

IN THE FEDERAL COURT OF APPEAL

BETWEEN:

GABOR LUKACS

Appellant

-and-

CANADIAN TRANSPORTATION AGENCY

Respondent

MEMORANDUM OF FACT AND LAW
OF THE
CANADIAN TRANSPORTATION AGENCY

Simon-Pierre Lessard
Counsel
Legal Services Branch
Canadian Transportation Agency
15, Eddy Street,
Gatineau, Québec
K1A 0N9
Simon-pierre.lessard@otc-cta.gc.ca
Telephone 819-953-2955
Facsimile 819-953-9269

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INTRODUCTION

1. This is the Memorandum of Fact and Law of the Respondent, Canadian Transportation Agency (the Agency), in response to the appeal filed before this Honourable Court, pursuant to section 41 of the *Canada Transportation Act*, S.C. 1996, c. 10, (CTA), of the *Rules Amending the Canadian Transportation Agency General Rules*, SOR/2013-133 (the Quorum Rule), registered on June 13, 2013.

2. The Quorum Rule, made pursuant to section 17 of the CTA, amended the *Canadian Transportation Agency General Rules*, SOR/2005-35 (the CTA Rules), to reduce the quorum requirement contained in subsection 16(1) of the CTA from two members to one.

3. In the absence of respondents to address the issue put forward in this appeal, the Agency is responding in order to provide assistance to this Honourable Court as to the process required to be followed in making the Quorum Rule and the relevant legislative framework and history.

PART I**STATEMENT OF FACTS**

4. The Agency is a superior independent quasi-judicial administrative body of the Government of Canada which performs two key functions within the federal transportation system. As an adjudicative tribunal, the Agency, informally and through formal adjudication, resolves a range of commercial and consumer transportation-related disputes, including accessibility issues for persons with disabilities. As an economic regulator, the Agency makes determinations and issues authorities, licences and permits to transportation carriers under federal jurisdiction.

5. The members of the Agency are Governor in Council (GIC) appointees who are responsible for making all economic, regulatory and adjudicative determinations, decisions and orders of the Agency. This means that members must decide on a wide range of matters that come before the Agency, from uncontested licence, permit and other approval applications with limited discretion to be exercised by members to complex and significant economic determinations, as well as contested disputes of varying complexity.

6. The Agency has explicit powers in its enabling statute, the CTA, to make both “rules” (for example, rules of procedure under section 17) and “regulations” (for example, regulations in relation to air matters under subsection 86(1), rail interswitching rates under subsection 128(1), and the elimination of undue obstacles to persons with disabilities in the federal transportation network under subsection 170 (1)).

Canada Transportation Act, S.C. 1996, c.10, s. 17, 86(1), 128(1) and 170(1). - Appendix A

7. The Agency has longstanding rules of procedure, the CTA Rules, in place and is in the process of amending these to replace them with modernized and streamlined provisions. One aspect of this amendment process is the Quorum Rule which reduces the Agency quorum established by subsection 16(1) of the CTA from two members to one member. The Quorum Rule amendment was made under section 17 of the CTA and before the other amendments out of necessity because of forecasted additional pressures on limited Agency member resources.

Canada Transportation Act, S.C. 1996, c.10, s. 16(1), 17. - Appendix A

8. Rules under section 17 of the CTA are promulgated pursuant to the process set out in the *Statutory Instruments Act*, R.S.C., 1985, c. S-22 (the SIA). Neither the SIA nor the CTA require GIC approval for the making of these rules.

Canada Transportation Act, S.C. 1996, c.10, s. 17. – Appendix A
Statutory Instruments Act, R.S.C., 1985, c. S-22, s. 3(1), 3(2), 5(1),
 6, 11, 19. – Appendix A

9. After holding public consultations in the winter of 2012 on the proposed revisions to the CTA Rules, including quorum, and taking into consideration stakeholder submissions, the Quorum Rule was made in accordance with the process set out in the SIA, which includes scrutiny by the Clerk of the Privy Council. As with regulations, the Quorum Rule was also subject to scrutiny by the Department of Justice.

Statutory Instruments Act, R.S.C., 1985, c. S-22, s. 3(1), 3(2), 5(1),
 6, 11, 19. – Appendix A

10. On June 13, 2013, the Quorum Rule was registered with the Privy Council Office and came into effect.
11. On July 3, 2013, the Quorum Rule was published in the Canada Gazette, Part II.
12. On July 10, 2013, the Agency was served with the Motion Record wherein leave was sought to appeal the Quorum Rule.
13. On August 22, 2013, leave was granted by this Honourable Court to appeal the Quorum Rule.

PART II

POINT IN ISSUE

14. The Agency respectfully submits that the following issue stands to be determined on this appeal:

Whether the Agency exceeded its jurisdiction and/or erred in law in making the Quorum Rule without GIC approval.

PART III**SUBMISSIONS****STANDARD OF REVIEW**

15. The Supreme Court of Canada has affirmed that true questions of jurisdiction, which could attract the correctness standard, are limited and are increasingly rare, and that questions of jurisdiction will be reviewed on the reasonableness standard where they involve an administrative body's interpretation of its home statute:

[...] unless the situation is exceptional, and we have not seen such a situation since *Dunsmuir*, the interpretation by the tribunal of "its own statute or statutes closely connected to its function, with which it will have particular familiarity" should be presumed to be a question of statutory interpretation subject to deference on judicial review.

[...]

True questions of jurisdiction are narrow and will be exceptional. When considering a decision of an administrative tribunal interpreting or applying its home statute, it should be presumed that the appropriate standard of review is reasonableness. As long as the true question of jurisdiction category remains, the party seeking to invoke it must be required to demonstrate why the court should not review a tribunal's interpretation of its home statute on the deferential standard of reasonableness.

Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association, 2011 SCC 61, at paras. 33, 39

16. The Agency respectfully submits that the issue before this Honourable Court involves the Agency's interpretation of its home statute. The Supreme Court of Canada has determined in

2007 that the appropriate standard of review for an Agency decision when it is interpreting its own legislation is reasonableness. Accordingly, should the Court determine that the appropriate standard of review is reasonableness, the Agency submits that the question is whether the Agency has acted unreasonably when making the Quorum Rule without the approval of the GIC.

Dunsmuir v. New Brunswick, [2008] 1 S.C.R. 190, at para. 54

Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association, 2011 SCC 61, Respondent's Authorities, at para. 39

Council of Canadians with Disabilities v. VIA Rail Canada Inc., [2007] 1 S.C.R. 650, 2007 SCC 15, at para. 99

PRINCIPLES OF STATUTORY INTERPRETATION

17. Whether rules made under section 17 of the CTA must be made with GIC approval depends on the interpretation to be given to the term "regulation" in subsection 36(1) of the CTA.

Canada Transportation Act, S.C. 1996, c.10, s. 17, 36(1). - Appendix A

18. In interpreting the CTA, the Agency relies on Driedger's modern principle of interpretation, which provides that "the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament". The Supreme Court of Canada in the case of *Rizzo & Rizzo Shoes Ltd. (Re)*, adopted Driedger's modern interpretation principle and has warned against just

relying on the language of a provision without due regard to the object, context of the words, and intention of the legislature:

Although the Court of Appeal looked to the plain meaning of the specific provisions in question in the present case, with respect, I believe that the court did not pay sufficient attention to the scheme of the *ESA*, its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized.

Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27, at para. 23

19. More recently, the Supreme Court of Canada has confirmed that the “ordinary meaning” of a term cannot supplant its interpretation using the modern principle:

The appellants emphasize the ordinary meaning of the words “removed from Canada” in s. 115(1) and that extradition is a form of “removal”. I agree, of course, that the ordinary meaning of these words is broad enough to include removal by any means including extradition. However, according to the often repeated “modern principle” of statutory interpretation, the words used in the IRPA must be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26. When this is done, it becomes clear in my view that the term “removed” has a specialized meaning in the IRPA and that it does not include removal by extradition.

Nemeth v. Canada (Justice), [2010] 3 S.C.R. 281, at para. 26.

20. Accordingly, the Agency will now review two elements relevant to the context and intent of Parliament: the legislative framework and the legislative history.

LEGISLATIVE FRAMEWORK

The *Canada Transportation Act (CTA)*

21. The CTA contains a quorum provision that is explicitly made subject to the Agency's rules:

16.(1) Subject to the Agency's rules, two members constitute a quorum.

Canada Transportation Act, S.C. 1996, c. 10, s. 16. - Appendix A

22. The Agency's rule-making powers are contained in section 17 of the CTA:

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.

Canada Transportation Act, S.C. 1996, c. 10, s. 17. - Appendix A

23. These rule-making powers are not subject to GIC approval.

Canada Transportation Act, S.C. 1996, c. 10, s. 17. – Appendix A

24. On the other hand, the Agency has specific regulation making powers under the CTA, for example regulations in relation to air matters under subsection 86(1), rail interswitching rates under subsection 128(1), and the elimination of undue obstacle to persons with disabilities in the federal transportation network under subsection 170 (1)). Section 36 of the CTA provides general requirements for the Agency when exercising its regulation-making powers, including the requirement to obtain GIC approval:

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.

Canada Transportation Act, S.C. 1996, c. 10, s. 36, 86(1), 128(1), 170(1) . – Appendix A

25. From a plain language reading of the CTA, “rule” and “regulation” mean two different things and have different requirements imposed under that Act.

The *Interpretation Act* (the IA)

26. The *Interpretation Act* (IA) establishes a scheme respecting the interpretation of federal statutes and regulations. It contains a section entitled "Operation", which addresses such rules as the day fixed for commencement or repeal of enactments, rules respecting regulations that are made prior to commencement, and the territorial operation of enactments. The IA also addresses "rules of construction", including imperative versus permissive constructions, the fact that all

enactments are deemed remedial, and the legal value of preambles and marginal notes. The IA sets out "rules respecting the operation and application of statutes and a range of interpretation rules" (Sullivan) applicable to legislative instruments. In order to do so, the IA sets out a broad definition of "regulation" and "enactment" (which includes "regulations") so as to capture as many statutory instruments as possible within the scope of that Act.

Interpretation Act, R.S.C., 1985, c. I-21.

Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 5th ed. Markham, Ont.: LexisNexis, 2008, at 68.

27. The meaning of "regulation" as defined in subsection 2(1) of the IA is broader than it is under the CTA in that it includes an "order" and a "rule". However, the CTA treats the three types of instruments separately and imposes different requirements on their making as described above, even though they may all be subject to the rules of operation and construction of the IA.

Interpretation Act, R.S.C., 1985, c. I-21, s. 2(1). - Appendix A

28. The IA contains rules of interpretation; it does not confer powers. As such, the definition of "regulation" in subsection 2(1) of the IA cannot be interpreted as supplanting or negating the specific distinction between the terms "order", "rule" and "regulation" made by Parliament in other statutes, like the CTA.

Interpretation Act, R.S.C., 1985, c. I-21, s. 2(1). - Appendix A

Dixon v. Canada (Commission of Inquiry into the Deployment of Canadian Forces in Somalia – Létourneau Commission), [1997] F.C.J. No 985, at para. 16.

29. Such an interpretation would run contrary not only to Driedger's modern principle as applied to the CTA, but it would also ignore the rule of construction that different words should be read to have different meanings in an Act :

When 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 1149 as cited in Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 5th ed. Markham, Ont.: LexisNexis, 2008, at 216.

30. Paragraph 15(2)(b) of the IA provides that “where an enactment contains an interpretation section or provision, it shall be read and construed [...] as being applicable to all other enactments relating to the same subject-matter unless a contrary intention appears”. Under this provision, the applicability of an interpretation section or provision from one enactment, like the IA, to another, like the CTA, is not triggered simply when the same word is used in the two enactments. Instead, the “contrary intention” referred to in paragraph 15(2)(b) of the IA is meant to avoid a situation, as in the case at bar, where importing definitions from general enactments, like the IA and the SIA, into another, like the CTA, would lead to an absurd result.

Interpretation Act, R.S.C., 1985, c. I-21, s. 15(2)(b). - Appendix A

31. The fact that the CTA makes a distinction between the terms “rule” and “regulation” establishes, in itself, a presumption of contrary intention which reflects differences in the intended meaning or effect of the two terms; in this case, the absence of GIC approval

requirement for “rules” made pursuant to section 17 of the CTA, in contrast with “regulations” made pursuant to subsection 36(1) of the CTA. As Professor Sullivan explains:

Applying the definitions in a statute *in pari materia* to the one to be interpreted is only one aspect of a more general principle. When statutes deal with the same subject, it is presumed that their language is consistent throughout. Identical phrases and expressions are presumed to have the same meaning while differences in wording are presumed to reflect differences in the intended meaning or effect.

Canada Transportation Act, S.C. 1996, c.10, s. 17, 36(1). - Appendix A

Interpretation Act, R.S.C., 1985, c. I-21, s. 15(2)(b). - Appendix A

Sullivan, *Ruth. Sullivan on the Construction of Statutes*, 5th ed.
Markham, Ont.: LexisNexis, 2008, at p.415.

32. As such, the contrary intention referred to in paragraph 15(2)(b) of the IA is manifest in the circumstances, as there is a clear indication that a “rule” and a “regulation” are to be treated differently for the purposes of the CTA, with only the latter requiring GIC approval.

Interpretation Act, R.S.C., 1985, c. I-21, s. 15(2)(b). - Appendix A

The *Statutory Instruments Act* (the SIA)

33. The SIA creates a statutory regulatory approval process which is designed to ensure that all statutory instruments considered to be a “regulation” pursuant to the SIA are made on a legally secure foundation and are accessible through the Canada Gazette. Statutory instruments that constitute “regulations” under the SIA are subject to several requirements under the formal process for the promulgation of regulations under the SIA, such as the examination by the Clerk

of the Privy Council in consultation with the Deputy Minister of Justice, registration and publication.

Statutory Instruments Act, R.S.C., 1985, c. S-22, s. 3(1), 3(2), 5(1), 6, 11, 19. – Appendix A

34. GIC approval is not part of the SIA statutory regulatory approval process. Rather, where GIC approval is required by Parliament, it is included in the regulation-making power of the body (in the Agency's case, in subsection 36(1) of the CTA).

Canada Transportation Act, S.C. 1996, c.10, s. 36(1). - Appendix A

35. The SIA does however distinguish between regulations requiring GIC approval and those regulations that do not, thus acknowledging the possibility that regulations may not require GIC approval. For example, the requirement set out at subsection 5(2) of the SIA for the regulation-making authority to certify a copy of each regulation that is transmitted to the Clerk of the Privy Council pursuant to subsection 5(1) to be a true copy does not apply to “a regulation made or approved by the Governor in Council”.

Statutory Instruments Act, R.S.C., 1985, c. S-22, s. 5(2). - Appendix A

36. Although GIC approval was not required for the making of the Quorum Rule, the Agency was still required to follow the statutory regulatory approval process set out in the SIA as a result of

the fact that rules of procedures of quasi-judicial bodies are captured in the definition of “regulation” for the purpose of the SIA:

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

Statutory Instruments Act, R.S.C., 1985, c. S-22, s. 2(1).
Appendix A

37. In this way the definition of “regulation” is broader under the SIA than it is under the CTA in that it includes certain procedural rules and orders of quasi-judicial bodies like the Agency. However, the CTA treats the three types of instruments separately as described above, and only requires GIC approval for regulations. Even though the Quorum Rule meets the definition of “regulation” for one statute (the SIA), it does not make it a “regulation” for the purposes of other statutes, like the CTA.

38. In addition, it should be noted that the definition of “regulation” in subsection 2(1) of the SIA explicitly states that it applies “[i]n *this Act*” [Emphasis added]. The definition of “regulation” in the SIA does not apply to all Acts of Parliament. Otherwise, the definition of “regulation” set

out in other statutes like the IA would be redundant. This is consistent with subsection 3(3) of the IA which recognizes that rules of statutory interpretation are to be applied to an enactment, such as the CTA, so long as they are not inconsistent with the IA. This is also consistent with section 35 of the IA which sets out definitions of terms used in the IA that are to apply "[i]n every enactment"; it does not include a definition of the term "regulation.", which is defined instead in subsection 2(1) of the IA, which applies "[i]n *this Act*" [Emphasis added].

Interpretation Act, R.S.C., 1985, c. I-21, s. 2(1), 3(3), 35. – Appendix A

Statutory Instruments Act, R.S.C., 1985, c. S-22, s. 2(1). - Appendix A

39. The regulatory process set out in the SIA had to be followed by the Agency in order for the Quorum Rule to be registered. It is respectfully submitted that the fact that the Clerk of the Privy Council accepted the Quorum Rule for registration further confirms that there is no requirement for the Quorum Rule to receive GIC approval prior to being made, whether under the SIA, the CTA or otherwise.

LEGISLATIVE HISTORY

40. The predecessor to the Canadian Transportation Agency, the National Transportation Agency (NTA), was governed by the *National Transportation Act, 1987*, R.S.C. 1985, c. 28 (3rd Supp.), (the former Act).

41. Pursuant to subsection 22(1) and section 27 of the former Act, the NTA had the power to make

“rules”, “orders” and “regulations” with GIC approval:

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.

National Transportation Act, 1987, R.S.C. 1985, c. 28 (3rd Supp.), s. 22. - Appendix A

27.(1) The Agency may make rules, orders and regulations respecting any matter or thing that comes within the jurisdiction of the Agency under any Act of Parliament.

(2) Subject to subsection (3), but notwithstanding anything in any other Act of Parliament, a rule, order or regulation that is authorized to be made by the Agency under this Act or any other Act of Parliament shall, where the rule, order or regulation is directed to more than one person or body and is made in the exercise of a legislative power and not in the exercise of a judicial or quasi-judicial power of the Agency be made only with the approval of the Governor in Council.

(3) The Agency may, by order, without the approval of the Governor in Council, exclude a person from all or any of the requirements of a rule, order or regulation referred to in subsection (2) for a period not exceeding sixty days.

National Transportation Act, 1987, R.S.C. 1985, c. 28 (3rd Supp.), s. 27. - Appendix A

41. The NTA was granted further regulation-making powers, including that contained in section 30 of the former Act:

30. The Agency may, with the approval of the Governor in Council, make regulations specifying the fees or providing for the manner of calculating fees that are to be paid to the Agency in respect of any application for a licence or an amendment or renewal thereof under this Act or for the issuance of any such licence, amendment or renewal.

National Transportation Act, 1987, R.S.C. 1985, c. 28 (3rd Supp.), s. 30. - Appendix A

42. Accordingly, when making the *National Transportation Agency General Rules*, SOR/88-23 (the NTA Rules), the NTA, obtained GIC approval as required by subsection 22(1) of the former Act.

National Transportation Act, 1987, R.S.C. 1985, c. 28 (3rd Supp.), s. 22(1). - Appendix A

43. In 1996, the former Act was replaced with the CTA. In particular, section 22 of the former Act was replaced by near identical provisions in subsection 16(1) and section 17 of the CTA, with the exception of the removal of the requirement to obtain GIC approval for the rules.

National Transportation Act, 1987, R.S.C. 1985, c. 28 (3rd Supp.), s. 22. - Appendix A

Canada Transportation Act, S.C. 1996, c. 10, s. 16(1), 17. Appendix A

44. In addition, the specific regulation-making power in section 30 of the former Act was replaced by a rule-making power in section 34 of the CTA, requiring notice to the Minister but no approval of the GIC:

34. (1) The Agency may, by rule, fix the fees that are to be paid to the Agency in respect of applications made to it, including applications for licences or permits and applications for amendments to or for the renewal of licences or permits, and any other matters brought before or dealt with by the Agency.

(2) The Agency shall give the Minister notice of every rule proposed to be made under subsection (1).

*National Transportation Act, 1987, R.S.C. 1985, c. 28
(3rd Supp.), s. 30. - Appendix A
Canada Transportation Act, S.C. 1996, c. 10, s. 34.
Appendix A*

45. Finally, and as set out above, the Agency's specific regulation-making powers under the CTA are now subject to general requirements contained in section 36 of the CTA, including the requirement to obtain GIC approval.

Canada Transportation Act, S.C. 1996, c. 10, s. 36. – Appendix A

46. Based on this examination of legislative history, it is respectfully submitted that, in the CTA, the term "regulation" in subsection 36(1) does not include the procedural rules the Agency is authorized to make under section 17 of the CTA for the following reasons:

- a) Sections 21, 22, 40, 41, and 196 of the CTA use the phrase "rules, orders or regulations". If the term "regulation" in subsection 36(1) of the CTA were extended to include "rules," the reference to the terms "rules" in these sections would be redundant.

This is contrary to the well-established principle of statutory interpretation that the legislator does not speak in vain. In other words, every word of a provision is presumed to have meaning, and interpretations leading to redundancies should be rejected, if possible. Another example of this point is related to the fact that the Agency's power to make rules regarding fees pursuant to subsection 34(1) of the CTA is subject to the requirement contained in subsection 34(2) that, if the Agency decides to make such a rule, it shall give the Minister notice. If "rules" were "regulations" under the CTA, Parliament would not have specified that notice to the Minister be given for the making of "rules" under subsection 34(2) of the CTA because this requirement already applies to the making of any "regulation" through the application of subsection 36(2) of the CTA. If the term "regulation" in subsection 36(1) included "rules" as a type of "regulation", subsection 36(2) would be redundant.

Canada Transportation Act, S.C. 1996, c.10, s. 17, 21, 22, s. 34, 36, 40, 41, 196. – Appendix A

Quebec (Attorney General) v. Carrières Ste. Thérèse Ltée, [1985] 1 S.C.R. 831, at para. 29

Canada (Attorney General) v. JTI-Macdonald Corp., [2007] 2 S.C.R. 610, at para.87

Further, section 34 of the CTA amended section 30 of the former Act by enabling the Agency to exercise its power by way of "rule", instead of "regulation", and by removing the requirement for GIC approval. This indicates that Parliament intended that a "rule"

made pursuant to subsection 34(1) not require GIC approval.

Canada Transportation Act, S.C. 1996, c.10, s. 34
Appendix A

National Transportation Act, 1987, c. 28 (3rd Supp.), s. 30
Appendix A

- b) In addition, subsection 22(1) of the former Act was replaced by section 17 of the CTA, which is identical in substance to subsection 22(1) of the former Act, with the exception of the removal of the phrase “with the approval of the Governor in Council”. This clearly indicates that Parliament intended that the Agency is not required to seek GIC approval when making rules pursuant to section 17 of the CTA.

Canada Transportation Act, S.C. 1996, c.10, s. 17.
Appendix A

National Transportation Act, 1987, c. 28 (3rd Supp.), s. 22(1)
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- c) Similarly, subsection 36(1), which requires that every regulation be approved by GIC, amended subsection 27(2) of the former Act by removing the terms “rules” and “orders” from the requirement of GIC approval. This indicates that Parliament intended that “rules” and “orders” not require GIC approval; only regulations require such approval under the CTA.

Canada Transportation Act, S.C. 1996, c.10, s. 36(1). - Appendix A

National Transportation Act, 1987, c. 28 (3rd Supp.), s. 27(2).
Appendix A

d) The distinction between “rules” and “regulations” in the CTA is further emphasized by the fact that Parliament has imposed various requirements for the making of statutory and other instruments made by the Agency and other bodies or persons. Considering the wording of sections 17, 48, 53.5, and 109 of the CTA, as well as of subsections 25.1(4), 34(1), 36(1), 51(2.1), 170(3) and 177(2) of the CTA, which are outlined in Appendix B it is clear that the requirements applicable to the making of “rules”, “regulations” and other statutory instruments are not solely determined by this characterization. The CTA imposes specific and distinct requirements to the making of each statutory instrument individually.

Canada Transportation Act, S.C. 1996, c.10, s. 17, 25.1(4), 34(1), 36(1), 48, 51(2.1), 53.5, 109, 170(3), 177(2). - Appendix A

47. In addition to its legislative evolution, information relating to legislative history, such as a clause-by-clause analysis, has been recognized by the courts as a component of the contextual analysis of legislation so long as it is relevant, reliable, and not assigned undue weight when interpreting legislation. In this respect, the Clause-by-clause analysis prepared for the parliamentary committee considering Bill C-14 indicates the legislator contemplated the abolition of GIC approval from section 17:

Description

- ◆ The Agency may, without having to seek approval from the Governor in Council, make its own rules governing its procedures such as Agency sittings, “closed door” hearings and other internal matters.

Rationale

- ♦ This provision makes it clear that the Agency's only rule-making authority is in respect of internal matters.

Clause-by-clause analysis pertaining to Bill C-14, An Act to continue the National Transportation Agency as the Canadian Transportation Agency, to consolidate and revise the National Transportation Act, 1987 and the Railway Act and to amend or repeal other Acts as a consequence, Bill C-14, s.17

Canada 3000 Inc., Re; Inter-Canada (1991) Inc. (Trustee of), [2006] 1 S.C.R. 865, at para. 57.

Castillo v. Castillo, [2005] 2 S.C.R. 870, at para.23.

Previous GIC Approval

48. While the CTA Rules were made in 2005 with GIC approval, GIC approval was an unnecessary step as there was no statutory requirement at that time for the CTA Rules to be made this way. Rather, the Agency exercised its powers under section 17 of the CTA by following the same process used by the NTA, but without there being a legislative requirement to do so anymore. Although the CTA gives the Agency the power to make procedural rules, the requirement to obtain GIC approval has been removed.

Canada Transportation Act, S.C. 1996, c.10, s. 17. - Appendix A

49. The question of whether the Agency can amend CTA Rules approved by the GIC in 2005 is not a question of legislative hierarchy and the superiority of GIC over the Agency: it is a question of statutory interpretation.

50. Since there is no statutory requirement to seek GIC approval, the Agency is not bound by its actions in 2005, nor is it bound by any statement made in the 2005 Regulatory Impact Analysis Statement (RIAS), which should not be assigned undue weight. As such, the reason why the CTA Rules were made in 2005 with GIC approval is immaterial.

51. When the GIC acts pursuant to the CTA, the GIC has no inherent rule-making and regulation-making powers. Instead, just like the Agency, it must have legislative powers delegated to it by Parliament. In the context of the CTA, the GIC has the power, under section 40 of the CTA, to vary or rescind any Agency “decision”, “order”, “rule” or “regulation”; it must also approve “regulations” under subsection 36(1) of the CTA. The Agency has the express power to make “rules” without seeking GIC approval. The GIC does not have the express power to approve a “rule”. Moreover, the GIC does not have the power to interfere with a rule made by the Agency without using the powers referred to in section 40 of the CTA.

Saputo Inc. v. Canada (Attorney General), [2010] 4 F.C.R. 274, at para. 87

Saskatchewan Wheat Pool v. Canada (Attorney General) (1993), 67 F.T.R. 98, at paras. 39, 46.

Saskatchewan Wheat Pool v. Canada (Attorney General) (1993), 112 Sask.R. 181 (QB), at para. 41.

Canada Transportation Act, S.C. 1996, c.10, s. 36(1), 40. - Appendix A

52. It would be contrary to the principles of statutory interpretation to read in additional requirements to the rule-making power under section 17 of the CTA, such as requiring that any amendment of a rule be approved by the same body that first approved the rule. Section 17 of

the CTA, which empowers the Agency to make rules, also includes the power to repeal, amend or vary those rules. GIC is bound by statute, just like the Agency. As such, it would be incongruous to interpret the CTA in a way in which the GIC would deprive the Agency of powers expressly granted to it by its home statute, the CTA.

Canada Transportation Act, S.C. 1996, c.10, s. 17. - Appendix A

Saskatchewan Wheat Pool v. Canada (Attorney General) (1993), 67 F.T.R. 98, at paras. 54, 64.

Dixon v. Canada (Commission of Inquiry into the Deployment of Canadian Forces in Somalia – Létourneau Commission), [1997] F.C.J. No 985, at para. 16.

CONCLUSION

53. By reviewing the legislative history, the present wording of subsection 36(1) and section 17 of the CTA, and the legislative intent it is clear what was intended, and there is no need to refer to the SIA or the IA in order to define the term “regulation” or the term “rule”. When reading “the words of the Act in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”, it becomes evident that the term “regulation” in subsection 36(1) of the CTA is not meant to include “rules” made pursuant to section 17 of the CTA, which govern procedural matters. Therefore, it is immaterial whether the term “regulation” includes the term “rule” in the context of the SIA and the IA.

Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 R.C.S. 27, at para. 23.

Canada Transportation Act, S.C. 1996, c.10, s. 17, 36(1). - Appendix A

54. Since the “pith and substance” of a “rule” pursuant to section 17 of the CTA is to govern procedure, it is clearly narrower in scope than the term “regulation”, either in light of the plain or ordinary meaning of the terms, the definition of the term “regulation” in the IA or the SIA, or in the context of the CTA. When “rule” is mentioned, it is generally procedure, and when “regulation” is mentioned it is more substantive. Alternatively, even if this Honourable Court was to find that, in general, a “rule” is a sub-class of “regulation”, or what Driedger refers to as “regulations governing matters of procedure”, the result would be the same as, in light of the modern interpretation principle as applied to the CTA, a procedural “rule” pursuant to section 17 of the CTA is not subject to GIC approval, in contrast with a “regulation” made pursuant to subsection 36(1) of the CTA. Even as a sub-class of regulation it is very clear that rules and regulations are to be treated differently.

Elmer A. Driedger: *Subordinate Legislation*, Can. Bar. Rev. 38 (1960), no. 1

Canada Transportation Act, S.C. 1996, c.10, s. 17, 36(1). - Appendix A

55. For these reasons, it is respectfully submitted that the Quorum Rule made under section 17 of the CTA did not require GIC approval and, thus, that the Respondent did not exceed its jurisdiction or err in law in making the Quorum Rule without GIC approval. Therefore, it is respectfully submitted that the appeal should be dismissed.

Canada Transportation Act, S.C. 1996, c.10, s. 17. - Appendix A

COSTS

56. The Supreme Court of Canada has recognized the importance of having a fully informed adjudication of the issues before it. Because of its specialized expertise, or for want of an

alternative knowledgeable advocate, submissions from an administrative body may be essential to achieve this objective. In these circumstances, the participation of the Agency adds value to the proceedings.

CAIMAW, Local 14 v. Paccar of Canada Ltd., (1989), 62 D.L.R. (4th) 437 (S.C.C.)

57. Generally, an administrative body like the Agency will neither be entitled to nor be ordered to pay costs, at least when responding to a court proceeding to address its jurisdiction and where there has been no misconduct on its part. Where the body has acted in good faith and conscientiously throughout, albeit resulting in error, the reviewing tribunal will not ordinarily impose costs.

Lang v. British Columbia (Superintendent of Motor Vehicles), 2005 BCCA 244, at para. 47.

58. It is respectfully submitted that costs should not be awarded against the Agency as the Agency was acting in good faith in making the Quorum Rule so as to fulfill its statutory mandate in a manner that is efficient, effective, responsive and exemplifying stewardship, as required under the Values and Ethics Code of the Public Sector. Furthermore, in the absence of respondents, the Agency has responded in this appeal in order to provide assistance to this Honourable Court as to the process required to be followed in making the Quorum Rule and the relevant legislative history.

Lang v. British Columbia (Superintendent of Motor Vehicles),
2005 BCCA 244, at para. 47.

Treasury Board of Canada Secretariat, *Values and Ethics Code of the Public Sector*,
Expected Behaviours

PART IV

ORDER SOUGHT

59. The Agency respectfully requests that this Honourable Court dismiss the appeal without costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at the City of Gatineau, in the Province of Quebec, this 15th day of November, 2013.



Simon-Pierre Lessard
Counsel for the Respondent
Canadian Transportation Agency

PART V**LIST OF AUTHORITIES****Appendix A - Legislation**

Canada Transportation Act, S.C. 1996, c. 10, s. 16, 17, 21, 22, 25.1, 34, 36, 40, 41, 48, 51(2.1), 53.5, 86(1), 109, 128(1), 170(1), 170(3), 177(2),

National Transportation Act, 1987, c. 28 (3rd Supp.), s. 22, 27, 30

Interpretation Act, R.S.C., 1985, c. I-21, s. 2(1), 3(3), 15(2)(b), 35

Statutory Instruments Act, R.S.C., 1985, c. S-22, s. 2, 3, 5, 6, 11, 19

Appendix B

Table - Requirements for the making of Canadian Transportation Agency statutory instruments

Case Law

Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association, 2001 SCC 61

Canada (Attorney General) v. JTI-Macdonald Corp., [2007] 2 S.C.R. 610

Canada 3000 Inc., Re; Inter-Canadian (1991) Inc. (Trustee of), [2006] 1 S.C.R. 865

CAIMAW, Local 14 v. Paccar of Canada Ltd., (1989), 62 D.L.R. (4th) 437 (S.C.C.)

Castillo v. Castillo, [2005] 2 S.C.R. 870, at para.23.

Council of Canadians with Disabilities v. VIA Rail Canada Inc., [2007] 1 S.C.R. 650, 2007 SCC 15

Dixon v. Canada (Commission of Inquiry into the Deployment of Canadian Forces in Somalia – Létourneau Commission), [1997] F.C.J. No 985

Dunsmuir v. New Brunswick, [2008] 1 S.C.R. 190

Lang v. British Columbia (Superintendent of Motor Vehicles), 2005 BCCA 244

Nemeth v. Canada (Justice), [2010] 3 S.C.R. 281

Peach Hill Management Ltd. v. Canada, [2000] F.C.J. No 1149

Quebec (Attorney General) v. Carrières Ste. Thérèse Ltée, [1985] 1 S.C.R. 831

Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27

Saputo Inc. v. Canada (Attorney General), [2010] 4 F.C.R. 274

Saskatchewan Wheat Pool v. Canada (Attorney General) (1993), 67 F.T.R. 98

Saskatchewan Wheat Pool v. Canada (Attorney General) (1993), 112 Sask.R. 181 (QB)

Other Authorities

Clause-by-clause analysis pertaining to Bill C-14, *An Act to continue the National Transportation Agency as the Canadian Transportation Agency, to consolidate and revise the National Transportation Act, 1987 and the Railway Act and to amend or repeal other Acts as a consequence*, s.17

Elmer A. Driedger: *Subordinate Legislation*, Can. Bar. Rev. 38 (1960), no. 1

Sullivan, Ruth. *Sullivan on the Construction of Statutes*, 5th ed. Markham, Ont.: LexisNexis, 2008.

Treasury Board of Canada Secretariat, *Values and Ethics Code of the Public Sector*, Expected Behaviours