Court File No.:

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Moving Party

– and –

CANADIAN TRANSPORTATION AGENCY and NEWLEAF TRAVEL COMPANY INC.

Respondents

MOTION RECORD OF THE MOVING PARTY

VOLUME 1

(Motion for Leave to Appeal)

DR. GÁBOR LUKÁCS

Halifax, NS

lukacs@AirPassengerRights.ca

Moving Party

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

Ms. Liz Barker, General Counsel and Secretary
Tel: 819-997-0099
Fax: 819-953-5253

AND TO: **NEWLEAF TRAVEL COMPANY INC.**
1 Lombard Place, Suite 2200
Winnipeg, MB R3B 0X7

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Decision No. 100-A-2016

March 29, 2016

DETERMINATION by the Canadian Transportation Agency as to whether resellers operate air services and should therefore be required to hold an air licence and whether NewLeaf Travel Company Inc. operates an air service and should therefore be required to hold an air licence.

Case Number: 15-03590

ISSUES

[1] The issues to be addressed in this Determination are whether:

1. resellers operate air services and should therefore be required to hold an air licence; and
2. NewLeaf Travel Company Inc. (NewLeaf), based on its proposed business model, will operate an air service and should therefore be required to hold an air licence.

SUMMARY OF CONCLUSIONS

[2] For the reasons set out below, the Canadian Transportation Agency (Agency) finds that:

1. Resellers do not operate air services and are not required to hold an air licence, as long as they do not hold themselves out to the public as an air carrier operating an air service.
2. NewLeaf, should it proceed with its proposed business model, would not operate an air service and would not be required to hold an air licence.

[3] These determinations reflect the most reasonable interpretation of the statutory requirements related to air licensing, based on a plain reading of their language, their entire statutory context, their statutory history, and an understanding of their underlying purposes.

[4] The determination on the first issue has broad applicability and will provide industry, air travellers, and other interested parties with clarity and predictability and, in so doing, will facilitate compliance with statutory requirements.

TERMINOLOGY

[5] Within the context of this Determination, the following terminology has been adopted:

"air carrier" means any person who operates aircraft on a domestic or international air service;

"charterer" means any person who charters an air carrier to operate non-resalable or resalable flights on its behalf and includes a tour operator that provides the charter as part of an inclusive tour package; and,

"reseller" means a person who does not operate aircraft and who purchases the seating capacity of an air carrier and subsequently resells those seats, in its own right, to the public.

THE LAW

[6] Paragraph 57(a) of the *Canada Transportation Act*, S.C., 1996, as amended (CTA) provides that no person shall "operate" an "air service" unless, in respect of that service, the person holds a licence issued under Part II of the CTA.

[7] Subsection 55(1) of the CTA defines "air service" as a service, provided by means of an aircraft, that is publicly available for the transportation of passengers or goods, or both.

[8] The word "operate" in paragraph 57(a) is not defined within the CTA.

BACKGROUND

[9] The Agency regulates the licensing of air transportation pursuant to the CTA and the *Air Transportation Regulations*, SOR/88-58, as amended (ATR (Air Transportation Regulations)). Part II of the CTA addresses air transportation matters and details the licensing requirements administered by the Agency, which apply to any person who operates an air service in Canada.

[10] The CTA requires that persons hold the appropriate licence before they can operate an air service. Licensees are subject to a number of passenger and industry protection provisions, including with respect to tariffs, financial requirements, and Canadian ownership.

[11] When the *National Transportation Act, 1987* (subsequently consolidated and revised by the CTA) was introduced, it ushered in the deregulation of the aviation industry, eliminating restrictions on market entry, routes that could be operated, pricing, and the distinction between non-scheduled and scheduled domestic air services. Deregulation resulted in a greater reliance on market forces to achieve more competitive prices and a wider range of services. Industry developed new approaches to the provision of air services, some of which did not always fit squarely into the CTA's licensing parameters. One such approach is the reseller model, whereby the reseller has commercial control over an air service and makes decisions on matters such as routes, scheduling, pricing, and aircraft to be used, while air carriers operate the aircraft on the reseller's behalf.

[12] In 1996, the CTA's licensing parameters were tested when Greyhound Lines of Canada Ltd. (Greyhound) proposed to market and sell air services, on its own behalf, while entering into a contract with Kelowna Flightcraft Air Charter Ltd. (Kelowna Flightcraft) to operate the aircraft. The Agency, in (/eng/ruling/232-A-1996)Decision No. 232-A-1996 (/eng/ruling/232-a-1996) and (/eng/ruling/292-A-1996)Decision No. 292-A-1996 (/eng/ruling/292-a-1996), determined that Greyhound would operate the air service and, therefore, require a licence. The Agency arrived at its determination on the basis that the person that had commercial control over the sale of the air service was required to hold the licence, irrespective of whether they operated aircraft.

[13] Greyhound and Kelowna Flightcraft petitioned the Governor in Council (GIC) to reverse the Agency's decisions. The GIC, on the recommendation of the Minister of Transport, determined that Greyhound Canada Transportation Corp., a successor corporation to Greyhound, would not be operating the air service (Order-in-Council No. P.C. 1996-849). The

GIC, however, placed a number of conditions on its decision, including that Greyhound Canada Transportation Corp. inform all prospective purchasers of the air services that Kelowna Flightcraft would be providing the air service.

[14] In 2009, the GIC again reversed an Agency determination, Confidential Decision of the Agency dated June 29, 2009, that a reseller, in that case American Medical Response of Canada Inc., would operate an air service (Order-in-Council No. P.C. 2010-1143).

[15] In 2013, the Agency issued (/eng/ruling/390-A-2013)Decision No. 390-A-2013 (/eng/ruling/390-a-2013) to inform the air industry of the criteria that it will apply in interpreting what constitutes an "air service" and, more specifically, when an air service is considered to be "publicly available." The Agency determined that an air service is one that is (i) offered and made available to the public; (ii) provided pursuant to a contract or arrangement for the transportation of passengers or goods; (iii) offered for consideration; and (iv) provided by means of an aircraft. (/eng/ruling/390-A-2013)Decision No. 390-A-2013 (/eng/ruling/390-a-2013) did not specifically address resellers.

[16] For international air services, the ATR (Air Transportation Regulations) require the air carrier, and not the reseller, to hold the licence. For this reason, the Agency only applied the approach developed in the Greyhound case to domestic air services, resulting in resellers having to hold a licence for the sale of domestic, but not international, air services. There are currently 14 resellers that hold licences for domestic air services.

[17] The Agency's enforcement activities have revealed, however, that there is a lack of clarity among resellers as to whether they are required to hold a licence, given that they do not operate any aircraft.

[18] In light of its experiences administering the air licensing provisions and the continued development by industry of new business models, in 2014, the Agency initiated an internal review of whether resellers are operating air services and are therefore required to hold a licence. The Agency subsequently became aware of NewLeaf's plan to market and sell air services, while not operating aircraft, and in August 2015, initiated an inquiry, pursuant to section 81 of the CTA, into whether NewLeaf would be operating an air service and therefore would be required to hold a licence. The Agency decided to complete its review of whether resellers are required to hold a licence as part of this inquiry, and also decided to hold public consultations on the matter.

CONSULTATIONS

[19] On December 21, 2015, the Agency released a consultation paper and invited information and feedback on whether resellers should be considered to operate air services pursuant to section 57 of the CTA. The paper included a description of a possible approach. The Agency received submissions from 26 interested parties and has considered all of them in arriving at its determination. The parties' comments are summarized below.

[20] Some parties commented that resellers should be required to hold a licence to ensure that the licensing requirement does not favour one business model over another; i.e., to provide a level playing field. They submitted that competing businesses holding themselves out to the public as providing the same service should be subject to the same regulatory requirements. In addition, they argued that not requiring resellers to hold a licence would create a competitive disadvantage for licensed air carriers by subjecting them to the additional regulatory requirements and limiting access to foreign capital, given that licensees must be owned and controlled by Canadians. It was also suggested that not obligating resellers to hold a licence could enable persons to structure their businesses in ways that effectively circumvent the licensing requirements.

[21] Parties also commented that resellers should be required to hold a licence when they enter into a contract of carriage with the public to ensure that equal protection is afforded to passengers, regardless of the chosen business model. One party submitted that absent the requirement for the reseller to hold a licence, the lack of a contractual relationship between the air carrier and the passenger would (i) provide no recourse to the passenger against the air carrier should the air carrier not provide the contracted service; (ii) limit the air carrier's liability to the passenger to tort law (i.e., negligence), thereby negating the applicability of the air carrier's insurance to claims by passengers against the reseller; and (iii) limit any available protection for the passenger from the tariff system.

[22] Conversely, other parties commented that resellers should not be required to hold a licence, provided they have contractual arrangements with licensed air carriers. Those parties commented that adequate measures already exist to protect passengers, through existing federal and provincial legislation, including the requirement for air carriers to hold a tariff that applies to passengers.

[23] Additionally, some parties commented that the intent of deregulation was to reduce government control over or intervention in how domestic air services are delivered. It was

argued that by requiring the licensee to hold a Canadian aviation document (CAD), Parliament's intention was for the CTA to only apply to air carriers (i.e., not resellers) and that Parliament deliberately chose not to exert its authority to license resellers. It was further suggested that not requiring resellers to hold a licence would eliminate the different licensing treatment between domestic and international operations and result in increased competition and lower airfares, with the market deciding the success of any proposed air service.

[24] On the matter of what criteria should be used to determine whether a reseller is holding itself out as an air carrier, the following criteria were proposed: commercial control, acceptance of financial risk for the sale of seats, non-disclosure of the aircraft operator, promoting oneself as an air carrier (i.e., images of aircraft with their livery), the use of business name(s) and words/phrases (such as "airlines", "aviation", or similar words) that create the impression that they are an air carrier or airline, and not clearly conveying their role as a reseller of the air carrier's capacity.

ANALYSIS AND DETERMINATIONS

Issue 1: Whether resellers operate air services and should therefore be required to hold an air licence

[25] Paragraph 57(a) of the CTA states that "no person shall operate an air service unless, in respect of that service, the person holds a licence issued under this Part." In interpreting the expression "operate an air service," the words are to be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the legislation, the object of the legislation, and the intention of Parliament (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 at para. 21).

[26] Having carefully considered the wording of the CTA and the ATR (Air Transportation Regulations), the CTA's underlying public policy purposes, and the submissions received during the consultation period, the Agency finds that the most reasonable interpretation of what it means to operate an air service does not capture resellers, as long as they do not hold themselves out to the public as an air carrier operating an air service.

[27] Factors that the Agency took into account in arriving at this interpretation include the plain meaning, context, and history of the statutory language; the national transportation policy, the CTA's passenger protection and Canadian ownership goals; and the manner in which resellers hold themselves out to the public.

The plain meaning, entire context, and history of the statutory language

[28] When considering what would be the most reasonable interpretation of the domestic licensing requirements in respect of resellers, a key starting point was the simple fact that Parliament both refrained from explicitly requiring entities that do not operate aircraft to hold a licence while also developing a licensing regime where the chartered air carrier is required to hold a licence for international services.

[29] The operation of an air service, pursuant to section 57 of the CTA, is the sole criterion that dictates whether a person is required to hold a licence. The interpretation of the expression "operate an air service" should be expected to produce consistent results in establishing whether or not a person is required to hold a licence, irrespective of whether the air service is domestic or international.

[30] Section 59 of the CTA prohibits persons from selling an air service unless a person holds a licence in respect of that air service. While the language in section 57 of the CTA requires a person operating an air service to hold a licence, the language in section 59 does not require the person selling the air service to be a licensee; it only requires that a licence be held in respect of that air service. When read together, these two sections lead to the conclusion that selling an air service to the public does not equate to operating an air service.

[31] Prior to deregulation, air carriers were required to hold either a scheduled or a non-scheduled domestic or international licence to operate air services. Air carriers operating pursuant to a non-scheduled licence were limited to selling their capacity to charterers, who could then resell that capacity on a unit toll or price per seat basis to the public. Resellers were not required to hold a licence. Deregulation removed the distinction between scheduled and non-scheduled for domestic air services, thereby allowing air carriers to distribute their capacity, as they see fit, with a single domestic licence. No new legislative provisions were introduced to require resellers to hold a licence.

[32] For non-scheduled international air services, the ATR (Air Transportation Regulations)'s provisions require licensed air carriers to hold the appropriate charter permit to operate charter flights on behalf of charterers who can resell that aircraft capacity directly to the public without the charterer having to hold a licence. Indeed, pursuant to Parts III and IV of the ATR (Air Transportation Regulations), the air carrier is prohibited from selling its aircraft capacity on a price per seat basis directly to the public as well as from promoting, in any manner, the resalable charter to the public. The resalable charter can only be operated according to the

conditions of a contract entered into between air carriers and charterers that require the charterers to charter the entire passenger seating capacity of an aircraft for resale by them to the public, at a price per seat. In the non-scheduled international context, the air carrier, and not the charterer, is required to hold the licence.

[33] In summary, a plain reading of the statutory provisions, informed by their history and the benefits of consistent interpretation of phrases used for both domestic and international licensing purposes, strongly suggests that Parliament did not intend for domestic licensing requirements to apply to entities that purchase air carriers' aircraft capacity for resale by them to the public, but do not themselves operate aircraft.

National transportation policy

[34] The national transportation policy, as articulated in section 5 of the CTA, provides the overall policy framework for the CTA. The policy instruments, which include legislation, regulations, programs, and actions that flow from the policy, should reflect and reinforce its intent.

[35] The policy declares the CTA's objective to be a competitive, economic and efficient national transportation system that meets the highest practicable safety and security standards. The policy provides for regulation and strategic public intervention to be targeted to situations where desired outcomes cannot be achieved satisfactorily by competition and market forces.

[36] Allowing resellers to offer their products to consumers without having to hold a licence when their partner air carrier already holds one is consistent with section 5, inasmuch as it limits regulatory intervention and administrative burdens and is more likely than not to foster competition and choice in the market.

Passenger protection

[37] The requirement to hold a licence subjects the licensee to a number of passenger protection provisions, as identified in Agency (/eng/ruling/390-A-2013)Decision No. 390-A-2013 (/eng/ruling/390-a-2013). Principal among these is the requirement for a licensed air carrier to:

i. have, display, and apply a clear tariff that addresses certain prescribed matters and that is

reasonable and not unduly discriminatory;

ii. meet the prescribed financial requirements, where applicable, before a licence can be issued, which is intended to reduce the risk that underfunded applicants enter the marketplace; and

iii. hold the prescribed minimum passenger and third party liability insurance coverage.

[38] In weighing the relevance of the licensing provisions' consumer protection purposes to the question of whether those provisions should be interpreted as covering resellers, it is important to note that when passengers buy tickets through a reseller that is not required to hold an air licence, they will still be covered by the terms and conditions of the tariff issued by the chartered air carrier operating the aircraft on which those passengers travel. Further, the licensed air carrier will be required to hold prescribed passenger and third party liability insurance pursuant to section 7 of the ATR (Air Transportation Regulations) and to comply with applicable financial requirements pursuant to section 8.1 of the ATR (Air Transportation Regulations). On the other hand, resellers who do not have to obtain a licence from the Agency will continue to be subject to any provincial travel protection or consumer rights legislation.

[39] Thus, not requiring resellers to obtain a licence does not equate to leaving consumers without protections. The Agency's role is to administer and enforce the CTA as promulgated by Parliament, and its interpretation of the legislation must be reasonable, even if some alternate approach might provide additional protections.

Canadian ownership requirement

[40] The CTA's ownership provisions ensure that only Canadian-owned and controlled enterprises can operate domestic air services, thereby restricting foreign access to the domestic marketplace.

[41] These provisions can still be given full effect in a context where resellers are not required to obtain a licence. Should a non-Canadian reseller enter into an arrangement whereby it owns or control in fact the licensed air carrier, that air carrier would cease to be Canadian and would no longer be eligible to hold a licence. It is also worth noting that non-Canadian charterers have legally operated in Canada for many decades, reselling licensed air carriers' aircraft capacity to the public without any government intervention.

Holding out as an air carrier operating an air service

[42] While the Agency finds that, on balance, the most reasonable interpretation of the statutory licensing provisions and their underlying objectives is that resellers are not operating air services and therefore, are not required to hold a licence, this will only be the case as long as those resellers do not hold themselves out to the public as an air carrier operating an air service. The Agency finds that if they choose to do so, resellers would be operating an air service and would be required to hold a licence, thereby ensuring that the consumer protection purposes of the legislation are not undermined.

[43] In determining whether a person is holding themselves out as an air carrier operating an air service, the Agency will consider whether the person promotes themselves as an air carrier, including providing images of aircraft with their livery and using business name(s) and words/phrases that create the impression that they are an air carrier.

[44] Lack of clear disclosure on its Web site, marketing material, and on tickets it issues of the identity of the operating air carrier would be indicative of the reseller holding itself out as an air carrier operating the air service. Web sites and marketing materials that use business names (e.g., "air", "air lines", "airlines" "airways", "aviation", "fly", "jet", or "sky") or phrases and words (e.g., "our fleet of aircraft", "our crew", "we fly") that convey that the reseller is an air carrier operating the air service would also be indicative of holding oneself out as operating an air service. In contrast, clearly identifying the air carrier that will operate the air service, that the reseller's role is limited to reselling the air carrier's capacity, and that the air carrier's tariff's terms and conditions apply to the flight would not be indicative of a person holding themselves out as an air carrier operating an air service.

[45] The Agency notes that a passive approach by the reseller that neither clarifies nor refutes any impression by the public that the reseller is an air carrier operating an air service could also be indicative of the reseller holding itself out as an air carrier operating an air service. The public should be clearly informed about whether they are contracting and dealing with the operator of the air service so that they can assess any risk and make informed decisions.

[46] Where, in the opinion of the Agency, based on all of the relevant facts, the public is led to believe that the reseller is the air carrier operating the air service, the Agency will require the reseller to hold a licence and to respect all of its requirements. The Agency, in making a determination as to whether a reseller is holding itself out to the public as an air carrier operating an air service, will apply the considerations listed above, as well as any other

relevant considerations it might identify from time to time, according to the facts of each case, and will weigh all facts together to make a determination.

Issue 2 – Whether NewLeaf will operate an air service and therefore be required to hold an air licence

[47] Having determined that resellers do not operate air services and are not required to hold a licence, as long as they do not hold themselves out to the public as an air carrier operating an air service, the Agency now turns to the question of whether NewLeaf - based on the determination above and the information before the Agency about its proposed business model - will operate an air service and would therefore be required to obtain a licence.

[48] On August 21, 2015, the Agency initiated an inquiry to determine whether NewLeaf's business proposal would constitute an air service for which a licence is required, and an Inquiry Officer was appointed to conduct that inquiry. The Inquiry Officer, in turn, sought information concerning the roles and responsibilities of NewLeaf and Flair Airlines Ltd. (Flair) in their business proposal.

[49] NewLeaf's response to the Inquiry Officer stated that it would initially operate as a "charterer" or a "tour operator" as defined in the ATR (Air Transportation Regulations). NewLeaf indicated that it would market and sell air services to the public, on its own behalf, and enter into a charter arrangement with Flair, a licensed air carrier, to operate the flights. NewLeaf further indicated that it might sell the air services as part of a packaged or bundled tour product. NewLeaf would be responsible from the check-in counter to the jet bridge door and would operate baggage handling services or contract them to a third party operating at each airport. NewLeaf would not acquire, lease, or operate any aircraft or other related airport infrastructure.

[50] NewLeaf stated that it would make it evident to the consumer that NewLeaf would be responsible for ticket sales and customer service, and that Flair would operate the air services. It was possible, however, that Flair's aircraft or other infrastructure would include some NewLeaf livery features to highlight the collaboration between the two parties.

[51] In January 2016, Canada Jetlines Ltd. and 1263343 Alberta Inc. carrying on business as EnerJet made unsolicited representations to the Agency with respect to NewLeaf. In summary, they submitted that NewLeaf had commercial control over the air service and was, therefore, operating an air service without a licence. They also argued that Newleaf was representing itself as an air carrier to the public, the media, and their customers without

holding a licence. The Agency accepted the representations as part of its inquiry into whether NewLeaf would operate an air service and provided NewLeaf with an opportunity to respond by March 11, 2016. NewLeaf did not provide a response.

[52] The Agency has reviewed all available information and finds that if the proposed business model is followed, NewLeaf would be a reseller that does not operate an air service and therefore does not need to obtain a licence. The Agency notes, however, that if NewLeaf were to hold itself out to the public as an air carrier operating an air service, it would be required to hold a licence.

[53] It is noted that during the brief period in January 2016 when NewLeaf actively promoted its services through its Web site, it included images of aircraft painted in its livery. While NewLeaf is no longer promoting its services and has since removed these images from its Web site, the use of similar images in the future would suggest that NewLeaf would be holding itself out as an air carrier operating an air service.

[54] It is also noted that while NewLeaf has referred to itself as a travel company, there is public perception that NewLeaf is an air carrier. This was evident in repeated press and news articles about NewLeaf that referred to it as an air carrier. The consumer protection purposes of the CTA make it important that the public understand whether they are dealing with a reseller or an air carrier and, where there is confusion, the reseller should take appropriate actions to correct any misperceptions.

[55] Finally, the Agency notes that Flair, as a licensee operating the air service to be resold by NewLeaf, must comply with the licensing regime, including having a tariff that respects legislative and regulatory requirements related to consumer protection.

CONCLUSION

[56] For the reasons set out above, the Agency finds that resellers do not operate air services and are not required to hold a licence as long as they do not hold themselves out to the public as air carriers operating an air service.

The Agency also finds that NewLeaf will not be considered to operate an air service and required to hold a licence, as long as it operates in a manner consistent with the business proposal summarized in this Determination and does not hold itself out to the public as an air carrier operating an air service.

Member(s)

Scott Streiner

Sam Barone

P. Paul Fitzgerald

Rulings

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Date modified:
2016-03-30

Court File No.:

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Moving Party

– and –

CANADIAN TRANSPORTATION AGENCY and NEWLEAF TRAVEL COMPANY INC.

Respondents

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 Courts 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 a decision made by the Canadian Transportation Agency (the "Agency") dated March 29, 2016 and bearing Decision No. 100-A-2016 (the "Impugned Decision");

2. An Order expediting the present motion;

3. An Order expediting the proposed appeal, and directing that it be heard together with the application for judicial review in Federal Court of Appeal File No. A-39-16;

4. Costs and/or reasonable out-of-pocket expenses of this motion forthwith and in any event of the cause; and

5. 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. Paragraph 57(a) of the *Canada Transportation Act* (the "*CTA*") prohibits operating an air service without a licence issued by the Agency under Part II of the *CTA*. Subsection 55(1) of the *CTA* defines "air service" as a service provided by means of an aircraft, that is publicly available for the transportation of passengers or goods, or both.

2. Through the licensing process and conditions set out in the *CTA*, Parliament imposed numerous economic and consumer protectionist conditions on operators of air service within Canada:

   (a) Canadian ownership, prescribed liability insurance coverage, and prescribed financial fitness (s. 61);

   (b) notice period for discontinuance or redaction of certain services (ss. 64-65);

   (c) prohibition against unreasonable fares or rates on routes served by only one provider (s. 66); and

   (d) regulatory oversight of the contractual relationship between the travelling public and the service provider (ss. 67, 67.1, and 67.2).

3. Section 58 of the *CTA* provides that a licence to operate an air service is not transferable.

The "Consultation on the Requirement to Hold a License"

4. An "Indirect Air Service Provider" ("IASP" or "reseller") is a person who has commercial control over an air service and makes decisions on matters such as routes, scheduling, and pricing, but performs the transportation of passengers with aircraft and flight crew rented from another person (see para. 11 of the Impugned Decision **[Tab 1]**).

5. Unlike travel agents, IASPs enter into agreements to transport passengers by air in their own name, rather than as agents for third parties.

6. Since 1996 and up until recently, the Agency had consistently held that a person with commercial control over a domestic air service "operates" it within the meaning of the *CTA*, and thus required them to hold a domestic licence. In doing so, the Agency had been following the so-called *1996 Greyhound Decision*.

7. On December 23, 2015, the Agency announced that it would conduct a public consultation on the requirement for IASPs to hold a licence, and that the Agency was considering implementing the following "Approach under consideration":

> Indirect Air Service Providers would not normally be required to hold a licence to sell air services directly to the public, as long as they charter licenced air carriers to operate the flights. This would apply to the operation of domestic and international air services. As these providers would not be subject to the licensing requirements, contracts they enter into with the public would not be subject to tariff protection, nor would they be subject to the financial and Canadian ownership requirements.
>
> [Emphasis added.]

NewLeaf

8. In January 2016, NewLeaf began to advertise and sell tickets for flights within Canada without holding any licence to operate an air service, but then suspended operations due to concerns about its lack of licence.

9. The Agency had been aware of NewLeaf's activities since spring 2015. It began an inquiry about whether NewLeaf required a licence at that time, and it turns out that the "Consultation on the Requirement to Hold a License" was commenced for the sake of NewLeaf.

Application for judicial review (Federal Court of Appeal File No.: A-39-16)

10. On January 22, 2016, Dr. Gábor Lukács, the Moving Party, brought an application for judicial review pursuant to s. 28 of the *Federal Courts Act* in respect of the "Approach under consideration" of the Agency that purports to exclude IASPs from the statutory requirement of holding a licence. Lukács sought, among other things:

    (a) a declaration that the Agency has no jurisdiction to make a decision or order that has the effect of exempting and/or excluding IASPs from the statutory requirement of holding a licence; and

    (b) a prohibition enjoining the Agency from making such a decision or order.

11. Lukács and the Agency agreed to expedite the application for judicial review and this Honourable Court has agreed to do so (*Lukács v. Canadian Transportation Agency*, 2016 FCA 103, para. 24).

The Impugned Decision and grounds for the proposed appeal

12. On March 29, 2016, without waiting for a determination of the application for judicial review brought by Lukács, the Agency issued Decision No. 100-A-2016 (the "Impugned Decision"), in which it concluded that:

    (a) IASPs (resellers) are not required to hold a licence as long as they do not hold themselves out to the public as an air carrier operating an air service; and

    (b) NewLeaf is not required to hold a licence.

13. The Agency erred in law and rendered an unreasonable decision by:

    (a) departing from the jurisprudence of the past two decades on the requirement to hold a licence, without explaining why;

    (b) erroneously assuming that the distinction between scheduled and non-scheduled domestic air services has been eliminated, contrary to the explicit language of s. 64(4) of the *CTA*;

    (c) basing its decision on the false premise of "deregulation of the aviation industry," contrary to the explicit language of ss. 64, 65, and 66 of the *CTA*;

    (d) interpreting the requirement to hold a licence in a manner that renders ss. 64, 65, and 66 of the *CTA* futile; and

    (e) interpreting the requirement to hold a licence in a manner that defeats the economic and consumer protectionist purposes for which the *CTA* was enacted.

14. The Agency exceeded it jurisdiction by making the Impugned Decision, which has the effect of relieving IASPs from the requirement of being Canadian and from holding prescribed liability insurance coverage, contrary to the explicit language of s. 80(2) of the *CTA*.

Grounds for expediting and consolidating hearings

15. NewLeaf intends to relaunch with its first flight taking off in late spring or summer 2016.

16. Allowing IASPs, and NewLeaf in particular, to operate without a licence exposes the public to significant risk from which Parliament intended to protect the public:

    (a) Without the financial fitness requirements, there is a risk that the IASP lacks the financial means necessary to operate the flights on which it has sold tickets.

    (b) Without the insurance coverage requirements, there is a risk that the IASP is unable to meet is liabilities in the case of a disaster (as happened in the case of the Lac-Mégantic rail disaster).

    (c) Without the minimal protection that the terms of a tariff may offer, there is a risk that passengers, who have no contractual relationship with the third party operating the aircraft, are left with no effective remedy if their flight is overbooked, delayed, or cancelled, or if their baggage is damaged.

17. The arguments raised in the application for judicial review and the proposed appeal overlap, and the Agency heavily relies on the Impugned Decision in its opposition to the application for judicial review. Thus, hearing the application for judicial review and the proposed appeal together will save valuable judicial resources.

Statutes and regulations relied on

18. Sections 7, 8.1, 8.2, 8.5, and 107 of the *Air Transportation Regulations*, S.O.R./88-58.

19. Sections 41, 53, 57-67.2, 80, 86, and 174 of the *Canada Transportation Act*, S.C. 1996, c. 10.

20. Rules 317, 318, 350, 352, and 369 of the *Federal Courts Rules*, S.O.R./98-106.

21. Such further and other grounds as the Moving Party may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used for the motion:

1. Affidavit of Dr. Gábor Lukács, affirmed on April 18, 2016.

2. Materials in the possession of the Agency to be produced pursuant to Rules 317, 318, and 350 of the *Federal Courts Rules*.

3. Such further and additional materials as the Moving Party may advise and this Honourable Court may allow.

The Moving Party requests the Canadian Transportation Agency to send a certified copy of the following material that is not in the possession of the Moving Party, but is in the possession of the Canadian Transportation Agency, to the Moving Party and to the Registry:

1. All documents in Case No. 15-03590.

2. The "confidential decision" of the Agency, dated August 21, 2015, referenced in Letter Decision No. LET-A-3-2016 **[Tab 4]** and in paragraph 48 of the Impugned Decision.

3. All correspondence sent and received by the Inquiry Officer and/or Agency staff acting on behalf of the Inquiry Officer in relation to the inquiry;

4. The Preliminary Report of the Inquiry Officer, referenced in Letter Decision No. LET-A-3-2016 **[Tab 4]**.

5. The final report of the Inquiry Officer.

6. NewLeaf's response to the Inquiry Officer, referenced at paragraph 49 of the Impugned Decision.

April 18, 2016

DR. GÁBOR LUKÁCS

Halifax, NS

lukacs@AirPassengerRights.ca

Moving Party

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

Ms. Liz Barker, General Counsel and Secretary
Tel: 819-997-0099
Fax: 819-953-5253

AND TO: **NEWLEAF TRAVEL COMPANY INC.**
1 Lombard Place, Suite 2200
Winnipeg, MB R3B 0X7

newleaf
Low fare. Here to there.

WINTER 2016 SCHEDULE

Effective February 12, 2016 to May 1, 2016 unless otherwise stated
All flights are non-stop

Frequency: Monday = M , Tuesday = Tu, Wednesday = W, Thursday = Th, Friday = F, Saturday = S, Sunday = Su

DEPARTURE CITY: ABBOTSFORD (YXX)				
Flight #	**Depart**	**Arrival City**	**Arrive**	**Frequency**
500	7:00	Regina (YQR)	9:09	M,S (eff Mar 14)
104	7:00	Winnipeg (YWG)	11:38	F,Su (eff Mar 14)
150	14:45	Winnipeg (YWG)	19:23	W (ends Mar 13)
550	12:30	Saskatoon (YXE)	15:22	M,F (eff Mar 14)

DEPARTURE CITY: KELOWNA (YLW)				
Flight #	**Depart**	**Arrival City**	**Arrive**	**Frequency**
100	8:00	Winnipeg (YWG)	12:23	W
102	8:00	Winnipeg (YWG)	12:23	S
200	8:00	Regina (YQR)	11:42 (Feb 12-Mar 12) 10:42 (Mar 13)	Su (ends Mar 13)
202	7:00	Saskatoon (YXE)	10:36 (Feb 12-Mar 12) 9:36 (Mar 13)	M,F
156	20:35	Hamilton (YHM)	3:40	Su

DEPARTURE CITY: SASKATOON (YXE)				
Flight #	**Depart**	**Arrival City**	**Arrive**	**Frequency**
501	11:40 (Feb 12-Mar 12) 10:40 (Mar 13)	Abbotsford (YXX)	11:42	M,F
400	11:30 (Feb 12-Mar 12) 10:30 (Mar 13)	Hamilton (YHM)	15:34	M,F
251	17:10 (Feb 12-Mar 12) 16:10 (Mar 13)	Kelowna (YLW)	16:58	M,F

DEPARTURE CITY: REGINA (YQR)				
Flight #	**Depart**	**Arrival City**	**Arrive**	**Frequency**
402	10:05 (Feb 12-Mar 12) 9:05 (Mar 13)	Hamilton (YHM)	13:57	Th
253	12:25 (Feb 12-Mar 12) 11:25 (Mar 13)	Kelowna (YLW)	12:23	Su (ends Mar 13)
551	15:50	Abbotsford (YXX)	16:53	M,S (eff Mar 14)

DEPARTURE CITY: WINNIPEG (YWG)				
Flight #	**Depart**	**Arrival City**	**Arrive**	**Frequency**
161	13:10	Abbotsford (YXX)	14:05	W (ends Mar 13)
159	16:10	Abbotsford (YXX)	17:05	F,Su (eff Mar 14)
152	13:05	Hamilton (YHM)	16:22	W
154	20:40	Hamilton (YHM)	23:57	S
153	13:05	Kelowna (YLW)	13:49	S
151	16:25	Kelowna (YLW)	17:09	Th

DEPARTURE CITY: HAMILTON (YHM)				
Flight #	**Depart**	**Arrival City**	**Arrive**	**Frequency**
401	8:00	Saskatoon (YXE)	10:39 (Feb 12-Mar 12) 9:39 (Mar 13)	M,F
450	16:15	Halifax (YHZ)	19:24	M,F
157	18:00	Kelowna (YLW)	19:54	Su
101	10:30	Winnipeg (YWG)	12:29	W
155	18:00	Winnipeg (YWG)	19:59	S
403	7:00	Regina (YQR)	9:25 (Feb 12-Mar 12) 8:25 (Mar 13)	Th

DEPARTURE CITY: HALIFAX (YHZ)				
Flight #	**Depart**	**Arrival City**	**Arrive**	**Frequency**
451	20:05	Hamilton (YHM)	21:41	M,F

Introductory Fares

Kelowna	Saskatoon	$ 89
Kelowna	Regina	$ 89
Abbottsford	Saskatoon	$ 89
Abbotsford	Regina	$ 89
Kelowna	Winnipeg	$ 99
Winnipeg	Hamilton	$ 99
Hamilton	Halifax	$ 99
Hamilton	Regina	$ 119
Hamilton	Saskatoon	$ 119
Abbottsford	Winnipeg	$ 119
Hamilton	Kelowna	$ 149

One way fares each way inclusive of all taxes and fees

Office des transports du Canada

Canadian Transportation Agency

LET-A-3-2016

February 5, 2016 Case No. 15-03590

BY E-MAIL: jim.young@newleafcorp.ca

NewLeaf Travel Company Inc.
128 - 2000 Wellington Ave.
Winnipeg, Manitoba
R3H 1C2

Attention: Jim Young, Chief Executive Officer

Dear Mr. Young:

Re: Inquiry into whether NewLeaf Travel Company Inc. is proposing to operate an air service

By confidential decision dated August 21, 2015 (Decision), the Canadian Transportation Agency (Agency) initiated an inquiry, pursuant to section 81 of the *Canada Transportation Act*, S.C. 1996, c. 10, as amended (CTA) into whether NewLeaf Travel Company Inc. (NewLeaf) is proposing to operate an air service and, therefore, required to hold a licence pursuant to section 57 of the CTA (Inquiry).

Mandate of the Inquiry Officer

The Agency appointed Ghislain Blanchard, Director General, Industry Regulation and Determinations Branch (the Inquiry Officer), to conduct the Inquiry and report his findings to the Agency. The Inquiry Officer's mandate was set out in terms of reference attached to the Decision.

On September 23, 2015, the Inquiry Officer presented a Preliminary Report to the Panel which summarized NewLeaf's confidential responses to the Inquiry Officer and explains the approach NewLeaf will employ to offer the air services to the public. The Preliminary Report states that any conclusion on whether NewLeaf is required to hold a licence is subject to the Panel's consideration of the appropriate criteria to be used in such cases and the application of those criteria to the facts surrounding NewLeaf's proposed operations.

On December 21, 2015, the Agency launched consultations on the broader issue of whether companies that bulk purchase all seats on planes and then resell those seats to the public, but do not operate any aircraft, should be required to hold a licence.

The Inquiry Officer's mandate effectively concluded with the launch of these consultations. By this decision, the Agency formally confirms there is no longer a role for the Inquiry Officer to play under the Inquiry and confirms the conclusion of his mandate. While the Agency continues the Inquiry and will make a determination in due course, it will do so without the Inquiry Officer.

Submissions from external parties

A number of submissions were filed as part of the above-noted consultation process and have been posted on the Agency's internet site.

In addition, two unsolicited submissions from Enerjet and Jetlines were received by an Agency designated enforcement officer, in which the companies express their views about the Agency's licensing requirement as it applies to NewLeaf's proposed operation.

Whether NewLeaf should hold a licence for the service it is proposing to operate is a regulatory matter that is currently being addressed through the Inquiry and is not subject to the Agency's Dispute Adjudication Rules contained in the *Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)*, SOR/2014-104. As such, while Enerjet and Jetlines indicated that their submissions are "complaints", the Agency is of the view that they are most appropriately treated as information that may have some relevance to the Inquiry. The Agency has not, however, determined the weight that it will give to these submissions, nor has it granted any further rights to either Enerjet or Jetlines to participate in the Agency's Inquiry.

Enerjet's submission is enclosed with this decision. As Jetlines' submission is marked confidential, NewLeaf must have any individuals who will have access to Jetlines' submission sign and provide the Agency with the enclosed undertaking of confidentiality before the Agency can disclose it.

NewLeaf has until February 19, 2016 to provide any comments on these submissions as well as any other information or documentation that it wishes the Agency to consider before making a determination on the Inquiry.

BY THE AGENCY:

(signed) (signed)

Scott Streiner
Member

Sam Barone
Member

Encl.

Request for Disclosure and Undertaking

Request for Disclosure

1. I, Jim Young, President and CEO of NewLeaf Travel Company Inc. (NewLeaf), request that the Canadian Transportation Agency (Agency) provide me with the following document submitted in the context of the Agency's inquiry (Agency Case No. 15-03590) into whether NewLeaf is proposing to operate an air service:

   Confidential submission filed by Jetlines dated January 14, 2016

2. I request permission to provide the document to the following individuals who need access to the document in order that NewLeaf may respond:

   (please list names and position of each individual)

_____

Jim Young, CEO, NewLeaf Travel Company Inc. Date:

Undertaking

1. I acknowledge that the document is confidential and that it is not to be disclosed to anyone other than as permitted and in accordance with this undertaking.

2. I will disclose the document only to those persons identified above who are employed by NewLeaf and who are required to see the document in order that NewLeaf can effectively respond and to no one else.

3. I undertake to not disclose this document to any other person and will inform the Agency immediately if any impermissible disclosure occurs, for whatever reason.

_____

Jim Young, CEO, NewLeaf Travel Company Inc. Date:

_____

, NewLeaf Travel Company Inc. Date:

_____

, NewLeaf Travel Company Inc. Date:

Court File No.:

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Moving Party

– and –

CANADIAN TRANSPORTATION AGENCY and NEWLEAF TRAVEL COMPANY INC.

Respondents

AFFIDAVIT OF DR. GÁBOR LUKÁCS
(Affirmed: April 18, 2016)

I, Dr. Gábor Lukács, of the City of Halifax in the Regional Municipality of Halifax, in the Province of Nova Scotia, AFFIRM THAT:

1. I am the Moving Party in the present proceeding. As such, I have personal knowledge of the matters to which I depose.

THE MOVING PARTY

2. I am a Canadian air passenger rights advocate. My work and public interest litigation have been recognized by the Federal Court of Appeal in a number of judgments:

   (a) *Lukács v. Canada (Transport, Infrastructure and Communities)*, 2015 FCA 140, at para. 1;

   (b) *Lukács v. Canada (Transportation Agency)*, 2014 FCA 76, at para. 62; and

   (c) *Lukács v. Canada (Transport, Infrastructure and Communities)*, 2015 FCA 269, at para. 43.

3. My activities as an air passenger rights advocate also include:

   (a) filing approximately two dozen successful regulatory complaints with the Canadian Transportation Agency ("**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;

   (c) referring passengers mistreated by airlines to legal information and resources.

4. On September 4, 2013, the Consumers' Association of Canada recognized my achievements in the area of air passenger rights by awarding me its Order of Merit for "singlehandedly initiating Legal Action resulting in revision of Air Canada unfair practices regarding Over Booking."

THE "CONSULTATION ON THE REQUIREMENT TO HOLD A LICENSE"

5. On December 23, 2015, just one day before Christmas Eve, the Agency announced that it would conduct a public consultation on the requirement for Indirect Air Service Providers (IASPs) to hold a license. The Agency's announcement stated that the Agency was considering implementing the following "Approach under consideration":

> Indirect Air Service Providers would not normally be required to hold a licence to sell air services directly to the public, as long as they charter licenced air carriers to operate the flights. This would apply to the operation of domestic and international air services. As these providers would not be subject to the licensing requirements, contracts they enter into with the public would not be subject to tariff

protection, nor would they be subject to the financial and Canadian ownership requirements.

[Emphasis added.]

A copy of the announcement and the "Details of the consultation" referenced in it are attached and marked as **Exhibit "A"**.

APPLICATION FOR JUDICIAL REVIEW (FILE NO.: A-39-16)

6. On January 22, 2016, I brought an application for judicial review pursuant to s. 28 of the *Federal Courts Act* in respect of the "Approach under consideration" of the Agency that purports to exclude IASPs from the statutory requirement of holding a licence. A copy of the Notice of Application, filed under Federal Court of Appeal File No. A-39-16, is attached and marked as **Exhibit "B"**.

7. The Agency served and filed the affidavit of Ms. Carole Girard, sworn on February 24, 2016, in response to the application for judicial review. A copy of the affidavit of Ms. Girard is attached and marked as **Exhibit "C"**.

THE IMPUGNED DECISION

8. On March 29, 2016, without waiting for a determination of the application for judicial review, the Agency issued Decision No. 100-A-2016 (the "Impugned Decision"), in which it concluded that:

   (a) IASPs (resellers) are not required to hold a licence as long as they do not hold themselves out to the public as an air carrier operating an air service; and

(b) NewLeaf Travel Company Inc. is not required to hold a licence.

9. I am seeking leave to appeal the Impugned Decision on the grounds that it is unreasonable and that the Agency exceeded its jurisdiction.

NEWLEAF INTENDS TO RELAUNCH

10. I believe that NewLeaf Travel Company Inc. intends to relaunch with its first flight taking off in late spring or summer 2016. The source of my belief is the public statement of Mr. Jim Young, the CEO of NewLeaf, quoted in a report by The Canadian Press, a copy of which is attached and marked as **Exhibit "D"**.

AFFIRMED before me at the City of Halifax
in the Regional Municipality of Halifax
on April 18, 2016.

_____

_____
Dr. Gábor Lukács

Halifax, NS
Tel:
lukacs@AirPassengerRights.ca

This is **Exhibit "A"** to the Affidavit of Dr. Gábor Lukacs affirmed before me on April 18, 2016

_____

Signature

Consultation on the requirement to hold a licence

The Agency is asking the aviation industry and other interested stakeholders whether persons who have commercial control over an air service, but do not operate aircraft (indirect air service providers), should be required to hold a licence.

Details of the consultation (/eng/consultation/consultation-requirement-hold-a-licence)

Date modified:
2015-12-23

Consultation on the requirement to hold a licence

The Canadian Transportation Agency (Agency) is requesting comments from the aviation industry and other interested stakeholders on whether persons who have commercial control over an air service, but do not operate aircraft (Indirect Air Service Providers), should be required to hold a licence.

Background

The Canadian Transportation Agency (Agency) regulates the licensing of air transportation pursuant to Part II of the *Canada Transportation Act* (http://laws-lois.justice.gc.ca/eng/acts/C-10.4/index.html) (Act) and the *Air Transportation Regulations* (http://laws-lois.justice.gc.ca/eng/regulations/SOR-88-58/index.html).

The Act requires that persons hold the appropriate licence before they can operate a publicly available air transportation service (air service), which subjects these persons to a number of economic, consumer and industry protection safeguards, including with respect to tariffs (https://www.otc-cta.gc.ca/eng/tariffs), financial requirements (https://www.otc-cta.gc.ca/eng/publication/financial-requirements-guide-air-licence-applicants), and Canadian ownership (https://www.otc-cta.gc.ca/eng/canadian-ownership). When more than one person is involved in the delivery of the air service, it is important to determine who is operating the air service and is required, as such, to comply with the licensing requirements.

When the *National Transportation Act, 1987* (subsequently consolidated and revised by the Act) was introduced in 1987, it ushered in the deregulation of the aviation industry. At this time, the distinction between chartered and scheduled air carriers was eliminated for domestic air services. Industry subsequently developed new and innovative approaches to the delivery of air services that did not always fit into the Act's licensing parameters. One such approach is the Indirect Air Service Provider model, where persons have commercial control over an air service and make decisions on matters such as on routes, scheduling, pricing, and aircraft to be used, while charter air carriers operate flights on their behalf.

The Agency's current approach to determining which person is operating a domestic air service originated from its 1996 Greyhound Decision (https://www.otc-cta.gc.ca/eng/ruling/232-a-1996) and requires the person with commercial control to hold the licence, irrespective of whether the

person operates any aircraft. As of December 1, 2015, 16 persons that did not operate any aircraft held licences providing them the authority to operate domestic air services.

For international air services, the Regulations require the air carrier, not the charterer, to hold a licence. Consequently, under the current approach, a person who is in commercial control of an air service and does not operate aircraft must hold the licence for domestic, but not for international air services.

All licensed air carriers are required to hold a Canadian Aviation Document (CAD) (http://www.tc.gc.ca/eng/civilaviation/publications/tp8880-chapter1-section3-5193.htm) issued by the Minister of Transport. When a person does not operate any aircraft, they are neither required nor entitled to obtain a CAD. The Agency has issued domestic licences to Indirect Air Service Providers on the basis that the CAD requirement is met by the charter air carrier.

The Agency, after careful review and study, is considering a change in its approach to determining who is operating an air service in situations where a person has commercial control over an air service, but does not operate aircraft. It is important to note that a review of the Act (http://www.tc.gc.ca/eng/ctareview2014/canada-transportation-act-review.html) is underway and may recommend changes to the legislative framework. Regulatory reforms may also be contemplated.

Approach under consideration

Indirect Air Service Providers would not normally be required to hold a licence to sell air services directly to the public, as long as they charter licenced air carriers to operate the flights. This would apply to the operation of domestic and international air services. As these providers would not be subject to the licensing requirements, contracts they enter into with the public would not be subject to tariff protection, nor would they be subject to the financial and Canadian ownership requirements.

However, the Agency would preserve its discretion to apply legislative and regulatory requirements in a purposive manner to ensure that the objectives underpinning the air licensing regime continue to be met. Accordingly, should a person who does not operate aircraft hold themselves out to the public as an air carrier and not a charterer or structure their business model to circumvent the licensing requirements, the Agency could determine that they are operating the air service. Considerations in any such determination could include the manner in which they hold themselves out to the public, whether their involvement goes beyond a typical contractual charter arrangement, and the extent to which their operations are integrated into those of the air carrier.

When an air service is marketed and sold by an air carrier that has commercial control and the flights are operated by another air carrier, pursuant to a wet lease, code share, blocked space, capacity purchase agreement or other similar agreement, the Agency will continue to require the air carrier in commercial control to hold the licence for that air service, consistent with existing regulatory requirements.

Call for comments

The Agency invites interested stakeholders to submit their comments on the Agency's proposed approach, including with respect to the following questions:

- Whether Indirect Air Service Providers should be required to hold a licence to sell their services directly to the public, in their own right. Provide a clear explanation for your position;
- What criteria the Agency should consider in determining whether an Indirect Air Service Provider is holding itself out as an air carrier, and therefore, should be required to hold the licence; and
- What regulatory amendments, if any, should be contemplated to clarify who is operating an air service and is required, as such, to hold a licence.

Participants may submit **written** comments no later than the end of the business day on January 22, 2016.

All submissions made as part of this consultation process will be considered public documents and, as such, may be posted on the Agency's website.

How to Participate

Submit your comments to consultations@otc-cta.gc.ca (mailto:consultations@otc-cta.gc.ca%20).

Contact:
John Touliopoulos - Manager, Financial Evaluation Division (http://geds20-sage20.ssc-spc.gc.ca/en/GEDS20/?pgid=015&dn=cn%3DTouliopoulos%5C%2C%20John%2C%20ou%3DRACD-DARC%2C%20ou%3DIRDB-DGRDI%2C%20ou%3DCTA-OTC%2C%20o%3DGC%2C%20c%3DCA)
Telephone:
819-953-8960
Email:
john.touliopoulos@otc-cta.gc.ca

Latest Milestones

Title	Date
Deadline for submissions	January 22, 2016

Date modified:

2015-12-21

This is **Exhibit "B"** to the Affidavit of Dr. Gábor Lukacs affirmed before me on April 18, 2016

_____

Signature

Court File No.:

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Applicant

– and –

CANADIAN TRANSPORTATION AGENCY

Respondent

NOTICE OF APPLICATION

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED by the Applicant. The relief claimed by the Applicant appears on the following page.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the Applicant. The Applicant requests that this application be heard at the Federal Court of Appeal in **Halifax, Nova Scotia**.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must prepare a notice of appearance in Form 305 prescribed by the *Federal Courts Rules* and serve it on the Applicant's solicitor, or where the applicant is self-represented, on the Applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the *Federal Courts Rules*, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

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

Date: January 22, 2016 Issued by: _____

Address of
local office: Federal Court of Appeal
1801 Hollis Street
Halifax, Nova Scotia

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

Ms. Liz Baker, General Counsel and Secretary
Tel: (819) 997 9325
Fax: (819) 997 0099

APPLICATION

This is an application for judicial review in respect of the ongoing "Consultation on the requirement to hold a licence" of the Canadian Transportation Agency ("Agency") and specifically the "Approach under consideration" that purports to exclude Indirect Air Service Providers ("IASP") from the statutory requirement of holding a license.

The Applicant makes application for:

1. a declaration that:

    (a) the Canadian Transportation Agency has no jurisdiction to make a decision or order that has the effect of exempting and/or excluding Indirect Air Service Providers from the statutory requirement of holding a license; and

    (b) Indirect Air Service Providers can be excluded from the statutory requirement to hold a license only:

        i. if the Canadian Transportation Agency makes regulations to that effect and obtains the approval of the Governor in Council as per ss. 86 and 36(1) of the Act; or

        ii. if Parliament amends the *Canada Transportation Act*, S.C. 1996, c. 10.

2. an interim and permanent prohibition, enjoining the Canadian Transportation Agency from making a decision or order that purports to exempt and/or exclude Indirect Air Service Providers from the statutory requirement of holding a license;

3. costs and/or reasonable out-of-pocket expenses of this application; and

4. such further and other relief or directions as the Applicant may request and this Honourable Court deems just.

The grounds for the application are as follows:

1. The present application challenges the attempt of the Canadian Transportation Agency ("Agency") to circumvent the will of Parliament and engage in a legislative exercise under the guise of decision-making.

A. Licensing requirements under the *CTA*

2. In enacting the *Canada Transportation Act*, S.C. 1996, c. 10 ("*CTA*"), Parliament chose to impose a regulatory scheme on air transportation to establish commercial standards and consumer protection measures:

   (a) Operating an air service requires having:

      i. a license issued under the *CTA* (s. 57(a));

      ii. a Canadian aviation document (s. 57(b)); and

      iii. prescribed liability insurance coverage (s. 57(c)).

   (b) A person seeking a license to operate air service within Canada ("domestic service") must meet additional conditions, including:

      i. being a Canadian (s. 61(a)(i)); and

      ii. prescribed financial fitness requirements (s. 61(a)(iv)).

   (c) A domestic license holder is required to establish and publish a Tariff setting out its terms and conditions with respect to a prescribed list of issues. The Tariff is the contract of carriage between the consumers and the licence holder, and can be enforced and reviewed by the Agency (ss. 67, 67.1, and 67.2).

   (d) A license to operate air service is not transferable (s. 58).

3. The *Air Transportation Regulations*, S.O.R./88-58 ("*ATR*"), promulgated pursuant to s. 86 of the *CTA* and with the approval of the Governor in Council, prescribes the liability insurance coverage (s. 7) and financial fitness (s. 8.1) requirements for licences, as well as the content of the domestic Tariff (s. 107).

4. Any contravention of the regulatory scheme is an offence punishable on summary conviction (s. 174 of the *CTA*). This legislative choice underscores the significant societal interest in ensuring full compliance.

B. The decision-making powers of the Agency

5. The decision-making powers of the Agency under the *CTA* include:

   (a) issuing licences (ss. 61 and 69);

   (b) granting exemptions, by way of orders, from certain licensing requirements on a case-by-case basis (s. 80); and

   (c) ensuring compliance with licensing requirements (s. 81).

6. Subsection 80(2) of the *CTA* prohibits the Agency from granting an exemption that has the effect of relieving a person from any of the following core requirements:

   (a) being a Canadian;

   (b) having a Canadian aviation document; and

   (c) having prescribed liability insurance coverage.

C. The regulation-making powers of the Agency

7. Section 86 of the *CTA* permits the Agency to make regulations:

   (a) defining words and expressions for the purposes of Part II of the *CTA* (s. 86(1)(k)); and

   (b) excluding a person from any of the requirements of Part II of the *CTA* (s. 86(1)(l)).

8. Pursuant to subsection 36(1) of the *CTA*, the Agency can exercise its regulation-making powers only after it has sought and obtained the approval of the Governor in Council.

D. Indirect Air Service Providers are required to hold a license

9. An “Indirect Air Service Provider” (IASP) is a person who has commercial control over an air service, but does not operate aircraft.

10. In practical terms, an IASP rents the aircraft and its crew from another person or bulk purchases all seats on the aircraft, and then (re)sells the seats to the public. Travel agents are distinguished from an IASP by the following:

    (a) an IASP contracts to transport passengers in its own name, while travel agents are not parties to the contract of carriage; and

    (b) travel agents do not have commercial control over the air service.

11. In 1996, the case of WestJet Airlines Ltd. against Greyhound Lines of Canada Ltd. and Kelowna Flightcraft Air Charter Ltd. (“1996 Greyhound Decision”), the National Transportation Agency determined that a person with commercial control over an air service “operates” the air service, and as such must hold a licence, irrespective of whether the person operates any aircraft.

12. Up until recently, the Agency has been following the 1996 Greyhound Decision to determine who is required to hold a domestic license.

13. As of December 1, 2015, sixteen (16) persons that did not operate any aircraft held licences allowing them operate domestic air services.

14. Since the purpose of the *CTA* and the mandate of the Agency is economic regulation, the Applicant submits that the 1996 Greyhound Decision correctly interprets the licensing requirements for IASPs.

E. The “Consultation on the requirement to hold a license” and the “Approach under consideration”

15. On December 23, 2015, just one day before Christmas Eve, the Agency announced that it would conduct a public consultation on the requirement for Indirect Air Service Providers to hold a license.

16. The Agency's announcement stated that the Agency was considering implementing the following "Approach under consideration":

> Indirect Air Service Providers would not normally be required to hold a licence to sell air services directly to the public, as long as they charter licenced air carriers to operate the flights. This would apply to the operation of domestic and international air services. As these providers would not be subject to the licensing requirements, contracts they enter into with the public would not be subject to tariff protection, nor would they be subject to the financial and Canadian ownership requirements.

[Emphasis added.]

17. The Agency's "Approach under consideration" allows Indirect Air Service Providers to circumvent the will of Parliament, and exposes the public to significant risk from which Parliament intended to protect the public:

(a) Without the financial fitness requirements, there is a risk that the IASP lacks the financial means necessary to operate the flights on which it sold tickets.

(b) Without the insurance coverage requirements, there is a risk that the IASP is unable to meet is liabilities in the case of a disaster (as happened in the case of the Lac-Mégantic rail disaster).

(c) Without the minimal protection that the terms of a tariff may offer, there is a risk that passengers are left with no effective remedy if their flight is overbooked, delayed, or cancelled, or if their baggage is damaged.

Since carriage by air within Canada is not subject to the protection that the liability regime of the *Montreal Convention* offers, these risks are significantly higher in the case of domestic air service.

18. The Applicant submits that the "Approach under consideration" is inconsistent with the intent of Parliament to impose a regulatory scheme on air transportation by enacting the *CTA*, and the unambigious wording of s. 57 of the *CTA*.

F. The "Approach under consideration" requires legislation

19. Subsection 80(1) of the *CTA* permits the Agency to make orders exempting a person from requirements only on a case-by-case basis, based on the specific circumstances of the case. It does not authorize the Agency to make a blanket exemption order for a business model without examining the facts specific to the person being exempted.

20. The "Approach under consideration" cannot reasonably meet the requirements set out in paragraphs 80(1)(a)-(c) of the *CTA*.

21. Pursuant to subsection 80(2) of the *CTA*, the Agency cannot exempt a person from certain core licensing requirements:

> (2) No exemption shall be granted under subsection (1) that has the effect of relieving a person from any provision of this Part that requires a person to be a Canadian and to have a Canadian aviation document and prescribed liability insurance coverage in respect of an air service.
>
> [Emphasis added.]

22. The "Approach under consideration" to not require IASPs to hold a license has the effect of relieving Indirect Air Service Providers from the requirement of being a Canadian and holding a prescribed liability insurance coverage.

23. Therefore, the Agency cannot lawfully make a decision or order purporting to exempt and/or exclude Indirect Air Services Providers from the statutory requirement to hold a license.

24. Hence, implementing the "Approach under consideration" requires legislation: either by Parliament amending the *CTA* or by the Agency making regulations. Pursuant to s. 36(1) of the *CTA*, the latter requires the approval of the Governor in Council.

G. The Honourable Court's intervention is needed due to the ongoing unlawful conduct of the Agency and/or its Chair

25. On October 29, 2015, almost two months before the "Consultation on the requirement to hold a license" was announced, the Chair of the Agency instructed the staff of the Agency not to require Indirect Air Service Providers to hold a license pending the outcome of the "consultation."

    (a) No order or decision was made to reflect the Chair's instructions.

    (b) The Chair's instructions were made orally.

    (c) No minutes were taken for the meeting in question.

26. The Applicant submits that the Agency's Chair acted unlawfully, and his action resulted in an ongoing unlawful conduct of the Agency with respect to the licensing of Indirect Air Service Providers.

27. The Applicant further submits that these circumstances lend further support to the need for this Honourable Court to provide guidance to the Agency by way of the sought declarations and prohibition.

H. The Applicant

28. The Applicant is a Canadian air passenger rights advocate, whose work and public interest litigation has been recognized by this Honourable Court in a number of judgments:

    (a) *Lukács v. Canada (Transport, Infrastructure and Communities)*, 2015 FCA 140, at para. 1;

    (b) *Lukács v. Canada (Transportation Agency)*, 2014 FCA 76, at para. 62; and

    (c) *Lukács v. Canada (Transport, Infrastructure and Communities)*, 2015 FCA 269, at para. 43.

I. Statutory provisions

29. The Applicant will also rely on the following statutory provisions:

(a) *Canada Transportation Act*, S.C. 1996, c. 10;

(b) *Carriage by Air Act*, R.S.C. 1985, c C-26;

(c) *Statutory Instruments Act*, R.S.C. 1985, c. S-22;

(d) *Air Transportation Regulations*, S.O.R./88-58;

(e) *Federal Courts Act*, R.S.C. 1985, c. F-7, and in particular, sections 18.1 and 28; and

(f) *Federal Court Rules*, S.O.R./98-106, and in particular, Rules 300 and 317.

30. Such further and other grounds as the Applicant may advise and this Honourable Court permits.

This application will be supported by the following material:

1. Affidavit of Dr. Gábor Lukács, to be served.

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

The Applicant requests the Canadian Transportation Agency to send a certified copy of the following material that is not in the possession of the Applicant but is in the possession of the Canadian Transportation Agency to the Applicant and to the Registry:

1. the complete, unredacted version of the “detailed reasons for the Agency decision” in the case of WestJet Airlines Ltd. against Greyhound Lines of Canada Ltd. and Kelowna Flightcraft Air Charter Ltd. (Docket No. 960315, File M4205/K14/6052), which were provided in confidence to Greyhound and Kelowna on or around April 16, 1996.

January 22, 2016

DR. GÁBOR LUKÁCS

Halifax, Nova Scotia

lukacs@AirPassengerRights.ca

Applicant

This is **Exhibit "C"** to the Affidavit of Dr. Gábor Lukacs affirmed before me on April 18, 2016

_____

Signature

Court File No.: A-39-16

IN THE FEDERAL COURT OF APPEAL

BETWEEN:

DR. GABOR LUKACS

Applicant

-and-

CANADIAN TRANSPORTATION AGENCY

Respondent

AFFIDAVIT OF CAROLE GIRARD,
SWORN FEBRUARY 24, 2016

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

1. I am the Senior Director of the Regulatory Approvals and Compliance Directorate of the Industry Regulation and Determinations Branch of the Canadian Transportation Agency and, as such, have personal knowledge of the matters hereinafter deposed to.

2. The *Canada Transportation Act*, S.C. 1996, c. 10, (CTA) requires that persons hold the appropriate licence before they can operate an air service. A licensee is subject to certain economic, consumer and industry protection safeguards (e.g. tariffs, financial requirements,

and Canadian ownership). The Agency has issued thousands of domestic and international licences.

3. An Indirect Air Service Provider (ISP) is a person who has commercial control over an air service but does not operate aircraft. An ISP makes decisions on matters such as routes, scheduling, pricing, and aircraft to be used, while it charters aircraft from licenced air carriers.

4. In Agency Decision No. 232-A-1996 in relation to a complaint filed by WestJet Airlines Ltd. against Greyhound Lines of Canada Ltd. (Greyhound) and Kelowna Flightcraft Air Charter Ltd. (Kelowna) (the Greyhound Decision), the Agency determined that Greyhound would be operating a domestic air service and therefore required Greyhound to hold a domestic licence, despite the fact that it did not operate any aircraft. Attached hereto and marked as Exhibit "A" to my affidavit is a copy of public Agency Decision No. 232-A-1996.

5. Greyhound and Kelowna requested that the Agency review its decision based on new facts and circumstances. The Agency did not vary or rescind its decision. Attached hereto and marked as Exhibit "B" to my affidavit is a copy of public Agency Decision No. 292-A-1996.

6. However, on Petition by Greyhound and Kelowna, the Governor-in-Council varied Decision 232-A-1996, finding that Greyhound will not be the operator of a domestic air service requiring a domestic licence if specified conditions were satisfied. The Governor in Council (in P.C. 1996-849 dated June 7, 1996) rescinded Decision 292-A-1996. Attached hereto and marked as Exhibit "C" to my affidavit is a copy of Governor in Council P.C. 1996-849 dated June 7, 1996.

7. Since then, the Agency has applied its interpretation of the expression "operate an air service" from its Greyhound decision and has issued domestic air licences to ISPs. At the moment there are approximately14 ISPs that hold a domestic licence, all of which involve small aircraft only.

8. In the spring of 2015, Agency staff became aware of a company named NewLeaf Travel Company Inc. (NewLeaf) that plans to partner with Flair Airlines Inc. (Flair) of Kelowna, BC. NewLeaf's proposed business plan involves the purchase and re-selling of tickets on large aircraft operated by Flair. Flair holds a domestic and non-scheduled international licence issued by the Agency.

9. In August 2015, the Chair of the Agency appointed a Panel pursuant to section 81 of the CTA to launch an inquiry into whether NewLeaf is operating an air service. The Panel was also tasked to review the Agency's longstanding interpretation of the expression "operate an air service". The NewLeaf inquiry constitutes the first time since its Greyhound decision

that the Agency will consider whether an ISP involving large aircraft requires an Agency licence.

10. The Agency Panel decided to hold consultations on the issue of who is operating an air service and is required, as such, to hold a licence; more particularly, whether persons who have commercial control over an air service but do not operate aircraft (Indirect Air Service Providers), should be required to hold a licence. On December 21, 2015, a consultation document was published on the Agency's Web site. Stakeholders were given until January 22, 2016 to submit their comments. The stakeholders were informed that while the review is underway, the Agency will not require persons to apply for a licence as long as the service offered to the public meets all of the following conditions:

    - The person does not operate any aircraft;
    - The person charters the aircraft's entire capacity, for the purpose of resale to the public; and
    - The air carrier holds the appropriate Agency licence to operate the air service.

    Attached hereto and marked as Exhibit "D" to my affidavit is a copy of December 21, 2015 email to stakeholders and the consultation document.

11. On December 21, 2015, NewLeaf was also informed of the Agency's consultation. NewLeaf was also informed that, while the review is underway, the Agency will not require persons to apply for a licence as long as the service offered to the public meets the three conditions

identified in paragraph 10. Attached hereto and marked as Exhibit "E" to my Affidavit is a copy of the December 21, 2015 email to NewLeaf.

12. In the consultation document, the Agency stated that it is re-considering the approach taken in Greyhound. The consultation document identified the approach under consideration to be that ISPs would not normally be required to hold a licence to sell air services directly to the public, as long as they charter licenced air carriers to operate the flights.

13. The stakeholders, including NewLeaf, were advised that should the Agency's review conclude that persons that market and sell an air service to the public, but do not operate any aircraft, are required to hold a licence, they would be informed of such decision and be given reasonable time to apply for the required Agency licence(s).

14. In early January 2016, media articles announced the impending launch of NewLeaf's travel offerings and commencement of online bookings on their Web site. Attached hereto and marked as Exhibit "F" to my affidavit is a copy of a media article referred to above.

15. On January 18, 2016, NewLeaf advised the Agency that it was temporarily postponing sales of airline tickets pending the Agency review. Attached hereto and marked as Exhibit "G" to my affidavit is a copy of the email from NewLeaf to the Agency dated January 18, 2016 as well as a copy of the News Release by NewLeaf.

16. On January 22, 2016, the consultation period closed. Twenty-six submissions were received during the consultation process.

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

DATED at the City of Gatineau, in the Province of Quebec, this 24th day of February, 2016.

SWORN BEFORE ME at the City of Gatineau in the Province of Quebec, this 24th day of February, 2016.

SIMON-PIERRE LESSARD, AVOCAT
199616-9
BARREAU DU QUÉBEC

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

de Carole Girard
of

assermenté devant moi ce 24th jour de February 199 2016
sworn to before me this day of

Commissaire à l'assermentation
Commissioner for Oaths

SIMON-PIERRE LESSARD, AVOCAT
199616-9
BARREAU DU QUÉBEC

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Government of Canada / Gouvernement du Canada

Canada

Decision No. 232-A-1996

Decision varied by P.C. 1996-849 dated June 7, 1996.

April 19, 1996

Decision No. 232-A-1996 (/eng/ruling/232-a-1996) dated April 18, 1996 - Complaint filed by WestJet Airlines Ltd. against Greyhound Lines of Canada Ltd. and Kelowna Flightcraft Air Charter Ltd.

File No. M4205/K14/6052

Docket No. 960315

An erratum to this Decision was issued - In the second paragraph below "March 16, 1996" should read "March 18, 1996".

April 18, 1996

IN THE MATTER OF a complaint filed by WestJet Airlines Ltd. against Greyhound Lines of Canada Ltd. and Kelowna Flightcraft Air Charter Ltd.

File No. M4205/K14/6052

Docket No. 960315

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WestJet Airlines Ltd. (hereinafter WestJet) filed a complaint with the National Transportation Agency on February 22, 1996. Copies of the complaint were provided to Greyhound Lines of Canada Ltd. (hereinafter Greyhound) and Kelowna Flightcraft Air Charter Ltd. (hereinafter Kelowna) for comments.

On March 11, 1996, Greyhound and Kelowna filed their answers to the complaint of WestJet. On March 15, 1996, WestJet filed its reply to the answers of Greyhound and Kelowna. Upon review of WestJet's March 15th reply, the Agency determined that it contained additional evidence. Accordingly, by letter dated March 16, 1996, Greyhound and Kelowna were provided an opportunity to comment on the new evidence; WestJet would then have the opportunity to respond to any comments received. Greyhound and Kelowna did not provide comments on this new evidence.

By letter dated February 26, 1996, WestJet provided additional comments in support of its complaint. This letter was received by the Agency on March 13, 1996 and copies were provided to Greyhound and Kelowna for comments. On March 18, 1996, Greyhound and Kelowna provided their answers to the letter dated February 26, 1996. On March 19, 1996, WestJet filed its reply.

In reviewing WestJet's reply dated March 19, 1996, the Agency determined that it contained additional evidence and accordingly, by letters dated March 21, 1996, the Agency advised the parties that Greyhound and Kelowna had a right to respond to the new evidence and that WestJet would then have an opportunity to respond to any new comments provided by Greyhound and Kelowna. The Agency also advised the parties that following receipt of all submissions related to the new evidence contained in WestJet's March 19, 1996 reply, the pleadings in respect of the complaint would be closed. On March 25, 1996, Greyhound and Kelowna provided their answers to the new evidence. On March 26, 1996, WestJet filed its reply to these answers.

By letter dated March 29, 1996, the Agency advised the parties that pleadings in respect of the complaint were closed. The Agency further advised the parties that it had concluded that insufficient information and documentation had been filed in order for the Agency to dispose of WestJet's complaint and that Kelowna and

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Greyhound were required to file copies with the Agency of "... all agreements, arrangements and contracts that have been or are to be entered into between Kelowna and Greyhound and their affiliates concerning proposed operations, for the Agency's review in confidence.". These documents were filed and attested to by affidavit on April 3, 1996.

POSITION OF WESTJET

WestJet submits that Greyhound is intending to circumvent the *National Transportation Act, 1987*, R.S.C., 1985, c. 28 (3rd Supp.) (hereinafter the NTA (National Transportation Agency), 1987). WestJet states that the effective control of Greyhound Air lies in the hands of Greyhound who, WestJet submits, in turn is controlled by The Dial Corp. WestJet states that it is of the view that the commercial relationship between Kelowna and Greyhound is intended to circumvent the Canadian ownership requirements of the NTA (National Transportation Agency), 1987.

WestJet states that because Greyhound would not be permitted by the Agency to operate the airline equipment itself, Greyhound has contracted all flight operations to Kelowna. WestJet submits that Greyhound would be responsible for all routes, scheduling, planning, pricing, payload control, marketing activities, service standards and meeting the competitive challenges in the marketplace. WestJet further states that Kelowna would simply operate Greyhound Air's aircraft at a contract rate per available seat mile, without incurring any market risk.

WestJet adds that it was required to meet the strict criteria stipulated by the Agency to ensure that the ownership and control of the airline industry remains in the hands of Canadians, and finds that the arrangement between Greyhound and Kelowna is a "backdoor approach" which is highly offensive.

In its reply dated March 15, 1996, WestJet alleges that certain of Greyhound's actions prior to entering into an agreement with Kelowna indicate Greyhound's awareness that it would not be able to obtain a licence from the Agency as it would not meet Canadian ownership requirements and yet Greyhound pressed ahead and entered into an arrangement with Kelowna. WestJet states that Greyhound's current

plan, as reported in the press, is to market and sell tickets for an airline service, then contract the flying to Kelowna. This, according to WestJet, is an attempt to circumvent the Canadian ownership and control requirements of the domestic licensing process. WestJet submits that an airline is considerably more than the sum of its inanimate aircraft; it is rather the sum total of the human and financial capital required to promote, market and ultimately sell seat inventory and cargo capacity on the aircraft. WestJet argues that, although Kelowna intends to physically operate the aircraft, what transforms those aircraft into an airline are the activities of Greyhound. WestJet asserts that without Greyhound, there is no Greyhound Air and maintains that the mind and control of Greyhound Air lies with Greyhound. It is submitted by WestJet that all marketing efforts, advertising, uniform selection, reservations systems, inventory management, payload control, route selection and scheduling and other key elements are clearly controlled by Greyhound.

POSITION OF GREYHOUND

Greyhound submits that the arrangement with Kelowna is a tour operator-charter carrier arrangement. Greyhound states that the allegations by WestJet concerning the control of the air service are without foundation and that the air service remains completely under the operation and control of Kelowna.

Greyhound expresses the view that there is nothing in either aviation law or policy which prevents a foreign-controlled company entering into charter contracts with Canadian air carriers.

In response to WestJet's allegations that Greyhound controls Kelowna, Greyhound asserts that both it and Kelowna have demonstrably shown that Greyhound does not control Kelowna. Greyhound further submits that it has no equity investment in Kelowna and has no representation on the board of directors nor does it have any control over the selection, retention and compensation of Kelowna's officers and executives. Additionally, Greyhound states that it is the officers, executives and employees of Kelowna that run and manage Kelowna and that will run and manage

the air operations of Greyhound Air on a day-to-day basis. Greyhound maintains that the financial arrangements in connection with Greyhound Air are highly conventional and standard.

In conclusion, Greyhound states that WestJet's allegations are without foundation and cannot be substantiated.

POSITION OF KELOWNA

Kelowna submits that the charter arrangement with Greyhound does not give control of Kelowna, directly or indirectly, to Greyhound. Kelowna further submits that Greyhound will obtain no ownership interest in Kelowna, nor will it have any representatives on its board of directors or amongst its executives. In addition, Kelowna states that it will, at all times, maintain full control of and decision-making over the operation of the aircraft, and only its employees will operate the aircraft.

Kelowna also submits that the terms of the charter arrangement represent common industry practice and, while confidential, are not unlike those of the charter arrangement already in place between Kelowna and Purolator Courier Ltd.

Kelowna asserts that its sole director, Mr. Barry Lapointe, has no intention of relinquishing any control over the corporation or its operations, nor does he have any intention of circumventing Canadian transportation law or assisting anyone in doing so.

FINDINGS

The Agency has carefully examined all of the submissions and evidence filed. Further, the Agency has carefully examined the documents which Kelowna and Greyhound were required to file with the Agency pursuant to the Agency's letter of March 29, 1996. By letter decision dated April 12, 1996, the Agency determined that these documents are confidential.

The Agency has also determined that the issue to be addressed in this matter is whether Greyhound will be operating a domestic air service which would require it to hold a domestic licence.

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Based primarily on the financial, operational and business relationships between Greyhound and Kelowna described in the confidential documents, the Agency determines that, if the air services commence as proposed therein, Greyhound will be operating a publicly available domestic air service. Accordingly, pursuant to subsection 71(1) of the NTA (National Transportation Agency), 1987 in order for the proposed air services to commence, Greyhound will be required to hold a domestic licence. In order to obtain a domestic licence, Greyhound would have to establish to the satisfaction of the Agency that it is Canadian as defined in section 67 of the NTA (National Transportation Agency), 1987, holds a Canadian aviation document, and has prescribed liability insurance coverage or evidence of such insurability in respect of the air services to be provided under the licence.

The Agency notes that Greyhound does not presently hold a domestic licence. Accordingly, if operation of the proposed air services commences, the Agency will take all actions within its jurisdiction to prevent such operation, including the issuance, if necessary, of a cease and desist order against Greyhound. The Agency, therefore, cautions against the commencement of the operation of the proposed air services.

In view of the foregoing and, in order to protect the travelling public, it is advisable that Greyhound immediately cease the marketing of its proposed air services, including advertising in the various media and selling tickets to the public.

Due to the confidentiality of the documents filed by Kelowna and Greyhound, as determined by the Agency in its letter decision dated April 12, 1996, detailed reasons for the Agency decision were to be provided, in confidence, to Greyhound and Kelowna which was done on April 16, 1996.

This Decision takes effect as of April 12, 1996, the date on which it was communicated by letter.

Rulings

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Go back to Rulings (/decisions)

Date modified:

2012-04-25

Ceci est la piece B de affidavit
This is Exhibit referred to in the Affidavi

de Carole Girard
of

assermenté devant moi ce 24th jour de February 20 16
sworn to before me this day of

SP Lessard

SIMON-PIERRE LESSARD, AVOCAT
199616-9
BARREAU DU QUÉBEC

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Government of Canada Gouvernement du Canada

Canada

Decision No. 292-A-1996

Decision rescinded by P.C. 1996-849 dated June 7, 1996.

May 10, 1996

APPLICATIONS by Greyhound Lines of Canada Ltd. and Kelowna Flightcraft Air Charter Ltd. pursuant to section 41 of the *National Transportation Act, 1987*, R.S.C., 1985, c. 28 (3rd Supp.) for a review of Decision No. 232-A-1996 (/eng/ruling/232-a-1996) dated April 18, 1996.

File Nos. M4205/K14/6115
M4205/K14/6116

Docket Nos. 960702R
960723R

Greyhound Lines of Canada Ltd. (hereinafter Greyhound) and Kelowna Flightcraft Air Charter Ltd. (hereinafter Kelowna) have applied for the review set out in the title. The applications were received on April 24 and 25, 1996, respectively.

In response to a complaint by WestJet Airlines Ltd. (hereinafter WestJet), the National Transportation Agency (hereinafter the Agency) determined in its Decision No. 232-A-1996 (/eng/ruling/232-a-1996) that, pursuant to subsection 71(1) of the *National Transportation Act, 1987* (hereinafter the NTA (National Transportation Agency), 1987), in order for air services to commence as proposed by Greyhound and Kelowna, Greyhound would be required to hold a domestic licence.

By letters dated April 25 and 26, 1996, the Agency requested WestJet to provide its comments on or before April 30, 1996 in respect of the applications for review. Following receipt of these comments, Greyhound and Kelowna were given two days to respond.

By letters dated April 30, 1996, WestJet filed its comments. By letters dated May 2, 1996, Greyhound and Kelowna filed their responses to WestJet's comments of April 30, 1996.

In addition, in its letters dated April 30, 1996, WestJet filed notices of motion requesting that it be provided with copies of the Agency's confidential reasons for its Decision No. 232-A-1996 (/eng/ruling/232-a-1996), which were communicated by letter dated April 16, 1996 to Greyhound and Kelowna (hereinafter the Confidential Reasons), the "Amended Arrangement documents" and the "Confidential Submissions" Greyhound and Kelowna filed in support of their respective applications for review. Alternatively, WestJet requested that it be provided with versions of the Confidential Reasons and the Amendment Arrangement documents with the "... sensitive commercial particulars blacked out and to the extent the context requires, a precis of any material portions which have been blacked out". The Agency ruled on these motions in its decision communicated by letter dated May 10, 1996 and determined that the documents in question should remain confidential and an abridged version would not be provided to WestJet.

GREYHOUND APPLICATION

In its application, Greyhound states that following a review of the Confidential Reasons, Kelowna and it entered into negotiations to amend and restate their air charter arrangements in order to address the concerns expressed by the Agency in the Confidential Reasons. Effective April 22, 1996, Greyhound

and Kelowna entered into an amended and restated Air Charter Agreement (hereinafter the amended and restated Agreement) which, it submits, constitutes a change in the facts or circumstances pertaining to Decision No. 232-A-1996

(/eng/ruling/232-a-1996) since it was issued. Specifically, these amendments directly affect the "financial, operational and business relationships" between Greyhound and Kelowna upon which the Agency primarily based its Decision.

Greyhound therefore requests that the Agency, pursuant to section 41 of the NTA (National Transportation Agency), 1987, review, rescind or vary the Decision in light of the amended and restated Agreement between Greyhound and Kelowna, which constitutes a change in the facts or circumstances pertaining to the previous Decision of the Agency, and find that Greyhound will not be operating a publicly available domestic air service for which it will be required to hold a domestic licence.

In addition, Greyhound advised that it would be filing with the Agency, pursuant to a claim for confidentiality, a "black-lined" [showing changes] and an execution copy of the amended and restated Agreement under cover of a separate letter explaining the amendments to the Agreement.

KELOWNA APPLICATION

In its application dated April 25, 1996, Kelowna requests that the Agency review, rescind or vary its Decision No. 232-A-1996 (/eng/ruling/232-a-1996) dated April 18, 1996 on the basis that new facts or circumstances have arisen pertaining to the Decision.

Kelowna therefore advised that it would provide to the Agency under separate cover and on a confidential basis, a more detailed version of its application, which includes the new confidential evidence which it wishes the Agency to consider. In Kelowna's view, this evidence would also address the concerns raised by the Agency in its Confidential Reasons.

POSITION OF WESTJET

WestJet submits that the Agency may only review, rescind or vary a previous decision made by it if there has been a change in the facts or circumstances leading to the decision and that the "change" referred to in the NTA (National Transportation Agency), 1987 is one of substance and not form and must be material in nature.

WestJet questions whether any possible amendments to Greyhound's leasing of Kelowna's air service licence, in the context of the overall arrangements between them, can constitute the required substantive, material "change" which would give the Agency jurisdiction to review, rescind or vary the Decision.

WestJet also submits that documentary amendments without substantive changes to many fundamental indicia to the operation of an airline service, such as the financing, schedule control, personnel and the like, will not be sufficient to change the fact, determined by the Agency, that Greyhound is operating an airline service in Canada. In the Greyhound/Kelowna arrangement, such indicia include, without limitation, the direct and indirect financing by Greyhound of Kelowna's aircraft acquisitions, and the necessary control of the flight schedule by Greyhound to create its "intermodal" system of transportation. In WestJet's view, the "charter" arrangement between Greyhound and Kelowna is an arrangement or enterprise reliant on Greyhound for its existence, its operation, and its namesake.

WestJet expresses concern with respect to circumvention of the ownership requirements of the NTA (National Transportation Agency), 1987 by Greyhound and Kelowna which could result in foreign-controlled entities, including foreign air carriers, doing the same.

WestJet concludes that, while chartering aircraft in certain circumstances is permitted, chartering aircraft

for the purpose of operating a scheduled airline service is tantamount to leasing a licence - a matter which is not permitted by Canadian aviation law and policy.

REPLY OF GREYHOUND

Greyhound submits that the Agency has the jurisdiction to review, rescind or vary its own decision, if since that decision, and in the opinion of the Agency, there has been a change in the facts or circumstances pertaining to that decision. In order to meet this test, a section 41 applicant need only demonstrate to the Agency that there has been a "change" in the facts or circumstances. In Greyhound's view, Parliament did not intend to establish a "material change" test.

Greyhound asserts that the Agency's determination of the WestJet complaint in favour of WestJet was based on the "financial, operational and business relationships" between Greyhound and Kelowna. In order to address the concerns expressed by the Agency in the Confidential Reasons, Greyhound and Kelowna engaged in arm's length negotiations which resulted in changes to the financial, operational and business relationships between Greyhound and Kelowna. The Amended Arrangement documents demonstrate a change in the facts or circumstances pertaining to the Decision since it was made by the Agency. Greyhound submits that by addressing the "financial, operational and business relationships" between Greyhound and Kelowna, the Amended Arrangement documents constitute material change.

With respect to WestJet's statement that the charter arrangement between Greyhound and Kelowna is "reliant on Greyhound for its existence, its operation, and its namesake", Greyhound submits that a charter arrangement could never exist without a charterer. In addition, the particular air service being operated by Kelowna pursuant to its air charter arrangements with Greyhound could not exist without Greyhound as a participant. This, in Greyhound's view, is no different than many other charter arrangements entered into between air operators and charterers.

Greyhound states that the financing and scheduling of flights have been addressed in the Amended Arrangement documents. In fact, Kelowna has assumed significant financial risk in connection with the financing it has arranged, independently with its banker of long-standing, in order to operate its new passenger charter air service. Furthermore, it is normal and to be expected that a charterer and the operator of an air service would have to agree to a schedule, which would be made known well in advance to passengers.

Greyhound concludes that it has no interest in operating a domestic air service. Greyhound's interest is in chartering the air service operations of Kelowna in order to market to the public an intermodal bus/air transportation service linking Greyhound's bus services with Kelowna's charter air services and that is why it has entered into the Amended Arrangement documents with Kelowna.

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REPLY OF KELOWNA

Kelowna states that the Amended Arrangement documents are before the Agency and it is up to the Agency to reconsider whether this new evidence will have an effect on the Decision.

In Kelowna's view, the arrangements between Kelowna and Greyhound require that only Kelowna hold a domestic licence and Kelowna meets all Canadian ownership and control in fact requirements to maintain its licence.

Kelowna states that it has already invested significant sums in the start-up of the passenger charter air service and that this investment was done in good faith with the belief that the arrangements between

Kelowna and Greyhound would not offend the Agency or violate the NTA (National Transportation Agency), 1987.

Kelowna submits that WestJet's contention that Kelowna is leasing its licence to Greyhound is inflammatory and without a factual basis.

Kelowna concludes that the amended charter arrangements between Kelowna and Greyhound put them on the solid footing of a tour operator and a chartered air service, an arrangement that is completely within the bounds of the NTA (National Transportation Agency), 1987.

FINDINGS

The Agency has carefully examined the pleadings, along with the Confidential Submissions, the Amended Arrangement documents, which include the amended and restated Agreement, and all other confidential information filed with the Agency (hereinafter the confidential material) and is of the opinion that there has been a change in the facts or circumstances pertaining to Decision No. 232-A-1996 (/eng/ruling/232-a-1996) since the Decision was issued. The Agency's opinion in this regard is based, primarily, on the numerous changes which have been effected to the Air Charter Agreement dated February 6, 1996 between Greyhound, Kelowna

and Kelowna Flightcraft Ltd. as reflected in the amended and restated Agreement. The Agency has, therefore, determined that it will review Decision No. 232-A-1996 (/eng/ruling/232-a-1996).

In the interest of efficiency and expediency, the Agency has considered the Greyhound and Kelowna applications together in this review of Decision No. 232-A-1996 (/eng/ruling/232-a-1996).

In Decision No. 232-A-1996 (/eng/ruling/232-a-1996), the Agency determined that the issue to be addressed was whether Greyhound would be operating a domestic air service, for which it would be required to hold a domestic licence, if it proceeded with its proposed arrangements with Kelowna as disclosed to the Agency. Based primarily on the financial, operational and business relationships between Greyhound and Kelowna, the Agency determined that, if the air services were to commence as proposed, Greyhound would be operating a publicly available domestic air service. Accordingly, the Agency determined in Decision No. 232-A-1996 (/eng/ruling/232-a-1996) that, pursuant to subsection 71(1) of the NTA (National Transportation Agency), 1987, in order for the proposed air services to commence, Greyhound would be required to hold a domestic licence. By confidential letter dated April 16, 1996, the Agency advised Greyhound and Kelowna of the specific, detailed reasons for this determination.

The Agency has closely examined the change in facts or circumstances pertaining to Decision No. 232-A-1996 (/eng/ruling/232-a-1996) in relation to the financial, operational and business relationships between Greyhound and Kelowna. The Agency notes that Greyhound and Kelowna have made numerous changes to their proposed relationship since Decision No. 232-A-1996 (/eng/ruling/232-a-1996) was issued. However, after reviewing and carefully considering all of these changes, the Agency remains of the opinion that the fundamental relationships between Kelowna and Greyhound, and the essence of their proposed arrangement, have not changed. Therefore, the Agency will not rescind or vary Decision No. 232-A-1996 (/eng/ruling/232-a-1996).

The Agency remains of the opinion that, if operations commence, Greyhound will be operating a publicly available domestic air service for which it requires a licence. In order to obtain a licence, Greyhound would have to establish to the satisfaction of the Agency that it is Canadian as defined in section 67 of the NTA (National Transportation Agency), 1987, holds a Canadian aviation document, and has prescribed liability insurance coverage or evidence of such insurability in respect of the air service to be provided under the licence.

Due to the confidentiality of the documents filed by Kelowna and Greyhound, as determined by the Agency in its letter decision dated May 10, 1996, a separate letter will be sent to Greyhound and

Kelowna in confidence setting out the detailed reasons for the Agency's Decision.

Rulings

Go back to Rulings (/decisions)

Date modified:
2012-04-19

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

de Carole Girard
of

assermenté devant moi ce 24th jour de February 199 2016
sworn to before me this day of

Commissaire à l'assermentation
Commissioner for Oaths

SIMON-PIERRE LESSARD, AVOCAT
199616-9
BARREAU DU QUÉBEC

Original with 292-A-1996

CANADA

PRIVY COUNCIL • CONSEIL PRIVÉ

P.C. 1996-849
June 7, 1996

Whereas, pursuant to section 64 of the *National Transportation Act, 1987*, Greyhound Lines of Canada Ltd. and Kelowna Flightcraft Air Charter Ltd. have petitioned the Governor in Council to rescind Decision No. 232-A-1996 dated April 18, 1996, and Decision No. 292-A-1996 dated May 10, 1996, of the National Transportation Agency;

Whereas Greyhound Canada Transportation Corp. is a successor corporation to Greyhound Lines of Canada Ltd.;

Whereas, pursuant to section 64 of the *National Transportation Act, 1987*, the Governor in Council may, at any time, in the discretion of the Governor in Council, either on petition of any party or person interested or of the Governor in Council's own motion, vary or rescind any decision of the National Transportation Agency;

Therefore, His Excellency the Governor General in Council, on the recommendation of the Minister of Transport, pursuant to section 64 of the *National Transportation Act, 1987*, hereby

(a) varies Decision No. 232-A-1996, in accordance with the schedule hereto; and

(b) rescinds Decision No. 292-A-1996.

CERTIFIED TO BE A TRUE COPY - COPIE CERTIFIÉE CONFORME

P.C. 1996-849

SCHEDULE

1. The second to fifth paragraphs of the Findings in Decision No. 232-A-1996 are replaced by the following:

Greyhound Canada Transportation Corp. will not be the operator of a domestic air service that requires a domestic licence only if

(*a*) Greyhound Canada Transportation Corp. continues to be Canadian within the meaning of subsection 67(1) of the *National Transportation Act, 1987*;

(*b*) Greyhound Canada Transportation Corp. complies with the provisions of the Air Charter Agreement, restated and amended as of April 22, 1996, between Greyhound Lines of Canada Ltd., Kelowna Flightcraft Air Charter Ltd. and Kelowna Flightcraft Ltd. that are applicable to Greyhound Lines of Canada Ltd.; and

(*c*) Greyhound Canada Transportation Corp. informs all prospective purchasers of air services that Kelowna Flightcraft Air Charter Ltd. will be providing the air service.

Ceci est la piece D de affidavit
This is Exhibit referred to in the Affidavit

de Carole Girard
of

assermenté devant moi ce 24th jour de February 2016
sworn to before me this day of

SPL
Commissaire à l'assermentation
Commissioner for Oaths

SIMON-PIERRE LESSARD, AVOCAT
199616-9
BARREAU DU QUÉBEC

From: Michael Enns
Sent: December-21-15 3:25 PM
Subject: La Consultation sur l'Obligation de Détenir une Licence / Consultation on the Requirement to Hold a Licence

Madame, Monsieur,

L'Office des transports du Canada (Office) entreprend un examen sur la question visant à déterminer si les personnes qui n'exploitent pas d'aéronef, mais qui commercialisent et vendent un service aérien au public, devraient être tenues de détenir une licence délivrée par l'Office.

L'Office entreprend une consultation publique à ce sujet et vous avez été désigné comme l'un des intervenants qui pourraient être intéressés à y participer. L'Office vous invite à visiter sa page de consultation où vous trouverez de l'information sur le sujet et sur la façon de présenter vos commentaires. La date limite pour présenter vos commentaires est le **22 janvier 2016**. Veuillez noter que tous les commentaires présentés dans le cadre du processus de consultation seront des documents publics et qu'ils pourraient être affichés sur le site Internet de l'Office.

Pendant le déroulement de l'examen, l'Office n'exigera pas la présentation d'une demande de licence à condition que le service offert au public satisfasse à **toutes** les exigences suivantes :

i. la personne n'exploite aucun aéronef;
ii. la personne affrète l'entière capacité de l'aéronef, aux fins de revente au public;
iii. le transporteur aérien est titulaire de la licence requise par l'Office pour exploiter le service aérien.

Si l'Office conclut, à l'issue de son examen, que les personnes qui commercialisent et vendent un service aérien au public, mais n'exploitent aucun aéronef, sont tenues de détenir une licence, vous serez informé de cette décision et disposerez d'un délai raisonnable pour présenter la ou les demandes de licences requises par l'Office.

Si l'Office a délivré des licences à des personnes qui n'exploitent aucun aéronef, ces personnes continueront de les détenir, mais elles ne seront pas tenues de présenter des demandes de licence additionnelles, pendant que l'Office examine la question.

Si vous avez des questions sur ce qui précède, n'hésitez pas à communiquer avec John Touliopoulos, gestionnaire, Division de l'évaluation financière, par téléphone au 819-953-8960 ou par courriel à john.touliopoulos@otc-cta.gc.ca.

Veuillez agréer, Madame, Monsieur, l'expression de nos sentiments distingués.

Carole Girard

Directrice principale des approbations réglementaires et de la conformité, Direction générale de la réglementation et des déterminations de l'industrie

Office des transports du Canada / Gouvernement du Canada
carole.girard@otc-cta.gc.ca / Tél. 819-997-8761 / ATS: 1-800-669-5575

Dear Sir / Madam,

The Canadian Transportation Agency (Agency) is undertaking a review on whether persons that do not operate any aircraft, but market and sell an air service to the public, should be required to hold an Agency licence.

The Agency is initiating a public consultation on this matter and you have been identified as a potential stakeholder who may be interested in participating. The Agency invites you to visit its consultation page where you can obtain information on this subject and learn how to make a submission. The deadline to submit your comments is **January 22, 2016**. Please note that all submissions as part of the consultation process will be public documents and may be posted on the Agency's website.

While this review is under way, the Agency will not require persons to apply for a licence as long as the service offered to the public meets **all** of the following conditions:

i. The person does not operate any aircraft;
ii. The person charters the aircraft's entire capacity, for the purpose of resale to the public; and
iii. The air carrier holds the appropriate Agency licence to operate the air service

In the event that the Agency, following its review, concludes that persons that market and sell an air service to the public, but do not operate any aircraft, are required to hold a licence, you will be informed of such decision and be given reasonable time to apply for the required Agency licence(s).

In situations where the Agency has issued licences to persons that do not operate any aircraft, these persons will continue to hold the issued licences, but will not be required to apply for any additional licences, while the Agency reviews the matter.

If you have any questions on this matter, please do not hesitate to contact John Touliopoulos, Manager of Financial Evaluation Division at 819-953-8960 or by e-mail at john.touliopoulos@otc-cta.gc.ca.

Sincerely,

Carole Girard

Senior Director Regulatory Approvals and Compliance, Industry Regulation and Determinations Branch
Canadian Transportation Agency / Government of Canada
carole.girard@otc-cta.gc.ca / Tel. 819-997-8761 / TTY: 1-800-669-5575

80

Government of Canada / Gouvernement du Canada

Canada

Consultation on the requirement to hold a licence

The Canadian Transportation Agency (Agency) is requesting comments from the aviation industry and other interested stakeholders on whether persons who have commercial control over an air service, but do not operate aircraft (Indirect Air Service Providers), should be required to hold a licence.

Background

The Canadian Transportation Agency (Agency) regulates the licensing of air transportation pursuant to Part II of the *Canada Transportation Act* (http://laws-lois.justice.gc.ca/eng/acts/C-10.4/index.html) (Act) and the *Air Transportation Regulations* (http://laws-lois.justice.gc.ca/eng/regulations/SOR-88-58/index.html).

The Act requires that persons hold the appropriate licence before they can operate a publicly available air transportation service (air service), which subjects these persons to a number of economic, consumer and industry protection safeguards, including with respect to tariffs (https://www.otc-cta.gc.ca/eng/tariffs), financial requirements (https://www.otc-cta.gc.ca/eng/publication/financial-requirements-guide-air-licence-applicants), and Canadian ownership (https://www.otc-cta.gc.ca/eng/canadian-ownership). When more than one person is involved in the delivery of the air service, it is important to determine who is operating the air service and is required, as such, to comply with the licensing requirements.

When the *National Transportation Act, 1987* (subsequently consolidated and revised by the Act) was introduced in 1987, it ushered in the deregulation of the aviation industry. At this time, the distinction between chartered and scheduled air carriers was eliminated for domestic air services. Industry subsequently developed new and innovative approaches to the delivery of air services that did not always fit into the Act's licensing parameters. One such approach is the Indirect Air Service Provider model, where persons have commercial control over an air service and make decisions on matters such as on routes, scheduling, pricing, and aircraft to be used, while charter air carriers operate flights on their behalf.

The Agency's current approach to determining which person is operating a domestic air service originated from its 1996 Greyhound Decision (https://www.otc-cta.gc.ca/eng/ruling/232-a-1996) and requires the person with commercial control to hold the licence, irrespective of whether the person operates any aircraft. As of December 1, 2015, 16 persons that did not operate any aircraft held licences providing them the authority to operate domestic air services.

For international air services, the Regulations require the air carrier, not the charterer, to hold a licence. Consequently, under the current approach, a person who is in commercial control of an air service and does not operate aircraft must hold the licence for domestic, but not for international air services.

All licensed air carriers are required to hold a Canadian Aviation Document (CAD) (http://www.tc.gc.ca/eng/civilaviation/publications/tp8880-chapter1-section3-5193.htm) issued by the Minister of Transport. When a person does not operate any aircraft, they are neither required nor entitled to obtain a CAD. The Agency has issued domestic licences to Indirect Air Service Providers on the basis that the CAD requirement is met by the charter air carrier.

The Agency, after careful review and study, is considering a change in its approach to determining who is operating an air service in situations where a person has commercial control over an air service, but does not operate aircraft. It is important to note that a review of the Act (http://www.tc.gc.ca/eng/ctareview2014/canada-transportation-act-review.html) is underway and may recommend changes to the legislative framework. Regulatory reforms may also be contemplated.

Approach under consideration

Indirect Air Service Providers would not normally be required to hold a licence to sell air services directly to the public, as long as they charter licenced air carriers to operate the flights. This would apply to the operation of domestic and international air services. As these providers would not be subject to the licensing requirements, contracts they enter into with the public would not be subject to tariff protection, nor would they be subject to the financial and Canadian ownership requirements.

However, the Agency would preserve its discretion to apply legislative and regulatory requirements in a purposive manner to ensure that the objectives underpinning the air licensing regime continue to be met. Accordingly, should a person who does not operate aircraft hold themselves out to the public as an air carrier and not a charterer or structure

their business model to circumvent the licensing requirements, the Agency could determine that they are operating the air service. Considerations in any such determination could include the manner in which they hold themselves out to the public, whether their involvement goes beyond a typical contractual charter arrangement, and the extent to which their operations are integrated into those of the air carrier.

When an air service is marketed and sold by an air carrier that has commercial control and the flights are operated by another air carrier, pursuant to a wet lease, code share, blocked space, capacity purchase agreement or other similar agreement, the Agency will continue to require the air carrier in commercial control to hold the licence for that air service, consistent with existing regulatory requirements.

Call for comments

The Agency invites interested stakeholders to submit their comments on the Agency's proposed approach, including with respect to the following questions:

- Whether Indirect Air Service Providers should be required to hold a licence to sell their services directly to the public, in their own right. Provide a clear explanation for your position;
- What criteria the Agency should consider in determining whether an Indirect Air Service Provider is holding itself out as an air carrier, and therefore, should be required to hold the licence; and
- What regulatory amendments, if any, should be contemplated to clarify who is operating an air service and is required, as such, to hold a licence.

Participants may submit **written** comments no later than the end of the business day on January 22, 2016.

All submissions made as part of this consultation process will be considered public documents and, as such, may be posted on the Agency's website.

How to Participate

Submit your comments to consultations@otc-cta.gc.ca (mailto:consultations@otc-cta.gc.ca%20).

Contact:

John Touliopoulos - Manager, Financial Evaluation Division (http://geds20-sage20.ssc-spc.gc.ca/en/GEDS20/?pgid=015&dn=cn%3DTouliopoulos%5C%2C%20John%2C%20ou%3DRACD-DARC%2C%20ou%3DIRDB-DGRDI%2C%20ou%3DCTA-OTC%2C%20o%3DGC%2C%20c%3DCA)
Telephone:
819-953-8960
Email:
john.touliopoulos@otc-cta.gc.ca

Latest Milestones

Title	Date
Deadline for submissions	January 22, 2016

Submitted Comments

- Air Canada (https://www.otc-cta.gc.ca/sites/default/files/submission_10_0.pdf)
- Avmax (https://www.otc-cta.gc.ca/sites/default/files/submission_11_0.pdf)
- CAC (https://www.otc-cta.gc.ca/sites/default/files/submission_13_0.pdf)
- Charles Green (https://www.otc-cta.gc.ca/sites/default/files/submission_14_0.pdf)
- Clark and Company (https://www.otc-cta.gc.ca/sites/default/files/clark_company_submission_-_consultation_on_the_requirement_to_hold_a_licence_0.pdf)
- Enerjet (https://www.otc-cta.gc.ca/sites/default/files/submission_18_0.pdf)
- Flair Airlines Ltd. (https://www.otc-cta.gc.ca/sites/default/files/submission_23.pdf)
- Frances Hudson (https://www.otc-cta.gc.ca/sites/default/files/submission_5_0.pdf)
- Dr. Gabor Lukacs (https://www.otc-cta.gc.ca/sites/default/files/submission_19_0.pdf)

- Garry Lewis (https://www.otc-cta.gc.ca/sites/default/files/submission_4_0.pdf)
- Glen Beckett (https://www.otc-cta.gc.ca/sites/default/files/sumission_2.pdf)
- InteliSys Aviation Systems (https://www.otc-cta.gc.ca/sites/default/files/newleaftravellicenserequirement_0.pdf)
- James Wilson (https://www.otc-cta.gc.ca/sites/default/files/submission_7_1.pdf)
- Jetlines (https://www.otc-cta.gc.ca/sites/default/files/submission_12_0.pdf)
- Kelowna International Airport (https://www.otc-cta.gc.ca/sites/default/files/submission_15_0.pdf)
- Kenn Borek Air Ltd. (https://www.otc-cta.gc.ca/sites/default/files/submission_16_0.pdf)
- Liz Throp (https://www.otc-cta.gc.ca/sites/default/files/submission_9_0.pdf)
- Lorna Harlow (https://www.otc-cta.gc.ca/sites/default/files/submission_8_0.pdf)
- NewLeaf Travel Company (https://www.otc-cta.gc.ca/sites/default/files/submission_20.pdf)
- Nolinor (https://www.otc-cta.gc.ca/sites/default/files/submission_24.pdf)
- Prince Rupert Airport (https://www.otc-cta.gc.ca/sites/default/files/submission_25.pdf)
- Provincial Airlines (https://www.otc-cta.gc.ca/sites/default/files/submission_1_0.pdf)
- Sunwing Airlines (https://www.otc-cta.gc.ca/sites/default/files/submission_17_0.pdf)
- Travel Industry Council of Ontario (https://www.otc-cta.gc.ca/sites/default/files/submission_21.pdf)
- VINCI (https://www.otc-cta.gc.ca/sites/default/files/submission_26.pdf)
- WestJet (https://www.otc-cta.gc.ca/sites/default/files/submission_22.pdf)

Date modified:

2016-01-28

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

de Carole Girard
of

assermenté devant moi ce 24th jour de February 2016
sworn to before me this day of

SP Ly

Commissaire à l'assermentation
Commissioner for Oaths

SIMON-PIERRE LESSARD, AVOCAT
199616-9
BARREAU DU QUÉBEC

From: Michael Enns
Sent: December-21-15 3:33 PM
To: 'jim.young@newleafcorp.ca'; 'ocurrie@DarcyDeacon.com'
Cc: Ghislain Blanchard; Carole Girard; John Touliopoulos
Subject: Consultation on the Requirement to Hold a Licence

(Sent on behalf of Ghislain Blanchard)

Dear Mr. Young,

On August 21, 2015, the Canadian Transportation Agency (Agency) advised NewLeaf Travel Company Inc. (NewLeaf) that I had been appointed to conduct an inquiry into whether NewLeaf, as part of its proposed business venture with Flair Airlines Inc. (Flair), would be operating an air service and, therefore, require a licence pursuant to section 57 of the *Canada Transportation Act* (CTA).

The Agency is continuing its review of whether persons who do not operate any aircraft, but market and sell air services to the public, should be required to hold Agency licences. The review applies to all persons operating in this manner and is not limited to NewLeaf's proposed business venture with Flair. As part of its review, the Agency is consulting with, and seeking comments from, stakeholders (including Newleaf) before finalizing its approach.

I am providing you with a direct link to the Agency's consultation document. The deadline to submit your comments, if you choose to do so, is **January 22, 2016**. Please note that all submissions as part of the consultation process will be public documents and may be posted on the Agency's website.

I have been instructed by the Panel to inform you that while this review is underway, the Agency will not require persons to apply for a licence as long as the service offered to the public meets **all** of the following conditions:

i. The person does not operate any aircraft;
ii. The person charters the aircraft's entire capacity, for the purpose of resale to the public; and
iii. The air carrier holds the appropriate Agency licence to operate the air service.

Should the Agency's review conclude that persons that market and sell an air service to the public, but do not operate any aircraft, are required to hold a licence, you will be informed of such decision and be given reasonable time to apply for the required Agency licence(s).

If you have any questions on this matter, please contact John Touliopoulos, Manager of Financial Evaluation Division at 819-953-8960 or by e-mail at john.touliopoulos@otc-cta.gc.ca.

Sincerely,

Ghislain Blanchard
Director General
Industry Regulations and Determinations Branch

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

de Carole Girard
of

assermenté devant moi ce 24th jour de February 2016
sworn to before me this day of

Commissaire à l'assermentation
Commissioner for Oaths

SIMON-PIERRE LESSARD, AVOCAT
199616-9
BARREAU DU QUÉBEC

89

Winnipeg Free Press

Local

Ultra low-cost airline taking off from Winnipeg airport

By: Geoff Kirbyson
Posted: **01/5/2016 2:05 AM** | Last Modified: 01/6/2016 5:16 PM

WAYNE GLOWACKI / WINNIPEG FREE PRESS

Jim Young, CEO NewLeaf airlines announces fares and dates for scheduled flights at a news conference Wednesday morning at James A Richardson Airport.

The arrival of NewLeaf Travel Company to Canadian skies won't threaten the domestic oligopoly of Air Canada and WestJet but it will certainly make it cheaper to fly.

The Winnipeg-based ultra-low-cost carrier unveiled its routes, schedule and other plans Wednesday morning at the Richardson International Airport.

Those in attendance didn't quite have visions of children breaking open their piggybanks to buy a ticket to Hamilton but, you know, it was close.

NewLeaf will take to the air on Feb. 12 with a network of seven cities, including Winnipeg, Halifax, Regina, Saskatoon, Kelowna, Abbotsford and Hamilton.

"We're in this thing for the long run," said CEO Jim Young.

But you've got to be flexible. NewLeaf isn't offering daily service. For example, it has an afternoon flight to Hamilton on Wednesdays and an evening flight on Saturdays and afternoon flights to Kelowna on Thursdays and Saturdays.

NewLeaf plans to achieve its model by focusing on smaller airports, a simple point-to-point network and avoiding larger, more expensive airports, such as Pearson in Toronto.

That model includes providing passengers with a seat and a seat belt and then enabling them to customize their trip by paying for extras such as priority boarding, in-flight drinks and snacks as well as carry-on and checked baggage.

NewLeaf will start out with two aircraft, a pair of 156-seat 737-400s, which are owned by its partner, Kelowna-based Flair Airlines. The plan is to grow to three planes within the first month and then to four by the summer. Within three years, Young's goal is to have a fleet of 15 planes.

NewLeaf's business plans includes charges for carry-on baggage. Not your purse or computer case or anything that will fit underneath the seat in front of you, but bags that are essentially substitutes for suitcases.

"A lot of our cost model is about turning the airplane (around) faster. You can board a plane our size in over an hour when everybody is hauling their bag on and trying to shove it (in the overhead compartment). We can offer lower fares by flying the airplane longer every day. In order to do that, we need to turn the airplane (around) at our stations inside of 30 to 40 minutes. The only way to do that when you're loading 156 people is to make sure you're getting them on and off as efficiently as possible," he said.

Another cost savings is avoiding travel agents and other third-party bookers. You will only be able to book a ticket on NewLeaf by visiting its website, flynewleaf.ca, which will bypass the global distribution system that travel agents use and which charges about $5 per leg of a trip. That could mean adding up to $30 for a return trip, Young said.

The arrival of NewLeaf makes Canada the last of the G-20 countries to have an ultra-low-cost carrier, said Barry Rempel, president and CEO of the Winnipeg Airports Authority, and he said there will undoubtedly be a ripple effect.

"What we've seen in these other environments is a stimulation of the market by up to 40 per cent. They're attracting people that wouldn't otherwise fly. Spirit Airlines in the U.S. and Ryanair in Ireland thrive when they stay close to their model, which is 'get me there cheap,'" he said.

Even though NewLeaf isn't competing with WestJet or Air Canada on direct flights, Rempel believes it will force them to lower their prices on at least some routes.

"Unquestionably. The established carriers are going to be watching very closely to see how much their visiting family market is impacted by NewLeaf. They'll have a number of potential reactions, everything from matching prices to using incentives through their frequent flyer programs," he said.

NewLeaf has hired a small handful of people for its Winnipeg head office and as the number of planes flying out of the city grows, that will increase as well. Eventually, Young said there will be 750 people based here, including administrative staff, pilots, flight attendants and mechanics.

Once NewLeaf has firmly established itself in the domestic market, it plans to branch out into sun destinations, Young said.

geoff.kirbyson@freepress.mb.ca

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

de Carole Girard
of

assermenté devant moi ce 24th jour de February 199 2016
sworn to before me this day of

SP

Commissaire à l'assermentation
Commissioner for Oaths

SIMON-PIERRE LESSARD, AVOCAT
199616-9
BARREAU DU QUÉBEC

From: Lisa Saunders <lisa@soundstrategy.ca>
Sent: January-18-16 4:02 PM
To: Michael Enns; John Touliopoulos; Daniel Cardozo
Subject: NewLeaf temporarily postpones service while the Canadian Transportation Agency completes its review of aviation licensing regulations

Hi Michael, just so you're aware of our current situation (below).
Thank you for all your help today.
Have a lovely day. Lisa...

newleaf

Low fare. Here to there.

NewLeaf temporarily postpones service while the Canadian Transportation Agency completes its review of aviation licensing regulations

(Winnipeg, MB – January 18, 2016) **NewLeaf Travel Company** announces that it is temporarily postponing sales of airline tickets pending a Canadian Transportation Agency (CTA) review of licensing regulations for Indirect Air Service Providers. NewLeaf will also refund all credit card transactions for reservations that were scheduled to begin on Feb. 12, 2016.

"During this uncertain time, we didn't want to put anyone with existing bookings at risk, and we wanted to give customers time to make other travel arrangements" explains NewLeaf Chief Executive Officer **Jim Young**.

NewLeaf aims to resume taking reservations in the Spring. "Canadians have clearly spoken that they want this type of low-cost service. The overwhelming demand for tickets shows the need for affordable travel in Canada. Hundreds of thousands of people visited the NewLeaf website when ticket sales began. Thousands made bookings," said Young.

"The reason why we launched on January 6 is because it was confirmed that we were in full compliance of CTA licensing regulations," says Young. "The CTA gave us an exemption from holding a licence directly while it reviews its legislation." Under a charter arrangement with Kelowna-based Flair Airlines Ltd., Flair held the CTA operating licence, while NewLeaf offered seat sales.

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News Release

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Court File No.:A-39-16

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GABOR LUKACS
Applicant

and

CANADIAN TRANSPORTATION AGENCY

Respondent

AFFIDAVIT OF CAROLE GIRARD
SWORN FEBRUARY 24, 2016

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

John.dodsworth@otc-cta.gc.ca

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

This is **Exhibit "D"** to the Affidavit of Dr. Gábor Lukacs affirmed before me on April 18, 2016

_____

Signature

Discount travel operator NewLeaf clears regulatory runway for flight sales

LINDA NGUYEN, THE CANADIAN PRESS 03.29.2016 |

Discount air carrier NewLeaf Travel will start selling low-cost seats in the next few weeks now that it has received the go-ahead from Ottawa to continue operations.

Chief executive Jim Young said Wednesday that the company expects its first flight to take off by late spring or early summer. In the meantime, it will work on reintroducing itself to consumers.

"This is a second relaunch for the company," he said. "It's our opportunity to make a second good impression."

NewLeaf had originally planned to begin flying last month, but suspended operations in January after just a week, pending a decision by the Canadian Transportation Agency.

Late Tuesday, the regulator ruled that indirect air service carriers like Winnipeg-based NewLeaf do not need an air licence, as long as they do not portray themselves to the public as the ones operating the flight or the aircraft.

NewLeaf purchases seats from Kelowna, B.C.,-based Flair Airlines and resells then to the public. Flair Airlines, which owns and operates a fleet of Boeing 737-400 jets, is licensed under the CTA.

Young said the company never described itself as an airline, even though he concedes there may have been some initial confusion.

He likened NewLeaf's role to that of a cellular carrier like Fido Solutions, which resells mobile packages but is owned by parent company Rogers Communications (TSX:RCI.B).

Moving forward, he said NewLeaf will ensure that all its marketing and branding reflects that it is only a reseller.

A CTA spokesman said the decision requires resellers like NewLeaf to "clearly disclose" which licenced carrier is operating the flight, adding that the agency will be monitoring to ensure that carriers comply with consumer protection requirements.

At its original launch, NewLeaf said it would offer "no frills" flights from Kelowna International Airport and John C. Munro Hamilton International Airport in Hamilton, Ont., to Abbotsford, B.C., Halifax, Regina, Saskatoon and Winnipeg.

It advertised one-way fares from as low as $89, which included all fees and taxes. Extra charges would apply for snacks, drinks and checked baggage.

It said it sold more than 4,000 tickets in one week, all of which were subsequently refunded due to the suspension.

But not everyone was happy with the situation.

In a submission to the CTA prior to the decision, Air Canada (TSX:AC) cited the danger of the CTA taking a "hands-off" approach with flight resellers like NewLeaf.

"Air Canada believes that the person having commercial control and selling the air service should hold a licence and comply with the usual requirements with which 'airlines' are expected to comply," it said in the letter.

Air passenger advocate Gabor Lukacs also criticized the ruling, which did not specifically address passengers' rights when it comes to damaged baggage and cancelled flights.

NewLeaf said passengers sign an agreement with them, but ultimately, reimbursements for delays and damages will come from Flair Airlines.

Ontario's travel regulator, the Travel Industry Council of Ontario, said it was also "concerned" that the CTA does not see the need for more regulations over indirect air service carriers.

"I'm always concerned when consumer protection is lessened in general but I understand the environment we operate under and that balance is always a fine balance," said Richard Smart, TICO's president and chief executive.

Follow @LindaNguyenTO on Twitter.

Court File No.:

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Moving Party

– and –

CANADIAN TRANSPORTATION AGENCY and NEWLEAF TRAVEL COMPANY INC.

Respondents

MEMORANDUM OF FACT AND LAW OF THE MOVING PARTY

PART I – STATEMENT OF FACTS

A. OVERVIEW

1. Dr. Gábor Lukács, the Moving Party, is seeking leave to appeal, pursuant to section 41 of the *Canada Transportation Act* ("CTA"), from Decision No. 100-A-2016 ("Impugned Decision") of the Canadian Transportation Agency ("Agency").

2. In the Impugned Decision, the Agency unreasonably and without lawful authority purports to exclude and/or exempt certain types of air service providers from the statutory requirement of holding a licence, set out in s. 57(a) of the *CTA*. With respect to the air services offered by these providers, the Impugned Decision effectively removes all economic regulation and consumer protection measures that were put in place by Parliament by enacting the *CTA*.

Decision No. 100-A-2016, para. 2 **Tab 1, p. 1**

3. In practical terms, the Impugned Decision circumvents the will of the legislature, and exposes the public to significant risks from which Parliament intended to protect the public:

(a) underfunded service providers, who are unable to deliver the air services that consumers have paid for in advance, leaving passengers stranded;

(b) service providers with insufficient insurance, who are thus unable to meet their liabilities in the case of a disaster (as happened in the case of the Lac-Mégantic rail disaster);

(c) unreasonable prices on routes served by only one provider; and

(d) uncompensated losses in the case of overbooked, delayed, or cancelled flights, or in the case of damage to baggage.

4. The reasons for the Impugned Decision are particularly troublesome and fundamentally flawed with respect to the issue of passenger protection in that they overlook the absence of a contractual relationship between the consumer and the operator of the aircraft and the doctrine of privity of contract (see paras. 60-64 below).

5. The grounds for the proposed appeal and the application for judicial review in File No. A-39-16 somewhat overlap, but the remedies sought differ.

Lukács Affidavit, Exhibit "B" **Tab 5B, p. 38**

6. Lukács submits that hearing the proposed appeal together with the application for judicial review would be in the interest of justice and save valuable judicial resources.

B. THE PARTIES

7. Lukács is a Canadian air passenger rights advocate, whose work and public interest advocacy have been widely recognized in Canada, including in a number of judgments of this Honourable Court.

Lukács Affidavit, paras. 2-4 **Tab 5, p. 28**

8. The Agency has a broad mandate in respect of all transportation matters under the legislative authority of Parliament. One of the Agency's key functions is to act as an economic regulator of transportation by air within Canada. The Agency carries out this function by issuing licences that permit operating an air service, and enforcing and reviewing the prices, terms, and conditions imposed by licence holders on the travelling public through its adjudicative proceedings.

9. NewLeaf Travel Company Inc. ("NewLeaf") is a company that in January 2016 began to advertise and sell tickets for scheduled flights within Canada without holding any licence to operate an air service. Subsequently, NewLeaf suspended operations due to concerns about its lack of a licence.

Girard Affidavit, Exhibits "F" and "G", being Exhibit "C" to the Lukács Affidavit **Tab 5C, pp. 88, 91**

C. THE LEGISLATIVE SCHEME

10. Paragraph 57(a) of the *CTA* prohibits operating an air service without a licence issued by the Agency under Part II of the *CTA*. Subsection 55(1) of the *CTA* defines "air service" as a service provided by means of an aircraft, that is publicly available for the transportation of passengers or goods, or both.

***Canada Transportation Act*, ss. 55(1) & 57(a)** **App. A, pp. 157 & 161**

11. Parliament imposed a number of economic and consumer protectionist conditions for obtaining a licence for operating an air service within Canada:

(a) Canadian ownership of at least 75%, ensuring that the licence holder is substantially owned and controlled by Canadians;

(b) prescribed liability insurance coverage; and

(c) prescribed financial fitness requirements.

***Canada Transportation Act*, s. 61** **App. A, p. 162**

12. The *Air Transportation Regulations*, SOR/88-58 ("ATR"), promulgated pursuant to ss. 36 and 86 of the *CTA* with the approval of the Governor in Council, provides that:

(a) an operator of an air service within Canada ("domestic service") must carry an insurance that covers risks of injury to or death of passengers and public liability; and

(b) an applicant for a licence to operate domestic service ("domestic licence") must demonstrate having sufficient funds for the cost of operating the air service for 90 days, even without any revenue.

***Air Transportation Regulations*, ss. 7 & 8.1** **App. A, pp. 142 & 144**
***Canada Transportation Act*, s. 86** **App. A, 177**

13. Operators of domestic air service are subject to stringent regulation:

(a) in some cases, a licensee must give a 120-day or 30-day notice before it can discontinue or reduce its service to a destination;

(b) prices are regulated on routes served only by one provider.

***Canada Transportation Act*, ss. 64-66** **App. A, pp. 163-164**

14. As an additional consumer protection measure, Parliament chose to subject the relationship between the travelling public and domestic air service providers to regulatory oversight by the Agency:

(a) each domestic licence holder is required to establish and publish a Tariff setting out its terms and conditions with respect to a prescribed list of core issues;

(b) the Tariff is the contact of carriage between the consumers and the licence holder, and can be enforced by the Agency; and

(c) upon complaint by any person, the Agency may suspend or disallow tariff provisions that are found to be unreasonable or unduly discriminatory.

***Canada Transportation Act*, ss. 67, 62.1, 67.2** **App. A, pp. 167-168**
***Air Transportation Regulations*, s. 107** **App. A, p. 151**

15. A licence to operate air service is not transferable.

***Canada Transportation Act*, s. 58** **App. A, p. 161**

16. Any contravention of a provision of the *CTA* or a regulation or order made under the *CTA*, including the operating of an air service without a licence, is an offence punishable on summary conviction.

***Canada Transportation Act*, s. 174** **App. A, p. 180**

D. INDIRECT AIR SERVICES PROVIDERS ("RESELLERS")

(i) The "Consultation on the Requirement to hold a licence"

17. An "Indirect Air Service Provider" ("IASP" or "reseller") is a person who has commercial control over an air service and makes decisions on matters such as routes, scheduling, and pricing, but performs the transportation of passengers with aircraft and flight crew rented from another person.

Decision No. 100-A-2016, para. 11 **Tab 1, p. 3**

Girard Affidavit, para. 3 **Tab 5C, p. 50**
being Exhibit "C" to the Lukács Affidavit

18. Unlike travel agents, IASPs enter into agreements to transport passengers by air in their own name, and not as agents for third parties. Consequently, consumers of IASPs have a contractual relationship only with the IASP, and they are not parties to the contract between the IASP and the third party who provides the aircraft and the crew.

19. IASP is not a new or innovative business model, but has been known for more than twenty years. Since 1996 and up until recently, the Agency had consistently held that a person with commercial control over a domestic air service "operates" it within the meaning of the *CTA*, and thus required them to hold a domestic licence. In doing so, the Agency had been following the so-called *1996 Greyhound Decision*.

Girard Affidavit, paras. 4-7 **Tab 5C, p. 50**
being Exhibit "C" to the Lukács Affidavit

20. On December 23, 2015, the Agency announced that it would conduct a public consultation on the requirement for IASPs to hold a licence, and that the Agency was considering implementing the following "Approach under consideration":

> Indirect Air Service Providers would not normally be required to hold a licence to sell air services directly to the public, as long as they charter licenced air carriers to operate the flights. This would apply to the operation of domestic and international air services. As these providers would not be subject to the licensing requirements, contracts they enter into with the public would not be subject to tariff protection, nor would they be subject to the financial and Canadian ownership requirements.
>
> [Emphasis added.]

Lukács Affidavit, Exhibit "A" **Tab 5A, p. 32**

(ii) NewLeaf

21. NewLeaf has never held and holds no licence to operate an air service in Canada. In spring 2015, the Agency became aware of NewLeaf's intention to provide an air service to the public as an IASP, with Flair Airlines Ltd. ("Flair") providing the aircraft with flight crew.

Girard Affidavit, para. 8 **Tab 5C, p. 50**
being Exhibit "C" to the Lukács Affidavit

22. On August 21, 2015, the Agency commenced an inquiry into whether NewLeaf was operating an air service within the meaning of the *CTA*. The Agency appointed Mr. Ghislain Blanchard to conduct the inquiry and report his findings to the Agency. Subsequently, the Agency announced the aforementioned "Consultation on the Requirement to Hold a License," which was commenced for the sake of NewLeaf, although this true purpose was not disclosed to the public. In fact, the inquiry about NewLeaf is never mentioned in the consultation announcement.

Letter Decision No. LET-A-3-2016 **Tab 4, p. 25**

Girard Affidavit, paras. 9-10 **Tab 5C, p. 50**
being Exhibit "C" to the Lukács Affidavit

23. In January 2016, while the Agency's inquiry and consultation was ongoing, NewLeaf began to advertise and sell tickets to the public for scheduled flights within Canada.

NewLeaf's Winter 2016 Schedule **Tab 3, p. 23**

Girard Affidavit, Exhibit "F" **Tab 5C, p. 88**
being Exhibit "C" to the Lukács Affidavit

24. Later in January 2016, NewLeaf suspended its ticket sales and postponed the launch of its service, due to concerns about its lack of a licence.

Girard Affidavit, Exhibit "G" **Tab 5C, p. 91**
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E. APPLICATION FOR JUDICIAL REVIEW (FILE NO.: A-39-16)

25. On January 22, 2016, Lukács brought an application for judicial review pursuant to s. 28 of the *Federal Courts Act* in respect of the "Approach under consideration" of the Agency that purports to relieve IASPs from the statutory requirement of holding a licence. Lukács sought, among other things:

(a) a declaration that the Agency has no jurisdiction to make a decision or order that has the effect of exempting and/or excluding IASPs from the statutory requirement of holding a licence; and

(b) a prohibition enjoining the Agency from making such a decision or order.

Lukács Affidavit, Exhibit "B" **Tab 5B, p. 38**

26. Lukács and the Agency have agreed to expedite the application, and this Honourable Court agreed that expedition is warranted.

***Lukács v. Canadian Transportation Agency*,** **Vol. II, Tab 9, p. 92**
2016 FCA 103, para. 24

F. THE IMPUGNED DECISION

27. On March 29, 2016, without waiting for a determination of the application for judicial review brought by Lukács, the Agency issued Decision No. 100-A-2016 (the "Impugned Decision"), in which it concluded that:

(a) IASPs (resellers) are not required to hold a licence as long as they do not hold themselves out to the public as an air carrier operating an air service; and

(b) NewLeaf is not required to hold a licence.

Decision No. 100-A-2016 **Tab 1, p. 1**

28. On March 29, 2016, NewLeaf announced that it was planning to re-launch with its first flight taking off by late spring or early summer 2016.

Lukács Affidavit, Exhibit "D" **Tab 5D, p. 100**

PART II – STATEMENT OF THE POINTS IN ISSUE

29. The questions to be decided on the present motion are:

(a) whether this Honourable Court should grant Lukács leave to appeal;

(b) whether the present motion should be expedited;

(c) whether the proposed appeal should be expedited; and

(d) whether the proposed appeal should be heard together with the application for judicial review in File No. A-39-16.

PART III – STATEMENT OF SUBMISSIONS

30. The crux of the case at bar is that the Agency pretends that the requirement to hold a licence is a mere policy choice of itself as a regulator, and that it can change its mind about it. This is clearly not the case. It was Parliament, and not the Agency, that chose to impose a regulatory scheme on air transportation to establish commercial standards and consumer protection measures. The requirement that all air service providers hold a licence is an inherent part of the regulatory scheme, and it serves as an enforcement mechanism to protect the the travelling public.

31. For nearly twenty years, the Agency had consistently and correctly been interpreting s. 57(a) of the *CTA* as requiring all IASPs providing domestic service to hold a domestic licence. Although Parliament amended the *CTA* on a number of occasions in the past twenty years, the provisions relating to the requirement to hold a licence have not been amended. Moreover, the IASP business model is not new and has been around for as long as the *CTA* itself.

32. Lukács seeks leave to appeal the Impugned Decision on the grounds that the Agency erred in law and/or exceeded its jurisdiction, because:

(a) no reasonable interpretation of the *CTA* is capable of supporting the conclusion that IASPs are not required to hold a domestic licence in order to provide domestic service; and

(b) the Agency has no jurisdiction to make a decision or order to the effect that IASPs no longer require a domestic licence.

33. 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)** **App. A, p. 155**

A. REASONABLENESS OF THE IMPUGNED DECISION

34. Section 57 of the *CTA* provides that:

> 57 No person shall operate an air service unless, in respect of that service, the person
>
> (a) holds a licence issued under this Part;
>
> (b) holds a Canadian aviation document; and
>
> (c) has the prescribed liability insurance coverage.

***Canada Transportation Act*, s. 57** **App. A, p. 161**

35. Subsection 55(1) of the *CTA* defines "air service" as follows:

> *air service* means a service, provided by means of an aircraft, that is publicly available for the transportation of passengers or goods, or both; (*service aérien*)

***Canada Transportation Act*, s. 55(1)** **App. A, p. 157**

36. The requirement to hold a licence was imposed by Parliament and not by the Agency. Consequently, the question of who "operates an air service" is not a mere question of policy that the Agency can change overnight; rather, it is a matter of statutory interpretation: identifying what Parliament intended to accomplish by imposing the requirement.

(i) The considered and consistent view of the Agency (1996-2015)

37. The considered and consistent view of a tribunal about the meaning of its home statute is entitled to some weight and is relevant to the determination of the reasonableness of a different interpretation.

***Canada (CHRC) v. Canada*, 2011 SCC 53, para. 53**	**Vol. II, Tab 1, p. 21**
"The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency"	**Vol. II, Tab 11, p. 129**

38. This principle is particularly relevant in the present case, because the *CTA* has a built-in mechanism for the review of the Act every eight years, and the *CTA* was amended by Parliament on a number of occasions. Nevertheless, in the past twenty years Parliament chose not to amend the provisions relating to the requirement to hold a licence.

***Canada Transportation Act*, s. 53**	**App. A, p. 156**

39. Between 1996 and 2015, the Agency consistently interpreted the *CTA* as imposing a requirement to hold a licence on any person who enters into a contract to provide an air service. A person who does not hold a licence can participate in the agreement only as an agent, not as a principal. In a 2010 decision, the Agency summarized the state of the law as follows:

> Duke Jets is reminded that only air carriers holding a valid Agency licence may enter into an agreement to provide an air service to, from or within Canada. [...] As such, the charter agreement with the air carrier must clearly indicate that Duke Jets has entered into the agreement on behalf of the named client failing which other regulatory requirements may apply and need to be met.

CTA Decision No. 222-A-2010, p. 2	**Vol. II, Tab 2, p. 28**
Girard Affidavit, paras. 4-7 being Exhibit "C" to the Lukács Affidavit	**Tab 5C, p. 50**

40. It is not uncommon for an air service to be delivered with the participation of multiple entities. The Agency established four factors for determining which of the participants is the one who operates an air service and thus is required to hold a licence in such situations:

1. Risks and benefits associated with the operation of the proposed air service;
2. Performance of key functions and decision-making authority with respect to the operation of the proposed air service;
3. Exclusivity and non-competition provisions; and
4. Use of firm name and style.

The "operator" of an air service is the participant who assumes the majority of the risks, is entitled to most of the benefits, and has decision-making authority.

Decision No. 42-A-2013, p. 2 **Vol. II, Tab 3, p. 30**

Decision No. 152-A-2014 **Vol. II, Tab 5, p. 46**

41. Items 1, 2, and 4 are precisely what characterize IASPs, and set them apart from a travel agent or businesses that rent out aircraft and flight crew, and thus the conclusion that IASPs are required to hold a licence directly follows from the Agency's considered and consistent view of the licensing requirement set out in the *CTA*.

42. Given that the relevant provisions of the *CTA* have remained unchanged for the past twenty years, it was incumbent on the Agency to explain why it chose to depart from its well-established, longstanding, considered, and consistent view on who is require to hold a license, and in particular, what was wrong with that interpretation. It is submitted that the failure of the Agency to do so renders the Impugned Decision unreasonable.

(ii) Reliance on false premises

43. The Impugned Decision is based on four erroneous premises. First, the *Air Transportation Regulations* (the "*ATR*") provides that:

> ***air carrier*** means any person who operates a domestic or an international service; (*transporteur aérien*)

The Impugned Decision, however, adopted a terminology that, by way of circular reasoning, equates operating an aircraft with operating an air service:

> "air carrier" means any person who operates aircraft on a domestic or international air service;
>
> [Emphasis added.]

***Air Transportation Regulations*, s. 2**	**App. A, p. 136**
Decision No. 100-A-2016, para. 5	**Tab 1, p. 2**

44. Second, the Impugned Decision is based on the misleading and incomplete statement that "In the non-scheduled international context, the air carrier, and not the charterer, is required to hold the licence."

Decision No. 100-A-2016, para. 32	**Tab 1, p. 7**

45. The aforementioned statement flies in the face of the Agency's decision issued only two weeks after the Impugned Decision, permitting Air Transat to rent aircraft with flight crew from Flair (the same company that NewLeaf was partnering with) subject to the following conditions:

> 1. Air Transat shall continue to hold the valid licence authority.
>
> 2. Commercial control of the flights shall be maintained by Air Transat. Flair shall maintain operational control of the flights and shall receive payment based on the rental of aircraft and crew and not on the basis of the volume of traffic carried or other revenue-sharing formula.

> 3. Air Transat and Flair shall continue to comply with the insurance requirements set out in subsections 8.2(4), 8.2(5) and 8.2(6) of the ATR.
>
> [Emphasis added.]

CTA Decision No. 112-A-2016 **Tab 6, p. 49**

46. The arrangement between Air Transat and Flair appears to be identical to the one between NewLeaf and Flair. Yet, in the case of the former, Air Transat is required to hold a valid licence and both Air Transat and Flair are required to comply with the insurance requirements.

47. Third, the Agency drew conclusions from the false premise that the *CTA* makes no distinction between scheduled and non-scheduled domestic air service. As a matter of fact, section 64 of the *CTA* restricts the discontinuance and reduction of the frequency of scheduled domestic service, and subsection 64(4) provides that:

> 64(4) In this section, non-stop scheduled air service means an air service operated between two points without any stops in accordance with a published timetable or on a regular basis.

The correct statement of the law is that although holders of a domestic license can operate both scheduled and non-scheduled domestic service, scheduled domestic service is subject to a more stringent regulation.

***Canada Transportation Act*, s. 64(4)** **App. A, p. 164**

48. Finally, the Impugned Decision is based on the false premise of "deregulation of the aviation industry, eliminating restrictions on market entry, routes that could be operated, [and] pricing."

Decision No. 100-A-2016, para. 11 **Tab 1, p. 3**

49. As a matter of fact, the Canadian domestic air service industry is far from being deregulated:

(a) only Canadian-owned businesses that meet prescribed financial fitness requirements can enter the market (s. 61);

(b) service cannot be abruptly discontinued or reduced, and is subject to a mandatory notice period (ss. 64-65); and

(c) prices are regulated on routes served by only one provider (s. 66).

***Canada Transportation Act*, ss. 61, 64-66** **App. A, pp. 162-164**

50. Lukács submits that the Agency's reliance on these false premises creates a lack of transparency and clarity in the reasoning of the Agency that renders the Impugned Decision unreasonable.

(iii) Rendering sections 64-66 of the *CTA* futile

51. In enacting sections 64-66 of the *CTA*, Parliament chose to regulate specific aspects of domestic service: (a) schedule changes that substantially affect the frequency of the service; and (b) prices on routes served by only one provider.

***Canada Transportation Act*, ss. 64-66** **App. A, pp. 163-164**

52. As the Agency correctly noted in the Impugned Decision, in the IASP business model, it is the IASP that "has commercial control over an air service, and makes decisions on matters such as routes, scheduling, pricing, and aircraft to be used" (emphasis added). Thus, it is the IASP that has control over those aspects of the air service that Parliament intended to regulate.

Decision No. 100-A-2016, para. 11 **Tab 1, p. 3**

53. Sections 64-66 consistently speak about "licensee." Therefore, Parliament intended the requirement of holding a licence to apply to the person who has control over scheduling and pricing, the regulation of which is the purpose of these provisions.

***Canada Transportation Act*, ss. 64-66** **App. A, pp. 163-164**

54. It is a well-established principle of statutory interpretation that Parliament does not intent to produce absurd consequences. An interpretation that defeats the purpose of a statute or renders some aspect of it futile is absurd.

***Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27, para. 27** **Vol. II, Tab 10, p. 107**

55. Interpreting the *CTA* as not requiring IASPs to hold a domestic licence, as the Agency did in the Impugned Decision, is absurd and thus unreasonable, because it renders ss. 64-66 of the *CTA* futile.

(iv) Textual and contextual analysis

56. Subsection 57(a) requires a person who "operate[s] an air service" to hold a licence. The definition of "air service" in s. 55(1) unambiguously refers to providing transportation service to the public at large (i.e., consumers), and not renting out aircraft with flight crew to another person. Thus, it is not the operator of the aircraft but the IASP that is required to hold a domestic licence.

***Canada Transportation Act*, ss. 55(1) & 57(a)** **App. A, pp. 157 & 161**

57. Any ambiguity that might possibly exist as to who "operates" an air service is resolved by s. 60(1) of the *CTA*, which specifically addresses the business model of a person providing an air service using an aircraft, with a flight crew, provided by another person:

> 60 (1) No person shall provide all or part of an aircraft, with a flight crew, to a licensee for the purpose of providing an air service pursuant to the licensee's licence and no licensee shall provide an air service using all or part of an aircraft, with a flight crew, provided by another person except
>
> (a) in accordance with regulations made by the Agency respecting disclosure of the identity of the operator of the aircraft and other related matters; and
>
> (b) where prescribed, with the approval of the Agency.
>
> [Emphasis added.]

***Canada Transportation Act*, s. 60(1)** **App. A, p. 161**

58. The wording of s. 60(1) underscores the distinction between the "operator of the aircraft" used to provide an air service, and the person who "provide[s] an air service" using the aircraft and crew of another person. Thus, the "operator of the aircraft" is not the same as the person who "operate[s] an air service," and thus requires a licence. Parliament's implicit assumption that the person who "provide[s] an air service" would be a "licensee" confirms that it is the provider of the air service (IASP) who is required to hold a licence. The Agency's conclusion to the contrary is unreasonable, because it violates the presumption of consistent expression.

***Lukács v. Canada (CTA)*, 2014 FCA 76, para. 41** **Vol. II, Tab 7, p. 62**

(v) Purposive analysis and privity of contract

59. Lukács adopts as his own position the Agency's analysis of the purpose of the air licensing requirement set out in Decision No. 390-A-2013. Parliament requires air service providers to hold a licence as a way of establishing commercial standards and consumer protection measures. These requirements serve a number of purposes, including:

(a) preventing underfunded service providers, who cannot deliver the services that consumers have paid for in advance, from entering the market;

(b) restricting foreign control over domestic air service; and

(c) ensuring that the terms and conditions of the service address prescribed core areas (such as bumping, delays, cancellations, refunds, etc.) and that the terms and conditions are reasonable and not unduly discriminatory.

Decision No. 390-A-2013, paras. 20-25 **Vol. II, Tab 4, pp. 37-38**

60. As the Agency acknowledged, the effect of interpreting the *CTA* as not requiring IASPs to hold a licence is that these commercial standards and consumer protection measures would not apply to IASPs and their consumers:

> Indirect Air Service Providers would not normally be required to hold a licence to sell air services directly to the public, as long as they charter licenced air carriers to operate the flights. This would apply to the operation of domestic and international air services. As these providers would not be subject to the licensing requirements, contracts they enter into with the public would not be subject to tariff protection, nor would they be subject to the financial and Canadian ownership requirements.
>
> [Emphasis added.]

Lukács Affidavit, Exhibit "A" **Tab 5A, p. 32**

61. The Impugned Decision fails to address how the interpretation advanced by the Agency could be reconciled with the objective of preventing underfunded service providers from entering the market. Indeed, it is plain and obvious that by not requiring IASPs to hold a licence and thus meet the financial fitness requirements, this objective is defeated.

62. With respect to the protection offered by the terms and conditions of the tariff, the Agency's reasons are fundamentally flawed in that they overlook the absence of a contractual relationship between the consumer and the operator of the aircraft and the doctrine of privity of contract:

> In weighing the relevance of the licensing provisions' consumer protection purposes to the question of whether those provisions should be interpreted as covering resellers, it is important to note that when passengers buy tickets through a reseller that is not required to hold an air licence, they will still be covered by the terms and conditions of the tariff issued by the chartered air carrier operating the aircraft on which those passengers travel.
>
> [Emphasis added.]
>
> **Decision No. 100-A-2016, para. 38** **Tab 1, p. 9**

63. The very essence of the IASP ("reseller") business model is that there are two separate and independent contracts: (1) between the IASP and the operator of the aircraft, for the rental of the aircraft with flight crew; and (2) between the passenger and the IASP, for the transportation of the passenger. In particular, there is no contractual relationship between the passenger and the operator of the aircraft, and consequently the operator of the aircraft has no obligations toward the passengers.

64. Therefore, the tariff of the operator of the aircraft governs the contractual relationship between the IASP and the operator of the aircraft, but it cannot govern the nonexistent contractual relationship between the passenger and the operator of the aircraft. Hence, the passengers are left without protection.

65. Consequently, the Agency's interpretation of the licensing requirement in the Impugned Decision is unreasonable, because it circumvents and defeats the very purpose for which Parliament enacted the *CTA*.

(vi) NewLeaf

66. Regardless of the terminology used to describe the activities of NewLeaf, the Winter 2016 Schedule of NewLeaf leaves no doubt that it was intending to provide a "non-stop scheduled air service" within the meaning of subsection 64(4) of the *CTA*.

NewLeaf's Winter 2016 Schedule **Tab 3, p. 23**

***Canada Transportation Act*, s. 64(4)** **App. A, p. 164**

67. Section 64 of the *CTA* leaves no doubt that Parliament intended to require anyone who has control over the schedule of a domestic non-stop scheduled service to be a "licensee," that is, to hold a licence.

***Canada Transportation Act*, s. 64** **App. A, p. 163**

68. Therefore, the Agency's conclusion that NewLeaf is not required to hold a domestic licence is unreasonable in that it falls outside the range of possible acceptable outcomes defensible in respect of the facts and the law.

B. EXCESS OF JURISDICTION

69. While the *CTA* confers broad decision-making and regulation-making powers on the Agency with respect to transportation by air, Parliament chose to explicitly withhold certain powers from the Agency:

> 80(2) No exemption shall be granted under subsection (1) that has the effect of relieving a person from any provision of this Part that requires a person to be a Canadian and to have a Canadian aviation document and prescribed liability insurance coverage in respect of an air service.

***Canada Transportation Act*, s. 80** **App. A, p. 175**

> 86(2) No regulation shall be made under paragraph (1)(l) that has the effect of relieving a person from any provision of this Part

> that requires a person to be a Canadian and to have a Canadian aviation document and prescribed liability insurance coverage in respect of an air service.
>
> ***Canada Transportation Act*, s. 86(2)** **App. A, p. 179**

70. Lukács submits that the Agency exceeded its jurisdiction in making the Impugned Decision, because the Agency has done indirectly, in the guise of statutory interpretation, what Parliament explicitly forbade it to do: relieving a person (in this case, IASPs) from the requirement of Canadian ownership and of maintaining a prescribed liability insurance coverage.

C. EXPEDITING AND CONSOLIDATING HEARINGS

71. The intention of NewLeaf to relaunch, with its first flight taking off by late spring or early summer 2016, creates an urgency for the determination of the present motion and the hearing of the proposed appeal, in order to prevent harm to the travelling public.

Lukács Affidavit, Exhibit "D" **Tab 5D, p. 100**

72. Allowing IASPs, and NewLeaf in particular, to operate without a licence exposes the public to significant risk from which Parliament intended to protect the public:

(a) Without the financial fitness requirements, there is a risk that the IASP lacks the financial means necessary to operate the flights on which it has sold tickets.

(b) Without the insurance coverage requirements, there is a risk that the IASP is unable to meet is liabilities in the case of a disaster (as happened in the case of the Lac-Mégantic rail disaster).

(c) Without the minimal protection that the terms of a tariff may offer, there is a risk that passengers, who have no contractual relationship with the third party operating the aircraft, are left with no effective remedy if their flight is overbooked, delayed, or cancelled, or if their baggage is damaged.

73. The arguments raised in the application for judicial review in File No. A-39-16 and the proposed appeal overlap, and the Agency heavily relies on the Impugned Decision in its opposition to the application for judicial review, although the remedies being sought differ:

(a) in the proposed appeal, Lukács is seeking to set aside the Impugned Decision; and

(b) in the application for judicial review, Lukács is seeking certain declarations and a prohibition against the Agency.

74. Lukács and the Agency have agreed to expedite the application for judicial review, and this Honourable Court agreed that expedition is warranted. It is submitted that the present motion and the proposed appeal should to be expedited for the same reasons that are rooted in the public interest.

***Lukács v. Canadian Transportation Agency*, 2016 FCA 103, para. 24** **Vol. II, Tab 9, p. 92**

75. Hearing the application for judicial review and the proposed appeal together will save valuable judicial resources.

D. COSTS

76. Lukács respectfully asks this Honourable Court that he be awarded his disbursements in any event of the cause, and if successful, also a modest allowance for his time, for the following reasons:

(a) the motion raises novel questions of law that have not been addressed by this Honourable Court;

(b) the motion and the proposed appeal are in the nature of public interest litigation; and

(c) the issues raised in the motion are not frivolous.

***Lukács v. Canada (CTA)*, 2014 FCA 76, para. 62** **Vol. II, Tab 7, p. 66**
***Lukács v. Canada (CTA)*, 2015 FCA 269, para. 43** **Vol. II, Tab 8, p. 79**

PART IV – ORDER SOUGHT

77. The Moving Party, Dr. Gábor Lukács, is seeking an Order:

(a) granting Lukács leave to appeal Decision No. 100-A-2016 of the Canadian Transportation Agency;

(b) expediting the hearing of the present motion;

(c) expediting the proposed appeal, and directing that it be heard together with the application for judicial review in Federal Court of Appeal File No. A-39-16;

(d) granting Lukács costs and/or reasonable out-of-pocket expenses of this motion forthwith and in any event of the cause; and

(e) granting such further relief as the Moving Party may request and this Honourable Court deems just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

April 18, 2016

DR. GÁBOR LUKÁCS

Halifax, NS

lukacs@AirPassengerRights.ca

Moving Party

PART V – LIST OF AUTHORITIES

STATUTES AND REGULATIONS

Air Transportation Regulations, SOR/88-58,
ss. 7, 8.1, 8.2, 8.5, 107

Canada Transportation Act, S.C. 1996, c. 10,
ss. 41, 53, 55, 57-67.2, 80, 86, 174

CASE LAW

Canada (Canadian Human Rights Commission) v. Canada (Attorney General), 2011 SCC 53

Determination of whether Duke Jets Ltd. requires a licence pursuant to Part II of the Canada Transportation Act,
Canadian Transportation Agency, Decision No. 222-A-2010

Determination of whether WestJet Encore Ltd. requires a licence pursuant to Part II of the Canada Transportation Act,
Canadian Transportation Agency, Decision No. 42-A-2013

Determination of what constitutes an "air service" and the criteria to be applied by the CTA,
Canadian Transportation Agency, Decision No. 390-A-2013

Determination of whether Air Georgian Limited requires a licence pursuant to Part II of the Canada Transportation Act,
Canadian Transportation Agency, Decision No. 152-A-2014

Determination of application by Air Transat on behalf of itself and Flair, Canadian Transportation Agency, Decision No. 112-A-2016

Lukács v. Canada (Transportation Agency), 2014 FCA 76

Lukács v. Canada (Canadian Transportation Agency), 2015 FCA 269

Lukács v. Canadian Transportation Agency, 2016 FCA 103

CASE LAW (CONTINUED)

Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 SCR 27

OTHER AUTHORITIES

Justice David Stratas, “The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency” (February 17, 2016). Available at SSRN: http://ssrn.com/abstract=2733751 or http://dx.doi.org/10.2139/ssrn.2733751

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Appendix A

Statutes and Regulations

CANADA

CONSOLIDATION

CODIFICATION

Air Transportation Regulations

Règlement sur les transports aériens

SOR/88-58

DORS/88-58

Current to February 15, 2016

Last amended on December 14, 2012

À jour au 15 février 2016

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Regulations Respecting Air Transportation

Règlement concernant les transports aériens

Short Title

1 These Regulations may be cited as the *Air Transportation Regulations*.

Titre abrégé

1 *Règlement sur les transports aériens*.

Interpretation

2 In these Regulations and Part II of the Act,

ABC/ITC means a passenger charter flight on which both advance booking passengers and inclusive tour participants are carried and that is operated pursuant to Division IV of Part III; (*VARA/VAFO*)

ABC/ITC (domestic) [Repealed, SOR/96-335, s. 1]

accommodation means sleeping facilities provided on a commercial basis to the general public; (*logement*)

Act means the *Canada Transportation Act*; (*Loi*)

advance booking charter or ***ABC*** means a round-trip passenger flight originating in Canada that is operated according to the conditions of a contract entered into between one or two air carriers and one or more charterers that requires the charterer or charterers to charter the entire passenger seating capacity of an aircraft for resale by them to the public, at a price per seat, not later than a specified number of days prior to the date of departure of the flight from its origin in Canada; (*vol affrété avec réservation anticipée ou VARA*)

advance booking charter (domestic) or ***ABC (domestic)*** [Repealed, SOR/96-335, s. 1]

air carrier means any person who operates a domestic service or an international service; (*transporteur aérien*)

air crew means the flight crew and one or more persons who, under the authority of an air carrier, perform in-flight duties in the passenger cabin of an aircraft of the air carrier; (*personnel d'aéronef*)

aircrew [Repealed, SOR/96-335, s. 1]

all-cargo aircraft means an aircraft that is equipped for the carriage of goods only; (*aéronef tout-cargo*)

back-to-back flights [Repealed, SOR/96-335, s. 1]

Définitions

2 Les définitions qui suivent s'appliquent au présent règlement et à la partie II de la Loi.

aéronef moyen Aéronef équipé pour le transport de passagers et ayant une capacité maximale certifiée de plus de 39 passagers sans dépasser 89 passagers. (*medium aircraft*)

aéronef tout-cargo Aéronef équipé exclusivement pour le transport de marchandises. (*all-cargo aircraft*)

affréteur des États-Unis Personne qui a pris des arrangements avec le transporteur aérien afin d'offrir des vols affrétés en provenance des États-Unis. (*United States charterer*)

autorisation [Abrogée, DORS/96-335, art. 1(F)]

base [Abrogée, DORS/96-335, art. 1]

bureau Est assimilé à un bureau du transporteur aérien tout endroit au Canada où celui-ci reçoit des marchandises en vue de leur transport ou met en vente des billets de passagers. La présente définition exclut les bureaux d'agents de voyages. (*business office*)

capacité maximale certifiée Selon le cas :

a) le nombre maximum de passagers précisé sur la fiche de données d'homologation de type ou la fiche de données de certificat de type délivrée ou acceptée pour les type et modèle d'aéronef par l'autorité compétente canadienne,

b) pour un aéronef ayant été modifié pour recevoir un plus grand nombre de passagers, le nombre maximum de passagers précisé sur l'homologation de type supplémentaire ou le certificat de type supplémentaire délivré ou accepté par l'autorité compétente canadienne. (*certificated maximum carrying capacity*)

cinquième liberté Privilège d'un transporteur aérien non canadien qui effectue un vol affrété d'embarquer ou

base [Repealed, SOR/96-335, s. 1]

business office, with respect to an air carrier, includes any place in Canada where the air carrier receives goods for transportation or offers passenger tickets for sale, but does not include an office of a travel agent; (*bureau*)

Canadian charter carrier licensee means a person who is a Canadian and holds a non-scheduled international licence that is valid for charters; (*transporteur fréteur licencié du Canada*)

certificated maximum carrying capacity means

(a) the maximum number of passengers specified in the Type Approval Data Sheet or the Type Certificate Data Sheet issued or accepted by the competent Canadian authority for the aircraft type and model, or

(b) in respect of a particular aircraft that has been modified to allow a higher number of passengers, the maximum number of passengers specified in the Supplemental Type Approval or the Supplemental Type Certificate issued or accepted by the competent Canadian authority; (*capacité maximale certifiée*)

common purpose charter or ***CPC*** means a round-trip passenger flight originating in Canada that is operated according to the conditions of a contract entered into between one or two air carriers and one or more charterers that requires the charterer or charterers to charter the entire passenger seating capacity of an aircraft to provide transportation at a price per seat to passengers

(a) travelling to and from a CPC event, or

(b) participating in a CPC educational program; (*vol affrété à but commun ou VABC*)

common purpose charter (domestic) or ***CPC (domestic)*** [Repealed, SOR/96-335, s. 1]

courier service means an enterprise engaged in the door-to-door transportation of consignments for overnight or earlier delivery; (*service de messageries*)

CPC educational program means a program for educational purposes organized for the exclusive benefit of full-time elementary or secondary school students, or both; (*programme éducatif VABC*)

CPC event means a presentation, performance, exhibition, competition, gathering or activity that

(a) is of apparent significance unrelated to the general interest inherent in travel, and

de débarquer au Canada des passagers ou des marchandises en provenance ou à destination du territoire d'un pays autre que celui du transporteur aérien. (*fifth freedom*)

équipage Une ou plusieurs personnes qui, pendant le temps de vol, agissent à titre de commandant de bord, de commandant en second, de copilote, de navigateur ou de mécanicien navigant. (*flight crew*)

événement VABC Présentation, spectacle, exposition, concours, rassemblement ou activité :

a) qui est d'une importance manifeste, et qui est motivé par des raisons autres que l'agrément de voyager; et

b) qui n'est pas mis sur pied ni organisé dans le but premier d'engendrer du trafic aérien d'affrètement. (*CPC event*)

gros aéronef Aéronef équipé pour le transport de passagers et ayant une capacité maximale certifiée de plus de 89 passagers. (*large aircraft*)

jour ouvrable Dans le cas du dépôt d'un document auprès de l'Office, à son siège ou à un bureau régional, jour normal d'ouverture des bureaux de l'administration publique fédérale dans la province où est situé le siège ou le bureau. (*working day*)

logement Chambre mise à la disposition du public à des fins commerciales. (*accommodation*)

Loi La *Loi sur les transports au Canada*. (*Act*)

marchandises Objets pouvant être transportés par la voie aérienne. La présente définition comprend les animaux. (*goods*)

mille Mille terrestre, sauf s'il est précisé qu'il s'agit d'un mille marin. (*mile*)

MMHD Pour un aéronef, la masse maximale homologuée au décollage indiquée dans le manuel de vol de l'aéronef dont fait mention le certificat de navigabilité délivré par l'autorité canadienne ou étrangère compétente. (*MCTOW*)

particularités du voyage Les marchandises, services, installations et avantages, autres que le logement et le transport, qui sont compris dans un programme VAFO au prix de voyage à forfait ou qui sont offerts aux participants à titre facultatif moyennant un supplément. (*tour features*)

(b) is not being created or organized for the primary purpose of generating charter air traffic; (*événement VABC*)

door-to-door transportation means the carriage of consignments between points of pick-up and points of delivery determined by the consignor, the consignee or both, including the surface transportation portion; (*transport de porte-à-porte*)

entity charter means a flight operated according to the conditions of a charter contract under which

(a) the cost of transportation of passengers or goods is paid by one person, corporation or organization without any contribution, direct or indirect, from any other person, and

(b) no charge or other financial obligation is imposed on a passenger as a condition of carriage or otherwise in connection with the transportation; (*vol affrété sans participation*)

fifth freedom means the privilege of a non-Canadian air carrier, where operating a charter flight, of embarking or disembarking in Canada passengers or goods destined for, or coming from, the territory of a country other than that of the non-Canadian air carrier; (*cinquième liberté*)

flight crew means one or more persons acting as pilot-in-command, second officer, co-pilot, flight navigator or flight engineer during flight time; (*équipage*)

fourth freedom means the privilege of a non-Canadian air carrier, where operating a charter flight, of embarking in Canada passengers or goods destined for the territory of the country of the non-Canadian air carrier and includes the privilege of disembarking such passengers in Canada on return from that territory; (*quatrième liberté*)

goods means anything that can be transported by air, including animals; (*marchandises*)

inclusive tour or ***tour*** means a round or circle trip performed in whole or in part by aircraft for an inclusive tour price for the period from the time of departure of the participants from the starting point of the journey to the time of their return to that point; (*voyage à forfait*)

inclusive tour charter or ***ITC*** means a passenger flight operated according to the conditions of a contract entered into between an air carrier and one or more tour operators that requires the tour operator or tour operators to charter the entire passenger seating capacity of an aircraft for resale by them to the public at an inclusive

passager Personne, autre qu'un membre du personnel d'aéronef, qui voyage à bord d'un aéronef du service intérieur ou du service international du transporteur aérien aux termes d'un contrat ou d'une entente valides. (*passenger*)

permis Document délivré ou réputé délivré par l'office qui autorise le transporteur aérien titulaire d'une licence internationale service à la demande, valable pour le vol ou la série de vols projetés, à effectuer un vol affrété ou une série de vols affrétés. (*permit*)

personnel d'aéronef L'équipage ainsi que les personnes qui, sous l'autorité du transporteur aérien, exercent des fonctions pendant le vol dans la cabine passagers d'un aéronef de ce transporteur. (*air crew*)

petit aéronef Aéronef équipé pour le transport de passagers et ayant une capacité maximale certifiée d'au plus 39 passagers. (*small aircraft*)

point [Abrogée, DORS/96-335, art. 1]

prix de voyage à forfait Sont assimilés au prix de voyage à forfait d'un participant les frais exigibles pour le transport, le logement et, s'il y a lieu, les particularités du voyage. (*inclusive tour price*)

prix par place Somme, exprimée en dollars canadiens, qui est payée à l'affréteur ou à son agent pour l'achat d'un billet de transport aller-retour d'un passager d'un VARA ou d'un VABC. (*price per seat*)

programme éducatif VABC Programme à but éducatif organisé dans l'intérêt exclusif des élèves à plein temps du primaire ou du secondaire ou des deux niveaux. (*CPC educational program*)

quatrième liberté Privilège d'un transporteur aérien non canadien qui effectue un vol affrété d'embarquer au Canada des passagers ou des marchandises à destination du territoire de son pays, y compris le privilège de débarquer ces passagers au Canada à leur retour de ce territoire. (*fourth freedom*)

responsabilité civile Responsabilité légale du transporteur aérien découlant de la propriété, de la possession ou de l'utilisation d'un aéronef, à l'égard :

a) des blessures ou du décès de personnes autres que ses passagers, son personnel d'aéronef et ses employés;

b) des dommages matériels autres que les dommages aux biens dont il a la charge. (*public liability*)

tour price per seat; (*vol affrété pour voyage à forfait ou VAFO*)

inclusive tour charter (domestic) or ***ITC (domestic)*** [Repealed, SOR/96-335, s. 1]

inclusive tour price includes, for a participant in an inclusive tour, charges for transportation, accommodation and, where applicable, tour features; (*prix de voyage à forfait*)

large aircraft means an aircraft equipped for the carriage of passengers and having a certificated maximum carrying capacity of more than 89 passengers; (*gros aéronef*)

MCTOW means the maximum certificated take-off weight for aircraft as shown in the aircraft flight manual referred to in the aircraft's Certificate of Airworthiness issued by the competent Canadian or foreign authority; (*MMHD*)

medium aircraft means an aircraft equipped for the carriage of passengers and having a certificated maximum carrying capacity of more than 39 but not more than 89 passengers; (*aéronef moyen*)

mile means a statute mile unless a nautical mile is specified; (*mille*)

passenger means a person, other than a member of the air crew, who uses an air carrier's domestic service or international service by boarding the air carrier's aircraft pursuant to a valid contract or arrangement; (*passager*)

permit means a document issued or deemed to be issued by the Agency authorizing an air carrier holding a non-scheduled international licence, valid for the proposed flight or series of flights, to operate a charter flight or series of charter flights; (*permis*)

point [Repealed, SOR/96-335, s. 1]

price per seat means the amount, expressed in Canadian dollars, by the payment of which round-trip air transportation may be purchased from a charterer or the charterer's agent for a passenger on an ABC or CPC; (*prix par place*)

public liability means legal liability of an air carrier, arising from the air carrier's operation, ownership or possession of an aircraft, for

(a) injury to or death of persons other than the air carrier's passengers, air crew or employees, and

secrétaire Le secrétaire de l'Office. (*Secretary*)

série [Abrogée, DORS/96-335, art. 1]

service de messageries Entreprise de transport de porte-à-porte d'envois pour livraison le lendemain au plus tard. (*courier service*)

taxe [Abrogée, DORS/2012-298, art. 1]

territoire S'entend des étendues de terre, y compris les eaux territoriales adjacentes, qui sont placées sous la souveraineté, la compétence ou la tutelle d'un État. Toute mention d'un État doit s'interpréter, le cas échéant, comme une mention du territoire de cet État, et toute mention d'une zone géographique qui comprend plusieurs États doit s'interpréter, le cas échéant, comme une mention de l'ensemble des territoires des États qui composent cette zone géographique. (*territory*)

trafic Les personnes ou les marchandises transportées par la voie aérienne. (*traffic*)

transport À l'égard d'un vol affrété pour voyage à forfait, le transport par air ou par tout autre mode :

a) entre tous les points de l'itinéraire du voyage;

b) entre les aéroports ou les terminaux terrestres et l'endroit où le logement est fourni aux points de l'itinéraire du voyage autres que le point d'origine. (*transportation*)

transport de porte-à-porte Transport d'envois entre les points de ramassage et de livraison déterminés par l'expéditeur, le destinataire ou les deux. La présente définition comprend la partie du transport de surface. (*door-to-door transportation*)

transporteur aérien Personne qui exploite un service intérieur ou un service international. (*air carrier*)

transporteur fréteur licencié des États-Unis Citoyen des États-Unis, au sens de la définition de ***citizen of the United States*** à la partie 204 du règlement intitulé *Federal Aviation Regulations*, publié par le gouvernement des États-Unis, qui détient une licence internationale service à la demande valable pour les vols affrétés entre le Canada et les États-Unis. (*United States charter carrier licensee*)

transporteur fréteur licencié du Canada Personne qui est un Canadien et qui détient une licence internationale service à la demande valable pour les vols affrétés. (*Canadian charter carrier licensee*)

(b) damage to property other than property in the air carrier's charge; (*responsabilité civile*)

Secretary means the Secretary of the Agency; (*secrétaire*)

small aircraft means an aircraft equipped for the carriage of passengers and having a certificated maximum carrying capacity of not more than 39 passengers; (*petit aéronef*)

territory means the land areas under the sovereignty, jurisdiction or trusteeship of a state, as well as territorial waters adjacent thereto, and any reference to a state shall be construed, where applicable, as a reference to the territory of that state and any reference to a geographical area comprising several states shall be construed, where applicable, as a reference to the aggregate of the territories of the states constituting that geographical area; (*territoire*)

third freedom means the privilege of a non-Canadian air carrier, where operating a charter flight, of disembarking in Canada passengers who, or goods that, originated in the territory of the country of the non-Canadian air carrier and includes the privilege of re-embarking such passengers in Canada for the purpose of returning them to that territory; (*troisième liberté*)

toll [Repealed, SOR/2012-298, s. 1]

tour features means all goods, services, facilities and benefits, other than accommodation and transportation, that are included in an ITC program at the inclusive tour price or made available to tour participants as optional extras at an additional charge; (*particularités du voyage*)

tour operator means a charterer with whom an air carrier has contracted to charter an aircraft in whole or in part for the purpose of operating an inclusive tour; (*voyagiste*)

traffic means any persons or goods that are transported by air; (*trafic*)

transborder goods charter or ***TGC*** means a one-way or return charter that originates in Canada and that is operated between Canada and the United States according to the conditions of a charter contract to carry goods, entered into between one or two air carriers and one or more charterers, under which the charterer or charterers charter the entire payload capacity of an aircraft; (*vol affrété transfrontalier de marchandises or VAM*)

troisième liberté Privilège d'un transporteur aérien non canadien qui effectue un vol affrété de débarquer au Canada des passagers ou des marchandises provenant du territoire de son pays, y compris le privilège de rembarquer les passagers au Canada pour les retourner dans ce territoire. (*third freedom*)

VARA/VAFO Vol passagers affrété transportant des passagers avec réservation anticipée et des participants à un voyage à forfait, qui est effectué conformément à la section IV de la partie III. (*ABC/ITC*)

VARA/VAFO (intérieur) [Abrogée, DORS/96-335, art. 1]

vol affrété à but commun ou ***VABC*** Vol passagers aller-retour en provenance du Canada, effectué aux termes d'un contrat passé entre un ou deux transporteurs aériens et un ou plusieurs affréteurs, selon lequel l'affréteur ou les affréteurs s'engagent à retenir toutes les places de l'aéronef destinées aux passagers pour fournir le transport à un prix par place à des passagers qui :

a) soit se rendent à un événement VABC et en reviennent;

b) soit participent à un programme éducatif VABC. (*common purpose charter or CPC*)

vol affrété à but commun (intérieur) ou ***VABC (intérieur)*** [Abrogée, DORS/96-335, art. 1]

vol affrété avec réservation anticipée ou ***VARA*** Vol passagers aller-retour en provenance du Canada, effectué aux termes d'un contrat passé entre un ou deux transporteurs aériens et un ou plusieurs affréteurs, selon lequel l'affréteur ou les affréteurs s'engagent à retenir toutes les places de l'aéronef destinées aux passagers pour les revendre au public à un prix par place avant un certain nombre de jours précédant la date de départ du vol du point d'origine au Canada. (*advance booking charter or ABC*)

vol affrété avec réservation anticipée (intérieur) ou ***VARA (intérieur)*** [Abrogée, DORS/96-335, art. 1]

vol affrété pour voyage à forfait ou ***VAFO*** Vol passagers effectué aux termes d'un contrat passé entre un transporteur aérien et un ou plusieurs voyagistes, selon lequel le ou les voyagistes s'engagent à retenir toutes les places de l'aéronef destinées aux passagers pour les revendre au public à un prix de voyage à forfait par place. (*inclusive tour charter or ITC*)

vol affrété pour voyage à forfait (intérieur) ou ***VAFO (intérieur)*** [Abrogée, DORS/96-335, art. 1]

transborder passenger charter or ***TPC*** means a one-way or return charter that originates in Canada and that is operated between Canada and the United States according to the conditions of a charter contract to carry passengers, entered into between one or two air carriers and one or more charterers, under which the charterer or charterers charter the entire passenger seating capacity of an aircraft, for resale by the charterer or charterers; (*vol affrété transfrontalier de passagers or VAP*)

transborder passenger non-resaleable charter or ***TPNC*** means a one-way or return charter that originates in Canada and that is operated between Canada and the United States according to the conditions of a charter contract to carry passengers, entered into between one or two air carriers and one or more charterers, under which the charterer or charterers charter the entire passenger seating capacity of an aircraft and do not resell that passenger seating capacity; (*vol affrété transfrontalier de passagers non revendable or VAPNOR*)

transborder United States charter or ***TUSC*** means a charter originating in the United States that is destined for Canada; (*vol affrété transfontalier des États-Unis or VAEU*)

transportation, in respect of an inclusive tour charter, means transportation by air or any other mode

(a) between all points in the tour itinerary, and

(b) between airports or land terminals and the location where accommodation is provided at any point in the tour itinerary, other than the point of origin; (*transport*)

United States charter carrier licensee means a person who is a citizen of the United States, as defined in Part 204 of the *Federal Aviation Regulations*, published by the Government of the United States, and who holds a non-scheduled international licence that is valid for charters between Canada and the United States; (*transporteur fréteur licencié des États-Unis*)

United States charterer means a person who has entered into an arrangement with an air carrier to provide charter air transportation originating in the United States; (*affréteur des États-Unis*)

working day, in respect of the filing of a document with the Agency, at its head office or a regional office, means a day on which offices of the Public Service of Canada are generally open in the province where the head office or regional office is situated. (*jour ouvrable*)

SOR/90-740, s. 1; SOR/93-253, s. 2; SOR/94-379, s. 4; SOR/96-335, s. 1; SOR/2012-298, s. 1.

vol affrété sans participation Vol effectué aux termes d'un contrat d'affrètement selon lequel :

a) le coût du transport des passagers ou des marchandises est payé par une seule personne, une seule société ou un seul organisme et n'est partagé, directement ou indirectement, par aucune autre personne;

b) nuls frais ni autre obligation financière ne sont imposés aux passagers comme condition de transport ou autrement pour le voyage. (*entity charter*)

vol affrété transfrontalier de marchandises ou ***VAM*** Vol affrété aller ou aller-retour en provenance du Canada effectué entre le Canada et les États-Unis aux termes d'un contrat d'affrètement pour le transport de marchandises passé entre un ou deux transporteurs aériens et un ou plusieurs affréteurs, selon lequel l'affréteur ou les affréteurs s'engagent à retenir toute la capacité payante de l'aéronef. (*transborder goods charter or TGC*)

vol affrété transfrontalier de passagers ou ***VAP*** Vol affrété aller ou aller-retour en provenance du Canada effectué entre le Canada et les États-Unis aux termes d'un contrat d'affrètement pour le transport de passagers passé entre un ou deux transporteurs aériens et un ou plusieurs affréteurs, selon lequel l'affréteur ou les affréteurs s'engagent à retenir toutes les places de l'aéronef destinées aux passagers en vue de les revendre. (*transborder passenger charter or TPC*)

vol affrété transfrontalier de passagers non revendable ou ***VAPNOR*** Vol affrété aller ou aller-retour en provenance du Canada effectué entre le Canada et les États-Unis aux termes d'un contrat d'affrètement pour le transport de passagers passé entre un ou deux transporteurs aériens et un ou plusieurs affréteurs, selon lequel l'affréteur ou les affréteurs s'engagent à retenir toutes les places de l'aéronef destinées aux passagers et à ne pas les revendre. (*transborder passenger non-resaleable charter or TPNC*)

vol affrété transfrontalier des États-Unis ou ***VAEU*** Vol affrété en provenance des États-Unis dont la destination est le Canada. (*transborder United States charter or TUSC*)

voyage à forfait Voyage aller-retour ou voyage circulaire effectué en totalité ou en partie par aéronef, à un prix de voyage à forfait, pour la période comprise entre le départ des participants et leur retour au point de départ. (*inclusive tour or tour*)

(ii) scheduled international service, medium aircraft,

(iii) scheduled international service, large aircraft, and

(iv) scheduled international service, all-cargo aircraft; and

(b) with respect to services operated by a non-Canadian air carrier, scheduled international service.

(3) The following classes of air services that may be operated under a non-scheduled international licence are hereby established:

(a) with respect to services operated by a Canadian air carrier,

(i) non-scheduled international service, small aircraft,

(ii) non-scheduled international service, medium aircraft,

(iii) non-scheduled international service, large aircraft, and

(iv) non-scheduled international service, all-cargo aircraft; and

(b) with respect to services operated by a non-Canadian air carrier, non-scheduled international service.

(4) Where an air carrier holds a licence that authorizes the operation of an air service of a class established by subsection (1), (2) or (3), that air carrier and that licence shall be assigned the same designation as that of the class of air service.

SOR/96-335, s. 2.

Liability Insurance

6 In section 7 and Schedule I, "passenger seat" means a seat on board an aircraft that may be permanently occupied by a passenger for the period during which the aircraft is being used for a domestic service or an international service.

7 (1) No air carrier shall operate a domestic service or an international service unless, for every accident or incident related to the operation of that service, it has

(a) liability insurance covering risks of injury to or death of passengers in an amount that is not less than the amount determined by multiplying $300,000 by

(ii) service international régulier (aéronefs moyens),

(iii) service international régulier (gros aéronefs),

(iv) service international régulier (aéronefs tout-cargo);

b) quant aux services exploités par le transporteur aérien non canadien, le service international régulier.

(3) Sont établies les catégories suivantes de services aériens qui peuvent être exploités aux termes d'une licence internationale service à la demande :

a) quant aux services exploités par le transporteur aérien canadien :

(i) service international à la demande (petits aéronefs),

(ii) service international à la demande (aéronefs moyens),

(iii) service international à la demande (gros aéronefs),

(iv) service international à la demande (aéronefs tout-cargo);

b) quant aux services exploités par le transporteur aérien non canadien, le service international à la demande.

(4) Le transporteur aérien qui détient une licence pour l'exploitation d'un service aérien d'une catégorie visée aux paragraphes (1), (2) ou (3) de même que cette licence sont désignés par la même appellation que la catégorie de service aérien.

DORS/96-335, art. 2.

Assurance responsabilité

6 Aux fins de l'article 7 et de l'annexe I, «siège passager» désigne un siège d'un aéronef qui peut être occupé en permanence par un passager pendant que l'aéronef est affecté à un service intérieur ou à un service international.

7 (1) Il est interdit au transporteur aérien d'exploiter un service intérieur ou un service international à moins de posséder les assurances suivantes couvrant tout accident ou incident lié à l'exploitation du service :

a) une assurance responsabilité couvrant les blessures et le décès de passagers pour un montant au moins

the number of passenger seats on board the aircraft engaged in the service; and

(b) insurance covering risks of public liability in an amount that is not less than

(i) $1,000,000, where the MCTOW of the aircraft engaged in the service is not greater than 7,500 pounds,

(ii) $2,000,000, where the MCTOW of the aircraft engaged in the service is greater than 7,500 pounds but not greater than 18,000 pounds, and

(iii) where the MCTOW of the aircraft engaged in the service is greater than 18,000 pounds, $2,000,000 plus an amount determined by multiplying $150 by the number of pounds by which the MCTOW of the aircraft exceeds 18,000 pounds.

égal au produit de 300 000 $ multiplié par le nombre de sièges passagers à bord de l'aéronef affecté au service;

b) une assurance couvrant la responsabilité civile pour un montant au moins égal à :

(i) 1 000 000 $ si la MMHD de l'aéronef affecté au service ne dépasse pas 7 500 livres,

(ii) 2 000 000 $ si la MMHD de l'aéronef affecté au service est supérieure à 7 500 livres sans dépasser 18 000 livres,

(iii) si la MMHD de l'aéronef affecté au service est supérieure à 18 000 livres, 2 000 000 $ plus le produit de 150 $ multiplié par l'excédent de la MMHD.

(2) The insurance coverage required by paragraph (1)(a) need not extend to any passenger who is an employee of an air carrier if workers' compensation legislation governing a claim for damages against that air carrier by the employee is applicable.

(2) Il n'est pas nécessaire que l'assurance prescrite à l'alinéa (1)a) s'étende aux passagers qui sont les employés du transporteur aérien si les réclamations en dommages des employés contre ce transporteur aérien sont régies par une loi sur les accidents de travail.

(3) No air carrier shall take out liability insurance to comply with subsection (1) that contains an exclusion or waiver provision reducing insurance coverage for any accident or incident below the applicable minima determined pursuant to that subsection, unless that provision

(a) consists of standard exclusion clauses adopted by the international aviation insurance industry dealing with

(i) war, hijacking and other perils,

(ii) noise and pollution and other perils, or

(iii) aviation radioactive contamination;

(b) is in respect of chemical drift;

(c) is to the effect that the insurance does not apply to liability assumed by the air carrier under any contract or agreement unless such liability would have attached to the air carrier even in the absence of such contract or agreement; or

(d) is to the effect that the entire policy shall be void if the air carrier has concealed or misrepresented any material fact or circumstance concerning the insurance or the subject thereof or if there has been any fraud, attempted fraud or false statement by the air carrier touching any matter relating to the insurance or the subject thereof, whether before or after a loss.

(3) Il est interdit au transporteur aérien de souscrire, pour se conformer au paragraphe (1), une assurance responsabilité comportant une clause d'exclusion ou de renonciation qui réduit l'étendue des risques assurés en cas d'accident ou d'incident en deçà des montants minimaux prévus à ce paragraphe, sauf si cette clause, selon le cas :

a) est une clause d'exclusion usuelle adoptée par les compagnies d'assurance en aviation internationale, qui vise :

(i) soit la guerre, la piraterie aérienne et d'autres dangers,

(ii) soit le bruit, la pollution et d'autres dangers,

(iii) soit la contamination radioactive aérienne;

b) porte sur l'épandage de produits chimiques;

c) précise que l'assurance ne s'applique pas à la responsabilité assumée par le transporteur aérien aux termes d'un contrat ou d'une entente, sauf si le transporteur aérien avait à s'acquitter de pareille responsabilité même en l'absence du contrat ou de l'entente;

d) précise que la police devient nulle si le transporteur aérien a caché ou faussé un fait ou une circonstance pertinents concernant l'assurance ou le sujet assuré, ou s'il y a eu fraude, tentative de fraude ou fausse déclaration de la part du transporteur aérien relative-

(4) An air carrier may have a comprehensive single limit liability coverage where liability risks are covered by a single policy or a combination of primary and excess policies, but no single limit liability coverage of that air carrier shall be for an amount that is less than the applicable combined insurance minima determined pursuant to paragraphs (1)(a) and (b).

SOR/96-335, s. 3.

8 (1) Every applicant for a licence or for an amendment to or renewal of a licence, and every licensee, shall file with the Agency, in respect of the service to be provided or being provided, as the case may be, a valid certificate of insurance in the form set out in Schedule I.

(2) A person referred to in subsection (1) who files a certificate of insurance electronically shall, on the request of the Agency, file forthwith a certified true copy of the certificate.

SOR/96-335, s. 4.

Financial Requirements

8.1 (1) In this section, "applicant" means a Canadian who applies for

(a) a domestic licence, non-scheduled international licence or scheduled international licence that authorizes the operation of an air service using medium aircraft, or for the reinstatement of such a licence that has been suspended for 60 days or longer; or

(b) a domestic licence, non-scheduled international licence or scheduled international licence that authorizes the operation of an air service using large aircraft, or for the reinstatement of such a licence that has been suspended for 60 days or longer.

(2) Subject to subsection (3), an applicant shall

(a) in respect of the air service specified in the application, provide the Agency with a current written statement of the start-up costs that the applicant has incurred in the preceding 12 months, with written estimates of start-up costs that the applicant expects to incur and with written estimates of operating and overhead costs for a 90-day period of operation of the air service, and establish that

ment à toute question se rapportant à l'assurance ou au sujet assuré, que ce soit avant ou après une perte.

(4) Le transporteur aérien peut souscrire une assurance tous risques à limite d'indemnité unique lorsque sa responsabilité est couverte par une seule police ou par un ensemble de polices primaires et complémentaires, auquel cas cette assurance doit prévoir une protection pour un montant au moins égal aux montants minimaux d'assurance combinés prévus aux alinéas (1)a) et b).

DORS/96-335, art. 3.

8 (1) Toute personne qui demande la délivrance, la modification ou le renouvellement d'une licence ainsi que tout licencié doivent déposer auprès de l'Office un certificat d'assurance valide, conforme à l'annexe I, à l'égard du service projeté ou fourni, selon le cas.

(2) En cas de dépôt par voie électronique, l'intéressé doit, à la demande de l'Office, déposer sans délai une copie certifiée conforme du certificat d'assurance.

DORS/96-335, art. 4.

Exigences financières

8.1 (1) Dans le présent article, « demandeur » s'entend d'un Canadien qui demande :

a) soit une licence intérieure, une licence internationale service à la demande ou une licence internationale service régulier qui autorise l'exploitation d'un service aérien utilisant des aéronefs moyens, ou le rétablissement d'une telle licence suspendue depuis au moins 60 jours;

b) soit une licence intérieure, une licence internationale service à la demande ou une licence internationale service régulier qui autorise l'exploitation d'un service aérien utilisant des gros aéronefs, ou le rétablissement d'une telle licence suspendue depuis au moins 60 jours.

(2) Sous réserve du paragraphe (3), le demandeur doit :

a) quant au service aérien visé par la demande, remettre à l'Office, par écrit, un relevé à jour des frais de démarrage qu'il a engagés au cours des 12 mois précédents, une estimation des frais de démarrage qu'il prévoit d'engager ainsi qu'une estimation des frais d'exploitation et des frais généraux qu'il prévoit d'engager pendant une période de 90 jours d'exploitation du service aérien, et démontrer :

(i) que le relevé est complet et exact et que l'estimation est raisonnable quant aux frais de démarrage,

(i) in respect of the start-up costs, the statement is complete and accurate and the estimates are reasonable,

(ii) in respect of the operating and overhead costs, the estimates are reasonable and are based on utilization of the aircraft solely on the specified air service under conditions of optimum demand, which utilization shall be no less than that which is necessary for the air service to be profitable,

(iii) subject to subparagraph (b)(i), the applicant has acquired or can acquire funds in an amount at least equal to the total costs included in the statement and in the estimates,

(iv) the funds are not encumbered and are comprised of liquid assets that have been acquired or that can be acquired by way of a line of credit issued by a financial institution or by way of a similar financial instrument,

(v) the terms and conditions under which those funds have been acquired or can be acquired are such that the funds are available and will remain available to finance the air service,

(vi) subject to paragraph (b), where the applicant is a corporation, at least 50% of the funds required by subparagraph (iii) have been acquired by way of capital stock that has been issued and paid for and that cannot be redeemed for a period of at least one year after the date of the issuance or reinstatement of the licence, and

(vii) subject to paragraph (b), where the applicant is a proprietorship or partnership, at least 50% of the funds required by subparagraph (iii) have been acquired by way of the proprietor's or partners' capital that has been injected into the proprietorship or partnership and that cannot be withdrawn for a period of at least one year after the date of the issuance or reinstatement of the licence;

(b) where the applicant is or has been in operation,

(i) increase the amount of funds required by subparagraph (a)(iii) by the amount of any shareholders', proprietor's or partners' deficit that is disclosed in the applicant's current audited financial statements which are prepared in accordance with generally accepted accounting principles in Canada, and those additional funds shall be acquired by way of capital stock that has been issued and paid for in the case of a corporation, or by way of the proprietor's or partners' invested capital in the case of a proprietorship or partnership, which capital stock

(ii) que l'estimation des frais d'exploitation et des frais généraux est raisonnable et fondée sur l'utilisation des aéronefs uniquement pour ce service aérien dans des conditions de demande optimale, laquelle utilisation représente au moins le minimum nécessaire pour assurer la rentabilité du service aérien,

(iii) sous réserve du sous-alinéa b)(i), qu'il a acquis ou est en mesure d'acquérir des fonds au moins équivalents au total des frais inscrits dans le relevé et dans les estimations,

(iv) que les fonds ne sont pas grevés et qu'ils sont constitués de liquidités acquises ou pouvant l'être au moyen d'une marge de crédit accordée par une institution financière ou au moyen de tout instrument financier semblable,

(v) que les modalités selon lesquelles ces fonds ont été acquis ou peuvent l'être sont telles que les fonds sont disponibles et continueront de l'être pour financer le service aérien,

(vi) sous réserve de l'alinéa b), s'il s'agit d'une société, qu'au moins 50 pour cent des fonds exigés par le sous-alinéa (iii) ont été acquis au moyen d'actions du capital-actions émises et libérées qui ne peuvent être rachetées pendant une période minimale d'un an après la date de délivrance ou de rétablissement de la licence,

(vii) sous réserve de l'alinéa b), s'il s'agit d'une entreprise individuelle ou d'une société de personnes, qu'au moins 50 pour cent des fonds exigés par le sous-alinéa (iii) ont été acquis au moyen du capital investi par le propriétaire ou les associés dans l'entreprise ou la société qui ne peut en être retiré pendant une période minimale d'un an après la date de délivrance ou de rétablissement de la licence;

b) s'il est en exploitation ou l'a été :

(i) augmenter le montant des fonds exigés par le sous-alinéa a)(iii) du montant du déficit des actionnaires, du propriétaire ou des associés figurant dans ses états financiers courants vérifiés, établis conformément aux principes comptables généralement reconnus au Canada; ces fonds additionnels doivent être acquis au moyen d'actions du capital-actions émises et libérées, dans le cas d'une société, ou au moyen du capital investi par le propriétaire ou les associés, dans le cas d'une entreprise individuelle ou d'une société de personnes, et ces actions ou ce capital investi sont assujettis à la condition prévue aux sous-alinéas a)(vi) ou (vii),

or invested capital is to be subject to the condition prescribed in subparagraph (a)(vi) or (vii), and

(ii) decrease the amount of the capital stock that is required by subparagraph (a)(vi) to be issued and paid for in the case of a corporation, or the amount of the proprietor's or partners' capital that is required by subparagraph (a)(vii) to be invested in the case of a proprietorship or partnership, by the amount of any shareholders', proprietor's or partners' equity that is disclosed in the applicant's current audited financial statements which are prepared in accordance with generally accepted accounting principles in Canada; and

(c) file with the Agency, on request, any information that the Agency requires to determine whether the applicant has complied with the requirements of paragraphs (a) and (b).

(3) Subsection (2) does not apply to

(a) an applicant that, at the proposed time of the issuance or reinstatement of the licence, operates an air service using medium or large aircraft in the case of an applicant referred to in paragraph (1)(a), or using large aircraft in the case of an applicant referred to in paragraph (1)(b), pursuant to

(i) a non-scheduled international licence or a scheduled international licence, or

(ii) a domestic licence in respect of which the applicant has, within 12 months before the proposed time of issuance or reinstatement of the licence, complied with subsection (2); and

(b) an applicant for the renewal of a licence referred to in paragraph (1)(a) or (b).

SOR/96-335, s. 4.

(ii) diminuer le montant des actions du capital-actions qui, selon le sous-alinéa a)(vi), doivent être émises et libérées, dans le cas d'une société, ou le montant du capital du propriétaire ou des associés qui doit être investi selon le sous-alinéa a)(vii), dans le cas d'une entreprise individuelle ou d'une société de personnes, du montant de tout avoir des actionnaires, du propriétaire ou des associés figurant dans ses états financiers courants vérifiés, établis conformément aux principes comptables généralement reconnus au Canada;

c) déposer auprès de l'Office, sur demande, les renseignements dont celui-ci a besoin pour vérifier si les exigences des alinéas a) et b) sont respectées.

(3) Le paragraphe (2) ne s'applique pas :

a) au demandeur qui, à la date prévue pour la délivrance ou le rétablissement de la licence, exploite un service aérien utilisant des aéronefs moyens ou des gros aéronefs, s'il s'agit du demandeur visé à l'alinéa (1)a), ou des gros aéronefs, s'il s'agit du demandeur visé à l'alinéa (1)b), aux termes :

(i) soit d'une licence internationale service à la demande ou d'une licence internationale service régulier,

(ii) soit d'une licence intérieure à l'égard de laquelle il s'est conformé aux exigences du paragraphe (2) dans les 12 mois précédant cette date;

b) au demandeur qui demande le renouvellement d'une licence visée aux alinéas (1)a) ou b).

DORS/96-335, art. 4.

Provision of Aircraft with Flight Crew

8.2 (1) For the purposes of section 60 of the Act and subject to section 8.3, approval of the Agency is required before a person may provide all or part of an aircraft, with a flight crew, to a licensee for the purpose of providing an air service pursuant to the licensee's licence and before a licensee may provide an air service using all or part of an aircraft, with flight crew, provided by another person.

(2) The person who provides an aircraft to a licensee and the licensee shall apply to the Agency for an approval referred to in subsection (1) at least 45 days before the first planned flight.

Fourniture d'aéronefs avec équipage

8.2 (1) Pour l'application de l'article 60 de la Loi, la fourniture de tout ou partie d'un aéronef, avec équipage, à un licencié en vue de la prestation d'un service aérien conformément à sa licence et la fourniture, par un licencié, d'un service aérien utilisant tout ou partie d'un aéronef, avec équipage, appartenant à un tiers sont, sous réserve de l'article 8.3, assujetties à l'autorisation préalable de l'Office.

(2) Le licencié et la personne qui lui fournit l'aéronef doivent demander cette autorisation à l'Office au moins 45 jours avant le premier vol prévu.

(3) The application shall include the following:

(a) in respect of the proposed air service, evidence that the appropriate licence authority, charter permit and Canadian aviation document and the liability insurance coverage referred to in subsection (4) and, where applicable, subsection (5) are in effect;

(b) the name of the licensee;

(c) if applicable, the name of the charterer or charterers and the charter program permit or authorization number;

(d) the name of the person providing the aircraft with flight crew;

(e) the aircraft type to be provided;

(f) the maximum number of seats and the cargo capacity of the aircraft to be provided and, where applicable, the maximum number of seats and the cargo capacity to be provided for use by the licensee;

(g) the points to be served;

(h) the frequency of service;

(i) the period covered by the proposed air service; and

(j) an explanation of why the use by the licensee of all or part of an aircraft with a flight crew provided by another person is necessary.

(4) The licensee shall maintain passenger and third party liability insurance coverage for a service for which another person provides an aircraft with flight crew, at least in the amounts set out in section 7,

(a) by means of its own policy; or

(b) subject to subsection (5), by being named as an additional insured under the policy of the other person.

(5) Where the licensee is named as an additional insured under the policy of the person referred to in subsection (4), there must be a written agreement between the licensee and the person to the effect that, for all flights for which the person provides aircraft with flight crew, the person will hold the licensee harmless from, and indemnify the licensee for, all passenger and third party liabilities while passengers or cargo transported under contract with the licensee are under the control of the person.

(3) La demande d'autorisation doit contenir les renseignements suivants :

a) quant au service aérien projeté, la preuve que la licence requise, le cas échéant, le permis d'affrètement et le document d'aviation canadien requis ainsi que la police d'assurance responsabilité visée au paragraphe (4) et, s'il y a lieu, au paragraphe (5) sont en vigueur;

b) le nom du licencié;

c) le cas échéant, le nom de l'affréteur ou des affréteurs et le numéro du permis-programme ou de la permission;

d) le nom de la personne qui fournit l'aéronef avec équipage;

e) le type d'aéronef qui sera fourni;

f) le nombre maximal de places de l'aéronef et sa capacité pour le transport de marchandises et, s'il y a lieu, le nombre maximal de places et sa capacité pour le transport de marchandises offerts au licencié pour son usage;

g) les points à desservir;

h) la fréquence du service;

i) la période visée par le service aérien projeté;

j) les raisons pour lesquelles le licencié doit utiliser tout ou partie d'un aéronef, avec équipage, fourni par un tiers.

(4) Le licencié doit maintenir l'assurance responsabilité à l'égard des passagers et autres personnes, selon les montants minimaux prévus à l'article 7, pour tout service utilisant un aéronef, avec équipage, fourni par un tiers :

a) soit par l'intermédiaire de sa propre police;

b) soit, sous réserve du paragraphe (5), en étant inscrit à titre d'assuré additionnel dans la police du tiers.

(5) Si le licencié est inscrit à titre d'assuré additionnel dans la police du tiers, les deux doivent avoir conclu une entente par écrit portant que, pour tous les vols pour lesquels le tiers fournit un aéronef avec équipage, il exonérera le licencié de toute responsabilité à l'égard des réclamations des passagers et autres personnes pendant que les passagers ou les marchandises transportés aux termes du contrat avec celui-ci sont sous sa responsabilité.

(6) The licensee and the person who provides the aircraft with flight crew shall notify the Agency in writing forthwith if the liability insurance coverage referred to in subsection (4) and, where applicable, subsection (5) has been cancelled or altered in any manner that results in failure by the licensee or the person to maintain the coverage.

SOR/96-335, s. 4.

8.3 (1) The approval referred to in section 8.2 is not required if, in respect of the air service to be provided, the appropriate licence authority, charter permit and Canadian aviation document and the liability insurance coverage referred to in subsection 8.2(4) and, where applicable, subsection 8.2(5), are in effect and

(a) both the person providing an aircraft to the licensee and the licensee are Canadian, the person is a licensee and the air service to be provided is a domestic service or an air service between Canada and the United States; or

(b) where the air service to be provided is an international service, a temporary and unforeseen circumstance has transpired within 72 hours before the planned departure time of a flight or the first flight of a series of flights that has forced the use of all or part of an aircraft, with a flight crew, provided by another person for a period of not more than one week, and the licensee

(i) has notified the Agency of the proposed flight or the first flight of a series of flights covering a period of not more than one week in accordance with subsection (2), and

(ii) has received an acknowledgement that the conditions of this paragraph have been met.

(2) The notification referred to in paragraph (1)(b) shall be given before the proposed flight or flights and shall contain

(a) a description of the temporary and unforeseen circumstance and an explanation of why it requires the use of all or part of an aircraft with a flight crew provided by another person;

(b) in respect of the air service to be provided,

(i) a statement that the appropriate licence authority, charter permit and Canadian aviation document and the liability insurance coverage referred to in subsection 8.2(4) and, where applicable, subsection 8.2(5) are in effect and that the liability insurance coverage is available for inspection by the Agency on request, or

(6) Le licencié et le tiers doivent aviser l'Office par écrit dès que la police d'assurance responsabilité visée au paragraphe (4) et, s'il y a lieu, au paragraphe (5) est annulée ou modifiée de façon qu'elle n'est plus maintenue par l'un ou l'autre.

DORS/96-335, art. 4.

8.3 (1) L'autorisation visée à l'article 8.2 n'est pas obligatoire pour le service aérien projeté si la licence requise, le cas échéant, le permis d'affrètement et le document d'aviation canadien requis ainsi que la police d'assurance responsabilité visée au paragraphe 8.2(4) et, s'il y a lieu, au paragraphe 8.2(5) sont en vigueur et si, selon le cas :

a) le tiers et le licencié sont des Canadiens, le tiers est un licencié et le service aérien est un service intérieur ou un service aérien entre le Canada et les États-Unis;

b) lorsqu'il s'agit d'un service international, une situation temporaire et imprévue est survenue dans les 72 heures précédant l'heure de départ prévue d'un vol ou du premier vol d'une série de vols et rend nécessaire l'utilisation, pour une période maximale d'une semaine, de tout ou partie d'un aéronef, avec équipage, fourni par un tiers, et le licencié :

(i) a avisé l'Office, conformément au paragraphe (2), du vol proposé ou du premier vol de la série de vols s'étendant sur une période maximale d'une semaine,

(ii) a reçu confirmation que les conditions énoncées au présent alinéa sont remplies.

(2) L'avis visé à l'alinéa (1)b) doit être donné avant le vol ou les vols proposés et doit contenir les renseignements suivants :

a) une description de la situation temporaire et imprévue et les raisons pour lesquelles il est nécessaire d'utiliser tout ou partie d'un aéronef, avec équipage, fourni par un tiers;

b) quant au service aérien projeté :

(i) une déclaration portant que la licence requise, le cas échéant, le permis d'affrètement et le document d'aviation canadien requis ainsi que la police d'assurance responsabilité visée au paragraphe 8.2(4) et, s'il y a lieu, au paragraphe 8.2(5) sont en vigueur et que la police peut, sur demande, être mise à la disposition de l'Office pour examen,

(ii) where use of the aircraft and flight crew does not require an Agency licence, a copy of the Canadian aviation document and the certificate of liability insurance;

(c) where the aircraft to be used is larger than that authorized in the charter permit, a statement that the number of seats sold will not be greater than the number authorized in the charter permit;

(d) the name of the licensee;

(e) the name of the person providing the aircraft with a flight crew;

(f) the aircraft type to be provided;

(g) the number of seats and the cargo capacity of the aircraft to be provided;

(h) the date of each flight; and

(i) the routing of each flight.

SOR/96-335, s. 4.

8.4 Where the Agency has granted an approval, or no approval is required pursuant to section 8.3, the licensee is not required to

(a) notwithstanding paragraph 18(a), furnish the services, equipment and facilities that are necessary for the purposes of the provision of the air service; or

(b) satisfy the condition set out in paragraph 18(c).

SOR/96-335, s. 4.

Public Disclosure

8.5 (1) Subject to subsection (4), a licensee that intends to provide an air service described in subsection 8.2(1) shall so notify the public in accordance with subsection (2).

(2) The licensee shall give notification that the air service referred to in subsection (1) is being operated using an aircraft and a flight crew provided by another person, and shall identify that person and specify the aircraft type

(a) on all service schedules, timetables, electronic displays and any other public advertising of the air service; and

(b) to travellers

(ii) dans les cas où l'utilisation de l'aéronef et de l'équipage exige l'obtention d'une licence de l'Office, une copie du document d'aviation canadien et du certificat d'assurance responsabilité;

c) lorsque l'aéronef à utiliser est plus gros que celui autorisé par le permis d'affrètement, une déclaration portant que le nombre de places vendues ne dépassera pas le nombre autorisé par ce permis;

d) le nom du licencié;

e) le nom du tiers fournissant l'aéronef avec équipage;

f) le type d'aéronef devant être fourni;

g) le nombre de places de l'aéronef et sa capacité pour le transport de marchandises;

h) la date de chaque vol;

i) l'itinéraire de chaque vol.

DORS/96-335, art. 4.

8.4 Dans le cas où l'Office a donné son autorisation ou dans le cas visé à l'article 8.3 où cette autorisation n'est pas obligatoire, le licencié n'est pas tenu :

a) malgré l'alinéa 18a), de fournir les services, le matériel et les installations nécessaires à la prestation du service aérien;

b) de remplir la condition énoncée à l'alinéa 18c).

DORS/96-335, art. 4.

Divulgation au public

8.5 (1) Sous réserve du paragraphe (4), le licencié qui a l'intention de fournir un service aérien visé au paragraphe 8.2(1) doit en informer le public de la manière prévue au paragraphe (2).

(2) Le licencié doit annoncer que ce service aérien est exploité au moyen d'un aéronef, avec équipage, fourni par un tiers et préciser le nom du tiers et le type d'aéronef :

a) sur tous les indicateurs, horaires et systèmes d'affichage électronique et dans toute autre publicité concernant le service aérien;

b) aux voyageurs, aux moments suivants :

(i) avant la réservation, ou après celle-ci si l'entente relative au service aérien a été conclue après qu'une réservation a été faite,

(i) before reservation, or after reservation if the arrangement for the air service has been entered into after a reservation has been made, and

(ii) on check-in.

(3) A licensee shall identify the person providing the aircraft and specify the aircraft type for each segment of the journey on all travel documents, including, if issued, itineraries.

(4) Where paragraph 8.3(1)(b) applies, a licensee is exempt from having to comply with the requirements of subsection (1), paragraph (2)(a), subparagraph (2)(b)(i) and subsection (3) only if the licensee has made every effort to comply with them.

(5) Where an approval is required by subsection 8.2(1) or an acknowledgement is required by paragraph 8.3(1)(b), the licensee may give the notification referred to in subsection (2) before receipt of the approval or acknowledgement if the notification contains a statement that the provision of the air service using all or part of an aircraft, with a flight crew, provided by a person other than the licensee is subject to the consent of the Agency.

SOR/96-335, s. 4.

9 [Repealed, SOR/96-335, s. 4]

PART II

Domestic and International Licences and Reduction in Domestic Services

[SOR/96-335, s. 5]

Domestic Licensing

10 (1) An applicant for a domestic licence, or for an amendment to or a renewal of such a licence, shall submit to the Agency documentary evidence to establish that the applicant

(a) is a Canadian or is exempted from that requirement under section 62 of the Act;

(b) holds a Canadian aviation document that is valid in respect of the air service to be provided under the licence;

(c) has the liability insurance coverage required by section 7 in respect of the air service to be provided under the licence and has complied with section 8; and

(ii) au moment de l'enregistrement.

(3) Le licencié doit indiquer sur tous les documents de voyage, y compris l'itinéraire, s'il y a lieu, le nom du tiers fournissant l'aéronef et le type d'aéronef pour chaque segment du voyage.

(4) Dans le cas où l'alinéa 8.2(1)b) s'applique, le licencié n'est exempté de l'application du paragraphe (1), de l'alinéa (2)a), du sous-alinéa (2)b)(i) et du paragraphe (3) que s'il a fait tout son possible pour s'y conformer.

(5) Dans les cas où l'autorisation visée au paragraphe 8.2(1) ou la confirmation visée à l'alinéa 8.3(1)b) est exigée, le licencié peut faire l'annonce mentionnée au paragraphe (2) avant d'avoir reçu l'autorisation ou la confirmation, pourvu qu'il y précise que la prestation du service aérien au moyen de tout ou partie d'un aéronef, avec équipage, fourni par un tiers est subordonnée au consentement de l'Office.

DORS/96-335, art. 4.

9 [Abrogé, DORS/96-335, art. 4]

PARTIE II

Licences intérieures et internationales et réduction des services intérieurs

[DORS/96-335, art. 5]

Licences intérieures

10 (1) Le demandeur qui désire obtenir, modifier ou renouveler une licence intérieure doit déposer auprès de l'Office une preuve documentaire établissant à la fois :

a) qu'il est Canadien ou qu'il est exempté de l'obligation de justifier de cette qualité en vertu de l'article 62 de la Loi;

b) qu'il détient un document d'aviation canadien valable pour le service aérien visé par la licence;

c) qu'il détient une police d'assurance responsabilité conforme à l'article 7 à l'égard du service aérien visé par la licence et qu'il s'est conformé à l'article 8;

local tariff means a tariff containing the local tolls of the air carrier named therein; (*tarif unitransporteur*)

local toll means a toll that applies to traffic between points served by one air carrier; (*taxe unitransporteur*)

through toll means the aggregate toll from a point of origin to a point of destination. (*taxe totale*)

SOR/93-253, s. 2(E).

taxe pluritransporteur Taxe applicable au trafic acheminé par deux transporteurs aériens ou plus, qui est publiée en tant que taxe unique. (*joint toll*)

taxe spécifique Taux ou frais applicables à des marchandises spécifiquement désignées dans le tarif. (*commodity toll*)

taxe totale Taxe globale applicable au trafic acheminé d'un point d'origine et à un point de destination. (*through toll*)

taxe unitransporteur Taxe applicable au trafic acheminé entre les points desservis par un seul transporteur aérien. (*local toll*)

DORS/93-253, art. 2(A).

DIVISION I

Domestic

Application

105 A tariff referred to in section 67 of the Act shall include the information required by this Division.

SOR/96-335, s. 53.

Exception

106 The holder of a domestic licence in respect of a domestic service that serves the transportation needs of the bona fide guests, employees and workers of a lodge operation, including the transportation of luggage, materials and supplies of those guests, employees or workers, is excluded, in respect of the service of those needs, from the requirements of section 67 of the Act.

SOR/96-335, s. 53.

Contents of Tariffs

107 (1) Every tariff shall contain

(a) the name of the issuing air carrier and the name, title and full address of the officer or agent issuing the tariff;

(b) the tariff number, and the title that describes the tariff contents;

(c) the dates of publication, coming into effect and expiration of the tariff, if it is to expire on a specific date;

(d) a description of the points or areas from and to which or between which the tariff applies;

SECTION I

Service intérieur

Application

105 Les tarifs visés à l'article 67 de la Loi doivent contenir les renseignements exigés par la présente section.

DORS/96-335, art. 53.

Exception

106 Le titulaire d'une licence intérieure pour l'exploitation d'un service intérieur servant à répondre aux besoins de transport des véritables clients, employés et travailleurs d'un hôtel pavillonnaire, y compris le transport de leurs bagages, matériel et fournitures, est exempté des exigences de l'article 67 de la Loi à l'égard de ce service.

DORS/96-335, art. 53.

Contenu des tarifs

107 (1) Tout tarif doit contenir :

a) le nom du transporteur aérien émetteur ainsi que le nom, le titre et l'adresse complète du dirigeant ou de l'agent responsable d'établir le tarif;

b) le numéro du tarif et son titre descriptif;

c) les dates de publication et d'entrée en vigueur ainsi que la date d'expiration s'il s'applique à une période donnée;

d) la description des points ou des régions en provenance et à destination desquels ou entre lesquels il s'applique;

(e) in the case of a joint tariff, a list of all participating air carriers;

(f) a table of contents showing the exact location where information under general headings is to be found;

(g) where applicable, an index of all goods for which commodity tolls are specified, with reference to each item or page of the tariff in which any of the goods are shown;

(h) an index of points from, to or between which tolls apply, showing the province or territory in which the points are located;

(i) a list of the airports, aerodromes or other facilities used with respect to each point shown in the tariff;

(j) where applicable, information respecting prepayment requirements and restrictions and information respecting non-acceptance and non-delivery of goods, unless reference is given to another tariff number in which that information is contained;

(k) a full explanation of all abbreviations, notes, reference marks, symbols and technical terms used in the tariff and, where a reference mark or symbol is used on a page, an explanation of it on that page or a reference thereon to the page on which the explanation is given;

(l) the terms and conditions governing the tariff, generally, stated in such a way that it is clear as to how the terms and conditions apply to the tolls named in the tariff;

(m) any special terms and conditions that apply to a particular toll and, where the toll appears on a page, a reference on that page to the page on which those terms and conditions appear;

(n) the terms and conditions of carriage, clearly stating the air carrier's policy in respect of at least the following matters, namely,

(i) the carriage of persons with disabilities,

(ii) acceptance of children,

(iii) compensation for denial of boarding as a result of overbooking,

(iv) passenger re-routing,

(v) failure to operate the service or failure to operate on schedule,

e) s'il s'agit d'un tarif pluritransporteur, la liste des transporteurs aériens participants;

f) une table des matières donnant un renvoi précis aux rubriques générales;

g) s'il y a lieu, un index de toutes les marchandises pour lesquelles des taxes spécifiques sont prévues, avec renvoi aux pages ou aux articles pertinents du tarif;

h) un index des points en provenance et à destination desquels ou entre lesquels s'appliquent les taxes, avec mention de la province ou du territoire où ils sont situés;

i) la liste des aérodromes, aéroports ou autres installations utilisés pour chaque point mentionné dans le tarif;

j) s'il y a lieu, les renseignements concernant les exigences et les restrictions de paiement à l'avance ainsi que le refus et la non-livraison des marchandises; toutefois, ces renseignements ne sont pas nécessaires si un renvoi est fait au numéro d'un autre tarif qui contient ces renseignements;

k) l'explication complète des abréviations, notes, appels de notes, symboles et termes techniques employés dans le tarif et, lorsque des appels de notes ou des symboles figurent sur une page, leur explication sur la page même ou un renvoi à la page qui en donne l'explication;

l) les conditions générales régissant le tarif, énoncées en des termes qui expliquent clairement leur application aux taxes énumérées;

m) les conditions particulières qui s'appliquent à une taxe donnée et, sur la page où figure la taxe, un renvoi à la page où se trouvent les conditions;

n) les conditions de transport, dans lesquelles est énoncée clairement la politique du transporteur aérien concernant au moins les éléments suivants :

(i) le transport des personnes ayant une déficience,

(ii) l'admission des enfants,

(iii) les indemnités pour refus d'embarquement à cause de sur réservation,

(iv) le réacheminement des passagers,

(v) l'inexécution du service et le non-respect de l'horaire,

(vi) refunds for services purchased but not used, whether in whole or in part, either as a result of the client's unwillingness or inability to continue or the air carrier's inability to provide the service for any reason,

(vii) ticket reservation, cancellation, confirmation, validity and loss,

(viii) refusal to transport passengers or goods,

(ix) method of calculation of charges not specifically set out in the tariff,

(x) limits of liability respecting passengers and goods,

(xi) exclusions from liability respecting passengers and goods, and

(xii) procedures to be followed, and time limitations, respecting claims;

(o) the tolls, shown in Canadian currency, together with the names of the points from, to or between which the tolls apply, arranged in a simple and systematic manner with, in the case of commodity tolls, goods clearly identified;

(p) the routings related to the tolls unless reference is made in the tariff to another tariff in which the routings appear; and

(q) the official descriptive title of each type of passenger fare, together with any name or abbreviation thereof.

(vi) le remboursement des services achetés mais non utilisés, intégralement ou partiellement, par suite de la décision du client de ne pas poursuivre son trajet ou de son incapacité à le faire, ou encore de l'inaptitude du transporteur aérien à fournir le service pour une raison quelconque,

(vii) la réservation, l'annulation, la confirmation, la validité et la perte des billets,

(viii) le refus de transporter des passagers ou des marchandises,

(ix) la méthode de calcul des frais non précisés dans le tarif,

(x) les limites de responsabilité à l'égard des passagers et des marchandises,

(xi) les exclusions de responsabilité à l'égard des passagers et des marchandises,

(xii) la marche à suivre ainsi que les délais fixés pour les réclamations;

o) les taxes, exprimées en monnaie canadienne, et les noms des points en provenance et à destination desquels ou entre lesquels elles s'appliquent, le tout étant disposé d'une manière simple et méthodique et les marchandises étant indiquées clairement dans le cas des taxes spécifiques;

p) les itinéraires visés par les taxes; toutefois, ces itinéraires n'ont pas à être indiqués si un renvoi est fait à un autre tarif qui les contient;

q) le titre descriptif officiel de chaque type de prix passagers, ainsi que tout nom ou abréviation servant à désigner ce prix.

(2) Every original tariff page shall be designated "Original Page", and changes in, or additions to, the material contained on the page shall be made by revising the page and renumbering it accordingly.

(3) Where an additional page is required within a series of pages in a tariff, that page shall be given the same number as the page it follows but a letter shall be added to the number.

(4) and (5) [Repealed, SOR/96-335, s. 54]

SOR/93-253, s. 2; SOR/93-449, s. 1; SOR/96-335, s. 54.

(2) Les pages originales du tarif doivent porter la mention «page originale» et, lorsque des changements ou des ajouts sont apportés, la page visée doit être révisée et numérotée en conséquence.

(3) S'il faut intercaler une page supplémentaire dans une série de pages d'un tarif, cette page doit porter le même numéro que la page qui la précède, auquel une lettre est ajoutée.

(4) et (5) [Abrogés, DORS/96-335, art. 54]

DORS/93-253, art. 2; DORS/93-449, art. 1; DORS/96-335, art. 54.

Interest

107.1 Where the Agency, by order, directs an air carrier to refund specified amounts to persons that have been

Intérêts

107.1 Dans le cas où, en vertu de l'alinéa 66(1)c) de la Loi, l'Office enjoint, par ordonnance, à un transporteur

CANADA

CONSOLIDATION

CODIFICATION

Canada Transportation Act

Loi sur les transports au Canada

S.C. 1996, c. 10

L.C. 1996, ch. 10

Current to February 15, 2016

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that is the property or under the control of any person the entry or inspection of which appears to the inquirer to be necessary; and

(b) exercise the same powers as are vested in a superior court to summon witnesses, enforce their attendance and compel them to give evidence and produce any materials, books, papers, plans, specifications, drawings and other documents that the inquirer thinks necessary.

Review and Appeal

Governor in Council may vary or rescind orders, etc.

40 The Governor in Council may, at any time, in the discretion of the Governor in Council, either on petition of a party or an interested person or of the Governor in Council's own motion, vary or rescind any decision, order, rule or regulation of the Agency, whether the decision or order is made *inter partes* or otherwise, and whether the rule or regulation is general or limited in its scope and application, and any order that the Governor in Council may make to do so is binding on the Agency and on all parties.

Appeal from Agency

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

Time for making appeal

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

Powers of Court

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

Agency may be heard

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

tériel roulant ou navire — , quel qu'en soit le propriétaire ou le responsable, si elle l'estime nécessaire à l'enquête;

b) exercer les attributions d'une cour supérieure pour faire comparaître des témoins et pour les contraindre à témoigner et à produire les pièces — objets, livres, plans, cahiers des charges, dessins ou autres documents — qu'elle estime nécessaires à l'enquête.

Révision et appel

Modification ou annulation

40 Le gouverneur en conseil peut modifier ou annuler les décisions, arrêtés, règles ou règlements de l'Office soit à la requête d'une partie ou d'un intéressé, soit de sa propre initiative; il importe peu que ces décisions ou arrêtés aient été pris en présence des parties ou non et que les règles ou règlements soient d'application générale ou particulière. Les décrets du gouverneur en conseil en cette matière lient l'Office et toutes les parties.

Appel

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

Délai

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

Pouvoirs de la cour

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

Plaidoirie de l'Office

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

Review of Act

Statutory review

53 (1) The Minister shall, no later than eight years after the day this subsection comes into force, appoint one or more persons to carry out a comprehensive review of the operation of this Act and any other Act of Parliament for which the Minister is responsible that pertains to the economic regulation of a mode of transportation or to transportation activities under the legislative authority of Parliament.

Objective of review

(2) The person or persons conducting the review shall assess whether the legislation referred to in subsection (1) provides Canadians with a transportation system that is consistent with the national transportation policy set out in section 5 and, if necessary or desirable, may recommend amendments to

(a) the national transportation policy; and

(b) the legislation referred to in subsection (1).

Consultations

(3) The review shall be undertaken in consultation with purchasers and suppliers of transportation services and any other persons whom the Minister considers appropriate.

Powers on review

(4) Every person appointed to carry out the review has, for the purposes of the review, the powers of a commissioner under Part I of the *Inquiries Act* and may engage the services of experts, professionals and other staff deemed necessary for making the review at the rates of remuneration that the Treasury Board approves.

Report

(5) The review shall be completed and a report of the review submitted to the Minister within 18 months after the appointment referred to in subsection (1).

Tabling of report

(6) The Minister shall have a copy of the report laid before each House of Parliament on any of the first thirty days on which that House is sitting after the Minister receives it.

1996, c. 10, s. 53; 2007, c. 19, s. 12.

Examen de la loi

Examen complet

53 (1) Le ministre nomme, dans les huit ans suivant la date d'entrée en vigueur du présent paragraphe, une ou plusieurs personnes chargées de procéder à un examen complet de l'application de la présente loi et de toute autre loi fédérale dont le ministre est responsable et qui porte sur la réglementation économique d'un mode de transport ou sur toute activité de transport assujettie à la compétence législative du Parlement.

But de l'examen

(2) Les personnes qui effectuent l'examen vérifient si les lois visées au paragraphe (1) fournissent aux Canadiens un système de transport qui est conforme à la politique nationale des transports énoncée à l'article 5. Si elles l'estiment utile, elles peuvent recommander des modifications :

a) à cette politique;

b) aux lois visées au paragraphe (1).

Consultations

(3) L'examen doit être effectué en consultation avec les acheteurs et les fournisseurs de services de transport et les autres personnes que le ministre estime indiquées.

Pouvoirs

(4) Chaque personne nommée pour effectuer l'examen dispose à cette fin des pouvoirs d'un commissaire nommé aux termes de la partie I de la *Loi sur les enquêtes* et peut, conformément au barème de rémunération approuvé par le Conseil du Trésor, engager le personnel — experts, professionnels et autres — nécessaire pour effectuer l'examen.

Rapport

(5) L'examen doit être terminé, et le rapport sur celui-ci présenté au ministre, dans les dix-huit mois suivant la date de la nomination prévue au paragraphe (1).

Dépôt du rapport

(6) Le ministre fait déposer une copie du rapport devant chaque chambre du Parlement dans les trente premiers jours de séance de celle-ci suivant sa réception.

1996, ch. 10, art. 53; 2007, ch. 19, art. 12.

with the orders, regulations and directions made or issued under this Act, notwithstanding the fact that the receiver, manager, official or person has been appointed by or acts under the authority of a court.

Adaptation orders

(2) Wherever by reason of insolvency, sale under mortgage or any other cause, a transportation undertaking or a portion of a transportation undertaking is operated, managed or held otherwise than by the carrier, the Agency or the Minister may make any order it considers proper for adapting and applying the provisions of this Act.

en vertu de la présente loi, en dépit du fait que sa nomination a été faite par le tribunal ou que ses attributions lui ont été confiées par celui-ci.

Modification

(2) L'Office ou le ministre peut, par arrêté, adapter les dispositions de la présente loi si, notamment pour insolvabilité ou vente hypothécaire, une entreprise de transport échappe, en tout ou en partie, à la gestion, à l'exploitation ou à la possession du transporteur en cause.

PART II

Air Transportation

Interpretation and Application

Definitions

55 (1) In this Part,

aircraft has the same meaning as in subsection 3(1) of the *Aeronautics Act*; (*aéronef*)

air service means a service, provided by means of an aircraft, that is publicly available for the transportation of passengers or goods, or both; (*service aérien*)

basic fare means

(a) the fare in the tariff of the holder of a domestic licence that has no restrictions and represents the lowest amount to be paid for one-way air transportation of an adult with reasonable baggage between two points in Canada, or

(b) where the licensee has more than one such fare between two points in Canada and the amount of any of those fares is dependent on the time of day or day of the week of travel, or both, the highest of those fares; (*prix de base*)

Canadian means a Canadian citizen or a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act*, a government in Canada or an agent of such a government or a corporation or other entity that is incorporated or formed under the laws of Canada or a province, that is controlled in fact by Canadians and of which at least seventy-five per cent, or such lesser percentage as the Governor in Council may by regulation specify, of the voting interests are owned and controlled by Canadians; (*Canadien*)

PARTIE II

Transport aérien

Définitions et champ d'application

Définitions

55 (1) Les définitions qui suivent s'appliquent à la présente partie.

aéronef S'entend au sens du paragraphe 3(1) de la *Loi sur l'aéronautique*. (*aircraft*)

Canadien Citoyen canadien ou résident permanent au sens du paragraphe 2(1) de la *Loi sur l'immigration et la protection des réfugiés*; la notion englobe également les administrations publiques du Canada ou leurs mandataires et les personnes ou organismes, constitués au Canada sous le régime de lois fédérales ou provinciales et contrôlés de fait par des Canadiens, dont au moins soixante-quinze pour cent — ou tel pourcentage inférieur désigné par règlement du gouverneur en conseil — des actions assorties du droit de vote sont détenues et contrôlées par des Canadiens. (*Canadian*)

document d'aviation canadien S'entend au sens du paragraphe 3(1) de la *Loi sur l'aéronautique*. (*Canadian aviation document*)

licencié Titulaire d'une licence délivrée par l'Office en application de la présente partie. (*licensee*)

prix de base

a) Prix du tarif du titulaire d'une licence intérieure qui est sans restriction et qui constitue le montant le moins élevé à payer pour le transport aller, entre deux points situés au Canada, d'un adulte accompagné d'une quantité normale de bagages;

Canadian aviation document has the same meaning as in subsection 3(1) of the *Aeronautics Act*; (*document d'aviation canadien*)

domestic licence means a licence issued under section 61; (*Version anglaise seulement*)

domestic service means an air service between points in Canada, from and to the same point in Canada or between Canada and a point outside Canada that is not in the territory of another country; (*service intérieur*)

international service means an air service between Canada and a point in the territory of another country; (*service international*)

licensee means the holder of a licence issued by the Agency under this Part; (*licencié*)

non-scheduled international licence means a licence issued under subsection 73(1); (*Version anglaise seulement*)

non-scheduled international service means an international service other than a scheduled international service; (*service international à la demande*)

prescribed means prescribed by regulations made under section 86; (*règlement*)

scheduled international licence means a licence issued under subsection 69(1); (*Version anglaise seulement*)

scheduled international service means an international service that is a scheduled service pursuant to

(a) an agreement or arrangement for the provision of that service to which Canada is a party, or

(b) a determination made under section 70; (*service international régulier*)

tariff means a schedule of fares, rates, charges and terms and conditions of carriage applicable to the provision of an air service and other incidental services. (*tarif*)

b) dans les cas où un tel prix peut varier selon le moment du jour ou de la semaine, ou des deux, auquel s'effectue le voyage, le montant le plus élevé de ce prix. (*basic fare*)

règlement Règlement pris au titre de l'article 86. (*prescribed*)

service aérien Service offert, par aéronef, au public pour le transport des passagers, des marchandises, ou des deux. (*air service*)

service intérieur Service aérien offert soit à l'intérieur du Canada, soit entre un point qui y est situé et un point qui lui est extérieur sans pour autant faire partie du territoire d'un autre pays. (*domestic service*)

service international Service aérien offert entre le Canada et l'étranger. (*international service*)

service international à la demande Service international autre qu'un service international régulier. (*non-scheduled international service*)

service international régulier Service international exploité à titre de service régulier aux termes d'un accord ou d'une entente à cet effet dont le Canada est signataire ou sous le régime d'une qualification faite en application de l'article 70. (*scheduled international service*)

tarif Barème des prix, taux, frais et autres conditions de transport applicables à la prestation d'un service aérien et des services connexes. (*tariff*)

texte d'application Arrêté ou règlement pris en application de la présente partie ou de telle de ses dispositions. (*French version only*)

Affiliation

(2) For the purposes of this Part,

(a) one corporation is affiliated with another corporation if

(i) one of them is a subsidiary of the other,

(ii) both are subsidiaries of the same corporation, or

Groupe

(2) Pour l'application de la présente partie :

a) des personnes morales sont du même groupe si l'une est la filiale de l'autre, si toutes deux sont des filiales d'une même personne morale ou si chacune d'elles est contrôlée par la même personne;

(iii) both are controlled by the same person;

(b) if two corporations are affiliated with the same corporation at the same time, they are deemed to be affiliated with each other;

(c) a partnership or sole proprietorship is affiliated with another partnership or sole proprietorship if both are controlled by the same person;

(d) a corporation is affiliated with a partnership or a sole proprietorship if both are controlled by the same person;

(e) a corporation is a subsidiary of another corporation if it is controlled by that other corporation or by a subsidiary of that other corporation;

(f) a corporation is controlled by a person other than Her Majesty in right of Canada or a province if

(i) securities of the corporation to which are attached more than 50% of the votes that may be cast to elect directors of the corporation are held, directly or indirectly, whether through one or more subsidiaries or otherwise, otherwise than by way of security only, by or for the benefit of that person, and

(ii) the votes attached to those securities are sufficient, if exercised, to elect a majority of the directors of the corporation;

(g) a corporation is controlled by Her Majesty in right of Canada or a province if

(i) the corporation is controlled by Her Majesty in the manner described in paragraph (f), or

(ii) in the case of a corporation without share capital, a majority of the directors of the corporation, other than *ex officio* directors, are appointed by

(A) the Governor in Council or the Lieutenant Governor in Council of the province, as the case may be, or

(B) a Minister of the government of Canada or the province, as the case may be; and

(h) a partnership is controlled by a person if the person holds an interest in the partnership that entitles the person to receive more than 50% of the profits of the partnership or more than 50% of its assets on dissolution.

b) si deux personnes morales sont du groupe d'une même personne morale au même moment, elles sont réputées être du même groupe;

c) une société de personnes ou une entreprise individuelle est du groupe d'une autre société de personnes ou d'une autre entreprise individuelle si toutes deux sont contrôlées par la même personne;

d) une personne morale est du groupe d'une société de personnes ou d'une entreprise individuelle si toutes deux sont contrôlées par la même personne;

e) une personne morale est une filiale d'une autre personne morale si elle est contrôlée par cette autre personne morale ou par une filiale de celle-ci;

f) une personne morale est contrôlée par une personne autre que Sa Majesté du chef du Canada ou d'une province si :

(i) des valeurs mobilières de la personne morale conférant plus de cinquante pour cent des votes qui peuvent être exercés lors de l'élection des administrateurs de la personne morale en question sont détenues, directement ou indirectement, notamment par l'intermédiaire d'une ou de plusieurs filiales, autrement qu'à titre de garantie uniquement, par cette personne ou pour son bénéfice,

(ii) les votes que comportent ces valeurs mobilières sont suffisants, en supposant leur exercice, pour élire une majorité des administrateurs de la personne morale;

g) une personne morale est contrôlée par Sa Majesté du chef du Canada ou d'une province si :

(i) la personne morale est contrôlée par Sa Majesté de la manière décrite à l'alinéa f),

(ii) dans le cas d'une personne morale sans capital-actions, une majorité des administrateurs de la personne morale, autres que les administrateurs d'office, sont nommés par :

(A) soit le gouverneur en conseil ou le lieutenant-gouverneur en conseil de la province, selon le cas,

(B) soit un ministre du gouvernement du Canada ou de la province, selon le cas;

h) contrôle une société de personnes la personne qui détient dans cette société des titres de participation lui donnant droit de recevoir plus de cinquante pour cent des bénéfices de la société ou plus de cinquante pour

cent des éléments d'actif de celle-ci au moment de sa dissolution.

Definition of "person"

(3) In subsection (2), *person* includes an individual, a partnership, an association, a corporation, a trustee, an executor, a liquidator of a succession, an administrator or a legal representative.

Définition de « personne »

(3) Au paragraphe (2), *personne* s'entend d'un particulier, d'une société de personnes, d'une association, d'une personne morale, d'un fiduciaire, d'un exécuteur testamentaire ou du liquidateur d'une succession, d'un tuteur, d'un curateur ou d'un mandataire.

Control in fact

(4) For greater certainty, nothing in subsection (2) shall be construed to affect the meaning of the expression "controlled in fact" in the definition "Canadian" in subsection (1).

1996, c. 10, s. 55; 2000, c. 15, s. 1; 2001, c. 27, s. 222.

Contrôle de fait

(4) Il demeure entendu que le paragraphe (2) n'a pas pour effet de modifier le sens de l'expression « contrôle de fait » dans la définition de « Canadien » au paragraphe (1).

1996, ch. 10, art. 55; 2000, ch. 15, art. 1; 2001, ch. 27, art. 222.

Non-application of Part

56 (1) This Part does not apply to a person that uses an aircraft on behalf of the Canadian Armed Forces or any other armed forces cooperating with the Canadian Armed Forces.

Exclusions — forces armées

56 (1) La présente partie ne s'applique pas aux personnes qui utilisent un aéronef pour le compte des Forces armées canadiennes ou des forces armées coopérant avec celles-ci.

Specialty service exclusion

(2) This Part does not apply to the operation of an air flight training service, aerial inspection service, aerial construction service, aerial photography service, aerial forest fire management service, aerial spraying service or any other prescribed air service.

Exclusion — services spécialisés

(2) La présente partie ne s'applique pas à l'exploitation d'un service aérien de formation en vol, d'inspection, de travaux publics ou de construction, de photographie, d'épandage, de contrôle des incendies de forêt ou autre service prévu par règlement.

Emergency service exclusion

(3) This Part does not apply to the provision of an air service if the federal government or a provincial or a municipal government declares an emergency under federal or provincial law, and that government directly or indirectly requests that the air service be provided to respond to the emergency.

Exclusion — urgences

(3) La présente partie ne s'applique pas à la fourniture d'un service aérien dans le cas où le gouvernement fédéral, le gouvernement d'une province ou une administration municipale déclare en vertu d'une loi fédérale ou provinciale qu'une situation de crise existe et présente directement ou indirectement une demande en vue d'obtenir ce service pour faire face à la situation de crise.

Public interest

(4) The Minister may, by order, prohibit the provision of an air service under subsection (3) or require the discontinuance of that air service if, in the opinion of the Minister, it is in the public interest to do so.

Intérêt public

(4) Le ministre peut, par arrêté, interdire la fourniture d'un service aérien au titre du paragraphe (3) ou exiger qu'il y soit mis fin s'il estime qu'il est dans l'intérêt public de le faire.

Not a statutory instrument

(5) The order is not a statutory instrument within the meaning of the *Statutory Instruments Act*.

1996, c. 10, s. 56; 2007, c. 19, s. 14.

Loi sur les textes réglementaires

(5) Les arrêtés ne sont pas des textes réglementaires au sens de la *Loi sur les textes réglementaires*.

1996, ch. 10, art. 56; 2007, ch. 19, art. 14.

56.1 [Repealed, 2007, c. 19, s. 15]

56.1 [Abrogé, 2007, ch. 19, art. 15]

56.2 [Repealed, 2007, c. 19, s. 15]

56.2 [Abrogé, 2007, ch. 19, art. 15]

56.3 [Repealed, 2007, c. 19, s. 15]

56.4 [Repealed, 2007, c. 19, s. 15]

56.5 [Repealed, 2007, c. 19, s. 15]

56.6 [Repealed, 2007, c. 19, s. 15]

56.7 [Repealed, 2007, c. 19, s. 15]

56.3 [Abrogé, 2007, ch. 19, art. 15]

56.4 [Abrogé, 2007, ch. 19, art. 15]

56.5 [Abrogé, 2007, ch. 19, art. 15]

56.6 [Abrogé, 2007, ch. 19, art. 15]

56.7 [Abrogé, 2007, ch. 19, art. 15]

Prohibitions

Prohibition re operation

57 No person shall operate an air service unless, in respect of that service, the person

(a) holds a licence issued under this Part;

(b) holds a Canadian aviation document; and

(c) has the prescribed liability insurance coverage.

Licence not transferable

58 A licence issued under this Part for the operation of an air service is not transferable.

Prohibition re sale

59 No person shall sell, cause to be sold or publicly offer for sale in Canada an air service unless, if required under this Part, a person holds a licence issued under this Part in respect of that service and that licence is not suspended.

1996, c. 10, s. 59; 2007, c. 19, s. 16.

Provision of aircraft with flight crew

60 (1) No person shall provide all or part of an aircraft, with a flight crew, to a licensee for the purpose of providing an air service pursuant to the licensee's licence and no licensee shall provide an air service using all or part of an aircraft, with a flight crew, provided by another person except

(a) in accordance with regulations made by the Agency respecting disclosure of the identity of the operator of the aircraft and other related matters; and

(b) where prescribed, with the approval of the Agency.

Conditions and Ministerial directions

(2) Approval by the Agency under subsection (1) is subject to any directions to the Agency issued by the Minister and to any terms and conditions that the Agency may specify in the approval, including terms and conditions respecting routes to be followed, points or areas to be served, size and type of aircraft to be operated, schedules,

Interdictions

Conditions d'exploitation

57 L'exploitation d'un service aérien est subordonnée à la détention, pour celui-ci, de la licence prévue par la présente partie, d'un document d'aviation canadien et de la police d'assurance responsabilité réglementaire.

Incessibilité

58 Les licences d'exploitation de services aériens sont incessibles.

Opérations visant le service

59 La vente, directe ou indirecte, et l'offre publique de vente, au Canada, d'un service aérien sont subordonnées à la détention, pour celui-ci, d'une licence en règle délivrée sous le régime de la présente partie.

1996, ch. 10, art. 59; 2007, ch. 19, art. 16.

Fourniture d'aéronefs

60 (1) La fourniture de tout ou partie d'aéronefs, avec équipage, à un licencié en vue de la prestation, conformément à sa licence, d'un service aérien et celle, par un licencié, d'un service aérien utilisant tout ou partie d'aéronefs, avec équipage, appartenant à un tiers sont assujetties :

a) au respect des règlements, notamment en matière de divulgation de l'identité des exploitants d'aéronefs;

b) si les règlements l'exigent, à l'autorisation de l'Office.

Directives ministérielles et conditions

(2) L'autorisation est assujettie aux directives que le ministre peut lui donner et peut comporter, lors de la délivrance ou par la suite en tant que de besoin, les conditions qu'il estime indiqué d'imposer, notamment en ce qui concerne les routes aériennes à suivre, les points ou régions à desservir, la dimension et la catégorie des aéro-

places of call, tariffs, fares, rates and charges, insurance, carriage of passengers and, subject to the *Canada Post Corporation Act*, carriage of goods.

Licence for Domestic Service

Issue of licence

61 On application to the Agency and on payment of the specified fee, the Agency shall issue a licence to operate a domestic service to the applicant if

(a) the applicant establishes in the application to the satisfaction of the Agency that the applicant

(i) is a Canadian,

(ii) holds a Canadian aviation document in respect of the service to be provided under the licence,

(iii) has the prescribed liability insurance coverage in respect of the service to be provided under the licence, and

(iv) meets prescribed financial requirements; and

(b) the Agency is satisfied that the applicant has not contravened section 59 in respect of a domestic service within the preceding twelve months.

Qualification exemption

62 (1) Where the Minister considers it necessary or advisable in the public interest that a domestic licence be issued to a person who is not a Canadian, the Minister may, by order, on such terms and conditions as may be specified in the order, exempt the person from the application of subparagraph 61(a)(i) for the duration of the order.

Statutory Instruments Act

(2) The order is not a regulation for the purposes of the *Statutory Instruments Act*.

Publication

(3) The Minister must, as soon as feasible, make the name of the person who is exempted and the exemption's duration accessible to the public through the Internet or by any other means that the Minister considers appropriate.

1996, c. 10, s. 62; 2013, c. 31, s. 5.

nefs à exploiter, les horaires, les escales, les tarifs, l'assurance, le transport des passagers et, sous réserve de la *Loi sur la Société canadienne des postes*, celui des marchandises.

Service intérieur

Délivrance de la licence

61 L'Office, sur demande et paiement des droits indiqués, délivre une licence pour l'exploitation d'un service intérieur au demandeur :

a) qui, dans la demande, justifie du fait :

(i) qu'il est Canadien,

(ii) qu'à l'égard du service, il détient un document d'aviation canadien,

(iii) qu'à l'égard du service, il détient la police d'assurance responsabilité réglementaire,

(iv) qu'il remplit les exigences financières réglementaires;

b) dont il est convaincu qu'il n'a pas, dans les douze mois précédents, enfreint l'article 59 relativement à un service intérieur.

Exemption

62 (1) Lorsqu'il estime souhaitable ou nécessaire dans l'intérêt public de délivrer une licence intérieure à une personne qui n'a pas la qualité de Canadien, le ministre peut, par arrêté assorti ou non de conditions, l'exempter de l'obligation de justifier de cette qualité, l'exemption restant valide tant que l'arrêté reste en vigueur.

Loi sur les textes réglementaires

(2) L'arrêté n'est pas un règlement pour l'application de la *Loi sur les textes réglementaires*.

Publication

(3) Dès que possible, le ministre rend le nom de la personne bénéficiant de l'exemption et la durée de celle-ci accessibles au public par Internet ou par tout autre moyen qu'il estime indiqué.

1996, ch. 10, art. 62; 2013, ch. 31, art. 5.

Mandatory suspension or cancellation

63 (1) The Agency shall suspend or cancel the domestic licence of a person where the Agency determines that, in respect of the service for which the licence was issued, the person ceases to meet any of the requirements of subparagraphs 61(a)(i) to (iii).

Discretionary suspension or cancellation

(2) The Agency may suspend or cancel a domestic licence

(a) where the Agency determines that, in respect of the service for which the domestic licence was issued, the licensee has contravened, or does not meet the requirements of, any regulation or order made under this Part or any provision of this Part other than subparagraphs 61(a)(i) to (iii); or

(b) subject to section 64, in accordance with a request from the licensee for the suspension or cancellation.

Reinstatement condition

(3) The Agency shall not reinstate a domestic licence that has been suspended for sixty days or longer unless the licensee establishes to the satisfaction of the Agency that the person meets the prescribed financial requirements.

Notice of discontinuance or reduction of certain services

64 (1) Where a licensee proposes to discontinue a domestic service or to reduce the frequency of such a service to a point to less than one flight per week and, as a result of the proposed discontinuance or reduction, there will be only one licensee or no licensee offering at least one flight per week to that point, the licensee shall give notice of the proposal in prescribed form and manner to such persons as are prescribed.

Notice of discontinuance of certain services

(1.1) If a licensee proposes to discontinue its year-round non-stop scheduled air service between two points in Canada and that discontinuance would result in a reduction, as compared to the week before the proposal is to take effect, of at least 50% of the weekly passenger-carrying capacity of all licensees operating year-round non-stop scheduled air services between those two points, the licensee shall give notice of the proposal in the prescribed form and manner to the prescribed persons.

Discussion with elected officials

(1.2) A licensee shall, as soon as practicable, provide an opportunity for elected officials of the municipal or local government of the community of the point or points, as

Suspension ou annulation obligatoire

63 (1) L'Office suspend ou annule la licence s'il est convaincu que le licencié ne répond plus à telle des conditions mentionnées aux sous-alinéas 61a)(i) à (iii).

Suspension ou annulation facultative

(2) L'Office peut suspendre ou annuler la licence :

a) s'il est convaincu que le licencié a, relativement au service, enfreint d'autres conditions que celles mentionnées au paragraphe (1) ou telle des dispositions de la présente partie ou de ses textes d'application;

b) sous réserve de l'article 64, sur demande du licencié.

Rétablissement de la licence

(3) L'Office ne peut rétablir une licence suspendue depuis au moins soixante jours que si l'intéressé justifie du fait qu'il remplit les exigences financières réglementaires.

Interruption ou réduction de services

64 (1) Le licencié qui se propose d'interrompre un service intérieur à un point ou d'en ramener la fréquence à moins d'un vol hebdomadaire est tenu, si cette mesure a pour effet qu'il y aura au plus un licencié offrant un service à une fréquence minimale d'un vol hebdomadaire, d'aviser, en la forme et selon les modalités réglementaires, les destinataires désignés par règlement.

Avis d'interruption de services

(1.1) Le licencié qui se propose d'interrompre un service aérien régulier sans escale offert à longueur d'année entre deux points au Canada, est tenu d'en aviser, selon les modalités réglementaires, les personnes désignées par règlement si l'interruption aurait pour effet de réduire d'au moins cinquante pour cent la capacité hebdomadaire de transport de passagers, par rapport à celle de la semaine précédant son entrée en vigueur, de l'ensemble des licenciés offrant à longueur d'année des services aériens réguliers sans escale entre ces deux points.

Consultation

(1.2) Le licencié offre dans les meilleurs délais aux représentants élus des administrations municipales ou locales de la collectivité où se trouvent le ou les points touchés la possibilité de le rencontrer et de discuter avec lui

the case may be, to meet and discuss with the licensee the impact of the proposed discontinuance or reduction.

Notice period

(2) A licensee shall not implement a proposal referred to in subsection (1) or (1.1) until the expiry of 120 days, or 30 days if the service referred to in that subsection has been in operation for less than one year, after the notice is given or until the expiry of any shorter period that the Agency may, on application by the licensee, specify by order.

Considerations re whether exemption to be granted

(3) In considering whether to specify a shorter period under subsection (2), the Agency shall have regard to

(a) the adequacy of alternative modes of public transportation available at or in the vicinity of the point referred to in subsection (1) or between the points referred to in subsection (1.1);

(b) other means by which air service to the point or between the points is or is likely to be provided;

(c) whether the licensee has complied with subsection (1.2); and

(d) the particular circumstances of the licensee.

Definition of "non-stop scheduled air service"

(4) In this section, *non-stop scheduled air service* means an air service operated between two points without any stops in accordance with a published timetable or on a regular basis.

1996, c. 10, s. 64; 2000, c. 15, s. 3; 2007, c. 19, s. 17.

Complaints re non-compliance

65 Where, on complaint in writing to the Agency by any person, the Agency finds that a licensee has failed to comply with section 64 and that it is practicable in the circumstances for the licensee to comply with an order under this section, the Agency may, by order, direct the licensee to reinstate the service referred to in that section

(a) for such a period, not exceeding 120 days after the date of the finding by the Agency, as the Agency deems appropriate; and

(b) at such a frequency as the Agency may specify.

1996, c. 10, s. 65; 2007, c. 19, s. 18.

Unreasonable fares or rates

66 (1) If, on complaint in writing to the Agency by any person, the Agency finds that a licensee, including affiliated licensees, is the only person providing a domestic

de l'effet qu'auraient l'interruption ou la réduction du service.

Délai

(2) Le licencié ne peut donner suite au projet mentionné aux paragraphes (1) ou (1.1) avant l'expiration soit des cent vingt jours ou, dans le cas où le service visé à ces paragraphes est offert depuis moins d'un an, des trente jours suivant la signification de l'avis, soit du délai inférieur fixé, à sa demande, par ordonnance de l'Office.

Examen relatif à l'exemption

(3) Pour décider s'il convient de fixer un délai inférieur, l'Office tient compte :

a) du fait que les autres modes de transport desservant le point visé au paragraphe (1), ou ses environs, ou existant entre les points visés au paragraphe (1.1), sont satisfaisants ou non;

b) de l'existence ou de la probabilité d'autres liaisons aériennes à destination du point ou entre les points;

c) du fait que le licencié a respecté ou non les exigences du paragraphe (1.2);

d) de la situation particulière du licencié.

Définition de « service aérien régulier sans escale »

(4) Au présent article, *service aérien régulier sans escale* s'entend d'un service aérien sans escale offert entre deux points soit régulièrement, soit conformément à un horaire publié.

1996, ch. 10, art. 64; 2000, ch. 15, art. 3. ; 2007, ch. 19, art. 17.

Plaintes relatives aux infractions

65 L'Office, saisi d'une plainte formulée par écrit à l'encontre d'un licencié, peut, s'il constate que celui-ci ne s'est pas conformé à l'article 64 et que les circonstances permettent à celui-ci de se conformer à l'arrêté, ordonner à celui-ci de rétablir le service pour la période, d'au plus cent vingt jours après la date de son constat, qu'il estime indiquée, et selon la fréquence qu'il peut fixer.

1996, ch. 10, art. 65; 2007, ch. 19, art. 18.

Prix ou taux excessifs

66 (1) S'il conclut, sur dépôt d'une plainte, qu'un licencié, y compris les licenciés de son groupe, est la seule personne à offrir un service intérieur entre deux points,

service between two points and that a fare, cargo rate or increase in a fare or cargo rate published or offered in respect of the service is unreasonable, the Agency may, by order,

(a) disallow the fare, rate or increase;

(b) direct the licensee to amend its tariff by reducing the fare, rate or increase by the amounts and for the periods that the Agency considers reasonable in the circumstances; or

(c) direct the licensee, if practicable, to refund amounts specified by the Agency, with interest calculated in the prescribed manner, to persons determined by the Agency to have been overcharged by the licensee.

Complaint of inadequate range of fares or rates

(2) If, on complaint in writing to the Agency by any person, the Agency finds that a licensee, including affiliated licensees, is the only person providing a domestic service between two points and that it is offering an inadequate range of fares or cargo rates in respect of that service, the Agency may, by order, direct the licensee, for a period that the Agency considers reasonable in the circumstances, to publish and apply in respect of that service one or more additional fares or cargo rates that the Agency considers reasonable in the circumstances.

Relevant information

(3) When making a finding under subsection (1) or (2) that a fare, cargo rate or increase in a fare or cargo rate published or offered in respect of a domestic service between two points is unreasonable or that a licensee is offering an inadequate range of fares or cargo rates in respect of a domestic service between two points, the Agency may take into consideration any information or factor that it considers relevant, including

(a) historical data respecting fares or cargo rates applicable to domestic services between those two points;

(b) fares or cargo rates applicable to similar domestic services offered by the licensee and one or more other licensees, including terms and conditions related to the fares or cargo rates, the number of seats available at those fares and the cargo capacity and cargo container types available at those rates;

(b.1) the competition from other modes of transportation, if the finding is in respect of a cargo rate, an increase in a cargo rate or a range of cargo rates; and

d'une part, et qu'un prix ou un taux, ou une augmentation de prix ou de taux, publiés ou appliqués à l'égard de ce service sont excessifs, d'autre part, l'Office peut, par ordonnance :

a) annuler le prix, le taux ou l'augmentation;

b) enjoindre au licencié de modifier son tarif afin de réduire d'une somme, et pour une période, qu'il estime indiquées dans les circonstances le prix, le taux ou l'augmentation;

c) lui enjoindre de rembourser, si possible, les sommes qu'il détermine, majorées des intérêts calculés de la manière réglementaire, aux personnes qui, selon lui, ont versé des sommes en trop.

Gamme de prix insuffisante

(2) S'il conclut, sur dépôt d'une plainte, qu'un licencié, y compris les licenciés de son groupe, est la seule personne à offrir un service intérieur entre deux points, d'une part, et que celui-ci offre une gamme de prix ou de taux insuffisante à l'égard de ce service, d'autre part, l'Office peut, par ordonnance, enjoindre au licencié, pour la période qu'il estime indiquée dans les circonstances, de publier et d'appliquer à l'égard de ce service un ou plusieurs prix ou taux supplémentaires qu'il estime indiqués dans les circonstances.

Facteurs à prendre en compte

(3) Pour décider, au titre des paragraphes (1) ou (2), si le prix, le taux ou l'augmentation de prix ou de taux publiés ou appliqués à l'égard d'un service intérieur entre deux points sont excessifs ou si le licencié offre une gamme de prix ou de taux insuffisante à l'égard d'un service intérieur entre deux points, l'Office peut tenir compte de tout renseignement ou facteur qu'il estime pertinent, notamment :

a) de renseignements relatifs aux prix ou aux taux appliqués antérieurement à l'égard des services intérieurs entre ces deux points;

b) des prix ou des taux applicables à l'égard des services intérieurs similaires offerts par le licencié et un ou plusieurs autres licenciés, y compris les conditions relatives aux prix ou aux taux applicables, le nombre de places offertes à ces prix et la capacité de transport et les types de conteneurs pour le transport disponibles à ces taux;

b.1) de la concurrence des autres moyens de transport, si la décision vise le taux, l'augmentation de taux ou la gamme de taux;

(c) any other information provided by the licensee, including information that the licensee is required to provide under section 83.

(c) des autres renseignements que lui fournit le licencié, y compris ceux qu'il est tenu de fournir au titre de l'article 83.

Alternative domestic services

(4) The Agency may find that a licensee is the only person providing a domestic service between two points if every alternative domestic service between those points is, in the Agency's opinion, unreasonable, taking into consideration the number of stops, the number of seats offered, the frequency of service, the flight connections and the total travel time and, more specifically, in the case of cargo, the cargo capacity and cargo container types available.

Services insuffisants

(4) L'Office peut conclure qu'un licencié est la seule personne à offrir un service intérieur entre deux points s'il estime que tous les autres services intérieurs offerts entre ces points sont insuffisants, compte tenu du nombre d'escales, de correspondances ou de places disponibles, de la fréquence des vols et de la durée totale du voyage et, plus précisément, dans le cas du transport de marchandises, de la capacité de transport et des types de conteneurs disponibles.

Alternative service

(4.1) The Agency shall not make an order under subsection (1) or (2) in respect of a licensee found by the Agency to be the only person providing a domestic service between two points if, in the Agency's opinion, there exists another domestic service that is not between the two points but is a reasonable alternative taking into consideration the convenience of access to the service, the number of stops, the number of seats offered, the frequency of service, the flight connections and the total travel time and, more specifically, in the case of cargo, the cargo capacity and cargo container types available.

Autres services

(4.1) L'Office ne rend pas l'ordonnance prévue aux paragraphes (1) ou (2) à l'égard du licencié s'il conclut que celui-ci est la seule personne à offrir un service intérieur entre deux points et s'il estime qu'il existe un autre service intérieur, qui n'est pas offert entre ces deux points, mais qui est suffisant compte tenu de la commodité de l'accès au service, du nombre d'escales, de correspondances ou de places disponibles, de la fréquence des vols et de la durée totale du voyage et, plus précisément, dans le cas du transport de marchandises, de la capacité de transport et des types de conteneurs disponibles.

Consideration of representations

(5) Before making a direction under paragraph (1)(b) or subsection (2), the Agency shall consider any representations that the licensee has made with respect to what is reasonable in the circumstances.

Représentations

(5) Avant de rendre l'ordonnance mentionnée à l'alinéa (1)b) ou au paragraphe (2), l'Office tient compte des observations du licencié sur les mesures qui seraient justifiées dans les circonstances.

(6) and (7) [Repealed, 2007, c. 19, s. 19]

(6) et (7) [Abrogés, 2007, ch. 19, art. 19]

Confidentiality of information

(8) The Agency may take any measures or make any order that it considers necessary to protect the confidentiality of any of the following information that it is considering in the course of any proceedings under this section:

(a) information that constitutes a trade secret;

(b) information the disclosure of which would likely cause material financial loss to, or prejudice to the competitive position of, the person providing the information or on whose behalf it is provided; and

(c) information the disclosure of which would likely interfere with contractual or other negotiations being conducted by the person providing the information or on whose behalf it is provided.

1996, c. 10, s. 66; 2000, c. 15, s. 4; 2007, c. 19, s. 19.

Confidentialité des renseignements

(8) L'Office peut prendre toute mesure, ou rendre toute ordonnance, qu'il estime indiquée pour assurer la confidentialité des renseignements ci-après qu'il examine dans le cadre du présent article :

a) les renseignements qui constituent un secret industriel;

b) les renseignements dont la divulgation risquerait vraisemblablement de causer des pertes financières importantes à la personne qui les a fournis ou de nuire à sa compétitivité;

c) les renseignements dont la divulgation risquerait vraisemblablement d'entraver des négociations — contractuelles ou autres — menées par la personne qui les a fournis.

1996, ch. 10, art. 66; 2000, ch. 15, art. 4; 2007, ch. 19, art. 19.

Tariffs to be made public

67 (1) The holder of a domestic licence shall

(a) display in a prominent place at the business offices of the licensee a sign indicating that the tariffs for the domestic service offered by the licensee, including the terms and conditions of carriage, are available for public inspection at the business offices of the licensee, and allow the public to make such inspections;

(a.1) publish the terms and conditions of carriage on any Internet site used by the licensee for selling the domestic service offered by the licensee;

(b) in its tariffs, specifically identify the basic fare between all points for which a domestic service is offered by the licensee; and

(c) retain a record of its tariffs for a period of not less than three years after the tariffs have ceased to have effect.

Prescribed tariff information to be included

(2) A tariff referred to in subsection (1) shall include such information as may be prescribed.

No fares, etc., unless set out in tariff

(3) The holder of a domestic licence shall not apply any fare, rate, charge or term or condition of carriage applicable to the domestic service it offers unless the fare, rate, charge, term or condition is set out in a tariff that has been published or displayed under subsection (1) and is in effect.

Copy of tariff on payment of fee

(4) The holder of a domestic licence shall provide a copy or excerpt of its tariffs to any person on request and on payment of a fee not exceeding the cost of making the copy or excerpt.

1996, c. 10, s. 67; 2000, c. 15, s. 5; 2007, c. 19, s. 20.

Fares or rates not set out in tariff

67.1 If, on complaint in writing to the Agency by any person, the Agency finds that, contrary to subsection 67(3), the holder of a domestic licence has applied a fare, rate, charge or term or condition of carriage applicable to the domestic service it offers that is not set out in its tariffs, the Agency may order the licensee to

(a) apply a fare, rate, charge or term or condition of carriage that is set out in its tariffs;

(b) compensate any person adversely affected for any expenses they incurred as a result of the licensee's fail-

Publication des tarifs

67 (1) Le licencié doit :

a) poser à ses bureaux, dans un endroit bien en vue, une affiche indiquant que les tarifs et notamment les conditions de transport pour le service intérieur qu'il offre sont à la disposition du public pour consultation à ses bureaux et permettre au public de les consulter;

a.1) publier les conditions de transport sur tout site Internet qu'il utilise pour vendre le service intérieur;

b) indiquer clairement dans ses tarifs le prix de base du service intérieur qu'il offre entre tous les points qu'il dessert;

c) conserver ses tarifs en archive pour une période minimale de trois ans après leur cessation d'effet.

Renseignements tarifaires

(2) Les tarifs comportent les renseignements exigés par règlement.

Interdiction

(3) Le titulaire d'une licence intérieure ne peut appliquer à l'égard d'un service intérieur que le prix, le taux, les frais ou les conditions de transport applicables figurant dans le tarif en vigueur publié ou affiché conformément au paragraphe (1).

Exemplaire du tarif

(4) Il fournit un exemplaire de tout ou partie de ses tarifs sur demande et paiement de frais non supérieurs au coût de reproduction de l'exemplaire.

1996, ch. 10, art. 67; 2000, ch. 15, art. 5; 2007, ch. 19, art. 20.

Prix, taux, frais ou conditions non inclus au tarif

67.1 S'il conclut, sur dépôt d'une plainte, que le titulaire d'une licence intérieure a, contrairement au paragraphe 67(3), appliqué à l'un de ses services intérieurs un prix, un taux, des frais ou d'autres conditions de transport ne figurant pas au tarif, l'Office peut, par ordonnance, lui enjoindre :

a) d'appliquer un prix, un taux, des frais ou d'autres conditions de transport figurant au tarif;

b) d'indemniser toute personne lésée des dépenses qu'elle a supportées consécutivement à la non-applica-

ure to apply a fare, rate, charge or term or condition of carriage that was set out in its tariffs; and

(c) take any other appropriate corrective measures.

2000, c. 15, s. 6; 2007, c. 19, s. 21.

tion du prix, du taux, des frais ou des autres conditions qui figuraient au tarif;

c) de prendre toute autre mesure corrective indiquée.

2000, ch. 15, art. 6; 2007, ch. 19, art. 21.

When unreasonable or unduly discriminatory terms or conditions

67.2 (1) If, on complaint in writing to the Agency by any person, the Agency finds that the holder of a domestic licence has applied terms or conditions of carriage applicable to the domestic service it offers that are unreasonable or unduly discriminatory, the Agency may suspend or disallow those terms or conditions and substitute other terms or conditions in their place.

Conditions déraisonnables

67.2 (1) S'il conclut, sur dépôt d'une plainte, que le titulaire d'une licence intérieure a appliqué pour un de ses services intérieurs des conditions de transport déraisonnables ou injustement discriminatoires, l'Office peut suspendre ou annuler ces conditions et leur en substituer de nouvelles.

Prohibition on advertising

(2) The holder of a domestic licence shall not advertise or apply any term or condition of carriage that is suspended or has been disallowed.

2000, c. 15, s. 6; 2007, c. 19, s. 22(F).

Interdiction d'annoncer

(2) Il est interdit au titulaire d'une licence intérieure d'annoncer ou d'appliquer une condition de transport suspendue ou annulée.

2000, ch. 15, art. 6; 2007, ch. 19, art. 22(F).

Non-application of fares, etc.

68 (1) Sections 66 to 67.2 do not apply in respect of fares, rates or charges applicable to a domestic service provided for under a contract between a holder of a domestic licence and another person whereby the parties to the contract agree to keep its provisions confidential.

Non-application de certaines dispositions

68 (1) Les articles 66 à 67.2 ne s'appliquent pas aux prix, taux ou frais applicables au service intérieur qui fait l'objet d'un contrat entre le titulaire d'une licence intérieure et une autre personne et par lequel les parties conviennent d'en garder les stipulations confidentielles.

Non-application of terms and conditions

(1.1) Sections 66 to 67.2 do not apply in respect of terms and conditions of carriage applicable to a domestic service provided for under a contract referred to in subsection (1) to which an employer is a party and that relates to travel by its employees.

Non-application aux conditions de transport

(1.1) Les articles 66 à 67.2 ne s'appliquent pas aux conditions de transport applicables au service intérieur qui fait l'objet d'un contrat visé au paragraphe (1) portant sur les voyages d'employés faits pour le compte d'un employeur qui est partie au contrat.

Provisions regarding exclusive use of services

(2) The parties to the contract shall not include in it provisions with respect to the exclusive use by the other person of a domestic service operated by the holder of the domestic licence between two points in accordance with a published timetable or on a regular basis, unless the contract is for all or a significant portion of the capacity of a flight or a series of flights.

Stipulations interdites

(2) Le contrat ne peut comporter aucune clause relative à l'usage exclusif par l'autre partie des services intérieurs offerts entre deux points par le titulaire de la licence intérieure, soit régulièrement, soit conformément à un horaire publié, sauf s'il porte sur la totalité ou une partie importante des places disponibles sur un vol ou une série de vols.

Retention of contract required

(3) The holder of a domestic licence who is a party to the contract shall retain a copy of it for a period of not less than three years after it has ceased to have effect and, on request made within that period, shall provide a copy of it to the Agency.

1996, c. 10, s. 68; 2000, c. 15, s. 7; 2007, c. 19, s. 23.

Double à conserver

(3) Le titulaire d'une licence intérieure est tenu de conserver, au moins trois ans après son expiration, un double du contrat et d'en fournir un exemplaire à l'Office pendant cette période s'il lui en fait la demande.

1996, ch. 10, art. 68; 2000, ch. 15, art. 7; 2007, ch. 19, art. 23.

Licence for Scheduled International Service

Issue of licence

69 (1) On application to the Agency and on payment of the specified fee, the Agency shall issue a licence to operate a scheduled international service to the applicant if

(a) the applicant establishes in the application to the satisfaction of the Agency that the applicant

(i) is, pursuant to subsection (2) or (3), eligible to hold the licence,

(ii) holds a Canadian aviation document in respect of the service to be provided under the licence,

(iii) has the prescribed liability insurance coverage in respect of the service to be provided under the licence, and

(iv) where the applicant is a Canadian, meets the prescribed financial requirements; and

(b) the Agency is satisfied that the applicant has not contravened section 59 in respect of the service to be provided under the licence within the preceding twelve months.

Eligibility of Canadians

(2) The Minister may, in writing, designate any Canadian as eligible to hold a scheduled international licence. That Canadian remains eligible while the designation remains in force.

Eligibility of non-Canadians

(3) A non-Canadian is eligible to hold a scheduled international licence if the non-Canadian

(a) has been designated by a foreign government or an agent of a foreign government to operate an air service under the terms of an agreement or arrangement between that government and the Government of Canada; and

(b) holds, in respect of the air service, a document issued by a foreign government or agent that, in respect of the service to be provided under the document, is equivalent to a scheduled international licence.

1996, c. 10, s. 69; 2013, c. 31, s. 6.

Service international régulier

Délivrance de la licence

69 (1) L'Office, sur demande et paiement des droits indiqués, délivre une licence pour l'exploitation d'un service international régulier au demandeur :

a) qui, dans la demande, justifie du fait :

(i) qu'il y est habilité, sous le régime des paragraphes (2) ou (3),

(ii) qu'à l'égard du service, il détient un document d'aviation canadien,

(iii) qu'à l'égard du service, il détient la police d'assurance responsabilité réglementaire,

(iv) qu'il remplit, s'agissant d'un Canadien, les exigences financières réglementaires;

b) dont il est convaincu qu'il n'a pas, dans les douze mois précédents, enfreint l'article 59 relativement au service.

Habilitation des Canadiens

(2) Le ministre peut, par écrit, désigner des Canadiens qu'il habilite à détenir une licence pour l'exploitation d'un service international régulier; l'habilitation reste valide tant que la désignation est en vigueur.

Habilitation des non-Canadiens

(3) Peut détenir une telle licence le non-Canadien qui :

a) a fait l'objet, de la part d'un gouvernement étranger ou du mandataire de celui-ci, d'une désignation l'habilitant à exploiter un service aérien aux termes d'un accord ou d'une entente entre ce gouvernement et celui du Canada;

b) détient en outre, à l'égard du service, un document délivré par un gouvernement étranger, ou par son mandataire, équivalant à une licence internationale service régulier.

1996, ch. 10, art. 69; 2013, ch. 31, art. 6.

Determination of scheduled international service

70 The Minister may, in writing to the Agency,

(a) determine that an international service is a scheduled international service; or

(b) withdraw a determination made under paragraph (a).

Qualification : service international régulier

70 Le ministre peut, par note expédiée à l'Office, qualifier de régulier un service international ou révoquer une telle qualification.

Terms and conditions of scheduled international licence

71 (1) Subject to any directions issued to the Agency under section 76, the Agency may, on the issuance of a scheduled international licence or from time to time thereafter, make the licence subject, in addition to any terms and conditions prescribed in respect of the licence, to such terms and conditions as the Agency deems to be consistent with the agreement, convention or arrangement pursuant to which the licence is being issued, including terms and conditions respecting routes to be followed, points or areas to be served, size and type of aircraft to be operated, schedules, places of call, tariffs, fares, rates and charges, insurance, carriage of passengers and, subject to the *Canada Post Corporation Act*, carriage of goods.

Conditions liées à la licence

71 (1) Sous réserve des directives visées à l'article 76, l'Office peut, lors de la délivrance de la licence ou par la suite en tant que de besoin, assujettir celle-ci aux conditions — outre les conditions réglementaires — réputées conformes à l'accord, la convention ou l'entente au titre duquel elle est délivrée, notamment en ce qui concerne les routes aériennes à suivre, les points ou régions à desservir, la dimension et la catégorie des aéronefs à exploiter, les horaires, les escales, les tarifs, l'assurance, le transport des passagers et, sous réserve de la *Loi sur la Société canadienne des postes*, celui des marchandises.

Compliance with terms and conditions

(2) The holder of a scheduled international licence shall comply with every term and condition to which the licence is subject.

Obligations du licencié

(2) Le licencié est tenu de respecter toutes les conditions auxquelles sa licence est assujettie.

Mandatory suspension or cancellation

72 (1) The Agency shall suspend or cancel a scheduled international licence where the Agency determines that, in respect of the service for which the licence was issued, the licensee ceases to meet any of the requirements of subparagraphs 69(1)(a)(i) to (iii).

Suspension ou annulation obligatoire

72 (1) L'Office suspend ou annule la licence s'il est convaincu que le licencié ne répond plus à telle des conditions mentionnées aux sous-alinéas 69(1)a)(i) à (iii).

Discretionary suspension or cancellation

(2) The Agency may suspend or cancel a scheduled international licence

(a) where the Agency determines that, in respect of the service for which the licence was issued, the licensee has contravened, or does not meet the requirements of, any regulation or order made under this Part or any provision of this Part other than subparagraphs 69(1)(a)(i) to (iii); or

(b) in accordance with a request from the licensee for the suspension or cancellation.

Suspension ou annulation facultative

(2) L'Office peut suspendre ou annuler la licence :

a) s'il est convaincu que le licencié a, relativement au service, enfreint des conditions autres que celles mentionnées au paragraphe (1) ou telle des dispositions de la présente partie ou de ses textes d'application;

b) sur demande du licencié.

Reinstatement condition

(3) The Agency shall not reinstate the scheduled international licence of a Canadian that has been suspended for sixty days or longer unless the Canadian establishes to the satisfaction of the Agency that the Canadian meets the prescribed financial requirements.

Rétablissement de la licence

(3) L'Office ne peut rétablir la licence d'un Canadien suspendue depuis au moins soixante jours que si celui-ci justifie du fait qu'il remplit les exigences financières réglementaires.

Licence for Non-scheduled International Service

Service international à la demande

Issue of licence

73 (1) Subject to any directions issued to the Agency under section 76, on application to the Agency and on payment of the specified fee, the Agency shall issue a licence to operate a non-scheduled international service to the applicant if

(a) the applicant establishes in the application to the satisfaction of the Agency that the applicant

(i) is a Canadian,

(ii) holds a Canadian aviation document in respect of the service to be provided under the licence,

(iii) has the prescribed liability insurance coverage in respect of the service to be provided under the licence, and

(iv) meets prescribed financial requirements; and

(b) the Agency is satisfied that the applicant has not contravened section 59 in respect of the service to be provided under the licence within the preceding twelve months.

Délivrance aux Canadiens

73 (1) Sous réserve des directives visées à l'article 76, l'Office, sur demande et paiement des droits indiqués, délivre une licence pour l'exploitation d'un service international à la demande au demandeur :

a) qui, dans la demande, justifie du fait :

(i) qu'il est Canadien,

(ii) qu'à l'égard du service, il détient un document d'aviation canadien,

(iii) qu'à l'égard du service, il détient la police d'assurance responsabilité réglementaire,

(iv) qu'il remplit les exigences financières réglementaires;

b) dont il est convaincu qu'il n'a pas, dans les douze mois précédents, enfreint l'article 59 relativement au service à offrir.

Non-Canadian applicant

(2) Subject to any directions issued to the Agency under section 76, on application to the Agency and on payment of the specified fee, the Agency may issue a non-scheduled international licence to a non-Canadian applicant if the applicant establishes in the application to the satisfaction of the Agency that the applicant

(a) holds a document issued by the government of the applicant's state or an agent of that government that, in respect of the service to be provided under the document, is equivalent to the non-scheduled international licence for which the application is being made; and

(b) meets the requirements of subparagraphs (1)(a)(ii) and (iii) and paragraph (1)(b).

Délivrance aux non-Canadiens

(2) Sous réserve des directives visées à l'article 76, l'Office, sur demande et paiement des droits indiqués, peut délivrer une licence pour l'exploitation d'un service international à la demande au non-Canadien qui, dans la demande, justifie du fait, qu'à l'égard du service :

a) il détient un document, délivré par le gouvernement de son État ou par son mandataire, équivalant à une licence internationale service à la demande;

b) il remplit les conditions mentionnées aux sous-alinéas (1)a)(ii) et (iii) et à l'alinéa (1)b).

Terms and conditions of non-scheduled international licence

74 (1) Subject to any directions issued to the Agency under section 76, the Agency may, on the issuance of a non-scheduled international licence or from time to time thereafter, make the licence subject, in addition to any terms and conditions prescribed in respect of the licence, to such terms and conditions as the Agency deems appropriate, including terms and conditions respecting points or areas to be served, size and type of aircraft to be operated, schedules, places of call, tariffs, fares, rates and charges, insurance, carriage of passengers and, subject to the *Canada Post Corporation Act*, carriage of goods.

Compliance with terms and conditions

(2) The holder of a non-scheduled international licence shall comply with every term and condition to which the licence is subject.

Mandatory suspension or cancellation

75 (1) The Agency shall suspend or cancel a non-scheduled international licence where the Agency determines that, in respect of the service for which the licence was issued, the licensee ceases to meet any of the requirements of

(a) in respect of a Canadian licensee, subparagraphs 73(1)(a)(i) to (iii); and

(b) in respect of a non-Canadian licensee, subparagraphs 73(1)(a)(ii) and (iii) and paragraph 73(2)(a).

Discretionary suspension or cancellation

(2) The Agency may suspend or cancel a non-scheduled international licence

(a) where the Agency determines that, in respect of the service for which the licence was issued, the licensee has contravened, or does not meet the requirements of, any regulation or order made under this Part or any provision of this Part other than the provisions referred to in paragraphs (1)(a) and (b); or

(b) in accordance with a request from the licensee for the suspension or cancellation.

Reinstatement condition

(3) The Agency shall not reinstate the non-scheduled international licence of a Canadian that has been suspended for sixty days or longer unless the Canadian establishes to the satisfaction of the Agency that the Canadian meets the prescribed financial requirements.

Conditions liées à la licence

74 (1) Sous réserve des directives visées à l'article 76, l'Office peut, lors de la délivrance de la licence ou par la suite en tant que de besoin, assujettir celle-ci aux conditions — outre les conditions réglementaires — qu'il estime indiqué d'imposer, notamment en ce qui concerne les points ou régions à desservir, la dimension et la catégorie des aéronefs à exploiter, les horaires, les escales, les tarifs, l'assurance, le transport des passagers et, sous réserve de la *Loi sur la Société canadienne des postes*, celui des marchandises.

Obligations du licencié

(2) Le licencié est tenu de respecter toutes les conditions auxquelles sa licence est assujettie.

Suspension ou annulation obligatoire

75 (1) L'Office suspend ou annule la licence s'il est convaincu que le licencié ne répond plus à telle des conditions mentionnées, pour un Canadien, aux sous-alinéas 73(1)a)(i) à (iii) et, pour un non-Canadien, aux sous-alinéas 73(1)a)(ii) et (iii) ou à l'alinéa 73(2)a).

Suspension ou annulation facultative

(2) L'Office peut suspendre ou annuler la licence :

a) s'il est convaincu que le licencié a, relativement au service, enfreint des conditions autres que celles mentionnées au paragraphe (1) ou telle des dispositions de la présente partie ou de ses textes d'application;

b) sur demande du licencié.

Rétablissement de la licence

(3) L'Office ne peut rétablir la licence d'un Canadien suspendue depuis au moins soixante jours que si celui-ci justifie du fait qu'il remplit les exigences financières réglementaires.

Issuance of International Charter Permits

Issuance, amendment and cancellation of permits

75.1 The issuance of a permit for the operation of an international charter to a licensee and the amendment or cancellation of the permit shall be made in accordance with regulations made under paragraph 86(1)(e).

2007, c. 19, s. 24.

Ministerial Directions for International Service

Minister may issue directions

76 (1) Where the Minister determines that it is necessary or advisable to provide direction to the Agency in respect of the exercise of any of its powers or the performance of any of its duties or functions under this Part relating to international service,

(a) in the interest of the safety or security of international civil aviation,

(b) in connection with the implementation or administration of an international agreement, convention or arrangement respecting civil aviation to which Canada is a party,

(c) in the interest of international comity or reciprocity,

(d) for the purpose of enforcing Canada's rights under an international agreement, convention or arrangement respecting civil aviation or responding to acts, policies or practices by a contracting party to any such agreement, convention or arrangement, or by an agency or citizen of such a party, that adversely affect or lead either directly or indirectly to adverse effects on Canadian international civil aviation services, or

(e) in connection with any other matter concerning international civil aviation as it affects the public interest,

the Minister may, subject to subsection (3), issue to the Agency directions that, notwithstanding any other provision of this Part, are binding on, and shall be complied with by, the Agency in the exercise of its powers or the performance of its duties or functions under this Part relating to international service.

Nature of directions

(2) Directions issued under subsection (1) may relate to

Délivrance de permis d'affrètement international

Délivrance, modification et annulation de permis

75.1 La délivrance d'un permis d'affrètement international à un licencié, de même que la modification ou l'annulation d'un tel permis, est faite en conformité avec les règlements pris en vertu de l'alinéa 86(1)e).

2007, ch. 19, art. 24.

Directives ministérielles en matière de service international

Directives ministérielles

76 (1) Le ministre peut donner des directives à l'Office, s'il l'estime nécessaire ou souhaitable aux fins suivantes dans le cadre de l'exercice de ses attributions relativement aux services internationaux :

a) la sécurité ou la sûreté de l'aviation civile internationale;

b) la mise en œuvre ou la gestion d'ententes, conventions ou accords internationaux, relatifs à l'aviation civile, dont le Canada est signataire;

c) la courtoisie ou la réciprocité internationale;

d) le respect des droits du Canada sous le régime d'ententes, accords ou conventions internationaux sur l'aviation civile ou l'objectif de réagir contre des mesures, prises soit par des parties à ces ententes, conventions ou accords, soit par des ressortissants ou organismes publics de celles-ci, qui portent atteinte ou sont, directement ou indirectement, susceptibles de porter atteinte aux services internationaux de l'aviation civile canadienne;

e) toute autre question d'intérêt public relative à l'aviation civile internationale.

Ces directives sont, par dérogation aux autres dispositions de la présente partie, obligatoires pour l'Office, lequel est tenu de s'y conformer.

Objet des directives

(2) Les directives peuvent porter sur :

(a) persons or classes of persons to whom licences to operate an international service shall or shall not be issued;

(b) the terms and conditions of such licences, or their variation;

(c) the suspension or cancellation of such licences; and

(d) any other matter concerning international service that is not governed by or under the *Aeronautics Act*.

Concurrence required for certain directions

(3) A direction by the Minister relating to a matter referred to in paragraph (1)(c), (d) or (e) may be issued only with the concurrence of the Minister of Foreign Affairs.

Duties and Powers of Agency

Duties and functions of Agency under international agreements, etc.

77 Where the Agency is identified as the aeronautical authority for Canada under an international agreement, convention or arrangement respecting civil aviation to which Canada is a party, or is directed by the Minister to perform any duty or function of the Minister pursuant to any such agreement, convention or arrangement, the Agency shall act as the aeronautical authority for Canada or perform the duty or function in accordance with the agreement, convention, arrangement or direction, as the case may be.

Agency powers qualified by certain agreements, etc.

78 (1) Subject to any directions issued to the Agency under section 76, the powers conferred on the Agency by this Part shall be exercised in accordance with any international agreement, convention or arrangement relating to civil aviation to which Canada is a party.

Variations from agreements, etc.

(2) Notwithstanding subsection (1) and subject to any directions issued to the Agency under section 76, the Agency may issue a licence or suspend a licence, or vary the terms and conditions of a licence, on a temporary basis for international air services that are not permitted in an agreement, convention or arrangement relating to civil aviation to which Canada is a party.

Agency may refuse licence — individuals

79 (1) Where the Agency has suspended or cancelled the licence of an individual under this Part or where an individual has contravened section 59, the Agency may, for a period not exceeding twelve months after the date

a) les personnes ou catégories de personnes à qui une licence d'exploitation d'un service international doit ou non être délivrée;

b) les conditions auxquelles ces licences peuvent être assujetties et la modification de ces conditions;

c) la suspension ou l'annulation des licences;

d) toute question de service international non visée par la *Loi sur l'aéronautique*.

Approbation pour certaines directives

(3) Les directives portant sur les questions visées aux alinéas (1)c), d) ou e) sont données avec le concours du ministre des Affaires étrangères.

Attributions de l'Office

Attributions de l'Office

77 L'Office agit comme l'autorité canadienne en matière d'aéronautique dès lors qu'une entente, une convention ou un accord internationaux, relatifs à l'aviation civile, dont le Canada est signataire, le prévoit ou dans les cas où le ministre le charge d'exercer tout ou partie des attributions que lui confèrent ces textes.

Conventions internationales

78 (1) Sous réserve des directives visées à l'article 76, l'exercice des attributions conférées à l'Office par la présente partie est assujetti aux ententes, conventions ou accords internationaux, relatifs à l'aviation civile, dont le Canada est signataire.

Dérogations

(2) Sous réserve des directives visées à l'article 76, l'Office peut toutefois, mais seulement à titre provisoire, délivrer une licence ou la suspendre, ou en modifier les conditions, pour le service international non permis par les textes visés au paragraphe (1).

Refus par l'Office

79 (1) L'Office, s'il a suspendu ou annulé la licence d'une personne physique, ou que celle-ci a contrevenu à l'article 59, peut refuser de lui délivrer toute licence relative à un service aérien pendant une période maximale de

of the suspension, cancellation or contravention, refuse to issue a licence in respect of an air service to the individual or to any corporation of which the individual is a principal.

douze mois suivant la prise de la mesure ou la contravention. Ce refus peut aussi viser toute personne morale dont l'intéressé est un dirigeant.

Agency may refuse licence — corporations

(2) Where the Agency has suspended or cancelled the licence of a corporation under this Part or where a corporation has contravened section 59, the Agency may, for a period not exceeding twelve months after the date of the suspension, cancellation or contravention, refuse to issue a licence in respect of an air service to

(a) the corporation;

(b) any person who, as a principal of the corporation, directed, authorized, assented to, acquiesced in or participated in a contravention that gave rise to the suspension or cancellation; and

(c) any body corporate of which the corporation or the person referred to in paragraph (b) is a principal.

Refus par l'Office

(2) L'Office, s'il a suspendu ou annulé la licence d'une personne morale, ou que celle-ci a contrevenu à l'article 59, peut refuser de lui délivrer toute licence relative à un service aérien pendant une période maximale de douze mois suivant la prise de la mesure ou la date de la contravention. Ce refus peut viser une personne qui, à titre de dirigeant de la personne morale, a ordonné ou autorisé la contravention qui a entraîné la mesure ou y a acquiescé ou participé et toute autre personne morale dont la personne physique ou morale précédemment mentionnée est un dirigeant.

Exemption

80 (1) The Agency may, by order, on such terms and conditions as it deems appropriate, exempt a person from the application of any of the provisions of this Part or of a regulation or order made under this Part where the Agency is of the opinion that

(a) the person has substantially complied with the provision;

(b) an action taken by the person is as effective as actual compliance with the provision; or

(c) compliance with the provision by the person is unnecessary, undesirable or impractical.

Exemptions

80 (1) L'Office peut, par arrêté assorti des conditions qu'il juge indiquées, soustraire quiconque à l'application de toute disposition de la présente partie ou de ses textes d'application s'il estime que l'intéressé, selon le cas :

a) s'y est déjà, dans une large mesure, conformé;

b) a pris des mesures équivalant à l'application effective de la disposition;

c) se trouve dans une situation ne rendant ni nécessaire, ni même souhaitable ou commode, cette application.

Exemption not to provide certain relief

(2) No exemption shall be granted under subsection (1) that has the effect of relieving a person from any provision of this Part that requires a person to be a Canadian and to have a Canadian aviation document and prescribed liability insurance coverage in respect of an air service.

Exception

(2) L'exemption ne peut avoir pour effet de soustraire quiconque aux dispositions relatives à la qualité de Canadien et à la détention d'un document d'aviation canadien et d'une police d'assurance responsabilité réglementaire en matière de service aérien.

Exemption not to provide certain relief — section 69

(3) No exemption shall be granted under subsection (1) that has the effect of relieving a person from the provisions of section 69 that require, in order to be eligible to hold a scheduled international licence,

(a) a Canadian to be designated by the Minister to hold such a licence; or

Exception — article 69

(3) L'exemption ne peut avoir pour effet de soustraire quiconque aux dispositions de l'article 69 qui exigent, en vue de permettre la détention d'une licence pour l'exploitation d'un service international régulier, selon le cas :

a) la désignation d'un Canadien, par le ministre, l'habilitant à détenir une telle licence;

(b) a non-Canadian to be designated by a foreign government or an agent of a foreign government to operate an air service under the terms of an agreement or arrangement between that government and the Government of Canada.

1996, c. 10, s. 80; 2013, c. 31, s. 7.

b) la désignation d'un non-Canadien, par un gouvernement étranger ou un mandataire de celui-ci, l'habilitant à exploiter un service aérien aux termes d'un accord ou d'une entente entre ce gouvernement et celui du Canada.

1996, ch. 10, art. 80; 2013, ch. 31, art. 7.

Inquiry into licensing matters

81 For the purposes of ensuring compliance with this Part, the Agency may inquire into any matter for which a licence, permit or other document is required under this Part.

Enquêtes sur les licences

81 Dans le but de faire appliquer la présente partie, l'Office peut faire enquête sur toute question relative à une licence, un permis ou un autre document requis par la présente partie.

Licensee to provide notification

82 Every licensee shall notify the Agency without delay, in writing, if

(a) the liability insurance coverage in respect of the air service for which the licence is issued is cancelled or is altered in a manner that results in the failure by the licensee to have the prescribed liability insurance coverage for that service;

(b) the licensee's operations change in a manner that results in the failure by the licensee to have the prescribed liability insurance coverage for that service; or

(c) any change occurs that affects, or is likely to affect, the licensee's status as a Canadian.

Avis

82 Le licencié est tenu d'aviser l'Office par écrit et sans délai de l'annulation de la police d'assurance responsabilité ou de toute modification — soit de celle-ci, soit de son exploitation — la rendant non conforme au règlement et de toute modification touchant ou susceptible de toucher sa qualité de Canadien.

Disclosure of information required

83 A licensee shall, at the request of the Agency, provide the Agency with information or documents available to the licensee that relate to any complaint under review or any investigation being conducted by the Agency under this Part.

Obligation

83 Le licencié est tenu, à la demande de l'Office, de lui fournir les renseignements et documents dont il dispose concernant toute plainte faisant l'objet d'un examen ou d'une enquête de l'Office sous le régime de la présente partie.

Notification of agent required

84 (1) A licensee who has an agent in Canada shall, in writing, provide the Agency with the agent's name and address.

Mandataire

84 (1) Le licencié qui a un mandataire au Canada est tenu de communiquer par écrit à l'Office les nom et adresse de celui-ci.

Appointment and notice of agent

(2) A licensee who does not have a place of business or an agent in Canada shall appoint an agent who has a place of business in Canada and, in writing, provide the Agency with the agent's name and address.

Constitution obligatoire

(2) Le licencié qui n'a pas d'établissement ni de mandataire au Canada est tenu d'en nommer un qui y ait un établissement et de communiquer par écrit à l'Office les nom et adresse du mandataire.

Notice of change of address

85 Where the address of a licensee's principal place of business in Canada or the name or address of the licensee's agent in Canada is changed, the licensee shall notify the Agency in writing of the change without delay.

Avis de changement

85 En cas de changement de l'adresse de son principal établissement ou de celle de son mandataire au Canada, ou s'il change de mandataire, le licencié est tenu d'en aviser sans délai par écrit l'Office.

Air Travel Complaints

Review and mediation

85.1 (1) If a person has made a complaint under any provision of this Part, the Agency, or a person authorized to act on the Agency's behalf, shall review and may attempt to resolve the complaint and may, if appropriate, mediate or arrange for mediation of the complaint.

Report

(2) The Agency or a person authorized to act on the Agency's behalf shall report to the parties outlining their positions regarding the complaint and any resolution of the complaint.

Complaint not resolved

(3) If the complaint is not resolved under this section to the complainant's satisfaction, the complainant may request the Agency to deal with the complaint in accordance with the provisions of this Part under which the complaint has been made.

Further proceedings

(4) A member of the Agency or any person authorized to act on the Agency's behalf who has been involved in attempting to resolve or mediate the complaint under this section may not act in any further proceedings before the Agency in respect of the complaint.

Extension of time

(5) The period of 120 days referred to in subsection 29(1) shall be extended by the period taken by the Agency or any person authorized to act on the Agency's behalf to review and attempt to resolve or mediate the complaint under this section.

Part of annual report

(6) The Agency shall, as part of its annual report, indicate the number and nature of the complaints filed under this Part, the names of the carriers against whom the complaints were made, the manner complaints were dealt with and the systemic trends observed.

2000, c. 15, s. 7.1; 2007, c. 19, s. 25.

Regulations

Regulations

86 (1) The Agency may make regulations

(a) classifying air services;

(b) classifying aircraft;

Plaintes relatives au transport aérien

Examen et médiation

85.1 (1) L'Office ou son délégué examine toute plainte déposée en vertu de la présente partie et peut tenter de régler l'affaire; il peut, dans les cas indiqués, jouer le rôle de médiateur entre les parties ou pourvoir à la médiation entre celles-ci.

Communication aux parties

(2) L'Office ou son délégué fait rapport aux parties des grandes lignes de la position de chacune d'entre elles et de tout éventuel règlement.

Affaire non réglée

(3) Si l'affaire n'est pas réglée à la satisfaction du plaignant dans le cadre du présent article, celui-ci peut demander à l'Office d'examiner la plainte conformément aux dispositions de la présente partie en vertu desquelles elle a été déposée.

Inhabilité

(4) Le membre de l'Office ou le délégué qui a tenté de régler l'affaire ou joué le rôle de médiateur en vertu du présent article ne peut agir dans le cadre de procédures ultérieures, le cas échéant, devant l'Office à l'égard de la plainte en question.

Prolongation

(5) La période de cent vingt jours prévue au paragraphe 29(1) est prolongée de la durée de la période durant laquelle l'Office ou son délégué agit en vertu du présent article.

Inclusion dans le rapport annuel

(6) L'Office inclut dans son rapport annuel le nombre et la nature des plaintes déposées au titre de la présente partie, le nom des transporteurs visés par celles-ci, la manière dont elles ont été traitées et les tendances systémiques qui se sont manifestées.

2000, ch. 15, art. 7.1; 2007, ch. 19, art. 25.

Règlements

Pouvoirs de l'Office

86 (1) L'Office peut, par règlement :

a) classifier les services aériens;

b) classifier les aéronefs;

(c) prescribing liability insurance coverage requirements for air services or aircraft;

(d) prescribing financial requirements for each class of air service or aircraft;

(e) respecting the issuance, amendment and cancellation of permits for the operation of international charters;

(f) respecting the duration and renewal of licences;

(g) respecting the amendment of licences;

(h) respecting traffic and tariffs, fares, rates, charges and terms and conditions of carriage for international service and

(i) providing for the disallowance or suspension by the Agency of any tariff, fare, rate or charge,

(ii) providing for the establishment and substitution by the Agency of any tariff, fare, rate or charge disallowed by the Agency,

(iii) authorizing the Agency to direct a licensee or carrier to take corrective measures that the Agency considers appropriate and to pay compensation for any expense incurred by a person adversely affected by the licensee's or carrier's failure to apply the fares, rates, charges or terms or conditions of carriage applicable to the service it offers that were set out in its tariffs, and

(iv) requiring a licensee or carrier to display the terms and conditions of carriage for its international service on its Internet site, if the site is used for selling the international service of the licensee or carrier;

(i) requiring licensees to file with the Agency any documents and information relating to activities under their licences that are necessary for the purposes of enabling the Agency to exercise its powers and perform its duties and functions under this Part and respecting the manner in which and the times at which the documents and information are to be filed;

(j) requiring licensees to include in contracts or arrangements with travel wholesalers, tour operators, charterers or other persons associated with the provision of air services to the public, or to make those contracts and arrangements subject to, terms and conditions specified or referred to in the regulations;

(k) defining words and expressions for the purposes of this Part;

c) prévoir les exigences relatives à la couverture d'assurance responsabilité pour les services aériens et les aéronefs;

d) prévoir les exigences financières pour chaque catégorie de service aérien ou d'aéronefs;

e) régir la délivrance, la modification et l'annulation des permis d'affrètements internationaux;

f) fixer la durée de validité et les modalités de renouvellement des licences;

g) régir la modification des licences;

h) prendre toute mesure concernant le trafic et les tarifs, prix, taux, frais et conditions de transport liés au service international, notamment prévoir qu'il peut :

(i) annuler ou suspendre des tarifs, prix, taux ou frais,

(ii) établir de nouveaux tarifs, prix, taux ou frais en remplacement de ceux annulés,

(iii) enjoindre à tout licencié ou transporteur de prendre les mesures correctives qu'il estime indiquées et de verser des indemnités aux personnes lésées par la non-application par le licencié ou transporteur des prix, taux, frais ou conditions de transport applicables au service et qui figuraient au tarif,

(iv) obliger tout licencié ou transporteur à publier les conditions de transport du service international sur tout site Internet qu'il utilise pour vendre ce service;

i) demander aux licenciés de déposer auprès de lui les documents ainsi que les renseignements relatifs aux activités liées à leurs licences et nécessaires à l'exercice de ses attributions dans le cadre de la présente partie, et fixer les modalités de temps ou autres du dépôt;

j) demander aux licenciés d'inclure dans les contrats ou ententes conclus avec les grossistes en voyages, voyagistes, affréteurs ou autres personnes associées à la prestation de services aériens au public les conditions prévues dans les règlements ou d'assujettir ces contrats ou ententes à ces conditions;

k) définir les termes non définis de la présente partie;

l) exempter toute personne des obligations imposées par la présente partie;

(l) excluding a person from any of the requirements of this Part;

(m) prescribing any matter or thing that by this Part is to be prescribed; and

(n) generally for carrying out the purposes and provisions of this Part.

m) prendre toute mesure d'ordre réglementaire prévue par la présente partie;

n) prendre toute autre mesure d'application de la présente partie.

Exclusion not to provide certain relief

(2) No regulation shall be made under paragraph (1)(l) that has the effect of relieving a person from any provision of this Part that requires a person to be a Canadian and to have a Canadian aviation document and prescribed liability insurance coverage in respect of an air service.

Exception

(2) Les obligations imposées par la présente partie relativement à la qualité de Canadien, au document d'aviation canadien et à la police d'assurance responsabilité réglementaire en matière de service aérien ne peuvent faire l'objet de l'exemption prévue à l'alinéa (1)l).

(3) [Repealed, 2007, c. 19, s. 26]

1996, c. 10, s. 86; 2000, c. 15, s. 8; 2007, c. 19, s. 26.

(3) [Abrogé, 2007, ch. 19, art. 26]

1996, ch. 10, art. 86; 2000, ch. 15, art. 8; 2007, ch. 19, art. 26.

Advertising regulations

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

Règlement concernant la publicité des prix

86.1 (1) L'Office régit, par règlement, la publicité dans les médias, y compris dans Internet, relative aux prix des services aériens au Canada ou dont le point de départ est au Canada.

Contents of regulations

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

Contenu des règlements

(2) Les règlements exigent notamment que le prix des services aériens mentionné dans toute publicité faite par le transporteur inclue les coûts supportés par celui-ci pour la fourniture des services et que la publicité indique les frais, droits et taxes perçus par lui pour le compte d'autres personnes, de façon à permettre à l'acheteur de déterminer aisément la somme à payer pour ces services.

Regulations may prescribe

(3) Without limiting the generality of subsection (1), the regulations may prescribe what are costs, fees, charges and taxes for the purposes of subsection (2).

2007, c. 19, s. 27.

Précisions

(3) Les règlements peuvent également préciser, pour l'application du paragraphe (2), les types de coûts, frais, droits et taxes visés à ce paragraphe.

2007, ch. 19, art. 27.

Regulations and orders

86.2 A regulation or order made under this Part may be conditional or unconditional or qualified or unqualified and may be general or restricted to a specific area, person or thing or group or class of persons or things.

2007, c. 19, s. 27.

Textes d'application

86.2 Les textes d'application de la présente partie peuvent être conditionnels ou absolus, assortis ou non de réserves, et de portée générale ou limitée quant aux zones, personnes, objets ou catégories de personnes ou d'objets visés.

2007, ch. 19, art. 27.

any person acting on behalf of the Agency or the Minister in connection with any matter under this Act.

Obstruction and false statements

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

Offence

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

(a) in the case of an individual, to a fine not exceeding $5,000; and

(b) in the case of a corporation, to a fine not exceeding $25,000.

Officers, etc., of corporation re offences

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

Time limit for commencement of proceedings

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

Administrative Monetary Penalties

Definition of *Tribunal*

176.1 For the purposes of sections 180.1 to 180.7, *Tribunal* means the Transportation Appeal Tribunal of Canada established by subsection 2(1) of the *Transportation Appeal Tribunal of Canada Act*.

2007, c. 19, s. 48.

Regulation-making powers

177 (1) The Agency may, by regulation,

(a) designate

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

agissant au nom de l'Office ou du ministre relativement à une question visée par la présente loi.

Entrave

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

Infraction et peines

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

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

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

Dirigeants des personnes morales

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

Prescription

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

Sanctions administratives pécuniaires

Définition de *Tribunal*

176.1 Pour l'application des articles 180.1 à 180.7, *Tribunal* s'entend du Tribunal d'appel des transports du Canada, constitué par le paragraphe 2(1) de la *Loi sur le Tribunal d'appel des transports du Canada*.

2007, ch. 19, art. 48.

Pouvoirs réglementaires de l'Office

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

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

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

Court File No.:

FEDERAL COURT OF APPEAL

BETWEEN:

DR. GÁBOR LUKÁCS

Moving Party

– and –

CANADIAN TRANSPORTATION AGENCY and NEWLEAF TRAVEL COMPANY INC.

Respondents

MOTION RECORD OF THE MOVING PARTY

VOLUME 2

(Appendix "B" – Book of Authorities)

DR. GÁBOR LUKÁCS

Halifax, NS

lukacs@AirPassengerRights.ca

Moving Party

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

Ms. Liz Barker, General Counsel and Secretary
Tel: 819-997-0099
Fax: 819-953-5253

AND TO: **NEWLEAF TRAVEL COMPANY INC.**
1 Lombard Place, Suite 2200
Winnipeg, MB R3B 0X7

TABLE OF CONTENTS OF VOLUME 2

Indexed as:

Canada (Canadian Human Rights Commission) v. Canada (Attorney General)

Canadian Human Rights Commission and Donna Mowat, Appellants;
v.
Attorney General of Canada, Respondent, and
Canadian Bar Association and Council of Canadians with Disabilities, Interveners.

[2011] 3 S.C.R. 471

[2011] 3 R.C.S. 471

[2011] S.C.J. No. 53

[2011] A.C.S. no 53

2011 SCC 53

File No.: 33507.

Supreme Court of Canada

Heard: December 13, 2010;
Judgment: October 28, 2011.

Present: McLachlin C.J. and LeBel, Deschamps, Abella, Charron, Rothstein and Cromwell JJ.

(65 paras.)

Appeal From:

ON APPEAL FROM THE FEDERAL COURT OF APPEAL

Catchwords:

Administrative law -- Judicial review -- Standard of review -- Canadian Human Rights Tribunal

awarding legal costs to complainant -- Whether standard of reasonableness applicable to Tribunal's decision to award costs -- Whether Tribunal made a reviewable error in awarding costs to complainant -- Canadian Human Rights Act, R.S.C. 1985, c. H-6, s. 53(2)(c), (d).

Administrative law -- Boards and tribunals -- Jurisdiction -- Costs -- Canadian Human Rights Tribunal awarding legal costs to complainant -- Whether Tribunal having jurisdiction to award costs -- Canadian Human Rights Act, R.S.C. 1985, c. H-6, s. 53(2)(c), (d).

Summary:

M filed a human rights complaint with the Canadian Human Rights Commission alleging that the Canadian Forces had discriminated against her on the ground of sex contrary to the provisions of the *Canadian Human Rights Act* ("*CHRA*"). The Canadian Human Rights Tribunal ("Tribunal") concluded that M's complaint of sexual harassment was substantiated in part and she was awarded $4,000 to compensate for "suffering in respect [page472] of feelings or self-respect". M applied for legal costs. The Tribunal determined that it had the authority to order costs pursuant to s. 53(2)(*c*) and (*d*) of the *CHRA* and awarded M $47,000 in this regard. The Federal Court upheld the Tribunal's decision on its authority to award costs. The Federal Court of Appeal allowed an appeal of this decision and held that the Tribunal had no authority to make a costs award.

Held: The appeal should be dismissed.

Administrative tribunals are generally entitled to deference in respect of the legal interpretation of their home statutes and laws or legal rules closely connected to them. However, general questions of law that are both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise must be reviewed on a standard of correctness. The proper standard of review of the Tribunal's decision to award legal costs to the successful complainant is reasonableness. Whether the Tribunal has the authority to award costs is a question of law which is located within the core function and expertise of the Tribunal and which relates to the interpretation and the application of its enabling statute. This issue is neither a question of jurisdiction, nor a question of law of central importance to the legal system as a whole falling outside the Tribunal's area of expertise within the meaning of *Dunsmuir*.

The precise interpretive question before the Tribunal was whether the words of s. 53(2)(*c*) and (*d*), which authorize the Tribunal to "compensate the victim ... for any expenses incurred by the victim as a result of the discriminatory practice" permit an award of legal costs. An examination of the text, context and purpose of these provisions reveals that the Tribunal's interpretation was not reasonable. Human rights legislation expresses fundamental values and pursues fundamental goals. It must be interpreted liberally and purposively so that the rights enunciated are given their full recognition and effect. However, the intent of Parliament must be respected by reading the words of their provision in their entire context and according to their grammatical and ordinary sense, harmoniously with the scheme and object of the Act. The words "any expenses incurred by the

victim" taken on their own and divorced from their context are wide enough to include legal costs. However, when these words are read in their statutory context, they cannot reasonably be interpreted as creating a stand-alone category of compensation capable of supporting any type of disbursement causally connected [page473] to the discrimination. The Tribunal's interpretation violates the legislative presumption against tautology, makes the repetition of the term "expenses" redundant and fails to explain why the term is linked to the particular types of compensation described in those paragraphs. Moreover, the term "costs" has a well-understood meaning that is distinct from compensation or expenses. If Parliament intended to confer authority to confer costs, it is difficult to understand why it did not use this very familiar and widely used legal term of art to implement that purpose. The legislative history of the *CHRA*, the Commission's understanding of costs authority as well as a review of parallel provincial legislation all support the conclusion that the Tribunal has no authority to award costs. Finally, the Tribunal's interpretation would permit it to make a free-standing award for pain and suffering coupled with an award of legal costs in a potentially unlimited amount. This view is difficult to reconcile with either the monetary limit of an award for pain and suffering or the omission of any express authority to award expenses in s. 53(3).

No reasonable interpretation of the relevant statutory provisions can support the view that the Tribunal may award legal costs to successful complainants. Faced with a difficult point of statutory interpretation and conflicting judicial authority, the Tribunal adopted a dictionary meaning of "expenses" and articulated what it considered to be a beneficial policy outcome rather than engaging in an interpretative process taking account of the text, context and purpose of the provisions in issue. A liberal and purposive interpretation cannot supplant a textual and contextual analysis simply in order to give effect to a policy decision different from the one made by Parliament.

Cases Cited

Applied: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; **disapproved:** *Canada (Attorney General) v. Thwaites*, [1994] 3 F.C. 38; *Canada (Attorney General) v. Stevenson*, 2003 FCT 341, 229 F.T.R. 297; *Canada (Attorney General) v. Brooks*, 2006 FC 500, 291 F.T.R. 32; **referred to:** *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114; *Canada (Citizenship and Immigration) [page474] v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160; *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19, [2004] 1 S.C.R. 485; *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324; *Dickason v. University of Alberta*, [1992] 2 S.C.R. 1103; *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554; *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353; *Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571; *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1, [2011] 1 S.C.R. 3; *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678; *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650; *Lévis (City) v. Fraternité des policiers de Lévis Inc.*, 2007 SCC 14, [2007] 1 S.C.R. 591; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77; *Canadian Union of Public Employees, Local 963 v. New*

Brunswick Liquor Corp., [1979] 2 S.C.R. 227; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61; *Attorney General of Quebec v. Carrières Ste-Thérèse Ltée*, [1985] 1 S.C.R. 831; *Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*, 2005 SCC 70, [2005] 3 S.C.R. 425; *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513; *Hilewitz v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 57, [2005] 2 S.C.R. 706; *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862; *M. v. H.*, [1999] 2 S.C.R. 3; *Will-Kare Paving & Contracting Ltd. v. Canada*, 2000 SCC 36, [2000] 1 S.C.R. 915; *Harel v. Deputy Minister of Revenue of Quebec*, [1978] 1 S.C.R. 851; *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29; *Canada (Attorney General) v. Public Service Alliance of Canada*, [1991] 1 S.C.R. 614; *Morguard Properties Ltd. v. City of Winnipeg*, [1983] 2 S.C.R. 493; *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, [2009] 2 S.C.R. 764.

Statutes and Regulations Cited

Alberta Human Rights Act, R.S.A. 2000, c. A-25.5, s. 32(2).

An Act to amend the Canadian Human Rights Act and other Acts in consequence thereof, Bill C-108, 3 Sess., 34 Parl., 1991-92, ss. 21, 24(3).

An Act to extend the present laws in Canada that proscribe discrimination and that protect the privacy of individuals, Bill C-72, 1 Sess., 30 Parl., 1975, s. 37(4).

[page475]

Canadian Human Rights Act, R.S.C. 1985, c. H-6, ss. 7, 14, 51 [repl. 1998, c. 9, s. 27], 53 [*idem*].

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Human Rights Act, R.S.P.E.I. 1988, c. H-12, s. 28.4(6).

Human Rights Act, S.N.W.T. 2002, c. 18, s. 63.

Human Rights Act, 2010, S.N.L. 2010, c. H-13.1, s. 39(2).

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History and Disposition:

APPEAL from a judgment of the Federal Court of Appeal (Létourneau, Sexton and Layden-Stevenson JJ.A.), 2009 FCA 309, [2010] 4 F.C.R. 579, 312 D.L.R. (4) 294, 4 Admin. L.R. (5) 192, 395 N.R. 52, [2009] F.C.J. No. 1359 (QL), 2009 CarswellNat 3405, setting aside a decision of Mandamin J., 2008 FC 118, 322 F.T.R. 222, [page476] 78 Admin. L.R. (4) 127, [2008] F.C.J. No. 143 (QL), 2008 CarswellNat 200. Appeal dismissed.

Counsel:

Philippe Dufresne and *Daniel Poulin*, for the appellant the Canadian Human Rights Commission.

Andrew Raven, *Andrew Astritis* and *Bijon Roy*, for the appellant Donna Mowat.

Peter Southey and *Sean Gaudet*, for the respondent.

Reidar M. Mogerman, for the intervener the Canadian Bar Association.

David Baker and *Paul Champ*, for the intervener the Council of Canadians with Disabilities.

The judgment of the Court was delivered by

LeBEL and CROMWELL JJ.:--

I. Overview

1 The Canadian Human Rights Tribunal may order a person who has engaged in a discriminatory practice contrary to the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 ("*CHRA*" or "Act"), to compensate the victim for any lost wages, for all additional costs of obtaining alternative goods, services, facilities or accommodation, and "for any expenses incurred by the victim as a result of the discriminatory practice" (s. 53(2)). The main question before us is whether the Tribunal made a reviewable error in deciding that this power to order compensation for "any expenses incurred by the victim as a result of the discriminatory practice" permits it to order payment of all or a portion of the victim's legal costs.

2 The Tribunal's decision affirming this authority was reviewed by the Federal Court on the standard of reasonableness and upheld (2008 FC 118, 322 F.T.R. 222). However, the Federal Court of Appeal set aside the decision, holding that the proper standard of review was correctness and that the Tribunal's decision was incorrect (2009 FCA 309, [page477] [2010] 4 F.C.R. 579). The Court of Appeal also was of the view that even if the Tribunal's decision should be reviewed on the reasonableness standard, its decision was unreasonable.

3 Ms. Mowat did not participate at the Federal Court of Appeal but now appeals to this Court for reinstatement of the Tribunal's award. The Canadian Human Rights Commission, which was not a party before the Tribunal or Federal Court, and intervened before the Federal Court of Appeal, now joins Ms. Mowat as an appellant. (We will refer to Ms. Mowat as the appellant and to the Canadian Human Rights Commission as the Commission.)

4 The further appeal to this Court raises a threshold question of the appropriate standard of judicial review of the Tribunal's decision and the main question of whether the Tribunal made a reviewable error in finding that it had the authority to award legal costs. We would hold that the Tribunal's decision should be reviewed on the reasonableness standard but that its interpretation of this aspect of its remedial authority was unreasonable. We would therefore dismiss the appeal.

II. Background

5 The Canadian Forces compulsorily released the appellant, Ms. Mowat, in 1995, following a 14-year career as a traffic technician. Over the course of her time in the military, the appellant had made many formal complaints and grievances against members of her chain of command and others. Many of these were taken to the Chief of the Defence Staff, the highest level in Canadian Forces grievance resolution, and none was substantiated (2005 CHRT 31, 54 C.H.R.R. D/21 (the "merits decision"), at paras. 20, 81-82, 94, 143, 193, 207-8, 216, 218, 231, 236, 286, 294, 297 and 299). The Canadian Forces conducted an internal investigation into comments made by one of the appellant's co-workers which she alleged were sexually [page478] harassing. The investigation found that they were (para. 303). The recommendations from several reports on the incidents were implemented by the appellant's Commanding Officer and the employee responsible was disciplined (paras. 83-87).

6 However, in 1998, three years after leaving the Forces, the appellant filed a complaint with the Canadian Human Rights Commission alleging sexual harassment, adverse differential treatment, and failure to continue to employ her on account of her sex, pursuant to ss. 7 and 14 of the *CHRA*. The matter was ultimately heard before the Canadian Human Rights Tribunal.

III. Proceedings

A. *Canadian Human Rights Tribunal, 2005 CHRT 31, 54 C.H.R.R. D/21*

7 The hearing before the Tribunal occupied six weeks and the case record comprised more than 4,000 pages of transcript evidence and over 200 exhibits. The presiding Tribunal member, J. Grant Sinclair, was highly critical of the way in which the appellant Mowat conducted the proceedings. He observed that the complaint was "marked by a fundamental lack of precision in identifying the theory of the ... case" and referred to the allegations as a "conspiracy theory" and a "scatter-shot complaint with the allegations all over the place" (merits decision, at paras. 4, 357 and 408).

8 However, the presiding Tribunal member concluded that the appellant's complaint was substantiated in part. He found that her claim of sexual harassment, based on three comments made by a male co-worker, was substantiated and that the military's response had not been adequate or in accordance with its own policies (paras. 42, 47, 49 and 312-22). The rest of her complaint was dismissed.

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9 The Tribunal awarded $4,000 (plus interest, taking the award to the maximum of $5,000, the statutory limit at the time), to compensate the appellant for "suffering in respect of feelings or self-respect" (para. 7). It found that the version of the Act which was in force when Ms. Mowat filed her claim applied to the case, and substantial amendments made in 1998 should not apply retroactively (paras. 399-401). It then asked for further submissions regarding her claim for legal costs, which she indicated totalled more than $196,000. At issue was whether the Tribunal's

authority to award a complainant "any expenses incurred by the victim as a result of the discriminatory practice" under s. 53(2)(*c*) and (*d*) of the *CHRA* includes the authority to award legal costs.

10 In a separate decision, Member Sinclair reviewed the conflicting Federal Court jurisprudence and policy considerations favouring reimbursement and found that he was empowered to award legal costs (2006 CHRT 49 (CanLII) (the "costs decision")). Without recovery of legal costs, he found, any victory would be "pyrrhic" (para. 29). He then awarded $47,000 in partial satisfaction of Ms. Mowat's legal bills, an amount which he based on the volume of evidence for the substantiated sexual harassment allegation in comparison with the rest of the unsubstantiated complaints.

B. *Judicial Review - Federal Court of Canada, 2008 FC 118, 322 F.T.R. 222*

11 The Attorney General of Canada applied for judicial review of the costs decision; the appellant did not participate. Turning first to the standard of review, Mandamin J. applied the four factors from *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, and conducted a pragmatic and functional analysis to arrive at a reasonableness *simpliciter* standard. He classified the question as one of law, but noted that the Tribunal was engaged in interpretation of its home statute on a matter at the "core" of its expertise [page480] (para. 24). He also relied upon the "human rights policy approach to statutory interpretation" (para. 41), purportedly arising from this Court's decision in *Canadian National Railway Co. v. Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114, to ground his analysis and explain why a one-sided costs regime is permissible. This approach calls for a broad, purposive interpretation of the *CHRA*, commensurate with its remedial goals and special status. He then concluded that the Tribunal's decision about its authority to award costs was reasonable (para. 40). However, Mandamin J. found that the presiding Member had not adequately explained the quantification of the $47,000 award and that this constituted a breach of the principles of procedural fairness. The judicial review judge therefore quashed the decision and sent it back to the Tribunal on this ground. That aspect of the matter has not been appealed and it is not at issue before this Court.

C. *Federal Court of Appeal, 2009 FCA 309, [2010] 4 F.C.R. 579*

12 The Attorney General of Canada appealed the decision to the Federal Court of Appeal, which unanimously allowed the appeal and held that the Tribunal had no authority to make a costs award. Layden-Stevenson J.A. applied the standard of review principles enunciated by this Court in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, which had been released after the Federal Court hearing. She applied the correctness standard of review, based primarily on her conclusion that the issue was a question of law both outside the Tribunal's expertise and of central importance to the legal system (para. 42). The Tribunal's human rights expertise was not engaged by the issue, which instead required one clear and consistent answer (para. 47).

13 The Federal Court of Appeal went on to conclude that the Tribunal's decision to award legal

[page481] costs was incorrect. After a comprehensive review of the conflicting Tribunal and Federal Court jurisprudence, Layden-Stevenson J.A. turned to the legislative history of the provision in question. In her view, it evinced a clear Parliamentary intent to eschew a costs regime in favour of an active role for the Commission (paras. 65-67 and 88). She noted that the Commission itself, in a Special Report to Parliament, acknowledged that the *CHRA* did not allow for costs recovery (paras. 68 and 90). Further, "costs" is a legal term of art (para. 76), the power to award which must be derived from statute (para. 78). She also relied on a comparative analysis of comparable human rights statutes across Canada, many of which explicitly mention costs jurisdiction in addition to reimbursement of expenses (paras. 70-74 and 84-87). In conclusion, Layden-Stevenson J.A. found that policy considerations and a liberal and purposive approach to interpretation could not be used to override clear Parliamentary intent (paras. 99-100). She reasoned that the decision to provide the Tribunal with the power to award costs is a policy decision best left to Parliament (para. 101). She noted that even on a reasonableness standard, the Tribunal's award of legal costs should be set aside (para. 96).

IV. Analysis

A. *The Issues*

14 As noted, this appeal raises two issues:

1. What is the appropriate standard of review of the decision of the Tribunal as to the interpretation of its power to award legal costs under s. 53(2)(*c*) and (*d*) of the Act?
2. Did the Tribunal make a reviewable error in deciding that it could award compensation for legal costs?

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B. *The Dunsmuir Analysis*

15 In *Dunsmuir* and *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, the Court simplified an analytical approach that the judiciary found difficult to implement. Being of the view that the distinction between the standards of patent unreasonableness and reasonableness *simpliciter* was illusory, the majority in *Dunsmuir* eliminated the standard of patent unreasonableness. The majority thus concluded that there should be two standards of review: correctness and reasonableness.

16 *Dunsmuir* kept in place an analytical approach to determine the appropriate standard of review, the standard of review analysis. The two-step process in the standard of review analysis is first to "ascertain whether the jurisprudence has already determined in a satisfactory manner the

degree of deference to be accorded with regard to a particular category of question. Second, where the first inquiry proves unfruitful, courts must proceed to an analysis of the factors making it possible to identify the proper standard of review" (para. 62). The focus of the analysis remains on the nature of the issue that was before the tribunal under review (*Khosa*, at para. 4, *per* Binnie J.). The factors that a reviewing court has to consider in order to determine whether an administrative decision maker is entitled to deference are: the existence of a privative clause; a discrete and special administrative regime in which the decision maker has special expertise; and the nature of the question of law (*Dunsmuir*, at para. 55). *Dunsmuir* recognized that deference is generally appropriate where a tribunal is interpreting its own home statute or statutes that are closely connected to its function and with which the tribunal has particular familiarity. Deference may also be warranted where a tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context (*Dunsmuir*, at para. 54; *Khosa*, at para. 25).

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17 *Dunsmuir* nuanced the earlier jurisprudence in respect of privative clauses by recognizing that privative clauses, which had for a long time served to immunize administrative decisions from judicial review, may point to a standard of deference. But, their presence or absence is no longer determinative about whether deference is owed to the tribunal or not (*Dunsmuir*, at para. 52). In *Khosa*, the majority of this Court confirmed that with or without a privative clause, administrative decision makers are entitled to a measure of deference in matters that relate to their special role, function and expertise (paras. 25-26).

18 *Dunsmuir* recognized that the standard of correctness will continue to apply to constitutional questions, questions of law that are of central importance to the legal system as a whole and that are outside the adjudicator's expertise, as well as to "[q]uestions regarding the jurisdictional lines between two or more competing specialized tribunals" (paras. 58, 60-61; see also *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, at para. 26, *per* Fish J.). The standard of correctness will also apply to true questions of jurisdiction or *vires*. In this respect, *Dunsmuir* expressly distanced itself from the extended definition of jurisdiction and restricted jurisdictional questions to those that require a tribunal to "explicitly determine whether its statutory grant of power gives it the authority to decide a particular matter" (para. 59; see also *United Taxi Drivers' Fellowship of Southern Alberta v. Calgary (City)*, 2004 SCC 19, [2004] 1 S.C.R. 485, at para. 5).

19 Having outlined the principles governing the judicial review analysis, we must now focus on how it should be applied to the decision of the Tribunal. As recommended by *Dunsmuir*, we must first consider how the existing jurisprudence has dealt with the decisions of the Tribunal and [page484] of similar bodies tasked with addressing human rights complaints. Over the years, a substantial body of case law about the standards of review of these decisions has developed.

Generally speaking, the reviewing courts have shown deference to the findings of fact of human rights tribunals (P. Garant, *Droit administratif* (6th ed. 2010), at p. 553). At the same time, they have granted little deference to their interpretations of laws, even of their own enabling statutes. It is well known that courts have traditionally extended deference to administrative bodies responsible for managing complex administrative schemes in domains like labour relations, telecommunications, the regulation of financial markets and international economic relations (*National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, at pp. 1339 and 1341, *per* Wilson J., and pp. 1369-70, *per* Gonthier J.). On the other hand, reviewing courts have not shown deference to human rights tribunals in respect of their decisions on legal questions. In the courts' view, the tribunals' level of comparative expertise remained weak and the regimes that they administered were not particularly complex (see A. Macklin, "Standard of Review: The Pragmatic and Functional Test", in C. M. Flood and L. Sossin, eds., *Administrative Law in Context* (2008), 197, at p. 216).

20 Several examples can be found in the jurisprudence of the Court. In *Dickason v. University of Alberta*, [1992] 2 S.C.R. 1103, this Court held that absent a privative clause and specialized skill, a human rights commission or tribunal must interpret legislation correctly (pp. 1125-26). In subsequent decisions of this Court, the questions of whether the definition of "family status" as a prohibited ground of discrimination in the federal Act included same-sex couples (*Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554), or what constituted a "service customarily available to the public" or "public service" under the provincial [page485] human rights legislation (*University of British Columbia v. Berg*, [1993] 2 S.C.R. 353; *Gould v. Yukon Order of Pioneers*, [1996] 1 S.C.R. 571) were held to be questions of law in which human rights adjudicators had no particular expertise *vis-à-vis* the courts and which had to be reviewed under a standard of correctness.

21 But given the recent developments in the law of judicial review since *Dunsmuir* and its emphasis on the deference owed to administrative tribunals, even in respect of many questions of law, we must discuss whether all decisions on questions of law rendered by the Tribunal and similar bodies should be swept under the standard of correctness. At this point, we must acknowledge a degree of tension between some policies underpinning the present system of judicial review, when it applies to the decisions of human rights tribunals.

22 The nature of these tribunals lies at the root of these problems. On the one hand, *Dunsmuir* and *Khosa*, building upon previous jurisprudence, recognize that administrative tribunals are generally entitled to deference, in respect of the legal interpretation of their home statutes and laws or legal rules closely connected to them. On the other hand, our Court has reaffirmed that general questions of law that are both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise, must still be reviewed on a standard of correctness, in order to safeguard a basic consistency in the fundamental legal order of our country. The nature of the "home statute" administered by a human rights tribunal makes the task of resolving this tension a particularly delicate one. A key part of any human rights legislation in Canada consists of

principles and rules designed to combat discrimination. But, these statutes also include a large number of provisions, addressing issues like questions of proof and procedure or the [page486] remedial authority of human rights tribunals or commissions.

23 There is no doubt that the human rights tribunals are often called upon to address issues of very broad import. But, the same questions may arise before other adjudicative bodies, particularly the courts. In respect of some of these questions, the application of the *Dunsmuir* standard of review analysis could well lead to the application of the standard of correctness. But, not all questions of general law entrusted to the Tribunal rise to the level of issues of central importance to the legal system or fall outside the adjudicator's specialized area of expertise. Proper distinctions ought to be drawn, especially in respect of the issue that remains before our Court.

24 In this case, there is no doubt that the Tribunal has the power to award compensation for "any expenses incurred by the victim as a result of the discriminatory practice" pursuant to s. 53(2)(*c*) and (*d*) of the Act. The issue is whether the Tribunal could order the payment of costs as a form of compensation. Although *Dunsmuir* maintained the category of jurisdictional questions, it took the view that this category should be interpreted narrowly. Indeed, our Court has held since *Dunsmuir* that issues which in other days might have been considered by some to be jurisdictional, should now be dealt with under the standard of review analysis in order to determine whether a standard of correctness or of reasonableness should apply (see, e.g., *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1, [2011] 1 S.C.R. 3, at paras. 33-34; *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678, at paras. 28-34). In substance, if the issue relates to the interpretation and application of its own statute, is within its expertise and does not raise issues of general legal importance, the standard of reasonableness will generally apply and the Tribunal will be entitled to deference.

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25 The question of costs is one of law located within the core function and expertise of the Tribunal relating to the interpretation and the application of its enabling statute (*Dunsmuir*, at para. 54). Although the respondent submitted that a human rights tribunal has no particular expertise in costs, care should be taken not to return to the formalism of the earlier decisions that attributed "a jurisdiction-limiting label, such as 'statutory interpretation' or 'human rights', to what is in reality a function assigned and properly exercised under the enabling legislation" by a tribunal (*Council of Canadians with Disabilities v. VIA Rail Canada Inc*., 2007 SCC 15, [2007] 1 S.C.R. 650, at para. 96, *per* Abella J.). The inquiry of what costs were incurred by the complainant as a result of a discriminatory practice is inextricably intertwined with the Tribunal's mandate and expertise to make factual findings relating to discrimination (see *Lévis (City) v. Fraternité des policiers de Lévis Inc.*, 2007 SCC 14, [2007] 1 S.C.R. 591, at para. 112, *per* Abella J., *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 76, *per* LeBel J.). As an administrative body

that makes such factual findings on a routine basis, the Tribunal is well positioned to consider questions relating to appropriate compensation under s. 53(2). In addition, a decision as to whether a particular tribunal will grant a particular type of compensation - in this case, legal costs - can hardly be said to be a question of central importance for the Canadian legal system and outside the specialized expertise of the adjudicator. Compensation is frequently awarded in various circumstances and under many schemes. It cannot be said that a decision on whether to grant legal costs as an element of that compensation and about their amount would subvert the legal system, even if a reviewing court found it to be in error.

26 Subjecting costs to a correctness review would represent a departure from *Dunsmuir*, and [page488] from this Court's recent decision in *Smith*. We note, though, that in that case there was a complex and substantial factual background. The issue was whether a tribunal with a mandate to arbitrate disputes relating to mandatory land expropriation and to award "legal, appraisal and other costs" could award costs of related proceedings which, in its view, had been necessary to secure compensation for the expropriation. Fish J., writing for the majority of this Court, concluded that the award of costs was reviewable on the standard of reasonableness since the tribunal was interpreting a provision of its home statute, and "[a]wards for costs are invariably fact-sensitive and generally discretionary" (para. 30). In his view, the tribunal's sole responsibility for determining the nature and the amount of costs was also grounded in the statutory language, and furthermore, involved an inquiry where the legal issues could not be easily separated from the factual issues (paras. 30-32). As the tribunal in *Smith*, the federal Tribunal in this case was interpreting a provision in its home statute that necessitated a fact-intensive inquiry and afforded the Tribunal a certain margin of discretion.

27 In summary, the issue of whether legal costs may be included in the Tribunal's compensation order is neither a question of jurisdiction, nor a question of law of central importance to the legal system as a whole and outside the Tribunal's area of expertise within the meaning of *Dunsmuir*. As such, the Tribunal's decision to award legal costs to the successful complainant is reviewable on the standard of reasonableness.

C. *Reasonableness of the Decision*

28 In *Dunsmuir*, the majority of this Court described reasonableness as

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> a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions.

> Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. [para. 47]

29 Reasonableness is therefore a deferential standard that shows respect for an administrative decision maker's experience and expertise. The concept of deference is fundamental in the context of judicial review, as this Court held in the seminal case of *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227. Deference to an administrative tribunal reflects recognition of interpretive choices. Such a recognition makes it possible to ask whether the tribunal or the court is better placed to make the choice (Macklin, at p. 205).

30 The concept of deference is also what distinguishes judicial review from appellate review. Although both judicial and appellate review take into account the principle of deference, care should be taken not to conflate the two. In the context of judicial review, deference can shield administrative decision makers from excessive judicial intervention even on certain questions of law as long as these questions are located within the decision makers' core function and expertise. In those cases, deference would therefore extend to protect a range of reasonable outcomes when the decision maker is interpreting its home statute (see R. E. Hawkins, "Whither Judicial Review?" (2010), 88 *Can. Bar Rev.* 603).

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31 By contrast, under the principles of appellate review set down in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, an appellate court owes no deference to a decision maker below on questions of law which are automatically reviewable on the standard of correctness. In *Khosa*, a majority of the Court confirmed that these principles of appellate review should not be imported into the judicial review context.

D. *Application - Reasonableness of Tribunal's Interpretation*

32 The Tribunal held that any authority to award legal costs must come from either s. 53(2)(*c*) or (*d*) of the Act (costs decision, at para. 11). The appellant and the Commission have not raised any other provisions capable of supporting the result sought and conceded during oral argument that they were relying on both provisions together. The precise interpretative question before the Tribunal, therefore, was whether the words of s. 53(2)(*c*) and (*d*), which authorize the Tribunal to "compensate the victim ... for any expenses incurred by the victim as a result of the discriminatory

practice", permit an award of legal costs. The Tribunal decided they did. However, in our view, this interpretation of these provisions is not reasonable, as a careful examination of the text, context and purpose of the provisions reveal.

33 The question is one of statutory interpretation and the object is to seek the intent of Parliament by reading the words of the provision in their entire context and according to their grammatical and ordinary sense, harmoniously with the scheme and object of the Act and the intention of Parliament (E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87, quoted in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21). In approaching this task in relation to human rights legislation, one must be mindful that it expresses fundamental values and pursues fundamental goals. It must therefore be interpreted liberally and purposively so that the rights enunciated are given their full recognition and effect: see, e.g., [page491] R. Sullivan, *Sullivan on the Construction of Statutes* (5th ed. 2008), at pp. 497-500. However, what is required is nonetheless an interpretation of the text of the statute which respects the words chosen by Parliament.

34 The Tribunal based its conclusion that it had the authority to award legal costs on two points. First, following three decisions of the Federal Court, the Tribunal reasoned that the term "expenses incurred" in s. 53(2)(*c*) and (*d*) is wide enough to include legal costs: *Canada (Attorney General) v. Thwaites*, [1994] 3 F.C. 38, at p. 71; *Canada (Attorney General) v. Stevenson*, 2003 FCT 341, 229 F.T.R. 297, at paras. 23-26; *Canada (Attorney General) v. Brooks*, 2006 FC 500, 291 F.T.R. 32, paras. 10-16. Second, the Tribunal relied on what it considered to be compelling policy considerations relating to access to the human rights adjudication process. For reasons that we will set out, our view is that these points do not reasonably support the conclusion that the Tribunal may award legal costs. When one conducts a full contextual and purposive analysis of the provisions it becomes clear that no reasonable interpretation supports that conclusion.

(1) Text

35 Turning to the text of the provisions in issue, the words "any expenses incurred by the victim", taken on their own and divorced from their context, are wide enough to include legal costs. This was the view adopted by the Tribunal and the three Federal Court decisions on which it relied. However, when these words are read, as they must be, in their statutory context, it becomes clear that they cannot reasonably be interpreted as creating a stand-alone category of compensation capable of supporting any type of disbursement causally connected to the discrimination. The contention that they were in our view, ignores the structure of the provision in which the words "any expenses incurred by the victim" appear.

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36 For ease of reference, we reproduce s. 53(2) and (3) as they read at the time the appellant's complaint was filed:

53....

(2) If, at the conclusion of its inquiry, a Tribunal finds that the complaint to which the inquiry relates is substantiated, it may ... make an order against the person found to be engaging or to have engaged in the discriminatory practice and include in that order any of the following terms that it considers appropriate:

(*a*) that the person cease the discriminatory practice and, in order to prevent the same or a similar practice from occurring in the future, take measures, including

(i) adoption of a special program, plan or arrangement referred to in subsection 16(1), or
(ii) the making of an application for approval and the implementing of a plan pursuant to section 17,

in consultation with the Commission on the general purposes of those measures;

(*b*) that the person make available to the victim of the discriminatory practice, on the first reasonable occasion, such rights, opportunities or privileges as, in the opinion of the Tribunal, are being or were denied the victim as a result of the practice;

(*c*) that the person compensate the victim, as the Tribunal may consider proper, for any or all of the wages that the victim was deprived of and for any expenses incurred by the victim as a result of the discriminatory practice; and

(*d*) that the person compensate the victim, as the Tribunal may consider proper, for any or all additional cost of obtaining alternative goods, services, facilities or accommodation and for any expenses incurred by the victim as a result of the discriminatory practice.

(3) In addition to any order that the Tribunal may make pursuant to

subsection (2), if the Tribunal finds that

> (*a*) a person is engaging or has engaged in a discriminatory practice wilfully or recklessly, or

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> (*b*) the victim of the discriminatory practice has suffered in respect of feelings or self-respect as a result of the practice,

the Tribunal may order the person to pay such compensation to the victim, not exceeding five thousand dollars, as the Tribunal may determine.

37 It is significant, in our view, that the phrase "that the person compensate the victim ... for any expenses incurred by the victim as a result of the discriminatory practice" appears twice, in two subsequent paragraphs. The wording is identical, but on each occasion it appears, the reference to expenses is preceded by specific, but different, wording. The repetition of the reference to expenses and the context in which this occurs strongly suggest that the expenses referred to in each paragraph take their character from the sort of compensation contemplated by the surrounding words of each paragraph. So, in s. 53(2)(*c*), the person must compensate the victim for lost wages and any expenses incurred by the victim as a result of the discriminatory practice. In s. 53(2)(*d*), compensation is for the additional costs of obtaining alternate goods, services, facilities, or accommodation in addition to expenses incurred. If the use of the term "expenses" had been intended to confer a free-standing authority to confer costs in all types of complaints, it is difficult to understand why the grant of power is repeated in the specific contexts of lost wages and provision of services and also why the power to award expenses was not provided for in its own paragraph rather than being repeated in the two specific contexts in which it appears. This suggests that the term "expenses" is intended to mean something different in each of paragraphs (*c*) and (*d*).

38 The interpretation adopted by the Tribunal makes the repetition of the term "expenses" redundant and fails to explain why the term is linked to the particular types of compensation described in each of those paragraphs. This interpretation therefore violates the legislative presumption against tautology. As Professor Sullivan notes, at p. 210 of her text, "It is presumed that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain. Every [page494] word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose." As former Chief Justice Lamer put it in *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, at para. 28, "It is a well accepted principle of statutory interpretation that no legislative provision should be interpreted so as to render it mere

surplusage." See also *Attorney General of Quebec v. Carrières Ste-Thérèse Ltée*, [1985] 1 S.C.R. 831, at p. 838.

39 The appellant received an award for pain and suffering under s. 53(3) of the *CHRA*. The Tribunal also expressly disallowed her medical expense claims (merits decision, at paras. 404-6). Unlike s. 53(2)(*c*) and (*d*), there is in subs. (3) no provision for the reimbursement of expenses. Once again, if the intention had been to grant free-standing authority to award costs, the meaning of this omission in light of the repeated specific provision for compensation for expenses is hard to fathom in the context of compensation for lost wages in paragraph (*c*) and for additional costs of obtaining goods and services in paragraph (*d*).

40 Moreover, the term "costs", in legal parlance, has a well-understood meaning that is distinct from either compensation or expenses. It is a legal term of art because it consists of "words or expressions that have through usage by legal professionals acquired a distinct legal meaning": Sullivan, at p. 57. Costs usually mean some sort of compensation for legal expenses and services incurred in the course of litigation. If Parliament intended to confer authority to order costs, it is difficult to understand why it did not use this very familiar and widely used legal term of art to implement that purpose. As we shall see shortly, the legislative history of the statute also strongly supports the inference that this was not Parliament's intent.

41 Finally, in relation to the text of the Act, it is noteworthy that it very strictly limits the [page495] amount of money the Tribunal may award for pain and suffering experienced as a result of the discriminatory practice and, as noted, does not explicitly provide for reimbursement of expenses in relation to such an award. At the time of these proceedings, the limit was $5,000. The Tribunal's interpretation permits it to make a free-standing award for pain and suffering coupled with an award of legal costs in a potentially unlimited amount. This view is hard to reconcile with either the monetary limit or the omission of any express authority to award expenses in s. 53(3).

(2) Context

42 Turning to context, three matters must be considered: legislative history, the Commission's own consistent understanding of the Tribunal's power to award costs, and parallel provincial and territorial legislation. These contextual matters, when considered along with the provisions' text and purpose, demonstrate that the Tribunal's interpretation does not fall within the range of reasonable interpretations of these provisions.

(a) *Legislative History*

43 The legislative evolution and history of a provision may often be important parts of the context to be examined as part of the modern approach to statutory interpretation: *Merk v. International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, Local 771*, 2005 SCC 70, [2005] 3 S.C.R. 425, at para. 28, *per* Binnie J.; *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513, at p. 528, *per* L'Heureux-Dubé J.; *Hilewitz v. Canada (Minister of*

Citizenship and Immigration), 2005 SCC 57, [2005] 2 S.C.R. 706, at paras. 41-53, *per* Abella J. Legislative evolution consists of the provision's initial formulation and all subsequent formulations. Legislative history includes material relating to the conception, preparation and passage of the enactment: see Sullivan, at pp. 587-93; P.-A. Côté, with the collaboration of S. Beaulac and [page496] M. Devinat, *Interprétation des lois* (4th ed. 2009), at pp. 496 and 501-8.

44 We think there is no reason to exclude proposed, but unenacted, provisions to the extent they may shed light on the purpose of the legislation. While great care must be taken in deciding how much, if any, weight to give to these sorts of material, it may provide helpful information about the background and purpose of the legislation, and in some cases, may give direct evidence of legislative intent: Sullivan, at p. 609; Côté, at p. 507; *Doré v. Verdun (City)*, [1997] 2 S.C.R. 862, at para. 37. This Court, in *M. v. H.*, [1999] 2 S.C.R. 3, has held that failed legislative amendments can constitute evidence of Parliamentary purpose: paras. 348-49, *per* Bastarache J.

45 The legislative evolution and history of the *CHRA* shed light on two important matters. First, it strongly supports the inference that it is likely that Parliament would have chosen the familiar legal term of art had it been the intention to confer a power to award costs. Parliament is presumed to know the law and it is a reasonable inference that its failure to use familiar terms of art shows that some other meaning was intended. The history of the enactment of the provisions in issue supports applying that reasonable inference because the legal term of art "costs" was used in some draft provisions but not others. Second, the role envisioned for the Commission explains why the power to award costs was not part of Parliament's intent.

46 Before the *Canadian Human Rights Act* was enacted in 1977, there was an earlier attempt to enact similar legislation. In 1975, Bill C-72, *An Act to extend the present laws in Canada that proscribe discrimination and that protect the privacy of individuals*, 1st Sess., 30th Parl., received first reading. It provided a specific costs jurisdiction for the Tribunal *in addition to* authority to award expenses which was expressed in wording that was virtually identical to the current s. 53(2). Clause 37(4) of Bill C-72 read as follows:

[page497]

> **37....**
>
> (4) The costs of and incidental to any hearing before a Tribunal are in the discretion of the Tribunal, which may direct that the whole or any part thereof be paid by any party to such hearing.

47 Bill C-72 died on the order paper. When Bill C-25, which ultimately became the *CHRA* in

1977, was introduced, the explicit authority to award costs, which had been granted in cl. 37(4) of Bill C-72, was deleted, while the authority to award expenses was retained. In addition, a provision relating to the role of the Commission was inserted which we will discuss in a moment.

48 This piece of the legislative history of the provision before us strongly suggests that "costs" was used as a term of art when the intention was to confer authority to award legal costs. This view is further reinforced by amendments that were proposed, but not enacted, in 1992. Clause 24(3) of Bill C-108, *An Act to amend the Canadian Human Rights Act and other Acts in consequence thereof*, 3rd Sess., 34th Parl., 1991-92, provided that the Tribunal could order the Commission to pay costs. It read as follows:

> **24....**
>
> **(3) Subsections 53(3) and (4) of the said Act are repealed and the following substituted therefor:**
>
> ...
>
> (6) The Tribunal may order the Commission to pay costs in accordance with the rules made under section 48.9 to
>
> (*a*) a complainant, if the complaint is substantiated and
>
> (i) the Commission did not appear before the Tribunal, or
> (ii) separate representation for the complainant was warranted by the divergent interests of the complainant and the Commission or by any other circumstances of the complaint; or
>
> (*b*) a respondent, if the complaint is not substantiated and is found to be trivial, frivolous, vexatious, in bad faith or without purpose or to have caused the respondent excessive financial hardship.

[page498]

Clause 21 (adding s. 48.9(1)(*h*)) also would have allowed the Human Rights Tribunal Panel, with the approval of the Governor in Council, to make rules of procedure governing awards of interest and costs.

49 These provisions received first reading in December of 1992, but did not proceed further and were not enacted. However, they again show that the word "costs" was understood to be a legal term of art to be used when the intention was to confer authority to order payment of legal costs.

50 Another aspect of legislative history suggests that the authority to award costs and the role envisaged for the Commission were related subjects in Parliament's view.

51 We mentioned earlier that the 1975 draft bill which was not ultimately enacted expressly authorized the Tribunal to award "costs of and incidental to any hearing" before it. That express power, as we have noted, was not contained in the 1977 bill that ultimately became the *CHRA*. However, while the power to award costs was removed, a provision relating to the role of the Commission was added. This section currently reads:

> **51.** In appearing at a hearing, presenting evidence and making representations, the Commission shall adopt such position as, in its opinion, is in the public interest having regard to the nature of the complaint.

We agree with the respondent that the clear implication of this chain of events is that Parliament chose an active role for the Commission, which could include litigating on behalf of complainants, instead of cloaking the Tribunal with a broad costs jurisdiction.

52 The 1992 proposed amendments which we have noted earlier are consistent with this view. It is noteworthy that the authority to award costs contemplated by those provisions could only be [page499] awarded under this regime if the Commission did not take carriage of the matter. This supports the respondent's contention that an authority to award costs was rejected in favour of an active role for the Commission in presenting complaints to the Tribunal.

(b) *The Commission's Understanding of Costs Authority*

53 A further element of context is that the Commission itself has consistently understood that the *CHRA* does not confer jurisdiction to award costs and has repeatedly urged Parliament to amend the Act in this respect. Despite the limited weight of the factor, this Court has permitted consideration of an administrative body's own interpretation of its enabling legislation, for example, in *Will-Kare Paving & Contracting Ltd. v. Canada*, 2000 SCC 36, [2000] 1 S.C.R. 915. Binnie J. (in dissent) relied on excerpts from speeches to the Canadian Tax Foundation made by both the Minister of Finance and an employee of Revenue Canada when interpreting an income tax provision. Binnie J. states, "Administrative policy and interpretation are not determinative but are entitled to weight and can be an important factor in case of doubt about the meaning of legislation", at para. 66, citing *Harel v. Deputy Minister of Revenue of Quebec*, [1978] 1 S.C.R. 851, at p. 859, *per* de Grandpré J., and *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 37, *per* Dickson J. (as he then was). While of course not conclusive, this sort of opinion about the proper interpretation of the provision may be consulted by the court provided it meets the threshold test of relevance and reliability (see Sullivan, at p. 575; Côté, at pp. 633-38). In my view, the considered and consistent view of the Commission

itself about the meaning of its constitutive statute meets these requirements.

54 In its 1985 annual report, the Commission asked that the Act be amended to empower the Tribunal to award costs:

[page500]

> *The Commission recommends to Parliament that the Canadian Human Rights Act be amended to include a provision to allow a human rights tribunal discretionary power to award costs to parties appearing before it.*
>
> The intent of this recommendation is to provide tribunals with a wider discretion in disposing of a complaint where undue hardship may be a factor.

(*Annual Report 1985* (1986), at p. 12 (italics in original))

The Commission made similar recommendations in each of its 1986, 1987, 1988, 1989 and 1990 annual reports to Parliament.

55 Most recently, in its *Special Report to Parliament: Freedom of Expression and Freedom from Hate in the Internet Age* (2009), the Commission stated that "[t]he CHRA does not allow for the awarding of costs" (p. 34). In this respect, the report makes mention of the simplified process that complainants must follow to file a complaint, and the assistance they get from both the Commission and the Tribunal during the investigation and litigation stages, as reasons why complainants do not need to hire lawyers to proceed. The Commission went on to recommend that Parliament amend the Act to allow discretion to award legal costs, but only if the Tribunal finds that one party has abused the Tribunal process.

56 While, as noted, the Commission's views about the limits of its statutory powers are not binding on the court, they may be considered. The Commission is the body charged with the administration and enforcement of the *CHRA* on a daily basis and possesses extensive knowledge of and familiarity with the Act. Its long-standing and consistently held view that the Act does not allow for costs, while not determinative, is entitled to some weight in the circumstances of this case.

(c) *Parallel Provincial and Territorial Legislation*

57 The respondent also urges us to consider parallel legislation in the provinces and territories [page501] and we agree that this is a useful exercise in this case. Of course, we do not suggest that consulting provincial and territorial legislation is always helpful to the task of discerning federal

legislative intent. However, Professor Sullivan confirms that cross-jurisdictional comparison of statutes dealing with the same subject matter may be instructive (pp. 419-20).

58 The Court has made use of parallel legislation as an interpretative aid in other cases. For example, in *Canada (Attorney General) v. Public Service Alliance of Canada*, [1991] 1 S.C.R. 614, Sopinka J. looked at several pieces of comparable provincial legislation to assist him in determining whether the federal legislation allowed the Public Service Staff Relations Board to decide who is an employee under its enabling legislation (pp. 631-32). Another example of this approach is found in *Morguard Properties Ltd. v. City of Winnipeg*, [1983] 2 S.C.R. 493, where Estey J. relied on a comparative analysis between Manitoba's legislation, and that of the other provinces, when deciding whether Winnipeg intended to freeze property tax assessments (pp. 504-5).

59 In this case, resort to parallel provincial and territorial legislation is helpful in one limited respect. It tends to confirm the view that the word "costs" is used consistently when the intention is to confer the authority to award legal costs.

60 For example, British Columbia allows costs to be awarded if there is "improper conduct" during the course of the complaint (*Human Rights Code*, R.S.B.C. 1996, c. 210, s. 37(4)). In Manitoba and the Northwest Territories, the conduct must be "frivolous or vexatious" (*Human Rights Code*, S.M. 1987-88, c. 45, s. 45(2); *Human Rights Act*, S.N.W.T. 2002, c. 18, s. 63). In Alberta, Prince Edward Island, and Newfoundland (*Alberta Human Rights Act*, R.S.A. 2000, c. A-25.5, s. 32(2); *Human Rights Act*, R.S.P.E.I. 1988, c. H-12, s. 28.4(6); *Human Rights Act, 2010*, S.N.L. 2010, c. H-13.1, s. 39(2)), tribunals can make any [page502] "appropriate" cost order, in Québec a tribunal may award costs "as it determines", *Charter of human rights and freedoms*, R.S.Q., c. C-12, s. 126; and in Saskatchewan it is any "appropriate" cost order but not against the Commission (*Saskatchewan Human Rights Code Regulations*, R.R.S., c. S-24.1, Reg. 1, s. 21(1)). In Ontario, the offending party's conduct must be "unreasonable, frivolous or vexatious or ... in bad faith" and the Tribunal can make its own rules pertaining to costs awards (*Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, s. 17.1(2)). In all provinces, this costs jurisdiction is *in addition to* broad compensatory jurisdiction for expenses incurred; the wording of these expense reimbursement provisions is very similar to the language of s. 53(2) of the *CHRA*.

(3) Purpose

61 The appellant urges the Court to give the provisions authorizing compensation for expenses a broad and purposive interpretation which will permit the Tribunal to make victims of discrimination whole. This was the second point relied on by the Tribunal in finding it could award costs.

62 As we noted earlier, the *CHRA* has been described as quasi-constitutional and deserves a broad, liberal, and purposive interpretation befitting of this special status. However, a liberal and purposive interpretation cannot supplant a textual and contextual analysis simply in order to give effect to a policy decision different from the one made by Parliament: *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, [2009] 2 S.C.R. 764, at paras. 49-50, *per* Abella J.; *Gould*

, at para. 50, *per* La Forest J., concurring.

[page503]

63 The genesis of this dispute appears to be the fact that, in 2003, the Commission decided to restrict its advocacy on behalf of complainants (R.F., at paras. 47-48). This policy change may have been in response to the Report of the Canadian Human Rights Act Review Panel, chaired by the Honourable Gérard La Forest, which recommended that the Commission act only in cases that raised serious issues of systemic discrimination or new points of law (*Promoting Equality: A New Vision* (2000)). Interestingly, this report also acknowledged that the *CHRA* does not provide any authority to award costs. The Report recommended clinic-type assistance to potential claimants (pp. 71-72 and 74-78). The latter recommendation was not acted upon, while the former was. As a result, the role of the Commission in taking complaints forward to the Tribunal was restricted without provision for alternative means to assist complainants to do so. Significantly, however, these changes occurred without changing the legislation in relation to the power to award costs.

64 In our view, the text, context and purpose of the legislation clearly show that there is no authority in the Tribunal to award legal costs and that there is no other reasonable interpretation of the relevant provisions. Faced with a difficult point of statutory interpretation and conflicting judicial authority, the Tribunal adopted a dictionary meaning of "expenses" and articulated what it considered to be a beneficial policy outcome rather than engage in an interpretative process taking account of the text, context and purpose of the provisions in issue. In our respectful view, this led the Tribunal to adopt an unreasonable interpretation of the provisions. The Court of Appeal was justified in reviewing and quashing the order of the Tribunal.

V. Disposition

65 We would dismiss the appeal without costs.

[page504]

Appeal dismissed.

Solicitors:

Solicitor for the appellant the Canadian Human Rights Commission: Canadian Human Rights Commission, Ottawa.

Solicitors for the appellant Donna Mowat: Raven, Cameron, Ballantyne & Yazbeck, Ottawa.

Solicitor for the respondent: Attorney General of Canada, Toronto.

Solicitors for the intervener the Canadian Bar Association: Camp Fiorante Matthews, Vancouver.

Solicitors for the intervener the Council of Canadians with Disabilities: Champ & Associates, Ottawa.

Decision No. 222-A-2010

May 27, 2010

APPLICATION by Duke Jets Ltd. requesting the Canadian Transportation Agency to determine whether a licence is required pursuant to Part II of the *Canada Transportation Act*, S.C., 1996, c. 10, as amended.

File No. M4210-4/D/10021

Duke Jets Ltd. (Duke Jets) applied to the Canadian Transportation Agency (Agency) for a determination as to whether its proposed plan to arrange charter flights on behalf of its clients, constitutes the provision of a publicly available air service for which a licence is required.

Agency licences are issued pursuant to Part II of the *Canada Transportation Act* (CTA) to those who propose to operate a publicly available air service in Canada.

Section 57 of the CTA provides in part that no person shall operate an air service unless, in respect of that service, the person holds a licence issued under Part II of the CTA.

Subsection 55(1) of the CTA defines an "air service" as "a service, provided by means of an aircraft, that is publicly available for the transportation of passengers or goods, or both."

Duke Jets proposes to act as an agent for its clients to arrange the most suitable charter flights for business travel. Duke Jets' stated contractual responsibility toward its clients is limited to retaining the air services on their behalf. It will contact a variety of charter companies requesting quotes on appropriate aircraft for a particular flight/itinerary. Should the client decide to proceed with booking the aircraft, Duke Jets would then enter into a charter agreement with the air carrier on behalf of the client.

The Agency has carefully considered the request and the information and material provided in support.

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Duke Jets would be acting as an agent arranging charter flights on behalf of its clients. It would not be assuming the risks nor be entitled to the benefits associated with the operation of an air service nor would it be performing the key functions or have any decision-making authority in respect of the air service. The Agency therefore concludes that Duke Jets would not be operating a publicly available service for which it would require a licence issued by the Agency pursuant to Part II of the CTA.

Accordingly, the Agency has determined that, provided Duke Jets operates its business in the manner described in the application, Duke Jets would not require a licence issued under Part II of the CTA.

Duke Jets is reminded that only air carriers holding a valid Agency licence may enter into an agreement to provide an air service to, from or within Canada. In addition, the air carrier must satisfy the requirements of the *Air Transportation Regulations*, SOR/88-58, as amended, with respect to non-scheduled international entity type charter flights. As such, the charter agreement with the air carrier must clearly indicate that Duke Jets has entered into the agreement on behalf of the named client failing which other regulatory requirements may apply and need to be met.

Members

- Jean-Denis Pelletier, P. Eng.
- J. Mark MacKeigan

Rulings

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Date modified:
2012-04-26

Decision No. 42-A-2013

February 8, 2013

APPLICATION by WestJet, on behalf of itself and WestJet Encore Ltd.

File No.: M4161/W221

WestJet, on behalf of itself and WestJet Encore Ltd. (Encore), has applied to the Canadian Transportation Agency (Agency) for a determination as to whether Encore will require Agency licences in respect of a proposed domestic service and a proposed scheduled international service between Canada and the United States of America.

Encore, a wholly-owned subsidiary of WestJet, currently does not hold any licences issued by the Agency. Encore and WestJet have entered into a draft Capacity Purchase Agreement (Agreement) where, in the view of both parties, WestJet would be the entity operating the air services for which it already holds the required licence authorities.

Agency licences are issued pursuant to Part II of the *Canada Transportation Act*, S.C., 1996, c. 10, as amended (CTA) to persons who propose to operate air services in Canada.

Paragraph 57(*a*) of the CTA states that no person shall operate an air service unless, in respect of that service, the person holds a licence issued under Part II of the CTA.

Subsection 55(1) of the CTA defines "air service" as "a service, provided by means of an aircraft, that is publicly available for the transportation of passengers or goods, or both."

The Agency has developed the following four overall factors that it considers relevant in determining whether a person is in fact or will be operating an air service:

1. Risks and benefits associated with the operation of the proposed air service;
2. Performance of key functions and decision-making authority with respect to the operation of the proposed air service;
3. Exclusivity and non-competition provisions; and,
4. Use of firm name and style.

The Agency has considered the application and the material filed in support.

The Agency has determined that Encore would not be assuming the majority of the risks nor be entitled to the majority of the benefits associated with the operation of the air services. The majority of the risks and benefits associated with the proposed air services would rest with WestJet. In addition, while Encore would be operating aircraft with flight crew with respect to the air services, it would do so on behalf of WestJet and would not be performing the other key strategic functions or have the decision-making authority normally associated with the operation of an air service.

The Agency notes that while there are no exclusivity and non-competition provisions in the Agreement, none are likely required, as Encore is a wholly-owned subsidiary of WestJet and therefore subject to its direction. Finally, WestJet's brand name and logo would be prominently displayed in the delivery of services. The Agency also notes that the flights to be operated would be identified using WestJet's designator code.

The Agency therefore finds that WestJet, and not Encore, would be operating the proposed air services. Accordingly, if the Agreement is executed based on the terms stated to date, Encore will not be required to hold licences for the proposed air services, as described in the application, as its role would be limited to providing aircraft and flight crew to WestJet, for the purpose of providing the subject air services pursuant to WestJet's licences.

In providing the proposed air services, Encore and WestJet must comply with the requirements of section 60 of the CTA and section 8.2 of the *Air Transportation Regulations*, SOR/88-58, as amended (ATR (Air Transportation Regulations)) which address the provision of aircraft, with flight crew, to a licensee for the purpose of providing a domestic service and a scheduled international service between Canada and the United States of America, pursuant to the licensee's licences.

As Encore is not a licensee, Agency approval will be required before it can provide aircraft

with flight crew to WestJet for the purpose of providing an air service, pursuant to subsection 8.2(1) of the ATR (Air Transportation Regulations).

The Agency requests that WestJet file a copy of the final executed Agreement within 30 days of its execution. Furthermore, WestJet and Encore must inform the Agency of any material changes to the documents previously filed in support of this application.

Finally, Encore is reminded that should it decide to operate an air service, it will be required to obtain the appropriate licence authority from the Agency. WestJet is also reminded of the public disclosure requirements of section 8.5 and the requirement of paragraph 18(*c*) of the ATR (Air Transportation Regulations).

Member(s)

Geoffrey C. Hare

J. Mark MacKeigan

Rulings

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Date modified:
2013-02-11

Decision No. 390-A-2013

October 7, 2013

IN THE MATTER OF determinations of what constitutes an "air service" and the criteria to be applied by the Canadian Transportation Agency.

File No.: M4161-9 PRO

INTRODUCTION

[1] The purpose of this Determination is to inform the air industry of the criteria the Canadian Transportation Agency (Agency) will apply to determine what constitutes an "air service" within the meaning of the *Canada Transportation Act*, S.C., 1996, c. 10, as amended (CTA).

[2] The Agency is mandated by Parliament to administer, interpret and enforce the CTA and associated regulations. The Agency is not bound by its past determinations and the interpretation of the CTA by the Agency can evolve in light of its own experience and the evolution of the air transportation industry.

[3] Part II of the CTA applies in respect of air transportation matters and details, among other matters, the applicable licensing requirements that are administered by the Agency. The licensing requirements of the CTA apply to any person who operates or proposes to operate an "air service" in Canada. An "air service" is defined in subsection 55(1) of the CTA as "a service, provided by means of an aircraft, that is publicly available for the transportation of passengers or goods, or both."

[4] The key element to any Agency determination as to whether a person is operating an air service is determining if the service is publicly available. While the CTA refers to the phrase "publicly available" within its definition of an air service, the term "publicly available" is not

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defined in the CTA. The Agency has interpreted this expression through its decisions which are rendered on a case-by-case basis, based on the specific facts in each application. The determination as to whether a service involves the transportation by means of an aircraft does not pose the same interpretation issues.

[5] It is clearly within the Agency's jurisdiction to determine, according to the CTA, the basis upon which an air carrier will require a licence for the provision of air services. This necessarily includes the interpretation of the expression "publicly available" which is not defined in the legislation. The Agency has developed an expertise in such interpretations. Pursuant to subsection 41(1) of the CTA, an appeal lies from the Agency to the Federal Court of Appeal on leave on questions of law or questions of jurisdiction. This statutory scheme clearly indicates Parliament's intention that the Agency is responsible for interpreting the provisions of the CTA, subject only to appeal to the Federal Court of Appeal. Furthermore, superior courts have consistently provided deference to the Agency in its interpretation of the CTA. The Supreme Court of Canada in *Council of Canadians with Disabilities v. VIA Rail Canada Inc.* [2007] 1 S.C.R. 650, 2007 SCC 15 at paras. 98, 100 stated:

> [...] The *Canada Transportation Act* is highly specialized regulatory legislation with a strong policy focus. The scheme and object of the Act are the oxygen the Agency breathes. When interpreting the Act, including its human rights components, the Agency is expected to bring its transportation policy knowledge and experience to bear on its interpretations of its assigned statutory mandate: *Pushpanathan*, at para. 26.
>
> [...] The Agency is responsible for interpreting its own legislation, including what that statutory responsibility includes. The Agency made a decision with many component parts, each of which fell squarely and inextricably within its expertise and mandate. It was therefore entitled to a single, deferential standard of review.

[6] Under its current 3-year Strategic Plan, the Agency has committed to modernize its regulatory framework, including by improving the transparency and clarity of the legislation and regulations that it administers pertaining to the air transportation sector. The Agency has also indicated that it will engage stakeholders in this process and take their views into account. This Determination is consistent with this commitment.

[7] While the Agency has rendered numerous decisions on the subject of whether a person is operating an "air service" and specifically, if a "publicly available" service is being operated, the requirement to respect confidentiality has normally precluded the Agency from disclosing

pertinent information and providing detailed reasons in its "public" decisions. This has resulted in little information being provided in the public domain on the Agency's interpretation of what constitutes a publicly available air transportation service.

[8] In addition, the continually evolving nature of the air transportation sector, including the introduction into the market of non-traditional service delivery models, has led the Agency to review the concept of "publicly available" and how it should be interpreted in the context of the objectives of the CTA, in particular of the air licensing regime administered by the Agency.

[9] The Agency, as a result, undertook a review with the intention of articulating a comprehensive set of criteria to assist in the interpretation of what constitutes an air service and, in particular, the concept of "publicly available", that could be shared with interested stakeholders.

[10] The Agency, after completing its initial review, developed a draft Interpretation Note on the "Requirement to Hold an Air Service Licence", which was circulated to a targeted group of stakeholders for their comments.

[11] Three industry stakeholders provided comments to the Agency. In summary, two of the stakeholders stressed that the requirement to hold a licence is subject to a number of consumer and industry economic protection provisions, which are focused on commercial air services. They conclude that a contractual requirement with an "offer, acceptance, and consideration" are all required components of a publicly available service. They contend that case law on the term "publicly available" indicates that the availability need not be utilized, nor be attractive to the entire public body, but only that it is available to the entire public body. Any reservation by the operator of the aircraft regarding access to the operation negates entirely any public factor. They also submit that the operation of corporate aircraft for the transportation of "clients, customers, and guests" is not a publicly available service, as the service is not available to the general public and is entirely at the discretion of the corporate aircraft owner.

[12] One of the stakeholders submits that "the reasonable expectations of the individual and their ability to influence or control their transportation circumstances are central to the consideration of publically available." Where an individual has very little control over the type of transportation, it would be similar to a commercial operation for which a licence should be required. This would apply to corporate aircraft utilized to transport general employees of a company, including sports teams, as well as government aircraft that are used to transport

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members of the public, such as within a police helicopter or forest firefighters. They also submit that, if there is some form of direct or indirect compensation for the flight, the use of personal aircraft to transport family, friends, and other personal acquaintances should be considered a publicly available service as should the transportation by one Government of another Government's employees.

[13] The Agency, after considering all of the stakeholders' comments, has decided to inform the air industry through this Determination of the criteria that the Agency will apply in interpreting what constitutes an "air service" and, more specifically, when an air service is considered to be "publicly available".

LEGISLATION

[14] Paragraph 57(*a*) of the CTA provides that no person shall operate an air service unless, in respect of that service, the person holds a licence issued under Part II of the CTA.

[15] Subsection 55(1) of the CTA defines "air service" as a service, provided by means of an aircraft, that is publicly available for the transportation of passengers or goods, or both.

[16] Paragraph 86(1)(*k*) of the CTA provides the Agency with the authority to make regulations for the purposes of defining words and expressions for the purposes of Part II of the CTA.

[17] Section 2 of the *Air Transportation Regulations*, SOR/88-58, as amended (ATR (Air Transportation Regulations)) defines:

- "passenger" as a person, other than a member of the air crew, who uses an air carrier's domestic service or international service by boarding the air carrier's aircraft pursuant to a valid contract or arrangement; and
- "goods" as anything that can be transported by air, including animals.

AGENCY DETERMINATION

[18] In summary, under the CTA, a person is required to hold an Agency licence to operate an air service that is:

i. provided by means of an aircraft;

ii. for the transportation of passengers and/or goods; and

iii. publicly available.

[19] What constitutes an air service for the purpose of Part II of the CTA and, in particular, when that service is considered to be publicly available are addressed in this Determination.

Purpose of the air licensing requirement

[20] The Agency finds that any interpretation of the expression "publicly available" should be consistent with the purpose behind the CTA requirement for a person to hold an Agency licence.

[21] In this regard, the Agency notes that the requirement to hold a licence subjects the licensee to a number of consumer and industry economic protection provisions of the CTA. The purpose of the air licensing requirement is identified through these consumer and industry economic protection provisions.

[22] For example, the CTA's ownership provisions ensure that only Canadians or Canadian owned and controlled enterprises can operate domestic services, thereby restricting foreign access to the domestic marketplace. Similarly, only Canadians designated by the Minister of Transport as eligible may operate scheduled international services using rights granted to Canada in an air transport agreement or arrangement with another government.

[23] Canadian licence applicants that propose to operate certain air services using aircraft having a certified maximum capacity of 40 or more passengers must also meet the prescribed financial requirements set out in section 8.1 of the ATR (Air Transportation Regulations), before a licence can be issued, which is intended to reduce the risk that underfunded applicants enter the marketplace.

[24] Licensees must also:

- have, display and apply a clear tariff that addresses certain prescribed matters and is reasonable and not unduly discriminatory;
- notify the public when discontinuing certain domestic services; and
- provide for the protection of monies paid in advance by Canadian-originating passengers for certain international charter flights.

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[25] The consumer and industry economic protection provisions referred to above are set out in Part II of the CTA. These requirements are "economic" and/or "consumer protectionist" in nature, as they serve to:

- limit access to the domestic market to Canadians;
- ensure compliance with international air agreements;
- limit the risk of underfunded applicants from entering the marketplace;
- require that a clear tariff be in place and be disclosed to clarify the terms and conditions of carriage;
- provide any person with access to complaint-based remedies against unreasonable terms and conditions of carriage and certain specified matters relating to fares;
- provide for public notification where the discontinuance of certain scheduled services eliminates or significantly reduces the availability of air services within that market; and,
- provide for the protection of monies paid in advance for certain international charter flights.

[26] In addition to the consumer and industry economic protection provisions referred to above, licensees must also meet the CTA's prescribed liability insurance requirements to hold an air service licence. The requirement to hold insurance, however, is not exclusive to the CTA as the *Aeronautics Act*, R.S.C., 1985, c. A-2 (AA) also requires all persons operating aircraft to meet the prescribed insurance requirements under the AA, if such persons are not already subject to the CTA's air licensing requirements. The CTA's insurance requirements therefore apply only to persons who operate or propose to operate a publicly available air transportation service. Should a person not operate or propose to operate a publicly available air transportation service, this person would nevertheless be subject to the insurance requirements that are otherwise applicable to "all" other aircraft operators. The prescribed insurance requirements of the two acts for commercial operations are essentially identical, with the only noteworthy difference being that the supporting regulations to the CTA, the ATR (Air Transportation Regulations), address the insurance requirements for situations where a licensee utilizes the aircraft and crew of another person in the operation of its own air service.

[27] Additionally, the Agency cannot issue a licence unless the applicant holds a Canadian aviation document (CAD) issued pursuant to the AA and the *Canadian Aviation Regulations,*SOR/96-433 (CAR), which ensure that the operation of an aircraft in Canada is subject to the safety and security requirements that are administered by Transport Canada.

The AA and the CAR establish the requirement to hold a CAD for all persons that operate aircraft in Canada irrespective of whether such persons are required to hold an Agency licence.

[28] Finally, it is noted that Part V of the CTA provides the Agency with the authority to create regulations and adjudicate complaints for the purpose of eliminating from the transportation network undue obstacles to the mobility of persons with disabilities. This authority, however, extends to the transportation network under the legislative authority of Parliament and is not limited or tied to the licensing regime.

[29] As such, the Agency's interpretation of the expression "publicly available" must be aligned with the objectives of the air licensing regime that it administers, which are "economic" and/or "consumer protection" in nature.

[30] In considering the prescribed consumer and industry economic protection provisions, the Agency interprets the CTA's air licensing requirements as intending to apply to the operation of a "commercial" air transportation service that is offered to the public. If a person is not operating a "commercial" air transportation service that is offered to the public, there would be little, if any, need for the CTA's consumer and industry economic protection provisions, such as the requirement to protect the domestic market from foreign competition; to hold additional insurance to that required under the AA; to hold and apply a tariff; to notify the public when discontinuing a service; or to protect advanced payments by passengers. In these cases, the safety and security requirements associated with aircraft operations would continue to be regulated by the AA, as would the requirement for the aircraft operator to hold the prescribed insurance.

[31] The Agency's interpretation of an air service that is publicly available therefore takes into consideration whether the person who provides the service is engaged in the business of transporting persons and/or goods, as part of acommercial undertaking, on aconsideration for service basis.

What is an air service?

[32] The Agency finds that in determining what constitutes an air service, all of its components, as defined in the CTA and the ATR (Air Transportation Regulations), need to be considered together to achieve the intended purpose of the air licensing regime. Specifically, is the service:

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i. offered and made available to the public?

ii. provided by means of an aircraft?

iii. provided pursuant to a contract or arrangement for the transportation of passengers or goods?

iv. offered for consideration?

[33] Each of these four criteria are discussed below:

(i) Is the service offered and made available to the public?

[34] A publicly available service is one that is offered to the public.

[35] This is the means through which members of the public can become aware of the air service's existence and availability and thereby decide if they would like to utilize the service.

[36] A person who offers an air service to the public may accomplish this through some form of promotion, advertisement or solicitation. The public can be informed by any means, including by voice, print, electronic media, or word of mouth. Promotional material, known routes, schedules, fares, terms and conditions of carriage, or a ticket distribution system are each indicative of a service that is offered to the public.

[37] It is not necessary for a person to extensively or aggressively promote an air service nor is it necessary for all members of the public to be made aware of an air service's existence to meet this requirement. The Agency is of the opinion that the existence of a restriction regarding who may access the air service does not necessarily make it private. All that is required is for a person to offer an air service to a segment or a portion of the general public.

[38] In addition, the person to whom the service is being offered should be able to avail themselves of the service.

[39] The person should be able to contact the air service provider and arrange for air transportation. The method used to obtain the air service could be by telephone, Internet, travel agent, broker, sales agent, sales office or any other means available to the public.

[40] To ensure that an air service reaches an intended user group, the person who operates the service may impose eligibility conditions on the user. While these conditions may be

restrictive, the service could still be considered to be offered and made available to the public if a person, who meets the terms and conditions of carriage, including payment of the appropriate consideration, can access the air service.

(ii) Is the service provided by means of an aircraft?

[41] The determination as to whether a service involves the transportation by means of an aircraft is a straight forward matter that does not pose interpretation issues and, therefore, does not need to be further elaborated on.

(iii) Is the service provided pursuant to a contract or arrangement for the transportation of passengers or goods?

[42] A key component of a publicly available service is that there be a contractual or other arrangement that authorizes the use of the air service. The contract or arrangement creates an obligation on the person who operates the service to provide the air service in return for payment of an agreed consideration.

[43] The requirement that there be a contractual obligation or other arrangement between parties is consistent with the ATR (Air Transportation Regulations)'s definition of a passenger, which is defined as a person that boards the aircraft pursuant to a valid contract or arrangement.

[44] When members of the public do not have a contractual or other right to be transported or have their goods transported by aircraft, then the service would not be a publicly available service and an Agency licence would not be required.

(iv) Is the service offered for consideration?

[45] The commercial nature of the arrangement, on a consideration for service basis, is also a key component of a publicly available service and is consistent with the requirement for the economic and consumer protection provisions of the CTA.

[46] A person's right to use an air service is generally established when such person agrees to provide consideration (including airfare, charge, or other consideration) established by the person that is providing the air service. When the service is provided to a person and there is no contractual obligation to provide the service for consideration, it would not be considered to be an air service and an Agency licence would not be required.

[47] The purchase of a bundled service that includes air transportation would meet the

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requirement that there be consideration for the air service, irrespective of whether the air service component is advertised as being free (e.g. lodge operator that includes an air service as part of a bundled package).

Private carriage

[48] Having considered the criteria that are required for the operation of an air service, the Agency will now consider private carriage, including the personal use of aircraft and the operation of corporate aircraft.

[49] It is important to distinguish between transporting members of the public and/or goods, and offering and making an air service available to the public. The transportation of a member of the public and/or their goods does not, on its own, necessarily result in the service being publicly available, as everyone is notionally part of the public. A person that is not engaged in the business of transporting passengers and/or goods by aircraft would not be operating a publicly available service only by agreeing to transport a person and/or their goods in a specific instance, whether or not as a one-time only event. For an air service to be publicly available, a person must offer the service to the public, including to a segment or a portion of the general public; in addition, members of the public must be able to enter into a contractual or other arrangement to acquire a right to such air service.

Personal use of aircraft

[50] The operation of an aircraft for personal use, including the transportation of family, friends and other personal acquaintances, is considered to be private carriage and not a publicly available service and, therefore, an Agency licence would not be required to operate this service.

Corporate aircraft

[51] The operation of corporate aircraft by an organization for the use and transportation of its officials, directors, employees, contractors, suppliers, and goods (or those of any parent, affiliated or subsidiary companies) in the conduct of the organization's business is generally also considered to be private carriage and not a publicly available service and, therefore, an Agency licence would not be required to operate this service. The same would apply to the transportation of the organization's clients and customers where the travel is not pursuant to a contract or arrangement for consideration.

DETERMINATION

[52] The Agency finds that an air service includes all of the following four criteria where the service is:

i. offered and made available to the public;

ii. provided by means of an aircraft;

iii. provided pursuant to a contract or arrangement for the transportation of passengers or goods; and

iv. offered for consideration.

[53] Every case is unique and accordingly the Agency will make its determinations based on the merits of each case. The Agency will apply these approved criteria when determining whether a person operates an air service that requires that person to hold an Agency licence.

[54] If a person believes that the criteria set out in this Determination may impact a previous determination of their requirement to hold an Agency licence, they may request the Agency to reconsider the matter.

Member(s)

Geoffrey C. Hare

J. Mark MacKeigan

Rulings

Go back to Rulings (/decisions)

Date modified:
2013-10-08

Decision No. 152-A-2014

April 28, 2014

APPLICATION by Air Georgian Limited carrying on business as Air Canada Express.

File No.: M4161/A1185

Air Georgian Limited carrying on business as Air Canada Express (Air Georgian) has applied to the Canadian Transportation Agency (Agency) for a determination on whether it requires Agency licences to operate medium aircraft with flight crew on behalf of Air Canada under a commercial capacity agreement.

Air Georgian is currently licensed to operate domestic, scheduled international and non-scheduled international services, small and all-cargo aircraft. Air Georgian and Air Canada have amended their existing Amended and Restated Commercial Agreement also known as a capacity purchase agreement (CPA).

Under the amended CPA, effective May 1, 2014, Air Georgian will operate five medium aircraft with flight crew in support of Air Canada's domestic service and scheduled international service between Canada and the United States of America. Air Georgian filed an amended draft copy of the amended CPA in support of this application.

Agency licences are issued pursuant to Part II of the *Canada Transportation Act*, S.C., 1996, c. 10, as amended (CTA) to persons who propose to operate air services in Canada.

Paragraph 57(*a*) of the CTA states that no person shall operate an air service unless, in respect of that service, the person holds a licence issued under Part II of the CTA.

Subsection 55(1) of the CTA defines "air service" as "a service, provided by means of an

aircraft, that is publicly available for the transportation of passengers or goods, or both."

The Agency has developed the following four overall factors that it considers relevant in determining whether a person is in fact or will be operating an air service:

1. Risks and benefits associated with the operation of the proposed air service;
2. Performance of key functions and decision-making authority with respect to the operation of the proposed air service;
3. Exclusivity and non-competition provisions; and
4. Use of firm name and style.

The Agency has considered the application and the material filed in support.

The Agency has determined that Air Georgian would not be assuming the majority of the risks, nor be entitled to the majority of the benefits associated with the operation of the air services. The majority of the risks and benefits associated with the air services would rest with Air Canada. In addition, while Air Georgian would be operating aircraft with flight crew with respect to the air services, it would do so on behalf of Air Canada and would not be performing the other key strategic functions or have the decision-making authority normally associated with the operation of an air service.

The Agency notes that under the amended CPA, there are exclusivity and non-competition provisions solely to the benefit of Air Canada. In addition, Air Canada's brand name and logo will be prominently displayed in the delivery of the air services. The Agency also notes that the flights to be operated by Air Georgian will be identified using Air Canada's designator code.

The Agency therefore finds that Air Canada, and not Air Georgian, would be operating the air services. Accordingly, if the amended CPA is executed based on the terms stated to date, Air Georgian will not be required to hold licences in respect of the services covered under the amended CPA, as its role would be limited to providing aircraft and flight crew to Air Canada, for the purpose of providing the subject services pursuant to Air Canada's licences.

In providing the air services, Air Georgian and Air Canada must comply with the requirements of section 60 of the CTA and section 8.2 of the *Air Transportation Regulations*, SOR/88-58, as amended (ATR (Air Transportation Regulations)) which address the provision of aircraft, with

flight crew, to a licensee for the purpose of providing a domestic service and a scheduled international service, between Canada and the United States of America, using medium aircraft, pursuant to the licensee's licences.

As Air Georgian does not hold licences to operate the services using medium aircraft, Agency approval pursuant to subsection 8.2(1) of the ATR (Air Transportation Regulations) will be required before Air Georgian can provide aircraft with flight crew to Air Canada.

Air Georgian must file a copy of the final executed agreement prior to receiving Agency approval pursuant to subsection 8.2(1) of the ATR (Air Transportation Regulations). Furthermore, Air Georgian and Air Canada must inform the Agency of any material changes to the amended CPA.

Air Georgian is reminded that should it decide to operate air services on its own behalf using medium aircraft, it will be required to obtain the appropriate licence authority from the Agency prior to operating such services. Air Georgian and Air Canada are also reminded of the public disclosure requirements of section 8.5 and the requirement of paragraph 18(*c*) of the ATR (Air Transportation Regulations).

Member(s)

J. Mark MacKeigan

Rulings

Go back to Rulings (/decisions)

Date modified:
2014-04-30

Decision No. 112-A-2016

April 12, 2016

APPLICATION by Air Transat A. T. Inc. carrying on business as Air Transat (Air Transat), on behalf of itself and Flair Airlines Ltd. carrying on business as Flair Air (Flair), pursuant to section 60 of the *Canada Transportation Act*, S.C., 1996, c.10, as amended (CTA), and section 8.2 of the *Air Transportation Regulations*, SOR/88-58, as amended (ATR (Air Transportation Regulations)).

Case Number: 16-01516

Air Transat, on behalf of itself and Flair, has applied to the Canadian Transportation Agency (Agency) for an approval to permit Air Transat to provide its scheduled international service between Canada and Mexico using aircraft with flight crew provided by Flair, beginning on May 7 to October 30, 2016.

Air Transat is licensed to operate a scheduled international service, large aircraft, in accordance with the Agreement between the Government of Canada and the Government of the United Mexican States on Air Transport, signed on February 18, 2014.

Flair is licensed to operate a non-scheduled international service, large aircraft and has a Canadian Air Operator Certificate in effect.

The Agency has considered the application and the material in support and is satisfied that it meets the requirements of section 8.2 of the ATR (Air Transportation Regulations).

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Accordingly, the Agency, pursuant to paragraph 60(1)(b) of the CTA and section 8.2 of the ATR (Air Transportation Regulations), approves the use by Air Transat of aircraft with flight crew provided by Flair, and the provision by Flair of such aircraft and flight crew to Air Transat, to permit Air Transat to provide its scheduled international service on licensed routes between Canada and Mexico using aircraft and flight crew provided by Flair, beginning on May 7 to October 30, 2016.

This approval is subject to the following conditions:

1. Air Transat shall continue to hold the valid licence authority.
2. Commercial control of the flights shall be maintained by Air Transat. Flair shall maintain operational control of the flights and shall receive payment based on the rental of aircraft and crew and not on the basis of the volume of traffic carried or other revenue-sharing formula.
3. Air Transat and Flair shall continue to comply with the insurance requirements set out in subsections 8.2(4), 8.2(5) and 8.2(6) of the ATR (Air Transportation Regulations).
4. Air Transat shall continue to comply with the public disclosure requirements set out in section 8.5 of the ATR (Air Transportation Regulations).
5. Air Transat and Flair shall advise the Agency in advance of any changes to the information provided in support of the application.

Member(s)

Stephen Campbell

Rulings

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Date modified:
2016-04-13

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. Canada (Canadian Transportation Agency)

Between
Dr. Gabor Lukacs, Appellant, and
Canadian Transportation Agency and
British Airways PLC, Respondents

[2015] F.C.J. No. 1398

2015 FCA 269

Docket: A-366-14

Federal Court of Appeal
Halifax, Nova Scotia

Dawson, Ryer and Near JJ.A.

Heard: September 15, 2015.
Judgment: November 27, 2015.

(61 paras.)

Transportation law -- Air transportation -- Regulations -- Federal -- Tariffs, rates and service charges -- Appeal by Lukacs from decision of Canadian Transportation Agency regarding British Airways' tariff for compensation payable to passengers denied boarding due to overbooking allowed -- Agency ordered British Airways to file Proposed Rule that would apply to flights from Canada to EU -- Agency's decision lacked clarity with respect to whether British Airways should address denied boarding compensation for flights to Canada from EU and did not address apparent tension between decision and Agency's prior decisions which seemed to suggest that an airline tariff must include denied boarding compensation provisions for both flights to and from Canada.á

Appeal by Lukacs from a decision of the Canadian Transportation Agency regarding British Airways' tariff for compensation payable to passengers to whom it denies boarding as a result of overbooking a flight. The appellant had filed a complaint with the Agency alleging that certain provisions relating to liability and denied boarding compensation contained in British Airways' International Passenger Rules and Fares Tariff were unclear or unreasonable. The appellant argued

that the amount payable under Rule 87(B)(3)(B) should reflect British Airways' obligations under Regulation (EC) which applied to all flights departing from an airport in the UK and operated by European Union airlines with a destination in the UK. The Agency concluded that it would not require British Airways to incorporate the provisions of the Regulation on the basis of the Agency's 2013 decision. In the 2013 decision the Agency considered an argument regarding the same EU Regulation and determined that it would only consider the reasonableness of carriers' tariffs by reference to legislation or regulations that the Agency was able to enforce. The Agency then provided British Airways with the opportunity to show cause why it should not be required to amend Ruleá87(B)(3)(B) to bring it in conformity with one of three denied boarding compensation schemes listed by the Agency or to propose a new scheme. British Airways proposed amending Rule 87(B)(3)(B) to provide that, on flights from Canada to the UK, passengers who were denied boarding would be compensated CAD $400 for delays of zero to four hours and CAD $800 for delays of over four hours. The Agency concluded that the Proposed Rule was unreasonable, as the proposal applied only to flights from Canada to the UK. The Agency therefore concluded that British Airways had failed to show cause and ordered British Airways to file a Proposed Rule that would apply to flights from Canada to the EU.

HELD: Appeal allowed. The Agency appeared to have implicitly decided that it was not necessary for an airline to include in its tariff a provision that clearly set out its obligations with respect to denied boarding compensation for flights departing the EU and coming to Canada. The Agency's 2013 decision offered little support for the proposition that British Airways need not set out clearly in its tariff its obligations with respect to denied boarding compensation both to and from Canada. The Agency's decision in the present case lacked clarity with respect to whether British Airways should address denied boarding compensation for flights to Canada from the EU. In addition, there was an apparent tension between the current decision and the Agency's prior decisions which seemed to suggest that an airline tariff must include denied boarding compensation provisions for both flights to and from Canada.áIt was necessary for the Agency to address this tension and apparent inconsistency directly. The Agency must clarify whether the tariff must in all instances set out denied boarding compensation provisions for flights to and from Canada or whether the fact that British Airways passengers from the EU to Canada were covered by Regulation (EC) was sufficient.

Statutes, Regulations and Rules Cited:

Air Transportation Regulations, SOR/88-58, s. 110, s. 111, s. 113, s. 122(c)(iii)

Canada Transportation Act, S.C. 1996, c.á10, s. 41

Appeal From:

An appeal from a decision of the Canadian Transportation Agency dated May 26, 2014, Decision No. 201-C-A-2014.

Counsel:

Dr. Gabor Lukacs, for the Appellant (on his own behalf).

Allan Matte, for the Respondent, Canadian Transportation Agency.

Carol E. McCall, for the Respondent, British Airways PLC.

REASONS FOR JUDGMENT

Reasons for judgment were delivered by Near J.A., concurred in by Ryer J.A. Separate dissenting reasons were delivered by Dawson J.A.

NEAR J.A.:--

I. Introduction

1 The appellant appeals from a May 26, 2014 decision of the Canadian Transportation Agency (the Agency), which concerns the compensation that British Airways must pay to passengers to whom it denies boarding (Decision No. 201-C-A-2014). He contests both the substance of the decision and the fairness of the procedure leading up to it. This Court granted the appellant leave to appeal under section 41 of the *Canada Transportation Act*, S.C. 1996, c. 10.

II. Facts

2 On January 30, 2013, the appellant filed a complaint with the Agency concerning a number of matters involving British Airways. On January 17, 2014, after an exchange of submissions by the parties, the Agency released its decision.

3 Only one of the matters figuring in the January 17, 2014 decision remains at issue in this appeal, namely the matter of "denied boarding compensation". This term refers to the compensation that an airline must pay to passengers to whom it denies boarding as a result of overbooking a flight. The amount that British Airways is required to pay is set out in Rule 87(B)(3)(B) of International Passenger Rules and Fares Tariff No. BA-1, NTA(A) No. 306.

4 In his initial complaint, the appellant argued that Rule 87(B)(3)(B) was unreasonable within the meaning of section 111 of the *Air Transportation Regulations*, SOR/88-58 (the *ATR*). The appellant put forward a number of arguments in support of this submission.

5 First, the appellant argued that the Rule should reflect British Airways' obligations under

European Union Regulation (EC) No. 261/2004, which applies to all flights departing from an airport in the United Kingdom (U.K.) and operated by European Union (E.U.) airlines (air carriers, or carriers) with a destination in the U.K. The appellant maintained that British Airways would not suffer any competitive disadvantage by amending the Rule to reflect the E.U. Regulation. He further submitted that British Airways has complied with the Regulation for flights from the U.K. to Canada, but has failed to comply with the Regulation for flights from Canada to the U.K. The appellant stated that he was not asking the Agency to enforce the E.U. Regulation. Rather, he was asking the Agency to consider the reasonableness of the Rule, and appropriate substitutes, in light of the Regulation.

6 The Agency concluded that it would not require British Airways to incorporate the provisions of the Regulation. The Agency based its conclusion on one of its previous decisions, Decision No. 432-C-A-2013 (*Nawrot et al v. Sunwing Airlines Inc.)*, in which it considered an argument regarding the same E.U. Regulation and determined that it would only consider the reasonableness of carriers' tariffs by reference to legislation or regulations that it is able to enforce. The relevant paragraph of Decision No. 432-C-A-2013 reads as follows:

> [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.

7 Second, the appellant argued that Rule 87(B)(3)(B) was unreasonable because it was inconsistent with the principle of a flat rate of denied boarding compensation. Rule 87(B)(3)(B) provides that when a passenger is denied boarding to a flight from Canada to the U.K., British Airways will pay the full value of the replacement ticket to the passenger's next stopover, plus between $50 and $200.

8 The Agency concluded that the Rule may be unreasonable within the meaning of subsection 111(1) of the *ATR* because British Airways had not demonstrated how it would suffer a competitive disadvantage if it were to raise the amounts of denied boarding compensation.

9 Third and finally, the appellant argued that Rule 87(B)(3)(B) purports to pre-empt the rights of passengers who accept denied boarding compensation to seek damages under other laws and, as such, fails to provide passengers with a reasonable opportunity to fully assess their compensation options. The Agency agreed, finding the Rule unreasonable within the meaning of subsection 111(1) of the *ATR* insofar as it purports to provide a "sole remedy" for denied boarding.

10 In the Order issued with its January 17, 2014 decision, the Agency provided British Airways with the opportunity to "show cause" why it should not be required to amend Rule 87(B)(3)(B) to

bring it in conformity with one of three denied boarding compensation schemes listed by the Agency, or to propose a new scheme that the Agency may consider to be reasonable. The Order also stipulated that the appellant would have the opportunity to file comments on British Airways' answer to the show cause Order.

11 On March 17, 2014, British Airways filed its answer. In this answer, British Airways stated that it was choosing to implement one of the four schemes listed in the Order, namely "[t]he regime proposed by Air Canada during the proceedings related to Decision No. 442-C-A-2013 (*Azar v. Air Canada)*". British Airways proposed amending Rule 87(B)(3)(B) to provide that, on flights from Canada to the U.K., passengers who were denied boarding would be compensated in the amount of CAD$400 in cash or equivalent for delays of zero to four hours, and in the amount of CAD$800 for delays of over four hours.

12 On March 26, 2014, in accordance with the show cause Order, the appellant filed comments in response to the answer given by British Airways.

13 On March 28, 2014, British Airways filed a reply to the appellant's March 26, 2014 submissions. On April 1, 2014, the appellant wrote to the Agency seeking permission to provide submissions in response to British Airways' March 28, 2014 reply.

14 In Decision No. LET-C-A-25-2014, dated April 16, 2014, the Agency struck from the record the submissions made by British Airways on March 28, 2014 and those made by the appellant on April 1, 2014. The Agency also directed the appellant to amend his March 26, 2014 comments by removing any submissions unrelated to the specific matter of the denied boarding compensation regime proposed by Air Canada in Decision No. 442-C-A-2013 (*Azar v. Air Canada*).

15 On April 23, 2014, the appellant asked the Agency to reconsider its April 16, 2014 decision. On May 2, 2014, in Decision No. LET-C-A-29-2014, the Agency denied the appellant's request for reconsideration. The appellant filed a redacted version of his March 26, 2014 submissions "under protest" shortly thereafter, on May 8, 2014.

16 On May 26, 2014, the Agency issued Decision No. 201-C-A-2014 (the final decision), the decision at issue in this appeal.

17 In this decision, the Agency first summarized the appellant's response, which was that the Proposed Rule was unreasonable because it only applied to flights from Canada to the U.K., and not to flights from the U.K. to Canada. In support of this argument, the appellant referenced Decision No. 227-C-A-2013 (*Lukacs v. WestJet*), in which the Agency had determined that:

> ... The failure to establish conditions governing denied boarding compensation for flights <u>to and from Canada</u> is contrary to Decision No. 666-C-A-2001. Therefore, the Agency finds that if Proposed Tariff Rule 110(E) were to be filed with the Agency, it would be considered unreasonable.

(At para. 39; emphasis added)

18 In its analysis, the Agency determined that British Airways' Proposed Rule was consistent with the proposal made by Air Canada in Decision No. 442-C-A-2013 in terms of the amount of compensation. However, the Agency determined that, in terms of its application, the Proposed Rule was inconsistent with Air Canada's proposal in Decision No. 442-C-A-2013. Air Canada's proposal applied to flights from Canada to the E.U., whereas British Airways' proposal applied only to flights from Canada to the U.K.

19 The Agency therefore concluded that the Proposed Rule was unreasonable, and that, as a result, British Airways had failed to show cause. The Agency ordered British Airways to file a Proposed Rule that would apply to flights from Canada to the E.U.

III. Legislative Framework

20 Section 110 of the *Air Transportation Regulations* requires air carriers operating international service in Canada to create and file with the Agency a tariff setting out the terms and conditions of carriage. The tariff is a contract between the carrier and its passengers.

21 Paragraph 122(*c*)(iii) of the *ATR* stipulates that carriers are required to include in their tariff terms and conditions relating to denied boarding compensation:

> **122.** Every tariff shall contain
>
> ...
>
> (*c*) the terms and conditions of carriage, clearly stating the air carrier's policy in respect of at least the following matters, namely,
>
> ...
>
> (iii) compensation for denial of boarding as a result of overbooking,
>
> ...

* * *

122. Les tarifs doivent contenir :

[...]

c) les conditions de transport, dans lesquelles est énoncée clairement la politique du transporteur aérien concernant au moins les éléments suivants :

[...]

(iii) les indemnités pour refus d'embarquement à cause de sur réservation,

[...]

22 Section 111 of the *ATR* sets out the requirements by which carriers must abide when setting terms and conditions of carriage:

111. (1) All tolls and terms and conditions of carriage, including free and reduced rate transportation, that are established by an air carrier shall be just and reasonable and shall, under substantially similar circumstances and conditions and with respect to all traffic of the same description, be applied equally to all that traffic.

(2) No air carrier shall, in respect of tolls or the terms and conditions of carriage,

(*a*) make any unjust discrimination against any person or other air carrier;

(*b*) give any undue or unreasonable preference or advantage to or in favour of any person or other air carrier in any respect whatever; or

(*c*) subject any person or other air carrier or any description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatever.

(3) The Agency may determine whether traffic is to be, is or has been carried under

substantially similar circumstances and conditions and whether, in any case, there is or has been unjust discrimination or undue or unreasonable preference or advantage, or prejudice or disadvantage, within the meaning of this section, or whether in any case the air carrier has complied with the provisions of this section or section 110.

* * *

111. (1) Les taxes et les conditions de transport établies par le transporteur aérien, y compris le transport à titre gratuit ou à taux réduit, doivent être justes et raisonnables et doivent, dans des circonstances et des conditions sensiblement analogues, être imposées uniformément pour tout le trafic du même genre.

(2) En ce qui concerne les taxes et les conditions de transport, il est interdit au transporteur aérien :

a) d'établir une distinction injuste à l'endroit de toute personne ou de tout autre transporteur aérien;

b) d'accorder une préférence ou un avantage indu ou déraisonnable, de quelque nature que ce soit, à l'égard ou en faveur d'une personne ou d'un autre transporteur aérien;

c) de soumettre une personne, un autre transporteur aérien ou un genre de trafic à un désavantage ou à un préjudice indu ou déraisonnable de quelque nature que ce soit.

(3) L'Office peut décider si le trafic doit être, est ou a été acheminé dans des circonstances et à des conditions sensiblement analogues et s'il y a ou s'il y a eu une distinction injuste, une préférence ou un avantage indu ou déraisonnable, ou encore un préjudice ou un désavantage au sens du présent article, ou si le transporteur aérien s'est conformé au présent article ou à l'article 110.

23 Section 113 of the *ATR* allows the Agency to disallow any tariff, or any portion of a tariff, that does not comply with the requirements of section 111:

113. The Agency may

(*a*) suspend any tariff or portion of a tariff that appears not to conform with subsections 110(3) to (5) or section 111 or 112, or disallow any tariff or portion of a tariff that does not conform with any of those provisions; and

(*b*) establish and substitute another tariff or portion thereof for any tariff or portion thereof disallowed under paragraph (*a*).

* * *

113. L'Office peut :

a) suspendre tout ou partie d'un tarif qui paraît ne pas être conforme aux paragraphes 110(3) à (5) ou aux articles 111 ou 112, ou refuser tout tarif qui n'est pas conforme à l'une de ces dispositions;

b) établir et substituer tout ou partie d'un autre tarif en remplacement de tout ou partie du tarif refusé en application de l'alinéa *a*).

IV. Positions of the Parties

24 The appellant submits that the Agency's final decision is unreasonable, as it neglects to impose any denied boarding compensation on British Airways flights departing from the E.U., contrary to paragraph 122(*c*)(iii) of the *ATR*. The appellant also submits that the Agency deprived him of a meaningful opportunity to reply to British Airways' response to the show cause Order, and thus breached its duty of procedural fairness.

25 The appellant asks this Court to allow the appeal and to set aside the final decision of the Agency. He also asks the Court to set aside the Agency's procedural decisions, to the extent that these decisions direct the appellant to delete portions of his submissions. The appellant seeks his disbursements in any event of the cause and, if he is successful, a moderate allowance for the time that he devoted to this appeal.

26 The respondent British Airways submits that the Agency's final decision is reasonable, and asks this Court to dismiss the appeal, with costs. The respondent Agency has not provided any written submissions in this appeal.

V. Issues

27 There are two issues in this appeal:

1. Does the substance of the Agency's final decision contain a reversible

error?

2. Did the Agency breach its duty of procedural fairness?

VI. Standard of Review

28 The standard of review applicable to the first issue, the Agency's substantive decision, is reasonableness. The issue of whether British Airways had indeed "shown cause" is a question of mixed fact and law. As such, the standard of review is presumed to be reasonableness (*Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 51, [2008] 1 S.C.R. 190). Furthermore, the courts have generally reviewed decisions of the Agency -- an administrative body with specialized expertise -- on a deferential standard (*Canadian National Railway Company v. Canadian Transportation Agency*, 2013 FCA 270 at para. 3, 454 N.R. 125, citing *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15 at para. 100, [2007] 1 S.C.R. 650).

29 Issues of procedural fairness are reviewable on the correctness standard (*Mission Institution v. Khela*, 2014 SCC 24 at para. 79, [2014] 1 S.C.R. 502). Correctness is therefore the standard of review applicable to the second issue in this appeal.

VII. Analysis

A. *Reasonableness of the Decision*

30 The appellant submits that the final decision of the Agency is unreasonable because it imposes on British Airways a tariff relating to denied boarding compensation that only covers passengers travelling from Canada to the E.U., and not those travelling from the E.U. to Canada.

31 The appellant submits that this outcome is unreasonable because it is contrary to paragraph 122(*c*)(iii) of the *ATR*, and creates a legal loophole, defeating the purpose for which paragraph 122(*c*)(iii) of the *ATR* was enacted.

32 The appellant submits that paragraph 122(*c*)(iii), which requires carriers to include in their tariff a policy concerning denied boarding compensation, applies to both service from Canada to destinations abroad, and to service from destinations abroad to Canada. The appellant supports this submission by reference to the Agency's Decision No. 227-C-A-2013 (*Lukacs v. WestJet*). The appellant also refers to the more recent Agency Decision No. 148-C-A-2015 (*Ahmad v. Pakistan International Airlines Corporation*). The Agency found in both of these cases that an airline's tariff must include provisions that deal with denied boarding compensation both to and from Canada.

33 As the appellant correctly points out, in Decision No. 227-C-A-2013, the Agency found that a tariff rule that WestJet had proposed was unreasonable because it did not set out compensation for flights to and from Canada. The relevant paragraph which the appellant has relied upon reads as

follows:

> [39] Although WestJet proposes to revise Existing Tariff Rule 110(E) by deleting text that provides that denied boarding compensation will not be tendered for flights to and from Canada, Proposed Tariff Rule 110(E) only sets out compensation due to passengers who are denied boarding for flights from the United States of America. The failure to establish conditions governing denied boarding compensation for flights to and from Canada is contrary to Decision No. 666-C-A-2001. Therefore, the Agency finds that if Proposed Tariff Rule 110(E) were to be filed with the Agency, it would be considered unreasonable.

34 Similarly, in Decision No. 148-C-A-2015 the Agency found as follows:

> [29] As PIA's Tariff does not contain terms and conditions of carriage that clearly state its policy in respect of denied boarding and compensation for denied boarding as a result of overbooking for travel to and from Canada, the Agency finds that PIA contravened paragraph 122(*c*) and subparagraph 122(*c*)(iii) of the ATR.

35 In the case before us the Agency appears to have implicitly decided that it is not necessary for an airline to include in its tariff a provision that clearly sets out its obligations with respect to denied boarding compensation for flights departing the E.U. and coming to Canada. The Agency found that British Airways need not reference E.U. Regulation (EC) No. 261/2004 in its Tariff. It is accepted by all parties to this appeal that British Airways is bound by E.U. Regulation (EC) No. 261/2004 for its flights departing the E.U. to other countries, including Canada.

36 The Agency supported this finding on the basis of its prior Decision No. 432-C-A-2013, in which it stated:

> [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.

37 In my view, the finding in paragraph 103 merely sets forth a policy decision that the Agency will not force an airline to incorporate by reference a provision of another jurisdiction's legislation on the basis that the Agency cannot enforce the provisions of foreign legislation. It does not specifically address whether a tariff must include a provision that deals with denied boarding compensation quite independent of another jurisdiction's legislation for flights to and from Canada.

38 It is instructive to note that British Airways' existing Tariff did in fact cover denied boarding compensation for flights "between points in Canada and points in the United Kingdom served by British Airways" (Rule 87(B)). No clear explanation was provided by the Agency as to why this was no longer required. Further, in Decision No. 432-C-A-2013 at paragraphs 71 and 72, the Agency found that the absence of language providing that passengers affected by denied boarding will be eligible for compensation is unreasonable. In the case before us there is also no language dealing with denied boarding compensation for flights from the E.U. to Canada. It seems to me that Decision No. 432-C-A-2013 offers little support for the proposition that British Airways need not set out clearly in its tariff its obligations with respect to denied boarding compensation both to and from Canada.

39 In addition, the option chosen by British Airways pursuant to the show cause Order was "The regime proposed by Air Canada during the proceedings related to Decision No. 442-C-A-2013 (Azar v. Air Canada)". While the regime proposed by Air Canada in *Azar v. Air Canada* dealt only with flights from Canada to the E.U. pursuant to the facts of that case, it is important to note that the tariff in respect of which the proposal applied also covers flights from the E.U. to Canada. This is pursuant to Rule 90(A) of Air Canada's tariff regime, which adopts by reference E.U. Regulation (EC) No. 261/2004 for flights originating in the E.U. and Switzerland.

40 The Agency decision in the case before us lacks clarity with respect to whether British Airways should address denied boarding compensation for flights to Canada from the E.U. In addition, there is an apparent tension between the decision before us and the Agency's prior decisions, which seem to suggest that an airline tariff must include denied boarding compensation provisions for both flights to and from Canada. In my view it is necessary for the Agency to address this tension and apparent inconsistency directly. In light of this, in my view this matter should be returned to the Agency for re-determination. The Agency must clearly address how British Airways is to "meet its tariff obligations of clarity" so that "the rights and obligations of both the carrier and passengers are stated in such a way as to exclude any reasonable doubt, ambiguity or uncertain meaning" in situations where the tariff is silent with respect to denied boarding compensation for inbound flights to Canada (Decision No. 432-C-A-2013, referencing Decision No. 344-C-A-2013 (*Lukacs v. Porter Airlines Inc.*)). In particular, the Agency must clarify whether the tariff must in all instances set out denied boarding compensation provisions for flights to and from Canada, or whether the fact that British Airways passengers from the E.U. to Canada are covered by E.U. Regulation (EC) No. 261/2004 is sufficient.

B. *Procedural Fairness*

41 The appellant submits that the Agency breached its duty of procedural fairness when it ordered him to redact the majority of his March 26, 2014 submissions. He submits that in doing so, the Agency deprived him of his right to make meaningful submissions in response to British Airways' proposal. Given the decision to refer this matter back to the Agency there is no need to consider the procedural fairness issue raised by the appellant. The Agency is best positioned to

determine the extent of submissions it will require for the redetermination of the issue set out above.

VIII. Conclusion

42 I would allow the appeal and remit the matter to the Agency for redetermination in accordance with these reasons.

43 This Court has previously seen fit to award this appellant his disbursements, on the basis that his appeal was in the nature of public interest litigation and that the issue raised was not frivolous (*Lukacs v. Canada (Transportation Agency*), 2014 FCA 76 at para 62, 456 N.R. 186). I would award the appellant costs in the amount of $250.00 and his disbursements in this Court, such amounts to be payable by British Airways.

NEAR J.A.
RYER J.A.:-- I agree.

44 DAWSON J.A. (dissenting):-- I would dismiss this appeal for the following reasons.

45 As noted by the majority, on January 30, 2013, the appellant, Gabor Lukacs, filed a complaint with the Canadian Transportation Agency. The complaint alleged that certain provisions relating to liability and denied boarding compensation contained in British Airways' International Passenger Rules and Fares Tariff No. BA-1, NTA(A) No. 306 were unclear and/or unreasonable. Amongst other relief, the appellant requested that the Agency disallow Rule 87(B)(3)(B) of the Tariff and direct British Airways to incorporate into the Tariff the obligations contained in Regulation (EC) No. 261/2004 of the European Parliament and of the Council of 11 February 2004.

46 Regulation (EC) No. 261/2004 deals with compensation to be paid to passengers in the event they are denied boarding. It applies to every flight departing from an airport in the United Kingdom, and every flight operated by a European Union carrier with a destination in the United Kingdom. The appellant argued that British Airways' Tariff should reflect its legal obligation under the regulation.

47 In response, British Airways noted that while it complies with Regulation (EC) No. 261/2004, it would be inappropriate for the Agency to enforce foreign laws by requiring carriers to include provisions of a European regulation in their Canadian contracts of carriage.

48 In his reply to British Airways' response, the appellant:

i) accepted British Airways' evidence that it complies with the provisions of Regulation (EC) No. 261/2004 with respect to passengers flying from the United Kingdom to Canada;

ii) submitted that British Airways was currently not complying with its

obligations under Regulation (EC) No. 261/2004 with respect to passengers flying from Canada to the United Kingdom;

iii) submitted that the Agency ought to substitute in the relevant portion of the Tariff a provision that reflects British Airways' current practice with respect to denied boarding compensation paid to passengers flying from the United Kingdom to Canada; and

iv) submitted that the Tariff should require British Airways to pay denied boarding compensation to passengers flying from Canada to the United Kingdom in the amounts prescribed by Regulation (EC) No. 261/ 2004.

49 In Decision No. 10-C-A-2014, the Agency rejected the appellant's submissions on Regulation (EC) No. 261/2004, stating at paragraph 113 of the decision that it would "not require British Airways to incorporate the provisions of Regulation (EC) No. 261/2004 into British Airways' Tariff, or make reference to that Regulation". In reaching this conclusion, the Agency quoted as follows from its earlier Decision No. 432-C-A-2013:

> As to the reasonableness of carriers' tariffs filed with the Agency, the Agency makes determination 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 had 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.

50 The order which accompanied the decision required British Airways "to amend its Tariff and conform to this Order and the Agency's findings set out in [the] Decision".

51 The order went on to provide, at paragraph 144, that:

> [...] the Agency provides British Airways with the opportunity to show cause, by no later than February 17, 2014, why the Agency should not require British Airways, with respect to the denied boarding compensation tendered to passengers under Rule 87(B)(3)(B), apply either:
>
> 1. The regime applicable in the United States of America;
>
> 2. The regime proposed by Mr. Lukacs in the proceedings related to

Decision No. 342-C-A-2013;

3. The regime proposed by Air Canada during the proceedings related to Decision No. 442-C-A-2013; or

4. Any other regime that British Airways may wish to propose that the Agency may consider to be reasonable within the meaning of subsection 111(1) of the ATR.

52 Decision No. 442-C-A-2013, referred to in the third option offered to British Airways, dealt with the reasonableness of Air Canada's tariff as it related to denied boarding compensation for travel from Canada to the European Union. The Agency found Air Canada's existing denied boarding compensation in connection with flights from Canada to the European Union to be unreasonable. In the result, the Agency ordered Air Canada to amend its tariff by filing its proposed denied boarding compensation amounts for travel from Canada to the European Union.

53 As argued by British Airways, the appellant did not seek leave to appeal Decision No. 10-C-A-2014 (British Airways' memorandum of fact and law at paragraph 18).

54 In response to this decision, British Airways proposed to apply the compensation regime proposed by Air Canada as set out in Agency Decision No. 442-C-A-2013. The text of British Airways' proposed tariff was clear that it applied only to compensation payable for flights from Canada to the United Kingdom. The proposed tariff was silent with respect to compensation payable for flights from the United Kingdom to Canada.

55 The appellant replied to the proposal advanced by British Airways, challenging the reasonableness of the proposal on the ground that it failed to establish conditions governing denied boarding compensation for flights from the United Kingdom to Canada. The appellant submitted that British Airways' proposal purported, albeit implicitly, to exempt it from the obligation to pay denied boarding compensation for flights from the United Kingdom to Canada.

56 Subsequently, in Decision No. LET-C-A-25-2014, the Agency found that parts of the appellant's reply submissions were unrelated to the specific matter of the denied boarding compensation regime proposed by Air Canada in the proceeding that led to Decision No. 442-C-A-2013. In result, the Agency directed the appellant to refile his reply submissions, deleting all submissions that were unrelated to the denied boarding compensation regime proposed previously by air Canada in the proceeding that led to Decision No. 442-C-A-2013.

57 Later, the Agency dismissed a request that it reconsider this decision (Decision No. LET-C-A-29-2014).

58 From this chronology it is apparent that in Decision No. 10-C-A-2014, the Agency made a final decision that it would not require British Airways to incorporate the provisions of Regulation (EC) No. 261/2004 into its tariff. By allowing British Airways the option to propose the same compensation regime previously proposed by Air Canada, the Agency also made a final decision that British Airways could, as it did, propose a tariff that dealt only with denied boarding compensation amounts for travel from Canada to the United Kingdom.

59 Any challenge to these decisions ought to have been brought as an application for leave to appeal Decision No. 10-C-A-2014. The appellant cannot challenge these decisions under the guise of a challenge to Decision No. 201-C-A-2014.

60 It further follows that the Agency did not breach procedural fairness by ordering that the appellant delete submissions in his final reply that were not relevant to the proposed tariff regime advanced by Air Canada that led to Decision No. 442-C-A-2013. The impugned submissions were not relevant to the remaining issue before the Agency, and it was not unfair for the Agency to ignore them and order that they be removed from the record.

61 For these reasons, I would dismiss the appeal with costs.

DAWSON J.A.

Federal Court of Appeal | Cour d'appel fédérale

Date: 20160405

Docket: A-39-16

Citation: 2016 FCA 103

Present: **STRATAS J.A.**

BETWEEN:

DR. GÁBOR LUKÁCS

Applicant

and

CANADIAN TRANSPORTATION AGENCY

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on April 5, 2016.

REASONS FOR ORDER BY: STRATAS J.A.

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Federal Court of Appeal | Cour d'appel fédérale

Date: 20160404

Docket: A-39-16

Citation: 2016 FCA 103

Present: **STRATAS J.A.**

BETWEEN:

DR. GÁBOR LUKÁCS

Applicant

and

CANADIAN TRANSPORTATION AGENCY

Respondent

REASONS FOR ORDER

STRATAS J.A.

[1] The parties are working to perfect this application for judicial review. The applicant has requested under Rule 317 that the respondent Agency transmit the record it relied upon when making its decisions that are the subject of the application. In response, the Agency has objected under Rule 318(2) to disclosure of some of the record and has informed the applicant and the Court of the reasons for the objection.

[2] Under Rule 318(3), the applicant now requests directions as to the procedure for making submissions on the objection.

[3] The Court has read the Agency's reasons for objection. Although unnecessary under Rule 318, the applicant has supplied his responses to the Agency's reasons.

[4] A reading of the parties' reasons and responses shows that they may not have a clear idea of the relationship between Rules 317 and 318 and the Court's remedial flexibility in this area. This affects the submissions on the objection that this Court will need. Before giving directions concerning the steps the parties need to take concerning the objection, it is necessary to clarify matters.

A. Rules 317-318 and the Court's remedial flexibility

[5] Rules 317-318 do not sit in isolation. Behind them is a common law backdrop and other Rules that describe how the record of the administrative decision-maker can be placed before a reviewing court. This was all explained in *Canadian Copyright Licensing Agency (Access Copyright) v. Alberta*, 2015 FCA 268 at paras. 7-18 and will not be repeated here. On admissibility of evidence before the reviewing court on judicial review, see, most recently, *Bernard v. Canada (Revenue Agency)*, 2015 FCA 263.

[6] Under Rule 317, a party can request from the administrative decision-maker material relevant to the application for judicial review. Under Rule 318, the requesting party is entitled to be

sent everything that it does not have in its possession and that was before the decision-maker at the time it made the decision under review, unless the decision-maker objects under Rule 318(2): *Access Information Agency Inc. v. Canada (Attorney General)*, 2007 FCA 224, 66 Admin. L.R. (4th) 83 at para. 7; *1185740 Ontario Ltd. v. Canada (Minister of National Revenue* (1999), 247 N.R. 287 (F C.A.). The Saskatchewan Court of Appeal set out the guiding principle on this entitlement rather well:

> In order to effectively pursue their rights to challenge administrative decisions from a reasonableness perspective, the applicants in judicial review proceedings must be entitled to have the reviewing court consider the evidence presented to the tribunal in question [absent well-founded objection by the tribunal].

(*Hartwig v. Commission of Inquiry into matters relating to the death of Neil Stonechild*, 2007 SKCA 74, 284 D.L.R. (4th) 268 at para. 24.)

[7] This passage recognizes the relationship between the record before the reviewing court and the reviewing court's ability to review what the administrative decision-maker has done. If the reviewing court does not have evidence of what the tribunal has done or relied upon, the reviewing court may not be able to detect reversible error on the part of the administrative decision-maker. In other words, an inadequate evidentiary record before the reviewing court can immunize the administrative decision-maker from review on certain grounds. Our judge-made law in the area of administrative law develops in a way that furthers the accountability of public decision-makers in their decision-making and avoids immunization, absent the most compelling reasons: *Slansky v. Canada (Attorney General)*, 2013 FCA 199, 364 D.L.R. (4th) 112 at paras. 314-15 (dissenting reasons, but not opposed on this point).

[8] Now to objections under Rule 318(2). Where the relevant administrative decision-maker, here the Agency, objects under Rule 318(2) to disclosing some or all of the material requested under Rule 317 and the applicant does not dispute the objection, then the material is not transmitted. However, if, as here, the applicant disputes the objection, either the applicant or the administrative decision-maker may ask the Court for directions as to how the objection should be litigated: see Rule 318(3).

[9] In response to a request for directions, the Court may determine that the objection cannot succeed solely on the basis of the reasons given by the administrative decision-maker under Rule 318(2). In that case, it may summarily dismiss the objection and require the administrative decision-maker to transmit the material under Rule 318(1) within a particular period of time.

[10] In cases where the Rule 318(2) objection might have some merit, the Court can ask for submissions from the parties on a set schedule. But sometimes the Court will need more than submissions: in some cases, there will be real doubt and complexity and sometimes evidence will have to be filed by the parties to support or contest the objection. In cases like these, the Court may require the administrative decision-maker to proceed by way of a written motion under Rule 369. That Rule provides for motion records, responding motion records and replies, and also the deadlines for filing those documents. The motion records require supporting affidavits and written representations.

[11] Regardless of the manner in which the Court proceeds, when determining the validity of an objection under Rule 318(2) what standpoint should it adopt? Is the Court reviewing the administrative decision-maker's decision to object?

[12] No. When determining the validity of an objection, the Court is tasked with deciding the content of the evidentiary record in the proceeding—the application for judicial review—before it. Like all proceedings before the Court, it must consider what evidence is admissible before it. The Court, regulating its own proceedings, must apply its own standards and not defer to the administrative decision-maker's view. See *Slansky*, above at para. 274. (Much of the discussion that follows is based on *Slansky*.)

[13] What can the Court do when determining the validity of an objection? Quite a bit. There is much remedial flexibility. The Court can do more than just accept or reject the administrative decision-maker's objection to disclosure of material. It is not an all-or-nothing proposition.

[14] In this regard, Rule 318 should not been seen in isolation. Other rules and powers inform and assist the Court in determining an objection. For example:

- Rules 151 and 152 allow for material before the reviewing court to be sealed where confidentiality interests established on the evidence outweigh the substantial public interest in openness: *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522.

- Rule 53 allows terms to be attached to any order and Rule 55 allows the Court to vary a rule or dispense with compliance with a Rule. The exercise of these discretionary powers is informed by the objective in Rule 3 (recently given further impetus by the Supreme Court's decision in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87): to "secure the just, most expeditious and least expensive determination of every proceedings on its merits." It is also informed by s. 18.4 of the *Federal Courts Act*, R.S.C. 1985, c. F-7: "an application shall be heard and determined without delay and in a summary way."

- The Court can draw upon its plenary powers in the area of supervision of tribunals to craft procedures to achieve certain legitimate objectives in specific cases: *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626, 157 D.L.R. (4th) 385 at paras. 35-38; *M.N.R. v. Derakhshani*, 2009 FCA 190, 400 N.R. 311 at paras. 10-11; *Canada (National Revenue) v. RBC Life Insurance Company*, 2013 FCA 50, 443 N.R. 378 at paras. 35-36.

[15] These Rules and powers allow the Court determining a Rule 318 objection to do more than just uphold or reject the administrative decision-maker's objection to disclosure of material. The Court may craft a remedy that furthers and reconciles, as much as possible, three objectives: (1) meaningful review of administrative decisions in accordance with Rule 3 and s. 18.4 of the *Federal Courts Act* and the principles discussed at paras. 6-7 above; (2) procedural fairness; and (3) the protection of any legitimate confidentiality interests while permitting as much openness as possible in accordance with the Supreme Court's principles in *Sierra Club*.

[16] Where there is a valid confidentiality interest that could sustain an objection against inclusion of a document into the record, the Court must ask itself, "Confidential from whom?" Perhaps the general public cannot access the confidential material, but the applicant and the Court can, perhaps with conditions attached. Perhaps the only party that can access the confidential material is the Court, but a benign summary of the material might have to be prepared and filed to further meaningful review, as much procedural fairness as possible, and openness. In other cases, the objection may be such that confidentiality must be upheld absolutely against all, including the Court. Legal professional privilege is an example of this.

[17] And the fact that part of a document may be confidential does not necessarily mean that the whole document must be excluded from the record. The Court must consider whether deleting or obscuring the confidential parts of a document is enough or whether the entire document should be excluded from the record.

[18] In short, the Court's determination of the Rule 318(2) objection—a determination aimed at furthering and reconciling, as much as possible, the three objectives set out in para. 15, above—can result in an order of any shape and size, limited only by the creativity and imagination of counsel and courts: see, for example, the creative and detailed sealing order made in *Health Services and Support-Facilities Subsector Bargaining Association v. British Columbia*, 2002 BCSC 1509, 8 B.C.L.R. (4th) 281.

B. The directions to be given in this case

[19] In some cases, the Court might be able to determine an administrative decision-maker's Rule 318(2) objection solely on the basis of the reasons the decision-maker has provided under Rule 318(2). This case—a complex one requiring evidence to establish the objection—is not one of those cases. Thus, in the circumstances of this case, the Agency should file a motion record under Rule 369 seeking an order vindicating its objection.

[20] Without limiting whatever other relief the Agency might wish to seek, the Agency must address, both in its evidence and in written representations, the requirements for confidentiality and the test set out in *Sierra Club*.

[21] The Agency should be specific in its motion record concerning the type of order it wants. In doing so, it should have regard to the above discussion—in particular, the remedial flexibility the Court possesses and the Court's desire to craft a remedy that furthers and reconciles, as much as possible, the three objectives set out in para. 15, above.

[22] The Agency shall file its motion under Rule 369 within ten days of today's date and then the times set out under Rule 369 shall follow for the respondent's responding record and the reply. The Registry shall forward the motion to me for determination immediately after the reply has been filed or the time for reply has expired, whichever is first. An order shall go to this effect.

[23] To the extent the Agency wishes part of its motion record to be sealed under Rules 151-152, the Agency should request that in its notice of motion and support its request with evidence. Any confidential material may then be included in a confidential volume within a sealed envelope, filed only with the Court. At the time of determining the motion, the Court will review the material and assess whether further submissions on this point are needed from the applicant or whether the claim of confidentiality is made out.

[24] The parties have agreed to expedite this matter. The Court agrees that expedition is warranted and, following the motion, will schedule the remaining steps in this application. The parties should immediately discuss an expedited schedule on the footing that the motion will be determined by the end of April at the latest. The parties should also consider whether the application should be heard as soon as possible by videoconference rather than waiting for the Court's next sittings in Halifax after April. The parties shall make their submissions on these matters in their written representations in their motion records.

[25] The parties are also encouraged to engage in discussions to try to settle the record that should be placed before this Court in this application. Through their agreement to expedite this matter, the parties now recognize that there is a public interest in expedition. Quick agreement on this issue will speed this matter considerably. One possibility is to agree that the matter proceed with a public record and a sealed disputed record and the admissibility of the disputed record can be argued before the Court hearing the application, if necessary with affidavits filed in the parties'

respective records for the purpose of resolving the dispute. If the parties truly recognize there is a public interest in expedition, then this is probably the best way to proceed.

"David Stratas"

J.A.

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FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-39-16
STYLE OF CAUSE:	DR. GÁBOR LUKÁCS v. CANADIAN TRANSPORTATION AGENCY

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	STRATAS J.A.
DATED:	APRIL 5, 2016

WRITTEN REPRESENTATIONS BY:

Dr. Gábor Lukács	ON HIS OWN BEHALF
John Dodsworth	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Canadian Transportation Agency Gatineau, Quebec	FOR THE RESPONDENT

Indexed as:

Rizzo & Rizzo Shoes Ltd. (Re)

Philippe Adrien, Emilia Berardi, Paul Creador, Lorenzo Abel Vasquez and Lindy Wagner on their own behalf and on behalf of the other former employees of Rizzo & Rizzo Shoes Limited, appellants;

v.

Zittrer, Siblin & Associates, Inc., Trustees in Bankruptcy of the Estate of Rizzo & Rizzo Shoes Limited, respondent, and The Ministry of Labour for the Province of Ontario, Employment Standards Branch, party.

[1998] 1 S.C.R. 27

[1998] S.C.J. No. 2

File No.: 24711.

Supreme Court of Canada

1997: October 16 / 1998: January 22.

Present: Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Employment law -- Bankruptcy -- Termination pay and severance available when employment terminated by the employer -- Whether bankruptcy can be said to be termination by the employer -- Employment Standards Act, R.S.O. 1980, c. 137, ss. 7(5), 40(1), (7), 40a -- Employment Standards Amendment Act, 1981, S.O. 1981, c. 22, s. 2(3) -- Bankruptcy Act, R.S.C., 1985, c. B-3, s. 121(1) -- Interpretation Act, R.S.O. 1990, c. I.11, ss. 10, 17.

A bankrupt firm's employees lost their jobs when a receiving order was made with respect to the firm's property. All wages, salaries, commissions and vacation pay were paid to the date of the receiving order. The province's Ministry of Labour audited the firm's records to determine if any outstanding termination or severance pay was owing to former employees under the Employment

Standards Act ("ESA") and delivered a proof of claim to the Trustee. The Trustee disallowed the claims on the ground that the bankruptcy of an employer does not constitute dismissal from employment and accordingly creates no entitlement to severance, termination or vacation pay under the ESA. The Ministry successfully appealed to the Ontario Court (General Division) but the Ontario Court of Appeal overturned that court's ruling and restored the Trustee's decision. The Ministry sought leave to appeal from the Court of Appeal judgment but discontinued its application. Following the discontinuance of the appeal, the Trustee paid a dividend to Rizzo's creditors, thereby leaving significantly less funds in the estate. Subsequently, the appellants, five former employees of Rizzo, moved to set aside the discontinuance, add themselves as parties to the proceedings, and requested and were granted an order granting them leave to appeal. At issue here is whether the termination of employment caused by the bankruptcy of an employer give rise to a claim provable in bankruptcy for termination pay and severance pay in accordance with the provisions of the ESA.

Held: The appeal should be allowed.

At the heart of this conflict is an issue of statutory interpretation. Although the plain language of ss. 40 and 40a of the ESA suggests that termination pay and severance pay are payable only when the employer terminates the employment, statutory interpretation cannot be founded on the wording of the legislation alone. 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. Moreover, s. 10 of Ontario's Interpretation Act provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".

The objects of the ESA and of the termination and severance pay provisions themselves are broadly premised upon the need to protect employees. Finding ss. 40 and 40a to be inapplicable in bankruptcy situations is incompatible with both the object of the ESA and the termination and severance pay provisions. The legislature does not intend to produce absurd consequences and such a consequence would result if employees dismissed before the bankruptcy were to be entitled to these benefits while those dismissed after a bankruptcy would not be so entitled. A distinction would be made between employees merely on the basis of the timing of their dismissal and such a result would arbitrarily deprive some of a means to cope with economic dislocation.

The use of legislative history as a tool for determining the intention of the legislature is an entirely appropriate exercise. Section 2(3) of the Employment Standards Amendment Act, 1981 exempted from severance pay obligations employers who became bankrupt and lost control of their assets between the coming into force of the amendment and its receipt of royal assent. Section 2(3) necessarily implies that the severance pay obligation does in fact extend to bankrupt employers. If this were not the case, no readily apparent purpose would be served by this transitional provision. Further, since the ESA is benefits-conferring legislation, it ought to be interpreted in a broad and

generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant.

When the express words of ss. 40 and 40a are examined in their entire context, the words "terminated by an employer" must be interpreted to include termination resulting from the bankruptcy of the employer. The impetus behind the termination of employment has no bearing upon the ability of the dismissed employee to cope with the sudden economic dislocation caused by unemployment. As all dismissed employees are equally in need of the protections provided by the ESA, any distinction between employees whose termination resulted from the bankruptcy of their employer and those who have been terminated for some other reason would be arbitrary and inequitable. Such an interpretation would defeat the true meaning, intent and spirit of the ESA. Termination as a result of an employer's bankruptcy therefore does give rise to an unsecured claim provable in bankruptcy pursuant to s. 121 of the Bankruptcy Act for termination and severance pay in accordance with ss. 40 and 40a of the ESA. It was not necessary to address the applicability of s. 7(5) of the ESA.

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Distinguished: Re Malone Lynch Securities Ltd., [1972] 3 O.R. 725; Re Kemp Products Ltd. (1978), 27 C.B.R. (N.S.) 1; Mills-Hughes v. Raynor (1988), 63 O.R. (2d) 343; referred to: U.F.C.W., Loc. 617P v. Royal Dressed Meats Inc. (Trustee of) (1989), 76 C.B.R. (N.S.) 86; R. v. Hydro-Québec, [1997] 1 S.C.R. 213; Royal Bank of Canada v. Sparrow Electric Corp., [1997] 1 S.C.R. 411; Verdun v. Toronto-Dominion Bank, [1996] 3 S.C.R. 550; Friesen v. Canada, [1995] 3 S.C.R. 103; Machtinger v. HOJ Industries Ltd., [1992] 1 S.C.R. 986; Wallace v. United Grain Growers Ltd., [1997] 3 S.C.R. 701; R. v. TNT Canada Inc. (1996), 27 O.R. (3d) 546; Re Telegram Publishing Co. v. Zwelling (1972), 1 L.A.C. (2d) 1; R. v. Vasil, [1981] 1 S.C.R. 469; Paul v. The Queen, [1982] 1 S.C.R. 621; R. v. Morgentaler, [1993] 3 S.C.R. 463; Abrahams v. Attorney General of Canada, [1983] 1 S.C.R. 2; Hills v. Canada (Attorney General), [1988] 1 S.C.R. 513; British Columbia (Director of Employment Standards) v. Eland Distributors Ltd. (Trustee of) (1996), 40 C.B.R. (3d) 25; R. v. Z. (D.A.), [1992] 2 S.C.R. 1025.

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Employment Standards Act, R.S.O. 1970, c. 147, s. 13(2).
Employment Standards Act, R.S.O. 1980, c. 137, ss. 7(5) [rep. & sub. 1986, c. 51, s. 2], 40(1) [rep. & sub. 1987, c. 30, s. 4(1)], (7), 40a(1) [rep. & sub. ibid., s. 5(1)].
Employment Standards Act, 1974, S.O. 1974, c. 112, s. 40(7).
Employment Standards Amendment Act, 1981, S.O. 1981, c. 22, s. 2.
Interpretation Act, R.S.O. 1980, c. 219 [now R.S.O. 1990, c. I.11], ss. 10, 17.
Labour Relations and Employment Statute Law Amendment Act, 1995, S.O. 1995, c. 1, ss. 74(1), 75(1).

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APPEAL from a judgment of the Ontario Court of Appeal (1995), 22 O.R. (3d) 385, 80 O.A.C. 201, 30 C.B.R. (3d) 1, 9 C.C.E.L. (2d) 264, 95 C.L.L.C. par. 210-020, [1995] O.J. No. 586 (QL), reversing a judgment of the Ontario Court (General Division) (1991), 6 O.R. (3d) 441, 11 C.B.R. (3d) 246, 92 C.L.L.C. par. 14,013, ruling that the Ministry of Labour could prove claims on behalf of employees of the bankrupt. Appeal allowed.

Steven M. Barrett and Kathleen Martin, for the appellants.
Raymond M. Slattery, for the respondent.
David Vickers, for the Ministry of Labour for the Province of Ontario, Employment Standards Branch.

Solicitors for the appellants: Sack, Goldblatt, Mitchell, Toronto.
Solicitors for the respondent: Minden, Gross, Grafstein & Greenstein, Toronto.
Solicitor for the Ministry of Labour for the Province of Ontario, Employment Standards Branch: The Attorney General for Ontario, Toronto.

The judgment of the Court was delivered by

1 IACOBUCCI J.:-- This is an appeal by the former employees of a now bankrupt employer from an order disallowing their claims for termination pay (including vacation pay thereon) and severance pay. The case turns on an issue of statutory interpretation. Specifically, the appeal decides whether, under the relevant legislation in effect at the time of the bankruptcy, employees are entitled to claim termination and severance payments where their employment has been terminated by reason of their employer's bankruptcy.

1. Facts

2 Prior to its bankruptcy, Rizzo & Rizzo Shoes Limited ("Rizzo") owned and operated a chain of retail shoe stores across Canada. Approximately 65 percent of those stores were located in Ontario. On April 13, 1989, a petition in bankruptcy was filed against the chain. The following day, a receiving order was made on consent in respect of Rizzo's property. Upon the making of that order, the employment of Rizzo's employees came to an end.

3 Pursuant to the receiving order, the respondent, Zittrer, Siblin & Associates, Inc. (the "Trustee") was appointed as trustee in bankruptcy of Rizzo's estate. The Bank of Nova Scotia privately appointed Peat Marwick Limited ("PML") as receiver and manager. By the end of July 1989, PML had liquidated Rizzo's property and assets and closed the stores. PML paid all wages, salaries, commissions and vacation pay that had been earned by Rizzo's employees up to the date on which the receiving order was made.

4 In November 1989, the Ministry of Labour for the Province of Ontario, Employment Standards Branch (the "Ministry") audited Rizzo's records to determine if there was any outstanding termination or severance pay owing to former employees under the Employment Standards Act, R.S.O. 1980, c. 137, as amended (the "ESA"). On August 23, 1990, the Ministry delivered a proof of claim to the respondent Trustee on behalf of the former employees of Rizzo for termination pay and vacation pay thereon in the amount of approximately $2.6 million and for severance pay totalling $14,215. The Trustee disallowed the claims, issuing a Notice of Disallowance on January 28, 1991. For the purposes of this appeal, the relevant ground for disallowing the claim was the Trustee's opinion that the bankruptcy of an employer does not constitute a dismissal from employment and thus, no entitlement to severance, termination or vacation pay is created under the ESA.

5 The Ministry appealed the Trustee's decision to the Ontario Court (General Division) which reversed the Trustee's disallowance and allowed the claims as unsecured claims provable in bankruptcy. On appeal, the Ontario Court of Appeal overturned the trial court's ruling and restored the decision of the Trustee. The Ministry sought leave to appeal from the Court of Appeal judgment, but discontinued its application on August 30, 1993. Following the discontinuance of the appeal, the Trustee paid a dividend to Rizzo's creditors, thereby leaving significantly less funds in the estate. Subsequently, the appellants, five former employees of Rizzo, moved to set aside the discontinuance, add themselves as parties to the proceedings, and requested an order granting them leave to appeal. This Court's order granting those applications was issued on December 5, 1996.

2. Relevant Statutory Provisions

6 The relevant versions of the Bankruptcy Act (now the Bankruptcy and Insolvency Act) and the Employment Standards Act for the purposes of this appeal are R.S.C., 1985, c. B-3 (the "BA"), and R.S.O. 1980, c. 137, as amended to April 14, 1989 (the "ESA") respectively.

Employment Standards Act, R.S.O. 1980, c. 137, as amended:

7. --

(5) Every contract of employment shall be deemed to include the following provision:

> All severance pay and termination pay become payable and shall be paid by the employer to the employee in two weekly instalments beginning with the first full week following termination of employment and shall be allocated to such weeks accordingly. This provision does not apply to severance pay if the employee has elected to maintain a right of recall as provided in subsection 40a (7) of the Employment Standards Act.

40. -- (1) No employer shall terminate the employment of an employee who has been employed for three months or more unless the employee gives,

(a) one weeks notice in writing to the employee if his or her period of employment is less than one year;
(b) two weeks notice in writing to the employee if his or her period of employment is one year or more but less than three years;
(c) three weeks notice in writing to the employee if his or her period of employment is three years or more but less than four years;
(d) four weeks notice in writing to the employee if his or her period of employment is four years or more but less than five years;
(e) five weeks notice in writing to the employee if his or her period of employment is five years or more but less than six years;
(f) six weeks notice in writing to the employee if his or her period of employment is six years or more but less than seven years;
(g) seven weeks notice in writing to the employee if his or her period of employment is seven years or more but less than eight years;
(h) eight weeks notice in writing to the employee if his or her period of employment is eight years or more,

and such notice has expired.

. . .

(7) Where the employment of an employee is terminated contrary to this section,

(a) the employer shall pay termination pay in an amount equal to the wages that the employee would have been entitled to receive at his regular rate for a regular non-overtime work week for the period of notice prescribed by subsection (1) or (2), and any wages to which he is entitled;

. . .

40a . . .

(1a) Where,

(a) fifty or more employees have their employment terminated by an employer in a period of six months or less and the terminations are caused by the permanent discontinuance of all or part of the business of the employer at an establishment; or
(b) one or more employees have their employment terminated by an employer with a payroll of $2.5 million or more,

the employer shall pay severance pay to each employee whose employment has been terminated and who has been employed by the employer for five or more years.

Employment Standards Amendment Act, 1981, S.O. 1981, c. 22

2.--(1)Part XII of the said Act is amended by adding thereto the following section:

. . .

(3) Section 40a of the said Act does not apply to an employer who became a bankrupt or an insolvent person within the meaning of the Bankruptcy Act (Canada) and whose assets have been distributed among his creditors or to an employer whose proposal within the meaning of the Bankruptcy Act (Canada) has been accepted by his creditors in the period from and including the 1st day of January,

> 1981, to and including the day immediately before the day this Act receives Royal Assent.

Bankruptcy Act, R.S.C., 1985, c. B-3

> 121. (1) All debts and liabilities, present or future, to which the bankrupt is subject at the date of the bankruptcy or to which he may become subject before his discharge by reason of any obligation incurred before the date of the bankruptcy shall be deemed to be claims provable in proceedings under this Act.

Interpretation Act, R.S.O. 1990, c. I.11

> 10. Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of anything that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.
>
> . . .
>
> 17. The repeal or amendment of an Act shall be deemed not to be or to involve any declaration as to the previous state of the law.

3. Judicial History

A. Ontario Court (General Division) (1991), 6 O.R. (3d) 441

7 Having disposed of several issues which do not arise on this appeal, Farley J. turned to the question of whether termination pay and severance pay are provable claims under the BA. Relying on U.F.C.W., Loc. 617P v. Royal Dressed Meats Inc. (Trustee of) (1989), 76 C.B.R. (N.S.) 86 (Ont. S.C. in Bankruptcy), he found that it is clear that claims for termination and severance pay are provable in bankruptcy where the statutory obligation to provide such payments arose prior to the bankruptcy. Accordingly, he reasoned that the essential matter to be resolved in the case at bar was whether bankruptcy acted as a termination of employment thereby triggering the termination and severance pay provisions of the ESA such that liability for such payments would arise on bankruptcy as well.

8 In addressing this question, Farley J. began by noting that the object and intent of the ESA is to provide minimum employment standards and to benefit and protect the interests of employees. Thus, he concluded that the ESA is remedial legislation and as such it should be interpreted in a fair, large and liberal manner to ensure that its object is attained according to its true meaning, spirit

and intent.

9 Farley J. then held that denying employees in this case the right to claim termination and severance pay would lead to the arbitrary and unfair result that an employee whose employment is terminated just prior to a bankruptcy would be entitled to termination and severance pay, whereas one whose employment is terminated by the bankruptcy itself would not have that right. This result, he stated, would defeat the intended working of the ESA.

10 Farley J. saw no reason why the claims of the employees in the present case would not generally be contemplated as wages or other claims under the BA. He emphasized that the former employees in the case at bar had not alleged that termination pay and severance pay should receive a priority in the distribution of the estate, but merely that they are provable (unsecured and unpreferred) claims in a bankruptcy. For this reason, he found it inappropriate to make reference to authorities whose focus was the interpretation of priority provisions in the BA.

11 Even if bankruptcy does not terminate the employment relationship so as to trigger the ESA termination and severance pay provisions, Farley J. was of the view that the employees in the instant case would nevertheless be entitled to such payments as these were liabilities incurred prior to the date of the bankruptcy by virtue of s. 7(5) of the ESA. He found that s. 7(5) deems every employment contract to include a provision to provide termination and severance pay following the termination of employment and concluded that a contingent obligation is thereby created for a bankrupt employer to make such payments from the outset of the relationship, long before the bankruptcy.

12 Farley J. also considered s. 2(3) of the Employment Standards Amendment Act, 1981, S.O. 1981, c. 22 (the "ESAA"), which is a transitional provision that exempted certain bankrupt employers from the newly introduced severance pay obligations until the amendments received royal assent. He was of the view that this provision would not have been necessary if the obligations of employers upon termination of employment had not been intended to apply to bankrupt employers under the ESA. Farley J. concluded that the claim by Rizzo's former employees for termination pay and severance pay could be provided as unsecured and unpreferred debts in a bankruptcy. Accordingly, he allowed the appeal from the decision of the Trustee.

B. Ontario Court of Appeal (1995), 22 O.R. (3d) 385

13 Austin J.A., writing for a unanimous court, began his analysis of the principal issue in this appeal by focussing upon the language of the termination pay and severance pay provisions of the ESA. He noted, at p. 390, that the termination pay provisions use phrases such as "[n]o employer shall terminate the employment of an employee" (s. 40(1)), "the notice required by an employer to terminate the employment" (s. 40(2)), and "[a]n employer who has terminated or who proposes to terminate the employment of employees" (s. 40(5)). Turning to severance pay, he quoted s. 40a(1)(a) (at p. 391) which includes the phrase "employees have their employment terminated by an employer". Austin J.A. concluded that this language limits the obligation to provide termination and

severance pay to situations in which the employer terminates the employment. The operation of the ESA, he stated, is not triggered by the termination of employment resulting from an act of law such as bankruptcy.

14 In support of his conclusion, Austin J.A. reviewed the leading cases in this area of law. He cited Re Malone Lynch Securities Ltd., [1972] 3 O.R. 725 (S.C. in bankruptcy), wherein Houlden J. (as he then was) concluded that the ESA termination pay provisions were not designed to apply to a bankrupt employer. He also relied upon Re Kemp Products Ltd. (1978), 27 C.B.R. (N.S.) 1 (Ont. S.C. in bankruptcy), for the proposition that the bankruptcy of a company at the instance of a creditor does not constitute dismissal. He concluded as follows at p. 395:

> The plain language of ss. 40 and 40a does not give rise to any liability to pay termination or severance pay except where the employment is terminated by the employer. In our case, the employment was terminated, not by the employer, but by the making of a receiving order against Rizzo on April 14, 1989, following a petition by one of its creditors. No entitlement to either termination or severance pay ever arose.

15 Regarding s. 7(5) of the ESA, Austin J.A. rejected the trial judge's interpretation and found that the section does not create a liability. Rather, in his opinion, it merely states when a liability otherwise created is to be paid and therefore it was not considered relevant to the issue before the court. Similarly, Austin J.A. did not accept the lower court's view of s. 2(3), the transitional provision in the ESAA. He found that that section had no effect upon the intention of the Legislature as evidenced by the terminology used in ss. 40 and 40a.

16 Austin J.A. concluded that, because the employment of Rizzo's former employees was terminated by the order of bankruptcy and not by the act of the employer, no liability arose with respect to termination, severance or vacation pay. The order of the trial judge was set aside and the Trustee's disallowance of the claims was restored.

4. Issues

17 This appeal raises one issue: does the termination of employment caused by the bankruptcy of an employer give rise to a claim provable in bankruptcy for termination pay and severance pay in accordance with the provisions of the ESA?

5. Analysis

18 The statutory obligation upon employers to provide both termination pay and severance pay is governed by ss. 40 and 40a of the ESA, respectively. The Court of Appeal noted that the plain language of those provisions suggests that termination pay and severance pay are payable only when the employer terminates the employment. For example, the opening words of s. 40(1) are: "No employer shall terminate the employment of an employee. . . ." Similarly, s. 40a(1a) begins

with the words, "Where . . . fifty or more employees have their employment terminated by an employer. . . ." Therefore, the question on which this appeal turns is whether, when bankruptcy occurs, the employment can be said to be terminated "by an employer".

19 The Court of Appeal answered this question in the negative, holding that, where an employer is petitioned into bankruptcy by a creditor, the employment of its employees is not terminated "by an employer", but rather by operation of law. Thus, the Court of Appeal reasoned that, in the circumstances of the present case, the ESA termination pay and severance pay provisions were not applicable and no obligations arose. In answer, the appellants submit that the phrase "terminated by an employer" is best interpreted as reflecting a distinction between involuntary and voluntary termination of employment. It is their position that this language was intended to relieve employers of their obligation to pay termination and severance pay when employees leave their jobs voluntarily. However, the appellants maintain that where an employee's employment is involuntarily terminated by reason of their employer's bankruptcy, this constitutes termination "by an employer" for the purpose of triggering entitlement to termination and severance pay under the ESA.

20 At the heart of this conflict is an issue of statutory interpretation. Consistent with the findings of the Court of Appeal, the plain meaning of the words of the provisions here in question appears to restrict the obligation to pay termination and severance pay to those employers who have actively terminated the employment of their employees. At first blush, bankruptcy does not fit comfortably into this interpretation. However, with respect, I believe this analysis is incomplete.

21 Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, Statutory Interpretation (1997); Ruth Sullivan, Driedger on the Construction of Statutes (3rd ed. 1994) (hereinafter "Construction of Statutes"); Pierre-André Côté, The Interpretation of Legislation in Canada (2nd ed. 1991)), Elmer Driedger in Construction of Statutes (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

> 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.

Recent cases which have cited the above passage with approval include: R. v. Hydro-Québec, [1997] 1 S.C.R. 213; Royal Bank of Canada v. Sparrow Electric Corp., [1997] 1 S.C.R. 411; Verdun v. Toronto-Dominion Bank, [1996] 3 S.C.R. 550; Friesen v. Canada, [1995] 3 S.C.R. 103.

22 I also rely upon s. 10 of the Interpretation Act, R.S.O. 1980, c. 219, which provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".

23 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. I now turn to a discussion of these issues.

24 In Machtinger v. HOJ Industries Ltd., [1992] 1 S.C.R. 986, at p. 1002, the majority of this Court recognized the importance that our society accords to employment and the fundamental role that it has assumed in the life of the individual. The manner in which employment can be terminated was said to be equally important (see also Wallace v. United Grain Growers Ltd., [1997] 3 S.C.R. 701). It was in this context that the majority in Machtinger described, at p. 1003, the object of the ESA as being the protection of ". . . the interests of employees by requiring employers to comply with certain minimum standards, including minimum periods of notice of termination". Accordingly, the majority concluded, at p. 1003, that, ". . . an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protections to as many employees as possible, is to be favoured over one that does not".

25 The objects of the termination and severance pay provisions themselves are also broadly premised upon the need to protect employees. Section 40 of the ESA requires employers to give their employees reasonable notice of termination based upon length of service. One of the primary purposes of this notice period is to provide employees with an opportunity to take preparatory measures and seek alternative employment. It follows that s. 40(7)(a), which provides for termination pay in lieu of notice when an employer has failed to give the required statutory notice, is intended to "cushion" employees against the adverse effects of economic dislocation likely to follow from the absence of an opportunity to search for alternative employment. (Innis Christie, Geoffrey England and Brent Cotter, Employment Law in Canada (2nd ed. 1993), at pp. 572-81.)

26 Similarly, s. 40a, which provides for severance pay, acts to compensate long-serving employees for their years of service and investment in the employer's business and for the special losses they suffer when their employment terminates. In R. v. TNT Canada Inc. (1996), 27 O.R. (3d) 546, Robins J.A. quoted with approval at pp. 556-57 from the words of D. D. Carter in the course of an employment standards determination in Re Telegram Publishing Co. v. Zwelling (1972), 1 L.A.C. (2d) 1 (Ont.), at p. 19, wherein he described the role of severance pay as follows:

> Severance pay recognizes that an employee does make an investment in his employer's business -- the extent of this investment being directly related to the length of the employee's service. This investment is the seniority that the employee builds up during his years of service. . . . Upon termination of the employment relationship, this investment of years of service is lost, and the employee must start to rebuild seniority at another place of work. The severance pay, based on length of service, is some compensation for this loss of investment.

27 In my opinion, the consequences or effects which result from the Court of Appeal's

interpretation of ss. 40 and 40a of the ESA are incompatible with both the object of the Act and with the object of the termination and severance pay provisions themselves. It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. According to Côté, supra, an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment (at pp. 378-80). Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile (Sullivan, Construction of Statutes, supra, at p. 88).

28 The trial judge properly noted that, if the ESA termination and severance pay provisions do not apply in circumstances of bankruptcy, those employees "fortunate" enough to have been dismissed the day before a bankruptcy would be entitled to such payments, but those terminated on the day the bankruptcy becomes final would not be so entitled. In my view, the absurdity of this consequence is particularly evident in a unionized workplace where seniority is a factor in determining the order of lay-off. The more senior the employee, the larger the investment he or she has made in the employer and the greater the entitlement to termination and severance pay. However, it is the more senior personnel who are likely to be employed up until the time of the bankruptcy and who would thereby lose their entitlements to these payments.

29 If the Court of Appeal's interpretation of the termination and severance pay provisions is correct, it would be acceptable to distinguish between employees merely on the basis of the timing of their dismissal. It seems to me that such a result would arbitrarily deprive some employees of a means to cope with the economic dislocation caused by unemployment. In this way the protections of the ESA would be limited rather than extended, thereby defeating the intended working of the legislation. In my opinion, this is an unreasonable result.

30 In addition to the termination and severance pay provisions, both the appellants and the respondent relied upon various other sections of the ESA to advance their arguments regarding the intention of the legislature. In my view, although the majority of these sections offer little interpretive assistance, one transitional provision is particularly instructive. In 1981, s. 2(1) of the ESAA introduced s. 40a, the severance pay provision, to the ESA. Section 2(2) deemed that provision to come into force on January 1, 1981. Section 2(3), the transitional provision in question provided as follows:

> 2. . . .
>
> (3) Section 40a of the said Act does not apply to an employer who became a bankrupt or an insolvent person within the meaning of the Bankruptcy Act (Canada) and whose assets have been distributed among his creditors or to an employer whose proposal within the

> meaning of the Bankruptcy Act (Canada) has been accepted by his creditors in the period from and including the 1st day of January, 1981, to and including the day immediately before the day this Act receives Royal Assent.

31 The Court of Appeal found that it was neither necessary nor appropriate to determine the intention of the legislature in enacting this provisional subsection. Nevertheless, the court took the position that the intention of the legislature as evidenced by the introductory words of ss. 40 and 40a was clear, namely, that termination by reason of a bankruptcy will not trigger the severance and termination pay obligations of the ESA. The court held that this intention remained unchanged by the introduction of the transitional provision. With respect, I do not agree with either of these findings. Firstly, in my opinion, the use of legislative history as a tool for determining the intention of the legislature is an entirely appropriate exercise and one which has often been employed by this Court (see, e.g., R. v. Vasil, [1981] 1 S.C.R. 469, at p. 487; Paul v. The Queen, [1982] 1 S.C.R. 621, at pp. 635, 653 and 660). Secondly, I believe that the transitional provision indicates that the Legislature intended that termination and severance pay obligations should arise upon an employers' bankruptcy.

32 In my view, by extending an exemption to employers who became bankrupt and lost control of their assets between the coming into force of the amendment and its receipt of royal assent, s. 2(3) necessarily implies that the severance pay obligation does in fact extend to bankrupt employers. It seems to me that, if this were not the case, no readily apparent purpose would be served by this transitional provision.

33 I find support for my conclusion in the decision of Saunders J. in Royal Dressed Meats Inc., supra. Having reviewed s. 2(3) of the ESAA, he commented as follows (at p. 89):

> . . . any doubt about the intention of the Ontario Legislature has been put to rest, in my opinion, by the transitional provision which introduced severance payments into the E.S.A. . . . it seems to me an inescapable inference that the legislature intended liability for severance payments to arise on a bankruptcy. That intention would, in my opinion, extend to termination payments which are similar in character.

34 This interpretation is also consistent with statements made by the Minister of Labour at the time he introduced the 1981 amendments to the ESA. With regard to the new severance pay provision he stated:

> The circumstances surrounding a closure will govern the applicability of the severance pay legislation in some defined situations. For example, a bankrupt or insolvent firm will still be required to pay severance pay to employees to the extent that assets are available to satisfy their claims.

. . .

> . . . the proposed severance pay measures will, as I indicated earlier, be retroactive to January 1 of this year. That retroactive provision, however, will not apply in those cases of bankruptcy and insolvency where the assets have already been distributed or where an agreement on a proposal to creditors has already been reached.
>
> (Legislature of Ontario Debates, 1st sess., 32nd Parl., June 4, 1981, at pp. 1236-37.)

Moreover, in the legislative debates regarding the proposed amendments the Minister stated:

> For purposes of retroactivity, severance pay will not apply to bankruptcies under the Bankruptcy Act where assets have been distributed. However, once this act receives royal assent, employees in bankruptcy closures will be covered by the severance pay provisions.
>
> (Legislature of Ontario Debates, 1st sess., 32nd Parl., June 16, 1981, at p. 1699.)

35 Although the frailties of Hansard evidence are many, this Court has recognized that it can play a limited role in the interpretation of legislation. Writing for the Court in R. v. Morgentaler, [1993] 3 S.C.R. 463, at p. 484, Sopinka J. stated:

> . . . until recently the courts have balked at admitting evidence of legislative debates and speeches. . . . The main criticism of such evidence has been that it cannot represent the "intent" of the legislature, an incorporeal body, but that is equally true of other forms of legislative history. Provided that the court remains mindful of the limited reliability and weight of Hansard evidence, it should be admitted as relevant to both the background and the purpose of legislation.

36 Finally, with regard to the scheme of the legislation, since the ESA is a mechanism for providing minimum benefits and standards to protect the interests of employees, it can be characterized as benefits-conferring legislation. As such, according to several decisions of this Court, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant (see, e.g., Abrahams v. Attorney General of Canada, [1983] 1 S.C.R. 2, at p. 10; Hills v. Canada (Attorney General), [1988] 1 S.C.R. 513, at p. 537). It seems to me that, by limiting its analysis to the plain meaning of ss. 40 and 40a of the ESA, the Court of Appeal adopted an overly restrictive approach that is inconsistent with the scheme of the Act.

37 The Court of Appeal's reasons relied heavily upon the decision in Malone Lynch, supra. In Malone Lynch, Houlden J. held that s. 13, the group termination provision of the former ESA, R.S.O. 1970, c. 147, and the predecessor to s. 40 at issue in the present case, was not applicable where termination resulted from the bankruptcy of the employer. Section 13(2) of the ESA then in force provided that, if an employer wishes to terminate the employment of 50 or more employees, the employer must give notice of termination for the period prescribed in the regulations, "and until the expiry of such notice the terminations shall not take effect". Houlden J. reasoned that termination of employment through bankruptcy could not trigger the termination payment provision, as employees in this situation had not received the written notice required by the statute, and therefore could not be said to have been terminated in accordance with the Act.

38 Two years after Malone Lynch was decided, the 1970 ESA termination pay provisions were amended by The Employment Standards Act, 1974, S.O. 1974, c. 112. As amended, s. 40(7) of the 1974 ESA eliminated the requirement that notice be given before termination can take effect. This provision makes it clear that termination pay is owing where an employer fails to give notice of termination and that employment terminates irrespective of whether or not proper notice has been given. Therefore, in my opinion it is clear that the Malone Lynch decision turned on statutory provisions which are materially different from those applicable in the instant case. It seems to me that Houlden J.'s holding goes no further than to say that the provisions of the 1970 ESA have no application to a bankrupt employer. For this reason, I do not accept the Malone Lynch decision as persuasive authority for the Court of Appeal's findings. I note that the courts in Royal Dressed Meats, supra, and British Columbia (Director of Employment Standards) v. Eland Distributors Ltd. (Trustee of) (1996), 40 C.B.R. (3d) 25 (B.C.S.C.), declined to rely upon Malone Lynch based upon similar reasoning.

39 The Court of Appeal also relied upon Re Kemp Products Ltd., supra, for the proposition that although the employment relationship will terminate upon an employer's bankruptcy, this does not constitute a "dismissal". I note that this case did not arise under the provisions of the ESA. Rather, it turned on the interpretation of the term "dismissal" in what the complainant alleged to be an employment contract. As such, I do not accept it as authoritative jurisprudence in the circumstances of this case. For the reasons discussed above, I also disagree with the Court of Appeal's reliance on Mills-Hughes v. Raynor (1988), 63 O.R. (2d) 343 (C.A.), which cited the decision in Malone Lynch, supra, with approval.

40 As I see the matter, when the express words of ss. 40 and 40a of the ESA are examined in their entire context, there is ample support for the conclusion that the words "terminated by the employer" must be interpreted to include termination resulting from the bankruptcy of the employer. Using the broad and generous approach to interpretation appropriate for benefits-conferring legislation, I believe that these words can reasonably bear that construction (see R. v. Z. (D.A.), [1992] 2 S.C.R. 1025). I also note that the intention of the Legislature as evidenced in s. 2(3) of the ESAA, clearly favours this interpretation. Further, in my opinion, to deny employees the right to claim ESA termination and severance pay where their termination has

resulted from their employer's bankruptcy, would be inconsistent with the purpose of the termination and severance pay provisions and would undermine the object of the ESA, namely, to protect the interests of as many employees as possible.

41 In my view, the impetus behind the termination of employment has no bearing upon the ability of the dismissed employee to cope with the sudden economic dislocation caused by unemployment. As all dismissed employees are equally in need of the protections provided by the ESA, any distinction between employees whose termination resulted from the bankruptcy of their employer and those who have been terminated for some other reason would be arbitrary and inequitable. Further, I believe that such an interpretation would defeat the true meaning, intent and spirit of the ESA. Therefore, I conclude that termination as a result of an employer's bankruptcy does give rise to an unsecured claim provable in bankruptcy pursuant to s. 121 of the BA for termination and severance pay in accordance with ss. 40 and 40a of the ESA. Because of this conclusion, I do not find it necessary to address the alternative finding of the trial judge as to the applicability of s. 7(5) of the ESA.

42 I note that subsequent to the Rizzo bankruptcy, the termination and severance pay provisions of the ESA underwent another amendment. Sections 74(1) and 75(1) of the Labour Relations and Employment Statute Law Amendment Act, 1995, S.O. 1995, c. 1, amend those provisions so that they now expressly provide that where employment is terminated by operation of law as a result of the bankruptcy of the employer, the employer will be deemed to have terminated the employment. However, s. 17 of the Interpretation Act directs that, "[t]he repeal or amendment of an Act shall be deemed not to be or to involve any declaration as to the previous state of the law". As a result, I note that the subsequent change in the legislation has played no role in determining the present appeal.

6. Disposition and Costs

43 I would allow the appeal and set aside paragraph 1 of the order of the Court of Appeal. In lieu thereof, I would substitute an order declaring that Rizzo's former employees are entitled to make claims for termination pay (including vacation pay due thereon) and severance pay as unsecured creditors. As to costs, the Ministry of Labour led no evidence regarding what effort it made in notifying or securing the consent of the Rizzo employees before it discontinued its application for leave to appeal to this Court on their behalf. In light of these circumstances, I would order that the costs in this Court be paid to the appellant by the Ministry on a party-and-party basis. I would not disturb the orders of the courts below with respect to costs.

The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency

The Hon. Justice David Stratas[*]

Doctrinal incoherence and inconsistency plague the Canadian law of judicial review. This must stop.

Professor Emeritus David Mullan—the dean of the Canadian administrative law academy—has identified at least fifteen fundamental, unresolved problems in the law of judicial review.[1] For some time now, these have festered, and remain unaddressed. Other academic commentators highlight the growing pile of unanswered questions and doctrinal confusion.[2] One rising member of the academy opines that only a couple of Supreme Court cases in the last eight years contribute to the doctrine while the rest—tens of cases—do not and are best ignored.[3]

For a while now, judges attending judicial education conferences regularly have been expressing frustration. Some are now articulating it in their reasons.[4]

These judges are not alone. Now, even judges on the Supreme Court are openly registering dissatisfaction about the current state of administrative law and the manner in which their Court applies it.[5]

The administrative law of most other major Commonwealth countries does not seem to be in such turmoil. But ours is—and has been for far too long.

Our administrative law is a never-ending construction site where one crew builds structures and then a later crew tears them down to build anew, seemingly without an overall plan. Roughly

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[*] Justice, Federal Court of Appeal, LL.B. (Queen's), B.C.L. (Oxon), LL.D. (*honoris causa*, Queen's). I acknowledge the assistance of Paul Warchuk, law clerk. The views expressed in this paper are mine alone. See also the comments in note 11, *infra*.

[1] David Mullan, "Unresolved Issues on Standard of Review in Canadian Judicial Review of Administrative Action—The Top Fifteen!" (2013) 42 Advocates Quarterly 1.

[2] See, *e.g.*, Peter A. Gall, "Problems with a Faith-Based Approach to Judicial Review" (2014) 66 S.C.L.R. (2d) 183 at 223-231; Matthew Lewans, "Deference and Reasonableness Since Dunsmuir" (2012) 38:1 Queen's L.J. 59 at 82-92; Paul Daly, "Dunsmuir's Flaws Exposed: Recent Decisions on Standard of Review" (2012) 58:2 McGill L.J. 483 at 485 and "The Scope and Meaning of Judicial Review" (2015) 52:4 Alberta L. Rev. 799.

[3] Paul Daly, "The Signal and the Noise in the Supreme Court of Canada's Administrative Law Jurisprudence" in his blog, *Administrative Law Matters* (online: http://www.administrativelawmatters.com/blog/2015/12/20/the-signal-and-the-noise-in-the-supreme-court-of-canadas-administrative-law-jurisprudence/). See also Daly, "Can This Be Correct?" in his blog (http://www.administrativelawmatters.com/blog/2015/12/11/can-this-be-correct-kanthasamy-v-canada-citizenship-and-immigration-2015-scc-61/).

[4] See, *e.g.*, *Canada (Public Safety and Emergency Preparedness) v. Tran*, 2015 FCA 237 at paras. 44-45; *Edmonton East (Capilano) Shopping Centres Limited v Edmonton (City)*, 2015 ABCA 85 at paras. 11; *Skyline Agriculture Financial Corp. v Farm Land Security Board*, 2015 SKQB 82 at paras. 35-37; *Corneil v. Canada (Transportation Appeal Tribunal)*, 2015 FC 755.

[5] *Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61 at para. 112 *per* Moldaver and Wagner JJ. (dissenting); *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57 at paras. 185 and 190 *per* Abella J. (dissenting).

forty years ago, the Supreme Court told us to categorize decisions as judicial, quasi-judicial or administrative.[6] Then, largely comprised of different members, the Court told us to follow a "pragmatic and functional" test.[7] Then, with further changes in its composition, it added another category of review, reasonableness, to join patent unreasonableness and correctness.[8] Then, with more turnover of judges, it told us to follow the principles and methodology in *Dunsmuir*.[9] Now it appears that we may be on the brink of another revision: as we shall see, the Supreme Court—mysteriously—is often not deciding cases in accordance with the principles in *Dunsmuir* and other cases decided under it.

Administrative law matters. Resting at its heart is the standard of review, the body of law that tells us when the judiciary can legitimately interfere with decision-making by the executive—a matter fundamental to democratic order and good governance, a matter where objectivity, consistency and predictability is essential.

Interference with the executive by the non-elected judiciary can be controversial, particularly in the many politically-sensitive matters that arise. If the standard of review is well-defined and applied objectively in accordance with stable law, much of the controversy disappears. The appearance, and of course the reality, is that the judiciary is not playing politics; it is dispassionately and neutrally applying objective doctrine worked out years before. The executive is measured up against known legal rules, not something made up or manipulated by the judiciary on the fly. Predictability is maximized: governments can know their powers and limits and everyone can knowledgeably plan their affairs.

Right now, we are far from realizing these objectives. Confusion and uncertainty surround so many fundamental questions in administrative law, at least as far as Supreme Court cases are concerned.

Why this article? I have to work with this jurisprudence every day. I may soon be faced with another reconstruction of this area of law. I have worked for clarity, consistency, unity, and simplicity in this crucial area of law for much of my life. As well, as I have recently explained elsewhere,[10] growing inattention to doctrine in public law on the part of the judiciary, the legal profession and the academy threatens our ability to address possible abuses by government in the future. We must pay more attention now to the settlement of the doctrine in this area of law before it is too late.

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[6] See, *e.g.*, *Martineau and al. v. Matsqui Institution Inmate Disciplinary Board*, [1978] 1 S.C.R. 118, 74 D.L.R. (3d) 1.
[7] *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, 95 N.R. 161.
[8] *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, 144 D.L.R. (4th) 1.
[9] *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190.
[10] "Reflections on the Decline of Doctrine," Speech to the Canadian Constitutional Foundation, January 8, 2016, Toronto, Ontario (online: https://www.youtube.com/watch?v=UxTqMw5v6rg).

To these ends and for these reasons, I have written this article.[11] I identify some of the unresolved fundamental questions in the Canadian law of judicial review arising from Supreme Court jurisprudence. Then I offer some constructive suggestions for consideration.

A. Fundamental questions

(1) Does the standard of review matter?

In the seminal case of *Dunsmuir*, the Supreme Court instructs us to determine the standard of review in every case, deciding between correctness review and reasonableness review.[12] This is consistent with the importance of the standard of review, explained above.

But today the Supreme Court itself does not always settle the standard of review.[13] In fact, in some cases, it does not discuss the standard of review at all.[14] *Bombardier* and *Febles*, both administrative law cases, were so devoid of administrative law discussion the Court did not even caption them as administrative law cases.[15] In those cases, the Court itself interpreted the law and applied it to the facts in the face of legislative regimes that vested the decision-making power with administrators, not the courts.

So does standard of review still matter? As explained above, it should.

(2) What authorities are relevant to the standard of review analysis?

Dunsmuir grandparents certain pre-*Dunsmuir* cases on the standard of review.[16] But recently, the Supreme Court suddenly overturned this aspect of *Dunsmuir* and decreed a different rule: pre-*Dunsmuir* cases on the standard of review survive only if consistent with "recent developments in the common law principles of judicial review," *i.e.*, *Dunsmuir* and post-*Dunsmuir* cases.[17] In effect, this ends grandparenting.

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[11] On general issues such as these and on smaller but serious concerns about the correctness of jurisprudence, intermediate appellate judges are permitted to comment. The Supreme Court recognizes that it does not have a monopoly on developing the law and that it is best developed by a dialogue among the Supreme Court, appellate courts and trial courts in the decided cases, with the assistance of the academy and counsel. See *R. v. Henry*, 2005 SCC 76, [2005] 3 S.C.R. 609 at para. 56; *Canada v. Craig*, 2012 SCC 43, [2012] 2 S.C.R. 489 at para. 21; *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442 at para. 17. In the end, the word of the Supreme Court is final and judges in lower courts must comply regardless of their personal views: *Craig*, *ibid*.

[12] *Supra* note 9.

[13] See *e.g.*, *B010 v. Canada (Citizenship and Immigration)*, 2015 SCC 58, 390 D.L.R. (4th) 385.

[14] *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Bombardier Inc. (Bombardier Aerospace Training Center)*, 2015 SCC 39, [2015] 2 S.C.R. 789; *Febles v. Canada (Citizenship and Immigration)*, 2014 SCC 68, [2014] 3 S.C.R. 431 (a case where there was substantial disagreement and discussion in the Federal Court of Appeal on the standard of review, 2014 FCA 324, [2014] 2 F.C.R. 224).

[15] *Ibid.*

[16] *Supra* note 9 at para. 62.

[17] *Agraira v. Canada (Public Safety and Emergency Preparedness)* 2013 SCC 36, [2013] 2 S.C.R. 559 at para. 48.

Why suddenly the new rule? It's a mystery left unexplained, a rule decreed with no stated doctrinal justification or explanation.

Kanthasamy adds to the confusion by both dismissing the helpfulness of pre-*Dunsmuir* cases and then relying exclusively on pre-*Dunsmuir* cases to determine the standard of review, all in the same paragraph.[18]

Assuming standard of review is still relevant—and it should be—what cases are relevant to it?

(3) When must we go beyond the *Dunsmuir* presumptions and conduct a full standard of review analysis?

Dunsmuir gave us certain presumptive rules to assist us in determining the standard of review. It also gave us factors to consider when determining whether the presumptive rules are rebutted.

But *Dunsmuir* never explained when we should resort to the factors rather than the presumptions. Early on, by and large, the Supreme Court used the presumptions and ignored the factors. Now, suddenly, the Supreme Court has gone to the factors, without instructing us when we should do this.[19] So what should we follow? Presumptions or factors?

(4) Does the principle of legislative supremacy matter?

Absent constitutional or *vires* objection, legislation binds everyone. No one is above the law.

This principle, enshrined in the English *Bill of Rights*, was won at the cost of long struggle, bloodshed and revolution centuries ago.[20] It has been part of the Canadian Constitution since our foundation.[21] And like any other constitutional principle, no court can ignore it.[22] It forms part of the core of our doctrine of judicial review.[23]

Legislation sometimes signals that the standard of review should be correctness—no deference at all to the administrative decision-maker. In some cases, the Supreme Court reads these signals and properly carries out the legislator's intent, reviewing the decision for correctness.[24]

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[18] *Supra* note 5 at para. 44.
[19] *Mouvement Laïque Québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3.
[20] 1 Will. & Mar. sess. 2, c. 2 (Eng., 1689).
[21] *Constitution Act, 1867* (U.K.) 30 & 31 Victoria, c. 3, reprinted in RSC 1985, App. II, No. 5 (opening words of sections 91 and 92 and the preamble stating that we have a Constitution "similar in principle" to that of the United Kingdom).
[22] See, generally, *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217, 161 D.L.R. (4th) 385 at para. 63; *Canada (National Revenue) v. JP Morgan Asset Management (Canada) Inc.*, 2013 F.C.A. 250, [2014] 2 F.C.R. 557 at para. 35.
[23] *Dunsmuir*, *supra* note 9 at paras. 27-30.
[24] *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, [2015] 1 S.C.R. 161; *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283.

But sometimes not. In cases where the legislator has enacted a full, untrammelled right of appeal from the administrative decision-maker to the reviewing court, the legislator is instructing the reviewing court to interfere as it would in any appeal. This means, for example, that errors by the administrative decision-maker in interpreting legislation would be legal errors that the reviewing court can correct. Yet, that is not the case. Even where the legislator has granted a full right of appeal, there is a presumption that administrative interpretations of legislation are subject to deferential reasonableness review.[25]

Sometimes legislative provisions suggest that the standard of review in a case should be reasonableness—deference to the administrative decision-maker. For example, privative clauses—clauses forbidding or greatly restricting judicial review—should matter.[26] But there are many Supreme Court cases where the presence of a privative clause in legislation goes unmentioned.

More questions about legislative supremacy arise in the area of the jurisdiction of administrative decision-makers to consider "values" inherent in the *Canadian Charter of Rights and Freedoms*.[27] The Supreme Court has held that administrative decision-makers can import "*Charter* values" into any matter before them, even where the legislative provision setting out the decision-maker's powers is limited and even where that provision seems inconsistent with the proffered *Charter* values.[28] This conflicts with earlier holdings based on the constitutional principle of legislative supremacy to the effect that the *Charter* does not add to or affect the subject-matter jurisdiction of subordinate bodies.[29]

Doré also conflicts with the seminal *Charter* case of *Slaight Communications Inc. v. Davidson*.[30] In *Slaight*, the Supreme Court said, in accordance with the principle of legislative supremacy, that in such cases the administrative decision-maker must follow the legislative provision and a litigant must constitutionally challenge the provision directly, either by asking the administrative decision-maker to disregard the provision or, where permissible, through court proceedings for a declaration of invalidity.[31]

In *Doré*, the Supreme Court, disparaging *Slaight*, suggests there is a growing departure from "Diceyan principles," in other words the principle that legislation governs the scope of authority of administrative decision-makers.[32] This is contrary to the constitutional principle of legislative

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[25] *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339.
[26] *Dunsmuir*, *supra* note 9 at para. 52 and see the appropriate attention paid to the privative clause in the decision of the New Brunswick Court of Appeal in *Dunsmuir*, 2006 NBCA 27, 297 N.B.R. (2d) 151, *per* Robertson J.A.
[27] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11.
[28] *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395 at para. 24.
[29] *R. v. 974649 Ontario Inc.*, 2001 SCC 81, [2001] 3 S.C.R. 575 at paras. 22-23; *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, 125 D.L.R. (4th) 583 at paras. 63-65.
[30] [1989] 1 S.C.R. 1038, 59 D.L.R. (4th) 416.
[31] See the combined effect of *Slaight*, *ibid.* and *Nova Scotia (Workers' Compensation Board) v. Martin*, 2003 SCC 54, [2003] 2 S.C.R. 504.
[32] *Supra* note 28 at para. 29.

supremacy, is unsupported by authority, and conflicts with many authorities, including the foundational case of *Dunsmuir*.[33]

The recent case of *Kanthasamy* is seen by some as another example where the principle of legislative supremacy has been flouted.[34] Under section 74 of the *Immigration and Refugee Protection Act*,[35] appeals can only be taken to the Federal Court of Appeal if the Federal Court states a certified question on a question of law. This is a legislative signal that the Federal Court of Appeal should, in return, answer the question correctly. But in *Kanthasamy*, the majority of the Supreme Court disagreed, holding that the standard of review was reasonableness. It read section 74 down to a gate-keeping function, though it did not disagree with the fact that the Federal Court of Appeal must answer the certified question correctly. The majority did this without looking at the text, context and purpose of the provision, as it normally does. And in relegating section 74 to a gate-keeping function, it contradicted some of its own relevant authority to the contrary, without explanation.[36]

As a result of *Kanthasamy*, in some cases the Federal Courts will now have to answer the certified question of law correctly, find that the administrative decision-maker applied an incorrect view of the law but then go on to consider whether its decision should still stand, *i.e.*, be regarded as a legally acceptable decision, despite the answer to the certified question. Surely Parliament did not have in mind this result when it enacted section 74.

(5) How do we conduct reasonableness review? What does "reasonableness" mean?

The main effect of *Dunsmuir* has been to subject most administrative decisions to reasonableness review rather than correctness review. Thus, the proper methodology of reasonableness review and the meaning of reasonableness is very much the core of judicial review and must be doctrinally settled. Unfortunately, the core is a mash of inconsistency and incoherence.

- I -

The reasonableness standard of review means entirely different things in different cases but we know not why.[37]

Often the Supreme Court purports to engage in reasonableness review—a "deferential standard"[38]—but acts non-deferentially, imposing its own view of the facts or the law or both over the view of the administrative decision-maker, without explanation.[39]

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[33] *Supra* note 9 at para. 29.
[34] *Supra* note 5.
[35] S.C. 2001, c. 27.
[36] See Daly, "Can This Be Correct?" *supra* note 3.
[37] See discussion in Lewans, "Deference and Reasonableness Since *Dunsmuir*," *supra* note 2 at 82-92 and Daly, "The Scope and Meaning of Reasonableness Review," *supra* note 2 at 814-827.
[38] *Dunsmuir*, *supra* note 9 at para 47.

There are sometimes exceptions where the Supreme Court defers to administrative decision-making quite consistently with the words of *Dunsmuir*.[40] Why deference prevails in these cases but not in so many others has never been explained.

Kanthasamy[41] adds to the confusion by doing several inconsistent things at once: it begins by interpreting afresh the legislative provision that the administrative decision-maker interpreted as if the standard of review were correctness, then it considers the standard of review and decides that the standard of review is reasonableness, and finally it parses the administrative decision-maker's reasons for error on an exacting basis as if the standard of review were correctness.

What does the reasonableness standard mean and how should it be applied? Reading the decisions of the Supreme Court, many are baffled.

- II -

Reasonableness review requires us to start with the administrative decision and "[inquire] into the qualities that make [it] reasonable."[42] This makes sense: the legislator has chosen the administrative decision-maker to decide the merits and so reviewing courts should respect that choice by beginning with a careful examination of what the administrator decided.

But repeatedly reasonableness review has been conducted without starting with the administrative decision. Often the Supreme Court does its own analysis of the merits (supposedly under reasonableness review) and finds the administrative decision to be wrong, offering only cursory words; seldom is an administrative decision analyzed in any depth.[43] Sometimes the fact that an administrative decision was made is not even mentioned.[44]

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[39] See, *e.g.*, *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52, [2011] 3 S.C.R. 422, *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471; *Alberta (Education) v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 SCC 37, [2012] 2 S.C.R. 345; *Quebec (Commission des norms du travail v. Asphalte Desjardins Inc.*, 2014 SCC 51, [2014] 2 S.C.R. 514; *United Food and Commercial Workers, Local 503 v. Wal-Mart Canada Corp.*, 2014 SCC 45, [2014] 2 S.C.R. 323; *Canadian Artists' Representation v. National Gallery of Canada*, 2014 SCC 42, [2014] 2 S.C.R. 197; *John Doe v. Ontario (Finance)*, 2014 SCC 36, [2014] 2 S.C.R. 3; *Dionne v. Commission scolaire des Patriotes*, 2014 SCC 33, [2014] 1 S.C.R. 765; *Martin v. Alberta (Workers' Compensation Board)*, 2014 SCC 25, [2014] S.C.R. 546; *B010*, *supra* note 13*; Kanthasamy*, *supra* note 5; and many, many more. Many commentators describe these cases and others like them as "disguised correctness cases."

[40] See, *e.g.*, *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3 S.C.R. 616; *Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 34, [2012] 2 S.C.R. 231; *Canada (Attorney General) v. Kane*, 2012 SCC 64, [2012] 3 S.C.R. 398; *Construction Labour Relations v. Driver Iron Inc.*, 2012 SCC 65, [2012] 3 S.C.R. 405; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708; *Halifax (Regional Municipality) v. Nova Scotia (Human Rights Commission)*, 2012 SCC 10, [2012] 1 S.C.R. 364; *Agraira*, *supra* note 17; and many, many more.

[41] *Supra* note 5.

[42] *Dunsmuir*, *supra* note 9 at para. 47.

[43] See generally the authorities *supra* note 39.

[44] *Febles*, *supra* note 14.

On judicial review, the reviewing court is to review the administrative decision. This must especially be so in the case of reasonableness review. What are we to make of the fact that the administrative decision is often ignored or even unmentioned?

- III -

When conducting reasonableness review, reviewing courts are to pay "respectful attention" to the administrative decision-maker's reasons and "be cautious about substituting their own view of the proper outcome by designating certain omissions in the reasons to be fateful."[45] In other words, reviewing courts should not embark on a "line-by-line treasure hunt for error."[46]

But here too, chaos reigns, with administrators' reasons being closely parsed in some cases and barely looked at in others, all purportedly under the reasonableness standard of review.[47]

- IV -

In *Dunsmuir*, the Supreme Court told us that reasonableness review is to take place on the basis of the reasons "which could be offered" in support of a decision.[48] Later, in *Newfoundland Nurses*, the Supreme Court in effect doubled down on this, saying that a reviewing court operating under the reasonableness standard should strive to uphold the outcome reached by the administrative decision-maker and "seek to supplement [its reasons] before [seeking] to subvert them."[49]

However, on the day before *Newfoundland Nurses* was released, the Supreme Court said something quite different, telling lower courts to restrain themselves in finding additional reasons to support a decision.[50]

In the end, on this point, we have different approaches in different cases with no explanation. Sometimes under the reasonableness standard the Supreme Court supplements the reasons to uphold an outcome.[51] Sometimes not.[52] We know not why.

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[45] *Newfoundland Nurses*, *supra* note 40 at para. 17.
[46] *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34, [2013] 2 S.C.R. 458 at para. 54.
[47] The authorities *supra*, notes 39-40 well illustrate this conflicting approach.
[48] *Dunsmuir*, *supra* note 9 at para. 48.
[49] *Supra* note 40 at para. 12.
[50] *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654. Mystifyingly, *Newfoundland Nurses* does not refer to *Alberta Teachers*.
[51] See *e.g.*, *Canada Post Corp. v. Public Service Alliance of Canada*, 2011 SCC 57, [2011] 3 S.C.R. 572, aff'g the dissent in 2010 FCA 56, [2011] 2 F.C.R. 221.
[52] See *e.g.*, *Kanthasamy*, *supra* note 5. In fact, in that case, the administrator's reasons were parsed to bits.

The problem is that the rule allowing reviewing courts to supplement reasons is a rule that has been decreed, not deduced from an underlying doctrinal concept. In *Dunsmuir*,[53] the Supreme Court adopted this rule solely on the basis of a quote plucked out of context from a single academic article that, if read in its entirety, deals with another subject entirely and, in fact, advocates something quite different. Without a coherent underlying concept to guide this rule, no one knows its limits or when or how it should be applied.

As will be seen below,[54] I consider the rule to be contrary to proper doctrine and the proper role of the reviewing court in judicial review.

(6) Where does the *Charter* fit in?

Above, I have shown how *Doré*[55] sits uneasily with the principle of legislative supremacy. But it causes doctrinal incoherence in another respect.

If an administrative decision-maker interprets a *Charter* provision, applies it and disregards a legislative provision, the standard of review for its decision is correctness.[56] Owing to the importance of interpretations of constitutional provisions, this makes sense. But if that same administrative decision-maker interprets a *Charter* provision finding a "*Charter* value," and finds that determinative of the question it is deciding, the standard of review is reasonableness: *Doré*, above. Why the difference?

Further compounding the confusion, we are left in uncertainty as to whether *Doré* still is good law. Recently, without explanation, three members of the Supreme Court declined to apply let alone mention *Doré*.[57] The other four members of the Court made *Doré* central to their reasons. Given that the Court normally staffs its appeals with nine judges will *Doré* remain the governing law?

(7) What is the standard of review for procedural fairness?

In this area, there has been incoherence. Recently, the incoherence has increased. In the same case, the Supreme Court has told us not to defer to administrators' procedural decisions but also to defer to them on certain things.[58] Why and when we must defer or not defer goes unmentioned.

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[53] *Supra*, note 9 at para. 48.
[54] *Infra*, text to notes 130-32.
[55] *Supra*, note 28.
[56] *Dunsmuir*, *supra* note 9 at para. 58.
[57] *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 S.C.R. 613.
[58] *Mission Institution v. Khela*, 2014 SCC 24, [2014] 1 S.C.R. 502 at paras. 79 and 89.

Dunsmuir never discussed this standard of review issue.[59] Decades of earlier case law from the Supreme Court is all over the place.[60] Rules seem to be decreed in this area without any underlying doctrinal basis or rationale and certainly none based on the animating concept underlying judicial review.[61]

Unsurprisingly, multiple views on this issue have emerged in my court, the Federal Court of Appeal—and despite pleas for resolution, none is in sight.[62]

(8) How are appellate courts to review first-instance judicial review decisions?

In the area of judicial review, appellate courts are to "step into the shoes" of the first instance reviewing court—in effect, conducting *de novo* review of the administrative decision-maker's decision.[63] In other words, *Dunsmuir* review, the review that governs the relationship between judges and administrative decision-makers, is to be done afresh by the appellate court.

But why is it *de novo* review in the appeal court? In this circumstance, the appellate court is reviewing the decision of the first instance court, not the decision of the administrative decision-maker. Shouldn't the appeal court, engaged in appellate review, apply the normal appellate standard of review, the standard that governs the relationship between appellate courts and first instance courts?[64] For better or worse, that is the rule in every other area of law, including constitutional adjudication.[65]

B. Answering the questions: achieving doctrinal clarity, consistency, unity and simplicity

Doctrinal clarity, consistency, unity and simplicity are possible. To achieve this, previously-pronounced rules without a proper conceptual or doctrinal basis must be abandoned, other rules should be tweaked to reflect a proper conceptual basis, and then the doctrine must be applied dispassionately and consistently.

The Federal Court of Appeal—staffed by many across Canada who have spent their lives practising, teaching, studying and judging in the area of judicial review—supervises thousands of

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[59] See discussion in *Maritime Broadcasting System Limited v. Canadian Media Guild*, 2014 FCA 59, 373 D.L.R. (4th) 167 at para. 53 (concurring reasons).
[60] See the cases reviewed in *Maritime Broadcasting*, *ibid.* at paras. 50-55 (concurring reasons) such as *Prassad v. Canada (Minister of Employment and Immigration)*, [1989] 1 S.C.R. 560 at pages 568-569; *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, 2007 SCC 15, [2007] 1 S.C.R. 650 at para. 231; *Bibeault v. McCaffrey*, [1984] 1 S.C.R. 176, 7 D.L.R. (4th) 1; *Deloitte & Touche LLP v. Ontario (Securities Commission)*, 2003 SCC 61, [2003] 2 S.C.R. 713.
[61] See discussion of the animating concept, *infra*, text to notes 71-73.
[62] See the summary of the multiple views in *Bergeron v. Canada (Attorney General)*, 2015 FCA 160 at paras. 67-71.
[63] *Agraira*, *supra*, note 17 at paras. 45-46.
[64] *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235.
[65] See, *e.g.*, *Carter v. Canada (Attorney General)*, 2015 SCC 5, [2015] 1 S.C.R. 331; *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101.

federal administrative decision-makers and, more broadly, the federal executive, massive as it is. We are the last port of call in 98% of the administrative law matters that come before us. By a large margin, we decide more judicial reviews than any other appellate court in Canada. We strive to arrive at results using consistent methodology and principled doctrinal analysis. As a result, we have developed coherent doctrine and have achieved a good measure of predictability. We have a general consensus on the broad strokes of the law of judicial review and our cases have answered many of the fundamental questions posed above. Some of our cases are mentioned below.

But the Supreme Court has never cited, let alone considered, any of these cases. Not a single one. However, we in the Federal Court of Appeal should not feel snubbed. The work of every other appellate court in Canada also goes unmentioned and unconsidered. In this area of law—for reasons unknown—the Supreme Court considers only its own decisions.[66]

If my suspicions are correct and the Supreme Court is about to embark on one of its once-a-decade, wholesale revisions to the law of judicial review,[67] now is the time to offer suggestions. Here are some.

(1) Appellate standard of review and administrative law review distinguished

Recently, administrative law review was used to change the law of appellate review in one area of private law.[68] The reverse must not happen.

The administrative law analysis of the margins of appreciation that should be afforded to administrative decision-makers—at present, the *Dunsmuir* approach—must never be confused with the appellate standard of review found in *Housen*.[69] In short, the Supreme Court got it right on this in *Saguenay* and must not reverse position.[70]

The appellate standard of review is the relationship between appellate courts and lower courts—a relationship between judges and other judges all within the judicial branch. This is different from the relationship between reviewing judges within the judicial branch and legislatively-empowered decision-makers within the executive branch.[71]

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[66] This is to be contrasted with the Supreme Court's approach in criminal law cases. Lower court cases are regularly reviewed. Differences among the courts are identified and resolved often on the basis of fundamental principle. Not surprisingly, Canadian criminal law, although sometimes unclear, is a model of coherence and consistency compared to Canadian administrative law.

[67] See text to notes 6-9, *supra*.

[68] *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633 at paras. 104-106. A number of appellate courts have already distinguished *Sattva* and have limited its application: *MacDonald v. Chicago Title Insurance Company of Canada*, 2015 ONCA 842; *Vallieres v. Vozniak*, 2014 ABCA 290, 580 A.R. 326; *Ledcor Construction Limited v. Northbridge Indemnity Insurance Co.*, 2015 ABCA 121, 386 D.L.R. (4th) 482; *Robb v. Walker*, 2015 BCCA 117 at para. 48; see also Earl A. Cherniak, "*Sattva* Revisited" (2015) 34:2 Adv. J. 6 at 7.

[69] *Supra* note 64.

[70] *Supra* note 19 at paras. 31-44.

[71] See *Canada v. Long Plain First Nation*, 2015 FCA 177, 388 D.L.R. (4th) 209 at paras. 88-89 and cases cited therein.

The relationship between appellate courts and lower courts is unchanging. A legal case may involve contracts, torts, property—you name it—and the appellate court's posture when reviewing the lower court is exactly the same in all instances.

This makes sense. A first-instance judge is a first-instance judge is a first-instance judge. And the first-instance judge's powers are the same regardless of the case—to receive evidence, to find the facts, to ascertain the law that applies and apply that law to the facts, regardless of the subject-matter of the case. An appellate judge is an appellate judge is an appellate judge. And the appellate judge's powers and tasks are also the same regardless of the case.

On the other hand, the relationship between reviewing courts and administrative decision-makers is entirely different. The extent to which reviewing courts may interfere with administrative decision-makers depends primarily upon what particular legislation in a particular context says, and other factors too.

While a first-instance judge is a first-instance judge is a first-instance judge, the same cannot be said for administrative decision-makers. Administrative decision-makers vary greatly in their mandates, their powers, and their subject-matters. A law society bencher sitting on a discipline committee deciding whether a lawyer has pilfered from a trust fund bears no relationship to the federal cabinet deciding whether, in light of all of the policy considerations, a transcontinental pipeline should be built. To treat them the same is folly.

And administrative decision-makers and their tasks differ from judges and their tasks. The development and finalization of a broadcasting policy by those experienced in broadcasting who sit on the CRTC and are governed by particular legislation is fundamentally different from a decision by a legally-trained judge deciding on whether a particular party has breached a particular contract. To treat them the same is folly.

Under some legislative regimes, the courts are left free to interfere with administrative decision-makers. Under others, not. Some administrative decision-makers decide subject-matters familiar to courts, perhaps justifying more intrusion by courts. Other administrative decision-makers decide matters outside of the ken of the courts, perhaps justifying less intrusion by courts. Some administrative decision-makers decide subject-matters the way courts do, using similar criteria and methods of reasoning. Others legitimately do not. Administrative decision-makers and their relationships with reviewing courts cannot be regarded as a monolith, identical regardless of the context.

From time to time, the author hears some judges and others—frustrated with the mess that has been the Canadian law of judicial review and desperate for simplicity—urge a single standard of review rule for courts to apply to anyone who decides anything anywhere. If adopted, this would be a unilateral judicial decree that a judicially-constructed standard of review for relationships within the judicial branch apply to every decision-maker in the executive branch regardless of any law legislatures enact, regardless of the subject-matter, and regardless of the courts' ability to deal with it practically and capably. This is something no other western democracy—let alone

any unelected court—has ever contemplated. That should be warning enough not to do such a thing. We must not let our desperation about the current mess take us to worse places.

(2) The basic soundness of *Dunsmuir*

At the outset, the Supreme Court in *Dunsmuir* planted the right seeds and initially did much to help them germinate. *Dunsmuir* is doctrinally sound. But as the above analysis shows, the Supreme Court has allowed weeds to grow in the garden, choking and obscuring what ought to be thriving and clear.

In *Dunsmuir*, the Supreme Court astutely recognized that the law of judicial review is animated and explained by a single concept.[72] This animating concept is a tension between two constitutional principles, both of which are deeply rooted in our history and our democratic and constitutional arrangements:

- On one side is the constitutional principle of legislative supremacy;[73] the legislature has vested jurisdiction over a subject-matter to an administrative decision-maker, not the courts—sometimes with a privative clause to boot;

- On the other side is the constitutional principle that the judiciary must sometimes enforce minimum rule of law standards—things such as rational fact-finding, procedural fairness, and (at least) acceptable and defensible interpretations and applications of law.[74]

In some cases, the latter trumps the former. This explains why sometimes courts interfere with the decisions of administrative decision-makers even though a legislative provision, known as a privative clause, forbids judicial interference of any sort.

As will be seen below, this animating concept has the potential to inform the doctrine surrounding the standard of review and when courts ought to interfere. Unfortunately, since deploying this concept in *Dunsmuir*, the Supreme Court has never returned to it to develop it further and draw upon it. Frequently, new rules have sprung up without any grounding or justification in this animating concept. Thinking about, developing, and coherently applying this animating concept is one of the keys to doctrinal clarity.

In *Dunsmuir*, the Supreme Court did much good in other areas too.

As is well-known, the Supreme Court eliminated an unnecessary category of review, created certain presumptive rules, and grandparented some earlier case law, all in the interests of simplification. These innovations eliminated a number of debating points, thereby reducing the

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[72] *Supra*, note 9 at paras. 27-30.
[73] See text to notes 20-23, *supra*.
[74] *Crevier v. Attorney General of Quebec*, [1981] 2 S.C.R. 220, 127 D.L.R. (3d) 1; *Bibeault, supra* note 7; see also *Secession Reference*, *supra* note 22 at para. 70; *Dunsmuir*, *supra* note 9 at paras 27-30 and 52.

amount of argument and analysis and furthering judicial economy and access to justice, two judicial policies well-established in the cases.

Dunsmuir also appropriately recognized that administrative decision-makers, their decisions, their governing legislation and their circumstances come in all shapes and sizes. To this end, it defined reasonableness as a range or a margin, rather than something static.[75] As we all know, ranges and margins can vary, sometimes broad, sometimes not.

Later Supreme Court cases have shrewdly picked up on this and have acknowledged that the margins of appreciation move in or out based on the circumstances (albeit, the Supreme Court has never defined the circumstances).[76] So some decision-makers deserve a large margin of appreciation concerning the decisions they make, others less so, some none at all.

(3) Margins of appreciation and what makes them vary: the intensity of review

This idea of varying margins of appreciation, sometimes called "intensity of review" in the academic literature, is something all leading Commonwealth courts care about in their reasons, either expressly or implicitly.[77] In their cases, reasons are often articulated why review in a particular case should be intense or less intense.

In a similar vein, the Federal Court of Appeal has also tried to articulate what makes margins of appreciation vary.[78] These circumstances and factors are not fabricated or drawn from freestanding policy, personal predilection or judicial whim. They reflect the animating concept behind judicial review, the tension between legislative supremacy and the rule of law.[79] Not

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[75] *Supra* note 9 at para. 47.

[76] *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5 at paras. 17-18 and 23; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at para. 59; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895 at paras. 37-41.

[77] See recently, *e.g.*, *Pham v Secretary of State for the Home Department*, [2015] UKSC 19 at para. 107; *R. (on the application of Rotherham Metropolitan Borough Council and others) v. Secretary of State for Business, Innovation and Skills*, [2015] UKSC 6 at para. 78.

[78] *Canada (Minister of Transport, Infrastructure and Communities) v. Farwaha*, 2014 FCA 56, 455 N.R. 157 at paras. 90-99 (matters within the ken of the executive, like security matters, can broaden the margin of appreciation; strong, personal work-related interests can narrow it); *Canada (Attorney General) v. Boogaard*, 2015 FCA 150 at paras. 41-52 (the nature of the decision, the breadth and purpose of the legislative provision, the factual complexity, and matters within the ken of the executive can broaden); *Canada (Attorney General) v. Abraham*, 2012 FCA 266, 440 N.R. 201 at paras. 37-50 (settled case law can constrain); *Canada (Attorney General) v. Canadian Human Rights Commission*, 2013 FCA 75, 444 N.R. 120 at paras. 13-14 (same); *Walchuk v. Canada (Justice)*, 2015 FCA 85 at para. 33 (fundamental liberty interests can constrain); *Canada (Attorney General) v. Almon Equipment Limited*, 2010 FCA 193, [2011] 4 F.C. 203 at para. 53 (statutory recipes can constrain); *Forest Ethics Advocacy Association v. Canada (National Energy Board)*, 2014 FCA 245 at para. 82 (fact-based decisions informed by policy and specialization can broaden); *Hupacasath First Nation v. Canada (Attorney General)*, 2015 FCA 4 at para. 66 (matters within the ken of the executive, not the courts, can broaden); *Paradis Honey Ltd. v. Canada*, 2015 FCA 89, 382 D.L.R. (4th) 720 at paras. 136-137 (same); see also *Mills v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, 2008 ONCA 436 at para. 22.

[79] See, *e.g.*, *Farwaha*, *supra* note 78 at para. 91 and see discussion at text to notes 71-73 *supra*.

coincidentally, they bear a strong resemblance to the circumstances and factors invoked in courts throughout the Anglo-American world, courts that work with the same animating concept.

(4) When assessing the intensity of review, have regard to the legislative words

In determining the intensity of review in a particular case, legislative words matter.[80] As explained above, the constitutional principle of legislative supremacy means that unless there is a constitutional objection, legislative words are binding—not optional extras to be jettisoned when inconvenient.[81]

What legislators say must affect the intensity of review. Some legislative words can broaden the margin of appreciation.[82] Others can narrow it, such as recipes set out in legislation that must be followed or other constraining words.[83]

The Alberta Court of Appeal recognized the importance of legislative words in *Edmonton East*.[84] It assiduously collected various legislative signals and carefully scrutinized them to determine the intensity of review. Similar approaches have been adopted elsewhere.[85]

(5) Move away from rigid categories of review

Roughly three years ago in *McLean*, the Supreme Court added an important gloss to *Dunsmuir* and the idea of margins of appreciation.[86] There, the Supreme Court recognized that in the context of reasonableness review an administrative decision-maker may have many possible and acceptable outcomes available to it. Or perhaps only a few. Or sometimes even just one.

When an administrative decision-maker has only one acceptable and defensible outcome available to it under the reasonableness standard, it has to be correct. If it reaches a different outcome, it is "unreasonable."

Recognizing this, why must we determine whether the case falls into the category of correctness review or reasonableness review? The real question is the intensity of review that an administrative decision-maker should be given.

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[80] *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982, 160 D.L.R. (4th) 193 at para. 26; *Canadian Union of Public Employees (C.U.P.E.) v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 53 at para. 149.
[81] *Canada (Citizenship and Immigration) v. Ishaq*, 2015 FCA 151 at para. 26; *Erasmo v. Canada (Attorney General)*, 2015 FCA 129 at para. 47.
[82] *Boogaard*, *supra* note 78 at paras. 42-44; *Walchuk*, *supra* note 78 at para. 34.
[83] *Almon*, *supra* note 78 at para. 53; *Walchuk*, *supra* note 78 at paras. 33 and 56.
[84] *Supra* note 4.
[85] See, *e.g.*, *Pfizer Canada. Inc. v. Canada (A.G.)*, 2014 FC 1243; *Takeda Canada Inc. v. Canada (Health)*, 2013 FCA 13; *Canada (Citizenship and Immigration) v. Kandola*, 2014 FCA 85, 372 D.L.R. (4th) 342.
[86] *Supra* note 76 at para. 38.

Sometimes the margin of appreciation to be given is extremely broad,[87] sometimes quite broad,[88] other times not so broad,[89] and sometimes, as *McLean* acknowledges and as appropriately happens in constitutional cases,[90] there is no margin at all. We need not speak of categories or labels like "correctness" or "reasonableness." As the discussion here shows, the intensity of review can be evaluated without slotting the case into "correctness" or "reasonableness."

No other leading Commonwealth court engages in pointless labelling or categorization exercises when assessing the intensity of review. All simply express or imply what sort of margin of appreciation should be given to the administrative decision-maker and then decide the case. So should we.

(6) Assess whether a decision is acceptable or defensible using a consistent methodology

In *Dunsmuir*, among other things, the Supreme Court aptly defined reasonableness as a range of "acceptability and defensibility."[91]

In assessing acceptability and defensibility, one must start with the decision of the administrative decision-maker. As the Supreme Court put it in *Dunsmuir*, where the administrative decision-maker is to be afforded some margin of appreciation on the matter, there must be "respectful attention" to what it has done;[92] after all, a reviewing court's role is to *review* what the administrative decision-maker has done, not *impose* its own view of the matter.[93] Where an administrative decision-maker is to be afforded a margin of appreciation, a reviewing court cannot interfere just because it would have decided differently.[94]

The evidentiary record, legislation and case law bearing on the problem, judicial understandings of the rule of law and constitutional standards help to inform acceptability and defensibility.[95] As well, certain indicia, sometimes called "badges of unreasonableness," can help to signal that an administrative law decision might not be acceptable or defensible.[96] Decisions whose effects appear to conflict with the purpose of the provision under which the administrator is operating may well be ones where interference is warranted.[97] So might be decisions containing key factual findings made without logic, without any rational basis, or entirely at odds with the evidence.

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[87] See, *e.g.*, *Thorne's Hardware v. Canada*, [1983] 1 S.C.R. 106; *Katz Group Canada Inc. v. Ontario (Health and Long-Term Care)*, 2013 SCC 64, [2013] 3 S.C.R. 810 at para. 28; *Catalyst*, *supra* note 76.
[88] See, *e.g.*, *Nor-Man*, supra note 40.
[89] See, *e.g.*, *McLean*, supra note 76; *Canada (Public Safety and Emergency Preparedness) v. Huang*, 2014 FCA 228, 464 N.R. 112.
[90] *Dunsmuir*, *supra* note 9 at para. 58.
[91] *Ibid.* at para. 47.
[92] *Ibid.* at para. 48.
[93] See generally *Kane v. Canada (Attorney General)*, 2011 FCA 19, 328 D.L.R. (4th) 193 at paras. 101-09 (dissenting reasons), the Supreme Court, *supra* note 40, *semble*, agreeing.
[94] *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171 at para. 28.
[95] *Ibid.* at para. 27.
[96] *Farwaha*, supra note 78 at para. 100.
[97] *Montréal (City) v. Montreal Port Authority*, 2010 SCC 14, [2010] 1 S.C.R. 427 at paras. 42 and 47; *Almon*, *supra* note 78 at para. 21.

Those that depart in an unexplained way from administrative or judicial precedent may also be suspect.[98]

Care must be taken not to allow acceptability and defensibility "to reduce itself to the application of rules founded upon badges."[99] Rather, "[a]cceptability and defensibility is a nuanced concept informed by the real-life problems and solutions recounted in the administrative law cases, not a jumble of rough-and-ready, hard-and-fast rules."[100] Nor, as I shall suggest at the end of this article, is it permissible or legitimate to evaluate acceptability and defensibility on the basis of personal predilections, ideological visions, or freestanding policy opinions.

(7) In developing doctrine, avoid creating debating points

As I have already explained, administrative law doctrine must emanate from the animating concept behind judicial review. But there are other judicially-recognized policies—not freestanding policies—that can and should shape administrative law doctrine.

The Supreme Court recently recognized one. Modern litigation and the rules surrounding it must be attentive to the need to enhance access to justice and minimize the cost of litigation.[101] To the extent we can unify, distill or simplify rules without damaging the concepts they serve, such as the animating concept behind judicial review, we should. We need to move away from multi-faceted, overly-elaborate tests and categorization exercises that create debating points that provide little or no benefit. Simpler rules or, where possible, leaving pronouncements at the level of standards and concepts, minimizes the risks of conflicting case law over particular details that really do not matter.

To this end, in explaining what makes the margins of appreciation vary from case to case and what administrative decisions are unacceptable or indefensible, it would be a mistake to over define these concepts, such as setting out some mandatory, multi-branch test or prescribing categorization exercises. Some concepts are best left as they are—as concepts, not technical rules in precisely-worded tests where the words must be parsed and fine distinctions must be debated.

Just imagine the mountain of case law in the law of negligence if we had to follow a precisely-worded, four-branch test to decide between whether a defendant's conduct falls below the standard of care or is just an "innocent" error of judgment. In administrative law, we've tried out that sort of approach under the former "pragmatic and functional" test to determine the standard of review. Let's not go back there.

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[98] See, *e.g.*, *Forest Ethics*, *supra* note 78 at para. 69; *Farwaha*, *supra* note 78 at para. 100; *League for Human Rights of B'Nai Brith Canada v. Odynsky*, 2010 FCA 307, 409 N.R. 298 at para. 87; *Boogaard*, *supra* note 78 at para. 81. Though, in the case of departures from administrative precedent, not automatically so: *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756; 105 D.L.R. (4th) 385.

[99] See generally *Delios*, *supra* note 94 at para. 27.

[100] *Ibid.*

[101] *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87.

In answering questions about the margin of appreciation and whether a decision is acceptable or defensible, we need not give a mathematical or precise answer; the determination is mainly a qualitative one.

And often the determination is an easy one that requires few words. For example, we know that labour arbitrators doing labour things and regulators formulating and applying broad policy within their field of regulation normally get broad margins of appreciation.[102] When they stray beyond that, when legislation constrains what they can do, or where other factors canvassed in the case law come to bear,[103] their margins of appreciation can shrink. And we know what qualities make a decision unacceptable or indefensible—in fact, we have started to see "badges" or indicators that can assist us.[104]

(8) Special issues in reviewing administrative decisions

(a) Reviewing administrators' legislative interpretations

Legislation and the administrative decision-makers who interpret it come in all shapes and sizes. Thus, it would be a mistake to adopt a monolithic approach, such as correctness review for all legislative interpretations by administrative decision-makers. Sound reasons in common sense, logic and policy call for a deferential approach in certain situations.[105]

As in the case of other decision-making by administrators, the margins of appreciation for legislative interpretation must vary according to the circumstances. But in the case of legislative interpretation some additional considerations come to bear.

Sometimes the legislator chooses words that are so clear that the administrator has few, if any, interpretive options available to it and so the margin must be narrow or non-existent. And sometimes the legislator chooses words so broad, such as "public interest" and "reasonable," giving the administrator the power to shape the meaning of the provision based upon its policy appreciation, specialization and experience, albeit in accordance with the purposes of the legislation.[106] In such cases, the margin of appreciation to be given must be very broad indeed; to do otherwise would offend the constitutional principle of legislative supremacy.

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[102] See, *e.g.*, *Canada (Attorney General) v. Gatien*, 2016 FCA 3 at paras. 33-39.
[103] See, *e.g.*, the cases mentioned *supra* note 78.
[104] See text to notes 96-98 *supra*. In eschewing rigid rules to govern us in this area, I do not for a moment advocate a loose "consider all the circumstances" approach divorced from an understanding of the animating concepts underlying judicial review. The jurisprudence must be rigorous and grounded on genuine doctrinal concepts such as the matters considered in the cases at notes 78 and 94-98, not personal predilections.
[105] Cass R. Sunstein and Adrian Vermeule, "The Unbearable Rightness of *Auer*" (January 16, 2016), available at SSRN: http://ssrn.com/abstract=2716737; Frank A.V. Falzon, Q.C., "Statutory Interpretation, Deference and the Ambiguous Concept of "Ambiguity on Judicial Review," C.L.E. B.C. conference, November 16, 2015.
[106] See, *e.g.*, *Navigation Protection Act*, R.S.C. 1985, c. N-22, ss. 6, 7 and 13; *Canada Grain Regulations*, C.R.C., c. 889, ss. 8(1); and hundreds of other examples across the country.

Suppose that a legislative provision provides that a dog licensing board can grant dog licences only on Tuesday. "Tuesday" is a very restrictive word with a tight meaning. It does not mean Wednesday or Sunday. The dog licensing board has no margin of discretion in interpreting "Tuesday." "Tuesday" is Tuesday. It has to get it right.

However, suppose that the legislative provision is different. Suppose that it allows the dog licensing board to grant dog licences only when "reasonable." That is a broader word that has many shades of meaning depending on the circumstances. That meaning may be informed by the expertise of the board in this licensing regime or its experience in administering it. Here, the dog licensing board will have a broader margin of appreciation.

When courts review administrators' interpretations of legislation, a danger must be recognized. Some courts begin by interpreting the legislation themselves and deciding upon a correct meaning. In doing that, they create a yardstick to measure what the administrative decision-maker has done. That is correctness review. It gives the administrative decision-maker no margin of appreciation when perhaps it should have been given one.[107]

Here, judicial humility pays dividends. Counsel often surprise us by suggesting interpretations of legislation we did not come up with ourselves. Sometimes we end up accepting those interpretations. The danger of surprise is higher when an administrative decision-maker, informed by years of experience and cognizant of policies beyond our ken, interprets legislation it uses every day. [108] In assessing administrators' interpretations of legislation, we should refrain from adopting a posture of judicial arrogance by developing and applying our own yardstick.

In my view, the right approach was taken in *Workplace Health, Safety and Compensation Commission v. Allen*.[109] There, the Court of Appeal for Newfoundland and Labrador looked to the legislative purpose, context and text of the legislation just to acquaint itself with the landscape relevant to the interpretive task. But the Court did not resolve the issue definitively itself. Instead, after appreciating the interpretive landscape, it looked to what the administrative decision-maker did, in part to educate itself as to considerations relevant to the interpretive task that it did not itself appreciate or that lie within the unique appreciation of the administrative decision-maker. Only then did it assess whether the administrative decision-maker acted within its margin of appreciation.

(b) Appreciating the role of reasons

Reasons are, as the Supreme Court says in *Newfoundland Nurses,* to be viewed organically in light of the record. But some read *Newfoundland Nurses* as suggesting that administrative decision-makers need only show that they were alive to the matters before them.

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[107] *Delios*, supra note 94 at paras 28 and 38-39; *Forest Ethics, supra* note 78 at para. 68.
[108] Hon. John M. Evans, "Triumph of Reasonableness: But How Much Does It Really Matter?" 27 Can. J. Admin. L. & Prac. 101 at 110-11.
[109] 2014 NLCA 42, 379 D.L.R. (4th) 271.

Applying this low standard to all administrative decision-makers in all contexts—the monolithic approach—is at odds with administrative law principles.[110] Further, it fails to take into account how reasons can affect the outcome of reasonableness review. I think that can happen in at last three ways.

First, the more an administrative decision-maker explains its decision and invokes expertise and specialized understandings in explicit reasons, the more the reviewing court is likely to find the administrative decision-maker acted within its margin of appreciation. An administrative decision-maker that does not explain its conclusion leaves it open to the reviewing court—baffled by how the administrator reached its conclusion—to find the conclusion wanting or to wonder whether the administrator even did the job it was supposed to do under its governing legislation. In short, good reasons can be an admission ticket to deference.

Take, for example, the dog licensing board, mentioned above.[111] Suppose it acts under a legislative provision that allows it to grant licences to any "dog." Someone walks into the board's offices and wants a licence for a coyote dog. Is a coyote dog a "dog" within the meaning of the legislative provision? If the board says "yes" and invokes its licensing experience along with expert evidence about whether coyote dogs are part of the *genus* canine, a reviewing court may give the board a broader margin of appreciation. It is dealing with a subject-matter beyond the court's ken. But if the board says "yes" and offers no reasons, the court will be more likely to second-guess. In fact, it may conclude from the absence of reasons that the board failed to consider the matter before it at all, and quash its decision.

Administrators' reasons can be important in the reviewing process in another way. If insufficient reasons are given or if the record in conjunction with the reasons is too sparse, the reviewing court may not be able to understand enough about the case in order to conduct reasonableness review. Reasons must also be sufficient to allow the reviewing court to discharge its reviewing task.[112]

Finally, in some cases, particularly where much turns on the matter, administrative decision-makers must provide a proper, transparent account of themselves and their decision-making to both the parties and the public at large.[113] It must not be forgotten that administrative decision-makers form part of government and must be held accountable to the public they serve.

(c) Reviewing decisions by Ministers of the Crown

Many Ministers are both administrative decision-makers and Members of Parliament. Does that affect the margin of appreciation they should be afforded in their decision-making?

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[110] *D'Errico v. Canada (Attorney General)*, 2014 FCA 95, 459 N.R. 167 at paras. 12-13.
[111] See the text, *supra* following note 106.
[112] *Leahy v. Canada (Citizenship and Immigration)*, 2012 FCA 227, [2014] 1 F.C.R. 766.
[113] *Dunsmuir* supra note 9 at para. 47; *Vancouver International Airport Authority v. Public Service Alliance of Canada*, 2010 FCA 158 at para. 16; *Abetew v. The Taxicab Board*, 2013 MBCA 19, 288 Man. R. (2d) 288.

At one time, the Federal Court of Appeal took a monolithic approach and held that Ministers and their delegates were always subject to correctness review.[114] But today we recognize the shortcomings of that approach.[115] For example, many decisions are made by specialist delegates of the Minister who apply their expertise to detailed facts and thus deserve a broad margin of appreciation.

Some Ministerial delegates write up legislative interpretations. Others implicitly or expressly adopt policy statements that embody legislative interpretations. The reasonableness of those can be assessed like all other administrative decision-makers. But some delegates and many Ministers in their personal capacity simply decide without expressing an actual interpretation of the relevant legislative provision, nor signalling any implicit or explicit adoption of an interpretation made elsewhere, such as in a policy statement. Here is where the failure to explain in their reasons may cause a finding of unreasonableness, as I have explained above.

(d) Reviewing for procedural fairness

The time has come to recognize that procedural decisions come in all shapes and sizes.

Courts are particularly vigilant in reviewing procedural fairness where the interests at stake are high. Thus, administrative decision-makers who make procedural decisions affecting those facing the expropriation of their home or the loss of their licence to practice a profession are often subject to exacting review. In many cases, the review is described as correctness review.

However, some cases are different. Suppose a labour arbitrator has been managing a case for years, observing the inter-party dynamics and understanding the litigation complexities in it. At the last minute, a party seeks an adjournment of a long-scheduled hearing. The arbitrator decides not to adjourn the case. On judicial review, the reviewing court will recognize the fact-based nature of the decision, the arbitrator's knowledge of the management-labour dynamic and the arbitrator's privileged position to appreciate what has been going on in this particular matter. In such a case, reviewing courts are deferential, sometimes highly so.[116]

In short, just as the intensity of review of substantive decisions should vary according to the circumstances, procedural decisions should also be subject to the same flexible approach. The approach discussed above—arriving at a sense of what the margin of appreciation should be in a particular case—is apposite to procedural decisions as well. Decisions are decisions and they should be reviewed using the same methodology.

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[114] *Canada (Fisheries and Oceans) v. David Suzuki Foundation*, 2012 FCA 40, [2013] 4 F.C.R. 155.
[115] *Kandola*, *supra* note 85; *Takeda*, *supra note* 85 at para. 33 (dissent).
[116] Too often, one sees cases where a reviewing court ignores the conflicting case law (see text to notes 58-62, *supra*) and the conflicting messages in *Khela*, supra note 58 at paras. 79 and 89 and confidently states that the standard of review for procedural matters is correctness: see, *e.g.*, *Air Canada v. Greenglass*, 2014 FCA 288, 468 N.R. 184. That makes no sense in a large number of cases. Is a reviewing court really going to second-guess a labour arbitrator, in the situation described here, with absolutely no deference solely on the basis of its remote and detached understanding of the paper record before it? It is doctrinally incoherent to state that the standard of review is correctness and then do something entirely different.

Some view "procedural" decisions as somehow being different from "substantive" decisions. But upon reflection, most will realize that those are labels that do not tell us much and that sometimes confuse. It is often hard to know what label to give to a decision. Sometimes decisions have substantive and procedural aspects at the same time.[117]

If a tribunal denies a person standing to make submissions on the ground that her submissions will not be relevant to the issues in the case, is the decision "procedural" or "substantive"? It is "procedural" if you characterize the decision as preventing her from having her say on an issue that is of concern to her and creating an appearance of unfairness. It is "substantive" if you characterize the decision as being a ruling on the nature of the issues before the tribunal and the relevancy of the person's proposed submissions to those issues. So which is it? Do we call the wine glass half empty or half full? The margin of appreciation to be afforded to the tribunal should not depend on the arbitrary outcome of a labelling exercise.

Simplicity and unification—objectives that advance clarity of the law and access to justice—suggest that a decision of any sort should be reviewed using one methodology.[118] As the conflicting Supreme Court decisions recognize,[119] some "procedural" decisions deserve deference, some less so, others not at all. It all depends on the animating concept behind judicial review and the factors and circumstances that affect its application in an individual case.

(e) Reviewing municipal by-laws, regulations and orders in council

Sometimes decisions by public bodies to enact municipal by-laws under municipal statutes and regulations and orders in council under a statute are judicially reviewed. They are decisions susceptible to judicial review, just like the decisions of other administrative decision-makers, such as the Canada Industrial Relations Board, the Canadian Radio-television and Telecommunications Commission, the National Energy Board and the Canadian International Trade Tribunal. All that differs is the nature of the decision and the decision-maker.

Public bodies that enact municipal by-laws under municipal statutes and regulations and orders in council under a statute often do so for policy reasons based on their appreciation of the needs of the community.[120] Thus, in accordance with the above analysis, they often enjoy a very broad margin of appreciation in their decision-making.[121]

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[117] *Forest Ethics*, *supra* note 77 at paras. 79-82.
[118] *Hryniak*, *supra* note 101; *Maritime Broadcasting*, *supra* note 59.
[119] See text to notes 58-62, *supra*.
[120] *Catalyst*, *supra* note 76 at para. 19.
[121] *Ibid.* A tendency in the cases is to use labels such as "egregious," "aberrant", or "overwhelming" to describe just how unacceptable a regulation, by-law or order in council must be in order for it to be set aside: see *Thorne's Hardware*, *supra* note 87; and see also *Catalyst*, *ibid*. at para. 20, citing *Kruse v. Johnson*, [1898] 2 Q.B. 91 (Div. Ct.); *Associated Provincial Picture Houses, Ltd. v. Wednesbury Corp.*, [1948] 1 K.B. 223 (C.A.); *Lehndorff United Properties (Canada) Ltd. v. Edmonton (City)* (1993), 146 A.R. 37 (Q.B.), aff'd (1994), 157 A.R. 169 (C.A.). The labels are unhelpful. The intensity of review depends on the context and contexts come in all shapes and sizes.

But not always. In some cases, a public body's power to enact a by-law, regulation or order in council may be quite constrained, significantly limiting it in what it can enact.[122] Sometimes this is referred to as a concern about "legality," an unhelpful label that can be misused. For the reasons discussed above, it is in the interests of simplicity and unification to speak in terms of margins of appreciation and to draw upon the insights discussed above. In cases where the power to enact a by-law, regulation or order in council is constrained and a question arises about whether the public body acted within that power, the margin of appreciation to be given to the public body's assessment of its power might be quite narrow and, depending on the precision of the language, non-existent.[123]

(f) Procedural issues arising in applications for judicial review

From time to time, lower court judges are confused about the content of the record before the reviewing court in an application for judicial review. The confusion arises from the fact that those judges also sit as first-instance courts that determine actions.

The two roles—judge on a judicial review and judge determining an action—are different. In the former, the judge is reviewing an administrative decision-maker's decision on the merits: the judge is not the merits-decider. In the latter, the judge is the merits-decider: the judge is deciding what is admissible and should be in the record.

As a general rule, the record before the judge reviewing an administrative decision-maker's decision on the merits consists of the material the administrative decision-maker considered. There are exceptions to this general rule. The exceptions are founded upon and are consistent with the differing roles of the administrative decision-maker and the reviewing court.[124]

Related to this is the introduction of issues in the reviewing court that were not raised before the administrative decision-maker. Quite consistent with the above discussion, the Supreme Court has rightly placed stringent restrictions on the introduction of new issues.[125] The reviewing court is not the place to raise issues that could have been considered by the administrative decision-maker.

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[122] *Catalyst*, *supra* note 76 at para. 15.

[123] See discussion under the heading "Reviewing administrators' legislative interpretations," *supra*, text to notes 105-09. *Quaere* whether the Supreme Court, in *Katz Group*, *supra* note 87 has prescribed a general rule of great deference to decision-making in this area that is inconsistent with principle. Nevertheless, *Katz Group* is the law and binds us all, unless it can be distinguished in a particular case.

[124] *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22, 428 N.R. 297; *Delios*, *supra* note 94 at paras. 41-53; *Forest Ethics*, *supra* note 78 at paras. 43-45; *Connolly v. Canada (Attorney General)*, 2014 FCA 294, 466 N.R. 44; *Bernard v. Canada (Revenue Agency)*, 2015 FCA 263.

[125] *Alberta Teachers*, *supra* note 50 at paras. 22-28; *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44, 388 D.L.R. (4th) 540 at para. 67. On constitutional issues raised for the first time on judicial review, see *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 and *Forest Ethics*, *supra* note 78 at paras. 46-47.

On the subject of the content of the record before the reviewing court, too often interveners participating in a judicial review or an appeal from a judicial review add to the evidentiary record by smuggling evidence into books of authorities or making improper statements in their memoranda of fact and law. This is improper.[126] Also improper is the raising of new issues.[127]

The Supreme Court often admits interveners into its appeals on condition that they do not add to the record. But despite that, interveners sometimes insert articles, policy material and international studies containing social science evidence into their books of authorities or memoranda and sometimes the Supreme Court relies upon this material.[128] This can undercut the legitimacy and acceptability of public law outcomes, making them appear to be based on someone's untested, out-of-court say-so, rather than rigorously-tested, admissible evidence.

On occasion, these problems are worsened by the admission of multiple interveners supporting only one side of the case, particularly where the interveners espouse political causes. This creates the appearance of "a court-sanctioned gang-up against one side" and can raise an apprehension that a decision was influenced by the weight of politics, not doctrine.[129]

(9) Pay more attention to remedial discretion

Post-*Dunsmuir*, the significance of the Court's remedial discretion not to set aside an administrative decision has often been overlooked.

Take, for example, the rule that courts should uphold the outcome reached by an administrative decision-maker who has made a serious mistake in the reasoning by trying to supplement the reasons.[130] This rule is problematic. Reviewing courts should not be in the business of coopering up an outcome that the administrative decision-maker, knowing of its mistake, might not have reached.[131]

At the level of basic concept, reviewing courts are reviewers and administrative decision-makers are the merits-deciders. Thus, reviewing courts should not meddle in the merits of cases and draft

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[126] *Public School Boards Ass'n v. Alberta (Attorney General)*, [1999] 3 S.C.R. 845 at 847; *Ishaq*, *supra* note 81 at paras. 18-24; *Canada v. Taylor*, [1987] 3 F.C. 593 at 608, 37 D.L.R. (4th) 577, cited approvingly in *Public School Boards Ass'n*; *Zaric v. Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 36 at para. 14.

[127] *Canada (Attorney General) v. Canadian Doctors for Refugee Care*, 2015 FCA 34, 470 N.R. 167 at para. 19; *Ishaq*, *supra* note 81 at para. 17. On occasion, interveners are allowed into proceedings even though they intend to make international law submissions, submissions not made below, where international law issues are irrelevant to the case: *Gitxaala Nation v. Canada*, 2015 FCA 73 at paras. 15-20. In some quarters, the view is prevalent that international law is always relevant and sometimes those inclined to policy and personal predilections rather than law use it to disrupt domestically-enacted legislation. Of course, this is wrong: *Capital Cities Comm. v. C.R.T.C.*, [1978] 2 S.C.R. 141, 81 D.L.R. (3d) 609; *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292.

[128] Some take the view this happened in *Kanthasamy*, *supra* note 5.

[129] *Zaric*, supra note 126 at para. 12.

[130] *Dunsmuir*, *supra* note 9 at para. 48 and the discussion at the text to notes 48-54, *supra*.

[131] *Lemus v. Canada (Citizenship and Immigration)*, 2014 FCA 114, 372 D.L.R. (4th) 567 at paras. 33-37, on this point agreeing with *Alberta Teachers*, *supra* note 49 rather than *Newfoundland Nurses*, *supra* note 39.

supplemental reasons that the administrator should have drafted; they review decisions already made and written up, nothing more.[132]

All these doctrinal problems can be avoided by keeping the reviewing court's remedial discretion front of mind. Where an administrative decision-maker has made an error in reasoning that would not have affected the outcome or where practical considerations militate against sending the matter back for redetermination, the reviewing court may exercise its discretion not to quash the decision.[133]

Administrative law discretions, such as remedial discretions and some discretions regarding preliminary objections to judicial review, should be guided by public law values resident in the cases.[134] These deserve more discussion and better definition in the case law.

(10) Enhance the legitimacy and acceptability of judicial review

The legitimacy of judicial review and its acceptability to the public we serve very much depends on our approach and attitude when applying all of the foregoing.

When we review the decisions of the executive and its agencies, we must always:

- act in a coherent and consistent way relying upon pre-determined, objective doctrine emanating from and reflecting the animating concept behind judicial review, namely the tension between Parliamentary supremacy and the reviewing courts' duty to enforce rule of law standards, and other legal concepts known to our law, including public policies emanating from legislation and relevant to the task at hand; and

- avoid resorting to *ad hoc* subjective impressions, aspirations, personal preconceptions, ideological visions, or freestanding policy opinions—matters that can depend on the idiosyncrasies of an individual judge and can vary unpredictably—about what is just, appropriate and right.

The former is the stuff of legal contestation and the legitimate domain of the courts; the latter is the stuff of public debate and the politicians we elect.

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[132] *Alberta Teachers*, *supra* note 50 at paras 23-28; *Association of Universities*, *supra* note 124 at paras. 15-19; *Budlakoti v. Canada (Citizenship and Immigration)*, 2015 FCA 139, 473 N.R. 283 at paras. 27-30.

[133] *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6; *Mobil Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202, 111 D.L.R. (4th) 1, and for practical examples, see *Community Panel of the Adams Lake Indian Band v. Adams Lake Band*, 2011 FCA 37, 419 N.R. 385 and *D'Errico*, *supra* note 110.

[134] *D'Errico*, *supra* note 110 at paras. 15-21; *Budlakoti*, supra note 132 at para. 60; and see the enumeration of public law values in *Wilson v. Atomic Energy of Canada Limited*, 2015 FCA 17, 467 N.R. 201 at para. 30, citing Paul Daly, "Administrative Law: A Values-Based Approach" in Mark Elliott and Jason Varuhas, eds., *Process and Substance in Public Law Adjudication* (Hart: Oxford, 2015).

Personal predilection must never be translated into enforceable law. There is a clear line between decrees founded upon the whims of individual lawyers who happen to hold a judicial commission and the considered pronouncements of judges relying upon doctrine that is objective and settled. In a free and democratic society ruled by law, only the latter is acceptable.[135] Judges expect public decision-makers to act in accordance with law rather than personal fiat.[136] As public decision-makers, judges must also expect that of themselves.

On this, the former Chief Justice of the Australian High Court, Sir Owen Dixon, wrote:

> It is one thing for a court to seek to extend the application of accepted principles to new cases or to reason from the more fundamental of settled legal principles to new conclusions or to decide that a category is not closed against unforeseen instances which in reason might be subsumed thereunder. It is an entirely different thing for a judge, who is discontented with a result held to flow from a long accepted legal principle, deliberately to abandon the principle in the name of justice or of social necessity or of social convenience. The former accords with the technique of the common law and amounts to no more than an enlightened application of modes of reasoning traditionally respected in the courts. It is a process by the repeated use of which the law is developed, is adapted to new conditions, and is improved in content. The latter means an abrupt and almost arbitrary change.[137]

Justice Benjamin Cardozo put it this way:

> The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles.[138]

These are not visions of the law that lead us to stasis. Far from it. The law can evolve, but only upon "a responsible, incremental extension of legal doctrine achieved through accepted pathways of legal reasoning."[139] Evolution may be prompted by concepts developed from judicial experience in working with the doctrine, [140] such as the recognition today that our legal rules should be developed and applied with a view to simplicity, unification and access to justice.[141] As well, certain indisputable values—now pre-eminent in our legal system through constitutional entrenchment, common law doctrine or public policies expressed in legislation—can also prompt

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[135] See, *e.g.*, Alexander Hamilton, *The Federalist* (Modern Library ed.), New York, Random House, 1937, No. 78 at page 510; *Lochner v. New York*, 198 U.S. 45 *per* Holmes J. (dissenting); *A.F.L. v. American Sash Co.* (1949), 335 U.S. 538 at page 515-56 *per* Frankfurter J.

[136] *Roncarelli v. Duplessis*, [1959] S.C.R. 121, 16 D.L.R. (2d) 689.

[137] "Concerning Judicial Method." (1956) 29 A.L.J. 468 at 471. (Address delivered at Yale University on September 19, 1955).

[138] *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921) at 141.

[139] *Paradis Honey*, *supra* note 78 at para. 117.

[140] Oliver Wendell Holmes Jr., *The Common Law* (1881) at 1: the "life of the law has not been logic: it has been experience." A good example is *Donoghue v. Stevenson*, [1932] A.C. 562. The speeches of Lord Buckmaster and Lord Atkin both were arguably loyal to the precedents as they existed at the time. However, Lord Atkin's view won out. It was based on his sense, honed by judicial experience, that an expanded scope of liability for negligence would better comport with judicially-recognized notions of responsibility.

[141] *Hryniak*, *supra* note 101.

and shape the evolution of judge-made law. These include freedom of the individual, equality and non-discrimination, procedural fairness, individual responsibility, duties of care to those who may suffer foreseeable harm, and the need for certainty and predictability in our law, to name a few.

Legal doctrine and the settled legal method to discern and develop it are larger than any one of us on any court—indeed, all of us put together. Most of it preceded our entry into the judiciary and will long outlast us.

We must respect it by applying it faithfully and, when necessary, developing it incrementally by using accepted pathways of legal reasoning drawing upon proper sources. We must not disrespect it by, for example, manipulating the administrative decision under review, fiddling with the margin of appreciation, cherry-picking authorities, misrepresenting the doctrine, reacting *ad hoc* to the facts of a case, saying one thing and then doing another, or ignoring legislative signals in order to reach a personally-preferred outcome. Those who reason tendentiously do not act judicially.

In my view, the Court of Appeal for Ontario recently performed review objectively and neutrally on the basis of pre-determined, objective doctrine in *Carrick (Re)*,[142] as did all of the other provincial appellate courts in the decisions cited above. The Federal Court of Appeal also recently performed review in a similar way in *Canada (Attorney General) v. Sandoz Canada Inc.*,[143] *LeBon v. Canada (Attorney General)*,[144] *Atkinson v. Canada (Attorney General)*,[145] *National Bank of Canada v. Lavoie*,[146] just a few examples of many.

Most recently, in my view, a majority of the Supreme Court performed reasonableness review in a doctrinally-appropriate way in the extradition case of *M.M. v. United States of America*.[147] Perhaps *M.M.* is a good sign for the future.

I look forward to the day when we can close the never-ending construction site that, to this point, has been Canadian administrative law and stand back and admire what has been constructed. Afterwards, perhaps only minor fixes and renovations will be required. One can only hope.

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[142] 2015 ONCA 866 at paras. 24-26.
[143] 2015 FCA 249.
[144] 2012 FCA 132.
[145] 2014 FCA 187.
[146] 2014 FCA 268.
[147] 2015 SCC 62 at paras. 104 *et seq*. Portions of the analysis appear to be correctness review under the guise of reasonableness, but it must be borne in mind that the Minister's margin of appreciation was quite narrow due to the existence of settled case law that must be followed (see, *e.g.*, *Abraham*, *supra* note 78 and *Canadian Human Rights Commission*, *supra* note 78). The careful, fair, and non-tendentious manner in which the majority of the Court assessed the content of the Minister's decision while it conducted reasonableness review deserves praise.