Court File No.: A-167-14

IN THE FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Applicant

- and -

CANADIAN TRANSPORTATION AGENCY

Respondent

RESPONDENT'S RECORD
CANADIAN TRANSPORTATION AGENCY
VOLUME 1 – AFFIDAVIT AND COURT ORDERS

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Court File No. A-167-14

IN THE FEDERAL COURT OF APPEAL

BETWEEN:

DR. GABOR LUKACS

Applicant

-and-

CANADIAN TRANSPORTATION AGENCY

Respondent

AFFIDAVIT OF SIMONA SASOVA,
SWORN MAY 20, 2014

I, Simona Sasova, resident of the City of Gatineau, in the Province of Quebec, MAKE OATH AND SAY AS FOLLOWS:

1. I am the Manager of the Enforcement Division in the Regulatory Approvals and Compliance Directorate of the Industry Regulations and Determinations Branch of the Canadian Transportation Agency and, as such, have personal knowledge of the matters hereinafter deposed to.

2. I am designated as an Enforcement Officer pursuant to paragraph 178(1)(a) of the *Canada Transportation Act*, S.C. 1996, c. 10. Attached hereto and marked as Exhibit "A" to my

Affidavit is a copy of section 178 of the *Canada Transportation Act*. Attached hereto and marked as Exhibit "B" to my Affidavit is a copy of my Designated Enforcement Officer Badge No. 1013; Authorization No. CTA-2010-0003 dated November 30, 2010.

3. The Agency's Enforcement Division administers the Agency's Inspections and Investigations Program. This program is designed to encourage voluntary compliance with the *Canada Transportation Act*, the *Air Transportation Regulations*, and the *Personnel Training for the Assistance of Persons with Disabilities Regulations*. The Inspections and Investigations Program consists of four elements: periodic inspections, targeted investigations, compliance verifications and special field projects.

4. Agency Designated Enforcement Officers often carry out investigations based on their own observations and knowledge of the industry. However, they may also instigate such investigations as a result of information they receive from outside sources, such as other law enforcement bodies, the general public, or another carrier.

5. On May 29, 1996, the *Canada Transportation Act,* which modernized the transportation regulatory framework, received royal assent. The legislation introduced, among other things, more effective enforcement powers for the Canadian Transportation Agency across all modes of transportation, including the ability to levy fines for non-compliance. The Administrative Monetary Penalty (AMPs) provisions of the Act gave the Agency the power to designate, by regulation, provisions or regulations under the Act which may be proceeded

with as a violation subject to an administrative monetary penalty. The legislation also set limits to the amount of penalties to be assessed against individuals and corporations. These provisions are found in Part VI of the Act at sections 173 through 181. Attached hereto and marked as Exhibit "C" to my Affidavit is a copy of Part VI of the *Canada Transportation Act*.

6. On June 11, 1999, the *Canadian Transportation Agency Designated Provisions Regulations*, SOR/99-244, came into force. These regulations designate provisions, requirements and conditions set out in column 1 of the schedule for the purposes of subsections 177(1) and (1.1) of the *Canada Transportation Act*. Attached hereto and marked as Exhibit "D" to my Affidavit is a copy of the *Canadian Transportation Agency Designated Provisions Regulations*.

7. On December 14, 2012, amendments to the *Air Transportation Regulations* (ATR), SOR/88-58, came into force. These amendments added Part V.1 to the ATR which Part relates to air services price advertising. The *Canadian Transportation Agency Designated Provisions Regulations* were also amended to include the provisions of the ATR relating to air services price advertising on December 14, 2012. Attached hereto and marked as Exhibit "E" to my Affidavit is a copy of Part V.1 of the ATR and a copy of SOR/2012-298 which adds Part V.1 to the ATR and the related provisions to the *Canadian Transportation Agency Designated Provisions Regulations*.

8. In order to assist any person who advertises prices of air services within, or originating in, Canada, in interpreting Part V.1 of the ATR, the Agency issued an interpretation note entitled "Air Transportation Regulations – Air Services Price Advertising Interpretation Note". Attached hereto and marked as Exhibit "F" to my Affidavit is a copy of the Air Transportation Regulations – Air Services Price Advertising Interpretation Note.

9. After the coming into force of the new air price advertising provisions, on December 18, 2012, the Agency informed the industry of the new requirements. Attached hereto and marked as Exhibit "G" to my Affidavit is a copy of the notice which was sent out to the industry relating to the air services price advertising provisions.

10. After that time, the Designated Enforcement Officer conducted online compliance verifications in order to ensure compliance with Part V.1 of the ATR. Enforcement of the requirements of the air price advertising regulations has been achieved entirely by the Enforcement Division through the issuance of warning letters and the imposition of administrative monetary penalties in accordance with sections 173 through 181 of Part VI of the Act and the *Canadian Transportation Agency Designated Provisions Regulations*. As a result of the compliance verifications, one hundred and thirty two (132) warning letters were sent to advertisers and twenty two (22) notices of violation were issued with fines amounting to $365,750.

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11. One of those warning letters was sent to Expedia Canada (Expedia). In particular, on January 21, 2013, a warning letter was sent to Expedia advising that results of a compliance verification conducted on January 14, 2013 revealed that Expedia was in contravention of paragraphs 135.8(1)(d), 135.8(1)(e), subsections 135.8(2), 135.8(3) and section 135.91 of the ATR as it relates to its online booking system (Expedia.ca). Attached hereto and marked as Exhibit "H" to my Affidavit is a copy of the January 31, 2013 warning letter.

12. As in all cases, after the warning letter was sent, the Designated Enforcement Officer worked with the advertiser to assist it to become compliant. As a result, Expedia made the required changes to its Web site and thus, at the time, became compliant with the regulations and was informed accordingly.

13. On February 24, 2014, the Agency received information concerning advertising prices of Expedia from the Applicant, Dr. Gabor Lukacs. Dr. Lukacs' letter states that Expedia failed to include fuel surcharges in "Air Transportation Charges" and improperly included and listed airline-imposed charges in "Taxes, Fees and Charges" under the name "YR – Service Charge". Attached hereto and marked as Exhibit "I" to my Affidavit is a copy of Dr. Lukacs' letter.

14. Subsequently, a Designated Enforcement Officer conducted a compliance verification and discovered that Expedia was non-compliant with the regulations. In particular, Expedia's

service charge was listed under the heading "Taxes, Fees, and Charges" and not under the heading "Air Transportation Charges", as required by the regulations. As this was a new violation, a warning letter was issued to Expedia on March 27, 2014, advising that it was in contravention of section 135.92 of the ATR. Expedia was given until April 30, 2014 to become compliant. Attached hereto and marked as Exhibit "J" to my Affidavit is a copy of the March 27, 2014 warning letter.

15. Expedia has since rectified the problem; the issue has now been resolved; and therefore, Expedia has complied with the requirements identified in the warning letter.

16. In his letter dated February 24, 2014, Dr. Lukacs also submits that the "Airline Fuel Surcharge" was improperly listed under the heading "Taxes, Fees and Charges"; however, an online verification indicated that the "Airline Fuel Surcharge", while physically located below (or underneath) the heading "Taxes, Fees and Charges" on Expedia's website, was not, in fact, included in the breakdown under the heading "Taxes, Fees and Charges". There is no requirement under the regulations to break out the "Air Transportation Charges" and list airline fuel surcharges under that heading. The "Air Transportation Regulations – Air Services Price Advertising Interpretation Note" states: "An advertiser may voluntarily choose to break out the air transportation charges, such as base fare or any payment that must be made to a travel agent upon the purchase of an air service, and itemize the respective amounts for each of these items in their advertisement. *If a breakdown of these charges is provided* in writing in the advertisement, it must appear under the heading "Air

Transportation Charges", not under "Taxes, Fees and Charges". In this case, Expedia listed the "Airline Fuel Surcharge" separately, which is acceptable because it makes it clear to the consumer that it is not a third party charge. Nevertheless, Expedia was requested to physically move the "Airline Fuel Surcharge" heading so that it appears under the "Air Transportation Charges", which Expedia has done. Attached hereto and marked as Exhibit "K" to my Affidavit is a screenshot of an Expedia online ad taken on May 20, 2014.

17. This Affidavit is made at the request of counsel to the Canadian Transportation Agency in support of the Agency's Reply to the application for judicial review in this matter and for no other or improper purpose.

DATED at the City of Gatineau, in the Province of Quebec, this 20th day of May, 2014

SWORN BEFORE ME at the City of Gatineau
in the Province of Quebec, this 20th day of
May, 2014.

Commissioner of Oaths

ANDRAY RENAUD, AVOCATE
194392-8
BARREAU DU QUÉBEC

TAB A

Ceci est la pièce A de affidavit
This is Exhibit referred to in the Affidavit

de Simona Sasova
of

assermenté devant moi ce 20th jour de May ~~mai~~ 2014
sworn to before me this day of

Commissaire à l'assermentation
Commissioner for Oaths

ANDRAY RENAUD, AVOCATE
194392-8
BARREAU DU QUÉBEC

Notices of violation

178. (1) The Agency, in respect of a violation referred to in subsection 177(1) or (1.1), or the Minister, in respect of a violation referred to in subsection 177(2), may

(*a*) designate persons, or classes of persons, as enforcement officers who are authorized to issue notices of violation; and

(*b*) establish the form and content of notices of violation.

Procès-verbaux

178. (1) L'Office ou le ministre, à l'égard d'une contravention à un texte désigné au titre des paragraphes 177(1), (1.1) ou (2), peut désigner, individuellement ou par catégorie, les agents verbalisateurs et déterminer la forme et la teneur des procès-verbaux de violation.

Powers of enforcement officers

(2) Every person designated as an enforcement officer pursuant to paragraph (1)(*a*) has the powers of entry and inspection referred to in paragraph 39(*a*).

Attributions des agents

(2) L'agent dispose, dans le cadre de ses fonctions, des pouvoirs de visite mentionnés à l'alinéa 39*a*).

Certification of designated persons

(3) Every person designated as an enforcement officer pursuant to paragraph (1)(*a*) shall receive an authorization in prescribed form attesting to the person's designation and shall, on demand, present the authorization to any person from whom the enforcement officer requests information in the course of the enforcement officer's duties.

Certificat

(3) Chaque agent reçoit un certificat établi en la forme fixée par l'Office ou le ministre, selon le cas, et attestant sa qualité, qu'il présente sur demande à la personne à qui il veut demander des renseignements.

Powers of designated persons

(4) For the purposes of determining whether a violation referred to in section 177 has been committed, a person designated as an enforcement officer pursuant to paragraph (1)(*a*) may require any person to produce for examination or reproduction all or part of any document or electronically stored data that the enforcement officer believes on reasonable grounds contain any information relevant to the enforcement of this Act.

Pouvoir

(4) En vue de déterminer si une violation a été commise, l'agent peut exiger la communication, pour examen ou reproduction totale ou partielle, de tout document ou données informatiques qui, à son avis, contient des renseignements utiles à l'application de la présente loi.

Assistance to enforcement officers

(5) Any person from whom documents or data are requested pursuant to subsection (4) shall provide all such reasonable assistance as is in their power to enable the enforcement officer making the request to carry out the enforcement officer's duties and shall furnish such information as the enforcement officer reasonably requires for the purposes of this Act.

Assistance

(5) La personne à qui l'agent demande la communication de documents ou données informatiques est tenue de lui prêter toute l'assistance possible dans l'exercice de ses fonctions et de lui donner les renseignements qu'il peut valablement exiger quant à l'application de la présente loi.

1996, c. 10, s. 178; 2007, c. 19, s. 50; 2013, c. 31, s. 13.

1996, ch. 10, art. 178; 2007, ch. 19, art. 50; 2013, ch. 31, art. 13.

TAB B

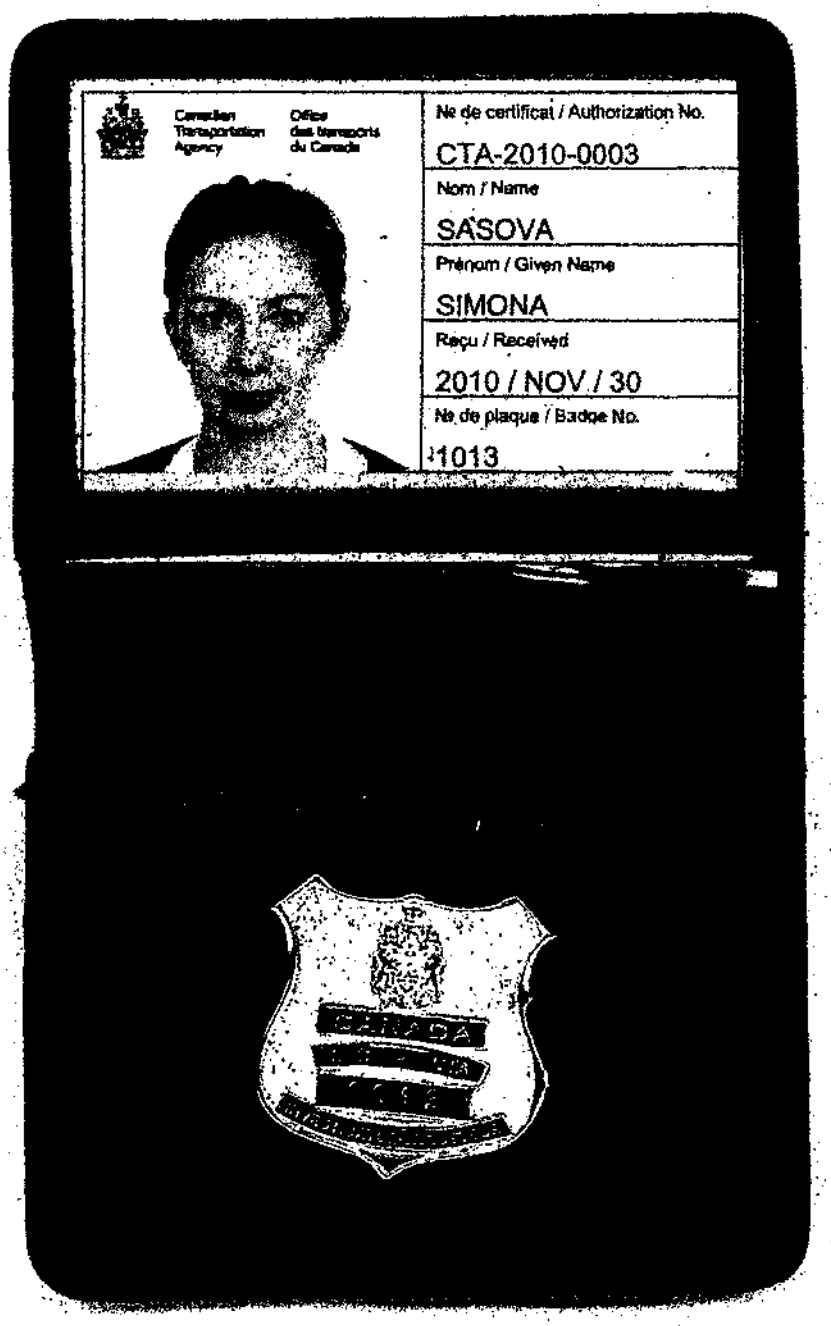
Ceci est la pièce B de affidavit
This is Exhibit referred to in the Affidavit

de Simona Sasova
of

assermenté devant moi ce 20th jour de May 2014
sworn to before me this day of

Andray Renaud
Commissaire à l'assermentation
Commissioner for Oaths

ANDRAY RENAUD, AVOCATE
194392-8
BARREAU DU QUÉBEC


Canadian Transportation Agency
Office des transports du Canada
No de certificat / Authorization No.
CTA-2010-0003
Nom / Name
SASOVA
Prénom / Given Name
SIMONA
Reçu / Received
2010 / NOV / 30
No de plaque / Badge No.
1013

TAB C

Ceci est la pièce C de l'affidavit
This is Exhibit referred to in the Affidavit

de Simona Sasova
of

assermenté devant moi ce 20th jour de May 2014
sworn to before me this day of

Commissaire à l'assermentation
Commissioner for Oaths

ANDRAY RENAUD, AVOCATE
194392-8
BARREAU DU QUÉBEC

PART VI

GENERAL

ENFORCEMENT

False information, etc.

173. (1) No person shall knowingly make any false or misleading statement or knowingly provide false or misleading information to the Agency or the Minister or to any person acting on behalf of the Agency or the Minister in connection with any matter under this Act.

Obstruction and false statements

(2) No person shall knowingly obstruct or hinder, or make any false or misleading statement, either orally or in writing, to a person designated as an enforcement officer pursuant to paragraph 178(1)(*a*) who is engaged in carrying out functions under this Act.

Offence

174. Every person who contravenes a provision of this Act or a regulation or order made under this Act, other than an order made under section 47, is guilty of an offence punishable on summary conviction and liable

(*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 $25,000.

Officers, etc., of corporation re offences

175. Where a corporation commits an offence under this Act, every person who at the time of the commission of the offence was a director or officer of the corporation is guilty of the like offence unless the act or omission constituting the offence took place without the person's knowledge or consent or the person exercised all due diligence to prevent the commission of the offence.

Time limit for commencement of proceedings

176. Proceedings by way of summary conviction in respect of an offence under this Act may be instituted within but not later than twelve months after the time when the subject-matter of the proceedings arose.

ADMINISTRATIVE MONETARY PENALTIES

Definition of "Tribunal"

176.1 For the purposes of sections 180.1 to 180.7, "Tribunal" means the Transportation Appeal Tribunal of Canada established by sub-

PARTIE VI

DISPOSITIONS GÉNÉRALES

MESURES DE CONTRAINTE

Déclarations fausses ou trompeuses

173. (1) Nul ne peut, sciemment, faire de déclaration fausse ou trompeuse ni fournir de renseignements faux ou trompeurs à l'Office, au ministre ou à toute personne agissant au nom de l'Office ou du ministre relativement à une question visée par la présente loi.

Entrave

(2) Il est interdit, sciemment, d'entraver l'action de l'agent verbalisateur désigné au titre du paragraphe 178(1) dans l'exercice de ses fonctions ou de lui faire, oralement ou par écrit, une déclaration fausse ou trompeuse.

Infraction et peines

174. Quiconque contrevient à la présente loi ou à un texte d'application de celle-ci, autre qu'un décret prévu à l'article 47, commet une infraction et est passible, sur déclaration de culpabilité par procédure sommaire :

a) dans le cas d'une personne physique, d'une amende maximale de 5 000 $;

b) dans le cas d'une personne morale, d'une amende maximale de 25 000 $.

Dirigeants des personnes morales

175. En cas de perpétration par une personne morale d'une infraction à la présente loi, celui qui, au moment de l'infraction, en était administrateur ou dirigeant la commet également, sauf si l'action ou l'omission à l'origine de l'infraction a eu lieu à son insu ou sans son consentement ou qu'il a pris toutes les mesures nécessaires pour empêcher l'infraction.

Prescription

176. Les poursuites intentées sur déclaration de culpabilité par procédure sommaire sous le régime de la présente loi se prescrivent par douze mois à compter du fait générateur de l'action.

SANCTIONS ADMINISTRATIVES PÉCUNIAIRES

Définition de «Tribunal»

176.1 Pour l'application des articles 180.1 à 180.7, «Tribunal» s'entend du Tribunal d'appel des transports du Canada, constitué par le

section 2(1) of the *Transportation Appeal Tribunal of Canada Act*.

2007, c. 19, s. 48.

paragraphe 2(1) de la *Loi sur le Tribunal d'appel des transports du Canada*.

2007, ch. 19, art. 48.

Regulation-making powers

177. (1) The Agency may, by regulation,

(*a*) designate

(i) any provision of this Act or of any regulation, order or direction made pursuant to this Act,

(ii) the requirements of any provision referred to in subparagraph (i), or

(iii) any condition of a licence issued under this Act,

as a provision, requirement or condition the contravention of which may be proceeded with as a violation in accordance with sections 179 and 180; and

(*b*) prescribe the maximum amount payable for each violation, but the amount shall not exceed

(i) $5,000, in the case of an individual, and

(ii) $25,000, in the case of a corporation.

Pouvoirs réglementaires de l'Office

177. (1) L'Office peut, par règlement :

a) désigner comme un texte dont la contravention est assujettie aux articles 179 et 180 :

(i) toute disposition de la présente loi ou de ses textes d'application,

(ii) toute obligation imposée par la présente loi ou ses textes d'application,

(iii) toute condition d'une licence délivrée au titre de la présente loi;

b) prévoir le montant maximal — plafonné, dans le cas des personnes physiques, à 5 000 $ et, dans le cas des personnes morales, à 25 000 $ — de la sanction applicable à chaque contravention à un texte ainsi désigné.

Regulation-making powers — railway company's obligations

(1.1) The Agency may, by regulation,

(*a*) designate any requirement imposed on a railway company in an arbitrator's decision made under section 169.37 as a requirement the contravention of which may be proceeded with as a violation in accordance with sections 179 and 180; and

(*b*) prescribe the maximum amount payable for each violation, but the amount shall not be more than $100,000.

Règlements — compagnie de chemin de fer

(1.1) L'Office peut, par règlement :

a) désigner toute obligation imposée à une compagnie de chemin de fer par une décision arbitrale rendue en vertu de l'article 169.37 comme un texte dont la contravention est assujettie aux articles 179 et 180;

b) prévoir le montant maximal de la sanction applicable à chaque contravention à un texte ainsi désigné, plafonné à 100 000 $.

Regulations by Minister

(2) The Minister may, by regulation,

(*a*) designate as a provision or requirement the contravention of which may be proceeded with as a violation in accordance with sections 179 and 180 any provision of section 51 or of any regulation made under section 50 or 51, or any requirement of any of those provisions; and

(*b*) prescribe the maximum amount payable for each violation, but the amount shall not exceed

(i) $5,000, in the case of an individual, and

Pouvoirs réglementaires du ministre

(2) Le ministre peut, par règlement :

a) désigner comme texte dont la contravention est assujettie aux articles 179 et 180 toute disposition de l'article 51 ou des règlements pris en vertu des articles 50 ou 51, ou toute obligation imposée par l'article 51 ou ces règlements;

b) prévoir le montant maximal — plafonné, dans le cas des personnes physiques, à 5 000 $ et, dans le cas des personnes morales, à 25 000 $ — de la sanction applicable à

(ii) $25,000, in the case of a corporation.

1996, c. 10, s. 177; 2007, c. 19, s. 49; 2013, c. 31, s. 12.

chaque contravention à un texte ainsi désigné.

1996, ch. 10, art. 177; 2007, ch. 19, art. 49; 2013, ch. 31, art. 12.

Notices of violation

178. (1) The Agency, in respect of a violation referred to in subsection 177(1) or (1.1), or the Minister, in respect of a violation referred to in subsection 177(2), may

(*a*) designate persons, or classes of persons, as enforcement officers who are authorized to issue notices of violation; and

(*b*) establish the form and content of notices of violation.

178. (1) L'Office ou le ministre, à l'égard d'une contravention à un texte désigné au titre des paragraphes 177(1), (1.1) ou (2), peut désigner, individuellement ou par catégorie, les agents verbalisateurs et déterminer la forme et la teneur des procès-verbaux de violation.

Procès-verbaux

Powers of enforcement officers

(2) Every person designated as an enforcement officer pursuant to paragraph (1)(*a*) has the powers of entry and inspection referred to in paragraph 39(*a*).

(2) L'agent dispose, dans le cadre de ses fonctions, des pouvoirs de visite mentionnés à l'alinéa 39*a*).

Attributions des agents

Certification of designated persons

(3) Every person designated as an enforcement officer pursuant to paragraph (1)(*a*) shall receive an authorization in prescribed form attesting to the person's designation and shall, on demand, present the authorization to any person from whom the enforcement officer requests information in the course of the enforcement officer's duties.

(3) Chaque agent reçoit un certificat établi en la forme fixée par l'Office ou le ministre, selon le cas, et attestant sa qualité, qu'il présente sur demande à la personne à qui il veut demander des renseignements.

Certificat

Powers of designated persons

(4) For the purposes of determining whether a violation referred to in section 177 has been committed, a person designated as an enforcement officer pursuant to paragraph (1)(*a*) may require any person to produce for examination or reproduction all or part of any document or electronically stored data that the enforcement officer believes on reasonable grounds contain any information relevant to the enforcement of this Act.

(4) En vue de déterminer si une violation a été commise, l'agent peut exiger la communication, pour examen ou reproduction totale ou partielle, de tout document ou données informatiques qui, à son avis, contient des renseignements utiles à l'application de la présente loi.

Pouvoir

Assistance to enforcement officers

(5) Any person from whom documents or data are requested pursuant to subsection (4) shall provide all such reasonable assistance as is in their power to enable the enforcement officer making the request to carry out the enforcement officer's duties and shall furnish such information as the enforcement officer reasonably requires for the purposes of this Act.

1996, c. 10, s. 178; 2007, c. 19, s. 50; 2013, c. 31, s. 13.

(5) La personne à qui l'agent demande la communication de documents ou données informatiques est tenue de lui prêter toute l'assistance possible dans l'exercice de ses fonctions et de lui donner les renseignements qu'il peut valablement exiger quant à l'application de la présente loi.

1996, ch. 10, art. 178; 2007, ch. 19, art. 50; 2013, ch. 31, art. 13.

Assistance

Violations

179. (1) Every person who contravenes a provision, requirement or condition designated under section 177 commits a violation and is liable to a penalty fixed pursuant to that section.

179. (1) Toute contravention à un texte désigné au titre de l'article 177 constitue une violation pour laquelle le contrevenant s'expose à la sanction établie conformément à cet article.

Violation

How contraventions may be proceeded with

(2) Where any act or omission can be proceeded with as a violation or as an offence, proceedings may be commenced in respect of that act or omission as a violation or as an offence, but proceeding with it as a violation precludes proceeding with it as an offence, and proceeding with it as an offence precludes proceeding with it as a violation.

Précision

(2) Tout acte ou omission qualifiable à la fois de violation et d'infraction peut être réprimé soit comme violation, soit comme infraction, les poursuites pour violation et celles pour infraction s'excluant toutefois mutuellement.

Nature of violation

(3) For greater certainty, a violation is not an offence and, accordingly, section 126 of the *Criminal Code* does not apply.

1996, c. 10, s. 179; 2007, c. 19, s. 51(F).

Nature de la violation

(3) Les violations n'ont pas valeur d'infractions; en conséquence nul ne peut être poursuivi à ce titre sur le fondement de l'article 126 du *Code criminel*.

1996, ch. 10, art. 179; 2007, ch. 19, art. 51(F).

Issuance of notice of violation

180. If a person designated as an enforcement officer under paragraph 178(1)(*a*) believes that a person has committed a violation, the enforcement officer may issue and serve on the person a notice of violation that names the person, identifies the violation and sets out

(*a*) the penalty, established in accordance with the regulations made under section 177, for the violation that the person is liable to pay; and

(*b*) the particulars concerning the time for paying and the manner of paying the penalty.

1996, c. 10, s. 180; 2001, c. 29, s. 52; 2007, c. 19, s. 52.

Verbalisation

180. L'agent verbalisateur qui croit qu'une violation a été commise peut dresser un procès-verbal qu'il signifie au contrevenant. Le procès-verbal comporte, outre le nom du contrevenant et les faits reprochés, le montant, établi conformément aux règlements pris en vertu de l'article 177, de la sanction à payer, ainsi que le délai et les modalités de paiement.

1996, ch. 10, art. 180; 2001, ch. 29, art. 52; 2007, ch. 19, art. 52.

Option

180.1 A person who has been served with a notice of violation must either pay the amount of the penalty specified in the notice or file with the Tribunal a written request for a review of the facts of the alleged contravention or of the amount of the penalty.

2007, c. 19, s. 52.

Option

180.1 Le destinataire du procès-verbal doit soit payer la sanction, soit déposer auprès du Tribunal une requête en révision des faits reprochés ou du montant de la sanction.

2007, ch. 19, art. 52.

Payment of specified amount precludes further proceedings

180.2 If a person who is served with a notice of violation pays the amount specified in the notice in accordance with the particulars set out in it, the Minister shall accept the amount as and in complete satisfaction of the amount of the penalty for the contravention by that person of the designated provision and no further proceedings under this Part shall be taken against the person in respect of that contravention.

2007, c. 19, s. 52.

Paiement de la sanction

180.2 Lorsque le destinataire du procès-verbal paie la somme requise dans les délais et selon les modalités qui y sont prévues, le ministre accepte ce paiement en règlement de la sanction imposée; aucune poursuite ne peut être intentée par la suite au titre de la présente partie contre l'intéressé pour la même contravention.

2007, ch. 19, art. 52.

Request for review of determination

180.3 (1) A person who is served with a notice of violation and who wishes to have the facts of the alleged contravention or the amount of the penalty reviewed shall, on or before the date specified in the notice or within any further time that the Tribunal on application may

Requête en révision

180.3 (1) Le destinataire du procès-verbal qui veut faire réviser la décision du ministre à l'égard des faits reprochés ou du montant de la sanction dépose une requête auprès du Tribunal à l'adresse indiquée dans le procès-verbal, au plus tard à la date limite qui y est indiquée, ou

allow, file a written request for a review with the Tribunal at the address set out in the notice.

Time and place for review

(2) On receipt of a request filed under subsection (1), the Tribunal shall appoint a time and place for the review and shall notify the Minister and the person who filed the request of the time and place in writing.

Review procedure

(3) The member of the Tribunal assigned to conduct the review shall provide the Minister and the person who filed the request with an opportunity consistent with procedural fairness and natural justice to present evidence and make representations.

Burden of proof

(4) The burden of establishing that a person has contravened a designated provision is on the Minister.

Person not compelled to testify

(5) A person who is alleged to have contravened a designated provision is not required, and shall not be compelled, to give any evidence or testimony in the matter.

2007, c. 19, s. 52.

Certificate

180.4 If a person neither pays the amount of the penalty in accordance with the particulars set out in the notice of violation nor files a request for a review under subsection 180.3(1), the person is deemed to have committed the contravention alleged in the notice, and the Minister may obtain from the Tribunal a certificate in the form that may be established by the Governor in Council that indicates the amount of the penalty specified in the notice.

2007, c. 19, s. 52.

Determination by Tribunal member

180.5 If, at the conclusion of a review under section 180.3, the member of the Tribunal who conducts the review determines that

(*a*) the person has not contravened the designated provision that the person is alleged to have contravened, the member of the Tribunal shall without delay inform the person and the Minister of the determination and, subject to section 180.6, no further proceedings under this Part shall be taken against the person in respect of the alleged contravention; or

(*b*) the person has contravened the designated provision that the person is alleged to have contravened, the member of the Tribunal shall without delay inform the person and the Minister of the determination and,

dans le délai supérieur éventuellement accordé à sa demande par le Tribunal.

Audience

(2) Le Tribunal, sur réception de la requête, fixe la date, l'heure et le lieu de l'audience et en avise par écrit le ministre et l'intéressé.

Déroulement

(3) À l'audience, le membre du Tribunal commis à l'affaire accorde au ministre et à l'intéressé la possibilité de présenter leurs éléments de preuve et leurs observations, conformément aux principes de l'équité procédurale et de la justice naturelle.

Charge de la preuve

(4) S'agissant d'une requête portant sur les faits reprochés, il incombe au ministre d'établir que l'intéressé a contrevenu au texte désigné.

Intéressé non tenu de témoigner

(5) L'intéressé n'est pas tenu de témoigner à l'audience.

2007, ch. 19, art. 52.

Omission de payer la sanction ou de présenter une requête

180.4 L'omission, par l'intéressé, de payer la pénalité dans les délais et selon les modalités prévus dans le procès-verbal et de présenter une requête en révision vaut déclaration de responsabilité à l'égard de la contravention. Sur demande, le ministre peut alors obtenir du Tribunal un certificat, établi en la forme que le gouverneur en conseil peut déterminer, sur lequel est inscrite la somme.

2007, ch. 19, art. 52.

Décision

180.5 Après audition des parties, le membre du Tribunal informe sans délai l'intéressé et le ministre de sa décision. S'il décide :

a) qu'il n'y a pas eu contravention, sous réserve de l'article 180.6, nulle autre poursuite ne peut être intentée à cet égard sous le régime de la présente partie;

b) qu'il y a eu contravention, il les informe également, sous réserve des règlements pris en vertu de l'article 177, de la somme qu'il fixe et qui doit être payée au Tribunal. En outre, à défaut de paiement dans le délai imparti, il expédie au ministre un certificat, établi en la forme que le gouverneur en conseil peut déterminer, sur lequel est inscrite la somme.

2007, ch. 19, art. 52.

subject to any regulations made under section 177, of the amount determined by the member of the Tribunal to be payable by the person in respect of the contravention and, if the amount is not paid to the Tribunal by or on behalf of the person within the time that the member of the Tribunal may allow, the member of the Tribunal shall issue to the Minister a certificate in the form that may be established by the Governor in Council, setting out the amount required to be paid by the person.

2007, c. 19, s. 52.

Right of appeal

180.6 (1) The Minister or a person affected by a determination made under section 180.5 may, within 30 days after the determination, appeal it to the Tribunal.

Loss of right of appeal

(2) A party that does not appear at a review hearing is not entitled to appeal a determination, unless they establish that there was sufficient reason to justify their absence.

Disposition of appeal

(3) The appeal panel of the Tribunal assigned to hear the appeal may dispose of the appeal by dismissing it or allowing it and, in allowing the appeal, the panel may substitute its decision for the determination appealed against.

Certificate

(4) If the appeal panel finds that a person has contravened the designated provision, the panel shall without delay inform the person of the finding and, subject to any regulations made under section 177, of the amount determined by the panel to be payable by the person in respect of the contravention and, if the amount is not paid to the Tribunal by or on behalf of the person within the time allowed by the Tribunal, the Tribunal shall issue to the Minister a certificate in the form that may be established by the Governor in Council, setting out the amount required to be paid by the person.

2007, c. 19, s. 52.

Registration of certificate

180.7 (1) If the time limit for the payment of an amount determined by the Minister in a notice of violation has expired, the time limit for the request for a review has expired, the time limit for an appeal has expired, or an appeal has been disposed of, on production in any superior court, a certificate issued under section 180.4, paragraph 180.5(*b*) or subsection

180.6 (1) Le ministre ou toute personne concernée peut faire appel au Tribunal de la décision rendue au titre de l'article 180.5. Le délai d'appel est de trente jours.

Appel

Perte du droit d'appel

(2) La partie qui ne se présente pas à l'audience portant sur la requête en révision perd le droit de porter la décision en appel, à moins qu'elle ne fasse valoir des motifs valables justifiant son absence.

Sort de l'appel

(3) Le comité du Tribunal peut rejeter l'appel ou y faire droit et substituer sa propre décision à celle en cause.

Avis

(4) S'il statue qu'il y a eu contravention, le comité en informe sans délai l'intéressé. Sous réserve des règlements pris en vertu de l'article 177, il l'informe également de la somme qu'il fixe et qui doit être payée au Tribunal. En outre, à défaut de paiement dans le délai imparti, il expédie au ministre un certificat, établi en la forme que le gouverneur en conseil peut déterminer, sur lequel est inscrite la somme.

2007, ch. 19, art. 52.

Enregistrement du certificat

180.7 (1) Sur présentation à la juridiction supérieure, une fois le délai d'appel expiré, la décision sur l'appel rendue ou le délai pour payer la sanction ou déposer une requête en révision expiré, selon le cas, le certificat visé à l'article 180.4, à l'alinéa 180.5*b*) ou au paragraphe 180.6(4) est enregistré. Dès lors, il devient exécutoire et toute procédure d'exécution

180.6(4) shall be registered in the court. When it is registered, a certificate has the same force and effect, and proceedings may be taken in connection with it, as if it were a judgment in that court obtained by Her Majesty in right of Canada against the person named in the certificate for a debt of the amount set out in the certificate.

peut être engagée, le certificat étant assimilé à un jugement de cette juridiction obtenu par Sa Majesté du chef du Canada contre la personne désignée dans le certificat pour une dette dont le montant y est indiqué.

Recovery of costs and charges

(2) All reasonable costs and charges attendant on the registration of the certificate are recoverable in like manner as if they had been certified and the certificate had been registered under subsection (1).

(2) Tous les frais entraînés par l'enregistrement du certificat peuvent être recouvrés comme s'ils faisaient partie de la somme indiquée sur le certificat enregistré en application du paragraphe (1).

Recouvrement des frais

Amounts received deemed public moneys

(3) An amount received by the Minister or the Tribunal under this section is deemed to be public money within the meaning of the *Financial Administration Act*.

(3) Les sommes reçues par le ministre ou le Tribunal au titre du présent article sont assimilées à des fonds publics au sens de la *Loi sur la gestion des finances publiques*.

Fonds publics

2007, c. 19, s. 52.

2007, ch. 19, art. 52.

References to "Minister"

180.8 (1) In the case of a violation referred to in subsection 177(1) or (1.1), every reference to the "Minister" in sections 180.3 to 180.7 shall be read as a reference to the Agency or to a person designated by the Agency.

180.8 (1) S'il s'agit d'une contravention à un texte désigné au titre des paragraphes 177(1) ou (1.1), la mention du ministre aux articles 180.3 à 180.7 vaut mention de l'Office ou de la personne que l'Office peut désigner.

Mention du ministre

Delegation by Minister

(2) In the case of a violation referred to in subsection 177(2), the Minister may delegate to the Agency any power, duty or function conferred on the Minister under this Part.

(2) S'il s'agit d'une contravention à un texte désigné au titre du paragraphe 177(2), le ministre peut déléguer à l'Office les attributions que lui confère la présente partie.

Délégation ministérielle

2007, c. 19, s. 52; 2013, c. 31, s. 14.

2007, ch. 19, art. 52; 2013, ch. 31, art. 14.

Time limit for proceedings

181. Proceedings in respect of a violation may be instituted not later than twelve months after the time when the subject-matter of the proceedings arose.

181. Les poursuites pour violation se prescrivent par douze mois à compter du fait générateur de l'action.

Prescription

TAB D

Ceci est la pièce D de l'affidavit
This is Exhibit referred to in the Affidavit

de Simona Sasova
of

assermenté devant moi ce 20th jour de May 2014
sworn to before me this day of

Andray Renaud
Commissaire à l'assermentation
Commissioner for Oaths

ANDRAY RENAUD, AVOCATE
194392-8
BARREAU DU QUÉBEC

21

CANADA

CONSOLIDATION

CODIFICATION

Canadian Transportation Agency Designated Provisions Regulations

Règlement sur les textes désignés (Office des transports du Canada)

SOR/99-244

DORS/99-244

Current to May 1, 2014

À jour au 1 mai 2014

Last amended on March 28, 2014

Dernière modification le 28 mars 2014

Published by the Minister of Justice at the following address:
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OFFICIAL STATUS OF CONSOLIDATIONS

Subsections 31(1) and (3) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

Published consolidation is evidence

31. (1) Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

...

Inconsistencies in regulations

(3) In the event of an inconsistency between a consolidated regulation published by the Minister under this Act and the original regulation or a subsequent amendment as registered by the Clerk of the Privy Council under the *Statutory Instruments Act*, the original regulation or amendment prevails to the extent of the inconsistency.

NOTE

This consolidation is current to May 1, 2014. The last amendments came into force on March 28, 2014. Any amendments that were not in force as of May 1, 2014 are set out at the end of this document under the heading "Amendments Not in Force".

CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (3) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1er juin 2009, prévoient ce qui suit :

Codifications comme élément de preuve

31. (1) Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

[...]

Incompatibilité — règlements

(3) Les dispositions du règlement d'origine avec ses modifications subséquentes enregistrées par le greffier du Conseil privé en vertu de la *Loi sur les textes réglementaires* l'emportent sur les dispositions incompatibles du règlement codifié publié par le ministre en vertu de la présente loi.

NOTE

Cette codification est à jour au 1 mai 2014. Les dernières modifications sont entrées en vigueur le 28 mars 2014. Toutes modifications qui n'étaient pas en vigueur au 1 mai 2014 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

TABLE OF PROVISIONS

TABLE ANALYTIQUE

Registration
SOR/99-244 June 11, 1999

CANADA TRANSPORTATION ACT

Canadian Transportation Agency Designated Provisions Regulations

P.C. 1999-1059 June 10, 1999

His Excellency the Governor General in Council, on the recommendation of the Minister of Transport, pursuant to subsection 36(1) of the *Canada Transportation Act*[a], hereby approves the *Canadian Transportation Agency Designated Provisions Regulations*, made by the Canadian Transportation Agency.

[a] S.C. 1996, c. 10

Enregistrement
DORS/99-244 Le 11 juin 1999

LOI SUR LES TRANSPORTS AU CANADA

Règlement sur les textes désignés (Office des transports du Canada)

C.P. 1999-1059 Le 10 juin 1999

Sur recommandation du ministre des Transports et en vertu du paragraphe 36(1) de la *Loi sur les transports au Canada*[a], Son Excellence le Gouverneur général en conseil agrée le *Règlement sur les textes désignés (Office des transports du Canada)*, ci-après, pris par l'Office des transports du Canada.

[a] L.C. 1996, ch. 10

CANADIAN TRANSPORTATION AGENCY DESIGNATED PROVISIONS REGULATIONS

INTERPRETATION

[SOR/2014-71, s. 1(F)]

1. In these Regulations, "Act" means the *Canada Transportation Act*.

SOR/2014-71, s. 2.

DESIGNATION

2. The provisions, requirements and conditions set out in column 1 of the schedule are designated for the purposes of subsections 177(1) and (1.1) of the Act.

SOR/2014-71, s. 2.

MAXIMUM AMOUNT

3. The maximum amount payable in respect of a contravention of a provision, requirement or condition set out in column 1 of the schedule is the amount

(*a*) in respect of a corporation, set out in column 2; and

(*b*) in respect of an individual, set out in column 3.

SOR/2014-71, s. 3(E)

COMING INTO FORCE

4. These Regulations come into force on the day on which they are registered.

RÈGLEMENT SUR LES TEXTES DÉSIGNÉS (OFFICE DES TRANSPORTS DU CANADA)

DÉFINITION

[DORS/2014-71, art. 1(F)]

1. Dans le présent règlement « Loi » s'entend de la *Loi sur les transports au Canada*.

DORS/2014-71, art. 2.

DÉSIGNATION

2. Pour l'application des paragraphes 177(1) et (1.1) de la Loi, les dispositions, les obligations et les conditions mentionnées à la colonne 1 de l'annexe sont des textes désignés.

DORS/2014-71, art. 2.

MONTANT MAXIMAL DE LA SANCTION

3. Le montant maximal de la sanction prévue pour toute contravention d'un texte désigné visé à la colonne 1 de l'annexe est :

a) dans le cas d'une personne morale, le montant indiqué à la colonne 2;

b) dans le cas d'une personne physique, le montant indiqué à la colonne 3.

DORS/2014-71, art. 3(A).

ENTRÉE EN VIGUEUR

4. Le présent règlement entre en vigueur à la date de son enregistrement.

SCHEDULE
(Sections 2 and 3)

Item	Column 1 Provision, Requirement or Condition	Column 2 Maximum Amount Payable — Corporation ($)	Column 3 Maximum Amount Payable — Individual ($)
	Canada Transportation Act		
1.	Section 57	25,000	5,000
2	Section 59	25,000	5,000
2.1	Subsection 64(1)	10,000	2,000
2.2	Subsection 64(1.1)	10,000	2,000
3.	Subsection 64(2)	25,000	5,000
3.1	Paragraph 66(1)(*a*)	25,000	5,000
3.2	Paragraph 66(1)(*b*)	25,000	5,000
3.3	Paragraph 66(1)(*c*)	25,000	5,000
3.4	Subsection 66(2)	25,000	5,000
3.5 and 3.6	[Repealed, SOR/2009-28, s. 4]		
3.7	Subsection 66(8)	25,000	5,000
4	Paragraph 67(1)(*a*)	10,000	2,000
4.1	Paragraph 67(1)(*a.1*)	10,000	2,000
5	Paragraph 67(1)(*c*)	5,000	1,000
6	Subsection 67(2)	5,000	1,000
7	Subsection 67(3)	10,000	2,000
8.	Subsection 67(4)	5,000	1,000
8.1	Paragraph 67.1(*a*)	25,000	5,000
8.2	Paragraph 67.1(*b*)	25,000	5,000
8.3	Paragraph 67.1(*c*)	25,000	5,000
8.4	Subsection 67.2(2)	25,000	5,000
9.	Subsection 68(2)	25,000	5,000
9.1	Subsection 68(3)	10,000	2,000
10.	Subsection 71(2)	25,000	5,000
11	Subsection 74(2)	25,000	5,000
12.	Section 82	25,000	5,000
13.	Section 83	10,000	2,000
13.01	Any requirement imposed under section 169.37	100,000	100,000
13.1	Subsection 172(3)	25,000	5,000
14.	Subsection 178(5)	5,000	1,000
	Air Transportation Regulations		
15.	Paragraph 7(1)(*a*)	25,000	5,000
16	Paragraph 7(1)(*b*)	25,000	5,000
17.	Subsection 7(3)	25,000	5,000
18.	Subsection 7(4)	25,000	5,000
19.	Subsection 8(1)	10,000	2,000
20.	Subsection 8(2)	5,000	1,000

ANNEXE
(articles 2 et 3)

Article	Colonne 1 Texte désigné	Colonne 2 Montant maximal de la sanction — Personne morale ($)	Colonne 3 Montant maximal de la sanction — Personne physique ($)
	Loi sur les transports au Canada		
1.	Article 57	25 000	5 000
2.	Article 59	25 000	5 000
2.1	Paragraphe 64(1)	10 000	2 000
2.2	Paragraphe 64(1.1)	10 000	2 000
3.	Paragraphe 64(2)	25 000	5 000
3.1	Alinéa 66(1)*a*)	25 000	5 000
3.2	Alinéa 66(1)*b*)	25 000	5 000
3.3	Alinéa 66(1)*c*)	25 000	5 000
3.4	Paragraphe 66(2)	25 000	5 000
3.5 et 3.6	[Abrogés, DORS/2009-28, art. 4]		
3.7	Paragraphe 66(8)	25 000	5 000
4.	Alinéa 67(1)*a*)	10 000	2 000
4.1	Alinéa 67(1)*a.1*)	10 000	2 000
5.	Alinéa 67(1)*c*)	5 000	1 000
6.	Paragraphe 67(2)	5 000	1 000
7.	Paragraphe 67(3)	10 000	2 000
8.	Paragraphe 67(4)	5 000	1 000
8.1	Alinéa 67.1*a*)	25 000	5 000
8.2	Alinéa 67.1*b*)	25 000	5 000
8.3	Alinéa 67.1*c*)	25 000	5 000
8.4	Paragraphe 67.2(2)	25 000	5 000
9.	Paragraphe 68(2)	25 000	5 000
9.1	Paragraphe 68(3)	10 000	2 000
10.	Paragraphe 71(2)	25 000	5 000
11.	Paragraphe 74(2)	25 000	5 000
12.	Article 82	25 000	5 000
13.	Article 83	10 000	2 000
13.01	Toute obligation imposée en vertu de l'article 169.37	100 000	100 000
13.1	Paragraphe 172(3)	25 000	5 000
14.	Paragraphe 178(5)	5 000	1 000
	Règlement sur les transports aériens		
15.	Alinéa 7(1)*a*)	25 000	5 000
16.	Alinéa 7(1)*b*)	25 000	5 000
17.	Paragraphe 7(3)	25 000	5 000
18.	Paragraphe 7(4)	25 000	5 000
19.	Paragraphe 8(1)	10 000	2 000
20.	Paragraphe 8(2)	5 000	1 000

Item	Column 1 Provision, Requirement or Condition	Column 2 Maximum Amount Payable — Corporation ($)	Column 3 Maximum Amount Payable — Individual ($)
21.	Subsection 8 2(1)	10,000	2,000
22.	Subsection 8.2(4)	25,000	5,000
23	Subsection 8.2(6)	25,000	5,000
24	Subparagraph 8.3(1)(*b*)(ii)	25,000	5,000
25.	Subsection 8.5(1)	10,000	2,000
26.	Subsection 10(2)	5,000	1,000
27.	Subsection 14(1)	5,000	1,000
28.	Subsection 15(3)	5,000	1,000
29.	Paragraph 18(*a*)	25,000	5,000
30.	Paragraph 18(*b*)	25,000	5,000
31	Paragraph 18(*c*)	10,000	2,000
32.	Section 19	5,000	1,000
33.	Paragraph 20(*a*)	10,000	2,000
34.	Paragraph 20(*b*)	10,000	2,000
35.	Section 80	25,000	5,000
36	Section 81	5,000	1,000
37.	Section 82	10,000	2,000
38.	Section 83	5,000	1,000
39. to 42. [Repealed, SOR/2009-28, s. 6]			
43.	Subsection 84(2)	10,000	2,000
44	Section 85	10,000	2,000
45.	Subsection 86(1)	10,000	2,000
46.	Subsection 86(2)	10,000	2,000
47.	Section 87	5,000	1,000
48.	Subsection 88(1)	10,000	2,000
49	Paragraph 93(1)(*a*)	25,000	5,000
50	Paragraph 93(1)(*b*)	25,000	5,000
51.	Paragraph 93(1)(*c*)	25,000	5,000
52.	Paragraph 93(1)(*d*)	25,000	5,000
53.	Paragraph 93(1)(*e*)	5,000	1,000
54.	Subsection 95(2)	25,000	5,000
55.	Paragraph 95(3)(*a*)	5,000	1,000
56.	Paragraph 95(3)(*c*)	25,000	5,000
57.	Paragraph 95(3)(*e*)	25,000	5,000
58	Paragraph 95(3)(*f*)	5,000	1,000
59.	Section 96	5,000	1,000
60.	Section 97	10,000	2,000
61.	Paragraph 99(1)(*a*)	5,000	1,000
62.	Paragraph 99(1)(*b*)	10,000	2,000
63.	Subsection 99(3)	10,000	2,000
64.	Section 100	5,000	1,000

Article	Colonne 1 Texte désigné	Colonne 2 Montant maximal de la sanction — Personne morale ($)	Colonne 3 Montant maximal de la sanction — Personne physique ($)
21.	Paragraphe 8.2(1)	10 000	2 000
22.	Paragraphe 8.2(4)	25 000	5 000
23.	Paragraphe 8.2(6)	25 000	5 000
24.	Sous-alinéa 8.3(1)*b*)(ii)	25 000	5 000
25.	Paragraphe 8.5(1)	10 000	2 000
26.	Paragraphe 10(2)	5 000	1 000
27.	Paragraphe 14(1)	5 000	1 000
28.	Paragraphe 15(3)	5 000	1 000
29.	Alinéa 18*a*)	25 000	5 000
30.	Alinéa 18*b*)	25 000	5 000
31.	Alinéa 18*c*)	10 000	2 000
32.	Article 19	5 000	1 000
33.	Alinéa 20*a*)	10 000	2 000
34.	Alinéa 20*b*)	10 000	2 000
35	Article 80	25 000	5 000
36	Article 81	5 000	1 000
37.	Article 82	10 000	2 000
38.	Article 83	5 000	1 000
39. à 42. [Abrogés, DORS/2009-28, art. 6]			
43.	Paragraphe 84(2)	10 000	2 000
44.	Article 85	10 000	2 000
45.	Paragraphe 86(1)	10 000	2 000
46.	Paragraphe 86(2)	10 000	2 000
47.	Article 87	5 000	1 000
48.	Paragraphe 88(1)	10 000	2 000
49.	Alinéa 93(1)*a*)	25 000	5 000
50.	Alinéa 93(1)*b*)	25 000	5 000
51.	Alinéa 93(1)*c*)	25 000	5 000
52.	Alinéa 93(1)*d*)	25 000	5 000
53.	Alinéa 93(1)*e*)	5 000	1 000
54.	Paragraphe 95(2)	25 000	5 000
55.	Alinéa 95(3)*a*)	5 000	1 000
56.	Alinéa 95(3)*c*)	25 000	5 000
57.	Alinéa 95(3)*e*)	25 000	5 000
58	Alinéa 95(3)*f*)	5 000	1 000
59.	Article 96	5 000	1 000
60.	Article 97	10 000	2 000
61.	Alinéa 99(1)*a*)	5 000	1 000
62.	Alinéa 99(1)*b*)	10 000	2 000
63.	Paragraphe 99(3)	10 000	2 000
64.	Article 100	5 000	1 000

Item	Column 1 Provision, Requirement or Condition	Column 2 Maximum Amount Payable — Corporation ($)	Column 3 Maximum Amount Payable — Individual ($)
65.	Subsection 101(1)	25,000	5,000
66.	Section 102	5,000	1,000
67.	Paragraph 103.2(1)(*a*)	25,000	5,000
68.	Subsection 103.2(2)	25,000	5,000
69.	Subsection 103.2(3)	10,000	2,000
70.	Section 103.3	10,000	2,000
71.	Paragraph 103.4(*a*)	10,000	2,000
72.	Paragraph 103.4(*b*)	10,000	2,000
73.	Paragraph 107(1)(*j*)	500	100
74.	Paragraph 107(1)(*l*)	500	100
75.	Paragraph 107(1)(*m*)	500	100
76.	Paragraph 107(1)(*n*)	500	100
77.	Paragraph 107(1)(*o*)	500	100
78.	Paragraph 107(1)(*p*)	500	100
79.	Subsection 110(1)	10,000	2,000
80.	Paragraph 110(3)(*a*)	10,000	2,000
81	Paragraph 110(3)(*b*)	25,000	5,000
82.	Subsection 110(4)	10,000	2,000
83.	Subsection 110(5)	10,000	2,000
84.	Subsection 116(1)	10,000	2,000
84.1	Subsection 116(2)	10,000	2,000
85.	Subsection 116(3)	5,000	1,000
85.1	Section 116.1	10,000	2,000
86.	Subsection 127(4)	5,000	1,000
87.	Subsection 127.1(2)	5,000	1,000
88	Subsection 129(1)	25,000	5,000
89.	Paragraph 135.3(1)(*a*)	10,000	2,000
90.	Paragraph 135.3(1)(*b*)	5,000	1,000
91	Paragraph 135.3(1)(*c*)	5,000	1,000
92.	Paragraph 135.3(1)(*d*)	5,000	1,000
93.	Subsection 135.3(2)	10,000	2,000
94	Subsection 135.3(3)	5,000	1,000
95.	Paragraph 135.3(4)(*b*)	500	100
96.	Paragraph 135.3(4)(*c*)	5,000	1,000
96.1	Paragraph 135.8(1)(*a*)	25,000	5,000
96.2	Paragraph 135.8(1)(*b*)	25,000	5,000
96.3	Paragraph 135.8(1)(*c*)	25,000	5,000
96.4	Paragraph 135.8(1)(*d*)	5,000	1,000
96.5	Paragraph 135.8(1)(*e*)	5,000	1,000
96.6	Paragraph 135.8(1)(*f*)	5,000	1,000
96.7	Subsection 135.8(2)	5,000	1,000
96.8	Subsection 135.8(3)	5,000	1,000

Article	Colonne 1 Texte désigné	Colonne 2 Montant maximal de la sanction — Personne morale ($)	Colonne 3 Montant maximal de la sanction — Personne physique ($)
65.	Paragraphe 101(1)	25 000	5 000
66.	Article 102	5 000	1 000
67.	Alinéa 103.2(1)*a*)	25 000	5 000
68.	Paragraphe 103.2(2)	25 000	5 000
69.	Paragraphe 103.2(3)	10 000	2 000
70.	Article 103.3	10 000	2 000
71	Alinéa 103.4*a*)	10 000	2 000
72.	Alinéa 103.4*b*)	10 000	2 000
73.	Alinéa 107(1)*j*)	500	100
74.	Alinéa 107(1)*l*)	500	100
75.	Alinéa 107(1)*m*)	500	100
76.	Alinéa 107(1)*n*)	500	100
77.	Alinéa 107(1)*o*)	500	100
78.	Alinéa 107(1)*p*)	500	100
79.	Paragraphe 110(1)	10 000	2 000
80.	Alinéa 110(3)*a*)	10 000	2 000
81.	Alinéa 110(3)*b*)	25 000	5 000
82.	Paragraphe 110(4)	10 000	2 000
83.	Paragraphe 110(5)	10 000	2 000
84.	Paragraphe 116(1)	10 000	2 000
84.1	Paragraphe 116(2)	10 000	2 000
85.	Paragraphe 116(3)	5'000	1 000
85.1	Article 116.1	10 000	2 000
86.	Paragraphe 127(4)	5 000	1 000
87.	Paragraphe 127.1(2)	5 000	1 000
88.	Paragraphe 129(1)	25 000	5 000
89.	Alinéa 135.3(1)*a*)	10 000	2 000
90.	Alinéa 135.3(1)*b*)	5 000	1 000
91.	Alinéa 135.3(1)*c*)	5 000	1 000
92.	Alinéa 135.3(1)*d*)	5 000	1 000
93.	Paragraphe 135.3(2)	10 000	2 000
94.	Paragraphe 135.3(3)	5 000	1 000
95.	Alinéa 135.3(4)*b*)	500	100
96.	Alinéa 135.3(4)*c*)	5 000	1 000
96.1	Alinéa 135.8(1)*a*)	25 000	5 000
96.2	Alinéa 135.8(1)*b*)	25 000	5 000
96.3	Alinéa 135.8(1)*c*)	25 000	5 000
96.4	Alinéa 135.8(1)*d*)	5 000	1 000
96.5	Alinéa 135.8(1)*e*)	5 000	1 000
96.6	Alinéa 135.8(1)*f*)	5 000	1 000
96.7	Paragraphe 135.8(2)	5 000	1 000
96.8	Paragraphe 135.8(3)	5 000	1 000

Item	Column 1 Provision, Requirement or Condition	Column 2 Maximum Amount Payable — Corporation ($)	Column 3 Maximum Amount Payable — Individual ($)
96.9	Section 135.9	5,000	1,000
96.91	Section 135.91	5,000	1,000
96.92	Section 135.92	5,000	1,000
97.	Section 137	5,000	1,000
98.	Section 141	5,000	1,000
99.	Paragraph 144(*b*)	500	100
100.	Subsection 147(1)	10,000	2,000
101	Subsection 147(2)	10,000	2,000
102.	Subsection 148(1)	10,000	2,000
103.	Paragraph 148(2)(*b*)	10,000	2,000
104.	Subsection 148(3)	10,000	2,000
105	Subsection 148(4)	10,000	2,000
106	Subsection 148(5)	10,000	2,000
107	Subsection 149(1)	10,000	2,000
108.	Subsection 149(2)	10,000	2,000
109.	Section 150	10,000	2,000
110.	Subsection 151(1)	10,000	2,000
111.	Subsection 151(2)	10,000	2,000
112.	Section 153	10,000	2,000
113.	Section 154	10,000	2,000
114.	Subsection 155(1)	10,000	2,000
115.	Subsection 155(2)	10,000	2,000
116	Subsection 155(3)	10,000	2,000
117.	Subsection 155(4)	10,000	2,000
	Personnel Training for the Assistance of Persons with Disabilities Regulations		
118.	Section 4	10,000	2,000
119	Section 5	10,000	2,000
120	Section 6	10,000	2,000
121.	Section 7	10,000	2,000
122.	Section 8	10,000	2,000
123.	Section 9	10,000	2,000
124.	Section 11	10,000	2,000

SOR/2001-72, s. 1; SOR/2009-28, ss. 4 to 8; SOR/2012-298, s. 4; SOR/2014-71, ss. 4(E), 5.

Article	Colonne 1 Texte désigné	Colonne 2 Montant maximal de la sanction — Personne morale ($)	Colonne 3 Montant maximal de la sanction — Personne physique ($)
96.9	Article 135.9	5 000	1 000
96.91	Article 135.91	5 000	1 000
96.92	Article 135.92	5 000	1 000
97.	Article 137	5 000	1 000
98.	Article 141	5 000	1 000
99.	Alinéa 144*b*)	500	100
100.	Paragraphe 147(1)	10 000	2 000
101	Paragraphe 147(2)	10 000	2 000
102.	Paragraphe 148(1)	10 000	2 000
103.	Alinéa 148(2)*b*)	10 000	2 000
104.	Paragraphe 148(3)	10 000	2 000
105.	Paragraphe 148(4)	10 000	2 000
106.	Paragraphe 148(5)	10 000	2 000
107.	Paragraphe 149(1)	10 000	2 000
108.	Paragraphe 149(2)	10 000	2 000
109.	Article 150	10 000	2 000
110.	Paragraphe 151(1)	10 000	2 000
111.	Paragraphe 151(2)	10 000	2 000
112.	Article 153	10 000	2 000
113.	Article 154	10 000	2 000
114.	Paragraphe 155(1)	10 000	2 000
115.	Paragraphe 155(2)	10 000	2 000
116.	Paragraphe 155(3)	10 000	2 000
117.	Paragraphe 155(4)	10 000	2 000
	Règlement sur la formation du personnel en matière d'aide aux personnes ayant une déficience		
118.	Article 4	10 000	2 000
119.	Article 5	10 000	2 000
120.	Article 6	10 000	2 000
121.	Article 7	10 000	2 000
122.	Article 8	10 000	2 000
123.	Article 9	10 000	2 000
124.	Article 11	10 000	2 000

DORS/2001-72, art. 1; DORS/2009-28, art. 4 à 8; DORS/2012-298, art. 4; DORS/2014-71, art. 4(A) et 5.

TAB E

Ceci est la pièce E de l'affidavit
This is Exhibit referred to in the Affidavit

de Simona Sasova
of

assermenté devant moi ce 20th jour de May 2014
sworn to before me this day of

Andray Renaud
Commissaire à l'assermentation
Commissioner for Oaths

ANDRAY RENAUD, AVOCATE
194392-8
BARREAU DU QUÉBEC

PART V.1

ADVERTISING PRICES

INTERPRETATION

135.5 The following definitions apply in this Part.

"air transportation charge" means, in relation to an air service, every fee or charge that must be paid upon the purchase of the air service, including the charge for the costs to the air carrier of providing the service, but excluding any third party charge. (*frais du transport aérien*)

"third party charge" means, in relation to an air service or an optional incidental service, any tax or prescribed fee or charge established by a government, public authority or airport authority, or by an agent of a government, public authority or airport authority, that upon the purchase of the service is collected by the air carrier or other seller of the service on behalf of the government, the public or airport authority or the agent for remittance to it. (*somme perçue pour un tiers*)

"total price" means

(*a*) in relation to an air service, the total of the air transportation charges and third party charges that must be paid to obtain the service; and

(*b*) in relation to an optional incidental service, the total of the amount that must be paid to obtain the service, including all third party charges. (*prix total*)

SOR/2012-298, s. 3.

135.6 For the purposes of subsection 86.1(2) of the Act and this Part, a prescribed fee or charge is one that is fixed on a per person or *ad valorem* basis.

SOR/2012-298, s. 3.

APPLICATION

135.7 (1) Subject to subsection (2), this Part applies to advertising in all media of prices for air services within, or originating in, Canada.

PARTIE V.1

PUBLICITÉ DES PRIX

DÉFINITIONS ET INTERPRÉTATION

135.5 Les définitions qui suivent s'appliquent à la présente partie.

« frais du transport aérien » S'entend, à l'égard d'un service aérien, de tout frais ou droit qui doit être payé lors de l'achat du service, y compris les coûts supportés par le transporteur aérien pour la fourniture du service, mais à l'exclusion des sommes perçues pour un tiers. (*air transportation charge*)

« prix total » S'entend :

a) à l'égard d'un service aérien, de la somme des frais du transport aérien et des sommes perçues pour un tiers à payer pour ce service;

b) à l'égard d'un service optionnel connexe, de la somme totale à payer pour ce service, y compris les sommes perçues pour un tiers. (*total price*)

« somme perçue pour un tiers » S'entend, à l'égard d'un service aérien ou d'un service optionnel connexe, d'une taxe ou d'un frais ou droit visé à l'article 135.6 établi par un gouvernement, une autorité publique, une autorité aéroportuaire ou un agent de ceux-ci et qui est, lors de l'achat du service, perçu par le transporteur aérien ou autre vendeur pour le compte de ce gouvernement, de cette autorité ou de cet agent afin de le lui être remis. (*third party charge*)

DORS/2012-298, art. 3.

135.6 Pour l'application du paragraphe 86.1(2) de la Loi, les frais et droits visés sont ceux établis par personne ou proportionnellement à une valeur de référence.

DORS/2012-298, art. 3.

CHAMP D'APPLICATION

135.7 (1) Sous réserve du paragraphe (2), la présente partie s'applique à toute publicité dans les médias relative aux prix de services aériens au Canada ou dont le point de départ est au Canada.

(2) This Part does not apply to an advertisement that relates to

(*a*) an air cargo service;

(*b*) a package travel service that includes an air service and any accommodation, surface transportation or entertainment activity that is not incidental to the air service; or

(*c*) a price that is not offered to the general public and is fixed through negotiation.

(3) This Part does not apply to a person who provides another person with a medium to advertise the price of an air service.

SOR/2012-298, s. 3.

REQUIREMENTS AND PROHIBITIONS RELATING TO ADVERTISING

135.8 (1) Any person who advertises the price of an air service must include in the advertisement the following information:

(*a*) the total price that must be paid to the advertiser to obtain the air service, expressed in Canadian dollars and, if it is also expressed in another currency, the name of that currency;

(*b*) the point of origin and point of destination of the service and whether the service is one way or round trip;

(*c*) any limitation on the period during which the advertised price will be offered and any limitation on the period for which the service will be provided at that price;

(*d*) the name and amount of each tax, fee or charge relating to the air service that is a third party charge;

(*e*) each optional incidental service offered for which a fee or charge is payable and its total price or range of total prices; and

(*f*) any published tax, fee or charge that is not collected by the advertiser but must be paid at the point of origin or departure by the person to whom the service is provided.

(2) La présente partie ne s'applique pas à la publicité relative :

a) à un service aérien de transport de marchandises;

b) à un forfait comprenant un service aérien et tout logement, tout transport terrestre ou toute activité de divertissement qui ne constitue pas un service connexe au service aérien;

c) à un prix qui n'est pas offert au grand public et qui est fixé par voie de négociations.

(3) La présente partie ne s'applique pas à la personne qui fournit un média à une autre personne pour annoncer le prix d'un service aérien.

DORS/2012-298, art. 3.

EXIGENCES ET INTERDICTIONS RELATIVES AUX PUBLICITÉS

135.8 (1) Quiconque annonce le prix d'un service aérien dans une publicité doit y inclure les renseignements suivants :

a) le prix total à payer à l'annonceur pour le service, en dollars canadiens, et, si le prix total est également indiqué dans une autre devise, la devise en cause;

b) le point de départ et le point d'arrivée du service et s'il s'agit d'un aller simple ou d'un aller-retour;

c) toute restriction quant à la période pendant laquelle le prix annoncé sera offert et toute restriction quant à la période pour laquelle le service sera disponible à ce prix;

d) le nom et le montant de chacun des frais, droits et taxes qui constituent des sommes perçues pour un tiers pour ce service;

e) les services optionnels connexes offerts pour lesquels un frais ou un droit est à payer ainsi que leur prix total ou échelle de prix total;

f) les frais, droits ou taxes publiés qui ne sont pas perçus par lui mais qui doivent être payés au point de départ ou d'arrivée du service par la personne à qui celui-ci est fourni.

(2) A person who advertises the price of an air service must set out all third party charges under the heading "Taxes, Fees and Charges" unless that information is only provided orally.

(3) A person who mentions an air transportation charge in the advertisement must set it out under the heading "Air Transportation Charges" unless that information is only provided orally.

(4) A person who advertises the price of one direction of a round trip air service is exempt from the application of paragraph (1)(*a*) if the following conditions are met:

(*a*) the advertised price is equal to 50% of the total price that must be paid to the advertiser to obtain the service;

(*b*) it is clearly indicated that the advertised price relates to only one direction of the service and applies only if both directions are purchased; and

(*c*) the advertised price is expressed in Canadian dollars and, if it is also expressed in another currency, the name of that other currency is specified.

(5) A person is exempt from the requirement to provide the information referred to in paragraphs (1)(*d*) to (*f*) in their advertisement if the following conditions are met:

(*a*) the advertisement is not interactive; and

(*b*) the advertisement mentions a location that is readily accessible where all the information referred to in subsection (1) can be readily obtained.

SOR/2012-298, s. 3.

135.9 A person must not provide information in an advertisement in a manner that could interfere with the ability of anyone to readily determine the total price that must be paid for an air service or for any optional incidental service.

SOR/2012-298, s. 3.

135.91 A person must not set out an air transportation charge in an advertisement as if it were a third party

(2) Quiconque annonce le prix d'un service aérien dans une publicité doit y indiquer les sommes perçues pour un tiers pour ce service sous le titre « Taxes, frais et droits », à moins que ces sommes ne soient annoncées qu'oralement.

(3) Quiconque fait mention d'un frais du transport aérien dans une publicité doit l'indiquer sous le titre « Frais du transport aérien», à moins que le frais du transport ne soit annoncé qu'oralement.

(4) La personne qui annonce dans sa publicité le prix pour un aller simple d'un service aller-retour est exemptée de l'application de l'alinéa (1)*a*) si les conditions ci-après sont remplies :

a) le prix annoncé correspond à cinquante pour cent du prix total à payer à l'annonceur pour le service;

b) il est clairement indiqué que le prix annoncé n'est que pour un aller simple et qu'il ne s'applique qu'à l'achat d'un aller-retour;

c) le prix annoncé est en dollars canadiens et, s'il est également indiqué dans une autre devise, la devise est précisée.

(5) La personne est exemptée d'inclure dans sa publicité les renseignements visés aux alinéas (1)*d*) à *f*) si les conditions ci-après sont remplies :

a) la publicité n'est pas interactive;

b) la publicité renvoie à un endroit facilement accessible où tous les renseignements visés au paragraphe (1) peuvent être facilement obtenus.

DORS/2012-298, art. 3.

135.9 Il est interdit de présenter des renseignements dans une publicité d'une manière qui pourrait nuire à la capacité de toute personne de déterminer aisément le prix total à payer pour un service aérien ou pour les services optionnels connexes.

DORS/2012-298, art. 3.

135.91 Il est interdit de présenter dans une publicité un frais du transport aérien comme étant une somme per-

charge or use the term "tax" in an advertisement to describe an air transportation charge.

SOR/2012-298, s. 3.

135.92 A person must not refer to a third party charge in an advertisement by a name other than the name under which it was established.

SOR/2012-298, s. 3.

çue pour un tiers ou d'y utiliser le terme « taxe » pour désigner un frais du transport aérien.

DORS/2012-298, art. 3.

135.92 Il est interdit de désigner dans une publicité une somme perçue pour un tiers sous un nom autre que celui sous lequel elle a été établie.

DORS/2012-298, art. 3.

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ARCHIVED — Vol. 147, No. 1 — January 2, 2013

Registration

SOR/2012-298 December 14, 2012

CANADA TRANSPORTATION ACT

Regulations Amending the Air Transportation Regulations and the Canadian Transportation Agency Designated Provisions Regulations

P.C. 2012-1751 December 13, 2012

His Excellency the Governor General in Council, on the recommendation of the Minister of Transport, pursuant to subsection 36(1) of the *Canada Transportation Act* (see footnote a), approves the annexed *Regulations Amending the Air Transportation Regulations and the Canadian Transportation Agency Designated Provisions Regulations*, made by the Canadian Transportation Agency.

REGULATIONS AMENDING THE AIR TRANSPORTATION REGULATIONS AND THE CANADIAN TRANSPORTATION AGENCY DESIGNATED PROVISIONS REGULATIONS

AIR TRANSPORTATION REGULATIONS

1. The definition "toll" in section 2 of the *Air Transportation Regulations* (see footnote 1) is repealed.

2. The Regulations are amended by adding the following after section 2:

2.1 For the purposes of these Regulations, "toll" means any fare, rate or charge established by an air carrier in respect of the shipment, transportation, care, handling or delivery of passengers or goods or of any service that is incidental to those services.

3. The Regulations are amended by adding the following after Part V:

PART V.1

ADVERTISING PRICES

INTERPRETATION

135.5 The following definitions apply in this Part.

"air transportation charge" means, in relation to an air service, every fee or charge that must be paid upon the purchase of the air service, including the charge for the costs to the air carrier of providing the service, but excluding any third party charge. (*frais du transport aérien*)

"third party charge" means, in relation to an air service or an optional incidental service, any tax or prescribed fee or charge established by a government, public authority or airport authority, or by an agent of a government, public authority or airport authority, that upon the purchase of the service is collected by the air carrier or other seller of the service on behalf of the government, the public or airport authority or the agent for remittance to it. (*somme perçue pour un tiers*)

"total price" means

(*a*) in relation to an air service, the total of the air transportation charges and third party charges that must be paid to obtain the service; and

(*b*) in relation to an optional incidental service, the total of the amount that must be paid to obtain the service, including all third party charges. (prix total)

135.6 For the purposes of subsection 86.1(2) of the Act and this Part, a prescribed fee or charge is one that is fixed on a per person or *ad valorem* basis.

APPLICATION

135.7 (1) Subject to subsection (2), this Part applies to advertising in all media of prices for air services within, or originating in, Canada.

(2) This Part does not apply to an advertisement that relates to

(*a*) an air cargo service;

(*b*) a package travel service that includes an air service and any accommodation, surface transportation or entertainment activity that is not incidental to the air service; or

(*c*) a price that is not offered to the general public and is fixed through negotiation.

(3) This Part does not apply to a person who provides another person with a medium to advertise the price of an air service.

REQUIREMENTS AND PROHIBITIONS RELATING TO ADVERTISING

135.8 (1) Any person who advertises the price of an air service must include in the advertisement the following information:

(*a*) the total price that must be paid to the advertiser to obtain the air service, expressed in Canadian dollars and, if it is also expressed in another currency, the name of that currency;

(*b*) the point of origin and point of destination of the service and whether the service is one way or round trip;

(*c*) any limitation on the period during which the advertised price will be offered and any limitation on the period for which the service will be provided at that price;

(*d*) the name and amount of each tax, fee or charge relating to the air service that is a third party charge;

(*e*) each optional incidental service offered for which a fee or charge is payable and its total price or range of total prices; and

(*f*) any published tax, fee or charge that is not collected by the advertiser but must be paid at the point of origin or departure by the person to whom the service is provided.

(2) A person who advertises the price of an air service must set out all third party charges under the heading "Taxes, Fees and Charges" unless that information is only provided orally.

(3) A person who mentions an air transportation charge in the advertisement must set it out under the heading "Air Transportation Charges" unless that information is only provided orally.

(4) A person who advertises the price of one direction of a round trip air service is exempt from the application of paragraph (1)(*a*) if the following conditions are met:

(*a*) the advertised price is equal to 50% of the total price that must be paid to the advertiser to obtain the service;

(*b*) it is clearly indicated that the advertised price relates to only one direction of the service and applies only if both directions are purchased; and

(*c*) the advertised price is expressed in Canadian dollars and, if it is also expressed in another currency, the name of that other currency is specified.

(5) A person is exempt from the requirement to provide the information referred to in paragraphs (1)(*d*) to (*f*) in their advertisement if the following conditions are met:

(*a*) the advertisement is not interactive; and

(*b*) the advertisement mentions a location that is readily accessible where all the information referred to in subsection (1) can be readily obtained.

135.9 A person must not provide information in an advertisement in a manner that could interfere with the ability of anyone to readily determine the total price that must be paid for an air service or for any optional incidental service.

135.91 A person must not set out an air transportation charge in an advertisement as if it were a third party charge or use the term "tax" in an advertisement to describe an air transportation charge.

135.92 A person must not refer to a third party charge in an advertisement by a name other than the name under which it was established.

CANADIAN TRANSPORTATION AGENCY DESIGNATED PROVISIONS REGULATIONS

4. The schedule the *Canadian Transportation Agency Designated Provisions Regulations* (see footnote 2) **is amended by adding the following after item 96:**

Item	Column 1 Designated Provision	Column 2 Maximum Amount of Penalty — Corporation ($)	Column 3 Maximum Amount of Penalty — Individual ($)
96.1	Paragraph 135.8 (1)(*a*)	25,000	5,000
96.2	Paragraph 135.8 (1)(*b*)	25,000	5,000
96.3	Paragraph 135.8 (1)(*c*)	25,000	5,000

Item	Column 1 Designated Provision	Column 2 Maximum Amount of Penalty — Corporation ($)	Column 3 Maximum Amount of Penalty — Individual ($)
96.4	Paragraph 135.8 (1)(*d*)	5,000	1,000
96.5	Paragraph 135.8 (1)(*e*)	5,000	1,000
96.6	Paragraph 135.8 (1)(*f*)	5,000	1,000
96.7	Subsection 135.8(2)	5,000	1,000
96.8	Subsection 135.8(3)	5,000	1,000
96.9	Section 135.9	5,000	1,000
96.91	Section 135.91	5,000	1,000
96.92	Section 135.92	5,000	1,000

COMING INTO FORCE

5. These Regulations come into force on the day on which they are registered under section 6 of the *Statutory Instruments Act*.

REGULATORY IMPACT ANALYSIS STATEMENT

(*This statement is not part of the Regulations.*)

Background

Interest in addressing air service price advertising in Canada began to emerge a number of years ago. In 2007, Bill C-11, *An Act to amend the Canada Transportation Act and the Railway Safety Act and to make consequential amendments to other Acts,* proposed several changes to the *Canada Transportation Act* (Act). One of the proposed changes, section 86.1, which mandated the development of air price advertising regulations, was included in this bill but was not put into force due to industry and other concerns at the time.

Since 2007, there have been significant developments in the air services pricing regimes of Canada's major economic partners. Regulations governing the advertisement of the price of air services were established in the European Union in 2008. The United States, which has had air fare advertising regulatory rules in place since 1992, updated its regime in January 2012 to require air price advertising to be based on the display of a single total price.

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.

In keeping with these worldwide trends, many of the key players in the Canadian air industry have either begun to employ or have transitioned to some form of an all-inclusive air fare advertising format.

In its role as an economic regulator and aeronautical authority, the Canadian Transportation Agency (Agency) administers regulations which govern the Canadian air transportation marketplace. Based on the December 2011 enactment of section 86.1 of the Act, the Agency is amending the *Air Transportation Regulations* (ATR) pertaining to the advertisement of the price of air services.

Issue

A significant number of Canadians have expressed their displeasure with regard to the manner in which the price of air services is represented in advertisements.

Specifically, they have indicated that it is

- difficult to determine the total price of an air service being offered in an advertisement when fuel surcharges, taxes, charges and other fees are not included in the advertised price;
- frustrating to investigate purchasing an air service only to find out that the actual price of the air service would be significantly greater than the advertised price; and
- difficult and time consuming to make comparisons between the advertised prices of different players which could lead to inappropriate choices based on perceptions of advertised prices.

At the industry level, stakeholders have also indicated that they would welcome rules that would level the playing field and be applicable to anyone involved in the air market.

Accountability would also be enhanced with the disclosure of third-party taxes, fees and charges in the advertised price.

Objectives

The amendments to the ATR (amendments) support two key objectives:

Objective 1 — Enable consumers to readily determine the total price of an advertised air service

The display of the total price in air service price advertising reduces confusion and frustration as to the total price and increases transparency. It also allows consumers to more readily conduct price comparisons and make informed choices.

Objective 2 — Promote fair competition between all advertisers in the air service industry

Regulation of all-inclusive air price advertising promotes competition by achieving a level playing field for all persons who advertise the price of air services within, or originating in, Canada.

Description

The amendments require all persons who advertise the price of an air service to display the total price, inclusive of all fees, charges and taxes. The intent of the amendments is to provide greater transparency in air price advertising for consumers while providing a level playing field for all air service advertisers.

Scope

The amendments apply to any person who advertises the price of air services within, or originating in, Canada, regardless of media. Given the wide breadth of advertising of air fares in the air industry, the amendments do not specify categories of stakeholders subject to the regulation (i.e. air carrier or travel agent), but rather focus more broadly on any person who engages in the activity of advertising the price of an air service.

Exclusions

The amendments do not apply to air cargo services or to services which are only offered "business to business" rather than to the general public. In addition, the amendments do not apply to packaged travel services, which in addition to an air service include other features such as accommodation, cruise, tours or car rental.

In keeping with the scope of the Act, air services that are excluded from the application of the Act are also excluded from the Amendments. Selected examples of such excluded air services are aerial surveying, aerial inspection and aerial fire-fighting. A complete list of excluded air services is provided in section 56 of the Act and section 3 of the ATR.

In order to retain the regulatory focus on the person responsible for the content of the advertisement, the amendments do not apply to any person whose sole involvement in the advertising of an air service is the provision of the advertising medium, for example newspaper publishers or radio stations.

Representation of total price

The amendments require the price represented in any advertisement

- to be the total price, inclusive of all taxes, fees and charges which a customer must pay in order to obtain and complete the air service;
- to include a minimum level of description of the air service offered, including
  - origin and destination,
  - whether the service is one way or round trip, and
  - limitations with respect to booking or travel availability periods; and
- to provide the customer with a breakdown of the taxes, fees and charges which are paid to a third party.

In acknowledgement of the technical differences of the various media, some flexibility is provided in the regulatory text to accommodate the limitations of certain media by allowing the required breakdown of information in the advertisement to be provided at another location. For example, in the case of announcement of the total all-inclusive price of an air service via a brief radio advertisement, the advertiser would be in compliance with the regulatory text if the advertisement included the mention of a location where a breakdown of necessary information (e.g. taxes, fees and charges) could be obtained (e.g. Web site or toll-free telephone number.)

The amendments also require that a consumer have access to a listing of any optional services offered by the service provider for a fee or charge, and that the price, or range of prices for each service be displayed as the total amount that must be paid to obtain the service, including all third-party charges.

Amendments to the *Canadian Transportation Agency Designated Provisions Regulations*

To ensure enforcement of the amendments, the *Canadian Transportation Agency Designated Provisions Regulations* are being amended to permit the issuance of administrative monetary penalties. The text also includes the designated sections of the amendments and the maximum amount of the penalty that can be applied to either a corporation or an individual.

Consultation

Prior to prepublication of the proposed amendments in the *Canada Gazette*, Part I, the Agency undertook an extensive consultation in January and February 2012 with air industry stakeholders, consumer associations and members of the general public. Input gathered from these consultations was carefully considered in the development of the draft Regulations.

The proposed amendments were prepublished in the *Canada Gazette*, Part I, on June 30, 2012, followed by a 75-day consultation period ending on September 13, 2012. In addition, identified stakeholders were targeted with direct mailings to inform them of the prepublication and the opportunity to comment. This direct mailing was further supported by a concerted effort to engage

electronic and print media outlets. In response, a total of 18 comments were received, 13 from industry stakeholders and 5 from the general public.

All submissions received expressed support for the overall objectives of the proposed amendments. The comments received fell into six categories:

1. Scope;
2. Publishing fees, taxes and charges not collected by the carrier;
3. Implementation costs;
4. Penalties;
5. Optional incidental services; and
6. Clarifications.

1. Scope

- The majority of air industry stakeholders were strongly supportive of including advertising by travel agencies within the scope of the Regulations. However, a single commenter advocated excluding them altogether.
- Three air industry stakeholders stated that they were in favour of including packaged travel services in the Regulations.

Subsection 86.1(1) of the enabling legislation directs the Agency to make regulations respecting advertising, in all media, of prices for 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.

With respect to packaged travel services, subsection 86.1(1) of the Act only refers to the advertisement of "air services." As packaged travel services include an assortment of travel services including car rentals, hotels and holiday cruises among others, the advertising of such packaged services is beyond the legislative scope of these amendments.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 Agency received one comment which identified loyalty programs as "misleading advertising" that should be subject to regulation. The Agency also received one submission which recommended that loyalty programs be specifically excluded from the proposed Regulations.

As noted in the RIAS which accompanied the prepublication, the Agency remains of the opinion that loyalty programs constitute a business practice and are not within the regulatory scope of the proposed amendments. After consideration of both comments received, the Agency does not recommend any change to the proposed amendments and will proceed with them as originally prepublished in the *Canada Gazette*, Part I.

- Three air industry stakeholders commented that under the Regulations, U.S. air carriers would be permitted to advertise in Canada flights that occur entirely in the United States without adhering to the Canadian Regulations.

As was recognized by several commenters, the legislative authority found in section 86.1 of the Act extends only to air services "within, or originating in" Canada. Therefore, expansion beyond the existing authority provided in the Act to flights outside Canada is beyond the scope of the amendments.

- One commenter indicated that the Agency had inadequate remedial and enforcement mechanisms. Specifically, the commenter noted that
  - the Agency does not have the power to order a payment of compensation to any person affected by a failure to comply with the proposed amendments; and
  - the proposed fines are unreasonably low and would fail to serve as a deterrent to breaching the provisions or to provide an incentive for compliance.

This commenter recognized that neither of these two points falls within the scope of the proposed amendments and that changes to the enabling legislation would be necessary to address these elements.

To support compliance, the Agency will work with advertisers of the price of air services to provide educational and other guidance materials to assist in the transition to the new regime. The Agency will monitor compliance with the proposed amendments and will conduct enforcement using its authority under the Act.

As with all Agency enforcement actions, the determination of what corrective measures and/or penalties are assessed for a contravention is based on a number of factors, including the frequency and nature of the offence.

The Agency is of the opinion that it has sufficient enforcement and education mechanisms to effectively implement the proposed amendments.

2. Publishing fees, taxes and charges not collected by the carrier

- Several air industry stakeholders were not in favour of including paragraph 135.8(1)(*f*) of the regulatory text, a paragraph that refers to "any tax, fee or charge not collected by the advertiser" but paid by the air traveller. The comments also suggested that compliance costs associated with the creation and ongoing updating of a database of such charges on a worldwide basis could be significant.

The Agency is confident that existing industry manuals, tools and databases provide appropriate reference material to inform the industry of such published charges to support them in conveying these additional costs to the consumer. It was also noted that no quantitative evidence was provided by those who made this comment to substantiate the claim of significant compliance costs.

3. Implementation costs

- Two air industry stakeholders suggested that the costs of implementing the computer system changes required to comply with the Regulations could require a significant investment in terms of time, resources and programming.

The Agency noted that no documentation was provided by those who made this comment to support their assertion that a significant investment would be required in order to comply with the proposed amendments. The Agency notes the air industry has already moved towards some form of all-inclusive price format, in part due to similar regulatory regimes in the European Union and the United States. In light of the progress made to date by the industry, the Agency is of the view that any additional costs of compliance would be minor and non-recurring.

4. Penalties

- A single member of the general public commented that the maximum administrative monetary penalties associated with the Regulations are too low to provide a reasonable deterrent.

To enforce the Agency's proposed amendments, the Agency may levy an administrative monetary penalty up to the existing maximum value of a penalty as specified in the Act. The Agency has made comparisons and found that the value of the administrative monetary penalties it may apply are in keeping with the value found in other international regimes.

5. Optional incidental services

- One member of the general public suggested that a definition of "optional incidental service" be included in the Regulations to eliminate any confusion as to what charges/fees should be included in the total price advertised. The same commenter advocated that carry-on and baggage fees should be specifically included in the advertised price.

The Agency remains of the view that the purpose of the regulatory regime is to foster transparent pricing and not to dictate business practices. The Agency notes that market conditions and consumer

demand create a wide scope to what may constitute an optional incidental service and whether or not this service may be subject to a charge. The proposed amendments require the advertiser to make the purchaser aware of these charges and require that the advertised price for any optional incidental charge be presented in the total price format.

6. Clarifications

- A small number of comments were received from both air industry stakeholders and members of the general public seeking clarification on certain elements of the Regulations.
- One stakeholder specifically requested the addition of the word "carrier" to be added in addition to the term "advertiser."

In addition to specific wording changes to expand or reduce the scope of the proposed amendments, as noted above, the Agency also received a small number of comments which either questioned the meaning of the proposed text of the amendment or which suggested changes to proposed definitions. The Agency has carefully reviewed the regulatory text and determined that no changes are required; however, to provide further clarity, the Agency has developed, informed by these consultations, additional guidance material which it will make available via its Web site to all advertisers and to the Canadian public.

The Agency is confident that the definition of advertiser is sufficient to encompass any person who advertises, including a "carrier."

Therefore, in conclusion, after careful consideration of all comments received, the Agency is of the view that no changes to the regulatory text are required. The Agency will, however, work with air industry stakeholders and other interested parties to provide clarification and to facilitate compliance.

"One-for-One" Rule

The "One-for-One" Rule does not apply as the Regulations are not expected to result in any incremental administrative burden on business.

Small business lens

In light of the progress to date and continued evolution of the air industry towards some form of a single price format, the Agency has determined that any costs of compliance with the amendments would be minor, non-recurring and would not have a disproportionate effect on small businesses in Canada.

Given the frequency with which the air travel industry makes pricing changes in advertisements and produces new advertisements, any costs associated with changes required by the amendments would be minor and could be absorbed as part of the regular business cycle.

The new regulatory requirements would not impose any additional administrative burden on businesses in relation to the reporting of information or the completion of forms or schedules by industry for submission to the Agency.

Rationale

The consultation process following prepublication in the *Canada Gazette*, Part I, confirmed broad support for the objectives of the amendments from both industry stakeholders and consumers.

Objective 1 — Enable consumers to readily determine the total price of an advertised air service

The amendments will require advertisers to provide consumers with the total price, inclusive of all taxes, fees and charges, which must be paid to obtain and complete travel. The objective is to provide consumers with the ability to readily compare advertised prices for air services, regardless of where they live in Canada and also to ensure an appropriate level of harmonization with air price advertising formats found in the American and European markets.

It is anticipated that there would be no cost to consumers as the result of the amendments.

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 ATR.

Objective 2 — Promote fair competition in the air service industry

With respect to the second objective, to the extent possible, the amendments harmonize the Canadian air fare advertisement regime with those of its major economic partners and provincial governments. For air carriers and other advertisers that also advertise in the American or European markets, the amendments are in keeping with these regimes.

Following the Government of Canada's announcement in December 2011 of its intention to develop regulations in the area of air services price advertising, a number of the major air carriers proactively adopted some form of a "single price" advertising format. Several of the large travel agencies and tour operators either were already using or have recently adopted similar "single price" advertising practices.

As noted, one air carrier did mention that financial costs for compliance with the amendments could be significant but did not provide any evidence to support this position. Based on the Agency's previous consultations with the air service industry, however, and taking into account the experience of both the United States and the European Union, the Agency remains of the opinion that the cost of changing key forms of advertising materials to comply with the amendments would be minor and would have no effect on the price of purchasing space in advertising media.

In determining the impact on the industry, the Agency noted 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 travel services may be performed. The amendments do not conflict with these existing provincial regimes as the federal requirements would require compliance with a comparable or higher standard. As well, the scope of the amendments excludes packaged travel services that are within the domain of provincial travel and/or consumer protection related legislation.

Given the frequency with which air service prices change due to market forces, it is assumed that any minor costs associated with the updating of pricing formats could be absorbed as part of the regular business cycle.

Implementation, enforcement and service standards

Compliance with the Regulations and a program of effective enforcement are crucial to the success of the regulatory regime. The Agency will begin monitoring compliance with the amendments as soon as they are registered. The Agency will bring about compliance by monitoring industry behaviour, increasing awareness through outreach activities, working collaboratively with advertisers and, when necessary, by using enforcement mechanisms.

In order to support enforcement, the *Canadian Transportation Agency Designated Provisions Regulations* have also been amended as indicated in the text to set out which of the proposed amendments, if contravened, may result in administrative monetary penalties. The Agency may impose fines of up to $5,000 for an individual and $25,000 for a corporation where either has been found guilty of an offence as a result of contravening these Regulations. As with all Agency enforcement actions, the determination of what corrective measures and/or penalties are required in the case of contravention is based on a number of factors including the frequency and nature of the offence.

In addition, the Agency may order a person to make changes to its air services advertising practices as necessary in order to conform to the Regulations and to bring about compliance.

Contact

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Footnote a
S.C. 1996, c. 10

Footnote 1
SOR/88-58

Footnote 2
SOR/99-244

Date modified: 2013-02-11

TAB F

Ceci est la pièce F de l'affidavit
This is Exhibit referred to in the Affidavit

de Simona Sasava
of

assermenté devant moi ce 30th jour de May me 2014
sworn to before me this day of

Lydia Renaud
Commissaire à l'assermentation
Commissioner for Oaths

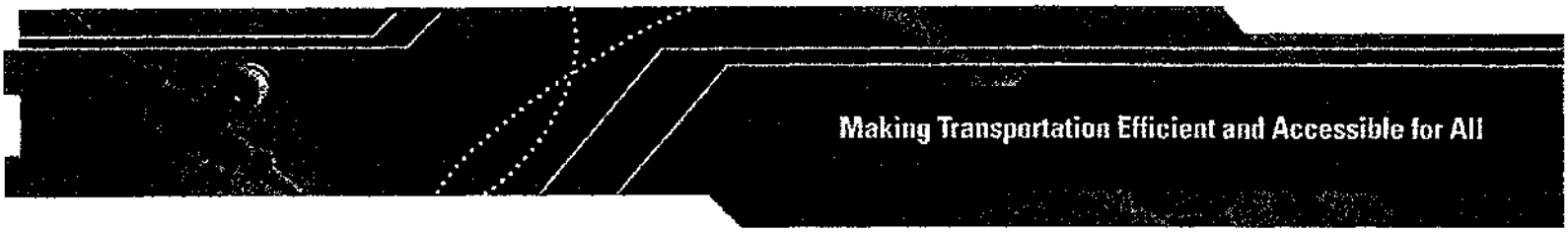
ANDRAY RENAUD, AVOCATE
194392-8
BARREAU DU QUÉBEC

47

Canadian Transportation Agency | Office des transports du Canada

Air Transportation Regulations – Air Services Price Advertising

Interpretation Note



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Canada

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Disclaimer

The Canadian Transportation Agency (Agency) is the economic regulator of Canada's federal transportation network. It publishes Interpretation Notes to provide information and guidance on provisions of the *Canada Transportation Act* and associated regulations that it administers. Should there be any discrepancy between the content of this Interpretation Note and the Act and associated regulat ons, the latter prevail. This Interpretation Note provides general guidance to air services price advertisers.

Although this Interpretation Note provides information and guidance on requirements of Part V.1 of the *Air Transportation Regulations*, when examining a particular situation, the Agency will consider each case on its own facts and merits.

I. Purpose

The purpose of this Interpretation Note is to assist any person who advertises prices of air services within, or originating in Canada, in any media. It provides general information and guidance to air services price advertisers on the regulatory requirements specified under Part V.1 - Advertising Prices as per the *Air Transportation Regulations* (ATR).

Part V.1 of the ATR should be read in its entirety to gain a full understanding of all of the air services price advertising requirements. This Note will continue to be updated as required to reflect Agency decisions or any rulings of the courts.

II. Objectives of the ATR Advertising Prices Provisions

Part V.1 of the ATR supports two key objectives:

Objective 1 — Enable consumers to readily determine the total price of an advertised air service.

The display of the total price in air services price advertising reduces confusion and frustration as to the total price and increases transparency. It also allows consumers to more readily conduct price comparisons and make informed choices.

Objective 2 — Promote fair competition between all advertisers in the air travel industry

Regulation of all-inclusive air price advertising promotes competition by achieving a level playing field for all persons who advertise the price of air services within, or originating in, Canada.

III. Legislative and Regulatory References

Note: See Appendix IV for the complete text of the referenced Legislation.

The Agency's power to make regulations pertaining to air services price advertising is found in section 86.1 of the *Canada Transportation Act* (Act). Section 177 of the Act also provides the Agency with the authority to prescribe administrative monetary penalties.

Act

Section 86.1:

- Requires the Agency to make regulations respecting the advertising of air service prices and specifically states that the Agency shall make regulations respecting advertising in all media, including on the Internet, of prices for air services within, or originating in, Canada.
- Requires the Agency to make regulations that will enable a consumer to readily determine the total price of an air service and requires some itemization. It specifically states that an advertisement for the price of an air service shall include in the price all costs of providing the service and to indicate in the advertisement all fees, charges and taxes collected on behalf of another person in respect of the service.
- Allows the Agency to prescribe what constitutes costs, fees, charges and taxes that may be itemized in the advertised price.

Section 177:

- Allows the Agency to designate the provisions of the Act and of any regulation made pursuant to the Act, the contravention of which results in a violation and to prescribe the maximum amount of the monetary penalty that may be imposed for such violation.

The regulation of air services price advertising is governed by Part V.1 of the ATR while the specification of related administrative monetary penalties is addressed in the *Canadian Transportation Agency Designated Provisions Regulations* (DPR).

ATR - Part V.1

- Subsection 135.8(1) - Requires any person advertising the price of an air service to include, among other things, the total price, including any third party charges, that must be paid to purchase the service.

DPR

- Sets out administrative monetary penalties of up to $5,000 to individuals and $25,000 to corporations for violation of the regulations regarding advertising prices.

IV. Air Services Price Advertising Terminology

Terms defined in the ATR and the Act

"air transportation charge" means, in relation to an air service, every fee or charge that must be paid upon the purchase of the air service, including the charge for the costs to the air carrier of providing the service, but excluding any third party charge (ATR section 135.5). [For example, it includes mandatory fees such as fuel surcharges, Canadian navigation surcharges and travel agent fees, but excludes third party charges, such as taxes.]

"third party charge" means, in relation to an air service or an optional incidental service, any tax or prescribed fee or charge established by a government, public authority or airport authority, or by an agent of a government, public authority or airport authority, that upon the purchase of the service is collected by the air carrier or other seller of the service on behalf of the government, the public or airport authority or the agent for remittance to it (ATR section 135.5). [Examples of third party charges include: Airport Improvement Fees, Air Travelers Security Charge, and Harmonized Sales Tax (HST).]

"total price" means

1. In relation to an air service, the total of the air transportation charges and third party charges that must be paid to obtain the service; and,
2. In relation to an optional incidental service, the total of the amount that must be paid to obtain that service including all third party charges (ATR section 135.5).

"**air service"** means a service, provided by means of an aircraft, that is publicly available for the transportation of passengers, or goods, or both (Act subsection 55(1)).

V. Scope

Part V.1 of the ATR applies to any person regardless of legal status or nature of business (e.g. individual, company, corporation or partnership, air carrier, travel agents, tours operators, online travel agents, etc.) who advertises the price for air services for travel within, or originating in Canada, through any media (Appendix VI), also referred to in this Interpretation Note as the advertiser.

VI. What Is Not Subject to the Advertising Requirements?

Part V.1 of the ATR excludes the following activities:

- Air cargo services, paragraph 135.7(2)(*a*);
- Prices that are negotiated between parties and are not available for purchase by the general public, paragraph 135.7(2)(*c*);
    - For example, fares available through corporate travel offices and not available to the general public, charter services negotiated with a private business or fares displayed to travel agents by the Global Distribution system.
- Air services as found in section 3 of the ATR and subsection 56(2) of the Act;
    - A complete list of excluded air services can be found in Appendix I.
- The media provider, subsection 135.7(3);
    - A media provider that acts solely as the means for an advertiser to advertise the price of an air service such as the newspaper providing advertising space to an air carrier or travel agent.
- Package travel services, paragraph 135.7(2)(*b*);
    - Package travel services typically involve the bundling of travel services for sale, such as combining air travel, accommodations, car rental and, where applicable, tour features. The Agency considers such bundled services, where the air service cannot be purchased separately, to be excluded from Part V.1 of the ATR;
    - Where components of a package travel service (air, car, accommodations, etc.) are offered through the same advertisement as stand alone travel services that the consumer can elect to purchase individually, only the air service component must adhere to the requirements of Part V.1 of the ATR;
    - Should a service of minimal value be added to an air service, it may be considered incidental requiring that the advertiser comply with Part V.1 of the ATR.
- Air services originating outside Canada, subsection 135.7(1);
    - Part V.1 of the ATR only applies to the advertising of prices for air services within, or originating in Canada.

Further activities to which Part V.1 of the ATR does not apply:

- The Agency considers that Part V.1 of the ATR does not need to apply to:

- Situations where there is a non-monetary component that forms part of the payment towards the purchase of an air service.
    - For example, this would include advertising the price of air services by loyalty reward programs, which requires the redemption of points, earned earlier, in exchange for air services.
- Advertising where the Canadian public has not been targeted.
    - For example, for carriers having multiple geographical specific versions of their Web sites, the Canadian version would need to comply.

VII. Overview of Air Services Price Advertising

The Agency considers that for the purpose of Part V.1 of the ATR, an advertisement refers to any **representation** in respect of the price of an air service within, or originating in Canada for the purpose of promoting or selling that air service to the general Canadian public. The advertisement can be done via an interactive or non-interactive media. The difference between the two usually lies in the fact that the interactive media is dynamic and the users' interaction influences the output. Generally a media that can be used in either an interactive or non-interactive way (Internet) should be considered to be dynamic or non-dynamic depending on the use that is being made of the media by the advertiser. Examples of interactive and non-interactive media can be found in Appendix VI.

Information that must appear in all Advertisements, ATR subsection 135.8(1)

Any person who advertises the price of an air service must include in the advertisement the following information:

1. The total price, inclusive of all taxes, fees and charges, that a consumer must pay to the advertiser to obtain the air service;
2. The price must always be in Canadian dollars; however, it may also be expressed in another clearly identified currency;
3. The point of origin and point of destination of the air service. The Agency considers that an advertisement must clearly indicate the cities between which the advertised air service is applicable.
4. An indication of whether the advertised price is for one-way (a trip from one place to another in one direction), round trip (a trip from one place to another and back, usually over the same route) or each way (one leg of a round trip) travel.

5. Any limitations on the period during which the advertised price will be offered and any limitation on the period for which the service will be provided at the price advertised (for example, the start and/or end date applicable to the availability period for the advertised price).

6. The proper name and amount of each tax, fee or charge relating to the air service that is a third party charge;
7. Any published tax, fee or charge related to air services that is not collected by the advertiser but must be paid at a departure, in-transit or arrival point in order for the consumer to travel. The advertiser, based on a review of published sources of information, must, at a minimum, indicate the name of such charges in the advertisement; and,
8. Each optional service offered for which a fee or charge is payable and its total price or range of total prices. An optional service generally refers to an option, service or amenity offered by an advertiser that can be selected by the consumer and that is supplemental to the services included in the advertised total price of the air service. The consumer is not obligated to purchase the optional service to complete their travel. Examples of optional services are provided in Appendix III.

Exemptions

The advertiser is exempt from the requirement to include the information described in points 6 to 8 above if:

- The advertisement is presented through a non-interactive media; and,
- The advertisement mentions a readily accessible location (which generally includes a location that is reasonably available to the consumer; for example a Web site, a telephone number, an e-mail address, or regular mail address, depending on the circumstances) where the consumer can go to readily obtain this information (without unreasonable efforts or delays at the readily accessible location).
    - When a consumer accesses the location referred to or provided in the advertisement, the information must be readily obtainable by the consumer. The Agency expects that the consumer will not be obligated to search through many layers of the carrier's Web site to find the information required. If the consumer is directed to a telephone number, e-mail address or regular mail address, the Agency expects that a representative of the advertiser would be able to readily provide

information, including information relating to taxes, fees and charges and optional services.

VIII. Representation of Total Price

Part V.1 of the ATR requires that the advertisement of the price of an air service must be displayed as a total price, inclusive of all taxes, fees and charges that a consumer must pay to obtain and complete the air service. A tax generally includes any amount levied on a product or activity by any government at any level, foreign or domestic, including amounts assessed by, and collected on behalf of, government agents. A tax must be applied on a per passenger or *ad valorem* (per value) basis to the air service. Examples of taxes, fees and charges can be found in Appendix VII. The Agency recognizes that there are unique instances where some taxes, fees and charges can increase or decrease on short notice immediately before or after the advertiser has posted the advertisement. Should such unforeseen changes in third party taxes, fees or charges occur, the advertiser must exercise best efforts to update the advertisement as soon as possible.

Part V.1 of the ATR also requires that a consumer have access to the price of any optional service offered by the service provider. The price or range of prices displayed for each optional service or range of optional services must also be inclusive of all taxes fees and charges.

The following sections describe the format for presenting the total price in an advertisement as well as permitted flexibilities to accommodate technical limitations of various media.

The Total Price of an Air Service

How must the total price of an air service be displayed in an advertisement?

The price for an air service must not be advertised in a manner that could interfere with the ability of a person to readily determine the total price that must be paid for the air service. The Agency considers that the total price must be at least as predominant as any other pricing information found in the advertisement. The total price must also be the first price presented to the consumer. For example, having to hover a mouse over a price advertised on a Web site to view the total price is not acceptable. Also, when asking for the price of an air service using a customer service telephone line, the first price given to the consumer by the representative must be the total price inclusive of taxes, fees and charges. Finally, the total price must be expressed in Canadian dollars, although it can also be expressed in other currencies.

Part V.1 of the ATR requires that the total price of an air service include the air transportation charges and third party charges (taxes, fees and charges) that must be paid to obtain the air service. These two categories of costs are further clarified below:

Total Price of an Air Service =
Air Transportation Charges + Taxes, Fees and Charges

Air Transportation Charges (Carrier's and Other Advertiser's Costs)

Air transportation charges represent every fee or charge that must be paid upon the purchase of the air service, including the charge for the costs to the air carrier of providing the service, but excluding any third party charge.

An advertiser may voluntarily choose to break out the air transportation charges, such as base fare or any payment that must be made to a travel agent upon the purchase of an air service, and itemize the respective amounts for each of these items in their advertisement. If a breakdown of these charges is provided in writing in the advertisement, it must appear under the heading "Air Transportation Charges, not under "Taxes, Fees and Charges".

Note: Canadian navigation surcharges, fuel surcharges and travel agent fees are considered to be air transportation charges and must not appear under third party charges.

Taxes, Fees and Charges (Third Party Charges)

This covers any taxes, fees and charges that the carrier collects from the consumer on behalf of a third party and that it must remit to the third party. Amounts represented under this heading include any government sales tax (provincial taxes are determined by the consumer's province of purchase), airport improvement fees, security screening fees, etc. These amounts must appear in writing under the heading "Taxes, Fees and Charges". The advertiser must use the proper name for any third party charge that is applicable to the air service (e.g. Goods and Services Tax). However, the Agency considers it acceptable to use commonly known acronyms to describe the name of a tax, fee or charge (for example, the Goods and Services Tax can be described as G.S.T. but not as "Federal Tax") or to use a translation of third party charges in either official language.

The term "tax" may only be used to express a tax collected by the advertiser on behalf of the federal, provincial, local or foreign government and remitted to the third party.

Note: The term "tax" can only be used under the heading "Taxes, Fees and Charges" and not under the heading "Air Transportation Charges".

Third Party Charges/Taxes, Fees and Charges

How must Third Party Charges collected by the Advertiser be displayed?

An advertiser must provide a breakdown of all third party charges on a per passenger basis under the heading "Taxes, Fees and Charges". However, there are exceptions to this requirement provided in Part V.1 of the ATR depending on the type of media used to advertise the air service.

All advertisements placed in non-interactive media must provide a readily accessible location where the breakdown and amounts of third party charges can be readily obtained. The advertisement might, for instance, make reference to an air carrier's Web site where a consumer can review the third party charges or provide a toll-free number a consumer can call to speak to an air carrier representative.

When the characteristics of the traveler (e.g. province of purchase) are not known at the time of the advertisement, the Agency recognizes that it may not be possible to accurately calculate all third party charges. In these circumstances, the Agency expects that the amounts advertised would represent a reasonable approximation for a trip that can be booked by the general public targeted in the advertisement.

In the case of advertisements via interactive media, the breakdown of the names and amounts of third party taxes, fees and charges must be available in the advertisement.

Round trip or One-way Services

How can prices be advertised for different types of services?

Part V.1 of the ATR requires that an advertiser indicate whether the advertised air service is offered on a round trip or one-way basis.

Part V.1 of the ATR also permits an advertiser to advertise a round trip service on a directional basis. In this instance, the price must be displayed on an each way basis and shown as representing 50 percent of the total round trip price. The advertiser must also be clear in the advertisement that the advertised price is obtainable only if both directions are purchased. The Agency considers that this would apply mainly to advertisements in non-interactive media.

When the characteristics of the traveler (e.g. province of purchase) are not known at the time of the advertisement, the Agency recognizes that it may not be possible to accurately calculate the round trip cost. In these circumstances, the Agency expects that the amounts advertised would represent a reasonable approximation for a trip that can be booked by the general public targeted in the advertisement.

The Total Price of an Optional Incidental Service

How must the price of Optional Incidental Services be advertised?

The advertised price of each optional incidental service offered in relation to the advertised air service must be displayed as the total price, inclusive of any third party charges that a person must pay to obtain that service.

If optional services are available, the advertisement must identify the services being offered, including the price or range of prices for each service. Where a range of prices are available for an optional service (e.g. range of meal prices) and the characteristics of the traveller are unknown (e.g. province of origin), the upper end of the displayed price range should incorporate a reasonable approximation of the maximum cost inclusive of the maximum taxes that could apply to the described service.

Total Price of an Optional Incidental Service =
Cost of Optional Incidental Service +
Taxes , Fees and Charges Applicable to an Optional Service

Where can a person find the price list of optional services applicable to a particular air service?

All advertisements placed in non-interactive media must provide a readily accessible location where all information about the price of optional incidental services can be readily obtained. The advertisement might, for instance, refer to an air carrier's Web site where a person can obtain the details about the price of such services or a telephone number a person can call to speak to an air carrier representative.

In the case of interactive media, the advertiser could decide to provide a direct link on its Web site to a page containing the prices or a range of prices for each optional incidental service or the optional services could be integrated into the carrier's online booking system.

Disclosure in Advertisements of Any Published Taxes, Fees and Charges required to be paid by the Consumer upon arrival or departure at an airport but not collected by the Advertiser

If the consumer will be required to pay a tax, fee or charge that the advertiser does not collect (e.g. additional foreign tax the consumer must pay before leaving the foreign country's airport, such as a departure tax), the advertiser, based on review of published sources of information, must indicate in the advertisement, at a minimum, the name of such charges.

Examples of published sources of information the advertiser could reference regarding such taxes, fees and charges include, but are not limited to, the *IATA List of Ticket and Airport Taxes and Fees* or a computer reservation system.

Where can a consumer find information about any additional taxes, fees and charges required to complete their travel, but not collected by the carrier?

All advertisements placed in non-interactive media must indicate a readily accessible location where the consumer can obtain the name of any third party taxes, fees and charges that the advertiser does not collect but will be required of the traveller to complete their travel by air. The advertisement might, for instance, make reference to an air carrier's Web site where a consumer can obtain this information or provide a toll-free number that a consumer can call during the advertiser's business hours to speak to a sales representative.

For interactive media advertisements, information or links regarding the names of published taxes, fees and charges that the advertiser does not collect but will be required of the traveller to complete their travel by air, can be provided on the Web site.

IX. Other Federal and Provincial Legislation to Consider when Advertising Prices for Air Services

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 ATR.

X. Agency Power

It is within the Agency's authority to determine whether an advertiser has met the advertisement requirements of Part V.1 of the ATR.

Ensuring compliance with Part V.1 of the ATR and implementing a program of effective education and enforcement are crucial to meeting the objectives of the Act and Part V.1 of the ATR. To support compliance, the Agency will work with advertisers of the price of air services to provide educational and other guidance material to assist them in meeting regulatory requirements. The Agency will monitor compliance with the requirements of Part V.1 of the ATR and enforce these requirements, where necessary, using its authority under the Act through monitoring, compliance verification and enforcement measures.

The *Canadian Transportation Agency Designated Provisions Regulations* identify the provisions of the ATR which, if contravened, are subject to administrative monetary penalties. The Agency may impose fines of up to $5,000 for an individual and $25,000 for a corporation where either has been found guilty of an offence as a result of contravening Part V.1 of the ATR. As with all Agency enforcement actions, the determination of what corrective measures and/or penalties are required in the case of a contravention is based on a number of factors including the frequency and nature of the offence (see Appendix V).

In addition, the Agency may order a person to make the changes necessary to conform to Part V.1 of the ATR to bring about compliance.

XI. Additional Information

Although this Interpretation Note provides information and guidance on compliance with the requirements of Part V.1 of the ATR, when considering a particular situation, the Agency will consider each case on its own merits.

For any additional information, you may contact the Agency at:

Canadian Transportation Agency
Ottawa, Ontario K1A 0N9
Tel: 1-888-222-2592
TTY: 1-800-669-5575
E-mail: info@otc-cta.gc.ca
Web: www.cta.gc.ca

To report non-compliant advertisements, you may contact the Agency at:

E-mail: conformite-compliance@otc-cta.gc.ca

Appendix I: Excluded Air Services

The air price advertising provisions do not apply to following types of air services as found in section 3 of the ATR and subsection 56(2) of the Act:

- aerial advertising services;
- aerial fire-fighting services;
- aerial survey services;
- aerial reconnaissance services;
- aerial forest fire management service;
- aerial sightseeing services;
- aerial spreading services;
- aerial spraying service;
- aerial weather altering services;
- air cushion vehicle services;
- transportation services for the retrieval of human organs for human transplants;
- aircraft demonstration services;
- external helitransport services;
- glider towing services;
- hot air balloon services;
- air flight training services;
- aerial inspection services;
- aerial construction services;
- aerial photography services;
- parachute jumping services; and
- rocket launching.

Appendix II: Examples of Price Advertising for Air Services

Non-Regulated Advertisement

Not regulated because no price is advertised.

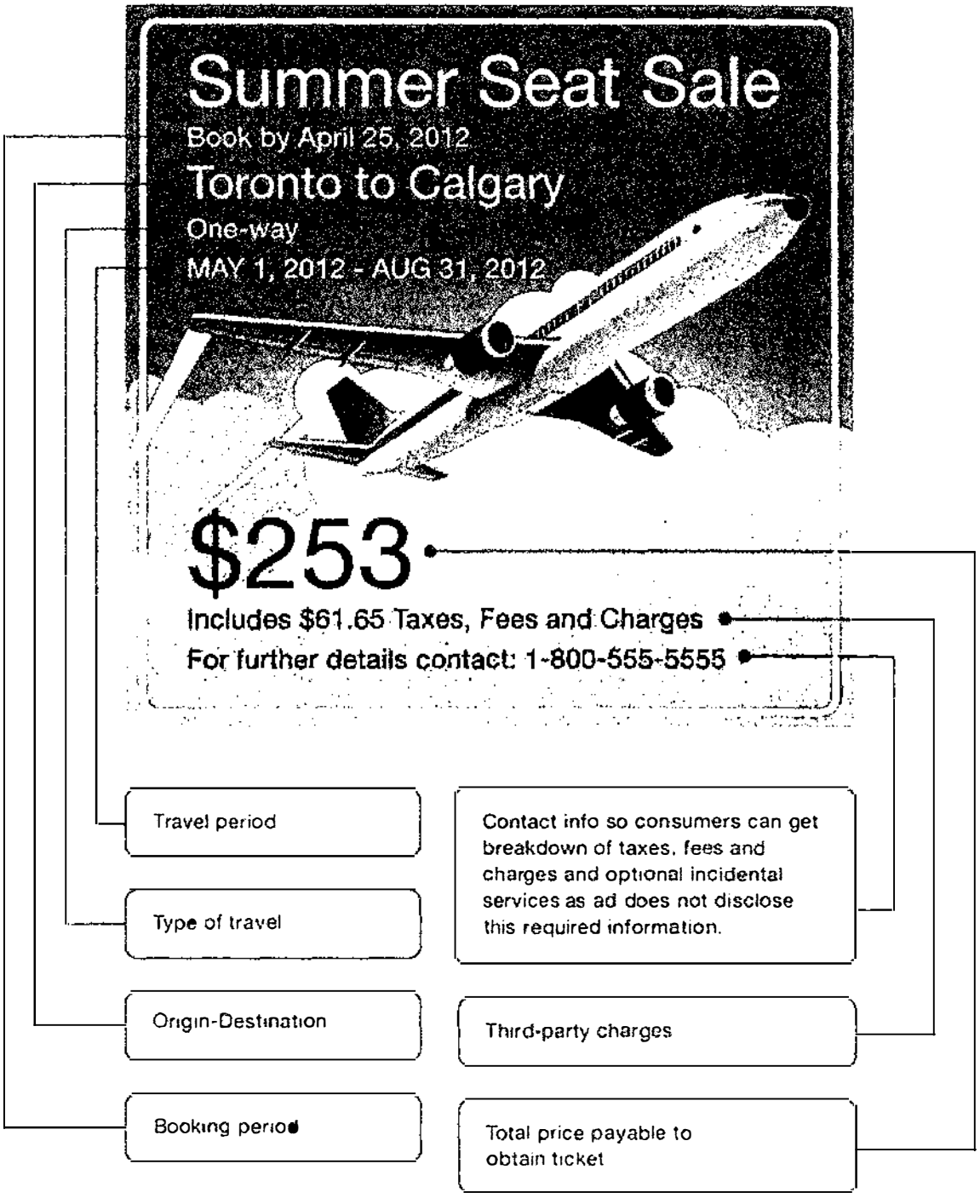
The above format does not need to comply with the ATR air services price advertising requirements as no price appears in the advertisement. However, once the consumer accesses the Web site and an air service price is displayed, the advertiser is obligated to comply with the requirements.

Non-Compliant Advertisement

The above advertisement is not compliant because it does not include the total price. It also does not mention if the air service is one-way or round trip and it does not clearly mention the destination.

Compliant Advertisements

Non-Interactive Media



Total of third-party charges collected to be remitted to a government, public authority or airport authority, or by an agent of a government, public authority or airport authority. Amounts do not have to be listed provided contact information is provided to allow the consumer the ability to obtain further information on the breakdown of the third-party taxes, fees and charges.

In the example above, as the advertisement is not interactive, the advertiser is not required to provide a breakdown of the taxes, fees and charges but must provide a location where the consumer can readily obtain this information. The amount for taxes, fees and charges must however be included in the total advertised price.

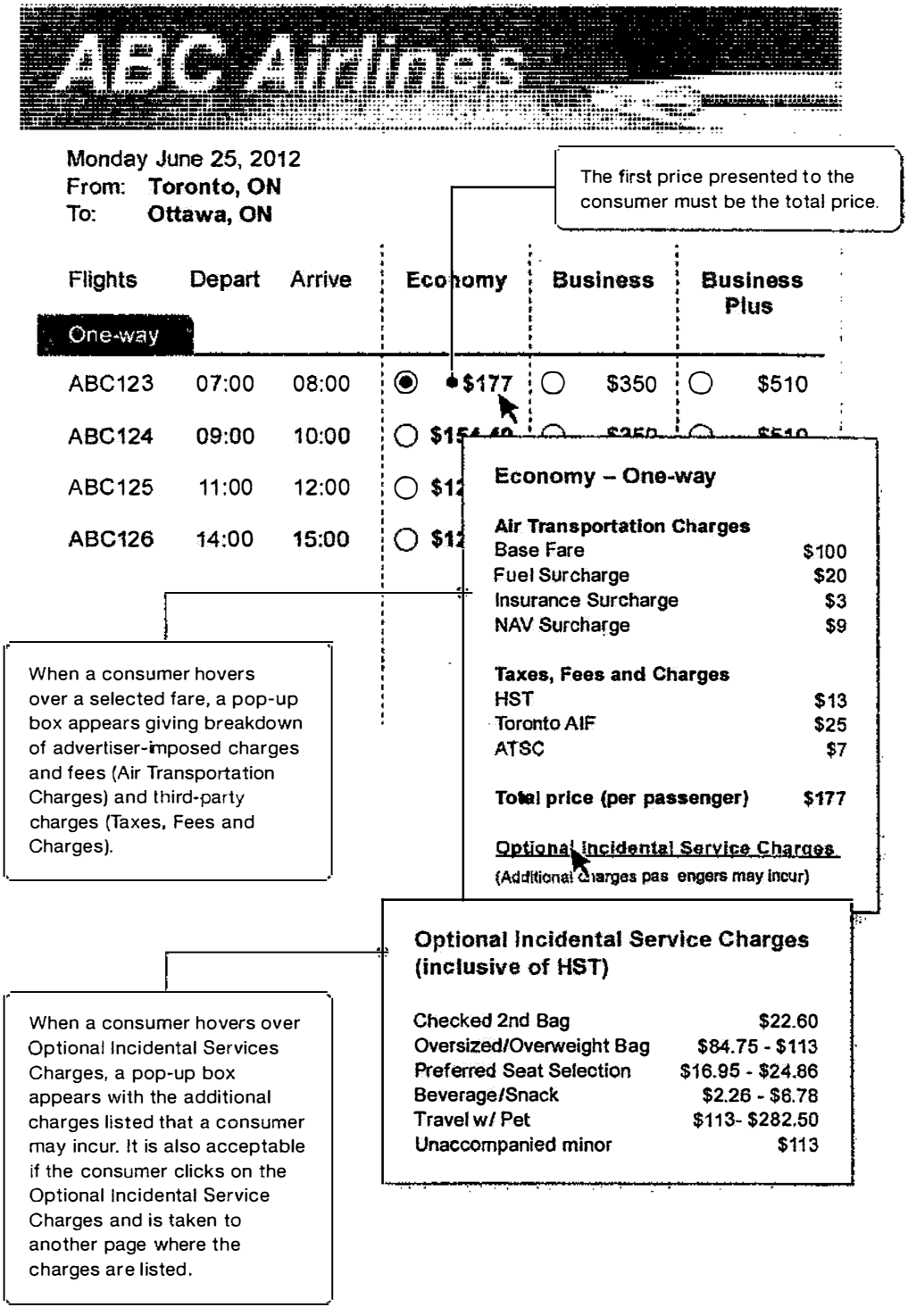
Total price to be paid to obtain a ticket inclusive of advertiser-imposed fees and charges (Air Transportation Charges) and third-party charges (Taxes, Fees and Charges.) Round trip service advertised on a directional basis must make a mention that the price is obtainable only if both directions are purchased and must be 50% of the round trip price.

The name of known taxes, fees and charges that are not collected by the advertiser but have to be paid to travel can be indicated in the ad.

In the example above, the departure tax is mentioned but as this is not an interactive advertisement, it is not mandatory for the advertiser to indicate it. However, the advertiser must still provide a location to readily obtain other prescribed information.

Interactive Media

Online Booking system



Responding to Advertising Queries – By Telephone

When responding to a telephone call from a consumer regarding an advertised price of an air service, the advertiser's representative must inform the caller of the total price of the advertised air service, inclusive of third party taxes, fees and charges, expressed in Canadian currency.

Consistent with the regulatory requirements, an advertising representative responding to a customer telephone query regarding an advertised price of an air service would initially quote the total price (inclusive of taxes, fees and charges) then specify the total amount of the applicable taxes, fees and charges.

Example:

The total price of the advertised flight is $550. This total includes $140 in taxes, fees and charges.

The representative must also be prepared upon request to provide the name and amount of each third party tax, fee and charge collected by the advertiser, which when added together, would equal the total amount of the quoted taxes, fees and charges i.e., breakdown of the $140 indicated in the example above).

Upon request by the consumer, the advertiser's representative must also provide:

- the origin and destination, whether the service is one-way or round trip, and any limitations that may exist with respect to availability or travel period;
- the cost or range of costs for optional incidental services, inclusive of applicable taxes, and;
- the name of any additional charges that the advertiser does not collect but will be required of the traveller to complete their air service travel (e.g. departure tax).

Appendix III: Examples of Optional Incidental Services

Optional air services are those services that do not form part of the total advertised price.

As optional services constitute a business practice and can vary by service provider/carrier, it is the advertiser who determines the type of optional services to be offered.

The consumer is not obligated to purchase the optional service to obtain and complete the advertised air travel.

Examples of services that might be optional services include:

- checked baggage;
- unchecked baggage;
- in-flight entertainment;
- meals and beverages;
- access to a lounge;
- pre-reserved seat assignment;
- priority boarding; and
- trip insurance provided by the advertiser.

Optional incidental services do not include services that are free and that are not incidental to the air service (e.g. additional miles for frequent flyer program or onboard duty free purchases)

Appendix IV: Referenced Legislation

Canada Transportation Act

86.1 (1) The Agency shall make regulations respecting advertising in all media, including on the Internet, of prices for air services within, or originating in, Canada.

(2) Without limiting the generality of subsection (1), regulations shall be made under that subsection requiring a carrier who advertises a price for an air service to include in the price all costs to the carrier of providing the service and to indicate in the advertisement all fees, charges and taxes collected by the carrier on behalf of another person in respect of the service, so as to enable a purchaser of the service to readily determine the total amount to be paid for the service.

(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).

177. (1) The Agency may, by regulation,

(*a*) designate

(i) any provision of this Act or of any regulation, order or direction made pursuant to this Act,

(ii) the requirements of any provision referred to in subparagraph (i), or

(iii) any condition of a licence issued under this Act,

as a provision, requirement or condition the contravention of which may be proceeded with as a violation in accordance with sections 179 and 180; and

(*b*) prescribe the maximum amount payable for each violation, but the amount shall not exceed

(i) $5,000, in the case of an individual, and

(ii) $25,000, in the case of a corporation.

Air Transportation Regulations

PART V.1

ADVERTISING PRICES

INTERPRETATION

135.5 The following definitions apply in this Part.

“air transportation charge” means, in relation to an air service, every fee or charge that must be paid upon the purchase of the air service, including the charge for the costs to

the air carrier of providing the service, but excluding any third party charge. (*frais du transport aérien*)

"third party charge" means, in relation to an air service or an optional incidental service, any tax or prescribed fee or charge established by a government, public authority or airport authority, or by an agent of a government, public authority or airport authority, that upon the purchase of the service is collected by the air carrier or other seller of the service on behalf of the government, the public or airport authority or the agent for remittance to it. (*somme perçue pour un tiers*)

"total price" means

(*a*) in relation to an air service, the total of the air transportation charges and third party charges that must be paid to obtain the service; and

(*b*) in relation to an optional incidental service, the total of the amount that must be paid to obtain the service, including all third party charges. (*prix total*)

135.6 For the purposes of subsection 86.1(2) of the Act and this Part, a prescribed fee or charge is one that is fixed on a per person or *ad valorem* basis.

APPLICATION

135.7 (1) Subject to subsection (2), this Part applies to advertising in all media of prices for air services within, or originating in, Canada.

(2) This Part does not apply to an advertisement that relates to

(a) an air cargo service;

(b) a package travel service that includes an air service and any accommodation, surface transportation or entertainment activity that is not incidental to the air service; or

(c) a price that is not offered to the general public and is fixed through negotiation.

(3) This Part does not apply to a person who provides another person with a medium to advertise the price of an air service.

REQUIREMENTS AND PROHIBITIONS RELATING TO ADVERTISING

135.8 (1) Any person who advertises the price of an air service must include in the advertisement the following information:

(*a*) the total price that must be paid to the advertiser to obtain the air service, expressed in Canadian dollars and, if it is also expressed in another currency, the name of that currency;

(*b*) the point of origin and point of destination of the service and whether the service is one-way or round trip;

(*c*) any limitation on the period during which the advertised price will be offered and any limitation on the period for which the service will be provided at that price;

(*d*) the name and amount of each tax, fee or charge relating to the air service that is a third party charge;

(*e*) each optional incidental service offered for which a fee or charge is payable and its total price or range of total prices; and

(*f*) any published tax, fee or charge that is not collected by the advertiser but must be paid at the point of origin or departure by the person to whom the service is provided.

(2) A person who advertises the price of an air service must set out all third party charges under the heading "Taxes, Fees and Charges" unless that information is only provided orally.

(3) A person who mentions an air transportation charge in the advertisement must set it out under the heading "Air Transportation Charges" unless that information is only provided orally.

(4) A person who advertises the price of one direction of a round trip air service is exempt from the application of paragraph (1)(*a*) if the following conditions are met:

(*a*) the advertised price is equal to 50% of the total price that must be paid to the advertiser to obtain the service;

(*b*) it is clearly indicated that the advertised price relates to only one direction of the service and applies only if both directions are purchased; and

(*c*) the advertised price is expressed in Canadian dollars and, if it is also expressed in another currency, the name of that other currency is specified.

(5) A person is exempt from the requirement to provide the information referred to in paragraphs (1)(*d*) to (*f*) in their advertisement if the following conditions are met:

(*a*) the advertisement is not interactive; and

(*b*) the advertisement mentions a location that is readily accessible where all the information referred to in subsection (1) can be readily obtained.

135.9 A person must not provide information in an advertisement in a manner that could interfere with the ability of anyone to readily determine the total price that must be paid for an air service or for any optional incidental service.

135.91 A person must not set out an air transportation charge in an advertisement as if it were a third party charge or use the term "tax" in an advertisement to describe an air transportation charge.

135.92 A person must not refer to a third party charge in an advertisement by a name other than the name under which it was established.

Canadian Transportation Agency Designated Provisions Regulations

4. The schedule to the *Canadian Transportation Agency Designated Provisions Regulation* sets out the following:

Column 1 Designated Provision	Column 2 Maximum Amount of Penalty — Corporation ($)	Column 3 Maximum Amount of Penalty — Individual ($)
Paragraph 135.8(1)(*a*)	25,000	5,000
Paragraph 135.8(1)(*b*)	25,000	5,000
Paragraph 135.8(1)(*c*)	25,000	5,000
Paragraph 135.8(1)(*d*)	5,000	1,000
Paragraph 135.8(1)(*e*)	5,000	1,000
Paragraph 135.8(1)(*f*)	5,000	1,000
Subsection 135.8(2)	5,000	1,000
Subsection 135.8(3)	5,000	1,000
Section 135.9	5,000	1,000
Section 135.91	5,000	1,000
Section 135.92	5,000	1,000

Appendix V: Designated Provisions - Levels

Designated Provisions – Levels

Designated Provision	Level
135. 8 (1) a), b), c)	4
135.8 (2) (3) (4)	2
135.91	2
135.8 (1) d), e), f)	2
135.9	2
135.92	2

Table of Penalty Amounts: Individual

	1st violation	2nd violation (up to)	3rd violation (up to)	4th and subsequent violations (up to)
Level 2	warning	$250	$500	$1,000
Level 4	warning	$1,000	$2,500	$5,000

Table of Penalty Amounts: Corporation

	1st violation	2nd violation (up to)	3rd violation (up to)	4th and subsequent violations (up to)
Level 2	warning	$1,250	$2,500	$5,000
Level 4	warning	$5,000	$12,500	$25,000

Appendix VI: Examples of Interactive and Non-Interactive Media

Non-Interactive Media

- Printed (newspapers, magazines, billboards, pamphlets, etc)
- Television, radio
- Internet banners
- Social medias (tweets, Facebook posts, YouTube videos, etc)
- Emails

Interactive Media

- Online booking system for the general public
- Customer and booking services by phone (call centers, service desks, etc)

The above list is given for general guidance only. Whether a specific media is used in an interactive or non-interactive way will depend on the facts of each case. The Agency also recognizes that the advertising practices and the technology enabling such practices are in constant evolution.

Appendix VII: Examples of Taxes, Fees and Charges

Third party charges when travelling within Canada include:

- Air Travellers Security Charge
- Airport Improvement Fees
- Goods and Services Tax
- Harmonized Sales Tax
- Quebec Sales Tax

For travel from Canada to a foreign country, other taxes, fees and charge may be applicable. A useful guide in this regard is the IATA List of Ticket and Airport Taxes and Fees.[1]

[1] http://www.iata.org/SiteCollectionDocuments/Documents/SampITaxlist.pdf

TAB G

Ceci est la pièce G de affidavit
This is Exhibit referred to in the Affidavit

de Simona Sasova
of

assermenté devant moi ce 30th jour de May 2014
sworn to before me this day of

Commissaire à la Cour supérieure
Commissioner of the Superior Court

ANDRAY RENAUD, AVOCATE
194392-8
BARREAU DU QUÉBEC

From: conformite-compliance
To: conformite-compliance
Date: 18/12/2012 4:54 PM
Subject: Nouvelles exigences réglementaires - New regulatory requirements

English message follows the French

Ce message donne de l'information importante et de la documentation concernant les nouvelles exigences règlementaires relatives à la publicité des prix tout inclus des annonceurs de services aériens.

Le 18 décembre 2012, L'honorable Denis Lebel, ministre des Transports, de l'Infrastructure et des Collectivités, a annoncé (www.tc.gc.ca/fra/medias/communiques-2012-h139f-7006.htm) que la publicité relative au prix tout compris des services aériens est maintenant devenue obligatoire en vertu de modifications apportées au *Règlement sur les transports aériens*.

L'Office des transports du Canada, qui est responsable de l'application de ce règlement, s'attend à œ que les annonceurs du prix des services aériens se conforment le plus rapidement possible aux nouvelles exigences.

Ce règlement permet aux consommateurs de déterminer aisément le prix total d'un service aérien et réduit la confusion en permettant de comparer plus facilement différents prix pour prendre une décision plus informée lorsque vient le temps de prendre un vol. Le règlement permet aussi de promouvoir une juste concurrence entre tous les annonceurs dans l'industrie du transport aérien.

Ces nouvelles exigences s'appliquent à toute personne qui annonce au public le prix d'un service aérien dans les médias, sans égard au statut juridique ou à la nature de leurs activités (ex. transporteurs canadiens ou étrangers, agents de voyage, tour opérateurs, agences de voyage en ligne), pour un vol au Canada ou dont le point de départ est au Canada.

L'Office utilisera une approche de collaboration proactive et éducative pour s'assurer que les annonceurs de prix de services aériens sont conscients de leur responsabilité de se conformer le plus tôt possible avec les règlements.

À cette fin, l'Office a mis en ligne plusieurs documents (www.otc-cta.gc.ca/fra/publicitedesservicesaeriens) concernant la publicité des prix tout inclus des services aériens pour aider les annonceurs à comprendre leurs nouvelles responsabilités. Le matériel en ligne inclus une note dinterprétation, une brochure, des questions et réponses, des exemples de publicités ainsi que des liens vers la Loi et le Règlement.

Nous espérons que vous trouverez utile le matériel présenté ci-haut. Si vous avez toujours des questions après avoir consulté ces documents, nhésitez pas à nous contacter à https://forms.cta-otc.gc.ca/rppsa-aspar/question_fra.cfm.

Sincères salutations

This message is intended to provide important information and documentation regarding new regulatory requirements relating to all-inclusive advertising for air price advertisers.

On December 18, 2012, the Honourable Denis Lebel, Minister of Transport, Infrastructure and Communities announced (http://www.tc.gc.ca/eng/mediaroom/releases-2012-h139e-7006.htm) that all-inclusive airfare advertising is now mandated under amendments to the *Air Transportation Regulations*.

The Canadian Transportation Agency, which is responsible for the implementation of the regulations, expects air price advertisers to comply as quickly as possible with the new requirements.

The regulations enable consumers to easily determine the total advertised air price and reduce confusion by allowing them to more easily compare prices and make informed choices when choosing to fly. They also promote fair competition between all advertisers in the air travel industry.

These new requirements apply to any person who advertises air prices, regardless of legal status or nature of business (e.g. Canadian and foreign air carriers, travel agents, tour operators and on-line travel agents), for travel within, or originating in Canada, through any media.

The Agency will use a proactive and collaborative educational approach to ensure air price advertisers are aware of their responsibility to comply as early as possible with the regulations.

To this effect, the Agency has launched its information repository (www.otc-cta.gc.ca/eng/airservicesadvertising) on all-inclusive air price advertising to help advertisers understand the new rules. The repository features educational material including an Interpretation Note, a brochure, questions and answers, examples of advertisements, as well as links to the regulations and legislation.

We hope that you will find the above material helpful. Should you have any further questions after having read this material, do not hesitate to contact us at https://forms.cta-otc.gc.ca/rppsa-aspar/question_eng.cfm.

Sincerely,

Carole Girard, CPA, CA
Directrice principale, Approbations réglementaires et conformité |
Senior Director, Regulatory Approvals and Compliance
Office des transports du Canada | 15, rue Eddy, Gatineau QC K1A 0N9
Canadian Transportation Agency | 15 Eddy St., Gatineau QC K1A 0N9
Gouvernement du Canada | Government of Canada

TAB H

Ceci est la pièce H de affidavit
This is Exhibit referred to in the Affidavit

de Simona Sasova
of

assermenté devant moi ce 20th jour de May 2014
sworn to before me this day of

Andray Renaud
Commissaire à l'assermentation
Commissioner for Oaths

ANDRAY RENAUD, AVOCATE
194392-8
BARREAU DU QUÉBEC

Office
des transports
du Canada

Canadian
Transportation
Agency

Reference No: 13-00257
Date: 2013-01-21

Sean C. Shannon
Expedia Canada
610-410 Adelaide Street West
Toronto ON
M5V 1S8

Dear Sir:

RE: Warning for violation of the *Air Transportation Regulations*

Results of a compliance verification conducted by a Designated Enforcement Officer of the Canadian Transportation Agency (Agency) indicate that Expedia is in contravention of paragraphs 135.8(1)d), 135.8(1)e), subsections 135.8(2), 135.8(3) and section 135.91 of the *Air Transportation Regulations* (ATR). This compliance verification took place on 2013-01-14 and relates to Expedia's online booking system (expedia.ca).

Paragraphs 135.8(1)d), 135.8(1)e), subsections 135.8(2), 135.8(3) and section 135.91 of the ATR reads as follows:

> *135.8 (1) Any person who advertises the price of an air service must include in the advertisement the following information:*
>
> - *(d) the name and amount of each tax, fee or charge relating to the air service that is a third party charge;*

The name and amount of each tax, fee or charge is not available at any moment in the booking process.

- *(e) each optional incidental service offered for which a fee or charge is payable and its total price or range of total prices; and*

The prices as displayed for optional incidental services are not total prices.

135.8 (2) A person who advertises the price of an air service must set out all third party charges under the heading "Taxes, Fees and Charges" unless that information is only provided orally.

The current heading reads "Taxes & Fees".

135.8 (3) A person who mentions an air transportation charge in the advertisement must set it out under the heading "Air Transportation Charges" unless that information is only provided orally.

The current heading reads "Flight".

135.91 A person must not set out an air transportation charge in an advertisement as if it were a third party charge or use the term "tax" in an advertisement to describe an air transportation charge.

An amount for "Surcharges" is part of the taxes and fees.

A copy of the evidence is on file at the Agency, 15 Eddy Street, Gatineau, Quebec and can be reviewed by previous arrangement during regular business hours by contacting Simona Sasova, Manager of Enforcement Division, Regulatory Approvals and Compliance Directorate at (819) 953-9786.

Expedia shall comply with the requirements set out in paragraphs 135.8(1)d), 135.8(1)e), subsections 135.8(2), 135.8(3) and section 135.91 of the ATR **by March 1, 2013**.

Please be advised that in the event of a further violation of this provision within next 4 years Expedia could be issued an administrative monetary penalty of up to $25,000 per violation.

Should you disagree with the findings of this verification and wish to contest the conclusions, you may do so, within **30** days of the date of this letter, by requesting the Agency to undertake a review of this case. Your signed letter should include the Reference Number indicated in the upper right hand corner of this letter and be addressed to:

The Secretary
Canadian Transportation Agency
Ottawa, Ontario
Canada
K1A 0N9
Tel: 1-888-222-2592
Fax: (819) 997-6727
E-mail: info@cta-otc.gc.ca

Your letter should contain a clear and concise statement of the facts and circumstances surrounding the case and should be accompanied by copies of any documentation or other evidence that you believe might be pertinent to your request for review (see attached).

Sincerely,

S. Sasova

Designated Enforcement Officer
Enforcement Division
Regulatory Approvals & Compliance Directorate
Industry Regulations and Determinations Branch
15 Eddy Street, 18th floor
Gatineau, Quebec
Canada
K1A 0N9

encl.

Procedures for submitting an application to request a review of a warning

(1) Where a warning is issued by an Enforcement Officer, the party named in the warning may request a review, by the Canadian Transportation Agency (Agency), of the facts of the violation.

(2) A request for a review shall be made by application to the Agency within 30 days after the date of issuance of the warning.

(3) Where the party who is served with a warning does not request a review in the prescribed time and manner, the party is deemed to have committed the violation identified in the warning. The case will be retained on record with the Agency as a first violation.

(4) The application for review shall be in the form of a letter and

(a) be submitted to the Agency by hand delivery, regular or registered mail, courier, facsimile, or by other means of written or electronic communication by the applicant or the duly authorized agent or solicitor acting for the applicant;

(b) contain a clear and concise statement of

(I) the facts, and

(ii) the grounds for the application;

(c) give any other information that may be useful in explaining or supporting the application;

(d) include the full name, address and telephone number of the applicant or the duly authorized agent or solicitor acting for the applicant;

(e) include the Reference Number indicated at the upper right hand corner of the letter; and

(f) include any documents that may explain or support the application.

(5) The Enforcement Officer who issued the subject warning may provide comments with respect to an application for review.

(6) An Enforcement Officer who intends to provide comments with respect to an application for review shall, within 30 days after receiving the application, submit his/her comments to the Agency, including any documents that may be useful in explaining or supporting the comments.

(7) If comments are provided, the Enforcement Officer shall serve a copy of the comments on the applicant at the same time as they are submitted to the Agency.

(8) The applicant may, within 10 days after receiving the Enforcement Officer's comments, file a reply with the Agency.

(9) Pursuant to section 29 of the Act, the Agency shall dispose of the application before it no later than one hundred and twenty days after the originating documents are received.

(10) Where, after concluding a review, the Agency determines that

(a) the party has not committed the violation it was alleged to have committed, the Agency shall forthwith inform the party of the determination and no further action shall be taken against the person in respect of that alleged violation; or

(b) the party has committed the violation that it was alleged to have committed, the Agency shall forthwith inform the party of the determination. A record of the violation, bearing the date of the original warning, will be retained by the Agency to be used as a basis for further enforcement action. Where there is a further contravention of the same designated provision, the record of the original warning will constitute evidence of a first violation. A second violation of the same provision, within four years, may be subject to an administrative monetary penalty.

IMPORTANT

Copies of the *Designated Provisions Regulations*, the *Canada Transportation Act* (the Act), the *Air Transportation Regulations*, the *Personnel Training for the Assistance of Persons with Disabilities Regulations* and the *Canadian Transportation Agency General Rules* are available through the Agency's Web site at: www.cta-otc.gc.ca. These documents are also available from authorized bookstores agents and other bookstores or by mail from:

Canadian Government Publishing
Ottawa, Ontario, Canada
K1A 0S9
Telephone: (819) 956-4800

TAB I

Ceci est la pièce 1 de affidavit
This is Exhibit referred to in the Affidavit

de Simona Sasova
of

assermenté devant moi ce 20th jour de May 2014
sworn to before me this day of

Andray Renaud
Commissaire à l'assermentation
Commissioner for Oaths

ANDRAY RENAUD, AVOCATE
194392-8
BARREAU DU QUÉBEC

Halifax, NS

lukacs@AirPassengerRights.ca

AIR PASSENGER RIGHTS

February 24, 2014

VIA EMAIL

The Secretary
Canadian Transportation Agency
Ottawa, Ontario, K1A 0N9

Dear Madam Secretary:

Re: Dr. Gábor Lukács v. Expedia, Inc.
Complaint concerning advertising prices – violations of Part V.1 of the *ATR*

Please accept the following submissions as a formal complaint pursuant to Rule 40 of the *Canadian Transportation Agency General Rules* concerning violations of Part V.1 of the *Air Transportation Regulations* (the "*ATR*"), governing advertising prices, by Expedia, Inc.

Since attempts to address the issues described below informally have not been successful, the Complainant is asking the Agency to open pleadings in the matter without delay.

OVERVIEW

The Complainant alleges that Expedia, Inc. has been advertising prices on its Canadian Website, `expedia.ca`, contrary to ss. 135.8 of the *ATR* by:

(a) failing to include fuel surcharges in "Air Transportation Charges"; and

(b) improperly including and listing airline-imposed charges in "Taxes, Fees and Charges" under the name "YR - Service Charge."

The Complainant is asking the Agency to order Expedia, Inc. to amend its Canadian Website to comply with Part V.1 of the *ATR*.

FACTS

1. Expedia, Inc. is an Internet-based travel agency, operating websites that offer, among other things, flights from and within Canada.

2. Expedia, Inc. operates a website dedicated to Canadian travellers, namely, `expedia.ca` (the "Canadian Website").

3. Users of the Canadian Website seeking to book flights are shown, among other things, a trip details page that displays the "Trip Summary," which lists the various fees and charges making up the total price of the flight. For greater clarity, this information is displayed to prospective travellers prior to the actual booking.

4. A screenshot of the Canadian Website, displaying the trip details for an Ottawa-London (LHR)-Ottawa itinerary is attached and marked as Exhibit "A".

5. A screenshot of the Canadian Website, displaying the trip details for a Halifax-Budapest-Halifax itinerary is attached and marked as Exhibit "B".

6. A screenshot of the Canadian Website, displaying the trip details for a Halifax-Budapest-Halifax itinerary, displaying what purports to be a break-down for "Taxes, Fees, and Charges," is attached and marked as Exhibit "C".

7. A screenshot of the Canadian Website, displaying the trip details for a Halifax-Toronto-Halifax itinerary, displaying what purports to be a break-down for "Taxes, Fees, and Charges," is attached and marked as Exhibit "D".

8. On February 9, 2014, the Complainant wrote to senior executives of Expedia, Inc. to express concerns over lack of compliance with Part V.1 of the *ATR*.

9. On February 21, 2014, Mr. Andy Dyer, Senior Director, Legal of Expedia, Inc. advised the Complainant that:

> Expedia's current pre-purchase display has been reviewed and approved by the Canadian Transportation Agency.

A copy of Mr. Dyer's email, dated February 21, 2014, is attached and marked as Exhibit "E".

10. Although the Complainant made further attempts to address the concerns informally, on February 24, 2014, Mr. Dyer advised the Complainant that:

> At this time, Expedia considers this matter closed.

A copy of Mr. Dyer's email, dated February 24, 2014, is attached marked as Exhibit "F".

91

ISSUES

EXHIBITS

I. Prior communications between Expedia, Inc. and the Agency

Mr. Dyer claimed in his communications with the Complainant (Exhibit "E") that the Agency has reviewed and approved the Canadian Website of Expedia, Inc.

The Complainant is unaware of such communications between Expedia, Inc. and the Agency, and has been unable to locate any decision or order of the Agency approving the Canadian Website of Expedia, Inc.

If communications as indicated by Mr. Dyer did indeed take place, then it appears that some employees or Members of the Agency may have already made up their minds as to the subject matter of the present complaint, and consequently, it would be inappropriate for them to take part in the adjudication of the present complaint. Furthermore, the prior communications between Expedia, Inc. and the Agency may give Expedia, Inc. an unfair advantage in the present proceeding.

Thus, the Complainant is asking that the Agency:

(a) provide the Complainant with copies of prior communications between Expedia, Inc. and the Agency in relation to the Canadian Website, if there are any, or alternatively, order Expedia, Inc. to produce same;

(b) identify the staff and/or Members who had prior involvement with the issue of the Canadian Website of Expedia, Inc.; and

(c) ensure that no staff and/or Member who has had prior involvement with the issue of the Canadian Website of Expedia, Inc. is involved in any way in the adjudication of the present complaint.

93.

II. The applicable law

Section 135.5 of the *ATR* defines "air transportation charge" and "third party charge" as follows:

> "air transportation charge" means, in relation to an air service, every fee or charge that must be paid upon the purchase of the air service, including the charge for the costs to the air carrier of providing the service, but excluding any third party charge.
>
> "third party charge" means, in relation to an air service or an optional incidental service, any tax or prescribed fee or charge established by a government, public authority or airport authority, or by an agent of a government, public authority or airport authority, that upon the purchase of the service is collected by the air carrier or other seller of the service on behalf of the government, the public or airport authority or the agent for remittance to it.

Section 135.7 of the *ATR* provides that Part V.1 of the *ATR* applies to all advertising activities for air services as long as it is within Canada or originates in Canada:

> 135.7 (1) Subject to subsection (2), this Part applies to advertising in all media of prices for air services within, or originating in, Canada.

Section 135.7(2) exempts package travel services from the price advertising regulations, and for greater clarity, the present complaint is focused on flight-only bookings advertised on the Canadian Website.

Section 135.8 of the *ATR* requires advertisers to clearly identify and distinguish between air transportation charges and third party charges:

> 135.8 (1) Any person who advertises the price of an air service must include in the advertisement the following information:
>
> (a) the total price that must be paid to the advertiser to obtain the air service, expressed in Canadian dollars and, if it is also expressed in another currency, the name of that currency;
>
> (b) the point of origin and point of destination of the service and whether the service is one way or round trip;
>
> (c) any limitation on the period during which the advertised price will be offered and any limitation on the period for which the service will be provided at that price;
>
> (d) the name and amount of each tax, fee or charge relating to the air service that is a third party charge;

(e) each optional incidental service offered for which a fee or charge is payable and its total price or range of total prices; and

(f) any published tax, fee or charge that is not collected by the advertiser but must be paid at the point of origin or departure by the person to whom the service is provided.

(2) A person who advertises the price of an air service must set out all third party charges under the heading "Taxes, Fees and Charges" unless that information is only provided orally.

(3) A person who mentions an air transportation charge in the advertisement must set it out under the heading "Air Transportation Charges" unless that information is only provided orally.

[Emphasis added.]

Section 135.91 of the *ATR* explicitly forbids misrepresenting air transportation charges as if they were third party charges:

135.91 A person must not set out an air transportation charge in an advertisement as if it were a third party charge or use the term "tax" in an advertisement to describe an air transportation charge.

III. Failure to include fuel surcharges in "Air Transportation Charges"

Expedia, Inc. does not include fuel surcharges under the heading "Air Transportation Charges," but rather lists it as a separate item called "Airline Fuel Surcharge" (see Exhibits "A" and "B"):

Trip Summary

Ottawa to London
Mon 28/Apr/2014 - Tue 15/Jul/2014

Departure: Arrives on April 29, 2014

1 Ticket Return

Traveller 1: Adult	**C$887.29**
Air Transportation Charges	C$195.00
Taxes, Fees and Charges	C$260.29
Airline Fuel Surcharge	C$432.00

Total: C$887.29

All prices quoted in **Canadian dollars**.

Trip Summary

Halifax to Budapest

Mon 28/Apr/2014 - Tue 15/Jul/2014

Departure: Arrives on April 29, 2014
Return: Arrives on July 16, 2014

1 Ticket: Return

^ Traveller 1: Adult	**C$985.12**
Air Transportation Charges	C$406.00
Taxes, Fees and Charges	C$363.62
Airline Fuel Surcharge	C$215.50

Total: C$985.12

All prices quoted in **Canadian dollars**.

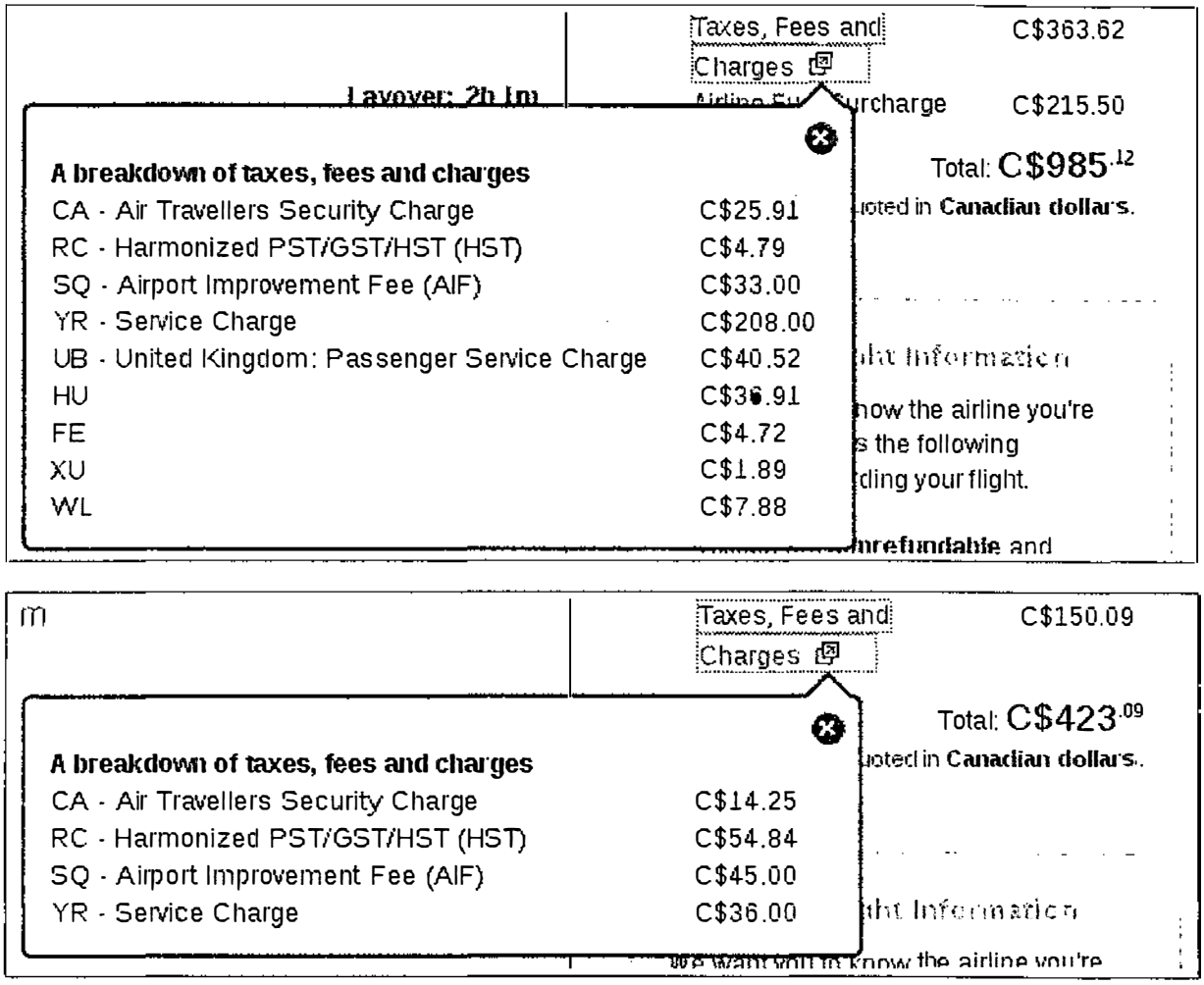
In *Re: Scandinavian Airlines System*, 8-A-2014, the Agency considered fuel surcharges in the context of Part V.1 of the *ATR*, and held that:

> [55] The fare is an air transportation charge, as is the fuel surcharge, yet the two charges are not grouped together on SAS's Web site. Further, these two charges are not grouped together under the heading "Air Transportation Charges" as required by the ATR. The ATR are clear that the appropriate headings are to be used and that the relevant charges are to be found under the appropriate headings.

The Complainant adopts the aforementioned findings of the Agency as his own position, and submits that Expedia, Inc. has violated s. 135.8 of the *ATR* by failing to include fuel surcharges under the heading of "Air Transportation Charges" on its Canadian Website.

IV. Inclusion of airline charges in "Taxes, Fees and Charges"

Expedia, Inc. improperly includes certain airline-imposed charges, entitled "YR - Service Charge," under the heading "Taxes, Fees and Charges" (see Exhibits "C" and "D"):



The "YR - Service Charge" is imposed by the airline, and not by any third party, and as such it ought to have been listed under the heading "Air Transportation Charges."

Therefore, it is submitted that Expedia, Inc. contravened ss. 135.8 and 135.91 of the *ATR* by setting out an air transportation charge in an advertisement as if it were a third party charge.

V. Relief sought

The Complainant is asking the Agency to order Expedia, Inc. to amend its Canadian Website to comply with Part V.1 of the *ATR*.

All of which is most respectfully submitted.

Dr. Gábor Lukács
Complainant

Cc: Mr. Barry Diller, Chairman and Senior Executive, Expedia, Inc.
Mr. Robert Dzielak, Executive VP, General Counsel and Secretary, Expedia, Inc.
Mr. Andy Dyer, Senior Director, Legal, Expedia, Inc.

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Your Trip to **London, England, UK**

Mon 28/Apr/2014 - Tue 15/Jul/2014 | Total price **C$887.29** Child tickets at this price!

Price Change

Your ticket price changed from C$885.09 to C$887.29. The airline could not confirm the original price due to pricing or availability changes that occurred after we posted the latest prices on our site. Continue booking or look for a different flight.

Flights

Change Flights | Show Details

April 28, 2014 - Departure — Nonstop — Total travel time : 6h 45m

Ottawa
YOW 6:50pm
→
London
LHR 6:35am + 1 day
Arrives on April 29, 2014
6h 45m

Lufthansa 6837 Operated by Air Canada
Economy/Coach (K)

July 15, 2014 - Return — Nonstop — Total travel time : 7h 40m

London
LHR 1:05pm
→
Ottawa
YOW 3:45pm
7h 40m

Lufthansa 6836 Operated by Air Canada
Economy/Coach (K)

CONTINUE BOOKING ▶

Save this itinerary

Trip Summary

Ottawa to London
Mon 28/Apr/2014 - Tue 15/Jul/2014

Departure: Arrives on April 29, 2014

1 Ticket: Return

Traveller 1: Adult	**C$887.29**
Air Transportation Charges	C$195.00
Taxes, Fees and Charges	C$260.29
Airline Fuel Surcharge	C$432.00

Total: **C$887.29**

All prices quoted in **Canadian dollars**

Flight Information

We want you to know the airline you're travelling with has the following restrictions regarding your flight.

- Tickets are **nonrefundable** and **nontransferable.** Name changes are not allowed.
- The airline may charge additional fees for checked baggage or other optional services.
- This airline may charge additional fees depending on your payment method.
- Airlines may change flight schedules and terminals at any time.
- Correct travel documents are required. It's your responsibility to check your documents before you travel. Please click here for up-to-date passport, visa and health information.

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Your Trip to **Budapest, Hungary**

Mon 28/Apr/2014 - Tue 15/Jul/2014 | Total price: **C$985.12** Only 5 tickets left at this price!

Flights

Change Flights | Close Details

April 28, 2014 - Departure — 2 stops — Total travel time : 15h 55m

Halifax
YHZ 3:25pm
British Airways 6463 Operated by WestJet
Economy/Coach (O)

Toronto
YYZ 4:44pm
2h 19m

Layover: 2h 1m

Toronto
YYZ 6:45pm
British Airways 92
Economy/Coach (O)

London
LHR 6:40am + 1 day
Arrives on April 29, 2014
6h 55m

Layover: 2h 10m

London
LHR 8:50am
Departs on April 29, 2014
British Airways 866
Economy/Coach (S)

Budapest
BUD 12:20pm
Arrives on April 29, 2014
2h 30m

July 15, 2014 - Return — 2 stops — Total travel time : 17h 47m

Budapest
BUD 11:40am
Finnair 754
Economy/Coach (Q)

Helsinki
HEL 3:00pm
2h 20m

Layover: 2h 0m

Helsinki
HEL 5:00pm
Finnair 31
Economy/Coach (Q)

Toronto
YYZ 6:45pm
8h 45m

Layover: 2h 40m

Toronto
YYZ 9:25pm
WestJet 438
Economy/Coach (P)

Halifax
YHZ 12:27am + 1 day
Arrives on July 16, 2014
2h 2m

Trip Summary

Halifax to Budapest
Mon 28/Apr/2014 - Tue 15/Jul/2014

Departure: Arrives on April 29, 2014
Return: Arrives on July 16, 2014

1 Ticket Return

* **Traveller 1: Adult**	**C$985.12**
Air Transportation Charges	C$406.00
Taxes, Fees and Charges	C$363.62
Airline Fuel Surcharge	C$215.50

Total: **C$985.12**
All prices quoted in **Canadian dollars**.

[illegible] Flight Information

We want you to know the airline you're travelling with has the following restrictions regarding your flight.

- Tickets are **nonrefundable** and **nontransferable.** A fee of US$275.00 per ticket is charged for itinerary changes. Name changes are not allowed.
- The airline may charge additional fees for checked baggage or other optional services.
- Airlines may change flight schedules and terminals at anytime.
- Correct travel documents are required. It's your responsibility to check your documents before you travel. Please click here for up-to-date passport, visa and health information.

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Your Trip to **Budapest, Hungary**

Mon 28/Apr/2014 - Tue 15/Jul/2014 | Total price: **C$985.12** Only 5 tickets left at this price!

Flights

Change Flights | Show Details

April 28, 2014 - Departure — 2 stops — Total travel time 15h 55m

Halifax **YHZ 3:25pm**	→	Toronto YYZ 4:44pm	2h 19m
British Airways 6463 Operated by WestJet Economy/Coach (O)			
		Layover: 2h 1m	
Toronto YYZ 6:45pm	→	London LHR 6:40a Arrives on Apr	
British Airways 92 Economy/Coach (O)			
London LHP 8:50am	→	Budapest **BUD 12:2** Arrives on Apr	
Departs on April 29, 2014 British Airways 866 Economy/Coach (S)			

July 15, 2014 - Return — 2 stops — Total travel time 17h 47m

Budapest **BUD 11:40am**	→	Helsinki HEL 3:00pm	2h 20m
Finnair 754 Economy/Coach (Q)			
		Layover: 2h 0m	
Helsinki HEL 5:00pm	→	Toronto YYZ 6:45pm	8h 45m
Finnair 31 Economy/Coach (Q)			
		Layover: 2h 40m	
Toronto YYZ 9:25pm	→	Halifax **YHZ 12:27am + 1 day** Arrives on July 16, 2014	2h 2m
WestJet 438 Economy/Coach (P)			

A breakdown of taxes, fees and charges

CA - Air Travellers Security Charge	C$25.91
RC - Harmonized PST/GST/HST (HST)	C$4.79
SQ - Airport Improvement Fee (AIF)	C$33.00
YR - Service Charge	C$208.00
UB - United Kingdom: Passenger Service Charge	C$40.52
HU	C$36.91
FE	C$4.72
XU	C$1.89
WL	C$7.88

Trip Summary

Halifax to Budapest
Mon 28/Apr/2014 - Tue 15/Jul/2014

Departure: Arrives on April 29, 2014
Return: Arrives on July 16, 2014

1 Ticket: Return

* **Traveller 1: Adult**	**C$985.12**
Air Transportation Charges	C$406.00
Taxes, Fees and Charges	C$363.62
[illegible]rcharge	C$215.50
Total:	C$985.12

...oted in **Canadian dollars**.

...now the airline you're ...s the following ...ding your flight.

...nonrefundable and **nontransferable.** A fee of US$275.00 per ticket is charged for itinerary changes. Name changes are not allowed.

- The airline may charge additional fees for checked baggage or other optional services.
- Airlines may change flight schedules and terminals at any time.
- Correct travel documents are required. It's your responsibility to check your documents before you travel. Please click here for up-to-date passport, visa and health information.

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Your Trip to **Toronto, ON**

Mon 28/Apr/2014 - Tue 15/Jul/2014 | Total price: **C$423.09**

Flights

Change Flights | Show Details

April 28, 2014 - Departure — 1 stop — Total travel time : 4h 15m

porter	Halifax **YHZ 1:15pm** Porter Airlines 418 Economy/Coach (A)	→	Montreal YUL 2:05pm	1h 50m
porter	Montreal YUL 3:20pm Porter Airlines 420 Economy/Coach (A)	→	Toronto **YTZ 4:30p**	

July 15, 2014 - Return — 1 stop — Total travel time : 3h 15m

porter	Toronto **YTZ 11:15am** Porter Airlines 253 Economy/Coach (A)	→	Ottawa YOW 12:11pm	0h 56m
			Layover: 0h 29m	
porter	Ottawa YOW 12:40pm Porter Airlines 253 Economy/Coach (A)	→	Halifax **YHZ 3:30pm**	1h 50m

A breakdown of taxes, fees and charges

CA - Air Travellers Security Charge	C$14.25
RC - Harmonized PST/GST/HST (HST)	C$54.84
SQ - Airport Improvement Fee (AIF)	C$45.00
YR - Service Charge	C$36.00

CONTINUE BOOKING ►

Save this Itinerary

Trip Summary

Halifax to Toronto

Mon 28/Apr/2014 - Tue 15/Jul/2014

1 Ticket Return

Traveller 1: Adult	**C$423.09**
Air Transportation Charges	C$273.00
Taxes, Fees and Charges	C$150.09

Total: **C$423.09**

...oted in **Canadian dollars**.

...ortant Information

We want you to know the airline you're travelling with has the following restrictions regarding your flight.

- Tickets are **nonrefundable** and **nontransferable.** Name changes are not allowed.
- The airline may charge additional fees for checked baggage or other optional services.
- Airlines may change flight schedules and terminals at any time.
- Correct travel documents are required. It's your responsibility to check your documents before you travel. Please click here for up-to-date passport, visa and health information.

From adyer@expedia.com Fri Feb 21 14:05:49 2014
Date: Fri, 21 Feb 2014 18:05:14 +0000
From: "Andy Dyer (ELCA)" <adyer@expedia.com>
To: Gabor Lukacs <lukacs@AirPassengerRights.ca>
Subject: RE: Expedia Display Concerns

Dr. Lukacs,

Expedia's current pre-purchase display has been reviewed and approved by the Canadian T ransportation Agency. Thank you for your attention to this issue.

Best regards,

Andy Dyer

-----Original Message-----
From: Gabor Lukacs [mailto:dr.gabor.lukacs@gmail.com] On Behalf Of Gabor Lukacs
Sent: Thursday, February 20, 2014 2:58 PM
To: Andy Dyer (ELCA)
Subject: Re: Expedia Display Concerns

Mr. Dyer,

Thank you for your message, which unfortunately, fails to address my concerns.

My concern is primarily about the advertising (i.e., pre-purchase) of the prices, as do cumented in the attached PDF files:

(1) In two of the attached three files, there is a "YR - Service Charge" item shown among the "Taxes, Fees and Charges," even though all airline-charged fees ou ght to be listed under "Air Transportation Charges."

(2) In two of the attached three files, there is also an "Airline Fuel Surcharge" item listed, even though such charges ought to be listed as part of the "Air Transportation Charges."

While these issues exist also with respect to post-purchase information provided, the t hrust of my concern is focused actually on advertising and on the information displayed on Expedia's website *prior* to the purchase (as shown on the attached PDF files).

The obligation to comply with the Air Transportation Regulations applies to Expedia reg ardless of how its partners enter information into their databases. Certainly, now that you have been made aware of the issues, Expedia has an obligation to take remedial act ions.

I would like to draw your attention to the Notice to the Industry of the Canadian Trans portation Agency from last Friday:

> "The Agency considers each day that an advertisement remains in non-compliance to constitute a contravention of the regulations. Consequently, an advertiser is subject to monetary penalties each and every day of its non-compliance."

http://www.otc-cta.gc.ca/eng/notice-industry-enforcement-all-inclusive-air-price-advert ising-regulations-aspar

Therefore, I urge you to take remedial action without delay, and make changes to Expedi a's website.

Kindly please confirm the receipt of this message, and advise as to when Expedia's webs ite will be amended to conform to the Air Transportation Regulations in general, and ss . 135.8 and 135.91 in particular.

I look forward to hearing from you.

Best wishes,
Dr. Gabor Lukacs

On Thu, 20 Feb 2014, Andy Dyer (ELCA) wrote:

> Dr. Lukacs,
>
> Thank you for your patience as I have researched your concern. As a summary, you raise two issues: (1) the inclusion of carrier-imposed charges (e.g. YQ fuel surcharges) under the heading ?Taxes? in Expedia?s post-purchase itemized fare breakdowns, and (2) the descriptor ?Default Validating Carrier Tax? in reference to YR charges. I will address each below.
>
> Itemized fare breakdowns may be requested in two ways: (1) online through Expedia.ca and (2) telephonically via our call center. You requested an itemized fare breakdown both online and through the call center. Online requests are routed to the operations group or partner responsible for ticketing a given itinerary, and that team produces a report through its accounting system that separately states the taxes paid with respect to the given itinerary. The accounting system used by that team will determine the format of the report. In your case, the accounting system?s report format uses a column header of ?Taxes? to identify all charges other than the base fare, while separately stating HST, GST and QST (as applicable) as line items under the generic heading ?Taxes.? Although that system is owned and maintained by a third party, Expedia is making a recommendation to them that they update the column header to ?Taxes/Fees.?
>
> Telephonic requests are handled by call center agents, who access individual itineraries that are stored in large third-party databases known as global distribution systems (?GDSs?), which act as data clearinghouses for the global airline reservations community. Upon request, agents access an itinerary, produce a report through the GDS and e-mail that report to the customer. As you can see from the e-mails provided to you, the GDS reports generally contain a greater level of detail with respect to the taxes and fees applied to a given itinerary. Because those taxes and fees are identified by 2-letter codes, the GDS report also contains a glossary to help users understand the nature of each charge. That glossary is also included in Expedia?s e-mails. The format of that report and the glossary definitions are both determined by the GDS. In your case, the report includes all charges other than the base fare under a heading of ?Taxes? and a roll-up of all such charges under a heading of ?Total Taxes.? Expedia is making a recommendation to our GDS partner to update those headings to ?Taxes/Fees? and ?Total Taxes/Fees? respectively.
>
> The glossary definition for ?YR? as provided by the GDS and subsequently passed to you was ?Default validating carrier tax.? Based on my research, YR charges appear to be charges imposed by a carrier, similar to a YQ fuel surcharge. In your case, the YR charge was a surcharge imposed by Finnair.

> Expedia is making a recommendation to our GDS partner to update that
> glossary definition to ?Default validating carrier fee.?
>
>
>
> Although the regulations to which you refer apply to the advertisement
> and promotion of airfares to consumers in the pre-purchase context, we
> are keenly interested in providing customers with a clear
> understanding of their charges when they request a post-purchase
> breakdown. In addition to making the above-mentioned recommendations
> to third-party systems providers, I have asked our internal teams to
> update our e-mail communications to inform customers as to the
> inclusion of all non-base fare amounts, including carrier-imposed
> charges, under the headings described above. I hope that the
> foregoing explanation provides you with some clarity as to the format
> of the reports you received, the nature of the charges on your
> itinerary, and the steps we are taking to increase transparency of these charges goin
g forward.
>
>
>
> Once again, I appreciate your bringing this to my attention as I
> believe it will allow Expedia to provide better service to our
> customers going forward. If you have any questions, please contact me.
>
>
>
> Best regards,
>
>
>
> Andy Dyer
>
>
>
>
>

From adyer@expedia.com Mon Feb 24 13:06:45 2014
Date: Mon, 24 Feb 2014 17:06:33 +0000
From: "Andy Dyer (ELCA)" <adyer@expedia.com>
To: Gabor Lukacs <lukacs@airpassengerrights.ca>
Subject: RE: Expedia Display Concerns

Dr. Lukacs,

Thank you for your correspondence and interest in this matter. As indicated in my previous e-mail, Expedia does not release internal or external correspondence to the public and we believe our display is compliant with Canadian regulations. At this time, Expedia considers this matter closed.

Best regards,

Andy Dyer

-----Original Message-----
From: Gabor Lukacs [mailto:dr.gabor.lukacs@gmail.com] On Behalf Of Gabor Lukacs
Sent: Friday, February 21, 2014 7:12 PM
To: Andy Dyer (ELCA)
Cc: Bob Dzielak (ELCA); barry.diller@iac.com
Subject: RE: Expedia Display Concerns

Mr. Dyer,

I am profoundly disappointed by Expedia's lack of cooperation in this matter. I have approached Expedia in attempt to resolve this matter amicably, but it appears that Expedia prefers to deal with matters through formal adjudication.

I am hereby making a final attempt to resolve this matter: please change Expedia's website to comply with the Air Transportation Regulations, or alternatively, provide me with a copy of the alleged approval that Expedia has allegedly received from the Agency.

Failing these, I am afraid, I will have no choice but to file a formal complaint against Expedia with the Canadian Transportation Agency.

Yours very truly,
Dr. Gabor Lukacs

On Sat, 22 Feb 2014, Andy Dyer (ELCA) wrote:

> Dr. Lukacs,
>
> Expedia does not make copies of internal or external correspondence
> available to the public.
>
> Best regards,
>
> Andy Dyer
>
> -----Original Message-----
> From: Gabor Lukacs [mailto:dr.gabor.lukacs@gmail.com] On Behalf Of
> Gabor Lukacs
> Sent: Friday, February 21, 2014 10:15 AM
> To: Andy Dyer (ELCA)
> Cc: Bob Dzielak (ELCA); barry.diller@iac.com
> Subject: RE: Expedia Display Concerns
>
> Mr. Dyer,
>
> Unfortunately, I could not find any trace of any approval of Expedia's website among the decisions of the Canadian Transportation Agency.

```
>
> Would you please be so kind to provide me with a copy of the approval of Expedia's cu
rrent pre-purchase display by the Canadian Transportation Agency?
>
> I look forward to hearing from you.
>
> Best wishes,
> Dr. Gabor Lukacs
>
>
> On Fri, 21 Feb 2014, Andy Dyer (ELCA) wrote:
>
>> Dr. Lukacs,
>>
>> Expedia's current pre-purchase display has been reviewed and approved
>> by the Canadian Transportation Agency.  Thank you for your attention
>> to this issue.
>>
>> Best regards,
>>
>> Andy Dyer
>>
>> -----Original Message-----
>> From: Gabor Lukacs [mailto:dr.gabor.lukacs@gmail.com] On Behalf Of
>> Gabor Lukacs
>> Sent: Thursday, February 20, 2014 2:58 PM
>> To: Andy Dyer (ELCA)
>> Subject: Re: Expedia Display Concerns
>>
>> Mr. Dyer,
>>
>> Thank you for your message, which unfortunately, fails to address my concerns.
>>
>> My concern is primarily about the advertising (i.e., pre-purchase) of the prices, as
 documented in the attached PDF files:
>>
>> (1) In two of the attached three files, there is a  "YR - Service Charge"
>> item shown among the "Taxes, Fees and Charges," even though all airline-charged fees
 ought to be listed under "Air Transportation Charges."
>>
>> (2) In two of the attached three files, there is also an "Airline Fuel Surcharge" it
em listed, even though such charges ought to be listed as part of the "Air Transportati
on Charges."
>>
>> While these issues exist also with respect to post-purchase information provided, th
e thrust of my concern is focused actually on advertising and on the information displa
yed on Expedia's website *prior* to the purchase (as shown on the attached PDF files).
>>
>> The obligation to comply with the Air Transportation Regulations applies to Expedia
regardless of how its partners enter information into their databases. Certainly, now t
hat you have been made aware of the issues, Expedia has an obligation to take remedial
actions.
>>
>> I would like to draw your attention to the Notice to the Industry of the Canadian Tr
ansportation Agency from last Friday:
>>
>>      "The Agency considers each day that an advertisement remains in
>>      non-compliance to constitute a contravention of the regulations.
>>      Consequently, an advertiser is subject to monetary penalties each
>>      and every day of its non-compliance."
>>
>> http://www.otc-cta.gc.ca/eng/notice-industry-enforcement-all-inclusiv
>> e -air-price-advertising-regulations-aspar
>>
>>
```

>> Therefore, I urge you to take remedial action without delay, and make changes to Exp
edia's website.
>>
>> Kindly please confirm the receipt of this message, and advise as to when Expedia's w
ebsite will be amended to conform to the Air Transportation Regulations in general, and
 ss. 135.8 and 135.91 in particular.
>>
>> I look forward to hearing from you.
>>
>>
>> Best wishes,
>> Dr. Gabor Lukacs
>>
>>
>>
>> On Thu, 20 Feb 2014, Andy Dyer (ELCA) wrote:
>>
>>>
>>> Dr. Lukacs,
>>>
>>>
>>>
>>> Thank you for your patience as I have researched your concern. As a
>>> summary, you raise two issues: (1) the inclusion of carrier-imposed
>>> charges (e.g. YQ fuel surcharges) under the heading ?Taxes? in
>>> Expedia?s post-purchase itemized fare breakdowns, and (2) the
>>> descriptor ?Default Validating Carrier Tax? in reference to YR
>>> charges. I will address each below.
>>>
>>>
>>>
>>> Itemized fare breakdowns may be requested in two ways: (1) online
>>> through Expedia.ca and (2) telephonically via our call center. You
>>> requested an itemized fare breakdown both online and through the
>>> call center. Online requests are routed to the operations group or
>>> partner responsible for ticketing a given itinerary, and that team
>>> produces a report through its accounting system that separately
>>> states the taxes paid with respect to the given itinerary. The
>>> accounting system used by that team will determine the format of the
>>> report. In your case, the accounting system?s report format uses a column header o
f ?Taxes?
>>> to identify all charges other than the base fare, while separately
>>> stating HST, GST and QST (as applicable) as line items under the
>>> generic heading ?Taxes.? Although that system is owned and
>>> maintained by a third party, Expedia is making a recommendation to them that they u
pdate the column header to ?Taxes/Fees.?
>>>
>>>
>>>
>>> Telephonic requests are handled by call center agents, who access
>>> individual itineraries that are stored in large third-party
>>> databases known as global distribution systems (?GDSs?), which act
>>> as data clearinghouses for the global airline reservations
>>> community. Upon request, agents access an itinerary, produce a
>>> report through the GDS and e-mail that report to the customer. As
>>> you can see from the e-mails provided to you, the GDS reports
>>> generally contain a greater level of detail with respect to the
>>> taxes and fees applied to a given itinerary. Because those taxes and
>>> fees are identified by 2-letter codes, the GDS report also contains
>>> a glossary to help users understand the nature of each charge. That
>>> glossary is also included in Expedia?s e-mails. The format of that
>>> report and the glossary definitions are both determined by the GDS.
>>> In your case, the report includes all charges other than the base
>>> fare under a heading of ?Taxes? and a roll-up of all such charges
>>> under a heading of ?Total Taxes.? Expedia is making a recommendation to our GDS pa

rtner to update those headings to ?Taxes/Fees? and ?Total Taxes/Fees? respectively.
>>>
>>>
>>>
>>> The glossary definition for ?YR? as provided by the GDS and
>>> subsequently passed to you was ?Default validating carrier tax.?
>>> Based on my research, YR charges appear to be charges imposed by a
>>> carrier, similar to a YQ fuel surcharge. In your case, the YR charge was a surchar
ge imposed by Finnair.
>>> Expedia is making a recommendation to our GDS partner to update that
>>> glossary definition to ?Default validating carrier fee.?
>>>
>>>
>>>
>>> Although the regulations to which you refer apply to the
>>> advertisement and promotion of airfares to consumers in the
>>> pre-purchase context, we are keenly interested in providing
>>> customers with a clear understanding of their charges when they
>>> request a post-purchase breakdown. In addition to making the
>>> above-mentioned recommendations to third-party systems providers, I
>>> have asked our internal teams to update our e-mail communications to
>>> inform customers as to the inclusion of all non-base fare amounts,
>>> including carrier-imposed charges, under the headings described
>>> above. I hope that the foregoing explanation provides you with some
>>> clarity as to the format of the reports you received, the nature of
>>> the charges on your itinerary, and the steps we are taking to increase transparency
of these charges going forward.
>>>
>>>
>>>
>>> Once again, I appreciate your bringing this to my attention as I
>>> believe it will allow Expedia to provide better service to our
>>> customers going forward. If you have any questions, please contact me.
>>>
>>>
>>>
>>> Best regards,
>>>
>>>
>>>
>>> Andy Dyer
>>>
>>>
>>>
>>>
>>>
>>
>

TAB J

Ceci est la pièce J de affidavit
This is Exhibit referred to in the Affidavit

de Simona Sasova
of

assermentée devant moi ce 20th jour de May 2014
sworn to before me this day of

Andray Renaud
Commissaire à l'assermentation
Commissioner for Oaths

ANDRAY RENAUD, AVOCATE
194392-8
BARREAU DU QUÉBEC

Office
des transports
du Canada

Canadian
Transportation
Agency

Reference No: 14-01601
Date: March 27, 2014

Sean C. Shannon
Expedia Canada Corporation
610-410 Adelaide Street West
Toronto ON
M5V 1S8

Dear Sir:

RE: Warning for violation of the *Air Transportation Regulations*

Results of a compliance verification conducted by a Designated Enforcement Officer of the Canadian Transportation Agency (Agency) indicate that Expedia Canada Corporation is in contravention of section 135.92 of the *Air Transportation Regulations* (ATR). This compliance verification relates to Expedia's online booking engine Expedia.ca.

Section 135.92 of the ATR reads as follows:

> 135.92 A person must not refer to a third party charge in an advertisement by a name other than the name under which it was established.

Third party charges are not identified by name, only a two letter code.

A copy of the evidence is on file at the Agency, 15 Eddy Street, Gatineau, Quebec and can be reviewed by previous arrangement during regular business hours by contacting Simona Sasova, Manager of Enforcement Division, Regulatory Approvals and Compliance Directorate at (819) 953-9786.

Expedia Canada Corporation **shall comply** with the requirements set out in section 135.92 of the ATR **by April 30, 2014**.

Please be advised that in the event of a further violation of this provision within next 4 years Expedia Canada Corporation could be issued an administrative monetary penalty of up to $5,000 per violation.

Should you disagree with the findings of this verification and wish to contest the conclusions, you may do so, within **30 days** of the date of this letter, by requesting the Agency to undertake a review of this case. Your signed letter should include the Reference Number indicated in the upper right hand corner of this letter and be addressed to:

The Secretary
Canadian Transportation Agency
Ottawa, Ontario
Canada
K1A 0N9
Tel: 1-888-222-2592
Fax: (819) 997-6727
E-mail: info@cta-otc.gc.ca

Your letter should contain a clear and concise statement of the facts and circumstances surrounding the case and should be accompanied by copies of any documentation or other evidence that you believe might be pertinent to your request for review (see attached).

Sincerely,

S. Sasova

Designated Enforcement Officer
Enforcement Division
Regulatory Approvals & Compliance Directorate
Industry Regulations and Determinations Branch
15 Eddy Street,
Gatineau, Quebec
Canada
K1A 0N9

encl.

c.c. XXXXXX

TAB K

Ceci est la pièce K de l'affidavit
This is Exhibit referred to in the Affidavit

de Simona Sasova
of

assermenté devant moi ce 20th jour de May 2014
sworn to before me this day of

Andray Renaud
Commissaire à l'assermentation
Commissioner for Oaths

ANDRAY RENAUD, AVOCAT
194392-8
BARREAU DU QUÉBEC

Your Trip to **Dubai, United Arab Emirates**

19 Sep 2014 - 26 Sep 2014 | Total price: **C$1,091.77**

Nice Job! You picked one of our **Cheapest** flights. Book now so you don't miss out on this price!

Flights

Change Flights | Show Details

19 Sep 2014 - Departure — 1 stop — Total travel time : 21h 35m

Cheapest

Ottawa
YOW 4:55pm
Air Canada 838
Economy/Coach (K)

Frankfurt
FRA 6:15am + 1 day
Arrives on 20 Sep 2014
7h 20m

Layover: 7h 55m

Frankfurt
FRA 2:10pm
Departs on 20 Sep 2014
Lufthansa 630
Economy/Coach (K)

Dubai
DXB 10:30pm
Arrives on 20 Sep 2014
6h 20m

26 Sep 2014 - Return — 2 stops — Total travel time : 31h 38m

Cheapest

Dubai
DXB 8:25am
Air Canada 9589 Operated by /LUFTHANSA OR LH CITYLINE
Economy/Coach (K)

Munich
MUC 12:50pm
6h 25m

Layover: 2h 40m

Munich
MUC 3:30pm
Air Canada 847
Economy/Coach (K)

Toronto
YYZ 6:20pm
8h 50m

Layover: 12h 40m

Toronto
YYZ 7:00am
Departs on 27 Sep 2014
Air Canada 440
Economy/Coach (K)

Ottawa
YOW 8:03am
Arrives on 27 Sep 2014
1h 3m

A breakdown of taxes, fees and charges

CA - Air Travellers Security Charge	C$25.91
RC - Harmonized PST/GST/HST (HST)	C$3.51
SQ - Airport Improvement Fee (AIF)	C$27.00
DE - Germany: Airport Security Charge	C$7.48
RA - Germany: Passenger Service Charge	C$57.48
AE - UAE: Passenger Service Charge	C$23.21
TP - UAE: Passenger Security and Safety Fee	C$1.55
ZR - UAE: Advance Passenger Information Fee	C$1.55

Trip Summary

Ottawa to Dubai
19 Sep 2014 - 26 Sep 2014

Departure: Arrives on 20 Sep 2014
Return: Arrives on 27 Sep 2014

1 Ticket: Return

Traveller 1: Adult	**C$1,091.77**
Air Transportation Charges	C$473.00
Airline Fuel Surcharge	C$460.00
Taxes, Fees and Charges	C$158.77
Total:	C$1,091.77

All prices quoted in **Canadian dollars.**

Important Flight Information

We want you to know the airline you're travelling with has the following restrictions regarding your flight.

- Tickets are **nonrefundable** and **nontransferable.** Name changes are not allowed.
- The airline may charge additional fees for checked baggage or other optional services.
- Airlines may change flight schedules and terminals at any time.
- Correct travel documents are required. It's your responsibility to check your documents before you travel. Please click here for up-to-date passport, visa and health information.

Add a Hotel **Don't miss out! This is your only opportunity for these trip savings**

Suite Novotel Mall Of The Emirates
1 Room, 6 Nights. Superior Suite
Book later ~~+ C$1,031~~
Book with flight + C$815
+ ADD TO TRIP
SAVE **C$216**

Novotel Deira City Centre
1 Room, 6 Nights. Superior Room, 1 Double Bed with Sofabed
Book later ~~+ C$860~~
Book with flight + C$679
+ ADD TO TRIP
SAVE **C$181**

Waldorf Astoria Dubai - Palm Jumeirah
Book later ~~+ C$2,523~~
+ ADD TO TRIP
SAVE

1 Room, 6 Nights. Superior Room, 1 King Bed, Balcony, Partial View

Book with flight + C$2,050 C$473

114

We'll show you hotels you can pair with your selected flight. View more Hotels »

Trip savings includes any individual item discounts, as well as savings from reduced taxes and service fees.

CONTINUE BOOKING ▶

Save this Itinerary

TAB 2

Federal Court of Appeal | Cour d'appel fédérale

TO: Judicial Administrator

FROM: Sharlow J.A.

DATE: July 3, 2014

RE: A-167-14 Dr. Gábor Lukács v. Canadian Transportation Agency

---

DIRECTION

The applicant has requested that this matter be held in abeyance pending settlement discussions.

The time for filing the applicant's record is extended to September 30, 2014.

"KS"

TAB 3

Federal Court of Appeal | Cour d'appel fédérale

Date: 20141126

Docket: A-167-14

Ottawa, Ontario, November 26, 2014

Present: **GAUTHIER J.A.**

BETWEEN:

DR. GÁBOR LUKÁCS

Applicant

and

CANADIAN TRANSPORTATION AGENCY

Respondent

ORDER

UPON the applicant's motion made in writing for an order:

[1] requiring Ms. Simona Sasova to pay Lukács the costs of the September 15, 2014 continuation of her cross-examination on her affidavit sworn on May 20, 2014;

[2] requiring Ms. Sasova to re-attend, at her own expense or the expense of the Agency, for cross-examination on said affidavit:

(i) to answer questions 393-397 and further questions in the line of questioning to which counsel for the Agency objected on September 15, 2015 (p. 99, l. 6-8 of the transcript), and any follow-up questions;

(ii) to produce all emails sent by Mr. Paul Lynch to Expedia on July 28, 2014, including those that were allegedly sent in error, and answer questions in relation to them, including any follow-up questions;

(iii) to answer questions related to Exhibit No. A for identification and its content, including any follow-up questions; and

[3] setting a schedule for the remaining steps in this proceeding, and granting the applicant 30 days from the receipt of the transcripts of Ms. Sasova's re-attendance to serve and file the applicant's record,

[4] the whole with costs;

HAVING considered the material filed by the parties;

UPON noting that cross-examination of an affiant is not meant to be used as discovery of a party or as a means to test every detail of every document listed in a direction to attend. Applications for judicial review are meant to proceed expeditiously and in a summary fashion. Documents listed in a direction to attend are not usually provided in advance to the party conducting the cross-examination. Nevertheless, all questions relating thereto must be put to the

witness in the absence of a clear agreement to the contrary. The cross-examination of an affiant becomes evidence in the record as it is the equivalent of a cross-examination of a witness at a hearing.

UPON considering that the applicant invoked Rule 96(2) of the *Federal Courts Rules*, SOR/98-106 (the Rules) to adjourn the cross-examination on the basis that the affiant had failed to produce documents listed in the direction to attend. Such adjournment is meant to allow the party conducting the examination to bring a motion for directions. The parties may avoid the need to bring such a motion but to do so, they must clearly agree on under what terms the cross-examination will be continued. Here, it is evident that there was no such agreement as counsel for the respondent made it clear that the cross-examination could only be continued in respect of new documents produced after the adjournment, while the applicant did not agree to such restrictions. Thus, the cross-examination should not have resumed without an appropriate motion for directions. In the circumstances, the Court is not satisfied that a special order as to costs is warranted;

UPON considering that in this case, the description of the documents to be produced in the direction to attend did not include a specific time period. According to the applicant, this meant implicitly that the period was flexible and ended only on the date of the cross-examination. This view was not shared by the respondent's counsel. In my view, it is incumbent on the applicant to ensure that the direction to attend contains enough precision not to require interpretation. In this case, the Court is not satisfied that the direction to attend was precise enough to warrant ordering special costs against the affiant;

UPON further considering that on a motion to compel answers, the party conducting the cross-examination must ask on the record all the questions to be dealt with by the Court. This includes everything arising from the documentation except for those questions that could not be anticipated and that arise solely from the answers given. Questions 395-396 are not questions that require an answer as they are simply statements as to what is written in the document. This document speaks for itself. Question 397 is a pure question of law that may not be answered. That said, the witness answered questions on similar topics (see, for example, Questions 169, 187-190, 212, 236), and the relevant email dated March 11 was already available to the applicant at the time. Finally, Questions 393 and 394 are identical and the answer is evident from the document itself and the answer given to Question 392. None of these warrant re-attendance of the witness;

UPON determining that Exhibit No. A is an email sent by the applicant to the respondent's counsel on a without prejudice basis and in the context of settlement negotiations. It appears that the witness became aware of this email when asked by counsel for the respondent to explore the feasibility of such settlement (see answer to Question 470 and pages 275 to 277 of the applicant's motion record). This document is privileged and the reference to the fact that steps were taken by the witness to explore the feasibility of what was being negotiated is not sufficient to assume that the respondent waived the privilege attached to it nor is it sufficient to make the document relevant. Testing one's credibility is not a means to obtain the production in the record of privileged documents;

UPON considering all the arguments put forth in respect of the production of emails sent by Mr. Paul Lynch, including especially the applicant's reply, I am not persuaded that these documents are relevant and need to be produced;

THIS COURT ORDERS that the motion is dismissed. The applicant shall file his applicant's record within 30 days of the date of this order. All further steps shall be taken within the time limits set out in the Rules.

"Johanne Gauthier"
J.A.

Court File No.:A-167-14

FEDERAL COURT OF APPEAL

BETWEEN:

GABOR LUKACS

Applicant

and

CANADIAN TRANSPORTATION AGENCY

Respondent

RESPONDENT'S RECORD
CANADIAN TRANSPORTATION AGENCY
VOLUME 1

John Dodsworth
Senior Counsel
Legal Services Branch
Canadian Transportation Agency
19th Floor
15 Eddy Street
Gatineau, Quebec
K1A 0N9

John.dodsworth@otc-cta.gc.ca

Tel: 819-953-9324
Fax: 819-953-9269

Court File No.: A-167-14

IN THE FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Applicant

- and -

CANADIAN TRANSPORTATION AGENCY

Respondent

RESPONDENT'S RECORD
CANADIAN TRANSPORTATION AGENCY
VOLUME 2 – MEMORANDUM OF FACT AND LAW

John Dodsworth
Senior Counsel
Legal Services Branch
Canadian Transportation Agency
19th Floor
15 Eddy Street
Gatineau, Quebec
K1A 0N9

Tel: 819-953-9324
Fax: 819-953-9269
John.dodsworth@otc-cta.gc.ca

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TAB 4

Court File No.: A-167-14

IN THE FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Applicant

- and -

CANADIAN TRANSPORTATION AGENCY

Respondent

MEMORANDUM OF FACT AND LAW
OF THE RESPONDENT
CANADIAN TRANSPORTATION AGENCY

---

1. These written representations are made in the judicial review application brought by the Applicant, Dr. Gabor Lukacs (Dr. Lukacs). In his application, Dr. Lukacs is seeking an order in mandamus requiring the Canadian Transportation Agency (Agency) to render a decision in matters raised in his February 24, 2014 correspondence to the Agency, purportedly pursuant to subsection 29(1) of the *Canada Transportation Act*, S.C. 1996, c. 10 (CTA). In his February 24, 2014 correspondence, Dr. Lukacs identified specific allegations of non-compliance by an online advertiser of the air service price advertising

regulations contained in Part V.1 of the Air Transportation Regulations (Part V.1 of the ATR).

2. The Agency's submissions are intended to explain the record and assist the Court in its consideration of the arguments made by the Applicant given that the Agency is the only respondent.

PART I - STATEMENT OF FACTS

A. The Agency

3. The Agency is a superior independent quasi-judicial administrative body of the Government of Canada which performs two key functions. As an adjudicative tribunal, the Agency, informally and through formal adjudication, resolves a range of commercial and consumer transportation-related disputes, including accessibility issues for persons with disabilities. As an economic regulator, the Agency makes determinations and issues authorities, licences and permits to transportation carriers under federal jurisdiction. The Agency administers and is responsible for a wide range of regulations.

4. The Agency consists of not more than five permanent members appointed by the Governor in Council and not more than three temporary members appointed by the Minister of Transport from a roster established by the Governor-in-Council.

> *Canada Transportation Act*, S.C. 1996, c. 10, section 7, subsection 9(3) - Appendix A

5. The Governor in Council shall designate one of the members appointed to be the Chairperson of the Agency.

> *Canada Transportation Act*, S.C. 1996, c. 10, subsection 7(3) - Appendix A

6. The Chairperson is the Chief Executive Officer (CEO) 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. The Chair is subject to the Values and Ethics Code of the Public Sector and has a responsibility for good stewardship and appropriate use of the Agency's resources.

> *Canada Transportation Act*, S.C. 1996, c. 10, section 13 - Appendix A
>
> Treasury Board of Canada Secretariat, Values and Ethics Code of the Public Sector, Expected Behaviours – Respondent's Record, Tab 10

7. The Agency is supported in its work by a professional staff, including lawyers, engineers, costing experts, economists and enforcement officers.

B. Part V.1 of the ATR

8. In December 2012, the Air Transportation Regulations (ATR) were amended under the authority of section 86.1 of the CTA to impose obligations on advertisers of the prices of air services. These amendments were aimed at two key objectives:

> Objective 1 — Enable consumers to readily determine the total price of an advertised air service. The display of the total price in air services price advertising reduces confusion and frustration as to the total price and increases transparency. It also allows consumers to more readily conduct price comparisons and make informed choices.
>
> Objective 2 — Promote fair competition between all advertisers in the air travel industry. Regulation of all-inclusive air price advertising promotes competition by achieving a level playing field for all persons who advertise the price of air services within, or originating in, Canada.
>
> > Air Transportation Regulations – Air Services Price Advertising: Interpretation Note
> > Respondent's Record, Tab 8

9. The Regulatory Impact Analysis Statement for the amendments made to the ATR to include Part V.1 stated:

> 8. Implementation, enforcement and service standards
>
> Compliance with the Regulations and a program of effective enforcement are crucial to the success of the regulatory regime. The Agency will begin monitoring compliance with the proposed Amendments as soon as they are registered and will enforce the Regulations using its authority under the Act through monitoring and enforcement mechanisms.
>
> In order to support enforcement, the Canadian Transportation Agency Designated Provisions Regulations would also be amended as indicated in the proposed text to set out the provisions of the Act and the ATR which, if contravened, may apply administrative monetary penalties. The Agency may impose fines of up to $5,000 for an individual and $25,000 for a corporation where either has been found guilty of an offence as a result of contravening these Regulations. As with all Agency enforcement actions, the determination of what corrective measures and/or penalties are required in the case of contravention is based on a number of different factors including the frequency and nature of the offence.
>
> In addition, in its role as a quasi-judicial tribunal, the Agency may order a person to make the changes necessary to conform with the legislation and regulations to bring about compliance.
>
> As with all of its enforcement actions, the Agency's primary objective is compliance. To support compliance, the Agency will work with advertisers of the price of air services to provide educational and other guidance materials to assist in the transition to the new regime.
>
> Regulatory Impact Analysis Statement
> Respondent's Record, Tab 9

Accordingly, the Agency amended the Canadian Transportation Agency Designated Provisions Regulation (DPR) to add the provisions of Part V.1 of the ATR. The DPR designate numerous provisions of the CTA, the ATR and the *Personnel Training for the Assistance of Persons with Disabilities Regulations* as provisions that, on violation, may be

subject to administrative monetary penalties of up to $5,000 for an individual, $25,000 for a corporation and up to $100,000 in the case of a violation of a requirement imposed on a railway company in an arbitrator's level of service decision. Under the administrative monetary penalties regime, the Agency appoints Designated Enforcement Officers (DEOs) who may issue a Notice of Violation (NOV) imposing an administrative monetary penalty where he/she is of the belief that a person has committed a violation of a provision designated in the DPRs. The DEOs that have been appointed by the Agency are all employees of the Agency and are not members.

Canada Transportation Act, S.C. 1996, c. 10, sections 177 & 178 - Appendix A

A. History of this Proceeding

10. On February 24, 2014, Dr. Lukacs sent correspondence to the Agency in which he stated that he would like to make a formal "complaint" with the Agency pursuant to section 40 of the Agency's General Rules. His correspondence concerned specific violations of Part V.1 of the ATR by Expedia, Inc., an online air service advertiser.

11. On March 27, 2014, Mr. Geoffrey Hare, Chairman and Chief Executive Officer (CEO) of the Agency responded to Dr. Lukacs. In his letter, Mr. Hare informed Dr. Lukacs that the Agency would not be conducting an inquiry into the matters he had raised in his correspondence. He stated:

(…)

Enforcement of the air pricing advertising provisions of the ATR is being

> achieved by application of the administrative monetary penalty provisions of the Canada Transportation Act (CTA). The Canadian Transportation Agency Designated Provisions Regulations (Designated Provisions Regulations) were amended specifically for that purpose. The DEO is empowered to exercise discretion and judgment in deciding how best to achieve compliance and where necessary enforce through the imposition of administrative monetary penalties. For your information, this approach has been highly successful in achieving compliance with the regulations amongst advertisers of air services.
>
> To be clear, no decision by an Agency Panel is required for the DEO to undertake an investigation of a potential contravention of a provision listed in the Designated Provisions Regulations. Therefore, the Agency will not be conducting an inquiry into the matter you have raised. Further, there is no role for the public to participate in an investigation, should the DEO decide that an investigation is warranted, except as requested by the DEO where the DEO determines that information relevant to the investigation is required. The role of the public is limited to apprising the DEO of concerns that they may have with respect to compliance. The Agency's Web site provides an e-mail address for this purpose.
>
> (…) the General Rules do not require the Agency to conduct an inquiry into a matter filed by the public with respect to alleged noncompliance with Part V.1 of the ATR or of other provisions of the ATR or the CTA which do not specifically provide for a complaint mechanism.
>
> Applicant's Record, Tab 2F, pages 46, 47

12. On March 28, 2014, Dr. Lukacs filed this application for judicial review.

13. On May 20, 2014, Ms. Simona Sasova, a Designated Enforcement Officer (DEO) at the Agency, filed an affidavit in the judicial review proceeding. In her affidavit, Ms. Sasova described her enforcement efforts with respect to Expedia, Inc. and the steps she took to address the instances of non-compliance identified by Dr. Lukacs in his February 24, 2014 correspondence.

14. On September 4, 2014, Dr. Lukacs cross-examined Ms. Sasova on her affidavit. Further cross-examinations of Ms. Sasova were conducted by Dr. Lukacs on September 15, 2014.

15. On October 14, 2014, Dr. Lukacs brought a motion to this Court seeking an Order requiring Ms. Sasova:

- to pay Lukacs the costs of the September 15, 2014 continuation of her cross-examination on her affidavit sworn on May 20, 2014;
- to re-attend, at her own expense or the expense of the Agency, for cross-examination on said affidavit to answer further questions and to produce further documents; and
- costs.

16. On November 26, 2014, by Order of Gauthier, J.A., Dr. Lukacs' motion was dismissed.

Order of Gauthier, J.A. dated November 26, 2014
Respondent's Record, Tab C

PART II - ISSUES

17. The Agency will address the following issues:

A. What is the appropriate standard of review?

B. Whether the Applicant has met the test set out in *Apotex v. Canada (Attorney General),* [1994] 1 F.C.R. 742, for the granting of an order of mandamus and, specifically:

- whether the CTA imposes a statutory duty upon the Agency to render a decision in Dr. Lukacs' February 24, 2014 correspondence;

- whether there is an alternative remedy that is available; and

- whether the order sought by Dr. Lukacs would have practical value or effect.

C. Whether the Court should grant costs in this application.

PART III – LAW AND SUBMISSIONS

A. Standard of Review

18. In *Apotex Inc. v. Canada (Attorney General)*, this Honourable Court formulated eight factors that must be considered in determining whether an order in mandamus should be issued. Those factors are as follows:

(a) there must be a public legal duty to act;
(b) the duty must be owed to the applicant;
(c) there is a clear right to performance of that duty;
(d) where the duty sought to be enforced is discretionary, certain additional principles apply; which include that in the exercise of a "fettered" discretion, the decision-maker must act upon "relevant", as opposed to "irrelevant", considerations; and that mandamus is unavailable to compel the exercise of a "fettered discretion" in a particular way;
(e) no other adequate remedy is available to the applicant;
(f) the order sought will have some practical value or effect;
(g) the Court finds no equitable bar to the relief sought; and
(h) on a "balance of convenience," an order of mandamus should be issued.

> *Apotex Inc. v. Canada (Attorney General),* [1994] 1 FCR 742
> Respondent's Record, Tab 1

19. The consideration of this Application involves the question of whether the requirements of mandamus, as formulated in *Apotex*, have been met. In *Ermineskin Indian Band and Nation v. Canada*, the Federal Court held that a standard of review of reasonableness applied to a mandamus application but that the standard of review only becomes relevant to the discretionary aspect of the principles governing mandamus.

> *Ermineskin First Nation v. Canada,* 2008 FC 1065
> Respondent's Record, Tab 2

B. Whether the Applicant has met the test set out in *Apotex v. Canada (Attorney General),* [1994] 1 F.C.R. 742, for the granting of an order of mandamus

20. In the Agency's respectful submission, in determining whether mandamus should be ordered, this Honourable Court should particularly consider whether the following three factors established by *Apotex* have been satisfied: (a) there must be a public legal duty to act; (e) another adequate remedy is available to the applicant; and (f) the order sought must have practical value or effect.

There must be a public legal duty to act

21. In the Agency's respectful submission, there is no public duty to hear an application or complaint with respect to Part V.1 of the ATR.

22. The CTA includes specific provisions which provide the Agency with the mandate to adjudicate applications and complaints. However, there is no complaint provision with respect to Part V.1 of the ATR. The specific application and complaint provisions in the CTA are many and are listed below.

> *Canada Transportation* Act, S.C. 1996, c. 10, sections s. 61, 65, 66, 67.1, 67.2, 69, 73, 91, 93, 95.3, 98, 99, 101, 103, 116, 120.1, 121, 127, 131, 132, 137, 138, 144, 145, 146.3, 152.1, 152.4, 161, 162, 162.1, 169.43, 172 - Appendix A

23. Section 116 of the CTA is of particular interest in respect of Dr. Lukac's application since it is an example of Parliament specifically placing a duty on the Agency to investigate and determine any level of service complaint submitted to the Agency by a shipper

against a railway. Section 116 states, in part:

> 116. (1) On receipt of a complaint made by any person that a railway company is not fulfilling any of its service obligations, the Agency shall
>
> (a) conduct, as expeditiously as possible, an investigation of the complaint that, in its opinion, is warranted; and
>
> (b) within one hundred and twenty days after receipt of the complaint, determine whether the company is fulfilling that obligation.
>
> *Canada Transportation Act*, S.C. 1996, c. 10, section 116
> - Appendix A

24. The Agency accepts that the specific wording of section 116 of the CTA places a public duty on the Agency to conduct an investigation into the complaint and make a decision.

25. In support of his position, Dr. Lukacs references testimony of Moya Greene, Assistant Deputy Minister Policy and Coordination, Department of Transport, to the Standing Committee on Transport (October 5, 1995) when the (then) proposed CTA was being debated. Though Ms. Greene testified that clause (section) 29 of the CTA obliges the Agency to decide a complaint, it is of note that her testimony was in response to concerns expressed that provisions of the proposed CTA might limit the ability of shippers to file complaints against railways.

26. Furthermore, ultimately it is the actual statutory scheme that must prevail, and as explained above, her statement is inconsistent with the context of the aforementioned application and complaint provisions of the CTA.

27. Section 29 provides that the "Agency shall make its decision in any proceedings before it as expeditiously as possible". The Agency respectfully submits that section 29 constitutes simply a statutory deadline provision. It provides no substantive grant of jurisdiction to the Agency. In the present case, section 29 is inapplicable as no proceeding was before the Agency since the Chair and CEO of the Agency referred the matter to enforcement by the Agency's Enforcement Branch; he did not appoint a panel to hear the matter.

28. Likewise, while the definitions of "application", "complaint" and "proceeding" in the Agency's General Rules may appear encompassing, the General Rules do not constitute a source of the Agency's jurisdiction. Rather, they merely establish procedures that the Agency may apply in a proceeding that is initiated in accordance with a specific complaint provision expressly enumerated in the CTA.

29. Moreover, since Dr. Lukacs' February 24, 2014 correspondence to the Agency, the Agency's General Rules have been repealed and replaced by the *Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)* (SOR/2014-104). The vast majority of the Dispute Proceedings Rules only apply to disputed proceedings and do not include a definition of "complaint".

30. Finally, properly read, sections 26 and 37 of the CTA do not create any general duty for the Agency to hear any complaint. They are clearly discretionary:

> 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.
>
> 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.
>
> *Canada Transportation Act*, S.C. 1996, c. 10, sections 26 & 37 - Appendix A

Another adequate remedy is available to the applicant

31. *Apotex* requires that consideration be given to whether there exists an alternative remedy available to an applicant. The Agency respectfully submits that administrative monetary penalties constitute an alternative means of enforcing Part V.1 of the ATR.

32. As noted by the Chair and CEO in his letter dated March 27, 2014, enforcement of the air pricing advertising provisions of the ATR is being achieved by application of the administrative monetary penalty provisions of the CTA, the DPR were amended specifically for that purpose, and this approach has been highly successful in achieving compliance with the regulations amongst advertisers of air services.

Applicant's Record, Tab 2F, page 46

33. In exercising his duties, the Chair of the Agency is accountable as CEO for efficiently managing the Agency's scarce resources in a manner that is efficient, effective, responsive and exemplifying stewardship, as required under the Values and Ethics Code of the Public Sector.

34. Choices relating to how to enforce Part V.1 of the ATR necessarily implicate those scarce resources and therefore, enforcement is a question of policy that should only be made by the Chair and CEO, who is in the best position to weigh the myriad of considerations that must, by definition, inform such choices.

35. The Agency's enforcement personnel are best placed to monitor air price advertising to ensure compliance. The advertisement of air prices is dynamic in nature. Internet advertisements, in particular, change constantly as information is sourced from thousands of air service providers. Global Websites must adhere to similar legislation in multiple jurisdictions, all of which informs the Agency's policy to achieve compliance of Part V.1 of the ATR through the Enforcement Branch rather than by an adjudicative process using Agency members.

36. Indeed, the use of enforcement personnel avoids the remedial problems identified by the Supreme Court of Canada in its recent decision in *Thibodeau v. Air Canada.* In *Thibodeau*, the Supreme Court rejected the use of "structural" or "institutional" orders that merely require compliance with a statute in broad terms. The SCC stated:

> [128] Ongoing judicial supervision will be appropriate in some cases, as discussed in Doucet-Boudreau. However, absent compelling circumstances, the courts generally should not make orders that have the almost inevitable effect of creating ongoing litigation about whether the order is being complied with. This is particularly so in this case given the statutory powers and expertise of the Commissioner to identify problems in relation to compliance with the OLA and to monitor whether appropriate progress is being made in implementing measures to correct them: ss. 49 to 75. (emphasis added)
>
> *Thibodeau v. Air Canada*, 2014 SCC 67, at para. 128
> Respondent's Record, Tab 4

37. In the Agency's respectful submission, treating allegations of non-compliance with Part V.1 of the ATR as complaints for adjudication raises exactly the same issues as the Supreme Court of Canada was concerned about: complainants will invariably seek broad orders requiring general compliance with Part V.1 of the ATR (as Dr. Lukacs has done in his February 24 correspondence), which will necessitate costly, inefficient, and continual supervision, either by the Agency or the courts (in contempt of court proceedings). This pitfall is avoided with the Agency's current enforcement strategy, namely enforcing Part V.1 of the ATR by means of administrative monetary penalties administered by DEOs.

38. Therefore, in determining whether there is no other adequate remedy available to the applicant, this Honourable Court should have regard to:

- the existing enforcement mechanism chosen by the Agency to enforce Part V.1 of the ATR, namely administrative monetary penalties applied by DEOs; and
- the risk of opening the door to requests for broad remedies (such as orders

generally requiring compliance with a statute), if enforcement occurs by means of individual complaints for adjudication.

The Order sought will not have practical value or effect

39. In the Agency's respectful submission, Ms. Sasova's affidavit evidences a very successful enforcement program for Part V.1 of the ATR.

40. For example, Ms. Sasova explained that upon receipt of Dr. Lukacs' letter to the Agency, the DEO conducted a second compliance verification of Expedia, Inc.'s online advertisement that led to three enforcement outcomes.

41. Firstly, the DEO noted that Expedia identified a service charge under the heading "Taxes, Fees and Charges" and not under the heading "Air Transportation Charges" as required by the regulations. A warning letter was issued to Expedia, Inc. on March 27, 2014 advising Expedia that it was non-compliant with section 135.92 of the Regulations. Expedia rectified the problem.

> Affidavit of Simona Sasova, sworn May 20, 2014, paragraph 14
> Respondent's Record, Tab A

42. Secondly, the DEO determined that while "Airline Fuel Surcharge" was located physically underneath the heading "Taxes, Fees and Charges", the amount of "Airline Fuel Surcharge" was not included in the total amount of "Taxes, Fees and Charges" and therefore not part of the breakdown of that heading and so was not in non-compliance

with s. 135.91 of the ATR.

43. Thirdly, though Part V.1 of the ATR only require an advertiser to identify "Air Transportation Charges" under that heading if they are included in its advertisement, Ms. Sasova found that Expedia, Inc. listed "Airline Fuel Surcharge" separately and this was acceptable because it makes it clear to the consumer that it is not a third party charge.

44. Nonetheless, Expedia was asked to move "Airline Fuel Surcharge" under the heading "Air Transportation Charge", which it did. However, the amount of the Airline Fuel Surcharge is not included within the amount identified with the heading "Air Transportation Charge".

45. In the Agency's respectful submission, the DEO's decision to not take further enforcement action against Expedia, Inc. to require it to include the amount of Airline Fuel Surcharge under the heading "Air Transportation Charges" constitutes a permissible exercise of discretion afforded a DEO. Section 180 of the CTA provides that the issuance of an NOV by the DEO is discretionary in nature.

> 180. If a person designated as an enforcement officer under paragraph 178(1)(a) believes that a person has committed a violation, the enforcement officer may issue and serve on the person a notice of violation
>
> *Canada Transportation Act*, S.C. 1996, c. 10, section 180 - Appendix A

46. While the Agency's position is that any order of mandamus would have no practical value or effect, in the event that this Honourable Court disagrees, it is respectfully submitted that further enforcement action by the DEO is the appropriate response. The remaining issue of technical non-compliance does not warrant assignment of a panel of members of the Agency.

47. Therefore, in determining whether the Order sought will have practical value or effect, this Honourable Court should have regard to:

- the current enforcement program of the Agency, which has been effective at achieving compliance with Part V.1 of the ATR; and
- with respect to Expedia, Inc. specifically, the fact that upon receipt of information regarding non-compliance, the DEO responded effectively with an appropriate use of her discretion in order to achieve substantive compliance with Part V.1 of the ATR, achieving the consumer protection purpose of the regulation.

Conclusion

48. It is the Agency's respectful submission that this Honourable Court should particularly consider the following factors when determining whether a mandamus order can issue:

(a) Whether there is a public duty to act

- the CTA enumerates numerous specific application and complaint provisions.
- there is no such provision in respect of Part V.1 of the ATR.

(b) Whether there is another adequate remedy that is available.

· Enforcement of non-compliance is being effectively addressed by DEOs by way of the administrative monetary penalty program

(c) Whether the order sought will have practical value or effect

· the DEOs' current enforcement activities are achieving compliance including the situations where information about non-compliance is received from members of the public.

C.COSTS

49. As a self-represented litigant, the Applicant is not entitled to solicitor-client costs.

> *Spruce Hollow Heavy Haul Ltd. v. Madill*, 2014 FC 548
> Respondent's Record, Tab 5

50. The Agency respectfully requests that the Applicant's request for his disbursements and an amount for his time be denied.

51. Generally, an administrative body like the Agency will neither be entitled to nor be ordered to pay costs, at least when responding to a court proceeding to address its jurisdiction and where there has been no misconduct on its part. Where the body has acted in good faith and conscientiously throughout, albeit resulting in error, the reviewing tribunal will not ordinarily impose costs.

> *Lang v. British Columbia (Superintendent of Motor Vehicles)*,
> 2005 BCCA 244, at para. 47 citing Brown and Evans, Judicial Review of Administrative Action in Canada (Toronto: Canvasback, 1998)
> Respondent's Record, Tab 6

52. Indeed, the Supreme Court of Canada has recognized the importance of having a fully informed adjudication of the issues before it. Because of its specialized expertise, or for want of an alternative knowledgeable advocate, submissions from an administrative body may be essential to achieve this objective. In these circumstances, the participation of the Agency adds value to the proceedings.

> *CAIMAW, Local 14 v. Paccar of Canada Ltd.*, (1989), 62 D.L.R. (4th) 437 (S.C.C.) – Respondent's Record, Tab 5

53. Finally, it is respectfully submitted that costs should not be awarded against the Agency as the Agency Chair and CEO was acting in good faith in referring enforcement of Dr. Lukacs' correspondence to the Agency's Enforcement Branch so as to fulfill its statutory mandate in a manner that is efficient, effective, responsive and exemplifying stewardship, as required under the Values and Ethics Code of the Public Sector.

> *Lang v. British Columbia (Superintendent of Motor Vehicles),* 2005 BCCA 244, at para. 47 – Respondent's Record, Tab 6
>
> Treasury Board of Canada Secretariat, Values and Ethics Code of the Public Sector, Expected Behaviours
> Respondent's Record, Tab 9

Request for costs of cross-examination

54. Dr. Lukacs asserts that Ms. Sasova's affidavit created the incorrect impression that Expedia, Inc.'s Website had become compliant with Part V.1 of the ATR as a result of her enforcement efforts and that this necessitated a very extensive cross-examination of Ms. Sasova.

55. In fact, at paragraph 16 of her affidavit, Ms. Sasova describes her enforcement efforts with respect to Expedia, Inc.'s failure to include fuel surcharges in "Air Transportation Charges" and acknowledged that Expedia's online advertisement was non-compliant with the requirement that the 'Airline Fuel Surcharge' appear under the heading 'Air Transportation Charges'. She stated:

> …If a breakdown of these charges is provided in writing in the advertisement, it must appear under the heading "Air Transportation Charges", not under "Taxes, Fees and Charges". In this case, Expedia listed the "Airline Fuel Surcharge" separately, which is acceptable

> because it makes it clear to the consumer that it is not a third party charge. Nevertheless, Expedia was requested to physically move the "Airline Fuel Surcharge" heading so that it appears under the "Air Transportation Charges", which Expedia has done. Attached hereto and marked as Exhibit "K" to my Affidavit is a screenshot of an Expedia online ad taken on May 20, 2014.
>
> Affidavit of Simona Sasova, sworn May 20, 2014, paragraph 16
> Respondent's Record, Tab A

56. It is noted that in his motion to this Court seeking an order compelling Ms. Sasova to re-attend cross-examinations and to produce further documents, Dr. Lukacs requested that Ms. Sasova personally bear the costs of the September 15, 2014 cross-examination.

57. In her decision dismissing the motion, Gauthier, J.A. stated (in part):

> ... UPON considering that the applicant invoked Rule 96(2) of the Federal Courts Rules, SOR/98-106 (the Rules) to adjourn the cross-examination on the basis that the affiant had failed to produce documents listed in the direction to attend... Thus, the cross-examination should not have resumed without an appropriate motion for directions. In the circumstances, the Court is not satisfied that a special order as to costs is warranted.
>
> UPON considering that in this case, the description of the documents to be produced in the direction to attend did not include a specific time period. According to the applicant, this meant implicitly that the period was flexible and ended only on the date of the cross-examination.
>
> This view was not shared by the respondent's counsel. In my view, it is incumbent on the applicant to ensure that the direction to attend contains enough precision not to require interpretation. In this case, the Court is not satisfied that the direction to attend was precise enough to warrant ordering special costs against the affiant.
>
> Order of Justice Gauthier dated November 26, 2014
> Respondent's Record, Tab C

58. Even if Dr. Lukacs misunderstood Ms. Sasova's affidavit as saying that Expedia, Inc. wa was compliant, she admitted several times early in her cross-examination that it was not, such that extensive cross-examination was not required. In cross-examinations on her affidavit, Ms. Sasova repeated her statement that Expedia's advertisement was non-compliant several times:

> Transcript of the September 4, 2014 cross-examination of Simona Sasova on her Affidavit sworn May 20, 2014, p. 48, line 25; p 49, lines 1-15; p. 52, lines 6, 15, 22
> Applicant's Record, p. 142-3, 146
>
> Transcript of the September 15, 2014 cross-examination of Simona Sasova on her Affidavit sworn May 20, 2014, p. 120, line 6, 18; p. 121, lines 15, 19, 24; p. 122, line 1; p. 138, line 11
> Applicant's Record, p. 230, 231, 232, 248

59. Ms. Sasova explains that her decision to not require Expedia, Inc. to fully comply with this provision was based on the exercise of her discretion as an Enforcement Officer.

Transcript of the September 4, 2014 cross-examination of Simona Sasova on her Affidavit sworn May 20, 2014, p. 59, line 8

Applicant's Motion Record, p. 198

60. It is therefore submitted that Dr. Lukacs was in no way misled to believe that Ms. Sasova's affidavit was tendered to evidence full compliance by Expedia, Inc., therefore requiring extensive cross-examination.

61. It is therefore respectfully requested that Dr. Lukacs' request that the Agency pay the costs of the cross-examinations, in any event of the cause, be denied.

PART IV - ORDER SOUGHT

62. The Agency respectfully requests that this Honourable Court dismiss this application for judicial review.

ALL OF WHICH IS RESPECTFULLY SUBMITTED. Dated at the City of Gatineau, in the Province of Quebec, this 26th day of January, 2015.

W. Liston

for John Dodsworth
Senior Counsel
Canadian Transportation Agency

PART V - LIST OF AUTHORITIES

Statutes and Regulations cited – Appendix A

Canada Transportation Act, S.C. 1996, c. 10, s. 7, 9(3), 13, 26, 37, 61, 65, 66, 67.1, 67.2, 69, 73, 91, 93, 95.3, 98, 99, 101, 103, 116, 120.1, 121, 127, 131, 132, 137, 138, 144, 145, 146.3, 152.1, 152.4, 161, 162, 162.1, 169.43, 172

Canadian Transportation Agency General Rules, SOR/2005-3, s. 19, 39(3)

Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings) (SOR/2014-104).

Case Law

Apotex Inc. v. Canada (Attorney General), [1994] 1 FCR 742

CAIMAW, Local 14 v. Paccar of Canada Ltd., (1989), 62 D.L.R. (4th) 437 (S.C.C.)

Ermineskin First Nation v. Canada, 2008 FC 1065

Lang v. British Columbia (Superintendent of Motor Vehicles), 2005 BCCA 244

Spruce Hollow Heavy Haul Ltd. v. Madill, 2014 FC 548

Thibodeau v. Air Canada, 2014 SCC 67

Other

Air Transportation Regulations – Air Services Price Advertising: Interpretation Note

Regulations Amending the Air Transportation Regulations and the Canadian Transportation Agency Designated Provisions Regulations – Regulatory Impact Analysis Statement

Treasury Board of Canada Secretariat, Values and Ethics Code of the Public Sector, Expected Behaviours

APPENDIX A

APPENDIX A

Canada Transportation Act, S.C. 1996, c.10, s. 7, 9

Agency continued	**7.** (1) The agency known as the National Transportation Agency is continued as the Canadian Transportation Agency.	**7.** (1) L'Office national des transports est maintenu sous le nom d'Office des transports du Canada.	Maintien de l'Office
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*.	(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*.	Composition
Chairperson and Vice-Chairperson	(3) The Governor in Council shall designate one of the members appointed under paragraph (2)(*a*) to be the Chairperson of the Agency and one of the other members appointed under that paragraph to be the Vice-Chairperson of the Agency.	(3) Le gouverneur en conseil choisit le président et le vice-président de l'Office parmi les membres nommés en vertu du paragraphe (2).	Président et vice-président
		1996, ch. 10, art. 7; 2001, ch. 27, art. 221; 2007, ch. 19, art. 3.	

Temporary members	**9.** (1) The Minister may appoint temporary members of the Agency from the roster of individuals established by the Governor in Council under subsection (2).	**9.** (1) Le ministre peut nommer des membres à titre temporaire à partir d'une liste de personnes établie par le gouverneur en conseil au titre du paragraphe (2).	Membres temporaires
Roster	(2) The Governor in Council may appoint any individual to a roster of candidates for the purpose of subsection (1).	(2) Pour l'application du paragraphe (1), le gouverneur en conseil peut nommer les personnes à inscrire sur la liste de candidats qui y est prévue.	Liste
Maximum number	(3) Not more than three temporary members shall hold office at any one time.	(3) L'Office ne peut compter plus de trois membres temporaires.	Nombre maximal
Term of temporary members	(4) A temporary member shall hold office during good behaviour for a term of not more than one year and may be removed for cause by the Governor in Council.	(4) Les membres temporaires sont nommés à titre inamovible pour un mandat d'au plus un an, sous réserve de révocation motivée par le gouverneur en conseil.	Durée du mandat
No reappointment	(5) A person who has served two consecutive terms as a temporary member is not, during the twelve months following the completion of the person's second term, eligible to be reappointed to the Agency as a temporary member.	(5) Les membres temporaires ayant occupé leur charge pendant deux mandats consécutifs ne peuvent, dans les douze mois qui suivent, recevoir un nouveau mandat.	Renouvellement du mandat

Canada Transportation Act, S.C. 1996, c.10, s. 13, 26, 37

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.

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.

Compelling observance of obligations

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.

Pouvoir de contrainte

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.

Inquiries

Inquiry into 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.

Enquêtes

Enquêtes sur les plaintes

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.

LICENCE FOR DOMESTIC SERVICE

Issue of licence

61. On application to the Agency and on payment of the specified fee, the Agency shall issue a licence to operate a domestic service to the applicant if

(*a*) the applicant establishes in the application to the satisfaction of the Agency that the applicant

(i) is a Canadian,

(ii) holds a Canadian aviation document in respect of the service to be provided under the licence,

(iii) has the prescribed liability insurance coverage in respect of the service to be provided under the licence, and

(iv) meets prescribed financial requirements; and

(*b*) the Agency is satisfied that the applicant has not contravened section 59 in respect of a domestic service within the preceding twelve months.

SERVICE INTÉRIEUR

Délivrance de la licence

61. L'Office, sur demande et paiement des droits indiqués, délivre une licence pour l'exploitation d'un service intérieur au demandeur :

a) qui, dans la demande, justifie du fait :

(i) qu'il est Canadien,

(ii) qu'à l'égard du service, il détient un document d'aviation canadien,

(iii) qu'à l'égard du service, il détient la police d'assurance responsabilité réglementaire,

(iv) qu'il remplit les exigences financières réglementaires;

b) dont il est convaincu qu'il n'a pas, dans les douze mois précédents, enfreint l'article 59 relativement à un service intérieur.

Complaints re non-compliance

65. Where, on complaint in writing to the Agency by any person, the Agency finds that a licensee has failed to comply with section 64 and that it is practicable in the circumstances for the licensee to comply with an order under this section, the Agency may, by order, direct the licensee to reinstate the service referred to in that section

(*a*) for such a period, not exceeding 120 days after the date of the finding by the Agency, as the Agency deems appropriate; and

(*b*) at such a frequency as the Agency may specify.

1996, c. 10, s. 65; 2007, c. 19, s. 18.

Plaintes relatives aux infractions

65. L'Office, saisi d'une plainte formulée par écrit à l'encontre d'un licencié, peut, s'il constate que celui-ci ne s'est pas conformé à l'article 64 et que les circonstances permettent à celui-ci de se conformer à l'arrêté, ordonner à celui-ci de rétablir le service pour la période, d'au plus cent vingt jours après la date de son constat, qu'il estime indiquée, et selon la fréquence qu'il peut fixer.

1996, ch. 10, art. 65; 2007, ch. 19, art. 18.

Unreasonable fares or rates

66. (1) If, on complaint in writing to the Agency by any person, the Agency finds that a licensee, including affiliated licensees, is the only person providing a domestic service between two points and that a fare, cargo rate or increase in a fare or cargo rate published or offered in respect of the service is unreasonable, the Agency may, by order,

(*a*) disallow the fare, rate or increase;

(*b*) direct the licensee to amend its tariff by reducing the fare, rate or increase by the amounts and for the periods that the Agency considers reasonable in the circumstances; or

(*c*) direct the licensee, if practicable, to refund amounts specified by the Agency, with interest calculated in the prescribed manner, to persons determined by the Agency to have been overcharged by the licensee.

Complaint of inadequate range of fares or rates

(2) If, on complaint in writing to the Agency by any person, the Agency finds that a licensee, including affiliated licensees, is the only person providing a domestic service between two points and that it is offering an inadequate range of fares or cargo rates in respect of that service, the Agency may, by order, direct the licensee, for a period that the Agency considers reasonable in the circumstances, to publish and apply in respect of that service one or more additional fares or cargo rates that the Agency considers reasonable in the circumstances.

Relevant information

(3) When making a finding under subsection (1) or (2) that a fare, cargo rate or increase in a fare or cargo rate published or offered in respect of a domestic service between two points is unreasonable or that a licensee is offering an inadequate range of fares or cargo rates in respect of a domestic service between two points, the Agency may take into consideration any information or factor that it considers relevant, including

(*a*) historical data respecting fares or cargo rates applicable to domestic services between those two points;

(*b*) fares or cargo rates applicable to similar domestic services offered by the licensee and one or more other licensees, including terms and conditions related to the fares or cargo rates, the number of seats available at those fares and the cargo capacity and cargo container types available at those rates;

Prix ou taux excessifs

66. (1) S'il conclut, sur dépôt d'une plainte, qu'un licencié, y compris les licenciés de son groupe, est la seule personne à offrir un service intérieur entre deux points, d'une part, et qu'un prix ou un taux, ou une augmentation de prix ou de taux, publiés ou appliqués à l'égard de ce service sont excessifs, d'autre part, l'Office peut, par ordonnance:

a) annuler le prix, le taux ou l'augmentation;

b) enjoindre au licencié de modifier son tarif afin de réduire d'une somme, et pour une période, qu'il estime indiquées dans les circonstances le prix, le taux ou l'augmentation;

c) lui enjoindre de rembourser, si possible, les sommes qu'il détermine, majorées des intérêts calculés de la manière réglementaire, aux personnes qui, selon lui, ont versé des sommes en trop.

Gamme de prix insuffisante

(2) S'il conclut, sur dépôt d'une plainte, qu'un licencié, y compris les licenciés de son groupe, est la seule personne à offrir un service intérieur entre deux points, d'une part, et que celui-ci offre une gamme de prix ou de taux insuffisante à l'égard de ce service, d'autre part, l'Office peut, par ordonnance, enjoindre au licencié, pour la période qu'il estime indiquée dans les circonstances, de publier et d'appliquer à l'égard de ce service un ou plusieurs prix ou taux supplémentaires qu'il estime indiqués dans les circonstances.

Facteurs à prendre en compte

(3) Pour décider, au titre des paragraphes (1) ou (2), si le prix, le taux ou l'augmentation de prix ou de taux publiés ou appliqués à l'égard d'un service intérieur entre deux points sont excessifs ou si le licencié offre une gamme de prix ou de taux insuffisante à l'égard d'un service intérieur entre deux points, l'Office peut tenir compte de tout renseignement ou facteur qu'il estime pertinent, notamment:

a) de renseignements relatifs aux prix ou aux taux appliqués antérieurement à l'égard des services intérieurs entre ces deux points;

b) des prix ou des taux applicables à l'égard des services intérieurs similaires offerts par le licencié et un ou plusieurs autres licenciés, y compris les conditions relatives aux prix ou aux taux applicables, le nombre de places offertes à ces prix et la capacité de transport et les types de conteneurs pour le transport disponibles à ces taux;

(*b.1*) the competition from other modes of transportation, if the finding is in respect of a cargo rate, an increase in a cargo rate or a range of cargo rates; and

(*c*) any other information provided by the licensee, including information that the licensee is required to provide under section 83.

b.1) de la concurrence des autres moyens de transport, si la décision vise le taux, l'augmentation de taux ou la gamme de taux;

c) des autres renseignements que lui fournit le licencié, y compris ceux qu'il est tenu de fournir au titre de l'article 83.

Alternative domestic services

(4) The Agency may find that a licensee is the only person providing a domestic service between two points if every alternative domestic service between those points is, in the Agency's opinion, unreasonable, taking into consideration the number of stops, the number of seats offered, the frequency of service, the flight connections and the total travel time and, more specifically, in the case of cargo, the cargo capacity and cargo container types available.

Services insuffisants

(4) L'Office peut conclure qu'un licencié est la seule personne à offrir un service intérieur entre deux points s'il estime que tous les autres services intérieurs offerts entre ces points sont insuffisants, compte tenu du nombre d'escales, de correspondances ou de places disponibles, de la fréquence des vols et de la durée totale du voyage et, plus précisément, dans le cas du transport de marchandises, de la capacité de transport et des types de conteneurs disponibles.

Alternative service

(4.1) The Agency shall not make an order under subsection (1) or (2) in respect of a licensee found by the Agency to be the only person providing a domestic service between two points if, in the Agency's opinion, there exists another domestic service that is not between the two points but is a reasonable alternative taking into consideration the convenience of access to the service, the number of stops, the number of seats offered, the frequency of service, the flight connections and the total travel time and, more specifically, in the case of cargo, the cargo capacity and cargo container types available.

Autres services

(4.1) L'Office ne rend pas l'ordonnance prévue aux paragraphes (1) ou (2) à l'égard du licencié s'il conclut que celui-ci est la seule personne à offrir un service intérieur entre deux points et s'il estime qu'il existe un autre service intérieur, qui n'est pas offert entre ces deux points, mais qui est suffisant compte tenu de la commodité de l'accès au service, du nombre d'escales, de correspondances ou de places disponibles, de la fréquence des vols et de la durée totale du voyage et, plus précisément, dans le cas du transport de marchandises, de la capacité de transport et des types de conteneurs disponibles.

Consideration of representations

(5) Before making a direction under paragraph (1)(*b*) or subsection (2), the Agency shall consider any representations that the licensee has made with respect to what is reasonable in the circumstances.

Représentations

(5) Avant de rendre l'ordonnance mentionnée à l'alinéa (1)*b*) ou au paragraphe (2), l'Office tient compte des observations du licencié sur les mesures qui seraient justifiées dans les circonstances.

(6) and (7) [Repealed, 2007, c. 19, s. 19]

(6) et (7) [Abrogés, 2007, ch. 19, art. 19]

Confidentiality of information

(8) The Agency may take any measures or make any order that it considers necessary to protect the confidentiality of any of the following information that it is considering in the course of any proceedings under this section:

(*a*) information that constitutes a trade secret;

(*b*) information the disclosure of which would likely cause material financial loss to, or prejudice to the competitive position of, the person providing the information or on whose behalf it is provided; and

(*c*) information the disclosure of which would likely interfere with contractual or other negotiations being conducted by the person providing the information or on whose behalf it is provided.

1996, c. 10, s. 66; 2000, c. 15, s. 4; 2007, c. 19, s. 19.

Confidentialité des renseignements

(8) L'Office peut prendre toute mesure, ou rendre toute ordonnance, qu'il estime indiquée pour assurer la confidentialité des renseignements ci-après qu'il examine dans le cadre du présent article:

a) les renseignements qui constituent un secret industriel;

b) les renseignements dont la divulgation risquerait vraisemblablement de causer des pertes financières importantes à la personne qui les a fournis ou de nuire à sa compétitivité;

c) les renseignements dont la divulgation risquerait vraisemblablement d'entraver des négociations — contractuelles ou autres — menées par la personne qui les a fournis.

1996, ch. 10, art. 66; 2000, ch. 15, art. 4; 2007, ch. 19, art. 19.

Tariffs to be made public

67. (1) The holder of a domestic licence shall

(*a*) display in a prominent place at the business offices of the licensee a sign indicating that the tariffs for the domestic service offered by the licensee, including the terms and conditions of carriage, are available for public inspection at the business offices of the licensee, and allow the public to make such inspections;

(*a.1*) publish the terms and conditions of carriage on any Internet site used by the licensee for selling the domestic service offered by the licensee;

(*b*) in its tariffs, specifically identify the basic fare between all points for which a domestic service is offered by the licensee; and

(*c*) retain a record of its tariffs for a period of not less than three years after the tariffs have ceased to have effect.

Publication des tarifs

67. (1) Le licencié doit:

a) poser à ses bureaux, dans un endroit bien en vue, une affiche indiquant que les tarifs et notamment les conditions de transport pour le service intérieur qu'il offre sont à la disposition du public pour consultation à ses bureaux et permettre au public de les consulter;

a.1) publier les conditions de transport sur tout site Internet qu'il utilise pour vendre le service intérieur;

b) indiquer clairement dans ses tarifs le prix de base du service intérieur qu'il offre entre tous les points qu'il dessert;

c) conserver ses tarifs en archive pour une période minimale de trois ans après leur cessation d'effet.

Prescribed tariff information to be included

(2) A tariff referred to in subsection (1) shall include such information as may be prescribed.

Renseignements tarifaires

(2) Les tarifs comportent les renseignements exigés par règlement.

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.

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).

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.

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.

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,

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

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.

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.

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.

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).

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).

LICENCE FOR SCHEDULED INTERNATIONAL SERVICE

Issue of licence

69. (1) On application to the Agency and on payment of the specified fee, the Agency shall issue a licence to operate a scheduled international service to the applicant if

(*a*) the applicant establishes in the application to the satisfaction of the Agency that the applicant

(i) is, pursuant to subsection (2) or (3), eligible to hold the licence,

(ii) holds a Canadian aviation document in respect of the service to be provided under the licence,

(iii) has the prescribed liability insurance coverage in respect of the service to be provided under the licence, and

(iv) where the applicant is a Canadian, meets the prescribed financial requirements; and

(*b*) the Agency is satisfied that the applicant has not contravened section 59 in respect of the service to be provided under the licence within the preceding twelve months.

Eligibility of Canadians

(2) The Minister may, in writing, designate any Canadian as eligible to hold a scheduled international licence. That Canadian remains eligible while the designation remains in force.

Eligibility of non-Canadians

(3) A non-Canadian is eligible to hold a scheduled international licence if the non-Canadian

(*a*) has been designated by a foreign government or an agent of a foreign government to operate an air service under the terms of an agreement or arrangement between that government and the Government of Canada; and

(*b*) holds, in respect of the air service, a document issued by a foreign government or agent that, in respect of the service to be provided under the document, is equivalent to a scheduled international licence.

1996, c. 10, s. 69; 2013, c. 31, s. 6.

SERVICE INTERNATIONAL RÉGULIER

Délivrance de la licence

69. (1) L'Office, sur demande et paiement des droits indiqués, délivre une licence pour l'exploitation d'un service international régulier au demandeur :

a) qui, dans la demande, justifie du fait :

(i) qu'il y est habilité, sous le régime des paragraphes (2) ou (3),

(ii) qu'à l'égard du service, il détient un document d'aviation canadien,

(iii) qu'à l'égard du service, il détient la police d'assurance responsabilité réglementaire,

(iv) qu'il remplit, s'agissant d'un Canadien, les exigences financières réglementaires;

b) dont il est convaincu qu'il n'a pas, dans les douze mois précédents, enfreint l'article 59 relativement au service.

Habilitation des Canadiens

(2) Le ministre peut, par écrit, désigner des Canadiens qu'il habilite à détenir une licence pour l'exploitation d'un service international régulier; l'habilitation reste valide tant que la désignation est en vigueur.

Habilitation des non-Canadiens

(3) Peut détenir une telle licence le non-Canadien qui :

a) a fait l'objet, de la part d'un gouvernement étranger ou du mandataire de celui-ci, d'une désignation l'habilitant à exploiter un service aérien aux termes d'un accord ou d'une entente entre ce gouvernement et celui du Canada;

b) détient en outre, à l'égard du service, un document délivré par un gouvernement étranger, ou par son mandataire, équivalant à une licence internationale service régulier.

1996, ch. 10, art. 69; 2013, ch. 31, art. 6.

LICENCE FOR NON-SCHEDULED INTERNATIONAL SERVICE

Issue of licence

73. (1) Subject to any directions issued to the Agency under section 76, on application to the Agency and on payment of the specified fee, the Agency shall issue a licence to operate a non-scheduled international service to the applicant if

(*a*) the applicant establishes in the application to the satisfaction of the Agency that the applicant

(i) is a Canadian,

(ii) holds a Canadian aviation document in respect of the service to be provided under the licence,

(iii) has the prescribed liability insurance coverage in respect of the service to be provided under the licence, and

(iv) meets prescribed financial requirements; and

(*b*) the Agency is satisfied that the applicant has not contravened section 59 in respect of the service to be provided under the licence within the preceding twelve months.

Non-Canadian applicant

(2) Subject to any directions issued to the Agency under section 76, on application to the Agency and on payment of the specified fee, the Agency may issue a non-scheduled international licence to a non-Canadian applicant if the applicant establishes in the application to the satisfaction of the Agency that the applicant

(*a*) holds a document issued by the government of the applicant's state or an agent of that government that, in respect of the service to be provided under the document, is equivalent to the non-scheduled international licence for which the application is being made; and

(*b*) meets the requirements of subparagraphs (1)(*a*)(ii) and (iii) and paragraph (1)(*b*).

SERVICE INTERNATIONAL À LA DEMANDE

Délivrance aux Canadiens

73. (1) Sous réserve des directives visées à l'article 76, l'Office, sur demande et paiement des droits indiqués, délivre une licence pour l'exploitation d'un service international à la demande au demandeur:

a) qui, dans la demande, justifie du fait:

(i) qu'il est Canadien,

(ii) qu'à l'égard du service, il détient un document d'aviation canadien,

(iii) qu'à l'égard du service, il détient la police d'assurance responsabilité réglementaire,

(iv) qu'il remplit les exigences financières réglementaires;

b) dont il est convaincu qu'il n'a pas, dans les douze mois précédents, enfreint l'article 59 relativement au service à offrir.

Délivrance aux non-Canadiens

(2) Sous réserve des directives visées à l'article 76, l'Office, sur demande et paiement des droits indiqués, peut délivrer une licence pour l'exploitation d'un service international à la demande au non-Canadien qui, dans la demande, justifie du fait, qu'à l'égard du service:

a) il détient un document, délivré par le gouvernement de son État ou par son mandataire, équivalant à une licence internationale service à la demande;

b) il remplit les conditions mentionnées aux sous-alinéas (1)*a*)(ii) et (iii) et à l'alinéa (1)*b*).

Application for certificate of fitness

91. (1) Any person may apply for a certificate of fitness for a railway, including a person who owns or leases the railway or controls, either directly or indirectly, a person who owns or leases the railway.

Application for certain types of operations

(2) If a person proposes to operate in Canada primarily on the railway of another railway company, the application must indicate the termini and route of every line of railway proposed to be operated.

Demande

91. (1) Toute personne, notamment le propriétaire ou le locataire d'un chemin de fer ou celui qui contrôle directement ou indirectement l'un d'eux, peut demander le certificat d'aptitude.

Mention obligatoire

(2) La demande mentionne obligatoirement les têtes de ligne et le parcours de chaque ligne que la personne se propose d'exploiter, si elle entend fonctionner au Canada principalement sur le chemin de fer d'une autre compagnie de chemin de fer.

suffisante, notamment en matière d'auto-assurance.

Variation of certificate

93. (1) The Agency may, on application, vary a certificate of fitness

(*a*) to change the termini or route of a line specified in the certificate;

(*b*) to add a line to the certificate; or

(*c*) to reflect a change in railway operations or circumstances relating to those operations.

Modification du certificat d'aptitude

93. (1) L'Office peut, sur demande, modifier le certificat d'aptitude afin :

a) d'y apporter un changement relatif à une tête de ligne ou au parcours d'une ligne y figurant;

b) d'y ajouter une ligne;

c) de tenir compte de la survenance de faits nouveaux ou de l'évolution des circonstances dans le cadre de l'exploitation ferroviaire.

Variation when running rights granted

(2) The Agency may vary a certificate of fitness when it

(*a*) makes an order under paragraph 116(4)(*e*) that requires a railway company to grant a right to the holder of the certificate; or

(*b*) grants a right under section 138 to the holder of the certificate.

1996, c. 10, s. 93; 2000, c. 16, s. 3.

Modification

(2) Il peut également modifier le certificat d'aptitude du titulaire :

a) à qui est accordée une autorisation au titre de l'alinéa 116(4)*e*);

b) à qui il accorde un droit au titre de l'article 138.

1996, ch. 10, art. 93; 2000, ch. 16, art. 3.

Complaints and investigations

95.3 (1) On receipt of a complaint made by any person that a railway company is not complying with section 95.1, the Agency may order the railway company to undertake any changes in its railway construction or operation that the Agency considers reasonable to ensure compliance with that section.

Restriction

(2) If the Agency has published guidelines under paragraph 95.2(1)(*b*), it must first satisfy itself that the collaborative measures set out in the guidelines have been exhausted in respect of the noise or vibration complained of before it conducts any investigation or hearing in respect of the complaint.

2007, c. 19, s. 29.

Plaintes et enquêtes

95.3 (1) Sur réception d'une plainte selon laquelle une compagnie de chemin de fer ne se conforme pas à l'article 95.1, l'Office peut ordonner à celle-ci de prendre les mesures qu'il estime raisonnables pour assurer qu'elle se conforme à cet article.

Restriction

(2) S'il a publié des lignes directrices au titre de l'alinéa 95.2(1)*b*), l'Office ne peut procéder à l'examen de la plainte que s'il est convaincu que toutes les mesures de coopération prévues par celles-ci ont été appliquées.

2007, ch. 19, art. 29.

Railway Lines

Lignes de chemin de fer

No construction without Agency approval

98. (1) A railway company shall not construct a railway line without the approval of the Agency.

Autorisation obligatoire

98. (1) La construction d'une ligne de chemin de fer par une compagnie de chemin de fer est subordonnée à l'autorisation de l'Office.

Grant of approval

(2) The Agency may, on application by the railway company, grant the approval if it considers that the location of the railway line is reasonable, taking into consideration requirements for railway operations and services and the interests of the localities that will be affected by the line.

Demande

(2) Sur demande de la compagnie, l'Office peut accorder l'autorisation s'il juge que l'emplacement de la ligne est convenable, compte tenu des besoins en matière de service et d'exploitation ferroviaires et des intérêts des localités qui seront touchées par celle-ci.

Exception

(3) No approval is needed for the construction of a railway line

(*a*) within the right of way of an existing railway line; or

(*b*) within 100 m of the centre line of an existing railway line for a distance of no more than 3 km.

Exception

(3) La construction d'une ligne de chemin de fer à l'intérieur du droit de passage d'une ligne de chemin de fer existante ou, s'il s'agit d'une ligne de chemin de fer d'au plus trois kilomètres de long, à 100 mètres ou moins de l'axe d'une telle ligne n'est pas subordonnée à l'autorisation.

Filing agreements

99. (1) An agreement, or an amendment to an agreement, relating to the construction of a railway line across another railway line may be filed with the Agency.

Dépôt d'ententes — lignes

99. (1) Toute entente, ou toute modification apportée à celle-ci, concernant la construction d'une ligne de chemin de fer en travers d'une autre ligne peut être déposée auprès de l'Office.

Effect of filing

(2) When the agreement or amendment is filed, it becomes an order of the Agency authorizing the parties to construct the railway line as provided in the agreement.

Effet du dépôt

(2) L'entente ou la modification ainsi déposée est assimilée à un arrêté de l'Office qui autorise la construction de la ligne conformément au document déposé.

No agreement

(3) If a person is unsuccessful in negotiating an agreement or amendment mentioned in subsection (1), the Agency may, on application, authorize the construction of the railway line or any related work.

Défaut d'entente

(3) L'Office peut, sur demande de la personne qui ne réussit pas à conclure l'entente ou une modification, autoriser la construction de la ligne ou de tout ouvrage qui y est lié.

Filing agreements

101. (1) An agreement, or an amendment to an agreement, relating to the construction, maintenance or apportionment of the costs of a road crossing or a utility crossing may be filed with the Agency.

Effect of filing

(2) When the agreement or amendment is filed, it becomes an order of the Agency authorizing the parties to construct or maintain the crossing, or apportioning the costs, as provided in the agreement.

No agreement on construction or maintenance

(3) If a person is unsuccessful in negotiating an agreement or amendment mentioned in subsection (1), the Agency may, on application, authorize the construction of a suitable road crossing, utility crossing or related work, or specifying who shall maintain the crossing.

No agreement on apportionment of costs

(4) Section 16 of the *Railway Safety Act* applies if a person is unsuccessful in negotiating an agreement relating to the apportionment of the costs of constructing or maintaining the road crossing or utility crossing.

Dépôt d'ententes — franchissements

101. (1) Toute entente, ou toute modification apportée à celle-ci, concernant la construction, l'entretien ou la répartition des coûts d'un franchissement routier ou par desserte peut être déposée auprès de l'Office.

Effet du dépôt

(2) L'entente ou la modification ainsi déposée est assimilée à un arrêté de l'Office qui autorise la construction ou l'entretien du franchissement, ou qui répartit les coûts afférents, conformément au document déposé.

Défaut d'entente

(3) L'Office peut, sur demande de la personne qui ne réussit pas à conclure l'entente ou une modification, autoriser la construction d'un franchissement convenable ou de tout ouvrage qui y est lié, ou désigner le responsable de l'entretien du franchissement.

Défaut d'entente quant aux coûts

(4) L'article 16 de la *Loi sur la sécurité ferroviaire* s'applique s'il n'y a pas d'entente quant à la répartition des coûts de la construction ou de l'entretien du franchissement.

Other crossings may be ordered

103. (1) If a railway company and an owner of land adjoining the company's railway do not agree on the construction of a crossing across the railway, the Agency, on the application of the owner, may order the company to construct a suitable crossing if the Agency considers it necessary for the owner's enjoyment of the land.

Terms and conditions

(2) The Agency may include in its order terms and conditions governing the construction and maintenance of the crossing.

Costs of construction and maintenance

(3) The owner of the land shall pay the costs of constructing and maintaining the crossing.

Non-application of section

(5) This section does not apply in any circumstances where section 102 or 103 applies.

Autres passages

103. (1) Si la compagnie de chemin de fer et le propriétaire d'une terre contiguë au chemin de fer ne s'entendent pas sur la construction d'un passage croisant celui-ci, l'Office peut, sur demande du propriétaire, ordonner à la compagnie de construire un passage convenable s'il juge celui-ci nécessaire à la jouissance, par le propriétaire, de sa terre.

Conditions

(2) L'Office peut assortir l'arrêté de conditions concernant la construction et l'entretien du passage.

Coûts de construction et d'entretien

(3) Les coûts de la construction et de l'entretien du passage sont à la charge du propriétaire de la terre.

Non-application

(5) Le présent article ne s'applique pas dans les cas où les articles 102 ou 103 s'appliquent.

Complaint and investigation concerning company's obligations

116. (1) On receipt of a complaint made by any person that a railway company is not fulfilling any of its service obligations, the Agency shall

(*a*) conduct, as expeditiously as possible, an investigation of the complaint that, in its opinion, is warranted; and

(*b*) within one hundred and twenty days after receipt of the complaint, determine whether the company is fulfilling that obligation.

Plaintes et enquêtes

116. (1) Sur réception d'une plainte selon laquelle une compagnie de chemin de fer ne s'acquitte pas de ses obligations prévues par les articles 113 ou 114, l'Office mène, aussi rapidement que possible, l'enquête qu'il estime indiquée et décide, dans les cent vingt jours suivant la réception de la plainte, si la compagnie s'acquitte de ses obligations.

Confidential contract binding on Agency

(2) If a company and a shipper agree, by means of a confidential contract, on the manner in which service obligations under section 113 are to be fulfilled by the company, the terms of that agreement are binding on the Agency in making its determination.

Contrat confidentiel

(2) Dans les cas où une compagnie et un expéditeur conviennent, par contrat confidentiel, de la manière dont la compagnie s'acquittera de ses obligations prévues par l'article 113, les clauses du contrat lient l'Office dans sa décision.

Competitive line rate provisions binding on Agency

(3) If a shipper and a company agree under subsection 136(4) on the manner in which the service obligations are to be fulfilled by the local carrier, the terms of the agreement are binding on the Agency in making its determination.

Obligation de l'Office

(3) Lorsque, en application du paragraphe 136(4), un expéditeur et une compagnie s'entendent sur les moyens à prendre par le transporteur local pour s'acquitter de ses obligations prévues par les articles 113 et 114, les modalités de l'accord lient l'Office dans sa décision.

Orders of Agency

(4) If the Agency determines that a company is not fulfilling any of its service obligations, the Agency may

(*a*) order that

(i) specific works be constructed or carried out,

(ii) property be acquired,

(iii) cars, motive power or other equipment be allotted, distributed, used or moved as specified by the Agency, or

(iv) any specified steps, systems or methods be taken or followed by the company;

(*b*) specify in the order the maximum charges that may be made by the company in respect of the matter so ordered;

(*c*) order the company to fulfil that obligation in any manner and within any time or during any period that the Agency deems expedient, having regard to all proper interests, and specify the particulars of the obligation to be fulfilled;

(*c.1*) order the company to compensate any person adversely affected for any expenses that they incurred as a result of the compa-

Arrêtés de l'Office

(4) L'Office, ayant décidé qu'une compagnie ne s'acquitte pas de ses obligations prévues par les articles 113 ou 114, peut:

a) ordonner la prise de l'une ou l'autre des mesures suivantes:

(i) la construction ou l'exécution d'ouvrages spécifiques,

(ii) l'acquisition de biens,

(iii) l'attribution, la distribution, l'usage ou le déplacement de wagons, de moteurs ou d'autre matériel selon ses instructions,

(iv) la prise de mesures ou l'application de systèmes ou de méthodes par la compagnie;

b) préciser le prix maximal que la compagnie peut exiger pour mettre en œuvre les mesures qu'il impose;

c) ordonner à la compagnie de remplir ses obligations selon les modalités de forme et de temps qu'il estime indiquées, eu égard aux intérêts légitimes, et préciser les détails de l'obligation à respecter;

c.1) ordonner à la compagnie d'indemniser toute personne lésée des dépenses qu'elle a

ny's failure to fulfill its service obligations or, if the company is a party to a confidential contract with a shipper that requires the company to pay an amount of compensation for expenses incurred by the shipper as a result of the company's failure to fulfill its service obligations, order the company to pay that amount to the shipper;

(*d*) if the service obligation is in respect of a grain-dependent branch line listed in Schedule I, order the company to add to the plan it is required to prepare under subsection 141(1) an indication that it intends to take steps to discontinue operating the line; or

(*e*) if the service obligation is in respect of a grain-dependent branch line listed in Schedule I, order the company, on the terms and conditions that the Agency considers appropriate, to grant to another railway company the right

(i) to run and operate its trains over and on any portion of the line, and

(ii) in so far as necessary to provide service to the line, to run and operate its trains over and on any portion of any other portion of the railway of the company against which the order is made but not to solicit traffic on that railway, to take possession of, use or occupy any land belonging to that company and to use the whole or any portion of that company's right-of-way, tracks, terminals, stations or station grounds.

supportées en conséquence du non-respect des obligations de la compagnie ou, si celle-ci est partie à un contrat confidentiel avec un expéditeur qui prévoit qu'elle versera, en cas de manquement à ses obligations, une indemnité pour les dépenses que l'expéditeur a supportées en conséquence du non-respect des obligations de la compagnie, lui ordonner de verser à l'expéditeur cette indemnité;

d) en cas de manquement à une obligation de service relative à un embranchement tributaire du transport du grain mentionné à l'annexe I, ordonner à la compagnie d'ajouter l'embranchement au plan visé au paragraphe 141(1) à titre de ligne dont elle entend cesser l'exploitation;

e) en cas de manquement à une obligation de service relative à un embranchement tributaire du transport du grain mentionné à l'annexe I, ordonner à la compagnie, selon les modalités qu'il estime indiquées, d'autoriser une autre compagnie:

(i) à faire circuler et à exploiter ses trains sur toute partie de l'embranchement,

(ii) dans la mesure nécessaire pour assurer le service sur l'embranchement, à faire circuler. et à exploiter ses trains sur toute autre partie du chemin de fer de la compagnie, sans toutefois lui permettre d'offrir des services de transport sur cette partie du chemin de fer, de même qu'à utiliser ou à occuper des terres lui appartenant, ou à prendre possession de telles terres, ou à utiliser tout ou partie de l'emprise, des rails, des têtes de lignes, des gares ou des terrains lui appartenant.

Right of action on default

(5) Every person aggrieved by any neglect or refusal of a company to fulfil its service obligations has, subject to this Act, an action for the neglect or refusal against the company.

(5) Quiconque souffre préjudice de la négligence ou du refus d'une compagnie de s'acquitter de ses obligations prévues par les articles 113 ou 114 possède, sous réserve de la présente loi, un droit d'action contre la compagnie.

Droit d'action

Company not relieved

(6) Subject to the terms of a confidential contract referred to in subsection 113(4) or a tariff setting out a competitive line rate referred to in subsection 136(4), a company is not relieved from an action taken under subsection (5) by any notice, condition or declaration if the damage claimed in the action arises from any negligence or omission of the company or any of its employees.

1996, c. 10, s. 116; 2000, c. 16, s. 4; 2014, c. 8, s. 5.1.

(6) Sous réserve des stipulations d'un contrat confidentiel visé au paragraphe 113(4) ou d'un tarif établissant un prix de ligne concurrentiel visé au paragraphe 136(4), une compagnie n'est pas soustraite à une action intentée en vertu du paragraphe (5) par un avis, une condition ou une déclaration, si les dommages-intérêts réclamés sont causés par la négligence ou les omissions de la compagnie ou d'un de ses employés.

1996, ch. 10, art. 116; 2000, ch. 16, art. 4; 2014, ch. 8, art. 5.1.

Compagnie non soustraite

Unreasonable charges or terms

120.1 (1) If, on complaint in writing to the Agency by a shipper who is subject to any charges and associated terms and conditions for the movement of traffic or for the provision of incidental services that are found in a tariff that applies to more than one shipper other than a tariff referred to in subsection 165(3), the Agency finds that the charges or associated terms and conditions are unreasonable, the Agency may, by order, establish new charges or associated terms and conditions.

Frais ou conditions déraisonnables

120.1 (1) Sur dépôt d'une plainte de tout expéditeur assujetti à un tarif applicable à plus d'un expéditeur — autre qu'un tarif visé au paragraphe 165(3) — prévoyant des frais relatifs au transport ou aux services connexes ou des conditions afférentes, l'Office peut, s'il les estime déraisonnables, fixer de nouveaux frais ou de nouvelles conditions par ordonnance.

Period of validity

(2) An order made under subsection (1) remains in effect for the period, not exceeding one year, specified in the order.

Validité

(2) L'ordonnance précise la période de validité de ces frais ou conditions, qui ne peut excéder un an.

Factors to be considered

(3) In deciding whether any charges or associated terms and conditions are unreasonable, the Agency shall take into account the following factors:

(*a*) the objective of the charges or associated terms and conditions;

(*b*) the industry practice in setting the charges or associated terms and conditions;

(*c*) in the case of a complaint relating to the provision of any incidental service, the existence of an effective, adequate and competitive alternative to the provision of that service; and

(*d*) any other factor that the Agency considers relevant.

Facteurs à prendre en compte

(3) Pour décider si les frais ou conditions sont déraisonnables, l'Office tient compte des facteurs suivants :

a) le but dans lequel les frais ou conditions sont imposés;

b) les pratiques suivies par l'industrie pour leur fixation;

c) dans le cas d'une plainte relative à des services connexes, l'existence d'une solution de rechange efficace, bien adaptée et concurrentielle;

d) tout autre facteur que l'Office estime pertinent.

Commercially fair and reasonable

(4) Any charges or associated terms and conditions established by the Agency shall be commercially fair and reasonable to the shippers who are subject to them as well as to the railway company that issued the tariff containing them.

Obligations

(4) Les frais ou conditions fixés par l'Office doivent être commercialement équitables et raisonnables tant pour les expéditeurs qui y sont assujettis que pour la compagnie de chemin de fer qui a établi le tarif les prévoyant.

Duty to vary tariff

(5) The railway company shall, without delay after the Agency establishes any charges or associated terms and conditions, vary its tariff to reflect those charges or associated terms and conditions.

Modification du tarif

(5) La compagnie de chemin de fer modifie le tarif en conséquence dès le prononcé de l'ordonnance par l'Office.

No variation

(6) The railway company shall not vary its tariff with respect to any charges or associated terms and conditions established by the Agency until the period referred to in subsection (2) has expired.

Pas de modification

(6) La compagnie de chemin de fer ne peut modifier son tarif à l'égard des frais et conditions fixés par l'Office avant l'expiration de la période de validité précisée au titre du paragraphe (2).

Clarification

(7) For greater certainty, this section does not apply to rates for the movement of traffic.

2008, c. 5, s. 3.

Précision

(7) Il est entendu que le présent article ne s'applique pas aux prix relatifs au transport.

2008, ch. 5, art. 3.

Joint Rates

Continuous route in Canada

121. (1) If traffic is to move over a continuous route in Canada and portions of it are operated by two or more railway companies, the companies shall, at the request of a shipper intending to move the traffic,

(*a*) agree on a joint tariff for the continuous route and on the apportionment of the rate in the joint tariff; or

(*b*) enter into a confidential contract for the continuous route.

Agency may decide if no agreement

(2) If the railway companies fail to agree or to enter into a confidential contract, the Agency, on the application of the shipper, may

(*a*) direct the companies, within any time that the Agency may specify, to agree on a joint tariff for the continuous route and an apportionment of the rate that is satisfactory to the Agency; or

(*b*) within ninety days after the application is received by the Agency,

(i) determine the route and the rate and apportion the rate among the companies, and

(ii) determine the dates, not earlier than the date of receipt by the Agency of the application, when the rate comes into effect and when it must be published.

Refund to shipper

(3) If the Agency determines a rate under paragraph (2)(*b*), the companies that operate the route shall pay a shipper who moved traffic over the route an amount equal to the difference, if any, between the rate that was paid by the shipper and the rate determined by the Agency, applicable to all movements of traffic by the shipper over the route from the date on which the application was made to the date on which the determined rate comes into effect.

Prix communs

Parcours continu au Canada

121. (1) Les compagnies de chemin de fer qui exploitent des parties d'un parcours continu au Canada sur lequel un transport de marchandises s'effectue doivent, sur demande de l'expéditeur qui veut les faire transporter sur le parcours :

a) soit s'entendre sur un tarif commun pour le parcours et la répartition du prix dans le tarif;

b) soit conclure un contrat confidentiel pour le parcours.

Défaut d'entente

(2) En l'absence d'une telle entente ou d'un tel contrat, l'Office peut, sur demande de l'expéditeur :

a) soit ordonner aux compagnies de s'entendre, dans le délai fixé par lui et selon les termes qu'il estime indiqués, sur le tarif commun et la répartition du prix pour le parcours;

b) soit, par arrêté pris dans les quatre-vingt-dix jours suivant la réception de la demande par lui, fixer le parcours, le prix pour celui-ci et répartir ce prix entre ces compagnies et fixer la date, non antérieure à celle où il a reçu la demande, de prise d'effet et de publication du prix.

Remboursement à l'expéditeur

(3) Les compagnies visées par l'arrêté payent à l'expéditeur qui a fait transporter des marchandises sur le parcours un montant égal à la différence éventuelle entre le prix qu'il a payé et le prix fixé par l'arrêté et applicable à tout le transport fait par lui sur le parcours entre la date de la présentation de la demande et celle de la prise d'effet de l'arrêté.

Application to interswitch traffic between connecting lines

127. (1) If a railway line of one railway company connects with a railway line of another railway company, an application for an interswitching order may be made to the Agency by either company, by a municipal government or by any other interested person.

Order

(2) The Agency may order the railway companies to provide reasonable facilities for the convenient interswitching of traffic in both directions at an interchange between the lines of either railway and those of other railway companies connecting with them.

Interswitching limits

(3) If the point of origin or destination of a continuous movement of traffic is within a radius of 30 km, or a prescribed greater distance, of an interchange, a railway company shall not transfer the traffic at the interchange except in accordance with the regulations.

Extension of interswitching limits

(4) On the application of a person referred to in subsection (1), the Agency may deem a point of origin or destination of a movement of traffic in any particular case to be within 30 km, or a prescribed greater distance, of an interchange, if the Agency is of the opinion that, in the circumstances, the point of origin or destination is reasonably close to the interchange.

Demande d'interconnexion

127. (1) Si une ligne d'une compagnie de chemin de fer est raccordée à la ligne d'une autre compagnie de chemin de fer, l'une ou l'autre de ces compagnies, une administration municipale ou tout intéressé peut demander à l'Office d'ordonner l'interconnexion.

Interconnexion

(2) L'Office peut ordonner aux compagnies de fournir les installations convenables pour permettre l'interconnexion, d'une manière commode et dans les deux directions, à un lieu de correspondance, du trafic, entre les lignes de l'un ou l'autre chemin de fer et celles des autres compagnies de chemins de fer qui y sont raccordées.

Limites

(3) Si le point d'origine ou de destination d'un transport continu est situé dans un rayon de 30 kilomètres d'un lieu de correspondance, ou à la distance supérieure prévue par règlement, le transfert de trafic par une compagnie de chemin de fer à ce lieu de correspondance est subordonné au respect des règlements.

Agrandissement des limites

(4) Sur demande formée au titre du paragraphe (1), l'Office peut statuer que, dans un cas particulier où le point d'origine ou de destination du trafic est situé à plus de 30 kilomètres d'un lieu de correspondance, ou à la distance supérieure prévue par règlement, et où il est d'avis que, dans les circonstances, le point d'origine ou de destination est suffisamment près du lieu de correspondance, le point d'origine ou de destination, selon le cas, est réputé situé à l'intérieur de cette distance.

Shipper and connecting carriers must agree

131. (1) A competitive line rate must not be established unless the shipper agrees with the connecting carrier, and with any other company, other than the local carrier, that moves traffic over a portion of the continuous route, on the terms and conditions governing their movement of the traffic, including the applicable rate.

Accord

131. (1) L'établissement d'un prix de ligne concurrentiel est subordonné à la conclusion, entre l'expéditeur et le transporteur de liaison, et toute autre compagnie — transporteur local exclu — qui effectue du transport sur une partie du parcours continu, d'un accord sur les conditions régissant le transport des marchandises, y compris sur le prix qui s'y applique.

No other rate applies

(2) If an interswitching rate determined under paragraph 128(1)(*b*) is available for a portion of the route operated by the local carrier, no other rate may be applied to that portion of the route.

Exception

(2) Il n'est établi aucun autre prix pour la partie d'un parcours continu pour laquelle un prix fixé en application de l'alinéa 128(1)*b*) est disponible.

Movement on flat cars or less than carload traffic

(3) A competitive line rate must not be established for the movement of trailers on flat cars, containers on flat cars or less than carload traffic, unless they arrive at a port in Canada by water for movement by rail or by rail for movement by water.

Exception

(3) Il n'est pas établi de prix de ligne concurrentiel pour le transport soit de remorques ou de conteneurs sur wagons plats, soit de chargements non complets, sauf s'ils arrivent à un port du Canada soit par eau en vue du transport ultérieur par rail, soit par rail en vue du transport ultérieur par eau.

Maximum portion of traffic

(4) The portion of a movement of traffic in respect of which a competitive line rate may be established must not exceed 50 per cent of the total number of kilometres over which the traffic is moved by rail or 1 200 km, whichever is greater.

Condition

(4) La partie d'un transport de marchandises pour laquelle un prix de ligne concurrentiel peut être établi ne peut dépasser la plus grande des distances suivantes : 50 pour cent de la distance totale du transport par rail ou 1 200 kilomètres.

Exception

(5) On application of a shipper, the Agency may establish a competitive line rate for a greater portion of a movement of traffic if the Agency is satisfied that no interchange exists within the maximum portion referred to in subsection (4).

Exception

(5) Sur demande d'un expéditeur et s'il est convaincu qu'il n'y a pas de lieu de correspondance à l'intérieur de cette limite, l'Office peut établir un prix de ligne concurrentiel pour une partie d'un transport de marchandises couvrant une distance supérieure.

No other rates may be established

(6) If a competitive line rate has been established for a movement of traffic of a shipper, no other competitive line rate may be established in respect of that movement while the rate is in effect.

Prix définitif

(6) Une fois qu'un prix de ligne concurrentiel a été établi pour un transport de marchandises pour un expéditeur, aucun autre prix de ligne concurrentiel ne peut être établi pour ce transport tant que ce prix est en vigueur.

Application to Agency to establish competitive line rates

132. (1) On the application of a shipper, the Agency shall, within forty-five days after receiving the application, establish any of the following matters in respect of which the shipper and the local carrier do not agree:

(*a*) the amount of the competitive line rate;

(*b*) the designation of the continuous route;

(*c*) the designation of the nearest interchange; and

(*d*) the manner in which the local carrier shall fulfil its service obligations.

No final offer arbitration

(2) If a matter is established by the Agency under this section, the shipper is not entitled to submit the matter to the Agency for final offer arbitration under section 161.

Établissement par l'Office

132. (1) Sur demande d'un expéditeur, l'Office établit, dans les quarante-cinq jours suivant la demande, tels des éléments suivants qui n'ont pas fait l'objet d'un accord entre l'expéditeur et le transporteur local :

a) le montant du prix de ligne concurrentiel;

b) la désignation du parcours continu;

c) la désignation du lieu de correspondance le plus proche;

d) les moyens à prendre par le transporteur local pour s'acquitter de ses obligations prévues par les articles 113 et 114.

Exclusion de l'arbitrage

(2) L'élément ainsi établi ne peut être assujetti à l'arbitrage prévu à l'article 161.

Agreement limiting liability

137. (1) A railway company shall not limit or restrict its liability to a shipper for the movement of traffic except by means of a written agreement signed by the shipper or by an association or other body representing shippers.

Liability if no agreement

(2) If there is no agreement, the railway company's liability is limited or restricted to the extent provided in any terms and conditions that the Agency may

(*a*) on the application of the company, specify for the traffic; or

(*b*) prescribe by regulation, if none are specified for the traffic.

Running Rights and Joint Track Usage

Application by railway company

138. (1) A railway company may apply to the Agency for the right to

(*a*) take possession of, use or occupy any land belonging to any other railway company;

(*b*) use the whole or any portion of the right-of-way, tracks, terminals, stations or station grounds of any other railway company; and

(*c*) run and operate its trains over and on any portion of the railway of any other railway company.

Application may be granted

(2) The Agency may grant the right and may make any order and impose any conditions on either railway company respecting the exercise or restriction of the rights as appear just or desirable to the Agency, having regard to the public interest.

Compensation

(3) The railway company shall pay compensation to the other railway company for the right granted and, if they do not agree on the compensation, the Agency may, by order, fix the amount to be paid.

Limitation par accord

137. (1) La compagnie de chemin de fer ne peut limiter sa responsabilité envers un expéditeur pour le transport des marchandises de celui-ci, sauf par accord écrit signé soit par l'expéditeur, soit par une association ou un groupe représentant les expéditeurs.

Mesure de la limitation

(2) En l'absence d'un tel accord, la mesure dans laquelle la responsabilité de la compagnie de chemin de fer peut être limitée en ce qui concerne un transport de marchandises est prévue par les conditions de cette limitation soit fixées par l'Office pour le transport, sur demande de la compagnie, soit, si aucune condition n'est fixée, établies par règlement de l'Office.

Droits de circulation et usage commun des voies

Demande

138. (1) Chaque compagnie de chemin de fer peut demander à l'Office :

a) de prendre possession de terres appartenant à une autre compagnie de chemin de fer, les utiliser ou les occuper;

b) d'utiliser tout ou partie de l'emprise, des rails, des têtes de lignes ou des gares, ou terrains de celles-ci, d'une autre compagnie de chemin de fer;

c) de faire circuler et d'exploiter ses trains sur toute partie du chemin de fer d'une autre compagnie.

Délivrance

(2) L'Office peut prendre l'arrêté et imposer les conditions, à l'une ou à l'autre compagnie, concernant l'exercice ou la limitation de ces droits, qui lui paraissent justes ou opportunes, compte tenu de l'intérêt public.

Indemnité

(3) La compagnie de chemin de fer verse une indemnité à l'autre compagnie pour l'exercice de ces droits. Si elles ne s'entendent pas sur le montant de l'indemnité, l'Office peut le fixer par arrêté.

Disclosure of process

144. (1) The railway company shall disclose the process it intends to follow for receiving and evaluating offers to each interested person who makes their interest known in accordance with the advertisement.

(2) [Repealed, 2007, c. 19, s. 37]

Negotiation in good faith

(3) The railway company shall negotiate with an interested person in good faith and in accordance with the process it discloses and the interested person shall negotiate with the company in good faith.

Net salvage value

(3.1) The Agency may, on application by a party to a negotiation, determine the net salvage value of the railway line and may, if it is of the opinion that the railway company has removed any of the infrastructure associated with the line in order to reduce traffic on the line, deduct from the net salvage value the amount that the Agency determines is the cost of replacing the removed infrastructure. The party who made the application shall reimburse the Agency its costs associated with the application.

Time limit for agreement

(4) The railway company has six months to reach an agreement after the final date stated in the advertisement for persons to make their interest known.

Decision to continue operating a railway line

(5) If an agreement is not reached within the six months, the railway company may decide to continue operating the railway line, in which case it is not required to comply with section 145, but shall amend its plan to reflect its decision.

Remedy if bad faith by a railway company

(6) If, on complaint in writing by the interested person, the Agency finds that the railway company is not negotiating in good faith and the Agency considers that a sale, lease or other transfer of the railway line, or the company's operating interest in the line, to the interested person for continued operation would be commercially fair and reasonable to the parties, the Agency may order the railway company to enter into an agreement with the interested person to effect the transfer and with respect to operating arrangements for the interchange of traffic, subject to the terms and conditions, including consideration, specified by the Agency.

Remedy if bad faith by an interested person

(7) If, on complaint in writing by the railway company, the Agency finds that the interested person is not negotiating in good faith, the Agency may order that the railway company is no longer required to negotiate with the person.

1996, c. 10, s. 144; 2000, c. 16, s. 7; 2007, c. 19, s. 37.

Communication

144. (1) La compagnie est tenue de communiquer la procédure d'examen et d'acceptation des offres à l'intéressé qui a manifesté son intention conformément à l'annonce.

(2) [Abrogé, 2007, ch. 19, art. 37]

Négociation

(3) Elle est tenue de négocier de bonne foi avec l'intéressé conformément à cette procédure et ce dernier est tenu de négocier de bonne foi avec elle.

Valeur nette de récupération

(3.1) L'Office peut, à la demande d'une partie à la négociation, déterminer la valeur nette de récupération de la ligne et, s'il est d'avis que la compagnie de chemin de fer a retiré une partie de l'infrastructure se rapportant à la ligne en vue de réduire le trafic, déduire de cette valeur la somme qu'il estime équivalente au coût de remplacement de l'infrastructure retirée. Le demandeur est tenu de rembourser à l'Office les frais afférents à la demande.

Délai

(4) La compagnie dispose, pour conclure une entente, d'un délai de six mois à compter de l'expiration du délai prévu par l'annonce.

Continuation de l'exploitation

(5) À défaut d'entente dans les six mois, elle peut décider de poursuivre l'exploitation de la ligne, auquel cas elle n'est pas tenue de se conformer à l'article 145, mais doit modifier son plan en conséquence.

Défaut par le chemin de fer de négocier de bonne foi

(6) Saisi d'une plainte écrite formulée par l'intéressé, l'Office peut, s'il conclut que la compagnie ne négocie pas de bonne foi et que le transfert à l'intéressé, notamment par vente ou bail, des droits de propriété ou d'exploitation sur la ligne en vue de la continuation de son exploitation serait commercialement équitable et raisonnable pour les parties, ordonner à la compagnie de conclure avec l'intéressé une entente pour effectuer ce transfert et prévoyant les modalités d'exploitation relativement à l'interconnexion du trafic, selon les modalités qu'il précise, notamment la remise d'une contrepartie.

Défaut par l'intéressé de négocier de bonne foi

(7) Saisi d'une plainte écrite formulée par la compagnie, l'Office peut décider que la compagnie n'est plus tenue de négocier avec l'intéressé s'il conclut que celui-ci ne négocie pas de bonne foi.

1996, ch. 10, art. 144; 2000, ch. 16, art. 7; 2007, ch. 19, art. 37.

Offer to governments

145. (1) The railway company shall offer to transfer all of its interest in the railway line to the governments and urban transit authorities mentioned in this section for not more than its net salvage value to be used for any purpose if

(*a*) no person makes their interest known to the railway company, or no agreement with an interested person is reached, within the required time; or

(*b*) an agreement is reached within the required time, but the transfer is not completed in accordance with the agreement.

Which governments receive offer

(2) After the requirement to make the offer arises, the railway company shall send it simultaneously

(*a*) to the Minister if the railway line passes through

(i) more than one province or outside Canada,

(ii) land that is or was a reserve, as defined in subsection 2(1) of the *Indian Act*,

(iii) land that is the subject of an agreement entered into by the railway company and the Minister for the settlement of aboriginal land claims, or

(iv) a metropolitan area;

(*b*) to the minister responsible for transportation matters in the government of each province through which the railway line passes;

(*c*) to the chairperson of every urban transit authority through whose territory the railway line passes; and

(*d*) to the clerk or other senior administrative officer of every municipal or district government through whose territory the railway line passes.

Offre aux gouvernements et administrations

145. (1) La compagnie de chemin de fer est tenue d'offrir aux gouvernements, administrations de transport de banlieue et administrations municipales de leur transférer tous ses intérêts à leur valeur nette de récupération ou moins si personne ne manifeste d'intérêt ou aucune entente n'est conclue dans le délai prescrit, ou si le transfert n'est pas effectué conformément à l'entente.

Précision

(2) L'offre est faite simultanément :

a) au ministre si la ligne franchit, selon le cas :

(i) les limites d'une province ou les frontières du Canada,

(ii) une réserve ou une terre ayant déjà été une réserve au sens du paragraphe 2(1) de la *Loi sur les Indiens*,

(iii) une terre faisant l'objet d'un accord, entre la compagnie de chemin de fer et le ministre, ayant pour but le règlement de revendications territoriales autochtones,

(iv) une région métropolitaine;

b) au ministre chargé des transports dans toute province dont la ligne franchit le territoire;

c) au président de toute administration de transport de banlieue dont la ligne franchit le territoire;

d) au greffier ou à un premier dirigeant de toute administration municipale dont la ligne franchit le territoire.

Time limits for acceptance

(3) Subject to subsection 146.3(3), after the offer is received

(*a*) by the Minister, the Government of Canada may accept it within thirty days;

(*b*) by a provincial minister, the government of the province may accept it within thirty days, unless the offer is received by the Minister, in which case the government of each province may accept it within an additional thirty days after the end of the period mentioned in paragraph (*a*) if it is not accepted under that paragraph;

(*b.1*) by an urban transit authority, it may accept it within an additional 30 days after the end of the period or periods for acceptance under paragraphs (*a*) and (*b*), if it is not accepted under those paragraphs; and

(*c*) by a municipal or district government, it may accept it within an additional 30 days after the end of the period or periods for acceptance under paragraphs (*a*), (*b*) and (*b.1*), if it is not accepted under those paragraphs.

Communication and notice of acceptance

(4) Once a government or an urban transit authority communicates its written acceptance of the offer to the railway company, the right of any other government or urban transit authority to accept the offer is extinguished, and the railway company must notify the other governments and urban transit authorities of the acceptance.

Net salvage value

(5) If a government or an urban transit authority accepts the offer, but cannot agree with the railway company on the net salvage value within 90 days after the acceptance, the Agency may, on the application of the government or urban transit authority or the railway company, determine the net salvage value.

1996, c. 10, s. 145; 2007, c. 19, s. 39.

Délai d'acceptation

(3) Sous réserve du paragraphe 146.3(3), les destinataires de l'offre disposent, après sa réception, des délais suivants pour l'accepter :

a) trente jours pour le gouvernement fédéral;

b) trente jours pour le gouvernement provincial, mais si le gouvernement fédéral n'accepte pas l'offre qui lui est d'abord faite, chaque gouvernement provincial visé dispose de trente jours supplémentaires une fois expiré le délai mentionné à l'alinéa *a*);

b.1) trente jours pour chaque administration de transport de banlieue, une fois expirés les délais mentionnés aux alinéas *a*) et *b*);

c) trente jours pour chaque administration municipale, une fois expirés les délais mentionnés aux alinéas *a*), *b*) et *b.1*).

Acceptation

(4) La communication, par écrit, de l'acceptation à la compagnie éteint le droit des autres destinataires de l'offre; celle-ci leur notifie l'acceptation de l'offre.

Valeur nette de récupération

(5) Si les parties ne peuvent s'entendre, dans les quatre-vingt-dix jours suivant l'acceptation de l'offre, sur la valeur nette de récupération, l'Office la détermine, sur demande de l'une d'elles.

1996, ch. 10, art. 145; 2007, ch. 19, art. 39.

Determination of net salvage value before expiry of time to accept offer

146.3 (1) A person to whom a railway line is offered under section 145, or to whom a siding or spur is offered under section 146.2, may apply to the Agency for a determination of the net salvage value of the railway line, siding or spur, as the case may be, at any time before the expiry of the period available to the person to accept the offer.

Détermination de la valeur nette de récupération avant l'acceptation de l'offre

146.3 (1) Le destinataire de l'offre faite au titre des articles 145 ou 146.2 peut, avant l'expiration du délai imparti pour l'accepter, demander à l'Office de déterminer la valeur nette de récupération de la ligne, de la voie d'évitement ou de l'épi, selon le cas.

Notification of application

(2) The applicant shall without delay provide a copy of the application to the railway company, and the railway company shall without delay notify every other person to whom the offer was made and whose time to accept the offer has not expired that an application for a determination of the net salvage value was made.

Copie de la demande

(2) Le demandeur envoie, sans délai, copie de sa demande à la compagnie de chemin de fer. Celle-ci en avise immédiatement les autres destinataires de l'offre à l'égard desquels le délai d'acceptation n'est pas expiré.

Effect of application

(3) If an application is made under subsection (1), the time available to the applicant to accept the offer expires on the day that is 30 days after the day the Agency notifies the applicant of its determination of the net salvage value and the 30-day period for each other person to accept the offer is calculated on the expiry of the period available to the applicant to accept the offer.

Effet de la demande

(3) Le demandeur dispose, après décision de l'Office, d'un délai de trente jours pour accepter l'offre. Les délais — de trente jours — dont disposent respectivement les autres destinataires pour l'accepter commencent à courir à compter de l'expiration du délai applicable au demandeur.

Costs

(4) The applicant shall reimburse the Agency's costs associated with the application.

2007, c. 19, s. 42.

Frais

(4) Le demandeur est tenu de rembourser à l'Office les frais afférents à sa demande.

2007, ch. 19, art. 42.

Application

152.1 (1) Whenever a public passenger service provider and a railway company are unable to agree in respect of any matter raised in the context of the negotiation of any agreement concerning the use of the railway company's railway, land, equipment, facilities or services by the public passenger service provider or concerning the conditions, or the amount to be paid, for that use, the public passenger service provider may, after reasonable efforts to resolve the matter have been made, apply to the Agency to decide the matter.

Demande

152.1 (1) En cas de différend survenant entre une société de transport publique et une compagnie de chemin de fer sur toute question soulevée dans le cadre de la négociation d'un accord et touchant l'utilisation de chemins de fer, de terres, d'installations, d'équipements ou de services de la compagnie, ou les conditions afférentes ou le prix à payer pour leur utilisation, la société peut, à la suite d'efforts raisonnables faits pour régler le différend, demander à l'Office de trancher la question.

Application

(2) Whenever a public passenger service provider and a railway company are unable to agree in respect of any matter raised in the context of the implementation of any matter previously decided by the Agency, either the public passenger service provider or the railway company may, after reasonable efforts to resolve the matter have been made, apply to the Agency to decide the matter.

2007, c. 19, s. 44.

Demande

(2) En cas de différend survenant entre une société de transport publique et une compagnie de chemin de fer sur toute question soulevée dans le cadre de la mise en oeuvre de l'accord et concernant une question que l'Office a réglée, l'une ou l'autre des parties peut, à la suite d'efforts raisonnables faits pour régler le différend, demander à celui-ci de trancher la question.

2007, ch. 19, art. 44.

Providing copies

152.4 (1) A railway company or a public passenger service provider must provide to any person who requests it

(*a*) a copy of any agreement entered into on or after the day on which this section comes into force concerning the use of the railway company's railway, land, equipment, facilities or services; and

(*b*) subject to subsection (2), a copy of any agreement entered into before the day on which this section comes into force concerning the use of the railway company's railway, land, equipment, facilities or services.

Exclusion

(2) The Agency may, on application by a railway company or a public passenger service provider, exclude an agreement, or any specified portion of an agreement, from the application of paragraph (1)(*b*) on the grounds that harm would likely result to the applicant if the agreement, or the specified portion, were to be disclosed.

2007, c. 19, s. 44.

Obligation de fournir une copie de l'accord

152.4 (1) La compagnie de chemin de fer ou la société de transport publique est tenue de fournir à quiconque lui en fait la demande :

a) une copie de tout accord conclu depuis la date d'entrée en vigueur du présent article et concernant l'utilisation des chemins de fer, terres, installations, équipements ou services en cause;

b) sous réserve du paragraphe (2), une copie de tout accord conclu avant la date d'entrée en vigueur du présent article et concernant l'utilisation des chemins de fer, terres, installations, équipements ou services en cause.

Exception

(2) Sur demande de la compagnie ou de la société, l'Office peut soustraire tout ou partie de l'accord à l'application de l'alinéa (1)*b*) au motif que sa divulgation causerait vraisemblablement un préjudice au demandeur.

2007, ch. 19, art. 44.

Submission for final offer arbitration

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.

Contents of submission

(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*) [Repealed, 2000, c. 16, s. 11]

(*c*) an undertaking by the shipper to ship the goods to which the arbitration relates in accordance with the decision of the arbitrator;

(*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.

Arbitration precluded in certain cases

(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.

Final offer arbitration not a proceeding

(4) A final offer arbitration is not a proceeding before the Agency.

1996, c. 10, s. 161; 2000, c. 16, s. 11.

Recours à l'arbitrage

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 le transporteur et lui ne sont pas en mesure de régler eux-mêmes la question, la soumettre par écrit à l'Office pour arbitrage soit par un arbitre seul soit, si le transporteur et lui y consentent, par une formation de trois arbitres.

Contenu de la demande

(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, sans mention de sommes d'argent;

b) [Abrogé, 2000, ch. 16, art. 11]

c) l'engagement par l'expéditeur d'expédier les marchandises visées par l'arbitrage selon les termes de la décision de l'arbitre;

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 ou, s'ils ont convenu que la question soit soumise à une formation de trois arbitres, le nom de l'arbitre choisi par l'expéditeur et le nom de celui choisi par le transporteur.

Arbitrage écarté

(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.

Soumission d'une question pour arbitrage

(4) La soumission d'une question à l'Office pour arbitrage ne constitue pas une procédure devant l'Office.

1996, ch. 10, art. 161; 2000, ch. 16, art. 11.

Arbitration

162. (1) Notwithstanding any application filed with the Agency by a carrier in respect of a matter, within five days after final offers are received under subsection 161.1(1), the Agency shall refer the matter for arbitration

(*a*) if the parties did not agree that the arbitration should be conducted by a panel of three arbitrators, to the arbitrator, if any, named under paragraph 161(2)(*e*) or, if that arbitrator is not, in the opinion of the Agency, available to conduct the arbitration or no arbitrator is named, to an arbitrator on the list of arbitrators referred to in section 169 who the Agency chooses and determines is appropriate and available to conduct the arbitration; and

(*b*) if the parties agreed that the arbitration should be conducted by a panel of three arbitrators,

(i) to the arbitrators named by the parties under paragraph 161(2)(*e*) and to any arbitrator who those arbitrators have, within 10 days after the submission was served under subsection 161(2), notified the Agency that they have agreed on, or if those arbitrators did not so notify the Agency, to an arbitrator on the list of arbitrators referred to in section 169 who the Agency chooses and determines is appropriate and available to conduct the arbitration, or

(ii) if an arbitrator referred to in subparagraph (i) is not, in the opinion of the Agency, available to conduct the arbitration, to the arbitrators named in that subparagraph who are available and to an arbitrator chosen by the Agency from the list of arbitrators referred to in section 169 who the Agency determines is appropriate and available to conduct the arbitration.

Arbitrage

162. (1) Malgré la présentation par le transporteur de toute demande relative à la question, l'Office, dans les cinq jours suivant la réception des deux offres présentées conformément au paragraphe 161.1(1), renvoie la question :

a) à défaut de choix par les parties de soumettre la question à une formation de trois arbitres, à l'arbitre unique visé à l'alinéa 161(2)*e*), s'il est disponible pour mener l'arbitrage ou, en l'absence de choix d'arbitre ou cas de non-disponibilité, selon l'Office, de l'arbitre choisi, à un arbitre que l'Office estime disponible et compétent et qui est inscrit sur la liste établie en vertu de l'article 169;

b) en cas de choix par les parties de soumettre la question à une formation de trois arbitres :

(i) aux arbitres visés à l'alinéa 161(2)*e*) et, soit à celui dont ils ont conjointement soumis le nom à l'Office dans les dix jours suivant la signification de la demande visée au paragraphe 161(2), soit, dans le cas où ils ne soumettent aucun nom à l'Office dans ce délai, à l'arbitre que l'Office estime disponible et compétent et qui est inscrit sur la liste établie en vertu de l'article 169,

(ii) si l'un des arbitres visés au sous-alinéa (i) n'est pas, selon l'Office, disponible, à ceux qui le sont et à celui que l'Office estime disponible et compétent et qui est inscrit sur la liste établie en vertu de l'article 169.

Interpretation

(1.1) If a matter was referred to a panel of arbitrators, every reference in subsections (1.2) and (2) and sections 163 to 169 to an arbitrator or the arbitrator shall be construed as a reference to a panel of arbitrators or the panel of arbitrators, as the case may be.

Assimilation

(1.1) Aux paragraphes (1.2) et (2) et aux articles 163 à 169, la mention de l'arbitre vaut mention, le cas échéant, de la formation de trois arbitres.

Delay in referral

(1.2) If the shipper consents to an application referred to in subsection (1) being heard before the matter is referred to an arbitrator, the Agency shall defer referring the matter until the application is dealt with.

Différé du renvoi à l'arbitrage

(1.2) Si l'expéditeur consent à ce que la demande visée au paragraphe (1) soit entendue avant le renvoi de l'affaire à l'arbitre, l'Office diffère le renvoi jusqu'au prononcé de la décision sur la demande.

Assistance by Agency

(2) The Agency may, at the request of the arbitrator, provide administrative, technical and legal assistance to the arbitrator on a cost recovery basis.

Soutien

(2) À la demande de l'arbitre, l'Office lui offre, moyennant remboursement des frais, le soutien administratif, technique et juridique voulu.

1996, c. 10, s. 162; 2000, c. 16, s. 13.

1996, ch. 10, art. 162; 2000, ch. 16, art. 13.

Decision or order affecting a matter being arbitrated

162.1 The Agency may, in addition to any other decision or order it may make, order that an arbitration be discontinued, that it be continued subject to the terms and conditions that the Agency may fix or that the decision of the arbitrator be set aside if

(*a*) the Agency makes a decision or an order arising out of an application that is in respect of a matter submitted to the Agency for a final offer arbitration and that is filed by a carrier before the matter is referred to arbitration; and

(*b*) the decision or order affects the arbitration.

2000, c. 16, s. 14.

Décision portant atteinte à l'arbitrage

162.1 S'il rend une décision ou prend un arrêté sur une demande présentée par un transporteur relativement à une affaire soumise à l'Office pour arbitrage avant que l'arbitre en soit saisi et que la décision ou l'arrêté porte atteinte à l'arbitrage, l'Office peut, par arrêté, en plus de tout autre arrêté qu'il peut prendre ou de toute autre décision qu'il peut rendre, mettre fin à l'arbitrage, l'assujettir aux conditions qu'il fixe ou annuler la décision de l'arbitre.

2000, ch. 16, art. 14.

Application for order

169.43 (1) A railway company may apply to the Agency, within 10 days after the day on which it is served with a copy of a submission under subsection 169.32(2), for an order declaring that the shipper is not entitled to submit to the Agency for arbitration a matter contained in the shipper's submission.

Demande d'arrêté

169.43 (1) La compagnie de chemin de fer peut, dans les dix jours suivant la signification d'un exemplaire de la demande d'arbitrage en application du paragraphe 169.32(2), demander à l'Office de prendre un arrêté déclarant qu'une question contenue dans la demande d'arbitrage de l'expéditeur ne peut lui être soumise pour arbitrage.

Content of order

(2) If the Agency makes the order, it may also

(*a*) dismiss the submission for arbitration, if the matter contained in it has not been referred to arbitration;

(*b*) discontinue the arbitration;

(*c*) subject the arbitration to any terms that it specifies; or

(*d*) set aside the arbitrator's decision or any part of it.

Contenu de l'arrêté

(2) S'il prend l'arrêté, l'Office peut en outre :

a) rejeter la demande d'arbitrage, dans le cas où l'arbitre n'en a pas encore été saisi;

b) mettre fin à l'arbitrage;

c) assujettir l'arbitrage aux conditions qu'il fixe;

d) annuler tout ou partie de la décision arbitrale.

Period for making decision

(3) The Agency must make a decision on the railway company's application made under subsection (1) as soon as feasible but not later than 35 days after the day on which it receives the application.

2013, c. 31, s. 11.

Délai pour statuer

(3) L'Office statue sur la demande présentée en vertu du paragraphe (1) aussi rapidement que possible et en tout état de cause dans les trente-cinq jours suivant sa réception.

2013, ch. 31, art. 11.

Inquiry re obstacles to persons with disabilities

172. (1) The Agency may, on application, inquire into a matter in relation to which a regulation could be made under subsection 170(1), regardless of whether such a regulation has been made, in order to determine whether there is an undue obstacle to the mobility of persons with disabilities.

Compliance with regulations

(2) Where the Agency is satisfied that regulations made under subsection 170(1) that are applicable in relation to a matter have been complied with or have not been contravened, the Agency shall determine that there is no undue obstacle to the mobility of persons with disabilities.

Remedies

(3) On determining that there is an undue obstacle to the mobility of persons with disabilities, the Agency may require the taking of appropriate corrective measures or direct that compensation be paid for any expense incurred by a person with a disability arising out of the undue obstacle, or both.

Enquête : obstacles au déplacement

172. (1) Même en l'absence de disposition réglementaire applicable, l'Office peut, sur demande, enquêter sur toute question relative à l'un des domaines visés au paragraphe 170(1) pour déterminer s'il existe un obstacle abusif aux possibilités de déplacement des personnes ayant une déficience.

Décision de l'Office

(2) L'Office rend une décision négative à l'issue de son enquête s'il est convaincu de la conformité du service du transporteur aux dispositions réglementaires applicables en l'occurrence.

Décision de l'Office

(3) En cas de décision positive, l'Office peut exiger la prise de mesures correctives indiquées ou le versement d'une indemnité destinée à couvrir les frais supportés par une personne ayant une déficience en raison de l'obstacle en cause, ou les deux.

Questions between Parties

Questions to other party

19. A party to a proceeding may direct questions to any other party if the party files with the Agency, and serves on the other parties, a copy of the questions along with the reasons for them and their relevance to the proceeding.

Questions entre les parties

Questions à l'autre partie

19. Toute partie à une instance peut adresser des questions à une autre partie si elle dépose auprès de l'Office et signifie aux autres parties une copie des questions, ainsi que la justification de leur pertinence au regard de l'instance.

Pleadings

Pleadings — what they comprise

39. (1) Subject to subsection (2), the pleadings in respect of an application consist at least of the application that commences the proceeding, and may include an answer, an intervention and a reply.

Exception

(2) In an appeal under subsection 42(1) of the *Civil Air Navigation Services Commercialization Act*, an intervention does not form part of the pleadings.

Leave of Agency

(3) No pleading may be filed following a reply without leave of the Agency. Leave may be given at the request of a party, if the Agency considers that it is appropriate.

Actes de procédure

Actes de procédure — contenu du dossier

39. (1) Sous réserve du paragraphe (2), les actes de procédure relatifs à une demande comprennent à tout le moins la demande introductive d'instance et, éventuellement, une réponse, une intervention et une réplique.

Exception

(2) Dans le cadre d'un appel interjeté aux termes du paragraphe 42(1) de la *Loi sur la commercialisation des services de navigation aérienne civile*, une intervention ne fait pas partie des actes de procédures.

Autorisation de l'Office

(3) Aucun acte de procédure ne peut être déposé après la réplique sans l'autorisation de l'Office, qu'il accorde à la demande de toute partie s'il le juge indiqué.

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CANADA

CONSOLIDATION

CODIFICATION

Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)

Règles de l'Office des transports du Canada (Instances de règlement des différends et certaines règles applicables à toutes les instances)

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Current to December 15, 2014

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À jour au 15 décembre 2014

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OFFICIAL STATUS OF CONSOLIDATIONS

Subsections 31(1) and (3) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

Published consolidation is evidence

31. (1) Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

...

Inconsistencies in regulations

(3) In the event of an inconsistency between a consolidated regulation published by the Minister under this Act and the original regulation or a subsequent amendment as registered by the Clerk of the Privy Council under the *Statutory Instruments Act*, the original regulation or amendment prevails to the extent of the inconsistency.

NOTE

This consolidation is current to December 15, 2014. The last amendments came into force on June 4, 2014. Any amendments that were not in force as of December 15, 2014 are set out at the end of this document under the heading "Amendments Not in Force".

CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (3) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1er juin 2009, prévoient ce qui suit :

Codifications comme élément de preuve

31. (1) Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

[...]

Incompatibilité — règlements

(3) Les dispositions du règlement d'origine avec ses modifications subséquentes enregistrées par le greffier du Conseil privé en vertu de la *Loi sur les textes réglementaires* l'emportent sur les dispositions incompatibles du règlement codifié publié par le ministre en vertu de la présente loi.

NOTE

Cette codification est à jour au 15 décembre 2014. Les dernières modifications sont entrées en vigueur le 4 juin 2014. Toutes modifications qui n'étaient pas en vigueur au 15 décembre 2014 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

TABLE OF PROVISIONS

TABLE ANALYTIQUE

Registration
SOR/2014-104 May 5, 2014

CANADA TRANSPORTATION ACT

Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)

The Canadian Transportation Agency, pursuant to section 17 of the *Canada Transportation Act*[a], makes the annexed *Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)*.

Gatineau, April 29, 2014

GEOFFREY C. HARE
Chairperson
Canadian Transportation Agency

SAM BARONE
Vice-Chairperson
Canadian Transportation Agency

[a] S.C. 1996, c. 10

Enregistrement
DORS/2014-104 Le 5 mai 2014

LOI SUR LES TRANSPORTS AU CANADA

Règles de l'Office des transports du Canada (Instances de règlement des différends et certaines règles applicables à toutes les instances)

En vertu de l'article 17 de la *Loi sur les transports au Canada*[a], l'Office des transports du Canada établit les *Règles de l'Office des transports du Canada (Instances de règlement des différends et certaines règles applicables à toutes les instances)*, ci-après.

Gatineau, le 29 avril 2014

Le président
de l'Office des transports du Canada
GEOFFREY C. HARE

Le vice-président
de l'Office des transports du Canada
SAM BARONE

[a] L.C. 1996, ch. 10

CANADIAN TRANSPORTATION AGENCY RULES (DISPUTE PROCEEDINGS AND CERTAIN RULES APPLICABLE TO ALL PROCEEDINGS)

INTERPRETATION

Definitions

1. The following definitions apply in these Rules.

"Act" « *Loi* »
"Act" means the *Canada Transportation Act*.

"affidavit" « *affidavit* »
"affidavit" means a written statement confirmed by oath or a solemn declaration.

"applicant" « *demandeur* »
"applicant" means a person that files an application with the Agency.

"application" « *demande* »
"application" means a document that is filed to commence a proceeding before the Agency under any legislation or regulations that are administered in whole or in part by the Agency.

"business day" « *jour ouvrable* »
"business day" means a day that the Agency is ordinarily open for business.

"dispute proceeding" « *instance de règlement des différends* »
"dispute proceeding" means any contested matter that is commenced by application to the Agency.

"document" « *document* »
"document" includes any information that is recorded in any form.

"intervener" « *intervenant* »
"intervener" means a person whose request to intervene filed under section 29 has been granted.

"party" « *partie* »
"party" means an applicant, a respondent or a person that is named by the Agency as a party.

"person" « *personne* »
"person" includes a partnership and an unincorporated association.

"proceeding" « *instance* »
"proceeding" means any matter that is commenced by application to the Agency, whether contested or not.

RÈGLES DE L'OFFICE DES TRANSPORTS DU CANADA (INSTANCES DE RÈGLEMENT DES DIFFÉRENDS ET CERTAINES RÈGLES APPLICABLES À TOUTES LES INSTANCES)

DÉFINITIONS

Définitions

1. Les définitions qui suivent s'appliquent aux présentes règles.

« affidavit » "*affidavit*"
« affidavit » Déclaration écrite certifiée par serment ou affirmation solennelle.

« défendeur » "*respondent*"
« défendeur » Personne nommée à ce titre dans une demande, ou toute autre personne désignée comme tel par l'Office.

« demande » "*application*"
« demande » Document introductif d'une instance déposé devant l'Office en vertu d'une loi ou d'un règlement qu'il est chargé d'appliquer en tout ou en partie.

« demandeur » "*applicant*"
« demandeur » Personne qui dépose une demande auprès de l'Office.

« document » "*document*"
« document » S'entend notamment de tout renseignement qui est enregistré, quelqu'en soit le support.

« instance » "*proceeding*"
« instance » Affaire, contestée ou non, qui est introduite devant l'Office au moyen d'une demande.

« instance de règlement des différends » "*dispute proceeding*"
« instance de règlement des différends » Affaire contestée qui est introduite devant l'Office au moyen d'une demande.

« intervenant » "*intervener*"
« intervenant » Personne dont la requête d'intervention déposée en vertu de l'article 29 a été accordée.

« jour ouvrable » "*business day*"
« jour ouvrable » Jour où l'Office est normalement ouvert au public.

« Loi » "*Act*"
« Loi » La *Loi sur les transports au Canada*.

« partie » "*party*"
« partie » Le demandeur, le défendeur ou toute personne désignée comme telle par l'Office.

"respondent" « *défendeur* »

"respondent" means a person that is named as a respondent in an application and any person that is named by the Agency as a respondent.

« personne » "*person*"

« personne » S'entend notamment d'une société de personnes et d'une association sans personnalité morale.

APPLICATION

APPLICATION

Dispute proceedings

2. Subject to sections 3 and 4, these Rules apply to dispute proceedings other than a matter that is the subject of mediation.

Instances de règlement des différends

2. Sous réserve des articles 3 et 4, les présentes règles s'appliquent aux instances de règlement des différends, à l'exception de toute question qui fait l'objet d'une médiation.

ALL PROCEEDINGS

TOUTES LES INSTANCES

Quorum

3. In all proceedings, one member constitutes a quorum.

Quorum

3. Dans toute instance, le quorum est constitué de un membre.

Principle of proportionality

4. The Agency is to conduct all proceedings in a manner that is proportionate to the importance and complexity of the issues at stake and the relief claimed.

Principe de proportionnalité

4. L'Office mène ses instances de manière qui soit proportionnée à l'importance et la complexité des questions en jeu et à la réparation demandée.

DISPUTE PROCEEDINGS

INSTANCES DE RÈGLEMENT DES DIFFÉRENDS

GENERAL

RÈGLES D'ORDRE GÉNÉRAL

Interpretation and Dispensing with Compliance

Interprétation et dispense d'observation des règles

Interpretation of Rules

5. (1) These Rules are to be interpreted in a manner that facilitates the most expeditious determination of every dispute proceeding, the optimal use of Agency and party resources and the promotion of justice.

Interprétation des Règles

5. (1) Les présentes règles sont interprétées de façon à faciliter le règlement le plus expéditif qui soit de l'instance de règlement des différends, l'utilisation optimale des ressources de l'Office et des parties et à promouvoir la justice.

Agency's initiative

(2) Anything that may be done on request under these Rules may also be done by the Agency of its own initiative.

Initiative de l'Office

(2) Toute chose qui peut être faite sur requête au titre des présentes règles peut être faite par l'Office de sa propre initiative.

Dispensing with compliance and varying rule

6. The Agency may, at the request of a person, dispense with compliance with or vary any rule at any time or grant other relief on any terms that will allow for the just determination of the issues.

Dispense d'observation et modification de règles

6. L'Office peut, à la requête d'une personne, soustraire une instance de règlement des différends à l'application d'une règle, modifier celle-ci ou autoriser quelque autre

réparation, avec ou sans conditions, en vue du règlement équitable des questions.

Filing of Documents and Sending of Copy to Parties

Dépôt de documents et envoi de copies aux autres parties

Filing

7. (1) Any document filed under these Rules must be filed with the Secretary of the Agency.

Dépôt

7. (1) Le dépôt de documents au titre des présentes règles se fait auprès du secrétaire de l'Office.

Agency's public record

(2) All filed documents are placed on the Agency's public record unless the person filing the document files, at the same time, a request for confidentiality under section 31 in respect of the document.

Archives publiques de l'Office

(2) Les documents déposés sont versés aux archives publiques de l'Office, sauf si la personne qui dépose le document dépose au même moment une requête de confidentialité, en vertu de l'article 31, à l'égard du document.

Copy to parties

8. A person that files a document must, on the same day, send a copy of the document to each party or, if a party is represented, to the party's representative, except if the document is

(*a*) a confidential version of a document in respect of which a request for confidentiality is filed under section 31;

(*b*) an application; or

(*c*) a position statement.

Copie aux autres parties

8. La personne qui dépose un document envoie le même jour une copie du document à chaque partie ou à son représentant, le cas échéant, sauf s'il s'agit :

a) d'une version confidentielle d'un document à l'égard duquel une requête de confidentialité a été déposée en vertu de l'article 31;

b) d'une demande;

c) d'un énoncé de position.

Means of transmission

9. Documents may be filed with the Agency and copies may be sent to the other parties by courrier, personal delivery, email, facsimile or other electronic means specified by the Agency.

Modes de transmission

9. Le dépôt de documents et l'envoi de copies aux autres parties peut se faire par remise en mains propres, par service de messagerie, par courriel, par télécopieur ou par tout autre moyen électronique que précise l'Office.

Facsimile — cover page

10. A person that files or sends a document by facsimile must include a cover page indicating the total number of pages transmitted, including the cover page, and the name and telephone number of a contact person if problems occur in the transmission of the document.

Télécopieur — page couverture

10. La personne qui dépose ou transmet un document par télécopieur indique sur une page couverture le nombre total de pages transmises, y compris la page couverture, ainsi que le nom et le numéro de téléphone d'une personne à joindre en cas de difficultés de transmission.

Electronic transmission

11. (1) A document that is sent by email, facsimile or other electronic means

Transmission électronique

11. (1) Le document transmis par courriel, télécopieur ou tout autre moyen élec-

is considered to be filed with the Agency and received by the other parties on the date of its transmission if it is sent at or before 5:00 p.m. Gatineau local time on a business day. A document that is sent after 5:00 p.m. Gatineau local time or on a day that is not a business day is considered to be filed with the Agency and received by the other parties on the next business day.

tronique est considéré comme déposé auprès de l'Office et reçu par les autres parties à la date de la transmission s'il a été envoyé un jour ouvrable au plus tard à 17 heures, heure de Gatineau; sinon, il est considéré comme déposé et reçu le jour ouvrable suivant.

Courier or personal delivery

(2) A document that is sent by courier or personal delivery is filed with the Agency and received by the other parties on the date of its delivery if it is delivered to the Agency and the other parties at or before 5:00 p.m. Gatineau local time on a business day. A document that is delivered after 5:00 p.m. Gatineau local time or on a day that is not a business day is considered to be filed with the Agency and received by the other parties on the next business day.

Services de messagerie ou remise en mains propres

(2) La remise d'un document envoyé par messagerie ou remis en mains propres est déposé auprès de l'Office et reçu par les autres parties à la date de la remise s'il a été reçu par l'Office et par les autres parties un jour ouvrable au plus tard à 17 heures, heure de Gatineau; sinon, il est considéré comme déposé et reçu le jour ouvrable suivant.

Filing after time limit

12. (1) A person must not file a document after the end of the applicable time limit for filing the document unless a request has been filed under subsection 30(1) and the request has been granted by the Agency.

Dépôt hors délai

12. (1) Nul ne peut déposer de document après l'expiration des délais prévus pour ce faire, sauf sur autorisation de l'Office à la suite d'une requête déposée en ce sens en vertu du paragraphe 30(1).

Filing not provided for in Rules

(2) A person must not file a document whose filing is not provided for in these Rules unless a request has been filed under subsection 34(1) and the request has been granted by the Agency.

Dépôt non prévu

(2) Nul ne peut déposer de document dont le dépôt n'est pas prévu par les présentes règles, sauf sur autorisation de l'Office à la suite d'une requête déposée en ce sens en vertu du paragraphe 34(1).

Failure to comply

(3) A document that is filed in contravention of subsection (1) or (2) will not be placed on the Agency's record.

Défaut de se conformer

(3) Les documents déposés en contravention des paragraphes (1) ou (2) ne sont pas versés aux archives de l'Office.

Language of Documents

Langues des documents

English or French

13. (1) Every document filed with the Agency must be in either English or French.

Français ou anglais

13. (1) Les documents déposés sont en français ou en anglais.

Translation

(2) If a person files a document that is in a language other than English or French, they must at the same time file an English or French translation of the document and the information referred to in Schedule 1.

Traduction

(2) Les documents déposés qui sont dans une langue autre que l'anglais ou le français sont accompagnés d'une traduction dans l'une ou l'autre de ces deux langues ainsi que des éléments visés à l'annexe 1.

Treated as original

(3) The translation is treated as the original for the purposes of the dispute proceeding.

Considérée comme original

(3) La traduction tient lieu d'original pour les fins de l'instance de règlement des différends.

Amended Documents

Modification de documents

Substantive amendment

14. (1) If a person proposes to make a substantive amendment to a previously filed document, they must file a request under subsection 33(1).

Modification de fond

14. (1) La personne qui souhaite apporter une modification de fond à un document qu'elle a déposé présente une requête en ce sens en vertu du paragraphe 33(1).

Identification of amendment

(2) A person that files a document that amends a previously filed document, whether the amendment is substantive or not, must ensure that the amendment is clearly identified in the document and that the word "AMENDED" appears in capital letters in the top right corner of the first page.

Indication des modifications

(2) La personne qui dépose une version modifiée d'un document qu'elle a déposé, que les modifications soient de fond ou non, indique clairement dans le document les modifications et inscrit la mention « MODIFIÉ » en lettres majuscules dans le coin supérieur droit de la première page.

Verification by Affidavit or by Witnessed Statement

Attestation par affidavit ou déclaration devant témoin

Verification of contents

15. (1) If the Agency considers it just and reasonable, the Agency may, by notice, require that a person provide verification of the contents of all or any part of a document by affidavit or by witnessed statement.

Attestation du contenu

15. (1) S'il l'estime juste et raisonnable, l'Office peut, par avis, exiger qu'une personne atteste, en tout ou en partie, le contenu d'un document par affidavit ou déclaration devant témoin.

Filing of verification

(2) The verification by affidavit or by witnessed statement must be filed within five business days after the date of the notice referred to in subsection (1) and must include the information referred to in Schedule 2 or Schedule 3, respectively.

Dépôt de l'attestation

(2) L'attestation par affidavit ou par déclaration devant témoin est déposée dans les cinq jours ouvrables suivant la date de l'avis visé au paragraphe (1) et comporte les éléments visés à l'annexe 2 ou à l'annexe 3, respectivement.

Failure to file verification

(3) The Agency may strike the document or the part of the document in ques-

Défaut de déposer l'attestation

(3) L'Office peut retirer de ses archives tout ou partie d'un document si la personne

tion from the Agency's record if the person fails to file the verification.

Representation and Change of Contact Information

Representative not a member of the bar

16. A person that is represented in a dispute proceeding by a person that is not a member of the bar of a province must authorize that person to act on their behalf by filing the information referred to in Schedule 4.

Change of contact information

17. A person must, if the contact information they provided to the Agency changes during the course of a dispute proceeding, provide their new contact information to the Agency and the parties without delay.

PLEADINGS

Application

Filing of application

18. (1) Any application filed with the Agency must include the information referred to in Schedule 5.

Application complete

(2) If the application is complete, the parties are notified in writing that the application has been accepted.

Incomplete application

(3) If the application is incomplete, the applicant is notified in writing and the applicant must provide the missing information within 20 business days after the date of the notice.

Closure of file

(4) If the applicant fails to provide the missing information within the time limit, the file is closed.

New application

(5) An applicant whose file is closed may file a new application in respect of the same matter.

ne dépose pas l'attestation par affidavit ou par déclaration devant témoin.

Représentation et changements des coordonnées

Représentant — non-membre du barreau

16. La personne qui, dans le cadre d'une instance de règlement des différends, est représentée par une personne qui n'est membre du barreau d'aucune province dépose une autorisation en ce sens, qui comporte les éléments visés à l'annexe 4.

Changement des coordonnées

17. La personne qui a fourni ses coordonnées à l'Office et dont les coordonnées changent au cours d'une instance de règlement des différends fournit sans délai ses nouvelles coordonnées à l'Office et aux parties.

ACTES DE PROCÉDURE

Demande

Dépôt de la demande

18. (1) Toute demande déposée auprès de l'Office comporte les éléments visés à l'annexe 5.

Demande complète

(2) Si la demande est complète, les parties sont avisées par écrit de l'acceptation de la demande.

Demande incomplète

(3) Si la demande est incomplète, le demandeur en est avisé par écrit et dispose de vingt jours ouvrables suivant la date de l'avis pour la compléter.

Fermeture du dossier

(4) Si le demandeur ne complète pas la demande dans le délai imparti, le dossier est fermé.

Nouvelle demande

(5) Le demandeur dont le dossier est fermé peut déposer à nouveau une demande relativement à la même affaire.

Answer

Filing of answer

19. A respondent may file an answer to the application. The answer must be filed within 15 business days after the date of the notice indicating that the application has been accepted and must include the information referred to in Schedule 6.

Réponse

Dépôt d'une réponse

19. Le défendeur qui souhaite déposer une réponse le fait dans les quinze jours ouvrables suivant la date de l'avis d'acceptation de la demande. La réponse comporte les éléments visés à l'annexe 6.

Reply

Filing of reply

20. (1) An applicant may file a reply to the answer. The reply must be filed within five business days after the day on which they receive a copy of the answer and must include the information referred to in Schedule 7.

Réplique

Dépôt d'une réplique

20. (1) Le demandeur qui souhaite déposer une réplique à la réponse le fait dans les cinq jours ouvrables suivant la date de réception de la copie de la réponse. La réplique comporte les éléments visés à l'annexe 7.

No new issues

(2) The reply must not raise issues or arguments that are not addressed in the answer or introduce new evidence unless a request has been filed to that effect and the request has been granted by the Agency.

Nouvelles questions

(2) La réplique ne peut soulever des questions ou arguments qui ne sont pas abordés dans la réponse, ni introduire de nouvelle preuve, sauf sur autorisation de l'Office à la suite d'une requête déposée en ce sens.

Intervention

Filing of intervention

21. (1) An intervener may file an intervention. The intervention must be filed within five business days after the day on which their request to intervene is granted by the Agency and must include the information referred to in Schedule 8.

Intervention

Dépôt de l'intervention

21. (1) L'intervenant qui souhaite déposer une intervention le fait dans les cinq jours ouvrables suivant la date à laquelle sa requête d'intervention a été accordée. L'intervention comporte les éléments visés à l'annexe 8.

Participation rights

(2) An intervener's participation is limited to the participation rights granted by the Agency.

Droits de participation

(2) La participation de l'intervenant se limite aux droits de participation que lui accorde l'Office.

Response to intervention

22. An applicant or a respondent that is adverse in interest to an intervener may file a response to the intervention. The response must be filed within five business days after the day on which they receive a copy of the intervention and must include the information referred to in Schedule 9.

Réponse à l'intervention

22. Le demandeur ou le défendeur qui a des intérêts opposés à ceux d'un intervenant et qui souhaite déposer une réponse à l'intervention le fait dans les cinq jours ouvrables suivant la date de réception de la copie de l'intervention. La réponse à l'intervention comporte les éléments visés à l'annexe 9.

Position Statement

Filing of position statement

23. (1) An interested person may file a position statement. The position statement must be filed before the close of pleadings and must include the information referred to in Schedule 10.

No participation rights

(2) A person that files a position statement has no participation rights and is not entitled to receive any notice in the dispute proceeding.

Written Questions and Production of Documents

Notice

24. (1) A party may, by notice, request that any party that is adverse in interest respond to written questions that relate to the matter in dispute or produce documents that are in their possession or control and that relate to the matter in dispute. The notice must include the information referred to in Schedule 11 and must be filed

(*a*) in the case of written questions, before the close of pleadings; and

(*b*) in the case of the production of documents, within five business days after the day on which the party becomes aware of the documents or before the close of pleadings, whichever is earlier.

Response to notice

(2) The party to which a notice has been given must, within five business days after the day on which they receive a copy of the notice, file a complete response to each question or the requested documents, as the case may be, accompanied by the information referred to in Schedule 12.

Objection

(3) If a party wishes to object to a question or to producing a document, that party

Énoncé de position

Dépôt de l'énoncé de position

23. (1) Toute personne intéressée peut déposer un énoncé de position. Celui-ci est déposé avant la clôture des actes de procédure et comporte les éléments visés à l'annexe 10.

Énoncé de position

(2) La personne qui dépose un énoncé de position n'a aucun droit de participation ni droit aux avis relatifs à l'instance de règlement des différends.

Questions écrites et production de documents

Avis

24. (1) Toute partie peut, par avis, demander à une partie qui a des intérêts opposés aux siens de répondre à des questions écrites ou de produire des documents qui se trouvent en sa possession ou sous sa garde et qui sont pertinents à l'affaire. L'avis comporte les éléments visés à l'annexe 11 et est déposé dans les délais suivants :

a) s'agissant de questions écrites, avant la clôture des actes de procédure;

b) s'agissant de la production de documents, soit, dans les cinq jours ouvrables suivant la date à laquelle la partie a pris connaissance de leur existence, soit, si elle est antérieure, avant la clôture des actes de procédure.

Réponse à l'avis

(2) Dans les cinq jours ouvrables suivant la date de réception de la copie de l'avis, la partie à qui l'avis est envoyé dépose une réponse complète à chacune des questions ou les documents demandés, selon le cas, ainsi que les éléments visés à l'annexe 12.

Opposition

(3) La partie qui souhaite s'opposer à une question ou à la demande de production d'un document dépose une opposition

must, within the time limit set out in subsection (2), file an objection that includes

(*a*) a clear and concise explanation of the reasons for the objection including, as applicable, the relevance of the information or document requested and their availability for production;

(*b*) any document that is relevant in explaining or supporting the objection; and

(*c*) any other information or document that is in the party's possession or control and that would be of assistance to the party making the request.

dans les délais prévus au paragraphe (2). L'opposition comporte les éléments suivants :

a) un exposé clair et concis des motifs de l'opposition, notamment la pertinence des renseignements ou du document demandé ou leur disponibilité, selon le cas;

b) tout document pertinent à l'appui de l'opposition;

c) tout autre renseignement ou document en la possession ou sous la garde de la partie et susceptible d'aider la partie qui a fait la demande.

Expedited Process

Processus accéléré

Decision to apply expedited process

25. (1) The Agency may, at the request of a party under section 28, decide that an expedited process applies to an answer under section 19 and a reply under section 20 or to any request filed under these Rules.

25. (1) L'Office peut, sur requête déposée en vertu de l'article 28, décider que le processus accéléré s'applique à une réponse déposée en vertu de l'article 19 et à une réplique déposée en vertu de l'article 20, ou à toute autre requête déposée au titre des présentes règles.

Décision d'appliquer le processus accéléré

Time limits for filing — answer and reply

(2) If an expedited process applies to an answer under section 19 and a reply under section 20, the following time limits apply:

(*a*) the answer must be filed within five business days after the date of the notice indicating that the application has been accepted; and

(*b*) the reply must be filed within three business days after the day on which the applicant receives a copy of the answer.

(2) Lorsque le processus accéléré est appliqué relativement à une réponse déposée en vertu de l'article 19 et à une réplique déposée en vertu de l'article 20, les délais suivants s'appliquent :

a) le dépôt de la réponse se fait dans les cinq jours ouvrables suivant la date de l'avis d'acceptation de la demande;

b) le dépôt de la réplique se fait dans les trois jours ouvrables suivant la date de réception de la copie de la réponse.

Délais de dépôt — réponse et réplique

Time limits for filing — request

(3) If an expedited process applies to a request filed under these Rules, the following time limits apply:

(*a*) any response to a request must be filed within two business days after the day on which the person who is respond-

(3) Lorsque le processus accéléré est appliqué relativement à une requête déposée au titre des présentes règles, les délais suivants s'appliquent :

a) le dépôt de la réponse à la requête se fait dans les deux jours ouvrables sui-

Délai de dépôt — Requête

ing to the request receives a copy of the request; and

(*b*) any reply to a response must be filed within one business day after the day on which the person who is replying to the response receives a copy of the response.

vant la date de réception de la copie de la requête;

b) le dépôt de la réplique à la réponse se fait au plus tard un jour ouvrable après la date de réception de la copie de la réponse.

Close of Pleadings

Clôture des actes de procédure

Normal process

26. (1) Subject to subsection (2), pleadings are closed

(*a*) if no answer is filed, 20 business days after the date of the notice indicating that the application has been accepted;

(*b*) if an answer is filed and no additional documents are filed after that answer, 25 business days after the date of the notice indicating that the application has been accepted; or

(*c*) if additional documents are filed after an answer is filed, the day on which the last document is to be filed under these Rules.

Procédure normale

26. (1) Sous réserve du paragraphe (2), les actes de procédure sont clos dans les délais suivants :

a) si aucune réponse n'est déposée, vingt jours ouvrables après la date de l'avis d'acceptation de la demande;

b) si une réponse est déposée, et qu'aucun autre document n'est déposé par la suite, vingt-cinq jours ouvrables après la date de l'avis d'acceptation de la demande;

c) si d'autres documents sont déposés après le dépôt de la réponse, à la date à laquelle le dernier document doit être déposé au titre des présentes règles.

Expedited process

(2) Under the expedited process, pleadings are closed

(*a*) if no answer is filed, seven business days after the date of the notice indicating that the application has been accepted;

(*b*) if an answer is filed and no additional documents are filed after that answer, 10 business days after the date of the notice indicating that the application has been accepted; or

(*c*) if additional documents are filed after an answer is filed, the day on which the last document is to be filed under these Rules.

Processus accéléré

(2) Si le processus accéléré est appliqué, les actes de procédure sont clos dans les délais suivants :

a) si aucune réponse n'est déposée, sept jours ouvrables après la date de l'avis d'acceptation de la demande;

b) si une réponse a été déposée, et qu'un aucun autre document n'est déposé par la suite, dix jours ouvrables après la date de l'avis d'acceptation de la demande;

c) si d'autres documents sont déposés après le dépôt de la réponse, à la date à laquelle le dernier document doit être déposé au titre des présentes règles.

REQUESTS

General Request

Filing of request

27. (1) A person may file a request for a decision on any issue that arises within a dispute proceeding and for which a specific request is not provided for under these Rules. The request must be filed as soon as feasible but, at the latest, before the close of pleadings and must include the information referred to in Schedule 13.

Response

(2) Any party may file a response to the request. The response must be filed within five business days after the day on which they receive a copy of the request and must include the information referred to in Schedule 14.

Reply

(3) The person that filed the request may file a reply to the response. The reply must be filed within two business days after the day on which they receive a copy of the response and must include the information referred to in Schedule 15.

No new issues

(4) The reply must not raise issues or arguments that are not addressed in the response or introduce new evidence unless a request has been filed to that effect and the request has been granted by the Agency.

Specific Requests

Request for Expedited Process

Expedited process

28. (1) A party may file a request to have an expedited process applied to an answer under section 19 and a reply under section 20 or to another request filed under these Rules. The request must include the information referred to in Schedule 13.

REQUÊTES

Requête générale

Dépôt d'une requête

27. (1) Toute personne peut déposer une requête en vue d'obtenir une décision sur toute question soulevée dans le cadre d'une instance de règlement des différents, mais à laquelle aucune requête spécifique n'est prévue au titre des présentes règles. La requête est déposée dès que possible, mais au plus tard avant la clôture des actes de procédure. Elle comporte les éléments visés à l'annexe 13.

Réponse

(2) Toute partie peut déposer une réponse à la requête dans les cinq jours ouvrables suivant la date de réception de la copie de la requête. La réponse comporte les éléments visés à l'annexe 14.

Réplique

(3) La personne ayant déposé la requête et qui souhaite déposer une réplique à la réponse le fait dans les deux jours ouvrables suivant la date de réception de la copie de la réponse. La réplique comporte les éléments visés à l'annexe 15.

Nouvelles questions

(4) La réplique ne peut soulever des questions ou arguments qui ne sont pas abordés dans la réponse, ni introduire de nouvelle preuve, sauf sur autorisation de l'Office à la suite d'une requête déposée en ce sens.

Requêtes spécifiques

Requête en processus accéléré

Processus accéléré

28. (1) Toute partie peut déposer une requête pour demander l'application du processus accéléré relativement à une réponse déposée en vertu de l'article 19 et à une réplique déposée en vertu de l'article 20, ou à une autre requête déposée au

titre des présentes règles. La requête comporte les éléments visés à l'annexe 13.

Justification for request

(2) The party filing the request must demonstrate to the satisfaction of the Agency that adherence to the time limits set out in these Rules would cause them financial or other prejudice.

(2) La partie qui dépose la requête doit convaincre l'Office qu'un préjudice financier ou autre lui serait causé si les délais prévus dans les présentes règles étaient appliqués.

Justification de la requête

Time limit for filing

(3) The request must be filed

(*a*) if the request is to have an expedited process apply to an answer and a reply,

(i) in the case of an applicant, at the time that the application is filed, or

(ii) in the case of a respondent, within one business day after the date of the notice indicating that the application has been accepted; or

(*b*) if the request is to have an expedited process apply to another request,

(i) in the case of a person filing the other request, at the time that that request is filed, or

(ii) in the case of a person responding to the other request, within one business day after the day on which they receive a copy of that request.

(3) La requête est déposée dans les délais suivants :

a) si la requête vise la réponse et la réplique :

(i) en ce qui concerne le demandeur, au moment du dépôt de la demande,

(ii) en ce qui concerne le défendeur, au plus tard un jour ouvrable après la date de l'avis d'acceptation de la demande;

b) si la requête vise une autre requête :

(i) en ce qui concerne la personne qui dépose cette autre requête, au moment du dépôt de celle-ci;

(ii) en ce qui concerne de la personne qui répond à cette autre requête, au plus tard un jour ouvrable après la date de réception de la copie de celle-ci.

Délai de dépôt

Response

(4) Any party may file a response to the request. The response must be filed within one business day after the day on which they receive a copy of the request and must include the information referred to in Schedule 14.

(4) La partie qui souhaite déposer une réponse à la requête le fait au plus tard un jour ouvrable après la date de réception de la copie de la requête. La réponse comporte les éléments visés à l'annexe 14.

Réponse

Reply

(5) The party that filed the request may file a reply to the response. The reply must be filed within one business day after the day on which they receive a copy of the response and must include the information referred to in Schedule 15.

(5) La partie ayant déposé la requête et qui souhaite déposer une réplique à la réponse le fait au plus tard un jour ouvrable après la date de réception de la copie de la réponse. La réplique comporte les éléments visés à l'annexe 15.

Réplique

No new issues

(6) The reply must not raise issues or arguments that are not addressed in the response or introduce new evidence unless a request has been filed to that effect and the request has been granted by the Agency.

Nouvelles questions

(6) La réplique ne peut soulever des questions ou arguments qui ne sont pas abordés dans la réponse, ni introduire de nouvelle preuve, sauf sur autorisation de l'Office à la suite d'une requête déposée en ce sens.

Request to Intervene

Requête d'intervention

Request to intervene

29. (1) A person that has a substantial and direct interest in a dispute proceeding may file a request to intervene. The request must be filed within 10 business days after the day on which the person becomes aware of the application or before the close of pleadings, whichever is earlier, and must include the information referred to in Schedule 16.

Requête d'intervention

29. (1) Toute personne qui a un intérêt direct et substantiel dans une instance de règlement des différends peut déposer une requête d'intervention. La requête est déposée, soit, dans les dix jours ouvrables suivant la date à laquelle la personne a pris connaissance de la demande, soit, si elle est antérieure, avant la clôture des actes de procédure. La requête comporte les éléments visés à l'annexe 16.

Limits and conditions

(2) If the Agency grants the request, it may set limits and conditions on the intervener's participation in the dispute proceeding.

Limites et conditions

(2) Si l'Office accorde la requête, il peut fixer les limites et les conditions de l'intervention.

Request to Extend or Shorten Time Limit

Requête de prolongation ou d'abrégement de délai

Extend or shorten

30. (1) A person may file a request to extend or shorten a time limit that applies in respect of a dispute proceeding. The request may be filed before or after the end of the time limit and must include the information referred to in Schedule 13.

Prolongation ou abrégement

30. (1) Toute personne peut déposer une requête pour demander la prolongation ou l'abrégement de tout délai applicable dans le cadre d'une instance de règlement des différends avant ou après son expiration. La requête comporte les éléments visés à l'annexe 13.

Response

(2) Any party may file a response to the request. The response must be filed within three business days after the day on which they receive a copy of the request and must include the information referred to in Schedule 14.

Réponse

(2) La partie qui souhaite déposer une réponse à la requête le fait dans les trois jours ouvrables suivant la date de réception de la copie de la requête. La réponse comporte les éléments visés à l'annexe 14.

Reply

(3) The person that filed the request may file a reply to the response. The reply must be filed within one business day after

Réplique

(3) La personne ayant déposé la requête et qui souhaite déposer une réplique à la réponse le fait au plus tard un jour ouvrable

the day on which they receive a copy of the response and must include the information referred to in Schedule 15.

après la date de réception de la copie de la réponse. La réplique comporte les éléments visés à l'annexe 15.

No new issues

(4) The reply must not raise issues or arguments that are not addressed in the response or introduce new evidence unless a request has been filed to that effect and the request has been granted by the Agency.

Nouvelles questions

(4) La réplique ne peut soulever des questions ou arguments qui ne sont abordés dans la réponse, ni introduire de nouvelle preuve, sauf sur autorisation de l'Office à la suite d'une requête déposée en ce sens.

Request for Confidentiality

Requête de confidentialité

Confidential treatment

31. (1) A person may file a request for confidentiality in respect of a document that they are filing. The request must include the information referred to in Schedule 17 and must be accompanied by, for each document identified as containing confidential information,

Traitement confidentiel

31. (1) Toute personne peut déposer une requête de confidentialité portant sur un document qu'elle dépose. La requête comporte les éléments visés à l'annexe 17 et, pour chaque document désigné comme étant confidentiel :

(*a*) one public version of the document from which the confidential information has been redacted; and

a) une version publique du document, de laquelle les renseignements confidentiels ont été supprimés;

(*b*) one confidential version of the document that identifies the confidential information that has been redacted from the public version of the document and that includes, at the top of each page, the words: "CONTAINS CONFIDENTIAL INFORMATION" in capital letters.

b) une version confidentielle du document, qui indique les passages qui ont été supprimés de la version publique du document et qui porte la mention « CONTIENT DES RENSEIGNEMENTS CONFIDENTIELS » en lettres majuscules au haut de chaque page.

Agency's record

(2) The request for confidentiality and the public version of the document from which the confidential information has been redacted are placed on the Agency's public record. The confidential version of the document is placed on the Agency's confidential record pending a decision of the Agency on the request for confidentiality.

Archives de l'Office

(2) La requête de confidentialité et la version publique du document de laquelle les renseignements confidentiels ont été supprimés sont versées aux archives publiques de l'Office. La version confidentielle du document est versée aux archives confidentielles de l'Office en attendant que celui-ci statue sur la requête.

Request for disclosure

(3) Any party may oppose a request for confidentiality by filing a request for disclosure. The request must be filed within five business days after the day on which they receive a copy of the request for con-

Requête de communication

(3) La partie qui souhaite s'opposer à une requête de confidentialité dépose une requête de communication dans les cinq jours ouvrables suivant la date de réception de la copie de la requête de confidentialité.

fidentiality and must include the information referred to in Schedule 18.

Response to request for disclosure

(4) The person that filed the request for confidentiality may file a response to a request for disclosure. The response must be filed within three business days after the day on which they receive a copy of the request for disclosure and must include the information referred to in Schedule 14.

Agency's decision

(5) The Agency may

(*a*) if the Agency determines that the document is not relevant to the dispute proceeding, decide to not place the document on the Agency's record;

(*b*) if the Agency determines that the document is relevant to the dispute proceeding and that no specific direct harm would likely result from its disclosure or that any demonstrated specific direct harm is not sufficient to outweigh the public interest in having it disclosed, decide to place the document on the Agency's public record; or

(*c*) if the Agency determines that the document is relevant to the dispute proceeding and that the specific direct harm likely to result from its disclosure justifies confidentiality,

(i) decide to confirm the confidentiality of the document or any part of it and keep the document or part of the document on the Agency's confidential record,

(ii) decide to place a version of the document or any part of it from which the confidential information has been redacted on the Agency's public record,

(iii) decide to keep the document or any part of it on the Agency's confi-

La requête de communication comporte les éléments visés à l'annexe 18.

Réponse à la requête de communication

(4) La personne ayant déposé la requête de confidentialité et qui souhaite déposer une réponse à une requête de communication le fait dans les trois jours ouvrables suivant la date de réception de copie de la requête de communication. La réponse comporte les éléments visés à l'annexe 14.

Décision de l'Office

(5) L'Office peut :

a) s'il conclut que le document n'est pas pertinent au regard de l'instance de règlement des différends, décider de ne pas le verser aux archives de l'Office;

b) s'il conclut que le document est pertinent au regard de l'instance de règlement des différends et que sa communication ne causerait vraisemblablement pas de préjudice direct précis ou que l'intérêt du public à ce qu'il soit communiqué l'emporte sur le préjudice direct précis qui pourrait en résulter, décider de le verser aux archives publiques de l'Office;

c) s'il conclut que le document est pertinent au regard de l'instance de règlement des différends et que le préjudice direct précis que pourrait causer sa communication justifie le traitement confidentiel :

(i) décider de confirmer le caractère confidentiel du document ou d'une partie de celui-ci et garder le document ou une partie de celui-ci dans ses archives confidentielles,

(ii) décider qu'une version ou une partie du document, de laquelle les renseignements confidentiels ont été supprimés, soit versée à ses archives publiques,

dential record but require that the person requesting confidentiality provide a copy of the document or part of the document in confidence to any party to the dispute proceeding, or to certain of their advisors, experts and representatives, as specified by the Agency, after the person requesting confidentiality has received a signed undertaking of confidentiality from the person to which the copy is to be provided, or

(iv) make any other decision that it considers just and reasonable.

(iii) décider de garder le document ou une partie de celui-ci dans ses archives confidentielles, mais exiger que la personne qui demande la confidentialité fournisse une copie du document ou une partie de celui-ci de façon confidentielle à une partie à l'instance, à certains de ses conseillers, experts ou représentants, tel qu'il le précise, après que la personne qui demande la confidentialité ait reçu un engagement de non-divulgation signé de chaque personne à qui le document devra être envoyé,

(iv) rendre toute autre décision qu'il estime juste et raisonnable.

Filing of undertaking of confidentiality

(6) The original copy of the undertaking of confidentiality must be filed with the Agency.

(6) L'original de l'engagement de non-divulgation est déposé auprès de l'Office.

Dépôt de l'engagement de non-divulgation

Request to Require Party to Provide Complete Response

Requête visant à obliger une partie à fournir une réponse complète à l'avis

Requirement to respond

32. (1) A party that has given notice under subsection 24(1) may, if they are not satisfied with the response to the notice or if they wish to contest an objection to their request, file a request to require the party to which the notice was directed to provide a complete response. The request must be filed within two business days after the day on which they receive a copy of the response to the notice or the objection, as the case may be, and must include the information referred to in Schedule 13.

32. (1) La partie qui a donné un avis en vertu du paragraphe 24(1) et qui est insatisfaite des réponses à l'avis ou qui souhaite contester l'opposition à sa demande peut déposer une requête pour demander que la partie à qui l'avis a été donné fournisse une réponse complète. La requête est déposée dans les deux jours ouvrables suivant la date de réception de la copie des réponses à l'avis ou de l'opposition et comporte les éléments visés à l'annexe 13.

Obligation de répondre

Agency's decision

(2) The Agency may do any of the following:

(*a*) require that a question be answered in full or in part;

(*b*) require that a document be provided;

(2) L'Office peut :

a) exiger qu'il soit répondu à la question en tout ou en partie;

b) exiger la production d'un document;

Décisions de l'Office

(*c*) require that a party submit secondary evidence of the contents of a document;

(*d*) require that a party produce a document for inspection only;

(*e*) deny the request in whole or in part.

c) exiger qu'une partie présente une preuve secondaire du contenu d'un document;

d) exiger qu'une partie produise un document pour examen seulement;

e) rejeter la requête en tout ou en partie.

Request to Amend Document

Requête de modification de document

Amendment

33. (1) A person may, before the close of pleadings, file a request to make a substantive amendment to a previously filed document. The request must include the information referred to in Schedule 13 and a copy of the amended document that the person proposes to file.

Modification

33. (1) Toute personne peut, avant la clôture des actes de procédure, déposer une requête en vue d'apporter une modification de fond à un document qu'elle a déposé. La requête comporte les éléments visés à l'annexe 13 ainsi que la copie du document modifié que la personne a l'intention de déposer.

Response

(2) Any party may file a response to the request. The response must be filed within three business days after the day on which they receive a copy of the request and must include

(*a*) the information referred to in Schedule 14; and

(*b*) a description of any prejudice that would be caused to the party if the request were granted including, if applicable, an explanation of how the proposed amendments would hinder or delay the fair conduct of the dispute proceeding.

Réponse

(2) La partie qui souhaite déposer une réponse à la requête le fait dans les trois jours ouvrables suivant la date de réception de la copie de la requête. La réponse comporte:

a) les éléments visés à l'annexe 14;

b) une description de tout préjudice qui serait causé à la partie si la requête était accordée, y compris, le cas échéant, la manière dont le dépôt des modifications proposées entraverait ou retarderait le déroulement équitable de l'instance de règlement des différends.

Reply

(3) The person that filed the request may file a reply to the response. The reply must be filed within one business day after the day on which they receive a copy of the response and must include the information referred to in Schedule 15.

Réplique

(3) La partie ayant déposé la requête et qui souhaite déposer une réplique à la réponse le fait au plus tard un jour ouvrable après la date de réception de la copie de réponse à la requête. La réplique comporte les éléments visés à l'annexe 15.

No new issues

(4) The reply must not raise issues or arguments that are not addressed in the response or introduce new evidence unless a request has been filed to that effect and the request has been granted by the Agency.

Nouvelles questions

(4) La réplique ne peut soulever des questions ou arguments qui ne sont pas abordés dans la réponse, ni introduire de nouvelle preuve, sauf sur autorisation de

l'Office à la suite d'une requête déposée en ce sens.

Agency's decision

(5) The Agency may

(*a*) deny the request; or

(*b*) approve the request in whole or in part and, if the Agency considers it just and reasonable to do so, provide parties that are adverse in interest with an opportunity to respond to the amended document.

Décisions de l'Office

(5) L'Office peut :

a) rejeter la requête;

b) accorder la requête de modification en tout ou en partie et, s'il l'estime juste et raisonnable, donner aux parties adverses la possibilité de répondre au document modifié.

Request to File Document Whose Filing is not Otherwise Provided for in Rules

Requête de dépôt de document dont le dépôt n'est pas prévu par les règles

Filing

34. (1) A person may file a request to file a document whose filing is not otherwise provided for in these Rules. The request must include the information referred to in Schedule 13 and a copy of the document that the person proposes to file.

Dépôt

34. (1) La personne qui souhaite déposer un document dont le dépôt n'est pas prévu par les présentes règles dépose une requête en ce sens. La requête comporte les éléments visés à l'annexe 13 ainsi que la copie du document que la partie a l'intention de déposer.

Response

(2) Any party may file a response to the request. The response must be filed within three business days after the day on which they receive a copy of the request and must include

(*a*) the information referred to in Schedule 14; and

(*b*) a description of any prejudice that would be caused to the party if the request were granted including, if applicable, an explanation of how the proposed filing would hinder or delay the fair conduct of the dispute proceeding.

Réponse

(2) La partie qui souhaite déposer une réponse à la requête le fait dans les trois jours ouvrables suivant la date de réception de la copie de la requête. La réponse comporte :

a) les éléments visés à l'annexe 14;

b) une description de tout préjudice qui serait causé à la partie si la requête était accordée, y compris, le cas échéant, une explication qui précise comment le dépôt du document entraverait ou retarderait le déroulement équitable de l'instance de règlement des différends.

Reply

(3) The person that filed the request may file a reply to the response. The reply must be filed within one business day after the day on which they receive a copy of the response and must include the information referred to in Schedule 15.

Réplique

(3) La partie ayant déposé la requête et qui souhaite déposer une réplique à la réponse le fait au plus tard un jour ouvrable après la date de réception de la copie de la réponse à la requête. La réplique comporte les éléments visés à l'annexe 15.

No new issues

(4) The reply must not raise issues or arguments that are not addressed in the response or introduce new evidence unless a request has been filed to that effect and the request has been granted by the Agency.

Nouvelles questions

(4) La réplique ne peut soulever des questions ou arguments qui ne sont pas abordés dans la réponse, ni introduire de nouvelle preuve, sauf sur autorisation de l'Office à la suite d'une requête déposée en ce sens.

Agency's decision

(5) The Agency may

(*a*) deny the request; or

(*b*) approve the request and, if pleadings are closed and if the Agency considers it just and reasonable to do so, reopen pleadings to provide the other parties with an opportunity to comment on the document.

Décisions de l'Office

(5) L'Office peut :

a) rejeter la requête;

b) accorder la requête et, si les actes de procédure sont clos, les rouvrir pour donner aux autres parties la possibilité de formuler des commentaires sur le document, s'il l'estime juste et raisonnable.

Request to Withdraw Document

Requête de retrait de document

Withdrawal of document

35. (1) Subject to section 36, a person may file a request to withdraw any document that they filed in a dispute proceeding. The request must be filed before the close of pleadings and must include the information referred to in Schedule 13.

Retrait de document

35. (1) Sous réserve de l'article 36, toute personne peut, avant la clôture des actes de procédure, déposer une requête en vue de retirer un document qu'elle a déposé dans le cadre d'une instance de règlement des différends. La requête comporte les éléments visés à l'annexe 13.

Terms and conditions

(2) If the Agency grants the request, it may impose any terms and conditions on the withdrawal that it considers just and reasonable, including the awarding of costs.

Conditions de retrait

(2) L'Office peut, s'il accorde la requête, fixer les conditions de retrait qu'il estime justes et raisonnables, y compris l'adjudication des frais.

Request to Withdraw Application

Requête de retrait d'une demande

Withdrawal of application

36. (1) An applicant may file a request to withdraw their application. The request must be filed before a final decision is made by the Agency in respect of the application and must include the information referred to in Schedule 13.

Retrait d'une demande

36. (1) Le demandeur peut, avant que l'Office ne rende une décision définitive, déposer une requête en vue de retirer sa demande. La requête comporte les éléments visés à l'annexe 13.

Terms and conditions

(2) If the Agency grants the request, it may impose any terms and conditions on the withdrawal that it considers just and

Conditions de retrait

(2) L'Office peut, s'il accorde la requête, fixer les conditions de retrait qu'il estime justes et raisonnables, y compris l'adjudication des frais.

reasonable, including the awarding of costs.

CASE MANAGEMENT

Formulation of issues

37. The Agency may formulate the issues to be considered in a dispute proceeding in any of the following circumstances:

(*a*) the documents filed do not clearly identify the issues;

(*b*) the formulation would assist in the conduct of the dispute proceeding;

(*c*) the formulation would assist the parties to participate more effectively in the dispute proceeding.

Preliminary determination

38. The Agency may, at the request of a party, determine that an issue should be decided as a preliminary question.

Joining of applications

39. The Agency may, at the request of a party, join two or more applications and consider them together in one dispute proceeding to provide for a more efficient and effective process.

Conference

40. (1) The Agency may, at the request of a party, require the parties to attend a conference by a means of telecommunication or by personal attendance for the purpose of

(*a*) encouraging settlement of the dispute;

(*b*) formulating, clarifying or simplifying the issues;

(*c*) determining the terms of amendment of any document;

(*d*) obtaining the admission of certain facts or determining whether the verification of those facts by affidavit should be required;

GESTION DE L'INSTANCE

Formulation des questions

37. L'Office peut, dans les cas suivants, formuler les questions qui seront examinées dans une instance de règlement des différends :

a) les documents déposés n'établissent pas clairement les questions en litige;

b) cette démarche faciliterait le déroulement de l'instance de règlement des différends;

c) cette démarche contribuerait à la participation plus efficace des parties à l'instance de règlement des différends.

Décision préliminaire

38. L'Office peut, sur requête, décider de trancher une question à titre préliminaire.

Jonction de demandes

39. L'Office peut, sur requête, joindre plusieurs demandes dans une instance de règlement des différends pour assurer un processus plus efficace et efficient.

Conférence

40. (1) L'Office peut, sur requête, exiger que les parties participent à une conférence par moyen de télécommunication ou en personne pour :

a) encourager le règlement des différends;

b) formuler, préciser ou simplifier les questions en litige;

c) fixer les conditions de modification d'un document;

d) obtenir la reconnaissance de certains faits ou décider si l'attestation de ces faits par affidavit est nécessaire;

(*e*) establishing the procedure to be followed in the dispute proceeding;

(*f*) providing for the exchange by the parties of documents proposed to be submitted;

(*g*) establishing a process for the identification and treatment of confidential information;

(*h*) discussing the appointment of experts; and

(*i*) resolving any other issues to provide for a more efficient and effective process.

e) établir la procédure à suivre pendant l'instance de règlement des différends;

f) permettre l'échange entre les parties des documents qu'elles ont l'intention de produire;

g) établir un processus d'identification et de traitement des renseignements confidentiels;

h) discuter de la nomination d'experts;

i) trancher toute autre question en vue de rendre le processus plus efficace et efficient.

Written submissions

(2) The parties may be required to file written submissions on any issue that is discussed at the conference.

(2) Les parties peuvent être tenues de déposer des observations écrites sur toute question discutée pendant la conférence.

Observations écrites

Minutes

(3) Minutes are prepared in respect of the conference and placed on the Agency's record.

(3) Un compte rendu de la conférence est préparé et est versé aux archives de l'Office.

Compte rendu

Agency decision or direction

(4) The Agency may issue a decision or direction on any issue discussed at the conference without further submissions from the parties.

(4) L'Office peut rendre une décision ou donner une directive sur toute question discutée pendant la conférence sans qu'il soit nécessaire de recevoir d'autres observations des parties.

Pouvoir décisionnel de l'Office

Stay of dispute proceeding

41. (1) The Agency may, at the request of a party, stay a dispute proceeding in any of the following circumstances:

(*a*) a decision is pending on a preliminary question in respect of the dispute proceeding;

(*b*) a decision is pending in another proceeding or before any court in respect of an issue that is the same as or substantially similar to one raised in the dispute proceeding;

(*c*) a party to the dispute proceeding has not complied with a requirement of these

41. (1) L'Office peut, sur requête, suspendre une instance de règlement des différends dans les cas suivants :

a) il est en attente d'une décision sur une question préliminaire soulevée à l'égard de règlement des différends;

b) il est en attente d'une décision pendante dans une autre instance ou devant un autre tribunal sur une question identique ou très similaire à une question qui est soulevée à l'égard de l'instance de règlement des différends;

c) une partie à l'instance de règlement des différends ne s'est pas conformée à

Suspension d'une instance de règlement des différents

Rules or with a procedural direction issued by the Agency;

(*d*) the Agency considers it just and reasonable to do so.

une exigence des présentes règles ou à une directive de l'Office sur la procédure à suivre;

d) l'Office l'estime juste et raisonnable.

Stay of decision or order

(2) The Agency may, at the request of a party, stay a decision or order of the Agency in any of the following circumstances:

(*a*) a review or re-hearing is being considered by the Agency under section 32 of the Act;

(*b*) a review is being considered by the Governor in Council under section 40 of the Act;

(*c*) an application for leave to appeal is made to the Federal Court of Appeal under section 41 of the Act;

(*d*) the Agency considers it just and reasonable to do so.

(2) L'Office peut, sur requête, surseoir à l'exécution de sa décision ou de son arrêté dans les cas suivants :

a) l'Office considère la possibilité de mener une révision ou une nouvelle audience en vertu de l'article 32 de la Loi;

b) le gouverneur en conseil considère la possibilité de mener une révision en vertu de l'article 40 de la Loi;

c) une demande d'autorisation d'interjeter appel a été présentée devant la Cour d'appel fédérale en vertu de l'article 41 de la Loi;

d) il l'estime juste et raisonnable.

Sursis à l'exécution d'une décision ou d'un arrêté

Stay — terms and conditions

(3) In staying a dispute proceeding or a decision or order, the Agency may impose any terms and conditions that it considers to be just and reasonable.

(3) L'Office peut, en cas de suspension d'une instance de règlement des différends ou de sursis à l'exécution d'une décision ou d'un arrêté, fixer les conditions qu'il estime justes et raisonnables.

Conditions de suspension ou de sursis

Notice of intention to dismiss application

42. (1) The Agency may, by notice to the applicant and before considering the issues raised in the application, require that the applicant justify why the Agency should not dismiss the application if the Agency is of the preliminary view that

(*a*) the Agency does not have jurisdiction over the subject matter of the application;

(*b*) the dispute proceeding would constitute an abuse of process; or

(*c*) the application contains a fundamental defect.

42. (1) L'Office peut, moyennant un avis au demandeur et avant d'examiner les questions soulevées dans la demande, exiger que le demandeur fournisse les raisons pour lesquelles l'Office ne devrait pas rejeter la demande, s'il lui apparaît à première vue que :

a) il n'a pas compétence sur la matière dont il est saisi;

b) l'instance de règlement des différends constituerait un abus de procédure;

c) la demande comporte un défaut fondamental.

Avis d'intention de rejeter une demande

Response

(2) The applicant must respond to the notice within 10 business days after the

(2) Le demandeur répond à l'avis dans les dix jours ouvrables suivant la date de

Réponse

date of the notice, failing which the application may be dismissed without further notice.

Opportunity to comment

(3) The Agency may provide any other party with an opportunity to comment on whether or not the application should be dismissed.

l'avis, faute de quoi la demande peut être rejetée sans autre préavis.

Commentaires

(3) L'Office peut donner à toute autre partie la possibilité de formuler des commentaires sur la question de savoir si la demande devrait être rejetée.

TRANSITIONAL PROVISION, REPEAL AND COMING INTO FORCE

DISPOSITION TRANSITOIRE, ABROGATION ET ENTRÉE EN VIGUEUR

Transitional Provision

Disposition transitoire

SOR/2005-35

43. The *Canadian Transportation Agency General Rules*, as they read immediately before the coming into force of these Rules, continue to apply to all proceedings before the Agency that were commenced before the coming into force of these Rules except proceedings in respect of which the application filed before that time was not complete.

DORS/2005-35

43. Les *Règles générales de l'Office de transports du Canada*, dans leur version antérieure à l'entrée en vigueur des présentes règles, continuent de s'appliquer à toutes les instances introduites avant l'entrée en vigueur des présentes règles, sauf aux instances dont les demandes déposées avant ce moment étaient incomplètes.

Repeal

Abrogation

44. [Repeal]

44. [Abrogation]

Coming into Force

Entrée en vigueur

June 4, 2014

45. These Rules come into force on June 4, 2014, but if they are published after that day, they come into force on the day on which they are published.

4 juin 2014

45. Les présentes règles entrent en vigueur le 4 juin 2014 ou, si elles sont publiées après cette date, à la date de leur publication.

SCHEDULE 1
(Subsection 13(2))

TRANSLATION — REQUIRED INFORMATION

1. The applicant's name, the respondent's name and the file number assigned by the Agency.

2. The name of the person filing the documents and, if the information has not already been provided to the Agency, the person's complete address, telephone number and, if applicable, email address and facsimile number.

3. A list of the translated documents that indicates, for each document, the language of the original document.

4. An affidavit of the translator that includes

(*a*) the translator's name and the city or town, the province or state and the country in which the document was translated;

(*b*) an attestation that the translator has translated the document in question and that the translation is, to the translator's knowledge, true, accurate and complete;

(*c*) the translator's signature and the date on which and the place at which the affidavit was signed; and

(*d*) the signature and the official seal of the person authorized to take affidavits and the date on which and the place at which the affidavit was made.

5. The name of each party to which a copy of the documents is being sent and the complete address, the email address or the facsimile number to which it is being sent.

ANNEXE 1
(Paragraphe 13(2))

TRADUCTION — RENSEIGNEMENTS REQUIS

1. Les noms du demandeur et du défendeur ainsi que et le numéro de dossier attribué par l'Office.

2. Le nom de la personne qui dépose les documents et, s'ils n'ont pas été déjà fournis, ses adresse complète et numéro de téléphone et, le cas échéant, ses numéro de télécopieur et adresse électronique.

3. La liste des documents traduits, et pour chaque document, l'indication de la langue originale du document.

4. L'affidavit du traducteur, qui comporte notamment:

a) le nom du traducteur ainsi que la ville, la province ou l'État et le pays où le document a été traduit;

b) une déclaration du traducteur portant qu'il a traduit les documents et qu'à sa connaissance, la traduction est véridique, exacte et complète;

c) la signature du traducteur ainsi que les date et lieu où l'affidavit a été signé;

d) la signature et le sceau officiel de la personne qui reçoit l'affidavit ainsi que les date et lieu où l'affidavit a été fait.

5. Le nom de chaque partie à qui une copie est envoyée ainsi que l'adresse complète, l'adresse électronique ou le numéro de télécopieur auquel la copie est envoyée.

SCHEDULE 2
(Subsection 15(2))

VERIFICATION BY AFFIDAVIT

1. The applicant's name, the respondent's name and the file number assigned by the Agency.

2. The name of the person filing the documents and, if the information has not already been provided to the Agency, the person's complete address, telephone number and, if applicable, email address and facsimile number.

3. An affidavit that includes

(*a*) the name of the person making the affidavit and the city or town, the province or state and the country in which it was made;

(*b*) a full description of the information being verified, a list of any supporting documents and a copy of each of those documents marked as appendices;

(*c*) an attestation that the person has personal knowledge of the information and that the information is, to their knowledge, true, accurate and complete or, if the person does not have personal knowledge of the information, a statement indicating the source of the information and an attestation that the information is, to their knowledge, true, accurate and complete;

(*d*) the person's signature and the date of signing; and

(*e*) the signature and the official seal of a person authorized to take affidavits and the date on which and the place at which the affidavit was made.

4. The name of each party to which a copy of the verification is being sent and the complete address, the email address or the facsimile number to which it is being sent.

ANNEXE 2
(Paragraphe 15(2))

ATTESTATION PAR AFFIDAVIT

1. Les noms du demandeur et du défendeur ainsi que le numéro de dossier attribué par l'Office.

2. Le nom de la personne qui dépose le document et, s'ils n'ont pas été déjà fournis, ses adresse complète et numéro de téléphone et, le cas échéant, ses numéro de télécopieur et adresse électronique.

3. Un affidavit, qui comporte notamment :

a) le nom de la personne qui dépose l'affidavit ainsi que la ville, la province ou l'État et le pays où l'affidavit a été fait;

b) un exposé détaillé des renseignements faisant l'objet de l'attestation et la liste des documents à l'appui ainsi qu'une copie de chacun de ces documents en annexe et marquée comme telle;

c) une attestation portant que la personne a une connaissance directe des renseignements ou, si tel n'est pas le cas, la source de ces renseignements et, dans tous les cas, qu'à sa connaissance, les renseignements sont véridiques, exacts et complets;

d) la signature de la personne qui fait l'affidavit et la date de signature;

e) la signature et le sceau officiel de la personne qui reçoit l'affidavit et les date et lieu où l'affidavit a été fait.

4. Le nom de chaque partie à qui une copie de l'attestation est envoyée ainsi que l'adresse complète, l'adresse électronique ou le numéro de télécopieur auquel la copie est envoyée.

SCHEDULE 3
(Subsection 15(2))

VERIFICATION BY WITNESSED STATEMENT

1. The applicant's name, the respondent's name and the file number assigned by the Agency.

2. The name of the person filing the documents and, if the information has not already been provided to the Agency, the person's complete address, telephone number and, if applicable, email address and facsimile number.

3. A statement before a witness that includes

(*a*) the name of the person making the statement and the city or town and the province or state and the country in which it was made;

(*b*) a full description of the information being verified, a list of any supporting documents and a copy of each of those documents marked as appendices;

(*c*) an attestation that the person has personal knowledge of the information and that the information is, to their knowledge, true, accurate and complete or, if the person does not have personal knowledge of the information, a statement indicating the source of the information and an attestation that the information is, to their knowledge, true, accurate and complete;

(*d*) the person's signature and the date of signing; and

(*e*) the name and signature of the person witnessing the statement and the date on which and place at which the statement was signed.

4. The name of each party to which a copy of the verification is being sent and the complete address, the email address or the facsimile number to which it is being sent.

ANNEXE 3
(Paragraphe 15(2))

ATTESTATION PAR DÉCLARATION DEVANT TÉMOIN

1. Les noms du demandeur et du défendeur ainsi que le numéro de dossier attribué par l'Office.

2. Le nom de la personne qui dépose le document et, s'ils n'ont pas été déjà fournis, ses adresse complète et numéro de téléphone et, le cas échéant, ses numéro de télécopieur et adresse électronique.

3. Une déclaration devant témoin qui comporte notamment :

a) le nom de la personne qui fait la déclaration ainsi que la ville, la province ou l'État et le pays où la déclaration a été faite;

b) un exposé détaillé des renseignements faisant l'objet de la déclaration et la liste des documents à l'appui ainsi qu'une copie de chacun de ces documents en annexe et marquée comme telle;

c) une attestation portant que la personne a une connaissance directe des renseignements ou, si tel n'est pas le cas, la source de ces renseignements et, dans tous les cas, qu'à sa connaissance, les renseignements sont véridiques, exacts et complets;

d) la signature de la personne qui fait la déclaration et la date celle-ci;

e) le nom et signature de la personne devant qui la déclaration est faite et les date et lieu où la déclaration a été faite.

4. Le nom de chaque partie à qui une copie de l'attestation est envoyée ainsi que l'adresse complète, l'adresse électronique ou le numéro de télécopieur auquel la copie est envoyée.

SCHEDULE 4
(Section 16)

AUTHORIZATION OF REPRESENTATIVE

1. The applicant's name, the respondent's name and the file number assigned by the Agency.

2. The name of the person giving the authorization and, if the information has not already been provided to the Agency, the person's complete address, telephone number and, if applicable, email address and facsimile number.

3. The name of the person's representative and the representative's complete address, telephone number and, if applicable, email address and facsimile number.

4. A statement, signed and dated by the representative, indicating that the representative has agreed to act on behalf of the person.

5. A statement, signed and dated by the person giving the authorization, indicating that they authorize the representative to act on their behalf for the purposes of the dispute proceeding.

6. The name of each party to which a copy of the authorization is being sent and the complete address, the email address or the facsimile number to which it is being sent.

ANNEXE 4
(Article 16)

AUTORISATION DE REPRÉSENTATION

1. Les noms du demandeur et du défendeur ainsi que le numéro de dossier attribué par l'Office.

2. Le nom de la personne qui donne l'autorisation et, s'ils n'ont pas été déjà fournis, ses adresse complète et numéro de téléphone et, le cas échéant, ses numéro de télécopieur et adresse électronique.

3. Le nom du représentant, ses adresse complète et numéro de téléphone et, le cas échéant, ses numéro de télécopieur et adresse électronique.

4. Une déclaration du représentant, signée et datée, portant qu'il accepte d'agir au nom de la personne en question.

5. Une déclaration de la personne qui donne l'autorisation, signée et datée, portant qu'elle autorise le représentant à agir en son nom dans le cadre de l'instance de règlement des différends.

6. Le nom de chaque partie à qui une copie de l'autorisation est envoyée ainsi que l'adresse complète, l'adresse électronique ou le numéro de télécopieur auquel la copie est envoyée.

SCHEDULE 5
(Subsection 18(1))

APPLICATION

1. The applicant's name, complete address, telephone number and, if applicable, email address and facsimile number.

2. If the applicant is represented by a member of the bar of a province, the representative's name, firm, complete address, telephone number and, if applicable, email address and facsimile number.

3. If the applicant is represented by a person that is not a member of the bar of a province, a statement to that effect.

4. The respondent's name and, if known, their complete address, telephone number and, if applicable, email address and facsimile number.

5. The details of the application that include

(*a*) any legislative provisions that the applicant relies on;

(*b*) a clear statement of the issues;

(*c*) a full description of the facts;

(*d*) the relief claimed; and

(*e*) the arguments in support of the application.

6. A list of any documents submitted in support of the application and a copy of each of those documents.

ANNEXE 5
(Paragraphe 18(1))

DEMANDE

1. Les nom et adresse complète ainsi que le numéro de téléphone et, le cas échéant, le numéro de télécopieur et l'adresse électronique du demandeur.

2. Si le demandeur est représenté par un membre du barreau d'une province, les noms du représentant et de son cabinet, ses adresse complète et numéro de téléphone et, le cas échéant, ses numéro de télécopieur et adresse électronique.

3. Si le représentant n'est membre du barreau d'aucune province, la mention de ce fait.

4. Le nom du défendeur et, s'il sont connus, ses adresse complète et numéro de téléphone et, le cas échéant, ses numéro de télécopieur et adresse électronique.

5. Les détails concernant la demande, notamment :

a) les dispositions législatives sur lesquelles la demande est fondée;

b) un énoncé clair des questions en litige;

c) une description complète des faits;

d) les réparations demandées;

e) les arguments à l'appui de la demande.

6. La liste de tous les documents à l'appui de la demande et une copie de chacun de ceux-ci.

SCHEDULE 6
(Section 19)

ANSWER TO APPLICATION

1. The applicant's name, the respondent's name and the file number assigned by the Agency.

2. The respondent's name, complete address, telephone number and, if applicable, email address and facsimile number.

3. If the respondent is represented by a member of the bar of a province, the representative's name, firm, complete address, telephone number and, if applicable, email address and facsimile number.

4. If the respondent is represented by a person that is not a member of the bar of a province, a statement to that effect.

5. The details of the answer that include

(*a*) a statement that sets out the elements that the respondent agrees with or disagrees with in the application;

(*b*) a full description of the facts; and

(*c*) the arguments in support of the answer.

6. A list of any documents submitted in support of the answer and a copy of each of those documents.

7. The name of each party to which a copy of the answer is being sent and the complete address, the email address or the facsimile number to which it is being sent.

ANNEXE 6
(Article 19)

RÉPONSE À UNE DEMANDE

1. Les noms du demandeur et du défendeur ainsi que le numéro de dossier attribué par l'Office.

2. Le nom du défendeur, ses adresse complète et numéro de téléphone et, le cas échéant, ses numéro de télécopieur et adresse électronique.

3. Si le défendeur est représenté par un membre du barreau d'une province, les noms du représentant et de son cabinet, ses adresse complète et numéro de téléphone et, le cas échéant, ses numéro de télécopieur et adresse électronique.

4. Si le représentant n'est membre du barreau d'aucune province, la mention de ce fait.

5. Les détails concernant la réponse, notamment :

a) les points de la demande sur lesquels le défendeur est d'accord ou en désaccord;

b) une description complète des faits;

c) les arguments à l'appui de la réponse.

6. La liste de tous les documents à l'appui de sa réponse et une copie de chacun de ceux-ci.

7. Le nom de chaque partie à qui une copie de la réponse est envoyée ainsi que l'adresse complète, l'adresse électronique ou le numéro de télécopieur auquel la copie est envoyée.

SCHEDULE 7
(Subsection 20(1))

REPLY TO ANSWER

1. The applicant's name, the respondent's name and the file number assigned by the Agency.

2. The name of the person filing the reply.

3. The details of the reply that include

(*a*) a statement that sets out the elements that the applicant agrees with or disagrees with in the answer; and

(*b*) the arguments in support of the reply.

4. A list of any documents submitted in support of the reply and a copy of each of those documents.

5. The name of each party to which a copy of the reply is being sent and the complete address, the email address or the facsimile number to which it is being sent.

ANNEXE 7
(Paragraphe 20(1))

RÉPLIQUE À LA RÉPONSE

1. Les noms du demandeur et du défendeur ainsi que le numéro de dossier attribué par l'Office.

2. Le nom de la personne qui dépose la réplique.

3. Les détails concernant la réplique, notamment :

a) les points de la réponse sur lesquels le demandeur est d'accord ou en désaccord;

b) les arguments à l'appui de la réplique.

4. La liste de tous les documents à l'appui de la réplique et une copie de chacun de ceux-ci.

5. Le nom de chaque partie à qui une copie de la réplique est envoyée ainsi que l'adresse complète, l'adresse électronique ou le numéro de télécopieur auquel la copie est envoyée.

SCHEDULE 8
(Subsection 21(1))

INTERVENTION

1. The applicant's name, the respondent's name and the file number assigned by the Agency.

2. The intervener's name, complete address, telephone number and, if applicable, email address and facsimile number.

3. If the intervener is represented by a member of the bar of a province, the representative's name, firm, complete address, telephone number and, if applicable, email address and facsimile number.

4. If the intervener is represented by a person that is not a member of the bar of a province, a statement to that effect.

5. The details of the intervention that include

(*a*) a statement that indicates the day on which the intervener became aware of the application;

(*b*) a statement that indicates whether the intervener supports the applicant's position, the respondent's position or neither position; and

(*c*) the information that the intervener would like the Agency to consider.

6. A list of any documents submitted in support of the intervention and a copy of each of those documents.

7. The name of each party to which a copy of the intervention is being sent and the complete address, the email address or the facsimile number to which it is being sent.

ANNEXE 8
(Paragraphe 21(1))

INTERVENTION

1. Les noms du demandeur et du défendeur ainsi que le numéro de dossier attribué par l'Office.

2. Le nom de l'intervenant, ses adresse complète et numéro de téléphone et, le cas échéant, ses numéro de télécopieur et adresse électronique.

3. Si l'intervenant est représenté par un membre du barreau d'une province, les noms du représentant et de son cabinet, ses adresse complète et numéro de téléphone et, le cas échéant, ses numéro de télécopieur et adresse électronique.

4. Si le représentant n'est membre du barreau d'aucune province, la mention de ce fait.

5. Les détails concernant l'intervention, notamment :

a) la date à laquelle l'intervenant a pris connaissance de la demande;

b) une mention indiquant s'il appuie la position du demandeur, celle du défendeur ou s'il n'appuie aucune des deux positions;

c) les éléments dont l'intervenant souhaite que l'Office tienne compte.

6. La liste de tous les documents à l'appui à l'intervention et une copie de chacun de ceux-ci.

7. Le nom de chaque partie à qui une copie de l'intervention est envoyée ainsi que l'adresse complète, l'adresse électronique ou le numéro de télécopieur auquel la copie est envoyée.

SCHEDULE 9
(Section 22)

RESPONSE TO INTERVENTION

1. The applicant's name, the respondent's name and the file number assigned by the Agency.

2. The name of the person filing the response.

3. The details of the response that include

(*a*) a statement that sets out the elements that the person agrees with or disagrees with in the intervention; and

(*b*) the arguments in support of the response.

4. A list of any documents submitted in support of the response and a copy of each of those documents.

5. The name of each party to which a copy of the response is being sent and the complete address, the email address or the facsimile number to which it is being sent.

ANNEXE 9
(Article 22)

RÉPONSE À L'INTERVENTION

1. Les noms du demandeur et du défendeur ainsi que le numéro de dossier attribué par l'Office.

2. Le nom de la personne qui dépose la réponse.

3. Les détails concernant la réponse, notamment :

a) les points de l'intervention sur lesquels la personne est d'accord ou en désaccord;

b) les arguments à l'appui de la réponse.

4. La liste de tous les documents à l'appui de la réponse et une copie de chacun de ceux-ci.

5. Le nom de chaque partie à qui une copie de la réponse est envoyée ainsi que l'adresse complète, l'adresse électronique ou le numéro de télécopieur auquel la copie est envoyée.

SCHEDULE 10
(Subsection 23(1))

POSITION STATEMENT

1. The applicant's name, the respondent's name and the file number assigned by the Agency.

2. The name of the person filing the position statement or, if the person is represented, the name of the person on behalf of which the position statement is being filed, and the person's complete address, telephone number and, if applicable, email address and facsimile number.

3. If the person is represented by a member of the bar of a province, the representative's name, firm, complete address, telephone number and, if applicable, email address and facsimile number.

4. If the person is represented by a person that is not a member of the bar of a province, a statement to that effect.

5. The details of the position statement that include

(*a*) a statement that indicates whether the person supports the applicant's position, the respondent's position or neither position; and

(*b*) the information that the person would like the Agency to consider.

6. A list of any documents submitted in support of the position statement and a copy of each of those documents.

ANNEXE 10
(Paragraphe 23(1))

ÉNONCÉ DE POSITION

1. Les noms du demandeur et du défendeur ainsi que le numéro de dossier attribué par l'Office.

2. Le nom de la personne qui dépose l'énoncé de position ou, si la personne est représentée, le nom de la personne pour le compte de laquelle l'énoncé de position est déposé, ses adresse complète et numéro de téléphone et, le cas échéant, ses numéro de télécopieur et adresse électronique.

3. Si la personne qui dépose l'énoncé est représentée par un membre du barreau d'une province, les noms du représentant et de son cabinet, ses adresse complète et numéro de téléphone et, le cas échéant, ses numéro de télécopieur et adresse électronique.

4. Si le représentant n'est membre du barreau d'aucune province, la mention de ce fait.

5. Les détails concernant l'énoncé de la position, notamment :

a) une mention indiquant si la personne appuie la position du demandeur, celle du défendeur ou si elle n'appuie aucune des deux positions;

b) les points dont la personne souhaite que l'Office tienne compte.

6. La liste de tous les documents à l'appui de l'énoncé de position et une copie de chacun de ceux-ci.

SCHEDULE 11
(Subsection 24(1))

WRITTEN QUESTIONS OR REQUEST FOR DOCUMENTS

1. The applicant's name, the respondent's name and the file number assigned by the Agency.

2. The name of the person filing the written questions or the request for documents and, if the information has not already been provided to the Agency, the person's complete address, telephone number and, if applicable, email address and facsimile number.

3. The name of the party to which the written questions or the request for documents is directed.

4. A list of the written questions or of the documents requested, as the case may be, and an explanation of their relevance to the dispute proceeding.

5. A list of any documents submitted in support of the written questions or the request for documents and a copy of each of those documents.

6. The name of each party to which a copy of the written questions or the request for documents is being sent and the complete address, the email address or the facsimile number to which it is being sent.

ANNEXE 11
(Paragraphe 24(1))

QUESTIONS ÉCRITES OU DEMANDE DE DOCUMENTS

1. Les noms du demandeur et du défendeur ainsi que le numéro de dossier attribué par l'Office.

2. Le nom de la personne qui dépose les questions écrites ou la demande de documents et, s'ils n'ont pas été déjà fournis, ses adresse complète et numéro de téléphone et, le cas échéant, ses numéro de télécopieur et adresse électronique.

3. Le nom de la personne à qui les questions écrites ou la demande de documents sont adressées.

4. La liste des questions écrites ou de documents demandés, selon le cas, et leur pertinence au regard de l'instance de règlement des différends.

5. La liste de tous les documents à l'appui des questions écrites ou de la demande de documents et une copie de chacun de ceux-ci.

6. Le nom de chaque partie à qui une copie des questions écrites ou de la demande de documents est envoyée ainsi que l'adresse complète, l'adresse électronique ou le numéro de télécopieur auquel la copie est envoyée.

SCHEDULE 12
(Subsection 24(2))

RESPONSE TO WRITTEN QUESTIONS OR REQUEST FOR DOCUMENTS

1. The applicant's name, the respondent's name and the file number assigned by the Agency.

2. The name of the person filing the response to the written questions or the request for documents.

3. A list of the documents produced.

4. A list of any documents submitted in support of the response and a copy of each of those documents.

5. The name of each party to which a copy of the response is being sent and the complete address, the email address or the facsimile number to which it is being sent.

ANNEXE 12
(Paragraphe 24(2))

RÉPONSES AUX QUESTIONS ÉCRITES OU À LA DEMANDE DE DOCUMENTS

1. Les noms du demandeur et du défendeur ainsi que le numéro de dossier attribué par l'Office.

2. Le nom de la personne qui dépose la réponse aux questions écrites ou à la demande de documents.

3. La liste des documents produits.

4. La liste de tous les documents à l'appui de la réponse et une copie de chacun de ceux-ci.

5. Le nom de chaque partie à qui une copie la réponse est envoyée ainsi que l'adresse complète, l'adresse électronique ou le numéro de télécopieur auquel la copie est envoyée.

SCHEDULE 13
(Subsections 27(1), 28(1), 30(1), 32(1), 33(1), 34(1), 35(1) and 36(1))

REQUEST

1. The applicant's name, the respondent's name and the file number assigned by the Agency.

2. The name of the person filing the request and, if the information has not already been provided to the Agency, the person's complete address, telephone number and, if applicable, email address and facsimile number.

3. The details of the request that include

(*a*) the relief claimed;

(*b*) a summary of the facts; and

(*c*) the arguments in support of the request.

4. A list of any documents submitted in support of the request and a copy of each of those documents.

5. The name of each party to which a copy of the request is being sent and the complete address, the email address or the facsimile number to which it is being sent.

ANNEXE 13
(Paragraphes 27(1), 28(1), 30(1), 32(1), 33(1), 34(1), 35(1) et 36(1))

REQUÊTE

1. Les noms du demandeur et du défendeur ainsi que le numéro de dossier attribué par l'Office.

2. Le nom de la personne qui dépose la requête et, s'ils n'ont pas été déjà fournis, ses adresse complète et numéro de téléphone et, le cas échéant, ses numéro de télécopieur et adresse électronique.

3. Les détails concernant la requête, notamment :

a) la réparation demandée;

b) le résumé des faits;

c) les arguments à l'appui de la requête.

4. La liste de tous les documents à l'appui de la requête et une copie de chacun de ceux-ci.

5. Le nom de chaque partie à qui une copie de la requête est envoyée ainsi que l'adresse complète, l'adresse électronique ou le numéro de télécopieur auquel la copie est envoyée.

SCHEDULE 14
(Subsections 27(2), 28(4), 30(2) and 31(4) and paragraphs 33(2)(a) and 34(2)(a))

RESPONSE TO REQUEST

1. The applicant's name, the respondent's name and the file number assigned by the Agency.

2. The name of the person filing the response.

3. An identification of the request to which the person is responding, including the name of the person that filed the request.

4. The details of the response that include

(*a*) a statement that sets out the elements that the person agrees with or disagrees with in the request; and

(*b*) the arguments in support of the response.

5. A list of any documents submitted in support of the response and a copy of each of those documents.

6. The name of each party to which a copy of the response is being sent and the complete address, the email address or the facsimile number to which it is being sent.

ANNEXE 14
(Paragraphes 27(2), 28(4), 30(2), 31(4), alinéas 33(2)a) et 34(2)a))

RÉPONSE À UNE REQUÊTE

1. Les noms du demandeur et du défendeur ainsi que le numéro de dossier attribué par l'Office.

2. Le nom de la personne qui dépose la réponse.

3. L'indication de la requête à laquelle la personne répond ainsi que le nom de la personne qui a déposé la requête.

4. Les détails concernant la réponse, notamment:

a) les points de la requête sur lesquels la personne est d'accord ou en désaccord;

b) les arguments à l'appui de la réponse.

5. La liste de tous les documents à l'appui de la réponse et une copie de chacun de ceux-ci.

6. Le nom de chaque partie à qui une copie de la réponse est envoyée ainsi que l'adresse complète, l'adresse électronique ou le numéro de télécopieur auquel la copie est envoyée.

SCHEDULE 15
(Subsections 27(3), 28(5), 30(3), 33(3) and 34(3))

REPLY TO RESPONSE TO REQUEST

1. The applicant's name, the respondent's name and the file number assigned by the Agency.

2. The name of the person filing the reply.

3. An identification of the response to which the person is replying, including the name of the person that filed the response.

4. The details of the reply that include

(*a*) a statement that sets out the elements that the person agrees with or disagrees with in the response; and

(*b*) the arguments in support of the reply.

5. A list of any documents submitted in support of the reply and a copy of each of those documents.

6. The name of each party to which a copy of the reply is being sent and the complete address, the email address or the facsimile number to which it is being sent.

ANNEXE 15
(Paragraphes 27(3), 28(5), 30(3),33(3)et 34(3))

RÉPLIQUE À LA RÉPONSE À UNE REQUÊTE

1. Les noms du demandeur et du défendeur ainsi que le numéro de dossier attribué par l'Office.

2. Le nom de la personne qui dépose la réplique.

3. L'indication de la réponse à laquelle la personne réplique ainsi que le nom de la personne qui a déposé la réponse.

4. Les détails concernant la réplique, notamment :

a) les points de la réponse à la requête sur lesquels la personne est d'accord ou en désaccord;

b) les arguments à l'appui de la réplique.

5. La liste de tous les documents à l'appui de la réplique et une copie de chacun de ceux-ci.

6. Le nom de chaque partie à qui une copie de la réplique est envoyée ainsi que l'adresse complète, l'adresse électronique ou le numéro de télécopieur auquel la copie est envoyée.

SCHEDULE 16
(Subsection 29(1))

REQUEST TO INTERVENE

1. The applicant's name, the respondent's name and the file number assigned by the Agency.

2. The name of the person that wishes to intervene in the dispute proceeding, their complete address, telephone number and, if applicable, email address and facsimile number.

3. If the person is represented by a member of the bar of a province, the representative's name, firm, complete address, telephone number and, if applicable, email address and facsimile number.

4. If the person is represented by a person that is not a member of the bar of a province, a statement to that effect.

5. The details of the request that include

(*a*) a demonstration of the person's substantial and direct interest in the dispute proceeding;

(*b*) a statement specifying the date on which the person became aware of the application;

(*c*) a statement that indicates whether the person supports the applicant's position, the respondent's position or neither position; and

(*d*) a statement of the participation rights that the person wishes to be granted in the dispute proceeding.

6. A list of any documents submitted in support of the request and a copy of each of those documents.

7. The name of each party to which a copy of the request is being sent and the complete address, the email address or the facsimile number to which it is being sent.

ANNEXE 16
(Paragraphe 29(1))

REQUÊTE D'INTERVENTION

1. Les noms du demandeur et du défendeur ainsi que le numéro de dossier attribué par l'Office.

2. Le nom de la personne qui souhaite intervenir dans l'instance de règlement des différends, ses adresse complète et numéro de téléphone et, le cas échéant, ses numéro de télécopieur et adresse électronique.

3. Si la personne est représentée par un membre du barreau d'une province, les noms du représentant et de son cabinet, ses adresse complète et numéro de téléphone et, le cas échéant, ses numéro de télécopieur et adresse électronique.

4. Si le représentant n'est membre du barreau d'aucune province, la mention de ce fait.

5. Les détails concernant la requête, notamment :

a) la démonstration de l'intérêt direct et substantiel de la personne dans l'instance de règlement des différends;

b) la date à laquelle la personne a pris connaissance de la demande;

c) une mention indiquant si la personne appuie la position du demandeur, celle du défendeur ou si elle n'appuie aucune des deux positions;

d) les droits de participation que la personne souhaite avoir dans l'instance de règlement des différends.

6. La liste de tous les documents à l'appui de la requête et une copie de chacun de ceux-ci.

7. Le nom de chaque partie à qui une copie de la requête est envoyée ainsi que l'adresse complète, l'adresse électronique ou le numéro de télécopieur auquel la copie est envoyée.

SCHEDULE 17
(Subsection 31(1))

REQUEST FOR CONFIDENTIALITY

1. The applicant's name, the respondent's name and the file number assigned by the Agency.

2. The name of the person filing the request and, if the information has not already been provided to the Agency, the person's complete address, telephone number and, if applicable, email address and facsimile number.

3. The details of the request that include

(*a*) an identification of the document or the portion of the document that contains confidential information;

(*b*) a list of the parties, if any, with which the person would be willing to share the document; and

(*c*) the arguments in support of the request, including an explanation of the relevance of the document to the dispute proceeding and a description of the specific direct harm that could result from the disclosure of the confidential information.

4. A list of any documents submitted in support of the request and a copy of each of those documents.

5. The name of each party to which a copy of the request is being sent and the complete address, the email address or the facsimile number to which it is being sent.

ANNEXE 17
(Paragraphe 31(1))

REQUÊTE DE CONFIDENTIALITÉ

1. Les noms du demandeur et du défendeur ainsi que le numéro de dossier attribué par l'Office.

2. Le nom de la personne qui dépose la requête et, s'ils n'ont pas été déjà fournis, ses adresse complète et numéro de téléphone et, le cas échéant, ses numéro de télécopieur et adresse électronique.

3. Les détails concernant la requête, notamment :

a) l'indication du document ou de la partie du document contenant des renseignements confidentiels;

b) la liste des parties, le cas échéant, avec qui la personne serait disposée à partager le document;

c) les arguments à l'appui de sa requête, notamment la pertinence du document et la description du préjudice direct précis qui pourrait résulter de la communication des renseignements confidentiels.

4. La liste des documents à l'appui de la requête et une copie de chacun de ceux-ci.

5. Le nom de chaque partie à qui une copie de la requête est envoyée ainsi que l'adresse complète, l'adresse électronique ou le numéro de télécopieur auquel la copie est envoyée.

SCHEDULE 18
(Subsection 31(3))

REQUEST FOR DISCLOSURE

1. The applicant's name, the respondent's name and the file number assigned by the Agency.

2. The name of the person filing the request.

3. The details of the request that include

(*a*) an identification of the documents for which the party is requesting disclosure;

(*b*) a list of the individuals who need access to the documents; and

(*c*) an explanation as to the relevance of the documents for which disclosure is being requested and the public interest in its disclosure.

4. A list of any documents submitted in support of the request and a copy of each of those documents.

5. The name of each party to which a copy of the request is being sent and the complete address, the email address or the facsimile number to which it is being sent.

ANNEXE 18
(Paragraphe 31(3))

REQUÊTE DE COMMUNICATION

1. Les noms du demandeur et du défendeur ainsi que le numéro de dossier attribué par l'Office.

2. Le nom de la personne qui dépose la requête.

3. Les détails concernant la requête, notamment :

a) la liste des documents dont la partie demande la communication;

b) la liste des personnes physiques qui ont besoin d'avoir accès aux documents;

c) la pertinence des documents demandés et l'intérêt public dans leur communication.

4. La liste de tous les documents à l'appui de la requête et une copie de chacun de ces documents.

5. Le nom de chaque partie à qui une copie de la requête est envoyée ainsi que l'adresse complète, l'adresse électronique ou le numéro de télécopieur auquel la copie est envoyée.

Court File No.:A-167-14

FEDERAL COURT OF APPEAL

BETWEEN:

GABOR LUKACS

Applicant

and

CANADIAN TRANSPORTATION AGENCY

Respondent

RESPONDENT'S RECORD
CANADIAN TRANSPORTATION AGENCY
VOLUME 2

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Court File No.: A-167-14

IN THE FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Applicant

- and -

CANADIAN TRANSPORTATION AGENCY

Respondent

RESPONDENT'S RECORD
CANADIAN TRANSPORTATION AGENCY
VOLUME 3 – AUTHORITIES

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Apotex Inc. c. Canada (Procureur général) (C.A.)

Merck & Co., Inc. et Merck Frosst Canada Inc. (appelantes) (intimées)
c.
Apotex Inc. (intimée) (requérante)
et
Procureur général du Canada et Ministre de la Santé nationale et du Bien-être social (intimés) (intimés)

[1994] 1 C.F. 742

[1993] A.C.F. no 1098

No du greffe A-457-93

Cour fédérale du Canada - Cour d'appel

les juges Mahoney, Robertson et McDonald, J.C.A.

Entendu: Ottawa, le 31 août et le 1 septembre 1993.
Rendu: le 22 octobre 1993.

Aliments et drogues -- Appel et appel incident formés contre la décision par laquelle la Section de première instance a accordé un mandamus et a refusé une ordonnance de prohibition relativement à l'avis de conformité (ADC) d'un produit pharmaceutique générique -- En vertu de la Loi sur les aliments et drogues, les "drogues nouvelles" doivent être conformes aux normes de santé et d'innocuité -- Un ADC est délivré si la drogue est jugée efficace et sans danger -- Les normes scientifiques d'innocuité et d'efficacité ont été respectées -- Apotex a un droit acquis à l'ADC même si le ministre n'avait pas pris une décision avant l'adoption de la Loi de 1992 modifiant la Loi sur les brevets (projet de loi C-91) -- Le pouvoir discrétionnaire du ministre a une portée limitée -- Les mesures législatives sur le point d'être mises en vigueur ne sont pas une considération pertinente.

Brevets -- Le projet de loi C-91 avait pour but de protéger les droits des sociétés pharmaceutiques innovatrices de distribuer et de vendre des médicaments brevetés -- Le Règlement sur les médicaments brevetés interdit la délivrance d'un ADC pour les drogues liées à des brevets -- Les ADC, liés à des droits découlant d'un brevet, ne dépendent pas mutuellement les uns des autres -- Le mandamus n'est pas destiné à faciliter la contrefaçon de brevets -- Le Règlement ne touche pas en soi la procédure -- Le projet de loi C-91 et les art. 5(1) et (2) du Règlement ne dépouillent pas les fabricants de produits génériques de leur droit acquis à un ADC.

Contrôle judiciaire -- Brefs de prérogative -- Mandamus -- Un fabricant de produits

pharmaceutiques génériques sollicite un mandamus enjoignant au ministre de lui délivrer un avis de conformité -- Jurisprudence portant sur les conditions de délivrance des mandamus -- Il y a lieu à mandamus lorsque l'obligation d'agir n'existe pas au moment où la demande est présentée -- Le délai requis pour obtenir des avis juridiques ne constitue pas une fin de non-recevoir à une demande de mandamus -- La Cour a le pouvoir discrétionnaire d'invoquer le critère de la balance des inconvénients pour refuser un mandamus -- Critères de l'exercice du pouvoir discrétionnaire -- Juridiquement parlant, il n'y a pas lieu en l'espèce de refuser un mandamus en raison de la balance des inconvénients.

Compétence de la Cour fédérale -- Section d'appel -- La disposition attributive de prépondérance figurant dans le projet de loi C-91 (Loi de 1992 modifiant la Loi sur les brevets) ne supprime pas la compétence conférée par l'art. 18 de la Loi sur la Cour fédérale -- L'art. 55.2(5) de la Loi sur les brevets n'est pas une clause privative protégeant le ministre et les dispositions législatives contre un contrôle judiciaire.

Il s'agit d'un appel et d'un appel incident formés contre la décision par laquelle le juge Dubé a accueilli une demande de mandamus sollicitant la délivrance d'un avis de conformité (ADC) à Apotex relativement à son produit générique énalapril, et a rejeté la demande d'ordonnance de prohibition présentée par les appelantes. La Loi de 1992 modifiant la Loi sur les brevets (projet de loi C-91), qui a reçu la sanction royale le 4 février 1993, avait pour objet de protéger les droits des sociétés pharmaceutiques innovatrices de distribuer et de vendre des médicaments brevetés. Le projet de loi C-91 est entré en vigueur le 15 février 1993, à l'exception du nouvel article 55.2 de la Loi sur les brevets qui n'est entré en vigueur que le 12 mars 1993 en même temps que le Règlement sur les médicaments brevetés. En vertu de la Loi sur les aliments et drogues (LAD), le ministre de la Santé nationale et du Bien-être social doit s'assurer que les drogues nouvelles sont conformes aux normes de santé et d'innocuité. Le fabricant d'une drogue nouvelle doit déposer une présentation de drogue nouvelle (PDN) indiquant les propriétés curatives et les ingrédients de la drogue ainsi que les méthodes de fabrication et de purification. Après avoir déposé une PDN relativement à son produit générique Apo-Enalapril, l'intimée Apotex a sollicité une ordonnance de mandamus afin d'obliger le ministre à lui délivrer un avis de conformité pour ce produit. Sa PDN était incomplète lorsqu'Apotex a déposé sa demande de mandamus; néanmoins, le 3 février 1993, la drogue nouvelle répondait à toutes les normes scientifiques d'innocuité et d'efficacité requises pour qu'un ADC soit délivré. Même si la PDN avait passé le processus d'examen scientifique et réglementaire, le SMA et le SM du Ministère ont décidé de demander des avis juridiques au sujet du pouvoir du ministre ou de son sous-ministre de délivrer l'ADC en raison de l'adoption imminente du projet de loi C-91. L'appelante Merck a également fait parvenir au ministre divers avis juridiques et elle a ensuite demandé une ordonnance de prohibition afin d'empêcher le ministre de délivrer l'avis de conformité. Le juge de première instance a statué que le ministre ne possédait pas le large pouvoir discrétionnaire qui aurait justifié son refus de délivrer l'ADC et que le retard à le faire n'était pas justifié. Il a également rejeté l'argument suivant lequel l'octroi d'un mandamus lorsqu'un nouveau régime réglementaire est sur le point d'être institué irait "à l'encontre de la volonté du Parlement". Le présent appel a soulevé diverses questions: 1) les principes applicables au mandamus et le caractère prématuré d'une demande; 2) Apotex avait-elle un droit acquis à l'ADC le 12 mars 1993; 3) la balance des inconvénients; 4) Apotex a-t-elle été dépouillée de son droit acquis à l'ADC par le projet de loi C-91 et par le Règlement sur les médicaments brevetés et 5) la compétence de la Cour. En appel incident, le ministre a allégué que le juge de première instance avait commis une erreur en concluant que le retard à délivrer l'ADC n'était pas justifié.

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Arrêt: l'appel et l'appel incident doivent être rejetés.

1) Plusieurs conditions fondamentales doivent être respectées avant qu'un mandamus ne puisse être accordé. Premièrement, il doit exister une obligation légale d'agir à caractère public envers le requérant. Habituellement, un mandamus ne peut être accordé relativement à une obligation envers la Couronne. Le ministre avait une obligation d'agir envers Apotex. Merck avait partiellement raison lorsqu'elle a prétendu que le ministre n'avait aucune obligation envers Apotex au moment où celle-ci a présenté sa demande de contrôle judiciaire le 22 décembre 1992 ou à la date de l'audience. Il n'y a pas lieu à une ordonnance de mandamus pour forcer un fonctionnaire à agir d'une manière donnée si ce dernier n'est pas tenu d'agir à la date de l'audience, mais cette règle n'était pas valide lorsqu'on l'appliquait à la date à laquelle la demande de mandamus a été présentée. Bien qu'une personne intimée puisse chercher à obtenir le rejet d'une demande lorsque l'obligation d'agir n'est pas encore née, en l'absence de raisons sérieuses, le fait qu'une demande de mandamus ait été présentée trop tôt ne devrait pas la faire échouer. La demande devrait être appréciée quant au fond pourvu que les conditions préalables à l'exercice de l'obligation aient été satisfaites au moment de l'audience.

2) Si un décideur possède un pouvoir discrétionnaire absolu qu'il n'a pas exercé à la date à laquelle une nouvelle loi entre en vigueur, le requérant ne peut alors revendiquer avec succès un droit acquis ni même le droit à une décision. Il faut faire une distinction entre un "droit acquis" et un "simple espoir" ou une "simple attente". La portée du pouvoir discrétionnaire d'un décideur varie selon que l'on qualifie diverses considérations de "pertinentes" ou de "non pertinentes" à son exercice. Le Règlement sur les aliments et drogues limite les facteurs que le ministre doit examiner dans l'exercice de son pouvoir discrétionnaire à ceux qui concernent l'innocuité et l'efficacité d'une drogue. Il ne vise pas à accorder expressément ou implicitement au ministre un pouvoir discrétionnaire aussi large que Merck le soutient. On ne peut affirmer que le temps nécessaire pour qu'un décideur puisse solliciter et obtenir des avis juridiques dans le cadre d'un processus décisionnel est en soi un motif de refuser un mandamus. Cette obligation volontaire ne peut en soi priver Apotex de son droit à un mandamus. Si aucune nouvelle disposition législative n'avait été adoptée, la question des "avis juridiques" ne se serait pas posée. L'avis juridique demandé en l'espèce n'avait aucune incidence sur l'exercice du pouvoir étroitement défini du ministre. De plus, refuser un mandamus en raison de considérations juridiques créées par une partie ayant des intérêts opposés (Merck) équivaudrait à fermer les yeux sur ce qui pourrait être considéré comme une tactique destinée à embrouiller et à retarder le processus décisionnel. Les mesures législatives sur le point d'être mises en vigueur n'étaient pas une considération pertinente quant à l'exercice du pouvoir discrétionnaire du ministre. On ne pouvait pas affirmer que, en exerçant le pouvoir que lui confère le Règlement sur les aliments et drogues, le ministre avait le droit de tenir compte des dispositions du projet de loi C-91 après leur adoption mais avant qu'elles n'aient été proclamées en vigueur. Apotex avait un droit acquis à l'ADC même si le ministre n'avait pas pris une décision le 12 mars 1993.

3) La jurisprudence portant sur les mandamus indique diverses techniques grâce auxquelles les tribunaux pondèrent des intérêts opposés. Toute tentative de s'engager dans la pondération des intérêts doit s'effectuer dans un respect rigoureux des règles de droit. Compte tenu de la jurisprudence pertinente, il fallait conclure que la Cour a le pouvoir discrétionnaire de refuser un mandamus en se fondant sur la balance des inconvénients. La jurisprudence indique trois catégories de cas où le critère de la balance des inconvénients a été implicitement reconnu. Il s'agit tout d'abord des cas où le chaos ou les coûts administratifs qui résulteraient de l'octroi d'une telle ordonnance sont évidents et inacceptables. Le deuxième motif de refuser un mandamus semble exister dans les cas où l'on considère que les risques possibles pour la santé et la sécurité publiques sont plus importants que le droit d'un individu de poursuivre ses intérêts personnels ou économiques. En l'espèce, il n'était

nullement question de chaos administratif ou de la sécurité et de la santé publiques. La troisième tendance jurisprudentielle tente simplement d'établir un principe permettant de déterminer si un propriétaire foncier a acquis un droit à un permis de construire en attendant l'approbation d'un règlement modificateur. Ce principe n'est pas pertinent pour l'espèce ni pour la question du pouvoir discrétionnaire de la Cour de refuser un mandamus en se fondant sur la balance des inconvénients. Il n'y avait juridiquement parlant aucune raison d'appliquer le critère de la "balance des inconvénients" pour refuser à Apotex l'ordonnance qu'elle sollicitait.

4) Le Règlement sur les médicaments brevetés interdit la délivrance d'un ADC pour les drogues "liées à des brevets". Ses paragraphes 5(1) et (2) concernent les PDN déposées avant le 12 mars 1993. Bien que les ADC et les droits découlant d'un brevet soient liés, ils n'ont jamais dépendu mutuellement les uns des autres. En fait, Merck tente d'obtenir une injonction interlocutoire contre Apotex relativement à la contrefaçon possible d'un brevet sans avoir à remplir les conditions légales préalables pour l'octroi d'une telle réparation. On ne peut pas considérer qu'une ordonnance de mandamus est un moyen qui "facilite" la contrefaçon du brevet. Le Règlement sur les médicaments brevetés ne touche pas en soi la procédure. La fixation d'un critère voulant qu'un ADC ne puisse être délivré relativement à une PDN liée à un brevet constitue manifestement un changement de fond dans la loi et elle est donc assujettie aux règles d'interprétation législative applicables aux lois visant à modifier des droits acquis. Les paragraphes 5(1) et (2) n'ont manifestement pas pour objet de dépouiller des personnes de leurs droits acquis; ils sont au mieux ambigus. Même si le Parlement a le pouvoir d'adopter une loi rétroactive, dépouillant ainsi des personnes d'un droit acquis, le Règlement sur les médicaments brevetés ne pouvait retirer des droits acquis à moins que les dispositions législatives habilitantes, c'est-à-dire la Loi sur les brevets ou le projet de loi C-91, n'autorisent implicitement ou explicitement de tels empiétements. Le projet de loi C-91 ne renferme aucune disposition permettant expressément que des règlements portent atteinte à des droits acquis ou existants, sauf en ce qui concerne les licences obligatoires accordées après le 20 décembre 1991.

5) La disposition attributive de prépondérance figurant dans le projet de loi C-91 n'a pas supprimé la compétence de la Cour. On ne pouvait pas affirmer que le paragraphe 55.2(5) de la Loi sur les brevets prévalait sur l'article 18 de la Loi sur la Cour fédérale, et ce paragraphe ne pouvait pas être interprété comme une clause privative protégeant le ministre et les dispositions législatives pertinentes contre un contrôle judiciaire.

Lois et règlements

Clean Water Act, R.S.A. 1980, ch. C-13, art. 3.
Code criminel, S.R.C. 1970, ch. C-34.
Loi de 1977 modifiant le droit pénal, S.C. 1976-77, ch. 53.
Loi de 1992 modifiant la Loi sur les brevets, L.C. 1993, ch. 2, art. 3, 4, 12(1).
Loi des brevets, S.C. 1923, ch. 23, art. 17.
Loi des mesures de guerre, 1914, S.C. 1914 (2e sess.), ch. 2.
Loi d'interprétation, S.R.C. 1952, ch. 158.
Loi d'interprétation, S.C. 1967-68, ch. 7, art. 36c), 37c).
Loi d'interprétation, L.R.C. (1985), ch. I-21, art. 44c).
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Loi sur les aliments et drogues, L.R.C. (1985), ch. F-27.
Loi sur les brevets, S.R.C. 1952, ch. 203, art. 41(3) (mod. par S.C. 1968-69, ch. 49, art. 1).
Loi sur les brevets, L.R.C. (1985), ch. P-4, art. 39(4),(14), 55.2 (édicté par L.C. 1993, ch. 2, art. 4).
Ordonnances et règlements concernant les brevets d'invention faits en vertu de la Loi sur les mesures

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de guerre, 1914, (1914), 48 La Gazette du Canada 1156.
Règlement sur les aliments et drogues, C.R.C., ch. 870, art. C.08.002 (mod. par DORS/85-143, art. 1), C.08.004 (mod. idem, art. 3, DORS/88-257, art. 1).
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Director of Public Works v. Ho Po Sang, [1961] A.C. 901 (C.P.);
P.G. de la Colombie-Britannique et autre c. Parklane Private Hospital Ltd., [1975] 2 R.C.S. 47; (1974), 47 D.L.R. (3d) 57; [1974] 6 W.W.R. 72; 2 N.R. 305.

Distinction faite avec:

Ottawa, City of v. Boyd Builders Ltd., [1965] R.C.S. 408; (1965), 50 D.L.R. (2d) 704;
Engineers' and Managers' Association v. Advisory, Conciliation and Arbitration Service, [1980] 1 W.L.R. 302 (H.L.);
Wimpey Western Ltd. and W-W-W Developments Ltd. v. Director of Standards and Approvals of the Department of the Environment, Minister of the Environment and Province of Alberta (1983), 49 A.R. 360; 3 Admin. L.R. 247; 23 Alta. L.R. (2d) 193 (C.A.).

Décisions examinées:

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O'Grady c. Whyte, [1983] 1 C.F. 719; (1982), 138 D.L.R. (3d) 167; 42 N.R. 608 (C.A.);
Karavos v. Toronto & Gillies, [1948] 3 D.L.R. 294; [1948] O.W.N. 17 (C.A. Ont.);
Distribution Canada Inc. c. M.R.N., [1991] 1 C.F. 716; (1990), 46 Admin. L.R. 34; 39 F.T.R. 127 (1re inst.); confirmée par [1993] 2 C.F. 26 (C.A.);
Reg. v. Anderson; Ex parte Ipec-Air Pty. Ltd. (1965), 113 C.L.R. 177 (H.C. Aust.);
Martinoff c. Gossen, [1979] 1 C.F. 327 (1re inst.);
Lemyre c. Trudel, [1978] 2 C.F. 453; (1978), 41 C.C.C. (2d) 373 (1re inst.); confirmée par [1979] 2 C.F. 362; (1979), 49 C.C.C. (2d) 188 (C.A.);
Abell v. Commissioner of Royal Canadian Mounted Police (1979), 49 C.C.C. (2d) 193; 3 Sask. R. 181 (C.A.);
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Apotex Inc. c. Canada (Procureur général) et autre (1993), 59 F.T.R. 85 (C.F. 1re inst.);
C.E. Jamieson & Co. (Dominion) c. Canada (Procureur général), [1988] 1 C.F. 590; (1987), 46 D.L.R. (4th) 582; 37 C.C.C. (3d) 193; 12 F.T.R. 167 (1re inst.);
Mensinger c. Canada (Ministre de l'Emploi et de l'Immigration), [1987] 1 C.F. 59; (1986), 24 C.R.R. 260; 5 F.T.R. 64 (1re inst.);
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La compagnie Rothmans de Pall Mall Canada Limitée c. Le ministre du Revenu national (No 1), [1976] 2 C.F. 500; (1976), 67 D.L.R. (3d) 505; [1976] C.T.C. 339; 10 N.R. 153 (C.A.);
Secunda Marine Services Ltd. c. Canada (Ministre des Approvisionnements et Services) (1989), 38 Admin. L.R. 287; 27 F.T.R. 161 (C.F. 1re inst.);
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APPEL et APPEL INCIDENT formés contre une décision de la Section de première instance ((1993), 49 C.P.R. (3d) 161; 66 F.T.R. 36 (C.F. 1re inst.)) qui a accueilli la demande de mandamus visant à obliger le ministre de la Santé nationale et du Bien-être social à délivrer un avis de conformité relativement à une drogue générique, et qui a rejeté la demande de prohibition présentée par les appelantes. Appel et appel incident du ministre rejetés.

Avocats:

W. Ian C. Binnie, c.r., et William H. Richardson pour les appelantes (intimées).
Harry B. Radomski et Richard Naiberg pour l'intimée (requérante) Apotex Inc.
H. Lorne Murphy, c.r., et Steve J. Tenai pour les intimés (intimés) le procureur général du Canada et le ministre de la Santé nationale et du Bien-être social.

Procureurs:

McCarthy Tétrault, Toronto, pour les appelantes (intimées).
Goodman & Goodman, Toronto, pour l'intimée (requérante) Apotex Inc.
Le sous-procureur général du Canada pour les intimés (intimés) le procureur général du Canada et le ministre de la Santé nationale et du Bien-être social.

Ce qui suit est la version française des motifs du jugement rendus par

1 LE JUGE ROBERTSON, J.C.A.:-- L'intimée, Apotex Inc. ("Apotex"), fabrique et distribue des drogues "génériques". Cela signifie qu'elle fabrique et distribue des drogues qui ont été conçues, élaborées et lancées sur le marché par des sociétés "innovatrices". Apotex a demandé une ordonnance de mandamus enjoignant au ministre de la Santé nationale et du Bien-être social ("le ministre") de lui délivrer un avis de conformité ("ADC") pour l'Apo-Enalapril, son produit générique de l'énalapril. Munie d'un ADC, Apotex aurait pu commercialiser l'Apo-Enalapril pour concurrencer directement le produit "VASOTEC", marque de commerce sous laquelle les appelantes, Merck & Co., Inc. et Merck Frosst Canada Inc. ("Merck"), fabriquent et vendent l'énalapril.

2 Merck, société pharmaceutique "innovatrice", est la principale compagnie pharmaceutique au Canada en terme de chiffre d'affaires. Sa drogue, VASOTEC , est utilisée pour le traitement de l'insuffisance cardiaque globale ainsi que de l'hypertension; elle est le produit pharmaceutique le plus vendu au Canada; en effet, ses ventes représentent environ 140 millions sur les 400 millions de revenus annuels de Merck. Il n'est donc pas étonnant que Merck ait sollicité une ordonnance interdisant au ministre de délivrer un ADC à Apotex. Les demandes de mandamus et d'ordonnance de prohibition ont été regroupées par suite d'une ordonnance de la Cour et entendues en même temps. Apotex a obtenu gain de cause et c'est pourquoi l'affaire nous a été soumise pour examen.

3 Ce n'est pas la première fois que les intérêts économiques opposés de sociétés pharmaceutiques canadiennes de produits génériques et innovateurs se heurtent: voir, par exemple, Pfizer Canada Inc. c. Ministre de la Santé nationale et du Bien-être social et autre (1986), 12 C.P.R. (3d) 438 (C.A.F.); autorisation de pourvoi devant la Cour suprême refusée (1987), 14 C.P.R. (3d) 447; Glaxo Canada Inc. c. Canada (Ministre de la Santé nationale et du Bien-être social), [1988] 1 C.F. 422 (1re inst.); motifs supplémentaires à (1988), 19 C.I.P.R. (120 (C.F. 1re inst.); décision confirmée par (1990), 68 D.L.R. (4th) 761 (C.A.F.); et Apotex Inc. c. Procureur général du Canada et autre (1986), 11 C.P.R. (3d) 43 (C.F. 1re inst.); demande de réexamen rejetée (1986), 11 C.P.R. (3d) 62; confirmée par (1986), 12 C.P.R. (3d) 95 (C.A.F.); autorisation de pourvoi devant la Cour suprême du Canada refusée (1987), 14 C.P.R. (3d) 447.

4 Cependant, le présent appel est davantage qu'un simple affrontement en matière de droit privé au sujet des intérêts économiques et médicaux des Canadiens. Le Parlement semblait avoir réglé au moins l'un des éléments de cette question lorsqu'il a adopté la Loi de 1992 modifiant la Loi sur les brevets, L.C. 1993, ch. 2, modifiant la [Loi sur les brevets] L.R.C. (1985), ch. P-4 ("projet de loi C-91"), afin d'empêcher les sociétés pharmaceutiques de produits génériques, comme Apotex, de s'approprier les résultats de la recherche et des découvertes de sociétés innovatrices, comme Merck. La principale question que nous devons examiner en l'espèce est l'effet du projet de loi C-91 sur ce qui est, selon Apotex, un droit acquis à l'ADC. L'adoption du projet de loi C-91 entre la date du dépôt par Apotex de sa demande de mandamus et celle à laquelle elle a été entendue ainsi que l'omission du ministre de délivrer un ADC pour l'Apo-Enalapril ont constitué les catalyseurs d'ordre juridique qui ont amené Apotex et Merck à s'affronter dans les salles d'audiences des sections de première instance et d'appel de la Cour.

5 En plus d'examiner les conditions habituelles de délivrance d'un mandamus, la Cour doit déterminer si le ministre pouvait refuser l'ADC en se fondant sur les dispositions du projet de loi C-91 qui n'avaient pas encore fait l'objet d'une proclamation. Subsidiairement, il lui faut déterminer si le retard occasionné par la nécessité d'obtenir un avis juridique sur la légalité de délivrer l'ADC a empêché Apotex d'acquérir un droit à l'ADC. Maintenant que le projet de loi C-91 est devenu loi, Merck soutient qu'Apotex doit respecter ses dispositions qui, si elles sont applicables, lui refusent clairement ce qu'elle demande. Merck soutient en outre que la Cour a le pouvoir discrétionnaire de refuser un mandamus lorsque celui-ci aurait pour effet d'aller "à l'encontre de la volonté du Parlement". Par cet argument, elle invite la Cour à tenir compte de ce qu'on a appelé le critère de la "balance des inconvénients" pour apprécier la demande de mandamus présentée par Apotex. Ces questions, parmi les autres qui ont été soulevées, ne peuvent être examinées qu'en fonction du cadre législatif existant à l'époque où Apotex a présenté sa demande d'ADC et en fonction du cadre législatif actuel.

LE CADRE LÉGISLATIF

6 Le présent appel repose en partie sur la portée du pouvoir discrétionnaire conféré au ministre par la Loi sur les aliments et drogues, L.R.C. (1985) ch. F-27 (la "LAD"), et les règlements pris conformément à cette Loi (le Règlement sur les aliments et drogues [C.R.C., ch. 870] ou "RAD"). C'est la Direction générale de la protection de la santé du Ministère de la Santé nationale et du Bien-être social (la "DGPS") qui est principalement chargée de l'application de la LAD.

7 Suivant la LAD, le ministre doit s'assurer que les "drogues nouvelles" sont conformes aux normes de santé et d'innocuité. L'article C.08.001 du RAD porte qu'une "drogue nouvelle" est une drogue qui renferme une substance qui n'a pas été vendue au Canada pendant assez longtemps et en quantité suffisante pour établir son innocuité et son efficacité.

8 Une "drogue nouvelle" doit subir des épreuves rigoureuses avant de pouvoir être vendue. Le fabricant de la drogue doit remettre à la DGPS une présentation de drogue nouvelle ("PDN") indiquant notamment les propriétés curatives et les ingrédients de la drogue ainsi que les méthodes de fabrication et de purification. La PDN contient également les résultats des épreuves cliniques qui ont été effectuées par le fabricant et qui confirment l'innocuité et l'efficacité de la drogue. Des équipes multidisciplinaires de la Direction des médicaments de la DGPS examinent tous les éléments de la PDN. Un ADC ne sera délivré que si la drogue est jugée à la fois efficace et sans danger pour les humains. Les dispositions pertinentes [C.08.002 (mod. par DORS/85-143, art. 1), C.08.004 (mod., idem, art. 3, DORS/88-257, art. 1)] du RAD portent:

> C.08.002. (1) Est interdite la vente et l'annonce pour la vente d'une drogue nouvelle, à moins que
>
> a) le fabricant n'ait, relativement à cette drogue nouvelle, déposé en double auprès du Ministre une présentation de drogue nouvelle dont le contenu satisfait le Ministre;
> b) le Ministre n'ait délivré, à ce fabricant de la drogue nouvelle un avis de conformité relativement à la drogue nouvelle qui fait l'objet de la présentation de drogue nouvelle, par application de l'article C.08.004;
> c) l'avis de conformité ne soit pas suspendu par application de l'article C.08.006 . . .
>
> . . .
>
> C.08.004. (1) Après avoir terminé l'examen d'une présentation de drogue nouvelle ou d'un supplément à une telle présentation, le Ministre doit
>
> a) si la présentation ou le supplément est conforme aux dispositions des articles C.08.002 ou C.08.003, suivant le cas, ou à celles de l'article C.08.005.1, délivrer un avis de conformité . . . [Non souligné dans le texte original.]

9 Avant la proclamation du projet de loi C-91, une société pharmaceutique de produits génériques pouvait obtenir du commissaire aux brevets une licence obligatoire l'autorisant à annoncer, à fabriquer et à vendre toute drogue pour laquelle un ADC avait été délivré. Même si la société était tenue de verser des redevances à la société ayant créé la drogue, elle pouvait vendre celle-ci malgré les droits de brevet conférés à la société qui l'avait élaborée. C'est le paragraphe 39(4) de la Loi sur les brevets, L.R.C. (1985), ch. P-4 (la "Loi sur les brevets") qui s'appliquait dans ce cas:

> 39. . . .
>
> (4) Si, dans le cas d'un brevet portant sur une invention destinée à des médicaments ou à la préparation ou à la production de médicaments, ou susceptible d'être utilisée à de telles fins, une personne présente une demande pour obtenir une licence en vue de faire l'une ou plusieurs des choses suivantes comme le spécifie la demande:
>
> a) lorsque l'invention consiste en un procédé, utiliser l'invention pour la préparation ou la production de médicaments, importer tout

médicament dans la préparation ou la production duquel l'invention a été utilisée ou vendre tout médicament dans la préparation ou la production duquel l'invention a été utilisée;

b) lorsque l'invention consiste en autre chose qu'un procédé, importer, fabriquer, utiliser ou vendre l'invention pour des médicaments ou pour la préparation ou la production de médicaments,

le commissaire accorde au demandeur une licence pour faire les choses spécifiées dans la demande à l'exception de celles pour lesquelles il a, le cas échéant, de bonnes raisons de ne pas accorder une telle licence.

10 Le paragraphe 39(14) de la Loi sur les brevets exigeait que le commissaire aux brevets informe le Ministère de la Santé nationale et du Bien-être social de toutes les demandes de licences obligatoires. Il y avait donc un "lien" entre les ADC et les droits de brevet.

11 Le projet de loi C-91 avait pour objet de protéger les droits des sociétés pharmaceutiques innovatrices de distribuer et de vendre des médicaments brevetés, et il constitue un changement radical de la politique gouvernementale adoptée par le Parlement en 1923: voir la Loi des brevets, S.C. 1923, ch. 23, art. 17, mais comparer avec l'arrêté en conseil relatif aux brevets d'invention détenus par des citoyens de pays ennemis [Ordonnanes et règlements concernant les brevets d'invention faits en vertu de la Loi des mesures de guerre 1914], C.P. 1914-2436, La Gazette du Canada, 10 octobre 1914, pris conformément à la Loi des mesures de guerre, 1914, S.C. 1914 (2e sess.), ch. 2. Le projet de loi C-91 a été présenté devant la Chambre des communes le 23 juin 1992 et il est passé en troisième lecture le 10 décembre 1992. Il a reçu la sanction royale le 4 février 1993[1].

12 Les effets immédiats du projet de loi C-91 sont bien connus. L'article 3 a abrogé les dispositions de la Loi sur les brevets relatives à l'octroi de licences obligatoires tandis que le paragraphe 12(1) a annulé toutes les licences obligatoires accordées depuis le 20 décembre 1991:

12. (1) Toute licence accordée au titre de l'article 39 de la loi antérieure le 20 décembre 1991 ou après cesse d'être valide à l'expiration du jour précédant la date d'entrée en vigueur et les droits et privilèges acquis au titre de cette licence ou de la loi antérieure relativement à cette licence s'éteignent.

13 L'article 4 du projet de loi ajoute l'article 55.2 à la Loi sur les brevets. Le paragraphe 55.2(4) autorise le gouverneur en conseil à prendre des règlements concernant, notamment, la délivrance des ADC:

55.2 . . .

(4) Afin d'empêcher la contrefaçon de brevet d'invention par l'utilisateur, le fabricant, le constructeur ou le vendeur d'une invention brevetée au sens des paragraphes (1) ou (2), le gouverneur en conseil peut prendre des règlements, notamment:

a) fixant des conditions complémentaires nécessaires à la délivrance, en vertu de lois fédérales régissant l'exploitation, la fabrication, la

construction ou la vente de produits sur lesquels porte un brevet, d'avis, de certificats, de permis ou de tout autre titre à quiconque n'est pas le breveté;

b) concernant la première date, et la manière de la fixer, à laquelle un titre visé à l'alinéa a) peut être délivré à quelqu'un qui n'est pas le breveté et à laquelle elle peut prendre effet;

c) concernant le règlement des litiges entre le breveté, ou l'ancien titulaire du brevet, et le demandeur d'un titre visé à l'alinéa a), quant à la date à laquelle le titre en question peut être délivré ou prendre effet;

d) conférant des droits d'action devant tout tribunal compétent concernant les litiges visés à l'alinéa c), les conclusions qui peuvent être recherchées, la procédure devant ce tribunal et les décisions qui peuvent être rendues;

e) sur toute autre mesure concernant la délivrance d'un titre visé à l'alinéa a) lorsque celle-ci peut avoir pour effet la contrefaçon de brevet.

14 Le 12 février 1993, le gouverneur en conseil a décidé que le projet de loi C-91, à l'exception de l'article 55.2, entrerait en vigueur le 15 février. Le 12 mars 1993, cet article ainsi que le Règlement sur les médicaments brevetés (avis de conformité), DORS/93-133 (le "Règlement sur les médicaments brevetés"), sont entrés en vigueur.

15 Le Règlement sur les médicaments brevetés interdit la délivrance d'un ADC pour les drogues "liées à des brevets". Une drogue "liée à un brevet" est une drogue pour laquelle un ADC ainsi qu'un brevet non expiré ont été délivrés. Le brevet peut viser soit la drogue elle-même soit la façon d'utiliser la drogue pour traiter une maladie.

16 Les paragraphes 5(1) et (2) du Règlement sur les médicaments brevetés concernent les PDN déposées avant le 12 mars 1993 (c'est-à-dire la date à laquelle le Règlement est entré en vigueur) et ils portent ce qui suit:

> 5. (1) Lorsqu'une personne dépose ou, avant la date d'entrée en vigueur du présent règlement, a déposé une demande d'avis de conformité à l'égard d'une drogue et souhaite comparer cette drogue à une drogue qui a été commercialisée au Canada aux termes d'un avis de conformité délivré à la première personne et à l'égard duquel une liste de brevets a été soumise ou qu'elle souhaite faire un renvoi à la drogue citée en second lieu, elle doit indiquer sur sa demande, à l'égard de chaque brevet énuméré dans la liste:
>
> a) soit une déclaration portant qu'elle accepte que l'avis de conformité ne sera pas délivré avant l'expiration du brevet;
>
> b) soit une allégation portant que, selon le cas:
>
> (i) la déclaration faite par la première personne aux termes de l'alinéa 4(2)b) est fausse,
>
> (ii) le brevet est expiré,
>
> (iii) le brevet n'est pas valide,
>
> (iv) aucune revendication pour le médicament en soi ni aucune revendication pour l'utilisation du médicament ne seraient contrefaites advenant l'utilisation, la fabrication, la construction

ou la vente par elle de la drogue faisant l'objet de la demande d'avis de conformité.

(2) Lorsque, après le dépôt par la seconde personne d'une demande d'avis de conformité mais avant la délivrance de cet avis, une liste de brevets est soumise ou modifiée aux termes du paragraphe 4(5) à l'égard d'un brevet, la seconde personne doit modifier la demande pour y inclure, à l'égard de ce brevet, la déclaration ou l'allégation exigée par le paragraphe (1).

Le paragraphe 7(1) du Règlement sur les médicaments brevetés interdit au ministre de délivrer un ADC aux sociétés pharmaceutiques de produits génériques qui ne se sont pas conformées à l'article 5 dudit Règlement.

17 L'une des principales questions en appel est de savoir si les dispositions citées plus haut s'appliquent à la PDN d'Apotex. À cet égard, Merck signale que le Parlement a expressément inséré dans la Loi sur les brevets une disposition spéciale attributive de prépondérance, le paragraphe 55.2 (5), afin de renforcer explicitement l'objectif du projet de loi C-91:

55.2 . . .

(5) Une disposition réglementaire prise sous le régime du présent article prévaut sur toute disposition législative ou réglementaire fédérale divergente. [Non souligné dans le texte original.]

LES FAITS

18 Deux catégories de faits sont en jeu en l'espèce. Il semble en outre qu'un certain élément la ou les raisons précises pour lesquelles le ministre a omis de délivrer l'ADC-a échappé à l'examen des parties. Nous apprécierons l'importance de cette lacune après avoir exposé les faits admis par les parties qui ont donné lieu au présent appel.

a) Les faits admis par les parties

19 Le 3 juillet 1989, le ministre a délégué au sous-ministre adjoint ("SMA") et au directeur général de la Direction des médicaments le pouvoir de signer les ADC. Pendant toute la période pertinente pour le présent appel, Kent Foster était le SMA et la seule personne à laquelle le pouvoir de signer les ADC avait été délégué.

20 Apotex a déposé une PDN pour l'Apo-Enalapril le 15 février 1990[2]. Huit mois plus tard, soit le 16 octobre 1990, Merck a obtenu pour l'énalapril un brevet d'une durée de dix-sept ans, brevet qui devait expirer le 16 octobre 2007.

21 Le projet de loi C-91 a reçu sa troisième lecture le 10 décembre 1992. Le 22 décembre, trente-quatre mois après avoir déposé sa PDN, Apotex a présenté contre le ministre une demande de contrôle judiciaire afin d'obtenir une ordonnance de mandamus relativement à l'ADC de l'Apo-Enalapril.

22 Sa PDN était incomplète lorsqu'Apotex a déposé sa demande de mandamus. Le 20 juillet 1992, la DGPS a informé Apotex par écrit des lacunes de la partie de sa PDN portant sur la bio-équivalence

et Apotex ne lui a fourni tous les renseignements requis que le 11 janvier 1993. Apotex a également fourni les détails supplémentaires qui lui avaient été demandés pour la partie portant sur la chimie et la fabrication. Enfin, le 2 février 1993, la DGPS a demandé des copies au propre de la monographie du produit et elles lui ont été remises le 3 février 1993. À cette date, la PDN d'Apotex satisfaisait aux exigences prescrites par le RAD relativement aux épreuves cliniques, à la chimie et à la fabrication. En d'autres termes, le 3 février 1993, l'Apo-Enalapril répondait à toutes les normes scientifiques d'innocuité et d'efficacité requises pour qu'un ADC soit délivré.

23 Deux événements pertinents pour le présent appel ont eu lieu le 4 février 1993: le projet de loi C-91 a reçu la sanction royale et l'ADC pour l'Apo-Enalapril a été placé sur le bureau de M. Foster pour signature. M. Foster a reconnu que la PDN avait [Traduction] "passé le processus d'examen scientifique et réglementaire" et que lui-même et le SMA de la stratégie nationale sur les produits pharmaceutiques étaient d'avis qu'un ADC devait être délivré. Toutefois, le chef de cabinet du ministre avait avisé M. Foster, le 21 janvier 1993, qu'il devrait informer le ministre de toute PDN "liée à un brevet" en raison de l'adoption imminente du projet de loi C-91. Dans une note jointe à l'ADC relatif à l'Apo-Enalapril, le SMA de la stratégie nationale sur les produits pharmaceutiques a laissé entendre que cet avis faisait partie de ceux pour lesquels le pouvoir de signature de Foster faisait effectivement l'objet d'une restriction.

24 Foster n'a pas vu les documents relatifs à l'ADC avant environ 18 h, le 4 février. Le lendemain, en raison de la limite qui avait été apportée à son pouvoir et informé de la demande présentée à la Cour par Apotex, il a communiqué avec son sous-ministre. Ils ont ensemble décidé de demander un avis juridique sur le pouvoir du ministre ou de Foster de délivrer un ADC pour l'Apo-Enalapril compte tenu de l'adoption du projet de loi C-91. Plus tard ce même jour, le président de Merck a téléphoné à Foster et lui a indiqué qu'il devait s'abstenir de délivrer l'ADC. Le 8 février 1993, le ministère de la Santé nationale et du Bien-être social a demandé et obtenu les avis juridiques d'avocats indépendants et d'avocats du ministère de la Justice au sujet du pouvoir du ministre de délivrer l'ADC. Le contenu de ces avis n'a pas été communiqué parce qu'il s'agissait de renseignements confidentiels[3].

25 Entre le 12 et le 23 février 1993, Merck a fait parvenir au ministre huit avis juridiques qu'elle avait obtenus de cabinets d'avocats privés. Ces avis confirmaient la thèse de Merck qui estimait qu'il serait inapproprié et même illégal pour le ministre ou pour Foster de délivrer un ADC pour l'Apo-Enalapril. Pour arriver à comprendre cette avalanche d'avis non sollicités, Foster a demandé un autre avis juridique le 24 février 1993. Il a déclaré:

> [Traduction] Je craignais que, peu importe la mesure que je prenne ou non, cela n'ait pour effet d'amener le ministre à violer la loi en raison du pouvoir qui m'a été délégué. J'ignorais la réponse à cette question et je voulais savoir ce qu'il en était.

26 Pour dissiper les doutes du ministre et de son personnel, Merck a produit des avis juridiques supplémentaires qui, pour l'essentiel, confirmaient les avis envoyés auparavant. Entre le 12 février et le 5 mars 1993, Merck a remis au gouvernement dix-sept avis juridiques. Tous ces avis ont été soumis au juge de première instance et à la Cour. Aucun ne corrobore la thèse d'Apotex qui soutient que le ministre n'avait pas le droit de tenir compte de la politique gouvernementale qui était sur le point d'être instaurée lorsqu'il lui a refusé son ADC.

27 Le 22 février 1993, Merck a déposé une demande de contrôle judiciaire visant notamment à obtenir une ordonnance de prohibition interdisant au ministre de délivrer un ADC pour l'Apo-Enalapril. Le 4 mars 1993, Apotex a présenté une requête en jugement enjoignant au ministre de

délivrer cet ADC. Le 9 mars 1993, le ministre a sollicité et obtenu un ajournement de la demande d'Apotex jusqu'au 16 mars 1993[4]. Le 12 mars 1993, le paragraphe 55.2(4) de la Loi sur les brevets et le Règlement sur les médicaments brevetés sont entrés en vigueur.

28 Le 18 mars 1993, les demandes de Merck et d'Apotex ont été regroupées à la suite d'une ordonnance d'un juge de première instance. Elles ont été entendues le 21 juin 1993. Le 16 juillet 1993, le juge Dubé a accueilli la demande de mandamus d'Apotex et il a rejeté la demande d'une ordonnance de prohibition présentée par Merck [Apotex Inc. c. Canada (Procureur général) (1993), 49 C.P.R. (3d) 161].

b) Les faits contestés

29 Dans son argumentation orale, Merck a tenté de démontrer que, après le 4 février 1993, le ministre vérifiait encore les allégations selon lesquelles l'Apo-Enalapril n'était pas sans danger. Il semble que la DGPS a conclu que ces allégations étaient dénuées de fondement et que, de toute manière, elles vont à l'encontre de la thèse du ministre à l'instruction, c'est-à-dire que l'Apo-Enalapril satisfaisait le 3 février 1993 aux normes et critères prescrits par les dispositions applicables du RAD (Apotex, précité, à la page 176).

30 En contre-attaque, Apotex a laissé entendre que le ministre n'avait pas examiné équitablement la PDN. Elle a soutenu que d'autres PDN de produits génériques "liés à des brevets" avaient été approuvées tandis que la délivrance de son ADC était retardée. (Je signale qu'il ressort du dossier d'appel que Merck avait accusé le ministre "d'accélérer" le traitement de la PDN d'Apotex.) Le juge de première instance a reconnu le problème, mais il ne l'a pas examiné soit parce que c'était inutile soit parce que cela n'en valait pas la peine (à la page 170). Apotex n'a pas interjeté d'appel incident sur cette question.

c) La lacune factuelle

31 Seul le ministre possédait le pouvoir discrétionnaire de délivrer un ADC à Apotex une fois l'examen de la PDN terminé. Ni Foster ni lui-même n'ont signé l'ADC. Cependant, les raisons pour lesquelles le ministre n'a pas délivré l'ADC ne sont pas claires.

32 Merck soutient tout d'abord que rien dans la preuve n'indique que l'ADC avait été officiellement présenté au ministre pour examen, fait qui a été admis par le juge de première instance (exposé des faits et du droit des appelantes, paragraphe 42; Apotex, précité, aux pages 167 et 168). Elle cherche également à démontrer que le ministre avait le droit de tenir compte, pour délivrer l'ADC, des mesures législatives sur le point d'être mises en vigueur (exposé des faits du droit des appelantes, paragraphe 67). La première allégation signifie que le ministre n'avait pas encore eu l'occasion d'examiner la demande d'Apotex. Il faut conclure de la deuxième que, non seulement le ministre a examiné la PDN, mais que sa prise en considération des dispositions législatives que le gouvernement s'apprêtait à mettre en vigueur était l'une des raisons pour lesquelles il n'a pas délivré l'ADC. Rien dans la preuve n'indique que le ministre a reçu l'avis juridique demandé le 24 février 1993 et encore moins qu'il s'y est conformé.

33 Malheureusement, personne n'a tenté d'obtenir du ministre la ou les véritables raisons pour lesquelles il n'a pas autorisé la délivrance de l'ADC avant le 12 mars 1993[5]. Réflexion faite, il nous reste les possibilités suivantes (il y en a d'autres): Le ministre cherchait-il encore à obtenir l'avis juridique "définitif"? N'a-t-il pas eu l'occasion d'examiner la PDN? Ou a-t-il conclu que, d'un point de vue juridique, l'ADC ne devait pas être délivré? Comme Apotex n'a pas contesté les motifs du

ministre ni soulevé la question du délai déraisonnable, il ne me reste que les arguments juridiques avancés par les parties.

LA DÉCISION PORTÉE EN APPEL

34 À l'instruction, le juge Dubé a considéré que la question centrale du litige était celle de savoir si le ministre avait, avant le 12 mars 1993, le pouvoir discrétionnaire de refuser de délivrer l'ADC à Apotex en raison des modifications projetées à la Loi sur les brevets. Il a conclu (à la page 177):

> À mon avis, il ne fait pas de doute que le RAD autorisait effectivement le ministre à exercer son pouvoir discrétionnaire dans le processus d'approbation de la PDN d'Apotex. Toutefois, ce pouvoir discrétionnaire, comme tout pouvoir discrétionnaire, n'était pas absolu. Le pouvoir discrétionnaire du ministre était strictement limité à l'examen de facteurs pertinents aux fins du RAD, dans la mesure où ils se rapportent au processus d'approbation de nouvelles drogues qui doivent être commercialisées au Canada. Le ministre devait se borner à déterminer si l'examen par la DGPS, en ce qui concerne la PDN d'Apotex, établissait l'innocuité et l'efficacité de l'Apo-Enalapril. Une fois que cette question avait reçu une réponse affirmative, comme en l'espèce, toute autre considération externe était dénuée de pertinence pour la délivrance d'un avis de conformité en vertu du RAD.
>
> Le ministre n'avait pas le droit de refuser de délivrer un avis de conformité à Apotex à cause des modifications projetées à la Loi sur les brevets et au règlement d'application, domaine dans lequel son collègue, le ministre de la Consommation et des Affaires commerciales, était compétent.

35 Le juge s'est appuyé sur trois décisions de la Section de première instance de la Cour. Il a tout d'abord appliqué le raisonnement suivi par le juge MacKay dans l'affaire Apotex Inc. c. Canada (Procureur général) et autre (1993), 59 F.T.R. 85 où il a statué (aux pages 108 et 109):

> [L]es mots "dont le contenu satisfait le ministre" qualifient les mots "présentation de drogue nouvelle" de façon que dans tous les cas, le contenu de la présentation soit une question relevant de la décision discrétionnaire du ministre et de ses représentants.
>
> . . .
>
> [L]e Règlement investit le ministre intimé et le directeur de la DGPS du pouvoir discrétionnaire et exclusif de fixer les conditions de la présentation de drogue nouvelle pour ce qui est des renseignements et des preuves à produire par le fabricant. [Non souligné dans le texte original.]

36 La deuxième décision est Glaxo Canada Inc. c. Canada (Ministre de la Santé nationale et du Bien-être social), précitée, où le juge Rouleau a conclu (à la page 426):

> L'objet principal du Règlement est d'assurer que toute drogue nouvelle satisfait à des normes de sécurité rigoureuses visant à protéger le public canadien. Lorsqu'il conclut, au terme de son examen, que la présentation de

> drogue nouvelle respecte les normes édictées, le ministre a l'obligation de délivrer un avis de conformité . . .

37 Enfin, le juge Dubé a utilisé la décision du juge Muldoon dans C.E. Jamieson & Co. (Dominion) c. Canada (Procureur général), [1988] 1 C.F. 590 (1re inst.), à la page 651 où le juge a statué:

> [L]e pouvoir d'appréciation qu'accorde ce Règlement clair et détaillé est fort limité . . . Aux termes de l'article C.08.004, le ministre est tenu de délivrer un avis de conformité ou de faire savoir au fabricant les raisons pour lesquelles la présentation . . . n'est pas conforme . . . Le ministre est sur ce point soumis au pouvoir de contrôle des tribunaux qui pourrait s'exprimer par une ordonnance de mandamus . . . Ces pouvoirs délégués n'autorisent pas le ministre ou le directeur à faire comme ils l'entendent: ils ne disposent pas de pouvoirs discrétionnaires absolus.

38 Le juge Dubé n'a pas eu de mal à conclure que le ministre ne possédait pas le large pouvoir discrétionnaire qui lui aurait permis de justifier son refus de délivrer l'ADC. Il restait à déterminer si le ministre et son délégué, Foster, étaient habilités à demander un avis juridique et à retarder ainsi la délivrance de l'ADC. Le juge Dubé a fait remarquer que le ministre ignorait, que ce soit lorsque le projet de loi C-91 a été adopté ou lorsqu'il a fait l'objet d'une proclamation, que le Règlement sur les médicaments brevetés entrerait en vigueur le 12 mars 1993. En d'autres termes, il aurait pu s'écouler considérablement plus de temps avant qu'on ne détermine s'il était possible de délivrer l'ADC. Acceptant la remarque pragmatique de Foster selon laquelle [Traduction] "ou la loi est en vigueur, ou elle ne l'est pas", le juge a conclu que "le retard du ministre pour délivrer l'avis de conformité d'Apotex n'était pas justifié" (à la page 181).

39 Le juge Dubé a ensuite rejeté l'argument suivant lequel l'octroi d'un mandamus dans un cas où il est clair qu'un nouveau régime réglementaire va être institué irait "à l'encontre de la volonté du Parlement". Il a signalé que la tendance jurisprudentielle établie en droit municipal avec l'arrêt de la Cour suprême Ottawa, City of v. Boyd Builders Ltd., [1965] R.C.S. 408, ne devrait pas "être extrapolé[e] facilement dans un contexte juridique entièrement différent" (à la page 181).

40 Enfin, le juge de première instance a rejeté l'argument selon lequel la demande de mandamus d'Apotex était prématurée parce que sa PDN était incomplète lorsque cette demande a été présentée. Il a tenu le raisonnement suivant (à la page 182):

> Avant de terminer, je voudrais régler une question "préliminaire" soulevée par Merck, à savoir que l'avis introductif d'instance d'Apotex, en date du 22 décembre 1992, était prématuré parce qu'à cette date, la PDN d'Apo-Enalapril était incomplète. D'après les termes de l'avis de requête, Apotex a demandé une ordonnance qui imposait au ministre de révéler l'état d'un certain nombre de PDN déposées par Apotex, notamment celle de l'Apo-Enalapril; de terminer l'examen de ces dossiers, s'il n'était pas terminé et de délivrer des avis de conformité [Traduction] "si les résultats des examens étaient satisfaisants". Ainsi, Apotex ne demandait pas un redressement différent des exigences normales du RAD et n'était donc pas "en avance" sur le déroulement normal de la procédure. En outre, au 3 février 1993, soit bien avant que cette affaire ne soit entendue, les résultats de la PDN d'Apo-Enalapril avaient été recommandés pour la délivrance d'un avis

de conformité. L'argument fondé sur le caractère prématuré doit donc échouer.

41 Pour les motifs qui précèdent, la demande de mandamus a été accueillie et la demande d'une ordonnance de prohibition a été rejetée.

LES QUESTIONS SOULEVÉES EN APPEL

42 L'appel donne l'occasion aux deux parties de critiquer, de préciser et de reformuler les arguments de fond qui peuvent avoir été avancés ou non en première instance. Les questions suivantes ont été formulées par Merck dans son exposé des faits et du droit et elles ont été examinées en appel:

1) Compte tenu des faits de l'espèce, y a-t-il lieu à mandamus contre le ministre?

2) Après le 4 février 1993, le ministre était-il habilité à solliciter un avis sur la légalité de ce qu'Apotex lui demandait de faire, en plus de tout autre renseignement pertinent auquel il aurait pu penser?

3) Dans l'exercice du pouvoir que lui confère le RAD, le ministre était-il habilité à tenir compte des dispositions du projet de loi C-91 après qu'elles eurent été adoptées mais avant qu'elles n'entrent en vigueur?

4) Le ministre a-t-il agi illégalement lorsqu'il a omis de rendre une décision sur la demande d'ADC avant le 12 mars 1993?

5) Le cas échéant, cela a-t-il eu pour effet de conférer à Apotex un "droit acquis" à la délivrance d'un ADC avant le 12 mars 1993?

6) Si Apotex a "acquis" un droit avant le 12 mars 1993, le Règlement sur les médicaments brevetés (avis de conformité) l'a-t-il néanmoins dépouillée de ce droit?

7) Les droits et recours créés par le projet de loi C -91 et le Règlement sur les médicaments brevetés (avis de conformité) ont-ils, à partir du 12 mars 1993, supprimé le pouvoir de la Cour de faire droit à un contrôle judiciaire, compte tenu des faits de l'affaire, pour forcer la délivrance de l'avis de conformité?

8) Les principes formulés dans l'arrêt Ottawa, City of v. Boyd Builders Ltd., [1965] R.C.S. 408, s'appliquent-ils à l'exercice par la Cour de son pouvoir discrétionnaire dans toutes les demandes de mandamus ou se limitent-ils aux demandes de permis de construire?

9) Si Apotex a par ailleurs droit à la délivrance d'un mandamus, s'agit-il d'un cas où la Cour aurait dû exercer son pouvoir discrétionnaire (que le juge Dubé ne croyait pas posséder) contre Apotex compte tenu de la politique officielle du gouvernement énoncée dans le projet de loi C-91 et le Règlement?

10) Compte tenu des faits de l'espèce, y a-t-il lieu à une ordonnance de prohibition contre le ministre?

43 En appel incident, le ministre allègue que le juge de première instance a commis une erreur en concluant que le retard à délivrer l'ADC n'était pas justifié. Comme Merck, il demeure convaincu que, d'un point de vue juridique, l'ADC ne peut pas être délivré.

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ANALYSE

44 La majorité des questions soulevées par les avocats concernent la possibilité d'obtenir des ordonnances de mandamus. J'ai l'intention d'exposer, en termes généraux, les principes qui régissent de telles ordonnances avant de clarifier les questions fondamentales pour le présent appel.

1) Le mandamus: les principes applicables

45 Plusieurs conditions fondamentales doivent être respectées avant qu'un mandamus ne puisse être accordé. Les principes généraux énoncés ci-dessous s'appuient sur la jurisprudence de la Cour (voir globalement, l'affaire O'Grady c. Whyte, [1983] 1 C.F. 719 (C.A.), aux pages 722 et 723, citant Karavos v. Toronto & Gillies, [1948] 3 D.L.R. 294 (C.A. Ont.), à la page 297; et Mensinger c. Canada (Ministre de l'Emploi et de l'Immigration), [1987] 1 C.F. 59 (1re inst.), à la page 66.

1. Il doit exister une obligation légale d'agir à caractère public: Ministre de l'Emploi et de l'Immigration c. Hudnik, [1980] 1 C.F. 180 (C.A.); Jefford c. Canada, [1988] 2 C.F. 189 (C.A.); Winegarden c. Commission de la fonction publique et Canada (Ministre des Transports) (1986), 5 F.T.R. 317 (C.F. 1re inst.); Rossi c. La Reine, [1974] 1 C.F. 531 (1re inst.); Fédération canadienne de la faune Inc. c. Canada (Ministre de l'Environnement), [1989] 3 C.F. 309 (1re inst.); conf. par [1990] 2 W.W.R. 69 (C.A.F.); Bedard c. Service correctionnel du Canada, [1984] 1 C.F. 193 (1re inst.); Carota c. Jamieson, [1979] 1 C.F. 735 (1re inst.); conf. par [1980] 1 C.F. 790 (C.A.); et Nguyen c. Canada (Ministre de l'Emploi et de l'Immigration), [1994] 1 C.F. 232 (C.A.).
2. L'obligation doit exister envers le requérant[6] : La compagnie Rothmans de Pall Mall Canada Limitée c. Le ministre du Revenu national (No 1), [1976] 2 C.F. 500 (C.A.); Distribution Canada Inc. c. M.R.N., [1991] 1 C.F. 716 (1re inst.); confirmé par [1993] 2 C.F. 26 (C.A.); Secunda Marine Services Ltd. c. Canada (Ministre des Approvisionnements et Services) (1989), 38 Admin. L.R. 287 (C.F. 1re inst.); et Szoboszloi c. Directeur général des élections du Canada, [1972] C.F. 1020 (1re inst.); voir aussi Jefford c. Canada, précité.
3. Il existe un droit clair d'obtenir l'exécution de cette obligation, notamment:
   a) le requérant a rempli toutes les conditions préalables donnant naissance à cette obligation; O'Grady c. Whyte, précité; Hutchins c. Canada (Commission nationale des libérations conditionnelles), [1993] 3 C.F. 505 (C.A.); et voir Nguyen c. Canada (Ministre de l'Emploi et de l'Immigration), précité;
   b) il y a eu (i) une demande d'exécution de l'obligation, (ii) un délai raisonnable a été accordé pour permettre de donner suite à la demande à moins que celle-ci n'ait été rejetée sur-le-champ, et (iii) il y a eu refus ultérieur, exprès ou implicite, par exemple un délai déraisonnable; voir O'Grady c. Whyte, précité, citant Karavos c. Toronto & Gillies, précité; Bhatnager c. Ministre de l'Emploi et de l'Immigration, [1985] 2 C.F. 315 (1re inst.); et Fédération canadienne de la faune Inc. c. Canada (Ministre de l'Environnement), précité.
4.

Lorsque l'obligation dont on demande l'exécution forcée est discrétionnaire, les règles suivantes s'appliquent:

a) le décideur qui exerce un pouvoir discrétionnaire ne doit pas agir d'une manière qui puisse être qualifiée d'"injuste", d'"oppressive" ou qui dénote une "irrégularité flagrante" ou la "mauvaise foi";
b) un mandamus ne peut être accordé si le pouvoir discrétionnaire du décideur est "illimité", "absolu" ou "facultatif";
c) le décideur qui exerce un pouvoir discrétionnaire "limité" doit agir en se fondant sur des considérations "pertinentes" par opposition à des considérations "non pertinentes";
d) un mandamus ne peut être accordé pour orienter l'exercice d'un "pouvoir discrétionnaire limité" dans un sens donné;
e) un mandamus ne peut être accordé que lorsque le pouvoir discrétionnaire du décideur est "épuisé", c'est-à-dire que le requérant a un droit acquis à l'exécution de l'obligation.

Voir Commission sur les pratiques restrictives du commerce c. Directeur des enquêtes et recherches nommé en vertu de la Loi relative aux enquêtes sur les coalitions, [1983] 2 C.F. 222 (C.A.); inf. [1983] 1 C.F. 520 (1re inst.); Carota c. Jamieson, précité; Apotex Inc. c. Canada (Procureur général) et autre, précité; Maple Lodge Farms Ltd. c. Le gouvernement du Canada, [1980] 2 C.F. 458 (1re inst.); conf. par [1981] 1 C.F. 500 (C.A.); confirmé par [1982] 2 R.C.S. 2; Jefford c. Canada, précité; Merck & Co. Inc. v. Sherman & Ulster Ltd., Attorney-General of Canada, Intervenant (1971), 65 C.P.R. 1 (C. de l'É.); pourvoi rejeté [1972] R.C.S. vi; Distribution Canada Inc. c. M.R.N., précité; et Kahlon c. Canada (Ministre de l'Emploi et de l'Immigration), [1986] 3 C.F. 386 (C.A.).

5. Le requérant n'a aucun autre recours: Carota c. Jamieson, précité; Maple Lodge Farms Ltd. c. Le gouvernement du Canada, précité; Jefford c. Canada, précité; Harelkin c. Université de Régina, [1979] 2 R.C.S. 561; et voir Canada (Vérificateur général) c. Canada (Ministre de l'Énergie, des Mines et des Ressources), [1987] 1 C.F. 406 (C.A.); appel rejeté [1989] 2 R.C.S. 49.
6. L'ordonnance sollicitée aura une incidence sur le plan pratique: Friends of the Oldman River Society c. Canada (Ministre des Transports), [1990] 2 C.F. 18 (C.A.), le juge Stone, aux pages 48 à 52; conf. par [1992] 1 R.C.S. 3, le juge La Forest, aux pages 76 à 80; Landreville c. La Reine, [1973] C.F. 1223 (1re inst.); et Beauchemin c. Commission de l'emploi et de l'immigration du Canada (1987), 15 F.T.R. 83 (C.F. 1re inst.).
7. Dans l'exercice de son pouvoir discrétionnaire, le tribunal estime que, en vertu de l'équité, rien n'empêche d'obtenir le redressement demandé: Penner c. La Commission de délimitation des circonscriptions électorales (Ont.), [1976] 2 C.F. 614 (1re inst.); Friends of the Oldman River Society c. Canada (Ministre des Transports), précité.
8. Compte tenu de la "balance des inconvénients", une ordonnance de mandamus devrait (ou ne devrait pas) être rendue.

46 Il est admis dans le présent appel que le ministre avait une obligation d'agir envers Apotex et non envers l'État. Merck n'a pas cherché à démontrer qu'Apotex n'avait pas droit en vertu de l'équité au redressement sollicité. Elle n'a pas non plus tenté d'établir qu'une ordonnance de mandamus serait sans effet. Par contre, elle allègue que la demande d'Apotex était prématurée parce que, au moment où elle a été présentée, toutes les conditions préalables n'avaient pas été remplies. De plus, elle soutient qu'un recours subsidiaire adéquat s'offre à Apotex. En dehors de la question de la balance des inconvénients signalée ci-dessus, les autres questions essentielles pour le présent appel peuvent être formulées comme suit: Le 12 mars 1993, Apotex avait-elle un droit acquis à l'ADC? Le cas échéant, Apotex a-t-elle été dépouillée de ce droit par le Règlement sur les médicaments brevetés? La disposition attributive de prépondérance figurant dans le projet de loi C-91 supprime-t-elle le pouvoir de la Cour d'accorder l'ordonnance sollicitée par Apotex?

2) Un recours subsidiaire adéquat

47 Le projet de loi C-91 autorise Apotex à contester la validité du brevet de Merck. Si elle obtenait gain de cause, non seulement Apotex aurait-elle droit à l'ADC mais Merck serait tenue de lui verser des dommages-intérêts pour avoir retardé à tort sa délivrance (voir l'article 6 du Règlement sur les médicaments brevetés). En conséquence, Merck soutient que l'observation des dispositions législatives actuelles constitue en soi un recours adéquat. Évidemment, ce raisonnement ne fait qu'éluder la question. J'aimerais signaler que Merck n'a pas cherché à démontrer qu'une ordonnance de mandamus serait en soi sans effet. Par contre, Apotex n'a pas tenté de prouver que Merck possédait un recours plus adéquat une action en contrefaçon de brevet qu'une demande d'ordonnance de prohibition.

3) Le caractère prématuré de la demande

48 Merck prétend que le ministre n'avait aucune obligation envers Apotex au moment où elle a présenté sa demande de contrôle judiciaire le 22 décembre 1992 ou à la date de l'audience. Cette prétention est certes partiellement exacte. Le ministre n'avait aucune obligation envers Apotex le 22 décembre. L'examen de la PDN d'Apotex par la DGPS était alors en cours. Merck affirme que le dépôt d'une demande avant qu'il n'existe une obligation constitue une fin de non-recevoir à une demande de mandamus. Elle invoque l'arrêt Karavos v. Toronto & Gillies, précité, de la Cour d'appel de l'Ontario que le juge Urie a cité et endossé dans l'arrêt O'Grady c. Whyte, précité, à la page 722. Dans l'arrêt Karavos, le juge Laidlaw, J.C.A., a dit (à la page 297):

> [Traduction] Je n'essaie pas de faire un résumé exhaustif des règles qui guident la Cour en matière de demande de bref de mandamus, mais je vais exposer brièvement certaines d'entre elles qui s'appliquent particulièrement en l'espèce. Pour que le redressement puisse être accordé, celui qui le sollicite doit établir ce qui suit: (1) "un droit clair et licite de faire accomplir la chose dont on demande l'exécution, de la manière demandée, et par la personne qui fait l'objet de la demande de redressement": High, op. cit., p. 13, art. 9; voir p. 15, art. 10. (2) "L'obligation dont on demande l'exécution forcée par voie de mandamus doit être née et doit incomber au fonctionnaire au moment de la demande de redressement, et le bref ne sera pas accordé pour forcer l'accomplissement de quelque chose qu'il n'est pas encore tenu de faire": ibid., p. 44, art. 36. (3) Cette obligation doit être de nature purement ministérielle, c'est-à-dire qu'elle doit "incomber manifestement à un fonctionnaire en vertu d'une loi ou de ses fonctions, et à l'égard de laquelle il

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n'a aucun pouvoir discrétionnaire": ibid., p. 92, art. 80. (4) Il doit y avoir une demande et un refus d'accomplir l'acte dont l'exécution forcée est sollicitée par voie de recours légale: ibid., p. 18, art. 13. [Non souligné dans le texte original.]

49 Merck tente de tirer des mots "au moment de la demande de redressement" une règle de droit signifiant qu'un mandamus doit être refusé si l'obligation d'agir n'existe pas au moment où la demande de mandamus est présentée. À mon avis, une telle règle dénoterait un manque flagrant de subtilité et ne peut pas s'appuyer sur les faits des arrêts Karavos ou O'Grady.

50 Dans l'arrêt Karavos, le requérant avait demandé une ordonnance de mandamus forçant la délivrance d'un permis de construire même s'il n'avait pas encore présenté sa demande de permis à la date de l'audience. De même, dans l'arrêt O'Grady, le requérant n'avait pas présenté de demande de droit d'établissement à la date à laquelle un agent d'immigration était tenu de se prononcer sur sa demande de parrainage. Dans les deux cas, il a été jugé que l'absence de la demande requise empêchait la délivrance d'un mandamus.

51 Le principe juridique découlant de ces deux arrêts est simple à formuler. Il n'y a pas lieu à une ordonnance de mandamus pour forcer un fonctionnaire à agir d'une manière donnée si ce dernier n'est pas tenu d'agir à la date de l'audience. Il reste à déterminer si cette règle reste valide lorsqu'on l'applique à la date à laquelle la demande de mandamus a été présentée. À mon avis, ce n'est pas le cas.

52 Dans sa demande, Apotex a prié la Cour de donner deux directives. Premièrement, elle a demandé que le ministre examine la PDN qui lui avait été soumise environ trente-quatre mois avant le dépôt de la demande de mandamus. Deuxièmement, elle a sollicité une ordonnance prévoyant la délivrance de l'ADC une fois que le processus d'examen de la PDN serait terminé.

53 On ne peut faire que des suppositions quant à la question de savoir si la demande de mandamus a eu pour effet de pousser la DGPS à agir. Nous savons que, dès le 3 février, l'Apo-Enalapril répondait aux normes d'innocuité et d'efficacité nécessaires à la délivrance de l'ADC. Nous savons aussi que le ministre et le procureur général du Canada ont présenté, le 27 janvier 1993, une demande de radiation de la demande de mandamus. Il semble que cette demande a été rejetée à l'audience pour des motifs qui ne ressortent pas à la lecture du dossier (voir le dossier d'appel, vol. I, onglets 4 et 5).

54 Comme principe général, il n'est pas difficile d'accepter une règle qui vise à éliminer les demandes prématurées de mandamus. Une personne intimée peut certes chercher à obtenir le rejet d'une demande lorsque l'obligation d'agir n'est pas encore née. Toutefois, le fait qu'elle ait été présentée trop tôt ne devrait pas faire échouer une demande d'ordonnance de mandamus à moins que des raisons sérieuses ne soient données. La demande devrait être appréciée quant au fond pourvu que les conditions préalables à l'exercice de l'obligation aient été satisfaites au moment de l'audience. Les personnes qui compliquent inutilement la procédure peuvent s'exposer à payer des dépens, même si elles obtiennent gain de cause. Pour les motifs qui précèdent, cet argument doit échouer.

4) L'exercice du pouvoir discrétionnaire-Les droits acquis

55 En quelques mots, la Cour doit décider si Apotex a droit aux avantages de l'"ancienne" loi ou doit accepter les inconvénients découlant de la "nouvelle". Habituellement, pour aborder une telle question, il faut déterminer si le décideur a pris une décision avant que la nouvelle législation n'entre en vigueur. En d'autres termes, Apotex avait-elle acquis un droit à l'ADC le 12 mars 1993?

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56 Si un décideur possède un pouvoir discrétionnaire absolu qu'il n'a pas exercé à la date à laquelle une nouvelle loi entre en vigueur, le requérant ne peut alors revendiquer avec succès un droit acquis ni même le droit à une décision. Tel a été le raisonnement adopté par le Comité judiciaire du Conseil privé dans l'arrêt Director of Public Works v. Ho Po Sang, [1961] A.C. 901. Dans cet arrêt, le tribunal a fait une distinction entre un "droit acquis" et un "simple espoir ou une simple attente", et il a statué que le particulier qui demandait un permis de rénovation espérait simplement que le permis lui serait délivré au moment où la loi abrogative entrait en vigueur. L'arrêt Ho Po Sang a été appliqué par la Cour de l'Échiquier dans l'affaire Merck & Co. Inc. v. Sherman & Ulster Ltd., Attorney-General of Canada, Intervenant, précitée. Ces décisions fournissent les éléments nécessaires pour apprécier les principes sous-jacents à la question des "droits acquis".

57 Dans Ho Po Sang, le preneur à bail de terrains de la Couronne à Hong Kong avait le droit en vertu d'une ordonnance à la libre possession d'immeubles occupés par des sous-preneurs à la condition qu'il érige de nouveaux immeubles et qu'il reçoive l'approbation du directeur des travaux publics. La loi dispensait également le preneur de l'obligation d'indemniser les sous-preneurs pour la résiliation de leur bail. Le 20 juillet 1956, le directeur avait l'intention d'accorder au preneur le certificat requis. Sur réception de l'avis leur intimant de quitter les lieux, les sous-preneurs ont interjeté appel au gouverneur en conseil. Le preneur a immédiatement formé un appel incident. Le 9 avril 1957, après que l'appel eut été interjeté, les dispositions pertinentes de l'ordonnance ont été abrogées afin d'accorder aux locataires le droit à une indemnité. À cette date, le gouverneur en conseil n'avait pas encore pris une décision.

58 Il s'agissait de déterminer lors de l'appel si, le 9 avril 1957, le preneur avait en vertu de l'ordonnance des "droits" qui n'étaient pas touchés par l'abrogation. Le Conseil privé a fondé sa conclusion sur le pouvoir discrétionnaire "absolu" conféré au gouverneur en conseil par l'ordonnance: [Traduction] "[Le preneur] n'avait rien de plus qu'un espoir que le gouverneur en conseil rendrait une décision favorable" (aux pages 920 et 921). L'argument du preneur qui soutenait qu'il avait un droit acquis, non touché par l'abrogation, à ce que l'affaire soit examinée par le gouverneur en conseil a été rejeté pour les mêmes motifs.

59 La décision du juge Thurlow (tel était alors son titre) dans l'affaire Merck & Co.Inc. v. Sherman & Ulster Ltd., Attorney-General of Canada, Intervenant, précitée, sert de guide pour déterminer si Apotex avait un droit acquis à l'ADC plutôt qu'un simple espoir ou une simple attente. Il s'agissait dans cette affaire de déterminer si le commissaire aux brevets avait commis une erreur en fixant la redevance payable à Merck par Sherman en vertu d'une licence obligatoire. Sherman avait présenté son mémoire descriptif de brevet et le commissaire avait fixé la redevance en application du paragraphe 41(3) de la Loi sur les brevets, S.R.C. 1952, ch. 203. Ce paragraphe a été abrogé ultérieurement et remplacé par le paragraphe 41(4) (S.C. 1968-69, ch. 49, art. 1). Le commissaire n'a ni entendu l'argumentation orale des parties ni reçu leurs arguments écrits avant que ces modifications n'entrent en vigueur. La question soumise au juge de première instance était simple: Quelle disposition législative s'appliquait au moment de fixer la redevance l'ancienne ou la nouvelle? Après une analyse minutieuse des dispositions opposées de la Loi d'interprétation, S.R.C. 1952, ch. 158, le juge Thurlow a conclu que c'est le "nouveau" paragraphe 41(4) qui s'appliquait. Son raisonnement porte directement sur la question des "droits acquis".

60 L'alinéa 37c) de la Loi d'interprétation, S.C. 1967-68, ch. 7 (maintenant Loi d'interprétation, L.R.C. (1985), ch. I-21, alinéa 44c)) traitait de l'effet des procédures engagées sous le régime d'un "texte antérieur" et a été invoqué par Merck au soutien de son argument voulant que les procédures ne pouvaient être continuées que conformément à la nouvelle disposition. Cet article portait:

> 37. Lorsqu'un texte législatif (au présent article appelé "texte antérieur") est abrogé et qu'un autre texte législatif (au présent article appelé "nouveau texte") y est substitué,
>
> . . .
>
> c) toutes les procédures prises aux termes du texte antérieur sont reprises et continuées aux termes et en conformité du nouveau texte, dans la mesure où la chose peut se faire conformément à ce dernier;

61 L'intimée Sherman a invoqué l'alinéa 36c) (maintenant alinéa 43c)) de la Loi d'interprétation au soutien de son argument qu'elle avait un droit "né" ou "naissant" à la date de sa demande de licence obligatoire[7]. L'alinéa 36c) portait:

> 36. Lorsqu'un texte législatif est abrogé en tout ou en partie, l'abrogation
>
> . . .
>
> c) n'a pas d'effet sur quelque droit, privilège, obligation ou responsabilité acquis, né, naissant ou encouru sous le régime du texte législatif ainsi abrogé;
>
> . . .
>
> et une enquête, une procédure judiciaire ou un recours prévu à l'alinéa e) peut être commencé, continué ou mis à exécution, et la peine, la confiscation ou la punition peut être infligée comme si le texte législatif n'avait pas été ainsi abrogé[8].

62 Après une analyse minutieuse de l'arrêt Ho Po Sang, le juge Thurlow a conclu ce qui suit (à la page 12):

> [Traduction] En l'espèce, lorsque l'art. 41(3) a été abrogé, la procédure prescrite par le commissaire n'était pas encore arrivée au stade où l'affaire était sur le point d'être tranchée, la réponse de l'intimée à la contre-déclaration n'ayant pas encore été produite et, en fait, ayant été retardée à la demande même de l'intimée. Mais, même si on en avait été arrivé à ce stade et qu'on avait simplement attendu la décision, je ne crois pas que l'on pourrait à juste titre affirmer que l'intimée avait un droit acquis soit à une licence soit à ce que l'affaire soit tranchée en fonction du droit tel qu'il était alors applicable. Selon moi, le pouvoir du commissaire ne consiste pas simplement à priver un requérant d'une licence lorsqu'il considère qu'il existe une bonne raison de le faire; il peut aussi décider si une licence devrait être accordée, ce pouvoir étant assujetti à l'obligation d'accorder la licence en l'absence d'une bonne raison de la refuser. La distinction est peut-être mince, mais c'est au commissaire plutôt qu'à la requérante qu'il incombe de dire si une licence sera accordée et la requérante n'a aucun contrôle sur la décision qu'il peut rendre. Comme dans l'arrêt Ho Po Sang, la question elle-même n'a pas été tranchée et le résultat dépendait de l'avenir. Je conviens comme l'a

allégué l'avocat de l'appelante que, à ce stade de la procédure, l'intimée n'avait rien de plus qu'un espoir (que celui-ci soit plus fort ou non que celui que l'intimé avait dans l'arrêt Ho Po Sang en raison de la directive que contenait l'art. 41(3) relativement à la prise d'une décision). Je ne crois pas non plus que l'on puisse considérer que l'intimée avait à ce stade un droit "naissant" (ou un privilège) au sens de l'art. 36c) étant donné que le problème ne se pose pas avec les termes "né" ou "naissant" mais avec l'absence de quoi que ce soit qui corresponde à la description des termes "droit" ou "privilège" à l'art. 36c).

À mon avis, l'art. 36c) ne s'applique donc pas et c'est l'art. 37c) de la Loi d'interprétation qui permet de poursuivre la procédure engagée avant l'abrogation.

63 Ce cadre analytique fait porter la décision sur la question de savoir si Apotex avait un droit "né" ou "acquis" à l'ADC. Les parties admettent que, dès le 4 février 1993, "l'affaire était sur le point d'être tranchée". Il s'agit de déterminer si, à cette date, le ministre avait épuisé son pouvoir discrétionnaire relativement à l'ADC.

64 Quatre éléments sont pertinents pour déterminer si Apotex avait un droit acquis à l'ADC: a) la portée du pouvoir discrétionnaire du ministre; b) la pertinence des avis juridiques; c) la pertinence des "mesures législatives sur le point d'être mises en vigueur", et d) la question de savoir si l'affaire avait été présentée au ministre pour examen.

a) Le ministre possède-t-il un pouvoir discrétionnaire large ou limité

65 La portée du pouvoir discrétionnaire d'un décideur varie selon que l'on qualifie diverses considérations de "pertinentes" ou de "non pertinentes" à son exercice: voir R. A. Macdonald et M. Paskell-Mede, Annual Survey of Canadian Law: Administrative Law (1981), 13 Ottawa L. Rev. 671, à la page 720. Merck soutient que le pouvoir discrétionnaire conféré au ministre par le paragraphe C.08.002(1) du RAD ("est interdite la vente . . . d'une drogue nouvelle, à moins que . . . [la drogue ait un] contenu [qui] satisfait le Ministre") est, du point de vue de l'interprétation législative, suffisamment général pour viser d'autres considérations que celles concernant l'innocuité et l'efficacité. À mon avis, cet argument est dénué de fondement. Le juge de première instance ainsi que trois autres juges de la Section de première instance ont minutieusement examiné les règles de droit portant sur cette question; voir les affaires Glaxo Canada Inc. c. Canada (Ministre de la Santé nationale et du Bien-être social), précitée; C.E. Jamieson & Co. (Dominion) c. Canada (Procureur général), précitée; et Apotex Inc. c. Canada (Procureur général) et autre, précitée.

66 Comme le juge de première instance, j'estime que le RAD limite les facteurs que le ministre doit examiner dans l'exercice de son pouvoir discrétionnaire à ceux qui concernent l'innocuité et l'efficacité d'une drogue. Pour en arriver à cette conclusion, je tiens compte des deux précédents cités par Merck. Dans Glaxo Canada Inc., précitée, le juge Rouleau a dit que "[l]'appréciation du ministre vise la santé publique et constitue la mise à exécution d'une politique sociale et économique" (à la page 439). La Cour a fait des remarques analogues dans l'arrêt Pfizer Canada Inc. c. Ministre de la Santé nationale et du Bien-être social et autre, précité, où le juge MacGuigan, J.C.A., a dit que "la décision du ministre était une décision qui avait pour souci la santé publique; il s'agissait donc de l'application d' une politique sociale et économique au sens large plutôt que de l'application de règles de fond à un cas individuel" (à la page 440).

67 Les énoncés qui précèdent ne signifient pas que la Cour avait l'intention de laisser de côté les principes élémentaires d'interprétation législative. La question à trancher dans l'arrêt Pfizer et dans l'appel formé dans l'affaire Glaxo Canada était la qualité pour agir des requérantes respectives[9]. Dans les deux cas, la drogue en cause répondait aux normes d'innocuité et d'efficacité du RAD. Dans les deux cas, la Cour a statué que l'ADC pouvait être délivré. Interprétés dans un tel contexte, ces arrêts ne portent pas atteinte au raisonnement du juge Dubé qui a considéré que le RAD ne vise pas à accorder expressément ou implicitement au ministre un pouvoir discrétionnaire aussi large que Merck le soutient.

68 Apotex affirme que la portée restreinte du pouvoir discrétionnaire du ministre signifie nécessairement que son droit à l'ADC s'est concrétisé le 4 février 1993 ou avant le 12 mars 1993, lorsque le Règlement sur les médicaments brevetés est entré en vigueur. Merck prétend que, quelle que soit l'interprétation que l'on donne au pouvoir discrétionnaire, le ministre a, d'un point de vue juridique, le pouvoir résiduel de tenir compte d'autres considérations que celles concernant l'innocuité et l'efficacité de l'Apo-Enalapril. Merck a indiqué que le besoin d'obtenir des avis juridiques et les modifications imminentes de la Loi sur les brevets contenues dans le projet de loi C-91 (les mesures législatives sur le point d'être mises en vigueur) constituaient des considérations pertinentes quant à l'exercice d'un pouvoir discrétionnaire même étroitement défini.

b) Les avis juridiques

69 Merck a pour l'essentiel demandé à la Cour de conclure que le temps nécessaire pour qu'un décideur puisse solliciter et obtenir des avis juridiques dans le cadre d'un processus décisionnel est en soi un motif de refuser un mandamus. Elle laisse également entendre que l'ignorance avouée d'une loi au sujet de laquelle des avis juridiques divergents ont été donnés a une incidence sur le droit du public à l'exécution d'une obligation légale. À mon avis, ces deux prétentions doivent être rejetées.

70 La seule décision invoquée par Merck au soutien de son argument est celle de la Chambre des lords dans l'affaire Engineers' and Managers' Association v. Advisory, Conciliation and Arbitration Service, [1980] 1 W.L.R. 302 (H.L.). Dans cette affaire, la Chambre des lords a statué qu'un tribunal des relations de travail était habilité à suspendre son processus pendant plus de deux ans pour des demandes d'accréditation conflictuelles. Le tribunal a estimé qu'il était obligé d'attendre l'issue d'une action indirectement liée à l'affaire avant de prendre une décision. Merck appliquerait cette décision pour prétendre que, comme le ministre avait le droit de solliciter des avis juridiques, il n'était pas tenu de délivrer l'ADC avant le 12 mars 1993. Je ne suis pas d'accord.

71 Tout d'abord, les dispositions législatives pertinentes dans l'affaire Engineers' attribuaient au tribunal un pouvoir discrétionnaire considérablement plus large que celui conféré au ministre par le Règlement sur les médicaments brevetés. Ensuite, dans cette affaire, l'action en était à une étape préliminaire et non à l'étape finale où en était rendue la PDN d'Apotex (le juge Dubé a avancé ces deux raisons dans ses motifs de jugement, à la page 180). Enfin, contrairement à l'espèce, le retard résultant dans l'affaire Engineers' de la nécessité d'obtenir des précisions juridiques n'a pas et ne pouvait pas dépouiller automatiquement les parties de droits consacrés par les dispositions législatives pertinentes.

72 Le droit d'un décideur d'obtenir des avis juridiques sur la légalité de l'exécution d'une obligation n'est pas en cause. En fait, compte tenu de la preuve d'opinion accablante sur la "légalité" de la délivrance de l'ADC à Apotex, l'omission par le ministre de solliciter les avis d'avocats du Ministère ou de l'extérieur aurait pu être considérée comme une abdication de ses responsabilités. Mais cette obligation volontaire ne peut en soi priver Apotex de son droit à un mandamus. Si aucune nouvelle

disposition législative n'avait été adoptée, la question des "avis juridiques" ne se serait pas posée. Elle ne peut maintenant être invoquée pour soutenir que, dès qu'il est devenu loi, c'est le Règlement sur les médicaments brevetés qui régissait le processus décisionnel en cours.

73 Je conviens avec le juge Dubé que la justification d'un avis juridique est potentiellement sans limite et pourrait presque nécessairement entraîner des allégations d'abus du pouvoir discrétionnaire ou de délai déraisonnable. Qui plus est, l'avis juridique demandé en l'espèce n'avait aucune incidence sur l'exercice du pouvoir étroitement défini du ministre. Sa pertinence transcende la principale question à laquelle doit répondre le ministre: l'Apo-Enalapril est-il une drogue sans danger? Cela ne veut pas dire qu'on peut affirmer que, une fois la réponse donnée à cette question, le ministre a agi illégalement en sollicitant un avis juridique. Toutefois, le retard inévitable découlant de la demande d'un avis juridique (par opposition au délai déraisonnable) ne peut pas porter préjudice au droit à l'exécution d'une obligation légale. Le principe directeur applicable est bien connu-l'équité considère que ce qui aurait dû être fait l'a été effectivement. De plus, refuser un mandamus en raison de considérations juridiques créées par une partie ayant des intérêts opposés (Merck) équivaut à fermer les yeux sur ce qui pourrait être considéré comme une tactique destinée à embrouiller et à retarder le processus décisionnel.

74 Compte tenu de ce qui précède, il est inutile d'examiner la conclusion du juge de première instance qui a estimé que "le retard du ministre pour délivrer l'avis de conformité d'Apotex n'était pas justifié" [à la page 181]. Comme nous n'avons pas été saisis des faits nécessaires, nous ne pouvons pas statuer sur la question de savoir si ce retard était raisonnable. À moins que le ministre ne puisse fournir un autre motif pour justifier la décision de retarder l'exécution d'une obligation par ailleurs due, l'argument de Merck doit échouer.

c) Les mesures législatives sur le point d'être mises en vigueur sont-elles pertinentes ou non pertinentes

75 Au soutien de son argument que les mesures législatives sur le point d'être mises en vigueur sont une considération pertinente quant à l'exercice du pouvoir discrétionnaire du ministre, l'avocat de Merck nous a signalé trois décisions. À mon avis, aucune ne corrobore son affirmation. J'examinerai néanmoins chaque décision et je répondrai ensuite à la question plus générale: d'un point de vue juridique, le ministre devrait-il avoir le droit de s'abstenir de délivrer l'ADC en se fondant sur les mesures législatives sur le point d'être mises en vigueur?

76 La première de ces décisions est Distribution Canada Inc. c. M.R.N., précitée. Dans cette affaire, la requérante sollicitait un mandamus afin de contraindre le ministre du Revenu national à percevoir rigoureusement les droits sur les provisions non exemptées achetées aux États-Unis. Le Ministère avait à l'époque pour politique de ne pas percevoir les droits de moins d'un dollar ou même plus lorsque d'autres facteurs, tel le volume de la circulation, l'exigeaient. Le juge de première instance a établi une distinction entre une abdication totale de ses responsabilités et des opinions conflictuelles sur la manière dont la loi devrait être appliquée, et il a conclu qu'un mandamus ne peut être accordé que dans le premier cas. En appel, la Cour a statué que le ministre doit prendre toutes les mesures raisonnables pour appliquer la législation sur les douanes; "[q]ue ces mesures soient raisonnables signifie qu'il faut prendre en considération des facteurs politiques qui échappent à la compétence des tribunaux judiciaires, puisqu'ils portent sur la manière dont la Loi doit être appliquée" (à la page 40).

77 Dans l'affaire Distribution Canada, l'exercice d'un pouvoir discrétionnaire ministériel en fonction de la politique gouvernementale n'avait pas pour principal objectif de retirer des droits acquis. La Cour a simplement conclu que le ministre possédait un pouvoir discrétionnaire dans

l'exercice duquel la loi n'interviendrait pas. Quoi qu'il en soit, on n'a pas utilisé comme il le fallait la valeur de précédent de cette décision. En effet, celle-ci est pertinente pour la question de la "balance des inconvénients" et, en conséquence, elle sera examinée plus loin.

78 La deuxième décision est Wimpey Western Ltd. and W-W-W Developments Ltd. v. Director of Standards and Approvals of the Department of the Environment, Minister of the Environment and Province of Alberta (1983), 49 A.R. 360 (C.A.)[10]. La Cour d'appel de l'Alberta devait déterminer si la perception par un ministre de la politique applicable était pertinente quant à l'exercice d'un pouvoir discrétionnaire. Le paragraphe pertinent de la Clean Water Act, R.S.A. 1980, ch. C-13, porte:

3 : . .

> [Traduction] (4) Le directeur des normes et agréments peut délivrer ou refuser de délivrer un permis, ou il peut exiger, comme condition préalable à la délivrance d'un permis aux termes du présent article, le choix d'un autre emplacement pour la station d'épuration ou la modification des plans et devis.

79 Dans l'arrêt Wimpey Western, l'intimé a refusé à l'appelante le permis de construire une station d'épuration sur un site de développement industriel parce qu'il estimait que la construction d'une telle installation devait être reportée jusqu'à ce qu'une usine d'épuration régionale soit opérationnelle. Cette justification était conforme à la politique du ministre de l'Environnement. La Cour d'appel a statué que le pouvoir discrétionnaire de l'intimé ne se limitait pas à des considérations d'ordre technique. Dans son analyse, le tribunal était unanime quant aux motifs pour lesquels la politique ministérielle était jugée pertinente (aux pages 368 et 369):

> [Traduction] L'objectif du processus de délivrance des permis prévu à l'art. 3 est de conférer au Ministère le pouvoir de contrôler ou de limiter les sources potentielles de polluants des eaux avant qu'elles n'existent. À mon avis, il est compatible avec cet objectif et avec le libellé de l'article de permettre au directeur de tenir compte d'une politique de son ministre visant à limiter le nombre des points de déversement de polluants dans un cours d'eau. Le régime de délivrance des permis serait considérablement gêné si le directeur devait se contenter d'examiner les demandes individuellement sans tenir compte des objectifs de la qualité de l'eau pour l'ensemble du système fluvial.

80 L'interprétation plutôt large des considérations pertinentes préconisée dans l'arrêt Wimpey Western doit être examinée à la lumière du large pouvoir discrétionnaire accordé au décideur. De même, les questions environnementales dans l'arrêt Wimpey Western semblent indiquer une prédisposition des tribunaux, en termes d'interprétation législative, à accorder plus d'importance à la santé publique qu'aux intérêts personnels d'un promoteur. En l'espèce, le pouvoir discrétionnaire du ministre est soigneusement défini et concerne expressément des questions de santé et d'efficacité.

81 La dernière des trois décisions citées ébranle sérieusement, à mon avis, la thèse de Merck. Dans l'arrêt Reg. v. Anderson; Ex parte Ipec-Air Pty. Ltd. (1965), 113 C.L.R. 177 (H.C. Aust.), le requérant sollicitait une ordonnance de mandamus enjoignant à l'intimé de lui permettre d'importer un avion et

de lui délivrer la licence nécessaire pour lui permettre d'effectuer le transport de fret entre diverses villes. Les dispositions législatives prévoyaient (à la page 177):

> [Traduction] L'article 199 du Règlement porte:-" . . . (2) Lorsque le service projeté est un service interétatique, le directeur général délivre un permis de transport, de transport par frètement ou de travail aérien, selon le cas, à moins que le requérant ne satisfasse pas, ou qu'il n'ait pas démontré qu'il est capable de satisfaire pendant la durée du permis, aux dispositions du présent Règlement ou de toute autre directive ou ordonnance donnée ou rendue conformément au présent Règlement, concernant la sécurité des opérations." [Non souligné dans le texte original.]

L'intimé avait rejeté les deux demandes en invoquant la politique gouvernementale opposée à l'augmentation du nombre de compagnies assurant des services aériens de fret entre les divers États.

82 Quant à la question de la délivrance d'un permis de transport par frètement, la majorité de la Haute Cour d'Australie a statué qu'il y avait lieu à mandamus, car l'intimé ne possédait pas un pouvoir discrétionnaire absolu pour décider de délivrer un tel permis. Le rejet par la Cour de la politique gouvernementale comme considération pertinente va à l'encontre de la thèse de Merck. Aux pages 187 et 188, la Haute Cour a statué ce qui suit:

> [Traduction] La preuve, et en particulier les déclarations mêmes du directeur général, indique clairement que son refus d'accorder le permis de transport par frètement n'avait rien à voir avec la question de la sécurité et que, en réalité, le plaignant a démontré à la satisfaction du directeur général qu'il était capable de satisfaire à toutes les dispositions relatives à la sécurité des opérations projetées. Je considère que la lettre de refus du directeur général reconnaît, même si cela n'était pas intentionnel, que c'est malgré et non en raison des derniers mots du par. 199(2) qu'il refusait le permis. Je pense qu'il faut admettre la vérité: le refus du permis ne reposait sur rien d'autre qu'une politique s'opposant à ce que d'autres personnes que celles qui le font déjà soient autorisées à participer à cette forme de commerce interétatique. Quelles que soient la sagesse et la légitimité de cette politique, si, interprété correctement, le Règlement permet un refus fondé sur un tel motif, j'aurais beaucoup de difficulté à ne pas conclure que l'art. 197, dans la mesure où il exige un permis de transport par frètement pour des activités de transport aérien interétatique, est nul parce qu'il est incompatible avec l'art. 92 de la Constitution. À mon avis, un tel refus est toutefois contraire à l'exigence directe du par. 199(2).
>
> J'estime qu'il s'agit d'un cas évident où il y a lieu d'accorder un bref de mandamus; et étant donné qu'il ressort de mon interprétation des faits que le directeur général a maintenant l'obligation absolue de délivrer un permis de transport par frètement, obligation que ne restreint aucun pouvoir discrétionnaire non encore exercé, j'estime que le bref devrait être rédigé de manière à exiger que cette obligation soit exécutée. [Non souligné dans le texte original.]

83 En ce qui concerne la demande d'importation d'un avion, la majorité a statué qu'un mandamus ne devait pas être accordé. Deux des trois juges ont conclu que cette question relevait du pouvoir discrétionnaire de l'intimé. Dans un jugement concordant, le troisième juge s'est dit d'avis que l'intimé avait l'obligation de tenir compte de la politique gouvernementale et de l'appliquer (aux pages 204 à 206). Je dois souligner que, pour en arriver à sa conclusion sur la première question, le juge de la minorité s'est fondé sur le fait qu'une ordonnance enjoignant à l'intimé de délivrer un permis de transport par frètement n'aurait aucun effet pratique, le requérant étant incapable d'obtenir un avion.

84 L'arrêt Anderson confirme que les décideurs possédant un pouvoir discrétionnaire absolu peuvent tenir compte de la politique gouvernementale existante. Ce qu'est la politique gouvernementale (par opposition à la politique ministérielle) est une autre question. Comme le pouvoir discrétionnaire du ministre était étroitement défini en l'espèce, il est évident que cet arrêt supporte la thèse d'Apotex plutôt que celle de Merck.

85 Enfin, la Cour doit déterminer si les mesures législatives sur le point d'être mises en vigueur peuvent constituer une considération pertinente malgré la portée limitée du pouvoir discrétionnaire du ministre. À première vue, j'estime que la loi ne devrait pas empêcher de reconnaître le droit du ministre de refuser d'exécuter une obligation à caractère public en invoquant les principes à l'origine des dispositions législatives sur le point d'être adoptées. Si on présume que le pouvoir discrétionnaire du ministre n'englobe pas des critères de sécurité et de santé, il est concevable de penser qu'un mandamus ne serait pas ou ne devrait pas être accordé lorsque, par exemple, une personne a droit à un permis l'autorisant à importer et à vendre un produit que le ministre, agissant de bonne foi, croit présenter un risque inacceptable pour la santé des Canadiens. Dans un tel cas, un tribunal pourra fort bien ajourner l'audition d'une demande de mandamus s'il peut être démontré qu'une loi modificatrice est sur le point d'entrer en vigueur. Agir ainsi serait reconnaître et appliquer le critère de la "balance des inconvénients" comme motif de refus du mandamus. Il ne s'agit donc pas de savoir si le ministre a le pouvoir de refuser d'exécuter une obligation en invoquant les modifications imminentes à la loi, mais plutôt de savoir si le tribunal veut exercer son pouvoir discrétionnaire pour accorder un mandamus compte tenu des conséquences possibles.

86 Si nous revenons aux faits dont la Cour a été saisie, j'estime que l'on ne peut pas affirmer que, en exerçant le pouvoir que lui confère le RAD, le ministre avait le droit de tenir compte des dispositions du projet de loi C-91 après qu'elles eurent été adoptées mais avant qu'elles n'aient été proclamées en vigueur. Compte tenu des faits de l'espèce, les mesures législatives sur le point d'être mises en vigueur ne constituent pas une considération pertinente qui peut être invoquée unilatéralement par le ministre.

d) De Facto-La décision n'a jamais été prise

87 Merck soutient que l'ADC n'a pas été délivré avant le 12 mars 1993 parce que le ministre n'a jamais examiné la demande d'Apotex. Comme le ministre n'a pas exercé son pouvoir discrétionnaire, le juge de première instance a commis une erreur en voulant dicter le résultat des délibérations du ministre. Merck affirme que, en l'absence d'une conclusion de mauvaise foi de la part du ministre, Apotex n'aurait pas pu acquérir un droit à l'ADC. Les deux parties invoquent au soutien de leurs arguments sur cette question les décisions judiciaires rendues après le resserrement des mesures de contrôle des armes à feu à la fin des années 1970.

88 En 1977, le Parlement a présenté diverses modifications au Code criminel [S.R.C. 1970, ch. C-34] (Loi de 1977 modifiant le droit pénal, S.C. 1976-77, ch. 53) afin de restreindre davantage l'usage et la vente des armes à feu au Canada. La Loi est entrée en vigueur le 1er janvier 1978 et des ordonnances de mandamus ont été demandées dans diverses affaires dont font état les recueils de

jurisprudence[11]. Dans chaque cas, le requérant avait présenté une demande de permis et rempli toutes les conditions préalables avant le 1er janvier.

89 Dans Martinoff c. Gossen, [1979] 1 C.F. 327 (1re inst.), le juge de première instance a conclu que, le 1er janvier, le requérant n'avait pas un droit acquis à un permis d'exploitation d'une entreprise de vente d'armes à autorisation restreinte. Le juge a fondé sa décision sur le fait que le pouvoir de l'intimé de délivrer le permis lui avait été retiré et qu'il n'y avait donc personne qui pouvait délivrer ce permis. Chose intéressante, il ne semble pas s'être laissé influencé par le fait que la demande était encore en cours au moment où la Loi est entrée en vigueur.

90 Dans Lemyre c. Trudel, [1978] 2 C.F. 453 (1re inst.); confirmée pour d'autres motifs par [1979] 2 C.F. 362 (C.A.), le requérant sollicitait un mandamus enjoignant à l'intimé de lui délivrer un certificat d'enregistrement pour une arme automatique de type Walther MPL calibre 9mm. Au moment du dépôt de la demande, cette arme était une arme à autorisation restreinte qui devait être enregistrée auprès du commissaire de la GRC. Le Code criminel modifié prohibait la possession d'une telle arme sauf si, "lors de l'entrée en vigueur du présent alinéa, [elle] était enregistrée comme arme à autorisation restreinte". La demande d'enregistrement présentée par le requérant n'avait pas encore été approuvée au 1er janvier. Au procès, le juge a statué que le requérant n'avait aucun "droit acquis à la possession de son arme, puisque cette possession, sans permis et certificat, était tout simplement prohibée" (à la page 457). Dans de brefs motifs prononcés à l'audience, la Cour d'appel a conclu que la seule façon pour le requérant d'obtenir gain de cause était d'établir que "son arme était incluse dans cette exception, c'est-à-dire qu'elle était enregistrée (non pas qu'elle aurait pu ou dû l'être) le 1er janvier 1978" (à la page 364).

91 La décision rendue dans Lemyre est fort différente de celle rendue par la Cour d'appel de la Saskatchewan dans Abell v. Commissioner of Royal Canadian Mounted Police (1979), 49 C.C.C. (2d) 193 (C.A. Sask.). Dans Abell, le requérant a réussi à obtenir l'enregistrement d'une arme de type F.A. Mark II (1944) Sten . Après avoir analysé les arrêts Ho Po Sang et Merck & Co. Inc. v. Sherman & Ulster Ltd., Attorney-General of Canada, Intervenant, précités, la Cour d'appel de la Saskatchewan a conclu que le requérant avait satisfait avant le 1er janvier 1978 aux dispositions applicables du Code criminel et que, en conséquence, il avait acquis un droit à ce que son arme soit enregistrée.

92 Un commentateur a signalé que les décisions de notre Cour "se concilient difficilement" avec l'arrêt Abell; voir P.-A. Côté, précité, à la page 165. Il ne s'agit toutefois pas de choisir entre l'affaire Lemyre et l'arrêt Abell. Suivant la règle du stare decisis, c'est le raisonnement suivi dans l'arrêt Merck & Co. Inc. v. Sherman & Ulster Ltd., Attorney-General of Canada, Intervenant, précité, qui prévaut. Cela ne signifie pas qu'une décision différente serait aujourd'hui rendue dans les affaires Lemyre ou Martinoff; il est certes permis de penser que la "balance des inconvénients" permettrait d'obtenir le même résultat.

93 En fin de compte, je dois conclure qu'Apotex avait un droit acquis à l'ADC même si le ministre n'avait pas pris une décision le 12 mars 1993.

5) La balance des inconvénients

94 Merck prétend que, si on en arrivait à la conclusion qu'Apotex a droit à un mandamus, la Cour devrait exercer son pouvoir discrétionnaire pour refuser l'ordonnance sollicitée. Elle allègue qu'un mandamus devrait être refusé lorsque cela aurait pour effet d'aller à l'encontre de modifications législatives. Merck affirme que le principe formulé dans l'arrêt Ottawa, City of v. Boyd Builders Ltd., précité, corrobore la proposition selon laquelle la Cour ne devrait pas appliquer l'ancienne loi, car le

projet de loi C-91 et le Règlement sur les médicaments brevetés étaient en vigueur au moment de l'audience.

95 Il est vrai que, dans l'arrêt Boyd Builders, la Cour suprême a reconnu la pertinence de modifications législatives imminentes pour déterminer si elle devait accorder une ordonnance de mandamus. Contrairement au juge de première instance et, avec déférence, je ne crois pas que l'on puisse écarter cet argument. Merck a invoqué ce qui a été qualifié de "motif controversé" pour lequel certains tribunaux ont été prêts à refuser un mandamus. L'arrêt Boyd Builders a été cité comme l'un des cas où les tribunaux ont utilisé ce que l'on a appelé le critère de la "balance des inconvénients" consistant à soupeser les intérêts opposés des parties pour déterminer comment doit être exercé un pouvoir discrétionnaire: voir J. M. Evans et autres, Administrative Law: Cases, Text, and Materials, 3e éd. (Toronto: Emond Montgomery, 1989), à la page 1083.

96 Malgré la forme sous laquelle le problème a été présenté au départ, trois questions distinctes se posent: 1) La Cour a-t-elle le pouvoir discrétionnaire d'invoquer le critère de la "balance des inconvénients" pour refuser un mandamus? 2) Le cas échéant, quels sont les critères de son exercice? et 3) S'agit-il d'un cas où il faut refuser le mandamus? J'examinerai chacune de ces questions.

a) L'étendue du pouvoir discrétionnaire de la Cour La balance des inconvénients

97 La jurisprudence portant sur les mandamus indique diverses techniques juridiques grâce auxquelles les tribunaux ont, à l'occasion, pondéré des intérêts opposés. Par exemple, appelé à déterminer la pertinence ou la non pertinence de considérations influençant le décideur, un tribunal peut accorder une interprétation large ou étroite au pouvoir discrétionnaire conféré par des dispositions législatives apparemment claires. C'est également vrai pour des dispositions qui visent à empiéter sur des droits acquis. En fait, on peut constater qu'une analyse des droits acquis repose sur des considérations générales implicites dans les motifs formels de jugement. Le professeur Côté offre une analyse pénétrante de ce processus dans son ouvrage intitulé Interprétation des lois, précité, à la page 157:

> On peut croire que le juge qui décide de reconnaître ou de ne pas reconnaître des droits acquis procède, le plus souvent sans le dire, à une appréciation comparative des coûts individuels et sociaux de sa décision. Plus grands sont les coûts individuels et plus grave le préjudice causé à l'individu par l'application immédiate de la loi, plus grandes sont les chances que des droits acquis soient reconnus. Par contre, si le coût individuel est jugé réduit (par exemple, lorsque la loi nouvelle ne prescrit qu'une règle de procédure), il est plus probable que la loi nouvelle soit appliquée immédiatement. D'autre part, si les inconvénients sociaux d'une application différée de la loi nouvelle sont perçus comme étant très lourds (par exemple, si cela met en cause la santé et la sécurité publiques), il est probable que le juge hésitera à admettre des droits acquis. Au contraire, si la survie du droit ancien ne paraît pas menacer indûment l'intérêt social, il sera plus facile au juge d'admettre les droits acquis.

98 Le pouvoir discrétionnaire de la Cour doit être exercé avec discernement. Un auteur fait valoir qu'étant donné que le pouvoir discrétionnaire de la Cour peut, en raison de son étendue, porter atteinte à la primauté du droit, il doit être exercé avec la plus grande prudence: voir Sir W. Wade, Administrative Law, 6e éd. (Oxford: Clarendon, 1988), à la page 709. Tout en présumant qu'il n'y a pas lieu à un mandamus de plein droit, un autre auteur a fait remarquer que la Cour n'a pas le pouvoir

discrétionnaire de refuser un tel bref lorsqu'il s'agit du seul moyen d'obtenir l'exécution d'une obligation ministérielle: voir S. A. de Smith, Judicial Review of Administrative Action, 4e éd., J. M. Evans (London: Stevens, 1980), à la page 558.

99 Merck a demandé à la Cour de refuser d'intervenir dans l'exercice du pouvoir discrétionnaire du ministre même si son défaut d'exécuter une obligation légale a été jugé injustifié, rendant en fait légal ce qui avait été considéré illégal. C'est peut-être conscient de ces considérations que le juge Dubé a laissé entendre que l'arrêt Boyd Builders empêchait la Cour d'exercer son pouvoir discrétionnaire pour rejeter le mandamus (à la page 181). Certes, l'introduction de la variable "balance des inconvénients" dans le problème du mandamus pose inévitablement la question de savoir s'il existe des limites aux considérations en vertu desquelles un tribunal peut exercer son pouvoir discrétionnaire.

100 Malgré des préoccupations évidentes, les recueils de jurisprudence font état de divers précédents qui, dans l'ensemble, peuvent nous amener à conclure que les tribunaux n'ont fait que reconnaître officiellement un autre principe directeur des règles de droit applicables au mandamusv[12]. Dans l'affaire Distribution Canada Inc. c. M.R.N., précitée et examinée plus haut, il était possible d'alléguer que la Cour avait effectivement pondéré les avantages de l'exécution forcée d'une obligation et les intérêts des personnes chargées de la mise en application de cette obligation ainsi que ceux du public. Il est permis de penser qu'une technique analogue de pondération a été adoptée dans les décisions relatives au contrôle des armes à feu.

101 Par ailleurs, le critère de la "balance des inconvénients" a été réellement reconnu dans l'affaire Re Central Canada Potash Co. Ltd. et al. and Minister of Mineral Resources for Saskatchewan (1972), 30 D.L.R. (3d) 480 (B.R. Sask.); conf. par (1973), 32 D.L.R. (3d) 107 (C.A. Sask.); pourvoi à la Cour suprême rejeté (1973), 38 D.L.R. (3d) 317. Dans cette affaire, le pouvoir discrétionnaire du ministre était absolu et le mandamus aurait pu être rejeté pour cet unique motif. Toutefois, tant le tribunal de première instance que la Cour d'appel ont reconnu un autre motif de refuser le mandamus: une telle ordonnance [Traduction] "entraînerait la confusion et le désordre dans l'industrie de la potasse". En Cour d'appel, le juge en chef Culliton a dit ce qui suit (à la page 115):

> [Traduction] Le juge en chambre a également statué que, même s'il y avait lieu à mandamus, il ne l'accorderait néanmoins pas dans l'exercice de son pouvoir discrétionnaire. Il est indubitable que le mandamus est avant tout un redressement assujetti à l'exercice d'un pouvoir discrétionnaire. Même s'il serait difficile d'énumérer avec précision tous les motifs pour lesquels il serait justifié pour un juge de refuser le bref dans l'exercice de son pouvoir discrétionnaire, ces motifs sont en fait nombreux et généraux. Il ne fait aucun doute que le juge en chambre a considéré que la délivrance d'un mandamus en l'espèce entraînerait la confusion et le désordre dans l'industrie de la potasse. La légitimité de cette conclusion ressort du fait que tous les autres producteurs de potasse se sont opposés à la demande de mandamus. À mon avis, un tel motif justifierait l'exercice du pouvoir discrétionnaire du juge en chambre.

102 D'autres tribunaux ont présumé qu'ils conservent un pouvoir discrétionnaire inhérent de refuser un redressement obligatoire dans certaines circonstances. Dans l'arrêt Fitzgerald v. Muldoon, [1976] 2 N.Z.L.R. 615 (C.S.), le premier ministre de la Nouvelle-Zélande, qui venait tout juste d'être élu, a annoncé l'abolition d'un régime de retraite comme il l'avait promis lors de la campagne électorale. Après cette annonce, le conseil, ayant obtenu l'assurance du premier ministre qu'une loi abrogative serait bientôt adoptée, a cessé d'exiger les paiements prévus dans les dispositions législatives

applicables aux pensions. Même si la Cour a rendu un jugement déclaratoire portant que les mesures prises par le premier ministre étaient illégales, elle a refusé d'accorder une injonction obligeant le conseil à percevoir les cotisations requises. Elle a plutôt ajourné l'affaire pour une période de six mois afin de voir si le gouvernement remplirait sa promesse d'abroger le régime de retraite.

103 Par ailleurs, l'arrêt Fitzgerald supporte officiellement le principe suivant lequel le pouvoir exécutif du gouvernement n'est nullement habilité à suspendre l'application d'une loi. Pour citer le juge Marceau, J.C.A., dans l'arrêt Conseil de la tribu Carrier-Sekani c. Canada (Ministre de l'Environnement), [1992] 3 C.F. 316 (C.A.), à la page 347: "Il est évident que la volonté du Parlement est souveraine et qu'aucun pouvoir administratif ou exécutif ne peut y contrevenir, directement ou indirectement". Cependant, en ajournant l'audience de mandamus, la Cour a en réalité suspendu l'application de la loi.

104 Dans l'arrêt Fitzgerald, le juge de première instance était manifestement motivé par les conséquences pratiques de l'octroi de l'ordonnance. Même si le régime de retraite avait été immédiatement remis en vigueur, il aurait fallu six semaines avant qu'il ne recommence à fonctionner tandis que le recouvrement des arriérés de cotisations aurait pris beaucoup plus de temps. Le juge de première instance a conclu (à la page 623):

> [Traduction] [I]l serait tout à fait injustifié d'exiger la remise en application des mécanismes de la New Zealand Superannuation Act 1974 lorsqu'il y a de fortes chances qu'il soit nécessaire de tout annuler encore une fois dans quelques mois.

105 Il convient de signaler que la preuve dont avait été saisi le juge de première instance lui permettait de croire que le Parlement était en position d'adopter une telle loi dans le délai envisagé lors de l'ajournement.

106 Compte tenu de la jurisprudence citée ci-dessus, je conclus que la Cour a le pouvoir discrétionnaire de refuser un mandamus en se fondant sur la "balance des inconvénients". La tâche la plus difficile consiste à déterminer les critères applicables pour décider s'il y a lieu d'exercer ce pouvoir.

b) Les critères de l'exercice du pouvoir discrétionnaire

107 La jurisprudence indique trois catégories de cas où le critère de la balance des inconvénients a été implicitement reconnu. Il s'agit tout d'abord des cas où le chaos ou les coûts administratifs qui résulteraient de l'octroi de l'ordonnance sont évidents et inacceptables; voir les arrêts Distribution Canada Inc. c. M.R.N., précité; Re Central Canada Potash Co. Ltd. et al. and Minister of Mineral Resources for Saskatchewan, précité; et Fitzgerald v. Muldoon, précité. Il convient de signaler que, dans la plupart de ces affaires, il s'agissait d'une obligation envers le public en général plutôt qu'une obligation envers le particulier requérant. C'est en ce sens que l'on peut dire que les règles de droit applicables au mandamus et celles applicables à la qualité pour agir se recoupent. Le juge Desjardins, J.C.A., a implicitement reconnu ces liens dans l'arrêt Distribution Canada c. M.R.N., précité, à la page 39:

> Pour ma part, j'incline à penser qu'avec l'addition du précédent Finlay, la jurisprudence n'exclut pas clairement la possibilité d'étendre la qualité pour agir au recours en mandamus lorsque l'intérêt général est en jeu et qu'il n'existe aucun autre moyen raisonnable d'en saisir la cour.

Quant à la question de savoir si le critère de la "balance des inconvénients" peut être utilisé pour assouplir davantage les conditions de la qualité pour agir, je l'examinerai une autre fois.

108 Le deuxième motif de refuser un mandamus, quoique plus hypothétique, semble exister dans les cas où l'on considère que les risques possibles pour la santé et la sécurité publiques sont plus importants que le droit d'un individu de protéger ses intérêts personnels ou économiques; voir les arrêts Martinoff c. Gossen, précité; Lemyre c. Trudel, précité; et Wimpey Western Ltd. and W-W-W Developments Ltd. v. Director of Standards and Approvals of the Department of the Environment Minister of the Environment and Province of Alberta, précité.

109 En l'espèce, il n'est nullement question qu'une ordonnance de mandamus entraîne un chaos administratif. Il est vrai qu'une telle ordonnance pourrait fort bien avoir pour effet d'encourager d'autres fabricants de produits génériques qui ont déposé une PDN avant l'entrée en vigueur du projet de loi C-91 et du Règlement sur les médicaments brevetés à solliciter un mandamus. Toutefois, étant donné que seuls les fabricants qui satisfont aux exigences habituelles du mandamus auront gain de cause, il ne s'agit pas d'un cas où les arguments en faveur de l'efficacité administrative sont particulièrement convaincants. En outre, comme l'Apo-Enalapril respecte les normes d'innocuité et d'efficacité du RAD, la question de la sécurité et de la santé publiques ne se pose pas. Il ne nous reste que la tendance jurisprudentielle représentée par l'arrêt Boyd Builders.

c) L'arrêt Boyd Builders

110 Merck soutient que le principe établi dans l'arrêt Boyd Builders permet à la Cour d'exercer son pouvoir discrétionnaire pour refuser un mandamus étant donné que, dans cet arrêt, la Cour a ajourné une audience de mandamus pour permettre la mise en place d'un nouveau régime réglementaire. À mon avis, ce principe est mal interprété. En fait, même l'interprétation que lui donne Merck ne fait pas avancer sa cause.

111 Boyd Builders avait présenté une demande de permis de construire à un moment où le règlement de zonage existant aurait permis le lotissement projeté. La nouvelle du projet a entraîné une réaction négative du public à laquelle la ville a répondu en entamant l'adoption d'un règlement municipal modificateur pour contrecarrer le projet du promoteur. Avant l'arrêt Boyd Builders, le conseil municipal pouvait faire échec à une demande de permis de construire en adoptant un règlement modificateur en tout temps avant la délivrance du permis; voir Toronto Corporation v. Roman Catholic Separate Schools Trustees, [1926] A.C. 81 (C.P.). Après le dépôt d'une demande de mandamus, la ville d'Ottawa a demandé un ajournement jusqu'à ce que la Commission des affaires municipales de l'Ontario ait eu l'occasion d'approuver ou de rejeter le règlement modificateur. La Cour suprême a formulé un triple critère pour déterminer s'il y avait lieu d'accorder l'ajournement: 1) la municipalité doit démontrer qu'elle avait, avant même que la demande de permis ne soit présentée, l'intention de rezoner le terrain; 2) la municipalité doit avoir agi de bonne foi, et 3) la municipalité doit avoir agi avec célérité pour obtenir l'adoption et l'approbation du règlement municipal modificateur.

112 Il est désormais bien établi que le droit prima facie d'un propriétaire foncier d'utiliser son terrain conformément aux règlements de zonage existants ne doit pas être entravé à moins que l'on ne démontre qu'il existait, avant le dépôt de la demande de permis, une intention de rezoner le terrain. Évidemment, l'application stricte du principe formulé dans l'arrêt Boyd Builders n'aide pas la cause de Merck. Apotex a déposé sa demande d'avis de conformité plus de deux ans avant que le Parlement n'indique son intention de présenter une loi modificatrice. Cet argument mis à part, je suis d'avis que la Cour suprême n'invitait pas les tribunaux à se mêler des affrontements politiques quotidiens qui

accompagnent les décisions relatives à la planification de l'utilisation des sols en pondérant ce qu'on appelle les "droits en equity": elle tentait simplement d'établir un principe permettant de déterminer si un propriétaire foncier avait acquis un droit à un permis de construire en attendant l'approbation d'un règlement modificateur.

113 Suivant l'état actuel du droit municipal, s'il est impossible de démontrer une intention préalable de procéder à un nouveau zonage, le propriétaire foncier peut alors revendiquer un droit acquis à un permis de construire. Ce principe ne peut pas être invoqué pour fonder l'exercice par la Cour de son pouvoir discrétionnaire de délivrer un mandamus en pondérant des intérêts opposés. Il faut reconnaître que certains allèguent que les tribunaux devraient jouer un plus grand rôle dans "la pondération des droits en equity", même en matière du droit de l'urbanisme (voir Makuch, Canadian Municipal and Planning Law, (Toronto: Carswell, 1983), aux pages 251 à 261), et il est indubitable que les recueils de jurisprudence font état des décisions où les tribunaux ont voulu se mêler de la question de l'utilisation des sols; p. ex., Re Hall and City of Toronto et al. (1979), 23 O.R. (2d) 86 (C.A.). Mais, à mon avis, cela n'ébranle pas l'application de l'arrêt Boyd Builders.

114 En fait, le critère de la balance des inconvénients autorise la Cour à utiliser son pouvoir discrétionnaire pour remplacer la règle des considérations pertinentes ainsi que la doctrine des droits acquis. Ce critère ne devrait donc être utilisé que dans les cas les plus évidents et il ne faudrait pas le considérer comme une panacée permettant de combler les lacunes des textes législatifs. À moins que les tribunaux ne soient prêts à se laisser entraîner dans le domaine réservé aux élus, toute tentative de s'engager dans la pondération des intérêts doit s'effectuer dans un respect rigoureux des règles de droit.

115 L'argument suivant lequel les coûts sociaux ou économiques sont plus importants que les droits d'Apotex ne fait que jeter la confusion sur ce qui n'est essentiellement qu'une question de droit privé. Enfin, je conclus que le principe formulé dans l'arrêt Boyd Builders n'est pas pertinent pour l'espèce, ni pour la question du pouvoir discrétionnaire de la Cour de refuser un mandamus en se fondant sur la "balance des inconvénients". En conséquence, il n'y a juridiquement parlant aucune raison d'appliquer le critère de la "balance des inconvénients" pour refuser à Apotex l'ordonnance qu'elle sollicite. Examinons maintenant si le projet de loi C-91 et le Règlement sur les médicaments brevetés ont dépouillé Apotex de son droit acquis à un ADC.

6) Loi rétroactive ou rétrospective

116 Merck a soutenu que, si Apotex avait acquis un droit avant le 12 mars 1993, ce droit lui a été retiré par les paragraphes 5(1) et (2) du Règlement sur les médicaments brevetés:

> 5. (1) Lorsqu'une personne dépose ou, avant la date d'entrée en vigueur du présent règlement, a déposé une demande d'avis de conformité à l'égard d'une drogue et souhaite comparer cette drogue à une drogue qui a été commercialisée au Canada aux termes d'un avis de conformité délivré à la première personne et à l'égard duquel une liste de brevets a été soumise ou qu'elle souhaite faire un renvoi à la drogue citée en second lieu, elle doit indiquer sur sa demande, à l'égard de chaque brevet énuméré dans la liste:
>
> . . .
>
> (2) Lorsque, après le dépôt par la seconde personne d'une demande d'avis de conformité mais avant la délivrance de cet avis, une liste de brevets

> est soumise ou modifiée aux termes du paragraphe 4(5) à l'égard d'un brevet, la seconde personne doit modifier la demande pour y inclure, à l'égard de ce brevet, la déclaration ou l'allégation exigée par le paragraphe (1). [Non souligné dans le texte original.]

117 Laissant de côté la question de l'effet de la "balance des inconvénients" sur une loi rétrospective, Merck avance trois arguments distincts.

118 Le premier argument de Merck est un argument de principe. Elle soutient qu'Apotex s'est créée un créneau juridique en obtenant un ADC malgré les dispositions législatives actuelles. Merck prétend aussi qu'Apotex tente en réalité d'obtenir l'aide de la Cour pour faciliter la contrefaçon d'un brevet. (L'illégalité n'a pas été invoquée comme fin de non-recevoir en equity à l'octroi de la réparation sollicitée.) Les paragraphes pertinents de l'exposé de Merck portent (exposé des faits et du droit des appelantes, paragraphes 87 à 89):

> [Traduction] 87. Les tribunaux n'ont pas oublié de tenir compte des droits découlant d'un brevet lorsqu'ils examinaient les ADC, même en fonction de l'ancienne loi. Les ADC et les droits de brevet n'ont jamais fait partie de domaines juridiques isolés et non liés. Lorsque l'ancienne loi s'appliquait, les tribunaux ont constamment souligné que c'était la licence obligatoire qui avait une incidence sur les droits des titulaires de brevets et que l'ADC ne faisait que permettre à la société pharmaceutique de produits génériques d'exercer ses droits en vertu de la licence obligatoire. La Cour est clairement en présence d'un cas où le Parlement a établi un lien entre les ADC et la protection des droits découlant d'un brevet, et où on sollicite son aide pour faciliter la contrefaçon d'un brevet.
>
> . . .
>
> 88. Ni le ministre (ni la Cour) ne devrait fermer les yeux sur le fait que, depuis le 4 février 1993, les dispositions relatives aux "licences obligatoires" ont été abrogées et qu'il a été directement et expressément question des "droits de propriété" des titulaires de brevet comme Merck dans le projet de loi C-91 et dans le Règlement sur les médicaments brevetés (avis de conformité). Le Parlement pouvait difficilement indiquer plus clairement le mal qu'il voulait corriger dans ces textes législatifs.
>
> 89. Apotex cherche à se créer un créneau juridique entre l'ancien régime légal (lorsque les droits découlant d'un brevet étaient examinés en fonction des dispositions relatives aux licences obligatoires) et le régime actuel (où la délivrance d'un ADC est liée à la protection du brevet). Le président et directeur général d'Apotex, Bernard Sherman, a déclaré à maintes reprises dans son témoignage qu'il a l'intention de vendre l'énalapril partout au Canada dès que possible, sans égard au fait que le brevet de Merck n'expirera pas avant le 16 octobre 2007.

119 Bien que les ADC et les droits découlant d'un brevet soient liés, ils n'ont jamais dépendu mutuellement les uns les autres. L'un des objectifs du régime d'octroi de licences obligatoires était d'éviter les litiges longs et coûteux relativement à la contrefaçon possible d'un brevet à la condition que la société de produits génériques accepte de verser des redevances. Cependant, cela ne nous

amène pas inévitablement à conclure que tous les produits génériques contrefont des brevets. À mon avis, tout ce que l'on peut dire est que l'Apo-Enalapril est une drogue "sans danger". Refuser le mandamus en se fondant sur l'argument invoqué par Merck équivaudrait essentiellement à préjuger de la question du brevet.

120 En fait, Merck tente d'obtenir une injonction interlocutoire contre Apotex relativement à la contrefaçon possible d'un brevet sans avoir à remplir les conditions légales préalables pour l'octroi d'une telle réparation. (L'interprétation qui sera accordée à l'article 6 du Règlement sur les médicaments brevetés est une toute autre question.) Dans les circonstances, on ne peut raisonnablement considérer qu'une ordonnance de mandamus est un moyen qui "facilite" la contrefaçon du brevet. La Cour ne devrait pas refermer le créneau juridique en ne tenant pas compte du fait que le Parlement avait à sa disposition un moyen législatif efficace pour retirer à Apotex ce que la loi considère comme un droit acquis. Elle ne devrait pas non plus fermer les yeux sur l'existence des recours juridiques habituels permettant de contrecarrer la contrefaçon d'un brevet.

121 Le deuxième argument de Merck repose sur l'hypothèse que le Règlement sur les médicaments brevetés est de nature "procédurale". Certes, si c'est le cas, il est alors évident que c'est le nouveau régime légal qui s'appliquerait à la PDN d'Apotex; voir Howard Smith Paper Mills Ltd. et al. v. The Queen, [1957] R.C.S 403, le juge Cartwright, aux pages 419 et 420, citant et endossant lord Blackburn dans l'arrêt Gardner v. Lucas (1878), 3 App. Cas. 582 (H.L.), à la page 603. Toutefois, nous devons décider [Traduction] "non seulement si le texte touche la procédure, mais aussi s'il ne touche que la procédure, sans toucher les droits fondamentaux des parties": DeRoussy v. Nesbitt (1920), 53 D.L.R. 514 (C.A. Alb.), à la page 516, le juge en chef Harvey, cité et endossé dans Angus c. Sun Alliance compagnie d'assurance, [1988] 2 R.C.S. 256, à la page 265, le juge La Forest.

122 En l'espèce, il ne s'agit pas d'un règlement touchant en soi la procédure. La fixation d'un critère voulant qu'un ADC ne peut être délivré relativement à une PDN liée à un brevet constitue manifestement un changement de fond dans la loi et elle est donc assujettie aux règles d'interprétation législative applicables aux lois visant à modifier des droits acquis.

123 Le troisième argument de Merck est que la portée projetée du paragraphe 5(1) est claire. Si cette hypothèse est valide, il en résulte nécessairement qu'il n'y a pas lieu d'invoquer les principes d'interprétation législative conçus pour aider à l'interprétation des textes législatifs ambigus. Merck cherche à éviter l'application de la présomption de la non-rétroactivité des lois et de la présomption relative à la non-interférence dans les droits acquis qui "s'appliqu[ent] seulement lorsque la loi est d'une quelconque façon ambiguë et logiquement susceptible de deux interprétations"; Gustavson Drilling (1964) Ltd. c. Le ministre du Revenu national, [1977] 1 R.C.S. 271, à la page 282, le juge Dickson (tel était alors son titre). À mon avis, les paragraphes 5(1) et (2) n'ont pas manifestement pour objet de dépouiller des personnes de leurs droits acquis. Ils sont au mieux ambigus.

124 À ce stade, deux méthodes s'offrent pour trancher le présent litige. La première demande une analyse approfondie des règles de droit applicables à la rétroactivité. Il est essentiel pour cette analyse de faire une distinction entre le principe de la non-rétroactivité des lois et celui de la non-interférence dans les droits acquis. Il est désormais bien établi qu'un texte législatif qui produit son effet dans l'avenir mais qui, en même temps, empiète sur des droits acquis ou y porte atteinte n'est pas nécessairement rétroactif. Ces distinctions ont été examinées dans trois arrêts de la Cour suprême[13]: Gustavson Drilling (1964) Ltd. c. Le ministre du Revenu national, précité; Procureur général du Québec c. Tribunal de l'expropriation et autres, [1986] 1 R.C.S. 732; et Venne c. Québec (Commission de protection du territoire agricole), [1989] 1 R.C.S. 880 (voir aussi Lorac Transport Ltd. c. Atra (Le), [1987] 1 C.F. 108 (C.A.), le juge Hugessen, à la page 117). La seconde méthode est

beaucoup plus simple et conforte mon opinion que, compte tenu des circonstances de l'espèce, les deux présomptions s'appliquent et que le Parlement n'avait pas l'intention que les paragraphes 5(1) et (2) du Règlement sur les médicaments brevetés empiètent sur des droits acquis.

125 À titre d'exemple, supposons que le paragraphe 5(1) s'applique expressément à tous les ADC "en cours de traitement", y compris à ceux sur lesquels les requérantes ont un droit acquis. Nul ne peut contester que le Parlement a le pouvoir d'adopter une loi rétroactive, dépouillant ainsi des personnes d'un droit acquis. Il est également clair, toutefois, que le Règlement sur les médicaments brevetés ne peut retirer des droits acquis à moins que les dispositions législatives habilitantes, c'est-à-dire la Loi sur les brevets ou le projet de loi C-91, autorisent implicitement ou explicitement de tels empiètements; voir Côté, précité, à la page 145. La Cour suprême a fait sienne cette méthode d'interprétation des textes réglementaires dans l'arrêt P.G. de la Colombie-Britannique et autre c. Parklane Private Hospital Ltd., [1975] 2 R.C.S. 47, à la page 60, le juge Dickson (tel était alors son titre):

> Si le décret 4400 est intra vires, il pourrait servir à éteindre rétroactivement l'entière réclamation de Parklane, mais à mon avis il ne peut avoir cet effet-là. Le lieutenant-gouverneur en conseil a le pouvoir de faire des règlements aux fins de mettre à effet les dispositions contenues dans la loi, mais rien qui soit expressément ou par implication nécessaire contenu dans la loi n'autorise de porter rétroactivement atteinte par règlement à des droits et obligations existants. [Non souligné dans le texte original.]

126 C'est une chose que d'essayer dans une disposition d'une loi du Parlement de porter atteinte à des droits acquis et c'en est une autre que de tenter de faire de même dans un paragraphe d'un règlement. Sauf une exception, je ne peux trouver dans le projet de loi C-91 de dispositions permettant expressément que des règlements portent atteinte à des droits acquis ou existants. Certes, le paragraphe 55.2(4) de la Loi sur les brevets, la disposition permettant de prendre des règlements, ne permet ni expressément ni implicitement que des règlements rétroactifs soient pris. Cela explique pourquoi le rédacteur législatif n'a pas formulé le paragraphe 5(1) du Règlement sur les médicaments brevetés de manière à englober toutes les PDN "en cours de traitement" en mentionnant expressément celles sur lesquelles le requérant avait obtenu un droit acquis. Selon moi, le rédacteur savait qu'un tel libellé outrepasserait les pouvoirs du gouverneur en conseil.

127 Par contre, le paragraphe 12(1) du projet de loi C-91 éteint expressément toutes les licences obligatoires accordées après le 20 décembre 1991. Tout comme le juge de première instance, je suis amené à conclure que le Parlement pourrait avoir fait la même chose pour les PDN "en cours de traitement". Une interprétation fondée sur l'objet du paragraphe 5(1) du Règlement sur les médicaments brevetés ainsi qu'une appréciation de la règle ejusdem generis d'interprétation législative indiquent que ce paragraphe ne s'applique qu'aux PDN qui n'en étaient pas encore au stade où le pouvoir discrétionnaire du ministre avait été épuisé le 12 mars 1993.

7) La compétence de la Cour

128 La dernière question qui se pose est celle de savoir si la disposition attributive de prépondérance figurant dans le projet de loi C-91 a supprimé le pouvoir de la Cour de faire droit à un contrôle judiciaire. Le paragraphe 55.2(5) [de la Loi sur les brevets] porte:

268

55.2 . . .

(5) Une disposition supplémentaire prise sous le régime du présent article prévaut sur toute disposition législative ou réglementaire fédérale divergente. [Non souligné dans le texte original.]

129 Merck a expliqué brièvement son nouvel argument dans son exposé (aux paragraphes 91 à 95 inclusivement):

[Traduction] 91. Comme nous l'avons examiné plus haut, le Règlement sur les médicaments brevetés (avis de conformité) s'applique expressément aux demandes d'ADC pendantes devant le ministre le 12 mars 1993.

92. Dès le 12 mars 1993, le Parlement avait mis en place une nouvelle procédure régissant les litiges relatifs à la délivrance ou à la non-délivrance des ADC. Cette nouvelle procédure est prévue aux articles 6 et 8 du Règlement sur les médicaments brevetés (avis de conformité).

93. La Loi sur la Cour fédérale tire son fondement constitutionnel de l'art. 101 de la Loi constitutionnelle de 1867 qui vise à assurer "la meilleure administration des lois du Canada".

94. L'interdiction à l'art. 7 du Règlement de délivrer un ADC tant que la procédure prévue aux art. 6 et 8 dudit Règlement n'aura pas été suivie est tout autant "une loi du Canada" que l'art. 18 de la Loi sur la Cour fédérale. En fait, et ce qui est plus important, le Parlement a déclaré au par. 55.2(5) du Règlement [sic] que l'interdiction prévue dans le Règlement prévaut sur l'art. 18 de la Loi sur la Cour fédérale et sur toute autre loi fédérale.

95. En conséquence, lorsque la présente affaire a été entendue le 21 juin 1993, la Cour n'était pas plus habilitée à accorder un mandamus obligeant le ministre à délivrer un ADC que le ministre n'avait le pouvoir de délivrer un ADC et ce, en raison de l'interdiction figurant à l'art. 7 du Règlement.

130 Je ne vois pas comment on peut affirmer que le paragraphe 55.2(5) ou tout autre règlement pris en vertu de cet article prévaut sur l'article 18 de la Loi sur la Cour fédérale [L.R.C. (1985), ch. F-7 (mod. par L.C. 1990, ch-8, art. 4)]: voir en général l'arrêt Friends of the Oldman River Society c. Canada (Ministre des Transports), précité, le juge La Forest, aux pages 38 et 39. Dois-je présumer que la Cour suprême du Canada, étant un tribunal créé par la loi, n'a pas non plus compétence en l'espèce? La réponse à cet argument est évidente. Il n'y a pas de question de prépondérance. On nous a demandé de déterminer si le Règlement sur les médicaments brevetés s'applique. Le paragraphe 55.2(5) ne peut pas être interprété comme une clause privative protégeant le ministre et les dispositions législatives pertinentes contre un contrôle judiciaire. Cet argument est dénué de fondement.

CONCLUSION

131 L'appel et l'appel incident devraient être rejetés avec dépens.

132 Le juge Mahoney, J.C.A.:-- Je soucris à ces motifs.

133 Le juge McDonald, J.C.A.:-- Je souscris à ces motifs.

1 Le 5 janvier 1993, Apotex a tenté en vain d'obtenir que la Cour fédérale du Canada interdise au Parlement d'adopter le projet de loi.

2 Le 20 septembre 1991, Merck a poursuivi Apotex parce que cette dernière exportait de l'énalapril aux États-Unis et dans les Caraïbes. Cette action en contrefaçon de brevet est encore pendante.

3 En appel, Apotex a invité la Cour à conclure du refus du ministre de communiquer le contenu de ces avis qu'ils corroboraient sa position juridique. Je souhaite seulement signaler que je peux imaginer de nombreuses raisons valables pour lesquelles le ministre ne souhaite peut-être pas qu'un avis juridique soit communiqué, que celui-ci soit favorable ou défavorable aux parties au litige.

4 Je pense qu'il est important de signaler que, lorsque l'avocat du ministre a demandé l'ajournement, il ignorait que le Règlement sur les médicaments brevetés entrerait en vigueur le 12 mars 1993. Personne n'a laissé entendre le contraire, pas même l'avocat d'Apotex.

5 Je sais toutefois qu'Apotex a fait allusion à cette question; voir l'exposé de l'appel incident d'Apotex, p. 6, sous-alinéas 8c)(vi) et (vii).

6 Habituellement, la règle est qu'un mandamus ne peut être accordé relativement à une obligation envers la Couronne. Historiquement, on a considéré que cette question concernait la qualité pour présenter une demande de mandamus. Au fil des ans, la Cour suprême a considérablement assoupli les conditions de la qualité pour agir; voir les arrêts Thorson c. Procureur général du Canada et autres, [1975] 1 R.C.S. 138; Nova Scotia Board of Censors c. McNeil, [1976] 2 R.C.S. 265; Ministre de la Justice du Canada et autre c. Borowski, [1981] 2 R.C.S. 575; Finlay c. Canada (Ministre des Finances), [1986] 2 R.C.S. 607. Pour un examen de l'application de ces arrêts aux procédures de mandamus, voir l'arrêt Distribution Canada Inc. c. M.R.N., précité, le juge Desjardins, J.C.A., aux p. 38 et 39.

7 Ces alinéas de la Loi d'interprétation ont une portée plus étroite que les principes de common law qu'elle reconnaît: voir P.-A. Côté, Interprétation des lois, 2e éd. (Montréal: Yvon Blais, 1990), à la page 85.

8 Merck a contesté énergiquement l'application au présent appel des art. 43c) et 44c) de la Loi d'interprétation. Elle a soutenu que, étant donné que le Règlement sur les médicaments brevetés est un texte législatif plutôt qu'une abrogation, les dispositions de la Loi d'interprétation qui sont censées concerner l'abrogation ne sont pas pertinentes. À mon avis, la modification d'une loi par l'ajout d'un critère équivaut à l'abrogation et au remplacement des critères antérieurs. L'art. 10 de la Loi d'interprétation indique que le fond l'emporte sur la forme.

9 On peut alléguer que l'arrêt Pfizer ébranle la qualité de Merck pour demander une ordonnance de prohibition. Dans cet arrêt, Pfizer, société pharmaceutique innovatrice, a cherché à faire annuler par la Cour la décision du ministre de délivrer un ADC à Apotex pour la drogue Piroxicam. Apotex a réussi à faire infirmer la demande parce que, notamment, Pfizer n'était pas

directement visée par la décision du ministre. Parallèlement, dans l'affaire Glaxo Canada, précitée, la demande présentée par Glaxo afin d'obtenir une injonction interlocutoire interdisant au ministre de délivrer à Apotex un ADC pour la drogue Ranitidine a été rejetée pour défaut de qualité. Il en résulte qu'une personne ne peut faire indirectement ce qu'elle ne peut pas faire directement. En l'espèce, la question de la qualité a peut-être fait l'objet de l'une des nombreuses demandes qui ont précédé l'appel. Compte tenu des circonstances, je présume que Merck a la qualité requise.

10 Voir aussi le commentaire d'arrêt de Peter P. Mercer, aux p. 248 à 251 [de (1983), 3 Admin. L.R. 248].

11 Le seul autre cas dont je suis au courant est Haines v. Attorney General of Canada (1979), 32 N.S.R. (2d) 271 (C.A.). Les faits de cet arrêt sont trop particuliers pour être utilisés dans le présent appel.

12 Suivant le droit anglais, il ne peut y avoir lieu à mandamus lorsque celui-ci entraînerait le chaos administratif et des problèmes d'ordre public, malgré des précédents contradictoires sur ce point (voir Halsbury's Laws of England, 4e éd., nouvelle édition, Vol. 1(1): Administrative Law, par. 130, et les décisions contradictoires regroupées à la note 12).

13 Notre Cour avait déjà fait cette distinction; voir Northern & Central Gas Corp. c. L'Office national de l'énergie, [1971] C.F. 149 (1re inst.); Le ministre du Revenu national c. Gustavson Drilling (1964) Ltd., [1972] C.F. 92 (1re inst.); et Zong c. Le commissaire des pénitenciers, [1976] 1 C.F. 657 (C.A.).

TAB 2

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Case Name:

Ermineskin Indian Band and Nation v. Canada

Between
Ermineskin Indian Band and Nation, Plaintiff, and
Her Majesty the Queen, Defendant

[2008] F.C.J. No. 1335

2008 FC 1065

88 Admin. L.R. (4th) 23

2008 CarswellNat 3384

170 A.C.W.S. (3d) 222

[2009] 1 C.N.L.R. 18

Docket T-1763-07

Federal Court
Calgary, Alberta

Phelan J.

Heard: June 24, 2008.
Judgment: September 23, 2008.

(39 paras.)

Aboriginal law -- Treaties and agreements -- Treaties -- Treaty moneys and annuities -- Practice and procedure -- Appeals and judicial review -- Application by aboriginal band for order of mandamus compelling Minister to pay moneys withheld dismissed -- $2.1 million distribution of capital moneys withheld by Minister on basis further substantiation of purposes for use -- Minister had obligation to ensure moneys properly expended -- Applicant did not establish Minister had been unfair, oppressive or acted in bad faith -- Applicant had not made out case for mandamus since moneys had already been paid into account and Minister simply withholding distribution until substantiation provided.

Application by the aboriginal band for an order of mandamus compelling the Minister to release $2.1 million in capital moneys withheld. The applicant was a party to the Pigeon Lake Split, a treaty that provided revenue and capital money from oil and gas found under the bands' reserve would be allocated by the Minister according to the relative population of each band. The dispute at hand was with respect to capital moneys. The Crown was required to calculate the amount of the split for capital moneys and respective shares then pay it into the bands' capital accounts. Proposals by the bands for expenditure of capital moneys had to be submitted to the Minister for approval. The applicant enacted two resolutions and submitted the proposals to the Minister. $2.1 million was withheld as the Minister stated it required further information to substantiate expenditures for renovations, fire damaged homes and new homes. The applicant argued that the split was traditionally paid in the summer and the Minister could not alter the timing of the payment by withholding funds. The applicant further argued that the Minister had a public duty or a duty as a trustee of the funds to release the moneys.

HELD: The application was dismissed. The moneys unpaid were not the split moneys. The split had already been calculated and paid; the Minister was withholding the release of funds until further information was provided to substantiate the expenditures. The Minister had an obligation to ensure the moneys were properly expended. The applicant had not demonstrated the Minister had been unfair, oppressive or acted in bad faith. The applicant had failed to make out a case for mandamus. The Minister's request that the application found to be an abuse of process was disallowed since the matter was a disagreement, not in bad faith.

Federal Courts Act, R.S.C. 1985, c. F-7, s. 18.1, s. 44

Federal Courts Rules, Rules 358-367

Financial Administration Act, R.S.C. 1985, c. F-11, s. 42

Indian Act, R.S.C. 1985, c. I-5, s. 61, s. 62, s. 64(1), s. 69(1), s. 69(1)(k), s. 69(2)

Indian Band Revenue Moneys Regulations, C.R.C., c. 953, s. 8

Indian Band Revenue Moneys Orders, SOR/90-297,

Counsel:

Priscilla Kennedy, for the Plaintiff.

Sheila Read, for the Defendant.

REASONS FOR JUDGMENT AND JUDGMENT

PHELAN J.:--

I. INTRODUCTION

1 This judicial review concerns the power of the Minister of Indian Affairs and Northern Development (Minister) to withhold payment of funds payable under the Pigeon Lake Split (Split) on

the basis that the Minister required further substantiation of the purposes for which the funds would be used.

2 This proceeding has been complicated by continuing changes in circumstances where events have overtaken some of the factual background since the judicial review was first filed. What ultimately remained at issue was approximately $2.1 million withheld pending receipt of further information from the Ermineskin Band and Nation (Ermineskin Band).

3 The Ermineskin Band has sought *mandamus* to compel the Minister to pay out, forthwith, the remaining amount of $2.1 million.

II. FACTS

4 The Ermineskin Band is a nation of aboriginal peoples who reside in central Alberta and are parties to Treaty No. 6.

5 In 1896 the Pigeon Lake Reserve (located south-west of Edmonton) was established, pursuant to Treaty No. 6, for four Indian Bands - the Sampson, Ermineskin, Bull and Montana Bands (Bands).

6 Oil and gas reserves were discovered under the surface of the Pigeon Lake Reserve and, pursuant to the scheme under the *Indian Act*, the Ermineskin Band and the three other named bands surrendered their interests in the mineral and mining rights to the Crown so that these lands could be leased for the respective Bands' benefit. The surrenders were executed in 1946 and, within a few years, commercial quantities of oil and gas were explored.

7 Beginning in 1952, the Crown prepared and executed leases with oil and gas companies that would yield royalties for the four Bands. At all relevant times, the oil and gas resources were and are beneficially owned by the Bands. The royalty moneys were and are paid to and managed by the Crown on each Band's behalf.

8 In accordance with s. 62 of the *Indian Act*, all Indian moneys are either categorized as "capital moneys" (derived from the sale of surrendered lands or the sale of capital assets of a first nation) or "revenue moneys" (all Indian moneys which are not capital moneys derived from a variety of sources including interest earned on capital and revenue moneys). The two categories are managed differently and must be accounted for separately. The Crown maintains separate capital accounts and revenue accounts for Indian moneys held in the Consolidated Revenue Fund (CRF).

9 There are separate capital accounts and revenue accounts for each of the four Bands as well as for the Pigeon Lake Reserve as a whole. These latter accounts are held for, and periodically allocated among, the Bands according to their respective populations -- this is known as the Pigeon Lake Split.

10 The management of capital moneys which include the royalties derived from the Pigeon Lake Reserve are governed by s. 64 of the *Indian Act*. These moneys are credited to the Pigeon Lake Capital Account and are then allocated periodically to the capital accounts of the four Bands according to the Split. Currently, the Ermineskin Band's share of the Split, based upon population, is 27%.

11 Moneys held in the capital accounts can be expended pursuant to s. 64 of the *Indian Act*. Section 64 (see attached Annex A) outlines a number of specific types of expenditures which, with

the consent of the Indian band, the Minister may authorize to be paid. The provision has a further catch-all provision in s. 64(1)*(k)*:

> **64.** (1) With the consent of the council of a band, the Minister may authorize and direct the expenditure of capital moneys of the band
>
> ...
>
> (*k*) for any other purpose that in the opinion of the Minister is for the benefit of the band.
>
> * * *
>
> **64.** (1) Avec le consentement du conseil d'une bande, le ministre peut autoriser et prescrire la dépense de sommes d'argent au compte en capital de la bande :
>
> ...
>
> *k*) pour toute autre fin qui, d'après le ministre, est à l'avantage de la bande.

12 While the governance of the Ermineskin Band's revenue funds were in issue, the principal issue in this proceeding concerns the capital moneys of the Split. In 1964 the Canadian government passed Orders-in-Council under s. 69(1) of the *Indian Act* authorizing the Ermineskin Band to manage its own revenue moneys. It has done so since then to the present time. There is a procedure in place by which the revenue moneys are turned over to the Band Council upon conditions. The legality of those conditions were in issue in this proceeding; however, all of the revenue moneys in issue have been paid out. As such, the principal issue in this proceeding relates to the capital moneys of the Split.

13 There are two critical steps with respect to the use of the moneys related to the Split. As Justice MacKay outlined in *Louis Bull Band v. Her Majesty the Queen* (3 September 1999), Ottawa T-2953-93 (F.C.T.D.), firstly the Crown must calculate the amount of the Split and the respective shares and secondly pay those amounts into the capital accounts of the respective Bands.

14 The other procedure which is of importance is that in the normal course in respect of expenditures under s. 64(1)*(k)* of the *Indian Act*, any proposal for expenditure of capital moneys is usually initiated by a Band Council, submitted as a Band Council Resolution (BCR) to the Minister containing the particulars of the proposal. That request is considered by the Minister and if approved, the moneys are released to the Ermineskin Band or as the Ermineskin Band directs.

15 In 2007 the Ermineskin Band Council enacted two BCRs to request the transfer of moneys in the amounts of $23,262,232.76 and $7,700,000.00 respectively to fund the Ermineskin Band's 2007/2008 operating budget. Of these amounts, approximately $13,287,000.00 was withheld because of delays in submitting an auditor's report. Of that amount withheld, approximately $5,313,000 was in respect of the capital account.

16 This judicial review was commenced in September 2007 and sought "an order in the nature of *mandamus* directing the Minister of Indian Affairs and Northern Development to pay out the Revenue Fund including the Pigeon Lake Split on a per capita basis pursuant to the *Federal Courts*

Act, sections 18.1 and 44, and the *Federal Courts Rules*, Rules 358-367, *Indian Act*, section 69 and the *Indian Band Revenue Moneys Order*, S.O.R./90-297 ...".

17 The use of the term "Revenue Fund" was the source of no end of confusion.

18 In the grounds for relief, the Plaintiff submitted, *inter alia*:

- that the Pigeon Lake Indian Reserve No. 138A was set aside on July 8, 1896 for the Indians of the Hobbema Agency;
- that Ermineskin are part of the Indians of the Hobbema Agency;
- that the Crown has distributed revenues from the Pigeon Lake Indian Reserve No. 138A on a per capita basis to, *inter alia*, the Ermineskin Cree Nation every year since 1954 generally in July or August of each year;
- that these oil and gas Revenues from the Pigeon Lake Indian Reserve No. 138A and the interest earned on the capital funds held by the Crown in trust for Ermineskin are held in the Revenue Fund which is held by Ermineskin pursuant to section 69 of the *Indian Act*, S.O.R./90-297;
- that Ermineskin uses the Revenue Fund to finance its governance of the Ermineskin Band;
- that Ermineskin has demanded on numerous occasions including September 24, 2007, that the Minister of Indian Affairs and Northern Development pay the Pigeon Lake Split and the Revenue Funds to Ermineskin and the Minister has not done so and has refused to do so.

19 As referred to in paragraph 15 of these Reasons, a significant amount of money was withheld from transfer to the Ermineskin Band because the Ermineskin Band had not met a condition imposed by the Minister that a proper auditor's report be submitted to the department. Over the course of the litigation, the Ermineskin Band ultimately submitted the audit report which resulted in the release of the bulk of the moneys which had initiated these proceedings.

20 Of the $5,313,000 withheld in respect of capital moneys, approximately $4.7 million was attributed to the Split. The Minister, on March 26, 2008, released $2.6 million approximately 200 days later than what the Ermineskin Band claim is the normal course of distribution in July or August of each year. In addition to late payment, $2.1 million remains outstanding pending satisfaction of the Minister's information requirements.

21 In the Minister's letter of March 26, 2008, releasing the $2.6 million, the Department noted as follows:

> The Department still awaits information to support the following expenditures relating to the Property Management program:

Renovations	$869,100
Fire Damaged Homes	$560,000
New Homes - 0405 Shortfall	$371,000
New Homes - 4	$258,308

Total	$2,058,408

There is a further $100,000 in dispute in respect of a camp which was under provincial jurisdiction. These amounts constitute the approximate $2,100,000 held by the Minister and currently in dispute under this litigation.

22 At the hearing of this matter, the Ermineskin Band placed considerable emphasis on the fact that the Split had traditionally been paid in the summer of each year; that the Ermineskin Band was in control of its monetary affairs; that the Minister has a public duty to pay these moneys, at the very least as a trustee of these moneys. In addition to the fact that the obligations in respect of the Split are pursuant to treaty obligations, the Ermineskin Band further claims that the Minister is estopped from altering the timing of payment of these moneys.

23 The Minister had a number of preliminary objections to the nature of this litigation, in part because of the confusing circumstances with respect to what was at issue. As stated earlier, some of that confusion related to the term "revenue fund" used in the Notice of Motion. The Minister understood "revenue fund" to equate to "revenue account". It was the Minister's position that all amounts under the "revenue account" had been paid out. Therefore, it was the Minister's position that this litigation was largely moot, both because the amounts had been paid out of the revenue account and because the impediment to previous payments, e.g. the audit, had been satisfied.

24 The Court has some sympathy with the Minister's position -- the facts and positions at issue were often opaque. However, there was a genuine dispute regarding the $2.1 million withheld. The circumstances of the withholding were entirely within the knowledge and control of the Minister. I therefore reject the submission that it would be unfair to the Minister to consider the merits of the withholding of the remaining amounts.

25 The parties have had this case under case management. They have also been afforded the opportunity to clarify positions, and to amend and update materials and submissions.

26 The Court is not prepared to address the issues of the demand for an audit, that matter has been complied with and therefore is not a live issue. The only remaining issue for the Court to address is whether the Minister is empowered to withhold the capital moneys on the grounds of the failure to comply with the department's information requests.

27 The Court notes that the requirement for an audit is contained in s. 8 of the *Indian Bands Revenue Moneys Regulations*, C.R.C., c. 953, enacted pursuant to s. 69(2) of the *Indian Act*. It would not be helpful to conclude on the consequences of failure to provide an audit report or providing an audit report at a later date than required as such a consideration may turn largely on the facts of a particular circumstance. It is an issue best left for another day.

III. ANALYSIS

28 The issue before this Court is whether the Minister has the discretion to withhold release of portions of the Split, and if so, has that discretion been exercised properly.

29 As the issue before the Court engages the Minister's actions, it is necessary to consider the standard of review. I adopt Justice Dawson's rationale in *Ermineskin Tribe v. Canada (Indian Affairs and Northern Affairs)*, [2008] F.C.J. No. 933, 2008 FC 741. While Justice Dawson's decision

related to Ministerial discretion to administer a publicly-funded program, and in this present proceeding the Minister's discretion relates to the use of funds for homes (s. 64(1)*(j)*) and for other purposes (s. 64(1)*(k)*), I see no material difference in respect of either the power or the scope of the discretion to be exercised. For the same reasons as in the earlier decision, the Minister's actions are subject to a standard of reasonableness.

30 The starting point of this case is that the Ermineskin Band is seeking *mandamus*. The standard of review only becomes relevant to the discretionary aspect of the principles governing *mandamus*.

31 On the issue of *mandamus*, the Court of Appeal in *Apotex v. Canada (A.G.)*, [1994] 1 F.C. 742 (F.C.A.), held that the principles applicable to *mandamus* are:

> 1. There must be a public duty to act.
> 2. The duty must be owed to the applicant.
> 3. There is a clear right to performance of the duty, in particular:
>
> > (a) the applicant has satisfied all conditions precedent giving rise to the duty;
> > (b) there is (i) a prior demand for performance of the duty; (ii) a reasonable time to comply with the demand unless refused outright; and (iii) a subsequent refusal which can either be expressed or implied, e.g. unreasonable delay;
>
> 4. Where the duty sought to be enforced is discretionary, the following rules apply:
>
> > (a) in exercising a discretion, the decision-maker must not act in a manner which can be characterized as "unfair", "oppressive" or demonstrate "flagrant impropriety" or "bad faith";
> > (b) *mandamus* is unavailable if the decision-maker's discretion is characterized as being "unqualified", "absolute", "permissive" or "unfettered";
> > (c) in the exercise of a "fettered" discretion, the decision-maker must act upon "relevant", as opposed to "irrelevant", considerations;
> > (d) *mandamus* is unavailable to compel the exercise of a "fettered discretion" in a particular way; and
> > (e) *mandamus* is only available when the decision-maker's discretion is "spent"; i.e. the applicant has a vested right to the performance of the duty.

(emphasis added by Court)

32 The Federal Court of Appeal in *Ermineskin Indian Band and Nation v. Canada*, [2007] 3 F.C.R. 245 (F.C.A.), has set out the statutory scheme for the management of royalties received by

the Crown commencing at paragraph 63 of the judgment. The Court notes the Minister's obligation is to ensure that moneys released (in this instance from the capital account) are expended on behalf of the Ermineskin Band and in accordance with the *Indian Act*.

33 The Ermineskin Band claims that moneys from the Split are treated differently than capital and revenue account moneys. On the evidence in this case, I am not satisfied that the Ermineskin Band has made that case. Of equal importance is the fact that the *Indian Act* does not make such a distinction -- moneys are accounted for either to the revenue or capital accounts. The evidence is that the Ermineskin Band's Split moneys are credited to the capital account.

34 For the Ermineskin Band to establish a basis for *mandamus*, it must meet the conditions in respect of the exercise of discretion. Given the obligations of the Minister to ensure that moneys are properly expended on behalf of the Ermineskin Band and in accordance with the *Indian Act*, there is nothing unfair, oppressive or in bad faith in requiring support for the proposed expenditures. The Ermineskin Band has not shown that anything demanded is unreasonable nor has the Ermineskin Band shown that it has a vested right in performance such that the Minister's discretion is "spent".

35 The Ermineskin Band has argued that the pattern of paying out the Split to the Ermineskin Band in the summer of each year created estoppel against the Minister delaying payment. In this, the Ermineskin Band relies particularly on *Ryan v. Moore*, [2005] 2 S.C.R. 53, in establishing the three conditions of estoppel by convention.

36 However, that decision applies in the context of relations between private parties not to situations governed by statute. Estoppel cannot operate to vitiate a statutory obligation on the Minister.

37 The Ermineskin Band has not made out a case for an order of *mandamus*. Section 64(1) makes it clear that moneys from the Ermineskin Band's account can only be disbursed with the consent of both the Ermineskin Band and the Minister. As long as the Minister exercises his discretion reasonably -- and there is nothing to suggest unreasonableness in demanding substantiation for planned expenses -- the Minister is authorized to withhold approval of disbursement. The Minister's refusal to disburse is not amendable to *mandamus*. The moneys at issue are not unpaid Split moneys -- those amounts have been paid to the capital account. The moneys that the Ermineskin Band seeks to obtain are already in this account. The Ermineskin Band really seeks to compel the Minister to authorize disbursement from the capital account.

38 I need not find, as the Defendant has asked, that this *mandamus* application is an abuse of process because it is contrary to the position taken by the Ermineskin Band before the Supreme Court of Canada in *Ermineskin Indian Band and Nations v. Canada*, [2007] S.C.C.A. No. 86. Firstly, it is not clear that the positions are inconsistent. Secondly, it is not bad faith to take different or alternate positions, particularly in the face of uncertainty as to the law.

39 For these reasons, this judicial review will be dismissed with costs.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application for judicial review is dismissed with costs.

PHELAN J.

* * * * *

ANNEX A

Financial Administration Act, R.S., 1985, c. F-11

42. (4) The following definitions apply in this section.

...

"recipient" means an individual, body corporate, partnership or unincorporated organization that has, in any five consecutive fiscal years, received a total of one million dollars or more under one or more funding agreements, but does not include

...

(*c.1*) a band, as defined in subsection 2(1) of the *Indian Act*, any member of the council or any agency of the band or an aboriginal body that is party to a self-government agreement given effect by an Act of Parliament or any of their agencies;

* * *

42. (4) Les définitions qui suivent s'appliquent au présent article.

...

"bénéficiaire" Personne physique ou morale, société de personnes ou organisme non doté de la personnalité morale qui a reçu, au total, au moins un million de dollars au cours de cinq exercices consécutifs au titre d'un ou de plusieurs accords de financement. Sont exclus de la présente définition :

...

c.1) les bandes, au sens du paragraphe 2(1) de la *Loi sur les Indiens*, tout membre du conseil ou tout organisme de la bande, et les organismes autochtones qui sont parties à un accord d'autonomie gouvernementale mis en vigueur par une loi fédérale, ainsi que leurs organismes;

Indian Act, R.S., 1985, c. I-5

61. (1) Indian moneys shall be expended only for the benefit of the Indians or bands for whose use and benefit in common the moneys are received or held, and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which Indian moneys are used or are to be used is for the use and benefit of the band.

(2) Interest on Indian moneys held in the Consolidated Revenue Fund shall be allowed at a rate to be fixed from time to time by the Governor in Council.

64. (1) With the consent of the council of a band, the Minister may authorize and direct the expenditure of capital moneys of the band

(*a*) to distribute per capita to the members of the band an amount not exceeding fifty per cent of the capital moneys of the band derived from the sale of surrendered lands;

(*b*) to construct and maintain roads, bridges, ditches and watercourses on reserves or on surrendered lands;

(*c*) to construct and maintain outer boundary fences on reserves;

(*d*) to purchase land for use by the band as a reserve or as an addition to a reserve;

(*e*) to purchase for the band the interest of a member of the band in lands on a reserve;

(*f*) to purchase livestock and farm implements, farm equipment or machinery for the band;

(*g*) to construct and maintain on or in connection with a reserve such permanent improvements or works as in the opinion of the Minister will be of permanent value to the band or will constitute a capital investment;

(*h*) to make to members of the band, for the purpose of promoting the welfare of the band, loans not exceeding one-half of the total value of

(i) the chattels owned by the borrower, and
(ii) the land with respect to which he holds or is eligible to receive a Certificate of Possession,

and may charge interest and take security therefor;

(*i*) to meet expenses necessarily incidental to the management of lands on a reserve, surrendered lands and any band property;

(*j*) to construct houses for members of the band, to make loans to members of the band for building purposes with or without security and to provide for the guarantee of loans made to members of the band for building purposes; and

(*k*) for any other purpose that in the opinion of the Minister is for the benefit of the band.

(2) The Minister may make expenditures out of the capital moneys of a band in accordance with by-laws made pursuant to paragraph 81(1)(*p*.3) for the purpose of making payments to any person whose name was deleted from the Band List of the band in an amount not exceeding one per capita share of the capital moneys.

69. (1) The Governor in Council may by order permit a band to control, manage and expend in whole or in part its revenue moneys and may amend or revoke any such order.

(2) The Governor in Council may make regulations to give effect to subsection (1) and may declare therein the extent to which this Act and the *Financial Administration Act* shall not apply to a band to which an order made under subsection (1) applies.

* * *

61. (1) L'argent des Indiens ne peut être dépensé qu'au bénéfice des Indiens ou des bandes à l'usage et au profit communs desquels il est reçu ou détenu, et, sous réserve des autres dispositions de la présente loi et des clauses de tout traité ou cession, le gouverneur en conseil peut décider si les fins auxquelles l'argent des Indiens est employé ou doit l'être, est à l'usage et au profit de la bande.

(2) Les intérêts sur l'argent des Indiens détenu au Trésor sont alloués au taux que fixe le gouverneur en conseil.

64. (1) Avec le consentement du conseil d'une bande, le ministre peut autoriser et prescrire la dépense de sommes d'argent au compte en capital de la bande :

a) pour distribuer *per capita* aux membres de la bande un montant maximal de cinquante pour cent des sommes d'argent au compte en capital de la bande, provenant de la vente de terres cédées;

b) pour construire et entretenir des routes, ponts, fossés et cours d'eau dans des réserves ou sur des terres cédées;

c) pour construire et entretenir des clôtures de délimitation extérieure sur les réserves;

d) pour acheter des terrains que la bande emploiera comme réserve ou comme addition à une réserve;

e) pour acheter pour la bande les droits d'un membre de la bande sur des terrains sur une réserve;

f) pour acheter des animaux, des instruments ou de l'outillage de ferme ou des machines pour la bande;

g) pour établir et entretenir dans une réserve ou à l'égard d'une réserve les améliorations ou ouvrages permanents qui, de l'avis du ministre, seront d'une valeur permanente pour la bande ou constitueront un placement en capital;

h) pour consentir aux membres de la bande, en vue de favoriser son bien-être, des prêts n'excédant pas la moitié de la valeur globale des éléments suivants :

(i) les biens meubles appartenant à l'emprunteur,
(ii) la terre concernant laquelle il détient ou a le droit de recevoir un certificat de possession,

et percevoir des intérêts et recevoir des gages à cet égard;

i) pour subvenir aux frais nécessairement accessoires à la gestion de terres situées sur une réserve, de terres cédées et de tout bien appartenant à la bande;

j) pour construire des maisons destinées aux membres de la bande, pour consentir des prêts aux membres de la bande aux fins de construction, avec ou sans garantie, et pour prévoir la garantie des prêts consentis aux membres de la bande en vue de la construction;

k) pour toute autre fin qui, d'après le ministre, est à l'avantage de la bande.

(2) Le ministre peut effectuer des dépenses sur les sommes d'argent au compte de capital d'une bande conformément aux règlements administratifs pris en vertu de l'alinéa 81(1)*p*.3) en vue de faire des paiements à toute personne dont le nom a été retranché de la liste de la bande pour un montant ne dépassant pas une part *per capita* de ces sommes.

69. (1) Le gouverneur en conseil peut, par décret, permettre à une bande de contrôler, administrer et dépenser la totalité ou une partie de l'argent de son compte de revenu; il peut aussi modifier ou révoquer un tel décret.

(2) Le gouverneur en conseil peut prendre des règlements pour donner effet au paragraphe (1) et y déclarer dans quelle mesure la présente loi et la *Loi sur la gestion des finances publiques* ne s'appliquent pas à une bande visée par un décret pris sous le régime du paragraphe (1).

TAB 3

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** Preliminary Version **

Case Name:

Council of Canadians with Disabilities v. Via Rail Canada Inc.

Council of Canadians with Disabilities, Appellant;
v.
Via Rail Canada Inc., Respondent, and Canadian Transportation Agency, Canadian Human Rights Commission, Ontario Human Rights Commission, Commission des droits de la personne et des droits de la jeunesse, Manitoba Human Rights Commission, Saskatchewan Human Rights Commission, Transportation Action Now, Alliance for Equality of Blind Canadians, Canadian Association for Community Living, Canadian Hard of Hearing Association, Canadian Association of Independent Living Centres and DisAbled Women's Network Canada, Interveners.

[2007] S.C.J. No. 15

[2007] A.C.S. no 15

2007 SCC 15

2007 CSC 15

[2007] 1 S.C.R. 650

[2007] 1 R.C.S. 650

279 D.L.R. (4th) 1

360 N.R. 1

J.E. 2007-670

59 Admin. L.R. (4th) 1

284

155 A.C.W.S. (3d) 7

EYB 2006-116801

2007 CarswellNat 608

59 C.H.R.R. D/276

File No.: 30909.

Supreme Court of Canada

Heard: May 19, 2006;
Judgment: March 23, 2007.

Present: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron and Rothstein JJ.

(370 paras.)

Appeal From:

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Administrative law -- Natural justice -- Duty of fairness -- Procedural fairness -- Appeal by the Council of Canadians with Disabilities from a Federal Court of Appeal decision finding that the Canadian Transportation Agency's decision ordering VIA to implement remedial measures with respect to the wheelchair accessibility of certain of its Renaissance rail cars was patently unreasonable -- Appeal allowed -- VIA's right to procedural fairness was not breached -- There were no grounds for a reviewing court to interfere with the Agency's decision not to wait for VIA to produce the cost estimates that VIA had repeatedly and explicitly refused to provide.

Human rights law -- Discrimination -- Exceptions -- Duty to accommodate -- Undue hardship -- Appeal by the Council of Canadians with Disabilities from a Federal Court of Appeal decision finding that the Canadian Transportation Agency's decision ordering VIA to implement remedial measures with respect to the wheelchair accessibility of certain of its Renaissance rail cars was patently unreasonable -- Appeal allowed -- Agency made a decision with many component parts, each of which fell squarely and inextricably within its expertise and mandate as set out in s. 172 -- Agency approached and applied its mandate reasonably and its decision was entitled to extreme deference.

Transportation law -- Railways -- Regulation -- Canada Transportation Act -- Appeal by the Council of Canadians with Disabilities from a Federal Court of Appeal decision finding that the Canadian Transportation Agency's decision ordering VIA to implement remedial measures with respect to the wheelchair accessibility of certain of its Renaissance rail cars was patently unrea-

sonable -- Appeal allowed -- Agency made a decision with many component parts, each of which fell squarely and inextricably within its expertise and mandate as set out in s. 172 -- Agency approached and applied its mandate reasonably and its decision was entitled to extreme deference -- Canada Transportation Act, s. 172.

The Council of Canadians with Disabilities (CCD) appealed a Federal Court of Appeal ruling that the Canadian Transportation Agency's decision to order VIA to implement remedial measures with respect to its Renaissance railway cars was patently unreasonable, and referred the matter back to the Agency for reconsideration. VIA paid $29.8 million to purchase 139 of the rail cars. The cars were inaccessible to persons with disabilities using personal wheelchairs. VIA claimed the cars were sufficiently accessible and that its employees would transfer passengers into on-board wheelchairs and assist them with services. The CCD applied to the Agency under s. 172 of the Canada Transportation Act, complaining that many features of the Renaissance cars constituted undue obstacles to the mobility of persons with disabilities. CCD relied, in part, on VIA's alleged non-compliance with the "1998 Rail Code", a voluntary Code negotiated with and agreed to by VIA that set minimum standards applicable to its transportation network. Under that Code, modern accessibility standards applied to new rail cars or cars undergoing a major refurbishment. VIA argued that the Renaissance cars were not newly manufactured or undergoing a major refurbishment. The Agency found otherwise, concluding that the Code's modern accessibility standards applied to the Renaissance cars. The Agency issued a preliminary determination in which it gave VIA a final opportunity to provide specific evidence to show cause to the Agency why the obstacles it had identified were not undue and to provide feasibility and costing information relating to the remedial options under consideration by the Agency. VIA responded with some information, indicating that it was not reasonable to require it to modify the cars. The Agency issued its final decision, requiring VIA to modify 13 economy coach cars and 17 service cars out of the 139 cars. On appeal, the Federal Court of Appeal found that while the Agency was correct to conclude that it had jurisdiction under s. 172 of the Act to proceed with CCD's complaint, the Agency's decision was patently unreasonable. The Court was also of the view that, having identified the modifications it thought necessary, the Agency had violated VIA's procedural fairness rights by failing to give VIA adequate opportunity to respond to its requests for cost and feasibility information.

HELD: Appeal allowed. The Agency's decisions were restored. The standard of review applicable to the Agency's decision as a whole was patent unreasonableness. The Agency made a decision with many component parts, each of which fell squarely and inextricably within its expertise and mandate as set out in s. 172. The Agency approached and applied its mandate reasonably and its decision was entitled to extreme deference. Under Part V of the Act, the Agency had to identify - and order appropriate remedies for - undue obstacles to persons with disabilities in the transportation context in a manner that was consistent with the approach to identifying and remedying discrimination in human rights law. In this case, it was the design of the Renaissance cars that was said to represent an undue obstacle. Under the concept of reasonable accommodation, service providers had a duty to do whatever was reasonably possible to accommodate persons with disabilities. The discriminatory barrier had to be removed unless there was a bona fide justification for its retention by establishing that accommodation imposed undue hardship on the service provider. In this case, VIA did not meet its onus of establishing that the obstacles created by its purchase of the cars were not "undue". The Agency's decision was not unreasonable. The Agency also considered VIA's network and found none of the evidence on the record supported VIA's position that its existing fleet, or its

network generally, would address obstacles found to exist in the Renaissance cars. The fact that there were accessible trains travelling along only some routes did not justify inaccessible trains on others. It was the global network of rail services that should be accessible. The Agency appropriately considered the cost of remedying an obstacle when determining whether it was undue. Its reasons made clear that retrofitting some cars in the Renaissance fleet to accommodate persons using personal wheelchairs would cost nowhere near the amounts claimed by VIA. In light of VIA's refusal to provide concrete evidence in support of its undue hardship argument, no reasonable basis existed for refusing to eliminate the undue obstacles created by the design of the cars. The Agency's findings with respect to cost and undue hardship were reasonable and were not to be interfered with. VIA's right to procedural fairness was not breached. There were no grounds for a reviewing court to interfere with the Agency's decision not to wait for VIA to produce the cost estimates that VIA had repeatedly and explicitly refused to provide.

Statutes, Regulations and Rules Cited:

Americans with Disabilities Act, 42 U.S.C. 12162 (2000),

Americans with Disabilities Act Accessibility Guidelines for Transportation Vehicles, 36, C.F.R. Part 1192 (1999),

Canada Transportation Act, S.C. 1996, c. 10, s. 5, s. 17, s. 20, s. 25, s. 25.1, s. 27(1), s. 28(2), s. 29, s. 31, s. 32, s. 33(1), s. 36, s. 40, s. 41(1), s. 170(1), s. 171, s. 172

Canadian Charter of Rights and Freedoms, 1982,

Canadian Human Rights Act, R.S.C. 1985, c. H-6, s. 5(a), s. 15

Disability Discrimination Act, 1995 (U.K.) 1995, c. 50, s. 46

Financial Administration Act, R.S.C. 1985, c. F-11,

National Transportation Agency General Rules, SOR/88-23, s. 8

Rail Vehicle Accessibility Regulations 1998, SI 1998/2456,

Subsequent History:

NOTE: This document is subject to editorial revision before its reproduction in final form in the Canada Supreme Court Reports.

Court Catchwords:

Transportation law -- Railways -- Duty to accommodate passengers with disabilities -- VIA Rail purchasing rail cars -- Canadian Transportation Agency ordering VIA Rail to modify 13 economy coach cars and 17 service cars to make them personal wheelchair accessible -- Whether accommodation imposing undue hardship on VIA Rail -- Whether Agency's decision ordering VIA Rail to retrofit some of its newly purchased cars patently unreasonable -- Canadian Transportation Act, S.C. 1996, c. 10, ss. 5, 172.

Administrative law -- Judicial review -- Standard of review -- Canadian Transportation Agency ordering VIA Rail to modify 13 economy coach cars and 17 service cars to make them personal wheelchair accessible -- Standard of review applicable to Agency's decision -- Whether preliminary

jurisdictional question subject to different standard of review -- Canadian Transportation Act, S.C. 1996, c. 10, s. 172.

Court Summary:

In late 2000, VIA Rail paid $29.8 million to purchase 139 rail cars ("Renaissance cars") no longer required for overnight train service through the Channel Tunnel. These cars were inaccessible to persons with disabilities using personal wheelchairs. VIA saw the Renaissance cars as a unique opportunity to substantially increase the size of its fleet at a comparatively moderate cost. Preparing the equipment for service was estimated at $100 million, but there was no "plan document" to enhance accessibility when the cars were purchased. VIA claimed that the cars were sufficiently accessible and that its employees would transfer passengers into on-board wheelchairs and assist them with services, such as washroom use. The Council of Canadians with Disabilities ("CCD") applied to the Canadian Transportation Agency under s. 172 of the *Canada Transportation Act* ("CTA"), complaining that many features of the Renaissance cars constituted undue obstacles to the mobility of persons with disabilities. CCD relied, in part, on VIA's alleged non-compliance with the "1998 Rail Code", a voluntary Code negotiated with and agreed to by VIA that sets minimum standards applicable to its transportation network. Under this Code, modern accessibility standards apply to new rail cars or cars undergoing a major refurbishment. The Code also provides that at least one car in every train that leaves a railway station must be accessible to persons using personal wheelchairs. VIA argued that the Renaissance cars were not newly manufactured or undergoing a major refurbishment. The Agency found otherwise, concluding that the Code's modern accessibility standards applied to the Renaissance cars.

The Agency issued a preliminary decision in March 2003 in which it gave VIA a final opportunity to provide specific evidence to show cause to the Agency why the obstacles it had identified were not undue and to provide feasibility and costing information relating to the remedial options under consideration by the Agency. Two months later, VIA replied that it was not reasonable to require it to modify the cars; it gave the Agency a brief estimate in a three-page letter without any supporting evidence. In June 2003, the Agency advised VIA that its response lacked detail and feasibility information and was therefore unverifiable. The Agency re-issued its original show cause order, giving VIA additional time to prepare a response. VIA submitted some cost estimates, but indicated that it was unable to comply with the show cause order any further. VIA did not request more time, instead repeatedly asking the Agency to render its final decision. On the basis of the record before it, the Agency issued its final decision and ordered VIA to implement remedial measures, all of which had been identified by the Agency by the time it had reissued its preliminary decision in June 2003. The main changes required VIA to modify 13 economy coach cars and 17 service cars out of the 139 cars, so that there would be one personal wheelchair accessible car on each daytime train and one car with personal wheelchair accessible sleeper facilities on each overnight train. The existing fleet provided one personal wheelchair accessible car per train. VIA used its VIA 1 cars for this purpose, which had been retrofitted to accommodate passenger-owned wheelchairs, but the existing fleet was to be phased out and replaced by the Renaissance cars.

VIA successfully sought leave to appeal the Agency's preliminary and final decisions to the Federal Court of Appeal. In support of its application for leave, VIA filed a report it had commissioned to review the Agency's final decision. The report, which was prepared in less than 40 days after the Agency's final decision, estimated that the cost of implementing that decision would be at least $48 million. The Federal Court of Appeal concluded that the Agency's identification of undue obstacles

to the mobility of persons with disabilities was reviewable on the standard of patent unreasonableness, but that the Agency's interpretation of its jurisdiction under s. 172 of the CTA was reviewable on the standard of correctness. Although the court found that the Agency was correct to conclude that it had jurisdiction under s. 172 to proceed with CCD's complaint, it disagreed with the Agency's findings that the obstacles in the Renaissance cars were undue, concluding that the decision was made without considering VIA's entire network, the interests of non-disabled persons, and the interests of persons with disabilities other than personal-wheelchair users. The court also disagreed with the Agency's conclusion that there was no evidence on the record to support VIA's view that its existing network was able to address obstacles in the Renaissance cars. Holding the Agency's decision to be patently unreasonable, the court set it aside and referred the matter back to the Agency for reconsideration. The court was also of the view that, having identified the modifications it thought necessary, the Agency had violated VIA's procedural fairness rights by failing to give VIA an adequate opportunity to respond to its requests for cost and feasibility information.

Held (Binnie, Deschamps, Fish and Rothstein JJ. dissenting): The appeal should be allowed and the Agency's decisions restored.

Per McLachlin C.J. and Bastarache, LeBel, **Abella** and Charron JJ.: The standard of review applicable to the Agency's decision as a whole is patent unreasonableness. Under s. 172 of the CTA, Parliament gave the Agency a specific mandate to determine how to render transportation systems more accessible to persons with disabilities. While that mandate undoubtedly has a human rights aspect, this does not take the questions of how and when the Agency exercises its human rights expertise outside the mandate conferred on it by Parliament. The Agency made a decision with many component parts, each of which fell squarely and inextricably within its expertise and mandate. The decision is therefore entitled to a single, deferential standard of review. Where an expert tribunal has charted an appropriate analytical course for itself, with reasons that serve as a rational guide, a reviewing court should not lightly interfere with the tribunal's interpretation and application of its enabling legislation. Here, the Agency interpreted its authority to proceed with CCD's complaint under s. 172(1) in a manner that is rationally supported by the relevant legislation. It also defined the analytical process to be followed in identifying undue obstacles in the federal transportation network in a way that is supported by the CTA and human rights jurisprudence. Viewed as a whole, the Agency's reasons show that it approached and applied its mandate reasonably. [para. 88] [para. 97] [para. 100] [paras. 104-105] [paras. 108-109]

Under Part V of the CTA, the Agency must identify - and order appropriate remedies for - undue obstacles to persons with disabilities in the transportation context in a manner that is consistent with the approach to identifying and remedying discrimination in human rights law. Here, it is the design of the Renaissance cars that is said to represent an undue obstacle. Under the concept of reasonable accommodation, service providers have a duty to do whatever is reasonably possible to accommodate persons with disabilities. The discriminatory barrier must be removed unless there is a *bona fide* justification for its retention, which is proven by establishing that accommodation imposes undue hardship on the service provider. What constitutes undue hardship depends on factors relevant to the circumstances and legislation governing each case. The factors set out in s. 5 of the CTA are compatible with those that apply under human rights principles. They flow out of the factors inherent in a reasonable accommodation analysis, such as cost, economic viability, safety, and the quality of service to all passengers, but are assessed based on the unique realities of the federal transportation context. In this case, VIA did not meet its onus of establishing that the obstacles created by its purchase of the Renaissance cars were not "undue". The Agency's analysis or decision was not un-

reasonable; in particular, there was nothing inappropriate about the factors it did, and did not, rely on. [paras. 117-118] [para. 121] [para. 123] [para. 133] [para. 135] [para. 138] [para. 142] [para. 144]

The Rail Code was a proper factor for the Agency to consider in its analysis. The purpose of this Code is to function as self-imposed minimum standards all rail carriers have agreed to meet. The standard of "personal wheelchair use" set out in the Code is also consistent with human rights jurisprudence. Independent access to the same comfort, dignity, safety and security as those without physical limitations is a fundamental human right for all persons who use wheelchairs. In view of the widespread domestic and international acceptance of personal wheelchair based accessibility standards, and particularly of VIA's own Rail Code commitments, it was not unreasonable for the Agency to rely on the personal wheelchair as a guiding accessibility paradigm. VIA was not entitled to resile from this norm because it found a better bargain for its able-bodied customers. Neither the Rail Code, the CTA, nor any human rights principle recognizes that a unique opportunity to acquire inaccessible cars at a comparatively low purchase price may be a legitimate justification for sustained inaccessibility. [paras. 145-146] [paras. 161-162] [paras. 164-165]

The Agency also considered VIA's network and found that none of the evidence on the record supported VIA's position that its existing fleet, or its network generally, would address obstacles found to exist in the Renaissance cars. The fact that there are accessible trains travelling along only some routes does not justify inaccessible trains on others. It is the global network of rail services that should be accessible. The *ad hoc* provision of services does not satisfy Parliament's continuing goal of ensuring accessible rail services. To permit VIA to point to its existing cars, which were to be phased out, and special service-based accommodations as a defence would be to overlook the fact that while human rights law includes an acknowledgment that not every barrier can be eliminated, it also includes a duty to prevent new ones, or at least not knowingly to perpetuate old ones where preventable. Here, VIA did not appear, from the evidence, to have seriously investigated the possibility of reasonably accommodating the use of personal wheelchairs or, for that matter, to have given serious consideration to any other issue related to providing access for persons with disabilities. [para. 169] [para. 176] [paras. 186-187]

Finally, the Agency appropriately considered the cost of remedying an obstacle when determining whether it was "undue". Its reasons make clear that retrofitting some cars in the Renaissance fleet to accommodate persons using personal wheelchairs would cost nowhere near the amounts claimed by VIA. Moreover, the record belies VIA's assertions that it could not have provided cost estimates of the remedial measures prior to the Agency's final decision, since VIA provided a new cost estimate 37 days after this decision was released. Each remedial measure with any cost implications had long been identified by the Agency and VIA's views on the structural, operational and economic implications of each were repeatedly sought. However, the issue is not just cost; it is whether the cost constitutes undue hardship. In light of VIA's refusal to provide concrete evidence in support of its undue hardship argument, no reasonable basis existed for refusing to eliminate the undue obstacles created by the design of the Renaissance cars. With the information it had, the Agency determined that the cost of the remedial measures it ordered would not be prohibitive and did not justify a finding of undue hardship based on financial cost. The Agency's findings with respect to cost and undue hardship were reasonable. They should not, therefore, be disturbed. [para. 190] [paras. 218-219] [para. 221] [paras. 226-227] [para. 229]

VIA's right to procedural fairness was not breached by the Agency. There are no grounds for a reviewing court to interfere with the Agency's decision not to wait for VIA to produce the cost estimates that VIA had repeatedly and explicitly refused to provide. Acceding to VIA's persistent requests, the Agency released its final decision. VIA had obviously made a tactical decision to deprive the Agency of information uniquely in VIA's possession that would have made the evaluation more complete. Further, the Agency's final decision did not order any remedial measures for which VIA had not previously been asked to prepare feasibility and cost estimates. Lastly, the fact that a third party commissioned by VIA to prepare a cost estimate did so in less than 40 days after the Agency's final decision belies VIA's position that it lacked the time, expertise and money to prepare cost estimates. The timing of the third-party report and its untested conclusions - conclusions fundamentally at odds with some of the Agency's binding factual findings - render it an inappropriate basis for interfering with those findings and the Agency's remedial responses. [para. 235] [paras. 238-239] [para. 242] [para. 245]

Per Binnie, **Deschamps**, Fish and **Rothstein** JJ. (dissenting): When the relevant factors of the pragmatic and functional approach are properly considered, the standard of review applicable to the issues of the Agency's jurisdiction to adjudicate CCD's application and the Agency's determination of the applicable human rights law principles in the federal transportation context is correctness. These issues are pure questions of law, and the Agency is not protected by a privative clause in respect of questions of law or jurisdiction. Rather, there is a statutory appeal procedure on such questions under s. 41(1) of the CTA. On questions of jurisdiction and the determination of the applicable human rights law principles, the Agency does not have greater relative expertise than a court. Nor do these questions involve a balancing of interests. [paras. 281-286]

The Agency did not exceed its jurisdiction. Under s. 172(1) of the CTA, the Agency has jurisdiction where an application is made to it, and its inquiry is to be directed to determining whether there is an undue obstacle. There is nothing to prevent the Agency from initiating an inquiry based on an application from a public interest group as long as the alleged obstacle exists. Given that the Renaissance cars had already been acquired by VIA, the inquiry into alleged obstacles in those cars was not beyond the Agency's jurisdiction. Further, the Agency did not lose jurisdiction when its inquiry extended past the 120-day deadline provided for in s. 29(1) of the CTA. When applied to s. 172 proceedings, this deadline is directory, not mandatory. Lastly, while the Agency's exercise of its regulatory power is subject to more stringent oversight than the exercise of its adjudicative power, the Agency is given broad and pervasive jurisdiction under Part V of the CTA. It may not have been Parliament's expectation that broad inquiries would be conducted under s. 172, but the words used do not preclude such adjudications, even though they might impose a significant burden on the carrier. [para. 315] [para. 317] [para. 321] [paras. 323-324]

Part V of the CTA, which grants the Agency jurisdiction to deal with undue obstacles to the mobility of persons with disabilities, must be reconciled with prevailing human rights principles. Applying those principles in the federal transportation context, the Agency is required, in adjudicating applications under s. 172, to conduct an undueness analysis: (1) the applicant must satisfy the Agency of the existence of a *prima facie* obstacle to the mobility of persons with disabilities; and (2) the burden then shifts to the carrier to demonstrate, on a balance of probabilities, that the obstacle is not undue because (i) it is rationally connected to a legitimate objective, (ii) the carrier has opted not to eliminate the obstacle based on an honest and good faith belief that it was necessary for the fulfilment of that legitimate objective, and (iii) not eliminating the obstacle is reasonably necessary for the accomplishment of that legitimate objective. [para. 291] [para. 293] [para. 297]

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In this case, the Agency erred in law with respect to the test for determining the undueness of an obstacle. Although the Agency did discuss some of the principles in the abstract, its analysis reveals that most of the applicable principles were excluded from its reasoning. The Agency did not acknowledge that it was required to identify the goals pursued by VIA in purchasing the cars; nor did it state whether it accepted VIA's argument and evidence that the acquisition of the cars was rationally connected to a legitimate purpose. VIA was attempting to operate within the subsidy allocated by the federal government for the purchase of rail cars. Efficiency and economic viability are objectives of the National Transportation Policy under s. 5 of the CTA and must be considered legitimate. Moreover, the acquisition of the Renaissance cars for $130 million was rationally connected to these objectives. The error at this stage was compounded at the second stage by the Agency's failure to identify VIA's motives and to assess the evidence relevant to good faith belief. At the third stage, the Agency did not consider how the obstacles might be circumvented by network alternatives that would accommodate persons with disabilities, but focused only on the Renaissance cars themselves. The basis of the Agency's rejection of the network as a reasonable alternative was the requirement that the Renaissance cars be accessible to persons using personal wheelchairs as provided for in the Rail Code. But the Rail Code and other voluntary codes of practice cannot be elevated to the status of laws as if they were legally binding regulations. In adopting the Rail Code and personal wheelchair accessibility standards as if they were regulatory requirements, the Agency failed to consider the full range of reasonable alternatives offered through the network and thereby erred in law. Furthermore, the third stage also requires the Agency to balance the significance of the obstacles for the mobility of persons with disabilities against other factors, such as structural constraints and the total estimated cost to remedy the obstacles, having regard to the objective of economic viability. Where cost constraints are at issue in an undueness analysis, it is an error of law for the Agency not to determine a total cost estimate for the corrective measures it orders. Although the Agency provided figures and calculations in respect of certain corrective measures, it never provided its best estimate of the total cost to VIA. Without a total cost estimate, the Agency could not conduct the undueness analysis required by s. 172. The Agency was also dismissive in its consideration of VIA's ability to fund the corrective measures, treating VIA's resources as virtually unlimited. The Agency's reasons do not demonstrate the attention that is required in a case where the cost of the measures is potentially very substantial. It is up to the Agency, on the basis of new evidence, to determine the cost of the corrective measures and VIA's ability to fund them, and to carry out the balancing exercise required of it at the third stage of the undueness analysis. [paras. 327-328] [para. 337] [paras. 340-341] [paras. 343-344] [para. 346] [paras. 351-352] [paras. 354-356] [para. 366]

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28; *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20; *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941; *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63; *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324; *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868; *Tranchemontagne v. Ontario (Director, Disability Support Program)*, [2006] 1 S.C.R. 513, 2006 SCC 14; *Winnipeg School Division No. 1 v. Craton*, [1985] 2 S.C.R. 150; *Commission scolaire régionale de Chambly v. Bergevin*, [1994] 2 S.C.R. 525; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114; *Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970; *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489; *Ontario Human Rights Commission v. Borough of Etobicoke*, [1982] 1 S.C.R. 202; *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536; *Howard v. University of British Columbia* (1993), 18 C.H.R.R. D/355; *Brock v. Tarrant Film Factory Ltd.* (2000), 37 C.H.R.R. D/305; *Quesnel v. London Educational Health Centre* (1995), 28 C.H.R.R. D/474; *Maine Human Rights Commission v. City of South Portland*, 508 A.2d 948 (1986); *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City)*, [2000] 1 S.C.R. 665, 2000 SCC 27; *VIA Rail Canada Inc. v. National Transportation Agency*, [2001] 2 F.C. 25; *Application by Yvonne Gaudet on behalf of Marcella Arsenault*, C.T.A. Decision No. 641-AT-R-1998; *Hutchinson v. British Columbia (Ministry of Health) (No. 4)* (2004), 49 C.H.R.R. D/348, 2004 BCHRT 58; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Gateway Packers 1968 Ltd. v. Burlington Northern (Manitoba) Ltd.*, [1971] F.C. 359; *Allied Auto Parts Ltd. v. Canadian Transport Commission*, [1983] 2 F.C. 248.

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History and Disposition:

APPEAL from a judgment of the Federal Court of Appeal (Décary, Sexton and Evans JJ.A.), [2005] 4 F.C.R. 473, 251 D.L.R. (4th) 418, 330 N.R. 337, [2005] F.C.J. No. 376 (QL), 2005 FCA 79, setting aside decisions of the Canadian Transportation Agency. Appeal allowed, Binnie, Deschamps, Fish and Rothstein JJ. dissenting.

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Written submissions only by *Hart Schwartz, Eric del Junco* and *Sylvia Davis*, for the intervener the Ontario Human Rights Commission.

Béatrice Vizkelety and *Stéphanie Fournier*, for the intervener Commission des droits de la personne et des droits de la jeunesse.

Written submissions only by *Sarah Lugtig*, for the interveners the Manitoba Human Rights Commission and the Saskatchewan Human Rights Commission.

Written submissions only by *Debra McAllister* and *Lana Kerzner*, for the interveners Transportation Action Now, the Alliance for Equality of Blind Canadians, the Canadian Association for Community Living and the Canadian Hard of Hearing Association.

David Shannon and *Paul-Claude Bérubé*, for the intervener the Canadian Association of Independent Living Centres.

Written submissions only by *Melina Buckley* and *Fiona Sampson*, for the intervener the DisAbled Women's Network Canada.

[Editor's note: A corrigendum was published by the Court April 5, 2007. The corrections have been incorporated in this document and the text of the corrigendum is appended to the end of the judgment.]

The judgment of McLachlin C.J. and Bastarache, LeBel, Abella and Charron JJ. was delivered by

1 ABELLA J.:-- This appeal raises questions about the degree to which persons who use wheelchairs can be self-reliant when using the national rail network.

2 Under the *Canada Transportation Act*, S.C. 1996, c. 10, it is declared to be "National Transportation Policy" that Canada's transportation services be accessible to persons with disabilities.

Responsibility for determining whether there is an "undue obstacle" to the mobility of persons with disabilities is assigned by the Act to the Canadian Transportation Agency. Where such obstacles are found to exist, the Agency is also responsible for determining what corrective measures are appropriate in accordance with the Act and human rights principles.

3 In 1998, VIA Rail Canada Inc. took part in the negotiation and drafting of a voluntary Rail Code. The Code stipulated that for new or substantially refurbished rail cars, at least one car on each train should be accessible to persons using their own wheelchairs.

4 To replace its existing fleet, in late 2000 VIA purchased 139 rail cars and car parts no longer required for overnight train service through the Channel Tunnel. These rail cars, known then as the "Nightstock" fleet, were renamed the "Renaissance cars" by VIA. None of the cars was accessible to persons with disabilities using personal wheelchairs.

5 In the course of the proceedings before the Agency lasting almost three years, and contrary to the Agency's directions, VIA unilaterally made modifications to the new cars without the prior approval of the Agency. VIA was also repeatedly asked to provide cost estimates so that the Agency could assess whether the remedial measures it was considering were reasonable. VIA consistently took the position that it had neither the time nor the money to prepare extensive cost estimates, several times asking the Agency to make its decision without these estimates.

6 The Agency, persuaded by VIA to issue its final decision without further cost estimates, ordered changes to 30 of the 139 newly purchased cars so that one car per train would be accessible to persons with disabilities using their own wheelchairs.

7 Thirty-seven days after the Agency issued its final decision, VIA presented newly prepared cost estimates to the Federal Court of Appeal as part of its leave application. Because VIA chose not to provide this information to the Agency during the proceedings, these estimates were not assessed or verified.

8 The Agency, an expert and specialized body, carefully considered the evidence and the law before imposing a remedy that was consistent both with the Rail Code and internationally accepted standards. In determining whether the design of the Renaissance cars represented undue obstacles for persons with disabilities, the Agency took into account factors usually associated with an "undue hardship" analysis, such as cost, economic viability and safety. In so doing, the Agency was properly merging human rights principles with its unique statutory mandate. I would not interfere with its decision.

I. Background

9 VIA finalized the purchase of the Renaissance fleet on December 1, 2000 and accepted delivery in 2001. At the time VIA acquired the rights to them, the cars were in various stages of assembly: 64 cars were fully assembled, construction had started on another 24, and the remaining 51 were unassembled. VIA saw the Renaissance fleet as a unique opportunity to substantially increase the size of its fleet at a comparatively moderate cost. It paid $29.8 million to purchase the Renaissance equipment, initially expecting that it would cost an additional $100 million to prepare the equipment for service, making a total estimated cost of $129.8 million. At the time of the purchase, VIA's capital expenditure budget was $401.9 million.

10 VIA's anticipated costs included the cost of transporting the cars and parts to Canada, weatherproofing the cars, modifying brake and electrical systems, removing redundant component parts, and renovating interiors. The interior changes included expanding lounge facilities for passengers by removing interior offices, adding vending machines, decommissioning one washroom in the coach cars to create additional baggage storage space, installing computer receptacles and a coat valet in the first class ("VIA 1") cars, adding refrigeration equipment to the service cars to provide the current level of VIA 1 service, and removing one seat in each coach car to install a coat valet. The total cost of the Renaissance cars grew to $139 million.

11 There was no "plan document" to enhance accessibility when the cars were purchased. VIA's position was that the cars were sufficiently accessible. Instead of renovations that would enable passengers with personal wheelchairs to independently meet their own needs, VIA proposed that its employees would transfer passengers into on-board wheelchairs, deliver their meals, assist them with the use of washroom facilities, and provide other necessary services. VIA argued that its budget for the acquisition of the Renaissance cars did not provide "for any major redesign or reconstruction" to make the cars more accessible because any such substantial changes would have "diminished or negated the value of the opportunity".

12 On November 16, 2000, government officials and members of groups representing persons with disabilities were permitted to inspect demonstration models of the Renaissance cars.

13 On December 4, 2000, the Council of Canadians with Disabilities ("CCD") applied to the Agency under s. 172 of the *Canada Transportation Act* complaining about the lack of accessibility of the Renaissance cars. The relevant portions provide:

> **172.** (1) The Agency may, on application, inquire into a matter in relation to which a regulation could be made under subsection 170(1), regardless of whether such a regulation has been made, in order to determine whether there is an undue obstacle to the mobility of persons with disabilities.
>
> ...
>
> (3) On determining that there is an undue obstacle to the mobility of persons with disabilities, the Agency may require the taking of appropriate corrective measures or direct that compensation be paid for any expense incurred by a person with a disability arising out of the undue obstacle, or both.

14 The Agency's mandate to address undue obstacles to the mobility of persons with disabilities originates in s. 5 of the *Canada Transportation Act*, which states that this mandate is an essential element of transportation services:

> NATIONAL TRANSPORTATION POLICY
>
> **5.** [Declaration] 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 more 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,

...

(*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

...

(ii) an undue obstacle to the mobility of persons, including persons with disabilities.

15 Under Part V of the *Canada Transportation Act*, entitled "Transportation of Persons with Disabilities", the Agency is granted two remedial approaches to the removal of "undue obstacles" from the federal transportation network - regulation-making powers under s. 170(1) and complaint adjudication powers under s. 172(1).

16 Section 170(1) empowers the Agency to "make regulations for the purpose of eliminating undue obstacles in the transportation network", including regulations respecting "the design, construction or modification of ... means of transportation and related facilities and premises" and the "conditions of carriage applicable in respect of the transportation of persons with disabilities". Under s. 172(1), the Agency

may, on application, inquire into a matter in relation to which a regulation could be made under subsection 170(1), regardless of whether such a regulation has been made, in order to determine whether there is an undue obstacle to the mobility of persons with disabilities.

17 Where the Agency determines that an undue obstacle to the mobility of persons with disabilities exists, the Agency may, pursuant to s. 172(3), require the taking of appropriate corrective measures. Both the Agency's regulation-making power and its authority to order remedial measures are subject to review by the federal Cabinet: ss. 36 and 40.

18 CCD alleged that 46 features of the Renaissance cars constituted "undue obstacles" to the mobility of persons with disabilities: the sleeper cars were not accessible to passengers in wheelchairs; passengers in wheelchairs could not ride in the economy coach cars; wheelchair users were segregated in sleeper units adjacent to immigration/prisoner control offices in the service cars, necessitating the use of narrow on-board wheelchairs; no washroom facilities in any type of car were accessible to passenger-owned wheelchairs; and the Renaissance cars offered inadequate accommodation for persons with visual disabilities and those accompanied by assisting animals.

19 Under the mistaken impression that the cars had not yet been purchased, CCD also requested an interim order under ss. 27(1) and 28(2) of the *Canada Transportation Act* directing VIA not to take any further steps to secure the purchase of the Renaissance cars. After learning that the cars

had already been purchased, CCD sought to prevent VIA from entering into contracts for, or undertaking further construction of the Renaissance fleet pending the Agency's final decision on its application.

20 CCD relied, in part, on VIA's alleged non compliance with the 1998 *Code of Practice - Passenger Rail Car Accessibility and Terms and Conditions of Carriage by Rail of Persons with Disabilities* ("Rail Code"), a voluntary code negotiated with and agreed to by VIA, setting minimum standards applicable to its transportation network. Under the Rail Code, lower standards are applied to existing equipment in recognition of the fact that it may be difficult or impossible for this older equipment to be made to comply with modern accessibility standards. Higher standards are applied to new rail cars or cars undergoing a major refurbishment. The most significant of these standards was that passengers with disabilities be able to use their personal wheelchairs on the train.

21 VIA's position before the Agency was that the Renaissance fleet, including the 75 cars that had yet to be fully assembled, were existing equipment, not new or undergoing major refurbishment. It argued that, based on the Rail Code standards that were applicable to *existing* cars, the new Renaissance cars were sufficiently accessible to persons with disabilities. Accordingly, VIA argued, it was not required to retrofit them to improve their accessibility in accordance with the requirements for new cars or cars undergoing a major refurbishment.

22 VIA asserted, in fact, that the Renaissance cars provided greater travel options and choice for passengers with disabilities by virtue of the fact that they were *differently* accessible than its existing fleet, and that "persons with disabilities who do not wish to use the Renaissance trains can continue to use [the] existing fleet for their travel purposes".

23 VIA intended, however, to replace the existing fleet with Renaissance cars on some of its routes starting in 2003.

24 The existing fleet provided one personal wheelchair accessible car per train. VIA used its VIA 1 cars for this purpose, which had been retrofitted to accommodate passenger-owned wheelchairs. A dedicated "tie-down" space had been created.

25 The size of this space was what CCD sought to have made available in the Renaissance cars because it adequately met the needs of persons with disabilities. And the washrooms on the VIA 1 cars in the existing fleet, though significantly smaller in square footage than those in the Renaissance service cars, had nonetheless been retrofitted to be accessible for personal wheelchair use. Disabled passengers travelling with assisting animals were also accommodated on the existing fleet.

II. The Agency Proceedings

A. *The Agency's Inquiry*

26 On January 24, 2001, the Agency declined CCD's application for an interim order which would affect VIA's agreement to purchase the Renaissance cars. However it sought a commitment from VIA that it would not enter into any contracts to construct, manufacture or retrofit the Renaissance cars prior to the Agency's final decision, and requested full particulars from VIA respecting its purchase agreement and any additional contracts it entered into with respect to the cars.

27 In January 2001, VIA filed an incomplete copy of the purchase agreement, with the financial data redacted, and requested that it be kept confidential. It advised the Agency that it had not yet entered into any contracts for the construction, manufacture or retrofitting of the Renaissance cars

and repeatedly maintained that no retrofitting plans would exist until at least late August 2001. VIA expected a first phase, consisting of 24 Renaissance cars ("Phase I Renaissance Cars"), to come into service in December 2001, with later phases to follow as more cars became ready for service.

28 VIA's expectation that no retrofitting plans would be available until August 2001 meant that the Agency was unable to complete its investigation of CCD's application, filed on December 4, 2000, within the 120 days stipulated in s. 29(1) of the *Canada Transportation Act* which states:

> **29.** (1) The Agency shall make its decision in any proceedings before it as expeditiously as possible, but no later than one hundred and twenty days after the originating documents are received, unless the parties agree to an extension or this Act or a regulation made under subsection (2) provides otherwise.

29 The deadline would have been April 3, 2001. In a decision dated that day, the Agency noted that the delay was caused by procedural and jurisdictional matters raised by the parties and by the fact that it was awaiting the filing of information by VIA, information VIA had indicated was not yet available. As a result, the Agency determined that it retained jurisdiction to deal with CCD's application notwithstanding the expiry of the statutory deadline. In doing so, the Agency was relying on the Federal Court of Appeal's decision in *Canadian National Railway Co. v. Ferroequus Railway Co.*, [2002] F.C.J. No. 762 (QL), 2002 FCA 193, which held that s. 29(1) was a directory, not mandatory, provision.

30 On April 24, 2001, VIA sought leave to appeal the Agency's decision of April 3, 2001 to the Federal Court of Appeal. It was granted a stay of the Agency's proceedings pending the determination of the leave application.

31 On May 25, 2001, the Thunder Bay *Chronicle Journal* published an article stating that VIA had entered into a contract with Bombardier Inc. to refurbish and modify the Renaissance cars. The text stated that "Bombardier will refurbish and modify the cars at its plant in Thunder Bay" and cited a Bombardier spokesperson as saying that the contract was worth $9.8 million, with another contract in progress. CCD filed this article with the Agency on May 28, 2001 as evidence that VIA was defying the Agency's order to provide information about the timing and details of any proposed construction and retrofitting plans and sought an interim order suspending the retrofitting process. The Agency then requested VIA's comments on the accuracy of the newspaper article.

32 VIA responded to this request by seeking to have the Agency found in contempt of the Federal Court of Appeal's order staying the proceedings. On June 8, 2001, when the Federal Court of Appeal dismissed VIA's application for leave to appeal, VIA withdrew its contempt motion.

33 In a decision dated June 29, 2001, the Agency once again ordered that VIA file a copy of its contract with Bombardier as well as the schedules to its purchase agreement which had been omitted from VIA's original filing. VIA complied, again requesting that these documents be kept confidential. The Agency in turn rejected CCD's request for an interim order suspending the retrofitting process, but put VIA on notice that, by proceeding with the Bombardier contract before the Agency had decided what was required, it could not subsequently complain that the assembly of the cars, and the changes it had unilaterally made, rendered any decision the Agency might eventually make too costly.

34 On September 20, 2001, the Agency organized a viewing of the Renaissance cars in Montreal and, with input from the parties, prepared an Inspection Report. The Inspection Report was a factual description of the dimensions and accessibility features of the Renaissance cars and a description of the changes VIA had unilaterally made.

35 Three types of Renaissance cars were inspected: sleeper cars for overnight trips, economy coach cars for standard trips and service cars containing public lounge facilities and an overnight suite intended for passengers using wheelchairs. The report revealed that as in VIA's existing fleet, passengers in wheelchairs of any size were unable to enter or use the sleeping compartments of standard sleeper cars in the Renaissance fleet. The width of the corridor was incompatible with the use of standard personal wheelchairs.

36 The economy coach cars in the Renaissance fleet were found to be less accessible than VIA's existing VIA 1 cars, which had been retrofitted to provide tie-down space that accommodated large personal wheelchairs and had personal wheelchair accessible washrooms. Personal wheelchairs could only be accommodated in the retrofitted VIA 1 cars in the existing fleet on day trips, however, and for overnight trips only if the passenger was content to spend the night in his or her wheelchair.

37 In the Renaissance cars, personal wheelchairs could not be used anywhere. Each Renaissance economy car had three washrooms. None was wheelchair accessible. A "wheelchair tie-down" mechanism, used to secure a wheelchair to the floor of the car, had been installed. However, the dimensions of this space did not accommodate standard personal wheelchairs. Evidence before the Agency suggested that only the smallest wheelchair, the size of a child's wheelchair, could actually fit in the tie-down space provided.

38 In addition, unlike VIA's existing fleet which permitted passengers with disabilities to ride with other passengers in VIA 1 coach cars, passengers using wheelchairs were to be primarily accommodated in service cars in the Renaissance fleet. Service cars were special cars that had office space and public lounge facilities where passengers could obtain refreshment services and store their baggage.

39 There was to be a service car on every train, with a self-contained sleeper unit separate from the service cars' public passenger lounge. VIA termed this the "accessible suite". No part of the service cars, including the accessible suite, was accessible to passengers using personal wheelchairs, both because the dimensions of the doors into the "accessible suite" and washroom were too narrow for a personal wheelchair, and because there was insufficient space to manoeuver or turn a personal wheelchair even if it could enter. Passengers' personal wheelchairs were to be kept in a storage compartment near the "accessible suite" or, if VIA required that space to refrigerate food and drink for VIA 1 passengers, in the baggage car.

40 On January 16, 2002, the Agency granted a request from VIA to make oral submissions before the Agency released its Preliminary Decision. Oral submissions were heard on April 8, 2002.

41 On June 23, 2002, VIA started using the Renaissance cars.

42 On July 22, 2002, the Agency asked VIA to confirm certain measurements in the washroom of the "accessible suite". VIA advised the Agency that the measurements no longer matched those that had been jointly agreed upon in the Agency's Inspection Report.

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43 The Agency also learned that VIA had made changes to essential features of accessibility, including widening two sliding doors in the "accessible suite" by only 2 or 3 cm. This change, made without the Agency's prior knowledge, was insufficient to make the "accessible suite" accessible for personal wheelchairs, despite the Rail Code standards VIA had agreed to. VIA asserted that widening the doors to meet Rail Code standards, while possible, was not reasonable because this would require a "complete re-design of the door, its pocket and the module that currently houses the control button", as well as the removal of sleeping berths.

44 In a decision dated August 14, 2002, the Agency expressed its "extreme displeasure" at what it likened to concealing evidence, namely "VIA's failure to keep the Agency informed of modifications bearing on the very mandate the Agency is called to exercise" (CTA Decision No. LET-AT-R-232-2002, at p. 2).

45 Because the changes VIA made to the cars without the Agency's knowledge created a discrepancy between the information the Agency had about the Renaissance cars and their actual condition, the Agency undertook a second inspection of the cars on September 16, 2002. This inspection revealed that in addition to the slightly widened doors, VIA had made a number of other changes to the Renaissance cars, including an expansion of the lounge area in the service cars. Because some measurements were disputed by the parties, a third inspection of the cars took place on November 26, 2002.

B. *The Agency's Preliminary Decision* (No. 175-AT-R-2003)

46 On March 27, 2003, the Agency issued a detailed Preliminary Decision of 150 pages. It was premised on the goal of having one accessible car per train.

47 The Agency's Preliminary Decision took the form of a "show cause" order. By this order, VIA was asked to "show cause" by May 26, 2003, why the obstacles the Agency had identified as potentially undue were not, in fact, undue obstacles. The Agency's show cause process was the methodology it used for assessing the hardship VIA might suffer if it were required to remove the obstacles.

48 The Agency identified five key problems with the Renaissance fleet, most of them in areas of the cars VIA itself had specifically targeted to meet the needs of passengers with disabilities. These problems led the Agency to identify 14 obstacles as being potentially undue.

49 The show cause process served two critical functions. First, it gave VIA a "final opportunity to provide specific evidence and related argument to show cause to the Agency" why the 14 obstacles it had identified were not undue and to provide feasibility and costing information relating to the remedial options under consideration by the Agency (p. 5). VIA had, until then, provided only general information about its operational, economic and structural requirements. The Agency noted that "there may be specific arguments that VIA may wish to bring forward in view of the Agency's preliminary findings" (p. 144).

50 Second, VIA was also asked to file answers to specific questions the Agency had about what remedial measures were structurally, economically and operationally possible. This gave VIA an opportunity to participate with the Agency in the accommodation of passengers with disabilities by identifying potential solutions, commenting on solutions CCD had proposed and developing a remedial plan.

51 In addition to its detailed analysis in its Preliminary Decision of the need for accessibility-enhancing measures, such as wheelchair tie-down spaces and accessible washrooms, the Agency stressed the importance of ensuring that persons with disabilities be capable of accessing features specifically designed to meet their needs in their own wheelchairs. Subject to structural and economic constraints, it was the Agency's opinion that "it is unacceptable that a person with a disability be deprived of his/her independent means of mobility in an area of the Renaissance trains that is intended to be used by persons with disabilities, including those who use wheelchairs" (p. 109).

52 VIA sought leave to appeal the Agency's Preliminary "show cause" Decision in April 2003.

53 While VIA's application for leave to appeal was pending, it responded to the Agency's "show cause" order with a three-page letter on May 26, 2003. In its opinion, "it is not reasonable to require VIA Rail to modify the cars".

54 VIA began by addressing some of CCD's safety concerns for persons with disabilities, pointing out that "the Equipment and Operations Branch of the Railway Safety Directorate has determined that there is no safety issue with respect to the Renaissance Cars".

55 VIA estimated that "the total cost and lost revenue of completing the work identified in the show cause directions is over $35 million". This was, VIA wrote, its "best estimate in answering the show cause portion of the hearing". It also stated that it "has back up for the estimates of cost", but it submitted no such evidence with its response.

56 On May 29, 2003, three days after VIA's response to the show cause order, CCD wrote to the Agency advising it that, contrary to VIA's assertions that there were no safety issues to address, the Transport Canada Rail Safety Directorate had ordered VIA to relocate washrooms in the Renaissance economy coach cars because they were located in an unsafe "crumple zone". While no final decisions had been made concerning how the mandatory modifications would be accomplished, CCD told the Agency that Transport Canada had approved three possible remedial designs. One involved the installation of an accessible washroom in each coach car ("Option 3"). CCD was told, however, that VIA intended to implement a different, less costly design that did not enhance the accessibility features of the coach cars ("Option 1").

57 On June 9, 2003, the Agency issued a decision advising VIA that its May 26, 2003 response to the Preliminary Decision lacked detail and supporting evidence and could not be verified. As part of this decision, the Agency re-issued its original show cause order, giving VIA an additional 60 days to prepare a response.

58 It also made two additional requests of VIA, each with its own deadline. First, VIA was asked to submit, by June 13, 2003, the "back-up" evidence for the cost estimates it had failed to include in its response to the Agency's show cause order. Second, VIA was asked to address, by June 23, Option 3 being considered by Transport Canada and "show cause" why it could not be implemented.

59 By July 3, 2003, both of these deadlines had passed with no response from VIA. The "back-up" evidence VIA told the Agency it had in its May 26th letter, was not provided. VIA also failed to submit any evidence to show why Option 3 should not be implemented.

60 As it was entitled to do under its enabling statute, the Agency turned its June 9, 2003 reissued Preliminary Decision into an order of the Federal Court. The Agency informed VIA that it would commence proceedings for contempt if VIA did not submit, by July 14, 2003, the additional

information the Agency had requested. VIA was still to respond to the original show cause order by the extended deadline, namely August 8, 2003.

61 VIA responded on July 14, 2003. It submitted back-up evidence for the cost estimates pertaining to the arm rest and tie-down area modifications the Agency was contemplating. It also submitted copies of the three design plans for Options 1, 2 and 3 that it had devised for Transport Canada, as well as a chart outlining the pros and cons associated with each.

62 No precise costing information was provided to the Agency about these options, but the documentation stated that Option 3, which would add a wheelchair accessible washroom to the Renaissance coach cars, would cost two and a half times as much as Option 1. VIA claimed in a single paragraph that Option 3 could not be implemented because a more detailed design was still required, that there would likely be a prohibitive loss of revenue of $24.2 million, and that the direct implementation costs had not been quantified but that, in any event, VIA could not afford them.

63 VIA told the Agency that it planned to implement Option 1 in the fall of 2003. Option 1, the least expensive solution, would replace the unsafe washrooms with a coat valet.

64 VIA also told the Agency that it was unable to comply with the show cause order any further. It asserted that it lacked the internal expertise to respond to the Agency's Preliminary Decision, that it would take longer than 60 days to have cost estimates prepared, and that the government had not provided funding for it to respond to the Agency's requests.

65 VIA did not request more time to comply.

66 On August 7, 2003, VIA again indicated to the Agency that there would be no further compliance with its Preliminary Decision. It wrote: "VIA Rail makes the following submissions respectfully. It asks for an oral hearing, if necessary. Otherwise, it asks the Agency to consider all of these issues, facts and estimates and render its decision in final form."

67 The Agency declined to exercise its discretion to hold a second oral hearing because "VIA has not demonstrated that there is any value to be gained from pursuing the time-consuming and costly exercise of convening an oral hearing at this time, either to permit VIA to explain why it did not provide the supporting evidence required or to provide to VIA an opportunity to produce evidence that should have been submitted in writing, either during the pleadings process or in response to the show cause orders" (Final Decision, at p. 14).

C. *The Agency's Final Decision* (No. 620-AT-R-2003)

68 In the face of VIA's persistent refusal to provide the necessary estimates and responses, despite having had from March 27 until August 8 to do so, and in the absence of any request from VIA for more time to prepare information, the Agency acceded to VIA's request and, on October 29, 2003, issued its final decision based on the record before it.

69 In its final decision, authored by Members Marion L. Robson and Michael Sutton, the Agency ordered VIA to implement six remedial measures, five of which involved making physical changes to the Renaissance cars with cost implications. All had been identified by the Agency by the time it reissued its Preliminary Decision on June 9, 2003:

- In order to make one car in every daytime train accessible to passengers using their own wheelchairs, VIA was ordered to install an accessible

washroom and a tie-down space for passengers using wheelchairs in 13 economy coach cars (i.e. implement Option 3).

- In order to provide one car with accessible sleeping accommodation in each overnight train, VIA was ordered to widen one doorway and install a mechanism that would secure a passenger's own wheelchair to the floor (a "wheelchair tie-down") in the segregated sleeper unit in each of the 17 "service cars" that housed the "accessible suite".
- The Agency also directed VIA to implement in more cars several of the changes it had already made or begun to make. These changes -- lowering one double seat in 33 economy cars, installing two moveable armrests in 47 coach cars, and closing stair risers on 12 cars -- would accommodate passengers travelling with animals to assist them, passengers able and willing to be transferred into standard coach seating, and passengers who might have difficulty navigating the entry stairs.

70 The Agency determined that the net cost to VIA of addressing Transport Canada's safety concerns in a way that could make 13 economy coach cars accessible for personal wheelchair use would be no more than $673,400 in direct costs plus $16,988 in lost passenger revenue.

71 This was the most significant remedial measure the Agency ordered. The cost was comparable to what VIA was prepared to incur each year to accommodate passengers wearing coats.

D. *Federal Court of Appeal Proceedings*

72 VIA sought leave to appeal the Agency's preliminary and final decisions. In support, it submitted a report to the Federal Court of Appeal that it had commissioned from Peter Schrum of Bombardier Inc. to review the Agency's final decision and prepare a global cost estimate of the corrective measures ordered by the Agency. Mr. Schrum's report estimated that the cost of implementing the Agency's final decision would be at least $48 million. The report was dated December 5, 2003, less than 40 days from the Agency's final decision. Leave was granted on March 10, 2004.

73 The Federal Court of Appeal unanimously agreed that the Agency's identification of undue obstacles to the mobility of persons with disabilities was reviewable on a standard of patent unreasonableness ([2005] 4 F.C.R. 473, 2005 FCA 79). Sexton J.A. (Décary J.A. concurring) concluded that, based on its expertise, its mandate, and the presence of a strong privative clause, the Agency was entitled to a high level of deference. In reasons concurring in the result, Evans J.A. agreed that the multiplicity of factors and interests to be weighed, the technical aspects to some issues before the Agency, and the Agency's obligation to exercise discretion based on the evidence and statutory criteria, all fell within its specialized mandate and warranted considerable deference.

74 Sexton J.A. concluded, however, that the Agency was subject to a correctness standard in its interpretation of its authority to entertain CCD's application under s. 172, a provision in the Agency's enabling legislation that he concluded raised a jurisdictional issue. He determined that the Agency's authority to proceed under s. 172 in the absence of a complaint based on an actual travel experience raised a question of statutory interpretation within the expertise of the courts, not of the Agency, because it implicated human rights. In Sexton J.A.'s view, these factors, including the presence of a statutory right of appeal with leave, indicated that the Agency's interpretation of its jurisdiction under s. 172 was reviewable on the less deferential standard of correctness.

75 The Federal Court of Appeal was unanimous in its conclusion that the Agency was correct to conclude that it had jurisdiction under s. 172 to proceed with CCD's complaint.

76 On the issue of how the Agency applied its jurisdiction under s. 172, however, Sexton J.A. criticized the Agency's findings that obstacles in the Renaissance cars were undue. He concluded that the decision was made without considering VIA's entire network, the interests of non-disabled persons, and the interests of persons with disabilities other than wheelchair users. He disagreed with the Agency's conclusion that there was no evidence in the record to support VIA's view that its existing network was able to address obstacles in the Renaissance cars. He noted that while the Agency explicitly stated that it was attempting to strike an appropriate balance between the rights of persons with disabilities and those of transportation service providers in accordance with s. 5 of the *Canada Transportation Act*, it had not properly balanced the competing interests when it decided that structural modifications to the Renaissance cars were the appropriate remedy. Holding the decision to be patently unreasonable, Sexton J.A. set it aside and referred the matter back to the Agency for reconsideration.

77 Evans J.A. was "not persuaded ... that, having considered VIA's submissions regarding its network, the Agency committed reversible error when it concluded in the preliminary decision that the obstacles to the mobility of persons in wheelchairs presented by the Renaissance cars were 'undue'" (para. 98). In his view, the Agency was entitled to conclude that the evidence did not establish that the existing fleet or network would address the obstacles that it had found to exist in the Renaissance cars. The evidence showed that, over time, the existing fleet would be retired; no Renaissance cars were accessible to personal wheelchair users; and VIA's estimates of the number of passengers affected were misleadingly low because they failed to take into account the number of disabled passengers who would use VIA if it were more accessible.

78 Noting that review for patent unreasonableness does not permit a reviewing court to intervene just because it would have weighed the relevant factors and evidence differently, Evans J.A. was of the view that the Agency's balancing choices were not patently unreasonable based on the evidence before it.

79 However, the Federal Court of Appeal was unanimous in its view that, having identified the modifications it thought necessary, the Agency violated VIA's procedural fairness rights by failing to give VIA an adequate opportunity to respond to the Agency's requests for cost and feasibility information.

80 VIA had not directly raised this procedural fairness argument before the Federal Court of Appeal. What it had advanced, as one of its grounds of appeal, was that the Agency had erred in law by identifying obstacles as "undue" before VIA had obtained expert evidence assessing the cost of remedial measures. Its procedural fairness argument was a separate ground, and pertained only to the Agency's refusal to hold a second oral hearing, an argument which was rejected by the majority. Sexton J.A. was of the view that the Agency had the right to exercise its discretion in deciding whether to grant an oral hearing.

81 In reaching the conclusion that VIA's right to procedural fairness had been violated when the Agency issued a final decision without giving VIA an opportunity to provide cost estimates, the Federal Court of Appeal blended VIA's discrete grounds of appeal to find a breach of procedural fairness.

82 The court accordingly allowed VIA's appeal and remitted the matter to the Agency for re-consideration in accordance with both the network-based analysis endorsed by the majority and the "fresh evidence", namely the Schrum report, adduced by VIA on appeal.

III. Analysis

A. *Standard of Review*

83 The Agency's decision was that there were undue obstacles to the mobility of persons with disabilities in VIA's Renaissance fleet and it ordered that remedial steps be taken to correct the problems it identified. In so doing, the Agency was proceeding under ss. 172(1) and 172(3) of the *Canada Transportation Act*, reproduced here for ease of reference:

> **172.** (1) The Agency may, on application, inquire into a matter in relation to which a regulation could be made under subsection 170(1)[1], regardless of whether such a regulation has been made, in order to determine whether there is an undue obstacle to the mobility of persons with disabilities.
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> ...
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> (3) On determining that there is an undue obstacle to the mobility of persons with disabilities, the Agency may require the taking of appropriate corrective measures or direct that compensation be paid for any expense incurred by a person with a disability arising out of the undue obstacle, or both.

84 VIA had argued that the Agency lacked jurisdiction under s. 172(1) to inquire into any complaint that was not based on an actual travel experience. The majority in the Federal Court of Appeal accepted VIA's characterization of s. 172(1) as jurisdiction-limiting because it turned on questions of statutory interpretation and human rights.

85 In Sexton J.A.'s view, s. 172, as part of Part V of the *Canada Transportation Act*, was one of several provisions that "have a human rights aspect to them", calling for a "lower level of deference" (para. 25).

86 Sexton J.A. relied on *Canadian Pacific Railway Co. v. Canada (Canada Transportation Agency)*, [2003] 4 F.C. 558, 2003 FCA 271, to draw a distinction between the Agency's expertise in regulatory matters and its expertise addressing human rights. In his view, the Agency's authority to proceed with CCD's complaint was an issue implicating the protection of human rights that turned on statutory interpretation outside the Agency's area of expertise. He determined that these factors, including the presence of a statutory right of appeal with leave, indicated that the Agency's interpretation of its jurisdiction under s. 172 was reviewable on the less deferential standard of correctness, thereby enabling the court to substitute its view of the correct answer for that of the Agency.

87 As previously noted, the Federal Court of Appeal was, however, unanimous in its conclusion that the Agency had correctly concluded that it had jurisdiction under s. 172 to proceed with CCD's complaint.

88 The Court of Appeal also concluded that the standard for reviewing the Agency's decision on the issue of whether an obstacle is undue, is patent unreasonableness. I agree. I do not, however, share the majority's view that VIA raised a preliminary, jurisdictional question falling outside the

Agency's expertise that was, therefore, subject to a different standard of review. Applying such an approach has the capacity to unravel the essence of the decision and undermine the very characteristic of the Agency which entitles it to the highest level of deference from a court - its specialized expertise. It ignores Dickson J.'s caution in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227, 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).

89 If every provision of a tribunal's enabling legislation were treated as if it had jurisdictional consequences that permitted a court to substitute its own view of the correct interpretation, a tribunal's role would be effectively reduced to fact-finding. Judicial or appellate review will "be better informed by an appreciation of the views of the tribunal operating daily in the relevant field": D. Mullan, "Tribunals and Courts -- The Contemporary Terrain: Lessons from Human Rights Regimes" (1999), 24 Queen's L.J. 643, at p. 660. Just as courts "should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so", so should they also refrain from overlooking the expertise a tribunal may bring to the exercise of interpreting its enabling legislation and defining the scope of its statutory authority.

90 Section 172 is part of the Agency's enabling legislation, the authorizing framework assigning responsibility to the Agency, and in which it is expected to apply its expertise. It is a clear example of a provision that reflects "a conscious and clearly worded decision by the legislature to use a subjective or open-ended grant of power [which] has the effect of widening the delegate's jurisdiction and therefore narrowing the ambit of jurisdictional review of the legality of its actions": D. P. Jones and A. S. de Villars, *Principles of Administrative Law* (4th ed. 2004), at p. 140.

91 In *Pasiechnyk v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890, at para. 18, this Court said:

> The test as to whether the provision in question is one that limits jurisdiction is: was the question which the provision raises one that was intended by the legislators to be left to the exclusive decision of the Board? ... Factors such as the purpose of the statute creating the tribunal, the reason for its existence, the area of expertise and the nature of the problem are all relevant in arriving at the intent of the legislature.

This approach, affirmed by Bastarache J. in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, at para. 26, reiterates Beetz J.'s observation in *U.E.S., local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, that:

> The concept of the preliminary or collateral question diverts the courts from the real problem of judicial review: it substitutes the question "Is this a preliminary or collateral question to the exercise of the tribunal's power?" for the only question which should be asked, "Did the legislator intend the question to be within the jurisdiction conferred on the tribunal?" [p. 1087]

92 A tribunal with the power to decide questions of law is a tribunal with the power to decide questions involving the statutory interpretation of its enabling legislation, whether or not the questions also engage human rights issues. Bastarache J.'s dissenting reasons note in *Barrie Public Utilities v. Canadian Cable Television Assn.*, [2003] 1 S.C.R. 476, 2003 SCC 28, at para. 86, that "the

broad policy context of a specialized agency infuses the exercise of statutory interpretation such that application of the enabling statute is no longer a matter of 'pure statutory interpretation'. When its enabling legislation is in issue, a specialized agency will be better equipped than a court": See also *Pushpanathan*, at para. 37.

93 The Agency's enabling legislation clearly shows that its interpretation of its authority to proceed with CCD's application is a question Parliament intended to fall squarely within its jurisdiction and expert assessment. Under s. 172(1), "[t]he Agency may, on application, inquire into a matter in relation to which a regulation could be made under subsection 170(1)". Section 170(1) gives the Agency discretionary authority to "make regulations for the purpose of eliminating undue obstacles in the transportation network under the legislative authority of Parliament". A list of four particular areas in which the Agency may make regulations is provided, but this list is not exhaustive. Instead, Parliament gave the Agency discretionary authority to determine whether regulations directed toward eliminating undue obstacles in the federal transportation system *could* be made, without circumscribing the Agency's discretion to identify the specific matters these regulations might address.

94 In accepting CCD's application, the Agency relied on its express authority to make regulations respecting "the design, construction or modification of ... means of transportation" and the "conditions of carriage applicable in respect of the transportation of persons with disabilities" under ss. 170(1)(*a*) and (*c*) to find that it had jurisdiction to entertain CCD's complaint. Since CCD's application clearly concerned the "design, construction or modification" of the Renaissance cars and the "conditions of carriage" confronting persons with disabilities, no jurisdictional question legitimately arises from this ground of appeal on these facts. If an experience-based complaint were required to operationalize the Agency's adjudicative authority, we would not expect to find authority to make regulations respecting the "design" or "construction" of rail cars in s. 170(1)(*c*).

95 The Agency's authority to entertain CCD's complaint, in any event, depended on its own discretionary determination of whether CCD's complaint raised an issue for which a regulation directed toward eliminating undue obstacles *could* be made. This falls squarely within the Agency's jurisdiction. Given that the Agency's jurisdiction to entertain CCD's complaint under s. 172(1) turns almost exclusively on its own discretionary decision-making, s. 172(1) is a jurisdiction-granting, not jurisdiction-limiting, provision.

96 It seems to me counterproductive for courts to parse and recharacterize aspects of a tribunal's core jurisdiction, like the Agency's discretionary authority to make regulations and adjudicate complaints, in a way that undermines the deference that jurisdiction was conferred to protect. By attributing a jurisdiction-limiting label, such as "statutory interpretation" or "human rights", to what is in reality a function assigned and properly exercised under the enabling legislation, a tribunal's expertise is made to defer to a court's generalism rather than the other way around.

97 I do not share the view that the issue before the Agency was, as a human rights matter, subject to review on a standard of correctness. This unduly narrows the characterization of what the Agency was called upon to decide and disregards how inextricably interwoven the human rights and transportation issues are. Parliament gave the Agency a specific mandate to determine how to render transportation systems more accessible for persons with disabilities. This undoubtedly has a human rights aspect. But that does not take the questions of how and when the Agency exercises its human rights expertise outside the mandate conferred on it by Parliament.

98 The human rights issues the Agency is called upon to address arise in a particular - and particularly complex - context: the federal transportation system. The *Canada Transportation Act* is highly specialized regulatory legislation with a strong policy focus. The scheme and object of the Act are the oxygen the Agency breathes. When interpreting the Act, including its human rights components, the Agency is expected to bring its transportation policy knowledge and experience to bear on its interpretations of its assigned statutory mandate: *Pushpanathan*, at para. 26

99 The allegedly jurisdictional determination the Agency was being asked to make, like the "undueness" inquiry, falls squarely within its statutory mandate. It did not involve answering a legal question beyond its expertise, but rather requires the Agency to apply its expertise to the legal issue assigned to it by statute. The Agency, and not a reviewing court, is best placed to determine whether the Agency may exercise its discretion to make a regulation for the purpose of eliminating an undue obstacle to the mobility of persons with disabilities - a determination on which the Agency's jurisdiction to entertain applications depends.

100 The Agency is responsible for interpreting its own legislation, including what that statutory responsibility includes. The Agency made a decision with many component parts, each of which fell squarely and inextricably within its expertise and mandate. It was therefore entitled to a single, deferential standard of review.

101 In any situation where deference is due, "there will often be no single right answer to the questions that are under review against the standard of reasonableness. ... Even if there could be, notionally, a single best answer, it is not the court's role to seek this out when deciding if the decision was unreasonable": *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20, at para. 51. Just as judicial assessments of what is reasonable may vary, it is unavoidable that "[w]hat is patently unreasonable to one judge may be eminently reasonable to another": *Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941, at p. 963.

102 I appreciate that it is a conceptual challenge to delineate the difference in degrees of deference between what is patently unreasonable and what is unreasonable. Both, it seems to me, speak to whether a tribunal's decision is demonstrably unreasonable, that is, such a marked departure from what is rational, as to be unsustainable. This issue was, in my view, persuasively canvassed by my colleague LeBel J. in his concurring reasons in *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77, 2003 SCC 63, and requires no further elaboration here.

103 But whatever label is used to describe the requisite standard of reasonableness, a reviewing court should defer where "the reasons, taken as a whole, are tenable as support for the decision" (*Ryan*, at para. 56) or "where ... the decision of that tribunal [could] be sustained on a reasonable interpretation of the facts or of the law" (*National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, at pp. 1369-70, *per* Gonthier J.) The "immediacy or obviousness" to a reviewing court of a defective strand in the analysis is not, in the face of the inevitable subjectivity involved, a reliable guide to whether a given decision is untenable or evidences an unreasonable interpretation of the facts or law.

104 As Wilson J. recognized in *National Corn Growers*, at pp. 1347-48, it is the way a tribunal understands the question its enabling legislation asks it to answer and the factors it is to consider, rather than the specific answer a tribunal arrives at, that should be the focus of a reviewing court's inquiry:

> [O]ne must begin with the question whether the tribunal's interpretation of the provisions in its constitutive legislation that define the way it is to set about answering particular questions is patently unreasonable. If the tribunal has not interpreted its constitutive statute in a patently unreasonable fashion, the courts must not then proceed to a wide ranging review of whether the tribunal's conclusions are unreasonable.

To engage in a wide-ranging review of a tribunal's specific conclusions when its interpretation of its constitutive statute cannot be said to be irrational, or unreasonable, would be an unwarranted trespass into the realm of reweighing and re-assessing evidence. Where an expert and specialized tribunal has charted an appropriate analytical course for itself, with reasons that serve as a rational guide, reviewing courts should not lightly interfere with its interpretation and application of its enabling legislation.

105 Here, the Agency interpreted its authority to proceed with CCD's application under s. 172(1) in a manner that is, to use the pioneering language of Dickson J., "rationally supported by the relevant legislation": *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, at p. 237. Nothing in the Agency's enabling legislation compels subjecting any particular aspect of the Agency's interpretation of s. 172 to a more searching review or a reweighing of the factors and evidence the Agency considered.

106 The Agency, to whom the duty of interpreting and applying its broad regulation-making powers falls, is owed deference in interpreting its own legislation. It did not reach an unreasonable conclusion respecting its jurisdiction when it rejected the suggestion that an actual travel-based complaint was required to trigger its adjudicative authority.

107 I also share the view of Evans J.A. that deference is owed to the Agency's application of s. 172 on the merits. Included in its mandate is the discretion to identify obstacles for persons with disabilities, to decide whether they are undue and, if they are, what the most appropriate remedy is. Parliament designated the Agency to interpret and apply its enabling legislation, select from a range of remedial choices, protect the interests of the public, address policy issues, and balance multiple and competing interests.

108 The Agency defined the analytical process inherent in identifying "undue obstacles" in the federal transportation network in a way that is supported by the *Canada Transportation Act*. In expressing its mandate, it stated: "if the Agency finds that the accommodation provided is not reasonable or falls short of what is practicable in the circumstances, then the Agency may find an undue obstacle and may require the taking of corrective measures to eliminate that undue obstacle" (Preliminary Decision, at p. 20).

109 Viewed as a whole, the Agency's reasons show that it approached and applied its mandate reasonably. In particular and most significantly, it complied substantially with this Court's directions in *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 ("*Meiorin*"), assessing reasonable accommodation, and applied the correct burden of proof. While the Agency did not conduct a step-by-step application of *Meiorin*, it did apply its guiding principles and adapted them to its governing statutory mandate. In the absence of specific evidence of undue hardship, the Agency's rejection of VIA's economic arguments was consistent with this Court's guidance in *British Columbia (Superintendent of Motor Vehicles) v. British Columbia*

(Council of Human Rights), [1999] 3 S.C.R. 868 ("*Grismer*"), at para. 41 that "impressionistic evidence of increased expense will not generally suffice.

110 To redress discriminatory exclusions, human rights law favours approaches that encourage, rather than fetter, independence and access. This means an approach that, to the extent structurally, economically and otherwise reasonably possible, seeks to minimize or eliminate the disadvantages created by disabilities. It is a concept known as reasonable accommodation.

111 In my view, as I attempt to explain in the balance of these reasons, far from being unreasonable for the Agency to adopt a frame of reference premised on achieving personal wheelchair-based accessibility in 13 economy coach cars and 17 service cars out of the 139 cars VIA purchased, it may well have been found to be patently unreasonable for the Agency not to do so. Nor did it violate VIA's rights to procedural fairness.

B. *Was the Agency's Decision Entitled to Deference?*

112 Part V of the *Canada Transportation Act* was enacted to confirm the protection of the human rights of persons with disabilities in the federal transportation context. The history of this regulatory scheme shows that it was Parliament's intention that what is now Part V of the Act be interpreted according to human rights principles and that "transportation legislation rather than human rights legislation should be used" to enforce the accessibility standards provided in the predecessor legislation, the *National Transportation Act, 1987*, R.S.C. 1985, c. 28 (3rd Supp.) (*House of Commons Debates*, vol. VI, 2nd Sess., 33rd Parl., June 17, 1987, at p. 7273 (Hon. John C. Crosbie)).

113 Amendments made to the *National Transportation Act, 1987* affirmed the government's intention that transportation legislation "be placed alongside the other laws of Canada that reflect its tradition for protecting human rights and values in Canada" (*House of Commons Debates*, vol. XIII, 2nd Sess. 33rd Parl., June 17, 1988, at p. 16573 (Hon. Gerry St. Germain)). Parliament's decision to use this particular legislation as the source of human rights protection for persons with disabilities ensures specialized protection, applying practical expertise in transportation issues to human rights principles. This both strengthens the protection and enables its realistic implementation.

114 In *Tranchemontagne v. Ontario (Director, Disability Support Program)*, [2006] 1 S.C.R. 513, 2006 SCC 14, at para. 26, a majority of this Court affirmed the presumption that a tribunal can look to external statutes to assist in the interpretation of provisions in its enabling legislation "because it is undesirable for a tribunal to limit itself to some of the law while shutting its eyes to the rest of the law. The law is not so easily compartmentalized that all relevant sources on a given issue can be found in the provisions of a tribunal's enabling statute." Both *Winnipeg School Division No. 1 v. Craton*, [1985] 2 S.C.R. 150, at p. 155, and *Tranchemontagne* make clear that human rights legislation, as a declaration of "public policy regarding matters of general concern", forms part of the body of relevant law necessary to assist a tribunal in interpreting its enabling legislation.

115 In *Winnipeg School Division*, Dickson C.J. confirmed that where there is a conflict between human rights law and other specific legislation, unless an exception is created, the human rights legislation, as a collective statement of public policy, must govern. It follows as a natural corollary that where a statutory provision is open to more than one interpretation, it must be interpreted consistently with human rights principles. The Agency is therefore obliged to apply the principles of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, when defining and identifying "undue obstacles" in the transportation context.

116 There is, moreover, a mandatory direction found in s. 171 from Parliament to the Agency to coordinate its activities with the Canadian Human Rights Commission to ensure policy, procedural and jurisdictional complementarity. It states:

> **171.** The Agency and the Canadian Human Rights Commission shall coordinate their activities in relation to the transportation of persons with disabilities in order to foster complementary policies and practices and to avoid jurisdictional conflicts.

117 Section 171 confirms the Agency's obligation to interpret and apply the *Canada Transportation Act* in a manner consistent with the purpose and provisions of human rights legislation. This means identifying and remedying undue obstacles for persons with disabilities in the transportation context in a manner that is consistent with the approach for identifying and remedying discrimination under human rights law. In practice, this has resulted, as the Agency noted in its Preliminary Decision, in complaints by persons with disabilities related to the federal transportation network being referred regularly by the Canadian Human Rights Commission to the Agency for investigation and determination.

118 In this case, it is the design of the Renaissance cars that is said to represent an undue obstacle. Either the actual existence or the planned existence of an obstacle to mobility can be sufficient to trigger the Agency's jurisdiction to inquire into matters relating to design, construction, or modification of the means of transportation. The applicant is not required to establish that the obstacle is already part of the federal transportation system, or that someone has actually experienced an incident relating to the obstacle.

119 When assessing the scope of an applicant's right not to be confronted with undue obstacles to mobility, the Agency is bound by this Court's decision in *Meiorin*. *Meiorin* defines the balancing required to determine whether a workplace obstacle or standard unjustifiably infringes human rights principles. An impugned standard may be justified "by establishing on a balance of probabilities":

> (1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;
> (2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and
> (3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer. [para. 54]

120 The same analysis applies in the case of physical barriers. A physical barrier denying access to goods, services, facilities or accommodation customarily available to the public can only be justified if it is "impossible to accommodate" the individual "without imposing undue hardship" on the person responsible for the barrier. There is, in other words, a duty to accommodate persons with disabilities unless there is a *bona fide* justification for not being able to do so.

121 The concept of reasonable accommodation recognizes the right of persons with disabilities to the same access as those without disabilities, and imposes a duty on others to do whatever is reasonably possible to accommodate this right. The discriminatory barrier must be removed unless there is a *bona fide* justification for its retention, which is proven by establishing that accommodation imposes undue hardship on the service provider: *Commission scolaire régionale de Chambly v. Bergevin*, [1994] 2 S.C.R. 525 ("*Chambly*"), at p. 546.

122 In *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at para. 79, this Court noted that it is "a cornerstone of human rights jurisprudence that the duty to take positive action to ensure that members of disadvantaged groups benefit equally from services offered to the general public is subject to the principle of reasonable accommodation", which means "to the point of 'undue hardship'". Undue hardship implies that there may necessarily be some hardship in accommodating someone's disability, but unless that hardship imposes an undue or unreasonable burden, it yields to the need to accommodate.

123 What constitutes undue hardship depends on the factors relevant to the circumstances and legislation governing each case: *Chambly*, at p. 546; *Meiorin*, at para. 63. The factors informing a respondent's duty to accommodate "are not entrenched, except to the extent that they are expressly included or excluded by statute": *Meiorin*, at para. 63.

124 In all cases, as Cory J. noted in *Chambly*, at p. 546, such considerations "should be applied with common sense and flexibility in the context of the factu al situation presented in each case".

125 Yet VIA argues that s. 5 of the *Canada Transportation Act*, whereby the Agency is directed to take matters of cost, economic viability, safety and the quality of services to all passengers into consideration when it makes accessible transportation decisions, "stands in stark contrast to the approach embodied in human rights statutes". The relevant portions of s. 5 of the Act are reproduced here for convenience:

> **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 more 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,
>
> ...
>
> (*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
>
> ...

(ii) an undue obstacle to the mobility of persons, including persons with disabilities.

126 VIA asserts that the duty to accommodate arising under human rights legislation is not limited by "practicability" because human rights legislation does not balance competing interests. In VIA's view, human rights legislation provides near absolute protection for persons with disabilities, unlike s. 5 of the *Canada Transportation Act*, which, VIA submits, was intended to provide less protection out of greater deference to financial, operational and other considerations.

127 With respect, this argument misconstrues the objectives and proper application of human rights principles. The purpose of federal human rights legislation is to prevent and remedy discrimination: *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114. In particular, s. 15 of the *Canadian Human Rights Act* creates a legal duty to accommodate the needs of persons accessing its protection to the point of undue hardship. The scope of the right of persons with disabilities to be free from discrimination will depend on the nature, legitimacy and strength of the competing interests at stake in a given case. These competing interests will inform an assessment of what constitutes reasonable accommodation.

128 A factor relied on to justify the continuity of a discriminatory barrier in almost every case is the cost of reducing or eliminating it to accommodate the needs of the person seeking access. This is a legitimate factor to consider: *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489, at pp. 520-21. But, as this Court admonished in *Grismer*, at para. 41, tribunals "must be wary of putting too low a value on accommodating the disabled".

129 Section 5(*a*) of the *Canadian Human Rights Act* states that "[i]t is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general public to deny, or to deny access to, any such good, service, facility or accommodation". Section 15(*g*) of the *Canadian Human Rights Act* provides, however, that it is not a discriminatory practice to deny access to a good, service, facility or accommodation customarily available to the general public if "there is *bona fide* justification for that denial or differentiation". In *Central Alberta Dairy Pool*, at p. 518, this Court unanimously agreed that "[i]f a reasonable alternative exists to burdening members of a group with any given rule, that rule will not be *bona fide*". *Grismer* further elaborated that establishing a *bona fide* justification for a *prima facie* violation of human rights legislation requires a respondent to show that "the employer or service provider has made every possible accommodation short of undue hardship" (para. 21). For the Agency to find that an obstacle denying access to transportation services is justified, therefore, no reasonable alternative to burdening persons with disabilities must exist.

130 The jurisprudence of this Court reveals that undue hardship can be established where a standard or barrier "is reasonably necessary" insofar as there is a "sufficient risk" that a legitimate objective like safety would be threatened enough to warrant the maintenance of the discriminatory standard (*Ontario Human Rights Commission v. Borough of Etobicoke*, [1982] 1 S.C.R. 202); where "such steps as may be reasonable to accommodate without undue interference in the operation of the employer's business and without undue expense to the employer" have been taken (*Ontario Human Rights Commission v. Simpsons Sears Ltd.*, [1985] 2 S.C.R. 536, at p. 555); where no reasonable alternatives are available (*Central Okanagan School District No. 23 v. Renaud*, [1992] 2 S.C.R. 970); where only "reasonable limits" are imposed on the exercise of a right (*Eldridge*, at para. 79); and, more recently, where an employer or service provider shows "that it could not have done anything else reasonable or practical to avoid negative impacts on the individual" (*Meiorin*, at para. 38).

The point of undue hardship is reached when reasonable means of accommodation are exhausted and only unreasonable or impracticable options for accommodation remain.

131 Since the Governor in Council has not prescribed standards for assessing undue hardship as authorized by s. 15(3) of the *Canadian Human Rights Act*, assessing whether the estimated cost of remedying a discriminatory physical barrier will cause undue hardship falls to be determined on the facts of each case and the guiding principles that emerge from the jurisprudence. A service provider's refusal to spend a small proportion of the total funds available to it in order to remedy a barrier to access will tend to undermine a claim of undue hardship (*Eldridge*, at para. 87). The size of a service provider's enterprise and the economic conditions confronting it are relevant (*Chambly*, at p. 546). Substantial interference with a service provider's business enterprise may constitute undue hardship, but some interference is an acceptable price to be paid for the realization of human rights (*Central Okanagan School District No. 23*, at p. 984). A service provider's capacity to shift and recover costs throughout its operation will lessen the likelihood that undue hardship will be established: *Howard v. University of British Columbia* (1993), 18 C.H.R.R. D/353 (B.C.C.H.R.).

132 Other relevant factors include the impact and availability of external funding, including tax deductions (*Brock v. Tarrant Film Factory Ltd.* (2000), 37 C.H.R.R. D/305 (Ont. Bd. Inq.)); the likelihood that bearing the net cost would threaten the survival of the enterprise or alter its essential character (*Quesnel v. London Educational Health Centre* (1995), 28 C.H.R.R. D/474 (Ont. Bd. Inq.)); and whether new barriers were erected when affordable, accessibility-enhancing alternatives were available (*Maine Human Rights Commission v. City of South Portland*, 508 A.2d 948 (Me. 1986), at pp. 956-57).

133 It bears repeating that "[i]t is important to remember that the duty to accommodate is limited by the words 'reasonable' and 'short of undue hardship'. Those words do not constitute independent criteria. Rather, they are alternate methods of expressing the same concept": *Chambly*, at para. 33, citing *Central Okanagan School District No. 23*, at p. 984. The factors set out in s. 5 of the *Canada Transportation Act* flow out of the very balancing inherent in a "reasonable accommodation" analysis. Reconciling accessibility for persons with disabilities with cost, economic viability, safety, and the quality of service to all passengers (some of the factors set out in s. 5 of the Act) reflects the reality that the balancing is taking place in a transportation context which, it need hardly be said, is unique.

134 Setting out the factors is Parliament's way of acknowledging that the considerations for weighing the reasonableness of a proposed accommodation vary with the context. It is an endorsement of, not a rebuke to the primacy of human rights principles, principles which anticipate, as this Court said in *Chambly* and *Meiorin*, that flexibility and common sense will not be disregarded.

135 Each of the factors delineated in s. 5 of the Act is compatible with those that apply under human rights principles. Any proposed accommodation that would unreasonably interfere with the realization of Parliament's objectives as declared in s. 5 of the Act may constitute undue hardship.

136 Section 5 of the *Canada Transportation Act*, together with s. 172(1), constitute a legislative direction to the Agency to determine if there is an "undue obstacle" to the mobility of persons with disabilities. Section 5(*g*)(ii) of the Act states that it is essential that "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 an *undue obstacle* to the mobility of persons, including persons with disabilities". The Agency's authority to identify and remedy "undue obstacles" to the mobility

of persons with disabilities requires that it implement the principle that persons with disabilities are entitled to the elimination of "undue" or "unreasonable" barriers, namely those barriers that cannot be justified under human rights principles.

137 The qualifier, "as far as is practicable", is the statutory acknowledgment of the "undue hardship" standard in the transportation context. The fact that the language is different does not make it a higher or lower threshold than what was stipulated in *Meiorin*: *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montreal (City)*, [2000] 1 S.C.R. 665, 2000 SCC 27, at para. 46. The same evaluative balancing is required in assessing how the duty to accommodate will be implemented.

138 That is precisely why Parliament charged the Agency with the public responsibility for assessing barriers, not the Canadian Human Rights Commission. The Agency uniquely has the specialized expertise to balance the requirements of those with disabilities with the practical realities - financial, structural and logistic - of a federal transportation system.

139 What is "practicable" within the meaning of s. 5(*g*)(ii) of the *Canada Transportation Act* is based on the evidence as to whether the accommodation of the disability results in an unreasonable burden on the party responsible for the barrier. That is the same analysis required to assess whether there is undue hardship under the *Canadian Human Rights Act* or whether, under the *Canada Transportation Act*, it would be unreasonable (or undue) to require that an obstacle be removed or rectified. No difference in approach is justified by the different context, particularly since Parliament directed the Agency in s. 171 to foster complementary policies and practices with those of the Canadian Human Rights Commission. The "reasonable accommodation" analysis in the transportation context is unique only insofar as the policy objectives articulated in s. 5 of the *Canada Transportation Act* are factors which inform a determination of the possible grounds on which undue hardship may be established. These factors inform, not dilute, the duty to accommodate to the point of undue hardship.

140 The Federal Court of Appeal's articulation of the Agency's mandate in *VIA Rail Canada Inc. v. National Transportation Agency*, [2001] 2 F.C. 25, at paras. 34-37, is consistent with this approach. While no specific definition of "undue obstacle" was promulgated, an analytical approach to identifying an "undue obstacle" under the *Canada Transportation Act* was proposed with reference to the judicial interpretation of the term "undue" in other legislative contexts, including human rights enactments. The court determined that "undueness" was a relative concept, and, relying on Supreme Court jurisprudence, recognized that "undue" generally means disproportionate, improper, inordinate, excessive or oppressive, and expresses a notion of seriousness or significance.

141 The court in *Via Rail Canada Inc. v. National Transportation Agency* explicitly adverted to established authority on "undue hardship" in the human rights context in discussing the need to balance the interests of various parties in an "undue obstacle analysis". Citing *Central Alberta Dairy Pool*, at p. 521, Sexton J.A. (Linden and Evans JJ.A. concurring) said: "The Supreme Court has also recognized that the term [undue] implies a requirement to balance the interests of the various parties" (para. 37). The court later determined that "the Agency was required to undertake a balancing of interests such that the satisfaction of one interest does not create disproportionate hardship affecting the other interest" (para. 39 (emphasis added)).

142 In the present case, the onus was on VIA to establish that the obstacles to the mobility of persons with disabilities created by its purchase of the Renaissance cars were not "undue" by per-

suading the Agency that it could not accommodate persons with disabilities without experiencing undue hardship. The Agency's decision makes clear that this onus was not met.

143 In finding the Agency's decision unreasonable, Sexton J.A. noted that "the system cannot afford to have every rail car equipped with every type of mechanism to be able to address every type of disability" (para. 55). That, however, is not what the Agency decided. Rather, the Agency's decision would make one coach car in each day trip accessible to persons using personal wheelchairs through the modification of 13 economy coach cars, and one sleeper unit in each overnight trip personal wheelchair accessible through the modification of 17 service cars.

144 I see nothing unreasonable in the Agency's analysis or decision in this case. In particular, I see nothing inappropriate about the factors it did -- and did not -- rely on, such as the Rail Code, the use of personal wheelchairs, the network, and cost, either in determining whether the obstacles were undue, or in determining what corrective measures were appropriate. Each factor will be examined in turn.

a) The Rail Code

145 The Agency accepted the 1998 Rail Code as a factor to consider. VIA challenged this reliance since the Rail Code was based on voluntary compliance.

146 The Rail Code, as previously stated, was in fact the result of a "voluntary, consensus-building process involving extensive consultation with the transportation industry, the community of persons with disabilities and other government bodies such as the Canadian Human Rights Commission ... and the Department of Transport", (Preliminary Decision, at p. 29). Developed in consultation with an expert human rights agency, the Rail Code's standards represent objectives that rail carriers, including VIA, publicly accepted. Its purpose was to function as self-imposed regulation, establishing minimum standards all rail carriers agreed to meet.

147 It was, accordingly, a proper factor in the Agency's analysis, especially since the anticipation of compliance is reflected in the language of the Rail Code itself, which provides, in s. 1.1.1: "It is expected that this [passenger rail car accessibility] Part of the Code of Practi ce will be followed by VIA Rail Canada Inc." The fact that the Rail Code was voluntarily agreed to and not government-imposed reinforces, rather than detracts from its relevance as a factor for assessing VIA's "undue hardship" arguments. VIA knew it had agreed to, and was expected to comply with, the Rail Code.

148 The Rail Code provides that until every grouping of passenger rail cars connected together to form a train (a "train consist") has at least one independently accessible seating/sleeping and washroom facility, any newly manufactured car, or car undergoing a major refurbishment, should provide for such accommodation. Because existing equipment can be more difficult and expensive to retrofit, the Rail Code permits some flexibility with respect to the time period during which rail carriers are expected to achieve accessibility.

149 The Agency concluded that the Renaissance cars were not existing equipment for purposes of the Rail Code, but fell instead in the category of newly manufactured cars or cars undergoing a major refurbishment within the meaning of s. 1.1.1 of the Rail Code. Seventy-five of the 139 Renaissance cars arrived in Canada as unused parts, or as partially assembled cars. VIA intended to assemble them as the next generation of rail cars for 20 to 25 years' use. It was spending at least

$100 million on structural and other changes to the Renaissance cars, which had themselves cost only $29.8 million.

150 VIA's argument that the provisions of the Rail Code now represent economically and structurally unfeasible standards is an *ex post facto* argument the Agency was entitled to reject, based on the paucity of supporting evidence and cooperation it got from VIA. In the context of VIA's decision to purchase new rail cars, the Agency concluded, properly in my view, that the Rail Code put "VIA on notice of the kinds of obstacles that it should reasonably have been expected to remove when it considered purchasing new rolling stock" (Preliminary Decision, at p. 22).

b) The Use of Personal Wheelchairs

151 Based on the Canadian Standards Association (CSA), CAN/CSA-B651-95, *Barrier-Free Design Standard*, which sets out minimum standards for making buildings and other facilities accessible to persons with disabilities, many of which are incorporated into the Rail Code, the accessibility paradigm is access by personal wheelchair. This standard was adopted in the Rail Code, which provides that "any newly manufactured coach car or sleeping car specified by these sections to be wheelchair-accessible should be designed to be accessible to a person in a personal wheelchair" (s. 1.1.1). Transport Canada too has incorporated the CSA *Barrier-Free Design Standard* definition of a personal wheelchair into its *Passenger Car Safety Rules*, which prescribe mandatory safety standards.

152 As purchased, none of the Renaissance cars, unlike the retrofitted VIA 1 cars in the existing fleet, satisfied these standards.

153 The Agency highlighted independent access as a critical component of the concept of rail car accessibility. Personal wheelchair users are physically and psychologically more independent when they are able to remain in personal wheelchairs designed to meet their specific physical needs. In view of the importance of independent access, the Agency concluded that accommodation by supplying a narrow wheelchair on the train (on-board wheelchair), which requires that passengers be assisted into it, is not an acceptable substitute for a person's own wheelchair.

154 The Agency noted that the use of personal wheelchairs minimizes the effects of disabilities in ways that "on-board" wheelchairs cannot, and eliminates both the physical risks and the humiliation that can accompany transfers from a personal wheelchair into alternative seating accommodations or the receipt of assistance in washroom use. In its words, being forced to rely on others for assistance gives rise to "human error, inconvenience, delays, affronts to human dignity and pride, cost, uncertainty, and no sense of confidence or security in one's ability to move through the network" (Preliminary Decision, at p. 19).

155 In the Agency's view, "on-board" wheelchair use was particularly inadequate in those parts of the train VIA had specifically intended to meet the needs of persons with disabilities, like the "accessible suite" in the service cars. Based on promoting the principle of independence, the Agency concluded that "where there are features and amenities specifically designed to meet the needs of persons with disabilities who wish to remain in their own wheelchairs, it is essential that they provide adequate dimensions and appropriate designs so as to not lessen the level of independence" (Preliminary Decision, at p. 20). According to the Rail Code, a personal wheelchair means a passenger-owned wheelchair that requires a minimum clear floor area of 750 mm by 1200 mm to ac-

commodate the wheelchair and its occupant and a minimum clear turning space of 1500 mm in diameter (s. 1.1.1).

156 CCD had invited the Agency to adopt a different standard that better reflects the larger size of modern wheelchairs. The Agency declined to do so. While acknowledging that the CSA definition of a personal wheelchair was based on data from the 1970s when wheelchairs were smaller than those in use today, the Agency chose instead to accept the well-established CSA personal wheelchair standard.

157 The standard of personal wheelchair use is not unique to Canada. Like the Rail Code, American, British and Australian standards emphasize the importance of ensuring that persons with disabilities can access rail facilities and services in their personal wheelchairs. Legislation in each country requires that at least one car in every passenger train be personal wheelchair accessible.

158 British standards direct rail service providers to provide one personal wheelchair-sized space in each class of passenger accommodation. In Part V of the *Disability Discrimination Act 1995* (U.K.), 1995, c. 50, s. 46 authorizes the Secretary of State to enact rail vehicle accessibility regulations ensuring accessibility for persons who must remain in their wheelchairs. These mandatory British standards under the *Rail Vehicle Accessibility Regulations 1998*, SI 1998/2456, are based on a reference wheelchair only slightly smaller than the "personal wheelchair" standard under the CSA *Barrier-Free Design Standard.*

159 In the United States, the *Americans with Disabilities Act*, 42 U.S.C. para.12162 (2000), provides that "it shall be considered discrimination ... for a person to purchase or lease any new rail passenger cars for use in intercity rail transportation ... unless all such rail cars are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, as prescribed ... in regulations". For American rail cars, accessibility is defined by technical standards provided in the *Americans with Disabilities Act Accessibility Guidelines for Transportation Vehicles*, 36 C.F.R. Part 1192 (1999), adopted by the Department of Transportation, many of which are substantially the same as the CSA *Barrier-Free Design Standard* for personal wheelchairs.

160 In Australia, the *Disability Standards for Accessible Public Transport 2002* ("*Disability Standards*") seek to remove discrimination on the basis of disability from public transport services over a 30-year period. To this end, the *Disability Standards* impose national requirements and mandatory performance outcomes governing such matters as the replacement or upgrading of infrastructure and capital investments. Consistent with the goal of ensuring that passengers using mobility aids can gain independent access to transportation equipment, the minimum allocated space for a single wheelchair is in accordance with what is required to accommodate a personal wheelchair as defined by Canadian standards. However, the *Disability Standards* note that the source data for this minimum standard may be dated, and warn service providers to be prepared for a future revision of these standards which would increase the dimensions to accommodate larger wheelchairs.

161 Personal wheelchair-based access as the appropriate accessibility paradigm is also consistent with this Court's human rights jurisprudence. In *Grismer*, this Court held at para. 19, that "[e]mployers and others governed by human rights legislation are now required *in all cases* to accommodate the characteristics of affected groups within their standards, rather than maintaining discriminatory standards supplemented by accommodation for those who cannot meet them" (emphasis in original). Standards, in other words, must be as inclusive as possible: *Grismer,* at para. 22.

162 The accommodation of personal wheelchairs enables persons with disabilities to access public services and facilities as independently and seamlessly as possible. Independent access to the same comfort, dignity, safety and security as those without physical limitations, is a fundamental human right for persons who use wheelchairs. This is the goal of the duty to accommodate: to render those services and facilities to which the public has access equally accessible to people with and without physical limitations.

163 VIA is required to accommodate this right as far as is practicable not only because Canadian law requires it to do so, but because it itself has committed publicly to doing so by agreeing to the Rail Code, a set of standards devised by it and the Agency in consultation with the Canadian Human Rights Commission. And the way VIA had agreed to do so was through access based on personal wheelchair use when it purchased new cars or undertook a major refurbishment of existing cars. The operating paradigm it accepted is the Canadian and internationally accepted norm, not the exception.

164 VIA cannot now argue that it was entitled to resile from these norms because it found a better bargain for its able-bodied customers. Neither the Rail Code, the *Canada Transportation Act*, nor any human rights principle recognizes that a unique opportunity to acquire inaccessible cars at a comparatively low purchase price may be a legitimate justification for sustained inaccessibility. In the expansion and upgrading of its fleet, VIA was not entitled to ignore its legal obligations and public commitments. The situation it now finds itself in was preventable in a myriad of ways.

165 In view of the widespread domestic and international acceptance of personal wheelchair-based accessibility standards and, in particular, VIA's own Rail Code commitments, it was not unreasonable for the Agency to rely on the personal wheelchair as a guiding accessibility paradigm.

c) The Network Defence

166 VIA's "network defence" can be broken down into two elements. First, VIA submitted that special, as-needed accommodations, such as individual meal delivery to the service cars, assistance from trained staff with transfers into on-board wheelchairs, and staff assistance for using the washroom facilities, were adequate alternatives to requiring retrofitting that would permit passengers using personal wheelchairs to access and perform these services themselves. Second, VIA was of the view that the "greater flexibility" in travel options the Renaissance cars provided, in addition to the continuing option for the time-being of using VIA's pre-Renaissance fleet, was a complete answer to CCD's concerns.

167 Although VIA made clear that its existing and more accessible fleet would be phased out and replaced with Renaissance cars on key routes between Montreal and Halifax and Montreal and Gaspé, VIA was of the view that any obstacles in the Renaissance fleet could be diminished if persons with disabilities used its older but more accessible fleet. The Agency interpreted VIA's argument to be that, unlike persons without disabilities, those with disabilities "cannot expect to go on every train, at every time in every way" (Preliminary Decision, at pp. 36-37).

168 Sexton J.A. found that the Agency's failure to properly consider VIA's network as a whole was patently unreasonable. In his view, the Agency erred by not considering the alternative actions VIA could take to ameliorate the obstacles in the Renaissance cars, like providing alternative transportation or different trains at different times.

169 The record, however, reveals that the Agency did in fact consider VIA's network to the extent that VIA was willing to provide any information about it, but rejected it, finding that "there is no evidence on the record that supports VIA's [position] that its existing fleet or its network, generally, will address obstacles that may be found to exist in the Renaissance Cars" (Preliminary Decision, at p. 38). For example, the Agency was alive to the possibility of remedying obstacles through network-based accommodations that would not involve physical changes to the Renaissance cars. Early in the proceedings, on March 29, 2001, the Agency asked VIA "whether it will be possible for the Nightstock [Renaissance] cars to be coupled with its existing fleet". VIA replied on April 2, 2001, stating: "the Nightstock cars will not be coupled with the existing fleet, save locomotives". The Agency also had information about VIA's reservation policy, its finalized fleet deployment plans, and its service standards.

170 But when it ordered VIA to provide a list of the network services it proposed would alleviate any obstacles on the Renaissance trains, VIA replied: "This case is a review of the physical dimensions of the Renaissance cars and whether they represent an undue obstacle to the transportation of persons with disabilities" (emphasis added).

171 VIA added the following clarification: "There is no change in the services which VIA Rail has committed to provide persons with disabilities". VIA's network defence was that it would provide the same services - no less and no more - that it already provided to passengers with disabilities. If persons with disabilities did not like the differently accessible features of the Renaissance fleet, they could continue to ride the pre-Renaissance fleet.

172 VIA described its network as including "the reservation system, the alternative transportation policy, ground services, special handling services, train accommodation, employee training and special service requests".

173 There is very little evidence in the record about the content of these network features and how they actually accommodate passengers with disabilities. What is clear, however, is that persons in a wheelchair who wish to purchase a ticket on a VIA train cannot be assured that the train they want to take will be able to accommodate them.

174 VIA asserted before the Agency that it "has a policy for alternative transportation that is sensitive to passengers with disabilities and a history of satisfying those needs", but provided no evidence in support of this assertion. In oral argument before this Court, VIA explained that in the past it has sent passengers to their destinations by taxi when they could not be accommodated on its trains, and that passengers who call in advance may be offered assistance.

175 This *ad hoc* provision of taxis or a network of rail services with only some accessible routes is not, it seems to me, adequately responsive to the goals of s. 5 of the *Canada Transportation Act*. Section 5 provides that the transportation services under federal legislative authority are, themselves, to be accessible. It is the rail service itself that is to be accessible, not alternative transportation services such as taxis. Persons with disabilities are entitled to ride with other passengers, not consigned to separate facilities.

176 Likewise, the fact that there are accessible trains travelling along some routes does not justify inaccessible trains on others. It is the global network of rail services that should be accessible. The fact that accessibility is limited to isolated aspects of the global network - like VIA's alternative transportation policy or the suggestion that persons with disabilities can continue to ride the existing

fleet for the time-being - does not satisfy Parliament's continuing goal of ensuring accessible transportation services.

177 Any ambiguity as to whether "accessible" in the English version of s. 5 of the *Canada Transportation Act* modifies the specific and plural "services" offered or the single global "network" of services provided is resolved by the use of the plural "*accessibles*" in the French version. The French text states:

> ... 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 ...

178 This confirms the common sense interpretation: namely that Parliament intended that all transportation services offered to the public be accessible, and not merely pieces of the network. As David Lepofsky notes, "[a] passenger who buys a ticket to take a VIA train does not ride the entire VIA network of all trains on all routes. He or she takes a specific train on a specific route at a specific time. To a passenger with a disability who needs to travel from Montreal to Toronto, it is immaterial whether VIA runs a fully accessible train from Calgary to Vancouver": "Federal Court of Appeal De-Rails Equality Rights for Persons with Disabilities: *VIA Rail v. Canadian Transportation Agency* and the Important Duty Not to Create New Barriers to Accessibility" (2005-2006), 18 *N.J.C.L.* 169, at p. 188.

179 The Agency found that VIA's network defence, based on what was available on its existing fleet, ran counter to the future-centred provisions of the Rail Code, which were oriented toward the incremental accommodation of personal wheelchairs in the federal rail network. In a 1998 case based on an *Application by Yvonne Gaudet, on behalf of Marcella Arsenault* (CTA Decision No. 641-AT-R-1998), it had found that the lack of personal wheelchair accessible sleeper units in VIA's existing fleet did not constitute an undue obstacle because of the financial and other implications of making the structural changes required. This acknowledgment of the cost and difficulties involved in structural changes to the *existing* fleet was based, in part, on an understanding that VIA had, through the Rail Code, among other methods, publicly committed itself to improving the accessibility of its *future* fleet of passenger rail cars.

180 But, the Agency concluded, rather than increasingly accommodating this goal in purchasing the Renaissance cars, VIA knowingly perpetuated the very inaccessibility problems that encumbered its existing fleet. The Agency therefore concluded that VIA could not rely on its existing equipment as an alternative accommodation.

181 VIA's proposed defence is also inconsistent with this Court's human rights jurisprudence. It ignores the fact that a significant cause of handicap is the nature of the environment in which a person with disabilities is required to function. Lepofsky has noted that "[o]ne of the greatest obstacles confronting disabled Canadians is the fact that virtually all major public and private institutions in Canadian society were originally designed on the implicit premise that they are intended to serve able-bodied persons, not the 10 to 15 percent of the public who have disabilities": "The Duty to Accommodate: A Purposive Approach" (1993), 1 *Can. Lab. L.J.* 1, at p. 6. It is, after all, the "combined effect of an individual's impairment or disability and the environment constructed by society that determines whether such an individual experiences a handicap": I. B. McKenna, "Legal Rights for Persons with Disabilities in Canada: Can the Impasse be Resolved?" (1997-98), 29 Ottawa L. Rev. 153, at p. 164.

182 The network approach preserves the paramountcy of this paradigm, contrary to this Court's direction that standards be as inclusive as possible: *Grismer*, at para. 22.

183 Under the *Canadian Human Rights Act*, VIA is required to take positive steps to implement inclusive standards and accommodate passengers with disabilities to the point of undue hardship. VIA's network defence would have it take no further steps to accommodate passengers with disabilities beyond its existing fleet. But because the Renaissance cars would "be the only cars in operation on some of VIA's routes in the very near future and they will be a significant part of VIA's network for a considerable period of time" (Preliminary Decision, at p. 39), passengers with disabilities would have to choose between not travelling by train at all or selecting from two generations of differently inaccessible rail cars with VIA staff assisting them.

184 The American equivalent of the Agency, the Architectural and Transportation Barriers Compliance Board has explicitly rejected the relevance of a service-based "network defence" where barriers to accessible transportation exist. In developing its regulatory guidelines, the Board was asked to "permit operational procedures to substitute for compliance with the technical provisions" of the *Americans with Disabilities Act* (*Accessibility Guidelines for Transportation Vehicles: Final Guidelines*, 56 Fed. Reg. 45530 (September 6, 1991), at p. 45532). The Board rejected this approach, stating:

> ... the Board's statutory mandate is to ensure accessibility of the built environment, including instances in which operational procedures might fail. Thus, for example, the Board cannot assume that the strength, agility and attention of a driver will be sufficient to prevent a heavy wheelchair from rolling off a lift. Neither is it appropriate, as one transit operator suggested, to assume that fellow passengers will have the strength or skill to assist persons with disabilities to board vehicles. It is just as inappropriate to expect other passengers to lift a wheelchair user into a vehicle as it is to assume others should lift a wheelchair over a curb or carry someone up a flight of stairs to enter a building.
>
> (Fed. Reg., at p. 45532)

185 Moreover, as previously noted, in the United States, Britain and Australia, legislative instruments require, as does the Rail Code, that at least one car in every train that leaves a railway station must be accessible to persons using personal wheelchairs. Each of these jurisdictions also requires that all *new* rail equipment satisfy minimum standards designed to accommodate personal wheelchairs. VIA's network defence is conceptually antithetical to these minimum standards of accommodation.

186 The twin goals of preventing and remedying discrimination recognized in *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)* cannot be accomplished if the creation of new, exclusionary barriers can be defended on the basis that they are no more discriminatory than what they are replacing. This is an approach that serves to perpetuate and exacerbate the historic disadvantage endured by persons with disabilities. Permitting VIA to point to its existing cars and special service-based accommodations as a defence overlooks the fact, that while human rights principles include an acknowledgment that not every barrier can be eliminated, they also include a duty to prevent new ones, or at least, not knowingly to perpetuate old ones where preventable.

187 *Meiorin* counsels tribunals to consider a respondent's efforts to investigate alternative, less discriminatory approaches demonstrating that no other reasonable or practical means of avoiding negative impacts on a claimant was possible in the circumstances. VIA did not appear, from the evidence, to have seriously investigated the possibility of reasonably accommodating the use of personal wheelchairs or, for that matter, any other issue related to providing access for persons with disabilities.

188 When it purchased the Renaissance cars, no "plan document" or cost estimates associated with improving the accessibility of the Renaissance cars existed, undermining VIA's submission that it discharged its obligations to investigate and consider alternative means of accommodating persons with disabilities when it decided to purchase the Renaissance cars. Though VIA initially expected "commissioning" costs associated with the assembly and renovation of the cars in the neighbourhood of $100 million, no portion of this amount appears to have been dedicated to accessibility enhancements, since it was VIA's position that the Renaissance cars were already accessible.

189 VIA did not satisfy the Agency that the barriers in question could not reasonably be remedied. The form of accommodation it proposed, instead, was leaving a person with disabilities entirely dependent on others. By endorsing network accommodation on the basis of VIA's existing fleet and service standards, the majority in the Federal Court of Appeal was, with respect, insufficiently attentive to the *Meiorin* principles.

d) Cost

190 The Agency, in my view, appropriately considered the cost of remedying an obstacle when determining whether it was "undue", contrary to the majority's assessment of the evidence. Sexton J.A., for the majority, concluded that the Agency could not have properly determined which obstacles in the Renaissance cars were undue without knowing how much it would cost to fix them. Moreover, it was patently unreasonable, the court unanimously found, for the Agency to conclude that there was no compelling evidence of economic impediments to remedying the obstacles in the Renaissance cars before receiving the cost estimates it had asked VIA to submit.

191 These conclusions are, with respect, problematic. The record reveals that the Agency did not identify any obstacles as "undue" or order corrective action to be taken without considering the cost of remedial measures and actively attempting to secure VIA's participation in pinpointing those measures.

192 It is useful to set out the specific remedial steps the Agency ordered VIA to take in its final decision dated October 29, 2003; how the Agency had put VIA on notice that it was considering these remedial measures; and what cost-related information it sought and received from VIA before ordering them. The Agency's final decision states:

> ... the Agency hereby directs VIA to make the necessary modifications to the Renaissance passenger rail cars:
>
> 1. In the "accessible suite", to ensure that:
>
> (a) the door from the vestibule in the service car into the sleeper unit in the "accessible suite" is widened to at least 81 cm [31.89"]; and,

(b) there is a wheelchair tie-down in the sleeper unit to allow a person with a disability to retain a Personal Wheelchair.

2. In the economy coach cars, through the implementation of Option 3, with the appropriate modifications, to ensure that:

   (a) there is a washroom that can accommodate persons using Personal Wheelchairs proximate to the wheelchair tie-down;
   (b) there is sufficient clear floor space in the wheelchair tie-down area to accommodate a person in a Personal Wheelchair and a service animal; and the tie-down area, in conjunction with the area that is adjacent to it, provides adequate manoeuvring and turning space to allow a person using a Personal Wheelchair to manoeuver into and out of the tie-down area;
   (c) there is a seat for an attendant, which faces the wheelchair tie-down; and
   (d) the width of the bulkhead door opening located behind the wheelchair tie-down and the width of the aisle between the "future valet/storage" are at least 81 cm [31.89"].

3. In every economy coach car, to ensure that there is one row of double seats that is lowered to floor level and that provides sufficient space for persons who travel with service animals;
4. In every coach car, to ensure that, in addition to the four moveable aisle armrests that are presently in the cars, there are at least two additional moveable aisle armrests on the double-seat side;
5. With respect to the exterior stairs to the cars, to ensure that the stair risers on the Phase I Renaissance Cars are closed; and,
6. With respect to overnight train consists where a sleeper car service is offered, to ensure that a service car is marshalled in such a way that the "accessible suite" is adjacent to the wheelchair tie-down end of the economy coach car that contains the wheelchair-accessible washroom, and this suite is offered as a sleeping accommodation. [pp. 70-71]

(i) *Corrective Measure 1(a): Widening Doors to Sleeper Unit*

193 On January 8, 2002, the Agency asked VIA to provide an estimate of the cost of widening the doors of the accessible suite to 81 cm (31.89 inches) after VIA failed to provide this information in response to a request dated November 15, 2001 from the CCD.

194 On January 14, 2002, VIA replied with a letter of the same date from Bombardier Inc. indicating that the preparation of an estimate would take 45 days and cost at least $100,000. VIA's covering letter shows it believed that the Agency was considering having both the interior doors into the "accessible suite" and the exterior doors into the service cars widened when it had this estimate of an estimate prepared. The Agency's final decision, and corrective measure 1(a), concerned only the interior door into the sleeper unit from the entry vestibule. In its correspondence with the Agency, VIA said that "[i]f VIA is required to prepare such an estimate, the Agency should direct

that that be done". Again on March 1, 2002, the Agency asked VIA for the estimated cost of widening the doors in the "accessible suite".

195 Eventually, in its Preliminary Decision of March 27, 2003, the Agency formally ordered VIA to provide this estimate. A 60-day deadline for an estimate of the cost of widening the interior doors was set by the Agency in its Preliminary Decision. VIA was given a further 60 days after the Agency reissued its Preliminary Decision on June 9, 2003.

196 VIA failed to comply with either deadline notwithstanding that it had previously indicated in its January 14, 2002 letter to the Agency that it could provide an estimate addressing even the more complicated question of exterior doors within 45 days. Eventually, the Agency found "that no compelling evidence was presented by VIA indicating that, from a structural or economic perspective, the doors to the sleeper unit and the washroom in the 'accessible suite' cannot be widened to at least 81 cm" (Preliminary Decision, at p. 108).

197 VIA had, in any event, already unilaterally increased the width from 72 and 73 cm respectively to 75 cm without the Agency's knowledge. This was 6 cm shorter than the Rail Code requirement of 81cm. If VIA had structural and economic information to justify this deviation from the Rail Code, none was provided to the Agency. With VIA's own acknowledgment that a more complicated estimate would take 45 days to prepare in mind and, given the cost knowledge it would have had from widening the doors already, there was no basis for VIA failing to provide the cost-related evidence to the Agency within any of the deadlines imposed.

(ii) *Correction Measure 1(b): Installing a Tie-down in Sleeper Unit*

198 The Agency's final decision required VIA to install a wheelchair tie-down in the 'accessible suite'. This is consistent with what VIA had originally said it intended to do when, early in the proceedings, it advised the Agency that the sleeper units in the service cars would have a wheelchair tie-down installed. Correspondence dated January 3, 2001 from VIA's general counsel states that "[t]he service car has special facilities, including sleeping accommodation for two, an accessible washroom, wide door access and will have a wheelchair tie-down" (emphasis added).

199 The Agency's Preliminary Decision in March 2003 stated: "the Agency is of the opinion that it appears that there is no structural impediment to installing a wheelchair tie-down in the 'accessible suite' and that the relative cost to install one is likely minimal" (p. 110). Clearly, VIA had received adequate notice of the specific remedial measure the Agency was considering to prepare a cost estimate that would rebut the Agency's preliminary conclusion that the cost was likely to be "minimal".

200 In its final decision, the Agency noted that "VIA, by its own submission indicated that it is feasible to install a tie-down in the 'accessible suite' but decided not to do so in order to avoid any isolation of persons with disabilities" (p. 30). The Agency went on to note that despite being specifically asked to provide feasibility and economic information about the installation of a wheelchair tie-down in the "accessible suite", VIA failed to provide any. VIA had already unilaterally added a tie-down to economy coach cars by this stage in the proceedings, so it would have had some information about their cost. Moreover, VIA had originally planned to add a tie-down to the 'accessible suite'. It could, accordingly, have provided any cost estimates it had previously prepared in support of these plans, if they existed. VIA failed to provide any of the cost information it had in its possession based on work it had actually completed or originally planned.

327

(iii) *Corrective Measure 2: Implementing Option 3*

201 The changes to the economy coach cars were the most significant ones VIA was ordered to make. In the Agency's decisions of June 9 and July 9, 2003, VIA had been put on notice that the Agency was considering ordering the implementation of Option 3, one of the redesign options VIA created to respond to Transport Canada's concern that the coach car washrooms were located in the unsafe "crumple zone" of the cars. It was given several opportunities to "show cause" why this Option could not be implemented. VIA ultimately submitted one paragraph of text with vague cost-related assertions.

202 Option 3, as proposed by VIA to Transport Canada, would alter the two washrooms located at the wheelchair tie-down end of the economy coach cars. Space from the washroom on the single-seat side of the cars would be used for an expanded wheelchair tie-down space, relocated from the double-seat side of the cars to the single-seat side. On the double-seat side, the space occupied by the inaccessible wheelchair tie-down would be used to enlarge and reconfigure the existing washroom located directly behind. While Transport Canada's concerns were unrelated to the cars' accessibility, the Agency was of the view that Option 3 could be implemented in 13 of the 33 economy coach cars in a way that would satisfy key Rail Code accessibility standards. It was the Agency's view that these changes, which it noted VIA had indicated to Transport Canada and to the Agency were structurally feasible, could concurrently address Transport Canada's safety concerns, the inaccessibility of the current wheelchair tie-down, and the absence of a wheelchair accessible washroom in close proximity to the tie-down space.

203 While VIA had not provided the dimensions associated with the tie-down space contemplated in Option 3, the Agency found that it had sufficient evidence to determine that it would, or could, readily be made personal wheelchair accessible. In the Agency's view, Option 3 would have to be modified to ensure that there was sufficient space for passengers using wheelchairs to easily manoeuver into and out of the tie-down area, which could be achieved by removing either or both of the existing bulkhead wall and the storage area VIA planned to create. The Agency was also of the opinion that because a removable seat had been installed in the tie-down mechanisms located in the VIA 1 Renaissance cars, it was equally feasible to install a removable seat in front of the Option 3 tie-down area to accommodate an attendant. The Agency planned to work with VIA to adjust Option 3 accordingly, noting that it would conduct "an examination of the general arrangement on how VIA intends to implement the corrective measures required by this Decision, which VIA is required to file with the Agency for its review and approval" (Final Decision, at p. 37).

204 Because it was less expensive, VIA preferred Option 1, under which VIA would decommission the two washrooms near the wheelchair tie-down space and replace them with storage space. The washroom at the other end of the car would be put into service, leaving no washroom at the end of the car where the wheelchair tie-down was located.

205 The Agency had made clear in its Preliminary Decision that it was only necessary to make 13 economy coach cars personal wheelchair accessible to satisfy the Rail Code (i.e. one accessible economy coach car per daytime train). Nonetheless, VIA gave the Agency cost estimates based on implementing Option 3 in all of the 47 coach cars, estimating $100,800 per car, for a total of $4.8 million. It also estimated it would lose $24.2 million in foregone passenger seat revenue over the life of the affected cars.

206 Nor did VIA subtract the costs of Option 1 from its estimate of the costs of Option 3. Because VIA would be required, in any event, to implement one of the redesign options it had prepared to address Transport Canada's safety concerns, the Agency determined that only the additional costs which VIA would bear by being required to address safety issues in a way that improved the accessibility of the Renaissance fleet were relevant. Since Option 1 would cost "at least $2.3 million" (Final Decision, at p. 39), VIA should have subtracted this amount from its estimate of the costs of implementing Option 3.

207 The Rail Code standard of one accessible car per train could be achieved by implementing Option 3 in only 13 of VIA's 33 economy coach cars at a total direct cost of $673,400. The Agency noted that these more accurate cost estimates did not reflect the various stages of completion of the coach cars and so were themselves "necessarily overstated" (Final Decision, at p. 39). The Agency made a finding of fact that "the passenger seat revenue that would be foregone as a result of implementing Option 3 would be relatively insignificant" (Final Decision, at p. 52); and its estimation of the "worst case" scenario for VIA regarding the total cost of implementing Option 3 in all 33 economy coach cars (if VIA chose to implement Option 3 exclusively) was approximately $1.7 million (Final Decision, at p. 39).

208 The Agency was also of the view that VIA's assertion that it would lose $24.2 million in passenger revenue over the 20-year life of the Renaissance cars through the implementation of Option 3 was extremely high. The Agency noted that if VIA planned "to remove up to 47 seats to accommodate passengers' coats and forego the revenues associated with this, it must be prepared to forego the revenues associated with removing up to 33 seats (or 13 seats in the 'best case scenario' ...) in order to implement Option 3" (Final Decision, at p. 53). Based on VIA's own statistics about the very small numbers of passengers who use wheelchairs on its trains, the tie-down space would be occupied less than 0.1 percent of the time. The other 99.9 percent of the time, the removable seat installed over the tie-down space could be used.

209 The Agency reassessed VIA's figures and determined that foregone passenger seat revenue would amount to $16,988 over the 20-year life of 33 economy coach cars.

(iv) *Corrective Measure 3: Space for Service Animals*

210 The Agency ordered VIA to remove a platform to lower one set of double seats in each economy coach car in order to ensure that there is space to accommodate the service animal of a passenger travelling with one. The seats in the Renaissance cars are on a raised platform that is designed to provide storage space for hand luggage. This design leaves no level space to accommodate service animals. In making changes to seats in the course of installing a wheelchair tie-down in coach cars, VIA had altered the supporting seat structure in a way that created space for service animal accommodation in each tie-down area through the installation of a removable seat. However, this seat would not be available to persons with service animals if the wheelchair tie-down was required by a passenger using a wheelchair. It was the Agency's view that a dedicated space for a passenger with a service animal was required.

211 In its Preliminary Decision, the Agency had identified "the removal of the platform from other seats in the coach cars", which would lower a double seat to create space for service animals, as "the obvious solution" to the lack of space for service animals (p. 129). The Agency provided VIA with full particulars respecting this corrective measure in its Preliminary Decision, giving VIA all the information it needed to prepare a cost estimate had VIA been inclined to do so.

212 Corrective measure 3 asks VIA to perform structural work it had already undertaken when adding wheelchair tie-downs in its coach cars. VIA did not provide the Agency with any information about how much the changes in question had cost when it installed the wheelchair tie-down area in the coach cars. If the costs of this work were prohibitive, VIA would have known by the time the Agency's Preliminary Decision was released and could have, had it chosen to do so, provided the Agency with this information.

(v) *Corrective Measure 4: Adding 2 Moveable Armrests in Coach Cars*

213 The Agency ordered VIA to add two adjustable armrests in each coach car. VIA had been advised that the Agency was considering this particular corrective measure through the Agency's Preliminary Decision, in which the Agency stated its view that "VIA should ... make the necessary modifications to provide at least two moveable aisle armrests on the double-seat side in the Renaissance coach cars" (p. 77). The purpose of adjustable armrests was to limit the height passengers transferring into standard coach seating from wheelchairs would have to be lifted, which would facilitate comfortable and safe access to standard seating.

214 When it ordered the addition of two moveable armrests in the Renaissance coach cars, the Agency had an estimated cost of $133,125 from VIA. VIA advised that "[i]t is possible to include moveable arm rests on the double seats" but was concerned to "ensure that the structural integrity of the seat is not compromised" (Final Decision, at p. 59). The estimate of $133,125 in direct costs did not include the cost of servicing the mechanism over time. In the Agency's view, "the direct costs of $133,125 for the installation of two movable aisle armrests in each of the 47 Renaissance coach cars [was] a reasonable cost given the importance of such a feature to many persons with disabilities, and particularly to those persons who use a wheelchair" (Final Decision, at p. 60).

(vi) *Corrective Measure 5: Closing Stair Risers on Twelve Cars*

215 The Agency ordered VIA to "ensure that the stair risers on the Phase 1 Renaissance Cars are closed" (Final Decision, at p. 71). In its submissions before the Agency, VIA indicated that all of the Renaissance cars, except those first introduced into service (i.e. the Phase I Renaissance cars), would have closed risers. This was necessary because closed stair risers serve as an important orientation tool to persons with visual impairments, ensuring improved safety and security during boarding and deboarding. In its Preliminary Decision, the Agency asked VIA to provide information about the feasibility and costs of closing the stair risers in the remaining 12 cars. Since it had planned or initiated this work for all of the other Renaissance cars, this information must have been available to VIA. However, VIA provided no information in response to the Agency's request. As in the case of corrective measures 1 and 3, if the cost of closing stair risers on 12 was excessive, VIA would have known this by the time the Agency's Preliminary Decision was released and could have provided the Agency with the necessary costing information to support an argument of impracticability.

(vii) *Corrective Measure 6: Marshalling Cars to Ensure Accessibility*

216 On the basis of the evidence before it, the Agency concluded that two changes would be required to address the absence of a wheelchair accessible washroom in the "accessible suite". First, the order of the cars on the Montreal-Toronto train would have to be altered. Second, VIA would have to utilize its reservation policy to ensure that the "accessible suite" was also made available for

use as sleeping accommodation for persons using personal wheelchairs. The Agency concluded that "[w]ith these two measures, persons occupying these 'accessible suites' who cannot use the washroom facilities in the suite or who prefer independent access would be able to use the wheelchair-accessible washroom in the adjacent economy coach cars" (Final Decision, at p. 60).

217 There are no obvious or significant costs associated with either of the steps VIA would have to take to implement corrective measure 6. The Agency had declined to find the inaccessible washroom in the "accessible suite" to be an undue obstacle. It was of the view that, while not ideal, passengers occupying the "accessible suite" could use the accessible washroom facilities in the economy cars. This meant that as a corresponding corrective measure, however, VIA had to ensure that its overnight train consists were marshalled in such a way that the "accessible suite" would be adjacent to the wheelchair tie-down end of an economy coach car with a wheelchair accessible washroom.

218 The record accordingly belies VIA's assertions that it could not have provided cost estimates of the remedial measures prior to the Agency's final decision because it supposedly did not know what remedial measures the Agency was contemplating. Each remedial measure with any cost implications had been previously identified by the Agency, and VIA's views on the structural, operational and economic implications of each were repeatedly sought.

219 Moreover, VIA's assertions that, in the absence of the Renaissance opportunity, it could only have afforded 36 new rail cars or that it would have taken at least four years at a cost of over $477 million to develop, design, engineer and build new rail cars, are not evidence of undue hardship in the circumstances. Retrofitting the Renaissance cars was a reasonable, and significantly cheaper, alternative than building new cars. The Agency's reasons make clear that retrofitting some cars in the Renaissance fleet to accommodate persons using personal wheelchairs would cost nowhere near the amounts claimed by VIA.

220 The majority judgment of the Federal Court of Appeal was also critical of the Agency's failure to consider the interests of passengers who are not disabled. Noting the small percentage of passengers with disabilities who utilize VIA's services, the majority was of the opinion that a remedial order which could result in significantly increased fares would unfairly economically disadvantage other members of the public.

221 This carves out from membership in the public those who are disabled. Members of the public who are physically disabled *are* members of the public. This is not a fight between able-bodied and disabled persons to keep fares down by avoiding the expense of eliminating discrimination. Safety measures can be expensive too, but one would hardly expect to hear that their cost justifies dangerous conditions. In the long run, danger is more expensive than safety and discrimination is more expensive than inclusion.

222 There is, moreover, no evidence in the record indicating that passenger fares are likely to increase as a result of the Agency's decision. But even if they do, VIA's passenger fares already fluctuate with the expense of operating the system. Wages, fuel, maintenance - these are among the variables. The Agency critically assessed the cost estimates VIA provided, examining this information in the context of VIA's budget, corporate plan, performance targets, total revenues, cost-recovery ratio, operational funding surplus, and a $25 million contingency fund including operational liabilities. The Agency concluded that "VIA has substantial funds reserved for future capital projects and for unforeseen events" (Final Decision, at p. 23).

223 The majority also criticized the Agency's failure to weigh the interests of those with disabilities other than those who require the use of a personal wheelchair. In its view, the cost of equipping rail cars to cope with all forms of disability would severely jeopardize the viability of rail services.

224 It has never been the case that all forms of disability are engaged when a particular one is said to raise an issue of discrimination. While there are undoubtedly related conceptual considerations involved, they may nonetheless call for completely different remedial considerations. A "reasonable accommodation", "undue hardship", or "undue obstacle" analysis is, necessarily, defined by who the complainant is, what the application is, what environment is being complained about, what remedial options are required, and what remedial options are reasonably available. Given the nature of the application and the parties before it, the Agency would have acted unreasonably in seeking representations about all conceivable forms of disability. Ironically, the Court of Appeal questioned the breadth of CCD's application as it was.

225 The threshold of "undue hardship" is not mere efficiency. It goes without saying that in weighing the competing interests on a balance sheet, the costs of restructuring or retrofitting are financially calculable, while the benefits of eliminating discrimination tend not to be. What monetary value can be assigned to dignity, to be weighed against the measurable cost of an accessible environment? It will always seem demonstrably cheaper to maintain the status quo and not eliminate a discriminatory barrier.

226 But the issue is not just cost, it is whether the cost constitutes undue hardship. VIA was required to discharge the burden of establishing that accommodating persons with disabilities was an undue hardship for it: *Grismer*, at para. 32. Concrete evidence is required to establish undue hardship: *Hutchinson v. British Columbia (Ministry of Health) (No. 4)* (2004), 49 C.H.R.R. D/348, 2004 BCHRT 58; *Grismer*, at para. 41. As in most cases, this means presenting evidence in the respondent's sole possession. However, as Evans J.A. noted,

> the Agency's problems were compounded by an apparent lack of cooperation during the administrative process on the part of VIA. Any corporation in a regulated industry, including VIA Rail, is entitled to defend vigorously the interests of its shareholders and customers, as well as the public purse, from the imposition of regulatory burdens. Nonetheless, in viewing the limited material before the Agency on the network issue and the question of cost, I find it hard to avoid the conclusion that, if the Agency's analysis was based on incomplete information, VIA was, in part at least, the author of its own misfortune. [para. 103]

Where VIA refuses to provide evidence in its sole possession in support of its undue hardship argument, it cannot be said that any reasonable basis exists for refusing to eliminate an undue obstacle.

227 The Agency's reasons show that it was acutely aware of the issue of the cost of the remedial measures it ordered. Based on the information it had received from VIA, the Agency made findings of fact about how much it would cost to make 13 economy coach cars accessible to personal wheelchairs of a standard size and how much it would cost to install moveable armrests in 47 coach cars. The Agency also found that the cost of installing a "tie-down" space in the "accessible suite" was "likely minimal". VIA failed to provide the Agency with any cost estimates associated with other accessibility renovations despite the fact these were already complete in some cars or under-

way in others. It was asked at least five times for a cost estimate on how much it would cost to widen the doors to the "accessible suite" starting November 15, 2001. VIA stated that it could prepare one within 45 days, but failed to provide it to the Agency. With the information it had, the Agency determined that the cost of the remedial measures it ordered would not be prohibitive.

228 The facts, as found by the Agency, did not justify a finding of undue hardship based on financial cost. The relevant costs of remedying the undue obstacles identified would, the Agency concluded, proportionally represent a relatively insignificant sum whether viewed in the context of VIA's entire capital expenditure budget of $401.9 million or the approximately $100 million VIA expected to spend renovating the Renaissance cars. The Agency found that VIA's financial statements "provide no indication of an inability ... to absorb the costs which it asserts would be incurred" (Final Decision, at p. 21). It also found that VIA was experiencing favourable economic conditions, with an operating surplus for the years ending December 31, 2001 and December 31, 2002 and a contingency fund of $25 million dollars. In the Agency's view, the cost of removing the obstacles caused by VIA's acquisition of inaccessible rail cars could be shifted throughout VIA's operations and mitigated through efforts to reallocate funds. Further, the Agency determined that there would be ways to remove the obstacles in issue that would not substantially impair VIA's business operations, for example by "planning the modifications to occur over time so as to minimize the impact on the operation of VIA's passenger rail network" (Final Decision, at p. 24).

229 In summary, the Agency concluded that there was no "compelling evidence of economic impediments to addressing any [of the] undue obstacles ... in the Renaissance Cars" (p. 24). Under s. 31 of the *Canada Transportation Act*, "[t]he finding or determination of the Agency on a question of fact within its jurisdiction is binding and conclusive". In the circumstances, the Agency's findings with respect to cost and evidence relating to undue hardship were far from being unreasonable and are entitled to deference.

C. *Did The Agency Violate Via's Right To Procedural Fairness?*

230 Parliament entrusted the Agency with extensive authority to govern its own process. The Agency has all the powers of a superior court associated with compelling attendance, examining witnesses, ordering the production of documents, entering and inspecting property and enforcing its orders (*Canada Transportation Act*, s. 25), including the powers of the Federal Court to award costs (s. 25.1). It is responsible for enforcing the *National Transportation Agency General Rules*, SOR/88-23, which govern practice and procedure before the Agency. It may make its own rules to govern many aspects of the conduct of proceedings before it (*Canada Transportation Act*, s. 17). Under s. 8 of the *National Transportation Agency General Rules*, it has the power to grant extensions of time and did so regularly during the course of the proceedings.

231 Considerable deference is owed to procedural rulings made by a tribunal with the authority to control its own process. The determination of the scope and content of a duty to act fairly is circumstance-specific, and may well depend on factors within the expertise and knowledge of the tribunal, including the nature of the statutory scheme and the expectations and practices of the Agency's constituencies. Any assessment of what procedures the duty of fairness requires in a given proceeding should "take into account and respect the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances": *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at para. 27, citing D. J. M. Brown and J. M. Evans, *Judicial Review of Administrative Action in Canada*

(loose-leaf), at pp. 7-66 to 7-70. See also *Gateway Packers 1968 Ltd. v. Burlington Northern (Manitoba) Ltd.*, [1971] F.C. 359 (C.A.), and *Allied Auto Parts Ltd. v. Canadian Transport Commission*, [1983] 2 F.C. 248 (C.A.).

232 Throughout the proceedings, the Agency asked VIA to provide cost and feasibility information about changes that could be made to the Renaissance cars to enhance their accessibility. In its Preliminary Decision of March 27, 2003, the Agency ordered VIA to provide cost and feasibility estimates in 60 days about the accessibility solutions it was considering. In the 60 days available to it, VIA prepared a three-page letter providing some, but not all, of the cost estimates requested. The Agency reissued its Preliminary Decision on June 9, 2003, giving VIA an additional 60 days to prepare an adequate response. In correspondence dated July 4, 2003, the Agency advised VIA of the specific inadequacies of its three-page response in order to assist VIA with the preparation of a more appropriate response.

233 On July 14, 2003, VIA wrote to the Agency saying that it lacked the internal expertise to respond to the Agency's Preliminary Decision, that it would take longer than 60 days, and that the government had not provided the funding required for it to respond to the Agency's orders. Instead of requesting more time, VIA asked the Agency to render its final decision. On August 7, 2003, VIA again asked the Agency to make its final decision on the basis of the evidence before it.

234 VIA asked the Agency to render a final decision on the basis of the evidence before it in submissions dated January 3 and 31, April 2 and June 15, 2001, in addition to the requests made on July 14 and August 7, 2003 noted above. The last request, dated August 7, 2003 states: "VIA Rail ... asks for an oral hearing, if necessary. Otherwise, it asks the Agency to consider all of these issues, facts and estimates and render its decision in final form". It did not ask for more time to provide cost estimates until after receiving the final decision it had repeatedly requested.

235 The Federal Court of Appeal's conclusion that VIA's rights of procedural fairness were violated by the Agency ordering corrective measures without waiting for the cost estimates it had, more than once, directed VIA to prepare, is difficult to sustain in the face of VIA's persistent refusal to provide these estimates. VIA had consistently urged the Agency to make its decision based on the cost information it already had and did not request an extension of time to prepare the additional cost estimates the Agency requested to assist it in deciding whether any of the obstacles were undue. VIA had obviously made a tactical decision to deprive the Agency of information uniquely in VIA's possession that would have made the evaluation more complete.

236 If VIA had attempted to implement the Agency's orders within the time allotted but new facts made implementation difficult, it could have asked the Agency to reopen its decision based on the changed circumstances, under s. 32 of the *Canada Transportation Act*. Section 32 states:

> **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.

237 VIA did not petition the Agency to review its decision on the basis of any new facts it learned through the Schrum report. It elected instead to appeal to the Federal Court of Appeal, seeking relief based on an evidentiary vacuum of its own creation. Had it complied with the Agen-

cy's requests for cost information during the course of the proceedings, or had it been denied reasonable requests for extensions of time to comply with those requests, VIA's procedural fairness argument would have had an air of fairness to it. But when, instead, it seeks to offer this evidence only after the final decision it repeatedly requested was made without, moreover, any reasonable explanation for why such information could not have been available *during* the proceedings, no issue of unfairness arises.

238 VIA's argument that it was unable to seek expert cost opinions because it could not know what remedial measures the Agency would order in the final decision is untenable. The Agency's final decision did not order any remedial measures for which VIA had not already been asked to prepare feasibility and cost estimates. The specificity of the obstacles and possible solutions identified in the Preliminary Decision a number of months earlier provided VIA with the information necessary to comply with the show cause order, had it wished to do so. VIA already knew how to remedy many of the obstacles identified, since the work eventually ordered by the Agency had already been done or was underway. VIA's procedural fairness argument amounts, essentially, to a complaint that its own lack of cooperation throughout the Agency's process entitles it to an additional opportunity to be heard.

239 VIA's position during the proceedings was that it lacked the time, expertise and money to prepare cost estimates. The record does not explain how Peter Schrum, a third party, was able to prepare a cost estimate in 37 days once the final decision was released, or how VIA was able to pay for it. The Schrum report, which reached conclusions fundamentally at odds with some of the Agency's binding factual findings, estimated a minimum cost of $48 million to implement the Agency's decision. This estimate was based on an assumption that 47 coach cars and 17 service cars would be the subject of a major reconstruction, even though the Agency's decision required that only 13 economy coach cars would require significant modification. Considerably less significant modifications were ordered for the 17 service cars in operation, the 12 economy coaches that lacked closed stair risers and the coaches that required only two more moveable armrests to be installed (all 47) or one double-seat to be removed (33 economy coaches).

240 The Schrum report appears to assume that each corrective action the Agency ordered would require engineering work from the ground up without taking into consideration the fact that many of the modifications the Agency ordered had been completed by VIA in the past. It indicates, for example, that an engineering feasibility study, concept development and concept refinement are steps that must be taken to add a wheelchair tie-down to the sleeper unit in the "accessible suite" and to lower one row of double seats to floor level to accommodate service animals in economy coach cars. This fails to take into account that VIA already had some, if not full, practical experience about how to effect these changes from having implemented them in the past.

241 The Agency's reasons are clear that the corrective measures it ordered would cost nowhere near $48 million. Yet, the Federal Court of Appeal concluded that the Agency ought to have waited until it had the Schrum report before ordering corrective measures. This appears to be based in part on the assumption that the Schrum report provided an accurate estimate of the costs in issue. It reasoned that "before costs of the magnitude envisioned by the Schrum report are incurred" (para. 76), the Agency must be required to reconsider its decision. Yet, the conclusions reached by Mr. Schrum were untested by the Agency because the report was introduced after the Agency's proceedings were over. It is, in fact, difficult to determine the basis for the admissibility of Mr. Schrum's report as "fresh evidence".

242 The timing of the Schrum report and its untested conclusions render it an inappropriate basis for interfering with the Agency's factual findings and remedial responses. To question the reasonableness of the Agency's decision on the basis of evidence VIA could, and ought, to have submitted to the Agency in a timely way is to render the Agency process vulnerable to cavalier attitudes before it, leaving the "real" case to unfold before the Federal Court of Appeal.

243 This misconstrues the relationship between the Agency and the court. The Agency has the expertise and specialized knowledge. That is why it is the body charged with balancing all the competing interests, including cost and the public interest. The court is a reviewing body, not a court of first instance. And it should not be permitted to be transformed into a body of first instance, or entitled to second-guess the responsibilities of the Agency, through the mechanism of evidence produced after the fact which could have been produced for the Agency proceedings.

244 The Agency provided VIA with adequate time and opportunity to comply with its directions. Though VIA clearly could have commissioned the Schrum report and provided it to the Agency within the time allotted, it did not. The Agency had the procedural power to grant extensions of time or reopen decisions at its disposal if it was of the view that VIA was attempting to comply but could not. No such extensions or reconsiderations were requested by VIA.

245 The Agency, following its multi-year dealings with the parties, was in the best position to control its own process with a view to the *bona fides* and strategic choices of the parties. There are no grounds for a reviewing court to interfere with the Agency's discretion to release its final decision without waiting for VIA to produce the cost estimates it had repeatedly and explicitly refused to provide. In the circumstances, VIA was not a victim of procedural unfairness.

IV. Conclusion

246 For the foregoing reasons, therefore, I would allow the appeal and restore the Agency's decisions with costs throughout to CCD.

The reasons of Binnie, Deschamps, Fish and Rothstein JJ. were delivered by

247 DESCHAMPS and ROTHSTEIN JJ. (dissenting):-- Accommodation is an issue arising in many contexts and it is the duty of this Court to give clear guidance on what legal principles must be adhered to by those adjudicating accommodation claims. It is not helpful to rely on nothing more than a judgment call to determine what is practicable. Parliament has set forth in the *Canada Transportation Act*, S.C. 1996, c. 10 ("Act"), a national transportation policy which consists of a number of objectives including human rights objectives. The Act also contains a statutory framework for determining human rights applications. This Court should have regard to the policy and the framework established by Parliament and common law principles developed by this Court in determining the requirements of reasonable accommodation. It is troubling that the majority would uphold an administrative tribunal's decision by finding that it applied the common law principles when the tribunal expressly rejected them. It is also problematic that the majority would uphold the tribunal's decision when a basic element, namely the estimated cost of accommodation, was not determined. The majority would forego both the proper legal analysis and ignore the lacking element of cost determination on the basis of deference to the tribunal. With respect, deference is not a proper justification for ignoring such errors.

248 The litigation originates from a decision by VIA Rail Canada Inc. ("VIA") to purchase 139 passenger rail cars. The Council of Canadians with Disabilities ("CCD") claims these cars present

"undue obstacles" affecting the mobility of persons with disabilities using wheelchairs. CCD made an application to the Canadian Transportation Agency ("Agency") which subsequently ordered VIA to make modifications to the rail cars. The Federal Court of Appeal allowed VIA's appeal and remitted the matter to the Agency for redetermination, taking account of VIA's network and cost considerations.

249 We agree with the conclusion reached by the Federal Court of Appeal and would remit the matter to the Agency for redetermination having regard to these reasons.

I. Factual Background

A. *The Parties*

250 CCD was founded in 1976 and is a national advocacy organization for persons with disabilities. CCD is a coalition of representatives from provincial disability organizations, in addition to other major national disability organizations. In past cases before this Court, CCD has appeared as an intervener on a number of occasions on matters relating to human rights and equality issues under the *Canadian Charter of Rights and Freedoms*.

251 VIA was established in 1977 and became a Crown corporation in 1978 with responsibility for passenger rail transportation in Canada. The Government of Canada ("Government") is VIA's sole shareholder. Since its inception, VIA has been dependent on subsidies from the Government to supplement the revenue it receives from passengers. VIA's government funding requirements, including defined capital expenditures, must be approved annually by the Treasury Board under the *Financial Administration Act*, R.S.C. 1985, c. F-11 .

252 The Agency, which was an intervener before this Court, is a federal, administrative tribunal that is mandated under the Act. The statutory mandate of the Agency deals mainly with the economic regulation of carriers and modes of transportation. Among its responsibilities, the Agency is granted regulatory and adjudicative powers to deal with "undue obstacles" to the mobility of persons with disabilities in rail passenger transportation.

B. *Purchase of the Renaissance Rail Cars*

253 In June 1998, the House of Commons Standing Committee on Transport issued a report entitled *The Renaissance of Passenger Rail in Canada* which stated that "almost every witness that appeared before us said that VIA Rail could not continue in its present state" (p. 17) and that "every time a train leaves the station, VIA Rail loses money" (p. 4). The Standing Committee reported that all services and segments of VIA's network operate at a deficit, for a total loss of $196 million in 1997.

254 The Standing Committee found that the cost of maintaining and operating VIA's aging rail cars, with current levels of funding, was a "death spiral" that would lead to "the inevitable demise of VIA Rail" (p. 5). The Standing Committee's report indicated that VIA needed to increase train frequency for its operations in the Quebec City-Windsor corridor. To enable VIA to renew and sustain its rail cars on a timely basis simply to maintain existing service levels, the Standing Committee found that the Government would need to allocate an additional $800 million over the next few years for capital expenditures to VIA. The Government did not elect to do so.

255 In 2000, the Treasury Board granted a total of $401.9 million for all of VIA's capital expenditures, including infrastructure improvements, station repairs, purchase of locomotives and rail

cars, operations, safety and signalling. This was considerably less than VIA had requested. Of the $401.9 million, approximately $130 million was allocated to the purchase of rail cars.

256 On September 28, 2000, VIA entered into a contract, effective on December 1, 2000, to purchase 139 rail cars. The initial cost of the purchase and commissioning into service of these cars was $130 million. VIA states that the purchase of the rail cars was "a unique, one-time opportunity" on account of their low cost and given that they were readily available. According to VIA, the replacement cost of these rail cars was $400 million and it would take four years to design and obtain delivery of alternative rail cars.

257 Designed by a British, French, German, Dutch and Belgian consortium that was formed in 1990, the rail cars were originally called the "Channel Tunnel Nightstock Cars" because they had been designed for service between continental Europe and the northern regions of the United Kingdom. According to VIA, one of the main reasons they became available for purchase was deregulation in the European airline industry which resulted in a drop in airfares to a level at which overnight rail trips were no longer cost competitive. VIA made a successful bid to purchase the rail cars. These cars became known as the Renaissance cars, an apparent reference to the title of the Report of the Standing Committee on Transport that alerted the Government to the need to address VIA's financial and operational difficulties.

258 VIA states that the Renaissance rail cars reflected European and British Rail regulations at the time of their design which included mandatory requirements for persons with disabilities. While VIA concedes that the Renaissance rail cars may not meet all desires of all persons with disabilities, they are an addition to its existing fleet within its budgetary constraints to deal with the urgent situation that it then faced. VIA submitted that it made improvements to the features of the Renaissance rail cars through its Accessibility Program. The features of the rail cars include: use of braille signage for visually impaired passengers, training for on-board personnel in providing assistance to persons with disabilities, handrails and grab bars, space to accommodate service animals, visual displays for communication of announcements for persons with a hearing impairment, washrooms with various accessibility features, auditory and visual smoke alarms, storage space for personal wheelchairs and provision of on-board wheelchairs where required, four moveable armrests in each car, as well as a wheelchair sleeping accommodation, and tie-downs and washrooms to accommodate wheelchair users.

C. *CCD's Application to the Agency*

259 On December 4, 2000, CCD filed an application with the Agency objecting to the purchase of the Renaissance rail cars. It alleged that numerous aspects of these rail cars would constitute "undue obstacles" to the mobility of persons with disabilities, mainly those using wheelchairs.

260 When CCD was advised that VIA had already purchased the Renaissance rail cars before the application was made, CCD sought: (i) an interim order from the Agency to stop the delivery of the Renaissance rail cars to VIA, pending the Agency's final determination of the application; and (ii) an order that VIA not enter into any contracts for the modification of the Renaissance rail cars, or take any additional steps furthering the purchase of these rail cars. The Agency declined to make these orders on the grounds that they would cause VIA substantial harm.

261 At this stage, CCD's application was pursued through an inquiry by the Agency into specific claims that aspects of the Renaissance rail cars were "undue obstacles" to the mobility of persons with disabilities, mainly those using wheelchairs.

II. Summary of Decisions Below

262 The proceedings in this matter have been lengthy, technical, and at times acrimonious. From the time CCD filed its initial application to the rendering of the Agency's final determination, some two years and ten months passed during which over 70 decision and orders were issued by the Agency.

A. *Position of the Parties During the Inquiry*

263 In the course of the Agency's inquiry, CCD took the position that "[p]ersons with disabilities had been waiting decades for VIA Rail's next generation of passenger trains." CCD's position was that these rail cars should be considered "newly manufactured" and subject to higher accessibility standards. CCD was of the view that the Renaissance rail cars should never have been purchased.

264 For its part, from very early on in the Agency's inquiry, VIA objected to the Agency's jurisdiction in this matter. As the scope of the Agency's inquiry grew larger, VIA consistently put to the Agency that it was exceeding its mandate, and was taking a monitoring role in VIA's affairs that was improper. VIA maintained that the Agency was interfering in the carrier's management, and in the decision that VIA made to purchase the Renaissance rail cars with the limited capital funds approved by the Government. VIA took the position that these rail cars could not be considered t"newly manufactured", and that they offered reasonable accessibility to passengers with disabilities.

B. *Preliminary Decision of Agency (No. 175-AT-R-2003)*

265 On March 27, 2003, the Agency delivered its preliminary findings on the 46 accessibility concerns raised by CCD ("Preliminary Decision"). The majority opinion of the Agency determined that the Renaissance rail cars were "newly manufactured" cars and should meet the higher level of accessibility for new cars that is set out in the Agency's *Code of Practice - Passenger Rail Car Accessibility and Terms and Conditions of Carriage by Rail of Persons with Disabilities* ("Rail Code").

266 For the 46 concerns raised by CCD, the Agency first considered whether each constituted an "obstacle" to the mobility of persons with disabilities. The Agency largely relied on the dimensions of a "Personal Wheelchair", defined in the Canadian Standards Association (CSA), CANCSA - B651-95, *Barrier-Free Design Standards* and referred to in the Rail Code, to make its technical findings based on centimetre-by-centimetre physical inspections it made of the Renaissance rail cars.

267 In determining whether an "obstacle" that it found to exist was "undue", the Agency rejected, in the context of Part V of the Act, the applicability of the undue hardship test found in human rights legislation and jurisprudence: "[w]hile the Agency rejects the applicability of the undue hardship test in the context of Part V of the CTA, the Agency recognizes that some of the factors identified by CCD concerning undue hardship may be applicable to an undue obstacle determination" (p. 36).

268 Of the 46 features of the Renaissance rail cars raised by CCD, the majority opinion of the Agency made a preliminary finding that 14 features constituted "undue obstacles". The Agency ordered VIA to show cause why these preliminary findings should not be made final.

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269 One of the three members of the Agency's panel issued a dissenting opinion. Member Richard Cashin found that "there is no evidence that th[e] obstacles [found undue by the majority] will not be accommodated by VIA's network" and that "the carrier can and will accommodate the needs of persons with disabilities within its network" (pp. 162-63). However, Mr. Cashin's term expired on June 30, 2003, so he did not participate in the subsequent final decision by the Agency.

C. *Final Decision of Agency (No. 620-AT-R-2003)*

270 On October 29, 2003, the Agency delivered its final decision ("Final Decision"). The Agency found 14 "undue obstacles" (although not precisely the same 14 as in its Preliminary Decision) and ordered VIA to make specific modifications to the Renaissance rail cars to eliminate the obstacles.

D. *Federal Court of Appeal, [2005] 4 F.C.R. 473, 2005 FCA 79*

271 The Federal Court of Appeal allowed VIA's appeal on March 2, 2005. Sexton J.A., writing for the majority, held at para. 43 that the Agency's decisions were patently unreasonable because "it confined itself to considering only alterations to the Renaissance rail cars rather than considering whether VIA's network could be flexible enough to accommodate these disabilities". Sexton J.A. added that the Agency "failed to conduct the necessary balancing" required by the Act, including the interests of persons without disabilities, the cost of the modifications ordered, and the interests of other persons with disabilities not using wheelchairs (para. 43).

272 The Federal Court of Appeal pointed to evidence filed in that court for the first time by VIA, estimating the total cost of the modifications determined in the Agency's Final Decision. This evaluation (the Schrum report) sets the cost between $48 and $92 million, and was described by Sexton J.A. as "the only objective third-party report which comprehensively estimates the costs of all the changes ordered by the Agency" (para. 69).

273 Evans J.A. concurred in allowing the appeal, finding that the Agency acted in breach of the duty of procedural fairness. He found that the Agency's preliminary decision should have specifically invited VIA to submit evidence demonstrating how it proposed to mitigate the obstacles in the Renaissance rail cars through its network. He also found that, given VIA's submission that providing cost evidence in response to the Agency's Preliminary Decision was unduly onerous, the Agency should have afforded VIA an opportunity to submit a third-party cost estimate *after* the Agency's "final" order specifying the modifications that it required VIA to make to the Renaissance rail cars.

III. Issues

274 CCD states the issues as follows:

(1) the correct interpretation of Part V of the Act;
(2) the fairness of the process; and
(3) the reasonableness of the Agency's decision.

In addition, VIA raises jurisdictional questions.

275 The jurisdictional questions will be addressed before dealing with the interpretation of the Act. In view of our conclusion on the interpretation of the Act - a question of law - it will not be necessary to deal with the questions of fairness of the process or reasonableness of the Agency's decision.

IV. Analysis

276 Given that the issues under review arose from a decision of an administrative tribunal, we begin by identifying the appropriate standard of review. We then provide a brief contextual overview of the governing legislation, with a focus on the declaration of the National Transportation Policy in s. 5 of the Act, and the framework in Part V of the Act to remove undue obstacles to the mobility of persons with disabilities. This is followed by an analysis that reconciles Part V of the Act with the applicable principles of human rights law. We then set out the legal framework for analysis of applications heard by the Agency under s. 172. Finally, we evaluate the Agency's decision on the issues raised in this appeal.

A. *Standard of Review*

(1) Segmentation and Terminology

277 The majority finds that the Agency "made a decision with many component parts, each of which fell squarely and inextricably within its expertise and mandate. It was therefore entitled to a single, deferential standard of review" (para. 100). We are unable to agree with this approach.

278 The standard of review jurisprudence recognizes that segmentation of a decision is appropriate in order to ascertain the nature of the questions before the tribunal and the degree of deference to be accorded to the tribunal's decisions on those questions. In *Canada (Deputy Minister of National Revenue) v. Mattel Canada Inc.*, [2001] 2 S.C.R. 100, 2001 SCC 36, at para. 27, Major J. stated:

> In general, different standards of review will apply to different legal questions depending on the nature of the question to be determined and the relative expertise of the tribunal in those particular matters.

In *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, 2003 SCC 20, although there were no legal questions to be examined separately in that case, Iacobucci J. clearly indicated that there are situations in which extrication is appropriate (para. 41). See also *Mattel v. 3894207 Canada Inc.*, [2006] 1 S.C.R. 772, 2006 SCC 22, at para. 39. Subjecting all aspects of a decision to a single standard of review does not account for the diversity of questions under review and either insulates the decision from a more exacting review where the pragmatic and functional considerations call for greater intensity in the review of specific legal questions, or subjects questions of fact to a standard that is too exacting. A tribunal's decision must therefore be subject to segmentation to enable a reviewing court to apply the appropriate degree of scrutiny to the various aspects of the decision which call for greater or lesser deference.

279 Moreover, in her reasons, Abella J. introduces a new term -- "demonstrably unreasonable" (para. 102). We must respectfully express reservations about introducing another term to an already complex area of the law which can only lead to ambiguity. We agree with the majority that it is difficult to determine the degrees of differences as between what is unreasonable and what is patently unreasonable. In an appropriate case, of which this is not one, the Court may engage in a review of the standards of unreasonableness and patent unreasonableness. Until that occurs, we do not see the need to add to the lexicon of standard of review terminology.

341

(2) Pragmatic and Functional Approach

280 Although the arguments were wide-ranging in this appeal, our reasons will only address the issues of the Agency's jurisdiction to adjudicate CCD's application and the Agency's determination of the applicable human rights law principles in the federal transportation context.

281 The factors to be considered in the pragmatic and functional approach were set out in *Dr. Q v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226, 2003 SCC 19, at paras. 26ff. In our view, consideration of all of the factors points to no deference being accorded to the Agency's decision.

282 The Agency's jurisdiction and the determination of the applicable human rights law principles in the federal transportation context are pure questions of law. Although in *Via Rail Canada Inc. v. National Transportation Agency*, [2001] 2 F.C. 25, the Federal Court of Appeal was seized of a case that concerned the undueness of an obstacle, the question was whether the reasons given by the Agency were sufficient. The jurisdiction of the Agency and the applicable human rights principles were not at issue. Thus, this being the first opportunity that a court has had to interpret these questions, the resolution of this case will have an important precedential value. This calls for an exacting standard of review. See *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at paras. 36-37, and *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, 2002 SCC 3, at para. 23.

283 Furthermore, the Agency is not protected by a privative clause in respect of questions of law or jurisdiction. Rather, there is a statutory appeal procedure on such questions under s. 41(1) of the Act. This contrasts with the Agency's factual determinations which are "binding and conclusive", under s. 31 of the Act.

284 On questions of jurisdiction and the determination of the applicable human rights law principles, the Agency does not have greater relative expertise than a court. The Agency is required to resort to human rights principles which are not comprehensively set out in its home statute and in respect of which the Agency, whose prime function is economic regulation of transportation in a largely deregulated environment, does not have specific expertise. This factor points to a standard of review that will be less deferential.

285 Finally, the purpose of s. 172 of the Act is to grant the Agency an adjudicative role to consider applications from persons with disabilities who allege the existence of undue obstacles to their mobility in respect of a federal transportation carrier. The issues generally involve a dispute between an aggrieved party and the transportation carrier. While the Agency's ultimate analysis, in those cases, involves a balancing of interests, the questions of the Agency's jurisdiction and the determination of the applicable human rights law, do not.

286 Considering all of these factors, the questions of the Agency's jurisdiction and the determination of the applicable human rights law principles in the federal transportation context are both to be reviewed on the standard of correctness.

B. *The National Transportation Policy*

287 We commence with a discussion of the National Transportation Policy as declared in s. 5 of the Act. This provision gives context for the entire Act, including s. 172. All relevant sections of the Act are reproduced in the Appendix.

288 Section 5 is a declaratory provision which states Canada's National Transportation Policy. Section 5 contains a number of objectives, amongst which are:

> **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... .

289 The objective of accessible transportation to persons with disabilities is an issue of human rights. It is critical to enabling persons with disabilities to gain employment, pursue educational opportunities, enjoy recreation, and live independently in the community. Recognizing this, Parliament included the accessibility of the federal transportation network to persons with disabilities among the objectives of the National Transportation Policy , and expressly granted the Agency jurisdiction to deal with undue obstacles to the mobility of persons with disabilities in Part V of the Act.

290 There is therefore no doubt that accessibility is an important policy objective of the legislation. However, several of the objectives set out in s. 5, including accessibility, are to be pursued "as far as is practicable" -- a term that appears three times in s. 5, indicating that the objectives are not expected to be achieved to the level of perfection. Thus, s. 5(*g*)(ii) provides that each "carrier or mode of transportation, as far as is practicable, carries traffic" under "conditions that do not constitute an undue obstacle to the mobility of persons, including persons with disabilities". Further, the words of s. 5(*g*)(ii) recognize that the mobility of persons may be subject to obstacles, but the objective of the Policy is that mobility not be impeded by *undue* obstacles.

C. *Part V of the Act: Dealing with Undue Obstacles to the Mobility of Persons with Disabilities*

291 Under Part V of the Act, Parliament granted the Agency jurisdiction to deal with undue obstacles to the mobility of persons with disabilities through two avenues. First, s. 170 of the Act grants certain regulatory powers to the Agency:

> **170.** (1) The Agency may make regulations for the purpose of eliminating undue obstacles in the transportation network under the legislative authority of Parliament to the mobility of persons with disabilities, including regulations respecting
>
> (*a*) the design, construction or modification of, and the posting of signs on, in or around, means of transportation and related facilities and premises, including equipment used in them;
>
> (*b*) the training of personnel employed at or in those facilities or premises or by carriers;
>
> (*c*) tariffs, rates, fares, charges and terms and conditions of carriage applicable in respect of the transportation of persons with disabilities or incidental services; and

(*d*) the communication of information to persons with disabilities.

...

292 Second, s. 172 of the Act sets out the adjudicative jurisdiction of the Agency:

> **172.** (1) The Agency may, on application, inquire into a matter in relation to which a regulation could be made under subsection 170(1), regardless of whether such a regulation has been made, in order to determine whether there is an undue obstacle to the mobility of persons with disabilities.
>
> (2) Where the Agency is satisfied that regulations made under subsection 170(1) that are applicable in relation to a matter have been complied with or have not been contravened, the Agency shall determine that there is no undue obstacle to the mobility of persons with disabilities.
>
> (3) On determining that there is an undue obstacle to the mobility of persons with disabilities, the Agency may require the taking of appropriate corrective measures or direct that compensation be paid for any expense incurred by a person with a disability arising out of the undue obstacle, or both.

293 As we have said, accessibility for persons with disabilities is a human rights issue. Therefore, the determination of the applicable human rights principles governing the Agency's adjudication of applications under s. 172 is at issue in the present appeal. These human rights principles do not operate in a vacuum. A body of case law has developed in Canada dealing with human rights adjudication. Therefore, it is useful to review prevailing human rights jurisprudence to understand how Part V of the Act is reconciled with it in a coherent framework.

D. *Reconciling Human Rights Law and Part V of the Canada Transportation Act*

294 In *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 ("*Meiorin*"), this Court laid down the approach to human rights claims. The framework in *Meiorin* was described in language specific to the employment context. However, it has been applied to other fields such as the licensing of motorists in *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868.

295 It is useful to set forth the *Meiorin* approach verbatim as found at para. 54 of the reasons of McLachlin J. (as she then was) in that case:

> Having considered the various alternatives, I propose the following three-step test for determining whether a *prima facie* discriminatory standard is a BFOR [*bona fide* occupational requirement]. An employer may justify the impugned standard by establishing on the balance of probabilities:
>
> (1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;

(2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and

(3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

This approach is premised on the need to develop standards that accommodate the potential contributions of all employees in so far as this can be done without undue hardship to the employer. Standards may adversely affect members of a particular group, to be sure. But as Wilson J. noted in *Central Alberta Dairy Pool, supra*, at p. 518, "[i]f a reasonable alternative exists to burdening members of a group with a given rule, that rule will not be [a BFOR]". It follows that a rule or standard must accommodate individual differences to the point of undue hardship if it is to be found reasonably necessary. Unless no further accommodation is possible without imposing undue hardship, the standard is not a BFOR in its existing form and the *prima facie* case of discrimination stands.

296 The approach in *Meiorin* has guided this Court's subsequent analyses in human rights cases and in our view it should be the guide in the federal transportation context. Human rights in respect of transportation of persons with disabilities are specifically provided for in the Act. Section 171 of the Act provides that the Agency and the Canadian Human Rights Commission are to coordinate their activities and foster complementary policies and practices in relation to the transportation of persons with disabilities. Both s. 5 and Part V of the Act, as discussed, identify the objective of removing "undue obstacles to the mobility of persons with disabilities" -- a human rights objective. It follows that the transportation of persons with disabilities should be guided by human rights principles as established in *Meiorin*.

297 Having regard to these considerations, applying *Meiorin* in the federal transportation context, the Agency's adjudication of applications under s. 172 of the Act requires that the following analysis be conducted:

(1) The applicant must satisfy the Agency of the existence of a *prima facie* obstacle to the mobility of persons with disabilities.

(2) The burden then shifts to the carrier to demonstrate, on a balance of probabilities, that the obstacle is not undue because:

(i) it is rationally connected to a legitimate objective;

(ii) the carrier has opted not to eliminate the obstacle based on an honest and good faith belief that it was necessary for the fulfilment of that legitimate objective; and,

(iii) not eliminating the obstacle is reasonably necessary for the accomplishment of that legitimate objective.

We will elaborate on the components of this test in the course of the analysis which follows in order to provide guidance to the Agency and reviewing courts on the correct approach in law to interpreting s. 172 of the Act.

E. *The Obstacle Analysis*

298 In the transportation context, the *prima facie* obstacle analysis must commence by assessing the alleged obstacle. For the Agency to conclude that an obstacle exists, it must be of more than minor significance to the mobility of persons with disabilities. Perfection is not the standard. The reference to "practicability" in the National Transportation Policy means that not every obstacle must be removed. Where the Agency finds that the alleged obstacle is not of sufficient significance, the analysis performed by the Agency is at an end, and the application should be dismissed.

F. *The Undueness Analysis*

299 Once the Agency determines that an obstacle is of sufficient significance, it must then determine if it constitutes an undue obstacle to the mobility of persons with disabilities.

300 The first stage is to determine whether the obstacle exists owing to a rationally connected legitimate purpose. Section 5 of the Act declares that a number of objectives and purposes are associated with what is "essential to serve the transportation needs of ... travellers, including persons with disabilities". These objectives or purposes are intimately tied to the Canadian transportation context and are specifically crafted by Parliament as goals to be achieved by a carrier. When there is evidence that a carrier has pursued one or more of the purposes in s. 5 of the Act, the Agency must consider them to be legitimate in its analysis. This, of course, does not preclude a carrier from advancing other objectives, or the Agency from deciding whether, in the context, such objectives constitute a legitimate purpose in a human rights analysis. Legitimate purposes contained in the National Transportation Policy that are relevant to rail passenger transportation include:

> (a) safety objectives; (b) efficiency objectives; (c) the opportunity to compete; (d) economic viability; and (e) competitive fares.

In pursuing the goals of safety, efficiency, economic viability, or any other legitimate purpose, obstacles to the mobility of persons with disabilities may be created, knowingly or otherwise. However, as long as these obstacles exist owing to a rationally connected legitimate purpose, the first stage of the undueness analysis will be satisfied.

301 Several of the Policy's objectives involve economic considerations. With respect to the objective of economic viability, VIA is not economically viable because it requires subsidization. In such a situation, the objective of economic viability must be interpreted as a policy of minimizing, to the extent reasonably possible, reliance on government subsidies. Where revenues do not cover a carrier's expenses, assuming the carrier is being operated efficiently and is maximizing passenger revenue, costs it would have to incur to eliminate an obstacle must be recovered by reducing other expenses through cutbacks in services or from the taxpayer through increased subsidies. Therefore, the continuing existence of obstacles due to financial cost may be rationally connected to a legitimate purpose.

302 Once a carrier has established that the obstacle is rationally connected to a legitimate purpose, the Agency must, at the second stage, consider whether the continuing existence of the obstacle is based on an honest and good faith belief that it is necessary for that legitimate purpose.

303 Finally, the third stage of the undueness analysis involves an assessment of whether the carrier's refusal to eliminate obstacles is reasonably necessary to achieve the legitimate purpose relied upon. Whether the existence of an obstacle is reasonably necessary requires an objective assessment of: (a) reasonable alternatives made available by the carrier to persons with disabilities affected by the obstacle; and, (b) constraints that may prevent the removal of the obstacle in question.

304 Where there are reasonable alternatives made available by the carrier to persons with disabilities, then the third part of the undueness analysis will be satisfied and the obstacle will not be found to be undue. A reasonable alternative must respect the dignity of the person with disabilities. It may be a functional alternative, not necessarily an identical service, and the alternative need not be the same for all routes. There may be remedies to an obstacle found on an individual car that do not involve eliminating the obstacle, but rather provide an alternative which enables the obstacle to be circumvented. The search for reasonable alternatives will vary with the circumstances of individual obstacle assessments. It will be for the Agency to determine what may constitute a reasonable alternative in specific cases.

305 In the present case, VIA submitted evidence that reasonable alternatives existed through its "network" to accommodate persons with disabilities. VIA said that its network design "includes the reservation system, the alternative transportation policy, ground services, special handling services, train accommodation, employee training and special service requests". Indeed, as a defence that could be raised by a carrier, the Canadian Human Rights Commission took the position in its factum, at para. 25, that:

> ... there is nothing inherently problematic with the suggestion that in some circumstances it will be appropriate ... to look at the respondent's entire network before concluding that an obstacle is "undue".

306 We have referred to VIA's "network" because that is the term used in s. 5 of the Act. It has been used by the parties, the Agency and the Federal Court of Appeal. However, to avoid ambiguity, we would emphasize that an obstacle in the passenger equipment on one route is not circumvented by accessible equipment on another route. In other words, a reasonable alternative must be a relevant alternative for the passenger. Rail passengers may be travelling for business or pleasure. But practically, they intend to travel from an origin to a destination. When considering the mobility of persons with disabilities, it is the transportation of passengers between specific origins and destinations that is considered. For instance, undue obstacles on the service between Winnipeg and Saskatoon are not remedied by accessible travel between Ottawa and Toronto.

307 If there are no reasonable alternatives that enable persons with disabilities to circumvent an obstacle, then the Agency must continue with its analysis with respect to constraints that may stand in the way of removing the obstacle.

308 Where there are structural constraints that make it impossible to remedy the obstacle, then the third part of the undueness analysis will be satisfied and the obstacle will not be found to be undue. However, where modifications are possible from an engineering perspective, then the Agency must continue with its analysis into the other constraints associated with such accommodation.

309 In *VIA Rail Canada Inc v. National Transportation Agency*, the Federal Court of Appeal referred to factors that were relevant to accommodating persons with disabilities requiring the assistance of an escort, e.g., availability of personnel, time required for providing assistance and ability to contract occasional workers. The factors will be dependent on the circumstances of each case. However, almost any accommodation can be evaluated in terms of cost, such as that associated with personnel or modifications to equipment. Consequently, in almost every case, the remaining constraint to the removal of an obstacle will be the cost involved. At this stage, the Agency must engage in balancing the significance of the obstacle with the cost involved in removing the obstacle. Where the cost of removing the obstacle is disproportionate to the significance of the obstacle to the mobility of persons with disabilities, then the third part of the undueness analysis will be satisfied and the obstacle will not be found to be undue.

310 The consideration of cost in human rights case law is well established. In *Meiorin*, McLachlin J. stated at para. 63 that the financial cost of the method of accommodation is a relevant factor. In *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, [1990] 2 S.C.R. 489, at pp. 520-21, "financial cost" is the first factor to which Wilson J. refers as being relevant to undue hardship. Similarly, in *Commission scolaire régionale de Chambly v. Bergevin*, [1994] 2 S.C.R. 525, at p. 546, Cory J. observed: "What may be eminently reasonable in prosperous times may impose an unreasonable financial burden on an employer in times of economic restraint or recession." Therefore, the cost required to remedy an obstacle must be considered by the Agency before it orders that the obstacle be removed.

311 The scope of the Agency's inquiry into cost will necessarily vary with the nature of the application. Cases under s. 172 have ranged from those involving a single obstacle to the present case in which 46 obstacles were alleged by CCD. The Agency's approach in each case must be tailored to meet the circumstances. In a case in which many obstacles are alleged, the difficulty of the Agency's work is compounded. Where a number of obstacles are involved, the Agency will have to consider the overall cost associated with their elimination and the impact on the carrier if such cost is imposed. Not only will the Agency be required to consider the global cost, but it must also consider whether the elimination of some obstacles may be justified in relation to the cost involved while the elimination of others may not.

312 Where an applicant seeks recourse to the Agency to order the removal of an obstacle, the burden of funding the required modifications by the carrier, especially a subsidized carrier, may result in a finding that in all the circumstances, the obstacle cannot be said to be undue. This is not to say that the obstacle may not be a serious matter for persons with disabilities. However, if there is to be recourse in such a case, it involves a policy decision that lies with the Government and is not within the adjudicative role of the Agency.

313 In summary, we can say that the human rights principles that apply in the federal transportation context are essentially the same as those applicable in other human rights cases.

G. *Analysis of the Agency's Decisions*

314 Two questions must be dealt with: the correctness of the Agency's assertion of jurisdiction, and its determination of the applicable human rights law principles in the federal transportation context.

(1) Jurisdictional Questions

315 CCD argued that VIA had improperly raised jurisdictional issues before this Court, because the Federal Court of Appeal found that the Agency did have jurisdiction, and VIA failed to cross-appeal. Rule 29(3) of the *Rules of the Supreme Court of Canada*, SOR2002-156, provides that a respondent who seeks to uphold the judgment appealed from on a ground not relied on in the reasons for that judgment, may do so in its factum without applying for leave to cross-appeal. Citing *Shell Canada Ltd. v. Canada*, [1999] 3 S.C.R. 616, CCD argued that Rule 29(3) did not apply in this case because VIA, in its jurisdictional argument, was not simply asking the Court to uphold the Federal Court of Appeal's judgment which remitted the matter to the Agency for redetermination. Rather, VIA was asking this Court to order that the CCD application be definitely dismissed. We do not find it necessary to decide on the application of Rule 29(3) because we find that the Agency did not exceed its jurisdiction.

(a) *Must an Applicant Have Actually Encountered an Undue Obstacle?*

316 There has been much debate in these proceedings over whether the Agency has jurisdiction where an applicant has not "actually encountered" an alleged undue obstacle.

317 The language of s. 172(1) of the Act indicates that Parliament intended the Agency to have jurisdiction where an "application" is made to it, and its inquiry is to be directed to "determine whether there is an undue obstacle". There is nothing to prevent the Agency from initiating an inquiry based on an application from a public interest group such as CCD and no indication that an applicant need have actually encountered an obstacle, as long as the alleged obstacle exists. In this case the Renaissance rail cars had already been acquired by VIA and the inquiry into alleged obstacles in those cars was not beyond the jurisdiction of the Agency.

(b) *Does the Agency Lose Jurisdiction When its Inquiry Extends Past the 120-Day Deadline in Section 29 of the Act?*

318 The breadth of the Agency's inquiry in this case was exceptionally broad. Sexton J.A. noted that the language of s. 172 gives the Agency authority to inquire into a matter in relation to which a regulation could be made under s. 170(1), which includes the design, construction and modification of rail cars. The question is whether the type of inquiry required in this case fits within the Agency's jurisdiction under s. 172.

319 Under s. 29 of the Act, adjudicative decisions are to be made as "expeditiously as possible" and within 120 days unless the parties consent to an extension. Therefore, VIA argued that the Agency was without jurisdiction under s. 172 to embark upon a lengthy inquiry such as this.

320 Given the requirement in s. 29(1) to make adjudicative rulings within 120 days, Parliament appears to have intended that adjudicative proceedings be more limited than when the Agency engages in a general regulatory function under s. 170. Nonetheless, there is no express limitation on the scope or nature of an adjudicative inquiry.

321 In *Canadian National Railways Co. v. Ferroequus Railway Co.*, [2002] F.C.J. No. 762 (QL), 2002 FCA 193, Décary J.A. found that the 120-day deadline in s. 29(1) was directory and not mandatory. We adopt his reasoning and agree that s. 29(1) is directory when applied to proceedings under s. 172 of the Act. Where a relatively limited adjudicative investigation is being conducted by the Agency, the Agency will gear its process towards rendering a decision within 120 days. On the other hand, where an adjudicative proceeding is broad in scope and has far-reaching implications,

the Agency will have to adjust its process to take account of these conditions. The 120-day period in s. 29 does not preclude it from doing so or cause the Agency to lose jurisdiction if the 120-day period is exceeded. Although the inquiry in this case was extensive, it was not beyond the jurisdiction of the Agency under s. 172.

(c) *Regulatory Burden*

322 VIA argues that the "onerous regulatory burden" imposed upon it in this case demonstrates that the Agency's adjudicative jurisdiction under s. 172 was not intended to apply where the impacts on a carrier would be broad and far-reaching. Rather, when such impacts are involved, it is the Agency's regulatory power under s. 170 that is applicable.

323 The Agency's exercise of its regulatory power is subject to more stringent oversight than that of its adjudicative power. Under s. 36 of the Act, Governor in Council oversight of regulations made by the Agency under s. 170 is mandatory. By contrast, under s. 40 of the Act, the Governor in Council may on petition or of its own motion vary or rescind any decision or order made by the Agency under s. 172. Here the oversight by the Governor in Council is discretionary. The rationale for mandatory oversight of regulations developed by the Agency under s. 170 would appear to be that regulations are legislative in nature and of general application. Adjudicative decisions of the Agency, including those under s. 172, will depend on the circumstances of a specific case.

324 We are mindful that the National Transportation Policy is to minimize the economic regulation of transportation undertakings. Nevertheless, the text of the Act governs and, in the case of Part V, the Agency is given broad and pervasive jurisdiction. It may not have been Parliament's expectation that broad inquiries would be conducted under s. 172, but the words used do not preclude such adjudications. There are no words that suggest that adjudications, once they reach a certain magnitude, are beyond the Agency's jurisdiction under s. 172, even though they impose a significant burden on the carrier.

(d) *Can the Agency Conduct a Review and Overhaul of a Carrier's Entire Infrastructure and System of Services?*

325 VIA also argues that the Agency's adjudicative jurisdiction under s. 172 cannot extend to a review and overhaul of a carrier's entire infrastructure and system of services. We would agree, but that is not what happened here. CCD's request to the Agency that it enjoin VIA from acquiring the Renaissance cars had been dismissed at an early stage. The decision to acquire the Renaissance cars, no matter their advantages or disadvantages, is not under review. Moreover, unfocussed applications under s. 172 cannot be entertained. However, the CCD application here, while it was certainly broad, alleged specific obstacles in the Renaissance cars. Section 172 is engaged once an application alleging specific and existing undue obstacles is filed with the Agency.

(e) *Other Jurisdictional Arguments*

326 In arguing that the Agency exceeded its jurisdiction, VIA made some arguments which we find are more properly considered as questions of law. For example, in its jurisdictional argument, VIA alleged that the Agency elevated the Rail Code's voluntary terms to *de facto* mandatory statutory requirements. In doing so, VIA maintained that the Agency improperly evaded Cabinet approval of the Agency's regulation-making power. We find that the issue of the Agency's use of the Rail Code is not a jurisdictional issue but rather a legal question. Similarly, VIA argued that the

Agency was without jurisdiction because it had found obstacles to be undue without knowing the cost of remedying the obstacles (cost being an element of undueness). The Agency's consideration of economic constraints goes to whether the Agency adhered to the applicable human rights principles in the transportation context. These questions will be dealt with as questions of law.

(2) Review of the Agency's Determination of the Human Rights Principles Applicable in the Federal Transportation Context

327 The outcome of the appeal turns on whether the Agency erred in law with respect to the test for determining the undueness of an obstacle. As mentioned earlier, the question at issue comes for the first time before this Court and consequently, the proper test has not yet been settled. We find that the Agency erred in law. It did not determine the correct principles and did not take into account the relevant considerations on material elements of the analysis.

328 The Agency recognized that it is subject to the *Charter* (Preliminary Decision, at p. 30). It specifically mentioned that it is directed to apply economic and commercial principles in the execution of its mandate and, particularly, that the notion of practicability has to be taken into account when considering whether the needs of persons with disabilities have been accommodated. Despite its elaboration of some of the principles in the abstract, the analysis conducted by the Agency reveals that most of the applicable principles were excluded from its reasoning.

329 The fact that the allegations in this case did not rest on obstacles actually encountered by persons with disabilities, and that the alleged obstacles were numerous, made the factual inquiry highly complex. The Agency elected to use predetermined fixed criteria when determining the existence of obstacles. For example, the Agency stated the criterion for accessibility of persons with disabilities was that an on-board wheelchair (as opposed to the individual's own wheelchair) "should only be provided as an option to those who can and wish to use it" (Preliminary Decision, at p. 19). Even if the use of predetermined fixed criteria was initially acceptable, the Agency should have been careful to leave itself room to re-evaluate the criteria in its undueness analysis to ensure that these predetermined measurements did not overtake the broader contextual inquiry that is required. Instead, at this latter stage, the Agency adhered to the predetermined fixed criteria that it had initially established.

(a) *Prima facie Obstacle*

330 The Agency appears to have taken a broad view of the term "obstacle". This view is consistent with the generous approach to be taken at the initial stage of a human rights application. However, as discussed in the section concerning the determination of the applicable principles, an alleged obstacle of insufficient significance will not be considered an obstacle. Although the Agency did not formally use the expression "sufficient significance", it appears to have applied such a nuanced standard in some instances. Five of the obstacles alleged by CCD were found not to be obstacles warranting consideration at the undueness stage. Since the correctness of the legal standard is at issue rather than the factual determination, it is not our intention to examine the findings of the Agency on individual alleged obstacles.

331 The undueness analysis is the stage where the problems arose in this case and it is not necessary to dwell further on the obstacle analysis.

(b) *Undueness Analysis*

332 Although the Agency's view of the undueness analysis captures some of the elements of the *Meiorin* framework, it overlooks material segments, namely the identification of the objective, the rational connection between the obstacle and the objective, the honest and good faith belief of the carrier, the assessment of reasonable alternatives and finally the balancing of the significance of the obstacle with the economic impact of the corrective measures, having regard to the objective pursued by the carrier.

333 In order to explain the errors, we review the Agency's decision against the applicable principles.

(i) First Stage: Identifying the Legitimate Objective and the Rational Connection

334 At the first stage of the analysis, the Agency must assess whether the obstacle is related to a legitimate purpose.

335 What the Agency had to determine in this case is the goal that VIA was pursuing and whether its resistance to improving the accessibility of the Renaissance cars to persons with disabilities was rationally connected to its objective.

336 The Agency explicitly noted VIA's position that (1) it required "the Renaissance cars to augment its rolling stock to meet its obligations to provide an efficient, viable and effective passenger rail network"; and (2) "that the Renaissance Cars were within the capital budget ... only because they were so advantageously purchased and retrofitted. VIA did not have sufficient money to meet its needs for 124 new cars from conventional purchases in North America" (Preliminary Decision, at p. 32).

337 VIA led evidence that it would have taken four years and some $400 million to acquire newly designed cars. The subsidy allocated for purchase of the rail cars was only $130 million. The Standing Committee report that VIA's network needed to be improved at the same time as it was found that VIA lost money "every time a train leaves the station" (p. 4) was evidence of the goals VIA was pursuing in purchasing the Renaissance cars. Efficiency and economic viability are objectives of the National Transportation Policy under s. 5 of the Act and must be considered to be legitimate. Operating within the subsidy allocated to VIA by the Government is consistent with those objectives. Nonetheless, the Agency does not acknowledge that it was required to identify the goals pursued by VIA in purchasing the cars; nor did it make a finding of whether it accepted VIA's argument and evidence that the acquisition of the cars was rationally connected to a legitimate purpose.

338 The majority of our colleagues do not engage in an analysis of whether the Agency considered VIA's purpose. In our view, this sidestepping of an important aspect of the *Meiorin* approach can have a broad impact in other human rights cases. The stage of the identification of legitimate purposes and whether the continued existence of obstacles is rationally connected to that purpose may appear perfunctory. However, it remains an indispensable stage of the undueness analysis. Only when the goals are clarified is it possible to assess the rational connection and, at later stages of the analysis, to evaluate the carrier's good faith belief and to conduct the appropriate balancing exercise. The goals pursued by VIA were the source from which the rest of the undueness analysis flowed. The Agency's error of law began at the first stage of the undueness analysis.

(ii) Second Stage: Honest and Good Faith Belief of Carrier

339 The Agency, not having identified the goals pursued by VIA did not examine whether VIA acted in good faith in doing so. It is not for this Court to conduct an evaluation of the evidence. However, here again, it is worth noting that there was evidence on the subject of good faith belief.

340 For example, VIA appears to have made a presentation to the Agency of an overview of its business and strategic case for the cars preceding their physical inspection on September 20, 2001. Further, as referred to above, VIA submitted evidence of its Accessibility Program and the steps it was taking to eliminate certain obstacles. The Agency, not having identified the good faith belief element of the undueness analysis, did not assess this evidence. The error of law of the Agency at the first stage of the undueness analysis was compounded at the second stage when it failed to identify and assess the motives pursued by VIA.

(iii) Third Stage: Reasonably Necessary to Accomplish Purpose

341 At the third stage, the Agency was required to consider whether the failure to eliminate obstacles was reasonably necessary in view of legitimate objectives being pursued by VIA. This entailed an analysis of reasonable alternatives and, if necessary, of constraints to eliminating the alleged undue obstacles.

1. *Reasonable Alternatives*

342 The Agency made an important statement in outlining the relevant principles of accessibility:

> Insofar as transportation service providers are aware of the needs of persons with disabilities and are prepared to accommodate those needs, it can be said that persons with disabilities may have equivalent access to the network. Implicit in the use of the term "equivalent access" is the notion that, in order to provide equal access to persons with disabilities, transportation service providers may have to provide different access - more or different services, different facilities or features, all designed to meet the needs of persons with disabilities to ensure that they, too, can access the network.
>
> (Preliminary Decision, at p. 19)

343 This extract points, albeit with a different terminology, to reasonable alternatives. However, when it came to evaluate the alternatives, the Agency failed to address how alleged undue obstacles might be circumvented by network alternatives which could accommodate persons with disabilities. The Agency focussed only on an centimeter-by-centimeter approach to measuring physical dimensions of the Renaissance cars, without regard to the possibility of accommodation through alternative services.

344 In fact, the Agency, after having, in effect, said reasonable alternatives were relevant, eventually completely dismissed the network as part of the analysis. It focussed only on the Renaissance cars themselves. The basis of the Agency's rejection of the network argument was the requirement that the Renaissance cars be accessible for persons using a Personal Wheelchair as pro-

vided for in the Rail Code. Therefore, it is necessary to examine the Agency's use of the Rail Code in this matter.

345 No regulations have been promulgated under s. 170 of the Act to govern the design, construction or modification of rail cars with respect to their accessibility for persons with disabilities. Rather than legally binding regulations, a policy choice has been made to encourage carriers to enhance accessibility to persons with disabilities within the federal transportation network through voluntary codes of practice such as the Rail Code. In its factum, the Agency states at para. 6:

> Following a change in government policy to deregulation in the mid-1990's, all further regulatory work has been achieved by means of voluntary consensual codes of practice and currently there are four codes of practice in effect [for aircraft, rail, ferries, and for removing communications barriers for all federal modes of transportation].

346 The Rail Code and other voluntary codes of practice cannot be elevated to the status of laws as if they were legally binding regulations. To do so is to improperly circumvent the policy choice of favouring adjudication over regulation; the Agency has been conferred the power to adjudicate and charged with the duty to exercise its discretion in assessing whether a given obstacle is undue. Applying the Rail Code as a binding instrument also sidesteps the requirement in s. 36 of the Act that the Minister of Transport be given notice of regulations, which the Governor in Council must then approve or reject.

347 As Doherty J.A. of the Ontario Court of Appeal held in *Ainsley Financial Corp. v. Ontario Securities Commission* (1994), 21 O.R. (3d) 104, at p. 109, a case dealing with a policy directive issued by the Ontario Securities Commission:

> 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 [a] 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. [Emphasis added.]

348 Upon reading the Agency's decisions in this case, despite its statement mentioning the Rail Code's voluntary nature, it appears that the Agency effectively applied the Rail Code as if it were a

regulation establishing minimum standards to be met by a rail carrier for the accessibility of rail cars to persons with disabilities. The Rail Code was the basis for the Agency assessing the accessibility of the Renaissance cars using the standard of the "Personal Wheelchair" as defined in the Rail Code. In its Preliminary Decision, the Agency stated:

> In this regard, it should be noted that the Rail Code sets out minimum standards that the Agency expects rail carriers to meet.
>
> ...
>
> In fact, the Rail Code is the result of a consensus-building exercise, between the community of persons with disabilities in industry, and represents, in many ways, compromises to which rail carriers are expected to adhere.
>
> In summary, the Rail Code was not developed in isolation by the Agency; rather, it was the product of consultations with both the rail industry and the community of persons with disabilities. As such, although the Rail Code is voluntary, it is an important reference tool which sets out clearly defined expectations regarding accessibility standards to be met by rail carriers such as VIA.
>
> In light of the above, the Agency is of the opinion that the appropriate standard to be applied in its determination of whether certain features of the Renaissance Cars present undue obstacles to the mobility of persons using wheelchairs, is the Personal Wheelchair as set out in the Rail Code.
>
> Rather, as set out in the "framework of the decision" section of this Decision, the Rail Code is a voluntary guideline on minimum accessibility standard developed by consensus by industry and the community of persons with disabilities. In recognition of this, the Agency is not precluded from finding undue obstacles in the Renaissance cars even it if finds apparent compliance with the Code. [Emphasis added; pp. 20, 21, 23, 27 and 31]

It is apparent that the Agency's approach was that the Rail Code set minimum standards but did not preclude it from finding an obstacle to be undue even if the minimum standards of the Rail Code had been met. In other words, the Agency was of the view that it could impose a standard more demanding than the Rail Code but not less demanding.

349 While some Renaissance cars were not complete or were being retrofitted by VIA, the fact is that they were not ordered from the manufacturer according to specifications established by VIA. Nonetheless, the Agency, applying the Rail Code formula, determined that they were "newly manufactured and, as such, the Rail Code accessibility standards applicable are those for newly manufactured cars" (Preliminary Decision, at p. 31).

350 We have no doubt of the desirability of rail cars meeting or exceeding the Rail Code standards. However, in the absence of regulations enacted pursuant to s. 170, the Agency cannot treat the Personal Wheelchair as a legally binding standard, because to do so results in a failure by the Agency to exercise the discretion vested in it when it adjudicates under s. 172 of the Act.

351 It is apparent that the Agency did not consider alternatives that did not meet the Personal Wheelchair accessibility standards of the Rail Code. The Agency's show cause order in its Preliminary Decision confirms that this was the Agency's approach. Every item on the show cause order pertained to modifying the Renaissance rail cars to meet the Rail Code and Personal Wheelchair standard. While the order contained a basket clause inviting VIA to make any other submissions it considered relevant, the Agency's exclusive focus on modifying the rail cars in accordance with these requirements implied that other submissions were not invited or would not be entertained. It effectively adopted the Rail Code and Personal Wheelchair accessibility standard as if they were regulatory requirements. In doing so, the Agency failed to consider the full range of reasonable alternatives offered through the network to address the obstacles identified in the Renaissance cars and thereby erred in law.

2. Constraints

352 At this stage, the Agency's analysis involved a balancing of the significance of the obstacles to the mobility of persons with disabilities against other constraints such as structural constraints and the total estimated cost to remedy the obstacles, having regard to the objective of economic viability.

353 With respect to structural constraints, the Agency appears not to have been satisfied with evidence advanced by VIA as to practical structural problems. However, the third-party Schrum report filed as evidence in the Federal Court of Appeal found that "[t]he re-construction of the cars, as directed by the Agency, make[s] no engineering or production sense". Furthermore, Mr. Schrum stated, "I am of the view that some of the changes may not be feasible from an engineering point of view". On the issue of structural constraints, we can say no more than that the onus is on VIA to produce relevant evidence and that the Agency must carefully evaluate that evidence.

354 Economic constraints were a significant issue before the Agency. The Agency did make certain cost findings with respect to some of the obstacles. However, its reasoning reveals a dismissive way of addressing the cost issue. Furthermore, the Agency did not identify its total cost estimate. In an undueness analysis, when cost constraints are an issue, it is an error of law for the Agency not to determine a total cost estimate for the corrective measures it orders.

355 In response to the Agency's show cause order in its Preliminary Decision, VIA had provided an estimate of some $35 million as the total cost and lost revenue of completing the corrective measures identified in the show cause order. The Agency found this to be overstated. In particular, it did not accept VIA's estimate of $24.2 million in foregone passenger revenue as a result of removing some seats to accommodate persons with disabilities. The Agency calculated its own range for this lost revenue, finding a best case scenario of approximately $700,000 and a worst case scenario of some $1.7 million. The Agency also rejected VIA's estimate of the cost of implementing certain corrective measures finding, for example, that such cost would be incurred by VIA in making required safety changes in any event. However, despite a number of figures and calculations by the Agency in respect of certain corrective measures, the Agency never provided its best estimate of VIA's total cost of the corrective measures it was ordering. Without a total cost estimate, the Agency could not conduct the undueness analysis required by s. 172, that is, balancing the significance of the obstacles to persons with disabilities with the cost of the corrective measures, having regard to the objective of economic viability.

356 The Agency was also dismissive in its consideration of VIA's ability to fund the corrective measures. For example, the Agency did not consider the removal of some obstacles and the retention of others based on cost considerations. It treated VIA's resources as virtually unlimited, stating that costs for accessibility "should always be budgeted for" (Preliminary Decision, at p. 45). The Agency noted that "VIA receives significant funding from the Government of Canada" (p. 46) as if VIA was entitled to such funding as a matter of right. The Agency also disregarded funding limitations when it stated that the "fundamental importance of accessible travel by rail to persons with disabilities cannot be set aside" in favour of reduced capital costs and flexibility in VIA's network (p. 46).

357 The Agency made reference to a contingency fund for the 2003- 2007 period of some $25 million for "unplanned events such as market downturns, potential accidents and other operational liabilities" (Final Decision, at p. 23). However, there is no indication that the fund is available for major reconstruction of the Renaissance cars and, in any event, without providing a cost estimate, the reference to the contingency fund is premature.

358 Under s. 172 the Agency has the power to order a carrier to take corrective measures in respect of an undue obstacle to the mobility of persons with disabilities. In cases in which the required funding may be significant, and, as in VIA's case, where the carrier operates on an annual deficit such that it is reliant on government subsidization for its ongoing operations and capital requirements, the Agency must be especially attentive to the cost it proposes to impose.

359 The Agency's reasons do not demonstrate the attention that is required for a case where the cost of the measures is potentially very substantial. For example, the Agency made a questionable comparison in its Preliminary Decision (p. 46) when it compared remedying obstacles to the mobility of persons with disabilities with station upgrades and retrofitting the lounge in the Renaissance cars. The Agency stated that each of these expenditures "will have the effect of increasing the company's operating loss", apparently missing the fact that station and lounge upgrades are made for economic objectives, intended to yield increased revenues over time (p. 46).

360 In justifying its order that VIA remove seats for accessibility purposes, the Agency compared this to VIA's removal of seats to provide space for coat storage:

> ... if VIA is prepared to remove up to 47 seats to accommodate passengers' coats and forego the revenues associated with this, it must be prepared to forego the revenues associated with removing up to 33 seats ... in order to implement Option 3.
>
> (Final Decision, at p. 53)

Again this was a flawed comparison. Providing space for coat storage is obviously not an objective of its own. It is an economic decision to maximize revenue. The revenue connected with the seats removed to create a coat valet will be foregone, but VIA must have determined that coat storage facilities were necessary in order to attract and retain passengers and maximize revenue from its remaining seats. Thus it does not follow, as the Agency concluded, that:

> ... it would appear that VIA can afford the revenue associated with one-passenger seat for the above-noted 13 or 33 economy coach cars, given that it is prepared to forego the revenue in respect of up to 47 coach seats to provide coat storage.

(Final Decision, at p. 53)

361 The Agency's flawed reasoning on this point may have owed something to its process. On September 17, 2003, the Agency wrote to VIA directing that VIA advise whether any passenger seats had been removed from the Renaissance cars, thereby causing an impact on VIA's passenger seat revenue. VIA responded in writing the following day, explaining that it had removed seats to install coat valets, a change that was necessary because there was no other facility appropriate for the storage of coats. VIA noted that the Agency had given VIA less than 26 hours to file its reply to the Agency's question and that "VIA Rail does not understand the context of the question." In its Final Decision the Agency used the information to make the coat storage comparison. Furthermore, the Agency stated that VIA did not indicate "why the existing storage or even some of the 'future valet/storage' is not sufficient for this purpose" (p. 53). But the Agency had not afforded VIA an opportunity to explain.

362 Once the Agency ordered corrective measures in its Final Decision, VIA says it was able to obtain a third-party estimate of the cost associated with these modifications. VIA claims that obtaining a third-party cost estimate was more feasible at this point because it pertained to a specific order of the Agency, rather than to an unlimited series of alternatives. Even though the order had narrowed the scope of the estimate, Bombardier train expert Peter Schrum stated that the directions of the Agency were laden with a number of complex and unknown structural, engineering, production and timing risks, such that his cost conclusions must be qualified.

363 The Federal Court of Appeal allowed the Schrum evidence to be added to the record. His report indicated that the modifications ordered by the Agency would cost some $48 million and possibly up to $92 million. This represented between 37 percent and 71 percent of the cost of purchasing and commissioning into service the Renaissance rail cars.

364 In its reasons, the majority implies the Schrum report should not have been admitted in evidence in the Federal Court of Appeal. However, the admission of this evidence is not an issue before this Court. This Court should not, on its own motion, disregard filed evidence in the absence of argument by the parties on the issue. Both parties filed extensive evidence and conducted cross-examinations on affidavits. In the end, over 2000 pages of evidence were filed in the Federal Court of Appeal. This is part of the record before this Court and cannot be ignored.

365 The majority questions the validity of the Schrum report and says that its "untested conclusions render it an inappropriate basis for interfering with the Agency's factual findings and remedial responses" (majority reasons at para. 242). It is not for this Court to assess and weigh the evidence. In any event, Mr. Schrum was cross-examined on his affidavit. Therefore, his report did not go untested. Moreover, the Federal Court of Appeal used the Schrum evidence not to make a decision with respect to the merits, but only as a basis for remitting the matter to the Agency for its reconsideration. In the circumstances, that was the correct approach. Where the cost is potentially significant and where the Agency adopted a dismissive approach to cost and funding of corrective measures, it is apparent that relevant considerations were not taken into account.

366 It should be for the Agency, on the basis of new evidence adduced before it (or if it considers it adequate, the evidence filed in the Federal Court of Appeal) to determine the cost of the corrective measures and VIA's ability to fund them and to carry out the balancing exercise required of it at the third stage of the undueness analysis.

367 In the name of deference, the majority would cut short the assessment of the Agency's decisions on the basis that it applied the *Meiorin* principles. This is problematic for two reasons. First, the Agency distanced itself from these human rights principles (Preliminary Decision, at p. 36). It takes an overly generous recrafting of the Agency's decision to characterize it as reflecting the correct approach. Second the majority is not clear as to how the *Meiorin* principles are to be applied and to what extent. Tests and frameworks are created to provide guidance to decision makers in the exercise of their discretion. Making them ambiguous is counterproductive.

V. Conclusion

368 On the one hand, Parliament's intention is to deregulate, to the extent possible, transportation subject to federal jurisdiction. That is the environment in which VIA may expect to operate. On the other, the Agency has been given broad powers in Part V of the Act in respect of human rights matters. In this context, the Agency's role as an adjudicative body necessarily requires it to place procedural obligations on the parties participating in proceedings. The Agency must be attuned to the feasibility of the orders it issues to the parties and the intrusiveness of its process into the management of the carrier. In turn, the parties must respect the Agency's role and conduct themselves accordingly. We observe from a review of the record that VIA's conduct during the proceedings did not always appear to be productive. Notwithstanding the fact that a s. 172 application creates an adversarial process in which VIA, as any regulated enterprise, is entitled to vigorously defend its interests, VIA must recognize and respect the role of the Agency.

369 With respect to costs, CCD is a non-profit organization that does not seek a pecuniary or proprietary benefit, and its application has raised important issues with a human rights dimension. VIA does not seek costs against CCD.

370 For these reasons, we would dismiss this appeal without costs. The decision of the majority of the Federal Court of Appeal should be affirmed, and the matter remitted to the Agency for redetermination having regard to these reasons.

* * * * *

APPENDIX

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

National transportation policy

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.

...

20. [Technical experts] 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.

...

25. [Agency powers in general] 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.

...

29. [Time for making decisions] (1) The Agency shall make its decision in any proceedings before it as expeditiously as possible, but no later than one hundred and twenty days after the originating documents are received, unless the parties agree to an extension or this Act or a regulation made under subsection (2) provides otherwise.

(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.

...

31. [Fact finding is conclusive] The finding or determination of the Agency on a question of fact within its jurisdiction is binding and conclusive.

...

33. [Enforcement of decision or order] (1) A decision or an order of the Agency may be made an order of any superior court and is enforceable in the same manner as such an order.

...

361

36. [Approval of regulations required] (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.

...

Review and appeal

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.

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.

...

Part V

Transportation of persons with disabilities

170. (1) The Agency may make regulations for the purpose of eliminating undue obstacles in the transportation network under the legislative authority of Parliament to the mobility of persons with disabilities, including regulations respecting

(*a*) the design, construction or modification of, and the posting of signs on, in or around, means of transportation and related facilities and premises, including equipment used in them;

(*b*) the training of personnel employed at or in those facilities or premises or by carriers;

(*c*) tariffs, rates, fares, charges and terms and conditions of carriage applicable in respect of the transportation of persons with disabilities or incidental services; and

(*d*) the communication of information to persons with disabilities.

...

171. The Agency and the Canadian Human Rights Commission shall coordinate their activities in relation to the transportation of persons with disabilities in order to foster complementary policies and practices and to avoid jurisdictional conflicts.

172. (1) The Agency may, on application, inquire into a matter in relation to which a regulation could be made under subsection 170(1), regardless of whether such a regulation has been made, in order to determine whether there is an undue obstacle to the mobility of persons with disabilities.

(2) Where the Agency is satisfied that regulations made under subsection 170(1) that are applicable in relation to a matter have been complied with or have not been contravened, the Agency shall determine that there is no undue obstacle to the mobility of persons with disabilities.

(3) On determining that there is an undue obstacle to the mobility of persons with disabilities, the Agency may require the taking of appropriate corrective measures or direct that compensation be paid for any expense incurred by a person with a disability arising out of the undue obstacle, or both.

Solicitors:

Solicitors for the appellant: Bakerlaw, Toronto.

Solicitors for the respondent: Fasken Martineau DuMoulin, Toronto.

Solicitor for the intervener the Canadian Transportation Agency: Canadian Transportation Agency, Gatineau.

Solicitor for the intervener the Canadian Human Rights Commission: Canadian Human Rights Commission, Ottawa.

Solicitor for the intervener the Ontario Human Rights Commission: Ontario Human Rights Commission, Toronto.

Solicitor for the intervener Commission des droits de la personne et des droits de la jeunesse: Commission des droits de la personne et des droits de la jeunesse, Montréal.

Solicitor for the interveners the Manitoba Human Rights Commission and the Saskatchewan Human Rights Commission: Manitoba Human Rights Commission, Winnipeg.

Solicitor for the interveners Transportation Action Now, the Alliance for Equality of Blind Canadians, the Canadian Association for Community Living and the Canadian Hard of Hearing Association: ARCH Disability Law Centre, Toronto.

Solicitors for the intervener the Canadian Association of Independent Living Centres: Shannon Law Office, Thunder Bay; Bérubé & Pion, Toronto.

Solicitor for the intervener the DisAbled Women's Network Canada: Melina Buckley, Vancouver.

* * * * *

Corrigendum, released April 5, 2007

Please note the following changes in paras. 369 and 370 of *Council of Canadians with Disabilities v. Via Rail Canada Inc.*, 2007 SCC 15, released March 23, 2007. In the English version, these paragraphs should read:

> With respect to costs, CCD is a non-profit organization that does not seek a pecuniary or proprietary benefit, and its application has raised important issues with a human rights dimension. VIA does not seek costs against CCD.
>
> For these reasons, we would dismiss this appeal without costs. The decision of the majority of the Federal Court of Appeal should be affirmed, and the matter remitted to the Agency for redetermination having regard to these reasons.

1 **170.** (1) The Agency may make regulations for the purpose of eliminating undue obstacles in the transportation network under the legislative authority of Parliament to the mobility of persons with disabilities, including regulations respecting

> (*a*) the design, construction or modification of, and the posting of signs on, in or around, means of transportation and related facilities and premises, including equipment used in them;
>
> (*b*) the training of personnel employed at or in those facilities or premises or by carriers;
>
> (*c*) tariffs, rates, fares, charges and terms and conditions of carriage applicable in respect of the transportation of persons with disabilities or incidental services; and
>
> (*d*) the communication of information to persons with disabilities.

TAB 4

364

** Preliminary Version **

Case Name:

Thibodeau v. Air Canada

Michel Thibodeau and Lynda Thibodeau, Appellants;
v.
Air Canada, Respondent.
And between
Commissioner of Official Languages of Canada, Appellant;
v.
Air Canada, Respondent.

[2014] S.C.J. No. 67

[2014] A.C.S. no 67

2014 SCC 67

74 Admin. L.R. (5th) 1

245 A.C.W.S. (3d) 460

377 D.L.R. (4th) 193

2014 CarswellNat 4124

2014EXP-3252

J.E. 2014-1847

EYB 2014-243626

File No.: 35100.

Supreme Court of Canada

Heard: March 26, 2014;

Judgment: October 28, 2014.

Present: McLachlin C.J. and LeBel, Abella, Rothstein, Cromwell, Karakatsanis and Wagner JJ.

(178 paras.)

Appeal From:

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Human rights and freedoms -- Compliance with official languages requirements -- Context -- Government services -- Official Languages Act -- The first part of the order, requiring Air Canada to comply with the law, should only be made in exceptional circumstances which do not exist here -- With respect to the second aspect of the order, requiring Air Canada to put a monitoring system in place, it was too imprecise, risks ongoing litigation and court supervision in relation to whether it is being complied with, and is inappropriate particularly in light of the Commissioner's statutory powers and expertise in relation to monitoring compliance with the O.L.A. -- Appeals dismissed -- Official Languages Act, s. 77.

Transportation law -- Air transportation -- Liability -- Limitations on liability to air carrier -- Montreal Convention 1999 -- Regulation -- Federal -- Administrative sanctions -- The Convention's uniform and exclusive scheme of damages liability for international air carriers does not permit an award of damages for breach of language rights during international carriage by air -- To hold otherwise would do violence to the text and purpose of the Convention, depart from Canada's international obligations under it and put Canada off-side a strong international consensus concerning its scope and effect -- Appeals dismissed -- Convention for the Unification of Certain Rules for International Carriage by Air, s. 29.

Appeal by Michel and Lynda Thibodeau (appellants) from a judgment of the Federal Court of Appeal which set aside in part a decision from the Federal Court which awarded them damages and granted a structural order against Air Canada. In 2009, on three international flights operated by the airline and in an airport, the appellants did not receive services in the French language. They filed several complaints with the Office of the Commissioner of Official Languages against the airline. There is no dispute that the airline breached its obligations to supply services in French under s. 22 of the Official Languages Act (O.L.A.)on the occasions giving rise to those complaints. The appellants applied to the Federal Court for damages and for orders, referred to as "structural" or "institutional" orders, requiring Air Canada to take steps in order to ensure future compliance with the O.L.A. The airline defended against the claims for damages by relying on the limitation on damages liability set out in the Convention for the Unification of Certain Rules for International Carriage by Air (Convention). The Federal Court of Appeal set that ruling aside in part, holding that the Convention precluded the damages remedy for the events that took place on board Air Canada flights and that a structural order was not appropriate.

HELD: Appeals dismissed. The issue of damages sits at the intersection of Canada's domestic commitment to official languages and its international commitment to an exclusive and uniform

scheme of damages liability for international air carriers. The question thus implicates two important values. When the Convention and O.L.A. are properly interpreted, there is no conflict between the general remedial powers under the O.L.A. and the exclusion of damages under the Convention and there is no need to consider which would prevail if there were. The O.L.A. does not provide that damages should be granted in every case, but authorizes courts to grant "appropriate and just" remedies. The exclusion of a damages remedy in the context of international air travel is thus not a direct contradiction of the remedial power under the O.L.A. The Convention's uniform and exclusive scheme of damages liability for international air carriers does not permit an award of damages for breach of language rights during international carriage by air. To hold otherwise would do violence to the text and purpose of the Convention, depart from Canada's international obligations under it and put Canada off-side a strong international consensus concerning its scope and effect. The general remedial power under the O.L.A. to award appropriate and just remedies cannot - and should not - be read as authorizing Canadian courts to depart from Canada's international obligations under the Convention. The first part of the order simply requires Air Canada to comply with the law. Those types of orders should only be made in exceptional circumstances which do not exist here. With respect to the second aspect of the order, requiring Air Canada to put a monitoring system in place, it was too imprecise, risks ongoing litigation and court supervision in relation to whether it is being complied with, and is inappropriate particularly in light of the Commissioner's statutory powers and expertise in relation to monitoring compliance with the O.L.A.

Statutes, Regulations and Rules Cited:

Air Canada Public Participation Act, R.S.C. 1985, c. 35 (4th Supp.), s. 10

Canadian Charter of Rights and Freedoms, R.S.C. 1985, App. II, No. 44, Schedule B, s. 16, s. 24(1)

Carriage by Air Act, R.S.C. 1985, c. C 26, schedule I, schedule III, schedule IV, schedule V, schedule VI, s. 2

Convention for the Unification of Certain Rules for International Carriage by Air, 2242 U.N.T.S. 350, s. 3(4), s. 17, s. 18, s. 19, s. 21, s. 22, s. 26, s. 29, s. 49

Convention for the Unification of Certain Rules Relating to International Carriage by Air, 137 L.N.T.S. 11, s. 17, s. 18, s. 19, s. 20, s. 22, s. 23, s. 24, s. 25

Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier, 500 U.N.T.S. 31,

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Official Languages Act, R.S.C. 1985, c. 31 (4th Supp.), s. 2, s. 22, arts. 49-75, s. 76, s. 77, s. 78

Protocol to amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, 478 U.N.T.S. 371,

Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at The Hague on 28 September 1955, signed at Guatemala City on 8 March 1971 (not in force),

Vienna Convention on the Law of Treaties, Can. T.S. 1980 No. 37, s. 31

Subsequent History:

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Court Catchwords:

Official languages -- Breach of language rights during international carriage by air -- Airline failing to provide services in French on international flights -- Passengers applying to Federal Court for damages and a structural order under Official Languages Act -- Whether award of damages barred by limitation of damages liability set out in the Convention for the Unification of Certain Rules for International Carriage by Air ("Montreal Convention") -- Whether structural order appropriate -- Official Languages Act, R.S.C. 1985, c. 31 (4th Supp.), s. 77(4) -- Convention for the Unification of Certain Rules for International Carriage by Air, 2242 U.N.T.S. 350, Article 29.

Legislation -- Interpretation -- Conflicting legislation -- Airline breaching passengers' right to services in French under Official Languages Act by failing to provide services in French on international flights -- Passengers applying to Federal Court for damages under Official Languages Act -- Whether award of damages barred by limitation of damages liability set out in Convention for the Unification of Certain Rules for International Carriage by Air ("Montreal Convention") -- Whether Official Languages Act and Montreal Convention conflict or overlap -- Official Languages Act, R.S.C. 1985, c. 31 (4th Supp.), s. 77(4) -- Convention for the Unification of Certain Rules for International Carriage by Air, 2242 U.N.T.S. 350, Article 29.

Court Summary:

In 2009, on three international flights operated by the airline and in an airport, the passengers did not receive services in the French language. They filed several complaints with the Office of the Commissioner of Official Languages against the airline, four of which were upheld. There is no dispute that the airline breached its obligations to supply services in French under s. 22 of the *Official Languages Act* (the "*OLA*") on the occasions giving rise to those four complaints. The passengers applied to the Federal Court under s. 77 of the *OLA* for damages and for structural orders in relation to the airline's breaches of their right to services in French. The airline defended against the claims for damages by relying on the limitation on damages liability set out in the *Convention for the Unification of Certain Rules for International Carriage by Air* (the "*Montreal Convention*"), which restricts the types and the amount of claims for damages that may be made against international air carriers. The Federal Court found that the passengers were entitled to both damages and a structural order, holding that although there was a conflict between the limitation on damages in the *Montreal Convention* and the power under the *OLA* to award damages, the latter prevailed. The Federal Court of Appeal set aside the award of damages for the three complaints about events that took place on board the flights as well as the structural order. It held that the *Montreal Convention* precluded the damages remedy and that a structural order was not appropriate.

Held (Abella and Wagner JJ. dissenting): The appeals should be dismissed.

Per McLachlin C.J. and LeBel, Rothstein, **Cromwell** and Karakatsanis JJ.: The *Montreal Convention*'s uniform and exclusive scheme of damages liability for international air carriers does not permit an award of damages for breach of language rights during international carriage by air. To hold

otherwise would do violence to the text and purpose of the *Montreal Convention*, depart from Canada's international obligations under it and put Canada off-side a strong international consensus concerning its scope and effect. The general remedial power under the *OLA* to award appropriate and just remedies cannot -- and should not -- be read as authorizing Canadian courts to depart from Canada's international obligations under the *Montreal Convention*.

The claims before this Court fall squarely within the exclusion established by the *Montreal Convention*. The key provision at the core of the *Montreal Convention*'s exclusive set of rules for liability is Article 29. This provision makes clear that the *Montreal Convention* provides the exclusive recourse against airlines for various types of claims arising in the course of international carriage by air. Article 29 establishes that in relation to claims falling within the scope of the *Montreal Convention*, "any action for damages, however founded" may only be brought "subject to the conditions and such limits of liability as are set out in this Convention". Articles 17 to 19 of the *Montreal Convention* establish that the carrier is liable for damage sustained: in case of an accident causing the death or bodily injury of a passenger on board the aircraft or in the course of embarking or disembarking (Article 17); in case of destruction or loss of, or of damage to, baggage while in the charge of the carrier (Article 17); in the event of the destruction or loss of, or damage to, cargo during carriage (Article 18); and for damage occasioned by delay (Article 19).

Two of the main purposes of the *Montreal Convention* are to achieve a uniform set of rules governing damages liability of international air carriers and to provide limitation of carrier liability. These purposes can only be achieved by the *Montreal Convention* if it provides the exclusive set of rules in relation to the matters that it covers. The *Montreal Convention* does not deal with all aspects of international carriage by air, but within the scope of the matters which it does address, it is exclusive in that it bars resort to other bases for liability in those areas. The *Montreal Convention*'s text and purpose as well as a strong current of jurisprudence make it clear that the exclusivity of the liability scheme established under the *Montreal Convention* extends at least to excluding actions arising from injuries suffered by passengers during flight or embarkation and debarkation when those actions do not otherwise fall within the scheme of permitted claims.

The passengers' argument that the *Montreal Convention* does not limit claims for damages sought in relation to public law claims or breaches of quasi-constitutional statutes has no support in the text or purpose of the *Montreal Convention* or in the international jurisprudence. The limitation in Article 29 of the *Montreal Convention* applies to "any action" in the carriage of passengers, baggage or cargo, "for damages, however founded, whether under this Convention or in contract or in tort or otherwise". There is no hint in this language that there is any intention to exempt any "action for damages" in the carriage of passengers, baggage or cargo depending on its legal foundation, such as when a plaintiff brings forward a statutory monetary claim of a public law nature based on the breach of quasi-constitutional rights. The passengers' claims are an "action for damages" within the meaning of Article 29, as they claim damages for injuries, namely moral prejudice, pain and suffering and loss of enjoyment of their vacation, suffered in the course of an international flight. Permitting an action in damages to compensate for moral prejudice, pain and suffering and loss of enjoyment of a passenger's vacation that does not otherwise fulfill the conditions of Article 17 of the *Montreal Convention* (because the action does not relate to death or bodily injury) would fly in the face of Article 29. It would also undermine one of the main purposes of the *Montreal Convention*, which is to bring uniformity across jurisdictions to the types and upper limits of claims for damages that may be made against international carriers for damages sustained in the course of carriage of

passengers, baggage and cargo. The application of the *Montreal Convention* focuses on the factual circumstances surrounding the monetary claim, not the legal foundation of it.

The passengers' argument that the substantive scope of the *Montreal Convention* does not extend to barring claims for "standardized damages" and that their claims are of that nature must also be rejected. Even if this Court were to adopt the distinction between "individual damages" and "standardized damages" relied on in jurisprudence from the European Court of Justice, the damages sought by the passengers in this case were for damages on an individual basis, as they were geared to and depended upon the impact on the passengers of the particular breaches.

The passengers' submission that, even if their claims fall within the substantive scope of the *Montreal Convention*, they fall outside its temporal scope for cases involving personal injuries since the assignments of non-bilingual flight attendants on the relevant flights were decisions made long before the embarkation process is not well founded. The passengers were clearly within the temporal limits of the *Montreal Convention* when they suffered the breach of their language rights. Courts must focus their application of the exclusivity principle on the location or activity of the passenger when the accident or occurrence directly causing the particular injury giving rise to the claim occurred, not on some antecedent fault.

When the *OLA* and the *Montreal Convention* are properly interpreted, there is no conflict between the general remedial powers under the *OLA* and the exclusion of damages under the *Montreal Convention* and, therefore, there is no need to consider which would prevail if there were. Courts presume that legislation passed by Parliament does not contain contradictions or inconsistencies and only find that they exist when provisions are so inconsistent that they are incapable of standing together. Even when provisions overlap in the sense that they address aspects of the same subject, they are interpreted so as to avoid conflict wherever this is possible. The provisions in issue here overlap but do not conflict. They have markedly different purposes and touch on distinct subject matters. The remedial provisions of the *OLA* are part of a larger scheme of obligations and mechanisms the object of which is to preserve and strengthen the vitality of Canada's official languages in our federal institutions. The *Montreal Convention*, in contrast, is part of an internationally agreed upon uniform and exclusive scheme addressing the damages claims in the field of international carriage by air. The remedial provisions in the *OLA* cannot be understood to be an exhaustive code that requires damages to be available in all settings and without regard to all other relevant laws. The *OLA* does not provide that damages should be granted in every case, but authorizes courts to grant "appropriate and just" remedies. The power to grant an "appropriate and just" remedy may easily be reconciled with the specific and limited exclusion of damages in the context of international air travel. A remedy is not "appropriate and just" if awarding it would constitute a breach of Canada's international obligations under the *Montreal Convention.* Accordingly, in fashioning an appropriate and just remedy under the *OLA* in a case of international carriage by air, the Federal Court must apply the limitation on damages set out in Article 29 of the *Montreal Convention.*

The passengers' submission that the quasi-constitutional status of the *OLA* prevents a harmonious interpretation of s. 77(4) of the *OLA* and of Article 29 of the *Montreal Convention* must be rejected. Section 77(4) of the *OLA*, which confers a wide remedial authority, is certainly part of a quasi-constitutional statutory scheme designed to both reflect and actualize the equality of status of English and French as the official languages of Canada and the equal rights and privileges as to their use in the institutions of Parliament and government of Canada as declared in s. 16(1) of the *Canadian Charter of Rights and Freedoms*, and it should be interpreted generously to achieve its

purpose. These factors, however, do not alter the correct approach to statutory interpretation which requires that the words of a statute be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme and object of the statute and the intention of Parliament. The *OLA*, read in its full context, demonstrates that Parliament did not intend to prevent s. 77(4) from being read harmoniously with Canada's international obligations given effect by another federal statute. The proposition that Parliament, through s. 77(4), intended that courts should be able to grant damages even though doing so would be in violation of Canada's international undertakings as incorporated into federal statute law runs afoul of the principle of interpretation that Parliament is presumed not to intend to legislate in breach of Canada's international law obligations. Section 77(4) should be understood as having been enacted into an existing legal framework which includes statutory limits, procedural requirements and a background of general legal principles -- including Canada's international undertakings incorporated into Canadian statute law -- which guide the court in deciding what remedy is "appropriate and just".

The Federal Court of Appeal was correct to set aside the structural order. Structural orders are treated with special care because of two potential and related problems: first, insufficient clarity, which in turn may result in the second, namely the need for ongoing judicial supervision. Orders must be sufficiently clear so that they give the parties bound by them fair guidance on what must be done to comply and to prevent a potentially endless round of further applications to determine whether the parties have complied. Ongoing judicial supervision will be appropriate in some cases, but absent compelling circumstances, the courts generally should not make orders that have the almost inevitable effect of creating ongoing litigation about whether the order is being complied with. In this case, the order is too imprecise, risks ongoing litigation and court supervision in relation to whether it is being complied with, and is inappropriate particularly in light of the Commissioner's statutory powers and expertise in relation to monitoring compliance with the *OLA*.

Per **Abella** and Wagner JJ. (dissenting): The *Montreal Convention* does not bar a damage award for breach of language rights during international carriage by air.

The T's seek damages for violations of a statute that reifies constitutionally protected rights. The *Montreal Convention* should be interpreted in a way that is respectful of the protections given to fundamental rights, including language rights, in domestic legislation. There is no evidence in the Parliamentary record or the legislative history of the *Convention* to suggest that Canada, as a state party, intended to extinguish domestic language rights protection by ratifying or implementing the *Montreal Convention*. Given the significance of the rights protected by the *Official Languages Act* and their constitutional and historic antecedents, the *Montreal Convention* ought to be interpreted in a way that respects Canada's express commitment to these fundamental rights, rather than as reflecting an intention to subvert them. This Court has often said that domestic law should be generously interpreted in alignment with international law and its human rights values. It has never said that international law should be interpreted in a way that diminishes human rights protected by domestic law.

The process of treaty interpretation is a process of discernment. The literal meaning of the words is rarely reliably able to yield a clear and unequivocal answer. The intention of state parties must therefore be discerned by using a good faith approach not only to the words at issue, but also to the context, history, object and purpose of the treaty as a whole. In this case, this exercise leads to the conclusion that Article 29 of the *Montreal Convention* does not exclusively govern the universe of damages for which carriers are liable during international carriage by air. The first words of Article

29 are words that restrict its scope by declaring that any action for damages "in the carriage of passengers, baggage and cargo" must be brought subject to the conditions set out in the *Montreal Convention.* The phrase that immediately follows -- "however founded, whether under this *Convention* or in contract or in tort or otherwise" -- is a clause dependant for its meaning on the preceding opening words; thus, "action" refers only to an action for damages "in the carriage of passengers, baggage and cargo". It is, therefore, only an action for damages incurred "in the carriage of passengers, baggage and cargo" that must be brought "subject to the conditions and such limits of liability as are set out" in the *Montreal Convention.*

Other provisions of the *Montreal Convention*, and, in particular, of Chapter III in which Article 29 is found, provide interpretive assistance to assess the meaning of an action for damages "in the carriage of passengers, baggage and cargo". Chapter III sets out the limited liability of carriers in the carriage of passengers, baggage and cargo. Articles 17, 18 and 19 refer to death or bodily injury of a passenger, destruction or loss of, or damage to, baggage, destruction or loss of, or damage to, cargo, and delay in the carriage of persons, baggage or cargo. Together with Article 29, these provisions confirm that the *Montreal Convention* exclusively governs only actions for damages in respect of these subjects.

The predecessor *Warsaw Convention* came into being in 1929 to assist the fledgling airline industry take flight. At that time, aviation technology was in its initial stages. Accidents were common, and many pilots and passengers were injured or died as a result. The relative frequency of accidents exposed carriers to unpredictable and significant losses. This made it difficult to secure investment capital or insurance protection. Airlines responded by requiring passengers to sign waivers relieving carriers of any and all liability in the event of an injury. When accidents happened, those passengers were left with no remedy for their injuries or losses. As safety in the industry improved, governments turned their attention from protecting the financial viability of airlines to introducing a more passenger-friendly legal regime. The focus tilted towards increasing the exceptionally low limits on carrier liability established in the *Warsaw Convention* and states subsequently signed on to different international efforts to expand carrier liability.

Notwithstanding the increasing recognition that compensation for passengers was too low, a single international instrument increasing ceilings on carrier liability proved elusive. Out of concern that this fractured response could lead to the demise of a unified system of international air law, the industry took action. The *Montreal Agreement* of 1966, a private arrangement between airlines, increased carrier liability under the *Warsaw Convention* for personal injury.

Having been "upstaged" by industry initiatives to address the low ceilings on carrier liability, States began to work towards updating the *Warsaw Convention.* The *Montreal Convention* came into being in 1999, adopting a two-tier liability scheme for passenger injury or death. The *Montreal Convention* sought to replace the patchwork system that had attempted to expand the limits on liability set by the *Warsaw Convention* in 1929. The drafters of the *Montreal Convention* continued to maintain a uniform liability scheme, as had the *Warsaw Convention*, but while the primary goal of the *Warsaw Convention* had been to limit the liability of carriers in order to foster the growth of the nascent commercial aviation industry, the state parties to the *Montreal Convention* were more focused on the importance of ensuring protection of the interests of consumers in international carriage by air and the need for equitable compensation based on the principle of restitution.

Interpreting Article 29 of the *Montreal Convention* in a way that narrows protection for consumers and expands it for carriers, is therefore both counter-intuitive and historically anomalous. At no

time was there ever any suggestion that the new *Convention* was designed to *reduce* the ability of passengers to sue carriers.

The absence of any reference in the Parliamentary record to the changes in language between the *Warsaw Convention* and the *Montreal Convention* is also revealing. Dramatic changes in law tend to attract dramatic reactions. This purported change attracted none. The most logical explanation for the silence, therefore, is that there was no change in law. In fact, it is hard to imagine such a drastic domestic intrusion without either express language or Parliamentary disclosure. The silence about such consequences suggests that no such consequence was either contemplated or intended.

The meaning of Article 29, considered in context and in light of the object and purpose of the *Montreal Convention*, therefore, points to a limited scope of exclusivity, and should be interpreted as directing that the *Montreal Convention* governs only those actions brought for damages incurred "[i]n the carriage of passengers, baggage and cargo", namely, actions covered by Articles 17, 18 and 19.

The T's action for damages does not fall within the actions covered by Articles 17, 18 and 19 of the *Montreal Convention*. The language of Article 17(1) makes it clear that the provision does not apply to all events that take place on board an aircraft or in the course of the operations of embarking or disembarking. Rather, Article 17(1) imposes the requirements that: (1) there must have been an accident; (2) which caused; (3) death or bodily injury; (4) while the passenger was on board the aircraft or was in the course of embarking or disembarking. In this case, there is no complaint of an accident. That is dispositive since Article 17(1) talks of "death or bodily injury" caused by an accident. The T's have not suffered any bodily injury. The fact that the breaches of their language rights occurred on board the aircraft is irrelevant since those circumstances are only pertinent if there was an accident.

The appeals should be allowed with respect to the claims for damages and the damages awarded by the application judge should be restored.

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McAuley v. Aer Lingus Ltd., [2011] IEHC 89 (online: http://www.courts.ie/Judgments.nsf/0/5DDF253DE6C0E09F8025787E0 053C421); *O'Mara v. Air Canada*, 2013 ONSC 2931, 115 O.R. (3d) 673; *Walton v. MyTravel Canada Holdings Inc.*, 2006 SKQB 231, 280 Sask. R. 1; *King v. American Airlines, Inc.*, 284 F.3d 352 (2002); *Gibbs v. American Airlines, Inc.*, 191 F.Supp.2d 144 (2002); *Turturro v. Continental Airlines*, 128 F.Supp.2d 170 (2001); *Brandt v. American Airlines*, 2000 WL 288393; *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28; *International Air Transport Association v. Department for Transport*, C-344/04, [2006] E.C.R. I-403; *Wallentin-Hermann v. Alitalia*, C-549/07, [2008] E.C.R. I-11061; *Sturgeon v. Condor Flugdienst GmbH*, C-402/07 and C-432/07, [2009] E.C.R. I-10923; *Nelson v. Deutsche Lufthansa AG*, C-581/10 and C-629/10, [2013] 1 C.M.L.R. 42 (p. 1191); *R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56, [2001] 2 S.C.R. 867; *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3; *Daniels v. White*, [1968] S.C.R. 517; *Toronto Railway Co. v. Paget* (1909), 42 S.C.R. 488; *Canadian Westinghouse Co. v. Grant*, [1927] S.C.R. 625; *International Brotherhood of Electrical Workers v. Town of Summerside*, [1960] S.C.R. 591; *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68, [2012] 3 S.C.R. 489; *Lévis (City) v. Fraternité des policiers de Lévis Inc.*, 2007 SCC 14, [2007] 1 S.C.R. 591; *Massicotte v. Boutin*, [1969] S.C.R. 818; *The King v. Williams*, [1944] S.C.R. 226; *Myran v. The Queen*, [1976] 2 S.C.R. 137; *Perron-Malenfant v. Malenfant (Trustee of)*, [1999] 3 S.C.R. 375; *R. v. Beaulac*, [1999] 1 S.C.R. 768; *Zingre v. The Queen*, [1981] 2 S.C.R. 392; *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3; *Pro Swing Inc. v. Elta Golf Inc.*, 2006 SCC 52, [2006] 2 S.C.R. 612.

By Abella J. (dissenting)

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History and Disposition:

APPEALS from a judgment of the Federal Court of Appeal (Pelletier, Gauthier and Trudel JJ.A.), 2012 FCA 246, [2013] 2 F.C.R. 155, 435 N.R. 131, 355 D.L.R. (4th) 62, [2012] F.C.J. No. 1201 (QL), 2012 CarswellNat 3578, setting aside in part a decision of Bédard J., 2011 FC 876, [2013] 2 F.C.R. 83, 394 F.T.R. 160, 239 C.R.R. (2d) 301, [2011] F.C.J. No. 1030 (QL), 2011 CarswellNat 6095. Appeals dismissed, Abella and Wagner JJ. dissenting.

Counsel:

Érik Labelle Eastaugh, *Ronald F. Caza* and *Alyssa Tomkins*, for the appellants Michel and Lynda Thibodeau.

Pascale Giguère, *Kevin Shaar* and *Mathew Croitoru*, for the appellant the Commissioner of Official Languages of Canada.

Louise-Hélène Sénécal, *Pierre Bienvenu* and *Andres Garin*, for the respondent.

The judgment of McLachlin C.J. and LeBel, Rothstein, Cromwell and Karakatsanis JJ. was delivered by

CROMWELL J.:--

Introduction

1 Air Canada failed to provide services in French on some international flights as it was obliged to do under the *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.) (the "*OLA*"). Two passengers, the appellants Michel and Lynda Thibodeau, applied to the Federal Court for damages and for orders, referred to as "structural" or "institutional" orders, requiring Air Canada to take steps in order to ensure future compliance with the *OLA*. The airline defended against the claims for damages by relying on the limitation on damages liability set out in the *Convention for the Unification of Certain Rules for International Carriage by Air*, 2242 U.N.T.S. 350 (the "*Montreal Convention*"), which is part of Canadian federal law by virtue of the *Carriage by Air Act*, R.S.C. 1985, c. C-26, a federal statute.

2 The Federal Court rejected Air Canada's defence, awarded damages and granted a structural order (2011 FC 876, [2013] 2 F.C.R. 83). However, the Federal Court of Appeal set that ruling aside in part, holding that the *Montreal Convention* precluded the damages remedy for the events that took place on board Air Canada flights and that a structural order was not appropriate (2012 FCA 246, [2013] 2 F.C.R. 155). The main issue on the further appeal to this Court is whether the Federal Court of Appeal erred in these conclusions.

3 The issue of damages sits at the intersection of Canada's domestic commitment to official languages and its international commitment to an exclusive and uniform scheme of damages liability for international air carriers. The question thus implicates two important values.

4 On one hand, we have Canada's duty to comply with its international undertaking, by its ratification of the *Montreal Convention* and its adoption of the *Montreal Convention* into domestic law, to establish and give effect to limitations on liability for international air carriers. Air Canada maintains that upholding a damages remedy against the airline would be inconsistent with this important international undertaking. On the other hand, we have Canada's foundational commitment to the equality of the French and English languages, a commitment reflected, among other places, in s. 16 of the *Canadian Charter of Rights and Freedoms* and in the *OLA*. These language rights are "basic to the continued viability of [this] nation": *R. v. Mercure*, [1988] 1 S.C.R. 234, at p. 269, *per* La Forest J. The appellants say that a damages remedy must be available for breach of language rights in order to fulfill the purposes of the *OLA*.

5 This appeal requires us to resolve this tension by interpreting the *OLA* and the *Montreal Convention* in accordance with their text and purpose. As I see it, when they are properly interpreted, there is no conflict between the general remedial powers under the *OLA* and the exclusion of damages under the *Montreal Convention* and there is no need to consider which would prevail if there were.

6 The *Montreal Convention*'s uniform and exclusive scheme of damages liability for international air carriers does not permit an award of damages for breach of language rights during international carriage by air. To hold otherwise would do violence to the text and purpose of the *Montreal Convention*, depart from Canada's international obligations under it and put Canada off-side a strong international consensus concerning its scope and effect. The general remedial power under the *OLA* to award appropriate and just remedies cannot -- and should not -- be read as authorizing Canadian courts to depart from Canada's international obligations under the *Montreal Convention.*

7 I also conclude that the Federal Court of Appeal was correct to set aside the structural order as it was impermissibly vague and unclear.

8 I would therefore dismiss the appeals.

Facts and Proceedings

The Official Languages Act

9 The *OLA* is a federal statute whose purposes include ensuring respect for English and French as the official languages of Canada and the equality of status and equal rights and privileges as to their use in all federal institutions: s. 2(*a*). The *OLA* also seeks to support the development of English and French linguistic minority communities and, as well, sets out the powers, duties and functions of federal institutions with respect to official languages: s. 2(*b*) and (*c*).

10 Parts I to VI of the *OLA* set out various language rights in a number of settings: the proceedings of Parliament, legislative and other instruments, the administration of justice, communications with the public and the workplace. Parts VII and VIII of the *OLA* set out duties and responsibilities with respect to enhancing the vitality of English and French linguistic minorities and fostering the full recognition and use of both English and French in Canadian society. Part IX establishes the Office of the Commissioner of Official Languages and sets out the Commissioner's duties and powers. These include the duty to undertake investigations, to make recommendations and to report.

11 Part X provides for court remedies and includes provision for a person who has made a complaint to the Commissioner in relation to certain parts of the *OLA* to apply to the Federal Court for a remedy: s. 77(1). The court is empowered, if it finds that a federal institution has failed to comply with the *OLA*, to award "such remedy as it considers appropriate and just in the circumstances": s. 77(4).

12 As the Court has observed on a number of occasions, the *OLA* has a special status: "... it belongs to that privileged category of quasi-constitutional legislation which reflects 'certain basic goals of our society' and must be so interpreted 'as to advance the broad policy considerations underlying it'" (*Lavigne v. Canada (Office of the Commissioner of Official Languages)*, 2002 SCC 53, [2002] 2 S.C.R. 773, at para. 23, quoting *Canada (Attorney General) v. Viola*, [1991] 1 F.C. 373 (C.A.), at p. 386).

13 Air Canada and its affiliate Jazz are subject to the *OLA*: see *Air Canada Public Participation Act*, R.S.C. 1985, c. 35 (4th Supp.), s. 10. (For convenience, I will refer to either or both of them as "Air Canada" in these reasons.) The *OLA* requires Air Canada to supply services in French or English where there is "significant demand" for them: see s. 22(*b*).

The Montreal Convention

14 The *Montreal Convention*, which is part of Canadian federal law by virtue of the *Carriage by Air Act*, restricts the types and the amount of claims for damages that may be made against international air carriers. It permits claims for death or bodily injury, destruction, damage or loss of baggage and cargo and for delay: Articles 17 to 19. It bars all other actions for damages, however founded, in the carriage of passengers, baggage and cargo: Article 29. The Thibodeaus' claims for damages under the *OLA* are clearly not within the types of permitted claims for death or bodily injury, destruction, damage or loss of baggage and cargo or for delay. The Thibodeaus submit, however, that their claims are not barred by the *Montreal Convention*.

The Complaints

15 On three international flights on Air Canada and in an airport, over the course of roughly four months in 2009, Mr. and Ms. Thibodeau did not receive services in the French language. On some flights, there was no flight attendant able to provide services in French and in some cases passenger announcements on board and in the terminal were made only in English.

16 On January 23, 2009, while on board a flight from Toronto to Atlanta, Georgia, Mr. and Ms. Thibodeau did not receive services in French because there was no bilingual flight attendant on the aircraft. A few days later, coming back from Atlanta, there was no French announcement made by the pilot or translation of it. On May 12, 2009, the Thibodeaus again did not receive services in French, this time on a flight from Charlotte, North Carolina, to Toronto. Upon arrival in Toronto, an announcement concerning baggage collection was made only in English.

17 There is no longer any dispute that Air Canada breached its obligations under s. 22 of the *OLA* on these occasions.

18 Mr. and Ms. Thibodeau filed eight complaints with the Office of the Commissioner of Official Languages: four complaints related to the breaches described above and four related to other incidents during those two trips. These latter complaints were however rejected by the Commissioner (and later by the application judge) and only the four complaints that were upheld by the Commissioner were subsequently upheld by the application judge: application judge's reasons, at para. 30.

19 In response to the Commissioner's investigation of the Thibodeaus' complaints, Air Canada put in place remedial measures to improve its capacity to offer bilingual services. These measures led the Commissioner to close its files pertaining to the four complaints that he had found to be established.

20 The Commissioner also undertook an audit of the bilingual services offered by Air Canada to its passengers and released its report in September 2011, after the Federal Court rendered its decision in the present case (*Audit of Service Delivery in English and French to Air Canada Passengers: Final Report* (2011)). The Commissioner made 12 recommendations to Air Canada in this audit, recommendations to which the latter responded by suggesting measures and deadlines to implement said measures. The Commissioner declared himself satisfied with Air Canada's proposed solutions for 11 of the recommendations, and partly satisfied with the answer provided for the remaining recommendation, which I should say is not relevant for the outcome of this appeal. (I note that the reliance of the Federal Court of Appeal on this subsequently acquired report was objected to by the Commissioner. I refer to this audit here simply to complete the factual background of this case and not in relation to the specific issues I will later decide in these reasons.)

Proceedings in the Federal Courts

21 As outlined earlier, under s. 77 of the *OLA*, a person who has complained to the Commissioner under various provisions, including in relation to failure to provide services to the public in both official languages, may apply to the Federal Court of Canada for a remedy. If the court concludes that a federal institution has failed to comply with the *OLA*, the court may grant such remedy as it considers appropriate and just in the circumstances.

22 The Thibodeaus applied to the Federal Court for remedies in relation to Air Canada's breaches of their right to services in French. They requested that the court make "institutional orders against Air Canada and ... order it to pay punitive and exemplary damages", as well as damages for the violation of their language rights: application judge's reasons, at para. 43.

23 Air Canada's position was that damages for breach of the *OLA* are not permitted under the *Montreal Convention* and that the Thibodeaus' claims for damages were therefore precluded because they arose out of injury suffered in the course of international flights governed by the *Montreal Convention.*

Federal Court, Bédard J.

24 The Federal Court found that the Thibodeaus were entitled to both damages and a structural order. The judge concluded that there was a conflict between the limitation on damages in the *Montreal Convention* and the power under the *OLA* to award damages. As she put it, "... in interpreting the Montréal Convention as allowing compensation on the basis of a cause of action which is not contemplated by the Convention, I would depart from the Canadian and international case law": para. 77. She concluded, however, that the power to award damages under the *OLA* prevailed over the *Montreal Convention* in the face of this conflict: paras. 81-83. She therefore ordered Air Canada to pay $6,000 in damages to each of the Thibodeaus ($1,500 per incident) in order to compensate them for the harm they suffered (moral prejudice, pain and suffering and loss of enjoyment of their vacation), to recognize the importance of the rights at issue and to deter future breaches: paras. 88-90.

25 Bédard J. then analyzed the evidence supporting the Thibodeaus' claim for a structural order and concluded that there was a "systemic problem at Air Canada", in the sense that violations of its linguistic obligations were not "isolated problems that [were] out of [its] control": para. 153. She therefore ordered the airline to put in place within the next six months a monitoring process that would "quickly identify, document and quantify potential violations of its language duties": application judge's reasons, at p. 153.

Federal Court of Appeal, Trudel J.A., Pelletier and Gauthier JJ.A., Concurring

26 Air Canada appealed these conclusions and, on September 25, 2012, the Federal Court of Appeal allowed the appeal and set aside the award of damages for the three complaints about events that took place on board Air Canada flights (the claim for damages related to the announcement concerning baggage collection at the Toronto Airport was not appealed: Air Canada factum, para. 29) and the structural order. The court agreed with the judge at first instance that the *Montreal Convention* would bar the Thibodeaus' claims for damages unless the broad remedial power under the *OLA* prevails over that bar: paras. 20-22. The court, however, found that there was no conflict between the two regimes: in deciding whether a remedy is "appropriate and just" under the *OLA*, the

court must take into account the fact that damages are not permitted in the circumstances to which the *Montreal Convention* applies: para. 43.

27 With respect to the structural order, the Federal Court of Appeal concluded it was not appropriate in the circumstances of this case because the evidence was insufficient and because the order was too vague to be properly enforced: paras. 74-76.

28 This Court granted Mr. and Ms. Thibodeau leave to appeal and, by the same judgment, gave appellant status to the Commissioner of Official Languages of Canada. I will refer to them collectively as the appellants.

Analysis

Does the Montreal Convention Purport to Exclude Monetary Damages Under the Official Languages Act?

The Appellants' Submissions

29 The appellants make three principal submissions in support of their position that the *Montreal Convention* does not purport to exclude a damages remedy under the *OLA*:

1. The *Montreal Convention* applies only to private law claims, not statutory claims in relation to fundamental rights such as language rights.
2. The *Montreal Convention* only limits "individual" damage awards, not remedies for "standardized" damages.
3. The appellants' claims do not fall within the temporal scope of the *Montreal Convention*'s limitation of claims.

30 Both the Federal Court and the Federal Court of Appeal were of the view that the *Montreal Convention* purports to exclude a claim for damages under the *OLA* and I agree with them. In my view, the appellants' submissions to the contrary are based on a misconception of the purpose and structure of the *Montreal Convention* and a misreading of its text. Before turning in more detail to each of the appellants' main submissions, I will set out briefly some important interpretative considerations in relation to the *Montreal Convention*.

Interpreting the *MontrealConvention*

Overview

31 The *Montreal Convention* was adopted in 1999 in Montreal and applies to all international carriage by aircraft of persons, baggage or cargo. It was the successor to the *Convention for the Unification of Certain Rules Relating to International Carriage by Air*, 137 L.N.T.S 11 (the "*Warsaw Convention*") and its purpose was "to modernize and consolidate the Warsaw Convention and related instruments": preamble of the *Montreal Convention*. To understand the purposes of the *Montreal Convention*, we therefore must go back to its predecessor, the *Warsaw Convention*, signed at Warsaw on October 12, 1929, as set out at Sch. I of the *Carriage by Air Act* (as amended at The Hague in 1955, as set out at Sch. III). The purposes of the *Warsaw Convention* and of the *Montreal Convention* were the same and decisions and commentary respecting the *Warsaw Convention* are therefore helpful in understanding those purposes: *Stott v. Thomas Cook Tour Operators Ltd.*, [2014] UKSC 15, [2014] 2 W.L.R. 521, at paras. 24-25; P. S. Dempsey, *Aviation Liability Law* (2nd

ed. 2013), at p. 304; P. S. Dempsey and M. Milde, *International Air Carrier Liability: The Montreal Convention of 1999* (2005), at p. 7.

32 There were a number of attempts to revise the *Warsaw Convention*, leading ultimately to the *Montreal Convention* with which we are directly concerned here: see, e.g., *Montreal Protocol No. 4 to amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw on 12 October 1929 as amended by the Protocol done at The Hague on 28 September 1955*, 2145 U.N.T.S. 36, as set out at Sch. IV of the *Carriage by Air Act*. For a comprehensive overview of these modifications which led to the *Montreal Convention*, see J. D. McClean et al., eds., *Shawcross and Beaumont: Air Law* (loose-leaf), at pp. VII-103 to VII-165. The *Montreal Convention* resulted from the work of delegates of approximately 120 states meeting in Montréal in 1999: L. Weber and A. Jakob, "The Modernization of the Warsaw System: The Montreal Convention of 1999" (1999), 24 *Ann. Air & Sp. L.* 333, at pp. 334-35; Dempsey, at p. 336; Dempsey and Milde, at pp. 36-41.

33 The *Montreal Convention* was ratified by Canada in 2002 and it came into force in 2003. It is part of Canadian federal law by virtue of s. 2 of the *Carriage by Air Act*, and its text is set out at Sch. VI of that statute. The same basic structure and language used in the various versions of the *Warsaw Convention* can be found in the *Montreal Convention* and the same *quid pro quo* between limiting air carrier's liability and facilitating consumers' claims was maintained: Dempsey, at pp. 310 and 338-40, *Shawcross and Beaumont*, at p. VII-251.

34 The question raised in this appeal is whether Article 29 of the *Montreal Convention*, which limits the actions in damages that can be brought for injuries in the course of international air carriage, excludes the Thibodeaus' claims for damages. I turn therefore to the interpretation of this article.

35 I begin this exercise with a fundamental principle of interpretation, set out in Article 31 of the *Vienna Convention on the Law of Treaties*, Can. T.S. 1980 No. 37: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." I will therefore first turn to the text of Article 29 of the *Montreal Convention* and then analyze its place within the *Montreal Convention* in light of the latter's purpose and object: *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, at para. 56.

Text

36 The key provision at the core of the *Montreal Convention*'s purpose of establishing a uniform and exclusive set of rules for liability is Article 29, which is the successor of Article 24 of the *Warsaw Convention*. Article 29 reads:

ARTICLE 29 -- BASIS OF CLAIMS

> In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights.

> In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.

37 The *Montreal Convention* makes clear that it provides the exclusive recourse against airlines for various types of claims arising in the course of international carriage by air. It provides that *all* "actions for damages" in the carriage of passengers, baggage and cargo are subject to the conditions and limitations of liability set out in its provisions. The provision could hardly be expressed more broadly; it applies to "any action for damages, however founded". This breadth is equally reflected in the French text: "...*toute action en dommages-intérêts, à quelque titre que ce soit* ... ."

38 This exclusivity principle is expressed even more clearly in the *Montreal Convention* than it was in the *Warsaw Convention*. Article 24 of the *Warsaw Convention* introduces its exclusion of other claims by referring to "the cases covered by" Articles 17 to 19. Article 29 of the *Montreal Convention*, in contrast, introduces its exclusion of other claims by using the terms "[i]n the carriage of passengers, baggage and cargo". By using this broader language, it articulates even more clearly the state signatories' intention to exclude any actions not specifically addressed in Articles 17 to 19. The comments made by the chairman of the International Conference on Air Law, held in Montréal in May 1999, on this point are enlightening:

> The provisions contained in Article [29] (*Basis of Claims*) made it clear that an action which was brought for damages, however founded, whether under the new Convention or in contract or tort or otherwise, could only be brought subject to the conditions and such limits of liability as were set out in the Convention. There was indeed jurisprudence which suggested that it was exclusive. It was not possible to get around the provisions of the Convention regarding the burden of proof, etc., by bringing an action in tort or by attempting to bring an action outside the Convention... . [Emphasis added.]
>
> (International Civil Aviation Organization, *International Conference on Air Law*, vol. I, *Minutes*, Doc. 9775-DC/2 (2001), at p. 137)

39 The *Montreal Convention* sets out in Chapter III the types of liability of carriers *that are permitted* and the applicable limits on compensation. It also clarifies the set of events that Article 29 purports to cover. Articles 17 to 19 establish that the carrier is liable for damage sustained: in case of an accident causing the death or bodily injury of a passenger on board the aircraft or in the course of embarking or disembarking (Article 17); in case of destruction or loss of, or of damage to, baggage while in the charge of the carrier (Article 17); in the event of the destruction or loss of, or damage to, cargo during carriage (Article 18); and for damage occasioned by delay (Article 19). The full text of the relevant provisions of the *Montreal Convention* is set out in the Appendix.

40 The monetary limits of the carrier's liability (which are not directly relevant to this appeal) are set out in Articles 21 and 22. These limits of liability are linked specifically and exclusively to the claims addressed in Articles 17 to 19 and, by virtue of Article 26, any contractual provision tending to relieve a carrier of liability or fix a lower limit of liability than that established in the *Montreal Convention* is null and void. Chapter VI of the *Montreal Convention* underlines its exclusive force by providing that any provision in a contract of carriage or special contract that purports to infringe the rules laid down by the *Montreal Convention* is null and void: Article 49. As discussed earlier, Article 29 establishes that in relation to claims falling within the scope of the *Mon-*

treal Convention, "any action for damages, however founded" may only be brought "subject to the conditions and such limits of liability as are set out in this Convention".

Purpose and Object of the Montreal Convention

41 The *Warsaw Convention* (and therefore its successor the *Montreal Convention*) had three main purposes: to create uniform rules governing claims arising from international air transportation; to protect the international air carriage industry by limiting carrier liability; and to balance that protective goal with the interests of passengers and others seeking recovery. These purposes responded to concerns that many legal regimes might apply to international carriage by air with the result that there could be no uniformity or predictability with respect to either carrier liability or the rights of passengers and others using the service. Both passengers and carriers were potentially harmed by this lack of uniformity. There were also concerns that the fledging international airline business needed protection against potentially ruinous multi-state litigation and virtually unlimited liability.

42 As succinctly summed up by one text, the *Warsaw Convention* aimed "to eliminate many of the conflicts problems which might arise in international air travel, to create a system of internationally recognized documentation, to prescribe a limitation period for claims, to resolve questions of jurisdiction and, perhaps most importantly, to impose very strict limits on carriers' liability": Fountain Court Chambers, *Carriage by Air* (2001), at p. 3. From the point of view of passengers and shippers, this limitation was balanced against a reversal of the burden of proof in their favour such that, on proof of damage, fault on the part of the carrier would be presumed: *ibid.* See also Dempsey, at pp. 309-10; *Shawcross and Beaumont*, at pp. VII-105 to VII-105A; A. Field, "International Air Carriage, The Montreal Convention and the Injuries for Which There is No Compensation" (2006), 12 *Canta. L.R.* 237, at p. 239; L. Chassot, *Les sources de la responsabilité du transporteur aérien international: entre conflit et complémentarité* (2012), at pp. 45-46.

43 It will be helpful to explain in a bit more detail how the *Warsaw Convention* addressed each of its three main purposes.

44 To further the goal of uniformity, the *Warsaw Convention* provided for three areas of air carrier liability: personal injuries in Article 17; loss, destruction and damage to baggage or cargo in Article 18; and damage occasioned by delay in Article 19. It also set out the conditions exempting air carriers from liability (Article 20), the monetary limits of liability (Article 22) and, to keep the scheme in balance, the circumstances in which air carriers may *not* limit liability (Articles 23 and 25). The intention was to exempt carriers from the differing liability regimes under the law of the various states: see, e.g., *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155 (1999), at pp. 169-171, *per* Ginsburg J.

45 As for the second purpose -- limiting liability -- the *Warsaw Convention* restricted both the nature of admissible claims and the amount of recovery. In Articles 22 and 24, passengers were limited in the amount of damages they could recover and restricted in the claims they could pursue. The *Warsaw Convention*'s regime rests on an exclusivity principle, found at Article 24, which provides that "[i]n the cases covered" by Articles 17 to 19, "any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention". It is useful to reproduce here Article 24 in its entirety, since several cases I will discuss later turn on this provision:

384

ARTICLE 24

(1) In the cases covered by Articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention.

(2) In the cases covered by Article 17 the provisions of the preceding paragraph also apply, without prejudice to the questions as to who are persons who have the right to bring suit and what are their respective rights.

46 The third purpose of the *Warsaw Convention* was to balance the interests of passengers seeking recovery for personal injuries, and the interests of air carriers seeking to limit potential liability: *Tseng*, at p. 170. While there was concern that damage suits could put the nascent international airline industry at risk, there was also concern that the airlines would take undue advantage of their ability to limit their liability by contractual means: *ibid.* The *Warsaw Convention* was thus seen as "a compromise between the interests of air carriers and their customers worldwide": *Tseng*, at p. 170. Article 17 of the *Warsaw Convention* denies carriers the contractual prerogative to exclude or limit their liability for personal injury, whereas Articles 22 and 24 limit the amount of damages that passengers can recover and restrict their claims. As previously mentioned, the *Warsaw Convention* also gave passengers and shippers the benefit of a reversed burden of proof.

47 As we have seen, two of the main purposes of the *Warsaw Convention*, and hence of the *Montreal Convention*, are to achieve a uniform set of rules governing damages liability of international air carriers and to provide limitation of carrier liability. These purposes can only be achieved by the *Montreal Convention* if it provides the exclusive set of rules in relation to the matters that it covers. The *Montreal Convention* of course does not deal with all aspects of international carriage by air: it is not comprehensive. But within the scope of the matters which it does address, it is exclusive in that it bars resort to other bases for liability in those areas: M. Clarke, *Contracts of Carriage by Air* (2nd ed., 2010), at pp. 8 and 160-62; G. N. Tompkins, Jr., "The Continuing Development of Montreal Convention 1999 Jurisprudence" (2010), 35 *Air & Space L.* 433, at pp. 433-36.

48 The scope of the exclusivity principle in the *Montreal Convention* lies at the heart of this appeal. While we do not have to resolve all of the issues that may arise with respect to how this exclusivity principle operates, the *Montreal Convention*'s text and purpose as well as a strong current of jurisprudence make it clear that the exclusivity of the liability scheme established under the *Montreal Convention* extends at least to excluding actions arising from injuries suffered by passengers during flight or embarkation and debarkation when those actions do not otherwise fall within the scheme of permitted claims.

49 I dwell on this point because the appellants' submissions, while not doing so directly, in effect take issue with this exclusivity principle. Instead of asking whether their claims fall within those permitted by the *Montreal Convention*, the appellants seek to circumvent the exclusivity of the *Montreal Convention* by arguing that their claims are not specifically excluded. The appellants have never suggested that the Thibodeaus' claims under the *OLA* could also be maintained under Articles 17 to 19 of the *Montreal Convention*. This, respectfully, is the fatal flaw in their argument. As we shall see in further detail below, the appellants try to escape the application of the *Montreal Convention* by claiming that the Thibodeaus' proceedings in the Federal Court do not constitute an

"action for damages" covered by the substantive scope of the *Montreal Convention* and that therefore its bar on claims does not apply to their action. The appellants also argue that their claims do not fall within the temporal scope of the *Montreal Convention*. These submissions fail because they are inconsistent with the exclusivity principle that underlies the *Montreal Convention* and because they are not consistent with its clear text. A review of the international jurisprudence supports this view.

The International Jurisprudence

50 The highest courts of state parties to the *Montreal Convention* have affirmed the exclusivity principle: S. Radoeviae, "CJEU's Decision in *Nelson and Others* in Light of the Exclusivity of the Montreal Convention" (2013), 38 *Air & Space L.* 95, at p. 99. In light of the *Montreal Convention*'s objective of achieving international uniformity, we should pay close attention to the international jurisprudence and be especially reluctant to depart from any strong international consensus that has developed in relation to its interpretation: see *Tseng*, at p. 175; *Morris v. KLM Royal Dutch Airlines*, [2002] UKHL 7, [2002] 2 A.C. 628, at paras. 5 and 7; see also *Plourde v. Service aérien FBO inc. (Skyservice)*, 2007 QCCA 739 (CanLII), leave to appeal refused, [2007] 3 S.C.R. xiii, at paras. 53-55; *Sakka (Litigation Guardian of) v. Air France*, 2011 ONSC 1995, 18 C.P.C. (7th) 150, at para. 28; and Chassot, at p. 34.

51 I begin my review with cases decided under the *Warsaw Convention*, which, as I noted earlier, is similar in purpose, structure and text to its successor the *Montreal Convention* which is in issue on this appeal. In cases under the *Warsaw Convention*, the highest courts of the United Kingdom, the United States, and France have endorsed the exclusivity principle. The exclusivity principle, affirmed under this *Warsaw Convention* jurisprudence, is, if anything, more strongly apparent in the text of the *Montreal Convention*.

52 In *Sidhu v. British Airways Plc.*, [1997] A.C. 430 (H.L.), the plaintiffs were taken hostage during a layover in Kuwait by the Iraqi forces, at the commencement of what became known as the Gulf War. Ms. Sidhu sued British Airways for personal injury at common law and Ms. Abnett, for delay and for breach of contract at common law. While the House of Lords did not express an opinion on this issue, it was common ground that Article 17 of the *Warsaw Convention*, as fully implemented by the *Carriage by Air Act, 1961*, 9 & 10 Eliz. 2, c. 27, in the United Kingdom, did not apply to the plaintiffs' claim. Indeed, the parties agreed that Article 17 could not apply, given that no "accident" occurred while on board the aircraft or while disembarking and that psychological damage could not fall under the notion of "bodily injury": pp. 440-41. The stark issue was therefore "whether a passenger who has sustained damage in the course of international carriage by air due to the fault of the carrier, but who has no claim against the carrier under article 17 of the [Warsaw] Convention, is left without a remedy": p. 441. In deciding this question, the House of Lords analyzed the purpose of the *Warsaw Convention*, as well as its text and context, and concluded, at pp. 453-54:

> I believe that the answer to the question raised in the present case is to be found in the objects and structure of the Convention. The language used and the subject matter with which it deals demonstrate that what was sought to be achieved was a uniform international code, which could be applied by the courts of all the high contracting parties without reference to the rules of their own do-

> mestic law. The Convention does not purport to deal with all matters relating to contracts of international carriage by air. But in those areas with which it deals -- and the liability of the carrier is one of them -- the code is intended to be uniform and to be exclusive also of any resort to the rules of domestic law.
>
> ...
>
> ... It was not designed to provide remedies against the carrier to enable all losses to be compensated. It was designed instead to define those situations in which compensation was to be available. So it set out the limits of liability and the conditions under which claims to establish that liability, if disputed, were to be made. A balance was struck, in the interests of certainty and uniformity.
>
> ... The conclusion must be therefore that any remedy is excluded by the Convention, as the set of uniform rules does not provide for it. The domestic courts are not free to provide a remedy according to their own law, because to do this would be to undermine the Convention. It would lead to the setting alongside the Convention of an entirely different set of rules which would distort the operation of the whole scheme. [Emphasis added.]

53 This understanding of the exclusivity principle was reiterated by the House of Lords in *In re Deep Vein Thrombosis and Air Travel Group Litigation*, [2005] UKHL 72, [2006] 1 A.C. 495, at para. 3:

> It is to the passenger's disadvantage, however, that even clear causative negligence on the part of the carrier will not entitle the passenger to a remedy if the article 17 conditions cannot be satisfied. It has been authoritatively established that if a remedy for the injury is not available under the Convention, it is not available at all: see *Sidhu v British Airways plc* [1997] AC 430 and *El Al Israel Airlines Ltd v Tsui Yuan Tseng* (1999) 525 US 155. [Emphasis added.]

54 In *Tseng*, the Supreme Court of the United States agreed with the House of Lord's affirmation of the exclusivity principle in *Sidhu* and adopted the interpretation of the *Warsaw Convention* which was supported by the United States government. The plaintiff was subjected to an intrusive security search at John F. Kennedy International Airport in New York before she boarded an El Al Israel Airlines flight to Tel Aviv. She sought damages for psychic or psychosomatic injuries, but agreed that she did not suffer any "bodily injury". The airline and the U.S. government submitted that the words "[i]n the cases covered by Article 17", found at Article 24 of the *Warsaw Convention*, "refer[red] generically to all personal injury cases stemming from occurrences on board an aircraft or in embarking or disembarking": p. 168. The United States Supreme Court further agreed with the proposition that "[s]o read, Article 24 [of the *Warsaw Convention*] would preclude a passenger from asserting any air transit personal injury claims under local law, including claims that failed to satisfy Article 17's liability conditions": *ibid.*

55 The French Cour de cassation adopted a similar approach in Civ. 1re, June 14, 2007, *Bull. civ.*, No. 230. Ms. Gillet suffered a pulmonary embolism more than two weeks after an international flight with Air Canada and sued the latter for damages, arguing that it failed to inform her of the

risks of aerial transportation, as was its contractual duty under the French *Code de la consommation*. She was however denied monetary relief by virtue of the application of the *Warsaw Convention*, which was integrated in French domestic law by art. L. 322-3 of the *Code de l'aviation civile*. She appealed to the Cour de cassation, première chambre civile, submitting among other arguments that the Cour d'appel de Paris erred in not applying the provisions of the *Code de la consommation*, which are of public order at domestic law. The Cour de cassation rejected this contention, holding that a personal injury claim that does not respect the conditions set out at Article 17 of the *Warsaw Convention* was precluded by Article 24 of this Convention.

56 This understanding of the exclusivity principle in the *Warsaw Convention* was also affirmed by the Court of Appeal of Hong Kong in *Ong v. Malaysian Airline System Bhd*, [2008] 3 H.K.L.R.D. 153, the High Court of Ireland in *Hennessey v. Aer Lingus Ltd.*, [2012] IEHC 124 (BAILII), the Court of Appeal of New Zealand in *Emery Air Freight Corp. v. Nerine Nurseries Ltd.*, [1997] 3 N.Z.L.R. 723, the Singapore Court of Appeal in *Seagate Technology International v. Changi International Airport Services Pte. Ltd.*, [1997] SGCA 22, [1997] 2 S.L.R.(R.) 57, and the High Court of South Africa in *Potgieter v. British Airways Plc*, [2005] ZAWCHC 5 (SAFLII). In Canada, courts have adopted the same view: see *Gal v. Northern Mountain Helicopters Inc.*, 1999 BCCA 486, 128 B.C.A.C. 290, and *Sakka*, at para. 30. A similar understanding of the exclusivity principle under the *Montreal Convention* was affirmed by the supreme court of Germany in Az. X ZR 99/10, March 15, 2011 (online), the Supreme Court of the United Kingdom in *Stott*, at para. 31, and the High Court of Ireland in *McAuley v. Aer Lingus Ltd.*, [2011] IEHC 89 (online), at paras. 6.3-6.6; in Canada, see *O'Mara v. Air Canada*, 2013 ONSC 2931, 115 O.R. (3d) 673, and *Walton v. MyTravel Canada Holdings Inc.*, 2006 SKQB 231, 280 Sask. R. 1.

57 To sum up, the text and purpose of the *Montreal Convention* and a strong current of international jurisprudence show that actions for damages in relation to matters falling within the scope of the *Montreal Convention* may only be pursued if they are the types of actions specifically permitted under its provisions. As the Supreme Court of the United Kingdom put it very recently, "[t]he Convention is intended to deal comprehensively with the carrier's liability for whatever may physically happen to passengers between embarkation and disembarkation": *Stott*, at para. 61.

58 I turn now to address the specific submissions advanced on behalf of the appellants.

Analysis of Appellants' Submissions

The Montreal Convention Does Not Limit Claims for Compensation for Public Law Claims for Breach of Statute or Fundamental Rights Arising Under Quasi-Constitutional Statutes Such as the Official Languages Act

59 The appellants contend that the *Montreal Convention* does not limit claims for damages sought in relation to public law claims or breaches of quasi-constitutional statutes. To place this submission in its statutory context, the appellants assert that their claims for damages under the *OLA* do not fall within the substantive scope of the *Montreal Convention*, that is to say the areas of air carriers' liability that the latter purports to cover. Since language rights claims would escape this substantive scope, their claims for damages would not be within the type of "action for damages" contemplated by Article 29 of the *Montreal Convention* and the exclusivity principle contained therein would therefore not apply. In support of this submission, the appellants principally argue

that the violation of language rights is not an inherent risk to air carriage covered by Article 17 and that the *Montreal Convention* intends to govern neither statutory claims based on fundamental rights nor the "public law damages" they would give rise to. In my view, this position has no support in the text or purpose of the *Montreal Convention* or in the international jurisprudence.

The Appellants' Argument Is Inconsistent With the Text and Purpose of the *Montreal Convention*

60 I have already discussed the breadth of the language that is used in Article 29 to describe the basis of the claims that are subject to the *Montreal Convention*'s limitations. The limitation applies to "any action" in the carriage of passengers, baggage or cargo, "for damages, however founded, whether under this Convention or in contract or in tort or otherwise". There is no hint in this language that there is any intention to exempt any "action for damages" in the carriage of passengers, baggage or cargo depending on its legal foundation, such as when a plaintiff brings forward a statutory monetary claim of a public law nature based on the breach of quasi-constitutional rights. As Dr. Chassot has said, both the terms "action" and "damages" must be understood in a broad sense; to do otherwise would unduly limit the ambit of the *Montreal Convention* in a way that was not intended: see pp. 176-77.

61 The Thibodeaus' claims are an "action for damages" within the meaning of Article 29, as they claim damages for injuries suffered in the course of an international flight. This is clear from the way in which the claims were asserted and from the application judge's reasons.

62 The Thibodeaus referred in their pleading to what they were claiming as damages. Their claims for damages, as set out in Part III (a) and (b) of their notice of application, filed with the Federal Court, included $25,000 in damages and $250,000 in punitive and exemplary damages for each of them. In response to these claims, the Federal Court awarded damages to compensate the Thibodeaus for the injury flowing from the breaches of their language rights. As the judge at first instance put it, "the applicants' language rights are clearly very important to them and the violation of their rights caused them a moral prejudice, pain and suffering and loss of enjoyment of their vacation": para. 88 (emphasis added). (Although the judge decided against awarding punitive or exemplary damages in this case, I note in passing that such damages are excluded by the concluding words of Article 29, even in actions that are otherwise permitted under the *Montreal Convention*.)

63 In short, damages for moral prejudice, pain and suffering and loss of enjoyment of their vacation are what the Thibodeaus sought in their court proceeding and such damages are what the judge awarded.

64 Permitting an action in damages to compensate for "moral prejudice, pain and suffering and loss of enjoyment of [a passenger's] vacation" that does not otherwise fulfill the conditions of Article 17 of the *Montreal Convention* (because the action does not relate to death or bodily injury) would fly in the face of Article 29. It would also undermine one of the main purposes of the *Montreal Convention*, which is to bring uniformity across jurisdictions to the types and upper limits of claims for damages that may be made against international carriers for damages sustained in the course of carriage of passengers, baggage and cargo. As the international jurisprudence makes clear, the application of the *Montreal Convention* focuses on the factual circumstances surrounding the monetary claim, not the legal foundation of it. To decide otherwise would be to permit artful pleading to define the scope of the *Montreal Convention*.

The Appellants' Argument Is Inconsistent With International Jurisprudence

65 The abundant international jurisprudence provides no support for the appellants' position that their claims escape the substantive scope of the *Montreal Convention.* It supports the opposite conclusion.

66 American courts have been faced with a similar issue as they had to decide whether claims based on fundamental rights were precluded by the *Warsaw Convention.* District and appellate courts, following *Tseng*, have concluded that, despite the substantive difference between tort claims and discrimination claims, the *Warsaw Convention* had to be applied to damages in relation to both of these types of claims. The principle underlying these holdings is that the application of the *Warsaw Convention* depends on the factual circumstances giving rise to the claim, not on its legal foundation. As discussed earlier, the exclusion under the *Montreal Convention* is, if anything, even clearer than it is under the *Warsaw Convention.*

67 In *King v. American Airlines, Inc.*, 284 F.3d 352 (2d Cir. 2002), Mr. and Ms. King claimed damages before the United States District Court for the Northern District of New York, alleging that they had been racially discriminated against in violation of their equal rights under the law, as protected by 42 U.S.C. s. 1981. The Kings also relied on the *Federal Aviation Act*, 49 U.S.C. s. 41310(a), and various other state and federal laws. They contended that American Airlines "bumped them from an overbooked flight because of their race": p. 355. The Federal Court of Appeals, Second Circuit, had to decide whether the *Warsaw Convention* applied to the Kings' damages claim. If it did, then this claim would be excluded, as it had been filed outside the two-year limitation period provided at Article 29 of the *Warsaw Convention.*

68 Circuit Judge Sotomayor (as she then was) for the court concluded that the claim fell within the substantive scope of Article 17 of the *Warsaw Convention*, which exhaustively covers claims for injuries suffered while "in the course of [one of] the operations of embarking": pp. 359-60. The Kings, however, submitted that civil rights claims based on federal statutes would fall outside the intended exclusivity regime of the *Warsaw Convention*: p. 360. Sotomayor J. rejected this argument:

> As *Tseng* makes clear, the scope of the Convention is not dependent on the legal theory pled nor on the nature of the harm suffered. *See Tseng*, 525 U.S. at 171, 119 S.Ct. 662 (rejecting a construction of the Convention that would look to the type of harm suffered, because it would "encourage artful pleading by plaintiffs seeking to opt out of the Convention's liability scheme when local law promised recovery in excess of that prescribed by the treaty?) ... .
>
> Notably, every court that has addressed the issue of whether discrimination claims are preempted by the Warsaw Convention post-*Tseng* has reached a similar conclusion... .
>
> ... It is not for the courts to rewrite the terms of a treaty between sovereign nations. *Cf. Turturro*, 128 F.Supp.2d at 181 ("[T]he Convention massively curtails damage awards for victims of horrible acts [of] terrorism; the fact that the

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> Convention also abridges recovery for ... discrimination should not surprise anyone.?). [Emphasis added; pp. 361-62.]

69 This decision is highly relevant because the Kings' argument that damages for civil rights claims were not excluded by the *Warsaw Convention* is similar to the appellants' arguments in this case that damages for breach of language rights are not excluded. The logic of *King*, holding that the exclusion does apply, supports the same conclusion here.

70 Similarly, in *Gibbs v. American Airlines, Inc.*, 191 F.Supp.2d 144 (D.D.C. 2002), Dr. Gibbs brought a claim against American Airlines under 42 U.S.C. s. 1981, alleging that the air carrier "refused to perform its contract to transport him ... on the basis of his race": pp. 146-47. Dr. Gibbs argued that "Congress did not intend the [Warsaw] Convention to impede civil rights claims rooted in the [American] Constitution, such as Section 1981 claims": p. 148. Kennedy J. of the United States District Court, District of Columbia, however rejected this argument and held that the "negative consequences that the *Tseng* Court found would flow from '[c]onstruing the [Warsaw] Convention ... to allow passengers to pursue claims under local law when the [Warsaw] Convention does not permit recovery' are no less likely with statutory discrimination claims than with common law claims": *ibid.*, citing *Tseng*, at p. 171. As Kennedy J. explained, "the primary purpose of the [Warsaw] Convention is to prevent variations in liability according to local law" and, as such, this purpose "does not distinguish between types of local law, only between local and international law": p. 149. To that extent, "[f]ederal discrimination statutes clearly fall into the former category": *ibid.* On the application of the *Warsaw Convention* to civil rights claims, see also *Turturro v. Continental Airlines*, 128 F.Supp.2d 170 (S.D.N.Y. 2001), and *Brandt v. American Airlines*, 2000 WL 288393 (N.D. Cal.).

71 Jurisprudence from other jurisdictions, including a very recent decision of the Supreme Court of the United Kingdom, also supports the view that exclusion under the *Montreal Convention* turns on whether the claim is one for damages related to the circumstances contemplated by the *Montreal Convention*, not on the alleged source of the obligation to pay them.

72 In *Stott*, the plaintiff, a disabled passenger in a wheelchair, claimed damages resulting from a series of breaches by Thomas Cook Tour Operators of the *Civil Aviation (Access to Air Travel for Disabled Persons and Persons with Reduced Mobility) Regulations 2007*, SI 2007/1895, which implemented in the United Kingdom Regulation (EC) No. 1107/2006 of the European Parliament and the Council concerning the rights of disabled persons and persons with reduced mobility when travelling by air. The Supreme Court of the United Kingdom however found that, because the claim did not fall within the sorts of injury claims permitted under Article 17 of the *Montreal Convention*, no monetary relief could be awarded:

> Should a claim for damages for ill treatment in breach of equality laws as a general class, or, more specifically, should a claim for damages for failure to provide properly for the needs of a disabled passenger, be regarded as outside the substantive scope of the Convention? As to the general question, my answer is no for the reasons given by Sotomayor CJ in *King v American Airlines*. I agree with her analysis that what matters is not the quality of the cause of action but the time and place of the accident or mishap. The Convention is intended to deal comprehensively with the carrier's liability for whatever may physically happen to pas-

> sengers between embarkation and disembarkation. The answer to that general question also covers the more specific question. [para. 61]

73 I agree with this analysis and I reject the appellants' argument that statutory claims for quasi-constitutional rights fall outside the type of actions covered by the *Montreal Convention*.

74 The Commissioner however submits that the *Montreal Convention* only applies to claims finding their source in private law and to claims for private law damages. With regards to the source of the liability at law, the Commissioner argues that claims such as the ones made by Mr. and Ms. Thibodeau, based on a statutory right, would not be excluded by Article 29, as they would be more akin to administrative complaints mechanisms than private law proceedings.

75 The flaw in this argument is that, as I have discussed, the relevant question concerns the nature of the claim (i.e. is it an action for damages related to the circumstances contemplated by the *Montreal Convention*, however founded), not the underlying source of the claim: see also Chassot, at p. 179; J. J. Wegter, "The ECJ Decision of 10 January 2006 on the Validity of Regulation 261/2004: Ignoring the Exclusivity of the Montreal Convention" (2006), 31 *Air & Space L.* 133, at p. 144.

76 The argument relating to the distinction between "public law" and "private law" damages rests on the same logic and can be answered in a similar fashion. Mr. and Ms. Thibodeau submit that they claimed public law damages, as they are pursuing redress for breach of quasi-constitutional rights. In support of this argument, they rely heavily on the remarks of this Court in *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28, where the Chief Justice differentiated actions for public law damages from actions for private law damages, emphasizing that they are distinct remedies: para. 22.

77 There are two flaws in this submission. The first is that, subject to constitutional considerations, the scope of the exclusivity principle in the *Montreal Convention* cannot be modeled on national definitions of damages. As Dr. Chassot explains, at p. 177:

> [TRANSLATION] The concept of damages, as an element of the definition of the scope of the exclusivity provided for in art. 29 [of the *Montreal Convention*], is a matter of uniform law: it must be interpreted independently... . To assess the scope of the exclusivity, one cannot refer to the domestic law concept of damages, however, since the rules of domestic law would then be defining the scope of the Convention, which would clearly be inconsistent with the objective of art. 29 [of the *Montreal Convention*]. Thus, the concept of damages within the meaning of art. 29 [of the *Montreal Convention*], the purpose of which is to define the scope of the exclusivity of the Convention's rules respecting liability, must be distinguished from that of the damage for which compensation might be obtained under arts. 17 *et seq.* [of the *Montreal Convention*]. [Emphasis added.]

78 The second flaw in the appellants' submission is that, even if domestic law were relevant at this stage, the damages discussed in *Ward* were damages against the state; but of course Air Canada is not the state, or its agent.

79 I conclude that the appellants' arguments that the *Montreal Convention* does not apply to the damages they claimed in these proceedings are inconsistent not only with the text and purpose of the *Montreal Convention*, but with a strong current of international jurisprudence interpreting it.

The Montreal Convention Excludes Only "Individual Damages" and Not Claims for "Standardized Damages"

80 The Thibodeaus further submit that the substantive scope of the *Montreal Convention* does not extend to barring claims for "standardized damages" and that their claims are of that nature. This argument relies on jurisprudence from the European Court of Justice, in particular *International Air Transport Association v. Department for Transport*, C-344/04, [2006] E.C.R. I-403 (Grand Chamber) ("*IATA*"), which was followed by the Fourth Chamber of the European Court of Justice in *Wallentin-Hermann v. Alitalia*, C-549/07, [2008] E.C.R. I-11061, at para. 32, and *Sturgeon v. Condor Flugdienst GmbH*, Joined Cases C-402/07 and C-432/07, [2009] E.C.R. I-10923, at para. 65, and reaffirmed by the Grand Chamber in *Nelson v. Deutsche Lufthansa AG*, Joined Cases C-581/10 and C-629/10, [2013] 1 C.M.L.R. 42 (p. 1191), at paras. 46-60. In the *IATA* case, for example, the question was whether a European Community regulation dealing with air passengers' rights in the event of delay was inconsistent with the *Montreal Convention*. The regulation required airlines to provide assistance to delayed passengers ranging from free meals and refreshments to free hotel accommodation. The court concluded that passenger delay gives rise to two distinct types of damage, only one of which is governed by the *Montreal Convention*. The first, which in the court's view is *not* addressed by the *Montreal Convention*, is "damage that is almost identical for every passenger, redress for which may take the form of standardised and immediate assistance or care for everybody concerned": para. 43. This, in the court's view, was the sort of measure contained in the regulation. The second, which *is* subject to the *Montreal Convention*, is "individual damage, ... redress for which requires a case-by-case assessment of the extent of the damage caused": *ibid.*

81 In my respectful view, this line of jurisprudence is not relevant to the issue that confronts us here. Even if we were to adopt the distinction between "individual damages" and "standardized damages" relied on by the European Court of Justice, it would not assist the Thibodeaus. The damages which they seek in this case cannot be described as "damage... redress for which may take the form of standardised and immediate assistance or care for everybody concerned" as were the measures required by the regulations considered in *IATA*. The damages as claimed by the Thibodeaus and as awarded by the application judge were, at least in part, geared to and depended upon the impact on the Thibodeaus of the particular breaches. Their claims were for damages on an individual basis.

82 I note that the Supreme Court of the United Kingdom recently understood the *IATA* line of jurisprudence in the same way. The court held that a claim for damages for breach of duties owed to disabled persons was a claim for damages on an individual basis and therefore the *IATA* line of jurisprudence did not assist the claimant's attempt to escape the bar set out in the *Montreal Convention*: *Stott*, at para. 58. I respectfully agree and would apply the same reasoning here.

The Appellants' Claims Do Not Fall Within the Temporal Scope of the Montreal Convention's Limitations

83 Mr. and Ms. Thibodeau submit that, even if their claims fall within the substantive scope of the *Montreal Convention*, they nonetheless fall outside its temporal scope for cases involving personal injuries. Article 17 of the *Montreal Convention* deals with personal injuries suffered "on board the aircraft or in the course of any of the operations of embarking or disembarking". Mr. and

Ms. Thibodeau argue that the assignments of non-bilingual flight attendants on the relevant flights by Air Canada were decisions made long before the embarkation process and were, as the application judge found, the result of systemic problems within the management of the airline. Thus, they submit, the failure to provide French language services did not occur "on board the aircraft or in the course of any of the operations of embarking or disembarking".

84 This submission is not well founded and I cannot accept it.

85 The Supreme Court of the United Kingdom rejected a similar argument, in my view correctly, in *Stott*. The appellant in that case argued that he "had a complete cause of action before boarding the aircraft based on his poor treatment prior to that stage": para. 60. The court rightly held that, by this logic, "most accidents or mishaps" could be "traced back to earlier operative causes" and that such an approach to the *Montreal Convention* "would distort [its] broad purpose": *ibid.* Rather, courts must focus their application of the exclusivity principle on the location or the activity of the passenger when the accident or occurrence directly causing the particular injury giving rise to the claim occurred, not on some antecedent fault: *ibid.* See also Dempsey, at pp. 439-41; *Shawcross and Beaumont*, at pp. VII-685 to VII-687.

86 In this case, the Thibodeaus were clearly within the temporal limits of the *Montreal Convention* when they suffered the breach of their language rights; they were aboard the aircraft for the three breaches for which damages were set aside by the Court of Appeal. I therefore reject the Thibodeaus' submission based on the temporal aspect of Article 17 of the *Montreal Convention.*

Conclusion

87 The claims before this Court fall squarely within the exclusion established by the *Montreal Convention.*

Are Mr. and Ms. Thibodeau Nonetheless Entitled to Monetary Damages Because the OLA and the Montreal Convention Conflict and the OLA Prevails?

Introduction

88 I have concluded that if the *Montreal Convention* applies, it bars the Thibodeaus' claims for damages under the *OLA*. The appellants say, however, that even if this is so, the *Montreal Convention* conflicts with the *OLA* and that the *OLA* prevails. They submit that the power of the Federal Court under s. 77(4) of the *OLA* to "grant such remedy as it considers appropriate and just in the circumstances" conflicts with the exclusion of actions for damages under the *Montreal Convention.* The first question therefore is whether these provisions conflict. I agree with the Federal Court of Appeal that they do not.

89 Courts presume that legislation passed by Parliament does not contain contradictions or inconsistencies and only find that they exist when provisions are so inconsistent that they are incapable of standing together. Even where provisions overlap in the sense that they address aspects of the same subject, they are interpreted so as to avoid conflict wherever this is possible.

90 When we apply these principles, we see that the provisions in issue here do not conflict. They have markedly different purposes. The remedial provisions in the *OLA* cannot be understood to be an exhaustive code that requires damages to be available in all settings and without regard to all other relevant laws. Moreover, the power to grant an "appropriate and just" remedy may easily

be reconciled with the specific and limited exclusion of damages in the context of international air travel. A remedy is not "appropriate and just" if awarding it would constitute a breach of Canada's international obligations under the *Montreal Convention*.

What Is "a Conflict"?

91 The appellants contend that there is a conflict between two acts of the same legislature. The *Carriage by Air Act*, incorporating the *Montreal Convention*, purports to preclude an award of damages while s. 77(4) of the *OLA* permits the court to grant an "appropriate and just" remedy, including damages. In short, the appellants' position is that the exclusion of damages during international air travel conflicts with the power to award an "appropriate and just" remedy.

92 The legal framework that governs this question is not complicated. First, courts take a restrictive approach to what constitutes a conflict in this context. Second, courts find that there is a conflict only when the existence of the conflict, in the restrictive sense of the word, cannot be avoided by interpretation. Overlap, on its own, does not constitute conflict in this context, so that even where the ambit of two provisions overlaps, there is a presumption that they both are meant to apply, provided that they can do so without producing absurd results. This presumption may be rebutted if one of the provisions was intended to cover the subject matter exhaustively. Third, only where a conflict is unavoidable should the court resort to statutory provisions and principles of interpretation concerned with which law takes precedence over the other. This case turns on the first two of these principles and I will explore them in somewhat more detail.

93 Courts presume that "the body of legislation enacted by a legislature does not contain contradictions or inconsistencies, that each provision is capable of operating without coming into conflict with any other": R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at p. 325; *R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56, [2001] 2 S.C.R. 867, at para. 30. This is sometimes expressed as a presumption of coherence, based on the common sense idea that the legislature does not intend to make contradictory enactments: *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at p. 38. This is why courts take a very restrictive approach to defining what constitutes a conflict: P.-A. Côté, in collaboration with S. Beaulac and M. Devinat, *The Interpretation of Legislation in Canada* (4th ed. 2011), at p. 375.

94 What then is a conflict in this context? The provisions must be "so inconsistent with ... or repugnant" to each other that they are "incapable of standing together": *Daniels v. White*, [1968] S.C.R. 517, at p. 526; *Toronto Railway Co. v. Paget* (1909), 42 S.C.R. 488, at pp. 491 and 499; *Canadian Westinghouse Co. v. Grant*, [1927] S.C.R. 625, at p. 630; *International Brotherhood of Electrical Workers v. Town of Summerside*, [1960] S.C.R. 591, at pp. 598-99; *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2010-168*, 2012 SCC 68, [2012] 3 S.C.R. 489, at paras. 41-45. Application of one provision "must implicitly or explicitly preclude application of the other": P.-A. Côté, *The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 350, adopted by the Court in *Lévis (City) v. Fraternité des policiers de Lévis Inc.*, 2007 SCC 14, [2007] 1 S.C.R. 591, at para. 47; see also Côté (4th ed.), at p. 376.

95 Bastarache J. held in *Lévis* that "[u]navoidable conflicts ... occur when two pieces of legislation are directly contradictory or where their concurrent application would lead to unreasonable or absurd results": para. 47. It is not an absurd result to exclude one particular remedy -- damages -- in the particular context of international air travel. Therefore, the live issue here is whether the provisions are directly contradictory.

96 A "direct contradiction" exists if the application of one law excludes the application of the other. For example, in *Massicotte v. Boutin*, [1969] S.C.R. 818, one statute allowed for an extension of time only before the time limit expired, while another statute allowed for an extension to be granted even after the time limit had expired. There was thus a direct conflict between the two laws with respect to an application for an extension of time sought after the time limit had expired: p. 820. Similarly, in *Lévis*, one provision required dismissal of a police officer who has been convicted of a criminal offence while another provision allowed the officer to retain the position upon showing special circumstances. As Bastarache J. put it, one enactment said yes while the other said no: paras. 48-49.

97 This is not the situation that faces us here. The *OLA* does not provide that damages should be granted in every case, but authorizes courts to grant "appropriate and just" remedies. The exclusion of a damages remedy in the context of international air travel is thus not a direct contradiction of the remedial power under the *OLA*.

98 This case is therefore not one of direct contradiction but of overlap. The *OLA*'s broad and discretionary remedial provisions permit an award of damages where that is what the court considers to be an appropriate and just remedy in the circumstances. The *Montreal Convention*, on the other hand, restricts claims for damages by passengers in the context of international air travel. Overlapping provisions, however, do not necessarily conflict. Laws do not conflict simply because "they overlap, are active in the same field or deal with the same subject matter": Côté (4th ed.), at p. 376; *Toronto Railway*, at p. 499. If the overlapping laws can both apply, it is presumed that they are meant to apply, and "[t]he only issue for the court is whether the presumption is rebutted by evidence that one of the provisions was intended to provide an exhaustive declaration of the applicable law": Sullivan, at p. 326.

99 Courts strive through interpretation to avoid finding that overlapping provisions conflict. As Bastarache J. said in *Lévis*, "an interpretation which results in conflict should be eschewed unless it is unavoidable" (para. 47). Courts are therefore slow to find that broadly worded provisions were intended to be an exhaustive declaration of the applicable law where the result of that conclusion creates rather than avoids conflict. For example, when overlapping provisions have different purposes or touch on different aspects, they will generally not be found to conflict: Sullivan, at p. 328. As Professor Côté explains, the court must consider the purpose of the law in order to determine whether in the circumstances the enactment of one norm may be interpreted as excluding all others: 4th ed., at pp. 379-80.

100 To pause here for a moment, the two allegedly conflicting laws in this case have markedly different purposes and touch on distinct subject matters. The remedial provisions of the *OLA* are part of a larger scheme of obligations and mechanisms the object of which is to preserve and strengthen the vitality of Canada's official languages in our federal institutions. It applies to only one airline, Air Canada. The *Montreal Convention*, in contrast, is part of an internationally agreed upon uniform and exclusive scheme addressing damages claims in the field of international carriage by air. Given these two dramatically different purposes and spheres of operation, we should be slow to find a conflict in the narrow point at which the schemes overlap. It will be helpful to review briefly three judgments of this Court dealing with overlapping provisions in order to see how these principles play out in specific cases.

The Jurisprudence

101 In *The King v. Williams*, [1944] S.C.R. 226, Mr. Williams was fined as a result of his conviction under the *Foreign Exchange Control Order*, P.C. 7378, made under the *War Measures Act*, R.S.C. 1927, c. 206, for attempting to export a quantity of gold from Canada without a licence. When he was pursued for forfeiture of the gold, he argued that the exportation of gold was addressed under *The Gold Export Act*, S.C. 1932, c. 33, which did *not* provide for forfeiture. It followed, he argued, that forfeiture was not available in the case of exporting gold contrary to the *Foreign Exchange Control Order*. The submission in effect was that *The Gold Export Act* dealt exhaustively and exclusively with the consequences of attempting to export gold from Canada. That position was rejected by a majority of the Court. The point is perhaps made most clearly in the concurring reasons of Hudson J., at p. 240:

> In the present case there is no repugnancy. Two measures were passed for different purposes and are to be enforced through different organs of the Government. The *Foreign Exchange Control Order* is very comprehensive, covering the whole field of currency, securities and commodities. I do not think that the Court could properly imply an intention to exclude from "currency" gold coins and from "commodities" fine gold, which nominally determines the value of all currency and monetary obligations. [Emphasis added.]

102 There is a clear parallel between *Williams* and this case. The two provisions were enacted for very different purposes, as I discussed earlier. The *Montreal Convention* is a "very comprehensive" scheme in relation to claims for damages in the field of international carriage by air. The remedial provisions in the *OLA*, by contrast, are very generally worded and cannot realistically be thought to mandate that damages must be available for every breach. Following the reasoning of *Williams*, there is no "repugnancy" between the two provisions.

103 In *Myran v. The Queen*, [1976] 2 S.C.R. 137, a memorandum of agreement with the force of statute assured the appellants, who were Treaty Indians, that they would have the right of hunting, trapping and fishing for food on all unoccupied Crown lands (and certain other lands). However, another statute made it an offence to hunt without due regard for the safety of other persons in the vicinity. There was no serious question that the appellants, while hunting, had failed to show due regard for the safety of other persons. The question was whether the statute creating the offence conflicted with the appellants' right to hunt. The Court concluded that it did not. There was no "irreconcilable conflict" between the two provisions: they served very different purposes (p. 142, *per* Dickson J.). One was concerned with conservation of game to secure a continuing supply of food for the Indians while the second was concerned with the risk of death or serious injury when hunters disregarded the safety of others. The obligation to hunt in a manner that did not risk death or serious injury did not diminish the right to hunt: *ibid.* This was a case in which the Court concluded that the broad and general words affirming the right to hunt could not be taken as an exhaustive and exclusive statement of the law governing its exercise.

104 There is once again a clear parallel between *Myran* and this case. The two schemes have different purposes and the broad right to an "appropriate and just" remedy is not inconsistent with the restriction on damages claims in relation to injuries during international carriage by air.

105 A third case, in which the Court reached the opposite conclusion, is *Perron-Malenfant v. Malenfant (Trustee of)*, [1999] 3 S.C.R. 375. The analysis leading to that conclusion is instructive.

106 Without getting too immersed in the details, the question in *Perron-Malenfant* concerned whether one of the bankrupt's assets became the property of the trustee upon bankruptcy. More precisely, the issue was whether the cash surrender value of a life insurance policy was exempt from seizure by the trustee on the policyholder's bankruptcy. By virtue of the incorporation of certain elements of provincial laws by the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, the answer to the issue depended on the interpretation of certain provisions of the *Civil Code of Lower Canada*. If two articles (art. 2552 and 2554) were exhaustive statements of the applicable exemptions, the surrender value would *not* be exempt. However, jurisprudence developed under another article (art. 1031), if applicable, would (the Court assumed without deciding) result in the surrender value *being* exempt. The question boiled down to whether the two articles, which did not allow for an exemption of the surrender value in this case, were intended to be an exhaustive statement of the exemptions from seizure of life insurance.

107 In answering this question, the Court examined the legislative history and evolution of the provisions, their text and their purpose. The legislative history and evolution revealed that arts. 2552 and 2554 were part of a comprehensive legislative treatment of every aspect of insurance law which had created "an insurance code within the *Civil Code*": paras. 36-37. The Court then turned to the text and purpose of the provisions, concluding that the legislature "must have had all elements of the life insurance contract in mind, including the right to surrender the contract for its cash surrender value": para. 39. To read the provisions as being other than comprehensive would "empt[y] them of much of their meaning": para. 41. The Court also placed its textual analysis within the overall thrust of the insurance reforms of which these articles formed a part. This led to the conclusion that the articles in question reflected a "careful balancing of the relevant considerations": para. 50. Taking all of these elements into account, the Court concluded that arts. 2552 and 2554 were intended to be a comprehensive and exclusive set of rules in relation to the seizability of the rights under life insurance contracts:

> ... it defies common sense to assume that the legislator wished to remain silent, in its exemption provisions, on the most important value of a life insurance policy for creditors -- the cash surrender value. On the contrary, given the legislator's policy of making rights under insurance contracts more available to creditors as part of the policyholder's collateral, the most reasonable conclusion is that the cash surrender value of the insurance contract was exactly what the legislature had in mind when determining, in arts. 2552 and 2554, which policies should be exempt, and which should not be. [para. 52]

108 To paraphrase the Court in *Perron-Malenfant*, the issue here is whether it defies common sense to assume that by permitting a court to grant an "appropriate and just" remedy for violation of the *OLA*, Parliament intended that the court would be free to make an order violating Canada's international treaty obligations. In other words, does it make sense that Parliament intended that a court order in breach of Canada's international obligations would be an "appropriate and just" remedy? The appellants would have us answer yes to both questions.

Application

109 With these principles in mind, I return to the question of whether there is a conflict between the broad remedial discretion under s. 77(4) of the *OLA* and the specific limitation on that remedial authority that results from Article 29 of the *Montreal Convention*.

110 These provisions bear all of the hallmarks of the sorts of provisions that have been found *not* to conflict. They were enacted for markedly different purposes. They may easily be interpreted in a way that permits them to operate together without absurdity: an "appropriate and just" remedy must not violate Canada's international obligations. The only serious question is whether the so-called presumption of overlap is rebutted because s. 77(4) of the *OLA* was intended as an exhaustive and exclusive declaration of the court's remedial power such that damages must always be available for breach of the *OLA*. This position, in my respectful view, is untenable.

111 The appellants suggest that the quasi-constitutional status of the *OLA* prevents a harmonious interpretation of s. 77(4) of the *OLA* and Article 29 of the *Montreal Convention*: Commissioner's factum, at paras. 90-95. The argument goes that to read s. 77(4) as not permitting an award of damages in the context of international air travel would run counter to the *OLA*'s status as quasi-constitutional legislation and therefore would run counter to Parliament's intention. With respect, I cannot accept this submission.

112 Section 77(4) of the *OLA* is certainly part of a quasi-constitutional statutory scheme designed to both reflect and to actualize the "equality of status" of English and French as the official languages of Canada and the "equal rights and privileges as to their use in all institutions of the Parliament and government of Canada" as declared in s. 16(1) of the *Charter*: see, e.g., *R. v. Beaulac*, [1999] 1 S.C.R. 768; *Lavigne*, at para. 23. Like s. 24(1) of the *Charter*, s. 77(4) of the *OLA* confers a wide remedial authority and should be interpreted generously to achieve its purpose. These factors, however, do not alter the correct approach to statutory interpretation which requires us to read "the words of an Act ... 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": *Lavigne*, at para. 25, quoting E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87. As I see it, the *OLA*, read in its full context, demonstrates that Parliament did not intend to prevent s. 77(4) from being read harmoniously with Canada's international obligations given effect by another federal statute.

113 It is unlikely that, by means of the broad and general wording of s. 77(4), Parliament intended this remedial power to be read as an exclusive and exhaustive statement in relation to the Federal Court's remedial authority under the *OLA*, overriding all other laws and legal principles. The appellants' position in effect is that Parliament, through s. 77(4), intended that courts should be able to grant damages even though doing so would be in violation of Canada's international undertakings as incorporated into federal statute law. This proposition runs afoul of the principle of interpretation that Parliament is presumed not to intend to legislate in breach of Canada's international law obligations: see, e.g., *Daniels*, at p. 541; *Zingre v. The Queen*, [1981] 2 S.C.R. 392, at pp. 409-10; *Ordon Estate v. Grail*, [1998] 3 S.C.R. 437, at paras. 128-31; Sullivan, at pp. 539-42.

114 I find it impossible to discern any such intent in the broad and general language of s. 77(4). Instead, this provision should be understood as having been enacted into an existing legal framework which includes statutory limits, procedural requirements and a background of general legal principles -- including Canada's international undertakings incorporated into Canadian statute law -- which guide the court in deciding what remedy is "appropriate and just".

115 Moreover, a review of the legislative history of this provision provides no evidence that Parliament intended to authorize awards of damages in violation of Canada's international commitments. The legislative record shows that members of Parliament discussing the scope of s. 77 of the *OLA* at the time of its enactment did not focus on the specific remedies available under this provision, but rather on how it gave courts the ability to enforce, through remedies, certain parts of the new *OLA*, in contrast to its predecessor that was merely declaratory: see *House of Commons Debates*, vol. X, 2nd Sess., 33rd Parl., February 8, 1988, at pp. 12706, 12712, 12715 and 12737 (Hon. Ray Hnatyshyn, Minister of Justice and Attorney General of Canada, Mr. Jean-Robert Gauthier, Ms. Marion Dewar, Hon. Warren Allmand); *House of Commons Debates*, vol. XIV, 2nd Sess., 33rd Parl., July 7, 1988, at p. 17224 (Hon. Ray Hnatyshyn, Minister of Justice and Attorney General of Canada). While the debate contemplated that damages could constitute an "appropriate and just" remedy in certain circumstances, it highlighted the open-ended nature of these terms and that they left to the courts the duty of determining what would be an "appropriate and just remedy" in the circumstances: *Debates of the Senate*, vol. IV, 2nd Sess., 33rd Parl., July 27, 1988, at pp. 4135-36. There is nothing in this to suggest any intent that this power would override other limitations on the court's authority to award damages.

116 We are not in a situation like that faced by the Court in *Perron-Malenfant* in which allowing both provisions to operate empties the remedial provisions in the statute of much of their meaning. It is not suggested that the powers of the Commissioner, including his authority to apply to the Federal Court for remedies under s. 78 of the *OLA*, conflict with the limitation on damages under the *Montreal Convention*. Damages are by no means the only remedies available under s. 77(4) and the limitation on their availability set out in Article 29 of the *Montreal Convention* applies only in respect of claims by passengers arising out of international carriage by air. I therefore reject the contention that my proposed interpretation of the *Montreal Convention* somehow silences language rights.

117 In short, there are no indicators here of a conflict between these two provisions in the narrow and strict sense of conflict which applies in this context, and there is no hint in the text, scheme or purpose of the *OLA* that the brief, broad, general and highly discretionary provision in s. 77(4) was intended to permit courts to make orders in breach of Canada's international undertakings which have been incorporated into federal law.

118 I conclude that there is no conflict between these provisions and that, in fashioning an appropriate and just remedy under the *OLA* in a case of international carriage by air, the Federal Court must apply the limitation on damages set out in Article 29 of the *Montreal Convention*. In light of that conclusion, I do not need to consider which provision would prevail in the event of conflict.

Did the Federal Court of Appeal Err in Allowing the Appeal in Relation to the Structural Order?

Introduction

119 The Thibodeaus sought a structural order requiring Air Canada to take all necessary measures so that it could comply with its obligations to provide services in the French language. These included measures to ensure that it had the bilingual capability to provide in-flight services in French when there is sufficient demand for them; to actively offer service in French at the outset of communications by providing signs, notices, and other information on services and initiating communication with the public; to establish an adequate monitoring system and procedures designed to

quickly identify, document and quantify potential violations of language rights; and to ensure that language rights prevail over any contract and collective agreement signed by the airline.

120 The application judge concluded that "Air Canada and Jazz make considerable efforts and invest substantial sums to comply with their linguistic duties": para. 145. She found, however, that "not everything is perfect and that more remains to be done": para. 146. She noted that major improvements were implemented following the Thibodeaus' complaints but expressed surprise that there was no monitoring system that enabled Air Canada to determine the number of times where no bilingual flight attendant is assigned to a flight on which there is a significant demand for services in French: para. 151. The judge found that there was a "systemic problem" at Air Canada:

> ... even though Air Canada is making efforts to comply with its linguistic duties, problems persist, and both Air Canada and Jazz have not completely developed a reflex to proactively implement all the tools and procedures required to comply with their duties, to measure their actual performance in the provision of services in French and to set improvement objectives. This finding, combined with Jazz's admission that it still has difficulty complying with all its duties, leads me to conclude that there is a systemic problem at Air Canada. [para. 153]

121 The application judge concluded in light of these findings that it was "fair and appropriate to require that Air Canada make every reasonable effort to fulfill all its duties under Part IV of the OLA and to ensure that it implement a monitoring process to allow it to identify and document the occasions on which Air Canada does not assign the required bilingual personnel on board flights on which there is significant demand for services in French": para. 154. She therefore ordered Air Canada to

> * make every reasonable effort to comply with all of its duties under Part IV of the *Official Languages Act*;
> * introduce, within six months of this judgment, a proper monitoring system and procedures to quickly identify, document and quantify potential violations of its language duties, ... particularly by introducing a procedure to identify and document occasions on which Jazz does not assign flight attendants able to provide services in French on board flights on which there is significant demand for services in French; [application judge's reasons, at p. 153]

122 The Federal Court of Appeal set this order aside. It held that the portion of the order that required Air Canada to "make every reasonable effort to comply with all of its duties" under Part IV of the *OLA* was simply a general order to comply with the law, a type of order that should be granted only in exceptional circumstances which did not exist here: paras. 55-60. Turning to the rest of the order, the court found that it was not supported by the evidence and that it, too, was not sufficiently precise: para. 63. As Trudel J.A. put it on behalf of the court:

> The imprecise wording of the order leads me once again to expect that its implementation would be problematic for the appellant, and for any court called to intervene in the event of a future dispute. Nothing in the record reveals what a proper and quick monitoring system is. The use of the word "particularly" shows

> that the assignment of bilingual flight attendants by Jazz is only one of the elements which call for action on the part of the appellant. What are the other elements? By encompassing the obligations set out in Part IV of the OLA, the order concerns not only in-flight services, but services offered at the various sales and baggage check-in counters, call centres, etc. The scope of the order goes much further than what is necessary to remedy the violation of the Thibodeaus' language rights. [para. 76]

123 The Commissioner submits that the Federal Court of Appeal exceeded its proper appellate role by weighing the evidence *de novo* and thereby not giving appropriate appellate deference to the findings at first instance. However, in my respectful view, the order was properly set aside.

124 The first part of the order simply requires Air Canada to comply with the law. But those types of orders should only be made in exceptional circumstances which do not exist here. The appellants did not attempt to defend this part of the application judge's order and, for the reasons given by the Federal Court of Appeal on this point, my view is that the application judge erred in making it.

125 With respect to the second aspect of the order -- requiring Air Canada to put a monitoring system in place -- it too was correctly set aside. My view is that the order is too imprecise, risks ongoing litigation and court supervision in relation to whether it is being complied with, and is inappropriate particularly in light of the Commissioner's statutory powers and expertise in relation to monitoring compliance with the *OLA*.

Legal Principles

126 Structural orders play an important, but limited, role in the enforcement of rights through the courts: *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at para. 56. Orders of this nature are treated with special care because of two potential and related problems: first, insufficient clarity, which in turn may result in the second, namely the need for ongoing judicial supervision -- ongoing supervision being something that courts only exceptionally undertake.

127 With respect to clarity, we must bear in mind that the ultimate sanction for failure to abide by an order of this nature is a finding of contempt of court and consequent imposition of a fine or a period of incarceration. Orders must be sufficiently clear so that they give the parties bound by them fair guidance on what must be done to comply and to prevent a potentially endless round of further applications to determine whether the parties have complied. As the Court put it in *Pro Swing Inc. v. Elta Golf Inc.*, 2006 SCC 52, [2006] 2 S.C.R. 612, at para. 24:

> The terms of the order must be clear and specific. The party needs to know exactly what has to be done to comply with the order... . While the specificity requirement is linked to the claimant's ability to follow up non-performance with contempt of court proceedings, supervision by the courts often means relitigation and the expenditure of judicial resources.

128 Ongoing judicial supervision will be appropriate in some cases, as discussed in *Doucet-Boudreau*. However, absent compelling circumstances, the courts generally should not make orders that have the almost inevitable effect of creating ongoing litigation about whether the

order is being complied with. This is particularly so in this case given the statutory powers and expertise of the Commissioner to identify problems in relation to compliance with the *OLA* and to monitor whether appropriate progress is being made in implementing measures to correct them: ss. 49 to 75.

Application

129 Tested against these principles, my view is that the Federal Court erred in law by making the structural order in this case. I will focus on the monitoring provisions of the order as there was no serious effort on the appellants' part to defend the first part of the judge's order that simply directed Air Canada to obey the law.

130 On its face, the monitoring aspects of the order immediately raise a number of questions about its scope and limits. In order to comply with the order, what would constitute a "proper" monitoring system? Would periodic inspections be sufficient or does the monitoring system have to be capable of documenting each and every "potential" violation? How "quickly" does it have to identify "potential violations"? For that matter, what is a "potential" violation? These rather obvious questions arising from a review of the order, and to which neither the order nor the record provides any answers, point to its lack of precision. While the application judge appears to have intended to focus on the assignment of flight attendants capable of providing services in French to flights on which there is a significant demand for services in French, her order goes far beyond that, as the Federal Court of Appeal noted.

131 In addition to these difficulties, there is also the fact that the Commissioner has both the statutory powers and the institutional expertise to monitor compliance and ameliorative efforts. This will generally make ongoing judicial supervision in relation to this statutory scheme something that should be undertaken in only truly compelling circumstances that did not exist here.

132 I agree with the Federal Court of Appeal that the structural order should not have been made. The declaration, apology, and costs of the application constituted appropriate and just remedies in this case.

Disposition

133 I would dismiss the appeals. The respondent has not requested costs and I would order none.

The reasons of Abella and Wagner JJ. were delivered by

134 ABELLA J. (dissenting):-- International law is a work in progress. Courts in liberal democracies are increasingly grappling with the domestic effect of international human rights law. Most of these cases involve interpreting domestic rules in light of broader international human rights protection. This case presents the opposite scenario -- how to interpret an international treaty that may be in conflict with the broader protection of fundamental rights available domestically.

135 Air Canada breached its duty to provide services in French to Michel and Lynda Thibodeau on three flights between Canada and the United States. The Thibodeaus applied to the Federal Court for damages and for "structural" orders to redress Air Canada's allegedly systemic violations of its bilingualism duties. Air Canada acknowledged that it is subject to the *Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.), but relied on the limitations on carrier liability in the *Convention for the Unification of Certain Rules for International Carriage by Air*, signed in Montréal, as set out in

Schedule VI of the *Carriage by Air Act*, R.S.C. 1985, c. C-26 (the *Montreal Convention* or *Convention*) as a barrier to the Thibodeaus' claims for damages.

136 There is no dispute that Air Canada breached its obligations under s. 22 of the *Official Languages Act* by failing to provide services and announcements in French. The remaining issue is whether the *Montreal Convention* prevents the Thibodeaus from recovering damages from Air Canada for these breaches.

137 In my respectful view, the *Montreal Convention* neither contemplates nor excludes the type of damages at issue on these appeals. I would therefore allow the appeals.

Analysis

138 The general focus of these appeals is on the scope of the liability provisions in the *Montreal Convention.* The particular focus is on Article 29, which is found in Chapter III of the *Convention*, headed "Liability of the Carrier and Extent of Compensation for Damage". Article 29 states:

ARTICLE 29 -- BASIS OF CLAIMS

> *In the carriage of passengers, baggage and cargo*, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.

139 Interpreting this language takes us to Article 31 of the *Vienna Convention on the Law of Treaties*, Can. T.S. 1980 No. 37, which requires that treaties be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" (entered into force January 27, 1980).

140 The process of treaty interpretation is a process of discernment. The literal meaning of the words is rarely reliably able to yield a clear and unequivocal answer. The intention of state parties must therefore be discerned by using a good faith approach not only to the words at issue, but also to the context, history, object and purpose of the treaty as a whole. In my respectful view, this exercise leads to the conclusion that Article 29 of the *Montreal Convention* does not exclusively govern the universe of damages for which carriers are liable during international carriage by air.

141 The first words of Article 29 are words that restrict its scope by declaring that any action for damages "[*i*]*n the carriage of passengers, baggage and cargo*" must be brought subject to the conditions set out in the *Convention.* I accept that the words which immediately follow -- "however founded, whether under this Convention or in contract or in tort or otherwise" -- are, if read in isolation, broad in scope. But I do not see this as an independent, defining phrase, I see it as a clause dependent for its meaning on the preceding opening words. Thus, "action" refers only to an action for damages "[i]n the carriage of passengers, baggage and cargo".

142 It is, therefore, only an action for damages incurred "[i]n the carriage of passengers, baggage and cargo" that must be brought "subject to the conditions and such limits of liability as are set out" in the *Convention*, whether or not the action is brought in contract or tort, under the *Convention* or otherwise. No other actions for damages are included in the scope of Article 29.

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143 What then does an action for damages "[i]n the carriage of passengers, baggage and cargo" mean? For interpretive assistance, we look to other provisions of the *Convention*, and, in particular, to Chapter III in which we find Article 29.

144 Chapter III sets out the limited liability of carriers in the carriage of passengers, baggage and cargo. Article 17(1) establishes the conditions of liability for "Death and Injury of Passengers". Articles 17(2), 17(3) and 17(4) establish the conditions of liability for "Damage to Baggage". Article 18 establishes the conditions of liability for "Damage to Cargo". Article 19 establishes the conditions of liability "for damage occasioned by delay in the carriage by air of passengers, baggage or cargo". Subsequent provisions establish the limits on recovery for these types of damage. Article 21 establishes the rules of "Compensation in Case of Death or Injury of Passengers" and Article 22 outlines the "Limits of Liability in Relation to Delay, Baggage and Cargo".

145 Article 19 actually tracks the opening words of Article 29 ("[i]n the carriage of passengers, baggage and cargo") and the other provisions refer to the same subject areas: death or bodily injury of a passenger, destruction or loss of, or damage to, baggage, destruction or loss of, or damage to, cargo, and delay in the carriage of persons, baggage or cargo. The rest of Article 29 ("any action for damages, however founded ... can only be brought subject to the conditions and such limits of liability as are set out in this Convention") merely confirms that the Treaty exclusively governs actions for damages in respect of these subjects.

146 Significant support for this interpretation can be found in the relationship between Article 29 of the *Montreal Convention* and its predecessor, Article 24 of the *Convention for the Unification of Certain Rules Relating to International Carriage by Air*, signed at Warsaw, October 12, 1929, as amended at The Hague, 1955, as set out at Schedule I of the *Carriage by Air Act* (the *Warsaw Convention*). Article 24 states:

ARTICLE 24

> (1) *In the cases covered by Articles 18 and 19* any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention.
>
> (2) *In the cases covered by Article 17* the provisions of the preceding paragraph also apply, without prejudice to the questions as to who are persons who have the right to bring suit and what are their respective rights.

147 Article 24 of the *Warsaw Convention* clearly limits the scope of the words "any action for damages, however founded" to "the cases covered by" Articles 17, 18 and 19. Those Articles had set out the conditions of liability for personal injury to passengers, for damage to baggage or cargo and for damage caused by delay. The language used in these provisions of the *Warsaw Convention* is almost identical to the language found in Articles 17, 18 and 19 of the *Montreal Convention*.

148 The only real difference, in fact, between the language in Article 24 of the *Warsaw Convention* and Article 29 of the *Montreal Convention* is that the words in Article 24 clarifying that the actions for damages relate to the cases covered by Articles 17, 18 and 19, are not found in Article 29. I do not see this as particularly meaningful for two reasons.

149 First, the U.S. Supreme Court examined this variation in language in *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155 (1999). Writing for eight of the members of the court, Ginsburg J. concluded that a shift from the words "[i]n the cases covered by" to the words "[i]n the carriage of passengers and baggage" does not change, but "merely clarifies" the scope of exclusivity of the provision (p. 175).

150 Second, seeing this shift in language as reflecting an intention to expand protection for air carriers beyond the actions covered by Articles 17, 18 and 19 contradicts the historic reality that the *Montreal Convention* was the culmination of a decades-long effort to improve consumer protection, not restrict it.

151 The predecessor *Warsaw Convention* came into being in 1929 to assist the fledgling airline industry take flight. At that time, aviation technology was in its initial stages. Accidents were common, and many pilots and passengers were injured or died as a result. The relative frequency of accidents exposed carriers to unpredictable and significant losses. This made it difficult to secure investment capital or insurance protection (Paul Stephen Dempsey, *Aviation Liability Law* (2nd ed. 2013), at pp. 309-10).

152 Airlines responded by requiring passengers to sign waivers relieving carriers of any and all liability in the event of an injury. When accidents happened, those passengers were left with no remedy for their injuries or losses.

153 The *Warsaw Convention* attempted a protective reconciliation for both airlines and passengers. Airlines would benefit from the introduction of a uniform scheme of limited liability to protect against the financial risks and uncertainty posed by accidents, passengers would benefit from access to predetermined amounts of limited compensation for death or injury -- about US$8,300 per passenger -- and a prohibition on airlines requiring passengers to waive all liability (Paul Stephen Dempsey and Michael Milde, *International Air Carrier Liability: The Montreal Convention of 1999* (2005), at pp. 15-16 and 50-51; John E. J. Clare, "Evaluation of Proposals to Increase the 'Warsaw Convention' Limit of Passenger Liability" (1949), 16 *J. Air L. & Com.* 53). The *Warsaw Convention* thus sought "to accommodate or balance the interests of passengers seeking recovery for personal injuries, and the interests of air carriers seeking to limit potential liability" (*Tseng*, at p. 170).

154 As safety in the industry improved, governments turned their attention from protecting the financial viability of airlines to introducing a more passenger-friendly legal regime. The focus tilted towards increasing the exceptionally low limits on carrier liability established in the *Warsaw Convention* (Dempsey, at pp. 315-16).

155 States subsequently signed on to different international efforts to expand carrier liability. The *Hague Protocol* of 1955, for example, doubled liability limits for death and personal injury of passengers to about US$16,600 (*Protocol to amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air*, signed at The Hague, September 28, 1955, 478 U.N.T.S. 371, as set out in Schedule III of the *Carriage by Air Act*). The *Guatemala City Protocol* of 1971 introduced an absolute limit on carrier liability of about US$100,000, and expanded the circumstances under which carriers could be found liable under the *Warsaw Convention* (*Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw on 12 October 1929 as Amended by the Protocol Done at The Hague on 28 September 1955*, signed at Guatemala City, March 8, 1971 (not in force)). The *Guadalajara Con-*

vention of 1961 extended the *Warsaw Convention*'s liability regime to cover both a contracting carrier *and* the carrier that actually provided service (*Convention, Supplementary to the Warsaw Convention, for the Unification of Certain Rules Relating to International Carriage by Air Performed by a Person Other than the Contracting Carrier*, signed at Guadalajara, September 18, 1961, 500 U.N.T.S. 31, as set out in Schedule V of the *Carriage by Air Act*). And *Montreal Protocol No. 4* of 1999 increased cargo liability limits (*Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air*, 25 September 1975; Dempsey and Milde, at pp. 17-41).

156 Notwithstanding the increasing recognition that compensation for passengers was too low, a single international instrument increasing ceilings on carrier liability proved elusive. Out of concern that this fractured response could lead to the demise of a unified system of international air law, the industry took action. The *Montreal Agreement* of 1966, a private arrangement between airlines, increased carrier liability under the *Warsaw Convention* for personal injury for carriage to, from or through the U.S. up to US$75,000 (*Agreement Relating to Liability Limitations of the Warsaw Convention and the Hague Protocol*, May 13, 1966). In 1974, some European and Japanese carriers agreed to increase passenger liability under the *Warsaw Convention* through their tariffs up to US$58,000, and later to US$100,000 (the Malta Agreement) (see Dempsey and Milde, at pp. 29-31).

157 In 1992, Japanese carriers effectively agreed to a liability regime for passenger injury of strict liability up to an initial limit greater than that established in the *Warsaw Convention*, and "a fault-based reversed burden of proof" that would apply thereafter without any limit (the Japanese Initiative) (Dempsey and Milde, at p. 32). In 1995, the International Air Transport Association (IATA), the trade association for the world's airlines, endorsed an intercarrier agreement revising the "grossly inadequate" liability limits installed by the *Warsaw Convention* and adopting a two-tier fault system of strict and then presumed liability (*IATA Intercarrier Agreement on Passenger Liability*, preamble; Dempsey and Milde, at p. 417). The signatory carriers to the *IATA Intercarrier Agreement* resolved "[t]o take action to waive the limitation of liability on recoverable compensatory damages in Article 22 paragraph 1 of the Warsaw Convention as to claims for death, wounding, or other bodily injury of a passenger ... so that recoverable compensatory damages may be determined and awarded by reference to the law of the domicile of the passenger" (Article 1; see Dempsey, at pp. 332-34; Dempsey and Milde, at pp. 32-35 and 417).

158 Having been "upstaged" by industry initiatives to address the low ceilings on carrier liability, States began to work towards updating the *Warsaw Convention* (Dempsey, at p. 336; Dempsey and Milde, at pp. 36-38). Through the International Civil Aviation Organization, the *Montreal Convention* came into being in 1999, adopting the two-tier liability schemes for passenger injury or death outlined in the Japanese Initiative of 1992 and the *IATA Intercarrier Agreement* of 1995, as well as an initial limit on recovery of around US$150,000 (Dempsey and Milde, at pp. 40-41).

159 The *Montreal Convention* thereby sought to replace the patchwork system that had attempted to expand the limits on liability set by the *Warsaw Convention* in 1929. The drafters of the *Montreal Convention* continued to maintain a uniform liability scheme, as had the *Warsaw Convention*, but while the primary goal of the *Warsaw Convention* had been to limit the liability of carriers in order to foster the growth of the nascent commercial aviation industry, the state parties to the *Montreal Convention* were more focused on the importance of "ensuring protection of the interests of consumers in international carriage by air and the need for equitable compensation based on the

principle of restitution" (*Montreal Convention*, preamble; *Ehrlich v. American Airlines, Inc.*, 360 F.3d 366 (2d Cir. 2004), at p. 371 (fn. 4)).

160 As this history shows, interpreting the change in language from Article 24 of the *Warsaw Convention* to Article 29 of the *Montreal Convention* in a way that narrows protection for consumers and expands it for carriers, is both counter-intuitive and historically anomalous. At no time was there ever any suggestion that the new *Convention* was designed to *reduce* the ability of passengers to sue carriers.

161 There is, in fact, no evidence that state parties intended to replace the subject-specific scope of exclusivity established in Article 24 of the *Warsaw Convention* with a *universal* rule of exclusivity in Article 29 of the *Montreal Convention*. What little evidence there is of the preparatory work preceding the adoption of the *Montreal Convention* suggests the opposite. As Dempsey and Milde point out, "[a] study of the history of drafting in the convoluted procedure rather indicates that there was no creative courage to innovate with new concepts" (p. 42).

162 I also find the absence of any reference in the Parliamentary record to the changes in language between Article 24 of the *Warsaw Convention* and Article 29 of the *Montreal Convention* revealing. The sponsors of the *Convention*'s implementing bill never mentioned Article 24 or Article 29 in the House of Commons or the Senate (speech of André Harvey (Parliamentary Secretary to the Minister of Transport), opening second reading in Parliament of Bill S-33, *An Act to amend the Carriage by Air Act*, *House of Commons Debates*, vol. 137, 1st Sess., 37th Parl., November 20, 2001, at p. 7346; see also speech of the Hon. Ross Fitzpatrick, moving the second reading in the Senate of Bill S-33, *Debates of the Senate*, vol. 139, 1st Sess., 37th Parl., October 2, 2001, at p. 1346). Nor did any of the witnesses who gave evidence before the House of Commons and Senate committees that reviewed the implementation of the *Convention* into federal law (transcript of statement of Mr. Vayzel Lee (Policy Advisor, Domestic Air Policy, Department of Transport) to the House of Commons Standing Committee on Transport and Government Operations, Meeting No. 40 -- Evidence, November 29, 2001 (online); *Proceedings of the Standing Senate Committee on Transport and Communications*, Issue No. 15 -- Evidence, October 31, 2001 (online)).

163 Given the suggestion that the wording in Article 29 of the *Montreal Convention* changes the focus from Article 24 of the *Warsaw Convention* by expanding protection for air carriers to *all* actions for damages, this silence is, to say the least, surprising. Dramatic changes in law tend to attract dramatic reactions. This purported change attracted none. The most logical explanation for the silence, therefore, is that there was no change in law. In fact, it is hard to imagine such a drastic domestic intrusion without either express language or Parliamentary disclosure. The silence about such consequences suggests that no such consequence was either contemplated or intended.

164 Finally, it is worth noting that Article 3(4) of the *Montreal Convention* also confirms a narrow interpretation of the scope of claims governed by the Treaty. It states:

> *ARTICLE 3 - PASSENGERS AND BAGGAGE*
>
> 4. The passenger shall be given written notice to the effect that where this Convention is applicable it governs and may limit the liability of carriers in respect of death or injury and for destruction or loss of, or damage to, baggage, and for delay.

This sets out what information passengers are entitled to know about the range of liability limitations covered by the *Convention*, namely, "death or injury and for destruction or loss of, or damage to, baggage, and for delay". Article 29 must, it seems to me, be read harmoniously with this provision. Concluding instead that Article 29 expands this list to include *all* claims for damages arising in the course of international carriage by air, suggests that the intention of the *Convention* was to give passengers notice only about some aspects of a carrier's limited liability, without warning them that all other actions are simply barred. This, it seems to me, contradicts the consumer protection purpose of the *Convention* by inferring that the state parties' intention was to mislead passengers by providing notice to them about only some, but not all, of the limits on a carrier's liability.

165 All Article 29 does, therefore, is direct that the *Montreal Convention* exclusively governs only those actions brought for damages incurred "[i]n the carriage of passengers, baggage and cargo", which in turn means those actions covered by Articles 17, 18 and 19.

166 The Thibodeaus, on the other hand, seek damages for violations of a statute that reifies constitutionally protected rights. This Court has held that those laws "which seek to protect individuals from discrimination acquire a quasi-constitutional status, which gives them preeminence over ordinary legislation" (*Dickason v. University of Alberta*, [1992] 2 S.C.R. 1103, at p. 1154, *per* L'Heureux-Dubé J., dissenting; *Winnipeg School Division No. 1 v. Craton*, [1985] 2 S.C.R. 150, at p. 156). As stated in *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] 2 S.C.R. 773, at para. 23, quoting *Canada (Attorney General) v. Viola*, [1991] 1 F.C. 373 (C.A.), at p. 386, the *Official Languages Act* has a special status because "[i]t reflects both the Constitution of the country and the social and political compromise out of which it arose." The *Official Languages Act* is therefore synergistically aligned with the language protections in the *Canadian Charter of Rights and Freedoms*.

167 Why does this matter? Because it helps broker the interpretive outcome. In my view, Article 29 of the *Montreal Convention* should be interpreted in a way that is respectful of the protections given to fundamental rights, including language rights, in domestic legislation.

168 And this goes to the object and purpose of the *Convention*. There is no evidence in the Parliamentary record or the legislative history of the *Convention* to suggest that Canada, as a state party, intended to extinguish domestic language rights protection by ratifying or implementing the *Montreal Convention*. Given the significance of the rights protected by the *Official Languages Act* and their constitutional and historic antecedents, the *Montreal Convention* ought to be interpreted in a way that respects Canada's express commitment to these fundamental rights, rather than as reflecting an intention to subvert them.

169 I am aware of the jurisprudential division about the scope of the Treaty. Some courts, as in *Walker v. Eastern Air Lines, Inc.*, 785 F.Supp. 1168 (S.D.N.Y. 1992), and *Beaudet v. British Airways, PLC*, 853 F.Supp. 1062 (N.D. Ill. 1994), have assumed limits on the range of actions covered. Others, as in *Sidhu v. British Airways Plc.*, [1997] A.C. 430, *Tseng, King v. American Airlines, Inc.*, 284 F.3d 352 (2nd Cir. 2002), *In re Deep Vein Thrombosis and Air Travel Group Litigation*, [2005] UKHL 72, [2006] 1 A.C. 495, and *Stott v. Thomas Cook Tour Operators Ltd.*, [2014] UKSC 15, [2014] 2 W.L.R. 521, have attributed it significantly wider coverage. But it seems to me that it would be an aberrant rule of treaty interpretation, and one which is hard to see as being consistent with the "good faith" required by Article 31 of the *Vienna Convention*, to conclude that a treaty which is silent as to its effect on domestic legislation protecting fundamental, let alone constitutional rights, can be construed as silencing those rights.

170 Finally, although it is not determinative, we cannot ignore the fact that we are dealing with a commercial treaty. This Court has often said that domestic law should be generously interpreted in alignment with international law and its human rights values. It has never said that international law should be interpreted in a way that diminishes human rights protected by domestic law.

171 Just as Parliament is not presumed to legislate in breach of a treaty, it should not be presumed to implement treaties that extinguish fundamental rights protected by domestic legislation.

172 The meaning of Article 29, considered in context and in light of the object and purpose of the *Montreal Convention*, therefore, points to a limited scope of exclusivity, and should be interpreted as directing that the *Montreal Convention* governs only those actions brought for damages incurred "[i]n the carriage of passengers, baggage and cargo", namely, actions covered by Articles 17, 18 and 19.

173 The remaining question is whether the Thibodeaus' action for damages falls within those Articles.

174 Articles 17(2), (3) and (4), 18 and 19 contemplate damages sustained in respect of baggage, cargo and delay. The only substantive provision of the *Convention*, therefore, that might relate to the Thibodeaus' action is Article 17(1), which states:

> *ARTICLE 17 -- DEATH AND INJURY OF PASSENGERS -- DAMAGE TO BAGGAGE*
>
> 1. The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

175 The majority concludes that the Thibodeaus' claim for damages relates to the circumstances contemplated by Article 17(1) because they suffered the breach of their language rights "aboard the aircraft" (para. 86). The language of Article 17(1) makes it clear that the provision does not apply to all events that take place on board an aircraft or in the course of the operations of embarking or disembarking. Rather, Article 17(1) imposes the requirements that (1) there must have been an accident, (2) which caused (3) death or bodily injury, (4) while the passenger was on board the aircraft or was in the course of embarking or disembarking (Dempsey and Milde, at p. 124; *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530 (1991), at pp. 535-36).

176 There is no complaint of an accident. That, in my view, is dispositive since Article 17(1) talks of "death or bodily injury" caused by an accident. That makes the rest of the provision redundant in this case. The Thibodeaus have not suffered any bodily injury. The fact that the breaches of the Thibodeaus' language rights occurred "on board the aircraft" is irrelevant since those circumstances are only pertinent if there was an accident.

177 Consequently, the *Montreal Convention* does not bar a damage award for breach of language rights during international carriage by air.

178 Accordingly, while I am not persuaded that a structural order was justified in the circumstances, I would allow the appeals with respect to the damages claims and restore the damages awarded by the Application Judge.

410

* * * * *

APPENDIX

***Convention for the Unification of Certain Rules Relating to International Carriage by Air*, signed at Warsaw, October 12, 1929, as set out at Schedule I of the *Carriage by Air Act*, R.S.C. 1985, c. C-26**

[Note: The paragraphs of the Convention shown in italics were deleted and replaced (except in the case of paragraph (2) of Article 20) by the Protocol set out in Schedule III, *infra*.]

ARTICLE 17

The carrier is liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

ARTICLE 18

(1) The carrier is liable for damage sustained in the event of the destruction or loss of, or of damage to, any registered baggage or any cargo, if the occurrence which caused the damage so sustained took place during the carriage by air.

(2) The carriage by air within the meaning of the preceding paragraph comprises the period during which the baggage or cargo is in charge of the carrier, whether in an aerodrome or on board an aircraft, or, in the case of a landing outside an aerodrome, in any place whatsoever.

(3) The period of the carriage by air does not extend to any carriage by land, by sea or by river performed outside an aerodrome. If, however, such a carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transhipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air.

ARTICLE 19

The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo.

ARTICLE 20

(1) The carrier is not liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

(2) *In the carriage of cargo and baggage the carrier is not liable if he proves that the damage was occasioned by negligent pilotage or negligence in the handling of the aircraft or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage.*

ARTICLE 22

(1) *In the carriage of passengers the liability of the carrier for each passenger is limited to the sum of 125,000 francs. Where, in accordance with the law of the Court seized of the case, damages may be awarded in the form of periodical payments, the equivalent capital value of the said*

payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

(2) *In the carriage of registered baggage and of cargo, the liability of the carrier is limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.*

(3) *As regards objects of which the passenger takes charge himself the liability of the carrier is limited to 5,000 francs per passenger.*

(4) *The sums mentioned above shall be deemed to refer to the French franc consisting of 65 1/2 milligrams gold of millesimal fineness 900. These sums may be converted into any national currency in round figures.*

ARTICLE 23

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.

[Note: This provision was renumbered as paragraph (1) and another provision added as paragraph (2) by Article XII of the Protocol set out in Schedule III, *infra*.]

ARTICLE 24

(1) In the cases covered by Articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention.

(2) In the cases covered by Article 17 the provisions of the preceding paragraph also apply, without prejudice to the questions as to who are persons who have the right to bring suit and what are their respective rights.

ARTICLE 25

(1) *The carrier shall not be entitled to avail himself of the provisions of this Convention which exclude or limit his liability, if the damage is caused by his wilful misconduct or by such default on his part as, in accordance with the law of the Court seized of the case, is considered to be equivalent to wilful misconduct.*

(2) *Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused as aforesaid by any agent of the carrier acting within the scope of his employment.*

[Note: A new article numbered as Article 25A was added by Article XIV of the Protocol set out in Schedule III, *infra*.]

***Convention for the Unification of Certain Rules for International Carriage by Air*, signed at Montréal, as set out at Schedule VI of the *Carriage by Air Act*, R.S.C. 1985, c. C-26**

ARTICLE 17 -- DEATH AND INJURY TO PASSENGERS --

DAMAGE TO BAGGAGE

1. The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

2. The carrier is liable for damage sustained in case of destruction or loss of, or of damage to, checked baggage upon condition only that the event which caused the destruction, loss or damage took place on board the aircraft or during any period within which the checked baggage was in the charge of the carrier. However, the carrier is not liable if and to the extent that the damage resulted from the inherent defect, quality or vice of the baggage. In the case of unchecked baggage, including personal items, the carrier is liable if the damage resulted from its fault or that of its servants or agents.

3. If the carrier admits the loss of the checked baggage, or if the checked baggage has not arrived at the expiration of twenty-one days after the date on which it ought to have arrived, the passenger is entitled to enforce against the carrier the rights which flow from the contract of carriage.

4. Unless otherwise specified, in this Convention the term "baggage" means both checked baggage and unchecked baggage.

ARTICLE 18 -- DAMAGE TO CARGO

1. The carrier is liable for damage sustained in the event of the destruction or loss of, or damage to, cargo upon condition only that the event which caused the damage so sustained took place during the carriage by air.

2. However, the carrier is not liable if and to the extent it proves that the destruction, or loss of, or damage to, the cargo resulted from one or more of the following:

(*a*) inherent defect, quality or vice of that cargo;

(*b*) defective packing of that cargo performed by a person other than the carrier or its servants or agents;

(*c*) an act of war or an armed conflict;

(*d*) an act of public authority carried out in connection with the entry, exit or transit of the cargo.

3. The carriage by air within the meaning of paragraph 1 of this Article comprises the period during which the cargo is in the charge of the carrier.

4. The period of the carriage by air does not extend to any carriage by land, by sea or by inland waterway performed outside an airport. If, however, such carriage takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transhipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air. If a carrier, without the consent of the consignor, substitutes carriage by another mode of transport for the whole or part of a carriage intended by the agreement between the parties to be carriage by air, such carriage by another mode of transport is deemed to be within the period of carriage by air.

413

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 21 -- COMPENSATION IN CASE OF DEATH OR INJURY OF PASSENGERS

1. For damages arising under paragraph 1 of Article 17 not exceeding 100 000 Special Drawing Rights for each passenger, the carrier shall not be able to exclude or limit its liability.

2. The carrier shall not be liable for damages arising under paragraph 1 of Article 17 to the extent that they exceed for each passenger 100 000 Special Drawing Rights if the carrier proves that:

(*a*) such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; or

(*b*) such damage was solely due to the negligence or other wrongful act or omission of a third party.

ARTICLE 22 -- LIMITS OF LIABILITY IN RELATION TO DELAY, BAGGAGE AND CARGO

1. In the case of damage caused by delay as specified in Article 19 in the carriage of persons, the liability of the carrier for each passenger is limited to 4 150 Special Drawing Rights.

2. In the carriage of baggage, the liability of the carrier in the case of destruction, loss, damage or delay is limited to 1 000 Special Drawing Rights for each passenger unless the passenger has made, at the time when the checked baggage was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless it proves that the sum is greater than the passenger's actual interest in delivery at destination.

3. In the carriage of cargo, the liability of the carrier in the case of destruction, loss, damage or delay is limited to a sum of 17 Special Drawing Rights per kilogramme, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless it proves that the sum is greater than the consignor's actual interest in delivery at destination.

4. In the case of destruction, loss, damage or delay of part of the cargo, or of any object contained therein, the weight to be taken into consideration in determining the amount to which the carrier's liability is limited shall be only the total weight of the package or packages concerned. Nevertheless, when the destruction, loss, damage or delay of a part of the cargo, or of an object contained therein, affects the value of other packages covered by the same air waybill, or the same receipt or, if they were not issued, by the same record preserved by the other means referred to in paragraph 2 of Article 4, the total weight of such package or packages shall also be taken into consideration in determining the limit of liability.

5. The foregoing provisions of paragraphs 1 and 2 of this Article shall not apply if it is proved that the damage resulted from an act or omission of the carrier, its servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of such act or omission of a servant or agent, it is also proved that such servant or agent was acting within the scope of its employment.

6. The limits prescribed in Article 21 and in this Article shall not prevent the court from awarding, in accordance with its own law, in addition, the whole or part of the court costs and of the other expenses of the litigation incurred by the plaintiff, including interest. The foregoing provision shall not apply if the amount of the damages awarded, excluding court costs and other expenses of the litigation, does not exceed the sum which the carrier has offered in writing to the plaintiff within a period of six months from the date of the occurrence causing the damage, or before the commencement of the action, if that is later.

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.

ARTICLE 29 -- BASIS OF CLAIMS

In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.

ARTICLE 49 -- MANDATORY APPLICATION

Any clause contained in the contract of carriage and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this Convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void.

***Carriage by Air Act*, R.S.C. 1985, c. C-26**

2. (1) Subject to this section, the provisions of the Convention set out in Schedule I and of the Convention set out in Schedule V, in so far as they relate to the rights and liabilities of carriers, carriers' servants and agents, passengers, consignors, consignees and other persons, have the force of law in Canada in relation to any carriage by air to which the provisions apply, irrespective of the nationality of the aircraft performing that carriage.

(2) Subject to this section, the provisions of the Convention set out in Schedule I, as amended by the Protocol set out in Schedule III or by the Protocols set out in Schedules III and IV, in so far as they relate to the rights and liabilities of carriers, carriers' servants and agents, passengers, consignors, consignees and other persons, have the force of law in Canada in relation to any carriage by

air to which the provisions apply, irrespective of the nationality of the aircraft performing that carriage.

(2.1) Subject to this section, the provisions of the Convention set out in Schedule VI, in so far as they relate to the rights and liabilities of carriers, carriers' servants and agents, passengers, consignors, consignees and other persons, have the force of law in Canada in relation to any carriage by air to which the provisions apply, irrespective of the nationality of the aircraft performing that carriage.

(3) The Governor in Council may from time to time, by proclamation published in the Canada Gazette, certify who are the parties to any convention or protocol set out in a schedule to this Act, in respect of what territories they are respectively parties, to what extent they have availed themselves of the Additional Protocol to the Convention set out in Schedule I, which of those parties have made a declaration under the Protocol set out in Schedule III or IV and which of those parties have made a declaration under the Convention set out in Schedule VI.

(4) Any reference in Schedule I to the territory of any party shall be construed as a reference to the territories subject to its sovereignty, suzerainty, mandate or authority, in respect of which it is a party.

(5) Any liability imposed by Article 17 of Schedule I or Article 17 of Schedule VI on a carrier in respect of the death of a passenger shall be in substitution for any liability of the carrier in respect of the death of that passenger under any law in force in Canada, and the provisions set out in Schedule II shall have effect with respect to the persons by whom and for whose benefit the liability so imposed is enforceable and with respect to the manner in which it may be enforced.

(6) Any sum in francs mentioned in Article 22 of Schedule I shall, for the purposes of any action against a carrier, be converted into Canadian dollars at the rate of exchange prevailing on the date on which the amount of any damage to be paid by the carrier is ascertained by a court.

(7) For the purposes of subsection (6), the Canadian dollar equivalents of francs or Special Drawing Rights, as defined in Article 22 of the Convention set out in Schedule I, are determined by

> (*a*) converting francs into Special Drawing Rights at the rate of one Special Drawing Right for 15.075 francs; and
>
> (*b*) converting Special Drawing Rights into Canadian dollars at the rate established by the International Monetary Fund.

***Air Canada Public Participation Act*, R.S.C. 1985, c. 35 (4th Supp.)**

10. (1) The *Official Languages Act* applies to the Corporation [Air Canada].

(2) Subject to subsection (5), if air services, including incidental services, are provided or made available by a subsidiary of the Corporation, the Corporation has the duty to ensure that any of the subsidiary's customers can communicate with the subsidiary in respect of those services, and obtain those services from the subsidiary, in either official language in any case where those services, if provided by the Corporation, would be required under Part IV of the *Official Languages Act* to be provided in either official language.

...

***Official Languages Act*, R.S.C. 1985, c. 31 (4th Supp.)**

2. The purpose of this Act is to

(*a*) ensure respect for English and French as the official languages of Canada and ensure equality of status and equal rights and privileges as to their use in all federal institutions, in particular with respect to their use in parliamentary proceedings, in legislative and other instruments, in the administration of justice, in communicating with or providing services to the public and in carrying out the work of federal institutions;

(*b*) support the development of English and French linguistic minority communities and generally advance the equality of status and use of the English and French languages within Canadian society; and

(*c*) set out the powers, duties and functions of federal institutions with respect to the official languages of Canada.

22. Every federal institution has the duty to ensure that any member of the public can communicate with and obtain available services from its head or central office in either official language, and has the same duty with respect to any of its other offices or facilities

(*a*) within the National Capital Region; or

(*b*) in Canada or elsewhere, where there is significant demand for communications with and services from that office or facility in that language.

76. In this Part, "Court" means the Federal Court.

77. (1) Any person who has made a complaint to the Commissioner in respect of a right or duty under sections 4 to 7, sections 10 to 13 or Part IV, V or VII, or in respect of section 91, may apply to the Court for a remedy under this Part.

...

(4) Where, in proceedings under subsection (1), the Court concludes that a federal institution has failed to comply with this Act, the Court may grant such remedy as it considers appropriate and just in the circumstances.

...

78. (1) The Commissioner may

(*a*) within the time limits prescribed by paragraph 77(2)(*a*) or (*b*), apply to the Court for a remedy under this Part in relation to a complaint investigated by the Commissioner if the Commissioner has the consent of the complainant;

(*b*) appear before the Court on behalf of any person who has applied under section 77 for a remedy under this Part; or

(*c*) with leave of the Court, appear as a party to any proceedings under this Part.

(2) Where the Commissioner makes an application under paragraph (1)(*a*), the complainant may appear as a party to any proceedings resulting from the application.

(3) Nothing in this section abrogates or derogates from the capacity of the Commissioner to seek leave to intervene in any adjudicative proceedings relating to the status or use of English or French.

Canadian Charter of Rights and Freedoms

16. (1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.

(2) English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick.

(3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

...

***Vienna Convention on the Law of Treaties*, Can. T.S. 1980 No. 37**

Article 31. GENERAL RULE OF INTERPRETATION

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(*a*) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(*b*) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account together with the context:

(*a*) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(*b*) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(*c*) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

Appeals dismissed, ABELLA *and* WAGNER JJ. *dissenting.*

Solicitors:

Solicitors for the appellants Michel and Lynda Thibodeau: CazaSaikaley, Ottawa.

Solicitor for the appellant the Commissioner of Official Languages of Canada: Office of the Commissioner of Official Languages, Ottawa.

Solicitors for the respondent: Air Canada, Dorval; Norton Rose Fulbright Canada, Montréal.

TAB 5

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Case Name:

Spruce Hollow Heavy Haul Ltd. v. Madill

Between
Spruce Hollow Heavy Haul Ltd., Applicant, and
Shannon Knezacky Madill, Respondent

[2014] F.C.J. No. 612

2014 FC 548

Docket: T-1740-13

Federal Court
Vancouver, British Columbia

Mosley J.

Heard: June 2, 2014.
Judgment: June 5, 2014.

(52 paras.)

Employment law -- Employment standards legislation -- Offences and enforcement -- Hearings -- Procedure -- Application by employer for judicial review of arbitrator's refusal to exclude individual from adjudication proceedings dismissed -- At hearing of complaint of wrongful termination, employee wished to have friend, who spouse of owner of previous employer, present to provide support -- Employer and employee's former husband, who was employer's representative, objected arguing evidence which it sought to rely on for employee's termination could be used against it in action commenced by previous employer against them -- Employee's friend was not a party to or involved in litigation between her husband's company and employer and it was unclear how her presence would affect that litigation.

Application by the employer for judicial review of the arbitrator's refusal to exclude an individual, Howard, from the adjudication proceedings. Both the employee and her former husband worked for the employer. Following her separation from her former husband, the employee was terminated. Following her termination, the employee complained to Human Resources and Skills Development Canada. The employer insisted that the employee's former husband act as its representative. At the hearing of the complaint, the employee was accompanied by Howard, who was the wife of the owner of Super H, a former employer of both the employee and her former husband. The employee,

who was unrepresented, wished to have Howard, who was her friend, present to provide support. The employer sought to have Howard excluded from the hearing on the basis that evidence which it sought to rely on to justify its dismissal of the employee could be used against it and the employee's former husband in an action commenced by Super H against them. The adjudicator denied the employer's request to exclude Howard on the basis that it had not shown good reason to exclude her. The employer then withdrew from the hearings. The employer sought judicial review of the arbitrator's decision on the basis that he violated the principle of audi alteram partem and acted beyond his jurisdiction or wrongly refused to exercise his jurisdiction by refusing to exclude Howard from the hearing. It further argued that the denial of fair notice of Howard's presence and the arbitrator's refusal to grant an adjournment to make additional representations on Howard's presence constituted a want or excess of jurisdiction.

HELD: Application dismissed. Howard was not a party to the litigation between Super H and the employer and had no direct involvement in those proceedings and it was unclear how her presence would affect that litigation. Furthermore, it was unclear what information would have emerged that could have assisted Super H in its litigation and there was nothing that prevented the employee from telling Howard about the content of the proceedings. The content of the duty of fairness to the employer was met by giving it an opportunity to be heard and to present their argument why exclusion of Howard was necessary and why an adjournment should be granted.

Statutes, Regulations and Rules Cited:

Canada Labour Code, RSC 1985, c L-2, s. 16(a), s. 16(b), s. 16(c), s. 240, s. 241(3), s. 242, s. 242(2), s. 242(2)(c), s. 242(3), s. 242(4)

Counsel:

Trevor Hande, for the Applicant.

Shannon Knezacky Madill, for the Respondent (on her own Behalf).

REASONS FOR JUDGMENT AND JUDGMENT

1 MOSLEY J.:-- This is an application for judicial review of a decision made by an Adjudicator appointed under s 242 of the *Canada Labour Code*, RSC 1985, c L-2 [Code], refusing a motion by the applicant to exclude Jean Howard from the adjudication proceedings.

2 The applicant, Spruce Hollow Heavy Haul Ltd (Spruce Hollow), seeks an order:

a) setting aside the Adjudicator's September 24, 2013 decision and referring the matter of Spruce Hollow's liability for unjust dismissal to another adjudicator appointed by the Minister;

b) excluding Jean Howard and any other representative, agent, director, officer or employee of Super H Holdings Ltd (Super H), or any of its affiliates from any and future hearings in this matter; and

c) a request for costs [withdrawn at the hearing].

3 The respondent seeks an order dismissing the application, directing that the hearing for remedies before the Adjudicator be scheduled without delay, and any costs the Court deems appropriate and just.

I. BACKGROUND

4 Spruce Hollow is a freight hauling company that trucks goods across Canada and the United States. It is incorporated in the province of British Columbia (BC) and operates out of an office in Abbotsford, BC.

5 Shannon Knezacky (formerly Shannon Madill) is a former employee of Spruce Hollow. She affirms that she began working at Spruce Hollow in December 2005 where she was the lead dispatcher. According to Ms Knezacky, she became a Shareholder and Director of the company in 2007. Prior to working at Spruce Hollow, she worked for Peter Howard, Owner and President of Super H from April 2001 to November 2005.

6 According to a Statement of Defence and Counterclaim, filed by Super H in an action in the Supreme Court of British Columbia between Spruce Hollow and Super H, included in the applicant's Application Record, Ms Knezacky and Mr Ronald Madill were both employees of Super H and were also both terminated by Super H on November 30, 2005. Super H's Statement of Defence and Counterclaim alleges, amongst other things, that Ms Knezacky was terminated for cause (wrongfully converting the property of Super H, in particular the ownership of the company, for personal use; taking steps to access bank accounts and attempting to be listed as a signing authority; wrongfully redirecting receivables).

7 The applicant asserts that Ms Knezacky was an employee of both Spruce Hollow and Super H Holdings Ltd, handling the bookkeeping and accounts for both companies out of the same office. Ms Knezacky deposes that she was never an employee of both companies at the same time. As of the date of the making of her affidavit in this matter she was again employed by Super H, having resumed working there in June 2013.

8 Ronald Madill is the General Manager of Spruce Hollow and Ms Knezacky's former husband. They were separated on August 11, 201 l,and are involved in acrimonious divorce proceedings. Ms Knezacky alleges that Mr Madill was abusive and that she left him with the assistance and protection of the Abbotsford Police. Ms Knezacky continued to work for a short time at Spruce Hollow after the separation. She says that Mr Madill made her continued employment there impossible. Ms Knezacky's last day of work was August 26, 2011. She believes the separation and divorce proceedings are the reason why she was terminated by Spruce Hollow by letter dated August 31, 2011. The letter did not provide any reasons for the termination.

9 On or around September 14 or 21, 2011, Ms Knezacky filed a written complaint with Human Resources and Skills Development Canada (HRSDC) under section 240 of the Code regarding her termination. According to Ms Knezacky's evidence, HRSDC staff was instructed by Spruce Hollow to deal with Mr Madill exclusively. As the matter was not settled in a reasonable period of time, Ms Knezacky made a written request that the complaint be referred to an adjudicator pursuant to subsection 241(3) of the Code. She also requested in writing that the matter be dealt with between her-

self and James Weber, the principal owner of Spruce Hollow. That request was refused and Spruce Hollow insisted that Mr Madill act as its representative.

10 Dalton L. Larson (the Adjudicator) was appointed to hear the complaint. He advised Ms Knezacky that Spruce Hollow was entitled to be represented by whomever they chose and they had chosen to be represented by Mr Madill.

11 Spruce Hollow declined an offer of settlement proposed by Ms Knezacky. After what appears from the record to have been delays in scheduling further proceedings caused primarily by Mr Madill's unavailability, Mr Larson ordered Spruce Hollow to provide full reasons for the dismissal and the particulars leading to Ms Knezacky's termination by October 31, 2012. Spruce Hollow responded on October 26, 2012 with a written statement of reasons for Ms Knezacky's dismissal.

12 A Case Management Meeting was conducted on November 7, 2012, to deal with preliminary issues of employment length, jurisdiction and document exchange. Mr Madill challenged the Adjudicator's jurisdiction on the ground that Ms Knezacky had not been employed for a sufficient length of time. Mr Larson disposed of that objection finding that Ms Knezacky's employment at Spruce Hollow extended beyond the required 12 consecutive months of continuous employment prior to her dismissal by the employer.

13 I note that according to an email in the record, counsel was retained by Spruce Hollow in November 2012 to "deal with this matter". However, Mr Madill continued to personally represent Spruce Hollow.

14 Mr Madill brought a motion to dismiss the complaint on the ground of what he characterized as "*res judicata*". His argument was that the issues in the case were inextricably tied up in the divorce proceedings underway in the Supreme Court of British Columbia between himself and Ms Knezacky. Mr Larson dismissed the objection in an interlocutory award dated November 23, 2012, finding that no other court or tribunal had purported to make a determination as to whether the complainant was discharged for just and proper cause. He noted that there may be an argument that he had concurrent jurisdiction on some common issues with the divorce courts relating to damages. Mr Larson also directed that the proceedings be bifurcated with the first hearings to determine whether the dismissal was for cause. If cause was not found, subsequent hearings would deal with the question of damages.

15 Following the hearing on the motion, the parties agreed to enter into a mediation process to attempt to settle the dispute, presided over by Mr Larson. That was not successful despite what he described as a genuine effort on the part of both parties. Further efforts to schedule proceeding dates proved to be difficult largely because of the unavailability of the Spruce Hollow counsel, Messrs Madill and Weber and their witnesses. The matter was eventually set down for hearing on August 7 and 8, 2013.

16 On the morning of August 7, 2013, Ms Knezacky brought with her Jean Howard, a former employee of Super H and the wife of Peter Howard, the sole director and shareholder of Super H, to attend the hearings to provide moral support. According to Ms Knezacky, Ms Howard had not worked for Super H since the spring of 2011. Ms Knezacky describes Ms Howard as a close friend, advisor and "surrogate mother" who has been a great support to her. The suggestion that Ms Howard attend the hearing had come up just the prior evening, she states, and was not pre-planned.

17 According to Ms Knezacky's evidence, Mr Madill forcefully reacted to seeing Ms Howard in the room. Spruce Hollow stated, through counsel, that it was concerned that the evidence it was seeking to rely on to justify its dismissal of Ms Knezacky could be used against it and Mr Madill by Super H in the Super H Litigation. According to Super H's Statement of Defence and Counterclaim, the allegations in the proceedings between Spruce Hollow and Super H relate to incidents dating back to 2004 and 2005. According to Spruce Hollow, some of the underlying reasons for terminating Ms Knezacky relate to these allegations.

18 After being given time to consider its position and to contact counsel handling the B.C. Supreme Court litigation, Spruce Hollow sought an adjournment to prepare submissions on Ms Howard's exclusion from the proceedings. The Adjudicator refused this request. The Adjudicator agreed to Ms Knezacky's request that Ms Howard be present at the hearing. Spruce Hollow says that it then withdrew from the hearing rather than enter only part of its evidence against Ms Knezacky or enter all of it and risk providing evidence to support Super H's claim. The applicant states that it reserved its right to seek judicial review of the Adjudicator's decision and to make submissions on the issue of quantum should there be a finding of no just cause to terminate Ms Knezacky.

II. DECISION UNDER REVIEW

19 In his written reasons for decision issued on September 24, 2013, the Adjudicator summarized the background and context to the proceedings. He noted the difficulties his administrator had encountered in attempting to schedule hearings and to deal with anyone at Spruce Hollow other than Mr Madill. He referred to his September 12, 2012 letter sent to Jennifer Weber, the office manager and wife of the owner, stating that he would not countenance any further delays resulting from Spruce Hollow's refusal to cooperate with his administrator. In particular, he noted that he would have no alternative but to schedule the hearings peremptorily and make a decision without their (i.e. Spruce Hollow's) participation.

20 When the hearings commenced on August 7, 2013, the respondent advised Mr Larson that she was unable to afford counsel and requested that she be accompanied by a friend, Ms Howard. The respondent's intention, as described by Mr Larson, was that Ms Howard would not represent her or participate in the hearings in any manner. She would not be called as a witness. Nor would she examine witnesses or make submissions. The respondent told the Adjudicator that it would be helpful if she could at least have Ms Howard by her side for emotional support and to advise her generally.

21 The Adjudicator noted that the applicant "vigorously opposed the application". The applicant argued that it would not be able to make a full defence without risking that the information provided would be used against it to establish liability in the other proceedings. The applicant also argued that it had been prejudiced by the respondent's failure to provide notice of Ms Howard's attendance. The Adjudicator probed the reasons for the objection:

> [24] I asked him to provide me with information on how the two cases might present as a conflict or more precisely how evidence in this case relating to whether the Complainant was dismissed for just and proper cause by the Employer could have any relevance to the issues in the other case. What he said in response was that the claim made by the plaintiff in the other case was that his client had misappropriated funds belonging to the plaintiff. However, he con-

ceded that it was not part of the case by either party that the Complainant had a role in the misappropriation but only that it happened during a time when the two companies operated out of the same office. He went on to explain that his position was based on the fact that the Complainant is currently employed by the plaintiff company in the other case and that she has the same role now as she had when she worked for the Employer in this case, and in particular that she was responsible for filing corporate taxes in both cases.

22 The Adjudicator met privately with the applicant and respondent and advised that he was inclined to deny the motion on the basis that prejudice had not been established by the applicant. He advised that he "would need to know how evidence relating to why the Complainant was dismissed could possibly influence the claim in the other case that funds had been misappropriated based on the one simple fact that she has the same job in both companies."

23 The Adjudicator granted the applicant's request for a recess. After a recess of "about 20- 30 minutes" the applicant requested an adjournment to the following day to prepare argument on the prejudice it would suffer if Ms Howard was allowed to be present. The Adjudicator "refused the adjournment because, as I said, he had not demonstrated how the evidence in this case could prejudice the other case."

24 The Adjudicator held that "an advisor who is tasked with a responsibility of providing emotional support and advice to a party who is otherwise not represented should be seen to have such a legitimate interest [in the proceedings] unless there is otherwise a good reason to exclude the advisor."

> [30] In this case I denied the motion to exclude Jean Howard from the hearings because I was not provided with what I considered to be a good reason to exclude her. I accepted that she should be permitted to attend the hearings as an advisor to assist the Complainant but not to speak on her behalf or to otherwise participate in the hearings. It is not unimportant, in that respect, to point out the incredible inconsistency between the position taken by the Employer at the outset of this case that it was entitled to select whomever it wished to represent it to the point that my Administrator could only speak with Mr Madill even to schedule hearings but that the Complainant could not have a friend attend the hearings as an advisor.
>
> [31] Moreover, it may also be properly observed that these proceedings have been under way for fully two years, the delays having been caused largely by the serious matrimonial conflict between the Complainant and Mr. Madill, as I have already discussed. When hearings were finally scheduled to determine the substantive issue in dispute [...], it was done on the general understanding that no further delays would be tolerated except under the most dire circumstances. My decision on the motion to adjourn was taken in that context and on the grounds that no factual basis had been established by Counsel that would preclude me from being able to deal with the issue summarily.
>
> [32] The real issue in this case involves what happened after I denied the Employer's motion to adjourn. I advised the Parties that I intended to proceed with

> the hearings and invited the Employer to commence its case and present its evidence. Mr Hande declined to do so. He advised me that that [sic] the Employer elected to withdraw from the hearings and to not participate further. I stated at that time that I was prepared to continue and that the failure of the Employer to participate would necessarily mean that it would fail to discharge its onus to prove that the Complainant was dismissed for just and proper cause. Notwithstanding my admonition, Mr Hande and his entire team of advisors and witnesses withdrew from the hearing room and left the building

25 In the result, the Adjudicator left open the question of remedies available to the respondent under s 242 (4) of the Code and the scheduling of hearings to address those issues.

III. ISSUES

26 The applicant raised a number of issues in its written submissions including an objection to the respondent's affidavit of December 18, 2013. Reference is made to "numerous paragraphs that are not relevant to the issues before the Court on this application" and to paragraphs that are "prejudicial to the Applicant." However, no specific paragraphs are identified. The respondent, who is self-represented, points out that she is unable to respond to unspecified complaints about the content of her affidavit when she does not know what paragraphs are in question.

27 It seems to me that the respondent did her best to present the facts relevant to the dispute and based upon her own personal knowledge of the events that have transpired as required: *Van Duyvenbode v Canada (Attorney General)*, 2009 FCA 120 at para 2. To the extent that any part of her affidavit consists of any unnecessary "gloss or explanation" to the facts within her personal knowledge and relevant to the dispute, I have disregarded it.

28 I would condense the remaining issues raised by the applicant as whether the Adjudicator's decision was unreasonable or a breach of procedural fairness.

29 The standard of review applicable to cases of unjust dismissal under the Code is generally reasonableness: *Skinner v Fedex Ground Ltd.*, 2014 FC 426 at para 5, while the right to make full submissions and be heard on the reasons for termination constitute matters of procedural fairness: *Couchiching First Nation v. Canada (Attorney General)*, 2012 FC 772 at para 21.

30 Where an issue of procedural fairness arises, the task for the Court is to determine whether the process followed by the decision-maker satisfied the level of fairness required in all of the circumstances: see *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 43.

IV. ANALYSIS

31 The applicant submits that the Adjudicator violated the principle of *audi alteram partem* and acted beyond his jurisdiction or wrongly refused to exercise his jurisdiction by refusing to exclude Ms Howard from the hearing. The applicant says that the denial of fair notice and refusal to grant an adjournment to make additional representations constituted a want or excess of jurisdiction on the part of the tribunal: *Supermarchés Jean Labrecque Inc v Flamand*, [1987] 2 SCR 219 [*Supermarchés*] at paras 52-54.

32 According to the applicant, Ms Knezacky was terminated from her employment at Spruce Hollow because she misdirected Spruce Hollow's funds, converted Spruce Hollow's property, and was dishonest with Spruce Hollow's ownership and management. Since this misconduct occurred when Ms Knezacky was working for both Spruce Hollow and Super H but Spruce Hollow paid Ms Knezacky's salary, Spruce Hollow could be found vicariously liable for Ms Knezacky's activities: *Bazley v Curry*, [1999] 2 SCR 534 at para 10.

33 Ms Knezacky disputes that she was ever simultaneously employed by Spruce Hollow and Super H and asserts that the counter-claim in the action against Spruce Hollow will be dismissed against her whenever it is convenient for Super H to do so. This is supported by the fact that she is again employed by Super H. It seems that the action has not been actively pursued for several years but there are signs, according to counsel for Spruce Hollow, that it is to be revived. In any event, the claims against Ms Knezacky are also directed against Mr Madill and involve a longstanding commercial dispute involving the ownership of both companies.

34 The applicant claims that it could therefore not effectively present its case with Ms Howard in attendance, since its evidence and arguments could be used to establish the direct or indirect liability of Spruce Hollow in its proceedings against Super H for any misfeasance by Ms Knezacky and Mr Madill.

35 The applicant notes that Ms Knezacky could have asked someone else to provide support. Specifically, she should have asked someone who was not connected to the ongoing proceedings between Spruce Hollow and Super H. The Adjudicator failed to weigh Ms Howard's "legitimate interest" in attending the hearing to provide moral support to Ms Knezacky against the potential harm to the applicant, Spruce Hollow submits.

36 The applicant therefore argues that the Adjudicator wrongfully exercised his discretion to allow Ms Howard to remain in attendance despite being advised of Spruce Hollow's concerns that its ability to present a full defence to Ms Knezacky's claim would be hampered. Thus, the purpose of Ms Howard's attendance is not relevant. What is relevant, according to the applicant, is the impact her attendance would have had on its ability to make its submissions.

37 Ms Howard is not a party to the litigation between her husband's company and Spruce Hollow and has no direct involvement, it appears, in those proceedings as a witness or otherwise. As was similarly found by the Adjudicator, counsel for Spruce Hollow was unable to explain to me just how the presence of Ms Howard in support of Ms Knezacky could affect its case in the B.C. Supreme Court litigation.

38 It is not clear what information, beyond that already disclosed in the public pleadings, would have emerged in the proceedings that could possibly have assisted Super H to defeat Spruce Hollow's claim or assert its counterclaim. The matter before the Adjudicator related to the respondent's termination from Spruce Hollow, and none of the material provided to the Adjudicator by the applicant mentioned Super H or indicated a link between the termination and the ongoing proceedings between Spruce Hollow and Super H.

39 Moreover, had the Adjudicator chosen to treat the proceedings as closed, nothing would have prevented Ms Knezacky, at their conclusion, from fully informing her friend about the content of the proceedings including anything of possible interest to Super H.

40 The applicant further submits that the Adjudicator provided its counsel with "only a brief period" to determine who Ms Howard was, consider the consequences of continuing the hearing with Ms Howard in attendance, including weighing the risks to his client with respect to another litigation matter of which he did not have detailed knowledge, and to research the limits of the Adjudicator's jurisdiction to allow a third party's attendance at a hearing in these circumstances. It was therefore unreasonable for the Adjudicator to expect the applicant's counsel to put forward cogent arguments.

41 I note that while counsel who appeared for Spruce Hollow at the hearing on August 7, 2013, had only been involved with the matter for a few weeks, another counsel in his firm who was familiar with the other litigation had been on record since November 2012.I find it difficult to accept that had the Super H litigation been relevant to the proceedings involving Ms Knezacky's termination, counsel would not have informed himself about them prior to the hearing and been in a position to explain the potential conflict to the Adjudicator.

42 Counsel had an opportunity to confer with the lawyer handling the Super H litigation when the issue arose on August 7, 2012. Following the recess, Spruce Hollow did not provide any further information as to why their motion to exclude Ms Howard should be granted. In particular, Spruce Hollow did not provide any submissions going to the alleged prejudice. Rather, they sought an adjournment to the following morning to prepare submissions on this issue.

43 While the Court might have made a different decision in the face of the spirited objection raised by Spruce Hollow, the refusal of adjournment in the circumstances was reasonable in the context of the protracted proceedings to that date. Although, the matter had been set down for two days, the loss of the first day may well have resulted in a need for a further adjournment. In the absence of clear prejudice to its case, the decision was within the range of acceptable outcomes defensible on the law and the facts.

44 An adjudicator's powers are set out in s 242(2) and, pursuant to paragraph 242(2)(c), paragraphs 16(a), 16(b) and 16(c) of the Code which sets out the powers of the Canada Industrial Relations Board. The adjudicator's powers are as follows:

> Powers of adjudicator 242 (2) An adjudicator to whom a complaint has been referred under subsection (1)
>
> (a) shall consider the complaint within such time as the Governor in Council may by regulation prescribe;
>
> (b) shall determine the procedure to be followed, but shall give full opportunity to the parties to the complaint to present evidence and make submissions to the adjudicator and shall consider the information relating to the complaint; and
>
> (c) has, in relation to any complaint before the adjudicator, the powers conferred on the Canada Industrial Relations Board, in relation to any proceeding before the Board, under paragraphs 16(a), (b) and (c).
>
> * * *
>
> Pouvoirs de l'arbitre 242 (2) Pour l'examen du cas dont il est saisi, l'arbitre:

a) dispose du délai fixé par règlement du gouverneur en conseil;

b) fixe lui-même sa procédure, sous réserve de la double obligation de donner à chaque partie toute possibilité de lui présenter des éléments de preuve et des observations, d'une part, et de tenir compte de l'information contenue dans le dossier, d'autre part;

c) est investi des pouvoirs conférés au Conseil canadien des relations industrielles par les alinéas 16a), b) et c).

45 It is well established that administrative tribunals are "masters of their own procedure". In *Prassad v Canada (Minister of Employment and Immigration)*, [1989] 1 SCR 560, [1989] SCJ No. 25 (QL) at para. 16, the Supreme Court observed that "[i]n the absence of specific rules laid down by statute or regulation, they control their own procedures subject to the proviso that they comply with the rules of fairness and, where they exercise judicial or quasi-judicial functions, the rules of natural justice."

46 The content of the duty of fairness to Spruce Hollow was met, in this context, by giving them an opportunity to be heard and to present their argument why exclusion of Ms Howard was necessary and why an adjournment should be granted.

47 Here, given the history of delay largely attributable to the applicant and the context of attempts to block or derail the hearing of the complaint on its merits, it was reasonable in my view for the Adjudicator to expect a cogent and compelling explanation for the applicant's objection to the presence of Ms Howard at the hearing. The Adjudicator gave the applicant an opportunity to make argument and to provide an explanation. In doing so, he respected the applicant's right to be heard and he was prepared to continue to give the applicant an opportunity to be heard on the merits of the complaint which the applicant rejected by walking out of the proceedings. An adjournment was provided. A longer adjournment was not required in the circumstances in order to provide the applicant with procedural fairness.

48 Had the matter proceeded as scheduled and information emerged that could have conceivably substantiated the applicant's concern, it would have been open to the applicant to again raise its objection to Ms Howard's presence.

49 I note that, as in this case, where the employer withdraws from the proceedings and declines to participate, the adjudicator retains jurisdiction to render a decision on the dismissal (s 242(3)) and, where the dismissal is found to be unjust, an order on remedies (s 242(4)).

50 In the circumstances of this matter, it was improper for the applicant to insist on having Mr Madill represent its interests given the matrimonial dispute in which he was involved with the respondent. Given these circumstances, Mr Madill could be perceived to have an oblique motive for delay and obstruction of the Labour Code proceedings. The Adjudicator was aware of that general context and the respondent's request that someone else, notably the principal owner and Director of Spruce Hollow, Mr Weber, be the applicant's representative. The tone of the applicant's communications with the Adjudicator and between Mr Madill and the respondent suggest, at best, an attempt to stall the proceedings and at the worst, intimidation. Contrary to the submissions of Spruce Hol-

low, there is no indication in the record that it was anxious to proceed to a determination of whether it had just cause to terminate the respondent.

51 On the record before me, I find that it was reasonable for the Adjudicator, in the absence of a compelling explanation as to why it was inappropriate, to determine that Ms Howard could remain and to proceed with the hearing. For that reason, this application is dismissed.

52 As the respondent has represented herself she is not entitled to recover solicitor-client costs. She has submitted a statement of her out of pocket costs for these proceedings, including the time which she has had to take off work, which amounts to $627.34. That amount appears reasonable and I shall, therefore, order that it be paid by the applicant. A similar amount was awarded in comparable circumstances in *MacFarlane v Day & Ross Inc.*, 2011 FC 377

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is dismissed;

2. The matter is remitted to the Adjudicator to schedule hearings on the remedies available to the respondent under s 242 (4) of the Code as soon as practicable; and

3. The respondent shall have her costs of $627.34 payable forthwith.

MOSLEY J.

TAB 6

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Case Name:

Lang v. British Columbia (Superintendent of Motor Vehicles)

Between
Robert Lang, respondent (petitioner), and
The Superintendent of Motor Vehicles for the Province of British Columbia and the Attorney General of British Columbia, appellants (respondents)
(Registry No. CA028764)
And between
Roger Steven Corbett, respondent (petitioner), and
The Superintendent of Motor Vehicles for the Province of British Columbia and the Attorney General of British Columbia, appellants (respondents)
(Registry No. CA028794)
And between
Kim Charles Lucas, respondent (petitioner), and
The Superintendent of Motor Vehicles for the Province of British Columbia and the Attorney General of British Columbia, appellants (respondents)
(Registry No. CA029799)
And between
Michael Sebelius Feddersen, respondent (petitioner), and
The Superintendent of Motor Vehicles for the Province of British Columbia and the Attorney General of British Columbia, appellants (respondents)
(Registry No. CA030648)

[2005] B.C.J. No. 906

2005 BCCA 244

254 D.L.R. (4th) 111

212 B.C.A.C. 78

43 B.C.L.R. (4th) 65

28 Admin. L.R. (4th) 299

431

12 C.P.C. (6th) 160

19 M.V.R. (5th) 138

65 W.C.B. (2d) 500

2005 CarswellBC 949

Vancouver Registry Nos. CA028764

CA028794

CA029799

and CA030648

British Columbia Court of Appeal
Vancouver, British Columbia

Donald, Newbury and Low JJ.A.

Heard: February 1 and 2, 2005 (Victoria)
Judgment: April 25, 2005.

(62 paras.)

Administrative law -- Judicial review and statutory appeal -- Boards and Tribunals -- Civil procedure -- Parties -- Government or Crown agents -- Costs -- Appeals -- Government -- Crown -- Governments boards and commissions.

Appeal by the British Columbia Superintendent of Motor Vehicles and Attorney General from decisions awarding costs of judicial review proceedings to the motorists, Lang, Feddersen, Corbett and Lucas. The motorists were each pulled over by a police officer, provided a breath sample and were given a driving prohibition. The motorists applied to have the driving prohibitions reviewed by an adjudicator, as the Superintendent's delegate, and the reviews were dismissed. The motorists then brought successful petitions for judicial review of the adjudicator's decisions and were awarded costs of the judicial review proceedings. The judicial review petitions variously named Her Majesty the Queen in Right of BC, the Superintendent and the Attorney General as respondents. The orders for Corbett and Lucas setting aside the prohibition were by consent. In Lang, the judge found a defect in the initiating document prepared by the peace officer which nullified the process on jurisdictional grounds. In Feddersen, the judge struck the prohibition on grounds that the adjudicator's decision gave rise to a reasonable apprehension of bias and was patently unreasonable.

HELD: Appeals allowed in part. The appeals in Corbett, Lang and Lucas were allowed, but the appeal in Feddersen was dismissed. An award of costs was only justified in the Feddersen case against the Superintendent. The representative of the Crown in proceedings under the Judicial Review Procedure Act was the Attorney General. In judicial review there was no true lis between the subject and the Crown as the issue was the jurisdiction of the tribunal, while the subject matter of the Crown Proceeding Act was the liability of the Crown in the ordinary case. In judicial review proceedings, the Attorney General could appear in his own right to speak for the public interest and could advocate for the tribunal if the tribunal did not engage separate counsel. By filing a response the Attorney General became a party or at least a party of record. If the decision was set aside, costs should not be levied against the tribunal unless it exhibited misconduct or perversity in the proceeding before it, or made submissions on the merits of the judicial review application itself and did not limit itself to jurisdiction. The Attorney General could be liable for costs if the tribunal did not file an appearance to the petition and the Attorney General argued the merits of the tribunal's decision. In the Feddersen case, costs were justified because the reviewing judge found misconduct on the part of the adjudicator. There was no reason to impose costs on the Attorney General.

Statutes, Regulations and Rules Cited:

Attorney General Act, R.S.B.C. 1996, c. 22 s. 2(i)

B.C. Reg. 418/00

British Columbia Supreme Court Rules Rule 1(8), Rule 10, Rule 10(5), Rule 63

Criminal Code s. 254, s. 258

Crown Proceeding Act, R.S.B.C. 1996, c. 89 s. 2, s. 3(2)(a)

Judicial Review Procedure Act, R.S.B.C. 1996, c. 241 s. 13, s. 15, s. 15(1)(b), s. 16, s. 19

Motor Vehicle Act, R.S.B.C. 1996, c. 318 s. 94.1, s. 94.3, s. 94.4, s. 94.5, s. 94.6, s. 117

Counsel:

J.G. Penner and R. Mullett: Counsel for the Appellants

R.P. Helme and R.M. Junger: Counsel for the Respondents R. Lang, R.S. Corbett and K.C. Lucas

W.C. MacGregor: Counsel for the Respondent M.S. Feddersen

The judgment of the Court was delivered by

1 **DONALD J.A.**:-- These appeals are brought with leave by the Superintendent of Motor Vehicles and the Attorney General of British Columbia against awards of costs upon the quashing of administrative licence prohibitions on judicial review in the Supreme Court. The issues require a determination of the correct parties in a judicial review, the role of the Attorney General in those proceedings, the exposure of the statutory decision maker and the Attorney General to costs, and whether the awards of costs in the instant cases are valid.

2 For reasons that follow I have concluded:

1. The representative of the Crown in proceedings under the Judicial Review Procedure Act, R.S.B.C. 1996, c. 241, is the Attorney General, not Her Majesty the Queen in Right of the Province of British Columbia.
2. The Attorney General can appear in his own right to speak for the public interest and may advocate for the statutory decision maker (hereinafter the tribunal) if the latter has not engaged separate counsel.
3. If the decision in question is set aside, costs should not be levied against the tribunal unless:

    (a) the tribunal exhibited misconduct or perversity in the proceedings before it; or
    (b) made submissions on the merits of the judicial review application and did not limit itself to jurisdiction.

4. The Attorney General may be liable in costs if:

    (a) the tribunal did not file an appearance to the petition; and
    (b) the Attorney General argued the merits of the tribunal's decision.

5. Of the instant cases, an award of costs was only justified in the Feddersen case and should be read as applying only to the tribunal.

FACTS

3 In each of the four cases the respondent (a motorist) was pulled over by a police officer while driving, provided a breath sample to the officer, and was given a driving prohibition after recording a blood alcohol level above the legal limit. The respondents then applied to have the driving prohibition reviewed by an adjudicator appointed under the Motor Vehicle Act, R.S.B.C. 1996, c. 318, as the Superintendent's delegate. The reviews of the prohibition were dismissed.

4 The respondents then brought a petition for judicial review of the adjudicator's decision in the Supreme Court for British Columbia; each was successful and awarded costs of the judicial review proceedings.

(a) Corbett

5 The petition in Corbett named the Superintendent and Her Majesty the Queen as respondents. On 18 December 2001, Mr. Justice Grist set aside the driving prohibition and remitted the matter to the Superintendent. He also made an order that the petitioner was entitled to double costs based on an offer to settle. In the style of cause of the order the Attorney General was substituted for Her Majesty the Queen, however, a dispute remains whether the proper Crown respondent is the Attorney General or Her Majesty the Queen. We were asked to put this controversy to rest.

(b) Feddersen

6 The petition in Feddersen was styled:

Re: The Decision of the Superintendent of Motor Vehicles in the Matter of Michael Sebelius Feddersen and Administrative Driving Prohibition No. 00-175422

On 10 February 2003, Mr. Justice Slade in an order styled:

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

MICHAEL SEBELIUS FEDDERSEN

PETITIONER

AND:

THE SUPERINTENDENT OF MOTOR VEHICLES and
THE ATTORNEY GENERAL OF BRITISH COLUMBIA

RESPONDENTS

pronounced:

THIS COURT ORDERS that

1. The Review Decision of adjudicator K. Anderson of August 1, 2002 in respect of Administrative Driving Prohibition No. 00-175422 is set aside, the Notice of Driving Prohibition is stayed, and the Superintendent of Motor Vehicles is prohibited from confirming the driving prohibition.
2. The Respondent shall pay the Petitioner costs on Scale 3 of the Supreme Court Rules (British Columbia).

(c) Lang

7 The petition in Lang used this style of cause:

IN THE SUPREME COURT OF BRITISH COLUMBIA

RE: REGINA v. ROBERT LANG

IN THE MATTER OF AN APPLICATION FOR RELIEF IN
THE NATURE OF CERTIORARI

BETWEEN:

ROBERT LANG

PETITIONER

AND:

THE SUPERINTENDENT OF MOTOR VEHICLES FOR THE PROVINCE OF BRITISH COLUMBIA and HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA

RESPONDENTS

8 On 29 November 2000, Mr. Justice Bouck set aside the decision of the adjudicator and declared the prohibition a nullity. The order named the Superintendent and the Attorney General as respondents even though in his reasons for judgment Mr. Justice Bouck recommended that Her Majesty the Queen be substituted for the respondents, if both parties agreed. He subsequently issued a memorandum to counsel on 30 July 2001 on the party issue, ventured the opinion that Her Majesty the Queen was the correct party respondent, but declined to make an order changing the style of cause because both parties seemed content with it.

(d) Lucas

9 The petition in Lucas named the Superintendent and Her Majesty the Queen as respondents. On 9 May 2002, Madam Justice Neilson made the following order:

> THIS COURT ORDERS, AND BY CONSENT, that
>
> 1. Her Majesty the Queen in Right of the Province of British Columbia be removed as a Respondent and be replaced by the Attorney General of British Columbia;
> 2. the Superintendent of Motor Vehicles rehear the application of the Petitioner to review the driving prohibition served pursuant to Section 94.1 of the Motor Vehicle Act on August 15, 1998;
> 3. the rehearing be held within 21 days of the date of this Order, unless the Superintendent is unable to send the decision within this period in which case the Superintendent may extend this period pursuant to Section 94.6(4) of the Act.
>
> AND, THIS COURT FURTHER ORDERS that
>
> 4. costs are payable to the Petitioner on scale 3.

10 The orders in Corbett and Lucas setting aside the prohibition are by consent. This is because the adjudicators in those cases extrapolated breathalyser readings back to the time of driving without expert evidence or notice to the disputant, a practice this Court condemned in Dennis v. British Columbia (Superintendent of Motor Vehicles) (2000), 82 B.C.L.R. (3d) 313, 150 C.C.C. (3d) 544, 2000 BCCA 653, upholding the order of Melvin J. (1999), 45 M.V.R. (3d) 10, [1999] B.C.J. No. 1568 (S.C.), as contrary to law.

11 In Lang, Bouck J. found a defect in the initiating document prepared by the peace officer which in his opinion nullified the process.

12 In Feddersen, Slade J. struck down the prohibition on grounds that the adjudicator's decision gave rise to a reasonable apprehension of bias and the adjudicator's findings were patently unreasonable.

DISCUSSION

13 The appeals arise in a much litigated scheme under ss. 94.1 to 94.6 of the Motor Vehicle Act, R.S.B.C. 1996, c. 318, which provide for a 90 day driving prohibition. The procedure involves the review by a delegate of the Superintendent, referred in the authorities as the adjudicator, of the grounds for a prohibition reported by a peace officer who investigated a drinking and driving incident. The authority of the Superintendent to delegate his powers, duties and functions is found in s. 117 of the Motor Vehicle Act.

14 The enactments creating the program came into force on 18 December 2000 pursuant to B.C. Reg. 418/00. Counsel for the appellants summarized the scheme in this way:

> 2. Broadly speaking, the Legislation is divided into two phases. First, a peace officer acts under s. 94.1 to issue a Notice of Driving Prohibition (the "Notice"). The peace officer must issue a Notice when he or she has reasonable and probable grounds to believe that one of two specified conditions exist: (1) on the basis of an analysis of breath or blood, the driver was "over .08" at any time within three hours after operating or having care or control of a motor vehicle; or (2) upon a demand being made for a sample of breath under s. 254 of the Criminal Code, the person failed or refused, without reasonable excuse, to provide a sample.
> 3. If a Notice is issued, the peace officer must send the documents specified in s. 94.3 to the Superintendent of Motor Vehicles (the "Superintendent"). The documents specified are: (a) the driver's licence; (b) a copy of the Notice; (c) a certificate of service; (d) a report, in the form established by the Superintendent, sworn or solemnly affirmed by the peace officer; and (e) a copy of any certificate of analysis under s. 258 of the Criminal Code with respect to the driver. The peace officer has no further involvement in the process.
> 4. A person who has been served with a Notice may apply to the Superintendent for a review by filing an Application for Review (the "Application") pursuant to s. 94.4. The person may submit, with the Application, any sworn statements or other evidence the applicant wishes the Superintendent to consider. The Superintendent is not required to hold an oral hearing unless the applicant requests an oral hearing at the time of filing the Application and pays the prescribed fee.
> 5. The second phase of the Legislation addresses the review to be conducted by the Superintendent. The Superintendent is directed by s. 94.5 to consider: (a) any relevant sworn or solemnly affirmed statements and any other relevant information; (b) the report of the peace officer; (c) any certificate of analysis under s. 258 of the Criminal Code; and (d) any relevant evidence given or representations made at the hearing.

6. After considering the Application, if the Superintendent is satisfied that either (a) the person had care or control and was "over .08" within three hours of having care or control; or (b) the person failed or refused, without a reasonable excuse, to comply with a demand made under s. 254 of the Criminal Code to supply a sample of his or her breath or blood, then the Superintendent must confirm the driving prohibition. If, however, the Superintendent is satisfied that either (a) the person was not, because of alcohol consumed prior to or while in care or control of the vehicle, "over .08" within three hours of having care or control; or (b) the person did not fail or refuse to comply with a demand, or had a reasonable excuse for doing so, then the Superintendent must revoke the driving prohibition and return the driver's licence, and must direct that the Application and hearing fees be refunded.

15 We are told that after more than 100 judicial reviews virtually all the major legal issues related to the program have been settled, except the issue of costs. Of particular importance here is the determination that the standard of review on the merits of the adjudicator's decision is patent unreasonableness: Pointon v. British Columbia (Superintendent of Motor Vehicles (2002), 6 B.C.L.R. (4th) 112, 29 M.V.R. (4th) 167, 2002 BCCA 516, following R. v. Gordon (2002), 100 B.C.L.R. (3d) 35, 23 M.V.R. (4th) 165, 2002 BCCA 224.

THE PARTIES

16 The question whether the Crown should be named as Her Majesty the Queen or the Attorney General arises from a concern by counsel for Corbett, Lang and Lucas that an order of costs against the Superintendent and the Attorney General may not be recoverable.

17 It is said that Her Majesty the Queen is a proper party respondent because of the Crown Proceeding Act, R.S.B.C. 1996, c. 89, and the reference to that Act in the Judicial Review Procedure Act, s. 19 which reads:

> 19 This Act is subject to the Crown Proceeding Act.

18 In the memorandum issued by Bouck J. in the Lang case to which I have referred, he reasons that all proceedings against the Crown provincial are subject to the Crown Proceeding Act. I respectfully disagree with that view. The Crown Proceeding Act deals with claims against the Crown. In judicial review there is no true lis between the subject and the Crown, the issue is the jurisdiction of the tribunal (although there may be another party truly adverse in interest such as between a union and an employer in a labour relations dispute: Hollinger Bus Lines v. Ontario (Labour Relations Board), [1952] 3 D.L.R. 162 at 169-70, [1952] O.R. 366 (C.A.)).

19 The subject matter of the Crown Proceeding Act is the liability of the Crown in the ordinary sense. Section 2 reads:

> Liability of government
>
> 2 Subject to this Act,

(a) proceeding against the government by way of petition of right is abolished,
(b) a claim against the government that, if this Act had not been passed, might be enforced by petition of right, subject to the grant of a fiat by the Lieutenant Governor, may be enforced as of right by proceeding against the government in accordance with this Act, without the grant of a fiat by the Lieutenant Governor,
(c) the government is subject to all the liabilities to which it would be liable if it were a person, and
(d) the law relating to indemnity and contribution is enforceable by and against the government for any liability to which it is subject, as if the government were a person.

20 Although the point was not fully argued before us, it would seem that s. 19 of the Judicial Review Procedure Act refers to the Crown Proceeding Act to harmonize the power to issue an injunction or a declaration with the immunity provided in s. 3(2)(a) of the Crown Proceeding Act:

3(2) Nothing in section 2 does any of the following:

(a) authorizes proceedings against the government for anything done or omitted to be done by a person acting in good faith while discharging or purporting to discharge responsibilities

(i) of a judicial nature vested in the person, or
(ii) that the person has in connection with the execution of judicial process;

21 Section 13 of the Judicial Review Procedure Act reads:

13(1) On the application of a party to a proceeding for a declaration or injunction, the court may direct that any issue about the exercise, refusal to exercise or proposed or purported exercise of a statutory power be disposed of summarily, as if it were an application for judicial review.

(2) Subsection (1) applies whether or not the proceeding for a declaration or injunction includes a claim for other relief.

22 The argument that Her Majesty the Queen is the proper party respondent to a judicial review proceeding proceeds on a fundamental misunderstanding of the origin and nature of the proceeding. Although put in modern dress, judicial review under the Act remains in substance the process by which the Sovereign supervises the jurisdiction of a Crown agency. If the agency acted outside its jurisdiction then the Queen's Court remits the matter for proper determination. To name the Sovereign as a party moved against is to place the Sovereign on both sides of the dispute, which is absurd. This was pointed out by Southin J., as she then was, in Allen v. British Columbia (Superintendent of Motor Vehicles) (1986), 2 B.C.L.R. (2d) 255 at 260-61, 27 C.C.C. (3d) 519, 42 M.V.R. 25 (S.C.):

Finally, I think it appropriate to point out that the style of these proceedings is not correct.

435

The petitioner ought not to have added Her Majesty the Queen in right of the Province of British Columbia as a respondent. I can only assume he thought that s. 7 of the Crown Proceeding Act, R.S.B.C. 1979, c. 86, applied. It does not.

Here, the petitioner sought two remedies:

(a) A declaration that s. 24.1 is invalid.

(b) A mandamus to order the Superintendent of Motor Vehicles to issue a driver's licence or to renew the petitioner's existing driver's licence.

As to the first, the proper respondent to a proceeding for a declaration that a statute is unconstitutional is the Attorney General.

As to the second, until the Judicial Review Procedure Act was introduced in 1976 [see R.S.B.C. 1979, c. 209] proceedings for mandamus were brought in the name of the Sovereign upon the relation of the citizen. The Sovereign could not then be both applicant and respondent and cannot be a respondent now. Judicial review is simply a modern form of the prerogative writs which were commands by the Sovereign ensuring obedience to the law, it being the Sovereign's right and duty to ensure that obedience: see the Crown Office Rules (Civil) of the Supreme Court Rules, 1943, and the Supreme Court Rules, 1961, O.LIX.

The style of cause of these proceedings is to be amended by striking out Her Majesty as a respondent and substituting the Attorney General of British Columbia.

[Emphasis added]

23 In Jones and de Villars, Principles of Administrative Law, 4th ed. (Toronto: Carswell, 2004), the learned authors describe the history in this way:

The "prerogative" nature of the remedies derives from the fact that they were issued by the Crown to control the actions of its servants taken in its name. In time, the Crown delegated these remedies to the superior courts. Royal writs were used to compel the administrators to come before the courts to justify their actions. Traditionally, the proper nomenclature for a prerogative remedy was "R. v. Delegate; Ex parte Applicant". In the first stage of what was a two-step procedure, the applicant applied for the writ ex parte, based on an affidavit indicating the applicant's knowledge, information or belief about the invalidity of the

> delegate's decision. The writ was issued if there was a prima facie case of illegality (although this was not required if the Crown itself was the applicant). The delegate was required by the writ to come to court to justify its actions. The second stage of the procedure involved an application at which the court determined the issue of illegality. If illegality was demonstrated, the court would generally issue an order for the respective prerogative remedy. However, the court always retained the discretion to refuse to issue such an order even if the case was made out by the applicant.

[Footnotes omitted]

24 The substance of judicial review is the prerogative superintendence of jurisdiction. The substance was not changed by the Judicial Review Procedure Act: Smithers v. Olsen (1985), 60 B.C.L.R. 377 (C.A.) at para. 15; see also Hollinger Bus Lines, supra, at 171-72 where it was said:

> Now the old prerogative writs of prohibition and certiorari have been abolished in this Province and a new and simpler procedure has been authorized for obtaining the relief that was made available by those writs. The change in procedure, however, has not altered the nature of the relief. It is still certiorari or prohibition.
>
> In Rex v. Titchmarsh [(1914), 32 O.L.R. 569], Riddell J. said, at p. 577: "The whole proceeding of removal into a Court where the King may be 'certified' is the certiorari; the means by which his order is made known is the writ. So long as by some means the record, etc. are got before the King, the means is unimportant, the effect is the same. If the King were to (effectively) change his method of procedure and cause the record etc. to come into his Court by some other process than by signifying his pleasure by a writ, surely that could not be called an abolition of certiorari, although the writ might be abolished."
>
> In this conception of certiorari it is plain that the relief thereby made available is of a type distinct and apart from the relief obtainable in an ordinary action.

25 Bouck J. dismisses the reasoning in Allen as anachronistic and out of step with the Crown Proceeding Act. For the above reasons I respectfully disagree with him on both points.

26 I move now to consider the position of the Attorney General in judicial review proceedings. At common law the Attorney General represents the Crown in the matter of the public interest. I refer to the third edition of Halsbury's Laws of England, (3d ed., vol. 7 (London: Butterworths, 1954) at 382-83, paras. 806-07):

The Attorney-General represents the Crown in the courts in all matters in which rights of a public character come into question (c). He must be plaintiff in any civil proceedings by the Crown unless an authorised government department sues in its own name and may be defendant in any civil proceedings against the Crown unless an authorised government department is clearly the appropriate defendant (d). He is a necessary party to the assertion of public rights even where the moving party is a private individual (e); though it is otherwise where a public body has a private right of action peculiar to itself, as, for example, for maintaining the quality of a commodity supplied to the public (f). The Attorney-General can be sued, as representing the Crown, for a declaration of right (g).

27 The Attorney General Act, R.S.B.C. 1996, c. 22, lists as one of the duties and powers of the office:

> 2(i) ... the regulation and conduct of all litigation for or against the government or a ministry in respect of any subjects within the authority or jurisdiction of the legislature, ...

28 The notice requirements in the Judicial Review Procedure Act provide:

> Notice to decision maker and right to be a party
>
> 15(1) For an application for judicial review in relation to the exercise, refusal to exercise, or proposed or purported exercise of a statutory power, the person who is authorized to exercise the power
>
> (a) must be served with notice of the application and a copy of the petition, and
> (b) may be a party to the application, at the person's option.
>
> (2) If 2 or more persons, whether styled a board or commission or any other collective title, act together to exercise a statutory power, they are deemed for the purpose of subsection (1) to be one person under the collective title, and service, if required, is effectively made on any one of those persons.
>
> Notice to Attorney General
>
> 16(1) The Attorney General must be served with notice of an application for judicial review and notice of an appeal from a decision of the court with respect to the application.
>
> (2) The Attorney General is entitled to be heard in person or by counsel at the hearing of the application or appeal.

29 It is said on behalf of the Attorney General that when he appears at a judicial review hearing he is not a party, and it follows therefore that he cannot be ordered to pay costs because he is not a party. It is submitted that while s. 15(1)(b) allows the tribunal the option to appear as a party, no such language describes the position of the Attorney General in s. 16 thus evincing an intention of

the Legislature not to put the Attorney General in the position as a party. I am unable to accept these propositions.

30 It is common practice for the Attorney General to appear for himself and as the legal representative of the tribunal. In that way he can address both matters of public interest and defend the jurisdiction of the tribunal. I am of the opinion that when the Attorney General appears in his own right he is a party, although I do not think that determines his liability for costs.

31 Reading the Judicial Review Procedure Act together with the Rules of Court, I think that when the Attorney General files an appearance he becomes a "party of record" within the meaning of the definition section of the Rules. The Rules do not define "party" but in Rule 1(8):

> (8) In these rules, unless the context otherwise requires:
>
> * * *
>
> "party of record" means a person who has
>
> (a) commenced a proceeding,
> (b) filed an appearance,
> (c) [Repealed. B.C. Reg. 161/98, s. 1(c).], or
> (d) filed a third party notice as an insurer under the Insurance Act or the Insurance (Motor Vehicle) Act;

[Emphasis added]

32 Rule 63 entitled "Crown Practice Rules in Civil Matters" provides:

> Originating application
>
> 63(1) Applications for relief in the nature of mandamus, prohibition, certiorari or habeas corpus are governed by these rules and must be commenced by petition under Rule 10.
>
> Writs abolished
>
> (2) No writ of mandamus, prohibition, certiorari or habeas corpus shall be issued, but all necessary directions shall be made by order.
>
> Person affected may take part in proceeding
>
> (3) The court may order that a person who may be affected by a proceeding for an order in the nature of mandamus may take part in the proceeding to the same extent as if served with the petition.

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33 The relevant parts of Rule 10 are:

Originating application by petition

(3) Subject to subrule (2), a person wishing to bring an originating application must file a petition in Form 3. [am. B.C. Reg. 367/2000, s. 3.]

Service

(4) Unless these rules provide otherwise, a copy of the petition and of each affidavit in support must be served on all persons whose interests may be affected by the order sought. [am. B.C. Reg. 367/2000, s. 3.]

Response

(5) A respondent who wishes to receive notice of the time and date of the hearing of the petition or to respond to it must, in addition to complying with Rule 14 (1) (b), deliver to the petitioner 2 copies, and to every other party of record one copy, of

(a) a response in Form 124, and
(b) each affidavit on which the respondent intends to rely. [am. B.C. Reg. 367/2000, s. 3.]

Time for response

(6) A respondent must deliver the documents referred to in subrule (5) on or before the 8th day after the date on which the respondent entered an appearance. [am. B.C. Reg. 367/2000, s. 3.]

34 Form 3 sets out the style in which the petition should be drawn:

No. _____

_____ Registry

In the Supreme Court of British Columbia

Between

, Petitioner(s)

and

, Respondent(s)

[or, where there is no person against whom relief is sought:

Re (State the person by whom, or the entity in respect of which relief is sought).]

35 The style of cause in judicial review proceedings suggested by McLachlin and Taylor, British Columbia Court Forms, Vol. 1 (Butterworths: July 2002), Service Issue 36, appears as follows:

No. [number]

[place name] Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

Re: The decision of [name of tribunal] in [describe proceeding, preferably identified by reference to name of Petitioner and where applicable, Respondent(s)] [1]

OR

BETWEEN

[name of Party seeking to have the decision reviewed]

PETITIONER

AND

[name of other Party(ies) in original proceeding]

RESPONDENT

945

36 The form is followed by this note at p. 55:

Referenced to Precedent

1. The above formulation has the advantage of identifying the tribunal whose decision is to be reviewed. The conventional Petitioner/Respondent formulation does not allow identification of the tribunal because the role of an administrative tribunal whose decision is at issue before the Court, even where the right to appear is given by statute, is limited to an explanatory role with reference to the record before the tribunal and to the making of representations relating to jurisdiction: the tribunal is given locus standi as a participant in the nature of an amicus curiae but not as a Party: Northwestern Utilities Ltd and the Public Utilities Board of the Province of Alberta v. The City of Edmonton [1979] 1 S.C.R. 684 at 708-709, 89 D.L.R. (3d) 161. In addition, it is often the case that relief is sought by the Petitioner against the tribunal rather than another Party to the proceedings, in which case, the alternative instructions in Form 3 of Appendix A ("Re (State the person by whom, or the entity in respect of which relief is sought)" should be followed, as has been done in the suggested Style of Proceeding.

[Emphasis added]

37 The learned authors do not suggest that at the initiating stage either the Attorney General or the Crown in the name of Her Majesty the Queen should be named.

38 The style of cause may not be static through the course of the proceedings, it depends on the response from those given notice of the petition. Rule 10(5), quoted above, calls upon a respondent (someone who has received notice of the petition) to deliver a response in Form 124. Form 124 reads:

[Style of Proceeding]

RESPONSE OF [name of respondent]

The respondent does not oppose the granting of the relief set out in the following paragraphs of the petition (or notice of motion): [set out paragraph numbers].

The respondent opposes the granting of the relief set out in the following paragraphs of the petition (or notice of motion): [set out paragraph numbers].

The respondent consents to the granting of the relief set out in the following paragraphs of the petition (or notice of motion) on the following terms: [set out paragraph numbers and any proposed terms].

The respondent will rely on the following affidavits and other documents: [set out affidavits delivered with this response and any other affidavits or other documents already in the court file on which the respondent will rely].

The respondent estimates that the application will take
..... minutes.

Dated: _____ _____

Respondent (or respondent's solicitor)

39 When the Attorney General files a response, as he did in each of the instant cases, he ensures that he will receive notice of the hearing of the petition. He also acquires standing to address the matters to which he refers in the response. By s. 15 of the Judicial Review Procedure Act he automatically has standing to speak to matters of the public interest, whether or not he files a response. In my view, by filing a response the Attorney General becomes a party, or at least a party of record (if there is any real difference for the purposes of this case, which I doubt). Thus I reject the Attorney General's submission that he is never a party when he participates in the manner provided in the Judicial Review Procedure Act and the Rules. However, his special status must not be ignored when it comes to costs. When the Attorney General presents submissions on the public interest he speaks on behalf of everyone and does not take sides. When the Attorney General defends the tribunal the petitioner can look to the tribunal for costs, assuming the claim for costs falls within the narrow limits discussed below. Hypothetically, the Attorney General could expose himself to costs if the tribunal does not file a response and the Attorney General purports to appear only in the public interest but in fact argues the tribunal's case.

40 I now consider an argument concerning both the Attorney General and the tribunal to the effect that no order of costs can be made in relation to either unless the Legislature has made an appropriation to cover the expenditure. The authorities cited in support of this contention do not in my opinion have any application to the present matter. They deal with the imposition of new and unanticipated expenditures on a public body. In my opinion, it can be fairly assumed that the Attorney General, as the officer with the responsibility for all litigation involving the government, has a budget for court costs; and likewise the Superintendent, whose many determinations are subject to court challenge.

41 The leading case on this topic is Auckland Harbour Board v. The King, [1924] A.C. 318 (P.C.). There the issue related to compensation for land taken for railway purposes where no appropriation was made for the payment. The Privy Council dismissed the appeal from a decision that the payment should be recovered. The judgment was given by Viscount Haldane who said at 326-27:

> For it has been a principle of the British Constitution now for more than two centuries, a principle which their Lordships understand to have been inherited in the Constitution of New Zealand with the same stringency, that no money can be taken out of the consolidated Fund into which the revenues of the State have been paid, excepting under a distinct authorization from Parliament itself. The days are long gone by in which the Crown, or its servants, apart from Parliament, could give such an authorization or ratify an improper payment. Any payment out of the consolidated fund made without Parliamentary authority is simply il-

legal and ultra vires, and may be recovered by the Government if it can, as here, be traced.

42 In R. v. Savard (1996), 106 C.C.C. (3d) 130, 47 C.R. (4th) 281 (Y.T.C.A.), leave to appeal to S.C.C. refused, [1996] S.C.C.A. No. 297, Rowles J.A. for the majority (Wood J.A. dissenting) wrote at para. 113:

> My opinion is that, in the absence of express language requiring government to pay counsel who represent an accused pursuant to an order made under s. 672.24, the fundamental principle the courts have applied in regard to the expenditure of public funds, as set out in Auckland Harbour Board v. The King, supra, must be respected. Thus I conclude that Stuart T.C.J. exceeded his jurisdiction in expressly ordering the Attorney General of Canada to pay Mr. La Flamme fees, and that Maddison J. erred in declining to set aside the order.

43 Unlike compensation for expropriation in Auckland Harbour Board or the ad hoc expansion of a legal aid program in Savard, court awarded costs in litigation are commonplace expenditures and just part of doing the business of the Attorney General's ministry and the Motor Vehicle Branch.

THE TRIBUNAL

44 As mentioned, it has been held that the adjudicator exercises a quasi-judicial function which attracts the patently unreasonable standard of review: Gordon, supra, Pointon, supra.

45 It follows that the Superintendent whose powers are delegated to the adjudicator enjoys the traditional immunity protecting quasi-judicial tribunals.

46 The parties agree that the immunity extends to costs, subject only to certain exceptions.

47 In Brown and Evans, Judicial Review of Administrative Action in Canada (Toronto: Canvasback, 1998-), the learned authors write:

> 5:2560 *Costs Payable by or to the Administrative Agency*
>
> Generally, an administrative tribunal will neither be entitled to nor be ordered to pay costs, at least where there has been no misconduct or lack of procedural fairness on its part. As one court has noted:
>
> > It has been recognized ... that, contrary to the normal practice, costs do not necessarily follow the event where administrative or quasi-judicial tribunals are concerned. They may be awarded only in unusual or exceptional cases, and then only with caution ... where the tribunal has acted in good faith and conscientiously throughout, albeit resulting in error, the reviewing tribunal will not ordinarily impose costs ... I am of the view that the circumstances which prevail here do not warrant an order for costs against the commission [St. Peters Estates Ltd. v. Prince Edward Island (Land Use Commn.) (1991), 2 Admin. L.R. (2d) 300 at 302-04 (PEITD)].

> However, costs have been awarded against an administrative tribunal where it cast itself in an adversarial position, acted capriciously in ignoring a clear legal duty, made a questionable exercise of state power, effectively split the case so as to generate unnecessary litigation, manifested a notable lack of diligence, or was the initiator of the litigation in question, or where bias among tribunal members had necessitated a new hearing. However, generally only *court* costs, and not costs associated with the entire administrative proceeding, are assessed where there has been misconduct on the part of the tribunal.
>
> Costs were also ordered against a chief judge whose order relocating the applicant to a different district because he disapproved of his decision was set aside as in breach of judicial independence. Otherwise, judges would be discouraged from discharging their duties to uphold constitutional rights.
>
> [Emphasis added, footnotes omitted]

48 For the purposes of this case it is enough to identify two exceptions:

1. misconduct or perversity in the proceedings before the tribunal; or
2. the tribunal argues the merits of a judicial review application rather than its own jurisdiction.

49 Applying the second exception may not always be clear cut. There are at least two reasons for this. First, the review by the adjudicator under the scheme in question does not conform to the classic adversarial model where opposing parties argue for and against the decision in question. The peace officer's report is the case, so to speak, for the prohibition, and there is no argumentation back and forth before the adjudicator as there would be in a conventional hearing. This feature may create a tendency on the part of the tribunal, or the Attorney General on its behalf, to argue the case for the prohibition at judicial review. The tendency should be resisted, otherwise costs may be awarded.

50 Secondly, the traditional restriction against the tribunal's arguing the merits of its own decision, articulated clearly and emphatically in cases like Canada Labour Relations Board v. Transair, [1977] 1 S.C.R. 722, 67 D.L.R. (3d) 421, and Northwestern Utilities Ltd. v. Edmonton (City), [1979] 1 S.C.R. 684, 89 D.L.R. (3d) 161, has been relaxed somewhat by the decision in CAIMAW v. Paccar of Canada Ltd., [1989] 2 S.C.R. 983, 62 D.L.R. (4th) 437. Paccar permits the tribunal to demonstrate that its decision was not patently unreasonable.

51 In Northwestern Utilities Ltd., Estey J. writing for the Court said at 709-10:

> It has been the policy in this Court to limit the role of an administrative tribunal whose decision is at issue before the Court, even where the right to appear is given by statute, to an explanatory role with reference to the record before the Board and to the making of representations relating to jurisdiction. (Vide The Labour Relations Board of the Province of New Brunswick v. Eastern Bakeries Limited et al. [[1961] S.C.R. 72]; The Labour Relations Board of Saskatchewan v. Dominion Fire Brick and Clay Products Limited et al. [[1947] S.C.R. 336].) Where the right to appear and present arguments is granted, an administrative

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tribunal would be well advised to adhere to the principles enunciated by Aylesworth J.A. in International Association of Machinists v. Genaire Ltd. and Ontario Labour Relations Board [(1958), 18 D.L.R. (2d) 588], at pp. 589, 590:

> Clearly upon an appeal from the Board, counsel may appear on behalf of the Board and may present argument to the appellate tribunal. We think in all propriety, however, such argument should be addressed not to the merits of the case as between the parties appearing before the Board, but rather to the jurisdiction or lack of jurisdiction of the Board. If argument by counsel for the Board is directed to such matters as we have indicated, the impartiality of the Board will be the better emphasized and its dignity and authority the better preserved, while at the same time the appellate tribunal will have the advantage of any submissions as to jurisdiction which counsel for the Board may see fit to advance.

Where the parent or authorizing statute is silent as to the role or status of the tribunal in appeal or review proceedings, this Court has confined the tribunal strictly to the issue of its jurisdiction to make the order in question. (Vide Central Broadcasting Company Ltd. v. Canada Labour Relations Board and International Brotherhood of Electrical Workers, Local Union No. 529 [[1977] 2 S.C.R. 112].)

52 In holding that the review test was patent unreasonableness, Mackenzie J.A. for the Court in Gordon said at para. 28:

> In my view, a consideration of the pragmatic and functional approach outlined in Pushpanathan [Pushpanathan v. Canada (Minister of Citizenship and Immigration), [1998] 1 S.C.R. 982] supports the conclusion that the decision of an adjudicator should only be overturned if it is patently unreasonable. While adjudicators do not have a particularly high level of expertise relative to their judicial counterparts vis-à-vis the indicia of impaired driving, the specificity of their mandate and training, as well as the broad public protection purposes embodied in the Act, indicate that the question raised under s. 94.4 is one that was intended by the legislators to be left to the exclusive decision of the Superintendent of Motor Vehicles and his delegates.

53 Paccar allows the tribunal some latitude to speak to its decision at judicial review. This is what La Forest J. said at 1016:

> In British Columbia Government Employees' Union v. Industrial Relations Council, [1988] B.C.J. No. 786, B.C.C.A., May 24, 1988, the British Columbia Court of Appeal held that the Industrial Relations Council had the right to make the submissions that the court below had erred in substituting its judgment for that of the Industrial Relations Council, and that the court erred in finding the Council's interpretation of the Act to be patently unreasonable. In the course of

his judgment, Taggart J.A. for the court made the following statement with which I am in complete agreement, at p. 13:

> The traditional basis for holding that a tribunal should not appear to defend the correctness of its decision has been the feeling that it is unseemly and inappropriate for it to put itself in that position. But when the issue becomes, as it does in relation to the patently unreasonable test, whether the decision was reasonable, there is a powerful policy reason in favour of permitting the tribunal to make submissions. That is, the tribunal is in the best position to draw the attention of the court to those considerations, rooted in the specialized jurisdiction or expertise of the tribunal, which may render reasonable what would otherwise appear unreasonable to someone not versed in the intricacies of the specialized area. In some cases, the parties to the dispute may not adequately place those considerations before the court, either because the parties do not perceive them or do not regard it as being in their interest to stress them.

[Emphasis added]

54 When read closely, the passage adopted by La Forest J. does not in my view provide the tribunal a broad opportunity to argue the merits. The matters before the adjudicator, breathalyser analysis and refusing a breath sample demand, are hardly unfamiliar to the regular courts and so it will seldom be necessary for the tribunal to expose some arcane or esoteric feature of the case in order to understand why it arrived at its decision. While the line between arguing the merits and explaining the record is somewhat blurry when the test is patent unreasonableness, there remains a boundary which must be observed. It will be up to the judgment of the reviewing judge in each case to determine if the tribunal, or the Attorney General on its behalf, has gone too far.

THE COSTS AWARDS

(a) Corbett

55 Double costs were awarded on the basis that Corbett delivered an offer to settle. This was in my respectful opinion an error for two reasons. First, neither the adjudicator nor the Attorney General can be treated as ordinary litigants with respect to costs. I refer to my earlier description of the special nature of judicial review and the absence of a true lis between the petitioner on the one hand and the Attorney General and the tribunal on the other. It is in my view inappropriate to give effect to an offer to settle when the parties referred to in the offer are not adverse in interest and the only question is the jurisdiction of the tribunal. Second, there was no contest of any kind at this judicial review hearing. The Crown consented to an order sending the matter back to the adjudicator to conduct a hearing free of the error identified in Dennis. I would set aside the order of costs.

(b) Feddersen

56 The award of costs in Feddersen can be supported on the basis of the first exception to the rule of immunity. The reviewing judge found misconduct on the part of the adjudicator. I refer to the judge's reasons at para. 44:

> I conclude that a reasonable apprehension of bias arises on a review of the adjudicator's reasons. My reasons follow:
>
> 1) The adjudicator considered the written arguments presented by the petitioner's legal counsel. In her reasons she says: "your lawyer submits that the police just fill in blanks not using their own words to describe the incident". Her reasons go on to say: "I also note that the police evidence is in the constable's own words. Your affidavit is not in your own words, as your lawyer stated in his submission and as you stated in your affidavit." This passage suggests that the adjudicator gave greater weight to the officer's report than the applicant's affidavit based on the fact that one was handwritten and the other was typed. This indicates bias.
>
> Moreover, her words are not a response to counsel's argument, but a retort. It is defensive in tone, and reveals the absence of an open mind.
>
> My view is reinforced by the adjudicator's treatment of the evidence' she relied upon to find that the petitioner was in care or control of a vehicle. She treated her own inferences as evidence of care or control of a motor vehicle, when an inference that the petitioner's cooperation established that he was not in care or control, i.e. that he blew' because he knew he was not in care or control and thus had nothing to worry about, would be equally available. This indicates a lack of neutrality.

57 The order in question provides that the respondent (singular) pay the petitioner's costs, even though the style of cause shows both the Superintendent and the Attorney General as respondents. The order should be read as applying only to the Superintendent, there being no reason to impose costs on the Attorney General.

(c) Lang

58 The question in Lang was whether the report from the peace officer was so fundamentally defective that the proceedings before the adjudicator were a nullity. The reviewing judge found that the report was defective because it did not indicate whether the prohibition was based on Lang's blood alcohol reading or a refusal to give a breath sample. Applying a strictissimi juris approach the judge effectively concluded that the adjudicator had no jurisdiction to embark on the inquiry.

59 It does not appear that the argument by the Attorney General on behalf of the adjudicator went beyond questions of jurisdiction. Neither has it been shown that by proceeding on the peace officer's report the adjudicator was guilty of misconduct or perversity. I would set aside the order of costs.

(d) Lucas

60 Like Corbett, the adjudication of Lucas' case suffered from the Dennis error and accordingly the Attorney General consented to an order remitting the case. Unlike Corbett, there was no offer to settle. The reviewing judge awarded costs payable on Scale 3.

61 I would set aside the order for the same reasons given in relation to Corbett.

DISPOSITION

62 I would allow the appeals in Corbett, Lang and Lucas and set aside the orders of costs. I would dismiss the appeal in Feddersen.

DONALD J.A.
NEWBURY J.A.:-- I agree.
LOW J.A.:-- I agree.

TAB 7

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Indexed as:

Canadian Assn. of Industrial, Mechanical and Allied Workers, Local 14 v. Paccar of Canada Ltd.

Paccar of Canada Ltd. (Canadian Kenworth Company Division), appellant;
v.
Canadian Association of Industrial, Mechanical and Allied Workers, Local 14, respondent;
and
British Columbia Hydro & Power Authority, respondent;
and
International Brotherhood of Electrical Workers, Local 213, respondent;
and
Industrial Relations Council of British Columbia, formerly the Labour Relations Board of British Columbia, respondent.

[1989] 2 S.C.R. 983

[1989] S.C.J. No. 107

File No.: 20174.

Supreme Court of Canada

1988: December 13 / 1989: October 26.

Present: Dickson C.J. and McIntyre *, Lamer, Wilson, La Forest, L'Heureux-Dubé and Sopinka JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

* McIntyre J. took no part in the judgment.

Administrative law -- Judicial review -- Jurisdiction -- Curial deference -- Court overturning decision of labour tribunal on judicial review -- Determination of jurisdiction of court on judicial review to overturn labour tribunal -- Jurisdiction infringed if error in interpreting jurisdictional provisions or if decision patently unreasonable -- Whether or not labour tribunal erred in interpreting

jurisdictional provisions -- Whether or not patently unreasonable error in performance of board's function -- Labour Code, R.S.B.C. 1979, c. 212, ss. 27, 33.

Appeals -- Standing -- Administrative tribunals -- Whether or not tribunals have standing in appeals from their own decisions. [page984]

CAIMAW and Paccar were parties to a collective agreement with a stated term extending to April 30, 1983. This collective agreement contained a renewal clause which provided for the contract's continuing from year to year unless notice to the contrary were given. The agreement also contained a termination clause which provided that the agreement would continue during negotiations and that negotiations would be discontinued on written notice by either party. During the course of the collective agreement, Paccar laid off a large number of employees and limited its activities to warehouse operations. The union was served with a notice to terminate and negotiations were conducted over six months but without success. Paccar notified the union that it was discontinuing negotiations and that it considered the agreement terminated in all respects except those required by the Labour Code and the Employment Standards Act. It then set out the terms and conditions which it was putting into effect. The employees continued to work after the date when these new conditions were unilaterally implemented.

CAIMAW alleged several violations of the Code and requested that the Industrial Relations Council make a determination as to whether a collective agreement was in full force and effect. A three-member panel of the Board decided against the union. A five-member panel reheard the application, along with another application between British Columbia Hydro & Power Authority and IBEW, and a consolidated decision in respect of both applications upheld the decisions of the original Boards, though for different reasons.

Both CAIMAW and IBEW petitioned the Supreme Court of British Columbia pursuant to the Judicial Review Procedure Act for an order quashing the decision of the review panel of the Labour Relations Board. The applications were granted and were upheld on appeal. Paccar appealed to this Court with leave. B.C. Hydro was named as a respondent but neither it nor the IBEW appeared before this Court or submitted factums.

At issue here was whether the Labour Relations Board decision, which permitted an employer to unilaterally alter terms and conditions of employment after the termination of a collective agreement, was patently unreasonable and therefore subject to review by this Court. A subsidiary issue concerned the standing before this Court of the Labour Relations Board.

[page985]

Held (L'Heureux-Dubé and Wilson JJ. dissenting): The appeal should be allowed.

Per Dickson C.J. and La Forest J.: The Labour Relations Board had jurisdiction to embark upon the specific inquiry as to whether the employer has the authority to unilaterally alter the terms and conditions of employment.

The first step in determining whether an administrative tribunal has exceeded its jurisdiction by answering a question of law in a patently unreasonable manner is to determine its jurisdiction. Section 27 is a direction to the Board simply as to the purposes and objects to which it should have re-

gard. It is not a jurisdiction limiting provision entailing judicial review even if the Board should err in its interpretation or application. The effect of s. 33 was that it was for the Board to determine whether any particular decision accords with the purposes and objects of s. 27, provided its interpretation was not patently unreasonable.

Where, as here, an administrative tribunal is protected by a privative clause, its decisions should only be reviewed if that Board has either made an error in interpreting the provisions conferring jurisdiction on it, or has exceeded its jurisdiction by making a patently unreasonable error of law in the performance of its function. The tribunal has the right to make errors, even serious ones, provided it does not act in a manner so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review. The test for review is a "severe test". The courts accordingly must adopt a posture of curial deference. Mere disagreement with the result arrived at by the tribunal does not make that result "patently unreasonable". The courts must focus their inquiry on the existence of a rational basis for the decision of the tribunal, and not on their agreement with it. Here, the Board's result was not patently unreasonable; indeed, it was as reasonable as the alternative. It was not necessary to go beyond that.

The scheme of the Labour Code, requiring the union and the employer to bargain collectively as the expiry of a collective agreement approaches, left no room for the operation of common law principles. As long as the ongoing duty on the parties to bargain collectively and in good faith remained, then the tripartite relationship of union, employer and employee brought about by the Code displaced common law concepts. The termination of the collective agreement had no effect on the obligation [page986] of the parties to bargain in good faith imposed by s. 6.

The terms and conditions formerly contained in a collective agreement are to be presumed to continue to govern the relationship, absent circumstances that would imply otherwise. The alternative would be chaos. The termination clause, however, would be of little effect if the employer were denied the power to change the terms of employment on the expiry of the contract. Such a move would not terminate the contract in any real sense but rather would signal the commencement of a new bargaining session.

The Act did not expressly provide that the employer has the power contended for but it was not unreasonable for the Board to find that the power existed. Indeed, the power to change the terms of employment on expiry of an agreement can be inferred from the existence of provisions in the Code which limit the circumstances in which unilateral changes can be made. The power of unilateral alteration did not introduce any unfairness into the bargaining relationship.

The two statutory freeze periods provided the union protection when it would be particularly vulnerable to management initiatives designed to weaken or destabilize it. The employer is expressly prohibited from pursuing a course of action it would otherwise be able to pursue, subject of course to the unfair labour practice provisions of the Code. The Board's conclusion that what is not prohibited by either the wording or the policy of the statute is permitted was not an unreasonable approach.

The Industrial Relations Council has standing before this Court to make submissions not only explaining the record before the Court, but also to show that it had jurisdiction to embark upon the inquiry and that it has not lost that jurisdiction through a patently unreasonable interpretation of its powers.

Per Lamer and Sopinka JJ.: It is not always necessary for the reviewing court to ignore its own view of the merits of the decision under review. Reasonableness is not a quality that exists in isolation. Any adjudication upon the reasonableness of a decision must involve an evaluation of the merits which provides a reference point for making a relative decision.

Curial deference is most important in the review of specialist tribunals' decisions but it does not come into play until the court finds itself in disagreement with the [page987] tribunal. Only then is it necessary to consider whether the error (so found) is within or outside the boundaries of reasonableness. The test is a "severe test" but even here an appreciation of the merits is not irrelevant.

The Board's decision was consistent with the Labour Code and the collective agreement. The Code did not totally exclude the general law and accordingly was silent in respect of some matters, including the employer's actions here. No amount of liberal interpretation could fill any lacuna caused by that silence. No express statutory conditions were violated. The decision, moreover, was consistent with the contractual expectations of the parties, since the insertion of the termination clause would have been meaningless if the terms of the collective agreement were held to persist indefinitely, or until a new collective agreement is concluded.

Per Wilson J. (dissenting): The reasons of La Forest J. were agreed with as to the broad scope of the principle of curial deference to the decisions of administrative tribunals because of their special expertise and as to the interpretation given to s. 27 of the Labour Code. However, a decision of a Board which meets the "severe test" of being "patently unreasonable" is not protected by the principle of curial deference. Such decisions must be treated as decisions which the Board had no jurisdiction to make. They cannot be passed off as the product of special expertise or "policy choices" which are not subject to review by the courts.

A patently unreasonable decision is one which no reasonable Board applying its expertise could possibly have arrived at. To describe a Board's decision as a "policy choice" does not insulate it from review if the policy on which the choice is based is inconsistent with the policy of the legislation under which it purports to have been made. Key elements of the legislation here were the obligation to bargain in good faith and the maintenance of a balance in the bargaining power between the parties.

The policy choices available to the Board were: (1) to permit the employer to decide when negotiations had reached an impasse and to unilaterally impose new terms on its employees if an impasse had been reached, or (2) to permit the same terms and conditions which were the product of the earlier bargaining process to continue to apply in the event of an impasse until such time as the parties are in a strike/lock-out position. The first did nothing to promote the collective bargaining process which is the legislatively accredited means of [page988] achieving collective agreements and industrial peace. It was also incompatible with the employer's obligation to bargain in good faith. The second allowed the Code to be interpreted in a way which did not interfere with the balance of bargaining power between the parties. Neither did it create a new power in the union, undermine the collective bargaining process, nor compel the parties to "re-enter a world which has ceased to exist".

The decision of the Board was "patently unreasonable" and constituted jurisdictional error. It was not a question of choosing between equally viable and reasonable "policy choices". One was completely consistent with the concept of freedom and equality of bargaining power between the parties and the paramount role of the collective bargaining process in labour dispute resolution. The other was completely inconsistent with and inimical to both.

Per L'Heureux-Dubé J. (dissenting): The British Columbia Labour Relations Board had standing to make arguments relative as to both the applicable standard of review and the steps it followed in reaching its decision. The Board, however, committed jurisdictional error when it stated that an employer may unilaterally impose the terms of employment upon the termination of the collective agreement, subject only to the obligation to bargain in good faith.

The Board was initially empowered to embark upon this specific inquiry but exceeded its jurisdiction in carrying it out. Section 27 of the Labour Code expressed the fundamental objectives of the legislation. The Board's decision neither referred to s. 27 nor discussed the public interest or the development of effective industrial relations. This omission was crucial to the Board's coming to a patently unreasonable solution.

The Board's decision was fraught with consequence because it in effect promulgated a "mini-Code" on the "rights and obligations" of employers and unions at that stage of the bargaining process. It was all the more necessary, therefore, that the Board address the arguments based on the development of harmonious labour relations. The courts must defer to the judgment of administrative tribunals in matters falling squarely within the area of their expertise. Here, however, there was no indication that the Board even considered the requirements of effective industrial relations and the purposes and objects expressed in s. 27.

[page989]

Collective bargaining, which was indispensable to the development of "effective industrial regulations" required by s. 27, has three broad characteristics in the Canadian context. First, legislative policy postpones the exercise of the economic sanctions until all other attempts at an agreement have failed. Second, the use of an economic sanction in collective bargaining necessarily entails that a party will suffer some loss in having recourse to it. Bargaining is premised upon mutual compromise. And third, the existence of an economic sanction presupposes the availability of a countervailing sanction of proportionate impact.

The unilateral imposition of the terms of employment as recognized by the Board shared none of these three characteristics. First, the policy provided for no ban on the unilateral imposition of terms of employment in the early stages of negotiation. Such unilateral sanction could, theoretically, occur at any time following the termination of the previous collective agreement. Second, the employer would not be detrimentally affected if it were to decide to reduce the salaries and cut other employment benefits. Third, no sanction was available to the union to countervail the unilateral setting of terms since the imposition of terms could conceivably take place before the right to strike arose under the Labour Code. More importantly, unlike the strike and lock-out, the unilateral imposition of the terms of employment would not necessarily pressure both parties into agreeing upon a settlement.

The unilateral imposition of terms of employment is a sanction that opens the door to a number of abuses of the process of collective negotiation. It focusses on the individual employees and forces them either to accept the lower terms or to stop working altogether and accordingly stands in a class by itself as an economic sanction which is inherently destructive of the freedom to engage in collective bargaining. This sanction strikes a fundamental blow to the freedom of employees to form themselves into a union and engage the employer in collective bargaining. The only foreseeable effect of this measure is to fuel uselessly the flames of the labour dispute. Section 27 of the Labour

Code, however, is designed to protect the integrity of the bargaining process against possible abuses.

Section 27 emphasized sovereign role of the union in the bargaining process and s. 46 conferred exclusive bargaining authority on certified unions even after the collective agreement had expired. The Board had it [page990] turned its mind to the fundamental policies expressed s. 27, would have had no choice but to come to the conclusion that s. 46 prevented an employer, on the termination of a collective agreement, from unilaterally implementing new working conditions through direct communication with the employees.

It was "patently unreasonable" for the Board to find that the employer had this power; the decision of the British Columbia Court of Appeal was agreed with.

The Code provided for mechanisms allowing the Board to broaden the reach and scope of the proceedings before it. The first set of mechanisms involved procedural adjustments which could be brought to the adjudicative hearing. The second involved a more radical change in the nature of the proceedings. The Board was empowered to conduct full-scale, public policy-making hearings which would foster broad participation by the members of the labour relations community in proceedings involving issues of widespread interest. In a case like the present one, where a previous policy orientation is reversed, where the area concerned involves a void in the enabling statute, and where the question raised is of crucial importance to employers, unions and individual employees at large, the matter may more properly have been dealt with in a policy-making hearing.

Cases Cited

By La Forest J.

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APPEAL from a judgment of the British Columbia Court of Appeal (1986), 7 B.C.L.R. (2d) 80, 32 D.L.R. (4th) 523, dismissing appeal from a judgment of Meredith J., [1986] B.C.W.L.D. 2745, allowing an appeal from a reconsideration of the Labour Relations Board of British Columbia (1985), 10 CLRBR (NS) 355, upholding the decisions of the original Board (CAIMAW v. Paccar of Canada Ltd. (Canadian Kenworth Company Division) and IBEW v. British [page993] Columbia Hydro & Power Authority). Appeal allowed, Wilson and L'Heureux-Dubé JJ. dissenting.

D.M.M. Goldie, Q.C., and B.R. Grist, for the appellant.
Ian Donald, Q.C., and Bruce Laughton, for the respondent Canadian Association of Industrial, Mechanical and Allied Workers, Local 14.
No one appeared for the respondent British Columbia Hydro & Power Authority.
No one appeared for the respondent International Brotherhood of Electrical Workers, Local 213.
J. Stuart Clyne, Q.C., and Eugene C. Jamieson, for the respondent Industrial Relations Council of British Columbia.

Solicitors for the appellant: Russell & DuMoulin, Vancouver.
Solicitors for the respondent Canadian Association of Industrial, Mechanical & Allied Workers, Local 14: Rankin & Company, Vancouver.
Solicitors for the respondent Industrial Relations Council of British Columbia: Campney & Murphy, Vancouver.

The judgment of Dickson C.J. and La Forest J. was delivered by

1 **LA FOREST J.**:-- The narrow issue in this appeal is whether the decision of the respondent Labour Relations Board of British Columbia permitting an employer, after the termination of a collective agreement, to unilaterally alter terms and conditions of employment is patently unreasonable and therefore subject to review by this Court. A subsidiary issue concerns the standing before this Court of the Labour Relations Board.

Facts

2 The respondent, Canadian Association of Industrial, Mechanical and Allied Workers (Local 14) ("CAIMAW"), is the certified bargaining agent for the employees of the appellant Paccar of Canada Ltd. (Canadian Kenworth Division) ("Paccar"). CAIMAW and Paccar were parties to a collective agreement with a stated term extending from May 1, 1982 to April 30, 1983. Paccar had been engaged in the manufacture of trucks, but during the course of the collective agreement, it laid

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off a large number of employees and limited its activities to warehouse operations. Instead of employing three hundred and fifty people before the layoffs, it employed only ten thereafter.

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3 The collective agreement contained a renewal and termination provision, the relevant parts of which read as follows:

> 21.01 This [a]greement shall be effective as and from May 1, 1982, to and including April 30, 1983, and shall continue thereafter from year to year unless written notice of contrary intention is given by either [p]arty to the other four (4) months prior to April 30, 1983, or any anniversary date thereafter.
>
> 21.03 In the event of a notice of termination, this [a]greement shall remain in full force and effect while negotiations are being carried on, it being agreed that negotiations shall be discontinued upon delivery of a written notice by either [p]arty.

4 On January 4, 1983, Paccar notified CAIMAW, in a document entitled "Notice to Terminate", that:

> This is notice to terminate the [c]ollective [a]greement between the parties and to commence negotiations for a new agreement, pursuant to the terms of the agreement and the Labour Code of B.C. Please contact the undersigned to arrange a mutually acceptable time and place to meet.

The parties negotiated over the next six months, but without success. On June 29, 1983, Paccar wrote CAIMAW:

> In accordance with Article 21.03 and in view of the impasse the parties have reached, this is the requisite notice to discontinue negotiations and that the Company considers the [c]ollective [a]greement terminated effective July 4, 1983. All terms and conditions of the [a]greement, including the COLA clause are cancelled except as noted below and/or required by the Labour Code and the Employment Standards Act.

Paccar then set out the terms and conditions which it would put into effect on July 4, 1983. The employees of Paccar have continued to work since that date.

5 CAIMAW then applied to the respondent Labour Relations Board (now the Industrial Relations Council) under s. 28 of the Labour Code, R.S.B.C. 1979, c. 212, (the "Code") alleging that Paccar had violated ss. 65, 79(2) and 82(2) of the Code, and requesting a determination under s. 34(1)(g) as to whether a collective agreement was [page995] in full force and effect. A three-member panel of the Board decided against the union. The union sought and was granted a re-hearing pursuant to s. 36 of the Code. At the re-hearing, the application was heard along with another application between British Columbia Hydro & Power Authority and the International Broth-

erhood of Electrical Workers, Local 213, (the "IBEW"), and a consolidated decision in respect of both applications was issued by a unanimous five-member panel of the Board, upholding, though for different reasons, the decisions of the original Boards.

6 Both CAIMAW and the IBEW petitioned the Supreme Court of British Columbia pursuant to the Judicial Review Procedure Act, R.S.B.C. 1979, c. 209, for an order quashing the decision of the review panel of the Labour Relations Board. Meredith J. granted the applications. Paccar and B.C. Hydro appealed to the British Columbia Court of Appeal, but the appeals were dismissed by a unanimous five-member panel of that court. Paccar appeals to this Court with leave. B.C. Hydro has been named as a respondent but neither it nor the IBEW appeared before this Court or submitted factums.

Decisions Below

7 Before the first Board, two issues required resolution. The first was whether Paccar had in fact terminated the collective agreement. The Board held, interpreting those portions of Article 21 set out above, that the employer had duly terminated the agreement in accordance with its terms. The issue that then arose was whether, in spite of the termination of the agreement, its terms necessarily bound Paccar and governed its relationship with its employees or whether Paccar had the authority to impose, unilaterally upon the employees in the bargaining unit, terms and conditions of employment different from those set out in the terminated agreement. The Board concluded in favour of the latter position. The essence of its reasoning is set out in the following passage:

> We conclude that the employer and the trade union may unilaterally impose terms and conditions of employment [page996] to be "incorporated" into the individual contracts of employment which spring up on the termination of the collective agreement. The appropriate response by the employer or the trade union to unacceptable "new terms" proposed by the other is to lock out or strike. That is not to say that an employer has a free hand. Certainly the employer's behaviour will be limited by the unfair labour practice provisions of the Code (for example, Section 6 thereof) and by Section 46.

The Board concluded that changing the terms and conditions on which an employer will continue to employ its work-force after the expiry of a collective agreement did not violate the exclusive bargaining authority given to the union by s. 46 of the Code. It therefore dismissed the complaint.

8 The re-hearing panel gave extensive, considered reasons and upheld the decision of the original Board, though for different reasons. Before the re-hearing panel, the unions made two arguments in support of the proposition that the earlier decision was inconsistent with the law and policy under the Labour Code. The first argument was premised on the view that when a collective agreement expires, individual contracts of employment between the employer and the employee resume operation, and that in accordance with the principles of employment law, those contracts cannot be altered except by agreement; see Hill v. Peter Gorman Ltd. (1957), 9 D.L.R. (2d) 124 (Ont. C.A.). In the present case, it cannot be said that the employees either expressly or impliedly accepted the varied terms.

9 The second argument was based on the earlier decision of the Labour Relations Board in Cariboo College and Cariboo College Faculty Ass'n (1983), 4 CLRBR (NS) 320, and on s. 46(a) of the Labour Code. That section gives the union the exclusive authority to bargain collectively for the

bargaining unit, and to bind the employees by collective agreement. The union argued that the effect of s. 46(a) was to preclude the employer from unilaterally altering terms of employment without the agreement of the union.

10 The Labour Relations Board decided against the union on both arguments. In doing so, the Board [page997] found it useful to examine the extensive American experience, though it did not blindly follow it. It held that on termination of a collective agreement, individual contracts of employment do not revive. They stated:

> In light of the Supreme Court of Canada's decision in McGavin Toastmaster Ltd., [[1976] 1 S.C.R. 718], and Chief Justice Laskin's above-quoted comments, we have concluded that it is no longer appropriate to speak of individual contracts of employment and common law principles flowing therefrom in respect of an employer-employee relationship which is governed by the Labour Code. Such contracts and principles are based on individual relationships between employer and employee, whereas the Labour Code and other similar labour relations legislation is premised on a collective relationship between an employer and his employees, with individual dealings between employer and employee being prohibited.
>
> . . .
>
> We are of the view that the comments of Chief Justice Laskin concerning the inapplicability of individual contracts of employment and the common law apply regardless of whether a collective agreement is in force. This conclusion flows from the fundamental change brought about by the certification of a trade union to represent a group of employees in a bargaining unit. Once certified, that union has the exclusive authority to bargain on behalf of and bind the employees in the unit. The individual employee has no authority to bargain on his own behalf whether a collective agreement is in force or not. In these circumstances, it does not make sense to speak of individual contracts of employment at any time. Individual employees may no longer make contracts regarding terms and conditions of employment; only the trade union may. Further, it no longer makes sense to speak of the common law. The collective bargaining relationship is governed by the provisions of the Labour Code, not the common law.

11 The Board then turned to the second argument based on s. 46(a) and said:

> Having given this matter serious consideration, we have concluded that Section 46(a) of the Labour Code does not prevent an employer from making unilateral alterations to terms and conditions of employment after the expiry of the collective agreement and after he has sought to negotiate those alterations with the union and the union has rejected them.

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In doing so, the Board explicitly disagreed with the decision in Cariboo College, supra. The Board concluded:

> After the expiry of the collective agreement, no unilateral alterations to terms and conditions of employment may be made by an employer unless they are done so in compliance with his duty to bargain in good faith with the union. Further, we wish to make it clear that the fact that an employer has made unilateral alterations to his employees' terms and conditions of employment does not extinguish his obligation to continue to bargain in good faith with the trade union and make every reasonable effort to conclude a collective agreement.
>
> In the period after the expiry of the collective agreement, where the employer continues to operate and the employees continue to work, it will be implied that the terms and conditions of employment for the employees will continue to be the same as those contained in the just expired collective agreement. This conclusion flows from the scheme of the Labour Code as a whole, but in particular, from the duty to bargain in good faith which limits the "when" and "how" of unilateral changes to terms and conditions of employment. It is that scheme, and, in particular, the limits on unilateral action prescribed by the duty to bargain in good faith which requires the initial maintenance of the status quo and the resulting implication of the terms and conditions of employment from the just expired collective agreement.

In the result, the union's complaint was dismissed.

12 Meredith J. allowed the application to quash. His reasons are brief and not entirely clear. They begin by saying:

> I take it that counsel for the employers and the unions agree with me that at law, labour or otherwise, the employers in these cases have no authority to make unilateral alterations in terms and conditions of employment at any time.

That agreement, if it ever existed, did not survive into this Court. Whether an employer has the asserted authority was strongly debated before us. The essence of Meredith J.'s reasoning appears to be that employment necessarily involves an agreement. Agreement and unilateral alteration are each other's antithesis. As a result, the Board was "wrong" in concluding that there had been unilateral alterations at all, and so the matter was [page999] remitted back to the Labour Relations Board for further consideration.

13 The Court of Appeal dismissed the appeal from that order. It held that the common law, and more particularly basic contract law, had not been ousted by the Labour Code and applied not only to individual contracts of employment but also to collective agreements. The court held that terms could not be unilaterally imposed by an employer. Seaton J.A. said:

> No foundation is given for the statement that "an employer has the authority under the Labour Code to make unilateral alterations ...". No section says that; nor does any imply it. The Code as a whole seeks stability resulting from agreement. This new power creates instability resulting from unilateral action.

The Court of Appeal rejected all reliance on the American authorities. These, it thought, were concerned with the issue of whether unilateral changes constituted a failure to bargain in good faith, an argument the unions had abandoned in the present case at the opening of the original Board hearing, or alternatively dealt with changes favourable to the employees, which is unlike the case at bar. As the Court of Appeal was of the view that the three panels of the Labour Relations Board were wrong in finding that an employer had the authority to unilaterally alter terms and conditions of employment after the expiry of the collective agreement, the court, in the last line of its decision, held that to find such a power in the employer was patently unreasonable.

Analysis

14 In oral argument before this Court, counsel for CAIMAW conceded that the Labour Relations Board had jurisdiction to embark upon the specific inquiry as to whether the employer has the authority to alter unilaterally the terms and conditions of employment. He submitted, however, that the Labour Relations Board lost jurisdiction by coming to the conclusion that that right exists without having any rational basis for so determining. In finding such a right, he submitted, the [page1000] Labour Relations Board went beyond making a serious error within its jurisdiction and into the realm of patently unreasonable errors.

15 The first step in determining whether an administrative tribunal has exceeded its jurisdiction by answering a question of law in a patently unreasonable manner is to determine its jurisdiction. "At this stage, the Court examines not only the wording of the enactment conferring jurisdiction on the administrative tribunal, but the purpose of the statute creating the tribunal, the reason for its existence, the area of expertise of its members and the nature of the problem before the tribunal"; see U.E.S., Local 298 v. Bibeault, [1988] 2 S.C.R. 1048, at p. 1088.

16 The Labour Relations Board derives its authority from Part II of the Labour Code, particularly ss. 27 and 31 to 34. It is useful to set out these provisions. They read:

> 27. (1) The board, having regard to the public interest as well as the rights and obligations of parties before it, may exercise its powers and shall perform the duties conferred or imposed on it under this Act so as to develop effective industrial relations in the interest of achieving or maintaining good working conditions and the well being of the public. For those purposes, the board shall have regard to the following purposes and objects:
>
> (a) securing and maintaining industrial peace, and furthering harmonious relations between employers and employees;
> (b) improving the practices and procedures of collective bargaining between employers and trade unions as the freely chosen representatives of employees; and

(c) promoting conditions favourable to the orderly and constructive settlement of disputes between employers and employees or their freely chosen trade unions.

(2) The board may formulate general guidelines to further the operation of this Act; but the board is not bound by those guidelines in the exercise of its powers or the performance of its duties.

. . .

31. Except as provided in this Act, the board has and shall exercise exclusive jurisdiction to hear and determine an application or complaint under this Act and to [page1001] make an order permitted to be made. Without limiting the generality of the foregoing, the board has and shall exercise exclusive jurisdiction in respect of

(a) a matter in respect of which the board has jurisdiction under this Act or regulations;
(b) a matter in respect of which the board determines under section 33 that it has jurisdiction; and
(c) an application for the regulation, restraint or prohibition of a person or group of persons from

(i) ceasing or refusing to perform work or to remain in a relationship of employment;
(ii) picketing, striking or locking out; or
(iii) communicating information or opinion in a labour dispute by speech, writing or other means.

32. (1) Except as provided in this section, no court has or shall exercise any jurisdiction in respect of a matter that is, or may be, the subject of a complaint under section 28 or a matter referred to in section 31, and, without restricting the generality of the foregoing, no court shall make an order enjoining or prohibiting an act or thing in respect of them.

. . .

33. The board has and shall exercise exclusive jurisdiction to determine the extent of its jurisdiction under this Act, a collective agreement or the regulations, to determine a fact or question of law necessary to establish its jurisdiction and to determine whether or in what manner it shall exercise its jurisdiction.

34. (1) The board has exclusive jurisdiction to decide a question arising under this Act, and, on application by any person or on its own motion, may de-

cide for all purposes of this Act any question, including, without restricting the generality of the foregoing, any question as to whether

. . .

(d) a person is, or what persons are, bound by a collective agreement;
(e) a person is, or what persons are, parties to a collective agreement;

. . .

(g) a collective agreement is in full force and effect;
(h) a person is bargaining collectively or has bargained collectively in good faith;

. . .

[page1002]

(2) Except in respect of the constitutional jurisdiction of the board, a decision or order of the board under this Act, a collective agreement or the regulations, on a matter in respect of which the board has jurisdiction, or determines under section 33 that it has jurisdiction under this Act, a collective agreement or the regulations, is final and conclusive and is not open to question or review in a court on any grounds, and no proceedings by or before the board shall be restrained by injunction, prohibition, mandamus or another process or proceeding in a court, or be removable by certiorari or otherwise into a court.

17 Section 27 requires that the Labour Relations Board make its decisions having regard to the public interest and the object of promoting harmonious relations between employers and employees. This direction to the Board does not, however, allow a court to substitute its judgment for that of the Board as to what actions will "develop effective industrial relations" and "secur[e] and [maintain] industrial peace". Section 27 is not, in this sense, a jurisdiction limiting provision upon the interpretation of which the Board cannot err without being subject to judicial review. Indeed, if the courts could intervene every time they were of the opinion that a particular decision of the Board did not accord with the objectives set out in s. 27, the notion of curial deference would be deprived of virtually all meaning. Every decision of the tribunal would be open to review whether patently unreasonable or not. In my opinion, s. 27 amounts to a direction to the Board simply as to the purposes and objects to which it should have regard. Implicit in the establishment of an expert administrative tribunal, however, is that that tribunal is the best judge of what actions would develop "effective" industrial relations and "further" industrial peace and harmony. Thus, in Lorne W. Camozzi Co. v. International Union of Operating Engineers, Local 115 (1985), 68 B.C.L.R. 338 (B.C.C.A.), at p. 345, Esson J.A. said:

[page1003]

> But where, as here, the interpretation depends upon the question whether the specific exercise of power is justified by the purposes and objects of the Act, there is an element of "curial deference" involved. The board is uniquely qualified to know what is necessary to develop effective industrial relations or maintain good working conditions. So, where the question is whether a particular exercise of power not prevented by the express words of the Code is one intended to be granted to the board, the court must show reasonable deference to the board's views and reasons in support of it. [Emphasis added.]

18 That it was the legislative intention that the interpretation of s. 27 should be left for the Board alone to determine is made clear by s. 33. That section gives the Board the exclusive jurisdiction to determine the extent of its jurisdiction under the Act, to determine any fact necessary to establish its jurisdiction, and to determine in what manner it shall exercise its jurisdiction. At the very least, the effect of this section must be that it establishes that it is for the Board to determine whether any particular decision accords with the purposes and objects of s. 27, provided its interpretation is not patently unreasonable.

19 Where, as here, an administrative tribunal is protected by a privative clause, this Court has indicated that it will only review the decision of the Board if that Board has either made an error in interpreting the provisions conferring jurisdiction on it, or has exceeded its jurisdiction by making a patently unreasonable error of law in the performance of its function; see Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp., [1979] 2 S.C.R. 227. The tribunal has the right to make errors, even serious ones, provided it does not act in a manner "so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review" (p. 237). The test for review is a "severe test"; see Blanchard v. Control Data Canada Ltd., [1984] 2 S.C.R. 476, at p. 493. This restricted scope of review requires the courts to adopt a posture of deference to the decisions of the tribunal. Curial deference is more than just a fiction courts resort to when they are in agreement with the decisions [page1004] of the tribunal. Mere disagreement with the result arrived at by the tribunal does not make that result "patently unreasonable". The courts must be careful to focus their inquiry on the existence of a rational basis for the decision of the tribunal, and not on their agreement with it. The emphasis should be not so much on what result the tribunal has arrived at, but on how the tribunal arrived at that result. Privative clauses, such as those contained in ss. 31 to 34 of the Code, are permissible exercises of legislative authority and, to the extent that they restrict the scope of curial review within their constitutional jurisdiction, the Court should respect that limitation and defer to the Board.

20 In Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp., supra, Dickson J., as he then was, thus put it at pp. 235-36:

> Section 101 constitutes a clear statutory direction on the part of the Legislature that public sector labour matters be promptly and finally decided by the Board. Privative clauses of this type are typically found in labour relations legislation. The rationale for protection of a labour board's decisions within jurisdiction is straightforward and compelling. The labour board is a specialized tribunal which administers a comprehensive statute regulating labour relations. In the administration of that regime, a board is called upon not only to find facts and decide

> questions of law, but also to exercise its understanding of the body of jurisprudence that has developed around the collective bargaining system, as understood in Canada, and its labour relations sense acquired from accumulated experience in the area.

The comments of McIntyre J. in Reference Re Public Service Employee Relations Act (Alta.), [1987] 1 S.C.R. 313, at p. 416, are particularly apt:

> Our experience with labour relations has shown that the courts, as a general rule, are not the best arbiters of disputes which arise from time to time. Labour legislation has recognized this fact and has created other procedures and other tribunals for the more expeditious [page1005] and efficient settlement of labour problems. Problems arising in labour matters frequently involve more than legal questions. Political, social, and economic questions frequently dominate in labour disputes. The legislative creation of conciliation officers, conciliation boards, labour relations boards, and labour dispute-resolving tribunals, has gone far in meeting needs not attainable in the court system. The nature of labour disputes and grievances and the other problems arising in labour matters dictates that special procedures outside the ordinary court system must be employed in their resolution. Judges do not have the expert knowledge always helpful and sometimes necessary in the resolution of labour problems. The courts will generally not be furnished in labour cases, if past experience is to guide us, with an evidentiary base upon which full resolution of the dispute may be made. In my view, it is scarcely contested that specialized labour tribunals are better suited than courts for resolving labour problems, except for the resolution of purely legal questions.

See also Inter City Glass Co. v. Attorney General of British Columbia, unreported, B.C.S.C. January 24, 1986, at p. 6.

21 I do not find it necessary to conclusively determine whether the decision of the Labour Relations Board is "correct" in the sense that it is the decision I would have reached had the proceedings been before this Court on their merits. It is sufficient to say that the result arrived at by the Board is not patently unreasonable. Indeed, I would go so far as to say that the result reached by the Board is as reasonable as the alternative. It is not necessary to go beyond that.

22 I am of the opinion that the courts below did not apply the appropriate standard of review to the decisions of the Board. I cannot escape the conclusion that, instead of examining the reasonableness or rationality of the Board's decision, the courts substituted their view of the appropriate result. In doing so, they became the arbiters of labour policy as can be seen from the finding that, while "The code as a whole seeks stability resulting from agreement[, this] new power creates instability resulting from unilateral action". With respect, [page1006] one cannot imagine that the Labour Relations Board did not consider the implications of a finding that the employer could unilaterally alter the terms and conditions of employment.

23 Other passages in the Court of Appeal's reasons also support the view that its decision was arrived at because it accorded with the court's view of the appropriate policy. Thus, Seaton J.A. held that "I do not accept that terms can be imposed unilaterally by an employer" (emphasis added). Later he said:

> I accept that after the expiry of a collective agreement the implied terms and conditions of employment are those found in the expired agreement. That must be so. The employees are not working for nothing. Unless something happens, the seniority rights, the pension rights, the dental plan and all those benefits that have been won by unions over the years must continue. The alternative is chaos. [Emphasis added.]

Labour relations policy is a matter for the specialized tribunal. As noted in Lorne W. Camozzi Co. v. International Union of Operating Engineers, Local 115, supra, at p. 345: "The board is uniquely qualified to know what is necessary to develop effective industrial relations or maintain good working conditions." By substituting its view of the effect of the conclusion of the Labour Relations Board, I am of the opinion that the Court of Appeal exceeded its function.

24 The Court of Appeal was also influenced by its view of the role of the common law in labour relations. While it accepted that individual contracts of employment no longer arise if the parties are in a collective bargaining relationship, a conclusion inescapable since the decision of this Court in McGavin Toastmaster Ltd. v. Ainscough, [1976] 1 S.C.R. 718, they limited the ratio of that decision to the rejection of common law only in so far as it relates to individual employment contracts. They maintained that the essence of [page1007] employment is not a "relationship", but agreement. Since the employer cannot "agree" directly with the employee, because that is precluded by statute (s. 46(a)), and since an agreement cannot be altered if one party does not expressly or impliedly consent to the alteration (see Hill v. Peter Gorman Ltd., supra), even though the agreement has by its own terms expired, the same terms and conditions must continue in force. Before this Court, counsel for the union did not try to defend the approach taken by the Court of Appeal with respect to the common law. While he submitted that the common law remains the substratum underlying the Labour Code, a position it is not necessary to accept or reject in this appeal, he submitted that the common law was only relevant to this appeal in that no express power to unilaterally alter a collective agreement could be found in it.

25 I do not see that the common law has any relevance to this appeal. The Labour Relations Board dealt with the application of the common law in specific response to the argument of the union that on termination of the collective agreement individual contracts of employment revive. The tribunal correctly rejected that argument as inconsistent with the decision of this Court in McGavin Toastmaster Ltd. v. Ainscough, supra. In that case, Laskin C.J. found that employer-employee relations governed by a collective agreement displaced the common law of individual employment. He noted at pp. 726-27:

> Neither this Act [The Mediation Services Act, S.B.C. 1968, c. 26] nor the companion Labour Relations Act could operate according to their terms if common law concepts like repudiation and fundamental breach could be invoked in relation to collective agreements which have not expired and where the duty to bargain collectively subsists.

I can see no reason why this finding should be restricted to those cases where the collective agreement continues in existence. The operative factor, it seems to me, is the ongoing duty on the parties to bargain collectively and in good faith. So long [page1008] as that obligation remains, then the tripartite relationship of union, employer and employee brought about by the Code displaces com-

mon law concepts. The termination of the collective agreement has no effect on the obligation of the parties to bargain in good faith imposed by s. 6. The union retains its certification as the representative of the employees whether a collective agreement is in force or not. The scheme of the Labour Code, requiring the union and the employer to bargain collectively as the expiry of a collective agreement approaches (ss. 62 and 63) does not leave any room for the operation of common law principles. To the extent the decision of the Court of Appeal relied on them in holding the decision of the Labour Relations Board to be unreasonable, I am of the opinion that the court erred.

26 The union submitted that the decision of the Board permitting the employer to alter terms and conditions of employment after unsuccessful bargaining towards a new agreement should be considered patently unreasonable because it is not expressly provided for in the Code or supported by implication from the scheme of the Code. Finding such a power, it maintained, would upset the balance of the labour relations legislation which offsets the union's right to strike against the employer's power to lock-out. The balance of the statute, it continued, would also be disturbed because the union has no countervailing or equivalent power. The union could not, for example, unilaterally decide that after expiry of the collective agreement a salary increase would take effect. Since the employer controls the payroll and manages the operation, such an attempt by the union to single-handedly alter the employment terms would simply be ignored by the employer.

27 It is not suggested that the Industrial Relations Council did not have the right to determine the existence of this power in the employer. This complaint was originally brought pursuant to s. 34(1)(g) of the Labour Code for a determination as to whether a collective agreement was in effect. [page1009] It logically follows that if the Council has the power to determine if a collective agreement is in force, it can also determine the labour relations consequences of a determination that a collective agreement has been terminated. It is no longer suggested that the collective agreement was not properly terminated. The question is simply as to the consequences of that termination.

28 Both the Board and the Court of Appeal relied on a passage from Re Telegram Publishing Co. and Zwelling (1975), 67 D.L.R. (3d) 404 (Ont. C.A.), where Kelly J.A. described the position upon the termination of a collective agreement as follows, at p. 412:

> ... the accepted view appears to be that where, after the collective agreement has expired, the employee has continued to work for the employer and the employer has continued to accept the benefit of his services, there being no agreement to the contrary, and no other circumstances from which there may be implied terms and conditions of employment different from those set out in the collective agreement, the terms and conditions of the employment after expiry are to be implied and would be similar to those spelled out in the collective agreement which related directly to the individual employer-employee relationship. [Emphasis added.]

The Court of Appeal seems to have attached no importance to the words I have emphasized. It is only sensible that the terms and conditions formerly contained in a collective agreement be presumed to continue to govern the relationship, absent circumstances that would imply otherwise. The alternative to this, it is fair to say, would be chaos. However, denying to the employer the power within the context of a collective bargaining relationship to, subject to its duty to bargain in good faith, change the terms on which it will make employment available denies almost all effect to the termination clause agreed to by the parties. Instead of terminating the agreement in any real sense, it

simply would signal the commencement of a new bargaining session, coupled with the threat of strikes or lock-outs. The position taken by Judson J. in Canadian Pacific Railway Co. v. Zambri, [1962] S.C.R. 609, at p. 624, that "When a collective agreement has expired, it is difficult to [page1010] see how there can be anything left to govern the employer-employee relationship" seems more satisfying. The relationship continues, of course, to be subject to the requirements contained in the appropriate statutory scheme.

29 While it is true that the Act does not expressly provide that the employer has the power contended for, it was not unreasonable for the Board to find that the power existed. Professor Weiler, the first Chairman of the Labour Relations Board of British Columbia and one of the drafters of the Code, discusses the issue of unilateral alteration as follows (Paul Weiler, Reconcilable Differences (1980), at pp. 65-66):

> Suppose the employer cannot get an agreement from the union to change these requirements in a new contract. In that event, management is entitled to act unilaterally. It can simply post an announcement to its employees that it is reducing the price it will pay for labour and the amount of labour that it is going to use. That is what it means for management to exercise the rights of property and of capital; to be able to propose the terms upon which it will purchase labour for its operations.
>
> What rights and resources do the employees and their union have in response? In essence, they have only the collective right to refuse to work on those terms, to withdraw their labour rather than to accept their employer's offer. That is what a strike consists of.

It was argued that the Labour Code as a whole was designed to balance the power of the employer and the union by balancing the right to strike against the right to lock-out. On this point, Professor Weiler writes as follows (p. 67):

> A lockout is not the employer equivalent of a strike. As I have shown, the reciprocal employer lever is really the management prerogative to maintain or to change the terms and conditions which the employer will pay its employees who want to work in its operations. (A lockout is usually the instrument of an employer association, an employer "union," which wants to defend itself against selective trade union strikes of its members.)

[page1011]

30 Two further considerations support the view that it was not unreasonable to find that the employer has the power to alter the terms and conditions on which he will make employment available. First, the experience of other jurisdictions shows that allowing the employer this power will not have a catastrophic effect or upset the delicate balance of power between the union and the employer. Put another way, the experience of other jurisdictions does not show that the power of unilateral alteration introduces any unfairness into the bargaining relationship. Nothing was ad-

vanced to support the view that a denial of this power is an essential element of an effective labour relations regime. Secondly, the power to change the terms of employment once an agreement has expired and the parties have been unable to agree can be inferred from the existence of provisions in the Code which limit the circumstances in which unilateral changes can be made.

31 No Canadian labour relations legislation grants an employer explicit power to unilaterally change terms and conditions of employment. Rather, the different jurisdictions have either declared that it shall be an unfair labour practice to effect such changes without first bargaining collectively in respect of those changes or unless a strike or lock-out has occurred (see Labour Relations Act, R.S.M. 1987, c. L-10, s. 10(4); The Trade Union Act, R.S.S. 1978, c. T-17, s. 11(1)(m)) or have placed limits on the circumstances upon which such changes can be made. Thus, in the majority of jurisdictions an employer is prohibited from effecting changes until a strike or lockout has or could occur; see Labour Relations Code, R.S.A. 1988, c. L-1.2, s. 145; Labour Code, R.S.Q. 1977, c. C-27, s. 59; Canada Labour Code, R.S.C., 1985, c. L-2, ss. 50, 89; or until the parties have bargained collectively and failed to reach an agreement and a conciliator or mediator has either been unable to resolve the dispute or has not been appointed; see Labour Relations Act, R.S.O. 1980, c. 228, s. 79; Industrial Relations Act, R.S.N.B. 1973, c. I-4, s. 35(2); Labour Act, R.S.P.E.I. 1974, c. L-1, s. 23; Labour Relations Act, S.N. 1977, c. 64, s. 74; Trade Union Act, S.N.S. 1972, c. 19, s. 33. While none of these statutes exactly parallels [page1012] the British Columbia Labour Code, much can be drawn from the fact that no jurisdiction has found it necessary to expressly permit an employer to unilaterally alter terms of employment, and implicitly all other jurisdictions allow it, albeit with some limitations. See also International Association of Machinists and Aerospace Workers v. Air Canada, unreported decision of the C.L.R.B. released January 18, 1988; Canada Safeway Ltd. v. Retail, Wholesale and Department Store Union, Locals 454 and 480 (1985), 11 CLRBR (NS) 68.

32 The American authorities provide further support for the approach taken by the Labour Relations Board, and cannot be dismissed as cursorily as was done by the Court of Appeal. The relevant American statute is the National Labour Relations Act, as amended, 29 U.S.C., particularly ss. 8(a)(5) and 9(a) which provide that it shall be an unfair labour practice to refuse to bargain collectively with the union, and that the union shall be the exclusive bargaining agent of the employees. In this the American legislation is broadly similar to many of the Canadian statutes. Though no express power of alteration exists, subject to limitations relating to the obligation to bargain in good faith with the union, it is clear that an employer does not violate the Act by making unilateral changes that are reasonably comprehended within the pre-impasse negotiating framework; see American Federation of Television and Radio Artists v. N.L.R.B., 395 F.2d 622 (D.C. 1968); Atlas Metal Parts Co. v. N.L.R.B., 660 F.2d 304 (7th Cir. 1981); American Ship Bldg. Co. v. Labor Board, 380 U.S. 300, 316 (1965); N.L.R.B. v. Cone Mills Corp., 373 F.2d 595 (4th Cir. 1967). The Court of Appeal rejected reliance on these cases because the issue facing the American courts was whether the employer had committed an unfair labour practice. The Labour Relations Board derived guidance from these cases as showing that such a power is not inconsistent with effective labour relations. The exercise of this power is moderated by the obligation imposed in s. 6 to bargain in good faith. It is not unreasonable for [page1013] the Board to determine that this power can be tempered by that duty.

33 The British Columbia legislation expressly provides for two statutory freeze periods. The applicable provisions read:

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51. (1) Where an application for certification is pending, a trade union or person affected by the application shall not declare or engage in a strike, an employer shall not declare a lockout, and an employer shall not increase or decrease rates of pay, or alter a term or condition of employment of the employees affected by the application, without the board's written permission.

. . .

61. (1) Where the board certifies a trade union as bargaining agent for employees in a unit and no collective agreement is in force,

. . .

(c) the employer shall not increase or decrease the rate of pay of an employee in the unit or alter another term or condition of employment until

(i) 4 months after the board has certified the trade union as bargaining agent for the unit; or
(ii) a collective agreement is executed,

whichever occurs first.

34 These sections provide statutory protection to the union at a time when it would be particularly vulnerable to management initiatives designed to weaken or destabilize it. The employer is expressly prohibited from pursuing a course of action it would otherwise be able to pursue, subject of course to the unfair labour practice provisions of the Code. The scheme of the Code is such that it prohibits certain courses of action. The Board came to the conclusion that what is not prohibited by either the wording or the policy of the statute is permitted. Counsel for the union was unable to persuade me that this is an unreasonable approach. Clearly the legislature could have prohibited [page1014] an employer from exercising this power. We were not directed to any legislation where such a prohibition, other than for a limited period of time, exists. In all these circumstances, it will be clear that I must respectfully disagree with the reasoning of the Court of Appeal.

Standing of the Industrial Relations Council

35 The union argued that the Industrial Relations Council, having had the opportunity in two lengthy sets of reasons to offer a rational basis for its conclusion, has no standing to make submissions before this Court in support of the reasonableness of its decision. It takes the position that while the Board could legitimately show that it had jurisdiction to embark upon the enquiry it did, a point the union concedes in any event, it cannot argue that it has not subsequently lost that jurisdiction through a patently unreasonable decision. With respect, I cannot accept this argument. In my view, the Industrial Relations Council has standing before this Court to make submissions not only explaining the record before the Court, but also to show that it had jurisdiction to embark upon the inquiry and that it has not lost that jurisdiction through a patently unreasonable interpretation of its powers.

36 In Northwestern Utilities Ltd. v. City of Edmonton, [1979] 1 S.C.R. 684, Estey J., for a unanimous Court, commented on the right of an administrative tribunal to make submissions before

the Court. In that case, the Public Utilities Board Act, R.S.A. 1970, c. 302, s. 65, conferred on the Public Utilities Board a specific right to be heard on the argument of any appeal from its decisions, but by implication in s. 63(2), it was precluded from bringing an appeal. In these circumstances, Estey J. stated at pp. 708-9:

> The Board has a limited status before the Court, and may not be considered as a party, in the full sense of that term, to an appeal from its own decisions. In my view, this limitation is entirely proper. This limitation was no doubt consciously imposed by the Legislature in [page1015] order to avoid placing an unfair burden on an appellant who, in the nature of things, must on another day and in another cause again submit itself to the rate fixing activities of the Board. It also recognizes the universal human frailties which are revealed when persons or organizations are placed in such adversarial positions.

In that case, the Board had presented "detailed and elaborate arguments" in support of the merits of its decision. Estey J., at p. 709, commented:

> Such active and even aggressive participation can have no other effect than to discredit the impartiality of an administrative tribunal either in the case where the matter is referred back to it, or in future proceedings involving similar interests and issues or the same parties. The Board is given a clear opportunity to make its point in its reasons for its decision, and it abuses one's notion of propriety to countenance its participation as a full-fledged litigant in this Court, in complete adversarial confrontation with one of the principals in the contest before the Board itself in the first instance.

In these circumstances, the tribunal is limited to an explanatory role and "to the issue of its jurisdiction to make the order in question".

37 Estey J. then, however, limited the meaning of jurisdiction so as not to "include the transgression of the authority of a tribunal by its failure to adhere to the rules of natural justice". He continued (p. 710):

> In such an issue, when it is joined by a party to proceedings before that tribunal in a review process, it is the tribunal which finds itself under examination. To allow an administrative board the opportunity to justify its action and indeed to vindicate itself would produce a spectacle not ordinarily contemplated in our judicial traditions.

38 At first sight, this may seem to conflict with Lamer J.'s comments in Bibeault v. McCaffrey, [1984] 1 S.C.R. 176, at p. 191, that:

> ... an infringement of the audi alteram partem rule in the case at bar postulates a patently unreasonable interpretation of s. 32 L.C. Such an interpretation by the commissioners, the judge or the Labour Court would in itself be an excess of jurisdiction of the kind recognized [page1016] by the above-cited decisions of this Court as conferring on the [commissioners] the necessary interest (locus standi) to be appellants.

There is, however, no conflict between these two decisions if it is recognized that the right to be heard was, in that case, a statutory right, and the issue for decision by the Labour Commissioners was as to the scope of that right. It is not every case in which a denial of natural justice will flow from a patently unreasonable interpretation of a statute. In the latter case, however, the administrative tribunal will be able to make certain limited submissions.

39 In British Columbia Government Employees' Union v. Industrial Relations Council (unreported, B.C.C.A., May 24, 1988), the British Columbia Court of Appeal held that the Industrial Relations Council had the right to make the submissions that the court below had erred in substituting its judgment for that of the Industrial Relations Council, and that the court erred in finding the Council's interpretation of the Act to be patently unreasonable. In the course of his judgment, Taggart J.A. for the court made the following statement with which I am in complete agreement, at p. 13:

> The traditional basis for holding that a tribunal should not appear to defend the correctness of its decision has been the feeling that it is unseemly and inappropriate for it to put itself in that position. But when the issue becomes, as it does in relation to the patently unreasonable test, whether the decision was reasonable, there is a powerful policy reason in favour of permitting the tribunal to make submissions. That is, the tribunal is in the best position to draw the attention of the court to those considerations, rooted in the specialized jurisdiction or expertise of the tribunal, which may render reasonable what would otherwise appear unreasonable to someone not versed in the intricacies of the specialized area. In some cases, the parties to the dispute may not adequately place those considerations before the court, either because the parties do not perceive them or do not regard it as being in their interest to stress them.

40 Before this Court, the Industrial Relations Council confined its submissions to two points. It [page1017] first argued that the Court of Appeal erred in applying the wrong standard of review to the decision of the Board. It submitted that the Court of Appeal reviewed for correctness instead of for reasonableness. As I have already indicated, I agree that the Court of Appeal erred in adopting such an approach. The second branch of the Council's submissions was to show that the Board had considered each of the union's submissions before it, and had given reasoned, rational rejections to each of the arguments. The argument before us emphasized that the Council had made a careful review of the relevant authorities and had made a decision that was within its exclusive jurisdiction. At no point did it argue that the decision of the Board was correct. Rather it argued that it was a reasonable approach for the Board to adopt. The Council had standing to make all these arguments, and in doing so it did not exceed the limited role the Court allows an administrative tribunal in judicial review proceedings.

Disposition

41 I would allow the appeal and restore the order of the Industrial Relations Council in so far as it relates to Paccar and CAIMAW. Paccar shall have its costs, but no order as to costs is made with respect to the Industrial Relations Council.

The reasons of Lamer and Sopinka JJ. were delivered by

42 SOPINKA J.:-- I have had the benefit of reading the reasons for judgment prepared in this appeal by Justice Wilson, Justice La Forest, and Justice L'Heureux-Dubé, and I am in agreement with La Forest J. that the appeal must be allowed. My route in arriving at this conclusion differs in an important respect from my colleague's, and it is thus necessary for me to set out my approach to the matter.

43 While I agree generally with La Forest J. on the principles underlying the scope and standard of review of labour board decisions, I cannot agree that it is always necessary for the reviewing [page1018] court to ignore its own view of the merits of the decision under review. Any adjudication upon the reasonableness of a decision must involve an evaluation of the merits. Reasonableness is not a quality that exists in isolation. When a court says that a decision under review is "reasonable" or "patently unreasonable" it is making a statement about the logical relationship between the grounds of the decision and premises thought by the court to be true. Without the reference point of an opinion (if not a conclusion) on the merits, such a relative statement cannot be made.

44 I share La Forest J.'s opinion of the importance of curial deference in the review of specialist tribunals' decisions. But, in my view, curial deference does not enter the picture until the court finds itself in disagreement with the tribunal. Only then is it necessary to consider whether the error (so found) is within or outside the boundaries of reasonableness. The test is, as La Forest J. points out, citing Blanchard v. Control Data Canada Ltd., [1984] 2 S.C.R. 476, a "severe test". But even here an appreciation of the merits is not irrelevant. Lamer J., speaking for himself and McIntyre J. in Blanchard, stated at pp. 494-95:

> ... though all errors do not lead to unreasonable findings, every unreasonable finding results from an error (whether of law, fact, or a combination of the two), which is unreasonable.

So long as the court is satisfied with the correctness of the tribunals' decision, any reference to reasonableness is superfluous.

45 Concerning the merits of the present case, I can be brief, since this ground has been substantially covered by La Forest J. in finding that the Board's decision was "not unreasonable". I am of the view that the Board's decision is consistent with the Labour Code, R.S.B.C. 1979, c. 212, which expressly provides for "freezes" in employment [page1019] conditions in some circumstances, though not those with which we are concerned here (see ss. 51 and 61). Moreover, the Board's decision is consistent with the contractual expectations of the parties, since the insertion of the termination clause would have been meaningless if the terms of the collective agreement were held to persist indefinitely, or until a new collective agreement is concluded.

46 The Board concluded that the duty to bargain in good faith prevented the employer from altering the terms of the collective agreement until an impasse was reached. Thereafter, the employer reverted to its right to change these terms because no collective agreement was in force, nor was the employer bound by any ordinary contract. This result is summed up in the following statement:

> The B.C. Legislature has not enacted a statutory freeze covering the period after the expiry of a collective agreement, with the result that the employer's authority to make unilateral alterations to terms and conditions of employment is left limited only by his duty to bargain in good faith.

47 In this respect, the Board's decision accords with the rule that a legislature is presumed not to depart from the general system of the law without expressing its intention to do so: Goodyear Tire & Rubber Co. of Canada Ltd. v. T. Eaton Co., [1956] S.C.R. 610, at p. 614.

48 In dealing with labour and other remedial legislation, this rule must be tempered by the rule of statutory construction that requires that such legislation be given a liberal construction. Accordingly, the legislation is not to be "whittled to a minimum" or given a narrow interpretation in the face of the expressed will of the legislature: Bakery and Confectionery Workers International Union of America Local No. 468 v. White Lunch Ltd., [1966] S.C.R. 282, at p. 292. The Labour Code, notwithstanding the use of the word, is not a code in the true civil law sense. It does not purport to totally exclude the general law. Accordingly, in respect of some matters, it is silent. This lacuna cannot be filled by any amount of liberal construction short of out-and-out judicial legislation. [page1020] Rather, the general law applies to fill the void. In common law jurisdictions, this is the common law. In RWDSU v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573, at p. 589, McIntyre J. stated:

> I am aware that the labour relations of the appellants are governed by the Canada Labour Code. However, since the Canada Labour Code is silent on the question of picketing, the common law applies, in this case the common law of British Columbia ....

49 The effect of the Board's decision is that, while the springing up of individual contracts of employment on the expiry of the collective agreement would be inconsistent with the statutory scheme of collective bargaining, the right of the employer to change the terms and conditions of employment in the absence of any agreement, collective or otherwise, is not. This result conforms with the principles referred to above and is the correct result. It is, therefore, not necessary to consider whether the decision was reasonable, or, much less, patently unreasonable.

50 I would therefore dispose of the appeal as proposed by La Forest J.

The following are the reasons delivered by

51 WILSON J. (dissenting):-- I have had the advantage of reading the reasons of both Justice La Forest and Justice L'Heureux-Dubé and, while I agree with the result arrived at by L'Heureux-Dubé J., I reach it by somewhat different reasons.

52 I am in agreement with my colleague, La Forest J., as to the broad scope of the principle of curial deference to the decisions of administrative tribunals such as Labour Relations Boards because of their special expertise. I also agree with him that s. 27 of the Labour Code of British Columbia is not, as such, "a jurisdiction limiting provision upon the interpretation of which the Board cannot err without being subject to judicial review". I do believe, however, that a decision of the Board which meets what La Forest J. calls the "severe test" of being "patently unreasonable" is not protected by the principle of curial deference. The principle does [page1021] have its own built-in limitation. The question before us therefore is whether the Board's decision to the effect that an employer can, while employer and employees are, so to speak, between collective agreements, unilaterally impose terms or conditions of employment on the employees is "patently unreasonable" so as to constitute jurisdictional error or is, at most, an error of law made by the Board within its jurisdiction.

53 It is my view that the test of patent unreasonableness is met in this case and I say that while fully recognizing that the Board's initial jurisdiction to deal with the question is not in issue. Accordingly, if it were simply a question of whether the Board's interpretation of the Code was the correct one, or even whether it was a reasonable one, there would be no issue for the courts. In such circumstances the principle of curial deference would require that the Board's decision be respected. But the courts must not defer to decisions that are patently unreasonable. Such decisions cannot be passed off as the product of special expertise or, as the appellant submits, "policy choices" which are not subject to review by the courts. They can only be treated as decisions which the Board had no jurisdiction to make.

54 I accept, of course, that when we postulate the test of patent unreasonableness we are attempting to assess the reasonableness of the Board's decision, not in terms of the reasonable man or reasonable member of the general public, but in terms of the reasonable Board. This must be so if we are to allow for the fact that the Board is deemed to have special expertise. A patently unreasonable decision is accordingly one which no reasonable Board applying its expertise could possibly have arrived at.

[page1022]

55 My colleague, La Forest J., suggests that the test the courts should apply in determining whether a decision is patently unreasonable is whether there is a rational basis for it. If there is no rational basis for it, then, in his view, it is patently unreasonable. But if there is a rational basis for it, then the courts must defer to the decision. It is sufficient, my colleague says, that the Board's decision is "rationally defensible".

56 I am not sure how helpful it is to substitute one adjectival phrase for another and define patent unreasonableness in terms of rational indefensibility. It seems to me that this simply injects one more opportunity for ambiguity into a test which is already fraught with ambiguity.

There is, it seems to me, a good argument to be made that "rational indefensibility" is an even stricter test than "patent unreasonableness". Be that as it may, both tests pose problems for the courts which, as my colleague points out, are to be viewed as lacking the special expertise required for the resolution of labour disputes which specialized labour boards enjoy.

57 If the resolution of the problem involves the application of the tribunal's special expertise, can a court be heard to say that the tribunal's decision was "patently unreasonable"? In this case, for example, would it be open to the Board to say: we know from experience in dealing with these matters that, strange as it may seem to the untrained person, the unilateral imposition of terms by an employer helps to promote settlement and secure industrial peace. Or would a complete answer to that be: maybe so, but that is not the right way to achieve that result: bringing economic pressure to bear on the employees during the bargaining process may achieve that result, but it is not conducive to harmonious relations between employers and employees and, indeed, is antithetical to the collective bargaining process which the legislature has obviously concluded is the highest and best means of achieving that result. In other words, does describing a Board's decision as a "policy choice" insulate it from review if the policy on [page1023] which the choice is based is inconsistent with the policy of the legislation under which it purports to have been made? I do not believe so. A policy

choice is only truly a policy choice if the choice is made between policies which are equally consistent with and supportable by the legislation. Is that the case here?

58 It seems to me that the key to the problem lies in the fundamental obligation of employer and union to bargain in good faith towards a new collective agreement once the earlier agreement has been properly terminated. I do not see how an employer can be bargaining in good faith towards a new collective agreement while at the same time unilaterally imposing detrimental terms upon the employees which he knows have already been rejected. (By detrimental terms I mean terms less beneficial to the employees than the terms in the earlier agreement.) I agree with the British Columbia Court of Appeal ((1986), 7 B.C.L.R. (2d) 80) that where the employer continues to employ the employees and the employees continue to work for the employer after the earlier agreement has been terminated, the terms and conditions of employment should be deemed to be the same terms and conditions as those in the earlier agreement until such time as new terms result from the process of bargaining in good faith. This must be so if good faith bargaining between employer and union is to have any opportunity to work. If, however, the parties cannot agree on new terms then, subject to the further requirements of the Code, the parties have their rights of lock-out and strike. But it seems to me that to interpret the Code (where the Code is silent on the subject) as permitting the employer to unilaterally impose new terms on the employees in the interval is to allow the employer to effectively bring the good faith bargaining period to an end. It is to say that the employer may decide when an impasse has been reached, when the time has come that further bargaining is useless because he, the employer, is [page1024] not prepared to move from his position, and that, having so decided, he may then proceed unilaterally to impose new terms even if those terms were the very ones which brought about the impasse. Compromise, which is the accepted means of ensuring the ongoing nature of the good faith bargaining process, is thus declared by the employer to be at an end and the employees are confronted with the option of living with the employer's new terms until the union is in a strike position or leaving their employ and trying to find work elsewhere.

59 Why, one might ask, should an employer be able to destroy in this way the freedom and equality of bargaining power both parties must have at the bargaining table? Why should he have this new power? It seems to me obvious that to permit the employer to decide when an impasse in the collective bargaining process has been reached and then give him the power to impose new terms unilaterally on his employees will do nothing to promote the collective bargaining process which is the legislatively accredited means of achieving collective agreements and industrial peace. As the British Columbia Court of Appeal pointed out at p. 85:

> The Code as a whole seeks stability resulting from agreement. This new power creates instability resulting from unilateral action.

60 Must we conclude that in the absence of a specific provision in the Code the employer is free to do anything which he is not specifically prohibited from doing? This seems to be the underlying premise of the appellant's position. Nothing in the Code, they say, prevents the employer from unilaterally imposing new terms. Or do we in filling the legislative vacuum take guidance from the legislative scheme? It seems to me that the latter must be the proper course. I would respectfully adopt the following comment from the majority reasons of Professor Bora Laskin (as he then was) in Re [page1025] Peterboro Lock Mfg. Co. (1954), 4 L.A.C. 1499, at p. 1502:

481

> In this Board's view, it is a very superficial generalization to contend that a Collective Agreement must be read as limiting an employer's pre-collective bargaining prerogatives only to the extent expressly stipulated. Such a generalization ignores completely the climate of employer-employee relations under a Collective Agreement. The change from individual to Collective Bargaining is a change in kind and not merely a difference in degree. The introduction of a Collective Bargaining regime involves the acceptance by the parties of assumptions which are entirely alien to an era of individual bargaining. Hence, any attempt to measure rights and duties in employer-employee relations by reference to pre-collective bargaining standards is an attempt to re-enter a world which has ceased to exist.

61 I cannot believe that the legislature intended in the circumstances before us to return the parties to pre-collective bargaining standards, particularly if there is another interpretation of the Code which does not give one of the negotiating parties the power to alter dramatically the balance of bargaining power between them in his own favour and which also has the very significant advantage of endorsing rather than undermining the collective bargaining process. That interpretation is, of course, to permit the same terms and conditions which were the product of the earlier bargaining process to apply in the event of an impasse until such time as the parties are in a strike/lock-out position.

62 It is true that this solution will probably benefit the union. It must be assumed that where the employer terminates the earlier agreement it is because circumstances have changed and he considers it no longer to his advantage to have that agreement continue in effect. The important point, however, is that an interpretation of the Code which supports this solution does not interfere with the balance of bargaining power between the parties. It does not create a new power in the union. It does not undermine the collective bargaining process. It does not compel the parties to "re-enter a [page1026] world which has ceased to exist". I cannot agree with La Forest J., therefore, that one interpretation of the Code is as reasonable as the other, that it is a matter of choosing between equally viable "policy choices". Far from it. One is completely consistent with the concept of freedom and equality of bargaining power between the parties and the paramount role of the collective bargaining process in labour dispute resolution. The other is completely inconsistent with and inimical to both. It is on that basis that I would find that the decision of the Board was "patently unreasonable" and constituted jurisdictional error.

63 I would dismiss the appeal with costs.

The following are the reasons delivered by

64 L'HEUREUX-DUBÉ J. (dissenting):-- Having carefully considered the opinion of my colleague Justice La Forest, I agree with him that the British Columbia Labour Relations Board had standing to make arguments relative to the applicable standard of review as well as to the steps it followed in reaching the decision now being challenged. With great respect, however, I must differ from his conclusion that the Board committed no jurisdictional error when it stated that an employer may unilaterally impose the terms of employment upon the termination of the collective agreement, subject only to the obligation to bargain in good faith.

65 As noted by La Forest J., the British Columbia Labour Code specifically prevents an employer from altering the terms of employment where an application for certification is pending (s.

51) and, upon certification, either for a period of four months or until the execution of a collective agreement, whichever comes first (s. 61). However, the Code provides for no statutory freeze of working conditions following the termination of a collective agreement, nor are there any applicable policy guidelines previously issued by the Board in this respect. In both the initial CAIMAW application, as well as in the subsequent CAIMAW/IBEW re-hearing, the Board accordingly proceeded on the basis of its general statutory jurisdiction to [page1027] decide "any question as to whether ... a collective agreement is in full force and effect" pursuant to subs. 34(1)(g) of the Labour Code. At the hearing before this Court, respondent properly conceded that the Board was initially empowered to embark upon this specific inquiry. However, it must be determined whether in carrying out this inquiry the Board exceeded its jurisdiction. To this end it is necessary to examine s. 27 of the British Columbia Labour Code which expresses the fundamental objectives of the legislation.

I

The Fundamental Objectives of the Labour Code

66 In 1973 a general purposes and objects clause appeared for the first time in the Labour Code. The clause then read as follows:

> 27. (1) The board may exercise the powers and shall perform the duties conferred or imposed upon it under this Act with the object of securing and maintaining industrial peace and promoting conditions favorable to settlement of disputes, and, for this purpose, the board may from time to time formulate general policies not contrary to this Act for the guidance of the general public and the board; but the board is not bound thereby in the exercise of its powers or the performance of its duties. [Emphasis added.]

67 This disposition was amended by the Labour Code Amendment Act, 1977, S.B.C. 1977, c. 72 and thereafter provided:

> 27. (1) The board, having regard to the public interest as well as the respective rights and obligations of parties before it, may exercise its powers and shall perform the duties conferred or imposed on it under this Act so as to develop effective industrial relations in the interest of achieving or maintaining good working conditions and the well-being of the public, and for those purposes, the board shall have regard to the following purposes and objects:
>
> (a) securing and maintaining industrial peace, and furthering harmonious relations between employers and employees;
> (b) improving the practices and procedures of collective bargaining between employers and trade-unions as the freely chosen representatives of employees; [page1028]
> (c) promoting conditions favorable to the orderly and constructive settlement of disputes between employers and employees or their freely chosen trade-unions. [Emphasis added.]

68 This is the formulation of s. 27(1) of the Labour Code which applies to the present appeal. It is appropriate, however, to complete the legislative history of s. 27(1) by noting that it was once again modified in 1987 by S.B.C. 1987, c. 24, s. 18 to read as follows:

> 27. (1) The council, having regard to the public interest as well as the rights of individuals and the rights and obligations of the parties before it and recognizing the desirability for employers and employees to achieve and maintain good working conditions as participants in and beneficiaries of a competitive market economy, shall exercise the powers and perform the duties conferred or imposed on it under this Act so as to achieve the expeditious resolution of labour disputes, and for these purposes the council shall have regard to the following purposes and objects:
>
> (a) securing and maintaining industrial peace and furthering harmonious relations between employers and employees;
> (b) improving the practices and procedures of collective bargaining between employers and trade unions as the freely chosen representatives of employees;
> (c) promoting conditions favorable to the orderly and constructive settlement of disputes between employers and employees or their freely chosen trade unions;
> (d) encouraging the voluntary resolution of collective bargaining disputes;
> (e) minimizing the harmful effects of labour disputes on persons who are not involved in the disputes;
> (f) providing such assistance to employers and bargaining agents as may facilitate the making or renewing of collective agreements;
> (g) gathering and publishing information and statistics respecting collective bargaining in the Province.

69 General purpose clauses such as s. 27(1) of the Labour Code not only aim to provide guidance to the administrative agency; they also identify the limits of the discretion it enjoys in the exercise of its statutory powers. The role of such clauses is described by D. J. Galligan, Discretionary Powers: [page1029] A Legal Study of Official Discretion (1986), as follows (at p. 109):

> The legislative statement of objects and purposes is of clear and central importance in exercising delegated powers. By that means the content and scope of powers are defined, and guidance is provided to the official in making decisions; moreover, it is in terms of those objects that an assessment or evaluation of a decision is to be made.

70 Purposes and objects clauses find their historical roots in the common law. In Padfield v. Minister of Agriculture, Fisheries and Food, [1968] A.C. 997 (H.L.), Lord Reid explained why the fundamental objects of the enabling legislation restrict the delegation of discretionary powers (at p. 1030):

> It is implicit in the argument for the Minister that there are only two possible interpretations of this provision -- either he must refer every complaint or he has an unfettered discretion to refuse to refer in any case. I do not think that [this] is right. Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act; 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. In a matter of this kind it is not possible to draw a hard and fast line, but 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.]

71 Complying with legislative intent is as valid a policy consideration in Canada as it is in England: [TRANSLATION] "... when Parliament delegates certain powers, it intends to enable the administrative agency concerned to meet the objectives which are either expressly or implicitly written in the act" (G. Pépin and Y. Ouellette, Principes de contentieux administratif (2nd ed. 1982), at p. 264). In the well-known case of Roncarelli v. [page1030] Duplessis, [1959] S.C.R. 121, Martland J. expressed views foreshadowing those later adhered to by Lord Reid (at p. 156):

> ... 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.

72 In the specific area of labour relations, it has long been recognized by this Court that the statutory imperatives of maintaining industrial peace and harmonious industrial relations are to be implied to limit the discretion conferred by the enabling legislation. In Smith & Rhuland Ltd v. The Queen, [1953] 2 S.C.R. 95, the question raised was whether a provincial labour relations board could validly decline to certify a union on the basis that the secretary-treasurer of the union was a communist and exercised a dominant influence in the union. A majority of this Court found that, while the Board enjoyed a discretion to certify, this discretion could not be exercised on the basis of matters extraneous to the underlying purposes and objectives of the Act. Speaking for three members of the majority, Rand J. said at p. 100:

> I am unable to agree, then, that the Board has been empowered to act upon the view that official association with an individual holding political views considered to be dangerous by the Board proscribes a labour organization.

In Rand J.'s view, the issue was one of vires: the Board exceeded its powers in exercising its discretion to certify based on considerations unrelated to the fundamental purposes of the legislation. Were such a case to arise today in British Columbia, it would no doubt be dealt with similarly under s. 27(1).

73 In Tremblay v. Commission des relations de travail du Québec, [1967] S.C.R. 697, this Court [page1031] was asked to determine whether s. 96 of the British North America Act, 1867 allowed the labour relations board of Quebec to validly exercise the discretion conferred by s. 50 of

the provincial Labour Relations Act. This provision stated: "If it be proved to the Board that an association has participated in an offence against s. 20 [domination by employer], the Board may ... decree the dissolution of such association". In deciding that the board had constitutional authority to apply s. 50, Abbott J., who delivered the opinion of the Court, wrote at pp. 701-702:

> The power given to the Board under s. 50 is a limited and discretionary power. It is purely incidental to the accomplishment of one of the primary purposes for which the association was granted corporate status, namely the maintenance of industrial peace.

74 Smith & Rhuland v. The Queen and Tremblay v. Commission des relations de travail du Québec demonstrate that general purposes and objects clauses such as s. 27(1) of the Labour Code are not enacted in a juridical vacuum. Such clauses codify the common law duty to exercise delegated powers in strict accordance with the fundamental dictates of the enabling statute. In this historical context, s. 27(1) amounts to more than a simple guide to the Board; it constitutes a statutory direction to carefully consider the goal of developing effective industrial relations having regard to certain specific purposes and objects.

75 The Board is generally well aware of the obligation s. 27(1) imposes upon it (see, e.g., Wall and Redekop Corp. v. United Brotherhood of Carpenters and Joiners of America (1986), 5 B.C.L.R. (2d) 335 (S.C.), dismissing an application for judicial review from (1986), 86 C.L.L.C. 16,054, itself denying a reconsideration from (1985), 85 C.L.L.C. 16,050). However, in deciding the complaints which gave rise to the present proceedings, the Board gave no consideration at all to the underlying purposes and objectives of the Code. In the initial CAIMAW application and in the joint [page1032] CAIMAW/IBEW re-hearing, there was not a single reference to s. 27 of the Code. Further, there was no discussion of the public interest or the development of effective industrial relations, with the result that it cannot be presumed that the Board implicitly considered that provision.

76 The Board's failure to discuss the requirements of s. 27 is especially fraught with consequence since the policy decision it was called to make affects by its very nature not only the parties before it but also all other unions, employees and employers in a highly sensitive area of collective bargaining. That the Board envisaged making a policy determination which would affect unions and employers at large is illustrated by the following extract from the CAIWAW/IBEW re-hearing:

> We now wish to summarize our conclusions above by describing the rights and obligations of the parties under the Labour Code after the expiry of a collective agreement.
>
> . . .
>
> After the expiry of the collective agreement, no unilateral alterations to terms and conditions of employment may be made by an employer unless they are done so in compliance with his duty to bargain in good faith with the union ....
>
> In the period after the expiry of the collective agreement, where the employer continues to operate and the employees continue to work, it will be im-

> plied that the terms and conditions of employment for the employees will continue to be the same as those contained in the just expired collective agreement.

The general references to "an employer" leave no doubt that the Board is engaged in an attempt to fill the void in the Labour Code with respect to the unilateral alteration of terms after the expiration of a collective agreement. This decision constitutes a "mini-Code" on "the rights and obligations" of employers and unions at that stage. The Board's policy decision goes well beyond the specific interests of the parties before it and acquires an importance akin to the enactment of a new legislative provision. This additional significance accentuates [page1033] the necessity for the Board to meet head on the arguments based on the development of harmonious labour relations.

77 I agree with my colleague La Forest J. that courts must defer to the judgment of administrative tribunals in matters falling squarely within the area of their expertise. It is now well-established that an administrative tribunal exceeds its jurisdiction because of error only if: (1) it errs in a patently unreasonable manner in respect of a question which is within its jurisdiction; or, (2) it commits a simple error in respect of a legislative provision limiting the tribunal's powers (see U.E.S., local 298 v. Bibeault, [1988] 2 S.C.R. 1048, at p. 1086). However, unlike my colleague La Forest J., I cannot accept that the Board's decision is anything but unreasonable. Here, as I said earlier, there is no indication that the Board even considered the requirements of effective industrial relations and the purposes and objects expressed in s. 27. Such an omission, in my view, played a crucial role in leading the Board astray and causing it to come to a patently unreasonable solution.

78 I now turn to my reasons for finding no rational basis for the Board's decision.

II

Infringement upon the Fundamental Objectives

79 Collective bargaining has been entrenched in Canadian labour relations law and policy for over fifty years. It is indispensable to the development of "effective industrial relations" pursuant to s. 27. From a legislative standpoint, collective bargaining involves the recognition of three basic freedoms on the part of employees: "to form themselves into associations, to engage employers in bargaining with the associations, and to invoke meaningful economic sanctions in support of the bargaining" (A.W.R. Carrothers, E.E. Palmer and W.B. Rayner, Collective Bargaining Law in Canada (2nd ed. 1986), at p. 4). The scheme postulates [page1034] that the employees' control over the supply of labour will match the employer's control over its demand, thereby fostering the proper conditions for constructive and successful negotiations. The strike and the lock-out are the principal economic sanctions which are provided for and regulated by labour legislation. These, however, are but two of a wide array of economic sanctions in the labour context.

80 While they may be different in accessory respects, all economic sanctions used in collective bargaining share three fundamental characteristics: they only come into play after concerted attempts at settlement; they hurt both parties economically; and they presuppose the existence of countervailing measures.

1 -- The Characteristics of Economic Sanctions

81 First, all Canadian labour jurisdictions have adopted a legislative policy of postponing the exercise of the economic sanctions until all other attempts at an agreement have failed. As noted by Professors H. W. Arthurs, D. D. Carter and H. J. Glasbeek in Labour Law and Industrial Relations in Canada (2nd ed. 1984), at p. 213:

> Canadian collective bargaining legislation usually requires the parties to exhaust certain dispute resolution procedures before striking or locking-out.

For instance, in British Columbia, the use of the strike and lock-out is subject to tight control by the Labour Code and close scrutiny on the part of the Labour Board. Under the Code, there is no right to strike or to lock out during the term of the collective agreement. These rights only arise upon the termination of the agreement, after the parties have "bargained collectively about the dispute which is the cause or occasion of the strike or lock-out and failed to conclude a collective agreement" (s. 80). In the case of the strike, there is the further requirement of holding a vote "by secret [page1035] ballot and in accordance with the regulations, of the employees in the unit affected, as to whether to strike" in which a "majority of those employees who vote have voted for a strike" (s. 81). Where the vote favours a strike, the right to strike may only be exercised within three months following the vote (s. 81(3)(a)), and after 72 hours have elapsed following written notice given by the trade union that the employees are going to strike (s. 81(3)(b)(i) and (ii)). Where a mediation officer has been appointed, a further delay may be necessary to allow for the officer's report to be made to the Minister (s. 81(3)(b)(iii)).

82 In deferring the use of the strike and lock-out until the negotiations come to a deadlock, the legislation furthers the fundamental commitment to the "orderly and constructive settlement of disputes", which is expressed in s. 27(1)(c) of the British Columbia Labour Code.

83 Second, the use of an economic sanction in collective bargaining necessarily entails that a party will suffer some loss in having recourse to it. Bargaining is premised upon mutual compromise. By engaging in a strike, members of a trade union accept that they will be out of work and receive no salary from the employer during the length of the strike. Likewise, where an employer locks out its employees, the employer accepts that its production may shut down and that its flow of revenues may eventually come to a halt.

84 Third, the existence of an economic sanction presupposes the availability of a countervailing sanction of proportionate impact (Carrothers, supra, at p. 577):

> The systems of industrial relations in Canada are, as a matter of deliberate legislative policy, based on collective action, the use of market forces and the concept of countervailing power. [Emphasis added.]

2 -- Discussion

85 The unilateral imposition of the terms of employment as recognized by the Board in the present instance shares none of these three characteristics. [page1036] First, the policy stated by the Board in the CAIMAW/IBEW re-hearing provides for no ban on the unilateral imposition of terms of employment in the early stages of negotiation. Such unilateral sanction may theoretically, on the basis of that policy, take place at any time following the termination of the previous collective agreement. This result is most unusual when compared to the law in other jurisdictions. In the United States, an exception to the general prohibition against the imposition of the terms of employment was created in the case of an impasse. This exception is itself subject to restrictions with respect to the extent, context and manner of the changes brought about by the employer (see the discussion by T. H. Murphy, "Impasse and the Duty to Bargain in Good Faith", (1977) 39 U. Pitt. L. Rev. 1, at pp. 24-34). Moreover, as noted in the reasons of my colleague La Forest J., the majority

of Canadian jurisdictions prohibit unilateral changes either until the right to strike or lock out is acquired or until negotiation, conciliation and mediation have all failed to produce an agreement. Consequently, there is a near unanimous recognition of the need to freeze working conditions until either an impasse is reached or the right to strike or lock out arises -- a situation which typically takes a number of months after termination. However, on the basis of the policy formulated by the Board, British Columbia would be the only jurisdiction in North America where the imposition of terms can occur before such time.

86 Second, the employer is not detrimentally affected if it decides to reduce the salaries and cut other employment benefits. The unilateral imposition of terms may thus actually be profitable to the employer since it allows continued production at lower costs.

87 Third, since the imposition of terms could conceivably take place before the right to strike arises under the Labour Code, no sanction is available to the union to countervail the unilateral setting of terms. The union cannot impose on the employer [page1037] the wages, hours and other benefits it seeks to obtain. It has no choice but to live with the new conditions until the right to strike springs into existence, and even then it may have no option.

88 More importantly, unlike the strike and lock-out, the unilateral imposition of the terms of employment does not necessarily pressure both parties into agreeing upon a settlement. This sanction opens the door to a number of abuses of the process of collective negotiation. Altering terms may have detrimental repercussions on the process of bargaining, such as discrediting the union's authority to negotiate an agreement or unduly forcing the union's hand in the decision to call for a strike.

89 The risk that the union's authority may be curtailed was discussed in a decision of the Canadian Labour Relations Board, Canadian Air Pilots Association v. Air Canada, Montreal, Quebec (1977), 24 di 203. While that Code expressly freezes the working conditions until the right to strike arises, this prohibition was designed to address the same concerns (at p. 214):

> The prohibition [against unilateral alteration of terms] is imposed on the employer, because Parliament recognizes that in the normal course it is the employer that is in the position to influence the proceedings at the bargaining table by making decisions affecting its operation without prior consultation with the union. By making such decisions and acting unilaterally, the employer can undermine the authority of the employees' bargaining agent, and also poison the environment within which collective bargaining is being conducted and thereby catalyze avoidable legal or illegal industrial conflict. Such unilateral action is contrary to the cooperative relationship envisioned by and sought to be promoted in the Canada Labour Code, Part V. [Emphasis added.]

The objective of "cooperative relationship" in the Canada Labour Code is similar to the objective of "furthering harmonious relations between employers and employees" set out in s. 27(1)(a) of the British Columbia Labour Code.

[page1038]

90 Similar concerns are expressed in U.E.W. and DeVilbiss Ltd., [1976] 2 CLRBR 101, (Ont. L.R.B.) at p. 115:

> When an employer, while negotiating with a trade union, implements new conditions of employment that have not even been first proposed to the trade union, the inference logically arises that the tactic is designed to undermine the status of the trade union -- amounting to a suggestion that beneficial terms and conditions of employment do not require the presence of the bargaining agent.

Here again, I have no doubt that s. 27 of the Labour Code is designed to protect the integrity of the bargaining process against possible abuses of the type described above by the Ontario Labour Board.

91 These concerns with respect to the integrity of the bargaining process are most acute when the employer proceeds to reduce or cancel employment benefits. Such changes are by their very nature inherently prejudicial to the freedom of unions to decide whether or not to strike. Indeed, in reducing the conditions of employment, the employer leaves the union and the employees with the following choices: to continue to work under the new, less favourable conditions, or to strike even though that may not otherwise have been the employees' intention. If no strike is called, then the employees lose faith in a union under whose leadership the benefits have decreased. If the union is forced into calling a strike at an inopportune time, the same destructive result can follow. To force such a choice upon the union is to make a mockery of the bargaining system. Such an ultimatum is especially disparaging of the system since the pressures are brought to bear upon the most vulnerable participants in the process: the individual employees. The basic imbalance sought to be corrected by the right of employees to associate is described in detail by Carrothers, supra, at p. 4:

> The employee, treating with his employer over terms under which he is to sell his services, is, individually, at an incompensable disadvantage. Where the process of production displays a high capacity for substituting one person for another, or one job for another, and where [page1039] the economy is operating at a level short of full employment, most individual workmen must take the terms offered or go without.

92 In focusing on the individual employees and forcing them either to accept the lower terms or to stop working altogether, the unilateral imposition of terms stands in a class by itself as an economic sanction which is inherently destructive of the freedom to engage in collective bargaining and strikes a fundamental blow to the freedom of employees to form themselves into a union and engage the employer in collective bargaining. The only foreseeable effect of this measure is to uselessly fuel the flames of the labour dispute. Such a result is inimical of the statutory purposes set out in s. 27 of the Labour Code. These concerns were addressed in Local 155 of International Molders and Allied Workers Union v. National Labour Relations Board, 442 F.2d 742 (D.C. 1971), where the employer decreased employment benefits with a view to pressure the union into going on strike. The Board, later confirmed by the Court of Appeals, found that (p. 747):

> It would seem reasonable to infer that when one party to the bargaining takes action which has a work stoppage as at least one of its objects, such conduct is inimical of the statutory purposes and reveals a purpose inconsistent with good-faith bargaining.

93 In stating as a goal the improvement of collective bargaining "between employers and trade unions as the freely chosen representatives of employees", s. 27(1)(b) of the Labour Code emphasizes the sovereign role of the union in the bargaining. This role is also underscored in s. 46(a) of the Code, which states:

> 46. Where a trade union is certified as bargaining agent for an appropriate bargaining unit,
>
> (a) it has exclusive authority to bargain collectively for the unit and to bind it by a collective agreement until the certification is cancelled;

[page1040]

Since the Code's definition of "collective bargaining" includes "the regulation of relations between an employer and employees" (s. 1), s. 46 confers exclusive bargaining authority to a certified union even after the collective agreement has expired.

94 In Cariboo College and Cariboo College Faculty Ass'n (1983), 4 CLRBR (NS) 320, the Board found that s. 46 prevents an employer, upon the termination of a collective agreement, from unilaterally implementing new working conditions through direct communication with the employees. Vice-Chairman Sheen wrote at pp. 336-37:

> In British Columbia, due to the provisions of s. 46 of the Labour Code, an employer cannot unilaterally alter an employee's terms of employment even in the interregnum between the expiration of the agreement and the commencement of a strike or lockout. For, by virtue of that section, a trade union certified to represent the employees in a bargaining unit, has the exclusive authority to "bargain collectively" for that unit and to conclude an agreement binding upon it.
>
> . . .
>
> [A]lthough there is no collective agreement in force, if an employer wishes to alter the terms and conditions of employment of the employees in that unit, it must do so by means of negotiations with the certified bargaining agent -- it cannot get legally binding agreements by means of bargaining with, or unilateral imposition upon, individual employees. For, so long as the union is the certified bargaining agent for those employees, the termination of the collective agreement does not give the employer the right to deal with the employees individually.

He added:

> ... the College sought to sign and implement the nine-month contract, at least until the settlement of a new collective agreement. In so doing it sought to achieve directly with the employees what it could not accomplish in bargaining with the

> Faculty Association. Such conduct is an attempt to undermine the latter's exclusive bargaining authority and is a violation of s. 6.

95 This reasoning, however, was subsequently distinguished by the Board in the CAIMAW application and CAIMAW/IBEW re-hearing, which are [page1041] at the origin of the present proceedings, on the basis that:

> ... by virtue of Section 46 of the Code an employer may not engage in any negotiation or bargaining in respect of terms or conditions of employment directly with the employees within a bargaining unit. Such direct employer-employee negotiations would certainly fail to recognize the exclusivity of the trade union's collective bargaining authority: Section 46.

The Board read Cariboo College narrowly as not extending to cases where unilateral action respecting the terms and conditions of employment is initiated by the employer in communicating with the bargaining agent instead of individual employees. The Board wrote (at p. 35):

> With the greatest of respect to the panel in Cariboo College [reported (1983), 4 Can. L.R.B.R. (N.S.) 320], we find that we cannot concur with some of the conclusions made in that case .... We are not, however, persuaded by the analysis in Cariboo College that any of the authorities cited therein stand for the proposition that an employer may not alter the terms and conditions of employment after the expiry of a collective agreement. To put it another way, we do not conclude that the unilateral imposition by an employer of new terms and conditions of employment after the termination of a collective agreement constitutes negotiating directly with employees and a failure to recognize the exclusivity of the trade union's collective bargaining authority.

96 After reconsidering Cariboo College, the Board felt that it "went too far" and that there was "unyielding rigidity" in its previous interpretation of s. 46. The reasons for this change of position were set out at length by the panel in the CAIMAW/IBEW re-hearing. First, the Board found that the "weight of authority" favoured the new interpretation, and it expressed the view that Cariboo College's reliance on Re Telegram Publishing Co. and Zwelling (1975), 67 D.L.R. (3d) 404 (Ont. C.A.), was "misplaced". The Board added the following, which states the ratio for the Board's disagreement with the interpretation offered in Cariboo College:

[page1042]

> Consider, as well, the overall structure of the Labour Code as it is pertinent to the issue under discussion. Section 51 states that where an application for certification is pending, the employer is prohibited, except with the consent of the Labour Board, from altering any terms or conditions of employment of the employees affected by the application. Where a certificate is granted, the prohibition is extended by Section 61 until four months after the issuance of the certificate,

> or until a collective agreement is reached, whichever occurs first. Of course, by the time Section 61 enters the picture, so has Section 46. Thus, three propositions emerge. First, Section 61 would be quite unnecessary if Section 46 had the per se result contemplated by the panel in Cariboo College. Second, if that result is correct, the dissipation after four months of the absolute prohibition against unilateral prohibitions (subject only to the consent of the Labour Board) would be rendered illusory. Third, the expiry of the four month period, far from leading to a loosening of restraints on the employer, would lead to a complete sterilization of the capacity to make non-negotiated alterations (subject only to an abandonment by the trade union of its certificate of bargaining authority), regardless of whether the Labour Board might wish to consent. The Board would simply lack the power to consent.
>
> To state such a situation is to repudiate it. Section 51 is a recognition that the pre-certification is the most sensitive of all. Section 61 is an acknowledgement that the early post-certification stage is also quite sensitive; that statutory protection against unilateral employer action continues to be warranted for awhile. But not forever. At some stage, the new collective must stand on its own feet. It must rely on its own negotiating strengths, and its will to resort to the devices of collective bargaining.

97 As noted by La Forest J., it is apparent that the Board sought to rationalize its conclusion. However, in so doing the Board omitted to consider an essential element of its mandate: s. 27. Had it turned its mind to the fundamental policies expressed in that provision, the Board would have had no choice but to come to a conclusion such as the one previously set forth in Cariboo College and to endorse a solution similar to the policies of [page1043] control which are universally applied in other jurisdictions.

98 At any rate, the Board's interpretation lacks a proper rationale. While there may be some overlap between the statutory freeze provided for by s. 61 and the principle of exclusive bargaining authority, it does not necessarily follow that s. 61 is rendered unnecessary, nor that the freeze is illusory. Once the agreement is reached, there is no longer any need for the protection afforded by s. 61 and the freeze, because the protection then is afforded by the binding nature of the agreement. Indeed, it is beyond dispute that, during the life of a collective agreement an employer is bound by the terms of the agreement (see s. 64, and Syndicat catholique des employés de magasins de Québec Inc. v. Cie Paquet Ltée, [1959] S.C.R. 206, and McGavin Toastmaster Ltd. v. Ainscough, [1976] 1 S.C.R. 718). This does not render, to quote the panel in the CAIMAW/IBEW re-hearing, "the dissipation ... of the absolute prohibition against unilateral [alterations] ... illusory". Simply, the prohibition finds its source elsewhere in the Code. The conclusion of a collective agreement, to use the Board's language, may also "lead to a complete sterilization of the capacity to make non-negotiated alterations"; yet, that is not an undesirable situation. Quite the contrary: parties negotiate precisely with a view to reaching an agreement which will provide certainty in labour relations for a specified period of time.

99 Moreover, it seems to me that, to be more in line with s. 27, the Board should have given the reasoning in Cariboo College a liberal application. The main infringement upon the union's exclusive bargaining authority in that case did not flow from the mere fact that an employer had notified

the individual employees personally or through a circular posted in the work place of the proposed alteration of terms. While that may have formed a subordinate part of the problem, the undermining of the union's authority resulted from the fact that changes in the terms and conditions of employment [page1044] were brought about without any participation by the employees' representative. To limit the principle of exclusive bargaining authority as the Board did, namely, as merely requiring the employer to "communicate the terms and conditions of the new post-collective agreement relationship directly to the trade union and not directly to the employees", is to amputate the efficiency of the collective bargaining scheme entrenched in the legislation.

100 The Court of Appeal found that the alternative proposed by the Board would bring "chaos" to labour relations in British Columbia. The five-member panel of the Court of Appeal determined that it was "patently unreasonable" for the Board to find that the employer had this power, in part because that power conflicted with the need to develop effective industrial relations. For the Court, Seaton J.A. noted:

> No foundation is given for the statement that "an employer has the authority under the Labour Code to make unilateral alterations ..." No section says that; nor does any imply it. The Code as a whole seeks stability resulting from agreement. This new power creates instability resulting from unilateral action. [Emphasis added.]

I share the Court of Appeal's opinion as regards the patently unreasonable nature of unilateral action as allowed by the Board in the present case.

101 While the foregoing reasons suffice to dispose of the present appeal, I find it necessary to add brief remarks on the procedure followed by the Board.

III

Policy-making Procedure

102 The failure of the Board to reject a policy solution contrary to the fundamental objectives of the Act may be due to the fact that the Board chose to make this policy decision within the context of a private adjudication between individual parties. The Board did not benefit from the input other parties may have had to offer in this respect had another route been chosen to formulate its [page1045] policy. In that fashion the spectrum of the consequences of the proposed policy may not have been fully brought to the Board's attention.

103 The Code does provide for mechanisms allowing the Board to broaden the reach and scope of the proceedings before it. The first set of mechanisms involves procedural adjustments which can be brought to the adjudicative hearing:

> 35. The board, in relation to a proceeding or matter before it, has power to
>
> (a) summon and enforce attendance of witnesses and compel them to give oral or written evidence on oath and to produce documents and things the board considers necessary for full investigation and consideration of a matter within its jurisdiction that is before it in the proceeding;

. . .

(k) adjourn or postpone the proceeding;

. . .

(n) add a party to the proceeding at any stage.

104 The second involves a more radical change in the nature of the proceedings. The Board is empowered to conduct full-scale, public policy-making hearings during the course of which the Board is more completely liberated from the restrictions inherent to private adjudication:

27. ...

(2) The board may formulate general guidelines to further the operation of this Act; but the board is not bound by those guidelines in the exercise of its powers or the performance of its duties.

(3) In formulating general guidelines the board may request that submissions be made to it by any person.

(4) The board shall make available in writing for publication all general guidelines formulated under this section, and their amendments and revisions.

105 In a policy-making hearing held under ss. 27(2) and (3), any interested party would have the opportunity to make representations thereby enabling [page1046] the Board to make a policy decision consistent with the public interest and the fundamental purposes of the legislation. These provisions indicate a legislative intent favouring broad participation by the members of the labour relations community in proceedings involving issues of widespread interest. While policy issues may be present in some form in private adjudications, and while the Board is empowered by s. 38 to make declaratory opinions in certain cases, some policy issues necessarily involve the use of the mechanisms provided for by ss. 27 and 35. I would only add that in a case like the present one, where a previous policy orientation is reversed, where the area concerned involves a void in the enabling statute, and where the question raised is of crucial importance to employers, unions and individual employees at large, the matter may more properly have been dealt with in a policy-making hearing.

IV

Conclusion and Disposition

106 From the foregoing, I conclude that, in allowing an employer to unilaterally impose the terms of employment upon the termination of a collective agreement subject only to an obligation to bargain in good faith, the Labour Relations Board of British Columbia interpreted the Labour Code in a patently unreasonable manner. In so doing, the Board committed a jurisdictional error and its decision cannot stand.

107 As a result, I would dismiss the appeal and confirm the order of the Court of Appeal, itself confirming Meredith J.'s order quashing the Board's decisions and remitting the matter to the Board for further consideration, the whole with costs.

TAB 8

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Canadian Transportation Agency | Office des transports du Canada

Air Transportation Regulations – Air Services Price Advertising

Interpretation Note

Making Transportation Efficient and Accessible for All

available in multiple formats

Canada

Table of Contents

Disclaimer

The Canadian Transportation Agency (Agency) is the economic regulator of Canada's federal transportation network. It publishes Interpretation Notes to provide information and guidance on provisions of the *Canada Transportation Act* and associated regulations that it administers. Should there be any discrepancy between the content of this Interpretation Note and the Act and associated regulations, the latter prevail. This Interpretation Note provides general guidance to air services price advertisers.

Although this Interpretation Note provides information and guidance on requirements of Part V.1 of the *Air Transportation Regulations*, when examining a particular situation, the Agency will consider each case on its own facts and merits.

I. Purpose

The purpose of this Interpretation Note is to assist any person who advertises prices of air services within, or originating in Canada, in any media. It provides general information and guidance to air services price advertisers on the regulatory requirements specified under Part V.1 - Advertising Prices as per the *Air Transportation Regulations* (ATR).

Part V.1 of the ATR should be read in its entirety to gain a full understanding of all of the air services price advertising requirements. This Note will continue to be updated as required to reflect Agency decisions or any rulings of the courts.

II. Objectives of the ATR Advertising Prices Provisions

Part V.1 of the ATR supports two key objectives:

Objective 1 — Enable consumers to readily determine the total price of an advertised air service.

The display of the total price in air services price advertising reduces confusion and frustration as to the total price and increases transparency. It also allows consumers to more readily conduct price comparisons and make informed choices.

Objective 2 — Promote fair competition between all advertisers in the air travel industry

Regulation of all-inclusive air price advertising promotes competition by achieving a level playing field for all persons who advertise the price of air services within, or originating in, Canada.

III. Legislative and Regulatory References

Note: See Appendix IV for the complete text of the referenced Legislation.

The Agency's power to make regulations pertaining to air services price advertising is found in section 86.1 of the *Canada Transportation Act* (Act). Section 177 of the Act also provides the Agency with the authority to prescribe administrative monetary penalties.

Act

Section 86.1:

- Requires the Agency to make regulations respecting the advertising of air service prices and specifically states that the Agency shall make regulations respecting advertising in all media, including on the Internet, of prices for air services within, or originating in, Canada.
- Requires the Agency to make regulations that will enable a consumer to readily determine the total price of an air service and requires some itemization. It specifically states that an advertisement for the price of an air service shall include in the price all costs of providing the service and to indicate in the advertisement all fees, charges and taxes collected on behalf of another person in respect of the service.
- Allows the Agency to prescribe what constitutes costs, fees, charges and taxes that may be itemized in the advertised price.

Section 177*:*

- Allows the Agency to designate the provisions of the Act and of any regulation made pursuant to the Act, the contravention of which results in a violation and to prescribe the maximum amount of the monetary penalty that may be imposed for such violation.

The regulation of air services price advertising is governed by Part V.1 of the ATR while the specification of related administrative monetary penalties is addressed in the *Canadian Transportation Agency Designated Provisions Regulations* (DPR).

ATR - Part V.1

- Subsection 135.8(1) - Requires any person advertising the price of an air service to include, among other things, the total price, including any third party charges, that must be paid to purchase the service.

DPR

- Sets out administrative monetary penalties of up to $5,000 to individuals and $25,000 to corporations for violation of the regulations regarding advertising prices.

IV. Air Services Price Advertising Terminology

Terms defined in the ATR and the Act

"air transportation charge" means, in relation to an air service, every fee or charge that must be paid upon the purchase of the air service, including the charge for the costs to the air carrier of providing the service, but excluding any third party charge (ATR section 135.5). [For example, it includes mandatory fees such as fuel surcharges, Canadian navigation surcharges and travel agent fees, but excludes third party charges, such as taxes.]

"third party charge" means, in relation to an air service or an optional incidental service, any tax or prescribed fee or charge established by a government, public authority or airport authority, or by an agent of a government, public authority or airport authority, that upon the purchase of the service is collected by the air carrier or other seller of the service on behalf of the government, the public or airport authority or the agent for remittance to it (ATR section 135.5). [Examples of third party charges include: Airport Improvement Fees, Air Travelers Security Charge, and Harmonized Sales Tax (HST).]

"total price" means

1. In relation to an air service, the total of the air transportation charges and third party charges that must be paid to obtain the service; and,
2. In relation to an optional incidental service, the total of the amount that must be paid to obtain that service including all third party charges (ATR section 135.5).

"**air service"** means a service, provided by means of an aircraft, that is publicly available for the transportation of passengers, or goods, or both (Act subsection 55(1)).

V. Scope

Part V.1 of the ATR applies to any person regardless of legal status or nature of business (e.g. individual, company, corporation or partnership, air carrier, travel agents, tours operators, online travel agents, etc.) who advertises the price for air services for travel within, or originating in Canada, through any media (Appendix VI), also referred to in this Interpretation Note as the advertiser.

VI. What Is Not Subject to the Advertising Requirements?

Part V.1 of the ATR excludes the following activities:

- Air cargo services, paragraph 135.7(2)(*a*);
- Prices that are negotiated between parties and are not available for purchase by the general public, paragraph 135.7(2)(*c*);
    - For example, fares available through corporate travel offices and not available to the general public, charter services negotiated with a private business or fares displayed to travel agents by the Global Distribution system.
- Air services as found in section 3 of the ATR and subsection 56(2) of the Act;
    - A complete list of excluded air services can be found in Appendix I.
- The media provider, subsection 135.7(3);
    - A media provider that acts solely as the means for an advertiser to advertise the price of an air service such as the newspaper providing advertising space to an air carrier or travel agent.
- Package travel services, paragraph 135.7(2)(*b*);
    - Package travel services typically involve the bundling of travel services for sale, such as combining air travel, accommodations, car rental and, where applicable, tour features. The Agency considers such bundled services, where the air service cannot be purchased separately, to be excluded from Part V.1 of the ATR;
    - Where components of a package travel service (air, car, accommodations, etc.) are offered through the same advertisement as stand alone travel services that the consumer can elect to purchase individually, only the air service component must adhere to the requirements of Part V.1 of the ATR;
    - Should a service of minimal value be added to an air service, it may be considered incidental requiring that the advertiser comply with Part V.1 of the ATR.
- Air services originating outside Canada, subsection 135.7(1);
    - Part V.1 of the ATR only applies to the advertising of prices for air services within, or originating in Canada.

Further activities to which Part V.1 of the ATR does not apply:

- The Agency considers that Part V.1 of the ATR does not need to apply to:

- Situations where there is a non-monetary component that forms part of the payment towards the purchase of an air service.
    - For example, this would include advertising the price of air services by loyalty reward programs, which requires the redemption of points, earned earlier, in exchange for air services.
- Advertising where the Canadian public has not been targeted.
    - For example, for carriers having multiple geographical specific versions of their Web sites, the Canadian version would need to comply.

VII. Overview of Air Services Price Advertising

The Agency considers that for the purpose of Part V.1 of the ATR, an advertisement refers to any **representation** in respect of the price of an air service within, or originating in Canada for the purpose of promoting or selling that air service to the general Canadian public. The advertisement can be done via an interactive or non-interactive media. The difference between the two usually lies in the fact that the interactive media is dynamic and the users' interaction influences the output. Generally a media that can be used in either an interactive or non-interactive way (Internet) should be considered to be dynamic or non-dynamic depending on the use that is being made of the media by the advertiser. Examples of interactive and non-interactive media can be found in Appendix VI.

Information that must appear in all Advertisements, ATR subsection 135.8(1)

Any person who advertises the price of an air service must include in the advertisement the following information:

1. The total price, inclusive of all taxes, fees and charges, that a consumer must pay to the advertiser to obtain the air service;
2. The price must always be in Canadian dollars; however, it may also be expressed in another clearly identified currency;
3. The point of origin and point of destination of the air service. The Agency considers that an advertisement must clearly indicate the cities between which the advertised air service is applicable.
4. An indication of whether the advertised price is for one-way (a trip from one place to another in one direction), round trip (a trip from one place to another and back, usually over the same route) or each way (one leg of a round trip) travel.

5. Any limitations on the period during which the advertised price will be offered and any limitation on the period for which the service will be provided at the price advertised (for example, the start and/or end date applicable to the availability period for the advertised price).

6. The proper name and amount of each tax, fee or charge relating to the air service that is a third party charge;
7. Any published tax, fee or charge related to air services that is not collected by the advertiser but must be paid at a departure, in-transit or arrival point in order for the consumer to travel. The advertiser, based on a review of published sources of information, must, at a minimum, indicate the name of such charges in the advertisement; and,
8. Each optional service offered for which a fee or charge is payable and its total price or range of total prices. An optional service generally refers to an option, service or amenity offered by an advertiser that can be selected by the consumer and that is supplemental to the services included in the advertised total price of the air service. The consumer is not obligated to purchase the optional service to complete their travel. Examples of optional services are provided in Appendix III.

Exemptions

The advertiser is exempt from the requirement to include the information described in points 6 to 8 above if:

- The advertisement is presented through a non-interactive media; and,
- The advertisement mentions a readily accessible location (which generally includes a location that is reasonably available to the consumer; for example a Web site, a telephone number, an e-mail address, or regular mail address, depending on the circumstances) where the consumer can go to readily obtain this information (without unreasonable efforts or delays at the readily accessible location).
    - When a consumer accesses the location referred to or provided in the advertisement, the information must be readily obtainable by the consumer. The Agency expects that the consumer will not be obligated to search through many layers of the carrier's Web site to find the information required. If the consumer is directed to a telephone number, e-mail address or regular mail address, the Agency expects that a representative of the advertiser would be able to readily provide

information, including information relating to taxes, fees and charges and optional services.

VIII. Representation of Total Price

Part V.1 of the ATR requires that the advertisement of the price of an air service must be displayed as a total price, inclusive of all taxes, fees and charges that a consumer must pay to obtain and complete the air service. A tax generally includes any amount levied on a product or activity by any government at any level, foreign or domestic, including amounts assessed by, and collected on behalf of, government agents. A tax must be applied on a per passenger or *ad valorem* (per value) basis to the air service. Examples of taxes, fees and charges can be found in Appendix VII. The Agency recognizes that there are unique instances where some taxes, fees and charges can increase or decrease on short notice immediately before or after the advertiser has posted the advertisement. Should such unforeseen changes in third party taxes, fees or charges occur, the advertiser must exercise best efforts to update the advertisement as soon as possible.

Part V.1 of the ATR also requires that a consumer have access to the price of any optional service offered by the service provider. The price or range of prices displayed for each optional service or range of optional services must also be inclusive of all taxes fees and charges.

The following sections describe the format for presenting the total price in an advertisement as well as permitted flexibilities to accommodate technical limitations of various media.

The Total Price of an Air Service

How must the total price of an air service be displayed in an advertisement?

The price for an air service must not be advertised in a manner that could interfere with the ability of a person to readily determine the total price that must be paid for the air service. The Agency considers that the total price must be at least as predominant as any other pricing information found in the advertisement. The total price must also be the first price presented to the consumer. For example, having to hover a mouse over a price advertised on a Web site to view the total price is not acceptable. Also, when asking for the price of an air service using a customer service telephone line, the first price given to the consumer by the representative must be the total price inclusive of taxes, fees and charges. Finally, the total price must be expressed in Canadian dollars, although it can also be expressed in other currencies.

Part V.1 of the ATR requires that the total price of an air service include the air transportation charges and third party charges (taxes, fees and charges) that must be paid to obtain the air service. These two categories of costs are further clarified below:

Total Price of an Air Service =
Air Transportation Charges + Taxes, Fees and Charges

Air Transportation Charges (Carrier's and Other Advertiser's Costs)

Air transportation charges represent every fee or charge that must be paid upon the purchase of the air service, including the charge for the costs to the air carrier of providing the service, but excluding any third party charge.

An advertiser may voluntarily choose to break out the air transportation charges, such as base fare or any payment that must be made to a travel agent upon the purchase of an air service, and itemize the respective amounts for each of these items in their advertisement. If a breakdown of these charges is provided in writing in the advertisement, it must appear under the heading "Air Transportation Charges, not under "Taxes, Fees and Charges".

Note: Canadian navigation surcharges, fuel surcharges and travel agent fees are considered to be air transportation charges and must not appear under third party charges.

Taxes, Fees and Charges (Third Party Charges)

This covers any taxes, fees and charges that the carrier collects from the consumer on behalf of a third party and that it must remit to the third party. Amounts represented under this heading include any government sales tax (provincial taxes are determined by the consumer's province of purchase), airport improvement fees, security screening fees, etc. These amounts must appear in writing under the heading "Taxes, Fees and Charges". The advertiser must use the proper name for any third party charge that is applicable to the air service (e.g. Goods and Services Tax). However, the Agency considers it acceptable to use commonly known acronyms to describe the name of a tax, fee or charge (for example, the Goods and Services Tax can be described as G.S.T. but not as ''Federal Tax'') or to use a translation of third party charges in either official language.

The term "tax" may only be used to express a tax collected by the advertiser on behalf of the federal, provincial, local or foreign government and remitted to the third party.

Note: The term "tax" can only be used under the heading "Taxes, Fees and Charges" and not under the heading ''Air Transportation Charges''.

Third Party Charges/Taxes, Fees and Charges

How must Third Party Charges collected by the Advertiser be displayed?

An advertiser must provide a breakdown of all third party charges on a per passenger basis under the heading "Taxes, Fees and Charges". However, there are exceptions to this requirement provided in Part V.1 of the ATR depending on the type of media used to advertise the air service.

All advertisements placed in non-interactive media must provide a readily accessible location where the breakdown and amounts of third party charges can be readily obtained. The advertisement might, for instance, make reference to an air carrier's Web site where a consumer can review the third party charges or provide a toll-free number a consumer can call to speak to an air carrier representative.

When the characteristics of the traveler (e.g. province of purchase) are not known at the time of the advertisement, the Agency recognizes that it may not be possible to accurately calculate all third party charges. In these circumstances, the Agency expects that the amounts advertised would represent a reasonable approximation for a trip that can be booked by the general public targeted in the advertisement.

In the case of advertisements via interactive media, the breakdown of the names and amounts of third party taxes, fees and charges must be available in the advertisement.

Round trip or One-way Services

How can prices be advertised for different types of services?

Part V.1 of the ATR requires that an advertiser indicate whether the advertised air service is offered on a round trip or one-way basis.

Part V.1 of the ATR also permits an advertiser to advertise a round trip service on a directional basis. In this instance, the price must be displayed on an each way basis and shown as representing 50 percent of the total round trip price. The advertiser must also be clear in the advertisement that the advertised price is obtainable only if both directions are purchased. The Agency considers that this would apply mainly to advertisements in non-interactive media.

When the characteristics of the traveler (e.g. province of purchase) are not known at the time of the advertisement, the Agency recognizes that it may not be possible to accurately calculate the round trip cost. In these circumstances, the Agency expects that the amounts advertised would represent a reasonable approximation for a trip that can be booked by the general public targeted in the advertisement.

The Total Price of an Optional Incidental Service

How must the price of Optional Incidental Services be advertised?

The advertised price of each optional incidental service offered in relation to the advertised air service must be displayed as the total price, inclusive of any third party charges that a person must pay to obtain that service.

If optional services are available, the advertisement must identify the services being offered, including the price or range of prices for each service. Where a range of prices are available for an optional service (e.g. range of meal prices) and the characteristics of the traveller are unknown (e.g. province of origin), the upper end of the displayed price range should incorporate a reasonable approximation of the maximum cost inclusive of the maximum taxes that could apply to the described service.

Total Price of an Optional Incidental Service =
Cost of Optional Incidental Service +
Taxes , Fees and Charges Applicable to an Optional Service

Where can a person find the price list of optional services applicable to a particular air service?

All advertisements placed in non-interactive media must provide a readily accessible location where all information about the price of optional incidental services can be readily obtained. The advertisement might, for instance, refer to an air carrier's Web site where a person can obtain the details about the price of such services or a telephone number a person can call to speak to an air carrier representative.

In the case of interactive media, the advertiser could decide to provide a direct link on its Web site to a page containing the prices or a range of prices for each optional incidental service or the optional services could be integrated into the carrier's online booking system.

Disclosure in Advertisements of Any Published Taxes, Fees and Charges required to be paid by the Consumer upon arrival or departure at an airport but not collected by the Advertiser

If the consumer will be required to pay a tax, fee or charge that the advertiser does not collect (e.g. additional foreign tax the consumer must pay before leaving the foreign country's airport, such as a departure tax), the advertiser, based on review of published sources of information, must indicate in the advertisement, at a minimum, the name of such charges.

Examples of published sources of information the advertiser could reference regarding such taxes, fees and charges include, but are not limited to, the *IATA List of Ticket and Airport Taxes and Fees* or a computer reservation system.

Where can a consumer find information about any additional taxes, fees and charges required to complete their travel, but not collected by the carrier?

All advertisements placed in non-interactive media must indicate a readily accessible location where the consumer can obtain the name of any third party taxes, fees and charges that the advertiser does not collect but will be required of the traveller to complete their travel by air. The advertisement might, for instance, make reference to an air carrier's Web site where a consumer can obtain this information or provide a toll-free number that a consumer can call during the advertiser's business hours to speak to a sales representative.

For interactive media advertisements, information or links regarding the names of published taxes, fees and charges that the advertiser does not collect but will be required of the traveller to complete their travel by air, can be provided on the Web site.

IX. Other Federal and Provincial Legislation to Consider when Advertising Prices for Air Services

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 ATR.

X. Agency Power

It is within the Agency's authority to determine whether an advertiser has met the advertisement requirements of Part V.1 of the ATR.

Ensuring compliance with Part V.1 of the ATR and implementing a program of effective education and enforcement are crucial to meeting the objectives of the Act and Part V.1 of the ATR. To support compliance, the Agency will work with advertisers of the price of air services to provide educational and other guidance material to assist them in meeting regulatory requirements. The Agency will monitor compliance with the requirements of Part V.1 of the ATR and enforce these requirements, where necessary, using its authority under the Act through monitoring, compliance verification and enforcement measures.

The *Canadian Transportation Agency Designated Provisions Regulations* identify the provisions of the ATR which, if contravened, are subject to administrative monetary penalties. The Agency may impose fines of up to $5,000 for an individual and $25,000 for a corporation where either has been found guilty of an offence as a result of contravening Part V.1 of the ATR. As with all Agency enforcement actions, the determination of what corrective measures and/or penalties are required in the case of a contravention is based on a number of factors including the frequency and nature of the offence (see Appendix V).

In addition, the Agency may order a person to make the changes necessary to conform to Part V.1 of the ATR to bring about compliance.

XI. Additional Information

Although this Interpretation Note provides information and guidance on compliance with the requirements of Part V.1 of the ATR, when considering a particular situation, the Agency will consider each case on its own merits.

For any additional information, you may contact the Agency at:

Canadian Transportation Agency
Ottawa, Ontario K1A 0N9
Tel: 1-888-222-2592
TTY: 1-800-669-5575
E-mail: info@otc-cta.gc.ca
Web: www.cta.gc.ca

To report non-compliant advertisements, you may contact the Agency at:

E-mail: conformite-compliance@otc-cta.gc.ca

Appendix I: Excluded Air Services

The air price advertising provisions do not apply to following types of air services as found in section 3 of the ATR and subsection 56(2) of the Act:

- aerial advertising services;
- aerial fire-fighting services;
- aerial survey services;
- aerial reconnaissance services;
- aerial forest fire management service;
- aerial sightseeing services;
- aerial spreading services;
- aerial spraying service;
- aerial weather altering services;
- air cushion vehicle services;
- transportation services for the retrieval of human organs for human transplants;
- aircraft demonstration services;
- external helitransport services;
- glider towing services;
- hot air balloon services;
- air flight training services;
- aerial inspection services;
- aerial construction services;
- aerial photography services;
- parachute jumping services; and
- rocket launching.

Appendix II: Examples of Price Advertising for Air Services

Non-Regulated Advertisement

The above format does not need to comply with the ATR air services price advertising requirements as no price appears in the advertisement. However, once the consumer accesses the Web site and an air service price is displayed, the advertiser is obligated to comply with the requirements.

Non-Compliant Advertisement

The above advertisement is not compliant because it does not include the total price. It also does not mention if the air service is one-way or round trip and it does not clearly mention the destination.

TAB 9

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Government of Canada / Gouvernement du Canada

Canada

Canada Gazette

ARCHIVED — Vol. 146, No. 26 — June 30, 2012

Regulations Amending the Air Transportation Regulations and the Canadian Transportation Agency Designated Provisions Regulations

Statutory authority

Canada Transportation Act

Sponsoring agency

Canadian Transportation Agency

REGULATORY IMPACT ANALYSIS STATEMENT

(*This statement is not part of the Regulations.*)

1. Background

Interest in addressing air service price advertising in Canada began to emerge a number of years ago. In 2007, Bill C-11, *An Act to amend the Canada Transportation Act and the Railway Safety Act and to make consequential amendments to other Acts*, proposed several changes to the *Canada Transportation Act* (the Act). One of the proposed changes, section 86.1, which mandated the development of air price advertising regulations, was included in this bill but was not put into force due to industry and other concerns at the time.

Since 2007, there have been significant developments in the air services pricing regimes of Canada's major economic partners. Regulations governing the advertisement of the price of air services were established in the European Union in 2008. The United States, which has had air fare advertising regulatory rules in place since 1992, updated its regime in January 2012 to require air price advertising to be based on the display of a single total price. 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.

In keeping with these worldwide trends, many of the key players in the Canadian air industry have either begun to employ or have transitioned to some form of an all-inclusive air fare advertising format.

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In its role as an economic regulator and aeronautical authority, the Canadian Transportation Agency (the Agency) administers regulations which govern the Canadian air transportation marketplace. Based on the January 2012 enactment of section 86.1 of the Act, the Agency is proposing the following amendments to the *Air Transportation Regulations* pertaining to the advertisement of the price of air services.

2. Issue

A significant number of Canadians have expressed their displeasure with regard to the manner in which the price of air services is represented in advertisements.

Specifically, they have indicated that it is

- difficult to determine the total price of an air service being offered in an advertisement when fuel surcharges, taxes, charges and other fees are not included in the advertised price;
- frustrating to investigate purchasing an air service only to find out that the actual price of the air service would be significantly greater than the advertised price; and
- difficult and time-consuming to make comparisons between the advertised prices of different players which could lead to inappropriate choices based on perceptions of advertised prices.

At the industry level, stakeholders have also indicated that they would welcome rules that would level the playing field and be applicable to anyone involved in the air market. Accountability would also be enhanced with the disclosure of third party taxes, fees and charges in the advertised price.

3. Objectives

The proposed Amendments to the *Air Transportation Regulations* (the Amendments) would support two key objectives:

Objective 1 — Enable consumers to readily determine the total price of an advertised air service

The display of the total price in air service price advertising would reduce confusion and frustration as to the total price and increase transparency. It would also allow consumers to more readily conduct price comparisons and make informed choices.

Objective 2 — Promote fair competition between all advertisers in the air travel industry

Regulation of all-inclusive air price advertising would promote competition by achieving a level playing field for all persons who advertise the price of air services within, or originating in, Canada.

4. Description

The proposed Amendments to the *Air Transportation Regulations* (SOR/88-58) [the ATR] would require all persons who advertise the price of an air service to display the total price, inclusive of all fees, charges and taxes. The intent of the proposed Amendments is to provide greater transparency in air price advertising for consumers while providing a level playing field for all air service advertisers.

Scope

The proposed Amendments would apply to any person who advertises the price of air services within, or originating in, Canada, regardless of media. Given the wide breadth of advertising of air fares in the air industry, the proposed Amendments would not specify categories of stakeholders subject to the regulation (i.e. air carrier or travel agent), but rather focus more broadly on any person who engages in the activity of advertising the price of an air service.

Exclusions

The proposed Amendments would not apply to air cargo services, to services which are only offered "business to business" or to the general public. In addition, the proposed Amendments would not apply to packaged travel services, which in addition to an air service include other features such as accommodation, cruise, tours or car rental.

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In keeping with the scope of the Act, air services which are excluded from the application of the Act would also be excluded from the proposed Amendments. Examples of such excluded activities are aerial surveying, aerial inspection and aerial fire-fighting. A complete list of excluded air services is provided in section 56 of the Act and section 3 of the ATR.

In order to retain the regulatory focus on the air industry, the proposed Amendments would not apply to any person whose sole involvement in the advertising of an air service is the provision of the advertising medium, for example newspaper publishers or radio stations.

Representation of total price

The proposed Amendments would require the price represented in any advertisement

- to be the total price, inclusive of all taxes, fees and charges that a customer must pay in order to obtain and complete the air service;
- to include a minimum level of description of the air service offered, including
  - origin and destination,
  - whether the service is one way or round trip, and
  - limitations with respect to booking or travel availability periods; and
- to provide the customer with a breakdown of the taxes, fees and charges that are paid to a third party.

In acknowledgement of the technical differences of the various media, some flexibility would be provided in the proposed regulatory text to accommodate the limitations of certain media by allowing the required breakdown of information in the advertisement to be provided at another location. For example, in the case of an announcement of the total all-inclusive price of an air service via a brief radio advertisement, the advertiser would be in compliance with the proposed regulatory text if the advertisement included the mention of a location where a breakdown of necessary information (e.g. taxes, fees and charges) could be obtained (e.g. Web site or toll-free telephone number.)

The proposed Amendments will also require that a consumer have access to a listing of any optional services offered by the service provider for a fee or charge, and that the price of each service be displayed using an all-inclusive price format.

Proposed Amendments to the *Canadian Transportation Agency Designated Provisions Regulations*

To ensure enforcement of the proposed Amendments, the *Designated Provisions Regulations* would also be amended to permit the issuance of administrative monetary penalties. The proposed text also includes the sections of the proposed Amendments which the Agency proposes to designate, and the maximum amount of the penalty that could be applied to either a corporation or an individual.

5. Consultation

In order to inform the development of the proposed Amendments, the Agency undertook a broad consultation process in January and February 2012, to obtain input from various stakeholders, including air carriers, travel and advertising industry experts, public interest advocacy groups and citizens.

The Agency's consultation process employed a variety of techniques such as the following:

- face-to-face consultations and teleconferences with selected industry stakeholders, industry experts and consumer interest organizations;
- email solicitation of comments to an even larger group of stakeholders and industry representatives; and
- an online consultation that included both the possibility for individuals to comment on the consultation and an interactive forum for discussion, which allowed individuals across Canada to provide their personal views.

Through the consultation process, the Agency received a number of comments specific to air service price advertising practices as well as topics outside the regulatory scope pertaining to business practices (e.g. approaches to baggage fees or points for travel reward programs) of the air industry.

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The following four points represent the most common topics noted during the consultations specific to the regulation of air services price advertising and are described in greater detail below:

- Total all-inclusive price — Price includes all costs necessary to complete travel;
- Consistent representation of advertised price — Regulations to apply to all persons who advertise the price of air services;
- Consistent regulatory regime — Harmonization with similar provincial regulations and with regulations in the United States and European Union; and
- Details of included costs and optional services.

Total all-inclusive price

Participants in the consultation process, including individual consumers and consumer advocacy groups, indicated that the price shown in the advertisement should include all costs necessary to complete the travel. Participants wanted the advertised price to present the entire cost of travelling from point A to point B.

The air travel industry, including representation from both air carriers and travel agents, was also in agreement with the concept of the total price being the all-in total price, inclusive of all taxes, fees and charges.

Consistent representation of advertised price

Participants indicated that regulation of air service pricing should apply to all forms of advertising and to any person or entity that advertises air fares, including travel agents and their agencies, loyalty programs and vacation package providers.

The air travel industry was also in agreement with the concept that regulation of air services pricing should apply to all who advertise the price of air services in order to provide for a level playing field.

Consistent regulatory regime

Participants indicated that the Government of Canada should base regulation of air services pricing on the approaches currently in place in the United States and the European Union. They were of the opinion that by using a comparable regulatory approach, the consumer would know what to expect on nearly every airline and flight in the world. Compatibility with other international practices would also minimize confusion with respect to ticket pricing and fare rules when comparing fares.

The air travel industry was also in agreement with the concept of harmonizing regulation of air services pricing with the regulatory approaches of our major markets and competitors in order to reduce the need to develop and maintain different compliance mechanisms in an integrated world marketplace.

Details of included costs and optional services

Participants expressed a strong interest in an itemization of the charges which make up the total price, provided either in the advertisement or easily accessible at a specified location, i.e. posted online. Most agreed that listing of the basic price along with other fees and charges (e.g. fuel, airport improvement, taxes, security) and the total price would be optimal. Respondents also indicated they would welcome such an approach since showing a breakdown would alleviate confusion associated with hidden costs and make it easier to calculate the total cost of the air service.

The air carriers also felt there were business or marketing reasons to show the detail of costs collected on behalf of others with respect to the provision of the air service. Other members of the air travel industry, perhaps due to the nature of their business models, were less concerned with the need to detail or break out the costs — except for optional services or upgrades. However, there was general acceptance of the proposal to provide access to a breakdown of the taxes, fees and charges collected on behalf of a third party.

In addition, the Agency held discussions with other governments, both within Canada and abroad.

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6. Small business lens

In light of the progress to date and continued evolution of the air industry towards some form of a single price format, the Agency has determined that any costs of compliance with the proposed Amendments would be minor, non-recurring and would not have a disproportionate effect on small businesses in Canada.

Given the frequency with which the air travel industry makes pricing changes in advertisements and produces new advertisements, any costs associated with changes required by the proposed Amendments would be minor and could be absorbed as part of the regular business cycle.

It is anticipated that some advertisers that offer online booking of air services may need to make minor changes to back-office systems to comply with the proposed Amendments. The Agency researched a sample of small businesses across Canada based on data obtained from Statistics Canada. This research, which focussed on industry practices and systems, revealed that these costs would be minor.

The new regulatory requirements would not impose any additional administrative burden on businesses in relation to the reporting of information or the completion of forms or schedules by industry for submission to the Agency.

7. Rationale

Objective 1 — Enable consumers to readily determine the total price of an advertised air service

With respect to meeting the first objective, the proposed Amendments would provide consumers with the total price, inclusive of all taxes, fees and charges, which must be paid to obtain and complete travel. This would alleviate consumer confusion or surprise as to the total cost of an advertised air service.

In addition, the proposed Amendments would allow the consumer to have access to a breakdown of taxes, fees and charges collected on behalf of a third party with respect to an air service. Flexibility would be provided to the advertiser as to where this information would be made available depending on the limitations of the advertising medium.

The proposed Amendments would provide consumers with a uniform representation of the format and level of detail of advertised prices, regardless of where they live in Canada, and ensure an appropriate level of harmonization with air price advertising formats found in the American and European markets.

It is anticipated that there would be no cost to consumers as the result of the proposed Amendments.

While not part of the proposed Amendments, it should be noted that in Canada, the advertising of products and services is subject to consumer protection legislation of general application at the federal level through the *Competition Act* and through provincial and territorial legislation. Therefore, any advertising or advertisements will continue to be subject to regulations pertaining to deceptive acts or practices and the making of representations to consumers that are not truthful.

Objective 2 — Promote fair competition between all advertisers in the air service industry

With respect to the second objective, to the extent possible, the proposed Amendments would harmonize the Canadian air fare advertisement regime with those of its major economic partners and provincial governments. For air carriers and other advertisers who also advertise in the American or European markets, the proposed Amendments would be in keeping with these regimes and are not expected to impose additional requirements.

Following the Government of Canada's announcement in December 2011 of its intention to develop regulations in the area of air services price advertising, a number of the major air carriers proactively adopted some form of a "single price" advertising format. Several of the large travel agencies and tour operators were either already using or have recently adopted similar "single price" advertising practices.

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Based on the Agency's consultations with the air service industry and taking into account the experience of both the United States and the European Union, the Agency has determined that the cost of changing key forms of advertising materials to align with the proposed Amendments would be minor and would have no effect on the price of purchasing space in advertising media.

In determining the impact on the industry, the Agency noted 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 travel services may be performed. The proposed Amendments would not conflict with these existing provincial regimes as the proposed federal requirements would require compliance with a comparable or higher standard. As well, the scope of the proposed Amendments would exclude packaged travel services that are within the domain of provincial travel and/or consumer protection-related legislation.

Given the frequency with which air service prices change due to market forces, it is assumed that any minor costs associated with the updating of pricing formats could be absorbed as part of the regular business cycle.

8. Implementation, enforcement and service standards

Compliance with the Regulations and a program of effective enforcement are crucial to the success of the regulatory regime. The Agency will begin monitoring compliance with the proposed Amendments as soon as they are registered and will enforce the Regulations using its authority under the Act through monitoring and enforcement mechanisms.

In order to support enforcement, the *Canadian Transportation Agency Designated Provisions Regulations* would also be amended as indicated in the proposed text to set out the provisions of the Act and the ATR which, if contravened, may apply administrative monetary penalties. The Agency may impose fines of up to $5,000 for an individual and $25,000 for a corporation where either has been found guilty of an offence as a result of contravening these Regulations. As with all Agency enforcement actions, the determination of what corrective measures and/or penalties are required in the case of contravention is based on a number of different factors including the frequency and nature of the offence.

In addition, in its role as a quasi-judicial tribunal, the Agency may order a person to make the changes necessary to conform with the legislation and regulations to bring about compliance.

As with all of its enforcement actions, the Agency's primary objective is compliance. To support compliance, the Agency will work with advertisers of the price of air services to provide educational and other guidance materials to assist in the transition to the new regime.

9. Contacts

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PROPOSED REGULATORY TEXT

Notice is given that the Canadian Transportation Agency, pursuant to subsection 86(1) (see footnote a), sections 86.1 (see footnote b) and 86.2 (see footnote c) and subsection 177(1) (see footnote d) of the *Canada Transportation Act* (see footnote e), proposes to make the annexed *Regulations Amending the Air Transportation Regulations and the Canadian Transportation Agency Designated Provisions Regulations*.

Interested persons may make representations concerning the proposed Regulations within 75 days after the date of publication of this notice. All such representations must cite the *Canada Gazette*, Part I, and the date of publication of this notice, and be addressed to Karen Plourde, Director, International Agreements and Tariffs Directorate, Industry Regulation and Determinations Branch, Canadian Transportation Agency, 15 Eddy Street, 18th Floor, Gatineau, Quebec K1A 0N9 (tel.: 819-997-6643; fax: 819-994-0289; email: karen.plourde@otc-cta.gc.ca).

Ottawa, June 19, 2012

JURICA ČAPKUN
Assistant Clerk of the Privy Council

REGULATIONS AMENDING THE AIR TRANSPORTATION REGULATIONS AND THE CANADIAN TRANSPORTATION AGENCY DESIGNATED PROVISIONS REGULATIONS

AIR TRANSPORTATION REGULATIONS

1. The definition "toll" in section 2 of the *Air Transportation Regulations* (see footnote 1) is repealed.

2. The Regulations are amended by adding the following after section 2:

2.1 For the purposes of these Regulations, "toll" means any fare, rate or charge established by an air carrier in respect of the shipment, transportation, care, handling or delivery of passengers or goods or of any service that is incidental to those services.

3. The Regulations are amended by adding the following after Part V:

PART V.1

ADVERTISING PRICES

INTERPRETATION

135.5 The following definitions apply in this Part.

"air transportation charge" means, in relation to an air service, every fee or charge that must be paid upon the purchase of the air service, including the charge for the costs to the air carrier of providing the service, but excluding any third party charge. (*frais du transport aérien*)

"third party charge" means, in relation to an air service or an optional incidental service, any tax or prescribed fee or charge established by a government, public authority or airport authority, or by an agent of a government, public authority or airport authority, that upon the purchase of the service is

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collected by the air carrier or other seller of the service on behalf of the government, the public or airport authority or the agent for remittance to it. (*somme perçue pour un tiers*)

"total price" means

(*a*) in relation to an air service, the total of the air transportation charges and third party charges that must be paid to obtain the service; and

(*b*) in relation to an optional incidental service, the total of the amount that must be paid to obtain the service, including all third party charges. (*prix total*)

135.6 For the purposes of subsection 86.1(2) of the Act and this Part, a prescribed fee or charge is one that is fixed on a per person or *ad valorem* basis.

APPLICATION

135.7 (1) Subject to subsection (2), this Part applies to advertising in all media of prices for air services within, or originating in, Canada.

(2) This Part does not apply to an advertisement that relates to

(*a*) an air cargo service;

(*b*) a package travel service that includes an air service and any accommodation, surface transportation or entertainment activity that is not incidental to the air service; or

(*c*) a price that is not offered to the general public and is fixed through negotiation.

(3) This Part does not apply to a person who provides another person with a medium to advertise the price of an air service.

REQUIREMENTS AND PROHIBITIONS RELATING TO ADVERTISING

135.8 (1) Any person who advertises the price of an air service must include in the advertisement the following information:

(*a*) the total price that must be paid to the advertiser to obtain the air service, expressed in Canadian dollars and, if it is also expressed in another currency, the name of that currency;

(*b*) the point of origin and point of destination of the service and whether the service is one way or round trip;

(*c*) any limitation on the period during which the advertised price will be offered and any limitation on the period for which the service will be provided at that price;

(*d*) the name and amount of each tax, fee or charge relating to the air service that is a third party charge;

(*e*) each optional incidental service offered for which a fee or charge is payable and its total price or range of total prices; and

(*f*) any published tax, fee or charge that is not collected by the advertiser but must be paid at the point of origin or departure by the person to whom the service is provided.

(2) A person who advertises the price of an air service must set out all third party charges under the heading "Taxes, Fees and Charges" unless that information is only provided orally.

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(3) A person who mentions an air transportation charge in the advertisement must set it out under the heading "Air Transportation Charges" unless that information is only provided orally.

(4) A person who advertises the price of one direction of a round trip air service is exempt from the application of paragraph (1)(*a*) if the following conditions are met:

(*a*) the advertised price is equal to 50% of the total price that must be paid to the advertiser to obtain the service;

(*b*) it is clearly indicated that the advertised price relates to only one direction of the service and applies only if both directions are purchased; and

(*c*) the advertised price is expressed in Canadian dollars and, if it is also expressed in another currency, the name of that other currency is specified.

(5) A person is exempt from the requirement to provide the information referred to in paragraphs (1)(*d*) to (*f*) in their advertisement if the following conditions are met:

(*a*) the advertisement is not interactive; and

(*b*) the advertisement mentions a location that is readily accessible where all the information referred to in subsection (1) can be readily obtained.

135.9 A person must not provide information in an advertisement in a manner that could interfere with the ability of anyone to readily determine the total price that must be paid for an air service or for any optional incidental service.

135.91 A person must not set out an air transportation charge in an advertisement as if it were a third party charge or use the term "tax" in an advertisement to describe an air transportation charge.

135.92 A person must not refer to a third party charge in an advertisement by a name other than the name under which it was established.

CANADIAN TRANSPORTATION AGENCY DESIGNATED PROVISIONS REGULATIONS

4. The schedule the *Canadian Transportation Agency Designated Provisions Regulations* (see footnote 2) **is amended by adding the following after item 96:**

Item	Column 1 Designated Provision	Column 2 Maximum Amount of Penalty — Corporation ($)	Column 3 Maximum Amount of Penalty — Individual ($)
96.1	Paragraph 135.8 (1)(*a*)	25,000	5,000
96.2	Paragraph 135.8 (1)(*b*)	25,000	5,000
96.3	Paragraph 135.8 (1)(*c*)	25,000	5,000
96.4	Paragraph 135.8 (1)(*d*)	5,000	1,000

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96.5	Paragraph 135.8 (1)(*e*)	5,000	1,000
96.6	Paragraph 135.8 (1)(*f*)	5,000	1,000
96.7	Subsection 135.8(2)	5,000	1,000
96.8	Subsection 135.8(3)	5,000	1,000
96.9	Section 135.9	5,000	1,000
96.91	Section 135.91	5,000	1,000
96.92	Section 135.92	5,000	1,000

COMING INTO FORCE

5. These Regulations come into force on the day on which they are registered under section 6 of the *Statutory Instruments Act*.

[26-1-o]

Footnote a
S.C. 2007, c. 19, ss. 26(1) and (2)

Footnote b
S.C. 2007, c. 19, s. 27

Footnote c
S.C. 2007, c. 19, s. 27

Footnote d
S.C. 2007, c. 19, ss. 49(1) and (2)

Footnote e
S.C. 1996, c. 10

Footnote 1
SOR/88-58

Footnote 2
SOR/99-244

Date modified: 2013-01-31

TAB 10

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Values and Ethics Code for the Public Sector

The Role of Federal Public Servants

Federal public servants have a fundamental role to play in serving Canadians, their communities and the public interest under the direction of the elected government and in accordance with the law. As professionals whose work is essential to Canada's well-being and the enduring strength of the Canadian democracy, public servants uphold the public trust.

The Constitution of Canada and the principles of responsible government provide the foundation for the role, responsibilities and values of the federal public sector.[1] Constitutional conventions of ministerial responsibility prescribe the appropriate relationships among ministers, parliamentarians, public servants[2] and the public. A professional and non-partisan federal public sector is integral to our democracy.

The Role of Ministers

Ministers are also responsible for preserving public trust and confidence in the integrity of public sector organizations and for upholding the tradition and practice of a professional non-partisan federal public sector. Furthermore, ministers play a critical role in supporting public servants' responsibility to provide professional and frank advice.[3]

Objectives

This Code outlines the values and expected behaviours that guide public servants in all activities related to their professional duties. By committing to these values and adhering to the expected behaviours, public servants strengthen the ethical culture of the public sector and contribute to public confidence in the integrity of all public institutions.

As established by the Treasury Board, this Code fulfills the requirement of section 5 of the *Public Servants Disclosure Protection Act* (PSDPA). It was developed in consultation with public servants, public sector organizations and bargaining agents. This Code should be read in conjunction with organizational codes of conduct.

Statement of Values

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These values are a compass to guide public servants in everything they do. They cannot be considered in isolation from each other as they will often overlap. This Code and respective organizational codes of conduct are important sources of guidance for public servants. Organizations are expected to take steps to integrate these values into their decisions, actions, policies, processes, and systems. Similarly, public servants can expect to be treated in accordance with these values by their organization.

Respect for Democracy

The system of Canadian parliamentary democracy and its institutions are fundamental to serving the public interest. Public servants recognize that elected officials are accountable to Parliament, and ultimately to the Canadian people, and that a non-partisan public sector is essential to our democratic system.

Respect for People

Treating all people with respect, dignity and fairness is fundamental to our relationship with the Canadian public and contributes to a safe and healthy work environment that promotes engagement, openness and transparency. The diversity of our people and the ideas they generate are the source of our innovation.

Integrity

Integrity is the cornerstone of good governance and democracy. By upholding the highest ethical standards, public servants conserve and enhance public confidence in the honesty, fairness and impartiality of the federal public sector.

Stewardship

Federal public servants are entrusted to use and care for public resources responsibly, for both the short term and long term.

Excellence

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Excellence in the design and delivery of public sector policy, programs and services is beneficial to every aspect of Canadian public life. Engagement, collaboration, effective teamwork and professional development are all essential to a high-performing organization.

Expected Behaviours

Federal public servants are expected to conduct themselves in accordance with the values of the public sector and these expected behaviours.

1. **Respect For Democracy**
    - *Public servants shall uphold the Canadian parliamentary democracy and its institutions by:*
    - 1.1 Respecting the rule of law and carrying out their duties in accordance with legislation, policies and directives in a non-partisan and impartial manner.
    - 1.2 Loyally carrying out the lawful decisions of their leaders and supporting ministers in their accountability to Parliament and Canadians.
    - 1.3 Providing decision makers with all the information, analysis and advice they need, always striving to be open, candid and impartial.
2. **Respect For People**
    - *Public servants shall respect human dignity and the value of every person by:*
    - 2.1 Treating every person with respect and fairness.
    - 2.2 Valuing diversity and the benefit of combining the unique qualities and strengths inherent in a diverse workforce.
    - 2.3 Helping to create and maintain safe and healthy workplaces that are free from harassment and discrimination.
    - 2.4 Working together in a spirit of openness, honesty and transparency that encourages engagement, collaboration and respectful communication.
3. **Integrity**
    - *Public servants shall serve the public interest by:*
    - 3.1 Acting at all times with integrity and in a manner that will bear the closest public scrutiny, an obligation that may not be fully satisfied by simply acting within the law.
    - 3.2 Never using their official roles to inappropriately obtain an advantage for themselves or to advantage or disadvantage others.
    - 3.3 Taking all possible steps to prevent and resolve any real, apparent or potential conflicts of interest between their official responsibilities and their private affairs in favour of the public interest.
    - 3.4 Acting in such a way as to maintain their employer's trust.
4. **Stewardship**

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- *Public servants shall use resources responsibly by:*
- 4.1 Effectively and efficiently using the public money, property and resources managed by them.
- 4.2 Considering the present and long-term effects that their actions have on people and the environment.
- 4.3 Acquiring, preserving and sharing knowledge and information as appropriate.

5. **Excellence**
   - *Public servants shall demonstrate professional excellence by:*
   - 5.1 Providing fair, timely, efficient and effective services that respect Canada's official languages.
   - 5.2 Continually improving the quality of policies, programs and services they provide.
   - 5.3 Fostering a work environment that promotes teamwork, learning and innovation.

Application

Acceptance of these values and adherence to the expected behaviours is a condition of employment for every public servant in the federal public sector, regardless of their level or position. A breach of these values or behaviours may result in disciplinary measures being taken, up to and including termination of employment.

The PSDPA defines the "public sector" as: (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 (b) the Crown corporations and other public bodies set out in Schedule I of the PSDPA. However, "the public sector" does not include the Canadian Forces, the Canadian Security Intelligence Service or the Communications Security Establishment, which are subject to separate requirements under the Act.

The *Values and Ethics Code for the Public Sector* came into force on April 2, 2012.

Avenues for Resolution

The expected behaviours are not intended to respond to every possible ethical issue that might arise in the course of a public servant's daily work. When ethical issues arise, public servants are encouraged to discuss and resolve these matters with their immediate supervisor. They can also seek advice and support from other appropriate sources within their organization.

Public servants at all levels are expected to resolve issues in a fair and respectful manner

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and consider informal processes such as dialogue or mediation.

As provided by sections 12 and 13 of the PSDPA, if public servants have information that could indicate a serious breach of this Code, they can bring the matter, in confidence and without fear of reprisal, to the attention of their immediate supervisor, their senior officer for disclosure or the Public Sector Integrity Commissioner.

Senior officers for disclosure are responsible for supporting the chief executive in meeting the requirements of the PSDPA. They help promote a positive environment for disclosing wrongdoing, and deal with disclosures of wrongdoing made by employees of the organization. Further information on the duties and powers of senior officers for disclosure can be found in the attached Appendix.

Members of the public who have reason to believe that a public servant has not acted in accordance with this Code can bring the matter to an organizational point of contact that has been designated for the handling of such concerns or to the Public Sector Integrity Commissioner to disclose a serious breach of this Code.

Appendix

Duties and Obligations

Public Servants

Public servants are expected to abide by this Code and demonstrate the values of the public sector in their actions and behaviour. Furthermore, public servants must also adhere to the behavioural expectations set out in their respective organizational codes of conduct. If a public servant does not abide by these values and expectations, he or she may be subject to administrative or disciplinary measures up to and including termination of employment.

Public servants who are also managers are in a position of influence and authority that gives them a particular responsibility to exemplify the values of the public sector.

As provided by sections 12 and 13 of the *Public Servants Disclosure Protection Act* (PSDPA), if public servants have information that could indicate a serious breach of this Code they can bring this matter, in confidence and without fear of reprisal, to the attention of their immediate supervisor, their senior officer for disclosure or the Public Sector Integrity Commissioner.

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Chief Executives[4]

Chief executives of public sector organizations have specific responsibilities under the PSDPA, including establishing a code of conduct for their organization and an overall responsibility for fostering a positive culture of values and ethics in their organization. They ensure that employees are aware of their obligations under this Code and their specific organizational code of conduct. They also ensure that employees can obtain appropriate advice within their organization on ethical issues, including possible conflicts of interest.

Chief executives ensure that this Code, their organizational code of conduct, and their internal disclosure procedures are implemented effectively in their organization, and that they are regularly monitored and evaluated. Chief executives of Crown corporations may rely on their boards of directors for support in this duty.

Chief executives are responsible for ensuring the non-partisan provision of programs and services by their organizations.

Chief executives are subject to this Code and to the *Conflict of Interest Act*.

Senior Officers for Disclosure

The senior officer for disclosure helps promote a positive environment for disclosing wrongdoing and deals with disclosures of wrongdoing made by public servants of their organization. Senior officers are responsible for supporting the chief executive in meeting the requirements of the PSDPA.

The senior officer's duties and powers within his or her organization also include the following, in accordance with the internal disclosure procedures established under the PSDPA:

1. Provide information, advice and guidance to public servants regarding the organization's internal disclosure procedures, including the making of disclosures, the conduct of investigations into disclosures, and the handling of disclosures made to supervisors.
2. Receive and record disclosures and review them to establish whether there are sufficient grounds for further action under the PSDPA.
3. Manage investigations into disclosures, including determining whether to deal with a disclosure under the PSDPA, initiate an investigation or cease an investigation.
4. Coordinate handling of a disclosure with the senior officer of another federal public sector organization, if a disclosure or an investigation into a disclosure involves that other organization.

5. Notify the person(s) who made a disclosure in writing of the outcome of any review and/or investigation into the disclosure and on the status of actions taken on the disclosure, as appropriate.
6. Report the findings of investigations, as well as any systemic problems that may give rise to wrongdoing, directly to his or her chief executive, with recommendations for corrective action, if any.

Treasury Board of Canada Secretariat-Office of the Chief Human Resources Officer

In support of the Treasury Board President's responsibilities under section 4 of the PSDPA, the Office of the Chief Human Resources Officer (OCHRO) is responsible for promoting ethical practices in the public sector.[5] The OCHRO will work with all relevant partner organizations to implement and promote this Code, and will provide advice to chief executives and designated departmental officials with respect to its interpretation.

The Chief Human Resources Officer may issue directives, standards and guidelines related to this Code.

OCHRO will monitor the implementation of this Code in organizations with a view to assessing whether the stated objectives have been achieved.

Public Service Commission

The Public Service Commission is responsible for conducting staffing investigations and audits to safeguard the integrity of the public service staffing system and administering certain provisions related to political activities to maintain the non-partisanship of the public service in accordance with the *Public Service Employment Act*.

1 This Code is intended to clarify the role and expectations of public servants within the framework of Canadian parliamentary democracy as laid out in the *Constitution Act* and the basic principle of responsible government, which holds that the powers of the Crown are exercised by ministers who are in turn accountable to Parliament.
2 The *Public Servants Disclosure Protection Act* (PSDPA) defines "public servant" as every person employed in the public sector (this includes the core public administration, Crown corporations and separate agencies). Every member of the Royal Canadian Mounted Police and every chief executive (including deputy ministers and chief executive officers) are also included in the definition of public servant for the purpose of the PSDPA and this Code.
3 This text reflects the duties and responsibilities set out in *Accountable Government: A Guide for Ministers and Ministers of State*, the *Conflict of Interest Act*, the *Lobbying Act* and the PSDPA.
4 "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 (PSDPA, 2005).
5 Section 4 of the PSDPA assigns this responsibility to the Minister responsible for the Public Service Human Resources Management Agency of Canada (subsequently the Canada Public Service Agency (CPSA)). With the creation of the Office of the Chief Human Resources Officer within Treasury Board of Canada Secretariat on February 6, 2009, the functions of the CPSA were transferred to the OCHRO.

Date Modified:

Court File No.:A-167-14

FEDERAL COURT OF APPEAL

BETWEEN:

GABOR LUKACS

Applicant

and

CANADIAN TRANSPORTATION AGENCY

Respondent

RESPONDENT'S RECORD
CANADIAN TRANSPORTATION AGENCY
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