Court File No.: 13-A-37

FEDERAL COURT OF APPEAL

BETWEEN:

RAYMOND PAUL NAWROT and
KRISTINA MARIE NAWROT and
KAROLYN THERESA NAWROT

Moving Parties

– and –

SUNWING AIRLINES INC. and
CANADIAN TRANSPORTATION AGENCY

Respondents

REPLY OF THE MOVING PARTIES, THE NAWROTS

(Motion for Leave to Appeal, Rule 352)

Dated: January 27, 2014

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A. OVERVIEW

1. The Nawrots are seeking leave to appeal from the Decision of the Agency on the following proposed grounds:

(a) the Agency failed to consider and apply the *Montreal Convention*;

(b) the Agency rendered an unreasonable decision by:

i. being oblivious to crucial submissions of the parties;

ii. failing to provide adequate reasons; and

iii. failing to analyze important relevant evidence;

(c) the Agency misstated the civil standard of proof; and

(d) the Agency fettered its discretion with respect to awarding costs.

2. The Nawrots submit that these proposed grounds of appeal raise arguable questions of law and jurisdiction.

3. In the alternative, should this Honourable Court find that any of these grounds involve mixed questions of law and fact, it is submitted that the *Canada Transportation Act* confers upon the Honourable Court jurisdiction to make findings of fact that are necessary for determining questions of law, as long as they are not inconsistent with facts expressly found by the Agency.

> ***Metropolitan Toronto (Municipality) v. Canadian National Railway Co. (C.A.)*, [1998] 4 F.C. 506, para. 10** **[Tab 5]**
>
> ***Canada Transportation Act*, s. 41(3)** **[Appendix "A", P16]**

B. MATERIAL OMISSIONS AND MISSTATEMENTS OF FACTS BY SUNWING

4. Sunwing's factum omits an important undisputed fact and misstates the Agency's decision at paragraph 7: "The Nawrots failed to present themselves for check-in as required and were accordingly denied boarding." Sunwing repeats the same misstatement of the Agency's decision at paragraph 14 of its factum: "...if the Agency reasonably concluded that the Moving Parties failed to fulfill a contractual condition..."

(i) Acknowledgment of the Nawrots' entitlement to transportation

5. Sunwing conveniently omits the undisputed fact that after the Nawrots were denied boarding on their original flight, Sunwing explicitly acknowledged that the Nawrots were still entitled to transportation: Sunwing offered to transport the Nawrots without any further payment, albeit 6 days later. Sunwing was unable to explain why it offered transportation to passengers who allegedly were late for their flight.

> **Affidavit of Mr. Nawrot, Ex. "J" & "K"** **[Nawrots Rec'd, Tabs 4J & 4K]**

6. The legal significance of Sunwing's offer to transport the Nawrots at a later date and without further payment is that it brings the dispute within the scope of the *Montreal Convention* and "delay" under Article 19, as opposed to a complete non-performance, which falls outside the scope of the *Convention*.

(ii) The Agency made no express finding of fact

7. The Agency did not make an express finding that the Nawrots were late; rather, the Agency incorrectly imposed the burden of proof on the Nawrots, and then concluded, without providing reasons, that there was insufficient evidence to conclude that the Nawrots presented themselves on time. The Nawrots submit that the Agency erred in law in failing to apply the *Montreal Convention* and incorrectly imposing the burden of proof on the Nawrots instead of Sunwing. The Nawrots also submit that the Agency's conclusion as to insufficiency of evidence was unreasonable.

C. THE *Montreal Convention*

8. Obviously, airlines should not be held liable for the negligence of passengers who do not present themselves on time for check-in, and the Nawrots never suggested the contrary.

9. The questions of law raised by the Nawrots are what is the applicable law and who has the burden of proof in the case of a dispute about the time passengers presented themselves. Is it the passengers who have to attempt to gather evidence that they were indeed at the airport on time, or is it the airline that has to prove that the passengers did not present themselves on time?

(i) Applicability

10. Sunwing misstates the law with respect to the applicability of the *Montreal Convention* at paragraphs 14 and 20 of its factum. Article 1(1) of the *Convention* states that:

> This Convention applies to all international carriage of persons, baggage or cargo performed by aircraft for reward. It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking.
>
> ***Montreal Convention*, Article 1(1)** **[Appendix "A", P17]**

11. Thus, the *Montreal Convention* is the law governing the rights of passengers and the liability of airlines with respect to international itineraries between signatory states, such as the itinerary of the Nawrots. The application of the *Convention* is mandatory and cannot be contracted out. According to Article 29, the provisions of the *Convention* apply regardless of whether a claim is brought under the *Convention* or under contract law.

***Montreal Convention*, Article 29** **[Appendix "A", P20]**

12. There is a very strong presumption, derived from the purpose of the *Convention*, in favour of the applicability of the *Convention*. Only complete non-performance of the contract of carriage, such as refusal to transport without offering transportation at a later time, can remove a claim from the scope of the *Convention*. The burden of proof of complete non-performance rests with the party (Sunwing) that argues that the *Convention* is not applicable.

13. Therefore, the *Montreal Convention* is applicable to the Nawrots' claim, because there was a contract of carriage between the parties and Sunwing offered to transport the Nawrots at a date later than contracted.

(ii) Burden of proof

14. Under the *Montreal Convention*, the alleged late arrival of the Nawrots at the airport is not a presumption that the Nawrots must disprove, but rather a defence under Article 20 that Sunwing must establish:

> Contributory negligence exists to a greater extent if a passenger arrives late at the airport and for this reason cannot be transported. In these circumstances there can be no question of fault on the part of the carrier.
>
> ⋮
>
> In this regard, Article 20 imposes two requirements. In addition to the requirement that the claimant or other persons named in the article must be (contributorily) negligent, the text requires the carrier to discharge the burden of proving that (contributory) negligence exists.
>
> [Emphasis added.]
>
> **Annotated *Montreal Convention* by E. Giemulla & R. Schmid, et al. (Wolters Kluwer: Netherlands, 2011), Article 20, paras. 11-12** **[Tab 6]**

15. Hence, the Agency erred in law by failing to apply the *Montreal Convention*, failing to place the burden of proof on Sunwing, and instead placing the burden of proof on the Nawrots that they were at the airport on time.

D. THE AGENCY'S DECISION IS UNREASONABLE

(i) Failure to decide a central issue

16. The applicability of the *Montreal Convention* was a central issue addressed in the submissions of both parties, which the Agency failed to address or decide. Sunwing's speculations at paragraph 14 of its factum about the possible reasons for this are not supported by the record. There is nothing in the

Agency's summary of the parties' position or its analysis to suggest that the Agency ever turned its mind to this issue.

17. Thus, the Nawrots submit that by failing to decide a central issue related to the applicable law raised by the parties, the Agency's decision was unreasonable and should be set aside.

> ***BNSF Railway Co. v. Canada (Canadian Transportation Agency)*, 2011 FCA 269, para. 32** **[Tab 3]**

(ii) Lack of familiarity with the file: undisputed portion of the claim

18. Sunwing correctly states at paragraph 8 of its factum that it has consistently admitted liability for the Nawrots' out-of-pocket expenses caused by the initial 14-hour delay. It is also common ground that Sunwing has failed to reimburse the Nawrots for these undisputed expenses. This issue is not moot, however, because to this date, Sunwing has failed to reimburse the Nawrots for the undisputed portion of their claim.

19. The Agency's failure to order the payment of the undisputed portion of the claim demonstrates the egregious extent of the Agency's lack of familiarity with the parties' positions, submissions, and the file as a whole.

(iii) An unreasonable finding is an error of law

20. A tribunal may err in its fact finding, but it is not entitled to make an unreasonable finding. The privative clause does not shield the Agency from appellate review of the reasonableness of its findings, including findings of fact:

> An unreasonable error of fact has been categorized as an error of law. [...] this error of law is then protected by the privative clause

> unless it is unreasonable. [...] An administrative tribunal has the necessary jurisdiction to make a mistake, and even a serious one, but not to be unreasonable. [...] An unreasonable finding is what justifies intervention by the courts.
>
> [Emphasis added.]
>
> ***Blanchard v. Control Data Canada Ltd.*, [1984] 2 S.C.R. 476, p. 16** **[Tab 2]**

21. Thus, Sunwing incorrectly argues at paragraph 22 of it factum that the Nawrots are seeking leave to appeal findings of facts and that the Agency is entitled to "absolute" deference in weighing evidence. In spite of the great deference owed to the Agency, this is not "absolute" as Sunwing submits, because the Agency is not entitled to make unreasonable findings.

22. The Nawrots' submission is that the Agency's decision is unreasonable because the Agency was oblivious to the parties' submissions and the issues, failed to analyze the evidence, and failed to provide adequate reasons; all of these are questions of law.

23. Paragraphs 13 through 37 of the Agency's Decision simply recite, albeit grossly incorrectly and incompletely, the parties' submissions, and contain not a single word of analysis, or agreement or disagreement with the parties' submissions. Paragraphs 38 through 42 deal with the standard of proof, and only paragraphs 43 to 47 attempt to address the evidence. These paragraphs, however, are confined to noting that the parties' positions are contradictory, and they are silent about several crucial questions:

(a) Did the Agency doubt the sworn affidavit of Mr. Nawrot stating that the Nawrots presented themselves at 1:10 am, and if so, why?

(b) Did the Agency doubt the veracity of the records and timetables obtained from Southern Railway that corroborate Mr. Nawrot's sworn affidavit, and if so, why?

(c) Why did the Agency find the sworn affidavit of Mr. Nawrot and the Southern Railway records insufficient proof that the Nawrots presented themselves for check-in at 1:10 am?

(d) Did the Agency believe Mr. Tydeman, whose sworn affidavit implies that 285 passengers boarded the aircraft in 5 minutes or that the Nawrots were in two places at the same time, or did the Agency accept the Nawrots' submission that Mr. Tydeman's evidence was not reliable? In either case, why?

(e) According to the Agency, at what time did the Nawrots present themselves for check-in, and what are the reasons for the Agency's finding?

It is worth noting that the Agency did not hold a hearing in the present case, and so the Agency could not make findings of credibility based on observing witnesses under cross-examination.

24. As a trier of facts, the Agency was not only entitled to make findings with respect to these questions, but was also required to do so in order to analyze the evidence before it. By failing to address these questions and failing to provide reasons for the answers to these questions, the Agency abandoned its duty as a trier of facts, and rendered an unreasonable decision.

E. STANDARD OF PROOF

25. The Agency had before it a vast number of documents, including the sworn affidavit of Mr. Nawrot and numerous records from Southern Railway. Nevertheless, the Agency found these to be insufficient, and did not explain why they were found to be insufficient. The Nawrots submit that this finding was based on the Agency imposing on the Nawrots a higher standard of proof than the civil one. The Agency's statement that the Nawrots "have a greater burden of proof than simply presenting facts" is to be considered in conjunction with the striking inadequacy of the Agency's reasons. In the absence of clear and logical reasons, the Agency's conclusion of insufficiency of the evidence supports the Nawrots' submission that the Agency misdirected itself as to the civil standard of proof.

F. FETTERING DISCRETION WITH RESPECT TO COSTS

26. The *R. v. Felderhod* case cited by Sunwing (at paragraph 24) is irrelevant to the case at bar, because it involved criminal proceedings, and not civil matters. While the conduct of Sunwing toward the Nawrots may, figuratively speaking, be labelled as "criminal," the Nawrots' claim is nevertheless a civil dispute, and not a criminal one.

27. The *Canada Transportation Act* was enacted for the purpose of revising and amending the *National Transportation Act*. One of the amendments was a substantial expansion of the Agency's powers with respect to costs. During the clause-by-clause consideration of *Canada Transportation Act* by the House of Commons Standing Committee on Transport, Ms. Moya Greene, the Assistant Deputy Minister, explained the purpose of section 25.1 as follows:

> Therefore, if you want to give the agency the power to award ordinary costs, and you want to make that very specific power to award costs relative to some power that is vested in a court, the easiest way technically to do it is to refer to the cost-awarding powers of the Federal Court.
>
> Therefore, under clause 25 the agency has the powers inherent to superior courts for its procedures. Under clause 25.1 the agency will have the power, an ordinary power most people will be aware of, to award costs. But in order to explain it, it's relative to the power that the Federal Court has.
>
> [Emphasis added.]
>
> **Clause-by-clause consideration of the *Canada Transportation Act* (November 22, 1995): Standing Committee on Transport, Meeting No. 83, 35th Parliament, 1st Session, p. 10** **[Tab 4]**

28. Consequently, both the legislative history and the wording of s. 25.1(1) of the *Canada Transportation Act* is unambiguous that Parliament intended the Agency to "award ordinary costs," that is, award costs in the same manner as superior courts do in civil matters, and specifically as the Federal Court does.

29. The Agency's reliance (at paragraph 130 of the Decision) on *Bell Canada v. Consumers' Assoc. of Canada* as to the meaning of "costs" before the Agency is misguided, because the *Bell* decision considered costs under the old *National Transportation Act*, and not under the new *Canada Transportation Act*.

30. The purpose of the permissive language in section 25.1 of the *Canada Transportation Act* cited by Sunwing is, as articulated by the Assistant Deputy Minister, to ensure that the Agency enjoys the same powers and discretion with respect to awarding costs as the Federal Court does; but it does not entitle the Agency to establish criteria for awarding costs that are inconsistent with the general principles of law.

(i) The Agency confused costs to parties with costs to interveners

31. Decision No. 63-AT-A-2008, cited by Sunwing at paragraph 30, unveils the origin of the Agency's error, namely, that the Agency confused the principles applicable to costs between parties with those applicable to costs awarded to interveners.

32. In the case of interveners, costs are awarded only in exceptional circumstances. The criteria of whether an applicant for costs "has a substantial interest in the proceeding" or "has made a significant contribution that is relevant to the proceeding, and has contributed to the better understanding of the issues by all parties before the Agency" are typical questions asked in the context of both granting leave to intervene and determining whether to award costs to an intervener.

33. These principles, applicable to awarding costs to interveners, become meaningless and unreasonable if they are applied to parties who have, by their very nature, an interest in the proceeding.

(ii) In the past, the Agency did look to the Federal Court for guidance

34. Although Sunwing cited Decision No. 63-AT-A-2008, it has neglected to address the actual assessment of costs that followed the decision. Contrary to what is suggested by Sunwing at paragraph 26 of its factum, the taxation officer did look at the courts of law in general, and the *Federal Court Rules*, S.O.R./98-106 in particular for guidance.

Order No. 2008-AT-A-63, Canadian Transportation Agency, paras. 11-12 **[Tab 7]**

(iii) Fettering of discretion in the present case

35. Sunwing incorrectly suggests at paragraph 29 of its factum that there is a need to demonstrate an asymmetrical approach to the awarding of costs in order to establish that the Agency fettered its discretion. The Nawrots respectfully disagree with this submission.

36. The Nawrots submit that fettering of discretion occurs when the application of a practice limits the discretion of the decision-maker and there is no explicit authority in the enabling legislation to establish that practice.

37. Section 25.1 of the *Canada Transportation Act* confers unfettered discretion upon the Agency to award costs in the same manner as the Federal Court does; however, (unlike s. 67(1)(c) of the *Telecommunications Act*), the *Canada Transportation Act* does not authorize the Agency to establish its own criteria for the awarding of costs. The Agency's rule-making powers in this respect are confined to "rules specifying a scale under which costs are to be taxed," and the Agency never made such rules.

***Canada Transportation Act*, s. 25.1(4)** **[Appendix "A", P15]**

38. In the present case, the Agency fettered its discretion by applying the general principle explicitly articulated and acknowledged at paragraph 136 of the Decision that "an award of costs is warranted only in special or exceptional circumstances."

39. Since a decision that is the product of a fettered discretion is automatically unreasonable, the Nawrots submit that the Agency's decision with respect to costs ought to be set aside.

G. COSTS OF THE PRESENT MOTION

40. For the past 17 months, Sunwing has failed to reimburse the Nawrots even for those out-of-pocket expenses that are undisputed, and which Sunwing explicitly admitted as owing to the Nawrots. Although Sunwing has undertaken to pay this undisputed portion of the claim (para. 8), no payment has been received to date.

41. In these circumstances, it is submitted that the Nawrots ought not be ordered to pay costs even if they are unsuccessful on the present motion, and Sunwing ought to pay the Nawrots' costs forthwith and in any event of the cause.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

January 27, 2014

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LIST OF AUTHORITIES

APPENDIX "A" – STATUTES AND REGULATIONS

***Canada Transportation Act*, S.C. 1996, c. 10**	***Loi sur les transports au Canada*, L.C. 1996, ch. 10**
25.1 (1) Subject to subsections (2) to (4), the Agency has all the powers that the Federal Court has to award costs in any proceeding before it.	**25.1** (1) Sous réserve des paragraphes (2) à (4), l'Office a tous les pouvoirs de la Cour fédérale en ce qui a trait à l'adjudication des frais relativement à toute procédure prise devant lui.
(2) Costs may be fixed in any case at a sum certain or may be taxed.	(2) Les frais peuvent être fixés à une somme déterminée, ou taxés.
(3) The Agency may direct by whom and to whom costs are to be paid and by whom they are to be taxed and allowed.	(3) L'Office peut ordonner par qui et à qui les frais doivent être payés et par qui ils doivent être taxés et alloués.
(4) The Agency may make rules specifying a scale under which costs are to be taxed.	(4) L'Office peut, par règle, fixer un tarif de taxation des frais.
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.	**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.

(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.	(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.
78. (1) Subject to any directions issued to the Agency under section 76, the powers conferred on the Agency by this Part shall be exercised in accordance with any international agreement, convention or arrangement relating to civil aviation to which Canada is a party.	**78.** (1) Sous réserve des directives visées à l'article 76, l'exercice des attributions conférées à l'Office par la présente partie est assujetti aux ententes, conventions ou accords internationaux, relatifs à l'aviation civile, dont le Canada est signataire.

***Canadian Transportation Agency General Rules*, SOR/2005-35**	***Règles générales de l'Office des transports du Canada*, DORS/2005-35**
36. The Agency shall give oral or written reasons in support of any of its orders and decisions that do not allow the relief requested, or if opposition has been expressed.	**36.** L'Office a l'obligation de motiver oralement ou par écrit ceux de ses arrêtés ou celles de ses décisions qui n'accordent pas le redressement demandé ou qui donnent lieu à une opposition.

Montreal Convention **(Schedule VI, *Carriage by Air Act*, R.S. 1985, c. C-26)**	***Convention de Montréal*** **(Annexe VI, *Loi sur le transport aérien*, L.R. 1985, c. C-26)**
Article 1 - Scope of Application	**Article 1 - Champ d'application**
1. This Convention applies to all international carriage of persons, baggage or cargo performed by aircraft for reward. It applies equally to gratuitous carriage by aircraft performed by an air transport undertaking.	1. La présente convention s'applique à tout transport international de personnes, bagages ou marchandises, effectué par aéronef contre rémunération. Elle s'applique également aux transports gratuits effectués par aéronef par une entreprise de transport aérien.
2. For the purposes of this Convention, the expression international carriage means any carriage in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transhipment, are situated either within the territories of two States Parties, or within the territory of a single State Party if there is an agreed stopping place within the territory of another State, even if that State is not a State Party. Carriage between two points within the territory of a single State Party without an agreed stopping place within the territory of another State is not international carriage for the purposes of this Convention.	2. Au sens de la présente convention, l'expression transport international s'entend de tout transport dans lequel, d'après les stipulations des parties, le point de départ et le point de destination, qu'il y ait ou non interruption de transport ou transbordement, sont situés soit sur le territoire de deux États parties, soit sur le territoire d'un seul État partie si une escale est prévue sur le territoire d'un autre État, même si cet État n'est pas un État partie. Le transport sans une telle escale entre deux points du territoire d'un seul État partie n'est pas considéré comme international au sens de la présente convention.

3. Carriage to be performed by several successive carriers is deemed, for the purposes of this Convention, to be one undivided carriage if it has been regarded by the parties as a single operation, whether it had been agreed upon under the form of a single contract or of a series of contracts, and it does not lose its international character merely because one contract or a series of contracts is to be performed entirely within the territory of the same State.	3. Le transport à exécuter par plusieurs transporteurs successifs est censé constituer pour l'application de la présente convention un transport unique lorsqu'il a été envisagé par les parties comme une seule opération, qu'il ait été conclu sous la forme d'un seul contrat ou d'une série de contrats, et il ne perd pas son caractère international par le fait qu'un seul contrat ou une série de contrats doivent être exécutés intégralement dans le territoire d'un même État.
4. This Convention applies also to carriage as set out in Chapter V, subject to the terms contained therein.	4. La présente convention s'applique aussi aux transports visés au Chapitre V, sous réserve des dispositions dudit chapitre.
Article 19 - Delay The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.	**Article 19 - Retard** Le transporteur est responsable du dommage résultant d'un retard dans le transport aérien de passagers, de bagages ou de marchandises. Cependant, le transporteur n'est pas responsable du dommage causé par un retard s'il prouve que lui, ses préposés et mandataires ont pris toutes les mesures qui pouvaient raisonnablement s'imposer pour éviter le dommage, ou qu'il leur était impossible de les prendre.

Article 20 - Exoneration If the carrier proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation, or the person from whom he or she derives his or her rights, the carrier shall be wholly or partly exonerated from its liability to the claimant to the extent that such negligence or wrongful act or omission caused or contributed to the damage. When by reason of death or injury of a passenger compensation is claimed by a person other than the passenger, the carrier shall likewise be wholly or partly exonerated from its liability to the extent that it proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of that passenger. This Article applies to all the liability provisions in this Convention, including paragraph 1 of Article 21.	**Article 20 - Exonération** Dans le cas où il fait la preuve que la négligence ou un autre acte ou omission préjudiciable de la personne qui demande réparation ou de la personne dont elle tient ses droits a causé le dommage ou y a contribué, le transporteur est exonéré en tout ou en partie de sa responsabilité à l'égard de cette personne, dans la mesure où cette négligence ou cet autre acte ou omission préjudiciable a causé le dommage ou y a contribué. Lorsqu'une demande en réparation est introduite par une personne autre que le passager, en raison de la mort ou d'une lésion subie par ce dernier, le transporteur est également exonéré en tout ou en partie de sa responsabilité dans la mesure où il prouve que la négligence ou un autre acte ou omission préjudiciable de ce passager a causé le dommage ou y a contribué. Le présent article s'applique à toutes les dispositions de la convention en matière de responsabilité, y compris le paragraphe 1 de l'article 21.

Article 29 – Basis of Claims In the carriage of passengers, baggage and cargo, any action for damages, however founded, whether under this Convention or in contract or in tort or otherwise, can only be brought subject to the conditions and such limits of liability as are set out in this Convention without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights. In any such action, punitive, exemplary or any other non-compensatory damages shall not be recoverable.	**Article 29 - Principe des recours** Dans le transport de passagers, de bagages et de marchandises, toute action en dommages-intérêts, à quelque titre que ce soit, en vertu de la présente convention, en raison d'un contrat ou d'un acte illicite ou pour toute autre cause, ne peut être exercée que dans les conditions et limites de responsabilité prévues par la présente convention, sans préjudice de la détermination des personnes qui ont le droit d'agir et de leurs droits respectifs. Dans toute action de ce genre, on ne pourra pas obtenir de dommages-intérêts punitifs ou exemplaires ni de dommages à un titre autre que la réparation.

Indexed as:

Blanchard v. Control Data Canada Ltd.

Denis Blanchard, Appellant; and
Control Data Canada Limited, Respondent; and
Jean-Paul Lalancette, Mis en cause.

[1984] 2 S.C.R. 476

Supreme Court of Canada

File No.: 17680.

1984: March 15 / 1984: November 22.

Present: Beetz, McIntyre, Chouinard, Lamer and Wilson JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Judicial review -- Labour law -- Arbitral award -- Complaint of dismissal without good and sufficient cause -- Alteration by arbitrator of penalty imposed by employer -- Writ of evocation -- Privative clause -- Powers of arbitrator -- Whether arbitral award reasonable and sufficient reasons given -- Act respecting labour standards, R.S.Q., c. N-1.1, ss. 124, 125, 126, 127, 128, 129 -- Labour Code, R.S.Q. 1977, c. C-27 as am., s. 139 -- Code of Civil Procedure, art. 846.

Appellant, contrary to his employer's policies and despite a previous prohibition, accepted a trip to Jamaica offered by the radio station with which he was negotiating an advertising purchase contract on behalf of his employer. Appellant was dismissed and submitted to the Commission des normes du travail a complaint of dismissal without good and sufficient cause. After examining the evidence submitted by the parties, the arbitrator concluded that appellant's insubordination did not justify such a penalty. Relying on s. 128 of the Act respecting labour standards, he substituted for the dismissal a suspension without pay for four months. Respondent applied to the Superior Court for a writ of evocation. The application was dismissed. A majority of the Court of Appeal reversed the judgment and authorized the writ to be issued. The majority of the Court held that the arbitrator had the power under s. 128 to amend the penalty chosen by the employer, but in the case at bar had exceeded his jurisdiction by making an unreasonable award. Additionally, they considered that the arbitrator's reasons were only an expression of opinion and that therefore the decision could be

regarded as void and rendered entirely without jurisdiction. The present appeal raises three questions: whether (1) the existence of "good and sufficient cause for dismissal" is a prerequisite for the exercise by the arbitrator of his jurisdiction; (2) in light of the powers conferred on him by s. 128, the arbitrator exceeded his jurisdiction by making an "unreasonable" award; and (3) in view of the requirement in s. 129 of the Act that the arbitral award be supported by reasons, should this Court intervene and vacate the award if it is not supported by sufficient reasons?

Held: The appeal should be allowed.

Per curiam: On the first question: the existence of good and sufficient cause for dismissal is not a prerequisite to the exercise of the arbitrator's jurisdiction, but is an intra-jurisdictional question, since it is the very subject of the inquiry. It is the only question which the arbitrator must decide before making the order he thinks proper.

Per Beetz, Chouinard and Wilson JJ., agreeing on the two other questions with the reasons of Monet J.A., dissenting, in the Court of Appeal. Moreover, on the second question: the complaint which the majority of the Court of Appeal made against the arbitrator was not, strictly speaking, that he committed an error of law or fact, but more precisely, that he committed an abuse of authority like that referred to in para. 4 of art. 846 C.C.P. Whatever the arbitrator's decision, an abuse of power amounting to fraud and of such a nature as to cause a flagrant injustice would divest him of his jurisdiction and be a basis for judicial review by evocation, regardless of any privative clause. In the case at bar, however, the arbitrator's award did not constitute such an abuse. It cannot be said that the less severe penalty imposed by the arbitrator is, in view of all the circumstances, clearly abusive, flagrantly unjust, absurd, contrary to common sense and lacking any basis in the evidence as a whole.

Per McIntyre and Lamer JJ., agreeing in substance on the second and third questions with the reasons of Monet J.A., dissenting, in the Court of Appeal. The Supreme Court has tended in exercising its power of review to avoid intervening when the decision of the administrative tribunal, whether erroneous or not, is reasonable in view of the applicable legislation. Where there is a privative clause, however, judicial review may only be exercised on questions of jurisdiction. The distinction between error of law and fact then becomes superfluous: an unreasonable finding, whatever its origin, impairs the jurisdiction of the tribunal and justifies judicial intervention. In the case at bar the arbitrator did not exceed his jurisdiction. His interpretation of s. 128 and of the powers it confers is not only reasonable but correct. An arbitrator acting under that section has a power to substitute another penalty for the dismissal imposed by the employer if, in his opinion, there is not a cause significant enough to warrant that penalty. As regards the award, it was not shown that in view of the facts considered by the arbitrator and his privileged position he rendered an unreasonable award by imposing a lesser penalty on appellant. A court may not agree with the arbitral award, but that does not authorize it to substitute its own opinion for that of an arbitrator who has acted in accordance with his enabling legislation and in a manner which is not "patently

unreasonable".

In addition, the arbitral award is not void because insufficient reasons were given for it. Even if the decision was not very well formulated, the arbitrator's reasons are intelligible and it is possible to understand the basis for his decision. In any case, even assuming that the reasons were insufficient, this is an error of law apparent of the face of the record. Where there is a privative clause such errors are generally beyond judicial review.

Cases Cited

Canadian Union of Public Employees Local 963 v. New Brunswick Liquor Corporation, [1979] 2 S.C.R. 227; Teamsters Union, Local 938 v. Massicotte, [1982] 1 S.C.R. 710; Alberta Union of Provincial Employees v. Board of Governors of Olds College, [1982] 1 S.C.R. 923; St. Luc Hospital v. Lafrance, [1982] 1 S.C.R. 974; C.L.R.B. v. Halifax Longshoremen's Association, [1983] 1 S.C.R. 245; National Bank of Canada v. Retail Clerks' International Union, [1984] 1 S.C.R. 269; Bibeault v. McCaffrey, [1984] 1 S.C.R. 176; Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Association, [1975] 1 S.C.R. 382; Parkhill Bedding & Furniture Ltd. v. International Molders & Foundry Workers Union (1961), 26 D.L.R. (2d) 589, considered; Lafrance v. Commercial Photo Service Inc., [1980] 1 S.C.R. 536, distinguished; Pearlman v. Keepers and Governors of Harrow School, [1979] 1 All E.R. 365, not followed; Heustis v. New Brunswick Electric Power Commission, [1979] 2 S.C.R. 768; Jacmain v. Attorney General of Canada, [1978] 2 S.C.R. 15; Crevier v. Attorney General of Quebec, [1981] 2 S.C.R. 220; Port Arthur Shipbuilding Co. v. Arthurs, [1969] S.C.R. 85; Newfoundland Association of Public Employees v. Attorney General of Newfoundland, [1978] 1 S.C.R. 524; South East Asia Fire Bricks Sdn. Bhd. v. Non-Metallic Mineral Products Manufacturing Employees Union, [1980] 3 W.L.R. 318 (U.K.); Re Racal Communications Ltd., [1980] 2 All E.R. 634, referred to.

APPEAL from a judgment of the Quebec Court of Appeal, [1983] C.A. 129, which reversed a judgment of the Superior Court refusing to issue a writ of evocation. Appeal allowed.

Robert Décary, Germain Canuel and Michel Canuel, for the appellant.
Jean-Jacques Rainville and Réjean Rioux, for the respondent.

Solicitors for the appellant: Canuel, Quidoz, Tremblay, Blier, Castonguay & Sylvain, Montréal.
Solicitors for the respondent: Vermette, Dunton & Associés, Montréal.

English version of the judgment of Beetz, Chouinard and Wilson JJ. delivered by

BEETZ J.:-- I have had the benefit of reading the opinion of my brother Lamer J. I adopt his description of the facts and pleadings and I refer also to his statement of the three points in issue.

On the first point, I consider as he does that the existence of good and sufficient cause of dismissal is not a prerequisite to the exercise of the arbitrator's jurisdiction, but is the very subject of his inquiry, and it is the principal question which the arbitrator must decide before making any other order he thinks proper and reasonable in view of all circumstances.

On the other two points, like Lamer J. I concur with the reasons of Monet J.A., dissenting in the Court of Appeal, Control Data Canada Ltée v. Lalancette, [1983] C.A. 129, at pp. 137-43.

I cannot add very much to the reasons of Monet J.A.

However, I feel I should make certain observations on the second point at issue.

According to the prior decisions of this Court, a patently unreasonable error by an administrative tribunal in interpreting a provision which it has to apply within the limits of its jurisdiction will in itself cause the tribunal to lose its jurisdiction. Reference may be made to these precedents in the case at bar, at least by analogy. But it is an analogy, considering the nature of the reproach addressed to the arbitrator by the majority of the Court of Appeal, at pp. 134 and 135 of the Recueils de jurisprudence de la Cour d'appel. This reproach was that

> [TRANSLATION] ... [the arbitrator] committed an excess of jurisdiction by giving the facts an unreasonable interpretation: his award was totally lacking in reality and contrary to public order ... [it] constituted a flagrant denial of justice, an invitation to repeat the offence and a bad example for the other employees.

It appears to me that the reproach is not, strictly speaking, that the arbitrator committed an error of law or fact, but more precisely, that he committed an abuse of authority like that referred to in para. 4 of art. 846 of the Code of Civil Procedure:

> 846. The Superior Court may, at the demand of one of the parties, evoke before judgment a case pending before a court subject to its superintending and reforming power, or revise a judgment already rendered by such court, in the following cases:
>
> 1. when there is want or excess of jurisdiction;
>
> 2. when the enactment upon which the proceedings have been based or the judgment rendered is null or of no effect;

> 3. when the proceedings are affected by some gross irregularity, and there is reason to believe that justice has not been, or will not be done;
>
> 4. when there has been a violation of the law or an abuse of authority amounting to fraud and of such a nature as to cause a flagrant injustice.

However, in the cases provided in paragraphs 2, 3 and 4 above, the remedy lies only if, in the particular case, the judgments of the court seized with the proceeding are not susceptible of appeal.

Whatever the arbitrator's jurisdiction, strictly speaking, an abuse of authority amounting to fraud and of such a nature as to cause a flagrant injustice would divest him of his jurisdiction and be a basis for judicial review by evocation, regardless of any privative clause.

I cannot say that the arbitrator's award constituted such an abuse.

The majority on the Court of Appeal appears in fact to have decided that the only reasonable sanction for the unquestionably reprehensible behaviour of appellant necessarily had to be the ultimate sanction of dismissal, and that by imposing a less severe penalty the arbitrator acted contrary to public order. It seems to me, be it said with the greatest respect, that this is coming close to confusing the appellant's actions and those of the arbitrator. I am far from certain that I would have decided as the arbitrator did, but I also cannot say that the less severe penalty which is imposed instead of the ultimate penalty is, in view of all the circumstances, clearly abusive, flagrantly unjust, absurd, contrary to common sense, and lacking any basis in the evidence as a whole.

I would dispose of the appeal as my brother Lamer J. suggests.

English version of the reasons of McIntyre and Lamer JJ. delivered by

LAMER J.:-- This case raises the problem of the extent of judicial review of the decisions of administrative tribunals. Appellant Blanchard is asking this Court to restore the decision of a judge of the Superior Court of Quebec who refused to issue a writ of evocation against the mis en cause arbitrator. A majority of the Court of Appeal of Quebec reversed this judgment and directed that the writ be issued.

Appellant Blanchard had been employed by the respondent since July 1973 and was dismissed on April 30, 1980. The circumstances resulting in this dismissal are essentially not in dispute. It was admitted that in November 1979, while working in advertising and promotion for the respondent, Mr. Blanchard accepted two tickets for a two-week stay in the Bahamas offered by station CJFM in connection with a contract for the purchase of advertising air time. These tickets were given by Mr. Blanchard to his subordinate Mr. Ducharme. It appeared that on the latter's return, Messrs. Blanchard and Ducharme were told by an officer of the company that such actions

were contrary to professional ethics and the company's policies.

In April 1980, in similar circumstances, Mr. Blanchard accepted two tickets for a two-week stay in Jamaica, which he decided to use himself. Shortly after, on April 30, 1980, Mr. Blanchard was dismissed. It may be noted from the evidence admitted by the arbitrator that relations between Control Data Canada Limited and Mr. Blanchard had deteriorated before the latter trip, as the result of a complaint by Mr. Blanchard to the Commission de surveillance de la langue française.

On May 25, 1980, appellant submitted a complaint to the Commission des normes du travail for dismissal without good and sufficient cause, under ss. 124 et seq. of the Act respecting labour standards, R.S.Q., c. N-1.1.

DIVISION III

RECOURSE AGAINST DISMISSALS NOT MADE FOR GOOD AND SUFFICIENT CAUSE

124. An employee credited with five years of uninterrupted service with one employer who believes that he has not been dismissed for a good and sufficient cause may present his complaint in writing to the Commission within 30 days of his dismissal, except where a remedial procedure, other than a recourse in damages, is provided elsewhere in this act, in another act or in an agreement.

125. Upon receiving the complaint, the Commission may appoint a person who shall endeavour to settle the complaint to the satisfaction of the interested parties.

The Commission may require from the employer a writing containing the reasons for dismissing the employee. It must provide a copy of this writing to the employee, on demand.

126. Where no settlement is reached within 30 days of the filing of the complaint with the Commission, the employee may apply to the Commission to have his complaint referred to arbitration.

The Commission shall appoint an arbitrator whose name appears on the list provided for in the second paragraph of section 78 of the Labour Code (chapter C-27).

127. Sections 100.1 to 100.9, 100.11 and 100.12, 100.14 to 100.16, 101, 101.3, 101.4, 139 and 140 of the Labour Code (chapter C-27) apply, mutatis mutandis, to the arbitrator so appointed.

> 128. Where the arbitrator considers that the employee has not been dismissed for good and sufficient cause, he may
>
> (1) order the employer to reinstate the employee;
> (2) order the employer to pay to the employee an indemnity up to a maximum equivalent to the wage he would normally have earned had he not been dismissed;
> (3) render any other decision he believes fair and reasonable, taking into account all the circumstances of the matter.
>
> However, in the case of a domestic, the arbitrator may only order the payment to the employee of an indemnity corresponding to the wage and other benefits of which he was deprived due to dismissal up to a maximum period of three months.
>
> 129. The arbitration award must state the grounds on which it is based and be rendered in writing.

(Emphasis added.)

In an arbitral award on February 4, 1982 the mis en cause Jean-Paul Lalancette, relying on s. 128 of the Act, substituted for the dismissal a suspension without pay for four months and directed that Mr. Blanchard be reinstated retroactively to August 30, 1980, that is, the date of the suspension's expiry. In his reasons, the arbitrator reviewed the facts and the evidence presented by the parties, and concluded:

> [TRANSLATION] Accordingly, there was insubordination by the complainant in view of the warning given by Mr. Jetté a year earlier; but once again, I am not persuaded that he was dismissed because of that, but rather because of all the events occurring in February, March and April 1980.
>
> If we consider the three (3) events in turn, namely the reduction in performance, the complaint to the Commission and the acceptance of a trip to Jamaica, none of these events is a ground for dismissal in itself. Even if they were to be taken as a whole, I do not think that they constitute a ground for dismissal, as the demotion was to some extent negotiated by the two (2) parties; so far as the complaint is concerned, it was the complainant's right to make it even if it was an unfortunate move: he could perhaps have acted differently; and that leaves the trip to Jamaica.

Accordingly, I cannot conclude there should have been a dismissal, even though some penalty was required, and in the circumstances the arbitrator makes use of s. 128(3) of the Labour Standards Act, namely:

> "(3) render any other decision he believes fair and reasonable, taking into account all the circumstances of the matter."

WHEREAS complainant has no previous disciplinary record;

WHEREAS the employee's performance was excellent until early 1980;

IN VIEW OF the events of February, March and April 1980;

WHEREAS disciplinary action was necessary, but dismissal was not appropriate;

WHEREAS in light of the offence committed;

WHEREAS it seems fair and reasonable to substitute for the dismissal a suspension of complainant without pay;

FOR ALL THESE REASONS, THE ARBITRATOR:

1. DIRECTS that complainant be rehired from the date on which this decision is received;
2. SUBSTITUTES for the dismissal of April 30, 1980 a suspension without pay for four (4) months, that is from April 30 to August 30, 1980;
3. DIRECTS the employer to pay complainant a wage of $410.00 bi-weekly, beginning August 30, 1980 until the date he is re-hired, plus the average salary increases paid to other employees, if any, and deducting for the four (4) weeks of salary paid, referred to in the letter of April 30, 1980, P-2, namely the salary paid up to May 2, 1980;
4. DECIDES that the whole shall bear interest at the legal rate, as specified in s. 100.15 (s. 88o of the Labour Code) referred to in s. 127 of the Labour Standards Act;

5. CONTINUES the rights and privileges of complainant as if he had not been dismissed, except for the suspension period;
6. DOES NOT AWARD any commission to complainant, pursuant to the employer's commissions plan, as complainant did not work;
7. RESERVES JURISDICTION to determine the amount owed under the provisions of s. 127 of the Labour Standards Act and 101.4 (89d of the Labour Code).

By a motion for a writ of evocation, respondent asked the Superior Court to quash the arbitrator's decision on three grounds:

> --insufficient reasons were given for the decision; --misinterpretation of s. 128 by the arbitrator; --the arbitral award was unreasonable.

On April 5, 1982 Bisaillon J. dismissed the motion on the bench. In his opinion, the reasons given for the decision were quite sufficient since [TRANSLATION] "the conclusion arrived at by the arbitrator proceeds logically from the analysis made by him of the evidence".

On section 128, respondent argued that the arbitrator's powers are alternative and not cumulative. According to this interpretation, in other words, the arbitrator could not both order that the employee be reinstated and suspended for four months. Bisaillon J. dismissed this argument, observing that the wording of s. 128 does not require such an interpretation, and that moreover, even if the arbitrator erred in this regard, his error was "intra-jurisdictional" and so excluded from judicial review by the privative clause.

On the third ground, Bisaillon J. stated:

> [TRANSLATION] It was then argued that the arbitrator committed an abuse of authority by making an unreasonable award. What is reasonable and unreasonable is a very elastic concept, but as the argument was that there had been an abuse of authority, the error must amount to an abuse of authority of such a nature as to cause a flagrant injustice ([1977] 2 S.C.R. 568). I see no abuse of authority here, first, in the conclusion arrived at by the arbitrator that the action required a penalty and second, in the remedial measures adopted by him, all of which was within his jurisdiction. It might be argued that his award was too harsh, or that it was not harsh enough, but the arbitrator has sole control of the degree of harshness. That is his function, and if it appears to the Court that his award was too harsh or not harsh enough, the Court cannot allow evocation solely in order to revise it in one direction or the other and to substitute its own concept of harshness.

(Case of Appeal, at p. 37)

On appeal, the Court was divided, [1983] C.A. 129. Turgeon J.A., writing for himself and for Malouf J.A., set aside the judgment of the Superior Court. After reviewing the decisions of this Court on disciplinary arbitration (Port Arthur Shipbuilding Co. v. Arthurs, [1969] S.C.R. 85; Newfoundland Association of Public Employees v. Attorney General of Newfoundland, [1978] 1 S.C.R. 524, and Heustis v. New Brunswick Electric Power Commission, [1979] 2 S.C.R. 768), Turgeon J.A. held that s. 128 expressly confers on the arbitrator a power to substitute some other penalty for that chosen by the employer, if this is justified by the circumstances. He therefore dismissed the argument of Control Data Canada Limited that the arbitrator had exceeded his jurisdiction by amending the penalty in the case at bar.

However, Turgeon J.A. held that the arbitrator had exceeded his jurisdiction by making an unreasonable award. Emphasizing the importance of the relationship of trust between an employer and his employee, Turgeon J.A. observed that [TRANSLATION] "if an employee's actions are likely to shake the trust an employer must have in him, it is not surprising that the latter decides to dispense with his services".

Applying these principles, therefore, Turgeon J.A. held that the acceptance of bribes by Mr. Blanchard constituted very serious misconduct for which the employer was justified in dismissing him.

As this misconduct is in addition a criminal offence, Turgeon J.A. concluded, at p. 134, that the arbitrator had lent his approval to unlawful acts, and that:

> [TRANSLATION] The arbitrator committed an excess of jurisdiction by giving the facts an unreasonable interpretation: his award was totally lacking in reality and contrary to public order. In the case at bar, though recognizing that there had been insubordination and that this insubordination could cause conflicts of interest, the arbitrator directed that the mis en cause be reinstated subject merely to a suspension.

Additionally, Turgeon J.A. considered that the arbitrator's reasons were only an expression of opinion and that therefore the decision [TRANSLATION] "could be regarded as void and rendered entirely without jurisdiction".

Monet J.A. agreed with the majority on the interpretation of s. 128, but dissented on the other two points at issue. Noting that the Act respecting labour standards changes the rules of the game regarding dismissals without good and sufficient cause and gives the arbitrator very wide powers, Monet J.A. concluded that the employer had not shown that the award was unreasonable. He noted the existence of the privative clause in s. 139 of the Labour Code, R.S.Q. 1977, c. C-27, which is made applicable to an arbitrator by s. 127 of the Act, he emphasized the advantage which the arbitrator has in seeing and hearing the witnesses, and he went on to say (at p. 142):

> [TRANSLATION] Was it a resentment or a sense of honesty which led appellant

> to dismiss the mis en cause? In my view, the function of this Court in hearing this appeal is not to decide this question. Under the statute which is applicable, the powers of the arbitrator are autonomous, and in deciding not to simply vacate the dismissal he was exercising those powers. Similarly, he thought it fair to substitute a non-drastic disciplinary measure, that is, one which in light of his weighing of the evidence as a whole seemed fair and reasonable to him. His decision was not on the legality of the dismissal, but on whether the mis en cause was right in concluding that he had been unfairly treated by being dismissed. Surely this was his function, as specified by the Act.

After dismissing the second argument, Monet J.A. concluded on the final point at issue that sufficient reasons were given for the arbitral award and [TRANSLATION] "that it was even in accordance with the generally accepted principles in such matters".

With respect, I concur in the opinion of Monet J.A. and I conclude that the Court of Appeal erred in setting aside the decision of Bisaillon J. and authorizing that a writ of evocation be issued.

As I see them, the questions at issue are:

(a) in light of the respondent's factum is the existence of "good and sufficient cause for dismissal" a prerequisite for the arbitrator to exercise his jurisdiction?
(b) in light of the powers conferred on him by s 128, did the arbitrator exceed his jurisdiction by making an award "so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review?" (Canadian Union of Public Employees Local 963 v. New Brunswick Liquor Corporation, [1979] 2 S.C.R. 227, a p. 237--the C.U.P.E. case.)
(c) in view of the requirement in s. 129 of the Act that the arbitral award be supported by reasons, should this Court intervene and quash the award if it is not supported by sufficient reasons?

Before answering these three questions, it is worth mentioning again that s. 127 of the Act makes the arbitrator subject to the provisions of s. 139 of the Labour Code, which on April 5, 1982 (the day of the judgment in the Superior Court) provided that:

> 139. No action under article 33 of the Code of Civil Procedure, or extraordinary recourse within the meaning of such code, or injunction shall be exercised against any council of arbitration, court of arbitration, arbitrator on grievances, certification agent, labour commissioner or the Court by reason of any act, proceeding or decision relating to the exercise of their functions.

Of course, as a result of the decision of this Court in Crevier v. Attorney General of Quebec,

[1981] 2 S.C.R. 220, such a clause can in no way impede judicial review regarding questions of jurisdiction. However, it is recognized that these clauses bar judicial review of any question other than that of jurisdiction. Further, on May 11, 1982, subsequent to the decision by the Superior Court in the case at bar, the Quebec legislator amended s. 139 of the Code to bring it in line with this case law:

> 139. Except on a question of jurisdiction, no extraordinary recourse contemplated in articles 834 to 850 of the Code of Civil Procedure shall be exercised and no injunction granted against any council of arbitration, court of arbitration, certification agent, labour commissioner or the Court acting in their official capacities.

It is therefore necessary to bear in mind the effect of the old s. 139 as limited by decisions of this Court. That provision clearly indicated the intention of the legislator to make the arbitrator responsible for deciding completely and finally the questions submitted to him by the Act. This deference is undoubtedly based both on the respect of the legislator for the arbitrator's expert knowledge and on the importance of ensuring a quick settlement of labour law disputes.

As Dickson J., as he then was, observed in similar circumstances in Heustis v. New Brunswick Electric Power Commission, supra, at p. 781:

> There is a very good policy reason for judicial restraint in fettering adjudicators in the exercise of remedial powers. The whole purpose in establishing a system of grievance adjudication under the Act is to secure prompt, final, and binding settlement of disputes arising out of interpretation or application of the collective agreement, or disciplinary action taken by the employer, all to the end that industrial peace may be maintained.

(Emphasis added.)

The courts must respect this choice made by the legislator and be extremely cautious in exercising their power of review. They should only intervene if they find a genuine excess of jurisdiction by the arbitrator, not simply where they disagree with his findings. Judicial review may only be exercised here on questions of jurisdiction.

It is in keeping with this approach and bearing these observations in mind that I now turn to a solution of the three questions stated above.

(A) The problem of the prerequisite to the exercise of the arbitrator's jurisdiction

In this Court, respondent argued that the existence of a "good and sufficient cause for dismissal" is a prerequisite to the exercise of the arbitrator's power to "render any other decision he believes fair and reasonable". Respondent maintained that s. 128 provides for a procedure which has

two distinct stages: first, the arbitrator must decide whether good and sufficient cause exists for the dismissal. If such a cause exists, the arbitrator has no jurisdiction to intervene. If such a cause does not exist, the arbitrator may exercise the powers conferred on him by s. 128. In other words, respondent argued that since the arbitrator committed an error as to the existence of good and sufficient cause, he conferred on himself a jurisdiction which he did not have under the Act.

This argument by respondent is based on the well-known theory in administrative law of so-called "collateral" or "preliminary" questions, according to which an administrative tribunal cannot err on these questions because any error would amount to assuming a jurisdiction which is different from what the legislator intended to confer on it.

In Jacmain v. Attorney General of Canada, a [1978] 2 S.C.R. 15, Dickson J., dissenting, properly observed that this theory places the superior courts in an extremely difficult position (at p. 29):

> The intractable difficulty is this. It is hard to conceive that a legislature would create a tribunal with a limited jurisdiction and yet bestow on such tribunal an unlimited power to determine the extent of its jurisdiction. On the other hand, if the correctness of every detail upon which the jurisdiction of the tribunal depends is to be subject to re-trial in the Courts and the opinion of a judge substituted for that of the tribunal, then the special experience and knowledge of the members of such a tribunal and the advantage they have of hearing and seeing the witnesses may be lost. The power to review jurisdictional questions provides the Courts with a useful tool to ensure that tribunals deal with the type of issues which the Legislature intended. It enables the Courts to check unlawful attempts at usurpation of power. But the Courts, in my opinion, should exercise restraint in declaring a tribunal to be without jurisdiction when it has reached its decision honestly and fairly and with due regard to the material before it. The Court should allow some latitude in its surveillance of jurisdictional findings. It should ask whether there is substantial evidence for decisions of fact and a rational basis for decisions of law, or mixed decisions of fact and law. The error must be manifest. The role of the Court is one of review, not trial de novo.

Professor Paul P. Craig, in his text Administrative Law, London, Sweet & Maxwell, 1983, at pp. 299 et seq., also emphasizes that the great weakness of the preliminary questions theory is the absence of any coherent test for distinguishing what is in fact preliminary.

To use the writer's words, at p. 302:

> The enabling statute always, explicitly or implicitly, states, if X1, X2, X3 exist, you may or shall do [Y1, Y2, Y3].

It is clear that all the "X" conditions can to some extent be categorized as prerequisites to the

exercise of the "Y" powers. In my view, there is no logical reason for distinguishing between condition X1 and condition X2 and concluding that one is a preliminary and the other is not. Thus, if all the "X" conditions are said to be preliminary, the administrative tribunal has lost the capacity to err: it can only exercise the power conferred on it by the law if it is right in its interpretation of what is meant by X1, X2 and X3. Ultimately, the distinction between an appeal and judicial review is somewhat fine. This distinction becomes nonexistent if we also adopt the theory that the administrative tribunal cannot err as to the content of powers Y1, Y2 and Y3, since it is then exercising a power that the law does not confer on it.

In short, it is important not to distort the superintending power of the superior courts, and to use the [TRANSLATION] "theory of prerequisites to the exercise of jurisdiction" with a great deal of caution. As Dickson J. observed in the C.U.P.E. case (at p. 233):

> The courts, in my view, should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so.

The current tendency is thus to limit the concept of a "preliminary question" as far as possible. Even those who favour retaining this concept limit it to questions concerning jurisdiction in the strict sense, of the initial power to proceed with an inquiry (C.U.P.E., supra, at p. 234, and Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Association, [1975] 1 S.C.R. 382, at p. 389). These questions are identified by the fact that they fall outside the limits of the enabling legislation itself, and are not usually within the area of expertise of the administrative tribunal (Parkhill Bedding & Furniture Ltd. v. International Molders & Foundry Workers Union (1961), 26 D.L.R. (2d) 589).

Whether we reject the theory of preliminary questions or apply it in its limited form as is currently being done, I think it is clear that the existence of good and sufficient cause is not a prerequisite to the exercise of the arbitrator's jurisdiction. On the contrary, it is the very subject of the inquiry. It is the only question which the arbitrator must decide before making the order he thinks proper. The Act does not confer a remedial authority on the arbitrator in the abstract: this authority is given to him when he finds that there is a situation requiring his intervention, namely dismissal without good and sufficient cause. By analogy, the Superior Court is not acting without jurisdiction when it directs that damages be paid after having erroneously held a defendant delictually liable: it is erring in the exercise of its jurisdiction. In the same way, the arbitrator is not acting without jurisdiction when he substitutes a new penalty for that chosen by the employer after erroneously finding that there was no good and sufficient cause for dismissal: he is erring in the exercise of his jurisdiction.

This observation gains additional weight from the actual wording of s. 128: the arbitrator has the powers specified in that section "where [he] considers that the employee has not been dismissed for good and sufficient cause". Section 128 does not make the use of these powers conditional on the objective existence of that cause, but on the arbitrator's subjective assessment.

For all these reasons, I consider that the existence of good and sufficient cause for dismissal is not a prerequisite to the exercise of the arbitrator's jurisdiction, but is an intra-jurisdictional question. This leads on to the second problem, which is determining whether the arbitral award is so unreasonable as to constitute an excess of jurisdiction.

(B) Whether arbitral award unreasonable

In principle, where there is a privative clause the superior courts should not be able to review errors of law made by the administrative tribunals. However, it is now settled that some errors of law can cause the arbitrator to lose his jurisdiction. The debate turns on the question of which errors of law result in the loss of jurisdiction. Contrary to the decision of Lord Denning in Pearlman v. Keepers and Governors of Harrow School, [1979] 1 All E.R. 365, where he said (at p. 372) that "no court or tribunal has any jurisdiction to make an error of law on which the decision of the case depends" (subsequently disapproved by the Privy Council in South East Asia Fire Bricks Sdn. Bhd. v. Non-Metallic Mineral Products Manufacturing Employees Union, [1980] 3 W.L.R. 318, and Re Racal Communications Ltd., [1980] 2 All E.R. 634), this Court has tended since Nipawin, supra, and C.U.P.E., supra, to avoid intervening when the decision of the administrative tribunal was reasonable, whether erroneous or not. In other words, only unreasonable errors of law can affect jurisdiction. The following extract from C.U.P.E., supra, at p. 237, frequently referred to in later cases, has become the classic statement of the approach taken by this Court:

> Put another way, was the Board's interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review?

This is a very severe test and signals a strict approach to the question of judicial review. It is nevertheless the test which this Court has applied and continues to apply:

--in Teamsters Union Local 938 v. Massicotte, [1982] 1 S.C.R. 710, in which Laskin C.J. observed at p. 724 "that mere doubt as to correctness of a labour board interpretation of its statutory power is no ground for finding jurisdictional error";

--in Alberta Union of Provincial Employees v. Board of Governors of Olds College, [1982] 1 S.C.R. 923, where Laskin C.J. applied the test mentioned above to a case involving a "quasi-privative" clause, which preserved the remedy of certiorari but conferred on the administrative tribunal a final jurisdiction not subject to appeal;

--in St. Luc Hospital v. Lafrance, [1982] 1 S.C.R. 974, where Chouinard J. used the C.U.P.E. test in a case not involving any privative clause respecting evocation;

--finally, and more recently, C.L.R.B. v. Halifax Longshoremen's Association, [1983] 1 S.C.R. 245; National Bank of Canada v. Retail Clerks' International Union, [1984] 1 S.C.R. 269 and Bibeault v. McCaffrey, [1984] 1 S.C.R. 176.

As this argument does not question the arbitrator's initial jurisdiction to rule on the award or to substitute his opinion for that of the employer, I cite these decisions in support of a rule, and to the extent that they enunciate a rule, which clearly applies to non-jurisdictional errors, without thereby stating any position on the effect of these decisions on the rule that must be applied to errors granting jurisdiction.

In looking for an error which might affect jurisdiction, the emphasis placed by this Court on the dichotomy of the reasonable or unreasonable nature of the error casts doubt on the appropriateness of making, on this basis, a distinction between error of law and error of fact. In addition to the difficulty of classification, the distinction collides with that given by the courts to unreasonable errors of fact. An unreasonable error of fact has been categorized as an error of law. The distinction would mean that this error of law is then protected by the privative clause unless it is unreasonable. What more is needed in order that an unreasonable finding of fact, in becoming an error of law, becomes an unreasonable error of law? An administrative tribunal has the necessary jurisdiction to make a mistake, and even a serious one, but not to be unreasonable. The unreasonable finding is no less fatal to jurisdiction because the finding is one of fact rather than law. An unreasonable finding is what justifies intervention by the courts.

Not only is the distinction between error of law and of fact superfluous in light of an unreasonable finding or conclusion, but the reference to error itself is as well. Indeed, though all errors do not lead to unreasonable findings, every unreasonable finding results from an error (whether of law, fact, or a combination of the two), which is unreasonable.

In conclusion, an unreasonable finding, whatever its origin, affects the jurisdiction of the tribunal. I hasten to add that the distinction between an error of law and one of fact is still entirely valid when the tribunal is not protected by a privative clause. Indeed, though all errors of law are then subject to review, only unreasonable errors of fact are, but no others.

Accordingly, the arbitrator in the case at bar only exceeded his jurisdiction if the award he made is unreasonable in light of the wording of s. 128 and/or the evidence. In this context, the arbitrator might have erred on four different points:

1. he interpreted the words "dismissed without good and sufficient cause" unreasonably;
2. he applied this test unreasonably to the facts of the case;
3. he gave an unreasonable interpretation of the various powers conferred on him by s. 128;
4. having regard to the evidence, he substituted an unreasonable penalty for that chosen by the employer.

It was not seriously argued in this Court that the arbitrator interpreted s. 128 unreasonably (questions 1 and 3). So far as the interpretation of the words "dismissed without good and sufficient cause" is concerned (question 1), respondent cited the decision of this Court in Lafrance v.

Commercial Photo Service Inc., [1980] 1 S.C.R. 536. In that case, five employees had submitted a complaint to the labour commissioner pursuant to s. 16 of the Labour Code (then s. 15), alleging that they had been dismissed because they exercised a right enuring to them under the Code.

> 15. When an employee is dismissed, suspended or transferred by the employer or his representative because of the exercise by such employee of a right arising from this Code, the labour commissioner may order the employer to reinstate such employee in his employment, within eight days of the service of the decision, with all his rights and privileges, and to pay him as an indemnity the equivalent of the salary and other benefits of which he was deprived due to dismissal, suspension or transfer.
>
> That indemnity is due in respect of the whole period comprised between the time of dismissal, suspension or transfer and that of the carrying out of the order, or the default of the employee to resume his employment after having been duly recalled by his employer.
>
> If the employee has worked elsewhere during the above mentioned period, the salary which he so earned shall be deducted from such indemnity.
>
> 16. An employee who believes that he has been illegally dismissed, suspended or transferred by reason of the exercise of a right which devolves on him under this code must, if he wishes to take advantage of section 15, present or mail his complaint in writing to the labour commissioner-general within fifteen days of the dismissal, suspension or transfer. The labour commissioner-general shall appoint a labour commissioner to make an investigation and decide as to the complaint.
>
> 17. If it is shown to the satisfaction of the labour commissioner seized of the matter that the employee exercises a right accorded to him by this code, there shall be a presumption in his favour that he was dismissed, suspended or transferred because he exercised such right, and the burden of proof that the employee was dismissed, suspended or transferred for another good and sufficient reason shall be upon the employer.

This was the context in which Chouinard J. had to interpret the final words of the presumption stated in s. 17 (then s. 16): "and the burden of proof that the employee was dismissed, suspended or transferred for another good and sufficient reason shall be upon the employer". After briefly reviewing the construction placed on these words by the courts, Chouinard J. concluded (at

p. 547):

> As his jurisdiction consisted of determining whether the other reason cited by the employer was a substantive reason as opposed to a pretext, and whether it constituted the true reason for the dismissal, by ruling on the severity of the penalty as compared with the seriousness of the wrongful act the judge substituted his judgment for that of the employer. In doing so he exceeded his jurisdiction, and this is the basis for the writ of evocation.

Respondent is therefore arguing that under s. 128 an arbitrator does not have to weigh the "sufficiency" of the cause and must refrain from acting once he finds there is a good cause for the penalty chosen by the employer.

I agree with the Court of Appeal that this case does not apply to the case at bar. The construction given by Chouinard J. must be placed in the context of ss. 15 et seq. of the Labour Code, which provide a remedy against dismissal that is unlawful because it results from the exercise by an employee of a right conferred on him by the Code. In the context of this remedy, the employee benefits from the presumption of s. 17 of the Code, and the commissioner's role is very limited in light of this presumption: he is only required to ensure that "the other reason" cited by the employer is not a pretext to mask an unlawful dismissal. This is a long way from s. 128 of the Act respecting labour standards, since a labour commissioner acting under ss. 15 et seq. of the Labour Code is not required, as an arbitrator appointed by the Commission des normes du travail is, to review the reasonableness of the exercise of the disciplinary power of the employer but its legality. Any question regarding the proportionality of the penalty is thus beyond the immediate limits of his inquiry.

For my part, I consider that the words "good and sufficient" in s. 128 must be given a meaning, and it is that there has to be a cause which in the arbitrator's opinion is significant enough to warrant a dismissal. In other words, there is no good and sufficient cause if the arbitrator considers that the penalty of dismissal was disproportionate to the wrongful act. This is the interpretation applied by the arbitrator in the case at bar: he concluded that there was no good and sufficient cause since in his view Mr. Blanchard's action was not wrongful enough to justify his dismissal. I therefore consider that the interpretation of these words by the arbitrator (question 1, supra) is not only reasonable but correct. I will return below to the question of how these words apply to the facts in the case at bar (question 2, supra).

As regards the interpretation by the arbitrator of the powers conferred on him by s. 128 (question 3, supra), I consider that it is also reasonable and so beyond judicial review. The Court of Appeal referred to the decision of this Court in Heustis, supra, to determine the scope of the arbitrator's powers under s. 128.

In that case, the adjudicator appointed pursuant to the Public Service Labour Relations Act, R.S.N.B. 1973, c. P-25, had to determine whether the employer had good and sufficient reason to

dismiss Mr. Heustis, but had no express power to substitute a lesser penalty. Dickson J., as he then was, concluded (at p. 783):

> There being nothing in either the agreement, or the Act, which expressly precludes the adjudicator's exercise of remedial authority, I am of the opinion that an adjudicator under the Public Service Labour Relations Act of New Brunswick has the power to substitute some lesser penalty for discharge where he had found just and sufficient cause for some disciplinary action, but not for discharge.

If that was true where there were no express remedial powers, a fortiori an arbitrator acting under s. 128 has the power to substitute a lesser penalty than that chosen by the employer. The terms of that section are clear: the arbitrator may order that the employee be reinstated, that an indemnity be paid to him, or he may "render any other decision he believes fair and reasonable, taking into account all the circumstances of the matter". In the case at bar, the arbitrator held that these provisions authorized him to substitute a four-month suspension for the dismissal, and once again, his construction of the law is reasonable and, be it said in passing, correct.

I therefore consider that the mis en cause arbitrator did not interpret the law unreasonably and did not exceed his jurisdiction (questions 1 and 3, supra).

However, a majority of the Court of Appeal held that the decision made by the arbitrator was unreasonable in view of the seriousness of appellant's act. In other words, the arbitrator was said to have erred in his application of the law to the facts of the case (questions 2 and 4, supra).

As I mentioned earlier, the arbitrator was said to have erred in two ways, namely by deciding that appellant's wrongful act did not justify dismissal and by imposing a penalty which was too light in view of the seriousness of the act. The court will only intervene if it is persuaded that the arbitrator made an unreasonable award. In coming to such a conclusion, the courts should always be mindful of the fact that an arbitrator is in a far better position to assess the impact of the award. It needs to be said again that administrative tribunals exist to provide solutions to disputes that can be best solved by a decision-making process other than that available in the courts. Often, too, the administrative "judge" is better trained and better informed on the area of his jurisdiction, and has access to information which more often than not does not find its way into the record submitted to the court. To this must be added the fact that the arbitrator saw and heard the parties.

In the case at bar, he chose to impose a four-month suspension without pay for an act which was unquestionably very reprehensible. He found that appellant's wrongful act did not justify his dismissal, taking all the circumstances into account.

The Court naturally condemns the actions of appellant and is fully in agreement with the arbitrator that those actions should be penalized. As to whether the penalty should have been dismissal or something less is a question for the arbitrator to decide.

For my part I was not persuaded that the arbitrator's decision, that the dismissal was not justified in the circumstances, was not based on a rational and reasonable assessment of the circumstances of the case and the rules applicable to the matter.

This Court may or may not agree with an arbitrator's award, but that does not authorize it to substitute its own opinion for that of an arbitrator who has acted in accordance with his enabling legislation and in a manner which is not "patently unreasonable". It is clear that the arbitrator took into account all the circumstances surrounding the dismissal and that he concluded that Mr. Blanchard had been dismissed for various reasons, only one of which was his acceptance of bribes. It is conceivable that in most circumstances, such a wrongful act would be a good and sufficient reason for dismissal. However, it was not shown that in light of the facts considered by the arbitrator and his privileged position, he made an unreasonable decision by imposing a lesser penalty on appellant.

With respect, therefore, it seems to me that the Court of Appeal erred in accepting this argument of the employer.

(C) Insufficiency of reasons given

There remains the final argument of respondent, which was also accepted by the Court of Appeal, that insufficient reasons were given for the arbitrator's award and that therefore it is "void and rendered entirely without jurisdiction".

In my view, this argument must be dismissed. Assuming for the purposes of argument that the reasons were in fact insufficient or ambiguous, as respondent suggested, this is an error of law apparent on the face of the record.

> [TRANSLATION] Error of law may also be pleaded to deal with insufficiency apparent on the record of the reasons given for the decisions of administrative bodies.

(Principes de contentieux administratif G. Pépin and Y. Ouellette, 2nd ed., 1982, Yvon Blais Inc., at p. 277.)

Where there is a privative clause such errors are beyond judicial review except in accordance with the rules discussed above. Additionally, it is hard to see how such a deficiency in the reasons could affect the arbitrator's jurisdiction to hear the case and to render the decision he thinks proper, except to the extent that the insufficiency of the reasons is so great that it amounts to an infringement of the rules of natural justice.

That does not appear to be the case here. There was no total absence of reasons. Even if as respondent suggests the decision was not very well worded, the arbitrator's reasons are intelligible and it is possible to understand the basis for his decision. Such a wording is far from amounting to

an infringement of the rules of natural justice. I would therefore dismiss this last argument.

For these reasons, I would allow the appeal, set aside the judgment of the Court of Appeal and restore that of the Superior Court denying the writ of evocation. Respondent will pay costs in all courts, except to the mis en cause arbitrator in this Court, as the latter filed no factum.

Appeal allowed.

Case Name:

BNSF Railway Co. v. Canada (Canadian Transportation Agency)

Between
BNSF Railway Company, Canadian National Railway Company and Canadian Pacific Railway Company, Appellants, and Canadian Transportation Agency, Quayside Community Board, Brian Allen and Matthew Laird, Respondents

[2011] F.C.J. No. 1377

[2011] A.C.F. no 1377

2011 FCA 269

423 N.R. 301

Docket A-25-11

Federal Court of Appeal
Vancouver, British Columbia

Noël, Pelletier and Dawson JJ.A.

Heard: September 20, 2011.
Judgment: September 28, 2011.

(34 paras.)

Transportation law -- Railways -- Regulation -- Federal -- Canadian Transportation Agency -- Appeal by railway companies from decision by Canadian Transportation Agency allowed -- Community Board brought noise and vibrations complaint in 2008 -- Matter went to mandatory mediation and was settled -- Board brought identical complaint in 2010, contending mediated settlement had failed -- Agency ruled it had jurisdiction to adjudicate matter -- Agency decision was unreasonable, as it failed to consider whether 2008 settlement was intended as final resolution of issues raised by identical first complaint -- No basis for Agency's conclusion that collaborative measures did not replace adjudicative process.

Appeal by the BNSF Railway Company, Canadian National Railway Company and Canadian Pacific Railway Company from a decision by the Canadian Transportation Agency in favour of the Quayside Community Board. In July 2008, the Board filed a complaint with the Agency on behalf of 2,080 strata units impacted by noise and vibrations from the appellants' rail operations. A mediation proceeded under s. 36.1 of the Canada Transportation Act and the parties entered into a confidential settlement agreement dated December 2008. A disposition statement signed by the parties confirmed a full resolution of the dispute to all parties' satisfaction. In April 2010, the Board filed a second complaint with the Agency against the appellants seeking the same relief as the 2008 complaint. The complaint also stated that the appellants had failed to communicate with the Board as per the settlement agreement and that the mediated settlement had failed. The appellants took the position that the Agency could not adjudicate the matter, as a valid and binding settlement agreement was in place. The appellants submitted that any disagreement as to implementation of the settlement agreement could only be referred back to a reconvened mediation session. The Agency concluded that in the absence of a formal adjudicative order disposing of the first complaint, it had jurisdiction to adjudicate the second complaint. The Agency subsequently rendered the decision under appeal.

HELD: Appeal allowed. The Agency was required to respect the terms of any final settlement agreement concluded by the parties. Mediation was a form of collaborative resolution provided for in the Act and had the effect of staying proceedings before the Agency. Read as a whole, the Act and guidelines evidenced intent to utilize alternative mechanisms in order to achieve the final resolution of a complaint. A final settlement agreement was capable of being filed with a court for enforcement. There was nothing in the Act which supported the Agency's conclusion that successful resolution of a complaint through collaborative measures did not replace the adjudicative process with respect to the issues raised by the complaint. To find otherwise would have impugned the mediation process. The Agency failed to consider the effect of the settlement agreement and its decision was thus unreasonable. The decision was set aside and returned to the Agency for determination of whether the settlement agreement intended to finally resolve the issues raised by the first complaint and, if so, the identical second complaint precluded re-litigation of those issues.

Statutes, Regulations and Rules Cited:

Canada Transportation Act, S.C. 1996, c. 10, s. 33(1), s. 36.1, s. 36.1(1), s. 36.1(4), s. 36.1(6), s. 36.1(7), s. 41(4), s. 95.1, s. 95.2, s. 95.2(1), s. 95.3

Counsel:

Richard R.E. DeFilippi and Darren Stewart, for the Appellants.

John Dodsworth, Barbara Cuber, for the Respondents.

The judgment of the Court was delivered by

1 **DAWSON J.A.**:-- The issue to be determined on this appeal is whether the Canadian Transportation Agency (Agency) erred in law in determining that it could adjudicate a complaint concerning noise and vibration arising from operations at the New Westminster Rail Yard, notwithstanding that the parties had previously entered into a settlement agreement with respect to the same complaint. The decision of the Agency is cited as LET-R-152-2010.

2 For the reasons that follow, I would allow the appeal.

Factual Background

3 On July 4, 2008, the Quayside Community Board (Community Board) filed a complaint with the Agency. The Community Board advised that it represented 2080 strata units which were directly impacted by the noise and vibration caused by rail company operations in the New Westminster Rail Yard. The complaint was made against four rail companies: the BNSF Railway Company, the Canadian National Railway Company, the Canadian Pacific Railway Company and the Southern Railway of British Columbia (together the Railway Companies). The Community Board sought, among other things, an order restricting use of the rail yard to between the hours of 7 a.m. and 10 p.m.

4 The *Canada Transportation Act*, S.C. 1996, c. 10 (Act) and the Agency's Guidelines for the Resolution of Complaints Concerning Railway Noise and Vibration (Guidelines) provide that before the Agency can investigate a complaint regarding railway noise and vibration, it must be satisfied that the collaborative measures set out in the Guidelines have been exhausted. In the present case, with the agreement of the parties, the complaint was referred to mediation. The Guidelines and the statutory regime established by the Act are discussed below.

5 The mediation proceeded under section 36.1 of the Act with the assistance of two Agency-appointed mediators. At the conclusion of the mediation session the parties entered into a confidential settlement agreement dated December 10, 2008. The settlement agreement was signed by two representatives of the Community Board and by representatives of each rail company and the City of New Westminster. The parties, together with the mediators, also signed a Disposition Statement in which they confirmed that they had "fully resolved the aforementioned dispute to the satisfaction of all parties." In this document the parties also consented to the closing of the Agency's file concerning the Community Board's complaint.

6 On April 13, 2010, the Community Board filed a second complaint with the Agency against the Railway Companies. After expressing concern that the Railway Companies had not communicated with the Community Board as they were obliged to do under the settlement agreement, the second complaint advised that "[u]nfortunately, this mediated solution has failed." The Community Board requested "the specific relief we originally requested in the attached copy of the original complaint." No allegation was made that there had been any material change in facts or circumstances. At this

time, the Community Board did not allege any irreparable breach of the settlement agreement.

7 The Agency provided copies of the second complaint to the Railway Companies and gave them 30 days to respond to its complaint. The Agency characterized the complaint to be one that "the mediation process in this complaint has failed."

8 The Railway Companies responded that there was a valid and binding settlement agreement in place so that the matter could not be adjudicated by the Agency. Any disagreement in respect of the implementation of the settlement agreement could only be referred back to a reconvened mediation session. See: responses of the Railway Companies at pages 55 to 57, 59, 63-64 and 65-68 of the Appeal Book.

9 The Community Board replied to the submissions of the Railway Companies in an e-mail dated June 11, 2010. The Community Board took the position that the railways had "been unable to or intentionally failed to comply" with the settlement agreement so that it had been irreparably breached. The Community Board further contended that the settlement agreement "was never intended as an enduring document which would prevent the filing of a subsequent complaint" with the Agency.

10 In response to these communications, the Agency sought and received further submissions concerning whether it could adjudicate the second complaint.

11 The BNSF Railway Company wrote in its submission:

> In summary, it is the position of BNSF that the Agency does ***not*** have jurisdiction to deal with ***this*** noise and vibration complaint, in the circumstances that have occurred. This complaint was conclusively resolved by the parties on 10 December 2008. In the result, the complainants are barred, or prevented, from seeking to have the complaint reactivated and heard by the Agency. Moreover, the Agency is *functus officio*, or without jurisdiction, to deal with this complaint.

12 This position was adopted by both the Canadian National Railway Company and the Canadian Pacific Railway Company. After receiving the submissions of the Community Board and the reply of the Railway Companies, the Agency rendered the decision now under appeal.

Applicable Legislation

13 The parties agree that the initial complaint made by the Community Board fell within section 95.1 of the Act so that the Agency had jurisdiction to hear and determine the first complaint. Section 95.1 states:

> 95.1 When constructing or operating a railway, a railway company shall cause only such noise and vibration as is reasonable, taking into account

(*a*) its obligations under sections 113 and 114, if applicable;

(*b*) its operational requirements; and

(*c*) the area where the construction or operation takes place.

* * *

95.1 La compagnie de chemin de fer qui construit ou exploite un chemin de fer doit limiter les vibrations et le bruit produits à un niveau raisonnable, compte tenu des éléments suivants :

a) les obligations qui lui incombent au titre des articles 113 et 114, le cas échéant;

b) ses besoins en matière d'exploitation;

c) le lieu de construction ou d'exploitation du chemin de fer.

14 Section 95.2 of the Act authorizes the Agency to create guidelines about how it will decide noise and vibration complaints and about the collaborative resolution of such complaints:

95.2 (1) The Agency shall issue, and publish in any manner that it considers appropriate, guidelines with respect to

(*a*) the elements that the Agency will use to determine whether a railway company is complying with section 95.1; and

(*b*) the collaborative resolution of noise and vibration complaints relating to the construction or operation of railways.

(2) The Agency must consult with interested parties, including municipal governments, before issuing any guidelines.

(3) The guidelines are not statutory instruments within the meaning of the *Statutory*

Instruments Act.

* * *

95.2 (1) L'Office établit -- et publie de la manière qu'il estime indiquée -- des lignes directrices:

a) sur les éléments dont il tient compte pour décider si une compagnie de chemin de fer se conforme à l'article 95.1;

b) sur des mesures de coopération en matière de résolution des conflits concernant le bruit ou les vibrations liés à la construction ou à l'exploitation de chemins de fer.

(2) Avant d'établir des lignes directrices, l'Office consulte les intéressés, notamment les administrations municipales.

(3) Les lignes directrices ne sont pas des textes réglementaires au sens de la *Loi sur les textes réglementaires*.

15 Section 95.3 of the Act sets out the process the Agency must follow when it receives a noise and vibration complaint.

95.3(1) On receipt of a complaint made by any person that a railway company is not complying with section 95.1, the Agency may order the railway company to undertake any changes in its railway construction or operation that the Agency considers reasonable to ensure compliance with that section.

(2) If the Agency has published guidelines under paragraph 95.2(1)(*b*), it must first satisfy itself that the collaborative measures set out in the guidelines have been exhausted in respect of the noise or vibration complained of before it conducts any investigation or hearing in respect of the complaint. [emphasis added]

* * *

95.3(1) Sur réception d'une plainte selon laquelle une compagnie de chemin de fer ne se conforme pas à l'article 95.1, l'Office peut ordonner à celle-ci de prendre les mesures qu'il estime raisonnables pour assurer qu'elle se conforme à cet article.

(2) S'il a publié des lignes directrices au titre de l'alinéa 95.2(1)*b*), l'Office ne peut procéder à l'examen de la plainte que s'il est convaincu que toutes les mesures de coopération prévues par celles-ci ont été appliquées. [Non souligné dans l'original.]

16 As referenced above, the Agency exercised the authority given in subsection 95.2(1) to enact guidelines concerning noise and vibration complaints. The following excerpt from the Guidelines re-states the legislated requirement that before the Agency can proceed with an investigation the parties must exhaust the collaborative measures developed to deal with noise and vibration complaints:

> Collaborative Resolution of Noise and Vibration Complaints
>
> The CTA specifies that before the Agency can investigate a complaint regarding railway noise or vibrations, it must be satisfied that the collaborative measures set out in these guidelines have been exhausted.
>
> Collaboration allows both complainants and railway companies to have a say in resolving an issue. A solution in which both parties have had input is more likely to constitute a long-term solution and is one that can often be implemented more effectively and efficiently than a decision rendered through an adjudicative process.

17 Section 36.1 of the Act deals with mediation. If the parties request mediation of a dispute within the Agency's jurisdiction, the Agency "shall" refer the dispute for mediation (subsection 36.1(1)). Mediation is to be confidential unless the parties otherwise agree (subsection 36.1(4).

18 Mediation effectively suspends adjudication of the formal application before the Agency until the collaborative measures are complete:

> 36.1(6) The mediation has the effect of
>
> (*a*) staying for the period of the mediation any proceedings before the Agency in so far as they relate to a matter that is the subject of the mediation; and
>
> (*b*) extending the time within which the Agency may make a decision or determination under this Act with regard to those proceedings by the period of the mediation.

* * *

36.1(6) La médiation a pour effet :

a) de suspendre, jusqu'à ce qu'elle prenne fin, les procédures dans toute affaire dont l'Office est saisi, dans la mesure où elles touchent les questions faisant l'objet de la médiation;

b) de prolonger, d'une période équivalant à sa durée, le délai dont dispose l'Office pour rendre en vertu de la présente loi une décision à l'égard de ces procédures.

19 A settlement agreement reached through mediation may be filed with the Agency, with the result that the agreement is enforceable "as if it were an order of the Agency" (subsection 36.1(7)). An order of the Agency may be made an order of the Federal Court or any superior court and "is enforceable in the same manner as such an order" (subsection 33(1)).

Decision of the Agency

20 The Agency began its analysis by finding that the Community Board was a party to both the first and second complaints and that the "contents of the two complaints are virtually identical." The Agency then framed the issue before it in the following terms:

> It is clear to the Agency that the two complaints are in fact, the same complaint involving the same parties, namely, the railway companies and QCB. Therefore the Agency finds that there is only one complaint before the Agency. The Agency must determine if it has jurisdiction to adjudicate this complaint.

The Agency did not treat the second complaint as a complaint that there had been a breach of the settlement agreement.

21 The Agency went on to make the following findings:

1. The mediation process was complementary to, and not a replacement for, the adjudicative process.
2. Nothing in the Act suggested that the conclusion of a settlement agreement after mediation was intended to constitute an order of the Agency. Reliance was placed upon subsection 36.1(7) of the Act, which provides that filing an agreement reached as a result of mediation with the Agency makes the agreement "enforceable as if it were an order of the Agency."
3. Because a filed mediation agreement is not an order of the Agency, neither

the principles of *issue estoppel* or *functus officio* applied.

4. The Disposition Statement is not akin to a consent judgment or order because it was not signed by a member of the Agency and did not state that it was intended to constitute an order of the Agency.
5. In the absence of a formal order or judgment of the Agency on consent or otherwise, "there is no basis upon which to assert that [the Agency] is barred from hearing this complaint on the basis of *issue estoppels*, or that the Agency is *functus officio*."

22 The Agency concluded by stating it was satisfied the collaborative measures set out in the Guidelines had been exhausted so that the formal adjudicative process could proceed.

Standard of Review

23 While the Agency framed the issue in terms of whether it had jurisdiction to adjudicate the complaint, properly understood the issue is not a true jurisdictional question. The parties agreed that the substance of the first complaint fell within the ambit of section 95.1 of the Act. The question before the Agency was whether the settlement agreement had the effect of precluding the Community Board from relitigating a complaint which it had previously compromised. This required the Agency to consider the legislative scheme and the terms of the settlement agreement.

24 The Railway Companies argue that the standard of review to be applied is that of correctness. In their view, the issue before the Agency was a question of general law that was both of central importance to the legal system as a whole and outside of the Agency's specialized area of expertise. The Agency, relying upon the decision of the Supreme Court of Canada in *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650, responded that the applicable standard of review is reasonableness.

25 In my view, it is not necessary to determine the applicable standard of review. As explained below, even on application of the more deferential standard of review the decision of the Agency must be set aside.

Analysis

26 During oral argument, counsel for the Agency conceded that if the parties had entered into a final and binding settlement agreement, the Agency would be required to acknowledge and respect the terms of a final settlement. However, counsel for the Agency argued that this was not the issue before the Agency in the present case. The issue before the Agency was whether it had jurisdiction to deal with the second complaint filed by the Community Board. In counsel's submission, the parties did not present the settlement agreement as a final and binding settlement agreement which could bar adjudication of the second complaint.

27 In my view, counsel for the Agency was correct to concede that the Agency must respect the

terms of any final settlement agreement concluded by the parties to a complaint before the Agency. This acknowledgment is consistent with the legislative scheme in which the Agency operates.

28 As described above, the Act authorizes the Agency to publish guidelines with respect to the collaborative resolution of noise and vibration complaints. Where such guidelines have been published, the Agency cannot proceed to investigate or hear a complaint unless it is satisfied that those measures have been exhausted. Mediation, a form of collaborative resolution provided for in the Act, has the effect of staying proceedings before the Agency. A settlement agreement reached through mediation may be filed with the Agency and be enforced as if it were an order of the Agency.

29 Read as a whole, these provisions reflect Parliament's intent that the collaborative and adjudicative procedures are alternate mechanisms for reaching the same result: the final resolution of a complaint. Both mechanisms result in a document that can be filed with the Federal Court or a superior court for enforcement. There is nothing in the legislative scheme to support the Agency's conclusion that the successful resolution of a complaint in whole or in part through collaborative measures does not replace the adjudicative process with respect to those issues which the parties have finally resolved.

30 Where the parties have finally resolved a complaint in a settlement agreement, the practical effect of a decision of the Agency to ignore the settlement agreement and adjudicate issues previously resolved would be to denude the collaborative measures of any effect. No properly advised litigant would agree to enter mediation if the litigant understood that the time and resources devoted to reaching a mediated result would be wasted if the other side later regretted its bargain and simply decided that the mediated solution was no longer desirable.

31 Turning to counsel's submission that in the present case the parties did not present the settlement agreement as a final and binding agreement that would bar adjudication of the second complaint, this submission is untenable in light of the written submissions the parties made to the Agency. As set out at some length above, the position of the Railway Companies throughout was that the settlement agreement was a final and binding agreement. The Community Board joined issue with the Railway Companies on this point, taking the position that the settlement agreement was not intended to be an "enduring document which would prevent the filing of a subsequent complaint."

32 The Agency failed to consider and decide the central issue raised by the parties: what was the effect of the settlement agreement. Was it a final and binding settlement which barred the Community Board from litigating issues it had previously compromised? By failing to decide the central issue raised by the parties, the Agency's decision was unreasonable and so should be set aside.

Conclusion and Costs

33 For these reasons, I would allow the appeal, set aside the decision of the Agency and return the matter to the Agency to determine whether the settlement agreement was intended to finally resolve the issues raised in the first complaint. If so, given the finding of the Agency that the two complaints are "virtually identical," the Community Board will be precluded from relitigating those issues before the Agency.

34 Subsection 41(4) of the Act entitles the Agency to be heard on the argument of an appeal from one of its decisions on a question of law or jurisdiction. In the present case, the submissions of the Agency went beyond the scope of its jurisdiction. Counsel for the Agency argued the merits of the appeal and asserted the reasonableness of the Agency's decision. For that reason, it is appropriate that costs follow the event. I would order that the Agency pay one set of the costs of this appeal to the Railway Companies.

DAWSON J.A.
NOËL J.A.:-- I agree.
PELLETIER J.A.:-- I agree.

cp/e/qlecl/qljxr/qlecl/qlced

HOUSE OF COMMONS OF CANADA
35th PARLIAMENT, 1st SESSION

EVIDENCE

Standing Committee
on

TRANSPORT

Chairman: Stan Keyes

Meeting No. 83

Wednesday, November 22, 1995

ORDER OF THE DAY:

Clause-by-clause consideration of Bill C-101

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EVIDENCE

[*Recorded by Electronic Apparatus*]

Wednesday, November 22, 1995

[*English*]

.1535

The Chairman: Order.

Good afternoon, colleagues. We are now into clause-by-clause consideration of Bill C-101.

Before we start, I just want to point out to you a correction in the numbering of the amendments you have in front of you.

I'll ask the clerk to distribute an amendment that's numbered G-4. If you could, insert that into your package. What is now number G-4 in your package, make G-5. Bingo! Only in British Columbia.

Some hon. members: Oh, oh!

The Chairman: Scratch that from the record.

.1540

Because there are so many clauses in this bill, if there's any confusion at any point I'll just stop the proceeding. We'll just take our time with each one of these clauses, ensuring that everyone has an opportunity to speak to the clause. If there's any confusion, we'll just straighten it out. We'll all just take our time and do it right.

Before I get right into clause 1, Jim Gouk had an intervention.

Mr. Gouk (Kootenay West - Revelstoke): Yes, actually, I have two different things. Although they're of a very similar nature, I'd like them to be treated differently.

One, we had submitted the list of the various amendments we wanted to have drafted, through legislative counsel, according to the time parameter, the guidelines that were laid down. I have only just been able to review some of them. Some of them just came in yesterday afternoon and are not worded to our satisfaction.

We have really only one that is of concern. I have a new wording for it. I do not have it translated. I do not have it done by legislative counsel. I would ask the committee to consider it the way it is written, or failing that, to set that particular clause aside until it can be dealt with, given that legislative counsel did not deal with it in the manner we had intended.

The second and separate issue is that three we put in we simply have not gotten back. They were sent in according to the time guidelines given, and we simply have not gotten them back.

The Chairman: From legislative counsel?

Mr. Gouk: That's correct. I would ask that those clauses be set aside as well.

The Chairman: Which clauses are they?

Mr. Gouk: Clause 67 and two new clauses under clause 146.

Mr. Nault (Kenora - Rainy River): On a point of order, Mr. Chairman, on the issue the Reform Party is bringing up as it relates to sending their amendments to be put into legal terms or rewritten, was that submitted at the proper timeframe? If you submit it too late, then it's too late. If it was submitted at the proper time, which is under the rules, and it hadn't gotten done, that's a different debate.

Mr. Gouk: It was submitted according to the time expressed here in this committee.

Mr. Nault: Okay.

Based on that, Mr. Chairman, if it's the consensus of the clerks - they're supposed to be keeping track of that - then fine, we could set them aside until we get a copy of them. I don't have any problem with that.

The Chairman: I'll deal with your last matter first, on clause 67 and the other.... We'll have the clerk speak with Mr. Ducharme and see what happened in that event. So we won't rule on that one.

I don't know if we'll get as far as clause 67, but if we do, we'll have to stand that one down.

.1545 ⤭

On the matter of your first concern, unless you can provide each member of this committee with an amendment in proper form - and proper form means translated, etc. - and written down so every member of this committee can see it -

Mr. Gouk: Well, that can't be done, because I only just discovered that it wasn't in an acceptable wording.

The Chairman: Then it's my regret, Mr. Gouk, that I won't be able to accept your first suggestion.

But on the second one, we will -

Mr. Gouk: Which belies what you said to me five minutes ago.

The Chairman: I advised that I would take it into consideration. I have just had discussions. As a result, that's where I'm going to stand on the first consideration.

Mr. Nault: First of all, Mr. Chairman, I hate to disagree with you, but I don't think the chair has the right to do that. It's up to the committee to decide whether in fact we want to allow members to make motions on the floor here without proper procedures followed.

What's he's asking, I think, and rightfully so, is that it stand down until he has an opportunity to put it forward to the committee in its proper form. We'll never get to clause 146 today anyway. He'll have time -

The Chairman: But it's not clause 146 he's talking about on his first one.

Mr. Nault: He's talking about clause 167.

The Chairman: And subclause 27(2).

Mr. Gouk: I got it back, but improperly worded.

The Chairman: The first issue was what Mr. Gouk raised on subclause 27(2). Having had discussions and made consideration, I'm going to use my chairman's prerogative and rule the request out of order.

On the second, he has I think a legitimate claim, because his allegation is that legal didn't get it back to him in time. We have to be fair and wait to see from where that complication came. If we come to that particular clause, we'll stand down the clause until tomorrow, until such time as we hear on his result.

Mr. Mercier.

[*Translation*]

Mr. Mercier (Blainville - Deux-Montagnes): Mr. Chairman, I would ask you to go slowly, because we only just received the government's amendments. As for the French translation, we are receiving it as I speak. Therefore, we would appreciate it if you could proceed slowly.

[*English*]

The Chairman: I'll take that suggestion in hand and let you know that we probably have the best two translators in the House of Commons sitting in the booth right now. They translate very quickly. They're very efficient.

Consideration of clause 1 is postponed pursuant to Standing Order 75(1). That's the naming of the act, which we always leave until the end.

Clauses 2 and 3 agreed to

On clause 4 - *Conflicts*

Mr. Fontana (London East): I move amendment G-1, Mr. Chairman, an amendment to the French version.

Amendment agreed to [See *Minutes of Proceedings*]

Clause 4 as amended agreed to

On clause 5 - *Declaration*

The Chairman: I understand we have amendments to clause 5.

Mr. Fontana: I move amendment G-1.5. This amendment adds to the advantages of harmonized federal and provincial regulatory approaches, and to legal and constitutional. I think it is an attempt to take some leadership to indicate to our provincial counterparts that passing Bill C-101, which is going to be a good act for this country, obviously encourages them to do provincially what we are doing here federally. Putting it in clause 5, the principle section of the bill, indicates our leadership role of trying to encourage our provincial governments to likewise come up with legislation that mirrors ours and tries to harmonize our principles, goals and objectives.

.1550

The Chairman: Is there any further discussion?

Amendment agreed to [See *Minutes of Proceedings*]

The Chairman: Is there anything on the second amendment?

Mr. Hubbard (Miramichi): Mr. Chairman, I'll withdraw my amendment, which is along a similar line. It is also printed in our book here under section 146.

The Chairman: Thank you, Mr. Hubbard.

We have another amendment, G-2. Mr. Fontana.

Mr. Fontana: Yes, I'd move the second amendment, that the French version of clause 5 of Bill C-101 be amended by striking out line 23 on page 2 and substituting the following. It's there, numbered G-2. I'm sorry, it's a technical French amendment.

The Chairman: We won't need to read each one of the government amendments. We can just label it as G-2, unless there's an explanation.

Amendment agreed to [See *Minutes of Proceedings*]

Mr. Fontana: I move G-3, Mr. Chairman.

The Chairman: Any questions on G-3?

Amendment agreed to on division [See *Minutes of Proceedings*]

Clause 5 as amended agreed to on division

On clause 6 - *Definitions*

The Chairman: We have an amendment.

Mr. Gouk.

Mr. Gouk: [*Inaudible - Editor*]...or just accept them as they're written for questions of a membership?

The Chairman: You can introduce it first, and then if there's.... Do you move it?

Mr. Gouk: I so move, yes.

The Chairman: Okay, that's R-1. R-1 is moved. It's a technical amendment.

Mr. Fontana, you wanted to speak to it?

Mr. Fontana: This one is in fact very close to G-4, so we would support the R-1 amendment.

Amendment agreed to [See *Minutes of Proceedings*]

The Chairman: Mr. Parliamentary Secretary, do you withdraw G-4?

Mr. Fontana: Yes.

The Chairman: G-4 is withdrawn.

Clause 6 as amended agreed to

On clause 7 - *Agency continued*

The Chairman: Mr. Fontana, do you have an amendment to clause 7?

Mr. Fontana: Mr. Chairman, I think our amendment to clause 7 reads G-5. It talks of increasing the membership on the new CTA from three to five members. I'd like to move that this amendment be tabled.

.1555

It's our intention obviously to agree with the principle of increasing the CTA, but due to some procedural hurdles that have not yet been cleared we would like to hold this in abeyance until such time as those approvals have come forward. If it can be tabled until tomorrow, we would respectfully request that of the committee. Or we can pull it until report stage, Mr. Chair.

Mr. Gouk: If you're doing it that way, I was just concerned that -

The Chairman: No, we're going to pull it.

Mr. Fontana: Again, it's obviously our intention -

Mr. Mercier: The clause?

The Chairman: No, not the clause, just G-5 of the amendments. But I suppose that means the whole clause.

Mr. Fontana: No, just G-5.

The Chairman: Just G-5.

Mr. Fontana: I think our intention -

The Chairman: Oh, I'm sorry, yes. The numbers can be changed, then.

Mr. Fontana: I think our intention is pretty clear. It's just that we have some procedural things that need to be completed.

The Chairman: So just amendment G-5 is withdrawn.

Mr. Fontana: No, it was renumbered.

The Chairman: That's the one we renumbered, Bob.

Mr. Mercier, do you have an amendment to this clause?

[*Translation*]

Mr. Mercier: Yes, we have amendments to clause 7.

[*English*]

The Chairman: Speak slowly, though, Mr. Mercier.

[*Translation*]

Mr. Mercier: We move that clause 7 of Bill C-101 be amended by replacing line 5 on page 5 with the following:

not more than four members appointed

We also have another amendment to clause 7. We move that clause 7 be amended by striking out lines 12 to 15 on page 5 and substituting the following:

(3) Every year, the Agency shall elect one of its members to serve as Chairperson.

[*English*]

The Chairman: One at a time.

[*Translation*]

Mr. Mercier: The first amendment reads:

not more than four members appointed

Five plus four equals nine in all.

[*English*]

The Chairman: Mr. Fontana, do you want to speak to this?

Mr. Fontana: Mr. Chairman, in light of the government amendment being tabled - because we have in fact moved or are going to be moving to five members, which is obviously one better than the Bloc is suggesting - obviously we would not be supportive of this amendment; we would wait until we have submitted our amendment at report stage.

The Chairman: Mr. Gouk.

Mr. Gouk: I would just make an inquiry of the Bloc, Mr. Chair.

Given that they obviously want to have more than three, they are generally accepting the tentative amendment of the Liberal Party and would be prepared to do that.

[*Translation*]

Mr. Mercier: We want the number indicated here, that is nine in total. We find the government's amendment to be an improvement, albeit still not a satisfactory one.

[*English*]

Mr. Gouk: They want your five plus their four. Someone is going to have to clear that one up.

The Chairman: Your amendment, Mr. Mercier, says ``not more than four members appointed''.

[*Translation*]

Mr. Mercier: Plus four.

Mr. Paré (Louis-Hébert): For a total of nine.

Mr. Mercier: Five plus four equals nine.

[*English*]

The Chairman: Then the translation is not correct.

Mr. Gouk: That's not what it says.

[*Translation*]

Mr. Mercier: The text is poorly translated in English.

[*English*]

The Chairman: Order, order.

All it is is an error in translation between the English and the French. Mr. Mercier is indicating that it's ``plus four members appointed'' -

[*Translation*]

Mr. Mercier: Plus, plus.

[*English*]

The Chairman: - not ``not more than'', as it says in the English.

Mr. Gouk: Could we have a reading of that in French so that it is translated and so we'll know exactly what it is we're dealing with?

[*Translation*]

Mr. Mercier: Plus!

[*English*]

The Chairman: The motion that's been put forward by the....

[*Translation*]

Mrs. Terrana (Vancouver East): Mr. Mercier, you want to substitute in line 5 "not more than three" by "not more than four". Instead of "three", you are proposing "four". The Liberal Party is proposing "five". It's the same thing.

Mr. Mercier: Not only is there a translation error, there is a mistake in the French version of the amendment as well.

Mrs. Terrana: We agree.

Mr. Mercier: There is one error on top of another. Two minuses equal a plus. It should read "not

more than nine".

.1600

[*English*]

The Chairman: We'll put it to a show of hands. The indication is an amendment asking for plus four.

Mr. Nault: Besides the three on -

Mr. Gouk: Now you can change the three to five.

The Chairman: Who don't we let the mover of the amendment speak?

Okay. One more time.

[*Translation*]

Mr. Mercier: Then the French should read "au plus". It's one mistake after another; the text should correctly read "au plus neuf".

[*English*]

The maximum is nine.

The Chairman: So for the question, colleagues, in a show of hands, all those in favour of the amendment that we have not more than nine members appointed.

Amendment negatived

[*Translation*]

Mr. Mercier: The text should read "au plus neuf", not "cinq".

[*English*]

The Chairman: Yes, I know. We'll have it all straightened out later. We'll let the House do it.

Do you have a second amendment, Mr. Mercier?

[*Translation*]

Mr. Mercier: Yes, B-2. We move that clause 7 be amended by striking out lines 12 to 15 on page 6 and substituting the following:

(3) Every year, the Agency shall elect one of its members to serve as Chairperson.

[*English*]

The Chairman: Mr. Fontana, do you want to speak to the amendment?

Mr. Fontana: Yes. In keeping with parliamentary and governmental precedent it's the prerogative of the Prime Minister to appoint the chair and the vice-chair, so we will be voting against the amendment.

Amendment negatived

Clause 7 agreed to on division

On clause 8 - *Term of members*

The Chairman: For clause 8, go to amendment G-6. That's the one you're pulling, Mr. Fontana.

Mr. Fontana: We're pulling G-6 for the same reasons as G-4 -

[*Translation*]

Mr. Mercier: We were opposed to clause 7. It carried on division.

[*English*]

Mrs. Terrana: Clause 7 is on division.

The Chairman: It's recorded as on division, and on clause 8, amendment G-6 is withdrawn.

Clause 8 agreed to

On clause 9 - *Temporary members*

The Chairman: Now it's clause 9, government amendment G-7.

Mr. Fontana: I move G-7, the technical amendment.

Amendment agreed to [*See Minutes of Proceedings*]

Clause 9 as amended agreed to

On clause 10 - *Members - conflicts of interest*

The Chairman: Mr. Mercier, you have amendment B-3.

Mr. Nault: Mr. Chairman, I'd like an explanation.

The Chairman: As soon as he introduces it.

[*Translation*]

Mr. Mercier: I move that clause 10 be amended by replacing lines 18 to 40 on page 6 with the following:

> 10. Each member of the Agency is subject to the same rules respecting conflicts of interest that apply to ministers of the Crown.

[*English*]

The Chairman: Can you explain that for us, Mr. Mercier?

[*Translation*]

Mr. Mercier: The objective here is to ensure that the three, five or nine members of the Agency are subject to the same conflict of interest rules that apply to ministers of the Crown.

[*English*]

The Chairman: Do you have a question, Mr. Nault?

Mr. Nault: Yes, Mr. Chairman. I'd like to know whether Mr. Mercier could give us some justification for this particular clause. Is he aware of other previous conflicts that would drive the Bloc to want to make this amendment?

[*Translation*]

Mr. Mercier: The objective is to further shield members of the Agency from the pressure of lobbyists by subjecting them to the same rules that apply to ministers of the Crown, particularly in terms of protecting them from lobbyists.

[*English*]

The Chairman: Mr. Nault.

Mr. Nault: Mr. Chairman, maybe we could ask the officials to give us a breakdown of what the conflict of interest guidelines are with the agency as it stands now. I understand that they have fairly restrictive conflict of interest guidelines that are very similar to what Mr. Mercier is talking about.

.1605

Ms Moya Greene (Assistant Deputy Minister, Policy and Coordination Group, Department of Transport): Yes, the agency is under fairly restrictive conflict of interest guidelines. In fact, it is covered off in this bill. They're under the same guidelines that all senior officials are under.

As I understand it, there is a slight difference between the conflict of interest guidelines that apply to ministers of the Crown relative to the conflict of interest guidelines that apply to senior agency and official people. That slight difference relates to the period of time following their employment when they may not be engaged in anything that could be considered or conceived of or perceived as a conflict.

With respect to ministers of the Crown, it is a two-year timeframe and with respect to senior officials it is a one-year timeframe. It would certainly be an aberration to impose the same requirements on agency staff as are imposed on ministers.

The Chairman: Thanks, Ms Greene. Are there any other questions?

Mr. Mercier.

[*Translation*]

Mr. Mercier: In light of these explanations, we withdraw the amendment.

[*English*]

The Chairman: Thank you, Mr. Mercier.

Mr. Gouk: Mr. Chair, on a point of order. Given that the Liberal membership on the committee is seven members and there are eight present, which member is not voting today?

The Chairman: The one in Liberal red.

Some hon. members: Oh, oh!

Mr. Gouk: That ink gets on everything, doesn't it?

The Chairman: Any member of the House is allowed to attend any committee.

Mr. Gouk: I have no problem with their presence for this one. We just wanted to clarify.

The Chairman: You'll notice that she's the one not raising her hand during a vote.

We have had Mr. Mercier withdraw amendment B-3, so shall clause 10 carry?

Clauses 10 to 24 inclusive agreed to

On clause 25 - *Agency powers in general*

The Chairman: There's an amendment, number R-2.

Mr. Fontana: No, it's G-7.5.

The Chairman: It's G-7.5 in your hit parade book. Mr. Fontana, do you want to move G-7.5?

Mr. Fontana: I move G-7.5, page 17 of the....

The Chairman: Colleagues, we're at clause 25. We had only one amendment at clause 25 and that's R-2, which is Mr. Gouk's.

Mrs. Terrana: No, that's G-7.5.

The Chairman: First there's clause 25 and R-2. Then there's a line and then new clause 25.1 with government amendment 7.5. It's just lined up a little backwards on the hit parade sheet but that's okay. All the amazing work these gentlemen have done in just under twelve hours in the middle of the night...I'm amazed by the work they've done anyway.

.1610

Shall clause 25 carry?

Mr. Gouk: No. What about the amendment?

The Chairman: As I understand it from the legal department, clause 25 will carry, and then we'll introduce the new clause 25.1 which follows 25.

Clause 25 agreed to

The Chairman: Now, new clause 25 has a government amendment, G-7.5.

Mr. Gouk: Mr. Chair, on a point of order. This is not a big thing, but I want to make sure it's clear. Clause 25 is the clause, and (1) or (2) or (27) under 25 are subclauses. We've just carried the clause.

The Chairman: That's right.

Mr. Gouk: It's finished, and now you want to amend something that's already been accepted.

The Chairman: No. Now we go to a new clause, 25.1, which is -

Mr. Gouk: So when we go through this, then, we don't say shall clause 25 carry. We say shall subclause 27(1) carry, shall subclause 27(2) carry.

Mr. Fontana: Mr. Chairman, there is an explanation. This is not clause 25, subclause (1). It is a new clause 25.1. That's the big difference.

Mr. Gouk: So there are points now. I'm glad we're going to get some points for doing this.

The Chairman: Now, any discussion on new clause 25.1 as moved by the parliamentary secretary. Mr. Mercier.

[*Translation*]

Mr. Mercier: No comment, Mr. Chairman. I would simply like a few more explanations. For example, could someone explain the meaning of "all the powers that the Federal Court has"?.

[*English*]

The Chairman: Ms Greene.

Ms Greene: The agency in clause 25 has the inherent powers of a superior court to call witnesses and to receive and examine documents. Superior courts do not have inherent in them the powers to award costs. Those powers are vested in each individual superior court by the statutes that create each of the provincial superior courts.

Therefore, if you want to give the agency the power to award ordinary costs, and you want to make that very specific power to award costs relative to some power that is vested in a court, the easiest way technically to do it is to refer to the cost-awarding powers of the Federal Court.

Therefore, under clause 25 the agency has the powers inherent to superior courts for its procedures. Under clause 25.1 the agency will have the power, an ordinary power most people will be aware of, to award costs. But in order to explain it, it's relative to the power that the Federal Court has.

The Chairman: Thank you. Okay, Mr. Mercier? Clear as mud, eh?

[*Translation*]

Mr. Mercier: That's clear.

[*English*]

Ms Greene: Do you want me to go over it again?

Amendment agreed to [See *Minutes of Proceedings*]

On clause 26 - *Compelling observance of obligations*

The Chairman: Clause 26 now has an amendment, R-2. I'm instructed that R-2 is a new clause that we have to do before we do clause 26. So R-2, Mr. Gouk.

Mr. Gouk: This is bringing forward something from the NTA. The principal intent of this is to allow for representation from provincial and municipal governments. It is in essence the wording brought forward from the NTA. It's simply bringing it forward into the CTA.

The Chairman: Mr. Fontana.

Mr. Fontana: Mr. Chairman, I appreciate the amendment put forward by the Reform Party to give standing to the provincial and municipal governments. I think in the way it's drafted, if one reads the clause, where there is a direct interest the agency is free to hear from any interested party.

.1615

Let's face it. Essentially Bill C-101 has put commercial application to a certain extent with regard to the CTA and railroads. The public interest test as we know it has for all intents and purposes been taken out. To allow provincial and municipal governments to have standing on practically every issue whether or not they have an interest in it would be paramount to confusing the issue at hand.

So, unfortunately, we're not going to be able to support the intent and this amendment.

The Chairman: Any further discussion? Mr. Nault.

Mr. Nault: Well, Mr. Chairman, I don't know what this amendment of Mr. Gouk's is all about. If there is a shipper who wants to make representation to the agency, they can do so. The way he has it worded here is that:

> representative or agent of any provincial or municipal government or any association or other body representing the interests of shippers

Quite frankly, I think what that basically says in essence is they're going forward on behalf of the shipper when the shipper should be there themselves. It is already allowed for the shipper to go.

I don't understand why he would make an amendment that sort of suggests someone is representing the interests of a shipper. That's like Mr. Gouk sending me down to represent the Reform Party. I doubt very much I'd do a good job at that.

Mr. Gouk: You never know. You're learning.

Amendment negatived [See *Minutes of Proceedings*]

Clause 26 agreed to

On clause 27 - *Relief*

The Chairman: Mr. Fontana, we have an amendment G-7.6 to clause 27.

Mr. Fontana: Mr. Chairman, on clause 27 I don't have to remind the committee members that after one month of testimony there were a number of questions raised by witnesses. These were with regard to the requirement of 27(2), the wording and the implications.

I think it would be fair to say we've recognized there are some clarifications necessary, and I think this amendment deals with a number of clarifications that it's important for us to want to point out.

First, I think it's important to clarify - and this amendment does it very clearly - what the government had always said was that it was not intended to be a fence around access to the agency, that in fact it was supposed to be guidance for the remedy on any decision of the agency. Therefore, I think the amendments to clause 27 make it clear.

Mr. Gouk: Mr. Chairman, a point of order. May we have a momentary recess? I'm trying to listen to the parliamentary secretary and also get an explanation of something that effects the propriety of amendments I'm putting in at this point.

The Chairman: I understand.

Mr. Gouk: I either have to do one or the other.

Mr. Fontana: Do they relate to 27?

The Chairman: Yes, they do. R-3, R-4 and R-5 are all related.

We've got a couple of minutes. Go ahead, Mr. Gouk. Have your discussion and then we'll get back to it.

.1620 ⛶

.1623 ⛶

The Chairman: Okay, colleagues, the parliamentary secretary has just given us an explanation on clause 27, amendment G-7.6.

Joe.

Mr. Fontana: As I was saying, Mr. Chairman, we heard a lot of testimony. There was a lot of clarification, which I think was required; hence the new wording in our amendment G-7.6 tries to structure clause 27 to deal with a number of issues.

One is that it was never intended to, but we wanted to clarify that access to the agency wasn't a two-step system, that there wasn't a fence towards access to the agency, that the whole intention of 27 was to be dealt with on the remedy side. I think the words must indicate that there is no fence being put around the agency. The shipper has total access to the agency and the agency doesn't have any discretion as to whether or not it can hear from that shipper or that complainant.

Secondly, it was obvious to us that the words ``significant prejudice'' caused a number of people some problems, perhaps because they had never been adjudicated upon. So we looked at words that perhaps could better explain what the intent was. We came up with the words ``substantial commercial harm''.

.1625 ⛶

Having said those new words, we also thought it would make sense, as the witnesses and the NTA representative who were here have indicated, to try to apply a criterion to what that substantial commercial harm might mean. Hence, we have included a number of factors:

(a) the market or market conditions relating to the goods involved;

(b) the location and volume of traffic of the goods;

(c) the scale of operation connected with the traffic;

(d) the type of traffic or service involved;

(e) the availability to the applicant of alternative means of transporting the goods; and

- I think this is an important factor - -

(f) any other matters that appear to the Agency to be relevant.

In saying so, I think this covers off a number of areas.

In addition, we tried to make it clear that subclause 27(2) and the provisions under final-offer arbitration had absolutely nothing to do with one another. I think we've added in our amendment, for further clarification, that the applicability to final-offer arbitration is with regard to 27(2) and it would stand on its own.

So, Mr. Speaker, I think it would be fair to say to all those witnesses who had some concerns that the government heard what they were saying. With the new wordings, we tried to put in place a regime that we feel, firstly, will give them access to the agency; secondly, will require the agency, in applying the remedy, to take into consideration a number of factors, and we've given them some guidance with regard to the criteria; and thirdly, makes it perfectly clear that the shippers are not losing anything with regard to their access to final-offer arbitration.

So we put forward the amendments, and we look forward to the good work that Mr. Gouk and the Reform Party have also done on this one.

Mr. Nault: Mr. Chairman, I know it's a little bit unusual but most of Mr. Gouk's amendments are covered in the government's amendment, with the exception of the last one.

The Chairman: I think Mr. Gouk is going to speak to that one in a moment.

Mr. Nault: The reason I ask is that we have to vote on this one first before going on to the next one.

The Chairman: Yes, we'll take it one amendment at a time.

Mr. Fontana: I think Mr. Gouk wants to give some clarification.

The Chairman: Mr. Gouk, do you want to speak to this before we vote on it?

Mr. Gouk: Yes, and just so it does clarify tying the two together while we're dealing with this one. In reading this one, I am satisfied that it addresses my concerns covered under R-3, which I will subsequently withdraw.

Under R-4.... Do you want it now? It addresses -

The Chairman: You're on a roll. Go ahead.

Mr. Gouk: Okay.

In R-4, I think the government has gone a long way, but I'm still not quite satisfied. I will deal with it at report stage, however.

I withdraw R-5 as it relates to this.

So you have two out of three, and we agree to disagree on the other.

An hon. member: You've pulled them all then, eh?

Mr. Gouk: Yes. I have to amend the wording according to what you have now done in any case. It's out of order to just carry on with mine.

The Chairman: So R-3, R-4 and R-5 are withdrawn. It's irregular but we'll go with it.

G-7.6 has been moved. Is everyone in favour of the amendment?

Mr. Mercier, you're opposed to the amendment.

An hon. member: No, everybody is in favour.

The Chairman: It's on division.

[*Translation*]

Mr. Mercier: We agree with clause 27.

[*English*]

Mrs. Terrana: They agree.

The Chairman: All right, they agree.

Mr. Fontana: It's unanimous. That's incredible. See how good work pays off.

Amendment agreed to [See *Minutes of Proceedings*]

Clause 27 as amended agreed to

On clause 28 - *Orders*

The Chairman: Clause 28 has an amendment, R-6. Mr. Gouk.

Mr. Gouk: I have to get through all my other Rs first. I thought I only had to learn the three Rs, but now I'm up to six already.

This is again a matter brought forward from the NTA. In discussions with the government it has been suggested that this is covered under clause 28. I think the explanation in the clause-by-clause booklet clearly suggests that it has not been covered in this. In fact, it has been specifically eliminated. I don't agree with the elimination of the ability of the agency to make an *ex parte* order.

Mr. Fontana: Mr. Chairman, I think we've had this discussion before to a certain extent. I think some witnesses have indicated for the reinsertion of such a thing. We believe it's already in the bill, and it's reflected as long as it's known that the agency must notify the other party. That's the only caveat.

.1630 ⤭

To tell you the truth, I think this is redundant, because the agency does have the power under the new bill to give those orders, provided it communicates that to the other party.

Mr. Gouk: Just for clarification, I would refer the parliamentary secretary to the government document on Canada transportation, a clause-by-clause analysis on page 18 that specifically states:

> *Ex parte* orders have been eliminated as this authority was considered extraordinary and no longer required.
>
> So it does contradict what the parliamentary secretary is saying.

The Chairman: Well, let's get an opinion from the department. Ms Greene.

Ms Greene: Could I clarify? I think ``extraordinary'' is a poor word and I apologize for that inartful drafting.

The powers of the agency are very broad and include the power to grant interim orders for matters that have to be dealt with right away. In this day and age, when there are all kinds of means of communicating by telephone in a hurry, the need for *ex parte* orders, that is to say, orders that would be made without even notifying the other interested party, is no longer there. So in the view of the department this is not needed, and the powers of the agency are certainly every bit as large in scope as the agency will need to deal with all manner of issues, including urgent ones.

The Chairman: So we have R-6 before us as an amendment.

Amendment negatived [See *Minutes of Proceedings*]

Clause 28 agreed to

On clause 29 - *Time for making decisions*

The Chairman: Mr. Fontana, do you have an amendment to clause 29?

Mr. Fontana: Mr. Chairman, I move amendment G-8, page 26 in the book. For all intents and purposes it's a technical amendment.

Amendment agreed to [See *Minutes of Proceedings*]

The Chairman: We have another Bloc amendment, B-4. Mr. Mercier.

[*Translation*]

Mr. Mercier: I move that clause 29 be amended by adding, after line 18 on page 11, the following:

> (3) Notwithstanding subsection (2), the House of Commons may, at the request of the committee of Parliament that normally considers matters relating to transportation, pass a resolution prescribing periods of less than one hundred and twenty days within which the Agency shall make its decision in respect of such classes of complaints or applications as are specified in the resolution.
>
> Mr. Chairman, the purpose of the amendment is to reduce the prescribed period of 120 days in case of emergency.

[*English*]

The Chairman: Do you want to speak to that one, Mr. Fontana, or maybe Ms Greene from the department?

Ms Greene: Mr. Mercier, the Governor in Council has the power to shorten the period of time in the bill for making a decision, if need be. It can be done by regulation. The regulations, as you know, are normally reviewed by the committee charged with that responsibility, so I don't really understand the amendment proposed.

[*Translation*]

Mr. Mercier: The objective is to have matters referred occasionally to the House rather than to Cabinet.

[*English*]

The Chairman: Your amendment, I think, is understood. We have an amendment moved, B-4.

Amendment agreed to

Clause 29 as amended agreed to on division

Clauses 30 to 33 inclusive agreed to

On clause 34 - *Costs*

The Chairman: Do you want to speak to that, Mr. Fontana?

.1635

Mr. Fontana: Mr. Chairman, we would like clause 34 to be entirely struck. If that is not possible - I believe the clerk has indicated it is not - we will be voting against clause 34, which for everybody is the frivolous and vexatious section of the bill.

The Chairman: So to remove clause 34 is out of order, according to Beauchesne's. We will call the clause anyway and vote against it to accomplish the same end.

Clause 34 negatived

Clauses 35 and 36 agreed to

On clause 37 - *Approval of regulations required*

The Chairman: Mr. Mercier.

[*Translation*]

Mr. Mercier: Mr. Chairman, I ask that clause 37 be amended by replacing line 45 on page 12 with the following:

> approval of the Governor in Council and the committee of Parliament that normally considers matters relating to transportation.

Thus, the approval of the parliamentary committee is also required in this case.

[*English*]

Ms Greene: The only thing I would suggest is it is highly irregular for regulations to be reviewed by committees, other than the parliamentary committee that is charged with the responsibility to review regulations.

[*Translation*]

Mr. Mercier: As I indicated, our amendments reflect certain general principles, one of which is to occasionally give the legislative arm powers which we wrongly feel are reserved for the executive branch. That's why we will be proposing in some of the upcoming amendments that certain matters be referred to the committee for approval and for recommendation to the House.

You will note later on that we have also put forward some amendments calling for certain decisions to be referred to the provinces and to the committee for approval, and thereafter to the House.

Therefore, as a rule, each time we have introduced an amendment calling for certain powers over the decision-making process to be extended to our committee, we have done so with this goal in mind. The same is true when we call for provinces to arbitrate certain decisions.

[*English*]

The Chairman: That is understood, Mr. Mercier. Your point is taken. I think it has been explained that it is highly irregular.

[*Translation*]

Mr. Paré: Let me also say, Mr. Chairman, that in the Red Book the government or the Liberal Party said it would give more responsibilities to members of Parliament, that is to the elected representatives. This particular amendment gives concrete expression to that undertaking.

[*English*]

Mr. Fontana: I think Bill C-101 is a perfect example of how our government is keeping to a red book commitment. It has submitted this bill to this committee in advance of second reading for us to essentially analyse it and look at ways of improving the bill.

While philosophically the Bloc makes a good point about involving committees, the committees are masters of their own houses and can essentially do what they want, when they want.

.1640 ⤭

Mr. Nault: Mr. Chairman, I understand what the interests of the Bloc are, but it's practically impossible to do what he suggested. If it was in the interest of the Bloc to shut the federal government down, then in relation to the agency this one would do it.

If you had to send every technical regulation to this committee to look at in a serious fashion, we'd never get a train across the country or a ship through the seaway or anything like that. These regulations are changed on a regular, daily basis, on a monthly basis. That's the reason why they don't come to us.

In conclusion, I think Mr. Fontana hit the nail on the head. This committee can look at any one of those regulations any time it likes. If there's one in particular that the Bloc wants to have reviewed, name it, pick it, and we'll look at it. But to say that every single one coming to the committee should be checked means that you would shut down the ability to regulate that particular transportation mode.

The Chairman: Not to mention, I suppose, that there's a whole elaborate process in place to cover off the eventuality that -

Mr. Nault: One last thing is that the Government of Quebec does the exact same thing this bill does when it relates to regulation. It goes to Order in Council. It doesn't go to committee, so why would it be different here?

The Chairman: Closing remarks from Mr. Mercier and we'll vote on it.

[*Translation*]

Mr. Mercier: Mr. Chairman, I admit we are trying to introduce a new way of doing things here today. As Mr. Paré mentioned, Mr. Fontana said that the government was keeping to its Red Book commitments. We wanted to ensure full compliance. That's what we are proposing.

[*English*]

Mr. Fontana: When the next election comes we'll have another red book and we'll just build upon that.

[*Translation*]

Mr. Mercier: Mr. Chairman, that's what is known as a *tu quoque* argument.

[*English*]

The Chairman: Thanks, Mr. Mercier.

Amendment negatived

Clause 37 agreed to on division

Clauses 38 to 40 inclusive agreed to

On clause 41 - *Governor in Council may vary or rescind orders, etc.*

The Chairman: Clause 41 has amendment B-6. Is it the same argument, Mr. Mercier?

[*Translation*]

Mr. Mercier: Yes.

[*English*]

Amendment negatived [See *Minutes of Proceedings*]

Clause 41 agreed to on division

Clauses 42 and 43 agreed to

On clause 44 - *Policy directions*

The Chairman: Clause 44 has amendment B-7. Is that the same argument, Mr. Mercier?

[*Translation*]

Mr. Mercier: Mr. Chairman, it's the same argument. I would have thought that elected representatives and not only officials would have liked to have their say from time to time, but this appears not to be the case.

[*English*]

The Chairman: We won't get into a debate, but for the record there is a lot of opportunity for elected -

[*Translation*]

Mr. Mercier: That's what a debate implies.

[*English*]

The Chairman: Some say there's too much opportunity for elected members to have their say.

Amendment negatived [See *Minutes of Proceedings*]

Clause 44 agreed to on division

Clauses 45 to 47 inclusive agreed to

On clause 48 - *Governor in Council may prevent disruptions*

The Chairman: Mr. Gouk, R-7.

Mr. Gouk: Mr. Chairman, R-7 deals with reporting to the Governor in Council only when Parliament is not sitting, the intent being that if you read further into it, it suggests that when it does go there, it should be brought to Parliament as soon as practicable. I would suggest that if Parliament is sitting, that is when in fact Parliament is sitting. It should go directly then to the parliamentary body. It's kind of a new, improved, reformed version of the Bloc amendment, you might say.

.1645 ⤭

Mr. Nault: Could I ask the officials if there's anything on record of an extraordinary disruption where we had a Governor in Council order in that fashion? I can't recall one in my lifetime, so I'm just curious as to whether it's ever happened.

Ms Greene: No, it hasn't. This is a new set of provisions. It's never expected that these would be used. It's meant to deal with a quite extraordinary set of circumstances. As the provisions lay out, if they were ever to be invoked, which is highly unlikely, the intention would be to lay any order under the provision before both houses of Parliament as soon as you could practically get into both houses of Parliament.

Amendment negatived [See *Minutes of Proceedings*]

The Chairman: R-8, Mr. Gouk.

Mr. Gouk: The way it's couched here, I have to read it first, Mr. Chair.

It is simply that if we're going to do this for extraordinary disruptions, and given that the one example we have seen and been active on in Parliament is a labour disruption, if this clause itself is to have any meaning, then I think we have to deal with the real problems we're going to see, and a labour disruption is the most likely of those. I can't see why that is taken out when other...Mr. Nault seems to be concerned about things that we rarely use and so why worry. However, this is the thing that we're most likely to use. They want the rest in there. Why not have the thing we're most likely to encounter?

The Chairman: It strikes me that the government always has the power to intervene at any time.

Mr. Gouk: Then why not strike the whole clause?

The Chairman: Ms Greene, did you want to speak to this?

Ms Greene: There are fairly well-established procedures for the houses of Parliament to deal with labour disruptions. It is a matter of personal opinion on my part, but I think that while labour disruptions can be, by their nature, disruptive, they are not extraordinary disruptions.

What this clause attempts to address is that highly unusual situation where, given the structure of key components of our transportation industry, if you were to face a potential failure of both airlines at the same time, for example, or both railways at the same time, you give the government and the houses of Parliament a little breathing room to figure out what, if anything, they wish to do in the face of such a truly extraordinary disruption. So for those two reasons, labour disruptions, while certainly a nuisance for many people who rely on the services, are not extraordinary in their nature. Because there are well-established procedures for the houses of Parliament to deal with disruptions of that type, it was suggested that they be excluded.

Mr. Gouk: Could I ask Ms Greene to give me an example. If a labour disruption such as the last one we had, which shut down both national railways, our passenger rail system and most of the ports, and potentially shut down pulp mills, smelters and all kinds of other operations in the country, is not extraordinary, could she kindly give me an example of what is beyond this that would come under this bill that she considers extraordinary?

Mr. Nault: War. That's what it's for - when we go to war.

Ms Greene: It's certainly very critical, Mr. Nault, but we have seen it before and we have well-established procedures for dealing with it.

Mr. Nault: We did it during the war.

Mr. Gouk makes it sound as though we don't have a process for labour disputes in this country, where, of course, we go to conciliation, mediation, and it just appears out of the horizon that we get a railway strike. There isn't anybody in the country who doesn't know a railway strike is coming for months in advance. So for him to suggest that Parliament won't be in a position to deal with it in an expedient fashion I think is stretching the argument significantly. We know that under the process the Minister of Labour has powers to make sure the strike doesn't occur at a particular time just by conciliation and mediation and delaying the inevitable. So I don't think this is necessary.

.1650

Mr. Gouk: It seems clear from my interpretation that the intent of this act is to provide some extraordinary measure for Order in Council before Parliament deals with something. There was a strong potential for the last strike to occur during the winter recess. If you wish to deal with it before recalling Parliament or faster than the ability to recall Parliament, then you want something, which this addresses, that gives the Governor in Council the clear ability to do so. That's if you wish to have anything in the act at all to deal with it.

You're saying no, because Parliament can deal with it. You're saying they'll know it's coming and they can deal with it. What are they going to do with anything?

The Chairman: We've heard the arguments.

Amendment negatived [See *Minutes of Proceedings*]

The Chairman: R-9 please, Mr. Gouk.

Mr. Gouk: As it stands, the bill is open-ended. It says ``as soon as possible''. That becomes very interpretative. I've unwillingly been stung before by things that have been left open. I think that two days is a reasonable time. They say ``as soon as possible'', but if the intent is really to bring it there, let's put some specific time parameters in and make it two days.

The Chairman: Mr. Parliamentary Secretary.

Mr. Fontana: We can be helpful here. I think we agree with the intent of the amendment, but two days is not enough. If we had a printer breakdown, two days could cause some difficulties. If by

unanimous consent, or if the Reform Party and Mr. Gouk would agree, we could accept seven days. Two days is completely out of the question.

If seven days is acceptable to the Reform Party, we'll allow you to amend it to seven sitting days.

Mr. Gouk: Okay, I can live with that.

The Chairman: So the amendment....

Mr. Fontana: We would allow him to change it to read seven days.

The Chairman: Do you want to bring forward your amendment?

Mr. Gouk: Yes, with the approval of the committee, I would like to amend my amendment R-9 to change it from ``two sitting days'' to ``seven sitting days''.

The Chairman: First, we're voting on the amendment to the amendment.

Subamendment agreed to

The Chairman: Now we're voting on R-9 as amended.

Amendment agreed to [See *Minutes of Proceedings*]

The Chairman: Now we go to B-8.

Mr. Mercier.

[*Translation*]

Mr. Mercier: Mr. Chairman, here's the problem. Clause 48(4) reads as follows:

> The minister shall have any order made under this section laid before both houses of Parliament as soon as possible after it is made.
>
> This includes the Senate, and we would prefer that such an order be laid only before the House of Commons. The Senate would be excluded.

[*English*]

The Chairman: Mr. Parliamentary Secretary, do you want to address that?

Mr. Fontana: We might want to be helpful here too, but with all due respect, Parliament is made up of two houses, the House of Commons and the Senate. If the Bloc had indicated it wanted to suggest both houses of Parliament, we would accept the amendment. The Senate exists in this country and it will until such time as the federation decides that it shouldn't.

I'm trying to be helpful. If you want it to change to both houses of Parliament, that would be acceptable to us. If not, then obviously we would have to -

The Chairman: Mr. Mercier.

Mr. Fontana: Oh, I'm sorry. That's what's already in there. He's moving to get rid of it and say ``House of Commons''. We can't agree. As much as some of us might like to, we can't.

The Chairman: Mr. Nault.

Mr. Nault: Mr. Chairman, I don't understand why the Bloc would be opposed to it going to the Senate. There are a lot of Bloc senators, aren't there? Castonguay is there with a few others. They're separatists. Why is he opposed to it?

The Chairman: You've heard the terms of this amendment.

Thank you, Bob, for being so helpful on these matters.

Amendment negatived [*See Minutes of Proceedings*]

The Chairman: Amendment B-9, Mr. Mercier.

[*Translation*]

Mr. Mercier: It's still in the same spirit, Mr. Chairman. It's the same argument.

[*English*]

The Chairman: Yes, thank you.

Amendment negatived [See *Minutes of Proceedings*]

.1655 ⤭

The Chairman: Amendment R-11.

Mr. Gouk.

Mr. Gouk: I'm trying to interpret the legislative counsel's wording as opposed to the original intent. It's a very strange way to word it.

It refers in the act right now to -

Mr. Nault: What section is that?

The Chairman: It's R-11, clause 48.

Mr. Gouk: It's R-11. It actually falls into subclause (5), where it says it ``shall be referred for review to the standing committee of the House of Commons'' or `` of the Senate''.

I have a problem with something that is laid before Parliament being referred for study to the Senate committee as opposed to the parliamentary committee. That's it, pure and simple.

I realize things flow through the Senate, but -

The Chairman: But technically, Parliament is the House and the Senate.

Mr. Gouk: Can I have a clarification from the government representatives? According to this, could something that comes before the House of Commons be referred to the transport committee of the Senate instead of to this committee and be dealt with from there, not by this committee, when it is a matter that is still before the House of Commons?

Ms Greene: Technically, but only if Parliament were to designate that.

The Chairman: No, not necessarily. The Senate can at any time initiate anything it wants to vis-à-vis legislation.

Mr. Gouk: We're talking about specific referral.

Ms Greene: There's a specific provision for referral, and certainly the intent of the provision was that it should be left to Parliament to decide which committee or committees should look at this.

Mr. Gouk: Do they need authorization in this act to do that?

Ms Greene: Not in this act. The act is entirely silent on that.

The Chairman: Mr. Jordan.

Mr. Jordan (Leeds - Grenville): Mr. Chairman, why couldn't you just say that it would be for a standing committee of Parliament?

Ms Greene: There may not be a standing committee in the future. That's the reason why the

language is a little more general.

The Chairman: As we've recently learned, standing committees have been reduced from twenty or so to nine or eight. That's why it's a little more general in the legislation.

But Mr. Jordan's remark is well-taken. It could be -

Mr. Jordan: Because it's designated to Parliament for that purpose.

Mr. Gouk: I'm more comfortable with that if we're talking about amending the amendments again for the harmony of all so that we can move on, as I know the chairman would like to do.

Mr. Fontana: Do you want an amendment to your amendment here?

Mr. Gouk: Yes.

The Chairman: Mr. Gouk, could you move the amendment to your amendment?

Mr. Gouk: I should get Mr. Jordan to make the amendment. He had the wording.

The Chairman: Mr. Jordan, you can make the amendment to the amendment.

An hon. member: You get your name on the record.

The Chairman: Put it on the record.

Mr. Jordan: The amendment will have it read in subclause (5) that:

> (5) Every order laid before Parliament under subsection (4) shall be referred for review to the standing committee designated by Parliament for that purpose.

Mr. Gouk: That's perfect.

The Chairman: All those in favour of the amendment to the amendment?

Subamendment agreed to

Mr. Nault: That's very irregular, Mr. Chairman.

The Chairman: In the spirit of cooperation.

Mr. Gouk: I like it.

The Chairman: Does amendment R-11, the amended amendment, carry?

Mr. Nault: If we're going to make these amendments on the fly, since we won't be finished by tomorrow or by tonight, could I ask that we get a copy of that amendment just read by our colleague tomorrow to make sure it's what we intended it to be, so that it doesn't get lost in transit?

The Chairman: We don't even have to wait until tomorrow. I'd prefer you to be comfortable when you go to sleep tonight, Bob.

Mr. Nault: Well, yes, I've -

The Chairman: We'll take one moment and we'll get it all down right.

Mr. Clerk, do you have it written down there?

Mr. Nault: Because it gets lost, and all of a sudden it turns out a little differently than what we imagined. I've seen it happen before, but only in collective bargaining, mind you.

.1700

The Chairman: Mr. Gouk, just for purposes of keeping things clear...if you withdrew R-11, then we could go ahead with Mr. Jordan's suggested amendment.

Mr. Gouk: I thought what he did was he amended mine. You could do it either way.

The Chairman: But this starts from a line above. You're going to change the lines, etc. Could you withdraw your R-11?

Mr. Gouk: Sure.

The Chairman: R-11 is then withdrawn.

Mr. Jordan: Mr. Chairman, could you read it, then?

The Chairman: Yes, we'll read it back slowly for Mr. Nault.

Do you want to write this down, Mr. Nault?

Mr. Nault: Yes, I want to hear it.

The Chairman: I want you to be perfectly comfortable with this.

It strikes out lines 31 to 33 on page 16 and replaces them with ``view to the standing committee designated by Parliament''. Following that line I just gave you, which is ``view to the standing committee designated by Parliament''...``shall be referred for review to the standing committee designated by Parliament for the purpose''.

Amendment agreed to

Clause 48 as amended agreed to

Clauses 49 and 50 agreed to

On clause 51 - *Regulations re information*

The Chairman: We have a Bloc amendment. We have all kinds of amendments on clause 51.

Mr. Mercier, the Bloc B-10 amendment.

[*Translation*]

Mr. Mercier: Mr. Chairman, we withdraw our amendments B-10 and B-11.

[*English*]

The Chairman: Thank you, sir. Amendments B-10 and B-11 are withdrawn.

Amendment G-9, Mr. Fontana.

Mr. Fontana: Mr. Chairman, this is one amendment that deals with adding to subclause 51(1) as written ``for the Minister to review...'', and I should say in this bill there are a number of review points to make sure we have it right. We're back to some four, I believe, where the minister and the government and the CTA and hopefully this committee will review to make sure the new Bill C-101 works. We're going to add grain handling in (a), and also we'll add (b), where we are striking lines 30 to 34 on page 17 and substituting ``the purposes of'' and a number of categories.

The Chairman: Thanks, Mr. Fontana.

.1705 ⤭

Amendment agreed to [See *Minutes of Proceedings*]

The Chairman: Amendment R-12, Mr. Gouk.

Mr. Gouk: It's fairly straightforward. It's just a concern by the railway that it is required to provide, with whatever cost and problems it may contain, the government with information that is otherwise available to it through other sources, specifically from either the agency or Statistics Canada.

Mr. Fontana: If Mr. Gouk would read amendment G-10, which deals with clause 52, he will find that's covered there. That should satisfy him. It talks about administration of this act or any other act of Parliament. So perhaps you want to move G-10.

I believe your R-12 is satisfied by G-10, under the next clause.

Mr. Gouk: Let me just read it for a second.

The Chairman: Okay.

Jim, don't bother reading it because -

Mr. Gouk: I'm having a lot of trouble putting -

The Chairman: So am I.

Mr. Gouk: I'm trying, Joe, I'm really trying.

The Chairman: The chairman doesn't see the linkage here, so we're going to get clarification.

Mr. Fontana: I apologize profusely to this committee for confusing everyone, including myself. Amendment R-12 can stand on its own with regard to clause 51. We can't accept it, but he can make his point.

Mr. Gouk: I thought after that faux pas that would be the least you could do, Joe.

Mr. Fontana: I apologize, but I can't accept.

Amendment negatived [See *Minutes of Proceedings*]

Clause 51 as amended agreed to

On clause 52 - *Confidentiality of information*

Mr. Fontana: There is a technical amendment in G-10 as it relates to clause 52.

Amendment agreed to [See *Minutes of Proceedings*]

The Chairman: B-12. Mr. Mercier.

[*Translation*]

Mr. Mercier: Again, it's the same argument. We would like the Committee to have broader powers so that elected representatives can have their say in matters.

Mr. Paré: This would be in keeping with the Red Book.

Mr. Mercier: Perfectly in keeping!

[*English*]

Amendment negatived [See *Minutes of Proceedings*]

Clause 52 as amended agreed to

On clause 53 - *Industry review*

The Chairman: Mr. Gouk, R-13.

Mr. Gouk: Instead of having it reported to the Governor in Council, the basic intent of this is to have it reported or laid before the House of Commons.

Mr. Fontana: I would offer to Mr. Gouk that if he's prepared to change the ``House of Commons'' to ``both houses of Parliament'', we could accept amendment R-13. But if he insists on putting it to the House of Commons only, unfortunately we have problem.

Mr. Gouk: I don't mind if it's ``and'', as long as it's not ``or''.

Mr. Fontana: That's fine.

Mr. Gouk: I don't care who else you give it to, Joe, as long as you give it to us.

The Chairman: Sorry, colleagues, just give us a minute.

.1710

Mr. Gouk, did you accept the proposal?

Mr. Gouk: I am prepared to amend my amendment by striking out the words ``the House of Commons'' and replacing them with ``Parliament''.

Subamendment agreed to

The Chairman: The Bloc does not agree, but it's still carried.

Amendment agreed to [See *Minutes of Proceedings*]

The Chairman: Of course, the Bloc does not agree.

Now we move to G-11. Mr. Fontana.

Mr. Fontana: Yes, I'm prepared to move G-11, which amends clause 53 to add:

> (a) the financial viability of each mode of transportation;
>
> to the review.

Mr. Gouk: You can review anything you like.

The Chairman: Mr. Mercier.

[*Translation*]

Mr. Mercier: Mr. Chairman, we would agree, but we would like to move a sub-amendment. Therefore, in the case of the amendment which reads:

> a) the financial viability of each mode of transportation;
>
> we would like not only the financial viability of each mode of transportation to be considered, but the general interest as well, and we would add the following:
>
> and its contribution to the Canadian economy and to the development of the regions.
>
> One can hardly object to such an amendment.

[*English*]

Mr. Nault: Is there a copy of that somewhere?

The Chairman: We'll just take a moment.

Mr. Fontana.

Mr. Fontana: Mr. Chairman, with regard to what the Bloc member, Mr. Mercier, has just indicated, I think if he reads subclause 53(1) in total, especially as amended, he will note that the (d) part of that section says ``any other transportation matters that the Minister considers appropriate'', which may very well mean reviewing those matters the member has just put forward.

Obviously there's a certain amount of latitude for the minister to review the state of affairs in the transportation sector in each mode. If he reads (a) through (d) I think he will find it's covered in that particular clause.

The Chairman: Mr. Mercier.

[*Translation*]

Mr. Mercier: Mr. Chairman, of course the minister can review these matters, but given the way in which the amendment is drafted, he can also choose not to. We would like him to be required to do so. I would also like to have my text, if possible.

[*English*]

The Chairman: For the sake of expediency, I'm going to ask Mr. Mercier to slowly -

Mr. Nault: May I have a point of order? When these little amendments come up off the floor like this, why don't we just stand that one down and let the clerk do his job? He can translate it and get it photocopied, and we can just keep on going and come back and revisit it. It's not fair to just have the member read it. If the translators miss something, then we don't know what we're voting for or against here. It won't take the clerk long to do that.

.1715

The Chairman: Okay, Mr. Nault, that's not a problem.

Mr. Mercier, we're going to have to ask you to take your amendment to this particular G-11 amendment by the government and have it written in French clearly, please, so that the clerk can take it, do it in English and then distribute it amongst the members. I'll try to accommodate you on this one, but normally it wouldn't be accepted at all because we're trying to.... That's why we do all these things in advance. I do, however, understand the time problem you had, etc., with the translation.

[*Translation*]

Mr. Mercier: We have just now received the French translation.

[*English*]

The Chairman: Yes, I understand. That's what I just said. I'm trying to be as accommodating as I can. So we'll look forward to your wording so we can have that amongst the members.

I'll stand clause 53. We'll revisit that.

Sometimes I think it's worth it just to hear back. We can easily understand it. It was seven words. Sometimes the chairman's discretion has to be allowed a little bit here.

Clause 53 allowed to stand

On clause 54 - *Statutory review*

The Chairman: Under clause 54, colleagues, we're looking at R-14.

Mr. Gouk.

Mr. Gouk: This one simply calls for having the comprehensive review, report or study carried out by the auditor general rather than someone who may have his objectivity challenged in terms of his being a patronage appointment. I'm sure the minister would be excruciatingly fair in who he picked, but it would still leave him open to that criticism, and I wish to protect the minister at all costs.

Mr. Nault: Mr. Chairman, that's not the auditor general's mandate, nor should it be. The auditor general has neither the staff nor the resources to start doing reports for every single department of Parliament. I think this is a very serious precedent that Mr. Gouk is attempting to set. The auditor general's job is to pick and choose certain areas of government that he wants to do an audit on. It's not to write reports of any fashion, whether it's for Transport, Labour, you name it. I therefore think this is a totally inappropriate amendment.

Mr. Gouk: Can I just add my clarification, then? If Mr. Nault's contention is that there are

insufficient resources and we're trying to economize, and if the report is going to be written in any case, it's going to be written at the behest of the House of Commons and someone has to do it. It is simply not a question of whether it is done or not, but rather who is doing it. Under those circumstances, I think it is appropriate to have someone who's objectivity could not be challenged doing that kind of job.

Mr. Nault: Mr. Chairman, let me get back to what I said before.

I'm sure Mr. Gouk knows what an auditor does. He must have met the odd accountant in his life.

Mr. Gouk: That's your term, not mine.

Mr. Nault: Auditors don't check these kinds of things; they don't do these kinds of reports. This is done by transport people who have technical knowledge of how the Department of Transport works and of what we do in the country as it relates to transport. If he wants to put some other Reform hack in there, maybe I'll look at the recommendation. I don't think the auditor's job is to do that, however.

Mr. Gouk: I have a sling right beside where you guys patted me.

The Chairman: Okay, you've heard the terms of amendment R-14.

Amendment negatived [See *Minutes of Proceedings*]

The Chairman: Can you carry on with amendment R-15, Mr. Gouk? Is it consequential? Is it the same thing?

Mr. Gouk: No.

The Chairman: It reads ``Auditor General shall''.

Mr. Gouk: Yes, but obviously if he doesn't do the report, we can't report on it.

The Chairman: So you're withdrawing R-15?

Mr. Gouk: Yes.

The Chairman: What about R-16, Mr. Gouk?

Mr. Gouk: Same thing.

The Chairman: Withdrawn.

What about amendment R-17?

Mr. Gouk: I have to find it. Hold your horse, I've lost my page numberings, here.

.1720 ⤧

This is not my language. It's somebody else's.

The Chairman: Are you withdrawing this one, Mr. Gouk, because it's the request and it is consequential to the others?

Mr. Gouk: Yes.

The Chairman: All right. Amendment R-17 is withdrawn.

Clause 54 agreed to

Clauses 55 to 59 inclusive agreed to

On clause 60 - *Prohibition re sale*

The Chairman: Mr. Fontana.

Mr. Fontana: I would move G-12, which is a technical amendment to the English version, Mr. Chairman.

Amendment agreed to [See *Minutes of Proceedings*]

Clause 60 as amended agreed to

Clauses 61 to 66 inclusive agreed to

Clause 67 allowed to stand

The Chairman: Shall clauses 68 through 81 carry?

Is there a problem there, Mr. Paré?

[*Translation*]

Mr. Paré: Specifically, in clause 70.

[*English*]

The Chairman: Do you have a prepared amendment? If you don't....

[*Translation*]

Mr. Paré: No, we are opposed to clause 70. I simply want to vote against it.

[*English*]

The Chairman: I see.

Clauses 68 and 69 agreed to

Clause 70 agreed to on division

Clauses 71 to 81 inclusive agreed to

On clause 82 - *Inquiry into licensing matters*

The Chairman: Mr. Fontana has an amendment to clause 82. That would be G-13.

Mr. Fontana: Yes, and it's a technical amendment. Amendment G-13 adds the words ``or other document''.

Amendment agreed to [See *Minutes of Proceedings*]

Clause 82 as amended agreed to

Clauses 83 to 86 inclusive agreed to

On clause 87 - *Regulations*

The Chairman: Mr. Fontana?

Mr. Fontana: I will move amendment G-14, which substitutes some words, ``requirements'' and ``services''.

The Chairman: So it's technical in nature. Shall amendment G-14 carry?

Amendment agreed to [See *Minutes of Proceedings*]

The Chairman: What about G-15, Mr. Fontana?

Mr. Fontana: It's a technical revision to the French version.

Amendment agreed to [See *Minutes of Proceedings*]

Clause 87 as amended agreed to

On clause 88 - *Definitions*

The Chairman: You have an amendment to clause 88, Mr. Fontana.

Mr. Fontana: Yes, Mr. Chairman.

We move amendment G-16, which amends clause 88 by adding the definitions of ``point of origin'' and ``point of destination''. This clarifies matters as they relate to shipper access to interswitching and competitive line rates, ensuring that it is maintained for those shippers whose lines are transferred to a provincial short line.

Amendment agreed to [See *Minutes of Proceedings*]

The Chairman: G-17, Mr. Fontana.

.1725

Mr. Fontana: I move G-17, which is a clarification to definitions.

Amendment agreed to [See *Minutes of Proceedings*]

The Chairman: G-18.

Mr. Fontana: I move G-18. Again, it's for clarification and adds some words, ``a partnership of such persons or a person who''.

Amendment agreed to [See *Minutes of Proceedings*]

Clause 88 as amended agreed to

On clause 89 - *Application*

The Chairman: Mr. Fontana.

Mr. Fontana: We have moved a technical amendment, ``person who operates a railway'', in G-19.

Amendment agreed to [See *Minutes of Proceedings*]

Clause 89 as amended agreed to

Clause 90 agreed to

On clause 91 - *Certificate required*

Mr. Fontana: I move amendment G-20. It's a technical amendment: ``ate a railway without a certificate of fitness''.

Amendment agreed to [See *Minutes of Proceedings*]

Clause 91 as amended agreed to

Clauses 92 and 93 agreed to

On clause 94 - *Variation of certificate*

Mr. Fontana: Mr. Chairman, I move amendment G-21, which clarifies clause 94, on certificates of fitness.

Amendment agreed to [See *Minutes of Proceedings*]

Clause 94 as amended agreed to

An hon. member: Just out of curiosity...the third word in the third line of clause 94: is that just a misprint, or is that a new word I don't know about? Is it pronounced ``termini''?

The Chairman: Plural of ``terminus''.

On clause 95 - *Notice of insurance changes*

Mr. Fontana: I move G-22. It's a correction to the French version of clause 95.

Amendment agreed to [See *Minutes of Proceedings*]

Clause 95 as amended agreed to

Clause 96 agreed to

On clause 97 - *Land taken pursuant to section 134 of Railway Act*

Mr. Fontana: Mr. Chairman, I move G-23. As you know, this clause places restrictions on the disposition of crown lands used by the railway, so we're making these amendments to clarify that. I wonder if Ms Greene -

The Chairman: Ms Greene, would you like to comment on G-23?

Ms Greene: Yes. I have fear, given the technical nature of these apportionment amendments.... This will be another one, Mr. Chairman, that you will characterize as being as clear as mud. But let me have a go at it.

A subset of railway land under the old Railway Act could not be alienated except to the Crown, depending on how the railway got hold of it. If we want to allow the railways to sell land to short-line railways so we can get short-line rail up and running, there has to be an amendment to that for that subset of land that could be sold to the short-line operator. However, in Quebec the technical language you have to use in the transfer of land is different from in the rest of the country. So there had to be a subclause to cover that off.

.1730

Finally, we wanted to make it plain, in response to representations made to the committee from aboriginal people, that nothing in this section in any way affects prior existing rights of other interested parties, including aboriginal people.

So there are those three technical aspects to the amendment. One was to make the section accord with what is actually being done under section 144, the sale of lines; two is to make the language appropriate so that all jurisdictions will be covered, including Quebec; and three is to make it plain that nothing that will be done in the transfer of any lines pertinent to a sale to a short line, for example, will affect prior existing rights, such as the rights of aboriginal peoples.

That's the effect of the amendment.

Amendment agreed to [See *Minutes of Proceedings*]

The Chairman: We now turn to amendment R-18. Mr. Gouk.

Mr. Gouk: R-18 and R-19 are just clearer versions of what we just passed, but because they're already passed, I will withdraw them.

The Chairman: Thank you, Mr. Gouk.

Mr. Gouk: That is a subjective opinion.

The Chairman: How about R-20, Mr. Gouk?

Mr. Gouk: Let me see which part we haven't dealt with yet.

Mr. Fontana: It's the same as R-18.

Mr. Gouk: Yes.

The Chairman: So you're pulling R-20 as well.

Mr. Gouk: R-20 as well.

The Chairman: R-20 is pulled.

Clause 97 as amended agreed to

On clause 98 - *Land obtained for railway purposes*

The Chairman: Next is amendment G-24. Mr. Fontana.

Mr. Fontana: G-24 is a technical amendment to the French version.

Amendment agreed to [See *Minutes of Proceedings*]

Clause 98 as amended agreed to

On clause 99 - *No construction without Agency approval*

The Chairman: Clause 99 has an amendment, G-25. Mr. Fontana.

Mr. Fontana: G-25 speaks to ``exempts railways from obtaining approval for construction of rail lines in some circumstances'' and we're making some clarifications there with regard to what a ``rail line'' is, (a) and (b) in that clause.

Amendment agreed to [See *Minutes of Proceedings*]

Clause 99 as amended agreed to

On clause 100 - *Filing agreements*

The Chairman: Clause 100 has an amendment. Mr. Fontana.

Mr. Fontana: Again, G-26, amending clause 100, is a technical amendment.

Amendment agreed to [See *Minutes of Proceedings*]

Clause 100 as amended agreed to

On clause 101 - *Definitions*

The Chairman: Clause 101 has a Reform amendment. I'll ask the clerk to hand it out.

A voice: Wait a minute. We're not on clause 102 yet. Hang on a second.

The Chairman: It's okay. The clerk is excited about his work and jumped ahead of us a little bit. He saw those sandwiches and lost his head for a minute. So there is no amendment for clause 101.

Clause 101 agreed to

On clause 102 - *Filing agreements*

The Chairman: Mr. Fontana.

Mr. Fontana: G-27 again is technical in nature.

Amendment agreed to [See *Minutes of Proceedings*]

Clause 102 as amended agreed to

Clause 103 agreed to

On clause 104 - *Other crossings may be ordered*

The Chairman: Clause 104 has two Bloc amendments. Mr. Mercier, B-14.

[*Translation*]

Mr. Mercier: Mr. Chairman, our two amendments would place a company under the obligation not only to construct but also to maintain a suitable crossing.

Clause 104(1) currently reads as follows:

> 104.(1) If a railway company and an owner of land adjoining the company's railway do not agree on the construction of a crossing across the railway, the Agency, on the application of the owner, may order the company to construct a suitable crossing if the Agency considers it necessary for the owner's enjoyment of the land.

.1735

We find that it is not enough for the company to construct a crossing; we also think that after constructing it, it should be required to maintain it. It's just common sense and that's why we move that clause 104 be amended by replacing line 2 on page 43 with the following:

> to construct and maintain a suitable crossing

[*English*]

Mr. Fontana: I believe that 103 and 104 distinguish between the different types of crossings, and therefore B-14, because of the amendments just passed, becomes redundant.

[*Translation*]

Mr. Mercier: We want the company to be required to maintain the crossing that it has constructed. That's just common sense.

[*English*]

Ms Greene: I don't know if this will be helpful, but in subclause 104(2) the agency's powers in the order include the terms and conditions governing the construction and maintenance of the crossing.

[*Translation*]

Mr. Mercier: Then it's a question of agreement.

Subclause 104(1) states...

[*English*]

The Chairman: From what I understand, it is covered.

Mr. Nault.

Mr. Nault: The reason why they're separated is because the agency can't order the railways to construct or maintain. In most instances, if it's a private crossing the owner pays the maintenance fees. That's why there's a difference. So you have to separate the two.

If he puts it in the other clause, every time there's an order to put in a crossing, the railways will have to pay for it. You know how many there are across the country, including Quebec. It would bankrupt the railway in about ten minutes. That's why they are separated.

[*Translation*]

Mr. Mercier: I understand the objection.

We don't want the requirement to maintain a crossing to be left to the Agency's discretion. We want it made clear that the company is required to maintain the crossing.

[*English*]

Mr. Nault: They do in subclause 104(2).

[*Translation*]

Mr. Mercier: Yes, but in subclause 104(2), it says that the agency "may include in its order" a requirement to maintain the crossing, whereas we don't want this to be left to the Agency's discretion. We want this to be a mandatory requirement.

It seems obvious to us.

[*English*]

The Chairman: Okay, you've heard the terms of the motion. Mr. Gouk.

Mr. Gouk: Could I just get one clarification? I just want to make sure I understand. I believe I'm in agreement with, God forbid, the government side.

If I understand it there are two distinctions here. One is where the railway splits an owner's property, in which case it has to provide the crossing. But this is referring to the clause where it is simply adjacent to the railway and someone wants a crossing to get to his or her property; then the onus is on the property owner.

Ms Greene: Exactly.

Mr. Gouk: I just want to make sure we're clear on that.

Mr. Fontana: About Mr. Gouk's comments, one should know there are about 25,000 or so private crossings. To make it mandatory would be absolutely unreasonable.

Amendment negatived

The Chairman: Amendment B-15, Mr. Mercier.

[*Translation*]

Mr. Mercier: The spirit behind it is the same. We are moving that clause 104 be amended by replacing line 8 on page 43 with the following:

> The railway company shall pay the...

[*English*]

The Chairman: Pretty close. You've heard the terms of amendment B-15.

Amendment negatived

Clause 104 agreed to on division

On clause 105 - *Deposit and notice of mortgage or hypotheque*

The Chairman: Mr. Fontana.

Mr. Fontana: I'd move G-28 if I could, but I would also ask the committee's indulgence to do something else. The French version is correct but the English version is not. In addition to what's before you in amendment G-28, we have to make just a couple of technical amendments in English.

.1740 ⤭

At line 20, where in the English version it uses the word ``Act'', we'd like to change that to ``law'' or

``statute''. We also want to do the same thing on line 37 and change the word ``Act'' to ``law'' or ``statute''. The French version already says that but the English version doesn't. So in addition to what's before you in G-28, there are those additional items on line 20 and line 37. They are friendly amendments to amendment G-28.

The Chairman: Does everybody understand that friendly amendment?

Subamendment agreed to

Amendment agreed to [See *Minutes of Proceedings*]

Clause 105 as amended agreed to

On clause 106 - *Deposit of documents*

Mr. Fontana: I move amendment G-29. It's ``hypothec...or security agreement relating to it''. That's a neat word, by the way.

Amendment agreed to [See *Minutes of Proceedings*]

The Chairman: Mr. Gouk, amendment R-21.

Mr. Fontana: Mr. Chairman, to help Mr. Gouk we'd be prepared to accept his amendment, except it needs a spelling correction.

The Chairman: That's not his fault.

Mr. Fontana: Instead of ``appartenances'', it should be ``appurtenances'', and then we'll help you out.

Amendment agreed to [See *Minutes of Proceedings*]

Clause 106 as amended agreed to

On clause 107 - *Scheme may be filed in Federal Court*

Mr. Fontana: There is a correction to the French version in amendment G-30.

Amendment agreed to [See *Minutes of Proceedings*]

Clause 107 as amended agreed to

The Chairman: Clause 108, Mr. Fontana.

Sorry, what's going on here.

Mrs. Terrana: There is an amendment to clause 107, page 44.

Mr. Fontana: Could I just take a moment?

The Chairman: Our list is not numbered correctly here. Just give us a minute.

Colleagues, you'll notice in your group of amendments it's listed as clause 107, page 44. We're going to list that as amendment G-30(a), under clause 107. So clause 107 still needs another amendment.

.1745

Mr. Fontana: On page 95 we'll number it G-30(a). Essentially, this provides 60 days for the financing of railway equipment, akin to what's happening in the United States. So that's what G-30(a) is all about.

The Chairman: So this will be G-30(a) for the purposes of the minutes.

Amendment agreed to [See *Minutes of Proceedings*]

Clause 107 as amended agreed to

On clause 108 - *Assent to scheme*

Mr. Fontana: On clause 108, amendment G-31 is just a correction of the English version.

Amendment agreed to [See *Minutes of Proceedings*]

Mr. Fontana: Amendment G-32 is a correction of the French version.

Amendment agreed to [See *Minutes of Proceedings*]

Clause 108 as amended agreed to

Clauses 109 and 110 agreed to

On clause 111 - *Copies of the scheme to be kept for sale*

Mr. Fontana: Amendment G-33 is a technical correction to the English version.

Amendment agreed to [See *Minutes of Proceedings*]

Clause 111 as amended agreed to

On clause 112 - *Definitions*

The Chairman: Mr. Gouk, amendment R-22.

Mr. Gouk: On clause 112, the intent in the bill, or at least the wording in the bill, makes it so that an interchange can take place only when two railways own two different sets of lines, and then the interchange is in effect. What it excludes is where a railway operated, but not necessarily the line owned by a second railway, comes into that same situation. They do not, in accordance with this bill, have the same entitlement for an interchange. The wording of the amendment deletes the words ``of the railway'' and substitutes the words ``operated by''.

Mr. Fontana: I would want to ask Ms Greene if she could do it. Probably it would have the effect of amending agreements already in place, and that would be really problematic.

The Chairman: Ms Greene, did you want to add to that?

Ms Greene: Mr. Fontana is correct.

Also, it has the effect of expanding quite considerably the points where competitive line rates could apply, such that there could be cases where Canadian rail traffic would be siphoned onto the American railroad system.

I would just point out to the committee that the definition of ``interchange'' is a very important, carefully crafted definition to link up the situations where it is possible to move traffic from one railroad to another. In the Canadian statute that is possible for Canadian federal railroads, and it is not the intention of the statute to make those sorts of provisions available so that traffic could be shifted from the Canadian system onto the American system.

So while this definitional change that Mr. Gouk is suggesting appears on its face to have the limited effect that he mentioned, because of its very critical link-up to other provisions to the bill it has a much wider impact.

Mr. Gouk: I have a bit of trouble with that explanation, because if the American rail line where the crossing took place owned its rail line and crossed our Canadian rail line, by this definition it would have an interchange.

.1750

Where we don't have an interchange, whether it be in Canada, wholly between two Canadian operations, or not is if one of the two operations doesn't happen to own the rail. Even though it is

wholly in Canada, they would not be able to get an interchange.

Ms Greene: Mr. Gouk, if it's the intention as part of the agreement between the two railroads, the one that owns the track and the one that is leasing the track, that such will be the arrangement between them, then it is negotiated between them.

Amendment negatived [See *Minutes of Proceedings*]

Clauses 112 and 113 agreed to on division

On clause 114 - *Accommodation for traffic*

The Chairman: Mr. Mercier.

[*Translation*]

Mr. Mercier: Pursuant to this amendment, a company entering into a confidential agreement must send a copy of such agreement to the Agency. I move that clause 114 be amended by replacing line 5 on page 48 with the following:

> be fulfilled by the company, in which case the company shall submit forthwith a copy of the confidential contract or agreement to the Agency.
>
> (5) The Agency shall examine the confidential contract or the agreement and if, in its opinion, the contract or the agreement does not serve the interests of consumers, it may make recommendations to the parties to the contract.

The purpose of the amendment would be to give the Agency the opportunity to make recommendations in cases where a confidential agreement appears to be contrary to the public interest.

[*English*]

The Chairman: Mr. Fontana.

Mr. Fontana: Mr. Chairman, I think the effect of the Bloc amendment would be to do something we're trying to get the agency not to do, and that's to examine thousands and thousands of confidential contracts...and hence to expedite and make the system work that much more efficiently and effectively.

Mr. Nault: Mr. Chairman, what is being suggested already exists in law now. It's called the Competition Act. There are protections for consumers.

What he's suggesting is that if there's a contract, it's somehow almost illegal. If that's not his intention, could he give us an example of something we would want to have reviewed by the agency and how the recommended change would affect a consumer? I'm not sure what he would be talking about.

[*Translation*]

Mr. Mercier: Mr. Chairman, I have no specific examples in mind. It's simply a matter that when a confidential contract is concluded, the Agency must be made aware of it in order to ascertain whether or not it serves the public interest.

[*English*]

Amendment negatived

Clauses 114 and 115 agreed to on division

Clauses 116 and 117 agreed to

On clause 118 - *Rates to be charged*

The Chairman: Clause 118 has an amendment. Mr. Fontana.

Mr. Fontana: Mr. Chairman, G-34 is a correction to the French version of the clause.

Amendment agreed to [See *Minutes of Proceedings*]

Clause 118 as amended agreed to

Clause 119 agreed to

On clause 120 - *Increasing rates in freight tariff*

The Chairman: R-23, Mr. Gouk.

Mr. Gouk: Mr. Chairman, this puts the time of notice from twenty days up to thirty days.

The Chairman: Mr. Fontana.

Mr. Fontana: Mr. Chairman, I've carefully considered the representations made by a number of people to move the dates from twenty to thirty days, and the effect of this amendment - and I'm sure the Reform Party would not want to encumber railroads essentially to have to keep two sets of books....

.1755

The U.S. provision for a tariff notification is twenty days, and therefore Canadian shippers moving into Canada have to comply with that provision. We thought it was only consistent with what's happening in the United States that we should stick with the twenty days. That's also consistent with other modes of transportation, where twenty days is an acceptable timeframe.

Mr. Gouk: That's a U.S. timeframe.

Amendment negatived [See *Minutes of Proceedings*]

The Chairman: Mr. Fontana, you have an amendment?

Mr. Fontana: Yes, Mr. Chairman. I move amendment G-35, which I would say is technical in nature, adding some words here and there.

Amendment agreed to [See *Minutes of Proceedings*]

Clause 120 as amended agreed to

The Chairman: Shall clauses 121 through 128 carry?

[*Translation*]

Mr. Mercier: We are opposed to clauses 127 and 128.

[*English*]

Clauses 121 to 126 inclusive agreed to

Clauses 127 and 128 agreed to on division

On clause 129 - *Regulations*

The Chairman: Colleagues, at this point we're at clause 129. I propose that we take ten minutes for a bite and we'll return at 6:10 p.m. We're only scheduled to be here till 7 p.m., so we'll start at 6:10 p.m. and go to 7 p.m. Thanks.

.1757

.1812

The Chairman: Where were we before we were pleasantly interrupted? Okay, we're at 129. G-36, parliamentary secretary.

Mr. Fontana: Mr. Chairman, the amendment G-36 dealing with clause 129 deals with interswitching. It is being amended to make it clear that interswitching rates set by the agency may not be less than the variable costs of performing the service, and the amendment clarifies that point.

Amendment agreed to [See *Minutes of Proceedings*]

The Chairman: Amendment R-24, Mr. Gouk.

Mr. Fontana.

Mr. Fontana: I think amendment G-36 covered off what amendment R-24 had purported to do.

Mr. Gouk: Yes, you got it right. I'll withdraw amendment R-24.

Clause 129 as amended agreed to

On clause 130 - *Application*

The Chairman: Mr. Fontana.

Mr. Fontana: Amendment G-36.5 for clause 130 is a technical amendment that says ``For greater certainty''.

Amendment agreed to [See *Minutes of Proceedings*]

The Chairman: Amendment R-25, Mr. Gouk.

Mr. Fontana: I think amendment R-25 does exactly what amendment G-36.5 does, and that's why you should be moving some of these government amendments, Mr. Gouk.

The Chairman: Okay.

Mr. Gouk: All you have to do is withdraw them, Joe, and then the correct wording is right behind them.

The Chairman: Are we withdrawing amendment R-25, Mr. Gouk?

Mr. Gouk: Yes, I will withdraw it.

The Chairman: Thank you.

Clause 130 as amended agreed to

Clause 131 agreed to

On clause 132 - *Shipper and connecting carriers must agree*

The Chairman: Mr. Fontana.

Mr. Fontana: I move amendment G-37, which deals with the CLRs for greater certainty.

The Chairman: Any discussion?

Amendment agreed to [See *Minutes of Proceedings*]

.1815

The Chairman: G-38, Mr. Fontana.

Mr. Fontana: It just adds a couple of words: ``is available''. Therefore it's a technical amendment.

Amendment agreed to [See *Minutes of Proceedings*]

The Chairman: R-26, Mr. Gouk.

Mr. Gouk: It's pretty straightforward and self-explanatory. The government has suggested to me it's already there. I place on it the onus of convincing me of that. Then I can live with it.

Mr. Fontana: I'll let Ms Greene do that for you.

Ms Greene: Mr. Chairman, under subclause 4(2) of this bill, the Competition Act for the first time very clearly applies to transportation matters, such that all the refusal-to-deal provisions in the Competition Act would be available if a shipper were being treated in a manner contrary to those provisions. Secondly, under this bill, in clause 119, the shippers can now force a carrier to quote a rate. So my suggestion to Mr. Gouk is that for those two reasons the provision is covered off elsewhere.

The Chairman: Do you want to withdraw it, Mr. Gouk, or do you want to vote on it, if it is covered off somewhere?

Mr. Gouk: No, it doesn't matter where it's covered off. I do want to see it. I can live with 119 as the explanation.

Clause 132 as amended agreed to

Clause 133 agreed to

On clause 134 - *Competitive line rate*

The Chairman: Mr. Gouk, R-27.

Mr. Gouk: I move it as it's written. It's pretty self-explanatory, subject to the tirade I might get as a result.

The Chairman: Do you want to explain it a bit?

Mr. Gouk: I knew you were going to do that to me. I haven't had a chance to go through that. I have to find all my amendments.

The Chairman: Maybe Ms Greene....

Ms Greene: Mr. Gouk, I may be mistaken, but I think what you were proposing to get at with the amendment was not only that substantially similar traffic be considered but that the agency look as well to substantially similar traffic covered over a comparable distance.

Mr. Gouk: Where there is no reasonable comparable traffic to use, they can go to this.

Ms Greene: The only thing I would point out to Mr. Gouk, and he may be interested in knowing, is that as a matter of practicality the agency has informed us that if they had to have two factors to do the comparison, it would be almost impossible for them to do. Leaving it with just ``substantially similar'' traffic makes it possible for them to do the comparison. To force on them a second factor, including comparable distance, is very difficult and impractical for them.

Mr. Gouk: I would trust you would agree that by comparing a short haul with a long haul and trying to use that to develop rates is a very unrealistic thing for providing some justifiable figures.

Ms Greene: I agree with you completely in the concept. However, I'm told it will make the comparison very difficult to do, and the agency is able to do the comparison by relying simply on similar traffic.

.1820 ⤭

Mr. Gouk: Again, I have trouble. If there is nothing for the agency to use for distance, then clearly they have to do the best they can. But I want to ensure that it has been required as a consideration where it is available.

Ms Greene: They have to take into consideration all traffic that's moved over the lines that is similar. But to impose the specific requirement of the distance comparison, we are told, would make it very difficult for them to do.

Mr. Gouk: I don't see where it would be difficult if that exists. If it doesn't exist, then they're going to have to substitute some other method of calculating, which is what they do. All I'm saying is that if that type of traffic is available, then they must use it, pure and simple - that they can't do it on the basis of the type of traffic alone, that they have to take that into consideration wherever it is available to them.

I don't think that's a particularly onerous problem for them. It's onerous only if we say that you have to use distance where distance sometimes isn't available and we say, ``Tough; find it''. Obviously, that's unreasonable. But if a similar distance comparison is available, then they have to use it.

Ms Greene: If it would be helpful for the committee, I can see no reason, if distance is available and would not in any way diminish their ability to make the comparison, why it ought not to be included. But I'm told that it's very difficult.

Mr. Nault: It isn't, unless I'm misreading the bill itself and the portion we're dealing with, because if you read further and you go to C, D, and E of clause 134, C, D, and E deal with the different distances. So I don't understand why there's a necessity to put it in A when in fact some of the other factors that are looked at are, in C, the total number of kilometres of the movement of traffic that generated the total revenue and, in D, the number of kilometres over which the competitive line rate is to apply....

Does that not do the same thing as Mr. Gouk is suggesting?

The Chairman: May I suggest that we stand this clause down until tomorrow. We'll give the officials a chance to have a look at it and come back and see if we can come to some arrangement on this one. All right?

Mr. Gouk: It's just an interpretive thing.

The Chairman: Yes. So we'll have clause 134 and both the R-27 and G-39 amendments stand until tomorrow.

Clause 134 allowed to stand

Clauses 135 and 136 agreed to

On clause 137 - *Obligation of carriers to provide cars*

Mr. Fontana: Amendment G-40 is a technical amendment of the French version.

Amendment agreed to [See *Minutes of Proceedings*]

The Chairman: Amendment G-41, Mr. Fontana.

Mr. Fontana: The clause deals with the agency's authority to determine limitations of railway liability in cases where shippers and carriers do not agree on a limitation of liability, and this will avoid protracted shipper-carrier negotiations and potential litigation. Therefore this amendment covers that off.

The Chairman: So it's a new clause, 137.1, which is the amendment G-41.

Mr. Fontana: I'm sorry; it isn't clause 137, then. So you can deal with clause 137 first -

The Chairman: We can deal with clause 137 first.

Clause 137 as amended agreed to

The Chairman: On amendment G-41, is there no discussion?

Mr. Fontana: I should say that both the shippers and the carriers wanted this amendment, so it's

supported by both parties.

Amendment agreed to [See *Minutes of Proceedings*]

On clause 138 - *Application by railway company*

The Chairman: Amendment G-42.

Mr. Fontana: It is a change to the French version.

Amendment agreed to [See *Minutes of Proceedings*]

The Chairman: Amendment G-43.

Mr. Fontana: It is a change to the French version.

Amendment agreed to [See *Minutes of Proceedings*]

.1825

Clause 138 as amended agreed to

On clause 139 - *Request for joint or common use of right-of-way*

The Chairman: Amendment G-44 is next.

Mr. Fontana: G-44 is a French version change.

Amendment agreed to [See *Minutes of Proceedings*]

Clause 139 as amended agreed to

On clause 140 - *Definition of ``railway line''*

The Chairman: We're on amendment G-45.

Mr. Fontana: Mr. Chairman, G-45 is an English version change.

The Chairman: It's a technical amendment.

Amendment agreed to [See *Minutes of Proceedings*]

Clause 140 as amended agreed to

On clause 141 - *Three year plan*

The Chairman: Amendment G-46.

Mr. Fontana: It's a French version change, Mr. Chairman.

Amendment agreed to on division [See *Minutes of Proceedings*]

The Chairman: Next is amendment G-47.

Mr. Fontana: The amendment is to strike out lines 27 to 30 on page 62 of the bill.

The Chairman: Is there any discussion?

Mr. Jordan: What's the significance of that, Mr. Chairman?

The Chairman: Mr. Fontana, why are we striking out lines 27 through 30?

Mr. Fontana: The amendments we just passed to section 97 make this subclause unnecessary and therefore we're striking it out.

Mr. Jordan: Okay.

Amendment agreed to [See *Minutes of Proceedings*]

The Chairman: As a result of that, amendments R-28 and R-29 probably don't apply.

Mr. Gouk, did you want to withdraw those two? The lines you're referring to have just been done away with.

Mr. Gouk: Okay.

The Chairman: Amendments R-28 and R-29 are withdrawn.

Clause 141 as amended agreed to

On clause 142 - *Compliance with steps for discontinuation*

The Chairman: Mr. Fontana, you have amendment G-48 to clause 142?

Mr. Fontana: Mr. Chairman, as you know, clause 142 is part of the discontinuance section, and this amendment proposed in G-48 requires a railway to wait 60 days after amending its plan before beginning the line discontinuance process. It's a loophole we wanted to fill to ensure the integrity of the three-year plan. While the railways can amend it at any time, we wanted to make sure it didn't circumvent the notification period and the times available for everyone to be notified of a sale, a lease and/or a conveyance.

Ms Greene might want to cover that.

Ms Greene: Mr. Fontana, I think you've covered it very clearly.

The Chairman: Are there any other discussions on amendment G-48?

Mr. Mercier.

Mr. Mercier: On division.

Amendment agreed to on division [See *Minutes of Proceedings*]

The Chairman: Mr. Fontana, there's an amendment G-48.5.

Mr. Fontana: Yes. It's a technical amendment.

The Chairman: It's a technical amendment on the wording?

Mr. Fontana: Well, we're substituting. I might want Ms Greene to do this because this takes into account the Robson lines, which are of great interest to a number of people.

The Chairman: Ms Greene.

Ms Greene: There is a series of light-density lines that all the interested parties in the handling and shipment of grain believe should be removed expeditiously from the rail network. They are never likely to be made into short lines. They end up costing grain farmers money as long as they are there.

.1830 ⤧

For the past several months Mrs. Robson has been studying a subset of these light-density lines, with a view to getting them out of the system without having to go through any further process, since everyone agrees that they are a cost burden on grain farmers in the system.

This provision makes plain that for that subset of lines they can come out of the system at a date fixed in March or ten days after the coming into force of this bill.

Mr. Fontana: All parties involved in this are in agreement. The producers, the stakeholders, the

carriers, everybody is in place, and so I think this would help expedite the situation very well.

Mr. Gouk: The only thing that makes me nervous about it, Joe, is that I have a railroad line running through a community called Robson in my riding, and I don't want anybody getting nervous.

Mrs. Terrana: There is a Robson Street in Vancouver.

The Chairman: Shall the amendment G-48.5 carry?

Mr. Fontana: It's worth about $5 million, isn't it?

Amendment agreed to [See *Minutes of Proceedings*]

Clause 142 as amended agreed to

On clause 143 - *Advertisement of availability of railway line for continued rail operations*

The Chairman: Mr. Fontana.

Mr. Fontana: There is an English version change in G-49.

Amendment agreed to [See *Minutes of Proceedings*]

The Chairman: G-50, Mr. Fontana.

Mr. Fontana: Clause 143 essentially specifies what the railway must include in the advertisement for the sale of the line, and this amendment requires that the railway, if it is not transferring all of its interest in the line, for example, if it intends to lease rather than sell, specify in the advertisement how it intends to transfer that interest.

The Chairman: For greater certainty.

Amendment agreed to [See *Minutes of Proceedings*]

Clause 143 as amended agreed to

On clause 144 - *Disclosure of process*

The Chairman: G-51, Mr. Fontana.

Mr. Fontana: Mr. Chairman, G-51, dealing with clause 144, is related to the amendments that we have just passed in clauses 142 to 145, so it brings all those clauses into line.

Does Ms Greene want to add anything to that one?

Ms Greene: No, I think it is pretty clear.

The Chairman: It is a straightforward technical....

Mr. Fontana: The railway company has four months.

Amendment agreed to [See *Minutes of Proceedings*]

Clause 144 as amended agreed to

On clause 145 - *Offer to governments*

The Chairman: G-52, Mr. Fontana.

Mr. Fontana: I believe Mrs. Terrana is going to do this one.

The Chairman: Mrs. Terrana.

Mrs. Terrana: This amendment relates to clause 145. It clarifies the cases in which the railways offer to the minister, and it also brings the time for the three levels of government to make the

decision from fifteen days to thirty days each.

Amendment agreed to [See *Minutes of Proceedings*]

The Chairman: Mr. Gouk, R-30.

Mr. Gouk: Mr. Chairman, most of the members will probably remember the submission by the Federation of Canadian Municipalities. We have three provinces in Canada that have an additional level of government, the regional districts.

Within my riding, for example, I have a line that I expect to possibly be considered for abandonment at some future time. In addition to running through two municipalities, it runs through a number of unorganized areas that can only be described as being in a specific regional district.

This amendment is designed to give an additional level of consideration, where that level of government exists, so that before it goes to the municipalities it would go to the regional districts, as I say, where they exist, for possible purchase by them before it goes to the individuals.

.1835

The Chairman: Ms Greene, can you explain why the department wouldn't put regional governments into the...?

Ms Greene: We have been advised that there's such a wide variation across the country on regional governments that it is probably not wise to go at the issue you cite in the way you suggest. If a line passes through several municipalities where there is a regional government, the likelihood is that the municipalities would get in contact with the regional government in any event.

Our concern was that to specify another level you had to go through, first, would not apply in many circumstances across the country, and secondly, could very well end up just delaying matters without having the curative effects you're seeking.

Mr. Gouk: With regard to the fact that it doesn't apply in many circumstances, then you have no problem with my amendment. Where you have a problem is where it would apply.

Using my own province as an example, I have areas where the municipalities are not strung together. I don't know how they do this in provinces where they do not have regional districts. What is the resolution of the disposal of that land after the province, where the rail line goes between two municipalities or cities but is not in a municipality or city at that time, only in a regional district?

Ms Greene: I understand a problem could emerge, but in that case.... First, let me say that as a federal statute we tend to recognize three orders of government or three levels of government.

Mr. Gouk: Tend to?

Ms Greene: Well, I don't know of a case.... I'm not going to be definitive about it, Mr. Gouk, because I don't know.

Secondly, in the case you cite, would you not think the province in that event would take hold of the matter and ensure that all of the interested municipalities come together on it?

Mr. Gouk: Yes, but you see the problem is we're not talking about interested municipalities; we're talking about specific sections of rail that aren't in anybody's municipality. They're in a regional district in certain provinces where regional districts exist.

Mr. Nault: Mr. Chairman, I don't understand why Mr. Gouk is coming at it this way. If you read subclause 145(2), it says:

> (2) After the requirement to make the offer arises, the railway company shall send it
>
> and then it says:
>
> (c) to the clerk or other senior administrative officer of each municipality that the railway

line passes through.

Mr. Gouk: Yes.

Mr. Nault: Unless it's different in B.C. from what it is in Ontario, if I put my old municipal hat on from when I used to be a municipal councillor, the regional government of the municipalities is a second tier of government. In fact, the first tier is always the municipality itself. They have authority over their particular area. If in fact the request or the information was sent to individual municipalities that the line goes through, then it would end up through those municipalities to the regional government themselves so that if they wanted to deal with it, it's in its total form.

To suggest that you put the clause in the way Mr. Gouk is suggesting, unless it's totally different in B.C. - and I can't speak for B.C. -

Mr. Gouk: I think it is.

Mr. Nault: - what you're doing is causing a confrontation as to which jurisdiction has the ability to deal with this issue.

In fact, the way it should go - at least it does in Ontario - is that the municipalities themselves have powers above and beyond and separate from the regional government, and then they have certain services that are applicable to the region as a whole. That's why I think it's best left this way. Then everybody will be informed. If the regional government wants to entice individual municipalities to buy a line, then they can do so.

Mr. Gouk: Where the problem still lies - and I haven't heard anybody explain to me how this is done. I've suggested to the parliamentary secretary when we discussed a lot of these amendments that if you guys have an explanation, I'm quite willing to listen to it. But the problem is, what do we do with a rail line being abandoned?

We've dealt with the federal government because it's all in Canada. In the case of British Columbia, we've dealt with the provincial government because we're talking about B.C. Now before we get to the individual municipalities, we have a substantial amount of the rail line that is not in anybody's municipality.

Mr. Nault: That's provincial jurisdiction.

Ms Greene: That's provincial jurisdiction.

.1840

Mr. Gouk: So it has to be done by the provinces. Hey, that's your area; we're not -

Mr. Nault: If the municipality has no jurisdiction outside of its boundaries and that railway isn't within their municipality, they have no right to suggest it is their obligation or the federal government's obligation or the railway's obligation to inform them. It then becomes a provincial jurisdiction.

If the province says, no.... I thought what you were saying is that it was within municipalities, but if you're saying it's within a district that happens to have municipalities in it - it's the district of such-and-such a municipality -

Mr. Gouk: It's a regional district.

Mr. Nault: That has nothing to do with it.

Mr. Gouk: Yes, it does. It is a regional district. It is a recognized level of government in British Columbia, with specific authorities provided to it by the provincial government in exactly the same way as a municipality.

The Chairman: Just as a point of clarification for myself, Mr. Gouk, in a regional municipality - and we've got them in Ontario, too - there are no voids between municipalities. A regional municipality is made up of a number of municipalities. In my area, for example, you have Hamilton and Dundas and

Flamborough, etc. These are little communities on the map, but their borders meet with one another. The regional municipality -

Mr. Gouk: And they are recognized municipalities.

The Chairman: Yes.

Mr. Gouk: We do not have those in British Columbia.

The Chairman: No, but the regional municipality is the other tier of government that brings those together.

Mr. Fontana.

Mr. Fontana: Mr. Gouk and I have had this discussion. I think what we're trying not to do is to confuse regional governments or regional districts with municipal governments. Because different provinces may have different municipal regimes, by saying ``municipalities'', it is fair to say it's covered off in terms of the notification and the opportunities that come with that level of government.

As I understand it, a regional district in British Columbia, as you just said, is recognized as a municipal government by the Province of British Columbia. It is therefore better for us to stick to a generic term that everybody across the country can understand, which is ``municipalities'', and one that designates a certain level of government. I'm sure the regional districts in B.C. will have the opportunity of the notification and those opportunities that come with regard to that particular rail line that they may want to acquire.

If we mention regional districts and regional governments, what do we do in other provinces, for example, where those things don't exist? We just confuse the situation immensely.

Mr. Gouk: It will simply happen where they exist. You're saying the regional districts don't need to be in here because they'll be notified by the province. Why do you bother having the municipalities in here, then? Let them be notified by the province.

Mr. Fontana: No, they'll be notified by the railroads, because the railroads have the obligation to do so.

Mr. Gouk: To notify the regional districts?

Mr. Fontana: They have the obligation to notify the municipalities, which may be regional districts.

Mr. Gouk: If you want to put a definition in here that for the purposes of this act a regional district shall be considered a municipality, I have no problem. But that's not what it says.

Mr. Fontana: It's not our jurisdiction to say that. It's the jurisdiction of the province to determine what is and what is not a municipality.

The Chairman: I think with the definition of ``municipality'' in this sense - and I can be corrected, by the way - we have federal government, we have provincial government, and we have local government. I think local government is what they mean by ``municipality''. So if it's regional, municipal or whatever they want to call it in whatever province, I think it means local government.

Mr. Jordan.

Mr. Jordan: I think I understand what Mr. Gouk is getting at: districts. There are some parts of this nation that are not in any municipality. They are in something called ``districts''.

Mr. Gouk: That's right.

Mr. Jordan: What we should do then is amend paragraph 145(2)(c) to read: ``to the clerk or other senior administrative officer of each municipality or district'' -

Mr. Gouk: Well, as long as all my territory is covered, I'm happy. This is one way to do it and that's

another.

Mr. Jordan: - ``that the railway line passes through''.

Mr. Gouk: If you prefer to liberalize my amendment, I can probably live with it as long as the area is included.

The Chairman: All right, then. Why don't we take this? The suggestion has been made about using the word ``district''. Why don't we stand this one down as well? We'll ask the officials to have a look to make sure there are no complications with the word ``district''. Maybe there's a better word that we can come up with by morning.

So with your indulgence, colleagues, we'll stand clause 145 down until tomorrow morning.

Mr. Gouk: Sounds good to me. Sleep tight all regional districts, we're on watch.

Clause 145 allowed to stand

.1845

The Chairman: The department will come back with an agreement or explanation on that one.

On clause 146 - *Discontinuation*

Mr. Fontana: May I just mention one thing on R-31? I think we've partly covered that in G-53.

Mr. Gouk: Which part do we still need to deal with?

Mr. Fontana: I knew you would say that.

Mr. Gouk: I will do something that will help expedite things. I will take the two that did not show up and deal with them at the tabling stage instead.

Mr. Nault: I would prefer to dealt with them here, if we could.

Mr. Gouk: I intend to deal with one of them there in any case.

The Chairman: We could stand down until tomorrow.

Mr. Gouk: I don't know if they'll show up or not. It's 7 p.m. now and I haven't seen them, and we're going to reconvene at 9 a.m.

Mr. Fontana: Mr. Gouk might want to look at G-53. As I said, it partly covers that. If he's still waiting for another one that is supposed to be working its way back to him, I think we should stand down clause 146 until tomorrow,

Clauses 146 allowed to stand

The Chairman: Amendment G-53 is for a brand-new clause 146.1, so that's a carry-over. Do you want to wait on that one as well?

Mr. Hubbard, are you withdrawing that one?

Mr. Hubbard: Yes.

Clauses 147 to 151 inclusive agreed to on division

On clause 152 - *Higher rates in respect of joint line movements*

The Chairman: Amendment G-54, Mr. Fontana.

Mr. Fontana: It's a French version correction on clause 152.

Amendment agreed to [See *Minutes of Proceedings*]

Clause 152 as amended agreed to on division

On clause 153 - *Higher rates in respect of certain railway cars*

The Chairman: Amendment G-54.5, Mr. Fontana.

Mr. Fontana: Government amendment 54.5 is another French version amendment to clause 153.

Amendment agreed to on division [See *Minutes of Proceedings*]

Clause 153 agreed to on division

On clause 154 - *Prescribed railway companies*

The Chairman: Amendment B-18, Mr. Mercier.

[*Translation*]

Mr. Mercier: Again, it's for the same reason.

[*English*]

Amendment negatived [See *Minutes of Proceedings*]

Clause 154 agreed to on division

On clause 155 - *Review*

The Chairman: Mr. Gouk.

Mr. Gouk: Amendment R-32 makes the change from doing it during 1999 to doing it on or before December 31, 1997. That still provides over two years to do it.

The Chairman: Mr. Fontana, did you want to address that?

Mr. Fontana: I only want to say a couple of things. Ms Greene might want to do it.

.1850

The rate cap obviously is going to be reviewed in 1999. The members should know there are ongoing consultations among all the stakeholders to develop a new calculation for that rate. We hope it will occur sooner than by 1997. In fact, it may occur after we pass C-101 and before the budget, at which point we would have to amend this bill. So I think we should allow all the partners and the stakeholders to try to work this out themselves, rather than impose certain changes at this time.

Ms Greene: I think that captures it, Mr. Fontana. This process will probably not be complete until budget time. So as amendments come forward, which is likely, they will be in 1996. At that time, if it's felt appropriate that the review should be advanced, it can be. But for now, this gives us a reasonable period to assess what's happening in grain transportation.

Mr. Gouk: She agrees with you, Joe. I'm surprised. I'm waiting for the time she smacks you and says no, you're wrong, Mr. Fontana.

Mr. Fontana: I'm a masochist, but I'm not sure I'd go that far.

Amendment negatived [See *Minutes of Proceedings*]

Clause 155 agreed to on division

On clause 156 - *Uniform accounting system for CN and CP*

The Chairman: G-55, Mr. Fontana.

Mr. Fontana: Mr. Chairman, G-55 makes minor but necessary amendments to the agency's powers

to prescribe a classification of accounts to allow comparison of railway performance. These amendments do that.

Amendment agreed to [See *Minutes of Proceedings*]

Clause 156 as amended agreed to

On clause 157 - *Regulations for determining costs*

The Chairman: G-56, Mr. Fontana.

Mr. Fontana: It's the French version amendment to 157.

Amendment agreed to [See *Minutes of Proceedings*]

The Chairman: G-57?

Mr. Fontana: It just adds the words ``the Agency must'' at line 70.

Amendment agreed to [See *Minutes of Proceedings*]

Clause 157 as amended agreed to

The Chairman: Now we go to G-58, which is a new clause 157.1. Mr. Fontana.

Mr. Fontana: Ms Greene....

The Chairman: Ms Greene, do you want to give us an explanation for this new clause 157.1?

Ms Greene: In cases where short lines are being set up, often the provincial government will wish to adopt rail safety laws that have been on our books, for example, almost holus-bolus into their laws. In other cases provinces that may be taking over some jurisdiction of rail that they have not had since the turn of the century will want for the administration of that jurisdiction to leave it with the agency or to leave it with officials of the department. This provision merely makes it clear that the minister is empowered to make agreements with his provincial colleagues to carry out the mutual administration of acts that may come into force in provincial governments. It's a clarifying provision.

Amendment agreed to [See *Minutes of Proceedings*]

Clauses 158 and 159 agreed to

On clause 160 - *Rail passenger services*

The Chairman: Clause 160 has a Reform amendment, R-33. Mr. Gouk.

Mr. Gouk: Ms Greene, you'll explain that one for us.

The Chairman: She can explain why it might not work.

Mr. Gouk: Of course - unless Joe has got the nod.

Basically, it's a process to provide arbitration within certain types of rail service, and a method of doing that, and time parameters.

Now we'll hear the other side.

.1855 ⤭

The Chairman: Ms Greene, do you want to comment on that one?

Ms Green: As I understand the clause, it proposes a type of arbitration different from the one that has commonly been in the transportation law. It's a kind of mediation style of process rather than a strict final-offer process.

I would suggest to Mr. Gouk that the final-offer process is generally regarded as the one that prompts the parties to engage most firmly in negotiations. A mediation process allows the parties to use a third party to a much greater extent than the pressure that is on them to negotiate with one another. So it's really a difference in philosophy: do you want somebody else to solve their problems, or do you want an arbitration process that forces the parties to solve their problems?

The Chairman: Thanks, Moya. That was a straight explanation.

Mr. Gouk: We will hear the reversal on the next one.

Amendment negatived [See *Minutes of Proceedings*]

Clause 160 agreed to

The Chairman: At this point I'm going to call it a night. We've been working since 3:30 p.m. It's now 7 p.m. I appreciate how far we've come this evening, and we'll be looking forward to seeing you tomorrow at 9 a.m. in this room. By then, hopefully, the department will have some responses on some of the matters we stood down and Mr. Gouk will have a response from the legal people on a couple of the missing amendments.

This meeting stands adjourned.

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Indexed as:

Metropolitan Toronto (Municipality) v. Canadian National Railway Co. (C.A.)

The Municipality of Metropolitan Toronto (Appellant)
v.
The Canadian National Railway Company (Respondent)
and
Canadian Pacific Railway Company and St. Lawrence & Hudson Railway Company Limited (Interveners)

[1998] 4 F.C. 506

[1998] F.C.J. No. 1164

Court File No. A-1029-96

Federal Court of Canada - Court of Appeal

Strayer, Robertson and McDonald JJ.A.

Heard: Toronto, June 4, 1998.
Judgment: Ottawa, August 14, 1998.

Railways -- Appeal from Canadian Transportation Agency decision apportioning capital, maintenance costs of fence along railway's right of way equally between Metropolitan Toronto, CNR -- Since Metro establishing paved pathway pedestrians, cyclists, trespassing on CNR property -- Other measures to discourage trespassers unsuccessful, causing complaints from residents (eg. whistle blowing) -- Railway Safety Act, s. 16 permitting reference to Agency where proposing party, any other person standing to benefit from completion of work, cannot agree on apportionment of costs between them -- CTA concluding fence "railway work", Metro stood to "benefit" from its installation -- (i) Reasonable to conclude fence "railway work" -- CTA reasoning fence preventing trespassing, thereby protecting railway line, facilitating railway operation, and within definition of "line work" -- Definition of "railway work" including "line work" -- (ii) Agency finding Metro stood to benefit from fence because protecting parkland users from inherent dangers created by presence of railway, addressing residents' complaints, discouraging trespassing thereby creating safer environment -- Interpretation not confining "benefit" to conferral of additional legal rights correct in light of Railway Safety Act, s. 4(4) clearly indicating Agency must concern itself with safety of

persons other than railway passengers, employees, including those using property adjacent to railway lines, who may be endangered by railway's presence -- (iii) Reasonable to conclude Metro having sufficient interest in protecting park users from access to railway line in such way as to avoid inconvenience to nearby residents.

Administrative law -- Statutory appeals -- Standard of review -- Appeal pursuant to Canada Transportation Act, s. 41(1) of Canadian Transportation Agency's decision to apportion equally between appellant, respondent capital, maintenance costs of fence along railway right of way -- Railway Act, s. 16 permitting reference to Agency where proposing party, any other person standing to benefit from completion of work, cannot agree on apportionment of costs between them -- On questions of law, jurisdiction standard of review correctness with some deference owed to expert tribunal on questions other than those of jurisdictional nature -- On questions of mixed law, fact proper test reasonableness -- But those decisions having potential to apply widely to many cases more likely to be treated as involving questions of law in contrast to those dealing with particular set of circumstances appropriately treated as involving mixed questions of law, fact -- (i) Whether fence "railway work" mixed question of law, fact, subject to standard of reasonableness i.e. whether facts satisfy legal tests -- Decision on particular set of circumstances, not likely to be of much general interest in future -- Although decision as to jurisdiction, difficult to apply test of minimum deference (correctness) as within CTA's expertise -- (ii) Interpretation of "stands to benefit" jurisdictional question subject to standard of correctness as involving question of law with potentially broad impact -- (iii) Application of concept "stands to benefit" to facts, involving mixed question of fact, law -- Such finding having no precedential significance -- Standard of review reasonableness.

This was an appeal from a Canadian Transportation Agency (CTA) decision that the appellant and respondent should share equally the capital and maintenance costs of fencing constructed along the right of way of the Canadian National Railway (CNR) in the lower Don Valley within what was at that time the Municipality of Metropolitan Toronto (Metro), now the City of Toronto. CNR operates a rail line along the Don River in the Don River Valley. Metro operated a regional park system, including parks in the Don River Valley. Since 1991, when Metro established a paved pathway in the lower Don Valley, pedestrians and cyclists have trespassed on CNR property, crossing and recrossing the tracks. CNR introduced various measures to discourage trespassers including signage, public information, prosecution of trespassers, and whistle blowing at all curves in the track for some three miles where the problem was found to exist. The whistle blowing caused complaints from local residents. In 1995, CNR proposed that it would pay the initial cost of construction of a 20,000-foot-long chain link fence, if Metro would undertake responsibility for major maintenance. When Metro rejected this proposal, CNR referred the matter to the National Transportation Agency, the predecessor of the CTA, for an apportionment of both the capital and maintenance costs of the fence between it and Metro pursuant to Railway Safety Act, section 16. Section 16 permits a reference to the Agency where the proposing party and any other person who stands to benefit from the completion of the work cannot agree on the apportionment between them

of the liability for costs. The CTA concluded that the fence was a "railway work" as defined by section 4 of the Act, and that Metro stood to "benefit" from the installation of the fence. Canada Transportation Act, subsection 41(1) allows an appeal with leave "on a question of law or question of jurisdiction".

The issues were: (1) what was the standard of review; (2) whether the CTA erred in concluding that the fence was a "railway work"; and (3) whether the CTA erred in concluding that Metro was a person "who stands to benefit" from the installation of the fence.

Held, the appeal should be dismissed.

(1) If the Agency in making the decision under appeal has applied truly legal tests on questions of law or jurisdiction then the standard of review is correctness, with some deference owed to this expert tribunal on legal questions other than those of a jurisdictional nature. If it has made decisions of mixed law and fact, including decisions relevant to assuming jurisdiction, then the proper test is reasonableness. But there is a spectrum running between these two types of decisions. Those that have the potential to apply widely to many cases are more likely to be treated as involving questions of law, in contrast to those that deal with a particular set of circumstances that is not apt to be of much interest to judges and lawyers in the future, which are appropriately treated as involving mixed questions of law and fact.

(2) The CTA reasoned that as the fence would prevent trespassing it could be considered a "structure that protects a line of railway and facilitates railway operations". Thus the fence would come within the definition of "line work" found in section 4, paragraphs (a) and (c). This was a decision on a particular set of circumstances, not likely to be of much general interest in future. Although a decision as to jurisdiction, it was difficult to apply the test of minimum deference, namely "correctness", to it because the CTA is an expert tribunal with a century's cumulative experience, an expert staff, and a regular involvement with problems of railway safety both with respect to those working or travelling by rail and those who by proximity may be endangered by the railway operation. A conclusion that keeping trespassers off the railway right of way and tracks both protects the railway and facilitates its operation would appear to be central to the Agency's area of expertise. Implicit in concerns about trespassers on the tracks is an assumption, which seems reasonable, that the presence of trespassers on a railway track can impede the operation of a railway. It was reasonable for the Agency to conclude that the fence would "facilitate" the operation of the railway within paragraph (c) of the definition of "line works" and, in the sense that it would keep the railway free of trespassers, that it would thus "protect" this line of railway within the meaning of paragraph (a) of that definition. These were decisions as to whether "the facts satisfy the legal test" and were decisions of mixed law and fact for which the standard of review should be reasonableness. The decision that the fence was a "railway work" was reasonable, and should not be set aside.

(3) The Agency found that Metro stood to benefit from the fence because it would protect parkland

users from inherent dangers created by the presence of the railway, address the complaints of area residents, discourage trespassing and provide a safer environment throughout the Don Valley parklands. It was inferred from this finding that the CTA took a broad, functional view of the expression "stands to benefit", which did not confine "benefit" to the conferral of additional legal rights on, or the relief of legal liability of those against whom an order of apportionment can be made. This involved statutory interpretation of a provision whose scope was open to debate and one which went to jurisdiction as to persons against whom the Agency could make orders. This is the kind of jurisdictional decision which is subject to the standard of correctness as involving a question of law with a potentially broad impact. The CTA's interpretation of "stands to benefit" was correct. Railway Safety Act, subsection 4(4) makes it clear that the Agency must concern itself not only with the safety of persons transported by railway but also with that of those who use property adjacent to railway lines and who may be endangered by the presence of the railway. The Agency may properly see a benefit to adjacent property owners in measures which reduce dangers to users of that property caused by the presence of the railway line. Therefore there was no reviewable error of law going to jurisdiction.

The application of this broad concept of "stands to benefit" to the facts of this case, as a jurisdictional basis for making this specific order against Metro, involved a mixed question of law and fact. Such a finding was very particular to these circumstances and had no precedential significance. Thus the standard of review was reasonableness. It was reasonable for the Agency to conclude that Metro as a political entity and owner of the parks had a sufficient interest in protecting users of these parks from random access to the railway line and incidentally, to do so in a way which would avoid inconvenience to other residents which would be caused by whistle blowing. As there had been no serious problem of trespassers on the tracks either in this area before the cyclist and pedestrian path was built or in other parts of the Don Valley where there is no such path, it was open to the Agency to conclude that Metro, having facilitated the entry of people to the area had at least a broad governmental interest and responsibility in minimizing the resulting dangers even if, in terms of occupiers' liability, it might have no legal liability for users of its parks leaving the parks to trespass on adjacent property.

Statutes and Regulations Judicially Considered

Canada Transportation Act, S.C. 1996, c. 10, ss. 31, 41(1),(2),(3).
Railway Safety Act, R.S.C., 1985 (4th Supp.), c. 32, ss. 4 "crossing work", "line work", "railway work", 16.

Cases Judicially Considered

Applied:

Upper Lakes Group Inc. v. Canada (National Transportation Agency), [1995] 3 F.C. 395; (1995), 125 D.L.R. (4th) 204; 62 C.P.R. (3d) 167; 181 N.R. 103 (C.A.);
Canada (Director of Investigation and Research) v. Southam Inc., [1997] 1 S.C.R. 748; (1997), 144

D.L.R. (4th) 748.

Considered:

Toronto (City) v. Toronto (Metropolitan) (1992), 97 D.L.R. (4th) 140; 13 M.P.L.R. (2d) 148; 60 O.A.C. 247 (Ont. Div. Ct.).

Referred to:

Westcoast Energy Inc. v. Canada (National Energy Board), [1998] 1 S.C.R. 322; (1998), 156 D.L.R. (4th) 456;
Quebec (Attorney General) v. Canada (National Energy Board), [1994] 1 S.C.R. 159; (1994), 112 D.L.R. (4th) 129; 20 Admin. L.R. (2d) 79; 14 C.E.L.R. (N.S.) 1; 3 C.N.L.R. 49; 163 N.R. 241.

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APPEAL from Canadian Transportation Agency's decision that the costs of installation and maintenance of fencing constructed along the right of way of the CNR in the lower Don Valley should be apportioned equally between the CNR and Metropolitan Toronto. Appeal dismissed.

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L. Michel Huart and William McMurray for respondent.
Maureen Helt for interveners.
Elizabeth C. Barker for Canadian Transportation Agency.

Solicitors of record:

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The following are the reasons for judgment rendered in English by

STRAYER J.A.:--

Introduction

1 This is an appeal from a decision of the Canadian Transportation Agency (CTA) dated August 29, 1996. The Agency thereby ordered that the costs of installation and maintenance of fencing constructed along the right of way of the Canadian National Railway (CNR) in the lower Don Valley within what was at that time the Municipality of Metropolitan Toronto (Metro), now the City of Toronto be apportioned equally between the appellant and respondent.

2 Although not named as an intervener, the CTA was heard on this appeal as authorized by subsection 41(2) of the Canada Transportation Act.[1]

Facts

3 It should first be noted that the order of the CTA was made pursuant to a reference under section 16 of the Railway Safety Act[2] which provides in part as follows:

> 16. (1) Where the proposing party in respect of a proposed railway work and each other person who stands to benefit from the completion of the work cannot agree on the apportionment between them of the liability to meet the construction, alteration, operational or maintenance costs in respect of that work, the proposing party or any of those persons may, if no right of recourse is available under the Railway Act or the Railway Relocation and Crossing Act, refer the matter to the Agency for a determination.
>
> . . .
>
> (4) Where a matter is referred to the Agency under subsection (1), the Agency shall, having regard to . . . the relative benefits that each person who has, or who might have, referred the matter stands to gain from the work, and to any other factor that it considers relevant, determine the proportion of the liability for construction, alteration, operational and maintenance costs to be borne by each person, and that liability shall be apportioned accordingly.

No hearing was held by the CTA after this matter was referred to it by the CNR but there was a lengthy exchange of written submissions by Metro and the CNR and no issue is raised as to the fairness of this procedure. It should be noted that the findings of the CTA are not based on sworn evidence. However, there seems to be no significant difference of view on the facts but only as to their interpretation and legal consequence.

4 For over a century, the CNR or its predecessor corporations have operated this rail line which

lies to the west of the Don River in the Don River Valley. It generally follows the sinuosities of the Don, at some places close to, and at others some distance from, the river. Metro operated a regional park system including parks in the Don Valley on lands lying both to the east and west of the CNR railway corridor. In approximately 1991, Metro established a paved pathway for pedestrians and cyclists in the lower Don Valley on the east side of the Don River, that is on the side opposite to that on which the CNR rail line is located. At one place, however, the paved pathway provides access to a bridge where path users can cross the river and enter further parkland belonging to Metro and immediately adjacent to the CNR line. This may lead them to use a railway bridge to cross the Don. Also, various "informal paths" have been created through Metro parkland by visitors and these paths enable cyclists and pedestrians to trespass on CNR property, crossing and recrossing the tracks.

5 In June 1994, Transport Canada indicated to CNR a concern as to the potential hazard created by the presence of these "informal trails" and discussions ensued between the CNR and Metro. The CNR introduced some measures to dissuade trespassers including signage, public information, prosecutions of trespassers, and in particular, whistle blowing at all curves in the track for some three miles where the problem was found to exist. The whistle blowing in 1994 and 1995 gave rise to many complaints from the local residents. After a further study was carried out by a consultant, a meeting was held on August 30, 1995 including representatives of the CNR, Metro, Transport Canada, and other concerned bodies. CNR proposed to deal with the trespass problem by constructing a chain-link fence some twenty thousand feet in length at strategic locations in this area to keep trespassers off its line. It proposed to pay the initial cost of installation on condition that Metro would be responsible for major maintenance. Metro rejected this proposal. Therefore on October 25, 1995 the CNR referred the matter to the National Transportation Agency (the predecessor of the CTA) for an apportionment of both the capital and maintenance costs of the fence, between it and Metro, pursuant to section 16 of the Railway Safety Act. There ensued exchanges of submissions as referred to above. On August 29, 1996 the CTA concluded that the fence came within the term "railway work" in subsection 16(1) and that Metro stood to "benefit" from the installation of the fence within the meaning of that subsection. It therefore made an apportionment under subsection 16(4), ordering the CNR and Metro to share equally the capital and maintenance costs of the fence.

6 Metro appeals that decision pursuant to subsection 41(1) of the Canada Transportation Act[3] which allows an appeal to this Court with leave "on a question of law or question of jurisdiction". The grounds of appeal are that the CTA erred in law or jurisdiction when it concluded that the proposed fencing was a "railway work" and that Metro was a person "who stands to benefit" from the completion of the fence.

Issues

7 There are three issues which must be addressed.

(1) What is the standard of review?
(2) Did the CTA commit reviewable error in concluding that the fence was a "railway work"?
(3) Did the CTA commit reviewable error in concluding that Metro was a person "who stands to benefit" from the installation of the fence?

Analysis

(1) Standard of Review

8 This will require more precise consideration when issues 2 and 3 are dealt with below.

9 It is important first to examine the provisions of the Canada Transportation Act[4] which govern the reviewability of CTA decisions.

> 31. The finding or determination of the Agency on a question of fact within its jurisdiction is binding and conclusive.
>
> . . .
>
> 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.
>
> . . .
>
> (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.

These provisions are in substance the same as those concerning the National Transportation Agency, the CTA's predecessor. In Upper Lakes Group Inc. v. Canada (National Transportation Agency)[5] a majority of a panel of this Court enunciated in respect of that predecessor a standard of review as follows:

> Since we are here dealing with a highly specialized tribunal whose decisions are binding and conclusive on matters of fact but subject to appeal on questions of law or jurisdiction only, I take it that the standard is one of correctness tempered by due regard for the experience and expertise of a senior

> administrative tribunal in the interpretation, application and operation of a non-jurisdictional provision of its governing statute.

10 I accept that in matters of pure law or jurisdiction, the standard of review is correctness as stated in Upper Lakes. I assume, however, that the reference to "jurisdiction" in that case, where no deference would be owed to the Agency, should be understood as referring to legal issues going to jurisdiction. But the assumption of jurisdiction by a tribunal may involve findings of fact as to whether the subject-matter or the persons before the tribunal come within the legal definition of its jurisdiction, the latter issue of statutory interpretation being one of law. As Iacobucci J. held in Canada (Director of Investigation and Research) v. Southam Inc.:[6]

> Briefly stated, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests.

By section 31 there is no right of appeal of CTA decisions with respect to pure questions of fact although according to subsection 41(3) of the Canada Transportation Act:

> 41. . . .
>
> (3) . . . 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. [Emphasis added.]

I therefore take it that on an appeal on a question of jurisdiction this Court may have to review mixed questions of law and fact.

11 I understand the Upper Lakes case, in the light of the subsequent Supreme Court decision in Southam[7] to mean that if the Agency in making the decision under appeal has applied truly legal tests on questions of law or jurisdiction then the standard of review is correctness, with some deference owed to this expert tribunal on legal questions other than those of a jurisdictional nature. If it has made decisions of mixed law and fact then the proper test should be reasonableness and this could include decisions relevant to assuming jurisdiction.[8] It is not clear to me why no deference would be owed to a tribunal's finding of fact necessary to establish jurisdiction in accordance with its governing statute. "Correctness" in fact-finding is a somewhat illusory concept at best. Courts can, depending on their place in the hierarchy, say with assurance what the "correct" law is because it becomes correct merely by their saying so. But no court, not even the highest, can state with assurance that its findings of fact correspond to what really happened. A reasonableness test, even on findings of jurisdictional fact, should provide adequate judicial control to avoid arbitrary or capricious determinations in support of the assertion of jurisdiction.[9]

12 This Court in Upper Lakes[10] referred to the CTA's predecessor as a "highly specialized tribunal" and it is not seriously questioned that the CTA is the depository of much expert knowledge and experience. That expertise includes railway safety concerning those both on and adjacent to a rail line. Although in the Southam case[11] the Supreme Court was not dealing with a jurisdictional issue, it held that in the mixed questions of law and fact concerned there the standard of review of a specialized tribunal such as the Competition Tribunal is that of reasonableness. In distinguishing between questions of law and mixed questions of law and fact Iacobucci J. recognized that there is a spectrum running between these two types of decisions. Those that have "the potential to apply widely to many cases" are more likely to be treated as involving questions of law in contrast to those that deal with a "particular set of circumstances that is not apt to be of much interest to judges and lawyers in the future" which are appropriately treated as involving mixed questions of law and fact.[12] For reasons that will be apparent later, I believe that the jurisdictional issues here are of the latter kind and that the CTA is a specialized tribunal whose decisions on these matters should be reviewed on the standard of reasonableness.

(2) Is the Fence a "Railway Work"?

13 Section 16 of the Railway Safety Act as quoted above only permits apportionment with respect to the costs of a "railway work". "Railway work" is defined in section 4 of that Act as follows:

4. (1) . . .

"railway work" means a line work or any part thereof, a crossing work or any part thereof, or any combination of the foregoing;

The same section defines "line work" and "crossing work", referred to in the definition of "railway work", as follows:

4. (1) . . .

"crossing work" means a road crossing or a utility crossing;

. . .

"line work" means

(a) a line of railway, including any structure supporting or protecting that line of railway or providing for drainage thereof,
(b) a system of switches, signals or other like devices that facilitates railway operations, or
(c) any other structure built across, beside, under or over a line of railway, that facilitates railway operations,

but does not include a crossing work;

14 The CTA concluded that this fence was a "line work" because:

> . . . since it prevents trespassing, it can be considered a structure that protects a line of railway and facilitates railway operations.[13]

It appears to me that there is no reviewable error in this conclusion which brought the fence within paragraph (c) of the definition of "line work".

15 To the extent that there is a pure question of law, it would be, as stated by Iacobucci J. in Southam, as to "what the correct legal test is"[14] in the definition of "line work" as a "structure built . . . beside . . . a line of railway, that facilitates railway operations." The CTA did not articulate any abstract definition of these terms but I can see no error in the implicit meaning which the Agency attributed to them, a meaning which must be inferred from the result reached. Therefore even if the test is correctness on questions of pure law, there is no basis for setting aside the Agency's decision. I might add that, although the appellant referred to other provisions in Part III of the Act (entitled "Non-Railway Operations Affecting Railway Safety") where there are some specific references to "fences" I am unable to conclude that the CTA erred in finding a fence, such as the one here, to be a "railway work" in the particular circumstances of this case. While I agree that in statutory interpretation it is proper to look at the Act as a whole, I can find nothing inconsistent in fences, though dealt with elsewhere in the Act for particular purposes there defined, also to be potentially within the meaning of "railway work" for the purposes of section 16.

16 The CTA's conclusion involves essentially a mixed question of law and fact which may be subject to appeal under the rubric of "jurisdiction" but, if so, should be subjected only to the standard of reasonableness as applied by the Supreme Court in Southam to a mixed question of fact and law, that is a question of "whether the facts satisfy the legal tests.[15] The CTA carried out this exercise succinctly in stating, as quoted above, that as the fence would prevent trespassing it could be considered a "structure that protects a line of railway and facilitates railway operations", thus holding that the fence would come within paragraphs (a) and (c) of the definition of "line work". This is a decision on a "particular set of circumstances" not likely to be of much general interest in future. Albeit that this can be seen as a decision as to jurisdiction I find difficulty in applying the test of minimum deference, namely "correctness" to it. Here we have an expert tribunal with the cumulative experience of a century acquired by it and its predecessors, with an expert staff, and a regular involvement with problems of railway safety both with respect to those working or travelling by rail and those who by proximity may be endangered by the railway operation. If the CTA concludes, as it obviously has, that keeping trespassers off the railway right of way and tracks both protects the railway and facilitates its operation, it is difficult to see why this is not central to its area of expertise. There was information before the CTA Board indicating that there were concerns raised by Transport Canada and shared by the CNR as to trespassers being on the tracks. Implicit in this is an assumption, which seems reasonable, that the presence of trespassers on a

railway track can impede the operation of a railway. According to the material before the Agency, the CNR took various measures to dissuade trespassers including having its trains whistle when approaching curves in this area. This led to many complaints from area residents in both 1994 and 1995 which created further problems for the CNR. As a result, it considered the fence to be a preferred means of keeping trespassers off the track. I am unable to say that it was unreasonable for the Agency to conclude that the fence would therefore "facilitate" the operation of the railway within paragraph (c) of the definition of "line works" and, in the sense that it would keep the railway free of trespassers, that it would thus "protect" this line of railway within the meaning of paragraph (a) of that definition. These are decisions as to whether "the facts satisfy the legal test" as described by Iacobucci J.[16] and as such, are decisions of mixed law and fact for which the standard of review should be reasonableness.

17 I thus find the decision that the fence was a "railway work" within the meaning of subsection 16(1) of the Act to be reasonable and therefore should not be set aside.

(3) Did Metro Toronto "Stand to Benefit"?

18 To the extent that there is any pure question of law involved here, whether going to jurisdiction or not, it would be the following. Metro invites us to hold that as a matter of law or jurisdiction the Agency could not correctly interpret the term "who stands to benefit" to apply to anyone, including Metro, whose immediate legal interests were not affected by the presence or absence of a fence. It argues that, by the law of occupiers' liability in Ontario, Metro or its successor, as owner of the parks, has no legal responsibility for those who may pass through its property but in leaving that property trespass on the property of others such as the CNR. It insists that the interests of a municipality are distinct from those of its residents and while the fence may be of some advantage to the safety of the residents of Metro and may enable the elimination of a nuisance to some residents caused by the blowing of whistles, none of this represents a benefit to the municipality as such.

19 The CTA's interpretation of "who stands to benefit" can be deduced from its reasons for ordering Metro to share in the cost of the fence. Its views are summarized in the following statement:

> . . . the Agency considers that Metro Toronto has a responsibility to offer protection to the parklands users against inherent dangers created by the presence of the railway through its parklands. The Agency specifically rejects the notion that Metro Toronto ought to bear no responsibility for persons using its parks. The fence will also address the complaints from Metro Toronto residents living in the area of the parklands, discourage trespassing and provide a safer environment through the Don Valley parklands to the public and users.[17]

For these reasons the Agency concluded that Metro "stands to benefit" from the fence. It may be inferred from this finding that the Agency takes a broad, functional view of the expression "stands

to benefit" which does not confine "benefit" to the conferral of additional legal rights on, or the relief of legal liability of, those against whom an order of apportionment can be made. This involved statutory interpretation of a provision whose scope was open to debate and one which went to its jurisdiction as to persons against whom it could make orders. I believe this is the kind of jurisdictional decision which is subject to the standard of correctness as involving a question of law with a potentially broad impact.

20 Having said that, it appears to me that the interpretation given by the Agency to "stands to benefit" was correct when one considers the purposes of the Railway Safety Act. Fundamental to this is the consideration of subsection 4(4) which provides:

> 4. . . .
>
> (4) In determining, for the purposes of this Act, whether railway operations are safe railway operations, or whether an act or thing constitutes a threat to safe railway operations or enhances the safety of railway operations, regard shall be had not only to the safety of persons and property transported by railways but also to the safety of other persons and other property.

This makes it clear that the Agency must concern itself with the safety of persons other than railway passengers or employees including those who may use property adjacent to railway lines and who may in one way or another be endangered by the presence of the railway. The Agency may properly see a benefit to adjacent property owners in measures which reduce dangers to users of that property caused by the presence of the railway line. I am therefore unable to say that there is a reviewable error of law going to jurisdiction.

21 The application of this broad concept of "stands to benefit" to the facts of this case, as a jurisdictional basis for making this specific order against Metro, in my view involves a mixed question of law and fact. Again it can be said that such a finding is very particular to these circumstances and has no widespread precedential significance. Thus the standard of review should be reasonableness. I believe it was not unreasonable for the Agency to conclude that Metro as a political entity and as owner of the parks had a sufficient interest in protecting users of these parks from random access to the railway line and, incidentally, to do so in a way which would avoid inconvenience to other residents which would be caused by the main alternative to the fence, namely whistle blowing. The nature of Metro Toronto was stated by the Divisional Court of Ontario in Toronto (City) v. Toronto (Metropolitan)[18] to be as follows:

> Metro is the incorporation of the inhabitants of the metropolitan area. Legally it is separate and apart from Toronto and the other area municipalities. Its powers are set out in the Municipality of Metropolitan Toronto Act, R.S.O. 1990, c. M.62 (the "Metro Act"). These powers are specific and relate to Metro-wide obligations relating to water and sewage works, waste disposal,

> roads, policing and many other matters, for the benefit of the inhabitants of the metropolitan area.

It was not disputed before us that one of the activities of Metro was the operation of regional parks such as those adjacent to this railway line. In reaching conclusions as to Metro's responsibilities the Agency also had before it information (which does not seem to be disputed) that there was no serious problem of trespassers on the CN line in this area until the cyclist and pedestrian path was built by Metro in about 1991. Similarly, in other parts of the Don Valley where there is no such path, the CN has had no serious problem of trespassers. It was open to the Agency to conclude that Metro, having facilitated the entry of people to the area, had at least a broad governmental interest and responsibility in minimizing the resulting dangers even if, in terms of the law of occupiers' liability, it might have no legal liability for users of its parks leaving the parks to trespass on adjacent property. I therefore find that this decision, on a mixed question of law and fact going to jurisdiction, was reasonable.

22 It follows that there was no reviewable error in the finding of the Agency that Metro "stands to benefit" from this fence and therefore can legitimately be ordered to pay part of the cost of the fence.

Conclusion

23 The appeal should therefore be dismissed. As the respondent is not asking for costs and neither the interveners nor the Agency would be entitled to costs, no costs will be ordered.

Robertson J.A.: I agree.

McDonald J.A.: I agree.

cp/d/nnb

1 S.C. 1996, c. 10.

2 R.S.C., 1985 (4th Supp.), c. 32.

3 Supra, note 1.

4 Ibid.

5 [1995] 3 F.C. 395 (C.A.), at p. 434, Isaac C.J. dissenting on this point at pp. 405, 418-419.

6 [1997]1 S.C.R. 748, at pp. 766-767.

7 Id., at pp. 771, 776-777.

8 There may be less deference owed if the jurisdictional issue is constitutional in nature: Westcoast Energy Inc. v. Canada (National Energy Board), [1998] 1 S.C.R. 322, at pp. 354-355, although arguably such an issue is essentially one of law.

9 See e.g. Quebec (Attorney General) v. Canada (National Energy Board), [1994] 1 S.C.R. 159, at p. 199; J. M. Evans, H. N. Janisch and D. J. Mullan, Administrative Law: Cases, Text and Materials (4th ed., Toronto: Emond Montgomery Publications, 1995), at p. 663.

10 Supra, note 5.

11 Supra, note 6.

12 Id., at pp. 767-768.

13 Appeal book, at p. 82.

14 Supra, note 6, at pp. 766-767.

15 Ibid.

16 Ibid.

17 Appeal Book, at p. 83.

18 (1992), 97 D.L.R. (4th) 140 (Ont. Div. Ct.), at p. 142.

Giemulla/Schmid
(Editors)

Montreal Convention

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Article 20 – Exoneration

If the carrier proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of the person claiming compensation, or the person from whom he or she derives his or her rights, the carrier shall be wholly or partly exonerated from its liability to the claimant to the extent that such negligence or wrongful act or omission caused or contributed to the damage. When by reason of death or injury of a passenger compensation is claimed by a person other than the passenger, the carrier shall likewise be wholly or partly exonerated from its liability to the extent that it proves that the damage was caused or contributed to by the negligence or other wrongful act or omission of that passenger. This Article applies to all the liability provisions in this Convention, including paragraph 1 of Article 21.

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§ 466. Types of Contributory Negligence

The plaintiffs contributory negligence may be either:

(a) an intentional and unreasonable exposure of himself to danger created by the defendant's negligence, of which danger the plaintiff knows or has reason to know, or

(b) conduct which, in respects other than those stated in clause (a), falls short of the standard to which the reasonable man should conform in order to protect himself from harm.

In the USA, courts considering the issue of contributory negligence under Article 21 WC have held that where the forum state uses a comparative negligence standard instead of a traditional contributory negligence standard, the comparative negligence standard should be applied.[8]

3. The Consequences of Different Interpretations

10. In the context in which these expressions are used, it makes no difference whether the term 'fault' or 'negligence' is generally adopted (expressly or by way of implication). It should be noted that both Article 20 and Article 21 deal with the carrier's exoneration (partial or complete) from liability; in other words these expressions are used in a negative fashion. The (complete or partial) exoneration from liability in consequence of the lack of fault on the part of the carrier or the presence of contributory negligence on the part of the injured party does not signify anything other than that a carrier who is exonerated under Article 20 may not have acted negligently or that the injured party must at least be negligent if it is to share liability under Article 20.

Therefore, subjectively speaking, the issue of negligence is a minimum requirement for the partial or complete exoneration of the carrier because its absence may prove (negatively) that neither it nor its servants or agents caused the damage by their negligence (*see* Art. 21 para. 2) whereas its presence may prove (positively) that the claimant or any other relevant persons at the very least caused or contributed to the damage by their negligence (*see* Art. 20). Obviously the carrier will be exonerated in circumstances where it can prove that the claimant or the person from whom the claimant derives his or her rights acted willfully.

Therefore, in the context of Articles 20 and 21, there is no significant difference between the terms 'willful' and 'negligent.'

B. Examples of Contributory Negligence

11. The following judgements have resulted from the application of Article 21 of the Warsaw Convention and will therefore have a bearing upon the application of Article 20 of the Montreal Convention.

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8. *Kwon v. Singapore Airlines*, 356 F. Supp. 2d 1041, N.D. Cal. 2003, relying on *Husain v. Olympic Airways*, 116 F. Supp. 2d 1121, 1141, N.D.Cal. 2000, aff'd, 316 F.3d 829, 9th Cir. 2002; aff'd 124 S. Ct. 1221 (2004) and *Eichler v. Lufthansa*, 794 F. Supp. 127, 130, S.D.N.Y. 1992. *See also Bradfield v. Transworld Airlines*, 88 Cal App 3d 681, 152 Cal. Rptr. 172, Ct. App 1979.

A passenger will be contributorily negligent if for example he stumbles over an obvious bump on the disembarkation platform.[9] A passenger would not be contributorily negligent if he or she fell over a piece of baggage in the aisle of an aircraft that was not obviously visible.[10] By the same token, if the baggage was obviously visible, the passenger would be guilty of contributory negligence if he or she fell over it.[11] In *Chutter v. KLM*,[12] after boarding the aircraft and being escorted to her assigned seat, a passenger walked toward the rear of the cabin and stepped out of the entrance door in order to wave to her daughter who was standing on the observation roof of the airport building. Immediately prior to the passenger stepping out of the aircraft, the loading stairs were removed from the side of the aircraft, and accordingly the plaintiff fell to the ground sustaining injury. It was held that the plaintiff was guilty of contributory negligence under Article 21 WC which barred her claim.

Contributory negligence – according to Dempsey and Milde[12a] – was recognized existing in case of a passenger killed by aircraft propeller when he used the wrong exit from the plane,[12b] a passenger's suicide that the carrier's servants or agents could not prevent[12c] and the injury of a passenger walking around the plane in turbulence when the 'fasten seat belt' sign was on.[12d]

Contributory negligence exists to a greater extent if a passenger arrives late at the airport and for this reason cannot be transported. In these circumstances there can be no question of fault on the part of the carrier.[13] The same is true if a passenger loses important documentation having foolishly packed it in checked baggage instead of carrying it in unchecked baggage.[14] The latter decision is however questionable where carriers limit the number of items of unchecked baggage which are permitted because of the threat of terrorist attacks and so force the passenger to check-in the remaining items. The extent to which the carrier may be blamed in these circumstances will depend upon how clearly and how soon it advised the passenger of these restrictions and how much time the passenger had to make alternative arrangements. A passenger will clearly be contributorily negligent if the carrier does not transport a suitcase which he or she did not identify at check-in. Moreover, a passenger who does not fasten his or her seatbelt contrary to the instructions of the cabin crew and is in consequence injured because of the sudden violent movement of the aircraft (e.g. as a result of so-called 'clear air turbulence' or wind shear) must, according to the circumstances of the case, expect to bear a large proportion of the responsibility for any injuries.[15]

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9. *Kraegel v. Lufthansa* – US District Court, EDNY, Lloyds Aviation Law, 1 Mar. 1988.
10. *Eichler v. Lufthansa* – 1994 WL 30464 S.D.N.Y. 1994.
11. *Ibid.*
12. 132 F. Supp. 611, S.D.N.Y. 1955.
12a. P.S. Dempsey, M. Milde, *International Air Carrier Liability: The Montreal Convention of 1999* (Montreal: McGill University, Institute of Air & Space Law, 2005), 187 *et seq.*
12b. Court of Appeals, Remals, France, confirmed by the French Supreme Court, *see* 1972 *RFDA* 60 and 1973 *RFDA* 316.
12c. *Embs v. Air France*, 1969 *RFDA* 325.
12d. *Chrisholm v. TWA*, 1963 {1} L12R 626, 4 Av. 17, 247.
13. *See Christian v. Air France* – Tribunal International de Tanger, [1955] *RFDA*, 200; likewise AG Düsseldorf, [1985] *TranspR*, 239; [1986] *ZLW*, 78 and [1986] *AL*, 174.
14. LG Köln, [1988] *ZLW*, 265 and [1989] *AL*, 38.
15. *See Bradfield v. TWA*, 88 Cal. App. 3d 681, 152 Cal. Rptr. 172, Ct. App. 1979.

A consignor which twice (and inconsistently) labelled a cargo of meat was also held to be contributorily negligent in circumstances where the customs office of the destination country refused clearance and the carrier returned the cargo.[16] A consignor will also be contributorily negligent if it has failed to pack cargo securely so that it is exposed to the elements and is damaged in consequence thereof.[17]

C. The Burden of Proof required for Contributory Negligence

12. If the carrier is at fault, which is the basis of its liability, any relevant contributory negligence must be taken into account in determining the compensation payable. The burden of pleading and proving facts which will partially or completely exonerate the carrier is not therefore a matter for the claimant or the person from whom the claimant derives his or her rights (the injured party) but a matter for the party disputing the claim. This approach is not self-evident in several legal systems[18] although it is adopted, for instance, by the German legal system. Article 254 of the German Civil Code (BGB) merely prohibits the possibility of pleading a defence of contributory negligence; instead, the court, as part of its official duty, takes into account any relevant facts which are known to it[19] and in borderline cases the person liable to pay compensation is required to discharge the burden of proof.[20]

In this regard, Article 20 imposes two requirements. In addition to the requirement that the claimant or other persons named in the article must be (contributorily) negligent, the text requires the carrier to discharge the burden of proving that (contributory) negligence exists.[21] This legal principle which is self-evident in many jurisdictions also operates where national rules concerning the burden of proof conversely require the carrier to prove that it has not been contributorily negligent.[22]

13. The procedural rules of evidence are derived from the evidentiary rules of the *lex fori*.[23] This however is not a consequence of Article 20 but of the principle of private international law (conflict of laws) which holds that a court must always apply its own rules of procedure.

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16. *Webert Ricoeur v. Air France* – Tribunale de Commerce de Paris, 17e Cli., [1988] *RFDA*, 391.
17. LG Hamburg, [1995] *TranspR*, 76.
18. *See* Mankiewicz, p. 106 for further details.
19. *See* for example BAG, [1971] *NJW*, 958.
20. *RGZ* 159, 261; BGH, [1975] *DB*, 1407; *See McCune v. Spantax*, 66 F.R.D. 619, S.D.N.Y. 1975: The carrier must plead contributory negligence as an affirmative defence in a case governed by WC Article 21.
21. *See* Article 21 WC: Guldimann, Article 21 WC, note 9; Shawcross and Beaumont, VII-1 17; Miller, p. 168; on EC liability regulations: Ruhwedel, note 380.
22. *See Chutter v. KLM* – US District Court, 132 F. Supp. 611; *Feibleman v. Air France* – NY City Civil Court, 334 NYS 2d 492 and 12 Avi 17, 575; *see also* Goldhirsch on this point, p. 92 for further information.
23. *Also ibid.* Guldimann.

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Order No. 2008-AT-A-63

June 27, 2008

APPLICATION by Linda McKay-Panos for an award of costs pursuant to section 25.1 of the Canada Transportation Act, S.C., 1996, c. 10, as amended.

File No. U 3570-14/04-1

AWARD OF COSTS

[1] This award arises from Decision No. 63-AT-A-2008 of the Canadian Transportation Agency (the Agency) dated February 15, 2008 wherein the Agency awarded costs to Linda McKay-Panos in relation to her participation as an intervener in the Agency's investigation of fares and charges to be paid by persons with disabilities who require additional seating to accommodate their disabilities to travel by air on domestic air services (the AFC proceeding). In the AFC proceeding, I was one of the panel members and, as such, have knowledge of this case. As a result, in Decision No. 63-AT-A-2008, I was appointed by the Agency, pursuant to subsection 25.1(3) of the *Canada Transportation Act* (the CTA) as taxing officer to determine the quantum of costs to be taxed and allowed to Ms. McKay-Panos, which costs shall be paid by Air Canada, Jazz Air LP, as represented by its general partner, Jazz Air Holding GP Inc. carrying on business as Air Canada Jazz, and WestJet (the respondents).

BACKGROUND

[2] On November 19, 2002, the Agency received an application by the Council of Canadians with Disabilities and other individuals with disabilities against, among others, Air Canada, Jazz Air LP, as represented by its general partner, Jazz Air Holding GP Inc. carrying on business as Air Canada Jazz, and WestJet, for a finding that charges by these carriers applied to persons with disabilities for additional fares or portions of additional fares constitute an undue obstacle within the meaning of section 172 of the CTA.

[3] On May 11, 2006, Ms. McKay-Panos filed with the Agency an application to intervene in the AFC proceeding and on July 5, 2006, by Decision No. LET-AT-A-175-2006, the Agency granted Ms. McKay-Panos the following rights: "participation in the second stage of the oral hearing, scheduled to commence on November 14, 2006, by calling evidence, questioning witnesses produced by parties adverse in interest to her and making oral submissions, all limited to matters pertaining to obesity."

[4] On January 10, 2008, the Agency issued Decision No. 6-AT-A-2008. In that Decision, the parties

were required to make their written submissions in support of their application for costs.

[5] On January 16, 2008, Ms. McKay-Panos filed submissions with the Agency pursuant to section 25.1 of the CTA in support of her application for an award of costs relating to her participation as an intervener in a proceeding before the Agency. The Agency, after consideration of the submissions filed by Ms. McKay-Panos and the respondents, determined, in Decision No. 63-AT-A-2008, that costs should be awarded.

[6] Accordingly, by letter dated February 25, 2008, written pleadings were initiated to gather information on the issue of quantum of costs to be awarded. In that letter, the parties were advised that costs would not be awarded on a party and party basis but, rather, that the general principles used in the past by taxation officers assigned by the Agency would be used. These principles include that the costs are compensatory in nature and reflect the costs that the parties actually incurred in the AFC proceeding that are reasonable, direct and necessary to the proceeding. In that regard, Ms. McKay-Panos was advised to submit her Bill of Costs with supporting documents and affidavits.

[7] By letter dated February 26, 2008, Gerard Chouest, on behalf of the respondents, stated that he was not given an opportunity to comment on the method by which the costs would be determined.

[8] On March 7, 2008, a response to Mr. Chouest's letter of February 26, 2008 was sent to the parties which clarified that no decision had been made to award costs on a solicitor-client basis. The parties were also advised that costs would not be awarded on a party and party basis and that the process will provide the respondents with a full opportunity to comment and provide submissions on the reasonableness and the appropriateness of the costs sought before they are assessed.

[9] On March 26, 2008, counsel for Ms. McKay-Panos submitted a Bill of Costs and on April 7, 2008, the respondents submitted their response to Ms. McKay-Panos' Bill of Costs.

PRINCIPLE UNDERLYING COST AWARD

[10] While the Agency does not have regulations or rules prescribing tariffs regarding the awarding of costs to a party, I have reviewed previous taxing orders issued by Agency taxation officers to identify common taxing criteria and have reviewed the principles applied by the Courts. I have also examined the arguments of counsel for Ms. McKay-Panos and the respondents to arrive at what I consider to be a fair and reasonable assessment to the extent that the costs claimed are reasonably necessary to permit full and fair participation.

[11] As a further tool in my assessment, I have examined the principles applied by the Courts and Tariff B of the *Federal Court Rules*, SOR/98-106, which detail counsel fees and disbursements allowable on assessment. I have used this Tariff for general comparison purposes; however, Tariff B establishes an assessment criteria based upon party and party costs, which results in less than full compensation for the successful party. As such, it is only a guide, and is not determinative.

[12] From the principles established by the Courts, I note that solicitor and client costs are generally intended to result in a full indemnity of legal fees and disbursements and are generally awarded only where there has been reprehensible conduct on the part of one of the parties such as delaying tactics, unduly prolonging proceedings or scandalous or outrageous conduct. I will be guided by this principle in my assessment.

[13] In making my determination as to the quantum to be awarded, I was guided by the principle that the costs must be reasonable in the circumstances and must have been incurred directly and necessarily for the purposes of the AFC proceeding. I have also carefully reviewed and analysed each item submitted under the Bill of Costs as well as all submissions made by the parties.

BILL OF COSTS

[14] Ms. McKay-Panos has produced time sheets itemizing her various claims. A summary of the Bill of Costs submitted is as follows:

Counsel fees	$36,278.35
Disbursements	$11,222.61
Total	$47,500.96

[15] In reply to Ms. McKay-Panos' cost submission, the respondents submit that the amount recoverable should be:

Counsel fees	$12,275.00 (+5% GST)
Disbursements	$ 7,880.63
Total	$20,769.38

[16] While the respondents acknowledge that the intervener is entitled to some level of cost recovery, they submit that this must be strictly limited to work done that was directly and reasonably related to the issue of obesity. In this regard, I am in agreement with the respondents that the fees submitted must be in relation to matters pertaining to obesity as Ms. McKay-Panos's intervener status was limited to her participation in issues pertaining to obesity. However, where amounts claimed are found to be a necessary element to Ms. McKay-Panos' fair participation in the AFC proceeding and represent a fair and reasonable compensation, they will be permitted.

A) Counsel hourly rates

[17] Ritu Khullar and Jo-Ann Kolmes represented Ms. McKay-Panos as her counsel throughout the AFC proceeding. Ms. McKay-Panos has submitted a Bill of Costs requesting the following hourly rates for counsel:

Ritu Khullar	2006 - $235 per hour 2007 - $265 per hour
Jo-Ann Kolmes	2006 - $220 per hour 2007 - $245 per hour

[18] The respondents submit that the hourly rates of both counsel rates are notably higher than the hourly rate claimed by David Baker who acted as principle counsel on the main application in this case. The respondents add that, at most, Ms. Khullar and Ms. Kolmes should be compensated at the same rate claimed by Mr. Baker, namely $225 per hour.

[19] After reviewing the parties' submissions in this matter and noting the seniority and expertise of Mr. Baker, who acted as principle counsel in the AFC proceeding, I am of the opinion that the hourly rate of counsel should not be more than that provided to Mr. Baker. Given that there was no evidence submitted as to the experience and/or year of call to the Bar for either of Ms. McKay-Panos' counsel in

this matter, I consider it reasonable to set a rate of $225 per hour for Ms. Khullar and $150 per hour for Ms. Kolmes, the latter which is in keeping with the rate provided to Sarah Godwin, who acted as co-counsel to Mr. Baker in the AFC proceeding.

B) Counsel fees

[20] There is no dispute that the time claimed by counsel in this cost submission was indeed spent; however, it was necessary to review each item provided on the time sheets submitted to arrive at what I consider to be reasonable.

[21] I have reviewed the submissions of the parties and have divided the costs into eight categories which I will deal with separately.

1) Preparation of originating documents (application to intervene)

[22] Ms. McKay-Panos claims $800 for preparation of the originating documents in the AFC proceeding. The respondents have no comments on this matter.

[23] A close review of the time sheets submitted indicates that, in fact, 2.8 hours were spent by Ms. Khullar and 0.3 hours was spent by Ms. Kolmes in the preparation of the originating documents. Using the rates provided above, I accept the following: 2.8 hours at $225 = $630 for Ms. Khullar and 0.3 at $150 = $45, for a total of $675.

2) Attendance at telephone conference (October 4, 2006)

[24] Ms. McKay-Panos submits counsel fees in the amount of $305 which are not disputed by the respondents. I consider this reasonable and accept this cost.

3) Preparation for the hearing and attendance at the hearing on November 21 and 22, 2006

[25] Ms. McKay-Panos has claimed $3,400 for attendance at the hearing and $9,350 for preparation for the hearing. The respondents propose that the Agency use the method of calculation provided for in the Agency's Decision in *Lucie Lemieux-Brassard - Taxation of Bill of Costs 1998-AT-A-216 TAX* (*Lemieux-Brassard)*, that is, time for attendance at hearing and double time for preparation for the hearing and at 8 hours per day (i.e., 2 days x 8 hours for attendance and 4 days x 8 hours for preparation, for a total of 48 hours x $225 per hour = $10,800).

[26] It is noted from the time sheets submitted that the actual time claimed for the hearing is 14.5 hours. I will therefore allow 14.5 hours for attendance at the hearing x $225 per hour for a total of $3,262.50.

[27] Using the principle applied in *Lemieux-Brassard*, cited above, I consider it reasonable to award two hours of preparation time for each hour spent at the hearing, which would be 29 hours. I therefore approve the amount of 29 hours x $225 for a total of $6,525 for preparation for the hearing.

4) Preparation of final arguments

[28] Ms. McKay-Panos has claimed $7,500 for the preparation and filing of the final arguments. The respondents submit that only 5 out of the 19 pages of Ms. Khullar's closing statement addressed obesity-related issues, whereas the rest of the statement addressed the scope of the Agency's ability to deal with human rights issues, an argument which was amply addressed by Mr. Baker who acted as principle counsel on the main application in this case.

[29] Ms. Khullar has claimed 7.6 hours and Ms. Kolmes has claimed 26.5 hours for the various items associated with the filing of closing arguments. I have reviewed the time sheets provided by Ms. McKay-Panos and consider that the preparation of the final arguments in AFC proceeding, including arguments relating to human rights issues, is a necessary element to the proceeding. I therefore approve the following fees: Ms. Khullar 7.6 hours x $225 = $1,710 and Ms. Kolmes 26.5 hours x $150 = $3,975, for a total of $5,685.

5) Preparation of written argument on the VIA Rail Canada Inc. case

[30] Ms. McKay-Panos claims $1,500 for preparation of written argument on the VIA Rail Canada Inc. (VIA Rail) case. The respondents submit that all of the submissions made by Ms. McKay-Panos with respect to the VIA Rail decision should not be compensated for the reason that Mr. Baker's arguments were sufficient and inclusive of issues related to obesity; therefore, these submissions were unnecessary and beyond the role of intervener granted to Ms. McKay-Panos.

[31] In making my determination in this matter, I note that Ms. McKay-Panos, as an intervener, was provided, along with the other parties to the AFC proceeding, with an opportunity to comment on the implications of the VIA Rail case and, therefore, I will not disallow this cost. However, a review of the daily logs submitted by Ms. McKay-Panos indicates that there was much duplication regarding the preparation of written argument on the Via Rail case. In light of this, I will allow the following fees for preparation of written argument on the Via Rail case: Ms. Khullar 1.2 x $225 = $270 and Ms. Kolmes 2.9 x $150 = $435, for a total of $705.

6) Travel by counsel to attend the hearing (November 20 and 23, 2006)

[32] Ms. McKay-Panos claims $2,800 for travel to attend the hearing. The respondents cite the Agency's Decision in *Gordon Moffat - Taxation of Bill of Costs 2000-R-178 TAX* (Moffat) and submit that the amount claimed is excessive and should not be compensated, or if compensated, it should be significantly reduced.

[33] I agree, in part, with the submission of the respondents in this matter. Therefore, in determining the appropriate amount of compensation for the purposes of travel, I find it reasonable to use the default column of Tariff B as a guideline. Using the high end of Column III, the travel time would be costed at $600, each way. I therefore allow travel time at $600 x 2 = $1,200.

7) Consulting with potential expert witnesses

[34] Ms. McKay-Panos has claimed $5,000 for the time spent consulting with a number of potential expert witnesses prior to the hiring of Laurie Ringaert, who was the witness ultimately retained by Ms. McKay-Panos. The respondents submit that this is excessive and should not be compensated as the fee consists of extensive telephone conferences and consultations with persons who were not ultimately retained by Ms. McKay-Panos.

[35] In reviewing this claim, I note that the amount claimed for consulting with potential expert witnesses is higher than the fees and expenses that were actually incurred by Ms. McKay-Panos's expert witness. Because the search for potential witnesses could theoretically take an inordinate amount of time and not result in the successful retaining of a witness, I find that this claim does not meet the test of reasonableness and, therefore, I am disallowing it.

8) Assessment of costs

[36] Ms. McKay-Panos submits the following two amounts for costs:

Application for costs	$ 2,250
Assessment of costs	$ 1,000

[37] The respondents have grouped these two costs together and submit that, in light of the documentation provided by Ms. McKay-Panos, this is an unreasonably high amount. The respondents suggest that 5 hours is appropriate for preparation of costs submissions.

[38] In determining the appropriate amount of compensation for the assessment of costs, I note that preparation of a bill of costs is normally considered an administrative task performed by office staff. In light of this, I find that the appropriate mechanism to determine a fair rate is to use the default column of Tariff B as a guideline. Using the high end of Column III, I therefore allow $720 for the assessment of costs.

Total counsel fees

[39] To summarize the above, I accept the following counsel fees:

Preparation of originating documents	$ 675.00
Attendance at telephone conference	$ 305.00
Preparation for the hearing	$ 6,525.00
Attendance at the hearing	$ 3,262.50
Preparation of final arguments	$ 5,685.00
Preparation of written arguments on the VIA Rail case	$ 705.00
Travel by counsel to attend the hearing	$ 1,200.00
Consulting with potential expert witnesses	$ .00
Assessment of costs	$ 720.00
Total Counsel fees	$ 19,077.50

C) Disbursements

[40] Ms. McKay-Panos claims disbursements in the amount of $11,222.61.

[41] The respondents accept all disbursements with the exception of the photocopy charges and Ms. McKay-Panos' travel charges. The respondents submit that photocopying should be reimbursed at 10 cents per page and that Ms. McKay-Panos' travel charges should not be compensated, particularly as her attendance at the hearing was unnecessary and that she did not, in this case, testify at the hearing.

[42] From my examination, I am persuaded that all disbursements are reasonable and were incurred necessarily and directly for the purposes of the AFC proceeding, with the exception of the following

items:

> Photocopying charges in the amount of $1,790.75. I am in agreement with the respondents that 10 cents per page is reasonable for photocopy charges. While the Affidavit filed in support of the disbursement of photocopying charges refers to a total amount for photocopying, from the materials submitted, it is impossible to determine, not only the number of pages that were photocopied but the amount claimed per copy. I was therefore unable to calculate this expense by using a per page formula. Keeping in mind that the burden is on the party submitting the costs to show the reasonableness of the costs, with no evidence as to the number of photocopies made, I would have had to estimate the number which I refuse to do, and, therefore, the claim for photocopies is rejected.
>
> Travel Expenses of Ms. McKay-Panos are in the amount of $1,551.98. In determining whether or not to grant this expense, I looked at the practice of the Federal Court in granting travel expenses to parties. The general principle is that the costs relating to a client's attendance at a hearing are not recoverable, especially when the party's attendance at the hearing is not reasonably necessary to the outcome of the proceeding. While I am aware of Ms. McKay-Panos' contribution to the AFC proceeding, the general principle provides that having competent counsel is sufficient. I am therefore disallowing Ms. McKay-Panos travel costs in full.

[43] I therefore allow the following disbursements:

Postage and courier charges		$ 384.99
On-line research		$ 160.10
Long distance telephone charges		$ 318.92
Fax charges		$ 216.20
Expert witness fees for Laurie Ringaert	Fees	$ 3,307.10
	Disbursements	$ 1,548.17
	Total	$ 4,855.27
Travel charges:	For counsel	$ 1,945.15
Total disbursements		**$ 7,880.63**

COSTS AS TAXED

[44] I hereby tax the fees and disbursements as follows:

Counsel fees	$19,077.50
GST on counsel fees (5%)	$ 953.88
Disbursements	$ 7,880.63

GST on disbursements (5%)* (see Note below)	$ 54.01
Total counsel fees and disbursements	**$27,966.02**

Note: With respect to the disbursements, the GST was already included in the expert witness fees and in the travel charges; therefore, the GST was calculated only on the remaining disbursements, that is postage and courier charges, on-line research, long distance telephone charges and fax charges.

[45] The costs awarded herein shall be paid to Ms. McKay-Panos by Air Canada, Air Canada Jazz and WestJet, which shall each pay 1/3 of the total award of $27,966.02. The award of costs shall be paid within 60 days from the date of this Decision.

(signed)

Beaton Tulk
Taxing Officer

Important Notices

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