckenridge Speedway Limited property at Wainwright, Green's Garage Body Shop property in Edmonton, House of Oscar and Irene Janet Green, Valleyview property and Glenlyon property.

Any default in payments of Lease rental amounts to the Provincial Treasurer will cause such Lease in Default to be null and void giving authority to the Provincial Treasurer to cancel said Lease and dispose of said property to apply on account at will. Default is made if payment is not made within 60 days of due date and after a 30 day notice of such non-payment is mailed to the Leasee.

All Lease rental payments to begin on May 1st, 1959.

(Sgd.) M. H. Pitcher
M. H. Pitcher,
for Superintendent.

40 Pursuant to this agreement, four option leases were executed in May, 1959, covering items 1, 2, 3 and 7 referred to in the agreement and were delivered to the appellants. These lease-option agreements are to be read as part of the agreement of December 8, 1958. Without referring specifically to the leases, each one called for a fixed rental. For some time the appellants paid rents on the various properties covered by the leases, but ultimately ceased doing so and they were not, at the date of the trial, paying rent although still in occupation of the various properties pursuant to the leases. The Wainwright property was sold after the trial and by agreement (see formal judgment) of the parties the proceeds were placed in trust and are to be treated as the Wainwright property. On receipt of these lease-option agreements, the respondent wrote Green's Garage on May 15, 1959 as follows:

Edmonton, Alberta,
May 15th, 1959.

Greens Garage,

Edmonton
Dear Sirs:

The following will give a breakdown of total amount outstanding on Greens Garage and Breckenridge Speedway Limited accounts at the office of the Treasury Branches. This Whole amount has been set up under the following headings with separate amounts making up the total liability as of May 15th, 1959, interest to May 1st, 1959.

Breckenridge Speedway Ltd., Wainwright property account	$37,343.60
Greens Garage, Edmonton, Body Shop Property Account	16,977.48
Greens Garage, E. C. Campbell, Viking Motors Account	3,294.09
Greens Garage, Edmonton account	71,219.27
Greens Garage, Edmonton, Glenlyon Property Account	6,009.50
Greens Garage, Edmonton, House Property Account	13,074.16
Greens Garage, Valleyview Property Account Clair Johnston, of Purves & Johnston, Solicitors, Edmonton	2,750.00
	$150,668.10

The Treasury Branch in consideration of Agreements now entered into hereby agree to release guarantees now held against:

G. K. Green
K. P. Lindsay
Breckenridge Speedway Ltd.
Twin Town Motors

We also agree to release guarantee now held by Greens Garage, signed by Irene Janet Green and Oscar A. Green, when a new guarantee is completed on Treasury Branch form to be signed by Irene Janet Green and Oscar A. Green covering the amount due Greens Garage Edmonton Account.

> It is necessary to have Mr. Green obtain authority from Breckenridge Speedway Limited to transfer $3,126.62 from Breckenridge Speedway Limited to the credit of Greens Garage Edmonton. This was an oversight in setting up the account to the credit of Greens Garage.
>
> (Signed) M. H. Pitcher
> M. H. Pitcher,
> for Superintendent.

41 As will be seen, the total indebtedness claimed by respondent at this time was $150,668.10.

42 The validity of *The Treasury Branches Act* is directly challenged in this court by the attorney-general of Canada and the question is also relevant to the contention by the appellants that notwithstanding their liability to repay the moneys borrowed, the fact that *The Treasury Branches Act* is *ultra vires* requires a finding that the securities and properties obtained by the respondent under the agreement of December 8, 1958 must be returned to the appellants.

43 I will deal: (1) With the question of the validity of *The Treasury Branches Act*; (2) With the liability of the appellants to repay the moneys received from the treasury branch even if the legislation is *ultra vires*; (3) With the contention of the appellants respecting the validity and effect of the agreement of December 8, 1958; and (4) With the claim for rescission and damages.

44 The question of the validity of *The Treasury Branches Act* was dealt with in the appellate division. Smith, C.J.A., with whom Johnson and Kane, JJ.A. concurred, did not find it necessary to deal with the issue, holding that the appellants could not in any event raise the question of *ultra vires* in this action. This was, of course, before the attorney-general of Canada intervened to challenge the validity of *The Treasury Branches Act*. Johnson, J.A. agreed with Smith, C.J.A. and Allen, J.A. that the agreement of December 8, 1958 created equitable mortgages in respect of Green's body shop property, the dwelling house and the Wainwright property. Porter and Allen, JJ.A., in separate judgments, held *The Treasury Branches Act* to be *ultra vires*. Both held that the appellants were not precluded in this action from raising the question of *ultra vires*. Allen, J.A. said (at p. 315) in this regard:

> It is, of course, obvious from the disposition which I would make of this appeal that I do not consider the plaintiffs are in any way precluded from raising the question of the *ultra vires* nature of their transactions with the treasury branches in this action.

45 Porter, J.A. said at pp. 279-80:

> But it is urged by the defendant that the plaintiffs are precluded by law from raising as a defence to the counterclaim as it affects the so-called conveyances the invalidity of the statute creating the treasury branches.

> If this be so, we arrive at the anomalous position that the defendant may have judgment for the money, keep the conveyed property and enforce its security. What has the subject done that this court should say to him and to his creditors, if any, that the crown can keep his property as a benefit in a transaction it could not make?

46 I agree with these views. The respondent can recover the moneys loaned not because the appellants cannot raise the *ultra vires* issue but because regardless of that issue they must return the moneys they received.

47 I do not think that I can usefully add anything to the reasons of Porter, J.A. at pp. 270-9, in this regard. He went fully into the history of the legislation and its relationship to banking, and concluded by saying:

> In my view *The Treasury Branches Act* is invalid as trenching upon a legislative field into which it is prohibited from entering by reason of the assignment of the exclusive legislative right therein to Canada.

48 I am also in agreement with Porter, J.A.'s view that the operation of the treasury branches cannot be upheld as being an exercise of the royal prerogative and valid regardless of the statute being *ultra vires*. Porter, J.A. dealt with this argument as follows, at p. 271:

> As will be seen from the subsequent discussion of the treasury branch legislation, the power of the crown to conduct the treasury branches sprang from legislation, namely, *The Treasury Branches Act*. The operation of the treasury branches cannot therefore be an exercise of the prerogative which is created and limited by common law and does not flow from statute. 7 *Halsbury's Laws of England*, 3rd ed., p. 221:
>
> '463. ... The royal prerogative may be defined as being pre-eminence which the Sovereign enjoys over and above all other persons by virtue of the common law, but out of its ordinary course, in right of her regal dignity, and comprehends all the special dignities, liberties, privileges, powers and royalties allowed by the common law to the Crown of England.
>
> '464. ... The prerogative is thus created and limited by the common law, and the Sovereign can claim no prerogatives except such as the law allows, nor such as are contrary to Magna Carta, or any other statute, or to the liberties of the subject.'
>
> Moreover, the prerogative of the crown in the right of the province is co-extensive with the division of the legislative powers made by the *B.N.A. Act* as between federal and provincial power, and the prerogative of the crown in the right of the province could not extend to the operations purporting to be authorized by *The Treasury Branches Act* unless *The Treasury Branches Act* is within the legislative authority of the province.

> In *Bonanza Creek Gold Mining Co. v. Attys.-Gen. for Ont., Que., N.S., N.B. and B.C.* (1916) 10 W.W.R. 391, at 398, [1916] 1 AC 566, at 580, 85 LJPC 114, 34 W.L.R. 177, 25 Que. K.B. 170, reversing 50 S.C.R. 534, 31 W.L.R. 43, Viscount Haldane said: '... the distribution under the new grant of executive authority in substance follows the distribution under the new grant of legislative powers.'
>
> With respect, I cannot agree with the learned trial judge that the conduct of the treasury branches is an exercise of the royal prerogative.

49 The fact that *The Treasury Branches Act* is *ultra vires* cannot deprive the respondent of the right to recover the moneys loaned to the appellants as moneys had and received. The law in this regard is aptly stated by Lush, J. in *Brougham v. Dwyer* (1913) 108 LT 504, 29 T.L.R. 234. This was an action to recover moneys as had and received a loan made by a company by way of overdraft when the company was not permitted to loan in this manner. Lush, J. said at p. 505:

> When one considers the real meaning of the expression that it was *ultra vires* on the part of the building society to enter into this transaction, the whole case becomes plain. The directors of the society purporting to act on behalf of the building society, and to make a contract on its behalf, lent the society's money to the defendant by way of an overdraft. It turned out that in point of law the building society were incompetent to make such a contract, and it followed that the contract which the directors thought they were making was not a contract at all, but was simply a transaction which in point of law did not exist. The consequence was that the defendant had received moneys belonging to the building society under a transaction which had no validity of any sort or kind. If the matter stood there, I should have thought it plain that there being no contract an action for money had and received would lie.

50 And later:

> But when one remembers the meaning of *ultra vires* the position is different. The contract was only no contract because the building society were unable to enter into it. There was nothing wrong in the contract itself or anything illegal in its nature, but the society being incompetent to make it, it did not exist in point of law. That being so the action was maintainable, and the defendant had no answer to it. It was an action brought for money lent under a transaction which was thought to be valid but which was in fact not valid. On principle I can see no possible reason why such an action should not be maintainable, and the Court of Appeal in *Re Coltman; Coltman v. Coltman* (1881) 19 Ch D 64, 51 LJ Ch 3, clearly decided that in a case such as the present assuming the contract not to be illegal, there would be no answer to the action. I am therefore of opinion that there was no defence to the present action, and the appeal must accordingly be allowed.

51 I am accordingly in agreement with Smith, C.J.A. when in his reasons he said at p. 267:

> I have no doubt that money lent by the province of Alberta in the course of carrying on the business of a treasury branch may be recovered with interest even though the carrying on by the province of the business of operating the treasury branch and the lending of money in that operation was beyond the powers of the province under the B.N.A. Act.

52 It should be noted that the appellants do not dispute this proposition. They say in their factum:

> It has never been suggested that if the transactions are set aside, the Appellants seek to defeat repayment of monies properly paid out for their use and benefit.
>
> . . . . .
>
> Obviously a borrower cannot be allowed to cheat his lender by saying the lender had no power to loan. No court is so powerless as to permit itself to be used as a vehicle to defraud a creditor. Although the terminology has not been settled the principle seems clear. It simply could not be done. The doctrine of ultra-vires is raised here to set aside an agreement for the purpose of restoring the parties to their original position each party accounting to the other for money had and received.

53 The appellants were seeking to avoid payment only of the amount of the cheques which Primrose, J. found had been paid after payment thereof had been countermanded. Payment of the amount of these cheques was being resisted, not on the ground of *ultra vires* but on the ground that where a banker pays a cheque, the payment of which has been countermanded, he cannot recover from his customer. That issue has been resolved against the appellants because as Primrose, J. correctly found the appellants ratified the payment of the cheques.

54 Having concluded: (1) That *The Treasury Branches Act* of Alberta is *ultra vires*; (2) That the conduct of the treasury branches is not an exercise of the royal prerogative; (3) That regardless of the finding that the legislation is *ultra vires*, the respondent is entitled to recover back the moneys loaned to the appellants, including the amount of the countermanded cheques, the question remains as to the effect and consequences arising from the agreement of December 8, 1958 and the securities transferred pursuant to that agreement. Two matters require decision in this regard: (1) Were any or all of the properties transferred to the respondent pursuant to the agreement of December 8, 1958 so transferred as payment *pro tanto* on the appellants' indebtedness to the respondent or as security for the said indebtedness; (2) The rate of interest the moneys advanced should carry from time to time.

55 Allen, J.A., with whom the majority of the appellate division concurred, held that three of the properties transferred in May, 1959, were transferred as payment *pro tanto* on the appellants' indebtedness existing at that time. I agree with this finding. The language of the agreement of December 8, 1958 is quite clear on this point. Being in possession of moneys belonging to the respondent, the appellants were under an obligation to return the moneys loaned to them and it appears to me that repayment could be made in kind as well as in cash. Title to these properties

being items 4, 5 and 8 as set out in the agreement of December 8, 1958 will remain in the respondent free of any claim thereto by or on behalf of the appellants or any of them. The appellants are, of course, entitled to be given credit for the value agreed upon at the time for these properties as shown in the letter of May 15, 1959 totalling $12,053.59.

56 As to the other properties being those which, under the agreement of December 8, 1958 were to remain in the possession of the appellants and leased back to them and which were, in fact, so leased back, the formal judgment in the appellate division provided in part that the judgment of the learned trial judge should be varied by striking out the orders for possession of the following properties: (a) The property known as Green's body shop; (b) The property known as the dwelling house; (c) The property known as the Wainwright property and also striking out directions for the removal of the caveats against Green's body shop and the dwelling house. The formal judgment also gave effect to an agreement entered into between the parties staying execution pending the appeal to this court and providing for the sum of $25,000 which had been realized from the sale of the Wainwright property should be paid into an interest-bearing trust account and dealt with as the Wainwright property. The formal judgment also provided that there should be no costs to any party.

57 Having found *The Treasury Branches Act* to be *ultra vires*, that fact and finding cannot then be ignored. I agree with Porter, J.A. when he said at p. 282:

> The cases on *ultra vires* are all founded on the principle that the person who deals with an entity of limited capacity cannot take advantage of its limitations for his own profit. The law does not enforce the contract; it treats it as non-existent, and compels payment or return of property on the basis that it would be unconscionable to enrich a receiver of the benefit. The contract being non-existent, the law precludes the plaintiffs from keeping the money regarding such conduct as unconscionable that would result in unjust enrichment. But it is urged that though the plaintiffs cannot keep the money the crown should be able to keep the security and thus take the benefit from and be enriched by a transaction which in law it did not make. Surely the transaction is a nullity for all purposes and not just a nullity against the subject.

58 But I differ from him and agree with Allen, J.A. as to the three properties transferred as payment *pro tanto* and not by way of security in May, 1959. As previously stated, if the appellants had made a cash payment of $12,053.59 at the time instead of transferring the three properties they could not, by any process, recover back moneys so paid, and I see no difference from the fact that the payment was made by an outright transfer of properties at agreed valuations. Being under obligation to repay, their act in repaying is a valid one notwithstanding that the agreement itself has no legal effect and is in law a nullity.

59 In the accounting now ordered the appellants should be charged interest at the legal rate of five per cent per annum regardless of the rate stipulated in the promissory notes or other securities

taken when the moneys were received by the appellants because the respondent does not recover on the securities but as moneys had and received. The moneys in the hands of the appellants, the borrowers, as a result of the *ultra vires* loans are in reality moneys belonging to the respondent and are recoverable by the respondent not as in an action in contract or tort but in an action for restitution for moneys had and received: *Brooks & Co. v. Blackburn Benefit Soc.* (1884) 9 App. Cas. 857, 54 LJ Ch 376.

60 There should be a full and complete accounting to determine the amount payable by the appellants to the respondent in respect of the moneys loaned to the appellants from time to time which have not been repaid with interest as aforesaid, allowing credit for all payments made by the appellants under the lease-option agreements and charging the appellants for all amounts properly expended by the respondent for taxes, upkeep and maintenance of the said properties including interest thereon, and the respondent should have judgment against the appellants severally for the amounts of their respective indebtedness to the respondent arrived at pursuant to the accounting and allowance of interest as above provided. The accounting should begin as of the date in September, 1956 when the disputed cheques to Consolidated were cashed and the proceeds remitted to Consolidated.

61 The agreement of December 8, 1958 being a nullity, the respondent cannot retain title to the properties transferred by way of security under the agreement. The respondent will reconvey these properties (other than the Wainwright property which has been sold) so that title thereto may vest in the appellant from whom title was received in May, 1959.

62 I have lastly to deal with the claim of the appellants for rescission of the agreement of December 8, 1958. In this connection the appellants, having succeeded in their contention that *The Treasury Branches Act* is *ultra vires*, it follows that the agreement of December 8, 1958 has no existence in law: *Brougham v. Dwyer, supra*. That does not, of course, nullify what was actually done by the appellants at that time when, as I have found, they transferred properties to the respondent outright at an agreed valuation of $12,053.59. However, because the agreement is a nullity, the appellants cannot maintain an action on it either for rescission or damages as claimed. The learned trial judge dismissed the claim for rescission and damages on the merits. On the basis that the agreement has no existence in law, I do not find it necessary to go into the merits on these issues.

63 In the result, there will be a declaration that *The Treasury Branches Act* is *ultra vires*. There will be an accounting as aforesaid and fixing the rate of interest in the said accounting at the legal rate of five per cent per annum from the date the various amounts were received by the several appellants. The respondent will have judgment for the amounts and interest thereon which the said accounting will show was received by the individual appellants, Breckenridge Speedway Ltd., Oscar Green and Irene Janet Green. Title to the properties known as Green's body shop and the dwelling house will be transferred back to the transferors thereof and the sum of $25,000

and interest accruing thereon being held in trust as representing the Wainwright property will be credited to Breckenridge Speedway Ltd. in the said accounting.

64 As to costs, the appellants have failed in their main claim to have deleted from the moneys owing by them the amounts of the disputed cheques to Consolidated and they have also failed in respect of the three pieces of property transferred in May, 1959 as payment on account. The respondent has failed in her cross-appeal. In the circumstances, there should be no costs to the appellants or the respondent in this court.

Spence, J. **concurs with Hall, J.:**

Pigeon, J. **concurs with Martland, J.:**

2018 CAF 132, 2018 FCA 132
Federal Court of Appeal

Canada (Citizenship and Immigration) v. Tennant

2018 CarswellNat 12342, 2018 CarswellNat 3601, 2018 CAF 132, 2018 FCA 132, [2018] F.C.J. No. 707, 294 A.C.W.S. (3d) 299

THE MINISTER OF CITIZENSHIP AND IMMIGRATION (Appellant) and ANDREW JAMES FISHER-TENNANT BY HIS GUARDIAN AT LAW, JONATHAN TENNANT (Respondent)

David Stratas J.A.

Judgment: July 4, 2018
Docket: A-104-18

Counsel: Greg George (written), David Joseph (written), Eleanor Elstub (written), for Appellant
Martha A. Cook (written), for Respondent

***David Stratas J.A.*:**

1 The Minister appeals from the judgment dated February 13, 2018 of the Federal Court (*per* Ahmed J.): 2018 FC 151 (F.C.). The Federal Court declared the respondent to be a citizen of Canada.

2 The Federal Court did not certify a question under subsection 22.2(*d*) of the *Citizenship Act*, R.S.C., 1985, c. C-29. This subsection provides that this Court cannot hear an appeal from the Federal Court unless the Federal Court has certified a question for its consideration.

3 The respondent has brought a motion under Rule 74 of the *Federal Courts Rules*, SOR/98-106, asking for the notice of appeal to be removed from the court file and the court file to be closed because this Court lacks jurisdiction.

A. Has this Court already decided the matter?

4 Upon the filing of the notice of appeal in March, 2018, the Registry forwarded it to this Court for direction. In a single-sentence direction, this Court allowed the notice of appeal to be filed. In making this direction, has this Court already decided the issue under Rule 74?

5 The Minister answers that question in the affirmative. The respondent obviously thinks not: he has brought a motion under Rule 74.

6 The transmittal sheet from the Registry that prompted the Court's direction suggested that at that time Rule 72 was the concern. Thus, it may be that this Court's earlier direction that the notice of appeal may be accepted for filing was only a ruling on Rule 72, not Rule 74.

7 Rule 72 and Rule 74 fulfil different purposes. Rule 72 concerns formal defects in a document presented for filing or the failure to satisfy conditions precedent for the filing of a document; Rule 74 deals with whether a document should be removed because it suffers from a fatal substantive defect, such as jurisdiction. See *Rock-St Laurent v. Canada (Minister of Citizenship & Immigration)*, 2012 FCA 192, 434 N.R. 144 (F.C.A.) at paras. 20-29.

8 The certified question requirement can be a matter of form to be addressed under Rule 72. A notice of appeal must be in Form IR-4 under Rule 20 of the *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22 and the Form requires the appellant to set out the certified question. In this case, it is possible that the Court noticed the absence of a question on the notice of appeal, thought that one had been stated, regarded the absence as a mere oversight of form, and allowed the notice of appeal to be filed. Left only with a single sentence directing the Registry to file the notice of appeal, I cannot be certain that this Court considered the substantive issue. Therefore, I shall entertain the substantive issue raised in the respondent's motion under Rule 74: whether this Court has jurisdiction to consider this appeal despite the absence of a certified question.

B. The applicable law

9 The certified question requirement serves only a "gatekeeping" function: *Kanthasamy v. Canada (Minister of Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 S.C.R. 909 (S.C.C.). Once appellants get past the requirement, they can raise any issues that affect the validity of the appeal. This Court explained this as follows:

> Once an appeal has been brought to this Court by way of certified question, this Court must deal with the certified question and all other issues that might affect the validity of the judgment under appeal: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193 at para. 12; *Harkat v. Canada (Citizenship and Immigration)*, 2012 FCA 122, [2012] 3 F.C.R. 635at para. 6. The certification of a question "is the trigger by which an appeal is justified" and, once triggered, the appeal concerns "the judgment itself, not merely the certified question": *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, 160 D.L.R. (4th) 193 at para. 25. Simply put, "once a case is to be considered by the Federal Court of Appeal, that Court is not restricted only to deciding the question certified"; instead, the Court may "consider all aspects of the appeal before it": *Ramoutar v. Canada (Minister of Employment and Immigration)* (1993), 65 F.T.R. 32, [1993] 3 F.C.R. 370 at pp. 379-380.

(*Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 157 (F.C.A.) at para. 50.)

10 Subsection 22.2(*d*) of the *Citizenship Act* and subsection 74(*d*) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 both impose a statutory bar against appeals: appeals shall not be brought to this Court unless the Federal Court has certified a question. In particular, both provide that "an appeal to the Federal Court of Appeal may be made only if, in rendering judgment, the [Federal Court] certifies that a serious question of general importance is involved and states the question." From all appearances, these are absolute bars.

11 Nevertheless this Court has recognized certain "well-defined" and "narrow" categories of exception and has allowed appeals falling within the categories to be brought: see, *e.g.*, the summary in *Es-Sayyid v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FCA 59, [2013] 4 F.C.R. 3 (F.C.A.) at para. 28.

12 The judicial implication of exceptions into seemingly absolute bars may strike some as strange. After all, judges, like everyone else, are subject to the laws passed by Parliament. Only Parliament can legislate, not judges. Judges have no business amending Parliament's laws. This is nothing more than the "hierarchy of law" described in *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128 (F.C.A.) at para. 82: a constitutional provision or principle takes precedence over statutory and subordinate legislative provisions, and they take precedence over judge-made common law. Put another way, only a constitutional principle can trump or modify legislation: *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control & Licensing Branch)*, 2001 SCC 52, [2001] 2 S.C.R. 781 (S.C.C.).

13 Thus, the only plausible basis for the judge-made exceptions to the statutory bars is a constitutional principle. Here, that constitutional principle is the rule of law, recognized in the preamble to the *Constitution Act, 1982* and in the unwritten principles of the Constitution. On occasion, the case law under subsection 74(*d*) explicitly acknowledges this: see *e.g. Canada (Minister of Citizenship & Immigration) v. Huntley*, 2011 FCA 273, [2012] 3 F.C.R. 118 (F.C.A.) at para. 7.

14 The recognized exceptions to the statutory bars — all of which exemplify rule of law concerns — include the Federal Court's failure to exercise jurisdiction in circumstances where it must exercise it (*Canada (Solicitor General) v. Subhaschandran*, 2005 FCA 27, [2005] 3 F.C.R. 255 (F.C.A.)), and a lack of jurisdiction owing to some fundamental flaw in the proceedings going to the root of the Federal Court's ability to decide the case (*Canada (Minister of Citizenship & Immigration) v. Katriuk* (1999), 235 N.R. 305 (Fed. C.A.); *Sellathurai v. Canada (Minister of Public Safety & Emergency Preparedness)*, 2011 FCA 1 (F.C.A.) at para. 6 and *Canada (Minister of Citizenship and Immigration) v. Goodman*, 2016 FCA 126 (F.C.A.) at para. 3), such as a reasonable apprehension of bias (*Zundel v. Canada (Minister of Citizenship & Immigration)*, 2004 FCA 394, 331 N.R. 180 (F.C.A.)).

15 An alleged error of law — even one where "an appeal would certainly succeed if it were entertained" — is not an exception to the statutory bars: *Mahjoub v. Canada (Minister of Citizenship & Immigration)*, 2011 FCA 294, 426 N.R. 49 (F.C.A.) at para. 12; *Huntley* at para. 8; *Goodman* at para. 9.

16 The case law has not defined particularly well the exception for loss of jurisdiction for some fundamental flaw in the proceeding going to the root of the Federal Court's ability to decide the case. This motion provides this Court with an opportunity to offer a better explanation for it. The explanation I offer does not change the threshold for the exception. It remains an exceedingly difficult one to meet. Indeed, most of the cases in para. 14, above that assert the existence of this exception deny it on the particular circumstances of the case.

17 This exception covers cases where:

- it is alleged that there is a fundamental flaw going to the very root of the Federal Court's judgment or striking at the Federal Court's very ability to decide the case — examples include a blatant exceedance of authority obvious from the face of the judgment or an infringement of the rule against actual or apparent bias supported by substantial particularity in the notice of appeal; and

- the flaw raises serious concerns about the Federal Court's compliance with the rule of law.

This exception does not include contentious debates over issues of statutory interpretation, errors of law, exercises of judicial discretion, and the weight that should be accorded to evidence and its assessment.

18 The threshold is high — one must show a flaw that is "fundamental," strikes at "the very root" of the judgment or "the very ability" of the Court to hear the case, in some circumstances has "substantial particularity," and raises "serious concerns" regarding the rule of law. This high threshold allows Parliament's preference for an absolute bar to prevail in all cases except for those most rare cases where concerns based on the constitutional principle of the rule of law are the most pronounced.

19 This explanation of the exception does not use the word "jurisdiction." "Jurisdiction" is an unhelpful word that too often is thrown around with abandon. When people speak of a body regulated by legislation, such as the Federal Court, going "beyond its jurisdiction," they usually mean that the body has gone beyond the powers given to it by the statute, properly interpreted. Seen in this way, issues of so-called "jurisdiction" are just issues of legislative interpretation: *Canadian Copyright Licensing Agency (Access Copyright) v. Canada*, 2018 FCA 58 (F.C.A.) at paras. 57-59; *Canadian National Railway v. Emerson Milling Inc.*, 2017 FCA 79 (F.C.A.) at paras. 15-16; *City of Arlington v. Federal Communications Commission*, 133 S.Ct. 1863 (U.S. Sup. Ct. 2013). And

errors in legislative interpretation are at best just errors of law, matters caught by the statutory bar: *Mahjoub* (2011), *Huntley* and *Goodman*, above.

20 Seen in this way, "jurisdiction" is not some sort of a magic password that opens the door to access to this Court. Rather, it is nothing more than a rhetorical label people sometimes use to try to boost a garden-variety issue of statutory interpretation into something more significant. In my view, in describing this very rare exception to the statutory bars it would be best if this word were avoided altogether. Rather, the exception is for fundamental flaws in well-defined, extraordinary circumstances.

21 Further underscoring the very rare nature of this exception is the meaning of the "rule of law." The "rule of law" does not mean whatever counsel can decry as egregious or unfair: *Galati v. Harper*, 2016 FCA 39 (F.C.A.) at para. 43 (concurring but not disputed by the majority) and cases cited therein. Rather, it is a limited concept illustrated by the very rare cases that have successfully applied it in this context.

22 In this context, the rule of law takes its flavour from the ills sought to be prevented by this exception. If this exception did not exist, a judge of the Federal Court could always blatantly disregard binding law and do whatever he or she wants in a case based on her or his own ideology, whim or personal idiosyncratic feelings, and then decline to certify a question. The effect? Immunization from any accountability or review.

23 "L'etat, c'est moi" and "trust us, we got it right" have no place in our democracy. In our system of governance, all holders of public power, even the most powerful of them — the Governor-General, the Prime Minister, Ministers, the Cabinet, Chief Justices and puisne judges, Deputy Ministers, and so on — must obey the law: *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, 161 D.L.R. (4th) 385 (S.C.C.); *United States v. Nixon*, 418 U.S. 683 (U.S. Dist. Ct. D.C. 1974); *Marbury v. Madison*, 5 U.S. 137 (U.S. Dist. Ct. D.C. 1803); *Magna Carta* (1215), art. 39. From this, just as night follows day, two corollaries must follow. First, there must be an umpire who can meaningfully assess whether the law has been obeyed and grant appropriate relief. Second, both the umpire and the assessment must be fully independent from the body being reviewed. See the discussion in *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 128 (F.C.A.) at paras. 77-79, *Slansky v. Canada (Attorney General)*, 2013 FCA 199, [2015] 1 F.C.R. 81 (F.C.A.) at paras. 313-315 (dissenting but not disputed by the majority), and the numerous authorities cited therein.

24 Tyranny, despotism and abuse can come in many forms, sizes, and motivations: major and minor, large and small, sometimes clothed in good intentions, sometimes not. Over centuries of experience, we have learned that all are nevertheless the same: all are pernicious. Thus, we insist that all who exercise public power — no matter how lofty, no matter how important — must be subject to meaningful and fully independent review and accountability.

C. Application of the applicable law to this case

25 In this case, the judgment of the Federal Court granted the respondent citizenship. But the clear language of the *Citizenship Act* gives this power only to the Minister. The judgment on its face, if upheld, would be a clear exceedance of authority not requiring a contentious debate over statutory interpretation — a fundamental flaw going to the very root of the Federal Court's judgment or striking at the Federal Court's very ability to decide the case in the way it did. The clear, apparent exceedance of authority implicates the rule of law in a serious way.

26 It follows, then, that this Court has jurisdiction over the notice of appeal; put another way, this Court should not remove the notice of appeal from the court file and close the file. To the extent that, contrary to what I have held, this Court has already pronounced on this substantive matter in its earlier direction, my ruling here effectively confirms it.

27 In reaching this conclusion, this Court is not in any way deciding the appeal against the respondent. Nor are serious aspersions being cast upon the Federal Court in this case. All that is being said is that the type of ground alleged — not yet proven — is of the qualitative kind that triggers an exception to the statutory bar, nothing more. And even if this ground is borne out, it may just be a technical error: although the Federal Court cannot grant citizenship, the same practical result should follow in this case because a mandatory order against the Minister forcing him to grant citizenship passes muster under the standard of review. (Note that the appellate standard of review applies, not the administrative law standard of review, to the Federal Court's choice of remedy: *Canada (Attorney General) v. Long Plain First Nation*, 2015 FCA 177, 388 D.L.R. (4th) 209 (F.C.A.) at paras. 88-89.)

28 I note that the reasons of the Federal Court speak of something called a "directed verdict" — a remedy not listed under section 18.1 of the *Federal Courts Act*. Perhaps what was meant was *mandamus*, which is a listed remedy: *Lebon v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 FCA 55, 444 N.R. 93 (F.C.A.) at para. 13; *Garshowitz v. Canada (Attorney General)*, 2017 FCA 251 (F.C.A.) at para. 8. But *mandamus* — the requiring of an administrative decision-maker to take positive action — is granted only where certain relatively rarely occurring prerequisites are met: *LeBon* at para. 14 and authorities cited therein; see also *D'Errico v. Canada (Attorney General)*, 2014 FCA 95, 459 N.R. 167 (F.C.A.) at para. 16. And under *mandamus*, it is the Minister that performs the required administrative action, not the Court.

29 These issues and all other issues said to affect the validity of the Federal Court's judgment will be for the hearing panel to decide.

D. Disposition

30 The respondent's motion to remove the notice of appeal from the court file and close the court file will be dismissed. Costs will be in the cause.

Motion dismissed.

1998 CarswellNat 387
Supreme Court of Canada

Canada (Human Rights Commission) v. Canadian Liberty Net

1998 CarswellNat 387, 1998 CarswellNat 388, [1998] 1 S.C.R. 626, [1998] 2 F.C. i, [1998] S.C.J. No. 31, 147 F.T.R. 305 (note), 157 D.L.R. (4th) 385, 224 N.R. 241, 22 C.P.C. (4th) 1, 31 C.H.R.R. D/433, 50 C.R.R. (2d) 189, 6 Admin. L.R. (3d) 1, 78 A.C.W.S. (3d) 705, J.E. 98-935

Canadian Human Rights Commission, Appellant v. Canadian Liberty Net and Tony McAleer (alias Derek J. Peterson), Respondents

Canadian Liberty Net and Tony McAleer (alias Derek J. Peterson), Appellants v. Canadian Human Rights Commission, Respondent and The Attorney General of Canada and the League for Human Rights of B'Nai Brith Canada, Interveners

L'Heureux-Dubé, Gonthier, McLachlin, Major and Bastarache JJ.

Heard: December 10, 1997
Judgment: April 9, 1998
Docket: 25228

Proceedings: reversing (1996), 192 N.R. 298 (Fed. C.A.); affirming (1996), 192 N.R. 313 (Fed. C.A.); affirming (1992), 48 F.T.R. 285 (Fed. T.D.); affirming (1996), 192 N.R. 313 (Fed. C.A.); affirming (1992), 56 F.T.R. 42 (Fed. T.D.)

Counsel: *William F. Pentney* and *Eddie Taylor*, for the appellant/respondent the Canadian Human Rights Commission.
Douglas H. Christie, for the respondents/appellants Canadian Liberty Net and Tony McAleer.
David Sgayias, Q.C., and *Brian Saunders*, for the intervener the Attorney General of Canada.
David Matas, for the intervener the League for Human Rights of B'Nai Brith Canada.

Subject: Public; Civil Practice and Procedure; Constitutional

APPEAL from judgment reported 192 N.R. 298, 132 D.L.R. (4th) 95, 108 F.T.R. 79 (note), [1996] 1 F.C. 804, 38 Admin. L.R. (2d) 27, *(*sub nom. *Canada (Human Rights Commission) v. Canadian Liberty Net (No. 2))* 26 C.H.R.R. D/242 (Fed. C.A.), allowing appeal from judgment reported 48 F.T.R. 285, 9 C.R.R. (2d) 330, 90 D.L.R. (4th) 190, [1992] 3 F.C. 155, 14 Admin. L.R. (2d) 294, *(*sub nom. *Canada (Human Rights Commission) v. Candian Liberty Net (No. 1))* 26 C.H.R.R. D/194 (Fed. T.D.), granting application for interlocutory injunction.

APPEAL from judgment reported 192 N.R. 313, 108 F.T.R. 80 (note), [1996] 1 F.C. 787, *(*sub nom. *Canada (Human Rights Commission) v. Canadian Liberty Net (No. 3))* 26 C.H.R.R. D/260 (Fed. C.A.), dismissing appeal from judgment reported, *(*sub nom. *Canada (Human Rights Commission) v. Canadian Liberty Net (No. 2))* 56 F.T.R. 42, [1992] 3 F.C. 504, *(*sub nom. *Canada (Human Rights Commission) v. Canadian Liberty Net (No. 2))* 26 C.H.R.R. D/221 (Fed. T.D.), convicting respondents for contempt of court. POURVOI du jugement publié à 192 N.R. 298, 132 D.L.R. (4th) 95, 108 F.T.R. 79 (note), [1996] 1 F.C. 804, 38 Admin. L.R. (2d) 27, *(*sub nom. *Canada (Human Rights Commission) v. Canadian Liberty Net (No. 2))* 26 C.H.R.R. D/242 (Fed. C.A.), accueillant l'appel du jugement publié à 48 F.T.R. 285, 9 C.R.R. (2d) 330, 90 D.L.R. (4th) 190, [1992] 3 F.C. 155, 14 Admin. L.R. (2d) 294, *(*sub nom. *Canada (Human Rights Commission) v. Candian Liberty Net (No. 1))* 26 C.H.R.R. D/194 (Fed. T.D.), accordant la requête pour injonction interlocutoire. POURVOI du jugement publié à 192 N.R. 313, 108 F.T.R. 80 (note), [1996] 1 F.C. 787, *(*sub nom. *Canada (Human Rights Commission) v. Canadian Liberty Net (No. 3))* 26 C.H.R.R. D/260 (Fed. C.A.), rejetant l'appel du jugement publié à (sub nom. *Canada (Human Rights Commission) v. Canadian Liberty Net (No. 2)*), 56 F.T.R. 42, [1992] 3 F.C. 504, *(*sub nom. *Canada (Human Rights Commission) v. Canadian Liberty Net (No. 2))* 26 C.H.R.R. D/221 (Fed. T.D.), condamnant les défendeurs pour outrage au tribunal.

Statutes considered by/Législation citée par *McLachlin* and *Major JJ.* (dissenting in part):

— referred to

— considered

— considered

— considered

— considered

— considered

— referred to

— considered

— considered

***Bastarache J.* (*L'Heureux-Dubé* and *Gonthier JJ.* concurring):**

1 This case raises the issue of the existence and proper exercise of an injunctive power in the Federal Court of Canada in support of federal legislation, the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 (the "*Human Rights Act*"). As the injunction sought in this case would prohibit

speech, it also implicates important issues regarding the guarantee of freedom of expression in s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*. Finally, there is the question of whether a person who violates an injunction can invoke lack of jurisdiction in the granting court, or wrongful exercise of that jurisdiction, as a defence to proceedings in contempt.

Facts

2 In December 1991, the Canadian Human Rights Commission (the "Commission") received five complaints regarding telephone messages made available by an organization advertising itself as "Canadian Liberty Net". Callers to the Liberty Net phone number were offered a menu of telephone messages to choose from, by subject area. These messages included denials of the existence or extent of the Holocaust; assertions that non-white "aliens" are importing crime and problems into Canada, and the implicit suggestion that violence could be helpful to "set matters straight"; criticism of an alleged "Kosher tax" on some foods to ensure that some percentage can be certified as Kosher; complaints about the alleged domination of the entertainment industry by Jews; and a number of messages decrying the alleged persecution of well-known leaders of the white supremacist movement. After having investigated the content of the messages, the Commission requested on January 20, 1992 that a Human Rights Tribunal (the "Tribunal") be empanelled to decide whether these messages were in violation of s. 13(1) of the *Human Rights Act*, which makes it a "a discriminatory practice ... to communicate telephonically ... any matter that is likely to expose a person or persons to hatred or contempt ... on the basis of a prohibited ground of discrimination". Section 3 of the Act includes race, national or ethnic origin, colour, and religion as prohibited grounds of discrimination.

3 On January 27, 1992, one week after the request to the Tribunal, the Commission filed an originating notice of motion before the Federal Court of Canada, Trial Division, seeking an injunction, enjoining Liberty Net, including Tony McAleer and any other associates in the Liberty Net organization, from making available any phone messages "that are likely to expose persons to hatred or contempt by reason of the fact that those persons are identifiable on the basis of race, national or ethnic origin, colour or religion", until a final order of the Tribunal is rendered. On February 5 and 6, the motion was argued, and on March 3, 1992, Muldoon J. granted the injunction sought: [1992] 3 F.C. 155 (Fed. T.D.). Upon further submissions of the parties, Muldoon J. varied the content of his order slightly, although those changes are not germane to any controversy in this appeal.

4 A Tribunal was empanelled in response to the Commission's request and held hearings for a total of five days in May and August 1992. The panel reserved its decision for more than a year, finally rendering a decision on September 9, 1993. Thus, the injunction order of Muldoon J. was in effect for almost eighteen months, from March 3, 1992 until September 9, 1993.

5 On June 5, 1992, a Commission investigator telephoned the Liberty Net phone number and heard a message referring callers to a new number of the Canadian Liberty Net "in exile" where they could "say exactly what we want without officious criticism and sanction". This new number was rented from a telephone company in the State of Washington, in the United States. Callers to that number then had access to a similar menu of messages as had been available prior to the issuance of Muldoon J.'s order of March 3. Indeed, Liberty Net admitted before the Court of Appeal that some of those messages were specifically covered by the injunction, but they contended that the messages were not in breach of the order because they emanated from a source outside Canada, and thus outside the jurisdiction of the Federal Court.

Issues

6 Two separate cases heard by the Federal Court have been combined in the appeal now before this Court. One is an appeal from the original order of Muldoon J. as to the issuance of the order (I will refer to this as the "injunction appeal"); the other is an appeal from a finding of contempt of court by Teitelbaum J. ([1992] 3 F.C. 504 (Fed. T.D.)) arising from the message on the Canadian Liberty Net phone line referring callers to the new number in the United States which contained messages whose content was proscribed by the order (the "contempt appeal"). The injunction appeal divides into two questions: first, did the Federal Court have jurisdiction to issue the injunction? Second, if it did have jurisdiction to issue the injunction, was the issuance of an injunctive order appropriate in this case? The contempt appeal has been inextricably tied to the substance of the injunction appeal by the defendants in this case. The third question before this Court, which arises from the contempt appeal, is: if the injunction was wrongly issued on either basis above, can the defendants be held in contempt of court for breach of the order?

7 Strictly speaking, since there has been a final determination by the Human Rights Tribunal on the substantive issue of the violation of s. 13(1), and an order made by the Tribunal which supplants the order of Muldoon J., the injunction appeal is now moot. However, given the manner in which the questions have been presented to this Court, it is impossible to address the contempt issue without addressing to some degree the injunction issue. Since it would be inconvenient and difficult at the outset to distinguish those principles pertaining to the injunction which are necessary to the contempt appeal from those which are not, I propose to articulate those principles as fully as possible given the facts of the case before us, and then turn to the contempt appeal. In my view, this is particularly important since there appears to have been considerable confusion in the courts below in distinguishing the tests for determining the *existence* of jurisdiction, from the *appropriateness* of exercising jurisdiction in a particular case. Having once set out and distinguished those principles, however, it is my view that there clearly is no need to apply the principles as to the *appropriateness* of the injunction in this case, as the contempt appeal in no way turns on that point. That point is undoubtedly moot and I propose to leave the application of those principles to specific facts for another day.

First Question: Does the Federal Court Have Jurisdiction?

8 Does the Federal Court have jurisdiction to issue an injunction in support of the prohibitions contained in the *Human Rights Act*? The classic statement as to the jurisdiction of the Federal Court in modem jurisprudence was given by McIntyre J. in *Miida Electronics Inc. v. Mitsui O.S.K. Lines Ltd.*, [1986] 1 S.C.R. 752 (S.C.C.), at p. 766, who posits three requirements:

> 1. There must be a statutory grant of jurisdiction by the federal Parliament.
>
> 2. There must be an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction.
>
> 3. The law on which the case is based must be "a law of Canada" as the phrase is used in s. 101 of the *Constitution Act, 1867*.

In my view, it is the first of these three conditions which presents the greatest obstacle for the Commission. It attempted to found a statutory grant of jurisdiction on three grounds arising from the interlocking structure of the *Federal Court Act*, R.S.C., 1985, c. F-7, and the *Human Rights Act*.

(i) Section 25 of the Federal Court Act

9

> **25.** The Trial Division has original jurisdiction, between subject and subject as well as otherwise, in any case in which a claim for relief is made or a remedy is sought under or by virtue of the laws of Canada if no other court constituted, established, or continued under any of the *Constitution Acts, 1867 to 1982* has jurisdiction in respect of that claim or remedy.

Muldoon J. found that no other court had jurisdiction over an interlocutory order giving effect to the *Human Rights Act* (at p. 168) and that this section therefore was a grant of jurisdiction to the Federal Court. The Tribunal was not competent to issue an interlocutory, only a final, order. By contrast, Strayer J.A. for the majority of the Court of Appeal ([1996] 1 F.C. 804 (Fed. C.A.)) engaged in an extensive analysis of the provisions of the *Human Rights Act* and found that Parliament had implicitly intended the scheme of remedies conferred on the Tribunal to be exhaustive. Thus, another court (the Tribunal) had, in fact, been vested with jurisdiction which ousted that of the Federal Court pursuant to s. 25. He also asserted, *obiter*, that a provincial superior court did not have jurisdiction to issue an injunction.

10 Before this Court, the appellant abandoned its argument under s. 25. It did so on the basis of this Court's decision in *B.M.W.E. v. Canadian Pacific Ltd.*, [1996] 2 S.C.R. 495 (S.C.C.), in which this Court held that a provincial superior court constituted under s. 96 of the *Constitution Act, 1867*, does have authority to issue an injunction in aid of the *Canada Labour Code*, R.S.C.,

1985, c. L-2, notwithstanding the comprehensiveness of the provisions of that Act. McLachlin J. stated the law succinctly (at paras. 5 and 7):

> The governing principle on this issue is that notwithstanding the existence of a comprehensive code for settling labour disputes, where "no adequate alternative remedy exists" the courts retain a residual discretionary power to grant interlocutory relief such as injunctions, a power which flows from the inherent jurisdiction of the courts over interlocutory matters....
>
> ...deference to labour tribunals and exclusivity of jurisdiction to an arbitrator are not inconsistent with a residual jurisdiction in the courts to grant relief unavailable under the statutory labour scheme. There has never been any dispute in this case that the arbitrator and the arbitrator alone is entitled to resolve the dispute between the employer and the employees.

The "courts" to which she refers are the provincial superior courts, and, in that case, the British Columbia Supreme Court "in the exercise of its inherent jurisdiction" (at para. 6). The features of the *Canada Labour Code* in issue in the *B.M.W.E.* case are in all salient respects identical to the features of the *Human Rights Act*: an administrative tribunal vested with power of final determination of claims brought under an Act; absence of reference to injunctive relief in the Act; and a tailored scheme of other remedies which was held not to implicitly preclude the existence of an injunctive remedy. The appellant concluded that those facts were applicable to the case at bar, and that, therefore, there was an "other court" which had jurisdiction which precluded the operation of s. 25.

11 Section 25 was not before the Court in *B.M.W.E.*, and the relationship between that section and the inherent jurisdiction of a provincial superior court was not the object of that decision. The appellant's concession before us relates to this relationship. Given my findings below as to the proper interpretation of s. 44 of the *Federal Court Act*, and in the absence of argument by the parties on this point, I prefer to exercise caution and refrain from expressing any opinion on this issue.

(ii) Implied Grant in the Human Rights Act

12 The Commission urged *R. v. Rhine*, [1980] 2 S.C.R. 442 (S.C.C.), upon us for the proposition that there need not be an express grant of authority for jurisdiction to be found in the provisions of a federal Act. But in that case, there was a clear statutory grant of jurisdiction under the *Federal Court Act* and the issue being decided by this Court, to use the language adopted in *Miida, supra*, was whether the cause of action was nourished by existing federal law. The principles in that case are not applicable to the question of whether there is an implied statutory grant.

13 Although Muldoon J. did not consider the question of implied statutory grant in the *Human Rights Act*, Strayer J.A. devotes a significant part of his analysis to this question. He draws upon remarks by Dickson C.J. in *Canada (Canadian Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892 (S.C.C.), at p. 924, as to the "conciliatory nature" of the procedures under the Act,

whose objective is "to encourage reform of the communicator of hate propaganda". Dickson C.J. is also quoted as observing that "s. 13(1) plays a minimal role in the imposition of moral, financial or incarcerating sanctions, the primary goal being to act directly for the benefit of those likely to be exposed to the harms caused by hate propaganda" (p. 940). Strayer J.A. asserts (at p. 822) that:

> The result in the Supreme Court, I believe, demonstrates the reason for the very cautious approach taken by Parliament in section 13 to remedy telephone hate messages within the context of the remedial provisions of the *Canadian Human Rights Act*. It also militates against there being an implied authority for the courts to issue interlocutory orders to stop communications prior to a full hearing by a tribunal.... The violation of an injunction based on such evidence involves criminal sanctions, something not contemplated by the Act until a full hearing by a tribunal, its determination of a violation of subsection 13(1), the issue of the prohibitory order, and the violation of that order.

14 With respect, this reasoning suffers from two flaws. First, the concerns expressed in the passage above could be dealt with in the context of the criteria for determining the appropriateness of issuing an injunction. A stringent test for the issuance of an injunction would satisfy Strayer J.A.'s concern that the constitutional constraints on the exercise of judicial power under s. 13(1) be respected. In my view, assuming that these concerns affect an implied jurisdiction is to mistake the question of appropriateness of exercising, for the existence, of the injunctive power.

15 Second, Strayer J.A. does not indicate the criteria which he considers necessary for a finding of implied jurisdiction. The intervener Attorney General for Canada advocated a relatively flexible and fluid approach to determining whether jurisdiction should be implied from the provisions of federal legislation, and suggested that the *Human Rights Act* contained such an implied jurisdiction. Indeed, although Strayer J.A. finds against Federal Court jurisdiction in this case, his methodology actually lends support to the idea of a relatively fluid approach to implied jurisdiction.

16 In my opinion, the standard for finding an implied power in the existing jurisprudence is actually much more stringent. An injunctive power has only been implied where that power is actually *necessary* for the administration of the terms of the legislation; coherence, logicality, or desirability are not sufficient. The Attorney General cited two cases: *New Brunswick Electric Power Commission v. Maritime Electric Co.*, [1985] 2 F.C. 13 (Fed. C.A.), and *Cooper v. Canada (Human Rights Commission)*, [1996] 3 S.C.R. 854 (S.C.C.). In the latter case, the implied "jurisdiction" referred not to remedy, but rather to whether the Human Rights Commission had the power to make determinations as to the constitutionality of its own constitutive statute. In considering that question. La Forest J., at para. 59, stated that "[i]n such an endeavour practical considerations may be of assistance in determining the intention of Parliament, but they are not determinative". But the "endeavour" in that case was not the addition of remedies to those spelled out in an Act, but rather the standard of review exercisable by a court over an administrative

body. Reading a remedial power into a statute is of an entirely different nature than attempting to determine legislative intent as to the proper standard of review and relative competence to decide constitutionality as between an administrative body and a court. In the latter case, the function must be exercised by one or the other institution, whereas in the former, the issue is whether the power exists at all where the Act is silent. Attempting to use the rules of implicit legislative intent in one case should not be automatically inferred for the other case.

17 The leading Federal Court authority on "implied" remedial jurisdiction suggests that far more conservative interpretative principles apply. In *New Brunswick Electric Power, supra* (*per* Stone J.A., Mahoney and Ryan JJ.A. concurring), the Federal Court of Appeal found that there was an implied right to issue a stay of execution of an order of the National Energy Board pending the disposition of an appeal where there was a statutory right of appeal. Quoting from an *obiter* remark of Pratte J.A. in *National Bank of Canada v. Granda* (1984), 60 N.R. 201 (Fed. C.A.), at p. 202, the court observed (at p. 27):

> It is clear that those provisions do not expressly confer on the court a power to stay the execution of decisions which it is asked to review. However, it could be argued that Parliament has conferred this power on the court by implication, in so far as the existence and exercise of the power are necessary for the court to fully exercise the jurisdiction expressly conferred on it by s. 28. In my opinion, this is the only possible source of any power the Court of Appeal may have to order a stay in the execution of a decision which is the subject of an appeal under s. 28. It follows logically that, if the court can order a stay in the execution of such decisions, it can only do so in the rare cases in which the exercise of this power is necessary to allow it to exercise the jurisdiction conferred on it by s. 28. [Emphasis added.]

In that case, failure to order a stay would have rendered the provision for the appeal nugatory. To a similar effect, and in contrast to the position of a court of inherent jurisdiction, the following observations were made in *Natural Law Party of Canada v. Canadian Broadcasting Corp.* (1993), [1994] 1 F.C. 580 (Fed. T.D.) (*per* McKeown J.), at pp. 583-84:

> There is no provision in the *Broadcasting Act* for providing relief on an expedited basis, but this does not mean that the Federal Court of Canada can obtain jurisdiction. Section 23 of the *Federal Court Act* ... limits the jurisdiction of the Federal Court to the extent that jurisdiction has been otherwise specially assigned. Since the *Broadcasting Act* has assigned jurisdiction to the CRTC, I do not have jurisdiction.
>
> This Court is a statutory court. I am unable to rely on the inherent jurisdiction of other superior courts as was the case in *Green Party Political Assn. of British Columbia v. Canadian Broadcasting Corp. (CBC)* ... where Colver J. accepted jurisdiction. Colver J. was a judge of the Supreme Court of British Columbia, which is not a statutory court. There is no gap in the jurisdiction.

Because s. 23 of the *Federal Court Act* referred the question of jurisdiction to the *Broadcasting Act*, the Court looked primarily to that Act as the foundation for its jurisdiction. Distinguishing his position from that of a court of inherent jurisdiction, McKeown J. refused to read that Act liberally to imply a power, even though he recognized that an inherent jurisdiction court might do so. Subject to what I have to say below about the operation of s. 44, this decision also indicates that "gaps" within federal legislation may only be filled where such a power is a necessary incident to the discharge of the scheme of the Act as constituted.

18 The scheme of the *Human Rights Act* does not come close to that It is not a necessary incident to any of the Tribunal's functions or powers that there be an injunctive power to restrain violations of s. 13(1). The existence of a "gap" in the range of remedies available in the Act itself does not mean that Parliament intended the Federal Court to have the power to issue an injunction. The Act could just as easily be read to mean that Parliament intended the "gap" to exist. Under these circumstances, it is inappropriate to engage in an extensive analysis of what is desirable to carry out the aims of the Act. The threshold test was precisely stated by Stone J.A. in *New Brunswick Electric Power, supra*, at p. 27:

> These observations bring into focus the absurdity that could result if, pending an appeal, operation of the order appealed from rendered it nugatory. Our appellate mandate would then become futile and be reduced to mere words lacking in practical substance.... The appeal process would be stifled. It would not, as it should, hold out the possibility of redress to a party invoking it. This Court could not, as was intended, render an effective result.

It cannot be said that the other remedies contained in the *Human Rights Act* would be rendered "nugatory" in the absence of an injunctive power in the Federal Court. Failing that, no such power can be implied into the scheme of the Act.

(iii) Section 44 of the Federal Court Act

19 Section 44 states:

> **44.** In addition to any other relief that the Court may grant or award, a *mandamus*, injunction or order for specific performance may be granted or a receiver appointed by the Court in all cases in which it appears to the Court to be just or convenient to do so, and any such order may be made either unconditionally or on such terms and conditions as the Court deems just.

A number of other sections of the *Federal Court Act* and *Human Rights Act* are helpful in understanding the ambit of this section. First, there are those sections setting out the purposes of the Act relevant to this appeal:

> **Human Rights Act**

> **2.** The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that every individual should have an equal opportunity with other individuals to make for himself or herself the life that he or she is able and wishes to have, consistent with his or her duties and obligations as a member of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability or conviction for an offence for which a pardon has been granted.
>
> **13.**(1) It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.

Second, there are descriptions of the general status and purpose of the Federal Court:

> **Federal Court Act**
>
> **3.** The court of law, equity and admiralty in and for Canada now existing under the name of the Federal Court of Canada is hereby continued as an additional court for the better administration of the laws of Canada and shall continue to be a superior court of record having civil and criminal jurisdiction.
>
> **Constitution Act, 1867**
>
> **101.** The Parliament of Canada may, notwithstanding anything in this Act, from Time to Time provide for the Constitution, Maintenance, and Organization of a General Court of Appeal for Canada, and for the Establishment of any additional Courts for the better Administration of the Laws of Canada.

Third, there are a number of sections of both Acts which describe the powers and relationship between the Federal Court and the *Human Rights Act* adjudication scheme:

> **Human Rights Act**
>
> **57.** Any order of a Tribunal ... may, for the purposes of enforcement, be made an order of the Federal Court by following the usual practice and procedure or, in lieu thereof, by the Commission filing in the Registry of the Court a copy of the order certified to be a true copy, and thereupon that order becomes an order of the Court.

58.(1) Where any investigator or Tribunal requires the disclosure of any information and a minister of the Crown or any other person interested objects to its disclosure, the Commission may apply to the Federal Court for a determination of the matter.

Federal Court Act

17. ...

(6) Where an Act of Parliament confers jurisdiction in respect of a matter on a court constituted or established by or under a law of a province, the Trial Division has no jurisdiction to entertain any proceeding in respect of the same matter unless the Act expressly confers that jurisdiction on the Court.

18.(1) Subject to section 28 [having to do with the original jurisdiction of the Federal Court of Appeal], the Trial Division has exclusive original jurisdiction

(*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....

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.

(3) On an application for judicial review, the Trial Division 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 proceeding of a federal board, commission or other tribunal.

20 The principal objection to s. 44 as a source of jurisdiction to issue an injunction is that there is no "other relief that the Court may grant or award" in this case. This objection has two versions. The first version is that the words used in s. 44 cannot support the exercise of a "free-standing" injunction — that is, an injunction granted where there is no action pending before the court as to the final resolution of the merits of the claim. This objection does not relate to the status of the Federal Court as distinguished from provincial superior courts; rather, it asserts that words akin to s. 44 as applied to *any court* could not support a free-standing injunction, but only an interlocutory injunction pending the determination before *that* court of the cause of action. The objection arises out of a controversy to this effect in English law which has now been resolved by the recent decision of the House of Lords in *Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd.*, [1993] A.C. 334 (U.K. H.L.). In that case, the issue was whether an English court had jurisdiction to

grant an injunction where it was likely (although not certain) that an arbitral body had jurisdiction over the final determination of the dispute. In commenting on a previous case, *"Siskina" (The) v. Distos Compania Naviera S.A.* (1977), [1979] A.C. 210 (U.K. H.L.), which appeared to suggest that there was no such jurisdiction. Lord Browne-Wilkinson stated (at pp. 342-43) that:

> I can see nothing in the language employed by Lord Diplock (or in later cases in this House commenting on *The Siskina*) which suggest that a court has to be satisfied, at the time it grants interlocutory relief, that the final order, if any, will be made by an English court....
>
> Even applying the test laid down by *The Siskina* the court has power to grant interlocutory relief based on a cause of action recognised by English law against a defendant duly served where such relief is ancillary to a final order whether to be granted by an English court or by some other court or arbitral body.

That approach has now been adopted by this Court in the *B.M.W.E.* case already mentioned, where McLachlin J. comments (at para. 16):

> Canadian courts since *Channel Tunnel* have applied it for the proposition that the courts have jurisdiction to grant an injunction where there is a justiciable right, wherever that right may fall to be determined.... This accords with the more general recognition throughout Canada that the court may grant interim relief where final relief will be granted in another forum....

The wording of the clause granting jurisdiction to the Supreme Court of British Columbia in *B.M.W.E.* was virtually identical to that in effect in England at the time of *"Siskina" (The), supra*. The *Law and Equity Act*, R.S.B.C. 1979, c. 224, states:

> **36.** A mandamus or an injunction may be granted or a receiver or receiver manager appointed by an interlocutory order of the court in all cases in which it appears to the court to be just or convenient that the order should be made, and the order may be made either unconditionally or on terms and conditions the court thinks just....

By virtue of this decision, there is now no doubt that the power of a court of inherent jurisdiction to award injunctive relief extends to disputes even in the event that the substance of the dispute falls to be determined by another decision-maker. Based on the principles articulated in *B.M.W.E.*, it is clear that if this injunction had been sought before the Supreme Court of British Columbia, that court could have granted the order.

21 This brings us to the more difficult version of the objection mentioned above. Section 44 uses the words "[i]n addition to any other relief that the Court may grant or award". The plain words might be interpreted in two quite divergent ways. The Commission contends that "in addition to" means simply "separate and apart from" any other relief which the Federal Court may grant or award. Rather than a clause of limitation, it is said to be an introductory clause to a power-

conferring section which is, in all purposes and effects, identical to s. 36 of the *Law and Equity Act*. By contrast, the words "in addition to" might be read as a clause of limitation, which creates an injunctive power only "ancillary to" other remedies which the court could award. Since no other relief may be issued by the Federal Court at the interlocutory stage, it is argued, no injunction is authorized by this section. The idea that there is "other relief" conferred on the court under the interlocking scheme of the *Human Rights Act* and the *Federal Court Act* is rejected, largely on the basis of a strict reading of s. 44. I would add that even if we adopt the "ancillary to" interpretation favoured by the respondents, a liberal approach to those words could favour an interpretation of the various powers of supervision over the Human Rights Tribunal as orders "ancillary to" which an injunctive order could be issued under s. 44.

22 I should say at the outset that I find that both the interpretations which favour a grant of jurisdiction, and that which does not, are plausible on the face of the section. When confronting an interpretative challenge such as this, it is necessary to examine the entire Act in question in order to determine its intendment, and to determine whether the language of the Act can support distinguishing this case from *B.M.W.E.*. The respondents contend that a reading which denies jurisdiction to grant the injunctive remedy is justified by the Federal Court's status as a mere "statutory court", which requires grants of jurisdiction to be read narrowly. By contrast, the Supreme Court of British Columbia is a superior court of inherent jurisdiction, and only it has jurisdiction to issue the injunction in this case.

23 That outcome appears anomalous. The sections of the *Human Rights Act* and *Federal Court Act* indicate a high degree of supervision of the Human Rights Tribunal by the Federal Court. The Federal Court is responsible for judicial review over decisions of the Tribunal (*Federal Court Act*, s. 18.1); it may issue injunctions *against* the Tribunal (*Federal Court Act*, s. 18(1)); recourse to it is necessary to order disclosure of information required in the course of an investigation or Tribunal hearing (*Human Rights Act*, s. 58(1)); and, an order of the Tribunal may be filed with and transformed into an order of the Federal Court (*Human Rights Act*, s. 57). And yet, it is argued that none of these powers are to be accepted as "other relief" because the relief sought at the interlocutory, or pre-filing stage, is said to be conceptually distinct from the relief which may be ordered under these provisions. Meanwhile, the provincial superior court would be competent as a court of "inherent jurisdiction".

24 Of course, while policy factors may be helpful in gleaning Parliament's intention as to whether there has been a statutory grant, they cannot be determinative. But the general statement in s. 3 as to the status of the Federal Court as "a superior court of record having civil and criminal jurisdiction", combined with the many powers of supervision, control, and enforcement of this and many other Tribunals, leaves one wondering why statutory authorization could not be inferred from s. 44 when its language is similar to that used to describe the powers of a superior court in s. 36 of the *Law and Equity Act*.

25 At this point, it is necessary to explore more carefully the concept of "inherent jurisdiction" to determine how it operates to give the provincial superior court remedial jurisdiction, and why this would require that the Federal Court, described as a "statutory court", would be bound by a very strict and narrow reading of its authorizing statute which effectively would deprive it of jurisdiction over an area where it is otherwise explicitly given extensive powers of supervision. Indeed, the doctrine of inherent jurisdiction has been used in this case as a corollary for the proposition that a federal statute granting authority to the Federal Court should be read narrowly. Whether the doctrine of inherent jurisdiction supports that approach merits closer inspection,

26 In *Wewayakum Indian Band v. Canada*, [1989] 1 S.C.R. 322 (S.C.C.), at p. 331, Wilson J. articulated the narrow view:

> The statutory grant of jurisdiction by Parliament to the Federal Court is contained in the *Federal Court Act*. Because the Federal Court is without any inherent jurisdiction such as that existing in provincial superior courts, the language of the Act is completely determinative of the scope of the Court's jurisdiction.

What is this notion of inherent jurisdiction which is used to justify a strict approach to the interpretation of the *Federal Court Act*? The notion of inherent jurisdiction has developed from the role of provincial superior courts in Canada's legal system. The unique historical feature of provincial superior courts, as opposed to the Federal Court, is that they have traditionally exercised general jurisdiction over all matters of a civil or criminal nature. This general jurisdictional function in the Canadian justice system precedes Confederation, and was expressly continued by s. 129 of the *Constitution Act, 1867*, "as if the Union had not been made". Under s. 92(14), the provinces exercise authority over the "Administration of Justice in the Province", including the "Constitution. Maintenance, and Organization" of provincial superior courts. The unique institutional feature of these courts is that by s. 96 of the *Constitution Act, 1867*, judges of provincial superior courts are appointed by the Governor General, not by the provinces. Responsibility for s. 96 courts is thus shared between the two levels of government, unlike either inferior provincial courts, or courts created under s. 101. Estey J., in *Canada (Attorney General) v. Law Society (British Columbia)*, [1982] 2 S.C.R. 307 (S.C.C.), at pp. 326-27, explained the unique nature of provincial superior courts in the following way:

> The provincial superior courts have always occupied a position of prime importance in the constitutional pattern of this country. They are the descendants of the Royal Courts of Justice as courts of general jurisdiction. They cross the dividing line, as it were, in the federal-provincial scheme of division of jurisdiction, being organized by the provinces under s. 92(14) of the [*Constitution Act, 1867*] and are presided over by judges appointed and paid by the federal government (sections 96 and 100 of the [*Constitution Act, 1867*]).

27 In addition to s. 129 providing for the post-Confederation continuation of provincial superior courts, s. 96 also impliedly contemplates their continued existence. The constitutional fact of their continued existence endorses their general jurisdiction and, in effect, guarantees a traditional core of superior court jurisdiction (*Reference re Residential Tenancies Act (Ontario)*, [1981] 1 S.C.R. 714 (S.C.C.); *Court of Unified Criminal Jurisdiction, Re*, [1983] 1 S.C.R. 704 (S.C.C.); *MacMillan Bloedel Ltd. v. Simpson*, [1995] 4 S.C.R. 725 (S.C.C.). See also *Valin v. Langlois* (1879), 3 S.C.R. 1 (S.C.C.), at pp. 19-20; *Ontario (Attorney General) v. Pembina Exploration Canada Ltd.*, [1989] 1 S.C.R. 206 (S.C.C.), at p. 217; Hogg, "Federalism and the Jurisdiction of Canadian Courts" (1981), 30 *U.N.B.L.J.* 9).

28 The historical origins and constitutional basis of the Federal Court of Canada demonstrate its more particular, as opposed to general, jurisdiction. Section 101 of the *Constitution Act, 1867* authorizes Parliament to create "any additional Courts for the better Administration of the Laws of Canada". This it did, in 1875, with the establishment of the Exchequer Court, which was granted a very limited jurisdiction, confined to "cases in which demand shall be made or relief sought in respect of any matter which might in England be the subject of a suit or action in the Court of Exchequer on its revenue side against the Crown, or any officer of the Crown" (*Supreme and Exchequer Courts Act*, S.C. 1875, c. 11, s. 58). In 1887, and again in 1890 and 1891, this jurisdiction was expanded modestly, to cover intellectual property, other actions brought by the government, admiralty, and expropriation of land by the government (*An Act to amend "The Supreme and Exchequer Courts Act", and to make better provision for the Trial of Claims against the Crown*, S.C. 1887, c. 16; the *Colonial Courts of Admiralty Act, 1890* (U.K.), 53 & 54 Vict., c. 27; *The Exchequer Court Amendment Act, 1891*, S.C. 1891, c. 26, s. 4). From an interpretation of the Federal Court's constitutional origins in s. 101, Professor Hogg draws the following conclusions (in *Constitutional Law of Canada* (loose-leafed.), vol. 1, at p. 7-15):

> Section 101 does not authorize the establishment of courts of general jurisdiction akin to the provincial courts. It only authorizes courts for the 'better administration of the laws of Canada'. This has two important consequences. First, it means that the Federal Court of Canada has no inherent jurisdiction; its jurisdiction is confined to those subject matters conferred upon it by the Federal Court Act or other statute. Secondly, it means that the Federal Court can be given jurisdiction over only subject matters governed by the 'laws of Canada'.

Thus, even when squarely within the realm of valid federal law, the Federal Court of Canada is not presumed to have jurisdiction in the absence of an express federal enactment. On the other hand, by virtue of their general jurisdiction over all civil and criminal, provincial, federal, and constitutional matters, provincial superior courts do enjoy such a presumption.

29 This presumption is not a necessary incident of the structure of our Constitution. Section 101 empowers Parliament to create a federal court with *general* jurisdiction over the administration

of all federal law. For whatever reasons, Parliament has not chosen to create such a court. Moreover, the presumption is the product of a long line of jurisprudence which has responded to the constitutional and historical indications described above, rather than an explicit constitutional requirement. Apposite are the comments of Bora Laskin, later Chief Justice of Canada, who described the situation in 1969 (in *The British Tradition in Canadian Law*, at pp. 113-14):

> There has been no great need in Canada to establish a separate system of federal courts for federal law, because, as a mere matter of course, provincial courts have from the beginning of the Canadian federation exercised jurisdiction in disputes arising out of or involving federal law. Unlike the case in Australia, where the Constitution empowers the Commonwealth Parliament to invest the State courts with jurisdiction in federal matters, the British North America Act is not express on the matter. Inferentially, the legislative authority of the Provinces in relation to the administration of justice therein, and including the constitution, organisation and maintenance of provincial courts both of civil and criminal jurisdiction — without limitation as to matters within federal competence — is an indication of the availability of provincial courts for litigating federal causes of action and for enforcing federal criminal law.... They may be considered, *pro tanto*, as federal courts in so far as they administer federal law.
>
> ...This view of the omnicompetence of provincial superior courts was fed by a decision of the Privy Council, suggestive of inherent superior court jurisdiction, that (to use its words) "if the right exists, the presumption is that there is a Court which can enforce it, for if no other mode of enforcing it is prescribed, that alone is sufficient to give jurisdiction to the [Queen's] Courts of Justice". [Emphasis added.]

30 The case quoted by Laskin, *Board v. Board*, [1919] A.C. 956 (Alberta P.C.), concerned the jurisdiction of the provincial superior court in Alberta to deal with matters arising under the *Matrimonial Causes Act, 1857* ((U.K.), 20 & 21 Vict., c. 85). Although marriage and divorce fall within s. 91 of the *Constitution Act, 1867*, and the applicable English law was received into federal law as a consequence, the provincial superior court was held to have jurisdiction in the absence of any express federal enactment which conferred jurisdiction. The reason for this was quite simple. As of 1919, Parliament had only granted a very limited jurisdiction to the federal court system, as noted above, which did not include jurisdiction over marriage and divorce matters. By contrast, the *Supreme Court Act* of Alberta, S.A. 1907, c. 3, passed in 1907, expansively based the jurisdiction of the superior courts of that province on

> the jurisdiction which on July 15, 1870, was vested in, or capable of being exercised in England by (1.) the High Court of Chancery, as a Common Law Court, as well as a Court of Equity, including the jurisdiction of the Master of the Rolls as a judge or Master of the Court of Chancery, and any jurisdiction exercised by him in relation to the Court of Chancery as a common law Court; (2.) The Court of Queen's Bench; (3.) The Court of Common Pleas

> at Westminster; (4.) The Court of Exchequer as a Court of Revenue as well as a Common Law Court; (5.) The Court of Probate; (6.) The Court created by Commissioners of Oyer and Terminer, and of Gaol Delivery, or of any such Commissions.

(*Per* Viscount Haldane, at p. 960, referring to s. 9 of the Act.)

31 Perhaps as a result of an oversight, the English court responsible for divorces was not among those courts listed above. Nevertheless, the Privy Council held, on the basis of the Supreme Court of Alberta' s general jurisdiction, that "that Court was bound to entertain and to give effect to proceedings for making [the right of divorce] operative" (p. 962). In referring to its interpretation of the jurisdiction-conferring clause of Alberta's *Supreme Court Act* of 1907, the Privy Council explained its reasons for recognizing the jurisdiction of the Supreme Court of Alberta in the following manner (at pp. 962-63):

> ...a well-known rule makes it plain that the language there used ought to be interpreted as not excluding the jurisdiction. If the right exists, the presumption is that there is a Court which can enforce it, for if no other mode of enforcing it is prescribed, that alone is sufficient to give jurisdiction to the King's Courts of Justice. In order to oust jurisdiction, it is necessary in the absence of a special law excluding it altogether, to plead that jurisdiction exists in some other Court. This is the effect of authorities ... [The Alberta] Act set up a Superior Court, and it is the rule as regards presumption of jurisdiction in such a Court that, as stated by Willes J. in *London Corporation v. Cox* ((1867) L.R., 2 H.L. 239, 259), nothing shall be intended to be out of the jurisdiction of a Superior Court, but that which specially appears to be so.

32 The notion of "inherent jurisdiction" arises from the presumption that if there is a justiciable right, then there must be a court competent to vindicate the right. The issue addressed in *Board v. Board* was whether a failure to grant jurisdiction should be read as implicitly excluding jurisdiction. In that context, the doctrine of inherent jurisdiction requires that only an explicit ouster of jurisdiction should be allowed to deny jurisdiction to the superior court. In my view, the case does not stand for the fundamentally different proposition that statutes which purport to grant jurisdiction to another court should be read narrowly so as to protect the jurisdiction of the superior court. That is not the purpose of the doctrine of inherent jurisdiction, which is simply to ensure that a right will not be without a superior court forum in which it can be recognized. Although certain language in *Board v. Board* could be taken to stand for the former proposition, a reading of the entire case indicates that a choice was not being made between the jurisdiction of the s. 96 court and the jurisdiction of the federal court (which was extremely narrow at the time). The Privy Council simply did not consider the possible jurisdiction of the Exchequer Court in *Board v. Board*. The case was not an attempt to answer the question "which court?", but rather "is there a court?" The former question can only be determined by considering the constitutional, statutory and historical factors which I have canvassed above, while the latter can be dealt with by means

of the simple presumption that only an express ouster will deny jurisdiction to the superior court to hear such a case.

33 The statutory position of the Federal Court has changed since *Board v. Board*, a case in which the possible jurisdiction of the Exchequer Court was not even considered, because its jurisdiction at that time was so marginal. The passage of the *Federal Court Act* in 1971 substantially expanded the jurisdiction of the Exchequer Court (and changed its name to the Federal Court of Canada), and by necessary implication, removed jurisdiction over many matters from the provincial superior courts. The new Federal Court of Canada was granted an expanded jurisdiction, not only by specific enumeration of new subject matters, as, for example, in s. 23(*c*) of the Act, but also in a more general fashion. In essence, by virtue of ss. 3, 18, and 18.1, it was made a court of review and of appeal which stands at the apex of all the administrative decision-makers on whom power has been granted by individual Acts of Parliament. Significant confusion had developed prior to the Act as superior courts in different provinces reached conflicting outcomes as to the disposition of applications for judicial review from these administrative decision-makers, as to the proper test for standing, and as to the geographical reach of their decisions (I. Bushnell, *The Federal Court of Canada: A History, 1875-1992* (1997), at p. 159). The growth of administrative decision-makers adjudicating a myriad of laws within federal competence, without a single court to supervise that structure below the Supreme Court of Canada, created difficulties which an expanded Federal Court was intended to address.

34 These are the historical and constitutional factors which led to the development of the notion of inherent jurisdiction in provincial superior courts, which to a certain extent has been compared and contrasted to the more limited statutory jurisdiction of the Federal Court of Canada. But in my view, there is nothing in this articulation of the essentially remedial concept of inherent jurisdiction which in any way can be used to justify a narrow, rather than a fair and liberal, interpretation of federal statutes granting jurisdiction to the Federal Court. The legitimate proposition that the institutional and constitutional position of provincial superior courts warrants the grant to them of a residual jurisdiction over all federal matters where there is a "gap" in statutory grants of jurisdiction, is entirely different from the proposition that federal statutes should be read to find "gaps" unless the words of the statute explicitly close them. The doctrine of inherent jurisdiction raises no valid reasons, constitutional or otherwise, for jealously protecting the jurisdiction of provincial superior courts as against the Federal Court of Canada.

35 In my view, the doctrine of inherent jurisdiction operates to ensure that, having once analysed the various statutory grants of jurisdiction, there will always be a court which has the power to vindicate a legal right independent of any statutory grant. The court which benefits from the inherent jurisdiction is the court of general jurisdiction, namely, the provincial superior court. The doctrine does not operate to narrowly confine a statutory grant of jurisdiction; indeed, it says nothing about the proper interpretation of such a grant. As noted by McLachlin J. in *B.M.W.E., supra*, at para. 7, it is a "residual jurisdiction". In a federal system, the doctrine of

inherent jurisdiction does not provide a rationale for narrowly reading federal legislation which confers jurisdiction on the Federal Court.

36 As is clear from the face of the *Federal Court Act*, and confirmed by the additional role conferred on it in other federal Acts, in this case the *Human Rights Act*, Parliament intended to grant a general administrative jurisdiction over federal tribunals to the Federal Court. Within the sphere of control and exercise of powers over administrative decision-makers, the powers conferred on the Federal Court by statute should not be interpreted in a narrow fashion. This means that where an issue is clearly related to the control and exercise of powers of an administrative agency, which includes the interim measures to regulate disputes whose final disposition is left to an administrative decision-maker, the Federal Court can be considered to have a plenary jurisdiction.

37 In this case, I believe it is within the obvious intendment of the *Federal Court Act* and the *Human Rights Act* that s. 44 grant jurisdiction to issue an injunction in support of the latter. I reach this conclusion on the basis that the Federal Court does have the power to grant "other relief" in matters before the Human Rights Tribunal, and that fact is not altered merely because Parliament has conferred determination of the merits to an expert administrative decision-maker. As I have noted above, the decisions and operation of the Tribunal are subject to the close scrutiny and control of the Federal Court, including the transformation of the order of the Tribunal into an order of the Federal Court. These powers amount to "other relief" for the purposes of s.44.

38 In my view, this statutory jurisdiction is concurrent with the inherent jurisdiction of a provincial superior court in accordance with the principles of *B.M.W.E.*. There is no repugnance in the concept of a concurrent jurisdiction; indeed, it is common in our judicial structure. As one author has observed (T. A. Cromwell, "Aspects of Constitutional Judicial Review in Canada" (1995), 46 *S.C. L. Rev.* 1027, at p. 1030):

> The provincial superior courts and the purely provincial courts share large areas of concurrent jurisdiction, particularly in criminal law. While considerably less significant, there also is a good deal of overlap in the civil jurisdiction of the provincial superior courts and the Federal Court.

The standard for a complete ouster of the s. 96 court's jurisdiction is significantly higher than that for determining whether jurisdiction has been granted at all. This is appropriate because, as a result of our federal division of powers, the exercise of jurisdiction over the same matter is based on heads of power which are not mutually exclusive. An example of this lack of mutual exclusivity is provided in this Court's decision in *Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631 (S.C.C.), which involved a challenge to the Justice Minister's decision not to exercise his discretionary authority to refuse to extradite the appellant. Review of that decision was conferred on the Federal Court by virtue of s. 18 of the *Federal Court Act*, which granted jurisdiction based on the identity of the decision-maker as a Federal Minister. The appellant sought a writ of *habeas*

corpus and a writ of *certiorari* in aid to quash the warrant of surrender on the grounds of improper procedures followed by the Minister. Vindication of the liberty interest through the writ of *habeas corpus* is a traditional function of as. 96 court. I note that in the case at bar there is a similar asymmetry: on the one hand, the granting of an injunction generally is a traditional function of s. 96 courts; on the other hand, the issuance of *this* injunction is integrally connected to the functioning of an administrative tribunal under the supervisory jurisdiction of the Federal Court. In considering whether the latter jurisdiction had been displaced or ousted by virtue of the *Federal Court Act*, Cory J. for a unanimous Court on this point said, at p. 651:

> The *Federal Court Act* does not remove the historic and long standing jurisdiction of provincial superior courts to hear an application for a writ of *habeas corpus*. To remove that jurisdiction from the superior courts would require clear and direct statutory language such as that used in the section referring to members of the Canadian Forces stationed overseas. It follows that the respondents fail in their contention that the Federal Court has exclusive jurisdiction in this matter. Rather it is clear that there is concurrent jurisdiction in the provincial superior courts and the Federal Court to hear all *habeas corpus* applications other than those specified in s. 17(6) [pertaining to the Canadian Forces] of the *Federal Court Act*.

The same standard was articulated in *Pringle v. Fraser*, [1972] S.C.R. 821 (S.C.C.), at p. 826. That standard of "clear and direct statutory language" is not satisfied in this case and, therefore, the jurisdiction of the Federal Court is concurrent with that of the provincial superior court.

39 As is clear, I have taken a different approach here with respect to s. 44 from that which I took in the previous section regarding an implied grant of authority within the *Human Rights Act*, read on its own. The reason for this should be made explicit. Many federal Acts do not provide for the exercise of administrative decision-making authority. Where that is the case, the reasoning adopted here with respect to the broad supervisory jurisdiction of the Federal Court is inapplicable.

40 I do not believe that anything in this approach undermines the special position of s. 96 courts, or that there is any likelihood of s. 101 courts acting beyond their constitutional competence. The third requirement of the *Miida, supra*, test — that the law be a constitutionally valid law of Canada — guarantees that from a doctrinal perspective. From an institutional perspective, I believe the ultimate guarantee is provided by this Court, whose purpose is to serve as the court of appeal for the federal and each provincial superior court system, and to ensure that each remains within its jurisdictional limits. Nor should anything which I have said in the foregoing be taken to undermine the long-established principle that where there is no federal law in a matter of federal jurisdiction, provincial superior courts continue to have jurisdiction by virtue of the doctrine of inherent jurisdiction. Even where federal law has been enacted, but there is no administrative decision-maker subject to the operation of the *Federal Court Act* or any other grant of jurisdiction to the Federal Court in the Act in question, then s. 96 courts continue to exercise an inherent jurisdiction.

41 Before this Court and in the courts below, it has been suggested that the finely balanced and tailored scheme of remedies contained in the *Human Rights Act* amounts to an implied ouster of the jurisdiction of the Federal Court. I would agree with McLachlin J. in *B.M.W.E.* who, when confronted with similar arguments, found that "[t]hese arguments go not to jurisdiction, but to whether, assuming jurisdiction, it was appropriate to grant the interim injunction" (para. 12). I will turn to that question in due course. Moreover, I would also agree with her observation in that case that an injunctive remedy will not be available where there is an adequate, alternative remedy conferred by statute on some other decision maker. If there is, then no jurisdiction should be found in the Federal Court under s. 44.

(iv) Section 23(c) of the Federal Court Act

42 At the hearing, the appellant suggested that another ground of jurisdiction could be found in s. 23(c) of the *Federal Court Act*. Given my finding in the previous section, and the lack of argument or supporting evidence presented by the parties, I consider it prudent to express no opinion on this submission.

Does Federal Law "Nourish" the Grant?

43 The requirement that there be valid federal law which nourishes the statutory grant of jurisdiction serves primarily to ensure that federal courts are kept within their constitutionally mandated sphere. As Wilson J. noted in *Wewayakum Indian Band*, *supra*, the second and third requirements set out in *Miida, supra*, of a nourishing body of federal law, and its constitutional validity, go hand in hand:

> While there is clearly an overlap between the second and third elements of the test for Federal Court jurisdiction, the second element, as I understand it, requires a general body of federal law covering the area of the dispute, i.e., in this case the law relating to Indians and Indian interests in reserve lands ... [Emphasis added.]

The dispute over which jurisdiction is sought must rely principally and essentially on federal law. If the dispute is only tangentially related to any corpus of federal law, then there is a possibility that assuming jurisdiction would take the Federal Court out of its constitutionally mandated role.

44 This case presents no such difficulties. The only relevant law that could cover the facts of this case is the *Human Rights Act*, confined as it is to the federal jurisdiction over telephonic means of communication. The prescription on which the Commission seeks to base the claim for an injunction is solely and exclusively s. 13(1) of the *Human Rights Act*. That is the normative root of its claim, and it clearly nourishes the statutory grant which I have found is conferred on the Federal Court. Whether an interlocutory power of restraint is conferred by federal law is best dealt with exclusively by the more nuanced and direct jurisprudence relating to the existence of

a statutory grant. Once that issue is decided, the nourishment requirement should not be used to subvert the conclusion of that analysis, but rather to ensure that the statutory grant is being exercised in a constitutionally valid manner. That is clearly the case here, and I find that the substantive provisions of the *Human Rights Act* nourish the statutory grant.

45 The appeal of the decision of the Court of Appeal on jurisdiction is therefore allowed with costs.

Second Question: Was the Exercise of Jurisdiction Appropriate?

46 Rule 469(3) of the *Federal Court Rules*, C.R.C., c. 663, states:

> The plaintiff may not make an application under this Rule before commencement of the action except in case of urgency, and in that case the injunction may be granted on terms providing for the commencement of the action and on such other terms, if any, as seem just.

Considerable argument before this Court and in the courts below was devoted to extrapolating the meaning of this provision based upon the landmark decision in *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396 (U.K. H.L.), whose methodology was generally approved by this Court in *Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832*, [1987] 1 S.C.R. 110 (S.C.C.), at pp. 128-29, and reaffirmed in *RJR-Macdonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.), at pp. 332-333. The three-stage test was defined in the latter case as follows (*per* Sopinka and Cory JJ., at p. 334):

> First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.

The appellants sought to fine-tune each of these elements in order to respond to the initial perception that they set the threshold fairly low in a case such as this one. In particular, they recommended that the initial criterion of "serious question to be tried" be raised to a "strong *prima fade* case". They also urged that in considering the balance of convenience criterion, the public interest ought to be weighed against the individual interests of the speaker at the balance of convenience stage.

47 In my view, the *Cyanamid* test, even with these slight modifications, is inappropriate to the circumstances presented here. The main reason for this is that *Cyanamid*, as well as the two other cases mentioned above, involved the commercial context in which the criteria of "balance of convenience" and "irreparable harm" had some measurable meaning and which varied from case to case. Moreover, where expression is unmixed with some other commercial purpose or activity,

it is virtually impossible to use the second and third criteria without grievously undermining the right to freedom of expression contained in 2(*b*) of the *Charter*. The reason for this is that the speaker usually has no tangible or measurable interest *other than the expression itself*, whereas the party seeking the injunction will almost always have such an interest. This test developed in the commercial context stacks the cards against the non-commercial speaker where there is no tangible, immediate utility arising from the expression other than the freedom of expression itself.

48 The inappropriateness of the *Cyanamid* test is confirmed by the jurisprudence relating to injunctions against allegedly defamatory statements, in both England and Canada. In both countries, the *Cyanamid* test has been rejected for injunctions against dissemination of defamatory statements. Although defamation does not possess precisely the same characteristics as discriminatory hate speech, it is a much closer analogy than restraining commercial activity, even where that commercial activity includes a speech element. Defamation typically involves damage to only one person's reputation and not an entire group. On the other hand, given the widespread circulation of many defamatory statements in the press and the crystallized damage which a defamatory statement may have, compared with the slow, insidious effect of a relatively isolated bigoted commentary, the two are not necessarily substantially different in terms of the "urgency" requirement. Certainly from the point of view of the rights of the speaker, bigotry and defamation cases both represent potentially low-or no-value speech and are in that sense, extremely similar. It is therefore helpful to look at the approach to injunctions in cases of defamatory speech to determine how "urgency" should be defined in the context of s. 13(1) of the *Human Rights Act*.

49 In his treatise *Injunctions and Specific Performance* (2nd ed. 1992 (loose-leaf)), Robert Sharpe says the following, at paras. 5.40-5.70 (pp. 5.2-5.4):

> There is a significant public interest in the free and uncensored circulation of information and the important principle of freedom of the press to be safeguarded....
>
> The well-established rule is that an interlocutory injunction will not be granted where the defendant indicates an intention to justify [ie. prove the truth of] the statements complained of, unless the plaintiff is able to satisfy the court at the interlocutory stage that the words are both clearly defamatory and impossible to justify.
>
> ...it seems clear that the rule is unaffected by the *American Cyanamid* case and that the balance of convenience is not a factor.

One of the leading English authorities has a close affinity to the *Human Rights Act* in that it was a statutory prohibition on certain expression. *Herbage v. Pressdram Ltd.*, [1984] 1 W.L.R. 1160 (Eng. C.A.), involved the application of the *Rehabilitation of Offenders Act 1974*, which had been enacted by Parliament to prevent indefinite reference to an individual's criminal history, after the individual had served his or her sentence. Based on that specific legislative intention, contended

the applicant, an injunction should be issued. Griffiths L.J. (on behalf of himself and Kerr L.J. on a two-judge panel) rejected that approach (at p. 1163):

> If the court were to accept this argument, the practical effect would I believe be that in very many cases the plaintiff would obtain an injunction, for on the *American Cyanamid* principles he would often show a serious issue to be tried, that damages would not be realistic compensation, and that the balance of convenience favoured restraining repetition of the alleged libel until trial of the action. It would thus be a very considerable incursion into the present rule which is based on freedom of speech.

In *Rapp v. McClelland & Stewart Ltd.* (1981), 34 O.R. (2d) 452 (Ont. H.C.), Griffiths J. attempted to define the precise threshold for the granting of an injunction in the following terms (at pp. 455-56):

> The guiding principle then is, that the injunction should only issue where the words complained of are so manifestly defamatory that any jury verdict to the contrary would be considered perverse by the Court of Appeal. To put it another way where it is impossible to say that a reasonable jury must inevitably find the words defamatory the injunction should not issue.
>
> ...*American Cyanamid* ... has not affected the well established principle in cases of libel that an interim injunction should not be granted unless the jury would inevitably come to the conclusion that the words were defamatory. [Emphasis added.]

This passage has recently been cited with approval in the Quebec Court of Appeal in *CEGEP de Jonquière c. Champagne*, [1997] R.J.Q. 2395 (Que. C.A.). Rothman J.A., on this point speaking on behalf of Delisle and Robert JJ.A., went on to comment on the constitutional dimension of these common law approaches to the use of the injunctive power (at pp. 2402-3):

> With the coming into force of the Canadian Charter and the Quebec Charter, these safeguards protecting freedom of expression and freedom of the press have become even more compelling.
>
> The common law authorities in Canada and the United Kingdom have suggested the guiding principle that interlocutory injunctions should only be granted to restrain in advance written or spoken words in the rarest and clearest of cases — where the words are so manifestly defamatory and impossible to justify that an action in defamation would almost certainly succeed. Given the value we place on freedom of expression, particularly in matters of public interest, that guiding principle has much to recommend it. [Emphasis added.]

These cases indicate quite clearly that the *Cyanamid* test is not applicable in cases of pure speech and, therefore, the appellants are misguided in presuming that this test does apply. As Griffiths L.J.

points out in *Herbage v. Pressdram, supra*, such a test would seldom, if ever, protect controversial speech. Nor do I believe that the modifications suggested by the appellants sufficiently relieve that problem. The same tests discussed here with respect to restraining potentially defamatory speech should be applied in cases of restraint of potential hate-speech, subject to modification which may prove necessary given the particular nature of bigotry as opposed to defamation. As the question now before us is moot, and as the parties did not address themselves to the appropriate tests, it would be inappropriate to speculate here as to how such distinctions might affect the analysis, if at all.

50 The second factor affecting the exercise of jurisdiction in this case is that the very constitutionality of s. 13(1) is predicated on the absence of remedies of this kind existing in the scheme of the Act. A major issue in *Taylor*, *supra*, which followed on the heels of *R. v. Keegstra*, [1990] 3 S.C.R. 697 (S.C.C.), where the hate speech provision of the *Criminal Code* was narrowly upheld, was whether the absence of an intent requirement ins. 13(1) of the *Human Rights Act* rendered it impermissibly broad under the *Oakes* criteria. On that point, Dickson C.J. stated (at p. 932):

> In coming to this conclusion, I do not mean to say that the purpose of eradicating discrimination in all its forms can justify any degree of impairment upon the freedom of expression, but it is well to remember that the present appeal concerns an infringement of s. 2(*b*) in the context of a human rights statute. The chill placed upon open expression in such a context will ordinarily be less severe than that occasioned where criminal legislation is involved, for attached to a criminal conviction is a significant degree of stigma and punishment, whereas the extent of opprobrium connected with the finding of discrimination is much diminished and the aim of remedial measures is more upon compensation and protection of the victim. [Second emphasis added.]

The constitutional concerns expressed in the *Rapp* and *CEGEP de Jonquière* cases mirror those of Dickson C.J. In my view, those tests would confine the issuance of an injunction to cases where it would be constitutionally justifiable. Elaborations of that test in the context of enforcement of s. 13(1) must be mindful of the guarantee of freedom of expression in the *Charter*. Given the mootness of the disposition of the appeal on this point, I refrain from expressing an opinion on the application of these principles to this case.

Third Question: Was Liberty Net in Contempt of Court?

51 On this issue, the appellants argue that they were not in contempt on two separate grounds. Their first ground of attack has to do with the validity of the order. As I have found above that the Federal Court had jurisdiction to issue the order, at its highest, the appellants can only suggest that that jurisdiction was exercised wrongly. Such an order is neither void nor nugatory, and violation of

its terms constitutes contempt of court. The words of McLachlin J. in *Taylor*, *supra*, at pp. 974-75, are both definitive and eloquent on this point:

> In my opinion, the 1979 order of the Tribunal, entered in the judgment and order book of the Federal Court in this case, continues to stand unaffected by the *Charter* violation until set aside. This result is as it should be. If people are free to ignore court orders because they believe that their foundation is unconstitutional, anarchy cannot be far behind. The citizens' safeguard is in seeking to have illegal orders set aside through the legal process, not in disobeying them.
>
> ...For the purposes of the contempt proceedings, [the order] must be considered to be valid until set aside by legal process. Thus, the ultimate invalidity of the order is no defence to the contempt citation.

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. The violation being impugned here is not the existence of the phone number in the United States without more, but rather the combined effect of that American phone number with the offending messages, and the referral message to that phone number on Liberty Net's old line. The gravamen of the violation of the order is the communication of the offending messages; that communication takes place by virtue of the advertisement on the Canadian phone line and the broadcast of the message on the American phone line. The former element took place "by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament", as provided for under s. 13 of the *Human Rights Act*. 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.

54 The second appeal is dismissed with costs.

***McLachlin* and *Major JJ.* (dissenting in part):**

55 We have read the reasons of Justice Bastarache. We agree with him that there is no implied grant of jurisdiction to the Federal Court in the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6. As well, we agree that the appeal on the contempt conviction should be dismissed. We disagree with his conclusion on s. 44 of the *Federal Court Act*, R.S.C. 1985, c. F-7.

I. Facts

56 The facts are set out in the decision of Bastarache J.

II. Issues

57 There are two issues in these appeals. The first issue arises out of the original order of Muldoon J. ([1992] 3 F.C. 155 (Fed. T.D.)) enjoining the Canadian Liberty Net from operating its telephone message service. The second issue concerns the contempt order issued by Teitelbaum J. ([1992] 3 F.C. 504 (Fed. T.D.)) in response to the relocation of the Canadian Liberty Net to the State of Washington in the United States of America.

A. Did The Federal Court Have Jurisdiction To Issue An Injunction?

58 The Federal Court of Canada is a statutory court that derives all its jurisdiction from the *Federal Court Act*. The traditional jurisdiction test for that court is set out by McIntyre J. in *Miida Electronics Inc. v. Mitsui O.S.K. Lines Ltd.*, [1986] 1 S.C.R. 752 (S.C.C.), at p. 766:

> 1. There must be a statutory grant of jurisdiction by the federal Parliament.
>
> 2. There must be an existing body of federal law which is essential to the disposition of the case and which nourishes the statutory grant of jurisdiction.
>
> 3. The law on which the case is based must be a "law of Canada" as the phrase is used ins. 101 of the *Constitution Act, 1867*.

59 The first test requires a party seeking to bring a matter before the Federal Court to find an express or implied grant of jurisdiction. In this appeal that jurisdiction will be found if at all in the *Canadian Human Rights Act* or the *Federal Court Act*. Neither of these statutes provides jurisdiction to the Federal Court of Canada to issue an injunction in aid of the Canadian Human Rights Commission pending the determination of a complaint by a Human Rights Tribunal.

(1) Grant of Authority Under s. 25 of the Federal Court Act

60 The jurisdiction sections of the *Federal Court Act* exhaustively enumerate all cases over which the Federal Court, Trial Division has jurisdiction. Save for s. 25, it is evident that none of the provisions grant the Federal Court, Trial Division jurisdiction to issue the injunction sought in this appeal.

61 Section 25 reads:

> **25.** The Trial Division has original jurisdiction, between subject and subject as well as otherwise, in any case in which a claim for relief is made or a remedy is sought under or by virtue of the laws of Canada if no other court constituted, established or continued under any of the *Constitution Acts, 1867 to 1982* has jurisdiction in respect of that claim or remedy. [Emphasis added.]

62 Section 25 grants limited original jurisdiction when there is no other court that can hear the matter. Only in the absence of a forum to rule on ajusticiable right is the Federal Court able to rely upon s. 25. This appeal does not qualify as such a case. In *B.M.W.E. v. Canadian Pacific Ltd.*, [1996] 2 S.C.R. 495 (S.C.C.), McLachlin J., writing for a unanimous nine-member Court, held that a s. 96 provincial superior court's inherent jurisdiction allowed it to issue an interim "free-standing" injunction in response to a gap in the *Canada Labour Code*.

63 Section 25 does not support the appellant's claim that the Federal Court has jurisdiction because another court, the Supreme Court of British Columbia, has jurisdiction to issue the precise injunction. While concurrent jurisdiction between the Federal Court and provincial superior courts exists in limited circumstances it is inconsistent with our primarily unitary court system. In *Reference re Residential Tenancies Act (Ontario)*, [1981] 1 S.C.R. 714 (S.C.C.), at p. 728, Dickson J. (as he then was) noted the importance of maintaining this system:

> Section 92(14) and ss. 96 to 100 represent one of the important compromises of the Fathers of Confederation.... What was conceived as a strong constitutional base for national unity, through a unitary judicial system, would be gravely undermined.

Interpretations that result in concurrent jurisdiction are undesirable as they not only detract from our unitary court system, but inevitably result in forum shopping.

(2) Implied Grant Of Authority From the Canadian Human Rights Act

64 The Human Rights Commission position was that a careful examination of the *Canadian Human Rights Act* reveals an implied grant of statutory authority to issue an injunction. We agree with Bastarache J. that the scheme of the *Canadian Human Rights Act* does not contemplate the Federal Court granting injunctive relief in support of alleged breaches of the Act. An implied grant of jurisdiction has previously been recognized by the Federal Court of Appeal only when

an injunctive remedy was a necessary incident to a Tribunal's function (*New Brunswick Electric Power Commission v. Maritime Electric Co.*, [1985] 2 F.C. 13 (Fed. C.A.)). That is not the situation in this appeal.

65 On the contrary, the *Canadian Human Rights Act* arguably negates the power of the Federal Court to grant injunctions restraining speech before a tribunal finds a contravention of s. 13(1) of the Act. Section 13 is the only provision in the Act dealing with communications. It is restricted to repeated communications by telephone likely to expose persons to hatred or contempt identification on the basis of a prohibited ground of discrimination. This Court upheld s. 13 on the basis that its ambit was narrow: *Canada (Canadian Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892 (S.C.C.). Parliament has adopted a narrow and measured approach to the question of when human rights concerns can trump the constitutional right of free speech. While we agree with Bastarache J. that these concerns might appropriately be raised at the point of applying for an injunction, this does not negate the point that nothing in the *Canadian Human Rights Act* suggests that Parliament intended by that Act to confer on the Federal Court the right to restrain speech alleged to violate the *Canadian Human Rights Act* prior to a hearing by the Commission. On the contrary, the Act suggests that Parliament was willing to trench on free speech only in very particular circumstances.

(3) Section 44 of the Federal Court Act

66 Section 44 was raised by several of the parties as a possible source of jurisdiction for allowing the Federal Court to grant the injunction.

> **44.** In addition to any other relief that the Court may grant or award, a *mandamus*, injunction or order for specific performance may be granted or a receiver appointed by the Court in all cases in which it appears to the Court to be just or convenient to do so, and any such order may be made either unconditionally or on such terms and conditions as the Court deems just.

The jurisdictional inquiry is twofold: Does s. 44 grant jurisdiction to issue an injunction and does s. 44 provide jurisdiction to grant "free-standing" injunctions? The key words in s. 44 are "[i]n addition to any other relief that the Court may grant or award". Two interpretations are possible. The appellant argues that "in addition to" refers to the Federal Court's independent ability to grant any relief or remedy. In contrast, the respondents argue that "in addition to" should be read as a limiting clause, which only permits the exercise of injunctive power that is "ancillary to" other preexisting remedies that the Court can grant. We agree with Pratte J.A. and prefer the latter interpretation.

67 In our view, the words "[i]n addition to any other relief that the Court may grant or award" indicate that s. 44 is an ancillary provision, and does not itself grant jurisdiction to the Federal Court, Trial Division. In order to avail itself of s. 44 the Federal Court must possess pre-existing jurisdiction over the subject matter at hand. A similar view was expressed by Rouleau J. in *C.U.P.E.*

v. Canadian Broadcasting Corp., [1991] 2 F.C. 455 (Fed. T.D.), where he held that s. 44 could not independently authorize the Federal Court to grant injunctive relief when the Court was not vested with jurisdiction under the *Federal Court Act*.

68 Clearly, the Federal Court, Trial Division does not have jurisdiction to hear or determine a complaint based on the *Canadian Human Rights Act*. That task is exclusively assigned to the Canadian Human Rights Commission. It follows that s. 44 does not clothe the Federal Court with jurisdiction to grant an interlocutory injunction.

69 The structure of the *Federal Court Act* is indicative of Parliament's intent with respect to s. 44 and the jurisdiction of the Federal Court. The Act is divided into divisions with each division set off by a bold heading. Section 44 appears within the division of the *Federal Court Act* headed "Substantive Provisions", as opposed to the division titled "Jurisdiction Of Trial Division". We are here concerned with an issue of jurisdiction. If the power to grant injunctions in a case such as this is to be found in the *Federal Court Act*, we would expect to find it in ss. 17 to 26, not in s. 44, which finds its place among the residual housekeeping sections of the Act.

70 As the Federal Court, Trial Division is a statutory court, there is no persuasive reason to interpret s. 44 in a broad manner. Bastarache J. sets out a number of other statutory provisions in his judgment that he reasons aid in ascertaining the proper interpretation of s. 44. Unlike a provincial superior court, the Federal Court's jurisdiction is limited by the statute and does not include residual or inherent jurisdiction. Wilson J. in *Wewayakum Indian Band v. Canada*, [1989] 1 S.C.R. 322 (S.C.C.), at p. 331, stated:

> The statutory grant of jurisdiction by Parliament to the Federal Court is contained in the *Federal Court Act*. Because the Federal Court is without any inherent jurisdiction such as that existing in Provincial Superior Courts, the language of the Act is completely determinative of the scope of the Court's jurisdiction.

71 Clearly, it would be contrary to the explicit language of the *Federal Court Act* and well-established jurisprudence of this Court to recognize jurisdiction that was not conferred on the Federal Court by Parliament. While the provincial superior courts and the Federal Court are both created by statute, the inherent jurisdiction of the s. 96 superior courts is an important distinguishing feature. Their inherent or residual nature was recognized in *Valin v. Langlois* (1879), 3 S.C.R. 1 (S.C.C.), and by the Privy Council in *Board v. Board*, [1919] A.C. 956 (Alberta P.C.), and in 1982 Estey J. in *Canada (Attorney General) v. Law Society (British Columbia)*, [1982] 2 S.C.R. 307 (S.C.C.), at pp. 326-27, stated:

> The provincial superior courts have always occupied a position of prime importance in the constitutional pattern of this country. They are the descendants of the Royal Courts of Justice as courts of general jurisdiction. They cross the dividing line, as it were, in the federal-provincial scheme of division of jurisdiction, being organized by the provinces under s. 92(14)

of the *Constitution Act* and are presided over by judges appointed and paid for by the federal government (sections 96 and 100 of the *Constitution Act*.)

72 The appellant is not prevented from seeking an injunction. The only question is: where does it find jurisdiction? It is clear from the *B.M.W.E., supra*, decision that a provincial superior court has the jurisdiction to issue an injunction in the present circumstances.

73 Given the result we have reached it is not necessary to determine the ability of the Federal Court to grant "free-standing" interim injunctions. We would dismiss this appeal on the ground that the Federal Court does not have jurisdiction to grant an injunction under the circumstances of this case.

B. Was Liberty Net in Contempt of Court?

74 The appellants were held in contempt of court by Teitelbaum J. for violating the injunction issued by Muldoon J. McAleer and Canadian Liberty Net argued that if the injunction was issued without jurisdiction it was void, and therefore the conviction should be set aside. We disagree and concur in the result of Bastarache J. and would dismiss the appeal.

Commission's Appeal allowed.

Respondents' Appeal dismissed.

Appel de la Commission accueilli.

Appel des défendeurs rejeté.

2014 CAF 84, 2014 FCA 84
Federal Court of Appeal

Canadian Broadcasting Corp. v. SODRAC 2003 Inc.

2014 CarswellNat 808, 2014 CarswellNat 809, 2014 CAF 84, 2014 FCA 84, [2014] F.C.J. No. 321, 118 C.P.R. (4th) 79, 241 A.C.W.S. (3d) 434, 457 N.R. 156

Canadian Broadcasting Corporation/Société Radio-Canada, Applicant and SODRAC 2003 Inc. and Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC) Inc., Respondents

Astral Media Inc., Applicant and Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC) Inc., Respondent

Canadian Broadcasting Corporation/Société Radio-Canada, Applicant and SODRAC 2003 Inc. and Society for Reproduction Rights of Authors, Composers and Publishers in Canada (SODRAC) Inc., Respondents

Marc Noël, J.D. Denis Pelletier, Johanne Trudel JJ.A.

Heard: October 1, 2013
Judgment: March 31, 2014
Docket: A-516-12, A-527-12, A-63-13

Counsel: Marek Nitoslawski, Karine Joizil, for Applicant, Canadian Broadcasting Corporation/ Société Radio-Canada
Colette Matteau, Lisanne Bertrand, for Respondents, SODRAC 2003 Inc. and Society, for Reproduction Rights of Authors, Composer and Publishers in Canada (SODRAC) Inc.
Marek Nitoslawski, Karine Joizil, for Applicant, Astal Media Inc.
Marek Nitoslawski, Karine Joizil, for Respondents, SODRAC 2003 Inc. and Society, for Reproduction Rights of Authors, Composer and Publishers in Canada (SODRAC) Inc.

Subject: Civil Practice and Procedure; Intellectual Property; Property

APPLICATION by broadcasters for judicial review of determination regarding licence fees for copyrighted material.

***J.D. Denis Pelletier J.A.*:**

1 In a decision dated November 2, 2012 [2012 CarswellNat 4255 (Copyright Bd.)] (the Decision), the Copyright Board (the Board) exercised its mandate under section 70.2 of the Copyright Act, R.S.C. 1985 c. C-42 (the Act) to settle the terms of a licence to be granted to two broadcasters by a collective society which administers reproduction rights. The terms of the licence reflect the Board's view that royalties were payable with respect to ephemeral copies of works made by the broadcasters in the normal course of their production or broadcasting activities. Ephemeral copies, as will be seen, are copies or reproductions that exist only to facilitate a technological operation by which audiovisual work is created or broadcast.

2 This aspect of the Board's decision rests on the Supreme Court of Canada's decision in *Bishop v. Stevens*, [1990] 2 S.C.R. 467 (S.C.C.), in which the Court held that ephemeral recordings of a performance of a work, made solely for the purpose of facilitating the broadcast of that performance, were, if unauthorized, an infringement of the copyright holder's rights. In this application for judicial review of the Board's Decision, the broadcasters argue that *Bishop v. Stevens* must be read in the light of *Public Performance of Musical Works, Re*, 2012 SCC 34, [2012] 2 S.C.R. 231 (S.C.C.) (*ESA*), a decision in which the Supreme Court affirmed the principle of technological neutrality in copyright matters. The result, in the applicants' view, is that, today, ephemeral copies should no longer attract royalties.

3 The Board's decision raised other issues which will be discussed below but the question that dominated the hearing of this appeal was the treatment of ephemeral recordings in light of *ESA*.

4 For the reasons that follow, I am of the view that *Bishop v. Stevens* continues to be good law.

The Decision Under Review

5 These reasons apply to three applications for judicial review. In file no. A-516-12, the Canadian Broadcasting Corporation/Société Radio Canada (CBC) seeks to set aside several terms of the 2008-2012 licence issued to it pursuant to the Decision. In file no. A-527-12, Astral Media Inc. (Astral) also seeks to set aside a number of the terms of the 2008-2012 licence issued to it pursuant to the Decision. Lastly, file no. A-63-13 involves another application for judicial review by CBC, this time with respect to the Board's January 16, 2013 [2013 CarswellNat 43 (Copyright Bd.)] decision extending the 2008-2012 licence to the 2012-2016 period on an interim basis pending a final determination of SODRAC's section 70.2 with respect to that period. Both licences issued pursuant to the November 2, 2012 and the January 16, 2013 decisions are subject to a stay of execution pursuant to an order of this Court made February 28, 2013, pending the final determination of these applications for judicial review.

6 These reasons deal with all three applications; a copy of them will be placed on each file. Judgment will issue separately in each file, on the terms provided in these reasons.

7 The Society for Reproduction Rights of Authors, Composers and Publishers in Canada (Sodrac) Inc., and SODRAC 2003 Inc. (collectively SODRAC) are collective societies responsible for the administration of the reproduction rights on behalf of the holders of those rights.

8 CBC is Canada's public broadcaster. CBC's mandate with respect to Canada's French speaking population is discharged by the Société Radio-Canada (Radio-Canada) which, for many years, has produced and broadcast programs incorporating music by Québec artists. Since SODRAC represents the majority of Québec reproduction rights holders, Radio-Canada and SODRAC are well known to each other.

9 Astral is a broadcaster specializing in specialty channels but unlike the CBC, it does not produce any of its own programming. It purchases audiovisual works for broadcast from producers, apparently on the understanding that these producers have obtained the necessary rights to allow it to broadcast the works without the payment of additional royalties

10 This dispute arises out of a particular historical context. Following the decision in *Bishop v. Stevens* in 1990, SODRAC licensed broadcasters making use of its repertoire to make ephemeral copies for broadcasting purposes, and to incorporate works in its repertoire into their own productions. These licences also covered producers who were commissioned by these broadcasters to produce works containing SOCRAC material. Around 1998, SODRAC began requiring such producers o obtain their own licence, though these licences did not require the payment of royalties. Around 2006, SODRAC began requiring producers to pay for the right to incorporate works from its repertoire into their productions, even if the broadcaster commissioning the work was licensed by SODRAC.

11 In 1992, CBC and SODRAC concluded an agreement that set the terms upon which CBC was authorized to use works from SODRAC's repertoire on radio, on television and for certain ancillary purposes. This agreement was renewed from time to time but as SODRAC's licensing practices changed, they were unable to come to an agreement on renewal. SODRAC invoked section 70.2 of the Act so as to seize the Board with the question. More or less at the same time, SODRAC also invoked section 70.2 of the Act in relation to Astral. The Board consolidated the hearing of these two matters.

12 Section 70.2 of the Act provides for a form of arbitration in which parties who are unable to agree on the term of a licence can apply to the Board to fix those terms:

> 70.2 (1) Where a collective society and any person not otherwise authorized to do an act mentioned in section 3, 15, 18 or 21, as the case may be, in respect of the works, sound recordings or communication signals included in the collective society's repertoire are unable to agree on the royalties to be paid for the right to do the act or on their related terms and

conditions, either of them or a representative of either may, after giving notice to the other, apply to the Board to fix the royalties and their related terms and conditions.

(2) The Board may fix the royalties and their related terms and conditions in respect of a licence during such period of not less than one year as the Board may specify and, as soon as practicable after rendering its decision, the Board shall send a copy thereof, together with the reasons therefor, to the collective society and the person concerned or that person's representative.

70.2 (1) À défaut d'une entente sur les redevances, ou les modalités afférentes, relatives à une licence autorisant l'intéressé à accomplir tel des actes mentionnés aux articles 3, 15, 18 ou 21, selon le cas, la société de gestion ou l'intéressé, ou leurs représentants, peuvent, après en avoir avisé l'autre partie, demander à la Commission de fixer ces redevances ou modalités.

(2) La Commission peut, selon les modalités, mais pour une période minimale d'un an, qu'elle arrête, fixer les redevances et les modalités afférentes relatives à la licence. Dès que possible après la fixation, elle en communique un double, accompagné des motifs de sa décision, à la société de gestion et à l'intéressé, ou au représentant de celui-ci.

13 The heart of the dispute between CBC and Astral (collectively, the Broadcasters) on the one hand, and SODRAC, on the other, is SODRAC's business model which the Broadcasters say is inconsistent with the prevailing industry model. The Broadcasters say that the normal practice in the industry is for the producer of an audiovisual work (television program, movie or other cinematographic work) to obtain a through-to-the-viewer licence from the rights holder.

14 In its Decision, the Board described a through-to-the viewer licence as follows:

Producers sometimes secure a *through-to-the-viewer licence*. Such a licence authorizes all copies of a musical work made by the producer or others in the course of delivering the audiovisual work to the ultimate consumer in the intended market, be it television, cinema, DVD, Internet or other. A *buy-out licence* is a through-to-the-viewer licence in which royalties are set at a lump sum paid up front. Other through-to-the-viewer licences give the producer the option to extend the licence beyond a certain point in time, a certain territory or a certain market at pre-determined prices. When a producer exercises an option pursuant to a through-to-the-viewer licence, the related rights are cleared for downstream users as well as for the producer.

Decision at paragraph 15

15 The Broadcasters emphasize that this type of licence is consistent with the producer's intention in obtaining a licence, which is to create a product that can be marketed to broadcasters or exhibitors who can then exploit it commercially. The fact that the rights acquired under a through-to-the-viewer licence may be limited in time or place does not detract from the essential feature of

such a licence, which is that the producer obtains or "clears" all necessary rights for downstream users, within the temporal or geographical limits of the licence.

16 As against this model, SODRAC has adopted a layered approach to licensing in which each link in the distribution chain must acquire (and pay for) the right to make the copies required for its commercial purposes. It is reasonable to assume that SOCRAC'S position is designed to maximize revenue for the artists it represents.

17 SODRAC's change in strategy corresponds with the adoption of new technology that generally requires producers to make multiple copies of a musical work in order to incorporate it into an audiovisual work, a process known as synchronisation. At the same time, computerized digital content management systems and digital projection systems require broadcasters or exhibitors of an audiovisual work to make multiple copies of the work in order to broadcast or exhibit it. These copies, described earlier in these reasons as ephemeral copies, are known as incidental copies and were described as follows by the Board:

> ...*Synchronization* refers to the process of incorporating a musical work into an audiovisual work. Thus, a *synchronization copy* is any copy made in order to include the work into the final (*master*) copy of an audiovisual work. A post-synchronization copy of the music is made each time the audiovisual work itself is copied, for example to broadcast, deliver or distribute the audiovisual work.
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> An *incidental copy* is necessary or helpful to achieve an intended outcome but is not part of the outcome itself. A *production-incidental copy* is made in the process of producing and distributing an audiovisual work, either before or after the master copy is made: it is a form of synchronization copy. A *broadcast-incidental copy* is made to facilitate the broadcast of an audiovisual work or to preserve the work in the broadcaster's archives, while a *distribution-incidental copy* is made for the purpose of readying or preserving the motion picture for distribution to the public: both are forms of post-synchronization copies.
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> Decision at paragraphs 11-12 (emphasis in the original)

18 To round out this discussion of incidental copies, it is of interest to note that the evidence before the Board was that a producer will reproduce a musical work between 12 and 20 times in the course of the synchronization process leading to a finished master copy. Television broadcasters, using digital content management systems (which are now the industry standard), make multiple copies of an audiovisual work in the course of editing (for example, adjusting sound and colour balance), broadcasting and archiving the work. While the making of incidental copies is not a new phenomenon (see *Bishop v. Stevens*), it appears that technological advances may have increased the number of incidental copies made in the course of commercial operations. The Board says it did; the Broadcasters dispute this.

19 With that background, I turn to the Board's decision. After having laid out the historical and technological background summarized above, the Decision then set out a few general legal principles, the most relevant of which is the following:

> Fourth, the Board cannot impose liability where the Act does not or remove liability where it exists. Consequently, the Board cannot decide who should pay, only what should be paid for which uses, and only to the extent that the envisaged use requires a licence.
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> Decision at *paragraph* 62

20 This principle is a partial answer to the Broadcaster's argument with respect to whether incidental copies should attract royalties. In the Board's view, liability to pay royalties is imposed by the Act and is based upon use of the protected material. As a result, the Board cannot relieve a user of protected material from the financial consequences of that use.

21 The Board then went on to consider what it called "contextual legal principles". Under this heading, the Board engaged in an examination of the history and current state of SODRAC's licensing practices. It acknowledged that the use of through-to-the viewer licenses in some markets by some rights holders was relevant but not determinative. The focus of the inquiry was on SODRAC's practices which, to the extent that they were both consistent and significant in the relevant market, could not be ignored.

22 The Board's review of the evidence, including SODRAC's licensing practices, led it to conclude that SODRAC had issued few, if any, through-to-the-viewer licences. To the extent that SODRAC had issued licences granting the licencee the right to authorize others to reproduce protected works, that right generally resided with the broadcaster not with the producer. So it was that CBC's licence from SODRAC covered synchronization in audiovisual works commissioned by CBC from independent producers. Under such licences, producers did not acquire the right to authorize anyone "downstream" in the distribution chain to reproduce a protected work.

23 As a result of its review of the evidence, the Board concluded that the record before it was unambiguous. "In the most relevant market, the province of Québec, through-to-the-viewer licensing exists but is not the norm": see Decision at paragraph 78. This finding is significant because, to the extent that the Board sets royalties and licence fees on the basis of the economic value of the rights involved, the definition of the market for those rights is a relevant consideration.

24 The Board next embarked on an analysis of the economic value of reproduction rights in the hands of broadcasters and producers, an analysis that proceeded on the basis of two fundamental propositions:

> a) The copy-dependent technologies adopted by producers and broadcasters add value to their businesses, by allowing them to remain competitive, even if they do not generate direct

profits. Since part of this value arises from the use of additional copies, some of the benefits flowing from those copies should be reflected in the remuneration paid for the additional copies.

b) The Board cannot, under the umbrella of a section 70.2 arbitration between two parties, dictate how either of the parties should conduct their business generally, or how they should deal with third parties such as producers. In other words, it is not for the Board to force SODRAC to issue through-to-the-viewer licenses or to establish through-to-the-viewer licences as a standard arrangement.

25 After establishing these principles, the Board's decision went on at some length in setting the financial terms of the licences to the CBC and to Astral. After making allowance for the fact that SODRAC did not represent all of the rights holders for music incorporated into the Broadcasters' offerings, the Board then addressed the quantification of the fees to be paid by the latter under various headings. The Board set the licence fees for broadcast-incidental copies in radio and television as well as the fees payable by CBC with respect to synchronization licences. Finally, the Board dealt with licence fees payable for internet TV, sales of programs to consumers for private use (DVDs and downloads), and fees for licensing of CBC programs to third parties.

26 The Broadcasters' principal argument before us was that the analysis adopted by the Board flew in the face of the principle of technological neutrality established by the Supreme Court in *ESA*. As a result, in order to simplify the analysis, I propose to deal with the issue of technological neutrality at this point, deferring the analysis of the other arguments made by the Broadcasters until later in these reasons.

Analysis

27 The Board is unusual among specialized administrative tribunals in that its decisions on question of law are reviewable on the standard of correctness: see *Public Performance of Musical Works, Re*, 2012 SCC 35, [2012] 2 S.C.R. 283 (S.C.C.) at paragraphs 10-15. Questions of fact are only reviewable if they are "made in a perverse or capricious manner or without regard for the material before it [the tribunal]": see section 18.1(4)(*d*) of the *Federal Courts Act*, R.S.C. 1985, c. F-7. In *Khosa v. Canada (Minister of Citizenship & Immigration)*, 2009 SCC 12, [2009] 1 S.C.R. 339 (S.C.C.) (*Khosa*), the Supreme Court of Canada described this provision as providing "legislative precision to the reasonableness standard of review of factual issues falling under the *Federal Courts Act*": *Khosa*, at paragraph 46.

28 Earlier in these reasons, I set out two fundamental propositions that inform the Board's reasoning: see paragraph 25. The first is that, if technological advances require the making of more copies of a musical work in order to get an audiovisual work that incorporates it to market, those additional copies add value to the enterprise. As a result, they attract additional royalties, not

necessarily on a per-copy basis but on the basis of the additional value generated by those copies. Simply put, more copies mean more value and thus, more royalties.

29 The Broadcasters challenge this proposition on two interrelated but distinct grounds. First, they say that copy-dependent technology does not add value to an enterprise and as a result, there is no additional value to share with artists who, incidentally, bear none of the costs of acquiring and maintaining the new technology. This is essentially an economic argument, on which the Board heard extensive evidence and on which it came to a conclusion for which there is an evidentiary foundation. As a result, this Court is not in a position to interfere with the Board's conclusion on the economic justification for its conclusion.

30 The Broadcasters' second argument is a legal one: the Board's decision fails to give effect to the principle of technological neutrality articulated by the Supreme Court in *ESA*. The Broadcasters concede, as they must, that the incorporation of a musical work into an audiovisual work (synchronization) is a reproduction that attracts royalties. However, they go on to argue that copies of the work that are made purely to meet the requirements of the technological systems used by producers and broadcasters ought not to attract royalties. Changes in technology should not automatically result in changes in royalties. Otherwise, intellectual property rights become a drag on technological innovation and efficiency.

31 The Board's reasoning is grounded in the Supreme Court's decision in *Bishop v. Stevens*, a case in which the Supreme Court held that each of the rights enumerated in subsection 3(1) of the Act was a separate right reserved to the owner of the copyright, whose use by another attracted liability for the payment of royalties. Section 3(1) of the Act is reproduced below for ease of reference:

> 3. (1) For the purposes of this Act, "*copyright*", in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof, and includes the sole right
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> (a) to produce, reproduce, perform or publish any translation of the work,
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> . . .
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> (d) in the case of a literary, dramatic or musical work, to make any sound recording, cinematograph film or other contrivance by means of which the work may be mechanically reproduced or performed,
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> (e) in the case of any literary, dramatic, musical or artistic work, to reproduce, adapt and publicly present the work as a cinematographic work,
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> (f) in the case of any literary, dramatic, musical or artistic work, to communicate the work to the public by telecommunication,

. . .

and to authorize any such acts.

3. (1) Le droit d'auteur sur l'oeuvre comporte le droit exclusif de produire ou reproduire la totalité ou une partie importante de l'oeuvre, sous une forme matérielle quelconque, d'en exécuter ou d'en représenter la totalité ou une partie importante en public et, si l'oeuvre n'est pas publiée, d'en publier la totalité ou une partie importante; ce droit comporte, en outre, le droit exclusif:

a) de produire, reproduire, représenter ou publier une traduction de l'oeuvre;

. . .

d) s'il s'agit d'une oeuvre littéraire, dramatique ou musicale, d'en faire un enregistrement sonore, film cinématographique ou autre support, à l'aide desquels l'oeuvre peut être reproduite, représentée ou exécutée mécaniquement;

e) s'il s'agit d'une oeuvre littéraire, dramatique, musicale ou artistique, de reproduire, d'adapter et de présenter publiquement l'oeuvre en tant qu'oeuvre cinématographique;

f) de communiquer au public, par télécommunication, une oeuvre littéraire, dramatique, musicale ou artistique;

. . .

Est inclus dans la présente définition le droit exclusif d'autoriser ces actes.

32 More specifically, *Bishop v. Stevens* decided that ephemeral recordings made solely for the purpose of facilitating the broadcast of a work were caught by paragraph 3(1)(*d*) of the Act and were not implied in the right to broadcast a work: see *Bishop v. Stevens* at paragraphs 22-25. To that extent, *Bishop v. Stevens* is directly on point and, unless it has been overturned or disavowed by the Supreme Court, it determines the outcome of this branch of the applications for judicial review.

33 The Broadcasters say that *Bishop v. Stevens* has been overtaken by *ESA*.

34 The issue in *ESA* was whether a download of a game containing music is a communication of the musical work to the public by telecommunication, one of the rights reserved exclusively to the copyright holder by the Act: see paragraph 3(1)(*f*). If it is, then the publishers of the game, who had already paid for the right to *reproduce* the music incorporated in the game, were liable to pay royalties with respect to the download (*the communication to the public by telecommunication*). As a result, recourse to a technologically advanced method of delivery would create liability for additional royalties that were not paid or payable when the game was sold on a traditional physical medium, such as a CD-ROM.

35 In its decision, reported at (2007), 61 C.P.R. (4th) 353 (Copyright Bd.), the Board found that the download of a game containing music was a communication of the musical work to the public by telecommunication, a decision that was confirmed by this Court at 2010 FCA 221 (F.C.A.). The majority of the Supreme Court reversed this Court and, in the course of doing so, affirmed the principle of technological neutrality.

36 The Supreme Court began by articulating its view of the source and effect of technological neutrality:

> In our view, the Board's conclusion that a separate, "communication" tariff applied to downloads of musical works violates the principle of technological neutrality, *which requires that the Copyright Act apply equally between traditional and more technologically advanced forms of the same media: Robertson v. Thomson Corp.*, [2006] 2 S.C.R. 363, at paragraph 49. The principle of technological neutrality is reflected in s. 3(1) of the Act, which describes a right to produce or reproduce a work "in any material form whatever". In our view, there is no practical difference between buying a durable copy of the work in a store, receiving a copy in the mail, or downloading an identical copy using the Internet. The Internet is simply a technological taxi that delivers a durable copy of the same work to the end user.
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> *ESA* at paragraph 5 (my emphasis).

37 A slightly different view of technological neutrality emerges from paragraph 9 of the majority's reasons:

> SOCAN has never been able to charge royalties for copies of video games stored on cartridges or discs, and bought in a store or shipped by mail. Yet it argues that identical copies of the games sold and delivered over the Internet are subject to both a fee for reproducing the work and a fee for communicating the work. *The principle of technological neutrality requires that, absent evidence of Parliamentary intent to the contrary, we interpret the Copyright Act in a way that avoids imposing an additional layer of protections and fees based solely on the method of delivery of the work to the end user.* To do otherwise would effectively impose a gratuitous cost for the use of more efficient, Internet-based technologies.
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> (My emphasis.)

38 Finally, a third view of technological neutrality is found in paragraph 10 of the majority's reasons:

> The Board's misstep is clear from its definition of "download' as "a file containing data ... the user is meant to keep as his own" (*paragraph* 13). The Board recognized that downloading is a copying exercise that creates an exact, durable copy of the digital file on the user's computer, identical to copies purchased in stores or through the mail. *Nevertheless, it concluded that*

> *delivering a copy through the Internet was subject to two fees - one for reproduction and one for communication - while delivering a copy through stores or mail was subject only to reproduction fees. In coming to this conclusion, the Board ignored the principle of technological neutrality.*
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> (My emphasis.)

39 A careful reading of these passages shows that the Supreme Court's majority reasons incorporate at least three views of technological neutrality:

> a) Technological neutrality is media neutrality. Media neutrality is a statutory prescription arising from the opening words of section 3 of the Act, which protects the production or reproduction of works "in any material form whatever". Media neutrality was recognized by the Supreme Court in *Robertson v. Thomson Corp.*, 2006 SCC 43, [2006] 2 S.C.R. 363(*Robertson*), a case involving copyright in content originally published in a newspaper and then republished online.
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> b) Technological neutrality is a principle of statutory interpretation according to which, absent evidence of a contrary Parliamentary intention, the Act is to be interpreted so as to avoid imposing royalties according to the method of delivery of a protected work.
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> c) Technological neutrality is determined by functional equivalence so that if two technologically distinct operations produce the same result (delivering a copy of a work to the consumer), the incidence of royalties should be the same in both cases.

40 In light of these different views of technological neutrality, it is difficult to know how one is to approach technological neutrality post-*ESA*. This is particularly true when one considers that in both *Robertson v. Thomson Corp.* [2006 CarswellOnt 6182 (S.C.C.)] and *ESA* the Court's decision was reached following an analysis that did not rely on any of the possible variants of technological neutrality.

41 In *Robertson*, the issue was whether the Globe and Mail infringed the copyright of freelance contributors when it contributed their work to electronic databases. The case was one of overlapping copyrights as the freelance contributors retained the copyright in their article while the Globe and Mail had the copyright in the newspaper as a whole, whether considered as a compilation or a collection: see *Robertson*, at paragraph 31. The majority in the Supreme Court held that the databases infringed the freelancer's copyright because the databases did not involve a reproduction of the newspaper as such but of discrete elements such as articles, even though these were tagged with the name of the original publication, date of publication and other publication specific identifiers. The basis of the Supreme Court's decision is that the database reproduced the freelance contributor's, not the newspaper's, originality. The result was that the inclusion of the

article in the database was an infringement of the freelancer's copyright and was not covered by the newspaper's copyright.

42 The decision in *Robertson* turned on the originality of the work being reproduced and not on the nature of the medium on which the articles were republished. While the Court's conclusion was technologically neutral, in the sense that the medium on which reproduction occurred was not a relevant consideration, its decision provided no guidance as to how technological neutrality was to be achieved.

43 Similarly, the majority decision in *ESA* was the result of an analysis of the legislative history of the Act and of the jurisprudence showing that communication to the public by telecommunication was historically an aspect of the performance right, and that this right did not include the delivery of a permanent copy of the work. Since the download did result in the creation of a permanent copy of the work on the downloader's computer, it was not a performance and thus not a communication of the work to the public by telecommunication.

44 The majority's analysis did not rely on nor refer to any of the shades of technological neutrality that it discussed in the earlier part of its reasons. As a result, *ESA*, while restating the principle of technological neutrality in copyright law, provides no guidance as to how a court should apply that principle when faced with a copyright problem in which technological change is a material fact.

45 *Bishop v. Stevens* was just such a case. In it, the broadcaster argued that the right to broadcast a performance necessarily included the right to make ephemeral recordings in support of the broadcasting activity. The broadcaster argued that pre-recording was virtually essential "to ensure the quality of broadcasts and to enable broadcasters to offer the same programming at convenient times across five different time zones": see *Bishop v. Stevens*, at paragraph 23. This argument was rejected on the basis of the statutory distinction between the right to make a recording of a work and the right to perform that work.

46 The Supreme Court's reasoning in *Bishop v. Stevens* is worth repeating here as it foreshadows the arguments made in this case:

> In sum, I am not convinced that there is any reason to depart from the literal meaning of s. 3(1)(d) and the introductory paragraph to s. 3(1) of the Act, which on their face, draw a distinction between the right to make a recording and the right to perform. Neither the wording of the Act, nor the object and purpose of the Act, nor practical necessity support an interpretation of these sections which would place ephemeral recordings within the introductory paragraph to s. 3(1) rather than in s. 3(1)(d). On the contrary, policy considerations suggest that if such a change is to be made to the Act, it should be made by the legislature, and not by a forced interpretation. I conclude that the right to broadcast a performance under s. 3(1)(d) of the Act does not include the right to make ephemeral recordings for the purpose of facilitating the broadcast.

Bishop v. Stevens, at paragraph 33

47 This reasoning is taken up in the following passage from *ESA*:

> 40 SOCAN submits that the distinction between reproduction and performance rights in *Bishop* actually supports its view that downloading a musical work over the Internet can attract two tariffs. Since reproduction and performance-based rights are two separate, independent rights, copyright owners should be entitled to a separate fee under each right. This is based on the Court's reliance in *Bishop*, at p. 477, on a quote from *Ash v. Hutchinson & Co. (Publishers), Ltd.*, [1936] 2 All E.R. 1496 (C.A.), at p. 1507, per Greene L.J.:
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> > Under the *Copyright Act*, 1911 [on which the Canadian Act was based], ... the rights of the owner of copyright are set out. A number of acts are specified, the sole right to do which is conferred on the owner of the copyright. The right to do each of these acts is, in my judgment, a separate statutory right, and anyone who without the consent of the owner of the copyright does any of these acts commits a tort; if he does two of them, he commits two torts, and so on. [Emphasis added.]
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> 41 In our view, the Court in *Bishop* merely used this quote to emphasize that the rights enumerated in s. 3(1) are distinct. *Bishop* does not stand for the proposition that a single activity (i.e., a download) can violate two separate rights at the same time. This is clear from the quote in *Ash v. Hutchinson*, which refers to "two acts". In *Bishop*, for example, there were two activities: 1) the making of an ephemeral copy of the musical work in order to affect a broadcast, and 2) the actual broadcast of the work itself. In this case, however, there is only one activity at issue: downloading a copy of a video game containing musical works.
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> *ESA* at paragraphs 40-41

48 In my view, this passage reaffirms the fundamental distinction between reproduction and performance (communication to the public by telecommunication) that the Court articulated in *Bishop v. Stevens* Nothing in this passage, or elsewhere in *ESA*, would authorize the Board to create a category of reproductions or copies which, by their association with broadcasting, would cease to be protected by the Act. ESA did not explicitly, or by necessary implication, overrule *Bishop v. Stevens*.

49 As a result, I am unable to accept the Broadcasters' argument that the comments about technological neutrality in *ESA* have changed the legal landscape to the point where the Board erred in finding that incidental copies are protected by copyright. The Broadcasters' argument with respect to technological neutrality fails.

Additional Grounds of Review

50 The Broadcasters raise a number of other issues in their attack on the Board's Decision. They can be summarized as follows:

> 1 - The Board failed to carry out or to properly carry out its role as economic regulator by wrongly deciding a number of questions that arose before it in the course of its decision.
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> 2 - The Board exceeded its jurisdiction when it imposed a general licence on the Broadcasters notwithstanding the latter's expressed preference for transaction-based licences if the Board ordered the payment of royalties for ephemeral reproductions.
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> 3 - The Board failed to consider a relevant factor when it refused to take into account the CBC's ability to pay when fixing licence fees that were substantially more than those which CBC has paid historically.

I will now address each of these in turn.

1- The Board failed to carry out or to properly carry out its role as economic regulator by wrongly deciding a number of questions that arose before it in the course of its decision.

51 This heading covers a number of distinct findings by the Board whose common denominator is their economic impact. Most of these findings relate to the exercise of the Board's judgment in assessing the evidence put before it by the parties and in putting a value on reproduction rights in different contexts, such as radio, television, internet, and film and DVD distribution.

52 Such questions are reviewable on the standard of reasonableness since they inevitably involve the weight to be given to the evidence heard by the Board and the conclusions to be drawn from that evidence. Reasonableness, in this context, means "within the range of acceptable outcomes that are defensible in terms of the facts and the law": *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.), at paragraph 74.

53 Many of the points raised by the Broadcasters are an attempt to re-argue before us the evidence that was before the Board. In essence, the questions raised by the Broadcasters turn on whether ephemeral copies have economic value and, if so, the proper quantification of that value in the setting of royalties.

54 The Broadcasters' first approach to the question of the value of ephemeral copies was to argue that any value attached to ephemeral copies was compensated in the through-to-the-viewer licence issued to the producers who paid for a synchronization licence with respect to an audiovisual work. A good deal of evidence was led to show that the through-to-the-viewer licence was the industry standard in Canada and that the terms of such a licence made the issue of broadcast-incidental copies redundant since all downstream reproductions are covered by the terms of the licence.

The Broadcasters say that the Board cannot or should not make an order contrary to established commercial practice in the broadcasting industry.

55 Notwithstanding the Broadcasters' attempt to make this a question of law, it is one of fact. Did the producers from whom they obtained programs (with respect to which SODRAC administered the reproduction rights) obtain a through to the viewer licence from SODRAC? If the answer to the question is no, it is of no assistance to the Broadcasters to say that they thought the producers had obtained such licences or that they ought to have.

56 The Board examined the evidence submitted by the parties on this question, including a number of synchronization licences issued by SODRAC and came to the conclusion that "in the relevant market, the province of Québec, through-to-the-viewer licensing exists but is not the norm": Decision, at paragraph 78. It is not this Court's role to review the evidence and to decide if it would come to the same conclusion. The Board's conclusion is based on the evidence, it is intelligible and it is within the range of acceptable outcomes, having regard to the facts and the law.

57 The Broadcasters also challenge the Board's conclusion that Québec is the relevant market but in light of the fact that SODRAC represents the majority of reproduction rights holders in Québec (see Decision, at paragraph 18), it is not unreasonable to consider the market where SODRAC is the most active as the relevant market.

58 The Broadcasters go on to say that the formula devised by the Board to credit them in cases where programs which they broadcast have cleared to the viewer is wrong and produces an absurd result because even if all programs broadcast in a given period were cleared to the viewer, the formula would still require them to pay royalties with respect to those programs. For reasons that will become apparent, I believe that this issue is best dealt with under the heading dealing with the Board's power to issue a blanket licence over CBC's objections.

59 The remaining "economic" issues involve questions such as the fixing of SODRAC's royalties as a percentage of royalties payable to SOCAN, and the fact that some royalties imposed by the Board (e.g. Internet TV) are inconsistent with those ratios. These decisions are based upon the evidence that the Board had before it and to which it makes reference in its Decision. The Board has expertise in the setting of appropriate royalties as a result of its long experience in doing so. It has the advantage of having heard all the evidence as well as having an in-depth understanding of the context in which these questions arise. These factors suggest that we should defer to the Board's expertise, unless it can be shown that the Board has come to an unreasonable conclusion. That has not been shown with respect to these issues.

2- The Board exceeded its jurisdiction when it imposed a general licence on the Broadcasters notwithstanding the latter's expressed preference for transaction-based licences in the event that the Board ordered the payment of royalties for ephemeral reproductions.

60 CBC argues that the Board exceeded its jurisdiction when it imposed a blanket synchronization licence. CBC says that it indicated to the Board that, at the royalty rates proposed by SODRAC, it would proceed by way of transactional licences as the need arose. This argument does not arise for Astral as it is not a producer of audiovisual works and therefore does not require a synchronization licence.

61 CBC's argument is based on the wording of section 70.2 of the Act, the provision that permits the Board to set the terms of a licence between two parties as opposed to fixing a tariff:

> 70.2 (1) Where a collective society and any person not otherwise authorized to do an act mentioned in section 3, 15, 18 or 21, as the case may be, in respect of the works, sound recordings or communication signals included in the collective society's repertoire are unable to agree on the royalties to be paid for the right to do the act or on their related terms and conditions, either of them or a representative of either may, after giving notice to the other, apply to the Board *to fix the royalties and their related terms and conditions*..
>
> (2) The Board may *fix the royalties and their related terms and conditions* in respect of a licence during such period of not less than one year as the Board may specify and, as soon as practicable after rendering its decision, the Board shall send a copy thereof, together with the reasons therefore, to the collective society and the person concerned or that person's representative.
>
> (My emphasis.)
>
> 70.2 (1) À défaut d'une entente sur les redevances, ou les modalités afférentes, relatives à une licence autorisant l'intéressé à accomplir tel des actes mentionnés aux articles 3, 15, 18 ou 21, selon le cas, la société de gestion ou l'intéressé, ou leurs représentants, peuvent, après en avoir avisé l'autre partie, demander à la Commission *de fixer ces redevances ou modalités.*
>
> (2) La Commission peut, selon les modalités, mais pour une période minimale d'un an, qu'elle arrête, *fixer les redevances et les modalités afférentes* relatives à la licence. Dès que possible après la fixation, elle en communique un double, accompagné des motifs de sa décision, à la société de gestion et à l'intéressé, ou au représentant de celui-ci.
>
> (Je souligne.)

62 CBC's argument is that the power to "fix the royalties and their related terms and conditions" does not include the power to decide if the parties will enter into a licensing agreement at all. If the parties do not agree that they wish to enter into a licence agreement, there is no agreement with respect to which the Board may fix the royalties and the terms and conditions. Thus, if "CBC does not want a blanket synchronization licence, the Board has no jurisdiction to impose it": Broadcasters' Memorandum of Fact and Law, at paragraph 18.

63 SODRAC points out that CBC has the right to refrain from using music in the SODRAC repertoire, in which case the question of the form of licence simply does not arise. However, where CBC chooses to use the SODRAC repertoire in its productions, it requires a licence. If it is not able to agree on the terms of that licence with SODRAC, then the latter is entitled to apply pursuant to section 70.2 of the Act to have the Board set the royalties and the terms and conditions which apply to them, including the basis upon which those royalties are calculated.

64 In its submissions before the Board, CBC seems to have conceded that the Board could impose a blanket licence. At paragraph 119 of its Decision, the Board summarizes one of the options put forward by CBC's experts with respect to a blanket through-to-the-viewer licence for CBC. Later on, at paragraph 132, the same experts propose a discount to the royalty payable pursuant to the proposal for a blanket licence favoured by the Board.

65 Finally, CBC's own submissions to the Board appear to have accepted that the Board could impose a blanket licence:

> 12.1 The Board should issue a blanket license covering all television production and broadcasting activities of SRC/CBC.
>
> Joint Application Record, Vol. 1 Tab 1

66 CBC's response to these facts is to say that the Board could impose a blanket licence with its consent but not without it.

67 If that is so, then the Board's remedial jurisdiction under section 70.2 is dependent upon the consent of one of the parties to the statutory arbitration. On its face, such a proposition is at odds with the objective of section 70.2, which is to resolve disputes that the parties have been unable to resolve themselves. In this case, CBC, having failed to agree with SODRAC on the terms of a licence, claims the right to decide that in the future, it will proceed by agreement with SODRAC.

68 CBC claims that its position is supported by a decision of this Court, *CTV Television Network Ltd. v. Canada (Copyright Board)*, [1990] 3 F.C. 489 (Fed. T.D.). In that case, the issue was whether CTV, as a network, was liable to pay royalties with respect to communication of a work to the public by telecommunication. That issue had been determined against the Copyright Board and the collective societies involved in *Composers, Authors & Publishers Assn. of Canada Ltd. v. CTV Television Network*, [1968] S.C.R. 676 (S.C.C.) (*Capac*) but, following amendments to the Act, the Board proposed, once again, to consider a tariff payable by the network. The Federal Court agreed with CTV that the amendments had not had the effect proposed by the Board. In the course of its reasoning, the Court said that the Board's only function was to fix the royalties that the collective societies could charge. On appeal, the Federal Court's decision was upheld though this Court took a broader view of the Board's jurisdiction. It quoted the following passage from

Bell Canada v. Canadian Radio-Television & Telecommunications Commission, [1989] 1 S.C.R. 1722 (S.C.C.), at page 1756:

> The powers of any administrative tribunal must of course be stated in its enabling statute but they may also exist by necessary implication from the wording of the act, its structure and its purpose. Although courts must refrain from unduly broadening the powers of such regulatory authorities through judicial law-making, they must also avoid sterilizing these powers through overly technical interpretations of enabling statutes.

69 In my view, this statement remains good law. As a result, *Composers, Authors & Publishers Assn. of Canada Ltd.* is of no assistance to CBC. Its argument on this issue fails.

70 That said, the issue of the discount formula may go some way to meeting some of CBC's objections to a blanket license. The discount formula is a formula designed to give the Broadcasters credit when they broadcast a program in which the producer has in fact obtained a through to the viewer licence from SODRAC.

71 Before dealing with the specifics of the operation of the discount formula, it may be useful to review the context. At paragraph 62 of its Decision, quoted at paragraph 19 of these reasons, the Board held that liability for royalties exists only to the extent that the "envisaged use" requires a licence. The corollary of this proposition is that, to the extent that a licence has been obtained by others for the benefit of a broadcaster, no royalties are payable.

72 A second factor to be taken into account is that the formula for royalties payable in a given month reflects the fact that music from the SODRAC repertoire is only a fraction of the total music used by a broadcaster in any given month. As a result, in calculating the royalty rate for SODRAC, the Board allowed a "repertoire adjustment". Thus at paragraph 93 of its decision, the Board identified the portion of a broadcasting service's offerings which were drawn from the SODRAC repertoire. By way of example only, it found that music from the SODRAC repertoire was 46.33% of the music used on CBC television. To obtain the net royalty rate, the Board multiplied the base royalty rate by the repertoire adjustment. For CBC television, the base royalty rate of 31.25% was reduced by 46.33% to yield a net royalty rate of 14.78%: see paragraph 110 of the Decision.

73 As for the formula itself, SODRAC points out in its Memorandum of Fact and Law that the Board proposed the discount formula to the parties in pre-hearing mediation. When it introduced the discount formula the Board explained it as follows:

> Nouvelle disposition dont je suis maintenant autorisé à vous faire part. L'intention est de permettre à la SRC [Société Radio Canada] (et à Astral) de ne payer aucune redevance pour les reproductions incidentes de diffusion (broadcast incidental copies) si le producteur de l'émission a effectivement obtenu une licence « through to the viewer ».

> New provision which I am now authorized to share with you. The intention is to allow SRC [Société Radio Canada] (and Astral) to not pay any royalties for broadcast incidental copies if he producer of the program has in fact obtained a "through to the viewer" licence.
>
> Application Record, Vol. 23 Tab 14 Article 6.03, Footnote 10

74 It bears repeating that the royalties payable to SODRAC are only payable for the use of music in the SODRAC repertoire. Taking the Board at its word, if all the programs using music from the SODRAC repertoire in a given month were cleared through to the viewer, then the formula should result in a discount equal to the total royalties otherwise payable for that month.

75 The Board expressed the formula in terms of a discount per program. The formula itself is as follows:

> Discount per program = A × B / C

Where

> A = the monthly rate applicable to the service that broadcasts the relevant program,
>
> B = the program's production cost, in the case of a CBC program, and the program's acquisition cost, in the case of another program, and
>
> C = the total production and acquisition costs for the programs broadcast by the service during the month.

76 While the formula is calculated on a program basis and the royalties are calculated on a monthly basis, the monthly discount is necessarily the sum of all the individual program discounts for a given month. So, if the relevant costs for all SODRAC material "cleared to the viewer" broadcast in a month are aggregated under item B, the formula will yield the monthly discount.

77 In a given month, the royalty payable by a broadcaster is the net royalty rate less the total of the discounts for programs containing music from the SODRAC repertoire that have been cleared to the viewer. If the formula is properly constructed, in a month where all the music used from the SODRAC repertoire was cleared to the viewer, the discount should equal the net royalty rate so that, in that month, no royalties would be due. In order for the discount to equal the net royalty rate (item A in the formula), the fraction B/C must equal 1.

78 However, we know from the repertoire adjustment that music from the SODRAC repertoire is only 46.33% of all music broadcast by CBC television. As a result, item C in the formula, the total production and acquisition costs for the programs broadcast by the service during the month, will always be larger than item B since item the latter (music from the SODRAC repertoire) represents only 46.33% of the music broadcast in a month and presumably roughly the same proportion of the

total production and acquisition costs of all programs in a month. So, in a case where all music from the SODRAC repertoire broadcast in a month had been cleared to the viewer, the total discount for that month would be in the order of 46%, such that a royalty of 54% would be payable in a month in which all rights had already been cleared to the viewer.

79 Such a result is contrary to law, in the sense that royalties are not payable where the rights to use the music have already been cleared. The Board recognized this when it proposed the formula as a means of allowing the broadcaster an exemption for cleared to the viewer programs. In my view, the Broadcasters are correct when they say that the formula is flawed and needs to be corrected.

80 In order for the discount formula to work as intended, C must represent the production or acquisition cost of all music from the SODRAC repertoire that has been broadcast in the reference month. Where all of that music has been cleared to the viewer, then B/C will equal 1. In a case where some of the music has been cleared to the viewer and some has not, this amendment to the formula will reduce the royalties payable in proportion to the extent to which music has been cleared to the viewer.

81 This discussion is no doubt difficult to follow in the abstract. As a result, I have included an example demonstrating both the flaw in the formula as drafted by the Board, and the effect of the amendment to the formula that I propose, in an appendix to these reasons.

82 In the end result, I would allow the applications in part to allow for the amendment of the discount formula.

3- The Board failed to consider a relevant factor when it refused to take into account the CBC's ability to pay when fixing licence fees that were substantially more than those which CBC has paid historically.

83 CBC bases this argument on a heading at p. 50 of the Board's decision: Summary of the Rates to be Certified, Estimated Royalties and *Ability to Pay* (my emphasis). CBC points out, correctly, that nowhere in the two paragraphs that make up this portion of the Board's decision is the subject of ability to pay discussed. Furthermore, CBC says that the Board committed a reviewable error in ordering a four-fold increase in royalties payable at a time when, according to the evidence, CBC's revenues have diminished drastically.

84 This argument can be disposed of summarily. CBC is a publicly funded broadcaster whose basic allocation is voted by Parliament. If the CBC is not properly funded, as its submissions suggest, it is not the role of the artists whose works it uses in its broadcasts and productions to make up the shortfall by accepting less than the economic value of their rights under the Act. The Board's role as economic regulator does not extend to protecting CBC from the cost consequences of the programming choices it makes. This argument fails as well.

85 This disposes of the matters raised by the Broadcasters in files no. A-516-12 and A-527-12. The terms of the judgment to be issued pursuant to these reasons will be dealt with below. I now turn to the subject matter of file no A-63-12.

The application for judicial review of the interim licence issued on January 16, 2013

86 The licences issued by the Board following its November 2, 2012 Decision expired on March 31, 2012 (CBC) and August 31, 2012 (Astral). However, in 2009, the Board made an interim order continuing the then existing licences in place until it rendered its decision with respect to the 2008-2012 period. Those interim orders were of no further effect as of November 2, 2012 when the Board issued its Decision and the concomitant licences. This left a legal vacuum as the 2009 interim licences were at an end and the new licences had already expired.

87 In order to fill this legal vacuum, on January 16, 2013, the Board ordered that the licences for the 2008-2012 periods would continue in effect from the date of their expiry until the Board rendered a final decision with respect to the section 70.2 application made by SODRAC for the 2012-2016 periods. The Board's interim decision and the licences issued as a result are the subject of the third application for judicial review by CBC.

88 In its January 16, 2013 reasons (available online at http://www.cb-cda.gc.ca/decisions/2013/sodrac-16012013.pdf), the Board canvassed the factors that were relevant to the making of an interim order. It noted that an interim decision was intended to avoid the negative consequences resulting from lengthy proceedings and avoided the creation of a legal vacuum. It disagreed with CBC's argument that the 2008-2012 licence did not represent the *status quo* given its significant differences from the parties' prior pattern of dealings. The Board found that the *status quo* represented the state of the relationship between the parties at a given time, regardless of how long that state of affairs had been in place. Once the Board made the order with respect to the 2008-2012 period, the terms of that order became the new *status quo*.

89 CBC also argued that legislative changes and the Supreme Court's recent jurisprudence had or would significantly change the landscape between it and SODRAC. The Board held that the positions put forward by CBC on these issues (the effect of the Supreme Court's decision in *Public Performance of Musical Works, Re*, 2012 SCC 36, [2012] 2 S.C.R. 326 (S.C.C.) and the effect of the amendment to the Act, particularly section 30.9) were hardly non-contentious. The Board was of the view that these matters were more appropriately dealt with in the course of a full hearing rather than on an interim basis.

90 However, the Board was conscious of the fact that the parties might well choose to organize their affairs differently following the issuance of the 2008-2012 licence. It was of the view that any interim licence should facilitate that process without pre-empting it. As a result, it held that the blanket synchronization licence which it imposed, over CBC's objections, for the 2008-2012

period should be discounted by 20% during the interim period so as to facilitate the migration to a new way of doing business, if the parties were motivated to do so.

91 Before us, CBC made the same arguments as it had before the Board. It stressed that the *status quo*, in fact, was the state of affairs that was in place prior to the issuance of the 2008-2012 licence, particularly since the execution of that licence was stayed pending the outcome of these proceedings. It also pointed to the effect that it says the newly added section 30.9 of the Act will have on the question of incidental licences. That section provides an exemption in favour of broadcast undertakings reproducing a protected work solely for the purpose of their broadcasting, subject to certain conditions.

92 Finally, CBC questions whether SODRAC would be in a position to repay any amounts paid to it pursuant to the interim licence if it is successful in its challenge to the latter.

93 I agree with the Board that once it settled the terms of the 2008-2012 licence, it became the *status quo* between the parties, notwithstanding the stay of execution of that licence. Given that I propose to uphold the 2008-2012 licence with one small change, I can see no reason not to treat that order as the *status quo*. As for the changes in the way the parties do business in the future, in light of the 2008-2012 licence, legislative amendments and developments in the jurisprudence, this is a matter best considered by the Board in the hearings on the merits for the 2012-2016 licence which, as I understand it, were to begin within days of the hearing of this appeal.

94 As a result, I would dismiss the application for judicial review in file no. A-63-13.

Conclusion

95 For the reasons set out above, I would allow the applications for judicial review in part in files no. A-517-12, A-527-12 and A-63-12, but only for the purpose of amending the discount formula. I would amend the formula by defining element C of the formula where it appears at subsection 5.03 (2) of the CBC licence and subsection 6.03(2) of the Astral licence so that it reads as follows:

> (C) represents the total production and acquisition costs for all programs containing music from the SODRAC repertoire Broadcast by the service during the month.

96 The stays of execution of the licences issued by the Board on November 2, 2012 and January 16, 2013 are hereby dissolved.

97 SODRAC is entitled to one set of costs for all applications. However, in light of the Broadcasters' partial success, the amount of the costs, otherwise determined, will be reduced by 10 per cent.

***Marc Noël J.A.*:**

I agree

***Johanne Trudel J.A.*:**

I agree

Application granted in part.

Appendix

For the purposes of this example, I assume the following facts:

CBC television's repertoire adjusted royalty rate is 14.78 per cent of the royalty base (the amount of which royalties are calculated): paragraph 110 of the Decision.

The average amount of music from the SODRAC repertoire broadcast by CBC in a month is 46 per cent: paragraph 93 of the Decision.

The total production costs and acquisition costs of programs containing music from the SODRAC repertoire in the reference month is $100,000.

The total production costs and acquisition costs of all programs broadcast in the reference month is $210,000

The acquisition/ production costs of all programs containing music from the SODRAC repertoire in the reference month is as follows:

Program 1	-	$15,000
Program 2	-	$25,000
Program 3	-	$14,000
Program 4	-	$16,000
Program 5	-	$30,000
		$100,000

Assuming that rights to Program 1 have been cleared to the viewer, the royalties payable by the broadcaster for that month would be calculated on the basis of the discount formula A × B/C, where

A = the royalty rate otherwise payable,

B = the acquisition/production cost of the cleared program, and

C = the total acquisition/production cost of programs broadcast in the reference month.

Therefore

A = 14.78% B = $15,000 C = $210,000

Discount Program 1 = 14.78% × $15,000/$210,000 =14.78% × .071= 1.03%

Therefore, the royalties payable by the broadcaster in the reference month would be

14.78% - 1.03% = 13.75% × the royalty base

The discount for each of the other programs, in the event that the producer has cleared the rights to the viewer, applying the same formula, would be:

Program 2 = 1.77%

Program 3 = 0.88%

Program 4 = 1.12%

Program 5 = 2.11%

If all five programs had been cleared to the viewer, the total discount, as per the formula would be:

1.03% + 1.76% + .98% + 1.12% + 2.11% = 7%

The result would be the same if the acquisition/production costs were aggregated for the month, as shown below:

14.78 × $100 000/$210 000 = 14.78 × .476 = 7%

As a result, in a case where all programs containing music from the SODRAC repertoire had been cleared to the viewer, the discount formula established by the Board would result in the broadcaster paying royalties of:

14.78% - 7% = 7.78% of the royalty base

in a month in which there was no liability to pay royalties. This is contrary to law and to the Board's own stated objectives.

This can be remedied by defining C in the formula as the total acquisition/production cost of all programs containing music from the SODRAC repertoire broadcast in the reference month.

Using this formula, if the rights for the music from the SODRAC repertoire had been cleared to the viewer, the discount for Program 1 would be

A=14.78% B=$15,000 C=$100,00\

Discount Program 1 = 14.78% × $15,000/$100,000 = 14.78 × .15 = 2.22%

Royalties payable in reference month = 14.78% - 2.22% = 12.56%

If all programs broadcast in the month had been cleared to the viewer, the discount would be

A=14.78% B=$100,000 C=$100,000

Discount = 14.78% × $100,000/$100,000 = 14.78% × 1 = 14.78%

Royalties payable: 14.78% - 14.78% = 0 × royalty base = $0

This is the result intended by the Board.

2006 FC 1046, 2006 CF 1046
Federal Court

Canadian Council for Refugees v. R.

2006 CarswellNat 2658, 2006 CarswellNat 3064, 2006 FC 1046, 2006 CF 1046, 151 A.C.W.S. (3d) 108, 299 F.T.R. 114 (Eng.), 57 Imm. L.R. (3d) 48

Canadian Council for Refugees, Canadian Council of Churches, Amnesty International, and John Doe (Applicants) and Her Majesty the Queen (Respondent)

R.T. Hughes J.

Heard: August 29, 2006
Judgment: August 30, 2006 *
Docket: IMM-7818-05

Counsel: Barbara Jackman, Andrew Brower for Applicants, Canadian Council for Refugees, Canadian Council of Churches, John Doe
David Lucas, Greg G. George, Matina Karvellas for Respondent

Subject: Immigration; Civil Practice and Procedure; Family

MOTION by applicants for order restraining respondent Crown from denying J and his wife entry to Canada.

***R.T. Hughes J.*:**

1 This is a Motion brought on behalf of the Applicants for an Order pursuant to section 18.2 of the *Federal Court Act* restraining the Respondent from denying John Doe and his wife entry to Canada or, in the alternative, an Order directing the Respondent to allow John Doe and his wife to enter Canada from the United States pending determination on Judicial Review as to whether or not the Safe Third Country Agreement applies to them to bar them from eligibility to make a refugee claim. The motion is brought within the context of a larger Application in which the validity of the designation of the United States of America as a "Safe Third Country" and certain regulatory provisions respecting "Safe Third Country" legislation in Canada is being challenged by the Applicants.

2 At the core of the Application is a challenge to certain *Regulations* appearing in the *Immigration and Refugee Protection Regulations* S.O.R./2002-227 established with reference to section 101 and 102 of the *Immigration and Refugee Protection Act* S.C. 2001, c. 27 [*IRPA*]. These

Regulations came into force in December 2004, and provide that a refugee claim is ineligible to be considered if the claimant came directly or indirectly to Canada from a third country other than their original country of nationality, which third country has been designated as "safe" by the new *Regulations*. The United States of America is presently the only designated country.

3 These *Regulations* arise from the Safe Third Country Agreement signed by Canada in December 2002. The Regulatory Impact Statement published in Part II of the Canada Gazette on 12 October, 2002 [C. Gaz. 2002 II. Vol. 136] described these *Regulations* as a necessary step towards international cooperation in the orderly handling of refugee claims. Thus, a person who has originally come from a country where they have been persecuted and who has first gone to the United States of America, cannot thereafter seek to claim refuge in Canada. Prior to the establishment of these *Regulations*, a sojourn in the United States of America, did not preclude a person from coming to Canada and claiming refugee protection.

4 The Applicants, other than John Doe, were opposed to the passage of these *Regulations* and since their passage, have been seeking a means to challenge their validity in Court. These Applicants frankly acknowledge that they have spent considerable time and effort to locate an individual whose circumstances would better enable them to challenge the validity of the *Regulations*. Eventually the Applicant John Doe, whose anonymity was preserved by an earlier Order of the Court, was selected as a joint Applicant for purposes of challenging the *Regulations*.

5 The Affidavit of John Doe filed in the Application establishes that he and his wife are citizens of Columbia where they resided until June 2000 when they entered the United States of America apparently under a tourist visa. Doe unsuccessfully sought employment in the United States. In August 2001, the United States government commenced removal proceedings against him. In December 2001, Doe made an application for asylum in the United States and the withholding of the removal order. He claimed that when he was in Columbia, he was targeted by a rebel group (FARC) who made threats against his life apparently by reason of certain political views that he had openly expressed. He fears that if he is returned to Colombia he would be persecuted on the basis of his political beliefs. Asylum was denied by a United States Immigration Judge in February 2005. The withholding of the removal order was denied at the same time. Doe now claims that he would like to seek asylum in Canada.

6 There is no evidence that Doe has ever been to Canada or attempted to enter Canada. He has no relatives here. There is no evidence that Doe ever had any interest in making a refugee or asylum claim in Canada prior to the denial of his claim for asylum in the United States. There is no evidence as to whether Doe has attempted to enter or make a refugee or asylum claim in any country other than the United States. There is no evidence as to efforts if any, made by Doe to exhaust any other remedies, whether by appeal or otherwise, as may remain available to him in the United States.

7 The purpose of the mandatory injunction now sought by the Applicants has been set out in an affidavit, not of Doe, but of an "assistant" in the offices of the solicitor for the Applicants other than Amnesty International. The assistant claims to have spoken by telephone to Doe and obtained the information. Paragraphs 6 and 7 of that Affidavit states:

> 6. John Doe is unable to pay the legal fees required to appeal the decision of the BIA, and so is not eligible for an extension of time for voluntary departure. He is therefore required to depart the United States on or before September 11, 2006, it appears that his spouse will also be required to leave at this time, as her asylum claim was joined to that of John Doe, though she was not named in the appeal. If they fail to depart voluntarily, they will be deported to Colombia, where their lives are at risk and where they continue to face a serious risk of persecution, torture and ill treatment. Recent documentation of the human rights situation in Colombia is attached as Exhibit A to my affidavit.
>
> 7. John Doe and his spouse have no place to go where they can be safe. They have been ordered to depart from the USA and have no status in any country other than Colombia. They would have approached a Canadian port of entry to seek refugee protection in Canada, but have not done so because they are ineligible to seek Canada's protection under the Safe Third Country Agreement. Unless this court orders the Respondent to admit them to Canada for the purpose of pursuing the herein application for judicial review of the Safe Third Country Agreement, they will be forced to return to the very country they fled in fear for their lives, Colombia.

There is no evidence to show why Doe did not provide an affidavit personally.

Jurisdiction of the Federal Court to Grant the Mandatory Injunction Requested

8 The motion for a mandatory injunction is brought within the context of an Application challenging certain *Regulations* established under *IRPA*. Neither that Act nor those *Regulations* provide for such relief. However, section 44 of the *Federal Court Act*, R.S.C. 1985, c.F-7 provides that the Court may grant other relief including a *mandamus* or injunction, or an order for specific performance in all cases in which appears to be just and convenient to do so.

9 The Supreme Court of Canada in *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626 (S.C.C.) [*Canadian Liberty*] at paragraphs 35 to 37 of the majority decision held that the Federal Court, having administrative jurisdiction over certain federal tribunals, has within the intent of section 44 of the *Federal Court Act*, the power to grant other relief of the kind contemplated here. In this case the general powers of supervision given by Parliament to the Federal Court under *IRPA* and the *Regulations*, taken together with section 44 of the *Federal Court Act*, give to the Court jurisdiction to grant the type of relief requested here.

Status of the Applicants to seek a Mandatory Injunction

10 The Applicants, other than John Doe, describe themselves as public interest litigants having a particular interest in the *Regulations* at issue. None of these Applicants are named in any way as persons affected by *IRPA* or *Regulations*.

11 There is no dispute that John Doe is a person that could be affected by the *Regulations*. As to the other Applicants, no remedy that could be provided by this Court by way of a mandatory injunction could affect them in any way. The status of persons such as the Applicants other than Doe has been the subject of several decisions of the Supreme Court of Canada. A principal decision is that of *Borowski v. Canada (Minister of Justice)*, [1981] 2 S.C.R. 575 (S.C.C.). The question of status of persons claiming to be public interest litigants is considered in light of the genuine interest of the litigant and whether or not there is no other reasonable and effective manner in which the issue may be brought before the Court. In *Canadian Council of Churches v. R.*, [1992] 1 S.C.R. 236 (S.C.C.) it was considered that where several persons directly affected had already filed Court challenges, a public interest litigant should not be given status to challenge.

12 I prefer to leave the matter open at this time. The issue of status can be argued more fully and properly at the time that the Application is heard.

Criteria to be met in the Granting of an Interlocutory Mandatory Injunction

13 An interlocutory injunction is typically sought so as to preserve matters as they are until the final determination of the issues in a proceeding at a full trial on the merits. In this way any relief granted following such a trial will not be meaningless. The injunction is granted usually to preserve the *status quo*.

14 A mandatory injunction sought before a full trial on the merits is somewhat different. It seeks to make one of the parties do something that it ordinarily would not do. It seeks to change the *status quo*. Again, the purpose is the same, to prevent any relief given following a trial from being meaningless. Here the Applicant argued that unless Doe were to be allowed to come to Canada to make a refugee claim before being removed from the United States to Colombia, his challenge to the validity of the *Regulations* would be meaningless.

15 At one time, the Courts were reluctant to grant mandatory injunctions but, over time, the Court have been somewhat more willing to do so. Still, some greater level of caution arises when, particularly at an interlocutory stage, the Court is asked to order somebody to take a positive action that will change the *status quo* [see Robert Sharpe, *Injunctions and Specific Performance*, Looseleaf ed., (Aurora, ON: Canada Law Book Inc., 2005), paras. 1500 to 1580].

16 The criteria for consideration by the Court as to whether to grant an interlocutory injunction, mandatory or not, are those as set out by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.), at pp. 332-333. The criteria are:

> 1. A preliminary assessment of the merits of the case is to be made so as to ensure that there is a serious issue to be tried.
>
> 2. It must be determined whether the applicant(s) were to suffer irreparable harm if the application were refused.
>
> 3. An assessment must be made as to which of the parties would suffer harm from granting or refusals of the remedy providing a decision on the merits. Sometimes this is simply called the balance of convenience.

17 In the *Canadian Liberty* case, *supra* at paragraphs 46 and following, the Supreme Court of Canada cautioned that some modification of these criteria may be needed in non-commercial cases. In cases such as this the public interest requires particular consideration. I will be paying attention to the public interest in considering the balance of convenience.

18 Each of these criteria will be examined in the context of the present motion.

1. Serious Issues:

19 The validity of the "Safe Third Country" *Regulations* and the designation of the United States of America as one such country is the predominant issue for a hearing on the merits. I do not propose to examine in depth the arguments raised, nor to assess the likelihood of success as to the outcome. It must be noted that the validity of *Regulations* is to be reviewed on a correctness standard (*Sunshine Village Corp. v. Parks Canada*, [2004] 3 F.C.R. 600 (F.C.A.) at para 10). However, *Regulations* have rarely been found to be invalid by Courts, partly, no doubt, because of the broad grant of delegated power under which they are made (*de Guzman v. Canada (Minister of Citizenship & Immigration)*, 2005 FCA 436 (F.C.A.) at para 25).

20 Counsel for the Applicants argued that the earlier Order of this Court granting leave to commence a Judicial Review was determinative in that a serious issue was raised. This is not the case, the standard for granting an Order permitting judicial review is low. The matter at that point is to be dealt with in a summary way. The standard on a leave application is whether or not a fairly arguable case is disclosed (*Bains v. Canada (Minister of Employment & Immigration)* (1990), 47 Admin. L.R. 317 (Fed. C.A.)).

21 It is sufficient for the purposes of this motion to say that I am satisfied that the arguments to be raised at the ultimate hearing of the Application do not appear to be frivolous and possess sufficient merit to meet the very low threshold usually applied in considering this criteria.

2. Irreparable Harm:

22 The Applicants argue that John Doe and his wife will be returned to Colombia to face possible torture or death unless they are given the chance to enter Canada and make a refugee claim here. They argue that Doe and his wife will, as of early September, be removed from the United States to Colombia and will lose forever any opportunity to claim refugee status in Canada. I am not persuaded that this is the case.

23 First, it appears that Doe has not exhausted the remedies that still remain open to him in the United States. The Affidavit of Martin, an expert in United States immigration and refugee law, states that a number of avenues for relief remain open to Doe in the United States so that it is still an open question as to whether he and his wife will be returned to Colombia or if so, whether they will be returned in the near future.

24 The applicants argue that Doe has no funds so as to retain counsel to engage in the pursuit of these further avenues. I am not persuaded that this is the case. The evidence as to lack of funds is hearsay, only the assistant makes this statement, Doe does not. Doe only says that he has not worked for some time. The evidence shows that Doe had counsel in the United States proceedings to date. The evidence also shows that there is a functional *pro bono* system available in the United States to persons in Doe's circumstances. I would have expected clearer evidence from Doe if he could not avail himself of these further remedies whether for financial reasons or otherwise. The onus is upon Doe to prove the likelihood of irreparable harm. He had an opportunity to respond to these issues and did not. This important aspect of his case has simply not been addressed properly.

25 Second, the Affidavit of Manni indicates that there are a number of countries including Argentina, Brazil, Chile, Costa Rica, Ecuador, Panama, Mexico, Spain and Venezuela that do not require a visa from persons such as Doe to enter. The Applicants argue that simply because Doe could enter such countries without a visa does not mean that he could sojourn or remain there. The Respondent argues that the evidence shows that these countries are signatories to the *Convention Relating to the Status of Refugees*, 28 July 1951, U.N.T.S. 189 [the *Convention*], just as Canada is, thus they must afford a person an opportunity to make a refugee claim. The Applicants say that there is no evidence that, having signed the Convention, any of these countries have implemented its terms into their laws or if there are exceptions that would prevent or allow Doe and his wife from making a refugee claim. Again, the Respondent has raised the issue, albeit imperfectly, it would have been expected that the applicant's would have lead some evidence to address it.

26 Third, the evidence of Doe himself as to irreparable harm is not robust. In his affidavit filed in the main application he says, paragraph 25, "I would like to seek asylum in Canada", in paragraph 26, he says, "I am deeply concerned about what might happen to my parents etc. if my whereabouts became know to FARC....If the Court declines to issue an order protecting my identity....I will be compelled to withdraw from this case..." This statement in paragraph 26 suggests that Doe does not

fear irreparable harm if he is not permitted to enter Canada for purposes of making a claim. What is does indicate is that he is willing to drop his case entirely if his identity is revealed. Presumably anonymity is more important to Doe than the making of a refugee claim in Canada.

27 The Prothonotary's Order permitted anonymity states that the fear that Doe has as a consequence of any revelation of his true identity is uncontradicted on the evidence and is not speculative, but rather is substantial and continuing. That finding is directed to the issue of anonymity, not to the issue of irreparable harm if a mandatory injunction were not to be granted.

28 The only evidence of irreparable harm comes from an affidavit of an "assistant" in the office of the solicitor for Doe. The relevant part of that affidavit is paragraph 7 which has previously been set out in full in these Reasons. That paragraph says that Doe and his spouse "...have no place to go" and that "...they will be forced to return to the very country they fled in fear for their lives, Colombia".

29 This affidavit is very unsatisfactory by way of evidence. First, the "assistant" gives no basis for statements such as that Doe has nowhere to go and will be forced to return to Colombia. The assistant does not purport to be an expert in the relevant legal areas.

30 Second, while the Court can, particularly in interlocutory proceedings, accept hearsay evidence, there is no stated reason why Doe could not provide an affidavit as to irreparable harm. Why do we need his solicitor's assistant? Rule 82 of this Court says that a solicitor should not swear an affidavit filed on a motion and also appear to argue that motion. This has been pointed out in an immigration setting in *Ly v. Canada (Minister of Citizenship & Immigration)*, 2003 FC 1184 (F.C.). The same has been held to apply to assistants and others in the solicitor's office (*Cross-Canada Auto Body Supply (Windsor) Ltd. v. Hyundai Auto Canada*, 2005 FC 1254 (F.C.)). Solicitor affidavits directed to non-controversial matters are often accepted by this Court. However, an affidavit from an assistant in the office of the solicitor arguing the case, directed to critical or controversial matters, if not rejected outright, should be given much less weight than if it came directly from the person who is a litigant. No meaningful cross-examination could be conducted upon the "assistant". No reason was given as to why Doe could not furnish evidence directly.

31 I find that the Applicants, who bear the onus, have failed to establish that irreparable harm would be the result to Doe should the relief sought not be granted.

3. Balance of Convenience

32 Much has been said as to the balance of convenience in this matter. The Supreme Court of Canada in *Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832*, [1987] 1 S.C.R. 110 (S.C.C.) at paragraphs 38 and 39 cautions that where the constitutional validity of a legislative provision is challenged the Court must take the public interest into consideration. The court must consider the far-reaching, albeit temporal, practical consequences of its Order. At

paragraphs, 54 to 56 of that decision the Supreme Court directs that a Court, in considering the balance of convenience, rise above the interests of private litigants. Will the grant of the order requested frustrate the pursuit of the common good?

33 In *Harper v. Canada (Attorney General)*, [2000] 2 S.C.R. 764 (S.C.C.) the Supreme Court of Canada, at paragraph 9 said that the Court will not lightly order that laws that Parliament has duly enacted for the public good are inoperative in advance of a complete hearing as to their validity. In the present case, to order a mandatory injunction would be to render the *Regulations* essentially inoperative against Doe and quite possibly many others.

34 The Respondent argues that the "Third Safe Country" Agreement is part of the orderly scheme in the administration of refugee claims and protected claims. He further argued that to allow the relief claimed on the motion would be effectively to suspend the effect of the *Regulations* not only as far as Doe is concerned, but also in respect of a large number of other individuals whose situations would be essentially undistinguishable from that of Doe.

35 The Applicants argue that Doe's claim is highly fact specific and that only few persons would be sufficiently emboldened by Doe's success on this motion so as to risk exposure to authorities in the United States, or elsewhere, for the purpose of making a claim in Canada. I am not persuaded that this narrow view is correct.

36 I find that the balance of convenience favours the Respondent. The *Regulations* have been enacted in the public interest. Private interests of those such as Doe must yield to the public interest unless and until those *Regulations* have been held to be invalid.

In Conclusion

37 I have found that, on a low threshold criteria, the Applicants have established a *prima facie* case. However, the Applicants have failed to establish irreparable harm would result should the requested relief not be granted. The balance of convenience favours the Respondent. Accordingly, the application will be dismissed.

38 Since this motion was brought within the context of an application ostensibly made under *IRPA*, there is a procedural as well as a substantive question as to whether a question has to be certified before any appeal from this Order can be taken. The parties have asked that I provide an opportunity for them to make submissions on this issue. They will have five days to file written submissions in this regard.

39 The parties have agreed that costs shall be in the cause and it will be so ordered.

ORDER

THIS COURT ORDERS that

1. The motion is dismissed;

2. The parties shall, within five (5) business days from the date of this Order file written submissions as to whether certification of a question is required and if so, what that question might be; and

3. Costs shall be in the cause.

Motion dismissed.

Footnotes

* A corrigendum issued by the court on November 14, 2006 has been incorporated herein.

2001 FCA 327
Federal Court of Canada — Appeal Division

Canadian National Railway v. Moffatt

2001 CarswellNat 2396, 2001 CarswellNat 3522, 2001 FCA 327, [2001] F.C.J. No. 1618, [2002] 2 F.C. 249, 109 A.C.W.S. (3d) 521, 207 D.L.R. (4th) 118, 278 N.R. 83

Canadian National Railway Company (Appellant) and Gordon Moffatt, Her Majesty in Right of the Province of Newfoundland and Labrador, Canadian Transportation Agency (Respondents) and Canadian Pacific Railway, The Atlantic Provinces Trucking Association (Interveners)

Richard C.J., Rothstein J.A. and Noël J.A.

Heard: September 24, 25, 2001
Judgment: October 31, 2001
Docket: A-613-99

Counsel: *Mr. Brian Crane*, *Mr. Ronald Lunau*, *Mr. Michel Huart*, for Appellant
Mr. Gary J. Corsano, for Respondent, Gordon Moffatt
Mr. Donald H. Burrage, for Respondent, Government for Newfoundland and Labrador
Mr. Ronald Ashley, for Respondent, Canadian Transportation Agency

Subject: Contracts; Torts; Constitutional; Public; Corporate and Commercial

***Rothstein J.A.*:**

INTRODUCTION

1 This is an appeal from Canadian Transportation Agency Decision 300-R-1999, dated June 2, 1999. Under Part IV of the *Canada Transportation Act*, S.C. 1996 c. 10 (CTA), where a shipper is dissatisfied with the rates proposed to be charged by a carrier for the movement of goods and the matter cannot be resolved between the shipper and the carrier, the shipper may submit the matter to the Canadian Transportation Agency (Agency) for final offer arbitration. On submission of a matter for final offer arbitration, the Agency is to refer the matter to the arbitrator chosen by the shipper and carrier or, if no arbitrator has been chosen by the parties, to an arbitrator chosen by the Agency. When this matter was submitted to the Agency for final offer arbitration, a constitutional question pertaining to the Terms of Union between Canada and Newfoundland was raised. It is the constitutional question that gives rise to this appeal.

FACTS

2 Agency Decision 300-R-1999 arose out of an August 26, 1997 submission by Gordon Moffatt for final offer arbitration of a freight rate dispute between him and the Canadian National Railway Company (CN). Mr. Moffatt wished to engage in the business of transporting goods in containers between Central Canada and Newfoundland.

3 In his submission for final offer arbitration, Mr. Moffatt stated what he thought were the highest rates CN could charge based upon the principles contained in Term 32(2) of the *Terms of Union of Newfoundland with Canada* (Schedule to the *Newfoundland Act*, (1949) (U.K.)). It appears these rates constituted Mr. Moffatt's final offer. (The actual rates are not before the Court and nothing turns on them.) Term 32(2) provides:

> 32(2) For the purpose of railway rate regulation the Island of Newfoundland will be included in the Maritime Region of Canada, and through-traffic moving between North Sydney and Port aux Basques will be treated as all-rail traffic.

I will return to Term 32(2) in the analysis portion of these reasons. At this point, it is sufficient to observe that, historically, Term 32(2) has been interpreted to require the extrapolation to points in Newfoundland, on a rail mileage basis, of rates applicable from Central Canada to the Maritime Provinces. Rates constructed on this basis were maximum rates; that is, CN could not charge rates to Newfoundland higher than those constructed according to Term 32(2).

4 Upon being served with Mr. Moffatt's submission to the Agency for final offer arbitration, CN wrote to the Agency by letter dated September 15, 1997, arguing that Moffatt's submission was not validly constituted and that the Agency was, therefore, not in a position to refer the matter to arbitration.

5 CN raised a number of objections, but the only ones dealt with in Agency Decision 300-R-1999 and that are the subject of this appeal, relate to Term 32(2) of the Terms of Union. CN objected to referral of the matter to arbitration on three grounds:

> 1. Term 32(2) had no further application after closure of the Newfoundland Railway in 1988;
>
> 2. There is no longer any relevant railway rate regulation to which Term 32(2) could apply;
>
> 3. CN is no longer a Crown corporation and there is no law binding on CN to implement Term 32(2) in its rate making with respect to movements to Newfoundland that include rail transportation.

6 In Decision 300-R-1999, the Agency rejected these objections and concluded that, as CN had offered "through" rates to Mr. Moffatt from the mainland of Canada to points in Newfoundland,

these rates fell within the purview of Term 32(2). Having come to that conclusion, the Agency then embarked upon a consideration of how rates should be developed to and from Newfoundland.

7 The Agency noted that the development of a Maritime rate structure was critical, since the extension of Newfoundland rates have historically been based on a mileage prorated extrapolation of rates found within an existing Maritime rate structure. However, the Agency acknowledged that identification of a Maritime rate structure had been difficult in recent years, as the majority of railway traffic now moves under rates contained in confidential contracts. Nonetheless, in the view of the Agency, as the Constitution requires Terms of Union rates, they must be developed "even if it means resorting to developing a 'best guess' figure" (at page 28 of Decision 300-R-1999).

8 The Agency concluded that Term 32(2) continued to apply to Mr. Moffatt's traffic and that CN had obligations under Term 32(2). While acknowledging that the development of a Maritime rate structure may be a difficult task for an arbitrator and that the arbitrator may not have expertise in rate matters, the Agency concluded that the arbitrator could use his own resources or ask for assistance from the Agency. It, therefore, submitted the matter for arbitration, assigning the task of developing a Maritime rate structure and Terms of Union rates to the arbitrator, reminding the arbitrator that the Terms of Union are mandatory and a paramount consideration in the arbitration.

ANALYSIS

9 The initial question to be addressed is whether, in the present circumstances, the Agency had the jurisdiction to conduct an inquiry into the application of Term 32(2) to the setting of freight rates to Newfoundland and to assign to the arbitrator the task of developing rates to Newfoundland according to Term 32(2). The Agency was of the view that it possessed such jurisdiction. The Agency referred to the test for jurisdiction set out in *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.R. 5 (S.C.C.) , that for a tribunal to address a constitutional issue, it "must already have jurisdiction over the whole of the matter before it, namely, the parties, subject matter and remedy sought". The Agency found it met the *Cuddy Chicks Ltd.* test. The Agency states, at page 16 of Decision 300-R-1999:

> In this case, the Agency finds that it meets the tests for jurisdiction set out by the Supreme Court of Canada in the Cuddy Chicks case. That is, the Agency has before it an application for statutory arbitration under Part IV of the CTA. Parliament has specifically mandated the Agency to receive such applications pursuant to section 161 of the CTA and refer them to an arbitrator, subject to any interlocutory objections that may arise. Thus, in terms of the tests established in Cuddy Chicks the Agency has jurisdiction over the subject matter. Further, there is no debate here that Mr. Moffatt is a shipper and that CN is a federal railway company; thus, the Agency has jurisdiction over the parties. Finally, the requested remedy here is referral of the matter (or in the case of CN's objection, the refusal to refer the matter) to an arbitrator. The remedy is, therefore, also in the Agency's specific mandate.

In my respectful opinion, the Agency erred in concluding that it had such jurisdiction.

10 I commence my analysis with the basic proposition that the Agency is a creature of statute and the powers it exercises must be found in statutory law, either expressly or by necessary implication: see *Duthie v. Grand Trunk Railway* (1905), 4 C.R.C. 304 (Bd. of Railway Commissioners). This principle is expressed by La Forest J. in *Cuddy Chicks Ltd.* , supra, with reference to subsection 52(1) of the *Constitution Act* not functioning as an independent source of an administrative tribunal's jurisdiction to address constitutional issues. At page 14, he stated:

> Rather, jurisdiction must have expressly or impliedly been conferred on the tribunal by its enabling statute or otherwise. This fundamental principle holds true regardless of the nature of the issue before the administrative body. Thus, a tribunal prepared to address a *Charter* issue must already have jurisdiction over the whole of the matter before it, namely, the parties, subject matter and remedy sought.

It is, therefore, necessary to consider whether jurisdiction has been conferred on the Agency by statute to conduct the inquiry into the application of Term 32(2), and to instruct the arbitrator to develop a Maritime rate structure and Terms of Union rates. There are three possible sources for such jurisdiction:

1. Part IV of the CTA under which the matter came before the Agency;

2. Other powers of the Agency under the CTA; and

3. Term 32(2) itself.

Part IV of the CTA

11 The matter came before the Agency under Part IV of the CTA, which is entitled "Final Offer Arbitration". The role of the Agency under Part IV is limited.

12 Under subsection 162(1), on the submission of a matter to the Agency for final offer arbitration, the Agency shall refer the matter for arbitration. (Section 161 and relevant statutory provisions not reproduced in the body of these reasons are set forth in Appendix A.) Under subsection 161(2), the submission shall contain the shipper's final offer and the railway company's last offer, an undertaking by the shipper to ship the goods in accordance with the decision of the arbitrator, an undertaking by the shipper to pay the shipper's portion of the arbitrator's fee, and the name of the arbitrator agreed upon between the shipper and carrier. Once the Agency determines that there has been compliance with subsection 161(2), the requirement to refer for arbitration is mandatory. The only exception appears to be in subsection 161(3), that the matter is not to be referred to arbitration if the shipper has not, at least five days before submission to the Agency,

served on the carrier a written notice indicating the shipper's intention to submit the matter to the Agency for final offer arbitration.

13 The only other duty assigned to the Agency is to choose the arbitrator if the parties have not already done so, or if the arbitrator selected by the parties is unavailable. Other than these three procedural functions, i.e. checking the contents of the submission, determining whether timely notice has been given to the railway company and, when necessary, choosing the arbitrator, Part IV does not provide for any other duties or functions by the Agency prior to referring the matter to the arbitrator.

14 The statutory history of final offer arbitration makes it quite clear that Parliament intended to restrict the Agency from involving itself in substantive matters preliminary to an arbitration. Final offer arbitration was introduced in the *National Transportation Act, 1987* S.C. 1987, c. 34 (NTA, 1987) in sections 47 to 57. Sections 47 to 57 are the predecessors to Part IV of the CTA. Part IV is similar in many respects to sections 47 to 57 but there are some significant changes indicating Parliament's intention in the CTA to restrict the Agency's role prior to referring a matter to arbitration.

15 One change is that unless the parties otherwise agree, the arbitrator's decision is to be rendered within 60 days after the date on which the submission for final offer arbitration is filed with the Agency by the shipper (CTA paragraph 165(2)(b)). This compares to ninety days under the NTA, 1987 (NTA, 1987 paragraph 52(2)(b)).

16 This is a strong indicator that Parliament intended that the Agency refer the matter to the arbitrator without becoming involved in a preliminary regulatory proceeding. There is virtually no time for the Agency to deal with substantive matters if the parties are to exchange information, request and answer interrogatories, make submissions to the arbitrator and if the arbitrator is to be given a reasonable amount of time to consider the submissions and evidence and to make a decision.

17 Most significantly, under paragraph 48(3)(b) of the NTA, 1987, the Agency (under that legislation, the National Transportation Agency) was not to cause any matter submitted to it by a shipper to be arbitrated if the Agency was of the view that the matter raised issues of general public interest, that interests other than those of the shipper and carrier may be materially prejudiced by the matter submitted, and that the matter should be investigated under section 59 of that Act. Paragraph 48(3)(b) provided:

48(3) The Agency shall not cause any matter submitted to it by a shipper under subsection (1) to be arbitrated if (a) [...] (b) the Agency has, within 10 days after receipt of the submission, advised the	48(3) L'arbitrage prévu au paragraphe (1) est exclu dans les cas suivants: a) [...] b) l'Office a, dans les dix jours suivant réception de la demande, avisé par écrit l'expéditeur qu'il estime que la question

shipper in writing that the Agency is of the opinion that

(i) the matter raises issues of general public interest and that interests other than those of the shipper and carrier concerned may be materially prejudiced by the matter submitted, and
(ii) the matter should be investigated by the Agency pursuant to section 59.

soulevée est d'intérêt public général et que la tenue de l'arbitrage serait notablement préjudiciable aux intérêts autres que ceux du transporteur et de l'expéditeur en cause, et qu'il est d'avis qu'il y aurait lieu de procéder par voie d'enquête en application de l'article 59.

18 Section 59 of the NTA, 1987 was a provision under which the Agency could conduct an investigation into whether rates charged by a carrier were prejudicial to the public interest. Under the CTA, there is no provision similar to paragraph 48(3)(b) of the NTA, 1987. Nor is there a public interest rate investigation provision similar to section 59 of the NTA, 1987.

19 Clearly, the role of the Agency, when a matter was submitted to it for final offer arbitration, was broader under the NTA, 1987 than it currently is under the CTA. Under the NTA, 1987, the Agency was obliged to consider whether a final offer arbitration raised public interest issues and issues that affected others than the shipper and carrier involved. There is no such role for the Agency under the CTA.

20 Nevertheless, the Agency found that "Parliament has specifically mandated the Agency to receive such applications pursuant to section 161 of the CTA and refer them to an arbitrator, subject to any interlocutory objections that may arise" (at page 16 of Decision 300-R-1999). I see nothing in section 161 or elsewhere in Part IV that mandates the Agency to deal with "interlocutory objections that may arise". With respect, I think the Agency has read words into section 161 that do not appear, in order to justify its assumption of jurisdiction in this case. It goes without saying that the Agency must take the statute as it finds it.

21 Further, it was incorrect for the Agency to have found, at page 16 of Decision 300-R-1999, that it had jurisdiction over the subject matter and remedy in this case. As in *Cuddy Chicks Ltd.* , *supra*, where La Forest J. held that the subject matter in that case could not be characterized simply as an application for certification, in this case, the subject matter cannot be characterized simply as an application for final offer arbitration. The issue raised before the Agency by CN was whether the submission for final offer arbitration was properly before it and the remedy sought was not to refer the matter for arbitration. There is nothing in Part IV of the CTA that confers on the Agency jurisdiction to decide, on any substantive basis, whether a submission for final offer arbitration is properly before it. Nor is there authority for the Agency not to refer the matter for arbitration if

it meets the procedural requirements of Part IV. Thus, insofar as Part IV is concerned, the subject matter and remedy were not within the jurisdiction of the Agency.

22 Finally, the Agency argued that it has the expertise in such a matter and that it was necessary for it to have dealt with CN's objection relative to the Terms of Union as a preliminary matter. I acknowledge that the Agency does have expertise dealing with subsection 32(2) of the Terms of Union, that the matter was raised by Mr. Moffatt and that CN requested the Agency to deal with it as a preliminary matter (even though, before this Court, CN's position was that the Agency did not have such jurisdiction). However, jurisdiction cannot be conferred by agreement and expertise, on its own, is not a basis for a tribunal assuming a jurisdiction not conferred upon it by statute.

23 On the facts of this case, nothing in Part IV of the CTA authorizes the Agency to have conducted the inquiry it undertook regarding the Terms of Union and to have issued instructions to the arbitrator to develop a Maritime rate structure and Terms of Union rates. For these reasons, the test for jurisdiction in *Cuddy Chicks Ltd.* , supra, in respect of Part IV was not met.

Other Provisions of the CTA

24 Are there provisions of the CTA outside Part IV that confer jurisdiction on the Agency to conduct a Term 32(2) inquiry and issue instructions to the arbitrator? This Court has had the occasion to address the extent of the Agency's jurisdiction in the wider context of the CTA as a whole, in *Canadian National Railway v. Brocklehurst* (2000), [2001] 2 F.C. 141 (Fed. C.A.). In that case, as in this, the Agency relied on sections 26 and 37 of the CTA. They provide:

26. The Agency may require a person to do or refrain from doing any thing that the person is or may be required to do or is prohibited from doing under any Act of Parliament that is administered in whole or in part by the Agency.	26. L'Office peut ordonner à quiconque d'accomplir un acte ou de s'en abstenir lorsque l'accomplissement ou l'abstention sont prévus par une loi fédérale qu'il est chargé d'appliquer en tout ou en partie.
37. The Agency may inquire into, hear and determine a complaint concerning any act, matter or thing prohibited, sanctioned or required to be done under any Act of Parliament that is administered in whole or in part by the Agency.	37. L'Office peut enquêter sur une plainte, l'entendre et en décider lorsqu'elle porte sur une question relevant d'une loi fédérale qu'il est chargé d'appliquer en tout ou en partie.

The analysis undertaken by Décary J.A. in paragraphs 6 to 9 and 13 to 17 of *Brocklehurst* , supra, is applicable to this case. Specifically, at paragraphs 13 and 14, Décary J.A. stated:

> [13] The Agency interprets sections 26 and 37 to mean that once the Agency administers part of an Act of Parliament, it is deemed to be administering the whole of the Act and is therefore the appropriate authority unless the Act expressly says otherwise. I do not agree with that interpretation. The two sections, in my view, give jurisdiction to the Agency either with

> respect to the whole of a statute should the Agency be generally mandated by the statute to administer it, or with respect to parts of a statute should the Agency be specifically mandated by the statute to administer parts only of the statute.
>
> [14] The 1996 Act contains no provision conferring upon the Agency the power, duty or function of administering the whole Act. It is indeed noteworthy that neither section 26 nor section 37 refer expressly to the very statute in which they are found. The statute, however, contains numerous provisions that confer upon the Agency jurisdiction with respect to the administration of specific parts of the Act. Unless section 95 is one such provision, the Agency has no jurisdiction with respect to that section.

25 As Décary J.A. found, there is no provision in the CTA conferring upon the Agency the power, duty or function of administering the whole CTA. Unless there is specific jurisdiction in the CTA to conduct a Term 32(2) inquiry upon submission of an application for final offer arbitration, there is no such jurisdiction. As I have already determined, Part IV does not confer such jurisdiction on the Agency. Nor does any other provision of the CTA confer a general jurisdiction on the Agency to deal with Term 32(2).

26 The only other provision referred to by the Agency was section 5 of the CTA, the declaration of the National Transportation Policy. Section 5 declares that as part of the National Transportation Policy, the objective of carriers being able to compete must have "due regard [...] to legal and constitutional requirements". The Agency submitted that section 5 confers on it jurisdiction to deal with Term 32(2) as a constitutional requirement.

27 However, section 5 is not a jurisdiction conferring provision. While not minimizing its importance, I believe that section 5 is a declaratory provision which states the objectives of Canada's National Transportation Policy. Those objectives are implemented by the regulatory provisions of the CTA and, in the currently largely deregulated environment, by the absence of regulatory provisions. Section 5 does not, itself, confer on the Agency the jurisdiction it assumed in this case. If it were construed to do so, then presumably any legal question could also be brought before the Agency for determination. Obviously section 5 was not intended to confer on the Agency jurisdiction over all disputes of any sort affecting carriers, simply because they involve legal or constitutional questions. Of course, the Constitution must be respected. But section 5 does not give the Agency plenary power to address any constitutional question that is raised before it where there is no specific statutory authority for it to conduct such an inquiry. This is the point made by La Forest J. in *Cuddy Chicks Ltd.* , supra, in relation to subsection 52(1) of the *Constitution Act* and it is equally applicable to section 5 of the CTA. Indeed, unlike prior legislation, the CTA does not mention Term 32(2) and there is no general jurisdiction in the Agency to regulate freight rates as there was in such prior legislation.

28 In *Cuddy Chicks Ltd.* , supra, the Ontario *Labour Relations Act* stipulated that the Labour Board had exclusive jurisdiction "to determine all questions of fact or law that arise in any matter

before it [...]". The Act conferred on the Board the power to determine questions of law and fact relating to its own jurisdiction and specifically to decide if a matter is arbitrable. Such provisions are noticeably absent in the CTA and that is not surprising, given the highly regulated nature of labour relations and the relatively deregulated nature of transportation. The CTA does not, expressly or by necessary implication, confer jurisdiction on the Agency to regulate freight rates to Newfoundland or to deal with Term 32(2).

Term 32(2)

29 The only other possible source of Agency jurisdiction is Term 32(2) itself. Term 32(2) does not mention the Agency or its predecessor tribunals. It does not, therefore, expressly confer jurisdiction on the Agency to regulate railway rates generally or rates to and from Newfoundland specifically.

30 Could it be construed, however, that railway rate regulation by the Agency is necessarily implied? In other words, could it be said that Term 32(2) requires rate regulation, that such rate regulation necessarily implies that there be a regulator and that the regulator be the Agency? I think not. In my opinion, Term 32(2) does not, of itself, require rate regulation. The words" For the purpose of railway rate regulation" presume the existence of rate regulation that is relevant to the balance of the Term, but they do not mandate that Parliament enact or maintain such regulation. The railway rate regulation to which the words "For the purpose of railway rate regulation" refer, was always found in the *Railway Act*, the *National Transportation Act* or the *National Transportation Act, 1987*. For Term 32(2) to apply, there must exist some relevant railway rate regulation in legislation administered by the Agency.

31 Relevant rate regulation is railway rate regulation that has some relevance to the regulation of railway rates to Newfoundland. Specifically, it must be regulation that gives some meaning to Newfoundland being included in the Maritime Region of Canada and "through-traffic" between North Sydney and Port Aux Basques being treated as "all-rail traffic".

32 The nature of railway rate regulation contemplated by Term 32(2) was a power in an administrative tribunal, the Board of Transport Commissioners at the time, to identify a rate structure applicable to the Maritime Region of Canada so that rates could then be extrapolated on a rail mileage basis to points in Newfoundland, treating the water movement from North Sydney to Port Aux Basques as a rail movement and ignoring dissimilar circumstances between Newfoundland and the Maritime Provinces. The history of railway rate regulation and statutory provisions relating to Term 32(2) since its enactment in 1949 supports this view and demonstrates that such railway rate regulation no longer exists in the current deregulated environment.

33 This history, up to 1987, has been well documented in the jurisprudence of the Board of Transport Commissioners and the Canadian Transport Commission, particularly in *Newfoundland*

(Attorney General) v. Atlantic Container Express, [1987] C.T.C.R. 28 (Can. Transport Comm.) (ACE, 1987).

_The Railway Act_in effect in 1949

34 When Newfoundland became a province in 1949, railway rate regulation was pervasive. Railway rates had to be published in tariffs that were public. Railway rates for traffic under substantially similar circumstances and conditions had to be charged equally to all shippers (*Railway Act*, R.S.C. 1927, s. 314).

35 Unjust discrimination and undue preference were the terms applied when the principle of equal treatment of shippers in substantially similar circumstances was departed from by a railway company.

36 Under the *Railway Act* at the time, the Board of Transport Commissioners had the power to disallow tariffs of rates that were unjust or unreasonable and to require the railway company to substitute a tariff satisfactory to the Board (section 325).

37 Railway rates setting, therefore, had to take into account the necessity to treat shippers equally in each region of Canada, the Maritimes being one such region. And indeed, there was a rate structure applicable to the Maritime Region from Central Canada and within the Maritime Region itself (see ACE, 1987 at pages 60-61).

38 The concern of Newfoundland at the time of Confederation was that its circumstances were not similar to those of the Maritime Provinces. The movement from North Sydney to Port Aux Basques was a water movement. The railway on the island of Newfoundland was narrow gauge and traversed rough terrain. Under railway rate regulation at the time, it could not be said that a higher level of rates to Newfoundland than pertained to the Maritime Provinces would be unjustly discriminatory. Indeed, CN had imposed a surcharge for extra handling involved in transferring traffic at Port Aux Basques and also additional charges because the capacity of freight cars used in Newfoundland were smaller than the capacity of freight cars used on standard gauge railway lines.

39 The Province of Newfoundland brought an application to the Board of Transport Commissioners asking the Board to order CN to cancel the tariffs it had in effect and to substitute tariffs of rates based on the rate structure in effect into and within the Maritime Provinces. In *Newfoundland (Attorney General) v. C.N.R.* (1950), 64 C.R.T.C. 352 (Bd. of Transport Commissioners), the Board of Transport Commissioners held that railway companies had the right to discriminate in rates because of dissimilarity in circumstances and that Term 32(2) did not lay down a different rule for Newfoundland (at page 353).

40 Newfoundland then asked the Board to reconsider its decision. In *Newfoundland (Attorney General) v. C.N.R.* (1951), 67 C.R.T.C. 353 (Bd. of Transport Commissioners), Wardrope A.C.C.,

in reversing the Board's prior decision, interpreted the opening words of subsection 32(2) in the following manner, at page 357:

> In my opinion they must mean then that notwithstanding certain dissimilar, disadvantageous circumstances and conditions pertaining to Newfoundland, this province is to be included ratewise in the Maritime region on a general level of rates similar to the other Maritime Provinces [...]
>
> I further believe that in the absence of car ferries, the treating of traffic between North Sydney and Port aux Basques as rail traffic, apart from other purposes, is to provide an extension of a reasonable and comparable mainland rate from North Sydney to Port aux Basques.

41 Term 32(2) then, as a constitutional provision or "Special Act" as it was termed at the time in the *Railway Act*, took precedence over railway rate regulation under the *Railway Act*. It was intended to give to Newfoundland something to which it was not otherwise entitled under railway rate regulation pursuant to the *Railway Act*. It required the setting of freight rates to Newfoundland on a non-discriminatory basis, notwithstanding dissimilar circumstances between the Maritimes and Newfoundland. This required the extrapolation of rates to Newfoundland on a rail mileage basis, based upon the structure of rates applicable from Central Canada to the Maritimes and within the Maritimes. By reason of the pervasive nature of railway rate regulation and the extensive power of the Board as regulator under the *Railway Act*, there is no question the Board had the authority to require CN, in accordance with Term 32(2), to treat Newfoundland as a rail extension of the Maritime Provinces and to require CN to charge rates based on rates applicable to and within the Maritime Provinces, extrapolated on a rail mileage basis to points in Newfoundland.

NTA of 1967

42 That pervasive rail rate regulation remained until the *National Transportation Act* (NTA) was enacted in 1967 by S.C. 1966-67, c. 69. The NTA of 1967 reduced the regulation of railways and railway rates under the *Railway Act* significantly. The pervasive regulatory powers of the Board of Transport Commissioners over railway rates were replaced by amendments to the *Railway Act* which granted to the railway companies the power, subject to specific and limited exceptions to be administered by the Canadian Transport Commission (which replaced the Board), to fix rates unencumbered by legislative or regulatory restrictions.

43 One exception was Term 32 of the Terms of Union. Subsection 326(6) of the *Railway Act*, enacted by S.C. 1966-67, c. 69, s. 49, and renumbered subsection 269(6) pursuant to R.S.C. 1970, c. R-2, provided:

269(6) Notwithstanding section 3, the power given by this Act to the company to fix, prepare and issue tariffs, tolls and rates, and to change and alter the same, is not limited or in any manner affected by any	269(6) Nonobstant les dispositions de l'article 3, le pouvoir que la présente loi attribue à la compagnie de fixer, préparer et émettre des tarifs, taxes et taux, et de les changer et les modifier, n'est pas

Act of the Parliament of Canada or by any agreement made or entered into pursuant thereto, whether general in application or special and relating only to any specific railway or railways, except the *Maritime Freight Rates Act*, Term 32 of the *Terms of Union of Newfoundland with Canada*, and Part IV of the *Transport Act*.

limité ni d'aucune façon atteint par une loi quelconque du Parlement du Canada, ni par un traité conclu ou passé en conformité d'une telle loi, qu'elle soit générale ou spéciale dans son application et qu'elle ait trait à un seul ou à plusieurs chemins de fer particuliers, à l'exception de la *Loi sur les taux de transport des marchandises dans les Provinces maritimes*, de la clause 32 des *Conditions de l'Union de Terre-Neuve au Canada*, et de la Partie IV de la *Loi sur les transports.*

In ACE, 1987, at page 57, referring to subsection 269(6), the Review Committee of the Canadian Transport Commission concluded:

> We therefore conclude that subsection 269(6) of the *Railway Act* limits the powers of the railway in constructing rates to, from and within Newfoundland by making these powers subject to the rights guaranteed to Newfoundland in the Terms of Union. Hence, in constructing these rates, the railway must ensure that Newfoundland is accorded rates in compliance with the Terms of Union. [...]

44 Under the NTA, railway rates were public and had to be filed with the Commission. It appears there still existed a Maritime rate structure. Accordingly, the Review Committee ordered CN to review its rates and file new rates in compliance with the Terms of Union. At page 68, it concluded:

> To this end, we are directing CN to begin an immediate review of all its rates to, from and within Newfoundland to satisfy itself that each and every rate meets the criteria outlined in this decision and to inform the Committee when this review has been completed. Where rates are found to be too high and thereby out of line with similar mainland maritime rates adjusted for distance, or too low and thereby lower than similar mainland maritime rates adjusted for distance and lower than the compensatory level, CN is directed to file new rates no later than 90 days from the date of this decision.

It then provided that parties dissatisfied with the rates filed by CN could make application to the Commission under section 45 of the NTA:

> Should any of the parties or any other person be of the opinion that any rates in effect after that date do not comply with the *Railway Act*, they are free to refer the matter to the Commission pursuant to section 45 of the *National Transportation Act*.

45 Section 45 of the NTA gave the Canadian Transport Commission broad power to determine any application complaining that a railway company had failed to do anything required by the *Railway Act*, i.e. subsection 269(6), or the *Special Act* (Term 32(2)) and to order a railway company

to do forthwith anything that it was required to do under the *Railway Act* or *Special Act*. Section 45 provided in relevant part:

45(1) The Commission has full jurisdiction to inquire into, hear and determine any application by or on behalf of any party interested, (a) complaining that any company, or person, has failed to do any act, matter or thing required to be done by the *Railway Act*, or the Special Act [...] or that any company or person has done or is doing any act, matter or thing contrary to or in violation of the *Railway Act*, or the Special Act [...]	45(1) La Commission a pleine juridiction pour instruire, entrendre et juger toute requête présentée par une partie intéressée ou en son nom, a) se plaignant qu'une compagnie ou qu'une personne a omis de faire une action ou une chose qu'elle était tenue de faire par la *Loi sur les chemins de fer*, par la loi spéciale [...] ou qu'une compagnie ou une personne a fait ou fait une action ou une chose contrairement ou en contravention à la *Loi sur les chemins de fer* ou à la loi spéciale [...]
(2) The Commission may order and require any company or person to do forthwith, or at any specified time, and in any manner prescribed by the Commission, so far as it is not inconsistent with the *Railway Act*, any act, matter or thing that such company or person is or may be required to do under the *Railway Act*, or the Special Act [...]; and for the purposes of the *Railway Act* has full jurisdiction to hear and determine all matters whether of law or of fact.	(2) La Commission peut ordonner et prescrire à toute compagnie ou personne de faire immédiatement, ou dans tel délai ou à telle époque qu'elle fixe, et de telle manière qu'elle prescrit, en tant qu'il n'y a rien d'incompatible avec la *Loi sur les chemins de fer*, toute action ou chose que cette compagnie ou personne est, ou peut être, tenue de faire sous le régime de la *Loi sur les chemins de fer* ou de la loi spéciale; [...] et elle a, aux fins de la *Loi sur les chemins de fer*, plein juridiction pour entendre et juger toute question tant de droit que de fait.

Of significance is the breadth of the Commission's power to regulate railway companies under section 45 of the NTA, as contrasted with the currently limited powers of the Agency under sections 26 and 37 of the CTA. There is no question that, by reason of subsection 269(6) of the *Railway Act* and section 45 of the NTA, the Commission had the jurisdiction to order CN to file and charge rates in accordance with Term 32(2).

NTA, 1987

46 The next major legislative change affecting the regulation of railways in Canada came with the NTA, 1987. Subsection 269(6), under which the railway companies were free to fix rates subject to limited exceptions, was continued as section 111 of the NTA, 1987. Section 111 provided:

111. The powers given by this Division to a railway company with respect to tariffs, confidential contracts and agreed charges are not limited or in any manner affected by any Act of Parliament, other than this Act, or by any agreement made or entered into pursuant to any Act of Parliament other	111. Les pouvoirs, conférés par la présente section à une compagnie de chemin de fer, à l'égard des tarifs, des contrats confidentiels et des prix convenus ne sont pas limités ni touchés par une loi du Parlement, autre que la présente loi, ou par un accord conclu en application d'une loi du Parlement, autre

than this Act, whether general in application or special and relating only to any specific railway, except the *Atlantic Region Trade Assistance Act*, the *Maritime Freight Rates Act*, the *Western Grain Transportation Act*, Term 32 of the *Terms of Union of Newfoundland with Canada* set out in the schedule to the *Newfoundland Act* and section 272 of the *Railway Act*.

que la présente loi,d'application générale ou particulière à un chemin de fer, sauf la *Loi sur le taux de transport des marchandises dans les provinces Maritimes*, la *Loi sur le transport des marchandises dans la Région Atlantique*, la *Loi sur le transport du grain de l'Ouest*, la clause 32 des *Conditions de l'union de Terre-Neuve au Canada*, énoncée à l'annexe de la *Loi sur Terre-Neuve* et l'article 272 de la *Loi sur les chemins de fer*.

47 Under the NTA, 1987, railway rates continued to be published, although there was no requirement that they be filed with the National Transportation Agency. One exception to publication was the introduction of confidential contracts, in which the rate agreed between the railway company and shipper would not be public. However, such contracts had to be filed with the Agency. Thus, the Agency had access to information upon which it could determine rates in confidential contracts applicable from Central Canada to the Maritimes and within the Maritime Provinces as a basis for the extrapolation of rates to Newfoundland pursuant to Term 32(2). In Decision 266-R-1991, May 22, 1991 (ACE, 1991), the Agency found at page 17 that as a basis for constructing Term 32(2) rates, CN was required to determine a Maritime rate structure by including rates in confidential contracts with similar terms and conditions as those applicable to Newfoundland shippers.

48 However, the broad power of the prior Canadian Transport Commission under section 45 of the NTA to hear and determine complaints and make orders resulting from such determinations was vastly curtailed. The Agency's power under the NTA, 1987 was identical to its power under the CTA today. Sections 26 and 37 of the CTA are identical to subsections 35(4) and 35(1) of the NTA, 1987.

49 In ACE, 1991, the Agency's role with respect to section 111 was explained by the majority of the panel at page 13:

> Section 111 allows CN to set its rates as it sees fit subject only to various legal requirements including the Terms of Union. In the competitive environment established by the NTA, 1987, it is the responsibility of CN to establish rates and it is not within the mandate of the Agency except on a properly filed complaint within its jurisdiction, to interfere with that responsibility. The Agency, therefore, has no ongoing monitoring function to ensure that the Terms of Union rates are properly established.

50 Section 111 of the NTA, 1987 appeared in Part III, Railway Transportation Division 1, Rail Freight. That Part of the Act was regulatory in nature and placed regulatory obligations on railway companies. The Agency is referred to throughout the Part. Accordingly, the Agency had

the jurisdiction, at that time, to inquire into and determine the complaint made, namely that CN was not charging rates in accordance with the Terms of Union and require CN to charge rates in accordance with the Terms of Union.

CTA

51 Finally, we come to the CTA enacted in 1996. As indicated, the power of the Agency under sections 26 and 37 of the CTA remains the same as under subsections 35(4) and 35(1) of the NTA, 1987. However, section 111 of the NTA, 1987 has been repealed. In other words, there is no Term 32(2) limitation in the CTA on the power of a railway company to set freight rates.

52 Further, under the CTA, there is no longer a requirement for railway companies to file confidential contracts with the Agency. While freight rates in tariffs continue to be public, the evidence before the Agency in this case was that seventy-five to eighty percent of CN's domestic intermodal business to and from the Maritimes moves under confidential contracts and not rates in public tariffs (page 23 of Decision 300-R-1999). The Agency does not have access to such rates as there is no power in the Agency to call for such confidential contracts or information contained in such contracts. In repealing section 111 of the NTA, 1987, I think Parliament recognized the fact that the vast majority of rates are negotiated individually between shippers and railway companies, and there is no longer a requirement to charges rates equally to shippers under substantially similar conditions. The notion of a Maritime rate structure had become an anachronism and there was no basis upon which to establish a realistic Maritime rate structure from which could be extrapolated rates to Newfoundland.

53 In summary, initially it was the broad power of the Board of Transport Commissioners to enforce and require just and reasonable rates that was the rate regulation to which Term 32(2) referred. Subsequently, by the National Transportation Act of 1967, it was the combination of the Canadian Transport Commission's broad power to inquire into matters under its statutory administration and the Term 32(2) limitation on the power of railway companies to fix freight rates under section 269(6) of the *Railway Act*, that was the source of the Commission's jurisdiction to order CN to file freight rates that complied with the Terms of Union. Under the NTA, 1987, it was the existence of section 111 of that Act combined with the Commission's power under subsections 35(1) and 35(4) that was the source of the Agency's jurisdiction.

54 Under the CTA, there is no provision for the Agency to have access to the vast majority of rates governing railway freight traffic. Nor is there any regulatory basis for the Agency to require a railway company to maintain a Maritime rate structure. There is no Term 32(2) limitation on a railway company's power to fix freight rates. In the absence of such provisions, there is no railway rate regulation that engages Term 32(2).

55 In Decision 300-R-1999, the Agency, correctly in my view, found that there must be railway rate regulation in existence for Term 32(2) to be applied. The Agency stated at page 14:

> Contrary to the arguments of the Government of Newfoundland and Labrador and Mr. Moffatt, the Agency cannot ignore these words and conclude that no rate regulation is needed at all for this term to apply. While no legislation is mentioned in Term 32(2), not even in a general sense as is the case with Term 32(3), it does contemplate that there be at least some railway rate regulation in existence for the Term to be applied.

The Agency then went on to find that railway rate regulation currently exists under the CTA:

> Having so concluded, the Agency finds that 'railway rate regulation' currently exists. Such regulation exists today, albeit in a diminished and different form than that which existed even as recently as 1996. Today's rate regulation is far less pervasive and much narrower in focus or limited than that which existed in earlier legislation.

The Agency then provided examples of current railway rate regulation: interswitching rates, competitive line rates, joint rates, maximum grain rates, level of service obligations and final offer arbitrations. On this basis, the Agency concluded at page 15:

> There is still some rate regulation today and this is enough to conclude that Term 32(2) continues to apply.

However, these regulations do not limit the power of a railway company to set rates to Newfoundland and do not imply a requirement that a Maritime rate structure exists, from which Newfoundland rates could be extrapolated.

56 The Agency seems to have acknowledged this difficulty when it concluded that the development of Terms of Union rates might involve "developing a 'best guess' figure". At page 28 of Decision 300-R-1999, the Agency stated:

> A rate must be identified or developed because the Constitution requires it, and it is the task of the Agency or the arbitrator, or some other party, to determine an appropriate rate in the circumstances of any particular case. The fact that such a task is daunting is unfortunate, but no matter how difficult, it is necessary, even if it means resorting to developing a "best guess" figure. The Agency or the arbitrator, when so called upon, is charged by the Constitution to develop a rate - if there is no clearly identical or comparable rate in terms of the type and quantity of traffic, then the best estimate based upon all the available information, must suffice.

With respect, I do not think it is reasonable to conclude that the Constitution of Canada would require that regulation of freight rates would be based on "best guess" figures.

57 The Agency does not explain how any of the examples of railway rate regulation that are cited in its reasons have any relevance to railway rates to Newfoundland. Indeed, the type of

railway rate regulation to which the Agency referred has never been cited by the Agency, or its predecessor tribunals, as the basis for regulating railway rates to Newfoundland. In the absence of rate regulation that has some relevance to the setting of rates to Newfoundland by a railway company, there is no regulation that engages Term 32(2) and no basis for the Agency to have assumed the jurisdiction it did in this case.

58 Although final offer arbitration is a form of rate regulation that can be invoked by shippers relative to railway rates to Newfoundland, for the reasons that I found Part IV did not confer jurisdiction on the Agency to do so, final offer arbitration is not a regulatory basis for the Agency to have conducted the inquiry it did in this case or to have instructed the arbitrator to develop Terms of Union rates.

Living Tree Doctrine of Constitutional Interpretation

59 The Agency seemed to feel that, because the Constitution is the supreme law of Canada and because, in its view, the Constitution is to be interpreted flexibly, consistent with the "living tree" doctrine of constitutional interpretation (see, for example, *Edwards v. Canada (Attorney General)* (1929), [1930] A.C. 124 (Canada P.C.), at 136 per Lord Sankey L.C.; and *Ellett v. British Columbia (Attorney General)*, [1980] 2 S.C.R. 466 (S.C.C.), at 478), Term 32(2) must be made to apply to the current state of railway rate regulation in Canada. With respect, I think this approach is misplaced. Certainly the Constitution is the supreme law of Canada and, in appropriate circumstances, it must be adapted to conditions that did not exist when its various provisions were enacted. However, the constitutional provisions in question in any given circumstances must be carefully considered to determine whether the living tree approach is appropriate or whether, as I believe is the case here, the constitutional provision is simply no longer applicable. The living tree doctrine cannot be stretched to animate a provision that is a practical anachronism.

60 A clear example of a constitutional provision that is no longer applicable is Term 32(3) of the Terms of Union. It provides:

> 32(3) All legislation of the Parliament of Canada providing for special rates on traffic moving within, into, or out of, the Maritime region will, as far as appropriate, be made applicable to the Island of Newfoundland.

For many years, the *Maritime Freight Rates Act*, 17 Geo. V, cap 44, provided for reduced rates on traffic moving within or westbound out of the Maritime Region. In 1996, this legislation was repealed. (See *Budget Implementation Act, 1995*, c. 17, s. 25, repeal effective May 31, 1996 (P.C. 1996-804). It could not be seriously suggested that Term 32(3) still applies in such a manner as to require the continuation of legislation providing for special rates within or from the Maritime Region. In other words, Term 32(3) will only guarantee Newfoundland access to special rates provided to the Maritime Region in legislation, should Parliament choose, in the future, to enact

such legislation. However, Term 32(3) currently has no application. Term 32(3) is part of the supreme law of Canada, but the living tree doctrine does not make it effective at this time.

61 Similarly, Term 32(2) subsists and will guarantee Newfoundland the protection it affords should Parliament, in the future, enact railway rate regulation which is relevant to Term 32(2) . However, at the present time, when Parliament has not provided for any relevant railway rate regulation, the application of Term 32(2) is suspended. As with Term 32(3), the living tree doctrine does not require that Term 32(2) be made to apply in circumstances where there is no relevant railway rate regulation.

62 For these reasons, I do not think that Term 32(2) itself, either expressly or by necessary implication, confers jurisdiction on the Agency to have conducted the inquiry it did into Term 32(2), nor to issue instructions to the arbitrator to develop Terms of Union rates. In answering the jurisdictional question, it will be apparent that I have also had to address the substantive question raised by CN (in paragraph [5] above) of whether there currently exists rate regulation that engages Term 32(2) and I have concluded that there is not.

CONCLUSION

63 The appeal will be allowed and the decision of the Agency quashed. At the conclusion of the hearing, the question arose as to whether the matter should be remitted to the Agency for referral to an arbitrator to decide the dispute between Mr. Moffat and CN. However, the period during which the rate selected by the arbitrator was to have effect has long since expired. The Court was told that Mr. Moffatt did not ship any rail traffic with CN during the relevant period. Accordingly, no useful purpose would be served by remitting the matter to the Agency for referral for final offer arbitration.

64 As to costs, it was Mr. Moffatt who first raised the matter of Terms of Union rates in his submission to the Agency for final offer arbitration. However, it was CN who raised the inapplicability of the Terms of Union to the rate dispute, objecting to the matter being referred to arbitration. CN now agrees that the Agency did not have jurisdiction to deal with its preliminary objection. For these reasons, there will be no award of costs.

***Richard J.A.*:**

I agree.

***Noël J.A.*:**

I agree.

Appendix A

Statutory Provisions Referred To But Not Reproduced In The Reasons
Canada Transportation Act S.C. 1996, c.10

5. It is hereby declared that a safe, economic, efficient and adequate network of viable and effective transportation services accessible to persons with disabilities and that makes the best use of all available modes of transportation at the lowest total cost is essential to serve the transportation needs of shippers and travellers, including persons with disabilities, and to maintain the economic well-being and growth of Canada and its regions and that those objectives are most likely to be achieved when all carriers are able to compete, both within and among the various modes of transportation, under conditions ensuring that, having due regard to national policy, to the advantages of harmonized federal and provincial regulatory approaches and to legal and constitutional requirements,

(a) the national transportation system meets the highest practicable safety standards,

(b) competition and market forces are, whenever possible, the prime agents in providing viable and effective transportation services,

(c) economic regulation of carriers and modes of transportation occurs only in respect of those services and regions where regulation is necessary to serve the transportation needs of shippers and travellers and that such regulation will not unfairly limit the ability of any carrier or mode of transportation to compete freely with any other carrier or mode of transportation,
d) transportation is recognized as a key to regional economic development and that commercial viability of transportation links is balanced with regional economic development objectives so that the potential economic strengths of each region may be realized,

(e) each carrier or mode of transportation, as far as is practicable, bears a fair proportion of the real costs of the resources, facilities and services provided to that carrier or mode of transportation at public expense,

Articles de la loi mentionnés mais non reproduit dans les motifs
La loi sur les transports au Canada S.C. 1996, c.10
5. Il est déclaré que, d'une part, la mise en place d'un réseau sûr, rentable et bien adapté de services de transport viables et efficaces, accessibles aux personnes une déficience, utilisant au mieux et aux moindres frais globaux tous les modes transport existants, est essentielle à la satisfaction des besoins des expéditeurs et des voyageurs - y compris des personnes ayant une déficience - en matière de transports comme à la prospérité et à la croissance économique du Canada et de ses régions, et, d'autre part, que ces objectifs sont plus susceptibles de se réaliser en situation de concurrence de tous les transporteurs, à l'intérieur des divers modes de transport ou entre eux, à condition que, compte dûment tenu de la politique nationale, des avantages liés à l'harmonisation de la réglementation fédérale et provinciale et du contexte juridique et constitutionnel:
a) le réseau national des transports soit conforme aux normes de sécurité les plus élevées possible dans la pratique;
b) la concurrence et les forces du marché soient, chaque fois que la chose est possible, les principaux facteurs en jeu dans la prestation de services de transport viables et efficaces;
c) la réglementation économique des transporteurs et des modes de transport se limite aux services et aux régions à propos desquels elle s'impose dans l'intérêt des expéditeurs et des voyageurs, sans pour autant restreindre abusivement la libre concurrence entre transporteurs et entre modes de transport;

d) les transports soient reconnus comme un facteur primordial du développement économique régional et que soit maintenu un équilibre entre les objectifs de rentabilité des liaisons de transport et ceux de développement économique régional en vue de la réalisation du potentiel économique de chaque région;
e) chaque transporteur ou mode de transport supporte, dans la mesure du possible, une juste part du coût réel des ressources, installations et services mis à sa disposition sur les fonds publics;

(f) each carrier or mode of transportation, as far as is practicable, receives fair and reasonable compensation for the resources, facilities and services that it is required to provide as an imposed public duty,
(g) each carrier or mode of transportation, as far as is practicable, carries traffic to or from any point in Canada under fares, rates and conditions that do not constitute

(i) an unfair disadvantage in respect of any such traffic beyond the disadvantage inherent in the location or volume of the traffic, the scale of operation connected with the traffic or the type of traffic or service involved,
(ii) an undue obstacle to the mobility of persons, including persons with disabilities,

iii) an undue obstacle to the interchange of commodities between points in Canada, or
(iv) an unreasonable discouragement to the development of primary or secondary industries, to export trade in or from any region of Canada or to the movement of commodities through Canadian ports, and
(h) each mode of transportation is economically viable,
and this Act is enacted in accordance with and for the attainment of those objectives to the extent that they fall within the purview of subject-matters under the legislative authority of Parliament relating to transportation.

f) chaque transporteur ou mode de transport soit, dans la mesure du possible, indemnisé, de façon juste et raisonnable, du coût des ressources, installations et services qu'il est tenu de mettre à la disposition du public;
g) les liaisons assurées en provenance ou à destination d'un point du Canada par chaque transporteur ou mode de transport s'effectuent, dans la mesure du possible, à des prix et selon des modalités qui ne constituent pas
(i) un désavantage injuste pour les autres liaisons de ce genre, mis à part le désavantage inhérent aux lieux desservis, à l'importance du trafic, à l'ampleur des activités connexes ou à la nature du trafic ou du service en cause,
(ii) un obstacle abusif à la circulation des personnes, y compris les personnes ayant une déficience,
(iii) un obstacle abusif à l'échange des marchandises à l'intérieur du Canada,
(iv) un empêchement excessif au développement des secteurs primaire ou secondaire, aux exportations du Canada ou de ses régions, ou au mouvement des marchandises par les ports canadiens;
h) les modes de transport demeurent rentables.
Il est en outre déclaré que la présente loi vise la réalisation de ceux de ces objectifs qui portent sur les questions relevant de la compétence législative du Parlement en matière de transports.

161. (1) A shipper who is dissatisfied with the rate or—rates charged or proposed to be charged by a carrier for the movement of goods, or with any of the conditions associated with the movement of goods, may, if the matter cannot be resolved between the shipper and the carrier, submit the matter in writing to the Agency for a final offer arbitration to be conducted by one arbitrator or, if the shipper and the carrier agree, by a panel of three arbitrators.

161. (1) L'expéditeur insatisfait des prix appliqués ou proposés par un transporteur pour le transport de marchandises ou des conditions imposées à cet égard peut, lorsque ceux-ci ne sont pas en mesure de régler eux-mêmes la question, la soumettre par écrit à l'Office pour arbitrage.

2) A copy of a submission under subsection (1) shall be served on the carrier by the shipper and the submission shall contain
(a) the final offer of the shipper to the carrier in the matter, excluding any dollar amounts;
(b) the last offer received by the shipper from the carrier in the matter;
(c) an undertaking by the shipper to ship the goods to which the arbitration relates in accordance with the decision of the arbitrator;

(2) Un exemplaire de la demande d'arbitrage est signifié au transporteur par l'expéditeur; la demande contient :
a) la dernière offre faite par l'expéditeur au transporteur;
b) la dernière offre reçue par l'expéditeur de la part du transporteur;
c) l'engagement par l'expéditeur d'expédier les marchandises visées par l'arbitrage selon les termes de la décision de l'arbitre;

(d) an undertaking by the shipper to the Agency whereby the shipper agrees to pay to the arbitrator the fee for which the shipper is liable under section 166 as a party to the arbitration; and

(e) the name of the arbitrator, if any, that the shipper and the carrier agreed should conduct the arbitration or, if they agreed that the arbitration should be conducted by a panel of three arbitrators, the name of an arbitrator chosen by the shipper and the name of an arbitrator chosen by the carrier.

(3) The Agency shall not have any matter submitted to it by a shipper under subsection (1) arbitrated if the shipper has not, at least five days before making the submission, served on the carrier a written notice indicating that the shipper intends to submit the matter to the Agency for a final offer arbitration.

(4)A final offer arbitration is not a proceeding before the Agency.

162 (1) On the submission of a matter to the Agency for a final offer arbitration, the Agency shall refer the matter for the arbitration

(a) to the chosen arbitrator, if any, referred to in paragraph 161(2)(e), if that arbitrator is available to conduct the arbitration; or

(b) where no arbitrator is chosen as contemplated—by paragraph (a) or the arbitrator chosen is, in the opinion of the Agency, unavailable to conduct the arbitration, to any other arbitrator, chosen by the Agency from the list of arbitrators referred to in section 169, that the Agency determines is appropriate and available to conduct the arbitration

(2) The Agency may, at the request of the arbitrator, provide administrative, technical and legal assistance to the arbitrator on a cost recovery basis.

165. (1) The decision of the arbitrator in conducting a final arbitration shall be the selection by the arbitrator of the final offer of either the shipper or the carrier and, for the purpose of this section,

(a) the final of the shipper shall be shipper's final offer set out in the submission to the Agency under subsection 161(1); and

(b) the final offer of the carrier shall be the last offer received by the shipper from the carrier as set out in the submission to the agency under subsection 161(1) or any other offer that the carrier, within tend days after the service referred to in subsection 161(2),

d) l'engagement par l'expéditeur envers l'Office de payer à l'arbitre les honoraires auxquels il est tenu en application de l'article 166 à titre de partie à l'arbitrage;

e) le cas échéant, le nom de l'arbitre sur lequel l'expéditeur et le transporteur se sont entendus.

(3) L'arbitrage prévu au paragraphe (1) est écarté en cas de défaut par l'expéditeur de signifier, dans les cinq jours précédant la demande, un avis écrit au transporteur annonçant son intention de soumettre la question à l'Office pour arbitrage.

(4) La soumission d'une question à l'Office pour arbitrage ne constitue pas une procédure devant l'Office.

162. (1) En cas de demande d'arbitrage, l'Office renvoie la question :

a) à l'arbitre visé à l'alinéa 161(2)e), s'il est disponible pour mener l'arbitrage;

b) en cas d'absence de choix d'un arbitre ou du manque de disponibilité, selon l'Office, de l'arbitre choisi, à un autre arbitre, que l'Office estime disponible et compétent et qui est inscrit sur la liste établie en vertu de l'article 169.

(2) À la demande de l'arbitre, l'Office lui offre, moyennant remboursement des frais, le soutien administratif, technique et juridique voulu.

165. (1) L'arbitre rend sa décision en choisissant la dernière offre de l'expéditeur ou celle du transporteur; pour l'application du présent article, la dernière offre :

a) de l'expéditeur est celle contenue dans sa demande présentée à l'Office en application du paragraphe 161(1);

b) du transporteur est la dernière offre du transporteur à l'expéditeur contenue dans la demande présentée à l'Office en application du paragraphe 161(1) ou toute autre offre, qualifiée de finale, que présente le transporteur à l'expéditeur et à l'Office

specifies in writing to the shipper and to the Agency as the carrier's final offer.
(2) The decision of the arbitrator shall
(a) be in writing;
(b) unless the parties agree otherwise, be rendered within sixty days after the date on which the submission for the final offer arbitration was received by the Agency from the shipper; and
(c) unless the parties agree otherwise, be rendered so as to apply to the parties for a period of one year or any lesser period that may be appropriate, having regard to the negotiations between the parties that preceded the arbitration.
(3) The carrier shall, without delay after the arbitrator's decision, set out the rate or rates or the conditions associated with the movement of goods that have been selected by the arbitrator in a tariff of the carrier, unless, where the carrier is entitled to keep the rate or rates or conditions confidential, the parties to the arbitration agree to include the rate or rates or conditions in a contract that the parties agree to keep confidential.
(4) No reasons shall be set out in the decision of the arbitrator
(5) The arbitrator shall, if requested by of the parties to the arbitration within thirty days after the decision of the arbitrator, give reasons in writing for the decision.
(6) Except where both parties agree otherwise,
(a) the decision of the arbitrator on a final offer arbitration shall be final and binding and be applicable to the parties as of the date on which the submission for the arbitration was received by the Agency from the shipper, and is enforceable as if it were an order of the Agency; and
(b) the arbitrator shall direct in the decision that interest at a reasonable rate specified by the arbitrator shall be paid to one of the parties by the other on moneys that, as a result of the application of paragraph (a), are owed by a party for the period between the date referred to in that paragraph and the date of the payment.
(7) Moneys and interest referred to in paragraph (6)(b) that are owed by a party pursuant to a decision of the arbitrator shall be paid without delay to the other party.
National Transportation Act, 1987 S.C. 1987, c.34
52. (1) The decision of the arbitrator in conducting a final offer arbitration shall be the selection by the arbitrator of the final offer of either the shipper or the carrier and,

dans les dix jours suivant la signification visée au paragraphe 161(2).
(2) La décision de l'arbitre est rendue :
a) par écrit;
b) sauf accord entre les parties à l'effet contraire, dans les soixante jours suivant la date de réception par l'Office de la demande d'arbitrage présentée par l'expéditeur;

c) sauf accord entre les parties à l'effet contraire, de manière à être applicable à celles-ci pendant un an, ou le délai inférieur indiqué, eu égard aux négociations ayant eu lieu entre les parties avant l'arbitrage.

(3) Le transporteur inscrit, sans délai après la décision de l'arbitre, les prix ou conditions liés à l'acheminement des marchandises choisis par l'arbitre dans un tarif du transporteur, sauf si, dans les cas où celui-ci a droit de ne pas dévoiler les prix ou conditions, les parties à l'arbitrage conviennent de les inclure dans un contrat confidentiel conclu entre les parties.

(4) La décision de l'arbitre n'énonce pas les motifs
(5) Sur demande de toutes les parties à l'arbitrage présentée dans les trente jours suivant la décision de l'arbitre, celui-ci donne par écrit les motifs de sa décision.
(6) Sauf accord entre les parties à l'effet contraire :
a) la décision de l'arbitre est définitive et obligatoire, s'applique aux parties à compter de la date de la réception par l'Office de la demande d'arbitrage présentée par l'expéditeur et, aux fins de son exécution, est assimilée à un arrêté de l'Office;

b) l'arbitre indique dans la décision les intérêts, au taux raisonnable qu'il fixe, à payer sur les sommes qui, par application de l'alinéa a), sont en souffrance depuis la date de la demande jusqu'à celle du paiement.

(7) Les montants exigibles visés à l'alinéa (6)b) sont payables sans délai à qui y a droit.

Loi nationale de 1987 sur les transports S.C. 1987, c.34
52. (1) L'arbitre rend sa décision en choisissant la dernière offre de l'expéditeur or du transporteur; pour l'application du présent article, la dernière offre:

for the purpose of this section, the final offer of
(a) the shipper shall be the shipper's final offer set out in the submission to the Agency under subsection 48(1); and
(b) the carrier shall be the last offer received by the shipper from the carrier as set out in the submission to the Agency under subsection 48(1) or such other offer as the carrier, within ten days after the service referred to in subsection 48(2), specifies in writing to the shipper and the Agency as the carrier's final offer
(2) the decision of the arbitrator shall
(a) be in writing;
(b) unless the parties otherwise agree, be rendered within ninety days after the date on which the submission for the final offer arbitration was received by the Agency from the shipper; and
(c) unless the parties otherwise agree, be rendered so as to be applicable in respect of the parties to the arbitration for a period of one year or such lesser period as may be appropriate, having regard to the negotiations between the parties that preceded the arbitration.
(3...)
59. (1) The public interest referred to in this section and in section 61 shall include the relevant matters required to be considered under section 60
(2) Where a person has reason to believe ——(a) that the effect of any rate established by a carrier or carriers, or —
(b) that any act or omission of a carrier, or of any two or more carriers,— may prejudicially affect the public interest in respect of rates for, or conditions of, the carriage of goods within, into or form Canada, the person may request the Agency to investigate the rate, act or omission and the Agency shall make such investigation of the rate, act or omission and the effect thereof as in its opinion is warranted.
(3) Where the Agency has, pursuant to section 48, received a submission for a final offer arbitration in respect of any matter and acted in accordance with paragraph 48(3) (b), the Agency shall be deemed to have received a request to investigate the matter under subsection (2).
(4) Where, at any time after a person has requested an investigation, the person by notice to the Agency withdraws the request, the Agency shall forthwith discontinue the investigation.

(a) de l'expéditeur est celle contenue dans sa demande présentée à l'Office en application du paragraphe 48(1);
(b) du transporteur est la dernière offre du transporteur à l'expéditeur contenue dans la demande présentée à l'Office en application du paragraphe 48(1) ou toute autre offre, qualifiée de finale, gue présente le transporteur à l'expéditeur et à l'Office dans le dix jours suivant la signification visée au paragraphe 48(2).
(2) La décision de l'arbitre est rendue:
(a) par écrit;
(b) sauf accord entre les parties à l'effet contraire, dans les quatre-vingt-dix jours suivant la date de réception par l'Office de la demande d'arbitrage présentée par l'expéditeur;
(c) sauf accord entre les parties à l'effet contraire, de manière à être applicable à celles-ci pendant un an, ou le délai inférieur indiqué, eu égard aux négociations ayant eu lieu entre les parties avant l'arbitrage.

(3...)
59. (1) L'intérêt public mentionné au présent article et à l'article 61 vise également les éléments don't il est tenu compte pour l'application de l'article 60.
(2) La personne ou l'organisme ayant des motifs de croire qu'un prix fixé par un or plusieurs transporteurs or qu'un acte ou une omission de ceux-ci risque de porter préjudice à l'intérêt public en matière de prix or de conditions de transport de marchandises à l'intérieur, à desitnation ou en provenance du Canada peut demande à l'Office de faire enquête sure le prix, l'acte ou l'omission celui-ci est alors tenu de mener l'enquête qu'il estime indiquée en l'espèce.

(3) Après avoir reçu unde demande d'arbitrage en application de l'article 48 e agi conformément à l'alinéa 48(3)(b), l'Office est réputé avoir recu une demande d'enquête sur la question en application du paragraphe (2).

(4) Sur avis de retrait de la personne qui a demandé la tenue de l'enquête, l'Office y met aussitôt fin.

The Railway Act, R.S.C. 1927, Cap. 170

314. (1) All tolls shall always under substantially similar circumstances and conditions, in respect of all traffic of the same description, and carried in or upon the like kind of cars or conveyances, passing over the same line or route, be charged equally to all person and at the same rate, whether by weight, mileage or otherwise.

(2) No reduction or advance in any such tolls shall be made, either directly or indirectly, in favour of or against any particular person or company travelling upon or using the railway.
(3) The tolls for carload quantities or longer distances, may be proportionately less that the tolls for less than car-load quantities, or shorter distance, if such tolls are, under substantially similar circumstances, charged equally to all persons.

(4) No toll shall be charged which unjustly discriminates between different localities.

(5) The Board shall not approve or allow any toll, which for the like description of goods, or for passengers carried under substantially similar circumstances and conditions in the same direction over the same line or route is greater for a shorter than for a longer distance, within which such shorter distance is included, unless the Board is satisfied that, owing to competition, it is expedient to allow such toll.

(6) The Board may declare that any places are competitive points with the meaning of the Act.
325. (1) The Board may disallow any tariff or any portion thereof which it considers to be unjust or unreasonable, or contrary to any of the provisions of this Act, and may require the company, within a prescribed time, to substitute a tariff satisfactory to the Board in lieu thereof, or may prescribe other tolls in lieu of the tolls so disallowed.

(2) The Board may designate the date at which any tariff shall come into force, and either on application or of its own motion may, pending investigation or for any reason, postpone the effective date of, or

La Loi des chemins de fer, R.S.C. 1927, Cap. 170
314. (1) Les taxes de transport doivent toujours, dans des conditions et circonstances essentiellement semblables, être exigeées également de tous, et d'après le même tarif soit au poids, sout au mille ou autrement, relativement à tout trafic de même genre et s'effectuant par la même espèce de wagons ou par le même mode de transport, sur la même voie ou le même parcours.
(2) Il ne doit être aucune réduction ni augmentation de ces taxes, soit directment ou indirectment, en faveurou au détriment d'une compagnieou d'un particulier qui vogage sur le chemin de fer ou qui s'en sert.
(3) Les taxes peuvent être proportionnellement moins élevées, s'il s'agit de chargements complets ou de plus longues distances à parcourir, qu'elles ne le seraient pour des quantités moindres ou dans le cas de moindres distances à parcourir, pourvu que ces taxes soient également exigées de tous dans des circonstances essentiellement analogues.
(4) Il ne peut être exigé de taxes don't l'imposition établirait une disparité en faveur ou au détriment de différentes localités.
(5) La Commission ne doit approuver ni permettre, pour les transports de voyageurs ou des marchandises, effectués dams des conditions et des circonstance essentiellement analogues, et dans la même direction ou sur la même ligne, des taxes plus élevées pour une plus courte distance que pour un plus long parcours, quand cette plus courte distance fait partie de ce plus long parcours, à moins que La Commission ne soit convaincue, vue la concurrence, de l'opportunité d'autoriser pareilles taxes.
(6) La Commission peut déclarer que n'importe quels endroits sont des points de concurrence au sens de la présente loi.
325. (1) La Commission peut rejeter un tarif ou une partie de tarif qu'elle considère injuste or déraisonnable, ou contraire à quelqu'une des dispositions de la présente loi, et exiger de la compagnie qu'elle y substitue, dans un délai prescrit, un tarif jugé satisfaisant par la Commission, ou elle peut prescrire d'autres taxes pour remplacer celles qui ont été ainsi rejetées.
(2) La Commission peut fixer la date à laqueslle un tarif doit entrer en vigueur et, soit sur demande, soit de son propre chef, elle peut, en vue d'une enquête ou pour une raison quelconque, retarder la date do son

either before or after it comes into effect, suspend any tariff or any portion thereof.

(3) Except as otherwise provided, any tariff in force, except standard tariffs hereinafter mentioned, may, subject to disallowance or change by the Board, be amended or supplemented by the company by new tariffs, in accordance with the provisions of this Act.

(4) When any tariff has been amended or supplemented, or is proposed to be amended or supplemented, the Board may order that a consolidation and reissue of such tariff be made by the company.

(5) Notwithstanding the provisions of section three of this Act the powers given to the Board under this Act to fix, determine and enforce just and reasonable rates, and to change and alter rates as changing conditions or cost of transportation may from time to time require, shall not be limited or in any manner affected by the provision of any Act of the Parliament of Canada, or by any agreement made or entered into pursuant thereto, whether general in application or special and relating only to any specific railway or railways, and the Board shall not excuse any charges of unjust discrimination, whether practised against shippers, consignees, or localities, or of undue or unreasonable preference, on the ground that such discrimination or preference is justified or required by any agreement made or entered into by the company: Provided that, notwithstanding anything in this subsection contained, rates on grain and flour shall, on and from the twenty-seventh day of June, one thousand nine hundred and twenty-five, be governed by the provisions of the agreement made pursuant to chapter five fo the Statutes of Canada 1897, but such rates shall apply to all such traffic moving from all points on all lines of railway west of Fort William to Fort William or Port Arthur over all lines now or hereafter constructed by any company subject to the jurisdiction of Parliament.

(6) the Board shall not excuse any charge of unjust discrimination, whether practised against shippers, consignees, or localities or of undue or unreasonable preference,

application effective, ou, soit avant soit après son entrée en vigueur, suspendre un tarif ou une partie de tarif.

(3) Sauf disposition contraire, un tarif en vigeur, excepté les tarif-types dont il est question ci-après, peut, subordonnément au rejet ou à des changements par la Commission, être modifié ou supplémenté par la compagnie au moyen de nouveaux tarifs, conformément aux dispositions de la présente loi.

(4) Lorsqu'un tarif a subi des modifications or additions, or lorsqu'on se propose d'y faire des modifications ou des additions, la Commission peut ordonner à la compagnie d'en publier une nouvelle édition.

(5) Nonobstant les dispositions de l'article trois de la présente loi, les pouvoirs attribués à la Commission sous le régime de la présente loi, pour fixer, déterminer et mettre en vigueur des tarifs équitables et raisonnables, et pour changer et modifier les tarifs, selon que peuvent, à l'occasion, l'exiger des circonstances nouvelles ou le coût du transport, ne doivent pas être limités ni d'aucune façon atteints par les dispositions d'une loi quelconque du Parlement du Canada, ou par un traité fait ou conclu en conformité de cette loi, qu'elle soit générale or spéciale dans son application et qu'elle ait trait à un ou plusieurs chemins de fer particuliers, et la Commission ne doit faire grâce d'aucune accusation de disparité injuste, qu'elle soit exercée contre des expéditeurs, des consignataires ou des localités, ou de préférence indue ou déraisonnable, pour le motif que cette disparité ou préférence est justifiée ou prescrite par une entente faite ou conclue par la compagnie. Toutefois, par dérogation à toute disposition contenue dans le présent paragraphe, les tarifs du grain et de la farine sont, à et à compter de la date du vingt-cinquième jour de juin mil neuf cent vingt-cinq, régis par les dispositions de la convention conclue en conformité du chapitre cinq du Statut du Canada, 1897; mais ces tarifs s'appliquent à tout trafic en circulation, à partir de tous les endroits sur toutes les lignes de chemin de fer à l'ouest de Fort-William jusqu'à Fort-William or Port-Arthur, sur tutes les lignes actuellement or désormais construites par une compagnie assujétie à la juridiction du Parlement.

(6) La Commission ne doit faire grâce d'aucune accusation de disparité injust, qu'elle soit exercée contre des expéditeurs, des consignataires ou des localités, ou de

respecting rates on grain and flour, governed by the provisions of chapter five of the Statutes of Canada 1897, and by the agreement made or entered into pursuant thereto within the territory in the immediately preceding subsection referred to, on the ground that such discrimination or preference is justified or required by the said Act or by the agreement made or entered into pursuant thereto.

préférence indue ou déraisonnable à l'égard des tarifs du grain et de la farine régis par les dispositions du chapitre cinq du Statut du Canada, 1897, et par la convention faite ou conclue en conformité dudit statut dans le territoire, et don't il est question au paragraphe précédent, pour le motif que cette disparité ou préférence est justifiée ou requise par ladite loi ou par la convention faite ou conclue en conformité de ladite loi.

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Federal Court of Appeal

Colel Chabad Lubavitch Foundation of Israel v. Canada (National Revenue)

2022 CarswellNat 1937, 2022 CarswellNat 1938, 2022 CAF 108, 2022 FCA 108, [2023] 2 C.T.C. 13, 2022 D.T.C. 5071, 2022 A.C.W.S. 2135

COLEL CHABAD LUBAVITCH FOUNDATION OF ISRAEL (Appellant) and MINISTER OF NATIONAL REVENUE (Respondent)

Johanne Gauthier, Mary J.L. Gleason, George R. Locke JJ.A.

Heard: December 14, 2021
Judgment: June 9, 2022
Docket: A-436-19

Counsel: Jean-François Dorais, Arnaud Prud'Homme, for Appellant
Charles Camirand, Anna Maria Konewka, for Respondent

***Mary J.L. Gleason J.A.*:**

1 In this appeal, brought under paragraph 172(3)(a.1) of the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.) (the ITA), the appellant seeks to have this Court set aside the October 22, 2019 Notice of Confirmation issued by the Minister of National Revenue and the earlier Notice of Intention to Revoke, issued on December 19, 2016, that was confirmed in the Notice of Confirmation. The effect of the Notice of Intention to Revoke will be to revoke the appellant's registration as a charitable organization for the purposes of the ITA once the Notice is published in the Canada Gazette.

2 For the reasons that follow, I would dismiss this appeal, with costs.

I. Background

3 Given the various arguments raised by the appellant, it is necessary to review the relevant factual background in some detail. For ease of reading, the relevant provisions in the ITA mentioned in these Reasons are reproduced in the attached Appendix.

4 The appellant was incorporated as a charitable organization on June 9, 1993. Its main objects were stated as being to: (1) provide buildings for the use of synagogues to conduct services and teach children in accordance with the Jewish faith; (2) provide scholarships for students to attend

schools that teach Jewish studies; and (3) receive and maintain a fund or funds and to apply them from time to time to help attain one of the first two stated objectives. On October 7, 1993, the Minister registered the appellant as a charitable organization, with an effective date of June 9, 1993.

5 In its T3010 Registered Charity Information Returns for the 2003 to 2007 fiscal periods, the appellant stated that its activities consisted of providing scholarship assistance to students to attend courses in Israel, providing information about Jewish holidays throughout Canada and, beginning in 2007, providing poverty relief to needy people in Israel. Some of these activities were not consistent with the appellant's objectives.

6 The appellant was subject to two audits by the Charities Directorate (the Directorate) of the Canada Revenue Agency (CRA). The first audit took place between April 2006 and August 2007 and covered the 2003 and 2004 fiscal periods. It identified several areas of non-compliance, namely:

- conduct of activities that were not consistent with the appellant's objects;
- failure to keep documents identifying scholarship recipients and their incomes;
- failure to properly document the relationship with the appellant's agent in Israel;
- errors in the appellant's information returns in not accurately reporting the salary received by one of its directors;
- making loans to a director and others in contravention of the appellant's objects;
- failure to maintain proper books and records with respect to travel expenses for a director; and
- failure to issue T4 or T4A slips and provide the CRA with information in respect of payments made to persons employed for fundraising activities.

7 On May 29, 2007, the appellant executed a Compliance Agreement in which the appellant agreed:

- not to undertake activities in contravention of its objects unless a request to modify them were approved by the Directorate;
- to send all scholarships directly to students and to document the provision of them in accordance with details prescribed in the Compliance Agreement;
- to sign the T1240 Registered Charity Adjustment Request form;
- not to lend money to those in need until its objects and activities allowed;

• not to provide monthly travel allowances to individuals who undertook activities on behalf of the appellant and to instead directly pay travel expenses related to the appellant's charitable activities; and

• to keep records of all individuals who received more than $500 annually for part-time work and to issue a T4 or T4A for such work.

8 Following the execution of the Compliance Agreement by the appellant, the Directorate wrote to the appellant on June 13, 2007 to confirm the receipt and acceptance of the Agreement. In its June 13, 2007 letter, the Directorate also noted that the audit that gave rise to the Compliance Agreement did "not cover the full scope of [the appellant's] operation and it [was] possible that an audit at some future time could cover the same period" (Appeal Book Vol. III, p. 349).

9 The first audit was conducted by an auditor named Mr. Jean Dion. During the course of his audit, Mr. Dion consulted with five other employees who worked in the Directorate. One of them was Mr. Daniel Racine. The documents before the Court indicate that the role of Mr. Racine during the first audit was limited to:

• sending Mr. Dion a copy of the appellant's 2004 Registered Charity Information Return;

• providing advice on the required documentation relating to selection criteria and recipients of the scholarships given by the appellant;

• reviewing documents regarding the appellant's formula to determine scholarship amounts;

• advising on tax withholdings required to be made from the scholarship payments made by the appellant;

• reviewing the appellant's representations with respect to the proper documentation required in respect of the scholarships;

• reviewing a draft of the first letter to the appellant, outlining the compliance issues;

• reviewing the draft compliance agreement; and

• advising Mr. Dion on the recourses available to the appellant if the Minister did not agree with the appellant's representations.

10 Following the execution of the Compliance Agreement, the appellant sought and obtained the approval of the Directorate for a modification of its objects to allow for provision of assistance to needy people in Israel. In connection with this modification, the Directorate advised the appellant that "[c]haritable organizations may not directly provide cash (funds) to non-qualified donees, in this case the poor [in Israel]..." but could provide them with furniture and clothing as the appellant proposed (Appeal Book Vol. III, p. 376). In response, the appellant advised the Directorate that its

intent was to send money to an agent in Israel (Rabbi Moshe Shmuel Deutsch), who, in turn, would use the funds to purchase food for the needy and to run a soup kitchen. The appellant provided the Directorate with an agency agreement in which Rabbi Deutsch undertook to use the funds in this fashion and, on the strength of these representations, the Directorate approved these activities being undertaken by the appellant.

11 In August 2011, the Directorate again selected the appellant for an audit, which initially concerned its 2008 and 2009 fiscal periods but was later extended to the appellant's 2003 to 2009 fiscal periods. Mr. Dion conducted the second audit. Mr. Racine was not involved in the second audit.

12 The only issue uncovered during the second audit in respect of the appellant's 2003 and 2004 taxation years (the years that had been previously audited) related to the appellant's participation in a donation scheme. More specifically, during the course of the second audit, the Directorate obtained evidence that indicated that the appellant had been engaged in a scheme through which it issued receipts for amounts well in excess of monies actually donated, thereby facilitating claims by the donor for charitable credits to which the donor was not entitled.

13 During the second audit, the Directorate also noted several other areas of non-compliance with the Compliance Agreement that the appellant had signed and with the requirements of the ITA in respect of taxation years subsequent to 2004.

14 Mr. Dion sent two fairness letters to the appellant, outlining the various concerns uncovered during the second audit. These letters, sent in November 2013 and January 2016, listed the following areas of non-compliance:

- issuance of donation receipts over the 2003 to 2007 period where a partial gift was made by a donor, Dr. Lorne Sokol, through which he was given receipts for approximately $3.5 million but approximately 80-90% thereof was remitted back to him by the appellant via a corporation registered in Belize, the Moshe Shmuel Deitsch Corp;

- failure of the appellant to devote all of its resources to charitable purposes and activities outside of Canada in 2008 and 2009 in that:

    - the appellant could not demonstrate that nearly $600,000.00 was actually paid to purchase food and clothing for needy people in Israel as there were no documents to adequately support such payments;

    - the appellant's agent in Israel, Rabbi Deutsch, distributed approximately $39,000.00 to other individuals, purportedly to have them provide assistance to needy individuals, but there were no agency agreements with these individuals;

• the appellant distributed an additional approximate amount of $31,000.00 to an organization in Israel but could not demonstrate that the funds donated directly achieved a charitable purpose;

• failure to maintain adequate books and records related to the travel expenses of one of the appellant's directors, Rabbi Zalman Zirkind, and related to the appellant's fundraising activities over the period from 2007 to 2009; and

• failure to file accurate information returns in 2008 and 2009 by misreporting the salary paid to one of the appellant's directors and in respect of payments made to those engaged in telephone solicitations.

15 Mr. Dion also expressed concern in the second fairness letter that the appellant had falsified the minutes of its board of directors' meetings for 2009 and 2010. The appellant had provided copies of these minutes to the Directorate during the audit. The individuals the appellant claimed were directors told the Directorate that they had no active involvement with the appellant or knowledge of the meetings. One of them in addition confirmed that he did not attend either of the two meetings that the minutes stated he attended.

16 Following a meeting with the appellant's representatives and review of the evidence and the appellant's representations, the Directorate issued a Notice of Intention to Revoke the appellant's registration as a charitable organization on December 19, 2016. The Notice was signed by Mr. Tony Manconi, the Director General of the Directorate. In the Notice, Mr. Manconi advised that the CRA had concluded that the appellant was not complying with the requirements of the ITA because the appellant:

• failed to issue donation receipts in accordance with the ITA by issuing official donation receipts where a partial gift was made;

• failed to devote all of its charitable resources to its own charitable activities, notably by gifting funds to non-qualified donees;

• failed to maintain adequate books and records;

• failed to file accurate information returns as required by the ITA;

• had no active board of directors; and

• had misrepresented its fundraising solicitations.

17 The appellant filed a Notice of Objection to the Notice of Intention to Revoke. Mr. Racine, who was by then assigned to the Tax and Charities Appeals Directorate (the Appeals Directorate), was assigned as the appeals officer. Following his review of the audit findings of the Directorate

and the appellant's Notice of Objection, Mr. Racine issued a letter on March 6, 2019, in which he stated:

> We have reviewed the CD's [*i.e.*, the Directorate's] audit findings and the information submitted by the Foundation with its objection. We agree with the decision of the CD to issue the [the Notice of Intention to Revoke] in accordance with subsection 168(1) and 149.1(2) of the [ITA] because of the following non-compliance issues. (Appeal Book Vol. I, p.61)

18 The letter then went on to enumerate the grounds for revocation. These were:

- paragraph 168(1)(b) of the ITA - ceased to comply with the requirements of the ITA for registration via participation in the donation scheme;

- paragraph 168(1)(b) of the ITA - ceased to comply with the requirements of the ITA for registration by not having direction and control over the activities undertaken in Israel and thus not devoting the appellant's resources to its own charitable activities;

- paragraph 168(1)(c) of the ITA - failure to file an information return as required under the ITA by allocating charitable expenditures that were not its own;

- paragraph 168(1)(c) of the ITA - failure to file an information return as required under the ITA by not correctly allocating fundraising expenditures;

- paragraph 168(1)(c) of the ITA - failure to file an information return as required under the ITA by not accurately listing the names of the appellant's directors;

- paragraph 168(1)(d) of the ITA - issuing a receipt for a gift that did not comply with the ITA and its Regulations or that contained false information because by the charity ultimately received only 10%-20% of the receipted amount;

- paragraph 168(1)(e) of the ITA - failure to comply with subsection 230(2) of the ITA through a failure to keep information in such a form as will enable the Minister to determine whether there are grounds for the revocation of its registration by having insufficient documentation for activities undertaken overseas;

- paragraph 168(1)(e) of the ITA - failure to comply with subsection 230(2) of the ITA through a failure to keep information in such a form as will enable the Minister to determine whether there are grounds for the revocation of its registration by not providing supporting documentation for travel and fundraising expenditures;

- paragraph 168(1)(e) of the ITA - failure to comply with subsection 230(2) of the ITA through a failure to keep information in such a form as will enable the Minister to determine whether there are grounds for the revocation of its registration by providing minutes of board meetings that were inaccurate;

• paragraph 149.1(2)(c) of the ITA - the making of disbursements by way of a gift to a non-qualified donee; and

• subsection 230(2) of the ITA - failure to file an information return as required under the ITA due to the foregoing issues.

19 The appellant was provided a final chance to make submissions in response to Mr. Racine's letter. After review of them, the Appeals Directorate determined that the additional submissions did not adequately respond to the concerns raised in the Notice of Intention to Revoke. On October 22, 2019, the Minister issued a Notice of Confirmation to the appellant, confirming ten grounds for revocation of the appellant's registration as a charitable organization, namely:

1. The appellant participated in a donation scheme in which 80-90% of the funds received were returned to Dr. Sokol and not used for charitable purposes (paragraph 168(1)(b) of the ITA);

2. The appellant did not have direction and control over the activities undertaken in Israel and Belize, and thus did not devote its resources to its own charitable activities (paragraph 168(1)(b) of the ITA);

3. The appellant failed to file an information return as required under the ITA by allocating charitable expenditures for activities that were not its own (paragraph 168(1)(c) of the ITA);

4. The appellant failed to file an information return as required under the ITA by not correctly allocating fundraising expenditures related to Rabbi Zirkind's salary (paragraph 168(1)(c) of the ITA);

5. The appellant failed to file an information return as required under the ITA by not listing accurately the names of its directors (paragraph 168(1)(c) of the ITA);

6. The appellant issued receipts for a gift otherwise than in accordance with the ITA and the Regulations or that contain false information, as it issued official donation receipts while receiving only 10-20% of the receipted amount (paragraph 168(1)(c) of the ITA);

7. The appellant failed to comply with subsection 230(2) of the ITA because it failed to keep information in such form as will enable the Minister to determine whether there are any grounds for the revocation of its registration by having insufficient supporting documentation for activities undertaken overseas (paragraph 168(1)(e) of the ITA);

8. The appellant failed to comply with subsection 230(2) of the ITA because it failed to keep information in such form as will enable the Minister to determine whether there are any grounds for the revocation of its registration by not providing supporting documentation for travel and fundraising expenditures (paragraph 168(1)(e) of the ITA);

9. The appellant failed to comply with subsection 230(2) of the ITA because it failed to keep information in such form as will enable the Minister to determine whether there are any grounds for the revocation of its registration by providing minutes of board meetings which were inaccurate (paragraph 168(1)(e) of the ITA); and,

10. The appellant made a gift to a non-qualified donee (paragraph 149.1(2)(c) of the ITA).

20 The Notice of Confirmation was signed by Mr. Isaac Piotrkowski, Manager of the Appeals Directorate.

21 On November 19, 2019, the appellant appealed to this Court.

II. Issues

22 In its memorandum of fact and law, the appellant challenges each of the bases for revocation upon which the Minister relied. The appellant also asserts that there is a reasonable apprehension of bias arising from the involvement of Mr. Racine in the first audit and his assignment as the appeals officer in the appeal from the Notice of Intention to Revoke that was issued as a consequence of the second audit. The appellant focused its oral submissions before this Court on the bias argument.

23 The appellant makes two inter-connected submissions in respect of bias. It first asserts that the dual role played by Mr. Racine as part of the first audit and as the appeals officer in respect of the findings made following the second audit violated the principle that an administrative decision-maker should not sit in appeal from a decision the decision-maker was involved in making. Second, the appellant asserts that the roles played by Mr. Racine in the first audit and in the appeal from the Notice of Intention to Revoke violated the appellant's legitimate expectations based on statements contained in the CRA's Appeals Manual and in the *Taxpayer* Bill of Rights, which are publicly available documents.

24 The Appeals Manual provided in relevant part that "...appeals officers must not work on files with which they were involved when they were in a different work section (for example, the appeals officer was the auditor on that file)" (Canada Revenue Agency, "Appeals Manual 2015-03" March 2015 at para. 1.1). The relevant section in the *Taxpayer* Bill of Rights, published on the CRA website, states that "[t]he officer responsible for handling your file will not have been involved with the original decision under dispute" (Canada Revenue Agency, RC17(E) Rev. 20, "*Taxpayer Bill of Rights*" (last modified April 8, 2021) at section 4).

25 The appellant's other arguments, directed to the merits of the Minister's decision and set out in its memorandum of fact and law, may be summarized as follows.

26 In relation to the donation scheme, the appellant argues that the Minister could not conclude that it participated simply because the appellant was unable to demonstrate to the Minister's

satisfaction that it did not take part in the scheme. Further, it suggests that because the conclusion comes from the "fraudster himself", the evidence from Dr. Sokol is unreliable. As such, the appellant argues that the Minister made an error of law in concluding that the appellant participated in a donation scheme. The appellant also submits that the Minister erred in law in concluding that it issued donation receipts including false information because the appellant issued the donation receipts in good faith based on the information available at the time of their issuance.

27 Next, in relation to the revocation of the appellant's registration due to its failure to have direction and control over its activities in Israel, the appellant argues that the Compliance Agreement governed the appellant's obligations going forward. According to the appellant, the Minister therefore erred in law in relying on activities that were occurring prior to the execution of the Compliance Agreement as a basis for revocation in respect of the continuation of these activities in later years. The appellant further argues that the Minister's findings were in near-complete disregard of the evidence submitted by it and of the context in which the appellant's activities were undertaken in Israel. The appellant says that the Minister therefore made a palpable and overriding error of fact in concluding that the appellant did not maintain direction and control over its activities in Israel in 2008 and 2009.

28 In relation to the charitable information returns, the appellant argues that the Minister made an error of law in concluding that the appellant did not accurately list the names of its directors in them because in 2008 and 2009 the individuals it listed as directors were *de jure* directors even though they had minimal involvement with the appellant. The appellant also argues that Rabbi Zirkind was involved in the daily operations of the appellant, so there is no reason why his salary should be considered a fundraising expense and that the Minister made a reviewable factual error in concluding otherwise.

29 The appellant further argues that the Minister made a palpable and overriding error of fact in concluding that it submitted inaccurate minutes of board meetings. It maintains that the Directorate did not seek additional evidence from Mr. Abraham Neuwirth, one of the directors whose involvement was in issue, and that its failure to do so constitutes a reviewable error. The appellant also suggests that the Directorate ought to have followed up with Mr. Meir Man, the other director, after he cancelled a planned meeting.

30 The appellant next contends that the Minister cannot revoke its registration for any alleged insufficient reporting documentation for activities undertaken abroad prior to the signature of the Compliance Agreement. The appellant also says that the Minister's conclusions that the appellant had insufficient documentation were based on improper inferences. The appellant finally submits that the reporting problems the Directorate found are an insufficient basis for revocation of the appellant's registration as a charitable organization.

III. Analysis

31 In accordance with the Supreme Court's holding in Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65, 441 D.L.R. (4th) 1 at para. 37, and, as this Court recently confirmed in Ark Angel Fund v. Canada (National Revenue), 2020 FCA 99 at para. 4 [Ark Angel Fund], the normal appellate standards of review apply to this appeal as it is a statutory appeal. Therefore, errors of law are reviewable for correctness and errors of fact or of mixed fact and law from which a legal issue cannot be extricated are reviewable for palpable and overriding error (*Ark Angel Fund* at paras. 4-5 and Housen v. Nikolaisen 2002 SCC 33, [2002] 2 S.C.R. 235 [Housen]).

32 The appellant's bias allegations raise an issue of law (Canadian Pacific Railway Company v. Canada (Transportation Agency),2021 FCA 69 at paras. 46-47, citing Canadian Pacific Railway Company v. Canada (Attorney General), 2018 FCA 69, [2019] 1 F.C.R. 121 at para. 54; Gulia v. Canada (Attorney General), 2021 FCA 106 at para. 9).

33 All the appellant's other arguments, on the other hand, raise questions of fact. Contrary to what the appellant says, each of its challenges to the Minister's grounds for issuing the Notice of Confirmation and Notice of Intention to Revoke involve challenges to factual determinations that the appellant wishes this Court to overturn. The standard of review applicable to each of the appellant's challenges to these determinations is that of palpable and overriding error (*Housen* at para. 10).

34 The test for setting aside a decision for palpable and overriding error is an exacting one. An error is only palpable if it is obvious or plainly seen and only overriding if it affects the result reached. As stated by this Court in Canada v. South Yukon Forest Corporation,2012 FCA 165, 431 N.R. 286 at para. 46:

> Palpable and overriding error is a highly deferential standard of review: *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401; *Peart v. Peel Regional Police Services*, 2006 CanLII 37566 (ONCA), (2006) 217 O.A.C. 269 (C.A.) at paragraphs 158-159; *Waxman*, *supra*. "Palpable" means an error that is obvious. "Overriding" means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.

35 I turn now to address the appellant's arguments under the above-described standards of review.

A. Does Mr. Racine's involvement in the first audit give rise to a reasonable apprehension of bias?

36 The test applicable to the assessment of an allegation of bias like the one made in this case is well known and involves asking, "what would an informed person, viewing the matter realistically

and practically — and having thought the matter through — conclude. Would [that person] think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly" (Committee for Justice and Liberty et al. v. National Energy Board et al. [1978] 1 S.C.R. 369, 68 D.L.R. (3d) 716 at p. 394 [National Energy Board]). Thus, a claim that circumstances give rise to a reasonable apprehension of bias must be evaluated "through the eyes of the reasonable, informed, practical and realistic person who considers the matter in some detail" (*R. v. S. (R.D.),*, [1997] 3 S.C.R. 484, 151 D.L.R (4th) 193 (S.C.C.) at para. 36 [*S. (R.D.)*]).

37 The inquiry into whether a decision-maker's conduct creates a reasonable apprehension of bias is inherently contextual and fact-specific (Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General),2015 SCC 25, [2015] 2 S.C.R. 282 at para. 26). In addition, the case law firmly establishes that the threshold for a finding of bias is high; a party alleging bias must rebut a strong presumption of impartiality on the part of the decision-maker and must do so with concrete evidence, as opposed to speculation (*National Energy Board*, at p. 395; Wewaykum Indian Band v. Canada,2003 SCC 45, [2003] 2 S.C.R. 259 at paras. 76-77 [Wewaykum]; *S. (R.D.)* at paras. 112-114).

38 A reasonable apprehension of bias — if not a finding of actual bias — may well arise where the same decision-maker makes an initial decision and then sits in appeal from that decision or appoints the appellate decision-maker (see, for example, MacBain v. Lederman, [1985] 1 F.C. 856 (FCA), 22 D.L.R. (4th) 119 at paras. 11, 14; *Port Colborne Warehousing Ltd. v Canada (Bd. of Steamship Inspection)*, 73 N.R. 126, 1987CarswellNat 924 at para. 12). In such circumstances, there is a perceived denial of an impartial appellate decision-maker. This sort of circumstance has sometimes been described as a violation of the maxim "*nemo judex in causa sua*" or that no one shall be a judge of that person's own cause.

39 Turning to the notion of legitimate expectations, an administrative decision-maker's failure to follow the procedure it has said it would follow may give rise to a breach of procedural fairness (Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817 (1999), 174 D.L.R. (4th) 193 at para. 26 [Baker]; Canada (Attorney General) v. Mavi,2011 SCC 30, [2011] 2 S.C.R. 504 [Mavi]). The Supreme Court set out the conditions where an administrative decision-maker's representations give rise to legitimate expectations in *Mavi* at paragraph 68:

> Where a government official makes representations within the scope of his or her authority to an individual about an administrative process that the government will follow, and the representations said to give rise to the legitimate expectations are clear, unambiguous and unqualified, the government may be held to its word, provided the representations are procedural in nature and do not conflict with the decision-maker's statutory duty. Proof of reliance is not a requisite. See *Mount Sinai Hospital Center* [*v. Quebec (Minister of Health and Social Services)*, 2001 SCC 41, [2001] 2 S.C.R. 281], at paras. 29-30; *Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11, [2002] 1 S.C.R. 249, at para. 78; and

C.U.P.E. v. Ontario (Minister of Labour), 2003 SCC 29, [2003] 1 S.C.R. 539, at para. 131. It will be a breach of the duty of fairness for the decision maker to fail in a substantial way to live up to its undertaking: Brown and Evans, at pp. 7-25 and 7-26.

40 Application of the foregoing principles in the instant appeal results in a determination that the appellant's legitimate expectations were not violated and that Mr. Racine's dual role did not give rise to either actual bias or to a reasonable apprehension of bias through violation of the prohibition against playing both the role of initial and appellate decision-maker.

41 Here, the involvement of Mr. Racine in the first audit was minimal and, to the extent he has been shown to have actually examined issues during the first audit as opposed to merely providing general advice or reviewing others' drafts, his examination was related to issues surrounding the scholarships provided by the appellant. Scholarships were not at issue in the second audit or the appeal.

42 The first audit, moreover, was a partial one of the appellant's 2003 and 2004 taxation years, where the donation scheme was not at issue because it had not yet been uncovered. With the exception of the donation scheme, the second audit and the appeal of the Notice of Intention to Revoke did not relate to the 2003 and 2004 taxation years. There was accordingly no overlap in the files or issues that Mr. Racine considered in the first audit and during the appeal from the Notice of Intention to Revoke.

43 Furthermore, Mr. Racine was not the decision-maker in respect of the determinations that give rise to this appeal. Rather, it was Mr. Manconi, who issued the Notice of Intention to Revoke, and Mr. Piotrkowski, who issued the Notice of Confirmation.

44 Based on the foregoing, Mr. Racine cannot be said to have sat in appeal from a decision he made.

45 The present case is somewhat similar to *Wewaykum* . There, the Supreme Court held that tangential involvement in a case by one of its members when he was the Associate Deputy Minister of Justice and generally oversaw the litigation that ended up before the Supreme Court several years later did not give rise to a reasonable apprehension of bias, even where that member of the Court wrote the reasons in the case. Similarly, Mr. Racine's tangential involvement, many years earlier, in respect of different issues in different taxation years from those that were examined in the appeal does not give rise to a reasonable apprehension of bias in the present case.

46 Nor does what occurred here violate any legitimate expectations the appellant might have had flowing from the CRA's Appeals Manual and the *Taxpayer Bill of Rights*. The passages in those publications upon which the appellant relies do not prohibit what occurred in this case. The two audits concerned different taxation years, except for the donation scheme, which was discovered only during the second audit. Mr. Racine was therefore not involved in auditing any issues that

were part of the appeal. Accordingly, he cannot be said as an appeals officer to have been "involved with the original decision under dispute", to use the wording of the *Taxpayer* Bill of Rights, or to have been involved with the same file, as prohibited by the CRA's Appeals Manual.

47 Particularly in light of the need for clear, unambiguous and unqualified representations in order to find a violation of a party's reasonable expectations as required by *Mavi*, there has been no violation of the appellant's legitimate expectations in this case.

48 I therefore conclude that there has been no violation of the appellant's procedural fairness rights and that what occurred in the present case does not give rise to either actual bias or a reasonable apprehension of bias.

B. Did the Minister commit a reviewable error in respect of the grounds for revocation?

49 Turning to the appellant's other arguments challenging the merits of the Minister's decision to revoke the appellant's registration as a charitable organization, as the appellant acknowledges, it must succeed on each of the other grounds it raises to be successful in this appeal if its bias argument fails. Thus, if just one of the bases for revocation is maintained, this appeal must be dismissed (see, for example, Humane Society of Canada for the Protection of Animals and the Environment v. Canada (National Revenue),2015 FCA 178, 474 N.R. 79 at para. 64 [Humane Society of Canada]).

50 As already noted, the standard of review applicable to these additional issues is that of palpable and overriding error — an exacting standard. As this Court recently held in *Ark Angel Fund*, under the standard of palpable and overriding error, this Court "cannot reweigh the evidence or second-guess the Minister's factual findings; instead, we must be convinced there has been obvious, calamitous error" (at para. 6).

51 The appellant has not so convinced me in respect of all but one of the issues it raises. The one meritorious issue was conceded by the Minister and relates to the composition of the appellant's board of directors in 2008 and 2009, which did include the two named individuals who were *de jure* directors. Success on this one issue, however, does not affect the result because there is no basis to interfere with the nine other grounds upon which the Minister based the decision to revoke the appellant's registration as a charitable organization.

52 I move to next discuss these grounds and, for ease of reading, have grouped them together based on the issues to which they relate.

(1) Grounds relied on in relation to the donation scheme

53 The most significant justification for revocation of the appellant's registration as a charitable organization was doubtless its participation in the donation scheme with Dr. Sokol. Contrary to

what the appellant says, it was not an error for the Minister to have relied on the evidence from Dr. Sokol to support the conclusion that the appellant was complicit in the scheme. Dr. Sokol's evidence was clear, compelling, and demonstrated the appellant's knowing involvement in the scheme. It was open to the Minister to accept such evidence from Dr. Sokol. Further, the Minister had ample additional evidence to support the decision to revoke on this basis, including documents from the appellant's own records and bank accounts, from the accounts in Belize of the Moshe Shmuel Deitsch Corp., and from Rabbi Moshe Shmuel Deutsch, himself.

54 Nor does the fact that the scheme was discovered only after the conclusion of the first audit and signature of the Compliance Agreement limit the Minister's ability to rely on the appellant's participation in the scheme from 2003 onward as a basis for revocation. There is no suggestion that the Minister in any way ignored the existence of the scheme during the first audit, which was conducted only on a partial basis.

55 The Minister therefore did not make a palpable and overriding error in concluding that the appellant had knowingly participated in the donation scheme with Dr. Sokol.

56 Under paragraph 168(1)(d) of the ITA, the Minister may revoke a charitable organization's registration if it issues a receipt for a gift otherwise than in accordance with the ITA or if it issues a receipt that contains false information. The appellant issued many such receipts to Dr. Sokol for amounts that were returned to him.

57 In addition, pursuant to paragraph 168(1)(b) of the ITA, the Minister possesses authority to issue a Notice of Revocation if a charity ceases to comply with the requirements for registration. One of the requirements for registration, set out in the definition of "charitable organization" in subsection 149.1(1) of the ITA, is that the charitable organization devote all of its resources to charitable activities carried on by the organization, itself (paragraph 149.1(1)(a.1) of the ITA). When a charity participates in the donation scheme, it fails to devote all its resources to charitable activities as resources are funnelled back to a donor, a non-qualified donee.

58 The Minister therefore possessed ample authority to revoke the appellant's registration by virtue of its participation in the donation scheme, which was a serious violation of the ITA.

59 While the foregoing is sufficient to result in the dismissal of this appeal, for sake of completeness, I will briefly review the appellant's other arguments.

(2) Grounds related to the failure to have direction and control over activities in Israel

60 Contrary to what the appellant says, it was entirely open to the Minister to have concluded that the appellant had inadequate control over the distribution of funds in Israel in 2008 and 2009. Indeed, the appellant acted in contravention of how the Directorate had told it to operate after the first audit and allowed funds to be disbursed directly to individuals in Israel in the total amount

of nearly $600,000.00. The appellant was unable to establish how these funds were used. Further, according to correspondence to Rabbi Deutsch, the appellant was not involved in the selection of the individuals to whom such funds were given. In addition, there were no agency agreements with several other individuals to whom other funds were disbursed, and it was unclear whether the funds distributed to an organization were used for a charitable purpose.

61 The appellant's challenges to the Minister's conclusion that the appellant failed to demonstrate that its funds were directed toward its charitable works in Israel in 2008 and 2009 amount to no more than a disagreement with the Minister's conclusion. Such disagreement does not amount to a palpable and overriding error.

62 The determination that the appellant had inadequate control over the distribution of funds in Israel in 2008 and 2009 and thus failed to demonstrate that its funds were directed toward its charitable works afforded the Minister authority to revoke the appellant's registration for non-compliance with paragraph 168(1)(b) and subsection 149.1(1)(a.1) of the ITA.

63 This Court has made it clear that, although charities may use agents, they still must direct and control the use of their resources and cannot be a conduit to funnel money to non-qualified donees. Thus, a charity that has an agent must ensure that the agent uses the charity's resources to carry out activities on the charity's behalf (Canadian Committee for the Tel Aviv Foundation v. Canada,2002 FCA 72, 287 N.R. 82 at paras. 30-31; Canadian Magen David Adom for Israel v. Canada (Minister of National Revenue),2002 FCA 323, 218 D.L.R. (4th) 718 at para. 66; Bayit Lepletot v. Canada (Minister of National Revenue),2006 FCA 128, 352 N.R. 374 at para. 5). As Justice Scott stated in Public Television Association of Quebec v. Canada (National Revenue),2015 FCA 170 at para. 44, "[t]he control over the agent's activities is a key element to establish that it maintained direction and control over its resources."

64 Such control was absent in respect of the appellant's activities in Israel in 2008 and 2009, which accordingly afforded the Minister another basis for the revocation of the appellant's registration as a charitable organization.

(3) Failure to maintain proper books and records

65 The Minister identified four areas in which the appellant's books and records were inaccurate: (1) its 2009 and 2010 minutes of board of directors' meetings, which were found to have been falsified; (2) lack of documentation to support travel expenditures by Rabbi Zirkind from 2007 to 2009; (3) lack of documentation regarding remuneration paid to fundraisers in 2008 and 2009; and (4) insufficient documentation for the appellant's activities in Israel in 2008 and 2009 and also with respect to the donation scheme involving Dr. Sokol.

66 Paragraph 168(1)(e) of the ITA permits the Minister to revoke the registration of a charitable organization by reason of its non-compliance with any of sections 230 to 231.5 of the

ITA. Subsection 230(2) of the ITA governs the books and records to be kept by organizations, including registered charities, and provides that they must keep records and books of account. This Court has described the requirement to maintain such books and records as "foundational", noting that, "[g]iven the significant privileges that flow from registration under the Act as a charitable organization, the Minister must be able to monitor the continuing entitlement of the charitable organizations to those privileges" (*Humane Society of Canada* at para. 80).

67 In *Jaamiah Al Uloom Al Islamiyyah Ontario v. Canada (National Revenue)*, 2016 FCA 49, Justice Ryer observed at paragraph 15 that maintaining adequate books and records is a "basic requirement" that is "foundational" because "the absence of proper books and records places the Minister in the position of being unable to meet [the Minister's] basic obligation to verify the accuracy and validity of the charitable donation receipts that the Charity has issued." For this reason, he found that non-compliance with the requirement was serious enough to warrant revocation. (See also, to similar effect, Lord's Evangelical Church of Deliverance and Prayer of Toronto v. Canada,2004 FCA 397, 328 N.R. 179 at paras. 17-19 and College rabbinique de Montreal Oir Hachaim D'Tash v. Canada (Minister of the Customs and Revenue Agency), 2004 FCA 101, 58 D.T.C. 6182 at para. 2).

68 As concerns the first of the bases upon which the Minister found the appellant's books and records to be insufficient, contrary to what the appellant says, it was open to the Minister to have concluded that the appellant had falsified the minutes for its board of directors' meetings, without speaking again with Mr. Neuwirth or Mr. Man. Mr. Neuwirth had signed a statement confirming that he had not attended the meetings and Mr. Man told the Directorate he did not recall having attended them. He cancelled a second meeting with the Directorate to discuss the issue due to the tragic death of his child.

69 In the circumstances, there was no need for the Directorate to have further questioned either Mr. Neuwirth or Mr. Man in light of the evidence it had obtained, all of which supported the conclusion that the minutes were falsified. Had the appellant been in possession of evidence to the contrary, it was incumbent on it to have tabled it. It failed to do so. Thus, based on the evidence the Directorate gathered, it was entirely open to the Minister to have concluded that the minutes of the board of directors meetings were falsified.

70 As concerns the Minister's determination that there was a lack of documentation to support Rabbi Zirkind's travel expenditures, the appellant challenges only the inferences drawn by the Minister and can point to no palpable and overriding error in the conclusion reached. Moreover, the record before this Court indicates that the appellant failed to provide documentation to support these travel expenditures beyond estimates from the Rabbi. In the absence of supporting documentation, like a mileage logbook, invoices for hotels, airline tickets or other similar documentation, it was open to the Minister to conclude that the appellant had failed to keep a sufficient record of the Rabbi's travel expenditures.

71 Similarly, the appellant cannot point to any palpable and overriding error in the Minister's determination that it did not maintain adequate records of amounts paid to students engaged in telephone solicitations, who were given cash and not issued any T4 or T4A documentation in circumstances where the appellant had no records of how much was paid to any of the students. The appellant's argument that the Directorate should have interviewed the students misses the point, namely, that it is precisely to avoid needing to undertake such investigations that the ITA requires the maintenance of adequate records.

72 Finally, as already discussed, incomplete and inaccurate documentation existed for the appellant's activities in Israel in 2008 and 2009 and in respect of the donation scheme.

73 The Minister therefore did not make a reviewable error in determining that the appellant's registration as a charitable organization should be revoked due to its multiple failures to maintain adequate books and records.

(4) Failure to file accurate information returns

74 Paragraph 168(1)(c) of the ITA authorizes the Minister to revoke a charitable organization's registration if it files inaccurate information returns. While minor errors made in returns do not warrant revocation as this Court noted in Opportunities for the Disabled Foundation v. Canada (National Revenue),2016 FCA 94, 482 N.R. 297 at para. 49, there were many significant errors made in this case which provided the Minster grounds for revocation, particularly when coupled with the numerous other instances of non-compliance discussed above.

75 As noted, the Minister conceded that the appellant did not fail to accurately list its directors as the two non-active directors had been appointed as directors. The other instances of inaccurate reporting upon which the Minister principally relied for the revocation included: (1) the failure to accurately report Rabbi Zirkind's salary (which should have been a fundraising expense, not a charitable expenditure); (2) the failure to accurately report the amounts paid to student fundraisers, for which there was no substantiation; (3) misreporting of charitable expenditures in Israel, which the appellant could not demonstrate had been made for allowable charitable purposes; and, (4) misreporting associated with the funds funnelled back to Dr. Sokol as part of the donation scheme.

76 All of the foregoing (with the exception of the characterization of Rabbi Zirkind's salary) have already been discussed as breaches of other requirements in the ITA, and, for similar reasons, the Minister made no palpable and overriding error in finding them to likewise constitute a violation of paragraph 168(1)(c) of the ITA.

77 As for the characterization of Rabbi Zirkind's salary, the appellant has pointed to no reason why his salary ought not have been considered a fundraising expense as opposed to a charitable expenditure and, indeed, the appellant concedes that the Rabbi spent much of his time during the

years in issue raising funds. I accordingly see no reviewable error in the Minister's conclusion that the appellant failed to accurately report his salary as a fundraising expense.

78 Thus, there is no reviewable error in nine of the ten grounds upon which the Minister relied in deciding to revoke the appellant's registration as a charitable organization.

IV. Proposed Disposition

79 I would accordingly dismiss this appeal with costs.

***Johanne Gauthier J.A.*:**

I agree.

***George R. Locke J.A.*:**

I agree.

Appeal dismissed.

AppendixA: — RELEVANT STATUTORY PROVISIONS

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)

> 149.1(1) ***charitable activities*** includes public policy dialogue and development activities carried on in furtherance of a charitable purpose; (activités de bienfaisance)
>
> . . .
>
> ***charitable organization***, at any particular time, means an organization, whether or not incorporated,
>
> > . . .
> >
> > (a.1) all the resources of which are devoted to charitable activities carried on by the organization itself,
> >
> > . . .
>
> ***qualified donee***, at any time, means a person that is
>
> > (a) registered by the Minister and that is
> >
> > > (i) a housing corporation resident in Canada and exempt from tax under this Part because of paragraph 149(1)(i) that has applied for registration,
> > >
> > > (ii) a municipality in Canada,

(iii) a municipal or public body performing a function of government in Canada that has applied for registration,

(iv) a university outside Canada, the student body of which ordinarily includes students from Canada, that has applied for registration, or

(v) a foreign charity that has applied to the Minister for registration under subsection (26),

(b) a registered charity,

(b.1) a registered journalism organization

(c) a registered Canadian amateur athletic association, or

(d) Her Majesty in right of Canada or a province, the United Nations or an agency of the United Nations; (donataire reconnu)

. . .

149.1 (2) The Minister may, in the manner described in section 168, revoke the registration of a charitable organization for any reason described in subsection 168(1) or where the organization

(a) carries on a business that is not a related business of that charity;

(b) fails to expend in any taxation year, on charitable activities carried on by it and by way of gifts made by it to qualified donees, amounts the total of which is at least equal to the organization's disbursement quota for that year; or

(c) makes a disbursement by way of a gift, other than a gift made

(i) in the course of charitable activities carried on by it, or

(ii) to a donee that is a qualified donee at the time of the gift.

. . .

168 (1) The Minister may, by registered mail, give notice to a person described in any of paragraphs (a) to (c) of the definition qualified donee in subsection 149.1(1) that the Minister proposes to revoke its registration if the person

(a) applies to the Minister in writing for revocation of its registration;

(b) ceases to comply with the requirements of this Act for its registration;

(c) in the case of a registered charity, registered Canadian amateur athletic association or registered journalism organization, fails to file an information return as and when required under this Act or a regulation;

(d) issues a receipt for a gift otherwise than in accordance with this Act and the regulations or that contains false information;

(e) fails to comply with or contravenes any of sections 230 to 231.5; or

. . .

230 (2) Every qualified donee referred to in paragraphs (a) to (c) of the definition qualified donee in subsection 149.1(1) shall keep records and books of account — in the case of a qualified donee referred to in any of subparagraphs (a)(i) and (iii) and paragraphs (b), (b.1) and (c) of that definition, at an address in Canada recorded with the Minister or designated by the Minister — containing

(a) information in such form as will enable the Minister to determine whether there are any grounds for the revocation of its registration under this Act;

(b) a duplicate of each receipt containing prescribed information for a donation received by it; and

(c) other information in such form as will enable the Minister to verify the donations to it for which a deduction or tax credit is available under this Act.

2006 FC 933, 2006 CF 933
Federal Court

Delisle c. Canada (Procureur général)

2006 CarswellNat 2482, 2006 CarswellNat 4723, 2006 FC 933, 2006 CF 933, [2006] A.C.F. No. 1230, [2006] F.C.J. No. 1230, 155 A.C.W.S. (3d) 212, 298 F.T.R. 1 (Eng.)

Léopold Delisle, Applicant and The Attorney General of Canada and Ministry of Health (Health Canada) and Director General Therapeutic Products Directorate (Health Canada), Respondents

Dany Laforest, Applicant and The Attorney General of Canada and Ministry of Health (Health Canada) and Director General Therapeutic Products Directorate (Health Canada), Respondents

Laurent Légère, Applicant and The Attorney General of Canada and Ministry of Health (Health Canada) and Director General Therapeutic Products Directorate (Health Canada), Respondents

Daniel Grandmont, Applicant and The Attorney General of Canada and Ministry of Health (Health Canada) and Director General Therapeutic Products Directorate (Health Canada), Respondents

F. Lemieux J.

Heard: July 4-5, 2006
Judgment: July 28, 2006
Docket: T-698-04, T-2138-04, T-2139-04, T-2140-04

Counsel: Michel Bélanger, pour demanderesse
Carmela Maiorino, pour défenderesse

Subject: Public; Criminal

APPLICATIONS by patients for judicial review of decision by bureau director to terminate access to drug.

***F. Lemieux J.*:**

I. Introduction

1 There are four applications for judicial review, to be jointly examined, regarding some decisions by the federal authorities made under Health Canada's Special Access Programme (the "SAP") and especially the January 23, 2004 decision by the Director of the Senior Medical Advisor Bureau (the "Director"). The effect of this decision is two-fold:

> 1º it stated a public policy: access via the SAP to a product known as 714-X, a medication which has not been licensed by Health Canada, nor elsewhere, but whose sale has been authorized in Canada, since 1989 via the SAP following requests for access submitted by several physicians was thereafter to be limited. This policy required that significant evidence be included in all requests to the SAP before any new sales were authorized. It indicated that [TRANSLATION] "in view of this decision, it is unlikely that the SAP shall authorize sales of 714-X for new patients." It provided for a one-year transitional period for the patients currently taking the product. They were to have access to the product on the advice of their physician if they experienced no adverse reaction. Future use of the product was to be submitted to a clinical trial;
>
> 2º this is Health Canada's response to several requests for access to 714-X which were then still on hold.

2 The respondents explain the scope of this decision in the following terms, that can be found in their memorandum of points and authorities:

> [TRANSLATION]
>
> 2. This decision bears on the sales conditions via the Special Access Programme of a drug known as 714-X. Pursuant to a thorough review of the documentation, the Director concluded, on January 23, 2004, that there was no credible evidence establishing the effectiveness or the safety of this drug. The Director decided not to invoke the exceptional discretionary power conferred on him by section C.08.010 of the *Food and Drug Regulations*, which authorizes the sale of this drug to certain patients. The sale of this drug remains prohibited, in accordance with the *Food and Drugs Act* (hereinafter referred to as "FDA") and the *Food and Drug Regulations* (hereinafter referred to as "FDR").
>
> . . . . .
>
> 24. On January 23, 2004, Dr. Brian Gillespie, Director of the Senior Medical Advisor Bureau, made a public policy decision regarding access to a new drug, 714-X. Pursuant to this public policy, the Director informed referring physicians that the new 714-X drug would no longer be accessible via the SAP, except for a one-year grace period for those patients whose referring physicians had already received an authorization. Furthermore, this decision was to be applicable to all access requests which had been on hold since August 2003.
>
> . . . . .

26. The Director, however, did not rule out the possibility that 714-X might eventually be accessible to Canadians. The manufacturer shall be, however, required to request and obtain an authorization prior to undertaking clinical trials. These are obligations that the "FDA" and the "FDR" impose on all manufacturers of new drugs.

[Emphasis added.]

3 The respondents focus on Dr. Gillespie's January 23, 2004 decision, claiming that said decision and all the issues raised by the applicants are inextricably interrelated;

4 As to the applicants, their submissions not only bear on Dr. Gillespie's decision, but also on the SAP's decision with regard to access requests by each of their referring physicians: they argue that those decisions were made within a reasonable time or that it is unwarranted to deny them access to the drug in issue;

5 The applicants raise several issues:

1.

Want of jurisdiction

They submit that access decisions were the prerogative of the Assistant Deputy Minister of the Food Directorate, Health Products and Food Branch within the Department, who could not delegate that power or, if he could, that the decision in issue was made by the wrong person, or that it should have been made on a case-by-case basis and not applied uniformly, or that a new delegation of powers was required in view of changes within Health Canada's administrative structure.

2.

Excess of jurisdiction

They submit that the SAP based sales authorizations of 714-X on requirements that went beyond the scope of the Regulations in several manners: (1) by requiring from referring physicians additional information on the product's effectiveness and safety that physicians do not have, (2) by asking for specific information that appeared in science magazines and pertained to the registration process, which is not part of the Regulations, and (3) by adopting a public policy going beyond the limits of its discretionary power;

3.

Breach of legitimate expectation

They contend that the SAP's mandate, as described by Health Canada, includes a commitment to treat every request for access within 24 hours after it is received. Not only was this policy

deviated from in several cases, but in the case of two of the applicants, the delay in the response was unreasonable. The applicants also submit that, after 15 years of access, they had a legitimate expectation that their requests for access would be authorized.

4.

The scope of the discretionary power

When construed in the light of their object, the Regulations creating the SAP provide for a restricted authorization power, exclusively based on the duties owed of the physician and his patient; there is nothing discretionary about it. The system thus created is that of access on demand.

5.

Abusive and patently unreasonable use of discretionary power

The applicants claim that 714-X is not toxic and is effective. In establishing its public policy, Health Canada is said to have ignored evidence from patients, their physicians, Mr. Nassens, as well as the scientific theory that supports 714-X. Furthermore, in its review of the issue of access to 714-X, the SAP acted arbitrarily in the evaluation and application of the evidence.

6.

Violation of sections 7 and 15 of the Canadian Charter of Rights and Freedoms *(the Charter)*

6 In my view, several of the issues raised by the applicants are essentially issues of statutory interpretation. The modern approach was reiterated by Mr. Justice Gonthier in *Barrie Public Utilities v. Canadian Cable Television Assn.*, [2003] 1 S.C.R. 476 (S.C.C.), who quoted the following excerpt from E.A. Driedger in his work, *Construction of Statutes* (2nd ed. 1983, p.87):

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> [Emphasis added.]

7 Only two sections of the Regulations, captioned "sale of new drug for emergency treatment," relate to the SAP:

> C.08.010. (1) The Director may issue a letter of authorization authorizing the sale of a quantity of a new drug for human or veterinary use to a practitioner named in the letter of authorization for use in the emergency treatment of a patient under the care of that practitioner, if

(a) the practitioner has supplied to the Director information concerning

(i) the medical emergency for which the drug is required,

(ii) the data in the possession of the practitioner with respect to the use, safety and efficacy of that drug,

(iii) the names of all institutions in which the drug is to be used, and

(iv) such other data as the Director may require; and

(b) the practitioner has agreed to

(i) report to the manufacturer of the new drug and to the Director on the results of the use of the drug in the medical emergency, including information respecting any adverse reactions encountered, and

(ii) account to the Director on request for all quantities of the drug received by him.

(2) The Director shall, in any letter of authorization issued pursuant to subsection (1), state

(a) the name of the practitioner to whom the new drug may be sold;

(b) the medical emergency in respect of which the new drug may be sold; and

(c) the quantity of the new drug that may be sold to that practitioner for that emergency.

C.08.011. (1) Notwithstanding section C.08.002, a manufacturer may sell to a practitioner named in a letter of authorization issued pursuant to section C.08.010, a quantity of the new drug named in that letter that does not exceed the quantity specified in the letter.

(2) A sale of a new drug made in accordance with subsection (1) is exempt from the provisions of the Act and these Regulations.

[Emphasis added.]

C.08.010. (1) Le Directeur général peut fournir une lettre d'autorisation permettant la vente d'une certaine quantité d'une drogue nouvelle d'usage humaine ou vétérinaire à un praticien nommé dans la lettre d'autorisation pour le traitement d'urgence d'un malade traité par ledit praticien, si

a) le praticien a fourni au Directeur général des renseignements concernant

(i) l'état pathologique urgent pour lequel la drogue est requise,

(ii) les données que possède le praticien à propos de l'usage, de l'innocuité et de l'efficacité de ladite drogue,

(iii) le nom de tous les établissements où la drogue doit être utilisée, et

(iv) les autres renseignements que le Directeur général pourrait lui demander; et

b) le praticien a consenti à

(i) faire part au fabricant de la drogue nouvelle et au Directeur général des résultats de l'usage de la drogue au cours de l'urgence, y compris les renseignements se rapportant à toute réaction défavorable qu'il aura observée, et

(ii) rendre compte au Directeur général, sur demande, de toutes les quantités de la drogue qu'il aura reçues.

(2) Le Directeur général doit, dans toute lettre d'autorisation fournie conformément au paragraphe (1), spécifier

a) le nom du praticien auquel la drogue nouvelle peut être vendue;

b) l'état pathologique urgent pour lequel la drogue nouvelle peut être vendue; et

c) la quantité de la drogue nouvelle qui peut être vendue audit praticien pour ledit cas urgent.

C.08.011. (1) Nonobstant l'article C.08.002, un fabricant peut vendre à un praticien mentionné dans une lettre d'autorisation fournie conformément à l'article C.08.010, une quantité de la drogue nouvelle nommée dans ladite lettre qui n'excède pas la quantité spécifiée dans la lettre.

(2) La vente d'une drogue nouvelle faite en conformité du paragraphe (1) n'est pas soumise aux dispositions de la Loi et du présent règlement.

8 The sale of a new drug via the SAP is not subject to the requirements of section C.08.002 of the Regulations.

9 According to subsection C.08.002(1), it is forbidden to sell or advertise a new drug unless, upon request from the manufacturer, the Minister issues a notice of compliance. However, subsection 30(1)(*j*) of the Act authorizes the Governor in Council to exempt a drug from any or all provisions of the Act and to prescribe the conditions of exemption;

10 In order to enable the Minister to assess the safety and effectiveness of a new drug, the information demanded under subsection C.08.002(4) of the Regulations in support of such a request includes: 1) details of the tests to be applied to control the potency, purity, stability and safety of the new drug; 2) detailed reports of the tests made to establish the safety of the new drug for the purpose and under the conditions of use recommended; and 3) substantial evidence of the clinical effectiveness of the new drug for the purposes and under the conditions of use recommended.

11 Léopold Delisle currently has access to 714-X via the SAP. In his application for judicial review, filed April 2, 2004, Mr. Delisle seeks to:

> [TRANSLATION]
>
> 5. **Purpose of application for judicial review:** The application for judicial review relates to the decisions of the respondent Health Canada, and more specifically, of the Director General of the Therapeutic Products Directorate, who refused requests from physicians on behalf of their patients to make the 714-X product available through the Special Access Programme (hereinafter referred to as "the SAP") administered by the respondents. The application also seeks to order the respondents to allow the physicians' requests, without any further requirements and conditions within 24 hours of receiving these requests, whether the patients concerned have been granted or not in the past a similar authorization for access to the 714-X product;
>
> [Emphasis added.]

12 Although his physician has been requesting it since August 2003, Daniel Grandmont was never treated with 714-X. His application for judicial review, filed on December 1st, 2004, seeks to have the following order issued against Health Canada:

> [TRANSLATION]
>
> (a) Not to deny access requests to 714-X made by his physician through the Special Access Programme ((hereinafter referred to as the "SAP") on grounds of insufficient information regarding the effectiveness or toxicity of 714-X;
>
> (b) To allow the applicant to have access to 714-X upon request from his physician through the SAP, beyond January 2005 and for as long as his physician deems it necessary;
>
> [emphasis added.]

13 Laurent Légère, who currently has access to the 714-X via the SAP, is seeking the following relief in his application for judicial review, filed on December 1st, 2004:

[TRANSLATION]

12. Relief sought

12.1 The application for judicial review seeks to have the following order made against respondent Health Canada:

(a) To respond to special access requests within twenty-fours and to avoid any unreasonable delay, such as the applicant has suffered, in processing requests for access;

(b) Not to deny any requests for access to 714-X made by his physician through the Special Access Programme (hereinafter referred to as the "SAP") on grounds of insufficient information regarding the effectiveness or the toxicity of 714-X;

(c) To allow the applicant to have access to 714-X upon request from his physician pursuant to the SAP, after January 2005 and for as long as his physician deems it necessary;

[emphasis added.]

12.2 . . .

14 Dany Laforest was treated with 714-X, but no longer has access to it. Her application for judicial review, filed on December 1st, 2004, seeks to have the following orders made against Health Canada:

[TRANSLATION]

(a) To allow her request for access to 714- X, which the respondent has omitted or refused to do within a twenty-four-hour deadline;

(b) Where applicable, not to request that her physician submit any further information on the effectiveness or toxicity of 714-X than that provided in response to prior requests;

(c) To enable the applicant to have access to 714-X, upon request from her physician in compliance with the SAP, after January 2005 and for as long as her physician deems it necessary;

[Emphasis added.]

15 In the alternative, assuming that Health Canada has complied with the enabling legislation, each applicant is seeking that the Court declare that sections C.08.010 and C.08.011 violate sections 7 and 15 of the Charter, in that they allow the responsible authorities to deny and delay treatment in an unreasonable manner, or to reject in an abusive and arbitrary manner and without reasonable grounds the requests submitted by physicians for access to 714-X, thus resulting in a deprivation of the liberty and security of the person under section 7, or discrimination under section 15.

II. The SAP

16 The SAP is a programme instituted by Health Canada to facilitate emergency access to unapproved experimental drugs for serious illnesses when conventional therapies have failed, are unsuitable, or unavailable. The programme started in 1966 under a different name. The Department describes as follows the SAP's mandate in its request for special access Guideline (applicants' brief, volume 1, page 62):

> The Special Access Programme (the SAP) provides access to nonmarketed drugs for practitioners treating patients with serious or life-threatening conditions when conventional therapies have failed, are unsuitable, or unavailable. The SAP authorizes a manufacturer to sell a drug that cannot otherwise be sold or distributed in Canada. Drugs considered for release by the SAP include pharmaceutical, biologic, and radiopharmaceutical products not approved for sale in Canada.
>
> The SAP does not authorize the use or administration of a drug - this authority falls within the practice of medicine, which is regulated at the provincial level. The SAP authorization does not constitute an opinion or statement that a drug is safe, efficacious or of high quality. The SAP does not conduct a comprehensive evaluation to ensure the validity of drug information or attestations of the manufacturer respecting safety, efficacy and quality. These are important factors for practitioners to consider when recommending the use of a drug and in making an appropriate risk/benefit decision in the best interests of the patient. The SAP strongly encourages practitioners treating individuals with drugs obtained through the SAP to seek informed consent before treatment.
>
> Practitioners are encouraged to contact individual manufacturers to confirm the availability of a drug as well as to obtain the most up-to-date drug information such as prescribing information and other data supporting the use of the drug. In all cases, the manufacturer has the final word on whether the drug will be supplied. The manufacturer also has the right to impose certain restrictions or conditions on the release of the drug to ensure that it is used in accordance with the latest information available. For instance, they may restrict the amount of drug released, request further patient information, etc. Inquiries concerning the shipping, cost and/or payment should be directed to individual manufacturers.

> In seeking and receiving access to a drug through the SAP, the practitioner agrees to provide both the SAP and the manufacturer with a report on the use of the drug, including information on adverse reactions and, on request, account for all quantities of drug received.
>
> [Emphasis added.]

17 The patient's referring physician is the one who requests access to 714-X (or any other new drug) by completing a Health Canada form. In addition to giving information on the medication, the patient and the exact medical condition he wishes to receive for this medication, since 2002, the physician must: (1) provide a clinical rationale, including about the patient's medical history, prognosis, other treatments attempted or ruled out; (2) justify why this drug is the best choice for the patient, for example it is a drug of choice, he is undergoing a first or second line therapy, there are no product alternatives; and (3) reference any sources of information available, such as specific medical literature, product monograph, etc., with respect to the use, safety and effectiveness of the medication he is ordering.

18 The practitioner's consent on the form is as follows:

> I, the practitioner, am accessing this non-marketed drug for use in the emergency treatment of a patient under my care in accordance with the *Food and Drug Regulations* (C.08.010).
>
> I, the practitioner, am aware that by accessing this drug through the SAP, the sale of the drug is exempt from all aspects of the *Food and Drugs Regulations* including those respecting the safety, efficacy and quality.
>
> I, the practitioner, agree to provide a report on the results of the use of the drug including information on Adverse Drug Reactions and, on request, to account for quantities of the drug received.
>
> [Emphasis added.]

19 In its guidelines, Health Canada requests that the forms be faxed to the SAP and indicates that a complete form does not guarantee that a request will be authorized, as "additional information may be required during the review process." Health Canada states that "every effort is made to process requests within 24 hours of receipt" but warns that "given the mandate of the Programme and the volume of requests received, the SAP adopts a triage system to ensure that requests for drugs for life-threatening conditions take precedence over other less urgent matters" and that "if a drug is new to the Programme, the total processing time may be extended" (applicants' brief, at page 64).

20 Another Health Canada document (applicants' brief, at page 70) defines the SAP's objective:

> The Special Access programme (the SAP) allows practitioners to request access to drugs that are unavailable for sale in Canada. This access is limited to patients with serious or life-threatening conditions on a compassionate or emergency basis when conventional therapies have failed, are unsuitable, or are unavailable.
>
> [Emphasis added.]

21 In the same document, Health Canada responds as follows to the question: "Can the SAP be considered a fast-track approval process for medications?":

> No. The SAP is not intended to be a mechanism to promote or encourage the early use of drugs or to circumvent the clinical trials review and approval process or the new drug approval process, but rather to provide compassionate access to drugs on a patient by patient basis.
>
> [My emphasis.]

22 In 1997, the House of Commons Standing Committee on Health ("Standing Committee") reviewed the operation of the Emergency Drug Release Program ("EDRP"), the SAP's precursor.

23 In its report, the Standing Committee addressed the right of catastrophically-ill patients:

> The concept of catastrophic rights holds that: "a catastrophically-ill patient has the right to be free from any paternalistic interference in electing, in consultation with his physician, any therapy whatsoever that does not cause direct harm to others." (2) This concept is rooted in the principle of freedom.
>
> [Emphasis added.]

24 This Committee acknowledged, however, that "the catastrophic right to try to save one's own life is, unfortunately, neither straightforward nor simple in its application for this is a "positive" right, meaning that its fulfilment requires the participation of others," in other words, it "imposes a corresponding duty on those who have drugs or on those who manufacture drugs."

25 In the Committee's opinion, "the Act attempts to safeguard the health of Canadians by prohibiting the sale of drugs of unproven safety and efficacy." It stated:

> As such, the Act would disallow an individual's catastrophic right to an unproven therapy were it not for sections C.08.010 and C.08.011 of the Act's Regulations. These provisions establish the conditions for the Emergency Drug Release Program (EDRP); whereby, the Health Protection Branch (HPB) of Health Canada may authorize a pharmaceutical manufacturer to sell a drug, not approved for sale in Canada, to a physician for the emergency treatment of a specific patient. The program covers two therapeutic categories: investigational drugs and drugs approved in foreign countries. When the EDRP was established in 1966, it

was largely used for this latter function; however, since the emergence of the AIDS epidemic approximately 15 years ago, the focus of the EDRP has shifted to the point where the authorization of experimental drugs for people who are catastrophically ill is the program's major function. While catastrophic rights do not have the force of legal recognition in Canada, the government's action to facilitate the provision of unapproved medications "implicitly recognizes that critically-ill persons should be allowed to take much greater risks than would otherwise be acceptable."

[Emphasis added.]

26 It cautioned, however:

Round Table participants identified a number of problems associated with compassionate access; however, its potential to slow the drug regulatory process was probably the greatest concern. There was strong concurrence that nothing must interfere with the rapidity of drug development, which brings the best treatment to the most people, and is therefore of paramount importance. The availability of compassionate access may lead to high drop-out rates from trials in progress or it may slow or limit recruitment to controlled trials ... Not only did this slow the achievement of knowledge, but some volunteers were on drugs for three years without any evidence of a superior arm. There was considerable agreement that if compassionate access is to occur in parallel to clinical trials then creative solutions must be developed to protect the drug development process; but, it was also stressed that greater flexibility within the drug regulatory process is required in order to respond to the urgent need for drugs to treat immediately life-threatening conditions.

[Emphasis added.]

27 At page 10 of its report, the Standing Committee stated a consensus on the need for compassionate access:

From the briefs, presentations and five days of Round Table discussions, it appears that the provision of compassionate access to investigational therapies can and does have an impact on the drug development and evaluation process in Canada. In spite of this impact, however, not a single Round Table participant suggested that compassionate access programs should be curtailed in any fashion or that attempts to further liberalize the process should be avoided. ...

[Emphasis added.]

28 Under the heading "Ethical aspect, overarching considerations," at page 18, it was stated:

The five National Round Table sessions were characterized by a high level of agreement. Indeed, there was no stated disagreement to the concept of a catastrophic right. It was pointed out, however, that this right is only operational when the physician agrees with the choice

of therapy; that is to say, an individual's right to an unmarketed therapy does not override the physician's equal right "to do no harm." This ethical obligation, to do no harm, goes to the heart of the question of when it becomes appropriate to consider an unproven therapy as a possible candidate for compassionate access. Although a few participants held that there should be no risk limitations on access to experimental drugs, the majority opinion held that release of a therapy should only be considered when "an acceptable balance between efficacy and toxicity" has been demonstrated. (43) Further, it was firmly held that the rights of those with catastrophic illness have defined limits. On this point, Neill Iscoe of the Canadian Cancer Society stated that "the society believes in the right to self-determination but does not believe this right permits one person to exercise that right to the disadvantage or detriment of another individual."(44) Specifically, it was felt that compassionate access, while necessary, should not be allowed to impede rapid drug development.

[Emphasis added.]

III. 714-X

29 The inventor of the 714-X product is a biologist, Gaston Naessens. He submitted an affidavit in support of each application for judicial review and was not cross-examined. 714-X was developed in 1975 and is sold by its manufacturer, CERBE Distribution Inc. ("CERBE"). Mr. Naessens is the owner. This product enhances the natural defenses and the immune system when it is introduced directly into the lymphatic system.

30 714-X has been accessible to the SAP since December 18, 1989. Gaston Naessens stated that, between that date and March 30, 2004, 1,499 Canadian physicians received 20 985 authorizations from Health Canada for 714-X, which is the equivalent of 440,685 injections and 30,513 treatments by inhalation provided for 4,051 Canadian patients.

31 According to section C.08.001 of the Regulations, 714-X is a new drug because it has not been sold for a sufficient time and in sufficient quantity in Canada to establish its safety and effectiveness, a finding which is challenged herein.

32 However, CERBE made no request for a notice of compliance in connection with this product. It should be noted that, until now, 714-X has not been subjected to any clinical trials. Based on the evidence submitted, this product is not authorized in the United States, or anywhere else.

IV. The challenged decision and related decisions

33 On January 23, 2004, Dr. Gillespie wrote to several physicians to respond to their requests for access to 714-X and notified them of changes in the administration of the programme which would affect the processing of future requests for the product. He recalled that the SAP's mandate is to offer access to non commercial drugs to physicians who treat patients with serious or life-

threatening conditions when conventional therapies have failed or have proven to be unsuitable. (I also note that Dr. Gillespie had sent a similar letter to a smaller number of physicians on January 19, 2004.)

34 He cautions, however, that, as an emergency mechanism, [TRANSLATION] "*the SAP is not designed to circumvent the clinical trial process or the review process of new medications, nor to promote or encourage the marketing or early use of drugs before their safety and effectiveness has clearly been shown*." [Emphasis added.]

35 He lists Health Canada's efforts since 2001 to improve the SAP's operations. He mentions two initiatives:

> [...]The first, a drug audit process, was implemented to monitor all drugs on the programme and identify those for which there are identified concerns of safety, efficacy or quality and/or there is limited data to support widespread access. The second, a quality initiative, was implemented to review the administration of the programme to preserve its use as an emergency mechanism in accordance with the SAP provisions of the *Food and Drugs Regulations*.
>
> [Emphasis added.]

36 As to 714-X, Dr. Gillespie advises that this product [TRANSLATION] "has been identified from the start of the medication verification process as a product with limited data to support widespread access or long-term use, and with limited prospects."

37 Therefore, at the time, [TRANSLATION] "it was assigned some priority and it was added on to a list of products requiring sequential testing in an order of priority." Shortly thereafter, a new form was introduced in connection with the Health Canada initiative on the quality of the programme. [TRANSLATION] "The most important change is the requirement that practitioners provide a clinical rationale for its use ... and the sources of scientific information supporting this rationale."

38 He concluded by announcing:

> In the months after these procedures were introduced, the SAP received many 714-X requests that did not reference scientific data supporting the use, safety and efficacy of this product. The SAP responded to these apparent deficiencies through a routine fax-back procedure for incomplete requests. This process is used to identify specific request deficiencies, reference additional sources of programme information, ... and outlines our minimal request standards. In addition, it offers practitioners an opportunity to consider a deficiency in light of the minimal requirements of the *Food and Drug Regulations* and resubmit a request, with

additional information, for further consideration. Despite these efforts, the SAP continued to receive a large volume of 714-X requests with little or no data.

Based on a further review of evidence now available with respect to the use, safety and efficacy of this drug, as they relate to the emergency uses for which this drug has been requested, it has been determined that significant new evidence would have to be included in any SAP request before any further sales of 714-X could be authorized pursuant to requests made under section C.08.010 of the *Food and Drug Regulations*. Given this determination, it is unlikely that the SAP will authorize the sale of 714-X for new patients. During an interim period of one year, the SAP will take account of the special considerations relating to patients currently receiving the drug, who in the opinion of the practitioner have not experienced adverse effects from their ongoing treatment, and may continue to authorize requests made for such patients. The SAP then will revisit the merits of any such continued authorizations on the basis of reports filed on the previous use of the product, including any adverse events, in accordance with subparagraph C.01.010 (*b*)(i) [n'existe pas] of the Food and Drug Regulations.

The determination that has been made by Health Canada in this matter is consistent with that made by the U.S. National Cancer Institute (NCI) concluded that there have been no clinical studies (e.g. clinical trials, case series or case reviews) reported in peer-reviewed, scientific journals to support the safety or the efficacy of 714-X and it did not recommend the use of 714-X outside the context of well designed clinical trials. If you wish to pursue the use of 714-X, I recommend that you work with a manufacturer to develop and sponsor a clinical trial. A clinical trial would provide an opportunity to better understand the safety and efficacy of 714-X for specific indications and conditions. The regulatory review of the clinical trial would ensure that formal scientific and medical scrutiny is applied to the method of manufacturer of 714-X and the protocol and data supporting the use of 714-X in the proposed treatment. Most importantly, a clinical trial would ensure that the best interests of patients are protected through the required involvement of research ethics boards.

[Emphasis added.]

V. The SAP's evaluation of each applicant's file

39 Following is a history of each applicant's treatment with 714-X and the progress of their physicians' request for access underlying the application brought before the Court. None of the applicants was cross-examined on the affidavit that they submitted in support of their application for judicial review.

A. Léopold Delisle

40 Mr. Delisle's evidence is not limited to his own particular case. He studied the cases of several other patients who used the product or wished to have access to it. He obtained access to other documents by submitting a request pursuant to the *Access to Information Act*;

41 The applicant, Léopold Delisle, was diagnosed in 1989 with an immune system illness — mastocytosis. He stated that neither traditional medicine nor international research has found any medication to cure this disease. Between May 1994 and June 1997, he was treated with experimental medication, not only unsuccessfully, but with adverse results. On July 23, 1997, he was given access to 714-X. Paragraphs 38 to 40 of his affidavit read as follows:

> [TRANSLATION]
>
> 38. On October 21, 1997, my medical specialist noticed that my condition had improved, with a weight gain, a decrease in these signs and symptoms, the disappearance of a right-side inguinal hernia, which had been present since December 1995, and a significant decrease in my medication;
>
> 39. Since July 1997, I have administered myself several 714-X injections; in addition, I have received more than 714-X 100 treatments by inhalation in conjunction with these injections;
>
> 40. During this entire period, I observed no secondary side effects, except some painless redness on the site of the injections. The effects of 714-X have given me much more energy, fewer signs and symptoms of the illness, and have enabled me to substantially reduce my medication.. Furthermore, it has helped stabilize my immune system and, as such, has enabled me to have a better quality of life;

42 He was authorized by an order of the Court to file a further affidavit in order to explain how the SAP reviewed his September 3, 2004 request for access, a request made, I emphasize, following Dr. Brian Gillespie's January 23, 2004 decision and following the filing of evidence contained in the first affidavit from Ian MacKay, Director of the SAP. The chronology of events is as follows:

> (1) on September 9, 2004, his physician received a letter from the SAP [TRANSLATION] "rejecting my request on the grounds that the form is incomplete in that it lacks information." (Indeed, his physician's answer to question 3 on the clinical rationale was "documentation;" however, this question was asking for the available reference materials with regard to the safety and effectiveness of 714-X.)
>
> (2) in anticipation of a possible decision to extend access to the SAP for 2005, on December 1st, 2004, his physician received a letter from Dr. Gillespie asking him if he had scientific information establishing the effectiveness and safety of 714-X and more

particularly, reminding him that his incomplete September 9, 2004 request for access remained unanswered;

(3) on December 14, 2004, his physician submitted a new request for access;

(4) on December 15, 2004, his physician responded to Dr Gillespie's December 1st, 2004 letter:

> [TRANSLATION]
>
> With respect to 714-X and the scientific data, I should tell you that my patient ... submitted to me in December 2004, a letter from Dr Arthur B. Pardee of the Dana-Farber Cancer Institute, which confirmed scientifically what I had been observing for many years about 714-X. Notwithstanding the fact that there are no clinical trials on 714-X, it is very evident to me that this product has specific characteristics that are very beneficial to the immune system. Dr. Pardee's report clarifies the clinical observations I had made.
>
> As to the September 2004 request on behalf of my patient L.D., your rejection and the further information required were irrelevant and unjustified, considering that in May 2004, you had authorized my request, which set forth facts identical to the ones submitted in September 2004. Furthermore, my patient has been using 714-X for several years and this medication is of great help to him. I support him in his wish to maintain its use.
>
> Encl.: Dr Pardee's letter [Emphasis added.]

(5) on December 15, 2004, Mr. Delisle's request for access to the SAP was granted.

43 The enclosure is a letter dated August 9, 1999 from Dr. Pardee. It plays an important role in both parties' arguments, and shall be analysed further down.

B. Laurent Légère

44 Laurent Légère's situation is analogous to Léopold Delisle's. He currently has access to 714-X. He complained about the delay incurred in the processing of his most recent request, the one submitted by his physician on November 13, 2003, and rejected, it appears, in December 2003 for insufficient information, but authorized in February 2004 following an exchange from his physician.

45 *In October 1994*, after he was diagnosed with a carcinoma-type stomach cancer, his survival prognosis was six to eighteen months, and there was no conventional treatment for that type of cancer.

46 His physician, who knew about 714-X, requested access to the SAP. The access was authorized. At the end of October 1994, he received treatments for eleven cycles, amounting to 231 consecutive injections. After nine months of treatment, he returned to work, [TRANSLATION] "to his physician's surprise" and discontinued using it for almost three years. *In 1998*, his physician obtained two cycles of treatment, and later, in 2001, he obtained 23 more. His health remained stable; he, again, discontinued 714-X treatments.

47 *In October 2002*, he experienced a relapse and resumed his 714-X treatments until September 2003. He stated that his health improved once more "again, to the great astonishment of my medical specialists."

48 His application before the Court relates to the request for access that his physician completed on *November 13, 2003* and which, according to him, received no response, notwithstanding the fact that his physician attempted unsuccessfully to reach that office. He claimed that his wife tried twice to speak to the person responsible for authorizations, but "the receptionist refused to transfer the call."

49 Mr. Légère alleged that, in *December 2003*, he left a message on Mr. Ian MacKay's voicemail, asking him to call him. "He never returned the call."

50 According to him, in December 2003, following his deputy's intervention in Ottawa, Health Canada responded "*denying him, however, access to 714-X based on a lack of information*." [Emphasis added.]

51 *Following the information provided by his physician in February 2004*, this request was granted on March 11, 2004 "after a 199-day wait." Due to this delay, he stated, the state of his health greatly deteriorated and he was morally very affected. He added that he was feeling "*very anxious since Health Canada has informed his physician that he would be permanently denying him access to 714-X as of January 2005*." [Emphasis added.] Paragraphs 25 to 29 of his affidavit read as follows:

> [TRANSLATION]
>
> 25. It is unthinkable that the Government of Canada would restrict access to a product that has kept me alive and has enabled me to work and pay income taxes during all those years. Furthermore, by personally paying for 714-X, I saved the country money. My health remained stable, I was able to return to work and to continue to pay income taxes, although I should have been dead since 1994;
>
> 26. By denying me access to 714-X, which, according to my physician, I need to remain healthy, the Government of Canada is causing me irreparable harm that could even prove fatal;

27. My physician and I can testify as to what 714-X has already done for me, as there exists no conventional treatment for the type of cancer I have;

28. My gastroenterologist confirmed that the 714-X treatment has worked. As he had never heard of a surviving case of carcinoma-type stomach cancer without surgical procedure or chemical intervention, he told me to consider 714-X as an interesting option that I should keep.

29. As he did not previously know about 714-X, but as he was very curious about the product, he asked the manufacturer, CERBE, for further information.

[Emphasis added.]

C. Daniel Grandmont

52 Daniel Grandmont described his illness — a cancer known as adenocarcinoma, his two surgical procedures, in 1985 and 1990, and his remissions. He was never treated with 714-X, notwithstanding his having made several requests to the SAP, which, he claimed, were denied.

53 *In February 2003*, his cancer relapsed; no surgery was possible and no treatment, available. While researching alternative treatments, he found out about 714-X and telephoned the CERBE. *On August 6, 2003*, his physician completed the access form. This request *was returned to his physician on August 20, 2003* [TRANSLATION] "on grounds of insufficient information."

54 His physician was said to have then resubmitted the form to the SAP, with a note: [TRANSLATION] "*Why this sudden change in attitude? 714-X is well known to the Canadian government. Please contact CERBE for available sources of information*." [Emphasis added.] *On August 26, 2003*, his physician received a rejection letter from Dr. Gillespie [TRANSLATION] "again on grounds of insufficient information."

55 Mr. Grandmont's physician was then said to have told the applicant that he was concerned with Health Canada's attitude [TRANSLATION] "*since, for years, he had always completed his request for authorization in the same manner, and he told me he could not understand why I was unable to get it*." [Emphasis added.] Following his MP's intervention and following a discussion Mr. Léopold Delisle was said to have had with an official at Health Canada, his physician would have accepted to submit another request for access on December 22, 2003. *On February 11, 2004*, his physician's request for access *was again denied*.

56 Paragraphs 29 to 33 of his affidavit read as follows:

[TRANSLATION]

29. Notwithstanding the fact that I met all the requirements of Health Canada to obtain this authorization to use 714-X, Health Canada always denied my physician's requests for authorization;

30. No chemotherapy treatment is appropriate for the type of cancer I have, no radiation therapy is possible in my case, and no surgery may be contemplated;

31. Today, I suffer from left-side facial paralysis, I have great difficulty eating because I have trouble swallowing; I am deaf in my left ear, I have no voice left. I have great difficulty talking because I am out of breath. My eyelid moves with difficulty and my eyes are often dry. I am no longer able to make any physical effort;

32. The only alternative treatment remaining for me is 714-X, which has been highly recommended to me, especially by my physician and my medical specialist. 714-X is my only chance of survival;

33. The attitude, the rejections and the behaviour of Health Canada towards me have totally turned me off. The only thing I ask is the right to have a last chance, which Health Canada denies me, thus disregarding a request to that effect by my own physician;

[emphasis added]

D. Dany Laforest

57 Applicant Dany Laforest is 45 years old and had no health problems prior to 2000. In November 2000, her gynecologist found an abnormality in her right breast which tested positive following a mammography and a biopsy. After surgery, she received chemotherapy and radiotherapy, and, as a result, felt very weak.

58 After doing some research and after contacting CERBE, on August 3, 2001, her physician *was granted access to 714-X* via the SAP. After eight cycles of treatment, feeling considerably better, she interrupted the treatment. Her last authorizations date back to December 4, 2002 and July 7, 2003.

59 According to Ms. Laforest, on *February 19, 2004*, another request for authorization was submitted, but there was no response from the SAP. Ms. Laforest and her physician are still awaiting that response.

60 *She asserted that she never felt any adverse effects from the 714-X treatments, but rather experienced a sensation of well-being and of health improvement. She submitted that it is Health Canada's duty to respect requests made by physicians who, in her opinion, know more than anyone else what is good for their patients*.

VI. Ian MacKay's June 8, 2004 affidavit

61 As hereinabove mentioned, Ian MacKay is Director of the SAP. His June 8, 2004 affidavit is the main evidence relied on by the respondents in response to the applicants' evidence. He was cross-examined.

62 In the introductory paragraphs of his affidavit, he explained the basis of Health Canada's decision to limit access to 714-X through the SAP:

> 8. The *Food and Drug Act and Regulations* provide a comprehensive scheme designed to protect the health of Canadians. As such, they prohibit the sale of drugs where their safety, efficacy and quality have not been demonstrated in accordance with the said *Act and Regulations*.
>
> 9. As explained herein, it has been determined, taking account of the review conducted by the Bureau of the Senior Medical Advisor within Health Canada, that, unless sufficient evidence to support the emergency use of 714-X was provided by a physician, access to 714-X through the Special Access Programme should be limited. This position is based on a clear absence of credible evidence to support the safety and efficacy of 714-X.
>
> 10. I have read the affidavit of Léopold Delisle and Gaston Naessens and they disclose unsubstantiated and unfounded claims.
>
> 11. In this affidavit, I will respond to these claims by explaining:
>
> (a) the role of Health Canada as Canada's drug regulator;
>
> (b) drug development in Canada;
>
> (c) the scope and mandate of the Special Access Programme;
>
> (d) the impact of the quality review of the Special Access Programme on 714-X;
>
> (e) the impact of the prevailing consensus within the scientific community in Canada and the United States as to the lack of any evidence of the safety and efficacy of 714-X;
>
> (f) the carefully considered steps undertaken by the Special Access Programme with respect to the availability of 714-X;
>
> [emphasis added.]

63 I will not elaborate on the portions of Mr. MacKay's affidavit describing the role of Health Canada as a drug regulator, the development of drugs in Canada and the SAP's mandate.

64 With regard to Health Canada's role, Mr. MacKay invoked the Regulations.

65 Mr. MacKay explained that the system set up by the Regulations "is precautionary given that all drugs carry some level of risk ... [and] emphasizes the need to take timely and appropriate preventative action, even in the absence of full scientific demonstration of cause and effect." In his opinion, the approval system for new drugs rests on the fact "that there is extensive uncertainty regarding the effects of drugs in humans. Promising treatments do not always work out." He acknowledged that "[n]o drug is totally effective and likewise no drug is completely safe. *Thus, part of the regulatory review process weighs a drug's potential for benefit (degree of effectiveness) against its potential for harm, as compared with other current treatment options. The regulatory decision as to whether or not to approve a drug for the Canadian market is largely based on this risk/benefit assessment*". [Emphasis added.]

66 He identified the steps involved in the development and approval of a new drug: discovery of a new active pharmaceutical ingredient, laboratory and animal studies, and, ultimately, clinical trials on humans "to formally and systematically gather information on the safety and efficacy of a drug in humans, verify the claims made by a sponsor and the uncertainty regarding the harms or benefits of drugs in humans. Clinical trials are conducted by physicians, scientists and other health care professionals in controlled settings using good clinical practices."

67 There are three types of clinical trials: (1) Phase I clinical trials "in which an experimental drug is usually given to a small number of healthy volunteers. The goals of a Phase I trial is to determine how the drug is absorbed, distributed in the body, metabolized and excreted, as well as to estimate the initial safety and tolerability of the drug at different dosages »; (2) Phase II clinical trials "are the initial trials to assess efficacy in patients for a specific indication, ... they are also called therapeutic exploratory studies. Some of the information gained in Phase II trials includes the best dose and frequency of the drug, the target population ... and the best outcome measures ... to assess efficacy;" and (3) Phase III clinical trials "also called therapeutic confirmatory studies, is to demonstrate the safety and efficacy of the drug in the intended patient population under the intended conditions of use."

68 At paragraphs 49, 50, 51 and 52 of his affidavit, Mr. MacKay summarized his theory on the quality of the evidence required by Health Canada under the Regulations:

> 49. In summary, the regulatory approval process ensures that the manufacturer develops a drug which is well characterized, and that its production results in consistent pharmacologic properties. The process involves the systematic assessment and reporting of extensive information on the drug and its effects. Furthermore, it restricts the claims a manufacturer can make about a drug, limiting claims to those areas for which there is sufficient scientific evidence.

50. Universally, anecdotal evidence, which by definition is gathered without any experimental design, is insufficient to make informed decisions as to whether the benefits of a drug outweigh the risks.

51. Evidence and data gathered from well designed and executed non-clinical and clinical trials is considered credible when conducted by scientific and medical experts and subjected to scrutiny by peer review.

52. A physician's impression from an individual patient cannot be extrapolated to form a scientific basis of support for widespread use of a drug. Classically this is referred to as anecdotal information.

[Emphasis added.]

69 Wit respect to the SAP, M. MacKay explained that:

(1) the decision to authorize or deny access to the SAP is based "*on the data supplied by the physician and other information it may have in its possession*. The SAP carefully exercises this discretion by considering all information provided by the physician, the nature of the medical emergency, and the extent to which the data submitted in support of the request is credible and relevant to specified medical emergency" [paragraph 56] [emphasis added];

(2) "A physician is responsible for initiating a request on behalf of a patient and ensuring that the decision to prescribe the drug for a specific indication is supported by credible evidence available in the medical literature or provided by the manufacturer" [paragraph 57];

(3) "Health Canada also considers other information in its possession about the drug including the progress of clinical trials, safety information and the regulatory status of the drug in other countries" [paragraph 58];

(4) "If the data submitted is insufficient, in order to render an informed decision, the SAP has the authority to request additional information respecting the use, safety and efficacy of the drug from the requesting physician" [paragraph 59];

(5) "*The sale of a drug is authorized for emergency use through the SAP when some credible evidence is available respecting the use, safety and efficacy. Typically drugs available through the SAP are either: a) the subject of clinical trials in Canada or elsewhere; b) authorized by Health Canada but not yet launched onto the Canadian market, or c) authorized by one or more credible and competent regulatory agencies in other jurisdictions. 714-X does not fall within any of the aforementioned parameters*" [paragraph 69] [emphasis added];

(6) "... SAP authorization does not constitute an opinion or statement that a drug is safe, efficacious or of high quality. The SAP does not conduct a comprehensive evaluation to

ensure the validity of drug information or attestations from the manufacturer respecting safety, efficacy and quality such as that undertaken during review of clinical trial applications or new drug submissions" [paragraph 70];

(7) "*Nevertheless, the SAP does manage risk within the context of its review and consideration of data supplied by a physician or provided by a manufacturer*. This framework takes into consideration what is known about the risks and benefits of a product. The SAP considers, *inter alia*, the standards of manufacturing ..., the package of product information provided by the manufacturer, *whether the product has been reviewed by another regulatory jurisdiction or by Health Canada for purposes of a clinical trial or a new drug. The SAP also consults with medical and scientific experts within Health Canada to rule out any knowledge of serious safety issues or submission deficiencies, as was done in the case of 714-X"* [paragraphs 72 and 73] [emphasis added].

70 He enumerated and explained recent SAP initiatives to improve its operations: (1) *in 1999*, the SAP considered how a new drug was authorized under the SAP; (2) *in 2001*, the SAP implemented a verification process in order to determine the number of authorizations, the date of the last authorization and the conformity to the regulatory regime or development required to secure a notice of compliance; (3) a third initiative on quality relates to the administration of the programme and the need to maintain it as an emergency mechanism in accordance with regulatory provisions. It is pursuant to this initiative that the SAP modified its form in 2002 to include a clinical rationale.

71 Mr. MacKay examined the 714-X product and noted that it is "promoted by the manufacturer and patient advocates as a non-toxic immune modulator for use in the treatment of HIV, AIDS, cancer, and a variety of other diseases and conditions" [paragraph 86]. "Its use is recommended in the context of an unorthodox biologic theory whereby disease states are diagnosed and treatment regimens are proposed after examining whole blood samples with the aid of a specialized attachment to a standard light microscope" [paragraph 87].

72 He noted that 714-X was never subjected to a clinical trial, or to a formal development plan leading to licensing by Health Canada, and that it had never received approval from a credible and competent regulatory board. "*Hence its safety and efficacy has not been established*" [paragraph 89] [emphasis added].

73 CERBE never submitted a request for accreditation to Health Canada, or a request for a clinical trial. "*Therefore, Health Canada has not had the opportunity to conduct a comprehensive regulatory review of the safety, efficacy or quality of 714-X*" [paragraph 90] [emphasis added].

74 As to a clinical trial for 714-X, in his view, "If such a trial were to be conducted, it would represent *an avenue for limited and controlled access to the drug and at the same time generate*

credible data that would contribute to an objective understanding of the safety and efficacy of the drug » [paragraph 91] [emphasis added].

75 He reviewed all the scientific information on 714-X: two pre-clinical studies, one in 1985 and one by Drs. Pardee and Huang in 1999, as well as the manufacturer CERBE's data sheet, and stated that, in his opinion, it "describes potential drug interactions which presumably stems from specific reports of adverse events reported to the manufacturer or is a reasonable expectation from the manufacturer's perspective ... *These identified risks alone refute the claim that the drug is non-toxic*" [paragraph 95] [emphasis added].

76 He commented on Gaston Naessens' affidavit and, more particularly, on the mandate CERBE gave in 1998 to a Toronto consulting firm, Clinical Consortiums, to conduct complementary immunological tests on 714-X, which would be used to prepare a briefing paper for a clinical trial request. Under the direction of Dr. Lux, this firm retained the services of Dr. Van Alstyne, a virology and immunology specialist, who asked Dr. Pardee's laboratory, which is associated with the Dana-Fiber Cancer Institute of Boston, to conduct immunological tests. Dr. Van Alstyne's August 22, 2000 report summarized the results of the research conducted by Dr. Pardee and his colleague, Dr. Huang. According to Mr. MacKay, "*Dr. Huang's position is that the tests are preliminary and that the results are too premature*..." [paragraph 94] [emphasis added].

77 Gaston Naessens transmitted Dr. Van Alstyne's report to Health Canada. Mr. MacKay has attached as exhibit K to his affidavit a letter from Health Canada attorney to CERBE's attorney, notifying him that Health Canada could not review this report without a specific regulatory request.

78 According to him, between 1988 and the early 1990s, 714- X was well known to patients suffering from AIDS "who, in the absence of any treatment options advocated for access to the drug on an emergency basis." Mr. MacKay concluded:

> 98. The unprecedented nature of the AIDS crisis challenged physicians, patients and government authorities to act in the public interest to permit limited access to 714-X. Hence, 714-X was first released through the SAP in 1989.
>
> 99. After the first and subsequent AIDS drugs were approved and marketed in Canada, interest in the use of 714-X as a treatment for AIDS waned precipitously. After 1992, interest in the product shifted from AIDS to cancer and a variety of other diseases.

79 The initiatives implemented to improve the SAP's operations had an impact on 714-X: "*the introduction of the new request form in 2002 and the more consistent review of requests revealed that requests for 714-X did not reference credible scientific data supporting the use, safety and efficacy of this product. As a result, 714-X was identified early in the audit process 2002 as a product for which there was limited, if any, data to support widespread access for any medical*

condition. At that time, it was assigned a relative priority and added to a list of products for further review and possible action" [paragraphs 100 and 101] [emphasis added];

80 The SAP reacted to the absence of scientific information from physicians:

> 102 ... through a routine fax-back procedure it employed to manage incomplete requests. This procedure is used to identify specific deficiencies and outlines our minimal request standards. In addition, it offers practitioners an opportunity to consider a deficiency in light of the minimal requirements of the *Food and Drug Regulations* and resubmit a request, with additional information, for further consideration. Despite these efforts, the SAP continued to receive requests for 714-X with little or no supporting data.
>
> [Emphasis added.]

81 This deficiency worried the SAP, whose interest had increased, knowing that "the Office of Cancer Complementary and Alternative Medicines (OCCAM), National Cancer Institute, National Institute of Health" was contemplating a review of 714-X. He asserted that "*the ongoing problem with request deficiencies and the new knowledge of the OCCAM review prompted Health Canada to take a closer review of the information submitted by physicians and credibility of scientific evidence available to support the use, safety and efficacy of the drug in humans." A new policy for review of access requests to 714-X was put in place* [emphasis added]:

> 105. As of July 2003, requests for 714-X received by the SAP were subject to normal processing except where the physician provided information that was insufficient to allow me to render a decision. Notwithstanding our growing understanding of what little data existed on the drug, most requests were processed provided that the physician quoted at least one source of information about the drug. In some cases, requests were returned and additional information or clarification sought from the prescribing physician.
>
> [Emphasis added.]

82 That more thorough review showed "*that the status of 714-X within the SAP represented an exception since the physicians clearly did not refer to credible data to support the safety and efficacy of the drug*" [emphasis added];

83 The study, led by a group experts from the OCCAM, in July 2003, included a meeting with CERBE and a review of five cases (four American and one Canadian) "where the drug reportedly had dramatic positive effects."

84 On or about September 11, 2003, Mr. MacKay knew that the OCCAM had concluded "that there was insufficient evidence to support NCI research following their Best Case Series review of 714-X. After considering the information from the OCCAM, *we began to reconsider the release of the product through the SAP*" [emphasis added] [paragraph 107].

85 In October 2003, the SAP contacted the physicians whose requests for access to the SAP were under review to inform them about the OCCAM's conclusions on 714-X. It said:

> 108. ... I contacted several physicians and explained the importance and significance of the OCCAM review such that they could be informed and take account of this information in making requests for 714-X. I also explained that, we were undertaking a review of the drug with a view to determining the availability of evidence supporting the safety and efficacy of the drug.
>
> 109. Many of those contacted acknowledged the paucity of data respecting the safety and efficacy and while some argued that patients should have continued access, others expressed the ethical and professional dilemmas associated with prescribing such a drug.
>
> [Emphasis added.]

86 Faced with this situation, Health Canada contemplated some alternatives "and, in consultation with Health Products and Food Branch's Risk Management Committee, *considered the merits of limiting access to the product ... The merits of continuing to authorize the SAP requests for patients currently being treated with 714-X for the period of one year was also considered*" [paragraph 111] [emphasis added].

87 Health Canada undertook a systematic review of all the scientific literature published on 714-X and, to that end, gave Dr. Bryan Garber, a member of Health Canada's Senior Medical Advisor Bureau, a mandate whose scope Mr. MacKay describes as follows:

> 112. ... This review considered, among other sources, published statements from authoritative bodies such as the National Cancer Institute, the Canadian Breast Cancer Research Alliance, and the MD Anderson Cancer Centre. The review concluded there is no credible scientific basis to support the use of 714-X for cancer or any other disease or condition.
>
> [Emphasis added.]

88 *On or about December 20, 2003, all requests for access to 714-X were put on hold* "as the scientific review of information neared completion and as the SAP prepared to *render decisions on pending requests and publish guidance* for future applicants" [paragraph 113] [emphasis added].

89 The SAP's statistics revealed that six physicians submitted to the SAP 75% of requests for access to 714-X, and that the other physicians submitted such requests once or twice.

90 Following Dr. Garber's report in the wake of the OCCAM's conclusions on 714-X, Health Canada decided to limit access to the SAP with respect to 714-X, a decision announced by Dr. Gillespie in his January 23, 2004 letter, which was:

127 ... sent to physicians in January 2004 was an official response to physicians who had pending requests to access 714-X in 2003 and early 2004 and was a guidance document sent to all physicians who had requested 714-X in 2003 and early 2004.

91 Mr. MacKay's comments on this decision were as follows:

129. The letter indicated future requests for new patients would be denied unless significant new evidence was provided to support the use, safety and efficacy. With respect to pending requests for new patients, the letter constituted a denial for the reasons contained therein.

130. Special consideration would be given to both pending and future requests for repeat patients. The letter invited physicians to re-submit a new request making specific mention of the patient's experience on the drug and specifically whether the patient had experienced any adverse effects during therapy with 714-X. This approach would allow access to repeat patients on the basis of the follow-up reports provided by the requesting physicians and confirmation that the particular patient had not experienced adverse events from their ongoing treatment. Ongoing access will be revisited after one year on the basis of follow-up reports provided by the physician, during which time clinical trials may have commenced and/or conducted or the therapy abandoned.

131. In fact, physicians with pending requests for repeat patients did subsequently submit modified requests for these patients noting that their patients did not experience any adverse effects. Once received and these facts confirmed, these requests were authorized forthwith. On a couple of occasions, physicians did not specify whether their patients had adverse effects - in these cases we telephoned the physician or faxed the request back asking for that specific information. Once received, they were reviewed and considered in accordance with the new policy.

132. Health Canada carefully considered this issue and opted to grandfather patients who had taken 714-X in the past and who had not experienced adverse effects. This approach considered that the level of risk incurred differed for new patients compared with repeat patients.

133. Since January 23, 2004, all requests received by the SAP for special access to 714-X have been processed in a timely and uniform manner and in accordance with the guidance set forth in the letter sent to physicians in January 2004. As of this date, there are no pending requests for special access to 714-X.

134. Records show that since this letter was issued, the SAP has authorized 56 requests, for a total of 24 repeat patients on the basis of the patients' experience with the drug as provided. A total of 14 requests for new patients have not been authorized.

[Emphasis added.]

VII. Mr. Ian MacKay's additional affidavits

92 The purpose of the January 13, 2005 additional affidavits was to enable Health Canada to respond to the applicants' affidavits, save for Mr. Delisle's affidavit on which it had previously commented.

A. Response to Léopold Delisle's December 20, 2004 affidavit

93 Mr. MacKay explained that, in August 2004, the OCCAM published an update of its review of 714-X. The OCCAM concluded: [paragraph 126]

> The NCI's BCS Program review of the pertinent medical records, radiographic films and pathology specimens of 17 cancer patients who reportedly received 714-X has been completed. At this time, the judgment is that there is insufficient information to justify NCI-initiated research on 714-X as an anticancer therapy. The OCCAM is seeking authorization to solicit referral of other well-documented cases directly from U.S. cancer patients. If approved, such a solicitation will be posted on the OCCAM website.
>
> [Emphasis added.]

94 The OCCAM conclusion "is exactly consistent with the discussions and correspondence between the SAP and OCCAM in 2003."

95 In December 2004, the SAP asked 14 Canadian physicians who had access to 714-X and to CERBE if new information on the effectiveness and safety of the drug had been published since Dr. Garber's scientific review:

> 141. In anticipation of the end of the one-year period for repeat patients referred to in the letter sent to physicians in January 2004, the SAP wanted to confirm whether any data respecting the use, safety and efficacy of 714-X had been reported in the medical literature since the review undertaken ... in December 2003 and whether they were involved with or aware of any efforts to initiate a program of formal drug development. To this end, the SAP had sent letters to physicians who had gained access to 714-X in accordance with the terms set out in the original notice sent to physicians on January 23, 2004. This letter was sent to a total of 14 physicians. The letter was also sent to the manufacturer.
>
> 142. Responses were requested on or before December 10, 2004. To date the SAP has received four (4) responses. None of the responses was able to provide any credible scientific information supporting the use, safety and efficacy of 714-X.
>
> [Emphasis added.]

96 The four responses were reviewed by Mr. MacKay:

> 143. ... the response from Dr. Teresa Clark, on behalf of the Centre for Integrated Healing in Vancouver, added that they had not encountered any cases of adverse effects and found 714-X to be effective in some cancer patients helping to improve their survival from advanced metastatic disease. She provided no details on these cases and I assume that her conclusions about the efficacy of the 714-X have not been peer reviewed.
>
> 144. ... he was not aware of any credible scientific information regarding the use of 714-X.
>
> 145. ... the response from Gaston Naessens did not provide any credible scientific information respecting the use, safety and efficacy of 714-X and provided a review of interactions with OCCAM and an update to ongoing discussions with the National Institutes of Health in the United States. I am familiar with the process undertaken by the OCCAM and acknowledge the ongoing discussion between Mr. Naessens and the NIH [emphasis added].
>
> . . . . .
>
> 149. ... the response from Dr. D. Dagenais included a short letter outlining his experience with 714-X and a copy of the letter from Drs. Pardee and Huang referred to herein at paragraphs 145 and 146.

97 The SAP received from Gaston Naessens a copy of the letter from Drs. A.B. Pardee and L. Huang, "with which I am familiar. The letter comments on the *non-clinical* laboratory studies they conducted. The correspondents' final paragraph is worthy of note" [emphasis added]. I set out hereunder the last paragraph of that letter:

> 146. ... "we strongly feel that this agent deserves equal attention as other compounds in a peer-reviewed journal if positive scientific evidence comes up to support its *in vivo* function. Therefore we would like to write up our results and submit them to a peer-reviewed journal for consideration of publication. Only our data will be presented in the manuscript. We believe that our data will provide a foundation for future characterization of this compound. Once scientific characterization of this compound is established, large scale clinical trials would be feasible and this agent could be available to more patients."
>
> [Emphasis added.]

98 Mr. MacKay submitted that:

> 147. This confirms that the studies performed were very preliminary in nature and that, in the opinion of the authors, the drug must be subject to further in vitro characterization before clinical trials, including "first in human" studies can begin.
>
> 148 To date, I am not aware that these results were ever submitted for publication.

[Emphasis added.]

99 He concluded:

150. To date, no adverse events have been reported with the use of 714-X since January 2004 in patients who have gained continued access to the drug in accordance with the January 2004 letter sent to physicians. This fact, combined with the ongoing and as yet unresolved legal challenges to the regulator's decision making respecting 714-X, the SAP will continue to consider requests from physicians treating repeat patients for continued access to the drug until such time as the courts render a decision or the matter is otherwise settled. Practitioners will be notified of this position.

[Emphasis added.]

100 Finally, he explained how the SAP processed the request for access from Mr. Delisle's physician in September 2004:

152. ... The request was screened by a clerk and not by a reviewer using standard operating procedures for handling requests. Clerks make the first decision as to whether the request is complete which includes a judgment call about the completeness of answers to all questions and fields on the form. In my absence, the clerk made the decision that the word "documentation" was normally not something that we accept as a substantial answer to question 3 of the form. The request was not denied but returned to the physician with an accompanying note requesting clarification and additional information.

153. The word "documentation" does not provide any indication of what information Dr. Dagenais may have had in his possession at the time he filed the request. It was clearly appropriate and indeed the regulator was obliged to request further information and clarification with respect to the information and data that the physician had in his possession.

154. . . .

155. A request form that is returned to a physician specifically states the reason for the clarification and specifically states that the request will not be processed. It does not constitute a denial. A denial is a decision that is based on a review of all the facts submitted, including any clarifications sought and leading to the issuance of a specific letter of denial.

156. Once a request is returned, we rely on the physician to consider the notice and to respond to our request for clarification or additional information accordingly. Ordinarily, we do not follow up with the physician directly.

157. In this case, I have no records or recollection of any attempt made by Dr. Dagenais to communicate with my office in response to our request for additional information. It was

> only after reading the additional affidavit of Mr. Delisle dated November 5, 2004 that it became apparent that the request for information sent by my office in September 2004 had been considered by Dr. Dagenais as a denial. Hence, in addition to the standard letter sent to Dr. Dagenais in December 2004, ... it was decided that an additional paragraph be added to the letter seeking clarification as to whether Dr. Dagenais intended to pursue the request on behalf of the patient.
>
> 158. An additional request was filed by Dr. Dagenais on December 14, 2004, which included additional information on 714-X. ... The request was authorized the following day and processed in the usual way.
>
> [Emphasis added.]

B. Response to the November 1, 2004 affidavit from Laurent Légère

101 Mr. MacKay acknowledged that Laurent Légère used 714-X prior to the implementation of Health Canada's new policy and explained the processing of the request for access received from him in November 2003:

> 165. ... at a time when a notice respecting continued access to 714-X through the SAP to physicians who had filed requests was pending final review by senior Health Canada officials and was scheduled for distribution in December 2003. Given the anticipated short time frames the name of the physician who had filed the request was added to the mailing list of physicians to receive a formal response.
>
> 166. I can confirm that the Dear Health Care Professional Letter dated January 19, 2004 was sent to, and according to our records, received by Dr. J. Taylor on January 21, 2004.
>
> 167. A new request was received on March 11, 2004 and was authorized on the same day since it was in compliance with the parameters set forth.
>
> 168. The SAP has received a number of other requests throughout the 2004 and I therefore conclude that Dr. Taylor has had access to 714-X for the treatment of Mr. Légère in accordance with the parameters set forth in the letter of January 19, 2004.
>
> [Emphasis added.]

102 He admitted that there were a number of problems within the SAP in processing requests for access, that he hoped would be resolved "... through the development of a custom and state-of-the-art information management system that will change the way in which requests are received, processed, considered and decided upon."

103 His most telling acknowledgment of the SAP's administrative problems was as follows:

> 170. ... During this period, the number of requests grew from a few thousand to a peak of 33,000 in 2002. Innovations were realized during this period but the programme also had to contend with period of time when the amount of paper was very unpredictable and would overwhelm the ability of staff to appropriately and adequately manage requests effectively. As manager, I am confident that my staff does everything they can to manage the paper appropriately, but on occasion, requests are misplaced, go missing, are misfiled or for a variety of technological reasons, are never received. We regret these incidents but believe that under the current conditions a certain small percentage of errors is unavoidable. When they are brought to our attention, we endeavour to solve problems expeditiously. ...

C. Response to the October 28, 2004 affidavit from Daniel Grandmont

104 This affidavit confirmed the following facts: the request for access submitted by Daniel Grandmont's physician on August 20, 2003 was "processed by staff members in the usual way. The request was denied on August 26, 2003, citing the request did not contain sufficient information with respect to the use, safety and efficacy of the drug" [paragraph 165].

105 *A new request was submitted on December 22, 2003. "Given that a formal response to all outstanding requests was imminent," his physician's name was added on to the list of those who received the January 19, 2004 letter* [emphasis added].

106 *On February 2, 2004*, his doctor submitted a new request "which appeared to be the same request as was filed on December 22, 2003. Because the request was filed subsequent to the issuance of the January 19, 2004 letter, *it was formerly processed and identified as a new patient and therefore denied. According to our records, the denial was sent on February 5, 2004*" [emphasis added] [paragraph 169].

D. Response to Dany Laforest's affidavit

107 He acknowledged that a request for access was sent on February 19, 2004 "and appears to have been successfully sent from Dr. C. Fournier to the SAP. Despite an exhaustive search, I can confirm that we have no record of having received this request on or about the above date" [paragraph 165].

108 He added: "I do not recall nor does my staff recall receiving a call from Dr. Fournier's office following up on the said request. I can confirm that the Dear Health Care Professional Letter dated January 19, 2004 was sent to, and according to our records, received by Dr. Fournier's office on January 20, 2004."

VIII. Analysis

A. The review standard

109 The review standard depends on four contextual factors: (1) the presence or absence in the statute of a privative clause or of a right to appeal; (2) the administrative body's expertise in comparison to the reviewing court on the issue in dispute; (3) the purpose of the act and of the specific provision; and (4) the type of issue — of law, of fact, or of mixed law and fact.

110 In this case, the Act includes no privative clause and does not provide for a right to appeal the decisions. However, the judicial review of the Director's decision is provided for under section 18.1 of the *Federal Courts Act*.

111 Health Canada undoubtedly has more expertise than the Court if the decision or the issue in dispute requires specialized knowledge or experience in a particular area, when it comes to assessing the safety or the effectiveness of a drug and the scientific credibility of the evidence. (See Madam Justice Layden-Stevenson's opinion in *Reddy-Cheminor Inc. v. Canada (Attorney General)*, 2003 FCT 542 (Fed. T.D.)).

112 The third factor is the general object of the statutory scheme within which the administrative decision-making is taking place. With respect to this factor, Madam Justice Layden-Stevenson in *Reddy-Cheminor Inc.* , *supra*, wrote:

> ¶ 55 ... Parliament has legislated that persons suffering from particular ailments and relying on particular products to alleviate those ailments must be assured that their reliance is not misplaced: *Wrigley Canada v. Canada* (1999), 164 F.T.R. 283 (T.D.), aff'd. (2000), 256 N.R. 387 (F.C.A.). The intent of the Regulations is to provide a process for approval of new drugs to be marketed in Canada that is "... in the interest of, or for the prevention of injury to the health of the purchaser or consumer": *Apotex 2*. Put another way, a drug manufacturer, under the scheme of the Regulations, must satisfy the Minister of the safety and effectiveness of a new drug before selling it in Canada: *Merck & Co. v. Canada (Attorney General)* (1999), 176 F.T.R. 21 (T.D.). The Regulations vest complete and exclusive discretion in the respondent Minister to determine the requirements of a new drug submission in terms of the information or evidence to be provided by the manufacturer. The discretion must be exercised on consideration of factors that are relevant to the purposes of the Act and Regulations: *Apotex 2*. In my view, the purpose of the FDA and the Regulations passed pursuant thereto applies to all submissions for new drugs whether in the form of a NDS or an ANDS. Regarding the polycentric characteristics, Blanchard J., in *Bristol-Myers Squibb Co. v. Canada (Attorney General)* (2002), 22 C.P.R. (4th) 345 (F.C.T.D.) stated:
>
> > The purpose of the notice of compliance provisions of the *Food and Drug Regulations* is to protect public health by assuring a certain level of safety and efficacy for drugs. As such, the decision that a new drug submission has satisfied the *Food and Drug Regulations* is a polycentric one, given that it involves the implementation of "social and

> economic policy in a broad sense". [*Pfizer Canada Inc. v. Minister of National Health and Welfare et al.*, (1986) 12 C.P.R. (3d) 438 (F.C.A.)]
>
> [emphasis added].

113 Because it creates an exception to the statutory scheme under the Regulations, it is important to analyze the provision relating to the SAP;

114 In its Instructions for Making Special Access Requests, Health Canada stated that the SAP enables physicians who treat patients with serious or life-threatening conditions to have access to drugs unavailable on the market when conventional therapies have failed, are unsuitable, or unavailable.

115 In another document, Health Canada acknowledged that access to drugs via the SAP is limited to patients with serious or life-threatening conditions for humanitarian or emergency reasons;

116 In its report, the Standing Committee considered that the SAP's humanitarian element was important, as was the rapid development of a medication, and that access to a medication that has not proved itself required that no treatment be applied until after the analysis has shown [TRANSLATION] "an acceptable balance between efficacy and toxicity;"

117 The fourth factor pertains to the nature of the problem. As Madam Justice Layden-Stevenson stated in *Reddy-Chemicor Inc.*, *supra*:

> ¶ 50 ... When the finding being reviewed is one of pure fact, this factor will militate in favour of showing more deference towards the decision-maker's decision. An issue of pure law militates in favour of a more searching review. Regarding questions of mixed fact and law, this factor will call for more deference if the question is fact-intensive and less deference if it is law-intensive.
>
> [Emphasis added.]

118 Madam Justice Layden-Stevenson's decision was appealed. The Federal Court of Appeal dismissed the appeal (see *Reddy-Cheminor Inc. v. Canada (Attorney General)*, 2004 FCA 102 (F.C.A.)). I quote paragraphs 8 and 9 of Mr. Justice Evans' reasons:

> ¶ 8 Second, I agree with Laydon-Stevenson J. that the pragmatic and functional analysis indicates that the decision under review is entitled to a high degree of deference. The drug approval process is a complex and technical area of public administration with a direct impact on the health of Canadians. Determining whether two products contain "identical medicinal ingredients" requires scientific understanding and regulatory experience, rather than knowledge of the law or legal principles.

¶ 9 Third, like the Applications Judge, I am not persuaded that it was either patently unreasonable, or unreasonable *simpliciter*, for the Minister to conclude that only drugs comprising the same chemical entities contain "identical medicinal ingredients", even though the active ingredients of drugs may deliver the same chemical substance to the body with the same therapeutic effects.

[Emphasis added].

119 Applying these principles herein, I hold:

(1) The applicants' alleged errors regarding the violation of the Charter, the decision-maker's want of jurisdiction, the relevant factors in the exercise of discretionary power and the scope of this power, as well as a violation of procedural fairness based on a breach of legitimate expectancy, must be assessed in accordance with the standard of correctness.

(2) As long as the decision challenged was based on an assessment of the evidence, the weighing of that evidence, or if it is alleged that that decision is based on an erroneous finding of fact, that decision is reviewable according to paragraph 18.1(4)(*d*) of the *Federal Courts Act*, which reads as follows:

> 18.1(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal
>
> . . .
>
> (*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;
>
> 18.1(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas:
>
> [...]
>
> *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;

The standard under this section is the equivalent of the patently unreasonableness standard.

120 When the applicants reproached Dr. Gillespie for having ruled out evidence on the effectiveness and safety of 714-X, this argument must be examined in view of the standard provided for in section 18.1(4)(*d*).

B. A few principles

1. Discretionary power

121 In *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.), Madam Justice L'Heureux-Dubé explained, at paragraph 52 of her reasons, the concept of discretionary power:

> ¶ 52 The concept of discretion refers to decisions where the law does not dictate a specific outcome, or where the decision-maker is given a choice of options within a statutorily imposed set of boundaries. As K. C. Davis wrote in *Discretionary Justice* (1969), at p. 4:
>
> > A public officer has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action or inaction.
>
> It is necessary in this case to consider the approach to judicial review of administrative discretion [page 853], taking into account the "pragmatic and functional" approach to judicial review that was first articulated in *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, and has been applied in subsequent cases including *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554, at pp. 601-607, *per* L'Heureux-Dubé J., dissenting, but not on this issue; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748; and *Pushpanathan*, *supra*.

122 Paragraph C.08.010(1) of the Regulations states that the "The Director may issue a letter of authorization authorizing the sale of a quantity of a new drug ..."

123 As held by Mr. Justice McIntyre in *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2 (S.C.C.), relying on the reasons of Mr. Justice Le Dain's, who was then a member of the Federal Court of Appeal, section 28 of the *Interpretation Act* requires that the word "may" be interpreted as referring to an option, unless the context indicates otherwise.

124 In *Maple Lodge Farms*, *supra*, the Supreme Court of Canada teaches us how the courts should construe statutes that grant a discretionary power, and it lists errors which warrant the quashing of a discretionary administrative decision. Mr. Justice McIntyre wrote as follows:

> ¶ 9 In construing statutes such as those under consideration in this appeal, which provide for far-reaching and frequently complicated administrative schemes, the judicial approach should be to endeavour within the scope of the legislation to give effect to its provisions so that the administrative agencies created may function effectively, as the legislation intended. In my view, in dealing with legislation of this nature, the courts should, wherever possible, avoid a narrow, technical construction, and endeavour to make effective the legislative intent as applied to the administrative scheme involved. It is, as well, a clearly-established rule that the courts should not interfere with the exercise of a discretion by a statutory authority merely because the court might have exercised the discretion in a different manner had it

been charged with that responsibility. Where the statutory discretion has been exercised in good faith and, where required, in accordance with the principles of natural justice [page 8], and where reliance has not been placed upon considerations irrelevant or extraneous to the statutory purpose, the courts should not interfere. This approach has been followed by Le Dain J. and I accept and adopt his words, at p. 514, where, though he had earlier noted that the appellant's view of the policy guidelines was not unreasonable, he said: ...

> In the present case the Minister, acting through the Office of Special Import Policy, appears to have adopted, as the reason for refusing the supplementary import permits sought by the appellant, the considerations which are disclosed in the passages quoted above from the letters of the Agency to the appellant. These considerations relate to the quantity of eviscerated chicken available and the over-all requirements of the market. Having regard to the terms of section 5(1)(a.1) of the *Export and Import Permits Act* and the description or definition of the product in Item 19 of the Import Control List, the proclamation establishing the Agency, and the Canadian Chicken Marketing Quota Regulations, I am unable to conclude that these considerations are clearly extraneous or irrelevant to the statutory purpose for which chicken was placed on the Import Control List and to which the exercise of the Minister's discretion must be related.
>
> [Emphasis added.]

2. Guidelines

125 It is obvious that, in January 2004, Health Canada established guidelines with regard to its discretionary power on access to 714-X through the SAP. Two classes were created: the old patients, those who had been treated with the product, and the new patients, those who had not been.

126 Although administrative law acknowledges the usefulness of guidelines as to the exercise of discretionary power, it also sets forth its limits. I quote again from the reasons of Mr. Justice McIntyre in *Maple Lodge*, *supra*:

> ¶ 8 It is clear, then, in my view, that the Minister has been accorded a discretion under s. 8 of the Act. The fact that the Minister in his policy guidelines issued in the Notice to Importers employed the words: "If Canadian product is not offered at the market price, a permit will normally be issued; ..." does not fetter the exercise of that discretion. The discretion is given by the Statute and the formulation and adoption of general policy guidelines cannot confine it. There is nothing improper or unlawful for the Minister charged with responsibility for the administration of the general scheme provided for in the Act and Regulations to formulate and to state general requirements for the granting of import permits. It will be helpful to applicants [page 7] for permits to know in general terms what the policy and practice of the Minister will be. To give the guidelines the effect contended for by the appellant would be to

elevate ministerial directions to the level of law and fetter the Minister in the exercise of his discretion. Le Dain J. dealt with this question at some length and said, at p. 513:

> The Minister may validly and properly indicate the kind of considerations by which he will be guided as a general rule in the exercise of his discretion (see *British Oxygen Co. Ltd. v. Minister of Technology* [1971] A.C. (H.L.) 610; *Capital Cities Communications Inc. v. Canadian Radio-Television Commission*, [1978] 2 S.C.R. 141, at pp. 169-171), but he cannot fetter his discretion by treating the guidelines as binding upon him and excluding other valid or relevant reasons for the exercise of his discretion (see *Re Hopedale Developments Ltd. and Town of Oakville*, [1965] 1 O.R. 259).

In any case, the words employed in s. 8 do not necessarily fetter the discretion. The use of the expression "a permit will normally be issued" is by no means equivalent to the words "a permit will necessarily be issued". They impose no requirement for the issue of a permit.

[Emphasis added.]

127 However, according to the case law, if a guideline is set forth, (1) it must be based on criteria that are relevant to the exercise of discretionary power, that is to say, related to the object of the law (*Maple Lodge Farms Ltd. v. Canada* (1980), [1981] 1 F.C. 500 (Fed. C.A.)) and (2) it must be in conformity with the enabling statute (*Ramsaroop v. University of Toronto*, [2001] O.J. No. 2103 (Ont. S.C.J.));

128 It is helpful to quote some excerpts from the reasons of Mr. Justice Doherty of the Court of Appeal for Ontario in *Ainsley Financial Corp. v. Ontario (Securities Commission)* (1994), 21 O.R. (3d) 104 (Ont. C.A.) .

> The authority of a regulator, like the Commission, to issue non-binding statements or guidelines intended to inform and guide those subject to Regulations is well established in Canada. The jurisprudence clearly recognizes that regulators may, as a matter of sound administrative practice, and without any specific statutory authority for doing so, issue guidelines and other non-binding instruments.
>
> . . .
>
> Non-statutory instruments, like guidelines, are not necessarily issued pursuant to any statutory grant of the power to issue such instruments. Rather, they are an administrative tool available to the regulator so that it can exercise its statutory authority and fulfil its regulatory mandate in a fairer, more open and more effective manner. While there may be considerable merit in providing for resort to non-statutory instruments in the regulator's enabling statute, such a provision is not a prerequisite for the use of those instruments by the regulator.
>
> . . .

> Having recognized the Commission's authority to use non-statutory instruments to fulfil its mandate, the limits on the use of those instruments must also be acknowledged. A non-statutory instrument can have no effect in the face of contradictory statutory provision or Regulations: *Capital Cities Communications Inc.*, *supra*, at p. 629; H. Janisch, "Reregulating the Regulator: Administrative Structure of Securities Commissions and Ministerial Responsibility" in Special Lectures of the Law Society of Upper Canada: Securities Law in the Modern Financial Marketplace (1989), at p. 107. Nor can a non-statutory instrument pre-empt the exercise of a regulator's discretion in a particular case: *Hopedale Developments Ltd.*, *supra*, at p. 263. Most importantly, for present purposes, a non-statutory instrument cannot impose mandatory requirements enforceable by sanction; that is, the regulator cannot issue de facto laws disguised as guidelines, Iacobucci J. put it this way in *Pezim* at p. 596:
>
> > However, it is important to note that the Commission's policy-making role is limited. By that I mean that their policies cannot be elevated to the status of law; they are not to be treated as legal pronouncements absent legal authority mandating such treatment.

(See also the judgment of the Court of Appeal of Saskatchewan in *Fairhaven Billiards Inc. v. Saskatchewan (Liquor & Gaming Authority)*, [1999] S.J. No. 307 (Sask. C.A.) and Mr. Justice Blanchard's decision in *Thamotharem v. Canada (Minister of Citizenship & Immigration)*, 2006 FC 16 (F.C.).)

3. Limitations on the exercise of discretionary power

129 For over 40 years, administrative law has recognized that a discretionary power is not an absolute and untrammelled power. In *Roncarelli v. Duplessis*, [1959] S.C.R. 121 (S.C.C.), Mr. Justice Rand is of the opinion that "there is always a perspective within which a statute is intended to operate."

130 A discretionary power may not be used to achieve a goal opposed to the object of the law. Rather, its exercise must be based on considerations relevant to the object of the statute at issue. This exercise must promote the scheme, the underlying policy and the object of the law. Following is the analysis by Mr. Justice Binnie on this point in *C.U.P.E. v. Ontario (Minister of Labour)* [2003 CarswellOnt 1770 (S.C.C.)] *supra*:

> ¶ 93 The exercise of a discretion, stated Rand J. in *Roncarelli*, "is to be based upon a weighing of considerations pertinent to the object of the [statute's] administration" (p. 140). Here, as in that case, it is alleged that the decision maker took into account irrelevant considerations (e.g., membership in the "class" of retired judges) and ignored pertinent considerations (e.g., relevant expertise and broad acceptability of a proposed chairperson in the labour relations community).

¶ 94 In this case, the "perspective within which a statute is intended to operate" is that of a legislative measure that seeks to achieve industrial peace by substituting compulsory arbitration for the right to strike or lockout. The "perspective" is another way of describing the policy and objects of the statute. In the language of Lord Reid in *Padfield v. Minister of Agriculture, Fisheries and Food*, [1968] A.C. 997 (H.L.), at p. 1030:

> ... if the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court.
>
> [Emphasis added.]

Lord Reid added that "the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court" (p. 1030). See also: *Air Canada v. British Columbia (Attorney General)*, [1986] 2 S.C.R. 539; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 56; *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, [2001] 2 S.C.R. 281, 2001 SCC 41; G. Pépin and Y. Ouellette, *Principes de contentieux administratif* (2nd ed. 1982), at p. 264; D.J.M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at para. 13:1221.

[Emphasis added.]

131 However, Mr. Justice Binnie gives a word of caution:

> ¶ 107 The *HLDAA* contemplates the appointment of "a person who is, in the opinion of the Minister, qualified to act." The Minister is a senior member of the government with a vital interest in industrial peace in the province. His work in pursuit of that objective in the hospital sector, supported by his officials, should not be micro-managed by the courts. Still, as Rand J. said in *Roncarelli*, *supra*, at p. 140, the discretionary power is not "absolute and untrammelled." The discretion is constrained by the scheme and object of the *HLDDA* as a whole, which the legislature intended to serve as a "neutral and credible" substitute for the right to strike and lockout.

4. Abuse of discretionary power

132 The Supreme Court of Canada further analyzed the concept of discretionary power in *Centre hospitalier Mont-Sinaï c. Québec (Ministre de la Santé & des Services sociaux)*, [2001] 2 S.C.R. 281 (S.C.C.). In that case, the challenged decision was that of the Minister who denied the Health Center a modified permit to legalize hospital services it had been providing for several years and which the Quebec government was aware of.

133 In Mr. Justice Binnie's opinion, the issue was "whether the Minister's decision was patently unreasonable in light of all the circumstances. This issue goes to the substance of the decision as opposed to the process by which it was reached." [paragraph 52] [emphasis added].

134 The concept of abuse of discretionary power originated in English administrative law. Mr. Justice Binnie stated:

> ¶ 53 I mentioned earlier the "abuse of discretion" exception to the customary deference paid to ministerial decision making as noted by Dickson J. in *Martineau v. Matsqui*, *supra*, and reported by Sopinka J. in *Reference re Canada Assistance Plan*, *supra*. Their concern was with procedural fairness. However, the English courts have long extended "abuse of discretion" to substantive decision making which they call "Wednesbury unreasonableness" after *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corp.*, [1948] 1 K.B. 223 (C.A.). The Wednesbury case was cited with approval in *Baker v. Canada*, *supra*, at para. 53. See generally H. W. MacLauchlan, "Transforming Administrative Law: The Didactic Role of the Supreme Court of Canada" (2001), 80 Can. Bar Rev. 281, at p. 285 et seq. ¶

135 Referring again to *Baker v. Canada (Minister of Citizenship & Immigration)* , *supra*, Mr. Justice Binnie explained why he rejected some developments under English law:

> ¶ 60 Resort to the doctrine of "unreasonableness" to test the validity of substantive decisions was elaborated in *Baker v. Canada*, *supra*, at para. 53:
>
> > A general doctrine of "unreasonableness" has also sometimes been applied to discretionary decisions: *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corporation*, [1948] 1 K.B. 223 (C.A.). In my opinion, these doctrines incorporate two central ideas — that discretionary decisions, like all other administrative decisions, must be made within the bounds of the jurisdiction conferred by the statute, but that considerable deference will be given to decision-makers by courts in reviewing the exercise of that discretion and determining the scope of the decision-maker's jurisdiction.
>
> ¶ 61 *Baker v. Canada* went on to hold that the Minister and immigration officials had given insufficient weight to the impact of the decision on Ms. Baker and her Canadian-born children. This is part of the traditional *Wednesbury* test, as pointed out in *Coughlan*, *supra*, where Lord Woolf M.R. noted, at para. 58, that the test under *Wednesbury* "will be rationality and whether the public body has given proper weight to the implications of not fulfilling the promise" [emphasis added]. He went to say at para. 81: "We would prefer to regard the *Wednesbury* categories themselves as the major instances (not necessarily the sole ones) ... of how public power may be misused." On that basis he subsumed "unreasonableness" into the global English concept of administrative unfairness.

¶ 62 Where Canadian law parts company with the developing English law is the assertion, which lies at the heart of the *Coughlan* treatment of substantive fairness, of the centrality of the judicial role in regulating government policy. In *Coughlan*, it is said, at para. 76, that the decision to withhold substantive relief under the doctrine of legitimate expectation can only be justified if there is an overriding public interest. Whether there is an overriding public interest is a question for the court.

[Emphasis added.]

¶ 63 In Canada, at least to date, the courts have taken the view that it is generally the Minister who determines whether the public interest overrides or not. The courts will intervene only if it is established that the Minister's decision is patently unreasonable in the sense of irrational or perverse or (in language adopted in *Coughlan*, at para. 72) "so gratuitous and oppressive that no reasonable person could think [it] justified." This high requirement is met here where the unreasonableness, as in *Baker v. Canada*, turns on the singular lack of recognition of the serious consequences the Minister's sudden reversal of position inflicted on the [page 318] respondents who were caught in the transition between the old policy (50 short-term care beds are in the public interest) and the new policy (50 short-term care beds must be coupled to enhanced diagnostic and treatment facilities).

[Emphasis added.]

IX. Discussion and conclusions

A. Discretionary or non-discretionary power

136 No doubt that sections C.08.010 and C.08.011 of the Regulations grant the Director a discretionary power to authorize or not the sale of a new drug;

137 As Madam Justice L'Heureux-Dubé noted in *Baker*, *supra*, the concept of discretion refers to decisions where the law does not dictate a specific outcome, or where the decision-maker is given a choice of options within a statutorily imposed set of boundaries;

138 The language and structure of the provision, the selection of the word "may," the nature of the power — exempted from the requirements of the Regulations — and the purpose of the power, based partly on humanitarian considerations, demonstrate an intention to give the Director much leeway in granting, or not, a request for access to a new drug for the emergency treatment of a patient;

139 In this case, my colleague Madam Justice Tremblay-Lamer ruled on an application from Léopold Delisle seeking an interlocutory order whereby the respondent was to grant the special access requests for 714-X submitted by physicians without any further requirements and

conditions, and within 24 hours of receiving said requests without distinction, whether or not the patients had already received such an authorization. My colleague refused to make the order for several reasons (see *Delisle c. Canada (Procureur général)*, 2004 FC 788 (F.C.)).

140 In her opinion, the use of the word "may" at paragraph C.08.010(1) of the Regulations vested the Director General with a discretionary power to issue, or not, a letter of authorization for the sale of a new drug via the SAP. She wrote:

> ¶ 12 Thus, section 8.010 of the Regulations creates a discretionary authority, and not an obligation, to issue authorizations for special access. In the case at bar, the applicant is asking that the Court order the respondents to issue authorizations for special access. It is obvious that the relief sought by the applicant is a *mandamus*. But the case law on this point is well established. The Court may, in the context of an application for *mandamus*, order the performance of a public duty but it cannot dictate the appropriate result when the authority conferred by the enabling provision is discretionary (*Apotex Inc. v. Canada (Attorney General)*, [1994] 1 F.C. 742 (F.C.A.), aff'd [1994] 3 S.C.R. 1100; see, to the same effect, *Martinoff v. Canada*, [1994] 2 F.C. 33 (C.A.); *Kahlon v. Canada (Minister of Employment and Immigration)*, [1986] 3 F.C. 386 (C.A.)).
>
> [Emphasis added.]

141 She added:

> ¶ 14 Finally, this Court cannot order the respondents to accept requests for access to 714-X "[TRANSLATION] without further requirements or conditions". Such an order would be illegal, since it would be in violation of the provisions of the Regulations, which stipulate certain conditions that must be met by a physician requesting access before the Director General can exercise his discretion.
>
> [Emphasis added.]

142 I concur with these reasons;

B. Want of jurisdiction

143 In reply, the applicants' counsel correctly downplayed his argument that the January 23, 2004 decision was invalid because it was taken by Dr. Gillespie, who did not qualify as Director General under sections C.08.010 and C.08.011, that define the Director as "the Assistant Deputy Minister, Health Products and Food Branch, of the Department of Health."

144 In this case, on August 14, 1989, Albert Joseph Liston, Assistant Deputy Minister, authorized certain persons "who may, from time to time, occupy the following positions within

the Bureau of Human Prescription Drugs, Drugs Directorate ... to sign on my behalf any letters of authorization issued pursuant to section C.08.010 of the *Food and Drug Regulations*."

145 Two of the officials mentioned in the delegation of authority are the Director of the Bureau of Human Prescription Drugs and the Emergency Drug Coordination within the Bureau. The parties acknowledge that the Bureau of Human Prescription Drugs, Drug Directorate, has become the Senior Medical Advisor Bureau, which Dr. Gillespie heads, and the Emergency Drug Coordination is the one responsible for the Emergency Drug Release Program, which is now the SAP, and which Mr. MacKay heads.

146 The Canadian doctrine and case law make it clear that the maxim *delegatus non potest delegare* is not a rule of law, but simply a rule of interpretation which, unless there is a provision to the contrary, authorizing a judge to conclude, from the nature of the powers assigned, as well as from the history and the spirit of the Act, that there may be an implied delegation or subdelegation of discretionary power (see *Peralta v. Ontario*, [1988] 2 S.C.R. 1045 (S.C.C.), confirming the judgment of the Ontario Court of Appeal (1985), 16 D.L.R. (4th) 259 (Ont. C.A.), and the work of Professor Garant, *Droit administratif*, 5 e ed. 2004, Editions Yvon Blais, at pages 219 and 220.)

147 I also quote from the Supreme Court of Canada judgment, *R. v. Harrison* (1976), [1977] 1 S.C.R. 238 (S.C.C.), at page 245:

> Thus, where the exercise of a discretionary power is entrusted to a Minister of the Crown it may be presumed that the acts will be performed, not by the Minister in person, but by responsible officials in his department: *Carltona, Ltd. v. Commissioners of Works* ... The tasks of a Minister of the Crown in modern times are so many and varied that it is unreasonable to expect them to be performed personally. It is to be supposed that the Minister will select deputies and departmental officials of experience and competence, and that such appointees, for whose conduct the Minister is accountable to the Legislature, will act on behalf of the Minister [page 246], within the bounds of their respective grants of authority, in the discharge of ministerial responsibilities. Any other approach would but lead to administrative chaos and ineffectiveness. It is true that in the present case there is no evidence that the Attorney General of British Columbia personally instructed Mr. McDiarmid to act on his behalf in appealing judgments or verdicts of acquittal of trial courts but it is reasonable to assume the "Director, Criminal Law" of the Province would have that authority to instruct.

148 In *Ahmad v. Canada (Public Service Commission)*, [1974] 2 F.C. 644 (Fed. C.A.), at page 651, the Federal Court of Appeal confirmed the principles of *Caltona Ltd. v. Works Commissioners*, [1943] 2 All E.R. 560 (Eng. C.A.).

149 In my opinion, in 1989, Mr. Liston was empowered to sub-delegate the administrative discretionary power to authorize access to the Emergency Drug Release Program, now called the

SAP, and of which Dr. Gillespie and Mr. MacKay became the delegated officers. Admittedly, as administrator of the SAP, Mr. MacKay is heading a team. The evidence, however, shows that his subordinates in this case did not make the final decisions with respect to the applicants on access to the SAP and that their intervention was limited to ensuring that the requests were in accordance with the administrative requirements. Furthermore, management of the SAP is subject to written administrative procedures (Standard Operating Procedures);

150 With respect to the processing of each of the applicants' request for access, the evidence shows that the decisions for or against access were made either by Dr. Gillespie or Mr. MacKay;

C. Excess of jurisdiction

151 The applicants deny that the SAP may require from physicians further information regarding the safety and effectiveness of 714-X. In their opinion, subparagraph C.08.010(1)(*a*)(iii) of the Regulations should be construed according to its plain meaning, that is, the data to be provided is [TRANSLATION] "the data *in the possession of the physician* [emphasis added] with respect to the use, safety and efficacy of that drug."

152 This is an argument without merit. It rules out the construction recognized in *Barrie Utilities*, *supra*. It completely ignores subparagraph C.08.010(1)9(*a*)(iv) of the Regulations, which provides that physicians must submit to the Director General "such other data as the Director may require." The words "other data" may not be limited, as the applicants submit, to data other than use, safety and effectiveness, which are limited under subparagraph (ii) to data "in the possession of the practitioner." Nothing in those provisions suggests such restrictions, that would, on the other hand, deviate from the object of the Act, which is to ensure the protection of the health of Canadians by banning the sale of medication whose safety and effectiveness are not proven. Furthermore, such a construction of the Regulations would bar the exercise of discretionary power assigned to the SAP's administrators by limiting the documentation required to make an informed decision.

D. Legitimate expectation

153 The applicants' legitimate expectation argument is two-fold:

> (1) the SAP's failure to comply with its promise that requests for access would be processed within 24 hours; and
>
> (2) after having approved authorization requests for 714-X in accordance with the regulations for more than fifteen years, the SAP created a legitimate expectation that it had to abide by with respect to the litigants, whether these were the patients or the referring physicians, who relied on this product as an alternative to ineffective treatments. The applicants submitted that the administration could not deny access to 714-X without new, concrete data leading to the conclusion that the product was toxic. They submit that Health Canada's position is that it has

no evidence that 714-X is effective in treating various cancers. The applicants respond that Health Canada has no evidence that the product is ineffective. In these circumstances, Health Canada was absolutely not justified in withdrawing 714-X from the SAP.

154 I cannot accept the applicants' arguments. The SAP's guidelines do not guarantee that each request for access shall be processed within 24 hours of receipt. The SAP's guidelines acknowledge that further information may be required during the review process and simply stated that "[E]very effort is made to process requests within 24 hours ..." The guidelines also mention a number of factors in the SAP's mandate that could impede its efforts.

155 At paragraph 32 in *Centre hospitalier Mont-Sinaï c. Québec (Ministre de la Santé & des Services sociaux)*, *supra*, Mr. Justice Binnie stated that the scope of the doctrine of legitimate expectation "was shut only against substantive relief" and, at paragraph 29, that "the expectations must not conflict with the public authority's statutory remit."

156 In my opinion, the application of the doctrine of legitimate expectation, as proposed by the applicants, would provide substantive, and not procedural, relief, notwithstanding the considerable efforts deployed by the applicants' attorney in attempting to persuade me that the legal basis of the disputed decision was substantive, that is, the evidence rules.

E. The reasonableness of the January 23, 2004 decision

157 The applicants challenge the quality of the evidence required by Health Canada. They submit that this evidence is the type of evidence required for licensing, which is inappropriate with respect to the SAP.

158 I must reject that argument. During his cross-examination, Mr. MacKay clearly indicated that the level of evidence required to persuade the SAP to issue a letter of authorization is much lower than what is required to obtain a notice of compliance, but that evidence of effectiveness and safety was not considered unacceptable. As he stated:

> I'm describing here the discretion, that you don't need to back up a truck, but you need something, and what you send us has to be credible information to support the emergency use of that product within the context of the physician's request. Page 92 So you know when we're talking about emergencies here, we're talking about emergencies and we're talking about levels of evidence, we're not talking about truck loads we're talking about plausible basis that would be generally supported within the scientific and medical community, and in the context of emergency, that threshold no one would expect to be ridiculously high, but nevertheless, there is a threshold.

159 That position is highly reasonable when construing the provisions of the SAP in light of the overall framework of the Regulations and of the legislative intent, at subsection C.08.010(1)(*a*)(ii), regarding the effectiveness, use and safety of a medication accessible through the SAP;

160 The applicants' submissions on the assessment of the evidence are without merit.

161 At paragraph 85 in *S.C.F.P., Local 301 c. Québec (Conseil des services essentiels)*, [1997] 1 S.C.R. 793 (S.C.C.), at page 844, the Supreme Court of Canada stated as follows:

> 85 We must remember that the standard of review on the factual findings of an administrative tribunal is an extremely deferent one: *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, per La Forest J., at pp. 849 and 852. Courts must not revisit the facts or weigh the evidence. Only where the evidence viewed reasonably is incapable of supporting the tribunal's findings will a fact finding be patently unreasonable. An example is the allegation in this case, viz. that there is no evidence at all for a significant element of the tribunal's decision: see *Toronto Board of Education*, *supra*, at para. 48, *per* Cory J.; *Lester*, *supra*, at p. 669, *per* McLachlin J.. Such a determination may well be made without an in-depth examination of the record: *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, *per* Gonthier J., at p. 1370.

F. Unreasonable delay

162 Laurent Légère complains that the SAP did not grant him access to the SAP within a reasonable time. It appears that Dany Laforest was still awaiting a decision when she filed her application for judicial review;

163 In Laurent Légère's case, there was a delay due to what the SAP considered insufficient information in his request;

164 The Federal Court of Appeal in *Apotex Inc. v. Canada (Attorney General)* (1993), [1994] 1 F.C. 742 (Fed. C.A.)ruled that the Regulations vest Health Canada with the discretionary and exclusive power to set forth the conditions relating to the information and evidence required from the manufacturer when introducing new drugs;

165 Because, in this case, the delay was caused by the applicant, there was no unreasonable delay;

166 As to Dany Laforest, Mr. MacKay, upon cross-examination, acknowledged that her physician had submitted a request for access in early 2004. He also admitted that, from time to time, requests had been lost. Based on the balance of probabilities, my opinion is that Dany Laforest's request for access was lost by the SAP;

G. The January 23, 2004 public policy

167 The public policy on 714-X announced by Dr. Gillespie is, in fact, a set of guidelines relating to the SAP's exercise of discretionary power.

168 The case law is clear on such guidelines:

> (a) they are a unique tool, as the decision-maker announces, by and large, the type of considerations which will guide him in exercising this power;
>
> (b) however, the decision-maker may not impede the exercise of his discretion by considering this statement of policies as compulsory or binding, to the exclusion of all other valid or relevant reasons why he exercises his decision power.

169 In this case, what prompted the SAP to restrict access to the 714-X product was the lack of reliable evidence on its effectiveness and safety.

170 The SAP officials concluded that, with respect to 714-X, the SAP had become a mechanism used by the manufacturer to circumvent the general requirements of the Regulations.

171 Such considerations, in my opinion, are not unrelated to the reasons why the SAP was created.

172 But the analysis must go further. The issue is to determine whether the guidelines set out on January 23, 2004 unduly fettered the discretionary power granted to the SAP through the Regulations. In other words, was the January 23, 2004 policy mandatory? In my opinion, it was and, consequently, it is invalid for the following reasons:

173 Firstly, the SAP was created in an attempt to strike a balance between access to medication that has not yet proven itself and humanitarian reasons in the case of an illness for which the conventional treatments were ineffective or inadequate. In my opinion, the January 23, 2004 public policy does not reflect the balance sought by Parliament, because it does not take into consideration humanitarian or compassionate concerns.

174 Secondly, the public policy requires a clinical trial for 714-X before any discretionary power may be exercised.

175 Thirdly, with regard to new patients, the access door, for all intents and purposes, is shut. All requests for access on hold for new patients were denied on January 23, 2004 because they had not been treated with 714-X. The humanitarian factor was not taken into account.

176 Fourthly, the same fate awaits the old patients at the end of the interim period.

177 My finding is not harmful for Health Canada and the SAP. It simply requires a weighing of the valid objectives of the public policy against the humanitarian factor.

178 In these circumstances, there is no need to consider the argument relating to the Charter.

179 I hereby order that these reasons be filed in files T-698-04, T-2138-04, T-2139-04 and T-2140-04.

Applications granted.

2018 CAF 194, 2018 FCA 194
Federal Court of Appeal

Democracy Watch v. Canada (Attorney General)

2018 CarswellNat 12357, 2018 CarswellNat 6000, 2018 CAF 194, 2018 FCA 194, 298 A.C.W.S. (3d) 229, 428 D.L.R. (4th) 739, 48 Admin. L.R. (6th) 1

DEMOCRACY WATCH (Applicant) and ATTORNEY GENERAL OF CANADA AND DOMINIC LEBLANC (Respondents) and CONFLICT OF INTEREST AND ETHICS COMMISSIONER (Intervener)

Donald J. Rennie, Yves de Montigny, J.B. Laskin JJ.A.

Heard: September 6, 2018
Judgment: October 26, 2018
Docket: A-287-16, A-424-16

Counsel: Yavar Hameed, for Applicant
Robert MacKinnon, Zoe Oxaal, for Respondents
Barbara MacIsaac, Timothy Roland, for Intervener

***Yves de Montigny J.A.*:**

1 At issue before this Court in this application for judicial review is the authority of the Conflict of Interest and Ethics Commissioner (Commissioner) to determine whether a conflict of interest screen is an appropriate compliance measure under section 29 of the *Conflict of Interest Act*, S.C. 2006, c. 9 (the Act). The applicant challenges two Public Declarations of Agreed Compliance Measures, which it characterizes as compliance orders issued by the Commissioner, whereby Mr. Dominic LeBlanc followed his agreement with the Commissioner and put in place conflict of interest screens to avoid any involvement in matters that could result in a conflict of interest.

2 For the reasons that follow, I would dismiss this application. Even assuming that the Commissioner's determinations underpinning the impugned conflict of interest screens can be considered as reviewable decisions, I believe that they are a reasonable exercise of her authority pursuant to section 29 of the Act.

I. Legislative framework and factual background

3 The prevention of conflicts of interest is central to the Act. This is made clear in section 3 of the Act, according to which its purpose notably includes to:

> (b) minimize the possibility of conflicts arising between the private interests and public duties of public office holders and provide for the resolution of those conflicts in the public interest should they arise;
>
> (c) provide the Conflict of Interest and Ethics Commissioner with the mandate to determine the measures necessary to avoid conflicts of interest and to determine whether a contravention of this Act has occurred;
>
> [Emphasis added.]
>
> b) de réduire au minimum les possibilités de conflit entre les intérêts personnels des titulaires de charge publique et leurs fonctions officielles, et de prévoir les moyens de régler de tels conflits, le cas échéant, dans l'intérêt public;
>
> c) de donner au commissaire aux conflits d'intérêts et à l'éthique le mandat de déterminer les mesures nécessaires à prendre pour éviter les conflits d'intérêts et de décider s'il y a eu contravention à la présente loi;
>
> [Soulignement ajouté.]

4 A conflict of interest is defined, at section 4 of the Act, as a situation when the public office holder "exercises an official power, duty or function that provides an opportunity to further his or her private interests or those of his or her relatives or friends or to improperly further another person's private interests". Public office holders have, according to section 5, a duty to "arrange [their] private affairs" so as to avoid finding themselves in a conflict. They are also prevented, under subsection 6(1) of the Act, from making decisions related to their official function if they know "or reasonably should know" that, in so doing, they "would be in a conflict of interest".

5 The duty of public officials to recuse themselves in cases of conflict of interest is found at section 21 of the Act:

> 21 A public office holder shall recuse himself or herself from any discussion, decision, debate or vote on any matter in respect of which he or she would be in a conflict of interest.
>
> 21 Le titulaire de charge publique doit se récuser concernant une discussion, une décision, un débat ou un vote, à l'égard de toute question qui pourrait le placer en situation de conflit d'intérêts.

6 With this duty comes the obligation to publicly declare the recusal. Pursuant to subsection 25(1) of the Act, a public office holder who has recused himself or herself shall publicly declare

such recusal with "sufficient detail to identify the conflict of interest that was avoided". These public declarations are kept in a registry maintained by the Commissioner for examination by the public (paragraph 51(1)(a) of the Act).

7 The Commissioner advises public office holders on how to comply with the Act, and ensures compliance through a number of administrative and enforcement tools. Part 2 of the Act provides a range of compliance measures, some of which are specifically enumerated (*e.g.* at sections 21 and 27), as well as a broad power for the Commissioner, found in section 29 of the Act, to determine appropriate compliance measures:

> **Determination of appropriate measures**
>
> 29 Before they are finalized, the Commissioner shall determine the appropriate measures by which a public office holder shall comply with this Act and, in doing so, shall try to achieve agreement with the public office holder.
>
> **Détermination des mesures pertinentes**
>
> 29. Le commissaire détermine, avant qu'elle ne soit définitive, la mesure à appliquer pour que le titulaire de charge publique se conforme aux mesures énoncées dans la présente loi, et tente d'en arriver à un accord avec le titulaire de charge publique à ce sujet.

8 Finally, section 30 of the Act holds that the Commissioner may, in addition to the specific compliance measures authorized by the Act, "order a public office holder, in respect of any matter, to take any compliance measure... that the Commissioner determines is necessary to comply with this Act". An example of the Commissioner's use of section 30 compliance orders is provided in the Commissioner's *2012-2013 Annual Report to Parliament*. Having learned that a minister and two parliamentary secretaries had written letters of support to the Canadian Radio-Television and Telecommunications Commission on behalf of constituents seeking broadcasting licences, the Commissioner made compliance orders to prohibit them from writing any similar letters in the future without the Commissioner's prior approval (Application Record, Vol. 2, at pp. 303-304).

9 The relevant facts in the case at bar can be summarized as follows. On November 4, 2015, Mr. LeBlanc was appointed Leader of the Government in the House of Commons. It appears that as part of their preliminary consultations, the Commissioner determined and Mr. LeBlanc agreed that a voluntary screen was an appropriate measure under section 29 by which he could comply with the Act by preventing conflicts of interest. I use the phrase "it appears that" because the record before us is limited, and does not include documentation of any communications between the Commissioner and Mr. LeBlanc leading up to Mr. LeBlanc's agreement. On January 27, 2016, a public declaration was posted on the Commissioner's electronic public registry, announcing that a conflict of interest screen had been established by Mr. LeBlanc, in accordance with the Commissioner's determination, to help him comply with his obligation not to participate in any

matters or decisions relating to his friend, James D. Irving, or any company he may have owned. The screen was administered by Mr. LeBlanc's chief of staff (Public Declaration of Agreed Compliance Measures, January 27, 2016, Application Record, Vol. 2, at pp. 315-316).

10 On May 31, 2016, Mr. LeBlanc assumed, in addition to his prior responsibilities as House Leader, the role of Minister of Fisheries, Oceans and the Canadian Coast Guard (Minister of Fisheries). On July 12, 2016, Mr. LeBlanc signed an updated public declaration relating to his screen, which update was also posted on the Commissioner's public registry. The update reflected the addition of his new ministerial title, as well as the fact that his two chiefs of staff (as House Leader and Minister of Fisheries) would, from that point forward, administer the screen (Public Declaration of Agreed Compliance Measures, July 12, 2016, Application Record, Vol. 2, at pp. 319-320).

11 In July 2016, the applicant served on the Commissioner a Notice of Application for Judicial Review seeking an order to quash the Commissioner's "compliance order" of July 12, 2016.

12 On October 7, 2016, Mr. LeBlanc signed an updated public declaration relating to his screen. This update reflected another change to his ministerial title, having stepped down from his House Leader role but remaining as Minister of Fisheries. It replaced the declaration of July 12 (Public Declaration of Agreed Compliance Measures, October 7, 2016, Application Record, Vol. 2, at pp. 317-318).

13 On November 7, 2016, a second application for judicial review was filed, this time in respect of the October 7 "compliance order". This application raised the same issues and was based on the same grounds as the first application. As a result, the two files were consolidated by Order of Chief Justice Noël, and continued under A-287-16 as the lead file (the other file being A-424-16). By the same Order, the Commissioner was also granted intervener status, and was replaced, as respondent, by the Attorney General of Canada and Mr. LeBlanc (Application Record, Vol. 1, at p. 18).

II. Issues

14 The only substantive issue to be decided in this case is whether the Commissioner failed to exercise her jurisdiction or made an unreasonable decision in determining that screens were an appropriate compliance measure to prevent conflicts of interest. Before turning to that issue, however, I must deal with two preliminary matters raised by counsel for the respondents, namely whether the applicant has standing to raise the substantive issue and whether this Court is seized with a reviewable matter. These preliminary issues were also raised in a companion case in which judgment is also being delivered today (*Democracy Watch v. Canada (Attorney General)*, 2018 FCA 195 (F.C.A.)). The applications in the two cases were heard one after the other by the same panel of the Court.

III. Analysis

A. Preliminary matters

(1) Standing

15 It is beyond dispute that the applicant is not directly affected by the issues raised in its application. The question for the Court, therefore, is whether it should exercise its judicial discretion to grant public interest standing to the applicant. The interrelated factors to be considered in answering that question are well-known, and have been summarized by the Supreme Court in *Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)*, 2012 SCC 45, [2012] 2 S.C.R. 524 (S.C.C.) at para. 37 (*Downtown Eastside Sex Workers*):

> In exercising the discretion to grant public interest standing, the court must consider three factors: (1) whether there is a serious justiciable issue raised; (2) whether the plaintiff has a real stake or a genuine interest in it; and (3) whether, in all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts. The plaintiff seeking public interest standing must persuade the court that these factors, applied purposively and flexibly, favour granting standing. All of the other relevant considerations being equal, a plaintiff with standing as of right will generally be preferred. [References omitted.]

16 A justiciable issue for this purpose is an issue of a kind that is appropriate for judicial determination (*Downtown Eastside Sex Workers* at para. 30).

17 Counsel for the respondents submits that the applicant fails on the first and third branches of the public interest standing test. The application allegedly does not raise a justiciable issue, insofar as it concerns Parliament's own means of holding the government to account. Relying on *Canada (Auditor General) v. Canada (Minister of Energy, Mines & Resources)*, [1989] 2 S.C.R. 49 (S.C.C.) and *Canada (House of Commons) v. Vaid*, 2005 SCC 30, [2005] 1 S.C.R. 667 (S.C.C.), the respondents argue that the Court should not overstep the bounds of its constitutional role when deciding whether to grant public interest standing. Moreover, the respondents claim that the present application is not a reasonable and effective way to raise the issue, as it relates to a non-adversarial process between the Commissioner and public office holders to reach agreement on compliance measures, thereby not resulting in a "decision" or "order". Equally relevant is the fact that section 44 of the Act provides another review mechanism, allowing parliamentarians who have reasonable grounds to believe a public office holder has contravened the Act to request that the Commissioner examine the matter.

18 There is no doubt in my mind that the issues raised by the applicant are serious. Specifically, the question raised in regard to the reasonableness of the Commissioner's interpretation of section 29 of the Act constitutes an important question that is far from frivolous. The same is true of the question of whether or not the establishment of a conflict screen circumvents the requirement, pursuant to section 25, to report each recusal arising due to a conflict of interest. These issues are

also clearly justiciable, for the purpose of assessing public interest standing, as they concern the correct interpretation to be given to provisions of the Act. The Court is not called upon to play the role of an arbiter between various branches of government, but to ensure that a parliamentary servant does not stray beyond its proper legislative mandate. This is clearly and eminently a judicial function.

19 The respondents do not contest, and rightly so, the genuine interest of the applicant in the matter. Indeed, I am satisfied by the evidence on file that the applicant has demonstrated a real and continuing engagement with the issues it seeks to raise, and more generally with questions of democratic reform and ethical behaviour in government (see Affidavit of Duff Conacher, Application Record, Vol. 1, at pp. 25-26; Democracy Watch's "20 Steps" Mandate, Application Record, Vol. 1, at p. 211). Accordingly, I am of the view that this second factor favours granting public interest standing.

20 As for the third factor of the public interest standing analysis, the Supreme Court has cautioned against a rigid approach in *Downtown Eastside Sex Workers*, and relaxed the previous requirement that there be "*no* other reasonable and effective manner" (emphasis in original) by which the issue may be brought before the Court. Instead, the Court referred to the third factor as requiring consideration of whether the proposed suit is "a reasonable and effective means to bring the challenge to court" (at para. 44). Among the considerations that can be taken into account, the Court proposed the following:

> ...whether the proposed action is an economical use of judicial resources, whether the issues are presented in a context suitable for judicial determination in an adversarial setting and whether permitting the proposed action to go forward will serve the purpose of upholding the principle of legality...
>
> (*Downtown Eastside Sex Workers* at para. 50.)

21 In this case, it is clear that the applicant has the resources and expertise to bring the issue forward and that, subject to the issue of reviewability discussed below, the issue has been presented in a context sufficient to allow for judicial determination. It is also clear that, even if it is the public office holders who are directly affected by the conflict of interest screens, it is unlikely that they will challenge them in court; in any event, it can also be said that the applicant brings a useful and distinctive perspective to the resolution of the issue before us.

22 Finally, I am not convinced by the respondents' claim that the review mechanisms provided for by sections 44 and 45 of the Act constitute a more effective means by which the issues at hand could be raised. Admittedly, information from the public "may" be considered, under subsection 44(4) of the Act, by the Commissioner conducting an examination. But, as the text of the provision makes clear, this information from the public has to be brought to the attention of the Commissioner by a Member of Parliament. Moreover, for a compliance examination pursuant to these provisions

to be commenced in the first place, it is necessary for a parliamentarian to make a request to that effect (subsection 44(1) of the Act), or for the Commissioner to do it on his or her own initiative (subsection 45(1) of the Act). No direct mechanism exists for a member of the public to request an investigation into such issues, as this Court made explicitly clear in *Democracy Watch v. Canada (Conflict of Interest & Ethics Commissioner)*, 2009 FCA 15 (F.C.A.) at para. 11, leave to appeal to SCC denied, 33086 [2009 CarswellNat 1536 (S.C.C.)] (June 11, 2009) (*Democracy Watch, 2009*).

23 For all of the above reasons, I am of the view that the three factors that have to be weighed in exercising the discretion whether to grant public interest standing favour the applicant.

(2) Reviewable matter

24 Paragraph 28(1)(b.1) of the *Federal Courts Act*, R.S.C., 1985, c. F-7, recognizes the jurisdiction of this Court to hear applications for judicial review made in respect of the Commissioner. The privative clause of section 66 of the Act serves as an indication that deference is due to the Commissioner's determinations, in holding that a decision or order from her is reviewable only if the Commissioner (i) acted without jurisdiction, acted beyond his or her jurisdiction or refused to exercise his or her jurisdiction; (ii) failed to observe a principle of natural justice or procedural fairness; or (iii) acted or failed to act by reason of fraud (*Federal Courts Act*, paragraphs 18.1(4)(a), (b) and (e)).

25 Counsel for the respondents, supported by the intervener, submits that there is no legally binding decision or order to be reviewed within the meaning of section 66 of the Act and subsection 18.1(3) of the *Federal Courts Act*. More specifically, argue the respondents, the Commissioner's determination under section 29 of the Act that certain compliance measures are appropriate does not constitute an order with binding legal consequences, as would a compliance order made under section 30 of the Act.

26 The text of section 29 and its statutory context certainly provide some support for this submission. In section 29, Parliament has not used the verb "[to] order" as in section 30 of the Act, or even the verb "[to] decide", but has instead used the verb "[to] determine". Parliament has also referred, in section 29 *in fine*, to the duty of the Commissioner to "try to achieve an agreement with the public office holder", language that seems to indicate the preventive and voluntary nature of section 29 measures. As suggested by the respondents, the text of section 29 "allows for the process of attempting to achieve an agreement with a public office holder on measures they will voluntarily implement to ensure compliance" (Respondents' Memorandum, p. 15, at para. 42). Indeed, the Commissioner refers to conflict of interest screens as "arrangements" in her *2013-2014 Annual Report*, an excerpt of which is reproduced in the two impugned Public Declarations of Agreed Compliance Measures.

27 The Commissioner's power to make compliance orders under section 30 of the Act was not engaged, insofar as an agreement was reached with Mr. LeBlanc pursuant to section 29. As

the Commissioner herself made clear in her Submission to the Standing Committee on Access to Information, Privacy and Ethics dated January 30, 2013, compliance orders under section 30 of the Act are used "in circumstances in which it is not possible to reach an agreement with a public office holder on a compliance measure, where I have reason to believe that a public office holder is not adhering to the terms of a compliance measure that has been put in place, or more generally, when a public office holder is uncooperative in establishing an appropriate compliance measure" (The *Conflict of Interest Act*: Five-Year Review, Application Record, Vol. 2, at p. 261).

28 In *Democracy Watch, 2009*, this Court considered an application for judicial review brought by the same applicant, against a letter of the Commissioner explaining that she did not have sufficient grounds to begin an examination pursuant to subsection 45(1) of the Act. The Court found, on a preliminary basis, that the letter in question was "not judicially reviewable" because no order or decision had been rendered (*Democracy Watch, 2009* at para. 9). The Court also held that the applicant had "no statutory right to have its complaint investigated by the Commissioner", nor did the Commissioner have a statutory duty to act on it (*Democracy Watch, 2009* at para. 11). Furthermore, the Court was of the view that the Commissioner had not made any statements in her letter which could have binding legal effects (*Democracy Watch, 2009* at para. 12). The Supreme Court dismissed the application for leave to appeal from this judgment.

29 From that point forward, the ruling of this Court in *Democracy Watch, 2009* has been used in support of the idea that "an application for judicial review cannot be brought where the conduct attacked in the application for judicial review fails to affect legal rights, impose legal obligations, or cause prejudicial effects" (*Sganos v. Canada (Attorney General)*, 2018 FCA 84 (F.C.A.) at para. 6; See also *Air Canada v. Toronto Port Authority*, 2011 FCA 347, [2013] 3 F.C.R. 605 (F.C.A.) at para. 29). The applicant tries to distinguish the case at bar from *Democracy Watch, 2009* on the basis that the Commissioner is required to make a decision under section 29 of the Act, whereas the Commissioner has no obligation to commence an investigation upon a request from the public. But the fact that a determination has to be made does not necessarily translate into a reviewable order or decision, or give the Commissioner's determination under section 29 that certain compliance measures are appropriate binding legal consequences. It is hard, in light of the record, to see what prejudicial effect, if any, the Commissioner's determination would have on the public office holder. It is unclear, for example, whether the decision of the public office holder not to follow this determination would necessarily lead the Commissioner to make an order under section 30 of the Act. There is therefore some merit to the position that, at best, the Commissioner's advice can be characterized as a non-binding opinion, or a suggested course of action.

30 In support of its argument that there is a reviewable matter here, counsel for the applicant also submits that the conflict of interest screens result in a violation of the Act by circumventing the public office holder's duty to report, pursuant to subsection 25(1) of the Act. That argument is premised on the notion that conflict of interest screens and recusals are for all intents and purposes the same process, as the words of the screen statement regarding when and why Mr. LeBlanc will

be removed from a decision-making process and the words of section 21 of the Act regarding when and why public office holders must recuse themselves are essentially the same. Therefore, it is argued, the screen directly interferes with the statutory requirement to make a public declaration of the recusal with sufficient detail to identify the conflict that was avoided.

31 In my view, this argument is mistaken. First of all, I fail to see how this reasoning, even if true, would make the matter reviewable; it goes to the substantive merit of the application, not to the preliminary objection that the Commissioner's determination is not properly before this Court. More importantly, it completely misses the purpose of conflict of interest screens. Compliance measures such as conflict of interest screens are proactive in nature, designed to prevent conflicts of interest before they occur, allowing the public office holder not to be placed in a situation where he/she may have to recuse himself/herself. They are not meant to avoid the reporting obligation set out in section 25 of the Act, but to ensure that the public office holder will not have to recuse himself or herself from a discussion, decision, debate or vote at the last minute. As the Commissioner stated in a Backgrounder:

> Despite the Act's requirement that recusals by reporting public office holders be made public, it has been noted that the public registry contains few recusal notices. This is because in most cases the establishment of conflict of interest screens eliminates the likelihood of a situation arising that would require recusal.
>
> *Conflict of Interest Screens*. The Office helps public office holders make formal arrangements in advance in order to avoid dealing with files that pose a real or potential conflict of interest. If a conflict of interest screen is in place, files that pose a potential conflict of interest are not brought to the public office holder's attention and therefore no recusal is required.
>
> (*Conflict of Interest Screens and other Compliance Measures*, Application Record, Vol. 2, at p. 242.)

32 Public declarations of agreed compliance measures are signed by the public office holders themselves. On the contrary, a compliance order under section 30 of the Act is issued by the Commissioner. Conflict of interest screens are not meant to replace the obligation on public office holders to recuse themselves in any situation where it might become necessary pursuant to section 21 of the Act, nor do they interfere with the Commissioner's power to order a compliance measure under section 30 of the Act and to probe the conduct of public office holders should they contravene their obligations under the Act.

33 Despite the apparent strength of the argument that a "determination" under section 29 does not constitute an "order or decision" subject to judicial review, there are also textual and contextual arguments that support the position that a determination under section 29 is a "decision", if not an "order". One of the ordinary meanings of "[to] determine" is "[to] decide". Section 29 uses mandatory language in providing that the Commissioner "*shall* determine the appropriate

measures by which a public office holder shall comply" (emphasis added). This is consistent with the mandate given the Commissioner by paragraph 3(c) of the Act "to determine the measures necessary to avoid conflicts of interest".

34 There is also an argument to be made that section 29 should not be read in isolation and disconnected from section 30. One could argue that these two sections should be interpreted as a continuum, the Commissioner's determination of the appropriate measures operating, so to speak, as the "carrot" inducing the office holder's agreement, and the compliance orders, if there is no agreement, as the "stick". Viewed in that light, the measures determined by the Commissioner such as public interest screens could well be viewed as having indirect consequences and prejudicial effects on a public office holder were he or she not to follow up with these measures.

35 The applicant submitted that this case can be distinguished from *Democracy Watch, 2009*, to the extent that in the case at bar, the Commissioner made a determination instead of merely declining to act. In that previous case, the Commissioner's refusal to conduct an investigation was based on her determination, pursuant to subsection 45(1) of the Act, that she did not have sufficient "reason[s] to believe that a public office holder or former public office holder has contravened this Act...". This is why this Court wrote, at paragraph [2] of that decision, that "the Commissioner *found* that she did not have sufficient grounds to begin an examination" (emphasis added). In this respect, it can be argued that in *Democracy Watch, 2009*, the Commissioner made as much of a determination as she does here.

36 The arguments in favour of reviewability would be more compelling if there was anything in the record that would give them an air of reality. However, there is no evidence in the record specifying the determination made by the Commissioner, and there is certainly nothing in writing from the Commissioner suggesting that her determination will be followed by an order if she cannot come to an agreement with the public office holder. Indeed, there is no record of the Commissioner's determination, and it appears that the discussion between the Commissioner and Mr. LeBlanc were confidential. Accordingly, I remain hard-pressed to find any reviewable decision or order that could be the subject of judicial review.

37 However, I do not believe it necessary to finally decide this issue. In part because there have now been a number of conflict of interest screens put in place, I believe it appropriate to proceed to consider the substantive issue. Even if the Commissioner could be said to have made a reviewable decision, I believe the Commissioner's interpretation and application of the Act, on the basis of which the screens have been set up, are reasonable. I would therefore dismiss the application regardless of my conclusion on reviewability.

B. Did the Commissioner fail to exercise her jurisdiction or make an unreasonable decision?

38 Contrary to the applicant's submission, this application does not raise any true question of jurisdiction that would attract correctness review. Questions of jurisdiction, to borrow from

the language of the Supreme Court, "are narrow and will be exceptional" (*A.T.A. v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61, [2011] 3 S.C.R. 654 (S.C.C.) at para. 39 (*A.T.A.*)). I agree with my colleague Justice Stratas that questions of legislative interpretation of an administrative decision-maker's home statute, which call for reasonableness review, are often incorrectly labelled by the parties as "jurisdictional". As he stated:

> ... the issue whether an administrative tribunal is inside or outside the "jurisdictional" fences set up by Parliament is really an issue of where those fences are - in other words, an interpretation of what the legislation says about what the administrative decision-maker can or cannot do.
>
> (*Canadian Copyright Licensing Agency (Access Copyright) v. Canada*, 2018 FCA 58 (F.C.A.) at para. 58 (Justice Stratas, concurring reasons); See also, more generally on jurisdictional questions, *Bell Canada v. 7265921 Canada Ltd.*, 2018 FCA 174 (F.C.A.) at paras. 38-68 (Justice Rennie, dissenting on another issue); *Canada (Human Rights Commission) v. Canada (Attorney General)*, 2018 SCC 31 (S.C.C.) at paras. 31-38; *West Fraser Mills Ltd. v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2018 SCC 22 (S.C.C.) at paras. 9-12.)

39 Where an administrative body is interpreting its home statute or statutes closely connected to its function, the reasonableness standard of review presumptively applies (*A.T.A.* at para. 30). I see no reason to detract from this jurisprudence, especially in light of the strong privative clause at section 66 of the Act. Pursuant to that clause, questions of law, of mixed fact and law, and of fact are not reviewable. That kind of language has been interpreted as a strong indicator that deference is in order and that the standard of reasonableness should apply. As the Supreme Court stated in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.) at para. 52:

> The existence of a privative or preclusive clause gives rise to a strong indication of review pursuant to the reasonableness standard. This conclusion is appropriate because a privative clause is evidence of Parliament or a legislature's intent that an administrative decision maker be given greater deference and that interference by reviewing courts be minimized. This does not mean, however, that the presence of a privative clause is determinative. The rule of law requires that the constitutional role of superior courts be preserved and, as indicated above, neither Parliament nor any legislature can completely remove the courts' power to review the actions and decisions of administrative bodies. This power is constitutionally protected. Judicial review is necessary to ensure that the privative clause is read in its appropriate statutory context and that administrative bodies do not exceed their jurisdiction.
>
> [Emphasis added.]
>
> See also: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633at para. 104; *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32at para. 42; Donald J.M. Brown and John M. Evans, *Judicial review of administrative action in Canada*, 2nd

ed. (Toronto: Cavasback, 2018), at 13:5280; Sara Blake, *Administrative law in Canada*, (Markham, Ont.: LexisNexis Canada, 2011), 5th ed., at 8.13.

40 I also note that a number of recent decisions from this Court have implicitly followed a similar reasoning with respect to subsection 31(4) of the *Federal Public Sector Labour Relations and Employment Board Act*, S.C. 2013, c. 40, s. 365, which enacts a privative clause similarly worded to section 66 of the Act (see *Bahniuk v. Canada (Attorney General)*, 2016 FCA 127 (F.C.A.) at para. 14; *Canada (Procureur général) c. Féthière*, 2017 CAF 66 (F.C.A.) at para. 15; *MacFarlane v. Day & Ross Inc.*, 2014 FCA 199 (F.C.A.) at para. 3). I shall therefore examine the Commissioner's interpretation and application of her home statute with respect to the use of conflict of interest screens under the reasonableness standard.

41 Counsel for the applicant submits that the plain meaning and clear intent of section 21 and subsection 25(1) of the Act are to require public disclosure of the details of every specific situation in which an office holder does not take part in any discussion, decision, debate or vote on any matter in order to avoid a conflict of interest. By allowing public office holders not to issue the required public declaration detailing each of those situations, the applicant argues, the screens deny the public's right to know the details of each situation where Mr. LeBlanc has actually recused himself.

42 In my view, this argument is untenable. It mischaracterizes conflict of interest screens and mistakenly assimilates them to recusals, it ignores the intent and spirit of the Act as well as the broad language of section 29, and it leads to potentially insurmountable challenges of implementation.

43 Screens are meant to prevent conflicts of interest from actually arising, by identifying in advance the potential for conflict and establishing means to avoid it. In other words, the purpose of the screens is to divert away the potential conflicts before they are brought to the public office holder's attention. As a result, the public office holder is never even aware of the matter. In that respect, it is helpful to quote the Commissioner herself in order to grasp her own understanding of that mechanism:

> Ms. Mary Dawson: ...Basically, the screens are put in place so that information doesn't get to the person who has the screen. In other words, a decision-making situation doesn't penetrate the screen. Someone is designated to enforce the screen. There is no recusal involved because no information has gone through. If something penetrates the screen by accident, then they would have to recuse.
>
> ...[T]he whole purpose of those screens is to prevent a conflict of interest [from] happening. It doesn't negate the recusal system at all, if necessary. Sometimes it may be a surprise that something comes up. You wouldn't have foreseen it, and then you'd have a recusal.

(Standing Committee on Access to Information Privacy and Ethics, October 27, 2016, Application Record, Vol. 2, at p. 471.)

44 Accordingly, conflict of interest screens and recusals serve two very different yet complementary purposes: one is to prevent a situation of conflict of interest from arising in the first place, the other is to ensure that if and when a conflict of interest does materialize, the public office holder does not take part in the decision-making process or discussion. Indeed, conflict of interest screens do not dispense with recusals altogether. There may well be situations where the screen fails to catch a potential conflict of interest, or where the matter is not subject to a screen. In such a case, a public office holder's section 21 obligation to recuse would be engaged and he or she would be required to report the recusal under section 25, as occurred with Mr. LeBlanc in one instance (see Public Declaration of Recusal, July 11, 2016, Application Record, Vol. 2, at p. 321).

45 It seems to me that such a measure is entirely compatible with the intent and spirit of the Act. After all, the central purpose of the Act is to "*minimize the possibility of conflicts arising* between the private interests and public duties of public office holders and provide for the resolution of those conflicts in the public interest should they arise" (paragraph 3(b) of the Act; emphasis added), and to "provide the Conflict of Interest and Ethics Commissioner with *the mandate to determine the measures necessary to avoid conflicts of interest* and to determine whether a contravention of this Act has occurred..." (paragraph 3(c) of the Act; emphasis added). Moreover, section 5 of the Act provides that public office holders are to "arrange [their] private affairs in a manner that will prevent" conflicts of interest.

46 Conflict of interest screens also clearly fall within the ambit of the broad language found in section 29 of the Act. That provision empowers the Commissioner to "determine the appropriate measures" by which a public office holder is to comply with the Act. That language signals a large discretion vested with the Commissioner when fashioning the tools best suited to ensure compliance with the Act. Courts must be weary to sterilize the powers conferred by the legislature upon administrative decision-makers "through overly technical interpretations of enabling statutes" (*Bell Canada v. Canadian Radio-Television & Telecommunications Commission*, [1989] 1 S.C.R. 1722 (S.C.C.) at p. 1756). While the Act does not expressly grant to the Commissioner the power to create conflict of interest screens as appropriate compliance measures under section 29, they must be deduced from the wording of the Act by necessary implication (see *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140 (S.C.C.) at paras. 35-38; *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 S.C.R. 650 (S.C.C.) at paras. 60 and 68; *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765 (S.C.C.) at paras. 81-82). This is in keeping with subsection 31(2) of the *Interpretation Act*, R.S.C. 1985, c. I-21, which holds that:

> 31(2) Where power is given to a person, officer or functionary to do or enforce the doing of any act or thing, all such powers as are necessary to enable the person, officer or functionary to do or enforce the doing of the act or thing are deemed to be also given.
>
> 31(2) Le pouvoir donné à quiconque, notamment à un agent ou fonctionnaire, de prendre des mesures ou de les faire exécuter comporte les pouvoirs nécessaires à l'exercice de celui-ci.

47 Counsel for the applicant also contended that if the Commissioner already possessed that power, there would have been no need for her to recommend, before the Standing Committee of Access to Information, Privacy and Ethics, that her authority to establish screens be made explicit in the Act. Advocating for more clarity is no proof that the power is not already granted under section 29.

48 Likewise, it seems reasonable to say that the transparency and public accountability purposes of subsection 25(1) of the Act are also furthered by the Commissioner's practice of finding that the establishment of public conflict screens is an appropriate compliance measure. Relying on paragraph 51(1)(e) of the Act, which authorizes the Commissioner to include in the public registry any documents that he or she considers appropriate, it appears that every conflict of interest screen currently in place have been publicized in this way. This practice of publicly identifying the potential conflicts of interest of each public office holder before any problematic situation has occurred strikes me as an eminently reasonable way to ensure the furtherance of the Act's purpose, which is to be preferred to the overly technical interpretation proposed by the applicant. As pointed out by the respondents, the publication of conflict of interest screens may well end up providing more information to the public than the publication of recusals. Pursuant to paragraph 51(2)(a) of the Act, no publication of the declaration of a recusal can be made if the very fact of the recusal could reveal directly or indirectly a cabinet confidence. Similarly, paragraph 51(2)(b) of the Act is to the effect that no publication of recusal could contain any detail that could directly or indirectly reveal a cabinet confidence or other privileges, or that could injure privacy or commercial interests.

49 Finally, I also agree with the respondents that public office holders would be put in the impossible position of having to report in sufficient detail on matters and meetings they do not even know about if, as the applicant contends, sections 21 and 25 of the Act were engaged even for matters screened out by a conflict of interest screen. In the alternative, the public office holder would need to be made aware, with sufficient detail, of all matters diverted to another decision-maker by the screen and of all meetings where he or she is not scheduled to attend, in order to address the requirements of section 25. Such a course of action would negate the benefits of the screens, which once again are put in place to prevent situations of conflict of interest.

IV. Conclusion

50 For all the above reasons, I am therefore of the view that this application for judicial review should be dismissed. No costs are warranted in the special circumstances of this case.

***Donald J. Rennie J.A.*:**

I agree

***J.B. Laskin J.A.*:**

I agree

Application dismissed.

2012 SCC 45
Supreme Court of Canada

Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)

2012 CarswellBC 2818, 2012 CarswellBC 2819, 2012 SCC 45, [2012] 10 W.W.R. 423, [2012] 2 S.C.R. 524, [2012] B.C.W.L.D. 6622, [2012] B.C.W.L.D. 6634, [2012] B.C.W.L.D. 6663, [2012] A.C.S. No. 45, [2012] S.C.J. No. 45, 103 W.C.B. (2d) 625, 220 A.C.W.S. (3d) 536, 23 C.P.C. (7th) 217, 266 C.R.R. (2d) 1, 290 C.C.C. (3d) 1, 325 B.C.A.C. 1, 34 B.C.L.R. (5th) 1, 352 D.L.R. (4th) 587, 553 W.A.C. 1, 95 C.R. (6th) 1

Attorney General of Canada, Appellant and Downtown Eastside Sex Workers United Against Violence Society and Sheryl Kiselbach, Respondents and Attorney General of Ontario, Community Legal Assistance Society, British Columbia Civil Liberties Association, Ecojustice Canada, Coalition of West Coast Women's Legal Education and Action Fund (West Coast LEAF), Justice for Children and Youth, ARCH Disability Law Centre, Conseil scolaire francophone de la Colombie-Britannique, David Asper Centre for Constitutional Rights, Canadian Civil Liberties Association, Canadian Association of Refugee Lawyers, Canadian Council for Refugees, Canadian HIV/AIDS Legal Network, HIV & AIDS Legal Clinic Ontario and Positive Living Society of British Columbia, Interveners

McLachlin C.J.C, LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis JJ.

Heard: January 19, 2012

Judgment: September 21, 2012 *

Docket: 33981

Proceedings: affirming *Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)* (2010), [2011] 1 W.W.R. 628, 260 C.C.C. (3d) 95, 219 C.R.R. (2d) 171, 294 B.C.A.C. 70, 498 W.A.C. 70, 2010 CarswellBC 2729, 2010 BCCA 439, 324 D.L.R. (4th) 1, 10 B.C.L.R. (5th) 33 (B.C. C.A.)**Proceedings: reversing *Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)* (2008), [2009] 5 W.W.R. 696, 182**

C.R.R. (2d) 262, 305 D.L.R. (4th) 713, 2008 BCSC 1726, 2008 CarswellBC 2709, 90 B.C.L.R. (4th) 177 (B.C. S.C.)

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***Cromwell J.*:**

I. Introduction

1 This appeal is concerned with the law of public interest standing in constitutional cases. The law of standing answers the question of who is entitled to bring a case to court for a decision. Of course it would be intolerable if everyone had standing to sue for everything, no matter how limited a personal stake they had in the matter. Limitations on standing are necessary in order to ensure that courts do not become hopelessly overburdened with marginal or redundant cases, to screen out the mere "busybody" litigant, to ensure that courts have the benefit of contending points of view of those most directly affected and to ensure that courts play their proper role within our democratic system of government: *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607 (S.C.C.), at p. 631. The traditional approach was to limit standing to persons whose private rights were at stake or who were specially affected by the issue. In public law cases, however, Canadian courts have relaxed these limitations on standing and have taken a flexible, discretionary approach to public interest standing, guided by the purposes which underlie the traditional limitations.

2 In exercising their discretion with respect to standing, the courts weigh three factors in light of these underlying purposes and of the particular circumstances. The courts consider whether the

case raises a serious justiciable issue, whether the party bringing the action has a real stake or a genuine interest in its outcome and whether, having regard to a number of factors, the proposed suit is a reasonable and effective means to bring the case to court: *Canadian Council of Churches v. R.*, [1992] 1 S.C.R. 236 (S.C.C.), at p. 253. The courts exercise this discretion to grant or refuse standing in a "liberal and generous manner" (p. 253).

3 In this case, the respondents the Downtown Eastside Sex Workers United Against Violence Society, whose objects include improving working conditions for female sex workers, and Ms. Kiselbach, have launched a broad constitutional challenge to the prostitution provisions of the *Criminal Code*, R.S.C. 1985, c. C-46. The British Columbia Court of Appeal found that they should be granted public interest standing to pursue this challenge; the Attorney General of Canada appeals. The appeal raises one main question: whether the three factors which courts are to consider in deciding the standing issue are to be treated as a rigid checklist or as considerations to be taken into account and weighed in exercising judicial discretion in a way that serves the underlying purposes of the law of standing. In my view, the latter approach is the right one. Applying it here, my view is that the Society and Ms. Kiselbach should be granted public interest standing. I would therefore dismiss the appeal.

II. Issues

4 The issues as framed by the parties are whether the respondents should be granted public interest standing and whether Ms. Kiselbach should be granted private interest standing. In my view, this case is best resolved by considering the discretion to grant public interest standing and standing should be granted to the respondents on that basis.

III. Overview of Facts and Proceedings

A. Facts

5 The respondent Society is a registered British Columbia society whose objects include improving working conditions for female sex workers. It is run "by and for" current and former sex workers living in the Vancouver Downtown Eastside. The Society's members are women, the majority of whom are Aboriginal, living with addiction issues, health challenges, disabilities, and poverty; almost all have been victims of physical and/or sexual violence.

6 Sheryl Kiselbach is a former sex worker currently working as a violence prevention coordinator in the Downtown Eastside. For approximately 30 years, Ms. Kiselbach engaged in a number of forms of sex work, including exotic dancing, live sex shows, work in massage parlours and street-level free-lance prostitution. During the course of this time, she was convicted of several prostitution-related offences. Ms. Kiselbach left the sex industry in 2001. She claims to have been unable to participate in a court challenge to prostitution laws when working as a sex worker because of risk of public exposure, fear for her personal safety, and the potential loss of social services,

income assistance, clientele and employment opportunities (chambers judge's reasons, 90 B.C.L.R. (4th) 177 (B.C. S.C.) [*Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)*], at paras. 29 and 44).

7 The respondents commenced an action challenging the constitutional validity of sections of the *Criminal Code* that deal with different aspects of prostitution. They seek a declaration that these provisions violate the rights of free expression and association, to equality before the law and to life, liberty and security of the person guaranteed by ss. 2(*b*), 2(*d*), 7 and 15 of the *Canadian Charter of Rights and Freedoms*. The challenged provisions are what I will refer to as the "prostitution provisions", the "bawdy house provisions", the "procurement provision" and the "communication provision". Prostitution provisions is the generic term to refer to the provisions in the *Criminal Code* relating to the criminalization of activities related to prostitution (ss. 210 to 213). Within these provisions can be found the bawdy house provisions, which include those relating to keeping and being within a common bawdy house (s. 210), and transporting a person to a common bawdy house (s. 211). The procurement provision refers to the act of procuring and living on the avails of prostitution (s. 212, except for s. 212(1)(*g*) and (*i*)), while the communication provision refers to the act of soliciting in a public place (s. 213(1)(*c*)). Neither respondent is currently charged with any of the offences challenged.

8 The respondents' position is that the prostitution provisions (ss. 210 to 213) infringe s. 2(*d*) freedom of association rights because these provisions prevent prostitutes from joining together to increase their personal safety; s. 7 security of the person rights due to the possibility of arrest and imprisonment and because the provisions prevent prostitutes from taking steps to improve the health and safety conditions of their work; s. 15 equality rights because the provisions discriminate against members of a disadvantaged group; and s. 2(*b*) freedom of expression rights by making illegal communication which could serve to increase safety and security.

B. Proceedings

(1) British Columbia Supreme Court (Ehrcke J.)

9 The Attorney General of Canada applied in British Columbia Supreme Court Chambers to dismiss the respondents' action on the ground that they lacked standing to bring it. In the alternative, he applied under Rule 19(24) of the *Supreme Court Rules*, B.C. Reg. 221/90 (replaced by *Supreme Court Civil Rules*, B.C. Reg. 168/2009, effective July 1, 2010), to have portions of the statement of claim struck out and part of the action stayed on the basis that the pleadings disclosed no reasonable claim. In the further alternative, he applied for particulars which he said were necessary in order to know the case to be met (chambers judge's reasons, at para. 2). The chambers judge dismissed the action, holding that neither respondent had private interest standing and that discretionary public interest standing should not be granted to them. In light of this conclusion, the chambers judge

found it unnecessary to consider the Attorney General's applications under Rule 19(24) and for particulars (para. 88).

10 The chambers judge reasoned that neither the Society nor Ms. Kiselbach was charged with any of the impugned provisions or was a defendant in an action brought by a government agency relying upon the legislation. Further, the Society is a separate entity with rights distinct from those of its members. Ms. Kiselbach, he determined, was not entitled to private interest standing because she was not currently engaged in sex work and the continued stigma associated with her past convictions could not give rise to private interest standing because that would amount to a collateral attack on her previous convictions.

11 The chambers judge turned to public interest standing and found that he should not exercise his discretion to grant standing to either respondent. He reviewed what he described as the three "requirements" for public interest standing as set out in *Canadian Council of Churches* and concluded that the respondents' action raised serious constitutional issues and they had a genuine interest in the validity of the provisions. Thus, the judge held that the first and second "requirements" for public interest standing were established. He then turned to the third part of the test, "whether, if standing is denied, there exists another reasonable and effective way to bring the issue before the court" (para. 70). This, in the judge's view, was where the respondents' claim for standing faltered.

12 He agreed with the Attorney General's argument that the provisions could be challenged by litigants charged under them. The fact that members of the Society were "particularly vulnerable" and allegedly unable to come forward could not give rise to public interest standing (para. 76). Members of the Society would likely have to come forward as witnesses should the matter proceed to trial and if they were willing to testify as witnesses, they were able to come forward as plaintiffs. The chambers judge noted that there was litigation underway in Ontario raising many of the same issues: *Bedford v. Canada (Attorney General)*, 2010 ONSC 4264, 327 D.L.R. (4th) 52 (Ont. S.C.J.), rev'd in part, *Bedford v. Canada (Attorney General)* (2012), 2012 ONCA 186, 109 O.R. (3d) 1 (Ont. C.A.). He reasoned that, while the existence of this litigation was not necessarily a sufficient reason for denying standing, it tended to show that there "may nevertheless be potential plaintiffs with personal interest standing who could, if they chose to do so, bring all of these issues before the court" (para. 75). He also referred to the fact that there had been a number of cases in British Columbia and elsewhere where the impugned legislation had been challenged and that there are hundreds of criminal prosecutions every year in British Columbia in each of which the accused "would be entitled, as of right, to raise the constitutional issues that the plaintiffs seek to raise in the case at bar" (para. 77).

13 The judge concluded that he was bound to apply the test of whether there is no other reasonable and effective way to bring the issue before the court and that the respondents did not meet that test (para. 85).

(2) British Columbia Court of Appeal (2010 BCCA 439, 10 B.C.L.R. (5th) 33 (B.C. C.A.) [Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)], Saunders J.A., Neilson J.A. Concurring, Groberman J.A. Dissenting)

14 The respondents appealed, submitting that the chambers judge had erred by rejecting private interest standing for Ms. Kiselbach and public interest standing for both respondents. The chambers judge's finding that the Society did not have private interest standing was not appealed (para. 3). The majority of the Court of Appeal upheld the chambers judge's decision to deny Ms. Kiselbach's private interest standing, but concluded that both respondents ought to have been granted public interest standing. The only issue on which the Court of Appeal divided was with respect to the third factor, that is, whether standing should be denied because there were other ways the issues raised in the respondents' proceedings could be brought before the courts.

15 Saunders J.A. (Neilson J.A. concurring), writing for the majority, found no reason for denying public interest standing. She held that this Court has made it clear that the discretion to grant standing must not be exercised mechanistically but rather in a broad and liberal manner to achieve the objective of ensuring that impugned laws are not immunized from review. The majority read the dissenting reasons for judgment of Binnie and LeBel JJ. in *Chaoulli c. Québec (Procureur général)*, 2005 SCC 35, [2005] 1 S.C.R. 791 (S.C.C.), as characterizing the *Charter* challenge in that case as a "systemic" challenge, which differs in scope from an individual's challenge addressing a discrete issue. To the majority, *Chaoulli* recognized that any problems arising from the difference in scope of the challenge may be resolved by taking "a more relaxed view of standing in the right case" (para. 59).

16 Applying this approach, the majority considered this case to fall closer on the spectrum to *Chaoulli* than to *Canadian Council of Churches*. Saunders J.A. took the view that the chambers judge had stripped the action of its central thesis by likening it to cases in which prostitution-related charges were laid. Saunders J.A. focused on the multi-faceted nature of the proposed challenge and felt that the respondents were seeking to challenge the *Criminal Code* provisions with reference to their cumulative effect on sex trade workers. In the majority judges' view, public interest standing ought to be granted in this case because the essence of the complaint was that the law impermissibly renders individuals vulnerable while they go about otherwise lawful activities and exacerbates their vulnerability.

17 In dissent, Groberman J.A. agreed with the chambers judge's reasoning. In his view, this case did not raise any challenges that could not be advanced by persons with private interest standing. He accepted the respondents' position that it was unlikely that a case would arise in which a multi-pronged attack on all of the impugned provisions could take place. However, he did not consider that the lack of such an opportunity established a valid basis for public interest standing. He took the view that a very broad-ranging challenge such as the one in this case required extensive evidence

on a multitude of issues and he did not find it clear that the litigation process would deal fairly and effectively with such a challenge in a reasonable amount of time. Interpreting the judgment in *Chaoulli*, Groberman J.A. held that the Court had not broadened the basis for public interest standing. In his view, *Chaoulli* did not establish that public interest standing should be granted preferentially for wide and sweeping attacks on legislation.

IV. Analysis

A. Public Interest Standing

(1) The Central Issue

18 In *Borowski v. Canada (Minister of Justice)*, [1981] 2 S.C.R. 575 (S.C.C.), the majority of the Court summed up the law of standing to seek a declaration that legislation is invalid as follows: if there is a serious justiciable issue as to the law's invalidity, "a person need only to show that he is affected by it directly or that he has a genuine interest as a citizen in the validity of the legislation and that there is no other reasonable and effective manner in which the issue may be brought before the Court" (p. 598). At the root of this appeal is how this approach to standing should be applied.

19 The chambers judge, supported by quotations from the leading cases, was of the view that the law sets out three requirements — something in the nature of a checklist — which a person seeking discretionary public interest standing must establish in order to succeed. The respondents, on the other hand, contend for a more flexible approach, emphasizing the discretionary nature of the standing decision. The debate focuses on the third factor as it was expressed in *Borowski* — that there is no other reasonable and effective manner in which the issue may be brought to the court — and concerns how strictly this factor should be defined and how it should be applied.

20 My view is that the three elements identified in *Borowski* are interrelated factors that must be weighed in exercising judicial discretion to grant or deny standing. These factors, and especially the third one, should not be treated as hard and fast requirements or free-standing, independently operating tests. Rather, they should be assessed and weighed cumulatively, in light of the underlying purposes of limiting standing and applied in a flexible and generous manner that best serves those underlying purposes.

21 I do not propose to lead a forced march through all of the Court's case law on public interest standing. However, I will highlight some key aspects of the Court's standing jurisprudence: its purposive approach, its underlying concern with the principle of legality and its emphasis on the wise application of judicial discretion. I will then explain that, in my view, the proper consideration of these factors supports the Court of Appeal's conclusion that the respondents ought to be granted public interest standing.

(2) The Purposes of Standing Law

22 The courts have long recognized that limitations on standing are necessary; not everyone who may want to litigate an issue, regardless of whether it affects them or not, should be entitled to do so: *Canadian Council of Churches*, at p. 252. On the other hand, the increase in governmental regulation and the coming into force of the *Charter* have led the courts to move away from a purely private law conception of their role. This has been reflected in some relaxation of the traditional private law rules relating to standing to sue: *Canadian Council of Churches*, at p. 249, and see generally, O. M. Fiss, "The Social and Political Foundations of Adjudication" (1982), 6 *Law & Hum. Behav*. 121. The Court has recognized that, in a constitutional democracy like Canada with a *Charter of Rights and Freedoms*, there are occasions when public interest litigation is an appropriate vehicle to bring matters of public interest and importance before the courts.

23 This Court has taken a purposive approach to the development of the law of standing in public law cases. In determining whether to grant standing, courts should exercise their discretion and balance the underlying rationale for restricting standing with the important role of the courts in assessing the legality of government action. At the root of the law of standing is the need to strike a balance "between ensuring access to the courts and preserving judicial resources": *Canadian Council of Churches*, at p. 252.

24 It will be helpful to trace, briefly, the underlying purposes of standing law which the Court has identified and how they are considered.

25 The most comprehensive discussion of the reasons underlying limitations on standing may be found in *Finlay*, at pp. 631-34. The following traditional concerns, which are seen as justifying limitations on standing, were identified: properly allocating scarce judicial resources and screening out the mere busybody; ensuring that courts have the benefit of contending points of view of those most directly affected by the determination of the issues; and preserving the proper role of courts and their constitutional relationship to the other branches of government. A brief word about each of these traditional concerns is in order.

(a) Scarce Judicial Resources and "Busybodies"

26 The concern about the need to carefully allocate scarce judicial resources is in part based on the well-known "floodgates" argument. Relaxing standing rules may result in many persons having the right to bring similar claims and "grave inconvenience" could be the result: see e.g. *Smith v. Ontario (Attorney General)*, [1924] S.C.R. 331 (S.C.C.), at p. 337. Cory J. put the point cogently on behalf of the Court in *Canadian Council of Churches*, at p. 252: "It would be disastrous if the courts were allowed to become hopelessly overburdened as a result of the unnecessary proliferation of marginal or redundant suits brought by well-meaning organizations pursuing their own particular cases certain in the knowledge that their cause is all important." This factor is not concerned with the convenience or workload of judges, but with the effective operation of the court system as a whole.

27 The concern about screening out "mere busybodies" relates not only to the issue of a possible multiplicity of actions but, in addition, to the consideration that plaintiffs with a personal stake in the outcome of a case should get priority in the allocation of judicial resources. The court must also consider the possible effect of granting public interest standing on others. For example, granting standing may undermine the decision not to sue by those with a personal stake in the case. In addition, granting standing for a challenge that ultimately fails may prejudice other challenges by parties with "specific and factually established complaints": *Hy & Zel's Inc. v. Ontario (Attorney General)*, [1993] 3 S.C.R. 675 (S.C.C.), at p. 694.

28 These concerns about a multiplicity of suits and litigation by "busybodies" have long been acknowledged. But it has also been recognized that they may be overstated. Few people, after all, bring cases to court in which they have no interest and which serve no proper purpose. As Professor K. E. Scott once put it, "[t]he idle and whimsical plaintiff, a dilettante who litigates for a lark, is a specter which haunts the legal literature, not the courtroom": "Standing in the Supreme Court — A Functional Analysis" (1973), 86 *Harv. L. Rev.* 645, at p. 674. Moreover, the blunt instrument of a denial of standing is not the only, or necessarily the most appropriate means of guarding against these dangers. Courts can screen claims for merit at an early stage, can intervene to prevent abuse and have the power to award costs, all of which may provide more appropriate means to address the dangers of a multiplicity of suits or litigation brought by mere busybodies: see e.g. *Thorson v. Canada (Attorney General) (No. 2)* (1974), [1975] 1 S.C.R. 138 (S.C.C.), at p. 145.

(b) Ensuring Contending Points of View

29 The second underlying purpose of limiting standing relates to the need for courts to have the benefit of contending points of view of the persons most directly affected by the issue. Courts function as impartial arbiters within an adversary system. They depend on the parties to present the evidence and relevant arguments fully and skillfully. "[C]oncrete adverseness" sharpens the debate of the issues and the parties' personal stake in the outcome helps ensure that the arguments are presented thoroughly and diligently: see e.g. *Baker v. Carr* (1962), 369 U.S. 186 (U.S. Sup. Ct.) (1962), at p. 284.

(c) The Proper Judicial Role

30 The third concern relates to the proper role of the courts and their constitutional relationship to the other branches of government. The premise of our discretionary approach to public interest standing is that the proceedings raise a justiciable question, that is, a question that is appropriate for judicial determination: *Finlay*, at p. 632; *Canada (Auditor General) v. Canada (Minister of Energy, Mines & Resources)*, [1989] 2 S.C.R. 49 (S.C.C.), at pp. 90-91; see also L. M. Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (2nd ed. 2012), at pp. 6-10. This concern engages consideration of the nature of the issue and the institutional capacity of the courts to address it.

(3) The Principle of Legality

31 The principle of legality refers to two ideas: that state action should conform to the Constitution and statutory authority and that there must be practical and effective ways to challenge the legality of state action. This principle was central to the development of public interest standing in Canada. For example, in the seminal case of *Thorson*, Laskin J. wrote that the "right of the citizenry to constitutional behaviour by Parliament" (p. 163) supports granting standing and that a question of constitutionality should be not be "immunized from judicial review by denying standing to anyone to challenge the impugned statute" (p. 145). He concluded that "*it would be strange and, indeed, alarming, if there was no way in which a question of alleged excess of legislative power, a matter traditionally within the scope of the judicial process, could be made the subject of adjudication*" (p. 145 (emphasis added)).

32 The legality principle was further discussed in *Finlay*. The Court noted the "repeated insistence in *Thorson* on the importance in a federal state that there be some access to the courts to challenge the constitutionality of legislation" (p. 627). To Le Dain J., this was "the dominant consideration of policy in *Thorson*" (*Finlay*, at p. 627). After reviewing the case law on public interest standing, the Court in *Finlay* extended the scope of discretionary public interest standing to challenges to the statutory authority for administrative action. This was done, in part because these types of challenges were supported by the concern to maintain respect for the "limits of statutory authority" (p. 631).

33 The importance of the principle of legality was reinforced in *Canadian Council of Churches*. The Court acknowledged both aspects of this principle: that no law should be immune from challenge and that unconstitutional laws should be struck down. To Cory J., the *Constitution Act, 1982* "entrench[ed] the fundamental right of the public to government in accordance with the law" (p. 250). The use of "discretion" in granting standing was "necessary to ensure that legislation conforms to the Constitution and the *Charter*" (p. 251). Cory J. noted that the passage of the *Charter* and the courts' new concomitant constitutional role called for a "general and liberal" approach to standing (p. 250). He stressed that there should be no "mechanistic application of a technical requirement. Rather it must be remembered that the basic purpose for allowing public interest standing is to ensure that legislation is not immunized from challenge" (p. 256).

34 In *Hy and Zel's*, Major J. commented on the underlying rationale for restricting standing and the balance that needs to be struck between limiting standing and giving due effect to the principle of legality:

> If there are other means to bring the matter before the court, scarce judicial resources may be put to better use. Yet the same test prevents the immunization of legislation from review as would have occurred in the *Thorson* and *Borowski* situations. [p. 692]

(4) Discretion

35 From the beginning of our modern public interest standing jurisprudence, the question of standing has been viewed as one to be resolved through the wise exercise of judicial discretion. As Laskin J. put it in *Thorson*, public interest standing "is a matter particularly appropriate for the exercise of judicial discretion, relating as it does to the effectiveness of process" (p. 161); see also pp. 147, 161 and 163; *MacNeil v. Nova Scotia (Board of Censors)* (1975), [1976] 2 S.C.R. 265 (S.C.C.), at pp. 269 and 271; *Borowski*, at p. 593; *Finlay*, at pp. 631-32 and 635. The decision to grant or refuse standing involves the careful exercise of judicial discretion through the weighing of the three factors (serious justiciable issue, the nature of the plaintiff's interest, and other reasonable and effective means). Cory J. emphasized this point in *Canadian Council of Churches* where he noted that the factors to be considered in exercising this discretion should not be treated as technical requirements and that the principles governing the exercise of this discretion should be interpreted in a liberal and generous manner (pp. 256 and 253).

36 It follows from this that the three factors should not be viewed as items on a checklist or as technical requirements. Instead, the factors should be seen as interrelated considerations to be weighed cumulatively, not individually, and in light of their purposes.

(5) A Purposive and Flexible Approach to Applying the Three Factors

37 In exercising the discretion to grant public interest standing, the court must consider three factors: (1) whether there is a serious justiciable issue raised; (2) whether the plaintiff has a real stake or a genuine interest in it; and (3) whether, in all the circumstances, the proposed suit is a reasonable and effective way to bring the issue before the courts: *Borowski*, at p. 598; *Finlay*, at p. 626; *Canadian Council of Churches*, at p. 253; *Hy and Zel's*, at p. 690; *Chaoulli*, at paras. 35 and 188. The plaintiff seeking public interest standing must persuade the court that these factors, applied purposively and flexibly, favour granting standing. All of the other relevant considerations being equal, a plaintiff with standing as of right will generally be preferred.

38 The main issue that separates the parties relates to the formulation and application of the third of these factors. However, as the factors are interrelated and there is some disagreement between the parties with respect to at least one other factor, I will briefly review some of the considerations relevant to each and then turn to my analysis of how the factors play out here.

(a) Serious Justiciable Issue

39 This factor relates to two of the concerns underlying the traditional restrictions on standing. In *Finlay*, Le Dain J. linked the justiciability of an issue to the "concern about the proper role of the courts and their constitutional relationship to the other branches of government" and the

seriousness of the issue to the concern about allocation of scarce judicial resources (p. 631); see also L'Heureux-Dubé J., in dissent, in *Hy and Zel's*, at pp. 702-3.

40 By insisting on the existence of a justiciable issue, courts ensure that their exercise of discretion with respect to standing is consistent with the court staying within the bounds of its proper constitutional role (*Finlay*, at p. 632). Le Dain J. in *Finlay* referred to *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441 (S.C.C.), and wrote that "where there is an issue which is appropriate for judicial determination the courts should not decline to determine it on the ground that because of its policy context or implications it is better left for review and determination by the legislative or executive branches of government": pp. 632-33; see also L. Sossin, "The Justice of Access: Who Should Have Standing to Challenge the Constitutional Adequacy of Legal Aid?" (2007), 40 *U.B.C. L. Rev.* 727, at pp. 733-34; Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, at p. 27.

41 This factor also reflects the concern about overburdening the courts with the "unnecessary proliferation of marginal or redundant suits" and the need to screen out the mere busybody: *Canadian Council of Churches*, at p. 252; *Finlay*, at pp. 631- 33. As discussed earlier, these concerns can be overplayed and must be assessed practically in light of the particular circumstances rather than abstractly and hypothetically. Other possible means of guarding against these dangers should also be considered.

42 To constitute a "serious issue", the question raised must be a "substantial constitutional issue" (*McNeil*, at p. 268) or an "important one" (*Borowski*, at p. 589). The claim must be "far from frivolous" (*Finlay*, at p. 633), although courts should not examine the merits of the case in other than a preliminary manner. For example, in *Hy and Zel's*, Major J. applied the standard of whether the claim was so unlikely to succeed that its result would be seen as a "foregone conclusion" (p. 690). He reached this position in spite of the fact that the Court had seven years earlier decided that the same Act was constitutional: *R. v. Videoflicks Ltd.*, [1986] 2 S.C.R. 713 (S.C.C.). Major J. held that he was "prepared to assume that the numerous amendments have sufficiently altered the Act in the seven years since *Edwards Books* so that the Act's validity is no longer a foregone conclusion" (*Hy and Zel's*, at p. 690). In *Canadian Council of Churches*, the Court had many reservations about the nature of the proposed action, but in the end accepted that "some aspects of the statement of claim could be said to raise a serious issue as to the validity of the legislation" (p. 254). Once it becomes clear that the statement of claim reveals at least one serious issue, it will usually not be necessary to minutely examine every pleaded claim for the purpose of the standing question.

(b) The Nature of the Plaintiff's Interest

43 In *Finlay*, the Court wrote that this factor reflects the concern for conserving scarce judicial resources and the need to screen out the mere busybody (p. 633). In my view, this factor

is concerned with whether the plaintiff has a real stake in the proceedings or is engaged with the issues they raise. The Court's case law illustrates this point. In *Finlay*, for example, although the plaintiff did not in the Court's view have standing as of right, he nonetheless had a direct, personal interest in the issues he sought to raise. In *Borowski*, the Court found that the plaintiff had a genuine interest in challenging the exculpatory provisions regarding abortion. He was a concerned citizen and taxpayer and he had sought unsuccessfully to have the issue determined by other means (p. 597). The Court thus assessed Mr. Borowski's engagement with the issue in assessing whether he had a genuine interest in the issue he advanced. Further, in *Canadian Council of Churches*, the Court held it was clear that the applicant had a "genuine interest", as it enjoyed "the highest possible reputation and has demonstrated a real and continuing interest in the problems of the refugees and immigrants" (p. 254). In examining the plaintiff's reputation, continuing interest, and link with the claim, the Court thus assessed its "engagement", so as to ensure an economical use of scarce judicial resources (see K. T. Roach, *Constitutional Remedies in Canada* (loose-leaf), at ¶ 5.120).

(c) Reasonable and Effective Means of Bringing the Issue Before the Court

44 This factor has often been expressed as a strict requirement. For example, in *Borowski*, the majority of the Court stated that the person seeking discretionary standing has "to show ... that there is *no* other reasonable and effective manner in which the issue may be brought before the Court" (p. 598 (emphasis added)); see also *Finlay*, at p. 626; *Hy and Zel's*, at p. 690. However, this consideration has not always been expressed and rarely applied so restrictively. My view is that we should now make clear that it is one of the three factors which must be assessed and weighed in the exercise of judicial discretion. It would be better, in my respectful view, to refer to this third factor as requiring consideration of whether the proposed suit is, in all of the circumstances, and in light of a number of considerations I will address shortly, a reasonable and effective means to bring the challenge to court. This approach to the third factor better reflects the flexible, discretionary and purposive approach to public interest standing that underpins all of the Court's decisions in this area.

(i) The Court Has Not Always Expressed and Rarely Applied This Factor Rigidly

45 A fair reading of the authorities from this Court demonstrates, in my view, that while this factor has often been expressed as a strict requirement, the Court has not done so consistently and in fact has not approached its application in a rigid fashion.

46 The strict formulation of the third factor as it appeared in *Borowski* was not used in the two major cases on public interest standing: *Thorson*, at p. 161; *McNeil*, at p. 271. Moreover, in *Canadian Council of Churches*, the third factor was expressed as whether "there [was] *another* reasonable and effective way to bring the issue before the court" (p. 253 (emphasis added)).

47 A number of decisions show that this third factor, however formulated, has not been applied rigidly. For example, in *McNeil*, at issue was the constitutionality of the legislative scheme

empowering a provincial board to permit or prohibit the showing of films to the public. It was clear that there were persons who were more directly affected by this regulatory scheme than was the plaintiff, notably the theatre owners and others who were the subject of that scheme. Nonetheless, the Court upheld granting discretionary public interest standing on the basis that the plaintiff, as a member of the public, had a different interest than the theatre owners and that there was no other way "practically speaking" to get a challenge of that nature before the court (pp. 270-71). Similarly in *Borowski*, although there were many people who were more directly affected by the legislation in question, they were unlikely in practical terms to bring the type of challenge brought by the plaintiff (pp. 597-98). In both cases, the consideration of whether there were no other reasonable and effective means to bring the matter before the court was addressed from a practical and pragmatic point of view and in light of the particular nature of the challenge which the plaintiffs proposed to bring.

48 Even when standing was denied because of this factor, the Court emphasized the need to approach discretionary standing generously and not by applying the factors mechanically. The best example is *Canadian Council of Churches*. On one hand, the Court stated that granting discretionary public interest standing "is not required when, on a balance of probabilities, it can be shown that the measure will be subject to attack by a private litigant" (p. 252). However, on the other hand, the Court emphasized that public interest standing is discretionary, that the applicable principles should be interpreted "in a liberal and generous manner" and that the other reasonable and effective means aspect must not be interpreted mechanically as a "technical requirement" (pp. 253 and 256).

(ii) This Factor Must Be Applied Purposively

49 This third factor should be applied in light of the need to ensure full and complete adversarial presentation and to conserve judicial resources. In *Finlay*, the Court linked this factor to the concern that the "court should have the benefit of the contending views of the persons most directly affected by the issue" (p. 633); see also Roach, at ¶ 5.120. In *Hy and Zel's*, Major J. linked this factor to the concern about needlessly overburdening the courts, noting that "[i]f there are other means to bring the matter before the court, scarce judicial resources may be put to better use" (p. 692). The factor is also closely linked to the principle of legality, since courts should consider whether granting standing is desirable from the point of view of ensuring lawful action by government actors. Applying this factor purposively thus requires the court to consider these underlying concerns.

(iii) A Flexible Approach Is Required to Consider the "Reasonable and Effective" Means Factor

50 The Court's jurisprudence to date does not have much to say about how to assess whether a particular means of bringing a matter to court is "reasonable and effective". However, by taking a purposive approach to the issue, courts should consider whether the proposed action is an

economical use of judicial resources, whether the issues are presented in a context suitable for judicial determination in an adversarial setting and whether permitting the proposed action to go forward will serve the purpose of upholding the principle of legality. A flexible, discretionary approach is called for in assessing the effect of these considerations on the ultimate decision to grant or to refuse standing. There is no binary, yes or no, analysis possible: whether a means of proceeding is reasonable, whether it is effective and whether it will serve to reinforce the principle of legality are matters of degree and must be considered in light of realistic alternatives in all of the circumstances.

51 It may be helpful to give some examples of the types of interrelated matters that courts may find useful to take into account when assessing the third discretionary factor. This list, of course, is not exhaustive but illustrative.

• The court should consider the plaintiff's capacity to bring forward a claim. In doing so, it should examine amongst other things, the plaintiff's resources, expertise and whether the issue will be presented in a sufficiently concrete and well-developed factual setting.

• The court should consider whether the case is of public interest in the sense that it transcends the interests of those most directly affected by the challenged law or action. Courts should take into account that one of the ideas which animates public interest litigation is that it may provide access to justice for disadvantaged persons in society whose legal rights are affected. Of course, this should not be equated with a licence to grant standing to whoever decides to set themselves up as the representative of the poor or marginalized.

• The court should turn its mind to whether there are realistic alternative means which would favour a more efficient and effective use of judicial resources and would present a context more suitable for adversarial determination. Courts should take a practical and pragmatic approach. The existence of other potential plaintiffs, particularly those who would have standing as of right, is relevant, but the practical prospects of their bringing the matter to court at all or by equally or more reasonable and effective means should be considered in light of the practical realities, not theoretical possibilities. Where there are other actual plaintiffs in the sense that other proceedings in relation to the matter are under way, the court should assess from a practical perspective what, if anything, is to be gained by having parallel proceedings and whether the other proceedings will resolve the issues in an equally or more reasonable and effective manner. In doing so, the court should consider not only the particular legal issues or issues raised, but whether the plaintiff brings any particularly useful or distinctive perspective to the resolution of those issues. As, for example, in *McNeil*, even where there may be persons with a more direct interest in the issue, the plaintiff may have a distinctive and important interest different from them and this may support granting discretionary standing.

• The potential impact of the proceedings on the rights of others who are equally or more directly affected should be taken into account. Indeed, courts should pay special attention

> where private and public interests may come into conflict. As was noted in *Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086 (S.C.C.), at p. 1093, the court should consider, for example, whether "the failure of a diffuse challenge could prejudice subsequent challenges to the impugned rules by parties with specific and factually established complaints". The converse is also true. If those with a more direct and personal stake in the matter have deliberately refrained from suing, this may argue against exercising discretion in favour of standing.

(iv) Conclusion

52 I conclude that the third factor in the public interest standing analysis should be expressed as: whether the proposed suit is, in all of the circumstances, a reasonable and effective means of bringing the matter before the court. This factor, like the other two, must be assessed in a flexible and purposive manner and weighed in light of the other factors.

(6) Weighing the Three Factors

53 I return to the circumstances of this case in light of the three factors which must be considered: whether the case raises a serious justiciable issue, whether the respondents have a real stake or a genuine interest in the issue(s) and the suit is a reasonable and effective means of bringing the issues before the courts in all of the circumstances. Although there is little dispute that the first two factors favour granting standing, I will review all three as in my view they must be weighed cumulatively rather than individually. I conclude that when all three factors are considered in a purposive, flexible and generous manner, the Court of Appeal was right to grant public interest standing to the Society and Ms. Kiselbach.

(a) Serious Justiciable Issue

54 As noted, with one exception, there is no dispute that the respondents' action raises serious and justiciable issues. The constitutionality of the prostitution laws certainly constitutes a "substantial constitutional issue" and an "important one" that is "far from frivolous": see *McNeil*, at p. 268; *Borowski*, at p. 589, *Finlay*, at p. 633. Indeed, the respondents argue that the impugned *Criminal Code* provisions, by criminalizing many of the activities surrounding prostitution, adversely affect a great number of women. These issues are also clearly justiciable ones, as they concern the constitutionality of the challenged provisions. Consideration of this factor unequivocally supports exercising discretion in favour of standing.

55 The appellant submits, however, that the respondents' action does not disclose a serious issue with respect to the constitutionality of s. 213(1)(*c*) (formerly s. 195.1 (1)(*c*)) because this Court has upheld that provision in *Reference re ss. 193 & 195.1(1)(c) of the Criminal Code (Canada)*, [1990] 1 S.C.R. 1123 (S.C.C.), and *R. v. Skinner*, [1990] 1 S.C.R. 1235 (S.C.C.).

56 On this point, I completely agree with the learned chambers judge. He held that, in the circumstances of this broad and multi-faceted challenge, it is not necessary for the purposes of deciding the standing issue to resolve whether the principles of *stare decisis* permit the respondents to raise this particular aspect of their much broader claim. A more pragmatic approach is to say, as did Cory J. in *Canadian Council of Churches* and the chambers judge in this case, that some aspects of the statement of claim raise serious issues as to the invalidity of the legislation. Where there are aspects of the claim that clearly raise serious justiciable issues, it is better for the purposes of the standing analysis not to get into a detailed screening of the merits of discrete and particular aspects of the claim. They can be assessed using other appropriate procedural vehicles.

(b) The Proposed Plaintiff's Interest

57 Applying the purposive approach outlined earlier, there is no doubt, as the appellant accepts that this factor favours granting public interest standing. The Society has a genuine interest in the current claim. It is fully engaged with the issues it seeks to raise.

> 58 As the respondents point out, the Society is no busybody and has proven to have a strong engagement with the issue. It has considerable experience with the sex workers in the Downtown Eastside of Vancouver and it is familiar with their interests. It is a registered non-profit organization that is run "by and for" current and former sex workers who live and/or work in this neighbourhood of Vancouver. Its mandate is based upon the vision and the needs of street-based sex workers and its objects include working toward better health and safety for sex workers, working against all forms of violence against sex workers and lobbying for policy and legal changes that will improve the lives and working conditions of the sex workers (R.F., at para. 8).

59 From Sheryl Kiselbach's affidavit, it is clear that she is deeply engaged with the issues raised. Not only does she claim that the prostitution laws have directly and significantly affected her for 30 years (A.R., vol. IV, at pp. 15-17), but also she notes that she is now employed as a violence prevention coordinator.

(c) Reasonable and Effective Means of Bringing the Issue Before the Court

60 Understandably, the chambers judge treated the traditional formulation of this factor as a requirement of a strict test. He rejected respondents' submission that they ought to have standing because their action was "the most reasonable and effective way" to bring this challenge to court. The judge noted that this submission misstated the test set down by this Court and that he was "bound to apply" the test requiring the respondents to show that there "is no other reasonable and effective way to bring the issue before the court" (paras. 84-85). However, for the reasons I set out earlier, approaching the third factor in this way should be considered an error in principle. We must therefore reassess the weight to be given to this consideration when it is applied in a purposive and flexible manner.

61 The learned chambers judge had three related concerns which he thought militated strongly against granting public interest standing. First, he thought that the existence of the *Bedford* litigation in Ontario showed that there could be other potential plaintiffs to raise many of the same issues. Second, he noted that there were many criminal prosecutions under the challenged provisions and that the accused in each one of them could raise constitutional issues as of right. Finally, he was not persuaded that individual sex workers could not bring the challenge forward as private litigants. I will discuss each of these concerns in turn.

62 The judge was first concerned by the related *Bedford* litigation underway in Ontario. The judge noted that the fact that there is another civil case in another province which raises many of the same issues "would not necessarily be sufficient reason for concluding that the present case ... should not proceed", it nonetheless "illustrates that if public interest standing is not granted ... there may nevertheless be potential plaintiffs with personal interest standing who could, if they chose to do so, bring all of these issues before the court" (para. 75).

63 The existence of parallel litigation is certainly a highly relevant consideration that will often support denying standing. However, I agree with the chambers judge that the existence of a civil case in another province — even one that raises many of the same issues — is not necessarily a sufficient basis for denying standing. There are several reasons for this.

64 One is that, given the provincial organization of our superior courts, decisions of the courts in one province are not binding on courts in the others. Thus, litigation in one province is not necessarily a full response to a plaintiff wishing to litigate similar issues in another. What is needed is a practical and pragmatic assessment of whether having parallel proceedings in different provinces is a reasonable and effective approach in the particular circumstances of the case. Another point is that the issues raised in the *Bedford* case are not identical to those raised in this one. Unlike in the present case, the *Bedford* litigation does not challenge ss. 211, 212(1)(*a*), (*b*), (*c*), (*d*), (*e*), (*f*), (*h*) or (3) of the *Code* and does not challenge any provisions on the basis of ss. 2(*d*) or 15 of the *Charter*. A further point is that, as discussed earlier, the court must examine not only the precise legal issue, but the perspective from which it is raised. The perspectives from which the challenges in *Bedford* and in this case come are very different. The claimants in *Bedford* were not primarily involved in street-level sex work, whereas the main focus in this case is on those individuals. As the claim of unconstitutionality of the prostitution laws revolves mainly around the effects it has on street-level sex workers, the respondents in this action ground their challenges in a distinctive context. Finally, there may be other litigation management strategies, short of the blunt instrument of a denial of standing, to ensure the efficient and effective use of judicial resources. We were told, for example, that the respondents proposed that their appeal to this Court should be stayed awaiting the results of the *Bedford* litigation. A stay of proceedings pending resolution of other litigation is one possibility that should be taken into account in exercising the discretion as to standing.

65 Taking these points into account, the existence of the *Bedford* litigation in Ontario, in the circumstances of this case, does not seem to me to weigh very heavily against the respondents in considering whether their suit is a reasonable and effective means of bringing the pleaded claims forward. The *Bedford* litigation, in my view, has not been shown to be a more reasonable and effective means of doing so.

66 The second concern identified by the chambers judge was that there are hundreds of prosecutions under the impugned provisions every year in British Columbia. In light of this, he reasoned that "the accused in each one of those cases would be entitled, as of right, to raise the constitutional issues that the plaintiffs seek to raise in the case at bar" (para. 77). He noted, in addition, that such challenges have been mounted by accused persons in numerous prostitution-related criminal trials (paras. 78-79). In my view, however, there are a number of points in the circumstances of this case that considerably reduce the weight that should properly be given this concern here.

67 To begin, the importance of a purposive approach to standing makes clear that the existence of a parallel claim, either potential or actual, is not conclusive. Moreover, the existence of potential plaintiffs, while of course relevant, should be considered in light of practical realities. As I will explain, the practical realities of this case are such that it is very unlikely that persons charged under these provisions would bring a claim similar to the respondents'. Finally, the fact that some challenges have been advanced by accused persons in numerous prostitution-related criminal trials is not very telling either.

68 The cases to which we have been referred did not challenge nearly the entire legislative scheme as the respondents do. As the respondents point out, almost all the cases referred to were challenges to the communication law alone: *R. v. Jahelka*, [1990] 1 S.C.R. 1226 (S.C.C.); *Skinner*; *R. v. Smith* (1988), 44 C.C.C. (3d) 385 (Ont. H.C.); *R. v. Gagne*, [1988] O.J. No. 2518 (Ont. Prov. Ct.); *R. v. Jahelka* (1987), 43 D.L.R. (4th) 111 (Alta. C.A.); *R. v. Kazelman*, [1987] O.J. No. 1931 (Ont. Prov. Ct.); *R. v. Bavington*, 1987 CarswellOnt 3371 (Ont. Prov. Ct.); *R. v. Cunningham* (1986), 31 C.C.C. (3d) 223 (Man. Prov. Ct.); *R. v. Bear* (1986), 47 Alta. L.R. (2d) 255 (Alta. Prov. Ct.); *R. v. McLean* (1986), 2 B.C.L.R. (2d) 232 (B.C. S.C.); *R. v. Bailey*, [1986] O.J. No. 2795 (Ont. Prov. Ct.); *R. v Cheeseman*, Sask. Prov. Ct., June 19, 1986; *R. v. Blais*, 2008 BCCA 389, 301 D.L.R. (4th) 464 (B.C. C.A.). Most of the other cases challenged one provision only, either the procurement provision (*R. v. Downey*, [1992] 2 S.C.R. 10 (S.C.C.); *R. v. Boston*, [1988] B.C.J. No. 1185 (B.C. C.A.), or the bawdy house provision (*R. v. DiGiuseppe* (2002), 161 C.C.C. (3d) 424 (Ont. C.A.)). From the record, the only criminal cases that challenge more than one section of the prostitution provisions were commenced *after* this case (Affidavit of Karen Howden, June 24, 2011, at para. 10 (*R. v Mangat*) (A.R., vol. V, at pp. 102-3; A.R., vol. IX, at pp. 31-36); paras. 4-5 (*R. v Cho)* (A.R., vol. V, at p. 102; A.R., vol. VIII, at p. 163); paras. 2 and 11 (*R. v To*) (A.R., vol. V, at pp. 101 and 104-12)). At the times of writing these reasons, one case had been dismissed, the

other held in abeyance pending the outcome of this case and the last one was set for a preliminary inquiry.

69 Of course, an accused in a criminal case will always be able to raise a constitutional challenge to the provisions under which he or she is charged. But that does not mean that this will necessarily constitute a more reasonable and effective alternative way to bring the issue to court. The case of *Blais* illustrates this point. In that case, the accused, a client, raised a constitutional challenge to the communication provision without any evidentiary support. The result was that the Provincial Court of British Columbia dismissed the constitutional claim, without examining it in detail. Further, the inherent unpredictability of criminal trials makes it more difficult for a party raising the type of challenge raised in this instance. For instance, in *R. v Hamilton* (Affidavit of Elizabeth Campbell, September 17, 2008, at para. 6 (A.R., vol. II, at pp. 34-35), the Crown, for unrelated reasons, entered a stayed of proceedings after the accused filed a constitutional challenge to a bawdy house provision. Thus, the challenge could not proceed.

70 Moreover, the fact that many challenges could be or have been brought in the context of criminal prosecutions may in fact support the view that a comprehensive declaratory action is a more reasonable and effective means of obtaining final resolution of the issues raised. There could be a multitude of similar challenges in the context of a host of criminal prosecutions. Encouraging that approach does not serve the goal of preserving scarce judicial resources. Moreover, a summary conviction proceeding may not necessarily be a more appropriate setting for a complex constitutional challenge.

71 The third concern identified by the chambers judge was that he could not understand how the vulnerability of the Society's constituency made it impossible for them to come forward as plaintiffs, given that they were prepared to testify as witnesses (para. 76). However, being a witness and a party are two very different things. In this case, the record shows that there were no sex workers in the Downtown Eastside neighbourhood of Vancouver willing to bring a comprehensive challenge forward. They feared loss of privacy and safety and increased violence by clients. Also, their spouses, friends, family members and/or members of their community may not know that they are or were involved in sex work or that they are or were drug users. They have children that they fear will be removed by child protection authorities. Finally, bringing such challenge, they fear, may limit their current or future education or employment opportunities (Affidavit of Jill Chettiar, September 26, 2008, at paras. 16-18 (A.R., vol. IV, at pp. 184-85)). As I see it, the willingness of many of these same persons to swear affidavits or to appear to testify does not undercut their evidence to the effect that they would not be willing or able to bring a challenge of this nature in their own names. There are also the practical aspects of running a major constitutional law suit. Counsel needs to be able to communicate with his or her clients and the clients must be able to provide timely and appropriate instructions. Many difficulties might arise in the context of individual challenges given the evidence about the circumstances of many of the individuals most directly affected by the challenged provisions.

72 I conclude, therefore, that these three concerns identified by the chambers judge were not entitled to the decisive weight which he gave them.

73 I turn now to other considerations that should be taken into account in considering the reasonable and effective means factor. This case constitutes public interest litigation: the respondents have raised issues of public importance that transcend their immediate interests. Their challenge is comprehensive, relating as it does to nearly the entire legislative scheme. It provides an opportunity to assess through the constitutional lens the overall effect of this scheme on those most directly affected by it. A challenge of this nature may prevent a multiplicity of individual challenges in the context of criminal prosecutions. There is no risk of the rights of others with a more personal or direct stake in the issue being adversely affected by a diffuse or badly advanced claim. It is obvious that the claim is being pursued with thoroughness and skill. There is no suggestion that others who are more directly or personally affected have deliberately chosen not to challenge these provisions. The presence of the individual respondent, as well as the Society, will ensure that there is both an individual and collective dimension to the litigation.

74 The record supports the respondents' position that they have the capacity to undertake this litigation. The Society is a well-organized association with considerable expertise with respect to sex workers in the Downtown Eastside, and Ms. Kiselbach, a former sex worker in this neighbourhood, is supported by the resources of the Society. They provide a concrete factual background and represent those most directly affected by the legislation. For instance, the respondents' evidence includes affidavits from more than 90 current or past sex workers from the Downtown Eastside neighbourhood of Vancouver (R.F., at para. 20). Further, the Society is represented by experienced human rights lawyers, as well as by the Pivot Legal Society, a non-profit legal advocacy group working in Vancouver's Downtown Eastside and focusing predominantly on the legal issues that affect this community (Affidavit of Peter Wrinch, January 30, 2011, at para. 3 (A.R., vol. VI, at p. 137)). It has conducted research on the subject, generated various reports and presented the evidence it has gathered before government officials and committees (see Wrinch Affidavit, at paras. 6-21). This in turn, suggests that the present litigation constitutes an effective means of bringing the issue to court in that it will be presented in a context suitable for adversarial determination.

75 Finally, other litigation management tools and strategies may be alternatives to a complete denial of standing, and may be used to ensure that the proposed litigation is a reasonable and effective way of getting the issues before the court.

(7) Conclusion With Respect to Public Interest Standing

76 All three factors, applied purposively, favour exercising discretion to grant public interest standing to the respondents to bring their claim. Granting standing will not only serve to enhance the principle of legality with respect to serious issues of direct concern to some of the most

marginalized members of society, but it will also promote the economical use of scarce judicial resources: *Canadian Council of Churches*, at p. 252.

B. Private Interest Standing

77 Having found that the respondents have public interest standing to pursue their claims, it is not necessary to address the issue of whether Ms. Kiselbach has private interest standing.

V. Disposition

78 I would dismiss the appeal with costs. However, I would not grant special costs to the respondents. The Court of Appeal declined to do so (2011 BCCA 515, 314 B.C.A.C. 137 (B.C. C.A.) [*Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)*]) and we ought not to interfere with that exercise of discretion unless there are clear and compelling reasons to do so which in my view do not exist here: *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263 (S.C.C.), at para. 77.

Appeal dismissed.

Pourvoi rejeté.

Footnotes

* A corrigendum issued by the court on October 15, 2012 has been incorporated herein.

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Dunsmuir v. New Brunswick

2008 CarswellNB 124, 2008 CarswellNB 125, 2008 SCC 9, 2008 CSC 9, [2008] 1 S.C.R. 190, [2008] A.C.S. No. 9, [2008] S.C.J. No. 9, 164 A.C.W.S. (3d) 727, 170 L.A.C. (4th) 1, 2008 C.L.L.C. 220-020, 291 D.L.R. (4th) 577, 329 N.B.R. (2d) 1, 372 N.R. 1, 64 C.C.E.L. (3d) 1, 69 Imm. L.R. (3d) 1, 69 Admin. L.R. (4th) 1, 844 A.P.R. 1, 95 L.C.R. 65, J.E. 2008-547, D.T.E. 2008T-223

David Dunsmuir (Appellant) v. Her Majesty the Queen in Right of the Province of New Brunswick as represented by Board of Management (Respondent)

McLachlin C.J.C., Bastarache, Binnie, LeBel,
Deschamps, Fish, Abella, Charron, Rothstein JJ.

Heard: May 15, 2007
Judgment: March 7, 2008 *
Docket: 31459

Proceedings: affirming *New Brunswick (Board of Management) v. Dunsmuir* (2006), 2006 CarswellNB 155, 2006 CarswellNB 156, 2006 NBCA 27, *(*sub nom. *Dunsmuir v. R.)* 2006 C.L.L.C. 220-030, 297 N.B.R. (2d) 151, 771 A.P.R. 151, 44 Admin. L.R. (4th) 92, 48 C.C.E.L. (3d) 196, 265 D.L.R. (4th) 609 (N.B. C.A.)**Proceedings: affirming *New Brunswick (Board of Management) v. Dunsmuir* (2005), 2005 NBQB 270, 2005 CarswellNB 444, 293 N.B.R. (2d) 5, 762 A.P.R. 5, 43 C.C.E.L. (3d) 205 (N.B. Q.B.)**

Counsel: J. Gordon Petrie, Q.C., Clarence L. Bennett for Appellant
C. Clyde Spinney, Q.C., Keith P. Mullin for Respondent

***Bastarache, LeBel JJ.*:**

I. Introduction

1 This appeal calls on the Court to consider, once again, the troubling question of the approach to be taken in judicial review of decisions of administrative tribunals. The recent history of judicial review in Canada has been marked by ebbs and flows of deference, confounding tests and new words for old problems, but no solutions that provide real guidance for litigants, counsel,

administrative decision makers or judicial review judges. The time has arrived for a reassessment of the question.

A. Facts

2 The appellant, David Dunsmuir, was employed by the Department of Justice for the Province of New Brunswick. His employment began on February 25, 2002, as a Legal Officer in the Fredericton Court Services Branch. The appellant was placed on an initial six-month probationary term. On March 14, 2002, by Order-in-Council, he was appointed to the offices of Clerk of the Court of Queen's Bench, Trial Division, Administrator of the Court of Queen's Bench, Family Division, and Clerk of the Probate Court of New Brunswick, all for the Judicial District of Fredericton.

3 The employment relationship was not perfect. The appellant's probationary period was extended twice, to the maximum 12 months. At the end of each probationary period, the appellant was given a performance review. The first such review, which occurred in August 2002, identified four specific areas for improvement. The second review, three months later, cited the same four areas for development, but noted improvements in two. At the end of the third probationary period, the Regional Director of Court Services noted that the appellant had met all expectations and his employment was continued on a permanent basis.

4 The employer reprimanded the appellant on three separate occasions during the course of his employment. The first incident occurred in July 2002. The appellant had sent an email to the Chief Justice of the Court of Queen's Bench objecting to a request that had been made by the judge of the Fredericton Judicial District for the preparation of a practice directive. The Regional Director issued a reprimand letter to the appellant, explaining that the means he had used to raise his concerns were inappropriate and exhibited serious error in judgment. In the event that a similar concern arose in the future, he was directed to discuss the matter first with the Registrar or the Regional Director. The letter warned that failure to comply would lead to additional disciplinary measures and, if necessary, to dismissal.

5 A second disciplinary measure occurred when, in April 2004, it came to the attention of the Assistant Deputy Minister that the appellant was being advertised as a lecturer at legal seminars offered in the private sector. The appellant had inquired previously into the possibility of doing legal work outside his employment. In February 2004, the Assistant Deputy Minister had informed him that lawyers in the public service should not practise law in the private sector. A month later, the appellant wrote a letter to the Law Society of New Brunswick stating that his participation as a non-remunerated lecturer had been vetted by his employer, who had voiced no objection. On June 3, 2004, the Assistant Deputy Minister issued to the appellant written notice of a one-day suspension with pay regarding the incident. The letter also referred to issues regarding the appellant's work performance, including complaints from unnamed staff, lawyers and members of

the public regarding his difficulties with timeliness and organization. This second letter concluded with the statement that "[f]uture occurrences of this nature and failure to develop more efficient organized work habits will result in disciplinary action up to and including dismissal".

6 Third, on July 21, 2004, the Regional Director wrote a formal letter of reprimand to the appellant regarding three alleged incidents relating to his job performance. This letter, too, concluded with a warning that the appellant's failure to improve his organization and timeliness would result in further disciplinary action up to and including dismissal. The appellant responded to the letter by informing the Regional Director that he would be seeking legal advice and, until that time, would not meet with her to discuss the matter further.

7 A review of the appellant's work performance had been due in April 2004 but did not take place. The appellant met with the Regional Director on a couple of occasions to discuss backlogs and organizational problems. Complaints were relayed to her by staff but they were not documented and it is unknown how many complaints there had been. The Regional Director notified the appellant on August 11, 2004, that his performance review was overdue and would occur by August 20. A meeting had been arranged for August 19 between the appellant, the Regional Director, the Assistant Deputy Minister and counsel for the appellant and the employer. While preparing for that meeting, the Regional Director and the Assistant Deputy Minister concluded that the appellant was not right for the job. The scheduled meeting was cancelled and a termination notice was faxed to the appellant. A formal letter of termination from the Deputy Minister was delivered to the appellant's lawyer the next day. The letter terminated the appellant's employment with the Province of New Brunswick, effective December 31, 2004. It read, in relevant part:

> I regret to advise you that I have come to the conclusion that your particular skill set does not meet the needs of your employer in your current position, and that it is advisable to terminate your employment on reasonable notice, pursuant to section 20 of the *Civil Service Act*. You are accordingly hereby advised that your employment with the Province of New Brunswick will terminate on December 31, 2004. Cause for termination is not alleged.
>
> To aid in your search for other employment, you are not required to report to work during the notice period and your salary will be continued until the date indicated or for such shorter period as you require either to find a job with equivalent remuneration, or you commence self-employment.
>
> . . . . .
>
> In the circumstances, we would request that you avoid returning to the workplace until your departure has been announced to staff, and until you have returned your keys and government identification to your supervisor, Ms. Laundry as well as any other property of the employer still in your possession...

8 On February 3, 2005, the appellant was removed from his statutory offices by order of the Lieutenant-Governor in Council.

9 The appellant commenced the grievance process under s. 100.1 of the *Public Service Labour Relations Act*, R.S.N.B. 1973, c. P-25 ("*PSLRA*"; see Appendix), by letter to the Deputy Minister on September 1, 2004. That provision grants non-unionized employees of the provincial public service the right to file a grievance with respect to a "discharge, suspension or a financial penalty" (s. 100.1(2)). The appellant asserted several grounds of complaint in his grievance letter, in particular, that the reasons for the employer's dissatisfaction were not made known; that he did not receive a reasonable opportunity to respond to the employer's concerns; that the employer's actions in terminating him were without notice, due process or procedural fairness; and that the length of the notice period was inadequate. The grievance was denied. The appellant then gave notice that he would refer the grievance to adjudication under the *PSLRA*. The adjudicator was selected by agreement of the parties and appointed by the Labour and Employment Board.

10 The adjudication hearing was convened and counsel for the appellant produced as evidence a volume of 169 documents. Counsel for the respondent objected to the inclusion of almost half of the documents. The objection was made on the ground that the documents were irrelevant since the appellant's dismissal was not disciplinary but rather was a termination on reasonable notice. The preliminary issue therefore arose of whether, where dismissal was with notice or pay in lieu thereof, the adjudicator was authorized to assess the reasons underlying the province's decision to terminate. Following his preliminary ruling on that issue, the adjudicator heard and decided the merits of the grievance.

B. Decisions of the Adjudicator

(1) Preliminary Ruling (January 10, 2005)

11 The adjudicator began his preliminary ruling by considering s. 97(2.1) of the *PSLRA*. He reasoned that because the appellant was not included in a bargaining unit and there was no collective agreement or arbitral award, the section ought to be interpreted to mean that where an adjudicator determines that an employee has been discharged for cause, the adjudicator may substitute another penalty for the discharge as seems just and reasonable in the circumstances. The adjudicator considered and relied on the decision of the New Brunswick Court of Appeal in *Dr. Everett Chalmers Hospital v. Mills* (1989), 102 N.B.R. (2d) 1 (N.B. C.A.).

12 Turning to s. 100.1 of the *PSLRA*, he noted the referential incorporation of s. 97 in s. 100.1(5). He stated that such incorporation "necessarily means that an adjudicator has jurisdiction to make the determination described in s. 97(2.1), i.e. that an employee has been discharged or otherwise disciplined for cause" (p. 5). The adjudicator noted that an employee to whom s. 20 of the *Civil Service Act*, S.N.B. 1984, c. C-5.1 (see Appendix), applies may be discharged for cause, with reasonable notice or with pay in lieu of reasonable notice. He concluded by holding that an employer cannot avoid an inquiry into its real reasons for dismissing an employee by stating that cause is not alleged. Rather, a grieving employee is entitled to an adjudication as to whether a

discharge purportedly with notice or pay in lieu thereof was in fact for cause. He therefore held that he had jurisdiction to make such a determination.

(2) Ruling on the Merits (February 16, 2005)

13 In his decision on the merits, released shortly thereafter, the adjudicator found that the termination letter of August 19 effected termination with pay in lieu of notice. The employer did not allege cause. Inquiring into the reasons for dismissal the adjudicator was satisfied that, on his view of the evidence, the termination was not disciplinary. Rather, the decision to terminate was based on the employer's concerns about the appellant's work performance and his suitability for the positions he held.

14 The adjudicator then considered the appellant's claim that he was dismissed without procedural fairness in that the employer did not inform him of the reasons for its dissatisfaction and did not give him an opportunity to respond. The adjudicator placed some responsibility on the employer for cancelling the performance review scheduled for August 19. He also opined that the employer was not so much dissatisfied with the appellant's quality of work as with his lack of organization.

15 The adjudicator's decision relied on *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 (S.C.C.), for the relevant legal principles regarding the right of "at pleasure" office holders to procedural fairness. As the appellant's employment was "hybrid in character" (para. 53) — he was both a Legal Officer under the *Civil Service Act* and, as Clerk, an office holder "at pleasure" — the adjudicator held that the appellant was entitled to procedural fairness in the employer's decision to terminate his employment. He declared that the termination was void *ab initio* and ordered the appellant reinstated as of August 19, 2004, the date of dismissal.

16 The adjudicator added that in the event that his reinstatement order was quashed on judicial review, he would find the appropriate notice period to be eight months.

C. Judicial History

(1) Court of Queen's Bench of New Brunswick (2005), 293 N.B.R. (2d) 5, 2005 NBQB 270 (N.B. Q.B.)

17 The Province of New Brunswick applied for judicial review of the adjudicator's decision on numerous grounds. In particular, it argued that the adjudicator had exceeded his jurisdiction in his preliminary ruling by holding that he was authorized to determine whether the termination was in fact for cause. The Province further argued that the adjudicator had acted incorrectly or unreasonably in deciding the procedural fairness issue. The application was heard by Rideout J.

18 The reviewing judge applied a pragmatic and functional analysis, considering the presence of a full privative clause in the *PSLRA*, the relative expertise of adjudicators appointed under the *PSLRA*, the purposes of ss. 97(2.1) and 100.1 of the *PSLRA* as well as s. 20 of the *Civil Service Act*, and the nature of the question as one of statutory interpretation. He concluded that the correctness standard of review applied and that the court need not show curial deference to the decision of an adjudicator regarding the interpretation of those statutory provisions.

19 Regarding the preliminary ruling, the reviewing judge noted that the appellant was employed "at pleasure" and fell under s. 20 of the *Civil Service Act*. In his view, the adjudicator had overlooked the effects of s. 20 and had mistakenly given ss. 97(2.1) and 100.1 of the *PSLRA* a substantive, rather than procedural, interpretation. Those sections are procedural in nature. They provide an employee with a right to grieve his or her dismissal and set out the steps that must be followed to pursue a grievance. The adjudicator is bound to apply the contractual provisions as they exist and has no authority to change those provisions. Thus, in cases in which s. 20 of the *Civil Service Act* applies, the adjudicator must apply the ordinary rules of contract. The reviewing judge held that the adjudicator had erred in removing the words "and the collective agreement or arbitral award does not contain a specific penalty for the infraction that resulted in the employee being discharged or otherwise disciplined" from s. 97(2.1). Those words limit s. 97(2.1) to employees who are not employed "at pleasure". In the view of the reviewing judge, the adjudicator did not have jurisdiction to inquire into the reasons for the termination. His authority was limited to determining whether the notice period was reasonable. Having found that the adjudicator had exceeded his jurisdiction, the reviewing judge quashed his preliminary ruling.

20 With respect to the adjudicator's award on the merits, the reviewing judge commented that some aspects of the decision are factual in nature and should be reviewed on a patent unreasonableness standard, while other aspects involve questions of mixed fact and law which are subject to a reasonableness *simpliciter* standard. The reviewing judge agreed with the Province that the adjudicator's reasons do not stand up to a "somewhat probing examination" (para. 76). The reviewing judge held that the adjudicator's award of reinstatement could not stand as he was not empowered by the *PSLRA* to make Lieutenant-Governor in Council appointments. In addition, by concluding that the decision was void *ab initio* owing to a lack of procedural fairness, the adjudicator failed to consider the doctrine of adequate alternative remedy. The appellant received procedural fairness by virtue of the grievance hearing before the adjudicator. The adjudicator had provisionally increased the notice period to eight months — that provided an adequate alternative remedy. Concluding that the adjudicator's decision did not stand up to review on a reasonableness *simpliciter* standard, the reviewing judge quashed the reinstatement order but upheld the adjudicator's provisional award of eight months' notice.

(2) Court of Appeal of New Brunswick (2006), 297 N.B.R. (2d) 151, 2006 NBCA 27 (N.B. C.A.)

21 The appellant appealed the decision of the reviewing judge. The Court of Appeal, Robertson J.A. writing, held that the proper standard with respect to the interpretation of the adjudicator's authority under the *PSLRA* was reasonableness *simpliciter* and that the reviewing judge had erred in adopting the correctness standard. The court reached that conclusion by proceeding through a pragmatic and functional analysis, placing particular emphasis on the presence of a full privative clause in the *PSLRA* and the relative expertise of an adjudicator in the labour relations and employment context. The court also relied on the decision of this Court in *A.U.P.E. v. Lethbridge Community College*, [2004] 1 S.C.R. 727, 2004 SCC 28 (S.C.C.). However, the court noted that the adjudicator's interpretation of the *Mills* decision warranted no deference and that "correctness is the proper review standard when it comes to the interpretation and application of caselaw" (para. 17).

22 Applying the reasonableness *simpliciter* standard, the court held that the adjudicator's decision was unreasonable. Robertson J.A. began by considering s. 20 of the *Civil Service Act* and noted that under the ordinary rules of contract, an employer holds the right to dismiss an employee with cause or with reasonable notice or with pay in lieu of notice. Section 20 of the *Civil Service Act* limits the Crown's common law right to dismiss its employees without cause or notice. Robertson J.A. reasoned that s. 97(2.1) of the *PSLRA* applies in principle to non-unionized employees, but that it is only where an employee has been discharged or disciplined *for cause* that an adjudicator may substitute such other penalty as seems just and reasonable in the circumstances. Where the employer elects to dismiss with notice or pay in lieu of notice, however, s. 97(2.1) does not apply. In such circumstances, the employee may only grieve the length of the notice period. The only exception is where the employee alleges that the decision to terminate was based on a prohibited ground of discrimination.

23 On the issue of procedural fairness, the court found that the appellant exercised his right to grieve, and thus a finding that the duty of fairness had been breached was without legal foundation. The court dismissed the appeal.

II. Issues

24 At issue, firstly is the approach to be taken in the judicial review of a decision of a particular adjudicative tribunal which was seized of a grievance filed by the appellant after his employment was terminated. This appeal gives us the opportunity to re-examine the foundations of judicial review and the standards of review applicable in various situations.

25 The second issue involves examining whether the appellant who held an office "at pleasure" in the civil service of New Brunswick, had the right to procedural fairness in the employer's decision to terminate him. On this occasion, we will reassess the rule that has found formal expression in *Knight*.

26 The two types of judicial review, on the merits and on the process, are therefore engaged in this case. Our review of the system will therefore be comprehensive, which is preferable since a holistic approach is needed when considering fundamental principles.

III. Issue 1: Review of the Adjudicator's statutory interpretation determination

A. Judicial Review

27 As a matter of constitutional law, judicial review is intimately connected with the preservation of the rule of law. It is essentially that constitutional foundation which explains the purpose of judicial review and guides its function and operation. Judicial review seeks to address an underlying tension between the rule of law and the foundational democratic principle, which finds an expression in the initiatives of Parliament and legislatures to create various administrative bodies and endow them with broad powers. Courts, while exercising their constitutional functions of judicial review, must be sensitive not only to the need to uphold the rule of law, but also to the necessity of avoiding undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures.

28 By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution. Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority. The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes.

29 Administrative powers are exercised by decision makers according to statutory regimes that are themselves confined. A decision maker may not exercise authority not specifically assigned to him or her. By acting in the absence of legal authority, the decision maker transgresses the principle of the rule of law. Thus, when a reviewing court considers the scope of a decision-making power or the jurisdiction conferred by a statute, the standard of review analysis strives to determine what authority was intended to be given to the body in relation to the subject matter. This is done within the context of the courts' constitutional duty to ensure that public authorities do not overreach their lawful powers: *Crevier v. Quebec (Attorney General)*, [1981] 2 S.C.R. 220 (S.C.C.), at p. 234; also *Q. v. College of Physicians & Surgeons (British Columbia)*, [2003] 1 S.C.R. 226, 2003 SCC 19 (S.C.C.), at para. 21.

30 In addition to the role judicial review plays in upholding the rule of law, it also performs an important constitutional function in maintaining legislative supremacy. As noted by Justice Thomas Cromwell, "the rule of law is affirmed by assuring that the courts have the final say on the jurisdictional limits of a tribunal's authority; second, legislative supremacy is affirmed by adopting the principle that the concept of jurisdiction should be narrowly circumscribed and

defined according to the intent of the legislature in a contextual and purposeful way; third, legislative supremacy is affirmed and the court-centric conception of the rule of law is reined in by acknowledging that the courts do not have a monopoly on deciding all questions of law" (T. A. Cromwell, "Appellate Review: Policy and Pragmatism", in *2006 Isaac Pitblado Lectures, Appellate Courts: Policy, Law and Practice*, V-1, p. V-12). In essence, the rule of law is maintained because the courts have the last word on jurisdiction, and legislative supremacy is assured because determining the applicable standard of review is accomplished by establishing legislative intent.

31 The legislative branch of government cannot remove the judiciary's power to review actions and decisions of administrative bodies for compliance with the constitutional capacities of the government. Even a privative clause, which provides a strong indication of legislative intent, cannot be determinative in this respect (*British Columbia (Minister of Finance) v. Woodward Estate* (1972), [1973] S.C.R. 120 (S.C.C.), at p. 127). The inherent power of superior courts to review administrative action and ensure that it does not exceed its jurisdiction stems from the judicature provisions in ss. 96 to 101 of the *Constitution Act, 1867*: *Crevier*. As noted by Beetz J. in *Syndicat national des employés de la commission scolaire régionale de l'Outaouais v. U.E.S., local 298*, [1988] 2 S.C.R. 1048 (S.C.C.), [hereinafter *Bibeault*], at p. 1090, "[t]he role of the superior courts in maintaining the rule of law is so important that it is given constitutional protection". In short, judicial review is constitutionally guaranteed in Canada, particularly with regard to the definition and enforcement of jurisdictional limits. As Laskin C.J. explained in *Crevier*, at pp. 237-38:

> Where ... questions of law have been specifically covered in a privative enactment, this Court, as in *Farrah*, has not hesitated to recognize this limitation on judicial review as serving the interests of an express legislative policy to protect decisions of adjudicative agencies from external correction. Thus, it has, in my opinion, balanced the competing interests of a provincial Legislature in its enactment of substantively valid legislation and of the courts as ultimate interpreters of the *British North America Act*, and s. 96 thereof. The same considerations do not, however, apply to issues of jurisdiction which are not far removed from issues of constitutionality. It cannot be left to a provincial statutory tribunal, in the face of s. 96, to determine the limits of its own jurisdiction without appeal or review.

See also D. J. Mullan, *Administrative Law* (2001), at p. 50.

32 Despite the clear, stable constitutional foundations of the system of judicial review, the operation of judicial review in Canada has been in a constant state of evolution over the years, as courts have attempted to devise approaches to judicial review that are both theoretically sound and effective in practice. Despite efforts to refine and clarify it, the present system has proven to be difficult to implement. The time has arrived to re-examine the Canadian approach to judicial review of administrative decisions and develop a principled framework that is more coherent and workable.

33 Although the instant appeal deals with the particular problem of judicial review of the decisions of an adjudicative tribunal, these reasons will address first and foremost the structure and characteristics of the system of judicial review as a whole. In the wake of *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.), *Suresh v. Canada (Minister of Citizenship & Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1 (S.C.C.), *Centre hospitalier Mont-Sinaï c. Québec (Ministre de la Santé & des Services sociaux)*, [2001] 2 S.C.R. 281, 2001 SCC 41 (S.C.C.), and *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29 (S.C.C.), it has become apparent that the present system must be simplified. The comments of LeBel J. in *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710, 2002 SCC 86 (S.C.C.), at paras. 190 and 195, questioning the applicability of the "pragmatic and functional approach" to the decisions and actions of all kinds of administrative actors, illustrated the need for change.

B. Reconsidering the Standards of Judicial Review

34 The current approach to judicial review involves three standards of review, which range from correctness, where no deference is shown, to patent unreasonableness, which is most deferential to the decision maker, the standard of reasonableness *simpliciter* lying, theoretically, in the middle. In our view, it is necessary to reconsider both the number and definitions of the various standards of review, and the analytical process employed to determine which standard applies in a given situation. We conclude that there ought to be two standards of review — correctness and reasonableness.

35 The existing system of judicial review has its roots in several landmark decisions beginning in the late 1970s in which this Court developed the theory of substantive review to be applied to determinations of law, and determinations of fact and of mixed law and fact made by administrative tribunals. In *C.U.P.E., Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227 (S.C.C.) ("*CUPE*"), Dickson J. introduced the idea that, depending on the legal and administrative contexts, a specialized administrative tribunal with particular expertise, which has been given the protection of a privative clause, if acting within its jurisdiction, could provide an interpretation of its enabling legislation that would be allowed to stand unless "so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review" (p. 237). Prior to *CUPE*, judicial review followed the "preliminary question doctrine", which inquired into whether a tribunal had erred in determining the scope of its jurisdiction. By simply branding an issue as "jurisdictional", courts could replace a decision of the tribunal with one they preferred, often at the expense of a legislative intention that the matter lie in the hands of the administrative tribunal. *CUPE* marked a significant turning point in the approach of courts to judicial review, most notably in Dickson J.'s warning that courts "should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be

doubtfully so" (p. 233). Dickson J.'s policy of judicial respect for administrative decision making marked the beginning of the modern era of Canadian administrative law.

36 *CUPE* did not do away with correctness review altogether and in *Bibeault*, the Court affirmed that there are still questions on which a tribunal must be correct. As Beetz J. explained, "the jurisdiction conferred on administrative tribunals and other bodies created by statute is limited, and ... such a tribunal cannot by a misinterpretation of an enactment assume a power not given to it by the legislator" (p. 1086). *Bibeault* introduced the concept of a "pragmatic and functional analysis" to determine the jurisdiction of a tribunal, abandoning the "preliminary question" theory. In arriving at the appropriate standard of review, courts were to consider a number of factors including the wording of the provision conferring jurisdiction on the tribunal, the purpose of the enabling statute, the reason for the existence of the tribunal, the expertise of its members, and the nature of the problem (p. 1088). The new approach would put "renewed emphasis on the superintending and reforming function of the superior courts" (p. 1090). The "pragmatic and functional analysis", as it came to be known, was later expanded to determine the appropriate degree of deference in respect of various forms of administrative decision making.

37 In *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 (S.C.C.), a third standard of review was introduced into Canadian administrative law. The legislative context of that case, which provided a statutory right of appeal from the decision of a specialized tribunal, suggested that none of the existing standards was entirely satisfactory. As a result, the reasonableness *simpliciter* standard was introduced. It asks whether the tribunal's decision was reasonable. If so, the decision should stand; if not, it must fall. In *Southam*, Iacobucci J. described an unreasonable decision as one that "is not supported by any reasons that can stand up to a somewhat probing examination" (para. 56) and explained that the difference between patent unreasonableness and reasonableness *simpliciter* is the "immediacy" or "obviousness" of the defect in the tribunal's decision (para. 57). The defect will appear on the face of a patently unreasonable decision, but where the decision is merely unreasonable, it will take a searching review to find the defect.

38 The three standards of review have since remained in Canadian administrative law, the approach to determining the appropriate standard of review having been refined in *Pushpanathan v. Canada (Minister of Employment & Immigration)*, [1998] 1 S.C.R. 982 (S.C.C.).

39 The operation of three standards of review has not been without practical and theoretical difficulties, neither has it been free of criticism. One major problem lies in distinguishing between the patent unreasonableness standard and the reasonableness *simpliciter* standard. The difficulty in distinguishing between those standards contributes to the problem of choosing the right standard of review. An even greater problem lies in the application of the patent unreasonableness standard, which at times seems to require parties to accept an unreasonable decision.

40 The definitions of the patent unreasonableness standard that arise from the case law tend to focus on the magnitude of the defect and on the immediacy of the defect (see *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63 (S.C.C.), at para. 78, *per* LeBel J.). Those two hallmarks of review under the patent unreasonableness standard have been used consistently in the jurisprudence to distinguish it from review under the standard of reasonableness *simpliciter*. As it had become clear that, after *Southam*, lower courts were struggling with the conceptual distinction between patent unreasonableness and reasonableness *simpliciter*, Iacobucci J., writing for the Court in *Ryan v. Law Society (New Brunswick)*, [2003] 1 S.C.R. 247, 2003 SCC 20 (S.C.C.), attempted to bring some clarity to the issue. He explained the different operations of the two deferential standards as follows, at paras. 52-53:

> [A] patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective. A patently unreasonable decision has been described as "clearly irrational" or "evidently not in accordance with reason". ... A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand.
>
> A decision may be unreasonable without being patently unreasonable when the defect in the decision is less obvious and might only be discovered after "significant searching or testing" (*Southam*, *supra*, at para. 57). Explaining the defect may require a detailed exposition to show that there are no lines of reasoning supporting the decision which could reasonably lead that tribunal to reach the decision it did.

41 As discussed by LeBel J. at length in *Toronto (City) v. C.U.P.E., Local 79*, notwithstanding the increased clarity that *Ryan* brought to the issue and the theoretical differences between the standards of patent unreasonableness and reasonableness *simpliciter*, a review of the cases reveals that any actual difference between them in terms of their operation appears to be illusory (see also the comments of Abella J. in *VIA Rail Canada Inc. v. Canadian Transportation Agency*, [2007] 1 S.C.R. 650 (S.C.C.), paras. 101-103). Indeed, even this Court divided when attempting to determine whether a particular decision was "patently unreasonable", although this should have been self-evident under the existing test (see *C.U.P.E. v. Ontario (Minister of Labour)*). This result is explained by the fact that both standards are based on the idea that there might be multiple valid interpretations of a statutory provision or answers to a legal dispute and that courts ought not to interfere where the tribunal's decision is rationally supported. Looking to either the magnitude or the immediacy of the defect in the tribunal's decision provides no meaningful way in practice of distinguishing between a patently unreasonable and an unreasonable decision. As Mullan has explained:

> [T]o maintain a position that it is only the "clearly irrational" that will cross the threshold of patent unreasonableness while irrationality *simpliciter* will not is to make a nonsense of the

> law. Attaching the adjective "clearly" to irrational is surely a tautology. Like "uniqueness", irrationality either exists or it does not. There cannot be shades of irrationality.

See D. M. Mullan, "Recent Developments in Standard of Review", in Canadian Bar Association (Ontario), *Taking the Tribunal to Court: A Practical Guide for Administrative Law Practitioners* (2000), at p. 25.

42 Moreover, even if one could conceive of a situation in which a clearly or highly irrational decision were distinguishable from a merely irrational decision, it would be unpalatable to require parties to accept an irrational decision simply because, on a deferential standard, the irrationality of the decision is not clear *enough*. It is also inconsistent with the rule of law to retain an irrational decision. As LeBel J. explained in his concurring reasons in *Toronto (City) v. C.U.P.E., Local 79*, at para. 108:

> In the end, the essential question remains the same under both standards: was the decision of the adjudicator taken in accordance with reason? Where the answer is no, for instance because the legislation in question cannot rationally support the adjudicator's interpretation, the error will invalidate the decision, regardless of whether the standard applied is reasonableness *simpliciter* or patent unreasonableness. ...

See also *Voice Construction Ltd. v. Construction & General Workers' Union, Local 92*, [2004] 1 S.C.R. 609, 2004 SCC 23 (S.C.C.), at paras. 40-41, *per* LeBel J.

C. Two Standards of Review

43 The Court has moved from a highly formalistic, artificial "jurisdiction" test that could easily be manipulated, to a highly contextual "functional" test that provides great flexibility but little real on-the-ground guidance, and offers too many standards of review. What is needed is a test that offers guidance, is not formalistic or artificial, and permits review where justice requires it, but not otherwise. A simpler test is needed.

(1) Defining the Concepts of Reasonabless and Correctness

44 As explained above, the patent unreasonableness standard was developed many years prior to the introduction of the reasonableness *simpliciter* standard in *Southam*. The intermediate standard was developed to respond to what the Court viewed as problems in the operation of judicial review in Canada, particularly the perceived all-or-nothing approach to deference, and in order to create a more finely calibrated system of judicial review (see also L. Sossin and C. M. Flood, "The Contextual Turn: Iacobucci's Legacy and the Standard of Review in Administrative Law" (2007), 57 *U.T.L.J.* 581). However, the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review. Though we are of the view that the three-standard model

is too difficult to apply to justify its retention, now, several years after *Southam*, we believe that it would be a step backwards to simply remove the reasonableness *simpliciter* standard and revert to pre-*Southam* law. As we see it, the problems that *Southam* attempted to remedy with the introduction of the intermediate standard are best addressed not by three standards of review, but by two standards, defined appropriately.

45 We therefore conclude that the two variants of reasonableness review should be collapsed into a single form of "reasonableness" review. The result is a system of judicial review comprising two standards — correctness and reasonableness. But the revised system cannot be expected to be simpler and more workable unless the concepts it employs are clearly defined.

46 What does this revised reasonableness standard mean? Reasonableness is one of the most widely used and yet most complex legal concepts. In any area of the law we turn our attention to, we find ourselves dealing with the reasonable, reasonableness or rationality. But what is a reasonable decision? How are reviewing courts to identify an unreasonable decision in the context of administrative law and, especially, of judicial review?

47 Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

48 The move towards a single reasonableness standard does not pave the way for a more intrusive review by courts and does not represent a return to pre-*Southam* formalism. In this respect, the concept of deference, so central to judicial review in administrative law, has perhaps been insufficiently explored in the case law. What does deference mean in this context? Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. The notion of deference "is rooted in part in a respect for governmental decisions to create administrative bodies with delegated powers" (*Mossop*, [*infra*], at p. 596, *per* L'Heureux-Dubé J., dissenting). We agree with David Dyzenhaus where he states that the concept of "deference as respect" requires of the courts "not submission but a respectful attention to the reasons offered

or which could be offered in support of a decision": "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286 (quoted with approval in *Baker*, at para. 65, *per* L'Heureux-Dubé J.; *Ryan*, at para. 49).

49 Deference in the context of the reasonableness standard therefore implies that courts will give due consideration to the determinations of decision makers. As Mullan explains, a policy of deference "recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime": D. J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 *C.J.A.L.P.* 59, at p. 93. In short, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.

50 As important as it is that courts have a proper understanding of reasonableness review as a deferential standard, it is also without question that the standard of correctness must be maintained in respect of jurisdictional and some other questions of law. This promotes just decisions and avoids inconsistent and unauthorized application of law. When applying the correctness standard, a reviewing court will not show deference to the decision maker's reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal's decision was correct.

(2) Determining the Appropriate Standard of Review

51 Having dealt with the nature of the standards of review, we now turn our attention to the method for selecting the appropriate standard in individual cases. As we will now demonstrate, questions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness while many legal issues attract a standard of correctness. Some legal issues, however, attract the more deferential standard of reasonableness.

52 The existence of a privative or preclusive clause gives rise to a strong indication of review pursuant to the reasonableness standard. This conclusion is appropriate because a privative clause is evidence of Parliament or a legislature's intent that an administrative decision maker be given greater deference and that interference by reviewing courts be minimized. This does not mean, however, that the presence of a privative clause is determinative. The rule of law requires that the constitutional role of superior courts be preserved and, as indicated above, neither Parliament nor any legislature can completely remove the courts' power to review the actions and decisions

of administrative bodies. This power is constitutionally protected. Judicial review is necessary to ensure that the privative clause is read in its appropriate statutory context and that administrative bodies do not exceed their jurisdiction.

53 Where the question is one of fact, discretion or policy, deference will usually apply automatically (*Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554 (S.C.C.), at pp. 599-600; *Q.*, at para. 29; *Suresh*, at paras. 29-30). We believe that the same standard must apply to the review of questions where the legal and factual issues are intertwined with and cannot be readily separated.

54 Guidance with regard to the questions that will be reviewed on a reasonableness standard can be found in the existing case law. Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity: *A.C.T.R.A. v. Canadian Broadcasting Corp.*, [1995] 1 S.C.R. 157 (S.C.C.), at para. 48; *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487 (S.C.C.), at para. 39. Deference may also be warranted where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context: *Toronto (City) v. C.U.P.E., Local 79*, at para. 72. Adjudication in labour law remains a good example of the relevance of this approach. The case law has moved away considerably from the strict position evidenced in *McLeod v. Egan* (1974), [1975] 1 S.C.R. 517 (S.C.C.), where it was held that an administrative decision maker will always risk having its interpretation of an external statute set aside upon judicial review.

55 A consideration of the following factors will lead to the conclusion that the decision maker should be given deference and a reasonableness test applied:

- A privative clause: this is a statutory direction from Parliament or a legislature indicating the need for deference.

- A discrete and special administrative regime in which the decision maker has special expertise (labour relations for instance).

- The nature of the question of law. A question of law that is of "central importance to the legal system ... and outside the ... specialized area of expertise" of the administrative decision maker will always attract a correctness standard (*Toronto (City) v. C.U.P.E., Local 79*, at para. 62). On the other hand, a question of law that does not rise to this level may be compatible with a reasonableness standard where the two above factors so indicate.

56 If these factors, considered together, point to a standard of reasonableness, the decision maker's decision must be approached with deference in the sense of respect discussed earlier in these reasons. There is nothing unprincipled in the fact that some questions of law will be decided

on the basis of reasonableness. It simply means giving the adjudicator's decision appropriate deference in deciding whether a decision should be upheld, bearing in mind the factors indicated.

57 An exhaustive review is not required in every case to determine the proper standard of review. Here again, existing jurisprudence may be helpful in identifying some of the questions that generally fall to be determined according to the correctness standard (*Cartaway Resources Corp., Re*, [2004] 1 S.C.R. 672, 2004 SCC 26 (S.C.C.)). This simply means that the analysis required is already deemed to have been performed and need not be repeated.

58 For example, correctness review has been found to apply to constitutional questions regarding the division of powers between Parliament and the provinces in the *Constitution Act, 1867*: *Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322 (S.C.C.). Such questions, as well as other constitutional issues, are necessarily subject to correctness review because of the unique role of s. 96 courts as interpreters of the Constitution: *Martin v. Nova Scotia (Workers' Compensation Board)*, [2003] 2 S.C.R. 504, 2003 SCC 54 (S.C.C.); Mullan, *Administrative Law*, at p. 60.

59 Administrative bodies must also be correct in their determinations of true questions of jurisdiction or *vires*. We mention true questions of *vires* to distance ourselves from the extended definitions adopted before *CUPE*. It is important here to take a robust view of jurisdiction. We neither wish nor intend to return to the jurisdiction/preliminary question doctrine that plagued the jurisprudence in this area for many years. "Jurisdiction" is intended in the narrow sense of whether or not the tribunal had the authority to make the inquiry. In other words, true jurisdiction questions arise where the tribunal must explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter. The tribunal must interpret the grant of authority correctly or its action will be found to be *ultra vires* or to constitute a wrongful decline of jurisdiction: D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf ed.), at pp. 14-3 to 14-6. An example may be found in *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, [2004] 1 S.C.R. 485, 2004 SCC 19 (S.C.C.). In that case, the issue was whether the City of Calgary was authorized under the relevant municipal acts to enact bylaws limiting the number of taxi plate licences (para. 5, Bastarache J.). That case involved the decision-making powers of a municipality and exemplifies a true question of jurisdiction or *vires*. These questions will be narrow. We reiterate the caution of Dickson J. in *CUPE* that reviewing judges must not brand as jurisdictional issues that are doubtfully so.

60 As mentioned earlier, courts must also continue to substitute their own view of the correct answer where the question at issue is one of general law "that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise" (*Toronto (City) v. C.U.P.E., Local 79*, at para. 62, *per* LeBel J.). Because of their impact on the administration of justice as a whole, such questions require uniform and consistent answers. Such was the case in *Toronto (City) v. C.U.P.E., Local 79*, which dealt with complex common law rules and conflicting

jurisprudence on the doctrines of *res judicata* and abuse of process — issues that are at the heart of the administration of justice (see para. 15, *per* Arbour J.).

61 Questions regarding the jurisdictional lines between two or more competing specialized tribunals have also been subject to review on a correctness basis: *Regina Police Assn. v. Regina (City) Police Commissioners*, [2000] 1 S.C.R. 360, 2000 SCC 14 (S.C.C.); *Québec (Commission des droits de la personne & des droits de la jeunesse) c. Québec (Procureure générale)*, [2004] 2 S.C.R. 185, 2004 SCC 39 (S.C.C.).

62 In summary, the process of judicial review involves two steps. First, courts ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review.

63 The existing approach to determining the appropriate standard of review has commonly been referred to as "pragmatic and functional". That name is unimportant. Reviewing courts must not get fixated on the label at the expense of a proper understanding of what the inquiry actually entails. Because the phrase "pragmatic and functional approach" may have misguided courts in the past, we prefer to refer simply to the "standard of review analysis" in the future.

64 The analysis must be contextual. As mentioned above, it is dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal. In many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case.

D. Application

65 Returning to the instant appeal and bearing in mind the foregoing discussion, we must determine the standard of review applicable to the adjudicator's interpretation of the *PSLRA*, in particular ss. 97(2.1) and 100.1, and s. 20 of the *Civil Service Act*. That standard of review must then be applied to the adjudicator's decision. In order to determine the applicable standard, we will now examine the factors relevant to the standard of review analysis.

(1) Proper Standard of Review on the Statutory Interpretation Issue

66 The specific question on this front is whether the combined effect of s. 97(2.1) and s. 100.1 of the *PSLRA* permits the adjudicator to inquire into the employer's reason for dismissing an employee with notice or pay in lieu of notice. This is a question of law. The question to be answered

is therefore whether in light of the privative clause, the regime under which the adjudicator acted, and the nature of the question of law involved, a standard of correctness should apply.

67 The adjudicator was appointed and empowered under the *PSLRA*; s. 101(1) of that statute contains a full privative clause, stating in no uncertain terms that "every order, award, direction, decision, declaration or ruling of ... an adjudicator is final and shall not be questioned or reviewed in any court". Section 101(2) adds that "[n]o order shall be made or process entered, and no proceedings shall be taken in any court, whether by way of injunction, judicial review, or otherwise, to question, review, prohibit or restrain ... an adjudicator in any of its or his proceedings." The inclusion of a full privative clause in the *PSLRA* gives rise to a strong indication that the reasonableness standard of review will apply.

68 The nature of the regime also favours the standard of reasonableness. This Court has often recognized the relative expertise of labour arbitrators in the interpretation of collective agreements, and counselled that the review of their decisions should be approached with deference: *CUPE*, at pp. 235-36; *Canada Safeway Ltd. v. R.W.D.S.U., Local 454*, [1998] 1 S.C.R. 1079 (S.C.C.), at para. 58; *Voice Construction*, at para. 22. The adjudicator in this case was, in fact, interpreting his enabling statute. Although the adjudicator was appointed on an *ad hoc* basis, he was selected by the mutual agreement of the parties and, at an institutional level, adjudicators acting under the *PSLRA* can be presumed to hold relative expertise in the interpretation of the legislation that gives them their mandate, as well as related legislation that they might often encounter in the course of their functions. See *A.U.P.E. v. Lethbridge Community College*. This factor also suggests a reasonableness standard of review.

69 The legislative purpose confirms this view of the regime. The *PSLRA* establishes a time- and cost-effective method of resolving employment disputes. It provides an alternative to judicial determination. Section 100.1 of the *PSLRA* defines the adjudicator's powers in deciding a dispute, but it also provides remedial protection for employees who are not unionized. The remedial nature of s. 100.1 and its provision for timely and binding settlements of disputes also imply that a reasonableness review is appropriate.

70 Finally, the nature of the legal question at issue is not one that is of central importance to the legal system and outside the specialized expertise of the adjudicator. This also suggests that the standard of reasonableness should apply.

71 Considering the privative clause, the nature of the regime, and the nature of the question of law here at issue, we conclude that the appropriate standard is reasonableness. We must now apply that standard to the issue considered by the adjudicator in his preliminary ruling.

(2) Was the Adjudicator's Interpretation Unreasonable?

72 While we are required to give deference to the determination of the adjudicator, considering the decision in the preliminary ruling as a whole, we are unable to accept that it reaches the standard of reasonableness. The reasoning process of the adjudicator was deeply flawed. It relied on and led to a construction of the statute that fell outside the range of admissible statutory interpretations.

73 The adjudicator considered the New Brunswick Court of Appeal decision in *Dr. Everett Chalmers Hospital v. Mills* as well as amendments made to the *PSLRA* in 1990 (S.N.B. 1990, c. 30). Under the former version of the Act, an employee could grieve "with respect to ... disciplinary action resulting in discharge, suspension or a financial penalty" (s. 92(1)). The amended legislation grants the right to grieve "with respect to discharge, suspension or a financial penalty" (*PSLRA*, s. 100.1(2)). The adjudicator reasoned that the referential incorporation of s. 97(2.1) in s. 100.1(5) "necessarily means that an adjudicator has jurisdiction to make the determination described in subsection 97(2.1), i.e. that an employee has been discharged or otherwise disciplined for cause" (p. 5). He further stated that an employer "cannot avoid an inquiry into its real reasons for a discharge, or exclude resort to subsection 97(2.1), *by simply stating that cause is not alleged*" (*ibid*, emphasis added). The adjudicator concluded that he could determine whether a discharge purportedly with notice or pay in lieu of notice was in reality for cause.

74 The interpretation of the law is always contextual. The law does not operate in a vacuum. The adjudicator was required to take into account the legal context in which he was to apply the law. The employment relationship between the parties in this case was governed by private law. The contractual terms of employment could not reasonably be ignored. That is made clear by s. 20 of the *Civil Service Act*. Under the ordinary rules of contract, the employer is entitled to discharge an employee for cause, with notice or with pay in lieu of notice. Where the employer chooses to exercise its right to discharge with reasonable notice or pay in lieu thereof, the employer is not required to assert cause for discharge. The grievance process cannot have the effect of changing the terms of the contract of employment. The respondent chose to exercise its right to terminate without alleging cause in this case. By giving the *PSLRA* an interpretation that allowed him to inquire into the reasons for discharge where the employer had the right not to provide — or even have — such reasons, the adjudicator adopted a reasoning process that was fundamentally inconsistent with the employment contract and, thus, fatally flawed. For this reason, the decision does not fall within the range of acceptable outcomes that are defensible in respect of the facts and the law.

75 The decision of the adjudicator treated the appellant, a non-unionized employee, as a unionized employee. His interpretation of the *PSLRA*, which permits an adjudicator to inquire into the reasons for discharge where notice is given and, under s. 97(2.1), substitute a penalty that he or she determines just and reasonable in the circumstances, creates a requirement that the employer show cause before dismissal. There can be no justification for this; no reasonable interpretation can lead to that result. Section 100.1(5) incorporates s. 97(2.1) by reference into the determination of grievances brought by non-unionized employees. The employees subject to the *PSLRA* are

usually unionized and the terms of their employment are determined by collective agreement; s. 97(2.1) explicitly refers to the collective agreement context. Section 100.1(5) referentially incorporates s. 97(2.1) *mutatis mutandis* into the non-collective agreement context so that non-unionized employees who are discharged *for cause and without notice* have the right to grieve the discharge and have the adjudicator substitute another penalty as seems just and reasonable in the circumstances. Therefore, the combined effect of s. 97(2.1) and s. 100.1 cannot, on any reasonable interpretation, remove the employer's right under contract law to discharge an employee with reasonable notice or pay in lieu of notice.

76 The interpretation of the adjudicator was simply unreasonable in the context of the legislative wording and the larger labour context in which it is embedded. It must be set aside. Nevertheless, it must be acknowledged that his interpretation of the *PSLRA* was ultimately inconsequential to the overall determination of the grievance, since the adjudicator made no finding as to whether the discharge was or was not, in fact, for cause. The decision on the merits, which resulted in an order that the appellant be reinstated, instead turned on the adjudicator's decision on a separate issue — whether the appellant was entitled to and, if so, received procedural fairness with regard to the employer's decision to terminate his employment. This issue is discrete and isolated from the statutory interpretation issue, and it raises very different considerations.

IV. Issue 2: Review of the Adjudicator's Procedural Fairness Determination

77 Procedural fairness has many faces. It is at issue where an administrative body may have prescribed rules of procedure that have been breached. It is also concerned with general principles involving the right to answer and defence where one's rights are affected. In this case, the appellant raised in his grievance letter that the reasons for the employer's dissatisfaction were not specified and that he did not have a reasonable opportunity to respond to the employer's concerns. There was, in his view, lack of due process and a breach of procedural fairness.

78 The procedural fairness issue was dealt with only briefly by the Court of Appeal. Robertson J.A. mentioned at the end of his reasons that a duty of fairness did not arise in this case since the appellant had been terminated with notice and had exercised his right to grieve. Before this Court, however, the appellant argued that he was entitled to procedural fairness as a result of this Court's jurisprudence. Although ultimately we do not agree with the appellant, his contention raises important issues that need to be examined more fully.

A. Duty of Fairness

79 Procedural fairness is a cornerstone of modern Canadian administrative law. Public decision makers are required to act fairly in coming to decisions that affect the rights, privileges or interests of an individual. Thus stated the principle is easy to grasp. It is not, however, always easy to apply. As has been noted many times, "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case" (*Knight*, at p. 682; *Baker*, at para.

21; *Moreau-Bérubé c. Nouveau-Brunswick*, [2002] 1 S.C.R. 249, 2002 SCC 11 (S.C.C.), at paras. 74-75).

80 This case raises the issue of the extent to which a duty of fairness applies to the dismissal of a public employee pursuant to a contract of employment. The grievance adjudicator concluded that the appellant had been denied procedural fairness because he had not been granted a hearing by the employer before being dismissed with four months' pay in lieu of notice. This conclusion was said to flow from this Court's decision in *Knight*, where it was held that the holder of an office "at pleasure" was entitled to be given the reasons for his or her dismissal and an opportunity to be heard before being dismissed (p. 683).

81 We are of the view that the principles established in *Knight* relating to the applicability of a duty of fairness in the context of public employment merit reconsideration. While the majority opinion in *Knight* properly recognized the important place of a general duty of fairness in administrative law, in our opinion, it incorrectly analyzed the effects of a contract of employment on such a duty. The majority in *Knight* proceeded on the premise that a duty of fairness based on public law applied unless expressly excluded by the employment contract or the statute (p. 681), without consideration of the terms of the contract with regard to fairness issues. It also upheld the distinction between office holders and contractual employees for procedural fairness purposes (pp. 670-76). In our view, what matters is the nature of the employment relationship between the public employee and the public employer. Where a public employee is employed under a contract of employment, regardless of his or her status as a public office holder, the applicable law governing his or her dismissal is the law of contract, not general principles arising out of public law. What *Knight* truly stands for is the principle that there is always a recourse available where the employee is an office holder and the applicable law leaves him or her without any protection whatsoever when dismissed.

82 This conclusion does not detract from the general duty of fairness owed by administrative decision makers. Rather it acknowledges that in the specific context of dismissal from public employment, disputes should be viewed through the lens of contract law rather than public law.

83 In order to understand why a reconsideration of *Knight* is warranted, it is necessary to review the development of the duty of fairness in Canadian administrative law. As we shall see, its development in the public employment context was intimately related to the distinction between public office holders and contractual employees, a distinction which, in our view, has become increasingly difficult to maintain both in principle and in practice.

(1) The Preliminary Issue of Jurisdiction

84 Before dealing with the scope of the duty of fairness in this case, a word should be said about the respondent's preliminary objection to the jurisdiction of the adjudicator under the *PSLRA* to consider procedural fairness. The respondent argues that allowing adjudicators to consider

procedural fairness risks granting them the inherent powers of a court. We disagree. We can see nothing problematic with a grievance adjudicator considering a public law duty of fairness issue where such a duty exists. It falls squarely within the adjudicator's task to resolve a grievance. However, as will be explained below, the proper approach is to first identify the nature of the employment relationship and the applicable law. Where, as here, the relationship is contractual, a public law duty of fairness is not engaged and therefore should play no role in resolving the grievance.

(2) The Development of the Duty of Fairness in Canadian Public Law

85 In Canada, the modern concept of procedural fairness in administrative law was inspired by the House of Lords' landmark decision in *Ridge v. Baldwin*, [1963] 2 All E.R. 66 (U.K. H.L.), a case which involved the summary dismissal of the chief constable of Brighton. The House of Lords declared the chief constable's dismissal a nullity on the grounds that the administrative body which had dismissed him had failed to provide the reasons for his dismissal or to accord him an opportunity to be heard in violation of the rules of natural justice. Central to the reasoning in the case was Lord Reid's distinction between (i) master-servant relationships (i.e. contractual employment), (ii) offices held "at pleasure", and (iii) offices where there must be cause for dismissal, which included the chief constable's position. According to Lord Reid, only the last category of persons was entitled to procedural fairness in relation to their dismissal since both contractual employees and office holders employed "at pleasure" could be dismissed without reason (p. 72). As the authors Wade and Forsyth note that, after a period of retreat from imposing procedural fairness requirements on administrative decision makers, *Ridge v. Baldwin* "marked an important change of judicial policy, indicating that natural justice was restored to favour and would be applied on a wide basis" (W. Wade and C. Forsyth, *Administrative Law* (8th ed. 2000), at p. 438).

86 The principles established by *Ridge v. Baldwin* were followed by this Court in *Nicholson v. Haldimand-Norfolk (Regional Municipality) Commissioners of Police* (1978), [1979] 1 S.C.R. 311 (S.C.C.). *Nicholson*, like its U.K. predecessor, marked the return to a less rigid approach to natural justice in Canada (see Brown and Evans, at pp. 7-5 to 7-9). *Nicholson* concerned the summary dismissal of a probationary police officer by a regional board of police commissioners. Laskin C.J., for the majority, at p. 328, declared the dismissal void on the ground that the officer fell into Lord Reid's third category and was therefore entitled to the same procedural protections as in *Ridge v. Baldwin*.

87 Although *Ridge v. Baldwin* and *Nicholson* were concerned with procedural fairness in the context of the dismissal of public office holders, the concept of fairness was quickly extended to other types of administrative decisions (see e.g. *Martineau v. Matsqui Institution (No. 2)* (1979), [1980] 1 S.C.R. 602 (S.C.C.); *Kane v. University of British Columbia*, [1980] 1 S.C.R. 1105 (S.C.C.); *Inuit Tapirisat of Canada v. Canada (Attorney General)*, [1980] 2 S.C.R. 735 (S.C.C.)).

In *Cardinal v. Kent Institution*, [1985] 2 S.C.R. 643 (S.C.C.), Le Dain J. stated that the duty of fairness was a general principle of law applicable to all public authorities:

> This Court has affirmed that there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual. ... [p. 653]
>
> (See also *Baker*, at para. 20.)

88 In *Knight*, the Court relied on the statement of Le Dain J. in *Cardinal v. Kent Institution* that the existence of a general duty to act fairly will depend on "(i) the nature of the decision to be made by the administrative body; (ii) the relationship existing between that body and the individual; and (iii) the effect of that decision on the individual's rights" (*Knight*, at p. 669).

89 The dispute in *Knight* centred on whether a board of education had failed to accord procedural fairness when it dismissed a director of education with three months' notice pursuant to his contract of employment. The main issue was whether the director's employment relationship with the school board was one that attracted a public law duty of fairness. L'Heureux-Dubé J., for the majority, held that it did attract such a duty on the ground that the director's position had a "strong 'statutory flavour'" and could thus be qualified as a public office (p. 672). In doing so, she specifically recognized that, contrary to Lord Reid's holding in *Ridge v. Baldwin*, holders of an office "at pleasure", were also entitled to procedural fairness before being dismissed (pp. 673-74). The fact that the director's written contract of employment specifically provided that he could be dismissed with three months' notice was held not to be enough to displace a public law duty to act fairly (p. 681).

90 From these foundational cases, procedural fairness has grown to become a central principle of Canadian administrative law. Its overarching purpose is not difficult to discern: administrative decision makers, in the exercise of public powers, should act fairly in coming to decisions that affect the interests of individuals. In other words, "[t]he observance of fair procedures is central to the notion of the 'just' exercise of power" (Brown and Evans, at p. 7-3). What is less clear, however, is whether this purpose is served by imposing public law procedural fairness requirements on public bodies in the exercise of their contractual rights as employers.

(3) Procedural Fairness in the Public Employment Context

91 *Ridge v. Baldwin* and *Nicholson* established that a public employee's right to procedural fairness depended on his or her status as an office holder. While *Knight* extended a duty of fairness to office holders during pleasure, it nevertheless upheld the distinction between office holders and contractual employees as an important criterion in establishing whether a duty of fairness was owed. Courts have continued to rely on this distinction, either extending or denying procedural

protections depending on the characterization of the public employee's legal status as an office holder or contractual employee (see e.g. *Reglin v. Creston (Town)* (2004), 34 C.C.E.L. (3d) 123, 2004 BCSC 790 (B.C. S.C.); *Gismondi v. Toronto (City)* (2003), 64 O.R. (3d) 688 (Ont. C.A.); *Seshia v. Health Sciences Centre* (2001), 160 Man. R. (2d) 41, 2001 MBCA 151 (Man. C.A.); *Rosen v. Saskatoon District Health Board* (2001), 202 D.L.R. (4th) 35, 2001 SKCA 83 (Sask. C.A.); *Hanis v. Teevan* (1998), 111 O.A.C. 91 (Ont. C.A.); *Gerrard v. Sackville (Town)* (1992), 124 N.B.R. (2d) 70 (N.B. C.A.)).

92 In practice, a clear distinction between office holders and contractual employees has been difficult to maintain:

> Although the law makes a sharp distinction between office and service in theory, in practice it may be difficult to tell which is which. For tax purposes "office" has long been defined as a "subsisting, permanent substantive position which has an existence independent of the person who fills it", but for the purposes of natural justice the test may not be the same. Nor need an office necessarily be statutory, although nearly all public offices of importance in administrative law are statutory. A statutory public authority may have many employees who are in law merely its servants, and others of higher grades who are office-holders.
>
> (Wade and Forsyth, at pp. 532-33)

93 Lord Wilberforce noted that attempting to separate office holders from contractual employees

> involves the risk of a compartmental approach which, although convenient as a solvent, may lead to narrower distinctions than are appropriate to the broader issues of administrative law. A comparative list of situations in which persons have been held entitled or not entitled to a hearing, or to observation of rules of natural justice, according to the master and servant test, looks illogical and even bizarre.
>
> (*Malloch v. Aberdeen Corp.*, [1971] 2 All E.R. 1278 (U.K. H.L.), at p. 1294)

94 There is no reason to think that the distinction has been easier to apply in Canada. In *Knight*, as has been noted, the majority judgment relied on whether the public employee's position had a "strong 'statutory flavour'" (p. 672), but as Brown and Evans observe, "there is no simple test for determining whether there is a sufficiently strong 'statutory flavour' to a job for it to be classified as an 'office'" (p. 7-19). This has led to uncertainty as to whether procedural fairness attaches to particular positions. For instance, there are conflicting decisions on whether the position of a "middle manager" in a municipality is sufficiently important to attract a duty of fairness (compare *Gismondi*, at para. 53, and *Hughes v. Moncton (City)* (1990), 111 N.B.R. (2d) 184 (N.B. Q.B.) aff'd (1991), 118 N.B.R. (2d) 306 (N.B. C.A.). Similarly, physicians working in the public health system may or may not be entitled to a duty of fairness (compare *Seshia* and *Rosen v. Saskatoon District Health Board*, [2000] 4 W.W.R. 606, 2000 SKQB 40 (Sask. Q.B.)).

95 Further complicating the distinction is the fact that public employment is for the most part now viewed as a regular contractual employment relationship. The traditional position at common law was that public servants were literally "servants of the Crown" and could therefore be dismissed at will. However, it is now recognized that most public employees are employed on a contractual basis: *Wells v. Newfoundland*, [1999] 3 S.C.R. 199 (S.C.C.).

96 *Wells* concerned the dismissal without compensation of a public office holder whose position had been abolished by statute. The Court held that, while Wells' position was created by statute, his employment relationship with the Crown was contractual and therefore he was entitled to be compensated for breach of contract according to ordinary private law principles. Indeed, *Wells* recognized that most civil servants and public officers are employed under contracts of employment, either as members of unions bound by collective agreements or as non-unionized employees under individual contracts of employment (paras. 20-21 and 29-32). Only certain officers, like ministers of the Crown and "others who fulfill constitutionally defined state roles", do not have a contractual relationship with the Crown, since the terms of their positions cannot be modified by agreement (*Wells*, at paras. 29-32).

97 The effect of *Wells*, as Professors Hogg and Monahan note, is that

> [t]he government's common law relationship with its employees will now be governed, for the most part, by the general law of contract, in the same way as private employment relationships. This does not mean that governments cannot provide for a right to terminate employment contracts at pleasure. However, if the government wishes to have such a right, it must either contract for it or make provision (expressly or by necessary implication) by way of statute.
>
> (P. W. Hogg and P. J. Monahan, *Liability of the Crown* (3rd ed. 2000, at p. 240)

The important point for our purposes is that *Wells* confirmed that most public office holders have a contractual employment relationship. Of course, office holders' positions will also often be governed by statute and regulations, but the essence of the employment relationship is still contractual. In this context, attempting to make a clear distinction between office holders and contractual employees for the purposes of procedural fairness becomes even more difficult.

98 If the distinction has become difficult to maintain in practice, it is also increasingly hard to justify in principle. There would appear to be three main reasons for distinguishing between office holders and contractual employees and for extending procedural fairness protections only to the former, all of which, in our view, are problematic.

99 First, historically, offices were viewed as a form of property, and thus could be recovered by the office holder who was removed contrary to the principles of natural justice. Employees who

were dismissed in breach of their contract, however, could only sue for damages, since specific performance is not generally available for contracts for personal service (Wade and Forsyth, at pp. 531-32). This conception of public office has long since faded from our law: public offices are no longer treated as a form of private property.

100 A second and more persuasive reason for the distinction is that dismissal from public office involves the exercise of delegated statutory power and should therefore be subject to public law controls like any other administrative decision (*Knight*, at p. 675; *Malloch*, at p. 1293, *per* Lord Wilberforce). In contrast, the dismissal of a contractual employee only implicates a public authority's private law rights as an employer.

101 A third reason is that, unlike contractual employees, office holders did not typically benefit from contractual rights protecting them from summary discharge. This was true of the public office holders in *Ridge v. Baldwin* and *Nicholson*. Indeed, in both cases the statutory language purported to authorize dismissal without notice. The holders of an office "at pleasure" were in an even more tenuous position since by definition they could be dismissed without notice *and* without reason (*Nicholson*, at p. 323; *Black's Law Dictionary* (8th ed. (2004), p. 1192 "pleasure appointment"). Because of this relative insecurity it was seen to be desirable to impose minimal procedural requirements in order to ensure that office holders were not deprived of their positions arbitrarily (*Nicholson*, at pp. 322-23; *Knight*, at pp. 674-75; Wade and Forsyth, at pp. 536-37).

102 In our view, the existence of a contract of employment, not the public employee's status as an office holder, is the crucial consideration. Where a public office holder is employed under a contract of employment the justifications for imposing a public law duty of fairness with respect to his or her dismissal lose much of their force.

103 Where the employment relationship is contractual, it becomes difficult to see how a public employer is acting any differently in dismissing a public office holder and a contractual employee. In both cases, it would seem that the public employer is merely exercising its private law rights as an employer. For instance, in *Knight*, the director's position was terminated by a resolution passed by the board of education pursuant to statute, but it was done in accordance with the contract of employment, which provided for dismissal on three months' notice. Similarly, the appellant in this case was dismissed pursuant to s. 20 of the New Brunswick *Civil Service Act*, but that section provides that the ordinary rules of contract govern dismissal. He could therefore only be dismissed for just cause or on reasonable notice, and any failure to do so would give rise to a right to damages. In seeking to end the employment relationship with four months' pay in lieu of notice, the respondent was acting no differently than any other employer at common law. In *Wells*, Major J. noted that public employment had all of the features of a contractual relationship:

> A common-sense view of what it means to work for the government suggests that these relationships have all the hallmarks of contract. There are negotiations leading to agreement

> and employment. This gives rise to enforceable obligations on both sides. The Crown is acting much as an ordinary citizen would, engaging in mutually beneficial commercial relations with individual and corporate actors. Although the Crown may have statutory guidelines, the result is still a contract of employment.
>
> [Emphasis added; para. 22.]

If the Crown is acting as any other private actor would in hiring its employees, then it follows that the dismissal of its employees should be viewed in the same way.

104 Furthermore, while public law is rightly concerned with preventing the arbitrary exercise of delegated powers, the good faith exercise of the contractual rights of an employer, such as the right to end the employment relationship on reasonable notice, cannot be qualified as arbitrary. Where the terms of the employment contract were explicitly agreed to, it will be assumed that procedural fairness was dealt with by the parties (see, for example, in the context of collective agreements: *Southeast Kootenay School District No. 5 v. B.C.T.F.* (2000), 94 L.A.C. (4th) 56 (B.C. Arb. Bd.)). If, however, the contract of employment is silent, the fundamental terms will be supplied by the common law or the civil law, in which case dismissal may only be for just cause or on reasonable notice.

105 In the context of this appeal, it must be emphasized that dismissal with reasonable notice is not unfair *per se*. An employer's right to terminate the employment relationship with due notice is simply the counterpart to the employee's right to quit with due notice (G. England, *Employment Law in Canada* (4th ed. (loose-leaf)), at para. 13.3). It is a well-established principle of the common law that, unless otherwise provided, both parties to an employment contract may end the relationship without alleging cause so long as they provide adequate notice. An employer's right to terminate on reasonable notice must be exercised within the framework of an employer's general obligations of good faith and fair dealing: *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 (S.C.C.), at para. 95. But the good faith exercise of a common law contractual right to dismiss with notice does not give rise to concerns about the illegitimate exercise of public power. Moreover, as will be discussed below, where public employers do act in bad faith or engage in unfair dealing, the private law provides a more appropriate form of relief and there is no reason that they should be treated differently than private sector employers who engage in similar conduct.

106 Of course, a public authority must abide by any statutory restrictions on the exercise of its discretion as an employer, regardless of the terms of an employment contract, and failure to do so may give rise to a public law remedy. A public authority cannot contract out of its statutory duties. But where a dismissal decision is properly within the public authority's powers and is taken pursuant to a contract of employment, there is no compelling public law purpose for imposing a duty of fairness.

107 Nor is the protection of office holders a justification for imposing a duty of fairness when the employee is protected from wrongful dismissal by contract. The appellant's situation provides a good illustration of why this is so. As an office holder, the appellant was employed "at pleasure", and could therefore be terminated without notice or reason (*Interpretation Act*, R.S.N.B. 1973, c. I-13, s. 20). However, he was also a civil servant and, pursuant to s. 20 of the *Civil Service Act*, his dismissal was governed by the ordinary rules of contract. If his employer had dismissed him without notice and without cause he would have been entitled to claim damages for breach of contract. Even if he was dismissed with notice, it was open to him to challenge the length of notice or amount of pay in lieu of notice given. On the facts, the respondent gave the appellant four months' worth of pay in lieu of notice, which he was successful in having increased to eight months before the grievance adjudicator.

108 It is true that the remedy of reinstatement is not available for breach of contract at common law. In this regard, it might be argued that contractual remedies, on their own, offer insufficient protection to office holders (see *de Smith, Woolf & Jowell: Judicial Review of Administrative Action* (5th ed. 1995), at p. 187). However, it must be kept in mind that breach of a public law duty of fairness also does not lead to full reinstatement. The effect of a breach of procedural fairness is to render the dismissal decision void *ab initio* (*Ridge v. Baldwin*, at p. 81). Accordingly, the employment is deemed to have never ceased and the office holder is entitled to unpaid wages and benefits from the date of the dismissal to the date of judgment (see England, at para. 17.224). However, an employer is free to follow the correct procedure and dismiss the office holder again. A breach of the duty of fairness simply requires that the dismissal decision be retaken. It therefore is incorrect to equate it to reinstatement (see *Malloch*, at p. 1284).

109 In addition, a public law remedy can lead to unfairness. The amount of unpaid wages and benefits an office holder is entitled to will be a function of the length of time the judicial process has taken to wend its way to a final resolution rather than criteria related to the employee's situation. Furthermore, in principle, there is no duty to mitigate since unpaid wages are not technically damages. As a result, an employee may recoup much more than he or she actually lost (see England, at para. 17.224).

110 In contrast, the private law offers a more principled and fair remedy. The length of notice or amount of pay in lieu of notice an employee is entitled to depends on a number of factors including length of service, age, experience and the availability of alternative employment (see *Wallace*, at paras. 81 ff.). The notice period may be increased if it is established that the employer acted in bad faith or engaged in unfair dealing when acting to dismiss the employee (*Wallace*, at para. 95). These considerations aim at ensuring that dismissed employees are afforded some measure of protection while looking for new employment.

111 It is important to note as well that the appellant, as a public employee employed under a contract of employment, also had access to all of the same statutory and common law protections that surround private sector employment. He was protected from dismissal on the basis of a prohibited ground of discrimination under the *Human Rights Act*, R.S.N.B. 1973, c. H-11. His employer was bound to respect the norms laid down by the *Employment Standards Act*, S.N.B. 1982, c. E-7.2. As has already been mentioned, if his dismissal had been in bad faith or he had been subject to unfair dealing, it would have been open to him to argue for an extension of the notice period pursuant to the principles laid down in *Wallace*. In short, the appellant was not without legal protections or remedies in the face of his dismissal.

(4) The Proper Approach to the Dismissal of Public Employees

112 In our view, the distinction between office holder and contractual employee for the purposes of a public law duty of fairness is problematic and should be done away with. The distinction is difficult to apply in practice and does not correspond with the justifications for imposing public law procedural fairness requirements. What is important in assessing the actions of a public employer in relation to its employees is the nature of the employment relationship. Where the relationship is contractual, it should be viewed as any other private law employment relationship regardless of an employee's status as an office holder.

113 The starting point, therefore, in any analysis, should be to determine the nature of the employment relationship with the public authority. Following *Wells*, it is assumed that most public employment relationships are contractual. Where this is the case, disputes relating to dismissal should be resolved according to the express or implied terms of the contract of employment and any applicable statutes and regulations, without regard for whether the employee is an office holder. A public authority which dismisses an employee pursuant to a contract of employment should not be subject to any additional public law duty of fairness. Where the dismissal results in a breach of contract, the public employee will have access to ordinary contractual remedies.

114 The principles expressed in *Knight* in relation to the general duty of fairness owed by public authorities when making decisions that affect the rights, privileges or interests of individuals are valid and important. However, to the extent that the majority decision in *Knight* ignored the important effect of a contract of employment, it should not be followed. Where a public employee is protected from wrongful dismissal by contract, his or her remedy should be in private law, not in public law.

115 The dismissal of a public employee should therefore generally be viewed as a typical employment law dispute. However, there may be occasions where a public law duty of fairness will still apply. We can envision two such situations at present. The first occurs where a public employee is not, in fact, protected by a contract of employment. This will be the case with judges, ministers of the Crown and others who "fulfill constitutionally defined state roles" (*Wells*, at para.

31). It may also be that the terms of appointment of some public office holders expressly provide for summary dismissal or, at the very least, are silent on the matter, in which case the office holders may be deemed to hold office "at pleasure" (see e.g. *New Brunswick Interpretation Act*, R.S.N.B. 1973, c. I-13, s. 20; *Interpretation Act*, R.S.C. 1985, c. I-21, s. 23(1)). Because an employee in this situation is truly subject to the will of the Crown, procedural fairness is required to ensure that public power is not exercised capriciously.

116 A second situation occurs when a duty of fairness flows by necessary implication from a statutory power governing the employment relationship. In *Malloch*, the applicable statute provided that dismissal of a teacher could only take place if the teacher was given three weeks' notice of the motion to dismiss. The House of Lords found that this necessarily implied a right for the teacher to make representations at the meeting where the dismissal motion was being considered. Otherwise, there would have been little reason for Parliament to have provided for the notice procedure in the first place (p. 1282). Whether and what type of procedural requirements result from a particular statutory power will of course depend on the specific wording at issue and will vary with the context (*Knight*, at p. 682).

B. Conclusion

117 In this case, the appellant was a contractual employee of the respondent in addition to being a public office holder. Section 20 of the *Civil Service Act* provided that, as a civil servant, he could only be dismissed in accordance with the ordinary rules of contract. In these circumstances it was unnecessary to consider any public law duty of procedural fairness. The respondent was fully within its rights to dismiss the appellant with pay in lieu of notice without affording him a hearing. The respondent dismissed the appellant with four months' pay in lieu of notice. The appellant was successful in increasing this amount to eight months. The appellant was protected by contract and was able to obtain contractual remedies in relation to his dismissal. By imposing procedural fairness requirements on the respondent over and above its contractual obligations and ordering the full "reinstatement" of the appellant, the adjudicator erred in his application of the duty of fairness and his decision was therefore correctly struck down by the Court of Queen's Bench.

V. Disposition

118 We would dismiss the appeal. There will be no order for costs in this Court as the respondent is not requesting them.

***Binnie J.* (concurring):**

119 I agree with my colleagues that the appellant's former employment relationship with the respondent is governed by contract. The respondent chose to exercise its right to terminate the employment without alleging cause. The adjudicator adopted an unreasonable interpretation of s. 20 of the *Civil Service Act*, S.N.B. 1984, c. C-5.1, and of ss. 97(2.1) and 100.1 of the *Public Service*

Labour Relations Act, R.S.N.B. 1973, c. P-25. The appellant was a non-unionized employee whose job was terminated in accordance with contract law. Public law principles of procedural fairness were not applicable in the circumstances. These conclusions are enough to dispose of the appeal.

120 However, my colleagues Bastarache and LeBel JJ. are embarked on a more ambitious mission, stating that:

> Although the instant appeal deals with the particular problem of judicial review of the decisions of an adjudicative tribunal, these reasons will address first and foremost the structure and characteristics of the system as a whole.
>
> . . . . .
>
> The time has arrived to reexamine the Canadian approach to judicial review of administrative decisions and develop a principled framework that is more coherent and workable. [Emphasis added; paras. 33 and 32.]

121 The need for such a re-examination is widely recognized, but in the end my colleagues' reasons for judgment do not deal with the "system as a whole". They focus on administrative tribunals. In that context, they reduce the applicable standards of review from three to two ("correctness" and "reasonableness"), but retain the pragmatic and functional analysis, although now it is to be called "the standard of review analysis" (para. 63). A broader reappraisal is called for. Changing the name of the old pragmatic and functional test represents a limited advance, but as the poet says:

> What's in a name? that which we call a rose
>
> By any other name would smell as sweet;
>
> (*Romeo and Juliet*, Act II, Scene i)

122 I am emboldened by my colleagues' insistence that "a holistic approach is needed when considering fundamental principles" (para. 26) to express the following views. Judicial review is an idea that has lately become unduly burdened with law office metaphysics. We are concerned with substance not nomenclature. The words themselves are unobjectionable. The dreaded reference to "functional" can simply be taken to mean that generally speaking courts have the last word on what *they* consider the correct decision on legal matters (because deciding legal issues is their "function"), while administrators should generally have the last word within *their* function, which is to decide administrative matters. The word "pragmatic" not only signals a distaste for formalism but recognizes that a conceptually tidy division of functions has to be tempered by practical considerations: for example a labour board is better placed than the courts to interpret the intricacies of provisions in a labour statute governing replacement of union workers; see e.g., *C.U.P.E., Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227 (S.C.C.).

123 Parliament or a provincial legislature is often well advised to allocate an administrative decision to someone other than a judge. The judge is on the outside of the administration looking in. The legislators are entitled to put their trust in the viewpoint of the designated decision maker (particularly as to what constitutes a reasonable outcome), not only in the case of the administrative tribunals of principal concern to my colleagues but (taking a "holistic approach") also in the case of a minister, a board, a public servant, a commission, an elected council or other administrative bodies and statutory decision makers. In the absence of a full statutory right of appeal, the court ought generally to respect the exercise of the administrative discretion, particularly in the face of a privative clause.

124 On the other hand, a court is right to insist that *its* view of the correct opinion (i.e. the "correctness" standard of review) is accepted on questions concerning the Constitution, the common law, and the interpretation of a statute other than the administrator's enabling statute (the "home statute") or a rule or statute closely connected with it; see generally D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf ed.), at para. 14: 2210.

125 Thus the law (or, more grandly, the "rule of law") sets the boundaries of potential administrative action. It is sometimes said by judges that an administrator acting within his or her discretion "has the right to be wrong". This reflects an unduly court-centred view of the universe. A disagreement between the court and an administrator does not necessarily mean that the administrator is wrong.

A. Limits on the Allocation of Decision Making

126 It should not be difficult in the course of judicial review to identify legal questions requiring disposition by a judge. There are three basic legal limits on the allocation of administrative discretion.

127 Firstly, the Constitution restricts the legislator's ability to allocate issues to administrative bodies which s. 96 of the *Constitution Act, 1867* has allocated to the courts. The logic of the constitutional limitation is obvious. If the limitation did not exist, the government could transfer the work of the courts to administrative bodies that are not independent of the executive and by statute immunize the decisions of these bodies from effective judicial review. The country would still possess an independent judiciary, but the courts would not be available to citizens whose rights or interests are trapped in the administration.

128 Secondly, administrative action must be founded on statutory or prerogative (i.e. common law) powers. This too is a simple idea. No one can exercise a power they do not possess. Whether or not the power (or jurisdiction) exists is a question of law for the courts to determine, just as it is for the courts (not the administrators) to have the final word on questions of general law that may be relevant to the resolution of an administrative issue. The instances where this Court has deferred

to an administrator's conclusion of law *outside* his or her home statute, or a statute "intimately" connected thereto, are exceptional. We should say so. Instead, my colleagues say the court's view of the law will prevail

> where the question at issue is one of general law "that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise". [para. 60]

It is, with respect, a distraction to unleash a debate in the reviewing judge's courtroom about whether or not a particular question of law is "of central importance to the legal system as a whole". It should be sufficient to frame a rule exempting from the correctness standard the provisions of the home statute and closely related statutes which require the expertise of the administrative decision maker (as in the labour board example). Apart from that exception, we should prefer clarity to needless complexity and hold that the last word on questions of general law should be left to judges.

129 Thirdly, a fair procedure is said to be the handmaiden of justice. Accordingly, procedural limits are placed on administrative bodies by statute and the common law. These include the requirements of "procedural fairness", which will vary with the type of decision maker and the type of decision under review. On such matters, as well, the courts have the final say. The need for such procedural safeguards is obvious. Nobody should have his or her rights, interests or privileges adversely dealt with by an unjust process. Nor is such an unjust intent to be attributed easily to legislators. *Hansard* is full of expressions of concern by Ministers and Members of Parliament regarding the fairness of proposed legislative provisions. There is a dated *hauteur* about judicial pronouncements such as that the "justice of the common law will supply the omission of the legislature" (*Cooper v. Wandsworth Board of Works* (1863), 14 C.B.N.S. 180, 143 E.R. 414 (Eng. C.P.), at p. 420). Generally speaking, legislators and judges in this country are working with a common set of basic legal and constitutional values. They share a belief in the rule of law. Constitutional considerations aside, however, statutory protections can nevertheless be repealed and common law protections can be modified by statute, as was demonstrated in *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control & Licensing Branch)*, [2001] 2 S.C.R. 781, 2001 SCC 52 (S.C.C).

B. Reasonableness of Outcome

130 At this point, judicial review shifts gears. When the applicant for judicial review challenges the substantive *outcome* of an administrative action, the judge is invited to cross the line into second-guessing matters that lie within the function of the administrator. This is controversial because it is not immediately obvious why a judge's view of the reasonableness of an administrative policy or the exercise of an administrative discretion should be preferred to that of the administrator to whom Parliament or a legislature has allocated the decision, unless there is a full statutory right of appeal to the courts, or it is otherwise indicated in the conferring legislation that a "correctness" standard is intended.

131 In *Syndicat national des employés de la commission scolaire régionale de l'Outaouais v. U.E.S., local 298*, [1988] 2 S.C.R. 1048 (S.C.C.), Beetz J. adopted the view that "[t]o a large extent judicial review of administrative action is a specialized branch of statutory interpretation" (p. 1087(emphasis in original deleted)). Judicial intervention in administrative decisions on grounds of substance (in the absence of a constitutional challenge) has been based on presumed legislative intent in a line of cases from *Associated Provincial Picture Houses Ltd. v. Wednesbury Corp.*, [1947] 2 All E.R. 680 (Eng. C.A.) ("you may have something so absurd that no sensible person could ever dream that it lay within the powers of the authority" (p. 683)) to *C.U.P.E., Local 963 v. New Brunswick Liquor Corp.* ("was the Board's interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation...?" (p. 237)). More recent examples are *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.) (para. 53), and *Centre hospitalier Mont-Sinaï c. Québec (Ministre de la Santé & des Services sociaux)*, [2001] 2 S.C.R. 281, 2001 SCC 41 (S.C.C.), (paras. 60-61). Judicial review proceeds on the justified presumption that legislators do not intend results that depart from *reasonable* standards.

C. The Need to Reappraise the Approach to Judicial Review

132 The present difficulty, it seems, does not lie in the component parts of judicial review, most of which are well entrenched in decades of case law, but in the current methodology for putting those component parts into action. There is afoot in the legal profession a desire for clearer guidance than is provided by lists of principles, factors and spectrums. It must be recognized, of course, that complexity is inherent in all legal principles that must address the vast range of administrative decision making.

The objection is that our present "pragmatic and functional" approach is more complicated than is required by the subject matter.

133 People who feel victimized or unjustly dealt with by the apparatus of government, and who have no recourse to an administrative appeal, should have access to an independent judge through a procedure that is quick and relatively inexpensive. Like much litigation these days, however, judicial review is burdened with undue cost and delay. Litigants understandably hesitate to go to court to seek redress for a perceived administrative injustice if their lawyers cannot predict with confidence even what standard of review will be applied. The disposition of the case may well *turn* on the choice of standard of review. If litigants do take the plunge, they may find the court's attention focussed not on their complaints, or the government's response, but on lengthy and arcane discussions of something they are told is the pragmatic and functional test. Every hour of a lawyer's preparation and court time devoted to unproductive "lawyer's talk" poses a significant cost to the applicant. If the challenge is unsuccessful, the unhappy applicant may also face a substantial bill of costs from the successful government agency. A victory before the reviewing court may

be overturned on appeal because the wrong "standard of review" was selected. A small business denied a licence or a professional person who wants to challenge disciplinary action should be able to seek judicial review without betting the store or the house on the outcome. Thus, in my view, the law of judicial review should be pruned of some of its unduly subtle, unproductive, or esoteric features.

D. Standards of Review

134 My colleagues conclude that three standards of review should be reduced to two standards of review. I agree that this simplification will avoid some of the arcane debates about the point at which "unreasonableness" becomes "patent unreasonableness". However, in my view the repercussions of their position go well beyond administrative tribunals. My colleagues conclude, and I agree:

> Looking to either the magnitude or the immediacy of the defect in the tribunal's decision provides no meaningful way in practice of distinguishing between a patently unreasonable and an unreasonable decision. [para. 41]

More broadly, they declare that "the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review" (para. 44), and "any actual difference between them in terms of their operation appears to be illusory" (para. 41). A test which is incoherent when applied to administrative tribunals does not gain in coherence or logic when applied to other administrative decision makers such as mid-level bureaucrats or, for that matter, Ministers. If logic and language cannot capture the distinction in one context, it must equally be deficient elsewhere in the field of judicial review. I therefore proceed on the basis that the distinction between "patent unreasonableness" and "reasonableness *simpliciter*" has been declared by the Court to be abandoned. I propose at this point to examine what I see as some of the implications of this abandonment.

E. Degrees of Deference

135 The distinction between reasonableness *simpliciter* and patent unreasonableness was not directed merely to "the magnitude or the immediacy of the defect" in the administrative decision (para. 41). The distinction also recognized that different administrative decisions command different degrees of deference, depending on who is deciding what.

136 A minister making decisions under the *Extradition Act*, R.S.C. 1985, c. E-23, to surrender a fugitive, for example, is said to be "at the extreme legislative end of the *continuum* of administrative decision making" (*Idziak v. Canada (Minister of Justice)*, [1992] 3 S.C.R. 631 (S.C.C.), at p. 659). On the other hand, a ministerial delegate making a deportation decision according to ministerial guidelines was accorded considerably less deference in *Baker* (where

the "reasonableness *simpliciter*" standard was applied). The difference does not lie only in the judge's view of the perceived immediacy of the defect in the administrative decision. In *Suresh v. Canada (Minister of Citizenship & Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1 (S.C.C.), a unanimous Court adopted the caution in the context of counter-terrorism measures that "[i]f the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove" (para. 33). Administrative decision makers generally command respect more for their expertise than for their prominence in the administrative food chain. Far more numerous are the lesser officials who reside in the bowels and recesses of government departments adjudicating pension benefits or the granting or withholding of licences, or municipal boards poring over budgets or allocating costs of local improvements. Then there are the Cabinet and Ministers of the Crown who make broad decisions of public policy such as testing cruise missiles, *Operation Dismantle Inc. v. R.*, [1985] 1 S.C.R. 441 (S.C.C.), or policy decisions arising out of decisions of major administrative tribunals, as in *Inuit Tapirisat of Canada v. Canada (Attorney General)*, [1980] 2 S.C.R. 735 (S.C.C.), at p. 753, where the Court said: "The very nature of the body must be taken into account in assessing the technique of review which has been adopted by the Governor in Council."

137 Of course, the degree of deference also depends on the nature and content of the question. An adjudicative tribunal called on to approve pipelines based on "public convenience and necessity" (*Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322 (S.C.C.)) or simply to take a decision in the "public interest" is necessarily accorded more room to manoeuvre than is a professional body, given the task of determining an appropriate sanction for a member's misconduct (*Ryan v. Law Society (New Brunswick)*, [2003] 1 S.C.R. 247, 2003 SCC 20 (S.C.C.)).

138 In our recent jurisprudence, the "nature of the question" before the decision maker has been considered as one of a number of elements to be considered in choosing amongst the various standards of review. At this point, however, I believe it plays a more important role in terms of substantive review. It helps to define the range of reasonable outcomes within which the administrator is authorized to choose.

139 The judicial sensitivity to different levels of respect (or deference) required in different situations is quite legitimate. "Contextualizing" a single standard of review will shift the debate (slightly) from choosing *between* two standards of reasonableness that each represent a different level of deference to a debate *within* a single standard of reasonableness to determine the appropriate level of deference. In practice, the result of today's decision may be like the bold innovations of a traffic engineer that in the end do no more than shift rush hour congestion from one road intersection to another without any overall saving to motorists in time or expense.

140 That said, I agree that the repeated attempts to define and explain the difference between reasonableness *simpliciter* and "patent" unreasonableness can be seen with the benefit of hindsight

to be unproductive and distracting. Nevertheless, the underlying issue of degrees of deference (which the two standards were designed to address) remains.

141 Historically, our law recognized "patent" unreasonableness before it recognized what became known as reasonableness *simpliciter*. The adjective "patent" initially underscored the level of respect that was due to the designated decision maker, and signalled the narrow authority of the courts to interfere with a particular administrative *outcome* on substantive grounds. The reasonableness *simpliciter* standard was added at a later date to recognize a reduced level of deference. Reducing three standards of review to two standards of review does not alter the reality that at the high end "patent" unreasonableness (in the sense of manifestly indefensible) was not a bad description of the hurdle an applicant had to get over to have an administrative decision quashed on a ground of substance. The danger of labelling the most "deferential" standard as "reasonableness" is that it may be taken (wrongly) as an invitation to reviewing judges not simply to identify the usual issues, such as whether irrelevant matters were taken into consideration, or relevant matters were not taken into consideration, but to reweigh the input that resulted in the administrator's decision as if it were the judge's view of "reasonableness" that counts. At this point, the judge's role is to identify the outer boundaries of reasonable outcomes within which the administrative decision maker is free to choose.

F. Multiple Aspects of Administrative Decisions

142 Mention should be made of a further feature that also reflects the complexity of the subject matter of judicial review. An applicant may advance several grounds for quashing an administrative decision. He or she may contend that the decision maker has misinterpreted the general law. He or she may argue, in the alternative, that even if the decision maker got the general law straight (an issue on which the court's view of what is correct will prevail), the decision maker did not properly apply it to the facts (an issue on which the decision maker is entitled to deference). In a challenge under the *Canadian Charter of Rights and Freedoms* to a surrender for extradition, for example, the minister will have to comply with the Court's view of *Charter* principles (the "correctness" standard), but if he or she correctly appreciates the applicable law, the court will properly recognize a wide discretion in the application of those principles to the particular facts. The same approach is taken to less exalted decision makers (*Moreau-Bérubé c. Nouveau-Brunswick*, [2002] 1 S.C.R. 249, 2002 SCC 11 (S.C.C.)). In the jargon of the judicial review bar, this is known as "segmentation".

G. The Existence of a Privative Clause

143 The existence of a privative clause is currently subsumed within the "pragmatic and functional" test as one factor amongst others to be considered in determining the appropriate standard of review, where it supports the choice of the patent unreasonableness standard. A single standard of "reasonableness" cannot mean that the degree of deference is unaffected by the

existence of a suitably worded privative clause. It is certainly a relevant contextual circumstance that helps to calibrate the intrusiveness of a court's review. It signals the level of respect that must be shown. Chief Justice Laskin during argument once memorably condemned the quashing of a labour board decision protected by a strong privative clause, by saying "what's wrong with these people [the judges], can't they read?" A system of judicial review based on the rule of law ought not to treat a privative clause as conclusive, but it is more than just another "factor" in the hopper of pragmatism and functionality. Its existence should presumptively foreclose judicial review on the basis of *outcome* on substantive grounds unless the applicant can show that the clause, properly interpreted, permits it or there is some legal reason why it cannot be given effect.

H. A Broader Reappraisal

144 "Reasonableness" is a big tent that will have to accommodate a lot of variables that inform and limit a court's review of the outcome of administrative decision making.

145 The theory of our recent case law has been that once the appropriate standard of review is selected, it is a fairly straightforward matter to apply it. In practice, the criteria for selection among "reasonableness" standards of review proved to be undefinable and their application unpredictable. The present incarnation of the "standard of review" analysis requires a threshold debate about the four factors (non-exhaustive) which critics say too often leads to unnecessary delay, uncertainty and costs as arguments rage before the court about balancing expertise against the "real" nature of the question before the administrator, or whether the existence of a privative clause trumps the larger statutory purpose, and so on. And this is all mere *preparation* for the argument about the actual substance of the case. While a measure of uncertainty is inherent in the subject matter and unavoidable in litigation (otherwise there wouldn't be any), we should at least (i) establish some presumptive rules and (ii) get the parties away from arguing about the tests and back to arguing about the substantive merits of their case.

146 The going-in presumption should be that the standard of review of any administrative outcome on grounds of substance is not correctness but reasonableness ("contextually" applied). The fact that the legislature designated someone other than the court as the decision maker calls for deference to (or judicial respect for) the outcome, absent a broad statutory right of appeal. Administrative decisions generally call for the exercise of discretion. Everybody recognizes in such cases that there is *no* single "correct" outcome. It should also be presumed, in accordance with the ordinary rules of litigation, that the decision under review *is* reasonable until the applicant shows otherwise.

147 An applicant urging the non-deferential "correctness" standard should be required to demonstrate that the decision under review rests on an error in the determination of a *legal* issue not confided (or which constitutionally *could* not be confided) to the administrative decision maker to decide, whether in relation to jurisdiction or the general law. Labour arbitrators, as in this case,

command deference on legal matters within their enabling statute or on legal matters intimately connected thereto.

148 When, then, should a decision be deemed "unreasonable"? My colleagues suggest a test *of irrationality* (para. 46), but the editors of de Smith point out that "many decisions which fall foul of [unreasonableness] have been coldly rational" (*Judicial Review of Administrative Action* (5th ed., H. Woolf and J. Jowell, 1995), para. 13-003). A decision meeting this description by this Court is *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29 (S.C.C.), where the Minister's appointment of retired judges with little experience in labour matters to chair "interest" arbitrations (as opposed to "grievance" arbitrations) between hospitals and hospital workers was "coldly rational" in terms of the Minister's own agenda, but was held by a majority of this Court to be patently unreasonable in terms of the history, object and purpose of the authorizing legislation. He had not used the appointment power for the purposes for which the legislature had conferred it.

149 Reasonableness rather than rationality has been the traditional standard and, properly interpreted, it works. That said, a single "reasonableness" standard will now necessarily incorporate *both* the degree of deference formerly reflected in the distinction between patent unreasonableness and reasonableness *simpliciter*, *and* an assessment of the range of options reasonably open to the decision maker in the circumstances, in light of the reasons given for the decision. Any reappraisal of our approach to judicial review should, I think, explicitly recognize these different dimensions to the "reasonableness" standard.

I. Judging "Reasonableness"

150 I agree with my colleagues that "reasonableness" depends on the context. It must be calibrated to fit the circumstances. A driving speed that is "reasonable" when motoring along a four-lane interprovincial highway is not "reasonable" when driving along an inner city street. The standard ("reasonableness") stays the same, but the reasonableness assessment will vary with the relevant circumstances.

151 This, of course, is the nub of the difficulty. My colleagues write:

> In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. [para. 47]

I agree with this summary but what is required, with respect, is a more easily applied framework into which the judicial review court and litigants can plug in the relevant context. No one doubts that in order to overturn an administrative outcome on grounds of substance (i.e. leaving aside errors of fairness or law which lie within the supervising "function" of the courts), the reviewing court must be satisfied that the outcome was outside the scope of reasonable responses open to the

decision maker under its grant of authority, usually a statute. "[T]here is always a perspective", observed Rand J., "within which a statute is intended [by the legislature] to operate", *Roncarelli v. Duplessis*, [1959] S.C.R. 121 (S.C.C.), at p. 140. How is that "perspective" to be ascertained? The reviewing judge will obviously want to consider the precise nature and function of the decision maker including its expertise, the terms and objectives of the governing statute (or common law) conferring the power of decision, including the existence of a privative clause and the nature of the issue being decided. Careful consideration of these matters will reveal the extent of the discretion conferred, for example, the extent to which the decision formulates or implements broad public policy. In such cases, the range of permissible considerations will obviously be much broader than where the decision to be made is more narrowly circumscribed, e.g., whether a particular claimant is entitled to a disability benefit under governmental social programs. In some cases, the court will have to recognize that the decision maker was required to strike a proper balance (or achieve proportionality) between the adverse impact of a decision on the rights and interests of the applicant or others directly affected weighed against the public purpose which is sought to be advanced. In each case, careful consideration will have to be given to the reasons given for the decision. To this list, of course, may be added as many "contextual" considerations as the court considers relevant and material.

152 Some of these indicia were included from the outset in the pragmatic and functional test itself (see *Bibeault*, at p. 1088). The problem, however, is that under *Bibeault*, and the cases that followed it, these indicia were used to choose among the different standards of review, which were themselves considered more or less fixed. In *Ryan v. Law Society (New Brunswick)*, for example, the Court *rejected* the argument that "it is sometimes appropriate to apply the reasonableness standard more deferentially and sometimes less deferentially depending on the circumstances" (para. 43). It seems to me that collapsing everything beyond "correctness" into a single "reasonableness" standard will require a reviewing court to do exactly that.

153 The Court's adoption in this case of a single "reasonableness" standard that covers both the degree of deference assessment and the reviewing court's evaluation, in light of the appropriate degree of deference, of whether the decision falls within a range of reasonable administrative choices will require a reviewing court to juggle a number of variables that are necessarily to be considered together. Asking courts to have regard to more than one variable is not asking too much, in my opinion. In other disciplines, data are routinely plotted simultaneously along both an *X* axis and a *Y* axis, without traumatizing the participants.

154 It is not as though we lack guidance in the decided cases. Much has been written by various courts about deference and reasonableness in the particular contexts of different administrative situations. Leaving aside the "pragmatic and functional" test, we have ample precedents to show when it is (or is not) appropriate for a court to intervene in the outcome of an administrative decision. The problem is that courts have lately felt obliged to devote too much time to multi-part

threshold tests instead of focussing on the who, what, why and wherefor of the litigant's complaint on its merits.

155 That having been said, a reviewing court ought to recognize throughout the exercise that fundamentally the "reasonableness" of the outcome is an issue given to others to decide. The exercise of discretion is an important part of administrative decision making. Adoption of a single "reasonableness" standard should not be seen by potential litigants as a lowering of the bar to judicial intervention.

J. Application to This Case

156 Labour arbitrators often have to juggle different statutory provisions in disposing of a grievance. The courts have generally attached great importance to their expertise in keeping labour peace. In this case, the adjudicator was dealing with his "home statute" plus other statutes intimately linked to public sector relations in New Brunswick. He was working on his "home turf", and the legislature has made clear in the privative clause that it intended the adjudicator to determine the outcome of the appellant's grievance. In this field, quick and cheap justice (capped by finality) advances the achievement of the legislative scheme. Recourse to judicial review is discouraged. I would therefore apply a reasonableness standard to the adjudicator's interpretation of his "home turf" statutory framework.

157 Once under the flag of reasonableness, however, the salient question before the adjudicator in this case was essentially legal in nature, as reflected in the reasons he gave for his decision. He was not called on to implement public policy; nor was there a lot of discretion in dealing with a non-unionized employee. The basic facts were not in dispute. He was disposing of a *lis* which he believed to be governed by the legislation. He was right to be conscious of the impact of his decision on the appellant, but he stretched the law too far in coming to his rescue. I therefore join with my colleagues in dismissing the appeal.

***Deschamps J.* (concurring):**

158 The law of judicial review of administrative action not only requires repairs, it needs to be cleared of superfluous discussions and processes. This area of the law can be simplified by examining the *substance* of the work courts are called upon to do when reviewing any case, whether it be in the context of administrative or of appellate review. Any review starts with the identification of the questions at issue as questions of law, questions of fact or questions of mixed fact and law. Very little else needs to be done in order to determine whether deference needs to be shown to an administrative body.

159 By virtue of the Constitution, superior courts are the only courts that possess inherent jurisdiction. They are responsible both for applying the laws enacted by Parliament and the legislatures and for insuring that statutory bodies respect their legal boundaries. Parliament and the

legislatures cannot totally exclude judicial oversight without overstepping the division between legislative or executive powers and judicial powers. Superior courts are, in the end, the protectors of the integrity of the rule of law and the justice system. Judicial review of administrative action is rooted in these fundamental principles and its boundaries are largely informed by the roles of the respective branches of government.

160 The judicial review of administrative action has, over the past 20 years, been viewed as involving a preliminary analysis of whether deference is owed to an administrative body based on four factors: (1) the nature of the question, (2) the presence or absence of a privative clause, (3) the expertise of the administrative decision maker and (4) the object of the statute. The process of answering this preliminary question has become more complex than the determination of the substantive questions the court is called upon to resolve. In my view, the analysis can be made plainer if the focus is placed on the issues the parties need to have adjudicated rather than on the nature of the judicial review process itself. By focusing first on "the nature of the question", to use what has become familiar parlance, it will become apparent that all four factors need not be considered in every case and that the judicial review of administrative action is often not distinguishable from the appellate review of court decisions.

161 Questions before the courts have consistently been identified as either questions of fact, questions of law or questions of mixed fact and law. Whether undergoing appellate review or administrative law review, decisions on questions of fact always attract deference. The use of different terminology — "palpable and overriding error" versus "unreasonable decision" — does not change the substance of the review. Indeed, in the context of appellate review of court decisions, this Court has recognized that these expressions as well as others all encapsulate the same principle of deference with respect to a trial judge's findings of fact: *L. (H.) v. Canada (Attorney General)*, [2005] 1 S.C.R. 401, 2005 SCC 25 (S.C.C.), at paras. 55-56. Therefore, when the issue is limited to questions of fact, there is no need to enquire into any other factor in order to determine that deference is owed to an administrative decision maker.

162 Questions of law, by contrast, require more thorough scrutiny when deference is evaluated, and the particular context of administrative decision making can make judicial review different than appellate review. Although superior courts have a core expertise to interpret questions of law, Parliament or a legislature may have provided that the decision of an administrative body is protected from judicial review by a privative clause. When an administrative body is created to interpret and apply certain legal rules, it develops specific expertise in exercising its jurisdiction and has a more comprehensive view of those rules. Where there is a privative clause, Parliament or a legislature's intent to leave the final decision to that body cannot be doubted and deference is usually owed to the body.

163 However, privative clauses cannot totally shield an administrative body from review. Parliament, or a legislature, cannot have intended that the body would be protected were it to

overstep its delegated powers. Moreover, if such a body is asked to interpret laws in respect of which it does not have expertise, the constitutional responsibility of the superior courts as guardians of the rule of law compels them to insure that laws falling outside an administrative body's core expertise are interpreted correctly. This reduced deference insures that laws of general application, such as the Constitution, the common law and the *Civil Code*, are interpreted correctly and consistently. Consistency of the law is of prime societal importance. Finally, deference is not owed on questions of law where Parliament or a legislature has provided for a statutory right of review on such questions.

164 The category of questions of mixed fact and law should be limited to cases in which the determination of a legal issue is inextricably intertwined with the determination of facts. Often, an administrative body will first identify the rule and then apply it. Identifying the contours and the content of a legal rule are questions of law. Applying the rule, however, is a question of mixed fact and law. When considering a question of mixed fact and law, a reviewing court should show an adjudicator the same deference as an appeal court would show a lower court.

165 In addition, Parliament or a legislature may confer a discretionary power on an administrative body. Since the case at bar does not concern a discretionary power, it will suffice for the purposes of these reasons to note that, in any analysis, deference is owed to an exercise of discretion unless the body has exceeded its mandate.

166 In summary, in the adjudicative context, the same deference is owed in respect of questions of fact and questions of mixed fact and law on administrative review as on an appeal from a court decision. A decision on a question of law will also attract deference, provided it concerns the interpretation of the enabling statute and provided there is no right of review.

167 I would be remiss were I to disregard the difficulty inherent in any exercise of deference. In *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63 (S.C.C.), LeBel J. explained why a distinction between the standards of patent unreasonableness and unreasonableness *simpliciter* is untenable. I agree. The problem with the definitions resides in attempts by the courts to enclose the concept of reasonableness in a formula fitting all cases. No matter how this Court defines this concept, any context considered by a reviewing court will, more often than not, look more like a rainbow than a black and white situation. One cannot change this reality. I use the word "deference" to define the contours of reasonableness because it describes the attitude adopted towards the decision maker. The word "reasonableness" concerns the decision. However, neither the concept of reasonableness nor that of deference is particular to the field of administrative law. These concepts are also found in the context of criminal and civil appellate review of court decisions. Yet, the exercise of the judicial supervisory role in those fields has not given rise to the complexities encountered in administrative law. The process of stepping back and taking an *ex post facto* look at the decision to determine whether there is an error justifying

intervention should not be more complex in the administrative law context than in the criminal and civil law contexts.

168 In the case at bar, the adjudicator was asked to adjudicate the grievance of a non-unionized employee. This meant that he had to identify the rules governing the contract. Identifying those rules is a question of law. Section 20 of the *Civil Service Act*, S.N.B. 1984, c. C-5.1, incorporates the rules of the common law, which accordingly become the starting point of the analysis. The adjudicator had to decide whether those rules had been ousted by the *Public Service Labour Relations Act*, R.S.N.B. 1973, c. P-25 ("*PSLRA*"), as applied, *mutatis mutandis*, to the case of a non-unionized employee (ss. 97(2.1), 100.1(2) and 100.1(5)). The common law rules relating to the dismissal of an employee differ completely from the ones provided for in the *PSLRA* that the adjudicator is regularly required to interpret. Since the common law, not the adjudicator's enabling statute, is the starting point of the analysis, and since the adjudicator does not have specific expertise in interpreting the common law, the reviewing court does not have to defer to his decision on the basis of expertise. This leads me to conclude that the reviewing court can proceed to its own interpretation of the rules applicable to the non-unionized employee's contract of employment and determine whether the adjudicator could enquire into the cause of the dismissal. The applicable standard of review is correctness.

169 It is clear from the adjudicator's reasoning that he did not even consider the common law rules. He said (p. 5):

> An employee to whom section 20 of the Civil Service Act and section 100.1 of the PSLR Act apply may be discharged for cause, with reasonable notice or with severance pay in lieu of reasonable notice. A discharge for cause may be for disciplinary or non-disciplinary reasons.

170 The employer's common law right to dismiss without cause is not alluded to in this key passage of the decision. Unlike a unionized employee, a non-unionized employee does not have employment security. His or her employment may be terminated without cause. The corollary of the employer's right to dismiss without cause is the employee's right to reasonable notice or to compensation in lieu of notice. The distinction between the common law rules of employment and the statutory rules applicable to a unionized employee is therefore essential if s. 97(2.1) is to be applied *mutatis mutandis* to the case of a non-unionized employee as required by s. 100.1(5). The adjudicator's failure to inform himself of this crucial difference led him to look for a cause, which was not relevant in the context of a dismissal without cause. In a case involving dismissal without cause, only the amount of the compensation or the length of the notice is relevant. In a case involving dismissal for cause, the employer takes the position that no compensation or notice is owed to the employee. This was not such a case. In the case at bar, the adjudicator's role was limited to evaluating the length of the notice. He erred in interpreting s. 97(2.1) in a vacuum. He overlooked the common law rules, misinterpreted s. 100.1(5) and applied s. 97(2.1) literally to the case of a non-unionized employee.

171 This case is one where, even if deference had been owed to the adjudicator, his interpretation could not have stood. The legislature could not have intended to grant employment security to non-unionized employees while providing only that the *PSLRA* was to apply *mutatis mutandis*. This right is so fundamental to an employment relationship that it could not have been granted in so indirect and obscure a manner.

172 In this case, the Court has been given both an opportunity and the responsibility to simplify and clarify the law of judicial review of administrative action. The judicial review of administrative action need not be a complex area of law in itself. Every day, reviewing courts decide cases raising multiple questions, some of fact, some of mixed fact and law and some purely of law; in various contexts, the first two of these types of questions tend to require deference, while the third often does not. Reviewing courts are already amply equipped to resolve such questions and do not need a specialized analytical toolbox in order to review administrative decisions.

173 On the issue of natural justice, I agree with my colleagues. On the result, I agree that the appeal should be dismissed.

Appeal dismissed.

Pourvoi rejeté.

APPENDIX

Relevant Statutory Provisions

Civil Service Act, S.N.B. 1984, c. C-5.1:

> **20** Subject to the provisions of this Act or any other Act, termination of the employment of a deputy head or an employee shall be governed by the ordinary rules of contract.

Public Service Labour Relations Act, R.S.N.B. 1973, c. P-25:

> **92**(1) Where an employee has presented a grievance up to and including the final level in the grievance process with respect to
>
> > (a) the interpretation or application in respect of him of a provision of a collective agreement or an arbitral award, or
> >
> > (b) disciplinary action resulting in discharge, suspension or a financial penalty,
>
> and his grievance has not been dealt with to his satisfaction, he may, subject to subsection (2), refer the grievance to adjudication.

Public Service Labour Relations Act, R.S.N.B. 1973, c. P-25, as amended:

97(2.1) Where an adjudicator determines that an employee has been discharged or otherwise disciplined by the employer for cause and the collective agreement or arbitral award does not contain a specific penalty for the infraction that resulted in the employee being discharged or otherwise disciplined, the adjudicator may substitute such other penalty for the discharge or discipline as to the adjudicator seems just and reasonable in all the circumstances.

. . . . .

100.1(2) An employee who is not included in a bargaining unit may, in the manner, form and within such time as may be prescribed, present to the employer a grievance with respect to discharge, suspension or a financial penalty.

100.1(3) Where an employee has presented a grievance in accordance with subsection (2) and the grievance has not been dealt with to the employee's satisfaction, the employee may refer the grievance to the Board who shall, in the manner and within such time as may be prescribed, refer the grievance to an adjudicator appointed by the Board.

. . . . .

100.1(5) Sections 19, 97, 98.1, 101, 108 and 111 apply *mutatis mutandis* to an adjudicator to whom a grievance has been referred in accordance with subsection (3) and in relation to any decision rendered by such adjudicator.

. . . . .

101(1) Except as provided in this Act, every order, award, direction, decision, declaration or ruling of the Board, an arbitration tribunal or an adjudicator is final and shall not be questioned or reviewed in any court.

101(2) No order shall be made or process entered, and no proceedings shall be taken in any court, whether by way of injunction, judicial review, or otherwise, to question, review, prohibit or restrain the Board, an arbitration tribunal or an adjudicator in any of its or his proceedings.

Footnotes

* Corrigenda issued by the Court on March 10, 11, 2008, and April 17, 2008 have been incoporated herein.

1 Para. 41

2 Para. 47

3 Para. 48

4 Para. 53

5 Para. 133

6 Para. 144

7 Para. 146

1994 CarswellOnt 1015
Ontario Court of Justice (General Division) [Divisional Court]

E.A. Manning Ltd. v. Ontario (Securities Commission)

1994 CarswellOnt 1015, [1994] O.J. No. 1026, 17 O.S.C.B. 2339, 18 O.R. (3d) 97, 24 Admin. L.R. (2d) 283, 3 C.C.L.S. 221, 47 A.C.W.S. (3d) 896, 72 O.A.C. 34

E.A. MANNING LIMITED, JUDITH MARCELLA MANNING, TIMOTHY EDWARD MANNING and WILLIAM DOUGLAS ELIK v. ONTARIO SECURITIES COMMISSION; APPLICATION UNDER THE JUDICIAL REVIEW PROCEDURE ACT, R.S.O. 1990, c. J.1

Montgomery, Dunnet and Howden JJ.

Heard: April 19 and 20, 1994
Judgment: May 13, 1994
Docket: Doc. 72/94

Counsel: *Bryan Finlay, Q.C.*, and *J. Gregory Richards*, for applicants.
Dennis R. O'Connor, Q.C., *James D.G. Douglas* and *Benjamin T. Glustein*, for respondent.

Subject: Securities; Public; Corporate and Commercial

Application for order prohibiting Ontario Securities Commission from proceeding with hearings.

The judgment of the court was delivered by *Montgomery J.*:

1 The applicants seeks prohibition to stop the Ontario Securities Commission ("OSC") from proceeding with two hearings that relate to allegedly improper sales practices by the applicants. Relief is sought on the ground of bias and in particular on the basis that the OSC has allegedly prejudged the case against the applicants.

The Issues

2 (1) Actual bias;

3 (2) Reasonable apprehension of bias;

4 (3) The doctrine of necessity.

5 These issues are to be decided under a legislative scheme which gives the OSC the following roles: investigator, prosecutor, policy maker and adjudicator.

6 The OSC is defined by s. 2 of the *Securities Act*, R.S.O. 1990, c. S.5 (the "Act") as consisting of a Chair and between 8 and 10 members, referred to as Commissioners, appointed by the Lieutenant Governor in Council. A quorum is two members. By subs. 3(3), where a Commissioner has, as part of his or her duties in the investigative and enforcement roles of the Commission, ordered proceedings to be instituted, that Commissioner may not participate in the resulting hearing. This is an important and apparently the only express statutory guide as to how the OSC is to keep its adjudicative role separate from its other duties. The issues in this case deal with the standard and application of the common law duty of a tribunal, with several conflicting functions assigned to its members and its staff, to act fairly, without bias or conduct indicating bias, when it comes to its adjudicative role.

The Facts

7 On December 15, 1993, the OSC issued a notice of hearing (the "first notice of hearing"), pursuant to the Act, to consider:

> (a) whether under s. 27 of the Act, it is in the public interest that the registrations of the applicants E.A. Manning Limited ("Manning Limited"), Judith Marcella Manning ("Judith Manning"), Timothy Edward Manning ("Ted Manning") and William Douglas Elik ("Elik") and certain other employees or officers of Manning Limited be suspended, cancelled, restricted or made subject to conditions;
>
> (b) whether under s. 128 of the Act, it is in the public interest to order that any or all of the exemptions contained in ss. 35, 72, 73 and 93 of the Act no longer apply to the said applicants and others.

First Notice of Hearing

8 With respect to the applicants named in the first notice of hearing, the staff of the OSC allege that they engaged in conduct involving trading in the securities of BelTeco Holdings Inc. ("BelTeco") and Torvalon Corporation ("Torvalon") which was abusive of the capital markets and contrary to the public interest.

9 In particular, the staff of the OSC allege that the applicants named in the first notice of hearing conducted trades in the securities of BelTeco and Torvalon contrary to the public interest by:

> (a) failing to adequately advise purchasers of the securities of BelTeco and Torvalon that Manning Limited was selling the securities as principal, not agent, and failing to disclose

to purchasers of the securities that mark-ups were included in the purchase price of those securities;

(b) permitting, encouraging or requiring salespersons of Manning Limited to approach customers with no bona fide independent verification of the nature of the businesses and the financial condition of BelTeco or Torvalon;

(c) failing to disclose to purchasers of the securities of BelTeco and Torvalon, inter alia, the limited marketability of the securities, and the nature of the businesses and the financial condition of BelTeco and Torvalon;

(d) using high pressure sales tactics to induce persons to purchase the securities of BelTeco and Torvalon;

(e) failing to comply with their suitability and "know your client" obligations, contrary to s. 114 of Regulation 1015, R.R.O. 1990;

(f) failing to make any bona fide independent effort to verify the nature of the businesses and the financial condition of BelTeco and Torvalon;

(g) giving undertakings to clients concerning the future value of the securities of BelTeco and Torvalon with the intention of effecting a trade in such securities;

(h) executing orders on behalf of clients in the securities of BelTeco and Torvalon without prior authorization;

(i) failing to execute, or refusing to accept, sell orders by clients in respect of the securities of BelTeco and Torvalon;

(j) failing to advise potential purchasers of the securities of BelTeco and Torvalon that investment in those securities was highly speculative and involved a significant risk;

(k) failing to advise clients of the commissions received by the salesperson in respect of the securities of BelTeco and Torvalon; and

(l) failing to deal fairly, honestly and in good faith with their clients in respect of the securities of BelTeco and Torvalon.

10 In addition, the staff of the OSC allege in the first notice of hearing that Judith Manning and Manning Limited failed to properly supervise the activities of Ted Manning and Elik, and the trading of Manning Limited in the securities of BelTeco and Torvalon.

11 The proceeding arising from the first notice of hearing is scheduled to commence on Monday, September 19, 1994.

Second Notice of Hearing

12 On February 1, 1994, the staff of the OSC informed Manning Limited that the staff would be attending before the OSC on February 2, 1994 at 2:00 p.m. to seek an order under s. 27(2) of the Act, for an interim suspension of the registration of Manning Limited.

13 On February 2, 1994, a panel of two Commissioners, Vice-chair Smart and Commissioner Blain, dismissed the s. 27(2) application and held that the allegations grounding the application should be considered at a full hearing under s. 27(1) of the Act.

14 Consequently, on February 4, 1994, the OSC issued a notice of hearing (the "second notice of hearing") to consider:

> (a) whether under s. 27(1) of the Act, it is in the public interest that the registrations of all of the applicants be suspended, cancelled, restricted or made subject to conditions; and
>
> (b) whether under s. 37(1) of the Act, it is in the public interest to suspend, cancel, restrict or impose terms and conditions upon the right of the applicants to call at or telephone to any residence in Ontario for the purpose of trading in any security or in any class of securities.

15 The staff of the OSC allege that from January 4, 1994, all of the present applicants, and from September 1992, the applicant Elik, have failed and continue to fail to deal fairly with and act in the best interests of clients during telephone calls made to induce individuals to purchase securities from Manning Limited, and in particular that the applicants:

> (a) failed to adequately disclose that Manning Limited was selling securities to its clients at markups and that Manning Limited's salespersons were receiving commissions at 17-1/2% on each client's purchase;
>
> (b) failed to disclose that Manning Limited salespersons would lose their entitlement to commissions if clients sold securities within a certain period of time;
>
> (c) used high pressure sales tactics;
>
> (d) resisted or refused to sell securities when so instructed by their clients;
>
> (e) failed to adequately advise about the risks associated with purchases and in particular that the purchases were highly speculative in nature and could result in significant loss of invested capital;
>
> (f) failed to comply with their "know your client" obligations;
>
> (g) misrepresented the commissions received by salespersons;

(h) gave oral undertakings relating to the future value or price of the securities sold or attempted to be sold and/or made unjustifiable statements with respect to the anticipated price of the securities sold or attempted to be sold;

(i) made unjustifiable, misleading and/or false statements with respect to companies whose securities were being sold or attempted to be sold;

(j) made representations based upon purported knowledge of inside information;

(k) misrepresented the results of previous securities recommendations; and/or

(l) instructed Manning Limited's salespersons to use the sale practices set out above.

16 The staff also allege that Manning Limited, Judith Manning and Mary Martha Fritz failed to adequately supervise salespersons of Manning Limited.

17 The proceeding arising from the second notice of hearing is scheduled to commence on Monday, June 13, 1994.

Background to Application

18 Policy 1.10 was adopted by the OSC on March 25, 1993. Its purpose was to address unfair or abusive sales practices that the OSC believed some securities dealers employed from time to time in connection with the marketing and sale of low cost, highly speculative securities ("penny stocks"). Policy 1.10 outlined certain business practices which the OSC regarded appropriate for securities dealers to adopt in connection with the marketing and sale of penny stocks. These practices were considered to be consistent with the duty to deal fairly, honestly, and in good faith with the securities dealers' customers.

19 Policy 1.10 purports to provide against any prejudgment of whether conduct by a particular securities dealer would constitute a breach of s. 27(1) of the Act. Page 2 of Policy 1.10 provided that:

> Subsection 27(1) of the Act provides that the Commission, after giving a registrant an opportunity to be heard, may suspend, cancel, restrict or impose terms and conditions upon the registration of or reprimand a registrant where in its opinion such action is in the public interest. In determining whether any failure to comply with this Policy constitutes grounds for the Commission taking action under subsection 27(1) of the Act or any other section of the Act, the Commission will continue to consider the particular facts and circumstances of each case.

20 The purpose of Policy 1.10 was to serve as a guide to assist securities dealers and their employees in satisfying their obligations under the Act in connection with the marketing and sale of penny stocks.

Investigation

21 I accept the fact that the Commissioners did not participate in the investigation of the alleged misconduct of the applicants. Investigations are conducted by OSC staff who make up the Enforcement Branch of the OSC. If an investigation discloses an apparent breach of the Act or conduct of a market participant contrary to the public interest, the Director of Enforcement, in consultation with the Executive Director of the OSC, considers whether it is appropriate to call a hearing before the Commissioners.

22 The investigation involving the shares of BelTeco and Torvalon arose out of two separate reports from the Toronto Stock Exchange. Neither of these reports was forwarded to nor reviewed by the Commissioners.

The Impugned Conduct

23 The applicants contend that the OSC has already made up its mind on the issues raised for hearings. Further, they say the Commissioners prejudged them before issuing Policy 1.10 and this is evidenced by the fact that the policy, as noted by the OSC in their factum of the *Ainsley*, infra, case, was issued in response "to the abusive and unfair sales practices that it had found to exist".

24 In *Ainsley Financial Corp. v. Ontario (Securities Commission)* (1993), 106 D.L.R. (4th) 507 [1 C.C.L.S. 1] (Ont. Gen. Div. [Commercial List]), Blair J. declared Policy 1.10 to be invalid as the Policy exceeded the OSC's statutory jurisdiction. At p. 509, the Court said:

> O.S.C. Policy Statement 1.10, with which the commission expects securities dealers to comply, contains very detailed and embracive measures regarding the trading of speculative penny stocks. Trading in such stocks comprises the predominant portion of the plaintiffs' business. They say that Policy 1.10 will drive them out of business and is designed to do just that.

And at pp. 511 to 513, Blair J. described in some detail its purpose and its very specific requirements:

> **Policy 1.10**
>
> Policy Statement 1.10, entitled "Marketing and Sale of Penny Stocks", was issued in its final form on March 25, 1993, to come into effect on June 1, 1993. The commission has agreed to hold the policy in abeyance pending the release of this decision.

Purpose of the policy

Policy 1.10 was developed by the commission as result of a growing concern over the employment of high pressure and unfair sales practices by securities dealers on a widespread basis in connection with the marketing and trading of low cost, highly speculative penny stocks in the over-the-counter market. The policy is designed to redress the abuses perceived by the commission in this respect.

The purpose of the policy is stated at some length in the body of the text. I set out that statement of purpose in full, because it is of some importance. The policy asserts:

> **Purpose of this Policy**
>
> The Act and the regulations under the Act (the 'Regulations' require, among other things, that registrants 'know their clients' and deal 'fairly, honestly and in good faith' with their customers and clients. The Commission is concerned that securities dealers engaged in unfair sales practices like those mentioned above are not complying with these obligations and are recommending investments in penny stocks that are highly speculative and often are not appropriate for an investor given his/her personal circumstances, investment experience, investment objectives and financial means. The Commission is also concerned that, as a result of the sales practices employed, investors often purchase penny stocks unaware of the risks involved and without adequate consideration being given to the suitability of the purchase. Losses of a significant portion of an investment in penny stocks are common. The Commission has concluded that these sales practices have a significant adverse impact on the fairness and integrity of the capital markets in Ontario.
>
> The Commission is issuing this Policy as a guide to identify what the Commission believes are appropriate business practices to assist securities dealers and their employees in satisfying their obligations under the Act in connection with the marketing and sale of penny stocks. This Policy is intended to inform interested parties that the Commission will be guided by this Policy in exercising its public interest jurisdiction under subsection 27(1) of the Act and its general public interest jurisdiction to protect investors and promote and maintain fair, equitable and efficient capital markets in Ontario.
>
> This Commission believes that the business practices set out in this Policy should be adopted by securities dealers when selling penny stocks. The Commission believes that such practices are in the public interest to promote and maintain fair, equitable and efficient capital markets in Ontario and to protect investors from high pressure and other unfair sales practices employed in the marketing and sale of penny stocks and that these business practices are consistent with the duty of securities dealers and their officers,

> partners, salespersons and directors to deal fairly, honestly and in good faith with their customers and clients. Subsection 27(1) of the Act provides that the Commission, after giving a registrant an opportunity to be heard, may suspend, cancel, restrict or impose terms and conditions upon the registration of or reprimand a registrant where in its opinion such action is in the public interest. In determining whether any failure to comply with this Policy constitutes grounds for the Commission taking action under subsection 27(1) of the Act or any other section of the Act, the Commission will continue to consider the particular facts and circumstances of each case.
>
> This policy is not intended to restrict unduly legitimate investment opportunities in the penny stock market or capital formation for small businesses but merely to regulate the high pressure and other unfair sales practices often employed in the marketing and sale of penny stocks. The Commission believes that this Policy will carry out its purposes without unduly inhibiting legitimate investment opportunities in the penny stock market or capital formation for small businesses.

In a section entitled "Appropriate Business Practices", the policy states:

> The Commission has concluded that it is in the public interest that the business practices identified in this Policy be adopted by securities dealers in connection with the marketing and sale of penny stocks.

The operative portions of Policy 1.10 call for the following, in furtherance of this conclusion and the objectives of the policy:

> (1) *the furnishing of a risk disclosure statement* to the client — in Form 1, attached to the Policy — together with a sufficient explanation of its contents to the client that the client understands he or she is purchasing a penny stock and is aware of and willing to assume the risks associated with such an investment; and before any order to purchase a penny stock can be accepted,
>
> (2) *the provision of a suitability statement in Form 2* (also attached to the policy) to the client, completed and signed by the salesperson, together with an explanation of its contents; and
>
> (3) *the return of the suitability statement, signed by the client*, to the securities dealer; and thereafter
>
> (4) *an agreement between the client and the securities dealer* with respect to the price of the penny stock to be purchased.

In addition, Policy 1.10 provides:

(5) that the securities dealer is to disclose to the client in advance of the trade that it is acting as principal or as agent for another securities dealer acting as principal on the transaction where that is so; *and*

(6) that the securities dealer is to disclose "the nature and amount of all compensation payable to the securities dealer, its salespersons, employees, agents and associates or any other person", including mark-ups, bonuses and commissions.

25 The OSC issued the Proposed Policy in draft form on August 11, 1992. In the "Introduction", the following appears:

1. *General*: The Ontario Securities Commission (the "Commission") is concerned about *the widespread use of high pressure and other unfair sales practices being employed* in connection with the marketing and sale of low cost, highly speculative securities commonly referred to as "penny stocks". These sales practices include:

(a) repeated unsolicited phone calls to potential customers at their homes and/or places of business and other high pressure tactics designed to encourage purchases of penny stocks;

(b) promises of great returns, including promises that the value or price of a penny stock will increase;

(c) representations that the dealer is in possession of favourable inside information;

(d) failing to advise customers that the dealer is selling the penny stocks as principal and is receiving a significant mark-up;

(e) failing to make necessary inquiries of customers to determine their personal circumstances, including their investment objectives, investment experience and financial resources, to enable the dealer to determine whether or not penny stocks are a suitable investment;

(f) failing to adequately advise investors of the risks associated with investing in penny stocks; and

(g) failing to advise customers of the compensation/commissions being paid to the salesperson.

These sales practices *are being engaged in by many securities dealers* and their salesperson engaged in the business of selling penny stocks and *who are not members of the Toronto Stock Exchange (the "TSE") or the Investment Dealers Association (the "IDA")*. The penny stocks involved do not generally trade on a stock exchange, but rather trade in the over-the-counter market in Ontario. The issuers of these securities often do not have significant tangible assets.

[Emphasis added.]

26 It is not disputed that there were, at the time the Policy was formulated, only some ten securities dealers trading primarily in highly speculative penny stocks. The applicant Manning was one of these dealers. Reliance is placed upon the underlined words to demonstrate that the OSC *had concluded* the ten or so were engaging in improper activity and, therefore, these comments are indicative of a closed mind.

27 On March 25, 1993, the *OSC* issued its Final Policy Statement 1.10. This document had been considered at many meetings of the Commissioners and was approved by them. The changes from the Proposed Policy are largely cosmetic.

28 As was the case in the Proposed Policy, the Final Policy reflected the OSC's *conclusion* that securities dealers like Manning Limited had engaged and continued to engage in the improper activity described in the Final Policy.

29 The *OSC* said in the "Background" portion of the Final Policy:

> The Ontario Securities Commission (the "Commission") is concerned about *high pressure and other unfair sales practices that are being employed on a widespread basis* in connection with the marketing and sale of low cost, highly speculative securities commonly known as "penny stocks". These sales practices include:
>
> • repeated, unsolicited phone calls to potential clients at their homes and/or places of business and other high pressure tactics designed to encourage purchases of penny stocks;
>
> • assurances of great returns, including assurances that the value or price of a penny stock will increase;
>
> • failing to advise investors adequately of the risks associated with investing in penny stocks;
>
> • failing to explain to clients adequately when the dealer is selling the penny stocks as principal and is receiving a significant mark-up;
>
> • failing to advise clients of the compensation/commission being paid to the salesperson; and
>
> failing to make necessary inquiries of clients to determine their personal circumstances, including their investment objectives, investment experience and financial resources, to enable the dealer to determine whether or not penny stocks are a suitable investment;

> *These sales practices often are conducted as part of a pattern of activity by securities dealers that* are engaged primarily in the business of selling penny stocks. While these Securities Dealers are registrants under the *Securities Act* (Ontario) (the "Act"), they *are not members of The Toronto Stock Exchange (the "TSE) or the Investment Dealers Association (the "IDA")* or any similar recognized self-regulatory organization and, accordingly, are not subject to the compliance, investigation, disciplinary or other rules, regulations, policies and by-laws of such self-regulatory organizations.

[Emphasis added.]

30 Under the heading "Purpose of this Policy", the *OSC* stated:

> The Act and the regulations under the Act (the "Regulations") require, among other things, that registrants "know their clients" and deal "fairly, honestly and in good faith" with their customers and clients. The Commission is concerned that *securities dealers* engaged in unfair sales practices like those mentioned above *are not complying with these obligations* and are recommending investments in penny stocks that are highly speculative and often are not appropriate for an investor given his/her personal circumstances, investment experience, investment objectives and financial means. The Commission is also concerned that, as a result of the sale practices employed, investors often purchase penny stocks unaware of the risks involved and without adequate consideration being given to the suitability of the purchase. Losses of a significant portion of an investment in penny stocks are common. The Commission *has concluded* that these sales practices have a significant adverse impact on the fairness and integrity of the capital markets in Ontario.

[Emphasis added.]

31 On August 18, 1993 the *OSC* issued a News Release in response to the *Ainsley* decision. The News Release stated in part:

> August 18, 1993 (Toronto) — The Ontario Securities Commission announced today that it is consulting with representatives of the Government of Ontario and other Canadian securities regulators, among others, with respect to the recent decision of the Ontario Court of Justice (General Division) in the action commenced by several securities dealers. In its decision, the Court concluded that the Commission does not have the jurisdiction to issue proposed Policy 1.10. *That policy was intended to address the abuses that the Commission believes to exist in the marketing and sale of penny stocks by certain securities dealers*. Among the issues under consideration is the desirability of an appeal of the court decision.
>
> . . . . .

> *The Commission has instructed its staff to continue to monitor penny stock abuses and to initiate any proceedings under the Act that may be available to protect investors from those abuses*.

[Emphasis added.]

32 As a further result of *Ainsley*, on October 7, 1993 the Ontario Minister of Finance announced the formation of a joint Ministry of Finance and OSC Task Force on securities regulation. The mandate of the Task Force was to review and to make recommendations in respect of the legislative framework for the development of securities policy in the Province of Ontario with particular attention to the policy-making role of the OSC.

33 The OSC staff, including the Chair and the other two full-time Commissioners, made a written submission to the Task Force. The submission was conveyed to the Task Force under cover of a December 17, 1993 transmittal letter from the OSC's Chair, Edward J. Waitzer.

34 I see nothing indicative of bias or reasonable apprehension of bias in the 13-page submission. It dealt exclusively with the reasons why the Task Force should recommend that the Legislature confer rule-making powers to the OSC.

35 The seven part-time Commissioners made a separate written submission to the Task Force. Their eleven-page submission is to the same effect as the prior submission and similarly contains no bias or views which would prompt any reasonable apprehension of bias.

36 The conclusions stated by the OSC in Policy 1.10 reflected the findings made in a Staff Report of July 8, 1992 which the Commissioners had before them and relied upon in formulating and approving Policy 1.10. The Staff Report sets out in detail the same allegations of ongoing improper conduct which are now the subject matter of the second notice of hearing. The sort of conclusions made in the Staff Report, which was in turn adopted by the OSC, can be observed in the following passage:

> Based upon our examination of the penny stock industry, we believe that as a result of the unfair sales practices engaged in by broker/dealers in the marketing of penny stocks:
>
> (a) Investors purchase penny stocks unaware of risks that:
>
> (i) there may be no market to sell their penny stocks after the broker/dealer has sold its inventory position; and
>
> (ii) they are likely to lose a significant portion of their investment.
>
> (b) Investors are unaware of the commission and/or mark-up charged by salespersons and broker-dealers;

(c) Investors are pressured into purchasing penny stocks over the phone; and

(d) Broker/dealers do not comply with their know-your-client obligations.

37 As can be seen, the unfair conduct alleged in the second notice of hearing has already been found to exist by the Commissioners. The *conclusions* stated in Policy 1.10 and the *conclusions* stated in the Staff Report, which the OSC expressly adopted in approving Policy 1.10, demonstrate that the subject matter of the hearing has already been decided by the Commissioners.

38 The affidavit of Mr. Gordon, a staff lawyer for the OSC, sufficiently creates the link between the unfair conduct alleged and the applicants. Mr. Gordon's affidavit was just part of the evidence relied upon by the OSC in the *Ainsley* case to support Policy 1.10. The conduct of Manning Limited which Mr. Gordon calls "unfair sales practices" is the same conduct alleged in the second notice of hearing.

39 Having considered all of the evidence filed by the OSC in the *Ainsley* case, the Honourable Mr. Justice R.A. Blair made a finding that the OSC had *concluded* that the plaintiff securities dealers (including Manning Limited) were guilty of various abuses. He said at p. 515:

> With the completion of this review, the commission was satisfied that it had found cogent evidence of abusive and unfair sales practices in the marketing of penny stocks, and in addition, I think it is fair to say, *had concluded that these abuses were centred in the practices of the plaintiff securities dealers*. It set out to remedy the situation for the reasons and in the manner outlined above. [i.e. by implementing Policy 1.10.]

[Emphasis added.]

40 On the material filed before me, it appears that the OSC has already decided that Manning Limited and related parties are guilty of these unfair practices.

41 The first notice of hearing merely goes through substantially the same allegations of improper conduct repeated in the second notice but relates them to the securities of two named companies, BelTeco and Torvalon, after certain dates in 1992 and 1994. These allegations are based on complaints of particular conduct about Manning Limited and other securities dealers which were before the Commissioners when they concluded such conduct was in fact occurring widely and approved Policy 1.10. In addition, on December 22, 1992, copies of the pleadings against the OSC in the *Ainsley* action were distributed to the Commissioners "to assist them in their review of the Draft Policy". In that action, substantial material was filed by the OSC specifically pertaining to complaints and practices now alleged against Manning Limited, its officers and employees and to be dealt with at the upcoming hearings.

42 Even if OSC staff tried to separate their investigative role from the Commissioners' role as adjudicators, the creation and adoption of Policy 1.10 and the additional evidence, including the mass of complaints specifically regarding Manning Limited and others in the staff report and the material led by the OSC in *Ainsley*, lead me to the irresistible conclusion that the roles have become so interwoven that there is a reasonable apprehension of bias against all Commissioners who took office prior to November 1993.

43 In a press interview, the Chair of the OSC, Mr. Waitzer, stated that dealing with penny stock dealers is a "perennial priority". "There will always be marginal players in the securities industry. Our task is to get these players into the self-regulatory system or get them out of the jurisdiction."

44 I conclude that Mr. Waitzer cannot sit on either hearing because of a reasonable apprehension of bias.

The Functions of the OSC

45 As previously noted, the OSC is investigator, prosecutor, policy maker and adjudicator. The 1993 annual report of the OSC to the Minister of Finance states in part:

> **The Mandate of the OSC**
>
> The OSC has administrative responsibility for the *Securities Act*, the *Commodity Futures Act* and the *Deposits Regulation Act*, as well as certain provisions of the *Ontario Business Corporations Act*. Most of the OSC's day-to-day operations relate to the administration and enforcement of the *Securities Act* and the *Commodity Futures Act*.
>
> **The Structure of the OSC**
>
> The OSC is a Schedule I regulatory agency of the Government of Ontario. The Minister of Finance answers for the OSC in the Legislature and presents OSC financial estimates as part of the Ministry of Finance's estimates.
>
> **The Commission**
>
> The OSC has two distinct parts. One part is an autonomous statutory tribunal — the Commission — the eleven members of which are appointed by Order-in-Council. At present, there is a full-time Chairman, one full-time Vice-Chair, and nine part-time Commissioners.
>
> . . . . .
>
> The OSC is empowered to grant official recognition to Self-Regulatory Organizations, and has recognized The Toronto Stock Exchange and The Toronto Futures Exchange. SROs, such as the TSE, the TFE and the IDA, impose financial and trading rules on their membres that are enforced through independent audit and compliance checks. The OSC reviews those rules and hears appeals from decisions of the SROs.

. . . . .

The Chairman is by statute the Commission's Chief Executive Officer. The Commission assists in the formulation of policy, sits as an administrative tribunal in hearings, acts as an appeal body from decisions made by the Executive Director and staff, hears appeals from decisions of the TSE and the TFE, and makes recommendations to the government for changes in legislation. Two members constitute a quorum. The Commission holds regular policy meetings, and also convenes in panels for administrative hearings.

The *Office of the Secretary* provides support to the Commission meetings and hearings, receives and co-ordinates the processing of applications to the OSC, publishes the weekly *OSC Bulletin*, coordinates corporate communications, provides library services and coordinates meetings of the CSA. (The CSA is an association of securities administrators from each of the provinces and territories in Canada. It seeks to achieve uniformity in legislation and policies.)

The Staff of the Commission

The other major part of the Commission is an administrative agency composed of more than 230 lawyers, accountants, investigators, managers and support staff. The *Executive Director* is the OSC's Chief Operating and Administrative Officer and is responsible for the day-to-day activities of the seven operating departments of the OSC — the Offices of the Chief Accountant, the General Counsel and the Chief of Compliance, and the Corporate Finance, Capital Markets/International Markets, Enforcement, and Administrative and Systems Services branches. The Executive Director also participates actively in policy development.

The Law

46 In *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623, Cory J., speaking for the Court, said at pp. 636 to 637:

The Duty of Boards

All administrative bodies, no matter what their function, owe a duty of fairness to the regulated parties whose interest they must determine. This was recognized in *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311. Chief Justice Laskin at p. 325 held:

> ... the classification of statutory functions as judicial, quasi-judicial or administrative is often very difficult, to say the least; and to endow some with procedural protection while denying others any at all would work injustice when the results of statutory decisions raise the same serious consequences for those adversely affected, regardless of the classification of the function in question.

> Although the duty of fairness applies to all administrative bodies, the extent of that duty will depend upon the nature and the function of the particular tribunal. See *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602. The duty to act fairly includes the duty to provide procedural fairness to the parties. That simply cannot exist if an adjudicator is biased. It is, of course, impossible to determine the precise state of mind of an adjudicator who has made an administrative board decision. As a result, the courts have taken the position that an unbiased appearance is, in itself, an essential component of procedural fairness. To ensure fairness the conduct of members of administrative tribunals has been measured against a standard of reasonable apprehension of bias. The test is whether a reasonably informed bystander could reasonably perceive bias on the part of an adjudicator.
>
> In *Szilard v. Szasz*, [1955] S.C.R. 3, Rand J. found a commercial arbitration was invalid because of bias. He held that the arbitrator did not possess "judicial impartiality" because he had a business relationship with one of the parties to the arbitration. This raised an apprehension of bias that was sufficient to invalidate the proceedings. At p. 7 he wrote:
>
> > Each party, acting reasonably, is entitled to a sustained confidence in the independence of mind of those who are to sit in judgment on him and his affairs.

And at pp. 638 to 639:

> It can be seen that there is a great diversity of administrative boards. Those that are primarily adjudicative in their functions will be expected to comply with the standard applicable to courts. That is to say that the conduct of the members of the board should be such that there could be no reasonable apprehension of bias with regard to their decision. At the other end of the scale are boards with popularly elected members such as those dealing with planning and development whose members are municipal councillors. With those boards, the standard will be much more lenient. In order to disqualify the members a challenging party must establish that there has been a prejudgment of the matter to such an extent that any representations to the contrary would be futile. Administrative boards that deal with matters of policy will be closely comparable to the boards composed of municipal councillors. For those boards, a strict application of a reasonable apprehension of bias as a test might undermine the very role which has been entrusted to them by the legislature.

And further at p. 642:

> During the investigative stage, a wide licence must be given to board members to make public comment. As long as those statements do not indicate a mind so closed that any submissions would be futile, they should not be subject to attack on the basis of bias.

47 Two other important cases must be addressed. *W.D. Latimer Co. v. Bray* [sub nom. *W.D. Latimer Co. v. Ontario (Attorney General)*] (1974), 6 O.R. (2d) 129 (C.A.) established the principle

that evidence of prejudgment, even in the context of the unique statutory scheme established by the *Securities Act*, is a ground for disqualification. However, it recognized that mere knowledge by Commissioners of market conditions or even of grounds for a complaint to be heard by them do not produce any apprehension of bias in the particular circumstances of this tribunal. Dubin J.A. (as he then was) delivered the judgment of the Court. He stated at pp. 140 to 141:

> Where by statute the tribunal is authorized to perform tripartite functions, disqualification must be founded upon some act of the tribunal going beyond the performance of the duties imposed upon it by the enactment pursuant to which the proceedings are conducted. Mere advance information as to the nature of the complaint and the grounds for it are not sufficient to disqualify the tribunal from completing its task. Evidence of prejudgment, however, is a ground for disqualification, unless the statute specifically permits the tribunal to have arrived at a preliminary judgment before conducting an inquiry.
>
> . . . . .
>
> I do not read s. 8 [now s. 27] of the *Securities Act* as permitting a prejudgment of the issues prior to the conduct of the inquiry.

48 The Court concluded on the facts there was no reasonable apprehension of bias.

49 In *Barry v. Alberta (Securities Commission)*, [1989] 1 S.C.R. 301, the Chairman of the Alberta Securities Commission was a member of a panel at a hearing under Alberta's securities legislation. At issue was whether or not there was a reasonable apprehension of bias because the Chair had received a report from the Deputy Director of Enforcement prior to the hearing.

50 In finding that there was no reasonable apprehension of bias on these facts, L'Heureux-Dubé J., delivering the judgment of the Court, relied heavily on the Court of Appeal's decision in *Latimer*. She said at p. 315:

> Dubin J.A. found that the structure of the Act whereby commissioners could be involved in both the investigatory and adjudicatory functions did not, by itself, give rise to a reasonable apprehension of bias.
>
> I am in agreement with this proposition. So long as the Chairman did not act outside of his statutory authority, and so long as there is no evidence to show involvement above and beyond the mere fact of the Chairman's fulfilling his statutory duties, a "reasonable apprehension of bias" affecting the Commission as a whole cannot be said to exist.

51 In the case at hand, the *OSC* did act outside its statutory authority in adopting Policy 1.10. The Commissioners, in effect, sought to legislate. This, as found by *Ainsley*, was ultra vires. In the process of formulating and deciding to issue the mandatory regulation presented by Policy 1.10, the Commissioners in March 1993 closed their minds to the issue of whether securities dealers, including Manning Limited, are guilty of unfair sales practices. This constitutes prejudgment.

52 In the context of the litigation brought by the securities dealers, including the motion for judgment in the *Ainsley* case and the pending appeal, the *OSC* went beyond merely defending itself and its jurisdiction and adopted the role of advocate against them and strenuously sought to demonstrate that Manning Limited and others are guilty of the very conduct which is now the subject of the current notices of hearing.

53 The affidavits filed on behalf of the *OSC* speak loudly in what they fail to address. The affidavit of Mr. Gordon does not say that there was no discussion between the staff and Commissioners about Manning Limited when Policy 1.10 was being prepared. There is no affidavit evidence to say the Commissioners have been canvassed and individually could make an unbiased decision. Further, there is no evidence to show that the 55 complaints about Manning, which were made to OSC staff and made know to the Commissioners in the 1992 report accepted by them, have not tainted them. It is reasonable to assume that the complaints played a part in the desire to establish Policy 1.10. Given these gaps in the respondent's material, it seems to me that "the informed bystander", to use the words of Cory J. in *Newfoundland Telephone*, "could reasonably perceive bias on the part of an adjudicator".

54 The OSC (both staff and Commissioners) were acting within the ambit of their statutory duties in assembling and considering information in respect of a certain segment of the securities market. But in using that information to conclude that the securities dealers (including Manning Limited) were in fact engaging in the practices alleged in Policy 1.10, and now in the notices of hearing, the Commissioners prejudged the case. They pursued a course in excess of their policy and regulatory functions due to a too-narrow focus on a small number of parties and very particular allegations of practices and that, in turn, has produced an overly specific regulation beyond the OSC's jurisdiction. It has also produced an obvious apprehension of bias, quite distinct from the situation in *Latimer*.

55 The OSC has repeatedly recorded its conclusion that the targeted dealers engaged in unfair sales practices. The OSC issued Policy 1.10 in an effort to protect the public from unfair sales practices it "had found to exist". In my view, this prejudgment coupled with the continued effort of the OSC to vindicate its position through the ongoing litigation with the security dealers, including the appeal in *Ainsley*, created a reasonable apprehension of bias that precludes all members of the OSC who were Commissioners prior to the fall of 1993 from sitting at the hearings involving the applicants. In addition, the new Chair, Mr. Waitzer, is precluded from sitting for reasons stated earlier.

Remaining Members of the OSC

56 By Order-in-Council dated November 3, 1993, John Arthur Geller was appointed a member and Vice-chair of the OSC for a period of three years. By Order-in-Council dated April 6, 1994,

Helen M. Meyer was appointed a member of the OSC for a period of six months. There still remains one vacancy on the OSC.

57 It is argued by the applicant that there is a corporate taint affecting all those Commissioners subsequently appointed to the OSC. There is no judicial authority for this proposition. Bias is a lack of neutrality.

58 Blake in *Administrative Law in Canada* (Toronto: Butterworths, 1992) states at p. 92:

> Many tribunals are part of a larger administrative body. The fact that one branch of that administrative body is biased does not mean that another branch that has carriage of the matter is biased. Bias on the part of an employee of the tribunal or a member who is not on the panel hearing the matter usually does not give rise to a reasonable apprehension of bias on the part of the tribunal. Even bias on the part of the Minister in charge of the department does not necessarily make the adjudicator employed by the Ministry biased.

59 There is no evidence that the views of the Chair are shared by the new Commissioners. Further, there is no evidence before the Court to indicate any underlying agenda of Mr. Geller or Ms. Meyer. As well, the minutes of the Commissioners indicate that they were not party to any of the decisions respecting Policy 1.10 or the OSC's position in *Ainsley*.

60 There must be a presumption in the absence of contrary evidence that a Commissioner will act fairly and impartially in discharging his/her adjudicative responsibility. As noted in *Bennett v. British Columbia (Securities Commission)* (1992), 69 B.C.L.R. (2d) 171 at 181 (C.A.); leave to appeal to the S.C.C. dismissed (27 August 1992), [1992] 6 W.W.R. lvii (note):

> Bias is an attitude of mind unique to an individual. An allegation of bias must be directed against a particular individual alleged, because of the circumstances, to be unable to bring an impartial mind to bear. No individual is identified here. Rather, the effect of the submissions is that all of the members of the commission appointed pursuant to s. 4 of the *Securities Act*, regardless of who they may be, are so tainted by staff conduct that none will be able to be an impartial judge. Counsel were unable to refer us to a single reported case where an entire tribunal of unidentified members had been disqualified from carrying out statutory responsibilities by reason of real or apprehended bias. We think that not to be surprising. The very proposition is so unlikely that it does not warrant serious consideration.

61 I therefore conclude that Mr. Geller and Ms. Meyer are not biased, nor is there any evidence of conduct by them raising any apprehension of bias. The vacant position may or may not be filled. The presumption remains that whomever is appointed to that vacancy is unbiased.

62 If it is felt elsewhere that there is some corporate taint, I would allow the above 2 or 3 persons, as the case may be, to sit on the basis of the doctrine of necessity. Natural justice must

give way to necessity. The doctrine of necessity was enunciated by Jackett C.J. in *Caccamo v. Canada (Minister of Manpower & Immigration)* (1977), 75 D.L.R. (3d) 720 (Fed. C.A.) at p. 726:

> As I understand the law concerning judicial bias, however, even where actual bias in the sense of a monetary interest in the subject of the litigation is involved, if all eligible adjudicating officers are subject to the same potential disqualification, the law must be carried out notwithstanding that potential disqualification. ... If this is the rule to be applied where actual bias is involved, as it seems to me, it must also be the rule where there is no actual case of bias but only a "probability" or reasonable suspicion arising from the impact of unfortunate statements on the public mind.

63 This case does not require the doctrine of necessity to be applied to the extent of the example referred to in *Caccamo v. Canada (Minister of Manpower & Immigration)*. The doctrine of necessity is properly used to prevent a failure of justice and not as an affront to justice: De Smith's *Judicial Review of Administrative Action*, 4th ed. (1980), at pp. 276-7. Neither new member has acted in any way or even participated in any process which could give rise to a reasonable apprehension of bias on their part. Therefore the doctrine of necessity is rightly applied in these facts to allow a panel to be constituted, in case any general corporate disqualification beyond those members' control were found. (R.R.S. Tracey, *Disqualified Adjudicators: The Doctrine of Necessity in Public Law*, [1982] Public Law 628, at p. 632.)

Conclusion

64 Mr. Geller and Ms. Meyer are capable of forming a quorum to conduct the s. 27 hearings. If the vacancy is filled, the person appointed could also sit, or any two of the three, as designated by the Chair of the OSC. The application is dismissed. The hearings may proceed only before a panel constituted as directed by this Court.

65 The matter of costs may be addressed by fax.

Application dismissed.

1995 CarswellOnt 1057
Ontario Court of Appeal

E.A. Manning Ltd. v. Ontario (Securities Commission)

1995 CarswellOnt 1057, [1995] O.J. No. 1305, 125 D.L.R. (4th) 305, 18 O.S.C.B. 2419, 23 O.R. (3d) 257, 32 Admin. L.R. (2d) 1, 55 A.C.W.S. (3d) 3, 7 C.C.L.S. 125, 80 O.A.C. 321

E.A. MANNING LIMITED, JUDITH MARCELLA MANNING, TIMOTHY EDWARD MANNING, WILLIAM DOUGLAS ELIK, MARY MARTHA FRITZ, MARC HAROLD SCHWALB and PETER JOHN FINANCE v. ONTARIO SECURITIES COMMISSION

Dubin C.J.O., Labrosse and Doherty JJ.A.

Heard: November 30 and December 2, 1994
Judgment: May 9, 1995 *
Docket: Doc. CA C18902

Counsel: *Bryan Finlay, Q.C.*, *Philip Anisman* and *J. Gregory Richards*, for appellants.
Dennis R. O'Connor, Q.C. and *Benjamin T. Glustein*, for respondent.

Subject: Securities; Corporate and Commercial; Public

Annotation

Introduction

On August 17, 1995 the Supreme Court of Canada refused leave to appeal the decision of the Ontario Court of Appeal in this case. [1] This brought to a close the efforts of Toronto-based broker dealer E.A. Manning Ltd. to prevent the Ontario Securities Commission from conducting a hearing into its fitness to stay in business.

The Issue

The central issue in this case was the allegation of a reasonable apprehension of bias. Bias cases tend to be quite rare. Cases in which tribunals are disqualified from proceeding, or have their decision quashed are rarer still. [2] There are several reasons why bias cases raise difficult issues.

Tribunals and Courts

A judge, in a court of law, will normally disqualify himself or herself before becoming involved in the proceedings if there is even the slightest question of bias. For example, a judge married to a lawyer in a particular firm will refuse to look at any files in which one of the counsel is from that firm. In other cases, a judge will ask counsel whether they would wish the judge to step down. [3]

Since judges are so cautious, if not hyper-sensitive, bias cases involving judges are exceedingly rare. The situation of administrative tribunals, however, is somewhat different, and not because of any lack of sensitivity on the part of tribunal members.

As the Court of Appeal in *Manning* quite appropriately observed, people are often appointed to tribunals for their expertise. For this reason, they are expected to have specialized knowledge of the matters within their jurisdiction. How are they to maintain this knowledge after they have been appointed, if not by reading about, and maintaining close contact with the regulated industry? Of equal importance, typically, a judge will encounter a particular set of parties only once in a judicial career (with the exception of special parties such as the Attorney General, who is really only notionally a party, but, in practice, the Government's lawyer). Many tribunals encounter the same few parties repeatedly.

A member of a regulatory tribunal such as the Ontario Securities Commission [4] will undoubtedly, over time, form opinions of the parties who appear before the Commission. Does this really mean that a party in a regulatory process must have a lower expectation of the degree of neutrality of the decision-maker than would a litigant in a court of law? The answer depends upon how one defines neutrality or, to put the issue the other way, how one defines bias.

The Open Mind

The public expectation is usually that the decision-maker will have an open mind. Rendering that expectation unrealistic is the obvious fact that there is no such thing as a totally open mind (except for a totally empty mind). The mature human mind can never be tabula rasa. There must be a continuum between a mind that is totally open to any point of view and one that is closed to at least one of the parties. At what point do the values and inclinations acquired during the lifetime of a decision-maker, or the views and inclinations of the matter at hand, as influenced by the firmly held opinions of a lifetime, give rise to a disqualifying bias? If one could measure degrees of open-mindedness as one does temperature, with a device analogous to a thermometer, one could easily set a standard. But there is no such scale. And even if there was, there would be no way to insert it into the mind of the decision-maker in order to obtain a reading. As we can never know what is in a decision-maker's mind we can never be certain whether it is or is not open or unbiased.

Every experienced counsel will have encountered decision-makers who appear to have it in for his or her client, judging by the decision-maker's demeanour and questions during the course of the

hearing, only to receive a favourable decision at the end of the case; or, conversely, to have the decision-maker smile approvingly and be friendly throughout, only to receive a decision which disagrees with the client's position on every important issue. Appearances can be, and frequently are, misleading. The more common situation, however, is that a negative or hostile reaction will precede loss of the case. But, even then, negative initial reactions of decision-makers can often be turned around through good advocacy. When they are not, it should still not be assumed that the negative initial reaction was due to bias against the individual applicant, rather than an honest expression of scepticism or disagreement with the individual applicant's arguments. In short, bias, like beauty, is very often in the eye of the beholder. The law, therefore, needs an objective test, and one that is not too quick to disqualify the relatively few members appointed to any tribunal from deciding cases.

The Presumption of Impartiality

Everyone is entitled to adjudication before an impartial decision-maker. But what does this mean in practice? Since, as we have said, there is no objective way to measure bias, and, as we do not give our decision-makers sodium pentathol, or some other "truth serum" before permitting them to make a decision, none of us can know what is in the mind of an individual decision-maker. The logical rule, therefore, as the Court of Appeal noted, is that the decision-maker is presumed not to be biased, absent proof to the contrary.

What form can this proof take? First, if the decision-maker writes an article or makes a speech which clearly indicates a pre-disposition in one direction, that may be a bias for suspecting that when a particular case appears before that decision-maker, the pre-disposition will determine the particular case. Canadian law, however, appears to require stronger proof than that before the decision-maker will be disqualified from participation in the decision, or the decision quashed. [5] There must be evidence that, for some further reason, the decision-maker cannot be trusted to bring objectivity to bear on the *particular* decision in issue. In other words, the presumption of impartiality in Canadian law is rather strong, and requires clear and direct evidence to overcome it. A mere apprehension of bias is not enough; a real likelihood of bias is required. [6]

The main occasions on which a disqualifying bias tends to arise, in practice, is where a decision-maker is alleged to have a proprietary or pecuniary interest in the outcome of a decision [7] or where there is some personal connection such as the decision-maker being a relative of one of the parties by birth or by marriage. Those cases are easy. They almost never result in litigation. The more difficult cases arise when a decision-maker has expressed a point of view on a subject, which is alleged to give rise to a real likelihood of bias. Judges can relatively easily avoid this problem by limiting their speeches to non-controversial subjects, or, at least, to subjects which are not likely to arise before them in a particular case. And, where a judge does make a speech on a subject, or writes an article, and the particular case does come up, there is usually a large enough pool of other judges available that there is no problem in finding an alternate judge. However, the problem is

greater for tribunals. Tribunal members are often required to make speeches, or to issue guidelines, as part of their regulatory duties, to provide guidance to the industry being regulated. The courts have held that it is better to do this openly and publicly than behind closed doors. [8] In some cases it will be necessary for a member of the tribunal, perhaps even one sitting on a case in which the issue is raised, to make a speech indicating a general policy or an inclination in a particular direction. The Court of Appeal left open the possibility that even that might not create a disqualifying bias, although the comment must be regarded as obiter, since it did not arise in the particular case. On the other hand, there are rare, extreme cases in which a member of a tribunal makes a speech which gives the impression that regardless of the evidence, he is very strongly inclined to a particular point of view, giving rise to a *real* likelihood of bias. [9]

Is There a Doctrine of "Corporate Taint"?

As if all of this was not complicated enough, the situation is further complicated when the decision-maker against whom bias is alleged may be only one member of a panel hearing the matter, or only one member of a tribunal, but not sitting on the panel hearing the matter. Is there some sort of doctrine of "corporate taint" in bias cases and, if so, when and how does it apply?

There does not appear to be any doctrine of "corporate taint" in Canadian law. The actions of one member of a tribunal do not, in ordinary circumstances, create a real likelihood of bias with respect to others. There are some circumstances, though, where the bias of one member will be imputed to others. If a tribunal makes a decision in a case, and then it is learned that one of the members of the panel which decided the case has a bias, a court will not speculate that the decision might have been the same had the member with the bias not participated. In those circumstances, the bias of one member will be seen as having tainted the entire panel. [10] On the other hand, as the Court of Appeal in *Manning* found, even if a member of a tribunal had a bias, if that member does not participate in making the decision, the decision is not tainted by that bias. [11] The reason for the difference in the two situations is that once a member with a bias participates on a panel, it becomes impossible afterwards to unravel what would have happened had that member not participated. Where, however, the decision-making panel has not yet been assembled, the presumption will be that the member with the bias will not participate and, therefore, taint the others. That presumption can be rebutted if there is evidence to the contrary.

The applicant in the *Manning* case had three grounds for its argument that the new Commissioners should be disqualified: first, the notion of "corporate taint"; second, by virtue of the comments of the Chair of the Commission; and third, because the Commission defended an action brought against it by some of the same parties, in the *Ainsley* case (annonated below). We have already discussed the scope and limits of the doctrine of corporate taint. The comments of the Chair were held, on the facts, not to give rise to a legal disqualification. Finally, the Court accepted the common

sense proposition that one cannot commence litigation against a tribunal, as in Ainsley, and then argue, when it defends itself, that that defence constitutes a bias.

Conclusion

There is nothing wrong with a member of a tribunal having a disqualifying bias. The problems arise when the member participates, or attempts to participate in making a decision in relation to which he or she should be disqualified. Fact situations in which the decision-maker is tainted by a proprietary or pecuniary interest, or a family connection, are fairly simple and straight-forward, although there may be difficulty in borderline cases. However, speeches and policy pronouncements, which chairs and members of tribunals, and sometimes even staff members, are often called upon to make, may make tribunal decisions targets for accusations of bias. Had the Court in the *Manning* case imposed a judicial standard of conduct on the Chair, despite his different institutional duties, and, had the Court expanded the notion from that of the bias of one member tainting a panel to that of the bias of one member tainting an entire tribunal, the decision in the *Manning* case could have gone the other way. Fortunately, the Court did not lose sight of the difference between tribunals and courts, and unequivocally rejected the new "corporate taint" doctrine advocated by the appellant.

Andrew J. Roman [12]

Appeal from judgment reported at (1994), 3 C.C.L.S. 221, 17 O.S.C.B. 2339, 18 O.R. (3d) 97, 72 O.A.C. 34, 24 Admin. L.R. (2d) 283 (Div. Ct.), dismissing application for order prohibiting Ontario Securities Commission from proceeding with hearings.

The judgment of the court was delivered by *Dubin C.J.O.*:

1 The appellants, by leave, appeal from the judgment of the Divisional Court, now reported at (1994), 18 O.R. (3d) 97 [3 C.C.L.S. 221], dismissing their application for an order in the nature of prohibition to prevent the Ontario Securities Commission (the "Commission") from proceeding with two hearings relating to allegedly improper sales practices by the appellants. The appellants alleged actual bias, and a reasonable apprehension of bias, principally arising out of a Policy Statement issued by the Commission relating to the sales practices of securities dealers recommending investment in penny stocks.

2 The Divisional Court held that the Commissioners who participated in the formulation and adoption of the Policy Statement and the Chair of the Commission appointed after the formulation and adoption of that Statement were precluded from participating in the two hearings then pending. The Divisional Court held, however, that the Commissioners who had been appointed to the Commission after the adoption of the Policy Statement were not disqualified and could preside over the hearings, and that the two hearings could proceed if presided over by the new Commissioners. The application for prohibition was therefore dismissed.

Facts

3 The appellant, E.A. Manning Limited ("Manning"), is registered as a securities dealer under s. 98(9) of the Regulation (R.R.O. 1990, Reg. 1015, as amended) enacted pursuant to the Ontario *Securities Act*, R.S.O. 1990, c. S.5. The other appellants at the material times were directors, officers or salespersons of Manning. The respondent Commission has a two-tiered structure, consisting of an appointed statutory tribunal (the Commission proper, or "Commissioners") and the Commission staff. The Commission is defined by s. 2(2) of the *Securities Act* as comprising a Chair, and not more than ten or less than eight other members. Section 2(4) of the *Securities Act* provides that two Commissioners constitute a quorum for any hearing held pursuant to the provisions of the *Securities Act*.

4 The Policy Statement sets forth the Commission's conclusion that abusive and unfair sales practices existed among securities dealers involved in the trading of the low-cost shares known as penny stocks. The Policy Statement sought to remedy these abuses by requiring securities dealers to provide potential purchasers with a risk disclosure statement and to complete a suitability statement in respect of each purchase. Brokers and investment dealers were excluded from the Policy Statement's consideration, the Commission having satisfied it self that traders registered under those classifications were adequately policed by the Toronto Stock Exchange and the Investment Dealers Association, the self-governing bodies to which they were respectively required to belong pursuant to the Regulation passed under the *Securities Act*.

5 The purpose of the Policy Statement was set forth in the statement as follows:

> **Purpose Of This Policy**
>
> The Act and the regulations under the Act (the "Regulations") require, among other things, that registrants "know their clients" and deal "fairly, honestly and in good faith" with their customers and clients. *The Commission is concerned that securities dealers engaged in unfair sales practices like those mentioned above are not complying with these obligations and are recommending investments in penny stocks that are highly speculative and often are not appropriate for an investor given his/her personal circumstances, investment experience, investment objectives and financial means. The Commission is also concerned that as a result of the sales practices employed, investors often purchase penny stocks unaware of the risks involved and without adequate consideration being given to the suitability of the purchase. Losses of a significant portion of an investment in penny stocks are common. The Commission has concluded that these sales practices have a significant adverse impact on the fairness and integrity of the capital markets in Ontario*.
>
> The Commission is issuing this Policy as a guide to identify what the Commission believes are appropriate business practices to assist securities dealers and their employees in satisfying

> their obligations under the Act in connection with the marketing and sale of penny stocks. This Policy is intended to inform interested parties that the Commission will be guided by this Policy in exercising its public interest jurisdiction under subsection 27(1) of the Act and its general public interest jurisdiction to protect investors and promote and maintain fair, equitable and efficient capital markets in Ontario.
>
> The Commission believes that the business practices set out in this Policy should be adopted by securities dealers when selling penny stocks. The Commission believes that such practices are in the public interest to promote and maintain fair, equitable and efficient capital markets in Ontario and to protect investors from high pressure and other unfair sales practices employed in the marketing and sale of penny stocks and that these business practices are consistent with the duty of securities dealers and their officers, partners, salespersons and directors to deal fairly, honestly and in good faith with their customers and clients. Subsection 27(1) of the Act provides that the Commission, after giving a registrant an opportunity to be heard, may suspend, cancel, restrict or impose terms and conditions upon the registration of or reprimand a registrant where in its opinion such action is in the public interest. *In determining whether any failure to comply with this Policy constitutes grounds for the Commission taking action under subsection 27(1) of the Act or any other section of the Act, the Commission will continue to consider the particular facts and circumstances of each case*.

[Emphasis added.]

6 On September 15, 1992, about one month after the issuance of the Policy Statement in its draft form, Manning and other securities dealers commenced an action (the *Ainsley* action) against the Commission alleging that the Policy Statement was ultra vires the Commission, that the Commission had no basis upon which to formulate the policy, and that they were being harassed and discriminated against by the Commission. In May 1993, the plaintiffs in that case brought a motion for summary judgment on the issue whether Policy Statement 1.10 was ultra vires the Commission. On August 13, 1993, Blair J. held that the Policy Statement, including the requirements with respect to the future business conduct of the securities dealers, was beyond the jurisdiction of the Commission ([*Ainsley Financial Corp. v. Ontario (Securities Commission)*] (1993), 14 O.R. (3d) 280). The decision of Blair J. was appealed to this court by the Commission, and the appeal was dismissed, the reasons for judgment being delivered by Doherty J.A. ((1994), 21 O.R. (3d) 104). The other allegations in the *Ainsley* action have not as yet been resolved, and they are still outstanding.

7 On December 15, 1993, the Commission issued a notice of hearing (the "first notice of hearing") to determine whether under s. 27 of the *Securities Act*, it was in the public interest to suspend, restrict, or cancel the registrations of Manning and three of the other appellants and to determine whether certain exemptions should no longer apply to the appellants. The notice alleged that the appellants traded in securities of BelTeco Holdings Inc. and Torvalon Corporation, contrary

to the public interest by, inter alia, using high-pressure sales tactics, failing to disclose that they were selling securities as principal and not as agents, and failing to disclose that mark-ups were included in the purchase price and that shares were of limited marketability. The hearing was scheduled to commence on September 19, 1994. On February 4, 1994, the Commission issued a second notice of hearing against Manning and five of the other appellants, the primary purpose of which was to seek an order prohibiting the named parties from calling on residences to sell securities (the Commission staff having failed in its attempt two days earlier to obtain an ex parte order under s. 27(2) of the *Securities Act* for an interim suspension of the registration of Manning). Essentially, the allegations in the second notice echoed the allegations in the first notice, but did not relate to the trading in the shares of specific corporations.

8 Following the release of the Policy Statement, Mr. Edward Waitzer was appointed the new Chair of the Commission; Mr. John Arthur Geller, the Vice-Chair of the Commission; and Helen M. Meyer, a member. A second new Commissioner has now also been appointed.

9 On December 7, 1993, one week prior to the issuance of the first notice of hearing, an interview with Edward Waitzer was published in the *Dow Jones News*. Mr. Waitzer was quoted as saying that dealing with penny stock dealers was a "perennial priority" of the Commission. He added, "[t]here will always be marginal players in the securities industry .... Our task is to get these players into the self-regulatory system or get them out of the jurisdiction."

10 Montgomery J., writing for the Divisional Court, made the following findings:

> i) There was a reasonable apprehension of bias on the part of the Commissioners who were involved in the adoption of the Policy Statement, as in the process of formulating it they had closed their minds to the issue whether securities dealers, including Manning Ltd., were guilty of unfair sales practices. Moreover, the defence of the *Ainsley* case was also evidence of prejudgment in that the Commission went beyond merely defending its jurisdiction and strenuously sought to show that Manning Ltd. (among others) was guilty of the very offences which were the subject of the hearings;
>
> ii) There was a reasonable apprehension of bias on the part of the new Chair, Waitzer, because of his public comments;
>
> iii) There was no evidence or reasonable apprehension of bias on the part of the two other Commissioners appointed after the adoption of the Policy Statement;
>
> iv) New Commissioners would not be affected by "corporate taint", and indeed, there is no judicial authority for such a concept;
>
> v) Even if the legal concept of "corporate taint" existed, the doctrine of necessity would apply to allow those Commissioners against whom no specific reasonable apprehension of bias was found to form a quorum for the hearings;

vi) That the hearings of the Commission could proceed only before a panel of Commissioners consisting of any two or more of Vice-Chair Geller and Commissioner Helen Meyer, or any Commissioner appointed after November 1, 1993. [A new Commissioner was appointed after the order of the Divisional Court.]

11 The appellants now appeal from the order of Montgomery J. dismissing their application for prohibition and submit that the Divisional Court erred in permitting the two hearings to proceed before the new Commissioners.

Issues

12 The appellants submitted that the Divisional Court erred in failing to give effect to their submissions that the conduct of the Commission in its formulation and adoption of the Policy Statement, its defence to the *Ainsley* action, and the comments of its Chair, Mr. Waitzer, had so tainted the entire Commission that even newly-appointed Commissioners should be excluded from sitting on the hearings to consider the allegations in the first and second notices of hearing. They also submitted that the Divisional Court erred in holding that even if the concept of corporate taint could be invoked to otherwise disqualify the new Commissioners, the doctrine of necessity would apply.

13 The respondent, although not conceding before the Divisional court that there was any basis for disqualification of any member of the Commission, did not seek to have any of the Commissioners who had participated in the formulation of the Policy Statement conduct the hearings. The respondent was content before the Divisional Court to have the hearings conducted by the new Commissioners. The respondent did not cross-appeal from the order of the Divisional Court.

14 On the appeal, the respondent submitted that the Divisional Court erred in holding that those Commissioners who participated in the formulation and adoption of the Policy Statement were disqualified to sit on the pending hearings, and that no case of bias had been made out against them. The respondent further submitted that the Divisional Court erred in holding that Mr. Waitzer, the Chair, was disqualified. It would follow that, under such circumstances, there would be no basis for questioning the qualification of the new Commissioners.

15 However, as has been noted, the respondent did not cross-appeal from the order of the Divisional Court and did not seek here, or in the Divisional Court, to have anyone other than the new Commissioners preside over the pending hearings. If the judgment under appeal permitting the new Commissioners to sit was dependent on the proposition that none of the Commissioners, nor the Chair, were disqualified, I would have to consider whether the Divisional Court was corrected in so holding. However, in my view, the status of the new Commissioners to conduct the hearings is not dependent upon the status of the others to do so. Assuming that the Divisional Court was

correct in disqualifying the Commissioners who had participated in and formulated the Policy Statement, it is only necessary to consider whether the new Commissioners are disqualified (1) on the doctrine of corporate taint, or (2) by reason of the comments of the Chair, or (3) by reason of the Commission's defence to the *Ainsley* action.

Overview

16 By statute, the Commission is given many independent responsibilities and duties, and, in considering issues of bias and reasonable apprehension of bias, regard must be had to the statutory framework within which the Commission functions.

17 Within that statutory framework, the Commission is, in disciplinary matters, the investigator, the prosecutor, and the judge. As a general principle, in the absence of statutory authority, this overlap would be held to be contrary to the principles of fairness. However, where such functions are authorized by statute, the overlapping of these functions, in itself, does not give rise to a reasonable apprehension of bias.

18 In this respect, Madam Justice L'Heureux-Dubé in *Barry v. Alberta (Securities Commission)*, [1989] 1 S.C.R. 301 [hereinafter referred to as *Brosseau v. Alberta (Securities Commision)*], observed as follows at pp. 313-314:

> Securities commissions, by their nature, undertake several different functions. They are involved in overseeing the filing of prospectuses, regulating the trade in securities, registering persons and companies who trade in securities, carrying out investigations and enforcing the provisions of the Act. By their nature, they will have repeated dealings with the same parties. The dealings could be in an administrative or adjudicative capacity. When a party is subjected to the enforcement proceedings contemplated by ss. 165 or 166 of the Act, that party is given an opportunity to present its case in a hearing before the Commission, as was done in this case. The Commission both orders the hearing and decides the matter. Given the circumstances, it is not enough for the appellant to merely claim bias because the Commission, in undertaking this preliminary internal review, did not act like a court. It is clear from its empowering legislation that, in such circumstances, the Commission is not meant to act like a court, and that certain activities which might otherwise be considered "biased" form an integral part of its operations.

19 In dealing with the issue of a reasonable apprehension of bias, Madam Justice L'Heureux-Dubé added at pp. 314-315:

> The particular structure and responsibilities of the Commission must be considered in assessing allegations of bias. Upon the appeal of *Latimer* to the Ontario Court of Appeal, Dubin J.A., for a unanimous Court, dismissed the complaint of bias. He acknowledged that

the Commission had a responsibility both to the public and to its registrants. He wrote at p. 135:

> ... I view the obligation of the Commission towards its registrants as analogous to a professional body dealing in disciplinary matters with its members. The duty imposed upon the Commission of protecting members of the public from the misconduct of its registrants is, of course, a principal object of the statute, but the obligation of the Commission to deal fairly with those whose livelihood is in its hands is also by statute clearly placed upon it, and nothing is to be gained, in my opinion, by placing a priority upon one of its functions over the other.

Dubin J.A. found that the structure of the Act whereby commissioners could be involved in both the investigatory and adjudicatory functions did not, by itself, give rise to a reasonable apprehension of bias.

I am in agreement with this proposition. So long as the Chairman did not act outside of his statutory authority, and so long as there is no evidence to show involvement above and beyond the mere fact of the Chairman's fulfilling his statutory duties, a "reasonable apprehension of bias" affecting the Commission as a whole cannot be said to exist.

20 In delivering the judgment of the Divisional Court, Montgomery J. stated as follows at p. 113:

> ... *W.D. Latimer Co. v. Bray* (1974), 6 O.R. (2d) 129 ... (C.A.), established the principle that evidence of prejudgment, even in the context of the unique statutory scheme established by the *Securities Act*, is a ground for disqualification. However, it recognized that mere knowledge by Commissioners of market conditions or even of grounds for a complaint to be heard by them do not produce any apprehension of bias in the particular circumstances of this tribunal. Dubin J.A. (as he then was) delivered the judgment of the court. He stated at pp. 140-141:
>
> > Where by statute the tribunal is authorized to perform tripartite functions, disqualification must be founded upon some act of the tribunal going beyond the performance of the duties imposed upon it by the enactment pursuant to which the proceedings are conducted. Mere advance information as to the nature of the complaint and the grounds for it are not sufficient to disqualify the tribunal from completing its task. *Evidence of prejudgment, however, is a ground for disqualification unless the statute specifically permits the tribunal to have arrived at a preliminary judgment before conducting an inquiry*.

[Emphasis added.]

Disqualification by Reason of Corporate Taint

21 As noted earlier, the appellants submitted that the Divisional Court erred in failing to prohibit the Commission from conducting the hearings pursuant to the two notices previously referred to. They submitted that the Divisional Court, having found that those Commissioners who had participated in the formulation and adoption of the Policy Statement had prejudged the matters to be considered, erred in failing to hold that this prejudgment tainted the entire Commission, including those members who were appointed after the formulation and adoption of the Policy Statement.

22 It should be noted that the Policy Statement was held to be beyond the jurisdiction of the Commission because it had crossed the line between a non-mandatory guideline, and a mandatory pronouncement having the same effect as a statutory instrument, without the appropriate statutory authority (Doherty J.A. in *Ainsley*, supra). However, there is no suggestion of bad faith.

23 For the reasons noted earlier, it is unnecessary to determine whether the Divisional Court was correct in finding that those Commissioners who had participated in the formulation and adoption of the Policy Statement were disqualified.

24 Assuming that the Divisional Court was correct in so finding, I agree with its conclusion that such a finding did not disqualify the new Commissioners. Montgomery J., at p. 116, stated, in part, as follows:

> It is argued by the applicant that there is a corporate taint affecting all those Commissioners subsequently appointed to the OSC. There is no judicial authority for this proposition. Bias is a lack of neutrality.
>
> Blake in *Administrative Law in Canada* (Toronto: Butterworths, 1992), states at p. 92:
>
> > Many tribunals are part of a larger administrative body. The fact that one branch of that administrative body is biased does not mean that another branch that has carriage of the matter is biased. Bias on the part of an employee of the tribunal or a member who is not on the panel hearing the matter usually does not give rise to a reasonable apprehension of bias on the part of the tribunal. Even bias on the part of the Minister in charge of the department does not necessarily make the adjudicator employed by the Ministry biased.

25 There was no evidence of prejudgment on the part of the new Commissioners. They were not involved in the consideration and adoption of the Policy Statement. Furthermore, none of the evidence which the staff of the Enforcement Branch proposed to adduce at the hearings was provided to them.

26 It should also be noted that the evidence to be adduced in connection with the second notice of hearing only came to the attention of Commission staff after final approval of the Policy Statement by the Commissioners. Furthermore, none of the details of the evidence proposed to be presented

to the Commissioners in connection with the first notice of hearing formed part of the staff report presented to those Commissioners who were present when the Policy Statement was adopted.

27 It is assumed, of course, that the new Commissioners would be familiar with the Policy Statement and the concerns of the Commission with respect to the trading in penny stocks.

28 Securities Commissions, by their very nature, are expert tribunals, the members of which are expected to have special knowledge of matters within their jurisdiction. They may have repeated dealings with the same parties in carrying out their statutory duties and obligations. It must be presumed, in the absence of any evidence to the contrary, that the Commissioners will act fairly and impartially in discharging their adjudicative responsibilities and will consider the particular facts and circumstances of each case.

29 As noted earlier, even advance information as to the nature of a complaint and the grounds for it, which are not present here, are not a basis for disqualification.

30 In *Brosseau*, supra, the fact that the Chairman of the Commission had received the investigative report and sat on the panel hearing the matter did not give rise to a finding of a reasonable apprehension of bias.

31 In *Bennett v. British Columbia (Securities Commission)* (1992), 69 B.C.L.R. (2d) 171 (C.A.), an allegation of bias against the Commission was made because the staff of the Commission had cooperated with Crown counsel in quasi-criminal proceedings against those who were subsequently to appear before the British Columbia Securities Commission.

32 In rejecting a motion to stay the proceedings before the Commission by reason of the participation of the staff in the quasi-criminal proceedings, the British Columbia Court of Appeal first referred to the following portion of the judgment at first instance, at p. 180:

> I have also indicated earlier in these reasons, as well, that the fact that employees of the commission swore the information used by the Crown to prosecute the Bennetts and Doman in the *quasi*-criminal trial and used their investigative capacity to provide the evidence, does not lead automatically to an inference of bias on the part of the commission, because of the very nature of the commission under the Securities Act. Indeed, I do not take an inference of bias from their having done so. Nor is there any other demonstrated evidence of bias in this case.

33 The British Columbia Court of Appeal went on as follows at pp. 180-181:

> We are fully in accord with these findings. In the absence of any evidence of bias we are unable to understand how it could be inferred that staff activities of the sort which occurred

> here could lead a reasonably informed person to apprehend that presently unknown hearing officers would not be able to act in an entirely impartial manner if the hearing proceeds...
>
> We wish to add one further observation and that is as to the target of a bias allegation. Bias is an attitude of mind unique to an individual. An allegation of bias must be directed against a particular individual alleged, because of the circumstances, to be unable to bring an impartial mind to bear. No individual is identified here. Rather, the effect of the submissions is that all of the members of the commission appointed pursuant to s. 4 of the *Securities Act*, regardless of who they may be, are so tainted by staff conduct that none will be able to be an impartial judge. Counsel were unable to refer us to a single reported case where an entire tribunal of unidentified members had been disqualified from carrying out statutory responsibilities by reason of real or apprehended bias. We think that not to be surprising. The very proposition is so unlikely that it does not warrant serious consideration.

34 A case very much in point is *Laws v. Australian Broadcasting Tribunal* (1990), 93 A.L.R. 435 (H.C.). In that case, three members of the Australian Broadcasting Tribunal, during the course of what was intended to be a preliminary investigation, concluded that the appellant (Laws) had breached broadcasting standards. Subsequently, the tribunal, as a whole, decided to hold a formal inquiry to consider whether it should exercise any of its regulatory powers against the appellant including the withdrawal of its licence. The appellant sought an order prohibiting the broadcasting tribunal from conducting such a hearing on the ground that the entire tribunal was tainted by reason of the prejudgment of three of its members. An employee of the tribunal, Ms. Paramore, the Director of its Programs Division, later gave an interview on behalf of the tribunal in which she repeated the conclusions made earlier by the three tribunal members. Mr. Laws submitted that this was a further ground for disqualification.

35 An action for defamation was commenced by Mr. Laws against the tribunal and Ms. Paramore arising from the radio interview. In defence, the tribunal pleaded justification. That also formed the basis of the appellant's application to prohibit the tribunal from proceeding with its formal inquiry. I find it convenient to deal with the impact of the lawsuit later.

36 At first instance, Morling J. concluded that the three members of the tribunal who had undertaken the preliminary investigation had gone much further and had made a positive finding that the appellant had violated broadcasting standards. He held that they were precluded from participating in the formal inquiry, but the appellant was not entitled to an order prohibiting the formal inquiry from continuing so long as it was conducted by other members of the tribunal who had not participated in the preliminary investigation. That conclusion was upheld by the full court and by the High Court of Australia.

37 With respect to the statements made by Ms. Paramore, the appellant contended that those statements reflected the corporate view of the members of the tribunal and thus formed the basis for an order of prohibition against the tribunal itself.

38 Morling J. held that there was no justification for attributing Ms. Paramore's views to the members of the tribunal who were to conduct a formal inquiry. That conclusion was upheld in the High Court of Australia. On that issue, Mason C.J. and Brennan J. stated at pp. 444-445:

> In order to examine this submission it is necessary to consider the interview given by Ms. Paramore. Although the Act did not authorise the publication of the findings of non-compliance by the appellant with RPS 3 [broadcasting standards], it was not disputed that Ms Paramore spoke for the tribunal when she gave an account of the vitiated decision of 24 November. The tribunal is constituted by the Act as a body corporate (s 7(1), (2)(a)) and it consists of a chairman, a vice-chairman and at least one other member but not more than six other members; s 8(1). There is nothing to identify the source of Ms. Paramore's authority to make the statements which she made in the interview on behalf of the tribunal. It is very likely that her authority arose from her responsibility as Director of the Programs Division; in other words, it was part of her general responsibility to publish and explain, by way of broadcast, interview and otherwise, decisions made by the tribunal. The fact that the decision which she sought to report and explain was vitiated, at least so far as it related to the appellant, did not deny to the interview the character of a corporate act performed in purported pursuance of s 17(1). *However, though it might be correct to regard the interview as a corporate act, it was not necessarily an act done on behalf of each of the individual members of the corporation. The circumstances are not such as to justify the drawing of an inference that each of the individual members of the tribunal authorised the interview or approved of its content. At best from the appellant's viewpoint, it might be inferred that the three members of the tribunal who made the decision of 24 November so authorised or approved the interview. Accordingly, the interview does not entitle the appellant to wider relief than that granted at first instance by Morling J.*

[Emphasis added.]

39 Although there may be circumstances where the conduct of a tribunal, or its members, could constitute institutional bias and preclude a tribunal from proceeding further, this is not such a case. This is not a case where the Commission has already passed judgment upon the very matters which are to be considered in the pending hearings by the new Commissioners and, in this respect, is distinguishable from the case of *Association des officiers de direction du service de police de Québec (ville) c. Québec (Commission de police)* (1994), 119 D.L.R. (4th) 484 (Que. C.A.), where that was the nature of the concern of the majority of the members of the court. In any event, and with respect, I prefer the dissenting reasons for judgment of Fish J.A.

Disqualification by Reason of the Comments of the Chair, Mr. Waitzer

40 In the reasons of the Divisional Court, Montgomery J. stated at p. 111 as follows:

> In a press interview, the Chair of the OSC, Mr. Waitzer, stated that dealing with penny stock dealers is a "perennial priority". "There will always be marginal players in the securities industry. Our task is to get these players into the self-regulatory system or get them out of the jurisdiction".
>
> I conclude that Mr. Waitzer cannot sit on either hearing because of a reasonable apprehension of bias.

Montgomery J. did not expand upon his reasons for arriving at that conclusion.

41 The appellants submitted that the statements of the Chair exhibited a bias against them which was reflective of the Commission as a whole, and, therefore, they could not get a fair hearing from any members of the Commission. They submitted that, having found Mr. Waitzer was disqualified by reason of a reasonable apprehension of bias, the Divisional Court erred in not prohibiting the hearings from proceeding.

42 Mr. Waitzer's comments were delivered in the context of a series of four articles published in the same issue of the *Dow Jones News*. They appeared under the titles: "OSC Chairman Sees Mandate To Improve Market Efficiency," "Growing Power of Institutions"; "Jurisdiction Debate Red Herring"; and "Market Transparency a Priority". In those articles, Mr. Waitzer discusses trends in the securities industry, and potential regulatory responses to them. He is quoted as saying that he sees as part of his job the removal of un necessary regulatory burdens from participants in Ontario capital markets, rather than the mere imposition of new measures. He also states that the Toronto Stock Exchange may well have to adapt to admit members who do not trade on the exchange. One of the articles notes his concern that the self-regulating agencies adapt to accommodate the trend to various proprietary trading systems:

> While Waitzer says he sees no immediate threat to the TSE, he says his concern is that the situation will evolve into one where "all of a sudden we have 20 trading systems and no self-regulatory system; we've got a real problem and it all lands in the Commission's lap."

In this context, Mr. Waitzer's comment about getting the penny stock dealers into the self-regulating system is clearly a reflection of what he sees as the ideal regulatory solution to the industry's problems. It is a solution he advocates for all players in the market, not just for the class of traders to which the appellants belong.

43 With respect, I fail to see how what was said by Mr. Waitzer could form any basis for concluding that there was a reasonable apprehension of bias if he were to sit on either of the pending hearings, let alone disqualify the other Commissioners from conducting the hearings. In making the comments complained of here, Mr. Waitzer was fulfilling his mandate as Chair of the Commission.

44 In this respect, what was stated by Doherty J.A. in *Ainsley Financial Corp. v. Ontario (Securities Commission)*, supra, at pp. 108-109, is apt:

> The authority of a regulator, like the Commission, to issue non-binding statements or guidelines intended to inform and guide those subject to regulation is well established in Canada. The *jurisprudence* clearly recognizes that regulators may, as a matter of sound administrative practice, and without any specific statutory authority for doing so, issue guidelines and other non-binding instruments: *Hopedale Developments Ltd. v. Oakville (Town)*, [1965] 1 O.R. 259 at p. 263, 47 D.L.R. (2d) 482 (C.A.); *Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2 at pp. 6-7; 137 D.L.R. (3d) 558; *Capital Cities Communications Inc. v. Canadian Radio-Television & Telecommunications Commission*, [1978] 2 S.C.R. 141 at p. 170, 81 D.L.R. (3d) 609 at p. 629; *Friends of Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 at p. 35; 88 D.L.R. (4th) 1; *Pezim*, *supra*, at p. 596; Law Reform Commission of Canada, Report 26, *Report on Independent Administrative Agencies: Framework for Decision Making* (1985), at pp. 29-31.
>
> Non-statutory instruments, like guidelines, are not necessarily issued pursuant to any statutory grant of the power to issue such instruments. Rather, they are an administrative tool available to the regulator so that it can exercise its statutory authority and fulfil its regulatory mandate in a fairer, more open and more efficient manner. While there may be considerable merit in providing for resort to non-statutory instruments in the regulator's enabling statute, such a provision is not a prerequisite for the use of those instruments by the regulator. The case law provides ample support for the opinion expressed by the Ontario Task Force on Securities Regulation, *Responsibility and Responsiveness* (June 1994) at pp. 11-12:
>
> > A sound system of securities regulation is more than legislation and regulations. Policy statements, rulings, speeches, communiqués, and Staff notes are all valuable parts of a mature and sophisticated regulatory system. ...

45 Mr. Waitzer's comments did not in any way relate to the subject matter of the complaints made against the appellants in the pending proceedings, nor should they be viewed as a veiled threat against the appellants, as was contended.

46 However, even if statements by a regulator relate to the very matters which he or she is considering, that, in itself, is not a basis for concluding that the regulator has prejudged the matter.

47 In *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623, Cory J. stated at p. 639:

> Further, a member of a board which performs a policy formation function should not be susceptible to a charge of bias simply because of the expression of strong opinions prior to

> the hearing. This does not of course mean that there are no limits to the conduct of board members. It is simply a confirmation of the principle that the courts must take a flexible approach to the problem so that the standard which is applied varies with the role and function of the Board which is being considered. In the end, however, commissioners must base their decision on the evidence which is before them. Although they may draw upon their relevant expertise and their background of knowledge and understanding, this must be applied to the evidence which has been adduced before the board.

48 Even if it could be said that the statements of the Chair exhibited bias against the appellants that, in itself, would not disqualify the other Commissioners from conducting the headings.

49 In *Van Rassel v. Royal Canadian Mounted Police*, *(*sub nom. *Van Rassel v. Canada (Commissioner of R.C.M.P.))* [1987] 1 F.C. 473 (T.D.), it was alleged that the Commissioner of the R.C.M.P. made a public comment strongly critical of the R.C.M.P. officer who faced a trial before the R.C.M.P. service tribunal. Joyal J. held that even if such a statement were made, it could not lead to a reasonable apprehension of bias against the whole tribunal, at p. 487:

> Assuming for the moment that the document is authentic and that the words were directed to the applicant, it would not on that basis constitute the kind of ground to justify my intervention at this time. The Commissioner of the RCM Police is not the tribunal. It is true that he has appointed the tribunal but once appointed, the tribunal is as independent and as seemingly impartial as any tribunal dealing with a service-related offence. One cannot reasonably conclude that the bias of the Commissioner, if bias there is, is the bias of the tribunal and that as a result the applicant would not get a fair trial.

50 As I indicated earlier, in my opinion, there was no merit in the contention that the new Commissioners were disqualified by reason of the comments made by the Chair.

Bias Resulting from Commission's Defence in the Ainsley Action

51 As noted earlier, the *Ainsley* action was an action commenced by several investment dealers, including the appellants, against the Commission.

52 In the judgment of the Divisional Court, Montgomery J. found that the Commission's defence of the *Ainsley* action offered further evidence of its prejudgment of the matters contained in the first and second notices of hearing. In part, he stated as follows at pp. 114-115:

> In the context of the litigation brought by the securities dealers, including the motion for judgment in the *Ainsley* case and the pending appeal, the OSC went beyond merely defending itself and its jurisdiction and adopted the role of advocate against them and strenuously sought to demonstrate that Manning Limited and others are guilty of the very conduct which is now the subject of the current notices of hearing.

53 Counsel for the appellants submitted that the Divisional Court, having come to that conclusion, erred in not holding that the Commission should be prohibited from proceeding with the two hearings even if such hearings were presided over by the new Commissioners.

54 In the action, the plaintiffs claimed, in part, that the Commission staff could neither establish the public interest basis for the Policy Statement, nor the truth of the conclusion reached in the staff report upon which it was based. The plaintiff's also alleged bad faith, harassment, intimidation, and intentional interference with their business interests and claimed damages in the amount of $1 million.

55 These were very serious allegations and certainly called for a vigorous defence. The Divisional Court did not detail the manner in which they felt that the Commission in its defence to the *Ainsley* action went beyond defending itself and its jurisdiction. It would be a strange result if a securities dealer, whose conduct is under investigation, could, by the institution of an action calling for a defence, prevent the Commission from taking proceedings against it.

56 However, it is unnecessary to determine whether the Divisional Court was correct in holding that the defence of the *Ainsley* action was a basis for disqualification of certain of the Commissioners.

57 It was the Commission staff, along with counsel, who were responsible for assembling the materials that formed the basis of the Commission's response to the plaintiffs' allegations in the *Ainsley* action. None of the Commissioners, with the exception of the former Chair, Robert Wright, participated in any way in assembling those materials, or preparing the Commission's response to the action.

58 In my opinion, it cannot be said tht the defence of the action was a basis to conclude that the new Commissioners had prejudged the complaints which were the subject matter of the notices of hearing, and, in this respect, I agree with the Divisional Court.

59 I agree with the way that this issue was dealt with in *Laws v. Australian Broadcasting Tribunal*, supra.

60 As noted above, in that case, an action for defamation had been commenced against the tribunal and one of its employees. The tribunal, in its defence, relied upon justification which, in effect, alleged that what the employee of the tribunal had stated was true, i.e., the Laws had violated the broadcasting standards. The High Court of Australia did not accede to the submission of the appellant in that case that the defence in the civil action demonstrated bias, or a reasonable apprehension of bias, on the part of all the members of the Commission, including those who had not participated in the preliminary investigation.

61 The court concluded that the defence in the defamation action did not preclude members of the tribunal who had not participated in the preliminary investigation from conducting the pending inquiry.

62 Mason C.J. and Brennan J., with respect to this matter, concluded as follows at pp. 447-448:

> We are left then with the suggestion that in the circumstances there is a reasonable apprehension of bias because the defences to the action for defamation give rise to a suspicion of prejudgment or because the members of the tribunal have a conflicting interest in defeating that action. *Granted that the existence of apprehended bias is a question of fact we are not persuaded that the appellant succeeds in making out such a case against members of the tribunal other than the chairman, vice-chairman and Ms Bailey, who participated in the decision of 24 November and may be taken to have approved the giving of the interview by Ms Paramore*.
>
> . . . . .
>
> *However, we do not consider that the inference drawn in the preceding paragraph, taken in conjunction with the other circumstances which we have described, would lead a fair-minded ob server to conclude that the members of the tribunal, apart from those who participated in the decision of 24 November, would bring other than an unprejudiced and impartial mind to the resolution of the issues which would properly arise in an inquiry to be held under s 17c; see Livesey v New South Wales Bar Association (CLR at 293-4)*.

[Emphasis added.]

63 Gaudron and McHugh JJ., concurring, added the following at pp. 457-458:

> In the present case, the most that can be said against those members of the tribunal who were parties to the filing of the defamation defences is that they believed that, upon the evidence then known to them, the assertions in the defences were true and that on that evidence they would probably have decided the s 17c issues adversely to the appellant. But to attribute that belief and that decision to them does not give rise to a reasonable fear that they would not fairly consider any evidence or arguments presented by the appellant at the s 17c inquiry or that they would not be prepared to change their views about the issues. When the defamation proceedings against the tribunal were commenced, the members of the tribunal were required to file the tribunal's defence on the evidence that they then had in their possession and without the benefit of evidence or argument from the appellant. When all the evidence is heard and the case argued, it may become apparent to them that the defences which the tribunal filed cannot succeed. However, there is no suggestion that the filing of the defences was itself an abuse of process or the product of prejudice. *To the contrary, the hypothesis is that the members of the tribunal believed that the assertions in the defences were true. But neither logic nor the evidence makes it reasonable to fear that because of that belief, the members of*

the tribunal will not decide the case impartially when they hear the evidence and arguments for the appellant at the s 17c inquiry.

[Emphasis added.]

64 As indicated earlier, I would reject the submission that the defence in the *Ainsley* action precluded the new Commissioners from presiding over the pending hearings.

Doctrine of Necessity

65 As noted earlier, the Divisional Court held that even if this were a case of "corporate taint," the doctrine of necessity could be invoked which would allow those Commissioners against whom no specific reasonable apprehension of bias was found to form a quorum for the hearings.

66 In the view that I take of the matter, it is not necessary to consider the doctrine of necessity.

Conclusion

67 I am indebted to counsel for their very thorough and able submissions.

68 In the result, I would dismiss the appeal with costs.

Appeal dismissed.

Footnotes

∗ Leave to appeal to the Supreme Court of Canada was denied (August 17, 1995), Doc. 24773, Lamer C.J.C., La Forest, and Major JJ. (S.C.C.).

1 *The Globe & Mail*, August 18, 1995, p. B.3.

2 The leading case in the area, which was not even referred to in the reasons of the Ontario Court of Appeal, is *Committee for Justice & Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369, 9 N.R. 115, 68 D.L.R. (3d) 716. The decision of the NEB in that case was overturned. However, the usual natural justice/fairness cases involve, primarily, allegations that for some reason the hearing itself was unfair.

3 For example, the writer was once asked by a judge as to whether he should disqualify himself on the ground that when he was an articling student (apparently at least 30 years earlier) he had worked on a file involving the parent company of the other party in the case.

4 Other examples might include professional disciplinary bodies, tribunals regulating prices of services, such as the CRTC for telephone rates, or issuing permits, such as the National Energy Board and numerous licensing bodies.

5 See the *R. v. Pickersgill*; *Ex parte Smith* (1970), 14 D.L.R. (3d) 717 (Man. Q.B.).

6 This was the central rule to emerge from the *Committee for Justice & Liberty* case, supra, at note 2, relying on the *PPG* case, ante, note 7.

7 See *Re Canada (Anti-dumping Tribunal)* (sub nom. *PPG Industries Canada Ltd. v. Canada (Attorney General)*), [1976] 2 S.C.R. 739, 7 N.R. 209, 65 D.L.R. (3d) 354, for a detailed discussion of this type of bias.

8 *Capital Cities Communications Inc. v. Canada (Canadian Radio-Television & Telecommunications Commission)*, [1978] 2 S.C.R. 141, 36 C.P.R. (2d) 1, 81 D.L.R. (3d) 609, 18 N.R. 181, at p. 629 (D.L.R.).

9 A rare, but clear example of this is found in the case of the consumer advocate who became a member of the tribunal in *Newfoundland Telephone Co. v. Newfoundland (Board of Commissions of Public Utilities)*, [1992] 1 S.C.R. 623, 4 Admin. L.R. (2d) 121, 134 N.R. 241, 89 D.L.R. (4th) 289, 95 Nfld. & P.E.I.R. 271, 301 A.P.R. 271.

10 This was the situation in the *Committee for Justice & Liberty* case, supra, note 2, where only one member of the panel was found to have had a bias but the decision of the entire panel had been quashed by the Federal Court of Appeal.

11 The decision of the Supreme Court of Canada in *PPG*, supra, note 7, reversed the Federal Court of Appeal on a similar ground: although the Chair of the tribunal had a bias, he did not participate in making the decision.

12 Partner, Miller Thomson

2006 SCC 13
Supreme Court of Canada

H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General)

2006 CarswellNat 903, 2006 CarswellNat 904, 2006 SCC 13, [2006] 1 S.C.R. 441, [2006] S.C.J. No. 13, 147 A.C.W.S. (3d) 159, 266 D.L.R. (4th) 675, 347 N.R. 1, 42 Admin. L.R. (4th) 1, 48 C.P.R. (4th) 161, J.E. 2006-836

Attorney General of Canada (Appellant) and H.J. Heinz Company of Canada Ltd. (Respondent) and Information Commissioner of Canada (Intervener)

McLachlin C.J.C., Bastarache, Binnie, LeBel, Deschamps, Fish, Abella JJ.

Heard: November 7, 2005
Judgment: April 21, 2006 *
Docket: 30417

Proceedings: affirming *H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General)* (2004), [2005] 1 F.C.R. 281, 14 Admin. L.R. (4th) 123, 32 C.P.R. (4th) 385, 241 D.L.R. (4th) 367, 320 N.R. 300, 2004 CAF 171, 2004 CarswellNat 3911, 2004 FCA 171, 2004 CarswellNat 1202 (F.C.A.); affirming *H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General)* (2003), 230 F.T.R. 272, [2003] 4 F.C. 3, 2003 FCT 250, 2003 CarswellNat 539, 2003 CFPI 250, 2003 CarswellNat 1724, 25 C.P.R. (4th) 193 (Fed. T.D.)

Counsel: Christopher Rupar, for Appellant
Nicholas McHaffie, Craig Collins-Williams, for Respondent
Raynold Langlois, Q.C., Daniel Brunet, for Intervener

Subject: Public; Property; Intellectual Property

APPEAL by attorney general from judgment reported at *H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General)* (2004), [2005] 1 F.C.R. 281, 14 Admin. L.R. (4th) 123, 32 C.P.R. (4th) 385, 241 D.L.R. (4th) 367, 320 N.R. 300, 2004 CAF 171, 2004 CarswellNat 3911, 2004 FCA 171, 2004 CarswellNat 1202 (F.C.A.), dismissing appeal from decision that third party could raise personal information exemption under s. 44 review, and ordering severance of records containing personal information.

POURVOI du procureur général à l'encontre de l'arrêt publié à *H.J. Heinz Co. of Canada Ltd. v. Canada (Attorney General)* (2004), [2005] 1 F.C.R. 281, 14 Admin. L.R. (4th) 123, 32 C.P.R.

(4th) 385, 241 D.L.R. (4th) 367, 320 N.R. 300, 2004 CAF 171, 2004 CarswellNat 3911, 2004 FCA 171, 2004 CarswellNat 1202 (C.A.F.), qui a rejeté le pourvoi à l'encontre de la décision qu'un tiers pouvait invoquer l'exception relative aux renseignements personnels dans le cadre d'une révision en vertu de l'art. 44 et qui a ordonné le prélèvement de certains documents contenant des renseignements personnels

***Deschamps J.*:**

1. Introduction

1 This case concerns the delicate balance between privacy rights and the right of access to information. The respondent, H.J. Heinz Company of Canada Ltd. ("Heinz"), contests the disclosure of certain documents on the ground that they contain personal information. Heinz, as a "third party" within the meaning of the *Access to Information Act*, R.S.C. 1985, c. A-1 ("*Access Act*"), seeks to raise the personal information exemption set out in s. 19 by means of an application for review under s. 44 of that Act. The appellant, the Attorney General of Canada, and the intervener, the Information Commissioner of Canada, however, argue that the documents must be disclosed. They assert that the review mechanism provided for in s. 44 is limited to the confidential *business* information which was the basis for Heinz's third party status in the first place. In their submission, a person wishing to complain about the disclosure of *personal* information should instead seek a remedy under the *Privacy Act*, R.S.C. 1985, c. P-21.

2 The Attorney General's narrow interpretation of the legislative scheme is, in my view, too restrictive of the rights involved. This Court has stated on numerous occasions that the *Privacy Act* and the *Access Act* must be read together as a "seamless code": *Canada (Information Commissioner) v. Royal Canadian Mounted Police Commissioner*, [2003] 1 S.C.R. 66, 2003 SCC 8 (S.C.C.), at para. 22 ("*RCMP*"). The right of access to government information, while an important principle of our democratic system, cannot be read in isolation from an individual's right to privacy. By including a mandatory privacy exemption in the *Access Act* itself, Parliament ensured that both statutes recognize that the protection of the privacy of individuals is paramount over the right of access, except as prescribed by law. Where a third party becomes aware that a government institution intends to disclose a record containing personal information, nothing in the plain language of the *Access Act* prevents the third party from raising this concern by applying for judicial review. What matters is not how the reviewing court became aware of the government's wrongful decision to disclose personal information, but the court's ability to give meaning to the right to privacy. A reviewing court is in a position to prevent harm from being committed and the statutory scheme imposes no legal barrier to prevent the court from intervening. An interpretation of s. 44 that forces an individual to wait until the personal information is disclosed and the damage is done, or that imposes an onerous burden on the person seeking to avert the harm, fails to give actual content to the right to privacy and also fails to satisfy the clear legislative goals underlying the *Access Act* and the *Privacy Act*.

2. Facts

3 In June 2000, the Canadian Food Inspection Agency ("CFIA") received a request under the *Access Act* for access to certain records pertaining to Heinz. The CFIA determined that some of the records might contain confidential business or scientific information, as described in s. 20(1) of the *Access Act*, and requested, pursuant to ss. 27 and 28 of the Act, that Heinz make representations as to why the documents should not be disclosed. Heinz submitted its representations in early September. After reviewing them, the CFIA concluded that the records should be disclosed, subject to certain redactions, and notified Heinz of its decision. On September 27, 2000, Heinz commenced a review proceeding pursuant to s. 44 of the *Access Act*, arguing that certain records should not be disclosed because they fell under two exemptions established by the Act: that of s. 20(1), which prohibits the disclosure of confidential business information, and that of s. 19(1), which prohibits the disclosure of personal information relating to individuals.

4 In the review proceeding, the Attorney General argued that it was inappropriate for Heinz to raise any exemption other than s. 20(1) because it was the presence of business information which was the basis for Heinz's right of review in the first place. The application judge disagreed, concluding that Heinz could raise the personal information exemption under s. 19, and ordered the severance of certain records containing personal information relating to individuals. The Attorney General appealed that decision. The Federal Court of Appeal dismissed the appeal.

3. Judicial History and Case Law

5 The judgments of both the Federal Court of Appeal and the Federal Court- Trial Division are rooted in the jurisprudence of the Federal Court of Canada. I will therefore review the judgments in this case in conjunction with the case law of the Federal Court of Canada.

3.1 Federal Court-Trial Division, [2003] 4 F.C. 3, 2003 FCT 250 (Fed. T.D.)

6 In the Trial Division, Layden-Stevenson J. considered whether, in a s. 44 application for review, Heinz could raise the prohibition against the disclosure of personal information established by s. 19 of the *Access Act*. She reviewed two prior Federal Court of Canada decisions which appeared to come to contradictory conclusions regarding the scope of s. 44: *Saint John Shipbuilding Ltd. v. Canada (Minister of Supply & Services)* (1988), 24 F.T.R. 32 (Fed. T.D.), aff'd (1990), 107 N.R. 89 (Fed. C.A.), and *Siemens Canada Ltd. v. Canada (Minister of Public Works & Government Services)* (2001), 213 F.T.R. 125, 2001 FCT 1202 (Fed. T.D.), aff'd (2002), 21 C.P.R. (4th) 575, 2002 FCA 414 (Fed. C.A.).

7 *Saint John Shipbuilding*, concerned an application under s. 44 for a review of a decision by the Department of Supply and Services to release certain extracts from and summaries of a contract with the Government of Canada. The applicant was primarily concerned with the proper

application of s. 20(1)(*c*) and (*d*) of the *Access Act* but urged the court to consider s. 15 as well. Section 15 provides that the head of an institution "may refuse to disclose any record requested under this Act that contains information the disclosure of which could reasonably be expected to be injurious to . . . the defence of Canada". Because the material at issue consisted of defence-related contracts, the applicant raised the fact that s. 15 of the *Access Act* might also exempt the records from disclosure, and urged the court to be particularly reticent to allow the records to be released. However, both the Trial Division and the Federal Court of Appeal rejected the applicant's arguments respecting s. 15. Martin J., writing for the Trial Division, held that his powers of review in a s. 44 proceeding were limited to the considerations set out in s. 20(1) of the Act and that the national security issue was irrelevant to the proceeding. Similarly, Hugessen J.A. at the Federal Court of Appeal stated that "the appellant's interest, as third party intervenor in a request for information, is limited to those matters set out in subsection 20(1)" (para. 9).

8 In *Siemens*, by contrast, the Federal Court of Appeal held that it was unable to interpret s. 44 in a way that would limit the jurisdiction of the court and prevent s. 24 from being involved. By implication, therefore, the Court of Appeal found that the applicant was not limited to the exemption set out in s. 20(1) of the *Access Act*. The applicant objected to the disclosure of information on the ground that s. 30 of the *Defence Production Act*, which is incorporated into the *Access Act* by virtue of s. 24, precluded release of the documents. At trial, McKeown J. accepted that s. 30 of the *Defence Production Act* applied, thereby implicitly accepting that he had jurisdiction to apply s. 24 in the context of a s. 44 application. Crown counsel apparently argued against this approach on appeal, asserting that s. 44 limits the jurisdiction of the court such that only s. 20(1) can be raised in a s. 44 review. In delivering a laconic decision from the bench, however, the Federal Court of Appeal dismissed the Crown's arguments, stating simply: "We are unable to interpret s. 44 in this way".

9 At trial in the instant case, Layden-Stevenson J. reconciled *Saint John Shipbuilding* and *Siemens* by pointing out that the *Access Act* contains both mandatory and discretionary exemptions and that the procedure for refusing disclosure differs under the two types of exemptions. A mandatory exemption requires only a decision as to whether the material falls within the exemption; a discretionary exemption, by contrast, requires the government institution to determine, first, whether the information falls within the exemption and, second, whether the material should be disclosed regardless. Layden-Stevenson J. found that the holding in *Saint John Shipbuilding* related specifically to the application of a discretionary exemption and did not prohibit raising *mandatory* exemptions in an application for review under s. 44. She added that in *Siemens*, the Federal Court of Canada had, in addressing the application of a mandatory exemption (s. 24), found that the exemption in question could be raised in a s. 44 proceeding. She therefore concluded, on the basis that the s. 19 prohibition against disclosing personal information is a mandatory exemption, that Heinz could raise s. 19 in a s. 44 proceeding.

10 Finally, Layden-Stevenson J. relied on the principles of statutory interpretation stated in *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.), to hold that Heinz was entitled to raise the personal information exemption because there is no restriction on the "representations" that can be made under s. 28 of the *Access Act*. She agreed that some of the requested information met the criteria of s. 19 and severed specific passages as a result. She ordered that the remaining records be disclosed.

3.2 Federal Court of Appeal, (2004), [2005] 1 F.C.R. 281, 2004 FCA 171 (F.C.A.)

11 On appeal, Nadon J.A. held that *Siemens* had settled the debate regarding the scope of s. 44 and that it was impossible to distinguish *Siemens* from the instant case on any basis. The Federal Court of Appeal had clearly decided in *Siemens* that a third party could, on a s. 44 application, seek to prevent the disclosure of records on the basis of exemptions other than confidential business information. Nadon J.A. refused to overturn *Siemens*, because it could not be said that the decision in that case was "manifestly wrong". He accordingly dismissed the appeal.

3.3 Applicability of the Case Law

12 Neither *Saint John Shipbuilding* nor *Siemens* provides this Court with specific reasoning on the proper scope of a s. 44 application. More importantly, the exemption provision at issue here (s. 19) differs markedly in nature, purpose and application from the exemption provisions raised in the prior cases. Parliament's harmonized design of access to information and privacy legislation clearly indicates, as this Court's jurisprudence has confirmed, that the *Access Act* and the *Privacy Act* must be read together, with special emphasis given to the protection of personal information.

13 The applicability of the personal information exemption in a s. 44 proceeding was also at issue in *SNC Lavalin Inc. v. Canada (Minister for International Co-operation)*, [2003] 4 F.C. 900, 2003 FCT 681 (Fed. T.D.) ("*Lavalin*"), which was heard by the Federal Court-Trial Division soon after the case at bar. In that case, SNC Lavalin, a large engineering construction company, contested a decision of the Canadian International Development Agency ("CIDA") to disclose documents to an access requester. Like Heinz, SNC Lavalin claimed that a number of the requested documents contained personal information relating to individuals and should not be released pursuant to s. 19 of the *Access Act*. The trial judge rejected Lavalin's arguments, suggesting that in order to confer on a third party a right to make representations unrelated to confidential business information (s. 20(1)), the court would have to read words into s. 28(1), the provision which establishes a third party's right to make representations. Reading in would violate the established principle that "the court should not accept an interpretation which requires the insertion of extra wording where there is another acceptable interpretation which does not require any additional wording": *Friesen v. R.*, [1995] 3 S.C.R. 103 (S.C.C.), at para. 27, as cited in *Markevich v. Canada*, [2003] 1 S.C.R. 94, 2003 SCC 9 (S.C.C.), at para. 15.

14 For the reasons discussed below, however, I am unable to agree with the trial judge's conclusions in *Lavalin*. The applicability of s. 19 in the context of a s. 44 review is now squarely before the Court and must be addressed keeping in mind the principles of statutory interpretation and, in particular, the broader purpose and context of the federal access to information and privacy legislation.

15 Before proceeding to the analysis, it will thus be helpful to review the legislative framework.

4. Legislative Provisions

16 The relevant legislative provisions are set out in the Appendix. However, the process under the *Access Act* for reviewing decisions to disclose information involves the interaction of multiple provisions, and it is worth examining the key provisions in greater detail.

17 The *Access Act* establishes a broad right of access to records under the control of government institutions (s. 4). At the same time, the Act recognizes that rights of access are not absolute by outlining a number of exemptions to disclosure (ss. 13-26). Most important for the purposes of this case are the exemptions relating to personal information (s. 19) and to confidential business information (s. 20(1)). They provide as follows:

> 19. (1) Subject to subsection (2), the head of a government institution shall refuse to disclose any record requested under this Act that contains personal information as defined in section 3 of the *Privacy Act*.
>
> (2) The head of a government institution may disclose any record requested under this Act that contains personal information if
>
> (a) the individual to whom it relates consents to the disclosure;
>
> (b) the information is publicly available; or
>
> (c) the disclosure is in accordance with section 8 of the *Privacy Act*.
>
> 20. (1) Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Act that contains
>
> (a) trade secrets of a third party;
>
> (b) financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party;

> (c) information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party; or
>
> (d) information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.

18 Section 19(1) thus creates a mandatory prohibition against the disclosure of "personal information", which is defined in s. 3 of the *Privacy Act* as "information about an identifiable individual that is recorded in any form". Section 20(1) prohibits the disclosure of records containing confidential business information supplied by a "third party". A "third party" is defined as "any person, group of persons or organization other than the person that made the request or a government institution" (s. 3 of the *Access Act*). The parties are not debating at this stage whether certain information contained in the records meets the criteria of s. 19; rather, the issue in the case at bar is whether s. 19 may be raised in a s. 44 review proceeding.

19 Where a government institution intends to disclose confidential business information, the *Access Act* provides that the institution must give the third party notice (s. 27(1)) and that the third party has the right to make representations to the institution as to why the record should *not* be disclosed (s. 28(1)(*a*)). It is important to note that the third party also has the right to be given notice if the institution decides to go ahead and disclose the record (s. 28(1)(*b*)). (This right to notice is also triggered under s. 29(1) of the *Access Act* by a recommendation for disclosure by the Information Commissioner, although only s. 28(1) is relevant to the facts of the instant case.) If the third party wishes to contest the government institution's decision to disclose the record, he or she may apply to the Federal Court for a review of the matter pursuant to s. 44(1), which reads as follows:

> 44. (1) Any third party to whom the head of a government institution is required under paragraph 28(1)(*b*) or subsection 29(1) to give a notice of a decision to disclose a record or a part thereof under this Act may, within twenty days after the notice is given, apply to the Court for a review of the matter.

Third parties who have received notice regarding the disclosure of confidential business information are thus accorded a special right of review. Moreover, if a s. 44 review is initiated, the person who made the original request for access must be notified and given the opportunity to appear as a party (ss. 44(2) and 44(3)).

20 These provisions must now be put in context.

5. Analysis

5.1 Statutory Interpretation

21 As with most questions of statutory interpretation, the dispute can be resolved through what is now commonly referred to as the modern approach: "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Rizzo & Rizzo Shoes Ltd.*, at para. 21).

5.1.1 Legislative History

22 Originally considered together by Parliament and enacted simultaneously in 1982, the *Access to Information Act* and the *Privacy Act* are parallel statutes which in combination provide a cohesive framework for balancing the right of access to information and privacy rights: *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403 (S.C.C.), at para. 45. As is clear from the parliamentary debates at the time the Acts were introduced, Parliament intended the new, comprehensive access to information and privacy legislation to increase government accountability in two ways: first, by ensuring that access to information under government control is a public right rather than a matter of government discretion and, second, by strengthening the rights of individuals to know "how personal information will be used . . . that the information used for decision-making purposes is accurate . . . and that information collected by government institutions is relevant to their legitimate programs and operations": *House of Commons Debates*, vol. VI, 1st Sess., 32nd Parl., January 29, 1981, at pp. 6689-91, Second Reading of Bill C-43 by the Hon. Mr. Francis Fox, then Minister of Communications.

23 Significantly, while protecting personal information is the primary purpose of the *Privacy Act*, the *Access Act* also recognizes the importance of protecting privacy rights, and in so doing necessarily qualifies the right of access to information under government control articulated in s. 4(1) of the Act: *RCMP*, at para. 22. Indeed, when the *Access Act* and the *Privacy Act* were introduced in Parliament, the then Minister of Communications emphasized that, while the Bill dealt with both access to information and privacy, it ensured "a *consistent* treatment of personal information and the protection of individual privacy" (emphasis added (*House of Commons Debates*, at p. 6690)). More specifically, the legislature ensured the protection of personal information under the *Access Act* through s. 19, which mandatorily prohibits government institutions from disclosing personal information about an individual to an access requester, subject to certain exceptions.

24 As demonstrated by the background to the enactment of the two statutes, therefore, Parliament has created a legislative scheme which, while intended to ensure access to information on the one hand and protect individual privacy on the other, consistently protects personal information. As a result of these tightly interlaced legislative histories, s. 44 cannot be interpreted simply with regard to the purpose of the *Access Act*, but must also be understood with reference to the purpose of the *Privacy Act*. I will therefore now turn to an analysis of the differing, but connected, purposes of the two statutes.

5.1.2 Purpose

25 As I have suggested, the closely related legislative histories of the *Access Act* and the *Privacy Act* require a reviewing court to consider the purposes of both statutes rather than viewing each one in isolation from the other. In *Dagg*, La Forest J. (dissenting but not on this point) came to the same conclusion. Addressing the tension between "two competing legislative policies" (para. 45), he suggested that while some friction between the right of access to information and privacy rights is inevitable, the two statutes "set out a coherent and principled mechanism for determining which value should be paramount in a given case" (para. 45). Like two sides of the same coin, the *Access Act* and the *Privacy Act* ensure that neither the right of access to information nor the right to individual privacy is given absolute pre-eminence.

26 The intimate connection between the right of access to information and privacy rights does not mean, however, that equal value should be accorded to all rights in all circumstances. The legislative scheme established by the *Access Act* and the *Privacy Act* clearly indicates that in a situation involving personal information about an individual, the right to privacy is paramount over the right of access to information, except as prescribed by the legislation. Both Acts contain statutory prohibitions against the disclosure of personal information, most significantly in s. 8 of the *Privacy Act* and s. 19 of the *Access Act*. Thus, while the right to privacy is the driving force behind the *Privacy Act*, it is also recognized and enforced by the *Access Act*.

27 As I have mentioned, s. 44 provides third parties with a right to apply to the Federal Court for review of decisions to disclose records. This right of review helps to promote one of the underlying purposes of the *Access Act*: to ensure that decisions on disclosure are "reviewed independently of government" (s. 2(1)). Indeed, the review mechanisms created by the two Acts introduce an important level of governmental accountability. As the Minister of Communications stated upon introducing the *Privacy Act* and the *Access Act* in Parliament, the Acts allow the courts to examine whether a government institution had reasonable grounds for its decision to disclose a particular record, placing the burden squarely on the shoulders of government: *House of Commons Debates*, at p. 6691. Section 44 thus establishes a key mechanism by which a government institution's erroneous decision to disclose information may be reviewed and rectified pursuant to the principles of the *Access Act*.

28 Given the interlocking nature of the two Acts, the right of review provided for in s. 44 must be interpreted with regard not only to the purpose and structure of the *Access Act*, but also to the legislative purposes of the *Privacy Act*. As indicated, the purpose of the *Privacy Act* is to protect the privacy of individuals with respect to personal information about themselves that is held by a government institution (s. 2). The importance of this legislation is such that the Privacy Act has been characterized by this Court as "quasi-constitutional" because of the role privacy plays

in the preservation of a free and democratic society: *Lavigne v. Canada (Commissioner of Official Languages)*, [2002] 2 S.C.R. 773, 2002 SCC 53 (S.C.C.), at para. 24; *Dagg*, at paras. 65-66.

29 The central protection relating to the disclosure of personal information is provided for in s. 8 of the *Privacy Act*, which establishes in strict terms that "[p]ersonal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be disclosed by the institution except in accordance with this section". The *Privacy Act* also provides a number of exceptions to the prohibition against disclosing personal information, including a "public interest" limitation on privacy rights (see s. 8(2)(*a*) through (*m*)). However, even where a government institution discloses personal information by exercising its public interest discretion, it must notify the Privacy Commissioner prior to disclosure where reasonably practicable, and the Privacy Commissioner may notify the individual (s. 8(5)). Thus, it is clear from the legislative scheme established by the *Access Act* and the *Privacy Act* that in a situation involving personal information about an individual, the right to privacy is paramount over the right of access to information.

30 It is worth noting, however, that despite the emphasis on the protection of privacy, the legislative scheme ensures that the rights of the access requester are also taken into account in the context of an application for review. Where a s. 44 review has been initiated, the person who made the original request for access must be notified and given the opportunity to make representations (ss. 44(2) and 44(3)). In this way, the statute provides a further mechanism for balancing the rights of access requesters and of those who object to disclosure.

31 It is apparent from the scheme and legislative histories of the *Access Act* and the *Privacy Act* that the combined purpose of the two statutes is to strike a careful balance between privacy rights and the right of access to information. However, within this balanced scheme, the Acts afford greater protection to personal information. By imposing stringent restrictions on the disclosure of personal information, Parliament clearly intended that no violation of this aspect of the right to privacy should occur. For this reason, since the legislative scheme offers a right of review pursuant to s. 44, courts should not resort to artifices to prevent efficient protection of personal information.

5.1.3 Legislative Context of Section 44

32 The histories and purposes of the *Privacy Act* and the *Access Act* illustrate the intimate relationship between the two statutes. This relationship is also reflected in the comprehensive legislative scheme created by the two statutes. The legislative context of s. 44 thus provides further guidance regarding the proper scope of the review power.

33 Structurally and conceptually, the *Privacy Act* and the *Access Act* create a complementary and harmonious legislative scheme: *RCMP*, at para. 22. This is evidenced in particular by the way in which the Acts make reference to each other (see, for example, ss. 19(1) and 19(2) of the *Access Act*, and ss. 3, 21, 46, and 65 of the *Privacy Act*) and by the lack of repetition between

them. The two statutes also establish analogous roles for the Information Commissioner and the Privacy Commissioner, each of whom is charged with carrying out impartial, independent and non-partisan investigations into the violation of, respectively, the right of access to information and privacy rights. Indeed, pursuant to s. 55(1) of the *Privacy Act*, the Information Commissioner may be appointed as Privacy Commissioner, and thus a single individual can hold both offices.

34 The Information Commissioner and the Privacy Commissioner benefit not only individuals who request access or object to disclosure, but also the Canadian public at large, by holding the government accountable for its information practices. As this Court has emphasized in the past, the Commissioners play a crucial role in the investigation, mediation, and resolution of complaints alleging the improper use or disclosure of information under government control: *Lavigne*, at paras. 37-39. Also, as former Justice La Forest notes in a recent report entitled *The Offices of the Information and Privacy Commissioners: The Merger and Related Issues*, Report of the Special Advisor to the Minister of Justice (November 15, 2005) ("La Forest report"), at pp. 17-18, the role and responsibilities of the Commissioners extend even further to include auditing government information practices, promoting the values of access and privacy nationally and internationally, sponsoring research, and reviewing proposed legislation.

35 However, as the following discussion will show, in the specific circumstances of the case at bar, the Privacy Commissioner and the Information Commissioner are of little help because, with no power to make binding orders, they have no teeth. Where, as here, a party seeks to *prevent* the disclosure of information as opposed to requesting its release, the Commissioners' role is necessarily limited by an inability to issue injunctive relief or to prohibit a government institution from disclosing information. Section 44 is therefore the sole mechanism under either the *Access Act* or the *Privacy Act* by which a third party can draw the court's attention to an intended disclosure of personal information in violation of s. 19 of the *Access Act*, and by which it can seek an effective remedy on behalf of others whose privacy would be affected by the disclosure of documents for which the third party is responsible.

36 The *Privacy Act* establishes a central role for the Privacy Commissioner in the protection of privacy rights. Under s. 29(1)(*a*) through (*f*), individuals who believe that personal information about themselves has been wrongfully used or disclosed by a government institution may complain to the Privacy Commissioner. The Privacy Commissioner is charged with receiving and investigating such complaints and, where they are well founded, with reporting his or her findings and recommendations to the appropriate government institution (ss. 29(1) and 35). To do this, the Commissioner is accorded broad investigative powers, including the powers to summon and enforce the appearance of persons, compel persons to give evidence, enter government premises, and examine records on government premises (s. 34). Pursuant to s. 37, the Privacy Commissioner may also carry out its own investigations in respect of personal information under the control of government institutions to ensure compliance with the *Privacy Act*. However, while these complaint mechanisms are important in the larger scheme of the *Privacy Act*, they are available

only where the wrongful disclosure has *already* occurred and where the complaint is laid directly by the person who is the subject of the information that was wrongfully disclosed (i.e. not by a third party). The Privacy Commissioner may not, therefore, act to prevent the disclosure of personal information.

37 Third parties may receive some assistance from the Privacy Commissioner pursuant to s. 29(1)(*h*)(ii) of the *Privacy Act*, which requires the Privacy Commissioner to receive and investigate complaints "in respect of any other matter relating to . . . the use or disclosure of personal information under the control of a government institution". In contrast to s. 29(1)(*a*) through (*f*), this provision accords the Privacy Commissioner a broader ambit of investigation and does not appear to be limited to situations where the wrongful disclosure of personal information has already occurred or where the complaint was received directly from the individual involved. It may therefore be open to a third party to initiate a complaint on behalf of employees or others *before* disclosure occurs. This broader complaint mechanism is inadequate, however, because the Privacy Commissioner has no authority to issue decisions binding on the government institution or the party contesting the disclosure. Nor does the Commissioner have an injunctive power which would allow it to stay the disclosure of information pending the outcome of an investigation. Indeed, s. 7 of the *Access Act* requires the government institution to disclose the requested information within a specific time limit once a disclosure order is issued. The Privacy Commissioner's ability to provide relief to Heinz is thus very limited.

38 In a manner similar to the *Privacy Act*, the *Access Act* establishes a central role for the Information Commissioner, who is charged with protecting and acting as an advocate of the rights of access requesters, and with conducting investigations. In a dispute under the *Access Act*, where a person makes a request to a government institution for access to a record and the request is denied, the requester may file a complaint with the Information Commissioner, which the Commissioner must investigate (s. 30). Section 36 of the *Access Act* accords to the Information Commissioner broad investigative powers similar to those of the Privacy Commissioner and, as a result of its expertise, staff and flexibility, the office of the Information Commissioner is in a unique position to conduct such investigations: *Davidson v. Canada (Solicitor General)*, [1989] 2 F.C. 341 (Fed. C.A.).

39 However, the Information Commissioner is of only limited assistance in circumstances like those in the case at bar. The primary role of the Information Commissioner is to represent the interests of the public by acting as an advocate of the rights of access requesters. Here, Heinz is *contesting* a decision to disclose information. While s. 30(1)(*f*) of the *Access Act* charges the Information Commissioner with receiving and investigating complaints "in respect of *any other matter* relating to requesting or obtaining access to records under this Act" (emphasis added), such broad language does not change the fact that the role of the Information Commissioner, and this is consistent with the purpose of the *Access Act* as a whole, is to act, where appropriate, as an advocate of the disclosure of information. Moreover, like the Privacy Commissioner, the

Information Commissioner may not issue binding orders or injunctive relief and accordingly cannot order the government not to disclose a record.

40 Section 44 thus establishes the sole mechanism within the scheme of the *Access Act* and the *Privacy Act* by which a third party may request an independent review of a ministerial or government decision to disclose information. As a result, s. 44 helps to promote the purposes of both Acts by providing an avenue for complaints relating to the violation of privacy and ensuring that government institutions are accountable for their information practices.

5.1.4 Plain and Ordinary Meaning

41 As has been discussed, a review under s. 44 of the *Access Act* is triggered by a third party's right to notice where requested records may contain confidential business information. While the notice provisions relating to the disclosure of confidential business information therefore necessarily limit the availability of a s. 44 review, the plain language of ss. 28, 44 and 51 of the *Access Act* does not explicitly restrict the scope of the right of review. On the contrary, four key words or expressions, read in their "plain and ordinary meaning", indicate the legislature's intention to give the court a generous ambit of review on a s. 44 application.

42 First, the plain language of s. 28 supports a broad interpretation of the review process. As has been mentioned, the *Access Act* provides that a third party has a right to make "representations" to the government institution as to why "the record or the part thereof should not be disclosed" (s. 28(1)(*a*)). As the trial judge noted, nothing in that section explicitly purports to limit the range of representations that can be made, "provided, of course, they are relevant to the issue of disclosure" (para. 24). Had the legislature intended to limit the scope of such representations, it would have included references to this effect.

43 Second, the use of the word "record" in s. 28 indicates a legislative intent to make the entire record available for review, not simply the specific information subject to s. 20(1). Section 3 of the *Access Act* specifies that "record" includes a wide range of "documentary material, regardless of physical form or characteristics", such as books, maps, drawings, photographs, sound recordings, and videotapes. This definition relates to the physical form of the information and places no limits on the scope of the review. Similarly, s. 51 of the *Access Act* refers to a reviewing judge in a s. 44(1) application determining whether a record "or part thereof" should be disclosed. The *Access Act* clearly envisions a "record" as a "set" of information which can be divided or severed. For example, a book may include many discrete and severable "pieces" of information, each of which might be reviewed on a different basis. This broader interpretation is confirmed by the use, in the French version of s. 28, of the word "*document*" rather than "*renseignements*".

44 Third, s. 44 allows the third party to apply to the court for a review of "the matter". Nothing in the plain language of s. 44 expressly limits the scope of "the matter". The French version is even more general because the subject of the review is not mentioned. What is more, in a case dealing

with the interpretation of s. 18 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, the Federal Court of Appeal held that "matter" embraces "not only a 'decision or order' but any matter in respect of which a remedy may be available under section 18 of the Federal Court Act": *Krause v. Canada*, [1999] 2 F.C. 476 (Fed. C.A.), at para. 21; see also *Morneault v. Canada (Attorney General)* (2000), [2001] 1 F.C. 30 (Fed. C.A.), at para. 42.

45 Finally, s. 51, which establishes the powers of the court on a s. 44 application, also suggests a broad interpretation. Section 51 states that:

> 51. Where the Court determines, after considering an application under section 44, that the head of a government institution is required to refuse to disclose a record or part of a record, the Court shall order the head of the institution not to disclose the record or part thereof or shall make such other order as the Court deems appropriate. [Emphasis added.]

Again, nothing in this section limits the court's discretion to a consideration of the s. 20(1) exemption alone. Indeed, the use of the word "required", coupled with the mandatory nature of s. 19(1), suggests that the court has an obligation to review any aspect of the record where the government has failed to abide by the provisions governing disclosure. This obligation is underscored by the emphasis placed on the protection of privacy rights in both the *Access Act* and the *Privacy Act*.

46 The broad language of s. 44, combined with the fact that this section provides the only direct access to the effective protection afforded by a reviewing court, lends support to the conclusion that the court's jurisdiction should not be limited by the circumstances under which the third party was given notice. The plain language of the statute, together with the legislative context and combined purposes of the *Access Act* and the *Privacy Act*, provides ample foundation for the conclusion that the reviewing court has jurisdiction to protect personal information on a third party application for review.

6. Arguments for Limiting the Scope of a Section 44 Review

47 The parties have presented a number of arguments in support of a more restrictive interpretation of s. 44 which merit further attention.

6.1 The History of Section 28(1)

48 The Attorney General argues that because s. 27 refers specifically to "information described in paragraph 20(1)(*b*)", s. 28 should also be read to include this reference. Prior to the revision and consolidation of the Statutes of Canada in 1985, the current s. 28(1)(*a*), which grants a third party the right to make representations to the government institution, and s. 27(1), which provides the third party with a right to notice of the decision to disclose, were combined in one provision (s.

28(5)). These rights to notice and to make representations were thus included in a single section which referred explicitly to the exemption under s. 20(1). Thus, according to the Attorney General, the right of a third party to make representations under s. 28 of the *Access Act* is limited to the part of the record which contains information described in s. 20 or, in other words, to confidential business information.

49 However, where a statutory provision is severed, the introductory words of the first provision are not necessarily read into the second: *R. v. McIntosh*, [1995] 1 S.C.R. 686 (S.C.C.). In *McIntosh*, a case concerning two provisions which had originally been combined in one, the Court refused to read the introductory words of the original provision into the new provisions. Finding that Parliament's decision not to reproduce the crucial words in the second provision "is the best and only evidence we have of legislative intention" (para. 25), Lamer C.J. concluded that he could not distort the clear and unequivocal wording of the provision. In the instant case, Parliament's decision not to link s. 28 explicitly to s. 20 must be regarded as significant. Moreover, no inconsistent results flow from a non-restrictive reading of the provision. Rather, interpreting ss. 28 and 44 to allow for representations based on s. 19 serves to strengthen the protection of personal information, which is a stated goal of the *Privacy Act* and an underlying theme of the *Access Act*.

6.2 The Notice Scheme

50 The Attorney General argues that the special notice accorded to third parties under the *Access Act* is proof that a third party should be able to raise only a s. 20(1) exemption in a s. 44 application. The right of review under s. 44 is triggered by a third party's right to notice where confidential business information is alleged to exist; therefore, the Attorney General asserts, the scope of s. 44 should be limited to such information. He suggests that Parliament's failure to provide similar notice provisions where personal information is involved indicates that the legislature did not intend that s. 19 should be available on a s. 44 application.

51 This argument is unconvincing. The unique notice given to third parties is tied to the specific nature of the exemption. While a government institution would not have any specific knowledge of the business or scientific dealings of a third party, the subject matter of the other exemptions falls generally within the expertise of government officials and/or the Privacy Commissioner. These exemptions relate, for example, to information obtained in confidence from a foreign state, federal-provincial affairs, international affairs, investigations and law enforcement, safety of individuals, the economic interests of Canada, advice and recommendations to a minister, testing procedures, solicitor-client privilege, and statutory prohibitions (see ss. 13 to 24 of the *Access Act*). Moreover, information covered by these exemptions would likely implicate the public interest in such a way that it would supersede any individual rights of access to information. In the case of confidential business information, however, the assistance of the third party is necessary for the government institution to know how, or if, the third party treated the information as confidential. Indeed, the third party's information management practices may be an important

means of determining whether the information actually meets the definition of "confidential": *Canadian Tobacco Manufacturers' Council v. Minister of National Revenue* (2003), 239 F.T.R. 1, 2003 FC 1037 (F.C.), at para. 114; *Air Atonabee Ltd. v. Canada (Minister of Transport)* (1989), 27 F.T.R. 194 (Fed. T.D.), at para. 37; *Brookfield Lepage Johnson Controls Facility Management Services v. Canada (Minister of Public Works & Government Services)*, [2003] F.C.J. No. 348, 2003 FCT 254 (Fed. T.D.), at para. 13. Whether the information is confidential cannot be determined without representations from the third party.

52 Moreover, in my view, the mandatory nature of s. 19 precludes the need for a notice provision. Notice under the *Access Act* is a right intended to enable a party to contest the release of information and is therefore required only where the statute contemplates the possibility of making information public, as is the case with confidential business information under s. 20(1). Section 19, however, provides that a government institution "shall refuse to" disclose personal information. The three exceptions carved out of this rule under s. 19(2) make it clear why a general notice provision is unnecessary.

53 First, personal information may be disclosed if the individual consents (s. 19(2)(*a*)). Clearly, if the individual consents, he or she will not contest the disclosure of the information, and as a result no express notice provision is necessary. A government institution can easily determine whether the individual has in fact consented to the release of personal information subject to s. 19.

54 Second, personal information may be disclosed where the government institution determines that the requested information is already in the public domain (s. 19(2)(*b*)). Again, in such circumstances, notice to the individual to whom the information relates would serve no useful purpose - the individual party cannot control access to information in the public domain and so, presumably, has no grounds on which to contest disclosure.

55 Third, a government institution may disclose personal information in exceptional circumstances in which the public interest in disclosure outweighs an individual's right to privacy (s. 19(2)(*c*) of the *Access Act* and s. 8(2)(*m*) of the *Privacy Act*). Should such circumstances arise, Parliament *has* provided for the individual to be notified via the Privacy Commissioner (s. 8(5) of the *Privacy Act*). Where the government exercises its discretion to disclose personal information on the basis of public interest, the Privacy Commissioner must be informed *prior to* the disclosure, where practicable, and may notify the individual involved.

56 In my view, therefore, the right to notice accorded to third parties follows logically from the specific nature of the confidential business information exemption and does not limit the right of review provided for in s. 44.

6.3 The Creation of "Two Levels" of Third Parties

57 The Attorney General further submits that allowing third parties to raise, on a s. 44 review, exemptions other than those provided for in s. 20(1) will result in the creation of two categories of third parties: those who receive notice under s. 20(1) and those who do not. If the possible application of s. 20(1) by the government institution had not occurred, the Attorney General argues, Heinz would not have received notice of the possible disclosure of records and would not have been able to make submissions in respect of the application of s. 19. To put it in more basic terms, why should Heinz be afforded an opportunity to invoke s. 19 that is not available to other parties who are not "third parties" under the *Access Act*?

58 This argument is, in my view, unsound. A basic premise of the *Access Act* is that personal information will not be disclosed in violation of the mandatory prohibition set out in s. 19. The access to information and privacy scheme is founded on the assumption that government institutions will respect the mandatory prohibition on disclosing personal information and that no notice is therefore required for personal information relating to individuals. As I have stated, in the specific circumstances in which the *Access Act* does authorize the disclosure of personal information - where the information is already publicly available, where the individual to whom the information relates consents, or where there is an overriding public interest - a notice provision is either superfluous or has in fact been provided for in the legislative scheme (s. 8(5) of the *Privacy Act*). Given this underlying presumption that personal information will not be disclosed as well as the paramount importance of individual privacy, it would therefore be absurd *not* to allow third parties to use the mechanism provided for by the legislature to prevent a violation of the spirit and the letter of the *Access Act* and the *Privacy Act*. Allowing Heinz to raise the s. 19 exemption on a s. 44 review does not create a "second tier" of third parties, but allows the *only* third party who has access to s. 44 to use this remedy to prevent harm from occurring needlessly.

59 A third party's right of review under s. 44 therefore provides an appropriate avenue for scrutinizing government decisions to disclose information that affects an individual's right to privacy. Of course, the court must be wary of attempts by third parties to avail themselves of the personal information exemption to prevent the legitimate disclosure of information. Such attempts to abuse the s. 19 exemption are easily uncovered, however, by determining whether the records in question actually contain personal information.

6.4 The "Discretionary" Nature of the Section 19 Exemption

60 The Information Commissioner suggests that the personal information exemption is more appropriately characterized as "discretionary" because the government institution has the discretion to disclose personal information where the violation of the right to privacy is clearly outweighed by the public interest in disclosure (s. 19(2) of the *Access Act*, s. 8(2)(*m*) of the *Privacy Act*). The parties dispute this characterization of s. 19 because, under the framework established

by Layden-Stevenson J. at trial, discretionary exemptions may not be raised in a s. 44 review proceeding.

61 Even if I accepted the dichotomy between discretionary and mandatory exemptions, I would disagree with the Information Commissioner's argument. The narrow scope of the discretion provided for in s. 19(2) was not at issue in this case and should not be viewed as undermining the mandatory character of s. 19(1), which clearly states that the government institution "*shall* refuse to disclose any record requested under this Act that contains personal information" (emphasis added). As this Court stated in *Dagg*, the personal information exemption should not be given a "cramped interpretation" by giving access pre-eminence over privacy: *Dagg*, at para. 51. Moreover, on the facts of the instant case, there is no debate regarding the existence of a pressing concern of public interest that would permit disclosure; both parties have conceded that s. 19(1) is the only relevant exemption.

6.5 The Availability of Judicial Review Under Section 18.1 of the Federal Courts Act

62 Finally, Heinz argues in the alternative that if the s. 44 review is limited to confidential business information, it retains an "independent" common law right of review that has been codified in s. 18.1(1) of the *Federal Courts Act*, which allows a party directly affected by a decision of a federal board, commission or tribunal to apply for judicial review. Having found that an application for a review under s. 44 *is* available to Heinz, I need not fully consider this argument. However, in my view, a conclusion that would force a party to split its complaint into two parallel proceedings is problematic. Such a scenario would become even more burdensome if the personal information related to multiple individuals. For example, if the requested records included personal information relating to a number of consumers or past employees, the third party might not be in a position to alert all the individuals concerned that their privacy rights were in danger of being violated. Moreover, not only would multiple proceedings be an unwarranted use of resources, but the applicable standard of review may not be the same in a s. 44 proceeding as would be the case in the context of a s. 18.1(1) application for judicial review. As I have suggested, however, I find that Heinz need not seek this residual right of review, because s. 44 already provides an adequate alternate remedy: *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561 (S.C.C.); *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3 (S.C.C.).

7. Conclusion

63 The importance of protecting personal information, combined with the open language of ss. 28, 44(1) and 51 of the *Access Act*, leads to the conclusion that a reviewing court can, on a s. 44 application, consider and apply the privacy exemption set out in s. 19(1). Where it has come to the attention of a third party that a government institution intends to disclose information which will violate the statutorily mandated, quasi-constitutional privacy rights of an individual, the third party must have the right to raise this concern upon judicial review. A

contrary ruling would force individuals to wait until the personal information has been disclosed and the (potentially irreversible) harm done before looking to the Privacy Commissioner or the courts for a remedy. While the Privacy Commissioner and the Information Commissioner play a central role in the access to information and privacy scheme and have extensive responsibilities, s. 44 provides the sole recourse in situations where a third party seeks to prevent the disclosure of personal information. A narrow interpretation of s. 44 would thus weaken the protection of personal information and dilute the right to privacy.

64 For these reasons, I would dismiss the appeal with costs.

The reasons of McLachlin C.J. and Bastarache and LeBel JJ. were delivered by

Bastarache J. **(dissenting):**

1. Introduction

65 The issue on appeal is whether a third party can raise the exemption from disclosure for personal information contained in s. 19 of the *Access to Information Act*, R.S.C. 1985, c. A-1 ("*Access Act*"), and ss. 3 and 8 of the *Privacy Act*, R.S.C. 1985, c. P-21, during a review proceeding initiated pursuant to s. 44 of the *Access Act*. This case brings to the fore the delicate balance Parliament has struck between promoting rights of access to records under government control, and protecting the personal information of individuals appearing in those records.

66 Where a government institution receives a request under the *Access Act*, and it concludes that the requested record may contain confidential business information about a third party, it must provide notice to that third party. The third party then has the right to make representations on the record, and it is entitled to notice of the government institution's decision to disclose the record. A third party who has received such notice is subsequently entitled to bring a s. 44 review of the matter. Where the court determines that the government institution is required to refuse disclosure, then it shall order that the institution not disclose the record.

67 As the facts of this case and the decisions below have been addressed in the reasons of Deschamps J., I proceed directly to the statutory interpretation of s. 44 of the *Access Act*. This Court has consistently held that

> [t]oday there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

(*Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.), at para. 21, citing E.A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87)

2. The Purpose of the Access Act

68 The *Access Act* must be read in light of the *Privacy Act*, which together form a coherent scheme governing the competing rights of access and privacy. They are complementary and equal statutes whose provisions must be construed harmoniously: *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403 (S.C.C.), at para. 51, *per* La Forest J., dissenting but not on this point. Section 2(1) of the *Access Act* describes the purpose of the Act as follows:

> **2.**(1) The purpose of this Act is to extend the present laws of Canada to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government.

69 Access to information under government control is meant to facilitate democracy. As La Forest J. explained in *Dagg*, at para. 61, "[i]t helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry".

70 Nonetheless, the goal of access must be understood in the context of the Act, which itself provides for a number of exemptions in ss. 13 to 24 and 26. According to s. 2, these necessary exceptions to access should be limited and specific. However, Gonthier J., speaking for a unanimous Court in *Canada (Information Commissioner) v. Royal Canadian Mounted Police Commissioner*, [2003] 1 S.C.R. 66, 2003 SCC 8 (S.C.C.), explained that "[t]he statement in s. 2 of the *Access Act* that exceptions to access should be 'limited and specific' does not create a presumption in favour of access" (para. 21).

71 Personal information is specifically exempted from the general rule of disclosure pursuant to s. 19 of the *Access Act*, subject to certain exceptions which are not at issue on this appeal. Personal information is defined in s. 19 of the *Access Act* by reference to s. 3 of the *Privacy Act*, which illustrates the complementary relationship between both statutes that I have described above. Section 3 defines "personal information" as information about an identifiable individual that is recorded in any form, and lists a number of examples. Parliament has thus struck a careful balance between the right to access records within government control, and the right to have all personal information in those records kept private. La Forest J. in *Dagg*, went so far as to state that "[b]oth statutes recognize that, in so far as it is encompassed by the definition of 'personal information' in s. 3 of the *Privacy Act*, privacy is paramount over access" (para. 48).

72 Even accepting, however, that privacy is paramount over access, it does not follow that Parliament is obliged to create a notice and review mechanism prior to the disclosure of personal information. The policy decision of how to balance rights of access and the right to privacy is one reserved for Parliament. As the following analysis demonstrates, Parliament has entrusted

the promotion of access to government records and the protection of personal information to two Commissioners who effectively act as ombudsmen. Their offices are independent of government, and their role is to impartially investigate complaints made against government institutions. In fact, the structure of both the *Access Act* and the *Privacy Act* also indicates that, apart from s. 44 review proceedings, Parliament has seen fit to limit opportunities for judicial review until after the Information Commissioner has conducted its investigation of the complaint.

3. The Role of the Federal Information and Privacy Commissioners

3.1 Remedies Available Under the Access Act and the Privacy Act

73 The privacy interests of third parties are protected by the *Privacy Act*, in particular, by s. 29 which protects the personal information of third parties by establishing a complaint and investigation procedure:

> **29.** (1) Subject to this Act, the Privacy Commissioner shall receive and investigate complaints
>
> (a) from individuals who allege that personal information about themselves held by a government institution has been used or disclosed otherwise than in accordance with section 7 or 8;
>
> . . . . .
>
> (h) in respect of any other matter relating to
>
> . . . . .
>
> (ii) the use or disclosure of personal information under the control of a government institution
>
> . . . . .

74 Under s. 29(2), nothing precludes the Privacy Commissioner from receiving and investigating complaints submitted by a person authorized by the complainant to act on behalf of him or her. It would therefore be open to Heinz to initiate a complaint on behalf of its employees in order to protect their personal information. The Privacy Commissioner has the power to investigate the complaint and has broad powers under that process (ss. 31to 34 of the *Privacy Act*), including the rights to summon and enforce the appearance of witnesses, compel witnesses to give evidence or produce documents, and enter premises of government institutions and inspect records found there (s. 34(1)). The Privacy Commissioner also has the authority to access any document (except Cabinet confidences) under the control of a government institution, including documents that would otherwise be protected by a legal privilege (s. 34(2)). Section 33 of the *Privacy Act* ensures that every investigation of a complaint is conducted in private. Where the complaint is well-founded, the Privacy Commissioner reports his or her findings and recommendations to the appropriate government institution (s. 35). The Privacy Commissioner does not, however, have the

power to order the release of information or compel the institution to do anything or refrain from doing anything with respect to the information. Pursuant to s. 37, the Privacy Commissioner may also, from time to time, at his discretion, carry out investigations in respect of personal information under the control of government institutions to ensure compliance with ss. 4 to 8 of the *Privacy Act*, which deal with the collection, retention, disposal and protection of personal information.

75 I have already mentioned that the exemption from disclosure for personal information is subject to a number of exceptions. Pursuant to s. 19(2)(*c*) of the *Access Act*, the head of a government institution may disclose any requested record that contains personal information if the disclosure is in accordance with s. 8 of the *Privacy Act*. Section 8(2)(*m*)(i) of the *Privacy Act* authorizes disclosure of personal information "for any purpose where, in the opinion of the head of the institution, . . . the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure". Where a government institution uses this discretionary power to disclose personal information, s. 8(5) provides that it shall notify the Privacy Commissioner in writing prior to the disclosure where reasonably practicable. This results in an added measure of protection for personal information that is to be disclosed in the public interest, insofar as the Privacy Commissioner can intervene prior to the disclosure.

76 It may also be open to the Information Commissioner to receive and investigate a complaint brought by a third party resisting disclosure. The Information Commissioner can receive and investigate complaints "in respect of any other matter relating to requesting or obtaining access to records under this Act," pursuant to s. 30(1)(*f*) of the *Access Act*. It is unclear whether this might include complaints pertaining to the unlawful disclosure of personal information. The Information Commissioner typically receives complaints from information requesters, where disclosure of a requested record has been refused, delayed or otherwise unsatisfactory. In any event, the Office of the Privacy Commissioner would appear to be more suited to the receipt and investigation of a complaint by a third party resisting disclosure on the basis of the s. 19 exemption for personal information, since it is charged with receiving and investigating all complaints brought pursuant to the *Privacy Act*.

3.2 The Effect of Allowing the Section 19 Exemption to be Raised on a Section 44 Review Proceeding on the Role of the Commissioners

77 Generally, the *Access Act* requires an investigation by the Information Commissioner prior to proceeding to a judicial determination of whether the government institution can lawfully refuse disclosure. Section 44 proceedings constitute the sole exception to this scheme.

78 The Information Commissioner is authorized to receive and investigate complaints under s. 30(1) of the *Access Act*, where disclosure of a requested record has been refused, delayed or is otherwise unsatisfactory. The information requester, the head of the government institution who has control of the record, and, where the Commissioner believes that the record may contain

confidential business information, the third party, have participation rights in that investigative process. As with investigations conducted by the Privacy Commissioner, every investigation of a complaint by the Information Commissioner is conducted in private (s. 35). Pursuant to s. 36(1) of the *Access Act*, the Information Commissioner has the same broad investigatory powers as the Privacy Commissioner, which I have listed above. Section 36(2) of the *Access Act* provides the Information Commissioner with the right to examine any record to which the *Access Act* applies that is under the control of a government institution, regardless of privilege. Contrary to the *Privacy Act*, s. 36(2) of the *Access Act* does not exclude Cabinet confidences from this general right of access. Where the complaint is determined to be well-founded, the Information Commissioner can report his findings and recommendations to the head of the government institution that has refused disclosure (s. 37(1)), and must also notify any party who received notice of the investigation and opted to participate (s. 37(2)).

79 Where an information requester has been denied access to a record, s. 41 of the *Access Act* provides a right of review. However, this right is only available where a complaint was initially made to the Information Commissioner, and where the information requester has received notice of the results of the investigation. In other words, the *Access Act* ensures that the Information Commissioner, as opposed to the courts, is entrusted with the initial review of the complaint. Where the government institution refuses disclosure following the Information Commissioner's investigation and recommendation, it is also open to the Commissioner to bring an application for review so long as he has the consent of the information requester (s. 42(1)(*a*) of the *Access Act*).

80 Section 44 proceedings constitute the sole exception in this statutory scheme. A third party who has received notice that the government institution intends to disclose the record can apply directly to the court for a s. 44 review of the matter. Where the court determines that the head of a government institution is required to refuse to disclose a record or part of a record, the court shall order the head of the institution not to disclose the record (s. 51 of the *Access Act*). The information requester is given notice of the hearing and is entitled to appear as a party (s. 44(3) of the *Access Act*). The Information Commissioner, however, is only entitled to appear as a party with leave of the court (s. 42(1)(*c*) of the *Access Act*). Where a s. 44 proceeding results in an order not to disclose the record, the court order effectively precludes any investigation by the Information Commissioner. If a third party was also entitled to raise the s. 19 exemption for personal information at a s. 44 review proceeding, the role of the Information Commissioner would be further compromised.

3.3 The Broader Role of the Information and Privacy Commissioners

81 The function of the Information and Privacy Commissioners is described as akin to that of an ombudsman. Speaking of the Privacy Commissioner and of the Commissioner of Official Languages, this Court stated in *Lavigne v. Canada (Commissioner of Official Languages)*, [2002] 2 S.C.R. 773, 2002 SCC 53 (S.C.C.), at para. 37, that:

In many significant respects, the mandates of the Commissioner of Official Languages and the Privacy Commissioner are in the nature of an ombudsman's role (see M. A. Marshall and L. C. Reif, "The Ombudsman: Maladministration and Alternative Dispute Resolution" (1995), 34 *Alta. L. Rev.* 215):

> • They are independent of the government's administrative institutions and hold office during good behaviour for a specified period. They receive the same salary as a judge of the Federal Court. This independence is reinforced by the fact that they may not, as a rule, be compelled to testify, and no civil or criminal proceedings lie against them for anything done in the performance of their duties;
>
> • They examine complaints made by individuals against the government's administrative institutions, and conduct impartial investigations;
>
> • They attempt to secure appropriate redress when the individual's complaint is based on non-judicial grounds;
>
> • They attempt to improve the level of compliance by government institutions with the *Privacy Act* and the *Official Languages Act*;
>
> • As a rule, they may not disclose information they receive.

82 Both the Privacy Commissioner and the Information Commissioner hold office during good behaviour for a set term of seven years, though they may be removed by the Governor in Council at any time on address of the Senate and House of Commons: s. 53(2) of the *Privacy Act* and s. 54(2) of the *Access Act*. Both Commissioners are paid a salary equal to that of a Federal Court judge: s. 55(2) of the *Access Act* and s. 54(2) of the *Privacy Act*. No criminal or civil proceedings lie against them for anything done in the performance of their duties: s. 66(1) of the *Access Act* and s. 67(1) of the *Privacy Act*. Both Commissioners are authorized to receive and investigate complaints, and to secure appropriate redress via non-binding recommendations to the particular government institution. Both Commissioners may only disclose information they receive in the course of their investigation in the narrow circumstances set out in the statutes: see ss. 63 and 64 of the *Access Act*, as well as ss. 64 and 65 of the *Privacy Act*. I would also note that their independent function is underlined in the purpose section of the *Access Act*, which provides that the disclosure of government information should be reviewed independently of government (s. 2(1)).

83 The approach followed by the Commissioners in investigating complaints and making recommendations, where warranted, is understood to be less formal than the judicial process. The Commissioners' purpose is to resolve disputes in an informal manner, and their offices were specifically created to address the limitations of the legal proceedings in this respect: see *Lavigne*, at para. 38. At para. 39, the Court went on to explain that:

An ombudsman is not counsel for the complainant. His or her duty is to examine both sides of the dispute, assess the harm that has been done and recommend ways of remedying it. The ombudsman's preferred methods are discussion and settlement by mutual agreement. As Dickson J. wrote in *British Columbia Development Corp. v. Friedmann*, [1984] 2 S.C.R. 447, the office of ombudsman and the grievance resolution procedure, which are neither legal nor political in a strict sense, are of Swedish origin, *circa* 1809. He described their genesis (at pp. 458-59):

> As originally conceived, the Swedish Ombudsman was to be the Parliament's overseer of the administration, but over time the character of the institution gradually changed. Eventually, the Ombudsman's main function came to be the investigation of complaints of maladministration on behalf of aggrieved citizens and the recommendation of corrective action to the governmental official or department involved.
>
> The institution of Ombudsman has grown since its creation. It has been adopted in many jurisdictions around the world in response to what R. Gregory and P. Hutchesson in *The Parliamentary Ombudsman* (1975) refer to, at p. 15, as "one of the dilemmas of our times" namely, that "(i)n the modern state . . . democratic action is possible only through the instrumentality of bureaucratic organization; yet bureaucratic - if it is not properly controlled - is itself destructive of democracy and its values".
>
> The factors which have led to the rise of the institution of Ombudsman are well-known. Within the last generation or two the size and complexity of government has increased immeasurably, in both qualitative and quantitative terms. Since the emergence of the modern welfare state the intrusion of government into the lives and livelihood of individuals has increased exponentially. Government now provides services and benefits, intervenes actively in the marketplace, and engages in proprietary functions that fifty years ago would have been unthinkable.

84 Former Justice La Forest, in a recent report entitled *The Offices of the Information and Privacy Commissioners: The Merger and Related Issues*, Report of the Special Advisor to the Minister of Justice (November 15, 2005) ("La Forest report"), at p. 15, explains that the primary duty of both the Information and Privacy Commissioners to independently and impartially investigate complaints and make recommendations is in keeping with this ombudsman function.

85 La Forest notes that the Commissioners exercise a number of other important functions:

> The Privacy Commissioner, for instance, is empowered to audit government institutions to ensure that they are complying with their obligations under the Act, recommend changes to effect compliance, and report failures to comply to the institution and Parliament. The Privacy Commissioner may also assess whether a government institution's decision to designate a

> data bank as exempt from disclosure was correct, and ask the Federal Court to rule on the question if the government institution fails to accept the Commissioner's determination that it was not. Both commissioners must also submit annual reports to Parliament and may in addition submit special reports with respect to urgent matters.[Footnotes omitted; pp. 16-17.]

86 The Privacy Commissioner has inherited additional responsibilities with the enactment of Part 1 of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5. Moreover, the Commissioners are also active in promoting the values of access and privacy in a variety of national and international fora. The "Commissioners have commented on proposed legislation and government policies, appeared before parliamentary committees, conducted surveys, sponsored research, published summaries of findings, and given public lectures": see La Forest report, at p. 18.

87 This has led some commentators to conclude that the Privacy Commissioner is "expected at some point to perform seven interrelated roles: ombudsman, auditor, consultant, educator, policy advisor, negotiator and enforcer": C.J. Bennett, "The Privacy Commissioner of Canada: Multiple Roles, Diverse Expectations and Structural Dilemmas" (2003), 46 *Canadian Public Administration* 218, at p. 237, cited in La Forest report, at p. 18. Many of these roles are also performed by the Information Commissioner: La Forest report, at p. 18.

4. The Legislative Scheme Surrounding Section 44 of the Access Act

4.1 The Statutory Context

88 This Court has held that statutory interpretation cannot be founded on the wording of the legislation alone: *Rizzo & Rizzo Shoes Ltd.*, at para. 21. As the previous analysis demonstrates, s. 44 review proceedings are part of a complex statutory code. Heinz initially became aware of the access request that formed the basis of the s. 44 review via s. 27(1) of the *Access Act*, which provides:

> **27.** (1) Where the head of a government institution intends to disclose any record requested under this Act, or any part thereof, that contains or that the head of the institution has reason to believe might contain
>
> (a) trade secrets of a third party,
>
> (b) information described in paragraph 20(1)(*b*) that was supplied by a third party, or
>
> (c) information the disclosure of which the head of the institution could reasonably foresee might effect a result described in paragraph 20(1)(*c*) or (*d*) in respect of a third party,

> the head of the institution shall, subject to subsection (2), if the third party can reasonably be located, within thirty days after the request is received, give written notice to the third party of the request and of the fact that the head of the institution intends to disclose the record or part thereof.

Section 27(1) is a notice provision for third parties where there has been an access request for a record containing information listed in (*a*) to (*c*). Those subsections refer directly to the exemption from disclosure contained in s. 20(1) of the *Access Act*:

> **20.** (1) Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Act that contains
>
> (a) trade secrets of a third party;
>
> (b) financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party;
>
> (c) information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party; or
>
> (d) information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.

89 For ease of reference, I refer to information exempted from disclosure pursuant to s. 20 as confidential business information. Where a third party has received notice pursuant to s. 27(1) because of the believed presence of confidential business information in the requested record, s. 28(1)(*a*) provides the third party with an opportunity to make representations to the head of the government institution as to why the record should not be disclosed. Pursuant to s. 28(1)(*b*), the third party is then entitled to notice of the government institution's decision as to whether or not to disclose the record. A third party who receives notice pursuant to s. 28(1)(*b*) of the government institution's decision to disclose the record has a right to apply for a review pursuant to s. 44:

> **44.** (1) Any third party to whom the head of a government institution is required under paragraph 28(1)(*b*) or subsection 29(1) to give a notice of a decision to disclose a record or a part thereof under this Act may, within twenty days after the notice is given, apply to the Court for a review of the matter.

. . . . .

90 Section 29(1) is not at issue on this appeal. It deals with the slightly different situation of a government institution initially refusing disclosure, and then opting to follow the recommendation

of the Information Commissioner to disclose the requested record. Pursuant to s. 29(1), notice must be given to the third party who initially received notice, or would have received notice, under s. 27(1) because of the believed presence of confidential business information in the record.

91 Pursuant to s. 51 of the *Access Act*, where the court determines, after considering an application under s. 44, that the head of a government institution is required to refuse to disclose a record, the court shall order the head of the institution not to disclose the record or shall make such other order as the court deems appropriate.

92 Deschamps J. relies on the broad wording of s. 44 and its related sections in order to conclude that a third party who has received notice pursuant to s. 28(1)(*b*) of the *Access Act* can raise the s. 19 exemption from disclosure for personal information on a s. 44 review. She relies, in particular, on the following:

- Section 28(1)(*b*) allows the third party to make representations as to why the record should not be disclosed. There is no language in that section that limits the range of representations that can be made.

- Similarly, the language of s. 28(1)(*b*) suggests that representations can be made as to why the record should not be disclosed, as opposed to explicitly limiting the right to make representations to that part of the record that contains confidential business information.

- Section 44 allows for a review of the matter, without expressly limiting the scope of what is reviewable.

- Finally, s. 51 states that the court shall make an order where it determines that the head of a government institution is required to refuse to disclose the record. In determining whether the government institution is required to refuse disclosure, s. 51 does not explicitly limit the court's consideration to the s. 20 exemption from disclosure for confidential business information.

93 The court is obliged to consider the total context of the provisions to be interpreted, no matter how plain the disposition may seem upon initial reading: *Chieu v. Canada (Minister of Citizenship & Immigration)*, [2002] 1 S.C.R. 84, [2002] 1 S.C.R. 84 (S.C.C.), at para. 34; *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4 (S.C.C.), at para. 48; R. Sullivan, *Sullivan and Driedger on the Construction of Statutes* (4th ed. 2002), at pp. 20-21. Some of the legislative provisions at issue are broadly worded. The intended meaning of open-ended expressions such as "representations", "record", and "matter" is lost when they are read in isolation: see *ATCO*, at para. 46.

94 Within its proper statutory context, the intended meaning of "representations", "record", and "matter" becomes clear. The right to bring a s. 44 review flows from the notice a third party receives because of the believed presence of confidential business information in the requested

record. The parties, and indeed Deschamps J., concede that notice is only required where s. 20 is possibly applicable because of the very nature of that exemption. Only the third party itself can clearly state whether or not the grounds listed in s. 20 apply to the information requested. This is because, considering the criteria listed in s. 20, only the third party can establish what information it treated or treats as confidential, as well as the effect of disclosure on its revenue or on its competitive position.

95 Deschamps J. includes in her reasons for judgment a brief analysis of the legislative history of ss. 27 and 28 of the *Access Act*, the notice provisions ultimately resulting in a right to bring an application for a s. 44 review. I do not find this legislative history to be particularly helpful in determining the proper scope of a s. 44 review. The legislative context, by contrast, provides considerable insight into the legislative intent behind the review process.

96 The complaint and investigation process that I have outlined above constitutes the mechanism Parliament has selected in order to balance access rights with the need to protect individuals' personal information. Where the personal information of individuals is improperly disclosed, those individuals can bring a complaint to the Privacy Commissioner under s. 29 of the *Privacy Act*. There is no notice provision prior to the disclosure of a requested record that might contain exempted personal information, nor does the unlawful disclosure of exempted personal information give rise to a right of judicial review under the *Access Act* or the *Privacy Act*. Indeed, ss. 27, 28 and 44 of the *Access Act* constitute the only available notice and review mechanisms under the statutory scheme meant to permit resistance to disclosure of a requested record.

97 Considered in its proper statutory context, s. 44 has nothing to do with the s. 19 exemption from disclosure for personal information. The right to bring a s. 44 application arises from the believed presence of confidential business information in the requested record. The structure of the *Access Act* and of the *Privacy Act* suggests that Parliament intended that the protection of personal information be assured exclusively by the Office of the Privacy Commissioner. Equally important is Parliament's desire to have all judicial reviews under the Acts preceded by an impartial investigation conducted by the Information Commissioner. The only exception provided in the statutory scheme is where confidential business information potentially appears in the requested record.

4.2 To Allow the Section 19 Exemption to be Raised on a Section 44 Proceeding Would Lead to Absurd Results

98 It is presumed that the legislature does not intend its legislation to result in absurd consequences: see Sullivan, at p. 236. The only available notice and review mechanisms to resist disclosure is that provided in ss. 27, 28 and 44 of the *Access Act*. The Act does not require notice to a third party prior to disclosure of information relating to that party except in the circumstances set out in s. 28(1). Where the head of a government institution concludes that the information

requested is not confidential business information, notice to the third party is not required, will not be ordered by the court and no right to apply for review under s. 44(1) arises.

99 Unless the opportunity to raise exemptions at a s. 44 review proceeding is limited to that contained in s. 20, third parties who have received notice pursuant to s. 28(1)(*b*) will be afforded an opportunity to raise the s. 19 exemption for personal information in circumstances where no comparable right exists for a third party claiming only that the record contains personal information belonging to it.

100 The only reason Heinz is able to raise the s. 19 exemption in the present appeal is the possible application of s. 20 and the notice received pursuant to ss. 27 and 28. Were it not for the possible application of s. 20, there would be no possibility of bringing a s. 44 review. The effect of the proposed extension of the s. 44 review would be to create two categories of third parties: those who receive notice under ss. 27 to 29 of the *Access Act* and those who do not. In other words, the distinction would be between third parties who have relevant confidential business information and those who do not. Such a result is absurd insofar as it allows greater protection of certain individuals' personal information, depending on the possible application of s. 20. Individuals with relevant confidential business information would thus benefit from a greater protection for their personal information than individuals without such information. There is no basis for such a two-tiered system in either the *Access Act* or the *Privacy Act*.

101 Deschamps J.'s proposed interpretation of s. 44 leads to a second absurd consequence. It is unlikely that Heinz itself possesses personal information within the meaning of s. 3 of the *Privacy Act*. Section 3 includes a non-exhaustive list of information which is considered personal information. Elements of this list reinforce the conclusion that only human beings can constitute identifiable individuals, because only human beings have a race; colour; religion; age; marital status; education; medical, criminal or employment history; fingerprints; and blood type. Heinz is raising s. 19 in the present case in order to protect the personal information of several of its employees. While both the *Access Act* and the *Privacy Act* expressly allow an authorized agent to bring complaints to the Information Commissioner or to the Privacy Commissioner, respectively, s. 44 does not so provide.

102 The right to apply for a review under s. 44 belongs to the third party who has received notice of the decision not to disclose the record - in this case, Heinz. The employees of Heinz whose personal information is implicated do not have the right to apply for a s. 44 review. In other words, the interpretation proposed by Deschamps J. has the effect of allowing Heinz to object to the intended disclosure because of the presence of personal information belonging to its employees, in circumstances where the affected employees themselves have no right whatsoever to bring an application for review under the Act. It cannot be the intention of Parliament, in my view, that Heinz can raise s. 19 on behalf of its employees in circumstances where its employees have no

right under the *Access Act* or the *Privacy Act* to raise the objection on their own behalf at a judicial hearing.

5. Conclusion on the Proper Interpretation of Section 44 of the Access Act

103 Parliament has entrusted the monitoring of government compliance with the *Access Act* and the *Privacy Act* to the Office of the Information Commissioner and the Office of the Privacy Commissioner. The role of these offices is akin to that of an ombudsman and is indicative of a policy decision to adopt a non-litigious dispute resolution mechanism in the context of complaints arising from individuals seeking access to government information or from third parties seeking to protect their personal information. The current scheme creates a more accessible review process of the decision of a government institution to disclose or not to disclose a requested record.

104 This accessible, informal and non-litigious complaint resolution process results in the Commissioners making non-binding recommendations to the government institution that is the subject of the complaint. The consequence of such a policy decision is, as Deschamps J. has noted, that the role of the Commissioners is necessarily limited by their inability to issue injunctive relief or to prohibit a government institution from disclosing information. Pending the receipt of their recommendations, or even upon receipt of a recommendation not to disclose the record, there is nothing to prevent the government institution from proceeding with disclosure. In fact, the government institution is required by s. 7 of the Access Act to provide notice to the information requester of its decision to disclose or to refuse disclosure within 30 days following receipt of the request. If the government institution opts to disclose the record, then access must be provided to the requester within that same time frame. The government institution can however extend that time limit pursuant to s. 9(1) of the *Access Act*, if:

> **9.**(1) . . .
>
> (a) the request is for a large number of records or necessitates a search through a large number of records and meeting the original time limit would unreasonably interfere with the operations of the government institution,
>
> (b) consultations are necessary to comply with the request that cannot reasonably be completed within the original time limit, or
>
> (c) notice of the request is given pursuant to subsection 27(1)
>
> . . . . .

In all such cases, the requester must be notified of the extension and of his or her right to complain to the Information Commissioner about the delay. Where the head of a government institution extends a time limit for more than 30 days, notice of the extension must also be given to the Information Commissioner according to s. 9(2).

105 The Commissioners do not have the decision-making or remedial capacity to prevent the unlawful disclosure of a requested record. Moreover, apart from a s. 44 proceeding, judicial review under the *Privacy Act* and under the *Access Act* is limited to cases where the government institution has refused to disclose the requested information. Partly for these reasons, Deschamps J. expresses concern that a narrow interpretation of s. 44 would weaken the protection of personal information. The La Forest report mentions that a number of provinces, including Quebec, Ontario, British Columbia, Alberta and Prince Edward Island, have given the provincial Commissioners the power to issue final decisions settling disputes about complaints, subject to judicial review: see p. 50. This reflects a different policy decision than that taken by Parliament. La Forest explains, however, that

> Commissioners in most of these provinces use this power sparingly, preferring whenever possible to resolve complaints through conciliation, mediation, and other informal means. They nonetheless consider the existence of this power, which provides a strong incentive to the parties to settle on reasonable terms, to be essential to their effectiveness [Footnote omitted; p. 50.].

La Forest concludes that the option of granting such powers to the federal Information and Privacy Commissioners is worthy of further study: see p. 52. The decision of whether or not to extend such powers to the Commissioners is a complicated one that must balance the protection of personal information with the need for an accessible, informal and expeditious complaints resolution system in order to promote access to information. It is quite clearly a decision best left to Parliament.

106 In interpreting s. 44 of the *Access Act*, it is necessary to preserve the integrity of the mechanism Parliament has selected in order to balance the competing rights of access and privacy. Where personal information has been unlawfully disclosed, that mechanism consists of the complaint and investigation process provided by s. 29 of the *Privacy Act*, and of the additional protection provided by s. 8(5) of the *Privacy Act*, where a government institution intends to disclose personal information on the basis that the public interest in disclosure outweighs any invasion of privacy. This process is nothing more than the expression of a governmental policy decision reflecting its own evaluation of the advantages and disadvantages of various options, in terms of principles and operational requirements. Its integrity must be respected in order to give effect to legislative intent.

107 As previously mentioned, Deschamps J. expresses concern in her reasons about what she views as the lack of protection in the Acts for individuals' personal information. However, her interpretation of s. 44 of the *Access Act* only provides a right of review to resist disclosure on the basis of s. 19 in the limited circumstances where confidential business information potentially appears in the requested record. This results in inequities, as mentioned earlier. Moreover, as is the case here, that right of review may not even belong to the individuals whose personal information actually appears in the requested record. In the present case, only Heinz has the right to apply for

a review, notwithstanding that the personal information contained in the record actually belongs to its employees.

108 Deschamps J.'s interpretation of s. 44 does not result in better or fairer protection for individuals' personal information. Cases such as these will be limited in number. The large majority of individuals whose personal information is vulnerable will not benefit. Moreover, although I have concluded that a third party cannot raise the s. 19 exemption for personal information on a s. 44 review, I do not exclude the possibility of judicial review pursuant to the *Federal Courts Act*, R.S.C. 1985, c. F-7. Indeed, where the government institution acts without or beyond its jurisdiction, it remains open to a party directly affected by the decision to bring an application for judicial review pursuant to s. 18.1 of the *Federal Courts Act*.

6. The Possibility of Bringing a Judicial Review Application Pursuant to the Federal Courts Act

6.1 Whether Judicial Review is Available Under the Federal Courts Act

109 Once a third party has received notice of the government institution's intended decision to disclose a record that may contain personal information, it may consider bringing an application for judicial review under the *Federal Courts Act*. Section 18.1(1) and (2) of that Act provides:

> **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.
>
> (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.

110 "Federal board, commission or other tribunal" is very broadly defined in s. 2(1) of the *Federal Courts Act*, and means

> any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown, other than the Tax Court of Canada or any of its judges, any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under section 96 of the *Constitution Act, 1867*;
>
> . . . . .

111 Pursuant to ss. 4, 7, and 10 of the *Access Act*, the government institution is under a duty to disclose all requested information that does not fall within one of the statutory exemptions listed in ss. 13 to 24 and 26 of that Act. The government institution thus exercises powers conferred by an Act of Parliament and falls within the meaning of "federal board, commission or other tribunal". Pursuant to s. 28(1)(*b*) of the *Access Act*, the government institution must provide notice to the third party whose confidential business information was initially believed to appear in the requested record of its decision concerning the disclosure of the record. That decision constitutes a decision of a federal board, commission or other tribunal within the meaning of the *Federal Courts Act* and is potentially reviewable. This is consistent with what Le Dain J. stated on behalf of a unanimous Court in *R. v. Miller*, [1985] 2 S.C.R. 613 (S.C.C.), at pp. 623-24:

> It is, of course, clear since the decision of this Court in *Martineau v. Matsqui Institution Disciplinary Board*, [1980] 1 S.C.R. 602, that *certiorari* is not confined to decisions required to be made on a judicial or quasi-judicial basis, but that it applies, in the words of Dickson J., as he then was, at pp. 622-23, "wherever a public body has power to decide any matter affecting the rights, interests, property, privileges, or liberties of any person."

112 Section 19 of the *Access Act* constitutes a mandatory exemption from disclosure for all personal information that does not fall into one of the stated exceptions. Although s. 8(2)(*m*)(i) of the *Privacy Act* allows the government institution to disclose personal information where it is deemed necessary in the public interest, that provision has not been invoked in the present case. As such, any decision to disclose a record containing information falling within s. 19 of the *Access Act* is clearly not authorized by the statute. Such a decision would be *ultra vires*, and would constitute a jurisdictional error pursuant to s. 18.1(4)(*a*) of the *Federal Courts Act*, which provides that:

> **18.1** . . .
>
> (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;
>
> . . . . .

113 As a result, it would be open to the third party to seek an order prohibiting the government institution from disclosing the record containing personal information (s. 18.1(3)(*b*)).

114 I have thus concluded that the decision of the government institution to disclose the requested record is reviewable for jurisdictional error, and that the remedy of prohibition is available under the *Federal Courts Act*. Section 18.5 provides an exception to s. 18.1, where a right of appeal is

available from the decision of the federal board, commission or other tribunal. Such is not the case here.

115 Nonetheless, a judge, on judicial review, may exercise his or her discretion so as to refuse to grant a remedy where an adequate alternative remedy exists. Dickson C.J. explained in *Canada (Auditor General) v. Canada (Minister of Energy, Mines & Resources)*, [1989] 2 S.C.R. 49 (S.C.C.), at p. 96, that:

> It may well be that once the alternative remedy is found to be adequate discretionary relief is barred, but this is nothing but a reflection of a judicial concern to exercise discretion in a consistent and principled manner. Inquiring into the adequacy of the alternative remedy is at one and the same time an inquiry into whether discretion to grant the judicial review remedy should be exercised. It is for the courts to isolate and balance the factors which are relevant to the inquiry into adequacy. [Cited in *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3 (S.C.C.), at para. 36.]

In determining whether to require the applicant to utilize a statutory appeal procedure provided in the legislation, the Court in *Canadian Pacific*, at para. 37, identified the following factors as relevant: the convenience of the alternative remedy, the nature of the error, and the nature of the appellate body (i.e., its investigatory, decision-making and remedial capacities). The Court noted, however, that this list was not closed.

116 The complaint process in the *Privacy Act* is convenient and accessible, and the expertise and investigatory role of the Privacy Commissioner are relevant considerations. The structure of the Act establishes clearly that the protection of privacy is meant to be the domain of the Privacy Commissioner who can receive complaints, investigate, and report its findings and recommendations to the relevant government institution. The scheme and purpose of the Act can be relevant considerations for a judge in determining whether or not to grant a remedy on judicial review: *Canadian Pacific*, at paras. 43-46. Ultimately, however, the Privacy Commissioner has no decision-making or remedial capacity. I have already concluded that s. 44 of the *Access Act* does not allow a third party to raise the s. 19 exemption for personal information. I also agree with the parties and with Deschamps J. that the *Access Act* provides no other avenue to prevent a government institution from disclosing a requested record.

117 In the context of an application pursuant to s. 18 of the *Federal Courts Act*, I would conclude that the statutory scheme does not provide Heinz with an adequate alternative remedy. According to s. 29(1)(*a*) of the *Privacy Act*, the complaint process is generally initiated after an individual's personal information has been "used or disclosed" contrary to the *Privacy Act*. Thus, the purported adequate alternative remedy may not even be available prior to the actual disclosure. Moreover, the remedy sought by Heinz in this case, that the information not be disclosed, is simply not available pursuant to the existing scheme. The Attorney General asks this Court to substitute judicial review

prior to disclosure with an administrative investigation following disclosure and resulting in non-binding recommendations. In *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, [2005] 1 S.C.R. 533, 2005 SCC 26 (S.C.C.), at para. 83, I found, in dissent, that "an application for judicial review was the sole procedural means available to [the appellant] in order to quash the Minister's decision". The special statutory regime created by the *Patented Medicines (Notice of Compliance) Regulations*, SOR/93-133, did not provide for the quashing of a notice of compliance, although it did provide for an order of prohibition pursuant to a statutory right of action. However, that cause of action was not open to the appellant in that case. Thus, the appellant was without a remedy. The same reasoning applies here.

118 Ultimately, the discretion to grant or refuse a remedy pursuant to ss. 18 and 18.1 of the *Federal Courts Act* rests with the Federal Court judge hearing the judicial review application. That judge will only decline to exercise his jurisdiction pursuant to the *Federal Courts Act* if he or she is satisfied that the statutory scheme provides an adequate alternative remedy. In a case similar to this, where the third party is attempting to protect personal information belonging to its employees, the judge would also have to decide whether the third party has standing to bring the application. This is because, according to s. 18.1, an application for judicial review may be brought by anyone "directly affected" by the matter in respect of which relief is sought.

6.2 Whether this Review Should Simply Be Allowed to Proceed under Section 44 of the Access Act for Reasons of Efficiency and Convenience

119 Deschamps J. expresses concern that forcing a party to split its complaint into two parallel proceedings might be an unwarranted use of resources. That concern is best left to Parliament to address, if it so chooses. Given the structure of the statutory scheme, I have concluded that a third party cannot raise a s. 19 exemption on a s. 44 review. I further conclude that there are valid reasons for refusing to collapse a s. 18.1 review within a s. 44 review.

120 There are critical differences between a s. 44 review and a s. 18.1 judicial review. Firstly, the Federal Court has held that a s. 44 review is a hearing *de novo*, whereas a s. 18.1 review requires the use of the pragmatic and functional approach to determine whether deference is owed to the decision of the government institution to disclose the record: *Aliments Prince Foods Inc. v. Canada (Department of Agriculture)* (2001), 272 N.R. 184 (Fed. C.A.), at para. 7. Secondly, s. 44 grants a right of review to third parties who have received notice under ss. 28(1)(*b*) or 29(1) of the *Access Act*. No other requirement exists. By contrast, s. 18.1 of the *Federal Courts Act* requires that the applicant have standing to bring the application for review. Finally, where the court, on a s. 44 review, determines that the government institution is required to refuse disclosure, s. 51 of the *Access Act* states that the court shall order the head of the institution not to disclose the record or to make such other order as the court deems appropriate. The remedies available under s. 18(3) of the *Federal Courts Act* are somewhat different. Most importantly, they are discretionary in nature.

121 I would also note that there is nothing to prevent a Federal Court judge from proceeding with both applications at the same time or consecutively, thereby addressing Deschamps J.'s concerns about unwarranted use of resources.

7. Conclusion

122 Only those third parties who are given notice pursuant to ss. 28(1)(*b*) or 29(1) of the *Access Act* of the government institution's decision to disclose the record will be in a position to seek a judicial review prohibiting the disclosure. This is because only such parties will usually have notice of the decision prior to disclosure. Presumably, judicial review will be of limited use to a third party after the record has been disclosed insofar as the damage to privacy will already have occurred. In such situations, the third party retains the option of laying a complaint with the Privacy Commissioner, as discussed above, who can report his findings and recommendations to the institution where warranted.

123 This inequality is a necessary result of the statutory scheme, which only provides notice prior to the actual disclosure in the circumstances outlined in ss. 27, 28 and 29 of the *Access Act*. In interpreting s. 44 of the *Access Act*, I concluded that it was necessary to respect the integrity of the complaint and investigation process contained in s. 29 of the *Privacy Act*, in order to give effect to legislative intent. Nonetheless, without providing an adequate alternative remedy, and without any privative clause whatsoever, the *Access Act* cannot oust the possibility of judicial review pursuant to the *Federal Courts Act*.

124 For these reasons, I would allow the appeal, set aside the decision of the Federal Court of Appeal, and award costs in all courts to the appellant.

Appeal dismissed.

Pourvoi rejeté.

Appendix

Relevant Statutory Provisions

Access to Information Act, R.S.C. 1985, c. A-1

> 2. (1) The purpose of this Act is to extend the present laws of Canada to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government.

3. In this Act,

. . . . .

"third party", in respect of a request for access to a record under this Act, means any person, group of persons or organization other than the person that made the request or a government institution.

19. (1) Subject to subsection (2), the head of a government institution shall refuse to disclose any record requested under this Act that contains personal information as defined in section 3 of the *Privacy Act*.

(2) The head of a government institution may disclose any record requested under this Act that contains personal information if

(a) the individual to whom it relates consents to the disclosure;

(b) the information is publicly available; or

(c) the disclosure is in accordance with section 8 of the *Privacy Act*.

20. (1) Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Act that contains

(a) trade secrets of a third party;

(b) financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party;

(c) information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party; or

(d) information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.

(2) The head of a government institution shall not, pursuant to subsection (1), refuse to disclose a part of a record if that part contains the results of product or environmental testing carried out by or on behalf of a government institution unless the testing was done as a service to a person, a group of persons or an organization other than a government institution and for a fee.

(3) Where the head of a government institution discloses a record requested under this Act, or a part thereof, that contains the results of product or environmental testing, the head of the institution shall at the same time as the record or part thereof is disclosed

provide the person who requested the record with a written explanation of the methods used in conducting the tests.

(4) For the purposes of this section, the results of product or environmental testing do not include the results of preliminary testing conducted for the purpose of developing methods of testing.

(5) The head of a government institution may disclose any record that contains information described in subsection (1) with the consent of the third party to whom the information relates.

(6) The head of a government institution may disclose any record requested under this Act, or any part thereof, that contains information described in paragraph (1)(*b*), (*c*) or (*d*) if that disclosure would be in the public interest as it relates to public health, public safety or protection of the environment and, if the public interest in disclosure clearly outweighs in importance any financial loss or gain to, prejudice to the competitive position of or interference with contractual or other negotiations of a third party.

27. (1) Where the head of a government institution intends to disclose any record requested under this Act, or any part thereof, that contains or that the head of the institution has reason to believe might contain

(a) trade secrets of a third party,

(b) information described in paragraph 20(1)(*b*) that was supplied by a third party, or

(c) information the disclosure of which the head of the institution could reasonably foresee might effect a result described in paragraph 20(1)(*c*) or (*d*) in respect of a third party,

the head of the institution shall, subject to subsection (2), if the third party can reasonably be located, within thirty days after the request is received, give written notice to the third party of the request and of the fact that the head of the institution intends to disclose the record or part thereof.

(2) Any third party to whom a notice is required to be given under subsection (1) in respect of an intended disclosure may waive the requirement, and where the third party has consented to the disclosure the third party shall be deemed to have waived the requirement.

(3) A notice given under subsection (1) shall include

(a) a statement that the head of the government institution giving the notice intends to release a record or a part thereof that might contain material or information described in subsection (1);

(b) a description of the contents of the record or part thereof that, as the case may be, belong to, were supplied by or relate to the third party to whom the notice is given; and

(c) a statement that the third party may, within twenty days after the notice is given, make representations to the head of the government institution that has control of the record as to why the record or part thereof should not be disclosed.

(4) The head of a government institution may extend the time limit set out in subsection (1) in respect of a request under this Act where the time limit set out in section 7 is extended under paragraph 9(1)(*a*) or (*b*) in respect of the same request, but any extension under this subsection shall be for a period no longer than the period of the extension under section 9.

28. (1) Where a notice is given by the head of a government institution under subsection 27(1) to a third party in respect of a record or a part thereof,

(a) the third party shall, within twenty days after the notice is given, be given the opportunity to make representations to the head of the institution as to why the record or the part thereof should not be disclosed; and

(b) the head of the institution shall, within thirty days after the notice is given, if the third party has been given an opportunity to make representations under paragraph (*a*), make a decision as to whether or not to disclose the record or the part thereof and give written notice of the decision to the third party.

(2) Representations made by a third party under paragraph (1)(*a*) shall be made in writing unless the head of the government institution concerned waives that requirement, in which case they may be made orally.

(3) A notice given under paragraph (1)(*b*) of a decision to disclose a record requested under this Act or a part thereof shall include

(a) a statement that the third party to whom the notice is given is entitled to request a review of the decision under section 44 within twenty days after the notice is given; and

(b) a statement that the person who requested access to the record will be given access thereto or to the part thereof unless, within twenty days after the notice is given, a review of the decision is requested under section 44.

(4) Where, pursuant to paragraph (1)(*b*), the head of a government institution decides to disclose a record requested under this Act or a part thereof, the head of the institution shall give the person who made the request access to the record or the part thereof forthwith on completion of twenty days after a notice is given under that paragraph, unless a review of the decision is requested under section 44.

29. (1) Where the head of a government institution decides, on the recommendation of the Information Commissioner made pursuant to subsection 37(1), to disclose a record requested under this Act or a part thereof, the head of the institution shall give written notice of the decision to

(a) the person who requested access to the record; and

(b) any third party that the head of the institution has notified under subsection 27(1) in respect of the request or would have notified under that subsection if the head of the institution had at the time of the request intended to disclose the record or part thereof.

(2) A notice given under subsection (1) shall include

(a) a statement that any third party referred to in paragraph (1)(*b*) is entitled to request a review of the decision under section 44 within twenty days after the notice is given; and

(b) a statement that the person who requested access to the record will be given access thereto unless, within twenty days after the notice is given, a review of the decision is requested under section 44.

44. (1) Any third party to whom the head of a government institution is required under paragraph 28(1)(*b*) or subsection 29(1) to give a notice of a decision to disclose a record or a part thereof under this Act may, within twenty days after the notice is given, apply to the Court for a review of the matter.

(2) The head of a government institution who has given notice under paragraph 28(1)(*b*) or subsection 29(1) that a record requested under this Act or a part thereof will be disclosed shall forthwith on being given notice of an application made under subsection (1) in respect of the disclosure give written notice of the application to the person who requested access to the record.

(3) Any person who has been given notice of an application for a review under subsection (2) may appear as a party to the review.

51. Where the Court determines, after considering an application under section 44, that the head of a government institution is required to refuse to disclose a record or part of a

record, the Court shall order the head of the institution not to disclose the record or part thereof or shall make such other order as the Court deems appropriate.

Privacy Act, R.S.C. 1985, c. P-21

3. In this Act,

. . . . .

"personal information" means information about an identifiable individual that is recorded in any form including, without restricting the generality of the foregoing,

(a) information relating to the race, national or ethnic origin, colour, religion, age or marital status of the individual,

(b) information relating to the education or the medical, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

(c) any identifying number, symbol or other particular assigned to the individual,

(d) the address, fingerprints or blood type of the individual,

(e) the personal opinions or views of the individual except where they are about another individual or about a proposal for a grant, an award or a prize to be made to another individual by a government institution or a part of a government institution specified in the regulations,

(f) correspondence sent to a government institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to such correspondence that would reveal the contents of the original correspondence,

(g) the views or opinions of another individual about the individual,

(h) the views or opinions of another individual about a proposal for a grant, an award or a prize to be made to the individual by an institution or a part of an institution referred to in paragraph (*e*), but excluding the name of the other individual where it appears with the views or opinions of the other individual, and

(i) the name of the individual where it appears with other personal information relating to the individual or where the disclosure of the name itself would reveal information about the individual,

but, for the purposes of sections 7, 8 and 26 and section 19 of the *Access to Information Act*, does not include

(j) information about an individual who is or was an officer or employee of a government institution that relates to the position or functions of the individual including,

(i) the fact that the individual is or was an officer or employee of the government institution,

(ii) the title, business address and telephone number of the individual,

(iii) the classification, salary range and responsibilities of the position held by the individual,

(iv) the name of the individual on a document prepared by the individual in the course of employment, and

(v) the personal opinions or views of the individual given in the course of employment,

(k) information about an individual who is or was performing services under contract for a government institution that relates to the services performed, including the terms of the contract, the name of the individual and the opinions or views of the individual given in the course of the performance of those services,

(l) information relating to any discretionary benefit of a financial nature, including the granting of a licence or permit, conferred on an individual, including the name of the individual and the exact nature of the benefit, and

(m) information about an individual who has been dead for more than twenty years;

. . . . .

8. (1) Personal information under the control of a government institution shall not, without the consent of the individual to whom it relates, be disclosed by the institution except in accordance with this section.

(2) Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed

. . . . .

(m) for any purpose where, in the opinion of the head of the institution,

(i) the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure, or

(ii) disclosure would clearly benefit the individual to whom the information relates.

. . . . .

(5) The head of a government institution shall notify the Privacy Commissioner in writing of any disclosure of personal information under paragraph (2)(*m*) prior to the disclosure where reasonably practicable or in any other case forthwith on the disclosure, and the Privacy Commissioner may, if the Commissioner deems it appropriate, notify the individual to whom the information relates of the disclosure.

. . . . .

Federal Courts Act, R.S.C. 1985, c. F-7

18. (1) Subject to section 28, the Federal Court has exclusive original jurisdiction

(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.

. . . . .

(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.

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.

(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.

(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 proceeding of a federal board, commission or other tribunal.

(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.

(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.

Footnotes

* Corrigenda issued from the court on April 26, 2006 and May 24, 2006 have been incorporated herein.

2012 ABQB 652
Alberta Court of Queen's Bench

Jackson v. Canadian National Railway

2012 CarswellAlta 2304, 2012 ABQB 652, [2013] 4 W.W.R. 311, [2013] A.W.L.D. 1421, [2013] A.W.L.D. 1599, 224 A.C.W.S. (3d) 565, 555 A.R. 1, 73 Alta. L.R. (5th) 219

Thomas Richard Jackson (Plaintiff) and Canadian National Railway and Canadian Pacific Railway (Defendants)

S.L. Martin J.

Heard: February 1-3, 7-9, 2012
Judgment: October 23, 2012
Docket: Calgary 1001-05744

Counsel: Mr. E.F.A. Merchant, Q.C., Mr. C.R. Churko, Mr. A. Tibbs for Plaintiff
Mr. R.W. Leurer, Q.C., Mr. D. Hodson, Q.C., Ms. V.M. Enweani, Mr. A.J. Stonhouse for Defendants

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Public; Restitution

APPLICATION by plaintiff to certify matter as class action; APPLICATION by defendants for summary judgment.

***S.L. Martin J.*:**

1. Introduction

1 This case involves farmers, railways and freight rates for regulated grain. The factual matrix is complex, extends over many years and involves various regulatory regimes. The Plaintiff asserts a class action on behalf of farmers alleging that the freight rates they paid unjustly enriched the Defendant railways. The Defendants say they were entitled to charge what they did and that the Plaintiff simply has no cause of action.

2 As the Case Management Justice for this action there are two distinct but related applications before me. First, Mr. Thomas Richard Jackson seeks certification of this matter as a class action. Second, the Defendants, Canadian National Railway Company ("CN") and Canadian Pacific Railway Company ("CP") (collectively, "the Railways"), apply for summary judgment dismissing the Plaintiff's Second Amended Statement of Claim.

2. The Putative Class Action and the Second Amended Statement of Claim

3 The Plaintiff seeks an order certifying this proceeding as a class action which would:

(a) describe the class as "all persons who delivered Grain to a Western Canadian Grain Delivery Point during the Class Period";

(b) appoint Mr. Jackson as the representative Plaintiff;

(c) state the nature of the claims asserted as:

> The Plaintiff claims restitution of overstated hopper car maintenance costs on the basis that the Defendants charged rates that were unfair and unreasonable in contravention of the spirit and intent of the *BIA, 1995*, *CTA, 1996*, *CTA, 2000*, and *Railways Costing Regulations*. In particular, the Defendants set tariffs and shipping rates under the Maximum Rate Scale and Maximum Revenue Entitlement without regard to actual hopper car maintenance costs;

(d) state the relief sought by the class as a personal restitutionary order and pre-judgment interest;

(e) set out the common issues for the class in a manner determined by the Court in consultation with counsel or as proposed by the Plaintiff, namely:

> (i) Between August 1, 1995 and July 31, 2007, did the Defendants charge unfair and unreasonable Grain shipping rates that were based on overstated hopper car maintenance costs and which therefore contravened the intent and policy of the *BIA, 1995*, *CTA, 1996*, *CTA, 2000*, and *Railway Costing Regulations*?
>
> (ii) If so, are class members entitled to restitution of the amount by which the Defendants' embedded hopper car maintenance costs exceeded their actual hopper car maintenance costs between August 1, 1995 and July 31, 2007? If so, can that amount be awarded as an aggregate monetary award, including on an average or proportionate basis?
>
> (iii) Are the Defendants liable to pay pre-judgment interest with respect to overstated hopper car maintenance costs? If so, in what amount?
>
> (iv) A suitable limitation period issue; and

(f) state an appropriate manner and time within which a class member may opt out as set out in a subsequently filed litigation plan.

4 The allegations contained in the Second Amended Statement of Claim are relatively straightforward. Mr. Jackson farms and resides near Killam, Alberta. Since August 1, 1995, he has delivered the grain he grows to a Western Canadian Grain Delivery Point and, he alleges, paid tariff rates established by federal legislation to the Railways for the shipment of his grain.

5 Mr. Jackson alleges that, at all material times, it was Parliament's policy that railway transportation would be provided to users at the lowest total cost; that railways would bear the actual cost of services provided to them at public expenses; and that railways would receive only fair and reasonable compensation. In particular, Mr. Jackson alleges that between August 1, 1995 and July 31, 2007, the Railways were obligated to charge fair and reasonable rates that were based on the Railways' actual hopper car maintenance costs ("Actual HCMC"), which are the costs associated with maintaining the fleet of hopper railway cars that had been provided to the Railways at public expense.

6 Mr. Jackson alleges that the Railways were required, but failed, to submit to the National Transportation Agency their Actual HCMC in 1994 and that, because the costs submitted by the Railways were overstated, the Railways charged unfair and unreasonable rates under two different legislative regimes from August 1, 1995 to July 31, 2007.

3. A Brief History of Regulated Grain Freight Rates

7 It is necessary to briefly discuss the complex historical relationship between the Railways and farmers in Western Canada, and the various regulatory regimes ("Regimes") that have governed that relationship. I am assisted in this regard by the affidavit evidence of Marian Robson, former Chairman and Chief Executive Officer for the Canadian Transportation Agency ("Agency") and Hedley Auld, Senior Marketing Manager with CN.

8 The history of the regulation of the transportation of grain within and from Western Canada goes back well over one hundred years. Prior to 1984, the rates for the movement of western Canadian grain were governed by the *Railway Act*, RSC 1985, c R-3, as repealed by SC 1996, c 10, s 185(1). Under the *Railway Act*, the Railways were allowed to charge statutory maximum rates, known as Crow Rates. By the 1960s, the Crow Rates did not come close to covering the Railways' costs associated with the transportation of Western Canadian grain, and from the 1960s to the 1980s, the Government of Canada financed a number of measures in an effort to relieve problems caused by the Railways' revenue shortfalls and growing production and export demand.

9 One of the measures taken by the Government of Canada during this time, and particularly relevant to these proceedings, was the creation of a program to purchase a large fleet of new grain hopper cars. From 1972 to 1986, the Government of Canada acquired 14,000 hopper cars, the Canadian Wheat Board ("CWB") acquired 4,000, and the Provinces of Alberta and Saskatchewan acquired 2,000. These hopper cars were supplied under various operating agreements, at no charge

to the Railways, for use in the transportation of Western Canadian grain. The Railways were responsible for all costs associated with the use of the cars, including their maintenance.

Regime 1: Annual Rate Scale under the Western Grain Transportation Act.

10 The Crow Rates were eliminated with the passage of the *Western Grain Transportation Act*, RSC 1985, c W-8, as repealed by SC 1995, c 17, s 26 ("*WGTA*") which came into force on November 23, 1983. The *WGTA* replaced the Crow Rates with a regime whereby an Annual Rate Scale would be established by the Canadian Transportation Commission ("CTC") for each crop year ("Regime 1"). The method for determining the Annual Rate Scale was set out in section 36(1) of the *WGTA*:

> 36(1) The annual rate scale in respect of a crop year shall be determined by multiplying the amount per tonne for the movement of grain over each range of distance set out in the base rate scale by the quotient obtained by dividing the estimated eligible costs of the railway companies in respect of that crop year less the CN adjustment in respect of that crop year by the base year revenues within the meaning of subsection (2), as those revenues are adjusted in accordance with the grain tonnage forecast for that crop year provided by the Administrator.

11 Section 36(1) prescribes a complex formula for the determination of freight rates. Put simply, the CTC was required to take the base rate amount, as set out in the *WGTA*, and adjust it annually to account for the estimated eligible costs of the Railways for the coming year, the amount of the CN adjustment (an amount the Government of Canada paid to CN to account for certain competitive disadvantages CN faced) and the figure to be used for base year revenues after making adjustments for the grain tonnage forecast for the coming year. In determining the estimated eligible costs of the Railways, the CTC was to consider its own estimate of volume-related costs for the movement of regulated grain and line-related variable costs for dependent branch lines, and the contribution to constant costs of the railways.

12 In addition, the *WGTA* mandated quadrennial costing reviews. Every four years, commencing in 1986, the CTC was to complete a review of and determine the volume-related variable costs of the Railways for the movement of regulated grain, and the line-related variable costs for grain-dependent branch lines. These reviews were to be conducted on the most recent calendar or crop year for which costing information was available. The 1994 Costing Review, which utilized information from 1992, was the last costing review under the *WGTA* and is of particular importance to these proceedings.

13 Pursuant to section 38(2) of the *WGTA*, in carrying out quadrennial costing reviews, the CTC was required to:

(a) take into account all costs actually incurred that were directly related to the provision of an adequate, reliable and efficient railway transportation system, that would meet future requirements for movement of grain;

(b) take into account costs of capital and adjustments deemed justified in light of the risks associated with the movement of grain;

(c) exclude costs of capital and depreciation in respect of branch line assets provided under the Prairie Branch Line Rehabilitation Program and railway cars not funded by the railway companies;

(d) reduce additional costs directly attributable to joint line movement by an amount equal to additional revenues derived by the Railways; and

(e) reduce additional costs directly attributable to the acquisition by the Railways of railway cars for the movement of grain other than box cars or hopper cars by an amount equal to additional revenues derived by the railways.

14 As the foregoing suggests, and Ms. Robson states in her Affidavit, the determination of costs and freight rates under the *WGTA* was extremely complicated. In a report entitled, "A Report on the Movement of Western Grain: Estimates of the Railway Costs and Net Revenues Incurred between 1992 and 1998 and a Review of the Railway Assessment of the Extent of Sharing of Productivity Gains with Shippers", the process undertaken by Agency was described, at 4:

...The WGTA, which required rates to be cost based, was an extremely complicated process and involved two major activities. The first activity involved determining total rail costs for the movement of western grain. These costs were derived through quadrennial costing reviews. Three costing reviews were conducted, for 1984, 1988 and 1992. The costs determined through each review were finalized about 12 to 13 months after the base year for two reasons: complete data for the base year were not available until several months after the end of the year and the reviews took about a year to carry out.

The second activity involved taking the most recent base year's costs and adjusting them to arrive at estimated eligible costs for the upcoming crop year. For the most part, the major factors driving the updates were railway inflation (which takes into account price changes for labour, fuel, material and capital inputs) and projected traffic volume. From these estimated eligible costs, annual mileage-based rates were developed. Because western grain transportation was subsidized under the WGTA, the rates per tonne were divided into shipper and federal government portions.

The main purpose of the WGTA quadrennial costing review was to ensure that prescribed rates set through the updating process were aligned with as recent an actual cost base as was

> deemed appropriate. Otherwise, prescribed rates, which were updated for inflation and the abandonment of branch lines, could fall out of line with actual railway costs, which were also influenced by changes in productivity. In effect, the costing review was a device to ensure that cumulative changes in productivity were periodically shared with shippers.

15 According to Ms. Robson, a high degree of scrutiny was applied by the Agency to the Railways' operations under the *WGTA*, and the Agency had several branches and divisions responsible for auditing the Railways' accounts. She points to the description of the Agency Financial Analysis Directorate in the Agency's 1988 Annual Report:

> This Directorate is responsible for the Uniform Classification of Accounts, the Railway Costing Regulations and their implementation in order to meet current information requirements. This includes insuring that the information provided by the railways is reliable, meaningful, useful for subsidy, freight rate and policy determinations, and meets the regulatory reporting requirements. The work of the Directorate involves the audit of railway records, depreciation rate determinations, the investigation of the railways' working capital requirements, and cost of capital determinations. The Directorate also analyses the railways' costing methodology and computerized costing systems; and is responsible for the determination of price indices used in the WGTA annual rate scale, and the determination of western branch lines designated as grain dependant...
>
> The Directorate monitors actual and planned railway investment and maintenance expenditures for grain dependent lines, the results of which are reported to the Minister of Transport.
>
> A major focus of activity of the Directorate is the quadrennial costing review pursuant to s.38 of the *Western Grain Transportation Act*.

16 Simply put, under Regime 1, the Agency established an Annual Rate Scale for the movement of regulated grain. It did so by determining, on a quadrennial basis, the Railways' costs associated with the transportation of regulated grain, and on an annual basis making adjustments to those base costs on the basis of its own estimates. Not all of the costs associated with the shipping of regulated grain would be borne by shippers; instead Regime 1 incorporated a direct government subsidy to the Railways known as the "Crow Benefit".

17 Because the annual adjustments under section 36(1) of the *WGTA* did not account for productivity gains by the Railways, any efficiencies realized by the Railways in the four years between quadrennial costing reviews would accrue solely to the Railways, and would not be shared by shippers.

18 It must be noted that Mr. Jackson does not seek to recover any excess payments made to the Railways under Regime 1. Nevertheless, some understanding of Regime 1 is important in

these proceedings because it establishes context for the two Regimes that followed, and because it mandated the 1992 Costing Review, which Mr. Jackson alleges would play some role in those Regimes.

Regime 2: Maximum Rate Scales under the Canadian Transportation Act

19 In 1995, the Government of Canada announced that it would cut transportation subsidies in its efforts to reduce the federal deficit. Subsidies to the Railways were a significant part of Regime 1 under the *WGTA*, and so pursuant to the *Budget Implementation Act, 1995*, SC 1995, c 17 ("*BIA, 1995*"), the *WGTA* was repealed and the *National Transportation Act, 1987*, RSC 1985, c 28 (3rd Supp), as repealed by SC 1996, c 10, s 183) ("*NTA, 1987*") amended to add provisions related to the transportation of regulated grain. In 1996, the National Transportation Agency ("NTA"), which was created under the *NTA 1987*, was continued as the Agency and the *NTA 1987* consolidated with the *Railway Act* to form the *Canada Transportation Act*, SC 1996, c 10 ("*CTA*"). A Maximum Rate Scale ("MRS") for the 1995 - 1996 crop year was set out in the *BIA, 1995*. The MRS for 1996-1997 was set by the NTA, and the MRS for 1997-1998 to 2000-2001 was set by the Agency.

20 In essence, beginning in 1995, federal subsidies to the Railways were eliminated and the Annual Rate Scale system under the *WGTA* was replaced by the MRS. The determination of the Maximum Rate Scale, like the determination of the Annual Rate Scale before it, was not a simple exercise. The MRS was determined by multiplying the rates for each range of distance set out in the Scale for the 1995-96 crop year by the Freight Rate Multiplier ("FRM") which effectively adjusted the rates for inflation, and reduced the maximum rates to take into account the abandonment of any grain dependent branch lines. The FRM itself was the product of a complex formula incorporating the volume-related composite price index ("VRCPI") for the 1994-1995 crop year and, as determined by the Agency, for the crop year in determination. The purpose of the VRCPI was to forecast changes in the Railways' expenses associated with the transportation of regulated grain including labour, fuel, materials, leased railway cars, and other capital components. The Agency based the VRCPI for any crop year on information provided by stakeholders, private forecasters, other government departments and agencies, and the Agency's own research.

21 In January 1996, the Agency decided that it would include consultations with various stakeholders, including the Railways, grain companies and producer representatives, in the process of determining maximum freight rates. In early March, the Agency would invite these stakeholders to review confidential forecasts for VRCPI components prepared by the Agency and the Railways and then invite them to submit their views in writing or in consultation sessions. Once this process was complete, the Agency would establish the MRS for the coming year, which was then used by the Railways in developing the rates that they would charge for the movement of regulated grain. The Railways could and sometimes did offer incentive rates to shippers by providing discounts for large shipments. These incentive rates were not required to be approved by the Agency.

22 It is important to note that with the repeal of the *WGTA*, the Government of Canada eliminated quadrennial costing reviews. Under the new regime, the benefit of increased railway efficiencies would not be periodically shared with grain shippers, as it was before.

23 Section 155 of the *CTA* required the Minister of Transportation to conduct a review of the effect of the *CTA* on the efficiency of the transportation of regulated grain and the extent of the sharing of efficiency gains between grain shippers and the Railways. In December 1997, Supreme Court Justice Willard Estey was appointed to undertake a review of the system. In December 1998, Justice Estey produced a report with 15 recommendations for the reform of the grain transport system, including a recommendation to replace the MRS with a more flexible pricing system. Arthur Kroeger, a former Deputy Minister of Transport, was appointed in May 1999 to develop a system based on the Estey Report's recommendations.

24 A number of parties suggested that a formal railway costing review should be conducted in connection with the Estey Report and Mr. Kroeger's work, but then Minister of Transport David Collenette did not order one, on the basis that a costing review would take too much time and that the repeal of the *WGTA* had eliminated statutory authority for such a review. Instead, Mr. Kroeger asked the Agency to provide an estimate of the change in the Railways' costs since the 1992 Costing Review, and the Agency's assessment of the extent to which productivity gains had been shared with shippers in the interim. In September 1999 Mr. Kroeger recommended the replacement of the MRS with a cap on the Railways' revenues for the transport of regulated grain, and that the Railways' revenues be reduced by 12% from 1998 revenues to account for productivity gains made by the Railways since 1992.

Regime 3: Maximum Revenue Entitlement

25 Following the Estey Report and Mr. Kroeger's review and recommendations, the Government of Canada announced major changes to the *CTA* in May 2000. On August 1, 2000 the MRS was effectively replaced by the Maximum Revenue Entitlement ("MRE") regime that exists to this day. Instead of the 12% reduction in railway revenues associated with the transport of regulated grain, Parliament imposed an 18% reduction.

26 Under the MRE regime, the Railways are required to publish tariffs that include a single car rate from every grain delivery point. The Railways are permitted to set the rates themselves. Rates may vary in response to market conditions, including the length of haul, service requirements for different commodities shipped, and time of year. However, while under this regime the Railways were permitted, for the first time in Canadian history, to establish their own rates for the shipment of regulated grain, so long as each Railway's revenues earned from the shipment of that grain do not exceed the Railway's MRE for that crop year. If a Railway's revenues exceed the MRE, then the Railway is required to pay out the excess plus penalties.

27 The formula for determining a Railway's MRE is set out in section 51 of the *CTA*:

> 151. (1) A prescribed railway company's maximum revenue entitlement for the movement of grain in a crop year is the amount determined by the Agency in accordance with the formula
>
> [A/B + ((C - D) × $0.022)] × E × F
>
> where
>
> A is the company's revenues for the movement of grain in the base year;
>
> B is the number of tonnes of grain involved in the company's movement of grain in the base year;
>
> C is the number of miles of the company's average length of haul for the movement of grain in that crop year as determined by the Agency;
>
> D is the number of miles of the company's average length of haul for the movement of grain in the base year;
>
> E is the number of tonnes of grain involved in the company's movement of grain in the crop year as determined by the Agency; and
>
> F is the volume-related composite price index as determined by the Agency.

28 Parliament sets out the base year figures for A, B, C and D in subsections 151(2) and 151(3) of the *CTA*. The Agency is required to determine the amount of grain the railways transport in a given year, and must also continue to conduct the complex VRCPI determination. It is also the Agency's responsibility to assess the Railways' revenues and determine if they exceed the MRE for a given year.

29 The process for determining VRCPI remains a consultative one, as described in the Agency *Decision No. 207-R-2008* CarswellNat 4975:

> The development of the volume-related composite price index for 2007-2008 required detailed submissions of historical price information of railway inputs (labour, fuel, material and capital) from the prescribed railway companies... The submitted information as reviewed and verified by Agency staff. In addition, the railway companies and Agency staff developed forecasts for future changes in the price of railway inputs. The historical and forecasted information was summarized in an Agency report and shared with grain industry participants for consultation purposes. Consultation included participants from producer organizations, grain companies, railway companies, and federal, provincial and municipal governments.

30 Under section 150 of the *CTA*, the determination of the Railways' revenues from the transportation of regulation grain is to be made by the Agency no later than December 31 of the following crop year. The way in which the Agency does this was described in its Decision No. 529-R-2009, at para 21:

> Railway company records relating to western grain revenue were audited by Agency staff. Initial freight revenue, including payments to other railway companies involved in the carriage of grain, were submitted by CN and CP on a per movement basis. Both were verified against company accounting records and source documents. Numerous onsite visits were also made to CN and CP offices to ensure that all western grain revenue was captured and to determine whether revenue exclusions or reductions were appropriate and accurate.

4. Hopper Car Maintenance Costs and the Hopper Car Decision

31 As noted above, between 1972 and 1986, the Government of Canada acquired some 14,000 hopper cars and provided them, under various operating agreements, to the Railways for the transportation of regulated grain, at no charge. The Railways were responsible for the maintenance of the hopper car fleet, and the associated costs were included in the costing process under the *WGTA*.

32 Along with the replacement of the Annual Rate Scale with the MRS in 1995, the Government of Canada began investigating the potential disposition of its large hopper car fleet. In the following years a number of proposals were considered, including the purchase of the hopper car fleet by the Railways and by groups representing western farmers. It is clear that the fact that hopper car maintenance costs were effectively "embedded" in the MRS was a live issue early on in the process of determining what to do with the hopper car fleet. In May 30, 1996 submissions to the House of Commons Standing Committee on Agriculture, Art Macklin, a member of the Advisory Committee to the Canadian Wheat Board, indicated that the Railways' current annual maintenance costs of $4000 per car per year could probably be reduced by half.

33 Though a sale by the Government of Canada of its hopper car fleet was essentially anticipated in the *BIA, 1995*, no sale proceeded and the matter was put on hold pending the outcome of the Estey Report. Meanwhile, the matter of hopper car maintenance costs embedded in the MRS remained a bone of contention. The National Farmers Union raised the issue in its submissions to Justice Estey, citing a "$3000-per-car discrepancy" between the amounts for hopper car maintenance embedded in the MRS and the amounts spent on an annual basis by commercial leasing companies.

34 Beyond a general comment in the Estey Report to the effect that a disposal of the hopper car fleet for fair market value conditional upon the cars remaining available to the Western Canada grain industry would be in the interest of Canadian grain transportation, the Estey Report made

no formal recommendation with regard to the disposal of the hopper car fleet or hopper car maintenance costs. In the following years, Transport Canada continued to study and to explore options relating to the disposal of the hopper car fleet. In the event of a sale of the hopper cars to a third party, hopper car maintenance costs would no longer be the Railways' responsibility and so in 2004, the Agency was asked to determine the amount embedded in the MRE for hopper car maintenance in the 2003-2004 crop year. The Agency determined that, at as of that time, the amount was some $4,329 per hopper car per year. The Farmer Rail Car Coalition ("FRCC"), a group comprised of a number of Western Canada farm groups that were exploring the purchase of the hopper cars itself, responded by pointing out that the $4,329 was significantly more than its own estimate of hopper car maintenance costs of $1,500 per year. An Agency study in 2005 indicated that the Agency's estimate of actual annual maintenance costs for the hopper car fleet in 2004 was $1,873 per car.

35 By 2005, it appears that the Government of Canada was close to an agreement with the FRCC that would see the transfer of the hopper car fleet to the FRCC, with an adjustment to the Railways' MRE to reflect the fact that they would no longer be responsible for hopper car maintenance costs. An agreement in principle was reached and announced on November 24, 2005, but on May 4, 2006, Transport Canada announced that the Government of Canada would no longer be proceeding with the sale. At the same time, there was a recognition that without the transfer of the hopper car fleet and the corresponding adjustment to the Railways' MRE, the disparity between "embedded" and actual hopper car maintenance costs would persist. As a result, the Government of Canada announced the introduction of *An Act to Amend the Canada Transportation Act and the Railway Safety Act and to Make Consequential Amendments to Other Acts*, 1st Sess, 39th Parl, 2007, assented to 22 June 2007) ("Bill C-11"), which would make an adjustment to the VRCPI to better reflect actual hopper car maintenance costs. Clause 57 of Bill C-11 provided:

> 57. Despite subsection 151(5) of the *Canada Transportation Act*, the Canadian Transportation Agency shall, once only, on request of the Minister of Transport and on the date set by the Agency, adjust the volume-related composite price index to reflect the costs incurred by the prescribed railway companies, as defined in section 147 of that Act, for the maintenance of hopper cars used for the movement of grain, as defined in section 147 of that Act.

36 Once Bill C-11 received Royal Assent, the Agency was immediately tasked with determining the adjustment to the VRCPI mandated by Clause 57. The Agency released a consultation document in May 2007, setting out its proposed methodology for determining the adjustment and a number of issues for discussion with stakeholders. In *Canadian National Railway v. Canadian Transportation Agency*, 2008 FCA 363 (F.C.A.), leave to appeal to SCC refused, [2009] S.C.C.A. No. 33 (S.C.C.), (the "Hopper Car Appeal") it was noted at para 43 that this consultation involved approximately 30 organizations.

37 On February 19, 2008, the Agency released *Decision No. 67-R-2008* [2008 CarswellNat 4923 (Can. Transport. Agency)] (the "Hopper Car Decision"). The purpose of the Hopper Car Decision was to implement the direction contained in Clause 57, which was described at paras 3-5:

> Clause 57 provides that the Agency must adjust the volume-related composite price index. The adjustment is not an adjustment at large. It is specifically the adjustment that is to reflect costs incurred by the Canadian National Railway Company (CN) and the Canadian Pacific Railway Company (CP) and only for the maintenance of hopper cars used for the movement of regulated grain.
>
> This new adjustment reflects Parliament's acceptance that since 1992, and largely due to improved railway company operating efficiencies, the railway companies' costs for moving statutory grains have decreased significantly. This downward trend was in fact first recognized in the year 2000 when the CTA was changed to reflect revenue regulation as opposed to direct rate regulation.
>
> The policy underpinning Clause 57 is that the railway companies' costs for the maintenance of hopper cars, which are a significant cost component in the movement of grain, have declined to the point that the overall integrity of the Revenue Cap Program is now in doubt. That is, as a regulatory system that is cost based, at least in part, there are historic operating costs in the system that the railway companies are no longer incurring. There is widespread recognition that these historic costs are significant and there is a broad-based view that they ought to be removed from the Revenue Cap formula to partly restore the balance between the interests of the railway companies, and shippers and producers.

38 The scale of the discrepancy arising from actual versus embedded hopper car maintenance costs under the MRE regime was described at para 9:

> It is estimated that during the first seven years under the Revenue Cap Program (i.e., from crop year 2000-2001 to crop year 2006-2007) the railway companies received more than $550 million for hopper car maintenance costs while incurring less than $250 million for this maintenance. Thus, in the period, the railway companies have received at least $300 million more than they have spent on hopper car maintenance, and this has been paid by Prairie grain producers. Moreover, the difference between the amount the railway companies receive under the Revenue Cap Program and what they incur as hopper car maintenance costs has been growing at an increasing rate.

39 The purpose of the Clause 57 adjustment was described at paras 11-12:

> ...If the cap is higher than it should be, due to the overstated historical costs, Parliament has directed the Agency to reduce it to partly restore the integrity of the Revenue Cap Program.

> Simply put, if the historical maintenance costs are too high, producers are paying too much to shippers who are paying too much to the railway companies. Parliament has directed that this should not be the case for hopper car maintenance costs included, or embedded, in the Revenue Caps.
>
> While Parliament has declared that a re-balancing is necessary, it has instructed the Agency to determine what re-balancing is required and how and when it is to be done. The only limit is that the adjustment must be undertaken "once only". This is to be achieved by adjusting the volume-related composite price index to better reflect costs for the maintenance of hopper cars used for the movement of grain. This determination is separate from the yearly Revenue Cap determination exercise which includes many costs, in addition to those related to hopper cars.

40 Not surprisingly, the Agency's task in determining the amount of hopper car maintenance costs that were embedded in the Railways' MRE was a highly complicated one. It first had to determine the applicable 1992 total for hopper car maintenance costs, since 1992 was the last time a formal cost review had been conducted. That figure, ultimately determined to be $140.41 million, was then adjusted to reflect the differences in the amount and distance of grain moved between 1992 and 2007-2008, and then further adjusted for inflation and productivity gains. In the end, the Agency determined the amount of embedded hopper car maintenance costs in the Railways' MRE to be $105.1 million for the 2007-2008 crop year. The Agency was then required to determine the actual hopper car maintenance costs for 2007-2008, which it did by relying upon costing data provided by the Railways for the period between 2004 and 2006 and adjusting for inflation and productivity gains. Ultimately, the Agency concluded that the actual hopper car maintenance cost for 2007-2008 was $32.9 million.

41 At para 177, the Agency concluded:

> The amount of "actual" hopper car maintenance costs relating to crop year 2007-2008 and reflecting the above Agency findings, totals $32.9 million. It follows that the difference between the amount of "embedded" and "actual" hopper car maintenance costs for crop year 2007-2008 is $72.2 million.

This conclusion, and what it represents when considered over the duration of the MRS and MRE regimes, is at the heart of this action. Though it speaks only to the difference between embedded and actual costs in the 2007-2008 crop year, it is clear that over the years the legislative schemes had incorporated into the Railways' costs an amount for hopper car maintenance that bore no relationship to reality.

42 To remedy the significant gulf between actual and embedded hopper car maintenance costs, the Agency was empowered only to make a one-time adjustment to the VRCPI, which it did by reducing that number to 1.0639, translating to a reduction, on average, of $2.59 per tonne of grain

shipped in the 2007-2008 crop year, on the basis of a forecast of 27.85 million tonnes. The effect was to remove $72.2 million from the Railways' 2007-2008 MREs, and further to remove this amount, plus adjustments for inflation, from the MREs in all subsequent years. The adjustment made as a result of Clause 57 and the Hopper Car Decision does not address the imbalance between actual and embedded hopper car maintenance costs between 1992 and 2007.

5. The Sale and Shipment of Grain in Western Canada

43 It is important to understand how Western Canadian grain is brought to market and sold. For the purpose of determining which crops would be covered by the statutory regime described above, the *WGTA* defined "grain" as including 56 different types of crops and products. Under the *BIA, 1995* and with the creation of the NTA, the list was expanded to 58 products. These include wheat and barley, which during the relevant period were subject to the CWB's marketing monopoly, as well as a significant number of grains such as corn, lentils, flax, oats and canola, as well as processed products like flour, animal feed, barley meal and canola oil, which were not subject to the CWB's monopoly. The CWB marketing monopoly covered wheat and barley grown in Western Canada, whether for human consumption or for shipment interprovincially or for export.

44 In the case of grains subject to the CWB monopoly, Western Canadian farmers were required to sell their crops to the CWB. A number of Grain Handling Companies ("GHCs") acted as agents for the CWB in purchasing grain from producers, and then storing, handling, and blending the grain, and arranging for the shipment of the grain on the CWB's behalf. Producers were free to sell their grain to any GHC and to negotiate the terms of sale. GHCs acting as agents for the CWB were required by law to deduct a "freight consideration rate" ("FCR fee") from the purchase price paid by the GHC for the grain. The operation of the FCR fee is set out in section 32 of the *Canadian Wheat Board Act*, RSC 1985, c C-24, as repealed by SC 2011, c 25, s 39:

> 32. (1) The Corporation shall undertake the marketing of wheat produced in the designated area in interprovincial and export trade and for that purpose shall
>
> . . .
>
> (b) pay to producers selling and delivering wheat produced in the designated area to the Corporation, at the time of delivery or at any time thereafter as may be agreed on, a sum certain per tonne basis in storage at a pooling point to be fixed from time to time
>
> (i) by regulation of the Governor in Council in respect of wheat of a base grade to be prescribed in those regulations, and
>
> (ii) by the Corporation, with the approval of the Governor in Council, in respect of each other grade of wheat;

> (b.1) deduct from the sum certain referred to in paragraph (b) the amount per tonne determined under subsection (2.1) for the delivery point of the wheat to the Corporation;
>
> . . .
>
> (2.1) For the purpose of paragraph (1)(b.1), the Corporation shall, with the approval of the Governor in Council, establish for each delivery point within the designated area an amount that, in the opinion of the Corporation, fairly represents the difference in the cost of transporting wheat from that point as compared to other delivery points.

45 The FCR fee was calculated by the CWB based on the single car rate for the movement of grain from any delivery point to either Thunder Bay or Vancouver. The fee is therefore the same for all producers who deliver grain to a particular delivery point. The FCR fee is shown on a "cash ticket" or "grain ticket" provided to the producer, but it is important to note that it does not directly reflect the actual cost of freight via the Railways. The FCR fee is the same regardless of whether the grain is ultimately transported on a regulated basis or not.

46 In the case of grain not subject to the CWB monopoly, producers have the right to sell their grain to any GHC or to any other purchaser of their choice. The purchase price is the result of negotiation between producer and GHC and is therefore subject to a variety of factors for both the producer and the purchaser. However, as Mr. Gorst, who is a former General Manager of the GHC Agricore, indicated in his Affidavit, GHCs would not deduct anticipated transportation costs, whether for regulated rail transportation, or otherwise, from the price paid to a producer, nor would the producer make a payment to the GHC for the shipment of grain. Instead, transportation costs, broadly speaking, would have been a factor taken into account by the GHC in determining the purchase price. Those transportation costs might be the costs the GHC could anticipate it would incur if it shipped the grain via regulated movement, or not. At the time of purchase, it is possible that the GHC would not know whether the grain would be shipped via regulated movement or not.

47 To put the matter simply, subject to one exception the carriage of grain produced in Western Canada is paid for by GHCs. While the cost of carriage is surely a factor in determining the price paid by GHCs and the CWB to Western Canadian producers, those producers do not pay the Railways directly for the shipment of regulated grain.

48 The exception is grain shipped in producer cars. Under the *Canada Grain Act*, RSC 1985, c G-10, a producer or group of producers are entitled to order rail cars from the Canadian Grain Commission. The grain car is then loaded directly by the producer or group of producers for shipment to another location. However, grain shipped by producer car does not form part of Mr. Jackson's claim.

49 Once a GHC has purchased and obtained title to grain (whether as agents for the CWB or not), there are typically three modes of carriage a GHC might employ: transportation by truck or

other non-rail mode; non-regulated rail movement (ie. into the United States or interprovincially); and regulated rail movement. A GHC opting to ship by way of regulated movement may negotiate a price for the shipment with the Railways, subject to the limits imposed upon the Railways by the statutory regime. The rate charged by the Railways may be different from the FCR fee deducted by the CWB, or the rates set out in the MRS, or the Railways' single car tariff rates, for a variety of reasons, but the most significant is that reduced or incentive rates may be offered by the Railways, often for large volume shipments. It is Mr. Gorst's evidence that the value of these reduced rates is significant and may apply to as much as 80% of the movements of regulated grain.

50 There are additional complexities, as described by Mr. Gorst. Once delivered to a GHC, a producer's grain will be commingled with grain delivered by other producers. Where it goes from there, and therefore whether the transportation of the grain is regulated or not, will depend upon a wide variety of factors, including the type of grain, the grade of the grain, the location of the producer, available space and inventory at the GHC facility, the availability of incentive or reduced shipping rates, the date of delivery, and the availability of rail cars.

6. The Certification Application

51 The relevant portions of section 5 of the *Class Proceedings Act*, SA 2003, c C-16.5 ("*CPA*") provide:

> 5(1) In order for a proceeding to be certified as a class proceeding on an application made under section 2 or 3, the Court must be satisfied as to each of the following
>
> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of 2 or more persons;
>
> (c) the claims of the prospective class members raise a common issue, whether or not the common issue predominates over issues affecting only individual prospective class members;
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
>
> (e) there is a person eligible to be appointed as a representative plaintiff who, in the opinion of the Court,
>
> (i) will fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

(iii) does not have, in respect of the common issues, an interest that is in conflict with the interests of other prospective class members.

5(2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the Court may consider any matter that the Court considers relevant to making that determination, but in making that determination the Court must consider at least the following:

(a) whether questions of fact or law common to the prospective class members predominate over any questions affecting only individual prospective class members;

(b) whether a significant number of the prospective class members have a valid interest in individually controlling the prosecution of separate actions;

(c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;

(d) whether other means of resolving the claims are less practical or less efficient;

(e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

5(3) Where the Court is satisfied as to each of the matters referred to in subsection (1)(a) to (e), the Court is to certify the proceeding as a class proceeding.

5(4) The Court may not certify a proceeding as a class proceeding unless the Court is satisfied as to each of the matters referred to in subsection (1)(a) to (e).

(a) Reasonable Cause of Action

52 Before describing the issues for trial as they are now framed in the Plaintiff's Second Amended Statement of Claim, it is worthwhile, in light of the changing allegations, to mention what is not being alleged. The Plaintiff no longer alleges that the 1994 Costing Review was faulty, or that the determination of HCMC at that time was improperly inflated. The Plaintiff does not allege that the Railways charged more than the tariffs under the MRS allowed, nor does he allege that the Railways exceeded their MREs.

53 Instead, the Plaintiff now contends that at all times during the relevant period the Railways were obligated to provide transportation to users at the lowest possible cost; that the Railways were to bear the actual cost of services provided to them at public expense; and that the Railways would receive only fair and reasonable compensation for shipping grain. The crux of the Plaintiff's allegations is contained in paragraph 7 of the Second Amended Statement of Claim, wherein the Plaintiff pleads "The policy of the Legislation (defined in the Statement of Claim as the *BIA, 1995*, *CTA, 1996*, *CTA, 2000* and the *Railways Costing Regulations*) was that the MRS and MRE were

to be "maximum" amounts, not amounts to which the Defendants had an "entitlement" without regard to underlying decreased operating costs."

54 In particular, the Plaintiff contends that, in repealing the *WGTA* and the requirement for quadrennial costing reviews, it was Parliament's intention that the Railways would pass on or share HCMC reductions with producers by way of lower freight rates. Instead, by charging rates and earning revenues at "the ceiling" of the MRS and MRE, the Railways earned more than Parliament intended. The relief sought is restitution for unjust enrichment.

55 The test for unjust enrichment is set out in *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629 (S.C.C.) at para 30:

> As a general matter, the test for unjust enrichment is well established in Canada. The cause of action has three elements: (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) an absence of juristic reason for the enrichment ...

56 The test under section 5(1)(a) of the *CPA* requires the Court to accept that the material facts pleaded in the Statement of Claim are true, and the Court may deny certification on the basis that the Statement of Claim fails to disclose a cause of action, only if it is plain, obvious and beyond a reasonable doubt that the plaintiff cannot succeed: *Elder Advocates of Alberta Society v. Alberta*, [2011] 2 S.C.R. 261 (S.C.C.) at para 20. The test is essentially the same as whether pleadings should be struck pursuant to an application under the former Rule 129(1)(a) of the Alberta *Rules of Court*: whether it is plain and obvious that there is no cause of action: *Alberta Municipal Retired Police Officers' Mutual Benefit Society v. Alberta*, 2010 ABQB 458 (Alta. Q.B.). While the Court must accept that the material facts pleaded are true, those facts must be clearly pleaded and a plaintiff may not rely upon mere speculation.

57 Section 5 of the *CTA* is entitled "National Transportation Policy". It is central to the Plaintiff's argument that, in charging maximum rates, the Railways breached the policies underlying the specific provisions of the *CTA*. From 1996 though June, 2007, ie. during the course of the Class Period, section 5 provided:

> 5. It is hereby declared that a safe, economic, efficient and adequate network of viable and effective transportation services accessible to persons with disabilities and that makes the best use of all available modes of transportation at the lowest total cost is essential to serve the transportation needs of shippers and travellers, including persons with disabilities, and to maintain the economic well-being and growth of Canada and its regions and that those objectives are most likely to be achieved when all carriers are able to compete, both within and among the various modes of transportation, under conditions ensuring that, having due regard to national policy, to the advantages of harmonized federal and provincial regulatory approaches and to legal and constitutional requirements,

(a) the national transportation system meets the highest practicable safety standards,

(b) competition and market forces are, whenever possible, the prime agents in providing viable and effective transportation services,

(c) economic regulation of carriers and modes of transportation occurs only in respect of those services and regions where regulation is necessary to serve the transportation needs of shippers and travellers and that such regulation will not unfairly limit the ability of any carrier or mode of transportation to compete freely with any other carrier or mode of transportation,

(d) transportation is recognized as a key to regional economic development and that commercial viability of transportation links is balanced with regional economic development objectives so that the potential economic strengths of each region may be realized,

(e) each carrier or mode of transportation, as far as is practicable, bears a fair proportion of the real costs of the resources, facilities and services provided to that carrier or mode of transportation at public expense,

(f) each carrier or mode of transportation, as far as is practicable, receives fair and reasonable compensation for the resources, facilities and services that it is required to provide as an imposed public duty,

(g) each carrier or mode of transportation, as far as is practicable, carries traffic to or from any point in Canada under fares, rates and conditions that do not constitute

(i) an unfair disadvantage in respect of any such traffic beyond the disadvantage inherent in the location or volume of the traffic, the scale of operation connected with the traffic or the type of traffic or service involved,

(ii) an undue obstacle to the mobility of persons, including persons with disabilities,

(iii) an undue obstacle to the interchange of commodities between points in Canada, or

(iv) an unreasonable discouragement to the development of primary or secondary industries, to export trade in or from any region of Canada or to the movement of commodities through Canadian ports, and

(h) each mode of transportation is economically viable,

and this Act is enacted in accordance with and for the attainment of those objectives to the extent that they fall within the purview of subject-matters under the legislative authority of Parliament relating to transportation.

58 Section 5 of the *CTA* is a "purpose statement", as described in Ruth Sullivan, *Driedger on the Construction of Statutes*, 3d ed (Vancouver: Butterworths Canada Ltd., 1994) at 263-264:

> ...A purpose statement is a provision set out in the body of legislation that declares the principles or policies the legislation is meant to implement or the objectives it is meant to achieve. Usually purpose statements are found at the beginning of an Act or the portion of the Act to which they relate. Some are explicit and begin with the words "The purposes of this Act are..." or "It is hereby declared that...". Others simply recite the principles or policies that the legislature wishes to declare without introductory fanfare...
>
> Like preambles, purpose statements reveal the purpose of legislation and they are also an important source of legislative values. Unlike preambles, they come after the enacting clause of the statute and are part of what is enacted into law. This makes them binding in the sense that they cannot be contradicted by courts; they carry the authority and the weight of duly enacted law. In the absence of specific legislative direction, however, it is still up to courts to determine what use should be made of the purposes or values set out in these statements.
>
> ...Purpose statements play an important role in modern regulatory legislation. Such legislation establishes a general framework within which powers are conferred to achieve particular goals or to give effect to particular policies. Purpose statements expressly set out these policies and goals...
>
> In some cases purpose statements point in a single direction and guide interpreters toward a particular outcome...
>
> . . .
>
> ...[t]he declarations set out in a purpose statement may inform judicial understanding of the Act as a whole and guide interpretation in a particular direction.
>
> Not all purpose statements establish a unified and coherent philosophy. Sometimes a purpose statement sets out a number of competing principles or policies which interpreters are to weigh and balance in applying the legislation to particular cases.

59 The purpose and effect of section 5 of the *CTA* was described by the Federal Court of Appeal in *Ferroequus Railway v. Canadian National Railway*, 2003 FCA 454, [2004] 2 F.C.R. 42 (F.C.A.) at paras 21-22:

> Second, it is common ground that the factors to which the Agency must have regard when determining whether the grant of running rights is in the public interest are contained in the National Transportation Policy. This Policy both informs and, because of its statutory base, imposes a legal limitation on, the Agency's exercise of discretion.

> However, since the Policy expresses the often competing considerations that the Agency must balance when making a particular decision, it inevitably operates at a level of some generality and does no more than guide and structure the Agency's exercise of discretion in any given fact situation. Thus, it imposes a relatively soft legal limit on the Agency's exercise of power, in the sense that it will rarely dictate a particular result in any particular case.

60 Similarly, in *Canadian National Railway v. Moffatt*, 2001 FCA 327, [2002] 2 F.C. 249 (Fed. C.A.), the purpose of section 5 was described at para 27:

> However, section 5 is not a jurisdiction-conferring provision. While not minimizing its importance, I believe that section 5 is a declaratory provision which states the objectives of Canada's National Transportation Policy. Those objectives are implemented by the regulatory provisions of the CTA and, in the currently largely deregulated environment, by the absence of regulatory provisions. Section 5 does not, itself, confer on the Agency the jurisdiction it assumed in this case. If it were construed to do so, then presumably any legal question could also be brought before the Agency for determination.

61 The Plaintiff, in his Brief of Law in respect of Certification, characterizes the National Transportation Policy embodied in section 5 as follows:

> (a) transportation services would be provided at the lowest total cost to serve the needs of shippers;
>
> (b) carriers "as far as is practicable" were to bear "a fair proportion of the real costs" of the resources and services provided to them at public expense;
>
> (c) each carrier "as far as is practicable" was to receive only "fair and reasonable compensation" for the services it was to provide.

62 This is, at best, a gross simplification of objectives set out in the National Transportation Policy. The National Transportation Policy does not state that any particular form of transportation must be provided at the lowest total cost, but that a safe, economic, efficient and adequate transportation network should make use of all available modes of transportation at the lowest total cost. While the National Transportation Policy does provide that carriers "as far as practicable" are to bear a fair proportion of the real costs of resources provided to them at public expense, and to receive fair and reasonable compensation for the services they would provide, these broad statements of policy must be read in the context of the entire policy, which also emphasizes the importance of competition, market forces, and the economic viability of each mode of transportation.

63 The National Transportation Policy sets out a number of competing principles and is intended to guide the decisions of the Agency. It is, per Saxton J.A. in *VIA Rail Canada Inc. v. Canadian*

Transportation Agency, 2005 FCA 79, [2005] 4 F.C.R. 473 (F.C.A.) at para 39, "...polycentric, meaning that it requires the Agency to balance competing principles". It does not establish a specific duty on the part of the Railways to charge rates below those mandated by the Agency to reflect decreasing HCMC.

64 Nor can the duty asserted by the Plaintiff be located in the express provisions of the *CTA* or its predecessor legislation. There is no express provision in the *CTA* mandating the adjustment of rates to account for decreased HCMC or indeed any other efficiency realized by the Railways. The elimination of the Costing Reviews mandated under the *WGTA* suggests, instead, an intention to move toward a less regulated regime and increasing freedom on the part of the Railways to establish freight rates. Indeed, the proposition that the Railways are obligated to charge rates based upon their own assessment of what is fair and reasonable, incorporating decreasing HCMC, and independent of the rates mandated in the legislation itself is inconsistent with both the MRS and MRE statutory regimes. An obligation on the part of the Railways to charge lower rates reflecting decreasing HCMC would render the MRS under Regime 2 unnecessary, since the maximum rate would be determined by an ongoing assessment of costs, not the MRS itself. Similarly, if the Railways are entitled to charge rates only in accordance with an assessment of costs, the establishment of MREs becomes a pointless exercise. There would be, as the Railways contend, no point to the Agency's annual VRCPI determinations or to the penalties for exceeding the MRE.

65 Finally, and perhaps most compellingly, it is impossible to square the Plaintiff's interpretation of the National Transportation Policy with Bill C-11 and the Hopper Car Decision itself. Had the Railways been under an obligation to charge rates based upon actual HCMC, there would have been no need for Clause 57, which directed the Agency to make a one-time only adjustment to the VRCPI to account for decreasing HCMC. Parliament's response to the proposition that the Railways' revenue entitlements were distorted by decreased HCMC was to mandate a one-time adjustment to the VRCPI, and it presumably would have mindful of the objectives it established in the National Transportation Policy when it did so.

66 In short, there is no obligation under the applicable legislation for the Railways to charge freight rates for regulated grain that are reflective of decreases over time in HCMC. The *CTA* is a comprehensive legislative regime under which the Agency is empowered to make certain determinations in regard to freight rates in accordance with the broad objectives set out in the National Transportation Policy. The regulatory regime effectively supplants any common law obligation on the part of Railways with regard to freight rates, and replaces it with an arrangement whereby the determination of appropriate maximum rates and railway revenues has been made by Parliament and the Agency. It is worth reiterating that the Plaintiff no longer contends that the Railways have charged rates or earned revenues in excess of the maximums established by Parliament and the Agency.

67 In the absence of a violation of the statute, the decisions cited by the Plaintiff in support of the proposition that restitution lies for benefits obtained in breach of the statutes of Canada are distinguishable. The Plaintiff points to *Elder Advocates*, wherein the Supreme Court allowed certification to proceed where the plaintiff alleged that the Government of Alberta had wrongfully inflated accommodation charges levied to elderly patients to subsidize medical expenses. In that case, however, the regulation under which the charges were levied was the subject of a Charter claim and, in the view of the Alberta Court of Appeal, it was arguable that the legislative scheme on the whole "...does not countenance the use of a charge for accommodation and meals for anything other than accommodation and meals." (2009 ABCA 403 (Alta. C.A.) at para 63). In the case at bar, the rates charged and revenues earned by the Railways were specifically allowed by Parliament and the Agency.

68 In *Apotex Inc. v. Abbott Laboratories Ltd.*, 2011 ONSC 3988 (Ont. S.C.J.), upon which the Plaintiff also relies, Swinton J. held that it was not plain and obvious that an unjust enrichment claim would fail where the defendant pharmaceutical manufacturer had initiated patent proceedings that, by virtue of the relevant legislation, prevented the plaintiff from manufacturing its own generic drug for a period of 24 months. Swinton J. concluded at para 18 that the matter could proceed because it was not plain and obvious that the legislation comprised a complete code. Swinton J. drew a contrast with the decision of the Supreme Court of Canada in *Gladstone v. Canada (Attorney General)*, [2005] 1 S.C.R. 325 (S.C.C.). In *Gladstone*, the issue was whether the Government of Canada was obligated to pay interest after it seized fish from the plaintiffs, sold the fish, and then determined to return the proceeds of the sale to the plaintiffs. Major J. concluded, at paras 16-18:

> An additional submission by the respondents was that the Crown was unjustly enriched by its retention of the proceeds during the time of seizure. This argument also fails. The test for unjust enrichment has three elements: (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and, (3) an absence of juristic reason for the enrichment...
>
> Assuming it can be established that there has been an enrichment of the Crown and a corresponding deprivation of the respondents, the element of "juristic reason" poses an unsurmountable hurdle in this appeal. The seizure, sale, and payment of the proceeds were lawfully carried out pursuant to the Act. The respondents rely upon *Manitoba v. Air Canada* (1978), 86 D.L.R. (3d) 631 (Man. C.A.), aff'd [1980] 2 S.C.R. 303, to support their claim that the Crown is not immune from the obligation to pay interest, even if the relevant legislation is silent on the matter. However, in my opinion, *Air Canada* is of no assistance because the issue in that case turned upon whether there was a lack of constitutional authority. There, the Crown collected taxes pursuant to an act that was *ultra vires* the province. This lack of legislative competence was central to that decision. This is not the case here. The constitutional authority of Parliament to enact the provisions of the *Fisheries Act* in question was not challenged.

The operation of the statutory provisions provides a "juristic reason" barring recovery...

69 The *CTA* and its predecessor legislation comprised an extensive and complete statutory regime governing the rates charged by the Railways in respect of the shipment of regulated grain. The operation of the statutory provisions and the charging of the rates and earning of revenues allowed under that legislative scheme provides a juristic reason barring restitution for unjust enrichment. While I agree with the Plaintiff that restitution is a flexible remedy and its ongoing evolution should not be unduly restrained, I cannot agree that it should extend to recovery of profits made in compliance with the terms of a regulatory regime.

(b) Identifiable Class of 2 or More Persons

70 The Class proposed by the Plaintiff is "[a]ll persons who delivered Grain (ie. Regulated Grain) to a Western Grain Delivery Point (an Elevator in Canada west of Armstrong, Ontario) between August 1, 1995 and July 31, 2007." The Railways' objection to this class definition is twofold. First, the Railways submit that certification of the class on the basis of delivery would involve an examination of each and every delivery of grain against each and every facility to which grain may be delivered, an extremely large and complex undertaking. Second, the Railways contend that the proposed class would necessarily include persons who would have no colourable claim against either of the Railways. This is because the proposed class would include all producers who delivered grain to an elevator, regardless of whether it was processed or moved as whole grain; moved by rail or by some other means; transported by regulated movement or not; and whether the rate paid by the shipper was or was not influenced by the alleged breach of the obligation to charge a rate based on actual HCMC.

71 An identifiable class is one which is capable of clear definition. The definition must state objective criteria by which class members can be identified, and those criteria must bear a rational relationship to the common issues asserted by the class members, but they must not depend upon the outcome of the litigation. While it is not necessary for each class member to be known, the criteria must not be such that the class is unbounded. A class should not be unnecessarily broad or narrow.

72 For the purpose of determining whether the proposed class meets the required criteria, it is helpful to assume that the Plaintiff has pleaded a valid cause of action. The question is, if we are to assume that the Railways unjustly inflated the rates they charged for the shipment of regulated grain, would the Railways' objections to the proposed class definition warrant a refusal to certify the claim?

73 The crux of the dispute between the parties on this point is well illustrated by their reliance upon different parts of the Alberta Court of Appeal decision in *Windsor v. Canadian Pacific Railway*, 2007 ABCA 294 (Alta. C.A.). The Railways point to that decision, at para 19:

> A class definition should not be overly broad and should not include persons who have no claim against the defendants. The plaintiff must establish that the class could not be defined more narrowly without arbitrarily excluding persons with claims similar to those asserted on behalf of the proposed class.

The Plaintiff relies upon para 24:

> While it is desirable to have as many of the potential claimants in the class as possible, the law does not require perfection, so long as the class is identifiable. As the Court said in *Hollick*, "While the appellant has not named every member of the class, it is clear that the class is bounded (that is, not unlimited)." The pursuit of a definition of the class that would include every possible claimant, but exclude every non-claimant, is likely to result in a merit based and, therefore, inappropriate definition...

74 A lengthy discussion of the issues that arise from attempting to ensure that a class is not overly broad without resorting to merits-based criteria is contained in *Ragoonanan Estate v. Imperial Tobacco Canada Ltd.* (2005), 78 O.R. (3d) 98 (Ont. S.C.J.); aff'd (2008), 54 C.P.C. (6th) 167 (Ont. Div. Ct.). In that case, certification was rejected because all of the proposed definitions were unacceptably merit-based. However, in the course of coming to that conclusion Cullity J. held, at paras 11-12:

> It is argued that a proposed class that contains persons who will not have valid claims is unacceptably over-inclusive, while a class that "arbitrarily" excludes persons who have — or may have — valid claims is under-inclusive. I adhere to the view I have expressed in other cases that neither of the suggested restrictive rules is supported by the following passage from the reasons of the Chief Justice in Hollick, at paras. 20-21, that is commonly relied on as authority for each of them:
>
> > It falls to the putative representative to show the class is defined sufficiently narrowly.
> >
> > The requirement is not an onerous one. The representative need not show that everyone in the class shares the same interest in the resolution of the asserted common issue. There must be some showing, however, that the class is not unnecessarily broad — that is, that the class could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issue. Where the class could be defined more narrowly, the court should either disallow certification or allow certification on condition that the definition of the class be amended...
>
> I understand that passage to accept a concept of over-inclusiveness confined to cases where more narrow class definitions would be possible without arbitrarily excluding persons who share the same interest in the resolution of the common issues. I do not understand it to imply that a plaintiff cannot choose — arbitrarily or otherwise — the persons whom he,

> or she, wishes to represent, or that the only class proceedings permissible are those where the class contains everyone with the same interest. Rather than supporting either of the suggested rules of class definition, it seems to me that the Chief Justice was recognizing that an "over-inclusive" class contemplated by the first of those rules is permitted if a more narrow definition would arbitrarily exclude persons whose claims the plaintiff wishes to enforce. A class may be over-inclusive if necessary but not necessarily over-inclusive.

75 The Railways point to *Cuff v. Canadian National Railway*, 2007 ABQB 761 (Alta. Q.B.), wherein Belzil J. held at para 38 that "...it surely is a requirement that all class members be able to advance at least one cause of action." It is worth pointing out that Belzil J. made that determination in the course of his consideration of the merits of the causes of action pleaded, and after concluding that the proposed class definition was acceptable. It is clear from the authorities that the possibility that some members of the class might not have a claim is not, in and of itself, a disqualifying factor. This was clearly recognized by Rooke J. (as he then was) in *Windsor* at para 91: "[i]n my opinion, the identifiable class requirement is a low threshold issue. Overinclusion, under-inclusion, or both, are not fatal as long as they are not illogical or arbitrary."

76 Both sides acknowledge the essential impossibility of determining how every delivery of Grain to a Western Grain Delivery Point was ultimately shipped. But this is not a case, such as *Mouhteros v. DeVry Canada Inc.* (1998), 41 O.R. (3d) 63 (Ont. Gen. Div.), wherein it is immediately clear that the proposed definition contains an identifiable group of people who would have no claim. In my view it is much more analogous to *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503 (B.C. C.A.) , leave to appeal to SCC refused [2010] S.C.C.A. No. 32 (S.C.C.). The allegation in that case was that the defendants had acted as a cartel, artificially increasing the price of a computer memory chip. The proposed class of plaintiffs consisted of indirect purchasers, ie. individuals who bought computers containing the memory chip at issue, but who did not purchase the chips directly from the defendants. The obviously complex and varied means by which the memory chips had been sold to manufacturers, incorporated into a range of different devices, then sold to wholesalers, to retailers, and to the public, rendered the determination of liability to individual computer purchasers a difficult and ultimately somewhat speculative endeavour. Nevertheless, the Court concluded, in part on the basis of expert evidence to the effect that it would be difficult but possible through statistical analysis to establish the cost of the defendants' wrongful conduct to members of the class, that the claim should be certified.

77 The Railways distinguish *Pro-Sys Consultants* on the basis that there, at least, all members of the class had purchased the memory chip at issue. Here, they contend, it is not possible to determine whether any individual farmer delivering Grain to a Western Grain Delivery Point had his or her product transported via regulated shipment. I appreciate the distinction and the case at bar may reflect the outer limit of what is acceptable in terms of the potential overbreadth of the class. Nevertheless, the test requires an identifiable class and rational connection between the class and the common issues. The standard is low enough to admit of the possibility that the class definition

will encompass individuals who may not have a claim. In my view, if one is to assume that the freight rates charged for the shipment of regulated grain were unjustly inflated by the Railways, the proposed class definition is sufficiently limited and rationally connected to the common issues. This is not to say, however, that the issues proposed by the Plaintiff are sufficiently common to meet the next part of the test.

(c) Common Issues

78 As with the determination of the appropriate class definition, the assessment of whether the claims of the proposed class members raise a common issue is complicated due to the conclusion that the pleadings themselves do not raise a viable cause of action. It is necessary to assume, in this analysis, that I am wrong in this conclusion and that the Railways could be found to have breached a duty to charge freight rates for the transportation of regulated grain on the basis of Actual HCMC.

79 The Plaintiff proposes the following common issues:

> (a) Between August 1, 1995 and July 1, 2007, did the Defendants charge grain shipping rates that were based on Overstated HCMC and which were therefore contrary to the intent and policy of the *BIA, 1995*, *CTA, 1996*, *CTA, 2000*, and *Railway Costing Regulations*?
>
> (b) If so, are class members entitled to restitution of the amount by which the Defendants' Embedded HCMC exceeded their Actual HCMC between August 1, 1995, and July 31, 2007? If so, can that amount be awarded as an aggregate monetary award, including on an average or proportionate basis? and
>
> (c) Are the Defendants liable to pay pre-judgment interest with respect of Overstated HCMC? If so, in what amount?

80 The first common issue raises two questions: one is factual, the second a question of interpretation. The latter, which is whether grain shipping rates which did not exceed the amounts allowed under the MRS and MRE regimes were nevertheless contrary to Parliament's intent and policy, is essentially the issue that I have determined does not form the basis of a valid cause of action.

81 The factual question, which is framed as whether the Railways charged grain shipping rates based on "overstated HCMC", must be considered in light of the changing nature of the Plaintiff's claim. As I understand it, the Plaintiff no longer alleges that the Railways wrongfully overstated HCMC in the 1994 Costing Review. So the factual inquiry is better framed as whether the Railways charged grain shipping rates based on "embedded" HCMC, which then leads to the legal inquiry into whether those rates were contrary to Parliament's intent.

82 The common issue requirement was described by McLachlin C.J.C. in *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534 (S.C.C.) at para 39:

> Commonality tests have been a source of confusion in the courts. The commonality question should be approached purposively. The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus an issue will be "common" only where its resolution is necessary to the resolution of each class member's claim. It is not essential that the class members be identically situated *vis-à-vis* the opposing party. Nor is it necessary that common issues predominate over non-common issues or that the resolution of the common issues would be determinative of each class member's claim. However, the class members' claims must share a substantial common ingredient to justify a class action. Determining whether the common issues justify a class action may require the court to examine the significance of the common issues in relation to individual issues. In doing so, the court should remember that it may not always be possible for a representative party to plead the claims of each class member with the same particularity as would be required in an individual suit.

83 The questions of class definition and common issues are closely connected and in the course of argument and analysis, the questions can become confused. To be clear, when considering whether a class action should be certified under section 5(1)(b), the essential question is whether the proposed class definition itself is objectively determinable and rationally connected to the matters at issue in the action. An affirmative answer to that question does not resolve the question of whether the issues identified by the plaintiff are sufficiently common across the class.

84 At this stage, it is important to reiterate a number of facts concerning the sale and shipment of grain in Western Canada. Grain producers do not pay the Railways directly for the shipment of grain. Nor do they pay grain handlers for the shipment of grain. Instead, at all relevant times, grain producers would sell their grain to either the CWB or to grain handlers, who then paid the Railways, if the grain was shipped by rail, for shipping. Grain sold to the CWB was subject to the FCR fee regardless of whether it was ultimately shipped via regulated rail movement or not, and the FCR fee itself was not determined solely on the basis of the Railways' rates, nor on the basis of what the CWB actually paid to ship the grain (by rail or otherwise). Farmers who sold grain directly to grain handlers could expect that the grain handlers' shipping costs would be factored into the purchase price, but again there was no way for the farmer to know whether the grain would be shipped by rail, or if it was, by regulated movement, and if it was, whether the grain handler had the benefit of one of the reduced rates frequently offered by the Railways. As the Railways point out, what is known is that the freight rates charged by the Railways under the MRS and MRE regimes were not experienced by farmers in common. Freight rates were charged pursuant to individual contracts between the Railways and specific shippers, and varied significantly as a result of competition in particular markets and capacity. The amount that an individual farmer

may have seen notionally "deducted" by a shipper from the purchase price for a delivery of grain may have borne no relationship to regulated freight rates at all. This is not merely an issue of the assessment of damages; because of the commingling of grain on delivery and the uncertainties inherent in the transportation system, it is in fact not possible to determine that the purchase price paid to any particular producer would have incorporated an element of embedded HCMC. This is a liability issue.

85 The Plaintiff contends that the potential for an award of aggregated damages effectively overcomes the liability obstacles posed by the indirect connection between grain producers and Railways and the uncertainties arising out of the different means by which grain could be shipped. Section 30 of the *CPA* provides:

> 30(1) The Court may make an order for an aggregate monetary award in respect of all or any part of a defendant's liability to class members or subclass members and may give judgment accordingly if
>
> (a) monetary relief is claimed on behalf of some or all class members or subclass members,
>
> (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability, and
>
> (c) the aggregate or a part of the defendant's liability to some or all class members or subclass members can, in the opinion of the Court, reasonably be determined without proof by individual class members or subclass members.
>
> (2) Before making an order under subsection (1), the Court is to provide the defendant with an opportunity to make submissions to the Court in respect of any matter touching on the proposed order, including, without limitation,
>
> (a) submissions that contest the merits or amount of an award under subsection (1), and
>
> (b) submissions that individual proof of monetary relief is required due to the individual nature of the relief.

86 The Ontario Court of Appeal considered a somewhat similar set of circumstances in *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 (Ont. C.A.) , leave to appeal to SCC refused, [2003] S.C.C.A. No. 106 (S.C.C.). In that case, it was alleged that the defendants had engaged in a price-fixing scheme in relation to colour brick and paving stones that inflated the cost of new homes. The motions judge certified the class proceeding, but both the Divisional Court and the Court of Appeal concluded that the indirect nature of the relationship between the cost of the bricks and the purchase price of homes posed an insurmountable hurdle. At paras 30-31, Feldman J.A. held:

> In my view, with respect, the motion judge erred by relying on the expert evidence filed by the appellants as the basis for the certification order... The expert's models are based on the assumption of a full pass-through of the price increase of the iron oxide to the homebuyers. However, it is that assumption that is the very issue that the court must be satisfied is provable by some method on a class-wide basis before the common issue can be certified as such.
>
> The motion judge relied on the opinion of the appellants' expert that "there would be a measurable price impact upon the ultimate consumer of the building products containing the iron oxide pigment". However, the fact that any price impact may be "measurable" goes only to the issue of how the damages can be calculated and distributed, not whether the inflated price charged to the direct buyers of the product was passed through to all of the ultimate consumers. The issue of whether there would be a price impact on all ultimate consumers of iron oxide coloured products, i.e., a pass-through to the class members of the inflated price charged by the respondents to their direct buyers, was what the expert assumed, but he did not indicate a method for proving, or even testing that assumption.

87 The Plaintiff relies upon the decision of the Ontario Court of Appeal in *Markson v. MBNA Canada Bank*, 2007 ONCA 334 (Ont. C.A.), leave to appeal to SCC refused, [2007] S.C.C.A. No. 346 (S.C.C.). In that case, it was alleged that the defendant had charged interest to credit card holders who had obtained cash advances in excess of rates allowed under section 347 of the *Criminal Code*, RSC 1985, c C-46. The motions judge and the Divisional Court declined to certify the proceedings in part because the issue of liability would turn on a vast number of individual assessments in respect of individual cardholders. Rosenberg J.A. disagreed, holding at para 44 that the class could be certified where "there is a reasonable likelihood that the preconditions in section 24(1) of the *Ontario Act* (which is identical to s.30(1) of the *CPA*) would be satisfied and an aggregate assessment made if the plaintiffs are otherwise successful at a trial for common issues". He further held, at para 48:

> Section 24(3) provides, in part, that, "In deciding whether to make an order under subsection (2), the court shall consider whether it would be impractical or inefficient to identify the class members entitled to share in the award." The subsection therefore contemplates that an aggregate award will be appropriate notwithstanding that identifying the individual class members entitled to damages and determining the amount cannot be done except on a case-by-case basis, which may be impractical or inefficient. Condition (b) must be interpreted accordingly. *In my view, condition (b) is satisfied where potential liability can be established on a class-wide basis, but entitlement to monetary relief may depend on individual assessments*. Or, in the words of s. 24(1)(b), where the only questions of fact or law that remain to be determined concern assessment of monetary relief.
>
> (Emphasis added).

88 The Plaintiff also relies upon *Pro-Sys Consultants* which, inasmuch as it deal with a claim in restitution to recover amounts indirectly paid to the defendants, bears some similarity to circumstances in the case at bar. In *Pro-Sys Consultants*, the motions judge relied upon *Chadha* in support of the proposition that the aggregation provisions are for the purpose of distributing damages, and could not be relied upon where liability could not otherwise be established on a class-wide basis. The Court of Appeal allowed certification because there was evidence that a statistical analysis would allow for the determination of whether the purchase price paid by any individual plaintiff was impacted by the defendants' wrongful conduct. In this regard, *Pro-Sys Consultants* is distinguishable from *Chadha*, wherein Feldman J.A. noted, at para 52:

> In my view, the motion judge erred in finding that liability could be proved as a common issue in this case. The evidence presented by the appellants on the motion does not satisfy the requirement prescribed by the Supreme Court in Hollick of providing sufficient evidence to support certification. The evidence of the appellants' expert assumes the pass-through of the illegal price increase, but does not suggest a methodology for proving it or for dealing with the variables that affect the end price of real property at any particular point in time. The motion judge focused on the expert's opinion that the loss could be measured, rather than on how any such loss could first be established on a class-wide basis.

89 The problem confronted by the Plaintiff in the case at bar is essentially identical to that faced by the plaintiffs in *Chadha*. John Edsforth, an expert in transportation economics, provided an Affidavit setting out his methodology and conclusion that "...for the crop years 1994-1995 through 2006-2007 the aggregate amount by which the statutory grain regulatory methodologies over-stated the revenue cap because of freight car costs was $577 million, or $1.66 per tonne." Jim Riegle, a former employee of the CTA with a thorough knowledge of the Western grain industry and the economics of hopper car maintenance, provided a report setting out a methodology by which an aggregate award of damages may be distributed. Neither demonstrates how liability can be determined on a class-wide basis.

(d) Preferable Procedure

90 Under section 5(2) of the *CPA*, the Court is required to consider five factors in determining whether a class action is the preferable procedure for the fair and efficient resolution of the common issues: (1) whether the common issues predominate over individual issues; (2) whether individual members have a valid interest in pursuing separate actions; (3) whether any of the claims are or have been the subject of other proceedings; (4) whether other means of resolving the claims are less practical or efficient; and (5) whether the administration of the class proceeding would create undue difficulty. The Court is required to take a purposive approach to the interpretation of these factors, testing them against the objectives of the *CPA*.

Predominance of Common Issues

91 The Plaintiff contends that, because the question is whether the Railways charged rates on a class wide basis that were unfair and unreasonable, individual inquiries into how much each particular class member was wrongfully charged for the transportation of grain will not be necessary. The Plaintiff points to the potential for an aggregate monetary award in this regard. In the alternative, he contends that a predominance of individual issues alone is not dispositive of the issue: *L. (T.) v. Alberta (Director of Child Welfare)*, 2009 ABCA 182 (Alta. C.A.), at para 25.

92 The Railways contend that the common issues in this claim would be overwhelmed by individual issues. They point out that any particular member of the class will only have a cause of action in the event he or she can establish that, at the time of the sale of grain to the GHC or to the CWB, the rate paid by the GHC or the CWB was influenced by the alleged breach of duty and that the overcharge was then passed on in the form of a lower price by the GHC or CWB to the individual grain producer. The number of grain producers who are potentially members of the class ranges from an estimated 115,000 to 142,000, making multiple deliveries to thousands of different delivery points. Reiterating the argument in respect of common issues, the Railways point out that answering the question of whether the Railways charged rates that unjustly incorporated excessive amounts for HCMC will not answer the question of liability in respect of any particular delivery of grain and therefore each individual class member will be required to demonstrate that the purchase price of their grain was affected by excessive rates charged by the Railways to the GHCs. Complicating the matter further, the Railways point out that the existence of individual defences, such as limitations.

93 It follows from my conclusion with respect to the absence of appropriately dispositive common issues that the individual determinations of liability required would be significant and in my view would overwhelm the common issues. It is appropriate at this stage to consider the further effect of the Railways' limitations defences.

94 This action was commenced on April 16, 2010, and it relates to transactions occurring prior to April 16, 2008. As the Railways' point out, per section 3(1)(a) of the *Limitations Act*, RSA 2000, c L-12, the claim is *prima facie* statute-barred, unless it can be established that members of the proposed class did not know or ought to know of the existence of a claim. The issue here is not whether the Railways' limitations defence would ultimately prevail, but whether the existence of a *bona fide* limitations defence, in the context of this claim, further raises the spectre of individual issues overwhelming common ones. The Plaintiff points out that the existence of individual limitations defences is not necessarily dispositive. For example, in *Kristal Inc. v. Nicholl & Akers*, 2006 ABQB 168 (Alta. Q.B.), rev'd (on other grounds): 2007 ABCA 162 (Alta. C.A.), this Court concluded, at para 126:

> The presence of a triable limitation defence may challenge the bifurcated process because it superimposes individual determinations on an issue which, if resolved in favour of the

> Defendants, operates as a defence providing immunity. It may require the discovery of class members. It is possible that it will create individual inquiries, but this is not a case like *Mouhteros* where, at para. 31, the court stated that "what common issues there may be are completely subsumed by the plethora of individual issues, which would necessitate individual trial for virtually each class member". In this case, the limitations issue may play a role in the ultimate determination of liability; however, given the common elements in the circumstances of this case, I am of the view that it plays a less significant role in comparison with the resolution of the common issues.

95 There is, however, considerable authority for the proposition that where a limitations defence raises the prospect that the application of the principle of discoverability will require individual inquiries of a each member of the class, the individual issues may be found to dominate and therefore function as a bar to certification: *Daniels v. Canada (Attorney General)*, 2003 SKQB 58 (Sask. Q.B.), leave to appeal to SCC refused [2003] S.C.C.A. No. 223 (S.C.C.); *Buffalo v. Samson Cree Nation*, 2008 FC 1308 (F.C.), aff'd 2010 FCA 165 (F.C.A.); *Alberta Municipal Retired Police Officers' Mutual Benefit Society v. Alberta*, 2010 ABQB 458 (Alta. Q.B.). In *Knight v. Imperial Tobacco Canada Ltd.*, 2005 BCSC 172 (B.C. S.C.), aff'd 2009 BCCA 541 (B.C. C.A.), and in *Graham v. Imperial Parking Canada Corp.*, 2010 ONSC 6217 (Ont. S.C.J.), aff'd 2011 ONSC 991 (Ont. Div. Ct.), the courts amended class definitions to exclude those class members whose claims arose outside of the limitation periods, but this approach is not available here, where all of the claims fall outside the 2-year period in Alberta's *Limitations Act*. The discoverability issue applies to every member of the class and, as I have noted above, the potential scope of that class is vast.

96 With respect to the limitation issue, it is my conclusion that an individual inquiry of each class member would be necessary to determine liability. As such, and taken together with the individual issues raised by the manner in which grain is sold and transported in Western Canada, and the difficult issue of whether the Railways' freight rates are passed on the grain producers in respect of each sale, individual issues would vastly predominate and a class proceeding would not therefore be the preferable procedure.

Controlling Proceedings and Other Proceedings

97 I agree with the Plaintiff that there is no evidence that any other prospective class members have demonstrated a valid interest in individually controlling the prosecution of separate actions. I further agree that, while there appear to be claims advanced in the Province of Saskatchewan, there is no advantage asserted to proceeding there.

Other Means of Resolving the Claim

98 Whether other means of resolving the claim would be less practical or less efficient will, in many cases, be closely connected to the question of whether individual issues predominate. In the

case at bar, resolving the proposed common issues will not resolve the key issue of liability to class members and therefore it is unlikely to prove significantly more efficient than individual trials.

Administration of the Class Proceeding

99 In *Kristal Inc.*, this Court held, at para 130:

> The CPA specifically contemplates resolution of both common and individual issues. S. 12 outlines the stages of class proceedings and provides that common issues are to be determined together and individual issues are to be determined according to ss. 28 and 29. The Court may give separate judgment in respect of these different sets of issues. In light of this, I do not see how the administration of a class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

100 The Railways contend that the issue is closely connected to the questions of whether the claim as pleaded raises a valid cause of action and whether individual issues predominate. The issue here is whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means. It is difficult to envision a circumstance where (as here) individual issues vastly predominate common ones, and yet a proposed class proceeding passes this hurdle. Moreover the preferability analysis at this stage should take account of the whole range of alternatives to a class proceeding, including test cases, consolidation, and joinder. In view of the range of individual issues arising out of the different jurisdictions, issues of discoverability, different delivery points and the different ways in which producers sold grain for shipment, in my view the administration of this class action would create greater difficulties than if various producers' or groups of producers' claims were to proceed separately.

Other Factors

101 The factors enumerated in section 5(2)(a) through (e) of the *CPA* are not exclusive and the Court may also consider any other relevant matter in determining whether a class proceeding is the preferable procedure. At this stage it is appropriate to also consider whether the class proceeding on the whole would advance the principles of judicial economy, access to justice and behaviour modification.

102 In view of the highly complex nature of the liability claims and the potential availability of individual limitation defences to a vast number of claims, it is my view that the proposed class action would not advance the principle of judicial economy and access to justice.

103 With respect to behaviour modification, it is worth pointing out that the Railways operate within a highly regulated environment. A number of authorities noted that a class proceeding may not be the ideal means of advancing the objective of behaviour modification where there is an

existing regulatory regime that may more adequately serve that function: see *Chadha* at para 62; *Penney v. Bell Canada*, 2010 ONSC 2801 (Ont. S.C.J.) at para 190. This is particularly compelling where, as here, the relevant authorities (Parliament and the Agency) have already taken remedial action in the form of Clause 57 and the Hopper Car decision, to address the very conduct the Plaintiff complains of. In my view, therefore, a class proceeding is not the appropriate means by which behaviour modification may be advanced.

(e) Adequate Representative Plaintiff

104 The requirements for an adequate representative plaintiff are set out in section 5(1)(e). In argument, the Railways have emphasized the evidentiary difficulties confronted by Mr. Jackson in establishing that he has a cause of action and in meeting the Railways' limitations defences. As I have noted above, these are likely to apply to all members of the class and are therefore more appropriately addressed elsewhere. In my view, a determination of Mr. Jackson's fitness as class representative should focus upon the factors set out in the *CPA*. These are whether he would fairly and adequately represent the interests of the class; has produced a plan for the proceeding that sets out a workable method; and that he does not have, in respect of the common issues, an interest that is in conflict with the interests of the other prospective class members.

105 The Railways have not produced any evidence that would suggest that Mr. Jackson would not fairly and adequately represent the interests of the class. They argue that he has not been well informed in the course of the litigation to date but I do not find their complaints in this regard to be fatal. Mr. Jackson is undoubtedly a member of the class as defined. There is no evidence of a potential conflict of interest with other prospective class members.

106 This leaves for consideration the issue of whether Mr. Jackson has produced an adequate plan workable method for these proceedings. The necessary elements of a working plan were set out by Topolniski J. in *Paron v. Alberta (Minister of Environmental Protection)*, 2006 ABQB 375 (Alta. Q.B.), at para 130:

> (i) the steps that are going to be taken to identify necessary witnesses and to locate them and gather their evidence;
>
> (ii) the collection of relevant documents from members of the class as well as others;
>
> (iii) the exchange and management of documents produced by all parties;
>
> (iv) ongoing reporting to the class;
>
> (v) mechanisms for responding to inquiries from class members;
>
> (vi) whether the discovery of individual class members is likely and, if so, the intended process for conducting those discoveries.

107 The Plaintiff's First Proposed Workable Method does not set out the steps that are going to be taken to identify necessary witnesses, and to collect relevant documents. However, contrary to the Railways' assertions, there is some provision for the exchange and management of documents, notice, reporting and responding to members of the class and discovery.

108 There are defects in the Plaintiff's First Proposed Workable Method that in my view would have to be remedied in short order if this matter were to proceed to certification. However, those defects are not in and of themselves sufficient to warrant a refusal to certify this proceeding.

109 In conclusion, Mr. Jackson has satisfied the requirements of section 5(1)(e) and would be an appropriate representative plaintiff.

Conclusion on Certification

110 The Second Amended Statement of Claim fails to disclose a reasonable cause of action and therefore the Plaintiff's application for certification is denied. Furthermore, it is clear that given the complexities that arise from the question of whether the Railways' freight rates, based in part on allegedly inflated HCMC, were passed through to the producers of grain in the form of lower purchase prices, and from the limitations defences available to the Railways, individual issues would vastly overwhelm common ones and I would further deny certification on this basis.

7. The Summary Judgment Application

111 The test for summary judgment is different from the test for certification. Typically, it is evidence-based, and requires consideration of different factors and the merits of the claim put forward by the representative Plaintiff. Rule 7.3 of the *Alberta Rules of Court* provides:

> 7.3(1) A party may apply to the Court for summary judgment in respect of all or part of a claim on one or more of the following grounds:
>
> (a) there is no defence to a claim or part of it;
>
> (b) there is no merit to a claim or part of it;
>
> (c) the only real issue is the amount to be awarded.
>
> (2) The application must be supported by an affidavit swearing positively that one or more of the grounds described in subrule (1) have been met or by other evidence to the effect that the grounds have been met.
>
> (3) If the application is successful the Court may, with respect to all or part of a claim, and whether or not the claim is for a single and undivided debt, do one or more of the following:

> (a) dismiss one or more claims in the action or give judgment for or in respect of all or part of the claim or for a lesser amount;
>
> (b) if the only real issue to be tried is the amount of the award, determine the amount or refer the amount for determination by a referee;
>
> (c) if judgment is given for part of a claim, refer the balance of the claim to trial or for determination by a referee, as the circumstances require.

112 In determining whether a claim has no merit under Rule 7.3(1)(b), the test to be applied was set out by the Supreme Court of Canada in *Papaschase Indian Band No. 136 v. Canada (Attorney General)*, 2008 SCC 14, [2008] 1 S.C.R. 372 (S.C.C.) at para 11:

> The defendant who seeks summary dismissal bears the evidentiary burden of showing that there is "no genuine issue of material fact requiring trial"... The defendant must prove this; it cannot rely on mere allegations or the pleadings... If the defendant does prove this, the plaintiff must either refute or counter the defendant's evidence, or risk summary dismissal... Each side must "put its best foot forward" with respect to the existence or non-existence of material issues to be tried... The chambers judge may make inferences of fact based on the undisputed facts before the court, as long as the inferences are strongly supported by the facts...

113 The Plaintiff has placed considerable reliance upon the decision of the Ontario Court of Appeal in *Combined Air Mechanical Services Inc. v. Flesch*, 2011 ONCA 764 (Ont. C.A.). In *Combined Air*, the Court considered the effect of recent amendments to the summary judgment rules in the Province of Ontario. The amendments were intended to expand the limits that Ontario jurisprudence had placed on a judge's power to assess the evidence in determining whether there is a genuine issue for trial. Under the amended Rule 20, judges in Ontario would be able to weigh the evidence, evaluate the credibility of a deponent and draw inferences from the evidence. Judges would also be able to order that oral evidence be presented.

114 In considering the proper application of the amended Rule, the Court held, at paras 50-51:

> In deciding if these powers should be used to weed out a claim as having no chance of success or be used to resolve all or part of an action, the motion judge must ask the following question: can the full appreciation of the evidence and issues that is required to make dispositive findings be achieved by way of summary judgment, or can this full appreciation only be achieved by way of a trial?
>
> We think this "full appreciation test" provides a useful benchmark for deciding whether or not a trial is required in the interest of justice. In cases that call for multiple findings of fact on the basis of conflicting evidence emanating from a number of witnesses and found in a voluminous record, a summary judgment motion cannot serve as an adequate substitute for

> the trial process. Generally speaking, in those cases, the motion judge simply cannot achieve the full appreciation of the evidence and issues that is required to make dispositive findings. Accordingly, the full appreciation test is not met and the "interest of justice" requires a trial.

115 The Plaintiff contends that the effect of *Combined Air* is that there must be no other evidence that is not before the Court that could shed light on the issues before the Court may grant summary judgment, and further that a defendant's onus is much higher and the plaintiff's much lower when summary judgment is sought prior to the completion of document discovery and questioning. With respect, this is neither the law with respect to summary judgment in Alberta nor, in my view, the proper interpretation of *Combined Air*. It is important to note that the Court in *Combined Air* was considering the newly expanded powers of Chamber Judges hearing summary judgment applications under a rule that is significantly different from Rule 7.3(1). At para 56, the Court made it clear that the evidentiary obligations described in *Lameman* continued to apply, and though the Court did suggest, at para 57, that it may be more difficult to determine that a matter is suitable for summary disposition early in the litigation process (ie. prior to discovery), it did not suggest that a different onus applied. In any event, I agree with the Railways that the essence of the "full appreciation test", as described in para 74 of *Combined Air*, is:

> ...whether [the motions judge] can achieve the full appreciation of the evidence and issues that is required to make dispositive findings on the basis of the motion record... or if the attributes of the trial process require that these powers only be exercised at trial.

116 In essence, the full appreciation test requires a judge to be certain that she can dispose of the issue given the motion record. It does not require the judge to refuse an application for summary judgment on speculation that there might be some other evidence that could shed light on the issues. The Court in *Lameman* pointed out, at para 19:

> We add this. In the Court of Appeal and here, the case for the plaintiffs was put forward, not only on the basis of evidence actually adduced on the summary judgment motion, but on suggestions of evidence that might be adduced, or amendments that might be made, if the matter were to go to trial. A summary judgment motion cannot be defeated by vague references to what may be adduced in the future, if the matter is allowed to proceed. To accept that proposition would be to undermine the rationale of the rule. A motion for summary judgment must be judged on the basis of the pleadings and materials actually before the judge, not on suppositions about what might be pleaded or proved in the future...

117 Similarly, in *Combined Air* the Court held, at para 56: "[o]n a motion for summary judgment, a party is not 'entitled to sit back and rely on the possibility that more favourable facts may develop at trial'".

118 In Alberta, the test remains as described in *Murphy Oil Co. v. Predator Corp.*, 2006 ABCA 69 (Alta. C.A.) at para 25:

> The analysis of a summary judgment application is performed in two stages. In the first, the moving party must adduce evidence to show that there is no genuine issue for trial. Once the moving party has met that burden, the responding party may adduce evidence to persuade the court that there remains a genuine issue to be tried. It may choose to adduce no evidence, but then bears the risk that the judge will decide that the evidence adduced by the moving party has established that there is no genuine issue to be tried.

119 In *Tottrup v. Clearwater (Municipal District) No. 99*, 2006 ABCA 380 (Alta. C.A.), the Alberta Court of Appeal described two different categories of summary judgment applications, at paras 10-11:

> Applications for summary judgment or summary dismissal can take many forms. In some cases the application is simply based on the factual merits of the case. In other words, the applicant argues that it can prove its case on the facts without a trial...
>
> There are, however, other types of summary judgment applications. In some cases the facts are clear and undisputed. The ultimate outcome of the case may depend on the interpretation of some statute or document, or on some other issue of law that arises from undisputed facts. In such cases the test for summary judgment is not whether the issue of law is "beyond doubt", but whether the issue of law can fairly be decided on the record before the court. If the legal issue is unsettled or complex or intertwined with the facts, it is sometimes necessary to have a full trial to provide a proper foundation for the decision. In other cases it is possible to decide the question of law summarily...

(a) Cause of Action in Restitution

120 It follows from my conclusion in respect of the cause of action, in the course of the certification analysis above, that this application for summary judgment falls into the second category described in *Tottrup*. That is, this is a case in which the facts are largely clear and undisputed, and the ultimate outcome depends upon the interpretation of a statute. The statute is the *CTA*.

121 It is worth pointing out the extent to which Parliament addressed the minutiae when it repealed the *WGTA* in favour of the *NTA* and then the *CTA*. The MRS for the 1995 - 1996 crop year was expressly set by Parliament in the *BIA, 1995*. It was thereafter set by the Agency, using the baseline figures set by Parliament and then applying the Freight Rate Multiplier, a complex formula expressly set out in the *CTA*. This was legislated arithmetic.

122 The Plaintiff contends that, while the freight rates were properly set in accordance with Parliament's instructions as embodied in the *CTA*, the Railways breached the "spirit" of the legislation in charging to the maximum of their entitlements. But there is no better indication

of the spirit of the *CTA*, as regards freight rates for regulated grain, than the actual numbers and complex mathematical formula Parliament chose to include in the legislation. The Plaintiff contends that, notwithstanding the Railways' compliance with the letter of the legislation (insofar as the Plaintiff no longer contends that the Railways charged rates or earned revenues in excess of the maximum allowed under the *CTA*) the Railways nevertheless breached the spirit because they charged and earned those "maximums". But there are a number of problems with this suggestion that compliance with the letter of the letter of the legislation is nevertheless a violation of its spirit.

123 First, and contrary to the Plaintiff's contention, the *CTA* and the National Transportation Policy it contains at section 5 do not raise a complex issue of statutory interpretation. It is clear from the provisions of the *CTA* that section 5 is intended as a purpose statement in respect of transportation in Canada, and the provisions governing freight rates for regulated grain must be interpreted as having been made in furtherance of the broad objectives set out therein. The conflict between "spirit" and "letter" of the legislation does not exist. Second, the Plaintiff's interpretation of the interaction between the National Transportation Policy and the provisions setting out MRS and MREs would essentially render the latter meaningless, because notwithstanding those provisions, the Railways would always have been required to charge what is "fair". This would place the Railways in the impossible position of having to incorporate an element of fairness into every rate they charged. Moreover, under the Plaintiff's interpretation, there would be no reason to limit this element of fairness to hopper car maintenance costs; assuming section 5 of the *CTA* requires Railways to charge only rates that are "fair and reasonable", one would be forced to conclude that efficiencies in fuel consumption or labour costs would also have to be incorporated into the Railways' rates. This cannot have been what Parliament intended when it eliminated costing reviews with the repeal of the *WGTA*.

124 The Plaintiff contends that the law of restitution is developing and though his claim may in some senses be novel, it would be inappropriate to grant summary judgment so as to rigidly limit the categories of restitution. I agree that the courts must remain open to a careful consideration of new categories of restitution, but I am not prepared to go so far as to expand the category of unjust enrichment to encompass the charging of rates or earning of revenues in compliance with the letter but not the claimed "spirit" of legislation, even if I were to have concluded that there is a conflict between those two things in the *CTA*. The principle that there must be no juristic reason for the enrichment is well entrenched and not in my view open to challenge. I can think of few more compelling examples of juristic reason than in the case at bar, where it is conceded that the Railways have charged freight rates and earned revenues that were at all times in compliance with the clearly legislated arithmetic set out in the *CTA*. On this basis I grant the Railways' application for summary judgment.

(b) Limitations

125 Section 3 of the *Limitations Act* provides:

> 3(1) Subject to section 11, if a claimant does not seek a remedial order within
>
> (a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,
>
> (i) that the injury for which the claimant seeks a remedial order had occurred,
>
> (ii) that the injury was attributable to conduct of the defendant, and
>
> (iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding,
>
> or
>
> (b) 10 years after the claim arose,
>
> whichever period expires first, the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.

126 The Plaintiff's claim is for restitution for amounts he alleges the Railways wrongfully charged him from between August 1, 1995 and July 31, 2007. The Plaintiff's initial Statement of Claim was issued on April 16, 2010. The Railways argue that the various provisions of the *Limitations Act* operate so as to bar the entirety of the Plaintiff's claim. The Plaintiff contends that summary judgment is not available where a limitation period is in issue and, in any event and for a variety of reasons, the provisions of the Alberta *Limitations Act* do not operate so as to bar this claim.

127 Contrary to the Plaintiff's submissions, it is clear to me that summary judgment is available on the basis of limitations: *Borchers v. Kulak*, 2009 ABQB 457 (Alta. Q.B.) at para 36; *Edwards v. Fisher*, 2010 ABQB 594 (Alta. Q.B.) at para 19. Furthermore, I do not agree with the Plaintiff's contention that, because this claim is brought in restitution, there has been no harm or injury that would trigger the limitation period. To accept this proposition would be to accept that the *Limitations Act* does not apply to all claims arising out of unjust enrichment. I agree with the Railways that because the *Limitations Act* defines "injury" to include "breach of duty", the alleged failure to charge "fair and reasonable" rates constitutes the breach that triggers the limitation period.

128 The Plaintiff argues that the Railways' application for summary judgment is based upon an "assumption" that this class action was issued on April 16, 2010, when it was filed in the Court of Queen's Bench of Alberta, whereas a parallel action (the "Wallace Claim") was filed in Saskatchewan on December 17, 2008, and to the extent that any limitation period applies it should be the longest one possible (ie. ten years from the filing in Saskatchewan). I agree with the Railways that, for the purpose of summary judgment in respect of this action, which has been

brought by Mr. Jackson and issued out of the Court of Queen's Bench of Alberta on April 16, 2010, the Alberta *Limitations Act* applies.

129 The Plaintiff further contends that, even if the *Limitations Act* applies, the limitation period was effectively "tolled" as a result of the filing of the Wallace Claim in Saskatchewan. He relies upon section 40(1) of the *CPA*, which provides:

> 40(1) Subject to subsection (3), any limitation period applicable to a cause of action asserted in a proceeding, whether or not the proceeding is ultimately certified, is suspended in favour of a person if another proceeding is commenced and it is reasonable for the person to assume that he or she is a class member or subclass member for the purposes of that other proceeding.

130 While any interjurisdictional aspects of this provision raise interesting issues, the fact is that Mr. Jackson was questioned on his Affidavit of August 11, 2010. In the course of that questioning, he acknowledged that he was unaware of any other claims brought in respect of freight rates, including the Wallace Claim. The purpose of the tolling provision in section 40(1) of the *CPA* is to protect potential members of the putative class who may, operating under the knowledge of a proceeding and the assumption that their rights are being pursued, decline to take individual action. Being unaware of the Wallace Claim, the Plaintiff cannot be said to have assumed that he was a member of the class in that claims and delayed bringing action as a result.

131 By operation of s. 3(1)(b) of the Alberta *Limitations Act*, any portion of the Plaintiff's claim that arose prior to April 16, 2000 is therefore barred.

132 The remainder of the Plaintiff's claim covers the period from April 16, 2000 to July 31, 2007, nearly three years prior to filing. It is therefore necessary to determine whether the Plaintiff knew, or ought to have known, of the existence of a claim two years prior to April 16, 2010.

133 The Plaintiff contends that a significant factual debate exists as to when reasonable producers ought to have known of the existence of the claim. He points out that even the Railways did not appreciate the full scope of the disparity between actual and embedded HCMC over the period covered by his claim, and it is clear from the affidavits of Mr. Ekbote and Ms. Robson that CP, in particular, did not track its actual HCMC during the relevant period. This is not particularly surprising given the Railways' belief that the legislatively mandated Rate Scales and revenue entitlements were what governed the freight rates they charged, not "fairness" as informed (in part) by HCMC.

134 It is nevertheless clear to me that the issue of HCMC and its relationship to the freight rates charged by the Railways was notorious among the farming community in Canada. The Plaintiff contends that it was the Hopper Car Appeal, affirming the Agency's "discovery" of the disparity between actual and embedded HCMC, that was the triggering event that would have led the Plaintiff to have sufficient knowledge of the claim. But the Hopper Car Decision and

the Hopper Car Appeal did not come out of nowhere; indeed, they could not have occurred without Clause 57 of Bill C-11, which was passed by Parliament with the express aim of adjusting freight rates to account for decreased HCMC. As Mr. Auld points out in his Affidavit, disparities between embedded and Actual HCMC were testified to before the Standing Senate Committee on Agriculture and Forestry, and the House of Commons Standing Committee on Agriculture and Agri-Food as early as 1996. The National Farmers Union raised the issue in its submissions to Justice Estey in 1998. Statements were made by the Farmer Rail Car Coalition in the industry publication Western Producer in December 2002, January 2003 and March 2003, about the disparity between actual maintenance costs and those embedded in the freight rates.

135 In his Affidavit of August 11, 2010, the Plaintiff swears that he has "always taken an interest in what is sometimes referred to as 'farm politics', and which includes issues relating to the cost of transporting grain, and the relationship between farmers and railroad companies." In questioning, he acknowledged that the "disassociation between the formula for calculating revenues and maintenance costs associated with the hopper cars... was a matter of common understanding in the agricultural community" for some time. In view of the notorious nature of the issue and the Plaintiff's interests and active involvement in the farming community, in my view the essential nature of this claim, which is that the Railways, in violation of the spirit of the *CTA* and the National Transportation Policy therein, charged excessive freight rates that incorporated embedded rather than actual HCMC, was knowable long before April 16, 2008. I would therefore also grant the Railways' application for summary judgment on the basis of the expiry of the limitation periods contained in subsection 3(1)(a) and (b) of the *Limitations Act*.

Conclusion

136 The Plaintiff's application for certification is denied.

137 The Defendants' application for summary judgment is granted.

138 The parties may speak to costs.

Plaintiff's application dismissed; defendants' application granted.

2010 FC 806, 2010 CF 806
Federal Court

Latimer v. Canada (Attorney General)

2010 CarswellNat 2688, 2010 CarswellNat 3412, 2010 FC 806, 2010 CF 806, [2010] F.C.J. No. 970, [2011] 4 F.C.R. 88, 372 F.T.R. 110 (Eng.), 89 W.C.B. (2d) 424

Robert Latimer, Applicant and Attorney General of Canada, Respondent

Anne Mactavish J.

Heard: July 26, 2010
Judgment: August 5, 2010
Docket: T-1997-09

Counsel: Jason Gratl, for Applicant
Susanne Pereira, for Respondent

Subject: Criminal

***Anne Mactavish J.*:**

1 Robert Latimer was convicted of second degree murder in relation to the death of his profoundly disabled daughter, Tracy. He now seeks judicial review of a decision of the Appeal Division of the National Parole Board confirming the refusal of his request for expanded leave privileges reducing the number of nights each week that he is required to return to a Community Release Facility (or "halfway house").

2 The Appeal Division found that Mr. Latimer had not established the existence of "exceptional circumstances" justifying a reduction in his nightly reporting requirements, as contemplated by Chapter 4.1 of the National Parole Board's Policy Manual.

3 Mr. Latimer submits that the Appeal Division erred in law in applying the "exceptional circumstances" test to his application. According to Mr. Latimer, there is no basis for such a test under the *Corrections and Conditional Release Act*, S.C. 1992, c. 20 (*CCRA*). He further submits that requiring an offender to establish the existence of exceptional circumstances is in fact inconsistent with the express mandatory provisions of the statute.

4 For the reasons that follow, I find that Chapter 4.1 of the National Parole Board's Policy Manual unlawfully fetters the discretion of Board members as it relates to the reduction of offenders' nightly reporting requirements. Consequently, the application for judicial review will be allowed.

Background

5 Following his conviction for second degree murder in 2001, Mr. Latimer was sentenced to life imprisonment, with eligibility for full parole after 10 years.

6 The Appeal Division of the National Parole Board granted day parole to Mr. Latimer in February of 2008. He was released from prison in March of 2008 on conditions that included the requirement that he live in a halfway house, that he continue with psychological counselling, and that he not have responsibility for any severely disabled individuals.

7 Mr. Latimer initially lived in Ottawa after his release on day parole. However, in September of 2008, the Board altered the conditions of his release to allow for the transfer of his supervision to Victoria, British Columbia. Mr. Latimer had previously lived in Victoria, and had family ties in that city. The Board's decision allowed Mr. Latimer "to pursue a reintegration plan involving further vocational training to obtain certification as an electrician."

8 The conditions of Mr. Latimer's day parole currently permit him to spend two nights a week at his apartment in Victoria, while spending the remaining five nights at a halfway house. This is known as a "two and five". Mr. Latimer has also been granted periodic extended leave privileges to allow him to visit his family in Saskatchewan.

9 After 16 months in the community without incident, Mr. Latimer sought to be granted a "five and two". This would allow him to spend five nights each week at his apartment, and two nights a week at the halfway house. His application for a five and two was supported by the "Assessment for Decision" prepared by his Parole Supervisor. This assessment observed that Mr. Latimer's risk of re-offending had been judged to be "very low". The Parole Supervisor further noted that Mr. Latimer's request for a five and two was supported by the staff of the halfway house, and by Mr. Latimer's wife.

10 It was further noted that at the time of the assessment, Mr. Latimer was maintaining gainful employment doing electrical work, and was engaged in an apprenticeship program. He was scheduled to start the classroom component of his electrician's program in October of 2009, when, in addition to attending classes, he would also continue to work part-time. In addition to his employment and vocational training, Mr. Latimer maintained responsibility for the management of the family farm in Saskatchewan.

11 The Parole Supervisor also observed that Mr. Latimer had demonstrated commitment to pursuing his vocational goals, and had been compliant with the conditions of his release. The assessment noted that a five and two would assist Mr. Latimer by allowing him additional time to fulfill his responsibilities to his family, his farm and his vocational training. The additional time spent at his apartment would "further assist him to continue leading a productive and constructive lifestyle". In the view of Mr. Latimer's Parole Supervisor, not only would his risk remain manageable if he were granted a five and two, in addition, expanded leave would address the "particular and exceptional needs of this case".

12 An addendum to the assessment advised that Mr. Latimer's request for a five and two was also supported by his psychologist.

13 In August of 2009, the National Parole Board denied Mr. Latimer's application for a five and two. The Board found that while Mr. Latimer was successfully reintegrating into the community and was abiding by his release conditions, his situation did not meet the test of "exceptional circumstances" set out in Chapter 4.1 of the National Parole Board's Policy Manual.

14 The Board further observed that while Mr. Latimer's efforts were commendable, his long-distance responsibilities were "self-imposed", and that a regional transfer to be closer to his family would alleviate his concerns. The Board expressly declined to consider Mr. Latimer's submission that the "exceptional circumstances" test conflicted with other Board policies and with the provisions of the *Corrections and Conditional Release Act*.

15 The Board's decision was subsequently affirmed by the Board's Appeal Division, which noted that Chapter 4.1 of the National Parole Board's Policy Manual provided that the Board "may reduce the nightly reporting requirement so the offender is not required to report for extended periods in exceptional circumstances, when all other options have been considered and judged inappropriate and only in order to meet the particular needs of the case". The Appeal Division observed that the Board "did not have the authority to disregard NPB policy on Expanded Leave Privileges, including the test of exceptional circumstances, which allows for a less restrictive measure than the residency condition for day parole that is prescribed in law."

16 The Appeal Division held that the Board's conclusion that Mr. Latimer had not met the test of exceptional circumstances was "reasonable, well supported and consistent with the law and Board policy". The Appeal Division further found that Mr. Latimer could "choose less onerous ways to manage [his] day" and that his case was "not unlike other offenders who work hard to successfully reintegrate [into] society after a lengthy incarceration." The Appeal Division also noted the Board's finding that Mr. Latimer enjoyed "expanded leave privileges beyond the norm for other offenders and that [Mr. Latimer had] been accommodated on several occasions when requesting further leave."

Issue

17 Mr. Latimer initially characterized the issue on this application as being one of statutory interpretation. However, based upon his oral submissions, I understand the real issue to be whether the Board and the Appeal Division erred in law and fettered their discretion by applying a test of "exceptional circumstances" in assessing Mr. Latimer's request for an amendment to the conditions of his day parole.

Standard of Review

18 The parties agree that decisions of the Appeal Division will generally be reviewed against the reasonableness standard. Citing *Khosa v. Canada (Minister of Citizenship & Immigration)*, 2009 SCC 12, [2009] 1 S.C.R. 339 (S.C.C.) and *Latham v. R.*, 2006 FC 284, 288 F.T.R. 37 (Eng.) (F.C.), the respondent says that this standard should apply in Mr. Latimer's case, submitting that the decision falls squarely within the Appeal Division's specialized area of expertise.

19 Mr. Latimer submits that the standard of review on an issue of statutory interpretation by the National Parole Board is that of correctness: *Dixon v. Canada (Attorney General)*, 2008 FC 889, 331 F.T.R. 214 (F.C.) at para. 10.

20 I agree with Mr. Latimer that the appropriate standard of review in this case is that of correctness. As discussed earlier, his arguments raise questions of procedural fairness and the unlawful fettering of discretion. The Federal Court of Appeal held in *Thamotharem v. Canada (Minister of Citizenship & Immigration)*, 2007 FCA 198, 366 N.R. 301 (F.C.A.), that such matters are reviewable on the correctness standard: at para. 33.

The Legislative Scheme

21 In order to put Mr. Latimer's arguments into context, it is first necessary to have an understanding of the legislative scheme governing decisions such as the one at issue in this case. The relevant statutory provisions are summarized below, and the full text of these provisions is attached as an appendix to this decision.

22 The *Corrections and Conditional Release Act* and Regulations constitute the framework under which the National Parole Board makes its decisions. Section 3 of the *CCRA* identifies the purpose of the federal correctional system as being "to contribute to the maintenance of a just, peaceful and safe society by carrying out sentences imposed by courts through the safe and humane custody and supervision of offenders" and to assist in "the rehabilitation of offenders and their reintegration into the community as law-abiding citizens through the provision of programs in penitentiaries and in the community".

23 Among other responsibilities, the Board acts as an independent administrative tribunal to make determinations regarding day and full parole. Section 107 of the Act gives the Board exclusive jurisdiction and absolute discretion in this regard.

24 Parole decisions are governed by section 102 of the *CCRA*. Two criteria are identified in this section governing the granting of parole. The Board may grant parole to an offender if it is of the opinion that "the offender will not, by re-offending, present an undue risk to society before the expiration according to law of the sentence the offender is serving". In addition, the Board must be satisfied that the release of the offender on parole "will contribute to the protection of society by facilitating the reintegration of the offender into society as a law-abiding citizen".

25 "Day parole" is defined by section 99 of the *CCRA* as "the authority granted to an offender by the Board ... to be at large during the offender's sentence in order to prepare the offender for full parole or statutory release, the conditions of which require the offender *to return to ... a community-based residential facility ... each night, unless otherwise authorized in writing*" [emphasis added]. The respondent describes these expanded leave privileges as "an intermediary level of liberty between normal day parole restrictions and full parole": respondent's memorandum of fact and law at para. 24.

26 Day parole is a form of conditional release and is governed by the basic principles set out in section 100 and 101 of the Act: see *Cartier c. Canada (Procureur général)*, 2002 FCA 384, 300 N.R. 362 (Fed. C.A.), at para. 13.

27 Section 100 of the *CCRA* identifies the purpose of conditional release as being "to contribute to the maintenance of a just, peaceful and safe society by means of decisions on the timing and conditions of release that will best facilitate the rehabilitation of offenders and their reintegration into the community as law-abiding citizens".

28 Section 101 of the *CCRA* articulates the statutory principles guiding parole boards "in achieving the purpose of conditional release". It provides that the paramount consideration in the determination of any case is the protection of society: subsection 101(a). Another statutory principle guiding parole boards is that they are to make "the least restrictive determination consistent with the protection of society": subsection 101(d). Amongst other things, parole boards are directed to take all available information, including the reasons and recommendations of the sentencing judge, into account in considering whether conditional release is appropriate in a given case: subsection 101(b).

29 The legislative scheme specifically contemplates the making of policies guiding parole boards. Subsection 101(e) of the *CCRA* authorizes boards, including the National Parole Board, to "adopt and be guided by appropriate policies" and directs that Board members are to "be provided with the training necessary to implement those policies".

30 Section 151 of the Act authorizes the Executive Committee of the Board to adopt policies relating to reviews dealing with conditional release, detention and long-term supervision. Such policies are to be promulgated after such consultation with Board members as the Executive Committee considers appropriate. Board members are directed by subsection 105(5) of the *CCRA* to "exercise their functions in accordance with policies adopted pursuant to subsection 151(2)".

The National Parole Board Policy Manual

31 A Policy Manual has been adopted by the National Parole Board under the authority of section 151 of the *CCRA*. Chapter 7.2 of the Manual deals with "Residency and Day Parole Leave Privileges" and observes that the Board is responsible "for establishing the parameter of leave privileges to be associated with an approved day parole, or parole or statutory release that is subject to a residency condition". The Policy Manual goes on to note that the Board "entrusts to those who are responsible for the day-to-day supervision and care of these offenders, the manner in which the leave privileges will be implemented".

32 Chapter 7.2 identifies what will "normally" be the maximum leave privileges which will be authorized by the Board. It observes that "the institutional head, the director of the residential facility or the CSC District Director, as the case may be and in conjunction with the parole supervisor, will determine how and when the Board authorized leave privileges are to be implemented".

33 Factors to be considered in arriving at this determination include "the offender's progress in achieving the objectives of the release in relation to the correctional plan". The policy further noted that "[a]dditional leave privileges may not be granted unless approved in writing by the Board".

34 For inmates such as Mr. Latimer living in community residential facilities, the policy provides that "[l]eave privileges may be granted in accordance with the basic rules and regulations of the community residential facility, unless the Board members have indicated specifically what those leave privileges are to be as part of the release plan...".

35 The parties agree that in accordance with this section of the Manual, weekend passes may be authorized by the offender's parole supervisor or the head of the Community Release Facility. Mr. Latimer's two and five was evidently granted under this authority. However, any further reduction in his reporting requirements had to be approved in writing by the Board.

36 Chapter 4.1 of the Policy Manual deals with "expanded periods of leave" and is the provision at the heart of this proceeding. It provides that the Board may reduce the nightly reporting requirements so the offender is not required to report for extended periods of time "*in exceptional circumstances*, when all other options have been considered and judged inappropriate, and only in order to meet the particular needs of the case" [emphasis added].

37 The Manual goes on to state that "[t]he Board may consider expanded leave to be responsive to the needs of female, aboriginal, ethnic minority or special needs offenders". It is common ground that this latter provision does not apply to Mr. Latimer.

38 It will be recalled that Mr. Latimer's request for a "five and two" was turned down on the basis that he had not demonstrated the existence of exceptional circumstances justifying the granting of such a measure.

Analysis

39 It should be noted at the outset that while Mr. Latimer's application for judicial review technically relates to the decision of the Appeal Division of the National Parole Board, where, as here, the Appeal Division has affirmed the Board's decision, it is the duty of this Court to ensure that the Board's decision is lawful: see *Cartier*, above, at para. 10.

40 In addressing this question, it is first necessary to examine the law relating to the status and use of guidelines such as the Policy Manual in issue in this case.

i) The Legal Status of the National Parole Board's Policy Manual

41 As the Federal Court of Appeal observed in *Thamotharem*, above, guidelines may, in some circumstances, constitute delegated legislation having the full force of law ("hard law"). In such cases, the instrument in question cannot be characterized as an unlawful fetter on the tribunal members' exercise of discretion: see para. 65, and see *Bell Canada v. C.T.E.A.*, 2003 SCC 36, [2003] 1 S.C.R. 884 (S.C.C.) at para 35.

42 Although the Executive Committee of the National Parole Board is statutorily authorized to adopt policies relating to the granting of conditional release, including day parole, the Policy Manual in issue in this case cannot, in my view, be viewed as delegated legislation or "hard law".

43 In coming to this conclusion, the National Parole Board's Policy Manual may be contrasted with the Guidelines issued by the Canadian Human Rights Commission that were in issue before the Supreme Court in the *Bell Canada* case. These Guidelines were found by the Supreme Court to be "akin to regulations": *Bell Canada* at para. 37.

44 One factor influencing the Supreme Court's finding in *Bell Canada* that the Commission Guidelines amounted to "hard law" was the fact that, like regulations, the Commission's Guidelines were subject to the Statutory Instruments Act, R.S.C. 1985, c. S-22, and had to be published in the Canada Gazette.

45 Moreover, the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 expressly provided that Commission Guidelines were binding on members of the Canadian Human Rights Tribunal dealing

with complaints of discrimination referred to it by the Commission. While subsection 105(5) of the *CCRA* does direct members to exercise their functions in accordance with Board policies, there is no provision in the Act expressly stating that the provisions of the National Parole Board's Policy Manual are binding on Board members.

46 The Supreme Court was also influenced by the fact that the French text of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, empowered the Commission to set out its interpretation of the legislation "*par ordonnance*". According to the Supreme Court, this "leaves no doubt that the guidelines are a form of law": *Bell Canada* at para. 37, (emphasis in the original).

47 In contrast, subsection 151(2) of the *CCRA* authorizes the Executive Committee of the National Parole Board to "adopt policies" (établit des directives") relating to reviews such as that in issue in this case. It is noteworthy that in *Thamotharem*, Justice Evans held that the use of the word "*directives*" in the French text of the *Immigration and Refugee Protection Act* suggested "a less legally authoritative instrument than '*ordonnance*'": at para. 71.

48 Thus, the National Parole Board's Policy Manual is closer in nature to the Chairperson's Guidelines at issue in *Thamotharem* than it is to the Commission Guidelines at issue in *Bell Canada*. As a consequence, it is more properly characterized as a "soft law" instrument that does not have the full force of law.

49 Before leaving this point, I would note that my conclusion regarding the legal status of the Board's Policy Manual is consistent with the decision of Justice Lemieux in *Sychuk v. Canada (Attorney General)*, 2009 FC 105, 340 F.T.R. 160 (Eng.) (F.C.) at para. 11.

ii) Is the Policy Manual an Unlawful Fetter on Board Members' Discretion?

50 The next question, then, is whether Chapter 4.1 of the Policy Manual is nevertheless an unlawful fetter on Board members' discretion. In my view, it is.

51 While non-statutory guidelines or policy manuals designed to assist administrative tribunals in carrying out their mandates are appropriate, there are limits on the use that can be made of such instruments.

52 In *Ainsley Financial Corp. v. Ontario (Securities Commission)* (1994), 21 O.R. (3d) 104 (Ont. C.A.), the Ontario Court of Appeal examined the limitations on non-statutory guidelines at paragraph 14 of its reasons, articulating the following principles:

> (1) a non-statutory instrument can have no effect in the face of contradictory statutory provision or regulation;
>
> (2) a non-statutory instrument cannot pre-empt the exercise of a regulator's discretion in a particular case;

(3) a non-statutory instrument cannot impose mandatory requirements enforceable by sanction; that is, the regulator cannot issue de facto laws disguised as guidelines.

53 Similarly, in *Judicial Review of Administrative Action in Canada* (Toronto: Canvasback Publishing, 1998), Brown and Evans observe that a guideline will be invalid "if it is inconsistent with or in conflict with a statutory provision, or if it deals with a matter outside an agency's statutory authorization, whether or not it imposes duties enforceable in the courts: at para. 15:3283.

54 I agree with the respondent that it is inarguably within the Board's discretion to determine when a deviation from the normal statutory reporting requirements will be warranted. That said, a policy stating that members may only reduce an offender's nightly reporting requirements "in exceptional circumstances", and then only when "all other options have been considered and judged inappropriate" is inconsistent with the statutory principles that Parliament has directed the National Parole Board to apply in relation to the granting of conditional release, including day parole.

55 In particular, it is inconsistent with the principle that, in achieving the purpose of conditional release, parole boards are to make the least restrictive determination consistent with the protection of society: subsection 101(d).

56 In accordance with subsection 99(1) of the *CCRA*, offenders on day parole must return to the institution in which they are housed each evening, *unless otherwise authorized in writing*. Discretion is thus conferred on the Board to authorize extended leave. The only condition imposed by section 99 of the Act is that there must be written authorization when the Board's discretion is exercised in the offender's favour in relation to the reporting requirement. That said, the Board's discretion to authorize extended periods of leave must nevertheless be exercised in a manner consistent with the principles articulated in the *CCRA*.

57 Chapter 4.1 of the National Parole Board's Policy Manual is not consistent with the provisions of the *CCRA* governing day parole. This inconsistency is demonstrated by the facts of Mr. Latimer's case.

58 The paramount consideration in the determination of any application for day parole is the protection of society: *CCRA*, subsection 101(a). Mr. Latimer has been determined to be at low risk of re-offending. There is nothing in the reasons of either the Board or the Appeal Division to suggest that the need to protect society played any role in the Board's decision to deny extended leave privileges. Indeed the Board itself noted that no concerns had been identified with respect to Mr. Latimer's behavior in the community.

59 In this regard, it is also noteworthy that the Supreme Court of Canada itself recognized that "the sentencing principles of rehabilitation, specific deterrence and protection [were] not triggered

for consideration" in Mr. Latimer's case: see *R. v. Latimer*, 2001 SCC 1, [2001] 1 S.C.R. 3 (S.C.C.) at para. 86. It will be recalled that, subsection 101(b) directs the Board take into consideration all available information relevant to the case, including the stated reasons and recommendations of the sentencing judge.

60 Thus, although the evidence before the Board indicated that a reduction in Mr. Latimer's reporting requirements would not present any real risk to public safety or adversely affect the protection of society, this was not properly taken into account by the Board, as the Board was required by Chapter 4.1 of the Policy Manual to limit its consideration to whether or not Mr. Latimer had demonstrated the existence of "exceptional circumstances" justifying a loosening of the conditions of his day parole.

61 Other relevant information before the Board included the positive recommendation in the "Assessment for Decision" carried out by Mr. Latimer's Parole Supervisor, along with the endorsement of the application by both his wife and his psychologist. While this information was referred to by the Board, it was only considered in assessing whether there were exceptional circumstances justifying a loosening of Mr. Latimer's reporting requirements, rather than in determining whether a five and two was the least restrictive measure consistent with the protection of society.

62 In assessing whether Mr. Latimer had demonstrated the existence of exceptional circumstances justifying a five and two, the Appeal Division also had regard to the fact that he could "choose less onerous ways to manage [his] day" (a statement with which Mr. Latimer does not agree). Whether or not this is the case, it is irrelevant to the question of whether loosening the conditions of Mr. Latimer's day parole was consistent with the governing principles of the *CCRA*. So too is the Appeal Division's observation that Mr. Latimer already enjoyed "expanded leave privileges beyond the norm for other offenders and that [he had] been accommodated on several occasions when requesting further leave."

63 Whether Mr. Latimer has enjoyed more or less liberty than other offenders is not the question. It is clear from the *CCRA* that in making the least restrictive determination, the Board has to carefully tailor the conditions of an offender's release having regard to all of the particular circumstances of the individual offender. How the leave privileges granted to Mr. Latimer compare to those granted to other offenders is irrelevant. Moreover, as was noted in the Assessment for Decision, the circumstances of Mr. Latimer's index offence are indeed "unique".

64 The "exceptional circumstances" test also ignores other statutorily-mandated principles. Thus no real consideration was given by the Board to whether a loosening of Mr. Latimer's reporting requirements after the successful completion of 16 months in the community would contribute to his reintegration into society (*CCRA* subsection 102(b)) or his rehabilitation (section 100).

65 For these reasons, I am satisfied that Chapter 4.1 of the Board's Policy Manual has the effect of precluding Board members from imposing the least restrictive measures consistent with the protection of the public where the particular situation of an individual offender is not deemed to be "exceptional" by the Board.

66 By limiting the ability of Board members to examine the individual merits of each case according to the relevant statutory principles identified in the *CCRA*, the Manual thus unlawfully fetters members' statutory discretion: see *Fahlman (Guardian ad litem of) v. Community Living British Columbia*, 2007 BCCA 15, 154 A.C.W.S. (3d) 958 (B.C. C.A.) at paras. 43-56; *Gregson v. Canada (National Parole Board)* (1982), [1983] 1 F.C. 573 (Fed. T.D.).

67 Before closing, there are two additional matters that require comment.

68 The first is that in addition to its inconsistency with the provisions of the *CCRA*, there is also an element of arbitrariness to Chapter 4.1 of the Policy Manual. Counsel for the respondent submitted in argument that two and five passes "further prepare offenders for eventual full parole". However, no explanation was provided as to why a two and five may be both an appropriate intermediate step in light of the unexceptional personal circumstances of an offender and consistent with the day parole provisions of the *CCRA*, whereas a "three and four", or a "four and three", or a five and two could only appropriate in "exceptional circumstances, when all other options have been considered and judged inappropriate".

69 The second point that requires comment is the respondent's argument that "[i]f public safety were the only consideration, it follows that all offenders that do not pose a risk to the public would be granted a 'six and one' parole arrangement, which constitutes the least restrictive measure of liberty without reaching full parole": respondent's memorandum of fact and law at para. 36.

70 I do not accept this argument. As is clear from the above analysis, the *CCRA* identifies a series of principles to be applied by the Board in determining the appropriate conditions to be attached to the conditional release of offenders. In addition to public safety and the least restrictive determination considerations, Board members must also take the statutory purpose of day parole into account, including the reintegration and rehabilitation of offenders.

71 That is, matters such as the nature, requirements and progress of the offender's individual rehabilitation plan and his or her track record of compliance are all part of the incremental, nuanced approach to the discretionary decision-making process prescribed by the *CCRA* and precluded by Chapter 4.1 of the National Parole Board's Policy Manual.

Conclusion

72 For these reasons, the application for judicial review is allowed, and the decision of the Appeal Division is set aside. The matter is remitted to the National Parole Board for re-determination in accordance with these reasons, without regard to the "exceptional circumstances" test set out in Chapter 4.1 of the Board's Policy Manual.

73 I note that Mr. Latimer is eligible for full parole on December 8, 2010. Accordingly, I am directing the Board to proceed with its re-determination on an expedited basis so that in the event that a positive decision is made with respect to Mr. Latimer's application for reduced reporting requirements, it may be of some practical benefit to him.

Judgment

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is allowed, with costs.

2. The matter is remitted to a differently constituted panel of the National Parole Board for re-determination on an expedited basis in accordance with these reasons, without regard to the "exceptional circumstances" test set out in Chapter 4.1 of the Board's Policy Manual.

Appendix

CORRECTIONS AND CONDITIONAL RELEASE ACT, S.C. 1992, C. 20

Purpose of correctional system

3. The purpose of the federal correctional system is to contribute to the maintenance of a just, peaceful and safe society by

(a) carrying out sentences imposed by courts through the safe and humane custody and supervision of offenders; and

(b) assisting the rehabilitation of offenders and their reintegration into the community as law-abiding citizens through the provision of programs in penitentiaries and in the community.

Definitions

99. (1) In this Part,

"day parole"

« *semi-liberté* »

"day parole" means the authority granted to an offender by the Board or a provincial parole board to be at large during the offender's sentence in order to prepare the offender for full parole or statutory release, the conditions of which require the offender to return to a penitentiary, a community-based residential facility or a provincial correctional facility each night, unless otherwise authorized in writing;

Purpose of conditional release

100. The purpose of conditional release is to contribute to the maintenance of a just, peaceful and safe society by means of decisions on the timing and conditions of release that will best facilitate the rehabilitation of offenders and their reintegration into the community as law-abiding citizens.

Principles guiding parole boards

101. The principles that shall guide the Board and the provincial parole boards in achieving the purpose of conditional release are

(a) that the protection of society be the paramount consideration in the determination of any case;

(b) that parole boards take into consideration all available information that is relevant to a case, including the stated reasons and recommendations of the sentencing judge, any other information from the trial or the sentencing hearing, information and assessments provided by correctional authorities, and information obtained from victims and the offender;

(c) that parole boards enhance their effectiveness and openness through the timely exchange of relevant information with other components of the criminal justice system and through communication of their policies and programs to offenders, victims and the general public;

(d) that parole boards make the least restrictive determination consistent with the protection of society;

(e) that parole boards adopt and be guided by appropriate policies and that their members be provided with the training necessary to implement those policies; and

(f) that offenders be provided with relevant information, reasons for decisions and access to the review of decisions in order to ensure a fair and understandable conditional release process.

Criteria for granting parole

102. The Board or a provincial parole board may grant parole to an offender if, in its opinion,

(a) the offender will not, by reoffending, present an undue risk to society before the expiration according to law of the sentence the offender is serving; and

(b) the release of the offender will contribute to the protection of society by facilitating the reintegration of the offender into society as a law-abiding citizen.

Policies

105. (5) Members of the Board shall exercise their functions in accordance with policies adopted pursuant to subsection 151(2).

Jurisdiction of Board

107. (1) Subject to this Act, the *Prisons and Reformatories Act*, the *International Transfer of Offenders Act*, the *National Defence Act*, the *Crimes Against Humanity and War Crimes Act* and the *Criminal Code*, the Board has exclusive jurisdiction and absolute discretion

(a) to grant parole to an offender;

(b) to terminate or to revoke the parole or statutory release of an offender, whether or not the offender is in custody under a warrant of apprehension issued as a result of the suspension of the parole or statutory release;

(c) to cancel a decision to grant parole to an offender, or to cancel the suspension, termination or revocation of the parole or statutory release of an offender;

(d) to review and to decide the case of an offender referred to it pursuant to section 129; and

(e) to authorize or to cancel a decision to authorize the unescorted temporary absence of an offender who is serving, in a penitentiary,

(i) a life sentence imposed as a minimum punishment or commuted from a sentence of death,

(ii) a sentence for an indeterminate period, or

(iii) a sentence for an offence set out in Schedule I or II.

[...]

Decision on Appeal

147. (1) An offender may appeal a decision of the Board to the Appeal Division on the ground that the Board, in making its decision,

(a) failed to observe a principle of fundamental justice;

(b) made an error of law;

(c) breached or failed to apply a policy adopted pursuant to subsection 151(2);

(d) based its decision on erroneous or incomplete information; or

(e) acted without jurisdiction or beyond its jurisdiction, or failed to exercise its jurisdiction.

[...]

(4) The Appeal Division, on the completion of a review of a decision appealed from, may

(a) affirm the decision;

(b) affirm the decision but order a further review of the case by the Board on a date earlier than the date otherwise provided for the next review;

(c) order a new review of the case by the Board and order the continuation of the decision pending the review; or

(d) reverse, cancel or vary the decision.

Functions

151. (2) The Executive Committee

(a) shall, after such consultation with Board members as it considers appropriate, adopt policies relating to reviews under this Part;

But du système correctionnel

3. Le système correctionnel vise à contribuer au maintien d'une société juste, vivant en paix et en sécurité, d'une part, en assurant l'exécution des peines par des mesures de garde et de surveillance sécuritaires et humaines, et d'autre part, en aidant au moyen de programmes appropriés dans les pénitenciers ou dans la collectivité, à la réadaptation des délinquants et à leur réinsertion sociale à titre de citoyens respectueux des lois.

Définitions

99. (1) Les définitions qui suivent s'appliquent à la présente partie.

« semi-liberté »

"*day parole*"

« semi-liberté » Régime de libération conditionnelle limitée accordé au délinquant, pendant qu'il purge sa peine, sous l'autorité de la Commission ou d'une commission provinciale en vue de le préparer à la libération conditionnelle totale ou à la libération d'office et dans le cadre duquel le délinquant réintègre l'établissement résidentiel communautaire, le pénitencier ou l'établissement correctionnel provincial chaque soir, à moins d'autorisation écrite contraire.

Objet

100. La mise en liberté sous condition vise à contribuer au maintien d'une société juste, paisible et sûre en favorisant, par la prise de décisions appropriées quant au moment et aux conditions de leur mise en liberté, la réadaptation et la réinsertion sociale des délinquants en tant que citoyens respectueux des lois.

Principes

101. La Commission et les commissions provinciales sont guidées dans l'exécution de leur mandat par les principes qui suivent:

a) la protection de la société est le critère déterminant dans tous les cas;

b) elles doivent tenir compte de toute l'information pertinente disponible, notamment les motifs et les recommandations du juge qui a infligé la peine, les renseignements disponibles lors du procès ou de la détermination de la peine, ceux qui ont été obtenus des victimes et des délinquants, ainsi que les renseignements et évaluations fournis par les autorités correctionnelles;

c) elles accroissent leur efficacité et leur transparence par l'échange de renseignements utiles au moment opportun avec les autres éléments du système de justice pénale d'une part, et par la communication de leurs directives d'orientation générale et programmes tant aux délinquants et aux victimes qu'au public, d'autre part;

d) le règlement des cas doit, compte tenu de la protection de la société, être le moins restrictif possible;

e) elles s'inspirent des directives d'orientation générale qui leur sont remises et leurs membres doivent recevoir la formation nécessaire à la mise en oeuvre de ces directives;

f) de manière à assurer l'équité et la clarté du processus, les autorités doivent donner aux délinquants les motifs des décisions, ainsi que tous autres renseignements pertinents, et la possibilité de les faire réviser.

Critères

102. La Commission et les commissions provinciales peuvent autoriser la libération conditionnelle si elles sont d'avis qu'une récidive du délinquant avant l'expiration légale de la

peine qu'il purge ne présentera pas un risque inacceptable pour la société et que cette libération contribuera à la protection de celle-ci en favorisant sa réinsertion sociale en tant que citoyen respectueux des lois.

Directives d'orientation générale

105. (5) Les membres exercent leurs fonctions conformément aux directives d'orientation générale établies en application du paragraphe 151(2).

Compétence

107. (1) Sous réserve de la présente loi, de la Loi sur les prisons et les maisons de correction, de la Loi sur le transfèrement international des délinquants, de la Loi sur la défense nationale, de la Loi sur les crimes contre l'humanité et les crimes de guerre et du Code criminel, la Commission a toute compétence et latitude pour:

a) accorder une libération conditionnelle;

b) mettre fin à la libération conditionnelle ou d'office, ou la révoquer que le délinquant soit ou non sous garde en exécution d'un mandat d'arrêt délivré à la suite de la suspension de sa libération conditionnelle ou d'office;

c) annuler l'octroi de la libération conditionnelle ou la suspension, la cessation ou la révocation de la libération conditionnelle ou d'office;

d) examiner les cas qui lui sont déférés en application de l'article 129 et rendre une décision à leur égard;

e) accorder une permission de sortir sans escorte, ou annuler la décision de l'accorder dans le cas du délinquant qui purge, dans un pénitencier, une peine d'emprisonnement, selon le cas:

(i) à perpétuité comme peine minimale ou à la suite de commutation de la peine de mort,

(ii) d'une durée indéterminée,

(iii) pour une infraction mentionnée à l'annexe I ou II.

[...]

Décision

147. (1) Le délinquant visé par une décision de la Commission peut interjeter appel auprès de la Section d'appel pour l'un ou plusieurs des motifs suivants:

a) la Commission a violé un principe de justice fondamentale;

b) elle a commis une erreur de droit en rendant sa décision;

c) elle a contrevenu aux directives établies aux termes du paragraphe 151(2) ou ne les a pas appliquées;

d) elle a fondé sa décision sur des renseignements erronés ou incomplets;

e) elle a agi sans compétence, outrepassé celle-ci ou omis de l'exercer.

[...]

(4) Au terme de la révision, la Section d'appel peut rendre l'une des décisions suivantes:

a) confirmer la décision visée par l'appel;

b) confirmer la décision visée par l'appel, mais ordonner un réexamen du cas avant la date normalement prévue pour le prochain examen;

c) ordonner un réexamen du cas et ordonner que la décision reste en vigueur malgré la tenue du nouvel examen;

d) infirmer ou modifier la décision visée par l'appel.

Attributions du Bureau

151. (2) Après avoir consulté les membres de la Commission de la façon qu'il estime indiquée, le Bureau établit des directives régissant les examens, réexamens ou révisions prévus à la présente partie et, à sa demande, conseille le président en ce qui touche les attributions que la présente loi et toute autre loi fédérale confèrent à la Commission ou à celui-ci; le Bureau peut également ordonner que le nombre de membres d'un comité chargé de l'examen ou du réexamen d'une catégorie de cas ou de la révision d'une décision soit supérieur au nombre réglementaire.

NATIONAL PAROLE BOARD POLICY MANUAL

4.1 Day parole

Expanded periods of leave

Before full parole eligibility, the Board may reduce the nightly reporting requirement so the offender is not required to report for extended periods in exceptional circumstances, when all other options have been considered and judged inappropriate, and only in order to meet the particular needs of the case. The Board may consider expanded leave to be responsive to the needs of female, aboriginal, ethnic minority or special needs offenders.

The Board has greater flexibility after full parole eligibility date. Board members must consider whether day parole represents the least restrictive option to protect society.

7.2 Residency and day parole leave privileges

The Board is responsible for establishing the parameter of leave privileges to be associated with an approved day parole, or parole or statutory release that is subject to a residency condition. It entrusts to those who are responsible for the day-to-day supervision and care of these offenders, the manner in which the leave privileges will be implemented.

Normally, the maximum leave privileges that will be authorized by the Board are as outlined below. Board members will specify in their decision any case specific leave privileges other than these.

The institutional head, the director of the residential facility or the CSC District Director, as the case may be and in conjunction with the parole supervisor, will determine how and when the Board authorized leave privileges are to be implemented. The determination will take into consideration the offender's progress in achieving the objectives of the release in relation to the correctional plan. Additional leave privileges may not be granted unless approved in writing by the Board.

Weekday

Setting of time limits for return to a residence on a weekday is subject to the discretion of the superintendent of the community correctional centre (CCC), the director of the community residential facility (CRF), or the responsible CSC District Director.

[...]

CSC Institutions

The District Director, Parole, in consultation with the institutional head, may implement the leave privileges within the context of the release plan approved by the Board and in relation to the general progress of the offender. As a maximum, one weekend may be granted each month; however, the first cannot be implemented until at least thirty days after the implementation of the release.

4.1 Semi-Liberte

PÉRIODES DE SORTIE PROLONGÉES

Avant la date d'admissibilité à la libération conditionnelle totale, la Commission peut, dans des circonstances exceptionnelles et lorsque toutes les autres possibilités ont été étudiées et jugées inopportunes, assouplir la règle exigeant un retour à l'établissement tous les soirs, mais ce, uniquement pour répondre aux besoins particuliers du délinquant. En effet, les membres

de la Commission peuvent envisager d'autoriser des sorties prolongées pour répondre aux besoins de certaines catégories de délinquants comme les femmes, les Autochtones et les membres de minorités visibles, ou d'autres délinquants présentant des besoins spéciaux.

7.2 Privilèges de sortie rattachés aux assignations à résidence et à la semi-liberté

Il appartient à la Commission d'établir les paramètres des privilèges de sortie rattachés à une semi-liberté, ou à une libération conditionnelle ou d'office assortie d'une assignation à résidence. Ces paramètres laissent le soin de déterminer les modalités d'application aux personnes chargées quotidiennement de s'occuper des délinquants en liberté et de les surveiller.

Normalement, les privilèges de sortie maximums autorisés par la Commission sont ceux qui sont décrits ci-après. Si les membres de la Commission désirent accorder des privilèges de sortie particuliers à un délinquant, ils doivent le préciser dans leur décision.

Selon le cas, c'est le directeur du pénitencier, le directeur de l'établissement résidentiel ou le directeur de district du SCC qui détermine, de concert avec le surveillant de liberté conditionnelle, quand et comment les privilèges de sortie autorisés par la Commission seront appliqués. Pour ce faire, il prend en considération les progrès accomplis par le délinquant dans la réalisation des objectifs de la liberté au regard du plan correctionnel. L'octroi de privilèges de sortie supplémentaires ne peut se faire sans l'approbation écrite de la Commission.

En Semaine

Le directeur du centre correctionnel communautaire, du centre résidentiel communautaire ou du district concerné du SCC décide de l'heure à laquelle le détenu est tenu de rentrer un jour de semaine.

[...]

ÉTABLISSEMENTS DU SCC

Le directeur de district (libération conditionnelle) peut, en consultation avec le directeur d'établissement, accorder des privilèges de sortie dans le cadre du plan de libération conditionnelle approuvé par la Commission et selon les progrès réalisés par le délinquant dans l'ensemble. Une fin de semaine tout au plus peut être accordée par mois, et la première peut seulement être accordée trente jours après l'entrée en vigueur du programme de semi-liberté.

2014 CAF 76, 2014 FCA 76
Federal Court of Appeal

Lukács v. Canadian Transportation Agency

2014 CarswellNat 5441, 2014 CarswellNat 722, 2014 CAF 76, 2014 FCA 76, 239 A.C.W.S. (3d) 2, 456 N.R. 186, 71 Admin. L.R. (5th) 175

Dr. Gábor Lukács, Appellant and Canadian Transportation Agency, Respondent

Eleanor R. Dawson, Wyman W. Webb JJ.A., Edmond P. Blanchard J.A. (ex officio)

Heard: January 29, 2014
Judgment: March 19, 2014
Docket: A-279-13

Counsel: Dr. Gábor Lukács, Appellant, for himself
Simon-Pierre Lessard, for Respondent

***Eleanor R. Dawson J.A.*:**

Introduction

1 This is an appeal on a question of law, brought with leave of this Court pursuant to section 41 of the *Canada Transportation Act*, S.C. 1996, c. 10 (Act). The question concerns the validity of a rule amending the *Canadian Transportation Agency General Rules*, SOR/2005-35 (Rules). The amendment added a single section to the Rules: Rule 2.1 (Quorum Rule). The Quorum Rule is brief, and states "In all proceedings before the Agency, one member constitutes a quorum". The Quorum Rule was published in the Canada Gazette Part II as SOR/2013-133. Prior to the enactment of the Quorum Rule, two members of the Agency constituted a quorum.

2 The evidentiary basis for the appeal is simple and undisputed: the Quorum Rule was not made with the approval of the Governor in Council.

3 The appellant argues that the rules governing the conduct of proceedings before the Agency, including the Quorum Rule, are regulations within the meaning of subsection 36(1) of the Act. As such, the Quorum Rule could only be made with the approval of the Governor in Council. Additionally, the appellant argues that the Rules were originally approved by the Governor in Council. It follows, the appellant argues, that the Rules could not be amended without the approval of the Governor in Council.

4 The Agency responds that the Quorum Rule is a rule respecting the number of members that are required to hear any matter or perform any of the functions of the Agency. Accordingly, the Agency could enact the Quorum Rule pursuant to its rule-making power found in section 17 of the Act.

5 Notwithstanding the appellant's able submissions, for the reasons that follow I have concluded that the Agency's decision to enact the Quorum Rule pursuant to its rule-making power (so that the approval of the Governor in Council was not required) was reasonable.

The Applicable Legislation

6 The Act contains a quorum provision that is expressly subjected to the Agency's rules:

> 16. (1) Subject to the Agency's rules, two members constitute a quorum.
>
> 16. (1) Sous réserve des règles de l'Office, le quorum est constitué de deux membres.

7 The Agency's rule-making power is as follows:

> 17. The Agency may make rules respecting
>
> (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.
>
> [Emphasis added.]
>
> 17. L'Office peut établir des règles concernant:
>
> 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.
>
> [Le souligné est de moi.]

8 The relevant provision of the Act dealing with regulations states:

36. (1) Every regulation made by the Agency under this Act must be made with the approval of the Governor in Council.

(2) The Agency shall give the Minister notice of every regulation proposed to be made by the Agency under this Act.

36. (1) Tout règlement pris par l'Office en vertu de la présente loi est subordonné à l'agrément du gouverneur en conseil.

(2) L'Office fait parvenir au ministre un avis relativement à tout règlement qu'il entend prendre en vertu de la présente loi.

The Standard of Review

9 The parties disagree about the standard of review to be applied.

10 The appellant argues that the issue of whether the Agency was authorized to enact the Quorum Rule without the approval of the Governor in Council is a true question of jurisdiction, or *vires*. As a result, he submits the applicable standard of review is correctness (*New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.), at paragraph 59). In oral argument, the appellant also argued that a quorum requirement is a question of law that is both of central importance to the legal system as a whole and outside the Agency's specialized area of expertise so that the validity of the Quorum Rule should be reviewed on the standard of correctness.

11 The respondent counters that in more recent jurisprudence the Supreme Court of Canada has held that true questions of jurisdiction are narrow and exceptional, and that an administrative tribunal's interpretation of its own statute should be presumed to be reviewable on the standard of reasonableness (*A.T.A. v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61, [2011] 3 S.C.R. 654 (S.C.C.), at paragraphs 33 and 39).

12 I agree that what is at issue is whether the Agency properly interpreted its rule-making power contained in its home statute. Pursuant to *A.T.A.*, the presumption of reasonableness review applies. In my view, the presumption of reasonableness review has not been rebutted.

13 As recently discussed by the Supreme Court in *British Columbia (Securities Commission) v. McLean*, 2013 SCC 67, 452 N.R. 340 (S.C.C.), at paragraphs 32 and 33, legislatures do not always speak with clarity. As a result, applying the principles of statutory interpretation may not always provide a single, clear interpretation of a provision. The resolution of unclear language in an administrative agency's home statute is usually best left to the agency, because the choice between competing reasonable interpretations will often involve policy considerations the legislature presumably wanted the agency to decide.

14 For two reasons I reject the assertion that a quorum rule raises a general question of law of central importance to the legal system outside the expertise of the Agency.

15 First, while conceptually quorum requirements are of importance to the fair administration of justice, it does not follow that the Agency's choice between a quorum of one or two members is a question of central importance to the legal system as a whole. In my view, it is not. The Quorum Rule does not seek to define quorum requirements for any other body than the Agency itself.

16 Second, the Supreme Court has rejected such a narrow view of the expertise of an administrative agency or tribunal. It is now recognized that courts may not be as well-qualified as a given agency to provide an interpretation of the agency's home statute that makes sense in the broad policy context in which the agency operates (*McLean*, at paragraphs 30 and 31, citing, among other authorities, *VIA Rail Canada Inc. v. Canadian Transportation Agency*, 2007 SCC 15, [2007] 1 S.C.R. 650 (S.C.C.), at paragraph 92 and *Canada (Attorney General) v. Mowat*, 2011 SCC 53, [2011] 3 S.C.R. 471 (S.C.C.), at paragraph 25.

17 It follows that the Agency's interpretation of its rule-making authority is a question reviewable on the standard of reasonableness.

18 Before leaving the issue of the standard of review I will deal with two authorities raised by the appellant in reply, which were, as a result, the subject of supplementary written submissions.

19 The two authorities are *Council of Independent Community Pharmacy Owners v. Newfoundland & Labrador*, 2013 NLCA 32, 360 D.L.R. (4th) 286 (N.L. C.A.), and *Yates v. Central Newfoundland (Regional Appeal Board)*, 2013 NLTD(G) 173, 344 Nfld. & P.E.I.R. 317 (N.L. T.D.).

20 In my view both decisions are distinguishable. At issue in the first case was whether regulations enacted by the Lieutenant-Governor in Council were *ultra vires*. In the second case, the Court's attention was not drawn to the decisions of the Supreme Court in *A.T.A.* and *McLean*. I am not persuaded either case supports the appellant's position.

The Applicable Principles of Statutory Interpretation

21 Whether rules made under section 17 of the Act must be approved by the Governor in Council depends upon the interpretation to be given to the word "regulation" as used in subsection 36(1) of the Act.

22 The preferred approach to statutory interpretation has been expressed in the following terms by the Supreme Court:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

See: *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.) at paragraph 21. See also: *R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56, [2001] 2 S.C.R. 867 (S.C.C.) at paragraph 29.

23 The Supreme Court restated this principle in *Canada Trustco Mortgage Co. v. R.*, 2005 SCC 54, [2005] 2 S.C.R. 601 (S.C.C.) at paragraph 10:

> It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

24 This formulation of the proper approach to statutory interpretation was repeated in *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1, [2011] 1 S.C.R. 3 (S.C.C.) at paragraph 21, and *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 S.C.R. 306 (S.C.C.) at paragraph 27.

25 Inherent in the contextual approach to statutory interpretation is the understanding that the grammatical and ordinary sense of a provision is not determinative of its meaning. A court must consider the total context of the provision to be interpreted "no matter how plain the disposition may seem upon initial reading" (*ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140 (S.C.C.) at paragraph 48). From the text and this wider context the interpreting court aims to ascertain legislative intent, "[t]he most significant element of this analysis" (*R. v. Monney*, [1999] 1 S.C.R. 652 (S.C.C.) at paragraph 26).

Application of the Principles of Statutory Interpretation

26 I therefore turn to the required textual, contextual and purposive analysis required to answer this question.

(i) Textual Analysis

27 The appellant argues that the definitions of "regulation" found in the *Interpretation Act*, R.S.C. 1985, c. I-21 and the *Statutory Instruments Act*, R.S.C. 1985, c. S-22 decide the meaning of "rules" under the Act. The appellant's argument relies on paragraph 15(2)(*b*) of the *Interpretation Act*, which states:

> 15. (2) Where an enactment contains an interpretation section or provision, it shall be read and construed
>
> [...]
>
> (*b*) as being applicable to all other enactments relating to the same subject-matter unless a contrary intention appears.
>
> 15. (2) Les dispositions définitoires ou interprétatives d'un texte:
>
> . . .
>
> *b*) s'appliquent, sauf indication contraire, aux autres textes portant sur un domaine identique.

28 Subsection 2(1) of the *Interpretation Act* provides that:

> 2. (1) In this Act,
>
> "regulation" includes an order, regulation, rule, rule of court, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution or other instrument issued, made or established
>
> (a) in the execution of a power conferred by or under the authority of an Act, or
>
> (b) by or under the authority of the Governor in Council.
>
> [Emphasis added.]
>
> 2. (1) Les définitions qui suivent s'appliquent à la présente loi.
>
> « règlement » Règlement proprement dit, décret, ordonnance, proclamation, arrêté, règle judiciaire ou autre, règlement administratif, formulaire, tarif de droits, de frais ou d'honoraires, lettres patentes, commission, mandat, résolution ou autre acte pris:
>
> a) soit dans l'exercice d'un pouvoir conféré sous le régime d'une loi fédérale;
>
> b) soit par le gouverneur en conseil ou sous son autorité.
>
> [Le souligné est de moi.]

29 Similarly, subsection 2(1) of the *Statutory Instruments Act* provides:

> 2. (1) In this Act,
>
> "regulation" means a statutory instrument
>
> (a) made in the exercise of a legislative power conferred by or under an Act of Parliament, or
>
> (b) for the contravention of which a penalty, fine or imprisonment is prescribed by or under an Act of Parliament,
>
> and includes a rule, order or regulation governing the practice or procedure in any proceedings before a judicial or quasi-judicial body established by or under an Act of Parliament, and any instrument described as a regulation in any other Act of Parliament.
>
> [Emphasis added.]
>
> 2. (1) Les définitions qui suivent s'appliquent à la présente loi.
>
> « règlement » Texte réglementaire:
>
> a) soit pris dans l'exercice d'un pouvoir législatif conféré sous le régime d'une loi fédérale;
>
> b) soit dont la violation est passible d'une pénalité, d'une amende ou d'une peine d'emprisonnement sous le régime d'une loi fédérale.
>
> Sont en outre visés par la présente définition les règlements, décrets, ordonnances, arrêtés ou règles régissant la pratique ou la procédure dans les instances engagées devant un organisme judiciaire ou quasi judiciaire constitué sous le régime d'une loi fédérale, de même que tout autre texte désigné comme règlement par une autre loi fédérale.
>
> [Le souligné est de moi.]

30 In the alternative, even if the definitions of "regulation" do not formally apply to the Act, the appellant submits that they are declaratory of the usual and ordinary meaning of the word "regulation". It follows, the appellant argues, that the word "regulation" found in subsection 36(1) of the Act includes "rules" made under section 17, so that the Agency was required to obtain the Governor in Council's approval of the Quorum Rule.

31 There are, in my view, a number of difficulties with these submissions.

32 First, the definition of "regulation" in subsection 2(1) of the *Interpretation Act* is preceded by the phrase "In this Act". This is to be contrasted with subsection 35(1) of the *Interpretation Act*

which contains definitions that are to be applied "[i]n every enactment". As the word "regulation" is not found in subsection 35(1), the logical inference is that the definition found in subsection 2(1) is not to be applied to other enactments.

33 Similarly, the word "regulation" is defined in the *Statutory Instruments Act* only for the purpose of that Act.

34 Second, paragraph 15(2)(*b*) of the *Interpretation Act* is subject to the caveat "unless a contrary intention" is evidenced in the enactment under consideration. For reasons developed in the contextual analysis, I am of the view that the Act does demonstrate such a contrary intention.

35 Third, subsection 3(3) of the *Interpretation Act* states that "[n]othing in this Act excludes the application to an enactment of a rule of construction applicable to that enactment and not inconsistent with this Act." This further limits the application of paragraph 15(2)(*b*) of the *Interpretation Act*.

36 Notwithstanding these difficulties, I agree that there is some potential ambiguity in the plain meaning of the word "regulation" in that in some contexts it can include a "rule". Where the word "regulation" can support more than one ordinary meaning, the meaning of the word plays a lesser role in the interpretive process. I therefore turn to the contextual analysis to read the provisions of the Act as a harmonious whole.

(ii) Contextual Analysis

37 An electronic search of the Act discloses that the word "rule" is used in the order of 11 different provisions, while "regulation" is found in over 30 provisions. In no case are the words used interchangeably. For example, at subsection 4(1) of the Act, "orders and regulations" made under the Act relating to transportation matters take precedence over any "rule, order or regulation" made under any other Act of Parliament. Similarly, under section 25 of the Act, the Agency is granted all powers vested in superior courts to, among other things, enforce "orders and regulations" made under the Act. The absence of reference to "rules" in both provisions suggests rules hold a subsidiary position to orders or regulations. This interpretation is consistent with the view that rules are created by the Agency on its own initiative, while orders come at the end of an adjudicative process and regulations must be approved by the Governor in Council.

38 Other provisions relevant to the contextual analysis are sections 34 and 36 of the Act. Subsection 34(2) requires the Agency to give to the Minister notice of every rule proposed under subsection 34(1) (which deals with the fixing of license and permit fees). Subsection 36(2) similarly requires the Agency to give the Minister notice of every regulation proposed to be made under the Act. If rules are a subset of regulations, subsection 34(2) would be redundant, because the Minister must be notified of all proposed regulations. The interpretation of "rules" as a subset of "regulation" would violate the presumption against tautology, where Parliament is presumed to

avoid speaking in vain (*Québec (Procureur général) c. Carrières Ste-Thérèse ltée*, [1985] 1 S.C.R. 831 (S.C.C.), at page 838.

39 Moreover, whenever "rule" appears in the Act it is in the context of internal procedural or non-adjudicative administrative matters. See:

- subsection 16(1): dealing with the quorum requirement;
- subsection 17(*a*): dealing with sittings of the Agency and the carrying on of its work;
- subsection 17(*b*): concerning procedures and business before the Agency, including the circumstances in which hearings may be held in private;
- subsection 17(*c*) dealing with a number of members required to hear any matter or perform any of the functions of the Agency;
- subsection 25.1(4): dealing with the Agency's right to make rules specifying a scale under which costs are taxed;
- subsection 34(1): dealing with fixing fees for, among other things, applications, licenses and permits;
- section 109: dealing with the right of judges of the Federal Court to, with the approval of the Governor in Council, make general rules regarding the practice and procedure of the Court in relation to insolvent railways;
- subsection 163(1): providing that in the absence of agreement to the contrary, the Agency's rules of procedure apply to arbitrations; and
- subsection 169.36(1): dealing with the right of the Agency to make rules of procedure for an arbitration.

40 In contrast, the Act's use of the word "regulations" generally refers to more than merely internal, procedural matters. For example:

- subsection 86(1): the Agency can make regulations relating to air services;
- section 86.1: the Agency shall make regulations respecting advertising of prices for air services within or originating in Canada;
- subsection 92(3): the Agency can make regulations concerning the adequacy of liability insurance for a railway;
- subsection 117(2): the Agency may make regulations with respect to information to be contained in a railway tariff;

• subsection 128(1): the Agency can make regulations relating to the interswitching of rail traffic; and

• section 170: the Agency can make regulations for the purpose of eliminating undue obstacles in the transportation network to the mobility of persons with disabilities.

41 The dichotomy between internal/procedural matters on one hand and external/substantive on the other is reflected in section 54 of the Act, which provides that the appointment of receivers or managers does not relieve them from complying with the Act and with the "orders, regulations, and directions made or issued under this Act". The absence of "rules" from this listing is consistent with the interpretation that, in the context of the Act, rules only apply to procedural matters and not the substantive operations that a receiver or manager would be charged with. This interpretation also accords with the presumption of consistent expression, since it is generally inferred that "[w]hen an Act uses different words in relation to the same subject such a choice by Parliament must be considered intentional and indicative of a change in meaning or a different meaning" (*Peach Hill Management Ltd. v. R.*, [2000] F.C.J. No. 894, 257 N.R. 193 (Fed. C.A.) at paragraph 12.

42 Another relevant provision is section 109, which requires Federal Court judges to seek approval from the Governor in Council when establishing rules of procedure for matters relating to insolvent railways. Two possible conclusions may be taken from this provision. First, it could imply that the Agency's rules are also subject to Governor in Council approval. Second, it could imply that since Federal Court judges are explicitly required to seek such approval, the absence of that same requirement under section 17 is indicative of Parliament's intent that the Agency is not required to seek such approval.

43 The latter interpretation is, in my view, the better view. It is in accordance with the maxim of statutory interpretation *expressio unius exclusio alterius*, which in essence states that consistent drafting requires that some legislative silences should be seen as deliberate. While this maxim should be approached with caution, the Supreme Court has relied on similar reasoning to find Parliament's inclusion of express limitations in some sections of an act as evidence Parliament did not intend those limitations to be included in other provisions where the exceptions are not explicitly stated (*Ulybel Enterprises Ltd.* at paragraph 42).

44 In the present case, since the Act specifically requires Federal Court judges to receive approval from the Governor in Council when establishing rules of procedure, the application of the *exclusio unius* maxim is consistent with the interpretation that the Agency's rules are not subject to this requirement.

45 There is a further, final contextual aid, found in the legislative evolution of the Act. In *Ulybel Enterprises Ltd.* at paragraph 33, the Supreme Court noted that prior enactments may throw light on Parliament's intent when amending or adding to a statute.

46 The predecessor to the Agency, the National Transportation Agency (NTA), was governed by the *National Transportation Act*, *1987*, c. 28 (3rd Supp.) (former Act).

47 Pursuant to subsection 22(1) of the former Act, the NTA had the power to make rules with the approval of the Governor in Council:

> 22. (1) The Agency may, with the approval of the Governor in Council, make rules respecting
>
> (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 in camera hearings may be held; and
>
> (c) the number of members of the Agency that are required to hear any matter or exercise any of the functions of the Agency under this Act or any other Act of Parliament.
>
> (2) Subject to the rules referred to in subsection (1), two members of the Agency constitute a quorum.
>
> [Emphasis added.]
>
> 22. (1) L'Office peut, avec l'approbation du gouverneur en conseil, établir des règles concernant:
>
> 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 connaître des questions ou remplir telles des fonctions de l'Office prévues par la présente loi ou une autre loi fédérale.
>
> (2) Sous réserve des règles visées au paragraphe (1), le quorum est constitué de deux membres.
>
> [Le souligné est de moi.]

48 In 1996, the former Act was replaced with the current regime. Section 22 of the former Act was replaced by nearly identical provisions contained in subsection 16(1) and section 17 of the current Act. There was one significant difference: the requirement to obtain Governor in Council approval for the rules was removed. In my view, this demonstrates that Parliament intended that the Agency not be required to obtain Governor in Council approval when making rules pursuant to section 17 of the Act.

49 Before leaving the contextual analysis, for completeness, I note that at the hearing of this appeal counsel for the Agency indicated that he no longer relied on the clause-by-cause analysis of section 17 of the Act as an aid to interpretation. As such, it has formed no part of my analysis.

(iii) Purposive Analysis

50 The Agency has a broad mandate in respect of all transportation matters under the legislative authority of Parliament. The Agency performs two key functions.

51 First, in its role as a quasi-judicial tribunal, it resolves commercial and consumer transportation-related disputes. Its mandate was increased to include resolving accessibility issues for persons with disabilities.

52 Second, the Agency functions as an economic regulator, making determinations and issuing licenses and permits to carriers which function within the ambit of Parliament's authority. In both roles the Agency may be called to deal with matters of significant complexity.

53 Subsection 29(1) of the Act requires the Agency to make its decision in any proceeding before it as expeditiously as possible, but no later than 120 days after the originating documents are received (unless the parties agree otherwise or the Governor in Council shortens the time frame by regulation).

54 The mandate of the Agency when viewed through the lens that it must act with celerity requires an efficient decision-making process. Efficient processes are the result of a number of factors, not the least of which are rules of procedure that establish efficient procedures and that are flexible and able to react to changing circumstances.

55 In my view, interpreting subsection 36(1) of the Act to not include rules as a subset of regulations (so as to allow the Agency to enact rules without Governor in Council approval) is consistent with the purpose of the Agency as envisioned in the Act.

(iv) Conclusion of Statutory Interpretation Analysis

56 Having conducted the required textual, contextual and purposive analysis, I am satisfied the Agency's interpretation of the Act was reasonable. While there may be a measure of ambiguity in the text of the Act, the Act's context and purpose demonstrate that the Agency's interpretation fell within a range of acceptable outcomes.

57 There remains to consider the appellant's final argument.

What, if anything, is the Effect of Governor in Council Approval of the Rules in 2005?

58 As noted above, the appellant argues that because the Rules were approved by the Governor in Council, they could not be amended without Governor in Council approval.

59 In my view, there are two answers to this argument.

60 First, while the Regulatory Impact Analysis Statement which accompanied the Rules in 2005 stated that Governor in Council approval was required for the enactment of the Rules, such a statement does not bind this Court. Regulatory Impact Analysis Statements do not form part of the substantive enactment (*Astral Media Radio Inc. v. Society of Composers, Authors & Music Publishers of Canada*, 2010 FCA 16, [2011] 1 F.C.R. 347 (F.C.A.), at paragraph 23). As the Agency later reasonably concluded that Governor in Council approval was not required to enact the Quorum Rule, it follows that Governor in Council approval in 2005 was an unnecessary step that does not limit or bind the Agency now or in the future.

61 Second, the Quorum Rule is new. It does not vary or rescind any provision in the Rules that could be said to be previously approved by the Governor in Council.

Conclusion

62 For these reasons, I would dismiss the appeal. In the circumstances where the appeal was in the nature of public interest litigation and the issue raised by the appellant was not frivolous, I would award the appellant his disbursements in this Court.

63 In the event the parties are unable to reach agreement on the disbursements, they shall be assessed.

***Wyman W. Webb J.A.*:**

I agree.

***Edmond P. Blanchard J.A. (ex officio)*:**

I agree.

Appeal dismissed.

2015 CAF 269, 2015 FCA 269
Federal Court of Appeal

Lukács v. Canadian Transportation Agency

2015 CarswellNat 12223, 2015 CarswellNat 6248,
2015 CAF 269, 2015 FCA 269, 261 A.C.W.S. (3d) 508

Dr. Gábor Lukács, Appellant and Canadian Transportation Agency and British Airways PLC, Respondents

Eleanor R. Dawson J.A., Ryer J.A., Near J.A.

Heard: September 15, 2015
Judgment: November 27, 2015
Docket: A-366-14

Counsel: Dr. Gábor Lukács, Appellant, for himself
Allan Matte, for Respondent, Canadian Transportation Agency
Carol E. McCall, for Respondent, British Airways PLC

***Near J.A.*:**

I. Introduction

1 The appellant appeals from a May 26, 2014 decision of the Canadian Transportation Agency (the Agency), which concerns the compensation that British Airways must pay to passengers to whom it denies boarding (Decision No. 201-C-A-2014). He contests both the substance of the decision and the fairness of the procedure leading up to it. This Court granted the appellant leave to appeal under section 41 of the *Canada Transportation Act*, S.C. 1996, c. 10.

II. Facts

2 On January 30, 2013, the appellant filed a complaint with the Agency concerning a number of matters involving British Airways. On January 17, 2014, after an exchange of submissions by the parties, the Agency released its decision.

3 Only one of the matters figuring in the January 17, 2014 decision remains at issue in this appeal, namely the matter of "denied boarding compensation". This term refers to the compensation that an airline must pay to passengers to whom it denies boarding as a result of overbooking a flight.

The amount that British Airways is required to pay is set out in Rule 87(B)(3)(B) of International Passenger Rules and Fares Tariff No. BA-1, NTA(A) No. 306.

4 In his initial complaint, the appellant argued that Rule 87(B)(3)(B) was unreasonable within the meaning of section 111 of the *Air Transportation Regulations*, SOR/88-58 (the *ATR*). The appellant put forward a number of arguments in support of this submission.

5 First, the appellant argued that the Rule should reflect British Airways' obligations under European Union Regulation (EC) No. 261/2004, which applies to all flights departing from an airport in the United Kingdom (U.K.) and operated by European Union (E.U.) airlines (air carriers, or carriers) with a destination in the U.K. The appellant maintained that British Airways would not suffer any competitive disadvantage by amending the Rule to reflect the E.U. Regulation. He further submitted that British Airways has complied with the Regulation for flights from the U.K. to Canada, but has failed to comply with the Regulation for flights from Canada to the U.K. The appellant stated that he was not asking the Agency to enforce the E.U. Regulation. Rather, he was asking the Agency to consider the reasonableness of the Rule, and appropriate substitutes, in light of the Regulation.

6 The Agency concluded that it would not require British Airways to incorporate the provisions of the Regulation. The Agency based its conclusion on one of its previous decisions, Decision No. 432-C-A-2013 (*Nawrot et al v. Sunwing Airlines Inc.)*, in which it considered an argument regarding the same E.U. Regulation and determined that it would only consider the reasonableness of carriers' tariffs by reference to legislation or regulations that it is able to enforce. The relevant paragraph of Decision No. 432-C-A-2013 reads as follows:

> [103] As to the reasonableness of carriers' tariffs filed with the Agency, the Agency makes determinations on provisions relating to legislation or regulations that the Agency is able to enforce. Legislation or regulations promulgated by a foreign authority, such as the European Union's Regulation (EC) 261/2004, do not satisfy this criterion. If a carrier feels compelled or has been instructed by a foreign authority to include a reference in its tariff to that authority's law, the carrier is permitted to do so, but it is not a requirement imposed by the Agency.

7 Second, the appellant argued that Rule 87(B)(3)(B) was unreasonable because it was inconsistent with the principle of a flat rate of denied boarding compensation. Rule 87(B)(3)(B) provides that when a passenger is denied boarding to a flight from Canada to the U.K., British Airways will pay the full value of the replacement ticket to the passenger's next stopover, plus between $50 and $200.

8 The Agency concluded that the Rule may be unreasonable within the meaning of subsection 111(1) of the *ATR* because British Airways had not demonstrated how it would suffer a competitive disadvantage if it were to raise the amounts of denied boarding compensation.

9 Third and finally, the appellant argued that Rule 87(B)(3)(B) purports to pre-empt the rights of passengers who accept denied boarding compensation to seek damages under other laws and, as such, fails to provide passengers with a reasonable opportunity to fully assess their compensation options. The Agency agreed, finding the Rule unreasonable within the meaning of subsection 111(1) of the *ATR* insofar as it purports to provide a "sole remedy" for denied boarding.

10 In the Order issued with its January 17, 2014 decision, the Agency provided British Airways with the opportunity to "show cause" why it should not be required to amend Rule 87(B)(3)(B) to bring it in conformity with one of three denied boarding compensation schemes listed by the Agency, or to propose a new scheme that the Agency may consider to be reasonable. The Order also stipulated that the appellant would have the opportunity to file comments on British Airways' answer to the show cause Order.

11 On March 17, 2014, British Airways filed its answer. In this answer, British Airways stated that it was choosing to implement one of the four schemes listed in the Order, namely "[t]he regime proposed by Air Canada during the proceedings related to Decision No. 442-C-A-2013 (*Azar v. Air Canada)*". British Airways proposed amending Rule 87(B)(3)(B) to provide that, on flights from Canada to the U.K., passengers who were denied boarding would be compensated in the amount of CAD$400 in cash or equivalent for delays of zero to four hours, and in the amount of CAD$800 for delays of over four hours.

12 On March 26, 2014, in accordance with the show cause Order, the appellant filed comments in response to the answer given by British Airways.

13 On March 28, 2014, British Airways filed a reply to the appellant's March 26, 2014 submissions. On April 1, 2014, the appellant wrote to the Agency seeking permission to provide submissions in response to British Airways' March 28, 2014 reply.

14 In Decision No. LET-C-A-25-2014, dated April 16, 2014, the Agency struck from the record the submissions made by British Airways on March 28, 2014 and those made by the appellant on April 1, 2014. The Agency also directed the appellant to amend his March 26, 2014 comments by removing any submissions unrelated to the specific matter of the denied boarding compensation regime proposed by Air Canada in Decision No. 442-C-A-2013 (*Azar v. Air Canada*).

15 On April 23, 2014, the appellant asked the Agency to reconsider its April 16, 2014 decision. On May 2, 2014, in Decision No. LET-C-A-29-2014, the Agency denied the appellant's request for reconsideration. The appellant filed a redacted version of his March 26, 2014 submissions "under protest" shortly thereafter, on May 8, 2014.

16 On May 26, 2014, the Agency issued Decision No. 201-C-A-2014 (the final decision), the decision at issue in this appeal.

17 In this decision, the Agency first summarized the appellant's response, which was that the Proposed Rule was unreasonable because it only applied to flights from Canada to the U.K., and not to flights from the U.K. to Canada. In support of this argument, the appellant referenced Decision No. 227-C-A-2013 (*Lukács v. WestJet*), in which the Agency had determined that:

> ... The failure to establish conditions governing denied boarding compensation for flights to and from Canada is contrary to Decision No. 666-C-A-2001. Therefore, the Agency finds that if Proposed Tariff Rule 110(E) were to be filed with the Agency, it would be considered unreasonable.
>
> (At para. 39; emphasis added)

18 In its analysis, the Agency determined that British Airways' Proposed Rule was consistent with the proposal made by Air Canada in Decision No. 442-C-A-2013 in terms of the amount of compensation. However, the Agency determined that, in terms of its application, the Proposed Rule was inconsistent with Air Canada's proposal in Decision No. 442-C-A-2013. Air Canada's proposal applied to flights from Canada to the E.U., whereas British Airways' proposal applied only to flights from Canada to the U.K.

19 The Agency therefore concluded that the Proposed Rule was unreasonable, and that, as a result, British Airways had failed to show cause. The Agency ordered British Airways to file a Proposed Rule that would apply to flights from Canada to the E.U.

III. Legislative Framework

20 Section 110 of the *Air Transportation Regulations* requires air carriers operating international service in Canada to create and file with the Agency a tariff setting out the terms and conditions of carriage. The tariff is a contract between the carrier and its passengers.

21 Paragraph 122(*c*)(iii) of the *ATR* stipulates that carriers are required to include in their tariff terms and conditions relating to denied boarding compensation:

> **122.** Every tariff shall contain
>
> . . .
>
> (*c*) the terms and conditions of carriage, clearly stating the air carrier's policy in respect of at least the following matters, namely,
>
> . . .
>
> (iii) compensation for denial of boarding as a result of overbooking,
>
> . . .

122. Les tarifs doivent contenir:

[...]

c) les conditions de transport, dans lesquelles est énoncée clairement la politique du transporteur aérien concernant au moins les éléments suivants:

[...]

(iii) les indemnités pour refus d'embarquement à cause de sur réservation,

[...]

22 Section 111 of the *ATR* sets out the requirements by which carriers must abide when setting terms and conditions of carriage:

111. (1) All tolls and terms and conditions of carriage, including free and reduced rate transportation, that are established by an air carrier shall be just and reasonable and shall, under substantially similar circumstances and conditions and with respect to all traffic of the same description, be applied equally to all that traffic.

(2) No air carrier shall, in respect of tolls or the terms and conditions of carriage,

(a) make any unjust discrimination against any person or other air carrier;

(b) give any undue or unreasonable preference or advantage to or in favour of any person or other air carrier in any respect whatever; or

(c) subject any person or other air carrier or any description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatever.

(3) The Agency may determine whether traffic is to be, is or has been carried under substantially similar circumstances and conditions and whether, in any case, there is or has been unjust discrimination or undue or unreasonable preference or advantage, or prejudice or disadvantage, within the meaning of this section, or whether in any case the air carrier has complied with the provisions of this section or section 110.

111. (1) Les taxes et les conditions de transport établies par le transporteur aérien, y compris le transport à titre gratuit ou à taux réduit, doivent être justes et raisonnables et doivent, dans des circonstances et des conditions sensiblement analogues, être imposées uniformément pour tout le trafic du même genre.

(2) En ce qui concerne les taxes et les conditions de transport, il est interdit au transporteur aérien:

a) d'établir une distinction injuste à l'endroit de toute personne ou de tout autre transporteur aérien;

b) d'accorder une préférence ou un avantage indu ou déraisonnable, de quelque nature que ce soit, à l'égard ou en faveur d'une personne ou d'un autre transporteur aérien;

c) de soumettre une personne, un autre transporteur aérien ou un genre de trafic à un désavantage ou à un préjudice indu ou déraisonnable de quelque nature que ce soit.

(3) L'Office peut décider si le trafic doit être, est ou a été acheminé dans des circonstances et à des conditions sensiblement analogues et s'il y a ou s'il y a eu une distinction injuste, une préférence ou un avantage indu ou déraisonnable, ou encore un préjudice ou un désavantage au sens du présent article, ou si le transporteur aérien s'est conformé au présent article ou à l'article 110.

23 Section 113 of the *ATR* allows the Agency to disallow any tariff, or any portion of a tariff, that does not comply with the requirements of section 111:

113. The Agency may

(a) suspend any tariff or portion of a tariff that appears not to conform with subsections 110(3) to (5) or section 111 or 112, or disallow any tariff or portion of a tariff that does not conform with any of those provisions; and

(b) establish and substitute another tariff or portion thereof for any tariff or portion thereof disallowed under paragraph (*a*).

113. L'Office peut:

a) suspendre tout ou partie d'un tarif qui paraît ne pas être conforme aux paragraphes 110(3) à (5) ou aux articles 111 ou 112, ou refuser tout tarif qui n'est pas conforme à l'une de ces dispositions;

b) établir et substituer tout ou partie d'un autre tarif en remplacement de tout ou partie du tarif refusé en application de l'alinéa *a*).

IV. Positions of the Parties

24 The appellant submits that the Agency's final decision is unreasonable, as it neglects to impose any denied boarding compensation on British Airways flights departing from the E.U., contrary to paragraph 122(*c*)(iii) of the *ATR*. The appellant also submits that the Agency deprived him of a meaningful opportunity to reply to British Airways' response to the show cause Order, and thus breached its duty of procedural fairness.

25 The appellant asks this Court to allow the appeal and to set aside the final decision of the Agency. He also asks the Court to set aside the Agency's procedural decisions, to the extent that these decisions direct the appellant to delete portions of his submissions. The appellant seeks his disbursements in any event of the cause and, if he is successful, a moderate allowance for the time that he devoted to this appeal.

26 The respondent British Airways submits that the Agency's final decision is reasonable, and asks this Court to dismiss the appeal, with costs. The respondent Agency has not provided any written submissions in this appeal.

V. Issues

27 There are two issues in this appeal:

1. Does the substance of the Agency's final decision contain a reversible error?

2. Did the Agency breach its duty of procedural fairness?

VI. Standard of Review

28 The standard of review applicable to the first issue, the Agency's substantive decision, is reasonableness. The issue of whether British Airways had indeed "shown cause" is a question of mixed fact and law. As such, the standard of review is presumed to be reasonableness (*New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9 (S.C.C.) at para. 51, [2008] 1 S.C.R. 190 (S.C.C.)). Furthermore, the courts have generally reviewed decisions of the Agency — an administrative body with specialized expertise — on a deferential standard (*Canadian National Railway v. Canadian Transportation Agency*, 2013 FCA 270 (F.C.A.) at para. 3, (2013), 454 N.R. 125 (F.C.A.), citing *VIA Rail Canada Inc. v. Canadian Transportation Agency*, 2007 SCC 15 (S.C.C.) at para. 100, [2007] 1 S.C.R. 650 (S.C.C.)).

29 Issues of procedural fairness are reviewable on the correctness standard (*Khela v. Mission Institution*, 2014 SCC 24 (S.C.C.) at para. 79, [2014] 1 S.C.R. 502 (S.C.C.)). Correctness is therefore the standard of review applicable to the second issue in this appeal.

VII. Analysis

A. Reasonableness of the Decision

30 The appellant submits that the final decision of the Agency is unreasonable because it imposes on British Airways a tariff relating to denied boarding compensation that only covers passengers travelling from Canada to the E.U., and not those travelling from the E.U. to Canada.

31 The appellant submits that this outcome is unreasonable because it is contrary to paragraph 122(*c*)(iii) of the *ATR*, and creates a legal loophole, defeating the purpose for which paragraph 122(*c*)(iii) of the *ATR* was enacted.

32 The appellant submits that paragraph 122(*c*)(iii), which requires carriers to include in their tariff a policy concerning denied boarding compensation, applies to both service from Canada to destinations abroad, and to service from destinations abroad to Canada. The appellant supports this submission by reference to the Agency's Decision No. 227-C-A-2013 (*Lukács v. WestJet*). The appellant also refers to the more recent Agency Decision No. 148-C-A-2015 (*Ahmad v. Pakistan International Airlines Corporation*). The Agency found in both of these cases that an airline's tariff must include provisions that deal with denied boarding compensation both to and from Canada.

33 As the appellant correctly points out, in Decision No. 227-C-A-2013, the Agency found that a tariff rule that WestJet had proposed was unreasonable because it did not set out compensation for flights to and from Canada. The relevant paragraph which the appellant has relied upon reads as follows:

> [39] Although WestJet proposes to revise Existing Tariff Rule 110(E) by deleting text that provides that denied boarding compensation will not be tendered for flights to and from Canada, Proposed Tariff Rule 110(E) only sets out compensation due to passengers who are denied boarding for flights from the United States of America. The failure to establish conditions governing denied boarding compensation for flights to and from Canada is contrary to Decision No. 666-C-A-2001. Therefore, the Agency finds that if Proposed Tariff Rule 110(E) were to be filed with the Agency, it would be considered unreasonable.

34 Similarly, in Decision No. 148-C-A-2015 the Agency found as follows:

> [29] As PIA's Tariff does not contain terms and conditions of carriage that clearly state its policy in respect of denied boarding and compensation for denied boarding as a result of overbooking for travel to and from Canada, the Agency finds that PIA contravened paragraph 122(*c*) and subparagraph 122(*c*)(iii) of the ATR.

35 In the case before us the Agency appears to have implicitly decided that it is not necessary for an airline to include in its tariff a provision that clearly sets out its obligations with respect to denied boarding compensation for flights departing the E.U. and coming to Canada. The Agency found that British Airways need not reference E.U. Regulation (EC) No. 261/2004 in its Tariff. It is accepted by all parties to this appeal that British Airways is bound by E.U. Regulation (EC) No. 261/2004 for its flights departing the E.U. to other countries, including Canada.

36 The Agency supported this finding on the basis of its prior Decision No. 432-C-A-2013, in which it stated:

> [103] As to the reasonableness of carriers' tariffs filed with the Agency, the Agency makes determinations on provisions relating to legislation or regulations that the Agency is able to enforce. Legislation or regulations promulgated by a foreign authority, such as the European Union's Regulation (EC) 261/2004, do not satisfy this criterion. If a carrier feels compelled or has been instructed by a foreign authority to include a reference in its tariff to that authority's law, the carrier is permitted to do so, but it is not a requirement imposed by the Agency.

37 In my view, the finding in paragraph 103 merely sets forth a policy decision that the Agency will not force an airline to incorporate by reference a provision of another jurisdiction's legislation on the basis that the Agency cannot enforce the provisions of foreign legislation. It does not specifically address whether a tariff must include a provision that deals with denied boarding compensation quite independent of another jurisdiction's legislation for flights to and from Canada.

38 It is instructive to note that British Airways' existing Tariff did in fact cover denied boarding compensation for flights "between points in Canada and points in the United Kingdom served by British Airways" (Rule 87(B)). No clear explanation was provided by the Agency as to why this was no longer required. Further, in Decision No. 432-C-A-2013 at paragraphs 71 and 72, the Agency found that the absence of language providing that passengers affected by denied boarding will be eligible for compensation is unreasonable. In the case before us there is also no language dealing with denied boarding compensation for flights from the E.U. to Canada. It seems to me that Decision No. 432-C-A-2013 offers little support for the proposition that British Airways need not set out clearly in its tariff its obligations with respect to denied boarding compensation both to and from Canada.

39 In addition, the option chosen by British Airways pursuant to the show cause Order was "The regime proposed by Air Canada during the proceedings related to Decision No. 442-C-A-2013 (*Azar v. Air Canada*)". While the regime proposed by Air Canada in *Azar v. Air Canada* dealt only with flights from Canada to the E.U. pursuant to the facts of that case, it is important to note that the tariff in respect of which the proposal applied also covers flights from the E.U. to Canada. This is pursuant to Rule 90(A) of Air Canada's tariff regime, which adopts by reference E.U. Regulation (EC) No. 261/2004 for flights originating in the E.U. and Switzerland.

40 The Agency decision in the case before us lacks clarity with respect to whether British Airways should address denied boarding compensation for flights to Canada from the E.U. In addition, there is an apparent tension between the decision before us and the Agency's prior decisions, which seem to suggest that an airline tariff must include denied boarding compensation provisions for both flights to and from Canada. In my view it is necessary for the Agency to address this tension and apparent inconsistency directly. In light of this, in my view this matter should be returned to the Agency for re-determination. The Agency must clearly address how British Airways is to "meet its tariff obligations of clarity" so that "the rights and obligations of both the

carrier and passengers are stated in such a way as to exclude any reasonable doubt, ambiguity or uncertain meaning" in situations where the tariff is silent with respect to denied boarding compensation for inbound flights to Canada (Decision No. 432-C-A-2013, referencing Decision No. 344-C-A-2013 (*Lukács v. Porter Airlines Inc.*)). In particular, the Agency must clarify whether the tariff must in all instances set out denied boarding compensation provisions for flights to and from Canada, or whether the fact that British Airways passengers from the E.U. to Canada are covered by E.U. Regulation (EC) No. 261/2004 is sufficient.

B. Procedural Fairness

41 The appellant submits that the Agency breached its duty of procedural fairness when it ordered him to redact the majority of his March 26, 2014 submissions. He submits that in doing so, the Agency deprived him of his right to make meaningful submissions in response to British Airways' proposal. Given the decision to refer this matter back to the Agency there is no need to consider the procedural fairness issue raised by the appellant. The Agency is best positioned to determine the extent of submissions it will require for the redetermination of the issue set out above.

VIII. Conclusion

42 I would allow the appeal and remit the matter to the Agency for redetermination in accordance with these reasons.

43 This Court has previously seen fit to award this appellant his disbursements, on the basis that his appeal was in the nature of public interest litigation and that the issue raised was not frivolous (*Lukács v. Canadian Transportation Agency*, 2014 FCA 76 (F.C.A.) at para 62, (2014), 456 N.R. 186 (F.C.A.)). I would award the appellant costs in the amount of $250.00 and his disbursements in this Court, such amounts to be payable by British Airways.

***C. Michael Ryer J.A.*:**

I agree.

***Dawson J.A.*, (dissenting reasons):**

44 I would dismiss this appeal for the following reasons.

45 As noted by the majority, on January 30, 2013, the appellant, Gábor Lukács, filed a complaint with the Canadian Transportation Agency. The complaint alleged that certain provisions relating to liability and denied boarding compensation contained in British Airways' International Passenger Rules and Fares Tariff No. BA-1, NTA(A) No. 306 were unclear and/or unreasonable. Amongst other relief, the appellant requested that the Agency disallow Rule 87(B)(3)(B) of the Tariff and

direct British Airways to incorporate into the Tariff the obligations contained in Regulation (EC) No. 261/2004 of the European Parliament and of the Council of 11 February 2004.

46 Regulation (EC) No. 261/2004 deals with compensation to be paid to passengers in the event they are denied boarding. It applies to every flight departing from an airport in the United Kingdom, and every flight operated by a European Union carrier with a destination in the United Kingdom. The appellant argued that British Airways' Tariff should reflect its legal obligation under the regulation.

47 In response, British Airways noted that while it complies with Regulation (EC) No. 261/2004, it would be inappropriate for the Agency to enforce foreign laws by requiring carriers to include provisions of a European regulation in their Canadian contracts of carriage.

48 In his reply to British Airways' response, the appellant:

> i) accepted British Airways' evidence that it complies with the provisions of Regulation (EC) No. 261/2004 with respect to passengers flying from the United Kingdom to Canada;
>
> ii) submitted that British Airways was currently not complying with its obligations under Regulation (EC) No. 261/2004 with respect to passengers flying from Canada to the United Kingdom;
>
> iii) submitted that the Agency ought to substitute in the relevant portion of the Tariff a provision that reflects British Airways' current practice with respect to denied boarding compensation paid to passengers flying from the United Kingdom to Canada; and
>
> iv) submitted that the Tariff should require British Airways to pay denied boarding compensation to passengers flying from Canada to the United Kingdom in the amounts prescribed by Regulation (EC) No. 261/2004.

49 In Decision No. 10-C-A-2014, the Agency rejected the appellant's submissions on Regulation (EC) No. 261/2004, stating at paragraph 113 of the decision that it would "not require British Airways to incorporate the provisions of Regulation (EC) No. 261/2004 into British Airways' Tariff, or make reference to that Regulation". In reaching this conclusion, the Agency quoted as follows from its earlier Decision No. 432-C-A-2013:

> As to the reasonableness of carriers' tariffs filed with the Agency, the Agency makes determination on provisions relating to legislation or regulations that the Agency is able to enforce. Legislation or regulations promulgated by a foreign authority, such as the European Union's Regulation (EC) 261/2004, do not satisfy this criterion. If a carrier feels compelled or had been instructed by a foreign authority to include a reference in its tariff to that authority's law, the carrier is permitted to do so, but it is not a requirement imposed by the Agency.

50 The order which accompanied the decision required British Airways "to amend its Tariff and conform to this Order and the Agency's findings set out in [the] Decision".

51 The order went on to provide, at paragraph 144, that:

> [...] the Agency provides British Airways with the opportunity to show cause, by no later than February 17, 2014, why the Agency should not require British Airways, with respect to the denied boarding compensation tendered to passengers under Rule 87(B)(3)(B), apply either:
>
> 1. The regime applicable in the United States of America;
>
> 2. The regime proposed by Mr. Lukács in the proceedings related to Decision No. 342-C-A-2013;
>
> 3. The regime proposed by Air Canada during the proceedings related to Decision No. 442-C-A-2013; or
>
> 4. Any other regime that British Airways may wish to propose that the Agency may consider to be reasonable within the meaning of subsection 111(1) of the ATR.

52 Decision No. 442-C-A-2013, referred to in the third option offered to British Airways, dealt with the reasonableness of Air Canada's tariff as it related to denied boarding compensation for travel from Canada to the European Union. The Agency found Air Canada's existing denied boarding compensation in connection with flights from Canada to the European Union to be unreasonable. In the result, the Agency ordered Air Canada to amend its tariff by filing its proposed denied boarding compensation amounts for travel from Canada to the European Union.

53 As argued by British Airways, the appellant did not seek leave to appeal Decision No. 10-C-A-2014 (British Airways' memorandum of fact and law at paragraph 18).

54 In response to this decision, British Airways proposed to apply the compensation regime proposed by Air Canada as set out in Agency Decision No. 442-C-A-2013. The text of British Airways' proposed tariff was clear that it applied only to compensation payable for flights from Canada to the United Kingdom. The proposed tariff was silent with respect to compensation payable for flights from the United Kingdom to Canada.

55 The appellant replied to the proposal advanced by British Airways, challenging the reasonableness of the proposal on the ground that it failed to establish conditions governing denied boarding compensation for flights from the United Kingdom to Canada. The appellant submitted that British Airways' proposal purported, albeit implicitly, to exempt it from the obligation to pay denied boarding compensation for flights from the United Kingdom to Canada.

56 Subsequently, in Decision No. LET-C-A-25-2014, the Agency found that parts of the appellant's reply submissions were unrelated to the specific matter of the denied boarding compensation regime proposed by Air Canada in the proceeding that led to Decision No. 442-C-A-2013. In result, the Agency directed the appellant to refile his reply submissions, deleting all submissions that were unrelated to the denied boarding compensation regime proposed previously by air Canada in the proceeding that led to Decision No. 442-C-A-2013.

57 Later, the Agency dismissed a request that it reconsider this decision (Decision No. LET-C-A-29-2014).

58 From this chronology it is apparent that in Decision No. 10-C-A-2014, the Agency made a final decision that it would not require British Airways to incorporate the provisions of Regulation (EC) No. 261/2004 into its tariff. By allowing British Airways the option to propose the same compensation regime previously proposed by Air Canada, the Agency also made a final decision that British Airways could, as it did, propose a tariff that dealt only with denied boarding compensation amounts for travel from Canada to the United Kingdom.

59 Any challenge to these decisions ought to have been brought as an application for leave to appeal Decision No. 10-C-A-2014. The appellant cannot challenge these decisions under the guise of a challenge to Decision No. 201-C-A-2014.

60 It further follows that the Agency did not breach procedural fairness by ordering that the appellant delete submissions in his final reply that were not relevant to the proposed tariff regime advanced by Air Canada that led to Decision No. 442-C-A-2013. The impugned submissions were not relevant to the remaining issue before the Agency, and it was not unfair for the Agency to ignore them and order that they be removed from the record.

61 For these reasons, I would dismiss the appeal with costs.

Appeal allowed.

2016 CAF 174, 2016 FCA 174
Federal Court of Appeal

Lukács v. Canadian Transportation Agency

2016 CarswellNat 10267, 2016 CarswellNat 2271,
2016 CAF 174, 2016 FCA 174, 267 A.C.W.S. (3d) 515

Gábor Lukács, Appellant and Canadian Transportation Agency and Newleaf Travel Company Inc., Respondents

Johanne Gauthier J.A., Wyman W. Webb J.A., Mary J.L. Gleason J.A.

Judgment: June 19, 2016
Docket: 16-A-17

Counsel: Dr. Gábor Lukács, Appellant (written), for himself
Allan Matte (written), for Respondent, Canadian Transportation Agency
Brian J. Meronek (written), Ian S. McIvor (written), for Respondent, Newleaf Travel Company Inc.

Subject: Civil Practice and Procedure; Contracts; Public

APPLICATION for leave to appeal decision of Canadian Transportation Agency.

***Mary J.L. Gleason J.A.*:**

1 The appellant, Dr. Gábor Lukács, is seeking leave to appeal Decision 100-A-2016 of the Canadian Transportation Agency, issued on March 29, 2016 [the Decision]. In the Decision, the Agency made two determinations. First, it decided that resellers of domestic air service are no longer required to hold licences under the *Canada Transportation Act*, S.C. 1996, c. 10 [the CTA], so long as they do not hold themselves out as an air carrier operating an air service. Second, in application of the foregoing, the Agency held that the respondent, Newleaf Travel Company Inc., was such a reseller and therefore not required to hold a licence. In so deciding, the Agency modified its previous interpretation of subsection 55(1) and paragraph 57(a) of the CTA that it had applied to several other domestic resellers of air services.

2 Dr. Lukács submits the Agency made an error of law as its changed interpretation of subsection 55(1) and paragraph 57(a) of the CTA is unreasonable. He also alleges that the Agency lacked jurisdiction to undertake the inquiry which led to the new interpretation of the licencing requirements applicable to resellers of domestic air services. The issues in the proposed appeal therefore raise questions that fall within the scope of section 41 of the CTA.

3 Newleaf does not contest this but rather says that Dr. Lukács lacks standing to commence this appeal as he was not a party to the proceeding before the Agency. It also asserts that Dr. Lukács has failed to raise an arguable case in respect of the issues that he has raised.

4 Contrary to what Newleaf asserts, the materials filed do raise an arguable case and Dr. Lukács does have standing to commence this appeal, either as a private or public interest applicant.

5 Dr. Lukács participated in the consultation before the Agency undertaken with respect to the change in the interpretation of the licencing requirements applicable to domestic resellers of air service, which is sufficient to afford him standing to launch this appeal.

6 Even if this were not the case, he would possess standing as a public interest litigant. The test for public interest standing involves consideration of three inter-related factors: first, whether there is a justiciable issue, second, whether the individual seeking standing has a genuine interest in the issue, and, third, whether the proposed proceeding is a reasonable and effective way to bring the matter before the courts: *Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)*, 2012 SCC 45, [2012] 2 S.C.R. 524 (S.C.C.) at paras. 36-37. As leave is being granted, this appeal raises a justiciable issue. It is undisputed that Dr. Lukács is an air passenger rights advocate, who has frequently brought applications to this Court in respect of Agency decisions, and therefore does have a genuine interest in the issues raised in this appeal. Finally, an appeal by someone like Dr. Lukács is an effective way for the issues raised in this appeal to be brought before the Court as Newleaf would not challenge the Decision rendered in its favour.

7 Thus, leave should be granted to Dr. Lukács to commence this appeal.

8 Dr. Lukács requests that this appeal be expedited and joined for hearing with an earlier judicial review application he commenced, challenging the jurisdiction of the Agency to embark upon the inquiry that led to the Decision (Federal Court of Appeal File A-39-16). The judicial review application in File A-39-16 is being conducted on an expedited basis. If the judicial review application is not rendered moot by this appeal, it makes sense that this appeal and the judicial review application be heard one immediately after the other by the same panel of this Court as there is considerable overlap between the files. It also is appropriate to expedite this appeal due both to the fact that the judicial review application is being expedited and to the nature of the issues raised in the appeal.

9 I would therefore order that the appeal be conducted on an expedited basis if Dr. Lukács files his Notice of Appeal within thirty days of the date of this Order. I would also order that if this matter is expedited, this appeal be heard immediately following the judicial review application in File A-39-16 if that application proceeds to hearing. The other issues raised by the parties regarding production of materials should be dealt with in a separate procedural Order issued concurrently with this Order.

10 While Dr. Lukács seeks his costs in respect of this motion for leave, it is more appropriate that they be in the cause.

***Johanne Gauthier J.A.*:**

I agree

***Wyman W. Webb J.A.*:**

I agree

Application granted.

2016 CAF 220, 2016 FCA 220
Federal Court of Appeal

Lukács v. Canadian Transportation Agency

2016 CarswellNat 4268, 2016 CarswellNat 9946, 2016 CAF 220, 2016 FCA 220, 270 A.C.W.S. (3d) 63, 408 D.L.R. (4th) 760

DR. GÁBOR LUKÁCS (Appellant) and CANADIAN TRANSPORTATION AGENCY AND DELTA AIR LINES, INC. (Respondents)

Wyman W. Webb, A.F. Scott, Yves de Montigny JJ.A.

Heard: April 25, 2016
Judgment: September 7, 2016
Docket: A-135-15

Counsel: Dr. Gábor Lukács, Appellant, for himself
Allan Matte, for Respondent, Canadian Transportation Agency
Gerard Chouest, for Respondent, Delta Air Lines Inc.

Subject: Civil Practice and Procedure; Public

APPEAL by complainant from determination regarding air travel complaint.

***Yves de Montigny J.A.*:**

1 This is a statutory appeal under section 41 of the *Canada Transportation Act*, S.C. 1996, c. 10 [the *Act*] of a decision rendered by the Canadian Transportation Agency (the Agency) dismissing a complaint of discriminatory practices filed by Dr. Gábor Lukács (the appellant) against Delta Air Lines Inc. (the respondent) on the preliminary basis that he lacks standing to bring this complaint.

2 This case essentially raises the issue of standing in proceedings before the Agency. The appellant argues that the Agency applied the wrong legal principles and fettered its discretion in denying him public interest standing to challenge Delta's policies and practices. Having carefully considered the parties' written and oral submissions, I am of the view that the appeal must be granted.

I. Background

3 On August 24, 2014, the appellant filed a complaint with the Agency alleging that certain practices of the respondent relating to the transportation of "large (obese)" persons are discriminatory, contrary to subsection 111(2) of the *Air Transportation Regulations*, SOR/88-58 (the *Regulations*) and also contrary to a previous decision of the Agency concerning the accommodation of passengers with disabilities. The appellant relied on an email dated August 20, 2014 from a customer care agent of Delta responding to a concern of a passenger ("Omer") regarding a fellow passenger who required additional space and who therefore made Omer feel "cramped".

4 In that email, Delta apologized to Omer and set out the guidelines it follows to ensure that large passengers and people sitting nearby are comfortable. It reads as follows:

> Sometimes, we ask the passenger to move to a location in the plane where there's more space. If the flight is full, we may ask the passenger to take a later flight. We recommend that large passengers purchase additional seats, so they can avoid being asked to rebook and so we can guarantee comfort for all.
>
> Appellant's Appeal Book, p. 21

5 Since it was not clear to the Agency whether Dr. Lukács had an interest in Delta's practices on the basis of the facts before it, he was provided with the opportunity to file submissions with the Agency regarding his standing. Dr. Lukács filed his submissions on September 19, 2014, Delta responded on September 26, 2014, and Dr. Lukács replied on October 1, 2014. In its Decision No. 425-C-A-2014 dated November 25, 2014, the Agency dismissed Dr. Lukács' complaint for lack of standing.

II. The impugned decision

6 The Agency first distinguished *Krygier v. WestJet et al.*, Decision No. LET-C-A-104-2013 [*Krygier*] and *Black v. Air Canada*, Decision No. 746-C-A-2005 [*Black*], on the basis that the issue in those cases was not the standing of the complainants but the need for a "real and precise factual background". Furthermore, the Agency found that although Dr. Lukács was not required to be a member of the group discriminated against in order to have standing, he must nonetheless have a "sufficient interest". The use of the term "any person" in the *Act* did not mean that the Agency should determine issues in the absence of the persons with the most at stake. On that basis, the Agency found that, at 6 feet tall and 175 pounds, nothing suggested that Dr. Lukács himself would ever be subject to Delta's policy regarding large persons that would not be able to sit in their seat without encroaching into the neighbouring seat.

7 With respect to public interest standing, the Agency took note of the three-part test established by the Supreme Court in the trilogy of *Thorson v. Canada (Attorney General) (No. 2)* (1974),

[1975] 1 S.C.R. 138, 43 D.L.R. (3d) 1 (S.C.C.); *McNeil v. Nova Scotia (Board of Censors)* (1975), [1976] 2 S.C.R. 265, 55 D.L.R. (3d) 632 (S.C.C.); and *Borowski v. Canada (Minister of Justice)*, [1981] 2 S.C.R. 575, 130 D.L.R. (3d) 588 (S.C.C.). The Agency further relied on *Canadian Council of Churches v. R.*, [1992] 1 S.C.R. 236, 88 D.L.R. (4th) 193 (S.C.C.) [*Canadian Council of Churches*] and *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607, 33 D.L.R. (4th) 321 (S.C.C.) [*Finlay*] in expressing the view that public interest standing does not extend beyond cases in which the constitutionality of legislation or the non-constitutionality of administrative action is contested. Such being the case, Dr. Lukács could not rely on public interest standing to bring his complaint before the Agency.

III. Issues

8 Dr. Lukács conceded at the hearing that he does not have a direct and personal interest in this case, and as a result he does not claim standing on that basis. The issues upon which the parties disagree can be formulated as follows:

> A. Did the Agency err in applying the general law of standing on a complaint for discriminatory terms and conditions under subsections 67.2(1) of the *Act* and 111(2) of the *Regulations*?
>
> B. Did the Agency err in finding that public interest standing is limited to cases in which the constitutionality of legislation or the non-constitutionality of administrative action is challenged?

9 As I dispose of the current matter on the basis of the issues raised in the above point A, the following analysis will not address the questions raised in point B.

IV. Relevant statutory provisions

10 Airlines operating flights within, to or from Canada are required to create a tariff that sets out the terms and conditions of carriage. The tariff is the contract of carriage between the passenger and the airline, and includes the terms and conditions which are enforceable in Canada (see ss. 67 of the *Act* and 100(1) of the *Regulations*).

11 For the purposes of this proceeding, a few provisions are of particular relevance. The first is section 37 of the *Act*, which grants the Agency the power to inquire into a complaint:

> 37 The Agency may inquire into, hear and determine a complaint concerning any act, matter or thing prohibited, sanctioned or required to be done under any Act of Parliament that is administered in whole or in part by the Agency.
>
> 37 L'Office peut enquêter sur une plainte, l'entendre et en décider lorsqu'elle porte sur une question relevant d'une loi fédérale qu'il est chargé d'appliquer en tout ou en partie.

12 The second, subsection 67.2(1) of the *Act*, sets out the powers of the Agency if it finds terms or conditions in a tariff that are unreasonable or unduly discriminatory:

> 67.2 (1) If, on complaint in writing to the Agency by any person, the Agency finds that the holder of a domestic licence has applied terms or conditions of carriage applicable to the domestic service it offers that are unreasonable or unduly discriminatory, the Agency may suspend or disallow those terms or conditions and substitute other terms or conditions in their place.
>
> 67.2 (1) S'il conclut, sur dépôt d'une plainte, que le titulaire d'une licence intérieure a appliqué pour un de ses services intérieurs des conditions de transport déraisonnables ou injustement discriminatoires, l'Office peut suspendre ou annuler ces conditions et leur en substituer de nouvelles.

13 Lastly, subsection 111(2) of the *Regulations* further expands on prohibited discrimination:

> 111(2) No air carrier shall, in respect of tolls or the terms and conditions of carriage,
>
> (a) make any unjust discrimination against any person or other air carrier;
>
> (b) give any undue or unreasonable preference or advantage to or in favour of any person or other air carrier in any respect whatever; or
>
> (c) subject any person or other air carrier or any description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatever.
>
> 111 (2) En ce qui concerne les taxes et les conditions de transport, il est interdit au transporteur aérien:
>
> a) d'établir une distinction injuste à l'endroit de toute personne ou de tout autre transporteur aérien;
>
> b) d'accorder une préférence ou un avantage indu ou déraisonnable, de quelque nature que ce soit, à l'égard ou en faveur d'une personne ou d'un autre transporteur aérien;
>
> c) de soumettre une personne, un autre transporteur aérien ou un genre de trafic à un désavantage ou à un préjudice indu ou déraisonnable de quelque nature que ce soit.

V. The standard of review

14 At its core, this case calls into question the general principles the Agency should apply when determining whether a party has standing to file a complaint under subsection 67.2(1) of the *Act*. Of course, the actual decision of whether to grant standing engages the exercise of discretion, and as such it must be reviewed by this Court on a standard of reasonableness. To the extent that

determining the standing requirements for a complaint under subsection 67.2(1) also requires an analysis of the particular requirements of the *Act* and the related statutes and case law, it is also entitled to a high degree of deference.

15 Of course, it could be argued that since Parliament has provided, through legislation, a right of appeal from the Agency to this Court on questions of law, correctness is the applicable standard. Such a view would be mistaken, however, as it is clear since the Supreme Court of Canada decision in *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.) that the correctness standard will only apply to constitutional questions; questions of law of central importance to the legal system as a whole and that are outside of the adjudicator's expertise; questions regarding the jurisdictional lines between two or more competing specialized tribunals; and the exceptional category of true questions of jurisdiction. The highest Court has repeated on a number of occasions that this is a very narrow exception to the general principle that an adjudicative administrative tribunal's interpretation of its enabling legislation is reviewable on a standard of reasonableness (see, for example, *A.T.A. v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61 (S.C.C.) at paras. 33-34, [2011] 3 S.C.R. 654 (S.C.C.); *Canada (Attorney General) v. Mowat*, 2011 SCC 53 (S.C.C.) at para. 24, [2011] 3 S.C.R. 471 (S.C.C.); *Canadian National Railway v. Canada (Attorney General)*, 2014 SCC 40 (S.C.C.) at para. 55, [2014] 2 S.C.R. 135 (S.C.C.); *British Columbia (Securities Commission) v. McLean*, 2013 SCC 67 (S.C.C.) at paras. 26-27, [2013] 3 S.C.R. 895 (S.C.C.); *Commission scolaire de Laval c. Syndicat de l'enseignement de la région de Laval*, 2016 SCC 8 (S.C.C.) at para. 34, (2016), 481 N.R. 25 (S.C.C.)). In my view, the criteria for standing under subsection 67.2(1) does not raise broad questions relating to the Agency's authority, and does not raise a question of central importance to the legal system as a whole; on the contrary, that question falls squarely within the Agency's expertise. As a result, the task of this Court is rather limited and is restricted to determining whether the decision of the Agency falls within a range of possible, acceptable outcomes which are defensible in light of the facts and the law.

A. Did the Agency err in applying the general law of standing on a complaint for discriminatory terms and conditions under subsections 67.2 (1) of the Act and 111(2) of the Regulations?

16 As recently stated by this Court in *Lukacs v. Canada (Transportation Agency)*, 2016 FCA 202 (F.C.A.) at paragraphs 31-32, the *Act* does not create a general obligation for the Agency to deal with each and every complaint regarding compliance with the *Act* and its various regulations. Section 37 of the *Act*, in particular, makes it clear that the Agency "may" inquire into, hear and determine a complaint. There is no question, therefore, that the Agency retains a gatekeeping function and has been granted the discretion to screen the complaints that it receives to ensure, among other things, the best use of its limited resources.

17 Counsel for the respondent infers from the permissive (as opposed to mandatory) nature of section 37, the power of the Agency to refuse to inquire into, hear and decide complaints lodged

by complainants who do not have standing to bring forward the complaint. It is not clear, however, on what basis the principles governing standing before courts of law ought to be transposed to a regulatory regime supervised and enforced by an administrative body like the Canadian Transportation Agency.

18 The rationale underlying the notion of standing has always been a concern about the allocation of scarce judicial resources and the corresponding need to weed out cases brought by persons who do not have a direct personal legal interest in the matter. Such preoccupations are warranted in a judicial setting, where the objective is to determine the individual rights of private litigants, the accused and individuals directly affected by state action (see *Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)*, 2012 SCC 45 (S.C.C.) at para. 22, [2012] 2 S.C.R. 524 (S.C.C.); *Canadian Council of Churches* at p. 249). As such, the general rule required that a person have a sufficient personal interest in the matter to bring a claim forward. The ability to seek declaratory or injunctive relief in the public interest is usually reserved for the Attorney General, who might allow a private individual to bring such a claim only on consent (*Finlay* at para. 17). Similar rules may also be appropriate before a quasi-judicial tribunal, established to dispose of disputes between a citizen and the government or one of its delegated authorities. It is far from clear that these strict rules developed in the judicial context, however, should be applied with the same rigour by an administrative agency mandated to act in the public interest.

19 I agree with the appellant that the Agency erred in superimposing the jurisprudence with respect to standing on the regulatory scheme put in place by Parliament, thereby ignoring not only the wording of the *Act* but also its purpose and intent. In enacting the *Act*, Parliament chose to create a regulatory regime for the national transportation system, and resolved to achieve a number of policy objectives (set out in section 5 of the *Act*). Within that framework, the role of the Agency is not only to provide redress and grant monetary compensation to persons adversely affected by national transportation actors, but also to ensure that the policies pursued by the legislator are carried out.

20 Administrative bodies such as the Agency are not courts. They are part of the executive branch, not the judiciary. Their mandates come in all shapes and sizes, and their role is different from that of a court of law. Often, such bodies are created to provide greater and more efficient access to justice through less formal procedures and specialized decision-makers that may not have legal training. Moreover, not all administrative bodies follow an adversarial model similar to that of courts. If an administrative body has important inquisitorial powers, ensuring that the particular parties before them are in a position to present extensive evidence of their particular factual situations may be less important than in a court of law, where judges are expected to take on a passive role and decide on the basis of the record and arguments presented to them by the parties.

21 For that reason, the Supreme Court of Canada has recognized that the procedure before administrative bodies must be consistent, above all, with their enabling statute, and need not replicate court procedure if their functions are different from that of a traditional court (see *Innisfil (Township) v. Vespra (Township)*, [1981] 2 S.C.R. 145 (S.C.C.) at pp. 167-168, [1981] A.C.S. No. 73 (S.C.C.). In a similar vein, the Supreme Court recognizes the importance of the particular statutory regime and the procedural choices made by the administrative body itself when it comes to determining the content of the duty of fairness (*Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.) at paras. 24 and 27, (1999), 174 D.L.R. (4th) 193 (S.C.C.) [*Baker*]). To the extent that courts have exhibited a tendency to impose court-like procedures on administrative bodies in the context of judicial review for breach of procedural fairness obligations in the wake of *Baker*, they have often been met with criticism (see, for example, David Mullan, "Tribunal Imitating Courts — Foolish Flattery or Sound Policy?" (2005) 28 Dal. L.J. 1 (S.C.C.) ; Robert Macaulay and James Sprague, *Practice and Procedure before Administrative Tribunals*, vol. 2 (Toronto: Carswell, 2010) at pp. 901 to 905).

22 Recognition of the particularity of administrative bodies has been reflected as well in decisions on standing and participation rights before administrative bodies. For example, this Court recently considered the particular language of the National Energy Board's enabling statute (most notably, the terms "directly affected", and "relevant information or expertise" used therein), and gave a wide margin of appreciation to the Board in deciding who should participate in its own proceedings. In so doing, this Court recognized the Board's expertise in managing its own process in light of its particular mandate (see *Forest Ethics Advocacy Assn. v. National Energy Board*, 2014 FCA 245 (F.C.A.) at para. 72, (2014), [2015] 4 F.C.R. 75 (F.C.A.)).

23 Turning now to the Agency, it has a role both as a specialized economic regulator and a quasi-judicial body that decides matters in an adversarial setting. For example, the Agency has regulation-making powers and specialized enforcement officers with investigative powers that verify compliance of carriers with the *Act* and its relevant regulations (see ss. 177 and 178 of the *Act*). The Agency also hears applications for a variety of licenses and other authorizations and complaints which may, or may not, involve disputes between opposing parties (consider, for instance, air travel complaints under s. 85.1; applications to interswitch railway lines under s. 127; and competitive line rate-setting applications under s. 132).

24 The *Act* distinguishes between "complaints" and "applications", and uses different terminology to describe the types of persons who are entitled to file them. The term "application" is used in Part III of the *Act* on Railway Transportation, and is usually accompanied by a specific descriptor of the party entitled to bring the application. For example, an application to establish competitive line rates is made "[o]n the application of a shipper" (s. 132(1) of the *Act*); an application to determine the carrier's liability is made "on the application of the company" (s. 137(2) of the *Act*); an application regarding running rights and joint track usage may be made

by a railway company (s. 138 of the *Act*); and an application to determine the net salvage value of a railway line is made "on application by a party to a negotiation" (s. 144(3.1) of the *Act*). Applications are governed by the *Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings*), S.O.R./2014-104, which are generally based on an adversarial model, with some variations. Of particular note are Rules 21 and 29 which allow the Agency to grant intervener status to a person that has a "substantial and direct interest", and Rule 23 which allows an "interested person" to file a position statement.

25 In contrast, the term "complaint" is mainly used in Part II — Air Transportation, and is almost always accompanied by the broad phrase "any person" (ss. 65, 66, 67.1, 67.2 of the *Act*). It is particularly telling that the phrase "any person" appearing in section 67.1 and subsection 67.2(1) is used to refer to those complainants who can bring a complaint in writing to the Agency. This is to be contrasted to the phrase "person adversely affected" appearing in subsection 67.1(b) and subparagraph 86(1)(h)(iii), which is more restrictive and determinative of who can seek monetary compensation. The use of those different phrases in the same act must be given effect and is indicative of Parliament's intention to distinguish between those who can bring a complaint to obtain a personal remedy and those who can bring a complaint as a matter of principle and with a view to ensuring that the broad policy objectives of the *Act*, which includes the prevention of harm, are enforced in a timely manner, not just remedied after the fact.

26 Dr. Lukács' complaint is brought under subsection 67.2(1). To the extent that this provision is at play (an issue that is not for this Court to decide and which is not the subject of this proceeding), it is incumbent on the Agency to intervene at the earliest possible opportunity, in order to prevent harm and damage that could result from unreasonable and unduly discriminatory terms or conditions of carriage, rather than to merely compensate those who have been affected *ex post facto*. This is precisely why the Agency is given the authority not only to compensate individuals who were adversely affected by an airline's conduct (s. 67.1(a)) and to take corrective measures (s. 67.1(b)), but also to disallow any tariff or tariff rule that is found to be unreasonable or unduly discriminatory and then to substitute the disallowed tariff or tariff rule with another one established by the Agency itself (*Regulations*, s. 113).

27 In that perspective, the fact that a complainant has not been directly affected by the fare, rate, charge, or term or condition complained of and may not even meet the requirements of public standing, should not be determinative. If the objective is to ensure that air carriers provide their services free from unreasonable or unduly discriminatory practices, one should not have to wait until having been subjected to such practices before being allowed to file a complaint. This is not to say, once again, that each and every complaint filed with the Agency has to be dealt with and decided, but that complaints that appear to be serious on their face cannot be dismissed for the sole reason that the person complaining has not been directly and personally affected or does not comply with other requirements of public standing. When read in its contextual and grammatical

context, there is no sound reason to limit standing under the *Act* to those with a direct, personal interest in the matter.

28 This interpretation is indeed consistent with the Agency's own analysis in a number of previous decisions. In *Black*, for example, the respondent submitted that the complainant had not established that he was sufficiently affected by the policies challenged and that he did not have the requisite direct personal interest standing or public interest standing. The Agency dismissed that argument and wrote:

> [...] The Agency is of the opinion that the term "any person" includes persons who have not encountered "a real and precise factual background involving the application of terms and conditions", but who wish, on principle, to contest a term or condition of carriage. With respect to section 111 of the ATR [Air Transportation Regulations], the Agency notes that there is nothing in the provisions that suggests that the Agency only has jurisdiction over complaints filed by persons who may have experienced "a real and precise factual background involving the application of terms and conditions". The Agency further notes that subsection 111(1) of the ATR provides, in part, that "All tolls and terms and conditions of carriage [...] that are established by an air carrier shall be just and reasonable [...]". The Agency is of the opinion that the word "established" does not limit the requirement that terms or conditions of carriage be just and reasonable to situations involving "a real and precise factual background involving the application of terms and conditions", but extends to situations where a person wishes, on principle, to challenge a term or condition that is being offered.
>
> [...]
>
> Furthermore, it would be inappropriate to require a person to experience an incident that results in damages being sustained before being able to file a complaint. To require a "real and precise factual background" could very well dissuade persons from using the transportation network.
>
> *Black*, paras. 5 and 7

29 That ruling was followed more recently in *Krygier*. Contrary to the appellant's submissions, these decisions do not only stand for the proposition that the absence of a real and precise factual background does not deprive the Agency of jurisdiction to hear a complaint, but also for the (overlapping) principle that it is not necessary for a complainant to have been personally affected by a term or condition for the Agency to assert jurisdiction under subsection 67.2(1) of the *Act* and section 111 of the *Regulations*.

30 For all of the foregoing reasons, I am of the view that the Agency erred in law and rendered an unreasonable decision in dismissing the complaint of Dr. Lukács for lack of standing. The Agency does not necessarily have to investigate and decide every complaint and is certainly empowered

to dismiss without any inquiry those that are futile or devoid of any merit on their face; it cannot, however, refuse to look into a complaint on the sole basis that the complainant does not meet the standing requirements developed by courts of civil jurisdictions. In so doing, the Agency unreasonably fettered its discretion.

31 Having so decided, it will not be necessary to address the second, alternative ground of appeal raised by the appellant. The public interest standing is a concept that has been developed in a judicial setting to bring more flexibility to the strict rules of standing. It is meant to ensure that statutes and regulations are not immune from challenges to their constitutionality and legality as a result of the requirement that litigants be directly and personally affected. Such a notion has no bearing on a complaint scheme designed to complement a regulatory regime, all the more so in a context where the administrative body tasked to apply and enforce the regime may act of its own motion pursuant to sections 111 and 113 of the *Regulations*.

VI. Conclusion

32 For these reasons, I would allow the appeal, set aside Decision No. 425-C-A-2014 of the Canadian Transportation Agency, and direct that the matter be returned to the Agency to determine, otherwise than on the basis of standing, whether it will inquire into, hear and decide the appellant's complaint. I would also award the appellant his disbursements in this Court and a modest allowance in the amount of $750, such amounts to be payable by the Agency.

***Wyman W. Webb J.A.*:**

I agree

***A.F. Scott J.A.*:**

I agree

Appeal allowed.

2019 FC 737, 2019 CF 737
Federal Court

Martell v. Canada (Attorney General)

2019 CarswellNat 2469, 2019 CarswellNat 2470,
2019 FC 737, 2019 CF 737, 306 A.C.W.S. (3d) 834

LESTER MARTELL (Applicant) and ATTORNEY GENERAL OF CANADA (Respondent)

Sylvie E. Roussel J.

Heard: May 9, 2019
Judgment: May 24, 2019
Docket: T-563-19

Counsel: Richard W. Norman, Michel P. Samson, Sian G. Laing, for Applicant
Catherine M.G. McIntyre, for Respondent

Subject: Civil Practice and Procedure; Constitutional; Natural Resources; Public; Human Rights

MOTION by applicant for mandatory injunction authorizing use of medical substitute operator.

***Sylvie E. Roussel J.*:**

I. Introduction

1 The Applicant, Mr. Lester Martell, is the holder of an Owner-Operator licence which authorizes him to fish lobster in Nova Scotia. He has held this licence since 1978 and has fished the licence personally, on a full-time basis, until a medical condition prevented him from doing so. Indeed, since 2009, Mr. Martell has received authorization to use a substitute operator given his inability to be on the fishing vessel full-time. On or around March 6, 2019, the Deputy Minister of the Department of Fisheries and Oceans Canada [DFO] denied Mr. Martell's request for a further extension of his use of a medical substitute operator.

2 On April 2, 2019, Mr. Martell filed a notice of application for judicial review in this Court wherein he seeks, *inter alia*, an order setting aside the Deputy Minister's decision on the basis that it is unreasonable because the Deputy Minister failed to acknowledge or consider his constitutionally protected right to be free from discrimination pursuant to subsection 15(1) of 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*].

3 As the lobster fishing season for Lobster Fishing Area 30 [LFA 30] was set to commence on May 18, 2019, Mr. Martell brought this motion, pursuant to section 18.2 of the *Federal Courts Act*, RSC 1985, c F-7 and subsection 373(1) of the *Federal Courts Rules*, SOR/98-106. He seeks an order staying the Deputy Minister's decision and, in the alternative, a mandatory interlocutory injunction ordering the DFO to authorize the use of a medical substitute operator.

4 Mr. Martell's motion proceeded before me in Halifax, Nova Scotia on May 9, 2019. After hearing the submissions of both parties, I reserved judgment on Mr. Martell's motion. On May 17, 2019, I granted Mr. Martell's motion with reasons to follow.

5 These are my reasons for granting Mr. Martell's motion for interlocutory relief.

II. Background

A. The DFO's Owner-Operator Policy

6 Beginning in the 1970s, the DFO introduced over a period of time the Owner-Operator policy in Eastern Canada. The policy was formally adopted in 1989 across the entire Eastern Canada inshore and its key elements were incorporated into subsections 11(6) to 11(8) of the *Commercial Fisheries Licensing Policy for Eastern Canada, 1996* [1996 Policy].

7 The goal of the Owner-Operator policy is to maintain an economically viable inshore fishery by keeping the control of licences in the hands of independent owner-operators in small coastal communities and to allow them to make decisions about the licence issued to them. To achieve this, the Owner-Operator policy requires licence holders to personally fish the licences issued in their name. This means that the licence holder is required to be on board the vessel authorized to fish the licence.

8 Subsection 23(2) of the *Fishery (General) Regulations*, SOR/93-53 creates an exception to the Owner-Operator policy where the licence holder is unable to engage in the activity authorized by the licence "because of circumstances beyond the control of the holder or operator." In such circumstances, a fishery officer or a DFO employee engaged in the issuance of licences may, on the request of the licence holder or the holder's agent, authorize another person to carry out the activity authorized under the licence.

9 Over time, the DFO developed policy guidance with respect to situations that may be considered "circumstances that are beyond" the control of the licence holder. In particular, subsection 11(11) of the 1996 Policy provides guidance in instances where the licence holder is ill:

> (11) Where the holder of a licence is affected by an illness which prevents him from operating a fishing vessel, upon request and upon provision of acceptable medical documentation to

support his request, he may be permitted to designate a substitute operator for the term of the licence. Such designation may not exceed a total period of five years.

(11) Si le titulaire d'un permis est affecté d'une maladie qui l'empêche d'exploiter son bateau de pêche, il peut être autorisé, sur demande et présentation de documents médicaux appropriés, à désigner un exploitant substitut pour la durée du permis. Cette désignation ne peut être supérieure à une période de cinq années.

10 In 2008, the DFO introduced flexibility in the application of the five (5) year limit in order to respond to a global economic downturn, and in the hopes of enhancing economic support for the industry.

11 By 2015, the DFO resumed strict compliance of the five (5) year limit following concerns expressed by licence holders and their representatives, including the Canadian Independent Fish Harvester's Federation in the inshore fleet, that the DFO's substitute operator designations were being abused by some licence holders.

B. Mr. Martell's Request for Authorization to Use a Medical Substitute Operator

12 Mr. Martell is eighty-five (85) years old. He has been fishing since 1947. He owns an Owner-Operator licence to fish lobster in LFA 30, situated on the Northeast coast of Nova Scotia. He employs four (4) full-time seasonal employees — three (3) deckhands and one (1) captain — who crew his vessel and assist him to fish the licence. Since holding the licence, he has fished it personally on a full-time basis up until 2009.

13 In or around 2009, Mr. Martell began experiencing problems with his knees which caused him excruciating pain and difficulty with balance. He underwent knee replacement surgery in 2009 which resulted in surgical complications. In 2012, he underwent a second replacement surgery for his other knee. He continues to experience difficulties with his balance.

14 In 2009, as a result of his knee problems, Mr. Martell requested and received authorization to use a medical substitute operator. His requests have been granted on a yearly basis since 2009 by the DFO.

15 In May 2015, Mr. Martell received notice from the DFO that the approval for his request for the 2015 season extended beyond the five (5) year period set out in the 1996 Policy and that further approval would be assessed on a case-by-case basis.

16 On May 10, 2016, Mr. Martell was advised that his request for a medical substitute operator for the 2016 season was approved but that future requests would not be considered.

17 Pursuant to sections 34 and 35 of the 1996 Policy, Mr. Martell appealed this decision to the Maritimes Region Licensing Appeal Committee [MRLAC], arguing that he should be granted

credit for some fishing seasons where he did in fact conduct fishing activities and requesting an extension to the five (5) year limit based on extenuating circumstances, including his ongoing management of the fishing activity and a lack of alternative employment opportunities. The MRLAC agreed and recommended that the 2017 year would count as his fifth (5th) year for the purposes of the application of the five (5) year limit in the 1996 Policy. On May 17, 2017, the MRLAC granted authorization to use a medical substitute operator until June 30, 2017, but did not recommend that further extensions be approved.

18 Mr. Martell appealed the MRLAC's recommendation to the Atlantic Fisheries Licensing Appeal Board [AFLAB] seeking the authorization to use a medical substitute operator up to and including the year 2021. During the appeal, and prior to the AFLAB making a recommendation to the Deputy Minister of the DFO, Mr. Martell was granted the authorization to use a medical substitute operator for the 2018 fishing season.

19 During the appeal before the AFLAB, counsel for Mr. Martell submitted that the five (5) year limit and the decision made pursuant to it were arbitrary, unjust and unconstitutional for violating his right to equality under section 15 of the *Charter*.

20 By letter dated March 6, 2019, the Deputy Minister of the DFO denied Mr. Martell's request for continued use of a medical substitute operator authorization. The Deputy Minister determined that the circumstances raised by Mr. Martell before the AFLAB, namely financial hardship and his succession plan, did not constitute extenuating circumstances that would warrant making an exception to the 1996 Policy.

21 On April 2, 2019, Mr. Martell filed an application for judicial review seeking various orders, including, *inter alia*, setting aside the Deputy Minister's decision and having him reconsider Mr. Martell's constitutionally protected rights to be free from discrimination pursuant to subsection 15(1) of the *Charter*.

22 As the upcoming lobster season was set to commence on May 18, 2019, Mr. Martell brought this motion asking the Court to stay the Deputy Minister's decision pending the determination of his application for judicial review and, in the alternative, to grant a mandatory interlocutory injunction ordering the DFO to authorize him to use a medical substitute operator pending the final resolution of the application for judicial review.

III. Analysis

A. Preliminary Matter

23 In its written submissions in response to Mr. Martell's motion, the Respondent, the Attorney General of Canada [AGC], identified two (2) issues: (1) whether Mr. Martell should be granted injunctive relief in the nature of *mandamus*; and (2) whether Mr. Martell can seek a stay of the

Deputy Minister's decision to refuse the authorization for a medical substitute operator up to and including the 2021 fishing season.

24 As Mr. Martell did not seek the issuance of a writ of *mandamus* in his motion, I do not intend to address the issue of whether or not the remedy of *mandamus* was available to Mr. Martell except to mention that it has its own requirements which are different from those of a mandatory injunction (*Madeley v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2016 FC 634 (F.C.) at para 29).

B. Test for Interlocutory Injunctions

25 In order to succeed on a motion seeking interlocutory injunctive relief, the moving party must meet the requirements of the conjunctive tripartite test articulated by the Supreme Court of Canada [SCC] in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.) at 348-349 [*RJR-MacDonald*] which requires the moving party demonstrate that: (1) there is a serious issue to be tried; (2) the moving party will suffer irreparable harm if the relief is not granted; and (3) the balance of convenience favours the granting of the order.

26 In *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5 (S.C.C.) [*CBC*], the SCC examined the framework applicable for granting mandatory interlocutory injunctions and held that the appropriate criterion for assessing the first factor of the *RJR-MacDonald* test is *not* whether there is a serious issue to be tried, but rather whether the moving party has shown a strong *prima facie* case (*CBC* at para 15). This is so because a mandatory injunction directs the defendant to undertake a positive course of action, such as taking steps to restore the *status quo*, or to otherwise "put a situation back to what it should be" (*CBC* at para 15). In some cases, it is also equivalent to the relief that would be requested at trial or, in this case, the underlying application for judicial review.

27 Establishing a strong *prima facie* case entails showing a *strong likelihood* on the law and the evidence presented that, at trial or the underlying application, the moving party will be ultimately successful in proving the allegations set out in the originating notice (*CBC* at para 18).

28 In the case before me, Mr. Martell has improperly characterized the mandatory interlocutory injunction as an alternative relief. He is essentially seeking an interlocutory order that will allow him to continue earning a livelihood pending the determination of his application for judicial review. A stay of the Deputy Minister's decision alone will not grant him the authorization he requires to use a medical substitute operator for the 2019 fishing season. However, the mandatory interlocutory injunction remedy, which compels action on the part of the DFO, can capture the relief Mr. Martell is seeking in his motion. Consequently, the mandatory interlocutory injunction will not be considered as an alternative relief. Hence, to be successful, Mr. Martell must demonstrate that he meets the elevated standard of a strong *prima facie* case that he will succeed on the underlying judicial review.

29 Relying on the recent case of *Calin v. Canada (Public Safety and Emergency Preparedness)*, 2018 FC 731 (F.C.) [*Calin*], Mr. Martell's counsel submits that the Court should not impose the elevated standard of mandatory injunctions set out in *CBC* and that he should only be required to demonstrate a likelihood or probability of success on the underlying application.

30 In *Calin*, the Court considered whether it was appropriate to impose the exception to the serious issue test when applied to a mandatory interlocutory injunction for the release of a person held in detention pursuant to the *Immigration and Refugee Protection Act*, SC 2001, c 27. The Court held that the test in such circumstance should be at the level of a likelihood or probability of success of the underlying application given that the respondent did not have to take "steps to restore the status quo" or to otherwise "put the situation back to what it should be". It also noted that the individual's release from detention did not entail any "potential severe consequences" for the respondent besides concerns relating to the public interest, which were to be considered in the context of the balance of convenience factor (*Calin* at para 14).

31 Mr. Martell argues that, similarly in his case, the steps to restore the status quo or otherwise put the situation back to what it should be are neither costly nor burdensome and require very little positive action on the part of the Deputy Minister.

32 It is not necessary for me to determine whether a mitigated standard should apply in the circumstances of this case as I am of the view that the elevated standard articulated in *CBC* has been met.

(1) A strong prima facie case

33 Mr. Martell submits the matter underlying the application for judicial review meets the higher threshold of a "strong likelihood" of success because the impugned decision is arbitrary, unjust and unconstitutional as it severely circumscribes the protection afforded by subsection 15(1) of the *Charter* to be free from discrimination based on physical disability, including chronic medical conditions.

34 Mr. Martell argues that he is limited by his medical condition/physical disability and that the decision of the Deputy Minister and by extension, the decision of the AFLAB, imposes differential treatment upon him in comparison to other licence holders. Licence holders who do not suffer from a medical condition preventing them from being on board the vessel are essentially able to renew their licences indefinitely, so long as they abide by their terms and conditions. According to Mr. Martell, it is widely recognized that the DFO's practice is to reissue to a given licence holder, each year, the licence held the previous year. The licence holder can reasonably expect his or her licence to be renewed from year to year, thus providing the holder with a measure of financial stability and certainty. Alternatively, the licence holder can request that the DFO reissue the licence to another person, as a replacement for their own, thus enabling the licence holder to

sell his licence or pass it on to a family member. However, he and others like him with a similar medical condition and physical disability must apply year after year for the authorization to use a medical substitute operator and are subjected to the five (5) year limitation found in the 1996 Policy. Like him, they face the risk of being forced to give up their licence in the event of a refusal as a way to mitigate their losses.

35 Mr. Martell argues that the Deputy Minister's decision has the effect of denying him all of the privileges and entitlements of other licence holders, simply because he is physically unable to remain on board his fishing vessel for the extended periods of time often required to harvest a catch. Instead of reflecting a proportionate balancing of the *Charter* protections and statutory objectives at play as prescribed by the SCC in *Doré c. Québec (Tribunal des professions)*, 2012 SCC 12 (S.C.C.) [*Doré*] and *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 (S.C.C.) [*Loyola*], the Deputy Minister gives no effect to Mr. Martell's right to equal benefit of the law without discrimination. Moreover, in the absence of some acknowledgment and accommodation of his disability, the decision is unreasonable and does not fall within the range of possible, acceptable outcomes.

36 Based on the material before me, I am satisfied that the first criterion for obtaining a mandatory interlocutory injunction has been met. I reach this conclusion for a number of reasons.

37 To begin with, the AGC fails to respond in its submissions to Mr. Martell's argument of discrimination, which therefore remains undisputed.

38 Furthermore, there is nothing in the motion materials demonstrating that the Deputy Minister or the AFLAB considered Mr. Martell's discrimination argument or that a proper proportionality analysis was conducted under the *Doré/Loyola* framework balancing Mr. Martell's *Charter* protections and the objectives of the 1996 Policy. To the extent that this argument was raised by Mr. Martell on appeal to the AFLAB and that the issue was not considered by the Deputy Minister, there is a strong likelihood that the decision could be set aside on this basis alone.

39 I have nevertheless considered the submissions of the AGC regarding the goals of the 1996 Policy in reaching my determination. I note from the affidavit filed by the AGC that one of the goals of the 1996 Policy is to maintain an economically viable inshore fishery by keeping the control of licences in the hands of independent owner-operators in small coastal communities. Furthermore, according to the AGC's submissions, one of the purposes of creating policies to achieve this goal was to prevent large corporations from gaining access to the licences by way of agreement. To the extent that these are the goals behind the implementation of the 1996 Policy, I note from Mr. Martell's affidavit that he continues to make all operational decisions related to the fishing vessel, including matters such as storage and repairs to the vessel and gear. He also negotiates the wharf price of the catch, arranges bait and fuel purchase and is responsible for hiring and managing the crew and the fishing operation's financial affairs. Despite his inability of being on the fishing vessel

full-time because of his medical condition or disability, his operations appear to be in line with the principles of the 1996 Policy.

40 I have also considered that granting a mandatory interlocutory injunction in this case will in part grant Mr. Martell the relief he is seeking in the underlying application for judicial review, being the authorization to use a substitute operator for the 2019 lobster fishing season. However, upon review of the relief sought in the notice of application for judicial review filed by Mr. Martell, I note that in addition to seeking an order setting aside the decision of the Deputy Minister, he is also seeking an order declaring that subsection 11(11) of the 1996 Policy, and specifically the five (5) year limit for designating a substitute operator, discriminates against fishermen with disabilities and is contrary to subsection 15(1) of the *Charter*. I also note from the affidavit filed by the AGC that in his appeal to the AFLAB, Mr. Martell sought authorization to use a medical substitute operator up to and including the year 2021. As a result, I am satisfied that by ordering the DFO, through its authorized representative, to allow Mr. Martell to use a medical substitute operator, the interlocutory relief will not be determining the outcome of the underlying judicial review. Mr. Martell will have to proceed with his application for judicial review failing which he will be required to seek a new exemption to the application of the policy for the 2020 fishing season as well as for the subsequent seasons.

(2) Irreparable harm

41 Under this second stage of the test, Mr. Martell submits that if the interlocutory relief he seeks is not granted, he will experience a substantial interference with his ability to earn a livelihood. Mr. Martell affirms in his affidavit that the income he receives from fishing this licence is a large portion of his total income. If he is unable to fish the licence by way of a substitute operator, he will not only forfeit the proceeds of the 2019 season which he estimates to be in the neighbourhood of $600,000.00 based on the value of the total catch for previous years, but also those for future seasons since he will have to transfer or sell his licence in order to mitigate his losses.

42 Mr. Martell adds that if he is forced to transfer or sell his licence, it will be virtually impossible for him to re-acquire the licence or a similar licence. It is his understanding that the LFA 30 fleet is comprised of twenty (20) licence holders and that no LFA 30 licences have been sold in over ten (10) years. The loss of the licence may also result in the loss of his Core enterprise status designation, attached to his licence. This designation allows him to operate an enterprise with several licences on a vessel. Without the Core enterprise status designation, the market of purchasers is very limited.

43 Finally, Mr. Martell indicates in his affidavit that he wishes to keep the licence in his family. His grandchildren are currently attending university and wish to enter the fisheries when they have finished their education. He intends to transfer the licence to one of his grandchildren when they

reach a suitable age and meet the necessary criteria set by the DFO to hold the licence. If forced to transfer the licence, he will be unable to carry out his succession plan for the benefit of his family.

44 In response, the AGC submits that to establish irreparable harm, Mr. Martell must lead clear and non-speculative evidence which goes beyond mere assertions and that the threshold is not lessened by the allegation that the Deputy Minister's decision is discriminatory. I agree. General assertions cannot establish irreparable harm. Moreover, irreparable harm refers to the *nature* of the harm rather than its *magnitude*. Additionally, irreparable harm is harm that cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other (*RJR-MacDonald* at 341; *Gateway City Church v. Minister of National Revenue*, 2013 FCA 126 (F.C.A.) at paras 15-16).

45 The AGC also submits that Mr. Martell has not established that he will suffer irreparable harm given that the nature of the harm he complains of, namely his livelihood, can be quantified in monetary terms.

46 Relying on the SCC decision in *Hislop v. Canada (Attorney General)*, 2007 SCC 10 (S.C.C.) at paragraphs 102 and 103 [*Hislop*], Mr. Martell opposes this argument by contending that if he is successful on the underlying judicial review, he will likely have no recourse to recover his lost income or licence if the DFO pleads the doctrine of qualified immunity to avoid liability. According to this doctrine, it is a general rule of public law that "absent conduct that is clearly wrong, in bad faith or an abuse of power, the courts will not award damages for the harm suffered as a result of the mere enactment or application of a law that is subsequently declared to be unconstitutional" (*Hislop* at para 102).

47 While I agree that Mr. Martell's economic loss for the 2019 fishing season can be quantified on the basis of the value of previous years, Mr. Martell's evidence is undisputed that if he is not authorized to use a substitute operator for the 2019 fishing season, the amount of the loss will be significant and he will have to either transfer or sell his licence. It is also undisputed that the number of licence holders in the LFA 30 fleet is comprised of twenty (20) licence holders and no LFA 30 fleet licences have been sold in over ten (10) years. I am satisfied that the sale or transfer of Mr. Martell's licence will constitute irreparable harm to Mr. Martell who has been fishing the licence since 1978 and who, in all likelihood will be limited in pursuing other employment opportunities and deprived of future income.

48 Moreover, I consider the inability to carry out one's succession plan to constitute irreparable harm that can support an application for a mandatory interlocutory injunction, providing the other criteria are met.

49 For these reasons, I am satisfied that Mr. Martell will suffer irreparable harm if the interlocutory relief is not granted.

(3) Balance of convenience

50 Under the third part of the test, Mr. Martell argues that the balance of convenience favours awarding the relief as substantially greater harm will be done to him than to the DFO or the public interest if the requested relief is not granted. Granting him the medical substitute operator authorization would not impose any additional financial or administrative burdens on the DFO staff or the Deputy Minister. Further, there is little to no public interest in allowing the Deputy Minister's decision to stand pending the judicial review.

51 In response, the AGC submits that the balance of convenience must favour the DFO. In support of its argument, the AGC contends that it is within Parliament's authority to manage the fishery on social, economic or other grounds, in conjunction with steps to conserve, protect, and harvest the reserve. The 1996 Policy was adopted pursuant to that broad authority which provides broad discretion to the Minister of the DFO to manage fisheries in the public interest, and in this case, to carry out the socio-economic objective to maintain an economically viable inshore fishery by keeping the control of licences in the hands of independent owner-operators. To do so, licence holders must personally fish the licence issued in their name. The 1996 Policy applies to any and all licence holders for the sake of protecting all affected stakeholders, not only those conducting fishing activities in LFA 30. In this case, Mr. Martell has been able to use a medical substitute operator designation since 2009.

52 I find that in the circumstances of this case, the balance of convenience favours Mr. Martell. While I recognize the importance of the Minister's discretion to manage the fisheries and the presumption of the public interest in enforcing policies, the fact remains that Mr. Martell has been fishing under this licence since 1978 and that he has been authorized to use a medical substitute operator since 2009. Throughout his appeals, he has been granted authorization to continue using a medical substitute operator. In my view, the granting of interlocutory relief allowing him to continue to do so will be maintaining the status quo. It has not been demonstrated that granting the requested interlocutory relief will have any additional or undue impact on the DFO and the lobster fishery industry.

53 The same cannot be said for rejecting Mr. Martell's motion.

54 If Mr. Martell is successful on his underlying application for judicial review, the immediate and continuing irreparable harm that arises from the inability to fish the 2019 season outweighs the inconvenience suffered by the DFO.

IV. Conclusion

55 For these reasons, I am satisfied that Mr. Martell has met the conjunctive tripartite test articulated in *RJR-MacDonald* to justify the granting of a stay of the Deputy Minister's decision

pending the final resolution of the application for judicial review. Mr. Martell has also met the elevated threshold of establishing a strong *prima facie* case, as elaborated in *CBC*, justifying the grant of a mandatory interlocutory injunction which effectively authorizes Mr. Martell to use a medical substitute operator for the upcoming 2019 lobster season in LFA 30.

ORDER in T-563-19

THIS COURT ORDERS that:

1. The Applicant's motion is granted;

2. The decision of the Deputy Minister of the Department of Fisheries and Oceans Canada made on or around March 6, 2019 denying the Applicant's request for the continued use of a medical substitute operator is stayed until a final determination of the application for judicial review has been made;

3. The Department of Fisheries and Oceans Canada, through its authorized representative, shall authorize the Applicant to use a medical substitute operator for the upcoming 2019 lobster season in Lobster Fishing Area 30 until a final determination of the application for judicial review has been made;

4. Costs shall be payable to the Applicant and they shall be assessed in accordance with Column III, Tariff B of the *Federal Courts Rules*, SOR/98 106.

Motion granted.

1959 CarswellQue 37
Supreme Court of Canada

Roncarelli v. Duplessis

1959 CarswellQue 37, [1959] S.C.R. 121, [1959] S.C.J. No. 1, 16 D.L.R. (2d) 689

Frank Roncarelli (Plaintiff), Appellant and The Honourable Maurice Duplessis (Defendant), Respondent

Kerwin C.J. and Taschereau, Rand, Locke,
Cartwright, Fauteux, Abbott, Martland and Judson JJ.

Judgment: June 2, 1958
Judgment: June 3, 1958
Judgment: June 4, 1958
Judgment: June 5, 1958
Judgment: June 6, 1958
Judgment: January 27, 1959

Proceedings: On appeal from the Court of Queen's Bench, appeal side, province of Quebec

Counsel: *F.R. Scott* and *A.L. Stein*, for the plaintiff, appellant.
L.E. Beaulieu, Q.C., and *L. Tremblay, Q.C.*, for the defendant, respondent.

***The Chief Justice*:**

1 No satisfactory reason has been advanced for the Court of Queen's Bench (Appeal Side) [1] setting aside the finding of fact by the trial judge that the respondent ordered the Quebec Liquor Commission to cancel the appellant's licence. A reading of the testimony of the respondent and of the person constituting the commission at the relevant time satisfies me that the trial judge correctly decided the point. As to the other questions, I agree with Mr. Justice Martland.

2 The appeals should be allowed with costs here and below and judgment directed to be entered for the appellant against the respondent in the sum of $33,123.53 with interest from the date of the judgment of the Superior Court, together with the costs of the action.

***Taschereau J.* (*dissenting*):**

3 L'intimé est Premier Ministre et Procureur Général de la province de Québec, et il occupait ces hautes fonctions dans le temps où les faits qui ont donné naissance à ce litige se sont passés.

4 L'appelant, un restaurateur de la Cité de Montréal, et porteur d'un permis de la Commission des Liqueurs pour la vente des spiritueux, lui a réclamé personnellement devant la Cour supérieure la somme de $118,741 en dommages. Il a allégué dans son action qu'il est licencié depuis de nombreuses années, qu'il a toujours respecté les lois de la Province se rapportant à la vente des liqueurs alcooliques, que son restaurant avait une excellente réputation, et jouissait de la faveur d'une clientèle nombreuse et recherchée.

5 Il a allégué en outre qu'il faisait et fait encore partie de la secte religieuse des "Témoins de Jéhovah", et que parce qu'il se serait rendu caution pour quelque 390 de ses coreligionnaires, traduits devant les tribunaux correctionnels de Montréal et accusés de distribution de littérature, sans permis, l'intimé serait illégalement intervenu auprès du gérant de la Commission pour lui faire perdre son permis, qui d'ailleurs lui a été enlevé le 4 décembre 1946. Ce serait comme résultat de l'intervention injustifiée de l'intimé que l'appelant aurait été privé de son permis, et aurait ainsi souffert les dommages considérables qu'il réclame.

6 La Cour supérieure a maintenu l'action jusqu'à concurrence de $8,123.53, et la Cour du banc de la reine [2], M. le Juge Rinfret étant dissident, aurait pour divers motifs maintenu l'appel et rejeté l'action.

7 L'intimé a soulevé plusieurs moyens à l'encontre de cette réclamation, mais je n'en examinerai qu'un seul, car je crois qu'il est suffisant pour disposer du présent appel. Le *Code de procédure civile* de la province de Québec contient la disposition suivante:

> *Art. 88 C.P.* — Nul officier public ou personne remplissant des fonctions ou *devoirs publics* ne peut être poursuivi pour dommages à raison d'un acte par lui fait *dans l'exercice de ses fonctions, et nul verdict ou jugement ne peut être rendu contre lui à moins qu'avis de cette poursuite* ne lui ait été donné au moins un mois avant l'émission de l'assignation.
>
> Cet avis doit être par écrit; il doit exposer les causes de l'action, contenir l'indication des noms et de l'étude du procureur du demandeur ou de son agent et être signifié au défendeur personnellement ou à son domicile.

8 Le défaut de donner cet avis peut être invoqué par le défendeur, soit au moyen d'une exception à la forme ou soit par plaidoyer au fond. *Charland v. Kay* [3]; *Corporation de la Paroisse de St-David v. Paquet* [4]; *Houde v. Benoit* [5].

9 Les termes mêmes employés par le législateur dans l'art. 88 C.P.C., "*nul jugement ne peut être rendu*" contre le défendeur, indiquent aussi que la Cour a le devoir de soulever d'office ce moyen, si le défendeur omet ou néglige de le faire par exception à la forme, ou dans son plaidoyer écrit. La signification de cet avis à un *officier public, remplissant des devoirs publics*, est une condition préalable, essentielle à la réussite d'une procédure judiciaire. S'il n'est pas donné, les tribunaux

ne peuvent prononcer aucune condamnation en dommages. Or, dans le cas présent, il est admis qu'aucun avis n'a été donné.

10 Mais, c'est la prétention de l'appelant que l'intimé ne peut se prévaloir de ce moyen qui est une fin de non recevoir, car, les conseils ou avis qu'il aurait donnés et qui auraient été la cause déterminante de la perte de son permis, ne l'ont pas été en raison d'un acte posé par lui *dans l'exercice de ses fonctions*.

11 La preuve révèle que l'appelant était bien licencié de la Commission des Liqueurs depuis de nombreuses années, que la tenue de son restaurant était irréprochable, et que dans le cours du mois de décembre de l'année 1946, alors qu'il était toujours porteur de son permis, celui-ci lui a été enlevé parce qu'il se rendait caution pour plusieurs centaines de ses coreligionnaires, distributeurs de littérature que l'on croyait séditieuse.

12 C'était avant le jugement de cette Cour dans la cause de *Boucher v. Le Roi*[6], alors que la conviction était profondément ancrée parmi la population, que les "Témoins de Jéhovah" étaient des perturbateurs de la paix publique, des sources constantes de trouble et de désordre dans la Province. On jugeait leur mouvement dangereux, susceptible de soulever une partie de la population contre l'autre, et de provoquer de sérieuses agitations. On parlait même de conspiration séditieuse, et ce n'est sûrement pas sans cause raisonnable, car cette opinion fut plus tard unanimement confirmée par cinq juges de la Cour du Banc de la Reine dans l'affaire *Boucher v. Le Roi*[7], et également par quatre juges dissidents devant cette Cour (*Boucher v. Le Roi cité supra*).

13 M. Archambault, alors gérant général de la Commission des Liqueurs, soupçonnait fortement que le "Frank Roncarelli" qui par ses cautionnements aidait financièrement ce mouvement qu'il croyait subversif, était détenteur d'un permis de restaurateur pour la vente de liqueurs alcooliques. Il pensait évidemment qu'il ne convenait pas que les bénéfices que Roncarelli retirait de son permis de la Commission, soient utilisés à servir la cause d'agitateurs religieux, dont les enseignements et les méthodes venaient en conflit avec les croyances populaires. Il en informa l'intimé, procureur général, qui en cette qualité est l'aviseur légal officiel de la province pour toutes les affaires juridiques.

14 Au cours d'une première conversation téléphonique, M. Archambault suggéra à l'intimé que le permis de Roncarelli lui soit enlevé, ce que d'ailleurs il avait personnellement le droit de faire, en vertu de l'art. 35 de la *Loi des Liqueurs*, qui est ainsi rédigé:

> 35. — La Commission peut à *sa discrétion* annuler un permis en tout temps.

15 Or, comme l'exécutif de la Commission des Liqueurs ne se compose que d'un gérant général qui était M. Archambault, cette discrétion reposait entièrement sur lui.

16 L'intimé lui suggéra la prudence, et lui proposa de s'enquérir avec certitude si le Roncarelli, détenteur de permis, était bien le même Roncarelli qui prodiguait ses cautionnements d'une façon si généreuse. Après enquête, l'affirmative ayant été établie, M. Archambault communiqua de nouveau avec l'intimé, et voici ce que nous dit M. Archambault dans son témoignage au sujet de ces conversations:

> Q. Maintenant, ce jour-là où vous avez reçu une lettre, le 30 novembre 1946, avez-vous décidé, ce jour-là, d'enlever la licence?
>
> R. *Certainement*, ce jour-là, j'avais appelé le Premier Ministre, en l'occurrence le procureur général, lui faisant part des constatations, c'est-à-dire des renseignements que je possédais, *et de mon intention d'annuler le privilège*, et le Premier Ministre m'a répondu de prendre mes précautions, de bien vérifier s'il s'agissait bien de la même personne, qu'il pouvait y avoir plusieurs Roncarelli, et coetera. Alors, quand j'ai eu la confirmation de Y3 à l'effet que c'était la même personne, j'ai appelé le Premier Ministre pour l'assurer qu'il s'agissait bien de Frank Roncarelli, détenteur d'un permis de la Commission des Liqueurs; et, là, le Premier Ministre m'a autorisé, il m'a donné son consentement, son approbation, sa permission, et son ordre de procéder.

17 Voici maintenant la version de l'intimé:

> Probablement, à la suite du rapport que l'indicateur Y-3 a fait, le rapport qui est produit, M. le Juge Archambault m'a téléphoné et m'a dit: 'On est sûr, c'est cette personne-là.' Et comme dans l'intervalle j'avais étudié le problème et parcouru les statuts depuis l'institution de la Commission des Liqueurs et tous les amendements qui avaient eu lieu, et j'avais consulté, j'en suis arrivé à la conclusion qu'en mon âme et conscience, mon impérieux devoir c'était d'approuver la suggestion très au point du Juge et d'autoriser la cancellation d'un privilège que cet homme-là ne méritait pas, à mon sens, et dont il n'était pas digne.

18 Et:

> Après avoir mûrement délibéré et conscient et sûr de faire mon devoir, j'ai dit à M. Archambault que j'approuvais sa suggestion d'annuler le permis, d'annuler le privilège.

19 Et, plus loin:

> ...j'ai dit au Juge Archambault que j'étais de son opinion, que je ne croyais pas que Roncarelli fût digne d'obtenir des privilèges de la province après son attitude que j'ai mentionnée tout à l'heure.
>
> ...et lorsque le Juge Archambault m'a dit, après vérification, que c'était la même personne, j'ai dit: 'Vous avez raison, ôtez le permis, ôtez le privilège.'

20 Quand on demande à l'intimé s'il a donné un ordre à M. Archambault, voici ce qu'il dit:

Non, je n'ai pas donné un ordre à M. Archambault, je viens de conter ce qui s'est passé.

21 Que le permis ait été enlevé à Roncarelli comme conséquence de la seule décision de M. Archambault, ce qu'il avait le droit de faire à sa discrétion, ou que cette discrétion ait été influencée par les paroles de l'intimé, n'a pas je crois d'effet décisif dans la détermination de la présente cause. Je demeure convaincu que même si les paroles de l'intimé ont pu avoir quelque influence sur la décision qui a été prise, ce dernier demeurait quand même un *officier public, agissant dans l'exercice de ses fonctions*, et qu'il était essentiel de lui donner l'avis requis par l'art. 88 C.P.C. L'absence de cet avis interdit aux tribunaux de prononcer aucune condamnation.

22 L'intimé est sûrement un *officier public*, et il me semble clair qu'il n'a pas agi *en sa qualité personnelle*. C'est bien comme aviseur légal de la Commission des Liqueurs, et aussi comme *officier public* chargé de la prévention des troubles, et gardien de la paix dans la province, qu'il a été consulté. C'est le Procureur Général, agissant dans l'exercice de ses fonctions, qui a été requis de donner ses directives à une branche gouvernementale dont il est l'aviseur. Vide: *Loi concernant le Département du Procureur Général*, R.S.Q. 1941, c. 46, art. 3, *Loi des liqueurs alcooliques*, S.R.Q. 1941, c. 255, art 138.

23 Certains, à tort ou à raison, peuvent croire que l'intimé se soit trompé, en pensant qu'il devait, pour le maintien de la paix publique et la suppression de troubles existants, et qui menaçaient de se propager davantage, conseiller l'enlèvement du permis de l'appelant. Pour ma part, je ne puis admettre le fallacieux principe qu'une erreur commise par un *officier public*, en posant un acte qui se rattache cependant à l'objet de son mandat, enléve à cet acte son caractère officiel, et que l'auteur de ce même acte fautif cesse alors d'agir dans *l'exécution de ses fonctions*.

24 Parce que l'appelant ne s'est pas conformé aux exigences de l'art. 88 C.P.C., en ne donnant pas l'avis requis à l'intimé qui est un *officier public, agissant dans l'exercice de ses fonctions*, je crois que l'action ne peut réussir. Le défaut de remplir cette condition préalable, constitute une fin de non recevoir, qui me dispense d'examiner les autres aspects de cette cause.

25 Je crois donc que l'appel principal, de même que l'appel logé pour faire augmenter le montant accordé par le juge de première instance, doivent être rejetés avec dépens de toutes les Cours.

The judgment of Rand and Judson JJ. was delivered by *Rand J.*:

26 The material facts from which my conclusion is drawn are these. The appellant was the proprietor of a restaurant in a busy section of Montreal which in 1946 through its transmission to him from his father had been continuously licensed for the sale of liquor for approximately 34 years; he is of good education and repute and the restaurant was of a superior class. On December

4 of that year, while his application for annual renewal was before the Liquor Commission, the existing license was cancelled and his application for renewal rejected, to which was added a declaration by the respondent that no future license would ever issue to him. These primary facts took place in the following circumstances.

27 For some years the appellant had been an adherent of a rather militant Christian religious sect known as the Witnesses of Jehovah. Their ideology condemns the established church institutions and stresses the absolute and exclusive personal relation of the individual to the Deity without human intermediation or intervention.

28 The first impact of their proselytizing zeal upon the Roman Catholic church and community in Quebec, as might be expected, produced a violent reaction. Meetings were forcibly broken up, property damaged, individuals ordered out of communities, in one case out of the province, and generally, within the cities and towns, bitter controversy aroused. The work of the Witnesses was carried on both by word of mouth and by the distribution of printed matter, the latter including two periodicals known as "The Watch Tower" and "Awake", sold at a small price.

29 In 1945 the provincial authorities began to take steps to bring an end to what was considered insulting and offensive to the religious beliefs and feelings of the Roman Catholic population. Large scale arrests were made of young men and women, by whom the publications mentioned were being held out for sale, under local by-laws requiring a licence for peddling any kind of wares. Altogether almost one thousand of such charges were laid. The penalty involved in Montreal, where most of the arrests took place, was a fine of $40, and as the Witnesses disputed liability, bail was in all cases resorted to.

30 The appellant, being a person of some means, was accepted by the Recorder's Court as bail without question, and up to November 12, 1946, he had gone security in about 380 cases, some of the accused being involved in repeated offences. Up to this time there had been no suggestion of impropriety; the security of the appellant was taken as so satisfactory that at times, to avoid delay when he was absent from the city, recognizances were signed by him in blank and kept ready for completion by the Court officials. The reason for the accumulation of charges was the doubt that they could be sustained in law. Apparently the legal officers of Montreal, acting in concert with those of the Province, had come to an agreement with the attorney for the Witnesses to have a test case proceeded with. Pending that, however, there was no stoppage of the sale of the tracts and this became the annoying circumstance that produced the volume of proceedings.

31 On or about November 12 it was decided to require bail in cash for Witnesses so arrested and the sum set ranged from $100 to $300. No such bail was furnished by the appellant; his connection with giving security ended with this change of practice; and in the result, all of the charges in relation to which he had become surety were dismissed.

32 At no time did he take any part in the distribution of the tracts: he was an adherent of the group but nothing more. It was shown that he had leased to another member premises in Sherbrooke which were used as a hall for carrying on religious meetings: but it is unnecessary to do more than mention that fact to reject it as having no bearing on the issues raised. Beyond the giving of bail and being an adherent, the appellant is free from any relation that could be tortured into a badge of character pertinent to his fitness or unfitness to hold a liquor licence.

33 The mounting resistance that stopped the surety bail sought other means of crushing the propagandist invasion and among the circumstances looked into was the situation of the appellant. Admittedly an adherent, he was enabling these protagonists to be at large to carry on their campaign of publishing what they believed to be the Christian truth as revealed by the Bible; he was also the holder of a liquor licence, a "privilege" granted by the Province, the profits from which, as it was seen by the authorities, he was using to promote the disturbance of settled beliefs and arouse community disaffection generally. Following discussions between the then Mr. Archambault, as the personality of the Liquor Commission, and the chief prosecuting officer in Montreal, the former, on or about November 21, telephoned to the respondent, advised him of those facts, and queried what should be done. Mr. Duplessis answered that the matter was serious and that the identity of the person furnishing bail and the liquor licensee should be put beyond doubt. A few days later, that identity being established through a private investigator, Mr. Archambault again communicated with the respondent and, as a result of what passed between them, the licence, as of December 4, 1946, was revoked.

34 In the meantime, about November 25, 1946, a blasting answer had come from the Witnesses. In an issue of one of the periodicals, under the heading "Quebec's Burning Hate", was a searing denunciation of what was alleged to be the savage persecution of Christian believers. Immediately instructions were sent out from the department of the Attorney-General ordering the confiscation of the issue and proceedings were taken against one Boucher charging him with publication of a seditious libel.

35 It is then wholly as a private citizen, an adherent of a religious group, holding a liquor licence and furnishing bail to arrested persons for no other purpose than to enable them to be released from detention pending the determination of the charges against them, and with no other relevant considerations to be taken into account, that he is involved in the issues of this controversy.

36 The complementary state of things is equally free from doubt. From the evidence of Mr. Duplessis and Mr. Archambault alone, it appears that the action taken by the latter as the general manager and sole member of the Commission was dictated by Mr. Duplessis as Attorney-General and Prime Minister of the province; that that step was taken as a means of bringing to a halt the activities of the Witnesses, to punish the appellant for the part he had played not only by revoking the existing licence but in declaring him barred from one "forever", and to warn others that they

similarly would be stripped of provincial "privileges" if they persisted in any activity directly or indirectly related to the Witnesses and to the objectionable campaign. The respondent felt that action to be his duty, something which his conscience demanded of him; and as representing the provincial government his decision became automatically that of Mr. Archambault and the Commission. The following excerpts of evidence make this clear:

M. DUPLESSIS:

R. ...Au mois de novembre 1946, M. Edouard Archambault, qui était alors le gérant général de la Commission des Liqueurs m'a appelé à Québec, téléphone longue distance de Montréal, et il m'a dit que Roncarelli qui multipliait les cautionnements à la Cour du Recorder d'une façon désordonnée, contribuant à paralyser les activités de la Police et à congestionner les tribunaux, que ce nommé Roncarelli détenait un privilège de la Commission des Liqueurs de Québec. De fait, Votre Seigneurie, un permis est un privilège, ce n'est pas un droit. L'article 35 de la Loi des Liqueurs alcooliques, paragraphe 1, a été édicté en 1921 par le statut II, Geo. V, chap. 24, qui déclare ceci:

> La Commission peut, à sa discrétion annuler le permis en tout temps.

. . . . .

"Je vais m'en informer et je vous le dirai." J'ai dit au Juge: "Dans l'intervalle, je vais examiner la question avec des officiers légaux, je vais y penser, je vais réfléchir et je vais voir ce que devrai faire." Quelques jours après, et pendant cet intervalle j'ai étudié le problème, j'ai étudié des dossiers, comme Procureur Général et comme Premier Ministre, quelques jours après le Juge Archambault, M. Edouard Archambault, m'a téléphoné pour me dire qu'il était certain que le Roncarelli en question, qui paralysait les activités de la Cour du Recorder qui accaparait dans une large mesure les services de la force constabulaire de Montréal, dont les journaux disaient avec raison qu'elle n'avait pas le nombre suffisant de policiers, était bien la personne qui détenait un permis. Je lui ai dit: "Dans ces circonstances, je considère que c'est mon devoir, comme Procureur Général et comme Premier Ministre, en conscience, dans l'exercice de mes fonctions officielles et pour remplir le mandat que le peuple m'avait confié et qu'il m'a renouvelé avec une immense majorité en 1948, après la cancellation du permis et après la poursuite intentée contre moi, j'ai cru que c'était mon devoir, en conscience, de dire au Juge que ce permis-là, le Gouvernement de Québec ne pouvait pas accorder un privilège à un individu comme Roncarelli qui tenait l'attitude qu'il tenait."

. . . . .

J'ai dit: "Il y a peut-être de pauvres personnes, de bonne foi, plus riches d'idéal que d'esprit, de jugement, ces personnes-là sont probablement à la merci de quelques-uns qui les exploitent, je vais donner une entrevue pour attirer l'attention de tout le monde sur l'article 69 du Code Criminel, qui déclare que les complices sont responsables au même titre que la personne qui a commis l'offense."

. . . . .

D. Vous n'avez pas reçu d'autres documents, c'est seulement les communications téléphoniques de M. le Juge Archambault?

R. Oui, certainement, un message du Juge Archambault, un autre téléphone au Juge Archambault, des examens de la situation, on en a même parlé au Conseil des Ministres, j'ai discuté le cas, j'ai consulté des officiers en loi et en mon âme et conscience j'ai fait mon devoir comme Procureur Général, j'ai fait la seule chose qui s'imposait, si c'était à recommencer je ferais pareil.

D. Monsieur le Premier Ministre, le 8 février 1947, dans le journal *La Presse*, paraissait un article intitulé: "Roncarelli subit un second refus". Le sous-titre de cet article se lit comme suit: "L'honorable M. Duplessis refuse au restaurateur, protecteur des Témoins de Jéhovah, la permission de poursuivre la Commission des Liqueurs." Vous trouverez, monsieur le Premier Ministre, presque à la fin de ce rapport, les mots suivants:

> C'est moi-même, à titre de Procureur Général, et de responsable de l'ordre dans cette province, qui ai donné l'ordre à la Commission des Liqueurs d'annuler son permis référant à Roncarelli.

Je vous demande, monsieur le Premier Ministre, si c'est un rapport exact de vos paroles à cette conférence de presse?

R. Ce que j'ai dit lors de la conférence de presse, c'est ce que je viens de déclarer. Je ne connaissais pas Roncarelli, je ne savais pas que Roncarelli avait un permis, ... lorsqu'il a attiré mon attention sur la situation absolument anormale d'un homme bénéficiant d'un privilège de la province, et multipliant les actes de nature à paralyser les tribunaux de la province et la police municipale de Montréal, c'est là que j'ai approuvé sa suggestion et que j'ai dit, comme Procureur général...

LA COUR: — C'est une autre question que l'on vous pose, Monsieur le Premier Ministre. Voulez-vous relire la question. (La demande précédente est alors relue.)

R. Ce que j'ai dit à la presse, c'est ce que je viens de dire tout à l'heure. L'article tel que produit n'est pas conforme textuellement à ce que j'ai dit. Ce que j'ai dit, ce que je répète, c'est que le Juge Archambault, gérant de la Commission des Liqueurs m'a mis au fait d'une situation que j'ignorais et comme Procureur Général, pour accomplir mon devoir, j'ai dit au Juge Archambault que j'étais de son opinion, que je ne croyais pas que Roncarelli fut digne d'obtenir des privilèges de la province après son attitude que j'ai mentionnée tout à l'heure.

. . . . .

D. Les mots que je viens de vous lire tout à l'heure, c'est censé être textuellement les mots que vous avez donnés, parce que c'est précédé d'une indication d'un rapport textuel:

> Nous n'avons fait qu'exercer en ce faisant un droit formel et incontestable, nous avons rempli un impérieux devoir. Le permis de Roncarelli a été annulé non pas temporairement mais bien pour toujours.

LE TÉMOIN: — Si j'ai dit cela?

L'AVOCAT: — Oui.

R. Oui. Le permis de Roncarelli a été annulé pour ce temps-là et pour toujours. Je l'ai dit et je considérais que c'était mon devoir et en mon âme et conscience j'aurais manqué à mon devoir si je ne l'avais pas fait.

D. Avec ces renseignements additionnels diriez-vous que les mots: "C'est moi-même, à titre de Procureur Général et de responsable de l'ordre dans cette province qui ai donné l'ordre à la Commission des Liqueurs d'annuler son permis." Diriez-vous que c'est exact?

R. J'ai dit tout à l'heure ce qui en était. J'ai eu un téléphone de M. Archambault me mettant au courant de certains faits que j'ignorais au sujet de Roncarelli. Vérification, identification pour voir si c'était bien la même personne, étude, réflexion, consultation et décision d'approuver la suggestion du gérant de la Commission des Liqueurs d'annuler le privilège de Roncarelli.

. . . . .

LA COUR:

D.M. Stein veut savoir si vous avez donné un ordre à M. Archambault?

R. Non, je n'ai pas donné un ordre à M. Archambault, je viens de conter ce qui s'est passé. Le juge Archambault m'a mis au courant d'un fait que je ne connaissais pas, je ne connaissais pas les faits, c'est lui qui m'a mis au courant des faits. Je ne sais pas comment on peut appeler ça, quand le Procureur Général, qui est à la tête d'un département, parle à un officier, même à un officier supérieur, et qu'il émet une opinion, ce n'est pas directement un ordre, c'en est un sans l'être. Mais c'est à la suggestion du Juge Archambault, après qu'il eut porté à ma connaissance des faits que j'ignorais, que la décision a été prise.

. . . . .

D. Monsieur le Premier Ministre, excusez-moi si je répète encore la question, mais il me semble que vous n'avez pas répondu à la question que j'ai posée. Il paraît, non seulement dans ce journal, mais aussi dans d'autres journaux, et cela est répété exactement dans les même paroles, dans le *Montreal Star*, en anglais, dans la *Gazette*, en anglais, dans *Le Canada*, en français et aussi dans *La Patrie*, en français, textuellement les mêmes mots: "C'est moi-même, à titre de Procureur Géneral, chargé d'assurer le respect de l'ordre et le respect des citoyens paisibles qui ai donné à la Commission des Liqueurs, l'ordre d'annuler le permis." Je vous demande si c'est possible que vous ayez employé presque exactement ces mots en discutant l'affaire avec les journalistes, ce jour-là?

R. Lorsque les journalistes viennent au bureau pour avoir des entrevues, des fois les entrevues durent une demi-heure, des fois une heure, des fois une heure et demie; quels sont les termes exacts qui sont employés, on ne peut pas se souvenir exactement des termes. Mais la vérité vraie c'est ce que j'ai dit tout à l'heure, et c'est cela que j'ai dit aux journalistes, comme Premier Ministre et comme Procureur Général, je prends la responsabilité. Si j'avais dit au Juge Archambault: "Vous ne le ferez pas", il ne l'aurait probablement pas fait. Comme il me suggérait de le faire et qu'après réflexion et vérification je trouvais que c'était correct, que c'était conforme à mon devoir, j'ai approuvé et c'est toujours un ordre que l'on donne. Quand l'officier supérieur parle, c'est un ordre que l'on donne, même s'il accepte la suggestion de l'officier dans son département, c'est un ordre qu'il donne indirectement. Je ne me rappelle pas des expressions exactes, mais ce sont les faits.

. . . . .

D. Référant à l'article contenue dans la *Gazette* du 5 décembre, c'est-à-dire le jour suivant l'annulation du permis, vous trouvez là les mots en anglais:

> In statement to the press yesterday, the Premier recalled that: 'Two weeks ago, I pointed out that the Provincial Government had the firm intention to take the most rigorous and efficient measures possible to get rid of those who under the names of Witnesses of Jehovah, distribute circulars which in my opinion, are not only injurious for Quebec and its population, but which are of a very libellous and seditious character. The propaganda of the Witnesses of Jehovah cannot be tolerated and there are more than 400 of them now before the courts in Montreal, Quebec, Three Rivers and other centers.'
>
> 'A certain Mr. Roncarelli has supplied bail for hundreds of witnesses of Jehovah. The sympathy which this man has shown for the Witnesses, in such an evident, repeated and audacious manner, is a provocation to public order, to the administration of justice and is definitely contrary to the aims of justice.'

D. Je vous demande, monsieur le Premier Ministre, si ce sont les paroles presque exactes ou exactes que vous avez dites à la conférence de presse?

R. Que j'ai dit ici: "A certain Mr. Roncarelli has supplied bail for hundreds of witnesses of Jehovah. The Sympathy which this man has shown for the Witnesses, in such an evident, repeated and audacious manner, is a provocation to public order, to the administration of justice and is definitely contrary to the aims of justice." Je l'ai dit et je considère que c'est vrai.

. . . . .

M. ARCHAMBAULT:

D. Maintenant, ce jour-là où vous avez reçu une lettre, le 30 novembre 1946, avez-vous décidé, ce jour-là, d'enlever la licence?

> R. Certainement, ce jour-là, j'avais appelé le Premier Ministre, en l'occurrence le procureur général, lui faisant part des constatations, c'est-à-dire des renseignements que je possédais, et de mon intention d'annuler le privilège, et le Premier Ministre m'a répondu de prendre mes précautions, de bien vérifier s'il s'agissait bien de la même personne, qu'il pouvait y avoir plusieurs Roncarelli, et coetera. Alors, quand j'ai eu la confirmation de Y3 à l'effet que c'était la même personne, j'ai rappelé le Premier Ministre pour l'assurer qu'il s'agissait bien de Frank Roncarelli, détenteur d'un permis de la Commission des Liqueurs; et, là, le Premier Ministre m'a autorisé, il m'a donné son consentement, son approbation, sa permission, et son ordre de procéder.

37 In these circumstances, when the *de facto* power of the Executive over its appointees at will to such a statutory public function is exercised deliberately and intentionally to destroy the vital business interests of a citizen, is there legal redress by him against the person so acting? This calls for an examination of the statutory provisions governing the issue, renewal and revocation of liquor licences and the scope of authority entrusted by law to the Attorney-General and the government in relation to the administration of the Act.

38 The liquor law is contained in R.S.Q. 1941, c. 255, entitled *An Act Respecting Alcoholic Liquor*. A Commission is created as a corporation, the only member of which is the general manager. By s. 5.

> The exercise of the functions, duties and powers of the Quebec Liquor Commission shall be vested in one person alone, named by the Lieutenant-Governor in Council, with the title of Manager. The remuneration of such person shall be determined by the Lieutenant-Governor in Council and be paid out of the revenues of the Liquor Commission. R.S. 1925, c. 37, s. 5; 1 Ed. VII (2), c. 14, ss. 1 and 5; 1 Geo. VI, c. 22, ss. 1 and 5.

The entire staff for carrying out the duties of the Commission are appointed by the general manager — here Mr. Archambault — who fixes salaries and assigns functions, the Lieutenant-Governor in Council reserving the right of approval of the salaries. Besides the general operation of buying and selling liquor throughout the province and doing all things necessary to that end, the Commission is authorized by s. 9 (e) to "grant, refuse or cancel permits for the sale of alcoholic liquors or other permits in regard thereto and to transfer the permit of any person deceased". By s. 12 suits against the general manager for acts done in the exercise of his duties require the authority of the Chief Justice of the province, and the Commission can be sued only with the consent of the Attorney-General. Every officer of the Commission is declared to be a public officer and by R.S.Q. 1941, c. 10, s. 2, holds office during pleasure. By s. 19 the Commission shall pay over to the Provincial Treasurer any moneys which the latter considers available and by s. 20 the Commission is to account to the Provincial Treasurer for its receipts, disbursements, assets and liabilities. Sections 30 and 32 provide for the issue of permits to sell; they are to be granted to individuals only, in their own names; by s. 34 the Commission "may refuse to grant any permit"; subs.(2) provides

for permits in special cases of municipalities where prohibition of sale is revoked in whole or part by by-law; subs. (3) restricts or refuses the grant of permits in certain cities the Council of which so requests; but it is provided that

> ...If the fyling of such by-law takes place after the Commission has granted a permit in such city or town, the Commission shall be unable to give effect to the request before the first of May next after the date of fyling.

Subsection (4) deals with a refusal to issue permits in small cities unless requested by a by-law, approved by a majority vote of the electors. By subs. (6) special power is given the Commission to grant permits to hotels in summer resorts for five months only notwithstanding that requests under subss. (2) and (4) are not made. Section 35 prescribes the expiration of every permit on April 30 of each year. Dealing with cancellation, the section provides that the "Commission may cancel any permit at its discretion". Besides the loss of the privilege and without the necessity of legal proceedings, cancellation entails loss of fees paid to obtain it and confiscation of the liquor in the possession of the holder and the receptacles containing it. If the cancellation is not followed by prosecution for an offence under the Act, compensation is provided for certain items of the forfeiture. Subsection (5) requires the Commission to cancel any permit made use of on behalf of a person other than the holder; s. 36 requires cancellation in specified cases. The sale of liquor is, by s. 42, forbidden to various persons. Section 148 places upon the Attorney-General the duty of

> 1. Assuring the observance of this Act and of the Alcoholic Liquor Possession and Transportation Act (Chap. 256), and investigating, preventing and suppressing the infringements of such acts, in every way authorized thereby;
>
> 2. Conducting the suits or prosecutions for infringements of this Act or of the said Alcoholic Liquor Possession and Transportation Act. R.S. 1925, c. 37, s. 78a; 24 Geo. V, c. 17, s. 17.

The provisions of the statute, which may be supplemented by detailed regulations, furnish a code for the complete administration of the sale and distribution of alcoholic liquors directed by the Commission as a public service, for all legitimate purposes of the populace. It recognizes the association of wines and liquors as embellishments of food and its ritual and as an interest of the public. As put in Macbeth, the "sauce to meat is ceremony", and so we have restaurants, cafés, hotels and other places of serving food, specifically provided for in that association.

39 At the same time the issue of permits has a complementary interest in those so catering to the public. The continuance of the permit over the years, as in this case, not only recognizes its virtual necessity to a superior class restaurant but also its identification with the business carried on. The provisions for assignment of the permit are to this most pertinent and they were exemplified in the continuity of the business here. As its exercise continues, the economic life of the holder becomes progressively more deeply implicated with the privilege while at the same time his vocation becomes correspondingly dependent on it.

40 The field of licensed occupations and businesses of this nature is steadily becoming of greater concern to citizens generally. It is a matter of vital importance that a public administration that can refuse to allow a person to enter or continue a calling which, in the absence of regulation, would be free and legitimate, should be conducted with complete impartiality and integrity; and that the grounds for refusing or cancelling a permit should unquestionably be such and such only as are incompatible with the purposes envisaged by the statute: the duty of a Commission is to serve those purposes and those only. A decision to deny or cancel such a privilege lies within the "discretion" of the Commission; but that means that decision is to be based upon a weighing of considerations pertinent to the object of the administration.

41 In public regulation of this sort there is no such thing as absolute and untrammelled "discretion", that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. Fraud and corruption in the Commission may not be mentioned in such statutes but they are always implied as exceptions. "Discretion" necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption. Could an applicant be refused a permit because he had been born in another province, or because of the colour of his hair? The ordinary language of the legislature cannot be so distorted.

42 To deny or revoke a permit because a citizen exercises an unchallengeable right totally irrelevant to the sale of liquor in a restaurant is equally beyond the scope of the discretion conferred. There was here not only revocation of the existing permit but a declaration of a future, definitive disqualification of the appellant to obtain one: it was to be "forever". This purports to divest his citizenship status of its incident of membership in the class of those of the public to whom such a privilege could be extended. Under the statutory language here, that is not competent to the Commission and *a fortiori* to the government or the respondent: *McGillivray v. Kimber*[8]. There is here an administrative tribunal which, in certain respects, is to act in a judicial manner; and even on the view of the dissenting justices in *McGillivray*, there is liability: what could be more malicious than to punish this licensee for having done what he had an absolute right to do in a matter utterly irrelevant to the *Liquor Act*? Malice in the proper sense is simply acting for a reason and purpose knowingly foreign to the administration, to which was added here the element of intentional punishment by what was virtually vocation outlawry.

43 It may be difficult if not impossible in cases generally to demonstrate a breach of this public duty in the illegal purpose served; there may be no means, even if proceedings against the Commission were permitted by the Attorney-General, as here they were refused, of compelling the Commission to justify a refusal or revocation or to give reasons for its action; on these questions I

make no observation; but in the case before us that difficulty is not present: the reasons are openly avowed.

44 The act of the respondent through the instrumentality of the Commission brought about a breach of an implied public statutory duty toward the appellant; it was a gross abuse of legal power expressly intended to punish him for an act wholly irrelevant to the statute, a punishment which inflicted on him, as it was intended to do, the destruction of his economic life as a restaurant keeper within the province. Whatever may be the immunity of the Commission or its member from an action for damages, there is none in the respondent. He was under no duty in relation to the appellant and his act was an instrusion upon the functions of a statutory body. The injury done by him was a fault engaging liability within the principles of the underlying public law of Quebec: *Mostyn v. Fabrigas*[9], and under art. 1053 of the *Civil Code*. That, in the presence of expanding administrative regulation of economic activities, such a step and its consequences are to be suffered by the victim without recourse or remedy, that an administration according to law is to be superseded by action dictated by and according to the arbitrary likes, dislikes and irrelevant purposes of public officers acting beyond their duty, would signalize the beginning of disintegration of the rule of law as a fundamental postulate of our constitutional structure. An administration of licences on the highest level of fair and impartial treatment to all may be forced to follow the practice of "first come, first served", which makes the strictest observance of equal responsibility to all of even greater importance; at this stage of developing government it would be a danger of high consequence to tolerate such a departure from good faith in executing the legislative purpose. It should be added, however, that that principle is not, by this language, intended to be extended to ordinary governmental employment: with that we are not here concerned.

45 It was urged by Mr. Beaulieu that the respondent, as the incumbent of an office of state, so long as he was proceeding in "good faith", was free to act in a matter of this kind virtually as he pleased. The office of Attorney-General traditionally and by statute carries duties that relate to advising the Executive, including here, administrative bodies, enforcing the public law and directing the administration of justice. In any decision of the statutory body in this case, he had no part to play beyond giving advice on legal questions arising. In that role his action should have been limited to advice on the validity of a revocation for such a reason or purpose and what that advice should have been does not seem to me to admit of any doubt. To pass from this limited scope of action to that of bringing about a step by the Commission beyond the bounds prescribed by the legislature for its exclusive action converted what was done into his personal act.

46 "Good faith" in this context, applicable both to the respondent and the general manager, means carrying out the statute according to its intent and for its purpose; it means good faith in acting with a rational appreciation of that intent and purpose and not with an improper intent and for an alien purpose; it does not mean for the purposes of punishing a person for exercising an

unchallengeable right; it does not mean arbitrarily and illegally attempting to divest a citizen of an incident of his civil status.

47 I mention, in order to make clear that it has not been overlooked, the decision of the House of Lords in *Allen v. Flood* [10], in which the principle was laid down that an act of an individual otherwise not actionable does not become so because of the motive or reason for doing it, even maliciously to injure, as distinguished from an act done by two or more persons. No contention was made in the present case based on agreed action by the respondent and Mr. Archambault. In *Allen v. Flood*, the actor was a labour leader and the victims non-union workmen who were lawfully dismissed by their employer to avoid a strike involving no breach of contract or law. Here the act done was in relation to a public administration affecting the rights of a citizen to enjoy a public privilege, and a duty implied by the statute toward the victim was violated. The existing permit was an interest for which the appellant was entitled to protection against any unauthorized interference, and the illegal destruction of which gave rise to a remedy for the damages suffered. In *Allen v. Flood* there were no such elements.

48 Nor is it necessary to examine the question whether on the basis of an improper revocation the appellant could have compelled the issue of a new permit or whether the purported revocation was a void act. The revocation was *de facto*, it was intended to end the privilege and to bring about the consequences that followed. As against the respondent, the appellant was entitled to treat the breach of duty as effecting a revocation and to elect for damages.

49 Mr. Scott argued further that even if the revocation were within the scope of discretion and not a breach of duty, the intervention of the respondent in so using the Commission was equally a fault. The proposition generalized is this: where, by a statute restricting the ordinary activities of citizens, a privilege is conferred by an administrative body, the continuance of that enjoyment is to be free from the influence of third persons on that body for the purpose only of injuring the privilege holder. It is the application to such a privilege of the proposition urged but rejected in *Allen v. Flood* in the case of a private employment. The grounds of distinction between the two cases have been pointed out; but for the reasons given consideration of this ground is unnecessary and I express no opinion for or against it.

50 A subsidiary defence was that notice of action had not been given as required by art. 88 C.C.P. This provides generally that, without such notice, no public officer or person fulfilling any public function or duty is liable in damages "by reason of any act done by him in the exercise of his functions". Was the act here, then, done by the respondent in the course of that exercise? The basis of the claim, as I have found it, is that the act was quite beyond the scope of any function or duty committed to him, so far so that it was one done exclusively in a private capacity, however much in fact the influence of public office and power may have carried over into it. It would be only through an assumption of a general overriding power of executive direction in statutory administrative matters that any colour of propriety in the act could be found. But such an assumption would be in

direct conflict with fundamental postulates of our provincial as well as dominion government; and in the actual circumstances there is not a shadow of justification for it in the statutory language.

51 The damages suffered involved the vocation of the appellant within the province. Any attempt at a precise computation or estimate must assume probabilities in an area of uncertainty and risk. The situation is one which the Court should approach as a jury would, in a view of its broad features; and in the best consideration I can give to them, the damages should be fixed at the sum of $25,000 plus that allowed by the trial court.

52 I would therefore allow the appeals, set aside the judgment of the Court of Queen's Bench and restore the judgment at trial modified by increasing the damages to the sum of $33,123.53. The appellant should have his costs in the Court of Queen's Bench and in this Court.

The judgment of Locke and Martland JJ. was delivered by *Martland J.*:

53 This is an appeal from a judgment of the Court of Queen's Bench, Appeal Side, for the Province of Quebec [11] , District of Montreal, rendered on April 12, 1956, overruling the judgment of the Superior Court rendered on May 2, 1951, under the terms of which the appellant had bene awarded damages in the sum of $8,123.53 and costs.

54 The appellant had appealed from the judgment of the Superior Court in respect of the amount of damages awarded. This appeal was dismissed.

55 The facts which give rise to this appeal are as follows:

> The appellant, on December 4, 1946, was the owner of a restaurant and café situated at 1429 Crescent Street in the City of Montreal. At that time he was the holder of a liquor permit, no. 68, granted to him on May 1, 1946, pursuant to the provisions of the *Alcoholic Liquor Act* of the Province of Quebec and which permitted the sale of alcoholic liquors in the restaurant and café. The permit was valid until April 30, 1947, subject to possible cancellation by the Quebec Liquor Commission (hereinafter sometimes referred to as "the Commission") in accordance with the provisions of s. 35 of that Act. The business operated by the appellant had been founded by his father in the year 1912 and it had been continuously licensed until December 4, 1946. The evidence is that prior to that date the appellant had complied with the requirements of the *Alcoholic Liquor Act* and had conducted a high-class restaurant business.
>
> The appellant was an adherent of the Witnesses of Jehovah. From some time in 1944 until November 12, 1946, he had, on numerous occasions, given security for Witnesses of Jehovah who had been prosecuted under City of Montreal By-laws numbered 270 and 1643 for minor offences of distributing, peddling and canvassing without a licence. The maximum penalty for these offences was a fine of $40 and costs, or imprisonment for 60 days. The total number of bonds furnished by the appellant was 390. These security bonds were accepted by the City

attorney and the Recorder of the City of Montreal without remuneration to the appellant. None of the accused who had been bonded ever defaulted. Subsequently the appellant was released from these bonds at his own request and new security was furnished by others.

As a result of a change of procedure in the Recorder's Court in Montreal by the Attorney in Chief of that Court, the appellant was not accepted as a bondsman in any cases before that Court after November 12, 1946.

Up to November 12, 1946, the security bonds furnished by the appellant were accepted without question. These bonds were based upon the value of the appellant's immovable property containing the restaurant. The appellant did not give any security in any criminal case involving a charge of sedition.

About the 24th or 25th of November 1946 the pamphlet "Quebec's Burning Hate" began to be distributed in the Province of Quebec by the Witnesses of Jehovah. The Chief Crown Prosecutor in Montreal, then Mtre. Oscar Gagnon, K.C., decided that the distribution of this pamphlet should be prevented. There is no evidence that the appellant was at any time a distributor of this pamphlet and his restaurant and café in Montreal was not used for the distribution or storage of these pamphlets by himself or by anyone else. The appellant had ceased to be a bondsman before the distribution of this pamphlet in the Province of Quebec had commenced.

On November 25, 1946, a number of pamphlets was seized in a building in the City of Sherbrooke owned by the appellant and leased from him, as a place of worship, by Witnesses of Jehovah under the control of the local minister Mr. Raymond Browning. There is no evidence that the appellant was in any way responsible for the activities of this congregation, or that he knew that the pamphlet "Quebec's Burning Hate" was in those premises.

56 In the course of his inquiries about the distribution of this pamphlet, Mr. Gagnon learned that the appellant had been giving bail in a large number of cases in the Recorder's Court and also that he was the holder of the liquor permit for his restaurant. These facts were brought by Mr. Gagnon to the attention of Mr. Edouard Archambault, then Chairman of the Quebec Liquor Commission and subsequently Chief Judge of the Court of Sessions of the Peace. Mr. Archambault then interviewed Recorder Paquette, who informed him that the appellant held a licence from the Quebec Liquor Commission; that he was furnishing bail in a large number of cases of infractions of municipal by-laws; that these were so numerous that a great part of the police of Montreal had been taken from their duties as a consequence and that his Court was congested by the large number of cases pending before it.

57 Subsequent to the receipt of this information, Mr. Archambault communicated by telephone with the respondent. The discussion which took place on that occasion and on the occasion of a subsequent telephone call will be reviewed later. Following the two telephone conversations

between Mr. Archambault and the respondent, Mr. Archambault, as manager of the Quebec Liquor Commission, issued an order for the cancellation of the appellant's permit without any prior notice to the appellant. All the liquor in the possession of the appellant on his restaurant premises was seized and was taken into the custody of the Commission.

58 The appellant carried on his restaurant business without a liquor licence for a period of approximately six months, after which, finding that the business could not be thus operated profitably, he closed it down and later effected a sale of the premises.

59 The appellant commenced action against the respondent on June 3, 1947, claiming damages in the total sum of $118,741. He alleged that the respondent, without legal or statutory authority, had caused the cancellation of his liquor permit as an act of reprisal because of his having acted as surety or bondsman for the Witnesses of Jehovah in connection with the charges above mentioned. He alleged that the permit had been arbitrarily and unlawfully cancelled and that, as a result, he had sustained the damages claimed.

60 By his defence the respondent alleged that the Witnesses of Jehovah, in the years 1945 and 1946, had, with the consent and encouragement of the appellant, organized a propaganda campaign in the Province of Quebec, and particularly in the City of Montreal, where they had distributed pamphlets of a seditious character. The respondent referred to the fact that the appellant had acted as surety for a number of persons under arrest and thus permitted them to repeat their offences and to continue their campaign. He alleged that in his capacity as Attorney-General of the Province of Quebec, after becoming cognizant of the conduct of the appellant and of the fact that he held a permit issued by the Quebec Liquor Commission, he had decided, after careful reflection, that it was contrary to public order to permit the appellant to enjoy the benefit of the privileges of this permit and that he, the respondent, had recommended to the manager of the Quebec Liquor Commission the cancellation of that permit. It was alleged that the permit did not give any right, but constituted a privilege available only during the pleasure of the Commission. He alleged that in the matter he had acted in his quality of Prime Minister and Attorney-General of the Province of Quebec and, accordingly, could not incur any personal responsibility. He further pleaded the provisions of art. 88 of the *Code of Civil Procedure* and alleged that he had not received notice of the action as required by the provisions of that article.

61 The case came on for trial in the Superior Court before MacKinnon J., who made findings of fact and reached conclusions in law as follows:

> 1. that the respondent gave an order to the manager of the Commission, Mr. Archambault, to cancel the appellant's permit and that it was the respondent's order which was the determining factor in relation to the cancellation of that permit;
>
> 2. that the Commission had acted arbitrarily when it cancelled the permit and had disregarded the rules of reason and justice;

3. that the respondent had failed to show that, in law, he had any authority to interfere with the administration of the Commission, or to order it to cancel a permit;

4. that the respondent was not entitled to receive notice of the action pursuant to art. 88 of the *Code of Civil Procedure* because his acts which were complained of were not done in the exercise of his functions.

62 Damages were awarded in the total amount of $8,123.53.

63 From this judgment the respondent appealed. The appellant cross-appealed in respect of the matter of damages, asking for an award in an increased amount.

64 The respondent's appeal on the issue of liability was allowed and the appellant's appeal was dismissed. Rinfret J. dissented in respect of the allowance of the respondent's appeal.

65 Various reasons were given for the allowance of the appeal by the majority of the Court [12]. They may be summarized as follows:

Bissonnette J. reached the conclusion that, upon the evidence, the decision to cancel the permit had been made by Mr. Archambault before taking the respondent's advice. He also held that, according to the strict interpretation of the *Alcoholic Liquor Act*, the Commission was not obliged to justify before any Court the wisdom of its acts in cancelling a liquor permit.

Pratte J. allowed the appeal of the respondent on the first ground advanced by Bissonnette J., finding that there was no relationship of cause and effect as between the acts of the respondent and the cancellation of the permit because Mr. Archambault had already made his decision to cancel before consulting with the respondent.

Casey J. was of the same view with respect to this point. He also held that, although the discretion of the Commission to cancel a permit should not be exercised arbitrarily or capriciously, no individual has an inherent right to engage in the business regulated by the Act and the continuance of a permit was conditional upon the holder being of good moral character and a suitable person to exercise that privilege. In his view the chairman of the Commission had reasonable grounds for believing that the Witnesses of Jehovah were engaged in a campaign of libel and sedition and that the appellant, an active member of the sect, was participating in the group's activities. His view was that, in the light of this, the Commission could properly cancel the permit.

Martineau J., like the other majority judges in the Court, found that there was no relationship of cause and effect as between what the respondent had done and the cancellation of the permit, also holding that Mr. Archambault had decided to cancel it before communicating with the respondent. He was also of the view that a Minister of the Crown is not liable if, in

the exercise of powers granted to him by law, he makes an erroneous decision upon reliable information. He also held that, while the Commission's discretion to cancel a permit was not absolute and had to be exercised in good faith, the discretion is not quasi-judicial but "quasi-illimited" and only restricted by the good faith of its officers. He was of the opinion that the good faith of both the respondent and Mr. Archambault could not be doubted. He found that no order to cancel the permit had been given by the respondent to Mr. Archambault. He also held that, even if an order had been given and had been the determining factor in procuring the cancellation of the permit, there would be no liability upon the respondent, in view of the appellant's participation in the propaganda of the Witnesses of Jehovah.

Rinfret J., who dissented and who would have dismissed the respondent's appeal, in general agreed with the conclusions reached by the trial judge.

66 In view of the foregoing, it appears that there are four main points which require to be considered in the present appeal, which are as follows:

1. Was there a relationship of cause and effect as between the respondent's acts and the cancellation of the appellant's permit?

2. If there was such a relationship, were the acts of the respondent justifiable on the ground that he acted in good faith in the exercise of his official functions as Attorney-General and Prime Minister of the Province of Quebec?

3. Was the cancellation of the appellant's permit a lawful act of the Commission, acting within the scope of its powers as defined in the *Alcoholic Liquor Act*?

4. Was the respondent entitled to the protection provided by art. 88 of the *Code of Civil Procedure*?

67 It is proposed to consider each of these points in the above sequence.

68 With respect to the first point, after reviewing the evidence, I am satisfied that there was ample evidence to sustain the finding of the trial judge that the cancellation of the appellant's permit was the result of instructions given by the respondent to the manager of the Commission.

69 Two telephone calls were made by Mr. Archambault to the respondent. According to the evidence of the respondent, Mr. Archambault telephoned him in November 1946 "et il m'a dit que Roncarelli qui multipliait les cautionnements à la Cour du Recorder d'une façon désordonnée, contribuant à paralyser les activités de la police et à congestionner les tribunaux, que ce nommé Roncarelli détenait un privilège de la Commission des Liqueurs de Québec."

70 In reply the respondent says that he said to Mr. Archambault:

> C'est une chose très grave, êtes-vous sûr qu'il s'agit de Roncarelli qui a un permis de la Commission des Liqueurs?

71 Mr. Archambault then replied that he would inform himself and would communicate with the respondent.

72 Some time after the first telephone conversation, and apparently about November 30 or December 1, 1946, Mr. Archambault again telephoned the respondent to say:

> qu'il était certain que le Roncarelli en question, qui paralysait les activités de la Cour du Recorder, qui accaparait dans une large mesure les services de la force constabulaire de Montréal, dont les journaux disaient avec raison qu'elle n'avait pas le nombre suffisant de policiers, était bien la personne qui détenait un permis.

73 To this the respondent replied:

> Dans ces circonstances, je considère que c'est mon devoir, comme Procureur Général et comme Premier Ministre, en conscience, dans l'exercice de mes fonctions officielles et pour remplir le mandat que le peuple m'avait confié et qu'il m'a renouvelé avec une immense majorité en 1948, après la cancellation du permis et après la poursuite intentée contre moi, j'ai cru que c'était mon devoir, en conscience, de dire au Juge que ce permis-là le Gouvernement de Québec ne pouvait pas accorder un privilège à un individu comme Roncarelli qui tenait l'attitude qu'il tenait.

74 The respondent further says that he told Mr. Archambault:

> Vous avez raison, ôtez le permis, ôtez le privilège.

75 In February 1947 the respondent, in an interview with the press, stated that the appellant's permit had been cancelled on orders from him. His statement on this point appeared in a news dispatch to the Canadian Press from its Quebec correspondent:

> It was I, as Attorney-General of the Province charged with the protection of good order, who gave the order to annual Frank Roncarelli's permit.
>
> Mr. Duplessis said:
>
> > By so doing, not only have we exercised a right but we have fulfilled an imperious duty. The permit was cancelled not temporarily but definitely and for always.

76 It seems to me that the only reason Mr. Archambault could have had for telephoning the respondent in the first place, after his receipt of the information given by Mr. Gagnon and Recorder Paquette, was to obtain the respondent's direction as to what should be done. I find it difficult

to accept the proposition that there was no relationship of cause and effect as between what the respondent said to Mr. Archambault and the cancellation of the permit. While it is true that in his evidence Mr. Archambault states that he had decided to cancel the permit on the day he received the written report from his secret agent Y3, dated November 30, 1946 (which was subsequent to the first telephone conversation), he goes on to say:

> D. Maintenant, ce jour-là où vous avez reçu une lettre, le 30 novembre 1946, avez-vous décidé, ce jour-là, d'enlever la licence?
>
> R. Certainement, ce jour-là, j'avais appelé le Premier Ministre, en l'occurrence le procureur général, lui faisant part des constatations, c'est-à-dire des renseignements que je possédais, et de mon intention d'annuler le privilège, et le Premier Ministre m'a répondu de prendre mes précautions, de bien vérifier s'il s'agissait bien de la même personne, qu'il pouvait y avoir plusieurs Roncarelli, et coetera. Alors, quand j'ai eu la confirmation de Y3 à l'effet que c'était la même personne, j'ai rappelé le Premier Ministre pour l'assurer qu'il s'agissait bien de Frank Roncarelli, détenteur d'un permis de la Commission des Liqueurs; et, là, le Premier Ministre m'a autorisé, il m'a donné son consentement, son approbation, sa permission, et son ordre de procéder.

77 I conclude from this evidence that any "decision" of Mr. Archambault's was at most tentative and would only be made effective if he received direction from the respondent to carry it out. I would doubt that, if the respondent had advised against the cancellation of the permit, Mr. Archambault's decision would have been implemented.

78 The respondent appears to have shared this view because in his evidence he states as follows:

> Si j'avais dit au Juge Archambault: "Vous ne le ferez pas", il ne l'aurait probablement pas fait. Comme il me suggérait de le faire et qu'après réflexion et vérification je trouvais que c'était correct, que c'était conforme à mon devoir, j'ai approuvé et c'est toujours un ordre que l'on donne. Quand l'officier supérieur parle, c'est un ordre que l'on donne, même s'il accepte la suggestion de l'officier dans son département, c'est un ordre qu'il donne indirectement. Je ne me rapelle pas des expressions exactes, mais ce sont les faits.

79 I, therefore, agree with the learned trial judge that the cancellation of the appellant's permit was the result of an order given by the respondent.

80 The second point for consideration is as to whether the respondent's acts were justifiable as having been done in good faith in the exercise of his official function as Attorney-General and Prime Minister of the Province of Quebec.

81 In support of his contention that the respondent had so acted, we were referred by his counsel to the following statutory provisions:

THE ATTORNEY-GENERAL'S DEPARTMENT ACT, R.S.Q. 1941, c. 46

. . . . .

3. The Attorney-General is the official legal adviser of the Lieutenant-Governor, and the legal member of the Executive Council of the Province of Quebec.

4. The duties of the Attorney-General are the following:

1. To see that the administration of public affairs is in accordance with the law;

2. To exercise a general superintendence over all matters connected with the administration of justice in the Province.

5. The function and powers of the Attorney-General are the following:

1. He has the functions and powers which belong to the office of Attorney-General of England, respectively, by law or usage, insofar as the same are applicable to this Province, and also the functions and powers, which, up to the Union, belonged to such offices in the late Province of Canada, and which, under the provisions of the British North America Act, 1867, are within the powers of the Government of this Province;

2. He advises the heads of the several departments of the Government of the Province upon all matters of law concerning such departments, or arising in the administration thereof;

. . . . .

7. He is charged with superintending the administration or the execution, as the case may be, of the laws respecting police.

THE EXECUTIVE POWER ACT, R.S.Q. 1941, c. 7

. . . . .

5. The Lieutenant-Governor may appoint, under the Great Seal, from among the members of the Executive Council, the following officials, who shall remain in office during pleasure:

1. A Prime Minister who shall, ex-officio, be president of the Council.

THE ALCOHOLIC LIQUOR ACT, R.S.Q. 1941, c. 255 DIVISION XII INVESTIGATION AND PROSECUTION OF OFFENCES

148. The Attorney-General shall be charged with:

1. Assuring the observance of this act and of the Alcoholic Liquor Possession and Transportation Act (Chap. 256), and investigating, preventing and suppressing the infringements of such acts, in every way authorized thereby;

> 2. Conducting the suits or prosecutions for infringements of this act or of the said Alcoholic Liquor Possession and Transportation Act.

82 I do not find, in any of these provisions, authority to enable the respondent, either as Attorney-General or Prime Minister, to direct the cancellation of a permit under the *Alcoholic Liquor Act*. On the contrary, the intent and purpose of that Act appears to be to place the complete control over the liquor traffic in Quebec in the hands of an independent commission. The only function of the Attorney-General under that statute is in relation to the assuring of the observance of its provisions. There is no evidence of any breach of that Act by the appellant.

83 However, it is further argued on behalf of the respondent that, as Attorney-General, in order to suppress or to prevent crimes and offences, "He may do so by instituting legal proceedings; he may do so by other methods". This amounts to a contention that he is free to use any methods he chooses; that, on suspicion of participation in what he thinks would be an offence, he may sentence a citizen to economic ruin without trial. This seems to me to be a very dangerous proposition and one which is completely alien to the legal concepts applicable to the administration of public office in Quebec, as well as in the other provinces of Canada.

84 In my view, the respondent was not acting in the exercise of any official powers which he possessed in doing what he did in this matter.

85 The third point to be considered is as to whether the appellant's permit was lawfully cancelled by the Commission under the provisions of the *Alcoholic Liquor Act*. Section 35 of that Act makes provision for the cancellation of a permit in the following terms:

> 35. 1. Whatever be the date of issue of any permit granted by the Commission, such permit shall expire on the 30th of April following, unless it be cancelled by the Commission before such date, or unless the date at which it must expire be prior to the 30th of April following.
>
> The Commission may cancel permit at its discretion.

86 It is contended by the respondent, and with considerable force, that this provision gives to the Commission an unqualified administrative discretion as to the cancellation of a permit issued pursuant to that Act. Such a discretion, it is contended, is not subject to any review in the Courts.

87 The appellant contends that the Commission's statutory discretion is not absolute and is subject to legal restraint. He cites the statement of the law by Lord Halsbury in *Sharp v. Wakefield*[13]:

> An extensive power is confided to the justices in their capacity as justices to be exercised judicially; and "discretion" means when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason

> and justice, not according to private opinion: Rooke's Case; according to law, and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself.

88 That was a case dealing with the discretionary powers of the licensing justices to refuse renewal of a licence for the sale of intoxicating liquors. This statement of the law was approved by Lord Greene M.R. in *Minister of National Revenue v. Wrights' Canadian Ropes, Limited* [14] .

89 The appellant further contends that, in exercising this discretion, the rules of natural justice must be observed and points out that no notice of the intention of the Commission to cancel his permit was ever given to the appellant, nor was he given a chance to be heard by the Commission before the permit was cancelled.

90 With respect to this latter point, it would appear to be somewhat doubtful whether the appellant had a right to a personal hearing, in view of the judgment of Lord Radcliffe in *Nakkuda Ali v. Jayaratne* [15] . However, regardless of this, it is my view that the discretionary power to cancel a permit given to the Commission by the *Alcoholic Liquor Act* must be related to the administration and enforcement of that statute. It is not proper to exercise the power of cancellation for reasons which are unrelated to the carrying into effect of the intent and purpose of the Act. The association of the appellant with the Witnesses of Jehovah and his furnishing of bail for members of that sect, which were admitted to be the reasons for the cancellation of his permit and which were entirely lawful, had no relationship to the intent and purposes of the *Alcoholic Liquor Act*.

91 Furthermore, it should be borne in mind that the right of cancellation of a permit under that Act is a substantial power conferred upon what the statute contemplated as an independent commission. That power must be exercised solely by that corporation. It must not and cannot be exercised by any one else. The principle involved is stated by the Earl of Selborne in the following passage in his judgment in *Spackman v. Plumstead Board of Works* [16] :

> No doubt, in the absence of special provisions as to how the person who is to decide is to proceed, the law will imply no more than that the substantial requirements of justice shall not be violated. He is not a judge in the proper sense of the word; but he must give the parties an opportunity of being heard before him and stating their case and their view. He must give notice when he will proceed with the matter, and he must act honestly and impartially and not under the dictation of some other person or persons to whom the authority is not given by law. There must be no malversation of any kind. There would be no decision within the meaning of the statute if there were anything of that sort done contrary to the essence of justice.

While the Earl of Selborne is here discussing the rules applicable to a quasi-judicial tribunal, that portion of his statement which requires such a tribunal to act honestly and impartially and not under

the dictation of some other person or persons is, I think, equally applicable to the performance of an administrative function.

92 The same principle was applied in respect of the performance of an administrative function by Chief Justice Greenshields in *Jaillard v. City of Montreal* [17] .

93 In the present case it is my view, for the reasons already given, that the power was not, in fact, exercised by the Commission, but was exercised by the respondent, acting through the manager of the Commission. Cancellation of a permit by the Commission at the request or upon the direction of a third party, whoever he may be, is not a proper and valid exercise of the power conferred upon the Commission by s. 35 of the Act. The Commission cannot abdicate its own functions and powers and act upon such direction.

94 Finally, there is the question as to the giving of notice of the action by the appellant to the respondent pursuant to art. 88 of the *Code of Civil Procedure*, which reads as follows:

> **ACTIONS AGAINST PUBLIC OFFICERS**
>
> 88. No public officer or other person fulfilling any public function or duty can be sued for damages by reason of any act done by him in the exercise of his functions, nor can any verdict or judgment be rendered against him, unless notice of such action has been given him at least one month before the issue of the writ of summons.
>
> Such notice must be in writing; it must state the grounds of the action, and the name of the plaintiff's attorney or agent, and indicate his office; and must be served upon him personnally or at his domicile.

95 The contention of the respondent is that, as Attorney-General, he was a public official whose function was to maintain law and order in the Province; that he acted as he did in the intended exercise of that function and that he is not deprived of the protection afforded by the article because he had exceeded the powers which, in law, he possessed.

96 The issue is as to whether those acts were "done by him in the exercise of his functions". For the reasons already given in dealing with the second of the four points under discussion, I do not think that it was a function either of the Prime Minister or of the Attorney-General to interfere with the administration of the Commission by causing the cancellation of a liquor permit. That was something entirely outside his legal functions. It involved the exercise of powers which, in law, he did not possess at all.

97 Is the position altered by the fact that apparently he thought it was his right and duty to act as he did? I do not think that it is. The question of whether or not his acts were done by him in the exercise of his functions is not to be determined on the basis of his own appreciation of those

functions, but must be determined according to law. The respondent apparently assumed that he was justified in using any means he thought fit to deal with the situation which confronted him. In my view, when he deliberately elected to use means which were entirely outside his powers and were unlawful, he did not act in the exercise of his functions as a public official.

98 The principle which should be applied is stated by Lopes J. in *Agnew v. Jobson* [18] . That was an action for assault against a justice of the peace who had ordered a medical examination of the person of the plaintiff. There was no legal authority to make such an order, but it was admitted that the defendant bona fide believed that he had the authority to do that which he did. The defendant relied on absence of notice of the action as required by 11 & 12 Vic., c. 44. Section 8 of that Act provided that "no action shall be brought against any justice of the peace for anything done by him in the execution of his office" unless within six calendar months of the act complained of. Section 9, the one relied on by the defendant, provided that "no such action shall be commenced against any such justice" until a month after notice of action. Lopes J. held that "such justice" in s. 9 referred to a justice in execution of his office in s. 8. He held that s. 9 did not provide a defence to the defendant in these words (p. 68):

> I am of opinion that the defendant Jobson is not entitled to notice of action. There was a total absence of any authority to do the act, and although he acted bona fide, believing he had authority, there was nothing on which to ground the belief, no knowledge of any fact such a belief might be based on.

99 Similarly here there was nothing on which the respondent could found the belief that he was entitled to deprive the appellant of his liquor permit.

100 On the issue of liability, I have, for the foregoing reasons, reached the conclusion that the respondent, by acts not justifiable in law, wrongfully caused the cancellation of the appellant's permit and thus cause damage to the appellant. The respondent intentionally inflicted damage upon the appellant and, therefore, in the absence of lawful justification, which I do not find, he is liable to the appellant for the commission of a fault under art. 1053 of the *Civil Code*.

101 I now turn to the matter of damages.

102 The learned trial judge awarded damages to the appellant in the sum of $8,123.53, made up of $1,123.53 for loss of value of liquor seized by the Commission, $6,000 for loss of profits from the restaurant from December 4, 1946, the date of the cancellation of the permit, to May 1, 1947, the date when the permit would normally have expired, and $1,000 for damages to his personal reputation. No objection is taken by the appellant in respect of these awards, but he contends that he is also entitled to compensation under certain other heads of damage in respect of which no award was made by the learned trial judge. These are in respect of damage to the good will and reputation of his business, loss of property rights in his permit and loss of future profits for a period

of at least one year from May 1, 1947. Damages in respect of these items were not allowed by the learned trial judge because of the fact that the appellant's permit was "only a temporary asset".

103 The appellant contends that, although his permit was not permanent, yet, in the light of the long history of his restaurant and the continuous renewals of the permit previously, he had a reasonable expectation of renewal in the future, had not the cancellation been effected in December 1946. He contends that the value of the good will of his business was substantially damaged by that cancellation.

104 His position on this point is supported by the reasoning of Duff J. (as he then was) in *McGillivray v. Kimber*[19]. That was an action claiming damages for the wrongful cancellation of the appellant's pilot's licence by the Sydney Pilotage Authority. At p. 163 he says:

> The statement of defence seems to proceed upon the theory that for the purpose of measuring legal responsibility the consequences of this dismissal came to an end with the expiry of the term and that I shall discuss; but for the present it is sufficient to repeat that the dismissal was an act which being not only calculated, but intended to prevent the appellant continuing the exercise of his calling had in fact this intended effect; and the respondents are consequently answerable in damages unless there was in law justification or excuse for what they did. Per Bowen L.J., Mogul S.S. Co. v. McGregor, 23 Q.B.D. 598.

105 The statement by Bowen L.J. to which he refers appears at p. 613 of the report and is also of significance in relation to the appellant's right of action in this case. It is as follows:

> Now, intentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that other person's property or trade, is actionable if done without just cause or excuse.

106 The evidence establishes that there was a substantial reduction in the value of the good will of the appellant's restaurant business as a result of what occurred, apart from the matter of any loss which might have resulted on the sale of the physical assets. It is difficult to assess this loss and there is not a great deal of evidence to assist in so doing. The appellant did file, as exhibits, income tax returns for the three years prior to 1946, which showed in those years a total net income from the business of $23,578.88. The profit-making possibilities of the business are certainly an item to be considered in determining the value of the good will.

107 However, in all the circumstances, the amount of these damages must be determined in a somewhat arbitrary fashion. I consider that $25,000 should be allowed as damages for the diminution of the value of the good will and for the loss of future profits.

108 I would allow both appeals, with costs here and below, and order the respondent to pay to the appellant damages in the total amount of $33,123.53, with interest from the date of the judgment in the Superior Court, and costs.

***Cartwright J.* (*dissenting*):**

109 This appeal is from two judgments of the Court of Queen's Bench (Appeal Side) for the Province of Quebec [20], of which the first allowed an appeal from a judgment of MacKinnon J. and dismissed the appellant's action, and the second dismissed a cross-appeal asking that the damages awarded by the learned trial judge be increased.

110 The respondent is, and was at all relevant times, the Prime Minister and Attorney-General of the Province of Quebec.

111 The appellant on December 4, 1946, was the owner of an immovable property, known as 1429 Crescent Street in the City of Montreal, where he had for many years successfully carried on the business of a restaurant and cafe. He was the holder of liquor permit no. 68 granted to him on May 1, 1946, for the sale of alcoholic liquors in his restaurant and cafe pursuant to the provisions of the *Alcoholic Liquor Act*, R.S.Q. 1941, c. 255, hereinafter referred to as "the Act". This permit would normally have expired on April 30, 1947. The business carried on by the appellant had been founded by his father in 1912 and had been licensed uninterruptedly from that time until 1946. Prior to December 4, 1946, the appellant had complied with all the requirements of the Act and had carried on his restaurant business in conformity with the laws of the Province.

112 The appellant was at all relevant times a member of a sect known as "The Witnesses of Jehovah" and from some time in 1944 up to November 12, 1946, had on about 390 occasions, acted as bailsman for numbers of his co-religionists prosecuted under by-laws of the City of Montreal for distributing literature without a licence. None of those for whom he acted as bailsman defaulted in appearance, and all of them were ultimately discharged upon the by-laws under which they were charged being held to be invalid.

113 About the 24th or 25th of November 1946 members of the sect commenced distributing copies of a circular entitled "Quebec's burning hate for God and Christ and Freedom is the shame of all Canada". Copies of this circular are printed in the record, the English version being exhibit D7 and the French version exhibit D11. The then senior Crown Prosecutor in Montreal, Mtre Oscar Gagnon, formed the opinion that the circular was a seditious libel and that its distribution should be prevented. It results from the judgment of this Court in *Boucher v. The King* [21] that the learned Crown Prosecutor was in error in forming the opinion that the circular could be regarded as seditious. It, however, can hardly be denied that it was couched in terms which would outrage the feelings of the great majority of the inhabitants of the Province of Quebec; and the same may

be said of a number of other documents circulated by the sect, copies of which form part of the record in the case at bar.

114 The evidence does not show that the appellant took part in the distribution of any of the circulars mentioned or that he was a leader or chief of the sect. He did not act as bailsman for any member of the sect charged in connection with the distribution of the circular, "Quebec's burning hate".

115 On November 25, 1946, pamphlets, including copies of "Quebec's burning hate" were seized in a building in the City of Sherbrooke owned by the appellant and leased by him to a congregation of Witnesses of Jehovah as a "Kingdom Hall" or place of worship. The appellant was not aware that the pamphlets were in this building.

116 From his investigations and the reports which he received M. Gagnon concluded that the distribution of the pamphlets "convergeait autour de M. Roncarelli ou de personnes qui étaient près de lui" and he so informed M. Edouard Archambault, the manager of the Quebec Liquor Commission. It may well be that M. Gagnon reached the conclusion mentioned on insufficient evidence. M. Gagnon also informed M. Archambault that the appellant had acted as bailsman for a great number of Witnesses of Jehovah.

117 On receiving this information from M. Gagnon, M. Archambault read the circular, "Quebec's burning hate" and had a conversation with M. Paquette, the Recorder-in-Chief at Montreal, who confirmed the statements as to the appellant furnishing bail.

118 At this point M. Archambault formed the opinion that he should cancel the permit held by the appellant, but before taking any action he telephoned the respondent at Quebec, told him what information he had received and that he proposed cancelling the permit. The respondent told him to be careful to make sure that the Roncarelli who had furnished bail was in fact the appellant. M. Archambault satisfied himself as to this through the report of an agent "Y3", in whom he had confidence, and thereupon, according to his uncontradicted evidence, decided to cancel the permit. The reasons which brought him to this decision were stated by him as follows:

> D. Alors, à ce moment-là, vous aviez déjà décidé d'enlever cette licence?
>
> R. Oui.
>
> D. Vous basant, je suppose, sur les rapports que vous aviez déjà reçus de monsieur Oscar Gagnon et du recorder-en-chef Paquette que monsieur Roncarelli avait fourni des cautionnements?
>
> R. Oui; et, à part de cela, de la littérature que j'avais lue.
>
> D. Et le pamphlet auquel vous avez référé: "Quebec's Burning Hate"?

R. Oui, monsieur.

M. Archambault then telephoned the respondent. The substance of the two telephone conversations between M. Archambault and the respondent is summarized by the former as follows:

> D. Maintenant, ce jour-là où vous avez reçu une lettre, le 30 novembre 1946, avez-vous décidé, ce jour-là, d'enlever la licence?
>
> R. Certainement, ce jour-là, j'avais appelé le Premier Ministre, en l'occurrence le procureur général, lui faisant part des constatations, c'est-à-dire des renseignements que je possédais, et de mon intention d'annuler le privilège, et le Premier Ministre m'a répondu de prendre mes précautions, de bien vérifier s'il s'agissait bien de la même personne, qu'il pouvait y avoir plusieurs Roncarelli, et coetera. Alors, quand j'ai eu la confirmation de Y3 à l'effet que c'était la même personne, j'ai rappelé le Premier Ministre pour l'assurer qu'il s'agissait bien de Frank Roncarelli, détenteur d'un permis de la Commission des Liqueurs; et, là le Premier Ministre m'a autorisé, il m'a donné son consentement, son approbation, sa permission, et son ordre de procéder.

119 The evidence of the respondent is also that the suggestion of cancelling the permit was made by M. Archambault, and there is no evidence to the contrary.

120 There has been a difference of opinion in the Courts below as to whether what was said by the respondent to M. Archambault amounted to an order to cancel or merely to an "approbation énergique" of a decision already made. I do not find it necessary to choose between these conflicting views as I propose to assume for the purposes of this appeal that what was said by the respondent was so far a determining factor in the cancellation of the permit as to render him liable for the damages caused thereby to the appellant if the cancellation was an actionable wrong giving rise to a right of action for damages.

121 All of the Judges in the Courts below who have dealt with that aspect of the matter have concluded that the respondent acted throughout in the honest belief that he was fulfilling his duty to the Province, and this conclusion is supported by the evidence.

122 The opinion of M. Archambault and of the respondent appears to have been that a permit to sell liquor under the Act is a privilege in the gift of the Province which ought not to be given to, or allowed to continue to be enjoyed by, one who was actively supporting members of a group of persons who were engaged in a concerted campaign to vilify the Province and were persistently acting in contravention of existing by-laws. Once it is found, as I think it must be on the evidence, that this opinion was honestly entertained, I have reached the conclusion, for reasons that will appear, that the Court cannot inquire as to whether there was sufficient evidence to warrant its formation or as to whether it constituted a reasonable ground for cancellation of the permit.

123 The permit was cancelled on December 4, 1946, without any prior notice to the appellant and without his being given any opportunity to show cause why it ought not to be cancelled. It is clear that the appellant suffered substantial financial loss as a result of the cancellation.

124 In determining whether the cancellation of the permit in these circumstances was an actionable wrong on the part of the commission or of M. Archambault, its manager, it is necessary to consider the relevant provisions of the Act. These appear to me to be as follows:

> S.5 A Commission is by this act created under the name of "The Quebec Liquor Commission", or "Commission des liqueurs de Québec", and shall constitute a corporation, vested with all the rights and powers belonging generally to corporations.
>
> The exercise of the functions, duties and powers of the Quebec Liquor Commission shall be vested in one person alone, named by the Lieutenant-Governor in Council, with the title of manager. The remuneration of such person shall be determined by the Lieutenant-Governor in Council and be paid out of the revenues of the Liquor Commission.
>
> . . . . .
>
> S.9 The function, duties and powers of the Commission shall be the following:
>
> . . . . .
>
> d. To control the possession, sale and delivery of alcoholic liquor in accordance with the provisions of this act;
>
> e. To grant, refuse, or cancel permits for the sale of alcoholic liquor or other permits in regard thereto, and to transfer the permit of any person deceased;
>
> . . . . .
>
> S.32 No permit shall be granted other than to an individual, and in his personal name.
>
> The application for a permit may be made only by a British subject, must be signed by the applicant before witnesses, and must give his surname, Christian names, age, occupation, nationality and domicile, the kind of permit required and the place where it will be used, and must be accompanied by the amount of the duties payable upon the application for the permit. The applicant must furnish all additional information which the Commission may deem expedient to ask for.
>
> If the permit is to be used for the benefit of a partnership or corporation, the application therefore must likewise be accompanied by a declaration to that effect, and duly signed by such partnership or corporation. In such case, the partnership or corporation shall be responsible for any fine and costs, to which the holder of the permit may be condemned; and the amount thereof may be recovered before any court having jurisdiction, without prejudice to imprisonment, if any.

All applications for permits must be addressed to the Commission before the 10th of January in each year, to take effect on the 1st of May in the same year.

. . . . .

S.34 1. The Commission may refuse to grant any permit.

2. The Commission must refuse to grant any permit for the sale of alcoholic liquor in any municipality where a prohibition by-law is in force.

Subsections 2 to 6 of s. 34 enumerate special cases in which the Commission must refuse a permit.

S.35 1. Whatever be the date of issue of any permit granted by the Commission, such permit shall expire on the 30th day of April following, unless it be cancelled by the Commission before such date, or unless the date at which it must expire be prior to the 30th of April following.

The Commission may cancel any permit at its discretion.

2. Saving the provisions of subsection 4 of this section, the cancellation of a permit shall entail the loss of the privilege conferred by such permit, and of the duties paid to obtain it, and the seizure and confiscation by the Commission of the alcoholic liquor found in the possession of the holder thereof, and the receptacles containing it, without any judicial proceedings being required for such confiscation.

The cancellation of a permit shall be served by a bailiff leaving a duplicate of such order of cancellation, signed by three members of the Commission, with the holder of such permit or with any other reasonable person at his domicile or place of business.

The cancellation shall take effect as soon as the order is served.

. . . . .

S.35 4. If the cancellation of the permit be not preceded or followed by a conviction for any offence under this act committed by the holder of such permit while it was in force, the Commission shall remit to such holder.

a. Such part of the duties which such person has paid upon the granting of such permit, proportionate to the number of full calendar months still to run up to the 1st of May following;

b. The proceeds of every sale by the Commission, after the seizure and confiscation thereof, of beer having an alcoholic content of not more than four per cent, in weight, less ten per cent of such proceeds;

c. The value, as determined by the Commission, of the other alcoholic liquor seized and confiscated, less ten per cent of such value.

5. Save in the case where a permit is granted to an individual on behalf of a partnership or corporation, in accordance with section 32, the Commission must cancel every permit made use of on behalf of any person other than the holder.

S.36 The Commission must cancel a permit:

1. Upon the production of a final condemnation, rendered against the permit-holder, his agent or employee, for selling, in the establishment, alcoholic liquor manufactured illegally or purchased in violation of this act;

2. Upon the production of three final condemnations rendered against the permit-holder for violation of this act;

3. If it appears that the permit-holder has, without the Commission's authorization, transferred, sold, pledged, or otherwise alienated the rights conferred by the permit.

125 On a consideration of these sections and of the remainder of the Act I am unable to find that the Legislature has, either expressly or by necessary implication, laid down any rules to guide the commission as to the circumstances under which it may refuse to grant a permit or may cancel a permit already granted. In my opinion the intention of the legislature, to be gathered from the whole Act, was to enumerate (i) certain cases in which the granting of a permit is forbidden, and (ii) certain cases in which the cancellation of a permit is mandatory, and, in all other cases to commit the decision as to whether a permit should be granted, refused or cancelled to the unfettered discretion of the commission. I conclude that the function of the commission in making that decision is administrative and not judicial or quasi-judicial. The submission of counsel for the respondent, made in the following words, appears to me to be well founded:

Under the Statute, no one has a pre-existing right to obtain a permit, and the permit being granted under the condition that it may be cancelled at any time, and no cause of cancellation being mentioned and no form of procedure being indicated, the cancellation is a discretionary decision of a purely administrative character.

126 I accept as an accurate statement of the distinction between a judicial and an administrative tribunal that adopted by Masten J.A. in giving the judgment of the Court of Appeal for Ontario in *re Ashby et al*[22]:

The distinction between a judicial tribunal and an administrative tribunal has been well pointed out by a learned writer in 49 Law Quarterly Review at pp. 106, 107 and 108:

A tribunal that dispenses justice, i.e. every judicial tribunal, is concerned with legal rights and liabilities, which means rights and liabilities conferred or imposed by 'law'; and 'law' means statute or long-settled principles. These legal rights and liabilities are

> treated by a judicial tribunal as pre-existing; such a tribunal professes merely to ascertain and give effect to them; it investigates the facts by hearing 'evidence' (as tested by long-settled rules), and it investigates the law by consulting precedents. Rights or liabilities so ascertained cannot, in theory, be refused recognition and enforcement, and no judicial tribunal claims the power of refusal.
>
> In contrast, non-judicial tribunals of the type called 'administrative' have invariably based their decisions and orders, not on legal rights and liabilities, but on policy and expediency.
>
> *Leeds* (*Corp.*) *v. Ryder* (1907) A.C. 420, at 423, 424, per Lord Loreburn L.C.; *Shell Co. of Australia v. Federal Commissioner of Taxation* (1931) A.C. 275, at 295; *Boulter v. Kent* JJ., (1897) A.C. 556, at 564.
>
> A judicial tribunal looks for some law to guide it; an 'administrative' tribunal, within its province, is a law unto itself.

127 In *re Ashby* the Court found that the statute there under consideration set up certain fixed standards and prescribed conditions on which persons might have their certificates revoked by the board, and accordingly held its function to be quasi-judicial; in the case at bar, on the contrary, no standards or conditions are indicated and I am forced to conclude that the Legislature intended the commission "to be a law unto itself".

128 If I am right in the view that in cancelling the permit M. Archambault was performing an administrative act in the exercise of an unfettered discretion given to him by the statute it would seem to follow that he was not bound to give the appellant an opportunity to be heard before deciding to cancel and that the Court cannot be called upon to determine whether there existed sufficient grounds for his decision. If authority is needed for this conclusion it may be found in the judgment of the Judicial Committee, delivered by Lord Radcliffe, in *Nakkuda Ali v. M.F. De S. Jayaratne* [23] and in the reasons of my brother Martland in *Calgary Power Limited et al v. Copithorne* [24] . The wisdom and desirability of conferring such a power upon an official without specifying the grounds upon which it is to be exercised are matters for the consideration of the Legislature not of the Court.

129 If, contrary to my conclusion, the function of the commission was quasi-judicial, it may well be that its decision to cancel the permit would be set aside by the Court for failure to observe the rules as to how such tribunals must proceed which are laid down in many authorities and are compendiously stated in the following passage in the judgment of the Earl of Selborne in *Spackman v. Plumstead Board of Works* [25] :

> No doubt, in the absence of special provisions as to how the person who is to decide is to proceed, the law will imply no more than that the substantial requirements of justice shall not

> be violated. He is not a judge in the proper sense of the word; but he must give the parties an opportunity of being heard before him and stating their case and their view. He must give notice when he will proceed with the matter, and he must act honestly and impartially and not under the dictation of some other person or persons to whom the authority is not given by law. There must be no malversation of any kind. There would be no decision within the meaning of the statute if there were anything of that sort done contrary to the essence of justice.

But even if it were assumed that the function of the commission was quasi-judicial and that its order cancelling the permit should be set aside for failure to observe the rules summarized in the passage quoted, I would be far from satisfied that any action for damages would lie.

130 If that question arose for decision it would be necessary to consider the judgments delivered in this Court in *McGillivray v. Kimber*[26], the cases cited in Halsbury, 2nd ed., vol. 26, pp. 284 and 285, in support of the following statement:

> Persons exercising such quasi-judicial powers ... in the absence of fraud, collusion, or malice, are not liable to any civil action at the suit of any person aggrieved by their decisions...

and the judgment of Wilmot C.J., concurred in by Gould J. and Blackstone J., in *Bassett v. Godschall*[27]:

> The legislature hath intrusted the justices of peace with a discretionary power to grant or refuse licences for keeping inns and alehouses; if they abuse that power, or misbehave themselves in the execution of their office or authority, they are answerable criminally, by way of information, in B.R. I cannot think a justice of peace is answerable in an action to every individual who asks him for a licence to keep an inn or an alehouse, and he refuses to grant one; if he were so, there would be an end of the commission of the peace, for no man would act therein. Indeed he is answerable to the public if he misbehaves himself, and wilfully, knowingly and maliciously injures or oppresses the King's subjects, under colour of his office, and contrary to law: but he cannot be answerable to every individual, touching the matter in question, in an action. Every plaintiff in an action must have an antecedent right to bring it; the plaintiff here has no right to have a licence, unless the justices think proper to grant it, therefore he can have no right of action against the justices for refusing it.

131 For the above reasons I have reached the conclusion that the heavy financial loss undoubtedly suffered by the appellant was *damnum sine injuria*. The whole loss flowed directly from the cancellation of the permit which was an act of the commission authorized by law. I have formed this opinion entirely apart from any special statutory protection afforded to the commission or to its manager, M. Archambault, as, for example, by s. 12 of the Act.

132 The case of *James v. Cowan* [28] relied upon by counsel for the appellant as supporting the existence of a right of action for damages seems to me to be clearly distinguishable. In that case the right of action asserted was for damages for the wrongful taking of the plaintiff's goods. The only justification put forward was an order held to be *ultra vires* and therefore void. It may be mentioned in passing that if, contrary to my view, the decision of the commission in the case at bar was made in the exercise of a judicial function, its failure to follow a rule of natural justice would appear to render the order voidable but not void; *Dimes v. Grand Junction Canal Proprietors* [29] .

133 Having concluded that the act of the commission in cancelling the permit was not an actionable wrong, it appears to me to follow that the respondent cannot be answerable in damages for directing or approving, as the case may be, the doing of that act.

134 As it was put by Bissonnette J. [30] :

> D'où il découle, en saine logique, que si dans l'exercice de son pouvoir discrétionnaire, il (M. Archambault) ne commettait ni faute, ni illégalité, personne n'est justifié à chercher à atteindre, au delà de sa personne, un conseiller, voire un chef ou supérieur politique, pour le motif que sans la faute du premier, celle qu'on veut imputer au second ne peut exister.

135 On this branch of the matter, I should perhaps mention that there is, in the record, no room for any suggestion that the respondent coerced an unwilling Commission into making a decision contrary to the view of the latter as to what that decision should be.

136 For the above reasons it is my opinion that the appeal fails and it becomes unnecessary for me to consider the alternative defence as to lack of notice of action, based upon art. 88 of the *Code of Civil Procedure* or the question of the quantum of damages.

137 The appeal, as to both of the judgments of the Court of Queen's Bench, should be dismissed with costs.

***Fauteux J.* (*dissenting*):**

138 L'appelant se pourvoit à l'encontre de deux décisions majoritaires de la Cour du banc de la reine [31] , dont la première infirme un jugement de la Cour supérieure condamnant l'intimé à lui payer une somme de $8,123.53 à titre de dommages-intérêts, et dont la seconde rejette l'appel logé par lui-même pour faire augmenter le quantum des dommages ainsi accordés.

139 Les faits donnant lieu à ce litige se situent dans le cadre des activités poursuivies dans la province de Québec, au cours particulièrement des années 1944, 1945 et 1946, par la secte des Témoins de Jéhovah. Ces activités prenaient forme d'assemblées, de distribution de circulaires, de pamphlets et de livres, et de sollicitation, dans les rues et à domicile. Dirigée ouvertement contre

les pratiques des religions professées dans la province et, plus particulièrement, de la religion catholique, les enseignements de cette secte étaient diffusés dans un langage manifestement, sinon délibérément, insultant et, par suite, provoquèrent dans les cités et les villages où ils étaient propagés, des troubles à la paix publique. Il y eut bris d'assemblées, assauts de personnes et dommages à la propriété. De plus, et partageant l'opinion généralement acceptée que cette campagne provocatrice était l'oeuvre de la licence et non de la liberté sous la loi, plusieurs autorités civiles refusaient d'accorder la protection recherchée par les membres de la secte ou adoptaient des moyens pour paralyser ces activités considérées comme une menace à la paix publique. L'intimé, comme Procureur Général, eut en son ministère, où des plaintes nombreuses affluèrent, tous les échos de cette situation. Devant les tribunaux, actions ou poursuites se multiplièrent. A Montréal, les arrestations pour distribution de littérature, sans permis, atteignirent et dépassèrent plusieurs centaines. Devant la Cour du Recorder, où furent traduits ceux qu'on accusait de violer le règlement municipal, on plaidait l'invalidité ou l'inapplication du règlement et attendant le prononcé d'un tribunal supérieur sur le bien-fondé de ces prétentions, on ajournait les causes. C'était l'appelant, l'un des membres de la secte, qui, dans la plupart de ces arrestations, à Montréal, fournissait le cautionnement garantissant la comparution des accusés. Une entente était même intervenue entre lui et les avocats chargés des poursuites, suivant laquelle on le considérait en quelque sorte comme la caution officielle des membres de la secte. L'appelant continua d'agir comme caution jusqu'au 12 novembre 1946 alors que les autorités de la Cour du Recorder, s'inquiétant de la congestion du rôle des causes résultant de la progressive multiplication des arrestations, aussi bien que du fait que le temps de nombre de constables était absorbé par ces enquêtes et ces poursuites, au préjudice de leurs autres devoirs, tentèrent de décourager les activités de la secte en exigeant des cautionnements en argent et plus substantiels, soit de $100 à $300.

140 Deux semaines après cette décision, apparut dans la province une nouvelle publication de la secte, intitulée: "La haine ardente du Québec pour Dieu, le Christ et la liberté." Ce livre, publié en français, en anglais et en ukrainien, étant, dans les termes les plus provocateurs, une attaque dirigée particulièrement contre les pratiques religieuses de la majorité de la population et contre l'administration de la justice dans la province, fut soumis par la police à la considération de l'avocat en chef de la Couronne, à Montréal, Me Gagnon, c.r., lequel émit l'opinion que cette publication constituait, au sens de la loi criminelle, un libelle séditieux.

141 Ajoutons immédiatement que le mérite de cette opinion fut par la suite judiciairement considéré avec le résultat qui suit. Un certain Aimé Boucher, distributeur de ce livre dans le district judiciaire de St-Joseph de Beauce, fut accusé sous les articles 133, 134 et 318 du *Code Criminel* et fut trouvé coupable par un jury dont le verdict fut confirmé par une décision majoritaire de la Cour du banc du roi en appel [32]. Sur un pourvoi subséquent devant cinq des membres de cette Cour, une majorité, trouvant justifiés les griefs fondés sur l'adresse du juge au procès, mais étant d'opinion qu'il était loisible à un jury légalement dirigé de juger cette publication séditieuse, ordonna un nouveau procès. Sur une seconde audition du même appel, — cette fois devant les neuf Juges de

cette Cour[33] — ces vues furent partagées par quatre des membres de cette Cour. Les cinq autres, d'autre part, acquittèrent l'accusé, en déclarant en substance, suivant le sommaire fidèle du jugé, qu'en droit:

> Neither language calculated to promote feelings of ill-will and hostility between different classes of His Majesty's subjects nor criticizing the courts is seditious unless there is the intention to incite to violence or resistance to or defiance of constituted authority.

En somme, la majorité écarta, comme étant la loi en la matière, la définition de l'intention séditieuse, donnée à la page 94 de la 8[e] édition de Stephen's Digest of Criminal Law, dans la mesure où cette définition différait de la loi telle que précisée au sommaire ci-dessus. *Boucher v. His Majesty the King*[34]. Ainsi appert-il que l'opinion émise par le représentant du Procureur Général à Montréal lors de l'apparition de ce livre en fin de 1946, fut par la suite partagée par une majorité de tous les juges qui eurent à considérer la question mais rejetée par ce qui constitute, depuis 1951, le jugement de cette Cour sur la question.

142 Ayant donc formé l'opinion que cette publication constituait un libelle séditieux, M[e] Gagnon participa à l'enquête faite pour en rechercher les distributeurs et les traduire en justice. Vers le même temps, la police saisissait en la cité de Sherbrooke, un nombre considérable de pamphlets, livres, y compris le livre en question, dans un établissement appartenant à l'appelant et par lui loué aux membres de la secte. Un examen de la situation et du rôle joué par l'appelant dans les procédures mues devant la Cour du Recorder à Montréal, amena M[e] Gagnon à conclure à sa participation dans la distribution. Apprenant, en la même occasion, que ce dernier était propriétaire d'un restaurant et détenteur de permis de la Commission des Liqueurs pour y vendre des spiritueux, il communiqua les faits ci-dessus à M. Archambault, alors gérant général de la Commission des Liqueurs. Après avoir conféré avec le recorder en chef de la cité de Montréal et M[e] Gagnon, M. Archambault téléphona au Procureur Général pour lui faire part de ces agissements des membres de la secte, et de l'appelant en particulier, et de son intention d'annuler le permis en faveur de l'appelant. L'intimé demanda à M. Archambault de bien s'assurer que le détenteur du permis était bien la même personne qui, au dire de M. Archambault, "multipliait les cautionnements à la Cour du Recorder de façon désordonnée, contribuait à désorganiser les activités de la police et à congestionner les tribunaux". Et l'intimé ajouta: — "Dans l'intervalle, je vais examiner les questions avec des officiers légaux, je vais y penser, je vais réfléchir et je vais voir à ce que je devrai faire." M. Archambault vérifia l'identité de l'appelant et, de son côté, le Procureur Général étudia le problème, la *Loi de la Commission des Liqueurs* et ses amendements, discuta de la question au Conseil des Ministres et avec des officiers en loi de son ministère. Quelques jours plus tard, M. Archambault téléphona au Procureur Général confirmant l'identité du détenteur de permis et, témoigne M. Archambault, "là, le Premier Ministre m'a autorisé, il m'a donné son consentement, son approbation, sa permission et son ordre de procéder".

143 A la suite de cette conversation téléphonique, le permis fut annulé et tous les spiritueux du restaurant furent confisqués. En raison de la perte d'opérations résultant de l'absence de permis, l'appelant, quelques mois plus tard, vendait ce restaurant, licencié pour vente de spiritueux depuis nombre d'années et exploité par son père, d'abord, et lui, par la suite. C'est alors que l'appelant institua la présente action en dommages contre l'intimé personnellement, invoquant en substance que, dans les circonstances, le fait de cette annulation constituait, suivant les dispositions de l'art. 1053 du *Code Civil*, un fait dommageable, illicite et imputable à l'intimé et, dès lors, donnant droit à réparation.

144 En défense, et en outre des moyens plaidés sur le mérite de l'action, l'intimé invoqua spécifiquement le défaut de l'appelant de s'être conformé aux prescriptions de l'art. 88 du *Code de procédure civile*, lequel conditionne impérativement l'exercice du droit d'action contre un officier public à la signification d'un avis d'au moins un mois avant l'émission de l'assignation.

145 Après considération attentive de la question et pour les motifs donnés ci-après, je suis arrivé à la conclusion que ce moyen est bien fondé. Il convient de dire, cependant, que n'eûe été ce défaut de l'appelant, j'aurais, au mérite, conclu au bien-fondé de son action et ce, pour des raisons qu'il suffit, dans les circonstances, de résumer comme suit. Personne ne met en doute que le fait invoqué au soutien de l'action en dommages, c'est-à-dire l'annulation du permis, ait constitué un fait dommageable pour l'appelant. De plus, et suivant la preuve au dossier, il est manifeste que ce fait est imputable, et exclusivement imputable, à l'intimé. Sans doute, lorsque le gérant général de la Commission des Liqueurs téléphona au Procureur Général pour le mettre au courant des faits ci-dessus, il lui indiqua au même temps son intention d'annuler le permis. Il y a loin, cependant, de l'indication d'une intention à la réalisation de cette intention; et à la vérité, dès cette première conversation téléphonique, c'est le Procureur Général qui prit l'entière responsabilité. Tel que déjà indiqué, il demanda à M. Archambault de vérifier l'identité de personne, l'avisant que, pendant ce temps-là, il étudierait le problème et verrait ce que lui devait faire. C'est d'ailleurs précisément pour décider de l'action à prendre qu'il examina la loi et discuta de l'affaire au Conseil des Ministres et avec ses officiers en loi. Lorsque, subséquemment, M. Archambault le rappela pour lui affirmer qu'il s'agissait de la même personne, "c'est là", dit le gérant général, que le Procureur Général "m'a autorisé, il m'a donné son consentement, son approbation, sa permission et son ordre de procéder". Le Juge de la Cour supérieure et tous les Juges de la Cour d'Appel n'ont jeté, et je crois avec raison, aucun doute sur la bonne foi du Procureur Général, pas plus qu'on n'en saurait avoir sur celle du gérant général de la Commission des Liqueurs. Ni l'un ni l'autre n'ont agi malicieusement. Mais, en témoignant que l'intimé l'avait autorisé, lui avait donné son consentement, son approbation, sa permission et son ordre de procéder, le gérant général de la Commission a bien indiqué, à mon avis, que, dans un esprit de subordination, il avait, dès la première conversation téléphonique, abdiqué, en faveur du Procureur Général s'en chargeant, le droit d'exercer la discrétion, qu'à l'exclusion de tous autres, il avait suivant l'esprit de la *Loi des Liqueurs Alcooliques*. Il a exécuté, mais non rendu, une décision arrêtée par le Procureur Général. D'ailleurs, ce dernier ne s'en est pas caché; il s'en

est ouvert au public par la voix des journaux. En prenant lui-même cette décision, comme Premier Ministre et Procureur Général, il s'est arrogé un droit que lui nie virtuellement la *Loi des Liqueurs Alcooliques*; il a commis une illégalité. Dans l'espèce, l'annulation du permis est exclusivement imputable à l'intimé et précisément pour cette raison, constitute, dans les circonstances, un acte illicite donnant droit à l'appelant d'obtenir réparation pour les dommages lui en résultant.

146 L'article 88 du *Code de procédure civile*. — Cet article se lit comme suit:

> Nul officier public ou personne remplissant des fonctions ou devoirs publics ne peut être poursuivi pour dommages à raison d'un acte par lui fait dans l'exercice de ses fonctions, et nul verdict ou jugement ne peut être rendu contre lui, à moins qu'avis de cette poursuite ne lui ait été donné au moins un mois avant l'émission de l'assignation.
>
> Cet avis doit être par écrit; il doit exposer les causes de l'action, contenir l'indication des noms et de l'étude du procureur du demandeur ou de son agent et être signifié au défendeur personnellement ou à son domicile.

Vu la forme prohibitive de la disposition et la règle de droit édictée en l'art. 14 du *Code Civil*, le défaut de donner cet avis, lorsqu'il y a lieu de ce faire, emporte nullité. Cette règle de droit est ainsi exprimée:

> 14. Les lois prohibitives emportent nullité, quoiqu'elle n'y soit pas prononcée.

De plus, et en raison de la prescription que "...nul verdict ou jugement ne peut être rendu...", ce défaut limite la juridiction même du tribunal. Aussi bien, non seulement, comme il a été reconnu au jugement de première instance, ce défaut peut-il être soulevé dans les plaidoiries, mais la Cour elle-même doit agir *proprio motu* et se conformer à la prescription.

147 En l'espèce, il est admis qu'aucun avis ne fut donné au Procureur Général. L'intimé a plaidé spécifiquement ce moyen dans sa défense et il l'a invoqué tant en Cour supérieure et en Cour d'Appel que devant cette Cour. Le juge au procès en disposa dans les termes suivants, dont les soulignés sont siens:

> Defendant is not entitled to avail himself of this exceptional provision as the acts complained of were not "done by him in the exercise of his functions", but they were acts performed by him when he had gone outside his functions to perform them. They were not acts "in the exercise of" but "on the occasion of public duties". Defendant was outside his functions in the acts complained of.

En Cour d'Appel[35], seul le Juge dissident, M. le Juge Rinfret, se prononce sur la question. S'inspirant, je crois, de l'interprétation donnée par la jurisprudence à l'expression "dans l'exécution

de ses fonctions", apparaissant à l'art. 1054 C.C. et plus particulièrement du critère indiqué dans *Plumb v. Cobden Flour Mills* [36], il prononce d'abord comme suit, sur le mérite même de l'action:

> L'action du défendeur, on l'a vu, ne peut pas être classifiée parmi les actes permis, par les statuts, au procureur général, ni au premier ministre; elle ne peut pas être considérée comme ayant été faite dans l'exercice ou dans l'exécution de ses fonctions comme telles; elle entre dans la catégorie des actes prohibés, des actes commis hors les limites des fonctions, et comme telle, elle engendre la responsabilité personnelle.

puis, précisant que l'art. 88 C.P.C. pose comme condition que le défendeur soit poursuivi "à raison d'un acte par lui fait dans l'exercice de ses fonctions", déclare que l'art. 88 n'a pas d'application en l'espèce.

148 Les juges de la majorité ont référé à ce moyen sans cependant s'y arrêter vu que dans leur opinion l'action, de toutes façons, était mal fondée.

149 D'où l'on voit que le droit de l'intimé à l'avis dépend uniquement, dans la présente cause, de la question de savoir si l'acte reproché a été fait par lui "dans l'exercice de ses fonctions" au sens qu'il faut donner à ces expressions dans le contexte de l'art. 88 C.P.C., et suivant l'esprit et la fin véritables de cet article.

150 L'article 1054 C.C. prescrit que les maîtres et les commettants sont responsables du dommage causé par leurs domestiques ou ouvriers *dans l'exécution des fonctions auxquelles ces derniers sont employés*. On est dès lors porté à donner aux expressions, plus ou moins identiques, apparaissant à l'art. 88 C.P.C., le même sens que donne la jurisprudence sur l'art. 1054 C.C. La règle d'interprétation visant la similarité des expressions n'établit qu'une présomption; cette présomption étant que les expressions similaires ont le même sens lorsqu'elles se trouvent, — ce qui n'est pas le cas en l'espèce, — dans une même loi. On accorde, d'ailleurs, peu de poids à cette présomption. Maxwell, On Interpretation of Statutes, 9[e] ed., p. 322 *et seq*. Les considérations présidant à l'établissement, la fin et la portée de l'art. 88 C.P.C., d'une part, et de l'art. 1054 C.C., d'autre part, sont totalement différentes. Sanctionnant la doctrine *Respondent superior*, l'art. 1054 C.C. établit la responsabilité du commettant pour l'acte de son préposé, ce dernier étant considéré le continuateur de la personne juridique du premier. L'intimé, agissant en sa qualité de Procureur Général, n'est le préposé de personne. Il n'a pas de commettant. La fonction qu'il exerce, il la tient de la loi. L'article 88 C.P.C. n'affecte en rien la question de responsabilité. Il accorde, en ce qui concerne la procédure seulement, un traitement spécial au bénéfice des officiers publics en raison de la nature même de la fonction. Les motifs apportés par la jurisprudence pour limiter le champ de l'exercice des fonctions, quant à la responsabilité édictée en l'art. 1054 C.C., sont étrangers à ceux conduisant la Législature à donner, quant à la procédure seulement, une protection aux officiers publics. Aussi bien, et en toute déférence, je ne crois pas que la portée de cette protection soit assujettie aux limitations de la responsabilité frappant les dispositions de l'art. 1054 C.C. L'article 8 du c. 101

des Statuts Refondus du Bas Canada, loi-source de l'art. 88 C.P.C., établit péremptoirement à mon avis que, *in pari materia*, un officier public n'est pas tenu comme ayant cessé d'agir dans l'exercice de ses fonctions du seul fait que l'acte reproché constitue un excès de pouvoir, ou de juridiction, ou une violation à la loi. La version française de cette loi n'étant pas en disponibilité, je cite de la version anglaise qu'on trouve dans *Consolidated Statutes, Lower Canada*, 1860, l'art. 8:

> Protection to extend to the magistrate only etc., and in what cases to him.
>
> 8. The privileges and protection given by this Act, shall be given to such justice, officer or other person acting as aforesaid, only, and to no other person or persons whatever, and any such justice, officer and other person shall be entitled to such protection and privileges in all cases where he has acted *bona fide* in the execution of his duty, although in such act done, he has exceeded his powers or jurisdiction, and has acted clearly contrary to law.

151 L'article 88 C.P.C. assume que ceux au bénéfice desquels il est établi se sont rendus coupables d'une illégalité pour laquelle ils doivent répondre. Tout doute qu'on pourrait avoir sur le point est dissipé par le texte même de l'art. 429 C.P.C. lequel, pourvoyant à un changement de venue dans le cas du procès d'un officier public, édicte:

> 429. Dans toute poursuite en dommages contre un officier public, *à raison de quelque illégalité dans l'exécution de ses fonctions*, le juge peut ordonner que le procès ait lieu dans un autre district, s'il est démontré que la cause ne peut être instruite avec impartialité dans le district où l'action a été portée.

On doit donc se garder d'associer au droit à l'avis toute idée de justification pour l'acte reproché ou de déduire du seul fait que l'officier public doive au mérite d'être tenu personnellement responsable, qu'il ait perdu tout droit à l'avis. Dans *Beattey v. Kozak*[37], ou la nécessité d'éviter cette confusion se présentait, une semblable observation est faite par notre collègue M. le Juge Rand. Il faut ajouter, cependant, que cette décision n'est d'aucune autre assistance sur la question qui nous intéresse; le litige portait, en droit, sur l'interprétation d'une loi différente et fut décidé en donnant effet à la jurisprudence d'un droit également différent sur l'incidence, en la matière, du rôle de la bonne foi.

152 L'incidence du rôle de la bonne foi de l'officier public dans la commission d'un acte reproché, en ce qui concerne la portée de l'art. 88 C.P.C., et non en ce qui a trait au mérite de l'action, a fait, dans la province de Québec, depuis le jour où la disposition fut établie par l'art. 22 du *Code de procédure civile* de 1867, dont les termes sont reproduits à l'art. 88 du Code de 1897, l'objet d'un conflit dans la jurisprudence. Suivant certains jugements, la bonne foi conditionnait le droit à l'avis et dès que la déclaration contenait une allégation de mauvaise foi, le défendeur se voyait privé du droit d'invoquer le défaut de l'avis, même si, au mérite, la preuve, révélant que cette allégation était mal fondée, on devait alors rejeter l'action parce que l'avis n'avait pas été donné. Suivant d'autres jugements, on tenait le droit à l'avis absolu dans tous les cas. La bonne foi, disait-on, en s'appuyant sur le principe sanctionné par l'art. 2202 C.C., est toujours présumée et cette

présomption ne peut être écartée par une simple allégation mais par une preuve de mauvaise foi. On jugeait qu'une simple allégation aux plaidoiries ne pouvait virtuellement abroger le droit au bénéfice de l'art. 88. Considérant que cet article conditionnait l'exercice même du droit d'action, on décidait que ce droit d'action devait être nié *ab initio* et non à la fin du procès. Ce conflit n'existe plus. Depuis plus de vingtcinq ans, la Cour d'Appel y a mis fin en décidant que l'incidence de la bonne ou de la mauvaise foi n'a aucune portée sur le droit à l'avis et que, dans tous les cas, il doit être donné. Acceptant les arguments déjà exprimés en ce sens, la Cour d'Appel s'est particulièrement basée sur la source historique de cette disposition et sur la modification qui y fut apportée lors et par suite de son insertion au *Code de procédure civile*. Les sources de l'article sont indiquées dans *Dame Chaput v. Crépeau* [38] par M. le Juge Bruneau et les modifications faites à la situation antérieure par l'insertion de l'article dans le Code, afin d'en généraliser l'application à tous les officiers publics, sont indiquées dans cette jurisprudence définitivement arrêtée par la Cour d'Appel dans *Charland v. Kay* [39] ; *Corporation de la Paroisse de St-David-de-l'Auberivière v. Paquette et autres* [40] et *Houde v. Benoît* [41] .

153 En somme, et comme le note M. le Juge Hall dans *Corporation de la Paroisse de St-David-de-l'Auberivière v. Paquette et autres, supra*, l'art. 22 du *Code de procédure* de 1867, prédécesseur de l'art. 88 du Code de 1897, a sa source dans la *Loi pour la protection de juges de paix*, c.101 des Status Refondus du Bas Canada. Le premier article de cette loi prescrivait l'avis d'action, alors que dans les autres dispositions, d'autres privilèges étaient établis, y compris celui fixant la prescription à six mois. L'article 8 conditionnait le droit aux privilèges y accordés, à la bonne foi. Lors de la confection du *Code de procédure*, la disposition ayant trait à l'avis fut extraite de la loi pour devenir l'art. 22 du *Code de procédure* et être déclarée applicable à tous les officiers publics. Dans le procédé, cependant, on laissa la disposition touchant la bonne foi dans la *Loi pour la protection des juges de paix* et on évita de l'inclure dans l'art. 22 C.P.C. comme condition de l'opération de cet article. D'autres considérations, tel, par exemple, le changement apporté par la Législature, le 4 août 1929, à l'art. 195 C.P.C. par la Loi 19 George V, c. 81, ayant pour effet de prohiber toute ordonnance de preuve avant faire droit qui jusqu'alors réservait au mérite les questions soulevées par l'inscription en droit, militent en faveur de ces vues. C'est ce changement, je crois, qui a provoqué l'occasion amenant la Cour d'Appel à fixer définitivement la jurisprudence. Les motifs déjà mentionnés suffisent pour partager les vues exprimées par la Cour d'Appel dans les causes précitées et pour conclure, comme M. le Juge Dorion dans *Charland v. Kay, supra*, qu'il faut s'en tenir au texte de la loi et lui donner son effet.

154 En assumant l'exercice d'un pouvoir discrétionnaire conféré au gérant général par la loi, l'intimé a commis une illégalité mais aucune offense connue de la loi pénale et aucun délit au sens de l'art. 1053 C.C. Il a fait ce qu'il n'avait pas le droit de faire, fermement et sincèrement convaincu, a-t-il affirmé sous serment, que non seulement il en avait le droit, mais qu'il y était tenu pour s'acquitter de ses responsabilités comme Procureur Général chargé de l'administration de la justice, du maintien de l'ordre et de la paix dans la province et de ses devoirs comme conseiller

juridique du gouvernement de la province. Il n'a pas pris occasion de sa fonction pour commettre cette illégalit. Il ne l'a pas commise à l'occasion de l'exercice de ses fonctions. Il l'a commise à cause de ses fonctions. Sa bonne foi n'a pas été mise en doute, et sur ce fait, les Juges de la Cour d'Appel, qui ont considéré la question, sont d'acord avec le Juge de première instance. Suivant les décisions considérées par cette Cour dans *Beatty v. Kozak, supra*, on retient, sous un droit différent de celui de la province de Québec, l'incidence de la bonne foi lorsque celle-ci se fonde sur l'erreur de fait, ou sur l'erreur de fait et de droit à la fois, sinon uniquement sur l'erreur de droit, pour décider du caractère exculpatoire de l'illégalité commise, voire même du droit à l'avis. Exclusivement compétente à légiférer sur la procédure civile, la Législature de Québec, par l'art. 88 C.P.C., n'a pas voulu assujettir le droit à l'avis d'action à l'incidence de la bonne ou de la mauvaise foi. Dans les circonstances de cette cause, je suis d'opinion que l'illégalité commise par l'intimé l'a été dans l'exercice de ses fonctions et que, de plus, ce serait faire indirectement ce que l'art. 88 C.P.C. ne permet pas, suivant l'interprétation de la Cour d'Appel, que de s'appuyer sur la bonne ou la mauvaise foi, que ce soit au sens vulgaire ou technique du mot, pour conclure que l'intimé est sorti de l'exercice de ses fonctions, au sens qu'ont ces expressions dans l'art. 88 C.P.C., et qu'il ait perdu le droit à l'avis d'action.

155 Pour ces raisons, l'appelant aurait dû être débouté de son action. Je renverrais les appels avec dépens.

***Abbott J.*:**

156 In his action appelant claimed from respondent the sum of $118,741 as damages alleged to have been sustained as a result of the cancellation of a licence or permit for the sale of alcoholic liquors held by appellant. The action was maintained by the learned trial judge to the extent of $8,123.53. From that judgment two appeals were taken, one by respondent asking that the action be dismissed in its entirety, the other by appellant asking that the amount allowed as damages be increased by an amount of $90,000. The Court of Queen's Bench [42] allowed the respondent's appeal, Rinfret J. dissenting, and dismissed the action. The appeal taken by appellant to increase the amount of the trial judgment was dismissed unanimously. The present appeals are from those two judgments.

157 The facts are these. On December 4, 1946, appellant was conducting a restaurant business in the City of Montreal, a business which he and his father and mother before him had been carrying on continuously for some thirty-four years prior to that date. The restaurant had been licensed for the sale of alcoholic beverages throughout the entire period.

158 In 1946 and for many years prior thereto, persons operating establishments of this kind and selling alcoholic beverages had been required to obtain a licence or permit under the *Alcoholic Liquor Act*, R.S.Q. 1941, c. 255. Unless granted for a shorter period, these were annual licences and expired on April 30 in each year. Moreover, s. 35, subs. 1., of the Act provides as follows:

The Commission may cancel any permit at its discretion.

The Commission referred to is the "Quebec Liquor Commission" established as a corporation under the Act in question and, generally speaking, it has been entrusted by the Legislature with the responsibility of directing and administering the provincial monopoly of the sale and distribution of alcoholic beverages.

159 On December 4, 1946, without previous notice to the appellant, his licence to sell alcoholic beverages was cancelled by the Quebec Liquor Commission, and at about 2 p.m. on that date the stock of liquor on his premises was seized and removed. The licence was not restored and after operating for some months without such a licence, in 1947 appellant sold the restaurant and the building in which it was located.

160 Appellant learned from press reports either in the afternoon of December 4 or early the following day, that his licence had been cancelled and the stock of liquor seized because he was an adherent of a religious sect or group known as the Witnesses of Jehovah. It soon became clear from statements made by the respondent to the press and confirmed by him at the trial as having been made by him, that the cancellation of the licence had been made because of the appellant's association with the sect in question and in order to prevent him from continuing to furnish bail for members of that sect summoned before the Recorder's Court on charges of contravening certain city by-laws respecting the distribution of printed material.

161 It might be added here that in December 1946 and for some time prior thereto the Witnesses of Jehovah appear to have been carrying on in the Montreal district and elsewhere in the Province of Quebec, an active campaign of meetings and the distribution of printed pamphlets and other like material of an offensive character to a great many people of most religious beliefs, and I have no doubt that at that time many people believed this material to be seditious.

162 The evidence is referred to in detail in the Courts below and I do not propose to do so here. I am satisfied from a consideration of this evidence: First: that the cancellation of the appellant's licence was made for the sole reason which I have mentioned and with the object and purpose to which I have referred; Second: that such cancellation was made with the express authorization and upon the order of the respondent; Third: that the determining cause of the cancellation was that order, and that the manager of the Quebec Liquor Commission would not have cancelled the licence without the order and authorization given by the respondent.

163 There can be no question as to the first point. It was conceded by respondent in his evidence at the trial and by his counsel at the hearing before us. As to the second and third points, I share the view of the learned trial judge and of Rinfret J. that both were clearly established.

164 The religious beliefs of the appellant and the fact that he acted as bondsman for members of the sect in question had no connection whatever with his obligations as the holder of a licence to sell alcoholic liquors. The cancellation of his licence upon this ground alone therefore was without any legal justification. Moreover, the religious beliefs of the appellant and his perfectly legal activities as a bondsman had nothing to do with the object and purposes of the *Alcoholic Liquor Act*, and the powers and responsibilities of the manager of the Quebec Liquor Commission are confined to the administration and enforcement of the provisions of the said Act. This may be one explanation of the latter's decision to consult the respondent before taking the action which he did to cancel appellant's licence.

165 At all events a careful reading of the evidence and a consideration of the surrounding circumstances has convinced me that without having received the authorization, direction, order, or "approbation énergique" of the respondent — however one chooses to describe it — the manager of the Quebec Liquor Commission would not have cancelled the licence.

166 The proposition that in Canada a member of the executive branch of government does not make the law but merely carries it out or administers it requires no citation of authority to support it. Similarly, I do not find it necessary to cite from the wealth of authority supporting the principle that a public officer is responsible for acts done by him without legal justification. I content myself with quoting the well known passage from Dicey's "Law of the Constitution", 9th ed., p. 193, where he says

> ...every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen. The Reports abound with cases in which officials have been brought before the courts, and made, in their personal capacity, liable to punishment, or to the payment of damages, for acts done in their official character but in excess of their lawful authority. A colonial governor, a secretary of state, a military officer, and all subordinates, though carrying out the commands of their official superiors, are as responsible for any act which the law does not authorize as is any private and unofficial person.

167 In the instant case, the respondent was given no statutory power to interfere in the administration or direction of the Quebec Liquor Commission although as Attorney-General of the Province the Commission and its officers could of course consult him for legal opinions and legal advice. The Commission is not a department of government in the accepted sense of that term. Under the *Alcoholic Liquor Act* the Commission is an independent body with corporate status and with the powers and responsibilities conferred upon it by the Legislature. The Attorney-General is given no power under the said Act to intervene in the administration of the affairs of the Commission nor does the *Attorney-General's Department Act*, R.S.Q. 1941, c. 46, confer any such authority upon him.

168 I have no doubt that in taking the action which he did, the respondent was convinced that he was acting in what he conceived to be the best interests of the people of his province but this, of course, has no relevance to the issue of his responsibility in damages for any acts done in excess of his legal authority. I have no doubt also that respondent knew and was bound to know as Attorney-General that neither as Premier of the province nor as Attorney-General was he authorized in law to interfere with the administration of the Quebec Liquor Commission or to give an order or an authorization to any officer of that body to exercise a discretionary authority entrusted to such officer by the statute.

169 It follows, therefore, that in purporting to authorize and instruct the manager of the Quebec Liquor Commission to cancel appellant's licence, the respondent was acting without any legal authority whatsoever. Moreover, as I have said, I think respondent was bound to know that he was acting without such authority.

170 The respondent is therefore liable under art. 1053 of the *Civil Code* for the damages sustained by the appellant, by reason of the acts done by respondent in excess of his legal authority.

171 Respondent also contended that appellant's action must fail because no notice of such action was given under art. 88 of the *Code of Civil Procedure*, which reads as follows:

> 88. No public officer or other person fulfilling any public function or duty can be sued for damages by reason of any act done by him in the exercise of his functions, nor can any verdict or judgment be rendered against him, unless notice of such action had been given him at least one month before the issue of the writ of summons.
>
> Such notice must be in writing; it must state the grounds of the action, and name of the plaintiff's attorney or agent, and indicate his office; and must be served upon him personally or at his domicile.

172 None of the learned judges constituting the majority in the Court of Queen's Bench has given as a reason for dismissing appellant's action, the failure to give such notice. The learned trial judge and Rinfret J. held that respondent is not entitled to avail himself of this exceptional provision since the act complained of was not "done by him in the exercise of his functions" but was an act done by him when he had gone outside his functions to perform it. I am in agreement with their views and there is little I need add to what they have said on this point. In this connection, however, reference may usefully be made to the decision of the Court of Appeal in *Lachance v. Casault*[43]. In that case a bailiff had attempted to take possession of books and papers in the hands of a judicial guardian without preparing a procès-verbal of the articles seized, as called for by the order of the Court requiring the guardian to give up possession to the seizing creditor. When the bailiff's action was resisted by the guardian as being unauthorized, the bailiff caused the guardian to be arrested. The charge having been subsequently dismissed, the bailiff was sued in damages for false arrest

and malicious prosecution. It was held that, even assuming such bailiff was a public officer within the meaning of art. 88 C.C.P., he was not entitled to notice under the said article since at the time the act complained of was committed, he was not "dans l'exercice légal de ses fonctions".

173 In my opinion before a public officer can be held to be acting "in the exercise of his functions", within the meaning of art. 88 C.C.P., it must be established that at the time he performed the act complained of such public officer had reasonable ground for believing that such act was within his legal authority to perform; *Asselin v. Davidson*[44]. In the instant case, as I have said, in my view the respondent was bound to know that the act complained of was beyond his legal authority.

174 I now deal with the second appeal asking that the amount awarded to appellant by the trial judge be increased by an amount of $90,000. This amount is claimed under three heads, namely:

```
Damages to goodwill and reputation of business ....
Loss of property rights in liquor permit ..........................
Loss of profits for a period of one year, May 1st, 1947
    to May 1st, 1948 ..........................................
                                                        _________
                                                        $90,000
```

175 The licence to sell alcoholic beverages was, of course, only an annual licence subject to revocation at any time and the renewal of which might have been properly refused for a variety of reasons. Nevertheless, in my view, appellant could reasonably expect that so long as he continued to observe the provisions of the *Alcoholic Liquor Act* his licence would be renewed from year to year, as in fact it had been for many years past.

176 There can be no doubt that cancellation of appellant's licence without legal justification resulted in a substantial reduction in the value of the goodwill and profit making possibilities of the restaurant business carried on by him at 1429 Crescent St., Montreal, and in a pecuniary loss to him for which in my opinion he is entitled to recover damages from respondent.

177 The restaurant business is probably no less hazardous than most other businesses, and damages of this sort are obviously difficult to assess, the amount being of necessity a more or less arbitrary one. The learned trial judge awarded appellant the sum of $6,000 as loss of profits for the period from December 4, 1946, to May 1, 1947, the date on which the licence would have expired, and this would appear to be supported by the evidence. I have reached the conclusion that the amount awarded to the appellant by the learned trial judge should be increased by an amount of $25,000, as damages for diminution in the value of the goodwill of the business and for loss of future profits.

178 In the result, therefore, I would allow both appeals with costs here and below, and modify the judgment at the trial by increasing the amount of the damages to $33,123.53 with interest from the date of the judgment in the Superior Court.

Appeals allowed with costs, Taschereau, Cartwright and Fauteux J.J. dissenting.

Solicitors of record:

Attorneys for the plaintiff, appellant: *A.L. Stein* and *F.R. Scott*, Montreal.

Attorneys for the defendant, respondent: *L.E. Beaulieu* and *Edouard Asselin*, Montreal.

Footnotes

1 [1956] Que. Q.B. 447.

2 [1956] Que. Q.B. 447.

3 (1933), 54 Que. K.B. 377.

4 (1937), 62 Que. K.B. 140.

5 [1943] Que. K.B. 713.

6 [1951] S.C.R. 265, 2 D.L.R. 369, 11 C.R. 85, 99 C.C.C. 1.

7 [1949] Que. K.B. 238.

8 (1915), 52 S.C.R. 146, 26 D.L.R. 164.

9 98 E.R. 1021.

10 [1898] A.C. 1.

11 [1956] Que. Q.B. 447.

12 [1956] Que. Q.B. 447.

13 [1891] A.C. 173 at 179.

14 [1947] A.C. 109 at 122.

15 [1951] A.C. 66.

16 (1885), 10 App. Cas. 229 at 240.

17 (1934), 72 Que. S.C. 112.

18 (1877), 47 L.J.M.C. 67, 13 Cox C.C. 625.

19 (1915), 52 S.C.R. 146, 26 D.L.R. 164.

20 [1956] Que. Q.B. 447.

21 [1951] S.C.R. 265, 2 D.L.R. 369, 11 C.R. 85, 99 C.C.C. 1.

22 [1934] O.R. 421 at 428, 3 D.L.R. 565, 62 C.C.C. 132.

23 [1951] A.C. 66.

24 [1959] S.C.R. 24, 16 D.L.R. (2d) 241.

25 (1885), 10 App. Cas. 229 at 240.

26 (1915), 52 S.C.R. 146, 26 D.L.R. 164.

27 (1770), 3 Wils. 121 at 123, 95 E.R. 967.

28 [1932] A.C. 542 (Australia P.C.).

29 (1852), 3 H.L. Cas. 759, 10 E.R. 301.

30 [1956] Que. Q.B. 447 at 457.

31 [1956] Que. Q.B. 447.

32 [1949] Que. K.B. 238.

33 [1951] S.C.R. 265, 2 D.L.R. 369, 11 C.R. 85, 99 C.C.C. 1.

34 [1951] S.C.R. 265, 2 D.L.R. 369, 11 C.R. 85, 99 C.C.C. 1.

35 [1956] Que. Q.B. 447.

36 [1914] A.C. 62.

37 [1958] S.C.R. 177 at 188, 13 D.L.R. (2d) 1, 120 C.C.C. 1.

38 (1917), 57 Que. S.C. 443.

39 (1933), 50 Que. K.B. 377.

40 (1937), 62 Que. K.B. 143.

41 [1943] Que. K.B. 713.

42 [1956] Que. Q.B. 447.

43 (1902), 12 Que. K.B. 179 at 202.

44 (1914), 23 Que. K.B. 274 at 280.

2005 CAF 9, 2005 FCA 9
Federal Court of Appeal

Sander Holdings Ltd. v. Canada (Attorney General)

2005 CarswellNat 118, 2005 CarswellNat 4525, 2005 CAF 9, 2005 FCA 9, [2005] F.C.J. No. 31, 136 A.C.W.S. (3d) 787, 329 N.R. 214

Sander Holdings Ltd., Donald Patenaude and Mathew Nagyl on their own behalf and on behalf of all persons who have been Producers, shipping grain through Canadian Wheat Board, as defined under The Canadian Wheat Board Act and who reside or have resided in Canada between 1994 and the date of the decision, Appellants and The Attorney General of Canada representing The Minister of Agriculture of Canada, Respondent

Desjardins J.A., Evans J.A., Pelletier J.A.

Heard: November 8, 2004
Judgment: January 14, 2005
Docket: A-120-04

Proceedings: reversing in part *Sander Holdings Ltd. v. Canada (Attorney General)* (2004), 2004 FC 188, 247 F.T.R. 123, 2004 CF 188, 2004 CarswellNat 1702, 2004 CarswellNat 321 (F.C.)

Counsel: Mr. Terry Zakreski, Ms Cathleen Edwards, for Appellants
Mr. Brian Hay, for Respondent

Subject: Civil Practice and Procedure; Corporate and Commercial; Public

APPEAL by farmer of judgment reported at *Sander Holdings Ltd. v. Canada (Attorney General)* (2004), 2004 FC 188, 247 F.T.R. 123, 2004 CF 188, 2004 CarswellNat 1702, 2004 CarswellNat 321 (F.C.) dismissing action for declaration of invalidity of income stabilization policies.

***Desjardins J.A.*:**

1 The appellants appeal a decision of a motions judge (von Finckenstein J.) who granted the respondent's motion for summary judgment on the ground that the appellants' statement of claim failed to disclose a reasonable cause of action, or a genuine issue for trial or judicial review. The motions judge's reasons for judgment are reported at (2004), 247 F.T.R. 123 (F.C.) .

2 The appellants are agricultural producers. They brought an action on their own behalf and on behalf of all other producers who have shipped grain through the Canadian Wheat Board. They are proceeding by way of a class action under rules 299.1 *et seq*. of the *Federal Court Rules*, 1998, SOR/98-106. Certification has been sought, but has not been obtained yet.

3 Each appellant is a participant in an agricultural income stabilization program entitled "the Federal/Provincial Agreement Establishing the Net Income Stabilization Account Program" (the "Agreement", the "NISA Program", or the "Program"), established under the authority of the *Farm Income Protection Act*, S.C. 1991, c. 22 (the "Act"). The NISA Program has now been replaced by the "Canadian Agriculture Income Stabilization Program" ("CAIS"), effective April 1, 2003. The appellants' claim relates to contributions made prior to the coming into existence of CAIS.

4 The objective of the Program is to stabilize the incomes of primary agricultural producers by establishing individual accounts for each participant which are meant to be used as a saving vehicle in good years so that funds are available to producers in lean years.

5 The Program operates by allowing a producer to make both matchable and non-matchable deposits to the Program. A producer can deposit up to three percent (3%) of his or her eligible net sales and receive matching contributions cost-shared between the federal and participating provincial governments. A producer can also make additional deposits of up to twenty percent (20%) of his or her eligible net sales, although these deposits are not matched by the governments. All deposits earn a three percent (3%) interest bonus.

6 While participation in the Program is voluntary, enrollment is high. In 2002, approximately 157,000 farmers were participating in the NISA Program.

I. Introduction

7 According to the appellants, in 1995, after the repeal of the *Western Grain Transportation Act*, R.S.C. 1985, c. W-8, which had for a number of years subsidized the transportation costs from elevator to port through the "CROW" rate, the value of grain at the elevators decreased as the transportation costs of the elevator to get the grain to port increased. The repeal of that statute, they say, had important repercussions on the grain trade.

8 The appellants complain that following what they allege were changes to the Point of Sales Guidelines in 1994, they are now forced by the NISA Administration to deduct transportation and elevation costs from their gross sales when calculating their eligible commodity sales.

9 Each year, participants in the NISA Program are asked to complete a form which details income and expenses in various categories. The forms must be completed in accordance with a handbook entitled "Individual Instrument Guide". These instructions include guidelines, referred

to as Point of Sales Guidelines (the "Guidelines"), designed to assist participants in determining their net sales for the purpose of the NISA Program.

10 Until 1994, the Point of Sales Guidelines read as follows:

> The point of sale occurs when one of the following point is met:
>
> • you no longer have full ownership of the commodity; or
>
> • you no longer have full managerial control of the commodity to make decisions on transportation, cleaning, packaging, marking etc.; or
>
> • you are no longer fully responsible for the loss of the commodity; or
>
> • your sales invoice does not clearly show the actual sale value of the commodity.

11 In October 1994, the NISA Committee recommended that the Point of Sales Guidelines be changed to read as follows:

> Participants may report for NISA the gross revenues of qualifying commodities and the applicable expenses recognized in the calculation of farming income for income tax purposes providing:
>
> • The commodities were produced on their farm;
>
> • They can demonstrate ownership of the product through identity preservation and bear full direct ownership of the commodity; and
>
> • They have separate billing or accounting transactions clearly showing the commodity sales value and any deductions from the commodity sales value.

12 The effect of the change in the Guidelines appears to be in the treatment of the figures which, in the form, come under the heading "Miscellaneous Deductions". These deductions may include expenses such as freight and elevation costs, terminal cleaning and administration fees (see exhibit A of the affidavit of Mr. Barry Jolly, income tax consultant and the NISA preparer for the appellants, A.B. p. 100 at 107). Prior to the change in the Guidelines those deductions were not applied to eligible net sales. The alleged change has the effect of reducing eligible net sales by the amount of the miscellaneous deductions. This reduction, in turn, affects the contributions the agricultural producers are entitled to receive.

13 This result, the appellants say, creates an inequity because identical farming operations will attract varying government NISA contributions depending upon proximity to port. The Guidelines are therefore a hardship to producers, such as those located in Saskatchewan, Alberta and Manitoba, who are located at great distances from port.

14 In an earlier case which reached the Court, *Boyko v. Canada (Attorney General)* (2000), 191 F.T.R. 6 (Fed. T.D.) ("*Boyko v. Canada (Attorney General)*"), a number of producers completed their 1996 annual application package for the NISA Program but did not include the cost of grain transportation to port as part of their revenue. They, however, included that amount in their 1997 application. As a result of an audit conducted by the NISA Administration, their accounts were reassessed and their eligible net sales for the year 1997 were reduced.

15 The producers asked the Appeals Sub-Committee to reverse the decision of the NISA Administration, which had reduced their eligible net sales. The Appeals Sub-Committee found that the Guidelines had been correctly applied by the NISA Administration. It recommended that the producers' appeals be rejected.

16 The producers sought review of that decision before Rouleau J. of the Federal Court, Trial Division (as it then was), on the ground that the Appeals Sub-Committee erred in fact and in law in its interpretation of the Agreement as it related to deducting freight and elevator expenses in determining eligible net sales.

17 Rouleau J. held, at para. 13 of his reasons, that administrative bodies frequently develop a coherent set of guidelines to assist in the exercise of their discretionary statutory powers. He stated that policies allowed a public body to develop guidelines which bridged the gap between a general discretionary statutory power and its specific application to a particular case. The content of the policy had, however, to be within the scope of the power bestowed by the enabling legislation. Moreover, it could not be formulated or applied in bad faith or with regard to irrelevant considerations or purposes extraneous to the intent of the legislation.

18 He was satisfied that the 1994 Guidelines met the above tests. There was, in his view (see para. 15 of his reasons), no evidence of bad faith or reliance upon irrelevant or extraneous considerations in the development of the Guidelines. He stated that, although the application before him was couched in terms of a direct attack on the recommendations of the Appeal Sub-Committee, the real essence of the applicants' complaint was with the policy itself. The applicants, he wrote, were taking exception to the fact that the phrase "eligible net sales" did not include grain transportation costs to port and were arguing that the Guidelines in some way constituted an unlawful amendment to the Agreement. He noted that all the evidence before him clearly established that "eligible net sales" had never, since the inception of the Program, included grain transportation cost to port nor had the Agreement ever been formally amended to reflect any change of that nature.

19 The producers appealed to this Court, which took the view that the producers were, for all practical purposes, seeking a declaration that the Point of Sales Guidelines adopted in 1994 by NISA were *ultra vires* the Act. Décary J.A., for the Court, held that the matter was not raised at trial, *Boyko v. Canada (Attorney General)*, 2001 FCA 22 (Fed. C.A.). He said, starting at para. 2:

> This was not the issue raised in the Trial Division. The issue, there, which was raised through a judicial review proceeding, was whether the Appeals Sub-Committee of the NISA Committee had erred in finding that the Point of Sale Guidelines had been properly applied by the NISA Administration.
>
> Assuming, for the sake of discussion, that the Appeals Sub-Committee has jurisdiction to decide whether guidelines are ultra vires, the issue was not put to it and we are in no position to rule on it.
>
> While there may be some merit in the views expressed by counsel, the proper avenue, it seems to us, -- apart, of course, from attempting to reach a consensus through the administrative process already in place -- would be to start afresh with a new proceeding seeking the proper remedy from the proper authority (my emphasis)

20 Hence the present class action.

21 The respondent moved for summary judgment.

II. The Decision Below

22 Von Finckenstein J. granted the Motion for summary judgment. He stated that the facts regarding the change were not in dispute (para. 20 and 22 of his reasons). He agreed with Rouleau J. in *Boyko* , that the process by which the change was made to the Guidelines was unexceptionable and that the 1994 Guidelines' treatment of freight and storage costs did not amount to an amendment of the Agreement (para. 25 of his reasons). He treated Rouleau J's decision as a final determination. He never addressed his mind to Décary J.A.'s reasons for judgment, where, at the end, the Court invited the parties to "start afresh with a new proceeding seeking the proper remedy from the proper authority". Von Finckenstein J. mentioned the citation to the decision of the Federal Court of Appeal, but no more.

23 Von Finckenstein J. further held that the Guidelines were not legal norms within the meaning of *Pereira v. Canada (Minister of Citizenship & Immigration)* (1994), 86 F.T.R. 43 (Fed. T.D.) ("*Pereira* ") and, for that reason, they could not be *ultra vires* the Act or its Regulations, neither could they be contrary to the Agreement (para. 26 of his reasons). He concluded that there was no genuine issue for trial or judicial review and that the appellants' further contentions that a cause of action existed based on negligence or on a breach of fiduciary duty were unfounded.

III. Relevant Statutory Provisions

24 The *Farm Income Protection Act* defines the words "agricultural product" thus:

2. In this Act,	2. Les définitions qui suivent s'appliquent à la présente loi.

...	...
"agricultural product" means	« produit agricole » Tout produit végétal ou animal -- ou d'origine végétale ou animale --, y compris les aliments et boissons qui en proviennent en tout ou en partie.
(a) an animal, a plant or an animal or plant product, or (b) a product, including any food or drink, that is wholly or partly derived from an animal or a plant;	
...	...

It provides, in section 4, that the Governor in Council may authorize the Minister of Agriculture and Agri-Food to enter into an agreement with one or more provinces to provide for the establishment of, *inter alia*, a net income stabilization account program.

25 Paragraph 5(1)(*c*) of the Act stipulates that an agreement shall provide:

(*c*) The manner of determining the income of producers and the manner of determining the value of the eligible agricultural products produced by them.	*c*) le mode de détermination du revenu des producteurs et de la valeur de leurs produits agricoles admissibles.

26 Paragraph 5(3)(*a*) of the Act provides for the establishment of one or more national committees representing the parties to the Agreement and the producers, and such technical experts as may be considered appropriate. Paragraph 8(1)(*a*) declares that an agreement that provides for the establishment of a net income stabilization account program shall, in addition, provide for:

(*a*) the eligible net sales, eligible production costs, gross margin and maximum eligible net sales, or the method of determining the sales, costs and margin that enable a producer to participate in the program.	*a*) le mode de détermination et le niveau des coûts de production et des marges brutes à partir duquel un producteur est admissible, ainsi que, dans le cas des ventes nettes, le seuil et le plafond;

27 The Act also provides, in section 15, for the establishment of a net income stabilization account.

IV. The Agreement

28 Under the Agreement which came into force in 1991, Canada is responsible for the administration of the NISA Program. The Agreement contemplates the establishment of the National NISA Committee (the "Committee") as advisory to Canada. The Committee is composed

of representatives from the federal and provincial governments and producers. Article 6.8 of the Agreement provides that:

> This agreement between Canada and any one Province shall take effect on the date that the signatories for that Province add their signatures to that of the Minister ...

29 Under Article 2 of Schedule C to the Agreement, the Committee is to have a minimum of six and a maximum of ten producers appointed by the Minister to represent commodity groups and regions of Canada. Each participating province is entitled to name one member to the Committee, while Canada is entitled to name four members to the Committee. Canada names the chairperson of the Committee who is responsible for referring matters of significant financial impact to the parties to the Agreement for approval. Article 2.5 of Schedule C to the Agreement stipulates the following:

> Canada shall name the chairperson of the Committee from those individuals appointed above. The chairperson shall be responsible to refer matters of significant financial impact to the parties to this Agreement for approval. (my emphasis)

30 The Agreement contains a special amendment clause. Article 6.9 provides that an amendment must be approved by Canada and at least two-thirds of the participating provinces, where these provinces represent at least 50% of the eligible net sales reported to the Program in the previous year. The wording of the amendment clause is the following:

> Except as provided in Section 5 of Schedule B, this Agreement may be amended from time to time by the agreement of Canada and at least two-thirds of the participating Provinces where these Provinces represent at least fifty (50) percent of the eligible net sales reported to the Program in the previous year. A Province which does not wish to comply with an amendment respecting significant financial implications, may elect, by written notice to Canada, to withdraw from the Agreement as of the end of the next calendar year and the amendments will not apply to that Province for this period.

31 Schedule B of the Agreement contains the following provisions:

> 1. All agricultural products are eligible for Program purposes.
>
> 2. Initially, only the revenue derived from the sale of the following commodities or classes of commodities produced in Canada is eligible for contribution to the Program:
>
> 2.1 All cereal grains.
>
> 2.2 All oilseed grains.
>
> . . . . .

V. The Contention of the Parties

32 The appellants claim that they are concerned, not with the policy behind the 1994 Guidelines, as held by Rouleau J., but with the fact that changes were made to the Guidelines in 1994. They contend that these changes constitute an amendment to the Agreement and the Act, and were made without regard to the amending formula provided in the Agreement.

33 Contrary to von Finckenstein J.'s statement that the facts regarding the change made to the Guidelines in 1994 were not in dispute, the appellants claim that there is conflicting evidence concerning the changes and the circumstances surrounding the adoption of the 1994 Guidelines.

34 They further explain that, according to a letter written by Mr. Nawolsky of the NISA administration, dated December 23, 1998, the Guidelines were adopted following a vote by Program signatories and that the chairperson of the Committee, in accordance with section 2.5 of Schedule C of the NISA Federal/Provincial Agreement, properly recognized that the Guidelines were a matter of significant financial impact.

35 They add that, once a matter of significant financial impact has been identified, the amendment procedure of article 6.9 of the Agreement is engaged since the requisite majority is necessary to adopt a change that would impact upon the funding requirements of the participatory authorities to the Program.

36 They further add that, in the case at bar, the proper procedure was not followed. They say that when a vote was taken (which body took the vote remains unclear), Canada, Manitoba, Ontario, Quebec, Nova Scotia and Newfoundland supported the motion to amend. British Columbia, Alberta, Saskatchewan, Prince Edward Island and New Brunswick did not support the motion. A majority of two-thirds of the participating provinces, they say, is therefore lacking. They add that Quebec participated in the vote but was not entitled to, because article 6.8 of the Agreement states that the agreement takes effect between Canada and any province that adds its signature to that of the Minister. Quebec, they say, did not add its signature.

37 The respondent, on the other hand, submits that the elimination of the "CROW" rate did not alter or directly affect the NISA Program, which is an income stabilization program and not a grain transportation program. He says that, from the inception of the Program to the time that this case was filed, the meaning of "eligible net sales" has never included grain transportation costs to port, nor has the Agreement ever been formally amended to reflect any change of that nature.

38 The respondent further submits that the appellants have no legal cause of action considering that guidelines or policy directives, "whether made pursuant to regulatory authority or general administrative capacity, are no more than directions and are unenforceable by members of the public" (*Mohammad v. Canada (Minister of Employment & Immigration)*), (1988), [1989] 2 F.C.

363 (Fed. C.A.) at para. 14). The respondent adds that the motions judge correctly decided that the Guidelines were not part of the Agreement, but existed merely to facilitate its administration.

39 The respondent claims that the appellants are really seeking a Court order that governments ought to have changed their policy, which would have resulted in governments paying more money to farmers for income support than the governments had intended under the NISA Program.

VI. Analysis

40 There are three issues in this appeal:

(i) whether the Guidelines are *ultra vires* the Act and the Agreement;

(ii) whether there is a reasonable cause of action based on negligence; and

(iii) whether the respondents owe a fiduciary duty to the NISA participants.

(i) The validity of the Guidelines

41 On this key point, the issues are whether there was a change to the Guidelines in 1994 and whether, if a change occurred, that change amended the Agreement, in which case the proper procedure, it would appear, was not followed.

(a) Did a change to the Guidelines occur?

42 The appellants claim that, whatever their technical legal status, the Guidelines were used by the NISA Administration to determine producers' eligible net sales and, hence, their contribution base. They argue that, since the Agreement only requires producers to deduct "agricultural input" (seeds, feed, for example), from the value of the commodity (see article 2.3 of the Agreement), in order to determine their eligible net sales on which their contribution was based, it was inconsistent with the Agreement for the NISA Administration to require the producers to deduct from the value of the commodity the cost of post-sale freight and storage.

43 Whether the Guidelines were inconsistent with the Agreement is not readily apparent from the record. There appears to be a conflict in the evidence as to whether freight and elevation costs have always been deducted from the calculation of the value of net sales or whether they only occurred after the adoption of the 1994 Guidelines. It is a reasonable, but not necessarily correct, inference from the 1998 instructions addressed to the producers (see exhibit I of the affidavit of Barry Jolly, A.B. p. 100 at 103 and 128 and 129) that, whereas post-sale freight and storage charges had previously been treated as expenses for the purpose of calculating producers' income, they were not taken off net sales so as to reduce the producers' contribution base. Finally, the fact that the chairperson of the NISA Committee regarded the 1994 Guidelines as having a significant

financial impact suggests that they may well have involved more than the minor tinkering with the definition of the point of sale alleged by the respondent.

44 Considering that the respondent pleads that no change occurred, I conclude that the facts are in dispute.

(b) Whether the change constitutes an amendment to the Agreement

45 It is not correct to state, as the motions judge seems to say, that non-statutory guidelines or other policy documents, used by program administrators, are not legal norms. This is far too broad a proposition. When they determine individuals' legal rights, they can be the subject of a declaration of invalidity.

46 Von Finckenstein J. found that the Guidelines were not part of the Agreement, but rather existed to facilitate its administration, on the basis of the case of *Pereira* , where MacKay J. wrote at para. 10 and 11:

> It is urged that the tribunal erred by failing to consider not just "unusual" hardship, but also whether the applicant faced 'undeserved or disproportionate hardship'.
>
> In my view, this argument implies the guidelines have the status of legal norm, which they do not. They are not more than guidance, for officers, with the intent of seeking a reasonable measure of consistency in the exercise of discretion. That does not establish the guidelines as equivalent to law; it does not require that the officers consider particular qualities or tests or measures, for that would fetter discretion, in a manner disapproved of in *Yhap*. (my emphasis)

47 *Pereira* is a case where a refugee claimant claimed that the officers erred by not considering all of the elements of the guidelines dealing with the exercise of discretion based on humanitarian and compassionate grounds. The applicant argued that the guidelines should always be followed. The Judge disagreed with her and found that the particular guidelines in question did not have the status of law and therefore did not have to be applied in every case. It is difficult to see how this decision is on point here.

48 In deciding whether the Guidelines were invalid, the more relevant decision is *Ainsley Financial Corp. v. Ontario (Securities Commission)* (1994), 21 O.R. (3d) 104 (Ont. C.A.) ("*Ainsley*"). *Ainsley* dealt with the difference between guidelines not requiring statutory authorization and those that amount to mandatory statements of law which require statutory authorization.

49 Doherty J.A., for the Ontario Court of Appeal, recognized the authority of a regulator to use non-statutory instruments, like guidelines, to fulfil its mandate in a fairer, more open and more efficient manner. He acknowledged, however, that there were limits on the use of these instruments.

50 He identified, at p. 109, three situations where guidelines issued without statutory authorization (the status of law) are impermissible:

> Having recognized the Commission's authority to use non-statutory instruments to fulfil its mandate, the limits on the use of those instruments must also be acknowledged. A non-statutory instrument can have no effect in the face of contradictory statutory provision or regulation: Capital Cities Communications Inc., *supra*, at p. 629; H. *Janisch, Reregulating the Regulator: Administrative Structure of Securities Commissions and Ministerial Responsibility in Special Lectures of the Law Society of Upper Canada: Securities Law in the Modern Financial Marketplace* (1989), at p. 107. Nor can a non-statutory instrument pre-empt the exercise of a regulator's discretion in a particular case: *Hopedale Developments Ltd., supra*, at p. 263. Most importantly, for present purposes, a non-statutory instrument cannot impose mandatory requirements enforceable by sanction; that is, the regulator cannot issue de facto laws disguised as guidelines. Iacobucci J. put it this way in Pezim at p. 596:
>
> > However, it is important to note that the Commission's policy-making role is limited. By that I mean that their policies cannot be elevated to the status of law; they are not to be treated as legal pronouncements absent legal authority mandating such treatment. [my emphasis]

51 Doherty J.A. recognized there was no bright line which always separates a guideline from a mandatory provision having the effect of law. At p. 110 of *Ainsley* he stated:

> At the centre of the regulatory continuum one shades into the other. Nor is the language of the particular instrument determinative. There is no magic to the use of the word "guidelines", just as no definitive conclusion can be drawn from the use of the word "regulate". An examination of the language of the instrument is but a part, albeit an important part, of the characterization process. In analyzing the langauge[sic] of the instrument, the focus must be on the thrust of the language considered in its entirety and not on isolated words or passages.

52 He found two factors to be particularly significant to the case: the fact that Policy Statement 1.10, at issue, was setting a code of conduct, and that it was made mandatory through the threat of sanctions which gave them a coercive effect.

53 It has also been held that policy guidelines that are in conflict with the primary legislation are impermissible (*Independent Contractors & Business Assn. (British Columbia) v. British Columbia* (1995), 6 B.C.L.R. (3d) 177 (B.C. S.C.)).

54 It cannot be said, in the case at bar, that the validity of the Guidelines was conclusively decided in *Boyko* . Although Rouleau J. seems to have found that there was nothing legally wrong

with the Guidelines, this Court was of the view that the only issue before Rouleau J. was whether the Appeals Sub-Committee of the NISA Committee had applied them properly. Since the validity of the Guidelines was not in issue, this Court held it could not pronounce on it. The appellants were invited to "start afresh with a new proceeding seeking the proper remedy from the proper authority."

55 The Guidelines therefore must be properly characterized in order to determine whether they amount to a mandatory statement of conduct and if so, whether they were authorized in accordance with the Agreement and the Act.

(c) Conclusion

56 The two issues discussed in (a) and (b) raise questions of fact and law of sufficient complexity and uncertainty that the motions judge erred in dismissing the appellants' statement of claim on the basis of a summary motion.

57 There is a genuine issue for trial or judicial review. If the appellants' claim is well-founded, they will be entitled to a declaration, a conclusion which is already found in their prayer for relief (para. 21 of their statement of claim, A.B. p. 33).

58 In view of my conclusion, it is not necessary to comment on the other bases of the appellants' attack on the validity of the 1994 Guidelines.

(ii) The actions in negligence

59 The motions judge, at para. 36 of his reasons, stated that, while the appellants did not allege negligence, they asserted that the alleged breach of the amendment provisions of the Agreement entitled them to damages. He dismissed their contention on the authority of the *Anns/Kamloops* test (see the cases of *Anns v. Merton London Borough Council* (1977), [1978] A.C. 728 (U.K. H.L.) and *Nielsen v. Kamloops (City)*, [1984] 2 S.C.R. 2 (S.C.C.) succinctly summarized by Hugessen J. in *A.O. Farms Inc. v. Canada* (2000), 28 Admin. L.R. (3d) 315 (Fed. T.D.) at para. 10-12.

60 Since that negligence was not pleaded by the appellants, I conclude that this issue should go no further.

(iii) The breach of a fiduciary duty

61 The appellants submit that the categories of fiduciary relationships are not closed, even when dealing with public law duties. They claim that the breach of fiduciary duty is apparent if the Guidelines are *ultra vires*. They say that the farmers' NISA accounts were in the care of the Minister of Agriculture. Under the Agreement, the Minister of Agriculture was obliged to set up separate NISA accounts for each producer similar to bank accounts. He was, in effect, given the control of those bank accounts. The appellants further argue that, if the Minister, through the NISA

Administration, in effect dipped into the NISA "bank" accounts of prairie farmers by applying unlawful and regional prejudicial Guidelines, a clear breach of trust arose.

62 In doing so, they rely on a line of cases, which they characterize as the "pension commission cases", namely *Collins v. Ontario (Pension Commission)* (1986), 56 O.R. (2d) 274 (Ont. Div. Ct.) and *Retirement Income Plan for Salaried Employees of Weavexx Corp. v. Ontario (Superintendent of Pensions)* (2002), 58 O.R. (3d) 380 (Ont. C.A.) .

63 Theses cases are not determinative of the law and are not binding on me.

64 Historically, fiduciary relationships were identified by whether or not they fit within specific "categories". For example, fiduciary relationships were found to arise between doctors and their patients, directors and a corporation, and solicitors and their clients. More recently, the law of fiduciary relationships has moved away from the notion of "categories" to an approach which requires the analysis of the particular characteristics of the relationship in question (*Guerin v. R.*, [1984] 2 S.C.R. 335 (S.C.C.)).

65 The relationship between the appellants and the respondent in this case must therefore be considered, in all of its context, in order to determine whether it can properly be characterized as fiduciary. While the analysis must be contextual and situation-specific, relationships that have been held to be fiduciary in nature have usually had the following three characteristics:

> (1) the fiduciary has scope for the exercise of some discretion or power;
>
> (2) the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests;
>
> (3) the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

66 These characteristics were first enunciated by Wilson J. in dissent in *Frame v. Smith*, [1987] 2 S.C.R. 99 (S.C.C.). La Forest J. noted in *International Corona Resources Ltd. v. Lac Minerals Ltd.*, [1989] 2 S.C.R. 574 (S.C.C.) at para. 145, that, while the majority in Frame disagreed with the result, they had not disapproved of the statement listing the three characteristics.

67 It follows that the presence of vulnerability is an essential element to a finding of fiduciary obligations. In *Lac Minerals Ltd.v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574 (S.C.C.), Sopinka J. quoted with approval, at para. 34 of his reasons, the following paragraph from *Hospital Products Ltd. v. United States Surgical Corp.* (1984), 55 A.L.R. 417 (Australia H.C.) :

> There is, however, the notion underlying all the cases of fiduciary obligation that inherent in the nature of the relationship itself is a position of disadvantage or vulnerability on the

> part of one of the parties which causes him to place reliance upon the other and requires the protection of equity acting upon the conscience of that other $^{1}/_{4}$"

68 Von Finckenstein J. found that the relationship between the appellants and the respondent could not be considered a fiduciary one. Specifically, he found that the appellants were not at the mercy of the Minister's discretion, given that the Program was voluntary, and hence were not vulnerable to the Minister.

69 I agree. The relationship between the Minister and the appellants in the context of the NISA Program is not fiduciary in nature. The appellants are clearly not at the mercy of the Minister. The Program is a voluntary one.

VII. Conclusion

70 For these reasons, I would allow this appeal, I would set aside the decision of the motions judge and I would grant the respondent Minister's motion except insofar as the appellants claim a declaration that the Guidelines are invalid.

71 Finally, I wish to emphasise the limited nature of the issue that I have decided in concluding that the motions judge erred in granting the respondent Minister's motion for summary judgment and in dismissing the appellants' claim for a declaration that the Guidelines are invalid. In particular, I should not be taken as deciding whether an action, rather than an application for judicial review, is the appropriate procedural form in which the issue should be brought before the Court; whether there are any discretionary bars to the grant of declaratory relief; or whether, if awarded a declaration of invalidity, the appellants are entitled to any consequential relief. These are all issues to be decided when and if the matter comes before the Federal Court for determination.

72 Since success is divided, no costs should be awarded.

***Evans J.A.*:**

I agree.

***Pelletier J.A.*:**

I agree.

Appeal allowed in part.

2019 FC 817, 2019 CF 817
Federal Court

Toutsaint v. Canada (Attorney General)

2019 CarswellNat 3606, 2019 CarswellNat 5097,
2019 FC 817, 2019 CF 817, 308 A.C.W.S. (3d) 844

JOEY TOUTSAINT (Applicant) and ATTORNEY GENERAL OF CANADA (Respondent)

Richard G. Mosley J.

Heard: April 10, 2019
Judgment: June 14, 2019
Docket: T-385-19

Counsel: Deborah Charles, for Applicant
Stephen McLachlin, Thomas Bean, for Respondent

Subject: Civil Practice and Procedure; Constitutional; Criminal; Employment; Human Rights

APPLICATION by prisoner for interlocutory injunction requiring transfer to psychiatric centre until his human rights complaint was resolved.

***Richard G. Mosley J.*:**

I. Introduction

1 This case highlights once again the challenges presented by the incarceration of mentally disordered offenders in Canada's prison system. In that context, it is not surprising that the Applicant is an Indigenous man with an appalling personal history of deprivation and abuse, as they are shockingly overrepresented in our jails and, in particular, in the type of solitary confinement institutionally known as administrative segregation.

2 Other courts have determined that the prolonged use of administrative segregation in general, and especially in the case of mentally disordered offenders, contravenes Canada's *Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

3 The question in this case is not, however, whether the Applicant's *Charter* rights have been infringed by his prolonged segregation, but whether the Court should intervene with the

management of his incarceration by ordering the Correctional Service of Canada (CSC) to transfer him to a penitentiary that also serves as an acute care psychiatric hospital pending the outcome of his discrimination complaint to the Canadian Human Rights Commission (CHRC).

4 For the reasons that follow, I decline to issue the mandatory interlocutory injunction the Applicant requests. This is because he has failed to meet the stringent requirements for the grant of an injunction requiring action by the opposing party. I am not persuaded that the Court should override the assessment of the mental health team at the institution in which the Applicant is presently held, namely that the transfer would be contrary to his best interests and disrupt his treatment plan.

5 A decision to transfer the Applicant to a hospital setting remains open to the Respondent and has been made to address his needs in the past. Nothing in my judgment and reasons should be interpreted as preventing such a decision from being made again. Indeed, I would urge the correctional officials responsible for the management of the Applicant's detention and care to consider whether, based on the evidence presented in this case, the time has come to once again consider his transfer to a more therapeutic setting. But, in my view, that is a decision to be made by the mental health professionals within CSC and not by the Court.

II. Background and Evidence

6 The Applicant, Mr. Joey Toutsaint, is a 32 year old Dene man from Black Lake Denesuline Nation in Saskatchewan with multiple mental and behavioural disorders, a history of personal trauma and a long history of self-harm. He was declared to be a dangerous offender in 2015 and sentenced to an indeterminate period of detention. He is currently serving his sentence as a federal maximum security inmate at Saskatchewan Penitentiary in Prince Albert, Saskatchewan.

7 On February 27, 2019, Mr. Toutsaint filed a Notice of Application, pursuant to section 44 of the *Federal Courts Act*, RSC 1985, c F-7, seeking the following relief:

> 1. An injunction pursuant to section 44 of the *Federal Courts Act*, requiring CSC to refrain from discriminating against the Applicant, and specifically requiring CSC to:
>
> > i. Transfer the Applicant immediately to the Regional Psychiatric Centre in Saskatoon, Saskatchewan;
> >
> > ii. Provide the Applicant with regular intensive one-on-one therapy to address his past trauma and grief counselling to address his past losses; and
> >
> > iii. Provide the Applicant with regular access to Dene cultural practices, including sweats and pipe ceremonies, and access to an Indigenous Elder.
>
> 2. Such other relief as this Honourable Court may deem just.

8 Pending the hearing of the application on an expedited basis, and in view of assertions that the Applicant was a suicide risk, an order was issued on March 14, 2019 requiring that the Applicant should remain as he was in the prison health care unit and was to be checked on an hourly basis, and more frequently as circumstances required. Officials at the Prince Albert penitentiary were to inform counsel and the Court of any material change in the Applicant's condition and circumstances. Further orders relating to the reporting requirement were issued on March 15, 2019, March 19, 2019 and March 26, 2019, and again on May 27, 2019.

9 The Applicant seeks to be transferred to the Regional Psychiatric Centre (RPC) in Saskatoon, Saskatchewan until his human rights complaint is resolved. RPC is a penitentiary administered by CSC. Part of it is also an acute care hospital registered under Saskatchewan's *Mental Health Services Act*, SS 1984-85-86, c M-13.1, as amended.

10 A December 2017 Report by Dr. John Bradford prepared for CSC describes the mental health challenges in dealing with the correctional population and makes a number of recommendations for managing those challenges. Dr. Bradford is an independent forensic psychiatrist with a distinguished professional and academic record and a long history of working with mentally disordered offenders. His Report provides a statistical overview comparing the mental health of prisoners and the non-offender population; the prevalence of major psychiatric disorders is much higher among the prisoner population. The Report describes the system of regional treatment centres administered by CSC and makes a series of recommendations for improving CSC's capacity to provide treatment for mentally disordered offenders. I found the Report to be very helpful in understanding the context in which this application arises. While I can't cover the full import of the Report in these reasons, I have drawn the information in the following paragraph from it.

11 CSC has five Regional Treatment Centres (RTC) located in British Columbia, the Prairies, Ontario, Quebec and the Maritimes. The Applicant has been placed in several of them during his adult correctional history. Of the five centres, the only custom built mental health treatment centre is RPC in Saskatoon, although there is a partially custom built facility in Abbotsford, B.C. and one at Bath, Ontario. The RPC has a total of 184 beds, including 60 psychiatric hospital beds. The Bradford Report points to a shortage of mental health personnel within the system, one of the consequences of which is the overuse of segregation and seclusion. Efforts to rely on transfers to provincial forensic psychiatric facilities have diminished when demands exceeded capacity. Dr. Bradford states that there is some evidence that the provision of residential programs and crisis centre units actually increased the demand for inpatient psychiatric care. He recommends a pilot project in which the number of beds at the RTC in Ontario be *reduced* by 30% and staffing levels increased. Among other concerns noted by Dr. Bradford is the integration of inmates with varying security levels in the treatment centres and the management of those with behavioural problems who cannot get along with the general population.

12 In this proceeding, the Applicant asks the Court to "require CSC to refrain from discriminating" against him and, specifically, to intervene in the transfer and treatment decision making processes within CSC to order his transfer to RPC, to order the type of therapy he would receive there and to order regular access to Dene cultural practices. The Court generally has no involvement in CSC's transfer process, other than in applications for judicial review of transfer decisions contrary to inmates' wishes. Every transfer between penitentiaries is a discretionary administrative decision: *McLeod v. Canada (Attorney General)*, 2018 FC 1148 (F.C.) at para 10. The Court also normally has no involvement in treatment decisions made by CSC health care professionals or spiritual advisors.

13 Mr. Toutsaint, like so many offenders, has had a tragic and troubled personal history. He lost his mother at a young age. He had little contact with his father while growing up and met him again as an adult only when they found themselves in the same penitentiary. That was not a positive experience. The loss of his grandmother was particularly traumatic as she had been a primary caregiver for him. His first language was Dene and he did not begin to learn English until he was placed in provincial youth custody at 16. He entered CSC custody at the age of 18 in 2005. At the time of his dangerous offender designation, he had amassed a record of 74 criminal convictions.

14 The Applicant's involvement with the criminal justice system was described in stark terms by the Saskatchewan Court of Appeal in *R. v. Toutsaint*, 2015 SKCA 117 (Sask. C.A.). The synopsis provided by the Court of Appeal, at paragraph 3, is instructive on the present application, as it points to some of the challenges faced by the correctional authorities in dealing with Mr. Toutsaint's disorders. Among other concerns, the Court noted that Mr. Toutsaint:

- Had nearly 30 convictions for violent, sexual, threatening or weapons-related offenses;
- Had spent most of his adult life in prison, and the majority of that time had been spent in segregation, on a voluntary or involuntary basis;
- Had never completed any programming geared toward his rehabilitation, had no interest in any programming that could reduce his risk factors and preferred segregation to any other proposal;
- Was uncooperative or threateningly disruptive with his health care providers; did not comply with treatment directions and had either sold or given away medications prescribed to him;
- Had denounced aboriginal elders and refused to avail himself of their assistance or advice;
- Had little or no family support and had never been visited or called by anyone while he was imprisoned;
- Had to be disarmed by fellow inmates — for their own protection — when he fashioned or acquired a weapon while residing with the general prison population.

15 The Court also noted that:

• Due to his intractable, violent behavior, CSC had considered transferring Mr. Toutsaint to the special handling unit reserved for the most unmanageable offenders in the federal correction system;

• When released from custody at warrant expiry, he had been subjected to *Criminal Code* restraining orders in the interests of public safety; and

• When released into the community, he violated or breached his bail, probation or restraining orders, usually within weeks.

16 The assessments of the psychologist and psychiatrist who provided reports to the sentencing judge were, as described in the Court of Appeal judgment at paragraphs 5 to 8, that Mr. Toutsaint remained at high risk to reoffend violently and sexually. Both noted that Mr. Toutsaint had told them that he would not participate in programming to reduce his risk of reoffending. He preferred to remain in segregation. The court appointed psychologist described Mr. Toutsaint "as highly dominant and overly aggressive" and entirely unresponsive to treatment. He concluded that his violent and threatening conduct while incarcerated was purposive — to get what he wanted. While the psychiatrist retained by Mr. Toutsaint, Dr. Mela, thought that there had been some improvement in his behavior prior to sentencing, the Court of Appeal concluded that this was based on the Applicant providing untruthful information. Among other things, the Court noted, Mr. Toutsaint had sabotaged his own treatment by selling his prescribed medication to other inmates shortly after he was assessed by the psychiatrist. The psychiatrist's report was included in the evidence the Applicant submitted in this proceeding.

17 The Applicant has glossed over this record in describing his history in the correctional system. Nonetheless, whether it was due to his own preference or to his pattern of violent and disruptive conduct, the Applicant has spent some 2,180 days, and counting, in administrative segregation. He has been frequently moved between regular living units and segregation units at his own request, or as a protective custody prisoner, and has also spent many days in observation units when threatening self-harm. The observation units are, if anything, even more isolating than segregation units, despite the constant surveillance.

18 The Applicant has, from time to time, been placed in regional psychiatric and treatment centres operated by CSC, with mixed results. On some occasions, he has regressed, refused to engage in treatment and continued to self-harm or has been aggressive and threatening towards other offenders, "muscling" or pressuring them for their medication. He has also been aggressive and threatening towards staff, including medical professionals.

19 Since the summer of 2016, the Applicant has been held at nine different institutions in six different provinces, as CSC attempted to find a facility that could cope with his treatment needs and behavioural problems. He has been at Saskatchewan Penitentiary since August 2018.

20 In this application, Mr. Toutsaint relies on his own extensive affidavit evidence, with numerous exhibits drawn from his institutional records. Other documentary evidence in support of the application was introduced through several affidavits of one of his legal representatives. In his evidence, Mr. Toutsaint describes a horrendous history of abuse at the hands of both inmates and guards in youth and adult custody. This includes sexual and physical assaults at the hands of other inmates, which he believes were facilitated by guards, as well as beatings by guards and aggressive interventions by Emergency Response Teams (ERTs). Whether accurate or not, it is clear that Mr. Toutsaint believes his recollection of these events to be true and this has made it difficult for him to trust and interact with correctional officers and some, but not all, mental health personnel.

21 Mr. Toutsaint suffers from a number of mental illnesses. The most recent assessment conducted by Dr. Alsaf Masood, Mr. Toutsaint's treating CSC psychiatrist, dated February 21, 2019 diagnosed him with the following illnesses:

(i) attention deficit hyperactivity disorder;

(ii) polysubstance use disorder;

(iii) mood disorder unspecified;

(iv) post-traumatic stress disorder [PTSD]; and

(v) mixed personality disorder (antisocial and borderline personality disorders).

22 Dr. Masood has also recognized that Mr. Toutsaint may suffer from Fetal Alcohol Spectrum Disorders, although that diagnosis has yet to be confirmed. If confirmed, Dr. Masood was of the opinion that it would not make a significant difference in the Applicant's treatment.

23 The Respondent relied on the evidence of Dr. Masood and that of Mr. Robin Finlayson, chief psychologist at Saskatchewan Penitentiary. Dr. Masood and Mr. Finlayson were cross-examined at length on their affidavits. In their assessment, Mr. Toutsaint would be better served by remaining where he has developed some degree of a relationship with the mental health team, rather than to start afresh at RPC. They maintained that position under vigorous cross-examination. Their evidence is not without inconsistencies, contradictions and other weaknesses. However, on the whole, I found it persuasive.

24 Mr. Toutsaint began to self-harm in 2006 and has since had numerous self-harming incidents, which have become more frequent in recent years. Mr. Toutsaint describes being fearful of correctional officers, especially the ERTs, which are often called in when he is threatening self-

harm and is in possession of a razor blade or other weapon. Mr. Toutsaint's evidence is that the ERT response actually increases his likelihood of self-harming, as does his continuing exposure to administrative segregation. He acknowledges often preferring segregation to being in the general population and has requested being placed in observation cells when fearful that he will self-harm.

25 Mr. Toutsaint's evidence is also that CSC has failed to allow him to engage in meaningful spiritual practices. He says that he has been deprived of Dene cultural practices in most institutions in which he has been placed, and at Saskatchewan Penitentiary, where there are Dene Elders, he contends that CSC has limited his access to both the type of practices he prefers and to a frequency that would be meaningful. For example, since his arrival in August 2018, he has yet to participate in a sweat and has only participated in five or so pipe ceremonies. He does not find smudging, or spiritual cleansing, which has been provided, to be meaningful.

26 Saskatchewan Penitentiary does have a sweat lodge in a fenced off corner of the prison yard. A photograph of it is in the 2017-2018 Correctional Investigator Report included in the record. It appears from the evidence that its use was constrained by a number of practical difficulties during Mr. Toutsaint's stay there, not the least of which was the cold northern Saskatchewan winter. But it also appears that he may have been denied a sweat because of his behavioural problems.

27 Since June 2018, Mr. Toutsaint has been asking CSC to transfer him to RPC. Mr. Toutsaint claims that he needs to be transferred to a therapeutic environment and that his mental health and spiritual needs can best be met at RPC. Mr. Toutsaint has not received any formal responses to his transfer requests but is aware that his treatment team has advised against it.

28 Mr. Toutsaint was previously transferred to RPC in 2015 for approximately 6 weeks on an emergency basis; in 2016 for approximately 6 months after a referral for treatment; and again in 2017 for approximately 2 months following a transfer between institutions. The evidence is that his time at RPC met with mixed results. Though he states that he was able to get meaningful treatment and interactions at RPC, the record is that he also self-harmed and fought with other inmates there. As noted above, he has also been placed in other treatment centres.

29 On May 6, 2018, Mr. Toutsaint filed a complaint with the CHRC in which he alleges that CSC has discriminated against him on the basis of race, national or ethnic origin, colour, religion, and disability (namely, his mental illnesses).

30 Also in May 2018, Mr. Toutsaint slashed his neck and severed his jugular vein while being held in segregation at the Quebec Regional Reception Centre. Mr. Toutsaint's evidence is that he was feeling distressed and threatened to hurt himself because the guards were giving him a hard time about him calling his legal representative. He states that while he calmed down when CSC promised not to call in the ERT, he proceeded to slash his neck after seeing ERT members crouched outside his cell. Mr. Toutsaint spent nine days in hospital recovering after emergency surgery.

31 Shortly after this incident, as part of his CHRC complaint process, Mr. Toutsaint met with Dr. Jon Wesley Boyd, a board certified psychiatrist from Massachusetts and Associate Professor at Harvard Medical School. Mr. Toutsaint's legal representative arranged this evaluation. Dr. Boyd met with Mr. Toutsaint for 2 hours on July 20, 2018 and submitted his first assessment on October 29, 2018. Dr. Boyd had an approximately 70 minute phone conversation with Mr. Toussaint on January 3, 2019 and submitted a follow-up assessment on January 19, 2019.

32 Dr. Boyd agreed with CSC's diagnoses and further diagnosed Mr. Toutsaint with Major Depressive Disorder (MDD) and PTSD. PTSD was not initially diagnosed by Dr. Masood, but he agreed with Dr. Boyd in his latest assessment. Dr. Boyd writes that these diagnoses make Mr. Toutsaint ineligible for administrative segregation under "Commissioner's Directive 709: Administrative Segregation".

33 Dr. Boyd's reports were introduced as exhibits to the affidavits of one of Mr. Toutsaint's legal representatives and as exhibits to Mr. Toutsaint's affidavits. As a result, they were not subject to cross-examination. The reports contain statements which the Court considers to be in the nature of advocacy. Dr. Boyd, for example, questioned whether the failure to diagnose Mr. Toutsaint with MDD was due to CSC policy for mental health clinicians to avoid diagnosing inmates with conditions that would be exclusionary under CD 709. There is no evidence in the record to support that allegation and it would be contrary to their ethical obligations.

34 That said, the ethical dilemmas created by dual loyalties to patient and employer in the CSC environment have been recognized. The 2017-2018 Correctional Investigator Report observed in its discussion of health care in federal corrections that CSC health services do not have true clinical independence.

35 While Dr. Masood agreed with Dr. Boyd's PTSD diagnosis, he continues to disagree that Mr. Toutsaint suffers from MDD, and that view was shared by the lead psychologist at the penitentiary, Mr. Finlayson. There are indications in the record that Mr. Toutsaint has been observed by other mental health staff to be depressed, and at least one report questions whether he suffered from MDD. But, no diagnosis exists other than Dr. Boyd's.

36 Mr. Finlayson signs off on reports stating that Mr. Toutsaint may stay in segregation under CD 709. This practice is arguably contrary to the United Nations Standard Minimum Rules for the Treatment of Prisoners, known as the Mandela Rules. The Rules prohibit medical professionals from being involved in disciplinary sanctions or restrictive measures. I make no finding on whether there has been a breach of either CD 709 or the principles. Mr. Finlayson's evidence is that he did not support the use of segregation or observation units as sanctions, but to protect Mr. Toutsaint from self-harm.

37 As noted, both Dr. Masood and Mr. Finlayson were cross-examined extensively for this application. Among other questions put to them, they were closely examined on whether their assessments of Mr. Toutsaint's treatment needs were coloured by their duties of loyalty to their employer. Both affiants denied that to be the case.

38 The Applicant also filed the affidavit of Dr. Melady Preece, a clinical psychologist and Assistant Professor in the Faculty of Medicine at the University of British Columbia. The affidavit attaches a four page report that she provided to the Applicant's legal team on March 13, 2019. Dr. Preece has expertise in mood disorders and PTSD, has worked with people who engage in self-harm and has conducted assessments of incarcerated individuals.

39 Dr. Preece had no personal interactions with Mr. Toutsaint but was provided with a number of documents relating to his institutional history a few days before she was asked to provide her report. Her report, based on the assumption that Mr. Toutsaint's affidavit is a true representation of how he experiences the environment at the penitentiary, responds to a series of questions regarding the appropriateness of the mental health treatment plan developed for Mr. Toutsaint. The report was, in my view, of limited value on this application.

40 Mr. Toutsaint submits that his transfer to RPC is necessary to prevent further harm to himself while his CHRC complaint is resolved. Specifically, he fears further harm, including a risk of suicide, further self-mutilation, psychological damage and loss of liberty. The Respondent contends that the weight of the evidence supports the conclusion that Mr. Toutsaint can presently best be cared for at Saskatchewan Penitentiary.

41 The members of his treatment team do not support a transfer to RPC at this time but recognize that this may yet again be assessed as necessary to meet his treatment needs. At the heart of this application, therefore, is the following question: who is best suited to make that determination — the Court, at Mr. Toutsaint's request, supported by the assessments of independent experts who have had limited or no contact with him, or the CSC mental health professionals who have ongoing contact with him and responsibility for his present treatment plan?

III. Issues

42 Based on the materials filed and the Parties' submissions, the Court must determine the following issues:

1. Whether the Court has jurisdiction to issue the relief sought;

2. Whether Mr. Toutsaint has satisfied the test for an interlocutory injunction.

IV. Relevant Legislation

43 *Federal Courts Act* section 44 grants this Court the jurisdiction to grant injunctions "in all cases in which it appears to the court to be just or convenient to do so":

> **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.
>
> **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.

44 Subsection 3(1) of the *Canadian Human Rights Act*, RSC 1985, c H-6 [CHRA] outlines prohibited grounds of discrimination:

> **Prohibited grounds of discrimination**
>
> **3 (1)** For all purposes of this Act, the prohibited grounds of discrimination are race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.
>
> **Motifs de distinction illicite**
>
> **3 (1)** Pour l'application de la présente loi, les motifs de distinction illicite sont ceux qui sont fondés sur la race, l'origine nationale ou ethnique, la couleur, la religion, l'âge, le sexe, l'orientation sexuelle, l'identité ou l'expression de genre, l'état matrimonial, la situation de famille, les caractéristiques génétiques, l'état de personne graciée ou la déficience.

45 CHRA section 5 outlines what may constitute a discriminatory practice:

> **Denial of good, service, facility or accommodation**
>
> **5** It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public

(a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or

(b) to differentiate adversely in relation to any individual,

on a prohibited ground of discrimination.

Refus de biens, de services, d'installations ou d'hébergement

5 Constitue un acte discriminatoire, s'il est fondé sur un motif de distinction illicite, le fait, pour le fournisseur de biens, de services, d'installations ou de moyens d'hébergement destinés au public:

a) d'en priver un individu;

b) de le défavoriser à l'occasion de leur fourniture.

46 CHRA section 15 outlines the onus that a responding party must meet, once a *prima facie* case of discrimination is established, to show that they have accommodated the needs of the complainant to the point of undue hardship:

Exceptions

15 (1) It is not a discriminatory practice if

(g) in the circumstances described in section 5 or 6, an individual is denied any goods, services, facilities or accommodation or access thereto or occupancy of any commercial premises or residential accommodation or is a victim of any adverse differentiation and there is bona fide justification for that denial or differentiation.

Accommodation of needs

(2) For any practice mentioned in paragraph (1)(a) to be considered to be based on a bona fide occupational requirement and for any practice mentioned in paragraph (1)(g) to be considered to have a bona fide justification, it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost.

Exceptions

15 (1) Ne constituent pas des actes discriminatoires:

g) le fait qu'un fournisseur de biens, de services, d'installations ou de moyens d'hébergement destinés au public, ou de locaux commerciaux ou de logements en prive

un individu ou le défavorise lors de leur fourniture pour un motif de distinction illicite, s'il a un motif justifiable de le faire.

Besoins des individus

(2) Les faits prévus à l'alinéa (1)a) sont des exigences professionnelles justifiées ou un motif justifiable, au sens de l'alinéa (1)g), s'il est démontré que les mesures destinées à répondre aux besoins d'une personne ou d'une catégorie de personnes visées constituent, pour la personne qui doit les prendre, une contrainte excessive en matière de coûts, de santé et de sécurité.

47 Transfers between penitentiaries are made under paragraph 29(a) of the *Corrections and Conditional Release Act*, SC 1992, c-20 [CCRA] and are subject to the factors set out in section 28, which includes "the safety of that person and other persons in the penitentiary" and "the availability of appropriate programs and services and the person's willingness to participate in those programs."

48 The CCRA permits CSC to place an inmate in administrative segregation. The inmate is normally permitted out of his or her cell for a minimum of two hours per day, plus time for a daily shower. The purpose of administrative segregation, as explained in CCRA subsection 31(1), is "to maintain the security of the penitentiary or the safety of any person by not allowing an inmate to associate with other inmates."

49 CCRA subsection 31 (3) gives the institutional head the discretion to order administrative segregation if certain conditions are met:

Grounds for confining inmate in administrative segregation

31 (3) The institutional head may order that an inmate be confined in administrative segregation if the institutional head is satisfied that there is no reasonable alternative to administrative segregation and he or she believes on reasonable grounds that

(a) the inmate has acted, has attempted to act or intends to act in a manner that jeopardizes the security of the penitentiary or the safety of any person and allowing the inmate to associate with other inmates would jeopardize the security of the penitentiary or the safety of any person;

(b) allowing the inmate to associate with other inmates would interfere with an investigation that could lead to a criminal charge or a charge under subsection 41(2) of a serious disciplinary offence; or

(c) allowing the inmate to associate with other inmates would jeopardize the inmate's safety.

Motifs d'isolement préventif

31 (3) Le directeur du pénitencier peut, s'il est convaincu qu'il n'existe aucune autre solution valable, ordonner l'isolement préventif d'un détenu lorsqu'il a des motifs raisonnables de croire, selon le cas:

a) que celui-ci a agi, tenté d'agir ou a l'intention d'agir d'une manière compromettant la sécurité d'une personne ou du pénitencier et que son maintien parmi les autres détenus mettrait en danger cette sécurité;

b) que son maintien parmi les autres détenus nuirait au déroulement d'une enquête pouvant mener à une accusation soit d'infraction criminelle soit d'infraction disciplinaire grave visée au paragraphe 41(2);

c) que son maintien parmi les autres détenus mettrait en danger sa sécurité.

50 CCRA sections 36 and 37 deal with the rights of inmates who are placed in administrative segregation:

Visits to inmate

36 (1) An inmate in administrative segregation shall be visited at least once every day by a registered health care professional.

Idem

(2) The institutional head shall visit the administrative segregation area at least once every day and meet with individual inmates on request.

Inmate rights

37 An inmate in administrative segregation has the same rights and conditions of confinement as other inmates, except for those that

(a) can only be enjoyed in association with other inmates; or

(b) cannot be enjoyed due to

(i) limitations specific to the administrative segregation area, or

(ii) security requirements.

Visites par un professionnel de la santé

36 (1) Le détenu en isolement préventif reçoit au moins une fois par jour la visite d'un professionnel de la santé agréé.

Visites par le directeur

(2) Le directeur visite l'aire d'isolement au moins une fois par jour et, sur demande, rencontre tout détenu qui s'y trouve.

Droits du détenu

37 Le détenu en isolement préventif jouit, compte tenu des contraintes inhérentes à l'isolement et des impératifs de sécurité, des mêmes droits et conditions que ceux dont bénéficient les autres détenus du pénitencier.

51 CCRA section 87(a) requires the institutional head to consider the inmate's health, including his or her mental health, when making the decision to place or maintain the inmate in administrative segregation.

52 CCRA sections 97 and 98 authorize the creation of Rules and Commissioner's Directives, some of which govern the practice of administrative segregation. Paragraph 19 of CD 709 precludes administrative segregation for those who meet certain criteria, including those "with serious mental illness with significant impairment." The policy defines that as including symptoms associated with psychotic, major depressive and bipolar disorders resulting in significant impairment in functioning.

53 Commissioner's Directive 710-2-3, entitled "Guidelines for Inmate Transfer Processes," provides at section 43:

> Prior to a transfer for admission to psychiatric hospital care in a CSC Treatment Centre, or admission to Intermediate Mental Health Care within a Treatment Centre or other institution, the inmate must meet the clinical admission criteria in accordance with the Admission and Discharge Guidelines listed in the Integrated Mental Health Guidelines.

54 Article 10.2 of the *Integrated Mental Health Guidelines* provides that "non-emergency referrals to Psychiatric Hospital and Intermediate Mental Health Care are coordinated through the Mental Health Team at the offender's mainstream institution, who will ensure that the referral is appropriate and adheres to the admission guidelines." In this instance, as noted above, the Mental Health Team at the Applicant's institution does not support his transfer to RPC.

V. Preliminary issue

55 At the hearing of this matter on April 10, 2019, counsel for the Attorney General of Canada unexpectedly advised the Court that they were under the belief that the proceedings that day related to a motion for interlocutory relief within an application, with further proceedings on the actual application to follow. Counsel for Mr. Toutsaint responded that they had proceeded on the understanding that the hearing was on their application for a mandatory interlocutory injunction pending the determination of the CHRC complaint.

56 Counsel for the Attorney General stated that certain decisions they had made in preparation for the hearing, such as foregoing cross examinations and not questioning the Court's jurisdiction to grant relief under *Federal Courts Act* section 44, were made to accommodate the hearing of the motion on an expedited basis, and that they would not make such decisions in the broader application when "in the fullness of time that is perfected and set down for hearing." Counsel for the Attorney General also stated that they may have sought to file more evidence and may have wished to cross-examine Dr. Preece and Nicole Kief, a legal advocate for Mr. Toutsaint, on her several affidavits. They would not, however, have attempted to cross-examine the Applicant under any circumstances, given his mental disorders.

57 The confusion over the nature of the proceedings may have arisen because the originating document, filed on February 27, 2019, is a Notice of Application. It contemplated what may be described as a free-standing application for an injunction under *Federal Courts Act* section 44 and CHRA sections 3 and 5. A case management order was issued on February 28, 2019. The matter was set down for hearing as a motion at the General Sittings in Vancouver on March 5, 2019 and was then adjourned at the Respondent's request to allow it more time to prepare. A case management judge was appointed on the same date.

58 By Order dated March 14, 2019, the Court stated it was "becoming clearer that an expedited hearing process diminishes the necessity of interim injunctive relief" and that the Court had been advised "that the Respondent will forego cross examination in order to assist with an expedited hearing." I understand these words to mean that the Court had addressed the potential need for interim relief under Rule 373 of the *Federal Courts Rules*, SOR/98-106.

59 In a further order dated March 26, 2019, the Court adjourned "[t]he hearing of the application for an injunction...*sine die*." In an Order dated March 28, 2019, the Court considered that "the hearing of the injunction application was originally scheduled for March 28, 2019," and ordered that "[t]he parties [were] to make themselves available anytime during the week of April 8 to 12, 2019 for a one day hearing of the injunction application."

60 In refusing the Attorney General's request to file further affidavit evidence, the March 28, 2019 Order stated that "the injunction motion was intended to proceed as an expedited hearing." However, the Order refers to the proceeding as an "injunction application" in a number of paragraphs. Further, the Court directed on April 1, 2019, that "the injunction application will be heard on Wednesday, April 10, 2019...for a duration of one day."

61 It is not clear to the Court what the Respondent considered would be the actual application that would follow the April 10, 2019 hearing. The relief being sought was a mandatory interlocutory injunction pending the determination of the CHRC complaint. The Court does not have jurisdiction to deal with the merits of the Applicant's complaint to the CHRC, other than through an application for judicial review after a decision on the complaint has been rendered. The Court could grant an

interlocutory injunction under Rule 373 of the *Federal Courts Rules* pending the outcome of those proceedings but could not usurp the jurisdiction of the CHRC to consider the complaint, or for that matter, that of the Canadian Human Rights Tribunal (CHRT) if the complaint was referred to them for determination.

62 It appears that the Respondent may have assumed that the proceedings were in the nature of the interim relief contemplated by Rule 373. But that was clearly not the Applicant's understanding, nor that of the Court in the case management proceedings leading up to the April 10, 2019 hearing. It is regrettable that counsel for the Attorney General did not seek to clarify their understanding until the injunction hearing itself, as their understanding is not supported by the record. In any event, I am satisfied that the Respondent has suffered no prejudice by the procedure followed.

63 I advised counsel for the Attorney General at the hearing that I would take their submissions under consideration but that they should be prepared to argue the merits of the motion. They were, and they did. Counsel advised that they were "ready to oppose the application for the injunction of the relief sought in the application and in the notice of motion."

64 In the result, the Attorney General did not challenge the Court's jurisdiction to issue the remedy sought under *Federal Courts Act* section 44. This Court must still be satisfied that it has the jurisdiction to issue any remedy that Mr. Toutsaint seeks before it can proceed to determine the matter. Given the lack of a challenge on that ground, the Court can deal with it without extensive reasons.

65 This Court is empowered by Parliament to grant an injunction "in all cases in which it appears to the court to be just or convenient to do so": *Federal Courts Act*, s 44. The courts have previously accepted that section 44 gives the Federal Court jurisdiction to grant interlocutory injunctions for proceedings before the CHRC: *Colasimone v. Canada (Attorney General)*, 2017 FC 953 (F.C.) at para 7; *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626 (S.C.C.) at para 37, (1998), 157 D.L.R. (4th) 385 (S.C.C.).

66 In the circumstances and absent any argument to the contrary, I am satisfied that the Court has jurisdiction to grant the relief Mr. Toutsaint seeks. The question remains whether the relief should be granted.

67 I note that this proceeding differs from the motion considered in *Boulachanis c. Canada (Procureur général)*, 2019 FC 456 (F.C.), a decision brought to my attention by Applicant's counsel after the hearing. The underlying matter in that case was an application for judicial review before the Federal Court of a refusal to transfer the applicant from a male institution to a female institution. A mandatory interlocutory injunction was granted by the motions judge on a determination that the applicant had demonstrated a strong *prima facie* case of discrimination, would suffer irreparable harm if not transferred and enjoyed the balance of convenience.

68 The transfer order was appealed to the Federal Court of Appeal, which granted a stay pending the outcome of the judicial review in the Federal Court: *Boulachanis c. Canada (Procureur général)*, 2019 CAF 100 (F.C.). I note that the Court of Appeal stay decision suggests that the motions judge did not have sufficient evidence of harm and did not sufficiently consider Ms. Boulachanis's escape risk. In the circumstances, I do not consider the decision at first instance to be helpful in deciding this matter.

VI. Analysis

69 The nature of the relief Mr. Toutsaint seeks is mandatory in that, if granted, it would force the Respondent to take action in accordance with the terms of the order. At the outset, I would note that the Court will not consider Mr. Toutsaint's general claim for relief "requiring CSC to refrain from discriminating against the Applicant." This particular claim was not argued during the April 10, 2019 hearing. Further, as a government institution, CSC is obliged to respect both the *Charter* and the CHRA. It is not this Court's role to reiterate this point absent a finding of discrimination, which is the very issue currently before the CHRC. This Court's only consideration is whether Mr. Toutsaint meets the test required for the Court to grant other relief while this determination unfolds.

70 To issue an interlocutory injunction regarding the other requested relief, the Court must be satisfied that Mr. Toutsaint meets the test set out by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385 (S.C.C.) [*RJR*].

A. Strong prima facie case

71 Under the first branch of the *RJR* test, it would have been sufficient for Mr. Toutsaint to demonstrate that there was a serious question to be tried in the underlying matter (i.e., the CHRC complaint). It would then be necessary for him to demonstrate that he would suffer irreparable harm if this Court did not grant the relief he seeks. Mr. Toutsaint would then have to show that the balance of convenience favours granting the injunction.

72 However, in *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5 (S.C.C.) [*CBC 2018*], the Supreme Court of Canada clarified that in the case of an application for a mandatory interlocutory injunction, the Applicant must demonstrate that he has a strong *prima facie* case. This is because the potentially severe consequences for the Respondent require a more in depth review of the merits of the underlying matter at the interlocutory stage. Here, the grant of a mandatory interlocutory injunction would disrupt the Respondent's offender management procedures and impose additional costs. See *Colasimone*, above at para 14.

73 The Supreme Court of Canada articulated what is meant by a strong *prima facie* case at paragraph 17 of *CBC 2018*:

> This brings me to just what is entailed by showing a "strong *prima facie* case". Courts have employed various formulations, requiring the applicant to establish a "strong and clear chance of success"; a "strong and clear" or "unusually strong and clear" case; that he or she is "clearly right" or "clearly in the right"; that he or she enjoys a "high probability" or "great likelihood of success"; a "high degree of assurance" of success; a "significant prospect" of success; or "almost certain" success. Common to all these formulations is a burden on the applicant to show a case of such merit that it is very likely to succeed at trial. Meaning, that upon a preliminary review of the case, the application judge must be satisfied that there is a *strong likelihood* on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice.

74 In the result, to establish a strong *prima facie* case of discrimination, the Applicant must show that it is very likely that he can demonstrate that he had a characteristic protected from discrimination by the CHRA, that he experienced an adverse impact and that the protected characteristic was a factor in the adverse impact: *Serge Lafrenière c. Via Rail Canada Inc.*, 2017 CHRT 29 (Can. Human Rights Trib.) at para 22.

75 The Applicant argues that he has a strong *prima facie* case that is likely to succeed before the CHRC and the CHRT. He contends that at the relevant times, he had characteristics protected from discrimination; namely, that he is Indigenous and suffers from mental disability. Mr. Toutsaint points to his prolonged periods of administrative segregation and the resulting exacerbated symptoms of his mental illnesses as evidence of the adverse impact he has experienced. He contends that his protected characteristics were a factor in that adverse impact. In particular, they have made him unable to integrate into the general prison population in the several institutions in which he has been placed. He says that he is in need of trauma therapy in an environment where health care staff are available at all times and are trained to deal with serious mental illnesses and risks of suicide.

76 The effects of administrative segregation were addressed in an Ontario Superior Court of Justice decision: *Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen*, 2017 ONSC 7491 (Ont. S.C.J.). In brief, the Court found that administrative segregation:

- Amounted to a significant deprivation of liberty beyond that which necessarily flowed from imprisonment;
- Imposed psychological stress capable of causing serious permanent negative mental health effects;
- Caused sensory deprivation and can alter brain activity shortly after admission; and
- Posed a serious risk of negative psychological effects when prolonged.

77 The Superior Court held that the use of prolonged segregation breached *Charter* section 7, requiring a declaration of invalidity: at paras 272-273. On appeal, the Ontario Court of Appeal upheld the decision at first instance in part but declared that sections 31-37 of the CCRA also violated the protection against cruel and unusual treatment in *Charter* section 12, could not be justified under section 1 and were of no force and effect: 2019 ONCA 243 (Ont. C.A.) at paras 119, 126, 130, 150.

78 An extensive review of the jurisprudence relating to the placement of mentally ill inmates in administrative segregation can also be found in *Brazeau v. Attorney General (Canada)*, 2019 ONSC 1888 (Ont. S.C.J.), a case in which summary judgment was granted in a class action for breach of the class members' *Charter* section 7 rights. See also *British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2018 BCSC 62 (B.C. S.C.), in which the Supreme Court of British Columbia found that CSC's administrative segregation regime perpetuates the disadvantage faced by Indigenous prisoners as they are overrepresented therein due to factors associated with their social history, including gang affiliation and entrenched violence.

79 The CHRC, in its 2015 Annual Report, advised that administrative segregation should only be used in exceptional circumstances, as a last resort, for a very brief time, and never with inmates with serious mental health issues.

80 There is no question that in his complaint to the CHRC, the Applicant will be able to point to the large body of evidence that has accumulated pointing to the adverse effects of administrative segregation, notwithstanding that it has often been his preference rather than admission to the general population of the institutions in which he has been held. The onus will then shift to the Respondent to show that it has made efforts to reasonably accommodate, and that it would cause undue hardship to eliminate the use of segregation in the Applicant's case.

81 This case is analogous, the Applicant argues, to *Tekano v. Canada (Attorney General)*, 2010 FC 818 (F.C.), in which this Court, on judicial review, quashed the CHRC's refusal to refer a complaint to the CHRT. There are factual similarities to the present matter in that Mr. Tekano resisted treatment and often preferred administrative segregation to being in living units with other prisoners. He also had a serious criminal record and was violent and threatening to other prisoners, correctional staff and medical personnel. Mr. Tekano alleged in his complaint that CSC failed to accommodate his mental disability by repeatedly placing him in segregation or isolation. He had spent time at the Pacific RTC, but he was transferred back to a maximum security institution because he had been violent towards the mental health staff. The Commission accepted the investigator's report that CSC was accommodating Mr. Tekano's disabilities. Madame Justice Gauthier held that the decision to dismiss the claim on the ground that it did not warrant further inquiry was not within the range of acceptable outcomes on the facts and the law.

82 According to the CHRC's 2015 Annual Report to Parliament, Mr. Tekano was ultimately sent again to a RTC where he was able to receive medication, therapy and treatment for his mental health issues, and where he reduced his self-harming. As far as the Court could determine from the record, this was not as a result of a mandatory interlocutory injunction but rather because of a treatment decision by CSC.

83 I accept that the weight of evidence is very much against the use of administrative segregation in general, and particularly in the case of mentally ill offenders. The evidence is that it is disproportionally used in the case of Indigenous offenders. There is no doubt, based on the evidence presented, that prolonged confinement in administrative segregation or protective isolation can have profoundly deleterious effects on inmates. The use of segregation also amounts to what is referred to in the literature and jurisprudence as a "prison within a prison." That implicates offenders' liberty interests notwithstanding that they are serving sentences in detention.

84 The Respondent contends that the case they have to answer is not about administrative segregation and that they would have approached the matter very differently if it was. The Notice of Application before the Court is not for an order to prevent the use of segregation by CSC in general or specifically in the Applicant's case, but for his mandatory transfer from Saskatchewan Penitentiary to RPC, for collateral relief relating to the nature of the treatment he receives and for access to Dene cultural practices.

85 In reply, counsel for the Applicant argued that while they had not sought an order to prevent the use of segregation, such a remedy was encompassed within the clause of "such other relief as this honourable court may deem just," included in the Notice of Application. I agree with the Respondent that a "such other relief" clause is not meant to be construed so broadly, but rather is meant to cover incidental or collateral matters related to the main relief sought. In this instance, a finding against the use of administrative segregation would be neither incidental nor collateral.

86 As noted above, while RPC as a whole is administered by CSC as a penitentiary, part of the centre is an acute care hospital licensed under provincial legislation. The evidence is that Saskatchewan Penitentiary uses both administrative segregation and observation cells, whereas RPC uses the latter when there are critical circumstances involving imminent danger. While the cells are similar, the observation cells have fewer amenities and the inmate is not permitted personal items, as they would be in segregation. The inmate under observation because of self-harming is also required to wear a simple smock, or "baby doll," instead of the normal clothing he would be permitted in segregation. At times, the treatment centres also employ physical or "Pinel" restraints to prevent inmate patients from harming themselves or others. The Applicant was confined in Pinel restraints for an extended period of time while at a centre in Quebec.

87 The Respondent's position, in essence, is that mental health care decisions, such as those mandated by the *Saskatchewan Mental Health Services Act*, should be made by mental health

care professionals who are treating the inmate patient and not by others, including this Court: *Colasimone*, above, at para 12. And where there is evidence of accommodation, as here, the Respondent argues, the Applicant fails to make out a strong *prima facie* case of discrimination.

88 I agree with the Respondent that the Applicant is asking that the Court substitute its judgment for that of the medical experts who are treating Mr. Toutsaint. Moreover, it is premature, as the Respondent argues, to conclude that the Applicant is very likely to succeed on his complaint to the CHRC. The complaint is at a very early stage of the process and has yet to result in referral to an inquiry. There is considerable evidence before the Court on this application of efforts to accommodate the very serious challenges presented by Mr. Toutsaint's mental and behavioural disorders, such as through transfers to other institutions, including RPC and other treatment centres. That these efforts to date have not proven to be successful beyond supporting brief periods of stability does not preclude a finding of reasonable accommodation. The evidence shows an active and substantial therapeutic program administered by qualified medical professionals attempting to address the Applicant's needs. Is it realistic to conclude that they will be resolved by a transfer to RPC, when that has not proven to be the answer in the past?

89 To grant the relief requested, I would be required to distinguish the judgment of my colleague, Madame Justice McDonald, in *Colasimone*, above, or disagree with it in a manner consistent with the principles of judicial comity. To issue the injunction could lead this Court into an area which it is ill-fitted to manage. As Madame Justice McDonald states in *Colasimone*, at paragraph 12, "[t]his Court is not in any position to substitute its decision for that of medical experts who have assessed the Applicant." I appreciate that the Applicant has sought to overcome that disqualification by submitting the expert views of Dr. Boyd and Dr. Preece, but for the reasons mentioned above, I am not persuaded that I should give their opinions greater weight than the CSC experts who have had greater contact with the Applicant.

90 *Colasimone*, as here, was a case seeking injunctive relief from this Court to compel the CSC to provide services to Mr. Colasimone, including a transfer to a RTC pending the resolution of his human rights complaint to the CHRC. Madame Justice McDonald concluded that Mr. Colasimone was not entitled to mandatory injunctive relief, applying the higher threshold on the serious issue branch of the tripartite test.

91 I note that in *Drennan v. Canada (Attorney General)*, 2008 FC 10 (F.C.), Madame Justice Mactavish accepted that the Court had jurisdiction to grant limited injunctive relief pending the exercise of the CHRC's screening function. She declined to grant a transfer to a different facility within CSC as had been requested. Justice Mactavish also stressed, at paragraph 24, that in the particular circumstances of that case — the offender was to be released in three weeks — she was not making a determination of whether his human rights complaint should ultimately succeed. She did find that Mr. Drennan had raised a serious issue about the accommodation provided to deal with his physical disability, quadriplegia, and that he would suffer irreparable harm in the

short time before his release because of the inadequacy of the accommodation provided. The Court was not persuaded that he would suffer irreparable harm if he was not transferred to a RTC. In the circumstances, the balance of convenience lay in his favour. Given the significant factual differences, *Drennan* is of little assistance in addressing the issues in this case.

92 The treating mental health care professionals providing care to Mr. Toutsaint are licensed under provincial legislation and subject to their regulatory bodies. Their treatment of patients within their care must adhere to the standards of the licensing bodies. As described in cross-examination by Mr. Finlayson, the lead psychologist responsible for Mr. Toutsaint's treatment at Saskatchewan Penitentiary, his loyalty is to the college that he practices under and to the clients he works with. Dr. Masood, the consultant psychiatrist who has diagnosed Mr. Toutsaint and is responsible for his overall treatment plan, gave similar evidence.

93 The evidence is that the mental health team that is actually providing treatment to Mr. Toutsaint at Saskatchewan Penitentiary does not support his transfer to RPC. They believe that it would actually be harmful to him. In their view, he is not ready in terms of engaging and participating in therapy and he requires stability. His history of prior transfers to RPC also does not support a conclusion that he would do better there. It is questionable that he would achieve a greater degree of stability at RPC given the disruption that has accompanied his prior transfers.

94 A transfer to RPC would also, in Dr. Masood's opinion, constitute negative reinforcement of the Applicant's behavioural problems. The priority was to address his self-harming behaviour through focused, trauma-based therapy and to try to improve his interpersonal relationships. The evidence from Mr. Finlayson is that they have the mental health personnel in place to carry out the treatment plan and to build what he described as a "therapeutic alliance" with Mr. Toutsaint. These arrangements are not perfect. Dr. Masood, for example, conducts his "visits" with Mr. Toutsaint by video conference, as he is based in Saskatoon. Contacts with mental health workers at Prince Albert are often through the cell door or in a booth with a barrier between the offender and the worker. Nonetheless, the weight of the evidence is that moving the Applicant would jeopardize the progress they have made thus far. There is no assurance that a transfer to RPC would achieve better results. It is not a panacea for the Applicant's problems.

95 In addition to the evidence of his treating psychiatrist and psychologist, the Respondent submitted the affidavit evidence of Lisa Barton, who directed the Aboriginal intervention program, including the Dene program, at Saskatchewan Penitentiary. Mr. Toutsaint has access to a Dene Elder from his home community of Black Lake who can conduct traditional cultural and spiritual practices. The evidence of the availability of such access is mixed. In at least one instance, a pipe ceremony being arranged was cancelled by the Elder after Mr. Toutsaint brandished a weapon. On another occasion, cold and snow interfered with plans to conduct a sweat. The Applicant objected to the use of that evidence as hearsay. In my view, the emails in which it is found are admissible under the business records exception to the hearsay rule. While the availability of such ceremonies

has clearly fallen short of Mr. Toutsaint's expectations, the evidence of the efforts to provide them may support a finding of reasonable accommodation. But that is not a matter for the Court to determine on this application.

96 Considering the Applicant's evidence and submissions, I am not persuaded that he has established a strong *prima facie* case that he is likely to succeed in the underlying complaint to the CHRC. While that conclusion is sufficient to dispose of the application before the Court, I think it appropriate to comment on the other aspects of the tripartite test.

B. Irreparable harm

97 The Applicant contends that the irreparable harms he is at risk of suffering are suicide, further self-mutilation, irreversible psychological damage and loss of liberty. These harms are irreparable, he argues, as they cannot be remedied by damages — particularly the risk of suicide. There is a very real risk that he could die before the completion of his human rights complaint if he is not transferred to a treatment centre where he feels safe and can engage in meaningful interaction and in his cultural and spiritual practices. Should he remain in a maximum security institution until the final determination of his complaint, there is a realistic probability that he will suffer further psychological deterioration that could be permanent. Moreover, each day his liberty is restricted in administrative segregation is a day he suffers irreparable harm, as the time can never be made up.

98 Both Dr. Masood and Mr. Finlayson were of the opinion that Mr. Toutsaint's risk of suicide is low. Dr. Masood's evidence was that during his contacts with Mr. Toutsaint, he was never concerned about the risk of suicide to the point that he would have considered it to be of imminent danger. Had he done so, he testified, he would have certified the Applicant under the provisions of the *Mental Health Services Act*. It is worth noting here that a transfer to RPC does not require certification.

99 The Applicant's self-harming was chronic but not done with the intention of killing himself, in Dr. Masood's view. Mr. Finlayson supported that assessment and testified that when Mr. Toutsaint had cut his own neck, the experience was extremely traumatizing. He told Mr. Finlayson that he had no intention of dying and could recall the incident in detail. In contrast to the neck slashing, which occurred at a Quebec institution, Mr. Toutsaint's self-harming at Saskatchewan Penitentiary was in the form of repeatedly cutting and reopening the same area on his arm. Mr. Finlayson described this as "non-suicidal self-injury," to which Mr. Toutsaint resorted as a method to cope with frustration and other emotions. While that in itself was considered serious and required intervention, the medical staff was confident that it could be managed. The only practical means to do so in some instances, however, was placement in an observation cell or physical restraints.

100 The use of self-harming as a coping mechanism could also be construed as a form of manipulation, as Mr. Toutsaint's counsel acknowledged during argument. Mr. Finlayson discounted that possibility during his cross-examination. But there are indications in the record

that Mr. Toutsaint resorted to self-harming or threatening self-harm or suicide when he did not get medications he preferred, access to canteen supplies rather than regular meals or some other accommodation in his favour. In a diagnostic review with Dr. Masood on October 18, 2018, the Applicant attributed the self-harming behaviour to mood instability and using those behaviours to prove a point, get heard and to bargain and achieve his demands. That also is consistent with the Saskatchewan Court of Appeal's findings in 2015 based on expert medical opinion.

101 The law governing irreparable harm was discussed by Stratas JA in *Glooscap Heritage Society v. Minister of National Revenue*, 2012 FCA 255 (F.C.A.) at para 31:

> To establish irreparable harm, there must be evidence at a convincing level of particularity that demonstrates a real probability that unavoidable irreparable harm will result unless a stay is granted. Assumptions, speculations, hypotheticals and arguable assertions, unsupported by evidence carry no weight.
>
> [Citations omitted]

102 In *Colasimone*, above, the applicant had attempted to commit suicide on two occasions. Justice McDonald was not prepared to find a risk of irreparable harm pending the completion of the CHRC process. She concluded, at paragraph 21, that the institution had appropriate measures in place to protect the applicant from himself if he attempts self-harm.

103 In this matter, there is compelling evidence that the Applicant is likely to continue to harm himself. But it is not clear that this risk would be reduced if he were transferred to RPC as he was in the past. Moreover, given his history of institutional misbehaviour, it is equally likely that he would continue to act out at RPC and that the treatment team there would be compelled to place him in observation cells similar to those in which he spends much of his time at Saskatchewan Penitentiary.

104 In the circumstances, and despite the extensive evidence marshalled by his counsel, I am not prepared to find that the Applicant would suffer irreparable harm if the injunction sought was not granted.

C. Balance of convenience

105 The Applicant submits that the balance of convenience favours granting the injunction on the ground that his death by suicide before the final determination of his case, if the injunction were not granted, would indisputably be more inconvenient to the Applicant than transferring him would be to CSC, if the injunction were granted. Granting the injunction, the Applicant argues, would support the purposes of the CCRA, which include carrying out sentences in a safe and humane manner, and would meet CSC's obligation to provide every inmate with essential mental health care.

106 The Applicant contends that any additional cost to CSC of transferring him to RPC and providing him with treatment there until the final determination of his human rights complaint is trivial in comparison to his serious risk of death, psychological harm and further restriction of liberty. Counsel argued that CSC could simply build more capacity if the current number of available beds was insufficient.

107 The Respondent submits that the evidence of the present treatment team establishes that the risk of suicide and self-harm is better mitigated in the current environment than it could be at RPC, owing in part to the Applicant's own behavioural issues. This assessment, the Respondent argues, is based on comprehensive and day-to-day knowledge of, and interactions with, the Applicant, and it should be preferred to the Applicant's evidence.

108 In my view, the effects of ordering a transfer cannot be discounted as trivial. Among other things, the treatment relationship that the Applicant has with the mental health professionals at his present institution would be disrupted. Moreover, CSC would be required to relocate and house the Applicant at RPC, potentially displacing or preventing another inmate from having access to the treatment facilities. The transfer would not be temporary but prolonged, as it would take some time for the CHRC to determine whether to refer the complaint to an inquiry and, if referred, for the inquiry to be held and a decision rendered. The order requested is for the duration of that process.

109 The Court must also be mindful of the broader public interest, including the safety and security of CSC institutions and of all persons within those institutions. The Applicant has shown little inclination to modify his behaviour and to actively participate in a treatment regime.

110 In the circumstances, the balance of convenience rests with the Respondent.

D. Conclusion

111 As Dr. Bradford states in the introduction to his December 2017 report: "[t]he administration of a correctional facility providing mental health care is a difficult balancing act between delivering the appropriate mental health assessment and treatment services and providing a security umbrella." That balancing act is not facilitated in my view by the unnecessary intervention of the courts. The issues addressed by Dr. Bradford in his report are systemic in nature and require a systemic response.

112 The Applicant has failed to demonstrate that he has a strong *prima facie* case in the underlying complaint to the CHRC or that he would suffer irreparable harm if the injunction were not granted. Weighing the competing interests, the balance of convenience rests with the Respondent. The application is, therefore, dismissed. However, as indicated at the beginning of these reasons, I urge the correctional officials to consider whether the time has come to

reassess whether Mr. Toutsaint could benefit from another period within the RPC's therapeutic environment.

VII. Costs

113 No costs were requested.

JUDGMENT IN T-385-19

THIS COURT ORDERS that:

1. the application is dismissed, and
2. no costs are awarded.

Application dismissed.

2017 CAF 128, 2017 FCA 128
Federal Court of Appeal

Tsleil-Waututh Nation v. Canada (Attorney General)

2017 CarswellNat 2708, 2017 CarswellNat 6822, 2017 CAF 128,
2017 FCA 128, [2017] F.C.J. No. 601, 280 A.C.W.S. (3d) 228

TSLEIL-WAUTUTH NATION, CITY OF VANCOUVER, CITY OF BURNABY, THE SQUAMISH NATION (also known as the SQUAMISH INDIAN BAND), XÀLEK/ SEKYÚ SIÝ AM, CHIEF IAN CAMPBELL on his own behalf and on behalf of all members of the Squamish Nation, COLDWATER INDIAN BAND, CHIEF LEE SPAHAN in his capacity as Chief of the Coldwater Band on behalf of all members of the Coldwater Band, MUSQUEAM INDIAN BAND, AITCHELITZ, SKOWKALE, SHXWHÁ:Y VILLAGE, SOOWAHLIE, SQUIALA FIRST NATION, TZEACHTEN, YAKWEAKWIOOSE, SKWAH, KWAW-KWAW-APILT, CHIEF DAVID JIMMIE on his own behalf and on behalf of all members of the TS'ELXWÉYEQW TRIBE, UPPER NICOLA BAND, CHIEF RON IGNACE and CHIEF FRED SEYMOUR on their own behalf and on behalf of all other members of the STK'EMLUPSEMC TE SECWEPEMC of the SECWEPEMC NATION, RAINCOAST CONSERVATION FOUNDATION and LIVING OCEANS SOCIETY (Applicants) and ATTORNEY GENERAL OF CANADA, NATIONAL ENERGY BOARD and TRANS MOUNTAIN PIPELINE ULC (Respondents) and ATTORNEY GENERAL OF ALBERTA (Intervener)

David Stratas J.A.

Heard: June 16, 2017
Judgment: June 16, 2017
Docket: A-78-17, A-217-16, A-218-16, A-223-16, A-224-16, A-225-16, A-232-16, A-68-17, A-73-17, A-74-17, A-75-17, A-76-17, A-77-17, A-84-17, A-86-17

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Maureen Killoran, Q.C. (written), for Respondent, Trans Mountain Pipeline ULC

***David Stratas J.A.*:**

A. Introduction

1 There are two motions before the Court:

• *The June 2, 2017 motion of the applicant, the Tsleil-Waututh Nation*. It objects to the inadequate state of the evidentiary record placed before the Court in these consolidated applications for judicial review. Among other things, it seeks production of relevant documents from Canada.

• *The June 6, 2017 motion of the Attorney General of Canada.* The Attorney General seeks leave to add a supplementary affidavit to the evidentiary record. The supplementary affidavit corrects errors and omissions in an earlier affidavit.

B. The judicial review proceedings before the Court

2 Before the Court are fifteen applications for judicial review, now consolidated, in which, collectively, twenty-seven parties seek to quash certain administrative decisions approving the Trans Mountain Expansion Project. The decisions are a Report dated May 19, 2016 by the National Energy Board, purportedly acting under section 52 of the *National Energy Board Act*, R.S.C. 1985, c. N-7 and the Order in Council, PC 2016-1069, dated November 29, 2016 and made by the Governor in Council. It can be found in the *Canada Gazette*, Part I, vol. 150, no. 50, December 10, 2016.

3 In brief, the Project — the capital cost of which is $7.4 billion — adds new pipeline, in part through new rights of way, thereby expanding the existing 1,150-kilometre pipeline that runs roughly from Edmonton, Alberta to Burnaby, British Columbia. The Project also entails the construction of new works such as pump stations and tanks and the expansion of an existing marine

terminal. The immediate effect will be to increase capacity from 300,000 barrels per day to 890,000 barrels per day.

4 The applicants challenge the administrative approvals on a number of grounds. In support of their challenges, the applicants invoke administrative law and relevant statutory law. The Indigenous applicants also invoke section 35 of the *Constitution Act, 1982* and associated case law concerning the obligations owed to them, including Canada's duty to consult and, in some cases, to accommodate. The applicants also raise many issues concerning the Project's "environmental effects," as defined by section 5 of the *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, s. 52.

5 These consolidated applications have been progressing quickly. In the space of roughly three months, counsel have worked hard getting the matter ready for hearing, guided by 3 sets of detailed reasons, 8 orders and 14 directions (including the reasons and order on these motions). The hearing will take place in early October, 2017.

C. The motion of the Attorney General of Canada

6 In response to the applications for judicial review and several affidavits filed in support of the applications, the Attorney General filed an affidavit of Mr. Gardiner. The aim of his affidavit is to supply evidence concerning what has taken place concerning the duty to consult and accommodate Indigenous groups.

7 Mr. Gardiner has now sworn a supplementary affidavit to correct dates in his original affidavit and supply missing records. The errors and omissions are said to be inadvertent.

8 The Attorney General of Canada now moves for leave to file the supplementary affidavit. Trans Mountain consents.

9 The Indigenous applicants either take no position or do not oppose the Attorney General's motion. However, four Indigenous applicants noted that portions of the supplementary affidavit were irrelevant to the consolidated applications. The Attorney General has agreed to remove the irrelevant portions.

10 The authority for allowing a party to file an additional affidavit on judicial review is Rule 312 of the *Federal Courts Rules*, SOR/98-106. The Rule merely permits such a filing with leave of the Court. It does not set out any criteria for the granting of that leave.

11 However, case law under Rule 312 assists. Additional affidavits are permitted only where it is "in the interests of justice": *Atlantic Engraving Ltd. v. LaPointe Rosenstein*, 2002 FCA 503, 299 N.R. 244 (Fed. C.A.) at paras. 8-9. The case law shows that the Court must have regard to whether:

- the evidence will assist the court (in particular, its relevance and sufficient probative value);

- admitting the evidence will cause substantial or serious prejudice to the other side;

- the evidence was available when the party filed its affidavits or it could have been discovered with the exercise of due diligence.

(*Holy Alpha & Omega Church of Toronto v. Canada (Attorney General)*, 2009 FCA 101, 392 N.R. 248 (F.C.A.) at para. 2; *Forest Ethics Advocacy Assn. v. National Energy Board*, 2014 FCA 88 (F.C.A.) at para. 6; *House of Gwasslaam v. Canada (Minister of Fisheries & Oceans)*, 2009 FCA 25, 387 N.R. 179 (F.C.A.) at para 4.) I note that this Court has applied these same factors in deciding whether a reply affidavit should be permitted to be filed in an application for leave to appeal under Rule 355, a rule that, like Rule 369(3), does not explicitly allow reply affidavits: *Quarmby v. National Energy Board of Canada*, 2015 FCA 19 (F.C.A.).

12 On balance, these factors lie in favour of admitting Mr. Gardiner's supplementary affidavit into these consolidated applications.

13 The dominant consideration underlying my exercise of discretion is that a fuller and more accurate record will promote the proper determination of the applications on their merits, consistent with Rule 3 of the *Federal Courts Rules*. Rule 3 provides that the Rules "shall be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits."

14 The applicants have offered no evidence of prejudice and, in fact, do not oppose. Cross-examinations of Mr. Gardiner have not yet taken place. Corrections of errors and the supplementing of information likely would have taken place at those cross-examinations anyway. The Court will also be open to an extension of the period for cross-examinations should the applicants request it, as long as the consolidated applications are ready for hearing on the date set by the Court.

15 No doubt more complete and more accurate information was available earlier and ideally should have appeared in Mr. Gardiner's first affidavit. This motion could have been brought sooner but it was delayed by Mr. Gardiner's absence from Canada. The Attorney General has brought this motion just before cross-examinations were to start. The delay is unfortunate — especially since this Court's Order of March 9, 2017 expedites these proceedings, sets a strict schedule, and warns all parties that "the schedule will be amended only if absolutely necessary." But the Attorney General's motion does not materially affect the progress of these proceedings.

16 Thus, leave shall be granted to admit Mr. Gardiner's supplementary affidavit (with the irrelevant portions removed) into these proceedings.

D. The motion of the Tsleil-Waututh Nation

(1) Introduction

17 The Tsleil-Waututh Nation has moved for an order to address what it says are serious deficiencies in the evidentiary record before this Court. The Indigenous applicants support the Tsleil-Waututh Nation.

18 The Tsleil-Waututh Nation says that a request for disclosure under Rule 317 *Federal Courts Rules* has gone unfulfilled. It also says that the materials that the Governor in Council relied upon in making its decision to approve the Trans Mountain Extension Project are not all before the Court. And, more generally, it says that more evidence is in the possession of Canada and should be produced.

19 Mixed in with its motion are issues concerning section 39 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, the provision that allows Canada to assert that certain information considered by the Governor in Council, commonly called the Cabinet, cannot be disclosed. Canada issued a section 39 certificate here. As we shall see, it also did this in the recent successful challenge in this Court to the Northern Gateway Pipeline Project: *Gitxaala Nation v. R.*, 2016 FCA 187 (F.C.A.) ("*Gitxaala Nation (2016)*"). As a result, certain information the Governor in Council considered in making its decision will not be placed before the Court.

(2) The issues before the Court

20 The motion brought by the Tsleil-Waututh Nation raises several issues concerning the record before the reviewing court in judicial review proceedings:

- The sufficiency of Canada's certificate under section 39 of the *Canada Evidence Act* and the effect of the certificate, which is to prohibit any disclosure of the evidence considered by the Governor in Council to the parties and to the reviewing court.

- The importance and role of the record before the reviewing court.

- The function and limits of Rule 317 of the *Federal Courts Rules*. This is the Rule that provides for an applicant to obtain the evidence that was before the administrative decision-maker. Related to this, though not in issue here, is how the applicant places the evidence, once obtained, before the administrative decision-maker.

- The admissibility in the reviewing court of evidence other than that which was before the administrative decision-maker.

- Whether, notwithstanding the above, an applicant in a judicial review may compel production of evidence from the administrative decision-maker or from others and have it placed before the reviewing court. In what circumstances should the reviewing court make a production order?

• Where, in the end, there are gaps in the evidentiary record before the reviewing court, how, if at all, can the reviewing court go about its task of review?

The submissions before me address or touch on these issues — all of which bear to a varying degree on what the Tsleil-Waututh Nation seeks in this motion.

(3) Should this Court decide the motion now?

21 This motion has been brought on an interlocutory basis. As is the normally the case for interlocutory motions raised on judicial review, the Court must consider whether the motions should be decided now or whether they should be left for the hearing panel.

22 Before us are issues concerning the content and sufficiency of the evidentiary record before the reviewing court. On an application for judicial review, the reviewing court can handle these issues and often does.

23 In my view, there is enough legal certainty surrounding this motion and its outcome on the facts for it to be determined now. As well, resolving a number of points raised by the motion and settling the parties' situations in this litigation will allow the parties to proceed in an orderly way with the pre-hearing cross-examinations and the hearing itself. Indeed, I expect that these reasons may assist the parties in focusing the submissions that they will make to the panel hearing these consolidated applications. See generally *Collins v. R.*, 2014 FCA 240, 466 N.R. 127 (F.C.A.) at paras. 6-7; *Gitxaala Nation v. Canada*, 2015 FCA 27 (F.C.A.) at paras. 7 and 12; *Bernard v. Canada Revenue Agency*, 2015 FCA 263, 479 N.R. 189 (F.C.A.) at paras. 9-12 ("*Bernard (2015)*"); *McConnell v. Canada (Human Rights Commission)*, 2004 FC 817 (F.C.), aff'd 2005 FCA 389 (F.C.A.); *P.S. Part Source Inc. v. Canadian Tire Corp.*, 2001 FCA 8, 200 F.T.R. 94 (note) (Fed. C.A.).

(4) Has Canada complied with section 39 of the Canada Evidence Act?

24 Canada has issued a certificate under section 39 of the *Canada Evidence Act*. Section 39 "is Canada's response to the need to provide a mechanism for the responsible exercise of the power to claim Cabinet confidentiality in the context of judicial and quasi-judicial proceedings": *Babcock v. Canada (Attorney General)*, 2002 SCC 57, [2002] 3 S.C.R. 3 (S.C.C.) at para. 21.

25 Certificates are issued to protect Cabinet confidences and nothing more. A certificate cannot be issued to "thwart public inquiry" or "gain tactical advantage in litigation": *Babcock* at para. 25.

26 According to the Supreme Court in *Babcock* (at para. 27), a certificate is valid if it is done by the Clerk or a Minister of the Crown, it relates to the information set out in subsection 39(2), it is done *bona fide*, and it is aimed at preventing disclosure of information that has been and is confidential.

27 The role of this Court in reviewing a section 39 certificate is limited. We must refuse disclosure of the information covered by the certificate "without examination or hearing of the information": *Babcock* at para. 38. We only review to ensure that the decision to make the certificate and the certificate itself "flow from statutory authority clearly granted and properly exercised": *Babcock* at para. 39, citing *Roncarelli c. Duplessis*, [1959] S.C.R. 121, 16 D.L.R. (2d) 689 (S.C.C.).

28 In practice, this means the Court may consider whether the information for which immunity is claimed does not fall within subsection 39(2) or whether the Clerk or Minister has improperly exercised the discretion conferred by subsection 39(2): *Babcock* at para. 39. The Supreme Court amplified on this as follows (at para. 40):

> The court, person or body reviewing the issuance of a s. 39 certificate works under the difficulty of not being able to examine the challenged information. A challenge on the basis that the information is not a Cabinet confidence within s. 39 thus will be generally confined to reviewing the sufficiency of the list and evidence of disclosure. A challenge based on wrongful exercise of power is similarly confined to information on the face of the certificate and such external evidence as the challenger may be able to provide. Doubtless these limitations may have the practical effect of making it difficult to set aside a s. 39 certification.

29 The certificate covers the following documents:

> #1: Letter to the Honourable Scott Brison, President of the Treasury Board, in November 2016 from the Honourable Jim Carr, Minister of Natural Resources, regarding the scheduling of consideration of a proposed Order in Council concerning the Trans Mountain Expansion Project.
>
> This information is a record reflecting communications between ministers of the Crown concerning agenda of Council. The information is therefore within the meaning of paragraphs 39(2)(c) and 39(2)(d) respectively of the *Canada Evidence Act*.
>
> #2: Submission to the Governor in Council in November, 2016 in English and French from the Honourable Jim Carr, Minister of Natural Resources, regarding a proposed Order in Council concerning the Trans Mountain Expansion Project, including signed Ministerial recommendation, summary and accompanying materials.
>
> This information, including all its attachments in their entirety which are integral parts of the document, constitutes a memorandum the purpose of which is to present proposals or recommendations to Council. The information is therefore within the meaning of paragraphs 39(2)(a) of the *Canada Evidence Act*.

30 The Tsleil-Waututh Nation submits that Canada has not complied with section 39 of the *Canada Evidence Act*: the documents are not sufficiently described. It says that the certificate does not specify the exact dates on which Documents #1 and #2 on the certificate were delivered to their recipients. Further, it says that there is no itemized and specific description of the materials that are said to have accompanied Document #2.

31 *Babcock* guides this Court in cases where, as here, the sufficiency of the description of documents is contested (at para. 28):

> It may be useful to comment on the formal aspects of certification. As noted, the Clerk must determine two things: (1) that the information is a Cabinet confidence within s. 39; and (2) that it is desirable that confidentiality be retained taking into account the competing interests in disclosure and retaining confidentiality. What formal certification requirements flow from this? The second, discretionary element may be taken as satisfied by the act of certification. However, the first element of the Clerk's decision requires that her certificate bring the information within the ambit of the Act. This means that the Clerk or minister must provide a description of the information sufficient to establish on its face that the information is a Cabinet confidence and that it falls within the categories of s. 39(2) This follows from the principle that the Clerk or minister must exercise her statutory power properly in accordance with the statute. The kind of description required for claims of solicitor-client privilege under the civil rules of court will generally suffice. The date, title, author and recipient of the document containing the information should normally be disclosed. If confidentiality concerns prevent disclosure of any of these preliminary indicia of identification, then the onus falls on the government to establish this, should a challenge ensue. On the other hand, if the documents containing the information are properly identified, a person seeking production and the court must accept the Clerk's determination. The only argument that can be made is that, on the description, they do not fall within s. 39, or that the Clerk has otherwise exceeded the powers conferred upon her.
>
> [emphasis added]

32 In this passage, the Supreme Court says that the description should approximate "the kind of description required for claims of solicitor-client privilege under the civil rules of court." But it adds that "normally" the "date, title, author and recipient of the document" should be disclosed.

33 These two statements conflict somewhat. To assert solicitor-client privilege successfully over a document, it is not always necessary to disclose the date, title, author and recipient of the document. Sometimes the disclosure of this information — especially the title of the document — can reveal privileged information. In my view, based on a complete reading of Babcock, the dominant consideration that overrides this potential conflict is that the certificate must provide

enough information to allow a court to assess, from the face of the certificate, that the Clerk has listed documents that fit under section 39, and has not exceeded her or his statutory powers.

34 Document #2 meets this overall test. A submission from a particular Minister to the entire Governor in Council during the month of its meeting (November, 2016) with "signed Ministerial recommendation, summary and accompanying materials" — attachments that are said to be "integral parts of the document [i.e., the submission]" — qualifies for protection under paragraph 39(2)(*a*) ("a memorandum the purpose of which is to present proposals or recommendations to Council") and paragraph 39(2)(*d*) ("a record used for or reflecting communications or discussions between ministers of the Crown on matters relating to the making of government decisions or the formulation of government policy").

35 Would a description such as the one provided here be adequate for the assertion of a claim of solicitor-client privilege? In my view, yes.

36 Suppose a lawyer writes a memorandum dated "November 2016" to her team of lawyers concerning litigation their client is defending. The litigation concerns breach of contract. The memorandum is for the team to consider in advance of a meeting at which the team will decide upon a course of action for their client. In the memorandum, the lawyer set out her recommendations and attached certain documents so that her team could consider the matter properly. On this description alone, the entire bundle of documents would be privileged. See, for example, the discussion of privilege in *Slansky v. Canada (Attorney General)*, 2013 FCA 199, [2015] 1 F.C.R. 81 (F.C.A.).

37 This is not to say that individual documents that are attached are privileged for all time in all contexts. Suppose one of the documents considered by the lawyer team is a contract entered into between the client and the opposite party in litigation. In the bundle of documents supplied to the lawyer team, it is privileged. The opposite party has no right to see what the lawyer team considered in its meeting about the client's affairs. However, the contract itself will be admissible in the litigation.

38 The Tsleil-Waututh Nation complains that the exact dates and titles of documents are not disclosed and this triggers a consequence: under *Babcock* (at para. 28) when there is such non-disclosure, "the onus falls on the government to establish [the documents fall under section 39], should a challenge ensue." That may be so, but for the reasons set out above, that onus has been met, merely from the description provided on the face of the certificate: a description that has persuaded me that here there has not been any exceedance of statutory power.

39 Further, concerning the undisclosed exact dates and titles, I note that in the solicitor-client context — one that *Babcock* invites us to use — disclosure of such information can reveal privileged information. In the above example, if the lawyer team were to disclose to the other side the title, the authors and the date of the contract, the other side would know that the lawyer team had the contract before them. If the lawyer team were to disclose the title, the authors, the dates

and recipients of all the attachments, the other side might well be able to piece together what was placed before the lawyer team. Indeed, with that information, it might be able to take an informed guess regarding the subject matter of the issue the lawyer team was considering.

40 The description of Document #2 says that "all its attachments in their entirety...are integral parts of the document" which is described as a "[s]ubmission to the Governor in Council." This suggests that a more particularized description of the attachments, such as their exact dates, authors and titles — like the contract in the above example — would shed light on what the submission said and, thus, reveal a Cabinet confidence.

41 In its reply submissions, the Tsleil-Waututh Nation asks the Court to draw an inference that the Clerk has selectively withheld disclosure of the exact dates to gain a tactical litigation advantage. On the material before me, I see no basis for drawing that inference, nor do I see any evidence of bad faith. As I have explained, the more likely reason why exact dates and some other specifying information have not been provided is that parties may be able to deduce exactly what was placed before and discussed by the Governor in Council, undercutting the protective purpose of section 39 of the *Canada Evidence Act*.

42 In this case, I consider the description of Document #2 adequate. If more particularity in the descriptions were supplied, there would be a substantial likelihood that the information that lies at the heart of what section 39 exists to protect would be disclosed to some extent. Enough concerning Document #2 has been disclosed to convince me that the decision to make the certificate and the certificate itself, in the words of *Babcock*, "flow from statutory authority clearly granted and properly exercised."

43 Document #1 stands in a different position. It is a letter in November 2016 from one Minister to another "regarding the scheduling of consideration" of a proposed order in council concerning the Project. We know that the Order in Council was made on November 29, 2016. Is a discussion of the timing of a meeting, without more, a confidence falling under subsection 39(2)? The Attorney General offered no cases on this specific point, nor could I find any myself.

44 But the description does not stop with timing. It adds that the communication is "concerning [the] agenda" of the Council. This injects vagueness and inconsistency into the description. Does Document #1 go beyond the timing and shed light on substantive reasons that might affect the timing, such as the preparation of the submission to the Governor in Council? Does the mere fact there is a discussion of timing taking place reveal something that is covered within subsection 39(2)? Does the communication contain a discussion about the substance of the agenda, such as the topics that the Governor in Council should, could or will discuss? If the answer to any of those questions were "yes," I would have found that Document #1 falls under subsection 39(2) and there is no exceedance of statutory power. But I cannot tell.

45 In short, the description of Document #1 does not lead me to conclude that it falls under subsection 39(2).

46 As well, I am not satisfied that a document in November 2016 discussing only timing and nothing else — which is what the first part of the description of Document #1 suggests — falls within subsection 39(2). Going back to cases like *Babcock* and *Carey v. Ontario*, [1986] 2 S.C.R. 637, 35 D.L.R. (4th) 161 (S.C.C.), I am not persuaded on the evidence or the brief submissions presented by the Attorney General on this point that a document that merely asks, "Should we do this on November 22 or November 29?" without any argumentation, debate or reasons is a Cabinet confidence falling under the specific paragraphs of subsection 39(2).

47 Although the description of Document #1 does not persuade me that it falls under subsection 39(2), I would not grant the Tsleil-Waututh Nation any relief. If Document #1 concerns only timing and nothing more, it is irrelevant and, thus, not admissible in the consolidated applications. Nothing in these consolidated applications turns on discussions of the timing of Cabinet's consideration of the matter. The only thing that matters is the legality of the Order in Council, which we all know is dated November 29, 2016.

48 The Tsleil-Waututh Nation makes a wider argument against the certificate. It suggests that the certificate is defective because it "adversely impacts [the Tsleil-Waututh Nation's] ability to review the decision(s) being challenge[d]." In particular, the failure to identify the documents in question with specificity — and here I believe the Tsleil-Waututh Nation has the attachments to Document #2 front of mind — undercuts its ability to know whether certain matters raised by it as late as November 28, 2016, were considered by the Governor in Council when it approved the Project.

49 I reject this submission. The Supreme Court in *Babcock*, above, makes it clear that the impact that a section 39 certificate might have on litigation is not a relevant factor for assessing the validity or sufficiency of a certificate.

50 Putting this aside for a moment, the Tsleil-Waututh Nation's concern about immunization is a significant one and in no way do I minimize it. I wish to discuss this for a moment, as it will be relevant later in my reasons to the Tsleil-Waututh Nation's request for a production order against Canada and it may benefit the parties as they prepare for the hearing of the consolidated applications.

51 As will be discussed below, under our law the exercise of public powers is not to be immunized from meaningful review. But I do not share the Tsleil-Waututh Nation's concern that this certificate necessarily has the effect of immunizing from review what the Governor in Council has done.

52 In a sense, this sort of effect caused by a certificate is nothing new. Administrative tribunals can rely on deliberative secrecy and, thus, can withhold key information from an applicant for judicial review: see *Québec (Commission des affaires sociales) c. Tremblay*, [1992] 1 S.C.R. 952 (S.C.C.) at page 965. Legal professional privilege can also apply even on key issues in the judicial review: *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31, [2004] 1 S.C.R. 809 (S.C.C.). In these cases, the reviews of the administrative decision-makers still went ahead. The withholding of just some materials from the reviewing court does not, by itself, necessarily mean that the administrative decision-maker is being immunized from review.

53 And while the impact of a section 39 certificate on litigation is not a relevant consideration in assessing the validity of the certificate, the issuance of a section 39 certificate may indeed impact the litigation to a challenger's benefit. The issuance of a certificate is no small thing. In *Gitxaala Nation (2016)*, this Court registered its concern about the issuance of a certificate as follows (at para. 319):

> The balance of the record that could shed light on this, *i.e.*, the staff recommendations flowing from the Phase IV consultation process, the ministerial recommendation to the Governor in Council and the information before the Governor in Council when it made his decision, are all the subject of Canada's claim to Cabinet confidence under section 39 of the *Canada Evidence Act* and thus do not form part of the record. Canada was not willing to provide even a general summary of the sorts of recommendations and information provided to the Governor in Council.

54 Can this sort of concern lead to an adverse finding? Arguably yes. In *RJR-Macdonald Inc. c. Canada (Procureur général)*, [1995] 3 S.C.R. 199 (S.C.C.), a majority of the Supreme Court found that a tobacco advertising ban was contrary to the Charter and was of no force or effect. In finding that the ban was not justified under section 1 of the Charter, McLachlin J. (as she then was), writing in separate reasons for three Justices, appeared to take into account the issuance of the certificate (at paras. 165-166):

> These considerations suggest that the advertising ban imposed by s. 4 of the Act may be more intrusive of freedom of expression than is necessary to accomplish its goals. Indeed, Health and Welfare proposed less-intrusive regulation instead of a complete prohibition on advertising. Why then, did the government adopt such a broad ban? The record provides no answer to this question. The government presented no evidence in defence of the total ban, no evidence comparing its effects to less invasive bans.
>
> This omission is all the more glaring in view of the fact that the government carried out at least one study of alternatives to a total ban on advertising before enacting the total ban. The government has deprived the courts of the results of that study. The Attorney General of Canada refused to disclose this document and approximately 500 others demanded at the trial

> by invoking s. 39 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, thereby circumventing an application by the tobacco companies for disclosure since the courts lack authority to review the documents for which privilege is claimed under s. 39. References to the study were blanked out of such documents as were produced: Reasons at Trial, at p. 516. In the face of this behaviour, one is hard-pressed not to infer that the results of the studies must undercut the government's claim that a less invasive ban would not have produced an equally salutary result.

55 In its submissions, the Attorney General suggests that the section 39 certificate does not have the drastic effect the Tsleil-Waututh Nation suggests. Ultimately, this will be for the hearing panel of the Court to assess, but there are certain matters raised by the Attorney General or consequent to what she has raised that are worth mentioning.

56 First, in this case there is an evidentiary record, partly described below. It is growing. It seems to be at least equivalent to the one placed before this Court in *Gitxaala Nation (2016)*. And in that case this Court did not find that the issuance of a certificate improperly immunized the Governor in Council's approval of the Northern Gateway Project from review. In fact, in *Gitxaala Nation (2016)*, this Court was able to meaningfully review the Order in Council. It quashed it on account of inadequate consultation with Indigenous groups.

57 Second, the Attorney General submits that the issue whether the Crown met its duty to consult Indigenous applicants "is determined on the basis of the evidence filed by the parties in relation to what actually took place during the consultation process" rather than by what the Governor in Council may have considered. This is seen from a Federal Court case where a section 39 certificate had been filed and the issue before the Court was whether the duty to consult had been fulfilled:

> The record does not reveal a lack of transparency; on the contrary, it shows that the Crown repeatedly shared information, replied to the [First Nation's] correspondence, met the [First Nation's] representatives, and made policy decisions in light of the [First Nation's] concerns. The applicant was not entitled to disclosure of the Minister's advice to Cabinet: as they acknowledge, the Minister properly asserted privilege (*Canada Evidence Act*, R.S.C. 1985, c. C-5, s. 39(2)). Furthermore, the duty to consult is determined by the actions that Canada took during the consultation process, not by what the Governor in Council may have considered.

(*Athabasca Chipewyan First Nation v. Canada (Minister of the Environment)*, 2014 FC 1185 (F.C.) [hereinafter Adam] at para. 79.)

58 As well, in the same vein, this Court stated in *Gitxaala Nation (2016)* that the duty to consult arises in cases like this in two ways. Before the Governor in Council, it can be a basis for finding unreasonableness on the basis of the evidence before it. But, notwithstanding whatever was before the Governor in Council, if the duty to consult owed by the Crown has not been fulfilled, the approval cannot stand: *Gitxaala Nation (2016)* at para. 159; *semble*, *Adam*, above.

59 No doubt the parties will make submissions on these and related matters at the hearing of these consolidated applications.

60 This suffices to determine the portion of the Tsleil-Waututh Nation's motion dealing with section 39 of the *Canada Evidence Act*. I turn now to a consideration of the Rule 317 issue the Tsleil-Waututh Nation has raised in its motion and its request for an order requiring Canada to produce more material.

61 To set the stage for this, it is necessary to offer some background legal discussion regarding the record before reviewing courts.

62 First, I shall examine the role of the evidentiary record before the reviewing court in judicial reviews and the principles that govern the court's interpretation of relevant statutory provisions and procedural rules. I shall also review the basic principles of admissibility in judicial review proceedings.

63 Then I shall descend into more practical and mechanical considerations concerning issues relating to the record before the reviewing court: how applicants can obtain evidence relevant to an application for judicial review and how all of the evidence is to be placed before the reviewing court. These two concepts, along with issues relating to the admissibility of evidence, are frequently confused. They must be kept separate.

64 I do not apologize for starting at such a level of generality. As we journey through areas like this, we can get lost in a dense forest of case law, with multiple issues flying about and various procedural rules seeming like predators poised to strike. But if we step back and view things from above, we can see the whole forest and find our way.

65 Here, the whole forest is an appreciation of the important role played by the record in judicial reviews, certain fundamental principles concerning judicial reviews, legislative provisions that bear on the problem, and how courts go about their task of review. With that appreciation in mind, we can better understand different things in the forest and their relationship to each other.

66 Only by doing this can Rule 317 — a rule about obtaining evidence from the administrative decision-maker — be placed in its proper context and understood. Only then can the Tsleil-Waututh Nation's complaint about non-compliance of Rule 317 be considered. And only then can its broader request for an order requiring Canada to produce further material be addressed.

(5) The evidentiary record before reviewing courts: some background

(a) The role of the evidentiary record before reviewing courts and relevant principles governing it

67 Subject to constitutional considerations, we must follow the statutory provisions and rules that govern and define the content of the evidentiary record before the reviewing court. Properly interpreted in accordance with their text, context and purpose, they sometimes give reviewing courts some ambit for discretion. Thus, we must have front of mind the role that the evidentiary record plays in reviewing courts. It lies at the heart of meaningful judicial review. Its importance cannot be understated.

68 First is the role the evidentiary record plays in the reviewing court's discernment of the reasons of the administrative decision-maker. Where the reasons of the administrative decision-maker are sparse or even non-existent on a key point, they can sometimes be deduced from comparing the result reached with the evidentiary record: see, *e.g.*, *P.S.A.C. v. Canada Post Corp.*, 2011 SCC 57, [2011] 3 S.C.R. 572 (S.C.C.).

69 Even where the reasons are more fulsome, the record the administrative decision-maker had in front of them can play a key role in construing and interpreting its reasons. See generally *N.L.N.U. v. Newfoundland & Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708 (S.C.C.) at para. 15; *Canadian National Railway v. Emerson Milling Inc.*, 2017 FCA 86 (F.C.A.) at para. 39.

70 The reasons of the administrative decision-maker — and, thus, the evidentiary record intimately associated with them — are no small thing. They are the starting point and the focus for the reviewing court's judicial review analysis: *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.) at paras. 48 and 56; *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171 (F.C.A.) at para. 26.

71 And, quite apart from the foregoing, the evidentiary record before the administrative decision-maker is indispensable to the reviewing court's fulfilment of its responsibility to engage in meaningful review. In most judicial reviews, the reviewing court must evaluate the substantive correctness or acceptability and defensibility of the administrative decision. It is alert to errors or defects that might render the decision unreasonable. Often error or unacceptability and indefensibility is found by comparing the reasons with the result reached in light of the legislative scheme and — most importantly for present purposes — the evidentiary record before the administrative decision-maker.

72 For example, a key evidentiary finding made without anything in the evidentiary record in circumstances where evidence was necessary can render an administrative decision unreasonable: *Canada (Minister of Transport, Infrastructure and Communities) v. Farwaha*, 2014 FCA 56, 455 N.R. 157 (F.C.A.) at para. 100; *Delios*, above at para. 27. So can a finding that is completely at odds with the evidentiary record. In the case of reasonableness review, where a key part of the record — for example, any evidence on an essential element — is missing and, as a result, the reviewing court cannot assess whether the decision is within the range of acceptability and defensibility and, thus, reasonable, sometimes the reviewing court has no choice but to quash the administrative decision:

see, *e.g.*, *Leahy v. Canada (Minister of Citizenship and Immigration)*, 2012 FCA 227, [2014] 1 F.C.R. 766 (F.C.A.) at para. 137; *Kabul Farms Inc. v. R.*, 2016 FCA 143 (F.C.A.) at paras. 31-39.

73 Related to this is the role of the evidentiary record in preventing administrative decision-makers and their decision-maker from being immunized from review.

74 Where the record placed before the reviewing court is deficient, certain grounds for setting aside an administrative decision can be foreclosed. To take an extreme example, if the evidentiary record of the administrative decision-maker is not before the reviewing court, how can a reviewing court evaluate whether the administrative decision-maker's decision was based on any evidence at all?

75 This point has been expressed in different ways. The Saskatchewan Court of Appeal put it this way:

> 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.

(*Hartwig v. Saskatchewan (Commissioner of Inquiry)*, 2007 SKCA 74, 284 D.L.R. (4th) 268 (Sask. C.A.) at para. 24.)

76 An academic commentator expressed it this way:

> Without knowing the reasoning behind a decision, it is impossible for a judge to determine if it is founded upon arbitrary reasoning. Thus, in order for a judge to determine whether a decision maker acted lawfully, the decision maker must provide reasons adequate to allow a reviewing judge to determine why the decision maker made the decision they did and whether it followed explicit statutory requirements [or the basis for the decision must be apparent in the record]. If the judge cannot ascertain how the decision was made [even in light of the evidentiary record], then the court cannot fulfill this role and decisions made in violation of the rule of law may be sanctioned by the court.

(Paul A. Warchuk, "The Role of Administrative Reasons in Judicial Review: Adequacy and Reasonableness" (2016), 29 C.J.A.L.P. 87 at p. 113.)

77 In support of its motion, the Tsleil-Waututh Nation forcefully and repeatedly makes the point about immunization. It cites the dissenting reasons of this Court in *Slansky*, above, correctly noting that the majority did not disagree with the propositions put on this point. *Slansky* put the point this way (at para. 276):

> 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 tribunal. In

other words, an inadequate evidentiary record before the reviewing court can immunize the tribunal from review on certain grounds.

78 In judicial review, the reviewing courts are in the business of enforcing the rule of law, one aspect of which is "executive accountability to legal authority" and protecting "individuals from arbitrary [executive] action": *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, 161 D.L.R. (4th) 385 (S.C.C.) at paragraph 70. Put another way, all holders of public power are to be accountable for their exercises of power, something that rests at the heart of our democratic governance and the rule of law: *Slansky* at paras. 313-315. Subject to any concerns about justiciability, when a judicial review of executive action is brought the courts are institutionally and practically capable of assessing whether or not the executive has acted reasonably, *i.e.*, within a range of acceptability and defensibility. That assessment is the proper, constitutionally guaranteed role of the courts within the constitutional separation of powers: *Crevier v. Quebec (Attorney General)*, [1981] 2 S.C.R. 220, 127 D.L.R. (3d) 1 (S.C.C.); *Dunsmuir*, above; *Hupacasath First Nation v. Canada (Minister of Foreign Affairs)*, 2015 FCA 4, 379 D.L.R. (4th) 737 (F.C.A.) at para. 66; *Habtenkiel v. Canada (Minister of Citizenship and Immigration)*, 2014 FCA 180 (F.C.A.) at para. 38; *Paradis Honey Ltd. v. Canada (Minister of Agriculture and Agri-Food)*, 2015 FCA 89, 382 D.L.R. (4th) 720 (F.C.A.) at para. 140. But, at least in the situation where the evidentiary record of the administrative decision-maker is not before the reviewing court in any way whatsoever — *i.e.*, there is not even a summary or hint of what was before the administrative decision-maker — or the record is completely lacking on an essential element, concerns about immunization of administrative decision-making can come to the fore.

79 In this Court, administrative decision-makers whose decisions cannot be fairly evaluated because of a complete lack of anything in the record on an essential element — situations where in effect the administrative decision-maker says on an essential element, "Trust us, we got it right" — have seen their decisions quashed: see, *e.g.*, *Leahy* above at para. 137; *Kabul Farms Inc.* at paras. 31-39; *Public Performance of Musical Works 2003-2007 & Public Performance of Sound Recordings 2003-2007, Re*, 2006 FCA 337, 54 C.P.R. (4th) 15 (F.C.A.) at para. 17. The test would seem to be that if a particular evidentiary record — even if bolstered by permissible inferences and any evidentiary presumptions — disables the reviewing court from assessing reasonableness under an acceptable methodology (such as that contemplated in cases like *Delios*, above and *Canada (Attorney General) v. Boogaard*, 2015 FCA 150 (F.C.A.)), the decision must be quashed.

80 There are a number of other principles that can affect the reviewing court's consideration of the adequacy of the evidentiary record before it.

81 In an ideal world, in complicated cases like this, a judicial review should not go ahead until every available crumb of evidence has been placed before the reviewing court. But this is simply not possible.

82 Subsection 18.4(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 requires judicial reviews to be heard and determined "without delay and in a summary way." This is a Parliamentary commandment writ in law. Under the hierarchy of law, a statutory provision takes precedence over any subordinate Rules found in the *Federal Courts Rules* and the case law of this Court: Stratas, David, *The Canadian Law of Judicial Review: Some Doctrine and Cases*, at pp. 10-15 (April 20, 2017 version) (online: https://ssrn.com/abstract=2924049). The rationale for promptness was discussed by this Court in *Larkman v. Canada (Department of Indian Affairs and Northern Development)*, 2012 FCA 204, 433 N.R. 184 (F.C.A.) at paras. 86-88 (albeit in the context of the short limitation period in subsection 18.1(2)).

83 Further, Rule 3 of the *Federal Courts Rules* provides that the Rules "shall be interpreted and applied so as to secure the just, most expeditious and least expensive determination of every proceeding on its merits." The concepts in Rule 3 have been underscored by the Supreme Court's recent call for courts and litigants to embrace a new litigation culture: *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87 (S.C.C.).

84 There are also certain general values and principles in administrative law — the rule of law, good administration, democracy and the separation of powers — that on occasion deserve voice in decisions concerning the content of the record before the reviewing court: see generally Paul Daly, "Administrative Law: A Values-Based Approach" in John Bell, Mark Elliott, Jason Varuhas and Philip Murray eds., *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart, Oxford, 2015).

85 Finally, and perhaps most significantly, reviewing courts are not trial courts. Trial courts build the evidentiary record for the first time, making findings of fact. They decide the merits. But reviewing courts are different. Reviewing courts review the decisions of administrative decision-makers. Those administrative decision-makers — not the reviewing courts — have been empowered by Parliament to determine the merits of matters. The administrative decision-makers are the merits-deciders and the reviewing courts are restricted to reviewing those merits-based decisions. See generally, *e.g.*, *Assn. of Universities & Colleges of Canada v. Canadian Copyright Licensing Agency*, 2012 FCA 22 (F.C.A.) at paras. 14-19; *Bernard (2015)*, above at paras. 22-28. This consideration alone significantly affects the law of admissibility of evidence in the reviewing court, a topic I turn to now.

(b) The general rule of admissibility in judicial review courts: the record before the administrative decision-maker is the record on review

86 As a general rule, only the evidentiary record that was before the administrative decision-maker is admissible on judicial review: *Assn. of Universities & Colleges of Canada v. Canadian Copyright Licensing Agency*, 2012 FCA 22 (F.C.A.).

87 The main principle behind this general rule is the one just discussed: the distinction between the administrative decision-makers as the bodies designated by Parliament as the merits-deciders and the Federal Courts as merely reviewing courts, nothing more.

(c) How do applicants for judicial review obtain the record before the administrative decision-maker?

88 Usually applicants for judicial review participated fully before the administrative decision-maker whose decision is under review. Sometimes they already will have the record in their possession.

89 Sometimes, however, applicants for judicial review do not have the full record or are not certain that they do. This is where Rule 317 comes in. Under Rule 317, applicants can request the administrative decision-maker for "material relevant to an application that is in the possession of [the decision-maker]...and not in the possession of the [applicants] by serving on [the decision-maker] and filing a written request, identifying the material requested."

90 Under Rule 318, the administrative decision-maker can object to production of the material. Usually the objection is based on relevance, deliberative privilege, solicitor-client privilege or public interest privilege. The objection is litigated in the manner specified by cases such as *Lukács v. Canadian Transportation Agency*, 2016 FCA 103 (F.C.A.) and *Bernard v. PSAC*, 2017 FCA 35 (F.C.A.).

91 Note that Rule 317 is only a mechanism by which applicants can obtain the record before the administrative decision-maker. It is not a means by which the record is placed before the reviewing court.

(d) How does the record before the administrative decision-maker get before the reviewing court?

92 In the Federal Courts system, applicants can place the record of the administrative decision-maker — whether obtained through their own participation before the administrative decision-maker or obtained under Rules 317-318 — before the reviewing court by offering an affidavit in support of their application for judicial review: Rule 306. The record of the administrative decision-maker is appended as one or more exhibits.

93 Insofar as placing the record before the administrative decision-maker before the reviewing court is concerned, respondents who consider the affidavit of the applicant to be incomplete or inaccurate may offer their own affidavit material: Rule 307.

94 Thereafter, cross-examinations on affidavits can take place: Rule 308.

95 The parties place their affidavits, the transcripts of the cross-examinations and the exhibits from any cross-examinations into records that they file with the Court: Rules 309 and 310.

96 The entire process of placing the record before the administrative decision-maker before the reviewing court is set out in more detail in *Canadian Copyright Licensing Agency v. Alberta*, 2015 FCA 268, [2016] 3 F.C.R. 19 (F.C.A.).

(e) Exceptions to the admissibility of evidence on judicial review

97 There are exceptions to the general rule that only the evidentiary record before the administrative decision-maker is admissible before the reviewing court. These do not offend the distinction between the administrative decision-maker as the merits-decider and the reviewing court whose role is restricted to review. See, *e.g.*, *Association of Universities*, above; *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 116 (F.C.A.); *Bernard (2015)*, above; *Delios*, above at paras. 41-42.

98 These cases show that there are three recognized exceptions and the list of exceptions is not closed:

- Sometimes this Court will receive an affidavit that provides general background in circumstances where that information might assist it in understanding the issues relevant to the judicial review.

- Sometimes an affidavit is necessary to bring to the attention of the judicial review court procedural defects that cannot be found in the evidentiary record of the administrative decision-maker, so that the judicial review court can engage in meaningful review for procedural unfairness.

- Sometimes an affidavit is received on judicial review in order to highlight the complete absence of evidence before the administrative decision-maker when it made a particular finding.

The last two are really just one exception: where a tenable ground of review is raised that can only be established by evidence outside of the administrative decision-maker's record, the evidence is admitted.

99 Suppose, for example, that an administrative decision-maker received a payment from a party after a hearing. In the reviewing court, the applicant alleges, with some credence, that this payment was a corrupt bribe. The bribe can only be proven by adducing post-hearing evidence, *i.e.*, evidence that was not before the administrative decision-maker. Or suppose that in the reviewing court the applicant alleges an improper purpose on the part of the administrative decision-maker in circumstances where the allegation has some basis and is not just a bare allegation made to engage

in a fishing expedition. Evidence of that improper purpose is often not in the record before the administrative decision-maker and must be proven by collateral evidence. This is another example where reviewing courts will admit evidence that was not before the administrative decision-maker. See, *e.g.*, *Roncarelli c. Duplessis*, above; *Multi-Malls Inc. v. Ontario (Minister of Transportation & Communications)* (1976), 14 O.R. (2d) 49, 73 D.L.R. (3d) 18 (Ont. C.A.); *Doctors Hospital v. Ontario (Minister of Health)* (1976), 12 O.R. (2d) 164, 68 D.L.R. (3d) 220 (Ont. Div. Ct.).

100 For the purposes of these reasons, I shall refer to this sort of evidence — evidence admitted by way of exception to the general rule of admissibility — as "exceptional evidence."

(f) How does one obtain the exceptional evidence and place it before the Court?

101 Exceptional evidence may be available from witnesses. The standard way and the way that allows judicial reviews to be heard and determined "without delay and in a summary way" (as required by subsection 18.4(1) of the *Federal Courts Act* and Rule 3 of the *Federal Courts Rules*) is through an affidavit; because of subsection 18.4(1), this will always be the preferred way. The affidavits can be subject to cross-examination and are presented to the Court by including them in the records that are filed with the Court.

102 Another way to gather exceptional evidence is to cross-examine a deponent in the course of the judicial review proceeding. Undertakings can be given that, in some circumstances, where appropriate, exceptional evidence will have to be produced.

103 In some cases, witnesses may be less than forthcoming. In rare cases, witnesses may be subpoenaed to produce a document or other material on an application for judicial review: Rule 41(1) and Rule 41(4)(*c*).The subpoena power in Rule 41 applies to "proceedings" and Rule 300 shows that applications are "proceedings." This is allowed with leave of the Court where:

- the evidence is necessary;
- there is no other way of obtaining the evidence;
- it is clear that an applicant is not engaged in a fishing expedition but, instead, has raised a credible ground for review beyond the applicant's say-so; and
- a witness is likely to have relevant evidence on the matter.

104 As well, a judicial review may be treated and proceeded with as an action, thereby allowing for discovery and live witnesses: sections 18.4(2) and 28(2) of the *Federal Courts Act*. However, the situations where this is allowed are most rare: see, *e.g.*, the requirements set out in *Assoc. des Crabiers Acadiens Inc. c. Canada (Procureur général)*, 2009 FCA 357, 402 N.R. 123 (F.C.A.).

105 Finally, rather than taking the foregoing steps to obtain exceptional evidence, the parties can agree to facts and submit them to the reviewing court. However, caution must be exercised: the reviewing court must always respect the fact that the administrative decision-maker has been designated under the administrative regime as the exclusive decider of the merits.

(g) The limits of a request under Rule 317

106 Rule 317 plays a limited role. As mentioned above, it allows applicants to obtain from the administrative decision-maker "material relevant to an application that is in the possession of [the decision-maker]...and not in [their] possession."

107 Rule 317 means what it says. The only material accessible under Rule 317 is that which is "relevant to an application" and is "in the possession" of the administrative decision-maker, not others. Rule 318(1) shows us that the material under Rule 317 must come from the administrative decision-maker, not others.

108 The material must be actually relevant. Material that "could be relevant in the hopes of later establishing relevance" does not fall within Rule 317: *Access Information Agency Inc. c. Canada (Procureur général)*, 2007 FCA 224, 66 Admin. L.R. (4th) 83 (F.C.A.) at para. 21. The principles canvassed above — particularly those in section 18.4(1) of the *Federal Courts Act* and Rule 3 of the *Federal Courts Rules* relating to promptness and the orderly progression of judicial reviews — discourage fishing expeditions.

109 Relevance is defined by the grounds of review in the notice of application:

> A document is relevant to an application for judicial review if it may affect the decision that the Court will make on the application. As the decision of the Court will deal only with the grounds of review invoked by the respondent, the relevance of the documents requested must necessarily be determined in relation to the grounds of review set forth in the originating notice of motion and the affidavit filed by the respondent.

(*Pathak v. Canada (Human Rights Commission)*, [1995] 2 F.C. 455 (Fed. C.A.) at page 460.)

110 The grounds of review are to be read in order to obtain "a realistic appreciation" of their "essential character" by reading them holistically and practically without fastening onto matters of form: *JP Morgan Asset Management (Canada) Inc. v. Minister of National Revenue*, 2013 FCA 250, [2014] 2 F.C.R. 557 (F.C.A.) at paras. 50 and 102; *Canadian National Railway v. Emerson Milling Inc.*, 2017 FCA 79 (F.C.A.) at para. 29.

111 It is evident from the text of Rule 317 that it cannot be used to obtain material that is in the possession of others.

112 It is often said in the case law that Rule 317 is restricted to the actual material the administrative decision-maker had before it when making the decision and nothing more: *Pathak*, above; *1185740 Ontario Ltd. v. Minister of National Revenue*, [1998] 3 C.T.C. 215, 150 F.T.R. 60 (Fed. T.D.).

113 This standard has been repeatedly applied by this Court. In *Quebec Ports Terminals Inc. v. Canada (Labour Relations Board)* (1993), 164 N.R. 60 (Fed. C.A.) at page 66, this Court stated:

> The obligation which is imposed on the tribunal by rules 1612 and 1613 [now Rules 317 and 318] is "without delay" to "provide" or "forward" a "certified copy" of "material" which is "in its possession" and which is "specified". In my view, this presumes that it is material which already exists at the time when the request to obtain the material is made, which the tribunal used in its hearing, deliberations or decision, which is part of its record and of which it is in a [position] to provide a certified copy.

114 In cases where some other government entity has information and supplied some of it to the administrative decision-maker, again only the information that was actually before the administrative decision-maker is obtainable under Rule 317:

> This surely has reference to "material" that was before the federal board, commission or other tribunal whose decision is the subject of an application for judicial review pursuant to section 18.1 of the [*Federal Courts Act*] and not to the contents of a Minister's file where no decision of his [or her] is the subject of the judicial review.

(*Eli Lilly & Co. v. Nu-Pharm Inc.* (1996), [1997] 1 F.C. 3 (Fed. C.A.) at pages 28-29.) To the same effect, see *Canadian Arctic Resources Committee Inc. v. Diavik Diamond Mines Inc.* (2000), 35 C.E.L.R. (N.S.) 1, 183 F.T.R. 267 (Fed. T.D.) at para. 27:

> To engage in such a review of all of the documents that were before the Responsible Authorities would in effect be a challenge to the comprehensiveness of the Comprehensive Study Report and indeed of the underlying science relied upon by the Responsible Authorities and of their expertise. This goes far beyond the judicial review of a Minister's decision which was based upon a report arising out of many months investigation by the Responsible Authorities.

115 Rule 317 does not in any way "serve the same purpose as documentary discovery in an action": *Access Information Agency Inc. c. Canada (Procureur général)*, 2007 FCA 224, 66 Admin. L.R. (4th) 83 (F.C.A.) at para. 17; *Atlantic Prudence Fund Corp. v. Canada (Minister of Citizenship & Immigration)*, [2000] F.C.J. No. 1156 (Fed. T.D.) at para. 11.

116 As a result of the foregoing, it is hard to see Rule 317 being used to obtain exceptional evidence. The only circumstance I can imagine is where the exceptional evidence happens to be in the possession of the administrative decision-maker — quite rare, I suspect.

117 The Tsleil-Waututh Nation submits that materials other than those before the administrative decision-maker may be considered relevant and producible under Rule 317 where it is alleged the decision-maker breached procedural fairness. Perhaps underneath this is a confusion of concepts of admissibility — exceptional evidence can sometimes be adduced to demonstrate procedural unfairness — with the substantive requirements of Rule 317. These must be kept apart. Not everything that is admissible can be obtained under Rule 317. For one thing, this submission overlooks the point, developed above, that the materials must be in the possession of the administrative decision-maker.

118 In support of this submission, the Tsleil-Waututh Nation cites the Federal Court decisions in *Canadian National Railway v. Louis Dreyfus Commodities Ltd.*, 2016 FC 101 (F.C.) and *Gagliano v. Gomery*, 2006 FC 720 (F.C.). In *Dreyfus*, the Federal Court suggests that materials that should have been before the administrative decision-maker are producible under Rule 317. In support of this, the Federal Court cites *Access Information Agency*, above and *Gagliano*, above. *Access Information Agency* nowhere says that materials that should have been before the administrative decision-maker are producible under Rule 317. And *Gagliano* is best construed as the rare case where exceptional evidence was admissible and happened to be in the possession of the administrative decision-maker.

119 Both *Dreyfus* and this particular submission of the Tsleil-Waututh Nation underscore the need to keep analytically separate different concepts such as obtaining evidence, placing the evidence before the Court, the admissibility of evidence, the requirements for particular tools (*e.g.*, Rule 317), and how courts go about reasonableness review.

(6) Analysis of the Rule 317 request in this case

(a) Procedures followed concerning Rule 317 in this case

120 The Tsleil-Waututh Nation placed its Rule 317 request in its application for judicial review.

121 Under Rule 318(1), the Attorney General was to have responded to the request within twenty days.

122 The Attorney General did not do so. And the Tsleil-Waututh Nation did not register a protest against the Attorney General's inaction for approximately two months.

123 Neither can be faulted. In its Order dated March 9, 2017, this Court granted leave to apply for judicial review in nine cases, consolidated these nine applications with seven others, and then

comprehensively scheduled the consolidated applications. The March 9, 2017 Order contemplated that the Attorney General would produce the record of the Governor in Council.

(b) The Rule 317 request in this case

124 I have reviewed the grounds of review in the application for judicial review of the Tsleil-Waututh Nation.

125 I am broadly summarizing, but in terms of the issues relating to the duty to consult and accommodate, the Tsleil-Waututh Nation is arguing that:

- the Governor in Council's decision cannot stand on the state of the evidence before it; and
- as the duty to consult and accommodate has not been fulfilled at the present time, the Governor in Council's decision must be quashed.

126 This mirrors the grounds that were considered in *Gitxaala Nation (2016)*, above. In that case, this Court noted that the duty to consult arose in two potential ways. If the Governor in Council incorrectly or unreasonably held that the Crown's obligations had been fulfilled at the time of its decision, its Order in Council is liable to be quashed. But, more generally, "if that duty [owed by the Crown] were not fulfilled, the Order in Council cannot stand": *Gitxaala Nation (2016)* at para. 159.

127 In its notice of application in file A-78-17, the Tsleil-Waututh Nation requested "any material that was before the [Governor in Council] or that it considered or relied on in making the Order."

128 To assess whether Rule 317 has been satisfied, it is first necessary to examine what has been produced concerning the current state of the record on these issues. Has the Tsleil-Waututh Nation persuaded me that — excluding the material covered by the section 39 certificate — there is still evidence in the hands of the administrative decision-maker, here the Governor in Council, that was before it and that is relevant to the grounds raised by the Tsleil-Waututh Nation?

(c) The current state of the record: has the Rule 317 request been satisfied?

129 As far as consultation is concerned, the Order in Council that approved the Project and that is attacked in these proceedings provides as follows:

> Whereas, by Order in Council P.C. 2016-435 of June 3, 2016, the Governor in Council, pursuant to subsection 54(3) of the *National Energy Board Act*, extended the time limit referred to in that subsection by four months to allow for additional Crown consultation with potentially affected Aboriginal groups, public engagement, and an assessment of the upstream greenhouse gas emissions associated with the Project;

> Whereas the Governor in Council, having considered Aboriginal concerns and interests identified in the *Joint Federal/Provincial Consultation and Accommodation Report for the Trans Mountain Expansion Project* dated November 21, 2016, is satisfied that the consultation process undertaken is consistent with the honour of the Crown and that the concerns and interests have been appropriately accommodated;

130 Behind this is an explanatory note: *Canada Gazette*, vol. 150, no. 50, December 10, 2016, pp. 4-23. The explanatory note discusses the participation of Indigenous peoples before the National Energy Board, the concerns they raised and other views. In assessing the impact on Indigenous groups, the explanatory note says the following (starting on page 14):

> Both social and environmental issues raised by Indigenous groups were considered and addressed through the NEB review process. The 157 conditions recommended by the NEB will require Trans Mountain to implement all commitments it made through the review process, and further implement mitigation measures for impacts that might otherwise occur to people and the environment, including in relation to air quality and greenhouse gases; water quality; soil, vegetation and wetlands; wildlife and wildlife habitat; fish and fish habitat; and marine mammals. Several of the conditions specifically address Aboriginal interests, such as requiring the proponent to continue reporting on the availability and findings of traditional use studies, hiring of Aboriginal monitors during construction, and ongoing filing of Aboriginal engagement reports. There are also specific conditions tied to concerns by the Coldwater Indian Band and Stó:l? Collective.
>
> With respect to rights associated with subsection 35(1) of the *Constitution Act, 1982*, the Board concluded that, having considered all the evidence submitted in this proceeding, the consultation undertaken with Aboriginal groups, the impacts on Aboriginal interests, the proposed mitigation measures, including conditions, to minimize adverse impacts on Aboriginal interests, and Board imposed requirements for ongoing consultation, it was satisfied that the Board's recommendation and decisions with respect to the Project are consistent with subsection 35(1) of the *Constitution Act, 1982*.

131 These paragraphs may shed light on what the Governor in Council had in mind when it approved the Project: submissions at the hearing before the panel in these consolidated applications will be required on that. Contextual materials such as the explanatory note may shed light on what was considered by the Governor in Council: *New Brunswick Broadcasting Co. v. Canadian Radio-Television & Telecommunications Commission*, [1984] 2 F.C. 410, 13 D.L.R. (4th) 77 (Fed. C.A.).

132 In this regard, I note that none of the parties in their notices of application or in their affidavits has alleged bad faith in the sense that an explanatory note or any preambles or factual statements cannot be taken as true. Statements such as these often enjoy a rebuttable presumption of regularity and as best as I can tell no evidence has yet emerged that would suggest otherwise:

see *Irvine v. Canada (Restrictive Trade Practices Commission)*, [1987] 1 S.C.R. 181, 41 D.L.R. (4th) 429 (S.C.C.) at para. 38 and authorities cited therein; *I.B.E.W., Local 894 v. Ellis-Don Ltd.*, [2001] 1 S.C.R. 221, 194 D.L.R. (4th) 385 (S.C.C.).

133 As well, it is apparent from these paragraphs in the explanatory note that the Governor in Council was aware of the proceedings before the National Energy Board and its Report. Just how aware is a matter on which submissions should be made to the panel in these consolidated applications.

134 Also of possible significance are an Amending Order to National Energy Board Order CPCN OC-49 and an Amending Order to Certificate of Public Convenience and Necessity OC-2 that the Governor in Council approved: *Canada Gazette*, vol. 150, no. 50, December 10, 2016 at pp. 23-247 and 248-501. These documents point to a body of information that must have been before the Governor in Council. Just what information is a matter on which submissions should be made to the panel in these consolidated applications.

135 Mr. Gardiner's first affidavit points to other evidence of consultation before the Order in Council was made but whether this was considered directly or indirectly by the Governor in Council is unclear based on the material before the Court on this motion. His affidavit also points to post-Order in Council consultations. I have discussed the possible relevance of this evidence elsewhere: *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2017 FCA 116 (F.C.A.).

136 There is now also the supplementary affidavit from Mr. Gardiner that corrects certain mistakes in his original affidavit and that adds additional information about consultative activities. Whether any of this was considered directly or indirectly by the Governor in Council is unclear based on the material before the Court on this motion.

137 In various places in its submissions, the Tsleil-Waututh Nation appears to misunderstand the limits of Rule 317. For example, it appears to be under the misapprehension that Rule 317 can be used to access documents held by government departments other than the Governor in Council. For the reasons explained above, this is not so.

138 Overall, I am not persuaded at this time that, aside from its section 39 certificate, Canada has withheld information responsive to the Rule 317 request that must be produced. This can be tested by the Tsleil-Waututh Nation on cross-examination.

139 The Tsleil-Waututh Nation suggests that the fact that the Attorney General has adduced a supplementary affidavit from Mr. Gardiner to fix errors and omissions in disclosure shows that it and others have not taken care in the disclosure process both under Rule 317 and overall. This submission overlooks the scope and complexity of these proceedings. Although it is not desirable, at the best of times mistakes can be made. I believe that the offering of the supplementary affidavit shows that the Attorney General and her lawyers are cognizant of their ethical responsibilities and

their responsibilities as officers of the Court and have stressed the importance of disclosure to those that hold documents. The evidence disclosed by the supplementary affidavit does not suggest to me otherwise. Below, at para. 151 of these reasons, I refer to a further commitment the Attorney General has made concerning disclosure. I conclude that the Attorney General is taking steps on an ongoing basis to ensure that any disclosure she is required to give is complete and accurate.

140 By itself, this is not at all dispositive of the Tsleil-Waututh Nation's motion for enforcement of its Rule 317 request. But it affords the Court some comfort that a genuine effort has been made to ensure that, despite the section 39 certificate, the material responsive to the Rule 317 request has been produced.

141 Under para. 7(3)(*b*) of this Court's Order of March 9, 2017, the Attorney General was obligated to produce "documents before the Governor in Council leading up to its determination." By necessary implication, this was subject to section 39 of the *Canada Evidence Act* if a certificate were to be filed. The Court is not satisfied on the evidence before it that the Attorney General has breached this Order.

142 To the extent that material supplied by the Tsleil-Waututh Nation was not placed before the Governor in Council, counsel can make submissions to the panel hearing these consolidated applications. To the extent that the material was considered by others in various Ministries and only summaries provided to the Governor in Council, the sufficiency of that is a matter for argument before the panel hearing these consolidated applications.

(7) The Tsleil-Waututh Nation's request for production of evidence from Canada

143 As mentioned, I am not persuaded that there is any evidence that has been improperly withheld under Rule 317. But, as I have explained, except in the rare circumstance explained above, Rule 317 allows for the obtaining of only materials relevant to the judicial review that were in the possession of the administrative decision-maker and that it relied upon in making the decision.

144 Here, more materials — materials not obtainable under Rule 317 — are potentially relevant. As mentioned, quite aside from what the Governor in Council had before it to support the reasonableness of its decision, if the duty to consult has not been complied with overall, the decision of the Governor in Council (*i.e.*, its Order in Council) cannot stand. Thus, evidence other than that which was before the Governor in Council is relevant to this ground of review. This evidence is what I have called exceptional evidence.

145 In this case, should the Court make an order requiring Canada to produce more evidence, including exceptional evidence? The Tsleil-Waututh Nation asks for just that. As mentioned, it seeks documents relevant to the grounds it has raised relating to the overall adequacy of Canada's consultation with it concerning the Project.

146 In my view, on the material before me, such an order should not be made.

147 First, to some extent, the Tsleil-Waututh Nation appears to be suggesting in its submissions that Rule 317 can be used to get exceptional evidence. As discussed, except for the rare situation described in paragraph 116, above, it cannot.

148 Next, there is no such thing as a "production order" for exceptional evidence under the *Federal Courts Rules*. As I have explained above, exceptional evidence may be obtained through cross-examination, by adducing an affidavit from a witness (which the Indigenous applicants have done), by a motion under Rule 41 or by converting the applications to actions under section 18.4(2) and section 28(2) of the *Federal Courts Act*.

149 Even if the Tsleil-Waututh Nation were to pursue these methods by motion at this time, I would dismiss the motion.

150 I understand that cross-examinations of Mr. Gardiner are about to be conducted. Plenty of exceptional evidence, if admissible, may be obtained in that way.

151 Further, the Attorney General has made the following commitment:

> ...Canada is willing to informally assist [Tsleil-Waututh Nation] in obtaining relevant consultation documents that may, by inadvertence, have been omitted from the affidavit and supplementary affidavit of Timothy Gardiner. Should [Tsleil-Waututh Nation] (or any other applicant) be aware of any such documents, counsel for Canada would welcome being advised as soon as possible in light of the impending deadline for completion of cross-examinations on affidavits.

152 As well, I am not persuaded at this time that there is exceptional evidence that cannot be had as a result of cross-examination. The Attorney General has filed evidence from Mr. Gardiner that relates to Canada's consultative activities both before and after the Order in Council was made. This falls into the category of exceptional evidence. The Indigenous applicants have filed evidence about their consultative activities and Canada's consideration or non-consideration of things put to it and its responses or non-responses. All of this is also exceptional evidence going to the overall issue of the duty to consult.

153 The Tsleil-Waututh Nation complains that Canada has not produced all of its evidence concerning its consideration of things put to it by the Indigenous applicants. One answer to that is that gaps in evidence do not always call for production orders. If there are gaps in the evidence Canada may suffer for that if, on the law and the state of the imperfect evidentiary record, it deserves to. In preparing their submissions for the panel hearing these consolidated applications, the parties may wish to consider when the Court can draw adverse inferences from missing

evidence: see, *e.g.*, *Pfizer Canada Inc. v. Teva Canada Ltd.*, 2016 FCA 161, 400 D.L.R. (4th) 723 (F.C.A.) at paras. 169-170 and authorities cited therein. If the Tsleil-Waututh Nation put something important to Canada and there is a gap in the evidence concerning what Canada did in reaction to it, Canada may have to explain the gap. Absent evidence of Canada's reaction, the panel may be driven to find that Canada did not react. As well, I have already mentioned some of the disadvantages that Canada might suffer as a result of its issuance of a section 39 certificate.

154 It is also worth mentioning that gaps in the evidence concerning Canada's responses do not automatically determine the consultation issues against Canada. Errors and omissions in fulfilment of the duty to consult and accommodate can be tolerated — but only to a certain point. Put another way, compliance with the duty to consult and accommodate need not be exacting. As this Court said in *Gitxaala Nation (2016)* (at paras. 182-183):

> Canada is not to be held to a standard of perfection in fulfilling its duty to consult. In this case, the subjects on which consultation was required were numerous, complex and dynamic, involving many parties. Sometimes in attempting to fulfil the duty there can be omissions, misunderstandings, accidents and mistakes. In attempting to fulfil the duty, there will be difficult judgment calls on which reasonable minds will differ.
>
> In determining whether the duty to consult has been fulfilled, "perfect satisfaction is not required," just reasonable satisfaction: *Ahousaht v. Canada (Minister of Fisheries and Oceans)*, 2008 FCA 212, 297 D.L.R. (4th) 722, at paragraph 54; *Canada v. Long Plain First Nation*, 2015 FCA 177, 388 D.L.R. (4th) 209, at paragraph 133; *Yellowknives Dene First Nation v. Canada (Minister of Aboriginal Affairs and Northern Development)*, 2015 FCA 148, 474 N.R. 350, at paragraph 56; *Clyde River (Hamlet) v. TGS-NOPEC Geophysical Co. ASA*, 2015 FCA 179, 474 N.R. 96, at paragraph 47.

155 In support of its view that there are serious gaps in the evidence offered by the Attorney General, the Tsleil-Waututh Nation points to information requests it has made under the *Access to Information Act*, R.S.C. 1985, c. A-1. It has directed these requests to Natural Resources Canada, Transport Canada, Fisheries and Oceans Canada and Environment and Climate Change Canada. These departments have each asked for significant extensions of time to address the requests. Natural Resources Canada has sought the longest extension: 510 days.

156 However, the requests are of exceptionally broad scope and seek every last crumb of information, even information that has absolutely no realistic bearing on this matter.

157 All four requests are similar. To illustrate their scope, here is the request addressed to Natural Resources Canada:

> Please provide: any and all information, documents, or correspondence created between August and November, 2016 and shared between Major Projects Management Office (Natural

> Resources Canada) and Environment Canada, Fisheries and Oceans Canada, or transport Canada officials/staff in relation to Trans Mountain Expansion Project, including but not limited to: any meeting minutes and/or notes of representatives that attended any meetings; any draft Order in Council materials or information; any briefing notes that were prepared in advance of or after any meetings; and any correspondence, including emails in August, September, October, and November 2016 to or from Ms. Erin O'Gorman, Assistant Deputy Minister, Major Projects Management Office, and/or related emails in August, September, October, and November 2016 to or from Timothy Gardiner, Director-General — Strategic Projects Secretariat, Major Projects Management Office.
>
> Also, please provide: emails, documents and/or briefing notes related to any terms, conditions, migration measures or accommodation measures proposed or considered by Natural Resources Canada in relation to the Trans Mountain Expansion Project; any briefing notes to Minister Carr prepared by Major Projects Management Office official(s)/staff or the Deputy Minister of Natural Resources Canada in relation to the Governor in Council's decision under the National Energy Board Act and the Canadian Environmental Assessment Act, 2012 for the trans Mountain Expansion Project; any briefing notes to the federal cabinet, the prime minister, or the Governor in Council prepared by Major Projects Management Office official(s)/staff, the Deputy Minister of Natural Resources Canada, or Minister Carr in relation to the Governor in Council's decision for the Trans Mountain Expansion Project; and any briefing notes, emails or other documents in relation to Canada's engagement or consultation with the Tsleil-Waututh National in relation to the Trans Mountain Expansion.

158 No doubt, some of this information is covered by the section 39 certificate. No doubt some is already on the table. And no doubt more will emerge from the cross-examinations. And at some point, materiality and proportionality — not just bare relevance — must come to bear on the matter.

159 I have mentioned Rule 3 above: the need to "secure the just, most expeditious and least expensive determination of every proceeding on its merits" I have also mentioned subsection 18.4(1) of the *Federal Courts Act*: the Parliamentary commandment that judicial reviews be heard and determined "without delay and in a summary way." And there is the admonition of the Supreme Court of Canada in *Hryniak*, above.

160 These concerns are significant in this case.

161 Before the Court made its Order of March 9, 2017 scheduling these consolidated applications, it circulated a draft version of it to all parties. The draft contained the following recitals:

> **AND WHEREAS** it is appropriate that this Court issue an order to ensure that these proceedings are conducted in an orderly, fair and prompt manner;

AND WHEREAS this Order is intended to give effect in these proceedings to the principles set out in Rule 3 of the *Federal Courts Rules*, SOR/98-106, which provides that proceedings are to be conducted in a manner that secures the just, most expeditious and least expensive determination of every proceeding on its merits;

. . . . .

AND WHEREAS concerning the issue of scheduling:

(a) without expressing any prejudgment on the matter, a report, an Order in Council and a Certificate have been made under the purported authority of legislation advancing the public interest and themselves have been made in the public interest, and all have effect until set aside; further, owing to the substantial interests of all parties in these proceedings, the proceedings should be prosecuted promptly; therefore, delays in the prosecution of these consolidated matters must be minimized;

(b) therefore, this Court shall set a schedule for the prompt and orderly advancement of these consolidated proceedings and the schedule will be amended only if absolutely necessary;

162 No party took issue with these recitals.

163 The Order of March 9, 2017 also scheduled the proceedings on an expedited basis up until the filing of the overall electronic record and the memoranda of fact and law. Here again, the schedule was circulated in advance and no objections were received. By direction on May 29, 2017, this Court sought the parties' input on a schedule it suggested for the rest of the proceedings and for the date of the hearing. Except for minor modifications, the parties accepted the proposed schedule.

164 And in their submissions on these motions, all parties urged the Court to rule now on the motions so the schedule is not disrupted.

165 For all these reasons, this Court will not delay or adjourn these consolidated applications so that every last crumb of information sought by the information requests, no matter how microscopic, can be gathered. Nor did I take any party to suggest seriously that this should happen.

166 The paramount consideration for this Court is whether the state of the evidence is such that the spectre of immunization of public decision-making looms. I am not persuaded of this here. Even without having the benefit of the transcripts of cross-examinations and exhibits from the cross-examinations before me, I can conclude that the evidentiary record here is as great or greater than that which was before the Court in *Gitxaala Nation (2016)*. In *Gitxaala Nation (2016)*, faced with substantially similar arguments put by the Indigenous applicants, this Court was able to conduct a very meaningful review, one that was cognizant of the gaps in the evidentiary record and one that resulted in the quashing of the Governor in Council's Order in Council.

167 Overall, this Court is satisfied that the record before it, including the exceptional evidence, will be sufficient and any gaps can be properly assessed and evaluated. This Court is not persuaded that its assistance is needed to augment the evidentiary record before the reviewing court at this time.

168 As the parties enter the cross-examination phase of this litigation, it goes without saying that the Court continues to stand ready to continue to facilitate the parties' progress towards a just, most expeditious and least expensive determination of these consolidated applications on their merits.

E. Disposition

169 The motion of the Attorney General shall be granted. The supplementary affidavit of Mr. Gardiner shall be admitted into the Electronic Record but the Attorney General shall first remove the portions that the parties agree are irrelevant. Costs in the cause.

170 The motion of the Tsleil-Waututh Nation is dismissed. Costs in the cause.

First Nation's motion dismissed; Crown's motion dismissed.

2013 BCCA 112
British Columbia Court of Appeal

Unlu v. Air Canada

2013 CarswellBC 634, 2013 BCCA 112, [2013] 5 W.W.R. 682, [2013] B.C.W.L.D. 2796, [2013] B.C.W.L.D. 2797, 225 A.C.W.S. (3d) 692, 335 B.C.A.C. 105, 364 D.L.R. (4th) 98, 42 B.C.L.R. (5th) 27, 573 W.A.C. 105

Bulent Unlu, Respondent (Plaintiff) and Air Canada, Appellant (Defendant) and The Attorney General of British Columbia and The Attorney General of Canada, Respondents

Bulent Unlu, Respondent (Plaintiff) and Deutsche Lufthansa Aktiengesellschaft, Appellant (Defendant) and The Attorney General of British Columbia and The Attorney General of Canada, Respondents

Tysoe, Neilson, Bennett JJ.A.

Heard: January 23-24, 2013
Judgment: March 14, 2013
Docket: Vancouver CA039699, CA039700

Proceedings: reversing in part *Unlu v. Air Canada* (2012), 2012 BCSC 60, 2012 CarswellBC 212, 30 B.C.L.R. (5th) 169, [2012] 6 W.W.R. 779, 346 D.L.R. (4th) 140 (B.C. S.C.)

Counsel: D.T. Neave, J.R. Lysyk, for Appellants
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N.E. Brown, E.W. Hughes, for Respondent, Attorney General of British Columbia

***Tysoe J.A.*:**

Introduction

1 The appellants each appeal from an order of a summary trial judge dated January 18, 2012 dismissing their respective applications for a declaration that the statute under which the plaintiff's claims are made against them, the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 (the "Provincial Act"), is constitutionally inapplicable to them by virtue of either the doctrine of paramountcy or the doctrine of interjurisdictional immunity.

2 The plaintiff's claims against the appellant airlines are made under s. 5 of the Provincial Act, which prohibits deceptive acts and practices in respect of consumer transactions. It is the intention of the plaintiff to apply to have the action certified as a class proceeding under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50.

3 The plaintiff asserts that each of the appellants committed a deceptive act or practice by including a fuel surcharge in the tax portion on the tickets he purchased from them. He contends the fuel surcharge is not a third party tax but is a charge retained by the appellants for their own use.

4 In her reasons for judgment (indexed as 2012 BCSC 60 (B.C. S.C.)), the summary trial judge concluded that neither the doctrine of paramountcy nor the doctrine of interjurisdictional immunity was engaged, and she dismissed the applications.

5 I agree with the summary trial judge that the applications should have been dismissed for substantially the reasons given by her. In these reasons, I will outline the reasoning of the summary trial judge with which I agree, and I will deal with submissions of the appellants on appeal that have not already been addressed by the summary trial judge in her reasons.

Background

6 Under s. 110 of the *Air Transportation Regulations*, SOR/88-58 (the "*Regulations*"), enacted pursuant to s. 86 of the *Canada Transportation Act*, S.C. 1996, c. 10 (the "Federal Act"), an air carrier operating an international service is required to file a tariff with the Canadian Transportation Agency (the "Agency"). Section 122 of the *Regulations* mandates the information that must be contained in tariffs, including the tolls charged by the airline and other terms and conditions of carriage. The tolls charged by the airline, which are defined as fares, rates and charges, are required to be just and reasonable: s. 111 of the *Regulations*.

7 One of the tolls that may be included in the tariff, as long as it is just and reasonable, is an international fuel surcharge that is added to the base fare to partially offset the fluctuations in the price of jet fuel. At the time of the events giving rise to this litigation, both of the appellants had filed tariffs containing international fuel surcharges for flights, among others, to and from Canada and Germany. The tariff filed by Air Canada was in evidence before the summary trial judge, and it provided that the amount for the international fuel surcharge was to be shown separately in the "TAX/FEE/Charge Box" of the airline ticket under the code YQ, which is an "airline use only" code used by members of the International Air Transport Association to designate various charges collected by the airline.

8 The plaintiff pleads in each of his notices of civil claim that he purchased return tickets to travel on the appellant airlines in October 2008 and November 2009, between Vancouver and Germany. He pleads that the electronic tickets he received showed an amount as tax that was not a third party

tax, but was retained by the appellants for their own use. It is common ground that the amounts in question were the international fuel surcharges collected and retained by the appellants.

9 The tickets purchased by the plaintiff were in evidence before the summary trial judge. In each case, the fuel surcharge had the YQ code, but it was shown as "TAX" (on the Lufthansa ticket it was shown separately as "TAX", and on the Air Canada ticket it was included with three other charges as "TAX"). There was no "TAX/FEE/Charge Box" on the tickets.

10 Section 5 of the Provincial Act prohibits suppliers from committing or engaging in a "deceptive act or practice in respect of a consumer transaction". Section 4 of the Provincial Act defines a "deceptive act or practice" to mean a representation or conduct "that has the capability, tendency or effect of deceiving or misleading a consumer or guarantor".

11 In each action, the plaintiff seeks relief under s. 172 of the Provincial Act for a declaration that the appellant airline has contravened the provisions of the Provincial Act, a permanent injunction restraining such contravention, and an order that the appellant airline restore to him the monies that the airline acquired in contravention of the Provincial Act.

12 Each appellant filed a notice of constitutional question challenging the constitutional applicability of the Provincial Act to the matters at issue in the action against it. Each appellant then applied, by way of a summary trial application, for a declaration that the Provincial Act is constitutionally inapplicable to it. The Attorney General of British Columbia supported the position of the plaintiff, both at the summary trial and on appeal. The Attorney General of Canada did not participate in the summary trial or the appeal.

Discussion

13 Before dealing with the doctrines of paramountcy and interjurisdictional immunity relied upon by the appellants, I wish to repeat several important observations made by the summary trial judge at para. 9 of her reasons and reiterated by her in later parts of her reasons. The claims of the plaintiff are that each of the appellant airlines misrepresented the amount of the fuel surcharge to be a tax. The plaintiff does not challenge the appellants' right to charge the fuel surcharge or the reasonableness of the surcharge. Nor does the plaintiff take issue with any aspect of the appellants' tariffs.

(a) Paramountcy

14 The summary trial judge referred to para. 69 of *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3 (S.C.C.), for the proposition that when the operational effects of provincial legislation are incompatible with federal legislation, the doctrine of paramountcy stipulates that the federal legislation will prevail and the provincial legislation will be rendered inoperative to the extent of the incompatibility. She also referred to para. 64 of *Laferrière c. Québec (Juge de*

la Cour du Québec), 2010 SCC 39, [2010] 2 S.C.R. 536 (S.C.C.), for the proposition that federal paramountcy can arise when there is an operational conflict between federal and provincial laws or when the provincial law is incompatible with the purpose of the federal legislation.

(i) Operational Conflict

15 The summary trial judge first concluded there was no operational conflict between the Provincial Act and the Federal Act. She reasoned that in order for an operational conflict to exist, the Agency would have to require the airlines to have a tariff containing a deceptive statement, and there is nothing in the Federal Act or *Regulations* to suggest the Agency would impose such a requirement. I agree with the judge in this regard.

16 On appeal, the appellants argue they were bound to comply with their tariffs and, if the plaintiff is correct in his assertion that the disclosure of the fuel surcharge within the tax portion of the ticket contravened the Provincial Act, then the "federal law says 'yes you must' while the provincial law says 'no you must not'". They say the federal legislation mandates that the very statements complained about by the plaintiff must be on the ticket.

17 The fallacy in the appellants' argument is that neither the federal legislation nor the tariff requires the appellants to show the fuel surcharge as a tax on the ticket. At most, Air Canada's tariff states that the fuel surcharge will be shown in the "TAX/FEE/Charge Box" on the ticket. There was no such box on the plaintiff's ticket but, more importantly, this statement does not require that the surcharge be shown as a tax. The appellants are not correct in their assertion that the federal legislation says "yes you must", because the legislation does not require the surcharge to be shown as a tax.

18 At the time the summary trial judge issued her reasons, the Federal Act had been amended to add s. 86.1, which authorized the Agency to make regulations respecting advertising, but no regulations had yet been enacted. The judge commented that the absence of regulations meant that there was nothing potentially in conflict. She also observed that s. 86.1(2) mandates that the regulations require an advertising carrier to indicate all fees, charges and taxes collected by the carrier on behalf of another person. She reasoned that it would be absurd for the Agency to require an airline to advertise something as a tax when it was a charge retained by the airline.

19 Regulations have now been approved by the Governor General in Council (SOR/2012-298) to regulate advertising of air services. One of the new sections of the *Regulations*, s. 135.8, requires specified information to be included in advertisements, including the total price to obtain the air service. The section also requires all third party charges under the heading "Taxes, Fees and Charges" to be set out unless that information is provided orally. Another new section, s. 135.91, provides that an air transportation charge must not be set out in an advertisement as if it were a third party charge and that the term "tax" may not be used to describe an air transportation charge.

20 Three points need be made about the new advertising regulations. First, they deal only with advertising, and the plaintiff's complaint does not relate to advertising; his complaint is the way in which the fuel surcharge was shown on the tickets he purchased. The second point is that ss. 135.8 and 135.91 are not inconsistent with the plaintiff's assertion that non-third-party charges should not be shown in such a way that suggests they are third party charges. The final, and most important, point is that there is no operational conflict between these regulations and the prohibition in s. 5 of the Provincial Act against suppliers committing or engaging in deceptive acts or practices.

21 In dealing with the aspect of operational conflict under the doctrine of paramountcy, the summary trial judge made reference to s. 155 of the Provincial Act, which authorizes an inspector to issue orders requiring persons to comply with the Provincial Act. The appellants argue that s. 155 allows for the issuance of compliance orders that could potentially override the powers of the Agency. The summary trial judge dealt with this argument by stating that it appeared to be based on the premise that the plaintiff's complaint is about the surcharge itself, when that is not the claim contained in each of the notices of civil claim.

22 I would prefer to deal with this argument by pointing out that s. 155 of the Provincial Act is not engaged by the present litigation. The plaintiff is seeking relief under s. 172 of the Provincial Act, not s. 155. No inspector is involved in this matter. In my view, the consideration of the doctrine of paramountcy should be based on the provisions of the Provincial Act that are engaged by this litigation (i.e., ss. 4, 5 and 172). The question of whether there is an operational conflict between the federal legislation and other provisions of the Provincial Act, including s. 155, should be left for a case that involves those other provisions.

23 It would be convenient at this point to make a comment about the orders made by the summary trial judge. In each action, she ordered that "The Application for a declaration that the *Business Practices and Consumer Protection Act* is constitutionally inapplicable to [each of the appellants] is dismissed". The orders were worded in this fashion because the appellants had phrased their applications to seek a declaration to the effect that all of the provisions of the Provincial Act were inapplicable to them. If the orders are not viewed in the context of the applications made by the appellants, they could possibly be misinterpreted to mean that all of the provisions of the Provincial Act are applicable to the appellants. This was not the intent, and the only provisions of the Provincial Act properly found to be applicable to the appellants are the ones relied upon by the plaintiff in making his claims against the appellants.

(ii) Frustration of Federal Purpose

24 The appellants submit that the Federal Act and the *Regulations* are a complete code for the regulation of all matters related to air travel, including airline tariffs and tickets, and that the Agency is intended to be the final decision maker in respect of these matters. They say the purpose

of the federal legislation would be frustrated by permitting provincial jurisdictions to intrude on the Agency's regime.

25 The summary trial judge rejected the appellants' argument that a purpose of the federal legislation is to make the Agency the exclusive and final decision-making authority with respect to matters relating to air travel. She concluded that no federal purpose would be frustrated by permitting the Provincial Act to apply to the act or practice about which the plaintiff complains in his notices of civil claim. I agree with this conclusion.

26 In asserting that the federal legislation was intended to be a complete code for all matters related to air travel, the appellants say the federal legislation deals with misrepresentations made by airlines and that the Agency has authority to deal with the plaintiff's complaints. In this regard, the appellants contend that the plaintiff could complain to the Agency that they are in contravention of s. 18 of the *Regulations*, the relevant portion of which reads as follows:

> Every scheduled international licence and non-scheduled international licence is subject to the following conditions:
>
> . . . . .
>
> (b) the licensee shall not make publicly any statement that is false or misleading with respect to the licensee's air service or any service incidental thereto ...

With respect, I do not agree that the plaintiff's allegations against the appellants fall within s. 18. He says the misrepresentations were made on the tickets, and there is no allegation that a false or misleading statement was made publicly.

27 As they did at the summary trial, the appellants also point to s. 113.1 of the *Regulations*, which authorizes the Agency to direct an airline to pay compensation for any expense incurred by a person adversely affected by the failure of an airline to apply the fares, rates, charges or terms and conditions of carriage set out in the tariff filed by it. I agree with the comment made by the summary trial judge that s. 113.1 would not provide any compensation to the plaintiff. In any event, s. 113.1 is not applicable to the current circumstances because the plaintiff is not alleging that the appellants failed to apply any aspect of their tariffs. His complaints are that the airlines misrepresented the fuel surcharges to be third party taxes.

28 The appellants further point to decisions made by the Agency about the fuel surcharges, including complaints about the charging of the surcharges. The Agency has jurisdiction to deal with such complaints because s. 111 of the *Regulations* requires that all tolls be just and reasonable. The plaintiff is not alleging that the fuel surcharges collected by the appellants are not just and reasonable.

29 The appellants' argument that the Federal Act and the *Regulations* are intended to be a complete code is belied by a regulatory impact analysis statement that was issued by the Agency

concurrently with the approval of the advertising regulations made pursuant to s. 86.1 of the Federal Act. Such statements are admissible to aid in the interpretation of regulations: see *R. v. Boutcher*, 2001 NFCA 33, 202 Nfld. & P.E.I.R. 243 (Nfld. C.A.) at paras. 157-162.

30 The regulatory impact analysis statement included the following comments:

> Provincial legislation also exists in both Ontario and Quebec, which regulates the manner in which travel agents and wholesalers may advertise the price of travel services.
>
> . . . . .
>
> Subsection 86.1(1) of the enabling legislation directs the Agency to make regulations respecting advertising, in all media, of prices of air services within, or originating in, Canada. As some provinces regulate the manner in which travel agents advertise their services, the Agency will consult with those provinces as part of the implementation and enforcement of the Regulations.
>
> . . . . .
>
> The Agency also notes that the majority of travel agents and wholesalers are based in Ontario and Quebec and are already subject to provincial legislation which governs the manner in which advertising of the price of packaged travel services may be presented.
>
> . . . . .
>
> The advertising of products and services is subject to consumer protection legislation of general application at the federal level through the *Competition Act* and at the provincial level through provincial legislation. Certain matters respecting misleading and deceptive acts and practices fall under the purview of the Competition Bureau.
>
> It is the advertisers' responsibility to ensure that they comply with all applicable legislation respecting advertising of prices, not just the [*Regulations*].
>
> [Emphasis added.]

31 These statements are inconsistent with the notions that the Federal Act and the *Regulations* are intended to be a complete code on all matters of air travel and that the Agency is intended to be the final decision maker on all such matters. Indeed, the Agency states that persons are expected to comply with provincial consumer protection legislation as well as the federal legislation. It is apparent the Agency does not consider the federal purpose to be frustrated by provincial consumer protection legislation. I share that view.

32 In the result, neither branch of the doctrine of paramountcy applies to the plaintiff's claims.

(b) Interjurisdictional Immunity

33 The summary trial judge reviewed the principles applicable to the doctrine of interjurisdictional immunity as set out in paras. 27, 35, 36, 42-45 and 57 of *Laferrière c. Québec*

(Juge de la Cour du Québec), *supra*. She summarized the general principle that the doctrine protects the core of federal power from impairment by provincial legislation. The court must first determine whether the provincial legislation trenches on the core of federal power and, if it does, the court must then determine whether the impairment is sufficiently serious to invoke the doctrine.

34 The judge noted the conclusion reached in *Canadian Western Bank v. Alberta*, *supra*, at para. 77, that interjurisdictional immunity should in general be reserved for situations already covered by precedent, and she disagreed with the appellants that precedent existed in the form of cases dealing with bills of lading in maritime shipping. She also concluded that even if the business of carrying passengers by air is part of the core of federal jurisdiction over aeronautics, the seriousness of the impairment of that core by the Provincial Act was not sufficient to attract the doctrine of interjurisdictional immunity.

35 In my opinion, the judge applied the correct principles and reached the correct conclusions. The appellants have not shown any error on the part of the judge. I agree with the Attorney General of British Columbia's submission that s. 5 of the Provincial Act, which protects consumers against deceptive acts and practices, is entirely compatible with the federal legislation and, in particular within the context of the plaintiff's claims, s. 5 is compatible with s. 135.91 of the *Regulations*, which prohibits the use of the term "tax" in an advertisement to describe an air transportation charge of an airline.

36 On appeal, the appellants argue the application of the Provincial Act would subject international airlines to the decisions of provincial regulators who have neither the mandate nor the expertise to take into account the unique features of the international airline industry. They also say it is not reasonable to expect international airlines to comply with potentially conflicting provincial regulations and orders while still complying with federal law.

37 Both of these arguments address provisions of the Provincial Act that are not engaged by this litigation. As I said above when discussing the doctrine of paramountcy, the arguments made by the appellants in this regard should be left for a case that involves the regulatory provisions of the Provincial Act. The plaintiff's claims are based on s. 5 of the Provincial Act, which is compatible with the federal legislation. Even if s. 5 could be viewed as an impairment of the federal core of the federal power over aeronautics, it is not a sufficiently serious impairment to attract the doctrine of interjurisdictional immunity.

Conclusion

38 I would not accede to the grounds of appeal advanced by the appellants. In order to avoid misinterpretation of the orders as discussed in para. 23 above, I would allow the appeals to the limited extent of varying the orders by deleting para. 1 of each order and replacing it with the words "The application of the defendant is dismissed." Although the appeals have been allowed to this limited extent, I would award costs of the appeals to the respondent, Bulent Unlu.

***Neilson J.A.*:**

I agree

***Bennett J.A.*:**

I agree

Appeal allowed in part.

2023 FCA 194
Federal Court of Appeal

Voltage Holdings, LLC v. Doe #1

2023 CarswellNat 3644, 2023 FCA 194

VOLTAGE HOLDINGS, LLC (Appellant) and DOE #1 et al. (See Schedule 1 for list of Defendants) (Respondents) and SAMUELSON-GLUSHKO CANADIAN INTERNET POLICY AND PUBLIC INTEREST CLINIC (Intervener)

Stratas J.A., Webb J.A., Donald J. Rennie J.A.

Heard: March 28, 2023
Judgment: September 27, 2023
Docket: A-129-22

Proceedings: affirming *Voltage Holdings, LLC v. Doe#1* (2022), 2022 FC 827, 2022 CarswellNat 1927, 2022 CF 827, 2022 CarswellNat 2318, Angela Furlanetto J. (F.C.)

Counsel: Kenneth R. Clark, Lawrence Veregin, for Appellant
David A. Fewer, for Intervener

***Donald J. Rennie J.A.*:**

1 The appellant sought default judgment against the respondents for two types of copyright infringement: direct infringement and authorizing infringement. In respect of the first, the appellant asserted that the respondents directly infringed its copyright by making a protected work available for download online (by posting or uploading the work); in respect of the latter, the appellant asserted that the respondents authorized an unknown person to directly infringe the appellant's copyright. The Federal Court (2022 FC 827, *per* Furlanetto J.) dismissed the motion brought under Rule 210(1) of the Federal Courts Rules, S.O.R./98-106 (the Rules). This is an appeal from that decision.

2 The appeal engages two issues. The first concerns the jurisprudence with respect to what constitutes direct infringement and authorizing infringement. The second issue is the burden of proof and the circumstances under which it can be discharged by drawing an adverse inference.

3 These issues are closely interrelated. The jurisprudence with respect to the law of copyright determines the minimum evidentiary requirements to establish the asserted types of infringement;

in other words, the jurisprudence constrains the extent to which an adverse inference may be drawn in the context of online copyright infringement.

4 These reasons address this interrelationship, discuss the procedural and practical limitations of discovery in the context of online infringement, and offer guidance as to the application of the principles in CCH Canadian Ltd. v. Law Society of Upper Canada, 2004 SCC 13, [2004] 1 S.C.R. 339 [, Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers, 2004 SCC 45, [2004] 2 S.C.R. 427 [, Rogers Communications Inc. v. Voltage Pictures, LLC,2018 SCC 38, [2018] 2 S.C.R. 643 [, and Society of Composers, Authors and Music Publishers of Canada v. Entertainment Software Association, 2022 SCC 30, 471 D.L.R. (4th) 391 [, in the circumstances presented by this particular case.

I. Background

5 In 2012, Parliament enacted the Copyright Modernization Act, S.C. 2012, c. 20 (the CMA), to amend the Copyright Act, R.S.C. 1985, c. C-42 (the Act) and respond to new technological pathways that facilitate online copyright infringement. The summary accompanying the CMA states that the amendments to the Act aim to "update the rights and protections of copyright owners to better address the challenges and opportunities of the Internet, so as to be in line with international standards." The summary also notes that the amendments seek to "clarify Internet service providers' liability and make the enabling of online copyright infringement itself an infringement of copyright."

6 The CMA established a system by which copyright owners may send a notice to internet service providers (ISPs), alleging online copyright infringement occurring at a particular electronic location called an Internet Protocol address (an IP address). On receipt, the ISP must forward a notice to the Internet subscriber corresponding to the IP address identified by the copyright owner. This is known as the "notice and notice" regime (the Act, ss. 41.25 and 41.26).

7 The appellant, Voltage Holdings, LLC, is a movie production company and the owner of the copyright to the film *Revolt* (the Work). The appellant detected that internet users at certain IP addresses were making the Work available using BitTorrent software, a protocol for distributing files on a peer-to-peer network. BitTorrent is particularly well suited for transferring large files such as movies, music, or computer software due to its capacity to upload and download files from a group of hosts instead of from a single source server. Using this software, internet users at the flagged IP addresses were uploading and offering copies of the Work without the appellant's consent.

8 Warning notices were sent to the internet subscribers through the notice and notice regime, advising that infringing activity had been detected at the internet subscribers' IP addresses. If a second instance of infringement occurred at the same IP address within seven days of the first notice, the appellant sent a second warning notice to the subscriber at the offending IP address.

The appellant subsequently obtained *Norwich* orders requiring ISPs to provide it with information about the internet subscribers' identities based on the IP addresses at which the infringement was occurring. The appellant then served the respondents, a subset of all the internet subscribers who had received two warning notices, with a statement of claim. No defences were filed.

9 The appellant next filed a motion for default judgment against the respondents. The Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic (CIPPIC) was granted leave to intervene and provided written submissions and oral argument at the hearing of the motion.

II. The Federal Court decision

10 The Federal Court dismissed the motion for default judgment. It found that the respondents were in default of filing a defence, but determined that the appellant had not provided sufficient evidence to establish that the respondents either were the direct infringers themselves, or possessed sufficient control over those who posted the Work to have authorized the infringement (Reasons at paras. 26, 56, 70).

11 Having considered the direction of the Supreme Court in *Rogers* at paragraphs 26 and 27, the Federal Court stated that the notice and notice regime was not an "absolute liability framework" and that there was "a presumption of innocence" for internet subscribers (Reasons at para. 42). The Federal Court noted that the notice and notice regime was not a complete solution to online copyright infringement and that infringement by internet subscribers, either direct or authorizing, must still be proven for the claim to succeed (Reasons at para. 42).

12 The Federal Court rejected the appellant's argument that the notices shifted the burden of proof to the respondents to disprove the allegations set out in its statement of claim. Instead, it noted that all allegations in a statement of claim are treated as denied in a default proceeding and that the appellant was "required to lead sufficient evidence to allow the [Federal] Court to conclude on a balance of probabilities that the [respondents were] the proper defendants [to the underlying action] and have infringed copyright" (Reasons at para. 45).

13 With respect to the appellant's claim for direct infringement, the Federal Court declined to draw an adverse inference against the respondents without evidence that the appellant had sought to identify the BitTorrent user (Reasons at para. 52):

> In my view, some attempt must be made to determine the internet user responsible for the alleged infringement before a presumption can arise that the internet subscriber is that user or a proper adverse inference can be drawn based on non-responsiveness.

14 The Federal Court similarly rejected the appellant's theory of authorizing infringement; it decided that the appellant could not establish the elements of the claim for authorizing infringement based on the respondents' knowledge of the infringing activity alone. It held that to do so would

undo the balance sought by the notice and notice regime (Reasons at paras. 67 and 68). Again, following the test established by the Supreme Court in *Rogers* , the Federal Court found that the appellant had not adduced "evidence as to the nature of relationship between the internet subscribers identified as the [respondents] and those that actually uploaded the unauthorized content," which, the Federal Court held, was required to make out the appellant's claim for authorizing infringement (Reasons at para. 70).

15 The Federal Court concluded that discovery may uncover additional information to help the appellant make out this claim (Reasons at para. 70):

> There is also no evidence as to what steps, if any, the internet subscribers have taken to prevent further alleged infringement. As previously noted, some form of discovery could be sought to seek these facts or any others that would support a finding of authorization or allow an adverse inference to be drawn.

16 These reasons will explain why the Federal Court did not err in concluding that it was premature to draw an adverse inference against the respondents. The appellant had not yet attempted to compel discovery of the respondents and their potential evidence. But the Federal Court was also right not to close the door on that possibility, otherwise there is a risk of creating a zone of immunity around online infringement. Robust jurisprudence supports the shifting of the burden of proof or drawing adverse inferences in circumstances where, as here, there is an informational imbalance or key evidence is uniquely in the hands of the defendant. Gaps in a plaintiff's evidence may be filled by an adverse inference or by the failure of a defendant to meet an evidentiary burden. The question, therefore, is not whether a court can shift the burden, but when and in what circumstances.

III. Submissions before this Court

17 The appellant's primary complaint, in relation to its claim for direct infringement, lies with the Federal Court's decision not to draw an adverse inference against the respondents. The appellant says that this inference would have allowed the Federal Court to conclude that the respondents had uploaded the Work, and that the judge erred by not drawing the inference only because the appellant had not sought further discovery of the respondents. According to the appellant, once it put forward all the evidence that had been technologically available to it, what it describes as a "tactical" burden of proof shifted to each respondent to disprove that they had posted the Work online.

18 CIPPIC, on the other hand, supports the Federal Court's understanding of the evidentiary principles on a motion for default judgment for claims of direct infringement. Citing Snell v. Farrell,[1990] 2 S.C.R. 311, 72 D.L.R. (4th) 289 [, CIPPIC argues that the respondents bore no burden to disprove the appellant's allegations to the extent that the appellant itself was unable to prove its case, and that the decision not to draw an adverse inference warrants deference on appeal

(Benhaim v. St-Germain,2016 SCC 48, [2016] 2 S.C.R. 352 [). CIPPIC also says that the appellant did not undertake a diligent investigation to identify the individuals who uploaded the Work at the relevant IP addresses, unlike the successful copyright owner in Teksavvy Solutions Inc. v. Bell Media Inc.,2021 FCA 100, 460 D.L.R. (4th) 136 [. Because of this, CIPPIC says, the appellant has failed to provide any basis for an inference of direct infringement.

19 The appellant's arguments take a different focus with respect to its claim of authorizing infringement. On this point, the appellant argues that the judge erred by requiring additional evidence of the respondent's personal control over those who posted the Work through the BitTorrent network. It argues that, to establish authorizing infringement, it only needed to prove the respondent's control over the internet accounts on which the infringement occurred. The appellant says that it has done so through the *Norwich* orders. In the appellant's view, the Federal Court ought to have inferred authorization from the respondents' control over their internet accounts, combined with their failure to respond to the notices of claimed copyright infringement, citing *SOCAN* at paragraphs 124-128.

20 CIPPIC disagrees, arguing that the appellant's framing of authorizing infringement or indifference as wilful blindness by the internet subscriber is unsupported by decisions of the Supreme Court.

IV. The law of authorizing infringement

21 The result of the appellant's action depends on the legal parameters of copyright infringement and the evidentiary principles guiding what is required to satisfy a trier of fact that the circumstances before him or her constitute infringement. This motion adds a further dimension: whether adverse inferences can be drawn at this point in the litigation. Because of this, the Federal Court's decision and the disposition of this appeal are more easily assessed when first framed by the state of the law on authorizing infringement.

22 First, subsection 3(1) of the Act grants a copyright owner the exclusive right to produce (or reproduce), perform, or publish their work. It also grants a copyright owner the sole right to "authorize any such acts." Accordingly, anyone who authorizes any of these expressions of the copyrighted work, absent a licence to do so, infringes the copyright owner's exclusive authorization right (the Act, ss. 3(1) and 27(1)).

23 Second, and relatedly, authorizing infringement requires that the authorizer hold themselves out as capable of granting one of the copyright owner's exclusive rights (Barry Sookman, Steven Mason & Carys Craig, *Copyright: Cases and Commentary on the Canadian and International Law*, 2nd ed. (Toronto: Carswell, 2013) at 1001):

> To authorize an act, the alleged infringer must grant or purport to grant, either expressly or by implication, the right to do the act complained of. Further, the grantor must have some

> degree of actual or apparent right to control the actions of the grantee before he will be taken to have authorized the act. An act is not authorized by somebody who merely enables or possibly assists or even encourages another to do that act, but who does not purport to have any authority which he can grant to justify the doing of the act.

24 Third, in copyright law, to "authorize" means to "sanction, approve and countenance" (*CCH* at para. 38). Although "countenance" in this definition may initially appear to include some degree of passivity within the scope of "authorization", the Supreme Court has confirmed that the term "countenance" here "must be understood in its strongest dictionary meaning, namely, '[g]ive approval to; sanction, permit; favour, encourage'" (*CCH* at para. 38).

25 Fourth, there are certain objective factors that, on their own, do not amount to authorizing infringement. An individual who provides the means or equipment to infringe another's copyright has not necessarily authorized the infringement, for example (*ESA* at para. 106; *CCH* at para. 38). Similarly, upon receiving a warning notice, an internet subscriber is not automatically assumed to have been responsible for the asserted copyright infringement; the mere association with an IP address is not conclusive of guilt (*Rogers* at para. 41).

26 Fifth, the law of authorizing infringement relies in part on a subjective standard. The knowledge that someone *might* be using neutral technology for infringing activity is not necessarily sufficient to establish authorization, and courts presume that an individual who authorizes an activity does so only so far as it is in accordance with the law (*SOCAN* at para. 127; *CCH* at para. 38; Sookman at 1002). In some cases, however, a "sufficient degree of indifference" may allow a court to infer that the individual has indeed authorized the infringement (*CCH* at para. 38; *SOCAN* at para. 127).

27 Sixth, in authorization analyses, courts have historically considered the relationship between the alleged authorizer and the person who infringes as a result of the authorization. A "certain relationship or degree of control" existing between these parties may rebut the presumption that a person who authorizes an activity has only authorized lawful forms of that activity (*CCH* at para. 38). Control over the means by which the infringement occurred may also warrant a finding of implicit authorization; additionally, authorization may be inferred where the supply of such means was "bound to lead to an infringement and was made specifically for that purpose" (Sookman at 1002). These factors suggest that the alleged authorizer played an active role in leading the other party to infringe the copyright owner's exclusive rights under subsection 3(1) of the Act.

Society of Composers, Authors and Music Publishers of Canada v. Entertainment Software Association, 2022 SCC 30, 471 D.L.R. (4th) 391

28 My final preliminary observation, and to foreshadow my reasoning, is that the jurisprudence on authorization, particularly the Supreme Court's decision in *ESA*, provides a clear answer against the appellant's argument that the respondents have authorized infringement.

29 "Authorization" is a statutory term of art, integral to the operation of the Act and the identification of copyright infringement. The scope of authorizing infringement has been considered by the courts in different contexts, from a library's provision of self-service photocopiers to an ISP's knowledge of infringing content on their facilities. However, the plain and ordinary meaning of the word "authorization" also evokes a different response — a simple grant of permission. The premise of the appellant's argument relies on this plain and ordinary meaning of the word "authorization", which leads it to assert that there are two groups of infringers in the present appeal: internet users who have directly infringed its copyright, and internet subscribers who enable, or authorize, the infringement. The argument before the Federal Court and the Federal Court's reasons were framed on this understanding as well, which results in a conflation of these two concepts of "authorization" with respect to copyright infringement.

30 The decision of the Supreme Court in *ESA* — rendered six weeks after the release of the decision under appeal — illustrates this conflation. *ESA* is clear that authorization, in the context of online copyright infringement, is directed to and only possible in respect of those who make the copyrighted material available for downloading. While the appellant's argument takes a two-track approach to establish infringement, either direct or authorizing, the law with respect to authorization requires that its position distill to only a single argument of infringement; the appellant's arguments with respect to authorizing infringement are, in essence, evidentiary arguments in support of its claim of direct infringement. As I will explain, the appellant's theory of what I will characterize as "third party authorization" — which involves a subscriber's consent to sharing access to their internet account, and indifference to the purposes for which it is used — does not fit into the law of copyright as it is currently understood.

31 The Supreme Court in *ESA* reiterated that, pursuant to subsection 3(1) of the Act, authors have only three copyright interests in their works: the right to produce or reproduce a work in any material form; the right to perform a work in public; and the right to publish an unpublished work (*ESA* at para. 54). An activity that engages one of the three copyright interests under subsection 3(1) is an infringement of copyright, pursuant to subsection 27(1) of the Act, since the activity would be something that only the owner of the copyright has the exclusive right to do (*ESA* at para. 104). On the other hand, an activity that does not engage one of the three copyright interests under subsection 3(1), or the author's moral rights, "is not a protected or compensable activity under the [Act]" (*ESA* at para. 57). This distinction confirms that non-infringing activities end, and infringing activities begin, upon the triggering of a copyright interest in subsection 3(1).

32 The Supreme Court then linked various infringing activities to the specific copyright interest triggered by each infringement, by examining what that activity does to the copyrighted work (*ESA* at para. 56). As Rowe J. explained, if a work is streamed or made available for on-demand streaming, the author's performance right is engaged; if the work is downloaded, the author's

reproduction right is engaged; and, importantly, "if the work is made available for downloading, the author's right to authorize reproductions is engaged" (*ESA* at paras. 8, 103, 106-108).

33 The Supreme Court endorsed the Copyright Board's determination that "it is the act of posting [the work] that constitutes authorization", because the person who makes the work available "either controls or purports to control the right to communicate it", and "invites anyone with Internet access to have the work communicated to them" (*ESA* at para. 106). The authorizer is the individual directly engaging with the copyrighted material. This close relationship between the authorizer and the copyrighted material is emphasized and repeated throughout the Supreme Court's reasons (*ESA* at paras. 8, 103, 106-108).

34 There is no question, based on *ESA*, that the person using the respondents' internet accounts to make the Work available for download via BitTorrent is authorizing infringement. This situation is the precise example of authorizing infringement described throughout *ESA* (*ESA* at paras. 8, 103, 106-108). However, the appellant's claim of authorizing infringement does not mirror this example. *ESA* says that an authorizer permits reproduction; the appellant says that an authorizer is someone who permits someone to permit reproduction. And, as Rowe J. observes, subsection 3(1) of the Act "exhaustively" sets out the scope of copyright interests (*ESA* at para. 54).

35 Two questions on authorizing infringement therefore remain for this Court: first, whether as a factual matter the appellant has shown, on a balance of probabilities, that the respondents are themselves the individuals who made the Work available for download via BitTorrent (following the example of authorizing infringement from *ESA*); and second, whether the appellant has shown the respondents to have otherwise authorized infringement, based on the meaning of the jurisprudence set out above. As I previously mentioned, these questions engage evidentiary considerations, in light of the shifting burdens and adverse inferences urged upon the Court by the appellant.

36 I conclude that the appellant has not shown any reversible error in the Federal Court's decision. This conclusion is based, in part, on my earlier observation that the thrust of the appellant's arguments before this Court are inconsistent with the Supreme Court's decision in *ESA*. I highlight as well that the first question described in the paragraph above reveals how the appellant's claim of direct infringement collides with the law on authorizing infringement following *ESA*. This collision is made abundantly clear when paragraph 2 of the appellant's memorandum of fact and law is juxtaposed with the direction from *ESA* that making a work available for downloading engages an author's authorization right:

> Voltage has two theories of copyright infringement against the [respondents]: (a) infringement by the [respondents] making the Work available for download online ("**Direct Infringement**"); and (b) infringement by a respondent who authorized the direct infringement of the Work by an unknown person by not responding to warning notices indicating

the Work was being infringed, and allowing the infringement to continue ("**Authorizing Infringement**").

[Bold characters in original, underlining added.]

37 Nonetheless, for the purposes of this appeal, I will deal with the reasons of the Federal Court and arguments before us as presented. I will explain, where necessary, why they do not align with *ESA* and the law of copyright infringement.

V. Burdens of proof and adverse inferences

38 A defendant's failure to file a defence means that no allegations of fact in a pleading are admitted (Rule 184(1); Tatuyou, LLC v. H2Ocean Inc.,2020 FC 865, 176 C.P.R. (4th) 1 at para. 9 [; NuWave Industries Inc. v. Trennen Industries Ltd., 2020 FC 867, 177 C.P.R. (4th) 1 at para. 16 [). Therefore, the appellant, as plaintiff before the Federal Court, bore the legal or persuasive burden of leading sufficient evidence to prove the necessary elements of its claim on a balance of probabilities (*Tatuyou* at paras. 9, 25; *NuWave* at para. 16).

39 The legal burden of proof, sometimes called the "persuasive burden" (see R. v. Morrison, 2019 SCC 15, [2019] 2 S.C.R. 3), never shifts, and the evidentiary building blocks by which it can be discharged may include affirmative evidence and adverse inferences. However it is discharged, the plaintiff in a civil case must prove its claims on a balance of probabilities with evidence that is "sufficiently clear, convincing and cogent" (Canada(; Nelson (City) v. Mowatt, 2017 SCC 8, [2017] 1 S.C.R. 138 at para. 40; F.H. v. McDougall, 2008 SCC 53, [2008] 3 S.C.R. 41 at para. 46).

40 The need for predictability in trial processes demands that the burden of proof be allocated according to rules of law and not *ad hoc* decisions by the trier of fact (Sidney N. Lederman, Michelle K. Fuerst & Hamish C. Stewart, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 6th ed. (Toronto: LexisNexis, 2022) at 105). Thus, normally, no true "shifting" of any legal burden occurs in the course of an action. The plaintiff must lead evidence on the required elements of the case, and matters of affirmative defence must be proved by the defendant (J. Kenneth McEwan, *Sopinka on the Trial of an Action*, 4th ed. (Toronto: LexisNexis, 2020) at 84). Which party bears the legal or persuasive burden of proof in relation to a fact or issue is governed by the substantive law, and the burden is always on the party asserting a proposition or fact that is not self-evident (WIC Radio Ltd. v. Simpson, 2008 SCC 40, [2008] 2 S.C.R. 420 at para. 30; Robins v. National Trust Co.,[1927] A.C. 515, [1927] 2 D.L.R. 97 (P.C.) at 100-101).

41 The evidential burden, in contrast, refers to a party's obligation to establish, through sufficient evidence, the existence or non-existence of a particular fact or issue so that a particular argument is live before the Court (R. v. Schwartz,[1988] 2 S.C.R. 443, 55 D.L.R. (4th) 1 at 466-467 [). Unlike the party with the legal burden, the party with an evidential burden is not strictly required to convince the trier of fact of anything, since an issue can be put into play without being proven

(Schwartzat 467). Thus, the use of the term "tactical burden" to describe the evidential burden has been criticized as evidential burdens are imposed by law and are not matters of tactics (Lederman at 101, citing G. Williams, *Textbook of Criminal Law*, 2d ed. (London: Stevens & Sons, 1983); R. v. Fontaine,2004 SCC 27, [2004] 1 S.C.R. 702 at paras. 11-12).

42 While legally discrete, shifting evidentiary burdens and adverse inferences are closely related and frequently used interchangeably. The failure to respond with exculpatory evidence to evidence led by a plaintiff may have consequences for a defendant. As the Supreme Court noted, "[i]t is not strictly accurate to speak of the burden shifting to the defendant when what is meant is that evidence adduced by the plaintiff may result in an inference being drawn adverse to the defendant" (Snellat 329-330). In this sense, the term "tactical burden" is apt, as it reflects the dynamic of the trial process. As *Sopinka on the Trial of an Action* notes, "the use of the term 'burden of proof' is merely a compendious way of summarizing the consequences of calling no evidence to rebut the evidence which gives rise to the inference" (McEwan at 84-85).

43 The consequences of calling no evidence to rebut inculpatory evidence in the context of online copyright infringement are a major issue on this appeal; a review of prior adaptations to the typical burden of proof in civil matters assists in identifying these consequences, if any.

(1) Cook v. Lewis, [1951] S.C.R. 830, [1952] 1 D.L.R. 1 [Cook]

44 No judge or lawyer can forget *Cook v. Lewis*, the classic case we learned as students in the first-year of law school. There, a plaintiff had been shot during a hunting accident but was unable at trial to prove which of the two defendants was responsible.

45 The Supreme Court held that, on proof that the plaintiff had been injured by one of the hunters, the onus shifted to each hunter to then establish that their conduct had not been negligent. Cartwright J., writing for the majority, determined that where a trier of fact could not ascertain which particular defendant had caused the plaintiff's injury, because either defendant could equally have been the cause of the injury, both should be held liable (*Cook* at 842). Rand J., in a concurring set of reasons later endorsed by the Supreme Court in Hollis v. Dow Corning Corp., [1995] 4 S.C.R. 634, 129 D.L.R. (4th) 609 [, explained the policy rationale for such a reversal of the onus of proof: he reasoned that the defendants had, by their own conduct, "made more difficult if not impossible the means of proving" the plaintiff's case, and had "in effect, destroyed the victim's power of proof" (*Cook* at 832).

(2) National Trust Co. Ltd. v. Wong Aviation Ltd. et al., [1969] S.C.R. 481, 3 D.L.R. (3d) 55 [National Trust]

46 The impact of evidentiary voids created by defendants is also observed in bailment cases. In *National Trust*, the Supreme Court adopted the following rationale for imposing a burden on the defendant bailee (at 489):

> Lord Justice Atkin explains the grounds upon which the principle [governing the burden of proof in bailment cases] is founded, and I quote his language as follows: "The bailee knows all about it; he must explain. He and his servants are the persons in charge; the bailor has no opportunity of knowing what happened. These considerations, coupled with the duty to take care, result in the obligation on the bailee to show that that duty has been discharged."

47 The Supreme Court in *National Trust* stressed that this rule of evidence, which effectively requires a defendant or bailee to prove a negative (that they were not negligent in handling the bailor's chattel), should only be invoked in circumstances where all considerations stipulated by Lord Atkin apply (National Trustat 489). Ritchie J. wrote that he "[did] not think it desirable, except in the clearest of cases, for a question of liability to be determined on the sole ground that the strict rules of evidence regarding the shifting of the onus of proof have not been complied with" (National Trustat 491). This led to the Supreme Court's later observation in *Snell* that the legal burden may be reversed if the rationale for its original allocation — that the party asserting an issue is in the best position to prove it — is absent.

(3) Snell v. Farrell, [1990] 2 S.C.R. 311, 72 D.L.R. (4th) 289

48 In *Snell*, Sopinka J. noted that the allocation of the burden of proof is a flexible concept. He confirmed that the Supreme Court "has not hesitated to alter the incidence of the ultimate burden of proof when the underlying rationale for its allocation is absent in a particular case", referring to *National Trust* and *Cook* (Snellat 321). A defendant's unique opportunity of knowledge with respect to the facts to be proved may open the door to an adverse inference being drawn, and "very little affirmative evidence on the part of the plaintiff will justify the drawing of an inference of causation in the absence of evidence to the contrary" (Snellat 328-329, 335-336).

49 The Supreme Court then went on to distinguish the case before it from *Cook*, where the reversal of the burden of proof was justified as the defendants' own tortious conduct had destroyed the plaintiff's means of proof. In *Cook*, the Supreme Court held, the injury was not caused by "neutral conduct"; it was therefore "quite a different matter" to reverse the burden of proof where the injury may very well be due to factors "unconnected to the defendant and not the fault of anyone" (Snellat 327). The Supreme Court continued, noting that while it was not accurate to describe the burden as shifting to the defendant, the plaintiff may nevertheless adduce sufficient evidence to warrant an adverse inference against the defendant (Snellat 329-330):

> Whether an inference is or is not drawn is a matter of weighing evidence. The defendant runs the risk of an adverse inference in the absence of evidence to the contrary. This is sometimes referred to as imposing on the defendant a provisional or tactical burden... In my opinion, this is not a true burden of proof, and use of an additional label to describe what is an ordinary step in the fact-finding process is unwarranted.

(4) Rainbow Industrial Caterers Ltd. v. Canadian National Railway Co., [1991] 3 S.C.R. 3 [Rainbow Caterers]

50 In *Rainbow Caterers*, the Supreme Court reiterated that the legal burden is not immutable, citing *National Trust* and *Snell* . The Supreme Court framed the evidentiary procedure applicable to the matter on the basis of which party had advanced which issue (Rainbow Caterersat 15):

> Once the loss occasioned by the transaction is established, the plaintiff has discharged the burden of proof with respect to damages. A defendant who alleges that a plaintiff would have entered into a transaction on different terms sets up a new issue. It is an issue that requires the court to speculate as to what would have happened in a hypothetical situation. It is an area in which it is usually impossible to adduce concrete evidence. In the absence of evidence to support a finding on this issue, should the plaintiff or defendant bear the risk of non-persuasion? Must the plaintiff negate all speculative hypotheses about his position if the defendant had not committed a tort or must the tortfeasor who sets up this hypothetical situation establish it?

51 The Supreme Court found that it was for the defendant to make out its case on an issue set up by it, to temper the quantification of damages as proved by the plaintiff. It observed that "[v]alid policy reasons will be sufficient to reverse the ordinary incidence of proof", and that the matter before it warranted such a reversal; the defendant had asked the court to arrive at a conclusion opposite that asserted by the plaintiff regarding what would have occurred in the hypothetical world, and therefore bore the burden of displacing the plaintiff's assertion of the state of affairs as they had previously existed (Rainbow Caterersat 15-16).

(5) Hollis v. Dow Corning Corp., [1995] 4 S.C.R. 634, 129 D.L.R. (4th) 609

52 In *Hollis*, the Supreme Court determined that a manufacturer of breast implants had a duty to warn physicians of risks associated with the implants.

53 The appellant in *Hollis* struggled with an evidentiary hurdle similar to that facing the appellant in the present matter. While the appellant's "power of proof" had not been destroyed as it had been in *Cook*, it nevertheless was "seriously undermined" by the manufacturer's insistence that she prove a hypothetical series of events: that her physician would have relayed to her all warnings from the manufacturer, had he indeed received information from the manufacturer regarding the risks of ruptured implants (*Hollis* at 683).

54 Although the physician's conduct may have itself contributed to the breach of the appellant's right to informed consent, the Supreme Court did not require the appellant to definitively eliminate every other possible cause of her injury before holding the manufacturer liable. The Supreme Court decided that it was not for the plaintiff, Ms. Hollis, to prove that her doctor would have

passed on the warning to her; she was in a position of "informational inequality" with respect to this issue, and had clearly "played no part in creating the set of causal conditions leading to her injury" (*Hollis* at 683).

(6) Benhaim v. St-Germain, 2016 SCC 48, [2016] 2 S.C.R. 352

55 The Supreme Court in *Benhaim* dealt with a similar tension between the evidence required of a plaintiff on the one hand, and the limitations on the evidence made available by a defendant on the other. In *Benhaim*, the Supreme Court determined that, although a physician's negligence had undermined the plaintiff's ability to prove causation in a medical liability case, the trial judge was not obligated to draw an adverse inference against the defendant (*Benhaim* at paras. 41-42). In cases where the plaintiff's quest for evidence is frustrated by the defendant's negligence, "an adverse inference of causation *may* discharge the plaintiff's burden of proving causation", but "[t]hose circumstance do not *trigger* such an inference" (*Benhaim* at para. 42, emphasis in original). The Supreme Court highlighted the permissive language that figures in case law describing trial judges' exercise of their discretion to draw adverse inferences (*Benhaim* at paras. 43, 52).

56 The Supreme Court concluded that uncertainty or speculation about a defendant's evidence is insufficient to warrant the drawing of an adverse inference (*Benhaim* at para. 44). Instead, decisions to draw an adverse inference must be based on "an evaluation of all of the evidence", including the weaknesses in the plaintiff's own evidence (*Benhaim* at para. 44). To approach the decision in any other way, where an adverse inference is triggered only by a scarcity of evidence, would have "the same effect as impermissibly reversing the burden of proof" (*Benhaim* at paras. 44, 68). The Supreme Court found that such an approach, in the context of the medical liability case before it, "risks turning defendant professionals into insurers" (*Benhaim* at para. 68).

57 A review of burdens of proof and adverse inferences arguably pulls in favour of the appellant's position. Taken together, *Cook*, *National Trust*, *Snell* , *Rainbow Caterers, Hollis*, and *Benhaim* show that the allocation of the burden of proof must be responsive to the parties, their respective abilities to procure or access critical evidence, and the issues raised in the matter. They also show that inferences may be drawn where a plaintiff cannot reasonably be expected to prove every aspect of their injury.

58 These overarching themes collide, however, with the reality that copyright law is statutory, and that both "infringement" and "authorization" are statutory terms whose scope and content has been judicially defined (*CCH* at paras. 9 and 38; *SOCAN* at para. 82; *ESA* at paras. 71, 104-107; Compo Co. Ltd. v. Blue Crest Music et al., [1980] 1 S.C.R. 357, 105 D.L.R. (3d) 249 at 372-273). In this way, *CCH* , *SOCAN*, *Rogers* and *ESA* establish minimum evidentiary requirements of a successful claim of infringement. More specifically, this jurisprudence does two things: it prescribes certain facts that must be established to prove infringement, and it allows for the drawing of adverse inferences of infringement based on the overall state of the evidence.

VI. Analysis of the Federal Court's decision

The appellant's claim of direct infringement

59 The appellant says that the respondents have directly infringed its copyright by making the Work available for download online through BitTorrent. It says that it has advanced all of the evidence that is "technologically possible" in respect of this claim, and that the Federal Court should have drawn an adverse inference to close any remaining evidentiary gap left by these limitations, thereby allowing the appellant's claims of direct infringement. It also says that the respondents' repeated non-response to the appellant's allegations necessitates that an adverse inference be drawn against them. Finally, the appellant argues that the Federal Court erred by declining to draw any such adverse inference on the basis that the appellant had failed to seek further discovery of the respondents.

60 I disagree that the Federal Court erred in its application of the legal principles relevant to adverse inferences or in its weighing of the evidence before it. In any event, the Federal Court's decision not to draw an adverse inference in this context is a question of fact warranting deference on appeal, subject to the correctness of the legal principles guiding its assessment of the claims (*Benhaim* at para. 42).

61 The Supreme Court's decision in *Rogers* is largely dispositive of the appellant's argument with respect to its claim of direct infringement. The Supreme Court there acknowledged "that there will likely be instances in which the person who receives notice of a claimed copyright infringement will not in fact have illegally shared copyrighted content online" (*Rogers* at para. 35). An internet subscriber therefore cannot be assumed to be the individual responsible for any infringing activity connected to their internet account (*Rogers* at para. 41):

> It must be borne in mind that being associated with an IP address that is the subject of a notice under s. 41.26(1)(a) is not conclusive of guilt. As I have explained, the person to whom an IP address belonged at the time of an alleged infringement may not be the same person who has shared copyrighted content online. It is also possible that an error on the part of a copyright owner would result in the incorrect identification of an IP address as having been the source of online copyright infringement.
>
> [Emphasis added.]

62 A further comment is in order.

63 A presumption of innocence underlies Parliament's choice of a notice and notice regime over a notice and take down regime. The presumption does not mean, though, that the notices have no evidentiary value or that there is some heightened obligation on a plaintiff to prove its case beyond

the usual civil standard of the balance of probabilities. To the contrary, the notices are a relevant part of the factual matrix before the judge hearing the action. They are not neutral facts.

64 I return to *Benhaim* , where the Supreme Court declined to draw an adverse inference on the basis of a scarcity of evidence alone, as "[s]hifting the consequences of causal uncertainty in [that] manner [risked] turning defendant [medical] professionals into insurers" (*Benhaim* at para. 68). The analogy to the facts in this appeal is patent: drawing an adverse inference, on the basis of the link between a flagged IP address and its corresponding internet subscriber would make subscribers strictly liable for all infringing activity associated with their account, a result that the Supreme Court has clearly rejected (*Rogers* at paras. 26 and 41).

65 The appellant's argument regarding its inability to collect further evidence is, in the absence of an attempt to obtain discovery from the account holder, unpersuasive. The appellant's assertion that it could not have proven more than it did, technologically speaking, does not afford it more flexibility in the weighing of its evidence, lower the applicable standard of proof, or displace what must be advanced to establish a copyright owner's claim of infringement. Legal burdens are not shifted to the defendant merely because the plaintiff has put forward all of the evidence possible.

66 Further, adverse inferences do not necessarily follow only because a party has presented all the evidence "reasonably available" to it on an *ex parte* motion. The appellant was still required to prove its claims of infringement to the Federal Court on a balance of probabilities. The Federal Court found that it had failed to do so, and I see no error in this conclusion in light of the guidance from *Rogers* that a mere association with an offending IP address is not conclusive that the corresponding internet subscriber shared copyrighted material online (Reasons at para. 56; *Rogers* at paras. 35 and 41).

(1) Cases relied on by the appellant

67 The appellant relies on *TekSavvy* to argue that, once copyright owners have completed all reasonable investigations, they cannot be required to undertake further investigations. Although this Court in *TekSavvy* concluded that "additional efforts to [identify, locate, and engage directly with] the defendants would have been fruitless", it arrived at this conclusion after noting that "[t]he plaintiffs clearly adduced evidence of efforts to find the defendants" (*TekSavvy* at para. 85).

68 In contrast, the Federal Court in this case concluded that the appellant had made no attempt to determine the internet user responsible for the alleged infringement beyond seeking the *Norwich* orders (Reasons at para. 52), and that further discovery may uncover helpful information (Reasons at para. 50). The plaintiffs in *TekSavvy* had evidently gone further in their investigations than did the appellant in the present case. This factual distinction limits the relevance of *TekSavvy* to this case.

69 The appellant also relies on Trimble Solutions Corporation v. Quantum Dynamics Inc.,2021 FC 63, 187 C.P.R. (4th) 36 [for the proposition that default judgment may be granted even where the Federal Court cannot discern the identity of the individual using the infringing software. However, this case does not stand for so broad a proposition. The Federal Court in *Trimble* granted a motion for default judgment based on the particular set of facts before it, which included evidence connecting the defendants to the instances of direct infringement.

70 Again, no similar evidence was before the Federal Court. Although the appellant obtained the *Norwich* orders to obtain the respondents' names and addresses from their ISPs, this evidence does not link the respondents to the infringing activity as did the evidence in *Trimble*. The hostnames, usernames, and e-mail addresses associated with the infringing activity in *Trimble* were inherently identifying pieces of information that strengthened the connection between the infringement and the person associated with these identifiers, and supported the inferences drawn by the judge (*Trimble* at para. 60). There was "no doubt", in the end, that the devices used for the infringing activities were under the control of the defendants and located at their premises (*Trimble* at para. 60).

71 The appellant's evidence that an internet subscriber is often the individual using BitTorrent software to distribute files does not overcome the speculation required to conclude that these particular respondents, in this particular case, are the infringing internet users (Perino Affidavit at para. 16, Appeal Book at 203). The appellant itself acknowledged that "it is well known that home internet accounts can be used by more than one person" in its written submissions (Appellant's memorandum of fact and law at para. 32).

72 Apart from the *Norwich* orders and the appellant's software, which linked the posting of the Work to a particular IP address, no other evidence before the Federal Court identified the respondents as the internet users who uploaded the Work. As described above, the appellant bore the burden of providing the Federal Court with this evidence. The Federal Court was not bound to accept that the respondents were the uploaders simply because no evidence before it pointed to anyone else as an uploader. Although it accepted that individuals using each respondents' IP address had infringed the appellant's copyright by uploading the Work, the Federal Court found that it could not conclude at this time that the respondents were themselves those particular individuals (Reasons at paras. 32-33, 56). I agree.

(2) Consequences of failing to defend

73 The appellant stresses that the respondents have passed up four occasions to provide exculpatory evidence (after the first notice was sent, after the second notice was sent, after receiving the statement of claim, and after being sent a reminder of the statement of claim). It says that the respondents' default status itself "demands" that an adverse inference be drawn against them.

74 The essence of the appellant's argument on this point blends the two-step consideration that a court undertakes when faced with a motion for default judgment. A finding that the defendant is in default is only the first of two steps that a plaintiff must satisfy to be successful on a motion for default judgment; to satisfy the second step, the plaintiff must also provide the court with sufficient evidence to support its particular claim (Chase Manhattan Corp. v. 3133559 Canada Inc., 2001 FCT 895, 2001 CarswellNat 2492 (WL Can) at para. 5; Canada v. Thiel, 2016 FC 137, 2016 CarswellNat 242 (WL Can) at para. 1; Canada v. Zielinski Brother's Farm Inc.,2019 FC 1532, 2019 CarswellNat 7286 (WL Can) at para. 1).

75 A failure to defend, when coupled with other probative evidence, leaves a defendant vulnerable to an adverse inference. The fact that a defendant is noted in default at the first stage does not itself require that an adverse inference be drawn at the second stage of this analysis. It is the second stage of the analysis that requires a weighing of the evidence and an assessment of whether the plaintiff has made out its claims. If the fact that a defendant was in default automatically allowed for adverse inferences at the second stage of the test for motions for default judgment, plaintiffs on *ex parte* motions for default judgment would need to present no evidence to the court in order to be successful. Some evidence is required.

76 Turning to the appellant's final argument with respect to its claim of direct infringement, I find that the Federal Court did not err by requiring the appellant to seek discovery of the respondents before drawing an adverse inference against them. I disagree with this characterization of the Federal Court's decision on this point, as I do not read it as requiring that this step be taken for purely procedural, formalistic, or symbolic reasons. The Federal Court instead offered that "further discovery or a request for further information" may provide the very evidence that the appellant was lacking in its attempt to show conduct that legally constituted infringement (Reasons at para. 50). Focusing on the evidentiary requirements of the appellant's claim, the Federal Court correctly held that "something more is needed than the bare assertion that a subscriber is, by default, the user responsible for infringement" (Reasons at para. 55).

77 I agree with the appellant, however, that it would have been an error for the Federal Court to require that the appellant discover the respondents' devices or electronic records as a pre-condition to drawing an adverse inference or making a finding of infringement. The Federal Court does appear to have alluded to such a requirement, stating that "some attempt must be made to determine the internet user responsible for the alleged infringement before... a proper adverse inference can be drawn based on non-responsiveness" (Reasons at para. 52).

78 To the extent that this comment introduces some procedural condition to claims of copyright infringement, I disagree. What ultimately matters in copyright litigation is whether the copyright owner, substantively, made out its claim of infringement on a balance of probabilities. However, given my prior conclusion that the appellant had failed to provide the Federal Court

with sufficient evidence necessary to establish a link between the respondents and the infringing activity, no adverse inference could properly have been drawn in the circumstances, regardless of the procedural steps undertaken by the appellant.

The appellant's claim of authorizing infringement

79 The appellant contends that the Federal Court erred by requiring that the appellant establish the scope of control that the respondents had over the person who posted the Work online prior to granting default judgment. The appellant also argues that the respondents were wilfully blind to the infringement of its copyright, in light of the continued infringement despite having received two notices alleging infringing activity at their IP addresses. The appellant submits that its evidence — that two notices were sent to the respondents, and that the respondents are the internet subscribers associated with the offending IP addresses — is sufficient to conclude that the respondents exercised control over the use of their internet account and the devices connected to it so as to have authorized the infringement.

80 These arguments fail for two reasons.

81 The first is rooted in the Supreme Court's definition of "authorize" (*CCH* at para. 38):

> "Authorize" means to "sanction, approve and countenance". Countenance in the context of authorizing copyright infringement must be understood in its strongest dictionary meaning, namely, "[g]ive approval to; sanction, permit; favour, encourage": see *The New Shorter Oxford English Dictionary* (1993), vol. 1, at p. 526. Authorization is a question of fact that depends on the circumstances of each particular case and can be inferred from acts that are less than direct and positive, including a sufficient degree of indifference. However, a person does not authorize infringement by authorizing the mere use of equipment that could be used to infringe copyright. Courts should presume that a person who authorizes an activity does so only so far as it is in accordance with the law. This presumption may be rebutted if it is shown that a certain relationship or degree of control existed between the alleged authorizer and the persons who committed the copyright infringement.
>
> [Citations omitted, emphasis added.]

82 "Authorization" therefore depends on the alleged authorizer's control over the *person* who committed the resulting infringement; it does not depend on the alleged authorizer's control over the supply of their technology (*CCH* at paras. 38 and 45; Sookman at 1002). Allowing the "mere use of equipment that could be used to infringe copyright", which at best is all we have here, does not fall within the legal definition of "authorizing" (*CCH* at paras. 38, 42-43). The Federal Court adhered to this principle, and found that the appellant had not proven any activity beyond the respondents' sharing of their internet accounts (Reasons at paras. 59, 68 and 70).

83 As the appellant notes, its argument of authorizing infringement has previously been before this Court in Salna v. Voltage Pictures, LLC,2021 FCA 176, 469 D.L.R. (4th) 342 [. Importantly, though, the Court considered the appellant's argument in the context of a certification motion, which does not call for an assessment of the merits of the argument (*Salna* at para. 77). Assessing only whether the appellant had pled a reasonable cause of action, the Court determined that the appellant had shown that it had a "novel but arguable claim" of authorizing infringement (*Salna* at para. 83). This conclusion does not represent an acceptance of the genre of authorizing infringement as framed by the appellant; rather, it represents an acceptance of this genre as arguable. As the Court noted in *Salna*, it was up to the appellant to prove its claims at the hearing on the merits (*Salna* at para. 84); the Federal Court in this case found that the appellant had not provided sufficient evidence to do so (Reasons at paras. 62-63).

84 The second reason for the failure of the appellant's claim of authorizing infringement is, as discussed already, the Supreme Court's decision in *ESA*.

85 *ESA* establishes clear guidance as to the legal and evidentiary requirements of infringement in the context of online infringement. To establish an infringing activity, there must be evidence that what the activity does *to* the work engages one of the three interests in subsection 3(1) of the Act (*ESA* at paras. 56-57). Posting a work online and inviting others to view it engages the author's authorization right; however, sharing internet access after receiving notices of alleged infringement does nothing *to* the work in question, and does not therefore engage any copyright interest granted to the author exclusively (*ESA* at paras. 56-57, 106; the Act, ss. 3(1) and 27(1)). Because the latter scenario arises here, the activity asserted by the appellant as "authorization" cannot justify protection under the Act.

VII. Conclusion

86 In the factual matrix of this case and at this relatively early stage of this case, the defendants' lack of participation in litigation does not offset the plaintiff's lack of evidence. The Federal Court was not obligated to draw an adverse inference at this stage of the litigation merely because the respondents had, by their silence, not put forward sufficient evidence to rebut the appellant's allegations (*Benhaim* at para. 42).

87 For the reasons above, I would dismiss this appeal. As neither the appellant nor CIPPIC seeks costs, none should be awarded.

***Stratas J.A.*:**

I agree.

***Webb J.A.*:**

I agree.

Appeal dismissed.

Schedule1 — LIST OFDEFENDANTSANDSPECIFIC INFORMATION REGARDING INFRINGEMENTS OF SUCH DEFENDANTS

	Name & Address	IP Address	1{st} Notice Date & Time (UTC) of Infringement	2{nd} Notice Date & Time (UTC) of Infringement
1.	Doe #1, name and address unknown	156.34.2.57	2017-09-23 12:14:22	2017-10-03 15:41:47
2.	Doe #2, name and address unknown	156.34.180.12	2017-09-23 14:26:32	2017-10-01 03:36:54
3.	Doe #3, name and address unknown	142.162.128.245	2017-09-23 14:13:46	2017-10-01 10:05:58
4.	Doe #4, name and address unknown	47.54.165.90	2017-09-22 21:55:01	2017-10-02 23:33:27
5.	Doe #5, name and address unknown	156.57.220.81	2017-09-24 14:49:05	2017-11-03 00:35:45
6.	Doe #6, name and address unknown	108.175.82.55	2017-09-24 23:55:18	2017-10-03 21:25:32
7.	Doe #7, name and address unknown	47.55.135.155	2017-09-28 12:02:47	2017-10-06 16:46:00
8.	Doe #8, name and address unknown	99.192.57.154	2017-10-03 15:46:37	2017-10-15 17:37:56
9.	Doe #9, name and address unknown	99.192.98.62	2017-10-21 01:18:19	2017-10-29 01:16:02
10.	Doe #10, name and address unknown	156.34.231.116	2017-10-23 21:20:10	2017-11-08 04:56:55
11.	Doe #11, name and address unknown	99.192.98.54	2017-10-31 15:58:55	2017-11-08 02:13:16
12.	Doe #12, name and address unknown	142.166.216.146	2017-11-02 00:08:42	2017-11-10 04:39:17
13.	Doe #13, name and address unknown	142.177.66.92	2017-11-22 12:29:40	2017-11-30 00:30:50
14.	Doe #14, name and address unknown	47.55.141.234	2017-12-06 05:04:51	2017-12-17 10:23:54
15.	Doe #15, name and address unknown	142.167.107.117	2018-01-08 02:54:10	2018-01-16 07:38:54
16.	Doe #16, name and address unknown	142.162.97.180	2018-01-08 22:17:39	2018-01-22 04:03:57
17.	Doe #17, name and address unknown	70.26.9.128	2017-09-04 15:47:34	2017-09-22 20:40:39
18.	Doe #18, name and address unknown	67.68.98.171	2017-09-09 17:37:40	2017-09-24 19:40:14
19.	Doe #19, name and address unknown	67.68.221.129	2017-09-21 18:07:52	2017-09-30 15:19:05
20.	Doe #20, name and address unknown	76.68.210.170	2017-09-23 04:08:35	2017-10-07 23:12:04
21.	Doe #21, name and address unknown	64.228.79.220	2017-09-23 02:44:57	2017-10-01 00:14:25
22.	Doe #22, name and address unknown	70.51.181.6	2017-09-21 23:51:26	2017-10-20 13:09:37

23.	Doe #23, name and address unknown	65.93.22.84	2017-09-23 14:20:10	2017-11-01 01:52:09
24.	Doe #24, name and address unknown	65.93.37.104	2017-09-22 20:29:47	2017-10-01 02:13:30
25.	Doe #25, name and address unknown	70.52.111.190	2017-09-24 23:22:52	2017-10-06 01:28:51
26.	Doe #26, name and address unknown	174.95.209.150	2017-09-28 20:5747	2017-10-10 00:16:33
27.	Doe #27, name and address unknown	174.91.58.211	2017-10-01 19:28:16	2017-10-12 07:30:15
28.	Doe #28, name and address unknown	69.158.120.153	2017-10-02 02:10:25	2017-10-15 18:12:41
29.	Doe #29, name and address unknown	69.157.112.66	2017-10-08 17:07:02	2017-10-26 09:23:29
30.	Doe #30, name and address unknown	70.54.41.122	2017-10-09 23:43:14	2017-10-19 08:17:40
31.	Doe #31, name and address unknown	76.68.166.197	2017-10-18 14:47:27	2017-10-28 15:44:59
32.	Doe #32, name and address unknown	174.94.24.88	2017-10-25 04:34:03	2017-11-12 04:05:48
33.	Doe #33, name and address unknown	76.68.165.22	2017-10-28 17:13:06	2017-11-19 05:22:22
34.	Doe #34, name and address unknown	70.55.183.190	2017-11-02 18:51:24	2017-11-11 03:31:49
35.	Doe #35, name and address unknown	70.53.243.234	2017-11-05 15:17:04	2017-12-01 23:56:50
36.	Doe #36, name and address unknown	67.70.141.111	2017-11-22 21:18:01	2017-12-01 16:44:10
37.	Doe #37, name and address unknown	174.89.225.185	2017-11-23 04:26:11	2017-12-08 22:56:01
38.	Doe #38, name and address unknown	50.100.143.185	2017-12-05 02:37:09	2017-12-26 21:59:23
39.	Doe #39, name and address unknown	70.26.230.20	2017-12-11 10:14:24	2017-12-19 08:30:27
40.	Doe #40, name and address unknown	65.92.242.120	2017-12-10 10:35:07	2017-12-19 02:23:52
41.	Doe #41, name and address unknown	174.91.250.77	2017-12-13 01:14:38	2017-12-22 02:07:19
42.	Doe #42, name and address unknown	76.64.239.125	2017-12-12 22:24:35	2017-12-23 01:07:57
43.	Doe #43, name and address unknown	70.31.230.190	2017-12-13 06:05:28	2017-12-21 09:26:03
44.	Doe #44, name and address unknown	70.26.203.10	2017-12-13 05:52:54	2017-12-21 04:56:51
45.	Doe #45, name and address unknown	74.12.216.135	2017-12-13 05:47:10	2017-12-22 01:36:51
46.	Doe #46, name and address unknown	70.49.66.137	2017-12-13 05:46:33	2017-12-21 19:44:48
47.	Doe #47, name and address unknown	67.68.201.148	2017-12-13 05:02:09	2017-12-21 08:04:36
48.	Doe #48, name and address unknown	184.145.217.50	2017-12-13 02:10:19	2017-12-21 19:19:35
49.	Doe #49, name and address unknown	70.30.248.51	2017-12-13 00:41:32	2017-12-21 03:10:12
50.	Doe #50, name and address unknown	70.51.141.35	2017-12-13 11:00:17	2017-12-21 09:45:38
51.	Doe #51, name and address unknown	65.92.23.220	2017-12-15 05:04:17	2017-12-25 01:13:54

52.	Doe #52, name and address unknown	70.4977.208	2017-12-15 18:16:58	2017-12-24 03:42:10
53.	Doe #53 name and address unknown	184.148.213.254	2017-12-17 07:22:22	2017-12-26 04:41:57
54.	Doe #54, name and address unknown	70.53.216.231	2017-12-17 07:15:20	2018-01-12 00:00:01
55.	Doe #55, name and address unknown	76.69.176.159	2017-12-13 00:58:02	2017-12-26 04:53:20
56.	Doe #56, name and address unknown	174.92.168.219	2017-12-19 08:26:54	2018-01-03 12:56:12
57.	Doe #57, name and address unknown	50.100.131.28	2017-12-20 23:14:07	2017-12-29 15:04:57
58.	Doe #58 name and address unknown	70.30.252.247	2017-12-20 23:08:22	2017-12-31 02:49:11
59.	Doe #59, name and address unknown	70.55.52.99	2017-12-24 05:25:07	2018-01-01 22:58:59
60.	Doe #60, name and address unknown	76.68.216.130	2017-12-25 05:04:52	2018-01-04 07:00:02
61.	Doe #61, name and address unknown	70.31 231 239	2017-12-28 11:53:40	2018-01-05 01:22:19
62.	Doe #62, name and address unknown	174.95.184.185	2017-12-29 03:47:51	2018-01-13 03:39:00
63.	Doe #63, name and address unknown	184.144.235.232	2017-12-30 11:35:25	2018-01-07 06:08:07
64.	Doe #64, name and address unknown	76.69.134.82	2018-01-01 23:48:55	2018-01-15 05:11:09
65.	Doe #65, name and address unknown	76.71.168.102	2018-01-03 03:32:41	2018-01-18 02:42:22
66.	Doe #66, name and address unknown	174.95.132.108	2018-01-04 01:18:07	2018-01-18 22:35:41
67.	Doe #67, name and address unknown	69.156.112.15	2018-01-05 11:06:28	2018-01-23 15:47:35
68.	Doe #68, name and address unknown	67.70.207.242	2018-01-07 06:17:38	2018-01-15 04:51:47
69.	Doe #69, name and address unknown	74.14.196.10	2018-01-10 04:34:22	2018-01-18 03:33:40
70.	Doe #70, name and address unknown	67.68.60.66	2018-01-18 00:38:08	2018-01-27 02:07:11
71.	Doe #71 name and address unknown	99.250.77.228	2017-08-09 02:25:50	2017-09-19 23:39:18
72.	Doe #72 name and address unknown	99.254.226.230	2017-08-08 04:08:35	2017-10-07 04:50:47
73.	Doe #73 name and address unknown	174.119.133.153	2017-08-16 02:02:32	2017-09-09 00:55:40
74.	Doe #74 name and address unknown	99.242.225.141	2017-08-26 23:11:41	2017-09-29 16:38:41
75.	Doe #75 name and address unknown	99.243.54.76	2017-09-23 13:47:35	2017-10-01 19:52:51
76.	Doe #76 name and address unknown	174.115.223.47	2017-09-23 12:59:57	2017-10-01 05:25:36
77.	Doe #77 name and address unknown	99.225.244.134	2017-09-23 01:32:44	2017-10-01 13:10:09
78.	Doe #78 name and address unknown	99.251.17.193	2017-09-22 20:08:09	2017-12-05 06:34:35
79.	Doe #79 name and address unknown	99.238.24.230	2017-09-21 20:40:34	2018-01-03 23:39:31
80.	Doe #80 name and address unknown	174.113.37.233	2017-09-23 10:20:25	2017-12-16 11:58:11

81.	Doe #81 name and address unknown	99.251.36.235	2017-09-23 21:20:25	2017-10-02 01:38:37
82.	Doe #82 name and address unknown	99.240.232.60	2017-09-23 18:23:11	2017-10-06 18:41:04
83.	Doe #83 name and address unknown	174.119.76.216	2017-09-23 17:50:23	2017-10-02 03:40:33
84.	Doe #84 name and address unknown	174.113.26.41	2017-09-23 14:39:49	2017-10-20 15:16:17
85.	Doe #85 name and address unknown	99.242.168.234	2017-09-24 04:39:22	2017-10-04 01:19:55
86.	Doe #86 name and address unknown	174.115.198.172	2017-09-24 15:23:27	2017-10-02 13:05:11
87.	Doe #87 name and address unknown	174.118.22.63	2017-09-25 00:58:28	2017-10-03 02:50:52
88.	Doe #88 name and address unknown	99.250.125.39	2017-09-25 00:39:34	2017-10-03 05:10:33
89.	Doe #89 name and address unknown	174.117.250.146	2017-09-25 08:21:03	2017-10-03 00:53:48
90.	Doe #90 name and address unknown	99.248.48.8	2017-09-25 08:00:36	2017-10-09 06:45:26
91.	Doe #91 name and address unknown	99.233.136.132	2017-09-25 02:25:26	2017-10-09 06:52:02
92.	Doe #92 name and address unknown	99.237.68.211	2017-09-24 12:42:10	2017-10-06 18:28:45
93.	Doe #93 name and address unknown	174.112.229.30	2017-09-27 13:39:43	2017-10-05 12:42:04
94.	Doe #94 name and address unknown	99.255.192.147	2017-09-27 21:39:25	2017-10-11 20:40:35
95.	Doe #95 name and address unknown	99.237.79.94	2017-10-01 03:20:36	2017-10-15 03:27:19
96.	Doe #96 name and address unknown	174.115.30.171	2017-10-01 13:20:23	2017-10-11 01:21:58
97.	Doe #97 name and address unknown	99.248.153.126	2017-10-02 23:25:56	2017-10-15 20:10:47
98.	Doe #98 name and address unknown	99.249.220.227	2017-10-04 02:52:08	2017-10-15 20:09:51
99.	Doe #99 name and address unknown	99.232.231.43	2017-10-05 21:33:07	2017-12-17 05:50:09
100.	Doe #100 name and address unknown	99.251.120.204	2017-10-14 00:42:35	2017-11-06 20:36:14
101.	Doe #101 name and address unknown	174.117.230.105	2017-10-24 00:49:47	2017-11-12 04:35:48
102.	Doe #102 name and address unknown	99.249.114.233	2017-10-28 01:13:01	2017-11-09 08:17:16
103.	Doe #103 name and address unknown	99.239.4.175	2017-10-23 07:37:12	2017-11-08 02:30:02
104.	Doe #104 name and address unknown	99.246.146.0	2017-11-05 21:57:09	2017-11-17 02:05:40
105.	Doe #105 name and address unknown	99.230.78.111	2017-11-09 06:35:11	2017-11-26 00:35:21
106.	Doe #106 name and address unknown	99.246.169.135	2017-11-29 07:16:31	2017-12-07 03:20:41
107.	Doe #107 name and address unknown	99.237.251.93	2017-12-19 18:59:47	2018-01-06 08:18:28
108.	Doe #108 name and address unknown	99.243.10.135	2017-12-25 01:12:13	2018-01-02 00:00:26
109.	Doe #109 name and address unknown	99.224.179.37	2017-12-30 01:43:44	2018-01-10 05:17:44

110.	Doe #110 name and address unknown	99.242.155.58	2018-01-06 01:05:59	2018-01-19 22:46:58

2003 SCC 45
Supreme Court of Canada

Roberts v. R.

2003 CarswellNat 2822, 2003 CarswellNat 2823, 2003 SCC 45, [2003] 2 S.C.R. 259, [2003] S.C.J. No. 50, [2004] 1 C.N.L.R. 342, [2004] 2 W.W.R. 1, 19 B.C.L.R. (4th) 195, 231 D.L.R. (4th) 1, 309 N.R. 201, 40 C.P.C. (5th) 1, 7 Admin. L.R. (4th) 1, J.E. 2003-1819, REJB 2003-47809

Roy Anthony Roberts, C. Aubrey Roberts and John Henderson, suing on their own behalf and on behalf of all other members of the Wewaykum Indian Band (also known as the Campbell River Indian Band), Appellants v. Her Majesty The Queen, Respondent and Ralph Dick, Daniel Billy, Elmer Dick, Stephen Assu and James D. Wilson, suing on their own behalf and on behalf of all other members of the Wewaikai Indian Band (also known as the Cape Mudge Indian Band), Respondents/Appellants

Ralph Dick, Daniel Billy, Elmer Dick, Stephen Assu, Godfrey Price, Allen Chickite and Lloyd Chickite, suing on their own behalf and on behalf of all other members of the Wewaikai Indian Band (also known as the Cape Mudge Indian Band), Appellants v. Her Majesty The Queen, Respondent and Attorney General of Ontario, Attorney General of British Columbia, Gitanmaax Indian Band, Kispiox Indian Band and Glen Vowell Indian Band, Interveners

McLachlin C.J.C., Gonthier, Iacobucci, Major, Bastarache, Arbour, LeBel, Deschamps JJ.

Heard: June 23, 2003
Judgment: September 26, 2003
Docket: 27641

Counsel: Michael P. Carroll, Q.C., and Malcolm Maclean for appellants Roy Anthony Roberts et al.
John D. McAlpine, Q.C., and Allan Donovan for respondents/appellants Ralph Dick et al.
J. Vincent O'Donnell, Q.C., and Jean Bélanger for respondent Her Majesty the Queen
Patrick G. Foy, Q.C., and Angus M. Gunn, Jr. (written submissions only), for intervener Attorney General of British Columbia
Peter Grant and David Schulze (written submissions only) for interveners Gitanmaax Indian Band, the Kispiox Indian Band and the Glen Vowell Indian Band

***Per curiam*:**

I. Introduction

1 The Wewaykum or Campbell River Indian Band ("Campbell River") and the Wewaikai or Cape Mudge Indian Band ("Cape Mudge") allege that the unanimous judgment of this Court in *Roberts v. R.*, [2002] 4 S.C.R. 245, 2002 SCC 79 (S.C.C.), with reasons written by Justice Binnie, is tainted by a reasonable apprehension of bias and should be set aside. The alleged reasonable apprehension of bias is said to arise from Binnie J.'s involvement in this matter in his capacity as federal Associate Deputy Minister of Justice over 15 years prior to the hearing of the bands' appeals by this Court.

2 An allegation that a judgment may be tainted by bias or by a reasonable apprehension of bias is most serious. That allegation calls into question the impartiality of the Court and its members and raises doubt on the public's perception of the Court's ability to render justice according to law. Consequently, the submissions in support of the applicant bands and the other parties have been examined in detail as reflected in the following reasons.

3 After an analysis of the allegations and the record upon which they are based, all of which is attached as Appendix A to these reasons, we have concluded that no reasonable apprehension of bias is established and hence that Binnie J. was not disqualified. The involvement of Binnie J. in this dispute was confined to a limited supervisory and administrative role, over 15 years prior to the hearing of the appeals. In his written statement filed as part of the record, Binnie J. has stated that he has no recollection of any involvement in this litigation, and no party disputes that fact. In light of this and for the reasons which follow, we are of the view that a reasonable person could not conclude that Binnie J. was suffering from a conscious or unconscious bias when he heard these appeals, and that, in any event, the unanimous judgment of this Court should not be disturbed. Accordingly, the motions to set aside this Court's judgment of December 6, 2002, are dismissed.

II. Factual Background

4 The bands have each presented motions to set aside the unanimous judgment of this Court, dated December 6, 2002, with reasons written by Binnie J. The judgment dismissed their appeals from an order of the Federal Court of Appeal. The motions to set aside allege that Binnie J.'s involvement as federal Associate Deputy Minister of Justice in the early stages of Campbell River's claim in 1985 and 1986 gives rise to a reasonable apprehension of bias by properly informed and right-thinking members of the public. These motions were brought following an application by the Crown in right of Canada for directions and were heard on June 23, 2003. Binnie J. had recused himself from any participation in this process after filing a statement as part of this record

indicating that he had no recollection of participating in the litigation process involving these claims while serving in the Department of Justice.

5 Prior to his appointment to the Supreme Court of Canada in 1998, Binnie J. had a long and varied career as a practising lawyer. Called to the Ontario Bar in 1967, Binnie J. practised litigation with Wright & McTaggart and successor firms until 1982. Between 1982 and 1986, and of most relevance to these motions, Binnie J. served as Associate Deputy Minister of Justice for Canada, having joined the federal civil service on a secondment. As Associate Deputy Minister of Justice, Binnie J. was responsible for all litigation involving the government of Canada, except cases originating from the province of Quebec and tax litigation. He also had special responsibilities for aboriginal matters. Upon leaving the Department of Justice on July 31, 1986, Binnie J. joined the firm of McCarthy Tétrault, where he remained until his appointment to this Court. Understandably, when Binnie J. left the Department of Justice, the files he worked on, in accordance with usual practice, remained with the Department of Justice. As a result, in the absence of recollection, judges who leave their firms or institutions do not have the ability to examine their previous files in order to verify whether there has been any prior involvement in a matter coming before them.

6 To distinguish between his role as judge and as Associate Deputy Minister, Justice Binnie is referred to in these reasons as Binnie J. and Binnie respectively.

A. The Original Appeals

7 To understand the allegations of reasonable apprehension of bias, it is necessary to examine the factual and procedural background of this case. Campbell River and Cape Mudge are sister bands of the Laich-kwil-tach First Nation. Since the end of the 19th century, members of each band have inhabited two reserves located a few miles from each other on the east coast of Vancouver Island. In particular, members of Campbell River inhabit Reserve No. 11 (Campbell River) and members of Cape Mudge inhabit Reserve No. 12 (Quinsam). In 1985 and 1989 respectively, Campbell River and Cape Mudge instituted legal proceedings against each other and the Crown. In these proceedings, each band claimed exclusive entitlement to both Reserves Nos. 11 and 12.

8 The bands' claims rely on a historical review of the process that led to the creation of the two reserves. In 1888, Mr. Ashdown Green, a federal government surveyor, recommended the creation of these reserves. In his report, however, he did not allocate the reserves to a particular band but rather to the Laich-kwil-tach Indians. The first Schedule of Indian Reserves, published in 1892 by the Department of Indian Affairs, listed Reserves Nos. 11 and 12 as belonging to Laich-kwil-tach Indians without any indication of how the reserves were to be distributed between the bands of the Laich-kwil-tach Indians. By 1902, the Schedule indicated that both reserves were allocated to the "Wewayakay" (Cape Mudge) Band. The Schedule allocated Reserves Nos. 7 through 12 to Cape Mudge. The name of the Cape Mudge Band ("Wewayakay") was written in the entry

corresponding to Reserve No. 7. Ditto marks were used to reproduce the same reference for entries corresponding to Reserves Nos. 8 through 12.

9 The allocation of Reserve No. 11 to Cape Mudge created difficulties. Cape Mudge was not and had never been in possession of Reserve No. 11. Members of Campbell River had occupied the reserve for several years to the exclusion of Cape Mudge. In 1905, a disagreement between the two bands over fishing rights in the Campbell River led to a dispute over possession of Reserve No. 11. In 1907, this dispute was settled by a resolution in which Cape Mudge ceded to Campbell River any claim to Reserve No. 11, subject to retaining fishing rights in the area. This resulted in the Department of Indian Affairs modifying the 1902 Schedule of Indian Reserves by marking "We-way-akum band" (Campbell River) in the entry corresponding to Reserve No. 11. By inadvertence, the "ditto marks" in the subsequent entry corresponding to Reserve No. 12 were not altered creating the erroneous appearance that Reserve No. 12 was also allocated to Campbell River. However, the alteration of the Schedule was intended to refer only to Reserve No. 11 and there was no intention to make any change to Reserve No. 12.

10 In 1912, the McKenna McBride Commission was established to address continuing disagreements between the federal and provincial governments about the size and number of reserves in British Columbia. The Commission acknowledged that Reserve No. 11 was properly allocated to Campbell River but noted the irregularity that was the source of the confusion with respect to Reserve No. 12. Nevertheless, the Commission made no alteration to the Schedule so that matters remained with Cape Mudge occupying Reserve No. 12 and Campbell River occupying Reserve No. 11 subject to the fishing rights in the waters of the Campbell River given to Cape Mudge.

11 The McKenna McBride Report did not receive approval by the province. Both the provincial and federal governments then established the Ditchburn Clark Commission to resolve the outstanding federal-provincial disagreements. In its 1923 report, the Ditchburn Clark Commission restated the position proposed in the McKenna McBride Report concerning Reserves Nos. 11 and 12. In 1924, both levels of government adopted the McKenna McBride recommendations as modified by the Ditchburn Clark Commission. In 1938, a provincial Order-in-Council was issued, transferring administration and control of the reserve lands to the federal Crown.

12 In the 1970s, a dispute between the bands resurfaced. Eventually, in December 1985, Campbell River started an action against the Crown and Cape Mudge in the Federal Court. It claimed that the Crown had acted in breach of its fiduciary duty, had acted negligently, had committed fraud, equitable fraud and deceit, and had breached and continued to breach statutory duties owed to Campbell River. Campbell River further claimed that Cape Mudge had trespassed and continued to trespass on Reserve No. 12. In 1989, Cape Mudge counterclaimed against Campbell River and brought its own claim against the Crown. Cape Mudge claimed that the Crown had breached its fiduciary duty, duty of trust and statutory duties under the *Indian Act*, R.S.C. 1985,

c. I-5. Each band thus claimed both reserves for itself, but sought compensation from the Crown as relief rather than dispossession of either band from their respective Reserves Nos. 11 and 12.

13 The two joined actions were heard together in the Federal Court - Trial Division by Teitelbaum J. The trial lasted 80 days and the actions were dismissed on September 19, 1995 (99 F.T.R. 1 (Fed. T.D.)). The bands appealed to the Federal Court of Appeal. By unanimous judgment the appeals were dismissed on October 12, 1999 (247 N.R. 350 (Fed. C.A.)).

14 The bands applied for and were granted leave to appeal on October 12, 2000, [2000] 2 S.C.R. xii (S.C.C.). The appeals were heard by the full Court on December 6, 2001. On December 6, 2002, in reasons written by Binnie J. and concurred in unanimously, the appeals were dismissed. The Court held that the Crown had not breached its fiduciary duty to either band. In any event, it found that the equitable defences of laches and acquiescence were available to the Crown. As well, the Court concluded that the bands' claims were statute-barred under the applicable statutes of limitations.

B. The Access to Information Request

15 In February 2003, a request under the *Access to Information Act*, R.S.C. 1985, c. A-1, made by Campbell River was received by the Department of Justice. The request sought:

> . . . copies of all records, including letters, correspondence and internal memoranda to, from or which make reference to Mr. William Binnie (Ian Binnie) [now Justice Binnie] in the matter of the claim against Canada by the Wewaykum (or Campbell River) Indian Band and the Wewaikai (or Cape Mudge) Indian Band for Quinsam IR 12 and Campbell River IR 11 between the years 1982 and 1986.

16 During the hearing of these motions, counsel for Campbell River explained the origin of the access to information request. Subsequent to the release of the Court's reasons, the band's solicitor, Mr. Robert T. Banno, reviewed the reasons with the band and, as stated by its counsel, the band was upset both by the tone and the result of the appeal. Counsel for Campbell River stated that:

> They were upset, quite frankly, with the tenor of the reasons in the sense that the claim had been dismissed; some of the words used were "a paper claim". And in effect they thought, as parties sometimes feel when they lose cases, that their arguments had not been properly addressed.

17 Counsel for Campbell River offered the following explanation as to why an unsuccessful litigant would be unusually inclined to present an access to information request about one of the authors of the reasons of the Court:

> Now, one could look at the FOI [freedom of information] request and could sort of infer something from it other than perhaps a proper - well, something improper about doing it. In my submission, what happens if a client is upset, an FOI request may be the very thing to satisfy that client or that litigant that everything is fine. I mean that may be the type of situation that comes back - the FOI request comes back with nothing and the client is satisfied. Well, the chips fall where they fall . . . .
>
> . . . in something like this, in sitting down with a client and - a litigant and explaining what has happened, this is the kind of thing that helps explain what has happened. You say, look, there is nothing untoward here, everything is above board.
>
> . . . in my submission, there should be no improper motive at all attributed to the filing of that information. That sometimes helps lawyers explain to litigants, helps quell those kinds of concerns.

18 Counsel for Campbell River offered this explanation as a rejection of any suggestion that Binnie J.'s involvement in the band's claim as Associate Deputy Minister in the Department of Justice many years previous was suspected prior to or during the hearing before this Court but only investigated subsequently when a negative decision was rendered.

C. Results of the Access to Information Request

19 Pursuant to the access to information request, the Department of Justice found a number of internal memoranda to, from or making reference to Binnie and related to Campbell River's claim. These memoranda show that in late 1985 and early 1986. Binnie, in his capacity at that time as Associate Deputy Minister of Justice, received some information and attended a meeting in the early stages of Campbell River's claim. On May 23, 2003, the Assistant Deputy Attorney General, James D. Bissell, Q.C., wrote the Registrar of the Supreme Court of Canada to inform her that, as a result of the preparation of the Department's response to the access to information request, it appeared "that Mr. W.I.C. Binnie in 1985 and early 1986, in the course of his duties as Associate Deputy Minister of Justice, participated in discussions with Department of Justice counsel in the *Wewaykum* [Campbell River] *Indian Band* case."

20 Accompanying Assistant Deputy Attorney General Bissell's letter to the Registrar were several documents, dated between 1985 and 1988, referring to Mr. Binnie and the Campbell River claim against Canada in regard to Reserves Nos. 11 and 12. Assistant Deputy Attorney General Bissell advised the Registrar that, in view of its duty as an officer of the Court, the Department was waiving solicitor-client privilege to these documents and that they would be provided to the requester under the *Access to Information Act*. He also advised that the Department intended to file a motion for directions, pursuant to R. 3 of the *Rules of the Supreme Court*, as to what steps,

if any, should be taken by reason of the information found in his letter. Attached to the letter was a Statement setting forth the following factual information that is part of the motion record:

> 1. The case of *Roberts v. R.*, [2002] SCC 79, file no. 27641 was heard in the Supreme Court of Canada in December 6, 2001 and judgment was rendered December 6, 2002.
>
> 2. The original claim in the case was filed in December 1985 and the original Defense on behalf of the Crown was filed on February 28, 1986.
>
> 3. The trial judgment was released by the Federal Court Trial Division on September 19, 1995 and the appeal judgment was released on October 12, 1999 by the Federal Court of Appeal.
>
> 4. Mr. W.I.C. Binnie was Associate Deputy Minister of Justice from September 2nd, 1982 until July 31st, 1986; at that time he left the Department of Justice and entered private practice.
>
> 5. As Associate Deputy Minister, Mr. Binnie's duties included responsibility for all litigation, civil as well as criminal matters, involving the Government of Canada as a party, arising in the common law provinces and territories of Canada; in that context he would have had under his general supervisory authority thousands of cases. In addition to his responsibilities for litigation, Mr. Binnie was also responsible for Native Law in the Department.
>
> 6. In the course of the preparation of a response to a request for information under the *Access to Information Act* received in February 2003, it has come to light that Mr. Binnie had occasion to discuss the case with Department counsel, in late 1985 and early 1986.
>
> 7. In the course of preparing for the hearing of the case before the Supreme Court of Canada, Department of Justice counsel noted the fact of Mr. Binnie's position as Associate Deputy Minister in 1985 and 1986, and asked themselves whether Mr. Binnie had had any specific involvement in the case.
>
> 8. Counsel did not conduct a thorough examination of the files. Consequently, Mr. Binnie's involvement was not discovered by counsel at that time.

21 Copies of Assistant Deputy Attorney General Bissell's letter, the Statement and the documents were provided to counsel for the other parties and the interveners.

D. The Motion for Directions

22 The Crown served and filed a motion for directions on May 26, 2003, on the following grounds:

> 1. Judgment in this appeal was handed down on December 6, 2002. The appeal from the Federal Court of Appeal was unanimously dismissed (9:0). The Honourable Mr. Justice Binnie wrote the decision;
>
> 2. It has recently come to the attention of counsel for the Respondent, Her Majesty the Queen, that in 1985 and 1986, when Mr. Justice Binnie was Associate Deputy Minister of Justice (Litigation), he had been involved in some of the early discussions within the Department of Justice regarding the proceeding that eventually came before the Court as this appeal;
>
> 3. The Respondent therefore brings this motion in order to formally place this fact before the Court, and to ask this Court for directions as to any steps to be taken.

23 Produced with the motion for directions were the documents referring to Mr. Binnie while in the employ of the Department of Justice and Campbell River's claim in relation to Reserves Nos. 11 and 12. Upon receipt of the motion by the Court, Binnie J. recused himself from any further proceedings on this matter and, on May 27, 2003, filed the following statement with the Registrar of the Supreme Court:

> With respect to the Motion for Directions filed yesterday by the Crown, would you please place this note on the Court file and communicate its contents to counsel for the parties.
>
> It is a matter of public record that between September 1982 and July 1986 I was Associate Deputy Minister of Justice responsible for all litigation for and against the federal Crown except tax matters and cases in Quebec. This included Indian claims. At any given time, the responsibility covered several thousand cases.
>
> When this appeal was pending before the Court in 2002, I had no recollection of personal involvement 17 years earlier at the commencement of this particular file, which was handled by departmental counsel in the Vancouver Regional Office.
>
> I do not recall anything about any involvement in this case to add to what is set out in the departmental file.
>
> I recuse myself from consideration of the pending motion.

24 The Court invited further submissions by the parties with respect to the Crown's motion for directions. The Crown filed a memorandum in which it submitted that there was no reasonable apprehension of bias affecting the Court's judgment as a result of Binnie J.'s employment in the Department of Justice and involvement in this matter some 17 years earlier and for which he had no recollection. In response, Cape Mudge sought an order setting aside the Court's judgment of December 6, 2002, and requesting that the Court recommend that the parties enter into a negotiation and reconciliation process. In the alternative, Cape Mudge sought an order suspending

the operation of the judgment for a period of four months to permit negotiation and reconciliation between the parties with further submissions to the Court, if required.

25 Campbell River, for its part, sought an order vacating the Court's judgment of December 6, 2002, and the reasons for judgment, as well as an order permitting a further application for relief in the event the Supreme Court's decision was vacated. The Crown opposed both motions. It also opposed Cape Mudge's submission that further negotiation would be an appropriate remedy in this matter.

26 The Attorney General of British Columbia, an intervener, submitted that there was no reasonable apprehension of bias and that the motions to vacate should be dismissed.

27 Several other interveners, being the Gitanmaax Band, the Kispiox Band and the Glen Vowell Band, submitted that the Court's judgment should be vacated.

E. Details of Binnie J.'s Involvement in the Appellants' Litigation 1985-86

28 We turn now to the documents produced by the Crown in order to determine the nature and extent of Binnie's involvement in the Campbell River claim in 1985-1986. Seventeen documents were produced by the Crown. As noted previously, the documents are reproduced in their entirety in the *Appendix*. All documents were shown to or seen by Binnie in his official capacity as Associate Deputy Minister of Justice. Where relevant, the documents relate to the Campbell River claim. Cape Mudge's claim was commenced in 1989, several years after Binnie left the Department of Justice. As can be seen, the 17 documents include one letter and 16 internal memoranda. The letter, dated May 23, 1985, is from Binnie to Chief Sol Sanderson of the Federation of Saskatchewan Indian Nations and is obviously not relevant to these motions. Of the remaining 16 documents, two were produced twice; they are the memorandum dated December 13, 1985, and the memorandum dated February 25, 1986, from Ms Mary Temple to Binnie. Consequently, 14 documents require examination, which will be done in chronological order.

29 Memorandum No. 1, dated June 19, 1985, is a memo to file written by Ms Temple, Acting Senior Counsel, Office of Native Claims. The memorandum refers to Binnie by reason of the fact that it includes a reference to his letter of May 23, 1985, to Chief Sanderson. The memorandum does not detail any involvement of Binnie in the Campbell River claim and is of no relevance to these motions.

30 Memorandum No. 2, dated August 9, 1985, is from Ms Temple to Binnie. The memo predates Campbell River's statement of claim. It indicates that an issue raised by the Campbell River claim and another matter known as the Port Simpson claim were referred to Mr. Tom Marsh of the Vancouver Office for his opinion. The memo further states that Mr. Marsh's opinion would not be ready before the middle of September. It concludes with a request to be informed of any further communications with respect to the Port Simpson opinion from Band representatives.

31 Memorandum No. 3 also predates Campbell River's statement of claim. It is from Mr. R. Green, General Counsel in the Department of Indian Affairs and Northern Development, to Binnie and is dated October 11, 1985. This memo, which relates to the Campbell River and Port Simpson claims, was prepared for a meeting between Binnie and Mr. Green to discuss a legal issue "which potentially touches on all claims from B.C. bands, or at least all involving a determination of rights and liabilities arising out of the pre-McKenna/McBride period." The memo addresses the gazetting of notices and reserve creation in British Columbia. In his memo, Mr. Green refers to the work of Mr. Marsh and sets out three likely interpretations of the B.C. legislation:

> 1. no reserve is legally established until the notice is Gazetted;
>
> 2. the Gazetting provision is for the purpose of land banking;
>
> 3. the Gazetting process is a condition precedent to transferring administration and control of reserves to the federal government but not to the creation of the Indian interest.

32 A handwritten note on the margin, presumably from Mr. Green to Binnie, reads: "On the surface argument 3 seems to be the least damaging way to go."

33 Memorandum No. 4, dated December 12, 1985, is from Mr. Duff Friesen, General Counsel, Civil Litigation Section, to Binnie. In it, Mr. Friesen proposes that Campbell River's statement of claim, filed on December 2, 1985, be referred to the Vancouver Regional Office of the Department of Justice. In a handwritten note on the memo, Binnie wrote "I agree."

34 Memorandum No. 5, dated December 13, 1985, is from Ms Temple to Mr. G. Donegan, General Counsel - Vancouver Regional Office, and copied to Binnie. The memo indicates that Campbell River had filed a statement of claim and intended to proceed by way of litigation rather than negotiation under the Department of Indian Affairs policy. The memo also indicates that certain aspects of the claim were the subject of correspondence with Mr. Marsh of the Vancouver Regional Office and were also discussed with Binnie in Ottawa. With respect to these discussions, Ms Temple wrote that:

> In particular, Ian Binnie formed the opinion that the McKenna McBride report, to the extent that it specified that Quinsam Reserve No. 12 was the Campbell River Band's Reserve, should be taken at its face value notwithstanding the apparent fact that the designation of the Reserve for this band stemmed from an administrative error in the list of reserves on which the Commission relied as its primary source of information.

35 Memorandum No. 6, dated January 14, 1986, is from Binnie to Ms Temple. It acknowledges receipt of Memorandum No. 5 and sets out the above-quoted passage from that memorandum. Binnie then wrote:

> I recall some discussion about this, but not in the raw terms you have stated it. Could you let me have a note setting out the factual circumstances of the case and the legal points addressed in our discussion and any other relevant legal points you think should be considered?

36 Memorandum No. 7, dated January 15, 1986, is from Binnie to Mr. Harry Wruck of the Vancouver Regional Office. In it Binnie wrote that he is delighted with the assignment of this matter to Mr. Bill Scarth (now Scarth J.). He further asks to be informed of anything that the Minister should be made aware of.

37 Memorandum No. 8, dated January 20, 1986, is from Ms Temple to Binnie in response to Memorandum No. 6. In this memo, Ms Temple describes the factual background of Campbell River's claim. She concludes the memo with the following description of their discussions in relation to the claim:

> In our discussion of this claim in October 1985, we spent most of the time on another legal issue. However, when we turned to the issue of the effect of the McKenna McBride Commission report vis a vis Reserves No.'s 11 and 12, you indicated that such a qualification of the apparent terms of the McKenna McBride Report, as suggested by me, should not be supported and that a report should be accepted on its face so as to result in the legal vesting of an interest for the Campbell River Band only in these two reserves. My understanding of your reasons for such a position was that if we started to qualify the face of the record in any way, we would call into question other aspects of the McKenna McBride exercise.
>
> The other issue on which we spent most of our time during the October discussion was in relation to the question of the effect of the B.C. Land Act Legislation on the establishment of Reserves during the time of the nineteen [*sic*] century reserve commissions. In particular, one interpretation of this legislation would have confirmed the necessity of publishing in the B.C. Gazette the decision of the B.C. Government or officials authorized by it to establish reserves for bands before a band could be considered to have a vested interest in such a reserve. We concluded that notwithstanding the basis for such an interpretation, we should maintain the position that at least with respect to the Campbell River and Quinsam Reserves there was no requirement to gazette notices of those reserves before they could be considered to have been established. The legislation in question was somewhat ambiguous and our decision reflected an attempt to support an interpretation which was, of course, reasonably arguable but which also was reflective of the treatment of these reserves during the period preceeding [*sic*] the McKenna McBride report implementation.

As indicated in the above-quoted passage, the discussions referred to by Ms Temple occurred in October 1985, before Campbell River filed its statement of claim and while the parties were still in the negotiation process.

38 Memorandum No. 9 is dated February 25, 1986, and is also from Ms Temple to Binnie. The memo transmits to Binnie a copy of Campbell River's statement of claim. The memo clarifies that when Binnie participated in discussions in this case "it was still in the ONC [Office of Native Claims] claims process and before the Campbell River Band decided to proceed with litigation." The memo further advises that Mr. Scarth, who had earlier been retained and had carriage of the action, had been instructed to file a full defence. Ms Temple also indicates in her memo that:

> I would just like to note for your information that a full defense of the action by the Crown might involve the Crown in arguing some qualification or interpretation of the implementation of the McKenna McBride Report which was a position which in our discussions respecting negotiation of the claim you advised against. It seemed to Bob Green and I [*sic*] and to the Departmental officials that such a defense in the context of this court action was, nevertheless, justified.

39 Memorandum No. 10 is also dated February 25, 1986, and is from Ms Temple to Mr. Scarth. The memo conveys instructions to file a full statement of defence. The following passage from this memo relates to Binnie's involvement in discussions relating to the claim:

> Since such a defense might result in legal arguments which involve "going behind" the face of the McKenna McBride decisions as implemented by the legislation and Orders in Council, these instructions are being communicated to Ian Binnie because when the Government position respecting the claim was initially discussed with him, he advised that, at least, in the claims process we should not challenge the McKenna McBride report itself.

40 Memos 8, 9 and 10 establish that any advice given by Binnie in relation to the preferred treatment of the McKenna McBride Report was offered in the context of the negotiation process not litigation. Indeed, Binnie's advice, in the context of the negotiation towards a settlement of Campbell River's claim, is what led to acceptance of the claim as valid for the purposes of negotiation. In Memorandum No. 9, Ms Temple wrote:

> When we discussed the position the Crown should take for the purpose of negotiating a settlement under the claims process, we decided to recommend acceptance of the Campbell River Band's claim for negotiation since to do otherwise would suggest that the implementation of the McKenna McBride Report was ineffective to vest Reserve No. 12 in the Campbell River Indian Band. At the time, this position was understood to be justified since although both on legal issues and factual issues the claim was debatable, there seem to be sufficiently reasonable arguments to support it so as to justify settlement, at least on a pro-rated basis, especially since it would presumably have involved a surrender by the Campbell River Band and therefore a clarification of the interest of the Cape Mudge Band in the Reserve.

41 Memorandum No. 11, dated February 27, 1986, is from Ms Temple to Ms Carol Pepper, Legal Counsel - Specific Claims Branch Vancouver. The memo transmits to Ms Pepper a number of opinions culled from the Campbell River claim file. In this memo, Ms Temple writes that her opinions eventually reflected Ian Binnie's preferred position "to not 'go behind' the McKenna McBride Report."

42 Memorandum No. 12, dated March 3, 1986, is from Mr. Scarth to Binnie. The memo transmits to Binnie a copy of the statement of defence presumably prepared by Mr. Scarth and filed on behalf of the Crown on February 28, 1986. In this memo, Mr. Scarth indicates that he believes that the defence reflects the positions of both Justice and Indian Affairs. He further indicates that he has attempted not to repudiate the McKenna McBride Commission Report.

43 Memorandum No. 13, dated March 5, 1986, is from Binnie to Ms Temple and is in response to Memorandum No. 9. In this memo, Binnie wrote:

> With respect to the treatment of the McKenna McBride Report, I suggest that we all await the advice of Bill Scarth as to how this aspect of our possible defence should be dealt with. So far as I am concerned Bill Scarth is in charge of the file. I am sure he will take note of the view expressed by you and Bob Green and "departmental officials" that it would be appropriate in the Crown's defence to argue some qualification or interpretation of the implementation of the McKenna McBride Report.
>
> I look forward to hearing Bill Scarth's views on this aspect of the matter in due course. We will then decide what to do.

44 Memorandum No. 13 is the last document evidencing Binnie's involvement in this matter. As conceded by the parties, the Court's determination of the extent of Binnie's involvement in the Campbell River claim is limited by the documentary record produced by the Crown. The record does not disclose any further involvement on Binnie's part and, in particular, no involvement in this matter between March 5, 1986, and his departure from the Department of Justice on July 31, 1986.

45 Finally, Memorandum No. 14 is dated February 3, 1988, after Binnie left the Department of Justice, and is from Mr. Scarth to Mr. E.A. Bowie, Q.C., Assistant Deputy Attorney General (now Bowie J.). In this memo, Mr. Scarth provides a summary of the Campbell River case to Mr. Bowie. In the body of his memo, Mr. Scarth writes:

> I point out, parenthetically, that Ian Binnie, during his time as Associate Deputy Minister, suggested, because of its wider impact, that we not challenge the validity of what was done by the Royal Commission. With respect, I continue to concur with that advice, and suggest it is a question of defining more narrowly what the Commission did, at least insofar as the Reserves in question are concerned.

III. The Parties' Arguments

A. Cape Mudge, Campbell River and the Interveners the Gitanmaax Band, the Kispiox Band and the Glen Vowell Band

46 Campbell River and Cape Mudge both agree that actual bias is not at issue. Neither band makes any submission that actual bias affected Binnie J., the reasons for judgment or the judgment of the Court. Both bands unreservedly accept Binnie J.'s statement that he had no recollection of personal involvement in the case. The bands submit, however, that the material disclosed by the Crown gives rise to a reasonable apprehension of bias.

47 Cape Mudge submitted that Binnie J.'s involvement in Campbell River's claim was so significant that he effectively acted as a senior counsel for the Crown and that he was disqualified on account of the principle that no judge should sit in a case in which he or she acted as counsel at any stage of the proceeding. According to Cape Mudge, the disclosed documents reveal that Binnie J. was actively involved in risk analysis and the development of litigation strategy on behalf of the defendant Crown. Cape Mudge submitted that Binnie J.'s involvement in the litigation while he was Associate Deputy Minister of Justice raises legitimate questions as to whether the positions he formulated and recommended and the various memoranda and documents he read would have had an influence on his approach to the same case as a judge. In Cape Mudge's submission, such influence could well be unconscious and Binnie J.'s lack of recollection does not change the fact that he was involved in a significant and material way. According to Cape Mudge, the fact that Binnie J. was involved as a lawyer for the defendant Crown, combined with the fact that some 15 years later he wrote a judgment in the same litigation that freed the Crown of potential liability, gives rise to a reasonable apprehension of bias. Cape Mudge submitted that had the documents disclosed by the Crown come to light prior to the hearing before the Court, Binnie J. would have recused himself from the hearing of the appeals.

48 Campbell River submitted that the test for reasonable apprehension of bias is met where a judge sits in a case in which he or she has had any prior involvement. In Campbell River's view, the documents disclosed by the Crown indicate that Binnie J.'s prior involvement in the band's claim was substantial. Like Cape Mudge, Campbell River submitted that had Binnie J.'s earlier involvement in these matters come to light prior to the hearing he would have had no choice but to recuse himself absent the consent of all the parties. According to Campbell River, subjective evidence of a judge's state of mind, and thus Binnie J.'s absence of recollection, is legally irrelevant to a determination of whether there is a reasonable apprehension of bias. Moreover, Campbell River submitted that, owing to Binnie J.'s special interest in aboriginal matters, the unique "ditto mark error" at issue in this case and his involvement as counsel in *Guerin v. R.*, [1984] 2 S.C.R. 335 (S.C.C.), common sense would indicate that some contaminating knowledge would have survived the passage of time, albeit unconsciously.

49 With respect to remedy, both bands submitted that a judgment affected by a reasonable apprehension of bias is void and must be set aside. According to Campbell River, the concurrence of the eight other judges of this Court does not remove the taint of bias. Campbell River submitted that in law a reasonable apprehension of bias taints the entire proceeding and is presumed to be transmitted among decision-makers.

50 As indicated previously, Cape Mudge submitted that this Court should also recommend that the parties enter into a negotiation and reconciliation process or, in the alternative, suspend operation of the judgment for four months so that discussions between the parties could take place. For its part, Campbell River requested an order permitting it to bring an application for further relief following a decision to set aside the judgment. During oral argument, counsel for both bands indicated that a rehearing of the appeals may ultimately become necessary should the decision be set aside and agreement between the parties prove impossible.

51 The interveners the Gitanmaax Band, the Kispiox Band and the Glen Vowell Band presented written arguments in support of the motions to vacate the Court's judgment. In their submission, the facts of this case give rise to a reasonable apprehension of bias and a legal finding of bias must result. Binnie J.'s lack of actual recollection is, in their view, irrelevant. The interveners go further suggesting that actual bias may have existed on Binnie J.'s part even if he neither intended it nor recalled his involvement in the case. Like Campbell River and Cape Mudge, the interveners submitted that Binnie J. would have recused himself had he recalled his participation in this case before the hearing.

B. The Crown and the Intervener the Attorney General of British Columbia

52 The Crown submitted that the Court's judgment should not be set aside and that no other remedy was required. In the Crown's view, the rule that a judge is disqualified if he or she previously acted as counsel in the case is subject to the general principle that disqualification results only where there is a reasonable apprehension of bias. Accordingly, the Crown submitted that the general test set out by de Grandpré J. in dissent in *Committee for Justice & Liberty v. Canada (National Energy Board)* (1976), [1978] 1 S.C.R. 369 (S.C.C.), and approved in *R. v. Valente (No. 2)*, [1985] 2 S.C.R. 673 (S.C.C.), should be applied to the particular circumstances of this case.

53 The Crown submitted that since Binnie J. had no recollection, he brought no knowledge of his prior participation by way of discussions about Campbell River's claim. As a result, there was neither actual bias nor any reasonable apprehension of bias on his part. Relying on the English Court of Appeal's decision in *Locabail (U.K.) v. Bayfield Properties Ltd.*, [2000] Q.B. 451 (Eng. C.A.), the Crown submitted that Binnie J.'s lack of recollection dispels any appearance of possible bias. According to the Crown, the fact that Binnie J.'s prior involvement occurred 17 years earlier reinforces the conclusion that there can be no reasonable apprehension of bias. On this point, the bands concede that the passage of time is a relevant factor. Finally, the Crown submitted that since

the judgment of the Court was unanimous in dismissing the appeals, and since Binnie J. had no recollection of his earlier involvement, no reasonable person could conclude that he somehow influenced the minds of the other eight judges who heard the case.

54 The Attorney General of British Columbia also submitted that the Court's judgment should not be disturbed. He submitted that the information disclosed by the Crown would not have necessitated Binnie J.'s recusal had an application been made before the hearing. *A fortiori*, the disclosed information does not establish a reasonable apprehension of bias nor require that the judgment be set aside. The Attorney General of British Columbia further submitted that, although evidence of a judge's subjective state of mind is not determinative as to the issue of whether a reasonable apprehension of bias arises, it remains relevant and of assistance to the reasonable and right-minded observer.

55 The Attorney General of British Columbia submitted that Binnie J. did not act as counsel for the Crown in this case. His involvement was in a general administrative and supervisory capacity, which does not give rise to a reasonable apprehension of bias. It was submitted that a reasonable person would not consider that the tentative views on a general issue expressed by Binnie J. 15 years earlier, in his capacity as Associate Deputy Minister, would prevent him from deciding the case impartially.

56 The Attorney General of British Columbia further submitted that since the decision-maker was the Court as a whole, a reasonable apprehension of bias in respect of Binnie J. is not legally significant unless it also establishes a reasonable apprehension of bias in respect of the judgment of the Court as a whole. In this case, the judgment of the Court as a whole is not tainted by any apprehension of bias. Moreover, the presumption of impartiality has a practical force in respect of appellate tribunals. The fact that appellate courts normally evaluate a written record and the collegial nature of an appellate bench reduces the leeway within which the personal attributes, traits and dispositions of each judge can operate. Finally, the Attorney General submitted that if there was a disqualifying bias in respect of the Court as a whole, the remedy would be to vacate the judgment and for the Court to reconsider the appeals in the absence of Binnie J. under the doctrine of necessity.

IV. Analysis

A. The Importance of the Principle of Impartiality

57 The motions brought by the parties require that we examine the circumstances of this case in light of the well-settled, foundational principle of impartiality of courts of justice. There is no need to reaffirm here the importance of this principle, which has been a matter of renewed attention across the common law world over the past decade. Simply put, public confidence in our legal system is rooted in the fundamental belief that those who adjudicate in law must always do so without bias or prejudice and must be perceived to do so.

58 The essence of impartiality lies in the requirement of the judge to approach the case to be adjudicated with an open mind. Conversely, bias or prejudice has been defined as

> . . . a leaning, inclination, bent or predisposition towards one side or another or a particular result. In its application to legal proceedings, it represents a predisposition to decide an issue or cause in a certain way which does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind which sways judgment and renders a judicial officer unable to exercise his or her functions impartially in a particular case.

(*R. v. Bertram*, [1989] O.J. No. 2123 (Ont. H.C.), quoted by Cory J. in *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 (S.C.C.), at para. 106)

59 Viewed in this light, "[i]mpartiality is the fundamental qualification of a judge and the core attribute of the judiciary" (Canadian Judicial Council, *Ethical Principles for Judges* (Ottawa: The Council, 1998), at p. 30). It is the key to our judicial process and must be presumed. As was noted by L'Heureux-Dubé J. and McLachlin J. (as she then was) in *S. (R.D.)*, *supra*, at para. 32, the presumption of impartiality carries considerable weight, and the law should not carelessly evoke the possibility of bias in a judge, whose authority depends upon that presumption. Thus, while the requirement of judicial impartiality is a stringent one, the burden is on the party arguing for disqualification to establish that the circumstances justify a finding that the judge must be disqualified.

60 In Canadian law, one standard has now emerged as the criterion for disqualification. The criterion, as expressed by de Grandpré J. in *Committee for Justice & Liberty v. Canada (National Energy Board)*, *supra*, at p. 394, is the reasonable apprehension of bias:

> . . . the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.

61 We will return shortly to this standard, as it applies to the circumstances outlined in the factual background. Before doing that, it is necessary to clarify the relationship of this objective standard to two other factors: the subjective consideration of actual bias; and the notion of automatic disqualification re-emerging in recent English decisions.

B. Reasonable Apprehension of Bias and Actual Bias

62 Determining whether the judge brought or would bring prejudice into consideration as a matter of fact is rarely an issue. Of course, where this can be established, it will inevitably lead to the disqualification of the judge. But this said, most arguments for disqualification typically begin with an acknowledgment by all parties that there was no actual bias and move on to a consideration of the reasonable apprehension of bias. Here, as in many cases, it is conceded by the parties that there was no actual bias on Binnie J.'s part, and his statement that he had no recollection of involvement is similarly accepted by all concerned. As submitted by the parties, his personal integrity is not in doubt, either in these appeals or in any appeal in which he has sat as a member of this Court. Nevertheless, it is said, the circumstances of the present case are such as to create a reasonable apprehension of bias on his part. Since the two propositions go hand in hand, to understand what is meant by reasonable apprehension of bias, it is helpful to consider what it means to say that disqualification is not argued on the basis of actual bias.

63 Saying that there was "no actual bias" can mean one of three things: that actual bias need not be established because reasonable apprehension of bias can be viewed as a surrogate for it, that unconscious bias can exist, even where the judge is in good faith, or that the presence or absence of actual bias is not the relevant inquiry. We take each in turn.

64 First, when parties say that there was no actual bias on the part of the judge, they may mean that the current standard for disqualification does not require that they prove it. In that sense, the "reasonable apprehension of bias" can be seen as a surrogate for actual bias on the assumption that it may be unwise or unrealistic to require that kind of evidence. It is obviously impossible to determine the precise state of mind of an adjudicator (Cory J. in *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623 (S.C.C.), at p. 636). As stated by the English Court of Appeal in *Locabail (U.K.)*, *supra*, at p. 472:

> The proof of actual bias is very difficult, because the law does not countenance the questioning of a judge about extraneous influences affecting his mind; and the policy of the common law is to protect litigants who can discharge the lesser burden of showing a real danger of bias without requiring them to show that such bias actually exists.

Again, in the present instance, no one suggests that Binnie J. was consciously allowing extraneous influences to affect his mind. Consequently, it would appear that reasonable apprehension of bias is not invoked here as a surrogate for actual bias.

65 Second, when parties say that there was no actual bias on the part of the judge, they may be conceding that the judge was acting in good faith and was not consciously relying on inappropriate preconceptions, but was nevertheless unconsciously biased. In *R. v. Gough*, [1993] A.C. 646 (Eng. C.A.), at p. 665, quoting Devlin L.J. in *R. v. Justices of Barnsley*, [1960] 2 Q.B. 167 (Eng. C.A.), Lord Goff reminded us that:

> Bias is or may be an unconscious thing and a man may honestly say that he was not actually biased and did not allow his interest to affect his mind, although, nevertheless, he may have allowed it unconsciously to do so. The matter must be determined upon the probabilities to be inferred from the circumstances in which the justices sit.

As framed, some of the arguments presented by the parties suggest that they are preoccupied that Binnie J. may have been unconsciously biased despite his good faith.

66 Finally, when parties concede that there was no actual bias, they may be suggesting that looking for real bias is simply not the relevant inquiry. In the present case, as is most common, parties have relied on Lord Hewart C.J.'s aphorism that "it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done" (*R. v. Justices of Sussex* (1923), [1924] 1 K.B. 256 (Eng. K.B.), at p. 259). To put it differently, in cases where disqualification is argued, the relevant inquiry is not whether there was *in fact* either conscious or unconscious bias on the part of the judge, but whether a reasonable person properly informed would apprehend that there was. In that sense, the reasonable apprehension of bias is not just a surrogate for unavailable evidence, or an evidentiary device to establish the likelihood of unconscious bias, but the manifestation of a broader preoccupation about the image of justice. As was said by Lord Goff in *Gough*, *supra*, at p. 659, "there is an overriding public interest that there should be confidence in the integrity of the administration of justice."

67 Of the three justifications for the objective standard of reasonable apprehension of bias, the last is the most demanding for the judicial system, because it countenances the possibility that justice might not be seen to be done, even where it is undoubtedly done - that is, it envisions the possibility that a decision-maker may be totally impartial in circumstances which nevertheless create a reasonable apprehension of bias, requiring his or her disqualification. But, even where the principle is understood in these terms, the criterion of disqualification still goes to the judge's state of mind, albeit viewed from the objective perspective of the reasonable person. The reasonable person is asked to imagine the decision-maker's state of mind, under the circumstances. In that sense, the oft-stated idea that "justice must be seen to be done," which was invoked by counsel for the bands, cannot be severed from the standard of reasonable apprehension of bias.

68 We emphasize this aspect of the criterion of disqualification in Canadian law because another strand of this area of the law in the Commonwealth suggests that some circumstances of conflict of interest may be enough to justify disqualification, whether or not, from the perspective of the reasonable person, they could have any impact on the judge's mind. As we conclude in the next section, this line of argument is not helpful to counsel for the bands in the present case.

C. Reasonable Apprehension of Bias and Automatic Disqualification

69 At the opposite end from claims of actual bias, it has been suggested that it is wrong to be a judge in one's own cause, whether or not one knows this to be the case. The idea has been linked to the early decision of *Dimes v. Grand Junction Canal Co.* (1852), 3 H.L.C. 759, 10 E.R. 301 (U.K. H.L.). More recently, in *Gough*, *supra*, at p. 661, Lord Goff stated that

> . . . there are certain cases in which it has been considered that the circumstances are such that they must inevitably shake public confidence in the integrity of the administration of justice if the decision is to be allowed to stand . . . . These cases arise where a person sitting in a judicial capacity has a pecuniary interest in the outcome of the proceedings . . . . In such a case, . . . not only is it irrelevant that there was in fact no bias on the part of the tribunal, but there is no question of investigating, from an objective point of view, whether there was any real likelihood of bias, or any reasonable suspicion of bias, on the facts of the particular case. The nature of the interest is such that public confidence in the administration of justice requires that the decision should not stand.

70 This has been described as "automatic disqualification" and was recently revisited by the House of Lords in *R. v. Bow Street Metropolitan Stipendiary Magistrate*, [1999] 2 W.L.R. 272 (U.K. H.L.). There, the House of Lords dealt with a situation in which Lord Hoffman had participated in a decision in which Amnesty International was an intervener, while sitting as a director and chairperson of a charity closely allied with Amnesty International and sharing its objects. In that context, it was found that the rule of "automatic disqualification" extended to a limited class of non-financial interests, where the judge has such a relevant interest in the subject matter of the case that he or she is effectively in the position of a party to the cause. As a result, Lord Hoffman was disqualified, and the decision of the House of Lords was set aside, in a judgment that drew much attention around the world.

71 A more recent decision of the English Court of Appeal suggests that this extension of the rule of automatic disqualification, beyond cases of financial interests, is likely to remain exceptional (*Locabail (U.K.)*, *supra*). Even so extended, the rule of automatic disqualification does not apply to the situation in which the decision-maker was somehow involved in the litigation or linked to counsel at an earlier stage, as is argued here.

72 Whatever the case in Britain, the idea of a rule of automatic disqualification takes a different shade in Canada, in light of our insistence that disqualification rest either on actual bias or on the reasonable apprehension of bias, both of which, as we have said, require a consideration of the judge's state of mind, either as a matter of fact or as imagined by the reasonable person. In any event, even on the assumption that the line of reasoning developed in *Bow Street*, *supra*, is authoritative in Canada, it is of no relevance in the present case. On the facts before us, there is no suggestion that Binnie J. had any financial interest in the appeals, or had such an interest in the subject matter of the case that he was effectively in the position of a party to the cause.

73 To sum up, if disqualification is to be argued here, it can only be argued on the basis of a reasonable apprehension of bias. It can only succeed if it is established that reasonable, right-minded and properly informed persons would think that Binnie J. was consciously or unconsciously influenced in an inappropriate manner by his participation in this case over 15 years before he heard it here in the Supreme Court of Canada. We now move to this aspect of the matter.

D. Reasonable Apprehension of Bias and Its Application in this Case

74 The question, once more, is as follows: What would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude? Would this person think that it is more likely than not that Binnie J., whether consciously or unconsciously, did not decide fairly?

75 Three preliminary remarks are in order.

76 First, it is worth repeating that the standard refers to an apprehension of bias that rests on serious grounds, in light of the strong presumption of judicial impartiality. In this respect, de Grandpré J. added these words to the now classical expression of the reasonable apprehension standard:

> The grounds for this apprehension must, however, be substantial, and I . . . refus[e] to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience".

(*Committee for Justice & Liberty v. Canada (National Energy Board)*, *supra*, at p. 395)

77 Second, this is an inquiry that remains highly fact-specific. In *Man O'War Station Ltd v. Auckland City Council*, [2002] 3 N.Z.L.R. 577 (New Zealand P.C.), at para. 11, Lord Steyn stated that "This is a corner of the law in which the context, and the particular circumstances, are of supreme importance." As a result, it cannot be addressed through peremptory rules, and contrary to what was submitted during oral argument, there are no "textbook" instances. Whether the facts, as established, point to financial or personal interest of the decision-maker; present or past link with a party, counsel or judge; earlier participation or knowledge of the litigation; or expression of views and activities, they must be addressed carefully in light of the entire context. There are no shortcuts.

78 Third, in circumstances such as the present one, where the issue of disqualification arises after judgment has been rendered, rather than at an earlier time in the proceedings, it is neither helpful nor necessary to determine whether the judge would have recused himself or herself if the matter had come to light earlier. There is no doubt that the standard remains the same, whenever the issue of disqualification is raised. But hypotheses about how judges react where the issue of recusal is raised early cannot be severed from the abundance of caution that guides many, if not

most, judges at this early stage. This caution yields results that may or may not be dictated by the detached application of the standard of reasonable apprehension of bias. In this respect, it may well be that judges have recused themselves in cases where it was, strictly speaking, not legally necessary to do so. Put another way, the fact that a judge would have recused himself or herself *ex ante* cannot be taken to be determinative of a reasonable apprehension of bias *ex post*.

79 As the parties acknowledged, Binnie J.'s past status as Associate Deputy Minister is, by itself, insufficient to justify his disqualification. The same can be said of his long-standing interest in matters involving First Nations. The source of concern, for the bands in these motions to vacate the judgment, is Binnie J.'s involvement in this case, as opposed to his general duties as head of litigation for the Department of Justice in the mid-1980s.

80 In this respect, the bands relied, among other arguments, on the following statement of Laskin C.J., in *Committee for Justice & Liberty v. Canada (National Energy Board)*, *supra*, at p. 388:

> Lawyers who have been appointed to the Bench have been known to refrain from sitting on cases involving former clients, even where they have not had any part in the case, until a reasonable period of time has passed. *A fortiori*, they would not sit in any case in which they played any part at any stage of the case. This would apply, for example, even if they had drawn up or had a hand in the statement of claim or statement of defence and nothing else.

81 This dictum must be understood in the context of the principle of which it is but an illustration. It does not suggest that any degree of earlier participation in a case is cause for automatic disqualification. This statement provides sensible guidance for individuals to consider *ex ante*. It suggests that a reasonable and right-minded person would likely view unfavourably the fact that the judge acted as counsel in a case over which he or she is presiding and could take this fact as the foundation of a reasonable apprehension of bias.

82 However, contrary to what has been argued, it cannot realistically be held that Binnie J. acted as counsel in the present case, and the limited extent of his participation does not support a reasonable apprehension of bias. To repeat, what is germane is the nature and extent of Binnie J.'s role. The details of Binnie J.'s involvement in this case, as outlined in the earlier part of these reasons and which should be viewed in the context of his broad duties in the Department of Justice, would convince a reasonable person that his role was of a limited supervisory and administrative nature.

83 Admittedly, Binnie J.'s link to this litigation exceeded *pro forma* management of the files. On the other hand, it should be noted that he was never counsel of record and played no active role in the dispute after the claim was filed. Memorandum No. 4, dated December 12, 1985, shows that the case was referred to the Vancouver Regional Office within a few days after filing of the Campbell River Claim. Although subsequent memoranda indicate that Binnie was kept informed of some developments in relation to this claim, carriage of the action was in the hands of Mr.

Bill Scarth in Vancouver. The facts do not support the proposition that Binnie planned litigation strategy for this case, as is suggested by the bands. For example, in their submissions, the Cape Mudge Band seemed to imply that the handwritten note in the margin of Memorandum No. 3 was written by Binnie in that "[he] was part of the Crown's early tactical considerations in this case; considering which approach would create the lowest risk for the Crown; which approach would constitute the 'least damaging way to go' " (see Cape Mudge's factum, at para. 12). However, upon examination of this note it would appear that it is addressed to "Ian [Binnie]" and signed "Bob" [Green]. Furthermore, and as indicated above, Memos 8, 9 and 10, in particular, establish that any views attributed to Binnie earlier on were offered in the context of wider implications of the negotiation process, and not in the context of litigation.

84 Furthermore, in assessing the potential for bias arising from a judge's earlier activities as counsel, the reasonable person would have to take into account the characteristics of legal practice within the Department of Justice, as compared to private practice in a law firm. See the Canadian Judicial Council's *Ethical Principles for Judges*, *supra*, at p. 47. In this respect, it bears repeating that all parties accepted that a reasonable apprehension of bias could not rest simply on Binnie J.'s years of service in the Department of Justice. In his capacity as Associate Deputy Minister, Binnie had responsibility for thousands of files at the relevant time. While his views were sought in the negotiations stage of the present dispute, it is relevant that he was consulted on strategic orientations in dozens of cases or classes of cases. In this regard, the matter on which he was involved in this file, principally the effect of the McKenna McBride Report, was not an issue unique to this case, but was an issue of general application to existing reserves in British Columbia. This was presumably the reason why he was approached in the first place.

85 To us, one significant factor stands out and must inform the perspective of the reasonable person assessing the impact of this involvement on Binnie J.'s impartiality in the appeals. That factor is the passage of time. Most arguments for disqualification rest on circumstances that are either contemporaneous to the decision-making, or that occurred within a short time prior to the decision-making.

86 In *Locabail (U.K.)*, *supra*, at p. 480, the English Court of Appeal stated:

> . . . every application must be decided on the facts and circumstances of the individual case. The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be.

87 Similarly, in *Panton v. Minister of Finance*, [2001] 5 L.R.C. 132, [2001] UKPC 33 (England P.C.), at para. 16, the Privy Council said:

> Another consideration which weighs against any idea of apparent or potential bias in the present case is the length of time which intervened between Rattray P.'s conduct in connection

> with the Act or indeed his holding of the office of Attorney General and the time when he sat as President in the Court of Appeal to hear the present case . . . . It appears that Rattray P. retired as Attorney General in 1993. The hearing of the appeal was in 1998. While that interval of time is not so great as to make the former connection with the Act one of remote history, it is nevertheless of some significance in diminishing to some degree the strength of any objection which could be made to his qualification to hear the case.

88 In the present instance, Binnie J.'s limited supervisory role in relation to this case dates back over 15 years. This lengthy period is obviously significant in relation to Binnie J.'s statement that when the appeals were heard and decided, he had no recollection of his involvement in this file from the 1980s. The lack of knowledge or recollection of the relevant facts was addressed by the English Court of Appeal in *Locabail (U.K.)*, *supra*. There, at p. 487, the Court of Appeal asked

> How can there be any real danger of bias, or any real apprehension or likelihood of bias, if the judge does not know of the facts that, in argument, are relied on as giving rise to the conflict of interest?

89 The parties have not challenged Binnie J.'s statement, and we are of the view that they are not required to do so. The question is whether the reasonable person's assessment is affected by his statement, in light of the context - that is, in light of the amount of time that has passed, coupled with the limited administrative and supervisory role Binnie played in this file. In our view, it is a factor that the reasonable person would properly consider, and it makes bias or its apprehension improbable in the circumstances.

90 Binnie J.'s lack of recollection is thus relevant. Yet it is not decisive of the issue. This is not a case in which the judge never knew about the relevant conflict of interest, which would be much easier, but a case in which the judge no longer recalls it. Without questioning his recollection, the argument can be made that his earlier involvement in the file affected his perspective unconsciously. Nevertheless, we are convinced that the reasonable person, viewing the matter realistically, would not come to the conclusion that the limited administrative and supervisory role played by Binnie J. in this file, over 15 years ago, affected his ability, even unconsciously, to remain impartial in these appeals. This is true, quite apart from the multitude of events and experiences that have shaped him as a lawyer and judge in the interim and the significant transformations of the law as it relates to aboriginal issues, that we have all witnessed since 1985.

91 We thus conclude that no reasonable apprehension of bias is established and that Binnie J. was not disqualified in these appeals. The judgment of the Court and the reasons delivered by Binnie J. on December 6, 2002, must stand. It is unnecessary to examine the question whether, in the event that the Court had found that Binnie J. was disqualified, the judgment of the Court in these appeals would have been undermined. Nevertheless, because of the importance of the issue, we offer a few comments in this respect.

92 The decision-making process within the Supreme Court of Canada, while not widely known, is a matter of public record. Many Justices of the Court have spoken publicly on this matter, and a rather complete description of it can be found in an essay published in 1986 by Justice Bertha Wilson ("Decision-making in the Supreme Court" (1986), 36 *U.T.L.J.* 227). For present purposes, it is enough to say the following. Each member of the Supreme Court prepares independently for the hearing of appeals. All judges are fully prepared, and no member of the Court is assigned the task to go through the case so as to "brief" the rest of the coram before the hearing. After the case is heard, each judge on the coram expresses his or her opinion independently. Discussions take place on who will prepare draft reasons and whether for the majority or the minority. Draft reasons are then prepared and circulated by one or more judges. These reasons are the fruit of a truly collegial process of revision of successive drafts. In that sense, it can be said that reasons express the individual views of each and every judge who signs them, and the collective effort and opinion of them all.

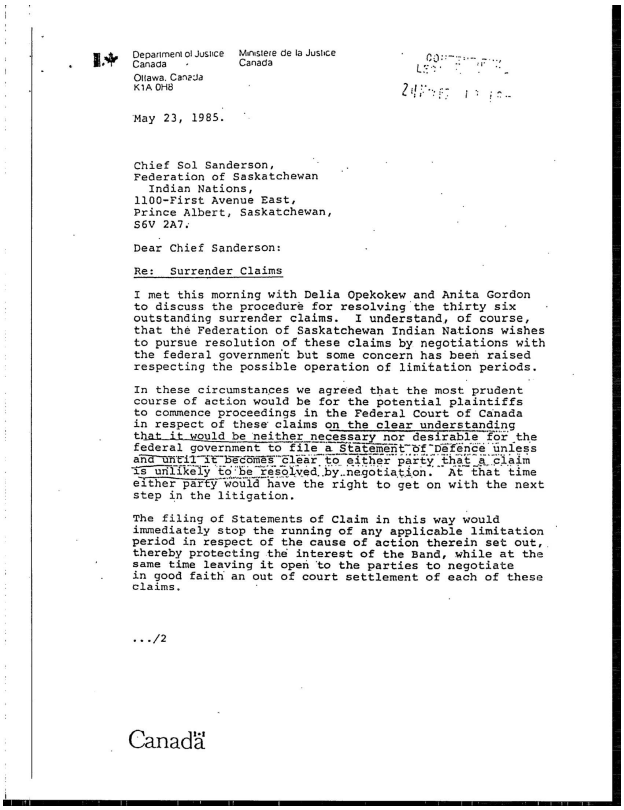
93 Here, the nine judges who sat on these appeals shared the same view as to the disposition of the appeals and the reasons for judgment. Cases where the tainted judge casts the deciding vote in a split decision are inapposite in this respect. In the circumstances of the present case, even if it were found that the involvement of a single judge gave rise to a reasonable apprehension of bias, no reasonable person informed of the decision-making process of the Court, and viewing it realistically, could conclude that it was likely that the eight other judges were biased, or somehow tainted, by the apprehended bias affecting the ninth judge.

V. Conclusion

94 We conclude that no reasonable apprehension of bias is established. Binnie J. was not disqualified to hear these appeals and to participate in the judgment. As a result, the motions to vacate the judgment rendered by this Court on December 6, 2002, are dismissed. The Crown's motion for directions is also dismissed. Although the bands requested costs, the Crown did not. Under the circumstances, each party will bear its own costs.

Motion dismissed.

APPENDIX



Department of Justice Canada
Ottawa, Canada
K1A 0H8

Ministère de la Justice Canada

May 23, 1985.

Chief Sol Sanderson,
Federation of Saskatchewan
Indian Nations,
1100-First Avenue East,
Prince Albert, Saskatchewan,
S6V 2A7.

Dear Chief Sanderson:

Re: Surrender Claims

I met this morning with Delia Opekokew and Anita Gordon to discuss the procedure for resolving the thirty six outstanding surrender claims. I understand, of course, that the Federation of Saskatchewan Indian Nations wishes to pursue resolution of these claims by negotiations with the federal government but some concern has been raised respecting the possible operation of limitation periods.

In these circumstances we agreed that the most prudent course of action would be for the potential plaintiffs to commence proceedings in the Federal Court of Canada in respect of these claims on the clear understanding that it would be neither necessary nor desirable for the federal government to file a Statement of Defence unless and until it becomes clear to either party that a claim is unlikely to be resolved by negotiation. At that time either party would have the right to get on with the next step in the litigation.

The filing of Statements of Claim in this way would immediately stop the running of any applicable limitation period in respect of the cause of action therein set out, thereby protecting the interest of the Band, while at the same time leaving it open to the parties to negotiate in good faith an out of court settlement of each of these claims.

.../2

Canada

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...2

As you know, it is the policy of the federal government to endeavour to resolve specific claims out of court and notwithstanding issuance of Statements of Claim every reasonable effort will be made on our part to deal with these claims expeditiously within the government's specific claims policy.

Yours very truly,

Signed by

Ian Binnie, Q.C.,
Associate Deputy Minister.
/hdm

c.c.: Bob Green
Stu Archibald

Department of Justice Canada / Ministère de la Justice Canada

MEMORANDUM/NOTE DE SERVICE

Security Classification – Cote de sécurité:

File number – numéro de dossier: 1.45.4.2071

Date: June 19, 1985

TO/A: FILE

FROM/DE: Mary Temple
A/Senior Counsel
Office of Native Claims

SUBJECT/OBJET: Campbell River Claim

Comments/Remarques

Last week Lou Harvey, the band lawyer, indicated that they were considering starting an action in the Federal court in order to protect themselves against the running of limitation periods in case the claim was not validated. So as to ensure that the ONC process could continue in the meantime he asked what should be done. I told him that a procedure had been discussed in respect of other claims and that I would get back to him within a week confirming precisely what the Crown would require from him. I reviewed the May 23, 1985 memo from Ian Binnie to Chief Sol Sanderson of the Federation of Saskatchewan Indian Nations, which was written in connection with 36 surrender claims. In this memo Mr. Binnie indicated that on the filing of the Statement of Claim the Federal Crown would need something confirming that it was neither necessary nor desirable for the Federal Government to file a Statement of Defence. I discussed such a procedure with Bill Scarth of the Vancouver Regional Office and he said what I propose sounded fine. I spoke to Lou Harvey today and said that he should, when he started an action, send to the Litigation section of the Department of Justice in Vancouver a letter indicating why the action was being started that they wished to continue with the ONC process (assuming a decision respecting validation had not yet been made) and that the Crown would not be required to file a Statement of Defence until further notice. Lou Harvey said this sounded fine and he would copy any such letter to me for my information.

M.T.

3

Department of Justice Canada / Ministère de la Justice Canada

MEMORANDUM/NOTE DE SERVICE

Security Classification – Cote de sécurité:

File number – numéro de dossier:

Date: August 9, 1985

TO/A: W. I. C. Binnie, Q.C.

FROM/DE: Mary Temple

SUBJECT/OBJET: Port Simpson and Campbell River Claims

Comments/Remarques

As you know an outstanding issue crucial to the federal position in respect of the validity of these two claims was referred to Tom Marsh of the Vancouver Office for his opinion. In a recent communication (August 7th) with Tom Marsh, he indicated to me that his work and opinion would not be ready before the middle of September. If there are any further communications with respect to the Port Simpson opinion from Band representatives I trust you will keep either myself or Joanne Kellerman informed.

M. T.

c.c. T. B. Marsh

4

Canada Canada

MEMORANDUM/NOTE DE SERVICE

Security Classification – Cote de sécurité

File number – numéro de dossier
1.45.4.2071
1.45.0.2007

Date
October 11, 1985

TO/A: I. Binnie, Q.C.
Associate Deputy Minister

FROM/DE: R. Green
General Counsel, DIAND Legal Services

SUBJECT/OBJET:
Establishment of Reserves in B.C.
Port Simpson and Campbell River Band Claims

Comments/Remarques

I have requested the October 18 (3:00 p.m.) meeting with you in connection with these matters in order to discuss a legal issue which potentially touches on all claims from B.C. bands, or at least all involving a determination of rights and liabilities arising out of the pre-McKenna/McBride period.

The validation of both of these claims turns on whether or not the reserves in question were established before the McKenna/McBride exercise. In the case of the Port Simpson Reserve, a provincial order-in-council was issued on February 26, 1884 (copy of that order and the related memorandu is attached) purporting to establish that Reserve. In the case of the Campbell River Reserves No. 11 and 12, a provincial and federal order-in-council were issued dated April 6, 1888 and May 29, 1888 respectively (copies of those orders are attached) giving Green the authority to determine the reserve boundaries. But for the provision in the provincial legislation (copies of this provision, in all its forms from before Confederation unti 1936, are attached) which referred to the Gazetting of notices for the reservation of Indian lands, these orders-in-council would seem sufficient to conclude that the reserves had been legally established by them (or, in the case of Campbell River, by Green's reported decision).

During the course of the first meeting between ONC and the Campbell River Band representatives to discuss the preliminary Justice opinion (which was to the effect the Band had no claim), the Band lawyer suggested that unless an appropriate notice was published in the B.C. Gazette in accordance with s.60 of the Land Act of B.C., the reserves were not legally established by the two orders-in-council of 1888 or by Green's Report. If this is correct, the reserves would not have been legally established until the McKenna/McBride exercise which would mean that the Band has a valid claim.

5

With respect to the Port Simpson claim, which was validated by the Minister on April 15, 1985 (copy of letter is attached), th conclusion that The Gazetting of a notice is essential to establish the reserve would have the opposite effect, ie., to convert what has to date been recognized as a valid claim into one for which the Crown has no legal liability.

In general, if the Gazetting of these notices is, in law, essential to establish a reserve, then, since no such notices were Gazetted after B.C. joined Confederation in 1871 (althoug they were so Gazetted before that date), none of the reserves identified by the Indian Commissioners during the latter part the 19th Century (estimated at 2/3 of all B.C. Reserves) would have been legally established until the implementation of the McKenna/McBride exercise in 1924.

I have attached hereto the response of Tom Marsh to our reques for his assistance in respect of this issue. As you can see h has set out a variety of arguments as to the interpretation of the B.C. Legislation. It seems to me that there are three likely interpretations:

1. no reserve is legally established until the notice Gazetted;
2. the Gazetting provision is for the purpose of land banking;
3. the Gazetting process is a condition prescedent to transferring administration and control of reserves to the federal government but not to the creation o the Indian interest.

No one interpretation is with any degree of certainty the best one, but in order to proceed with either of the two claims, a decision must be made as to which one is to be supported.

A further wrinkle relates to the liklihood of litigation whichever way we go. The Port Simpson Band representatives ha indicated they will proceed with litigation if their claim is not recognized and the Campbell River Band has, apparently already commenced an action, although for the time being, on th basis of preventing the expiration of any applicable limitatio period.

I trust the above has conveyed the essential factors related t the issue. I am looking forward to our meeting and trust an acceptable solution will be identified.

R.G.

Attach.

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Department of Justice Canada / Ministère de la Justice Canada

MEMORANDUM/NOTE DE SERVICE

Security Classification – Cote de sécurité:

File number – numéro de dossier: 284563

Date: December 12, 1985

TO/A: W.I.C. BINNIE, Q.C., Associate Deputy Minister.

FROM/DE: DUFF FRIESEN, General Counsel, Civil Litigation Section.

SUBJECT/OBJET: ROY ANTHONY ROBERTS, C. AUBREY ROBERTS and JOHN HENDERSON, suing on their own behalf and on behalf of all other members of the WEWAYAKUM INDIAN BAND, also known as the CAMPBELL RIVER INDIAN BAND
Court No.: T-2652-85

Comments/Remarques

The Statement of Claim in this matter raises issues relating to the administration or application of laws relating to Indians. Accordingly, I refer it to you for your comments before assigning it. Unless you wish to handle the matter differently, I propose to refer it to the Vancouver Regional Office.

May I please have your comments?

D.F.F.

DFF/vht
Attch.

I agree
J. Binnie
12.12.85

7

Department of Justice Canada / Ministère de la Justice Canada

MEMORANDUM/NOTE DE SERVICE

Security Classification – Cote de sécurité:

File number – numéro de dossier: 1.45.4.2071

Date: December 13, 1985

TO/A: G. Donegan
General Counsel, Vancouver Regional Office

Attention: H.J. Wruck, Senior Counsel, Civil Litigation

FROM/DE: Mary Temple, Legal Counsel
Native Claims

SUBJECT/OBJET: Re: Campbell River Band's Specific Claim

Comments/Remarques

On October 22, 1985 I informed Manfred Klein, Negotiator for the Specific Claims Branch in Vancouver, that I considered the Campbell River claim respecting Quinsam Reserve No. 12 to be one which could be validated for the purposes of negotiations under the policy of the Department of Indian and Northern Affairs. I was informed today by Lou Harvey of the Davis and Company Law Firm in Vancouver, representing the Campbell River Band, that the band has now had a statement of claim filed on its behalf in court and intends to proceed with this claim through litigation rather than through negotiation under the Department of Indian Affairs policy. The main reason cited was that the band wants to have the reserve in question, Quinsam Reserve No. 12, returned to it notwithstanding the fact that Reserve No. 12 is presently and has always been occupied by another band, the Cape Mudge Band. Under the Department of Indian Affairs policy the normal position is that third party interest will not be disturbed in order to compensate a band for any loss recognized under the policy.

I assume you will be served officially with documentation relating to this claim and for your assistance in developing a statement of defence I am enclosing hereunder my opinion of October 22, my opinion of March 8, 1985 which is somewhat modified by the October 22 opinion, and a copy of a memo dated November 14, 1985 which was sent to Mr. Harvey from Manfred Klein informing him that Mr. Klein was prepared to recommend to the Minister of Indian Affairs recognition of the claim under the policy.

The documentation on which my opinion was based was reviewed and is in the hands of the Office of Native Claims Branch in Vancouver. Manfred Klein of that office would be able to provide you with this documentation at your request.

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For your further information, certain aspects of this claim were the subject of correspondence with Thomas Marsh of your office and were also discussed with Ian Binnie in Ottawa. In particular, Ian Binnie formed the opinion that the McKenna McBride report, to the extent that it specified that Quinsam Reserve No. 12 was the Campbell River Band's Reserve, should b taken at its face value notwithstanding the apparent fact that the designation of the Reserve for this band stemmed from an administrative error in the list of reserves on which the Commission relied as its primary source of information.

If I can be of any assistance to the member of your staff to whom the file is assigned, I would be most pleased.

M.T.

Encl.

cc: D. F. Friesen, General Counsel
Civil Litigation (Common Law Section) Ottawa Headquarter

I. Binnie, Associate Deputy Minister, Ottawa Headquarter

M. Freeman, Sr. Counsel, Native Law Section, Ottawa Headquarters.

M. Klein, Negotiator, Specific Claims Branch, Vancouver Regional Office

D. K. Goodwin, Assistant Deputy Minister, Indian and Inuit Affairs Program

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Department of Justice Canada / Ministère de la Justice Canada

MEMORANDUM/NOTE DE SERVICE

Security Classification – Cote de sécurité

File number – numéro de dossier

Date: January 14, 1986

TO/À: Mary Temple
Office of Native Claims - DIAND

FROM/DE: Ian Binnie

SUBJECT/OBJET: Campbell River Band Specific Claim

Comments/Remarques

I acknowledge with thanks receipt of a copy of your note of December 13, 1985 which states in part:

> "Ian Binnie formed the opinion that the McKenna McBride Report, to the extent that it specified that Quinsam Reserve No. 12 was the Campbell River Band's reserve should be taken at its face value notwithstanding the apparent fact that the designation of the reserve for this Band stemmed from an administrative error in the list of reserves on which the Commission relied as its primary source of information."

I recall some discussion about this, but not in the raw terms you have stated it. Could you let me have a note setting out the factual circumstances of the case and the legal points addressed in our discussion and any other relevant legal points you think should be considered?

Many thanks.

Ian Binnie
/hdm

c.c.: Bob Green

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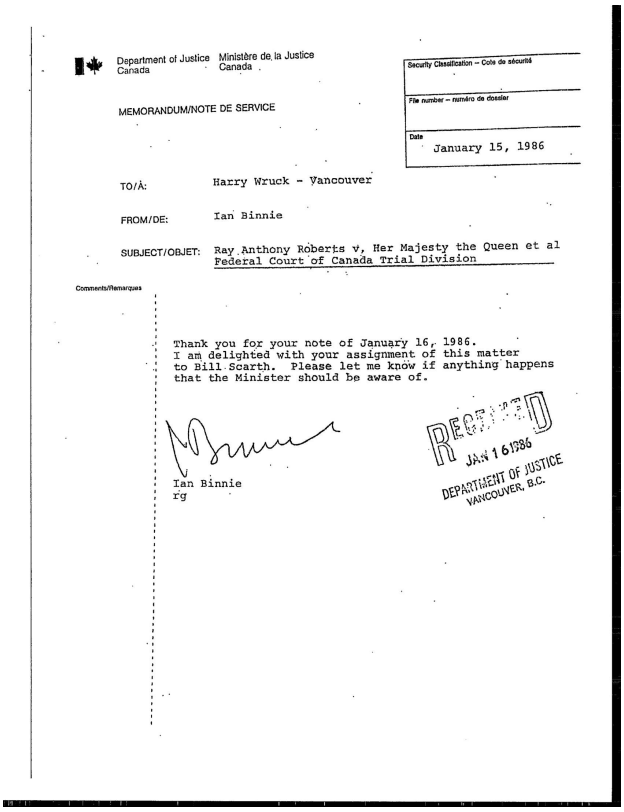

Department of Justice Canada / Ministère de la Justice Canada

MEMORANDUM/NOTE DE SERVICE

Security Classification – Cote de sécurité

File number – numéro de dossier

Date: January 15, 1986

TO/À: Harry Wruck - Vancouver

FROM/DE: Ian Binnie

SUBJECT/OBJET: Ray Anthony Roberts v, Her Majesty the Queen et al
Federal Court of Canada Trial Division

Comments/Remarques

Thank you for your note of January 16, 1986. I am delighted with your assignment of this matter to Bill Scarth. Please let me know if anything happens that the Minister should be aware of.

Ian Binnie
rg

RECEIVED
JAN 16 1986
DEPARTMENT OF JUSTICE
VANCOUVER, B.C.

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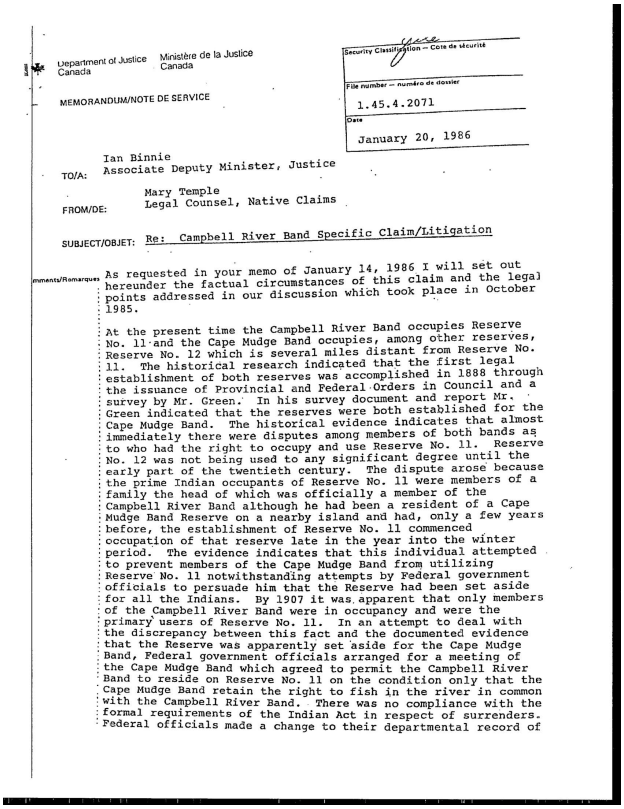

Department of Justice Canada / Ministère de la Justice Canada

MEMORANDUM/NOTE DE SERVICE

Security Classification – Cote de sécurité: Case

File number – numéro de dossier: 1.45.4.2071

Date: January 20, 1986

TO/A: Ian Binnie
Associate Deputy Minister, Justice

FROM/DE: Mary Temple
Legal Counsel, Native Claims

SUBJECT/OBJET: Re: Campbell River Band Specific Claim/Litigation

Comments/Remarques

As requested in your memo of January 14, 1986 I will set out hereunder the factual circumstances of this claim and the legal points addressed in our discussion which took place in October 1985.

At the present time the Campbell River Band occupies Reserve No. 11 and the Cape Mudge Band occupies, among other reserves, Reserve No. 12 which is several miles distant from Reserve No. 11. The historical research indicated that the first legal establishment of both reserves was accomplished in 1888 through the issuance of Provincial and Federal Orders in Council and a survey by Mr. Green. In his survey document and report Mr. Green indicated that the reserves were both established for the Cape Mudge Band. The historical evidence indicates that almost immediately there were disputes among members of both bands as to who had the right to occupy and use Reserve No. 11. Reserve No. 12 was not being used to any significant degree until the early part of the twentieth century. The dispute arose because the prime Indian occupants of Reserve No. 11 were members of a family the head of which was officially a member of the Campbell River Band although he had been a resident of a Cape Mudge Band Reserve on a nearby island and had, only a few years before, the establishment of Reserve No. 11 commenced occupation of that reserve late in the year into the winter period. The evidence indicates that this individual attempted to prevent members of the Cape Mudge Band from utilizing Reserve No. 11 notwithstanding attempts by Federal government officials to persuade him that the Reserve had been set aside for all the Indians. By 1907 it was apparent that only members of the Campbell River Band were in occupancy and were the primary users of Reserve No. 11. In an attempt to deal with the discrepancy between this fact and the documented evidence that the Reserve was apparently set aside for the Cape Mudge Band, Federal government officials arranged for a meeting of the Cape Mudge Band which agreed to permit the Campbell River Band to reside on Reserve No. 11 on the condition only that the Cape Mudge Band retain the right to fish in the river in common with the Campbell River Band. There was no compliance with the formal requirements of the Indian Act in respect of surrenders. Federal officials made a change to their departmental record of

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Comments/Remarques

reserves by writing the name of the Campbell River Band throug the entry opposite the description of Reserve No. 11 which entry had previously been a set of quotation marks coming underneath other sets of quotation marks which were topped by the name of the Cape Mudge Band. Since Reserve No. 12 was listed immediately following Reserve No. 11 and since the quotation marks remained unaltered opposite the description of Reserve No. 12, the 1914 printing of this departmental record gave the appearance that both Reserves No.'s 11 and 12 were held for the Campbell River Band and not for the Cape Mudge Band, although in the previous printing of this schedule since quote marks had been entered opposite the description of both reserves and underneath the name of the Cape Mudge Band, the previous version of the schedule of reserves had indicated that both Reserves No.'s 11 and 12 were held for the Cape Mudge Band. There appears to be no authority for giving legal effect to the alteration of the schedule of reserves. In other words, the reprinting of the schedule by the Department could not be considered a officially representing a transfer of interests in either reserves from the Cape Mudge Band to the Campbell River Band. However, the 1914 Schedule of Reserves was the document utilized by the McKenna McBride Royal Commission as the factual basis from which it commenced its review of the B.C. Reserves.

The McKenna McBridge report organized its findings into three categories. The first category was in relation to those areas which were recommended to be set aside a new; the second category was in relation to those areas which, according to the 1914 schedule, had already been set aside for a particular band but which the commission was recommending be freed of reserve status; the third category being those reserves which had already been set aside for a particular band or bands according to the 1914 schedule and in respect of which the Commission was recommending confirmation of that status. In the report both reserves no. 11 and 12 were placed in the latter category, namely, confirmations, but in reflection of the 1914 schedule the name of the band for both reserves was that of the Campbell River Band. Although there was legislative authority for the McKenna McBridge Commission to remove the Indian status from reserve lands, because the information at their disposal apparently led them to believe that the legal status of reserves no.'s 11 and 12 was such that only the Campbell River Band had an interest therein, and because they entered these two reserves in the confirmation part of the their report, I had suggested that the record be interpreted so as not to give legal effect to what appeared on the face of the Royal Commission report on the grounds that Indian interest should not, in law, be considered as one which could be taken away inadvertently but could only be taken away, assuming adequate legislative authority, by a conscious act.

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Comments/Remarques

In our discussion of this claim in October 1985, we spent most of the time on another legal issue. However, when we turned to the issue of the effect of the McKenna McBride Commission report vis a vis Reserves No.'s 11 and 12, you indicated that such a qualification of the apparent terms of the McKenna McBride Report, as suggested by me, should not be supported and that a report should be accepted on its face so as to result in the legal vesting of an interest for the Campbell River Band only in these two reserves. My understanding of your reasons for such a position was that if we started to qualify the face of the record in any way, we would call into question other aspects of the McKenna McBride exercise.

The other issue on which we spent most of our time during the October discussion was in relation to the question of the effect of the B.C. Land Act Legislation on the establishment of Reserves during the time of the nineteen century reserve commissions. In particular, one interpretation of this legislation would have confirmed the necessity of publishing in the B.C. Gazette the decision of the B.C. Government or officials authorized by it to establish reserves for bands before a band could be considered to have a vested interest in such a reserve. We concluded that notwithstanding the basis for such an interpretation, we should maintain the position that at least with respect to the Campbell River and Quinsam Reserves there was no requirement to gazette notices of those reserves before they could be considered to have been established. The legislation in question was somewhat ambiguous and our decision reflected an attempt to support an interpretation which was, of course, reasonably arguable but which also was reflective of the treatment of these reserves during the period preceeding the McKenna McBride report implementation.

I trust this memo meets your request and if you have any further concerns with the analysis I have presented in my various memos I would most appreciate hearing from you. If I can provide you with any further information, recollections or analysis on the matter I would be pleased to do so.

M.T.

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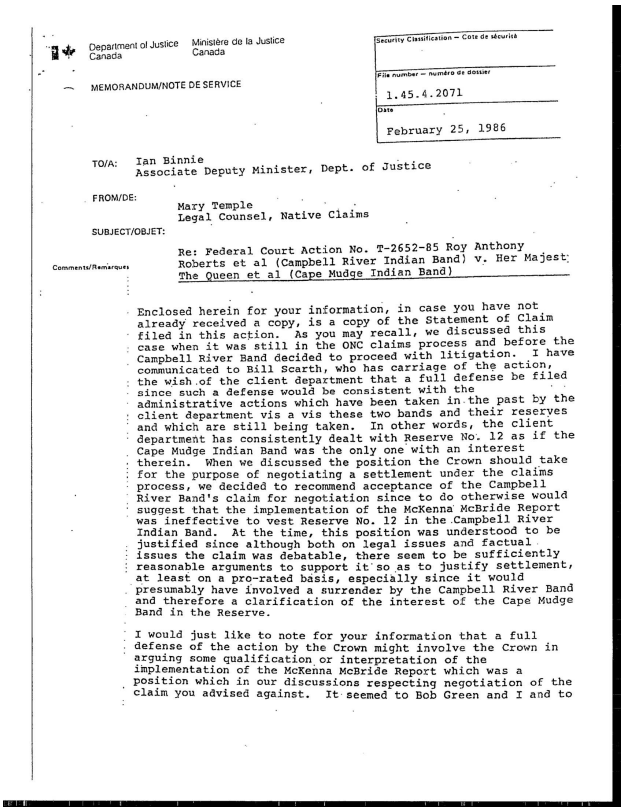


Department of Justice Canada / Ministère de la Justice Canada

MEMORANDUM/NOTE DE SERVICE

Security Classification – Cote de sécurité

File number – numéro de dossier: 1.45.4.2071

Date: February 25, 1986

TO/A: Ian Binnie
Associate Deputy Minister, Dept. of Justice

FROM/DE:
Mary Temple
Legal Counsel, Native Claims

SUBJECT/OBJET:

Comments/Remarques

Re: Federal Court Action No. T-2652-85 Roy Anthony Roberts et al (Campbell River Indian Band) v. Her Majest The Queen et al (Cape Mudge Indian Band)

Enclosed herein for your information, in case you have not already received a copy, is a copy of the Statement of Claim filed in this action. As you may recall, we discussed this case when it was still in the ONC claims process and before the Campbell River Band decided to proceed with litigation. I have communicated to Bill Scarth, who has carriage of the action, the wish of the client department that a full defense be filed since such a defense would be consistent with the administrative actions which have been taken in the past by the client department vis a vis these two bands and their reserves and which are still being taken. In other words, the client department has consistently dealt with Reserve No. 12 as if the Cape Mudge Indian Band was the only one with an interest therein. When we discussed the position the Crown should take for the purpose of negotiating a settlement under the claims process, we decided to recommend acceptance of the Campbell River Band's claim for negotiation since to do otherwise would suggest that the implementation of the McKenna McBride Report was ineffective to vest Reserve No. 12 in the Campbell River Indian Band. At the time, this position was understood to be justified since although both on legal issues and factual issues the claim was debatable, there seem to be sufficiently reasonable arguments to support it so as to justify settlement, at least on a pro-rated basis, especially since it would presumably have involved a surrender by the Campbell River Band and therefore a clarification of the interest of the Cape Mudge Band in the Reserve.

I would just like to note for your information that a full defense of the action by the Crown might involve the Crown in arguing some qualification or interpretation of the implementation of the McKenna McBride Report which was a position which in our discussions respecting negotiation of the claim you advised against. It seemed to Bob Green and I and to

Co[illegible]nts/Remarques

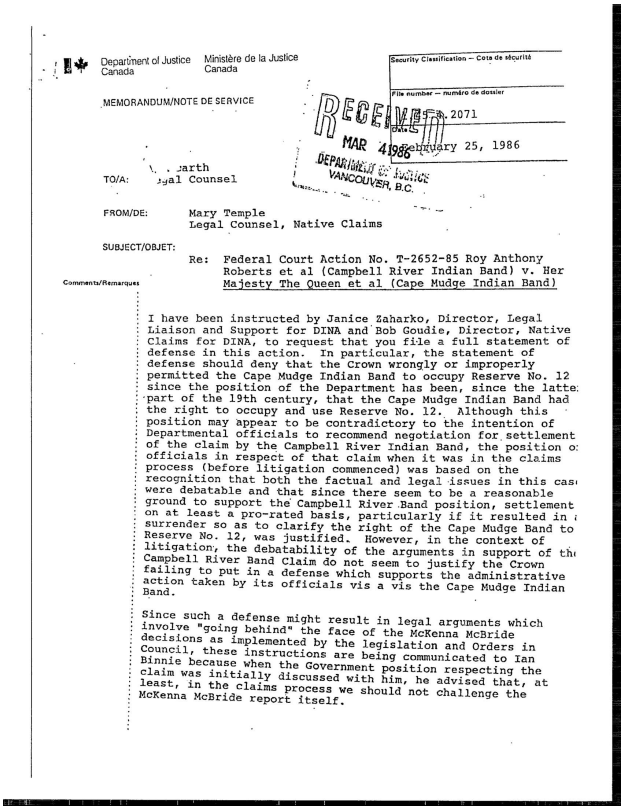
the Departmental officials that such a defense in the context of this court action was, nevertheless, justified.

If you have any further concerns in respect of these decisions we would most appreciate hearing from you.

M.T.

Encl.

cc: B. Scarth



Department of Justice Canada / Ministère de la Justice Canada

Security Classification – Cote de sécurité

File number – numéro de dossier 2071

RECEIVED MAR 4 1986 DEPARTMENT OF JUSTICE VANCOUVER, B.C.

Date February 25, 1986

MEMORANDUM/NOTE DE SERVICE

TO/A: [illegible]arth
[illegible]gal Counsel

FROM/DE: Mary Temple
Legal Counsel, Native Claims

SUBJECT/OBJET:

Re: Federal Court Action No. T-2652-85 Roy Anthony Roberts et al (Campbell River Indian Band) v. Her Majesty The Queen et al (Cape Mudge Indian Band)

Comments/Remarques

I have been instructed by Janice Zaharko, Director, Legal Liaison and Support for DINA and Bob Goudie, Director, Native Claims for DINA, to request that you file a full statement of defense in this action. In particular, the statement of defense should deny that the Crown wrongly or improperly permitted the Cape Mudge Indian Band to occupy Reserve No. 12 since the position of the Department has been, since the latte part of the 19th century, that the Cape Mudge Indian Band had the right to occupy and use Reserve No. 12. Although this position may appear to be contradictory to the intention of Departmental officials to recommend negotiation for settlement of the claim by the Campbell River Indian Band, the position o officials in respect of that claim when it was in the claims process (before litigation commenced) was based on the recognition that both the factual and legal issues in this cas were debatable and that since there seem to be a reasonable ground to support the Campbell River Band position, settlement on at least a pro-rated basis, particularly if it resulted in surrender so as to clarify the right of the Cape Mudge Band to Reserve No. 12, was justified. However, in the context of litigation, the debatability of the arguments in support of th Campbell River Band Claim do not seem to justify the Crown failing to put in a defense which supports the administrative action taken by its officials vis a vis the Cape Mudge Indian Band.

Since such a defense might result in legal arguments which involve "going behind" the face of the McKenna McBride decisions as implemented by the legislation and Orders in Council, these instructions are being communicated to Ian Binnie because when the Government position respecting the claim was initially discussed with him, he advised that, at least, in the claims process we should not challenge the McKenna McBride report itself.

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C nents/Remarques

These instructions are in accordance with advice from this legal service since it seemed to us that not only was it supportive of past departmental action (and of current dealings with the two reserves) but also because it seems there are good arguments to support a defense of the positions taken by the plaintiff in the Statement of Claim.

If I or any one else in Ottawa can be of further assistance to you in respect of the development of the Statement of Claim or in any other matter touching on this action, please do not hesitate to contact us.

M.T.

cc: J. Zaharko
P. Goudie

Canada Canada

MEMORANDUM/NOTE DE SERVICE

Security Classification – Cote de sécurité

File number – numéro de dossier
1.45.4.2071

Date
February 27, 1986

TO/A: Carol Pepper
Legal Counsel, Specific Claims Branch
Vancouver

FROM/DE: Mary Temple
Legal Counsel, Native Claims

SUBJECT/OBJET: Recent Legal Opinions

Comments/Remarques

In response to your request of February 13, 1986 I have culled from my Campbell River Claim file (Quinsam Reserve No. 12) a number of opinions which I enclose. As you can see the opinions fall into two categories. Those which I have bundled together and marked package #1 relate to the specific issue of the necessity for gazetting notices of Indian Reserves in order to properly establish them during the latter part of the 19th century. The second, which I have bundled and marked package #2, relate to the other issues which were raised in the Campbell River claim. Please note that my March 8 memo to the ONC Office was merely my preliminary position and following my subsequent meeting with the band lawyer and further consultations in Ottawa I reversed my position on several issues which I will note below.

1. With respect to paragraph 4 on page 6 of my March 8 memo I eventually did take the position that the McKenna McBride exercise had the effect of changing the band which had an interest in the reserve, assuming that any band had been vested with an interest in a reserve before McKenna McBride dealt with it.

2. With respect to the middle paragraph on page 8 of my March 8 memo, in my reference to the implementation of the Ditchburn and Clark alterations, I subsequently changed my opinion so as to accept the position that the 1924 Order in Council does give effect to confirmations as specified by McKenna McBride although it gives effect only to the alterations of Ditchburn and Clark which touch on new reserves or cut-offs from reserves. Although I eventually reflected Ian Binnie's preferred position (to not "go behind" the McKenna McBride Report, I think it is nevertheless reasonably arguable that even if the McKenna McBride Report as given effect eventually by the 1924 Order in Council, among other Acts, can be said in general to have established new reserves, altered existing reserves and confirmed various other existing reserves, (or established new reserves by means of "confirmation" if for some reason it appears the "existing" reserve was not in fact validly established?) in the case of one such as Campbell River where they

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Comments/Remarques

base their confirmation on a faulty piece of information since they through the language that they used intended only to maintain the status quo, their stated dispositic of the reserve to a band other than the one in which it had been originally vested cannot be considered to take effect since to do so would result in an unintentional dissolution of the Indian interest.

3. On page 9 of my March 8 memo I state a position respecting the 1938 Order in Council on which I was persuaded to shift so that although it was eventually no necessary to communicate this in later memos I was persuaded that the 1938 Order in Council could have the effect of vesting areas anew for specific bands but because of the surrender provisions of the Federal India Act, it did not appear to me to be arguable that such a provincial order in council could alter any existing ban interests in reserves.

With respect to my April 26, 1985 memo to ONC please note also that subsequent to this memo I did provide an opinion indicating the different position respecting the scope of the implementation of the McKenna McBride report, as amended by th Ditchburn and Clark changes.

I trust this documentation may be at least of interest to you and hopefully of some assistance in your current files.

M.T.

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Canada Canada

Security Classification – Cote de sécurité

File number – numéro de dossier

Date
March 3, 1986

MEMORANDUM/NOTE DE SERVICE

TO/À: W.I.C. Binnie, Q.C.
Associate Deputy Minister

FROM/DE: W. B. Scarth
Vancouver Regional Office

SUBJECT/OBJET: Roberts et al v. Her Majesty the Queen et al

Comments/Remarques

Enclosed is copy of the Defence filed on behalf of the Crown on February 28, 1986.

I think this reflects the positions of both Justice and Indian Affairs. Necessarily, because I have not been told whether the Cape Mudge Band intends suing the Crown, the defence lacks some specificity and may require amendment at a later time. In any event I have attempted not to repudiate the McKenna-McBride Commission report.

W.B.S.

WBS/dg

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Department of Justice Canada Ministère de la Justice Canada

Security Classification – Cote de sécurité

File number – numéro de dossier

Date
March 5, 1986

MEMORANDUM/NOTE DE SERVICE

TO/A: Mary Temple
Legal Counsel, Native Claims

FROM/DE: Ian Binnie

SUBJECT/OBJET: Federal Court Action No. T-2652-85
Roy Anthony Roberts et al (Campbell River Indian Band) v. Her Majesty the Queen et al (CAPE Mudge Indian Band)

Comments/Remarques

Thank you for your memorandum dated February 25, 1986 together with a copy of the Statement of Claim which was filed in the Federal Court of Canada on December 2, 1985 with respect to the above noted matter. With respect to the treatment of the McKenna McBride Report, I suggest that we all await the advice of Bill Scarth as to how this aspect of our possible defence should be dealt with. So far as I am concerned Bill Scarth is in charge of the file. I am sure he will take note of the view expressed by you and Bob Green and "departmental officials" that it would be appropriate in the Crown's defence to argue some qualification or interpretation of the implementation of the McKenna McBride Report.

I look forward to hearing Bill Scarth's views on this aspect of the matter in due course. We will then decide what to do.

Ian Binnie
rg

cc: Bill Scarth, Q.C.
Dogan Akman (with enclosures)

RECEIVED
MAR - 6 1986
DEPARTMENT OF JUSTICE
VANCOUVER, B.C.

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Department of Justice Canada / Ministère de la Justice Canada

Security Classification – Cote de sécurité

File number – numéro de dossier

Date: February 3, 1988

MEMORANDUM/NOTE DE SERVICE

TO/À: E.A. Bowie, Q.C.
Assistant Deputy Attorney General

FROM/DE: W. B. Scarth
Vancouver Regional Office

SUBJECT/OBJET: **Roy Anthony Roberts et al v. Her Majesty the Queen et al**

Comments/Remarques

During our meeting in Vancouver last week (January 29th) I undertook to write you with respect to an issue which arises in the above captioned case and which, in my view, should be considered in the context of not only this case but also of the claims based on aboriginal rights being made in British Columbia.

Shortly put, it is fundamental to our defence in Roberts that the two reserves in question be determined by the Court to have been allotted to the Cape Mudge Band prior to 1900. On the other hand, the interests of the Crown in the Gitksan Carrier and Pasco actions would no doubt be better served by a ruling that reserves in British Columbia were not created until at least 1930 because there will then be available a stronger argument that provincial legislation has effectively extinguished certain aboriginal rights insofar as reserve lands are concerned.

To the above I would add that our position has, in previous cases, been that reserves were established in or before 1887, notwithstanding the lands were not conveyed to Canada by British Columbia until 1930. The Province, on the other hand, has traditionally taken the position that the lands did not become "lands reserved for the Indians" until 1938. (See Moses et al v. The Queen et al [1977] 4 W.W.R. 474, at p. 477; Dunstan et al v. Hell's Gate Enterprises Ltd. et al (1985) 22 D.L.R. (4th) 568, at pp. 597-8.)

Insofar as the Roberts case is concerned, the significance of arguing that the two reserves were allotted to the Cape Mudge Band prior to 1900 may be seen from the following summary:

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Com...ts/Remarques

A. The Claim

1. The Campbell River Indian Band has sued the Cape Mudge Indian Band and Federal Crown in the Federal Court for, amongst other things, declarations that Reserves Nos. 11 and 12 have at all times been set aside for the exclusive use and benefit of the Campbell River Indian Band. That Band presently occupies, and since prior to the turn of the century, has occupied, Reserve No. 11; members of the Cape Mudge Band presently occupy, and at all times have occupied, Reserve No. 12. In its defence the Cape Mudge Band claims an entitlement to occupy both reserves. The Crown's position, as pleaded, is that members of the Campbell River Band are, and since about 1907, have been, in lawful occupation of and entitled to the use and benefit of Reserve No. 11, and that members of the Cape Mudge Band are and at all times material have been in lawful occupation of and entitled to the use and benefit of Reserve No. 12.

B. Historical Background

1. In 1879, Gilbert Malcolm Sproat, a Commissioner appointed to settle the Indian land question in British Columbia, allotted reserves to the Laich-kwil-tach Tribe, of which the Campbell River and Cape Mudge Bands are members. Apparently his allotments were not approved, as required by the Orders-in-Council appointing him, by the B.C. Chief Commissioner of Lands and Works.

2. In October, 1886, Peter O'Reilly, then B.C. Reserve Commissioner, set aside a number of reserves for the Laich-kwil-tach Tribe. He was able to set aside one reserve (No. 10 not in issue) for Cape Mudge, but was unable to define the boundaries of Nos. 11 and 12 owing to the absence from the area of the Indians.

3. Then, in 1888, Ashdown H. Green, Chief Surveyor of the Reserve Commission, was appointed by the Federal Government (P.C. dated May 29, 1888), upon the request of the Provincial Government, "to determine the

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Com. ts/Remarques

extent, and boundaries of the Indian Reserves at Campbell River. In his Report Mr. Green forwarded to the Chief Commissioner of Lands and Works, for his approval, a sketch and Minute of Decision of the reserves as defined by him, Mr. Green, "for the use of the 'Laich-kwil-Tach' tribe". The sketch outlines both reserves, and is headed by the caption:

"Laich-kwil-Tach (Eu-cla-taw) Indians
We-way-A-kay Band"

"We-way-A-kay" is a reference to the Cape Mudge Band. In issue is whether Mr. Green was officially alloting these reserves to the Laich-kwil-Tach Tribe and, indeed, whether he was authorized to do so. I am seeking advice from our historical researchers as to whether either reserve was, prior to 1900, in fact allotted to a specific Band. The documents we have, (letters, memoranda, etc.) however, indicate Indian Affairs treated both reserves as being set aside for the use and benefit of the Cape Mudge Band until about 1907 when the Cape Mudge Band, by resolution, 'ceded' Reserve No. 11 to the Campbell River Band.

During our discussion I mentioned the existence of a Proclamation dated December 15, 1876, by which the Governor-in-Council exempted all reserves and Indian lands in British Columbia from the operation of the surrender provisions of the Indian Act. A copy of this Proclamation is enclosed. I am told this Proclamation remained in effect until 1951, at which time the provision of the Indian Act under which it was authorized was repealed.

I am also enclosing the text of the resolution by which the Cape Mudge Band 'ceded' Reserve No. 11 to the Campbell River Band. On the basis that Reserve No. 11 had been allotted to the Cape Mudge Band by Mr. Ashdown Green and that they were lawfully in occupation of and entitled to the use and benefit of that reserve, we will have to argue that the Cape Mudge Band, by virtue of the Proclamation, legally 'surrendered' their rights to Reserve No. 11 to the Campbell

/4

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Comm. /Remarques

River Band, retaining, of course, the right to be in lawful occupation of Reserve No. 12 which had similarly been allotted to them.

4. Finally, the 1902 Schedule of Indian Reserves appears to have given rise to an error with respect to entitlement to occupy Reserve No. 12. The error arose because a handwritten note was made on the Schedule, presumably following the 'ceding' resolution, indicating the Campbell River Band occupied Reserve No. 11 (which is in fact correct). Existing ditto marks below the handwritten notation were not altered so as to indicate that Cape Mudge continued to occupy No. 12 (as it in fact does).

5. This "error" was recognized but perpetuated in the Report of the McKenna McBride Commission made in 1916 and B.C. Order-in-Council 1036 (passed in 1938) by which reserve lands in British Columbia were conveyed by the Province to Canada. The plaintiffs (Campbell River Band) will undoubtedly argue that the combined effect of the recommendations contained in the Report of the Royal Commission, the legislation and Orders-in-Council pertaining to those recommendations, and the conveyance of the lands to Canada, was to vest the right to occupy both reserves in the plaintiffs. We will have to argue that the Royal Commission merely confirmed the boundaries of these two reserves, but did not allot either reserve to a specific band, that having been done by the reserve Commissioners in the last century and that the effect of the legislation is not to vest in the plaintiffs any right to occupy Reserve No. 12. (I point out, parenthetically, that Ian Binnie, during his time as Associate Deputy Minister, suggested, because of its wider impact, that we not challenge the validity of what was done by the Royal Commission. With respect, I continue to concur with that advice, and suggest it is a question of defining more narrowly what the Commission did, at least insofar as the Reserves in question are concerned.)

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Co nts/Remarques

I have discussed the reserve creation issue briefly with Mrs. Koenigsberg, and am scheduled to meet with her again for the purpose of determining the approach she and Mr. Macaulay intend taking in Gitksan Carrier and Pasco. I shall, of course, seek her views as to whether she feels those cases would be seriously prejudiced by the approach I am taking in Roberts.

As we discussed, it would be advisable to have Rob Green's views on the matter. I am sending a copy of this memorandum to him.

In the meantime, I am proceeding to conduct the Crown's defence as outlined above. Short of legislation we probably have no alternative. If you have a contrary view to the above approach please let me know.

W.B.S.

WBS/dg

c.c. R. L. Evans, Q.C.
R. J. Green, Q.C.
I. G. Whitehall, Q.C.

2000 CarswellNat 947
Federal Court of Canada — Appeal Division

Zündel v. Citron

2000 CarswellNat 3268, 2000 CarswellNat 947, [2000] 4 F.C. 225, [2000] F.C.J. No. 679, 183 F.T.R. 160 (note), 189 D.L.R. (4th) 131, 256 N.R. 201, 25 Admin. L.R. (3d) 113, 38 C.H.R.R. D/88, 97 A.C.W.S. (3d) 723

Sabina Citron, Toronto Mayor's Committee on Community and Race Relations, The Attorney General of Canada, The Canadian Human Rights Commission, Canadian Holocaust Remembrance Association, Simon Wiesenthal Centre, Canadian Jewish Congress and League for Human Rights of B'Nai Brith, Appellants and Ernst Zundel and Canadian Association for Free Expression Inc., Respondents

Isaac, Robertson, Sexton JJ.A.

Heard: April 4, 2000
Judgment: May 18, 2000 *
Docket: A-253-99

Proceedings: reversing (1999), 3 F.C. 409, 165 F.T.R. 113, (sub nom. Zündel v. Canada (Attorney General)(No. 9)) 35 C.H.R.R. D/354 (Federal Court of Canada — Appeal Division)

Counsel: *Jane S. Bailey*, for Appellants, Sabina Citron, Canadian Holocaust Remembrance Association.
Andrew A. Weretelnyk, for Appellant, Toronto Mayor's Committee on Community and Race Relations.
Richard Kramer, for Appellant, Attorney General of Canada.
René Duval, for Appellant, Canadian Human Rights Commission.
Robyn M. Bell, for Appellant, Simon Wiesenthal Centre.
Joel Richler and *Judy Chan*, for Appellant, Canadian Jewish Congress.
Marvin Kurz, for Appellant, League for Human Rights of B'Nai Brith.
Douglas Christie and *Barbara Kulaszka*, for Respondent, Ernst Zündel.
Gregory Rhone, for Respondent, Canadian Association for Free Expression Inc.

The judgment of the court was delivered by *Sexton J.A.*:

Introduction

1 Ms. Devins is a member of the Canadian Human Rights Tribunal (the "Tribunal") that is hearing a complaint brought against Ernst Zündel. At issue in this appeal is whether Ms. Devins is subject to a reasonable apprehension of bias, stemming from a now twelve-year old press release that was issued by the Ontario Human Rights Commission (the "Commission" or "Ontario Human Rights Commission") when Ms. Devins was a member of that Commission, in which the Commission, among other things, applauded a court ruling that found Mr. Zündel to be guilty of publishing false statements that denied the Holocaust.

Background Facts

2 On May 11, 1988, a jury found Mr. Zündel to be guilty of wilfully publishing a pamphlet called "Did Six Million Really Die?" that he knew was false and that causes or is likely to cause injury or mischief to a public interest, contrary to s. 177 of the *Criminal Code*. [1]

3 Two days after the jury had reached its verdict, the Ontario Human Rights Commission issued the following press release:

> TIME/DATE: 10:32 Eastern Time May 13, 1988
>
> SOURCE: Ontario Human Rights Commission
>
> HEADLINE: *** HUMAN RIGHTS COMMISSION COMMENDS RECENT ZÜNDEL RULING***
>
> PLACELINE: TORONTO
>
> The Ontario Human Rights Commission commends the recent court ruling that found Ernst Zundel guilty of publishing false statements denying the Holocaust.
>
> "This decision lays to rest, once and for all, the position that is resurrected from time to time that the Holocaust did not happen and is, in fact, a hoax," said Chief Commissioner, Raj Anand. "We applaud the jury's decision since it calls for sanctions against a man responsible for contradicting the truth of the suffering experienced by the Jewish people, which was visited upon them solely because of their religion and ethnicity."
>
> Mr. Anand also stated that the decision is of broader significance in that it affirms not only the rights of Jews, but also of and [***sic***] other religious and ethnocultural groups to be free from the dissemination of false information that maligns them.

4 Mr. Zündel's criminal conviction was eventually overturned by the Supreme Court of Canada, which held that s. 177 of the *Criminal Code* [2] was contrary to the right of free expression

guaranteed by s. 2(b) of the *Charter*, and that the infringement could not be saved by s. 1 of the *Charter*.[3]

5 Approximately four years after the Supreme Court overturned Mr. Zündel's conviction, two complainants laid complaints with the Canadian Human Rights Commission. The complainants said that they believed that an Internet website operated by Mr. Zündel would be "likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination," contrary to subsection 13(1) of the *Canadian Human Rights Act*.[4] A panel of the Canadian Human Rights Tribunal was appointed to inquire into the complaints. Reva E. Devins was one of three persons appointed to determine the complaint.

6 At the inquiry, which commenced on May 26, 1997, the Canadian Human Rights Commission relied heavily on the "Did Six Million Really Die?" pamphlet that had been published on Mr. Zündel's website. This pamphlet was the same one that had led to the earlier criminal charges and to the press release issued by the Ontario Human Rights Commission.

7 After approximately forty days of hearings, Mr. Zündel requested that the Tribunal fax him the biographies of the three Tribunal members. Approximately one week after the biographies had been faxed to him, counsel for Mr. Zündel located the press release while searching Quicklaw Systems' databases. That same day, counsel for Mr. Zündel brought a motion before the Tribunal, seeking to dismiss the s. 13(1) complaints on the basis that Ms. Devins was subject to a reasonable apprehension of bias.

The Tribunal's Decision

8 The Tribunal rejected Mr. Zündel's motion. It concluded that the press release had been made by the then Chief Commissioner of the Ontario Human Rights Commission, not by the Commission or by Ms. Devins personally. Moreover, the Tribunal added, the statements was arguably within the Chief Commissioner's statutory mandate. These factors, the Tribunal held, made it difficult to understand how the press release could be said to create a reasonable apprehension of bias on the part of the Chief Commissioner, or that any bias could then be imputed to Ms. Devins. In any event, the Tribunal held that even if Mr. Zündel's submission had any merit, it held that it was "totally inappropriate at this late state for this matter to be advanced."[5] The Tribunal reasoned that because the statement had been made long before the hearing had commenced, Mr. Zündel could have raised the bias allegation at the outset of the proceedings. In so doing, the Tribunal implied that Mr. Zündel had waived his right to raise an allegation of reasonable apprehension of bias. Mr. Zündel sought judicial review of the Tribunal's decision to the Federal Court — Trial Division.

The Federal Court — Trial Division's Decision

9 In his decision, the Motions Judge held that the press release was a "gratuitous political statement" [6] that made "a specific damning statement" [7] against Mr. Zündel, which was "thoroughly inappropriate for the Chair of the Ontario Commission" [8] to do. He held that "an institution with adjudicative responsibilities has no legitimate purpose in engaging in such public condemnation." [9]

10 The Motions Judge reasoned that because the press release stated that "*the Ontario Human Rights Commission* commends the present court ruling," [10] and that "*we* applaud the jury's decision," [11] the Chair purported to speak on behalf of all members of the Commission, including Ms. Devins. The Motions Judge added that it would be a "reasonable conclusion to reach that at the time the statement was made, the members of the Ontario Commission held a strong actual bias" [12] against Mr. Zündel. Nevertheless, he concluded that by the time the Canadian Human Rights Tribunal was convened to inquire into the s. 13(1) complaint, there was "insufficient evidence to find present actual bias" [13] against Ms. Devins.

11 The Motions Judge concluded that even though the statement was released some ten years before Ms. Devins was called to inquire into the s. 13(1) complaint brought against Mr. Zündel, a reasonably informed bystander would apprehend that the "extreme impropriety" [14] of the press release would make her subject to a reasonable apprehension of bias.

12 The Motions Judge rejected the Tribunal's decision that Mr. Zündel had waived his right to bring the bias complaint by not bringing it at the outset of the Tribunal's proceedings. The Motions Judge accepted Mr. Zündel's evidence that he was not aware of the press release until shortly before the bias allegation was brought.

13 Even though he concluded that Ms. Devins was subject to a reasonable apprehension of bias, the Motions Judge declined to prohibit the remaining member of the Tribunal from continuing to hear and to ultimately determine the complaint. He held that because the *Canadian Human Rights Act* permits one Tribunal member to complete an already-commenced hearing where other appointed members are unable to continue, [15] the one remaining member of the panel could continue to hear and decide the complaint.

14 Ms. Citron and the other appellants now appeal the Motion Judge's decision that Ms. Devins was subject to a reasonable apprehension of bias. They have not appealed the Motion Judge's decision that Mr. Zündel did not waive his right to raise the bias allegation by not bringing it at the outset of the Tribunal's proceedings. Mr. Zündel has cross-appealed one aspect of the Motion Judge's decision, arguing that the Motions Judge should have quashed the Tribunal's proceedings in their entirety.

Issues

1. Was the finding of the Motions Judge that there was a reasonable apprehension of bias on the part of Ms. Devins unreasonable, based on erroneous considerations, reached on wrong principle, or reached as a result of insufficient weight having been given to relevant matters?

2. Was the Motions Judge correct in holding that, if there was a reasonable apprehension of bias, the Tribunal could continue with the hearing?

Analysis

1. The Reasonable Apprehension of Bias Test

15 In *R. v. S. (R.D.)*, [16] Cory J. stated the following manner in which the reasonable apprehension of bias test should be applied:

> The apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. [...] [The] test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter though — conclude [...] [17]

16 He held that the test contained a two-fold objective element: "the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case." [18]

Does the press release address the same issue as the complaint before the Canadian Human Rights Tribunal?

17 On appeal, Mr. Zündel submits that a reasonable bystander would conclude that the press release, which attributes certain statements directly to the Ontario Human Rights Commission, and not merely to the Chair of that Commission, would cause Ms. Devins (who was a member of the Ontario Human Rights Commission when the press release was issued) to be subject to a reasonable apprehension of bias. Mr. Zündel submits that the criminal charges upon which the press release was based were directly in relation to his publication "Did Six Million Really Die?", the very same pamphlet that Mr. Zündel had reproduced on his website and that led to the s. 13(1) human rights complaint that Ms. Devins and the other two members of the Tribunal were asked to determine.

18 In my view, the press release draws a distinction between statements made by the Ontario Human Rights Commission, and statements made by Mr. Anand, the Chair of the Ontario Human

Rights Commission. The only statements contained in the press release that are directly attributed to the Ontario Human Rights Commission are the following:

> (i) The Ontario Human Rights Commission commends the recent court ruling that found Ernst Zundel guilty of publishing false statements denying the Holocaust;
>
> (ii) We applaud the jury's decision since it calls for sanctions against a man responsible for contradicting the truth of the suffering experienced by the Jewish people, which was visited upon them solely because of their religion and ethnicity.

19 The criminal charge that the Ontario Human Rights Commission addressed in the press release was s. 177 of the *Criminal Code*, later renumbered to s. 181. The section states:

> 181. Every one who wilfully publishes a statement, tale or news that he knows is false and that causes or is likely to cause injury or mischief to a public interest is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

20 By contrast, s. 13(1) of the *Canadian Human Rights Act* states:

> 13 (1) It is a discriminatory practice for a person or a group of persons acting in concert to communicate telephonically or to cause to be so communicated, repeatedly, in whole or in part by means of the facilities of a telecommunication undertaking within the legislative authority of Parliament, any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.

21 In *Canada (Human Rights Commission) v. Taylor*, [19] Dickson C.J. held that "s. 13(1) [of the *Canadian Human Rights Act*] provides no defences to the discriminatory practice it describes, and most especially does not contain an exemption for truthful statements." [20] He concluded that "[...] the *Charter* does not mandate an exception for truthful statements in the context of s. 13(1) of the *Canadian Human Rights Act*." [21]

22 The press release was made in response to a criminal charge that did afford a defence of truthfulness ("[...] that he knows is false.") [22] The statements attributed to the Ontario Human Rights Commission simply criticize Mr. Zündel for denying the truthfulness of the Holocaust. By contrast, in a s. 13(1) complaint, the truth or non-truthfulness of statements is immaterial to whether the complaint is substantiated. Consequently, the issue faced by the jury in 1988 is different from the issue faced by the Canadian Human Rights Tribunal.

23 Shortly stated, the essence of the offence in section 177 of the *Criminal Code* was that the statement was false and that it could or would likely cause injury or mischief to a public interest. Thus, the truth of the statement would provide a complete defence. On the other hand, the essence

of the complaint before the Canadian Human Rights Tribunal is that certain people were exposed to hatred or contempt. The truth of the statement would provide no defence.

24 The only statement contained in the press release that might be material to the s. 13(1) complaint is the following:

> Mr. Anand also stated that the decision is of broader significance in that it affirms not only the rights of Jews, but also of and [***sic***] other religious and ethnocultural groups to be free from the dissemination of false information that maligns them.

25 It could be argued that the statement reproduced above states that the information disseminated by Mr. Zündel exposes Jews to hatred, the essence of a s. 13(1) complaint. However, in my view, an informed person, viewing the matter realistically and practically — and having thought the matter through — would conclude that the press release draws a distinction between statements made by the Ontario Human Rights Commission (*i.e.* "the *Ontario Human Rights Commission* commends [...]" or "*we* applaud [...]") and statements made by Raj Anand, the Chief Commissioner of the Ontario Human Rights Commission. The statement reproduced above is attributed to Mr. Anand, and not to the Commission as a whole. Accordingly, I do not think that a reasonable and informed observer would conclude that the above statement should be attributed to Ms. Devins.

26 Counsel for Mr. Zündel relied heavily on the Ontario Divisional Court's judgment in *Dulmage v. Ontario (Police Complaints Commissioner)*[23] to demonstrate that statements made by one member of an organization can be used to demonstrate that a different member of that organization is subject to a reasonable apprehension of bias.

27 In *Dulmage*, the president of the Mississauga chapter of the Congress of Black Women of Canada had been appointed to a Board of Inquiry pursuant to Ontario's *Police Services Act*.[24] The Board was appointed to investigate a complaint that a public strip search had taken place, contrary to the manner provided in the Metropolitan Toronto Police Force's regulations. Approximately one year before the president of the Mississauga chapter of the Congress of Black Women of Canada was appointed to the Board, the vice-president of the Toronto chapter of that organization was reported to have publicly stated that the strip search incident at issue was "not an 'isolated case' and reflects the 'sexual humiliation and abuse of black women.'"[25] In a different statement, the vice-president recommended "an RCMP investigation of [the] incident,"[26] and urged that the then-Chief of the Metropolitan Toronto Police Force resign, saying that "Chief McCormack has clearly demonstrated an inability to give effective leadership to the Police Force."[27]

28 In its decision, the Divisional Court concluded that the president who had been appointed to the Board of Inquiry was subject to a reasonable apprehension of bias. O'Brien J. held:

> [...] Inflammatory statements dealing with this very incident involved in this inquiry were made by an officer of the Congress of Black Women of Canada. Those statements were made in Toronto, closely adjacent to the City of Mississauga. They deal with an incident which received significant public attention. The statements referred to the incident as an "outrage" and called for the suspension of the officers involved. Those officers were the very ones involved in this hearing. Ms. Douglas was the president of the Mississauga chapter of the same organization. [28]

29 Similarly, in his dissenting reasons (although not on this point), Moldaver J. held that "the remarks themselves related, at least in part, to the critical issue which the board was required to decide." [29]

30 In my view, *Dulmage* is distinguishable because the statements at issue in *Dulmage* dealt with the very question at issue before the Board of Inquiry, whereas the statements made by the Ontario Human Rights Commission address an issue that is immaterial to the s. 13(1) Tribunal inquiry that Ms. Devins has been asked to determine.

31 I think the House of Lords' decision in *R. v. Bow Street Metropolitan Stipendiary Magistrate* [30] can be distinguished on a similar basis. In that appeal, the House of Lords vacated the earlier order it had made in *R. v. Bow Street Metropolitan Stipendiary Magistrate* [31] because Lord Hoffman, one of the members who heard the appeal, had links to an intervener (Amnesty International) that had argued on the appeal at the House of Lords.

32 When Lord Hoffman heard the appeal at issue in *R. v. Bow Street Metropolitan Stipendiary Magistrate*, he had been a Director and Chairperson of Amnesty International Charity Limited. That corporation was charged with undertaking charity work for Amnesty International, the entity that had intervened in *R. v. Bow Street Metropolitan Stipendiary Magistrate*.

33 The type of bias at issue in *R. v. Bow Street Metropolitan Stipendiary Magistrate* was characterized by Lord Browne-Wilkinson as "where the judge is disqualified because he is a judge in his own cause." [32] Lord Browne-Wilkinson then held that "if the absolute impartiality of the judiciary is to be maintained, there must be a rule which automatically disqualifies a judge who is involved, whether personally or as a Director of a company, *in promoting the same causes in the same organisation as is a party to the suit*." [33] Lord Browne-Wilkinson highlighted that "the facts of this present case are exceptional," [34] holding that "the critical elements are (1) that [Amnesty International] was a party to this appeal; [...] (3) the judge was a Director of a charity closely allied to [Amnesty International] and sharing, in this respect, [Amnesty International's] objects." [35] He concluded that "only in cases where a judge is taking an active role as trustee or Director of a

charity which is closely allied to *and acting with a party to the litigation* should a judge normally be concerned either to recuse himself or disclose the position to the parties." [36]

34 Accordingly, *R. v. Bow Street Metropolitan Stipendiary Magistrate* is not analogous to this appeal. It might be so if the Ontario Human Rights Commission was a party to the proceedings before the Tribunal. Since it was not, I do not think that *R. v. Bow Street Metropolitan Stipendiary Magistrate* demonstrates that Ms. Devins is subject to a reasonable apprehension of bias.

Other Errors Made by the Motions Judge

35 I now turn to other alleged errors made by the Motions Judge. In my view, he committed the following errors, each of which I address at greater length below:

1. He failed to address the presumption of impartiality;

2. He failed to consider whether the press release demonstrated an objectively justifiable disposition;

3. He failed to properly connect Ms. Devins to the press release;

4. He failed to give appropriate weight to the passage of time;

5. He erred in concluding that the Ontario Human Rights Commission was an adjudicative body and had no legitimate purpose in making the press release;

6. He erred in concluding that a doctrine of "corporate taint" exists.

Presumption of impartiality

36 In my view, the Motions Judge erred by failing to take into account the principle that a member of a Tribunal will act fairly and impartially, in the absence of evidence to the contrary. In *R. v. S. (R.D.)*, Cory J. held that "the reasonable person must be an *informed* person, with knowledge of all the relevant circumstances, including 'the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold'." [37] He added that "the threshold for a finding of real or perceived bias is high," [38] and that "a real likelihood of probability of bias must be demonstrated, and that a mere suspicion is not enough." [39] Further, Cory J. held that "the onus of demonstrating bias lies with the person who is alleging its existence." [40]

37 In *Beno v. Canada (Somalia Inquiry Commission)*, [41] this Court held that there is a presumption that a decision-maker will act impartially. [42] Similarly, in *E.A. Manning Ltd. v. Ontario (Securities Commission)*, [43] the Ontario Court of Appeal held, in the context of a bias

allegation levelled against a securities commission, that "it must be presumed, in the absence of any evidence to the contrary, that the Commissioners will act fairly and impartially in discharging their adjudicative responsibilities and will consider the particular facts and circumstances of each case." [44] And in *Finch v. Assn. of Professional Engineers & Geoscientists (British Columbia)*, [45] the British Columbia Court of Appeal held that it must be assumed, "unless and until the contrary is shown, that every member of this committee will carry out his or her duties in an impartial manner and consider only the evidence in relation to the charges before the panel." [46]

Failure to consider whether the press release demonstrated an objectively justifiable disposition

38 In *R. v. S. (R.D.)*, Cory J. offered a useful definition of the word "bias." He held that "bias denotes a state of mind that is in some way predisposed to a particular result, or that is closed with regard to particular issues." [47] He added that "not every favourable or unfavourable disposition attracts the label of prejudice." [48] He held that where particular unfavourable dispositions are "objectively justifiable," [49] such dispositions would not constitute impermissible bias. He offered "those who condemn Hitler" [50] as examples of objectively justifiable dispositions and, therefore, such comments do not give rise to a reasonable apprehension of bias on the part of the speaker.

39 In the Supreme Court's judgment that overturned Mr. Zündel's criminal conviction for publishing the "Did Six Million People Really Die?" pamphlet, McLachlin J. (as she then was) referred to Mr. Zündel's beliefs as "admittedly offensive," [51] while Cory and Iacobucci JJ. described the pamphlet as part of a "genre of anti-Semitic literature" [52] that "makes numerous false allegations of fact." [53] In light of these statements, how could it *not* be objectively justifiable for the Ontario Human Rights Commission and its Chair to have made similar statements regarding the same pamphlet in their press release?

Failure to connect Ms. Devins to the press release

40 The Motions Judge held that it would be a reasonable conclusion to think that at the time the press release was issued, both the Chair of the Ontario Human Rights Commission and its members held a strong actual bias (*i.e.* and not just a reasonable apprehension of bias) as against Mr. Zündel.

41 He later held that "the passage of time does not eradicate the fact that Ms. Devins is reasonably attributed with strong actual bias." [54] However, from the Motion Judge's reasons, it appears that he took Ms. Devins' present denial of bias into account to conclude that at the time the Tribunal was appointed to inquire into the s. 13(1) complaint, there was "insufficient evidence to find present actual bias by Ms. Devins against the applicant." [55]

42 In my view, the Motions Judge's reasons confuse the passage of time with Ms. Devins' actual connection to the press release. There was no evidence that Ms. Devins was aware of the press release, let alone agreed with or was party to its issuance so as to demonstrate actual bias at the time the press release was issued. Similarly, there was no evidence of conduct of Ms. Devins from which one could infer a reasonable apprehension of bias later.

Failure to give appropriate weight to the passage of time

43 In the instant matter now on appeal, the Motions Judge attributed little or no weight to the time that had passed between the date the press release was issued and the date on which Ms. Devins was appointed to determine the complaint launched against Mr. Zündel. He held that "the passage of time does not eradicate the fact that Ms. Devins is reasonably attributed with strong actual bias." [56]

44 In so doing, I think the Motions Judge failed to give appropriate weight to the amount of time that had passed between the date on which the press release was issued and the date Ms. Devins was asked to hear the s. 13(1) complaint. In *Dulmage*, referred to earlier in these reasons, Moldaver J. concluded that the impugned board member was subject to a reasonable apprehension of bias in part because the press conference during which the statements were made had only taken place one year before the board hearing, a period of time that he did not consider to be "sufficient to expunge the taint left in the wake of these remarks." [57]

45 In the instant appeal, the Tribunal at issue was appointed some nine years after the press release was issued: a much greater time lag than was at issue in *Dulmage*, and one that, along with the other factors considered in this judgment, I consider to be sufficient to expunge any taint of bias that might have existed by reason of the press release.

Error in concluding that a doctrine of "corporate taint" exists

46 By concluding that all members of the Ontario Human Rights Commission would be biased by reason of the press release, the Motions Judge appeared to conclude that there is a doctrine of corporate "taint," a taint that is said to paint all members of a decision-making body with bias in certain circumstances. In *Bennett v. British Columbia (Securities Commission)*, [58] the British Columbia Court of Appeal rejected the doctrine of corporate taint. It held:

> We wish to add one further observation and that is as to the target of a bias allegation. Bias is an attitude of mind unique to an individual. An allegation of bias must be directed against a particular individual alleged, because of the circumstances, to be unable to bring an impartial mind to bear. No individual is identified here. Rather, the effect of the submissions is that all of the members of the commission appointed pursuant to s. 4 of the *Securities Act*, regardless

> of who they may be, are so tainted by staff conduct that none will be able to be an impartial judge. Counsel were unable to refer us to a single reported case where an entire tribunal of unidentified members had been disqualified from carrying out statutory responsibilities by reason of real or apprehended bias. We think that not to be surprising. The very proposition is so unlikely that it does not warrant serious consideration. [59]

47 Similarly, in *Laws v. Australian Broadcasting Tribunal*, [60] Australia's High Court concluded that the doctrine of corporate taint did not exist, absent circumstances that permit an inference to be drawn that all members of an administrative tribunal authorized or approved statements or conduct that gave rise to a reasonable apprehension of bias on the part of one of its members. In *Laws*, three members of the Australian Broadcasting Tribunal conducted a preliminary investigation of Mr. Laws, and concluded that he had breached broadcasting standards. The Director of the Tribunal's Programs Division later gave an interview in which she repeated the conclusions made by the three Tribunal members. Mr. Laws sought an order prohibiting the entire Tribunal from later holding a formal hearing to determine whether it should exercise regulatory powers against Mr. Laws. His application was brought on the basis that the prejudgment expressed by the three members who had conducted the preliminary investigation and the statements made by the Director of the Programs Division served to taint the entire Tribunal.

48 Australia's High Court rejected Mr. Laws' application. It held:

> However, though it might be correct to regard the interview as a corporate act, it was not necessarily an act done on behalf of each of the individual members of the corporation. The circumstances are not such as to justify the drawing of an inference that each of the individual members of the tribunal authorised the interview or approved of its content. At best, from the appellant's viewpoint, it might be inferred that the three members of the tribunal who made the decision of 24 November so authorised or approved the interview. [61]

49 These decisions, I think, demonstrate that there is no doctrine of corporate taint. I prefer the reasoning in these decisions to the implication drawn by the majority in the *Dulmage* decision that such a taint could be said to exist. [62]

50 As I have previously explained in these reasons, I do not think that the proviso contained in the paragraph reproduced above from the *Laws* decision applies in the circumstances of this appeal: one cannot draw an inference that each of the individual members of the Ontario Human Rights Commission authorized the entire press release that was issued. To the extent that the members of the Commission could be said to have authorized certain statements contained in the press release, any such statements are immaterial to the complaint that Ms. Devins has been asked to determine.

The Supreme Court of Canada's Judgment in Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)

51 Counsel for the appellants relied on the Supreme Court of Canada's judgment in *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)* [63] for the proposition that the Ontario Human Rights Commission was engaged in a policy-making function at the time the press release was issued and therefore the statements contained in the press release were subject to a much lower standard of impartiality.

52 In *Newfoundland Telephone*, Andy Wells was appointed to a Board that was responsible for the regulation of the Newfoundland Telephone Company Limited. After he was appointed to the Board, and after the Board had scheduled a public hearing to examine Newfoundland Telephone's costs, Mr. Wells made several strong statements against Newfoundland Telephone's executive pay policies. Mr. Wells was one of five who sat on that hearing. Counsel for Newfoundland Telephone objected to Mr. Wells' participation at the hearing, arguing that the strong statements Mr. Wells had made demonstrated that he was subject to a reasonable apprehension of bias.

53 In *Newfoundland Telephone*, Cory J. recognized that administrative decision-makers were subject to varying standards of impartiality. He held that "those that are primarily adjudicative in their functions will be expected to comply with the standard applicable to courts," [64] while boards with popularly-elected members are subject to a "much more lenient" standard. [65] He added that administrative boards that deal with matters of policy should not be subject to a strict application of the reasonable apprehension of bias test, since to do so "might undermine the very role which has been entrusted to them by the legislature." [66] Accordingly, he held that "a member of a board which performs a policy formation function should not be susceptible to a charge of bias simply because of the expression of strong opinions prior to the hearing." [67]

54 Accordingly, Cory J. held that, had the following statement been made before the Board's hearing date was set, it would not amount to impermissible bias: "[s]o I want the company hauled in here — all them fat cats with their big pensions — to justify (these expenses) under the public glare [...] I think the rate payers have a right to be assured that we are not permitting this company to be too extravagant." He supported that conclusion in the following manner:

> That comment is no more than a colourful expression of an opinion that the salaries and pension benefits seemed to be unreasonably high. It does not indicate a closed mind. Even Wells' statement that he did not think that the expenses could be justified, did not indicate a closed mind. However, should a commissioner state that, no matter what evidence might be disclosed as a result of the investigation, his or her position would not change, this would indicate a closed mind. [68]

55 In *Newfoundland Telephone*, Cory J. held that once a board member charged with a policy-making function is then asked to sit on a hearing, "a greater degree of discretion is required

of a member."[69] Once a hearing date was set, Cory J. held that the board members at issue in *Newfoundland Telephone* had to "conduct themselves so that there could be no reasonable apprehension of bias."[70] In other words, a person who is subject to the "closed mind" standard can later be required to adhere to a stricter "reasonable apprehension of bias" standard.

56 Counsel for the appellants have seized on these aspects of Cory J.'s judgment in *Newfoundland Telephone*, to demonstrate that the Motions Judge erred by concluding that when the Ontario Human Rights Commission issued the press release, it was engaged in adjudicative functions, and was therefore required to abide by a high standard of impartiality. Instead, counsel for the appellants argue that the Ontario Human Rights Commission was engaged in a policy-making function when it issued the press release, and was therefore subject to a much lower standard of impartiality.

57 While I agree that the Motions Judge erred when he concluded that the Ontario Human Rights Commission was engaged in an adjudicative role when it issued the press release, I do not agree with the further implications sought to be drawn by the appellants.

58 When the press release was issued by the Ontario Human Rights Commission, it was charged with the following functions:

> 28. It is the function of the Commission,
>
> > (a) to forward the policy that the dignity and worth of every person be recognized and that equal rights and opportunities be provided without discrimination that is contrary to law;
> >
> > (b) to promote an understanding and acceptance of and compliance with this Act; [...]
> >
> > (d) to develop and conduct programs of public information and education and undertake, direct and encourage research designed to eliminate discriminatory practices that infringe rights under this Act; [...][71]

59 Subsections 28(a), (b) and (d) demonstrate that the Ontario Human Rights Commission is vested with policy-making functions and with an obligation to educate and to inform the public. Accordingly, I do not agree with the Motion Judge's conclusion that the press release issued by the Ontario Human Rights Commission was "thoroughly inappropriate." Rather, the statement was consistent with its statutory obligation, *inter alia*, "to forward the policy that the dignity and worth of every person be recognized."

60 However, I do not think that the *Newfoundland Telephone* case provides much assistance to the appellants. In my view, one should bear in mind that in *Newfoundland Telephone*, the Board

was specifically charged with dual functions: investigatory ones and adjudicative ones. Among its investigatory powers, the Board was permitted to "make all necessary examinations and enquiries to keep itself informed as to the compliance by public utilities with the provisions of law," [72] to "enquire into any violation of the laws or regulations in force," [73] to "summarily investigate [...] whenever the Board believes that any rate or charge is unreasonable or unjustly discriminatory [...]." [74] In the same breath, the Board was permitted to hold hearings "if, after any summary investigation, the Board becomes satisfied that sufficient grounds exist to warrant a formal hearing [...]." [75] Accordingly, the statute specifically envisaged that Board members who had acted in an investigatory capacity could later act as adjudicators. Indeed, in *Newfoundland Telephone*, Cory J. held that even when the Board at issue in that appeal was required to abide by the reasonable apprehension of bias standard, the standard "need not be as strict for this Board dealing with policy matters as it would be for a board acting solely in an adjudicative capacity."

61 By contrast, the Canadian Human Rights Tribunal is vested with no policy functions or with dual functions: it is simply charged with the adjudication of human rights complaints. Accordingly, unlike *Newfoundland Telephone*, there is no statutory authority for the proposition that Parliament specifically envisaged that members of the Canadian Human Rights Tribunal would have engaged in policy-making functions with regard to the very same issues that they would later be asked to adjudicate.

Conclusion on Bias

62 In my view, the Motions Judge erred when he concluded that Ms. Devins was subject to a reasonable apprehension of bias. I would set aside his decision, and remit the matter to the Canadian Human Rights Tribunal.

2. Was the Motions Judge correct in holding that, if there was a reasonable apprehension of bias, the Tribunal could continue with the hearing?

63 In the event I am wrong on the first issue it is necessary to deal with the second issue: namely, whether the Motions Judge erred by concluding that even though Ms. Devins was subject to a reasonable apprehension of bias, the remaining member of the Tribunal could continue to determine the as-yet undetermined complaint at issue before the Canadian Human Rights Tribunal.

64 In my view, the Motions Judge erred by concluding that where a reasonable apprehension of bias is proven, the remaining members of the Tribunal could continue to hear and determine the complaint. At the time the bias allegation was raised, the panel of which Ms. Devins was a member had sat for some fourty days, and had made approximately 53 rulings. Counsel for Mr. Zündel argued that each one of those rulings was contrary to the result for which he had argued.

65 Viewed in this light, I cannot see how the Tribunal's proceedings could somehow be remedied merely by virtue of there being one remaining member of the Tribunal who could determine the complaint. How could one ever know whether the Tribunal's ultimate decision was somehow affected by one or more of the Tribunal's rulings? How could one ever know whether the biased member had expressed her preliminary views on the merits of the complaint before she was ordered to be recused from the proceedings? And how could one ever know whether those consultations might have somehow affected the remaining member's decisions on the interlocutory rulings? These concerns, I think, demonstrate that where one member of an administrative tribunal is subject to a reasonable apprehension of bias and a number of serious interlocutory orders have been made over the course of a lengthy hearing, the tribunal's proceedings should be quashed in their entirety, even though a statutory provision on its face permits the tribunal to proceed with fewer members where a member is, for some reason, unable to proceed.

66 My conclusions are supported by Cory J.'s reasons in *R. v. S. (R.D.)*, where he held:

> If a reasonable apprehension of bias arises, it colours the entire trial proceedings and it cannot be cured by the correctness of the subsequent decision. See *Newfoundland Telephone, supra*, at p. 645; see also *Curragh, supra*, at para. 6. Thus, the mere fact that the judge appears to make proper findings of credibility on certain issues or comes to the correct result cannot alleviate the effects of a reasonable apprehension of bias arising from other words or conduct of the judge. In the context of an application to disqualify a judge from sitting in a particular lawsuit, it has been held that where there is a reasonable apprehension of bias, "it is impossible to render a final decision resting on findings as to credibility made under such circumstances." [76]

Conclusion

67 I would allow the appeal, with costs and set aside the order of the Motions Judge dated April 13, 1999 and remit the matter back to the Tribunal for completion of the hearing.

Appeal allowed, cross-appeal dismissed, and matter remitted to tribunal.

Footnotes

* Leave to appeal refused (December 14, 2000), Doc. 28008 (S.C.C.).

1 R.S.C. 1985, c. C-46.

2 By the time the Supreme Court heard Mr. Zündel's appeal, s. 177 of the *Criminal Code* had been renumbered to s. 181.

3 [1992] 2 S.C.R. 731 (S.C.C.), at 778, *per* McLachlin J. (as she then was).

4 R.S.C. 1985, c. H-6.

5 Appeal Book, p. 74.

6 *Zündel v. Citron*, [1999] 3 F.C. 409 (Fed. T.D.) at 421.

7 *Zündel v. Citron*, *Ibid.*

8 *Zündel v. Citron*, *Ibid.*

9 *Zündel v. Citron*, *Ibid.*

10 *Zündel v. Citron*, *Ibid.* (emphasis in original).

11 *Zündel v. Citron*, *Ibid.* (emphasis in original).

12 *Zündel v. Citron*, *Ibid.*

13 *Zündel v. Citron*, *Ibid.*, p. 422.

14 *Zündel v. Citron*, *Ibid.*

15 The Motions Judge never specifically identified the provision of the *Canadian Human Rights Act* on which he relied.

16 [1997] 3 S.C.R. 484 (S.C.C.).

17 *Ibid.*, p. 530.

18 *R. v. S. (R.D.)*, *Ibid.*, p. 531.

19 [1990] 3 S.C.R. 892 (S.C.C.).

20 *Canada (Human Rights Commission) v. Taylor*, *Ibid.*, p. 934.

21 *Canada (Human Rights Commission) v. Taylor*, *Ibid.*, p. 935.

22 Subsection 177 (which was later renumbered to s. 181) stated that "every one who wilfully publishes a statement, tale or news that *he knows is false* and that causes or is likely to cause injury or mischief to a public interest is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years" (emphasis added).

23 (1994), 21 O.R. (3d) 356 (Ont. Div. Ct.).

24 R.S.O. 1990, c. P.15.

25 *Dulmage*, *supra* at p. 360.

26 *Dulmage*, *Ibid.*

27 *Dulmage*, *Ibid.*, p. 361.

28 *Ibid.*, p. 363 (emphasis added).

29 *Dulmage*, *Ibid.*, p. 365.

30 [1999] 2 W.L.R. 272 (U.K. H.L.).

31 [1998] 4 ALL E.R. 897 (U.K. H.L.).

32 *R. v. Bow Street Metropolitan Stipendiary Magistrate*, *supra* at para. 30.

33 *R. v. Bow Street Metropolitan Stipendiary Magistrate*, *Ibid.*, para. 37 (emphasis added).

34 *R. v. Bow Street Metropolitan Stipendiary Magistrate*, *Ibid.*, para. 40.

35 *R. v. Bow Street Metropolitan Stipendiary Magistrate*, *Ibid.*

36 *R. v. Bow Street Metropolitan Stipendiary Magistrate*, *Ibid.* (emphasis added).

37 *R. v. S. (R.D.)*, *supra* at 531 (emphasis in original).

38 *R. v. S. (R.D.)*, *Ibid.*, p. 532.

39 *R. v. S. (R.D.)*, *Ibid.*, p. 531.

40 *R. v. S. (R.D.)*, *Ibid.*

41 [1997] 2 F.C. 527 (Fed. C.A.).

42 *Beno v. Canada (Somalia Inquiry Commission)*, *Ibid.*, p. 542.

43 (1995), 23 O.R. (3d) 257 (Ont. C.A.), application for leave to appeal to S.C.C. dismissed August 17, 1995 [reported:(1995), 8 C.C.L.S. 242n (S.C.C.)].

44 *E.A. Manning Ltd. v. Ontario (Securities Commission)*, *Ibid.*, p. 267.

45 [1996] 5 W.W.R. 690 (B.C. C.A.).

46 *Finch v. Assn. of Professional Engineers & Geoscientists (British Columbia)*, *Ibid.*, p. 704.

47 *R. v. S. (R.D.)*, *supra* at p. 528.

48 *R. v. S. (R.D.)*, *Ibid.*

49 *R. v. S. (R.D.)*, *Ibid.*

50 *R. v. S. (R.D.)*, *Ibid.*

51 *R. v. Zündel*, *supra* at 743.

52 *R. v. Zündel*, *Ibid.*, p. 779.

53 *R. v. Zündel*, *Ibid.*, p. 781.

54 *Zündel*, *supra* at p. 422.

55 *Zündel*, *Ibid.*

56 *Zündel*, *Ibid.*

57 *Dulmage*, *supra* at p. 365.

58 (1992), 69 B.C.L.R. (2d) 171 (B.C. C.A.).

59 *Ibid.*, p. 181.

60 (1990), 93 A.L.R. 435 (Australian H.C.).

61 *Ibid.*, p. 445.

62 In his dissenting reasons, Moldaver J. appeared to recognize that no such doctrine exists. He held that "a member need not automatically withdraw solely because of statements made by a representative of an affiliated community organization about issues before the board" (at 363). Later in his judgment, he repeated the point, holding:
Lest there be any doubt about it, I wish to emphasize that mere association, either past or present, on the part of a board member with an organization, which, by its very nature, might be said to favour one side or the other, will not of itself satisfy the test for reasonable apprehension of bias (at 366).

63 [1992] 1 S.C.R. 623 (S.C.C.).

64 *Newfoundland Telephone*, *Ibid.*, p. 638.

65 *Newfoundland Telephone*, *Ibid.*

66 *Newfoundland Telephone*, *Ibid.*

67 *Newfoundland Telephone*, *Ibid.*, p. 639.

68 *Ibid.*, p. 642-643.

69 *Newfoundland Telephone*, *Ibid.*, p. 643.

70 *Newfoundland Telephone*, *Ibid.*, p. 644.

71 *Human Rights Code*, S.O. 1981, c. 53.

72 *The Public Utilities* Act, R.S.N. 1970, c. 322, as am. by S.N. 1979, c. 30, s. 1, s. 14.

73 *Ibid.*, s. 15.

74 *Ibid.*, s. 79.

75 *Ibid.*, s. 85.

76 *Ibid.*, p. 526.

Decision No. 389-A-2015

December 16, 2015

DETERMINATION by the Canadian Transportation Agency of whether to continue its own motion investigation into whether SkyGreece Airlines, S.A. failed to apply the terms and conditions of carriage set out in its tariff, contrary to subsection 110(4) of the *Air Transportation Regulations*, SOR/88-50, as amended.

Case number: 15-03972

BACKGROUND

[1] On August 28, 2015, SkyGreece Airlines, S.A. (SkyGreece) announced that it would temporarily cease all operations.

[2] On September 2, 2015, the Canadian Transportation Agency (Agency) issued Decision No. LET-A-55-2015 (Decision), noting the following:

- there had been a temporary cessation of operations by SkyGreece;
- there had been widespread media coverage and expressions of concern for passengers affected by the cessation;
- fifteen persons had filed air travel complaints forms through the Agency's Web site; and,
- a dispute proceeding had been commenced concerning related matters.

[3] To avoid a multitude of proceedings, and given the seriousness and urgency of the situation, the Agency decided to examine, of its own motion, whether SkyGreece had failed to apply the terms and conditions set out in its tariff.

[4] In the Decision, the Agency found, on a preliminary basis, that SkyGreece had failed to properly apply the terms and conditions set out in its tariff. The Decision provided SkyGreece with the opportunity to show cause by September 3, 2015 why the Agency should not order SkyGreece to:

1. immediately inform passengers of their options under its tariff;
2. implement the options chosen by passengers;
3. establish a help line for passengers; and,
4. update its Web site to fully explain the measures in place to address the situation.

[5] On September 3, 2015, SkyGreece informed the Agency that it had filed a Notice of Intention to Make a Proposal (Notice) with the office of the Official Receiver at Toronto under the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 (BIA). 2389

[6] On September 8, 2015, the Ontario Superior Court of Justice stayed the Agency proceedings. The Court eventually extended the stay until November 17, 2015.

[7] On December 4, 2015, the Agency received a Certificate of Assignment, pursuant to paragraph 50.4(8)(*b.1*) of the BIA, from Ernst & Young Inc., the trustee of SkyGreece (Trustee). The Certificate confirms that SkyGreece has made a deemed assignment into bankruptcy. The Trustee also sent a copy of the Notice of First Meeting of Creditors under paragraph 155 (*d.1*) of the BIA. The meeting was scheduled for December 8, 2015.

ISSUE

[8] Given that SkyGreece is now bankrupt, should the Agency resume its own motion investigation into whether SkyGreece failed to apply the terms and conditions set out in its tariff?

ANALYSIS

[9] Section 71 of the BIA provides as follows:

> On a bankruptcy order being made or an assignment being filed with an official receiver, a bankrupt ceases to have any capacity to dispose of or otherwise deal with their property, which shall, subject to this Act and to the rights of secured creditors, immediately pass to and vest in the trustee named in the bankruptcy order or assignment, and in any case of change of trustee the property shall pass from trustee to trustee without any assignment or transfer.

[10] Accordingly, SkyGreece no longer has control of its property, can no longer operate an air service, and is incapable of either fulfilling the terms and conditions of its tariff or providing passengers with compensation for its alleged failure to do so. As a result, any remedial measures that could be ordered by the Agency as a result of its own motion investigation would be of no practical value to the passengers affected by the cessation of SkyGreece's service. Therefore, this case is now moot.

[11] Furthermore, there are no special circumstances, such as broader questions of law, that would justify the Agency exercising its discretion to hear this matter despite its mootness.

[12] The Trustee, rather than the Agency, is now in the best position to deliver a remedy to the claims of passengers. It is the Trustee who is vested with all of SkyGreece's assets and charged with a specific legislative mandate to distribute those assets among all of SkyGreece's debtors, including passengers, in accordance with the scheme in the BIA.

CONCLUSION

[13] In light of the foregoing, the Agency finds that the proceedings initiated in Decision No. LET-A-55-2015 have become moot and they will therefore be discontinued.

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Member(s)

Scott Streiner

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Date modified:

2015-12-16

Decision No. 44-C-A-2016

February 11, 2016

APPLICATION by Gábor Lukács against SkyGreece Airlines S.A.

Case number: 15-03912

[1] On August 28, 2015, SkyGreece Airlines, S.A. (SkyGreece) announced that it would temporarily cease all operations.

[2] On August 28, 2015, Gábor Lukács filed an application with the Canadian Transportation Agency (Agency) alleging that SkyGreece was refusing to apply its tariff. He requested that the Agency order SkyGreece to offer affected passengers transportation on flights of other airlines and to provide security for anticipated passenger claims.

[3] On December 4, 2015, the Agency received a Certificate of Assignment, pursuant to paragraph 50.4(8)(b.1) of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 (BIA). The Certificate confirmed that SkyGreece has made a deemed assignment into bankruptcy.

[4] Subsection 69.3(1) of the BIA provides as follows:

> … on the bankruptcy of any debtor, no creditor has any remedy against the debtor or the debtor's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy.

[5] Accordingly, pursuant to subsection 69.3(1) of the BIA, the Agency discontinues this proceeding.

Member(s)

Raymon J. Kaduck
Stephen Campbell

Back to rulings

Regulating Distance Contracts:
Time to Take Stock

Final Report of the Research Project
Submitted to Industry Canada's
Office of Consumer Affairs

union des consommateurs

June 2014

3. Canadian Legislation: Protection and Harmonization

3.1 Guidelines

Canada is made up of provinces and territories, each with its own jurisdiction with respect to contracts and consumer protection. With respect to private international law, the Canadian provinces and territories are different "countries," and the question of jurisdiction is just as important for remote purchases between provinces as when the purchase is made between Quebec and the U.S., for instance. Commercial transactions between provinces, even within Canada, thus consist of transborder transactions.

This is why it is important and even necessary, between Canadian "countries," to have regulations that are harmonized, if not identical, in order to facilitate e-commerce across Canada and give merchants as much predictability as possible, while assuring that consumers benefit to a certain extent from greater compliance on the merchants' part to consumer protection regulations for the consumer's province: if they are similar, observance of the regulations in a given province will generally result in observance of the rules of the province with which the rules have been harmonized.

It is to limit the effect of these borders that the Canadian First Ministers signed the Agreement on Internal Trade, which came into force in 1995 and aimed at establishing an open domestic market in Canada.[53] This agreement led to the creation of the Consumer Measures Committee, which oversees the sought-after harmonization.

a) Principles of Consumer Protection for Electronic Commerce

In 1999, the *Working Group on Electronic Commerce and Consumers,* made up of representatives from consumer groups, Canadian industry associations, and the federal and provincial governments, adopted the *Principles of Consumer Protection for Electronic Commerce: A Canadian Framework* (the "PCPEC Principles"[54]) aimed at better guiding consumers and businesses as well as Canadian provincial governments in adopting consumer protection frameworks for online purchases,[55] which should, under these principles, "be consistent with directions in consumer protection established by international bodies such as the Organisation for Economic Co-operation and Development."[56]

The PCPEC Principles provide, for instance, for better disclosure of certain information to anyone accessing the merchant's website. Disclosure must be made in an evident and clear manner, and should include the merchant's contact information, the exact and precise

[53] *Agreement on Internal Trade*. [Online] http://www.ait-aci.ca/index_en/intro.htm (page viewed on April 11, 2014).
[54] **WORKING GROUP ON ELECTRONIC COMMERCE AND CONSUMERS**, *Principles of Consumer Protection for Electronic Commerce: A Canadian Framework*, 1999. Available online at the Canadian Bankers Association website. [Online] http://www.cba.ca/contents/files/misc/vol_20090000_consumerprotectionelectroniccommerce_en.pdf (document viewed on August 3, 2013).
[55] **ALLARD, A.**, *Les contrats à distance et la protection du consommateur – Les nouvelles dispositions de la loi sur la protection du consommateur du Québec*, Office de la protection du consommateur, Montreal, Canada, April 21, 2008, 37 pages, p. 7. Available online on the Legal IT conference website. [Online] http://legalit.ca/wp-content/uploads/presentations/2008_Allard_Contrats_a_distance.pdf (document viewed on August 3, 2013).
[56] **WORKING GROUP ON ELECTRONIC COMMERCE AND CONSUMERS**, *Op. cit.*, note 54, p. 2.

description of the products, and information on complaint procedures, prices and other charges, geographical restrictions, etc. Cancellation, exchange and refund policies, total price, shipping and handling charges, taxes, delivery-related information, among other information, should be disclosed before the contract is concluded and the transaction confirmed as soon as possible.

With respect to recourses, the working group is recommending that governments cooperate in order to establish clear regulations that are applicable at the time of transborder disputes.[57] The PCPEC Principles also deal with payment security ("Consumers should be protected against unreasonable liability for payments in transactions"[58]), and recommend that credit card companies make reasonable efforts to help consumers for such transactions, when sellers do not deliver the merchandise, or for unauthorized transactions.[59]

However, note that this is only a voluntary code of conduct that does not have the force of law.

b) Canadian harmonization template

The Consumer Measures Committee (CMC) was set up under chapter eight of the Agreement on Internal Trade (AIT).[60] The CMC is made up of a federal administration representative along with a representative from each province and territory, and aims at improving the market for the benefit of Canadian consumers and improving efficiency in consumer-related matters through the harmonization of laws nation-wide.[61]

The CMC studied electronic commerce and drew up the *Internet Sales Contract Harmonization Template,*[62] which was ratified in 2001 by the federal and provincial governments. In fact, the Harmonization Template was in large part used by the provinces to subsequently set up a regulatory framework for online contracts.

Disclosure of information

The Harmonization Template, aimed at conciliating the measures that will be taken by Canadian lawmakers with expertise in e-commerce, details in section 3 the rules about the disclosure of information ("clear and comprehensible," prominently displayed) established in the PCPEC Principles and, in section 4, the merchant's obligation to send the consumer a written copy or an electronic version of the contract within fifteen (15) days following the transaction. Under Section 3(1)a), the merchant must in particular disclose the following information to the consumer: (i) information on the merchant, (ii) on the goods and services (exact description, technical specifications), (iii) on the transaction (price, shipping charges, taxes, customs duties), currency, conditions, method of payment, (iv) on the delivery, (v) on policies regarding

[57] *Ibid.*, Principle 5.4, p. 8.
[58] *Ibid.*, Principle 6, p. 9.
[59] *Ibid.*, Principle 6.2, p. 9.
[60] *Agreement on Internal Trade*, *Op. cit.*, Note 53, sect. 809. The Agreement on Internal Trade (AIT) is an intergovernmental trade agreement signed by Canadian First Ministers that came into force in 1995. Its purpose is to reduce and eliminate, to the extent possible, barriers to the free movement of persons, goods, services, and investment within Canada and to establish an open, efficient, and stable domestic market.
[61] **CONSUMER MEASURES COMMITTEE.** Website home page, Consumer Measures Committee, Government of Canada, Ottawa, Canada, April 19, 2011. [Online] http://www.ic.gc.ca/eic/site/cmc-cmc.nsf/eng/home (page viewed on April 11, 2014).
[62] **CONSUMER MEASURES COMMITTEE.** *Op. cit.*, note 2, sect. 3.

cancellation, return, exchange or refund, if applicable, and (vi) on any other restrictions, limitations or conditions likely to apply to the purchases.

Cancellation rights

Section 5 of the Harmonization Template stipulates certain consumer contract cancellation rights if the merchant does not observe the disclosure rules:

> ***5(1) A consumer may cancel an internet sales contract […]***
>
> *a) at any time from the date the contract is entered into until 7 days after the consumer receives a copy of the contract if*
> *(i) the supplier does not disclose to the consumer the information described in section 3(1)(a), or*
> *(ii) the supplier does not provide to the consumer an express opportunity to accept or decline the contract or to correct errors immediately before entering into it.*
>
> *b) within 30 days from the date the contract is entered into if the supplier does not provide the consumer with a copy of the contract pursuant to section 4.*
>
> ***5(2) In addition to the cancellation rights under subsection (1), a consumer may cancel an internet sales contract at any time before delivery of the goods or the commencement of the services under the contract if***
>
> *a) in the case of goods, the supplier does not deliver the goods within 30 days from the delivery date specified in the contract or an amended delivery date agreed on by the consumer and the supplier, either in writing or in electronic form, or*
>
> *b) in the case of services, the supplier does not begin the services within 30 days from the commencement date specified in the contract or an amended commencement date agreed on by the consumer and the supplier, either in writing or in electronic form.*
>
> ***5(3) If the delivery date or commencement date is not specified in the internet sales contract, a consumer may cancel the contract at any time before the delivery of the goods or the commencement of the services under the contract if the supplier does not deliver the goods or begin the services within 30 days from the date the contract is entered into.***

Contract cancellation by the consumer involves the following obligations, pursuant to section 9:

- The supplier has fifteen (15) days following the cancellation of the contract to reimburse the consumer for any amounts paid under the terms of the contract and any related transaction;
- The consumer has fifteen (15) days following the date of cancellation or delivery (whichever is later) to return the goods to the supplier, by any means, provided there is proof of delivery. The goods must not have been used and must be returned in the same condition as when they were delivered;
- The supplier must accept the returned goods and pay the reasonable charges incurred for the return;

The same section states that:

- Any consumer who does not receive a reimbursement within said period of fifteen (15) days can sue the supplier to recover the amounts.

Chargeback

When the merchant fails to reimburse the consumer, the latter may, as long as the payment has been made with a credit card, have the transaction cancelled by the credit card issuer. Section 11 of the Harmonization Template in fact states that credit card issuers are obligated to reimburse a consumer who requests it by indicating the reason for the cancellation of the contract, which must be one of the reasons listed in section 5 of the Harmonization Template. This reimbursement procedure is known as a "chargeback."

Penal offences

Section 12 states that a breach of section 9 (obligations when contract is cancelled by the consumer) and section 11 (chargeback) constitutes a penal offence.

c) Canadian Code of Practice for Consumer Protection in Electronic Commerce

In 1999, the federal government set up the *Working Group on Electronic Commerce and Consumers*, composed of representatives of different sectors of the economy, to develop a Code of Practice, based on the PCPEC Principles and the OECD Code. In 2003, the *Canadian Code of Practice for Consumer Protection in Electronic Commerce* (the "Code") was approved in principle by the Working Group as a "model for effective consumer protection in electronic commerce"[63] and was endorsed in 2004 by the federal, provincial and territorial ministers in charge of consumer-related matters.[64] This "model for effective consumer protection" was intended to provide merchants with an easy procedure to help them adopt harmonized practices that conform to the principles, which at the time were designed to guide provincial legislators.

The Code, in article 1, in turn covered the disclosure of certain information. Furthermore, like the PCPEC Principles, the Code covered questions regarding the protection of online personal information, payment security, handling of complaints, unsolicited e-mails, etc.

[63] **CONSUMER MEASURES COMMITTEE**. [Online] http://cmcweb.ca/eic/site/cmc-cmc.nsf/eng/fe00064.html (page viewed on April 11, 2014).
[64] *Ibid.* The CMC archived page mentions that the Code "is now open to endorsement by private sector organizations and consumer organizations as representing good practice benchmarks for merchants engaging in consumer e-commerce" and that attestations that "any particular vendor or group of vendors meets the terms of the Code" may take place. The page has not been updated since 2004 and Government of Canada Publications indicates that the document is no longer published (see [Online] http://www.publications.gc.ca/site/eng/269762/publication.html (page viewed on April 11, 2014).