Court File No.:

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Moving Party

– and –

CANADIAN TRANSPORTATION AGENCY

Respondent

MOTION RECORD OF THE MOVING PARTY

(Motion for Leave to Appeal, Rule 352)

Dated: June 20, 2014

DR. GÁBOR LUKÁCS

Halifax, NS

lukacs@AirPassengerRights.ca

Moving Party

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

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

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NOTICE OF MOTION

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

THE MOTION IS FOR:

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

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

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

THE GROUNDS FOR THE MOTION ARE:

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

***Ultra vires* provisions**

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

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

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

Denial of natural justice and access to justice

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

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

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

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

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

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

Statutes and regulations relied on

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

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

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

THE FOLLOWING DOCUMENTARY EVIDENCE will be used for the motion:

1. Affidavit of affirmed on June 17, 2014.

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

June 20, 2014

DR. GÁBOR LUKÁCS

Halifax, NS

lukacs@AirPassengerRights.ca

Moving Party

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

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

Registration
SOR/2014-104 May 5, 2014

CANADA TRANSPORTATION ACT

Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)

The Canadian Transportation Agency, pursuant to section 17 of the *Canada Transportation Act*[a], makes the annexed *Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)*.

Gatineau, April 29, 2014

GEOFFREY C. HARE
Chairperson
Canadian Transportation Agency

SAM BARONE
Vice-Chairperson
Canadian Transportation Agency

Enregistrement
DORS/2014-104 Le 5 mai 2014

LOI SUR LES TRANSPORTS AU CANADA

Règles de l'Office des transports du Canada (Instances de règlement des différends et certaines règles applicables à toutes les instances)

En vertu de l'article 17 de la *Loi sur les transports au Canada*[a], l'Office des transports du Canada établit les *Règles de l'Office des transports du Canada (Instances de règlement des différends et certaines règles applicables à toutes les instances)*, ci-après.

Gatineau, le 29 avril 2014

Le président
de l'Office des transports du Canada
GEOFFREY C. HARE

Le vice-président
de l'Office des transports du Canada
SAM BARONE

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CANADIAN TRANSPORTATION AGENCY RULES (DISPUTE PROCEEDINGS AND CERTAIN RULES APPLICABLE TO ALL PROCEEDINGS)

INTERPRETATION

Definitions

1. The following definitions apply in these Rules.

"Act" « *Loi* » "Act" means the *Canada Transportation Act*.

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

"applicant" « *demandeur* » "applicant" means a person that files an application with the Agency.

"application" « *demande* » "application" means a document that is filed to commence a proceeding before the Agency under any legislation or regulations that are administered in whole or in part by the Agency.

"business day" « *jour ouvrable* » "business day" means a day that the Agency is ordinarily open for business.

"dispute proceeding" « *instance de règlement des différends* » "dispute proceeding" means any contested matter that is commenced by application to the Agency.

"document" « *document* » "document" includes any information that is recorded in any form.

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

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

"person" « *personne* » "person" includes a partnership and an unincorporated association.

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

"respondent" « *défendeur* » "respondent" means a person that is named as a respondent in an application and any person that is named by the Agency as a respondent.

APPLICATION

Dispute proceedings

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

RÈGLES DE L'OFFICE DES TRANSPORTS DU CANADA (INSTANCES DE RÈGLEMENT DES DIFFÉRENDS ET CERTAINES RÈGLES APPLICABLES À TOUTES LES INSTANCES)

DÉFINITIONS

Définitions

1. Les définitions qui suivent s'appliquent aux présentes règles.

« affidavit » Déclaration écrite certifiée par serment ou affirmation solennelle. « affidavit » "*affidavit*"

« défendeur » Personne nommée à ce titre dans une demande, ou toute autre personne désignée comme tel par l'Office. « défendeur » "*respondent*"

« demande » Document introductif d'une instance déposé devant l'Office en vertu d'une loi ou d'un règlement qu'il est chargé d'appliquer en tout ou en partie. « demande » "*application*"

« demandeur » Personne qui dépose une demande auprès de l'Office. « demandeur » "*applicant*"

« document » S'entend notamment de tout renseignement qui est enregistré, quelqu'en soit le support. « document » "*document*"

« instance » Affaire, contestée ou non, qui est introduite devant l'Office au moyen d'une demande. « instance » "*proceeding*"

« instance de règlement des différends » Affaire contestée qui est introduite devant l'Office au moyen d'une demande. « instance de règlement des différends » "*dispute proceeding*"

« intervenant » Personne dont la requête d'intervention déposée en vertu de l'article 29 a été accordée. « intervenant » "*intervener*"

« jour ouvrable » Jour où l'Office est normalement ouvert au public. « jour ouvrable » "*business day*"

« Loi » La *Loi sur les transports au Canada*. « Loi » "*Act*"

« partie » Le demandeur, le défendeur ou toute personne désignée comme telle par l'Office. « partie » "*party*"

« personne » S'entend notamment d'une société de personnes et d'une association sans personnalité morale. « personne » "*person*"

APPLICATION

Instances de règlement des différends

2. Sous réserve des articles 3 et 4, les présentes règles s'appliquent aux instances de règlement des différends, à l'exception de toute question qui fait l'objet d'une médiation.

ALL PROCEEDINGS

Quorum

3. In all proceedings, one member constitutes a quorum.

Principle of proportionality

4. The Agency is to conduct all proceedings in a manner that is proportionate to the importance and complexity of the issues at stake and the relief claimed.

DISPUTE PROCEEDINGS

GENERAL

Interpretation and Dispensing with Compliance

Interpretation of Rules

5. (1) These Rules are to be interpreted in a manner that facilitates the most expeditious determination of every dispute proceeding, the optimal use of Agency and party resources and the promotion of justice.

Agency's initiative

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

Dispensing with compliance and varying rule

6. The Agency may, at the request of a person, dispense with compliance with or vary any rule at any time or grant other relief on any terms that will allow for the just determination of the issues.

Filing of Documents and Sending of Copy to Parties

Filing

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

Agency's public record

(2) All filed documents are placed on the Agency's public record unless the person filing the document files, at the same time, a request for confidentiality under section 31 in respect of the document.

Copy to parties

8. A person that files a document must, on the same day, send a copy of the document to each party or, if a party is represented, to the party's representative, except if the document is

(*a*) a confidential version of a document in respect of which a request for confidentiality is filed under section 31;

(*b*) an application; or

(*c*) a position statement.

Means of transmission

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

Facsimile — cover page

10. A person that files or sends a document by facsimile must include a cover page indicating the total number of pages transmitted, including the cover page, and the name and telephone number of a contact person if problems occur in the transmission of the document.

TOUTES LES INSTANCES

Quorum

3. Dans toute instance, le quorum est constitué de un membre.

Principe de proportionnalité

4. L'Office mène ses instances de manière qui soit proportionnée à l'importance et la complexité des questions en jeu et à la réparation demandée.

INSTANCES DE RÈGLEMENT DES DIFFÉRENDS

RÈGLES D'ORDRE GÉNÉRAL

Interprétation et dispense d'observation des règles

Interprétation des Règles

5. (1) Les présentes règles sont interprétées de façon à faciliter le règlement le plus expéditif qui soit de l'instance de règlement des différends, l'utilisation optimale des ressources de l'Office et des parties et à promouvoir la justice.

Initiative de l'Office

(2) Toute chose qui peut être faite sur requête au titre des présentes règles peut être faite par l'Office de sa propre initiative.

Dispense d'observation et modification de règles

6. L'Office peut, à la requête d'une personne, soustraire une instance de règlement des différends à l'application d'une règle, modifier celle-ci ou autoriser quelque autre réparation, avec ou sans conditions, en vue du règlement équitable des questions.

Dépôt de documents et envoi de copies aux autres parties

Dépôt

7. (1) Le dépôt de documents au titre des présentes règles se fait auprès du secrétaire de l'Office.

Archives publiques de l'Office

(2) Les documents déposés sont versés aux archives publiques de l'Office, sauf si la personne qui dépose le document dépose au même moment une requête de confidentialité, en vertu de l'article 31, à l'égard du document.

Copie aux autres parties

8. La personne qui dépose un document envoie le même jour une copie du document à chaque partie ou à son représentant, le cas échéant, sauf s'il s'agit :

a) d'une version confidentielle d'un document à l'égard duquel une requête de confidentialité a été déposée en vertu de l'article 31;

b) d'une demande;

c) d'un énoncé de position.

Modes de transmission

9. Le dépôt de documents et l'envoi de copies aux autres parties peut se faire par remise en mains propres, par service de messagerie, par courriel, par télécopieur ou par tout autre moyen électronique que précise l'Office.

Télécopieur — page couverture

10. La personne qui dépose ou transmet un document par télécopieur indique sur une page couverture le nombre total de pages transmises, y compris la page couverture, ainsi que le nom et le numéro de téléphone d'une personne à joindre en cas de difficultés de transmission.

Electronic transmission

11. (1) A document that is sent by email, facsimile or other electronic means is considered to be filed with the Agency and received by the other parties on the date of its transmission if it is sent at or before 5:00 p.m. Gatineau local time on a business day. A document that is sent after 5:00 p.m. Gatineau local time or on a day that is not a business day is considered to be filed with the Agency and received by the other parties on the next business day.

Transmission électronique

11. (1) Le document transmis par courriel, télécopieur ou tout autre moyen électronique est considéré comme déposé auprès de l'Office et reçu par les autres parties à la date de la transmission s'il a été envoyé un jour ouvrable au plus tard à 17 heures, heure de Gatineau; sinon, il est considéré comme déposé et reçu le jour ouvrable suivant.

Courier or personal delivery

(2) A document that is sent by courier or personal delivery is filed with the Agency and received by the other parties on the date of its delivery if it is delivered to the Agency and the other parties at or before 5:00 p.m. Gatineau local time on a business day. A document that is delivered after 5:00 p.m. Gatineau local time or on a day that is not a business day is considered to be filed with the Agency and received by the other parties on the next business day.

Services de messagerie ou remise en mains propres

(2) La remise d'un document envoyé par messagerie ou remis en mains propres est déposé auprès de l'Office et reçu par les autres parties à la date de la remise s'il a été reçu par l'Office et par les autres parties un jour ouvrable au plus tard à 17 heures, heure de Gatineau; sinon, il est considéré comme déposé et reçu le jour ouvrable suivant.

Filing after time limit

12. (1) A person must not file a document after the end of the applicable time limit for filing the document unless a request has been filed under subsection 30(1) and the request has been granted by the Agency.

Dépôt hors délai

12. (1) Nul ne peut déposer de document après l'expiration des délais prévus pour ce faire, sauf sur autorisation de l'Office à la suite d'une requête déposée en ce sens en vertu du paragraphe 30(1).

Filing not provided for in Rules

(2) A person must not file a document whose filing is not provided for in these Rules unless a request has been filed under subsection 34(1) and the request has been granted by the Agency.

Dépôt non prévu

(2) Nul ne peut déposer de document dont le dépôt n'est pas prévu par les présentes règles, sauf sur autorisation de l'Office à la suite d'une requête déposée en ce sens en vertu du paragraphe 34(1).

Failure to comply

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

Défaut de se conformer

(3) Les documents déposés en contravention des paragraphes (1) ou (2) ne sont pas versés aux archives de l'Office.

Language of Documents

Langues des documents

English or French

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

Français ou anglais

13. (1) Les documents déposés sont en français ou en anglais.

Translation

(2) If a person files a document that is in a language other than English or French, they must at the same time file an English or French translation of the document and the information referred to in Schedule 1.

Traduction

(2) Les documents déposés qui sont dans une langue autre que l'anglais ou le français sont accompagnés d'une traduction dans l'une ou l'autre de ces deux langues ainsi que des éléments visés à l'annexe 1.

Treated as original

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

Considérée comme original

(3) La traduction tient lieu d'original pour les fins de l'instance de règlement des différends.

Amended Documents

Modification de documents

Substantive amendment

14. (1) If a person proposes to make a substantive amendment to a previously filed document, they must file a request under subsection 33(1).

Modification de fond

14. (1) La personne qui souhaite apporter une modification de fond à un document qu'elle a déposé présente une requête en ce sens en vertu du paragraphe 33(1).

Identification of amendment

(2) A person that files a document that amends a previously filed document, whether the amendment is substantive or not, must ensure that the amendment is clearly identified in the document and that the word "AMENDED" appears in capital letters in the top right corner of the first page.

Indication des modifications

(2) La personne qui dépose une version modifiée d'un document qu'elle a déposé, que les modifications soient de fond ou non, indique clairement dans le document les modifications et inscrit la mention « MODIFIÉ » en lettres majuscules dans le coin supérieur droit de la première page.

Verification by Affidavit or by Witnessed Statement

Attestation par affidavit ou déclaration devant témoin

Verification of contents

15. (1) If the Agency considers it just and reasonable, the Agency may, by notice, require that a

Attestation du contenu

15. (1) S'il l'estime juste et raisonnable, l'Office peut, par avis, exiger qu'une personne atteste, en

person provide verification of the contents of all or any part of a document by affidavit or by witnessed statement.

tout ou en partie, le contenu d'un document par affidavit ou déclaration devant témoin.

Filing of verification

(2) The verification by affidavit or by witnessed statement must be filed within five business days after the date of the notice referred to in subsection (1) and must include the information referred to in Schedule 2 or Schedule 3, respectively.

(2) L'attestation par affidavit ou par déclaration devant témoin est déposée dans les cinq jours ouvrables suivant la date de l'avis visé au paragraphe (1) et comporte les éléments visés à l'annexe 2 ou à l'annexe 3, respectivement.

Dépôt de l'attestation

Failure to file verification

(3) The Agency may strike the document or the part of the document in question from the Agency's record if the person fails to file the verification.

(3) L'Office peut retirer de ses archives tout ou partie d'un document si la personne ne dépose pas l'attestation par affidavit ou par déclaration devant témoin.

Défaut de déposer l'attestation

Representation and Change of Contact Information

Représentation et changements des coordonnées

Representative not a member of the bar

16. A person that is represented in a dispute proceeding by a person that is not a member of the bar of a province must authorize that person to act on their behalf by filing the information referred to in Schedule 4.

16. La personne qui, dans le cadre d'une instance de règlement des différends, est représentée par une personne qui n'est membre du barreau d'aucune province dépose une autorisation en ce sens, qui comporte les éléments visés à l'annexe 4.

Représentant — non-membre du barreau

Change of contact information

17. A person must, if the contact information they provided to the Agency changes during the course of a dispute proceeding, provide their new contact information to the Agency and the parties without delay.

17. La personne qui a fourni ses coordonnées à l'Office et dont les coordonnées changent au cours d'une instance de règlement des différends fournit sans délai ses nouvelles coordonnées à l'Office et aux parties.

Changement des coordonnées

PLEADINGS

ACTES DE PROCÉDURE

Application

Demande

Filing of application

18. (1) Any application filed with the Agency must include the information referred to in Schedule 5.

18. (1) Toute demande déposée auprès de l'Office comporte les éléments visés à l'annexe 5.

Dépôt de la demande

Application complete

(2) If the application is complete, the parties are notified in writing that the application has been accepted.

(2) Si la demande est complète, les parties sont avisées par écrit de l'acceptation de la demande.

Demande complète

Incomplete application

(3) If the application is incomplete, the applicant is notified in writing and the applicant must provide the missing information within 20 business days after the date of the notice.

(3) Si la demande est incomplète, le demandeur en est avisé par écrit et dispose de vingt jours ouvrables suivant la date de l'avis pour la compléter.

Demande incomplète

Closure of file

(4) If the applicant fails to provide the missing information within the time limit, the file is closed.

(4) Si le demandeur ne complète pas la demande dans le délai imparti, le dossier est fermé.

Fermeture du dossier

New application

(5) An applicant whose file is closed may file a new application in respect of the same matter.

(5) Le demandeur dont le dossier est fermé peut déposer à nouveau une demande relativement à la même affaire.

Nouvelle demande

Answer

Réponse

Filing of answer

19. A respondent may file an answer to the application. The answer must be filed within 15 business days after the date of the notice indicating that the application has been accepted and must include the information referred to in Schedule 6.

19. Le défendeur qui souhaite déposer une réponse le fait dans les quinze jours ouvrables suivant la date de l'avis d'acceptation de la demande. La réponse comporte les éléments visés à l'annexe 6.

Dépôt d'une réponse

Reply

Réplique

Filing of reply

20. (1) An applicant may file a reply to the answer. The reply must be filed within five business days after the day on which they receive a copy of the answer and must include the information referred to in Schedule 7.

20. (1) Le demandeur qui souhaite déposer une réplique à la réponse le fait dans les cinq jours ouvrables suivant la date de réception de la copie de la réponse. La réplique comporte les éléments visés à l'annexe 7.

Dépôt d'une réplique

No new issues

(2) The reply must not raise issues or arguments that are not addressed in the answer or introduce new evidence unless a request has been filed to that effect and the request has been granted by the Agency.

Nouvelles questions

(2) La réplique ne peut soulever des questions ou arguments qui ne sont pas abordés dans la réponse, ni introduire de nouvelle preuve, sauf sur autorisation de l'Office à la suite d'une requête déposée en ce sens.

Intervention

Intervention

Filing of intervention

21. (1) An intervener may file an intervention. The intervention must be filed within five business days after the day on which their request to intervene is granted by the Agency and must include the information referred to in Schedule 8.

Dépôt de l'intervention

21. (1) L'intervenant qui souhaite déposer une intervention le fait dans les cinq jours ouvrables suivant la date à laquelle sa requête d'intervention a été accordée. L'intervention comporte les éléments visés à l'annexe 8.

Participation rights

(2) An intervener's participation is limited to the participation rights granted by the Agency.

Droits de participation

(2) La participation de l'intervenant se limite aux droits de participation que lui accorde l'Office.

Response to intervention

22. An applicant or a respondent that is adverse in interest to an intervener may file a response to the intervention. The response must be filed within five business days after the day on which they receive a copy of the intervention and must include the information referred to in Schedule 9.

Réponse à l'intervention

22. Le demandeur ou le défendeur qui a des intérêts opposés à ceux d'un intervenant et qui souhaite déposer une réponse à l'intervention le fait dans les cinq jours ouvrables suivant la date de réception de la copie de l'intervention. La réponse à l'intervention comporte les éléments visés à l'annexe 9.

Position Statement

Énoncé de position

Filing of position statement

23. (1) An interested person may file a position statement. The position statement must be filed before the close of pleadings and must include the information referred to in Schedule 10.

Dépôt de l'énoncé de position

23. (1) Toute personne intéressée peut déposer un énoncé de position. Celui-ci est déposé avant la clôture des actes de procédure et comporte les éléments visés à l'annexe 10.

No participation rights

(2) A person that files a position statement has no participation rights and is not entitled to receive any notice in the dispute proceeding.

Énoncé de position

(2) La personne qui dépose un énoncé de position n'a aucun droit de participation ni droit aux avis relatifs à l'instance de règlement des différends.

Written Questions and Production of Documents

Questions écrites et production de documents

Notice

24. (1) A party may, by notice, request that any party that is adverse in interest respond to written questions that relate to the matter in dispute or produce documents that are in their possession or control and that relate to the matter in dispute. The notice must include the information referred to in Schedule 11 and must be filed

(*a*) in the case of written questions, before the close of pleadings; and

(*b*) in the case of the production of documents, within five business days after the day on which the party becomes aware of the documents or before the close of pleadings, whichever is earlier.

Avis

24. (1) Toute partie peut, par avis, demander à une partie qui a des intérêts opposés aux siens de répondre à des questions écrites ou de produire des documents qui se trouvent en sa possession ou sous sa garde et qui sont pertinents à l'affaire. L'avis comporte les éléments visés à l'annexe 11 et est déposé dans les délais suivants :

a) s'agissant de questions écrites, avant la clôture des actes de procédure;

b) s'agissant de la production de documents, soit, dans les cinq jours ouvrables suivant la date à laquelle la partie a pris connaissance de leur existence, soit, si elle est antérieure, avant la clôture des actes de procédure.

Response to notice

(2) The party to which a notice has been given must, within five business days after the day on which they receive a copy of the notice, file a complete response to each question or the requested documents, as the case may be, accompanied by the information referred to in Schedule 12.

Réponse à l'avis

(2) Dans les cinq jours ouvrables suivant la date de réception de la copie de l'avis, la partie à qui l'avis est envoyé dépose une réponse complète à chacune des questions ou les documents demandés, selon le cas, ainsi que les éléments visés à l'annexe 12.

Objection

(3) If a party wishes to object to a question or to producing a document, that party must, within the time limit set out in subsection (2), file an objection that includes

(*a*) a clear and concise explanation of the reasons for the objection including, as applicable, the relevance of the information or document requested and their availability for production;

Opposition

(3) La partie qui souhaite s'opposer à une question ou à la demande de production d'un document dépose une opposition dans les délais prévus au paragraphe (2). L'opposition comporte les éléments suivants :

a) un exposé clair et concis des motifs de l'opposition, notamment la pertinence des renseignements ou du document demandé ou leur disponibilité, selon le cas;

(*b*) any document that is relevant in explaining or supporting the objection; and

(*c*) any other information or document that is in the party's possession or control and that would be of assistance to the party making the request.

b) tout document pertinent à l'appui de l'opposition;

c) tout autre renseignement ou document en la possession ou sous la garde de la partie et susceptible d'aider la partie qui a fait la demande.

Expedited Process

Processus accéléré

Decision to apply expedited process

25. (1) The Agency may, at the request of a party under section 28, decide that an expedited process applies to an answer under section 19 and a reply under section 20 or to any request filed under these Rules.

Décision d'appliquer le processus accéléré

25. (1) L'Office peut, sur requête déposée en vertu de l'article 28, décider que le processus accéléré s'applique à une réponse déposée en vertu de l'article 19 et à une réplique déposée en vertu de l'article 20, ou à toute autre requête déposée au titre des présentes règles.

Time limits for filing — answer and reply

(2) If an expedited process applies to an answer under section 19 and a reply under section 20, the following time limits apply:

(*a*) the answer must be filed within five business days after the date of the notice indicating that the application has been accepted; and

(*b*) the reply must be filed within three business days after the day on which the applicant receives a copy of the answer.

Délais de dépôt — réponse et réplique

(2) Lorsque le processus accéléré est appliqué relativement à une réponse déposée en vertu de l'article 19 et à une réplique déposée en vertu de l'article 20, les délais suivants s'appliquent :

a) le dépôt de la réponse se fait dans les cinq jours ouvrables suivant la date de l'avis d'acceptation de la demande;

b) le dépôt de la réplique se fait dans les trois jours ouvrables suivant la date de réception de la copie de la réponse.

Time limits for filing — request

(3) If an expedited process applies to a request filed under these Rules, the following time limits apply:

(*a*) any response to a request must be filed within two business days after the day on which the person who is responding to the request receives a copy of the request; and

(*b*) any reply to a response must be filed within one business day after the day on which the person who is replying to the response receives a copy of the response.

Délai de dépôt — Requête

(3) Lorsque le processus accéléré est appliqué relativement à une requête déposée au titre des présentes règles, les délais suivants s'appliquent :

a) le dépôt de la réponse à la requête se fait dans les deux jours ouvrables suivant la date de réception de la copie de la requête;

b) le dépôt de la réplique à la réponse se fait au plus tard un jour ouvrable après la date de réception de la copie de la réponse.

Close of Pleadings

Clôture des actes de procédure

Normal process

26. (1) Subject to subsection (2), pleadings are closed

(*a*) if no answer is filed, 20 business days after the date of the notice indicating that the application has been accepted;

(*b*) if an answer is filed and no additional documents are filed after that answer, 25 business days after the date of the notice indicating that the application has been accepted; or

(*c*) if additional documents are filed after an answer is filed, the day on which the last document is to be filed under these Rules.

Procédure normale

26. (1) Sous réserve du paragraphe (2), les actes de procédure sont clos dans les délais suivants :

a) si aucune réponse n'est déposée, vingt jours ouvrables après la date de l'avis d'acceptation de la demande;

b) si une réponse est déposée, et qu'aucun autre document n'est déposé par la suite, vingt-cinq jours ouvrables après la date de l'avis d'acceptation de la demande;

c) si d'autres documents sont déposés après le dépôt de la réponse, à la date à laquelle le dernier document doit être déposé au titre des présentes règles.

Expedited process

(2) Under the expedited process, pleadings are closed

(*a*) if no answer is filed, seven business days after the date of the notice indicating that the application has been accepted;

(*b*) if an answer is filed and no additional documents are filed after that answer, 10 business days after the date of the notice indicating that the application has been accepted; or

Processus accéléré

(2) Si le processus accéléré est appliqué, les actes de procédure sont clos dans les délais suivants :

a) si aucune réponse n'est déposée, sept jours ouvrables après la date de l'avis d'acceptation de la demande;

b) si une réponse a été déposée, et qu'un aucun autre document n'est déposé par la suite, dix jours ouvrables après la date de l'avis d'acceptation de la demande;

(*c*) if additional documents are filed after an answer is filed, the day on which the last document is to be filed under these Rules.

c) si d'autres documents sont déposés après le dépôt de la réponse, à la date à laquelle le dernier document doit être déposé au titre des présentes règles.

REQUESTS

General Request

REQUÊTES

Requête générale

Filing of request

27. (1) A person may file a request for a decision on any issue that arises within a dispute proceeding and for which a specific request is not provided for under these Rules. The request must be filed as soon as feasible but, at the latest, before the close of pleadings and must include the information referred to in Schedule 13.

27. (1) Toute personne peut déposer une requête en vue d'obtenir une décision sur toute question soulevée dans le cadre d'une instance de règlement des différents, mais à laquelle aucune requête spécifique n'est prévue au titre des présentes règles. La requête est déposée dès que possible, mais au plus tard avant la clôture des actes de procédure. Elle comporte les éléments visés à l'annexe 13. Dépôt d'une requête

Response

(2) Any party may file a response to the request. The response must be filed within five business days after the day on which they receive a copy of the request and must include the information referred to in Schedule 14.

(2) Toute partie peut déposer une réponse à la requête dans les cinq jours ouvrables suivant la date de réception de la copie de la requête. La réponse comporte les éléments visés à l'annexe 14. Réponse

Reply

(3) The person that filed the request may file a reply to the response. The reply must be filed within two business days after the day on which they receive a copy of the response and must include the information referred to in Schedule 15.

(3) La personne ayant déposé la requête et qui souhaite déposer une réplique à la réponse le fait dans les deux jours ouvrables suivant la date de réception de la copie de la réponse. La réplique comporte les éléments visés à l'annexe 15. Réplique

No new issues

(4) The reply must not raise issues or arguments that are not addressed in the response or introduce new evidence unless a request has been filed to that effect and the request has been granted by the Agency.

(4) La réplique ne peut soulever des questions ou arguments qui ne sont pas abordés dans la réponse, ni introduire de nouvelle preuve, sauf sur autorisation de l'Office à la suite d'une requête déposée en ce sens. Nouvelles questions

Specific Requests

Requêtes spécifiques

Request for Expedited Process

Requête en processus accéléré

Expedited process

28. (1) A party may file a request to have an expedited process applied to an answer under section 19 and a reply under section 20 or to another request filed under these Rules. The request must include the information referred to in Schedule 13.

28. (1) Toute partie peut déposer une requête pour demander l'application du processus accéléré relativement à une réponse déposée en vertu de l'article 19 et à une réplique déposée en vertu de l'article 20, ou à une autre requête déposée au titre des présentes règles. La requête comporte les éléments visés à l'annexe 13. Processus accéléré

Justification for request

(2) The party filing the request must demonstrate to the satisfaction of the Agency that adherence to the time limits set out in these Rules would cause them financial or other prejudice.

(2) La partie qui dépose la requête doit convaincre l'Office qu'un préjudice financier ou autre lui serait causé si les délais prévus dans les présentes règles étaient appliqués. Justification de la requête

Time limit for filing

(3) The request must be filed

(*a*) if the request is to have an expedited process apply to an answer and a reply,

(i) in the case of an applicant, at the time that the application is filed, or

(ii) in the case of a respondent, within one business day after the date of the notice indicating that the application has been accepted; or

(*b*) if the request is to have an expedited process apply to another request,

(i) in the case of a person filing the other request, at the time that that request is filed, or

(ii) in the case of a person responding to the other request, within one business day after the

(3) La requête est déposée dans les délais suivants : Délai de dépôt

a) si la requête vise la réponse et la réplique :

(i) en ce qui concerne le demandeur, au moment du dépôt de la demande,

(ii) en ce qui concerne le défendeur, au plus tard un jour ouvrable après la date de l'avis d'acceptation de la demande;

b) si la requête vise une autre requête :

(i) en ce qui concerne la personne qui dépose cette autre requête, au moment du dépôt de celle-ci;

(ii) en ce qui concerne de la personne qui répond à cette autre requête, au plus tard un

day on which they receive a copy of that request.

Response

(4) Any party may file a response to the request. The response must be filed within one business day after the day on which they receive a copy of the request and must include the information referred to in Schedule 14.

Reply

(5) The party that filed the request may file a reply to the response. The reply must be filed within one business day after the day on which they receive a copy of the response and must include the information referred to in Schedule 15.

No new issues

(6) The reply must not raise issues or arguments that are not addressed in the response or introduce new evidence unless a request has been filed to that effect and the request has been granted by the Agency.

Request to Intervene

Request to intervene

29. (1) A person that has a substantial and direct interest in a dispute proceeding may file a request to intervene. The request must be filed within 10 business days after the day on which the person becomes aware of the application or before the close of pleadings, whichever is earlier, and must include the information referred to in Schedule 16.

Limits and conditions

(2) If the Agency grants the request, it may set limits and conditions on the intervener's participation in the dispute proceeding.

Request to Extend or Shorten Time Limit

Extend or shorten

30. (1) A person may file a request to extend or shorten a time limit that applies in respect of a dispute proceeding. The request may be filed before or after the end of the time limit and must include the information referred to in Schedule 13.

Response

(2) Any party may file a response to the request. The response must be filed within three business days after the day on which they receive a copy of the request and must include the information referred to in Schedule 14.

Reply

(3) The person that filed the request may file a reply to the response. The reply must be filed within one business day after the day on which they receive a copy of the response and must include the information referred to in Schedule 15.

No new issues

(4) The reply must not raise issues or arguments that are not addressed in the response or introduce new evidence unless a request has been filed to that effect and the request has been granted by the Agency.

Request for Confidentiality

Confidential treatment

31. (1) A person may file a request for confidentiality in respect of a document that they are filing.

jour ouvrable après la date de réception de la copie de celle-ci.

Réponse

(4) La partie qui souhaite déposer une réponse à la requête le fait au plus tard un jour ouvrable après la date de réception de la copie de la requête. La réponse comporte les éléments visés à l'annexe 14.

Réplique

(5) La partie ayant déposé la requête et qui souhaite déposer une réplique à la réponse le fait au plus tard un jour ouvrable après la date de réception de la copie de la réponse. La réplique comporte les éléments visés à l'annexe 15.

Nouvelles questions

(6) La réplique ne peut soulever des questions ou arguments qui ne sont pas abordés dans la réponse, ni introduire de nouvelle preuve, sauf sur autorisation de l'Office à la suite d'une requête déposée en ce sens.

Requête d'intervention

Requête d'intervention

29. (1) Toute personne qui a un intérêt direct et substantiel dans une instance de règlement des différends peut déposer une requête d'intervention. La requête est déposée, soit, dans les dix jours ouvrables suivant la date à laquelle la personne a pris connaissance de la demande, soit, si elle est antérieure, avant la clôture des actes de procédure. La requête comporte les éléments visés à l'annexe 16.

Limites et conditions

(2) Si l'Office accorde la requête, il peut fixer les limites et les conditions de l'intervention.

Requête de prolongation ou d'abrégement de délai

Prolongation ou abrégement

30. (1) Toute personne peut déposer une requête pour demander la prolongation ou l'abrégement de tout délai applicable dans le cadre d'une instance de règlement des différends avant ou après son expiration. La requête comporte les éléments visés à l'annexe 13.

Réponse

(2) La partie qui souhaite déposer une réponse à la requête le fait dans les trois jours ouvrables suivant la date de réception de la copie de la requête. La réponse comporte les éléments visés à l'annexe 14.

Réplique

(3) La personne ayant déposé la requête et qui souhaite déposer une réplique à la réponse le fait au plus tard un jour ouvrable après la date de réception de la copie de la réponse. La réplique comporte les éléments visés à l'annexe 15.

Nouvelles questions

(4) La réplique ne peut soulever des questions ou arguments qui ne sont abordés dans la réponse, ni introduire de nouvelle preuve, sauf sur autorisation de l'Office à la suite d'une requête déposée en ce sens.

Requête de confidentialité

Traitement confidentiel

31. (1) Toute personne peut déposer une requête de confidentialité portant sur un document qu'elle

The request must include the information referred to in Schedule 17 and must be accompanied by, for each document identified as containing confidential information,

(*a*) one public version of the document from which the confidential information has been redacted; and

(*b*) one confidential version of the document that identifies the confidential information that has been redacted from the public version of the document and that includes, at the top of each page, the words: "CONTAINS CONFIDENTIAL INFORMATION" in capital letters.

Agency's record

(2) The request for confidentiality and the public version of the document from which the confidential information has been redacted are placed on the Agency's public record. The confidential version of the document is placed on the Agency's confidential record pending a decision of the Agency on the request for confidentiality.

Request for disclosure

(3) Any party may oppose a request for confidentiality by filing a request for disclosure. The request must be filed within five business days after the day on which they receive a copy of the request for confidentiality and must include the information referred to in Schedule 18.

Response to request for disclosure

(4) The person that filed the request for confidentiality may file a response to a request for disclosure. The response must be filed within three business days after the day on which they receive a copy of the request for disclosure and must include the information referred to in Schedule 14.

Agency's decision

(5) The Agency may

(*a*) if the Agency determines that the document is not relevant to the dispute proceeding, decide to not place the document on the Agency's record;

(*b*) if the Agency determines that the document is relevant to the dispute proceeding and that no specific direct harm would likely result from its disclosure or that any demonstrated specific direct harm is not sufficient to outweigh the public interest in having it disclosed, decide to place the document on the Agency's public record; or

(*c*) if the Agency determines that the document is relevant to the dispute proceeding and that the specific direct harm likely to result from its disclosure justifies confidentiality,

(i) decide to confirm the confidentiality of the document or any part of it and keep the document or part of the document on the Agency's confidential record,

(ii) decide to place a version of the document or any part of it from which the confidential information has been redacted on the Agency's public record,

(iii) decide to keep the document or any part of it on the Agency's confidential record but require that the person requesting confidentiality provide a copy of the document or part of the document in confidence to any party to the

dépose. La requête comporte les éléments visés à l'annexe 17 et, pour chaque document désigné comme étant confidentiel :

a) une version publique du document, de laquelle les renseignements confidentiels ont été supprimés;

b) une version confidentielle du document, qui indique les passages qui ont été supprimés de la version publique du document et qui porte la mention « CONTIENT DES RENSEIGNEMENTS CONFIDENTIELS » en lettres majuscules au haut de chaque page.

Archives de l'Office

(2) La requête de confidentialité et la version publique du document de laquelle les renseignements confidentiels ont été supprimés sont versées aux archives publiques de l'Office. La version confidentielle du document est versée aux archives confidentielles de l'Office en attendant que celui-ci statue sur la requête.

Requête de communication

(3) La partie qui souhaite s'opposer à une requête de confidentialité dépose une requête de communication dans les cinq jours ouvrables suivant la date de réception de la copie de la requête de confidentialité. La requête de communication comporte les éléments visés à l'annexe 18.

Réponse à la requête de communication

(4) La personne ayant déposé la requête de confidentialité et qui souhaite déposer une réponse à une requête de communication le fait dans les trois jours ouvrables suivant la date de réception de copie de la requête de communication. La réponse comporte les éléments visés à l'annexe 14.

Décision de l'Office

(5) L'Office peut :

a) s'il conclut que le document n'est pas pertinent au regard de l'instance de règlement des différends, décider de ne pas le verser aux archives de l'Office;

b) s'il conclut que le document est pertinent au regard de l'instance de règlement des différends et que sa communication ne causerait vraisemblablement pas de préjudice direct précis ou que l'intérêt du public à ce qu'il soit communiqué l'emporte sur le préjudice direct précis qui pourrait en résulter, décider de le verser aux archives publiques de l'Office;

c) s'il conclut que le document est pertinent au regard de l'instance de règlement des différends et que le préjudice direct précis que pourrait causer sa communication justifie le traitement confidentiel :

(i) décider de confirmer le caractère confidentiel du document ou d'une partie de celui-ci et garder le document ou une partie de celui-ci dans ses archives confidentielles,

(ii) décider qu'une version ou une partie du document, de laquelle les renseignements confidentiels ont été supprimés, soit versée à ses archives publiques,

(iii) décider de garder le document ou une partie de celui-ci dans ses archives confidentielles,

dispute proceeding, or to certain of their advisors, experts and representatives, as specified by the Agency, after the person requesting confidentiality has received a signed undertaking of confidentiality from the person to which the copy is to be provided, or

(iv) make any other decision that it considers just and reasonable.

mais exiger que la personne qui demande la confidentialité fournisse une copie du document ou une partie de celui-ci de façon confidentielle à une partie à l'instance, à certains de ses conseillers, experts ou représentants, tel qu'il le précise, après que la personne qui demande la confidentialité ait reçu un engagement de non-divulgation signé de chaque personne à qui le document devra être envoyé,

(iv) rendre toute autre décision qu'il estime juste et raisonnable.

Filing of undertaking of confidentiality

(6) The original copy of the undertaking of confidentiality must be filed with the Agency.

(6) L'original de l'engagement de non-divulgation est déposé auprès de l'Office.

Dépôt de l'engagement de non-divulgation

Request to Require Party to Provide Complete Response

Requête visant à obliger une partie à fournir une réponse complète à l'avis

Requirement to respond

32. (1) A party that has given notice under subsection 24(1) may, if they are not satisfied with the response to the notice or if they wish to contest an objection to their request, file a request to require the party to which the notice was directed to provide a complete response. The request must be filed within two business days after the day on which they receive a copy of the response to the notice or the objection, as the case may be, and must include the information referred to in Schedule 13.

32. (1) La partie qui a donné un avis en vertu du paragraphe 24(1) et qui est insatisfaite des réponses à l'avis ou qui souhaite contester l'opposition à sa demande peut déposer une requête pour demander que la partie à qui l'avis a été donné fournisse une réponse complète. La requête est déposée dans les deux jours ouvrables suivant la date de réception de la copie des réponses à l'avis ou de l'opposition et comporte les éléments visés à l'annexe 13.

Obligation de répondre

Agency's decision

(2) The Agency may do any of the following:

(*a*) require that a question be answered in full or in part;

(*b*) require that a document be provided;

(*c*) require that a party submit secondary evidence of the contents of a document;

(*d*) require that a party produce a document for inspection only;

(*e*) deny the request in whole or in part.

(2) L'Office peut :

a) exiger qu'il soit répondu à la question en tout ou en partie;

b) exiger la production d'un document;

c) exiger qu'une partie présente une preuve secondaire du contenu d'un document;

d) exiger qu'une partie produise un document pour examen seulement;

e) rejeter la requête en tout ou en partie.

Décisions de l'Office

Request to Amend Document

Requête de modification de document

Amendment

33. (1) A person may, before the close of pleadings, file a request to make a substantive amendment to a previously filed document. The request must include the information referred to in Schedule 13 and a copy of the amended document that the person proposes to file.

33. (1) Toute personne peut, avant la clôture des actes de procédure, déposer une requête en vue d'apporter une modification de fond à un document qu'elle a déposé. La requête comporte les éléments visés à l'annexe 13 ainsi que la copie du document modifié que la personne a l'intention de déposer.

Modification

Response

(2) Any party may file a response to the request. The response must be filed within three business days after the day on which they receive a copy of the request and must include

(*a*) the information referred to in Schedule 14; and

(*b*) a description of any prejudice that would be caused to the party if the request were granted including, if applicable, an explanation of how the proposed amendments would hinder or delay the fair conduct of the dispute proceeding.

(2) La partie qui souhaite déposer une réponse à la requête le fait dans les trois jours ouvrables suivant la date de réception de la copie de la requête. La réponse comporte :

a) les éléments visés à l'annexe 14;

b*)* une description de tout préjudice qui serait causé à la partie si la requête était accordée, y compris, le cas échéant, la manière dont le dépôt des modifications proposées entraverait ou retarderait le déroulement équitable de l'instance de règlement des différends.

Réponse

Reply

(3) The person that filed the request may file a reply to the response. The reply must be filed within one business day after the day on which they receive a copy of the response and must include the information referred to in Schedule 15.

(3) La partie ayant déposé la requête et qui souhaite déposer une réplique à la réponse le fait au plus tard un jour ouvrable après la date de réception de la copie de réponse à la requête. La réplique comporte les éléments visés à l'annexe 15.

Réplique

No new issues

(4) The reply must not raise issues or arguments that are not addressed in the response or introduce new evidence unless a request has been filed to that effect and the request has been granted by the Agency.

Nouvelles questions

(4) La réplique ne peut soulever des questions ou arguments qui ne sont pas abordés dans la réponse, ni introduire de nouvelle preuve, sauf sur autorisation de l'Office à la suite d'une requête déposée en ce sens.

Agency's decision

(5) The Agency may

(*a*) deny the request; or

(*b*) approve the request in whole or in part and, if the Agency considers it just and reasonable to do so, provide parties that are adverse in interest with an opportunity to respond to the amended document.

Décisions de l'Office

(5) L'Office peut :

a) rejeter la requête;

b) accorder la requête de modification en tout ou en partie et, s'il l'estime juste et raisonnable, donner aux parties adverses la possibilité de répondre au document modifié.

Request to File Document Whose Filing is not Otherwise Provided for in Rules

Requête de dépôt de document dont le dépôt n'est pas prévu par les règles

Filing

34. (1) A person may file a request to file a document whose filing is not otherwise provided for in these Rules. The request must include the information referred to in Schedule 13 and a copy of the document that the person proposes to file.

Dépôt

34. (1) La personne qui souhaite déposer un document dont le dépôt n'est pas prévu par les présentes règles dépose une requête en ce sens. La requête comporte les éléments visés à l'annexe 13 ainsi que la copie du document que la partie a l'intention de déposer.

Response

(2) Any party may file a response to the request. The response must be filed within three business days after the day on which they receive a copy of the request and must include

(*a*) the information referred to in Schedule 14; and

(*b*) a description of any prejudice that would be caused to the party if the request were granted including, if applicable, an explanation of how the proposed filing would hinder or delay the fair conduct of the dispute proceeding.

Réponse

(2) La partie qui souhaite déposer une réponse à la requête le fait dans les trois jours ouvrables suivant la date de réception de la copie de la requête. La réponse comporte :

a) les éléments visés à l'annexe 14;

b) une description de tout préjudice qui serait causé à la partie si la requête était accordée, y compris, le cas échéant, une explication qui précise comment le dépôt du document entraverait ou retarderait le déroulement équitable de l'instance de règlement des différends.

Reply

(3) The person that filed the request may file a reply to the response. The reply must be filed within one business day after the day on which they receive a copy of the response and must include the information referred to in Schedule 15.

Réplique

(3) La partie ayant déposé la requête et qui souhaite déposer une réplique à la réponse le fait au plus tard un jour ouvrable après la date de réception de la copie de la réponse à la requête. La réplique comporte les éléments visés à l'annexe 15.

No new issues

(4) The reply must not raise issues or arguments that are not addressed in the response or introduce new evidence unless a request has been filed to that effect and the request has been granted by the Agency.

Nouvelles questions

(4) La réplique ne peut soulever des questions ou arguments qui ne sont pas abordés dans la réponse, ni introduire de nouvelle preuve, sauf sur autorisation de l'Office à la suite d'une requête déposée en ce sens.

Agency's decision

(5) The Agency may

(*a*) deny the request; or

(*b*) approve the request and, if pleadings are closed and if the Agency considers it just and reasonable to do so, reopen pleadings to provide the other parties with an opportunity to comment on the document.

Décisions de l'Office

(5) L'Office peut :

a) rejeter la requête;

b) accorder la requête et, si les actes de procédure sont clos, les rouvrir pour donner aux autres parties la possibilité de formuler des commentaires sur le document, s'il l'estime juste et raisonnable.

Request to Withdraw Document

Requête de retrait de document

Withdrawal of document

35. (1) Subject to section 36, a person may file a request to withdraw any document that they filed in a dispute proceeding. The request must be filed before the close of pleadings and must include the information referred to in Schedule 13.

Retrait de document

35. (1) Sous réserve de l'article 36, toute personne peut, avant la clôture des actes de procédure, déposer une requête en vue de retirer un document qu'elle a déposé dans le cadre d'une instance de règlement des différends. La requête comporte les éléments visés à l'annexe 13.

Terms and conditions

(2) If the Agency grants the request, it may impose any terms and conditions on the withdrawal that it considers just and reasonable, including the awarding of costs.

Conditions de retrait

(2) L'Office peut, s'il accorde la requête, fixer les conditions de retrait qu'il estime justes et raisonnables, y compris l'adjudication des frais.

Request to Withdraw Application

Requête de retrait d'une demande

Withdrawal of application

36. (1) An applicant may file a request to withdraw their application. The request must be filed before a final decision is made by the Agency in respect of the application and must include the information referred to in Schedule 13.

Retrait d'une demande

36. (1) Le demandeur peut, avant que l'Office ne rende une décision définitive, déposer une requête en vue de retirer sa demande. La requête comporte les éléments visés à l'annexe 13.

Terms and conditions

(2) If the Agency grants the request, it may impose any terms and conditions on the withdrawal that it considers just and reasonable, including the awarding of costs.

Conditions de retrait

(2) L'Office peut, s'il accorde la requête, fixer les conditions de retrait qu'il estime justes et raisonnables, y compris l'adjudication des frais.

Case Management

Gestion de l'instance

Formulation of issues

37. The Agency may formulate the issues to be considered in a dispute proceeding in any of the following circumstances:

(*a*) the documents filed do not clearly identify the issues;

(*b*) the formulation would assist in the conduct of the dispute proceeding;

(*c*) the formulation would assist the parties to participate more effectively in the dispute proceeding.

Formulation des questions

37. (1) L'Office peut, dans les cas suivants, formuler les questions qui seront examinées dans une instance de règlement des différends :

a) les documents déposés n'établissent pas clairement les questions en litige;

b) cette démarche faciliterait le déroulement de l'instance de règlement des différends;

c) cette démarche contribuerait à la participation plus efficace des parties à l'instance de règlement des différends.

Preliminary determination

38. The Agency may, at the request of a party, determine that an issue should be decided as a preliminary question.

Décision préliminaire

38. L'Office peut, sur requête, décider de trancher une question à titre préliminaire.

Joining of applications

39. The Agency may, at the request of a party, join two or more applications and consider them together in one dispute proceeding to provide for a more efficient and effective process.

Jonction de demandes

39. L'Office peut, sur requête, joindre plusieurs demandes dans une instance de règlement des différends pour assurer un processus plus efficace et efficient.

Conference

40. (1) The Agency may, at the request of a party, require the parties to attend a conference by a means of telecommunication or by personal attendance for the purpose of

(*a*) encouraging settlement of the dispute;

(*b*) formulating, clarifying or simplifying the issues;

(*c*) determining the terms of amendment of any document;

(*d*) obtaining the admission of certain facts or determining whether the verification of those facts by affidavit should be required;

(*e*) establishing the procedure to be followed in the dispute proceeding;

(*f*) providing for the exchange by the parties of documents proposed to be submitted;

(*g*) establishing a process for the identification and treatment of confidential information;

(*h*) discussing the appointment of experts; and

(*i*) resolving any other issues to provide for a more efficient and effective process.

Conférence

40. (1) L'Office peut, sur requête, exiger que les parties participent à une conférence par moyen de télécommunication ou en personne pour :

a) encourager le règlement des différends;

b) formuler, préciser ou simplifier les questions en litige;

c) fixer les conditions de modification d'un document;

d) obtenir la reconnaissance de certains faits ou décider si l'attestation de ces faits par affidavit est nécessaire;

e) établir la procédure à suivre pendant l'instance de règlement des différends;

f) permettre l'échange entre les parties des documents qu'elles ont l'intention de produire;

g) établir un processus d'identification et de traitement des renseignements confidentiels;

h) discuter de la nomination d'experts;

i) trancher toute autre question en vue de rendre le processus plus efficace et efficient.

Written submissions

(2) The parties may be required to file written submissions on any issue that is discussed at the conference.

Observations écrites

(2) Les parties peuvent être tenues de déposer des observations écrites sur toute question discutée pendant la conférence.

Minutes

(3) Minutes are prepared in respect of the conference and placed on the Agency's record.

Agency decision or direction

(4) The Agency may issue a decision or direction on any issue discussed at the conference without further submissions from the parties.

Stay of dispute proceeding

41. (1) The Agency may, at the request of a party, stay a dispute proceeding in any of the following circumstances:

(*a*) a decision is pending on a preliminary question in respect of the dispute proceeding;

(*b*) a decision is pending in another proceeding or before any court in respect of an issue that is the same as or substantially similar to one raised in the dispute proceeding;

(*c*) a party to the dispute proceeding has not complied with a requirement of these Rules or with a procedural direction issued by the Agency;

(*d*) the Agency considers it just and reasonable to do so.

Stay of decision or order

(2) The Agency may, at the request of a party, stay a decision or order of the Agency in any of the following circumstances:

(*a*) a review or re-hearing is being considered by the Agency under section 32 of the Act;

(*b*) a review is being considered by the Governor in Council under section 40 of the Act;

(*c*) an application for leave to appeal is made to the Federal Court of Appeal under section 41 of the Act;

(*d*) the Agency considers it just and reasonable to do so.

Stay — terms and conditions

(3) In staying a dispute proceeding or a decision or order, the Agency may impose any terms and conditions that it considers to be just and reasonable.

Notice of intention to dismiss application

42. (1) The Agency may, by notice to the applicant and before considering the issues raised in the application, require that the applicant justify why the Agency should not dismiss the application if the Agency is of the preliminary view that

(*a*) the Agency does not have jurisdiction over the subject matter of the application;

(*b*) the dispute proceeding would constitute an abuse of process; or

(*c*) the application contains a fundamental defect.

Response

(2) The applicant must respond to the notice within 10 business days after the date of the notice, failing which the application may be dismissed without further notice.

Opportunity to comment

(3) The Agency may provide any other party with an opportunity to comment on whether or not the application should be dismissed.

Compte rendu

(3) Un compte rendu de la conférence est préparé et est versé aux archives de l'Office.

Pouvoir décisionnel de l'Office

(4) L'Office peut rendre une décision ou donner une directive sur toute question discutée pendant la conférence sans qu'il soit nécessaire de recevoir d'autres observations des parties.

Suspension d'une instance de règlement des différents

41. (1) L'Office peut, sur requête, suspendre une instance de règlement des différends dans les cas suivants :

a) il est en attente d'une décision sur une question préliminaire soulevée à l'égard de règlement des différends;

b) il est en attente d'une décision pendante dans une autre instance ou devant un autre tribunal sur une question identique ou très similaire à une question qui est soulevée à l'égard de l'instance de règlement des différends;

c) une partie à l'instance de règlement des différends ne s'est pas conformée à une exigence des présentes règles ou à une directive de l'Office sur la procédure à suivre;

d) l'Office l'estime juste et raisonnable.

Sursis à l'exécution d'une décision ou d'un arrêté

(2) L'Office peut, sur requête, surseoir à l'exécution de sa décision ou de son arrêté dans les cas suivants :

a) l'Office considère la possibilité de mener une révision ou une nouvelle audience en vertu de l'article 32 de la Loi;

b) le gouverneur en conseil considère la possibilité de mener une révision en vertu de l'article 40 de la Loi;

c) une demande d'autorisation d'interjeter appel a été présentée devant la Cour d'appel fédérale en vertu de l'article 41 de la Loi;

d) il l'estime juste et raisonnable.

Conditions de suspension ou de sursis

(3) L'Office peut, en cas de suspension d'une instance de règlement des différends ou de sursis à l'exécution d'une décision ou d'un arrêté, fixer les conditions qu'il estime justes et raisonnables.

Avis d'intention de rejeter une demande

42. (1) L'Office peut, moyennant un avis au demandeur et avant d'examiner les questions soulevées dans la demande, exiger que le demandeur fournisse les raisons pour lesquelles l'Office ne devrait pas rejeter la demande, s'il lui apparaît à première vue que :

a) il n'a pas compétence sur la matière dont il est saisi;

b) l'instance de règlement des différends constituerait un abus de procédure;

c) la demande comporte un défaut fondamental.

Réponse

(2) Le demandeur répond à l'avis dans les dix jours ouvrables suivant la date de l'avis, faute de quoi la demande peut être rejetée sans autre préavis.

Commentaires

(3) L'Office peut donner à toute autre partie la possibilité de formuler des commentaires sur la question de savoir si la demande devrait être rejetée.

TRANSITIONAL PROVISION, REPEAL AND COMING INTO FORCE

TRANSITIONAL PROVISION

SOR/2005-35

43. The *Canadian Transportation Agency General Rules*, as they read immediately before the coming into force of these Rules, continue to apply to all proceedings before the Agency that were commenced before the coming into force of these Rules except proceedings in respect of which the application filed before that time was not complete.

REPEAL

44. The *Canadian Transportation Agency General Rules*[1] are repealed.

COMING INTO FORCE

June 4, 2014

45. These Rules come into force on June 4, 2014, but if they are published after that day, they come into force on the day on which they are published.

DISPOSITION TRANSITOIRE, ABROGATION ET ENTRÉE EN VIGUEUR

DISPOSITION TRANSITOIRE

DORS/2005-35

43. Les *Règles générales de l'Office de transports du Canada*, dans leur version antérieure à l'entrée en vigueur des présentes règles, continuent de s'appliquer à toutes les instances introduites avant l'entrée en vigueur des présentes règles, sauf aux instances dont les demandes déposées avant ce moment étaient incomplètes.

ABROGATION

44. Les *Règles générales de l'Office des transports du Canada*[1] sont abrogées.

ENTRÉE EN VIGUEUR

4 juin 2014

45. Les présentes règles entrent en vigueur le 4 juin 2014 ou, si elles sont publiées après cette date, à la date de leur publication.

SCHEDULE 1
(Subsection 13(2))

TRANSLATION — REQUIRED INFORMATION

1. The applicant's name, the respondent's name and the file number assigned by the Agency.

2. The name of the person filing the documents and, if the information has not already been provided to the Agency, the person's complete address, telephone number and, if applicable, email address and facsimile number.

3. A list of the translated documents that indicates, for each document, the language of the original document.

4. An affidavit of the translator that includes

(*a*) the translator's name and the city or town, the province or state and the country in which the document was translated;

(*b*) an attestation that the translator has translated the document in question and that the translation is, to the translator's knowledge, true, accurate and complete;

(*c*) the translator's signature and the date on which and the place at which the affidavit was signed; and

(*d*) the signature and the official seal of the person authorized to take affidavits and the date on which and the place at which the affidavit was made.

5. The name of each party to which a copy of the documents is being sent and the complete address, the email address or the facsimile number to which it is being sent.

[1] SOR/2005-35

ANNEXE 1
(Paragraphe 13(2))

TRADUCTION — RENSEIGNEMENTS REQUIS

1. Les noms du demandeur et du défendeur ainsi que et le numéro de dossier attribué par l'Office.

2. Le nom de la personne qui dépose les documents et, s'ils n'ont pas été déjà fournis, ses adresse complète et numéro de téléphone et, le cas échéant, ses numéro de télécopieur et adresse électronique.

3. La liste des documents traduits, et pour chaque document, l'indication de la langue originale du document.

4. L'affidavit du traducteur, qui comporte notamment :

a) le nom du traducteur ainsi que la ville, la province ou l'État et le pays où le document a été traduit;

b) une déclaration du traducteur portant qu'il a traduit les documents et qu'à sa connaissance, la traduction est véridique, exacte et complète;

c) la signature du traducteur ainsi que les date et lieu où l'affidavit a été signé;

d) la signature et le sceau officiel de la personne qui reçoit l'affidavit ainsi que les date et lieu où l'affidavit a été fait;

5. Le nom de chaque partie à qui une copie est envoyée ainsi que l'adresse complète, l'adresse électronique ou le numéro de télécopieur auquel la copie est envoyée.

[1] DORS/2005-35

SCHEDULE 2
(Subsection 15(2))

VERIFICATION BY AFFIDAVIT

1. The applicant's name, the respondent's name and the file number assigned by the Agency.

2. The name of the person filing the documents and, if the information has not already been provided to the Agency, the person's complete address, telephone number and, if applicable, email address and facsimile number.

3. An affidavit that includes

(*a*) the name of the person making the affidavit and the city or town, the province or state and the country in which it was made;

(*b*) a full description of the information being verified, a list of any supporting documents and a copy of each of those documents marked as appendices;

(*c*) an attestation that the person has personal knowledge of the information and that the information is, to their knowledge, true, accurate and complete or, if the person does not have personal knowledge of the information, a statement indicating the source of the information and an attestation that the information is, to their knowledge, true, accurate and complete;

(*d*) the person's signature and the date of signing; and

(*e*) the signature and the official seal of a person authorized to take affidavits and the date on which and the place at which the affidavit was made.

4. The name of each party to which a copy of the verification is being sent and the complete address, the email address or the facsimile number to which it is being sent.

ANNEXE 2
(Paragraphe 15(2))

ATTESTATION PAR AFFIDAVIT

1. Les noms du demandeur et du défendeur ainsi que le numéro de dossier attribué par l'Office.

2. Le nom de la personne qui dépose le document et, s'ils n'ont pas été déjà fournis, ses adresse complète et numéro de téléphone et, le cas échéant, ses numéro de télécopieur et adresse électronique.

3. Un affidavit, qui comporte notamment :

a) le nom de la personne qui dépose l'affidavit ainsi que la ville, la province ou l'État et le pays où l'affidavit a été fait;

b) un exposé détaillé des renseignements faisant l'objet de l'attestation et la liste des documents à l'appui ainsi qu'une copie de chacun de ces documents en annexe et marquée comme telle;

c) une attestation portant que la personne a une connaissance directe des renseignements ou, si tel n'est pas le cas, la source de ces renseignements et, dans tous les cas, qu'à sa connaissance, les renseignements sont véridiques, exacts et complets;

d) la signature de la personne qui fait l'affidavit et la date de signature;

e) la signature et le sceau officiel de la personne qui reçoit l'affidavit et les date et lieu où l'affidavit a été fait.

4. Le nom de chaque partie à qui une copie de l'attestation est envoyée ainsi que l'adresse complète, l'adresse électronique ou le numéro de télécopieur auquel la copie est envoyée.

SCHEDULE 3
(Subsection 15(2))

VERIFICATION BY WITNESSED STATEMENT

1. The applicant's name, the respondent's name and the file number assigned by the Agency.

2. The name of the person filing the documents and, if the information has not already been provided to the Agency, the person's complete address, telephone number and, if applicable, email address and facsimile number.

3. A statement before a witness that includes

(*a*) the name of the person making the statement and the city or town and the province or state and the country in which it was made;

(*b*) a full description of the information being verified, a list of any supporting documents and a copy of each of those documents marked as appendices;

(*c*) an attestation that the person has personal knowledge of the information and that the information is, to their knowledge, true, accurate and complete or, if the person does not have personal knowledge of the information, a statement indicating the source of the information and an attestation that the information is, to their knowledge, true, accurate and complete;

(*d*) the person's signature and the date of signing; and

(*e*) the name and signature of the person witnessing the statement and the date on which and place at which the statement was signed.

ANNEXE 3
(Paragraphe 15(2))

ATTESTATION PAR DÉCLARATION DEVANT TÉMOIN

1. Les noms du demandeur et du défendeur ainsi que le numéro de dossier attribué par l'Office.

2. Le nom de la personne qui dépose le document et, s'ils n'ont pas été déjà fournis, ses adresse complète et numéro de téléphone et, le cas échéant, ses numéro de télécopieur et adresse électronique.

3. Une déclaration devant témoin qui comporte notamment :

a) le nom de la personne qui fait la déclaration ainsi que la ville, la province ou l'État et le pays où la déclaration a été faite;

b) un exposé détaillé des renseignements faisant l'objet de la déclaration et la liste des documents à l'appui ainsi qu'une copie de chacun de ces documents en annexe et marquée comme telle;

c) une attestation portant que la personne a une connaissance directe des renseignements ou, si tel n'est pas le cas, la source de ces renseignements et, dans tous les cas, qu'à sa connaissance, les renseignements sont véridiques, exacts et complets;

d) la signature de la personne qui fait la déclaration et la date celle-ci;

e) le nom et signature de la personne devant qui la déclaration est faite et les date et lieu où la déclaration a été faite;

4. The name of each party to which a copy of the verification is being sent and the complete address, the email address or the facsimile number to which it is being sent.

4. Le nom de chaque partie à qui une copie de l'attestation est envoyée ainsi que l'adresse complète, l'adresse électronique ou le numéro de télécopieur auquel la copie est envoyée.

SCHEDULE 4
(Section 16)

AUTHORIZATION OF REPRESENTATIVE

1. The applicant's name, the respondent's name and the file number assigned by the Agency.

2. The name of the person giving the authorization and, if the information has not already been provided to the Agency, the person's complete address, telephone number and, if applicable, email address and facsimile number.

3. The name of the person's representative and the representative's complete address, telephone number and, if applicable, email address and facsimile number.

4. A statement, signed and dated by the representative, indicating that the representative has agreed to act on behalf of the person.

5. A statement, signed and dated by the person giving the authorization, indicating that they authorize the representative to act on their behalf for the purposes of the dispute proceeding.

6. The name of each party to which a copy of the authorization is being sent and the complete address, the email address or the facsimile number to which it is being sent.

ANNEXE 4
(Article 16)

AUTORISATION DE REPRÉSENTATION

1. Les noms du demandeur et du défendeur ainsi que le numéro de dossier attribué par l'Office.

2. Le nom de la personne qui donne l'autorisation et, s'ils n'ont pas été déjà fournis, ses adresse complète et numéro de téléphone et, le cas échéant, ses numéro de télécopieur et adresse électronique.

3. Le nom du représentant, ses adresse complète et numéro de téléphone et, le cas échéant, ses numéro de télécopieur et adresse électronique.

4. Une déclaration du représentant, signée et datée, portant qu'il accepte d'agir au nom de la personne en question.

5. Une déclaration de la personne qui donne l'autorisation, signée et datée, portant qu'elle autorise le représentant à agir en son nom dans le cadre de l'instance de règlement des différends.

6. Le nom de chaque partie à qui une copie de l'autorisation est envoyée ainsi que l'adresse complète, l'adresse électronique ou le numéro de télécopieur auquel la copie est envoyée.

SCHEDULE 5
(Subsection 18(1))

APPLICATION

1. The applicant's name, complete address, telephone number and, if applicable, email address and facsimile number.

2. If the applicant is represented by a member of the bar of a province, the representative's name, firm, complete address, telephone number and, if applicable, email address and facsimile number.

3. If the applicant is represented by a person that is not a member of the bar of a province, a statement to that effect.

4. The respondent's name and, if known, their complete address, telephone number and, if applicable, email address and facsimile number.

5. The details of the application that include

(*a*) any legislative provisions that the applicant relies on;

(*b*) a clear statement of the issues;

(*c*) a full description of the facts;

(*d*) the relief claimed; and

(*e*) the arguments in support of the application.

6. A list of any documents submitted in support of the application and a copy of each of those documents.

ANNEXE 5
(Paragraphe 18(1))

DEMANDE

1. Les nom et adresse complète ainsi que le numéro de téléphone et, le cas échéant, le numéro de télécopieur et l'adresse électronique du demandeur.

2. Si le demandeur est représenté par un membre du barreau d'une province, les noms du représentant et de son cabinet, ses adresse complète et numéro de téléphone et, le cas échéant, ses numéro de télécopieur et adresse électronique.

3. Si le représentant n'est membre du barreau d'aucune province, la mention de ce fait.

4. Le nom du défendeur et, s'il sont connus, ses adresse complète et numéro de téléphone et, le cas échéant, ses numéro de télécopieur et adresse électronique.

5. Les détails concernant la demande, notamment :

a) les dispositions législatives sur lesquelles la demande est fondée;

b) un énoncé clair des questions en litige;

c) une description complète des faits;

d) les réparations demandées;

e) les arguments à l'appui de la demande.

6. La liste de tous les documents à l'appui de la demande et une copie de chacun de ceux-ci.

SCHEDULE 6
(Section 19)

ANSWER TO APPLICATION

1. The applicant's name, the respondent's name and the file number assigned by the Agency.

2. The respondent's name, complete address, telephone number and, if applicable, email address and facsimile number.

3. If the respondent is represented by a member of the bar of a province, the representative's name, firm, complete address, telephone number and, if applicable, email address and facsimile number.

4. If the respondent is represented by a person that is not a member of the bar of a province, a statement to that effect.

5. The details of the answer that include

(*a*) a statement that sets out the elements that the respondent agrees with or disagrees with in the application;

(*b*) a full description of the facts; and

(*c*) the arguments in support of the answer.

6. A list of any documents submitted in support of the answer and a copy of each of those documents.

7. The name of each party to which a copy of the answer is being sent and the complete address, the email address or the facsimile number to which it is being sent.

ANNEXE 6
(Article 19)

RÉPONSE À UNE DEMANDE

1. Les noms du demandeur et du défendeur ainsi que le numéro de dossier attribué par l'Office.

2. Le nom du défendeur, ses adresse complète et numéro de téléphone et, le cas échéant, ses numéro de télécopieur et adresse électronique.

3. Si le défendeur est représenté par un membre du barreau d'une province, les noms du représentant et de son cabinet, ses adresse complète et numéro de téléphone et, le cas échéant, ses numéro de télécopieur et adresse électronique.

4. Si le représentant n'est membre du barreau d'aucune province, la mention de ce fait.

5. Les détails concernant la réponse, notamment :

a) les points de la demande sur lesquels le défendeur est d'accord ou en désaccord;

b) une description complète des faits;

c) les arguments à l'appui de la réponse.

6. La liste de tous les documents à l'appui de sa réponse et une copie de chacun de ceux-ci.

7. Le nom de chaque partie à qui une copie de la réponse est envoyée ainsi que l'adresse complète, l'adresse électronique ou le numéro de télécopieur auquel la copie est envoyée.

SCHEDULE 7
(Subsection 20(1))

REPLY TO ANSWER

1. The applicant's name, the respondent's name and the file number assigned by the Agency.

2. The name of the person filing the reply.

3. The details of the reply that include

(*a*) a statement that sets out the elements that the applicant agrees with or disagrees with in the answer; and

(*b*) the arguments in support of the reply.

4. A list of any documents submitted in support of the reply and a copy of each of those documents.

5. The name of each party to which a copy of the reply is being sent and the complete address, the email address or the facsimile number to which it is being sent.

ANNEXE 7
(Paragraphe 20(1))

RÉPLIQUE À LA RÉPONSE

1. Les noms du demandeur et du défendeur ainsi que le numéro de dossier attribué par l'Office.

2. Le nom de la personne qui dépose la réplique.

3. Les détails concernant la réplique, notamment :

a) les points de la réponse sur lesquels le demandeur est d'accord ou en désaccord;

b) les arguments à l'appui de la réplique;

4. La liste de tous les documents à l'appui de la réplique et une copie de chacun de ceux-ci.

5. Le nom de chaque partie à qui une copie de la réplique est envoyée ainsi que l'adresse complète, l'adresse électronique ou le numéro de télécopieur auquel la copie est envoyée.

SCHEDULE 8
(Subsection 21(1))

INTERVENTION

1. The applicant's name, the respondent's name and the file number assigned by the Agency.

2. The intervener's name, complete address, telephone number and, if applicable, email address and facsimile number.

ANNEXE 8
(Paragraphe 21(1))

INTERVENTION

1. Les noms du demandeur et du défendeur ainsi que le numéro de dossier attribué par l'Office.

2. Le nom de l'intervenant, ses adresse complète et numéro de téléphone et, le cas échéant, ses numéro de télécopieur et adresse électronique.

3. If the intervener is represented by a member of the bar of a province, the representative's name, firm, complete address, telephone number and, if applicable, email address and facsimile number.

4. If the intervener is represented by a person that is not a member of the bar of a province, a statement to that effect.

5. The details of the intervention that include

(*a*) a statement that indicates the day on which the intervener became aware of the application;

(*b*) a statement that indicates whether the intervener supports the applicant's position, the respondent's position or neither position; and

(*c*) the information that the intervener would like the Agency to consider.

6. A list of any documents submitted in support of the intervention and a copy of each of those documents.

7. The name of each party to which a copy of the intervention is being sent and the complete address, the email address or the facsimile number to which it is being sent.

3. Si l'intervenant est représenté par un membre du barreau d'une province, les noms du représentant et de son cabinet, ses adresse complète et numéro de téléphone et, le cas échéant, ses numéro de télécopieur et adresse électronique.

4. Si le représentant n'est membre du barreau d'aucune province, la mention de ce fait.

5. Les détails concernant l'intervention, notamment :

a) la date à laquelle l'intervenant a pris connaissance de la demande;

b) une mention indiquant s'il appuie la position du demandeur, celle du défendeur ou s'il n'appuie aucune des deux positions;

c) les éléments dont l'intervenant souhaite que l'Office tienne compte.

6. La liste de tous les documents à l'appui à l'intervention et une copie de chacun de ceux-ci.

7. Le nom de chaque partie à qui une copie de l'intervention est envoyée ainsi que l'adresse complète, l'adresse électronique ou le numéro de télécopieur auquel la copie est envoyée.

SCHEDULE 9
(Section 22)

RESPONSE TO INTERVENTION

1. The applicant's name, the respondent's name and the file number assigned by the Agency.

2. The name of the person filing the response.

3. The details of the response that include

(*a*) a statement that sets out the elements that the person agrees with or disagrees with in the intervention; and

(*b*) the arguments in support of the response.

4. A list of any documents submitted in support of the response and a copy of each of those documents.

5. The name of each party to which a copy of the response is being sent and the complete address, the email address or the facsimile number to which it is being sent.

ANNEXE 9
(Article 22)

RÉPONSE À L'INTERVENTION

1. Les noms du demandeur et du défendeur ainsi que le numéro de dossier attribué par l'Office.

2. Le nom de la personne qui dépose la réponse.

3. Les détails concernant la réponse, notamment :

a) les points de l'intervention sur lesquels la personne est d'accord ou en désaccord;

b) les arguments à l'appui de la réponse.

4. La liste de tous les documents à l'appui de la réponse et une copie de chacun de ceux-ci.

5. Le nom de chaque partie à qui une copie de la réponse est envoyée ainsi que l'adresse complète, l'adresse électronique ou le numéro de télécopieur auquel la copie est envoyée.

SCHEDULE 10
(Subsection 23(1))

POSITION STATEMENT

1. The applicant's name, the respondent's name and the file number assigned by the Agency.

2. The name of the person filing the position statement or, if the person is represented, the name of the person on behalf of which the position statement is being filed, and the person's complete address, telephone number and, if applicable, email address and facsimile number.

3. If the person is represented by a member of the bar of a province, the representative's name, firm, complete address, telephone number and, if applicable, email address and facsimile number.

4. If the person is represented by a person that is not a member of the bar of a province, a statement to that effect.

ANNEXE 10
(Paragraphe 23(1))

ÉNONCÉ DE POSITION

1. Les noms du demandeur et du défendeur ainsi que le numéro de dossier attribué par l'Office.

2. Le nom de la personne qui dépose l'énoncé de position ou, si la personne est représentée, le nom de la personne pour le compte de laquelle l'énoncé de position est déposé, ses adresse complète et numéro de téléphone et, le cas échéant, ses numéro de télécopieur et adresse électronique.

3. Si la personne qui dépose l'énoncé est représentée par un membre du barreau d'une province, les noms du représentant et de son cabinet, ses adresse complète et numéro de téléphone et, le cas échéant, ses numéro de télécopieur et adresse électronique.

4. Si le représentant n'est membre du barreau d'aucune province, la mention de ce fait.

5. The details of the position statement that include

(*a*) a statement that indicates whether the person supports the applicant's position, the respondent's position or neither position; and

(*b*) the information that the person would like the Agency to consider.

6. A list of any documents submitted in support of the position statement and a copy of each of those documents.

5. Les détails concernant l'énoncé de la position, notamment :

a) une mention indiquant si la personne appuie la position du demandeur, celle du défendeur ou si elle n'appuie aucune des deux positions;

b) les points dont la personne souhaite que l'Office tienne compte.

6. La liste de tous les documents à l'appui de l'énoncé de position et une copie de chacun de ceux-ci.

SCHEDULE 11
(Subsection 24(1))

WRITTEN QUESTIONS OR REQUEST FOR DOCUMENTS

1. The applicant's name, the respondent's name and the file number assigned by the Agency.

2. The name of the person filing the written questions or the request for documents and, if the information has not already been provided to the Agency, the person's complete address, telephone number and, if applicable, email address and facsimile number.

3. The name of the party to which the written questions or the request for documents is directed.

4. A list of the written questions or of the documents requested, as the case may be, and an explanation of their relevance to the dispute proceeding.

5. A list of any documents submitted in support of the written questions or the request for documents and a copy of each of those documents.

6. The name of each party to which a copy of the written questions or the request for documents is being sent and the complete address, the email address or the facsimile number to which it is being sent.

ANNEXE 11
(Paragraphe 24(1))

QUESTIONS ÉCRITES OU DEMANDE DE DOCUMENTS

1. Les noms du demandeur et du défendeur ainsi que le numéro de dossier attribué par l'Office

2. Le nom de la personne qui dépose les questions écrites ou la demande de documents et, s'ils n'ont pas été déjà fournis, ses adresse complète et numéro de téléphone et, le cas échéant, ses numéro de télécopieur et adresse électronique.

3. Le nom de la personne à qui les questions écrites ou la demande de documents sont adressées.

4. La liste des questions écrites ou de documents demandés, selon le cas, et leur pertinence au regard de l'instance de règlement des différends.

5. La liste de tous les documents à l'appui des questions écrites ou de la demande de documents et une copie de chacun de ceux-ci.

6. Le nom de chaque partie à qui une copie des questions écrites ou de la demande de documents est envoyée ainsi que l'adresse complète, l'adresse électronique ou le numéro de télécopieur auquel la copie est envoyée.

SCHEDULE 12
(Subsection 24(2))

RESPONSE TO WRITTEN QUESTIONS OR REQUEST FOR DOCUMENTS

1. The applicant's name, the respondent's name and the file number assigned by the Agency.

2. The name of the person filing the response to the written questions or the request for documents.

3. A list of the documents produced.

4. A list of any documents submitted in support of the response and a copy of each of those documents.

5. The name of each party to which a copy of the response is being sent and the complete address, the email address or the facsimile number to which it is being sent.

ANNEXE 12
(Paragraphe 24(2))

RÉPONSES AUX QUESTIONS ÉCRITES OU À LA DEMANDE DE DOCUMENTS

1. Les noms du demandeur et du défendeur ainsi que le numéro de dossier attribué par l'Office.

2. Le nom de la personne qui dépose la réponse aux questions écrites ou à la demande de documents.

3. La liste des documents produits.

4. La liste de tous les documents à l'appui de la réponse et une copie de chacun de ceux-ci.

5. Le nom de chaque partie à qui une copie la réponse est envoyée ainsi que l'adresse complète, l'adresse électronique ou le numéro de télécopieur auquel la copie est envoyée.

SCHEDULE 13
(Subsections 27(1), 28(1), 30(1), 32(1), 33(1), 34(1), 35(1) and 36(1))

REQUEST

1. The applicant's name, the respondent's name and the file number assigned by the Agency.

2. The name of the person filing the request and, if the information has not already been provided to the Agency, the person's complete address, telephone number and, if applicable, email address and facsimile number.

3. The details of the request that include

(*a*) the relief claimed;

(*b*) a summary of the facts; and

(*c*) the arguments in support of the request.

4. A list of any documents submitted in support of the request and a copy of each of those documents.

5. The name of each party to which a copy of the request is being sent and the complete address, the email address or the facsimile number to which it is being sent.

ANNEXE 13
(Paragraphes 27(1), 28(1), 30(1), 32(1), 33(1), 34(1), 35(1) et 36(1))

REQUÊTE

1. Les noms du demandeur et du défendeur ainsi que le numéro de dossier attribué par l'Office.

2. Le nom de la personne qui dépose la requête et, s'ils n'ont pas été déjà fournis, ses adresse complète et numéro de téléphone et, le cas échéant, ses numéro de télécopieur et adresse électronique.

3. Les détails concernant la requête, notamment :

a) la réparation demandée;

b) le résumé des faits;

c) les arguments à l'appui de la requête;

4. La liste de tous les documents à l'appui de la requête et une copie de chacun de ceux-ci.

5. Le nom de chaque partie à qui une copie de la requête est envoyée ainsi que l'adresse complète, l'adresse électronique ou le numéro de télécopieur auquel la copie est envoyée.

SCHEDULE 14
(Subsections 27(2), 28(4), 30(2) and 31(4) and paragraphs 33(2)(a) and 34(2)(a))

RESPONSE TO REQUEST

1. The applicant's name, the respondent's name and the file number assigned by the Agency.

2. The name of the person filing the response.

3. An identification of the request to which the person is responding, including the name of the person that filed the request.

4. The details of the response that include

(*a*) a statement that sets out the elements that the person agrees with or disagrees with in the request; and

(*b*) the arguments in support of the response.

5. A list of any documents submitted in support of the response and a copy of each of those documents.

6. The name of each party to which a copy of the response is being sent and the complete address, the email address or the facsimile number to which it is being sent.

ANNEXE 14
(Paragraphes 27(2), 28(4), 30(2), 31(4), alinéas 33(2)a) et 34(2)a))

RÉPONSE À UNE REQUÊTE

1. Les noms du demandeur et du défendeur ainsi que le numéro de dossier attribué par l'Office.

2. Le nom de la personne qui dépose la réponse.

3. L'indication de la requête à laquelle la personne répond ainsi que le nom de la personne qui a déposé la requête.

4. Les détails concernant la réponse, notamment :

a) les points de la requête sur lesquels la personne est d'accord ou en désaccord;

b) les arguments à l'appui de la réponse.

5. La liste de tous les documents à l'appui de la réponse et une copie de chacun de ceux-ci.

6. Le nom de chaque partie à qui une copie de la réponse est envoyée ainsi que l'adresse complète, l'adresse électronique ou le numéro de télécopieur auquel la copie est envoyée.

SCHEDULE 15
(Subsections 27(3), 28(5), 30(3), 33(3) and 34(3))

REPLY TO RESPONSE TO REQUEST

1. The applicant's name, the respondent's name and the file number assigned by the Agency.

2. The name of the person filing the reply.

3. An identification of the response to which the person is replying, including the name of the person that filed the response.

ANNEXE 15
(Paragraphes 27(3), 28(5), 30(3),33(3)et 34(3))

RÉPLIQUE À LA RÉPONSE À UNE REQUÊTE

1. Les noms du demandeur et du défendeur ainsi que le numéro de dossier attribué par l'Office.

2. Le nom de la personne qui dépose la réplique.

3. L'indication de la réponse à laquelle la personne réplique ainsi que le nom de la personne qui a déposé la réponse.

4. The details of the reply that include

(*a*) a statement that sets out the elements that the person agrees with or disagrees with in the response; and

(*b*) the arguments in support of the reply.

5. A list of any documents submitted in support of the reply and a copy of each of those documents.

6. The name of each party to which a copy of the reply is being sent and the complete address, the email address or the facsimile number to which it is being sent.

4. Les détails concernant la réplique, notamment :

a) les points de la réponse à la requête sur lesquels la personne est d'accord ou en désaccord;

b) les arguments à l'appui de la réplique.

5. La liste de tous les documents à l'appui de la réplique et une copie de chacun de ceux-ci.

6. Le nom de chaque partie à qui une copie de la réplique est envoyée ainsi que l'adresse complète, l'adresse électronique ou le numéro de télécopieur auquel la copie est envoyée.

SCHEDULE 16
(Subsection 29(1))

REQUEST TO INTERVENE

1. The applicant's name, the respondent's name and the file number assigned by the Agency.

2. The name of the person that wishes to intervene in the dispute proceeding, their complete address, telephone number and, if applicable, email address and facsimile number.

3. If the person is represented by a member of the bar of a province, the representative's name, firm, complete address, telephone number and, if applicable, email address and facsimile number.

4. If the person is represented by a person that is not a member of the bar of a province, a statement to that effect.

5. The details of the request that include

(*a*) a demonstration of the person's substantial and direct interest in the dispute proceeding;

(*b*) a statement specifying the date on which the person became aware of the application;

(*c*) a statement that indicates whether the person supports the applicant's position, the respondent's position or neither position; and

(*d*) a statement of the participation rights that the person wishes to be granted in the dispute proceeding.

6. A list of any documents submitted in support of the request and a copy of each of those documents.

7. The name of each party to which a copy of the request is being sent and the complete address, the email address or the facsimile number to which it is being sent.

ANNEXE 16
(Paragraphe 29(1))

REQUÊTE D'INTERVENTION

1. Les noms du demandeur et du défendeur ainsi que le numéro de dossier attribué par l'Office.

2. Le nom de la personne qui souhaite intervenir dans l'instance de règlement des différends, ses adresse complète et numéro de téléphone et, le cas échéant, ses numéro de télécopieur et adresse électronique.

3. Si la personne est représentée par un membre du barreau d'une province, les noms du représentant et de son cabinet, ses adresse complète et numéro de téléphone et, le cas échéant, ses numéro de télécopieur et adresse électronique.

4. Si le représentant n'est membre du barreau d'aucune province, la mention de ce fait.

5. Les détails concernant la requête, notamment :

a) la démonstration de l'intérêt direct et substantiel de la personne dans l'instance de règlement des différends;

b) la date à laquelle la personne a pris connaissance de la demande;

c) une mention indiquant si la personne appuie la position du demandeur, celle du défendeur ou si elle n'appuie aucune des deux positions;

d) les droits de participation que la personne souhaite avoir dans l'instance de règlement des différends.

6. La liste de tous les documents à l'appui de la requête et une copie de chacun de ceux-ci.

7. Le nom de chaque partie à qui une copie de la requête est envoyée ainsi que l'adresse complète, l'adresse électronique ou le numéro de télécopieur auquel la copie est envoyée.

SCHEDULE 17
(Subsection 31(1))

REQUEST FOR CONFIDENTIALITY

1. The applicant's name, the respondent's name and the file number assigned by the Agency.

2. The name of the person filing the request and, if the information has not already been provided to the Agency, the person's complete address, telephone number and, if applicable, email address and facsimile number.

ANNEXE 17
(Paragraphe 31(1))

REQUÊTE DE CONFIDENTIALITÉ

1. Les noms du demandeur et du défendeur ainsi que le numéro de dossier attribué par l'Office.

2. Le nom de la personne qui dépose la requête et, s'ils n'ont pas été déjà fournis, ses adresse complète et numéro de téléphone et, le cas échéant, ses numéro de télécopieur et adresse électronique.

3. The details of the request that include

(*a*) an identification of the document or the portion of the document that contains confidential information;

(*b*) a list of the parties, if any, with which the person would be willing to share the document; and

(*c*) the arguments in support of the request, including an explanation of the relevance of the document to the dispute proceeding and a description of the specific direct harm that could result from the disclosure of the confidential information.

4. A list of any documents submitted in support of the request and a copy of each of those documents.

5. The name of each party to which a copy of the request is being sent and the complete address, the email address or the facsimile number to which it is being sent.

SCHEDULE 18
(Subsection 31(3))

REQUEST FOR DISCLOSURE

1. The applicant's name, the respondent's name and the file number assigned by the Agency.

2. The name of the person filing the request.

3. The details of the request that include

(*a*) an identification of the documents for which the party is requesting disclosure;

(*b*) a list of the individuals who need access to the documents; and

(*c*) an explanation as to the relevance of the documents for which disclosure is being requested and the public interest in its disclosure.

4. A list of any documents submitted in support of the request and a copy of each of those documents.

5. The name of each party to which a copy of the request is being sent and the complete address, the email address or the facsimile number to which it is being sent.

REGULATORY IMPACT ANALYSIS STATEMENT

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

Issues

The Canadian Transportation Agency (the Agency) has used the *Canadian Transportation Agency General Rules*, SOR/2005-35 (the General Rules) to establish procedures for both dispute adjudications and economic determinations. However, this has resulted in rules of procedure that are overly broad, difficult for parties without legal representation to understand and, at times, inefficient. While the Agency has always had full discretion under the General Rules to adopt different procedures on a case-by-case basis and is required to use these powers regularly to craft customized procedures that are efficient and effective in individual cases, this ad hoc approach has not provided the predictability and clarity that the Agency's clients and stakeholders expect.

3. Les détails concernant la requête, notamment :

a) l'indication du document ou de la partie du document contenant des renseignements confidentiels;

b) la liste des parties, le cas échéant, avec qui la personne serait disposée à partager le document;

c) les arguments à l'appui de sa requête, notamment la pertinence du document et la description du préjudice direct précis qui pourrait résulter de la communication des renseignements confidentiels.

4. La liste des documents à l'appui de la requête et une copie de chacun de ceux-ci.

5. Le nom de chaque partie à qui une copie de la requête est envoyée ainsi que l'adresse complète, l'adresse électronique ou le numéro de télécopieur auquel la copie est envoyée.

ANNEXE 18
(Paragraphe 31(3))

REQUÊTE DE COMMUNICATION

1. Les noms du demandeur et du défendeur ainsi que le numéro de dossier attribué par l'Office.

2. Le nom de la personne qui dépose la requête.

3. Les détails concernant la requête, notamment :

a) la liste des documents dont la partie demande la communication;

b) la liste des personnes physiques qui ont besoin d'avoir accès aux documents;

c) la pertinence des documents demandés et l'intérêt public dans leur communication;

4. La liste de tous les documents à l'appui de la requête et une copie de chacun de ces documents.

5. Le nom de chaque partie à qui une copie de la requête est envoyée ainsi que l'adresse complète, l'adresse électronique ou le numéro de télécopieur auquel la copie est envoyée.

RÉSUMÉ DE L'ÉTUDE D'IMPACT DE LA RÉGLEMENTATION

(*Ce résumé ne fait pas partie des Règles.*)

Enjeux

L'Office des transports du Canada (l'Office) a utilisé les *Règles générales de l'Office des transports du Canada*, DORS/2005-35 (règles générales) pour établir ses procédures pour le règlement des différends et les décisions d'ordre économique. Cependant, cela a donné lieu à des règles de procédure qui ont une portée trop large, qui sont difficiles à comprendre pour les parties non représentées, et qui sont parfois inefficaces. L'Office a toujours eu le pouvoir, en vertu des règles générales, d'adopter différentes règles de procédure au cas par cas et ces pouvoirs sont utilisés régulièrement pour élaborer des règles de procédure personnalisées qui sont efficientes et efficaces pour des cas précis, mais cette approche ponctuelle n'a pas permis d'obtenir la prévisibilité et la clarté désirées par les clients et les intervenants de l'Office.

Background

The Agency is an independent, quasi-judicial tribunal. It makes decisions and determinations on a wide range of matters involving modes of transportation under the authority of Parliament, as set out in the *Canada Transportation Act*, S.C. 1996, c. 10 (CTA). The Agency's vision is a competitive and accessible national transportation system that fulfills the needs of Canadians and the Canadian economy.

The Agency's mission is to be a respected and trusted tribunal and economic regulator through efficient dispute resolution and essential economic regulation.

The Agency's values include integrity, fairness, transparency and quality of service. The Agency is committed to expand client-oriented resources and develop new ones to facilitate access to dispute resolution services.

Objectives

The Agency has the power under section 17 of the CTA to establish its own rules of procedure and the courts have been deferential to the Agency's procedural decisions, continually affirming that the Agency is the master of its own procedures.

Accordingly, and as part of its effort to ensure that its services are timely, effective, responsive, fair and transparent, the Agency is implementing new Rules entitled the *Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)* [the Rules], the objectives of which are as follows:

- To modernize and streamline the Agency's procedures for dispute adjudication;
- To enhance the clarity, transparency and predictability of the formal adjudication process in dispute proceedings;
- To improve the efficiency of case processing; and
- To better inform and assist persons who do not have legal representation or commercial parties that are first-time users of the Agency's processes.

Description

The Agency is repealing the General Rules and putting in place the new Rules. The Rules introduce the following main changes:

1. The use of schedules that incorporate specific information requirements to improve the completeness of filings with the Agency and assist applicants in providing the information required;

2. A standard pleadings process of 20 business days and an expedited pleadings process of 8 business days for the filing of any answers and replies after the notice of acceptance of a complete application or 3 business days for the filing of any responses and replies in relation to a request;

3. An emphasis on the use of electronic means of filing documents with the Agency;

4. Limiting the application of the Rules to dispute proceedings, except for sections 3 and 4 concerning the Agency's quorum and the principle of proportionality, which apply to all proceedings before the Agency; and

5. The introduction of a full range of provisions addressing common requests made to the Agency in the course of dispute proceedings to simplify the process and raise the awareness of

Contexte

L'Office est un tribunal quasi judiciaire indépendant. Il prend des décisions sur un éventail de questions au sujet des modes de transport relevant du Parlement, comme le prévoit la *Loi sur les transports au Canada*, L.C. (1996), ch. 10 (LTC). La vision de l'Office est un réseau de transport national concurrentiel et accessible qui répond aux besoins des Canadiens et de l'économie canadienne.

La mission de l'Office est d'être un tribunal et un organisme de réglementation économique respecté et digne de confiance grâce au règlement des différends et à une réglementation économique essentielle.

Les valeurs de l'Office sont l'intégrité, l'équité, la transparence et la qualité du service. L'Office est déterminé à renforcer ses ressources axées sur le client et à en instaurer de nouvelles dans le but de faciliter l'accès aux services de règlement des différends.

Objectifs

L'Office a le pouvoir, en vertu l'article 17 de la LTC, d'établir ses propres règles de procédure et les tribunaux ont généralement respecté les décisions en matière de procédure de l'Office et ont affirmé que l'Office peut établir ses propres procédures.

Par conséquent, dans le cadre de ses efforts visant à assurer que ses services sont efficaces, adaptés aux besoins, équitables, transparents et opportuns, l'Office met en place les nouvelles règles, intitulées *Règles de l'Office des transports du Canada (Instances de règlement des différends et certaines règles applicables à toutes les instances)* [les règles], dont les objectifs sont les suivants :

- moderniser et simplifier les procédures de l'Office relatives au règlement des différends;
- améliorer la clarté, la transparence et la prévisibilité du processus décisionnel formel dans les instances de règlement des différends;
- améliorer l'efficience du traitement des cas;
- mieux informer et aider les personnes qui ne sont pas représentées ou les parties commerciales qui ont recours pour la première fois aux processus de l'Office.

Description

L'Office abroge les règles générales et met en place les nouvelles règles. Les règles contiennent les changements suivants :

1. le recours aux annexes qui contiennent des exigences particulières en matière de renseignements pour améliorer l'intégralité des documents déposés auprès de l'Office et aider les demandeurs à fournir les renseignements requis;

2. un processus standard d'actes de procédure de 20 jours ouvrables et un processus d'actes de procédure accéléré de 8 jours ouvrables après l'avis d'acceptation d'une demande complète pour le dépôt de toute réponse ou réplique, ou de 3 jours ouvrables pour le dépôt de toute réponse ou réplique liée à une requête;

3. l'accent sur le recours aux moyens électroniques pour déposer des documents auprès de l'Office;

4. le fait de limiter l'application des règles aux seules instances de règlement des différends, sauf pour les articles 3 et 4 concernant le quorum de l'Office et le principe de la proportionnalité, qui s'appliquent à toutes les instances devant l'Office;

5. l'introduction d'une gamme complète de dispositions sur les requêtes communes présentées à l'Office dans le cadre

persons interacting with the Agency of common matters to be addressed.

It is noted that during a transitional period after the coming into force of the Rules, the General Rules will continue to apply to all proceedings before the Agency that are commenced before the coming into force of these Rules unless the application filed before that time was not complete.

"One-for-One" Rule

The "One-for-One" Rule does not apply to these Rules, as there is no change in administrative costs to business.

Small business lens

The small business lens does not apply as the Rules would not increase administrative or compliance burden on small business.

Consultation

The Agency launched, on November 13, 2012, its consultation on the revisions to the General Rules. Interested parties were given until December 21, 2012, to submit their comments. The Agency received eight written submissions from industry and consumers. In addition, six meetings were held with targeted transportation service provider and related stakeholders.

The following section addresses the main substantive comments received during the consultation process and explains how these comments were taken into account.

Comments resulting in substantial changes to the Rules

Use of forms

At the time of consultation, the Agency proposed the introduction of 28 mandatory forms. One form was provided as an example.

Several stakeholders commented on the Agency's proposed use of mandatory forms. Stakeholders indicated that the introduction of 28 mandatory forms might complicate matters and may represent an unnecessary hurdle for unrepresented parties. A comment was also made that while forms might be useful in handling certain applications, such as those concerning lost luggage, they may be less effective in handling rail complaints. Concerns were also raised that forms may leave little room for describing facts. Finally, it was suggested that form numbering should correspond to rule numbers for ease of reference.

Following receipt of these comments, the Agency created online forms whose use is now voluntary and whose numbering matches those of the schedules. The Agency has also reduced the number of forms accompanying the Rules to 18.

In order to ensure that the forms leave sufficient room for describing the facts, issues, arguments and relief, the online forms have no space limitations. In addition, the Agency has developed specific forms that will be available to be used in particular disputes, including disability-related applications and noise and vibration applications. Although the use of forms will not be mandatory, it is believed that with these changes, the forms will be an

d'instances de règlement des différends pour simplifier le processus et sensibiliser les personnes qui interagissent avec l'Office aux points communs à traiter.

Il est à noter que durant une période transitoire suivant l'entrée en vigueur des présentes règles, les règles générales continueront de s'appliquer à toutes les instances introduites devant l'Office avant l'entrée en vigueur des présentes règles sauf si les demandes déposées avant ce moment étaient incomplètes.

Règle du « un pour un »

La règle du « un pour un » ne s'applique pas aux règles, car il n'y a aucun changement des coûts administratifs imposés aux entreprises.

Lentille des petites entreprises

La lentille des petites entreprises ne s'applique pas étant donné que les règles n'augmenteraient pas le fardeau administratif et réglementaire pour les petites entreprises.

Consultation

L'Office a lancé, le 13 novembre 2012, sa consultation sur les révisions des règles générales. Il a donné aux parties intéressées jusqu'au 21 décembre 2012 pour soumettre leurs commentaires. L'Office a reçu huit présentations écrites de l'industrie et des consommateurs. De plus, six réunions ont été tenues avec des fournisseurs de services de transport ciblés et des intervenants connexes.

La section qui suit traite des principaux commentaires de fond reçus pendant le processus de consultation et la façon dont ces commentaires ont été pris en compte.

Commentaires qui ont entraîné d'importants changements aux règles

Le recours aux formulaires

Au moment de la consultation, l'Office proposait l'introduction de 28 formulaires obligatoires. Un formulaire était fourni à titre d'exemple.

Plusieurs intervenants ont fourni des commentaires sur le recours aux formulaires proposés par l'Office. Les intervenants ont indiqué que l'introduction de 28 formulaires obligatoires pourrait compliquer les choses et représenter un obstacle indu pour les parties non représentées. Un commentaire soulignait que même si les formulaires sont utiles dans le traitement de certaines demandes, comme celles portant sur les bagages perdus, ils pourraient être moins efficaces dans le traitement des différends ferroviaires. Des préoccupations ont également été soulevées sur le peu d'espace prévu sur les formulaires pour décrire les faits. Enfin, il a été indiqué que la numérotation des formulaires devrait correspondre aux règles pour un renvoi facile.

Après avoir reçu ces commentaires, l'Office a créé des formulaires en ligne dont l'utilisation est volontaire et dont la numérotation correspond à celle des annexes. L'Office a également réduit à 18 le nombre de formulaires qui accompagnent les règles.

Pour veiller à ce que les formulaires fournissent suffisamment d'espace pour décrire les faits, les questions, les arguments et les réparations, les formulaires en ligne n'ont aucune limite d'espace. En outre, l'Office a créé des formulaires précis conçus pour des différends particuliers, y compris les demandes liées à une déficience et les demandes liées au bruit et aux vibrations. Même si le recours aux formulaires n'est pas obligatoire, on croit qu'avec ces

important client-focused resource for persons in their interactions with the Agency and will improve the efficiency of case processing by assisting people to ensure that the Agency receives all of the information that it requires to make its decisions.

In order to address the Agency's ongoing concerns about the incompleteness of the information that it receives in dispute proceedings and the time that it takes to address this issue, the Agency has developed 18 schedules to the Rules, which outline the required content of different documents that may be filed with the Agency. While persons are not required to use the forms, the schedules set out specific information requirements to improve the completeness of filings with the Agency. The Agency has numbered the schedules and provided references in each schedule to the applicable sections of the Rules. The Agency will release resource tools to assist people in using the Rules which will include links to the related forms.

Facilitation and mediation

The proposed Rules contained a section stating that, at any time in a dispute proceeding, the Agency may request that the parties participate in facilitation or mediation to help settle a dispute or any issue in a dispute where this would lead to a more effective and efficient resolution of any of the issues in dispute.

Comments from stakeholders on this provision were mixed. While some welcomed the Agency's approach of requesting mediation, others expressed a concern that the Agency's role as an impartial adjudicator should be kept separate from its new role as a promoter and facilitator of alternative dispute resolution. Other stakeholders expressed concern that the section might purport to confer upon the Agency a power to compel parties to participate in mediation. One stakeholder indicated that a section allowing the Agency to compel parties to participate in mediation is *ultra vires* the Agency's powers.

Although the intent of the section was not to compel parties to participate in facilitation or mediation as this remains a voluntary process, the Agency has removed these references from the Rules given that the focus of the Rules is on the adjudication of disputes. However, the Agency will continue to promote alternative dispute resolution mechanisms as successful and efficient client-focused processes, and has thus retained the reference to encouraging the settlement of disputes through both adjudication and alternative dispute resolution mechanisms.

Guidelines

The Agency proposed a section stating that it may establish guidelines for the processing of specific proceedings. This section met with mixed reaction from stakeholders. While one stakeholder favoured the use of guidelines to streamline the Rules, others expressed concern that the Agency is attempting to give guidelines a binding effect or to circumvent rule- and regulation-making requirements.

The Agency has removed this section from the Rules.

Reopening a decision or order of the Agency

The proposed Rules contained a section that addressed situations in which the Agency might reopen a decision or order.

changements, les formulaires constitueront pour les gens une importante ressource axée sur les clients dans leurs interactions avec l'Office et qu'ils amélioreront l'efficience du traitement des cas en aidant les gens à s'assurer que l'Office reçoit tous les renseignements qu'il requiert pour prendre ses décisions.

Pour régler la préoccupation constante quant aux renseignements incomplets qu'il reçoit dans les instances de règlement des différends et au temps requis pour les obtenir, l'Office a créé 18 annexes aux règles qui décrivent le contenu requis de différents documents qui peuvent être déposés auprès de l'Office. Même si l'utilisation des formulaires n'est pas obligatoire, les annexes énoncent des exigences précises en matière de renseignements pour aider les parties à déposer tous les documents nécessaires auprès de l'Office. L'Office a numéroté les annexes et fourni dans chaque annexe des références aux articles des règles qui s'appliquent. Il publiera des outils d'information pour aider les gens à utiliser les règles, qui contiendront des liens vers les formulaires connexes.

Facilitation et médiation

Les règles proposées contenaient une section qui prévoyait qu'à tout moment au cours d'une instance de règlement des différends, l'Office pourrait demander aux parties de participer à la facilitation ou à la médiation pour aider au règlement d'un différend ou pour régler une question du règlement d'un différend, si cela assurait un règlement plus efficace et plus efficient des questions en litige.

Les commentaires des intervenants sur cette disposition étaient partagés. Même si certains étaient favorables à la démarche de l'Office visant à demander la médiation, d'autres ont soulevé une préoccupation selon laquelle le rôle d'arbitre impartial de l'Office devrait être séparé de son nouveau rôle de promoteur et d'animateur des modes alternatifs de règlement des différends. D'autres intervenants ont exprimé une préoccupation selon laquelle cet article pourrait avoir pour objet de donner à l'Office le pouvoir de forcer les parties à participer à la médiation. Un intervenant a indiqué qu'un article permettant à l'Office de forcer les parties à participer à une médiation outrepasse les pouvoirs de l'Office.

Même si l'objet de cet article n'était pas de forcer les parties à participer à la facilitation ou à la médiation puisque cela demeure un processus volontaire, l'Office a retiré ces références des règles, puisque leur but premier est le règlement des différends. Toutefois, l'Office continuera de promouvoir les mécanismes alternatifs de règlement des différends comme des processus axés sur les clients efficients et valables, et il a donc retenu la référence qui encourage le règlement des différends tant par le processus décisionnel formel qu'au moyen de modes alternatifs de règlement des différends.

Lignes directrices

L'Office a proposé un article qui prévoit qu'il peut établir des lignes directrices pour le traitement d'instances particulières. Cet article a suscité des réactions partagées des intervenants. Bien qu'un intervenant favorisait le recours aux lignes directrices pour simplifier les règles, d'autres étaient préoccupés de ce que l'Office tente de donner aux lignes directrices un effet obligatoire ou de contourner les exigences en matière de création de règles ou de règlement.

L'Office a retiré cet article des règles.

Réouverture d'une décision ou d'un arrêté de l'Office

Les règles proposées contenaient un article qui traitait des cas où l'Office pourrait rouvrir une décision ou un arrêté. Plusieurs

Several stakeholders provided comments on this section, and questioned the content and procedures set out in the proposed provision.

The Agency has removed this section from the Rules.

Applications

In addition to commenting that it is unclear when the time limit for providing an answer to an application would begin to run, stakeholders indicated that respondent contact information is not always available and parties should not be required to copy the respondent on an originating document.

Parties will be notified when the application has been accepted as complete and the date on which the pleadings process begins. This notification will also provide the respondents with clear information on when their answers are due.

The Rules will not require an applicant to send a copy of their application to the respondent. Applications should be filed with the Agency and respondents will receive a copy along with the notice that the application has been accepted as complete.

Request for expedited pleadings process

Some stakeholders commented that the Agency should clarify the circumstances under which such a process would be available, or that it should only be available where there is a demonstrated necessity for such a process. One stakeholder asked whether the expedited process would entail an expedited decision-making process. Another stakeholder commented that a time limit of one day to respond to a request for an expedited process has the potential of abuse against unrepresented parties.

The Rules specify the documents to which an expedited process may apply, namely to an answer, a reply or any request filed under the Rules. The Agency has indicated when requests for an expedited process must be filed.

Following the consultation, the Rules now indicate that the party filing a request for an expedited process must demonstrate that adherence to the time limits set out in the Rules would cause them financial or other prejudice. Finally, the Agency has provided for a right of response and reply in relation to requests for an expedited process.

This provision is consistent with the most efficient processing of disputes and recognizes that certain matters demand shorter pleadings timeframes.

Removal of oral hearings provisions

Three stakeholders commented on the removal of Part III of the General Rules relating to oral hearings. They commented that the Agency should maintain a set of rules applicable to oral hearings as the Agency may benefit from the option of an oral hearings process.

While Part III of the General Rules set out procedures applicable to oral hearings, the provisions did not adequately address the procedural steps involved in an oral hearing process, and therefore, these provisions were not carried over in the Rules. However, the Rules will apply to disputes that proceed by way of oral hearing. In addition, the Agency may establish guidelines in relation to oral hearings and may further establish the procedures and time limits that will apply to each proceeding to be heard by way of oral hearing. This case-by-case approach is consistent with past practice in disputes before the Agency that have proceeded by way of oral hearing.

intervenants ont fourni des commentaires sur cet article et remis en question le contenu et les procédures établis dans la disposition proposée.

L'Office a retiré cet article des règles.

Demandes

Outre le commentaire voulant qu'il n'est pas clair à quel moment le délai pour fournir une réponse à une demande commence, les intervenants ont indiqué que les coordonnées du défenseur ne sont pas toujours disponibles et que les parties ne devraient pas être tenues de lui soumettre une copie de l'acte introductif.

Les parties seront avisées que la demande a été acceptée comme complète et de la date du début des actes de procédure. Cet avis fournira également aux défenseurs une indication claire du moment où leur réponse doit être fournie.

Les règles n'exigeront pas qu'un demandeur soumette une copie de sa demande au défenseur. Les demandes doivent être déposées auprès de l'Office et les défenseurs en recevront une copie avec l'avis que la demande a été acceptée comme complète.

Requête de processus accéléré

Certains intervenants ont indiqué que l'Office devrait préciser les circonstances dans lesquelles on peut avoir recours au processus accéléré ou que ce processus ne devrait être offert que lorsqu'il est démontré qu'il est nécessaire. Un intervenant a demandé si le processus accéléré supposerait un processus de prise de décision accéléré. Un autre a indiqué qu'un délai d'une journée pour répondre à une requête de processus accéléré pourrait être abusif pour les parties non représentées.

Les règles précisent les documents auxquels le processus accéléré peut s'appliquer, soit une réponse, une réplique ou toute requête présentée en vertu des règles. L'Office a indiqué quand une requête de processus accéléré doit être déposée.

À la suite de la consultation, les règles indiquent maintenant qu'une partie qui dépose une requête de processus accéléré doit démontrer que le respect des délais établis dans les règles leur causerait un préjudice financier ou autre. Enfin, l'Office a prévu un droit de réponse et de réplique pour les requêtes de processus accéléré.

Cette disposition est conforme au traitement le plus efficace des différends et reconnaît que certaines affaires exigent des actes de procédure accélérés.

Retrait des dispositions sur les audiences publiques

Trois intervenants ont fourni des commentaires sur le retrait de la partie III des règles générales liée aux audiences. Ils ont indiqué que l'Office devrait maintenir un ensemble de règles applicables aux audiences puisqu'il pourrait se prévaloir de l'option d'un processus d'audience publique.

Même si la partie III des règles générales établissait les procédures applicables aux audiences publiques, ces dispositions ne traitaient pas adéquatement des étapes procédurales d'une audience publique et, par conséquent, elles n'ont pas été conservées dans les règles. Toutefois, les règles s'appliqueront aux différends réglés au moyen d'une audience publique. En outre, l'Office peut établir des lignes directrices pour les audiences publiques et ensuite établir les procédures et les délais qui s'appliqueront à chaque instance qui sera entendue en audience. Cette démarche au cas par cas est cohérente avec la pratique passée en ce qui a trait aux instances de différends devant l'Office qui ont été réglées au moyen d'une audience publique.

Comments not resulting in substantial changes to the Rules

Time limits

Seven stakeholders objected to the shortened time limits for filing pleadings. Concerns were that the shorter time limits sacrifice fairness and quality of pleadings and decisions in favour of expediency; that the Agency will receive more requests for extensions of time resulting in higher Agency workload; that the time limits are insufficient for complex cases; and that the time limits create a substantial barrier for unrepresented parties.

Stakeholders suggested that, if the shortened time limits are adopted, the Agency should improve communication as to when proceedings commence, and that time limits should start to run from the time that the Agency has provided notice of the completeness of an application and, in the case of the time limit for filing a request to intervene, from the time that the Agency posted the application on its Web site. A stakeholder also suggested that extensions by consent of the parties should be considered.

The Agency has adopted a change in the time limits for filing documents in a dispute proceeding — 15 business days rather than 30 calendar days to file an answer and 5 business days rather than 10 calendar days to file a reply. The time limits for filing pleadings in relation to requests have also been shortened.

The Agency considers that the time limits set out in the Rules should be adequate in most low and medium complexity disputes given instantaneous communication. In August 2012, industry and consumer stakeholders were informed of a change in Agency practice whereby filing time limits would be shortened to 21 and 7 calendar days for answers and replies respectively. This practice has been in effect for nearly two years without any reported problems. The time limits for filing an answer and a reply to applications provided for in the Rules are roughly equivalent to the current time limits being applied by the Agency.

Persons filing documents always have the opportunity to request an extension of time under section 30 where the complexity of the file or some other justification makes the time limits inadequate.

In the past, there has been some confusion as to whether an application was complete, and therefore should be answered by the respondent. The existing section simply states that an answer is to be filed "within 30 days after receiving it." This confusion has now been addressed under the Rules in that an answer is to be filed within 15 business days after the date of the notice indicating that the application has been accepted.

In order to further assist parties, the Agency has defined the term "business day" in the Rules and is providing an annotation to explain how time will be calculated and which days are holidays for the Agency. Finally, and in keeping with current practice, wherever possible, the Agency will identify deadlines by the specific date on which the deadline falls, thus eliminating confusion around the calculation of deadlines.

Requests to intervene

Several stakeholders were concerned that the Agency is introducing a new test of "substantial and direct interest," and that potential interveners may have difficulty meeting this test. They argue

Commentaires qui n'ont pas entraîné d'importants changements aux règles

Délais

Sept intervenants se sont opposés à l'abrégement des délais pour déposer des actes de procédure. Des préoccupations ont été soulevées selon lesquelles les délais plus courts sacrifieraient l'équité et la qualité des actes de procédure et des décisions au profit de la rapidité; l'Office recevrait plus de requêtes visant les prolongations de délais, ce qui augmenterait sa charge de travail; les délais seraient insuffisants dans les cas complexes; et les délais créeraient un obstacle important pour les parties non représentées.

Les intervenants ont indiqué que si l'abrégement des délais était accepté, l'Office devrait améliorer la communication dès le début des instances et que les délais devraient commencer au moment où l'Office a donné avis qu'une demande est complète et, dans le cas des délais pour déposer une requête pour intervention, au moment où l'Office a publié la demande sur son site Web. Un intervenant a également indiqué que la prolongation sur consentement des parties devrait être considérée.

L'Office a adopté un changement des délais pour déposer les documents dans le cadre d'une instance de règlement d'un différend, soit 15 jours ouvrables plutôt que 30 jours civils pour déposer une réponse et 5 jours ouvrables plutôt que 10 jours civils pour déposer une réplique. Les délais pour déposer des arguments en réponse à des requêtes ont également été abrégés.

L'Office considère que les délais établis dans les règles devraient être appropriés dans la plupart des différends d'une complexité faible ou moyenne compte tenu de l'instantanéité des communications. En août 2012, l'industrie et les intervenants ont été informés d'un changement dans la pratique de l'Office voulant que les délais de dépôt soient écourtés à 21 et à 7 jours civils pour les réponses et les répliques respectivement. Cette pratique est en vigueur depuis presque deux ans sans qu'aucun problème n'ait été signalé. Les délais pour le dépôt d'une réponse et d'une réplique aux demandes prévus dans les règles sont sensiblement équivalents aux délais actuels appliqués par l'Office.

Aux termes de l'article 30, les personnes qui déposent des documents ont l'occasion de demander une prolongation du délai lorsque la complexité du dossier ou une autre justification fait en sorte que les délais sont inappropriés.

Dans le passé, il y a eu confusion à savoir si une demande était complète et si le défendeur devait donc y répondre. L'article antérieur énonçait simplement que la réponse devait être déposée « dans les 30 jours suivant la réception de la demande ». Cette confusion est maintenant éliminée puisque les nouvelles règles prévoient qu'une réponse doit être déposée dans les 15 jours ouvrables suivant la date de l'avis que la demande a été acceptée.

Pour aider davantage les parties, l'Office a défini dans les règles le terme « jour ouvrable » et offre une annotation pour expliquer comment le temps sera calculé et quels jours sont fériés pour l'Office. Enfin, conformément à la pratique actuelle, lorsque c'est possible, l'Office indiquera les délais selon leur date d'échéance précise, ce qui éliminera toute confusion pour le calcul des délais.

Requêtes pour intervention

De nombreux intervenants s'inquiétaient de ce que l'Office introduise un nouveau critère d'« intérêt substantiel et direct » et que les intervenants éventuels pourraient avoir de la difficulté à

that this will have a negative impact on lobby groups, trade organizations, industry and shipper associations, railway companies, unions and municipalities.

One stakeholder commented that imposing an obligation to apply for intervener status is an undue obstacle, whereas another commented that it is a breach of the duty of fairness not to provide a right of reply to a request to intervene.

Finally, there was a concern with the time limit of 10 business days to file an intervention once a person becomes aware of an application. It was noted that the Agency's Web site is not always updated and that the posting of applications is not always consistent.

The new Rules, and use of the term "substantial and direct interest," provide for greater clarity as to who may be an intervener in a dispute proceeding. The intent is not to impose a new test but to clarify an existing test that has been applied by the Agency in its decisions.

The process for intervention is now a two-step process in which a potential intervener must first make a request to intervene and may only file an intervention if the Agency grants the request. Under the General Rules, a person simply filed an intervention without the Agency first making a determination as to their intervener status. The right to respond to interventions has been carried over from the General Rules, however, the new approach represents an improvement in that it ensures that parties only respond to interventions filed by Agency-approved interveners.

In order to facilitate awareness of applications, the Agency intends to ensure the timely posting of applications on its Web site when the new Rules come into effect.

Position statements

Stakeholders commented on the addition of a rule relating to position statements. There were various concerns raised, namely that persons may be discouraged from filing position statements as they may be required to answer questions or produce documents and they may not have the desire or resources to do so; that this will take procedural rights from the parties as there is no automatic right to cross-examine on a position statement; and that unrepresented parties with limited resources will be disadvantaged by being forced to respond to position statements while having no avenue to recover costs from the authors of those position statements.

Section 23 of the Rules resembles section 46 of the General Rules respecting "interested persons" and clarifies expectations by confirming that a person filing a position statement receives no further participation rights or notice in the dispute proceeding.

One important feature of administrative law is the ability of tribunals to take into consideration, in their decision-making, broader public views and interests, where appropriate. This section is intended to provide interested persons with a simple, transparent and effective way to make their views known to the Agency. From the Agency's perspective, it is necessary to have a streamlined process for the receipt of this type of material, so that the public's right

respecter ce critère. Ils avancent que cela aura un effet défavorable sur les groupes de pression, sur les associations corporatives, sur l'industrie et les associations d'expéditeurs, sur les compagnies de chemin de fer, sur les syndicats et sur les municipalités.

Un intervenant a indiqué que le fait d'imposer une obligation de demander le statut d'intervenant est un obstacle indu, alors qu'un autre a indiqué que le fait de ne pas fournir de droit de réplique à une requête pour intervention contrevient au devoir d'agir équitablement.

Enfin, une préoccupation a été soulevée à l'égard du délai de 10 jours ouvrables pour déposer une intervention une fois qu'une personne a pris connaissance d'une demande. Il a été noté que le site Web de l'Office n'est pas toujours mis à jour et que l'affichage des demandes n'est pas toujours cohérent.

Les nouvelles règles et le recours à l'expression « intérêt substantiel et direct » précisent mieux qui peut intervenir dans une instance de règlement d'un différend. Le but n'est pas d'imposer un nouveau critère, mais de préciser le critère existant que l'Office applique dans ses décisions.

Le processus d'intervention comporte maintenant deux volets en vertu desquels l'intervenant éventuel doit d'abord déposer une requête pour intervention et ne peut intervenir que si l'Office accorde cette requête. En vertu des règles générales, une personne n'avait qu'à déposer une intervention sans que l'Office décide d'abord de son statut d'intervenant. Le droit de répondre aux interventions qui était établi dans les règles générales a été conservé, mais la nouvelle démarche représente une amélioration en ce qu'elle assure que les parties ne répondent qu'aux interventions déposées par les intervenants approuvés par l'Office.

Pour faciliter la prise de connaissance des demandes, l'Office entend veiller à la publication opportune des demandes sur son site Web lorsque les nouvelles règles seront en vigueur.

Énoncés de position

Les intervenants ont fourni des commentaires sur l'ajout d'une règle relative aux énoncés de position. Diverses préoccupations ont été soulevées, notamment le fait que les personnes pourraient être tenues de répondre à des questions ou de produire des documents alors qu'elles ne souhaitent pas le faire et qu'elles n'ont pas les ressources pour le faire et que cela pourrait les décourager de déposer un énoncé de position; que cela réduirait les droits des parties en matière de procédure puisqu'il n'y a pas de droit automatique de contre-interrogatoire dans le cas des énoncés de position; et que les parties non représentées qui ont des ressources limitées seraient défavorisées si on les forçait à répondre aux énoncés de position sans disposer d'un moyen de récupérer les frais des auteurs de ces énoncés.

L'article 23 des règles ressemble à l'article 46 des règles générales concernant les « personnes intéressées » et précise les attentes en confirmant que toute personne qui dépose un énoncé de position ne reçoit aucun autre droit de participation ou aucun autre avis dans l'instance de règlement d'un différend.

Une caractéristique importante du droit administratif est la possibilité pour les tribunaux de tenir compte dans leur prise de décision des opinions et des intérêts plus larges du public, le cas échéant. Cet article a pour but de fournir aux personnes intéressées un moyen simple, transparent et efficace de faire connaître leurs opinions à l'Office. Du point de vue de l'Office, il est essentiel d'avoir un processus simplifié pour la réception de ce type de

to make its views known is respected, but in a manner that is not resource intensive for either the Agency or the parties.

The filing of a position statement is, in most cases, the extent of a person's participation in a file. Position statements are typically just that, a statement of an individual's position on a matter, whether they support or oppose an application. On occasion, position statements are submitted in the form of petitions signed by large numbers of individuals. In the Agency's experience, it is generally sufficient that these statements be placed on the record as evidence of public interest in a matter and there is no need for the parties to respond to these statements or to conduct any follow-up in the way of questions or document requests.

Less frequently, persons may have information that is relevant and necessary to the Agency, but they may wish to limit their participation in the proceeding. They, too, may use a position statement to bring this information forward; however, the Agency may decide to ask questions or make a request that further documents be submitted if necessary. Furthermore, although there is no automatic right to respond to a position statement, if a party wants to respond to a position statement that contains relevant and necessary information, they may seek permission to do so from the Agency pursuant to section 34 of the Rules.

Questions or document requests between parties

Several stakeholders commented on this proposed provision. Among the comments received, stakeholders expressed concern for the time limits for responding to a notice of written questions or a document request. Stakeholders further commented that subjecting a document request "after the party becomes aware of the document" could result in a series of cascading deadlines for parties. In addition, a stakeholder commented that it was unclear what efficiencies would be gained from allowing for a notice to be sent at any time prior to the close of pleadings, and that the Agency should consider providing for an interrogatory phase. One stakeholder suggested adopting a principle of proportionality in relation to these requests.

The time limits for providing a notice of written questions or the production of documents between parties, as well as the time limits for responding to such a notice, have been retained from the proposed provision following the consultation. The Agency considers the time limit for providing notice to be fair, and that the time limit for responding should be adequate in most low and medium complexity disputes.

The General Rules do not limit the time for questions or document requests in any way. This has resulted in inefficiencies as parties attempt to continue this phase after the close of pleadings. The new time limits have been introduced in order to clarify that the time for questions and document requests should be limited to the period when pleadings are open. Also, there should be no further exchange of documents or information after the close of pleadings and while the Agency is deliberating, except in exceptional circumstances and with the approval of the Agency.

document pour que soit respecté le droit du public de faire connaître ses opinions, mais d'une manière qui exige peu de ressources de l'Office et des parties.

Dans la plupart des cas, le dépôt d'un énoncé de position constitue toute la participation d'une personne au dossier. Habituellement, l'énoncé de position représente cela, un énoncé de la position d'une personne sur une question, qu'elle appuie une demande ou qu'elle s'y oppose. À l'occasion, un énoncé de position est déposé sous forme de pétition signée par un grand nombre de personnes. Selon l'expérience de l'Office, il suffit que ces énoncés soient versés aux archives comme élément de preuve de l'intérêt du public dans une affaire et les parties n'ont pas à y répondre ni à en faire le suivi au moyen de questions ou d'une requête de production de document.

Plus rarement, certaines personnes peuvent avoir des renseignements pertinents nécessaires à l'Office, mais elles peuvent souhaiter limiter leur participation à l'instance. Elles peuvent aussi avoir recours à l'énoncé de position pour faire connaître ces renseignements, mais l'Office peut décider de poser des questions et demander que d'autres documents soient déposés au besoin. De plus, même s'il n'y a pas de droit de réponse automatique à un énoncé de position, si une partie souhaite répondre à un énoncé de position qui contient des renseignements pertinents et nécessaires, elle peut demander la permission de le faire à l'Office en vertu de l'article 34 des règles.

Questions ou requêtes de production de documents entre les parties

De nombreux intervenants ont fourni des commentaires à l'égard de cette disposition proposée. Parmi les commentaires reçus, les intervenants ont soulevé des préoccupations à l'égard des délais pour répondre à un avis de question écrite ou à une requête de production de documents. Les intervenants ont également indiqué que le fait de soumettre une requête de production de documents à un moment « suivant la date à laquelle la partie est informée de leur existence » pourrait entraîner une série de délais en cascade pour les parties. En outre, un intervenant a indiqué qu'il n'est pas clair quelles efficiences seraient réalisées si on permettait d'envoyer un avis à tout moment avant la clôture des actes de procédure, et que l'Office devrait considérer d'accorder une étape de demande de renseignements. Un autre intervenant a suggéré d'adopter un principe de proportionnalité à l'égard de ces requêtes.

Les délais pour fournir un avis de question écrite ou de production de documents entre les parties, ainsi que les délais pour répondre à un tel avis, ont été retenus dans la disposition proposée à la suite de la consultation. L'Office considère que le délai pour fournir un avis est juste et que celui pour répondre devrait être approprié dans la plupart des différends d'une complexité faible à moyenne.

Les règles générales n'imposaient aucune limite de temps pour les requêtes de questions ou de production de documents. Cela a entraîné des inefficiences puisque les parties tentaient de prolonger cette étape après la clôture des actes de procédure. Les nouveaux délais ont été introduits pour préciser que le temps accordé pour les requêtes de questions et de production de documents devrait se limiter à la période pendant laquelle les actes de procédure sont ouverts et qu'il ne devrait y avoir aucun échange de documents ou de renseignements après la clôture des actes de procédure et pendant les délibérations de l'Office, sauf dans des circonstances exceptionnelles et avec l'approbation de l'Office.

Should further time be required to provide a response, the party responding always has the opportunity to request an extension of time.

The Agency has included a proportionality provision in a section that applies to all proceedings before the Agency.

Close of pleadings

Two stakeholders commented on the close of pleadings. One stakeholder commented that the close of pleadings might be affected if there are confidentiality claims. The other commented that it would be helpful if the Agency provided a letter stating that pleadings are closed.

The Agency has maintained the close of pleadings time limits. The automatic closure of pleadings includes a cushion of five days to allow for parties to make decisions about whether they will pose questions, request the production of documents or make other requests to the Agency.

The intention is to have the pleadings automatically close within an established time limit. However, the Agency has the power to vary the date for the close of pleadings to allow for outstanding matters to be resolved before the close of pleadings. Parties will be notified once pleadings have closed. In addition, this information will be reflected in the status of cases on the Agency's Web site.

Request for confidentiality

Two stakeholders commented on the confidentiality provision. One expressed concern that the requirement to present "specific direct harm" imposed a standard that is too high and that cannot be met. Concern was also expressed that section 26 of the General Rules, which creates a broad presumption of confidentiality for financial and corporate information, should be retained.

The test set out in the Rules is the same as the test set out and applied by the Agency under the General Rules.

As an economic regulator, the Agency receives a large quantity of confidential financial and corporate information that it uses in its uncontested economic determinations. Section 26 of the General Rules was required to address the confidentiality of this information in light of the fact that the General Rules applied to both dispute proceedings and non-dispute proceedings. Section 26 is not required in rules for dispute adjudication.

In dispute proceedings, each party is entitled to know and test the case being made by the other party, including the evidence being produced by the other party. This entitlement is subject to limited exceptions, for example, where one party can show that disclosure of its confidential information would cause specific direct harm to it that is not outweighed by the public interest in having it disclosed. This is the test currently applied by the Agency in determining claims for confidentiality and this test will continue under the Rules.

Notice of intention to dismiss an application

Three stakeholders commented on this provision, indicating that what is meant by "fundamental defect" is unclear; that the rights of parties to make submissions in respect of a notice of intention to summarily dismiss an application should be clarified; and that the

Si plus de temps est requis pour fournir une réponse, la partie qui répond a toujours la possibilité de demander une prolongation du délai.

L'Office a inclus une disposition sur la proportionnalité dans un article qui s'applique à toutes les instances devant l'Office.

Clôture des actes de procédure

Deux intervenants ont fourni des commentaires sur la clôture des actes de procédure. Un a indiqué que la clôture des actes de procédure pourrait être touchée dans le cas d'une requête de confidentialité. L'autre intervenant a indiqué qu'il serait utile que l'Office fournisse une lettre déclarant que les actes de procédure sont clos.

L'Office a conservé les délais pour la clôture des actes de procédure. La clôture automatique des actes de procédure comporte une disposition pour une réserve de cinq jours pour permettre aux parties de décider si elles poseront des questions, exigeront la production de documents ou présenteront une autre requête à l'Office.

Le but est d'avoir une clôture automatique des actes de procédure en un calendrier établi. Toutefois, l'Office a le pouvoir de modifier la date de clôture des actes de procédure pour permettre de régler les questions en suspens avant la clôture des actes de procédure. Les parties seront avisées de la clôture des actes de procédure. De plus, l'état des instances sur le site Web de l'Office fournira cette information.

Requête de confidentialité

Deux intervenants ont fourni des commentaires sur la disposition sur la confidentialité. Un s'inquiétait de ce que l'exigence de présenter tout « dommage direct particulier » impose une norme trop élevée qui ne peut être respectée. Une préoccupation a également été soulevée voulant que l'article 26 des règles générales, qui crée une présomption de confidentialité pour les renseignements financiers ou d'entreprise, doive être conservé.

Le critère établi dans les règles est le même que celui énoncé dans les règles générales et appliqué par l'Office.

En tant qu'organisme de réglementation économique, l'Office reçoit un volume important de renseignements financiers et d'entreprise confidentiels qu'il utilise dans ses déterminations économiques réglementaires incontestées. L'article 26 des règles générales était nécessaire pour assurer la confidentialité de ces renseignements à la lumière du fait que les règles générales s'appliquaient tant aux instances de règlement des différends qu'à des instances non liées à des différends. L'article 26 n'est pas nécessaire dans les règles pour le règlement des différends.

Dans les instances de règlement des différends, chaque partie a le droit de connaître les allégations formulées à son endroit et d'en débattre, y compris les éléments de preuve produits par l'autre partie. Ce droit comporte des exceptions, par exemple, lorsqu'une partie peut démontrer que la communication de ses renseignements confidentiels lui causerait un préjudice direct précis que ne compenserait pas l'intérêt du public. C'est le critère que l'Office applique actuellement pour se prononcer sur les requêtes de confidentialité et ce critère sera maintenu dans les règles.

Avis d'intention de rejeter une demande

Trois intervenants ont fait des commentaires sur cette disposition et ont indiqué que ce qu'on vise par l'expression « défaut fondamental » n'est pas clair; que les droits des parties de faire des présentations à l'égard d'un avis d'intention de rejeter une demande

provision should be expanded to include cases where the requested remedy is based upon identical or closely similar facts and arguments that have already been extensively litigated before the Agency.

The Agency has maintained this provision following consultation as it supports the efficient use of resources. The Agency acknowledges that there is not an automatic right of participation for other parties, and anticipates that this mechanism may be used before the respondent becomes involved in the proceeding. The Agency will determine, on a case-by-case basis, if a right to participate is appropriate and should be given to other parties.

Rationale

One of the key tools the Agency has used in carrying out its mandate as an independent, quasi-judicial tribunal is the General Rules. The General Rules set out the overall procedures, processes and timelines applied by the Agency.

The Agency is committed to providing high quality services that are timely, efficient and responsive. This is a key corporate strategic plan priority for 2014–2017. In this regard, the Agency has adopted a set of performance targets that are monitored and publicly reported on an annual basis.

The General Rules have been in place since 2005. Through the Agency's experience in applying them, and based on feedback received from clients and stakeholders, it was felt that the time was right to review the dispute adjudication procedures, with a view to modernizing, streamlining and simplifying them.

For example, through feedback provided as part of the Agency's client satisfaction surveys, clients and stakeholders have clearly indicated that they want more information about the Agency's processes and they want these same processes to be faster, simpler, more predictable and transparent. The Rules have been designed to address these objectives.

The Agency has used its General Rules as procedures for both dispute adjudications and economic determinations. The Rules establish specific procedures designed for the adjudication of disputes. These Rules put in place significant improvements to benefit users of the Agency's dispute resolution services. These improvements will make the Rules more understandable, efficient and predictable in their application.

Overall, clients and stakeholders will benefit from the Rules with no anticipated additional cost to industry or Government.

Implementation, enforcement and service standards

The Rules come into force on June 4, 2014, but, if they are published after that day, they come into force on the day on which they are published.

The General Rules will continue to apply to all proceedings before the Agency that were commenced before the coming into force of these Rules, except proceedings in respect of which the application filed before that time was not complete.

The Agency's implementation plan has been tailored to both known clients and stakeholders as well as first-time users of the Agency's dispute resolution services. Relying on various tools and means of communication, the strategy is aimed at promoting early

de façon sommaire doivent être précisés; et que la disposition doit être élargie pour inclure les cas où la réparation demandée est fondée sur des faits identiques ou très semblables et des arguments qui ont déjà été débattus de façon exhaustive devant l'Office.

L'Office a maintenu cette disposition à la suite des consultations puisqu'elle soutient l'utilisation efficace des ressources. L'Office reconnaît qu'il n'y a aucun droit automatique de participation pour d'autres parties et prévoit que ce mécanisme pourra servir avant que le défenseur soit engagé dans l'instance. L'Office déterminera, en fonction de chaque cas, si un droit de participation est approprié et devrait être accordé à d'autres parties.

Justification

Les règles générales constituent un des outils clés que l'Office a utilisés dans le cadre de son mandat de tribunal quasi judiciaire. Les règles générales établissent l'ensemble des procédures, des processus et des délais appliqués par l'Office.

L'Office s'engage à fournir des services de haute qualité, efficaces, adaptés aux besoins et opportuns. Il s'agit d'une priorité ministérielle clé établie dans son plan stratégique pour 2014-2017. À cet égard, l'Office a adopté des cibles de rendement qui sont surveillées et qui font l'objet d'un rapport public sur une base annuelle.

Les règles générales actuelles sont en vigueur depuis 2005. L'expérience de l'Office à l'égard de leur application, de même que les commentaires reçus des clients et des intervenants, ont fait ressortir que le moment était opportun pour réviser les procédures liées au règlement des différends dans l'optique de les moderniser et de les simplifier.

Par exemple, grâce aux commentaires reçus dans le cadre de sondages sur la satisfaction des clients, les clients et les intervenants de l'Office ont clairement indiqué qu'ils veulent obtenir plus de renseignements sur les processus de l'Office et qu'ils souhaitent que ces processus soient plus rapides, simples, prévisibles et transparents. Les règles ont été conçues pour tenir compte de ces objectifs.

L'Office a utilisé ses règles générales comme des procédures tant pour le règlement des différends que pour les décisions d'ordre économique. Les règles établissent des procédures précises conçues pour le règlement des différends. Ces règles donnent lieu à des améliorations marquées qui sont à l'avantage des utilisateurs des services de règlement des différends de l'Office. Ces améliorations aideront à rendre les règles plus faciles à comprendre, efficaces et prévisibles en ce qui a trait à leur application.

De façon générale, les clients et les intervenants tireront profit des règles, sans coût supplémentaire pour l'industrie et le gouvernement.

Mise en œuvre, application et normes de service

Les règles entrent en vigueur le 4 juin 2014, ou, si elles sont publiées après cette date, à la date de leur publication.

Les règles générales continuent de s'appliquer à toutes les instances introduites avant l'entrée en vigueur des présentes règles, sauf aux instances dont les demandes déposées avant ce moment étaient incomplètes.

Le plan de mise en œuvre de l'Office a été adapté aux clients et aux intervenants connus, ainsi qu'aux nouveaux utilisateurs des services de règlement des différends de l'Office. La stratégie, fondée sur divers outils et moyens de communication, vise à favoriser

awareness and understanding of the new procedures and time limits that will apply after the Rules come into force. This will ensure that the Rules are applied as efficiently and effectively as possible following their implementation.

There are no compliance and enforcement strategies that would be specifically applicable to the Rules.

The Agency has set in place an extensive array of time-based service standards to ensure that it provides efficient and transparent services. These standards are based on the Agency's Performance Measurement Framework, first established in 2007, and are adjusted periodically according to client and stakeholder feedback as well as the Agency's strategic objectives. Each year, the Agency publishes its performance results against these standards in its annual report.

The Agency will monitor the implementation of the Rules and how often dispute files meet the service standards established by the Agency.

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une connaissance et une compréhension rapides des nouvelles procédures et des nouveaux délais qui s'appliqueront après l'entrée en vigueur des règles. Cela fera en sorte que les règles seront appliquées de la façon la plus efficiente et efficace possible après leur mise en œuvre.

Il n'y a aucune stratégie de conformité et d'application de la loi qui s'appliquera précisément aux règles.

L'Office a mis en place une vaste gamme de normes temporelles de service pour veiller à ce qu'il offre des services efficients et transparents. Ces normes sont fondées sur le cadre de mesure du rendement de l'Office, établi en 2007, et elles sont modifiées périodiquement à la lumière des commentaires des clients et des intervenants ainsi que des objectifs stratégiques de l'Office. Chaque année, l'Office publie ses résultats en matière de rendement, en fonction de ces normes, dans son rapport annuel.

L'Office surveillera la mise en œuvre des règles et la fréquence à laquelle les dossiers liés aux différends sont conformes aux normes de service établies par l'Office.

Personne-ressource

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Court File No.:

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Moving Party

– and –

CANADIAN TRANSPORTATION AGENCY

Respondent

AFFIDAVIT OF
(Affirmed: June 17, 2014)

I,

, AFFIRM THAT:

1. I am , and as such, I have personal knowledge of the matters deposed to.

2. Dr. Lukács is a frequent traveller and an air passenger rights advocate. The activities of Dr. Lukács in the latter capacity include:

   (a) filing approximately two dozen successful complaints with the Canadian Transportation Agency (the "Agency"), resulting in airlines being ordered to implement policies that reflect the legal principles of the *Montreal Convention* or otherwise offer better protection to passengers;

   (b) promoting air passenger rights through the press and social media; and

   (c) referring passengers mistreated by airlines to legal information and resources.

3. On September 4, 2013, the Consumers' Association of Canada recognized the achievements of Dr. Lukács in the area of air passenger rights by awarding him its Order of Merit for "singlehandedly initiating Legal Action resulting in revision of Air Canada unfair practices regarding Over Booking."

4. On May 21, 2014, the *Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)*, S.O.R./2014-104 ("New Rules") were published in the *Canada Gazette*.

5. I have been advised by Dr. Lukács and I do verily believe that:

   (a) Dr. Lukács is affected by the New Rules, because the New Rules are applicable to all complaints that Dr. Lukács will be filing with the Agency after June 4, 2014;

   (b) Dr. Lukács is seeking leave to appeal the New Rules pursuant to section 41 of the *Canada Transportation Act*, S.C. 1996, c. 10.

AFFIRMED before me at the City of Halifax
in the Regional Municipality of Halifax
on June 17, 2014.

_____

_____

Halifax, NS
Tel:

Court File No.:

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Moving Party

– and –

CANADIAN TRANSPORTATION AGENCY

Respondent

MEMORANDUM OF FACT AND LAW OF THE MOVING PARTY

PART I – STATEMENT OF FACTS

1. The present motion concerns the validity and reasonableness of the new rules of the Canadian Transportation Agency (the "Agency") governing dispute proceedings, entitled *Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)*, S.O.R./2014-104 (the "New Rules").

2. The Agency, established by the *Canada Transportation Act*, S.C. 1996, c. 10 ("*CTA*"), has a broad mandate in respect of all transportation matters under the legislative authority of Parliament. The Agency performs two key functions:

(a) as a quasi-judicial tribunal, the Agency resolves commercial and consumer transportation-related disputes; and

(b) as an economic regulator, the Agency makes determinations and issues licenses and permits to carriers that function within the ambit of Parliament's authority.

3. The Moving Party, Dr. Gábor Lukács, is a Canadian air passenger rights advocate and a frequent traveller. Lukács has a track record of approximately two dozen successful regulatory complaints with the Agency. The Consumers' Association of Canada awarded Lukács its Order of Merit in recognition of his work in the area of air passenger rights.

Affidavit , paras. 2-3 **[Tab 3, P41]**

4. Since 2005, proceedings before the Agency have been governed by the *Canadian Transportation Agency General Rules*, S.O.R./2005-35 (the "Old Rules").

5. On May 21, 2014, the New Rules were published in the *Canada Gazette*. Section 44 of the New Rules repeals the Old Rules effective June 4, 2014.

6. Lukács seeks leave to appeal the New Rules, pursuant to section 41 of the *CTA*, on the following two grounds:

(a) subsections 41(2)(b), 41(2)(c), and 41(2)(d) of the New Rules are *ultra vires* and/or invalid;

(b) the New Rules are unreasonable and establish inherently unfair procedures that are inconsistent with the intent of Parliament in establishing the Agency.

PART II – STATEMENT OF THE POINTS IN ISSUE

7. The question to be decided on this motion is whether this Honourable Court should grant Lukács leave to appeal the New Rules.

PART III – STATEMENT OF SUBMISSIONS

JURISDICTION OF THIS HONOURABLE COURT

8. Every decision, order, rule or regulation of the Agency may be appealed to this Honourable Court on a question of law or a question of jurisdiction with the leave of the Court.

***Canada Transportation Act*, s. 41(1)** **[Appendix "A", P66]**

9. The New Rules, promulgated pursuant to section 17 of the *CTA*, are "rules" within the meaning of the *CTA*, and thus this Honourable Court has jurisdiction to grant leave to appeal and hear the proposed appeal pursuant to subsection 41(1) of the *CTA*.

***Canada Transportation Act*, s. 17** **[Appendix "A", P63]**
New Rules **[Tab 2, P5]**

A. SUBSECTIONS 41(2)(B)-(D) OF THE NEW RULES ARE ULTRA VIRES AND/OR INVALID

10. Subsection 41(2) of the New Rules purports to confer on the Agency the power to stay a decision or order that has already been rendered.

> (2) The Agency may, at the request of a party, stay a decision or order of the Agency in any of the following circumstances:
>
> (a) a review or re-hearing is being considered by the Agency under section 32 of the Act;
>
> (b) a review is being considered by the Governor in Council under section 40 of the Act;
>
> (c) an application for leave to appeal is made to the Federal Court of Appeal under section 41 of the Act;
>
> (d) the Agency considers it just and reasonable to do so.

***New Rules*, s. 41(2)** **[Tab 2, P21]**

(i) The rule of law and section 17 of the *CTA*

11. The fundamental constitutional principle of the rule of law dictates that all powers must find their source in law. Accordingly, administrative bodies, such as the Agency, can exercise only those powers that were explicitly assigned to them, and may exercise them only in the form prescribed by law.

> ***Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9, paras. 27-30** **[Appendix "B", P100]**

12. The New Rules were promulgated pursuant to section 17 of the *CTA*, which provides that:

> 17. The Agency may make rules respecting
>
> (a) the sittings of the Agency and the carrying on of its work;
>
> (b) the manner of and procedures for dealing with matters and business before the Agency, including the circumstances in which hearings may be held in private; and
>
> (c) the number of members that are required to hear any matter or perform any of the functions of the Agency under this Act or any other Act of Parliament.
>
> [Emphasis added.]
>
> ***Canada Transportation Act*, s. 17** **[Appendix "A", P63]**

13. The meaning of the term "rules" in the *CTA* is confined to internal or procedural matters, and does not encompass external or substantive matters. Thus, rule-making powers of the Agency pursuant to s. 17 of the *CTA* are confined to "internal procedural or non-adjudicative administrative matters." These rule-making powers cannot be used by the Agency to confer additional (substantive) powers upon itself, which Parliament did not confer upon the Agency.

> ***Lukács v. Canada (Transportation Agency)*, 2014 FCA 76, paras. 39-41** **[Appendix "B", P119]**

14. The Agency cannot make valid rules for exercising powers that the Agency does not possess. Therefore, only those provisions of subsection 41(2) of the New Rules that govern the manner and procedure of exercising powers that Parliament conferred upon the Agency are *intra vires* and valid.

15. Hence, the validity of the provisions of subsection 41(2) of the New Rules depends on whether and in what circumstances the Agency can stay its own order or decision after it has been rendered.

(ii) The doctrine of *functus officio* and section 32 of the *CTA*

16. According to the doctrine of *functus officio*, once decision-makers make a final decision or order in a matter, they exhaust their authority with respect to that matter, and the decision or order cannot be reopened and/or varied by the decision-makers, but only by the appellate jurisdiction. This principle, which equally applies to administrative tribunals, such as the Agency, is subject to two exceptions. Final decisions or orders can be varied by decision-makers only if: (a) authorized by statute; or (b) there was a slip in drawing up the decision or there was an error in expressing the manifest intention of the tribunal.

> ***Fowlie v. Air Canada*, CTA, 488-C-A-2010, para. 28 [Appendix "B", P105]**
> **citing: *Chandler v. Alberta association of architects*, [1989] 2 SCR 848**

17. Section 32 of the *CTA* confers only limited powers upon the Agency to review, rescind, or vary any decision or order of the Agency by the Agency itself.

> 32. The Agency may review, rescind or vary any decision or order made by it or may re-hear any application before deciding it if, in the opinion of the Agency, since the decision or order or the hearing of the application, there has been a change in the facts or circumstances pertaining to the decision, order or hearing.
>
> ***Canada Transportation Act*, s. 32 [Appendix "A", P65]**

18. It is helpful to compare section 32 of the *CTA* with section 62 of the *Telecommunications Act*, the enabling statute of the CRTC. While the *CTA* provides limited powers to review, rescind, or vary decisions or orders, in the case of the CRTC, Parliament chose not to restrict or qualify these powers:

> 62. The Commission may, on application or on its own motion, review and rescind or vary any decision made by it or re-hear a matter before rendering a decision.

***Telecommunications Act*, s. 62** **[Appendix "A", P77]**

19. This difference in the respective enabling statutes reflects Parliament's intent to confine the Agency's power to review its own decisions and orders to very specific situations, namely, where there has been a change in the facts or circumstances pertaining to a particular decision since its issuance.

***Canada Transportation Act*, s. 32** **[Appendix "A", P65]**
***Fowlie v. Air Canada*, CTA, 488-C-A-2010, para. 27** **[Appendix "B", P105]**

(iii) Analysis of section 41(2) of the New Rules

20. Subsection 41(2)(a) of the New Rules allows the Agency to stay a decision or order pending a review or re-hearing pursuant to section 32 of the *CTA*. The *CTA* contains no explicit provision concerning powers to stay in such situations; nevertheless, staying an order or decision pending review or re-hearing is arguably necessary for the Agency to carry out its mandate pursuant to section 32. Thus, it is conceivable that Parliament did intend to confer on the Agency the power to stay decisions and orders for the specific purpose and duration of review or re-hearing pursuant to section 32. Such implied powers, however, are certainly not open-ended, and cannot be considered as broad powers outside the purpose and scope of section 32.

21. In sharp contrast, subsection 41(2)(d) of the New Rules purports to confer open-ended powers on the Agency to stay its decisions and orders. The *CTA* contains no statutory authorization for such powers, which would result in delaying the remedy sought by parties. This would defeat the purpose of the statutory requirement of rendering a decision within 120 days after the originating documents are received, which Parliament chose to impose on the Agency.

***Canada Transportation Act*, s. 29(1)** **[Appendix "A", P65]**

22. Similarly, subsections 41(2)(b)-(c) of the New Rules purport to allow the Agency to stay its decisions and orders pending an appeal to the Governor in Council or a motion for leave to appeal to this Court. There is no statutory authorization for such powers in the *CTA*. Indeed, section 32 of the *CTA* is the only exception to the doctrine of *functus officio* found in the enabling statute of the Agency. Unlike section 62 of the *Telecommunications Act*, section 32 of the *CTA* is confined to situations where there has been a change in the facts or circumstances "pertaining to" the decision or order. Seeking leave to appeal or appealing from a decision or order cannot reasonably be considered a change in the facts "pertaining to" the decision or order, because such an interpretation would render the restriction contained in section 32 of the *CTA* meaningless.

23. Furthermore, both this Honourable Court and the Governor in Council have jurisdiction to stay decisions and orders that are being appealed to them (or when leave to appeal is sought). Thus, concurrent powers to stay are not necessary for the Agency to carry out its mandate under the *CTA*.

***Association des Compagnies de Téléphone du Québec Inc. v. Canada (Attorney General)*, 2012 FCA 203, paras. 18-19, 30-33** **[Appendix "B", P83] [Appendix "B", P84] [Appendix "B", P87]**

(iv) Conclusion

24. While subsection 41(2)(a) of the New Rules is arguably necessary for the Agency to carry out its mandate pursuant to section 32 of the *CTA*, subsections 41(2)(b)-(d) of the New Rules purport to confer powers upon the Agency that Parliament neither explicitly conferred nor did implicitly intend to confer. As such, subsections 41(2)(b)-(d) of the New Rules are *ultra vires* and/or invalid.

B. DENIAL OF NATURAL JUSTICE AND ACCESS TO JUSTICE

25. One of the key functions of the Agency is to act as a quasi-judicial tribunal to resolve consumer transportation-related disputes.

> ***Lukács v. Canada (Transportation Agency)*, 2014 FCA 76, para. 51** **[Appendix "B", P123]**

26. According to the Agency, the vast majority of complainants in consumer disputes are not represented by counsel. Moreover, the Agency's rules are meant to be a complete code that self-represented parties can read and use.

> ***Nawrots v. Sunwing Airlines*, CTA, 432-C-A-2013, paras. 133-134** **[Appendix "B", P168]**

27. Thus, the New Rules, which repeal the Old Rules effective June 4, 2014, govern the conduct of dispute proceedings between mostly unrepresented complainants with no legal knowledge or experience, and large corporations, such as airlines, represented by counsel as respondents.

28. For the reasons explained below, it is submitted that the New Rules are unreasonable, establish procedures that are inherently unfair to complainants (unrepresented ones in particular), and they are inconsistent with the intent of Parliament to establish the Agency as a quasi-judicial tribunal.

(i) No opportunity to object to requests of non-parties to intervene

29. Section 29 of the New Rules, which governs requests of non-parties for leave to intervene in a proceeding, provides no opportunity for parties to lead evidence and make submissions in opposition to such requests. Indeed, while section 29(1) describes the procedure for making a request to intervene, there are no provisions in section 29 that speak about parties responding to the request to intervene. In other words, according to section 29, the Agency will rule on requests to intervene without hearing first from the parties to the proceeding.

***New Rules*, s. 29** **[Tab 2, P16]**

30. The participation of interveners in a proceeding complicates the proceeding, and increases the demand on parties' resources. Thus, adding interveners to a proceeding may, in some cases, create a prohibitive burden for unrepresented parties, and force such vulnerable parties to give up and not pursue their rights.

31. Consequently, granting interver status to non-parties also affects the substantive rights and access to justice of parties in general, and unrepresented parties with limited resources in particular.

32. Therefore, it is submitted that parties to a proceeding are entitled, as a matter of procedural fairness, to lead evidence and make submissions in opposition to requests of non-parties to intervene. Hence, section 29 of the New Rules is unreasonable and inherently unfair in the absence of a provision that provides parties with a reasonable opportunity to respond to requests to intervene.

(ii) Abolishment of the requirement to provide reasons

33. Section 36 of the Old Rules provides that:

> 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.

Old Rules, s. 36 **[Appendix "A", P69]**

34. The New Rules, however, contain no such or similar provision that would require the Agency to provide reasons for its orders and decisions. The removal of such a provision from the New Rules demonstrates an intention of the Agency to alter its previous practice with respect to providing reasons, and an attempt to reduce its duty to provide reasons. It is submitted that this is inconsistent with the intent of Parliament, for several reasons.

35. The duty to give reasons is a salutary one, and it is measured against the functions for which the duty to provide them was imposed. Reasons serve a number of purposes:

(a) focus the decision-maker on the relevant factors and evidence;

(b) provide the parties with the assurance that their representations have been considered;

(c) provide a basis for an assessment of possible grounds for appeal;

(d) allow the appellate court to determine whether the decision-maker erred and thereby render him or her accountable.

***Vancouver International Airport Authority v. Public Service Alliance of Canada*, 2010 FCA 158, paras. 13-14** **[Appendix "B", P176]**

36. Pursuant to subsection 41(1) of the *CTA*, decisions, orders, rules, and regulations of the Agency are subject to appellate review of this Honourable Court (on questions of law or jurisdiction). The justification, transparency and intelligibility within the decision-making process and its reasons are of primary concern in the review of decisions and orders. Thus, Parliament envisioned the Agency as a tribunal that provides reasons for its decisions and orders. Indeed, the absence of reasons would frustrate the ability of this Court to fulfill its mandate pursuant to section 41 of the *CTA*.

***Canada Transportation Act*, s. 41(1)** **[Appendix "A", P66]**

37. In addition to the legal duty to provide reasons, one should also be mindful of the purpose of the Agency's rules. As noted earlier, according to the Agency, the rules serve as a complete code that self-represented parties can read and use. Therefore, it is unreasonable to omit from the New Rules an explicit provision concerning the Agency's duty to provide reasons, because the absence of such a provision will deprive unrepresented parties of knowledge about their most basic procedural rights before the Agency.

(iii) Abolishment of rules concerning examinations and oral hearings

38. The Old Rules contain provisions concerning out-of-hearing examination of deponents and affiants (section 34) and rules governing the conduct of oral hearings (sections 48-67).

Old Rules, ss. 34, 48-67 **[Appendix "A", P68]**
[Appendix "A", P70]

39. The New Rules, however, contain no such provisions, which demonstrates the Agency's intent to abolish all procedures that would allow parties to test the evidence of witnesses and reveal the truth by way of cross-examination. In other words, the Agency intends to decide all consumer disputes in writing, based on affidavits and declarations only, without hearing any oral evidence or at the very least having the benefit of transcripts of cross-examinations.

40. It is submitted that such procedures are unreasonable, inherently unfair to complainants, and inconsistent with the purpose for which the Agency was established as a quasi-judicial tribunal.

(a) Parliament envisioned examination of witnesses before the Agency

41. Parliament did not intend to confine the Agency's decision-making processes to written submissions and documents. On the contrary, Parliament did envision examination of witnesses in proceedings before the Agency:

> 25. The Agency has, with respect to all matters necessary or proper for the exercise of its jurisdiction, the attendance and examination of witnesses, the production and inspection of documents, the enforcement of its orders or regulations and the entry on and inspection of property, all the powers, rights and privileges that are vested in a superior court.
>
> [Emphasis added.]

***Canada Transportation Act*, s. 25** **[Appendix "A", P64]**

(b) Nature of consumer disputes before the Agency

42. One of the purposes for which the Agency was established is to resolve certain types of consumer disputes. Most consumer disputes before the Agency fall into one of the following three categories:

(1) refusal to transport (including lifetime ban), involving allegations of unruly behaviour of passengers;

(2) monetary claims for expenses incurred as a result of a carrier failing to follow the terms and conditions set out in its tariff;

(3) policy complaints, alleging that a carrier's policies are unreasonable, unclear, or fail to accommodate passengers with disabilities.

43. Disputes belonging to the first two categories tend to be fact-driven, and require decision-makers to decide whom they believe. For example, in the case of refusal to transport, the airline typically submits reports or declarations of its employees stating that the passenger was abusive, aggressive, or drunk, while the passenger denies the allegations.

44. When a decision-maker is faced with contradictory evidence of the parties, it is impossible to make findings of facts in a fair and reasonable manner without allowing parties to test the evidence of their opponents. The most common method for doing so is requiring witnesses to testify at an oral hearing. As an alternative, affiants may be required to submit themselves to cross-examinations, whose transcripts can be used in written submissions.

45. The New Rules, however, abolish every procedure that could be used to test the evidence of witnesses submitted by an opposing party.

(c) The importance of oral testimony in consumer disputes

46. Consumer disputes are often heard by small claims courts, whose purpose is to adjudicate monetary claims informally and inexpensively, but in accordance with established principles of law and natural justice. The procedures of small claims courts are established so as to enable unrepresented parties, with no or very limited legal knowledge, to gain access to justice. In spite of the informal nature of small claims proceedings, they nevertheless entail an oral hearing where witnesses give oral testimony, and are cross-examined by the opposing party. Holding oral hearings and allowing parties to examine witnesses serves a very important role in the fair disposition of all consumer disputes in general; this is particularly so in transportation-related disputes, where witnesses are often employees who are under great pressure to sign declarations and affidavits drafted by corporate counsels, and to remember events in the most favourable way for their employer.

47. The vital importance and substantial contribution of cross-examination to the fact-finding of decision-makers in the context of transportation-related consumer disputes is demonstrated, for example, by the judgment of the Manitoba Court of Queen's Bench (hearing a small claim):

> [17] Ms. Parenty stated during direct examination that the plaintiff was agitated, forceful and insistent that his ticket be transferred to the Northwest Airlines flight. She stated that she was intimidated by him, as he was "yelling" at her. On cross-examination, after she was given the opportunity to listen to 13 minutes of their recorded conversation, she admitted that he had not "yelled", but then stated that he had raised his voice, which she considered was "yelling". After listening to this recorded conversation, I have concluded that although the plaintiff was seeking an immediate resolution to his problem and was frustrated by Ms. Parenty's ineffectual efforts, Ms. Parenty exaggerated the tone and loudness of the plaintiff's words. Further, although she stated on direct exam-

> ination that she personally went to the Northwest Airlines counter to determine if a seat was available on a flight leaving at 16:19 hours, during cross-examination she admitted that she was not sure if she had done so. I accept the evidence of the plaintiff and conclude that during the critical period of time when Ms. Parenty might have authorized a ticket transfer to another airline, she made no real efforts to do so.
>
> ***Lukacs v. United Airlines Inc., et al.*, 2009 MBQB 29, para. 17** **[Appendix "B", P131]**

(d) Deciding complaints in writing may lead to miscarriage of justice

48. The Agency's failure to hold oral hearings and cross-examinations to resolve contradictory evidence of parties has a high potential of resulting in miscarriage of justice, especially in cases involving allegations of unruly behaviour. As demonstrated by the Agency's decision in *Boutin v. Air Canada*, such allegations have serious ramifications and impacts on the passenger's reputation and ability to travel; oddly, however, the Agency's finding in favour of Air Canada and against Boutin was based exclusively on untested witness statements:

> [40] The Agency notes that the submissions and evidence are contradictory. Mr. Boutin maintains that he was not verbally abusive or physically violent toward Air Canada employees. Mr. Boutin also states that he was not aggressive toward Air Canada employees. He acknowledges, however, that he was angry and frustrated because he missed his flight. The Agency notes that Mr. Boutin's version is corroborated by his travelling companion's written statement. [...]
>
> [41] Air Canada maintains that Mr. Boutin was aggressive, threatened employees and tried to grab its Agent. The Agency notes that, in support of its position, Air Canada filed a copy of Mr. Boutin's Passenger Name Record. Air Canada's version is corroborated by three written statements from Air Canada employees who dealt with Mr. Boutin at the Cancun airport. The Agency has reviewed theses statements and finds that they are consistent and persuasive.
>
> ***Boutin v. Air Canada*, CTA, 444-C-A-2012, paras. 40-41** **[Appendix "B", P95]**

49. As the *Boutin* decision demonstrates, making findings of facts based exclusively on written witness statements that cannot be tested in any way reduces the proceeding to a statement-writing contest. Indeed, there is no doubt that a skilled counsel can draft “consistent and persuasive” written statements, and a carrier can persuade as many employees as needed to sign them (especially since these statements are not made under oath). The reliability of such written statements that are prepared by counsel rather than reflecting the words and recollections of the witness, and which are shielded from being tested by way of cross-examination, is very low. Thus, it is submitted that accepting such untested statements as the sole basis for fact-finding is inherently unfair to consumers (complainants).

(e) Conclusion

50. Although the Agency is the master of its own procedures, the Agency must establish procedures that are fair, reasonable, consistent with the principles of natural justice, and consistent with the purpose for which the Agency was established as a quasi-judicial tribunal. For example, the Agency cannot use the tossing of a coin as the procedure to make findings of facts.

51. The New Rules are unreasonable and inherently unfair, because they eliminate all procedures for examination of witnesses and oral hearings. While a small portion of dispute proceedings can be decided fairly in writing based on uncontested evidence, the vast majority of the cases before the Agency also involve factual disputes that require some form of evidentiary hearing or cross-examination. Since the New Rules preclude such procedural steps, they defeat the purpose for which the Agency was established, and they are inconsistent with the legislative intent manifested in section 25 of the *CTA*.

PART IV – ORDER SOUGHT

52. The Moving Party, Dr. Gábor Lukács, is seeking an Order:

(a) granting Lukács leave to appeal the *Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)*, S.O.R./2014-104;

(b) granting Dr. Lukács costs and/or reasonable out-of-pocket expenses of this motion; and

(c) granting such further relief as this Honourable Court may deem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

June 20, 2014

DR. GÁBOR LUKÁCS

Halifax, NS

lukacs@AirPassengerRights.ca

Moving Party

PART V – LIST OF AUTHORITIES

CASES

Association des Compagnies de Téléphone du Québec Inc. v. Canada (Attorney General), 2012 FCA 203

Dunsmuir v. New Brunswick, [2008] 1 S.C.R. 190, 2008 SCC 9

Fowlie v. Air Canada, Canadian Transportation Agency, 488-C-A-2010

Lukács v. Canada (Transportation Agency), 2014 FCA 76

Lukacs v. United Airlines Inc., et al., 2009 MBQB 29

Nawrots v. Sunwing Airlines, Canadian Transportation Agency, 432-C-A-2013

Vancouver International Airport Authority v. Public Service Alliance of Canada, 2010 FCA 158

STATUTES AND REGULATIONS

Canada Transportation Act, S.C. 1996, c. 10, ss. 17, 25, 29, 32, 41

Canadian Transportation Agency General Rules, S.O.R./2005-35 ss. 34, 36, 48-67

Telecommunications Act, S.C. 1993, c. 38, s. 62

Appendix “A”

Statutes and Regulations

CANADA

CONSOLIDATION

CODIFICATION

Canada Transportation Act

Loi sur les transports au Canada

S.C. 1996, c. 10

L.C. 1996, ch. 10

Current to November 26, 2013

À jour au 26 novembre 2013

Last amended on June 26, 2013

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Chairperson may, with the consent of all the parties to the hearing,

(*a*) if the incapacity or death occurs during the hearing, authorize another member to continue the hearing and render a decision, or

(*b*) if the incapacity or death occurs after the conclusion of the hearing, authorize another member to examine the evidence presented at the hearing and render a decision,

and in either case, the quorum in respect of the matter is deemed never to have been lost.

ment des parties à l'audience, si le fait survient :

a) pendant l'audience, habiliter un autre membre à continuer l'audience et à rendre la décision;

b) après la fin de l'audience, habiliter un autre membre à examiner la preuve présentée à l'audience et à rendre la décision.

Dans l'une ou l'autre de ces éventualités, le quorum est réputé avoir toujours existé.

Quorum not lost because of incapacity of member

(3) Where a member who is conducting a hearing in respect of a matter becomes incapacitated or dies during the hearing and quorum is not lost as a result, another member may be assigned by the Chairperson to participate in the hearing and in the rendering of a decision.

Décès ou empêchement sans perte de quorum

(3) En cas de décès ou d'empêchement, pendant une audience, du membre qui en est chargé, sans perte de quorum résultant de ce fait, le président peut habiliter un autre membre à participer à l'audience et au prononcé de la décision.

Rules

Rules

17. The Agency may make rules respecting

(*a*) the sittings of the Agency and the carrying on of its work;

(*b*) the manner of and procedures for dealing with matters and business before the Agency, including the circumstances in which hearings may be held in private; and

(*c*) the number of members that are required to hear any matter or perform any of the functions of the Agency under this Act or any other Act of Parliament.

Règles

Règles

17. L'Office peut établir des règles concernant :

a) ses séances et l'exécution de ses travaux;

b) la procédure relative aux questions dont il est saisi, notamment pour ce qui est des cas de huis clos;

c) le nombre de membres qui doivent entendre les questions ou remplir telles des fonctions de l'Office prévues par la présente loi ou une autre loi fédérale.

Head Office

Head office

18. (1) The head office of the Agency shall be in the National Capital Region described in the schedule to the *National Capital Act*.

Residence of members

(2) The members appointed under subsection 7(2) shall reside in the National Capital Region described in the schedule to the *National Capital Act* or within any distance of it that the Governor in Council determines.

1996, c. 10, s. 18; 2007, c. 19, s. 5; 2008, c. 21, s. 61.

Siège de l'Office

Siège

18. (1) Le siège de l'Office est fixé dans la région de la capitale nationale délimitée à l'annexe de la *Loi sur la capitale nationale*.

Lieu de résidence des membres

(2) Les membres nommés au titre du paragraphe 7(2) résident dans la région de la capitale nationale délimitée à l'annexe de la *Loi sur la capitale nationale* ou dans la périphérie de cette région définie par le gouverneur en conseil.

1996, ch. 10, art. 18; 2007, ch. 19, art. 5; 2008, ch. 21, art. 61.

Staff

Secretary, officers and employees

19. The Secretary of the Agency and the other officers and employees that are necessary for the proper conduct of the business of the

Personnel

Secrétaire et personnel

19. Le secrétaire de l'Office et le personnel nécessaire à l'exécution des travaux de celui-ci

shall be exercised and performed in conformity with any policy direction issued to the Agency under section 43.

les directives générales qui lui sont données en vertu de l'article 43.

Agency powers in general

25. The Agency has, with respect to all matters necessary or proper for the exercise of its jurisdiction, the attendance and examination of witnesses, the production and inspection of documents, the enforcement of its orders or regulations and the entry on and inspection of property, all the powers, rights and privileges that are vested in a superior court.

Pouvoirs généraux

25. L'Office a, à toute fin liée à l'exercice de sa compétence, la comparution et l'interrogatoire des témoins, la production et l'examen des pièces, l'exécution de ses arrêtés ou règlements et la visite d'un lieu, les attributions d'une cour supérieure.

Power to award costs

25.1 (1) Subject to subsections (2) to (4), the Agency has all the powers that the Federal Court has to award costs in any proceeding before it.

Pouvoirs relatifs à l'adjudication des frais

25.1 (1) Sous réserve des paragraphes (2) à (4), l'Office a tous les pouvoirs de la Cour fédérale en ce qui a trait à l'adjudication des frais relativement à toute procédure prise devant lui.

Costs may be fixed or taxed

(2) Costs may be fixed in any case at a sum certain or may be taxed.

Frais fixés ou taxés

(2) Les frais peuvent être fixés à une somme déterminée, ou taxés.

Payment

(3) The Agency may direct by whom and to whom costs are to be paid and by whom they are to be taxed and allowed.

Paiement

(3) L'Office peut ordonner par qui et à qui les frais doivent être payés et par qui ils doivent être taxés et alloués.

Scale

(4) The Agency may make rules specifying a scale under which costs are to be taxed.

Tarif

(4) L'Office peut, par règle, fixer un tarif de taxation des frais.

Compelling observance of obligations

26. The Agency may require a person to do or refrain from doing any thing that the person is or may be required to do or is prohibited from doing under any Act of Parliament that is administered in whole or in part by the Agency.

Pouvoir de contrainte

26. L'Office peut ordonner à quiconque d'accomplir un acte ou de s'en abstenir lorsque l'accomplissement ou l'abstention sont prévus par une loi fédérale qu'il est chargé d'appliquer en tout ou en partie.

Relief

27. (1) On an application made to the Agency, the Agency may grant the whole or part of the application, or may make any order or grant any further or other relief that to the Agency seems just and proper.

Réparation

27. (1) L'Office peut acquiescer à tout ou partie d'une demande ou prendre un arrêté, ou, s'il l'estime indiqué, accorder une réparation supplémentaire ou substitutive.

(2) and (3) [Repealed, 2008, c. 5, s. 1]

(2) et (3) [Abrogés, 2008, ch. 5, art. 1]

Amendments

(4) The Agency may, on terms or otherwise, make or allow any amendments in any proceedings before it.

Modification

(4) L'Office peut, notamment sous condition, apporter ou autoriser toute modification aux procédures prises devant lui.

(5) [Repealed, 2008, c. 5, s. 1]

1996, c. 10, s. 27; 2008, c. 5, s. 1.

(5) [Abrogé, 2008, ch. 5, art. 1]

1996, ch. 10, art. 27; 2008, ch. 5, art. 1.

Orders

28. (1) The Agency may in any order direct that the order or a portion or provision of it shall come into force

(*a*) at a future time,

(*b*) on the happening of any contingency, event or condition specified in the order, or

(*c*) on the performance, to the satisfaction of the Agency or a person named by it, of any

Arrêtés

28. (1) L'Office peut, dans ses arrêtés, prévoir une date déterminée pour leur entrée en vigueur totale ou partielle ou subordonner celle-ci à la survenance d'un événement, à la réalisation d'une condition ou à la bonne exécution, appréciée par lui-même ou son délégué, d'obligations qu'il aura imposées à l'intéressé; il peut en outre y prévoir une date déterminée pour leur cessation d'effet totale ou partielle ou

terms that the Agency may impose on an interested party,

and the Agency may direct that the whole or any portion of the order shall have force for a limited time or until the happening of a specified event.

subordonner celle-ci à la survenance d'un événement.

Interim orders

(2) The Agency may, instead of making an order final in the first instance, make an interim order and reserve further directions either for an adjourned hearing of the matter or for further application.

Arrêtés provisoires

(2) L'Office peut prendre un arrêté provisoire et se réserver le droit de compléter sa décision lors d'une audience ultérieure ou d'une nouvelle demande.

Time for making decisions

29. (1) The Agency shall make its decision in any proceedings before it as expeditiously as possible, but no later than one hundred and twenty days after the originating documents are received, unless the parties agree to an extension or this Act or a regulation made under subsection (2) provides otherwise.

Délai

29. (1) Sauf indication contraire de la présente loi ou d'un règlement pris en vertu du paragraphe (2) ou accord entre les parties sur une prolongation du délai, l'Office rend sa décision sur toute affaire dont il est saisi avec toute la diligence possible dans les cent vingt jours suivant la réception de l'acte introductif d'instance.

Period for specified classes

(2) The Governor in Council may, by regulation, prescribe periods of less than one hundred and twenty days within which the Agency shall make its decision in respect of such classes of proceedings as are specified in the regulation.

Délai plus court

(2) Le gouverneur en conseil peut, par règlement, imposer à l'Office un délai inférieur à cent vingt jours pour rendre une décision à l'égard des catégories d'affaires qu'il indique.

Pending proceedings

30. The fact that a suit, prosecution or proceeding involving a question of fact is pending in any court does not deprive the Agency of jurisdiction to hear and determine the same question of fact.

Affaire en instance

30. L'Office a compétence pour statuer sur une question de fait, peu importe que celle-ci fasse l'objet d'une poursuite ou autre instance en cours devant un tribunal.

Fact finding is conclusive

31. The finding or determination of the Agency on a question of fact within its jurisdiction is binding and conclusive.

Décision définitive

31. La décision de l'Office sur une question de fait relevant de sa compétence est définitive.

Review of decisions and orders

32. The Agency may review, rescind or vary any decision or order made by it or may re-hear any application before deciding it if, in the opinion of the Agency, since the decision or order or the hearing of the application, there has been a change in the facts or circumstances pertaining to the decision, order or hearing.

Révision, annulation ou modification de décisions

32. L'Office peut réviser, annuler ou modifier ses décisions ou arrêtés, ou entendre de nouveau une demande avant d'en décider, en raison de faits nouveaux ou en cas d'évolution, selon son appréciation, des circonstances de l'affaire visée par ces décisions, arrêtés ou audiences.

Enforcement of decision or order

33. (1) A decision or order of the Agency may be made an order of the Federal Court or of any superior court and is enforceable in the same manner as such an order.

Homologation

33. (1) Les décisions ou arrêtés de l'Office peuvent être homologués par la Cour fédérale ou une cour supérieure; le cas échéant, leur exécution s'effectue selon les mêmes modalités que les ordonnances de la cour saisie.

Procedure

(2) To make a decision or order an order of a court, either the usual practice and procedure of the court in such matters may be followed or the Secretary of the Agency may file with the

Procédure

(2) L'homologation peut se faire soit selon les règles de pratique et de procédure de la cour saisie applicables en l'occurrence, soit au moyen du dépôt, auprès du greffier de la cour

Appeal from Agency

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

Appel

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

Time for making appeal

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

Délai

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

Powers of Court

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

Pouvoirs de la cour

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

Agency may be heard

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

Plaidoirie de l'Office

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

Report of Agency

Rapport de l'Office

Agency's report

42. (1) Each year the Agency shall, before the end of July, make a report on its activities for the preceding year and submit it, through the Minister, to the Governor in Council describing briefly, in respect of that year,

(*a*) applications to the Agency and the findings on them; and

(*b*) the findings of the Agency in regard to any matter or thing respecting which the Agency has acted on the request of the Minister.

Rapport de l'Office

42. (1) Chaque année, avant la fin du mois de juillet, l'Office présente au gouverneur en conseil, par l'intermédiaire du ministre, un rapport de ses activités de l'année précédente résumant :

a) les demandes qui lui ont été présentées et ses conclusions à leur égard;

b) ses conclusions concernant les questions ou les objets à l'égard desquels il a agi à la demande du ministre.

Assessment of Act

(2) The Agency shall include in every report referred to in subsection (1) the Agency's assessment of the operation of this Act and any difficulties observed in the administration of this Act.

Évaluation de la loi

(2) L'Office joint à ce rapport son évaluation de l'effet de la présente loi et des difficultés rencontrées dans l'application de celle-ci.

Tabling of report

(3) The Minister shall have a copy of each report made under this section laid before each House of Parliament on any of the first thirty

Dépôt

(3) Dans les trente jours de séance de chaque chambre du Parlement suivant la réception du rapport par le ministre, celui-ci le fait déposer devant elle.

1996, ch. 10, art. 42; 2013, ch. 31, art. 2.

CANADA

CONSOLIDATION

CODIFICATION

Canadian Transportation Agency General Rules

Règles générales de l’Office des transports du Canada

SOR/2005-35

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the Agency and shall serve a copy of the reply on the other parties.

près de l'Office et en signifier une copie aux autres parties.

Submission of supporting documents

(6) If a party intends to submit a document in support of a notice of motion or an answer or a reply to it, the document shall accompany the notice, answer or reply, and the party shall file the document with the Agency and serve a copy of it on the other parties.

(6) La partie qui a l'intention de présenter un document à l'appui de son avis de requête, de sa réponse ou de sa réplique l'y annexe et le dépose auprès de l'Office et en signifie une copie aux autres parties.

Présentation des documents à l'appui

Disposition of motion

(7) Subject to section 61, the Agency shall dispose of a motion in writing.

(7) Sous réserve de l'article 61, l'Office rend sa décision sur la requête par écrit.

Décision sur la requête

EVIDENCE

PREUVE

Requirement for affidavit

33. The Agency may, at any time, order any particular facts relating to a proceeding to be supported by an affidavit.

33. L'Office peut en tout temps ordonner que la preuve de certains faits reliés à l'instance soit établie par affidavit.

Affidavit

Examination under oath or solemn affirmation

34. (1) The Agency may, at any time, order that a person attend and be examined under oath or solemn affirmation before a commissioner of oaths or another person who is authorized to administer oaths or affirmations and who is appointed by the Agency for that purpose.

34. (1) L'Office peut en tout temps ordonner à une personne de se présenter pour être interrogée devant un commissaire aux serments ou toute autre personne habilitée à faire prêter serment ou à recevoir des affirmations solennelles et nommée à cette fin par l'Office.

Interrogatoire sous serment ou affirmation solennelle

Notice of date, time and place

(2) Notice of the date, time and place of an examination ordered under subsection (1) shall be given to the persons required to attend.

(2) Un avis de la date, de l'heure et du lieu de l'interrogatoire tenu aux termes du paragraphe (1) est donné aux parties concernées.

Avis des date, heure et lieu

Transcripts

(3) A transcript of an examination ordered under subsection (1) shall be taken and filed with the Agency.

(3) Les transcriptions des interrogatoires tenus aux termes du paragraphe (1) sont consignées et déposées auprès de l'Office.

Transcriptions

Certified examinations

(4) All transcripts of examinations certified under the hand of the person taking them may, without further proof, be used in evidence in the proceeding to which they relate.

(4) Les transcriptions des interrogatoires authentifiées par la signature de l'autorité qui y a procédé peuvent, sans autre justification, être admises en preuve dans l'instance à laquelle elles se rapportent.

Interrogatoires authentifiés

CONFERENCES

CONFÉRENCES

Reasons for holding conference

35. (1) The Agency may, at any time, direct the parties to a proceeding to appear

35. (1) L'Office peut en tout temps ordonner aux parties de se présenter devant

Motifs pour la tenue d'une conférence

Reasons

When reasons to be given for orders and decisions

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.

Motifs

Obligation de motiver certains arrêtés et certaines décisions

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.

Oral Hearing Not Necessary

No oral hearing

37. The Agency may make any order or decision otherwise than by holding an oral hearing.

Audience non obligatoire

Pas d'audience

37. L'Office peut prendre un arrêté ou une décision autrement qu'en tenant une audience.

PART 2

APPLICATIONS

PARTIE 2

DEMANDES

Application of This Part

Application to all applications

38. Unless otherwise provided in these Rules, this Part applies to proceedings in respect of any application to the Agency except a notice of objection under Part 5.

Application de la présente partie

Application à toutes les demandes

38. Sauf disposition contraire, la présente partie s'applique aux instances relatives à toute demande présentée à l'Office, à l'exception de l'avis d'opposition visé à la partie 5.

Pleadings

Pleadings — what they comprise

39. (1) Subject to subsection (2), the pleadings in respect of an application consist at least of the application that commences the proceeding, and may include an answer, an intervention and a reply.

Actes de procédure

Actes de procédure — contenu du dossier

39. (1) Sous réserve du paragraphe (2), les actes de procédure relatifs à une demande comprennent à tout le moins la demande introductive d'instance et, éventuellement, une réponse, une intervention et une réplique.

Exception

(2) In an appeal under subsection 42(1) of the *Civil Air Navigation Services Commercialization Act*, an intervention does not form part of the pleadings.

Exception

(2) Dans le cadre d'un appel interjeté aux termes du paragraphe 42(1) de la *Loi sur la commercialisation des services de navigation aérienne civile*, une intervention ne fait pas partie des actes de procédures.

Leave of Agency

(3) No pleading may be filed following a reply without leave of the Agency. Leave may be given at the request of a party, if the Agency considers that it is appropriate.

Autorisation de l'Office

(3) Aucun acte de procédure ne peut être déposé après la réplique sans l'autorisation de l'Office, qu'il accorde à la demande de toute partie s'il le juge indiqué.

with the Agency, and serve on the applicant on or before the date set out in the notice of oral hearing referred to in section 50, a submission that

(*a*) comments on the application or the subject-matter of the proceeding;

(*b*) describes the nature of the person's interest in the proceeding; and

(*c*) provides any relevant information that the person considers will explain or support the person's comments.

Copy for all parties

(2) The Agency shall provide all parties with a copy of any submission filed under subsection (1).

No further notice

(3) A person who files a submission under subsection (1) is not entitled to any further notice in the proceeding.

ci, et signifie au demandeur au plus tard à la date fixé dans l'avis d'audience, un exposé qui contient les éléments suivants :

a) ses commentaires concernant la demande ou l'objet de l'instance;

b) une description de la nature de son intérêt dans l'instance;

c) tout renseignements pertinent qui, selon elle, explique ou appuie ses commentaires.

Copies aux autres parties

(2) L'Office fournit aux autres parties une copie de tout exposé déposé auprès de lui.

Avis subséquents

(3) La personne intéressée n'a pas droit aux avis subséquents visant l'instance.

Disposition of Application If No Oral Hearing

As soon as practicable

47. If no oral hearing is held into an application, the Agency shall, as soon as practicable after the close of pleadings, dispose of the application on the basis of the documentation before it.

Décision sans audience

Devoir de diligence

47. Si aucune audience n'est tenue à l'égard de la demande, l'Office rend sa décision, le plus tôt possible après la clôture des actes de procédure, sur la foi de la preuve documentaire à sa disposition.

PART 3

RULES APPLICABLE TO THE CONDUCT OF ORAL HEARINGS

PARTIE 3

RÈGLES APPLICABLES AU DÉROULEMENT DES AUDIENCES

Interpretation

Definition of "hearing panel"

48. For the purposes of this Part, "hearing panel" means a panel of members of the Agency constituted by the Chairman for the purpose of holding an oral hearing into a particular matter.

Interprétation

Comité d'audience

48. Pour l'application de la présente partie, le comité d'audience est le comité des membres de l'Office constitué par le président pour tenir l'audience relativement à une affaire déterminée.

Application of this Part

Application

49. (1) This Part applies in respect of the conduct of oral hearings before a hearing panel.

Non-application of period in Part 1

(2) The five day period prescribed in subsection 23(9) for filing a reply does not apply to a party claiming confidentiality in respect of a document filed during an oral hearing.

Notice of Oral Hearing

Contents of notice

50. If an oral hearing is to be held in relation to an application, the Agency shall notify the parties of the date, time and location of the hearing at least 15 days before its commencement.

Service and Filing of Documents

Application of certain provisions

51. Subsections 11(2) and (4) are the only provisions of section 11 that apply in respect of the filing and service of documents during an oral hearing.

Special Arrangements

Notice to Secretary

52. A party who requires the services of an interpreter at an oral hearing, or who requires special arrangements for the hearing, shall advise the Secretary of their requirements as soon as possible, but not later than the date specified in the notice of oral hearing.

Appearance at Oral Hearing

When failure to appear

53. An oral hearing may proceed even though a party fails to appear before the hearing panel.

Application de la présente partie

Application

49. (1) La présente partie s'applique aux audiences devant le comité d'audience.

Non-application de la période prévue à la partie 1

(2) Le délai de cinq jours prévu au paragraphe 23(9) pour présenter une réplique ne s'applique pas à la partie qui demande le traitement confidentiel d'un document déposé au cours d'une audience.

Avis d'audience

Contenu de l'avis

50. Si une audience doit être tenue relativement à une demande, l'Office avise toutes les parties de la date, de l'heure et du lieu de l'audience au moins quinze jours avant le début de celle-ci.

Dépôt et signification de documents

Application de certaines dispositions

51. Les paragraphes 11(2) et (4) sont les seules dispositions de l'article 11 qui s'appliquent au dépôt des documents déposés au cours d'une audience et à leur signification.

Arrangements spéciaux

Avis au secrétaire

52. La partie qui requiert les services d'un interprète à l'audience ou des arrangements spéciaux doit en aviser le secrétaire le plus tôt possible et au plus tard à la date fixée dans l'avis d'audience.

Comparution à l'audience

Défaut de comparaître

53. Une audience peut se poursuivre même si une partie ne comparaît pas devant le comité d'audience.

Issues Not Raised in Pleadings

Prohibition except if leave given

54. A party who does not raise an issue in their pleadings shall not raise the issue at an oral hearing except with leave of the hearing panel.

Questions non soulevées dans les actes de procédure

Interdiction sauf en cas d'autorisation

54. La partie qui n'a pas soulevé une question dans ses actes de procédure ne peut plus le faire à l'audience, sauf avec l'autorisation du comité d'audience.

Evidence

Evidence by affidavit

55. Despite section 60, the hearing panel may, at any time during an oral hearing, and subject to any conditions imposed by it, order that

(*a*) evidence of certain facts be given by affidavit and read at the oral hearing; and

(*b*) any deponent of an affidavit be examined in accordance with section 34, before a commissioner of oaths or another person who is authorized to administer oaths or affirmations and who is appointed by the Agency for that purpose.

Preuve

Preuve par affidavit

55. Malgré l'article 60, à tout moment au cours de l'audience et sous réserve des conditions qu'il impose, le comité d'audience peut ordonner :

a) que la preuve de certains faits soit établie par affidavit et que celui-ci soit lu à l'audience;

b) que l'auteur de l'affidavit soit interrogé conformément à la procédure prévue à l'article 34 devant un commissaire aux serments ou toute autre personne habilitée à faire prêter serment ou à recevoir des affirmations solennelles et nommée à cette fin par l'Office.

Witnesses

Prohibition

56. A party who does not provide the name of a witness or give written notice of a witness' proposed testimony before the commencement of an oral hearing may not call the witness at the hearing, except with leave of the hearing panel.

Témoins

Interdiction

56. La partie qui n'a pas fourni l'identité d'un témoin ou qui n'a pas donné avis de la teneur de son témoignage avant le début de l'audience ne peut le faire témoigner, sauf autorisation du comité d'audience.

Subpoenas

Obtaining subpoena

57. (1) A subpoena requiring the attendance of a person as a witness at an oral hearing may be obtained without charge from the Agency.

Signed and sealed

(2) The subpoena shall be signed by the Secretary and sealed with the Agency's seal and, if it is issued in blank, it shall be completed by a party to the proceeding or the party's representative.

Assignation à comparaître

Obtention de l'assignation

57. (1) L'assignation à comparaître comme témoin à l'audience peut être obtenue gratuitement de l'Office.

Assignation signée et scellée

(2) L'assignation à comparaître est signée par le secrétaire, porte le sceau de l'Office et, si elle est délivrée en blanc, est remplie par une partie à l'instance ou par son représentant.

Personal service and filing

(3) A subpoena shall be served personally on the person to whom it is directed and a copy of the subpoena and the affidavit of service shall be filed with the Agency at least 48 hours before the date fixed for the attendance of the person as a witness.

Signification à personne et dépôt

(3) L'assignation à comparaître est signifiée à personne et une copie de l'assignation ainsi que l'affidavit de signification sont déposés auprès de l'Office au moins quarante-huit heures avant la date fixée pour la comparution du témoin.

Fees and allowances

(4) A party who serves a subpoena shall, at the time of service, pay or tender to the person served an amount that is not less than the amount to which the person would have been entitled as fees and allowances if the subpoena had been issued under the *Federal Court Rules, 1998*.

Indemnités et frais

(4) La partie qui signifie une assignation à comparaître verse ou offre de verser au témoin, au moment de la signification, une somme au moins égale à l'indemnité et aux frais auxquels il aurait eu droit si l'assignation à comparaître avait été donnée en vertu des *Règles de la Cour fédérale (1998)*.

Order of Proceeding

Order of proceeding

58. Unless an order of proceeding has been agreed to by all parties in advance and approved by the Agency, the hearing panel shall establish the order of proceeding at the start of the hearing.

Conduite de l'instance

Conduite de l'instance

58. Sauf dans le cas où les parties, avec l'approbation de l'Office, ont convenu à l'avance de la conduite de l'instance, le comité d'audience fixe la conduite de ses audiences au début de celles-ci.

Presentation of Evidence

Opportunity to present evidence

59. Every party shall be given an opportunity to present evidence and make representations to the hearing panel.

Présentation des éléments de preuve

Possibilité de présenter des éléments de preuve

59. Toute partie doit avoir la possibilité de présenter des éléments de preuve et des observations au comité d'audience.

Examination of witnesses

60. (1) Witnesses at an oral hearing shall be examined orally under oath or solemn affirmation, and the examination may consist of direct examination, cross-examination and re-examination.

Interrogatoire des témoins

60. (1) Les témoins à l'audience sont interrogés oralement après avoir prêté serment ou fait une affirmation solennelle; l'interrogatoire peut comprendre un interrogatoire principal, un contre-interrogatoire et un réinterrogatoire.

Expert witness' report

(2) A party who intends to call an expert witness at an oral hearing shall, not less than 30 days before the commencement of the hearing, serve on the other parties a copy of the report, signed by the expert witness, setting out the substance of the expert witness' testimony, the curriculum vitae of the expert witness and a de-

Rapport de l'expert

(2) Toute partie qui entend convoquer un expert comme témoin signifie aux autres parties, au moins trente jours avant l'audience, une copie du rapport signé par l'expert faisant état de l'essentiel de son témoignage, une copie de son curriculum vitae et un résumé détaillé de son témoignage. L'original du rapport et les copies

tailed summary of the expert witness' testimony. The original of the report along with copies of the other documents shall be filed with the Agency.

des autres documents sont déposés auprès de l'Office.

Rebuttal of expert's report

(3) A party on whom a copy of the expert witness's report has been served and who intends to rebut with expert evidence any matter set out in the report shall, not less than 10 days before the commencement of the oral hearing, serve on the other parties a copy of the report signed by the expert witness setting out the substance of the evidence to be introduced in rebuttal, the curriculum vitae of the expert witness and a detailed summary of the expert witness' testimony. The original of the report along with copies of the other documents shall be filed with the Agency.

Rapport de l'expert réfuté

(3) La partie à qui le rapport de l'expert a été signifié et qui entend réfuter au moyen d'un témoignage d'expert tout point soulevé dans le rapport, dépose auprès de l'Office et signifie aux autres parties, au moins dix jours avant l'audience, une copie du rapport signé par l'expert faisant état de l'essentiel de son témoignage, une copie de son curriculum vitae et un résumé détaillé de son témoignage. L'original du rapport et les copies des autres documents sont déposés auprès de l'Office.

Oral Motion

Oral Motion

61. A motion may, with leave of the Agency, be made orally during a hearing and disposed of in accordance with any procedure that the Agency considers appropriate.

Requêtes orales

Requête orale

61. Une requête peut, avec l'autorisation de l'Office, être présentée oralement au cours d'une audience et est réglée selon la procédure que l'Office juge indiquée.

Interveners

Order of intervener evidence

62. (1) An intervener may give evidence after the party whom it supports has presented its case and may be examined by the applicant and respondent.

Cross-examination

(2) An intervener is not entitled to cross-examine the applicant, the respondent or any of their witnesses unless the intervener's request to do so has been granted by the hearing panel.

Intervenants

Présentation de la preuve — intervenant

62. (1) L'intervenant présente sa preuve après que la partie dont il appuie la prétention a présenté la sienne et peut être interrogé par le demandeur et l'intimé.

Contre-interrogatoire

(2) L'intervenant ne peut contre-interroger le demandeur, l'intimé ou leurs témoins que s'il en a présenté la demande au comité d'audience et que la demande a été acceptée.

Electronic Examination

Agency's powers

63. The Agency may, on any terms and conditions that it considers appropriate, order that the examination of a person be

Interrogatoire par voie électronique

Pouvoirs de l'Office

63. L'Office peut, aux conditions qu'il juge indiquées, ordonner que l'interrogatoire d'une personne se fasse par vidéocas-

conducted by videotape, video-conference or any other form of electronic communication.

sette, vidéoconférence ou tout autre moyen de communication électronique.

Written Arguments

Plaidoiries écrites

Agency's powers

64. The Agency may, whenever it considers it appropriate to do so, order written arguments to be submitted by a party to a proceeding in addition to or instead of oral argument.

Pouvoirs de l'Office

64. L'Office peut, lorsqu'il le juge indiqué, ordonner à une partie à une instance de lui présenter sa plaidoirie par écrit en plus ou à la place de plaider oralement.

Postponements and Adjournments

Suspension et ajournement

Postponement

Suspension

By request

65. The Agency may allow a postponement of an oral hearing if a party requests it in writing, at least 10 days before the commencement of the hearing, on any terms that the Agency considers appropriate.

Suspension sur demande

65. L'Office peut, aux conditions qu'il juge indiquées, autoriser la suspension d'une audience sur demande écrite de toute partie présentée au plus tard dix jours avant la date fixée pour le début de l'audience.

Adjournment

Ajournement

Agency's powers

66. The Agency may allow an adjournment of an oral hearing, at the request of a party, at any time during the hearing, on any terms that the Agency considers appropriate.

Pouvoirs de l'Office

66. L'Office peut en tout temps pendant l'audience, sur demande d'une partie, ajourner celle-ci aux conditions qu'il juge indiquées.

PART 4

COMPLAINTS BY AIR CARRIERS AGAINST OTHER AIR CARRIERS' TARIFFS APPLICABLE TO INTERNATIONAL SERVICES

PARTIE 4

PLAINTES DE TRANSPORTEURS AÉRIENS À L'ÉGARD DES TARIFS D'AUTRES TRANSPORTEURS AÉRIENS APPLICABLES À DES SERVICES INTERNATIONAUX

Application of This Part

Application de la présente partie

Application

67. This Part applies in respect of a complaint to the Agency by an air carrier against the tariffs of another air carrier which are applicable to that air carrier's international service.

Application

67. La présente partie s'applique à toute plainte présentée à l'Office par un transporteur aérien à l'égard de tarifs d'un autre transporteur aérien, lesquels s'appliquent au service international du transporteur aérien qui porte plainte.

CANADA

CONSOLIDATION

CODIFICATION

Telecommunications Act

Loi sur les télécommunications

S.C. 1993, c. 38

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of the Commission and tariffs of the carrier, but the advice is not binding on the Commission.

Saving

(2) This section does not affect the power of the Commission to advise any person with respect to any other matter within its jurisdiction.

sions déjà rendues dans ce domaine. La demande peut aussi être faite par l'entreprise.

Autres questions

(2) Le présent article n'a pas pour effet de porter atteinte au pouvoir du Conseil de donner son avis sur toute autre question relevant de sa compétence.

Decisions of Commission

Décisions du Conseil

Partial or additional relief

60. The Commission may grant the whole or any portion of the relief applied for in any case, and may grant any other relief in addition to or in substitution for the relief applied for as if the application had been for that other relief.

Réparation

60. Le Conseil peut soit faire droit à une demande de réparation, en tout ou en partie, soit accorder, en plus ou à la place de celle qui est demandée, la réparation qui lui semble justifiée, l'effet étant alors le même que si celle-ci avait fait l'objet de la demande.

Conditional decisions

61. (1) The Commission may, in any decision, provide that the whole or any portion of the decision shall come into force on, or remain in force until, a specified day, the occurrence of a specified event, the fulfilment of a specified condition, or the performance to the satisfaction of the Commission, or of a person named by it, of a requirement imposed on any interested person.

Effet des décisions

61. (1) Le Conseil peut, dans ses décisions, prévoir une date déterminée pour leur mise à exécution ou cessation d'effet — totale ou partielle — ou subordonner celle-ci à la survenance d'un événement, à la réalisation d'une condition ou à la bonne exécution, appréciée par lui-même ou son délégué, d'obligations qu'il aura imposées à l'intéressé.

Interim decisions

(2) The Commission may make an interim decision and may make its final decision effective from the day on which the interim decision came into effect.

Décisions provisoires

(2) Le Conseil peut rendre une décision provisoire et rendre effective, à compter de la prise d'effet de celle-ci, la décision définitive.

Ex parte decisions

(3) The Commission may make an *ex parte* decision where it considers that the circumstances of the case justify it.

Décisions *ex parte*

(3) La décision peut également être rendue *ex parte* si le Conseil estime que les circonstances le justifient.

Review of decisions

62. The Commission may, on application or on its own motion, review and rescind or vary any decision made by it or re-hear a matter before rendering a decision.

Révision et annulation

62. Le Conseil peut, sur demande ou de sa propre initiative, réviser, annuler ou modifier ses décisions, ou entendre à nouveau une demande avant d'en décider.

Enforcement in Federal Court

63. (1) A decision of the Commission may be made an order of the Federal Court or of a superior court of a province and may be enforced in the same manner as an order of that court as if it had been an order of that court on the date of the decision.

Assimilation

63. (1) Les décisions du Conseil peuvent être assimilées à des ordonnances de la Cour fédérale ou d'une cour supérieure à la date où elles sont prononcées; le cas échéant, leur exécution peut s'effectuer selon les mêmes modalités.

Procedure

(2) A decision of the Commission may be made an order of a court in accordance with the usual practice and procedure of the court in such matters, if any, or by the filing with the registrar of the court of a copy of the decision certified by the secretary to the Commission.

Procédure

(2) L'assimilation peut se faire soit selon les règles de pratique et de procédure de la cour applicables en l'occurrence, soit par dépôt, auprès du greffier de la cour, d'une copie de la décision en cause certifiée conforme par le secrétaire du Conseil.

Effect of revocation or amendment

(3) Where a decision of the Commission that has been made an order of a court is rescinded or varied by a subsequent decision of

Annulation ou modification

(3) Les décisions assimilées peuvent être annulées ou modifiées par le Conseil, auquel cas l'assimilation devient caduque. Les décisions

Appendix “B”

Caselaw

Case Name:

Assoc. des compagnies de téléphone du Québec Inc. v. Canada (Attorney General)

Between
L'Association des compagnies de téléphone du Québec Inc. and the Ontario Telecommunications Association, Moving Parties,
and
Attorney General of Canada, Rogers Communications Partnership, Cogeco Cable Inc., Bragg Communications Inc. (carrying on business as Eastlink), Cablovision Warwick Inc., Bell Alliant Regional Communications, Bell Canada and Telus Communications Company, Respondents

[2012] F.C.J. No. 1162

[2012] A.C.F. no 1162

2012 FCA 203

435 N.R. 239

Docket 12-A-23

Federal Court of Appeal
Ottawa, Ontario

Stratas J.A.

Heard: June 27, 2012.
Judgment: July 3, 2012.

(48 paras.)

Media and communications law -- Canadian Radio-television and Telecommunications Commission proceedings -- Enforcement of decisions -- Motion by L'Association des Compagnies de TÚlÚphone du QuÚbec and the Ontario Telecommunications Association to stay implementation of part or all of certain decisions of Canadian Radio-Television and Telecommunications Commission dismissed -- Associations had appealed two decisions to Governor in Council -- Although Court had

jurisdiction to grant stay, Governor in Council was adequate, available forum in which moving parties could seek their stay.

Media and communications law -- Canadian Radio-television and Telecommunications Commission reviews and appeals -- Cabinet appeals -- Motion by L'Association des Compagnies de TÚlÚphone du QuÚbec and the Ontario Telecommunications Association to stay implementation of part or all of certain decisions of Canadian Radio-Television and Telecommunications Commission dismissed -- Associations had appealed two decisions to Governor in Council -- Although Court had jurisdiction to grant stay, Governor in Council was adequate, available forum in which moving parties could seek their stay.

Motion by L'Association des Compagnies de TÚlÚphone du QuÚbec and the Ontario Telecommunications Association to stay the implementation of part or all of certain decisions of the Canadian Radio-Television and Telecommunications Commission. The Associations argued that these decisions, directives and policies exposed their members to greater competition and detrimentally changed subsidies and other payments they received. As a result, their members and the public would suffer detrimental effects. Although the Associations had only appealed two of these decisions to the Governor in Council, they sought to stay most of the decisions or directives not under appeal until the appeal of the two decisions was determined. The Associations had already asked the CRTC to stay the decisions but the request was refused.

HELD: Motion dismissed. Although the Court had the jurisdiction under ss. 44 and 50 of the Federal Courts Act to grant injunctive relief concerning administrative proceedings and decisions, even in circumstances where there was no proceeding before this Court, the circumstances in which that jurisdiction could be exercised were rare. Discretionary bars existed in this case to foreclose this Court's consideration of the moving parties' stay motion. The Governor in Council was an adequate, available forum in which the moving parties could seek their stay. The Court also had the ability to decline to hear a matter and to refer it to another body with jurisdiction in circumstances where that body was more appropriate or better suited to decide the matter, such as the Governor in Council in this case. Considering that the Associations had appealed to the Governor in Council, the stay was really a matter for the Governor in Council to decide.

Statutes, Regulations and Rules Cited:

Federal Courts Act, R.S.C. 1985, c. F-7, s. 44, s. 50

Telecommunications Act, S.C. 1993, c. 38, s. 12, s. 62, s. 64(1)

A motion to stay the implementation of part or all of certain decisions of the Canadian Radio-Television and Telecommunications Commission rendered between May 2011 and January 2012.

Counsel:

Alan M. Riddell and Stephen Shaddock, for the Moving Parties.

Gerald Kerr-Wilson and Marisa Victor, for the Respondents.

Rogers Communications Partnership, Cogeco Cable Inc., Bragg Communications Inc. (carrying on business as Eastlink), and Cablovision Warwick Inc.

Christopher Rootham and Stephen Schmidt, for the Respondent, Telus Communications Company.

REASONS FOR ORDER

1 **STRATAS J.A.**:-- The moving parties, L'Association des Compagnies de Téléphone du Québec Inc. and the Ontario Telecommunications Association, have brought a motion for an order staying certain decisions, directives and policies made by the Canadian Radio-television and Telecommunications Commission.

2 The respondents oppose the motion on the basis that the test in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 has not been met. In particular, they say that the moving parties have not established the existence of irreparable harm and have not established that the balance of convenience is in favour of granting a stay. The respondents also note that the moving parties are associations and submit it is their members, not the associations themselves, that will suffer irreparable harm, if any. To deal with that submission, the moving parties have brought an additional motion, seeking to add some of their members as moving parties.

3 The respondents have also asserted a number of preliminary objections. For the reasons that follow, I find that two of these preliminary objections are well-founded and so I must dismiss the moving parties' stay motion.

A. The basic facts

4 Since this Court is not dismissing the moving parties' stay motion on its merits and since it is possible that, as a result of these reasons, the moving parties may apply to the Governor in Council for a stay, only a brief recounting of the facts is necessary and appropriate.

(1) What the CRTC has done

5 Over the past year, the CRTC has made a number of decisions, directives and policies that the moving parties say adversely affect their members: Telecom Regulatory Policy CRTC 2011-291;

Telecom Notice of Consultation, CRTC 2011-348; Telecom Decisions CRTC 2011-733, 2012-35, 2012-36, 2012-37, 2012-38, 2012-39, 2012-40, 2012-41, 2012-42, 2012-43, 2012-44, 2012-45, 2012-46 and 2012-47.

(2) Effects on the moving parties

6 The moving parties say that these decisions, directives and policies expose their members to greater competition and detrimentally change subsidies and other payments they receive. As a result, their members and the public will suffer detrimental effects. Further, they say that their members' financial viability is at stake.

(3) The moving parties' appeals

7 Under the *Telecommunications Act*, S.C. 1993, c. 38, "decisions" may be varied, rescinded or referred back to the CRTC by way of petition to the Governor in Council under section 12 (collectively "appealed"). They may also be appealed to this Court, with leave, on questions of law or jurisdiction (section 64). "Decisions" are "determination[s] made by the Commission in any form" (section 2).

8 The moving parties have appealed only two decisions to the Governor in Council: Telecom Regulatory Policy, CRTC 2011-291 and Telecom Decision CRTC 2011-733 (a decision that is not sought to be stayed). These have not been appealed to this Court.

(4) The moving parties' motion to this Court

9 In their motion in this Court, the moving parties seek a stay of all or part of the decisions, directives and policies set out in paragraph 5, above. They ask that the decisions, directives and policies - most of them not under appeal - be stayed until the Governor in Council determines their appeal of Telecom Regulatory Policy, CRTC 2011-291 and Telecom Decision CRTC 2011-733.

10 The bottom line is that the moving parties seek a stay from this Court even though the only appeals on the merits have been made to the Governor in Council.

B. Places where the moving parties could seek a stay of the CRTC's decisions

11 In these circumstances, the moving parties had three places which they could seek a stay of the CRTC's decisions.

(1) The CRTC

12 After the CRTC makes a decision, an aggrieved party may ask the CRTC to stay it. The CRTC exercises this jurisdiction under section 62 of the *Telecommunications Act*. Among other things, that section allows it to "vary any decision made by it."

13 Although the CRTC often describes its power as a power to grant stays, in law it is really varying the effective date of its decision. For example, a decision that was to take immediate effect can be varied to come into effect at a future time.

14 By Practice Note dated February 28, 1997, the CRTC has announced that it will consider stay applications by examining the test set out by the Supreme Court of Canada in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110 and *RJR-MacDonald Inc.*, *supra*.

15 In this case, the moving parties asked the CRTC to stay the decisions, directives and policies set out in paragraph 5, above. On March 30, 2012, the majority of the CRTC (with one dissenter) refused the request. The majority found that the moving parties had not established the existence of irreparable harm, nor had they established that the balance of convenience was in favour of granting a stay. The moving parties have brought a motion for leave to appeal to this Court from the CRTC's decision not to grant a stay. That motion remains pending before this Court.

(2) The Governor in Council

16 The respondent, TELUS, submits that the Governor in Council has the power to stay CRTC decisions. It says that this power exists under section 12 of the *Telecommunications Act*.

17 I agree with this submission. Section 12 provides as follows:

> 12. (1) Within one year after a decision by the Commission, the Governor in Council may, on petition in writing presented to the Governor in Council within ninety days after the decision, or on the Governor in Council's own motion, by order, vary or rescind the decision or refer it back to the Commission for reconsideration of all or a portion of it.
>
> * * *
>
> 12. (1) Dans l'année qui suit la prise d'une décision par le Conseil, le gouverneur en conseil peut, par décret, soit de sa propre initiative, soit sur demande écrite présentée dans les quatre-vingt-dix jours de cette prise, modifier ou annuler la décision ou la renvoyer au Conseil pour réexamen de tout ou partie de celle-ci et nouvelle audience.

18 Many CRTC decisions take effect on the date on which they were pronounced. The Governor in Council can use section 12 to vary the time when they take effect. In effect, they are stayed or suspended until the times specified by the Governor in Council. The Governor in Council has exercised this power on a number of occasions: P.C. 1981-2151, 1981-3382 and 1981-3456 (*Telsat Canada*) (on its own motion); P.C. 1988-2386, 1989-1238 and 1990-620 (*Call-Net*) (on its own motion); *C.W.C. v. Canada (Attorney General)*, [1989] 1 F.C. 643 at paragraph 4 (in response to a party's request).

(3) The Federal Court of Appeal

19 When a party brings a motion for leave to appeal to this Court from a CRTC decision on the merits, on occasion the party also seeks a stay of a decision of the CRTC until final judgment of this Court. Our jurisdiction to grant such a stay is undoubted: sections 44 and 50 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 and see, *e.g.*, *North American Gateway Inc. v. CRTC* (1997), 74 C.P.R. (3d) 156 (F.C.A.). When a potential appellant or an appellant is before our Court, our Court has the ability to protect that party from the effects of a CRTC decision under challenge. We do so when the test in *RJR-MacDonald*, *supra*, is met.

20 However, this case is different. As mentioned above, the moving parties have appealed the CRTC decisions only to the Governor in Council, not to this Court. Does this Court have any jurisdiction to entertain a stay motion in circumstances where the only appeal is before the Governor in Council, not this Court?

C. Preliminary Objections

21 That question is one of the preliminary objections advanced by the respondent TELUS. It answers that question in the negative. It adds that the Governor in Council is an adequate alternative forum for advancing a stay. Finally, it submits that the moving parties are barred from bringing a stay in this Court as a result of issue estoppel caused by the CRTC's decision not to grant a stay.

22 In my view, this Court can entertain a stay motion in circumstances where the only appeal is before the Governor in Council, but there are important qualifications to this. As will be seen, the circumstances in which that jurisdiction can be exercised are rare.

23 This Court does have the jurisdiction to grant injunctive relief - and stays are a form of injunctive relief - concerning administrative proceedings and decisions, even in circumstances where there is no proceeding before this Court. A good example is *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626. The basis for this jurisdiction is section 44 of the *Federal Courts Act*. It provides as follows:

> **44.** In addition to any other relief that the Federal Court of Appeal or the Federal Court may grant or award, a mandamus, an injunction or an order for specific performance may be granted or a receiver appointed by that court in all cases in which it appears to the court to be just or convenient to do so. The order may be made either unconditionally or on any terms and conditions that the court considers just.
>
> * * *
>
> **44**. Indépendamment de toute autre forme de réparation qu'elle peut accorder, la Cour d'appel fédérale ou la Cour fédérale peut, dans tous les cas où il lui paraît

> juste ou opportun de le faire, décerner un mandamus, une injonction ou une ordonnance d'exécution intégrale, ou nommer un séquestre, soit sans condition, soit selon les modalités qu'elle juge équitables.

24 An alternative basis for this jurisdiction is section 50 of the *Federal Courts Act*. It provides as follows:

> **50.** (1) The Federal Court of Appeal or the Federal Court may, in its discretion, stay proceedings in any cause or matter
>
> (*a*) on the ground that the claim is being proceeded with in another court or jurisdiction; or
>
> (*b*) where for any other reason it is in the interest of justice that the proceedings be stayed.
>
> * * *
>
> **50.** (1) La Cour d'appel fédérale et la Cour fédérale ont le pouvoir discrétionnaire de suspendre les procédures dans toute affaire :
>
> *a*) au motif que la demande est en instance devant un autre tribunal;
>
> *b*) lorsque, pour quelque autre raison, l'intérêt de la justice l'exige.

25 The scope of this Court's jurisdiction under these sections is unclear.

26 On one view, this Court has "a general administrative jurisdiction over federal tribunals" that "should not be interpreted in a narrow fashion": *Canadian Liberty Net*, *supra* at paragraph 36. This is a "plenary jurisdiction" identical to that existing in superior courts to "regulate disputes related to the control and exercise of powers of an administrative agency," for example through "injunctive relief in certain urgent situations": *ibid*.; *Okwuobi v. Lester B. Pearson School Board; Casimir v. Quebec (Attorney General); Zorrilla v. Quebec (Attorney General)*, 2005 SCC 16, [2005] 1 S.C.R. 257 at paragraphs 50-53. However, although the Court has this jurisdiction, as a discretionary matter it can decide not to exercise it. For example, there may be other available, adequate and effective administrative avenues for relief: *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3; *Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61; D.J.M. Brown and J.M. Evans, *Judicial Review of Administrative Action in Canada* (looseleaf) (Toronto: Canvasback Publishing, 2007) at paragraph 3:2000. Alternatively, another forum may possess

superior expertise or be better suited to deciding the issue: *Reza v. Canada*, [1994] 2 S.C.R. 394. But the mere existence of an alternative administrative scheme does not, by itself, oust this Court's jurisdiction: *Canadian Liberty Net*, *supra*; *A.B.L.E. Association for Betterment of Literacy & Education v. The Queen* (1998), 52 D.T.C. 6668 at paragraph 7 (F.C.A), *Canada (Minister of National Revenue) v. Swiftsure Taxi Co.*, 2005 FCA 136 at paragraphs 3-6.

27 On another view, this Court's jurisdiction is only "residuary," a word that does not necessarily mean the same thing as "other available, adequate and effective administrative avenues for relief" in the authorities mentioned above. See, *e.g.*, *Canadian Liberty Net*, *supra* at paragraph 41, where, apparently contrary to other passages in the judgment, it is said that "no jurisdiction" should be found where another forum exists. See also *Okwuobi*, *supra* at paragraph 1 and *Brotherhood*, *supra* at paragraph 5. On this view, the existence of another forum in which the relief could potentially be sought could deprive this Court of jurisdiction, regardless of the circumstances.

28 Under either view, the Court's jurisdiction to grant injunctive relief can be ousted by a clear indication of statutory intention to exclude it: *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929; *Okwuobi*, *supra* at paragraph 38; *Vaughan v. Canada*, 2005 SCC 11, [2005] 1 S.C.R. 146 at paragraphs 27-29. Even then, in exceptional circumstances, such an ouster might be regarded as similar to a privative clause and so it may be that this Court can still act, albeit deferentially, under its constitutional jurisdiction founded on the rule of law: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraphs 27-29. This may be one of the bases for the emergency injunctive power discussed in *Okwuobi*, *supra*.

29 Were it necessary to decide between these two views, I would subscribe to the former view, the view that our jurisdiction is full and plenary. This view maximizes this Court's ability to react to unusual circumstances while drawing upon the rich jurisprudence on adequate alternative remedies to ensure that administrative regimes are respected and are allowed to operate effectively. Also it is more in accord with the normal analytical framework that applies in administrative matters. Under that framework, three questions are to be asked:

- *Jurisdiction.* Does the Court have jurisdiction? In other words, can it consider the matter placed before it?
- *Discretionary bars.* Do any discretionary bars exist against exercising jurisdiction? In other words, even though it can consider the matter placed before it, should it? The two matters mentioned in paragraph 26, above - the existence of other available, adequate and effective administrative avenues for relief and the existence of another forum which possesses superior expertise or is better suited to deciding the issue - fall to be considered here.
- *Merits.* How should the Court exercise its jurisdiction? In other words, given that the Court can and should consider the matter, what result on the merits should it reach?

In these reasons, I shall follow this analytical framework.

D. Analysis

(1) Does the Court have jurisdiction?

30 In this case, the moving parties seek relief from the Governor in Council under the provisions of the federal *Telecommunications Act*. In these circumstances, sections 44 and 50 of the *Federal Courts Act* potentially give this Court jurisdiction to grant a stay pending an appeal to the Governor in Council.

31 The *Telecommunications Act* does not expressly exclude that jurisdiction. There is only a restriction on appealing the merits of a CRTC decision to this Court (see section 64).

32 Further, it cannot be said that that jurisdiction is impliedly or necessarily excluded by the *Telecommunications Act*. By way of illustration, suppose that a party that has received an adverse decision from the CRTC and has a strong appeal from it. Also suppose that it will be gravely and irreparably affected by it in the next three days. Finally, suppose that the Governor in Council cannot meet within those three days to deal with the party's request for a stay. In my view, there is nothing in the *Telecommunications Act* that would impliedly or necessarily require this Court to stand by and let injustice happen in those urgent circumstances. See *Okwuobi*, *supra* at paragraphs 51-53 (albeit in the context of superior courts).

33 Therefore, in my view, this Court has jurisdiction to entertain the moving party's stay motion.

(2) Do any discretionary bars exist against exercising jurisdiction?

34 TELUS submits that the moving parties are barred by way of issue estoppel from seeking a stay from this Court. The estoppel is said to arise from the CRTC's dismissal of the moving parties' application for a stay before it. TELUS submits that the CRTC applied the *RJR-MacDonald* test and this is the same test that must be applied on the motion in this Court.

35 In order for issue estoppel to constitute a complete bar to this Court's consideration of the moving parties' stay motion, the issues considered by the CRTC must be the same as those to be considered in this Court. Here, although there is substantial overlap in the issues - and indeed, the CRTC uses the same test that this Court uses on stay motions - the issues are not necessarily identical. The CRTC is acting under its power in section 62 of the *Telecommunications Act* to vary one of its decisions. This Court does not vary the CRTC's decision but rather exercises its own original jurisdiction to stay it under either of sections 44 and 50 of the *Federal Courts Act*. Different considerations can potentially come to bear on these two different matters: *Mylan Pharmaceuticals ULC v. AstraZeneca Canada, Inc.*, 2011 FCA 312.

36 A more fundamental impediment to the application of issue estoppel in these circumstances is

the lack of finality associated with the CRTC's decision not to grant the moving parties a stay. As mentioned in paragraph 15, above, the moving parties have brought a motion seeking leave to appeal that decision to this Court under subsection 64(1) of the *Telecommunications Act*.

37 I would add that although issue estoppel is not a complete bar to this Court's consideration of the moving parties' stay motion, the doctrine of abuse of process may prevent certain matters from being relitigated: *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77. It is not necessary to consider this further, as two other discretionary bars exist to foreclose this Court's consideration of the moving parties' stay motion.

38 The first discretionary bar is the fact that the Governor in Council is an adequate, available forum in which the moving parties can seek their stay: *Matsqui Indian Band*, *supra*; *C.B. Powell Limited*, *supra*; Brown and Evans, *supra* at paragraph 3:2000. As mentioned in paragraph 18, above, the Governor in Council has the power to stay CRTC decisions and has shown a willingness to exercise that power.

39 Although the Governor in Council is an adequate, available forum for obtaining the remedy they seek, the moving parties have not availed themselves of it. Indeed, their petition to the Governor in Council does not request a stay, nor does it even ask the Governor in Council to speed up its decision-making.

40 The moving parties submitted that the Governor in Council is not an adequate forum because it is ill-suited to the receipt of complicated evidence, fact-finding and legal submissions. This is essentially a factual submission made without evidence as to the nature of the Governor in Council's consideration of such matters or its inadequacy or inability to act. In any event, the cases show that the Governor in Council is sometimes required under statutes to consider complicated evidence, fact-finding and legal submissions alongside policy considerations, and it does so: *e.g.*, *Globalive Wireless Management Corp. v. Public Mobile Inc.*, 2011 FCA 194; *League for Human Rights of B'Nai Brith Canada v. Odynsky*, 2010 FCA 307.

41 In a future case, conditions of urgency or emergency might be demonstrated that would prompt this Court not to apply this discretionary bar and to grant relief, at least until the Governor in Council can consider the matter. In another future case, the Governor in Council, although requested to stay a CRTC decision, might be dilatory in reacting to the request and this Court's intervention might be necessary in the circumstances. In another future case, proof might be supplied that shows that the Governor in Council is not an adequate, available forum for the granting of relief.

42 But the present case is quite different. For one thing, conditions of urgency or emergency sufficient to overcome this Court's view on the discretionary bar have not been demonstrated. I am not convinced that the financial viability of the moving parties' members is at imminent peril. The moving parties have proceeded at a fairly sedate pace, bringing their stay motion in this Court well after the CRTC decisions were made.

43 The second discretionary bar is this Court's ability to decline to hear a matter but rather to refer it to another body with jurisdiction in circumstances where that body is more appropriate or better suited to decide the matter: *Reza*, *supra*. In this case, that body is the Governor in Council.

44 The moving parties' appeal on the merits of the CRTC's decisions has been made to the Governor in Council under section 12 of the *Telecommunications Act*. In these circumstances, this Court would be meddling in a matter that is really for the Governor in Council to decide. Further, in addition to the sorts of factors described in *RJR-MacDonald*, *supra* that the Governor in Council may consider, there may also be relevant policy considerations. As a policy body, the Governor in Council can consider these.

45 In a future case, a party might demonstrate conditions of urgency, emergency or other compelling circumstance that might overcome the factors supporting a referral of the matter to the Governor in Council. But that has not been demonstrated here.

46 Therefore, I apply these two discretionary bars against the moving parties' stay motion. The motion must be dismissed.

(3) The merits of the stay application

47 It is not necessary to consider the merits of the stay motion. It is also not necessary to deal with the moving parties' motion to add some of their members as moving parties.

E. Disposition

48 For the foregoing reasons, I shall dismiss the stay motion with costs.

STRATAS J.A.

90

Government of Canada Gouvernement du Canada

Canada

Canadian Transportation Agency

Decision No. 444-C-A-2012

November 20, 2012

COMPLAINT filed by Guillaume Boutin against Air Canada.

File No.: M4120-3/12/03736

INTRODUCTION AND ISSUES

[1] Guillaume Boutin filed a complaint with the Canadian Transportation Agency (Agency) against Air Canada regarding a permanent travel ban imposed by Air Canada following an incident that occurred at the Cancun, Mexico airport just prior to Mr. Boutin's return flight (Flight No. AC1253) to Montréal, Quebec, Canada, on February 29, 2012.

[2] Mr. Boutin asks that Air Canada lift the travel ban and requests damages in the amount of $30,000.00, which includes monetary damages, including for moral damages and trouble and inconvenience, as well as consideration for future travel and a letter of apology.

[3] The issues before the Agency are as follows:

- Did Air Canada contravene the terms and conditions of carriage set out in its tariff entitled *International Passenger Rules and Fares Tarif* NTA(A) No. 458 (Tariff) and, consequently, subsection 110(4) of the *Air Transportation Regulations*, SOR/88-58, as amended (ATR), when it decided to impose a permanent travel ban?
- If Air Canada contravened the terms and conditions of carriage set out in its Tariff, should the Agency order Air Canada to pay Mr. Boutin the claimed compensation?

[4] As indicated in the reasons that follow, the Agency concludes that:

- Air Canada did not contravene the terms and conditions set out in its Tariff when it imposed a permanent travel ban on Mr. Boutin;
- Therefore, the Agency need not address the issue of the claimed compensation.

[5] The legislative and Tariff provisions relevant to this Decision are appended.

PRELIMINARY MATTERS

[6] Mr. Boutin alleges that he did not receive the relevant documents in French. Given that the Agency does not have the authority to address issues relating to official languages, the Agency will not address this issue.

[7] Mr. Boutin is requesting damages in the amount of $30,000.00. These represent monetary damages, including for moral damages and trouble and inconvenience, as well as consideration for future travel and a letter of apology. There is nothing in the Agency's enabling legislation that would allow the Agency to award compensation for these damages. Accordingly, the Agency will not address this issue.

[8] Although a letter signed by a witness for Air Canada was filed one day late, the Agency, pursuant to section 5 of the *Canadian Transportation Agency General Rules*, SOR/2005-35, accepts this statement as it deems it relevant to its review of this case.

[9] In Decision No. LET-C-A-188-2012, the Agency decided to address Mr. Boutin's complaint despite the existence of a partially concurrent suit presently before the Court of Québec's Small Claims Division – Civil Division.

POSITIONS OF THE PARTIES

[10] Mr. Boutin maintains that, while waiting in the Business Lounge at the Cancun airport, he and his travelling companion were misinformed by the Air Canada employees about the boarding announcement for their return flight from Cancun to Montréal on February 29, 2012, and that Air Canada failed to post its flight schedule, causing them to miss their flight.

[11] Mr. Boutin submits that he asked an Air Canada employee at the airport if he could arrange to have the aircraft return and, if not, to at least put them on another flight; this employee, in Mr. Boutin's view, was uncompromising, very rude and arrogant.

[12] Mr. Boutin advises that he and his companion were able to leave Cancun the following day with Air Canada but they had to pay extra fees.

[13] Mr. Boutin advises that he received a letter from Air Canada notifying him that he can no longer travel with the carrier as he was aggressive, and therefore represented a danger to other passengers and that he had tried to grab an Air Canada agent. Mr. Boutin admits that he was upset and did complain forcefully, but he maintains that he never swore and did not make any offending gesture.

[14] Air Canada, in a letter sent to Mr. Boutin prior to the filing of this complaint with the Agency, referred to *Leonard O'Reilly vs. Air Canada* (Decision No. 295-C-A-2011). In response, Mr. Boutin submits that he does not support the carrier's position respecting his situation based on the following:

- He missed his flight because of erroneous information he received. Air Canada did not refuse to put him on the next flight, or the seven other flights he took after the incident in Cancun, and a travel ban has been imposed, whereas the travel ban in Mr. O'Reilly's case was a refusal to transport on one flight.
- He seeks an apology and the annulment of the travel ban, but no financial compensation unless the travel ban is not waived in a reasonable delay, whereas Mr. O'Reilly sought an apology from Air Canada and compensation for the additional costs he incurred and the "gross impugnment" of his character that the treatment he received constitutes.
- Air Canada has one witness and this person has yet to be identified, whereas in Mr. O'Reilly's case, there were three written statements submitted.
- He was upset and did complain forcefully, but he never swore and did not make any offending gestures, whereas Mr. O'Reilly threw a $20 bill on the counter, swore, was very irate, aggressive and uncooperative.

[15] Mr. Boutin submits that he has travelled over 300 segments with Air Canada, has travelled 11 times, including seven with Air Canada, since the incident, and has shown no signs or behavior detrimental to the safety of passengers or crew, or affecting the operations of the carrier during these flights.

[16] In its reply, Air Canada indicates that in the "Mera" Business Lounge at the Cancun airport, while awaiting the departure of Flight No. AC1253, Mr. Boutin notified the Concierge that he had forgotten his wallet and cell phone at the hotel. To help him, the Concierge put him in touch with the hotel by telephone.

[17] Air Canada claims that when it came time to board Flight No. AC1253, the Concierge notified all passengers to head to the boarding gate. Air Canada adds that boarding for the flight was clearly posted on all screens in the Business Lounge but that despite these announcements, Mr. Boutin decided to stay in the Business Lounge as he was still on the phone with the hotel.

[18] Air Canada maintains that several general and personal calls were made in the waiting areas to indicate that final boarding for Flight No. AC1253 was underway. Air Canada adds that the Concierge continued to notify Mr. Boutin and his travelling companion personally that they needed to get to the boarding gate for Flight No. AC1253.

[19] Air Canada indicates that Mr. Boutin's name was removed from the passenger list at 4:21 p.m., i.e., nine minutes before Flight No. AC1253's scheduled departure time, in accordance with Rule 60 of its Tariff, which stipulates that passengers must be at the departure gate at least 30 minutes prior to the flight's sched departure time.

[20] Air Canada submits that upon learning that he would not be able to board his flight, Mr. Boutin became aggressive toward the Air Canada agent at the boarding gate counter (Agent) and the customer service supervisor (Supervisor), who also tried to explain to Mr. Boutin that it was too late to board the flight. According to Air Canada, Mr. Boutin remained aggressive; more specifically, he used abusive and vulgar language and threatened the Agent and Supervisor, telling them in particular that he would make sure they lost their jobs. He also allegedly hit the desk and tried to grab the Agent.

[21] Air Canada points out that the next day, March 1, 2012, Mr. Boutin was redirected to Flight No. AC1251.

[22] Air Canada states that on March 22, 2012, Mr. Boutin sent a formal request to Air Canada for damages caused because he missed his flight. In this formal request, Mr. Boutin alleges that the incident of February 29, 2012 was the fault of Air Canada employees, who erroneously indicated to him that his flight would be delayed. In this regard, Air Canada maintains that Mr. Boutin falsely declared that he missed his flight due to Air Canada's employees because, to the contrary, employees spoke directly to him to inform him that Flight No. AC1253 was boarding.

[23] Air Canada asserts that because Mr. Boutin was aggressive on February 29, 2012 and falsely declared that he missed his flight because of Air Canada employees at the Cancun airport, Air Canada decided to no longer accept Mr. Boutin as a passenger until he could demonstrate to Air Canada's satisfaction that he no longer poses a threat to the safety and comfort of Air Canada's passengers and crew. This decision was transmitted to Mr. Boutin in a letter on May 11, 2012.

[24] Air Canada advises that on May 30, 2012, Mr. Boutin again wrote to Air Canada. In this letter, M. Boutin alleges that the incident of February 29, 2012 was the fault of Air Canada employees, and he claims that these employees could not have identified him. Air Canada points out, however, that Mr. Boutin presented his passport and boarding card to the Agent, casting doubt on Mr. Boutin's credibility.

[25] Air Canada maintains that in a letter dated June 19, 2012, Mr. Boutin asked Air Canada to lift the travel ban. Air Canada replied that it refused, mainly because Mr. Boutin continues to deny Air Canada's version of the facts and refuses to acknowledge that he behaved wrongfully on February 29, 2012. Air Canada adds that, in this letter, Mr. Boutin alleged that he has been on seven flights with Air Canada since the incident of February 29, 2012. In this regard, Air Canada states that its reservation system indicates that he travelled twice for a total of four segments; Montréal-Narita, Japan, via Toronto, Ontario, on April 12, 2012, returning on April 25, 2012. Air Canada contends that this false statement once again casts doubt on Mr. Boutin's credibility.

[26] Air Canada claims that it is reasonable to conclude that Mr. Boutin may still interfere with the physical comfort or safety of Air Canada's other passengers or employees and consequently its decision to no longer accept him on its flights until he has shown to Air Canada's satisfaction that he no longer poses a threat to the safety and comfort of passengers and crew is justified.

[27] Air Canada refers to previous Agency decisions in which a decision to refuse to transport a passe s recognized as valid. Air Canada refers to *Gus Fuentes v. Air Canada* (Decision No. 493-C-A-2006) and *Charles D. Flynn v. Air Canada* (Decision No. 278-C-A-2006) and states that in those Decisions, the Agency determined that Air Canada had the right to refuse to transport a passenger in cases where said passenger used abusive language with its employees.

[28] Air Canada adds that, in any case, the onus is on the passenger to demonstrate that the terms and conditions of carriage of the applicable tariff were not correctly applied. In this regard, Air Canada contends

that the Agency recognized the carrier's right to refuse to transport a passenger when the evidence presented is contradictory, such as in *Reverend Curtis Toppie v. Air Canada* (Decision No. 65-C-A-2001), *Shlomo Toledano v. Air Canada* (Decision No. 637-C-A-2004), *Cécile Bernier v. Air Transat* (Decision No. 348-C-A-2008) and *Frank Fowlie v. Air Canada* (Decision No. 57-C-A-2010).

[29] Air Canada states that as indicated in Rule 25 of its Tariff, Air Canada must take the necessary measures to ensure the physical comfort and safety of the other passengers or employees when a passenger engages in prohibited conduct. According to Air Canada, Mr. Boutin's conduct on February 29, 2012, denoted a lack of concern for the authority of Air Canada's employees and, given this conduct, the way he spoke to Air Canada employees and the fact that he tried to grab the Agent, it is reasonable to conclude that Mr. Boutin could interfere with the physical comfort or safety of Air Canada's other passengers or employees.

[30] Air Canada submits that for the travel ban to be lifted, Mr. Boutin must demonstrate to Air Canada in writing that he no longer poses a threat to the safety and comfort of Air Canada's passengers and crew and will need to acknowledge that the conduct he engaged in on February 29, 2012, was inappropriate. Furthermore, he must explain the reasons why his behaviour was inappropriate. Mr. Boutin will also have to commit to no longer engage in such conduct if the travel ban were to be lifted.

[31] In support of the arguments presented, Air Canada appended written statements from employees who witnessed the event to its response.

[32] Mr. Boutin questions why Air Canada agreed to transport him between February 29 and May 11, 2012, and why the carrier denies other trips he took: Cancun-Montréal and Tokyo-Ho Chi Minh (return). Mr. Boutin indicates that these trips should be considered because they were organized and invoiced by Air Canada, and Air Canada issued the tickets; accordingly, the terms and conditions of carriage were Air Canada's.

[33] Mr. Boutin points out that Air Canada did not contact him between February 29 and May 11, 2012, to inform him of its displeasure or concerns, and let him travel seven times during this period. Mr. Boutin submits that if a passenger behaves in a way that is abusive, offensive, threatening, intimidating, violent or disorderly, the carrier would probably have internal memos and communicate with the passenger to impose a penalty without waiting two months.

[34] Mr. Boutin states that he denies the facts presented in the written statements of Air Canada empl

[35] Mr. Boutin alleges that Air Canada's version is unlikely in the sense that neither he nor his travelling companion would have waited in the Business Lounge without reacting to repeated calls for them to go to the boarding counter.

[36] Mr. Boutin states that he did, out of anger and frustration and in reaction to the Agent's attitude, tell the Agent that he would make sure he lost his job, but Mr. Boutin maintains that he did not say what Air Canada alleges.

[37] According to Mr. Boutin, the penalty imposed by Air Canada is too harsh and the conditions for the travel ban to be lifted are arbitrary, because they depend on the carrier's good will.

ANALYSIS AND FINDINGS

[38] With respect to complaints filed with the Agency, the burden of proof is on the applicant, in this case Mr. Boutin. To this end, Mr. Boutin must show, on a preponderance of evidence, that the carrier did not correctly apply the terms and conditions of carriage set out in its Tariff. Furthermore, he must do so with the best evidence. As mentioned in Decision No. 348-C-A-2008, this best evidence can be presented in several ways, such as through testimonies, corroborations, confessions or other.

[39] Rule 25(C)(A)(2) of Air Canada's Tariff allows the carrier to impose a travel ban when there are reasonable grounds to believe that the passenger engaged in unacceptable behaviour.

[40] The Agency notes that the submissions and evidence are contradictory. Mr. Boutin maintains that he was not verbally abusive or physically violent toward Air Canada employees. Mr. Boutin also states that he was not aggressive toward Air Canada employees. He acknowledges, however, that he was angry and frustrated because he missed his flight. The Agency notes that Mr. Boutin's version is corroborated by his travelling companion's written statement. The Agency also notes that Mr. Boutin filed several statements with the Agency from people who know him. However, the people who signed these statements did not witness the events in question. The Agency gives little weight to these statements, because they neither directly nor indirectly support Mr. Boutin's version of the facts.

[41] Air Canada maintains that Mr. Boutin was aggressive, threatened employees and tried to grab its Agent. The Agency notes that, in support of its position, Air Canada filed a copy of Mr. Boutin's Passenger Name Record. Air Canada's version is corroborated by three written statements from Air Canada employees who dealt with Mr. Boutin at the Cancun airport. The Agency has reviewed theses statements and finds that they are consistent and persuasive.

[42] As indicated above, the burden is on Mr. Boutin to prove the alleged facts. The Agency finds that Mr. Boutin did not demonstrate, on a preponderance of evidence, that his version of the facts is more con than Air Canada's, and accordingly Mr. Boutin has not proven that Air Canada did not correctly apply s and conditions of carriage set out in its Tariff.

[43] Although the Agency concludes that Mr. Boutin failed to demonstrate that Air Canada did not correctly apply the terms and conditions of its Tariff, the Agency notes that the travel ban imposed on Mr. Boutin is indeterminate. Given that the incident in question was a one-time event, the Agency encourages Air Canada to reconsider the travel ban imposed on Mr. Boutin.

CONCLUSION

[44] The Agency concludes that Air Canada did not contravene the provisions of its Tariff. The Agency therefore dismisses Mr. Boutin's complaint.

APPENDIX TO DECISION NO. 444-C-A-2012

Legislative provisions

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

Subsection 110(4)

Where a tariff is filed containing the date of publication and the effective date and is consistent with these Regulations and any orders of the Agency, the tolls and terms and conditions of carriage in the tariff shall, unless they are rejected, disallowed or suspended by the Agency or unless they are replaced by a new tariff, take effect on the date stated in the tariff, and the air carrier shall on and after that date charge the tolls and apply the terms and conditions of carriage specified in the tariff.

Canadian Transportation Agency General Rules, SOR/2005-35

Section 5

In any proceeding, the Agency may extend or abridge the time limits set by these Rules, or otherwise set bv the Agency, either before or after the expiry of the time limits.

Tariff provisions

Air Canada's *International Passenger Rules and Fares Tariff* NTA(A) No. 458

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Rule 25 REFUSAL TO TRANSPORT – LIMITATIONS OF CARRIER

II. PASSENGER'S CONDUCT – REFUSAL TO TRANSPORT PROHIBITED CONDUCT & SANCTIONS

(A) PROHIBITED CONDUCT:

Without limiting the generality of the foregoing, the following constitutes prohibited conduct where it may be necessary, in the reasonable discretion of the carrier, to take action to ensure the physical comfort or safety of the person, other passengers (in the future and present) and/or the carrier's employees; the safety of the aircraft; the unhindered performance of the crew members in their duty aboard the aircraft; or the safe and adequate flight operations:

[…]

(2) the person's conduct, or condition is or has been known to be abusive, offensive, threatening, intimidating, violent, or otherwise disorderly, and in the reasonable judgment of a responsible carrier employee there is a possibility that such passenger could cause disruption or serious impairment to the physical comfort or safety of other passengers or carrier's employees, interfere with a crew member in the performance of his duties aboard carrier's aircraft, or otherwise jeopardize safe and adequate flight operations.

Rule 60 RESERVATIONS

[…]

(D) CHECK-IN TIME LIMITS

(1) The passenger is recommended to present himself/herself for check-in at locations designated for such purposes at least 120 minutes [N](Exception for Tel-Aviv: 180 minutes) prior to scheduled departure time of the flight on which he/she holds a reservation in order to permit completion of government formalities and departure procedures. Passengers must check-in, with his/her baggage, at least 60 minutes [N](Exception for Tel-Aviv: 75 minutes) prior to scheduled departure time.

[...]

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NOTE: For the purpose of this rule, check-in is the point for checking baggage and the boarding gate is the point where the boarding pass stub is lifted and retained by the carrier.

Member(s)

Jean-Denis Pelletier, P.Eng.

J. Mark MacKeigan

2008 CarswellNB 124, 2008 SCC 9, J.E. 2008-547, D.T.E. 2008T-223, 2008 C.L.L.C. 220-020, 64 C.C.E.L. (3d) 1, 69 Imm. L.R. (3d) 1, 69 Admin. L.R. (4th) 1, 372 N.R. 1, 170 L.A.C. (4th) 1, 291 D.L.R. (4th) 577, 164 A.C.W.S. (3d) 727, 329 N.B.R. (2d) 1, [2008] 1 S.C.R. 190, 844 A.P.R. 1, 95 L.C.R. 65

2008 CarswellNB 124, 2008 SCC 9, J.E. 2008-547, D.T.E. 2008T-223, 2008 C.L.L.C. 220-020, 64 C.C.E.L. (3d) 1, 69 Imm. L.R. (3d) 1, 69 Admin. L.R. (4th) 1, 372 N.R. 1, 170 L.A.C. (4th) 1, 291 D.L.R. (4th) 577, 164 A.C.W.S. (3d) 727, 329 N.B.R. (2d) 1, [2008] 1 S.C.R. 190, 844 A.P.R. 1, 95 L.C.R. 65

New Brunswick (Board of Management) v. Dunsmuir

David Dunsmuir (Appellant) v. Her Majesty the Queen in Right of the Province of New Brunswick as represented by Board of Management (Respondent)

Supreme Court of Canada

McLachlin C.J.C., Bastarache, Binnie, LeBel, Deschamps, Fish, Abella, Charron, Rothstein JJ.

Heard: May 15, 2007
Judgment: March 7, 2008[FN*]
Docket: 31459

Proceedings: affirming *New Brunswick (Board of Management) v. Dunsmuir* (2006), 2006 CarswellNB 155, 2006 CarswellNB 156, 2006 NBCA 27, *(*sub nom. *Dunsmuir v. R.)* 2006 C.L.L.C. 220-030, 297 N.B.R. (2d) 151, 771 A.P.R. 151, 44 Admin. L.R. (4th) 92, 48 C.C.E.L. (3d) 196, 265 D.L.R. (4th) 609 (N.B. C.A.)**Proceedings: affirming *New Brunswick (Board of Management) v. Dunsmuir* (2005), 2005 NBQB 270, 2005 CarswellNB 444, 293 N.B.R. (2d) 5, 762 A.P.R. 5, 43 C.C.E.L. (3d) 205 (N.B. Q.B.)**

Counsel: J. Gordon Petrie, Q.C., Clarence L. Bennett for Appellant

C. Clyde Spinney, Q.C., Keith P. Mullin for Respondent

Subject: Labour and Employment; Public

Labour and employment law --- Employment law — Termination and dismissal — Termination of employment by employer — Procedure on dismissal — Procedural fairness

Employee was employed by Province as legal officer and court clerk — Performance issues arose and employee was disciplined — Province later dismissed employee with four months'

2008 CarswellNB 124, 2008 SCC 9, J.E. 2008-547, D.T.E. 2008T-223, 2008 C.L.L.C. 220-020, 64 C.C.E.L. (3d) 1, 69 Imm. L.R. (3d) 1, 69 Admin. L.R. (4th) 1, 372 N.R. 1, 170 L.A.C. (4th) 1, 291 D.L.R. (4th) 577, 164 A.C.W.S. (3d) 727, 329 N.B.R. (2d) 1, [2008] 1 S.C.R. 190, 844 A.P.R. 1, 95 L.C.R. 65

found formal expression in *Knight*.

26 The two types of judicial review, on the merits and on the process, are therefore engaged in this case. Our review of the system will therefore be comprehensive, which is preferable since a holistic approach is needed when considering fundamental principles.

III. Issue 1: Review of the Adjudicator's statutory interpretation determination

A. Judicial Review

27 As a matter of constitutional law, judicial review is intimately connected with the preservation of the rule of law. It is essentially that constitutional foundation which explains the purpose of judicial review and guides its function and operation. Judicial review seeks to address an underlying tension between the rule of law and the foundational democratic principle, which finds an expression in the initiatives of Parliament and legislatures to create various administrative bodies and endow them with broad powers. Courts, while exercising their constitutional functions of judicial review, must be sensitive not only to the need to uphold the rule of law, but also to the necessity of avoiding undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures.

28 By virtue of the rule of law principle, all exercises of public authority must find their source in law. All decision-making powers have legal limits, derived from the enabling statute itself, the common or civil law or the Constitution. Judicial review is the means by which the courts supervise those who exercise statutory powers, to ensure that they do not overstep their legal authority. The function of judicial review is therefore to ensure the legality, the reasonableness and the fairness of the administrative process and its outcomes.

29 Administrative powers are exercised by decision makers according to statutory regimes that are themselves confined. A decision maker may not exercise authority not specifically assigned to him or her. By acting in the absence of legal authority, the decision maker transgresses the principle of the rule of law. Thus, when a reviewing court considers the scope of a decision-making power or the jurisdiction conferred by a statute, the standard of review analysis strives to determine what authority was intended to be given to the body in relation to the subject matter. This is done within the context of the courts' constitutional duty to ensure that public authorities do not overreach their lawful powers: *Crevier v. Quebec (Attorney General)*, [1981] 2 S.C.R. 220 (S.C.C.), at p. 234; also *Q. v. College of Physicians & Surgeons (British Columbia)*, [2003] 1 S.C.R. 226, 2003 SCC 19 (S.C.C.), at para. 21.

30 In addition to the role judicial review plays in upholding the rule of law, it also performs an important constitutional function in maintaining legislative supremacy. As noted by Justice Thomas Cromwell, "the rule of law is affirmed by assuring that the courts have the final say on the jurisdictional limits of a tribunal's authority; second, legislative supremacy is affirmed by adopting the principle that the concept of jurisdiction should be narrowly circumscribed and defined according to the intent of the legislature in a contextual and purposeful way; third, legislative supremacy is affirmed and the court-centric conception of the rule of law is reined in by acknowledging that the courts do not have a monopoly on deciding all

questions of law" (T. A. Cromwell, "Appellate Review: Policy and Pragmatism", in *2006 Isaac Pitblado Lectures, Appellate Courts: Policy, Law and Practice*, V-1, p. V-12). In essence, the rule of law is maintained because the courts have the last word on jurisdiction, and legislative supremacy is assured because determining the applicable standard of review is accomplished by establishing legislative intent.

31 The legislative branch of government cannot remove the judiciary's power to review actions and decisions of administrative bodies for compliance with the constitutional capacities of the government. Even a privative clause, which provides a strong indication of legislative intent, cannot be determinative in this respect (*British Columbia (Minister of Finance) v. Woodward Estate* (1972), [1973] S.C.R. 120 (S.C.C.), at p. 127). The inherent power of superior courts to review administrative action and ensure that it does not exceed its jurisdiction stems from the judicature provisions in ss. 96 to 101 of the *Constitution Act, 1867*: *Crevier*. As noted by Beetz J. in *Syndicat national des employés de la commission scolaire régionale de l'Outaouais v. U.E.S., local 298*, [1988] 2 S.C.R. 1048 (S.C.C.), [hereinafter *Bibeault*], at p. 1090, "[t]he role of the superior courts in maintaining the rule of law is so important that it is given constitutional protection". In short, judicial review is constitutionally guaranteed in Canada, particularly with regard to the definition and enforcement of jurisdictional limits. As Laskin C.J. explained in *Crevier*, at pp. 237-38:

> Where ... questions of law have been specifically covered in a privative enactment, this Court, as in *Farrah*, has not hesitated to recognize this limitation on judicial review as serving the interests of an express legislative policy to protect decisions of adjudicative agencies from external correction. Thus, it has, in my opinion, balanced the competing interests of a provincial Legislature in its enactment of substantively valid legislation and of the courts as ultimate interpreters of the *British North America Act*, and s. 96 thereof. The same considerations do not, however, apply to issues of jurisdiction which are not far removed from issues of constitutionality. It cannot be left to a provincial statutory tribunal, in the face of s. 96, to determine the limits of its own jurisdiction without appeal or review.

See also D. J. Mullan, *Administrative Law* (2001), at p. 50.

32 Despite the clear, stable constitutional foundations of the system of judicial review, the operation of judicial review in Canada has been in a constant state of evolution over the years, as courts have attempted to devise approaches to judicial review that are both theoretically sound and effective in practice. Despite efforts to refine and clarify it, the present system has proven to be difficult to implement. The time has arrived to re-examine the Canadian approach to judicial review of administrative decisions and develop a principled framework that is more coherent and workable.

33 Although the instant appeal deals with the particular problem of judicial review of the decisions of an adjudicative tribunal, these reasons will address first and foremost the structure and characteristics of the system of judicial review as a whole. In the wake of *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.), *Suresh v. Canada (Minister of Citizenship & Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1 (S.C.C.), *Centre hospitalier Mont-Sinaï c. Québec (Ministre de la Santé & des Services sociaux)*,

Canadian Transportation Agency
www.cta.gc.ca

Decision No. 488-C-A-2010

November 30, 2010

APPLICATION by Dr. Frank Fowlie, pursuant to section 32 of the Canada Transportation Act, S.C., 1996, c. 10, as amended, for a review of Decision No. 57-C-A-2010.

File No. M4120-3/10-01239

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[1] This Decision deals with two distinct issues:

i. a request under section 14 of the *Canadian Transportation Agency General Rules*, SOR/2005-35 (General Rules) to amend the application under section 32 of the *Canada Transportation Act* (CTA) for review of Decision No. 57-C-A-2010.

ii. an application under section 32 of the CTA to review Decision No. 57-C-A-2010 (Initial Decision).

BACKGROUND

[2] In the Initial Decision dated February 18, 2010, the Canadian Transportation Agency (Agency) dismissed Dr. Fowlie's complaint with respect to Air Canada's refusal to transport him on Flight AC195 from Montréal, Quebec to Vancouver, British Columbia on March 22, 2009. Air Canada had refused said transport due to what it considered was prohibited conduct (or unruly behaviour) on the part of Dr. Fowlie on Flight AC871 from Paris, France, to Montréal earlier that day. The Agency found that Dr. Fowlie "[...] engaged in abusive and offensive behaviour during Flight AC871" and that he "[...] failed to discharge the burden of proving that Air Canada did not properly apply the terms and conditions [pertaining to prohibited conduct by a passenger and refusal to transport] set out in Rule 25 of its [International Passenger Rules and Fares] Tariff [NTA(A) No. 458]."

[3] On March 1, 2010, Dr. Fowlie filed with the Agency an application for review of the Initial Decision in accordance with section 32 of the CTA (Original Application for Review).

[4] On March 9, 2010, the Agency received a request from Dr. Fowlie for non-publication of his name in the Initial Decision. On April 16, 2010, Dr. Fowlie was informed that the Agency would place his section 32 application on hold pending the determination of his request for non-publication of his name. On July 7, 2010, the Agency issued Decision No. 289-C-A-2010 dismissing Dr. Fowlie's request for non-publication of his name. The Agency found that Dr. Fowlie did not meet the evidentiary threshold and did not establish, on a balance of probabilities, the need for a non-publication order. In the same

Decision, the Agency asked Dr. Fowlie to advise it as to whether or not he wished to pursue his section 32 application. 103

[5] The Agency reactivated the Original Application for Review on July 19, 2010.

[6] Before addressing the substantive matter of this application for review, the Agency will deal with Dr. Fowlie's request to amend his Original Application for Review.

I. PRELIMINARY MATTER: REQUEST UNDER SECTION 14 OF THE GENERAL RULES TO AMEND THE ORIGINAL APPLICATION FOR REVIEW

[7] On July 22, 2010, Dr. Fowlie advised the Agency that he wished to submit further submissions and material before the Agency in support of the Original Application for Review. Following receipt and its consideration of the submissions filed by both parties with respect to this request, the Agency issued Decision No. LET-C-A-135-2010 on August 16, 2010, in which it informed Dr. Fowlie that it considered the Original Application for Review to be a complete application for review, and that requests to amend submissions must be made in accordance with section 14 of the General Rules. The Agency also advised Dr. Fowlie that he should include with his request copies of all additional evidence he planned to bring forward in support of his proposed amended submissions, as well as explanations as to the admissibility of this new evidence in the context of a section 32 proceeding.

[8] On August 20, 2010, Dr. Fowlie filed a request under section 14 of the General Rules to amend his Original Application for Review. This request was accompanied by amended submissions in support of Dr. Fowlie's application for review.

Issue

[9] Should the Agency allow Dr. Fowlie's request to amend his Original Application for Review?

Submissions

Dr. Fowlie

[10] At the outset, Dr. Fowlie indicates that following the filing of his Original Application for Review, he retained legal counsel and that he was subsequently able to formulate more comprehensive submissions and arguments in support of his application.

[11] Dr. Fowlie argues that his amended submissions do not raise new issues, but merely better elucidate the issues raised in the Original Application for Review. Dr. Fowlie notes that these issues relate to:

1. newly available eyewitness evidence bearing directly on the findings of fact and credibility on which the Initial Decision was based; and
2. the question as to whether Air Canada discharged its onus of proof under Article 19 of the Montreal Convention with respect to its liability to Dr. Fowlie as a consequence of what he considers was a flight delay.

[12] Dr. Fowlie maintains that his ability to fully illustrate and argue the issues raised in his application for review and to assist the Agency in analyzing the new evidence will be seriously undermined if

submissions are limited to the material he initially filed. Dr. Fowlie further argues that, if the Agency were to deny the amendments to his application for review, he will effectively have been confined to apply for review without the benefit of legal counsel.

[13] Dr. Fowlie notes that Air Canada is represented by counsel, and submits that the carrier will not be prejudiced should the amendments be allowed.

[14] Finally, Dr. Fowlie asserts that the overall interests of justice would be served in allowing the amendments as to do so would "[...] permit all of the issues to be fully presented and considered by the Agency in making its decision."

[15] In his reply to Air Canada's submissions, Dr. Fowlie argues that the witness statement he has filed does, in fact, constitute a change in facts and circumstances as this evidence was not available at the time of the Initial Decision, and that it is relevant as it has direct bearing on the finding of credibility made by the Agency in the Initial Decision. Dr. Fowlie further argues that the change in circumstances is the availability of new evidence relevant to the material facts argued. As section 14 of the General Rules does not contain any limiting provisions that amendments must consist only of new facts, he argues that nothing prohibits him from bringing forth new submissions as long as they are necessary to the proceeding.

Air Canada

[16] Air Canada, in opposing Dr. Fowlie's application to amend the Original Application for Review, submits that, to be allowed by the Agency, the proposed amendments must be necessary for the adjudication of the application for review, and the documents to be filed, should the amendments be granted, must not prejudice, hinder or delay the fair conduct of the proceedings.

[17] Air Canada argues that Dr. Fowlie's additional submissions are not necessary to the adjudication of his application for review. Air Canada indicates that they contain no new evidence as to any change in facts or circumstances since the issuance of the Initial Decision. Air Canada adds that the only evidence that contains facts is the statement made by Mary Ann Mulhern, who was Dr. Fowlie's travelling companion, and which was included in Dr. Fowlie's Original Application for Review. According to Air Canada, the facts included in Ms. Mulhern's statement are not new facts or circumstances arising since the decision was issued and her statement does not add any relevant material to the consideration of the application for review under section 32 of the CTA.

[18] Air Canada also submits that Dr. Fowlie is using Ms. Mulhern's statement to re-argue the merits of the initial complaint and to dispute the Agency's findings of fact, as paragraphs 1 to 17 of Dr. Fowlie's additional submissions are simply repetitions of his version of the events of March 22, 2009, which he had already submitted to the Agency and was considered by it in the context of the initial complaint. Therefore, Air Canada submits that the filing of the additional submissions will prejudice the fair conduct of the proceedings by allowing Dr. Fowlie to re-argue his earlier case and by obliging Air Canada to re-plead the case, as this case has been duly heard, and a decision was rendered.

[19] Air Canada further maintains that a section 32 application cannot be an opportunity to re-hear a case or re-assess the credibility of witnesses and that re-opening the debate on facts previously adjudicated by the Agency would breach section 31 of the CTA, which states that the finding or determination of the Agency on a question of fact within its jurisdiction is binding and conclusive.

[20] Furthermore, Air Canada asserts that the witness statement in question was easily available (or could have been with the exercise of minimal diligence) before the Initial Decision was rendered. Air Canada submits that a decision has already been rendered by the Agency and that to re-argue the

case is contrary to the best interests of justice, as Air Canada had a legitimate expectation that this matter was coming to an end. Essentially, the carrier asserts that the amendments sought by Dr. Fowlie are not necessary for the adjudication of the application under section 32 and will prejudice Air Canada's right to a fair hearing in this matter.

Agency ruling on the section 14 request to amend the Original Application for Review

[21] The Agency clarifies at the outset that the following discussion relates only to the section 14 request. Although, as described above, both parties also made submissions pertaining to the merits of the section 32 application in their pleadings with respect to the section 14 request, these are not relevant to the outcome of the section 14 request and will not be considered in that context.

[22] After review of each party's submissions, the Agency finds that the amendments proposed by Dr. Fowlie do not raise new issues, but elucidate the issues raised in his Original Application for Review. The overall interests of justice are served in allowing the amendments, as to do so permits all of the issues to be fully presented and considered by the Agency in making its decision.

[23] Furthermore, Air Canada is not prejudiced in any way by the amendments. The application for review was adjourned prior to opening pleadings pending the resolution of Dr. Fowlie's request for non-publication of his name. Soon after that matter was settled, Dr. Fowlie sought permission to amend his Original Application for Review. Air Canada had the opportunity to respond to that request. Therefore, the Agency accepts the amended submissions and will treat these as the principal application for the purpose of the section 32 review.

[24] The Agency will now examine Dr. Fowlie's application pursuant to section 32 of the CTA for a review of the Initial Decision.

II. APPLICATION PURSUANT TO SECTION 32 OF THE CTA

Legislative context

[25] Pursuant to section 32 of the CTA:

> The Agency may review, rescind or vary any decision or order made by it or may re-hear any application before deciding it if, in the opinion of the Agency, since the decision or order or the hearing of the application, there has been a change in the facts or circumstances pertaining to the decision, order or hearing.

[26] It is important to stress at the outset that the review process contemplated by section 32 of the CTA is not an appeal process. Parties wishing to appeal an Agency decision may proceed before the Federal Court of Appeal as per section 41 of the CTA.

[27] Nor is this process an open-ended authority for the Agency to review its decisions. The Agency's jurisdiction under this section is limited and only arises if, in its opinion, there has been a change in the facts or circumstances pertaining to a particular decision since its issuance.

[28] Indeed, the ability for a tribunal to review a final decision constitutes an exception to the rule of *functus officio* that the final decision of a court cannot be re-opened. In *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848, the Supreme Court of Canada dealt with the issue as to whether a board or a tribunal, such as the Agency, is empowered to review its final decisions in the following

terms:

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> As a general rule, once such a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances. It can only do so if authorized by statute or if there has been a slip or error within the exceptions enunciated in *Paper Machinery Ltd. v. O.J. Ross Engineering Corp.*, *supra*.
>
> To this extent, the principle of *functus officio* applies. It is based, however, on the policy ground which favours finality of proceedings rather than the rule which was developed with respect to formal judgments of a court whose decision was subject to a full appeal. For this reason I am of the opinion that its application must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal only on a point of law. Justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal.
>
> Accordingly, the principle should not be strictly applied where there are indications in the enabling statute that a decision can be reopened in order to enable the tribunal to discharge the function committed to it by enabling legislation.

[29] Section 32 of the CTA outlines the statutory framework through which the Agency can exercise its power to review its decisions. The Agency is fully empowered to interpret the provisions of the CTA, its enabling legislation.

[30] A similar issue was ruled on by the Federal Court of Appeal in *Kent v. Canada (A.G.)*, 2004 FCA 420 (Kent Decision). The Court confirmed a two-step approach to the determination of whether new facts are being presented to a tribunal in the context of a request for rescission or amendment of a decision. First, the proposed new facts must not have been discoverable, with due diligence, prior to the first hearing. If such is the case, then the tribunal must proceed to the second step and evaluate the materiality of the new facts, i.e. it must assess the importance of the proposed new facts to the merits of the claim. In the event that there are no new facts, the decision must stand.

[31] Although the Kent Decision relates to subsection 84(2) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8, which refers to the introduction of "new facts" rather than "a change in facts and circumstances," the Agency considers it nonetheless a source of guidance as to what can constitute a change in facts or circumstances.

[32] In dealing with an application for review, the Agency must first determine whether there has been a change in facts or circumstances pertaining to the decision. If no such change exists, the decision stands. If, however, the Agency finds that there has been a change in facts or circumstances since the issuance of the decision, it must then determine whether such a change is sufficient to warrant a review, rescission or variance of the decision. When another party was involved in the first hearing, the Agency may decide to open pleadings to ensure that all of the parties to the original decision are given the opportunity to address the issues, including the question as to whether there was a change in facts or circumstances since the issuance of the decision and the impact of the change on the matter.

[33] The Panel concludes that the wording of section 32 must generally be construed to include only facts or circumstances that were not in existence at the time of the original hearing or were undiscoverable by the applicant for review at that time. If a fact was known to the applicant or discoverable through exercise of due diligence at the time of the initial complaint, it cannot constitute a change in facts or circumstances. The text of section 32 expressly refers to new facts and

circumstances arising "since the decision".

[34] The burden of proof rests on the applicant requesting the review to provide the Agency with some substance and explanation demonstrating that the alleged change in the facts or circumstances has arisen since the decision. The applicant must also explain how the alleged change affects the outcome of the matter.

[35] A section 32 application is not the appropriate vehicle to introduce evidence that was known to or knowable by the applicant during the original application. It is not meant to provide the losing party an opportunity to complete the record or to re-argue a case. For the application to succeed, there must have been a real change in facts or circumstances since the original decision to justify a re-hearing. This must be weighed against the basic legal principle in favour of finality of decisions. This protects the other party, who has a legitimate expectation that a decision, once rendered, is final.

Issue

[36] Do the witness statement and/or legal arguments filed by Dr. Fowlie constitute a change in facts or circumstances since the issuance of the Initial Decision which would warrant a review of the Agency's Initial Decision?

Analysis and findings

[37] In his application for review, Dr. Fowlie submitted a witness statement made by Ms. Mulhern, claiming that its new-found availability constitutes a change in facts or circumstances that is sufficient to warrant a review of the Initial Decision. Dr. Fowlie also submitted new legal arguments based on article 19 of the Montreal Convention in support of a new request for out-of-pocket expenses resulting from Air Canada's refusal to transport. The Agency notes that in his Original Application for Review, Dr. Fowlie had presented an argument based on the *Canadian Aviation Regulations*, SOR/96-433. This argument was not repeated in his amended submissions.

[38] The Agency has carefully reviewed all of the evidence filed by the parties, including the witness statement and legal arguments submitted by Dr. Fowlie in his Original Application for Review, as well as his amended submissions.

[39] As mentioned above, the burden lies with the applicant in a section 32 review to demonstrate that there has been a change in facts or circumstances since the issuance of the original decision. In the Agency's opinion, Dr. Fowlie has not met this burden.

[40] Although Dr. Fowlie makes broad statements as to the fact that Ms Mulhern's witness statement was not available prior to the issuance of the Initial Decision, he has provided the Agency with no explanation as to why this is the case, despite explicit instructions from the Agency in its Decision No. LET-C-A-135-2010 requiring him to provide "[...] explanations as to the admissibility of this new evidence in the context of a section 32 proceeding." Instead, Dr. Fowlie's filed submissions such as, "[s]ubsequent to the [Initial] Decision being rendered, [he] was able to obtain a statement of evidence from a Ms. Mulhern, who had occupied the seat next to his aboard AC871, and had witnessed the events in question" and "[...] the evidence of Ms. Mulhern was not available to [him] at the time of the initial hearing or the issuance of the Decision."

[41] The Agency notes that Air Canada has asserted, and Dr. Fowlie did not deny, that Ms. Mulhern was Dr. Fowlie's travelling companion on the flight in question, a qualification indicating that Dr. Fowlie and Ms. Mulhern knew each other before embarking on the flight. Moreover, in reading Ms. Mulhern's statement, one discovers that Ms. Mulhern not only witnessed the events and discussed them with Dr.

Fowlie, but intervened with Air Canada's staff on behalf of Dr. Fowlie. He therefore knew, at the time of the original hearing, that someone other than Air Canada employees had witnessed and had knowledge of the events in question. He obviously also knew that if he wanted evidence corroborating his version of events, he could go to her, which he did promptly after receiving the Initial Decision. **108**

[42] The Agency also takes note of the fact that Ms. Mulhern provided Dr. Fowlie with the signed statement within ten days of the issuance of the Initial Decision. The Agency finds it improbable that Ms. Mulhern's witness statement was not discoverable or available to Dr. Fowlie with exercise of due diligence on his part before the Initial Decision was issued. In the Agency's opinion, this witness statement does not constitute a change in facts or circumstances since the issuance of the Initial Decision justifying a review of that Decision.

[43] With respect to the legal arguments presented by Dr. Fowlie, the Agency finds that he had the opportunity, at the time of his initial complaint, to plead any legal argument he considered relevant. An application for review is not the appropriate vehicle to re-argue a case or appeal questions of law; the appropriate avenue of appeal is the Federal Court of Appeal.

[44] Finally, obtaining counsel or change in counsel for the purposes of filing a section 32 application cannot, in itself, qualify as a change in circumstances.

[45] In light of the foregoing, the Agency finds that neither the witness statement nor the legal arguments provided by Dr. Fowlie constitute a change in the facts or circumstances pertaining to the Initial Decision as contemplated by section 32 of the CTA, and therefore do not warrant the Agency proceeding with a review of the Initial Decision.

CONCLUSION

[46] Based on the above findings, the Agency dismisses Dr. Fowlie's application for a review of Decision No. 57-C-A-2010.

Members

- Raymon J. Kaduck
- J. Mark MacKeigan

Important Notices

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Date Modified :
2010-11-30

Case Name:

Lukács v. Canada (Transportation Agency)

Between
Dr. Gábor Lukács, Appellant, and
Canadian Transportation Agency, Respondent

[2014] F.C.J. No. 301

2014 FCA 76

456 N.R. 186

Docket: A-279-13

Federal Court of Appeal
Halifax, Nova Scotia

Dawson and Webb JJ.A. and Blanchard J.A. (ex officio)

Heard: January 29, 2014.
Judgment: March 19, 2014.

(63 paras.)

Administrative law -- Judicial review and statutory appeal -- Standard of review -- Reasonableness -- Appeal by Lukacs from Agency's decision to enact quorum rule dismissed -- Without approval of Governor in Council, Agency enacted rule that provided that in all proceedings before Agency, one members constituted quorum -- Agency's decision to enact quorum rule pursuant to rule-making power, which did not require approval of Governor in Council, was reasonable given contextual and purposive interpretation of Act -- Governor in Council's prior approval of rules did not mean approval of quorum rule was required as approval of rules was unnecessary step and quorum rule did not vary or rescind any rule that had been approved.

Administrative law -- Bodies under review -- Nature of body -- Types -- Regulatory agencies -- Powers or functions -- Types -- Appeal by Lukacs from Agency's decision to enact quorum rule dismissed -- Without approval of Governor in Council, Agency enacted rule that provided that in all proceedings before Agency, one members constituted quorum -- Agency's decision to enact quorum rule pursuant to rule-making power, which did not require approval of Governor in Council, was

reasonable given contextual and purposive interpretation of Act -- Governor in Council's prior approval of rules did not mean approval of quorum rule was required as approval of rules was unnecessary step and quorum rule did not vary or rescind any rule that had been approved.

Statutory interpretation -- Statutes -- Construction -- By context -- Legislative intent -- Appeal by Lukacs from Agency's decision to enact quorum rule dismissed -- Without approval of Governor in Council, Agency enacted rule that provided that in all proceedings before Agency, one members constituted quorum -- Agency's decision to enact quorum rule pursuant to rule-making power, which did not require approval of Governor in Council, was reasonable given contextual and purposive interpretation of Act -- Governor in Council's prior approval of rules did not mean approval of quorum rule was required as approval of rules was unnecessary step and quorum rule did not vary or rescind any rule that had been approved.

Appeal by Lukacs from the Canada Transportation Agency's decision to enact a rule (the "quorum rule") that provided that in all proceedings before the Agency, one member constituted a quorum. Prior to the enactment of the quorum rule, two members of the Agency constituted a quorum. The quorum rule was not made with the approval of the Governor in Council. The appellant took the position that the rules governing the conduct of the proceedings before the Agency were regulations within the meaning of s. 36(1) of the Canada Transportation Act and as such could only be made with the approval of the Governor in Council and that as the rules were originally approved by the Governor in Council, they could not be amended without the approval of the Governor in Council. The Agency argued that the quorum rule was a rule respecting the number of members that were required to hear any matter or perform any function of the Agency and, as such, it could be enacted by the Agency pursuant to the Agency's rule-making power in s. 17 of the Act.

HELD: Appeal dismissed. The appropriate standard of review was reasonableness as the issue was whether the Agency properly interpreted its rule-making power contained in its home statute. The Agency's decision to enact the quorum rule pursuant to its rule-making power, so that the approval of the Governor in Council was not required, was reasonable. A contextual analysis of the Canada Transportation Act suggested that rules held a subsidiary position to orders or regulations, which was consistent with the view that rules were created by the Agency on its own initiative, while order came at the end of an adjudicative process and regulations must be approved by the Governor in Council. Furthermore, the interpretation of "rules" as a subset of "regulation" violated the presumption against tautology. Moreover, whenever "rule" appeared in the Act, it was in the context of internal procedural or non-adjudicative administrative matters and wherever "regulation" appeared in the Act it referred to more than internal, procedural matters. In addition, since the Act specifically required Federal Court judges to receive approval from the Governor in Council when establishing rules of procedure but there was no express requirement for the Agency to do so, the application of the expressio unius maxim was consistent with the interpretation that the Agency's rules were not subject to that requirement. Furthermore, under the former Act, the predecessor of the Agency had the power to make rules with the approval of the Governor in Council. Interpreting

the Act so as to not include rules as a subset of regulations (so as to allow the Agency to enact rules without Governor in Council approval) was consistent with the purpose of the Agency as envisioned in the Act. The fact that the Governor in Council had approved the Rules in 2005 did not mean that the approval of the Governor in Council was required to amend the rules. Firstly, Governor in Council approval in 2005 was an unnecessary step. Secondly, the quorum rule was new and did not rescind or vary any provision of the rules that was previously approved by the Governor in Council.

Statutes, Regulations and Rules Cited:

Canada Transportation Act, S.C. 1996, c. 10, s. 4(1), s. 16(1), s. 17, s. 17(a), s. 17(b), s. 17(c), s. 25, s. 25.1(4), s. 29(1), ss. 34-36, s. 34(1), s. 34(2), s. 36(1), s. 36(2), s. 41, s. 54, s. 86(1), s. 86.1, s. 92(3), s. 109, s. 117(2), s. 128(1), s. 163(1), s. 169.36(1), s. 170

Canadian Transportation Agency General Rules, SOR/2005-35, Rule 2.1

Interpretation Act, R.S.C. 1985, c. I-21, s. 2(1), s. 3(3), s. 15(2)(b), s. 35(1)

National Transportation Act, 1987, c. 28 (3rd Supp.), s. 22, s. 22(1)

Statutory Instruments Act, R.S.C. 1985, c. S-22, s. 2(1)

Counsel:

Dr. Gábor Lukács, the Appellant (on his own behalf).

Simon-Pierre Lessard, for the Respondent.

The judgment of the Court was delivered by

1 DAWSON J.A.:-- This is an appeal on a question of law, brought with leave of this Court pursuant to section 41 of the *Canada Transportation Act*, S.C. 1996, c. 10 (Act). The question concerns the validity of a rule amending the *Canadian Transportation Agency General Rules*, SOR/2005-35 (Rules). The amendment added a single section to the Rules: Rule 2.1 (Quorum Rule). The Quorum Rule is brief, and states 'In all proceedings before the Agency, one member constitutes a quorum". The Quorum Rule was published in the Canada Gazette Part II as SOR/2013-133. Prior to the enactment of the Quorum Rule, two members of the Agency constituted a quorum.

2 The evidentiary basis for the appeal is simple and undisputed: the Quorum Rule was not made

with the approval of the Governor in Council.

3 The appellant argues that the rules governing the conduct of proceedings before the Agency, including the Quorum Rule, are regulations within the meaning of subsection 36(1) of the Act. As such, the Quorum Rule could only be made with the approval of the Governor in Council. Additionally, the appellant argues that the Rules were originally approved by the Governor in Council. It follows, the appellant argues, that the Rules could not be amended without the approval of the Governor in Council.

4 The Agency responds that the Quorum Rule is a rule respecting the number of members that are required to hear any matter or perform any of the functions of the Agency. Accordingly, the Agency could enact the Quorum Rule pursuant to its rule-making power found in section 17 of the Act.

5 Notwithstanding the appellant's able submissions, for the reasons that follow I have concluded that the Agency's decision to enact the Quorum Rule pursuant to its rule-making power (so that the approval of the Governor in Council was not required) was reasonable.

The Applicable Legislation

6 The Act contains a quorum provision that is expressly subjected to the Agency's rules:

> 16. (1) Subject to the Agency's rules, two members constitute a quorum.
>
> * * *
>
> 16. (1) Sous réserve des règles de l'Office, le quorum est constitué de deux membres.

7 The Agency's rule-making power is as follows:

> 17. The Agency may make rules respecting
>
> (*a*) the sittings of the Agency and the carrying on of its work;
>
> (*b*) the manner of and procedures for dealing with matters and business before the Agency, including the circumstances in which hearings may be held in private; and
>
> (*c*) the number of members that are required to hear any matter or perform any of the functions of the Agency under this Act or any other Act of Parliament. [Emphasis added.]

* * *

17. L'Office peut établir des règles concernant :

a) ses séances et l'exécution de ses travaux;

b) la procédure relative aux questions dont il est saisi, notamment pour ce qui est des cas de huis clos;

c) le nombre de membres qui doivent entendre les questions ou remplir telles des fonctions de l'Office prévues par la présente loi ou une autre loi fédérale. [Le souligné est de moi.]

8 The relevant provision of the Act dealing with regulations states:

36. (1) Every regulation made by the Agency under this Act must be made with the approval of the Governor in Council.
(2) The Agency shall give the Minister notice of every regulation proposed to be made by the Agency under this Act.

* * *

36. (1) Tout règlement pris par l'Office en vertu de la présente loi est subordonné à l'agrément du gouverneur en conseil.
(2) L'Office fait parvenir au ministre un avis relativement à tout règlement qu'il entend prendre en vertu de la présente loi.

The Standard of Review

9 The parties disagree about the standard of review to be applied.

10 The appellant argues that the issue of whether the Agency was authorized to enact the Quorum Rule without the approval of the Governor in Council is a true question of jurisdiction, or *vires*. As a result, he submits the applicable standard of review is correctness (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paragraph 59). In oral argument, the appellant also argued that a quorum requirement is a question of law that is both of central importance to the legal system as a whole and outside the Agency's specialized area of expertise so that the validity of the Quorum Rule should be reviewed on the standard of correctness.

11 The respondent counters that in more recent jurisprudence the Supreme Court of Canada has held that true questions of jurisdiction are narrow and exceptional, and that an administrative

tribunal's interpretation of its own statute should be presumed to be reviewable on the standard of reasonableness (*Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at paragraphs 33 and 39).

12 I agree that what is at issue is whether the Agency properly interpreted its rule-making power contained in its home statute. Pursuant to *Alberta Teachers'*, the presumption of reasonableness review applies. In my view, the presumption of reasonableness review has not been rebutted.

13 As recently discussed by the Supreme Court in *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, 452 N.R. 340, at paragraphs 32 and 33, legislatures do not always speak with clarity. As a result, applying the principles of statutory interpretation may not always provide a single, clear interpretation of a provision. The resolution of unclear language in an administrative agency's home statute is usually best left to the agency, because the choice between competing reasonable interpretations will often involve policy considerations the legislature presumably wanted the agency to decide.

14 For two reasons I reject the assertion that a quorum rule raises a general question of law of central importance to the legal system outside the expertise of the Agency.

15 First, while conceptually quorum requirements are of importance to the fair administration of justice, it does not follow that the Agency's choice between a quorum of one or two members is a question of central importance to the legal system as a whole. In my view, it is not. The Quorum Rule does not seek to define quorum requirements for any other body than the Agency itself.

16 Second, the Supreme Court has rejected such a narrow view of the expertise of an administrative agency or tribunal. It is now recognized that courts may not be as well-qualified as a given agency to provide an interpretation of the agency's home statute that makes sense in the broad policy context in which the agency operates (*McLean*, at paragraphs 30 and 31, citing, among other authorities, *Council of Canadians with Disabilities v. Via Rail, Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650, at paragraph 92 and *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471, at paragraph 25.

17 It follows that the Agency's interpretation of its rule-making authority is a question reviewable on the standard of reasonableness.

18 Before leaving the issue of the standard of review I will deal with two authorities raised by the appellant in reply, which were, as a result, the subject of supplementary written submissions.

19 The two authorities are *Council of Independent Community Pharmacy Owners v. Newfoundland and Labrador*, 2013 NLCA 32, 360 D.L.R. (4th) 286, and *Yates v. Newfoundland and Labrador (Regional Appeal Board)*, 2013 NLTD(G) 173, 344 Nfld. & P.E.I.R. 317.

20 In my view both decisions are distinguishable. At issue in the first case was whether

regulations enacted by the Lieutenant-Governor in Council were *ultra vires*. In the second case, the Court's attention was not drawn to the decisions of the Supreme Court in *Alberta Teachers'* and *McLean*. I am not persuaded either case supports the appellant's position.

The Applicable Principles of Statutory Interpretation

21 Whether rules made under section 17 of the Act must be approved by the Governor in Council depends upon the interpretation to be given to the word "regulation" as used in subsection 36(1) of the Act.

22 The preferred approach to statutory interpretation has been expressed in the following terms by the Supreme Court:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

See: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at paragraph 21. See also: *R. v. Ulybel Enterprises Ltd.*, 2001 SCC 56, [2001] 2 S.C.R. 867 at paragraph 29.

23 The Supreme Court restated this principle in *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601 at paragraph 10:

> It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

24 This formulation of the proper approach to statutory interpretation was repeated in *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1, [2011] 1 S.C.R. 3 at paragraph 21, and *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 S.C.R. 306 at paragraph 27.

25 Inherent in the contextual approach to statutory interpretation is the understanding that the grammatical and ordinary sense of a provision is not determinative of its meaning. A court must consider the total context of the provision to be interpreted "no matter how plain the disposition may seem upon initial reading" (*ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140 at paragraph 48). From the text and this wider context the interpreting court aims to ascertain legislative intent, "[t]he most significant element of this analysis" (*R. v. Monney*, [1999] 1 S.C.R. 652 at paragraph 26).

Application of the Principles of Statutory Interpretation

26 I therefore turn to the required textual, contextual and purposive analysis required to answer this question.

(i) Textual Analysis

27 The appellant argues that the definitions of"regulation" found in the *Interpretation Act*, R.S.C. 1985, c. I-21 and the *Statutory Instruments Act*, R.S.C. 1985, c. S-22 decide the meaning of "rules" under the Act. The appellant's argument relies on paragraph 15(2)(*b*) of the *Interpretation Act*, which states:

> 15. (2) Where an enactment contains an interpretation section or provision, it shall be read and construed
>
> [...]
>
> (*b*) as being applicable to all other enactments relating to the same subject-matter unless a contrary intention appears.
>
> * * *
>
> 15. (2) Les dispositions définitoires ou interprétatives d'un texte :
>
> ...
>
> *b*) s'appliquent, sauf indication contraire, aux autres textes portant sur un domaine identique.

28 Subsection 2(1) of the *Interpretation Act* provides that:

> 2. (1) In this Act,

"regulation" includes an order, regulation, rule, rule of court, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution or other instrument issued, made or established

(*a*) in the execution of a power conferred by or under the authority of an Act, or

(*b*) by or under the authority of the Governor in Council. [Emphasis added.]

* * *

2. (1) Les définitions qui suivent s'appliquent à la présente loi.

"règlement" Règlement proprement dit, décret, ordonnance, proclamation, arrêté, règle judiciaire ou autre, règlement administratif, formulaire, tarif de droits, de frais ou d'honoraires, lettres patentes, commission, mandat, résolution ou autre acte pris :

a) soit dans l'exercice d'un pouvoir conféré sous le régime d'une loi fédérale;

b) soit par le gouverneur en conseil ou sous son autorité. [Le souligné est de moi.]

29 Similarly, subsection 2(1) of the *Statutory Instruments Act* provides:

2. (1) In this Act,

"regulation" means a statutory instrument

(*a*) made in the exercise of a legislative power conferred by or under an Act of Parliament, or

(*b*) for the contravention of which a penalty, fine or imprisonment is prescribed by or under an Act of Parliament,

> and includes a rule, order or regulation governing the practice or procedure in any proceedings before a judicial or quasi-judicial body established by or under an Act of Parliament, and any instrument described as a regulation in any other Act of Parliament. [Emphasis added.]
>
> * * *
>
> 2. (1) Les définitions qui suivent s'appliquent à la présente loi.
>
> "règlement" Texte réglementaire :
>
> *a*) soit pris dans l'exercice d'un pouvoir législatif conféré sous le régime d'une loi fédérale;
>
> *b*) soit dont la violation est passible d'une pénalité, d'une amende ou d'une peine d'emprisonnement sous le régime d'une loi fédérale.
>
> Sont en outre visés par la présente définition les règlements, décrets, ordonnances, arrêtés ou règles régissant la pratique ou la procédure dans les instances engagées devant un organisme judiciaire ou quasi judiciaire constitué sous le régime d'une loi fédérale, de même que tout autre texte désigné comme règlement par une autre loi fédérale. [Le souligné est de moi.]

30 In the alternative, even if the definitions of "regulation"do not formally apply to the Act, the appellant submits that they are declaratory of the usual and ordinary meaning of the word "regulation". It follows, the appellant argues, that the word "regulation" found in subsection 36(1) of the Act includes "rules" made under section 17, so that the Agency was required to obtain the Governor in Council's approval of the Quorum Rule.

31 There are, in my view, a number of difficulties with these submissions.

32 First, the definition of "regulation" in subsection 2(1) of the *Interpretation Act* is preceded by the phrase "In this Act". This is to be contrasted with subsection 35(1) of the *Interpretation Act* which contains definitions that are to be applied "[i]n every enactment". As the word "regulation" is not found in subsection 35(1), the logical inference is that the definition found in subsection 2(1) is not to be applied to other enactments.

33 Similarly, the word "regulation" is defined in the *Statutory Instruments Act* only for the

purpose of that Act.

34 Second, paragraph 15(2)(*b*) of the *Interpretation Act* is subject to the caveat "unless a contrary intention" is evidenced in the enactment under consideration. For reasons developed in the contextual analysis, I am of the view that the Act does demonstrate such a contrary intention.

35 Third, subsection 3(3) of the *Interpretation Act* states that "[n]othing in this Act excludes the application to an enactment of a rule of construction applicable to that enactment and not inconsistent with this Act." This further limits the application of paragraph 15(2)(*b*) of the *Interpretation Act*.

36 Notwithstanding these difficulties, I agree that there is some potential ambiguity in the plain meaning of the word "regulation"in that in some contexts it can include a "rule". Where the word "regulation"can support more than one ordinary meaning, the meaning of the word plays a lesser role in the interpretive process. I therefore turn to the contextual analysis to read the provisions of the Act as a harmonious whole.

(ii) Contextual Analysis

37 An electronic search of the Act discloses that the word "rule" is used in the order of 11 different provisions, while "regulation"is found in over 30 provisions. In no case are the words used interchangeably. For example, at subsection 4(1) of the Act, "orders and regulations" made under the Act relating to transportation matters take precedence over any "rule, order or regulation" made under any other Act of Parliament. Similarly, under section 25 of the Act, the Agency is granted all powers vested in superior courts to, among other things, enforce "orders and regulations" made under the Act. The absence of reference to "rules" in both provisions suggests rules hold a subsidiary position to orders or regulations. This interpretation is consistent with the view that rules are created by the Agency on its own initiative, while orders come at the end of an adjudicative process and regulations must be approved by the Governor in Council.

38 Other provisions relevant to the contextual analysis are sections 34 and 36 of the Act. Subsection 34(2) requires the Agency to give to the Minister notice of every rule proposed under subsection 34(1) (which deals with the fixing of license and permit fees). Subsection 36(2) similarly requires the Agency to give the Minister notice of every regulation proposed to be made under the Act. If rules are a subset of regulations, subsection 34(2) would be redundant, because the Minister must be notified of all proposed regulations. The interpretation of "rules" as a subset of "regulation" would violate the presumption against tautology, where Parliament is presumed to avoid speaking in vain *(Quebec (Attorney General) v. Carrières Ste. Thérèse Ltée*, [1985] 1 S.C.R. 831, at page 838.

39 Moreover, whenever "rule" appears in the Act it is in the context of internal procedural or non-adjudicative administrative matters. See:

* subsection 16(1): dealing with the quorum requirement;
* subsection 17(*a*): dealing with sittings of the Agency and the carrying on of its work;
* subsection 17(*b*): concerning procedures and business before the Agency, including the circumstances in which hearings may be held in private;
* subsection 17(*c*) dealing with a number of members required to hear any matter or perform any of the functions of the Agency;
* subsection 25.1(4): dealing with the Agency's right to make rules specifying a scale under which costs are taxed;
* subsection 34(1): dealing with fixing fees for, among other things, applications, licenses and permits;
* section 109: dealing with the right of judges of the Federal Court to, with the approval of the Governor in Council, make general rules regarding the practice and procedure of the Court in relation to insolvent railways;
* subsection 163(1): providing that in the absence of agreement to the contrary, the Agency's rules of procedure apply to arbitrations; and
* subsection 169.36(1): dealing with the right of the Agency to make rules of procedure for an arbitration.

40 In contrast, the Act's use of the word"regulations" generally refers to more than merely internal, procedural matters. For example:

* subsection 86(1): the Agency can make regulations relating to air services;
* section 86.1: the Agency shall make regulations respecting advertising of prices for air services within or originating in Canada;
* subsection 92(3): the Agency can make regulations concerning the adequacy of liability insurance for a railway;
* subsection 117(2): the Agency may make regulations with respect to information to be contained in a railway tariff;
* subsection 128(1): the Agency can make regulations relating to the interswitching of rail traffic; and
* section 170: the Agency can make regulations for the purpose of eliminating undue obstacles in the transportation network to the mobility of persons with disabilities.

41 The dichotomy between internal/procedural matters on one hand and external/substantive on the other is reflected in section 54 of the Act, which provides that the appointment of receivers or managers does not relieve them from complying with the Act and with the "orders, regulations, and directions made or issued under this Act". The absence of "rules" from this listing is consistent with the interpretation that, in the context of the Act, rules only apply to procedural matters and not the substantive operations that a receiver or manager would be charged with. This interpretation also accords with the presumption of consistent expression, since it is generally inferred that "[w]hen an

Act uses different words in relation to the same subject such a choice by Parliament must be considered intentional and indicative of a change in meaning or a different meaning" (*Peach Hill Management Ltd. v. Canada*, [2000] F.C.J. No. 894, 257 N.R. 193, at paragraph 12 (F.C.A.).

42 Another relevant provision is section 109, which requires Federal Court judges to seek approval from the Governor in Council when establishing rules of procedure for matters relating to insolvent railways. Two possible conclusions may be taken from this provision. First, it could imply that the Agency's rules are also subject to Governor in Council approval. Second, it could imply that since Federal Court judges are explicitly required to seek such approval, the absence of that same requirement under section 17 is indicative of Parliament's intent that the Agency is not required to seek such approval.

43 The latter interpretation is, in my view, the better view. It is in accordance with the maxim of statutory interpretation *expressio unius exclusio alterius*, which in essence states that consistent drafting requires that some legislative silences should be seen as deliberate. While this maxim should be approached with caution, the Supreme Court has relied on similar reasoning to find Parliament's inclusion of express limitations in some sections of an act as evidence Parliament did not intend those limitations to be included in other provisions where the exceptions are not explicitly stated (*Ulybel Enterprises* at paragraph 42).

44 In the present case, since the Act specifically requires Federal Court judges to receive approval from the Governor in Council when establishing rules of procedure, the application of the *exclusio unius* maxim is consistent with the interpretation that the Agency's rules are not subject to this requirement.

45 There is a further, final contextual aid, found in the legislative evolution of the Act. In *Ulybel Enterprises* at paragraph 33, the Supreme Court noted that prior enactments may throw light on Parliament's intent when amending or adding to a statute.

46 The predecessor to the Agency, the National Transportation Agency (NTA), was governed by the *National Transportation Act,1987*, c. 28 (3rd Supp.) (former Act).

47 Pursuant to subsection 22(1) of the former Act, the NTA had the power to make rules with the approval of the Governor in Council:

> 22. (1) The Agency may, with the approval of the Governor in Council, make rules respecting
>
> (*a*) the sittings of the Agency and the carrying on of its work;
>
> (*b*) the manner of and procedures for dealing with matters and business

before the Agency, including the circumstances in which in camera hearings may be held; and

(*c*) the number of members of the Agency that are required to hear any matter or exercise any of the functions of the Agency under this Act or any other Act of Parliament.

(2) Subject to the rules referred to in subsection (1), two members of the Agency constitute a quorum. [Emphasis added.]

* * *

22. (1) L'Office peut, avec l'approbation du gouverneur en conseil, établir des règles concernant:

a) ses séances et l'exécution de ses travaux;

b) la procédure relative aux questions dont il est saisi, notamment pour ce qui est des cas de huis clos;

c) le nombre de membres qui doivent connaître des questions ou remplir telles des fonctions de l'Office prévues par la présente loi ou une autre loi fédérale.

(2) Sous réserve des règles visées au paragraphe (1), le quorum est constitué de deux membres. [Le souligné est de moi.]

48 In 1996, the former Act was replaced with the current regime. Section 22 of the former Act was replaced by nearly identical provisions contained in subsection 16(1) and section 17 of the current Act. There was one significant difference: the requirement to obtain Governor in Council approval for the rules was removed. In my view, this demonstrates that Parliament intended that the Agency not be required to obtain Governor in Council approval when making rules pursuant to section 17 of the Act.

49 Before leaving the contextual analysis, for completeness, I note that at the hearing of this appeal counsel for the Agency indicated that he no longer relied on the clause-by-cause analysis of section 17 of the Act as an aid to interpretation. As such, it has formed no part of my analysis.

(iii) Purposive Analysis

50 The Agency has a broad mandate in respect of all transportation matters under the legislative authority of Parliament. The Agency performs two key functions.

51 First, in its role as a quasi-judicial tribunal, it resolves commercial and consumer transportation-related disputes. Its mandate was increased to include resolving accessibility issues for persons with disabilities.

52 Second, the Agency functions as an economic regulator, making determinations and issuing licenses and permits to carriers which function within the ambit of Parliament's authority. In both roles the Agency may be called to deal with matters of significant complexity.

53 Subsection 29(1) of the Act requires the Agency to make its decision in any proceeding before it as expeditiously as possible, but no later than 120 days after the originating documents are received (unless the parties agree otherwise or the Governor in Council shortens the time frame by regulation).

54 The mandate of the Agency when viewed through the lens that it must act with celerity requires an efficient decision-making process. Efficient processes are the result of a number of factors, not the least of which are rules of procedure that establish efficient procedures and that are flexible and able to react to changing circumstances.

55 In my view, interpreting subsection 36(1) of the Act to not include rules as a subset of regulations (so as to allow the Agency to enact rules without Governor in Council approval) is consistent with the purpose of the Agency as envisioned in the Act.

(iv) Conclusion of Statutory Interpretation Analysis

56 Having conducted the required textual, contextual and purposive analysis, I am satisfied the Agency's interpretation of the Act was reasonable. While there may be a measure of ambiguity in the text of the Act, the Act's context and purpose demonstrate that the Agency's interpretation fell within a range of acceptable outcomes.

57 There remains to consider the appellant's final argument.

What, if anything, is the Effect of Governor in Council Approval of the Rules in 2005?

58 As noted above, the appellant argues that because the Rules were approved by the Governor in Council, they could not be amended without Governor in Council approval.

59 In my view, there are two answers to this argument.

60 First, while the Regulatory Impact Analysis Statement which accompanied the Rules in 2005

stated that Governor in Council approval was required for the enactment of the Rules, such a statement does not bind this Court. Regulatory Impact Analysis Statements do not form part of the substantive enactment (*Astral Media Radio Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2010 FCA 16, [2011] 1 F.C.R. 347, at paragraph 23). As the Agency later reasonably concluded that Governor in Council approval was not required to enact the Quorum Rule, it follows that Governor in Council approval in 2005 was an unnecessary step that does not limit or bind the Agency now or in the future.

61 Second, the Quorum Rule is new. It does not vary or rescind any provision in the Rules that could be said to be previously approved by the Governor in Council.

Conclusion

62 For these reasons, I would dismiss the appeal. In the circumstances where the appeal was in the nature of public interest litigation and the issue raised by the appellant was not frivolous, I would award the appellant his disbursements in this Court.

63 In the event the parties are unable to reach agreement on the disbursements, they shall be assessed.

DAWSON J.A.
WEBB J.A.:-- I agree.
BLANCHARD J.A. (*ex officio*):-- I agree.

Case Name:

Lukacs v. United Airlines Inc.

Between
Gabor Lukacs, applicant, and
United Airlines Inc. and Skywest Airlines Inc.,
respondents

[2009] M.J. No. 43

2009 MBQB 29

237 Man.R. (2d) 75

73 C.P.C. (6th) 385

2009 CarswellMan 54

Docket: SC 07-01-09618

Manitoba Court of Queen's Bench
Winnipeg Centre

L.A. Duval J.

Judgment: February 6, 2009.

(71 paras.)

Transportation law -- Air transportation -- Liability -- Civil actions -- Limitations on liability to air carrier -- Montreal Convention 1999 -- Action by plaintiff for damages for defendant airline's failure to honour contract of carriage allowed in part -- Plaintiff sought $80 for ground transportation, $1,000 for mental anguish and $5,000 for loss of opportunity -- Plaintiff had been scheduled to attend conference in Ohio -- Plaintiff's flight cancelled due to mechanical problems -- Plaintiff unable to make alternate flight due to defendant's failure to provide staff properly trained to transfer his ticket -- Plaintiff missed conference -- Defendant required to pay $80 for transportation to and from airport -- Other damages sought fell under general damages which had been explicitly rejected from Montreal Convention.

Action by the plaintiff for damages suffered due to the defendant airline's failure to honour its contract of carriage. The plaintiff sought $80 for ground transportation, $1,000 for inconvenience and mental anguish and $5,000 for missed academic research and learning opportunity. The plaintiff was a tenured professor and had been invited to attend a conference in Ohio. The plaintiff had been scheduled to depart at 17:55 on November 16, 2007, and would have arrived in Ohio later that night. The workshop constituting the plaintiff's motivation for attending the conference was scheduled the next morning. At 14:32, an agent for the defendant called the plaintiff and informed him that his flight was being cancelled due to mechanical failure on the aircraft. The agent told the plaintiff he could make the 16:19 flight on another airline if he got to the airport immediately. The plaintiff took a taxi to the airport and arrived at 15:20. The plaintiff went to the defendant's counter but the agent told him she was not authorized to endorse his ticket for the other airline and had to call a supervisor. The supervisor did not arrive until 16:00, at which point there was not time to change the ticket and have the plaintiff clear customs and board the plane. The plaintiff was given a boarding pass for a flight the following morning but did not take it as he would have missed his workshop.

HELD: The action was allowed in part. Upon a review of airline policy and procedure, it was clear that the agent had been authorized to endorse and transfer the plaintiff's ticket but just did not know how to do so. The airline was required to take the possibility of mechanical failures into consideration and make every attempt to reschedule flights for passengers. The defendant's failure to have properly trained agents at the counter removed any possibility of the plaintiff making the alternate flight. The plaintiff was reasonable to decline the morning flight since there was no longer a reason for him to go. The plaintiff was entitled to $80 to reimburse him for the taxi to and from the airport. The damages claimed for mental anguish and lost opportunity fell under the classification of general damages. The Montreal Convention 1999 specifically considered and rejected compensation for general damages and domestic law could not be applied as it would undermine the convention. Therefore, the defendant had been substantially successful in defending the action but given the inconvenience it had caused, each party was ordered to bear its own costs.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, R.S.C. 1985, App. II, No. 44, Schedule B, s. 15

Carriage by Air Act, R.S.C. 1985, c. C-26, Schedule VI, Article 1, Article 17, Article 19, Article 20, Article 22, Article 23, Article 29

Civil Code of Quebec, S.Q. 1991, c. 64, Paragraph 1436, Paragraph 1458, Paragraph 2037

Quebec Charter of Rights and Freedoms, R.S.Q., c. C-12, s. 55

The Consumer Protection Act, C.C.S.M. c. C200,

The Court of Queen's Bench Small Claims Practices Act, C.C.S.M. c. C285, s. 3(1)(a)

The Warsaw Convention of 1929, Article 17, Article 19

Counsel:

The applicant, self-represented.

David A. Simpson for the respondents.

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1 L.A. DUVAL J.:-- This is a claim at first instance initiated pursuant to ***The Court of Queen's Bench Small Claims Practices Act***, C.C.S.M. c. C285, for general and special damages against the contracting carrier, United Airlines Inc. (hereinafter "United Airlines"), and the actual carrier, Skywest Airlines Inc. (hereinafter "Skywest Airlines"), for failure to honor a contract of carriage. The plaintiff relies on the ***Carriage by Air Act***, R.S.C. 1985, c. C-26, an Act to give effect to certain conventions for the unification of certain rules relating to international carriage by air and, in particular, Schedule VI known as the *Montreal Convention*. He also relies on ***The Consumer Protection Act***, C.C.S.M. c. 200, and s. 15 of the ***Canadian Charter of Rights and Freedoms***.

2 The plaintiff claims:

*	for ground transportation;	$ 80.00
*	for inconvenience and mental anguish	1,000.00
*	for missed academic, research and learning opportunities;	5,000.00

	TOTAL	$6,080.00

3 A claim at first instance is usually heard by a small claims hearing officer. The plaintiff relied on a number of decisions of the Quebec courts in the French language and requested a hearing before a bilingual hearing officer. As none was available at the time, due to the retirement of the sole bilingual hearing officer, the plaintiff was offered the choice of waiting until the appointment

of a bilingual hearing officer or proceeding before a bilingual judge. The plaintiff was advised that if he chose the latter option, he would be waiving a right of appeal from a decision of the hearing officer to a judge, but would nevertheless have a right of appeal from the judge's decision to the Manitoba Court of Appeal. He chose to proceed before a judge.

ISSUES

4 The following issues have been raised by the parties:

1. Were the damages claimed by the plaintiff "occasioned by delay in the carriage by air of passengers" where the initial flight was cancelled and the plaintiff did not take a later flight?
2. Did the defendants take all measures that could reasonably be required to avoid the damages?
3. Does Article 19 of the *Montreal Convention* permit the granting of general damages for inconvenience, anxiety, and "mental anguish" or does it limit compensation to special damages for out-of-pocket expenses or an easily quantifiable loss?
4. Does the plaintiff's claim for "loss of academic opportunity" constitute general or special damages? If the former, is the plaintiff limited to general damages of $2,000 pursuant to s. 3(1)(a) of ***The Court of Queen's Bench Small Claims Practices Act***?

FACTS

5 The facts as I have found them are as follows. The plaintiff is a tenured assistant professor and Ph.D. mathematician with the University of Manitoba, his specialty being topology. He registered to attend an academic conference, to be held at Ohio University in Athens, Ohio, U.S.A., which was of particular interest to him due to its inclusion of a workshop on the first day, i.e., November 17, 2007, by the noted expert, Simon Thomas on the topic, "Countable Borel Equivalence Relations". As the conference was sponsored by the National Science Foundation, there was no registration fee. He booked flights with United Airlines through his travel agent. He received an electronic ticket. With his itinerary, he also received advice recommending that for an international flight, he should check-in two hours prior to departure.

6 The first flight, No. 6657 operated by Skywest Airlines, was scheduled to depart Winnipeg International Airport on November 16, 2007 at 17:55 hours and to arrive in Chicago at 20:07 hours. The second flight was to depart Chicago at 21:35 hours and arrive in Columbus, Ohio at 23:50 hours. The plaintiff had arranged to pick up a rental vehicle at the Columbus airport, intending to drive to Athens, Ohio, a distance of approximately 200 kilometres, in order to attend the next morning's workshop.

7 At approximately 14:32 hours on November 16, 2007, the plaintiff received a telephone call at

his office from a United Airlines agent who advised that flight No. 6657 had been cancelled due to mechanical failure. The next United Airlines replacement flight was scheduled to depart the next day, i.e., November 17, in the morning. This would not permit the plaintiff to arrive in time to attend the first day of the conference. The agent checked for alternate flights on other airlines and suggested that one seat was available on a Northwest Airlines flight departing at 16:19 hours if he could get to the airport immediately. The plaintiff was advised that a United Airlines agent could endorse his United Airlines ticket for the Northwest Airlines flight. While the United Airlines agent continued to check for alternate flights, the telephone line was disconnected. The plaintiff waited six minutes. The agent did not call back. He called his travel agent and left by taxi from the university campus for the airport immediately, arriving at approximately 15:20 hours. As there was no agent at the United Airlines counter, he approached an agent at the Northwest Airlines counter and was told that he would need an endorsement on his ticket by United Airlines to fly on Northwest. He did not inquire about purchasing a ticket from Northwest Airlines.

8 The plaintiff stated that he is required to check-in at least one hour before a flight's departure. This is correct if the flight is domestic. However, for international flights, the airlines advise a passenger to check-in at least two hours prior to departure. This additional time is required for customs and immigration processing and clearance. The plaintiff was at the Northwest Airlines counter speaking to an agent 59 minutes before the 16:19 hour departure of that airline's flight.

9 At 15:32 hours, a United Airlines agent, Ms. Christine Parenty, attended at the United Airlines counter and was advised of the plaintiff's particular dilemma. She did not personally attempt to endorse his ticket to another airline, but made a number of futile telephone and two-way radio calls to her supervisor, who did not attend until 16:00 hours. Ms. Parenty told the plaintiff that she needed her supervisor's authorization to endorse the ticket to Northwest Airlines and that she would do everything to get him on another flight so that he could attend the conference. In fact, she had not received training, and did not know the procedure for endorsing a ticket to another airline. Neither she, nor any other United Airlines employee ever suggested to the plaintiff that he purchase a ticket from Northwest Airlines and seek reimbursement from United Airlines later. However, the plaintiff admitted that he had used that alternative in another situation, but had subsequently been refused reimbursement. He also stated that a ticket purchased at the last minute is considerably more costly.

10 As time passed, the plaintiff became more upset and Ms. Parenty tried to placate him. At trial, she stated that she had neither the authority, nor the training to transfer the ticket. At 15:45 hours, she told the plaintiff that she could still get him on the Northwest flight leaving at 16:19 hours if she obtained her supervisor's authorization. At 15:50 hours she told the plaintiff that her supervisor was on her way. A supervisor arrived shortly thereafter. At 16:00 hours she asked another United Airlines agent to look after him.

11 This agent, Ms. M. Hart, told the plaintiff that it was too late to make the Northwest Airlines flight. She said that the cause of the cancellation of the United Airlines flight might be due to

weather. She told waiting passengers that if the cause was weather-related, they were not entitled to be rebooked on another airline. She told the plaintiff to get back in line. The suggestion by Ms. Hart that the cancellation might be due to weather, rather than a mechanical problem, was an attempt to minimize United Airlines' liability for the consequences of the cancellation. The evidence indicates that some airlines do not assume responsibility for expenses, such as hotels, transportation or meals related to cancellation of flights due to weather conditions. The plaintiff states that Ms. Hart was rude, told him to get to the back of the line, and called the airport police/security to complain about him and ask that he be removed. The plaintiff admits that he was upset and raised his voice at times. He was not asked to leave by security personnel, although they attended. Ms. Hart was not called as a witness by the defendants, from which I draw a negative inference against the defendants. The plaintiff's evidence in this respect is not disputed. I, therefore, accept it as true.

12 Later, the plaintiff was handed over to a male agent or supervisor who had arrived at approximately 16:20 hours and who tried to find an alternate flight which would allow the plaintiff to attend the first day of the conference, but to no avail. The plaintiff requested written confirmation from the United Airlines counter agents that the flight was cancelled, that he was present, and that he was seeking a refund of the ticket and the travel agency fee. He was refused written confirmation and was told to contact the United Airlines Call Centre for a refund. The plaintiff received a boarding pass for a United Airlines flight leaving the next morning, but did not use it. He left the airport at 17:10 hours.

13 He claimed reimbursement for the cancelled flight and received a refund in the full amount. The defendants do not dispute the plaintiff's claim of $80 for ground transportation to and from the airport on November 16, 2007, although at the time of the trial, they had not yet reimbursed him.

14 Mr. Gregory Burton, regional contract manager for Skywest Airlines, has knowledge of United Airlines' policies and procedures. When a flight is cancelled, the passenger is notified and the computer system automatically rebooks on the next United Airlines flight to that destination. If the cancellation arises due to factors within the control of the airline (not due to weather), the airline's priority is as follows:

(a) reroute primarily on a United Airlines flight;
(b) transfer onto another available airline's flight;
(c) issue ground transportation;
(d) refund the ticket.

15 Mr. Burton also stated that, in this case, no alternate aircraft was available to be sent from Chicago when mechanical difficulties arose. If the regional hub (Chicago in this case) has only one spare aircraft and it is in use, then, in the case of a mechanical problem, the flight is cancelled. The flight was cancelled due to mechanical problems with the aircraft, at 14:30 hours. The standard procedure does not include attempting to locate an available aircraft from another regional hub or chartering an aircraft from another airline. He did not know when the aircraft had last been checked

at the maintenance facility in Chicago.

16 He stated that a ticket transfer is a courtesy between airlines, requiring the acceptance of the other airline, but that it is frequently done. The passenger must attend at the United Airlines counter to make the arrangements. In Winnipeg, the counter is only staffed two hours prior to a flight's departure. A United Airlines agent is authorized to endorse a transfer of a ticket. This was also confirmed by Ms. Jacqueline Fraser, the Winnipeg station manager for Swissport, which provides ground handling services, including trained counter agents, for United and Skywest Airlines. I have concluded that Ms. Parenty had the authority to transfer the ticket, but did not want to admit to a passenger that she did not know the procedure. Mr. Burton stated that if an agent does not know the procedure, she can telephone the United Airlines Help Desk, but there will be an initial 5 to 10 minute delay and the procedure can take up to 30 minutes.

17 Ms. Parenty stated during direct examination that the plaintiff was agitated, forceful and insistent that his ticket be transferred to the Northwest Airlines flight. She stated that she was intimidated by him, as he was "yelling" at her. On cross-examination, after she was given the opportunity to listen to 13 minutes of their recorded conversation, she admitted that he had not "yelled", but then stated that he had raised his voice, which she considered was "yelling". After listening to this recorded conversation, I have concluded that although the plaintiff was seeking an immediate resolution to his problem and was frustrated by Ms. Parenty's ineffectual efforts, Ms. Parenty exaggerated the tone and loudness of the plaintiff's words. Further, although she stated on direct examination that she personally went to the Northwest Airlines counter to determine if a seat was available on a flight leaving at 16:19 hours, during cross-examination she admitted that she was not sure if she had done so. I accept the evidence of the plaintiff and conclude that during the critical period of time when Ms. Parenty might have authorized a ticket transfer to another airline, she made no real efforts to do so.

18 Ms. Parenty had only four days of on-the-job experience at the time. This was her first experience with a cancelled flight. At the time of trial, five months later, she had still not been trained in the procedure to transfer a ticket. She stated that two Swissport agents know how to do it. The others are told to call the Help Line. She called for assistance from a supervisor up to seven times before one arrived, approximately 20 minutes later.

19 The station manager for Swissport, Ms. Jacqueline Fraser, on receipt of notice of the flight cancellation at 14:30 hours, began calling hotels to reserve a block of rooms in the event that some international travel passengers would not be able to make a connecting flight. The airline would then assume their hotel and ground transportation costs. She attended the United Airlines counter at approximately 16:00 hours, and then walked to the Northwest Airlines counter (a distance of a few feet) to check on seat availability for the flight at 16:19 hours. Nothing was then available. She checked another airline's flights on-line, but without success. Although she heard Ms. Parenty's calls for assistance when she was in her office, she assumed that the United Airlines supervisor who had left the office with the agents would deal with it. When scheduling airline agents, she does not

consider it necessary to have an on-duty agent who has the training to transfer a ticket. She estimated that the transfer procedure, undertaken by a trained agent, could take up to 20 minutes.

PLAINTIFF'S POSITION

20 Both the plaintiff and counsel for the defendants agree that the *Montreal Convention*, i.e., Schedule VI to the ***Carriage by Air Act***, *supra*, is applicable. The plaintiff submits that the damages claimed are recoverable pursuant to Article 19 of the *Montreal Convention*, which provides as follows:

> **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.

21 He takes the position that United Airlines did not take all measures that could reasonably be required to honour its contract of carriage with him or to limit his damages. The plaintiff argues that an airline must take into consideration the possibility of mechanical failures and foresee efficient solutions to assure the service promised to the flying public. (See ***Quesnel c. Voyages Bernard Gendron inc.***, [1997] J.Q. No. 5555 [C.Q. (Civ. Div. Sm. Cl.)], at paras. 15 and 16) Having only one replacement aircraft available in a large hub may be inadequate, depending on the total number of aircraft, the number of flights, the mechanical condition of the aircraft and other factors. Further, United Airlines personnel made no effort to seek and obtain an aircraft from another hub. No evidence was led relating to the schedule of aircraft maintenance, in particular, in respect of the aircraft in question.

22 The plaintiff further submits that the following actions by the airline and its employees or agents establish that it did not take all measures that could reasonably be required to avoid the damage:

(i) the United Airlines customer service agent who advised him of the cancellation of the flight hung up, or was disconnected and failed to call the plaintiff back;
(ii) on arrival at the airport, although United Airlines employees had received notification of the flight cancellation at 14:30 hours, no agent(s) were present at the United Airlines counter to deal with passengers until 15:30 hours;
(iii) Ms. Parenty, a United Airlines counter agent, was not trained in the procedure to expeditiously transfer a ticket to another airline and no

other agent was then available to effect a ticket transfer;

(iv) a supervisor was not available to assist for 20 minutes while the agent was attempting to contact that supervisor, nor was one available later when another agent made similar attempts;

(v) when the agent was unable to transfer his ticket, United Airlines personnel did not offer to reimburse the cost of a Northwest Airlines ticket if he personally purchased it.

23 Pursuant to Article 22 of the *Montreal Convention*, the liability of the carrier for each passenger is limited to 4 150 Special Drawing Rights in the case of damage caused by delay in the carriage of persons. The plaintiff seeks compensation for, and argues that the language of Article 19 is sufficiently broad to include, claims for inconvenience and mental anguish, as well as for loss of academic, research and/or learning opportunities. He argues that these latter heads of compensation do not constitute general damages, but are quantifiable special damages pursuant to his suggested formula of two and a half months of time x 40% of the total time dedicated to his work x his gross salary. He receives a gross monthly salary of $5,866.12 ($2,707.44 bi-monthly x 26 pay periods/12 months). Based on this formula, his claim for loss of academic opportunity totals $5,866.12, although he claims $5,000.

24 In the alternative, if the *Montreal Convention* is not applicable, the plaintiff relies on ***The Consumer Protection Act***, *supra*, in its totality. He could not point to any particular applicable section. He also submits that s. 15 of the ***Charter*** is applicable, as it provides the right to equality before and under the law.

25 The plaintiff relies on a number of decisions of the Court of Quebec, Civil Division, Small Claims, as well as the judgment of the Quebec Court of Appeal in ***Lambert c. Minerve Canada, Compagnie de transport aérien inc.***, [1998] R.J.Q. No. 1740, a decision of Rothman, Baudouin and Deschamps JJ.A.

26 He also cited the case of ***D'Onofrio c. Air Transat A.T. inc.***, [2000] J.Q. no 2332, a claim based on the contract of carriage and on the *Warsaw Convention*. Vermette J. held that the burden of proof rested with the defendant to establish that all necessary measures to avoid the damages had been taken. He held that the burden of proof had not been met. There was no evidence to establish that reasonable measures had been taken by the defendant to avoid the delays, due to the engines losing oil on the departure from Montreal, which required a return to Mirabel Airport, and due to the further engine problems on the departure from Rome on the return flight. Nor was there any evidence that the airline had made alternate arrangements to transport the passengers with reasonable diligence. No proof was led as to the maintenance of the aircraft or the exact nature of the problem experienced. General damages for inconvenience, fatigue and stress, and loss of vacation time were granted of approximately $1,000 to Mr. D'Onofrio.

27 In ***Grenier c. Air Canada***, 2007 QCCQ 12045 (CanLII), Shamie J. of the Court of Quebec

allowed $700 in general damages for inconvenience and loss of golfing time due to the failure of the airline to deliver two sets of golf clubs for a period of 20 days after the plaintiff's arrival at his destination. The plaintiff relied on Article 19 of the *Montreal Convention*. The court held that although Article 29 of the *Convention* did not allow recovery for exemplary or punitive damages, the damages sought by the plaintiff constituted "des dommages-intérêts visant à compenser le préjudice".

28 Shamie J. relied on the decision of the Quebec Court of Appeal in ***Lambert***, *supra*, where non-pecuniary compensatory damages were awarded by the court. Shamie J. held that the legislation relied upon in ***Lambert*** was similar to Article 19 of the *Montreal Convention*. The damages in ***Lambert*** resulted from a 20-hour delay in departure. The legislation referred to by the court in ***Lambert*** was the ***Civil Code of Quebec*** and the ***Consumer Protection Act*** of Quebec. The Quebec Court of Appeal granted exemplary damages against the airline which had been declared bankrupt. Leave to proceed against the bankrupt airline had been granted. Against the airline, liability was found pursuant to s. 2034 of the ***Civil Code of Quebec*** and Article 19 of the *Warsaw Convention*. Exemplary damages against the airline were granted based on contract law. It does not appear that any issue was raised by the parties relating to the question of whether Article 19 of the *Warsaw Convention* contemplated the granting of general damages.

29 The plaintiff also relies on the decision of Barbe J. of the Small Claims Division of the Court of Quebec in ***Zikovsky c. Air France***, 2006 QCCQ 948 (CanLII), where the court applied para. 1437 of the ***Civil Code of Quebec***, declaring a clause in the contract of carriage invalid and of no effect. The circumstances related to a four and a half hour delay due to a failure in the sufficiency of personnel. As a result, the plaintiff was unable to arrive in time to board a corresponding flight departing from Paris to New Delhi, India. The court considered Article 19 of the *Montreal Convention*. The court concluded that the defendant had not satisfied the burden of establishing that it had taken reasonable measures to honour the contract of carriage. In circumstances where a clause of the contract of carriage, which attempted to contradict the *Montreal Convention*, had not specifically been brought to the attention of the plaintiff and was so faded as to be practically illegible, the court applied para. 1436 of the ***Civil Code of Quebec*** which declares null any illegible or incomprehensible clauses of a contract. The claim in the amount of $1,125, based on loss of employment income of five hours, was granted.

30 The plaintiff also relied on the decision of Hébert J. of the Small Claim Division of the Court of Quebec in ***Zaor c. Air Canada***, 2006 QCCQ 1796 (CanLII), where a delay in departing from Montreal resulted in the plaintiffs missing the departure of their cruise ship. The delay was due to the mechanical failure of the aircraft; a further delay occurred when six passengers, who had asked to disembark, were allowed to do so. Another delay occurred when the airline effected a change in cabin personnel due to the lengthy initial delay. Although the plaintiffs had also made requests to leave the aircraft, their requests were denied. Ultimately, they were able to board their cruise liner in Mexico after overnighting in Fort Lauderdale and making arrangements for travel to the next port of call. Instead of a four-day cruise, they spent one day aboard. General damages for inconvenience,

stress, and time and trouble to reconnect with their cruise was granted in the amount of $1,000 ($500 each).

31 What constitutes reasonable efforts to honour the contract of carriage where mechanical failure of the aircraft is the cause of delay? That issue was considered in ***Quesnel***, *supra*, relied upon by the plaintiff, where Boyer J. stated at paras. 15 and 16, as follows:

> **15** Dans un temps où la mondialisation des voyages et des échanges commerciaux s'accentue de façon considérable de jour en jour, il est raisonnable de s'attendre à une grande régularité de services chez une société aérienne de l'envergure de l'intimée Air Canada. Certes, le transporteur aérien demeure tributaire des phénomènes atmosphériques. En revanche, il doit escompter la possibilité de bris mécaniques et prévoir pour cette raison des solutions efficaces de rechange afin d'assurer le service promis. Ce devoir s'accentue davantage lorsque ce transporteur effectue ce transport à partir de son principal établissement.
>
> **16** L'intimée n'a pas fait à l'audience la preuve nécessaire requise pour se décharger de la présomption de responsabilité qui pesait contre elle. Il ne lui suffisait pas d'affirmer que l'on avait tenté de trouver des sièges sur un vol d'une autre compagnie deux heures plus tard mais que les passagers seraient arrivés de toute façon en retard. Il lui incombait de prouver qu'aucune solution de rechange raisonnable n'existait, par substitution ou autrement, y compris la mise en opération d'un autre appareil. En l'absence d'une telle preuve, la présomption de responsabilité doit jouer contre l'intimée Air Canada.

32 The court held that the airline must take into consideration the possibility of mechanical failures and provide for efficient solutions to assure the service contracted with the public. I agree. The court also opined that where the airline was aware that certain seats had been sold to a travel agency whose passengers were required to reach a boarding port by a certain date and time, it could not complain that the allowed interval to board the cruise was too short. The essential question which arose was whether, in the circumstances, the airline had established that all reasonable measures had been taken to honour the contract of carriage. For the loss of three days of a vacation cruise, Air Canada was ordered to pay $1,707.30 to the plaintiffs.

33 The plaintiff also relies on the decision of Gagnon J. in ***Assaf c. Air Transat A.T. inc.***, [2002] J.Q. no 8391 [C.Q. (Civ. Div. Sm. Cl.)] (QL). In that case, mechanical difficulty resulted in 11 hours of delay. The plaintiffs missed four days of their cruise. Articles 19, 20 and 23 of the *Warsaw Convention* were considered. Although the court opined that a mechanical problem arising just prior to takeoff would constitute a sufficient justification for the delay, the carrier was nevertheless required to satisfy the terms of Article 20(1) of the *Convention*. It must establish that it took all

reasonable measures to avoid damages, i.e., that it took all reasonable measures not only to prevent damage, but also to redress the harm caused by the delay.

34 In this case, the plaintiffs requested that the carrier arrange for seats on another airline leaving the next day from Orlando to Freeport, which would have permitted them to board their cruise at the latter port. The defendant refused, relying on clause 9 of the contract which stated that the carrier was not responsible for any delay, was only obliged to do its best, and that the hours of departure and arrival specified on the ticket were excluded from the terms of the contract. The court held that clause 9 was null and void, applying Article 23 of the *Convention*, which took precedence in the case of international flights.

DEFENDANTS' POSITION

35 The defendants oppose the plaintiff's claim for $1,000 representing inconvenience and mental anguish, as well as his claim for $5,000 representing loss of academic, research and learning opportunities. The defendants submit that the damage was not "occasioned by delay in the carriage by air of passengers", as the plaintiff did not avail himself of the next morning's alternate flight, and that he was, therefore, not "delayed".

36 The defendants also submit that their employees and agents took all measures that could reasonably be required to avoid the damage. As there was no alternate plane available, there was nothing the airline could have done. Counsel submits that United Airlines cannot require another airline, such as Northwest Airlines, to accept a passenger and that the plaintiff was only available 59 minutes prior to the anticipated departure of the Northwest Airlines flight, and could not have boarded that flight in the remaining time, taking into consideration the time required to go through customs and security. Counsel submits that the plaintiff should have purchased a ticket on Northwest Airlines when he arrived at the airport and sought reimbursement for the difference in price from the defendants at a later date. He submits that the plaintiff, therefore, failed to mitigate his damages.

37 Counsel for the defendants argues that the plaintiff's claim of $5,000 for loss of academic, research and learning opportunities is speculative and not a proper head of damage. He submits that the onus on the plaintiff to establish such damages on a balance of probabilities has not been met and that the plaintiff has not established a rational connection between his claim and the delay. The claim is based on a theoretical amount of time to learn. It assumes that the plaintiff would have learned in a seven-hour workshop that which would otherwise require 40% of his time over a period of two and a half months. Counsel submits that as the plaintiff has not suffered a direct calculable pecuniary loss resulting from the delay, the claim based on missed academic opportunity does not constitute a special damage. Nor is it a recoverable general damage. Although the plaintiff suggested that the loss of this learning opportunity could have a negative effect on his future promotion, counsel correctly submits that this suggestion is speculative and was not supported by evidence.

38 Counsel for the defendants relies on the decision of the United States Court of Appeals for the Fifth Circuit, filed January 14, 2004, in ***Lee v. American Airlines Inc.***, 355 F. 3d 386, 2004 U.S. App. LEXIS 441, which applied the rationale of the United States Supreme Court in ***Eastern Airlines, Inc. v. Floyd***, 499 U.S. 530, 111 S. Ct. 1489, 113 L. Ed 2d 569, 1991 U.S. LEXIS 2222. In ***Lee***, a claim for mental anguish, inconvenience, and loss of a "refreshing, memorable vacation" was dismissed. Circuit Court Judge Emilio M. Garza held that the plaintiff's so-called inconvenience damages were not easily quantifiable, did not result in real economic loss, and constituted an attempt to re-characterize mental anguish damages which were not recoverable under the *Warsaw Convention*. Garza J. relied on the decision of the United States Supreme Court in ***Eastern Airlines***, *supra*, which held that Article 17 of the *Warsaw Convention* did not allow recovery for purely mental injury unrelated to bodily injury, the drafters of the *Warsaw Convention* not having intended to include such a remedy.

39 The plaintiff submits that the decisions in ***Lee*** and ***Eastern Airlines***, relied upon by the defendants' counsel, are in error and should not be followed by this court, as these decisions refer to the *Warsaw Convention* which preceded the *Montreal Convention*. Further, they refer to Article 17 and the basis of the claim herein is Article 19.

40 The defendants also rely on the decision in ***Onwuteaka et al. v. Northwest Airlines Inc. et al.***, 2007 U.S. District LEXIS 34273, where a United States District Court Judge held that although the *Montreal Convention* completely replaced the *Warsaw Convention*, courts interpreting the *Montreal Convention* could rely on the statutory interpretation of similar provisions of the *Warsaw Convention*. The plaintiffs had claimed damages in the Texas State Court, pursuant to an action in contract, not pursuant to the *Montreal Convention*. A motion by the defendants to dismiss the claim was granted on the basis that the *Montreal Convention* applied to contracts relating to international carriage by air. The court also held that prior jurisprudence interpreting the *Warsaw Convention* had held that only economic loss or physical injury were recoverable damages under Article 19.

41 The defendants also rely on the decision of Nordheimer J. of the Ontario Superior Court of Justice in ***Chau et al. v. Delta Air Lines Inc. et al.*** (2003), 67 O.R. (3d) 108, in which the court held at para. 23 that neither Article 17 nor Article 19 of the *Warsaw Convention* could provide a foundation for the plaintiffs' claims for general and/or punitive damages. Nordheimer J. considered the decision of the United States Supreme Court in ***Eastern Airlines*** and the decision of the House of Lords in ***Morris v. KLM Royal Dutch Airlines***, [2002] A.C. 628. These cases considered Article 17 of the *Warsaw Convention*, which provided for damages sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger. Article 19, however, simply referred to the carrier's liability for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nordheimer J. held:

> [20] I see no compelling reason to reach a conclusion different than that reached by these two courts which have carefully considered the issue. I agree with the point made in *Barrett* that it would appear to be inherently inconsistent to

> interpret the *Convention* as permitting a person to recover for purely emotional or psychological injuries in the case of delay alone but not to permit such recovery in much more serious circumstances involving actual accidents.

42 Further, Nordheimer J. held that the basis of the claim in ***Chau***, *supra*, was not logically or rationally connected to the issue of delay and could not constitute a ground for a claim pursuant to Article 19 (delay) or Article 17 (death or bodily injury). In the ***Chau*** case, the plaintiffs had become involved in a dispute with another passenger respecting the seating arrangements on the plane, including the seating of their young daughter. They were asked to leave the aircraft. Their claim for general and punitive damages for embarrassment and emotional distress was dismissed.

43 Counsel for the defendants submits that the jurisprudence developed by the Small Claims Courts of Quebec, where claims for general damages for mental anguish, inconvenience or similar heads of damage have been granted, should not be followed. He argues that damages occasioned by delay, pursuant to Article 19 of the *Montreal Convention*, are limited to special damages, i.e., economic, easily quantifiable losses and do not include general damages for inconvenience, emotional stress or similar heads of damage. In particular, he argues that, as the *Convention* has been held by U.S. courts, and by Nordheimer J. of the Ontario Superior Court of Justice, to exclude recovery for purely mental or psychological injuries under Article 17 (relating to cases of death or bodily injury of a passenger), then such damages should not be compensable under Article 19, which permits recovery for damage occasioned by delay, a much less serious circumstance.

COSTS

44 If successful, the plaintiff seeks costs of $500 and relies on the decision of the British Columbia Court of Appeal in ***Skidmore v. Blackmore*** (1995), 122 D.L.R. (4th) 330, where costs were granted to a self-represented successful litigant. The plaintiff also relies on ***Clancy v. Harvey***, 2006 MBQB 110, 203 Man.R. (2d) 204, where costs were granted in a small claim hearing which lasted five days and where lack of credibility of witnesses was a factor.

45 Counsel for the defendants argues that the plaintiff's reliance on voluminous case law, including Quebec court cases reported in the French language which required translation, have increased the defendants' costs. Counsel seeks $500 for a two-day hearing, if successful.

CONCLUSION

1. Were the damages claimed by the plaintiff "occasioned by delay in the carriage by air of passengers" where the initial flight was cancelled and the plaintiff did not take a later flight?

46 I do not accept the defendants' argument that the plaintiff's damages were not occasioned by delay. The plaintiff reasonably decided that there was no purpose to attending late to the conference

when the particular workshop, which constituted his reason for attending, would have been missed. The delay caused the damages sustained by the plaintiff who was unable to attend the first day of the conference.

2. Did the defendants take all measures that could reasonably be required to avoid the damages?

47 With respect to the issue of liability, the defendants have not established on a balance of probabilities that they took all measures that could reasonably be required to avoid the damage sustained by the plaintiff arising from the delay.

48 The evidence did not address the issue of aircraft maintenance and whether the mechanical failure of the aircraft which resulted in the cancellation of the flight was something which could have been avoided. The evidence indicated that one replacement aircraft is available for the Chicago hub. As there was no evidence as to the number of United Airlines aircraft flying from the Chicago hub, it is not possible to determine whether having only one aircraft available is reasonable. No efforts were made to attempt to find another aircraft from another hub, as this is not "standard procedure" for United Airlines.

49 Further, there was a slight possibility that the plaintiff could have flown on Northwest Airlines, but the failure of United Airlines to have properly trained staff available to arrange a quick transfer of a ticket made it impossible. Although it is unlikely that the plaintiff could have, within one hour, obtained a transfer of his ticket, and proceeded through customs and security in time to board the Northwest Airlines flight at 16:19 hours, no attempt was made by United Airlines personnel at the relevant time to assist him.

50 Nor is it the responsibility of the passenger to purchase a ticket on an alternate airline at much greater expense, in the hopes that he may be reimbursed by the airline which has caused the delay. The onus rests with the airline to establish that it has taken all measures that could reasonably be required to avoid the damage. The onus does not rest with the passenger. There is no negligence on the part of the plaintiff which would exonerate the defendants pursuant to Article 20 of the *Montreal Convention*.

3. Does Article 19 of the *Montreal Convention* include general damages for inconvenience, anxiety and "mental anguish"?

51 The *Warsaw Convention* was signed on October 12, 1929 and has since been amended on a number of occasions, including by the *Montreal Convention*, which was signed on May 28, 1999. The latter was added to the ***Carriage by Air Act*** as Schedule VI to the, S.C. 2001, c. 31, s. 5, which came into force in Canada on November 4, 2003.

52 Article 19 of the *Warsaw Convention* provided only that "the carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo". The same language is repeated in Article 19 of the *Montreal Convention*.

53 The plaintiff submits that the language of the Article should be interpreted broadly to include general damages. A review of the case law relied upon by the plaintiff, emanating from the Court of Quebec, Small Claims Division, reveals that the decision of the United States Supreme Court in ***Eastern Airlines*** was not brought to the attention of the presiding judges. Article 17 of the *Warsaw Convention* of 1929, considered in ***Eastern Airlines***, provided:

> The carrier is liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Article 17(1) of the *Montreal Convention* provides:

> **Death and Injury of Passengers ...**
>
> 1. The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

The language of Article 17 of the *Warsaw Convention* and Article 17(1) of the *Montreal Convention* are substantially identical (the word "wounding" is omitted from the latter).

54 In ***Eastern Airlines***, the United States Supreme Court determined that Article 17 of the *Warsaw Convention* did not allow recovery for mental or psychic injuries unaccompanied by physical injury or physical manifestation of injury. In arriving at its decision, the court considered the meaning of "lésion corporelle", French having been the language in which the *Warsaw Convention* had been drafted. The United States Supreme Court considered the documentary record for the Warsaw Conference. It concluded that neither the drafters, nor the signatories specifically considered liability for psychic injury, apparently because many, if not most, countries did not recognize recovery for such injuries at the time. The court concluded that the drafters most likely would have felt compelled to make an unequivocal reference to purely mental injury if they had intended to allow such recovery, as did the signatories to the Berne Convention on International Rail. The court also concluded that the narrower reading of "lésion corporelle" was consistent with the primary purpose of the *Warsaw Convention's* contracting parties, who were more concerned with limiting the liability of air carriers in order to foster the growth of the fledgling commercial aviation industry than they were with providing full recovery to injured passengers (p. 1491). In arriving at its decision, the court considered French legislative provisions in force in 1929, French

court decisions in or before 1929 explaining the phrase "lésion corporelle" and French treatises and scholarly writing. At p. 1498 of Marshall J.'s judgment on behalf of the court, he states that the unavailability of compensation for purely psychic injury in many common and civil law countries at the time of the Warsaw Conference persuaded the court that the signatories had no specific intent to include such a remedy in the *Convention*. Such a remedy was unknown in many, if not most, jurisdictions. At p. 1502 of the decision, Marshall J. stated:

> ... Even if we were to agree that allowing recovery for purely psychic injury is desirable as a policy goal, we cannot give effect to such policy without convincing evidence that the signatories' intent with respect to Article 17 would allow such recovery. As discussed, neither the language, negotiating history, nor postenactment interpretations of Article 17 clearly evidences such intent. ...
>
> ... We have no doubt that subjecting international air carriers to *strict* liability for purely mental distress would be controversial for most signatory countries. Our construction avoids this potential source of divergence.

55 The United States Supreme Court concluded that an air carrier cannot be held liable under Article 17 when an accident has not caused a passenger to suffer death, physical injury, or physical manifestation of injury. The court expressed no view as to whether passengers could recover for mental injuries that are accompanied by physical injuries, as that issue had not been presented to it (p. 1502).

56 Although ***Eastern Airlines*** considers Article 17 of the *Warsaw Convention*, rather than Article 19 thereof, the rationale of the decision of Nordheimer J. in ***Chau***, is persuasive.

57 In ***Simard c. Air Canada***, 2007 QCCS 4452, Mayrand J. of the Superior Court of Quebec, considered whether Article 19 provided for general damages, despite Article 17 having been held not to include psychological or emotional injury, unless directly related to the bodily injury sustained. She relied on the decision in ***Chau***, and stated:

> 37 Il serait pour le moins surprenant que les dommages psychologiques, reliés au retard d'un transporteur, puissent être recouvrés collectivement, alors que ceux visés par l'article 17 et qui ont trait à une lésion corporelle ne peuvent l'être.

58 The ***Simard*** case, *supra*, involved an application to institute a class action on behalf of all passengers on an Air Canada flight which had been delayed six hours. Local police authorities had received an anonymous telephone call informing them of a safety threat to the flight and they advised Air Canada personnel. Air Canada, despite notice of the threat, allowed passengers to board. The police and local airport authorities halted the plane's takeoff while it was taxiing on the runway, in order to conduct their own investigation. Passengers were prevented from leaving the aircraft for six hours and feared for their lives. They were eventually allowed to disembark and were

taken to hotels. The plaintiff did not take the flight the next day, as the event for which he was supposed to travel was over. He was reimbursed the cost of his ticket.

59 The claim in ***Simard*** was based on Articles 17 and 19 of the *Montreal Convention*, on Sections 1458 and 2037 of the ***Civil Code of Quebec*** and on Section 55 of the ***Quebec Charter of Rights and Freedoms***.

60 It was admitted that no bodily injuries were suffered by any of the passengers. The issue was a claim for inconvenience and psychological injury for which the plaintiff was seeking punitive and exemplary damages. The application to commence a class action was dismissed with costs.

61 In ***Plourde c. Service aérien FBO inc. (Skyservice)***, 2007 QCCA 739, the Quebec Court of Appeal determined that the *Montreal Convention* did not contemplate indemnification for psychological injury. The plaintiff sought $30,000 for psychological injury and the disastrous impact on his holiday resulting from a delay caused by mechanical difficulties of the aircraft which necessitated an emergency landing. In considering Article 17 of the *Montreal Convention*, the court concluded that psychological injury is not compensable, unless related to bodily injury which forms the basis of the claim.

62 In respect of Article 17, Thibault J.A., at paras. 47 and 48 of ***Plourde***, *supra*, considered the judgment of the United States Federal Court in ***Ehrlich v. American Eagle Airlines Inc.***, 360 F. 3d 366, 2004 U.S. App. LEXIS 4403, which involved an emergency landing of an aircraft and a claim by passengers for bodily injury and unrelated psychological injury. The United States Federal Court reviewed in detail the discussions of delegates to the *Montreal Convention* and concluded that the delegates could not agree on the issue of compensation for psychological injury. They arrived at a compromise position, adopting "the concept of death or bodily injury ... contained in the *Warsaw Convention*".

63 In considering the *Montreal Convention*, the United States Federal Court held that "in coming to [an] accommodation" with respect to the "definition of [an] 'injury'" under the new Convention, the drafting changes made as the text of that Convention developed, "were not intended to interfere with the jurisprudence under the 'Warsaw System' of liability".

64 In ***Plourde***, Thibault J.A. observed that the object and purpose of the *Montreal Convention* differed from that of the *Warsaw Convention*. The *Montreal Convention* recognized the need to modernize and consolidate the *Warsaw Convention* and related instruments. Nevertheless, she concluded that in 1999, the issue of damages for psychological injury was specifically considered and clearly rejected in arriving at the *Montreal Convention*.

65 For the reasons expressed in the ***Ehrlich*** and ***Plourde*** cases, *supra*, I have concluded that general damages claimed pursuant to Article 19 of the *Montreal Convention*, intended to compensate an injured party for intangible injury suffered as a result of mental distress, inconvenience or hardship, are excluded.

APPLICABILITY OF DOMESTIC LAW

66 The plaintiff also relies on the provisions of ***The Consumer Protection Act*** of Manitoba, *supra*. Articles 1 and 29 of the *Montreal Convention* are relevant to the applicability of domestic law. Article 1 provides that the *Convention* applies to all international carriage of persons, baggage or cargo performed by aircraft for a reward. Article 29 of the *Convention* provides as follows:

> **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. [Emphasis supplied]

The *Montreal Convention* does not permit claims against a carrier based on domestic law. Claims against third parties such as travel agencies are not limited by the *Convention*, as they are not carriers.

67 The issue of the applicability of domestic law was considered by Thibault J.A. in the ***Plourde*** decision. At para. 55, she refers with approval to the following quotation at p. 61 of Professor Bin Cheng's article: "Wilful Misconduct: From Warsaw to the Hague and From Brussells to Paris"([published in the *Annals of Air and Space Law*, Vol. II - 1977 (Toronto: Carswell, 1977)), cited by Molloy J. in ***Connaught Laboratories Ltd. v. British Airways*** (2002), 61 O.R. (3d) 204 (S.C.J.), in which Professor Cheng refers to the following excerpt from the decision of the ***Belgian Cour de Cassation in Tondriau v. Air India***, R.D.F.A. (1977):

> The interpretation of an international convention the purpose of which is the unification of the law cannot be done by reference to the domestic law of one of the contracting States. If the treaty text calls for interpretation, this ought to be done on the basis of elements that pertain to the treaty, notably, its object, its purpose and its context, as well as its preparatory work and genesis. ...

68 Mayrand J. also considered the issue in ***Simard***. She referred to a decision of the House of Lords in ***Sidhu v. British Airways***, [1997] 1 All. E.R. 193, which held that domestic courts are not free to provide a remedy according to their own law, because to do so would be to undermine the *Warsaw Convention*. She also noted that the United States Supreme Court in applying Article 24 of the *Warsaw Convention* in ***El Al Israel Airlines, Ltd. v. Tseng***, 525 U.S. 155, 199 S. Ct. 662, 142 L. Ed 2d 576, 1999 U.S. LEXIS 505, held that recourse to local law would undermine the uniform regulation of international air carrier liability that the Convention is designed to foster.

4. Does the plaintiff's claim for "loss of academic opportunity" constitute general or special damages? If the former, is the plaintiff limited to general damages of $2,000 pursuant to s. 3(1)(a) of *The Court of Queen's Bench Small Claims Practices Act*?

69 The plaintiff's claim for missed academic and learning opportunities constitutes a claim for general damages which I have concluded is not recoverable. Had it been recoverable, s. 3(1)(a) of ***The Court of Queen's Bench Small Claims Practices Act***, *supra*, would limit entitlement to the sum of $2,000.

70 The plaintiff is entitled to be compensated for special damages. As he has been reimbursed for the cost of the airline ticket and the travel agent's fee, judgment is granted to the plaintiff against the defendants for the cost of ground transportation in the amount of $80. Pursuant to the Court of Queen's Bench Interest Tables, he is entitled to prejudgment interest from the date of the filing of the statement of claim, i.e., November 27, 2007 to the date of judgment and to post judgment interest thereafter.

71 With respect to the issue of costs, the defendants are not entitled to additional costs arising from the translation of Quebec court decisions relied upon by the plaintiff. French and English are the official languages of Canada. A party to a legal proceeding is entitled to rely on jurisprudence in either of these official languages. Although the defendants have been substantially successful in opposing the plaintiff's claim, in the circumstances, having considered the inconvenience and lack of consideration suffered by the plaintiff, which is non-compensable, I have determined that each party shall bear his own costs of these proceedings.

L.A. DUVAL J.

DECISION NO. 432-C-A-2013

November 15, 2013

COMPLAINT by Raymond Paul Nawrot, Kristina Marie Nawrot and Karolyne Theresa Nawrot against Sunwing Airlines Inc.

File No. M4120-3/13-01696

INTRODUCTION

[1] Raymond Paul Nawrot, Kristina Marie Nawrot and Karolyne Theresa Nawrot (Nawrots) filed a complaint with the Canadian Transportation Agency (Agency) against Sunwing Airlines Inc. (Sunwing) concerning alleged denied boarding on August 11, 2012 for Sunwing's Flight No. WG201 from London, United Kingdom to Toronto, Ontario, Canada, and the refusal by Sunwing to provide compensation.

[2] The Nawrots also allege that Existing Tariff Rule 18(g), governing check-in requirements, and Existing Tariff Rule 20, governing denied boarding compensation, of Sunwing's *International Scheduled Services Tariff*, CTA(A) No. 2 (Tariff) are unclear, therefore contrary to paragraph 122(*c*) of the *Air Transportation Regulations*, SOR/88-58, as amended (ATR), and unreasonable, therefore contrary to subsection 111(1) of the ATR.

[3] The Nawrots request that the Agency:

- order Sunwing to reimburse them the sum of CAD$4,963.32 for out-of-pocket expenses, plus interest, occasioned by the denied boarding;
- order Sunwing to pay them denied boarding compensation in the amount of 1800 euros;
- order Sunwing to pay them costs on a full indemnity basis; and,
- disallow Existing Tariff Rules 18(g) and 20 for being unclear and unreasonable.

[4] In its answer, Sunwing submits, among other things, that it revised Existing Tariff Rule 18, Refunds, and that the revisions resolve the Nawrots' complaint relating to Existing Tariff Rule 18(g). Sunwing also proposed certain revisions to Rule 20 (Proposed Tariff Rule 20) in an effort to respond to the Nawrots' complaint. In their reply, the Nawrots submit, among other things, that Proposed Tariff Rule 20 is unclear, unjust and unreasonable, and therefore should be disallowed, and they address certain revisions in Proposed Tariff Rule 18.

PRELIMINARY MATTER

[5] In their reply, the Nawrots submit that Proposed Tariff Rules 18(b) and 18(c)(i) are unreasonable. The Agency has considered this matter, and finds that this submission constitutes a new issue.

[6] A reply represents an opportunity for a party to address additional information or arguments that may have been raised in another party's submission. It should not include arguments contained in previous correspondence with the Agency or new arguments unrelated to those raised in the other party's submissions.

[7] Accordingly, the Nawrots' submission with respect to Proposed Tariff Rules 18(b) and 18(c)(i) will not be considered in this proceeding.

ISSUES

1. Did Sunwing properly apply the terms and conditions relating to check-in time limits specified in its Tariff, as required by subsection 110(4) of the ATR?

   – If not, should the Agency order Sunwing to reimburse the out-of-pocket expenses incurred by the Nawrots, plus interest?
   – If not, should the Agency direct Sunwing to provide the Nawrots with denied boarding compensation?

2. Is Existing Tariff Rule 18(g) unclear, contrary to paragraph 122(*c*) of the ATR, and unreasonable, contrary to subsection 111(1) of the ATR?

3. Is Existing Tariff Rule 20 unclear, contrary to paragraph 122(*c*) of the ATR, and unreasonable, contrary to subsection 111(1) of the ATR?

4. If Proposed Tariff Rule 20 were to be filed with the Agency, would it be found to be unclear, contrary to paragraph 122(*c*) of the ATR, and unreasonable, contrary to subsection 111(1) of the ATR?

5. Should the Nawrots be awarded costs, pursuant to section 25.1 of the *Canada Transportation Act*, S.C., 1996, c. 10, as amended (CTA)?

RELEVANT STATUTORY AND TARIFF EXTRACTS

[8] The legislation, tariff provisions and provisions of the Convention for the Unification of Certain Rules for International Carriage by Air – Montreal Convention (Convention) relevant to this matter are set out in the Appendix.

CLARITY AND REASONABLENESS OF TARIFF PROVISIONS

Clarity

[9] As recently stated by the Agency in Decision No. 344-C-A-2013 (*Lukács v. Porter Airlines Inc.*), a carrier meets its tariff obligation of clarity when the rights and obligations of both the carrier and the passengers are stated in such a way as to exclude any reasonable doubt, ambiguity or uncertain meaning.

Reasonableness

[10] To assess whether a term or condition of carriage is "unreasonable," the Agency has traditionally applied a balancing test, which requires that a balance be struck between the rights of passengers to be subject to reasonable terms and conditions of carriage, and the particular air carrier's statutory, commercial and operational obligations. This test was first established in Decision No. 666-C-A-2001 (*Anderson v. Air Canada*) and was most recently applied in Decision No. 344-C-A-2013.

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

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

ISSUE 1: DID SUNWING PROPERLY APPLY THE TERMS AND CONDITIONS RELATING TO CHECK-IN TIME LIMITS SPECIFIED IN ITS TARIFF, AS REQUIRED BY SUBSECTION 110(4) OF THE ATR?

Positions of the parties

The Nawrots

[13] The Nawrots submit that the fundamental factual dispute between themselves and Sunwing is whether the Nawrots presented themselves for check in for Flight No. WG201. The Nawrots argue that both they and Sunwing agree that the departure time for that flight was 2:25 a.m. on August 11, 2012, and that the cut-off/check-in deadline is 60 minutes prior to departure. The Nawrots therefore contend that Sunwing was required to keep its check-in counter open until 1:25 a.m. on August 11, 2012. They argue that their account of events is corroborated by both documentary evidence and Sunwing's subsequent actions. In support of their submissions, the Nawrots filed an affidavit by Mr. Nawrot and declarations by Kristina Marie Nawrot and Karolyne Theresa Nawrot.

[14] The Nawrots submit that they left their hotel on August 10, 2012 at approximately 11:00 p.m. to head to the Gatwick International Airport (Airport). They advise that they first took the London Underground and then the train from the Victoria Station to the Airport. The Nawrots state that Mr. Nawrot's credit card statement indicates that the purchase of the train tickets at the Victoria Station occurred prior to midnight. They point out that the credit card statement also indicates that they travelled on a train operated by Southern Railway, and that the applicable timetable shows that Southern Railway operated two trains from the Victoria Station to the Airport shortly after midnight on August 11, 2012, on one of which they were passengers. The Nawrots point out that the timetable indicates that the latest departing train was scheduled to arrive at the Airport at 00:59 a.m.

[15] The Nawrots state that they presented themselves for check in at the Airport at approximately 1:10 a.m. on August 11, 2012, but found all counters to be unattended and the lights were dimmed.

[16] The Nawrots maintain that Mr. Nawrot spoke on the phone to an airport employee, who advised him that the Captain of Flight No. WG201 would not allow the Nawrots to board the flight. The Nawrots submit that, subsequently, a supervisor attended the check-in area, and the supervisor indicated to them that they were supposed to have checked in three hours prior to their flight. The Nawrots add that they attempted to persuade the supervisor to allow them to check in and board their flight, but without success.

[17] The Nawrots advise that they left the terminal at the Airport shortly after 1:45 a.m. and headed to the Sofitel London Gatwick Hotel (Sofitel). They add that Mr. Nawrot's credit card was preauthorized at the Sofitel at 2:05 a.m. on August 11, 2012.

[18] The Nawrots submit that on the morning of August 11, 2012, Mr. Nawrot returned to the Airport and asked that they be transported to Toronto on Sunwing's next flight that day, but his request was refused. They further submit that Mr. Nawrot subsequently sent an e-mail to Sunwing seeking assistance to be transported to Toronto, and that Sunwing, in response, offered to transport them six days later than originally scheduled, i.e., on August 16, 2012. The Nawrots maintain that Sunwing's offer was unreasonable and unacceptable given that Kristina Marie Nawrot and Karolyn Theresa Nawrot were due to attend a sports camp near Toronto from August 12 to 19, 2012. According to the Nawrots, they had no choice but to purchase one-way tickets on an Air Canada flight to return to Toronto. They indicate that they also incurred out-of-pocket expenses with respect to their two-night stay at the Sofitel and meals during their unplanned two-day stay in London.

Sunwing

[19] Sunwing submits that the Nawrots' e-tickets provided information relating to their travel, the conditions of the contract and, by incorporation, the Tariff rules. Sunwing further submits that the e-tickets indicated that passengers were to check in no later than 1:25 a.m. local time on August 11, 2012. The e-tickets also indicated that the check-in counter was to open at 10:25 p.m. local time on August 10, 2012 (four hours prior to scheduled departure), and strongly recommended that passengers arrive at the Airport for check in at 10:25 p.m. local time on

August 10, 2012. Sunwing points out that the Nawrots admitted that they were aware of this, and that the Tariff rules and terms and conditions required that the cut-off for check in was 60 minutes prior to the scheduled departure time, or 1:25 a.m. local time on August 11, 2012. In support of its submission, Sunwing filed an affidavit by Joanne Dhue, National Director, Customer Relations Sunwing Vacations/Signature Vacations.

[20] Sunwing states that all of the reports generated pursuant to standard operating procedures indicate that the scheduled departure time for Flight No. WG201 was 2:25 a.m. local time on August 11, 2012. Sunwing submits that the Shift Report states that the check-in counter was in fact closed at 1:25 a.m. local time, one hour prior to the scheduled departure of the flight, i.e., 2:25 a.m. Sunwing asserts that the Passenger Services Supervisor, Vic Tydeman, who completed the Shift Report, recalls the incident and confirms that three passengers arrived at the check-in counter at 1:45 a.m. on August 11, 2012, and a fourth passenger arrived five minutes after that. In support of its submission, Sunwing filed an affidavit by Mr. Tydeman.

[21] Sunwing contends that prior to the Nawrots' complaint, Sunwing never had any report or complaints that check-in for a flight was closed prior to 60 minutes before the scheduled departure of the flight in question.

[22] Sunwing argues that the Nawrots have not provided consistent evidence as to when they presented themselves for check in, nor have they provided any independent or objective evidence to support their claim that they arrived at check-in prior to 1:25 a.m. local time on August 11, 2012. Sunwing submits that where there is such independent or objective evidence readily available, the Nawrots have chosen not to proffer this evidence.

[23] Sunwing argues that to support their contention that they presented themselves for check in at 1:10 a.m. local time on August 11, 2012, the Nawrots have attempted to establish a timeline based on assumptions derived from two documents: a credit card payment summary showing the purchase of a single train ticket from the Victoria Station to the Airport, and a pre-authorization for their hotel at the Airport dated August 11, 2012 at 2:05 a.m.

[24] Sunwing points out that Southern Railway owns and operates Gatwick Express, and therefore, the schedule for all the Southern Railway and Gatwick Express trains is irrelevant. Sunwing submits that without proof to the contrary, the submission that Mr. Nawrots' credit card was processed by Southern Railway does not exclude tickets purchased for the Gatwick Express trains.

[25] Sunwing submits that the statements of the Nawrot family members relating to this matter fail to acknowledge that all trains from the Victoria Station to the Airport arrive at the South Terminal. Sunwing adds that the Nawrots had at least three options to get to the Sunwing check-in counter located at the North Terminal: shuttle bus, walk or taxi, but no evidence was filed by the Nawrots to indicate which option they chose.

[26] Sunwing advises that in an e-mail to Sunwing, Mr. Nawrot stated that he arrived at the airport at 1:15 a.m., and on arrival, the check-in counter was closed. Sunwing submits that this means that the Nawrots arrived at the South Terminal at 1:15 a.m., and then made their way to the North Terminal, which would have taken them approximately 10 minutes, which places the Nawrots at the check-in counter at 1:25 a.m., the cut-off time.

[27] Sunwing contends that the Nawrots must make assumptions to establish they made the time for check in and, to that extent, they are self-serving. Sunwing adds that there is no evidence that the British rail system runs on time. Sunwing also states that the evidence filed by the Nawrots indicates that only one ticket was purchased.

[28] Sunwing maintains that the Nawrots have failed to proffer any objective documentary evidence of which train they actually took from the Victoria Station. Sunwing also maintains that, assuming that the Nawrots did leave their hotel between 10:00 p.m. and 11:00 p.m. on August 11, 2012, no explanation was provided for not having taken an earlier train.

[29] Sunwing submits that in the correspondence to Sunwing dated August 11, 2012; August 27, 2012; October 19, 2012; and January 21, 2013, respectively, the Nawrots repeatedly referred to another passenger who was denied boarding for the same reason the Nawrots allege they were denied boarding, i.e., presenting themselves for check in prior to the 60-minute cut-off. Sunwing contends that it received no claim or complaint from this fourth passenger, and that the Nawrots filed no evidence from that passenger.

[30] Sunwing asserts that it investigated each and every one of the passengers who did not show up for Flight No. WG201 to determine whether the alleged fourth passenger was indeed denied boarding for failing to be present for check in. Sunwing asserts that its investigation ruled out any such passenger.

[31] Sunwing states that it relies on complete and accurate reporting in all areas of its operations, and that its evidence reflects and confirms this reporting exists in the circumstances of this matter.

The Nawrots

[32] The Nawrots submit that the affidavit by Ms. Dhue indicates that Swissport, the ground handling agent for Sunwing, had serious staffing problems on the night of the incident, and that those problems may explain why Sunwing closed its check-in counter well before 1:25 a.m.

[33] The Nawrots point out that some of the staff working for Swissport that night were "borrowed" from another company, so they were likely unfamiliar with Sunwing's procedures or its updated departure time, while others "stayed on" from the day shift, and were likely very exhausted.

[34] The Nawrots contend that Mr. Tydeman's evidence is self-serving and not reliable as he is not an objective, neutral and disinterested witness, but rather an employee who has far more to lose in relation to the Nawrots' complaint than a few thousand dollars. The Nawrots assert that there are a number of inconsistencies between Mr. Tydeman's affidavit and the Shift Report, i.e., time of

arrival of the allegedly late passenger, grouping of allegedly late passengers, alleged state of boarding, and the evidence of reliable and independent third parties. They argue that giving any credence to Mr. Tydeman's recollection of events would amount to accepting claims that are contrary to common sense.

[35] The Nawrots maintain that, based on the credit card usage history received from Southern Railway, the train tickets for carriage from the Victoria Station to the Airport were purchased on August 10, 2012 at 11:56 p.m. The Nawrots submit that, contrary to Sunwing's submission, the credit card statement clearly identifies the date and postal code of the location where the tickets were purchased. They add that a copy of Southern Railway's transaction logs provides a complete and independent record of that purchase.

[36] The Nawrots argue that Gatwick Express has an entirely different and substantially higher fare structure than Southern Railway, and that it is not necessary to decide which train they took in order to determine the complaint; it is sufficient to observe that they took one of the two trains as both were on time. The Nawrots submit that there can be no doubt that they arrived at the Airport train stop at or shortly after 1:00 a.m., at the latest, on August 11, 2012, which is more than 25 minutes before Sunwing's check-in cut-off time. They advise that the shuttle between the North and the South Terminals operates 24 hours a day and the journey only takes two minutes. The Nawrots therefore contend that, on a balance of probabilities, they presented themselves for check in at 1:10 a.m. or shortly thereafter, and certainly several minutes before the 1:25 a.m. check-in cut-off time.

[37] The Nawrots argue that they have discharged their onus of proof, and further claim that according to Decision No. 54-C-A-2006 (*McIntyre v. Air Canada*), the burden of proof is on Sunwing to demonstrate that it was entitled to refuse to transport the Nawrots.

Analysis and findings

[38] When a complaint such as this one is filed with the Agency, the complainant must, on a balance of probabilities, establish that the air carrier has failed to apply, or has inconsistently applied, terms and conditions of carriage appearing in the applicable tariff.

[39] In *Smith v. Smith*, [1952] 2 S.C.R. 312, the Supreme Court of Canada discussed the notion of balance of probabilities and the degree of probability required to satisfy the burden of proof. The Supreme Court of Canada indicated, at pages 331 and 332, that:

> [...] before the tribunal can safely find the affirmative of an issue of fact required to be proved it must be reasonably satisfied, and that whether or not it will be satisfied must depend upon the totality of the circumstances on which its judgment is formed including the gravity of the consequences of the finding.

[40] Relying on *Briginshaw v. Briginshaw* (1938) 60 CLR 336, the Supreme Court of Canada went on and indicated that:

> The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality. No doubt an opinion that a state of facts exists may be held according to indefinite gradations of certainty; and this has led to attempts to define exactly the certainty required by the law for various purposes [...] But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters, "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony or indirect inferences. Everyone must feel that, when, for instance, the issue is on which of two dates an admitted occurrence took place, a satisfactory conclusion may be reached on materials of a kind that would not satisfy any sound and prudent judgment if the question was whether some act had been done involving grave moral delinquency.

[41] The Supreme Court of Canada also relied on *George v. George and Logie* [1951] 1 D.L.R. 278, and indicated that:

> [...] Evidence that creates only suspicion, surmise or conjecture is, of course, insufficient. It is necessary that the quality and quantity of the evidence must be such as leads the tribunal - be it judge or jury - acting with care and caution, to the fair and reasonable conclusion that the act was committed.

[42] For this case, the onus is on the Nawrots, as they are making the allegations, to convince the Agency, on a balance of probabilities, that they presented themselves at the check-in counter on time. They have a greater burden of proof than simply presenting facts.

[43] The Agency notes that Sunwing's Tariff provides that check-in counters are open three hours prior to the scheduled departure and will close 60 minutes before scheduled departure, and that passengers arriving for check in after 60 minutes prior to the scheduled departure will not be accepted for travel.

[44] The Agency notes that the parties' versions of events are contradictory. The Nawrots allege that they arrived at the check-in counter at around 1:10 a.m., only to discover that it was closed. To support their position, the Nawrots provided a copy of their ticket to travel by train from the Victoria Station to the Airport, and a credit card statement showing the purchase of that ticket, as well as an affidavit and written declarations. Sunwing, on the other hand, submits that its check-in counter closed at 1:25 a.m. In support of this submission, Sunwing provided the Shift Report, which indicates that the check in for Flight No. WG201 closed at 1:25 a.m., and affidavits from, respectively, its National Director, Customer Relations, and its Passenger Services Supervisor, who completed the Shift Report.

[45] The evidence provided by the Nawrots strongly suggests that they bought train tickets, travelled by train from the Victoria Station to the Airport and later paid for accommodations at the Sofitel. While it is normal in such cases that the majority of the evidence is circumstantial, the totality of the evidence must be sufficient for the Agency to conclude, on a balance of probabilities, that the Nawrots presented themselves on time at the check-in counter at the Airport. This burden rests with the complainant and it has not been met.

[46] With respect to the Nawrots' claim relating to Decision No. 54-C-A-2006, that Decision can be distinguished from this case. In that Decision, the Agency concluded that the applicant had met its burden of proving that he was at the check-in counter in time. Therefore, the burden was then on Air Canada to prove that it was entitled to cancel the reservation.

[47] In this case, the Nawrots failed to provide evidence that would lead the Agency to the fair and reasonable conclusion that they arrived at the check-in counter 60 minutes before the scheduled departure of the flight. Therefore, the Agency finds that Sunwing has not contravened subsection 110(4) of the ATR in relation to this matter. Consequently, Sunwing is not required to reimburse the Nawrots for the out-of-pocket expenses they incurred or tender denied boarding compensation.

ISSUE 2: IS EXISTING TARIFF RULE 18(G) UNCLEAR, CONTRARY TO PARAGRAPH 122(*c*) OF THE ATR, AND UNREASONABLE, CONTRARY TO SUBSECTION 111(1) OF THE ATR?

Positions of the parties

The Nawrots

[48] The Nawrots take exception to the phrase "recommended times," appearing in the following provision of Existing Tariff Rule 18(g):

> Passenger(s) who arrive later than the recommended times for check-in or at the boarding gate will not be eligible for any denied boarding compensation or refund.

[49] The Nawrots assert that the phrase "recommended times" is not defined anywhere in the Tariff, and moreover, it is inconsistent with Existing Tariff Rule 19(c), which provides that the passenger is not eligible for compensation if the passenger is present at the boarding gate after the minimum check-in time or gate time.

[50] The Nawrots also submit that the phrase renders Existing Tariff Rule 18(g) unclear, and ought to be replaced with "cut-off times" or "minimum times." The Nawrots argue that while it is reasonable to expect passengers to comply with minimum check-in time requirements, it is unreasonable to expect passengers to comply with "recommended times."

Sunwing

[51] Sunwing advised that it would revise Existing Tariff Rule 18(g) so as to delete the following sentence in its entirety:

> Passenger(s) who arrive later than the recommended times for check-in or at the boarding gate will not be eligible for any denied boarding compensation or refund.

Analysis and findings

[52] Subsequent to its response to the complaint, Sunwing deleted the Tariff provision at issue. This matter, therefore, has been rendered moot.

ISSUE 3: IS EXISTING TARIFF RULE 20 UNCLEAR, CONTRARY TO PARAGRAPH 122(*c*) OF THE ATR, AND UNREASONABLE, CONTRARY TO SUBSECTION 111(1) OF THE ATR?

Positions of the parties

The Nawrots

[53] The Nawrots submit that Existing Tariff Rule 20 is unclear as it fails to specify where the choice lies between the two options of either refunding the total fare paid for each unused segment or arranging to provide reasonable alternate transportation on Sunwing's own services, when a passenger is denied a reserved seat because of an oversold flight. The Nawrots point out that in Decision No. LET-A-82-2009 (*Air Canada's Proposed Additional Service Commitments*), the Agency considered a similar provision in Air Canada's tariff that raised concerns respecting clarity, and that, subsequently, Air Canada amended its tariff to retain the choice, thereby addressing the matter of clarity. The Nawrots refer to Decision No. LET-C-A-80-2011 (*Lukács v. Air Canada*), where the Agency determined that, for the tariff provision at issue to be considered reasonable, the choice of option should lie exclusively with the passenger.

[54] The Nawrots point out that Existing Tariff Rule 20 states, in part, that "the carrier will try to arrange transportation on the services of another carrier or combination of carriers on a confirmed basis in the same comparable, or lower booking code." The Nawrots submit that the term "will try" renders Existing Tariff Rule 20 unclear in that it does not impose a clear

obligation on Sunwing, and the term ought to be replaced by the word "shall." The Nawrots further submit that Existing Tariff Rule 20 also purports to limit Sunwing's obligation to secure alternate transportation on flights "in the same comparable, or lower booking code." According to the Nawrots, this phrase is unclear because Sunwing's booking codes may not be comparable to booking codes of other air carriers. They also maintain that this restriction is unreasonable. The Nawrots argue that excluding the possibility of reprotecting victims of denied boarding on a booking class higher than their original booking is inconsistent with the obligations of Sunwing under Article 19 of the Convention and, as such, it is unreasonable.

[55] The Nawrots assert that while Existing Tariff Rule 20 does not explicitly exonerate Sunwing from liability for damages for delay in connection with denied boarding, that Rule is silent about compensation to victims of denied boarding for damages occasioned by delay, including meals, accommodation and transportation. According to the Nawrots, this omission, when read in conjunction with Existing Tariff Rule 18, creates uncertainty and is not clear about the rights of passengers who are denied boarding, and therefore renders Existing Tariff Rule 20 at least unclear, and possibly also unreasonable.

[56] The Nawrots contend that although Existing Tariff Rule 20 is labeled as "Denied Boarding Compensation," it contains no provision for any compensation to passengers who are denied boarding, and is confined to reprotection of passengers who are denied boarding. According to the Nawrots, reprotection for passengers is not a form of compensation. They maintain that compensation has two components:

- reimbursement for out-of-pocket expenses; and,
- denied boarding compensation.

[57] In this regard, the Nawrots argue that Existing Tariff Rule 20 is unreasonable because it provides neither for reimbursement of out-of-pocket expenses nor for any monetary compensation for denied boarding.

[58] The Nawrots assert that the failure to pay any denied boarding compensation to victims of denied boarding is of particular concern in light of the legal obligation to do so both pursuant to Regulation No. 14 CFR 250.5(b) of the Department of Transportation (DoT) of the United States, as amended by Final Ruling No. 76 FR 23110 of the DoT, and Regulation (EC) No. 261/2004 of the European Parliament and of the Council.

[59] The Nawrots indicate that while other carriers, such as Air Canada, do comply with these legal obligations, and have incorporated them into their tariffs (for example, Rule 89 of Air Canada), it appears that Sunwing refuses to comply with these obligations, and is attempting to benefit from an unfair competitive advantage compared to its main competitors.

[60] In particular, the Nawrots submit that Sunwing would suffer no competitive disadvantage if it adopted a denied boarding compensation policy similar to that of Air Canada or other major carriers, such as Deutsche Lufthansa Aktiengesellschaft (Lufthansa German Airlines) [Lufthansa] and Société Air France carrying on business as Air France (Air France).

[61] The Nawrots therefore argue that Existing Tariff Rule 20 is unreasonable, because it fails to impose any obligation of paying denied boarding compensation to passengers, contrary to the Agency's findings in Decision No. 666-C-A-2001.

Sunwing

[62] In response to this part of the complaint, Sunwing filed Proposed Tariff Rule 20 that would replace in its entirety Existing Tariff Rule 20.

Analysis and findings

Choice of options

[63] As stated by the Nawrots, Existing Tariff Rule 20 is silent with respect to who has the choice between the two options (refund or alternate transportation), i.e., the passenger or the carrier, when a passenger is denied a reserved seat because of an oversold flight.

[64] As correctly pointed out by the Nawrots, previous Agency Decisions addressed, respectively, the clarity of a tariff provision similar to that currently before the Agency (Decision No. LET-A-82-2009) and whether the passenger or carrier should have the choice of options (Decision No. LET-C-A-80-2011).

[65] The Agency finds that, by failing to identify who may choose between the options of obtaining a refund or having alternate carriage arranged, Existing Tariff Rule 20 creates reasonable doubt, ambiguity or uncertain meaning as to that Rule's application. As such, Existing Tariff Rule 20 is unclear.

[66] With respect to the matter of where the choice must rest, the Agency is of the opinion that the passenger is in a better position than the carrier to determine which is most appropriate for the passenger. As such, the Agency finds that to strike a balance between the passenger's right to be subject to reasonable terms and conditions of carriage and the carrier's statutory, commercial and operational obligations, the choice of option must reside with the passenger.

Clarity of the phrase "carrier will try"

[67] The Agency finds that the phrase "carrier will try" creates ambiguity and doubt as to the application of the Tariff provision. The particular undertaking by Sunwing leaves doubt as to the outcome of that undertaking. As such, the Agency finds that the phrase is unclear.

Clarity of the phrase "the same comparable, or lower booking code"

[68] The Agency finds that this phrase is unclear because doubt is created respecting the phrase's application given that the booking codes of carriers may not be at all comparable.

Reasonableness of the application of the phrase "the same comparable, or lower booking code"

[69] Article 19 of the Convention provides that:

> 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.

[70] The Agency agrees with the Nawrots that in restricting alternate carriage to a comparable or a lower booking code, Sunwing is not taking all reasonable measures to mitigate delays resulting from overbooking. As such, Existing Tariff Rule 20 is contrary to Article 19 of the Convention, and it is therefore unreasonable.

Clarity and reasonableness given the silence respecting compensation for damages suffered by passengers affected by denied boarding

[71] The Agency agrees with the Nawrots that Existing Tariff Rule 20 creates doubt as to whether passengers who are denied boarding are entitled to damages. As such, the Agency finds that Existing Tariff Rule 20 is unclear. The Agency also agrees with the Nawrots' argument that the absence of language providing that passengers affected by denied boarding will be eligible for compensation arising from the delay in carriage, including meals, accommodation and transportation, renders Existing Tariff Rule 20 contrary to Article 19 of the Convention. As such, the Agency finds that Existing Tariff Rule 20 is unreasonable.

Reasonableness given the absence of denied boarding compensation

[72] As pointed out by the Nawrots, Existing Tariff Rule 20 does not provide for denied boarding compensation. The Agency determined in Decision No. 666-C-A-2001 that any passenger who is denied boarding is entitled to compensation, and that the non-existence of a tariff provision in this regard is unreasonable. Given the absence of a provision in Existing Tariff Rule 20 requiring Sunwing to tender denied boarding compensation, the Agency finds that such Rule is unreasonable because it fails to strike a balance between Sunwing's statutory, commercial and operational obligations and the passenger's right to be subject to reasonable terms and conditions of carriage.

ISSUE 4: IF PROPOSED TARIFF RULE 20 WERE TO BE FILED WITH THE AGENCY, WOULD IT BE FOUND TO BE UNCLEAR, CONTRARY TO PARAGRAPH 122(*c*) OF THE ATR, AND UNREASONABLE, CONTRARY TO SUBSECTION 111(1) OF THE ATR?

Positions of the parties – Proposed Tariff Rule 20(a)

The Nawrots

[73] The Nawrots submit that Proposed Tariff Rule 20(a), which sets out the options should a passenger be denied a confirmed seat because of an oversold flight, is inconsistent with Existing Tariff Rule 15(1)(f), which requires Sunwing, in the event of flight advancement or cancellation, or overbooking, to offer the passenger not simply the option of a refund of the unused segments, but rather:

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

[74] The Nawrots therefore maintain that when read together with Existing Tariff Rule 15(1)(f), Proposed Tariff Rule 20(a) is unclear.

[75] The Nawrots also maintain that Proposed Tariff Rule 20(a) is unreasonable because it defines "denied boarding" too narrowly. They submit that, in purporting to confine the scope of denied boarding compensation to cases where a passenger is denied a confirmed seat because of an oversold flight, Proposed Tariff Rule 20(a) excludes many other cases where passengers may be denied boarding for reasons entirely outside their control, such as substitution of an aircraft with one of a smaller capacity or, as in this case, failure of the carrier to staff its check-in counters. The Nawrots contend that Proposed Tariff Rule 20(c) already exempts Sunwing from the obligation to pay denied boarding compensation to passengers who fail to fully comply with the ticketing or check-in requirements, or who are not acceptable for transportation under the Tariff. The Nawrots therefore argue that the additional limitation in Proposed Tariff Rule 20(a) is unreasonable.

[76] The Nawrots maintain that the damage to passengers who are denied boarding is identical whether they were denied boarding as a result of an oversold flight, substitution of the aircraft or failure of the carrier to check them in, even though they presented themselves for check in on time. They submit that the words "in the case of an oversold flight of the Carrier" ought to be deleted from Proposed Tariff Rule 20(a).

[77] The Nawrots also assert that Proposed Tariff Rule 20(a) is inconsistent with the principles established by the Agency in five Decisions issued in June 2012 respecting flight cancellation and denied boarding (Decision No. 248-C-A-2012 – *Lukács v. Air Transat*; Decision No. 249-C-A-2012 – *Lukács v. WestJet*; Decision No. 250-C-A-2012 – *Lukács v. Air Canada*; Decision No. 251-C-A-2012 – *Lukács v. Air Canada*; and Decision No. 252-C-A-2012 – *Lukács v. WestJet*). Specifically, the Nawrots submit that Proposed Tariff Rule 20(a) fails to recognize the right of passengers to a full refund even if travel has commenced in certain cases, or their right to transportation to their point of origin at no additional cost.

Analysis and findings – Proposed Tariff Rule 20(a)

[78] The Agency notes that Existing Tariff Rule 15, to which the Nawrots refer, was filed with the Agency, with an effective date of June 14, 2013, during the course of the proceedings relating to a different case for which the Agency issued Decision No. 313-C-A-2013 (*Lukács v. Sunwing)*.

Clarity

[79] The Agency agrees with the Nawrots respecting the inconsistency between Proposed Tariff Rule 20(a) and Existing Tariff Rule 15(1)(f)(i)(a). When reading Proposed Tariff Rule 20(a) together with Existing Tariff Rule 15(1)(f)(i)(a), it is not clear as to what remedy is available to a passenger affected by overbooking. Proposed Tariff Rule 20(a) provides the option of choosing a refund of the total fare paid for each unused segment, while Existing Tariff Rule 15(1)(f)(i)(a) provides that if a passenger's journey is interrupted, they will be entitled to a reimbursement of the total price of the ticket, for the part or parts of the journey not made, and for the part or parts already made if they no longer serve any purpose in relation to the original travel plan. Existing Tariff Rule 15 also provides that, when relevant, Sunwing will transport passengers to their point of origin, at the earliest opportunity, at no additional cost. The Agency finds that this inconsistency would make Proposed Tariff Rule 20(a) unclear if it were to be filed with the Agency because it creates reasonable doubt, ambiguity or uncertain meaning as to its application.

Reasonableness

[80] The Nawrots submit that Proposed Tariff Rule 20(a) is unreasonable for the following reasons:

- The narrow definition of "denied boarding" is inconsistent with the findings of the Agency in Decision No. 204-C-A-2013 (*Lukács v. Air Canada*) respecting the obligation of the carrier to compensate passengers who are denied boarding due to substitution of aircraft with one of a lower capacity;
- With respect to the Agency's decisions issued in June 2012 relating to flight cancellation and denied boarding, Proposed Tariff Rule 20(a) fails to recognize the right of passengers for a full refund, even if travel has commenced in certain cases, or their right to transportation to their point of origin at no additional cost;
- Proposed Tariff Rule 20(a) deprives passengers with confirmed seats who present themselves for transportation on time, and who comply with all travel requirements, of denied boarding compensation if those passengers are denied boarding for reasons other than an oversold flight.

[81] With respect to denied boarding arising from substitution of aircraft, in Decision No. 204-C-A-2013, the Agency directed Air Canada to show cause why it should not have a revised tariff provision that provides that in the absence of Air Canada demonstrating that all reasonable measures were taken to avoid substitution to a smaller aircraft, denied boarding compensation will be tendered to affected passengers. In Decision No. 342-C-A-2013 (*Lukács v. Air Canada*), the Agency determined that Air Canada had failed to show cause in respect of that matter, and ordered Air Canada to include the aforesaid provision in its tariff.

[82] The Agency finds that the absence of a provision in Proposed Tariff Rule 20(a) providing for payment of denied boarding compensation if Sunwing fails to demonstrate that all reasonable measures were taken to avoid substitution to a smaller aircraft, or that it was impossible for Sunwing to take such measures, would render that Rule unreasonable, if it were to be filed with the Agency.

[83] With respect to the matter of refunds, although Existing Tariff Rule 15(1) provides for full refunds, under certain circumstances, even if travel has commenced, and for return of the passenger to the point of origin, without charge, Proposed Tariff Rule 20(a) fails to do so. If Proposed Tariff Rule 20(a) were filed with the Agency, it would be considered unreasonable because it fails to strike a balance between Sunwing's statutory, commercial and operational obligations and a passenger's right to be subject to reasonable terms and conditions of carriage.

[84] Where a carrier fails to check in passengers because of the absence of personnel at the counter prior to the cut-off time for check in, the Agency is of the opinion that it is reasonable that compensation be tendered:

- when passengers holding confirmed and ticketed reservations can demonstrate that they presented themselves at the ticket counter prior to the cut-off time for check in; and,
- when the ticket counter was closed.

[85] For greater clarity, where such passengers present themselves for boarding before the cut-off time, only to discover that the check-in counter has been closed, the carrier cannot avoid paying denied boarding compensation, regardless of whether or not the flight is fully booked, nor can it avoid liability by closing the check-in counter early.

[86] The Agency finds that this requirement strikes a balance between Sunwing's statutory, commercial and operational obligations and a passenger's right to be subject to reasonable terms and conditions of carriage.

Positions of the parties – Proposed Tariff Rule 20(c)

The Nawrots

[87] The Nawrots note that Proposed Tariff Rule 20(c) provides that:

> (c) **Compensation for Involuntary Denied Boarding**. If you are denied boarding involuntarily you are entitled to a payment of denied boarding compensation unless:
>
> [...]
>
> – you are denied boarding because a small capacity aircraft was substituted for safety or operational reasons.

[88] The Nawrots maintain that this portion of Proposed Tariff Rule 20(c) is unreasonable for the same reasons that a virtually identical provision in Air Canada's domestic tariff was held to be unreasonable by the Agency in Decision No. 204-C-A-2013. They submit that in that Decision, the Agency found that to relieve itself from the obligation to pay denied boarding compensation, Air Canada must demonstrate the following, failing which compensation should be due to the affected passengers:

1) substitution occurred for operational and safety reasons beyond its control; and,
2) it took all reasonable measures to avoid the substitution or that it was impossible for Air Canada to take such measures.

[89] The Nawrots argue that the same finding is applicable to Proposed Tariff Rule 20(c).

Analysis and findings – Proposed Tariff Rule 20(c)

[90] The Agency notes that Proposed Tariff Rule 20(c) contains the same language as that appearing in Air Canada's domestic tariff, which was determined to be unreasonable in Decision No. 204-C-A-2013.

[91] As previously mentioned, the Agency is of the opinion that a carrier should not be expected to tender compensation when it has demonstrated that substitution occurred for operational or safety reasons beyond its control, and that it took all reasonable measures to avoid the substitution or that it was impossible to take such measures. In the event that the carrier fails to so demonstrate, compensation should be due to the affected passengers.

[92] In this regard, the Agency is of the opinion that the absence of specific language that establishes context or qualifies Sunwing's exemption from paying compensation would render Proposed Tariff Rule 20(c) unreasonable if it were to be filed with the Agency because it fails to strike a balance between Sunwing's statutory, commercial and operational obligations and a passenger's right to be subject to reasonable terms and conditions of carriage.

Positions of the parties – Proposed Tariff Rule 20(d)

The Nawrots

[93] The Nawrots submit that Proposed Tariff Rule 20(d) is reasonable to the extent that it is identical to the American denied boarding compensation regime. At the same time, they indicate that a difference exists that can turn out to be substantial in some cases, namely, the way Proposed Tariff Rule 20(d) defines the notion of "fare":

> For the purpose of calculating compensation under this Rule 20, the "fare" is the one-way fare for the flight including any surcharges and air transportation tax, minus any applicable discounts. All flights, including connecting flights, to the passenger's destination or first stopover of four hours or greater are used to calculate the compensation payable.

[94] The Nawrots point out that in the American denied boarding compensation scheme, the DoT Regulation No. 14 CFR Part 250.1 defines "stopover" as follows:

> *Stopover* means a deliberate interruption of a journey by the passenger, scheduled to exceed 4 hours, at a point between the place of departure and the final destination.

[95] The Nawrots therefore submit that under the American regime, a mere 5-hour waiting time for a connecting flight would not be considered a "stopover," because a "stopover" requires a deliberate interruption of the journey.

[96] The Nawrots argue that for the sake of clarity, this definition ought to be added to Proposed Tariff Rule 20(d), and that without this addition, that Rule would be unreasonable.

[97] The Nawrots assert that the denied boarding compensation regime proposed by Sunwing fails to address and meet its obligations with respect to passengers who are denied boarding on a flight departing from the European Union. They point out that compensation for denied boarding on such flights, and any flight departing from an airport in the territory of the European Union, is governed by Regulation (EC) 261/2004. The Nawrots also point out that Proposed Tariff Rule 20 makes no reference to Regulation (EC) 261/2004, and purports to apply the American compensation regime even to flights departing from the European Union.

[98] According to the Nawrots, a tariff provision that clearly ignores and contradicts a carrier's statutory obligation cannot be reasonable, even if the statute is a foreign legislation. The Nawrots indicate that in their complaint, they asked, among other things, that:

> the Agency disallow Sunwing Airlines' International Tariff Rule 20 as unclear and unreasonable, and **substitute it with a denied boarding compensation policy similar to that of major airlines, such as Air France or Lufthansa**. [Emphasis added]

[99] The Nawrots point out that Sunwing made no submissions to oppose this relief, nor did Sunwing lead any evidence that granting the relief would adversely affect its ability to meet its statutory, commercial or operational obligations. Thus, the Nawrots submit that the Agency ought to direct Sunwing to implement a denied boarding compensation similar to that of major European carriers, such as Air France or Lufthansa, at least with respect to flights departing from airports located in the European Union.

Analysis and findings – Proposed Tariff Rule 20(d)

Clarity

[100] The Agency notes that Rule 1, Definitions and Interpretation, of the Tariff provides the following definition of the term "stopover":

> Stopover means a **deliberate** interruption of a journey by the passenger, agreed to in advance by the carrier, at a point between the place of departure and the place of destination. [Emphasis added]

[101] Given the inclusion of the word "deliberate" in Sunwing's definition of the term "stopover," the Agency finds that Proposed Tariff Rule 20(d) would be found to be clear if it were to be filed with the Agency because it excludes any reasonable doubt, ambiguity or uncertain meaning as to the Rule's application, and does not require further clarity to render it reasonable.

Reasonableness

[102] The Nawrots maintain that, with respect to flights originating in the European Union, Proposed Tariff Rule 20 does not reflect Sunwing's obligations relating to denied boarding as imposed by Regulation (EC) 261/2004. They argue that the Agency should direct Sunwing to apply a denied boarding compensation regime similar to that of major European carriers, at least with respect to flights departing from airports located in the European Union.

[103] As to the reasonableness of carriers' tariffs filed with the Agency, the Agency makes determinations on provisions relating to legislation or regulations that the Agency is able to enforce. Legislation or regulations promulgated by a foreign authority, such as the European Union's Regulation (EC) 261/2004, do not satisfy this criterion. If a carrier feels compelled or has been instructed by a foreign authority to include a reference in its tariff to that authority's law, the carrier is permitted to do so, but it is not a requirement imposed by the Agency.

Positions of the parties – Proposed Tariff Rule 20(e)

Right to bring legal action – The Nawrots

[104] The Nawrots point out that the last sentence of Proposed Tariff Rule 20(e) provides that:

> The passenger may, however, insist on the cash payment, or refuse all compensation and bring private legal action.

[105] The Nawrots indicate that in Decision No. 227-C-A-2013 (*Lukács v. WestJet*), the Agency considered a similar provision, and held that:

> With respect to the clarity of Proposed Tariff Rule 110(G), the Agency agrees with Mr. Lukács' submission that the phrasing of that Rule, without being explicit, suggests that the availability of the option of seeking payment in a court of law is predicated on the passenger first declining payment offered by WestJet. The Agency finds, therefore, that Proposed Tariff Rule 110(G) would be considered unclear if it were to be filed with the Agency given that it is phrased in such a manner as to create reasonable doubt and ambiguity respecting its application.
>
> As to the reasonableness of Proposed Tariff Rule 110(G), the Agency concurs with Mr. Lukács' submission that the Rule seems to indicate that for a person to retain a right to legal redress, that person must first reject any payment offered by WestJet, and that a similar provision was deemed to be unreasonable in Decision No. 249-C-A-2012. The Agency finds that if Proposed Tariff Rule 110(G) were to be filed with the Agency, it would also be determined to be unreasonable.

[106] The Nawrots accept these Agency findings as their own position, and submit that the second part of the last sentence of Proposed Tariff Rule 20(e) is both unclear and unreasonable.

Form of payment (vouchers) – The Nawrots

[107] The Nawrots point out that the second last sentence of Proposed Tariff Rule 20(e) provides that:

> The Carrier may offer free or discounted transportation vouchers in place of cash or cheque payment.

[108] The Nawrots maintain that it is unreasonable for Sunwing to offer travel vouchers in lieu of denied boarding compensation. They submit that in Decision No. LET-C-A-83-2011 (*Lukács v. WestJet*), the Agency held that any compensation paid in accordance with the tariff must be paid in the form of cash, cheque, credit to a passenger's credit card, or any other form acceptable to the passenger. The Nawrots point out that that finding was reiterated by the Agency in Decision No. 227-C-A-2013 in the specific context of denied boarding compensation.

[109] The Nawrots argue that acceptance of other forms of compensation must be an informed decision, based on the passenger being fully advised of the restrictions that those other forms entail. They assert that the requirement that passengers provide a written agreement confirming that they accept compensation in a form other than cash (or equivalent) underscores the principle that the standard form of compensation is by cash and that the passengers' decision to depart from this standard must be an informed one. According to the Nawrots, the vast majority of passengers are not aware of the many restrictions associated with vouchers, and it is very difficult to verify whether passengers are adequately informed by the carrier about their rights. The Nawrots also maintain that passengers should be able to change their minds within a reasonable length of time, and exchange their travel vouchers for cash.

Analysis and findings – Proposed Tariff Rule 20(e)

Right to bring legal action

[110] The Nawrots point out that in Decision No. 227-C-A-2013, the Agency held that a provision respecting the right to initiate legal action similar to that appearing in Proposed Tariff Rule 20(e) was unclear and unreasonable. The Nawrots accept the Agency's findings as their own position in this matter, and submit that Proposed Tariff Rule 20(e) is unclear and unreasonable.

[111] The Agency agrees with the Nawrots' submission, and finds that if the provision at issue in Proposed Tariff Rule 20(e) were to be filed with the Agency, it would be found to be unclear and unreasonable for the same reasons set out in Decision No. 227-C-A-2013.

Form of payment – vouchers

[112] The Nawrots point out that in previous decisions, the Agency determined that compensation paid in accordance with the tariff must be paid in the form of cash, cheque, credit to a passenger's credit card, or any other form acceptable to the passenger. They also submit that passengers must be advised of the restrictions associated with vouchers and afforded ample opportunity to determine whether they wish to choose them in lieu of a cash payment as denied boarding compensation.

[113] The Agency agrees with the Nawrots' submission respecting this particular matter, and finds that if the provision at issue were to be filed with the Agency, it would be found to be unreasonable for the same reasons set out in Decision Nos. LET-C-A-83-2011 and 227-C-A-2013.

[114] With respect to the length of time to be afforded to passengers to change their minds regarding the form of compensation to be tendered by the carrier, the Agency notes that in Decision No. 342-C-A-2013, the Agency determined that a period of one month is reasonable.

ISSUE 5: SHOULD THE NAWROTS BE AWARDED COSTS, PURSUANT TO SECTION 25.1 OF THE CTA?

Positions of the parties

The Nawrots

[115] The Nawrots assert that it appears that the Agency has never exercised its powers pursuant to subsection 25.1(4) of the CTA to establish a scale for taxation of costs, and has been reluctant to make cost awards. They submit that in Decision No. 20-C-A-2011 (*Kipper v. WestJet)*, the Agency held:

> As a general rule, costs are not awarded, and the Agency's practice has been to award these only in special or exceptional circumstances. In making its determination in a given case, the Agency considers a combination of factors such as the nature of the application, the length and complexity of the proceeding, whether the Agency held an oral hearing, whether parties have acted efficiently and in good faith, or if a party has incurred extraordinary costs to prepare and defend its application.

[116] The Nawrots contend that the "general rule" to not award costs is inconsistent with the dicta of the Supreme Court of Canada in *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71(*Okanagan*). That case is a leading authority on cost awards, and the Supreme Court of Canada described the traditional principles for awarding costs.

[117] According to the Nawrots, the Agency is bound by the principles laid down in *Okanagan* and, as such, the Agency must exercise the powers and discretion conferred upon it by subsection 25.1(1) of the CTA judicially, and the ordinary rules of costs (namely, that costs follow the event) should be followed unless the circumstances justify a different approach. Therefore, awarding costs to the successful party against the unsuccessful one ought to be the "general rule" for awarding costs by the Agency, and not awarding costs ought to be the exception.

[118] The Nawrots submit that the preamble of the Convention recognizes "the importance of ensuring protection of the interests of consumers in international carriage by air and the need for equitable compensation based on the principle of restitution." They add that while Article 22(6) of the Convention explicitly recognizes that costs are to be awarded in accordance with the own law of the court seized with the matter, the aforementioned underlying principles of the Convention strongly militate in favour of awarding costs on a full indemnity basis against carriers who fail to offer compensation to passengers in accordance with the provisions of the Convention.

[119] The Nawrots maintain that access to justice has been recognized as a consideration in awarding costs, in particular, in the context of public interest litigation, in the landmark decision of the Supreme Court of Canada in *Okanagan.*

[120] The Nawrots argue that although the Agency's procedures are somewhat simpler than those of a court of law, they nevertheless involve an adversarial process, strict deadlines and complex legal arguments that are clearly beyond the legal knowledge and skill of an average air passenger.

[121] The Nawrots submit that none of the common cost-reducing methods (such as commencing a class proceeding or a contingency fee agreement) are available to consumers before the Agency. They contend that the Agency has neither jurisdiction nor procedures for adjudicating class proceedings, and the amounts typically involved in individual consumer complaints are too small for contingency fee agreements.

[122] According to the Nawrots, individual consumers are left with only one avenue to obtain legal representation before the Agency: paying the legal fees from their own resources. These fees significantly exceed the amount of damages sought, and render such complaints economically infeasible if the Agency follows its "general rule" to not award costs to successful consumers.

[123] The Nawrots therefore argue that awarding costs in favour of consumers who are successful in a proceeding before the Agency is absolutely necessary to ensure that the complaint process remains accessible for the travelling public at large, and not only to the exceptionally wealthy or the legally trained.

[124] The Nawrots submit that costs should be awarded against an unsuccessful consumer only in cases of vexatious complaints, which are brought in bad faith.

[125] The Nawrots maintain that it is important to also reflect on the public policy effect of the Agency's current "general rule" of not awarding costs, which (as this case exemplifies) encourages carriers to ignore consumer complaints that could be settled as hoped for by the drafters of the Convention, without the involvement of the Agency. According to the Nawrots, a significant portion of consumers are deterred from pursuing their claims before the Agency due to the associated legal fees, which they would not be compensated for due to the Agency's "general rule" on costs.

[126] Considering this, the Nawrots contend that the current "general rule" provides a disincentive for carriers to settle claims, and encourages them to not take consumer complaints seriously until they are brought before the Agency or a court. The Nawrots argue that the exceptional circumstances of this case therefore warrant an award of costs in favour of the Nawrots and against Sunwing, even under the Agency's current "general rule."

Sunwing

[127] Sunwing submits that any discussion with respect to costs should follow the determination of the Nawrots' complaint. Sunwing requests that it be permitted to make costs submissions at that time.

Analysis and findings

[128] Section 25.1 of the CTA states:

> (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.
> (2) Costs may be fixed in any case at a sum certain or may be taxed.
> (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.
> (4) The Agency may make rules specifying a scale under which costs are to be taxed.

[129] The Agency has full discretion to award costs and, in the past, has relied on a set of general principles in determining whether to award costs, including whether the applicant for an award of costs has a substantial interest in the proceeding, has participated in the proceeding in a responsible manner, has made a significant contribution that is relevant to the proceeding, and has contributed to a better understanding of the issues by all the parties before the Agency. In addition, the Agency may consider other factors, such as the importance and complexity of the issues, the amount of work and the result of the proceeding in justifying an award of costs.

[130] The Nawrots rely on the Supreme Court of Canada ruling in *Okanagan*, and argue that the Agency is bound by the principles laid down by that Court. To clarify, the question on appeal before the Supreme Court of Canada in that case related to the inherent jurisdiction of the courts to grant costs to a litigant, in rare and exceptional circumstances, prior to the final disposition of a case and in any event of the cause. Also important in that case is that the Supreme Court of Canada referred to judicial proceedings as opposed to quasi-judicial Agency proceedings. In *Bell Canada v. Consumers' Assoc. of Canada*, [1986] 1 S.C.R. 190, the issue that the Supreme Court of Canada had to decide was whether, in the exercise of the discretion to award costs conferred by section 73 of the *National Transportation Act, 1987*, the Canadian Radio-television and Telecommunications Commission was bound by the principle of indemnification as it is applied in the award of costs by the courts. The Supreme Court of Canada stated:

> On the application of the principle of indemnification to the award of costs by the Commission pursuant to s. 73 of the Act, Urie J. expressed himself as follows: The principal issue in this appeal is whether the meaning to be ascribed to the word ["costs"] as it appears in the Act should be the meaning given it in ordinary judicial proceedings in which, in general terms, costs are awarded to indemnify or compensate a party for the actual expenses to which he has been put by the litigation in which he has been involved and in which he has been adjudged to have been a successful party. In my opinion, this is not the interpretation of the word which must necessarily be given in proceedings before regulatory tribunals.

[131] What an award of costs means when judicial courts are dealing with judicial proceedings is not necessarily the same as when a quasi-judicial tribunal, such as the Agency, is dealing with quasi-judicial proceedings.

[132] Another consideration is that in judicial courts, there are always litigation expenses, even if only for judicial fees to be paid for the issuance of, for example, a statement of claim, a statement of defence, a notice of application, a notice of motion, a requisition for a hearing date, a notice of appeal and a subpoena. The Agency, however, does not charge fees for the filing of applications, responses, replies and motions, or other documents.

[133] The Agency, as a quasi-judicial tribunal, is, by its very nature, a forum in which a party can successfully plead without representation by counsel. For the vast majority of consumer complaints, including successful ones, the complainant is not represented by counsel.

[134] With respect to the argument that proceedings before the Agency involve an adversarial process, strict deadlines and complex legal arguments that are clearly beyond the legal knowledge and skill of an average air passenger, the Agency reminds the Nawrots of the existence of the *Canadian Transportation Agency General Rules*, SOR/2005-35, as amended (General Rules). The General Rules set out a full procedural code for proceedings before the Agency that can be used by an individual who is self-represented.

[135] The Nawrots are of the opinion that awarding costs in favour of consumers who are successful in a proceeding before the Agency is absolutely necessary to ensure that the Agency's complaint process remains accessible to the travelling public at large, and not only to the exceptionally wealthy or the legally trained. The Nawrots are also of the opinion that a significant portion of consumers are deterred from pursuing their claims before the Agency due to the associated legal fees, which they would not be compensated for due to the Agency's "general rule" on costs. The Nawrots provide no substantiation for this position. The Agency has been in existence for a long time; the complaint process has been used successfully on many occasions.

[136] In light of the above, the Agency maintains, as it has in past decisions, that an award of costs is warranted only in special or exceptional circumstances. There are no special or exceptional circumstances in this case.

SUMMARY OF CONCLUSIONS

Issue 1

[137] Sunwing properly applied the terms and conditions relating to check-in time limits specified in its Tariff.

Issue 2

[138] Revised Tariff Rule 18(g), now in effect, is clear and reasonable.

Issue 3

[139] Existing Tariff Rule 20 is unclear and unreasonable.

Issue 4

[140] The Agency has determined that:

- Proposed Tariff Rule 20(a) would be found to be unclear and unreasonable if it were to be filed with the Agency.
- Proposed Tariff Rule 20(c) would be found to be unreasonable if it were to be filed with the Agency.
- Proposed Tariff Rule 20(d) would be found to be clear if it were to be filed with the Agency; however, the Agency is not making a determination as to the reasonableness.

– Proposed Tariff Rule 20(e) would be found to be unclear and unreasonable if it were to be filed with the Agency.

Issue 5

[141] The Agency does not order costs against Sunwing.

ORDER

[142] The Agency, pursuant to section 113 of the ATR, disallows Existing Tariff Rule 20 of Sunwing's Tariff.

[143] The Agency orders Sunwing, by no later than December 16, 2013, to amend its Tariff to conform to this Order and the Agency's findings set out in this Decision.

[144] Pursuant to paragraph 28(1)(*b*) of the CTA, the disallowance of Existing Tariff Rule 20 shall come into force when Sunwing complies with the above or on December 16, 2013, whichever is sooner.

(signed)

Raymon J. Kaduck
Member

(signed)

Sam Barone
Member

Indexed as:

Vancouver International Airport Authority v. Public Service Alliance of Canada

Vancouver International Airport Authority and YVR Project Management Ltd. (Applicants)

v.

Public Service Alliance of Canada (Respondent)

[2011] 4 F.C.R. 425

[2011] 4 R.C.F. 425

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[2010] A.C.F. no 809

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Nos. A-277-09, A-318-09

Federal Court of Appeal

Létourneau, Pelletier and Stratas JJ.A.

Heard: Vancouver, June 2, 2010;
Judgment: Ottawa, June 12, 2010.

(32 paras.)

Catchwords:

Labour Relations -- Judicial review of Canada Industrial Relations Board rulings on whether job positions falling within bargaining unit -- Applicants submitting that Board's reasons inadequate -- Reasons of administrative decision maker having to fulfil fundamental purposes -- Court having to bear in mind certain principles in assessing such reasons -- Board's reasons herein inadequate when measured against fundamental purposes, principles -- Presence of factors influencing Court's assessment of adequacy of reasons not reducing to naught Board's obligation to write adequate reasons, address fundamental purposes -- Purposes underlying requirement of adequate reasons

could have been met without difficulty by Board -- Evidentiary record not helping to supply rationale for Board's decision -- Open to Board to adopt portions of record as basis for its conclusions, but not doing so -- Applications allowed.

Summary:

These were consolidated applications for judicial review of the Canada Industrial Relations Board's rulings on whether new job positions created by the applicants fell within the bargaining unit represented by the respondent.

The applicants submitted that the Board gave inadequate reasons in support of including a certain number of jobs in the bargaining unit. The respondent replied that the parties knew the relevant principles and that the Board had issued [page426] a detailed investigation report setting out principles and factual findings.

At issue was whether the Board's reasons were adequate.

Held, the applications should be allowed.

The reasons of an administrative decision maker must fulfil, at a minimum, the following four fundamental purposes: (1) substantive, (2) procedural, (3) accountability, and (4) justification, transparency and intelligibility. In assessing whether these purposes have been met, courts must also bear in mind the relevancy of extraneous material, the adequacy of the reasons, the relevance of Parliamentary intention and the administrative context, and judicial restraint. In the present case, the Board's reasons were inadequate when measured against these fundamental purposes and principles. The Court was unable to conduct any meaningful supervisory role, and there is no transparency, justification or intelligibility in the senses set out in the Board's reasons. The fact that the Board employs principles that are well developed and understood by the parties, and that care must be taken not to affect the Board's ability to operate efficiently are factors that can influence a court's assessment of the adequacy of the Board's reasons. However, the fundamental purposes underlying the adequacy of reasons must still be addressed. The Board's obligation to write adequate reasons and address fundamental purposes cannot be reduced to naught. The purposes underlying the requirement of adequate reasons could have been met without any difficulty, consistent with the Board's practical realities. As for extraneous material, it was impossible to see anything in the evidentiary record, including the investigation report, as helping to supply a rationale for the Board's decision. It was open to the Board to adopt portions of the record as a basis for its conclusions, but it did not do this.

Cases Cited

Considered:

Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817, (1999), 174 D.L.R. (4th) 193, 14 Admin. L.R. (3d) 173; *VIA Rail Canada Inc. v. National Transportation Agency*, [2001] 2 F.C. 25, (2000), 193 D.L.R. (4th) 357, 26 Admin. L.R. (3d) 1 (C.A.); *Canadian Assn. of Broadcasters v. Society of Composers, Authors and Music Publishers of Canada*, 2006 FCA 337, 54 C.P.R. (4th) 15, 354 N.R. 310; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, [page427] 329 N.B.R. (2d) 1, 291 D.L.R. (4th) 577; *Lake v. Canada (Attorney General)*, 2008 SCC 23, [2008] 1 S.C.R. 761, 292 D.L.R. (4th) 193, 72 Admin. L.R. (4th) 30.

Referred to:

Knight v. Indian Head School Division No. 19, [1990] 1 S.C.R. 653, (1990), 69 D.L.R. (4th) 489, [1990] 3 W.W.R. 289; *Sketchley v. Canada (Attorney General)*, 2005 FCA 404, [2006] 3 F.C.R. 392, 263 D.L.R. (4th) 113, 44 Admin. L.R. (4th) 4; *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, 211 Nfld. & P.E.I.R. 50, 210 D.L.R. (4th) 608; *R. v. Braich*, 2002 SCC 27, [2002] 1 S.C.R. 903, 210 D.L.R. (4th) 635, 162 C.C.C. (3d) 324; *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3, 297 D.L.R. (4th) 577, [2008] 11 W.W.R. 383; *Crevier v. Attorney General of Quebec et al.*, [1981] 2 S.C.R. 220, (1981) 127 D.L.R. (3d) 1, 38 N.R. 541; *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129, 285 D.L.R. (4th) 620, 64 Admin. L.R. (4th) 163; *Clifford v. Ontario (Attorney General)*, 2009 ONCA 670, 98 O.R. (3d) 210, 312 D.L.R. (4th) 70.

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History and Disposition:

APPLICATIONS for judicial review of the Canada Industrial Relations Board's rulings (*Vancouver International Airport Authority*, 2009 CIRB LD 2148; *Vancouver International Airport Authority*, 2009 CIRB LD 2172) on whether certain new job positions created by the applicants fell within the bargaining unit represented by the respondent. Applications allowed.

Appearances:

R. Paul Fairweather for applicants.

Edith Bramwell for respondent.

Solicitors of record:

Harris & Company LLP, Vancouver, for applicants.

Public Service Alliance of Canada, Ottawa, for respondent.

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The following are the reasons for judgment rendered in English by

1 **STRATAS J.A.**:-- The applicant employers' main submission is that the Canada Industrial Relations Board [Board] has given inadequate reasons in support of certain rulings against them. These rulings appear in two Board decisions: a decision dated June 3, 2009 (2009 CIRB LD 2148; file A-277-09 in this Court) and a further decision dated July 24, 2009 (2009 CIRB LD 2172; file A-318-09 in this Court). For the reasons below, I agree with the applicants' main submission. The reasons of the Board are inadequate.

2 The Board was dealing with the issue whether certain new job positions created by the applicant employers fell within the bargaining unit that the respondent union is certified to represent. In its two decisions, the Board ruled upon 66 job positions. It ruled that 43 job positions should be excluded from the bargaining unit and 23 job positions should be included into the bargaining unit.

3 In this Court, the applicants brought two applications for judicial review against the two decisions. Their applications challenged the 23 inclusions. The respondent did not seek judicial review of any of the Board's rulings. Therefore, only the Board's rulings on the 23 inclusions are before this Court.

4 Before this matter arrived in this Court, the applicants asked the Board to reconsider its decisions. The Board declined to do so. In this Court, the parties agreed that the Board's two decisions remained in place, completely unaffected by the reconsideration. They agreed that this Court should hear and determine the applications for judicial review, which have now been consolidated.

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A. *The parties' submissions*

5 At the outset of the parties' submissions, there was some common ground. The parties agreed that the Board was obligated to give reasons in support of its rulings in this case.

6 I agree. On the matters before it, the Board was obligated to provide the parties with procedural fairness. The Board adjudicated legal and factual issues of significance for the affected parties, namely whether certain positions were included or excluded from the bargaining unit.

7 Nothing in these reasons for judgment should be taken as suggesting that all administrative decision makers must give reasons in all circumstances. It depends. In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paragraph 43, the Supreme Court regarded the common law obligation to provide reasons as a subset of the duty to afford procedural fairness to the parties. In that case, the Supreme Court held that a Minister deciding a refugee claim owed the claimant a duty of procedural fairness and, due to the importance of the decision to the claimant, the claimant needed to know why her claim was dismissed. *Baker* emphasizes, at paragraphs 23 to 28, that the level of procedural fairness to be afforded depends upon the circumstances and may vary from no obligation whatsoever, to a high obligation. Finally, there are some administrative decision makers that are not obligated to afford procedural fairness at all: *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at page 670.

8 On the central issue of adequacy of reasons, the applicants submitted that after reading the Board's reasons, they do not know why 23 job positions were included in the bargaining unit. For many of the positions, the Board offered only a single, curt conclusion, nothing more.

9 The respondent disagreed. While the reasons were brief, the parties could understand why the Board ruled [page430] in the way it did. The parties knew the relevant principles, there had been a lengthy back and forth over the years on these issues, and a Board officer had released a very detailed report setting out principles and factual findings. That report should be regarded as part of the Board's rationale for its decision, says the respondent, citing this Court's decision in *Sketchley v. Canada (Attorney General)*, 2005 FCA 404, [2006] 3 F.C.R. 392.

10 An assumption underlies the respondent's submissions: whether reasons are adequate depends on whether they fulfil, in a minimal way, certain purposes and functions. Distilling the respondent's submissions to their essence, the respondent says that the main purpose of reasons is to ensure that the parties know why the Board decided in the way that it did.

B. *Analysis*

(1) *Introduction*

11 I agree that the adequacy of reasons is to be assessed against the purposes that underlie the giving of reasons. Put another way, "adequate reasons are those that serve the functions for which the duty to provide them was imposed": *VIA Rail Canada Inc. v. National Transportation Agency*,

[2001] 2 F.C. 25 (C.A.), at paragraph 21. This has been the consistent approach of the Supreme Court and this Court: *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869; *R. v. Braich*, 2002 SCC 27, [2002] 1 S.C.R. 903; *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3; *Canadian Assn. of Broadcasters v. Society of Composers, Authors and Music Publishers of Canada*, 2006 FCA 337, 54 C.P.R. (4th) 15.

12 However, as will be seen, I do not agree with the respondent that the reasons of administrative decision makers are adequate just because the parties know why they won or lost. The reasons of administrative decision makers also must fulfil other purposes. In this case, the Board's reasons are inadequate because they do not fulfil, even at a minimum, many of these purposes.

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(2) *The purposes underlying the giving of reasons in the administrative law context*

13 The Supreme Court has identified some of the purposes underlying the giving of reasons in the administrative law context, albeit in only three cases, and only briefly. These purposes include "fairness to the parties" and "justification, transparency and intelligibility": *Baker*, above, at paragraph 43; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paragraph 47. In the area of ministerial discretion in the extradition context, the Supreme Court in *Lake v. Canada (Minister of Justice)*, 2008 SCC 23, [2008] 1 S.C.R. 761, at paragraph 46, has emphasized that the reasons must inform the parties why the result was reached. They must also make it possible for the supervising court to review the decision.

14 Our Court has held that reasons in the administrative law context must provide an assurance to the parties that their submissions have been considered, enable the reviewing court to conduct a meaningful review, and be transparent so that regulatees can receive guidance: *Canadian Assn. of Broadcasters*, above, at paragraph 11; *VIA Rail Canada Inc.*, above, at paragraphs 17 to 22.

15 In the area of criminal law, the Supreme Court has more fully developed the purposes underlying the giving of reasons. These should not be imported uncritically into the administrative law area, as the two areas have important differences. Nevertheless, there is some overlap with the purposes and functions identified above. Enough information must be given so parties can assess whether or not to exercise their rights of review, the supervising court can review what has been done, and the public can scrutinize what has happened: *Sheppard*, above, at paragraphs 15 and 24; *R.E.M.*, above.

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16 Where, as here, an administrative decision maker, acting under a procedural duty to receive and consider full submissions, is adjudicating on a matter of significance, what sort of reasons must it give? From the above authorities, and bearing in mind a number of fundamental principles in the administrative law context, the adequacy of the decision maker's reasons in situations such as this must be evaluated with four fundamental purposes in mind:

(a) *The substantive purpose*. At least in a minimal way, the substance of the decision must be understood, along with why the administrative decision maker ruled in the way that it did.

(b) *The procedural purpose*. The parties must be able to decide whether or not to invoke their rights to have the decision reviewed by a supervising court. This is an aspect of procedural fairness in administrative law. If the bases underlying the decision are withheld, a party cannot assess whether the bases give rise to a ground for review.

(c) *The accountability purpose*. There must be enough information about the decision and its bases so that the supervising court can assess, meaningfully, whether the decision maker met minimum standards of legality. This role of supervising courts is an important aspect of the rule of law and must be respected: *Crevier v. Attorney General of Quebec et al.*, [1981] 2 S.C.R. 220; *Dunsmuir*, above, at paragraphs 27 to 31. In cases where the standard of review is reasonableness, the supervising court must assess "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir*, above, at paragraph 47. If the supervising court has been prevented from assessing this because too little information has been provided, the reasons are inadequate: see, e.g., *Canadian Assn. of Broadcasters*, above, at paragraph 11.

(d) *The "justification, transparency and intelligibility" purpose*: *Dunsmuir*, above, at paragraph 47. This purpose overlaps, to some extent, with the substantive [page433] purpose. Justification and intelligibility are present when a basis for a decision has been given, and the basis is understandable, with some discernable rationality and logic. Transparency speaks to the ability of observers to scrutinize and understand what an administrative decision maker has decided and why. In this case, this would include the parties to the proceeding, the employees whose positions were in issue, and employees, employ-ers, unions and businesses that may face similar issues in the future. Transparency, though, is not just limited to observers who have a specific interest in the decision. The broader public also has an interest in transparency: in this case, the Board is a public institution of government and part of our democratic governance structure.

17 The reasons of administrative decision makers in situations such as this must fulfil these purposes at a minimum. As courts assess whether these purposes have been fulfilled, there are a number of important principles, established by the authorities, to be kept firmly in mind:

(a) *The relevancy of extraneous material.* The respondent emphasized that information about why an administrative decision maker ruled in the way that it did can sometimes be found in the record of the case and the surrounding context. I agree. Reasons form part of a broader context. Information that fulfils the above purposes can come from various sources. For example, there may be oral or written reasons of the decision maker and those reasons may be amplified or clarified by extraneous material, such as notes in the decision maker's file and other matters in the record. Even where no reasons have been given, extraneous material may suffice when it can be taken to express the basis for the decision. *Baker*, above, provides us with a good example of this, where the Supreme Court found that notes in the administrative file adequately expressed the basis for the decision. See also *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129, at paragraph 101 for the role of extraneous materials in the assessment of adequacy of reasons.

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(b) *The adequacy of reasons is not measured by the pound.* The task is not to count the number of words or weigh the amount of ink spilled on the page. Instead, the task is to ask whether reasons, with an eye to their context and the evidentiary record, satisfy, in a minimal way, the fundamental purposes, above. Often, a handful of well-chosen words can suffice. In this regard, the respondent emphasized that very brief reasons with short form expressions can be adequate. That is true, as long as the fundamental purposes, above, are met at a minimum. In this regard, the respondent cited the example of the Board sometimes issuing orders without reasons. Whether such orders are adequate depends on the facts of a specific case, but the methodology for assessing adequacy is clear: the preambles, recitals and provisions of the orders, when viewed with an eye to their context and the evidentiary record, must satisfy, in a minimal way, the fundamental purposes, above.

(c) *The relevance of Parliamentary intention and the administrative context.* Judge-made rulings on adequacy of reasons must not be allowed to frustrate Parliament's intention to remit subject-matters to specialized administrative decision makers. In many cases, Parliament has set out procedures or has given them the power to develop procedures suitable to their specialization, aimed at achieving cost-effective, timely justice. In assessing the adequacy of reasons, courts should make allowances for the "day to day realities" of administrative tribunals, a number of which are staffed by non-lawyers: *Baker*, above, at paragraph 44; *Clifford v. Ontario (Attorney General)*, 2009 ONCA 670, 98 O.R.

> (3d) 210, at paragraph 27. Allowance should also be given for short form modes of expression that are rooted in the expertise of the administrative decision maker. However, these allowances must not be allowed to whittle down the standards too far. Reasons must address fundamental purposes-purposes that, as we have seen, are founded on such fundamental principles as accountability, the rule of law, procedural fairness, and transparency.

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> (d) *Judicial restraint.* The court's assessment of reasons is aimed only at ensuring that legal minimums are met; it is not an exercise in editorial control or literary criticism. See *Sheppard*, above, at paragraph 26.

18 In the above statement of purposes and principles, nothing should be taken to encourage administrative decision makers to aim only for the legal minimums, and no higher. Administrative decision makers should strive to follow best practices so that the public gets the service it deserves, including providing exemplary reasons of high standard: for an example of one authority's helpful view of best practices, see Ombudsman Saskatchewan, *Practice Essentials for Administrative Tribunals*, Saskatchewan: Ministry of Justice and Attorney General, 2009, online: <http: //www.ombudsman.sk.ca/uploads/document/files/omb-tribunal-guid e_web-en-1.pdf>.

(3) *Application of these principles to this case*

19 Measured against the fundamental concerns and principles, set out above, the Board's reasons fall well short of the mark. They are inadequate.

20 In 13 of the 23 positions found to be in the bargaining unit, the Board simply wrote that "there is no basis to exclude given the job duties", "there is no basis in the information supplied to exclude the position from the unit", or "job duties do not require exclusion". Did the Board apply any principles in these rulings? If so, what are the principles? It is a mystery. The applicants have no idea why they lost, they cannot meaningfully assess whether a judicial review is warranted or formulate any grounds for it in the case of these 13 positions, this Court is unable to conduct any meaningful supervisory role, and there is no transparency, justification or intelligibility in the senses set out above. [page436] All we have are conclusions, laudably definitive, but frustratingly opaque.

21 In effect, for these 13 positions, the Board is telling the parties, this Court, and all others, "Trust us, we got it right." In this regard, this case is strikingly similar to *Canadian Assn. of Broadcasters*, above, where the administrative decision maker asserted a bottom-line conclusion with no supporting information, in effect immunizing itself from review and accountability.

22 In 6 of the 23 positions found to be in the bargaining unit, the Board offered slightly more than a bare conclusion in support of its ruling. On these occasions, the Board included a position in the bargaining unit because it was "at the same level on the organizational chart" or because it was similar, for some undisclosed reason, to a position in the bargaining unit. What was it about the level on the organizational chart or the particular position that led to this conclusion? It is a mystery. In effect, the Board is saying: "Trust us, but here is a hint". But the hint does not shed light on the bases for its decision.

23 The respondent gamely attempted to support the reasons of the Board, sparse as they are. It emphasized that the principles that the Board normally employs in cases such as this one are fairly well developed and understood by many employers, unions and observers of this area of law. Further, a fairly large number of positions, 66, were in issue, each involving highly specific facts. The respondent stressed that care must be taken not to impose too high an obligation to provide reasons on the Board, affecting its ability to operate efficiently.

24 I accept that these factors can influence the Court's assessment of the adequacy of the Board's reasons. These factors speak to the issue of whether some allowance should be given to reflect the practical, [page437] daily realities that this administrative decision maker must face. But the fundamental purposes underlying the adequacy of reasons, such as the transparency concern and the supervisory concern, must still be addressed at a minimum. The Board's obligation to write adequate reasons and address fundamental purposes cannot be reduced to naught.

25 In this case, the purposes underlying the requirement of adequate reasons could have been met without any difficulty, consistent with the practical realities facing the Board. With just a handful of words-"Throughout this decision, we apply the principles in [case name]"-the Board could have shown that it was following some principle. From there, the Board might have written a sentence or two to identify how the principle applies to each position, or to groups of positions that raise similar considerations. A sentence or two, sitting alongside the record in this case, might have disclosed exactly why the Board ruled in the way it did, and might have addressed all of the fundamental concerns underlying the provision of adequate reasons.

26 So far, I have dealt with 19 of the 23 positions that the Board included into the bargaining unit. In the case of the remaining four positions, "payroll assistant", "human resource advisor", "contracts manager", and "project manager", the Board did write a sentence or two. But the bases identified in those sentences seem to conflict with the bases provided for exclusion of other positions: sometimes one factor is determinative, other times an entirely different factor seems determinative. The salient concern here is intelligibility. A single paragraph, perhaps at the start of the reasons could have set out the operative principles to be followed along with governing authority. Then the Board's "sentence or two" approach might have been perfectly adequate. It might have met any intelligibility concerns by eliminating any apparent inconsistency in principle.

27 As for extraneous material, it is of no assistance in understanding the Board's reasons. In the

[page438] circumstances of this case and given the sparseness of the Board's reasons, it is impossible to see anything in the evidentiary record, including the investigation report, as helping to supply a rationale for the Board's decision. It was open to the Board to adopt, through express language or by implication, portions of the record as a basis for its conclusions (see *Sketchley*, above, at paragraph 37), but the Board did not do this.

(4) *Other grounds of review*

28 The applicants raised other grounds of review of the Board's decision. These arose primarily as a result of the Board's reference to positions on an organizational chart in support of some of its rulings. This led the applicants to note that a position on an organizational chart, by itself, cannot lead in principle to a conclusion that a position should be included in the bargaining unit. To the applicants, this gave rise to two legitimate grounds of judicial review: the taking into account of an irrelevant consideration and the failure to take into account relevant considerations.

29 We simply cannot assess these grounds of judicial review because of the absence of adequate reasons. Quite simply, the considerations and principles that the Board took into account, relevant or irrelevant, are not adequately apparent. In any event, it is unnecessary to deal with these other grounds of review in this case.

C. *Conclusion*

30 The Board's decisions to include 23 positions into the bargaining unit should be quashed, because its reasons are inadequate.

31 The applicants asked that the matter be remitted to a differently constituted panel of the Board. I would remit the matter back to the Board, but there is no reason why the matter must be sent to a differently constituted panel. Such a requirement is imposed when there are concerns about the capacity, capability, fairness or [page439] propriety of the original panel to rule on a matter if it were to be sent back to them. As best as we can assess from the Board's truncated reasons and the parties' submissions, no such concerns exist here.

32 Therefore, I would allow both applications for judicial review, with costs in file A-318-09 up to the date of consolidation (September 19, 2009) and costs throughout in A-277-09. I would quash the decisions of the Board (2009 CIRB LD 2148 and 2009 CIRB LD 2172) with respect to the 23 positions that the Board decided were included in the bargaining unit. I would remit these 23 inclusions back to the Board for redetermination.

LÉTOURNEAU J.A.:-- I agree.
PELLETIER J.A.:-- I agree.

cp/e/qlaim