Court File No.: A-357-14

FEDERAL COURT OF APPEAL

BETWEEN:

GABOR LUKACS

Applicant

and

CANADIAN TRANSPORTATION AGENCY

Respondent

MOTION RECORD OF THE
RESPONDENT/MOVING PARTY
CANADIAN TRANSPORTATION AGENCY

Gabor Lukacs

Halifax, Nova Scotia

lukacs@AirPassengerRights.ca

Barbara Cuber
Counsel
Legal Services Branch
Canadian Transportation Agency
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TABLE OF CONTENTS

TAB 1

Court File No.: A-357-14

FEDERAL COURT OF APPEAL

BETWEEN:

GABOR LUKACS

Applicant

and

CANADIAN TRANSPORTATION AGENCY

Respondents

NOTICE OF MOTION

TAKE NOTICE that counsel on behalf of the Canadian Transportation Agency ("the Agency") hereby makes a motion to the Federal Court of Appeal in writing pursuant to Rule 369 of the *Federal Courts Rules,* SOR/98-106.

THE MOTION IS FOR:

1. An Order that the following document be included in the Appeal Book:
   "Annotated Dispute Adjudication Rules"

2. In the alternative, an Order that the "Annotated Dispute Adjudication Rules" be included as new evidence on appeal.

AND FURTHER TAKE NOTICE that the motion is brought on the grounds that:

1. On July 16, 2014, this Honourable Court granted Mr. Lukacs' application for leave to appeal the Agency's *Canadian Transportation Agency Rules (Dispute Adjudication and Certain Rules Applicable to All Proceedings)* ("Dispute Adjudication Rules").

2. The Appellant was granted leave to appeal the Agency's Dispute Adjudication Rules in order to determine the following issues:

   -Whether subsections 41(2)(b), 41(2)(c) and 41(2)(d) of the Dispute Adjudication Rules are *ultra vires* and/or invalid;

   -Whether the Dispute Adjudication Rules are unreasonable and establish inherently unfair procedures that are inconsistent with the intent of Parliament in establishing the Agency because:

   (a) Section 29 deprives parties of any opportunity to respond and object to requests to intervene;

   (b) The Dispute Adjudication Rules abolish the requirement that the Agency provide reasons in support of any of its orders and decisions that do not allow the relief requested, or if opposition has been expressed (section 36 of the Old Rules);

   (c) The Dispute Adjudication Rules abolish all provisions about examinations of deponents or affiants (section 34 of the Old Rules) and about oral hearings (sections 48-66 of the Old Rules).

3. The Appellant's Notice of Appeal was filed on August 1, 2014.

4. In accordance with Rule 343 of the *Federal Courts Rules*, the parties had until September 1, 2014 to agree in writing as to the contents of the Appeal Book.

5. The parties did not reach an agreement on the contents of the Appeal Book.

6. The Agency seeks to include in the Appeal Book the "Annotated Dispute Adjudication Rules" ("Annotation").

7. The Annotation should be included in the Appeal Book specifically because it was created by the Agency as a companion document to explain and clarify the Dispute Adjudication Rules that are presently under appeal and, therefore, this document is relevant and is required to dispose of the procedural fairness issue on appeal.

8. In the absence of an adjudicative decision evidencing the Agency's application of the Dispute Adjudication Rules, the Annotation provides the only available information concerning the manner in which the Dispute Adjudication Rules are intended to function.

9. In the alternative, the Agency makes a motion to have the Annotation introduced as new evidence.

10. The grounds for this motion are that the Annotation was amended on or around August 22, 2014, in response to the concerns raised by the appellant with respect to the procedural fairness issues raised on appeal.

11. The Annotation is a credible document, having been created by Agency staff and approved for publication on the Agency's website by the Agency's Chair and Chief Executive Officer. It is a document that is intended to be updated regularly.

12. The Annotation was updated to address the procedural fairness issues raised on appeal. It was amended subsequent to the publication of the Dispute Adjudication Rules and to the filing of the Notice of Appeal, but with due diligence in the circumstances.

13. The Annotation speaks directly to the procedural fairness issues raised by the appellant.

14. It is in the interests of justice to put the Annotation before this Honourable Court as the document is relevant and speaks directly to the procedural fairness issues on appeal.

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

THE FOLLOWING DOCUMENTARY EVIDENCE will be presented in support of this motion:

- Affidavit of Alexei Baturin, sworn on September 15, 2014;

- Written Representations of the Canadian Transportation Agency.

DATED at the City of Gatineau, in the Province of Quebec, this 15th day of September, 2014.

Barbara Cuber
Counsel
Canadian Transportation Agency

TAB 2

Court File No.:A-357-14

FEDERAL COURT OF APPEAL

BETWEEN:

GABOR LUKACS

Applicant

and

CANADIAN TRANSPORTATION AGENCY

Respondent

AFFIDAVIT OF ALEXEI BATURIN
SWORN SEPTEMBER 15, 2014

I, Alexei Baturin, resident of the City of Ottawa, in the Province of Ontario, MAKE OATH AND SAY AS FOLLOWS:

1. I am a Paralegal in the Legal Services Branch of the Canadian Transportation Agency ("the Agency") and, as such, have personal knowledge of the matters hereinafter deposed to.

2. On June 20, 2014, Gabor Lukacs filed an application with the Federal Court of Appeal seeking leave to appeal from the *Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to all Proceedings)*, SOR/2014-104 (the "Dispute Adjudication Rules"). Attached hereto and marked as Exhibit "A" to my Affidavit is a copy of the June 20, 2014 notice of motion seeking leave to appeal.

3. On July 16, 2014, this Honourable Court granted Mr. Lukacs' application for leave to appeal the Agency's Dispute Adjudication Rules. Attached hereto and marked as Exhibit "B" to my Affidavit is a copy of the July 16, 2014 Order of the Federal Court of Appeal.

4. On August 1, 2014, the Agency was served with the Notice of Appeal in relation to the appeal of Agency's New Rules. Attached hereto and marked as Exhibit "C" to my Affidavit is a copy of the August 1, 2014 Notice of Appeal.

5. On August 8, 2014, the Agency received from the Appellant a proposed Agreement as to the Contents of the Appeal Book. Attached hereto and marked as Exhibit "D" to my Affidavit is a copy of the proposed Agreement as to the Contents of the Appeal Book.

6. On August 11, 2014, the Agency filed the Notice of Appearance. Attached hereto and marked as Exhibit "E" to my Affidavit is a copy of the Agency's Notice of Appearance.

7. On August 26, 2014, the Agency sought direction from this Honourable Court on how to proceed in requesting a determination on the contents of the Appeal Book, specifically whether it may be permitted to file the motion under Rule 343(3) of the *Federal Courts Rules* SOR 198-106, with a motion under Rule 351, in the alternative. Attached hereto and marked as Exhibit "F" to my Affidavit is a copy of the Agency's letter dated August 26, 2014.

8. On September 5, 2014, this Honourable Court directed the Agency to proceed as proposed in its letter of August 26, 2014. Attached hereto and marked as Exhibit "G" to my Affidavit is a copy of the Court's direction dated September 5, 2014.

9. On September 10, 2014, pursuant to Rule 7 of the *Federal Courts Rules* the Agency obtained the consent of the appellant to an extension of time until September 15, 2014 to file its Motion to determine the contents of the Appeal Book. Attached hereto and marked as Exhibit "H" to my Affidavit is a copy of the signed Notice of Consent to an extension of time.

10. This Affidavit is made in support of the Motion by the Respondent, Canadian Transportation Agency, for an Order to determine the Contents of the Appeal Book, and for no other or improper purpose.

DATED at the City of Gatineau, in the Province of Quebec, this 15th day of September, 2014.

SWORN BEFORE ME at the City of Gatineau, in the Province of Quebec, this 15th day of September, 2014.

Commissioner of Oaths

ODETTE LALUMIÈRE, AVOCATE
187916-2
BARREAU DU QUÉBEC

EXHIBIT "A"

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

de Alexei Baturin
of

assermenté devant moi ce 15 jour de September 2014
sworn to before me this day of

Commissaire à l'assermentation
Commissioner for Oaths

ODETTE LALUMIÈRE, AVOCATE
187916-2
BARREAU DU QUÉBEC

Court File No.:

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Moving Party

– and –

CANADIAN TRANSPORTATION AGENCY

Respondent

NOTICE OF MOTION

TAKE NOTICE THAT THE MOVING PARTY will make a motion in writing to the Court under Rules 352 and 369 of the *Federal Court Rules*, S.O.R./98-106.

THE MOTION IS FOR:

1. An Order pursuant to section 41 of the *Canada Transportation Act*, S.C. 1996, c. 10, granting the Moving Party leave to appeal the *Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)*, S.O.R./2014-104 made by the Canadian Transportation Agency (the "Agency") and published in the *Canada Gazette* on May 21, 2014 (the "New Rules");

2. Costs and/or reasonable out-of-pocket expenses of this motion; and

3. Such further and other relief or directions as the Moving Party may request and this Honourable Court deems just.

THE GROUNDS FOR THE MOTION ARE:

1. Section 44 of the New Rules repeals the *Canadian Transportation Agency General Rules*, S.O.R./2005-35 (the "Old Rules").

***Ultra vires* provisions**

2. Subsections 41(2)(b), 41(2)(c), and 41(2)(d) of the New Rules are *ultra vires* and/or invalid, because:

   (a) they purport to grant the Agency powers that Parliament never conferred upon the Agency; and

   (b) they are inconsistent with the doctrine of *functus officio*.

Denial of natural justice and access to justice

3. A significant portion of the dispute proceedings before the Agency involve unrepresented individuals with no legal knowledge or experience as applicants, and airlines represented by counsel as respondents.

4. The Agency's longstanding position has been that its rules provide a complete code of procedure that unrepresented parties can read and understand.

5. The New Rules are unreasonable and establish inherently unfair procedures that are inconsistent with the intent of Parliament in establishing the Agency, because:

   (a) section 29 of the New Rules deprives parties of any opportunity to respond and object to requests of non-parties to intervene;

(b) the New Rules abolish the requirement that the Agency provide reasons in support of any of its orders and decisions that do not allow the relief requested, or if opposition has been expressed (section 36 of the Old Rules);

(c) the New Rules abolish all provisions about examinations of deponents or affiants (section 34 of the Old Rules) and about oral hearings (sections 48-66 of the Old Rules).

Statutes and regulations relied on

6. Sections 17, 25, 29, 32, and 41 of the *Canada Transportation Act*, S.C. 1996, c. 10.

7. Rules 352 and 369 of the *Federal Court Rules*, S.O.R./98-106.

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

THE FOLLOWING DOCUMENTARY EVIDENCE will be used for the motion:

1. Affidavit of Ms. Karen Kipper, affirmed on June 17, 2014.

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

June 20, 2014

DR. GÁBOR LUKÁCS

Halifax, NS

lukacs@AirPassengerRights.ca

Moving Party

TO: **CANADIAN TRANSPORTATION AGENCY**
15 Eddy Street
Gatineau, Quebec J8X 4B3

Ms. Cathy Murphy, Secretary
Tel: 819-997-0099
Fax: 819-953-5253

EXHIBIT "B"

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

de Alexei Baturin
of

assermenté devant moi ce 15 jour de September 2014
sworn to before me this day of

Commissaire à l'assermentation
Commissioner for Oaths

ODETTE LALUMIÈRE, AVOCATE
187916-2
BARREAU DU QUÉBEC

Federal Court of Appeal | Cour d'appel fédérale

Date: 20140716

Docket: 14-A-36

Ottawa, Ontario, July 16, 2014

CORAM: **NADON J.A.**
STRATAS J.A.
BOIVIN J.A.

BETWEEN:

DR. GABOR LUKACS

Applicant

and

CANADIAN TRANSPORTATION AGENCY

Respondent

ORDER

UPON Notice of motion by Dr. Gabor Lukacs for an Order granting leave to appeal a decision of the *Canadian Transportation Agency Rules* S.O.R./2014-104 (the "New Rules") made by the Canadian Transportation Agency and published in the *Canada Gazette* on May 21, 2014;

UPON the affidavit of Ms. Karen Kipper sworn June 17, 2014;

UPON the Memorandum of Fact and Law filed by Dr. Lukacs;

UPON a letter dated July 10, 2014 by the Canadian Transportation Agency informing the Court that it would not be filing written representations in response to Dr. Lukacs' Notice of motion for leave to appeal;

THE COURT ORDERS:

Leave is granted to Dr. Lukacs to appeal the New Rules;

Costs on the Motion shall be in the cause.

"M. Nadon"

J.A.

"DS"

"RB"

EXHIBIT "C"

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

de Alexei Baturin
of

assermenté devant moi ce 15 jour de September 2014
sworn to before me this day of

Commissaire à l'assermentation
Commissioner for Oaths

ODETTE LALUMIÈRE, AVOCATE
187916-2
BARREAU DU QUÉBEC

Court File No.: A-357-14

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Appellant

– and –

CANADIAN TRANSPORTATION AGENCY

Respondent

NOTICE OF APPEAL

TO THE RESPONDENT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the appellant. The relief claimed by the appellant appears on the following page.

THIS APPEAL will be heard by the Federal Court of Appeal at a time and place to be fixed by the Judicial Administrator. Unless the court directs otherwise, the place of hearing will be as requested by the appellant. The appellant requests that this appeal be heard in **Halifax, Nova Scotia**.

IF YOU WISH TO OPPOSE THIS APPEAL, to receive notice of any step in the appeal or to be served with any documents in the appeal, you or a solicitor acting for you must prepare a notice of appearance in Form 341A prescribed by the *Federal Courts Rules* and serve it on the appellant's solicitor, or where the appellant is self-represented, on the appellant, WITHIN 10 DAYS of being served with this notice of appeal.

IF YOU INTEND TO SEEK A DIFFERENT DISPOSITION of the judgment appealed from, you must serve and file a notice of cross-appeal in Form 341B prescribed by the *Federal Courts Rules* instead of serving and filing a notice of appearance.

Copies of the *Federal Courts Rules*, information concerning the local offices of the court and other necessary information may be obtained on request to the Administrator of this court at Ottawa (telephone 613-996-6795) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPEAL, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

Date: August 1, 2014

Issued by: ORIGINAL SIGNED BY MICHAEL KOWALCHUK ORIGINAL SIGNÉ PAR

Address of local office: Federal Court of Appeal
1801 Hollis Street, Suite 1720
Halifax, Nova Scotia, B3J 3N4

TO: **CANADIAN TRANSPORTATION AGENCY**
15 Eddy Street
Gatineau, Quebec J8X 4B3

Ms. Cathy Murphy, Secretary
Tel: 819-997-0099
Fax: 819-953-5253

APPEAL

THE APPELLANT APPEALS to the Federal Court of Appeal from the *Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)*, S.O.R./2014-104 (the "New Rules") made by the Canadian Transportation Agency (the "Agency") and published in the *Canada Gazette* on May 21, 2014.

THE APPELLANT ASKS that:

(i) this Honourable Court quash subsections 41(2)(b), 41(2)(c), and 41(2)(d) of the New Rules and declare these provisions to be *ultra vires* the powers of the Agency and/or invalid and/or of no force or effect;

(ii) this Honourable Court declare that the New Rules are invalid because they are unreasonable and establish inherently unfair procedures that are inconsistent with the intent of Parliament in establishing the Agency;

(iii) this Honourable Court refer the New Rules back to the Agency with directions to revise them within 60 days by establishing rules that:

  (a) provide parties a reasonable opportunity to respond and object to requests of non-parties to intervene;

  (b) require the Agency to provide reasons in support of any of its orders and decisions that do not allow the relief requested, or if opposition has been expressed; and

  (c) govern examinations of deponents and affiants, oral hearings, and in particular, requests for oral hearings.

(iv) the Appellant be awarded costs and/or reasonable out-of-pocket expenses incurred in relation to the appeal; and

(v) this Honourable Court grant such further and other relief as is just.

THE GROUNDS OF APPEAL are as follows:

1. Section 44 of the New Rules repeals the *Canadian Transportation Agency General Rules*, S.O.R./2005-35 (the "Old Rules").

***Ultra vires* provisions**

2. Subsections 41(2)(b), 41(2)(c), and 41(2)(d) of the New Rules are *ultra vires* and/or invalid, because:

   (a) they purport to grant the Agency powers that Parliament never conferred upon the Agency; and

   (b) they are inconsistent with the doctrine of *functus officio.*

Denial of natural justice and access to justice

3. A significant portion of the dispute proceedings before the Agency involve unrepresented individuals with no legal knowledge or experience as applicants, and airlines represented by counsel as respondents.

4. The Agency's longstanding position has been that its rules provide a complete code of procedure that unrepresented parties can read and understand.

5. The New Rules are unreasonable and establish inherently unfair procedures that are inconsistent with the intent of Parliament in establishing the Agency, because:

   (a) section 29 of the New Rules deprives parties of any opportunity to respond and object to requests of non-parties to intervene;

   (b) the New Rules abolish the requirement that the Agency provide reasons in support of any of its orders and decisions that do not

allow the relief requested, or if opposition has been expressed (section 36 of the Old Rules); and

(c) the New Rules abolish all provisions about examinations of deponents or affiants (section 34 of the Old Rules) and about oral hearings (sections 48-66 of the Old Rules).

Statutes and regulations relied on

6. Sections 17, 25, 29, 32, and 41 of the *Canada Transportation Act*, S.C. 1996, c. 10.

7. Such further and other grounds as the Appellant may advise and the Honourable Court permits.

August 1, 2014

DR. GÁBOR LUKÁCS

Halifax, Nova Scotia

lukacs@AirPassengerRights.ca

Appellant

I HEREBY CERTIFY that the above document is a true copy of the original issued out of / filed in the Court on the 1 day of August A.D. 20 14

Dated this 1 day of August 20 14

M Kowalchuk
Registry Officer

EXHIBIT "D"

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

de Alexei Batuvin
of

assermenté devant moi ce 15 jour de September 2014
sworn to before me this day of

Commissaire à l'assermentation
Commissioner for Oaths

ODETTE LALUMIÈRE, AVOCATE
187916-2
BARREAU DU QUÉBEC

Court File No.: A-357-14

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Appellant

– and –

CANADIAN TRANSPORTATION AGENCY

Respondent

AGREEMENT AS TO CONTENTS OF THE APPEAL BOOK (RULE 343(1))

PURSUANT to Rule 343(1) of the *Federal Court Rules*, the parties agree that the documents, exhibits, and transcripts to be included in the appeal book are as follows:

1. Notice of Appeal;

2. *Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)*, S.O.R./2014-104 made by the Canadian Transportation Agency and published in the *Canada Gazette* on May 21, 2014;

3. Order of the Federal Court of Appeal granting Leave to Appeal, dated July 16, 2014;

EXHIBIT "E"

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

de Alexei Boturin
of

assermenté devant moi ce 15 jour de September 2014
sworn to before me this day of

Commissaire à l'assermentation
Commissioner for Oaths

ODETTE LALUMIÈRE, AVOCATE
187916-2
BARREAU DU QUÉBEC

Court File No.: A-357-14

IN THE FEDERAL COURT OF APPEAL

BETWEEN:

DR. GABOR LUKACS

Appellant

- and -

CANADIAN TRANSPORTATION AGENCY

Respondent

NOTICE OF APPEARANCE

The Respondent, Canadian Transportation Agency intends to oppose this appeal.

August 11, 2014

Barbara Cuber
Counsel
Legal Services Branch
Canadian Transportation Agency
15 Eddy Street, 19th Floor
Gatineau, Quebec
K1A 0N9
Tel: (819) 953-2236
Fax: (819) 953-9269

Counsel for the
Canadian Transportation Agency

TO: Dr. Gabor Lukacs lukacs@airpassengerrights.ca

Halifax, NS

EXHIBIT "F"

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

de Alexei Bobrinin
of

assermenté devant moi ce 15 jour de September 2014
sworn to before me this day of

Commissaire à l'assermentation
Commissioner for Oaths

ODETTE LALUMIÈRE, AVOCATE
187916-2
BARREAU DU QUÉBEC

By Facsimile: (613) 952-7226

August 26, 2014

The Registrar
Federal Court of Appeal
1st Floor
90 Sparks Street
Ottawa, Ontario

Dear Sir/Madam:

Re: Dr. Gabor Lukacs v. Canadian Transportation Agency
– Court File No.: A-357-14

I am writing on behalf of the respondent Canadian Transportation Agency (Agency) to seek the direction of this Honourable Court on how to proceed in requesting a determination on the contents of the appeal book in the above-mentioned file.

Pursuant to subsection 343(3) of the *Federal Courts Rules,* SOR/98-106 (Rules), in the event that no agreement is reached on the contents of the appeal book, the appellant shall make a motion for a determination on its contents. In this case, however, the appellant is seeking to exclude a document that the respondent wishes to include in the appeal book.

In this circumstance, the Agency considers that it would be appropriate for it to be permitted to file the motion respecting the contents of the appeal book. This would allow the Agency to put the document before the Court in a motion and to explain its reasons for seeking inclusion of the document. The appellant could then present his arguments against its inclusion in a response. The Agency considers that, in light of the fact that the appellant is self-represented and that the Agency is seeking to include a document to which the appellant does not agree, the responsibility should fall on the Agency to make the motion in this case.

The Agency has contacted the appellant, who has indicated that he agrees with the proposal that the Agency be responsible for making the motion to determine whether any version of the document in question should be included in the appeal book.

Moreover, in this case, the Agency intends to make a motion in the alternative that, in the event the Court should order that the document will not form part of the appeal book, it should be included as new evidence on appeal pursuant to section 351 of the Rules.

In light of this, the Agency seeks the Court's direction with respect to the above, and specifically whether it may be permitted to file the motion under subsection 343(3) of the Rules, with a motion under section 351 in the alternative, in this case.

All of which is respectfully submitted.

Barbara Cuber
Counsel
Legal Services Branch
Canadian Transportation Agency
15 Eddy Street, 19th Floor
Gatineau, Quebec
K1A 0N9
Tel: (819) 953-2236
Fax: (819) 953-9269

c.c: Dr. Gabor Lukacs
6507 Roslyn Road
Halifax, NS
B3L 2M8

By e-mail: lukacs@airpassengerrights.ca

EXHIBIT "G"

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

de Alexei Beturin
of

assermenté devant moi ce 15 jour de September 2014
sworn to before me this day of

Commissaire à l'assermentation
Commissioner for Oaths

ODETTE LALUMIÈRE, AVOCATE
187916-2
BARREAU DU QUÉBEC

Federal Court of Appeal | Cour d'appel fédérale

TO : Appeal Registry

FROM : Nadon J.A.

DATE : September 5, 2014

RE : A-357-14

DIRECTION

The Agency should proceed as proposed in its letter of August 26, 2014 to the Court.

"Marc Nadon"
J.A.

EXHIBIT "H"

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

de Alexei Boturin
of

assermenté devant moi ce 15 jour de September 2014
sworn to before me this day of

Commissaire à l'assermentation
Commissioner for Oaths

ODETTE LALUMIÈRE, AVOCATE
187916-2
BARREAU DU QUÉBEC

Court File No.: A-357-14

IN THE FEDERAL COURT OF APPEAL

BETWEEN:

DR. GABOR LUKA CS

Appellant

- and -

CANADIAN TRANSPORTATION AGENCY

Respondent

NOTICE OF CONSENT

I hereby consent to the Respondent Canadian Transportation Agency's request for an extension of time until September 15, 2014 to file its Motion to determine the contents of the appeal book pursuant to Rule 343(3) of the *Federal Courts Rules* or, in the alternative, to adduce new evidence on appeal pursuant to Rule 351, in the within matter.

September 10, 2014

Dr. Gabor Lukacs

Halifax, NS

lukacs@airpassengerrights.ca

TAB 3

Court File No.: A-357-14

FEDERAL COURT OF APPEAL

BETWEEN:

GABOR LUKACS

Applicant

and

CANADIAN TRANSPORTATION AGENCY

Respondent

WRITTEN REPRESENTATIONS
OF THE RESPONDENT
CANADIAN TRANSPORTATION AGENCY

INTRODUCTION

These are the written representations in support of the Notice of Motion of the Respondent, Canadian Transportation Agency ("the Agency"), for an Order to set the contents of the Appeal Book or, in the alternative, for an Order granting the Agency's motion to introduce new evidence on appeal.

PART I - STATEMENT OF FACTS

1. On June 20, 2014, Gabor Lukacs filed a notice of motion with the Federal Court of Appeal seeking leave to appeal from the *Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to all Proceedings)*, SOR/2014-104 (the "Dispute Adjudication Rules") made by the Agency and published in the *Canada Gazette* on May 21, 2014.

   Exhibit "A" to the Affidavit of Alexei Baturin,
   sworn September 15th, 2014

2. On July 16, 2014, this Honourable Court granted Mr. Lukacs' application for leave to appeal the Agency's Dispute Adjudication Rules.

   Exhibit "B" to the Affidavit of Alexei Baturin,
   sworn September 15th, 2014

3. On August 1, 2014, the Agency was served with the Notice of Appeal in relation to the appeal of Agency's Dispute Adjudication Rules (Federal Court of Appeal File No. A-357-14).

   Exhibit "C" to the Affidavit of Alexei Baturin,
   sworn September 15th, 2014

4. On August 8, 2014, the Agency received the proposed Agreement as to the Contents of the Appeal Book.

   Exhibit "D" to the Affidavit of Alexei Baturin,
   sworn September 15th , 2014

5. On August 11, 2014, the Agency filed the Notice of Appearance.

Exhibit "E" to the Affidavit of Alexei Baturin,
sworn September 15th, 2014

6. On August 26, 2014, the Agency sought direction from this Honourable Court on how to proceed in requesting a determination on the contents of the Appeal Book, specifically whether it may be permitted to file the motion under Rule 343(3) of the *Federal Courts Rules* SOR 198-106, with a motion under Rule 351, in the alternative.

Exhibit "F" to the Affidavit of Alexei Baturin,
sworn September 15th, 2014

7. On September 5, 2014, this Honourable Court directed the Agency to proceed as proposed in its letter of August 26, 2014.

Exhibit "G" to the Affidavit of Alexei Baturin,
sworn September 15th, 2014

8. On September 10, 2014, pursuant to Rule 7 of the *Federal Courts Rules*, the Agency obtained the consent of the appellant to an extension of time until September 15, 2014 to file its Motion to determine the contents of the appeal book.

Exhibit "H" to the Affidavit of Alexei Baturin,
sworn September 15th, 2014

PART II - ISSUES

9. The issue is whether the document entitled "Annotated Dispute Adjudication Rules" ("Annotation") meets the requirement of Rule 343(2) of the *Federal Courts Rules* for inclusion in the Appeal Book; or

10. In the alternative, the issue is whether the Annotation should be admitted as new evidence on appeal pursuant to Rule 351.

PART III - ARGUMENTS

Document sought to be presented

11. In this appeal, the Agency is seeking to file the Annotation to its Dispute Adjudication Rules.

    Annotated Dispute Adjudication Rules
    Tab 11 of the Respondent's Motion Record

12. The Dispute Adjudication Rules that are the subject of this appeal came into force on June 4, 2014. On that date, the Agency published the Annotation on its website.

13. The Annotation was designed, as its introduction states, as a companion document to the Dispute Adjudication Rules, with the intention of providing explanations and clarifications of the Rules for those unfamiliar with the Agency and its processes.

14. The Annotation was prepared by Agency staff and was approved for publication by the Agency's Chair and Chief Executive Officer. The document is intended as a soft law instrument to provide guidance on the Agency's procedures but is not intended to fetter the Agency's discretion in the adjudicative decision-making process.

15. The Annotation is also intended to be an evergreen document, to be updated as needed.

16. Having received comments from the appellant respecting concerns about the Agency's procedures under the new Dispute Adjudication Rules, the Agency amended its Annotation on or around August 22, 2014, to address the following issues:

a. The Agency's continued commitment to providing reasons for its decisions;

b. The possibility of requesting an opportunity to respond to a request to intervene in dispute proceedings before the Agency;

c. The possibility of requesting an opportunity to conduct a cross-examination on affidavit; and

d. The possibility of proceeding by way of oral hearing.

17. The Agency seeks to present to this Honourable Court the version of the Annotation that was amended and published on the Agency's website on or around August 22, 2014.

Issue 1: Whether the Annotation meets the requirements of Rule 343(2) of the *Federal Courts Rules* for inclusion in the Appeal Book

18. The parties agree as to the contents of the Appeal Book, with the exception of the Annotation.

19. Rule 343(2) of the Federal Courts Rules states:

> The parties shall include in an appeal book only such documents, exhibits and transcripts as are required to dispose of the issues on appeal.
>
> *Federal Courts Rules*, SOR/98-106, Rule 343(2)

20. The Agency submits that the Annotation meets the requirement of Rule 343(2) to be included in the Appeal Book.

21. A document should be included in the Appeal Book if there is a reasonable basis for concluding that it is required to dispose of an issue on appeal. In particular, this Honourable Court (Sharlow J.A.) has stated:

> An evidentiary document should be included in the appeal book only if there is a reasonable basis for concluding that it is required to dispose of an issue on appeal.
> ...
> The test in Rule 343(2) is a flexible one. For example, it may be appropriate to exclude from the appeal book a document that was presented in the court below to prove a particular fact that will not be in dispute on appeal; on the other hand, that document ought to be included if it is reasonable to suppose the appellate court may require it to gain a full appreciation of the facts. Similarly, it may be appropriate to exclude a document adduced by a party who does not intend to rely on it to support any of its arguments on appeal; on the other hand, it ought to be included if the opposing party has a reasonable basis for believing that it may wish to rely on that document to support one of its argument on appeal. (emphasis added)
>
> *Bojangles International LCC. v. Bojangles Café Ltd.*
> [2006] F.C.J. No. 1306 at paras. 3 & 6.
> **Tab 5** of the Respondent's Motion Record

22. The Agency notes that jurisprudence in relation to Rule 343 has developed specifically with respect to appeals of adjudicative decisions. In such circumstances, the contents of an appeal book should be limited to the record that was before the decision-maker whose decision is being appealed.

23. In this case, the appellant is appealing the Dispute Adjudication Rules, which were established in the exercise of the Agency's rule-making power, as opposed to its adjudicative decision-making power. As Brown and Evans have stated, in exercising non-adjudicative powers like the making of delegated legislation, "the administrative decision-maker does not normally make findings of fact or declarations of law and record them in the form of written reasons for decision." In other words, in this case, the appeal does not concern an adjudicative decision which was based on a factual record before a decision-maker as understood by Rule 343.

> Donald J.M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada*, loose-leaf edition, Carswell, vol. 3, para. 15:1100 at 15-1. **Tab 10** of the Respondent's Motion Record

24. Moreover, section 41 of the *Canada Transportation Act*, S.C. 1996, c. 10, provides for a right of appeal from an Agency rule or regulation to this Honourable Court, with leave. The Federal Court of Appeal is therefore the first level of court engaging in a review of the Dispute Adjudication Rules; there is no record of a court below from which to draw.

> *Canada Transportation Act*, S.C. 1996, c. 10, s. 41

25. In the circumstances, the Agency respectfully submits that the contents of the Appeal Book cannot be determined based on any record in first instance. It is the Agency's position that the Appeal Book should therefore be determined on the basis of the relevance of the document the Agency seeks to file.

26. In this regard, the Annotation is relevant and ought to be included in the Appeal Book because:

    a) it is a companion document to the Dispute Adjudication Rules, which are the subject of this appeal, and is intended to provide explanations and clarifications with respect to the Rules;
    b) the document directly addresses the procedural fairness issues on appeal; and
    c) insofar as the appellant may impute intent on the part of the Agency as a result of the absence of certain provisions from the Dispute Adjudication Rules, the Annotation is relevant as it provides guidance on the Agency's intentions.

27. The Agency notes that reviewing courts have made reference to commentary or guidelines that explain the meaning to be attributed to written procedures when these procedures have been impugned. It is therefore not uncommon for a reviewing court to make reference to such documents in the course of its review.

> *Advocacy Centre for Tenants Ontario v. The Landlord and Tenant Board,* [2013] O.J. No. 6175, at paras. 5 & 10, which refers to commentary.
> **Tab 4** of the Respondent's Motion Record
>
> *Thamotharem v. Canada (Minister of Citizenship and Immigration),* [2008] 1 FCR 385, at para. 43, which refers to a training document prepared by the Immigration and Refugee Board Professional Development Branch subsequent to the publication of the impugned Guideline 7.
> **Tab 9** of the Respondent's Motion Record
>
> *Duale v. Canada (Minister of Citizenship and Immigration),* [2004] F.C.J. No. 178, at paras. 6 *ff.,* which refers to commentary.
> **Tab 7** of the Respondent's Motion Record

28. The Annotation, in the version published on August 22, 2014, speaks directly to the issues raised in this appeal. Specifically, the Annotation addresses the following appeal points:

    a. The Agency's continued commitment to providing reasons for its decisions. Specifically, the Annotation provides as follows:

    At section 1, definition of "Dispute Proceeding" under the subheading "Agency Decision or Order":

    > "The Agency's decision or order will contain a summary of the application and other information provided during the pleadings, the Agency's decision, including reasons for that decision, and any corrective action it deemed necessary"; and

    Under the part entitled "Dispute Proceedings: Requests", under the subheading "Requests":

    > "The Agency will render a decision or order on each request. The decision or order will contain a summary of the request as well as the Agency's conclusions. Where the request is contested, the Agency will provide reasons for its decision."

    b. The possibility of requesting an opportunity to respond to a request to intervene in dispute proceedings before the Agency. Specifically, the Annotation provides as follows:

    At section 29, Request to Intervene, under the subheading "Contents of the request to intervene in a dispute proceeding":

"The discretion to allow an intervention lies with the Agency based on the Panel's assessment of whether the intervention will bring new information from a different perspective to the Agency that is relevant and necessary to its decision. As a result, a right of response and reply has not been provided. In exceptional cases, however, the Agency may, upon request filed under section 34 or on its own initiative, provide parties who are adverse in interest with the opportunity to respond to such requests, as well as a right of reply to the person seeking intervener status.

If the request to intervene is approved by the Agency, parties adverse in interest will have an opportunity to respond to the intervention when it is filed."

c. The possibility of requesting an opportunity to conduct a cross-examination on affidavit. Specifically, the Annotation provides as follows:

At section 15, Verification by Affidavit or by Witnessed Statement, the subheading called "Affidavit":

"Note that if a party adverse in interest makes a request before the close of pleadings and the request is approved by the Agency, they may be permitted to conduct oral cross-examinations on an affidavit to test the evidence contained in the affidavit. A party may make such a request under section 27 of the Dispute Adjudication Rules."

At section 32, Request for Agency to Require Party to Respond, the subheading called "Request":

"The notice to respond to questions or produce documents allows a party to test evidence or submissions made by another party adverse in interest to them, or to obtain further information in relation to the dispute."

[...]

"Note that if a party adverse in interest makes a request before the close of pleadings and the request is approved by the Agency, they may be permitted to conduct oral cross-examinations on an affidavit to test the evidence contained in

the affidavit. A party may make such a request under section 27 of the Dispute Adjudication Rules."

d. The possibility of proceeding by way of oral hearing. Specifically, the Annotation provides as follows:

At Section 2: Dispute Proceedings, under the subheading "Rules apply to contested matters":

> "Alternatively, the Agency may decide to organize an oral hearing as a means to gather and test the information it needs to make its decision. In an oral hearing, the parties appear before the Agency and make submissions in person. If the proceeding is to be dealt with by way of an oral hearing, then at the time that an oral hearing is called, a pre-hearing conference will typically be held to work out the details of the procedures to be used in that case. These procedures will then be contained in a Procedural Direction specific to that case. The Rules will continue to apply to disputes that proceed by way of oral hearing subject to the Agency establishing customized procedures in any Procedural Direction that may be issued within the proceeding. The Agency has established guidelines in relation to one type of oral hearing, the 35-day adjudication process under section 169.43 of the CTA, and is working to establish more general guidelines in relation to all oral hearings"; and

Under section 40, Conference:

> "A conference may be held during any proceeding. However, if the proceeding is to be dealt with by way of an oral hearing, then at the time that an oral hearing is called, a pre-hearing conference will typically be held to work out the details of the procedures to be used in that case."

Annotated Dispute Adjudication Rules
Tab 12 of the Respondent's Motion Record

29. This Honourable Court (Létourneau J.A.) has held that it is preferable to err on the side of caution in determining which documents will be included in an Appeal Book.

Canada (Information Commissioner v. Canada (Minister of the Environment), [2001] F.C.J. No. 1303, at para. 4.
Tab 6 of the Respondent's Motion Record

30. Because appeals concerning whether rules of procedure, in and of themselves, establish inherently unfair procedures are uncommon, it is difficult to assess what documents might be material to the Appeal Panel respecting the issues on appeal.

31. Moreover, in this case, there is no adjudicative decision under appeal and, as a result, there is no indication of the manner in which the Agency applies or interprets the Dispute Adjudication Rules.

32. In the circumstances, the Agency respectfully submits that the Annotation may be relevant to this appeal insofar as it communicates prospectively examples of procedural steps that may be requested in a proceeding but that are uncommon in most cases, as well as the manner in which the Agency may interpret the Dispute Adjudication Rules. This Honourable Court has commented on the importance of tools like the Annotation as follows:

> Effective decision making by administrative agencies often involves striking a balance between general rules and the exercise of *ad hoc* discretion or, to put it another way, between the benefits of certainty and consistency on the one hand, and of flexibility and fact-specific solutions on the other. Legislative instruments (including such non-legally binding "soft law" documents as policy statements, guidelines, manuals, and handbooks) can assist members of the public to predict how an agency is likely to exercise its statutory discretion and to arrange their affairs accordingly, and enable an agency to deal with a problem comprehensively and proactively, rather than incrementally and reactively on a case-by-case basis.

> Through the use of "soft law" an agency can communicate prospectively its thinking on an issue to agency members and staff, as well as to the public at large and to the agency's "stakeholders" in particular. Because "soft law" instruments may be put in place relatively easily and adjusted in the light of day-to-day experience, they may be preferable to formal rules requiring external approval and, possibly, drafting appropriate for legislation. Indeed, an administrative agency does not require an express grant of statutory authority in order to issue guidelines and policies to structure the exercise of its discretion or the interpretation of its enabling legislation: *Ainsley Financial Corp. v. Ontario Securities Commission,* (1994), 21 O.R. (3d) 104 (C.A.) at pages 108-109 (*Ainsley*).
>
> *Thamotharem v. Canada (Minister of Citizenship and Immigration),* [2008] 1 FCR 385, at paras. 55-56. **Tab 9** of the Respondent's Motion Record

33. In this case, the Agency has published the Annotation to explain and clarify how the Dispute Adjudication Rules are intended to function. For all the above reasons, the Agency respectfully submits that the Annotation should be included in the Appeal Book in this case.

Issue 2: In the alternative, the Agency makes a *motion to present the Annotation as new* evidence on appeal pursuant to Rule 351.

34. Rule 351 of the *Federal Courts Rules* provides as follows:

> In special circumstances, the Court may grant leave to a party to present evidence on a question of fact.

35. The test for admission of new evidence has been established by this Honourable Court as follows:

> Generally, evidence will not be admitted on appeal unless it is credible, it is practically conclusive of an issue on appeal, and it could not with due diligence have been presented to the judge who made the order under appeal. It is rare that all three tests are satisfied.

The Court has residual discretion, even if these three tests are not satisfied, to admit new evidence on appeal in the interest of justice, but that residual discretion is exercised only in the clearest of cases and with great care.

> *Shire Canada Inc. v. Apotex Inc.*, [2011] F.C.J. No. 49 at paras. 17-18
> **Tab 8** of the Respondent's Motion Record

36. The Agency acknowledges that the Annotation was published concurrently with the Dispute Adjudication Rules, and that, in addition to this, the Agency seeks to submit on appeal a version that was amended on or around August 22, 2014, subsequent to the publication of its Rules and to the filing of the Notice of Appeal on August 1, 2014.

37. Accordingly, should this Honourable Court consider that the Annotated Dispute Adjudication Rules constitute new evidence, the Agency respectfully submits that the document should be admitted as:

    a. It is credible, having been prepared by the Agency and prominently published on the home page of its website as a companion document to the Dispute Adjudication Rules;

    b. It is practically conclusive of the issues on appeal as it explains that the Agency has not established procedures in its Dispute Adjudication Rules that are inherently unfair; and

    c. It was prepared with due diligence to address the concerns raised by the appellant insofar as he is a member of the public who uses the Agency's processes and insofar as he raised questions as to how the Agency's procedures may work under the Dispute Adjudication Rules. The Annotation is intended as an evergreen document so that it can be updated.

38. Should this Honourable Court determine that the three-part test has not been met, the Agency respectfully submits that it is in the interest of justice that the Annotation be admitted as new evidence as its contents constitute evidence of the Agency's procedures and provide explanations directly related to the concerns raised by the appellant in this appeal, as set out above in paragraph 28.

39. Moreover, in the absence of an adjudicative decision in which the Agency interprets and applies the Dispute Adjudication Rules in a particular case, the Annotation is the only source of insight available into the Agency's position on the issues raised.

40. The Agency respectfully submits that the Annotation, in directly addressing the appeal points raised in this case, is conclusive of those procedural fairness issues, speaks credibly to those issues, and that it is in the interest of justice that it should be included as new evidence on appeal.

PART IV - ORDER SOUGHT

41. The Agency respectfully requests an order determining that the "Annotated Dispute Adjudication Rules", as amended on or around August 22, 2014, be included in the Contents of the Appeal Book; or

42. In the alternative, the Agency respectfully requests that this Honourable Court grant the Agency's motion that the "Annotated Dispute Adjudication Rules" be accepted as new evidence on appeal pursuant to Rule 351.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at the City of Gatineau, in the Province of Quebec, this 15th day of September, 2014

Barbara Cuber
Counsel
Canadian Transportation Agency

PART V - LIST OF AUTHORITIES

Legislation

Federal Courts Rules, SOR/98-106, Rules 8, 343(2), 369

Canada Transportation Act, S.C. 1996 c. 10, section 41

Case Law

Advocacy Centre for Tenants Ontario v. The Landlord and Tenant Board, [2013] O.J. No. 6175

Bojangles Internationol. v. Bojangles Café Ltd. [2006] F.C.J. No. 1306

Canada (Information Commissioner v. Canada (Minister of the Environment), [2001] F.C.J. No. 1303

Duale v. Canada (Minister of Citizenship and Immigration), [2004] F.C.J. No. 178

Shire Canada Inc. v. Apotex Inc., [2011] F.C.J. No. 49

Thamotharem v. Canada (Minister of Citizenship and Immigration), [2008] 1 FCR 385

Other Documents:

Donald J.M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada*, loose-leaf edition, Carswell, vol. 3.

Annotated Dispute Adjudication Rules

Extension or abridgement

8. (1) On motion, the Court may extend or abridge a period provided by these Rules or fixed by an order.

Délai prorogé ou abrégé

8. (1) La Cour peut, sur requête, proroger ou abréger tout délai prévu par les présentes règles ou fixé par ordonnance.

When motion may be brought

(2) A motion for an extension of time may be brought before or after the end of the period sought to be extended.

Moment de la présentation de la requête

(2) La requête visant la prorogation d'un délai peut être présentée avant ou après l'expiration du délai.

Motions for extension in Court of Appeal

(3) Unless the Court directs otherwise, a motion to the Federal Court of Appeal for an extension of time shall be brought in accordance with rule 369.

SOR/2004-283, s. 32.

Requête présentée à la Cour d'appel fédérale

(3) Sauf directives contraires de la Cour, la requête visant la prorogation d'un délai qui est présentée à la Cour d'appel fédérale doit l'être selon la règle 369.

DORS/2004-283, art. 32.

Agreement re appeal book

343. (1) Within 30 days after the filing of a notice of appeal, the parties shall agree in writing as to the documents, exhibits and transcripts to be included in the appeal book and shall file that agreement.

Entente entre les parties

343. (1) Dans les 30 jours suivant le dépôt de l'avis d'appel, les parties conviennent par écrit des documents, pièces et transcriptions qui constitueront le dossier d'appel et déposent copie de leur entente.

Limitation

(2) The parties shall include in an appeal book only such documents, exhibits and transcripts as are required to dispose of the issues on appeal.

Restriction

(2) Les parties n'incluent dans le dossier d'appel que les documents, pièces et transcriptions nécessaires au règlement des questions en litige dans l'appel.

Motion to determine content of appeal book

(3) If no agreement is reached within the period referred to in subsection (1), the appellant shall, within 10 days after the expiration of that period, serve and file a notice of motion under rule 369 to request that the Court determine the content of the appeal book.

Requête visant le contenu du dossier

(3) À défaut d'une entente dans le délai prévu au paragraphe (1), l'appelant demande à la Cour de déterminer le contenu du dossier d'appel en signifiant et en déposant un avis de requête selon la règle 369 dans les 10 jours suivant l'expiration de ce délai.

Order for transcripts or reproductions

(4) Where a transcript or the reproduction of exhibits is required, the appellant shall order it and shall file proof of the order within 10 days after filing an agreement under subsection (1) or obtaining an order under subsection (3).

Ordonnance visant les transcriptions ou copies

(4) Si la transcription de témoignages oraux ou la reproduction de pièces est requise, l'appelant se charge de les obtenir et dépose la preuve des démarches entreprises à cette fin dans les 10 jours suivant le dépôt de l'entente visée au paragraphe (1) ou l'obtention de l'ordonnance qui en tient lieu.

Preparation of appeal book

(5) The appeal book shall be prepared by the appellant forthwith unless, on the motion of the appellant, the Court orders the Administrator to prepare an appeal book on the appellant's behalf from documents provided by the appellant.

Préparation du dossier d'appel

(5) Le dossier d'appel est préparé sans délai par l'appelant à moins que la Cour, sur requête de celui-ci, n'ordonne à l'administrateur de préparer le dossier d'appel pour le compte de l'appelant sur remise de documents par celui-ci.

Motions in writing

369. (1) A party may, in a notice of motion, request that the motion be decided on the basis of written representations.

Request for oral hearing

(2) A respondent to a motion brought in accordance with subsection (1) shall serve and file a respondent's record within 10 days after being served under rule 364 and, if the respondent objects to disposition of the motion in writing, indicate in its written representations or memorandum of fact and law the reasons why the motion should not be disposed of in writing.

Reply

(3) A moving party may serve and file written representations in reply within four days after being served with a respondent's record under subsection (2).

Disposition of motion

(4) On the filing of a reply under subsection (3) or on the expiration of the period allowed for a reply, the Court may dispose of a motion in writing or fix a time and place for an oral hearing of the motion.

Procédure de requête écrite

369. (1) Le requérant peut, dans l'avis de requête, demander que la décision à l'égard de la requête soit prise uniquement sur la base de ses prétentions écrites.

Demande d'audience

(2) L'intimé signifie et dépose son dossier de réponse dans les 10 jours suivant la signification visée à la règle 364 et, s'il demande l'audition de la requête, inclut une mention à cet effet, accompagnée des raisons justifiant l'audition, dans ses prétentions écrites ou son mémoire des faits et du droit.

Réponse du requérant

(3) Le requérant peut signifier et déposer des prétentions écrites en réponse au dossier de réponse dans les quatre jours après en avoir reçu signification.

Décision

(4) Dès le dépôt de la réponse visée au paragraphe (3) ou dès l'expiration du délai prévu à cette fin, la Cour peut statuer sur la requête par écrit ou fixer les date, heure et lieu de l'audition de la requête.

Appeal from Agency

41. (1) An appeal lies from the Agency to the Federal Court of Appeal on a question of law or a question of jurisdiction on leave to appeal being obtained from that Court on application made within one month after the date of the decision, order, rule or regulation being appealed from, or within any further time that a judge of that Court under special circumstances allows, and on notice to the parties and the Agency, and on hearing those of them that appear and desire to be heard.

Time for making appeal

(2) No appeal, after leave to appeal has been obtained under subsection (1), lies unless it is entered in the Federal Court of Appeal within sixty days after the order granting leave to appeal is made.

Powers of Court

(3) An appeal shall be heard as quickly as is practicable and, on the hearing of the appeal, the Court may draw any inferences that are not inconsistent with the facts expressly found by the Agency and that are necessary for determining the question of law or jurisdiction, as the case may be.

Agency may be heard

(4) The Agency is entitled to be heard by counsel or otherwise on the argument of an appeal.

Appel

41. (1) Tout acte — décision, arrêté, règle ou règlement — de l'Office est susceptible d'appel devant la Cour d'appel fédérale sur une question de droit ou de compétence, avec l'autorisation de la cour sur demande présentée dans le mois suivant la date de l'acte ou dans le délai supérieur accordé par un juge de la cour en des circonstances spéciales, après notification aux parties et à l'Office et audition de ceux d'entre eux qui comparaissent et désirent être entendus.

Délai

(2) Une fois l'autorisation obtenue en application du paragraphe (1), l'appel n'est admissible que s'il est interjeté dans les soixante jours suivant le prononcé de l'ordonnance l'autorisant.

Pouvoirs de la cour

(3) L'appel est mené aussi rapidement que possible; la cour peut l'entendre en faisant toutes inférences non incompatibles avec les faits formellement établis par l'Office et nécessaires pour décider de la question de droit ou de compétence, selon le cas.

Plaidoirie de l'Office

(4) L'Office peut plaider sa cause à l'appel par procureur ou autrement.

TAB 4

056

Case Name:

Advocacy Centre for Tenants Ontario v. Ontario (Landlord and Tenant Board)

Between
Advocacy Centre for Tenants Ontario, Applicant, and
The Landlord and Tenant Board, Respondent

[2013] O.J. No. 6175

2013 ONSC 7636

Divisional Court File No. 397/12

Ontario Superior Court of Justice
Divisional Court

F.J.C. Newbould J.

Heard: December 10, 2013.
Judgment: December 11, 2013.

(18 paras.)

Counsel:

Brian A. Blumenthal, for the moving party.

Karen Andrews, for the responding party.

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1 F.J.C. NEWBOULD J.:-- The Landlord and Tenant Board ("LTB") moves to quash a judicial review application brought by the Advocacy Centre for Tenants Ontario ("ACTO") for an order prohibiting the LTB from applying rule 32 of its rules of practice in all matters before it. For the reasons that follow, the motion to quash is granted.

2 ACTO is a clinic established by Legal Aid Ontario to advocate for legal protection of the housing rights of low-income tenants and homeless persons through test case litigation and law reform advocacy. It also manages a Legal Aid Ontario duty counsel program and through it delivers summary legal services to low-income tenants.

Legislation and rule

3 The LTB is established under the *Residential Tenancies Act, 2006*, S.O. 2006 c. 17 ("Act"). The purposes of the Act are set out in section 1, which provides:

> **Purposes of Act**
>
> 1. The purposes of this Act are to provide protection for residential tenants from unlawful rent increases and unlawful evictions, to establish a framework for the regulation of residential rents, to balance the rights and responsibilities of residential landlords and tenants and to provide for the adjudication of disputes and for other processes to informally resolve disputes.

4 Under the Act, the LTB is to make rules of practice and procedure. More particularly,

> **Rules and Guidelines Committee**
>
> 176(1) The Chair of the Board shall establish a Rules and Guidelines Committee to be composed of the Chair, as Chair of the Committee, and any other members of the Board the Chair may from time to time appoint to the Committee.
>
> **Committee shall adopt rules**
>
> (2) The Committee shall adopt rules of practice and procedure governing the practice and procedure before the Board under the authority of this section and section 25.1 of the *Statutory Powers Procedure Act*.
>
> **Committee may adopt guidelines**
>
> (3) The Committee may adopt non-binding guidelines to assist members in interpreting and applying this Act and the regulations made under it.
>
> **Means of adoption**
>
> (4) The Committee shall adopt the rules and guidelines by simple majority, subject to the right of the Chair to veto the adoption of any rule or guideline.
>
> **Make public**
>
> (5) The Board shall make its rules, guidelines and approved forms available to the public.

5 In January, 2012 the LTB promulgated rule 32. The rule, and the commentary to the rule, is as follows-

> **32. Subject to the discretion of the Board Member, at a hearing before the Board, a party's legal representative appearing on behalf of a party may be both an advocate and a witness.**

> *The Law Society of Upper Canada's Rules of Professional Conduct provide that, subject to the discretion of the tribunal, a lawyer or paralegal shall not appear as both an advocate and a witness in the same proceeding unless the matter is purely formal or uncontroverted, or, the tribunal's rules of practice allow for a lawyer or paralegal to be both an advocate and a witness.*
>
> *The Board's practice is generally, in the absence of an objection, to allow a legal representative to be both a witness and an advocate in the same proceeding. On a challenge by a party, or in the exercise of the Board's discretion, a Member, in making a decision whether to permit or to refuse a party's legal representative to be both an advocate and a witness in the same proceeding, will consider a number of factors including, the type of application, whether the hearing is contested, the nature of the evidence proposed to be given, the potential prejudice to a party, and the reasons given by the party's legal representative appearing as an advocate who seeks the Board's permission to give evidence in the proceedings.*
>
> *Even where the Board allows a legal representative to be both a witness and an advocate in the same proceeding, the Board will consider the weight to be given to the evidence.*

6 ACTO is a member of the LTB's stakeholder advisory committee. During a consultative process prior to rule 32 being promulgated, ACTO voiced serious reservations about the proposed rule, including assertions that the rule would place lawyers and paralegals in a conflict of interest and put their credibility in issue and that the rule was contrary to the general standard set by the Law Society. Nevertheless the rule was promulgated by the LTB.

Position of the parties and analysis

7 ACTO recognizes that the LTB has the legislative jurisdiction to promulgate its rules. It takes the position, however, that rule 32 is procedurally unfair and undermines the administration of justice. It points out that a very high percentage of tenants who appear before the LTB are unrepresented and are not equipped to deal with issues that will arise under rule 32.

8 The basic position of the LTB is that the rule cannot be challenged in a vacuum and that there can be no assessment of procedural fairness until such time as the rule engages the participatory rights of a party in the context of a proceeding and to their detriment. Absent that factual context, the argument that the rule in itself breaches procedural fairness is hypothetical and speculative. In my view this position of the LTB is correct.

9 The test on a motion such as this to quash an application for judicial review is the plain and obvious test. In *Deeb v. IIROC*, [2012] O.J. No. 691, Pepall J. (as she then was) in quashing a motion for judicial review stated:

> **32** The test on a motion to quash is whether it is plain and obvious that the application cannot succeed: *Adams v. Canada,* 2011 ONSC 325. Is it beyond doubt that the application for judicial review will fail?

10 It is clear that rule 32 is discretionary. How it will be applied in any given case is unknown. The commentary by the LTB following the rule indicates the kind of considerations that will be taken into

account in the exercise of the discretion of a board member. Such an exercise of discretion may or may not be against the interests of a tenant and the results of the particular case may be a decision in favour of the tenant not requiring any review or appeal by the tenant. That is, whether rule 32 works procedural unfairness permitting an application for judicial review will not be known until an actual case is heard and determined.

11 Essentially for that reason, it cannot be established that rule 32 necessarily results in a procedural unfairness, which is what ACTO would have to establish as it seeks an order prohibiting the LTB from applying rule 32 of its rules of practice in all matters before it.

12 In *Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 S.C.R. 817 L'Heureux-Dubé J. made clear that the duty of fairness is not to be considered in a vacuum but rather in the specifics of a particular case. She stated:

> **21** The existence of a duty of fairness, however, does not determine what requirements will be applicable in a given set of circumstances. As I wrote in *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at p. 682, "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case". All of the circumstances must be considered in order to determine the content of the duty of procedural fairness: *Knight,* at pp. 682-83; *Cardinal, supra*, [1985] 2 S.C.R. 643, at p. 654; *Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170, per Sopinka J.

13 There is little direct authority on the issue of challenging a rule of a tribunal or board, but what there is supports the LTB. In *Minister of Citizenship and Immigration v. Daniel Thamotharem*, 2007 FCA 198, a challenge was unsuccessfully made to a guideline issued by the chairman of the Refugee Protection Division of the Immigration and Refugee Board on the grounds that it deprived refugee claimants of a fair hearing. The guideline provided that the standard practice in a refugee protection claim would be for the Refugee Protection Officer to start questioning the claimant, although the member hearing the claim might in exceptional circumstances vary the order of questioning. There were a large number of cases consolidated for the hearing of the appeals, all taken from particular decisions relevant to each claimant. Thus there was a great deal of evidence before the court as to how the guideline in question was being applied.

14 Evans J.A. held that the guideline was discretionary and that the evidence did not disclose that members slavishly followed the general practice without considering the cases before them. He stated:

> 10 For substantially the reasons that they gave, I agree with both Justices that Guideline 7 is not, on its face, invalid on the ground of procedural unfairness, although, as the Minister and the Board conceded, fairness may require that, in certain circumstances, particular claimants should be questioned first by their own counsel. ...
>
> 11 However, in my opinion, Guideline 7 is not an unlawful fetter on the exercise of members' discretion on the conduct of refugee protection hearings. The Guideline expressly directs members to consider the facts of the particular case before them to determine whether there are exceptional circumstances warranting a deviation from the standard order of questioning. The evidence does not establish that members disregard this aspect of

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> Guideline 7 and slavishly adhere to the standard order of questioning, regardless of the facts of the case before them. ...
>
> 82 In short, those challenging the validity of Guideline 7 did not produce evidence establishing on a balance of probabilities that members rigidly apply the standard order of questioning without regard to its appropriateness in particular circumstances.

15 Unlike *Thamotharem*, there is no judicial review by ACTO attacking any particular decision of the LTB dealing with rule 32. Nor is there any evidence on this application as to how rule 32 is being dealt with by the LTB. There is a transcript of one hearing only and no decision was made under rule 32 in that case and the case was adjourned by the member of the LTB.

16 ACTO refers to *Canada (Attorney General) v. Mercier,* 2010 FCA 167. In that case a number of inmates objected to a directive of the Commissioner of Correctional Service of Canada banning smoking in correctional facilities. They brought an application for judicial review that failed. None of the applicants had defied the ban and been punished, and ACTO says that in spite of that the judicial review application was heard. There is no indication, however, that a motion to quash the judicial review application was sought or even considered. Moreover, the directive was not one that gave prison wardens any discretion. It was mandatory, and the issue was whether the directive was *ultra vires* the powers of the Commissioner. That is not the situation here.

17 In my view, it is plain and obvious that the application for judicial review is bound to fail. The motion to quash is granted.

18 ACTO acts in the public interest. I do not see this as a case in which costs should be ordered. No order as to costs.

F.J.C. NEWBOULD J.

TAB 5

061

Case Name:

Bojangles' International, LLC v. Bojangles Café Ltd.

Between
Bojangles' International, LLC and Bojangles' Restaurants, Inc., Appellants, and
Bojangles Café Ltd., Respondent

[2006] F.C.J. No. 1306

[2006] A.C.F. no 1306

2006 FCA 291

2006 CAF 291

353 N.R. 86

55 C.P.R. (4th) 192

151 A.C.W.S. (3d) 760

Docket A-289-06

Federal Court of Appeal
Ottawa, Ontario

Sharlow J.A.

Heard: In writing.
Judgment: September 1, 2006.
Reasons amended: March 3, 2009.

(36 paras.)

Civil procedure -- Appeals -- Appeal books and factums -- Motion by the parties to the appeal for a determination as to the contents of the appeal book -- Appeal was from a Federal Court decision dismissing the appellants' appeal from a decision of the Trade Marks Opposition Board rejecting their opposition to the respondent's application to register its trade-mark BOJANGLES CAFÉ -- Words of Rule 343(2) indicated that an evidentiary document, such as an affidavit, was not necessarily required to be included in the appeal book simply because it was before the judge -- Evidentiary document was to be included in the appeal book only if there was a reasonable basis for concluding that it was required to dispose of an issue on appeal -- To that end, those documents that

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were not required to dispose of the issues on appeal were to be excluded -- Federal Court Rules, Rule 343(2).

Intellectual property law -- Trade-marks -- Opposition -- Procedure -- Appeals -- Motion by the parties to the appeal for a determination as to the contents of the appeal book -- Appeal was from a Federal Court decision dismissing the appellants' appeal from a decision of the Trade Marks Opposition Board rejecting their opposition to the respondent's application to register its trade-mark BOJANGLES CAFÉ -- Words of Rule 343(2) indicated that an evidentiary document, such as an affidavit, was not necessarily required to be included in the appeal book simply because it was before the judge -- Evidentiary document was to be included in the appeal book only if there was a reasonable basis for concluding that it was required to dispose of an issue on appeal -- To that end, those documents that were not required to dispose of the issues on appeal were to be excluded -- Federal Court Rules, Rule 343(2).

Motion by the parties to the appeal for a determination as to the contents of the appeal book. The appellants (collectively, Bojangles U.S.) appealed from a Federal Court decision dismissing their appeal from a decision of the Trade Marks Opposition Board rejecting their opposition to the respondent's application to register its trade-mark BOJANGLES CAFÉ. In 1998, the respondent filed an application to register the trade-mark based on its use and proposed use in Canada for wares and services relating to the operation of a restaurant. The appellants operated a chain of restaurants under the trade name "Bojangles". Their opposition to the respondent's application was rejected by the Board in June 2004. The appellants appealed to the Federal Court under subsection 56(1) of the Trade-Marks Act. That appeal was dismissed and the appellant appealed to the Federal Court of Appeal. The issue on the motion was whether certain documents that were before the Federal Court judge should be excluded from the appeal book because they were not "required to dispose of the issues on appeal".

HELD: The words of Rule 343(2) indicated that an evidentiary document, such as an affidavit, was not necessarily required to be included in the appeal book simply because it was before the judge. An evidentiary document was to be included in the appeal book only if there was a reasonable basis for concluding that it was required to dispose of an issue on appeal. To that end, those documents that were not required to dispose of the issues on appeal were to be excluded. Those documents included an affidavit from a survey expert, an affidavit that was found to be irrelevant by the Federal Court judge, and affidavits of members or employees of Smart & Biggar.

Statutes, Regulations and Rules Cited:

Federal Court Rules, SOR/98-106, Rules 343(2), 343(3)

Trade-marks Act, R.S.C. 1985, c. T-13, ss. 38(2)(d), 56(1)

Counsel:

Written representations by :

R. Scott Jolliffe and Kevin Sartorio, for the Appellants.

David J. McGruder and Craig A. Ash, for the Respondent.

[Editor's note: An amendment was released by the Court on October 30, 2006. The changes were not indicated. This document contains the amended text.]

REASONS FOR ORDER

1 SHARLOW J.A.:-- In 1998, the respondent (Bojangles Café) filed an application to register the trade-mark BOJANGLES CAFÉ based on its use and proposed use in Canada for wares and services relating to the operation of a restaurant. The appellants (collectively, Bojangles U.S.) operate a chain of restaurants in the United States under the trade name "Bojangles". They opposed the application. Their opposition was rejected by the Trade Marks Opposition Board on June 9, 2004 (40 C.P.R. (4th) 553). Bojangles U.S. appealed to the Federal Court under subsection 56(1) of the *Trade-Marks Act*, R.S.C. 1985, c. T-13. That appeal was dismissed on May 31, 2006 ([2006] F.C.J. No. 843, 2006 FC 657). Bojangles U.S. has appealed that judgment to this Court.

2 The parties have been unable to agree on the contents of the appeal book. Bojangles U.S. has filed a notice of motion under Rule 343(3) of the *Federal Courts Rules*, SOR/98-106, to have the contents determined by the Court. The issue in the motion is whether certain documents that were before the Federal Court judge should be excluded from the appeal book because, in the words of Rule 343(2), they are not "required to dispose of the issues on appeal".

3 Bojangles U.S. says, and I agree, that the words of Rule 343(2) quoted above indicate that an evidentiary document, such as an affidavit, is not necessarily required to be included in the appeal book simply because it was before the Judge. An evidentiary document should be included in the appeal book only if there is a reasonable basis for concluding that it is required to dispose of an issue on appeal.

4 Parties rarely disagree on whether an evidentiary document is required to dispose of an issue on appeal. When there is such a disagreement, the result is a motion such as the present one, which places the motions judge in the difficult position of trying to appreciate the potential relevance of a document, with only a cursory knowledge of the case and the arguments on appeal (see *Canada (Information Commissioner) v. Canada (Minister of the Environment)*, [2001] F.C.J. No. 1303, 2001 FCA 221, per Létourneau J.A., at paragraph 4). The practicalities are such that in a close case, a motions judge generally will choose to include, rather than exclude.

5 In most cases, the appeal book includes all of the evidentiary documents. That is appropriate if the issues on appeal are such that any of the documents might be required to dispose of an issue on appeal. I suspect, however, that in some cases the parties agree to include all evidentiary documents in the appeal book only because, at that early stage, they prefer not to risk excluding something to which they might later wish to refer. That is a practical approach as long as it does not result in voluminous appeal books in which the connection between the documents and the issues on appeal is relatively remote. However, in a case with a lengthy evidentiary record, it is not good appellate practice to insist invariably on including all evidentiary documents in the appeal book. Rather, counsel should make a reasonable effort to determine, for each evidentiary document, whether the test in Rule 343(2) is met.

6 The test in Rule 343(2) is a flexible one. For example, it may be appropriate to exclude from the appeal book a document that was presented in the court below to prove a particular fact that will not be in dispute on appeal; on the other hand, that document ought to be included if it is reasonable to suppose the appellate court may require it to gain a full appreciation of the facts. Similarly, it may be

appropriate to exclude a document adduced by a party who does not intend to rely on it to support any of its arguments on appeal; on the other hand, it ought to be included if the opposing party has a reasonable basis for believing that it may wish to rely on that document to support one of its argument on appeal. Generally, an evidentiary document should be excluded if its only foreseeable use is to enable one party to emphasize a general weakness in the evidentiary foundation presented by the other party in the court below.

7 With these considerations in mind, I will examine the dispute about the evidentiary documents in this case, considering first the nature of the case, then the grounds of appeal, then the documents themselves.

8 The only ground of opposition asserted by Bojangles U.S. in the Federal Court was distinctiveness, so that the main issue in the Federal Court was whether there was any basis for reversing the decision of the Board that, at the relevant date (which was agreed to be July 4, 2000), the trade-mark that Bojangles Café wished to register was "distinctive", as defined in section 2 of the *Trade-Mark Act*. The Judge considered the matter of standard of review, and determined that the appropriate standard of review of the decision of the Trade-Mark Opposition Board is reasonableness. He then considered whether the Board met that standard in its determination and application of the legal test in paragraph 38(2)(d) of the *Trade-Mark Act*.

9 After analyzing the jurisprudence, the Judge concluded that the Board had erred in its statement of the legal test, with the result that the Judge was required to consider the issue anew. He engaged in a detailed review of all of the affidavit evidence that was before the Board, as well as the additional affidavits filed in the Federal Court. I infer that the Judge considered all of the evidence, including the affidavits to which he did not refer in his reasons, and those to which he gave little or no weight. In the result, the Judge agreed with Board that the trade-mark sought to be registered by Bojangles Café was distinctive at the relevant time, and dismissed the appeal.

10 The notice of appeal alleges that the Judge erred in law by requiring Bojangles U.S. to establish that its trade name "Bojangles" was known in Canada to a "substantial" or "significant" extent, when the test should have been whether it was known in Canada "at least to some extent". The notice of appeal also alleges that the Judge erred in law by not deferring to the findings of fact of the Board to the effect that the "Bojangles" trade name was known "to some extent" in Canada.

The Survey Evidence

11 Bojangles U.S. wishes to exclude from the appeal book the affidavit of Gillian Humphreys (a survey expert) that they filed in the Federal Court, an affidavit of Ruth Corbin (a survey expert) filed in the Federal Court by Bojangles Café for the sole purpose of criticizing the evidence of Gillian Humphreys, and the transcripts of the cross-examinations of both survey experts.

12 The Judge gave the affidavit of Gillian Humphreys "little weight" because it did not contain information in relation to the relevant time period, the questions were flawed, they were drafted by counsel rather than by the expert, there was no control condition. He said that even if that affidavit were treated as capable of establishing the degree of awareness in Canada of the "Bojangles" trade name of Bojangles U.S., it would establish, at best, that a positive response was given by 6 to 26 out of 1019 respondents, and that less than 1% of respondents said that their recollection goes back to the relevant time period.

13 Counsel for Bojangles U.S. has said that he is "prepared to waive reliance on the affidavit of Gillian Humphreys". I understand that to be an undertaking that the appeal will be conducted on the basis that Bojangles adduced no credible survey evidence relating to the degree to which the "Bojangles" trade name of Bojangles U.S. was known in Canada at the relevant time.

14 Counsel for Bojangles Café has provided no basis upon which I could conclude that he may wish to refer specifically to any of the survey evidence. From that I infer that there is nothing in any of that evidence that is likely to advance the position of Bojangles Café. Bojangles Café objects to the exclusion of the survey evidence from the appeal book on the basis that the appellate court is entitled to be aware that Bojangles U.S. presented a large body of evidence, much of which was found to be weak and deeply flawed.

15 There is some force in the argument of Bojangles Café, but it seems to me that if the appeal is conducted on the basis that Bojangles U.S. presented no credible survey evidence, Bojangles Café will be able to make submissions about the overall weakness of the case for Bojangles U.S., without necessarily having to point to the actual evidence that turned out to be unpersuasive. I would exclude from the appeal book the affidavit of Gillian Humphreys, the responding affidavit of Ruth Corbin, and the transcripts of the related cross-examinations.

The updated Newman affidavit

16 Bojangles U.S. presented in the Federal Court an affidavit of Eric Newman, for the sole purpose of "updating" financial information about Bojangles U.S. in an earlier affidavit by Mr. Newman that had been presented to the Board. The Judge found that affidavit to be irrelevant because it did not relate to a relevant period of time. I see no justification for including that affidavit in the appeal book. It should be excluded.

Affidavits of members or employees of Smart & Biggar

17 In the Federal Court, Bojangles U.S. presented nineteen affidavits of "fact witness". Six of those witnesses were lawyers or employees of Smart & Biggar, the law firm that was then representing Bojangles U.S. (J. Auerbach, L. Blais, F. Boltezar, T. Briggs, B. Padget, E. Simcoe). Of those six witnesses, Bojangles Café cross-examined only J. Auerbach. A motion was made by Bojangles Café to have those affidavits struck. That motion was denied but Bojangles U.S. was required to retain new counsel ([2005] F.C.J. No. 383, 2005 FC 272). Bojangles U.S. retained new counsel; that same counsel is now acting for them in this appeal.

18 Bojangles U.S. wishes these six affidavits, as well as the transcript of the cross-examination of J. Auerbach, to be excluded from the appeal book. Bojangles U.S. also wishes to exclude the reasons cited above ([2005] F.C.J. No. 383, 2005 FC 272) and the related order, on the basis that they are not relevant to any issue on appeal. Counsel for Bojangles U.S. has said that he is prepared to waive reliance on these six affidavits. Again, I understand that to be an undertaking that the appeal will be conducted on the basis that Bojangles adduced no evidence from those witnesses.

19 Counsel for Bojangles Café does not point to anything in any of these affidavits, the transcript of the cross-examination, the reasons or the order that would be relevant to the appeal, except in the general sense that the initial impropriety of adducing these affidavits puts Bojangles U.S. in a generally bad light and, again, comprises part of a very large body of evidence presented by Bojangles U.S. that was ultimately found to be weak. It seems to me that because the appeal will be conducted on the basis that there was no relevant evidence from any of these six witnesses, and their affidavits

contain nothing that will advance the case of Bojangles Café, it cannot be said that their affidavits are required to dispose of any issue on appeal. The same can be said of the transcript of the cross-examination of J. Auerbach, the reasons cited as [2005] F.C.J. No. 86, 2005 FC 72, and the related order. I would exclude them all from the appeal book.

Affidavits of members or employees of Osler, Hoskins and Harcourt and KMPG LLP

20 Bojangles U.S. also presented in the Federal Court thirteen affidavits were from employees or lawyers with the law firm Osler, Hoskins and Harcourt, or the accounting firm KPMG LLP. Of those witnesses, Bojangles Café cross-examined J. Dolman from Oslers, and M. Avarello from KPMG.

21 Bojangles U.S. says that of those thirteen affidavits, the affidavits of R. Beaumont, K. Cabana, J. Dolman, C. Murray, D. Seymour, A. Whyte contain only evidence of knowledge relating to a period of time that is not relevant to the issues on appeal. For that reason, Bojangles U.S. wishes to have the affidavits of R. Beaumont, K. Cabana, J. Dolman, C. Murray, D. Seymour, A. Whyte, and the transcript of the cross-examination of J. Dolman, excluded from the appeal book.

22 Counsel for Bojangles U.S. has said that he is prepared to waive reliance on these six affidavits, meaning that the appeal will be conducted on the basis that Bojangles adduced no evidence from those witnesses.

23 Bojangles Café objects to the exclusion of these affidavits, substantially for the same reason as it objects to the other exclusions. However, there is an additional point in relation to the affidavit and cross-examination of J. Dolman. That point is that the cross-examination apparently revealed the existence of certain e-mails, which are among the documents that Bojangles U.S. wishes to have included in the appeal book.

24 I find it impossible to determine, at this point, whether and how that connection to the e-mails relates to any of the issues on appeal. Given that uncertainty, I would include the affidavit of J. Dolman and the transcript of her cross-examination in the appeal book. However, I would exclude the affidavits of R. Beaumont, K. Cabana, C. Murray, D. Seymour, L. Hill and A. Whyte.

25 Bojangles Café also submits that Bojangles U.S. presented the affidavit of a person named "Boyes", whose knowledge also relates to an irrelevant period of time, and yet Bojangles U.S. has not sought to exclude that affidavit. This is said to indicate an inconsistent approach by Bojangles U.S. I cannot determine whether the approach of Bojangles U.S. is inconsistent, or whether Bojangles Café is correct in its characterization of the facts stated in the Boyes affidavit. In any event, I see nothing in the comments about the Boyes affidavit that advances the debate about whether the other affidavits referred to above should be included in the appeal book.

The emails

26 There are a number of emails that apparently relate to enquiries sent by the former counsel of Bojangles U.S. to various people to solicit information as to their knowledge of the trade name Bojangles. Bojangles U.S. agrees that most of those emails should be included in the appeal book, but argues that one particular email should be excluded because the only persons who responded to it were those whose affidavits are not being relied upon. As I cannot tell whether those persons include J. Dolman, I would include that email in the appeal book.

Federal Court Orders

27 Bojangles U.S. says that there are four Federal Court orders that related to the conduct of the proceedings that should be excluded from the appeal book. I assume that one of those is the order referred to above, relating to the affidavits of members or employees of Smart & Biggar.

28 The material filed by Bojangles U.S. does not state what other orders are referred to but it appears from the material filed by Bojangles Café that the other three orders are the orders dated December 10, 2004, March 30, 2005 and April 6, 2005.

29 As I have no idea what those orders deal with, I have no basis for concluding that they should be excluded from the appeal book.

Evidence before the Board

30 Bojangles U.S. argues that the only material that was before the Board that is relevant to the appeal is the material that addresses the question of distinctiveness. Bojangles U.S. says that the relevant evidence consists of the affidavits of J. Cavanaugh, V. Chestnut, T. Dekine, B. Lukie, D. Maisel, E. Newman (2001), M. Oshefsky, T. Rumsey, M. Snide and W. Whray.

31 Bojangles U.S. wishes to exclude the affidavits of C. Cordova, B. Green, F. Hurd, J. Megison, M. Moran, G. Rawls, K. Rosenthal, M. Sandefer, D. Scopinich, and D. Carkeek, which were filed with Board and were part of the record of the Federal Court, on the basis that they deal with other issues or were not relied upon by the Board. Bojangles Café disagrees, and argues that these affidavits must be taken as going to the issue of distinctiveness, as they were cited by Bojangles U.S. in argument in the Federal Court, where distinctiveness was the only issue.

32 None of these affidavits are before me. There is substantial disagreement as to their actual contents, and I have no basis for resolving that disagreement. For that reason, I would require all affidavits that were filed with the Board and were part of the record of the Federal Court to be included in the appeal book.

Letters to the Federal Court following the Court's direction of April 28, 2006

33 Bojangles Café submits that two letters from counsel, submitted in response to the Court's direction of April 28, 2006, should be included in the appeal book.

34 Bojangles U.S. has made no submissions on that point. I will require those letters to be included in the appeal book.

Memoranda of Fact and Law submitted in the Federal Court

35 Bojangles Café submits that the memorandum of fact and law of Bojangles U.S. dated April 28, 2005, and its own memorandum of fact and law dated June 29, 2005 filed in the Federal Court, should be included in the appeal book, because they confirm that distinctiveness was the only issue before the Federal Court, and because it contains some statements about the relevant date for determining distinctiveness. I am unable to see how any of those statements would be of assistance to this Court in determining the appeal. There would appear to be no dispute on either of those points. These memoranda should be excluded.

Conclusion

36 An order will be made to require the appeal book to include all of the documents set out in the draft order in Tab 3 of Volume 2 of the Motion Record of Bojangles Café (pages 299-303), except the documents specified in these reasons as documents that are to be excluded. Costs of this motion are costs in the cause.

SHARLOW J.A.

cp/e/qw/qlklc/qltxp/qlhbb

TAB 6

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Indexed as:

Canada (Information Commissioner) v. Canada (Minister of the Environment)

Between
The Minister of the Environment Canada, appellant and
The Information Commissioner of Canada, respondent, and
Ethyl Canada Inc., added respondent

[2001] F.C.J. No. 1303

[2001] A.C.F. no 1303

2001 FCA 221

2001 CAF 221

278 N.R. 190

14 C.P.R. (4th) 574

108 A.C.W.S. (3d) 11

Court File No. A-233-01

Federal Court of Appeal
Ottawa, Ontario

Létourneau J.A.

June 29, 2001.

(4 paras.)

Practice -- Appeals -- Factum, case on appeal or appeal book -- Content of.

Motion regarding the content of the appeal books. The appeal was from an order by a motions judge. The respondent Information Commissioner argued that all of the material placed before the motions judge should be included in the appeal books. The appellant Minister argued that because a large amount of material placed before the motions judge was not used or referred to, the appeal books should only contain material that was used on the motion. Any other material could be included in a

070

supplemental appeal book. The Commissioner's application record filed on the motion consisted of 22 volumes. The Commissioner's proposed appeal book was 39 pages long.

HELD: All of the material placed before the motions judge was to be included in the appeal book. It was impossible at this stage of the appeal to appreciate the relevancy and usefulness of every piece of material. It was preferable to err on the side of caution. The Commissioner was to look again at the material with a view to eliminating those documents which were not required on the appeal.

Statutes, Regulations and Rules Cited:

Federal Court Rules, Rule 343(2).

Counsel:

Written representations by:
David Sgayias, Q.C., for the appellant.
Daniel Brunet and Marc-Aurèle Racicot, for the respondent, the Information Commissioner of Canada.
Tim Gilbert, for the added respondent, Ethyl Canada Inc.

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1 **LÉTOURNEAU J.A.** (Reasons for Order):-- The appellant and the respondents cannot agree on the contents of the appeal books. The appellant invokes Rule 343(2) of the Federal Court Rules, 1998 to limit the contents to some of the material that was before the Motions judge whose decision is the subject of the appeal, namely the material referred to by the parties in their Memoranda filed with the Trial Division. He asserts that a large amount of material put before the motions judge was not used and even referred to. He proposes that a party who wishes to include material that was not referred to at the Trial Division do it in a supplemental appeal book.

2 The Information Commissioner who is a respondent objects to this proposal. He submits that the appeal books should include all of the material that was placed before the Motions judge. I should add that the Application Record of the Information Commissioner filed before the Motions judge consisted of 22 volumes totalling over 3,800 pages of material. The table of contents of the appeal books proposed by the Information Commissioner is 39 pages in length. The Commissioner alleges that the decision of the Motions judge was based on extensive documentary evidence which should be put before the& Court of Appeal for a proper assessment of that decision. Finally, the Commissioner mentions the lack of prejudice to the appellant since he is willing to assume the preparation of the appeal books and share their costs.

3 While I am satisfied that the position taken by the appellant with respect to the issue may be too narrow, although there is some flexibility in the form of supplementary appeal books, I am, at the same time, after a perusal of the table of contents proposed by the Information Commissioner, not sure that everything that was before the Motions judge will be needed. For example, I am not sure that, in the list of documents, every letter. and attachment from G.F. Osbaldeston to various individuals will be of use. Counsel for the Commissioner might want to review his position in this regard with respect to all documents and exhibits.

4 This illustrates the dilemma in which a Motions judge of this Court finds himself or herself when confronted with these issues. It is simply impossible to appreciate, at this stage of the appeal, the relevancy and usefulness of each and every piece of material. Experience tells me that it is very rare indeed that the parties on appeal refer to all the material in the appeal books, especially when there are so many. In fact, for convenience, and the Commissioner is known for resorting to this useful practice, the parties often prepare a Compendium of the material that they intend to use. It is true that the appeal books remain available to supplement these Compendiums. Prudence and wisdom also advise me, if I have to err, that it is preferable to err on the safe side. Therefore, I will accede to the Information Commissioner's request, but impose upon the Commissioner an obligation to have another look at the material with a view to eliminating what is not required to dispose of the issues on appeal. I will reserve to the panel hearing the appeal the right to adjudicate on the costs of the appeal books irrespective of the decision on the merits of the appeal.

LÉTOURNEAU J.A.

cp/s/qladj

TAB 7

072

Case Name:

Duale v. Canada (Minister of Citizenship and Immigration)

Between
Mohamed Aden Duale, applicant, and
The Minister of Citizenship and Immigration, respondent

[2004] F.C.J. No. 178

[2004] A.C.F. no 178

2004 FC 150

2004 CF 150

40 Imm. L.R. (3d) 165

128 A.C.W.S. (3d) 1168

Docket IMM-6712-02

Federal Court
Ottawa, Ontario

Dawson J.

Heard: January 26, 2004.
Judgment: January 30, 2004.

(24 paras.)

Counsel:

Michael Bossin, for the applicant.
Marie Crowley, for the respondent.

REASONS FOR ORDER

1 **DAWSON J.**:-- In Stumf v. Canada (Minister of Citizenship and Immigration), [2002] F.C.J. No. 590, 2002 FCA 148, the Federal Court of Appeal held that subsection 69(4) of the Immigration of

Act, R.S.C. 1985, c. I-2 ("former Act") imposed the obligation on the Convention Refugee Determination Division of the Immigration and Refugee Board ("Board") to designate a representative for any refugee claimant who met the statutory criteria. This was to be done at the earliest point in time at which the Board became aware of facts which revealed the necessity of the appointment of a designated representative. In Stumf the obligation to appoint a designated representative for one of the claimants was triggered by the fact that this claimant was a minor. Because the age of the minor claimant was apparent to the Board from the outset, and because the failure to appoint a designated representative could have affected the outcome of the claim, the failure of the Board to designate a representative was held by the Court of Appeal to be an error that vitiated the entire decision made with respect to the minor claimant's claim. This was so notwithstanding that the issue of the failure to designate a representative was not raised before the Board, nor was it raised in the application to the Trial Division of the Federal Court (as it then was) for judicial review of the Board's decision.

2 In the present case, two issues arise. First, are the principles enunciated by the Federal Court of Appeal in Stumf applicable under the current legislation, the Immigration and Refugee Protection Act, S.C. 2001, c. 27 ("Act")? Second, on the facts of the present case should the decision of the Refugee Protection Division ("RPD") denying Mr. Duale's claim to status as a Convention refugee be set aside?

3 Counsel for the Minister fairly conceded that there is not a sufficient distinction between the relevant provisions of the former Act and the Act as to allow the proposition of law determined in Stumf to be distinguished. I agree. Indeed, in my view, the provisions of the Act, together with the provisions of the Refugee Protection Division Rules, SOR/2002-228 ("Rules"), clearly reflect that the obligation to designate a representative for a claimant who is a minor or who is otherwise unable to appreciate the nature of the proceedings arises at the earliest point in time at which the RPD becomes aware of facts which reveal the need for a designated representative. Further, the need for the designation of a representative applies to the entirety of the proceedings in respect of a refugee claim and not just to the actual hearing of the claim before the RPD. I so conclude for the following reasons.

4 First, the statutory obligation under subsection 167(2) of the Act to appoint a designated representative is virtually identical to the statutory obligation considered by the Federal Court of Appeal in Stumf. Similarly, the obligation on counsel for such a claimant to notify the Board in writing without delay that a claimant is under 18 years of age is continued under the Rules. Such obligation was formerly found in section 11 of the Convention Refugee Determination Division Rules, SOR/93-45 ("former Rules") and is now found in subsection 15(1) of the Rules. The slight difference in wording between the two provisions is not, in my view, material. Subsection 69(4) of the former Act, subsection 167(2) of the Act, section 11 of the former Rules and subsection 15(1) of the Rules are set out in Appendix A to these reasons.

5 That the designation of a representative is to apply to the entirety of the proceedings in respect of a refugee claim flows from the fact that "Board proceedings" as used in section 167 of the Act encompasses more than the actual hearing before the RPD. Thus, subsection 168(1) allows a division to determine that "a proceeding" before it has been abandoned for such pre-hearing matters as failing to provide required information or failing to communicate with the division as required. As well, the word "proceeding" is defined in the Rules to include "a conference, an application, a hearing and an interview". Thus, the duty upon counsel to notify the RPD that a claimant in the "proceedings" is a minor applies to the status of the claimant at conferences, applications, interviews and the like.

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6 The Immigration and Refugee Board acknowledges this to be the case in both the "Guidelines concerning Child Refugee Claimants: Procedural and Evidentiary Issues" ("Guidelines") continued under the statutory authority contained in paragraph 159(1)(h) of the Act, and in the Commentary to the Rules ("Commentary") published by the Immigration and Refugee Board.

7 The Guidelines state as follows under the heading "Processing Claims of Unaccompanied Children":

> 1. Claims of unaccompanied children should be identified as soon as possible by Registry staff after referral to the CRDD. The name of the child and any other relevant information should be referred to the provincial authorities responsible for child protection issues, if this has not already been done by Citizenship and Immigration Canada (CIC). After referral, all notices of hearings and pre-hearing conferences should be forwarded to the provincial authority.
> 2. The CRDD panel and Refugee Claim Officer (RCO) should be immediately assigned to the claim and, to the extent possible, the same individuals should retain responsibility for the claim until completion. It may also be necessary in some cases to assign an interpreter to the claim as early as possible so that the child can develop a relationship of trust with the interpreter. Before the panel, RCO and interpreter are assigned, consideration should be given to their experience in dealing with the claims of children.
>
> [...]
>
> 4. A designated representative for the child should be appointed as soon as possible following the assignment of the panel to the claim. This designation would usually occur at the pre-hearing conference referred to below, but it may be done earlier. CRDD panels should refer to Section II above for guidelines on designating an appropriate representative. In determining whether a proposed representative is willing and able to act in the "best interests of the child", the panel should consider any relevant information received from the provincial authorities responsible for child protection as well as any relevant information from other reliable sources.
> 5. A pre-hearing conference should be scheduled within 30 days of the receipt of the Personal Information Form (PIF). The purposes of the conference would include assigning the designated representative (if this has not already been done), identifying the issues in the claim, identifying the evidence to be presented and determining what evidence the child is able to provide and the best way to elicit that evidence. Information from individuals, such as the designated representative, medical practitioners, social workers, community workers and teachers can be considered when determining what evidence the child is able to provide and the best way to obtain the evidence.

[underlining added, footnotes omitted]

8 The Commentary states:

> Designation applies to all the proceedings in a claim

> The designation of a representative applies to all the proceedings in respect of a refugee claim and not just to the hearing of the claim. [emphasis in original]

9 Turning to the application of facts of this case to the law, the Minister argues that the following are significant facts. First, by the time the hearing took place before the RPD, Mr. Duale was 18 years of age and represented by counsel. Thus, it is argued that Mr. Duale was competent to instruct counsel at the hearing and that any designated representative appointed before the hearing would have been dismissed at the hearing. To vitiate the decision in this circumstance is said not to be in accord with the intent of the legislation. Second, the RPD found that Mr. Duale failed to establish his identity that he was not credible. Therefore, it is asserted that the designation of a representative could not change the outcome of the claim and it would be futile to remit the matter for redetermination. Finally, it is said that neither Mr. Duale nor his counsel raised the issue of a designated representative before the RPD so that Mr. Duale is deemed to have waived the requirement.

10 I agree that it is necessary to consider the facts of each particular case and that it may be possible that the failure to designate a representative will not vitiate the determination of a claim. In the present case, the chronology of relevant events is as follows.

11 Mr. Duale was born on October 27, 1984. Therefore, his 18th birthday fell on October 27, 2002.

12 Mr. Duale arrived in Canada unaccompanied by anyone on March 2, 2001. He made his claim to refugee status on April 12, 2001. At that time Mr. Duale was 16 years of age.

13 In consequence of his claim, a notice to appear was issued to Mr. Duale on May 31, 2001 requiring that he appear on July 2, 2001 for the purpose of discussing his claim. Mr. Duale's Personal Information Form ("PIF") was completed by him on June 20, 2001 and was received by the Immigration and Refugee Board on June 21, 2001. On July 12, 2001, copies of documents which Citizenship and Immigration Canada had provided to the Immigration and Refugee Board were provided to counsel for Mr. Duale. Sometime between July 12, 2001 and October 12, 2001, a case officer was assigned to Mr. Duale's file. The case officer completed a checklist which expressly noted that Mr. Duale was a minor and that he was not represented by a designated representative.

14 October 12, 2001, a Refugee Claim Officer ("RCO") File Screening Form was completed which noted that a member of the RPD had been assigned to the claim. Subsequently, on February 12, 2002 the RCO wrote to counsel for Mr. Duale advising of the issues which the presiding member had noted as being particularly relevant. Those issues included Mr. Duale's personal identity and the fact that Mr. Duale was undocumented. On May 21, 2002, an expedited hearing was requested on Mr. Duale's behalf. This request was denied on May 22, 2002.

15 On July 2, 2002, a notice to appear was issued to Mr. Duale advising that the hearing before the RPD would take place on November 5, 2002. On October 22, 2002, correspondence was sent to Mr. Duale's counsel requiring that Mr. Duale bring to the hearing original identification documents.

16 All of these matters transpired while Mr. Duale was a minor not represented by a designated representative.

17 It is also important to consider the purpose of a designated representative. The Guidelines provide that the duties of a designated representative are as follows:

The duties of the designated representative are as follows:

- to retain counsel;

- to instruct counsel or to assist the child in instructing counsel;

- to make other decisions with respect to the proceedings or to help the child make those decisions;

- to inform the child about the various stages and proceedings of the claim;

- to assist in obtaining evidence in support of the claim;

- to provide evidence and be a witness in the claim;

- to act in the best interests of the child.

[emphasis in original]

18 Mr. Duale went through each stage of the proceeding, except for the actual hearing, without the assistance a designated representative was intended to provide. In particular, Mr. Duale did not have the benefit of any assistance from a designated representative in gathering evidence to support his claim. This is contrary to the intent and scheme of the Act and the Rules, and contrary to the Guidelines.

19 As to the effect of the failure to comply with the Act, Rules and Guidelines upon his claim, the RPD made the following findings:

1. Mr. Duale failed to establish his identity. The lack of original identification documents was found to be "incredible";
2. After reciting Mr. Duale's testimony to the effect that the UNHCR issues documents to persons in refugee camps only when they reach 18 years of age, and without commenting adversely on such testimony, the Board wrote:

> So I asked if his mother was in the camp with him, had any documents, if she had a ration card because I know from testimony that there are ration cards issued in these camps, and his response was, I never asked my mother, to which I replied it would have made your job a lot easier in establishing your identity and my job a lot easier in accepting that you had made an effort to establish your identity if we had some documentation from the camp.

3. With respect to an affidavit tendered as to Mr. Duale's identity, the Board wrote:

> We do have an affidavit going to identity and this affidavit was entered into evidence as Exhibit C-2. Affidavits are always

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problematic and certainly even more problematic if the author of the affidavit is not available for testimony in support of his affidavit, which is the case in this situation. When asked where the author of the affidavit was, the claimant said he was on his way to Somalia. Asked when he left, he said the 2nd of November.

I find it puzzling that on an issue as important as this, that is the identity of this claimant, the man who authors an affidavit saying he knew the claimant in Somalia would not be able to delay his departure for Somalia by three days so that he would be able to testify as an identity witness. It is up to the claimant to establish his identity and he must make a genuine, substantive effort to do so.

4. The RPD went on to find Mr. Duale's story not to be credible.

20 In light of the first three findings of the RPD set out above, I am unable to safely conclude that the failure to appoint a designated representative could not have had an adverse effect on the outcome of the claim. A designated representative would have been responsible for assisting Mr. Duale to obtain evidence. The evidence before me supports the inference that the evidence gathering process was not what it could have been. (In fairness, I note that counsel for Mr. Duale in this Court did not represent Mr. Duale before the RPD).

21 In sum, to use the words used by Madam Justice Sharlow for the Court in Stumf, I am satisfied that "the designation of a representative in this case could have affected the outcome".

22 I am mindful of the adverse credibility findings of the RPD, but having carefully reviewed them I am satisfied that they could well have been coloured by the RPD's initial finding with respect to identity. Further, the Guidelines note that special evidentiary issues arise when eliciting the evidence of children and when assessing that evidence. While Mr. Duale was not a minor at the time of his hearing, he had turned 18 only 9 days before the hearing and he was 16 when he prepared his PIF. The reasons of the RPD do not expressly refer to Mr. Duale's age, notwithstanding a particularly minute examination of Mr. Duale's PIF. The failure to expressly acknowledge Mr. Duale's age and the impact that age may have had on the completion of his PIF, his testimony and the assessment of his testimony, while perhaps by itself not a reviewable error, does not enhance the credibility findings.

23 I have as well considered the Minister's argument of waiver. In Stumf the claimant's failure to raise the issue of designation either at the hearing or on the application for judicial review did not prevent the issue from being raised in the Court of Appeal. I am not prepared to reach a contrary conclusion in the present case where the issue of the failure to designate a representative was raised squarely in the application for judicial review.

24 For these reasons, an order will issue allowing the application for judicial review and remitting the matter for redetermination. Prior to the issuance of such order, counsel may make submissions with respect to the certification of a question by serving and filing correspondence with the Court within seven days of the receipt of these reasons. Opposing counsel may then serve and file reply submissions within four days of receipt of the opposing party's submissions with respect to certification. Following consideration of any submissions received with respect to certification, an order will issue allowing the application for judicial review and dealing with the issue of certification of a question.

DAWSON J.

* * * * *

APPENDIX A

Subsection 69(4) of the former Act, subsection 167(2) of the Act, section 11 of the former Rules and subsection 15(1) of the Rules are as follows:

> 69(4) Where a person who is the subject of proceedings before the Refugee Division is under eighteen years of age or is unable, in the opinion of the Division, to appreciate the nature of the proceedings, the Division shall designate another person to represent that person in the proceedings.
>
> [...]
>
> 167(2) If a person who is the subject of proceedings is under 18 years of age or unable, in the opinion of the applicable Division, to appreciate the nature of the proceedings, the Division shall designate a person to represent the person.
>
> [...]
>
> 11. Where counsel of the person concerned believes that the person concerned is under 18 years of age or is unable to appreciate the nature of the proceeding, counsel shall so advise the Refugee Division forthwith in writing so that the Refugee Division may decide whether to designate a representative pursuant to subsection 69(4) of the Act.
>
> [...]
>
> 15(1) If counsel for a party believes that the Division should designate a representative for the claimant or protected person in the proceedings because the claimant or protected person is under 18 years of age or unable to appreciate the nature of the proceedings, counsel must without delay notify the Division in writing. If counsel is aware of a person in Canada who meets the requirements to be designated as a representative, counsel must provide the person's contact information in the notice.
>
> * * *
>
> 69(4) La section du statut commet d'office un représentant dans le cas où l'intéressé n'a pas dix-huit ans ou n'est pas, selon elle, en mesure de comprendre la nature de la procédure en cause.
>
> [...]

167(2) Est commis d'office un représentant à l'intéressé qui n'a pas dix-huit ans ou n'est pas, selon la section, en mesure de comprendre la nature de la procédure.

[...]

11. Dans le cas où le conseil de l'intéressé croit que ce dernier est âgé de moins de dix-huit ans ou n'est pas en mesure de comprendre la nature de la procédure en cause, il en avise par écrit sans délai la section du statut afin qu'elle décide si elle doit commettre d'office un représentant conformément au paragraphe 69(4) de la Loi.

[...]

15(1) Si le conseil d'une partie croit que la Section devrait commettre un représentant à la personne en cause parce qu'elle est âgée de moins de dix-huit ans ou n'est pas en mesure de comprendre la nature de la procédure, il en avise sans délai la Section par écrit. S'il sait qu'il se trouve au Canada une personne ayant les qualités requises pour être représentant, il fournit les coordonnées de cette personne dans l'avis.

cp/e/qw/qlklc/qlhcs

TAB 8

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Case Name:

Shire Canada Inc. v. Apotex Inc.

Between
Shire Canada Inc., Appellant, and
Apotex Inc., Respondent

[2011] F.C.J. No. 49

2011 FCA 10

414 N.R. 270

Docket A-390-10

Federal Court of Appeal

Sharlow J.A.

Heard: In writing.
Judgment: January 12, 2011.

(24 paras.)

Civil litigation -- Civil procedure -- Appeals -- Appeal books and factums -- Fresh evidence -- Motion by appellant to determine contents of appeal book or for leave to present documents as new evidence on appeal dismissed -- On appeal of interlocutory order in patent dispute, appellant sought to include in appeal book 11 contentious documents, none of which were before judge who made order under appeal -- Rule 343(2) did not permit party to augment case by including documents in appeal book that were not before judge who made order under appeal -- Facts upon which appellant wished to rely were not new and appellant failed to establish they could not have been discovered prior to order.

Statutes, Regulations and Rules Cited:

Federal Courts Rules, SOR/98-106, Rule 343(2), Rule 351

Patented Medicines (Notice of Compliance) Regulations, [SOR/93-133], s. 8

Counsel:

Written representations by:

Jay Zakaïb and Viktor Haramina, for the Appellant.

Harry Radomski and Jerry Topolski, for the Respondent.

REASONS FOR ORDER

1 SHARLOW J.A.:-- The parties do not agree on the contents of the appeal book. There are eleven contentious documents. Before me is a motion to determine the matter and, in the alternative, to grant the appellant Shire Canada Inc. ("Shire") leave to present all but one of the contentious documents as new evidence on appeal.

Procedural history

2 Cephalon Inc. (not a party to this case) claims to be the owner of Canadian patent number 2,201,967 relating to modafinil. Shire holds a notice of compliance permitting it to manufacture and sell in Canada a medicine named Alertec which contains modafinil as its medicinal ingredient.

3 The 967 patent is listed in relation to Alertec on the patent register maintained by the Minister of Health pursuant to the *Patented Medicines (Notice of Compliance) Regulations*, [SOR/93-133]. Shire claims to have a licence from Cephalon for the use of 967 patent and also claims to have Cephalon's consent to include the 967 patent on the patent list in relation to Alertec.

4 In 2006, Apotex wished to manufacture and sell in Canada a generic version of Alertec. To comply with the *NOC Regulations*, Apotex served a notice of allegation in respect of the 967 patent, alleging invalidity. Shire and Cephalon commenced an application under the *NOC Regulations* (Federal Court File T-756-06) for an order prohibiting the Minister from issuing a notice of compliance to Apotex for its generic version of Alertec until after the expiry of the 967 patent (October 4, 2015). That application was dismissed by Justice Hughes on April 25, 2008 (2008 FC 538). A notice of compliance was issued to Apotex on May 1, 2008. It is not clear when Apotex began to market its generic version of Alertec, but I assume that it did so at some point.

5 In November of 2008, Apotex commenced an action against Shire (Federal Court File T-1787-08) for damages pursuant to section 8 of the *NOC Regulations* claiming that, because of the unsuccessful prohibition application, the issuance of a notice of compliance to Apotex for its generic version of Alertec was delayed from September 1, 2006 to April 25, 2008. The motion before me relates to an appeal of an interlocutory order in T-1787-08, which I will refer to as the "section 8 action".

6 Shire has filed a defence in the section 8 action denying on a number of grounds that Apotex is entitled to damages under section 8 of the *NOC Regulations*. However, Shire did not plead infringement of the 967 patent as a defence.

7 In April of 2009, Cephalon commenced an action against Apotex for infringement of the 967 patent (Federal Court File T-609-09). I will refer to this as the "infringement action". Shire is not a party to the infringement action.

8 Shire filed a motion in the section 8 action seeking to add an allegation that the claim of Apotex for damages under section 8 should be dismissed if, in the infringement action, Apotex is found to have infringed the 967 patent. That motion was dismissed by Prothonotary Tabib on June 4, 2010 for

reasons issued August 19, 2010 (2010 FC 828). An appeal from her order was dismissed by Justice Pinard on October 8, 2010 (2010 FC 1001). Shire commenced the present appeal from Justice Pinard's order on October 18, 2010.

9 Later, on October 29, 2010, Cephalon filed a motion in the infringement action for an order consolidating the infringement action and the section 8 action (or alternatively, directing that they be heard together or one after the other). That motion remains outstanding before the Federal Court.

The contentious documents.

10 As mentioned above, there are eleven contentious documents. None of them were included in any of the motion records that were before Justice Pinard when he made the order under appeal.

11 One of the contentious documents is the 2006 notice of allegation that was the basis of the unsuccessful prohibition application by Shire and Cephalon (T-756-06). Another is the Cephalon notice of motion for consolidation, filed in the infringement action in October of 2010 after Justice Pinard had made the order under appeal. The others are the affidavit of Dr. David E. Bugay filed in support of the consolidation motion, and all 8 exhibits to that affidavit.

Whether the contentious documents be included in the appeal book on grounds of relevance

12 In support of its motion, Shire cites Rule 343(2) of the *Federal Courts Rules*, SOR/98-106, which states that the appeal book should include "only such documents, exhibits and transcripts as are required to dispose of the issues on appeal." Shire relies on two cases in which this Court has noted that, in settling the contents of an appeal book, it is difficult to determine the relevance of a document because at that stage the issues on appeal are not yet fully stated: *Bojangles' International, LLC v. Bojangles Café Ltd.*, 2006 FCA 291 at paragraph 6 and *Office of the Superintendent of Bankruptcy v. MacLeod*, 2010 FCA 97 at paragraphs 5 and 6. However, in my view those cases do not assist Shire.

13 Rule 343(2) must be read in light of the broader principle that an appeal book should not include evidentiary documents that were not before the judge who made the order under appeal (see, for example, *Montana Band v. Canada*, 2001 FCA 176 at paragraph 8, *Stawicki v. Canada*, 2006 FCA 262 at paragraph 2). The two cases cited by Shire relate to disputes about whether documents that were before the court below should be excluded from the appeal book because they are not relevant to the issues on appeal. That is unlike this case, where a party is arguing for the inclusion in the appeal book of documents that were not before the court below.

14 It appears to me that Shire is misinterpreting Rule 343(2). That rule means that the appeal book should not include a document *unless* it is required to dispose of an issue on appeal. This is intended to discourage parties from including material in the appeal book that is not useful. Rule 343(2) does not permit a party to augment its case on appeal by including in the appeal book documents that were not before the judge who made the order under appeal.

15 Shire argues that, since Justice Pinard had before him evidence that Apotex had filed a notice of allegation in 2006, and evidence that Cephalon intended to file a motion for consolidation of the section 8 action and the infringement action, Apotex cannot fairly object to including in the appeal book the notice of allegation and the consolidation motion material. This argument is without merit. It confuses the factual basis of a case with the evidence that a party may present to prove the facts. This Court has said on numerous occasions that, absent an order under Rule 351 granting leave to present evidence on appeal, this Court will not consider evidence that was not before the judge who made the

order under appeal. The most recent statement to that effect is in *Ratiopharm Inc. v. Pfizer Ltd.*, 2009 FCA 338, citing *Montana Band v. Canada*, 2001 FCA 176.

16 I conclude that none of the contentious documents should be included in the appeal book without leave under Rule 351.

Whether leave should be granted under Rule 351

17 Generally, evidence will not be admitted on appeal unless it is credible, it is practically conclusive of an issue on appeal, and it could not with due diligence have been presented to the judge who made the order under appeal. It is rare that all three tests are satisfied.

18 The Court has residual discretion, even if these three tests are not satisfied, to admit new evidence on appeal in the interest of justice, but that residual discretion is exercised only in the clearest of cases and with great care. In my view, there is nothing in this case that would warrant the exercise of that residual discretion.

19 Shire is asking for leave to present, as new evidence on appeal, the 10 documents relating to the 2010 consolidation motion. Obviously, those documents did not exist before October of 2010 and therefore they could not have been placed before Justice Pinard.

20 As I understand the position of Shire, it is that the consolidation motion materials comprise or contain credible evidence that addresses concerns expressed by Justice Pinard, and therefore they could have influenced the outcome. That is, according to Shire, factual statements have been made in support of the merits of the consolidation motion that would or could have led Justice Pinard to grant Shire's motion for leave to amend its statement of defence.

21 I do not propose to try to explain exactly what facts are stated in the 2010 consolidation motion material that Shire argues should have been so compelling to Justice Pinard, because I find Shire's argument on that point to be somewhat obscure. What is important, in my view, is that Shire has provided no basis upon which I can conclude that those same facts could not have been set out in an affidavit filed by Shire in support of its motion to amend its statement of defence.

22 While it is true that the *documents* that Shire wishes to present as new evidence did not exist before October of 2010, the *alleged facts* upon which Shire wishes to rely in support of its appeal are not new -- essentially they are the facts about the alleged infringement by Apotex of the 976 patent, and the connection between that alleged infringement and the facts relating to the 2006 prohibition proceedings. To meet the due diligence test, Shire was required to establish that it did not know those facts, and could not with due diligence have discovered them before presenting its case to Prothonotary Tabib or Justice Pinard. Shire has not met that test. Indeed, it did not even attempt to meet that test.

23 Even if the due diligence test had been met, I am unable to discern any basis upon which I can conclude that the 2010 consolidation motion material could have affected the determination of Justice Pinard to deny Shire leave to amend its statement of defence. When Justice Pinard made the order under appeal, he was aware that Cephalon had commenced an action for infringement and was considering making a consolidation motion. I cannot reasonably conclude that he might have made a different order if he had been aware of the grounds for the consolidation motion or the contents of the affidavit filed in support of it.

Conclusion

24 For these reasons, an order will be made that none of the contentious documents are to be included in the appeal book or presented as evidence on appeal. Apotex will be awarded its costs of this motion in any event of the cause.

SHARLOW J.A.

TAB 9

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Indexed as:

Thamotharem v. Canada (Minister of Citizenship and Immigration) (F.C.A.)

The Minister of Citizenship and Immigration (Appellant)
v.
Daniel Thamotharem (Respondent)
and
The Canadian Council For Refugees and The Immigration Refugee Board (Interveners)

[2008] 1 F.C.R. 385

[2007] F.C.J. No. 734

2007 FCA 198

Docket A-38-06

Federal Court of Appeal

Décary, Sharlow and Evans JJ.A..

Heard: Toronto, April 16, 2007.
Judgment: Ottawa, May 25, 2007

(120 paras.)

Catchwords

Citizenship and Immigration -- Immigration Practice -- Appeal from Federal Court decision setting aside decision of Refugee Protection Division (RPD) of Immigration and Refugee Board (IRB) dismissing respondent's claim for refugee protection -- Cross-appeal from Federal Court's finding Guideline 7 of Guidelines Issued by the Chairperson pursuant to the Immigration and Refugee Protection Act (IRPA) 159(1)(h) not invalid on ground depriving refugee claimants of right to fair hearing -- Guideline 7 providing that, except in exceptional circumstances, Refugee Protection Officer (RPO) to start questioning claimant in refugee protection claim -- Per Evans J.A. (Décary J.A. concurring): (1) Refugee claimants deserving high degree of procedural protection but tailored to fit inquisitorial, informal nature of hearing -- Fair adjudication of individual rights compatible with inquisitorial process -- Procedure in Guideline 7 not breaching IRB's duty of fairness -- (2) Administrative agency not requiring express grant of statutory authority to issue guidelines, policies to structure exercise of discretion or interpretation of enabling legislation -- Although language of

Guideline 7 more than "recommended but optional process", not unlawful fetter on discretion, as long as deviation from normal practice in exceptional circumstances not precluded -- Evidence not establishing reasonable person would think RPD members' independence unduly constrained by Guideline 7 -- (3) Power granted by IRPA, s. 159(1)(h) to Chairperson to issue guidelines broad enough to include guideline concerning exercise of members' discretion in procedural, evidential or substantive matters -- Chairperson's guideline-issuing, rule-making powers overlapping -- Not unreasonable for Chairperson to choose to implement standard order of questioning through guideline [page386] rather than rule of procedure -- Appeal allowed, cross-appeal dismissed -- Per Sharlow J.A. (concurring): Chairperson's powers under IRPA to issue guidelines, make rules respecting activities, practice, procedure of Board not interchangeable -- Standard procedure outlined in Guideline 7 should have been implemented by means of a rule, but neither procedurally unfair nor unlawfully fettering IRB members' discretion.

Summary

This was an appeal from a Federal Court decision granting an application for judicial review to set aside a decision of the Refugee Protection Division (RPD) dismissing the respondent's claim for refugee protection. The respondent cross-appealed the finding that Guideline 7 of the *Guidelines Issued by the Chairperson Pursuant to Section 159(1)(h) of the Immigration and Refugee Protection Act* (IRPA) is not invalid because it deprives refugee claimants of the right to a fair hearing. Guideline 7 was issued in 2003 by the Chairperson of the Board pursuant to the statutory power to "issue guidelines ... to assist members in carrying out their duties" as outlined in the *Immigration and Refugee Protection Act* (IRPA), paragraph 159(1)(*h*). The IRPA also empowers the Chairperson to make rules for each of the three Divisions of Board but these rules must be approved by the Governor in Council and laid before Parliament. The key paragraphs of Guideline 7 provide that the standard practice in a refugee protection claim will be for the Refugee Protection Officer (RPO) to start questioning the claimant (paragraph 19), although paragraph 23 states that the RPD member hearing the claim may, in exceptional circumstances, vary the order of questioning. Guideline 7 was challenged on the grounds that (1) it deprives refugee claimants of the right to a fair hearing by denying them the opportunity to be questioned first by their own counsel; and (2) even if does not breach the duty of fairness, the Chairperson should have introduced the new standard order of questioning as a rule of procedure under the IRPA, paragraph 161(1)(*a*). While the Federal Court held that Guideline 7 is an unlawful fetter on the exercise of discretion by individual RPD members to determine the order of questioning at a hearing in the absence of a provision in either the IRPA or the *Refugee Protection Division Rules* (Rules), it [page387] rejected the respondent's argument that it deprives refugee claimants of the right to a fair hearing and distorts the "judicial" role of the member hearing the claim. It remitted the matter for re-determination on the basis that Guideline 7 is an invalid fetter on the RPD's discretion in the conduct of the hearing.

The respondent is a Sri Lankan Tamil who claimed refugee protection in Canada but his claim was rejected. Before the issue of Guideline 7, which was applied during the respondent's hearing despite the respondent's objection, neither the IRPA nor the Rules addressed the order of questioning at a hearing. The order of questioning was within the individual members' discretion and practice thereon was not uniform across Canada.

The main issues in the present case were: (1) whether Guideline 7 prescribes a hearing procedure that is in breach of claimants' right to procedural fairness; (2) whether Guideline 7 is unauthorized by paragraph 159(1)(*h*) because it is a fetter on RPD members' exercise of discretion in the conduct of

hearings; and (3) whether Guideline 7 is invalid because it is a rule of procedure and should therefore have been issued under IRPA, paragraph 161(1)(*a*).

Held, the appeal should be allowed, and the cross-appeal should be dismissed.

Per Evans J.A. (Décary J.A. concurring): (1) At a general level, the seriousness of the rights involved in the determination of a refugee claim, as well as the generally "judicial" character of the oral hearings held by the RPD, militate in favour of affording claimants a high degree of procedural protection. However, its details must also be tailored to fit the inquisitorial and relatively informal nature of the hearing established by Parliament as well as the RPD's high volume case load. Although a relatively inquisitorial procedural form may reduce the degree of control over the process often exercisable by counsel in adversarial proceedings, the fair adjudication of individual rights is perfectly compatible with an inquisitorial process where the order of questioning is not as obvious as it generally is in an adversarial hearing. Furthermore, the fact that members question the claimant first when there is no RPO present does not distort the inquisitorial process established by IRPA and [page388] would not give rise to a reasonable apprehension of bias on the part of the person who is informed of the facts and has thought the matter through. Guideline 7 does not curtail counsel's participation in the hearing since counsel is present throughout and may conduct an examination of the client to ensure that the claimant's testimony is before the decision maker. The right to be represented by counsel does not include the right of counsel to determine the order of questioning or any other aspect of the procedure to be followed at the hearing. Although fairness may require a departure from the standard order of questioning in some circumstances, the procedure prescribed by Guideline 7 does not, on its face, breach the Board's duty of fairness.

(2) Effective decision making by administrative agencies often involves striking a balance between general rules and the exercise of *ad hoc* discretion. Through the use of "soft law" (policy statements, guidelines, manuals and handbooks), an agency can communicate prospectively its thinking on an issue to agency members and staff as well as to the public at large and to the agency's "stakeholders" in particular. An administrative agency does not require an express grant of statutory authority in order to issue guidelines and policies to structure the exercise of its discretion or the interpretation of its enabling legislation. Although not legally binding on a decision maker, guidelines may validly influence a decision maker's conduct. The use of guidelines and other "soft law" techniques to achieve an acceptable level of consistency in administrative decisions is particularly important for tribunals exercising discretion, whether on procedural, evidential or substantive issues, in the performance of adjudicative functions. This is especially true for large tribunals, such as the Immigration and Refugee Board (IRB).

Despite the express statutory authority of the Chairperson to issue guidelines under IRPA, paragraph 159(1)(*h*), they do not have the same legal effects that statutory rules can have. In particular, guidelines cannot lay down a mandatory rule from which members have no meaningful degree of discretion to deviate regardless of the facts of the particular case before them. The word "guideline" itself normally suggests some operating principle or general norm, which does not necessarily determine the result of every dispute.

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Since the language of Guideline 7 expressly permits members to depart from the standard order of questioning in exceptional circumstances, the Court should be slow to conclude that members will regard themselves as bound to follow the standard order in the absence of clear evidence to the

contrary. The Federal Court correctly concluded that the language of Guideline 7 is more than "a recommended but optional process". The fact that a guideline is intended to establish how discretion will normally be exercised is not enough to make it an unlawful fetter, as long as it does not preclude the possibility that the decision maker may deviate from normal practice in the light of particular facts. While RPD members must perform their adjudicative functions without improper influence from others, case law also recognizes that administrative agencies must be free to devise processes for ensuring an acceptable level of consistency and quality in their decisions. Evidence that the IRB "monitors" members' deviations from the standard order of questioning does not create the kind of coercive environment that would make Guideline 7 an improper fetter on members' exercise of their decision-making powers. Nor did the evidence establish that a reasonable person would think that RPD members' independence was unduly constrained by Guideline 7.

(3) On its face, the power granted by IRPA, paragraph 159(1)(*h*) to the Chairperson to issue guidelines in writing "to assist members in carrying out their duties" is broad enough to include a guideline issued in respect of the exercise of members' discretion in procedural, evidential or substantive matters. Structuring members' discretion over the order of questioning is within the subject-matter of the guidelines contemplated by section 159. The exercise of the Chairperson's power to issue guidelines is not made expressly subject to paragraph 161(1)(*a*), although a guideline issued under paragraph 159(1)(*h*) that is inconsistent with a formal rule of procedure issued under paragraph 161(1)(*a*) will be invalid. Thus, on procedural issues, the Chairperson's guideline-issuing and rule-making powers overlap. Provided that it does not unlawfully fetter members' exercise of their adjudicative discretion, that the subject of a guideline could have been enacted as a rule of procedure issued under IRPA, paragraph 161(1)(*a*) will not normally invalidate it. It was not unreasonable for the Chairperson to choose to implement the standard order of questioning through the guideline, rather than through a formal rule of procedure.

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Per Sharlow (concurring): The two powers the IRPA gives the Chairperson to issue guidelines in writing to assist members in carrying out their duties (paragraph 159(1)(*h*)) and to make rules respecting the activities, practice and procedure of the Board, subject to the Governor in Council's approval (paragraph 161(1)(*a*)) differ substantively and functionally and are not interchangeable at the will of the Chairperson. The Chairperson's determination that the standard practice in refugee hearings, barring exceptional circumstances, should be for the RPO or the member to start questioning the refugee claimant should have been implemented by means of a rule rather than a guideline. But the standard procedure outlined in Guideline 7 is not in itself procedurally unfair and Guideline 7 does not unlawfully fetter the discretion of members. Despite Guideline 7, each member continues to have the unfettered discretion to adopt any order of procedure required by the exigencies of each claim to which the member is assigned.

Statutes and Regulations Judicially Considered

An Act to amend the Immigration Act and other Acts in consequence thereof, S.C. 1992, c. 49.

Canadian Human Rights Act, R.S.C., 1985, c. H-6, ss. 27(2) (as am. by S.C. 1998, c. 9, s. 20), (3) (as am. *idem*), 49(2) (as am. *idem*, s. 27).

Department of the Environment Act, R.S.C., 1985, c. E-10, s. 6.

Immigration and Refugee Protection Act, S.C. 2001, c. 27, ss. 74(*d*), 159, 161, 162(2), 165, 170(*a*), (*g*),(*h*).

Inquiries Act, R.S.C., 1985, c. I-11, ss. 4, 5.

Refugee Protection Division Rules, SOR/2002-228, rr. 16(*e*), 25, 38, 69, 70.

Statutory Powers Procedure Act, R.S.O. 1990, c. S.22, s. 25.1(1) (as am. by S.O. 1994, c. 27, s. 56).

Cases Judicially Considered

Applied:

Benitez v. Canada (Minister of Citizenship and Immigration), [2007] 1 F.C.R. 107; (2006), 40 Admin. L.R. (4th) 159; 290 F.T.R. 161; 54 Imm. L.R. (3d) 27; 2006 FC 461.

Maple Lodge Farms Ltd. v. Government of Canada, [1982] 2 S.C.R. 2; (1982), 137 D.L.R. (3d) 558; 44 N.R. 354.

IWA v. Consolidated-Bathurst Packaging Ltd., [1990] 1 S.C.R. 282; (1990), 68 D.L.R. (4th) 524; 42 Admin. L.R. 1; 90 CLLC 14,007; 105 N.R. 161; 38 O.A.C. 321.

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Distinguished:

Bell Canada v. Canadian Employees Association, [2003] 1 S.C.R. 884; (2003), 227 D.L.R. (4th) 193; [2004] 1 W.W.R. 1; 3 Admin. L.R. (4th) 163; 109 C.R.R. (2d) 65; 306 N.R. 34; 2003 SCC 36.

Friends of the Oldman River Society v. Canada (Minister of Transport), [1992] 1 S.C.R. 3; (1992), 88 D.L.R. (4th) 1; [1992] 2 W.W.R. 193; 84 Alta. L.R. (2d) 129; 3 Admin. L.R. (2d) 1; 7 C.E.L.R. (N.S.) 1; 132 N.R. 321.

Considered:

Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817; (1999), 174 D.L.R. (4th) 193; 14 Admin. L.R. (3d) 173; 1 Imm. L.R. (3d) 1; 243 N.R. 22.

Rajaratnam v. Canada (Minister of Employment and Immigration) (1991), 135 N.R. 300 (F.C.A.).

Ainsley Financial Corp. v. Ontario Securities Commission (1994), 21 O.R. (3d) 104; 121 D.L.R. (4th) 79; 28 Admin. L.R. (2d) 1; 77 O.A.C. 155 (C.A.).

Referred to:

Benitez v. Canada (Minister of Citizenship and Immigration), [2008] 1 F.C.R. 155; 2007 FCA 199; *Can-Am Realty Ltd. v. Canada*, [1994] 1 C.T.C. 1; (1993), 94 DTC 6069; 69 F.T.R. 63 (F.C.T.D.); *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84; (2002), 208 D.L.R. (4th) 107; 37 Admin. L.R. (3d) 252; 18 Imm. L.R. (3d) 93; 280 N.R. 268; 2002 SCC 3; *Sivasamboo v. Canada (Minister of Citizenship and Immigration)*, [1995] 1 F.C. 741; (1994), 29 Admin. L.R. (2d)

211; 87 F.T.R. 46 (T.D.); *Shahib v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1250; *Capital Cities Communications Inc. et al. v. Canadian Radio-Television Commn.*, [1978] 2 S.C.R. 141; (1977), 81 D.L.R. (3d) 609; 36 C.P.R. (2d) 1; 18 N.R. 181; *Vidal v. Canada (Minister of Employment and Immigration)* (1991), 49 Admin. L.R. 118; 41 F.T.R. 118; 13 Imm. L.R. 118 (F.C.T.D.); *Roncarelli v. Duplessis*, [1959] S.C.R. 121; (1959), 16 D.L.R. (2d) 689; *Canada (Attorney General) v. Public Service Alliance of Canada*, [2000] 1 F.C. 146; (1999), 180 D.L.R. (4th) 95; [2000] CLLC 230-002; 176 F.T.R. 161 (T.D.); *Ha v. Canada (Minister of Citizenship and Immigration)*, [2004] 3 F.C.R. 195; (2004), 236 D.L.R. (4th) 485; 11 Admin. L.R. (4th) 306; 34 Imm. L.R. (3d) 157; 316 N.R. 299; 2004 FCA 49; *Tremblay v. Quebec (Commission des affaires sociales)*, [1992] 1 S.C.R. 952; (1992), 90 D.L.R. (4th) 609; 3 Admin. L.R. (2d) 173; 136 N.R. 5; 147 Q.A.C. 169.

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History and Disposition:

APPEAL from a Federal Court decision ([2006] 3 F.C.R. 168; (2006), 40 Admin. L.R. (4th) 221) granting an application for judicial review to set aside a decision of the Refugee Protection Division ([2004] R.P.D. No. 613 (QL)) dismissing the respondent's claim for refugee protection. CROSS-APPEAL from that decision's finding that Guideline 7 of the *Guidelines Issued by the Chairperson Pursuant to Section 159(1)(h) of the Immigration and Refugee Protection Act* is not invalid because it deprives refugee claimants of the right to a fair hearing. Appeal allowed and cross-appeal dismissed.

Appearances:

Jamie R. D. Todd and *John Provart* for appellant.

John W. Davis for respondent.

Christopher D. Bredt and *Morgana Kellythorne* for intervener, the Immigration and Refugee Board.

Catherine F. Bruce and *Angus Grant* for intervener, the Canadian Council for Refugees.

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Solicitors of record:

Deputy Attorney General of Canada for appellant.

Davis & Grice, Toronto, for respondent.

Borden Ladner Gervais LLP, Toronto, for intervener, the Immigration and Refugee Board.

The Law Offices of Catherine F. Bruce and *Ms. Barbara Jackman*, Toronto, for intervener, the Canadian Council for Refugees.

The following are the reasons for judgment rendered in English by

EVANS J.A.:--

A. INTRODUCTION

1 The Chairperson of the Immigration and Refugee Board (the Board) has broad statutory powers to issue both guidelines and rules. Rules have to be approved by the Governor in Council and laid before Parliament, but guidelines do not.

2 This appeal concerns the validity of Guideline 7 *Guidelines Issued by the Chairperson Pursuant to Section 159(1)(h) of the Immigration and Refugee Protection Act: Guideline 7: Concerning Preparation and Conduct of a Hearing in the Refugee Protection Division*, issued in 2003 by the Chairperson of the Board pursuant to the statutory power to "issue guidelines ... to assist members in carrying out their duties": *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), paragraph 159(1)(*h*). The key paragraphs of Guideline 7 provide as follows: "In a claim for refugee protection, the standard practice will be for the R[efugee] P[rotection] O[fficer] to start questioning the claimant" (paragraph 19), although the member of the Refugee Protection Division (RPD) hearing the claim "may vary the order of questioning in exceptional circumstances" (paragraph 23).

3 The validity of Guideline 7 is challenged on two principal grounds. First, it deprives refugee claimants of [page394] the right to a fair hearing by denying them the opportunity to be questioned first by their own counsel. Second, even if Guideline 7 does not prescribe a hearing that is in breach of the duty of fairness, the Chairperson should have introduced the new standard order of questioning as a rule of procedure under IRPA, paragraph 161(1)(*a*), not as a guideline under IRPA, paragraph 159(1)(*h*). Guideline 7 is not valid as a guideline because paragraphs 19 and 23 unlawfully fetter the

discretion of members of the RPD to determine the appropriate order of questioning when hearing refugee protection claims.

4 This is an appeal by the Minister of Citizenship and Immigration from a decision by Justice Blanchard of the Federal Court granting an application for judicial review by Daniel Thamotharem to set aside a decision by the RPD dismissing his claim for refugee protection: *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, [2006] 3 F.C.R. 168 (F.C.).

5 Justice Blanchard held that Guideline 7 is an unlawful fetter on the exercise of discretion by individual RPD members to determine the order of questioning at a hearing, in the absence of a provision in either IRPA or the *Refugee Protection Division Rules,* SOR/2002-228, dealing with this aspect of refugee protection hearings. He remitted Mr. Thamotharem's refugee claim to be determined by a different member of the RPD on the basis that Guideline 7 is an invalid fetter on the exercise of decision makers' discretion.

6 However, Justice Blanchard rejected Mr. Thamotharem's argument that Guideline 7 is invalid because it deprives refugee claimants of the right to a fair hearing and distorts the "judicial" role of the member hearing the claim. Mr. Thamotharem has cross-appealed this finding.

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7 The Judge certified the following questions for appeal pursuant to paragraph 74(*d*) of IRPA.

1. Does the implementation of paragraphs 19 and 23 of the Chairperson's Guideline 7 violate principles of natural justice by unduly interfering with claimants' right to be heard?
2. Has the implementation of Guideline 7 led to fettering of Board Members' discretion?
3. Does a finding that Guideline 7 fetters a Refugee Protection Division Member's discretion necessarily mean that the application for judicial review must be granted, without regard to whether or not the applicant was otherwise afforded procedural fairness in the particular case or whether there was an alternate basis for rejecting the claim?

8 Immediately after hearing the Minister's appeal in *Thamotharem*, we heard appeals by unsuccessful refugee claimants challenging the validity of Guideline 7 and, in some of the cases, impugning on other grounds the dismissal of their claim. In the Federal Court, 19 applications for judicial review concerning Guideline 7 were consolidated. Justice Mosley's decision on the Guideline 7 issue is reported as *Benitez v. Canada (Minister of Citizenship and Immigration)*, [2007] 1 F.C.R. 107 (F.C.). The appeals from these decisions were also consolidated, *Benitez* being designated the lead case.

9 In *Benitez*, Justice Mosley agreed with the conclusions of Justice Blanchard on all issues, except one: he held that Guideline 7 was not an unlawful fetter on the discretion of Board members because its text permitted them to allow the claimant's counsel to question first, as, in fact, some had.

10 For substantially the reasons that they gave, I agree with both Justices that Guideline 7 is not, on its [page396] face, invalid on the ground of procedural unfairness, although, as the Minister and the

Board conceded, fairness may require that, in certain circumstances, particular claimants should be questioned first by their own counsel. I also agree that Guideline 7 is not incompatible with the impartiality required of a member when conducting a hearing which is inquisitorial in form.

11 However, in my opinion, Guideline 7 is not an unlawful fetter on the exercise of members' discretion on the conduct of refugee protection hearings. The Guideline expressly directs members to consider the facts of the particular case before them to determine whether there are exceptional circumstances warranting a deviation from the standard order of questioning. The evidence does not establish that members disregard this aspect of Guideline 7 and slavishly adhere to the standard order of questioning, regardless of the facts of the case before them. Accordingly, I agree with Justice Mosley on this issue and must respectfully disagree with Justice Blanchard.

12 Nor does it follow from the fact that Guideline 7 could have been issued as a statutory rule of procedure that it is invalid because it was not approved by the Governor in Council. In my opinion, the Chairperson's rule-making power does not invalidate Guideline 7 by impliedly excluding from the broad statutory power to issue guidelines "to assist members in carrying out their duties" changes to the procedure of any of the Board's Divisions.

13 Accordingly, I would allow the Minister's appeal and dismiss Mr. Thamotharem's cross- appeal and his application for judicial review. Although separate reasons are given in *Benitez*, [2008] 1 F.C.R. 155 (F.C.A.) dealing with issues not raised in Mr. Thamotharem's appeal, a copy of the reasons in the present appeal will also be inserted in Court File No. A-164-06 (*Benitez*) and the files of the appeals [page397] consolidated with it.

B. FACTUAL BACKGROUND

(i) Mr. Thamotharem's refugee claim

14 Mr. Thamotharem is Tamil and a citizen of Sri Lanka. He entered Canada in September 2002 on a student visa. In January 2004, he made a claim for refugee protection in Canada, since he feared that, if forced to return to Sri Lanka, he would be persecuted by the Liberation Tigers of Tamil Eelam.

15 In written submissions to the RPD before his hearing, Mr. Thamotharem objected to the application of Guideline 7, on the ground that it deprives refugee claimants of their right to a fair hearing. He did not argue that, on the facts of his case, he would be denied a fair hearing if he were questioned first by the refugee protection officer (RPO) and/or the member conducting the hearing. There was no evidence that Mr. Thamotharem suffered from post-trauma stress disorder or was otherwise particularly vulnerable.

16 At the hearing of the claim before the RPD, the RPO questioned Mr. Thamotharem first. The RPD held that the duty of fairness does not require that refugee claimants always have the right to be questioned first by their counsel and that the application of Guideline 7 does not breach Mr. Thamotharem's right to procedural fairness.

17 In a decision dated August 18, 2004 [[2004] R.P.D.D. No. 613 (QL)], the RPD dismissed Mr. Thamotharem's refugee claim and found him not to be a person in need of protection. It based its decision on documentary evidence of improved country conditions for Tamils in Sri Lanka, and on the absence of reliable evidence that Mr. Thamotharem would be persecuted as a perceived member of a political group or would, for the first time, become the target of extortion.

18 In his application for judicial review, Mr. Thamotharem challenged this decision on the ground [page398] that Guideline 7 was invalid and that the RPD had made a reviewable error in its determination of the merits of his claim. As already noted, Mr. Thamotharem's application for judicial review was granted, the RPD's decision set aside and the matter remitted to another member for redetermination on the basis that Guideline 7 is an invalid fetter on the RPD's discretion in the conduct of the hearing. In responding in this Court to the Minister's appeal, Mr. Thamotharem did not argue that, even if Guideline 7 is valid, Justice Blanchard was correct to remit the matter to the RPD because it committed a reviewable error in determining the merits of the claim.

(ii) Guideline 7

19 Before the Chairperson issued Guideline 7, the order of questioning was within the discretion of individual members; neither IRPA nor the *Refugee Protection Division Rules*, addressed it. Refugee protection claims are normally determined by a single member of the RPD. The evidence indicated that, before the issue of Guideline 7, practice on the order of questioning was not uniform across Canada. Members sitting in Toronto and, possibly, in Vancouver and Calgary, permitted claimants to be "examined in chief" by their counsel before being questioned by the RPO and/or the member. In Montréal and Ottawa, on the other hand, the practice seems to have been that the member or the RPO questioned the claimant first, although a request by counsel for a claimant to question first seems generally to have been granted.

20 It is not surprising that the Board did not regard it as satisfactory that the order of questioning was left to be decided by individual members on an *ad hoc* basis, with variations among regions, and among members within a region. Claimants are entitled to expect essentially the same procedure to be followed at an RPD hearing, regardless of where or by whom the hearing is conducted.

21 There was also a view that refugee protection hearings would be more expeditious if claimants were [page399] generally questioned first by the RPO or the member, thus dispensing with the often lengthy and unfocussed examination-in-chief of claimants by their counsel. The backlog of refugee determinations has been a major problem for the Board. For example, from 1997-1998 to 2001-2002 the number of claims referred for determination each year increased steadily from more than 23,000 to over 45,000, while, in the same period, the backlog of claims referred but not decided grew from more than 27,000 to nearly 49,000: Canada, Immigration and Refugee Board, Performance Report for the period ending March 31, 2004.

22 Studies were undertaken to find ways of tackling this problem. For example, in a relatively early report, *Rebuilding Trust: Report of the Review of Fundamental Justice in Information Gathering and Dissemination at the Immigration and Refugee Board of Canada* (Ottawa: Immigration and Refugee Board, December 1993), refugee law scholar, Professor James C. Hathaway, made many recommendations designed to make the Board's determination of refugee claims more effective, expeditious, and efficient. The following passage from the Report (at pages 74-75) is particularly relevant to the present appeal.

> The present practice of an introductory "examination in chief" by counsel should be dispensed with, the sworn testimony in the Application for Refugee Status being presumed to be true unless explicitly put in issue. Panel members should initially set out clearly the substantive matters into which they wish to inquire, and explain any concerns they may have about the sufficiency of documentary evidence presented. Members should assume primary responsibility to formulate the necessary questions, although they

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> should feel free to invite counsel to adduce testimony in regard to matters of concern to them. Once the panel has concluded its questioning, it should allow the Minister's representative, if present, an opportunity to question or call evidence, ensuring that the tenor of the Ministerial intervention is not allowed to detract from the non-adversarial nature of the hearing. Following a brief recess, the panel should outline clearly on the record which matters it views as still in issue, generally using the Conference Report as its guide. Any matters not stated by the panel to be topics of continuing concern should be deemed to be no longer in issue. Counsel would then be invited to elicit testimony, call witnesses, and make submissions as adjudged appropriate, keeping in mind that all [page400] additional evidence must be directed to a matter which remains in issue. [Footnotes omitted.]

23 Starting in 1999, the Board worked to develop what became Guideline 7, which was finally issued in October 31, 2003, as part of an action plan to reduce the backlog on the refugee side by increasing the efficiency of its decision-making process. In addition to the order of questioning provisions in dispute in this case, Guideline 7 also deals with the early identification of issues and disclosure of documents, procedures when a claimant is late or fails to appear, informal pre-hearing conferences, and the administration of oaths and affirmations.

24 In addition to the consultations with the Deputy Chairperson and the Director General of the Immigration Division mandated by paragraph 159(1)(*h*) before the Chairperson issues a guideline, the Board held consultations on the proposed Guideline with members of the Bar and other "stakeholders." Some, however, including the Canadian Council for Refugees, an intervener in this appeal, regarded the consultations as less than meaningful, while others characterized Guideline 7 as an overly "top-down" initiative by senior management of the Board. On the basis of the material before us, I am unable to comment on either of these observations.

25 From December 1, 2003, the implementation of Guideline 7 was gradually phased in, becoming fully operational across the country by June 1, 2004. Like other guidelines issued by the Chairperson, Guideline 7 was published.

C. LEGISLATIVE FRAMEWORK

(i) IRPA

26 IRPA confers on the Chairperson of the Board broad powers over the management of each Division of [page401] the Board, including a power to issue guidelines.

> **159.** (1) The Chairperson is, by virtue of holding that office, a member of each Division of the Board and is the chief executive officer of the Board. In that capacity, the Chairperson
>
> (*a*) has supervision over and direction of the work and staff of the Board;
>
> ...

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(*g*) takes any action that may be necessary to ensure that the members of the Board carry out their duties efficiently and without undue delay;

(*h*) may issue guidelines in writing to members of the Board and identify decisions of the Board as jurisprudential guides, after consulting with the Deputy Chairpersons and the Director General of the Immigration Division, to assist members in carrying out their duties; [Underlining added.]

27 IRPA also empowers the Chairperson of the Board to make rules for each of the three Divisions of Board. The rules, however, must be approved by the Governor in Council and laid before Parliament.

161. (1) Subject to the approval of the Governor in Council, and in consultation with the Deputy Chairpersons and the Director General of the Immigration Division, the Chairperson may make rules respecting

(*a*) the activities, practice and procedure of each of the Divisions of the Board, including the periods for appeal, the priority to be given to proceedings, the notice that is required and the period in which notice must be given;

(*b*) the conduct of persons in proceedings before the Board, as well as the consequences of, and sanctions for, the breach of those rules;

(*c*) the information that may be required and the manner in which, and the time within which, it must be provided with respect to a proceeding before the Board; and

(*d*) any other matter considered by the Chairperson to require rules.

(2) The Minister shall cause a copy of any rule made under subsection (1) to be laid before each House of Parliament on any of the first 15 days on which that House is sitting after the approval of the rule by the Governor in Council. [Underlining added.]

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28 IRPA emphasizes the importance of informality, promptness and fairness in the Board's proceedings.

162. ...

(2) Each Division shall deal with all proceedings before it as informally and quickly as the circumstances and the considerations of fairness and natural justice permit.

29 In keeping with the inquisitorial nature of the RPD's process, IRPA confers broad discretion on members in their conduct of a hearing.

> **165.** The Refugee Protection Division and the Immigration Division and each member of those Divisions have the powers and authority of a commissioner appointed under Part I of the *Inquiries Act* and may do any other thing they consider necessary to provide a full and proper hearing. .

30 Part I of the *Inquiries Act*, R.S.C., 1985, c. I-11, empowers commissioners of inquiry as follows:

> **4.** The commissioners have the power of summoning before them any witnesses, and of requiring them to
>
> (*a*) give evidence, orally or in writing, and on oath or, if they are persons entitled to affirm in civil matters on solemn affirmation; and
>
> (*b*) produce such documents and things as the commissioners deem requisite to the full investigation of the matters into which they are appointed to examine.
>
> **5.** The commissioners have the same power to enforce the attendance of witnesses and to compel them to give evidence as is vested in any court of record in civil cases.

31 The following provisions of IRPA respecting the decision-making process of the RPD are also relevant.

> **170.** The Refugee Protection Division, in any proceeding before it,
>
> (*a*) may inquire into any matter that it considers relevant to establishing whether a claim is well-founded;
>
> ...
>
> (*g*) is not bound by any legal or technical rules of evidence;
>
> (*h*) may receive and base a decision on evidence that is adduced in the proceedings and considered credible or trustworthy in the circumstances;

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(ii) Guideline 7

32 Paragraphs 19 and 23 of Guideline 7, issued by the Chairperson under IRPA, paragraph 159(1)(*h*), are of immediate relevance in this appeal, while paragraphs 20-22 provide context.

19. In a claim for refugee protection, the standard practice will be for the RPO to start questioning the claimant. If there is no RPO participating in the hearing, the member will begin, followed by counsel for the claimant. Beginning the hearing in this way allows the claimant to quickly understand what evidence the member needs from the claimant in order for the claimant to prove his or her case.
20. In a claim for refugee protection where the Minister intervenes on an issue other than exclusion, for example, on a credibility issue, the RPO starts the questioning. If there is no RPO at the hearing, the member will start the questioning, followed by the Minister's counsel and then counsel for the claimant.
21. In proceedings where the Minister intervenes on the issue of exclusion, Minister's counsel will start the questioning, followed by the RPO, the member, and counsel for the claimant. Where the Minister's counsel requests another chance to question at the end, the member will allow it if the member is satisfied that new matters were raised during questioning by the other participants.
22. In proceedings where the Minister is making an application to vacate or to cease refugee protection, Minister's counsel will start the questioning, followed by the member, and counsel for the protected person. Where the Minister's counsel requests another chance to question at the end, the member will allow it if the member is satisfied that new matters were raised during questioning by the other participants.
23. The member may vary the order of questioning in exceptional circumstances. For example, a severely disturbed claimant or a very young child might feel too intimidated by an unfamiliar examiner to be able to understand and properly answer questions. In such circumstances, the member could decide that it would be better for counsel for the claimant to start the questioning. A party who believes that exceptional circumstances exist must make an application to change the order of questioning before the hearing. The application has to be made according to the *RPD Rules*. [Underlining added; endnote omitted.]

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D. ISSUES AND ANALYSIS

Issue 1: Standard of review

33 The questions of law raised in this appeal about the validity of Guideline 7 are reviewable on a standard of correctness: they concern procedural fairness, statutory interpretation, and the unlawful fettering of discretion. The exercise of discretion by the Chairperson to choose a guideline rather than

a formal rule as the legal instrument for amending the procedure of any of the Board's Divisions by is reviewable for patent unreasonableness.

Issue 2: Does Guideline 7 prescribe a hearing procedure that is in breach of claimants' right to procedural fairness?

34 Justice Blanchard dealt thoroughly with this issue at paragraphs 36-92 of his reasons. He concluded that the jurisprudence did not require that, as a matter of fairness, claimants always be given the opportunity to be questioned first by their counsel (at paragraphs 38-53). He then considered (at paragraphs 68-90) the criteria set out in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paragraphs 21-28 (*Baker*), for determining where to locate refugee protection hearings on the procedural spectrum from the informal to the judicial. Largely on the basis of the adjudicative nature of the RPD's functions, the finality of its decision, and the importance of the individual rights at stake, he concluded (at paragraph 75) that "a higher level of procedural protection is warranted."

35 However, recognizing also that the content of the duty of fairness varies with context, Justice Blanchard noted that Parliament had chosen an inquisitorial procedural model for the determination of refugee claims by the RPD, in the sense that there is no party opposing the claim, except in the rare cases when the [page405] Minister intervenes to oppose a claim on exclusion grounds. Consequently, in the overwhelming majority of cases, the task of probing the legitimacy of claims inevitably falls to the RPO, who questions the claimant on behalf of the member, and/or to the member of the RPD conducting the hearing, especially when no RPO is present. This is an important reason for concluding that not all the elements of the adversarial procedural model followed in the courts are necessarily required for a fair hearing of a refugee claim: see paragraphs 72-75.

36 Justice Blanchard also acknowledged that claimants may derive tactical advantages from being taken through their story by their own lawyer before being subjected to questioning by the RPO, who will typically focus on inconsistencies, gaps, and improbabilities in the narrative found in the claimant's Personal Information Form (PIF) and any supporting documentation, as well as any legal weaknesses in the claim. The tactical advantage of questioning first may be particularly significant in refugee hearings because of the vulnerability and anxiety of many claimants, as a result of: their inability to communicate except through an interpreter; their cultural backgrounds; the importance for them of the RPD's ultimate decision; and the psychological effects of the harrowing events experienced in their country of origin.

37 Nonetheless, Justice Blanchard concluded that these considerations do not necessarily rise to the level of unfairness. Indeed, in addition to shortening the hearing, questioning by the RPO may also serve to improve the quality of the hearing by focusing it and enabling a claimant's counsel to make sure that aspects of the claim troubling the member are fully dealt with when the claimant comes to tell his or her story. Consequently, in order to be afforded their right to procedural fairness, claimants need not normally be given the opportunity to be questioned by their counsel [page406] before being questioned by the RPO and/or RPD member.

38 Justice Blanchard noted, for example, that RPD members receive training to sensitize them to the accommodations needed when questioning vulnerable claimants, that claimants may supplement or modify the information in their PIF and adduce evidence before the hearing, and that expert

evidence indicated that vulnerable claimants' ability to answer questions fully, correctly and clearly is likely to depend more on the tone and style of questioning than on the order in which it occurs.

39 Moreover, the duty of fairness forbids members from questioning in an overly aggressive and badgering manner, or in a way that otherwise gives rise to a reasonable apprehension of bias. Fairness also requires that claimants be given an adequate opportunity to tell their story in full, to adduce evidence in support of their claim, and to make submissions relevant to it. To this end, fairness may also require that, in certain circumstances, a claimant be afforded the right to be questioned first by her or his counsel. In addition, Guideline 7 recognizes that there will be exceptional cases in which, even though not necessarily required by the duty of fairness, it will be appropriate for the RPD to depart from the standard order of questioning.

40 I agree with Justice Blanchard's conclusion on this issue and have little useful to add to his reasons. Before us, counsel did not identify any error of principle in the applications Judge's analysis nor produce any binding judicial authority for the proposition that it is a breach of the duty of fairness to deny claimants the right to be questioned first by their own counsel. Criticisms were directed more to the weight that Justice Blanchard gave to some of the evidence and the factors to be considered. I can summarize as follows the principal points made in this Court by counsel.

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41 First, the importance of the individual rights potentially at stake in refugee protection proceedings indicates a court-like hearing, in which the party with the burden of proof goes first: see, for example, *Can-Am Realty Ltd. v. Canada*, [1994] 1 C.T.C. 1 (F.C.T.D.), at page 1. I agree at a general level that the seriousness of the rights involved in the determination of a refugee claim, as well as the generally "judicial" character of the oral hearings held by the RPD, militate in favour of affording claimants a high degree of procedural protection. However, its details must also be tailored to fit the inquisitorial and relatively informal nature of the hearing established by Parliament, as well as the RPD's high volume case load, considerations which reduce the power of the claim to aspects of the adversarial model used in courts, including the order of questioning.

42 Second, the procedure set out in Guideline 7 is derived from the erroneous notion that the RPD is a board of inquiry, not an adjudicator. Unlike those appearing at inquiries, refugee claimants have the burden of proving a claim, which the RPD adjudicates.

43 I do not agree. The Board correctly recognizes that the RPD's procedural model is more inquisitorial in nature, unlike that of the Immigration Appeal Division (*Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, at paragraph 82). I cannot conclude on the basis of the evidence as a whole that the Board adopted the standard order of questioning in the mistaken view that the RPD is a board of inquiry, even though it decides claimants' legal rights in the cases which they bring to it for adjudication and claimants bear the burden of proof. This conclusion is not undermined by a training document "Questioning 101", prepared by the Board's Professional Development Branch in 2004 for members and RPOs, which contains a somewhat misleading reference to the compatibility of the standard order of questioning with "a board of inquiry model."

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44 A relatively inquisitorial procedural form may reduce the degree of control over the process often exercisable by counsel in adversarial proceedings, especially before inexperienced tribunal members or those who lack the confidence that legal training can give. Nonetheless, the fair adjudication of individual rights is perfectly compatible with an inquisitorial process, where the order of questioning is not as obvious as it generally is in an adversarial hearing.

45 Third, placing RPD members in the position of asking the claimant questions first, when no RPO is present, distorts their judicial role by thrusting them into the fray, thereby creating a reasonable apprehension of bias by making them appear to be acting as both judge and prosecutor. Guideline 7 is particularly burdensome for members now that panels normally comprise a single member, and there is often no RPO present to assume the primary responsibility for questioning the claimant on behalf of the Board.

46 I disagree. Adjudicators can and should normally play a relatively passive role in an adversarial process, because the parties are largely responsible for adducing the evidence and arguments on which the adjudicator must decide the dispute. In contrast, members of the RPD, sometimes assisted by an RPO, do not have this luxury. In the absence in most cases of a party to oppose the claim, members are responsible for making the inquiries necessary, including questioning the claimant, to determine the validity of the claim: see IRPA, paragraph 170(*a*); *Sivasamboo v. Canada (Minister of Citizenship and Immigration)*, [1995] 1 F.C. 741 (T.D.), at pages 757-778; *Shahib v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1250, at paragraph 21. The fact that the member or the RPO may [page409] ask probing questions does not make the proceeding adversarial in the procedural sense.

47 To the extent that statements in *Rajaratnam v. Canada (Minister of Employment and Immigration)* (1991), 135 N.R. 300 (F.C.A.), suggest that a member of the RPD hearing a refugee claim is restricted to asking the kind of questions that a judge in a civil or criminal proceeding may ask, they are, in my respectful opinion, incorrect, especially when no RPO is present.

48 The fact that members question the claimant first when there is no RPO present does not distort the inquisitorial process established by IRPA and would not give rise to a reasonable apprehension of bias on the part of a person who was informed of the facts and had thought the matter through in a practical manner. Inquisitorial processes of adjudication are not unfair simply because they are relatively unfamiliar to common lawyers.

49 Fourth, Guideline 7 interferes with claimants' right to the assistance of counsel because it prevents them from being taken through their story by their counsel before being subject to the typically more sceptical questioning by the RPO. I do not agree. Guideline 7 does not curtail counsel's participation in the hearing; counsel is present throughout and may conduct an examination of the client to ensure that the claimant's testimony is before the decision maker. The right to be represented by counsel does not include the right of counsel to determine the order of questioning or, for that matter, any other aspect of the procedure to be followed at the hearing.

50 Finally, no statistical evidence was adduced to support the allegation that Guideline 7 jeopardizes the ability of the RPD accurately to determine claims for refugee protection. There is simply no evidence to establish what impact, if any, the introduction of Guideline 7 has had on acceptance rates.

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51 In summary, the procedure prescribed by Guideline 7 is not, on its face, in breach of the Board's duty of fairness. However, in some circumstances, fairness may require a departure from the standard order of questioning. In those circumstances, a member's refusal of a request that the claimant be questioned first by her counsel may render the determination of the claim invalid for breach of the duty of fairness.

52 Consequently, if the Chairperson had implemented the reform to the standard order of questioning at refugee determination hearings in a formal rule of procedure issued in accordance with paragraph 161(1)(*a*), it would have been beyond challenge on the grounds advanced in this appeal respecting the duty of fairness, including bias. The somewhat technical question remaining is whether the Chairperson's choice of legislative instrument (that is, a guideline rather than a formal rule of procedure) to implement the procedural change was in law open to him.

Issue 3: Is Guideline 7 unauthorized by paragraph 159(1)(*h*) because it is a fetter on RPD members' exercise of discretion in the conduct of hearings?

53 As already noted, Justice Blanchard and, in *Benitez,* Justice Mosley, reached different conclusions on whether Guideline 7 unlawfully fettered the discretion of members of the RPD in deciding the order of questioning at a refugee determination hearing. The records in the two applications were not identical. In particular, there was more evidence before Justice Mosley, comprising some 40 decisions and excerpts from transcripts of RPD hearings, that RPD members are willing to recognize exceptional cases in which it is appropriate to depart from the standard order of questioning.

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54 In the circumstances of these appeals, it is appropriate to consider all the evidence before both judges. From a practical point of view, it would be anomalous if this Court were to reach different conclusions about the validity of Guideline 7 in two cases set down to be heard one after the other. However, I do not attach much, if any, significance to the differences in the records. Justice Blanchard properly based his conclusion, for the most part, on what he saw as the mandatory language of Guideline 7.

(i) Rules, discretion and fettering

55 Effective decision making by administrative agencies often involves striking a balance between general rules and the exercise of *ad hoc* discretion or, to put it another way, between the benefits of certainty and consistency on the one hand, and of flexibility and fact-specific solutions on the other. Legislative instruments (including such non-legally binding "soft law" documents as policy statements, guidelines, manuals, and handbooks) can assist members of the public to predict how an agency is likely to exercise its statutory discretion and to arrange their affairs accordingly, and enable an agency to deal with a problem comprehensively and proactively, rather than incrementally and reactively on a case-by-case basis.

56 Through the use of "soft law" an agency can communicate prospectively its thinking on an issue to agency members and staff, as well as to the public at large and to the agency's "stakeholders" in particular. Because "soft law" instruments may be put in place relatively easily and adjusted in the light of day-to-day experience, they may be preferable to formal rules requiring external approval and, possibly, drafting appropriate for legislation. Indeed, an administrative agency does not require an express grant of statutory authority in order to issue guidelines and policies to structure the exercise of its discretion or the [page412] interpretation of its enabling legislation: *Ainsley Financial Corp. v. Ontario Securities Commission* (1994), 21 O.R. (3d) 104 (C.A.) at pages 108-109 (*Ainsley*).

57 Both academic commentators and the courts have emphasized the importance of these tools for good public administration and have explored their legal significance. See, for example, Hudson N. Janisch, "The Choice of Decision Making Method: Adjudication, Policies and Rule Making" in *Special Lectures of the Law Society of Upper Canada 1992, Administrative Law: Principles, Practice and Pluralism*, Scarborough: Carswell, 1992, page 259; David J. Mullan, *Administrative Law* (Toronto: Irwin Law, 2001), at pages 374-379; Craig, Paul P., *Administrative Law*, 5th ed. (London: Thomson, 2003), at pages 398-405, 536-540; *Capital Cities Communications Inc. et al. v. Canadian radio-Telivision Commn.*, [1978] 2 S.C.R. 141, at page 171; *Vidal v. Canada (Minister of Employment and Immigration)* (1991), 49 Admin. L.R. 118 (F.C.T.D.), at page 131; *Ainsley*, at pages 107-109.

58 Legal rules and discretion do not inhabit different universes, but are arrayed along a continuum. In our system of law and government, the exercise of even the broadest grant of statutory discretion which may adversely affect individuals is never absolute and beyond legal control: *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at page 140 (*per* Rand J.). Conversely, few, if any, legal rules admit of no element of discretion in their interpretation and application: *Baker*, at paragrah 54.

59 Although not legally binding on a decision maker in the sense that it may be an error of law to misinterpret or misapply them, guidelines may validly influence a decision maker's conduct. Indeed, in *Maple Lodge Farms Ltd. v. Government of Canada*, [1982] 2 S.C.R. 2, McIntyre J., writing for the Court, said (at page 6):

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> The fact that the Minister in his policy guidelines issued in the Notice to Importers employed the words: "If Canadian product is not offered at the market price, a permit will normally be issued; ..." does not fetter the exercise of that discretion. [Emphasis added.]

The line between law and guideline was further blurred by *Baker*, at paragraph 72, where, writing for a majority of the Court, L'Heureux-Dubé J. said that the fact that administrative action is contrary to a guideline "is of great help" in assessing whether it is unreasonable.

60 The use of guidelines, and other "soft law" techniques, to achieve an acceptable level of consistency in administrative decisions is particularly important for tribunals exercising discretion, whether on procedural, evidential or substantive issues, in the performance of adjudicative functions. This is especially true for large tribunals, such as the Board, which sit in panels; in the case of the RPD, as already noted, a panel typically comprises a single member.

61 It is fundamental to the idea of justice that adjudicators, whether in administrative tribunals or courts, strive to ensure that similar cases receive the same treatment. This point was made eloquently by Gonthier J. when writing for the majority in *IWA v. Consolidated-Bathurst Packaging Ltd.*, [1990] 1 S.C.R. 282, at page 327 (*Consolidated-Bathurst*):

> It is obvious that coherence in administrative decision making must be fostered. The outcome of disputes should not depend on the identity of the persons sitting on the panel for this result would be [TRANSLATION]"difficult to reconcile with the notion of equality before the law, which is one of the main corollaries of the rule of law, and perhaps also the most intelligible one". [Citation omitted.]

62 Nonetheless, while agencies may issue guidelines or policy statements to structure the exercise of statutory discretion in order to enhance consistency, administrative decision makers may not apply them as if they were [page414] law. Thus, a decision made solely by reference to the mandatory prescription of a guideline, despite a request to deviate from it in the light of the particular facts, may be set aside, on the ground that the decision maker's exercise of discretion was unlawfully fettered: see, for example, *Maple Lodge Farms*, at page 7. This level of compliance may only be achieved through the exercise of a statutory power to make "hard" law, through, for example, regulations or statutory rules made in accordance with statutorily prescribed procedure.

63 In addition, the validity of a rule or policy itself has sometimes been impugned independently of its application in the making of a particular decision. *Ainsley* is the best known example. That case concerned a challenge to the validity of a non-statutory policy statement issued by the Ontario Securities Commission setting out business practices which would satisfy the public interest in the marketing of penny stocks by certain securities dealers. The policy also stated that the Commission would not necessarily impose a sanction for non-compliance on a dealer under its "public interest" jurisdiction but would consider the particular circumstances of each case.

64 Writing for the Court in *Ainsley*, Doherty J.A. adopted [at page 110] the criteria formulated by the trial Judge for determining if the policy statement was "a mere guideline" or was "mandatory," namely, its language, the practical effect of non-compliance, and the expectations of the agency and its staff regarding its implementation. On the basis of these criteria, Doherty J.A. concluded that the policy statement was invalid. He emphasized, in particular, its minute detail, which "reads like a statute or regulation" (at page 111), and the threat of sanctions for non-compliance. He found this threat to be implicit in the Commission's pronouncement that the business practices it described complied with the public interest, and was evident in the attitude of enforcement staff ,who treated the policy as if it were a statute or regulation, breach of which was liable to trigger [page415] enforcement proceedings.

(ii) Guideline 7 and the fettering of discretion

(a) Is Guideline 7 delegated legislation?

65 An initial question is whether guidelines issued under IRPA, paragraph 159(1)(*h*) constitute delegated legislation, having the full force of law "hard law". If they do, Guideline 7 can no more be characterized as an unlawful fetter on members' exercise of discretion with respect to the order of questioning than could a rule of procedure to the same effect issued under IRPA, paragraph 161(1))

(*a*): *Bell Canada v. Canadian Employees Association*, [2003] 1 S.C.R. 884, at paragraph 35 (*Bell Canada*).

66 In my view, despite the express statutory authority of the Chairperson to issue guidelines, they do not have the same legal effects that statutory rules can have. In particular, guidelines cannot lay down a mandatory rule from which members have no meaningful degree of discretion to deviate, regardless of the facts of the particular case before them. The word "guideline" itself normally suggests some operating principle or general norm, which does not necessarily determine the result of every dispute.

67 However, the meaning of "guideline" in a statute may depend on context. For example, in *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at pages 33-37, La Forest J. upheld the validity of mandatory environmental assessment guidelines issued under section 6 of the *Department of the Environment Act,* R.S.C., 1985, c. E-10, which, he held, constituted delegated legislation and, as such, were legally binding.

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68 In my view, *Oldman River* is distinguishable from the case before us. Section 6 of the *Department of the Environment Act* provided that guidelines were to be issued by an "order" "*arrêté*" of the Minister and approved by the Cabinet. In contrast, only rules issued by the Chairperson require Cabinet approval, guidelines "*directives*" do not. It would make little sense for IRPA to have conferred powers on the Chairperson to issue two types of legislative instrument, guidelines and rules, specified that rules must have Cabinet approval, and yet given both the same legal effect.

69 Guidelines issued by the Human Rights Commission pursuant to subsection 27(2) [as am. by S.C. 1998, c. 9, s. 20] of the *Canadian Human Rights Act*, R.S.C., 1985, c. H-6, have also been treated as capable of having the full force of law, even though they are made by an independent administrative agency and are not subject to Cabinet approval: *Canada (Attorney General) v. Public Service Alliance of Canada*, [2000] 1 F.C. 146 (T.D.), at paragraphs 136-141; *Bell Canada*, at paragraphs 35-38.

70 In *Bell Canada*, LeBel J. held (at paragraph 37), "[a] functional and purposive approach to the nature" of the Commission's guidelines, that they were "akin to regulations." a conclusion supported by the use of the word "*ordonnance*" in the French text of subsection 27(2) of the *Canadian Human Rights Act*. In addition, subsection 27(3) [as am. by S.C. 1998, c. 9, s. 20] expressly provides that guidelines issued under subsection 27(2) are binding on the Commission and on the person or panel assigned to inquire into a complaint of discrimination referred by the Commission under subsection 49(2) [as am. *idem*, s. 27] of the Act.

71 In my opinion, the scheme of IRPA is different, particularly the inclusion of a potentially overlapping rule-making power and the absence of a provision that guidelines are binding on adjudicators. In addition, the [page417] word "*directives*" in the French text of paragraph 159(1)(*h*) suggests a less legally authoritative instrument than "*ordonnance*."

72 I conclude, therefore, that, even though issued under an express statutory grant of power, guidelines issued under IRPA, paragraph 159(1)(*h*) cannot have the same legally binding effect on members as statutory rules may.

(b) Is Guideline 7 an unlawful fetter on members' discretion?

73 Since guidelines issued by the Chairperson of the Board do not have the full force of law, the next question is whether, in its language and effect, Guideline 7 unduly fetters RPD members' discretion to determine for themselves, case-by-case, the order of questioning at refugee protection hearings. In my opinion, language is likely to be a more important factor than effect in determining whether Guideline 7 constitutes an unlawful fetter. It is inherently difficult to predict how decision makers will apply a guideline, especially in an agency, like the Board, with a large membership sitting in panels.

74 Consequently, since the language of Guideline 7 expressly permits members to depart from the standard order of questioning in exceptional circumstances, the Court should be slow to conclude that members will regard themselves as bound to follow the standard order, in the absence of clear evidence to the contrary, such as that members have routinely refused to consider whether the facts of particular cases require an exception to be made.

75 I turn first to language. The *Board's Policy on the Use of Chairperson's Guidelines*, issued in 2003 [Policy No. 2003-07], states that guidelines are not legally binding on members: section 6. The introduction [page418] to Guideline 7 states: "The guidelines apply to most cases heard by the RPD. However, in compelling or exceptional circumstances, the members will use their discretion not to apply some guidelines or to apply them less strictly."

76 The text of the provisions of Guideline 7 are of most immediate relevance to this appeal. Paragraph 19 states that it "will be" standard practice for the RPO to question the claimant first; this is less obligatory than "must" or some similarly mandatory language. The discretionary element of Guideline 7 is emphasized in paragraph 19, which provides that, while "the standard practice will be for the RPO to start questioning the claimant" (emphasis added), a member may vary the order [at paragraph 23] "in exceptional circumstances."

77 Claimants who believe that exceptional circumstances exist in their case must apply to the RPD, before the start of the hearing, for a change in the order of questioning. The examples, and they are only examples, of exceptional circumstances given in paragraph 23 suggest that only the most unusual cases will warrant a variation. However, the parameters of "exceptional circumstances" will no doubt be made more precise, and likely expanded incrementally, on a case-by-case basis.

78 I agree with Justice Blanchard's conclusion (at paragraph 119) that the language of Guideline 7 is more than "a recommended but optional process." However, as *Maple Lodge Farms* makes clear, the fact that a guideline is intended to establish how discretion will normally be exercised is not enough to make it an unlawful fetter, as long as it does not preclude the possibility that the decision maker may deviate from normal practice in the light of particular facts: see *Ha v. Canada (Minister of Citizenship and Immigration)*, [2004] 3 F.C.R. 195 (F.C.A.).

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79 To turn to the effect of Guideline 7, there was evidence that, when requested by counsel, members of the RPD had exercised their discretion and varied the standard order of questioning in cases which they regarded as exceptional. No such request was made on behalf of Mr. Thamotharem.

In any event, members must permit a claimant to be questioned first by her or his counsel when the duty of fairness so requires.

80 In at least one case, however, a member wrongly regarded himself as having no discretion to vary the standard order of questioning prescribed in Guideline 7. On July 3, 2005, this decision was set aside on consent on an application for judicial review, on the ground that the member had fettered the exercise of his discretion, and the matter remitted for re-determination by a different member of the RPD: *Baskaran v. Canada (Minister of Citizenship and Immigration)* (Court File No. IMM-7189-04). Nonetheless, the fact that some members may erroneously believe that Guideline 7 removes their discretion to depart from the standard practice in exceptional circumstances does not warrant invalidating the Guideline. In such cases, the appropriate remedy for an unsuccessful claimant is to seek judicial review to have the RPD's decision set aside.

81 There was also evidence from Professor Donald Galloway, an immigration and refugee law scholar, a consultant to the Board and a former Board member, that RPD members would feel constrained from departing from the standard order of questioning. However, he did not base his opinion on the actual conduct of members with respect to Guideline 7.

82 In short, those challenging the validity of Guideline 7 did not produce evidence establishing on a balance of probabilities that members rigidly apply the [page420] standard order of questioning without regard to its appropriateness in particular circumstances.

83 I recognize that members of the RPD must perform their adjudicative functions without improper influence from others, including the Chairperson and other members of the Board. However, the jurisprudence also recognizes that administrative agencies must be free to devise processes for ensuring an acceptable level of consistency and quality in their decisions, a particular challenge for large tribunals which, like the Board, sit in panels.

84 Most notably, the Supreme Court of Canada in *Consolidated-Bathurst* upheld the Ontario Labour Relations Board's practice of inviting members of panels who had heard but not yet decided cases to bring them to "full Board meetings, where the legal or policy issues that they raised could be discussed in the absence of the parties. This practice was held not to impinge improperly on members' adjudicative independence, or to breach the principle of procedural fairness that those who hear must also decide. Writing for the majority of the Court, Gonthier J. said (at page 340):

> The institutionalization of the consultation process adopted by the Board provides a framework within which the experience of the chairman, vice-chairmen and members of the Board can be shared to improve the overall quality of its decisions. Although respect for the judicial independence of Board members will impede total coherence in decision making, the Board through this consultation process seeks to avoid inadvertent contradictory results and to achieve the highest degree of coherence possible under these circumstances.
>
> The advantages of an institutionalized consultation process are obvious and I cannot agree with the proposition that this practice necessarily conflicts with the rules of natural justice. The rules of natural justice must have the flexibility required to take into account the institutional pressures faced by [page421] modern administrative tribunals as well as the risks inherent in such a practice.

85 However, the arrangements made for discussions within an agency with members who have heard a case must not be so coercive as to raise a reasonable apprehension that members' ability to decide cases free from improper constraints has been undermined: *Tremblay v. Quebec (Commission des affaires sociales)*, [1992] 1 S.C.R. 952.

86 Evidence that the Immigration and Refugee Board "monitors" members' deviations from the standard order of questioning does not, in my opinion, create the kind of coercive environment which would make Guideline 7 an improper fetter on members' exercise of their decision-making powers. On a voluntary basis, members complete, infrequently and inconsistently, a hearing information sheet asking them, among other things, to explain when and why they had not followed "standard practice" on the order of questioning. There was no evidence that any member had been threatened with a sanction for non-compliance. Given the Board's legitimate interest in promoting consistency, I do not find it at all sinister that the Board does not attempt to monitor the frequency of members' compliance with the "standard practice."

87 Nor is it an infringement of members' independence that they are expected to explain in their reasons why a case is exceptional and warrants a departure from the standard order of questioning. Such an expectation serves the interests of coherence and consistency in the Board's decision making in at least two ways. First, it helps to ensure that members do not arbitrarily ignore Guideline 7. Second, it is a way of developing criteria for determining if circumstances are "exceptional" for the purpose of paragraph 23 and of providing guidance to other members, and to the Bar, on the exercise of discretion to depart from the standard order of questioning in future cases.

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88 In my opinion, therefore, the evidence in the present case does not establish that a reasonable person would think that RPD members' independence was unduly constrained by Guideline 7, particularly in view of: the terms of the Guideline; the evidence of members' deviation from "standard practice"; and the need for the Board, the largest administrative agency in Canada, to attain an acceptable level of consistency at hearings, conducted mostly by single members.

89 Adjudicative "independence" is not an all or nothing thing, but is a question of degree. The independence of judges, for example, is balanced against public accountability, through the Canadian Judicial Council, for misconduct. The independence of members of administrative agencies must be balanced against the institutional interest of the agency in the quality and consistency of the decisions, from which there are normally only limited rights of access to the courts, rendered by individual members in the agency's name.

(iii) Is Guideline 7 invalid because it is a rule of procedure and should therefore have been issued under IRPA, paragraph 161(1)(*a*)?

90 On its face, the power granted by IRPA, paragraph 159(1)(*h*) to the Chairperson to issue guidelines in writing "to assist members in carrying out their duties" is broad enough to include a guideline issued in respect of the exercise of members' discretion in procedural, evidential or substantive matters. Members' "duties" include the conduct of hearings "as informally and quickly as the circumstances and the considerations of fairness and natural justice permit": IRPA, subsection 162 (2). In my view, structuring members' discretion over the order of questioning is within the subject-matter of the guidelines contemplated by section 159.

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91 In any event, the Chairperson did not need an express grant of statutory authority to issue guidelines to members. Paragraph 159(1)(*h*) puts the question beyond dispute, establishes a duty to consult before a guideline is issued, and, perhaps, enhances their legitimacy.

92 An express statutory power to issue guidelines was first conferred on the Chairperson of the Board in 1993, as a result of an amendment to the former *Immigration Act* [R.S.C., 1985, c. I-2] by Bill C-86 [*An Act to amend the Immigration Act and other Acts in consequence thereof*, S.C. 1992, c. 49]. Appearing before the Committee of the House examining the Bill, Mr. Gordon Fairweather, the then Chairperson of the Board welcomed this addition to the Board's powers (Canada, House of Commons, *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-86*, 3rd Sess., 34th Parl., July 30, 1992, at page 80.):

> I'm also pleased that the minister has responded to the need for new tools for managing the board itself. In the board's desire to ensure consistency of decision-making, we welcome the legislative provision allowing for guidelines.... The provision will reinforce my authority, after appropriate consultations, and the courts have been very specific about saying, no guidelines until you have consulted widely with the caring agencies, the immigration bar, and other non-governmental organizations. But the courts have given the green light for such provision provided we go through those consultations.
>
> This provision will reinforce my authority, or the chair's authority--that is a little less pompous--after appropriate consultations to direct members toward preferred positions and therefore foster consistency in decisions. [Emphasis added.]

93 In my view, the present appeal raises an important question about the relationship between the Chairperson's powers to issue guidelines and rules. In particular, are these grants of legal authority cumulative so that, for the most part, the scope of each is to be determined independently of the other? Or, is the [page424] Chairperson's power to issue guidelines implicitly limited by the power to make rules of procedure? If it is, then a change to the procedure of any Division of the Board may only be effected through a rule of procedure issued under paragraph 161(1)(*a*) which has been approved by Cabinet and subjected to Parliamentary scrutiny in accordance with subsection 161(2).

94 The argument in the present case is that Guideline 7 is a rule of procedure and, since it reforms the existing procedure of the RPD, should have been issued under paragraph 161(1)(*a*), received Cabinet approval and been laid before Parliament. The power of the Chairperson to issue guidelines may not be used to avoid the political accountability mechanisms applicable to statutory rules issued under subsection 161(1).

95 For this purpose, the fact that Guideline 7 permits RPD members to exercise their discretion in "exceptional circumstances" to deviate from "standard practice" in the order of questioning does not prevent it from being a rule of procedure: rules of procedure commonly confer discretion to be exercised in the light of particular facts.

96 An analogous line of reasoning is found in the Ontario Court of Appeal's decision in *Ainsley*, where it was said that the Ontario Securities Commission's policy statement prescribing business practices of penny stock dealers which would satisfy the statutory public interest standard was invalid, because it was in substance and effect "a mandatory provision having the effect of law" (at page 110). In my opinion, however, *Ainsley* should be applied to the present case with some caution.

97 First, when *Ainsley* was decided, the Commission had no express statutory power to issue guidelines and no statutorily recognized role in the regulation-making process. In contrast, the Chairperson of the Board has a [page425] broad statutory power to issue guidelines and, subject to Cabinet approval, to make rules respecting a broad range of topics, including procedure.

98 Admittedly, the Board's rules of procedure (as well, of course, as IRPA itself and regulations made under it by the Governor in Council) have a higher legal status than guidelines, in the sense that, if a guideline and a rule conflict, the rule prevails.

99 Second, the policy statement considered in *Ainsley* was directed at businesses regulated by the Commission and was designed to modify their practices by linking compliance with the policy to the Commission's prosecutorial power to institute enforcement proceedings, which could result in the loss of a licence by businesses not operating in "the public interest." Guideline 7, on the other hand, is directed at the practice of RPD members in the conduct of their proceedings. It does not impose *de facto* duties on members of the public or deprive them of an existing right. Guideline 7 lacks the kind of coercive threat, against either claimants or members, in the event of non-compliance, which was identified as important to the decision in *Ainsley*.

100 The Commission's promulgation of detailed industry standards, other than through enforcement proceedings against individuals, when it lacked any legislative power, raised rule of law concerns. In my opinion, the same cannot plausibly be said of the Chairperson's decision to introduce a standard order of questioning through the statutory power to issue guidelines, rather than his power to issue rules.

101 Third, while the Board can only issue formal statutory rules of procedure with Cabinet approval, tribunals often do not require Cabinet approval of their rules. In Ontario, for example, the procedural rules of [page426] tribunals to which the province's general code of administrative procedure applies are not subject to Cabinet approval: *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, subsection 25.1(1) [as am. by S.O. 1994, c. 27, s. 56]. Hence, it cannot be said to be a principle of our system of law and government that administrative tribunals' rules of procedure require political approval.

102 Fourth, while Guideline 7 changed the way in which the Board conducts most of its hearings, it represents, in my view, more of a filling in of detail in the procedural model established by IRPA and the *Refugee Protection Division Rules,* than "fundamental procedural change" or "sweeping procedural reform," to use the characterization in the memorandum of the intervener, the Canadian Council for Refugees.

103 For example, paragraph 16(*e*) includes the questioning of witnesses in the RPO's duties, but is silent on the precise point in the hearing when the questioning is to occur. Similarly, while rule 25 deals with the intervention of the Minister, it does not specify when the Minister will lead evidence and make submissions. Rule 38 permits a party to call witnesses, but does not say when they will testify.

104 Fifth, the differences in the legal characteristics of statutory rules of procedure and Guideline 7 should not be overstated. Rules of procedure commonly permit those to whom they are directed to depart from them in the interests of justice and efficiency. Thus, rule 69 of the *Refugee Protection Division Rules* permits a member to change a requirement of a rule or excuse a person from it, and to extend or shorten a time period. Failure to comply with a requirement of the Rules does not make a proceeding invalid: rule 70.

[page427]

105 Finally, as I have already indicated, the Chairperson's power to issue guidelines extends, on its face, to matters of procedure. Its exercise is not made expressly subject to paragraph 161(1)(*a*), although a guideline issued under paragraph 159(1)(*h*) which is inconsistent with a formal rule of procedure issued under paragraph 161(1)(*a*) will be invalid.

106 On the basis of the foregoing analysis, I conclude that, on procedural issues, the Chairperson's guideline-issuing and rule-making powers overlap. That the subject of a guideline could have been enacted as a rule of procedure issued under paragraph 161(1)(*a*) will not normally invalidate it, provided that it does not unlawfully fetter members' exercise of their adjudicative discretion, which, for reasons already given, I have concluded that it does not.

107 In my opinion, the Chairperson may choose through which legislative instrument to introduce a change to the procedures of any of the three Divisions of the Board. Parliament should not be taken to have implicitly imposed a rigidity on the administrative scheme by preventing the Chairperson from issuing a guideline to introduce procedural change or clarification.

108 I do not say that the Chairperson's discretion to choose between a guideline or a rule is beyond judicial review. However, it was not unreasonable for the Chairperson to choose to implement the standard order of questioning through the more flexible legislative instrument, the guideline, rather than through a formal rule of procedure.

109 First, Guideline 7 is not a comprehensive code of procedure nor, when considered in the context of the refugee determination process as a whole, is it inconsistent with the existing procedural model for RPD hearings. Second, the procedural innovation of standard order questioning may well require modification in the light of cumulated experience. Fine-tuning and [page428] adjustments of this kind are more readily accomplished through a guideline than a formal rule. Parliament should not be taken to have intended the Chairperson to obtain Cabinet approval for such changes.

E. CONCLUSIONS

110 For these reasons, I would allow the Minister's appeal, dismiss Mr. Thamotharem's cross-appeal, set aside the order of the Federal Court, and dismiss the application for judicial review. I would answer the first two certified questions as follows:

1. Does the implementation of paragraphs 19 and 23 of the Chairperson's Guideline 7 violate principles of natural justice by unduly interfering with claimants' right to be heard? No
2. Has the implementation of Guideline 7 led to fettering of Board Members' discretion? No.

111 Since I would dismiss the application for judicial review, the third question does not arise and need not be answered.

DÉCARY J.A.:-- I agree.

* * *

The following are the reasons for judgment rendered in English by

112 SHARLOW J.A.:-- I agree with my colleague Justice Evans that this appeal should be allowed, but I reach that conclusion by a different route.

113 As Justice Evans explains, IRPA gives the Chairperson two separate powers. One is the power in paragraph 159(1)(*h*) to issue guidelines in writing to [page429] assist members in carrying out their duties. The other is the power in paragraph 161(1)(*a*) to make rules respecting the activities, practice and procedure of the Board, subject to the approval of the Governor in Council. Both powers are to be exercised in consultation with the Deputy Chairpersons and the Director General of the Immigration Division. In my view, these two powers are different in substantive and functional terms and are not interchangeable at the will of the Chairperson.

114 The subject of Guideline 7 is the order of proceeding in refugee hearings. That is a matter respecting the activities, practice and procedure of the Board, analogous to the subject-matter of the procedural rules of courts. In my view, the imposition of a standard practice for refugee determination hearings should have been the subject of a rule of procedure, not a guideline.

115 I make no comment on the wisdom of the Chairperson's determination that the standard practice in refugee hearings, barring exceptional circumstances, should be for the RPO or the member to start questioning the refugee claimant. That is a determination that the Chairperson was entitled to make. However, to put that determination into practice while respecting the limits of the statutory authority of the Chairperson, the Chairperson should have drafted a rule to that effect, in consultation with the Deputy Chairpersons and the Director General of the Immigration Division, and sought the approval of the Governor in Council.

116 Justice Evans notes that some commentators have suggested that the implementation of a rule under paragraph 161(1)(*a*) is more onerous in administrative and bureaucratic terms than the implementation of a guideline under paragraph 159(1)(*h*). That appears to me to be an unduly negative characterization of the legislated requirement for the approval of the Governor in Council, Parliament's chosen mechanism of oversight for the Chairperson's rule-making power under paragraph 161(1)(*a*). It is also belied by the facts of this case, which indicates that the development of Guideline [page430] 7 took approximately four years. I doubt that a rule with the same content would necessarily have taken longer than that.

117 The more important question in this case is whether the Chairperson's erroneous decision to implement a guideline rather than a rule to establish a standard practice for refugee hearings provides a sufficient basis in itself for setting aside a negative refugee determination made by a member who requires a refugee claimant to submit to questions from the RPO or the member before presenting his or her own case.

118 I agree with Justice Evans that the standard procedure outlined in Guideline 7 is not in itself procedurally unfair and that Guideline 7, properly understood, does not unlawfully fetter the

discretion of members. In my view, despite Guideline 7, each member continues to have the unfettered discretion to adopt any order of procedure required by the exigencies of each claim to which the member is assigned.

119 It may be the case that a particular member may conclude incorrectly that Guideline 7 deprives the member of the discretion to permit a refugee claimant to present his or her case before submitting to questioning from the RPO or the member. If so, it is arguable that a negative refugee determination by that member is subject to being set aside if (1) the member refused the request of a refugee claimant to proceed first and required the refugee claimant to submit to questioning by the RPO or the member before presenting his or her case, and (2) it is established that, but for Guideline 7, the member would have permitted the refugee claimant to present his or her case first. In the case of Mr. Thamotharem, those conditions have not been met.

120 For these reasons, I would dispose of this appeal as proposed by Justice Evans, and I would answer the certified questions as he proposes.

TAB 10

JUDICIAL REVIEW OF ADMINISTRATIVE ACTION IN CANADA

BY

DONALD J.M. BROWN, Q.C.

AND

THE HONOURABLE JOHN M. EVANS
of the Federal Court of Appeal
Professor Emeritus, Osgoode Hall Law School
York University

WITH THE ASSISTANCE OF

CHRISTINE E. DEACON

of the Ontario Bar

VOLUME 3

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CHAPTER 15

REVIEW OF NON-ADJUDICATIVE ADMINISTRATIVE ACTION

15:1000 OVERVIEW

15:1100 The Several types of Non-Adjudicative Administrative Action

It is commonly accepted that administrative decision-making falls along a continuum, with adjudication at one end and legislative action at the other.[1] *Non*-adjudicative administrative action is distinct from adjudication,[2] and may be divided into two general categories: delegated legislation, including municipal bylaws, on the one hand, and other administrative action such as licensing, inspecting, expropriating, or giving consent or approval to certain conduct on the other. These general categories of non-adjudicative administrative action have two common characteristics. First, the administrative decision-maker does not normally make findings of fact or declarations of law and record them in the form of reasons for decision. Second, the grant of authority both to enact administrative legislation[3] and to make non-adjudicative decisions is usually cast in terms of a broad discretionary power.

15:1200 The Three Facets of Review: *Vires*, Process, and the Merits

There are three distinct facets to the review of non-adjudicative administrative action. In the first place, as with any administrative

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[1] ***Lake v. Canada (Minister of Justice)***, 2008 SCC 23 at para. 22, ref'g to ***Idziak v. Canada (Minister of Justice)***, [1992] 3 S.C.R. 631 at p. 659.

[2] See topic 14:1100, *ante*. **And see *Nanaimo (City) v. Rascal Trucking Ltd.***, [2000] 1 S.C.R. 342 at para. 28.

[3] E.g. *Valley Rubber Resources Inc. v. British Columbia (Minister of Environment, Lands and Parks* (2001), 90 B.C.L.R. (3d) 165 (BCSC), rev'd on other grounds (2002), 219 D.L.R. (4th) 1 (BCCA); *Farm Credit Corp. v. Pipe* (1993), 16 O.R. (3d) 49 (Ont. C.A.). **But see** *Thibodeau-Labée v. Québec (Régie des permits d'alcool)* (1991), 2 Admin. L.R. (2d) 69 (Que. C.A.) ("may" construed to be mandatory). As to the meaning of "may" and "shall" generally, **see** topic 9:8420, *ante*.

TAB 11

Canadian Transportation Agency
Office des transports du Canada

Annotated Dispute Adjudication Rules

Making Transportation Efficient and Accessible for All

available in multiple formats

Canada

Contents

Disclaimer: This document is not the official version of the *Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)* (Dispute Adjudication Rules). This document is a reference tool only. It is not a substitute for legal advice and has no official sanction.

About the Annotated Dispute Adjudication Rules

This is a companion document to the Dispute Adjudication Rules.

The Agency's Dispute Adjudication Rules set out the process that is followed during adjudication. They also provide information on how to make a variety of procedural requests to the Agency on matters that commonly arise in dispute proceedings, including requests to keep information confidential.

The annotation provides explanations and clarifications of the Rules which will be useful to those unfamiliar with the Agency and its processes. It is organized by section number to make accessing the information easier, but it also contains hyperlinks that allow easy navigation to related sections and further explanatory text that the reader will find useful.

Interpretation

1. Definitions

The following definitions apply in these Rules.

"Act" means the Canada Transportation Act.

"affidavit" means a written statement confirmed by oath or a solemn declaration.

Annotation: Definitions (Affidavit)

An affidavit is a written statement that contains important facts that a person wants the Agency to know about. It is sworn by the person making the affidavit in the presence of someone authorized to administer an oath, such as a commissioner for taking oaths, a notary public, a notary (province of Quebec) or a lawyer. The person swearing the affidavit should have direct knowledge of the events or facts set out in the statement. "To swear" means you promise that the information contained in the affidavit is true. Note that there are potential legal sanctions to swearing an affidavit if you know that the content of the affidavit is not true, accurate or complete.

The affidavit is used by the Agency to verify the truthfulness, including both the accuracy and completeness, of some or all of the information in a document.

For more information, refer to section 15: Verification by Affidavit or Witnessed Statement

"applicant" means a person that files an application with the Agency.

Annotation: Definitions (Applicant)

An applicant is a person who comes before the Agency seeking a decision on a particular matter within the jurisdiction of the Agency.

The applicant files an application with the Agency which sets out the information that the applicant wants the Agency to take into account when making a decision. Schedule 5 of the Dispute Adjudication Rules sets out the information that must be included in an application such as the issues that the applicant wants the Agency to consider, the facts, the relief/remedies being asked for) and arguments in support of the application.

An applicant includes a complainant under section 52 or 94 of the *Canada Marine Act* or section 13 of the *Shipping Conferences Exemption Act, 1987*; an appellant under subsection 42(1) of the *Civil Air Navigation Services Commercialization Act*; or an objector under subsection 34(2) of the *Pilotage Act*.

"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.

Annotation: Definitions (Application)

The term "application" is defined broadly to mean a document that commences any proceeding before the Agency, including both dispute proceedings and uncontested economic regulatory proceedings. However, with the exception of sections 3 and 4, the Dispute Adjudication Rules apply only to dispute proceedings.

For example, an application for a dispute proceeding includes:

- A complaint under section 52 or 94 of the *Canada Marine Act*;
- A complaint under section 13 of the Shipping Conferences Exemption Act, 1987;
- An appeal under subsection 42(1) of the Civil Air Navigation Services Commercialization Act;
- An application under section 3 of the *Railway Relocation and Crossing Act*;
- A reference under sections 16 and 26 of the *Railway Safety Act*; or
- A notice of objection under subsection 34(2) of the *Pilotage Act*.

This means that the application must contain the information that the respondent will need to know about the case being made against them and that the Agency must have to make its decision on the matter. In some cases, in addition to the information contained in the application, additional information will be gathered through the asking of questions or the filing of further documents.

In some instances, the Agency has provided further guidance on what is required to be filed to complete various specific types of dispute proceeding applications, including:

- Accessible Transportation Complaints: A Resource Tool for Persons with Disabilities
- Guidelines on the Resolution of Complaints Over Railway Noise and Vibration

For more information, refer to section 18: Application

"business day" means a day that the Agency is ordinarily open for business.

Annotation: Definitions (Business day)

The Agency's headquarters is located in the province of Quebec, where the statutory holidays recognized by the federal public service are:

- New Year's Day (January 1)
- Good Friday
- Easter Monday
- Victoria Day Monday
- La Fête nationale du Québec (June 24)
- Canada Day (July 1)
- Labour Day Monday
- Thanksgiving Monday
- Remembrance Day (November 11)
- Christmas Day (December 25)
- Boxing Day (December 26)

If a holiday with a specified date falls on a Saturday or Sunday, the statutory holiday will fall on the next business day.

For example, if a person has five business days from Friday, May 16 to file a document, it will be required to be filed on Monday, May 26 because Monday, May 19 would be a statutory holiday for Victoria Day and would not be considered a business day.

"dispute proceeding" means any contested matter that is commenced by application to the Agency.

Annotation: Definitions (Dispute proceeding)

A dispute proceeding involves two or more parties and is started when an applicant files an application against a respondent or respondents and the application is accepted as complete.

Triage

After an application is filed, Agency staff will review it to make sure that it is complete as the application must be complete before the dispute proceeding can formally begin. Applicants will be notified as to whether their application is complete or incomplete. In some cases, Agency staff may suggest other dispute resolution options, like facilitation or mediation, as an alternative to adjudication.

For more information on complete and incomplete applications, refer to section 18: Application

There are two stages in any dispute proceeding before the Agency:

Pleadings
Pleadings start when notification is sent to the parties that the application is accepted as complete. This is the evidence and information gathering stage of the dispute proceeding where the parties are given the opportunity to provide the Agency with information in support of their positions on the issues raised in the application and to file information that might be requested by the Agency or the other parties.

Deliberations
Deliberations start once the pleadings process has ended and pleadings are closed. The Agency Panel assigned to the case (composed of one or more Agency Members) deliberates on the evidence and information. This stage ends with the issuance of a decision and/or order.

At any stage before a decision or order is issued, an applicant may make a request to withdraw an application (for example, if the matter is resolved between the parties).

For more information, refer to section 36: Request to Withdraw Application

Agency Decision or Order

The Agency's decision or order will contain a summary of the application and other information provided during the pleadings, the Agency's decision, including reasons for that decision, and any corrective action it deemed necessary.

Compliance

When the Agency has made a decision and has ordered a party to do something, like put into effect a particular policy that will address an issue raised in the application, the Agency ensures compliance with its order. For example, Agency staff will follow up with the transportation service provider to ensure that the policy is implemented and meets any conditions imposed by the Agency in the final decision.

If Agency staff is unable to get the party to comply, a new Agency Panel may be assigned to handle this issue directly with the respondent. These issues are typically resolved between the respondent and the Agency. In exceptional circumstances, the Agency may decide to consult with the applicant.

Alternatively, some Agency decisions are subject to administrative monetary penalties (amps), meaning that a fine can be imposed against a respondent that fails to comply with certain types of Agency decisions. To determine if an order is subject to amps, check the *Canadian Transportation Agency Designated Provision Regulations* (DPR).

If a respondent fails to comply with an Agency order that is identified as subject to amps in the DPR, the matter may be referred to the Agency's Enforcement Division for further action. If a Designated Enforcement Officer finds that the respondent has failed to comply with an Agency order that is subject to amps, a Notice of Violation can be issued against the respondent setting an AMP payable by the respondent in an amount of up to $5,000 for individuals and $25,000 for corporate respondents.

In addition, Agency decisions can be enforced against respondents by making the decision an order of the Federal Court or another superior court and then bringing quasi-criminal proceedings in that court to have the respondent found to be in contempt of Court.

"document" includes any information that is recorded in any form.

Annotation: Definitions (Document)

A document includes any pleading (a document that contains arguments that advance a position) as well as any information or evidence filed or otherwise placed on the record during proceedings before the Agency. This includes any correspondence, affidavit, witnessed statement, memorandum, medical note/report, book, plan, map, drawing, diagram, pictorial or graphic work, photograph, film, video or sound recording, machine readable record and any other recorded material, and any copy of it.

More specific examples of a document include contracts, flight tickets and tariff pages.

"intervener" means a person whose request to intervene filed under section 29 has been granted.

"party" means an applicant, a respondent or a person that is named by the Agency as a party.

Annotation: Definitions (Party)

Applicants and respondents are always parties to a dispute proceeding before the Agency. This means that, subject to any confidentiality determinations, they are sent all documents that are placed on the Agency's record.

Interested persons who file position statements in a dispute proceeding with the Agency under section 23 are not parties to the dispute proceeding and will not be provided with the documents that are placed on the Agency's record. They will, however, be provided with a copy of the Agency's final decision in the dispute proceeding.

Persons who have been granted intervener status by the Agency under section 29 are also not automatically a party to the dispute proceeding (unless so named by the Agency) and are only provided with the documents that they require in order to participate as an intervener to the extent determined by the Agency. They will, however, be provided with a copy of the Agency's final decision in the dispute proceeding.

If a person believes that they have a "substantial and direct interest" in a proceeding and wish to be named as a party to the proceeding, they should request authority from the Agency to intervene under section 29. In their request to intervene, the person should clearly identify that they wish to be named a party to the proceeding and set out the participation rights that they are seeking.

For more information, refer to section 29: Request to Intervene.

"person" includes a partnership and an unincorporated association.

"proceeding" means any matter that is commenced by application to the Agency, whether contested or not.

Annotation: Definitions (Proceeding)

The Agency performs two key functions within the federal transportation system:

- Informally and through formal adjudication (where the Agency reviews an application and makes a decision), the Agency resolves a range of commercial and consumer transportation-related disputes, including accessibility issues for persons with disabilities. It operates like a court when adjudicating disputes.
- As an economic regulator, the Agency makes decisions and issues authorities, licences and permits to transportation service providers under federal jurisdiction.

These two key functions mean that the Agency will have some proceedings that only involve one party (for example an air carrier applying for a licence) and others that are

dispute proceedings that involve two or more parties, such as a dispute between a railway company and a group of homeowners about noise coming from a rail yard. ().

With the exception of sections 3 and 4, the Dispute Adjudication Rules apply only to dispute proceedings.

Some types of economic regulatory proceedings may have specific procedural guidelines or resource tools that explain the Agency's processes and how to prepare a particular type of application. For example:

Guidelines:

- Coasting Trade Licence Applications
- Extra-bilateral Air Service Applications to the Canadian Transportation Agency
- Net Salvage Value Determination Applications

Resource tools:

- Apportionment of Costs of Grade Separations
- Crossings

These guidelines generally cover the following topics:

- The structure of the proceeding (e.g. what documents need to be filed, deadlines for filing documents).
- The content of submissions made by the parties. For example, the Agency has tests that it applies for certain types of issues. The guidelines provide information on the tests and what type of information might be filed by a party when making submissions on the test. The guidelines may also set out factors or criteria that the Agency looks at when making a decision on a matter.

Parties should always refer to the relevant publication for more information.

For certain economic regulatory determinations, the guidelines may state that some or all of the provisions in the Dispute Adjudication Rules are applicable. The Agency may also decide that it is appropriate to apply any or all of the provisions of the Dispute Adjudication Rules in a particular case.

"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.

Annotation: Definitions (Respondent)

In a dispute proceeding there are at least two parties: the applicant and the respondent.

The applicant files an application with the Agency against a respondent (or respondents). In the application, the applicant sets out details of the dispute with the

respondent and the issues that it wants the Agency to address. The respondent then has an opportunity to file an answer to the issues raised in the application.

In exceptional circumstances, the Agency may name other respondents to the application where their involvement in the travel situation is not apparent to the applicant.

It is important, for the efficiency of case processing and to be fair to the applicant, that answers be complete when they are filed with the Agency. This means that the answer should address the issues raised by the applicant in their application and that positions should be substantiated.

Annotation: Additional definitions

Adverse in interest

A person is adverse in interest to you if they hold a position that is contrary to or different from that of yourself.

Jurisdiction

The Agency only has the authority to make a decision on a matter that falls within the mandate given to it by the *Canada Transportation Act*. The Agency cannot make decisions on matters that do not fall within its mandate/jurisdiction.

Economic regulatory proceedings

As an economic regulator, the Agency makes decisions and issues authorities, licences and permits to federal transportation carriers. For example, an applicant may be granted a licence if it meets the legislative requirements. These matters are largely uncontested.

Pleadings process

The period of time within a dispute proceeding when parties may file their pleadings (such as answers, replies and requests) with the Agency.

Panel

The Chair of the Agency may assign one or more Members to hear a case. The assigned Member(s) are referred to as the Panel. One Member, the Panel Chair, may be assigned at the outset to make decisions on procedure and the processing of the case.

Procedural matters

A step that is taken in a dispute proceeding in order to assist in the processing of the case. An example is whether expert opinions should be filed in a dispute proceeding and the time lines for such a filing.

Record

All the documents and information gathered during the dispute proceeding that have been accepted by the Agency and which will be considered by it in making its decision. The Agency's record can consist of a public and a confidential record.

Relief/remedies

Generally refers to the solution that a person is seeking to address the issues raised in an application. Examples include covering expenses incurred as a result of the issue or changing a transportation carrier's policy concerning the issue.

Representative

A person who acts for another person. For the purposes of these Rules a representative is anyone who is not a lawyer.

Stay

When the Agency stays a proceeding it means that the proceeding is stopped for a period of time and may be restarted at a later date.

Witnesses

A witness is a person who knows something about an issue in a dispute proceeding and is asked to answer questions under oath at an oral hearing or by means of an affidavit.

Application

2. Dispute Proceedings

Subject to sections 3 and 4, these Rules apply to dispute proceedings other than a matter that is the subject of mediation.

Annotation: Dispute proceedings

General

The Agency performs two key functions within the federal transportation system:

- Informally and through formal adjudication (where the Agency reviews an application and makes a decision), the Agency resolves a range of commercial and consumer transportation-related disputes, including accessibility issues for persons with disabilities. It operates like a court when adjudicating disputes.
- As an economic regulator, the Agency makes decisions and issues authorities, licences and permits to transportation service providers under federal jurisdiction.

Sections 3 and 4 of the Rules apply to all matters that come before the Agency

Section 3 (the one-Member quorum provision) and section 4 (principle of proportionality) apply to all proceedings before the Agency, which include both:

- Dispute proceedings (e.g. a noise complaint where a group of homeowners or a person acting on behalf of another person or a group of persons files a complaint against a railway company concerning noise produced by railway operations in a rail yard adjacent to their homes); and
- Economic regulatory proceedings (e.g. an application by an air carrier for a licence to operate an air service between Canada and another country).

The Rules do not apply to mediation and arbitration

The Dispute Adjudication Rules do **not** apply to dispute proceedings or any part of a dispute proceeding that is referred for mediation or submitted to arbitration. In each of these cases, there are specific guidelines or resource tools that will apply to that proceeding:

- Resolution of Disputes through Mediation
- Final Offer Arbitration
- Selecting an Arbitrator
- Rules of Procedure for Rail Level of Service Arbitration, Annotation and Resource Tool (in development)

Rules apply to contested matters

As stated above, except for mediations and arbitrations, the Dispute Adjudication Rules apply to all contested dispute proceedings before the Agency.

In the vast majority of cases that come before the Agency, the parties present their positions in writing without having to appear before the Agency at an oral hearing and the Agency makes its decision based on the documents on the file.

Alternatively, the Agency may decide to organize an oral hearing as a means to gather and test the information it needs to make its decision. In an oral hearing, the parties appear before the Agency and make submissions in person. If the proceeding is to be dealt with by way of an oral hearing, then at the time that an oral hearing is called, a pre-hearing conference will typically be held to work out the details of the procedures to be used in that case. These procedures will then be contained in a Procedural Direction specific to that case. The Rules will continue to apply to disputes that proceed by way of oral hearing subject to the Agency establishing customized procedures in any Procedural Direction that may be issued within the proceeding. The Agency has established guidelines in relation to one type of oral hearing, the 35-day adjudication process under section 169.43 of the CTA, and is working to establish more general guidelines in relation to all oral hearings.

All Proceedings

3. Quorum

In all proceedings, one member constitutes a quorum.

Annotation: Quorum

Although only one Member is required to make a decision, the Chair of the Agency may appoint more than one Member to hear a case. The Member or Members assigned to a case are referred to as the Agency Panel.

Even in situations where two or more Members may be assigned to deliberate and issue the final decision, one Member may be assigned at the outset to provide decisions on the processing of the case and to make procedural decisions. This Member is referred to as the Panel Chair.

Note that even when Agency staff communicates decisions of the Agency to the parties, they are doing so on behalf of and with the instructions of the Agency Panel assigned to the case.

4. Principle of Proportionality

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.

Annotation: Principle of proportionality

The principle of proportionality guides the Agency's decisions on matters that arise in proceedings. The objective is to achieve just, expeditious and resource effective proceedings which sometimes means that a request made by a person must be denied where the anticipated outcome does not justify the means.

For example, Party A asks that Party B produce what would amount to 100 pages of documents. Party B refuses to produce the requested documents and the matter comes before the Agency to make a decision as to whether the documents should be produced by Party B. The Agency may decide that the documents are relevant in that they relate to the matter before the Agency but that the value of the documents to the proceeding is minimal. In that case, having Party B produce 100 pages of documents would not be proportionate to the benefit that the Agency would gain by having those 100 pages on the record.

Dispute Proceedings: General

5. Interpretation of Rules and Agency's Initiative

(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.

(2) Anything that may be done on request under these Rules may also be done by the Agency of its own initiative.

Annotation: Interpretation of Rules

This means that when the Agency conducts dispute proceedings, it will strive to achieve efficiencies so that cases are resolved in a timely way, there is minimal cost or other imposition on the parties and the Agency, all while ensuring that the process is fair to the parties. This often involves a balancing of rights and interests. For example, the Agency deals with a wide range of disputes, including both highly complex cases worth millions of dollars to the parties and less complex cases involving, for example, loss of personal goods by air carriers worth less than $500. Different, proportionate approaches are required for these different types of cases to ensure efficient and effective use of resources for dispute resolution.

Annotation: Agency's initiative

The Agency may do anything under these Dispute Adjudication Rules that a person may do by making a request.

6. Dispensing with Compliance and Varying Rule

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.

Annotation: Dispensing with compliance and varying rule

The Agency has the power to vary the Dispute Adjudication Rules to help ensure fair decision-making on the issues in a dispute proceeding. Each case before the Agency is different and sometimes a strict application of the Dispute Adjudication Rules is not the best way to deal with a case. For example, the Agency may vary a rule that applies to a party in order to extend it to a person.

To make a request to the Agency under this section, refer to section 27 of the Dispute Adjudication Rules, which sets out what needs to be filed to make a general request to the Agency.

For more information, refer to section 27: Requests – General Request

7. Filing and Agency's public record

(1) Any document filed under these Rules must be filed with the Secretary of the Agency.

(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.

Annotation: Filing of documents and Agency's Public Record

Documents must be sent to the Secretary of the Canadian Transportation Agency.

By courier or hand delivery
Secretary
Canadian Transportation Agency
15 Eddy Street
17th Floor, Mailroom
Gatineau, Quebec
J8X 4B3

By fax
819-953-5253

By e-mail
secretariat@otc-cta.gc.ca

Due to the timeframes involved and the widespread availability of technology, filings by ordinary mail will no longer be accepted by the Agency unless, in exceptional circumstances, a person has requested and received approval from the Agency to use ordinary mail. In those instances, longer timelines will have to be established for the exchange of pleadings and the processing of the case will be delayed.

The Agency's record

The Agency's record is made up of all the documents and information gathered during the dispute proceeding that have been accepted by the Agency. This record will be considered by the Agency when making its decision.

The Agency's record can consist of two parts: the public record and the confidential record.

Public record

Generally, all documents filed with and accepted by the Agency during the dispute proceeding, including the names of parties and witnesses, form part of the public record.

Parties filing documents with the Agency should not assume that a document that they believe is confidential will be kept confidential by the Agency. A request to have a document kept confidential may be made pursuant to section 31 of the Dispute Adjudication Rules.

Documents on the public record will be:

- Provided to the other parties involved;
- Considered by the Agency in making its decision; and
- Made available to members of the public, upon request, with limited exceptions.

Decisions and applications are posted on the Agency's website and include the names of the parties involved, as well as witnesses. Medical conditions which relate to an issue raised in the application will also be disclosed. The decision will also be distributed by e-mail to anyone who has subscribed through the Agency's website to receive Agency decisions.

Confidential record

The confidential record contains all the documents from the dispute proceeding that the Agency has determined to be confidential.

If there are no confidential documents, then there is only a public record.

No person can refuse to file a document with the Agency or provide it to a party because they believe that it is confidential. If a person is of the view that a document is confidential, they must file it with the Agency along with a request for confidentiality under section 31 of the Dispute Adjudication Rules. This will trigger a process where the Agency will determine whether the document is confidential. During this process, the document is not placed on the public record.

Decisions that contain confidential information that is essential to understanding the Agency's reasons will be treated as confidential as well and will not be placed on the Agency's website. However, a public version of the decision will be issued and placed on the website.

8. Copy to parties

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.

Annotation: Copy to parties

With three exceptions all documents to be filed with the Agency must be sent to the other parties (or their representatives) on the same day that they are filed with the Agency. Failure to comply with this requirement, which is the responsibility of the person filing the document, will result in the document not being considered to be filed with the Agency. If a dispute arises about whether a document was sent to the other parties, the sender may be required to provide proof that the document was sent. As such, the sender should keep proof that the document was sent.

The most efficient means of sending documents to the Agency and to the other parties is by e-mail as by sending the document electronically to the Agency and copying the other parties in the same transmission, it is easy to confirm that this requirement has been met. It is up to the person filing documents to determine the most appropriate means of transmission, particularly in situations where confidential information or documents are being filed with the Agency, where concerns may exist about ensuring the safe transmission of confidential information.

Exceptions to sending a copy to other parties

There are three exceptions to the requirement that all documents filed with the Agency must also be sent to the other parties.

1. A person who makes a request for confidentiality under section 31.

In these circumstances the confidential version of the document must be filed with the Agency, but does not need to be sent to the parties. A public version of the document must also be filed with the Agency and this document must be sent to the other parties pending the Agency's decision on confidentiality.

For more information, refer to section 31: Request for Confidentiality

2. The filing of applications under section 18.

The application will be sent to the other parties by the Agency once it has been accepted as complete.

3. The filing of position statements under section 23.

A position statement will be sent to the other parties by the Agency once it has been filed with the Agency.

For more information refer to:

- Section 18: Application
- Section 23: Position Statement

9. Means of Transmission

Documents may be filed with the Agency and copies may be sent to the other parties by courier, personal delivery, email, facsimile or other electronic means specified by the Agency.

Annotation: Means of transmission

Electronic means of filing

The Agency encourages people to use e-mail to file documents with the Agency and provide them to the other parties. As instantaneous communication, it is the most efficient way to file and exchange information and it will also show that the document has been provided to the other parties on the same day as it has been filed with the Agency, which is a requirement of section 8. In some circumstances, the Agency may require the parties to use e-mail, for example, in the case of expedited proceedings under section 25

In exceptional circumstances, where a person does not have access to an electronic means of transmission, a request can be made to the Agency under section 27 of these Dispute Adjudication Rules to use ordinary mail to file documents with the Agency and provide them to other parties. This means that longer timelines will have to be established for the exchange of pleadings and the processing of the case will be delayed.

In some cases, such as the filing of affidavits or witnessed statements, although the person may file the document electronically, the Agency will require the person to follow up by providing an original copy of the document to the Agency by ordinary mail.

It is up to the person filing documents to determine the most appropriate means of transmission, particularly in situations where confidential information or documents are being filed with the Agency.

10. Facsimile—Cover Page

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.

11. Electronic Transmission

(1) A document that is sent by email, facsimile or other electronic means 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.

(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.

Annotation: Date of filing and receipt (Electronic transmission and courier or personal delivery)

Filing deadlines

Documents sent by e-mail, facsimile or other electronic means must be both filed with the Agency and sent to the other parties before 5:00 p.m. Gatineau local time to be considered as having been sent that day. Documents sent by courier, or that are delivered in person, must be both filed with the Agency and received by the other parties before 5:00 p.m. Gatineau local time to be considered as having been filed that day.

For example, if a party e-mailed a document to the Agency at 4:30 p.m on the date of the filing deadline, but didn't copy the other parties with the e-mail and waited until 5:30 p.m. before e-mailing it to the other parties, the document will not be considered as received by the parties that day and will not be placed on the Agency's record unless a request is made under section 30 for an extension of the filing deadline.

When a person is required to file a document within a number of business days under the Dispute Adjudication Rules or by order of the Agency, the time limit for filing is counted from the day after the person is notified of the requirement and includes the last day.

Most time limits in a dispute proceeding will have the specific deadline date for filing set out in a procedural decision or letter(e.g. June 10, 2013). This date will generally be based on the time limits set out in the Dispute Adjudication Rules.

Statutory holidays are not considered business days.

Example of counting business days

An applicant has been given five business days to file a reply to an answer.

If the answer was filed on Monday, day one would be Tuesday. The reply must be filed by the end of day five, which is 5:00 p.m. Gatineau local time the following Monday. If Monday is a statutory holiday, the reply would be due by 5:00 p.m. Gatineau local time on Tuesday, the next business day.

Filing of documents with forms

Parties are encouraged to use the Agency's forms, especially when filing documents where specific information is required as set out in the Schedules to the Dispute Adjudication Rules. The forms link to a secure file transfer system to allow for attachments to be filed with the Agency and copied to the parties.

12. Filing after Time Limit

(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.

(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.

(3) A document that is filed in contravention of subsection (1) or (2) will not be placed on the Agency's record.

Annotation: Consequences of missing a deadline

Filing deadlines that are set by the Agency, as set out in the Dispute Adjudication Rules or by decision or order of the Agency, must be met.

The Agency will not accept a document that has been filed late unless a request is made under section 30 of the Dispute Adjudication Rules for an extension of time and the Agency has approved the request.

In addition, a person must not file a document which is not required to be filed under these Dispute Adjudication Rules or by the Agency. For example, a person cannot file a response to a reply without Agency approval. Where a request to file a document whose filing is not provided for is filed after the close of pleadings, it does not need to be accompanied by a request to extend the time limit under section 30.

Without these approvals, the document will not form part of the record and will not be considered by the Agency when making its final decision.

For more information, refer to:

- Section 30 Request to Extend or Shorten Time Limit
- Section 34: Request to File Document Whose Filing is not Otherwise Provided For in Rules

13. Language of Documents

(1) Every document filed with the Agency must be in either English or French.

(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.

(3) The translation is treated as the original for the purposes of the dispute proceeding.

Annotation: Language of documents

Documents to be filed in one of the official languages

A person filing a document is entitled to submit the document in the official language of their choice (English or French).

If documents are submitted by persons in different official languages, the Agency is not required to translate the documents. Where translation is required by a person to understand the document, that person will be responsible for obtaining and paying for the translation.

In such situations, the person does not have to file the translation with the Agency or any other party.

Procedure to be followed for documents that are not in one of the official languages

A person submitting a document in a language other than English or French is responsible for ensuring that the document is accompanied by:

- A translation to English or French; and
- A properly completed and sworn affidavit from the translator (Schedule 1).

Note: the translated document and affidavit must be filed with the Agency and provided to the other parties at the same time as the document filed in the other language. The English or French translation will be considered the official document on the record.

Any document in a language other than English or French that is not accompanied by a translation and affidavit will not form part of the record and therefore will not be considered by the Agency when making a decision. The party is free to submit a proper document; however, if the time limit for the filing of the document has passed, the party

will also have to obtain approval to do so by filing a request to extend the time line for the filing of the document.

Note that all Agency decisions are posted on the website in English and French.

Also, in exceptional cases and on request, the Agency may accept a witnessed statement in place of an affidavit, for example, when the person lives in a remote community with no access to a lawyer or other person who can swear the affidavit

Translator

Unless specified otherwise by the Agency, the person who translated the document does not need to be a certified translator.

Agency form: Form 1: –Translation – Required Information

14. Amended Documents

(1) If a person proposes to make a substantive amendment to a previously filed document, they must file a request under subsection 33(1).

(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.

Annotation: Filing of amended document

There are two types of amendments or changes that can be made to a document: substantive and non-substantive.

Substantive amendments: Any substantive amendment to a document needs to be approved by the Agency.

The person must file a new copy of the document which clearly identifies the amendment being made by:

- Underlining any new text and striking out (or drawing a line through) any deleted text; and
- Adding "AMENDED" at the top right hand corner of the first page of the document.

In addition, the person must make a request to file the amended document.

For more information and instructions on how to make a request for a substantive amendment, refer to section 33: Request to Amend Document.

Where appropriate, the Agency may provide parties adverse in interest with an opportunity to respond to the amended document. The Agency will establish the process to be followed and the time limits to be met in a procedural direction.

Non-substantive amendments: A request to the Agency is not required to make a minor amendment to a document.

Some examples of non-substantive amendments that can be made without the approval of the Agency are:

- Correction in spelling of names and places; and
- Dates (if they have no substantive implications).

The person must file a new copy of the document which clearly identifies the amendment being made by:

- Underlining any new text and striking out (or drawing a line through) any deleted text; and
- Adding "AMENDED" at the top right hand corner of the first page of the document.

The other parties must be provided with a copy of the amended document on the same day that it is filed with the Agency.

Where a person submits a non-substantive amendment, but the Agency considers it to be a substantive amendment, the person will be notified of the requirement to follow the procedure for substantive amendments in subsection 33(1) of the Dispute Adjudication Rules.

15. Verification by Affidavit or by Witnessed Statement

(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.

(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.

(3) The Agency may strike the document or the part of the document in question from the Agency's record if the person fails to file the verification.

Annotation: Verification by affidavit or by witnessed statement

The Agency may require an affidavit or a witnessed statement to be filed if evidence is contested or if the accounts or positions of the parties conflict.

Affidavit

An affidavit is a written statement that contains important facts that a person wants the Agency to know about. It is sworn by the person making the affidavit in the presence of someone authorized to administer an oath, such as a commissioner for taking oaths, a notary public, a notary (province of Quebec) or a lawyer. The person swearing the affidavit should have direct knowledge of the events or facts set out in the statement. "To swear" means that you promise that the information contained in the affidavit is true. Note that there are potential legal sanctions to swearing an affidavit if you know that the affidavit is not true, accurate or complete.

The affidavit is used by the Agency to verify the truthfulness, including both the accuracy and completeness, of some or all of the information in a document.

Agency form: Form 2 – Verification by Affidavit

Note that if a party adverse in interest makes a request and the request is approved by the Agency, they may be permitted to conduct oral cross-examinations on an affidavit in order to test the evidence contained in the affidavit. A party may make such a request under section 27 of the Dispute Adjudication Rules.

For more information, refer to section 27 – General Request

Witnessed Statements

Witnessed statements are written and signed statements that the person signing the statement believes to be true. Unlike affidavits, they are not signed and sworn in the presence of an authorized individual, like a lawyer, but are signed in the presence of a witness who also signs the document.

Agency form: Form 3 – Verification by Witnessed Statement

Timelines for the filing of an affidavit or a witnessed statement

The affidavit or witnessed statement must be filed within five business days after the date of receipt of the notice by the Agency requiring the filing of verification by affidavit or witnessed statement. The Agency will provide notice as to which means of verification is to be filed.

If it would be impossible or impracticable to obtain an affidavit, a person may submit a witnessed statement along with a request under section 27 that the Agency accept the witnessed statement instead of an affidavit. The request must include:

- A clear and concise description of the reasons supporting the request, including why it would be impossible or impracticable to obtain an affidavit;

- All information or documents that are relevant in explaining or supporting the request; and
- Confirmation that copies of the witnessed statement and the request have been provided to the other parties in the proceeding

For more information refer to: Section 27 Requests – General Request

Consequences of not providing the required verification

If the Agency has required verification of a document or part of a document, but the verification by affidavit or a witnessed statement is not provided, the document will either:

1. Form part of the record, but will be given limited or no weight by the Agency when making its final decision; or
2. Not form part of the record and not be considered by the Agency when making its final decision (that is the document will be struck from the record).

16. Representative Not a Member of the Bar

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.

Annotation: Authorization for representative

Persons involved in a dispute proceeding are not required to be represented by a lawyer, although a lawyer can be consulted, if desired. They can also choose to be represented by another person, including a family member or friend.

If a person would like to have a representative (other than a lawyer or an officer or employee of the company, for example in the case of a corporate respondent) act on their behalf, written authorization must be filed with the Agency. The authorization only needs to be filed once during the dispute proceeding. This authorization is not necessary if the person is represented by a lawyer.

Power of attorney: persons acting under a power of attorney must file a copy of the power of attorney in place of the written authorization.

Parents/Legal Guardians acting on behalf of minor children: parents/legal guardians do not require authorization to act on behalf of their minor children.

Agency form: Form 4 – Authorization of Representative

17. Change of Contact Information

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.

Dispute Proceedings: Pleadings

18. Application

(1) Any application filed with the Agency must include the information referred to in Schedule 5.

(2) If the application is complete, the parties are notified in writing that the application has been accepted.

(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.

(4) If the applicant fails to provide the missing information within the time limit, the file is closed.

(5) An applicant whose file is closed may file a new application in respect of the same matter.

Annotation: Application

Who is an applicant?

The applicant is the person who files an application with the Agency.

Complete applications

A dispute proceeding does not formally start until the application is accepted as complete. Although an applicant might fill out Form 5 or file its application in another format this does not necessarily mean that the application is complete.

Parties will be notified in an opening pleadings letter when the application has been accepted as complete and the date on which the pleadings process has begun.

Contents of an application

An application must include the information set out in Schedule 5. It should clearly and concisely:

- Set out the relevant facts;
- Identify the issues;

- Identify the relevant provisions of the legislation or regulations that are administered by the Agency and that relate to the application;
- Set out the arguments in support of the application;
- Set out any relief/remedies sought (e.g. The solution to the issues that were raised); and
- Set out any other information and arguments that help to explain or support the position set out in the application.

The Agency encourages the use of Form 5 to file an application. The Form provides guidance on the information that is required for the application to be considered complete. The application should be as detailed as possible and include all relevant information. This will make the dispute proceeding more efficient.

Agency form: Form 5 – Application

In addition to the general application form, Form 5, the Agency has separate application forms for two specific types of dispute proceeding. These forms are accessible through the Agency's complaint wizard:

- Accessible transportation – Form 5a
- Rail noise and vibration – Form 5b

Guidance for completing specific types of applications

In some instances, the Agency has provided further guidance, in guidelines and resource tools, on what is required to be filed to complete various specific types of dispute proceeding applications, including:

- Accessible Transportation Complaints: A Resource Tool for Persons with Disabilities
- Guidelines on the Resolution of Complaints Over Railway Noise and Vibration

Time limit for filing an application

Applicants should first try to resolve their issue with the other party before initiating a dispute resolution process with the Agency. In some instances, the Agency cannot accept an application until this has been done, for example, in rail noise and vibration disputes.

If this fails, an application should be filed with the Agency as soon as possible, in order to:

- Minimize the challenge of substantiating allegations or obtaining records after significant time has passed;

- Ensure the availability of any witnesses;
- Maximize the possibility that all potential relief/remedies will be available by, for example, meeting statutory deadlines for obtaining relief/remedies from the Agency (e.g. The solution to the issues that were raised). As an example, while there is no statutory time limit for the filing of an application under the Canada Transportation Act, in the case of air disputes, the Montreal Convention and the Carriage by Air Act provide a statutory time limit of two years to obtain relief for certain air disputes.

Filing an application

The filing of an application is done by instantaneous means of communication unless it is made by personal delivery or courier. This assists in the timely processing of applications.

Note that ordinary mail cannot be used as a means of filing unless there are exceptional circumstances where electronic, personal delivery or courier as a means of communication are not available or practicable. In these situations, a request must be made to the Agency under section 27 and approval must be granted by the Agency to use ordinary mail. This will require a change in the filing deadlines.

For more information, refer to:

- Section 27: Requests - General Request
- Section 9: Means of Transmission

Application goes on the public record

An application filed with the Agency is placed on the public record unless:

1. A claim for confidentiality is made at the same time that it is filed; and
2. The Agency determines that the application, or parts of it, are confidential.

For more information, refer to:

- Section 7: Filing
- Section 31: Request for Confidentiality

Having a representative represent you

If a person filing an application would like to have a representative (other than a lawyer) act on their behalf, a written authorization must be filed with the Agency at the same time that the application is filed. An authorization is not required if the person is represented by a lawyer.

Note that where the representative did not witness the incident described in the application, the applicant will have to sign the account of the events in the application.

For more information, refer to section 16: Representative Not a Member of the Bar

Agency form: Form 4 – Authorization of Representative

Pleadings process

The party (or parties) against whom the application has been filed (also known as the respondent[s]) will have the opportunity to file an answer. The applicant will then have the opportunity to file a reply to the respondent(s)' answer.

For more information, refer to:

- Section 19: Answer
- Section 20: Reply

Incomplete application

A dispute proceeding does not formally start until the application is accepted as complete. If the application is not complete, the person attempting to file the application will be notified and will have 20 business days to provide the missing information.

If the missing information is not provided within 20 business days, the file will be closed.

Consequences of the Agency closing a file

Even if a file has been closed due to an incomplete application, the application can be filed again at a later date.

- However, the application should be filed with the Agency as soon as possible, in order to:
- Minimize the challenge of backing up allegations or getting records after significant time has passed;
- Ensure the availability of any witnesses;
- Maximize the possibility that all potential relief/remedies will be available by, for example, meeting statutory deadlines for obtaining relief/remedies from the Agency. As an example, while there is no statutory time limit for the filing of an application under the Canada Transportation Act, in the case of air disputes, the Montreal Convention and the Carriage by Air Act provide a statutory time limit of two years to obtain relief for certain air disputes.

19. Answer

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.

Annotation: Answer

Who is a respondent?

In a dispute proceeding there are at least two parties: the applicant and the respondent.

The applicant files an application with the Agency against a respondent. In the application, the applicant sets out the details of the dispute with the respondent and the issues that the applicant wishes the Agency to address. In some cases, there may be a number of respondents involved.

Although the applicant must clearly identify the respondent in the application, in exceptional circumstances, the Agency may identify the respondent or other respondents where it is not evident to the applicant who is responsible for the situation that is the subject of their application.

The purpose of filing an answer

The purpose of filing an answer is to respond to the arguments and issues raised in the application.

If the respondent does not file an answer, the Agency will make its decision based on the information provided by the applicant. This could result in the Agency making a decision in favour of the applicant and might result in the Agency finding that the respondent must provide relief/remedies to the applicant. In some instances, the relief may relate to expenses that were incurred by the applicant. For example, in the situation of a flight delay where the Agency finds in favour of the applicant, the respondent may be directed to reimburse the applicant for related expenses, such as for lunch and a hotel room, which had been paid for by the applicant.

Contents of an answer

The answer must include the information set out in Schedule 6 and should clearly and concisely:

- Indicate which parts of the application the respondent agrees with or disagrees with; and
- Set out the arguments in support of the respondent's position.

Any documents that support the position set out in the answer should be filed with the Agency by the respondent and provided to the other parties on the same day. A person filing an answer may either use form 6 or another document.

Agency form: Form 6 – Answer to Application

Answer goes on the public record

An answer filed with the Agency is placed on the public record unless:

1. A claim for confidentiality is made at the same time that it is filed; and
2. The Agency determines that the answer, or parts of it, are confidential.

For more information, refer to:

- Section 7: Filing
- Section 31: Request for Confidentiality

Time limit for filing an answer

The answer must be filed within 15 business days after the respondent receives notice that the application has been accepted as complete.

There are exceptions to this time limit. In particular, if the parties receive notice from the Agency that an expedited process will be used, then the respondent will have five business days to file an answer.

For more information, refer to:

- Section 25: Expedited Process
- Section 28: Request for Expedited Process

The Agency has the power to extend time limits where a party has good reason for not being able to meet a time limit. In this situation, a party must make a request under section 30 for an extension of the time limit for filing an answer.

For more information, refer to section 30: Request to Extend or Shorten Time Limit

Having a representative represent you

If a person filing an answer would like to have a representative (other than a lawyer or an officer or employee of the company in the case of a corporate respondent) act on their behalf, a written authorization must be filed with the Agency.

For more information, refer to section 16: Representative Not a Member of the Bar

Agency form: Form 4 – Authorization of Representative

20. Reply

(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.

(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.

Annotation: Reply to the answer

Once the respondent has filed an answer to the application, the applicant is then given an opportunity to reply to the answer.

Contents of a reply to the answer

The reply must include the information set out in Schedule 7.

An applicant filing a reply may either use Form 7 or another document and the other parties must be provided with a copy of the reply on the same day as it is filed with the Agency.

A reply can only address issues raised in the answer. It must not repeat arguments already made in the application, or raise new issues, arguments or evidence not related to the answer.

A reply that raises new issues, arguments or evidence that were not addressed in the answer may not be struck in its entirety from the Agency's record. The Agency may strike the new material from the reply on its own initiative. Should the person filing the reply take the position that the Agency requires the new material to make an informed decision, it may make a request to the Agency under section 34 of the Dispute Adjudication Rules to have the new material accepted by the Agency. The Agency has discretion to accept new material that is relevant and necessary to its consideration of the case and, where appropriate, may give parties adverse in interest an opportunity to respond to the new material. For more information, refer to section 34: Request to File Document Whose Filing is Not Otherwise Provided For in Rules

Agency form: Form 7 – Reply to Answer

Reply to the answer goes on the public record

A reply to an answer filed with the Agency is placed on the public record unless:

1. A claim for confidentiality is made at the same time that it is filed; and
2. The Agency determines that the answer, or parts of it, are confidential.

For more information, refer to:

- Section 7: Filing
- Section 31: Request for Confidentiality

Time limit for filing the reply to the answer

The reply to an answer must be filed within five business days after the applicant receives the answer.

There are exceptions to this time limit. In particular, if the parties receive notice from the Agency that an expedited process will be used, then the applicant has three business days to file a reply to an answer.

For more information, refer to:

- Section 25: Expedited Process
- Section 28: Request for Expedited Process

The Agency has the power to extend time limits where a party has good reason for not being able to meet a time limit. In this situation, a party must make a request under section 30 for an extension of the time limit for filing an answer.

For more information, refer to: Section 30: Request to Extend or Shorten Time Limit

21. Intervention

(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.

(2) An intervener's participation is limited to the participation rights granted by the Agency.

Annotation: Intervention

Section 29 sets out how a person applies to become an intervener in a dispute proceeding while section 21 sets out the process to be followed *after* the Agency has accepted a person as an intervener.

For more information on how to become an intervener, refer to section 29: Request to Intervene

Who is an intervener?

An intervener is a person with a "substantial and direct interest" in a dispute proceeding before the Agency. A person must make a request to the Agency and be accepted as an intervener before they can participate as an intervener in a dispute proceeding.

An intervener is not a party to the dispute proceeding unless they are named as a party by the Agency. However, interveners may be required to respond to questions or information requests from the Agency or from any party to the proceeding that is adverse in interest to them.

Extent of participation in the dispute proceeding

The Agency will determine the extent of an intervener's participation in the proceeding, including limitations on the issues that can be addressed in the intervention, and will

inform the intervener and the parties. This decision is based on the participation rights requested by the person and an assessment of what would be useful and necessary to the Agency's consideration of the issues in dispute.

The Agency may require that an intervener file information or documents, respond to questions from the Agency or respond to questions or document requests from a party that is adverse in interest.

Content of an intervention

An intervention must include the information set out in Schedule 8.

Agency form: Form 8 – Intervention

Time limit for filing an intervention

An intervention must be filed within five business days of the intervener being notified by the Agency that their request to intervene has been accepted. Note that the Agency can specify a shorter time limit. A person filing an intervention may either use Form 8 or another document and the other parties must be provided with a copy of the intervention on the same day that it is filed with the Agency.

Failure to meet this deadline means that the Agency will proceed with the dispute proceeding without the intervener's position being taken into account unless a request to extend the time limit for filing the intervention is filed and is accepted by the Agency.

For more information, refer to section 30: Request to Extend or Shorten Time Limit

Intervention goes on the public record

All interventions filed with the Agency are placed on the public record unless:

1. A claim for confidentiality is made at the same time that it is filed; and
2. The Agency determines that the intervention, or parts of it, are confidential.

For more information, refer to:

- Section 7: Filing
- Section 31: Request for Confidentiality

22. Response to Intervention

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.

Annotation: Response to Intervention

Who can file a response to an intervention

You have the option of filing a response to an intervention if you are:

- An applicant or a respondent; and
- Adverse in interest to the intervener

Content of a response to an intervention

The response to the intervention must include the information set out in Schedule 9.

The response can only address the issues raised in the intervention.

An applicant or a respondent filing a response may either use Form 9 or another document and the other parties must be provided with a copy of the response on the same day that it is filed with the Agency.

Agency form: Form 9 – Response to Intervention

Time limit for filing a response to an intervention

A response must be filed within five business days after the party adverse in interest receives the intervention. Note that the Agency can specify a shorter time limit.

Response to an intervention goes on the public record

All responses to interventions filed with the Agency are placed on the public record unless:

1. A claim for confidentiality is made at the same time that it is filed; and
2. The Agency determines that the response to the intervention, or parts of it, are confidential.

For more information, refer to:

- Section 7: Filing
- Section 31: Request for Confidentiality

23. Position Statement

(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.

(2) A person that files a position statement has no participation rights and is not entitled to receive any notice in the dispute proceeding.

Annotation: Position statement

A person may become aware of a dispute proceeding that is before the Agency that they have an interest in and would like their views to be considered in the Agency's decision-making process. However, they might not want to apply to become an intervener or their interest might not be sufficient to permit them to participate as an intervener.

For more information, refer to:

- Section 21: Intervention
- Section 29: Request to Intervene

Position statements are automatically accepted

There is no requirement to demonstrate a "substantial and direct interest" in the dispute proceeding before filing a position statement, unlike a request to intervene. An interest in the dispute proceeding is sufficient to file a position statement.

The Agency will automatically accept a position statement and will consider it in its decision- making process, unless it has no relevance to the dispute proceeding.

Contents of the position statement

The position statement must include the information set out in Schedule 10. A person filing a position statement may either use Form 10 or another document to set out their interest in the dispute proceeding.

It is important to clearly set out whether the position statement is in support of or in opposition to the application and to provide a clear and concise description of your interest. You should also include any documents that are relevant in support of your position.

Agency form: Form 10 – Position Statement

Extent of participation in the dispute proceeding

Filing a position statement allows a person to have their views placed on the Agency's record without having to actively participate in the dispute proceeding (unless required to do so by the Agency). However, the Agency may require that a person who files a position statement file information or documents, respond to questions from the Agency or respond to questions or document requests from a party that is adverse in interest.

After a person files a position statement, their participation ends as they are not a party to the dispute proceeding. This means that they will not:

- Be copied on any documents filed;

- Receive updates on the proceeding; or
- Be provided with the opportunity to comment on subsequent correspondence.

A person who files a position statement will, however, receive a copy of the Agency's final decision in the matter.

Time limit for filing of a position statement

A position statement must be filed before the close of pleadings.

Section 26 of the Dispute Adjudication Rules sets out when the pleadings in a proceeding are closed. Parties will be notified once pleadings have closed. In addition, this information will be reflected in the status of cases on the Agency's website.

For more information, refer to

- Section 26: Close of Pleadings
- Appendix A: Agency Contact Information

Position statement goes on the public record

All position statements filed with the Agency are placed on the public record unless:

1. A claim for confidentiality is made at the same time that it is filed; and
2. The Agency determines that the position statement, or parts of it, are confidential.

Although parties do not normally respond to position statements any party that believes that it should respond to a position statement may make a request to file a response to a position statement under section 34.

For more information, refer to:

- Section 7: Filing
- Section 34: Request to File Document Whose Filing is Not Otherwise Provided For in Rules
- Section 31: Request for Confidentiality

24. Written Questions and Production of Documents

(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.

(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.

(3) If a party wishes to object to a question or to producing a document, that party 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.

Annotation: Asking questions or requesting documents of another party

Limitations on asking questions and requesting documents

To help respond to an application, answer, intervention or request, a party that is adverse in interest to another party can ask that party to respond to questions or produce documents. This request is made by sending a notice to the other party. A party may also request approval under section 27 to ask questions or request document production from persons who are not parties to the proceeding (for example, persons who file position statements and interveners who are not granted full party status in the proceeding by the Agency). If the Agency approves such a request, this rule applies to the person in the same way as it would to a party.

The notice to respond to questions or produce documents allows a party to test evidence or submissions made by another party adverse in interest to them, or to obtain further information in relation to the dispute.

Questions and requests for documents must be relevant and designed to clarify matters so that the party can clearly and accurately state its position in the matter that is before the Agency. There must be a link between the answers and documents requested and the matter in dispute.

A notice to produce documents must be for existing documents that the other party possesses or has access to or control of. The document must be referred to or relied on

in a submission to the Agency, or related to a matter in the dispute. A party cannot request that a new document be created.

Note that if a party adverse in interest makes a request before the close of pleadings and the request is approved by the Agency, they may be permitted to conduct oral cross-examinations on an affidavit to test the evidence contained in the affidavit. A party may make such a request under section 27 of the Dispute Adjudication Rules.

For more information, refer to section 27 – General Request

Content of a notice to respond to written questions or produce documents

The notice must include the information set out in Schedule 11.

A party filing a notice may either use form 11 or another document and the other parties must be provided with a copy of the notice on the same day as it is filed with the Agency.

Agency form: Form 11 – Written Questions or Request for Documents

Time limit for the notice for asking questions or requesting documents

Questions: any time before the close of pleadings.

Production of documents: within five business days of the party becoming aware of the document or before the close of pleadings, whichever is earlier.

If you need help determining whether pleadings are closed, please refer to the list of current cases before the Agency.

For more information, refer to:

- Section 26: Close of Pleadings
- Appendix A: Agency Contact Information

Annotation: Response to a notice to respond to questions or produce documents

Time for responding to a notice

A party has five business days to respond after receiving a copy of the notice.

Responding to the notice

A party that has received a notice to respond to questions or produce documents must:

1. Provide a complete response to each question and/or produce copies of documents requested; and/or

2. Object to responding to any question or producing any document on the basis, among other matters, that it is not relevant to the issue before the Agency or that the information is not available.

Any questions that the party is responding to or any documents produced must be accompanied by the information contained in Schedule 12.

A party filing a response to the notice may either use Form 12 or another document and the other parties must be provided with a copy of the response to the notice on the same day as it is filed with the Agency.

Agency form: Form 12 – Response to Written Questions or Request for Documents

If a party objects to responding to any questions or producing any of the requested documents, it must provide the information set out in subsection 24(3). It is very important that the reasons for the objection be clearly set out. For example, if a party is of the view that the requested documents or questions asked are not relevant to the matter, then the reasons supporting this position must be stated.

Annotation: Party satisfied or not satisfied with the response

If the party asking questions or requesting documents is satisfied with the response, then this part of the dispute proceeding concludes. The information that was gathered goes on the public record or the confidential record if a claim for confidentiality is made by the party filing the documents and the Agency determines that the information is confidential. However, the party asking questions or requesting documents may not be satisfied that the response is complete or agree with the objections raised by the other parties. They then must make a request under subsection 32(1) for the Agency to require the other party to respond. .

Responses and documents go on the public record

Any information or documents gathered under section 24 of the Rules are placed on the public record unless:

1. A claim for confidentiality is made at the same time that they are filed or gathered; and
2. The Agency determines that the response, or parts of it, are confidential.

For more information, refer to:

- Section 7: Filing
- Section 31: Request for Confidentiality

Annotation: Documents and information required by the Agency

Although this provision only provides for the parties to ask questions and request documents from other parties, the Agency also has the power to require parties and other persons involved in a dispute proceeding to answer questions and provide further documents.

Agency gathering of additional information/documents

In addition to any documents filed, the Agency may require additional information from the parties and other persons (such as interveners) to assist in its decision making.

The Agency may gather additional information/documents in two ways:

1. By directing a person to produce information/documents and/or posing specific questions; or
2. By the Agency or staff performing a site inspection to collect information and data.

Documents and information required by the Agency go on the public record

All information/documents gathered by the Agency are placed on the public record unless:

1. A claim for confidentiality is made at the same time that they are filed or gathered; and
2. The Agency determines that the information/documents, or parts of them, are confidential.

For more information, refer to:

- Section 7: Filing
- Section 31: Request for Confidentiality

Documents filed with the Agency are provided to the parties in the dispute proceeding

Documents must be provided to the other parties on the same day that they are filed with the Agency, unless a request for confidentiality is made under section 31.

With respect to confidential information, if the Agency determines that the information is confidential, the Agency may limit the distribution of the information, permit a person to only make the documents available for review by other parties under limited circumstances, such as at a specified location or during certain hours, and require any person who is to receive access to the information to sign a confidentiality undertaking.

For more information, refer to section 31: Request for Confidentiality

Consequences of not providing documents or complying with the information gathering process

If a person does not comply with the process established by the Agency to gather more documents/information, the Agency may stay the dispute proceeding until the person complies.

If a dispute proceeding is stayed, a matter will not progress until the Agency determines that the process can continue. While the proceeding is stayed, the Agency will not accept or consider any documents. This will delay the issuance of the decision.

For more information, refer to section 41: Stay of Proceeding, Order or Decision

25. Expedited Process

(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.

(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.**

(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 responding 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.**

Annotation: Expedited Process

The expedited process can apply to:

- An answer under section 19 and a reply under section 20; or
- A request made under these Dispute Adjudication Rules

The expedited process has shorter time limits for filing documents in a dispute proceeding.

The Agency may on its own initiative apply an expedited process or a party can make a request for an expedited process. The expedited process is used if it is clearly demonstrated that following the time limits set out in the Dispute Adjudication Rules would cause a party financial or other prejudice. For example, a decision by the Agency is needed as soon as possible because a shipper has filed a level of service complaint against a railway company where perishable cargo is at risk.

Section 28 sets out how a party files a request for an expedited process.

Section 25 sets out the time limits for filing an answer and a reply and a request made under these Dispute Adjudication Rules in an expedited process, once the Agency has decided that such a process is appropriate.

For more information, refer to section 28: Request for Expedited Process

Time limit for an expedited process

The time limits depend upon whether they apply to a respondent's answer and the applicant's reply, or a request under these Dispute Adjudication Rules.

Answer/Reply: the answer must be filed within five business days and the reply must be filed in three business days.

A request made under these Dispute Adjudication Rules: a response to a request must be filed within two business days and a reply must be filed within one business day.

For information about the time limits for the close of pleadings in an expedited pleadings process, refer to section 26: Close of Pleadings

If you need help determining whether pleadings are closed, please refer to the list of current cases before the Agency.

26. Close of Pleadings

(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.

(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.

Annotation: Close of pleadings

The importance of knowing when pleadings are closed

It is important to know when pleadings are closed. The Agency will not accept documents filed after the close of pleadings unless a request is made under sections 30 or 34 and the Agency has approved the request. Without this approval, the document will not form part of the record and it will not be considered by the Agency when making its final decision.

Parties are responsible for making any requests before the close of pleadings. In particular, requests where information will be placed on the record (e.g. questions between parties) must be made before the close of pleadings.

Expedited process: pleadings will close earlier than they would in a regular dispute proceeding.

If you need help determining whether pleadings are closed, please refer to the list of current cases before the Agency.

For more information, refer to:

- Section 30: Request to Extend or Shorten Time Limit
- Section 34: Request to File Document Whose Filing is Not Otherwise Provided for in Rules
- Appendix A: Agency Contact Information

Dispute Proceedings: Requests

Annotation: Requests

In any dispute proceeding, procedural issues can arise that need to be decided by the Agency in the course of the proceeding. Sections 27 to 36 of the Dispute Adjudication Rules deal with the process by which people can bring these procedural issues forward for decision. The request mechanism replaces what used to be known as "motions".

Depending on the section, parties and in some instances persons can make a request to have a procedural issue determined by the Agency. Agency decisions on requests are sometimes referred to as "interlocutory decisions" meaning that they are a

procedural decision that is made during a proceeding before the final substantive decision is made on the merits of the application.

The Agency will render a decision or order on each request. The decision or order will contain a summary of the request as well as the Agency's conclusions. Where the request is contested, the Agency will provide reasons for its decision.

27. General Request

(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.

(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.

(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.

(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.

Annotation: General requests

When to use section 27

If a person wants the Agency to address a procedural matter that is not covered in the specific requests found in sections 28 to 36, they must make a request under the general request provision, section 27, and obtain the Agency's approval.

The Dispute Adjudication Rules set out the process to be followed for specific types of procedural requests:

- Section 28 – Request for Expedited Process
- Section 29 – Request to Intervene
- Section 30 – Request to Extend or Shorten Time Limit
- Section 31 – Request for Confidentiality
- Section 32 – Request to Require Party to Provide Complete Response
- Section 33 – Request to Amend Document

- Section 34 – Request to File Document Whose Filing is not Otherwise Provided For in Rules
- Section 35 – Request to Withdraw Document
- Section 36 – Request to Withdraw Application

Content of a request

It is the responsibility of the person making the request to demonstrate to the satisfaction of the Agency that the request should be granted.

The person must provide details as to why the request should be granted by the Agency. It is not sufficient to merely make a request.

The request must include the information set out in Schedule 13. A person filing a request may either use form 13 or another document and the other parties must be provided with a copy of the request on the same day that it is filed with the Agency.

Agency form: Form 13 – Request

Time limit for filing a request under section 27

A request must be filed as soon as possible after the issue arises and before the close of pleadings.

If the need to file a request arises after pleadings close, the request should be accompanied by a request under section 30 for an extension of time. For more information, refer to:

- Section 26: Close of Pleadings
- Section 30: Request to Extend or Shorten Time Limit

If you need help determining whether pleadings are closed, please refer to the list of current cases before the Agency.

Annotation: Responding to a request

Contents of a response to a request

Any party to the proceeding can file a detailed response to the request with the Agency and the other parties.

For example, a party may choose to respond if it may be affected by the request. A party may be affected by a request if the request:

- Would require the party to do something; or
- Has an impact on the party, for example, it might delay the proceedings. The party must clearly indicate whether they support or oppose the request. If

opposed, the party must state why it does not want the Agency to grant the request, including the impact this would have on it or on the proceeding.

The response must include the information set out in Schedule 14. A party filing a response may either use Form 14 or another document and the other parties must be provided with a copy of the response to the request on the same day that it is filed with the Agency.

Agency form: Form 14 – Response to Request

Time limit for filing of a response to a request

A response to a request must be filed within five business days after the party receives the request.

Annotation: Replying to a response to a request

Contents of a reply to a response to a request

Once a party has responded to a request, the person who filed the request can file a written reply.

The purpose of the reply is to respond only to the issues raised in the response to the request. It must not raise new issues, arguments or evidence and should not repeat what is already in the request.

A reply that raises new issues, arguments or evidence that were not addressed in the answer may not be struck in its entirety from the Agency's record. The Agency may strike the new material from the reply on its own initiative. Should the person filing the reply take the position that the Agency requires the new material to make an informed decision, it may make a request to the Agency under section 34 of the Dispute Adjudication Rules to have the new material accepted by the Agency. The Agency has discretion to accept new material that is relevant and necessary to its consideration of the case and, where appropriate, may give parties adverse in interest an opportunity to respond to the new material.

For more information, refer to section 34: Request to File Document Whose Filing is not Otherwise Provided For in Rules

Agency form: Form 15 – Reply to Response to Request

Time limit for filing a reply to a response to a request

Any reply to the response must be filed within two business days after the person receives the response, unless otherwise directed by the Agency.

28. Request for Expedited Process

(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.

(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.

(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.

(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.

(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.

(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.

Annotation: Request for expedited process

Sections related to shortened time limits

Section 28 sets out how a party can file a request for an expedited process and some of the factors that the Agency might consider.

Section 25 sets out shorter time limits for filing pleadings in a dispute proceeding where the Agency has approved an expedited process. Section 30 should be used to shorten an individual time line.

For more information, refer to:

- Section 25: Expedited Process
- Section 30: Request to Extend or Shorten Time Limit

What is an expedited process?

The expedited process allows for shorter time limits for filing pleadings in a dispute proceeding. The Agency, either on its own initiative or at the request of a party, determines whether it is appropriate to apply the expedited process to the dispute proceeding.

This is an exceptional process and it is very important that the party making the request set out all relevant factors. The Agency will consider the impact of an expedited process on the other party or parties. Note that given the shortened time limits, the expedited process will only be considered where the parties can use an electronic instantaneous means of communication.

There are two situations where pleadings may be expedited:

The dispute proceeding: In an expedited proceeding, the time limits for the answer and reply are shortened.

A request under Sections 27 to 36: If a request is expedited, the time limits for the response and reply to the request are shortened. For example, if it is necessary for the parties to file additional information/documents or respond to questions of the other parties as part of the dispute proceeding, the time limits provided in the Dispute Adjudication Rules for responding can be expedited upon request.

Factors that the Agency may consider

Requests to expedite pleadings should refer to the factors that the Agency may take into account when considering a request:

- The complexity of the matter;
- The reasons for the request, including any financial or other prejudice that may be caused by following the time limits set out in the Dispute Adjudication Rules;
- The financial or other prejudice, if any, to the other parties if the request is granted; and
- Any other factors that may be relevant.

Contents of a request for an expedited process

It is the responsibility of the party making the request to demonstrate to the satisfaction of the Agency that the request should be granted. Reasons must be provided for expediting a pleadings process.

The request must include the information set out in Schedule 13 and reference should be made to the factors that the Agency looks at which are set out above. A party filing a request may either use Form 13 or another document. The other parties must be provided with a copy of the request on the same day that it is filed with the Agency.

Agency form: Form 13 – Request

Time limit for requesting an expedited process

The time limit depends on whether it applies to a dispute proceeding (the filing of an answer and reply) or a request under sections 27 to 36.

Dispute proceeding: the request must be filed at the same time that the application is filed with the Agency or, in the case of a respondent within one business day after the date of the notice that the application is complete.

Request under Sections 27 to 36: the person must file the request at the same time that the other request is filed with the Agency or, 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 the request.

Annotation: Responding to a request

Contents of a response to a request for an expedited process

Any party to the dispute proceeding may file a detailed response to the request with the Agency and, on the same day, with the other parties.

The party must clearly indicate whether it supports or opposes the request. If the request is opposed, the party must state why it does not want the Agency to grant the request, including the impact this would have on it or on the proceeding.

A person filing a response to a request may either use Form 14 or another document.

Agency form: Form 14 – Response to Request

Time limit for responding to a request for an expedited process

All other parties to the proceeding will have one business day to file a response to a request for an expedited process.

Annotation: Replying to a response to a request

Contents of a reply to a response to a request

A reply to the response may be filed.

A reply can only address issues raised in the response to the request. It must not repeat arguments already made in the request, or raise new issues, arguments or evidence not related to the response to the request.

A reply that raises new issues, arguments or evidence that were not addressed in the answer may not be struck in its entirety from the Agency's record. The Agency may strike the new material from the reply on its own initiative. Should the person filing the reply take the position that the Agency requires the new material to make an informed decision, it may make a request to the Agency under section 34 of the Dispute Adjudication Rules to have the new material accepted by the Agency. The Agency has discretion to accept new material that is relevant and necessary to its consideration of the case and, where appropriate, may give parties adverse in interest an opportunity to respond to the new material.

For more information, refer to section 34: Request to File Document Whose Filing is Not Otherwise Provided For in Rules .

Time limit for filing a reply to a response to a request

Any reply to the response must be filed within one business day after the person receives the response, unless otherwise directed by the Agency.

29. Request to Intervene

(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.

(2) If the Agency grants the request, it may set limits and conditions on the intervener's participation in the dispute proceeding.

Annotation: Request to intervene

Section 29 sets out how a person applies to become an intervener in a dispute proceeding.

Section 21 sets out the process to be followed after the Agency has accepted a person as an intervener.

For more information, refer to section 21: Intervention

Who is an intervener?

An intervener is a person who has a "substantial and direct interest" in a dispute proceeding, either supports or opposes the application filed by the applicant and has been granted intervener status by the Agency. An intervener may be considered a party to the proceeding if the person asks for this status and it is granted by the Agency.

In a dispute proceeding, an applicant files an application against a specific party – the respondent. However, there may be other persons who have an interest in the application. Intervener status allows those persons to participate in the proceeding and have the Agency consider their views when making its decision.

Contents of the request to intervene in a dispute proceeding

A person requesting to be an intervener in a dispute proceeding before the Agency must demonstrate a "substantial and direct interest" in the application. The request must include the information set out in Schedule 16. A person filing a request may either use Form 16 or another document.

It is the Agency that determines the extent of your participation in the proceeding, based on your stated needs and an assessment of what will be helpful to the Agency in its decision-making process. As such, you should also indicate how you wish to participate in the proceeding. Do you want to fully participate and respond to other parties' pleadings or do you want to participate in a more limited way (e.g. by only filing a written submission)? Do you want to be a party to the proceeding?

If the Agency grants your request to intervene in the proceeding, it will inform you of the extent of your participation.

Agency form: Form 16 – Request to Intervene

The discretion to allow an intervention lies with the Agency based on the Panel's assessment of whether the intervention will bring new information from a different perspective to the Agency that is relevant and necessary to its decision. As a result, a right of response and reply has not been provided. In exceptional cases, however, the Agency may, upon request filed under section 34 or on its own initiative, provide parties who are adverse in interest with the opportunity to respond to such requests, as well as a right of reply to the person seeking intervener status.

If the request to intervene is approved by the Agency, parties adverse in interest will have an opportunity to respond to the intervention when it is filed.

For more information refer to section 21 -- Intervention

Time limit for filing a request to intervene

A request to intervene must be filed within 10 business days after the person becomes aware of the dispute proceeding and, in any event, before the close of pleadings. The parties must be provided with a copy of the request on the same day that it is filed with the Agency. The Agency's website contains information about all dispute applications before the Agency for adjudication. This information will help you decide whether you want to intervene and it will provide information about the status of the file, including when pleadings are expected to close or if they are closed already.

If you need help determining whether pleadings are closed, please refer to the list of current cases before the Agency.

If a person just becomes aware of an application and wishes to intervene but pleadings have already closed, the person may make a request under section 30 of the Dispute Adjudication Rules to permit the late filing. In exceptional circumstances, where the relevance and importance of the person's evidence to the Agency outweighs the prejudice or harm in delaying the proceeding, the Agency may reopen the pleadings to permit a late intervention.

For more information, refer to:

- Section 26: Close of Pleadings
- Section 30: Request to Extend or Shorten Time Limit
- Appendix A: Agency Contact Information

Intervention goes on the public record

Interventions filed with the Agency are placed on the public record unless:

1. A claim for confidentiality is made at the same time that it is filed; and
2. The Agency determines that the intervention, or parts of it, are confidential.

For more information, refer to:

- Section 7: Filing
- Section 31: Request for Confidentiality

In considering a claim for confidentiality of a document the Agency may reject the claim and place the document on the public record or determine that the information is in whole or in part confidential and grant access only to specific persons/parties on the filing of written undertakings to maintain the confidentiality of the information. In exceptional circumstances the Agency might determine that the document is confidential and cannot be viewed by other parties although it will be taken into consideration by the Agency when making a decision.

An intervener is not automatically a party to the dispute proceedings

Even if a request to intervene is granted by the Agency, the intervener does not become a party to the proceeding unless the Agency names the intervener as a party. This means that an intervener will not be copied on documents filed between the parties unless the Agency accepts them as a party or unless their participation rights include being provided with copies of documents. They will, however, be provided with a copy of the Agency's final decision in the dispute proceeding.

An intervener may be asked to respond to questions or document requests from either the Agency or the parties, regardless of whether or not they are a party.

Having a representative represent you

If a person filing a request to intervene would like to have a representative (other than a lawyer) act on their behalf, a written authorization must be filed with the Agency.

For more information, refer to section 16: Representative Not a Member of the Bar

Agency form: Form 4 – Authorization of Representative

Position statement as an alternative to becoming an intervener

Sometimes a person may have an interest in a dispute proceeding and want their views to be taken into consideration by the Agency. However, they may not have a "substantial and direct interest" in the proceeding and/or may want to limit their participation in the proceeding to simply filing a statement.

A position statement can be filed with the Agency as an alternative to being an intervener. Agency approval is not required to file a position statement.

For more information, refer to section 23: Position Statement

30. Request to Extend or Shorten Time Limit

(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.

(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.

(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.

(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.

Annotation: Request to extend or shorten time limit

Section 30 is used when a person wishes to extend or shorten a time limit in a dispute proceeding that has been established either in the Dispute Adjudication Rules or by the Agency.

For example, a person may have five business days to file a document with the Agency, but if there are factors that they believe would make it impossible to meet the deadline, they may apply to the Agency under this section to extend the time limit.

Contents of the request to extend or shorten time limit

It is the responsibility of the person making the request to demonstrate to the satisfaction of the Agency that the request should be granted. Reasons must be provided for extending or shortening time limits. Reference should be made to the factors that the Agency considers, which are set out below.

The request must include the information set out in Schedule 13. A person filing a request may either use Form 13 or another document.

Agency form: Form 13 – Request

Factors that the Agency may consider

Requests to extend or shorten time limits should refer to the factors appropriate to your request. The following are factors that the Agency may take into account when considering a request:

- The complexity of the matter;
- The impact of the request on other parties;
- The time required to compile the necessary information;
- The difficulty in obtaining the necessary information;
- Whether the party made a serious effort to meet the deadline;
- The period of time since the party first became aware of the matter;
- When the party requested the extension of time;
- The number of extensions already granted;
- The availability of key personnel of parties;

- A reasonable opportunity for parties to comment; and
- Any other factors that may be relevant.

Time limit for filing a request under section 30

Requests to extend a time limit should be made in enough time to permit the party to meet the original deadline if the request to extend the time limit is denied by the Agency. Under exceptional circumstances, the Agency may consider a request filed after the expiry of a time limit provided that the person demonstrates why the request could not have been made before the expiry of the time limit.

Responding to a request to extend or shorten time limit

The response to a request should reference the factors that the Agency may consider (set out above) and must be filed within three business days of the party receiving the request. It must include the information set out in Schedule 14.

A party filing a response to a request may either use Form 14 or another document and the other parties must be provided with a copy of the response to the request on the same day that it is filed with the Agency.

Agency form: Form 14 –Response to Request

Replying to the response to a request to extend or shorten time limit

A reply to the response, if any, must be filed within one business day of the party receiving the response. It should clearly address the issues raised in the response and must not raise any new issues.

A person filing a reply may either use form 15 or another document and the other parties must be provided with a copy of the reply on the same day that it is filed with the Agency.

Agency form: Form 15 – Reply to Response to Request

A reply that raises new issues, arguments or evidence that were not addressed in the answer may not be struck in its entirety from the Agency's record. The Agency may strike the new material from the reply on its own initiative. Should the person filing the reply take the position that the Agency requires the new material to make an informed decision, it may make a request to the Agency under section 34 of the Dispute Adjudication Rules to have the new material accepted by the Agency. The Agency has discretion to accept new material that is relevant and necessary to its consideration of the case and, where appropriate, may give parties adverse in interest an opportunity to respond to the new material.

For more information, refer to section 34: Request to File Document Whose Filing is Not Otherwise Provided For in Rules

31. Request for Confidentiality

(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,

(a) one public version of the document from which the confidential information has been redacted; and

(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.

(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.

(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 confidentiality and must include the information referred to in Schedule 18.

(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.

(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 confidential 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.

(6) The original copy of the undertaking of confidentiality must be filed with the Agency.

Annotation: Request for confidentiality

The Agency is a quasi-judicial tribunal that follows the "open court principle." This principle guarantees the public's right to know how justice is administered and to have access to decisions rendered by courts and tribunals, except in exceptional cases. That is, the other parties in a dispute proceeding have a fundamental right to know the case being made against them and the documents that the decision-maker will review when making its decision which must be balanced against any specific direct harm the person filing the document alleges will occur if it is disclosed. This means that, upon request, and with limited exceptions, all information filed in a dispute proceeding can be viewed by the public.

In general, all documents filed with or gathered by the Agency in a dispute proceeding, including the names of parties and witnesses, form part of the public record. Parties filing documents with the Agency must also provide the documents to the other parties involved in the dispute proceeding under section 8 of the Dispute Adjudication Rules.

No person may refuse to file a document with the Agency because they believe that it is confidential. If a person believes that a document is confidential, they must make a request for confidentiality under section 31 and the Agency will decide whether the document is confidential. During this process, the document is not placed on the public record.

The Agency may also, without a request for disclosure being made, decide whether a document should be confidential after it provides the parties with a chance to comment on the issue.

Where the Agency finds that the document is not relevant to the dispute proceeding, the document will not form part of the record and will not be taken into consideration by the Agency when making its decision.

Where the Agency finds that the document is relevant to the dispute proceeding, the document will be put on the public record if the Agency finds that its disclosure will likely cause no specific direct harm, or that any demonstrated specific direct harm is not sufficient to outweigh the public interest in having it disclosed.

It should be noted that in some situations documents that have been determined to be confidential by the Agency may have to be disclosed in whole or in part to some or all of the other parties if the Agency determines that not disclosing them to the other parties would be unfair. In this regard, safeguards are put in place to ensure that documents remain confidential, including ensuring that people who will have access to the documents sign confidentiality undertakings in which they promise to maintain the confidentiality of the information that they will have access to in the dispute proceeding.

For more information, refer to:

- Section 7: Filing
- Section 8: Copy to Parties

Contents of a request for confidentiality

The person making a request for confidentiality must file:

1. One **public version** of the document for the public record with the confidential information redacted (or blacked out). This version will go on the Agency's public record.
2. One **confidential version** of the document that contains and identifies the confidential information that has been redacted, or blacked out from the public version, by underlining with a single line the confidential text. The document must be marked "CONTAINS CONFIDENTIAL INFORMATION" on the top of each page. This version will go on the Agency's confidential record pending a final determination by the Agency on its confidentiality.
3. A **request for confidentiality** containing the information contained in Schedule 17, which will be placed on the public record. The request for confidentiality must address the relevance of the documents to the issue(s) before the Agency, as well as whether the disclosure would cause specific direct harm sufficient enough to outweigh the public interest in having it disclosed. A person filing a request may either use Form 17 or another document.

The request for confidentiality and the public version of the document must also be provided to the parties at the same time that they are filed with the Agency. A person filing a request for confidentiality may either use Form 17 or another document.

In the past, the Agency has indicated that vague claims of unspecified harm are not sufficient when making a request.

Related decision: Decision No. LET-P-A-67-2011

Agency form: Form 17– Request for Confidentiality

Party opposing a request for confidentiality

A party may oppose a request for confidentiality of a document by filing a written request for disclosure within five business days after receiving the request for confidentiality.

The request for disclosure should address the relevance of the document to the issue(s) before the Agency, as well as why the document is required to be disclosed or must be seen by the party, including the public interest in its disclosure. The request for disclosure must include the information set out in Schedule 18. . A party filing a request for disclosure may either use Form 18 or another document and the other parties must be provided with a copy of the request for disclosure on the same day that it is filed with the Agency.

Agency form: Form 18 – Request for Disclosure

Person making the request for confidentiality may respond

The person making the request for confidentiality may respond to the request for disclosure. The response must include the information set out in Schedule 14. A person filing the response may either use Form 14 or another document and the other parties must be provided with a copy of the request for disclosure on the same day that it is filed with the Agency.

The response must be filed within three business days after receiving the request for disclosure.

The response can only address the issues raised in the request for disclosure.

Agency form: Form 14 –Response to Request

If the document is determined to be not relevant

If the Agency determines that a document is not relevant to a dispute proceeding it will not be placed on the record and will not be taken into consideration by the Agency when making its decision on the matter before it.

If the document is relevant but the Agency determines that it is not confidential

If the Agency determines that a document is relevant and not confidential then it is put on the Agency's public record and will be taken into consideration by the Agency when making its decision on the matter before it.

If the document is determined to be confidential

If the Agency determines that the document is relevant and confidential, the Agency may :

- Order that the document be kept in confidence and not be placed on the public record;
- Order that a version or part of the document be placed on the public record from which the confidential information has been redacted (or blacked out);
- Order that the document (or any part of it) not be placed on the public record, but that it be provided in confidence to any of the other parties to the proceeding upon receipt of a signed confidentiality undertaking; or
- Make any other decision that it considers just and reasonable.

When a person makes a claim for confidentiality for a document and the Agency has ruled that it is confidential, the confidential document:

- Will be placed on a confidential record;
- Will be considered by the Agency in its decision-making process;
- Will not be made available to the public; and
- May be provided to the other parties or to some of them if the Agency finds that they require access to the document to make their case. Usually the person to receive the document must file a signed confidentiality undertaking before receiving the document.

The original copy of the undertaking must be filed with the Agency.

32. Request for Agency to Require Party to Respond

(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.

(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;

(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.

Annotation: Request for Agency to require a party to provide a complete response

Request

Under section 24 of the Dispute Adjudication Rules, a party can give notice to another party to answer questions or produce documents.

If the party asking questions or requesting documents is satisfied with the response received, then this part of the dispute proceeding concludes. The information that was gathered goes on the public record or the confidential record (if the Agency determines that the information is confidential) and the dispute proceeding continues.

However, if a party is not satisfied with the response to its document request or to the answers provided to its questions, or if it opposes an objection to producing the documents or answering the questions, it may file a request under section 32 of the Dispute Adjudication Rules for an Agency decision on the matter. For example, the party who gave notice may oppose the objection(s) made to respond to questions or produce documents.

Note that if a party adverse in interest makes a request before the close of pleadings and the request is approved by the Agency, they may be permitted to conduct oral cross-examinations on an affidavit to test the evidence contained in the affidavit. A party may make such a request under section 27 of the Dispute Adjudication Rules.

For more information, refer to section 27 – General Request

Time limit

The request must be made within two business days after receiving the response to the document request or questions.

Content of the request

Justification must be provided for each question or document request where the party is not satisfied with the completeness of the answer or where an objection was made. The request must include the information set out in Schedule 13. A person filing a request may either use Form 13 or another document and the other parties must be provided with a copy of the request on the same day that it is filed with the Agency.

Agency form: Form 13 – Request

Relief

The Agency may

(a) Require answering of a question in whole or in part
(b) Require production of a document
(c) Require production of secondary evidence of the content of a document
(d) Require that a document be provided for inspection only
(e) Deny the request in whole or in part

Responses and documents go on the public record

Any information or documents gathered under section 32 of the Dispute Adjudication Rules are placed on the public record unless:

- A claim for confidentiality is made at the same time that they are filed or gathered; and
- The Agency determines that the response, or parts of it, are confidential.

For more information, refer to:

- Section 7: Filing
- Section 31: Request for Confidentiality

33. Request to Amend Documents

(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.

(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.

(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.

(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.

(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.

Annotation: Request to amend document

Types of amendments

There are two types of amendments or changes that can be made to documents: substantive and non-substantive.

Substantive amendments: A substantive amendment would have a direct impact on the matter in dispute. Examples include an amendment to the names of the persons involved in the dispute proceeding or information being added or taken out of a document such as an expert's report.

Any substantive amendment to a document will need to be approved by the Agency.

Non-substantive amendments:

Some examples of non-substantive amendments are:

- Correction of spelling of names and places; and
- Dates (if they have no substantive implications).

A request under the Dispute Adjudication Rules is not required to make a non-substantive amendment to a document.

The person must file a new copy of the document which clearly identifies the amendment being made by:

- Underlining any new text and striking out (or drawing a line through) any deleted text; and
- Adding "AMENDED" at the top right hand corner of the first page of the document.

Where a person submits a non-substantive amendment, but the Agency considers it to be a substantive amendment, the person will be notified of the requirement to follow the procedure for substantive amendments in subsection 33(1).

For more information, refer to section 14: Amended Documents

Time Limit for making a substantive amendment to a document

The request should be made as soon as the person learns of the change and in any event it must be made before pleadings close. Any delay in making the amendment

may result in the request being denied, particularly if prejudice or harm will be caused to the other parties.

Contents of a request to make a substantive amendment

A party that wants to make a substantive amendment to a document must file a request with the Agency to explain the change and why it needs to be made. The request must include the information set out in Schedule 13. A person filing a request may either use Form 13 or another document and the other parties must be provided with a copy of the request on the same day that it is filed with the Agency.

The person must file a new copy of the document that clearly identifies the amendment being made by:

- Underlining any new text and striking out (or drawing a line through) any deleted text; and
- Adding "AMENDED" at the top right hand corner of the first page of the document.

For more information, refer to section 14: Amended Documents

Agency form: Form 13 – Request

Response to a request to make a substantive amendment

A party may respond to a request to amend a document.

Any party opposing the request must include a description of any prejudice or harm that would be caused to the party if the request were granted, and, if applicable, whether permitting the amendment will hinder or delay the fair conduct of the proceeding. The response must include the information set out in Schedule 14. A person filing a response to a request may either use Form 14 or another document and the other parties must be provided with a copy of the response to the request on the same day that it is filed with the Agency.

The response must be filed within three business days after the party receives a copy of the request.

Agency form: Form 14 – Response to Request

Replying to the response to a request to amend a document

A reply to the response to a request to amend a document, if any, must be filed within one business day of the party receiving the response. It should clearly address the issues raised in the response and must not raise any new issues.

A person filing a reply may either use form 15 or another document and the other parties must be provided with a copy of the reply on the same day that it is filed with the Agency.

Agency form: Form 15 –Reply to Response to Request

A reply that raises new issues, arguments or evidence that were not addressed in the answer may not be struck in its entirety from the Agency's record. The Agency may strike the new material from the reply on its own initiative. Should the person filing the reply take the position that the Agency requires the new material to make an informed decision, it may make a request to the Agency under section 34 of the Dispute Adjudication Rules to have the new material accepted by the Agency. The Agency has discretion to accept new material that is relevant and necessary to its consideration of the case and, where appropriate, may give parties adverse in interest an opportunity to respond to the new material.

For more information, refer to section 34: Request to File Document Whose Filing is Not Otherwise Provided For in Rules

Outcome of a request to make a substantive amendment

After receiving a request to amend a document, the Agency may:

- Deny the request; or
- Approve the request, in whole or in part.

If the Agency approves the request, it may provide parties adverse in interest with the opportunity to respond to the amended document and will set out the process to be followed and the time limits to be met in a decision to the parties.

34. Request to File Document Whose Filing is not Otherwise Provided For in Rules

(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.

(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.

(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.

(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.

(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.

Annotation: Request to file document whose filing is not otherwise provided for in Rules

This section applies where a person seeks to file a document that is not identified in the Dispute Adjudication Rules or that the Agency has not required to be filed.

A request must be made and approved by the Agency. Without this approval, the documents will not form part of the record and will not be considered by the Agency when making its final decision. Where a request to file a document whose filing is not provided for is filed after the close of pleadings, it does not need to be accompanied by a request to extend the time limit under section 30.

For more information, refer to section 12: Filing After Time Limit

Content of a request to file document whose filing is not otherwise provided for in Rules

In their request the person must include the information referred to in Schedule 13 as well as a copy of the document that the person proposes to file. A person filing a request may either use Form 13 or another document and the other parties must be provided with a copy of the request on the same day as it is filed with the Agency.

The person making the request is responsible for demonstrating that the document should be accepted and form part of the record. In making a request the person should refer to the following factors (whichever are applicable) which the Agency may take into account:

- Was the document available before pleadings were closed or before the expiry of the time limit?
- Could the document have been obtained with reasonable effort (due diligence) before pleadings closed?

- Is the document relevant and necessary to the matter?
- Will the document advance the proceedings or assist the Agency in making its decision?
- Should the document be allowed on the record to avoid a miscarriage of justice – for instance, to correct an error in the record?
- Would the late filing of the new document allow a party to split or reargue their case?
- Will the other party suffer prejudice or harm?

Agency form: Form 13 – Request

Response to a request to file document whose filing is not otherwise provided for in Rules

A party may respond to a request to file documents whose filing is not otherwise provided for in the Dispute Adjudication Rules.

Any party opposing the request must include a description of any prejudice or harm that would be caused to the party if the request were granted, including, if applicable, whether permitting the request will hinder or delay the fair conduct of the proceeding. The response must also include the information set out in Schedule 14. A party filing a response to a request may either use Form 14 or another document and the other parties must be provided with a copy of the response on the same day that it is filed with the Agency.

The response must be filed within three business days after the party receives a copy of the request.

Agency form: Form 14 – Response to Request

Replying to the response to a request to file a document whose filing is not otherwise provided for in Rules

A reply to the response, if any, must be filed within one business day of the party receiving the response. It should clearly address the issues raised in the response and must not raise any new issues. A person filing a response to a request may either use form 15 or another document and the other parties must be provided with a copy of the response on the same day that it is filed with the Agency.

Agency form: Form 15 – Reply to Response to Request

A reply that raises new issues, arguments or evidence that were not addressed in the answer may not be struck in its entirety from the Agency's record. The Agency may strike the new material from the reply on its own initiative. Should the person filing the

reply take the position that the Agency requires the new material to make an informed decision, it may make a request to the Agency under section 34 of the Dispute Adjudication Rules to have the new material accepted by the Agency. The Agency has discretion to accept new material that is relevant and necessary to its consideration of the case and, where appropriate, may give parties adverse in interest an opportunity to respond to the new material.

For more information, refer to section 34: Request to File Document Whose Filing is Not Otherwise Provided For in Rules

Outcome of a request to file document whose filing is not otherwise provided for in Rules

After receiving a request to file documents after a time limit, the Agency may:

- Deny the request; or
- Approve the request, in whole or in part.

If the Agency approves the request, it may provide parties adverse in interest with the opportunity to respond to the documents and will set out the process to be followed and the time limits to be met in a decision to the parties.

For more information, refer to section 12: Filing After Time Limit

35. Request to Withdraw Document

(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.

(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.

Annotation: Request to withdraw document

A party may request to withdraw any document filed in a dispute proceeding before the Agency. The request must include the information set out in Schedule 13. A person filing a request may either use Form 13 or another document. This request must be made before the close of pleadings and the other parties must be provided with a copy of the request on the same day as it is filed with the Agency.

If you need help determining whether pleadings are closed, please refer to the list of current cases before the Agency.

The parties will be notified as to the Agency's decision on the matter and, if it approves the withdrawal, any terms and conditions the Agency may determine just and reasonable, such as the applicant paying the costs of another party.

For example, the Agency could require the applicant to pay the costs paid by the respondent in having an expert report prepared to address a document that was filed by the applicant if the applicant later decides to withdraw that document.

For more information, refer to:

- Section 26: Close of Pleadings
- Appendix A: Agency Contact Information

Agency form: Form 13 – Request

36. Request to Withdraw Application

(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.

(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.

Annotation: Request to withdraw application

An applicant may request to withdraw their application and discontinue their dispute proceeding before the Agency. This request must be made before the Agency issues its final decision. All other parties must be provided with a copy of the request on the same day that it is filed with the Agency.

The request must include the information set out in Schedule 13. A person filing a request may either use Form 13 or another document. The parties will be notified as to the Agency's decision on the matter and, if it approves the withdrawal, any terms and conditions that the Agency may determine just and reasonable, such as the applicant paying the costs of another party. For example, the Agency could require the applicant to pay the costs incurred by the respondent for that part of the dispute proceeding where the respondent incurred costs preparing expert reports to respond to the application.

Agency form: Form 13 – Request

Dispute Proceedings: Case Management

37. Formulation of Issues

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.

Annotation: Formulation of issues

It is essential – for both the Agency and the parties – to have the issues in the dispute proceeding clearly identified.

If the submissions filed in a dispute proceeding do not clearly identify the issues, the Agency may, where appropriate, identify or clarify the issues. This will help the Agency conduct an efficient dispute proceeding and identify areas where further information may be required. It will also give the parties a better understanding of the issues before the Agency and allow for clearer and more directed responses.

In some situations, the Agency might require the parties to attend a conference by means of a telephone conference call or by personal attendance in order to identify or clarify the issues.

For more information on conferences, refer to section 40: Conference

An application may be considered incomplete if the applicant has not clearly identified the issues. In these cases, the applicant will be given 20 business days to complete their application.

For more information, refer to section 18: Application

38. Preliminary Determination

The Agency may, at the request of a party, determine that an issue should be decided as a preliminary question.

Annotation: Preliminary determination of issues

In some circumstances, the Agency may make a decision on a certain matter at the outset, before continuing with the dispute proceeding. These matters are often referred to as "preliminary matters". For example, where there is a serious question about whether the party has standing to appear before the Agency, the Agency will usually

consider that issue as a preliminary matter and issue a decision on the preliminary issue before starting to gather pleadings and information on the merits of the application.

How to make a request for the preliminary determination of an issue

To request that an issue be determined as a preliminary matter, the process for making a general request to the Agency should be followed.

For more information, refer to: section 27: Requests – General Request

Agency form: Form 13 – Request

Staying the proceeding

The Agency may stay the dispute proceeding if the preliminary matter is a central issue, such as the Agency's jurisdiction to consider the issue(s) raised in the application.

This means that the dispute proceeding will stop while the Agency considers the preliminary matter. The Agency will not usually address any other issues raised in the dispute proceeding during the stay.

For more information, refer to section 41: Stay of Proceeding, Order or Decision

39. Joining of Applications

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.

Annotation: Joining of applications

The Agency may, where appropriate, decide to join applications filed by different parties and consider them together in one dispute proceeding.

For example, this could occur if one or more applications raise similar issues, whether they are against the same respondents or different respondents. Note that the information contained in the various applications would be provided to all parties, subject to any request for confidentiality being made and a ruling from the Agency that information is confidential and should not be circulated.

How to make a request for the joining of applications

To request the joining of applications, the process for making a general request to the Agency should be followed.

For more information, refer to section 27: Requests – General Request

Agency form: Form 13 – Request

40. Conference

(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;

(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.

(2) The parties may be required to file written submissions on any issue that is discussed at the conference.

(3) Minutes are prepared in respect of the conference and placed on the Agency's record.

(4) The Agency may issue a decision or direction on any issue discussed at the conference without further submissions from the parties.

Annotation: Conference

A conference is a meeting to discuss and resolve procedural matters or other issues. It can be held in person, by teleconference (telephone) or by web conference.

A conference may be conducted by Agency staff, counsel or the Agency Panel assigned to the case.

A conference may be held during any proceeding. However, if the proceeding is to be dealt with by way of an oral hearing, then at the time that an oral hearing is called, a pre-hearing conference will typically be held to work out the details of the procedures to be used in that case.

The result of a conference is usually a procedural direction, which is a decision issued by the Agency setting out specific procedural requirements and instructions to the

parties for the processing of the application. For example, a procedural direction might direct the parties to file specific information and if some of that information is confidential, it will also set out the rules as to how it is to be treated and who can have access to that information and under what terms and conditions.

Where the Agency and the parties agree on procedural matters, this agreement will be reflected in the procedural direction. Where the parties do not agree, the Agency will decide the matter based on the positions of the parties, as set out either in the minutes of the meeting and/or any written submissions made by the parties. Note that parties will have the opportunity to comment on the minutes.

Minutes are prepared for all conferences, circulated to the parties to ensure accuracy and placed on the Agency's record.

How to make a request for a conference

To request a conference, the process for making a general request to the Agency should be followed.

For more information, refer to section 27: Requests – General Request

Agency form: Form 13 – Request

41. Stay of Proceeding, Order or Decision

(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 Rules or with a procedural direction issued by the Agency;

(d) the Agency considers it just and reasonable to do so.

(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.

(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.

Annotation: Stay of proceeding, order or decision

What is a stay?

When the Agency stays a dispute proceeding, it means that the proceeding is stopped for a period of time. The dispute proceeding may be restarted at a later date. It means that the Agency is stopping the proceeding while another matter is being decided that has relevance to the matter that is before the Agency.

When the Agency stays a decision or order, it means that it will not enforce compliance with that Agency decision or order for the duration of the stay.

The Agency may decide on its own or at the request of another party to stay a dispute proceeding, or a decision or order of the Agency.

The Agency is much more likely to stay a proceeding than it is to stay a decision or order. The Agency's position is that its decisions and orders are properly made and final and binding unless and until they are overturned by either an appeal court or the Governor-in-Council. As such, the Agency's policy is to ensure compliance with its decisions and orders regardless of whether reviews or appeals are pursued. Should a respondent against whom a decision or an order is made wish to obtain a stay of the decision or order pending a review or appeal, it is the responsibility of that party to either seek a stay of the decision or order from the Agency or from the appeal court in the context of the appeal proceedings.

The Agency determines on a case-by-case basis whether it is appropriate to order a stay.

How to make a request for a stay

To request a stay of a proceeding, order, or decision, the process for general requests under section 27 must be followed.

A stay can delay either the issuance of the final decision or the implementation of any relief/remedies that were ordered by the Agency. As a result, the party making the request must clearly demonstrate to the Agency that the stay is justified.

In deciding whether to grant a stay, the Agency uses a three-part test that has been established by the courts (see below). A party, when providing reasons for the request for a stay, must provide submissions on all three parts of the test for a stay.

The Agency may also provide other parties to the dispute proceeding with the opportunity to comment on the request for a stay and the party requesting the stay will have an opportunity to reply to any responses received.

For more information, refer to section 27: Requests – General Request

Agency form: Form 13 –Request

Three-part test for a stay

To decide whether a stay should be granted, the Agency is guided by the three-part test in the Supreme Court of Canada decision *RJR - Macdonald Inc. v. Canada (Attorney General),* [1994] 1 S.C.R. 311 (RJR Macdonald). The Agency must determine whether:

1. There is a serious question to be tried based on a preliminary assessment of the merits of the case;
2. The party seeking the stay would suffer irreparable harm if the stay wasn't granted; and,
3. The party seeking the stay will suffer the greater harm if the stay is refused than the other party(ies) if the stay is granted (referred to as the balance of inconvenience to the parties).

Related decisions:

- Decision No. LET-R-267-1999
- Decision No. LET-R-174-2000
- Decision No. LET-AT-A-124-2013

The parties will be notified as to the Agency's decision on the matter and, if it approves the stay, any terms and conditions the Agency may determine appropriate, such as one party paying the costs of another party.

42. Notice of Intention to Dismiss Application

(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.

(2) The applicant must respond to the notice within 10 business days after the date of the notice, failing which the application may be dismissed without further notice.

(3) The Agency may provide any other party with an opportunity to comment on whether or not the application should be dismissed.

Annotation: Notice of intention to dismiss application

In certain cases it seems apparent that the Agency does not have jurisdiction over a matter, or that the application does not properly raise an issue, or that the issue is irrelevant or has already been decided. In these cases, the Agency may express a preliminary view that the application should be dismissed but it will give the applicant an opportunity to address the Agency's preliminary view and justify why the application should not be dismissed. In other words, the applicant has the opportunity to change the Agency's initial view of the matter.

If the applicant does not convince the Agency to change its preliminary view, the application will be dismissed, which means that it will not be considered by the Agency.

Time limit for the applicant to respond to the Agency's preliminary view

The applicant must file a response to the Agency's preliminary view within 10 business days after being given notice of the Agency's preliminary view.

If the applicant does not respond within that time limit, the application will be dismissed without further notice.

Time limit for other parties to respond to the preliminary view

The Agency might provide other parties with an opportunity to comment on whether the application should be dismissed. The Agency will establish time limits for the filling of submissions by the other parties and will communicate this information in a decision.

Impact of dismissal

If an application is dismissed under this provision, this is a substantive, final decision by the Agency and the applicant will not be able to pursue the same matter before the Agency again.

This is different from a situation where an applicant is informed that their incomplete application is being closed as they have not provided the missing information. In this case, the Agency has not considered the application, the file is simply closed and the applicant is free to pursue the matter in the future.

For more information, refer to section 18: Application

Three situations where the Agency can dismiss an application

1. **The Agency does not have jurisdiction over the subject matter of the application:** The Agency can only issue decisions on matters within its mandate,

as set out in the *Canada Transportation Act* and other related legislation or regulations. In cases where the matter is clearly outside the Agency's mandate, the applicant will be notified and the application will be returned.

2. **Abuse of proceedings:** An abuse of proceedings could include cases where:
    - The supporting reasons are frivolous or vexatious;
    - Pleadings were initiated with the intent to cause distress or harm to others;
    - A proceeding was initiated for the purpose of delay; or,
    - A proceeding was an unjustified attempt to have a matter redetermined where it was already resolved in an earlier proceeding.
3. **Fundamental defect:** This includes situations where an issue is irrelevant or has already been determined.

43. Transitional Provision

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.

Annotation: General Rules

The *Canadian Transportation Agency General Rules* (the Rules that existed before the coming into force of these Dispute Adjudication Rules) will continue to apply to all applications that are accepted as complete before June 4, 2014. If an application is filed before June 4 but is not accepted as complete until June 4 or after, these new Dispute Adjudication Rules will apply once the application has been accepted as complete.

44. Repeal

The *Canadian Transportation Agency General Rules*[1] are repealed.

45. Coming into Force

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.

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[1] SOR/2005-35

List of schedules

Schedule 1: 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.

Schedule 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.

Schedule 3: 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.

Schedule 4: 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.

Schedule 5: 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.

Schedule 6: 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.

Schedule 7: 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.

Schedule 8: 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.

Schedule 9: 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.

Schedule 10: 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.

Schedule 11: 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.

Schedule 12: 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.

Schedule 13: 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.

Schedule 14: 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.

Schedule 15: 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.

Schedule 16: 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.

Schedule 17: 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.

Schedule 18: 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.

Appendix A: Agency Contact Information

Documents must be sent to the Secretary of the Canadian Transportation Agency.

By mail
Secretary
Canadian Transportation Agency
Ottawa, Ontario
K1A 0N9

By courier
Secretary
Canadian Transportation Agency
15 Eddy Street
17th Floor, Mailroom
Gatineau, Quebec
J8X 4B3

By fax
819-953-5253

By e-mail
secretariat@otc-cta.gc.ca

For further information:

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

If you need help determining whether pleadings are closed, please refer to the list of current cases before the Agency.

For more information, refer to section 26: Close of Pleadings