Court File No.:

FEDERAL COURT OF APPEAL

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

– and –

CANADIAN TRANSPORTATION AGENCY

Respondent

MOTION RECORD OF THE MOVING PARTY, AIR PASSENGER RIGHTS

Motion for an Urgent Interim Injunction Without Notice
(Pursuant to Rules 369 and 373-374 of the *Federal Courts Rules*)

VOLUME 1 of 2

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TO: **CANADIAN TRANSPORTATION AGENCY**

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NOTICE OF MOTION

TAKE NOTICE THAT THE MOVING PARTY will make an urgent motion in writing to the Court under Rule 369 of the *Federal Courts Rules*, S.O.R./98-106, **without notice**.

THE MOTION IS FOR:

1. an interim order (*ex-parte*) that:

   (a) upon service of this Court's interim order, the Agency shall prominently post the interim clarification (below) at the top portion of both the French and English versions of the "Statement on Vouchers" [**Statement**] and the "Important Information for Travellers During COVID-19" page [**COVID-19 Agency Page**] (both defined in paragraphs 11-12 of the Notice of Application):

> The Canadian Transportation Agency's "Statement on Vouchers" is not a decision, order, determination, or any legal ruling of the Canadian Transportation Agency. It **does not** have the force of law. The "Statement on Vouchers" is currently pending judicial review by the Federal Court of Appeal. This notice is posted by Order of the Federal Court of Appeal.

(b) starting from the date of service of this Court's interim order, the Agency shall bring the above interim clarification to the attention of anyone that contacts the Agency with a formal complaint and/or informal inquiry regarding air carriers' refusal to refund arising from the COVID-19 pandemic;

(c) the Agency shall not issue any decision, order, determination or any other ruling with respect to refunds from air carriers for the COVID-19 pandemic; and

(d) this interim order is valid for fourteen days from the date of service of this Court's interim order on the Agency, and may be renewed by the Applicant under Rule 374(2);

2. an interlocutory order that:

(a) the Agency shall completely remove the Statement from the Agency's website including any references to the Statement within the COVID-19 Agency Page, or alternatively renewing the order for interim clarification (subparagraph 1(a) above), until final disposition of the Application;

(b) the interim order in subparagraph 1(b) above is maintained until final disposition of the Application;

(c) the interim order in subparagraph 1(c) above is maintained until final disposition of the Application;

(d) the Agency shall forthwith communicate with all persons that the Agency has communicated with regarding the Statement and bring those persons' attention to this Court's interlocutory order and the removal or clarification of the Statement; and

(e) the Agency shall forthwith communicate with all air carriers under the Agency's jurisdiction and the Association of Canadian Travel Agencies and bring those persons' attention to this Court's interlocutory order and the removal or clarification of the Statement;

3. an order fixing an expedited timetable for the Applicant's motion for an interlocutory order (para. 2 above), and the hearing of the Application;

4. an order directing that all documents in this Application shall be served electronically;

5. costs and/or reasonable out-of-pocket expenses of this motion; and

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

THE GROUNDS FOR THE MOTION ARE:

1. This is a motion seeking an interim order, on an *ex-parte* basis, and an interlocutory order pending final disposition of the Application, including the fixing of a timeline for the matter.

2. There is urgency in addressing the interim order at the earliest opportunity because the Agency's conduct, that is the subject of the underlying Application, has a clear tendency to mislead, and likely has already misled, tens of thousands of passengers. Many more passengers will continue to be misled regarding their rights unless a prompt clarification is issued.

Background

3. The underlying Application challenges the legality of the Canadian Transportation Agency's Statement on refunds for air tickets relating to COVID-19. The Agency's Statement purports to provide an unsolicited advance ruling favouring air carriers without submissions from passengers at all. The Statement specifi-

cally endorses the air carriers in withholding refunds from passengers, and instead issuing expiring "credits" that are subject to other various conditions that air carriers seeks to impose, such as one-time use only or any excess credit is to be forfeited.

4. Since as early as 2004, the Agency has determined that passengers have a fundamental right to a refund in cases where the passengers could not travel due to events outside of their control, even when it arises from a situation outside the air carriers' control. The Agency now seeks to upend that settled principle via the Statement and grants air carriers a blanket immunity from the law without hearing the submissions from a single passenger.

5. The Agency is a quasi-judicial tribunal that must act independently and impartially at all times. The Statement, and the COVID-19 Agency Page, stray far from the required independence and impartiality. This motion seeks to bring interim measures, followed by interlocutory measures, to protect the passengers' interest in the face of the anonymous Statement, which has since been widely distributed and relied upon as "support" by air carriers and travel agencies in denying refunds rightfully owed to passengers.

6. This Application is brought by the Applicant, Air Passenger Rights [**APR**], a non-profit public interest advocacy group that represents the right of air passengers. The public interest advocacy work of Dr. Gábor Lukács, the President of APR, has been recognized by this Court.

The Impugned Statement and the COVID-19 Agency Page

7. On or about March 25, 2020, the Agency publicly posted the Statement on its website (**French**: https://otc-cta.gc.ca/fra/message-concernant-credits; **English**: https://otc-cta.gc.ca/eng/statement-vouchers) which reads as follows:

> The COVID-19 pandemic has caused major disruptions in domestic and international air travel.
>
> For flight disruptions that are outside an airline's control, the

> Canada Transportation Act and Air Passenger Protection Regulations only require that the airline ensure passengers can complete their itineraries. Some airlines' tariffs provide for refunds in certain cases, but may have clauses that airlines believe relieve them of such obligations in force majeure situations.
>
> The legislation, regulations, and tariffs were developed in anticipation of relatively localized and short-term disruptions. None contemplated the sorts of worldwide mass flight cancellations that have taken place over recent weeks as a result of the pandemic. It's important to consider how to strike a fair and sensible balance between passenger protection and airlines' operational realities in these extraordinary and unprecedented circumstances.
>
> On the one hand, passengers who have no prospect of completing their planned itineraries with an airline's assistance should not simply be out-of-pocket for the cost of cancelled flights. On the other hand, airlines facing huge drops in passenger volumes and revenues should not be expected to take steps that could threaten their economic viability.
>
> While any specific situation brought before the CTA will be examined on its merits, the CTA believes that, generally speaking, an appropriate approach in the current context could be for airlines to provide affected passengers with vouchers or credits for future travel, as long as these vouchers or credits do not expire in an unreasonably short period of time (24 months would be considered reasonable in most cases).
>
> The CTA will continue to provide information, guidance, and services to passengers and airlines as we make our way through this challenging period.

8. Concurrently with the Statement, the Agency posted an amendment to the COVID-19 Agency Page on its website, adding four references to the Statement (French: **Information importante pour les voyageurs pour la periode de la COVID-19** [https://otc-cta.gc.ca/fra/information-importante-pour-voyageurs-pour-periode-covid-19]; English: **Important Information for Travellers During COVID-19** [https://otc-cta.gc.ca/eng/important-information-travellers-during-covid-19]).

9. The COVID-19 Agency Page purports to endorse a blanket immunity for air

carriers to withhold refunds from passengers in **all** circumstances, and instead issue a "credit," contrary to the explicit provisions of the *Air Passenger Protection Regulations*, SOR/2019-150 [**APPR**] and settled jurisprudence of the Agency:

(a) **Cancellations within an air carriers' control:** The COVID-19 Agency Page specifically endorsed the Statement, *despite* s. 17(7) of the *APPR* specifically providing for a refund to the original form of payment.

(b) **Cancellations within an air carriers' control, but required for safety:** The COVID-19 Agency Page specifically endorsed the Statement, *despite* s. 17(7) of the *APPR* specifically providing for a refund to the original form of payment.

(c) **Cancellations outside an air carriers' control:** The COVID-19 Agency Page specifically endorsed the Statement. The *APPR* sets the minimum standards of treatment in this situation, mandating that an air carrier provide alternative transportation on the next available flight (s. 18 of *APPR*). Section 18 is silent on what is required of the air carrier if transportation cannot be offered on the next available flight, which would then fall to be determined by previous decisions of the Agency (i.e., the fundamental right to a refund when the air carrier cannot offer the service, as briefly mentioned above).

The Orders Sought on this Motion

The Interim Order Preserving and Clarifying the Rights of Passengers

10. The test for issuing the interim mandatory order that the Agency providing a clarification relating to their website (interim order subparagraphs (1)(a)-(b)) is met:

(a) There is a strong *prima facie* case that the Statement is not a legally binding decision, order, determination or any other ruling of the Agency.

(b) There is also a strong *prima facie* case that the Statement and COVID-19 Agency Page, individually or collectively, have the capability, tendency or effect of deceiving or misleading passengers regarding their legal right to a refund of their airfares from the air carriers.

(c) Public interest will be severely undermined if misinformation is not promptly remedied. In particular, the passengers will suffer irreparable harm if the Statement and the COVID-19 Agency Page are not immediately clarified. Many passengers have already been contacting airlines to seek refunds. Many passengers may, or already have, incorrectly relied on the Statement and the COVID-19 Agency Page, potentially prejudicing their legal rights to a refund.

(d) The balance of convenience favours the issuing of the interim order, pending the hearing of the interlocutory order. The Applicant has written to the Agency indicating that the Statement is misleading and must be removed. The Agency has failed to take any action or respond. The Agency suffers no prejudice whatsoever in having its public message properly qualified and clarified until this Court makes its determination.

(e) The Applicant is a non-profit advocacy group and does not have the means to provide an undertaking as to damages. In any case, the Agency clearly will not suffer any damages from the interim order. And, most

importantly, the lack of an undertaking is merely a factor in considering the balance of convenience and is not fatal to a motion for an injunction.

11. The test for issuing the interim injunction enjoining the Agency's conduct (interim order subparagraph (1)(c)) is also met:

    (a) There is a *serious issue to be tried* as to whether the Statement and/or the COVID-19 Agency Page gives rise to a reasonable apprehension of bias for the Agency as a whole, or for the appointed members of the Agency that supported the Statement.

    (b) There will be irreparable harm to the passengers, and also to the administration of justice, if a decision-maker that is not impartial and not independent embarks on an inquiry of the passengers' complaints.

    (c) The balance of convenience favours the issuing of the interim injunction, pending the hearing of the interlocutory injunction. There will be no inconvenience or prejudice to the Agency in simply maintaining the same *status quo* and not hearing any complaints in relation to refunds from air carriers for COVID-19. The Agency, on its own motion, already suspended all dispute resolutions until June 30, 2020, but that suspension could be rescinded with little to no notice. The Agency's own motion supports the view that there is no urgency in having the passengers' complaints determined before this Court rules on the Application.

Interlocutory Order Preserving the Rights of Passengers

12. The test for issuing the interlocutory mandatory order that the Agency remove the Statement and references to the Statement in the COVID-19 Agency Page (interlocutory order subparagraph (2)(a)) is met:

    (a) There is a strong *prima facie* case, and very clear, that the Statement cannot be a legally binding decision, order, determination, or any other ruling of the Agency;

(b) There is also a strong *prima facie* case that the Statement and the COVID-19 Agency Page, individually or collectively, have the capability, tendency, or effect of deceiving or misleading passengers regarding their legal right to a refund of their airfares from the air carriers;

(c) Public interest will be severely undermined if the misinformation is not promptly corrected. In particular, the passengers will suffer irreparable harm if the Statement and the COVID-19 Agency Page are not removed. Many passengers have already been contacting airlines to seek refunds. Airlines have already relied on the Statement and the COVID-19 Agency Page to mislead passengers regarding their rights, to the prejudice of the passengers.

(d) The balance of convenience favours the issuing of the interlocutory order. Alternatively, the Court should continue the interim orders in subparagraphs 1(a)-(b).

(e) The Applicant is a non-profit advocacy group and does not have the means to provide an undertaking as to damages. In any case, the Agency clearly will not suffer any damages from the interim order. And, most importantly, the lack of an undertaking is merely a factor in considering the balance of convenience and is not fatal to a motion for an injunction.

13. The interim orders in subparagraphs 1(b)-(c) ought to be maintained until final disposition of the Application.

14. The test for issuing the mandatory interlocutory order for the Agency to inform the air carriers, the travel industry, and passengers that the Agency previously communicated with regarding the Statement, regarding this Court's interlocutory order (interlocutory order subparagraph 2(c)-(d)), is also met:

(a) There is a strong *prima facie* case that the Statement was used as "legal support" by air carriers and the travel industry in refusing refunds to

passengers. Those persons ought to be promptly informed of this Court's order so that they can take the appropriate steps to correct information they previously provided to passengers.

(b) Public interest will be severely undermined if the misinformation is not promptly remedied. In particular, the passengers will suffer irreparable harm if the Statement and the COVID-19 Agency Page are not immediately removed or clarified. Many passengers have already been contacting airlines to seek refunds. Many passengers may, or already have, incorrectly relied on the Statement and the COVID-19 Agency Page, prejudicing their legal rights to a refund.

(c) The balance of convenience favours the issuing of the mandatory interlocutory order. There will be no inconvenience or prejudice to the Agency in simply informing those persons of this Court's interlocutory order.

An Order Fixing an Expedited Timetable

15. There is urgency in hearing **both** the interlocutory orders, and the underlying Application, on an expedited basis. While there is no direct evidence from passengers, the Court can take judicial notice of the COVID-19 situation that has affected virtually every individual and entity. The air carriers and the tens of thousands (or likely hundred of thousands) of passengers require some certainty of their legal rights, so as to allow them to assess their financial positions in these difficult times.

An Order for Electronic Service of Documents

16. In light of the COVID-19 situation, it would be most expedient for documents in this Application to be dealt with electronically as much as possible.

Statutes and regulations relied on

17. *Canada Transportation Act*, S.C. 1996, c. 10 and, in particular, sections 7 and 41;

18. *Federal Courts Act*, R.S.C. 1985, c. F-7, and in particular, sections 18.1, 18.2, 28, and 44; and

19. *Federal Courts Rules*, S.O.R./98-106, and in particular, Rules 300, 369, and 372-374;

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

THE FOLLOWING DOCUMENTARY EVIDENCE will be used for the motion:

1. Affidavit of Dr. Gábor Lukács, affirmed on April 7, 2020.

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

April 7, 2020

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AFFIDAVIT OF DR. GÁBOR LUKÁCS
(Affirmed: April 7, 2020)

I, **DR. GÁBOR LUKÁCS**, of the City of Halifax in the Province of Nova Scotia, AFFIRM THAT:

1. I am the President of the Applicant, Air Passenger Rights. As such, I have personal knowledge of the matters to which I depose, except as to those matters stated to be on information and belief, which I believe to be true.

A. Public interest advocacy activities

2. Since 2008, in my personal capacity, I have been an air passenger rights advocate, and I have been volunteering my time and expertise for the benefit of the travelling public. I have filed more than two dozen successful regulatory complaints with the Canadian Transportation Agency [**Agency**] that resulted in airlines being ordered to amend their terms and conditions and/or their websites and/or their signage, and to offer better protection to passengers. An excerpt from a 2017 brief, summarizing my activities, is attached and marked as **Exhibit "A"**.

3. 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."

4. In a 2013 review article on aviation law in Canada, a copy of which is attached and marked as **Exhibit "B"**, Mr. Carlos Martins, a lawyer at the Bersenas Jacobsen Chouest Thomson Blackburn firm, described my advocacy as follows:

> In the consumer protection landscape, for the last several years, the field has largely been occupied by Gabor Lukács, a Canadian mathematician who has taken an interest in challenging various aspects of the tariffs filed by air carriers with the regulator, the Canadian Transportation Agency (the Agency). The majority of Mr Lukács' complaints centre on the clarity and reasonableness of the content of the filed tariffs, as well as the extent to which air carriers are applying their tariffs, as filed, in the ordinary course of business.
>
> Mr Lukács' efforts have created a significant body of jurisprudence from the Agency - to the extent that his more recent decisions often rely heavily upon principles enunciated in previous complaints launched by him.

5. I have successfully challenged, in the public interest, the legality of the Agency's actions on a number of occasions before this Honourable Court:

(a) *Lukács v. Canada (Transport, Infrastructure and Communities)*, 2015 FCA 140, relating to the open court principle in proceedings before the Canadian Transportation Agency;

(b) *Lukács v. Canada (Canadian Transportation Agency)*, 2015 FCA 269, relating to denied boarding compensation; and

(c) *Lukács v. Canada (Canadian Transportation Agency)*, 2016 FCA 220, relating to standing to bring a complaint about discrimination against large passengers without being personally affected.

6. In *Lukács v. Canada (Transportation Agency)*, 2016 FCA 174, at paragraph 6, the Federal Court of Appeal recognized my genuine interest in air passenger rights and the legality of the Agency's decisions and actions, and granted me public interest standing on that basis.

7. In October 2017, I appeared before the Supreme Court of Canada. The court's judgment was delivered on January 19, 2018, and is indexed as *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2.

8. In October 2018, I delivered two invited lectures on air passenger rights at McGill University Faculty of Law's Institute of Air and Space Law.

9. In *Lukács v. Canada (Transportation Agency)*, 2019 FC 1148, at paragraphs 46 and 50, the Federal Court recognized my reputation, continued interest, and expertise in advocating for passenger rights.

10. In March 2020, I was granted leave to intervene by the Federal Court of Appeal in the appeal of the International Air Transport Association and a number of airlines against certain provisions of the *Air Passenger Protection Regulations* in File No. A-311-19:

> [...] the Court is of the view that the case engages the public interest, that the proposed intervener would defend the interests of airline passengers in a way that the parties cannot, that the interests of justice favour allowing the proposed intervention in the appeal, and that the proposed intervention would be of assistance to the Court in deciding the appeal;
>
> [Emphasis added.]

A copy of the Order of the Federal Court of Appeal granting leave to to intervene, dated March 3, 2020, is attached and marked as **Exhibit "C"**.

11. I offer *pro bono* assistance to passengers in their disputes with airlines to the extent that I am permitted to do so by law. For example:

(a) In *Lachance v. Air Canada*, 2014 NSSM 14, I obtained a judgment requiring Air Canada to compensate the passenger, who had been bumped.

(b) Since 2015, I have been assisting and representing Ms. Nayla Farah and Ms. Amal Haddad of Toronto, Ontario, who were harassed and discriminated against by airline crew due to their visual impairment and reliance on the assistance of Seeing Eye service dogs. In October 2018, the Canadian Human Rights Commission decided to refer the case to the Canadian Human Rights Tribunal for an inquiry.

(c) In *Paine v. Air Canada*, 2018 NSSC 215, I was granted permission to represent passengers in an appeal before the Supreme Court of Nova Scotia in a case relating to denied boarding compensation.

(i) Involvement with the *Transportation Modernization Act* and the *Air Passenger Protection Regulations*

12. I testified twice with respect to the *Transportation Modernization Act*:

(a) in September 2017, before the House of Commons' Standing Committee on Transport, Infrastructure and Communities (TRAN); and

(b) in March 2018, before the Standing Senate Committee on Transport and Communications.

13. The Agency recognized me as a stakeholder in the consultation process leading to the development of the *Air Passenger Protection Regulations* [***APPR***]:

(a) In June 2018, I had a 2-hour bilateral consultation session with officials from the Agency.

(b) In August 2018, I submitted a 26-page brief to the Agency with respect to the *APPR*.

(c) In January 2019, after the proposed *APPR* were prepublished in Canada Gazette Part I, I had a 1.5-hour bilateral consultation session with officials from the Agency.

(d) In February 2019, I submitted a 52-page brief to the Agency with respect to the proposed *APPR*.

For greater clarity, these bilateral consultation sessions were organized only for those whom the Agency identified as "stakeholders," and were distinct from the Agency's townhall meetings for the general public.

14. As noted earlier, the Federal Court of Appeal granted me leave to intervene in the appeal of the International Air Transport Association and a number of airlines against certain provisions of the *Air Passenger Protection Regulations* (Exhibit "C").

(ii) Involvement with accessibility

15. In October 2018, I submitted a brief to the House of Commons' Standing Committee on Human Resources, Skills and Social Development and the Status of Persons with Disabilities with respect to the *Act to ensure a barrier-free Canada* (Bill C-81).

16. In April 2019, I submitted a brief to the Agency about the draft *Accessible Transportation for Persons with Disabilities Regulations* that were prepublished in Canada Gazette Part I.

17. In April 2019, I submitted a brief to the Standing Senate Committee on Social Affairs, Science, and Technology with respect to the *Act to ensure a barrier-free Canada* (Bill C-81).

18. In February 2020, I submitted a brief to the Agency about phase 2 of the *Accessible Transportation for Persons with Disabilities Regulations*.

B. The Applicant: Air Passenger Rights

19. Air Passenger Rights [**APR**] is a non-profit organization, formed under the *Canada Not-for-profit Corporations Act*, SC 2009 on or about May 2019, to expand and continue the air passenger advocacy work that I have initiated in my personal capacity for the last decade. A copy of APR's articles of incorporation are attached and marked as **Exhibit "D"**.

20. APR's mandate is to engage in public interest advocacy for air passengers, continuing the same work that I have been engaging in personally for the past decade, including advocating on behalf of the travelling public before Parliament, administrative agencies and tribunals, and the courts, when necessary.

21. I am the President and a director of APR, and I actively lead all the work of APR. APR operates on a non-profit basis and its directors, including myself, are not paid any salaries or wages.

22. APR currently receives small donations, on a non-recurring and irregular basis, from a limited number of passengers that have benefited from APR's work or my work. Those donations only cover some out-of-pocket expenses incurred by myself and APR in undertaking the public interest advocacy work.

23. APR does not own real property or personal property. As such, it has no available means to provide an undertaking to this Court to pay damages that may arise from an issuance of the interim or interlocutory orders.

24. APR promotes air passenger rights by referring passengers mistreated by airlines to legal information and resources through the press, social media, and the

AirPassengerRights.ca website.

25. APR's Facebook group, entitled "Air Passenger Rights (Canada)," has more than 23,700 members as of the date of this Affidavit [**APR Facebook Group**].

26. The APR Facebook Group is a platform for passengers to share their concerns regarding air travel and passenger rights, and to discuss their issues and concerns with other passengers.

27. A small group of volunteers, led by me, regularly responds to every passengers' Facebook post on the APR Facebook Group and provides passengers with information whenever possible.

C. The COVID-19 Pandemic and Air Travel

28. Since the start of the COVID-19 disruptions in various countries in early March, I observed that the APR Facebook Group began to regularly receive Facebook posts from passengers concerning disruption of their travel plans to countries that were heavily affected by COVID-19 during that time, such as the People's Republic of China and Italy.

29. On March 11, 2020, the World Health Organization (WHO) declared COVID-19 a pandemic. A copy of the WHO's press release is attached and marked as **Exhibit "E"**.

30. On March 13, 2020, the Government of Canada issued an advisory advising those within Canada to avoid non-essential travel abroad, and those abroad to consider returning to Canada earlier as options were becoming more limited. A copy of the news release issued by Global Affairs Canada is attached and marked as **Exhibit "F"**.

31. At around the time of the Global Affairs Canada advisory above, the government of Canada began urging Canadians to stem the spread of COVID-19. A copy of a news report published by Reuters, which appeared in the National Post online on March 16, 2020, is attached and marked as **Exhibit "G"**.

32. After the March 11 WHO announcement and the March 13 Global Affairs Canada advisory, internet traffic to the APR Facebook Group has increased substantially, despite individuals refraining from air travel for a number of reasons. The majority of that increased traffic relates to passengers experiencing difficulties obtaining a full refund of unused travel services, mostly air fare, in light of the COVID-19 situation.

33. During the period of February 2 to April 2, 2020, the daily number of new Facebook posts to the APR Facebook Group has increased by 189%, to 3,210 posts for the entire period. The graph generated by Facebook is reproduced below.

34. During the same time period, the daily number of comments to the new Facebook posts (above) has increased by 196%, to 53,205 for the entire period. The graph generated by Facebook is reproduced below.

35. During the same time period, the APR Facebook Group increased from approximately 15,700 members to 23,709 members as of the date of this Affidavit. The graph generated by Facebook is reproduced below.

36. Based on my ongoing and daily involvement with assisting passengers through the APR Facebook Group, I believe that COVID-19 affected and continues to affect passengers' air travel in the following ways:

(a) passengers could not travel to some countries, such as France and Italy, because they closed their borders to foreign nationals;

(b) passengers adhering to the government travel advisories or health warnings decided to cancel their travel plans in the near term; and/or

(c) air carriers cancelled some or all of their flights.

D. The Agency's Lawful Actions in Response to COVID-19

37. Since March 13, 2020 and up to the date of this affidavit, the Agency has issued some orders and/or determinations in response to COVID-19, which are not the subject of challenge on this judicial review application.

(i) Exemptions of Air Carriers from Minimum Compensation and Accommodations under the *APPR*

38. On March 13, 2020, the Agency issued Determination No. A-2020-42 suspending and/or relaxing some of the air carriers' obligation to pay minimum compensation to passengers and the obligation to rebook passengers, under the *Air Passenger Protection Regulations*, SOR/2019-150 [**APPR**] until April 30, 2020. A copy of Determination No. A-2020-42 is attached and marked as **Exhibit "H"**.

39. On March 25, 2020, the Agency issued Determination No. A-2020-47 extending the exemptions under Decision No. A-2020-42 (above) to June 30, 2020, and further allowed air carriers to respond to compensation requests within 120 days after June 30, 2020, instead of the usual 30 days after receipt. A copy of Determination A-2020-47 is attached and marked as **Exhibit "I"**.

(ii) Suspension of All Existing and New Passenger Dispute Resolutions

40. On March 18, 2020, the Agency issued Order No. 2020-A-32, suspending all of the Agency's new and existing dispute resolution activities, including passenger complaints, until April 30, 2020. A copy of Order No. 2020-A-32 is attached and marked as **Exhibit "J"**.

41. On March 25, 2020, the Agency issued Order No. 2020-A-37, extending the suspension of all passenger dispute resolution activities to June 30, 2020. A copy of Order No. 2020-A-37 is attached and marked as **Exhibit "K"**.

E. The Agency's Impugned and Unlawful Actions on this Judicial Review

(i) The Agency's "Statement on Vouchers"

42. On March 25, 2020, at approximately the same time as the orders and determinations of the Agency on March 25, 2020 (above), the Agency posted a "Statement on Vouchers" [**Statement**] on its website.

43. The Statement makes no reference to the names of the appointed members of the Agency. The contents of the Statement are excerpted in full below.

> The COVID-19 pandemic has caused major disruptions in domestic and international air travel.
>
> For flight disruptions that are outside an airline's control, the Canada Transportation Act and Air Passenger Protection Regulations only require that the airline ensure passengers can complete their itineraries. Some airlines' tariffs provide for refunds in certain cases, but may have clauses that airlines believe relieve them of such obligations in force majeure situations.
>
> The legislation, regulations, and tariffs were developed in anticipation of relatively localized and short-term disruptions. None contemplated the sorts of worldwide mass flight cancellations that have taken place over recent weeks as a result of the pandemic. It's important to consider how to strike a fair and sensible balance between passenger protection and airlines' operational realities in these extraordinary and unprecedented circumstances.
>
> On the one hand, passengers who have no prospect of completing their planned itineraries with an airline's assistance should not simply be out-of-pocket for the cost of cancelled flights. On the other hand, airlines facing huge drops in passenger volumes and revenues should not be expected to take steps that could threaten their economic viability.

> While any specific situation brought before the CTA will be examined on its merits, the CTA believes that, generally speaking, an appropriate approach in the current context could be for airlines to provide affected passengers with vouchers or credits for future travel, as long as these vouchers or credits do not expire in an unreasonably short period of time (24 months would be considered reasonable in most cases).
>
> The CTA will continue to provide information, guidance, and services to passengers and airlines as we make our way through this challenging period.

The French version of the Statement is attached and marked as **Exhibit "L"**. The English version of the Statement is attached and marked as **Exhibit "M"**.

44. I have long been recognized as a stakeholder for passenger rights. Since I was not informed by the Agency about the Statement beforehand and I could not find any indication of any consultation on the Statement, I believe that the Agency's Statement was issued without any input or submissions from the passengers' perspective.

45. On the other hand, based on the email sent by Westjet to a passenger, Mr. Jeff Chamberlain (below), I believe that the Statement was the culmination of co-operation between the Agency and air carriers, with extensive input from air carriers in the absence of passengers.

> We recognize that the cancellation of flights and the current economic uncertainty for amny of our guests has created a great deal of frustration. A viable and consistent decision was reached in conjunction with the Canada Transportation Agency regarding the refund of itineraries immediately affected by the COVID-19 crisis period.
>
> We appreciate that your view is that the Canadian Transportation Agency has issued two different initiatives however they act as the governing agency for all Canadian agencies and we operate within the policies that they set out.
>
> We assure you that should future discussions result in an alter-

> nate policy adjustment that you will be contacted via email to advise you of such.
>
> [Emphasis added.]

A copy of the email that Westjet sent to Mr. Chamberlain on April 5, 2020, which Mr. Chamberlain provided to me, is attached and marked as **Exhibit "N"**.

(ii) The Agency's COVID-19 Agency Page

46. On March 18, 2020, the Agency posted to their internet website a page dedicated to COVID-19 matters [**COVID-19 Agency Page**].

47. On March 25, 2020, I believe at approximately the same time as the posting of the Statement, the COVID-19 Agency Page was updated to include four references to the Statement and a URL linking to the Statement.

> **Air Passenger Protection Obligations During COVID-19 Pandemic**
>
> [...]
>
> In addition to the APPR, carriers must also follow their tariffs. In light of the COVID-19 Pandemic, CTA has issued a Statement on Vouchers.
>
> **Delays and Cancellations**
>
> [...]
>
> The CTA has identified a number of situations related to the COVID-19 pandemic that are considered outside the airline's control. These include:
>
> - flight disruptions to locations that are covered by a government advisory against travel or unnecessary travel due to COVID-19;
> - employee quarantine or self-isolation due to COVID-19; and
> - additional hygiene or passenger health screening processes put in place due to COVID-19.

> Airlines may make decisions to cancel or delay flights for other reasons. Whether these situations are within or outside the airline's control would have to be assessed on a case-by-case basis.
>
> **Airline obligations**
>
> [...]
>
> **Situations outside airline control (including COVID-19 related situations mentioned above)**
>
> In these situations, airlines must:
>
> - Rebook passengers [...]
>   - Please refer to the CTA's Statement on Vouchers
>
> [...]
>
> **Situations within airline control**
>
> In these situations, airlines must:
>
> - Rebook passengers [...]
>   - Please refer to the CTA's Statement on Vouchers
>
> [...]
>
> **Situations within airline control, but required for safety**
>
> In these situations, airlines must:
>
> - Rebook passengers [...]
>   - Please refer to the CTA's Statement on Vouchers
>
> [...]

A copy of the French version of the COVID-19 Agency Page, entitled "Information importante pour les voyageurs pour la periode de la COVID-19," is attached and marked as **Exhibit "O"**. A copy of the English version of the COVID-19 Agency Page, entitled "Important Information for Travellers During COVID-19," is attached and marked as **Exhibit "P"**.

(iii) The Agency's Usage and Dissemination of the "Statement on Vouchers"

48. Based on my experience that the CTA typically repeats template answers to passengers, and on comments from passengers on the APR Facebook Group that I believe to be true, I believe that after the Agency's posting of the Statement and updating of the COVID-19 Agency Page with specific references to the Statement, the Agency took it upon itself to disseminate those publications to as many passengers as possible, as outlined in the examples below.

49. On March 25, 2020, the Agency responded to public Twitter tweets from passengers using the following text:

> Good afternoon, please refer to this link that will answer your question: https://otc-cta.gc.ca/eng/statement-vouchers Thank you. CTA social media

A copy of the Agency's tweets on March 25, 2020 are attached and marked as **Exhibit "Q"**.

50. Twitter also permits account holders to privately respond to messages. I do not know if the Agency privately sent the Statement to passengers.

51. Between March 20 to 27, 2020, the Agency was responding to inquiries from a passenger named Tammy Pedersen. On March 20, 2020 at 1:08AM, Ms. Pedersen asked the Agency about her rights to a refund when Swoop is cancelling the flight, without reference to the COVID-19 situation:

> Hello,
>
> I booked a flight with Swoop Airlines for next month and they are cancelling the flight and only offering me a future credit. The flight is from Abbotsford, B.C. to Las Vegas, Nevada and return.
>
> Am I not entitled to a refund back to my card?
>
> Thank you,

52. On March 20, 2020 at 7:43AM, the Agency replied and referred to the COVID-19 situation. The Agency then cited to Ms. Pedersen material portions of Determination No. A-2020-42 (Exhibit "H") relating to the relaxing of an air carriers' obligation to pay the minimum compensation under the *APPR* and that the air carrier "would have to make sure the passenger completes the itinerary."

53. On March 20, 2020 at 11:25AM, Ms. Pedersen wrote back to the Agency indicating she did not understand the Agency's answer. Ms. Pedersen specifically inquired what her rights would be if the air carrier is unable to complete her itinerary, which reads as follows:

> Hello,
>
> Thank you for your response, but I don't understand the answer.
>
> "However, they would have to make sure the passenger completes their itinerary." If the carrier doesn't - what form of compensation am I entitled to? A refund in the form of a future credit or a refund in the original form of payment?
>
> I have them my money in exchange for a service they are unable to provide. This is also outside of my control and a financial burden to me. All I want is my money returned.
>
> Any info/clarification would be appreciated.
>
> Thank you.

54. On March 27, 2020 at 10:25AM, the Agency responded to Ms. Pedersen's inquiry from March 20, 2020 with a copy of material portions of the Statement as follows:

> Hello Tammy,
>
> Thanks for following up.
>
> For flight disruptions that are outside an airline's control, the Canada Transportation Act and Air Passenger Protection Regulations only require that the airline ensure passengers can com-

> plete their itineraries. Some airlines' tariffs provide for refunds in certain cases, but may have clauses that may relieve the airline of such obligations in force majeure situations.
>
> While any specific situation brought before the CTA will be examined on its merits, the CTA believes that, generally speaking, an appropriate approach in the current context could be for airlines to provide affected passengers with vouchers or credits for future travel, as long as these vouchers or credits do not expire in an unreasonably short period of time (24 months would be considered reasonable in most cases).

55. A copy of the email chain between the Agency and Ms. Pedersen between March 20 to 27, 2020, provided to me by Ms. Pedersen, is attached and marked as **Exhibit "R"**.

56. On March 27, 2020, another passenger named Ms. Jennifer Mossey received from the Agency a similar email as Ms. Pedersen that repeats the Statement. The Agency's response did not answer Ms. Mossey's concern about Sunwing initially agreeing to a refund pursuant to their own policies, only to change the policy days after and deny any refunds. In particular, the Agency provided a generic response as follows:

> [...]
>
> The CTA has taken steps to address the major impact that the COVD-19 pandemic is having on the airlines industry by making temporary exemptions to certain requirements of the Air Passenger Protection Regulations (APPR). These exemptions apply to flight disruptions that occur from March 13, 2020 until June 30, 2020.
>
> [...]
>
> You should first contact your airline to try and resolve the issues you have raised. Given circumstances, please be patient and provide your airline time to respond to you ? a minimum of 30 days. If you do not hear back from your airline, or you are dissatisfied with the response you receive, you may file a complaint with the CTA.

> If you decide to file, or have already filed, a complaint with the CTA, please note that in light of the extraordinary circumstances resulting from the COVID-19 pandemic, the CTA has decided to temporarily pause communications with airlines on complaints against them. This includes all new complaints received, as well as those currently in the facilitation process. The pause is currently set to continue until June 30, and is aimed at allowing the airlines to focus on immediate and urgent operational demands, like getting Canadians home.
>
> Also, effective March 25, 2020, the deadline for a carrier to respond to claims filed by passengers for payment of the compensation for inconvenience is suspended until June 30, 2020 (or any further period that the Agency may order). Once the suspension is over, carriers will have 120 days to respond to claims received before or during the suspension.
>
> Rest assured that once the pause is lifted, we will deal with every complaint. The delay will not change the outcome of our review.

A copy of the exchange between the Agency and Ms. Mossey, provided to me by Ms. Mossey, is attached and marked as **Exhibit "S"**.

57. Based on my interactions with numerous passengers and my understanding of the Agency's usual practice of giving boilerplate answers, I believe that many passengers that contacted the Agency would have received similar generic responses from the Agency.

58. Based on my experience of managing the APR Facebook Group, I believe that many passengers rely on the APR Facebook Group for information and/or guidance as a reliable resource when the passengers cannot receive satisfactory resolution or assistance from the air carrier, as demonstrated in Ms. Mossey's situation above.

(iv) The Agency's Own *Code of Conduct*

59. Since the Agency is a quasi-judicial tribunal that engages in the adjudication of disputes between air carriers and passengers, the Agency published a *Code of Conduct* for its members. The *Code of Conduct* provides, in part, that:

> (40) Members shall not publicly express an opinion about any past, current, or potential cases or any other issue related to the work of the Agency, and shall refrain from comments or discussions in public or otherwise that may create a reasonable apprehension of bias.

A copy of the Agency's *Code of Conduct* is attached and marked as **Exhibit "T"**.

F. Immediate Prejudice to the Passengers Arising from the Agency's Unlawful Actions

(i) Air Carriers and Travel Agents Misrepresenting the Effects of the Agency's "Statement on Vouchers" to Passengers

60. On March 27, 2020, Sunwing issued a letter that was distributed to travel agents, including an accompanying FAQ, both of which contained the text below:

> Initially, we offered customers booked on our flights during this suspension the choice between a future travel credit valid for 12 months and a full cash refund. However, after the Government of Canada's non-essential travel advisory, we adjusted our policy to be aligned with all other Canadian airlines and tour operators. This decision is also consistent with the ruling made by the Canadian Transportation Agency on March 26, 2020.
>
> [Emphasis added.]

A copy of the letter to the travel agents is attached and marked as **Exhibit "U"**.

A copy of the accompanying FAQ is attached and marked as **Exhibit "V"**.

61. On March 31, 2020, WestJet communicated with a passenger, Ms. Steffany Christopher, via Facebook Messenger, stating that:

> We understand the challenges our guest have been faced with. However, the Canadian Transport Agency has approved us to issue refunds to the travel bank. [...]
>
> [Emphasis added.]

A screenshot of those Facebook messages, provided to me by Ms. Christopher, is attached and marked as **Exhibit "W"**.

62. On April 1, 2020, Air Canada wrote in response to an email from Mr. David Foulkes, a passenger, demanding a refund:

> [...] Hello / Bonjour Mr. Foulkes,
>
> I would like to attach two links from the Canadian Transportation Agency website as they may help clarify some of your questions. The CTA has issued temporary exemptions to the Air Passenger Protection Regulations regarding refund request and extension of ticket validity.
>
> https://www.otc-cta.gc.ca/eng/content/canadian-transportation-agency-issues -temporary-exemptions-certain-air-passenger-protection
>
> https://otc-cta.gc.ca/eng/statement-vouchers [...]
>
> [Emphasis added.]

A copy of the email chain between Air Canada and Mr. Foulkes, provided to me by Mr. Foulkes, is attached and marked as **Exhibit "X"**.

63. On March 27, 2020, Air Canada wrote in response to an email from Mr. Ahren Belisle, a passenger, demanding a refund:

> As mention previously the maximum we can provide is to keep your ticket as a credit for 24 months (2 years) [...] The policy we follow at the moment is supported by the CTA (Canadian air transportation agency).
>
> [Emphasis added.]

A copy of the email chain between Air Canada and Mr. Belisle, provided to me by Mr. Belisle, is attached and marked as **Exhibit "Y"**.

64. On March 26, 2020, Air Transat responded to a personal message on Twitter from a passenger, Mr. Adam Bacour, as follows:

> [...] We strongly believe that the 24-month credit offered to our customers to compensate for their cancelled travel plans is a flexible proposition in these exceptional circumstances [...] In this regard, the Canadian Transportation Agency recently issued an opinion on the subject, which supports our decision and emphasizes that the solution proposed by Transat, among others, is appropriate given the current situation.
>
> [Emphasis added.]

A screenshot of that Twitter message, which was provided to me by Mr. Bacour, is attached and marked as **Exhibit "Z"**.

65. On March 28, 2020, Swoop responded to an email request for a refund from a passenger, Ms. Susan Simpson, as follows:

> We do understand that a refund would be preferred, however we are only offering Swoop credits at this time for cancelled flights.
>
> On March 25, the Canadian Transportation Agency clarified its position on providing credit for travel due to the uncertain times we are in. This clarification stated that airlines could offer travel credit for cancelled flights, and the credit should be valid for a reasonable amount of time, which was indicated to be 24 months. If you would like more information please visit the CTA's website here: https://otc-cta.gc.ca/eng/statement-vouchers

A copy of the email chain between Swoop and Ms. Simpson, which was provided to me by Ms. Simpson, is attached and marked as **Exhibit "AA"**.

66. On March 25, 2020, a travel agency based in Ontario named TravelOnly, made the following Facebook post on their Facebook page, citing the Agency's Statement as follows:

> To all of our amazing clients - thank you for putting your trust in TravelOnly and our amazing advisors. Over the course of the past two weeks, our advisors have been on hold for upwards of 12+ hours to help you get home or cancel or rebook your trips. No doubt this will continue for the foreseeable future – we are here for you and hope that you will remember the value of using a travel advisor in the future!
>
> Some of you have reached out to enquire how the new Air Passenger Protection Regulations would impact the requirements of airlines when flights were cancelled and/or rebooked.
>
> The Canadian Transportation Agency has provided a statement which provides direction for you and your travel advisor regarding the issuing of future travel vouchers. In summary, the CTA believes that providing affected passengers with vouchers or credits for future travel is appropriate and reasonable. We understand that you may have questions on your voucher and how to use it for future travel and we encourage you to reach out to your TravelOnly advisor or our offices for assistance at any time. Please note that most vouchers will be issued within the next 4-6 weeks depending on the airline and travel supplier.
>
> [Emphasis added.]

A copy of the Facebook post is attached and marked as **Exhibit "AB"**.

(ii) Other Entities Mischaracterizing the Agency's "Statement on Vouchers"

67. On March 31, 2020, the Travel Industry Council of Ontario (the organization that regulates travel agents in Ontario) released a bulletin targeted towards licensed Ontario travel agents entitled "Registrar Bulletin: Vouchers or Similar Documents." The article, suggesting that the Travel Industry Council of Ontario understands the Agency's Statement as a form of approval for the issuance of vouchers, states in part as follows:

> **If you sold only air transportation on an airline regulated by the Canadian Transportation Agency (CTA):**
>
> The CTA has indicated that to sustain the economic viability of the airline industry, the airlines under their jurisdiction may issue vouchers for future travel in lieu of refunds. Please click here for the CTA's statement. Please note that TICO does not have jurisdiction over airlines, which are federally regulated.

A copy of the article is attached and marked as **Exhibit "AC"**.

68. On April 3, 2020, a news article entitled "Tactful and tough, agents have effective strategies for dealing with refund demands" was published in Travel Week, a weekly publication targeting travel agents. The news article referred to the Agency's Statement and outlined an example of how travel agents can utilize the Statement to cause passengers to accept a voucher, in part, as follows:

> [...] On March 25 the Canadian Transportation Agency waded into the fray, issuing a special statement saying that while specific cases may get further analysis, in general, vouchers are appropriate in these extraordinary circumstances.
>
> [...]
>
> A letter that Vanderlubbe and his team have ready for any client making persistent refund requests or launching credit card chargebacks is strongly worded but fair, and explains the situation from the retailer's side. The letter cites the CTA statement and reads, in part: "We too are experiencing financial damage from the COVID19 pandemic, paying our staff for more than 5 weeks now with little or no revenue coming, in order to help our customers return home, process future travel credits, and we will be re-booking for months later."
>
> The letter also notes: "The Federal Government has issued a plain language statement which you can read from the link below [https://otc-cta.gc.ca/eng/statement-vouchers] that states that, as far as the air travellers protection regime goes, it was never intended to cover acts of God, or a force majeure situation. In short, they state that a future travel credit for 2 years is sufficient compensation under this circumstance.

> "Further, the Travel Industry Council of Ontario, that administers the Ontario Travel Industry Act, has issued a statement that 'under Ontario law, there is no requirement for a travel company to refund or offer alternative travel services if a government travel advisory is in effect'. In short, our suppliers are not even obligated to provide a future travel credit, but they are.
>
> [*sic*] Your chargeback through your credit card is unreasonable given that you are being offered a travel credit good for two years, and that you had the opportunity to purchase cancellation insurance at the time of booking, and you declined to do so.
>
> [*sic*] We ask that you contact your credit card company and 'reverse the chargeback request'. We need evidence of this in order to process your future travel credit."
>
> [Emphasis added.]

A copy of the article is attached and marked as **Exhibit "AD"**.

(iii) Inconsistency with a Lawful Directive of the US Regulator

69. The United States Department of Transportation [**USDOT**] is the federal regulator of commercial US and foreign airlines that fly to, from, or within the United States. Unlike the Agency in Canada, the USDOT **does not** adjudicate or mediate disputes between passengers and the air carriers.

70. On April 3, 2020, the USDOT issued a formal enforcement notice, citing various legal authorities and signed by the USDOT Assistant General Counsel for Aviation Enforcement and Proceedings, entitled "Enforcement Notice Regarding Refunds by Carriers Given the Unprecedented Impact of the COVID-19 Public Health Emergency On Air Travel" [**USDOT Enforcement Notice**]. The USDOT Enforcement Notice specifies that:

> Although the COVID-19 public health emergency has had an unprecedented impact on air travel, the airlines' obligation to refund passengers for cancelled or significantly delayed flights remains unchanged.
>
> [Emphasis added.]

A copy of the USDOT Enforcement Notice is attached and marked as **Exhibit "AE"**.

(iv) The Statement's Impacts on Passengers

71. Based on various public statements made by the air carriers and information posted by passengers on the APR Facebook Group, which I believe to be true, I believe that the overwhelming majority of passengers whose travel was affected by COVID-19 have not received full refunds for their unused airfares.

72. Based on the experiences shared by passengers on the APR Facebook Group, which I believe to be true, I believe that the air carriers and/or travel agents are avoiding their obligations to refund passengers by presenting vouchers as the passengers' only viable option:

(a) Many passengers received an automatic template email from the air carrier and/or their travel agent indicating that either:

i. a voucher would be automatically issued to the passenger shortly and the passenger need not contact the air carrier or travel agent; or

ii. the passenger can elect between rebooking their flight or accepting a voucher, subject to conditions and expiry;

(b) Passengers who initiate contact with the air carrier and/or travel agent are being informed that their only options are:

i. rebooking their flight for a future date;

ii. accepting a voucher, subject to conditions and expiry; or

iii. receiving a partial refund, usually of less than 50% of the price originally paid, consisting only of the applicable taxes and fees, or after deduction of cancellation fees from the price originally paid.

73. Based on information posted by passengers on the APR Facebook Group that I believe to be true, and as demonstrated in the exhibits referred to above, after March 25, 2020, passengers that contacted air carriers or travel agents for a refund would have the Statement cited to the passengers as support for refusing issuing refunds.

74. On April 1, 2020, the Canadian Life and Health Insurance Association, a voluntary association representing 99 percent of Canada's life and health insurance business, published a press release entitled "Advisory: Travel cancellation insurance and airline vouchers or credits" that specifically relies on the Statement, suggesting that passengers may be unable to claim against their travel insurance policies as follows:

> [...] On March 25, 2020, the Canadian Transportation Agency updated its endorsement of the use of vouchers or credits as an appropriate approach for Canada's airlines as long as these vouchers or credits do not expire in an unreasonably short period of time.
>
> Travel insurers are advising policyholders that if you have been offered this type of full credit, or voucher for future use by an airline, train or other travel provider, in many instances, under the terms of your insurance policy you will not be considered to have suffered an insurable loss.
>
> [...]
>
> Disputes over refunds and credits should be directed to your travel service provider, transportation carrier or the Canadian Transportation Agency. [...] [Emphasis added.]

A copy of the press release is attached and marked as **Exhibit "AF".**

G. The CTA's Failure to Address Any of the Passengers' Prejudice from the "Statement on Vouchers"

75. On March 30, 2020, I sent a letter to the Agency on behalf of APR, specifically raising a concern that the Statement is misleading. APR specifically requested that the Agency remove the Statement by March 31, 2020. A copy of that letter is attached and marked as **Exhibit "AG"**.

76. On March 30, 2020, the Secretariat of the Agency sent an email acknowledging receipt of my letter of March 30, 2020. A copy of that acknowledgement email is attached and marked as **Exhibit "AH"**.

77. Until the time of affirming this Affidavit, the Agency has not responded to APR's letter of March 30, 2020, except for the acknowledgment email above. The Agency also did not remove the Statement, or make any modifications or clarifications to the Statement.

78. APR retained pro-bono counsel, Mr. Simon Lin who is also a director of APR, to issue the Notice of Application and bring this Motion to this Honourable Court to seek an injunction. A draft, unfiled copy of the Notice of Application is attached and marked as **Exhibit "AI"**.

AFFIRMED before me at the
City of Halifax, Nova Scotia
on April 7, 2020.

_____

_____
Dr. Gábor Lukács

Halifax, NS
Tel:
lukacs@AirPassengerRights.ca

This is **Exhibit "A"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on April 7, 2020

_____

Signature

Halifax, NS

AirPassengerRights.ca

lukacs@AirPassengerRights.ca

The *Transportation Modernization Act* (Bill C-49)

Submissions to the Standing Committee on Transport, Infrastructure and Communities

by *Air Passenger Rights*

September 2017

About *Air Passenger Rights*

Air Passenger Rights (APR) is an independent nonprofit network of volunteers, devoted to empowering travellers through education, advocacy, investigation, and litigation.

- **Educate** passengers about their rights and enforcement of those rights.
- **Advocate** for the enforcement of the existing rights of passengers and for better consumer protection for travel by air within, to, and from Canada.
- **Investigate and expose** anomalies affecting travellers, including, but not limited to: non-compliance of airlines with their own terms and conditions or the law; misinformation and deception of passengers by airlines; practices that put passengers' safety at risk; and collusion between the airline industry and regulatory or administrative bodies mandated to oversee the activities of airlines.
- **Litigate** to foster: compliance of airlines with their own terms and conditions and the law; conformity of the terms and conditions of airlines with the law; transparency, reasonableness, and legality of the actions of regulatory and administrative bodies in their dealings with passengers and airlines; and reasonable and correct interpretation of legislation affecting the rights of passengers.

APR was founded and is coordinated by Dr. Gábor Lukács, a Canadian air passenger rights advocate, who volunteers his time and expertise for the benefit of the travelling public.

Gábor Lukács, PhD (Founder and Coordinator)

Since 2008, Dr. Lukács has filed **more than two dozen successful complaints**[1] with the Canadian Transportation Agency (Agency), challenging the terms, conditions, and practices of air carriers, resulting in orders directing them to amend their conditions of carriage and offer better protection to passengers. He has also appeared before the Federal Court of Appeal, and successfully challenged the Agency's lack of transparancy and the reasonableness of the Agency's decisions.

In 2013, the Consumers' Association of Canada awarded Dr. Lukács its Order of Merit for singlehandedly initiating legal action resulting in the revision of Air Canada's unfair practices regarding overbooking. His advocacy in the public interest and expertise in the area of air passenger rights have also been recognized by both the Federal Court of Appeal[2] and the legal profession.[3]

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[1] See Appendix A.

[2] *Lukács v. Canada*, 2015 FCA 140 at para. 1; *Lukács v. Canada*, 2015 FCA 269 at para. 43; and *Lukács v. Canada*, 2016 FCA 174 at para. 6.

[3] Carlos Martins: Aviation Practice Area Review (September 2013), WHO'SWHOLEGAL.

Appendix

A. Final Decisions Arising from Dr. Lukács's Successful Complaints (Highlights)

1. *Lukács v. Air Canada*, Decision No. 208-C-A-2009;
2. *Lukács v. WestJet*, Decision No. 313-C-A-2010;
3. *Lukács v. WestJet*, Decision No. 477-C-A-2010
(leave to appeal denied, Federal Court of Appeal File No.: 10-A-41);
4. *Lukács v. WestJet*, Decision No. 483-C-A-2010
(leave to appeal denied, Federal Court of Appeal File No.: 10-A-42);
5. *Lukács v. Air Canada*, Decision No. 291-C-A-2011;
6. *Lukács v. WestJet*, Decision No. 418-C-A-2011;
7. *Lukács v. United Airlines*, Decision No. 182-C-A-2012;
8. *Lukács v. Air Canada*, Decision No. 250-C-A-2012;
9. *Lukács v. Air Canada*, Decision No. 251-C-A-2012;
10. *Lukács v. Air Transat*, Decision No. 248-C-A-2012;
11. *Lukács v. WestJet*, Decision No. 249-C-A-2012;
12. *Lukács v. WestJet*, Decision No. 252-C-A-2012;
13. *Lukács v. United Airlines*, Decision No. 467-C-A-2012;
14. *Lukács v. Porter Airlines*, Decision No. 16-C-A-2013;
15. *Lukács v. Air Canada*, Decision No. 204-C-A-2013;
16. *Lukács v. WestJet*, Decision No. 227-C-A-2013;
17. *Lukács v. Sunwing Airlines*, Decision No. 249-C-A-2013;
18. *Lukács v. Sunwing Airlines*, Decision No. 313-C-A-2013;
19. *Lukács v. Air Transat*, Decision No. 327-C-A-2013;
20. *Lukács v. Air Canada*, Decision No. 342-C-A-2013;
21. *Lukács v. Porter Airlines*, Decision No. 344-C-A-2013;
22. *Lukács v. British Airways*, Decision No. 10-C-A-2014;
23. *Lukács v. Porter Airlines*, Decision No. 31-C-A-2014;
24. *Lukács v. Porter Airlines*, Decision No. 249-C-A-2014;
25. *Lukács v. WestJet*, Decision No. 420-C-A-2014; and
26. *Lukács v. British Airways*, Decision No. 49-C-A-2016.

This is **Exhibit "B"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on April 7, 2020

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Signature

WHO'SWHOLEGAL

AVIATION PRACTICE AREA REVIEW

SEPTEMBER 2013

Carlos Martins of Bersenas Jacobsen Chouest Thomson Blackburn outlines recent developments in aviation law in Canada.

There have been a number of developments in Canada in the realm of aviation law that promise to make for interesting times in the months ahead. In this review, we will consider some of these decisions, their implications and how they may play out in the coming year.

Warsaw/Montreal Liability

On the airline liability front, the Supreme Court of Canada will hear the appeal of the Federal Court of Appeal's decision in *Thibodeau v Air Canada*, 2012 FCA 246. This case involves a complaint by Michel and Lynda Thibodeau, passengers on a series of Air Canada flights between Canada and the United States in 2009. On some of the transborder legs of those journeys, Air Canada was not able to provide the Thibodeaus with French-language services at check-in, on board the aircraft or at airport baggage carousels. The substantive aspect of the case is of limited interest to air carriers because the requirement that air passengers be served in both official languages applies only to Air Canada as a result of the Official Languages Act (Canada), an idiosyncratic piece of legislation that continues to apply to Air Canada even though it was privatised in 1988.

However, from the perspective of other air carriers, the most notable facet of the Supreme Court's decision will be whether that Court will uphold the Federal Court of Appeal's "strong exclusivity" interpretation of the Warsaw/Montreal Conventions. If it does, it will incontrovertibly bring the Canadian law in line with that of the United States and the United Kingdom – meaning that passengers involved in international air travel to which either of the Conventions apply are restricted to only those remedies explicitly provided for in the Conventions. At present, the Federal Court of Appeal's decision in *Thibodeau* provides the most definitive statement to date that "strong exclusivity" is the rule in Canada.

YQ Fares Class Action

The battle over "YQ Fares" is expected to continue in a British Columbia class action. The case relates to the practice of several air carriers identifying the fuel surcharge levied on their tickets in a manner that may cause their passengers to believe that these charges are taxes collected on behalf of a third party when, in fact, fuel surcharges are collected by the air carrier for its own benefit. In the British Columbia action, the plaintiffs complain that this practice contravenes the provincial consumer protection legislation which provides that service providers shall not engage in a "deceptive act or practice".

Last year, an issue arose as to whether air carriers can be subject to the provincial legislation given that, in Canada, matters relating to aeronautics are in the domain of the federal government. Most recently, in *Unlu v Air Canada*, 2013 BCCA 112, the British Columbia Court of Appeal held that the complaint should be allowed to proceed on the basis that, among other things, there was no operational conflict between the workings of the provincial legislation and the regime imposed under the federal Air Transportation Regulations, SOR/88-58, that deal with airfare advertising. Leave to appeal the Court of Appeal's decision to the Supreme Court of Canada was denied in August 2013.

Regulatory/Passenger Complaints

In the consumer protection landscape, for the last several years, the field has largely been occupied by Gabor Lukács, a Canadian mathematician who has taken an interest in challenging various aspects of the tariffs filed by air carriers with the regulator, the Canadian Transportation Agency (the Agency). The majority of Mr Lukács' complaints centre on the clarity and reasonableness of the content of the filed tariffs, as well as the extent to which air carriers are applying their tariffs, as filed, in the ordinary course of business.

Mr Lukács' efforts have created a significant body of jurisprudence from the Agency – to the extent that his more recent decisions often rely heavily upon principles enunciated in previous complaints launched by him.

Since 2012, Mr Lukács has been involved in complaints arising from, among other things:

- air carriers' online and airport communications to the public as to the extent to which baggage claims involving "wear and tear" must be paid (*Lukács v United Airlines*, CTA Decision Nos. 182/200-C-A-2012);

- lack of compliance of tariff liability provisions with the Montreal liability regime (*Lukács v Porter Airlines*, CTA Decision No. 16-C-A-2013);

• the reasonableness of imposing releases of liability as a precondition for the payment of compensation provided for in a tariff (*Lukács v WestJet*, CTA Decision No. 227-C-A-2013);

• the reasonableness of air carriers engaging in overselling flights for commercial reasons (*Lukács v Air Canada*, CTA Decision No. 204-C-A-2013);

• the amount of denied boarding compensation to be paid to involuntarily bumped passengers in the event of a commercial overbooking (*Lukács v Air Canada*, CTA Decision No. 342-C-A-2013);

• the amount of compensation to be paid to passengers who miss their flight as a result of an early departure (*Lukács v Air Transat*, CTA Decision No. 327-C-A-2013); and

• the use of cameras by passengers onboard aircraft (*Lukács v United Airlines*, CTA Decision No. 311-C-A-2013)

It is expected that, in 2014, Mr Lukács will continue in his quest to ensure that air carrier tariffs are reasonable, clear and faithfully applied.

Although it may not be initiated by Mr Lukács, we expect that, in 2014, the Agency will consider the issue of whether air carriers should be able to charge a fee for booking a specific seat for a child travelling with a parent or guardian.

Regulatory/ Notices to Industry

Wet Leasing

On 30 August 2013, the Agency released its new policy on wet leasing of foreign aircraft. It applies to operators who wet lease foreign aircraft for use on international passenger services for arrangements of more than 30 days. The key changes are that, in order for the Agency to approve such an arrangement:

• the number of aircraft leased by an operator is capped at 20 per cent of the number of Canadian-registered aircraft on the lessees' Air Operator Certificate at the time the application was made;

• small aircraft are excluded from the number of Canadian-registered aircraft described above; and

• small aircraft is defined as an aircraft equipped for the carriage of passengers and having a certificated maximum carrying capacity of not more than 39 passengers.

In addition to the above, the lessee is required to provide a rationale as to why the wetlease arrangement (or its renewal) is necessary. The Agency has stated that it:

• will not deny an application solely on the basis of the rationale for the use of foreign aircraft with flight crew, as long as the cap is not exceeded; and

• may renew approvals of wet-lease applications of more than 30 days as long as the cap is not exceeded.

There is some flexibility for short-term arrangements and where unexpected events require an exception.

All-Inclusive Fare Advertising

In December 2012, the Agency approved new regulations with respect to all-inclusive fare advertising. Initially, the regulations were enforced through a "proactive and collaborative educational approach". The Agency has recently released a notice to the industry advising that it will now take a firmer stance in ensuring compliance. It has recently issued administrative monetary penalties (AMPs) against two online travel retailers for not advertising the total all-inclusive price on their online booking systems. In one case, the AMP amounted to $40,000 due to the lack of initial response from the retailer. In another, the AMP was $8,000 in a situation where that retailer complied in the case of booking through its main website, but not with respect to booking on its mobile website.

Baggage Rules

The Agency has recently completed a consultation process with the industry and with the public with respect to the issue of baggage rules. The issues under contemplation include à la carte pricing, regulatory change and carriers' attempts to further monetize the transportation of baggage. At present, there are two regimes being used in Canada: one of which was adopted by the International Air Transport Association (Resolution 302) and the other by way of recently promulgated

regulations to be enforced by the United States Department of Transportation (14 CFR part 399.87). The Agency has gone on the record to state that it expects to make a decision on the appropriate approach to apply for baggage being transported to/from Canada in the fall of 2013.

Defining the Boundaries of Regulation

In the arena of business aviation, the Appeal Panel of the Transportation Appeal Tribunal of Canada is expected to revisit the extent to which the Canadian Transportation Agency should regulate business-related aviation in Canada. The facts arise from the practice of a casino based in Atlantic City, New Jersey, offering voluntary air transfers to the casino to some of its most valued clients. In evidence that has already been led in these proceedings, the casino has asserted that the complimentary flights are at the sole discretion of the casino; no customer was entitled to such a service; and the provision of the flights is not based on the amount spent by the customers at the casino.

The core of the issue is whether the casino requires a licence from the Agency in order to offer this benefit to its customers. Under the applicable legislation, those who offer a "publicly available air service" in Canada require such a licence and are subject to all of the requirements imposed on licensees. *In Marina District Development Company v Attorney General of Canada*, 2013 FC 800, the Federal Court was asked by the casino, on a judicial review, to overturn the Appeal's panel's previous finding that the casino's air service did, in fact, trigger the Agency's oversight. The Federal Court found that the legal test imposed by the Appeal Panel for determining whether an air service was publicly available bordered on tautological but declined to answer the question itself. The matter was sent back to the Appeal Panel for reconsideration. A new decision is expected in 2014. In our view, it is likely that the matter will be sent back to the Federal Court, possibly before the end of 2014 as well, regardless of which party prevails.

This is **Exhibit "C"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on April 7, 2020

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Signature

Federal Court of Appeal | Cour d'appel fédérale

Date: 20200303

Docket: A-311-19

Ottawa, Ontario, March 3, 2020

Present: **NEAR J.A.**

BETWEEN:

INTERNATIONAL AIR TRANSPORT ASSOCIATION, AIR TRANSPORTATION ASSOCIATION OF AMERICA DBA AIRLINES FOR AMERICA, DEUTSCHE LUFTHANSA AG, SOCIÉTÉ AIR FRANCE, S.A., BRITISH AIRWAYS PLC, AIR CHINA LIMITED, ALL NIPPON AIRWAYS CO., LTD., CATHAY PACIFIC AIRWAYS LIMITED, SWISS INTERNATIONAL AIRLINES LTD., QATAR AIRWAYS GROUP Q.C.S.C., AIR CANADA, PORTER AIRLINES INC., AMERICAN AIRLINES INC., UNITED AIRLINES INC., DELTA AIR LINES INC., ALASKA AIRLINES INC., HAWAIIAN AIRLINES, INC. and JETBLUE AIRWAYS CORPORATION

Appellants

and

CANADIAN TRANSPORTATION AGENCY and THE ATTORNEY GENERAL OF CANADA

Respondents

and

DR. GÁBOR LUKÁCS

Intervener

ORDER

WHEREAS Dr. Gábor Lukács moves for an order permitting him to intervene in this appeal;

AND WHEREAS the Court has read the proposed intervener's motion record, the appellants' responding motion record in response to the motion to intervene, correspondence from the respondent Canadian Transportation Agency, and the proposed intervener's reply;

AND WHEREAS the appellants oppose the proposed intervener's motion, and the respondents take no position;

AND WHEREAS the Court has considered the factors relevant to granting leave to intervene under rule 109 of the *Federal Courts Rules*, SOR/98-106;

AND WHEREAS the Court is of the view that the case engages the public interest, that the proposed intervener would defend the interests of airline passengers in a way that the parties cannot, that the interests of justice favour allowing the proposed intervention in the appeal, and that the proposed intervention would be of assistance to the Court in deciding the appeal;

AND WHEREAS the Court is nevertheless of the view that the proposed intervention in the motion for a stay is not in the interests of justice, and would not be of assistance to the Court;

THIS COURT ORDERS that:

1. Dr. Lukács's motion to intervene in this appeal is granted in part. Dr. Lukács may intervene in the appeal subject to the terms described below. Dr. Lukács may not intervene in the motion for a stay.

2. The style of cause shall be amended by including Dr. Lukács as an intervener as appears in this Order, and shall be used on all further documents in this appeal.

3. Dr. Lukács's intervention in the appeal shall be subject to the following terms:

    i. Dr. Lukács may serve and file a memorandum of fact and law of no more than twenty (20) pages with respect to the appeal within twenty (20) days of the service of the Respondents' memoranda;

    ii. Dr. Lukács shall have the right to make oral submissions at the hearing of the appeal for no more than twenty (20) minutes; and

    iii. Dr. Lukács may not seek costs, nor shall costs be awarded against him.

"D. G. Near"
J.A.

This is **Exhibit "D"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on April 7, 2020

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Signature

Form 4001
Articles of Incorporation
Canada Not-for-profit Corporations Act (NFP Act)

Formulaire 4001
Statuts constitutifs
Loi canadienne sur les organisations à but non lucratif (Loi BNL)

1 Corporate name
Dénomination de l'organisation

Air Passenger Rights

2 The province or territory in Canada where the registered office is situated
La province ou le territoire au Canada où est maintenu le siège

NS

3 Minimum and maximum number of directors
Nombres minimal et maximal d'administrateurs

Min. 3 Max. 9

4 Statement of the purpose of the corporation
Déclaration d'intention de l'organisation

See attached schedule / Voir l'annexe ci-jointe

5 Restrictions on the activities that the corporation may carry on, if any
Limites imposées aux activités de l'organisation, le cas échéant

See attached schedule / Voir l'annexe ci-jointe

6 The classes, or regional or other groups, of members that the corporation is authorized to establish
Les catégories, groupes régionaux ou autres groupes de membres que l'organisation est autorisée à établir

See attached schedule / Voir l'annexe ci-jointe

7 Statement regarding the distribution of property remaining on liquidation
Déclaration relative à la répartition du reliquat des biens lors de la liquidation

See attached schedule / Voir l'annexe ci-jointe

8 Additional provisions, if any
Dispositions supplémentaires, le cas échéant

See attached schedule / Voir l'annexe ci-jointe

9 **Declaration:** I hereby certify that I am an incorporator of the corporation.
Déclaration : J'atteste que je suis un fondateur de l'organisation.

Name(s) - Nom(s)

Gabor Lukacs

Signature

Gabor Lukacs

A person who makes, or assists in making, a false or misleading statement is guilty of an offence and liable on summary conviction to a fine of not more than $5,000 or to imprisonment for a term of not more than six months or to both (subsection 262(2) of the NFP Act).

La personne qui fait une déclaration fausse ou trompeuse, ou qui aide une personne à faire une telle déclaration, commet une infraction et encourt, sur déclaration de culpabilité par procédure sommaire, une amende maximale de 5 000 $ et un emprisonnement maximal de six mois ou l'une de ces peines (paragraphe 262(2) de la Loi BNL).

You are providing information required by the NFP Act. Note that both the NFP Act and the *Privacy Act* allow this information to be disclosed to the public. It will be stored in personal information bank number IC/PPU-049.

Vous fournissez des renseignements exigés par la Loi BNL. Il est à noter que la Loi BNL et la *Loi sur les renseignements personnels* permettent que de tels renseignements soient divulgués au public. Ils seront stockés dans la banque de renseignements personnels numéro IC/PPU-049.

Schedule / Annexe

Purpose Of Corporation / Déclaration d'intention de l'organisation

1. To educate air passengers and the public at large as to their rights and the means for the enforcement of these rights, by researching and making available the results of such research on the matter of the law relating to air passenger rights on domestic and international flights.

2. To act as a liaison between other public interest or citizens' groups engaged in public interest advocacy.

3. To assist in and promote the activity of public interest group representation throughout Canada and elsewhere.

4. To make representations to governing authorities on behalf of the public at large and on behalf of public interest groups with respect to matters of public concern and interest with respect to air passenger rights, and to teach public interest advocacy skills and techniques.

Schedule / Annexe

Restrictions On Activities / Limites imposées aux activités de l'organisation

The Corporation shall have all the powers permissible by the Canada Not-for-profit Corporations Act, save as limited by the by-laws of the Corporation.

Nothing in the above purposes, however, shall be construed or interpreted as in any way empowering the Corporation to undertake functions normally carried out by barristers and solicitors.

Schedule / Annexe
Classes of Members / Catégories de membres

There shall be two classes of members: Ordinary Members and voting General Members. The criteria for admission to both classes shall be governed by the by-laws of the Corporation.

Schedule / Annexe

Distribution of Property on Liquidation / Répartition du reliquat des biens lors de la liquidation

Upon liquidation, the property of the Corporation shall be disposed of by being donated to an eligible donee, as defined in the Income Tax Act (Canada).

Schedule / Annexe
Additional Provisions / Dispositions supplémentaires

a) Any amendment or repeal of the Corporation's By-Laws shall require confirmation by a Special Resolution of two-thirds of the General Membership prior to taking effect.

b) The Corporation shall be carried on without the purpose of gain for its Members, and any profits or other accretions shall be used in furtherance of its purposes.

c) Directors shall serve without remuneration, and no Director shall directly or indirectly receive any profit from his or her position as such, provided that Directors may be reimbursed for reasonable expenses incurred in the performance of their duties.

This is **Exhibit "E"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on April 7, 2020

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Signature

World Health Organization

WHO Director-General's opening remarks at the media briefing on COVID-19 - 11 March 2020

11 March 2020

Good afternoon.

In the past two weeks, the number of cases of COVID-19 outside China has increased 13-fold, and the number of affected countries has tripled.

There are now more than 118,000 cases in 114 countries, and 4,291 people have lost their lives.

Thousands more are fighting for their lives in hospitals.

In the days and weeks ahead, we expect to see the number of cases, the number of deaths, and the number of affected countries climb even higher.

WHO has been assessing this outbreak around the clock and we are deeply concerned both by the alarming levels of spread and severity, and by the alarming levels of inaction.

We have therefore made the assessment that COVID-19 can be characterized as a pandemic.

Pandemic is not a word to use lightly or carelessly. It is a word that, if misused, can cause unreasonable fear, or unjustified acceptance that the fight is over, leading to unnecessary suffering and death.

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Describing the situation as a pandemic does not change WHO's assessment of the threat posed by this virus. It doesn't change what WHO is doing, and it doesn't change what countries should do.

We have never before seen a pandemic sparked by a coronavirus. This is the first pandemic caused by a coronavirus.

And we have never before seen a pandemic that can be controlled, at the same time.

WHO has been in full response mode since we were notified of the first cases.

And we have called every day for countries to take urgent and aggressive action.

We have rung the alarm bell loud and clear.

===

As I said on Monday, just looking at the number of cases and the number of countries affected does not tell the full story.

Of the 118,000 cases reported globally in 114 countries, more than 90 percent of cases are in just four countries, and two of those – China and the Republic of Korea - have significantly declining epidemics.

81 countries have not reported any cases, and 57 countries have reported 10 cases or less.

We cannot say this loudly enough, or clearly enough, or often enough: all countries can still change the course of this pandemic.

If countries detect, test, treat, isolate, trace, and mobilize their people in the response, those with a handful of cases can prevent those cases becoming clusters, and those clusters becoming community transmission.

Even those countries with community transmission or large clusters can turn the tide on this virus.

Several countries have demonstrated that this virus can be suppressed and controlled.

The challenge for many countries who are now dealing with large clusters or community transmission is not whether they **can** do the same – it's whether they **will**.

Some countries are struggling with a lack of capacity.

Some countries are struggling with a lack of resources.

Some countries are struggling with a lack of resolve.

We are grateful for the measures being taken in Iran, Italy and the Republic of Korea to slow the virus and control their epidemics.

We know that these measures are taking a heavy toll on societies and economies, just as they did in China.

All countries must strike a fine balance between protecting health, minimizing economic and social disruption, and respecting human rights.

WHO's mandate is public health. But we're working with many partners across all sectors to mitigate the social and economic consequences of this pandemic.

This is not just a public health crisis, it is a crisis that will touch every sector – so every sector and every individual must be involved in the fight.

I have said from the beginning that countries must take a whole-of-government, whole-of-society approach, built around a comprehensive strategy to prevent infections, save lives and minimize impact.

Let me summarize it in four key areas.

First, prepare and be ready.

Second, detect, protect and treat.

Third, reduce transmission.

Fourth, innovate and learn.

I remind all countries that we are calling on you to activate and scale up your emergency response mechanisms;

Communicate with your people about the risks and how they can protect themselves – this is everybody's business;

Find, isolate, test and treat every case and trace every contact;

Ready your hospitals;

Protect and train your health workers.

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And let’s all look out for each other, because we need each other.

===

There’s been so much attention on one word.

Let me give you some other words that matter much more, and that are much more actionable.

Prevention.

Preparedness.

Public health.

Political leadership.

And most of all, people.

We’re in this together, to do the right things with calm and protect the citizens of the world. It’s doable.

I thank you.

This is **Exhibit "F"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on April 7, 2020

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Signature

Government of Canada / Gouvernement du Canada

Government of Canada advises Canadians to avoid non-essential travel abroad

From: Global Affairs Canada

News release

March 13, 2020 - Ottawa, Ontario - Global Affairs Canada

The Honourable François-Philippe Champagne, Minister of Foreign Affairs, today announced that Canada has issued an official global travel advisory to avoid non-essential travel abroad.

In an attempt to limit the spread of the coronavirus (COVID-19), many governments have implemented special entry and exit and movement restrictions for their territories. New restrictions could be imposed, and could severely disrupt Canadians' travel plans.

As a result, the Government of Canada is advising Canadians to avoid non-essential travel outside of Canada until further notice.

Canadians currently outside the country should find out what commercial options are still available and consider returning to Canada earlier than planned if these options are becoming more limited.

We encourage Canadians abroad to register with the Registration of Canadians Abroad service.

Canadians abroad in need of emergency consular assistance can call Global Affairs Canada's 24/7 Emergency Watch and Response Centre in Ottawa at +1 613-996-8885 (collect calls are accepted where available) or email sos@international.gc.ca.

Quotes

"We are monitoring the situation abroad to provide credible and timely information to Canadians to help them make well-informed decisions regarding their travel. We also continue to work around the clock to provide assistance and consular services to Canadians abroad affected by COVID-19."

- François-Philippe Champagne, Minister of Foreign Affairs

Associated links

- Travel Advice and Advisories
- Canadian travellers: Avoid all cruise ship travel due to COVID-19
- Coronavirus disease (COVID-19): Outbreak update
- Coronavirus disease (COVID-19): Resources for Canadian businesses

Contacts

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Search for related information by keyword: GV Government and Politics |

66

Global Affairs Canada | Canada | Canada and the world | general public | news releases | Hon. François-Philippe Champagne

Date modified:
2020-03-13

This is **Exhibit "G"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on April 7, 2020

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Signature

Canada closes borders, says people should stay at home to stop virus- PM Trudeau

REUTERS

REUTERS

March 16, 2020
2:06 PM EDT

Filed under
PMN Health

OTTAWA — Canada closed its borders to all foreign nationals, except U.S. citizens, on Monday, and Prime Minister Justin Trudeau urged people to stay at home to help stem the spread of the new coronavirus.

"We will be denying entry into Canada to people who are not Canadian citizens or permanent residents," Trudeau told reporters at a news conference outside his home, where he is under quarantine. (Reporting by Kelsey Johnson and David Ljunggren, writing by Steve Scherer Editing by Chizu Nomiyama)

RELATED STORIES:

Trudeau remaining in isolation longer despite wife recovering from COVID-19

Canada faces 'critical week' in coronavirus crisis, death toll jumps

Canada's Trudeau wants to recall MPs to back massive coronavirus aid package

This is **Exhibit "H"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on April 7, 2020

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Signature

CANADIAN TRANSPORTATION AGENCY

Determination No. A-2020-42

March 13, 2020

DETERMINATION by the Canadian Transportation Agency relating to COVID-19 pandemic – Temporary exemptions to certain provisions of the *Air Passenger Protection Regulations*, SOR/2019-150 (APPR).

Case number: 20-02750

[1] On March 11, 2020, the World Health Organization assessed the outbreak of COVID-19 as a pandemic.

[2] Since the outbreak of the virus, a number of countries, including Canada, have imposed travel bans, restrictions, or advisories.

[3] Public health experts have also recommended behaviours, such as enhanced hygiene practices and social distancing, to mitigate the spread of the virus.

[4] The situation is evolving rapidly, and further restrictions relating to travel may be implemented.

[5] The pandemic is causing a significant decrease in demand for air travel. Flying with many empty aircraft seats can result in significant financial difficulties for air carriers, which may therefore decide to cancel or consolidate flights. Due to the evolving nature of the situation and public behaviours, these decisions may need to be made much closer to a scheduled flight day than would normally be the case.

[6] Other aspects of air carrier operations may also be impacted by the pandemic, including but not limited to staff shortages due to quarantines or refusals to work, additional hygiene practices onboard the aircraft, and passenger health screenings. These factors may result in flight delays.

[7] Under the APPR, air carriers have minimum obligations to passengers when flights are cancelled or delayed. Those obligations depend on whether the disruption was within the control of the air carrier, within the air carrier's control but required for safety, or outside the carrier's control:

- Situations within the air carrier's control: keep the passenger informed, provide standards of treatment (such as food and water), compensate the passenger for inconvenience, and rebook or refund the passenger.
- Situations within the air carrier's control but required for safety: keep the passenger informed, provide standards of treatment, and rebook or refund the passenger.
- Situations outside the air carrier's control: keep the passenger informed and rebook the passenger so the passenger can complete their itinerary.

[8] Section 10 of the APPR provides a non-exhaustive list of situations considered outside the air carrier's

control (the third category above). These include medical emergencies and orders or instructions from state officials. In the context of the COVID-19 pandemic, the following would be considered outside a carrier's control:

- flight disruptions to locations that are covered by a government advisory against travel or unnecessary travel due to COVID-19;
- employee quarantine or self-isolation due to COVID-19;
- employee refusal to work under Part II of the *Canada Labour Code,* R.S.C, 1985, c. L-2*,* (or equivalent law) due to COVID-19; and
- additional hygiene or passenger health screening processes put in place due to COVID-19.

[9] Beyond such situations, air carriers may make decisions that are influenced by the pandemic, including decisions to cancel and consolidate flights due to dropping passenger volumes. Whether such situations are within or outside carrier control would have to be assessed on a case-by-case basis. If the disruption was within the air carrier's control, the air carrier would be subject to more onerous obligations.

[10] In the extraordinary context of this pandemic, reasonable expectations regarding air travel have changed, taking into account government travel bans, restrictions, and advisories; public health practices; and impacts on travel demand and air carrier operations.

CONCLUSION

[11] The Agency finds that, in the context of the significant declines in passenger volumes and disruptions to air carrier operations caused by the COVID-19 pandemic, temporary exemptions to the APPR should be made to provide air carriers with increased flexibility to adjust flight schedules without facing prohibitive costs.

[12] Specifically, the Agency finds it undesirable, in the current extraordinary circumstances, that carriers be obligated to provide compensation for inconvenience to passengers who were informed of a flight delay or a flight cancellation more than 72 hours before their original scheduled departure or to passengers who were delayed at destination by less than six hours. The Agency further finds it undesirable that carriers be required to offer alternative travel arrangements that include flights on other air carriers with which they have no commercial agreement.

ORDER

[13] The Agency orders that all air carriers be exempted from:

- the obligation, under paragraphs 19(1)(a) and 19(1)(b) of the APPR, to pay compensation for inconvenience
    - if the flight delay or the flight cancellation is communicated to passengers more than 72 hours before the departure time indicated on the passengers' original ticket; or,
    - if the flight delay or the flight cancellation is communicated to the passengers within 72 hours of the departure time indicated on the original ticket, on condition that the carrier pays the passengers the following compensation for inconvenience;in the case of a large carrier,
        - in the case of a large carrier,

            - $400, if the arrival of the passenger's flight at the destination that is indicated on the original ticket is delayed by six hours or more, but less than nine hours, or

- $700, if the arrival of the passenger's flight at the destination that is indicated on the original ticket is delayed by nine hours or more; and

  - in the case of a small carrier,

    - $125, if the arrival of the passenger's flight at the destination that is indicated on the original ticket is delayed by six hours or more, but less than nine hours, or

    - $250, if the arrival of the passenger's flight at the destination that is indicated on the original ticket is delayed by nine hours or more.

- the obligation, under subsection 19(2) of the APPR to pay compensation for inconvenience to passengers who opted to obtain a refund instead of alternative travel arrangement, if the flight delay or the flight cancellation is communicated to passengers more than 72 hours before the departure time indicated on the passengers' original ticket;
- the obligation, under paragraphs 17(1)(a)(ii),17(1)(a)(iii), and 18(1)(a)(ii) of the APPR to provide a confirmed reservation on a flight operated by a carrier with which the carrier does not have any commercial agreement.

[14] The exemption is effective immediately, will remain valid until April 30, 2020, and may be extended by a further determination of the Agency, if required.

Member(s)

Scott Streiner
Elizabeth C. Barker

Back to rulings

Date modified:
2020-03-13

This is **Exhibit "I"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on April 7, 2020

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Signature

CANADIAN TRANSPORTATION AGENCY

Determination No. A-2020-47

March 25, 2020

DETERMINATION by the Canadian Transportation Agency relating to COVID-19 pandemic – Additional temporary exemptions to certain provisions of the *Air Passenger Protection Regulations*, SOR/2019-150 (APPR) and extension of the temporary exemption period.

Case number: 20-03254

[1] On March 11, 2020, the World Health Organization assessed the outbreak of COVID-19 as a pandemic.

[2] On March 13, 2020, the Canadian Transportation Agency (Agency) found in Determination No. A-2020-42 that it is undesirable that carriers be obligated to follow certain requirements of the APPR in these circumstances.

[3] Specifically, in the context of the significant declines in passenger volumes and disruptions to air carrier operations caused by the COVID-19 pandemic, the Agency granted temporary exemptions from APPR requirements related to compensation for inconvenience and to rebooking with competitors, to provide air carriers with increased flexibility to adjust flight schedules without facing prohibitive costs.

[4] To allow air carriers to continue focusing on immediate and urgent operational demands, including bringing Canadians home from abroad, the Agency considers it temporarily undesirable for air carriers to have to meet the APPR's 30-day deadline to respond to passengers' claims for the payment of compensation for inconvenience.

[5] Further, considering that the major impacts of the COVID-19 pandemic on the air sector are unlikely to be resolved by April 30, 2020, the Agency finds it appropriate to extend the duration of the exemptions in Determination No. A-2020-42.

ORDER

[6] Pursuant to subsection 80(1) of the *Canada Transportation Act*, S.C., 1996, c. 10, as amended, the Agency orders that all air carriers be exempted from the requirement under subsection 19(4) of the APPR to respond to requests for compensation, on the condition that air carriers respond to such requests within 120 day of the expiry of this order.

[7] This Order is effective immediately and will remain valid until June 30, 2020.

[8] The Agency further orders that the exemptions granted by Determination No. A-2020-42 remain valid until June 30, 2020.

[9] Exemptions granted under this determination and Determination No. A-2020-42 may be extended by a further determination of the Agency, if required.

Member(s)

Scott Streiner
Elizabeth C. Barker

Back to rulings

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Date modified:
2020-03-25

This is **Exhibit "J"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on April 7, 2020

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Signature

CANADIAN TRANSPORTATION AGENCY

Order No. 2020-A-32

March 18, 2020

IN THE MATTER OF an immediate and temporary stay of all dispute proceedings involving air carriers.

Case number: 20-02915

On March 11, 2020, the World Health Organization assessed the outbreak of COVID-19 as a pandemic. Since the outbreak of the virus, a number of countries, including Canada, have imposed travel bans, restrictions, or advisories. On March 13, 2020, in Determination No. A-2020-42, the Agency ordered that all air carriers be temporarily exempted from certain provisions of the *Air Passenger Protection Regulations*, SOR/2019-150. On March 16, 2020, the Government of Canada announced several new COVID 19 responses which directly affect air carriers. Air carriers are now required to conduct a basic health assessment of all passengers, and to deny boarding for international flights to Canada to passengers who present COVID-19 symptoms, and to many non citizens and non-residents. As of March 18, 2020, arrivals of international flights are restricted to four airports in Canada.

The impact of the COVID-19 pandemic on air carriers and passengers is significant and continues to evolve. Air carrier resources are highly stretched as carriers work to bring Canadians home from abroad, implement new Government of Canada directions, and adjust to rapidly dropping passenger volumes and travel restrictions.

The Agency finds that in light of these extraordinary circumstances, it would be just and reasonable to temporarily stay dispute proceedings involving air carriers to permit them to focus on immediate and urgent operational demands.

ORDER

Pursuant to subsection 5(2), paragraph 41(1)(d), and section 6 of the *Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings*), SOR/2014-104, the Agency, on its own motion, orders that all dispute proceedings before the Agency involving air carriers be stayed until April 30, 2020. The stay is effective immediately and applies to all current applications currently before the Agency, as well as any applications received for dispute adjudication during the stay period. On or before April 30, 2020, the Agency will determine if the stay should end on that date or be extended to a later date. In exceptional circumstances, the Agency may lift the stay on individual cases sooner, where necessary in the interests of justice.

Member(s)

Scott Streiner
Elizabeth C. Barker
J. Mark MacKeigan
Heather Smith
Mary Tobin Oates
Gerald Dickie
Lenore Duff

Back to rulings

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Date modified:
2020-03-18

This is **Exhibit "K"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on April 7, 2020

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Signature

CANADIAN TRANSPORTATION AGENCY

Order No. 2020-A-37

March 25, 2020

IN THE MATTER OF an extension of the stay of proceedings ordered in Order No. 2020-A-32.

Case number: 20-03246

On March 11, 2020, the World Health Organization assessed the outbreak of COVID-19 as a pandemic.

On March 18, 2020, the Canadian Transportation Agency (Agency) found that in light of these extraordinary circumstances related to the pandemic, it would be just and reasonable to temporarily stay dispute proceedings involving air carriers to permit them to focus on immediate and urgent operational demands.

Considering that the major impacts of the COVID-19 pandemic on the air sector are unlikely to be resolved by April 30, 2020, the Agency finds it is just and reasonable to extend the duration of the stay of proceedings ordered in Order No. 2020 A-32 until June 30, 2020.

ORDER

Pursuant to subsection 5(2), paragraph 41(1)(d), and section 6 of the Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings), SOR/2014-104, the Agency, on its own motion, orders that all dispute proceedings before the Agency involving air carriers be stayed until June 30, 2020, including any applications received for dispute adjudication during the stay period.

On or before June 30, 2020, the Agency will determine if the stay should end on that date or be extended to a later date. In exceptional circumstances, the Agency may lift the stay on individual cases sooner, where necessary in the interests of justice.

Member(s)

Scott Streiner
Elizabeth C. Barker
J. Mark MacKeigan
Mary Tobin Oates
Heather Smith
Gerald Dickie
Lenore Duff

Back to rulings

Share this page

Date modified:
2020-03-25

This is **Exhibit "L"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on April 7, 2020

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Signature

OFFICE DES TRANSPORTS DU CANADA

Accueil

Message concernant les crédits

La pandémie de COVID-19 a gravement perturbé le transport aérien intérieur et international.

En ce qui concerne les perturbations de vol indépendantes de la volonté de la compagnie aérienne, la *Loi sur les transports au Canada* et le *Règlement sur la protection des passagers aériens* exigent seulement que la compagnie aérienne veille à ce que les passagers effectuent leur itinéraire au complet. Certaines compagnies aériennes ont intégré dans leurs tarifs des règles prévoyant des remboursements dans certaines situations. Elles peuvent également y avoir prévu des dispositions par lesquelles elles se croient exemptées de telles obligations dans des cas de force majeure.

Les différentes dispositions législatives, réglementaires et tarifaires ont été rédigées pour des perturbations à court terme relativement localisées. Aucune n'a été envisagée pour les types d'annulations de vols massives à l'échelle de la planète qui sont survenues au cours des dernières semaines en conséquence de la pandémie. Il est important de tenir compte de la façon dont nous devrons établir un équilibre qui soit juste et rationnel entre les mesures visant à protéger les passagers et les réalités opérationnelles des compagnies aériennes dans ces circonstances extraordinaires et sans précédent.

D'une part, les passagers qui n'ont aucune possibilité d'effectuer au complet l'itinéraire prévu avec l'assistance d'une compagnie aérienne ne devraient pas avoir à assumer des dépenses pour des vols annulés. D'autre part, on ne peut pas s'attendre à ce que les compagnies aériennes qui voient leurs volumes de passagers et leurs revenus baisser de façon vertigineuse prennent des mesures qui risqueraient de menacer leur viabilité économique.

L'Office des transports du Canada (OTC) examinera le bien-fondé de chaque situation précise qui lui sera présentée, mais il estime que, de façon générale, une solution qui serait convenable dans le contexte actuel serait que les compagnies aériennes fournissent aux passagers touchés des bons ou des crédits pour des vols futurs qui n'expireront pas dans un délai déraisonnablement court (un délai de 24 mois serait jugé raisonnable dans la plupart des cas).

L'OTC continuera de fournir des renseignements, des conseils et des services aux passagers et aux compagnies aériennes, à mesure que nous passerons à travers cette période difficile.

Partagez cette page

Date de modification :
2020-03-25

This is **Exhibit "M"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on April 7, 2020

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Signature

CANADIAN TRANSPORTATION AGENCY

Statement on Vouchers

The COVID-19 pandemic has caused major disruptions in domestic and international air travel.

For flight disruptions that are outside an airline's control, the *Canada Transportation Act* and *Air Passenger Protection Regulations* only require that the airline ensure passengers can complete their itineraries. Some airlines' tariffs provide for refunds in certain cases, but may have clauses that airlines believe relieve them of such obligations in force majeure situations.

The legislation, regulations, and tariffs were developed in anticipation of relatively localized and short-term disruptions. None contemplated the sorts of worldwide mass flight cancellations that have taken place over recent weeks as a result of the pandemic. It's important to consider how to strike a fair and sensible balance between passenger protection and airlines' operational realities in these extraordinary and unprecedented circumstances.

On the one hand, passengers who have no prospect of completing their planned itineraries with an airline's assistance should not simply be out-of-pocket for the cost of cancelled flights. On the other hand, airlines facing huge drops in passenger volumes and revenues should not be expected to take steps that could threaten their economic viability.

While any specific situation brought before the CTA will be examined on its merits, the CTA believes that, generally speaking, an appropriate approach in the current context could be for airlines to provide affected passengers with vouchers or credits for future travel, as long as these vouchers or credits do not expire in an unreasonably short period of time (24 months would be considered reasonable in most cases).

The CTA will continue to provide information, guidance, and services to passengers and airlines as we make our way through this challenging period.

Date modified:
2020-03-25

This is **Exhibit "N"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on April 7, 2020

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Signature

From: GuestFeedback <guestfeedback@westjet.com>
Sent: April 5, 2020 11:43 AM
To: jeff_chamberlain@hotmail.com <jeff_chamberlain@hotmail.com>
Subject: DXHICF

Thank you for contacting WestJet.
To ensure you receive emails from WestJet, please add us to your contacts.

Mr. Chamberlain

Re: DXHICF

Thank you for calling WestJet.

It is unfortunate that our views on what WestJet is required to do regarding the refund of reservations during the unfolding COVID-19 pandemic. As I attempted to explain, our executive leadership team is currently focused on the necessary steps to address the repatriation of Canadians abroad.

We recognize that the cancellation of flights and the current economic uncertainty for amny of our guests has created a great deal of frustration. A viable and consistent decision was reached in conjunction with the Canada Transportation Agency regarding the refund of itineraries immediately affected by the COVID-19 crisis period.

We appreciate that your view is that the Canadian Transportation Agency has issued two different initiatives however they act as the governing agency for all Canadian agencies and we operate within the policies that they set out.

We assure you that should future discussions result in an alternate policy adjustment that you will be contacted via email to advise you of such.

Should this not be acceptable to you, we respectfully direct you to contact the CTA directly once they have placed notice on their website that they are entertaining complaints again.

Thank you

Paula | Guest Support Specialist

Privacy policy

WestJet, 22 Aerial Place NE, Calgary, AB T2E 3J1, Canada

This is **Exhibit "O"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on April 7, 2020

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Signature

OFFICE DES TRANSPORTS DU CANADA

Information importante pour les voyageurs pour la période de la COVID-19

Avertissement officiel global aux voyageurs du gouvernement du Canada

Suspension des activités liées aux règlements des différends aériens

Pendant cette période difficile, et malgré la pratique de nos employés pour favoriser la distanciation sociale, l'Office des transports du Canada (OTC) demeure en opération. Nos employés dévoués travaillent à distance et sont disponibles par moyen électronique pour continuer à fournir nos services. Vous pouvez continuer à nous acheminer vos demandes de services, dépôts d'applications et effectuer des opérations normales à travers nos canaux.

Par contre, veuillez noter que l'OTC a temporairement suspendu toutes instances de règlement des différends concernant les compagnies aériennes jusqu'au 30 juin 2020, afin de permettre à celles-ci de se concentrer sur leurs exigences opérationnelles immédiates et urgentes. Bien que vous pouvez toujours déposer une plainte avec nous et que toute plainte sera traitée en temps opportun, il se peut que nous ne pouvions répondre rapidement. L'OTC déterminera, au plus tard le 30 juin 2020, si la suspension doit se terminer à cette date ou si elle doit être prolongée jusqu'à une date ultérieure.

Obligations en matière de protection des passagers aériens durant la pandémie de COVID-19

Le 11 mars 2020, l'Organisation mondiale de la santé a décrété que la COVID-19 était devenue pandémique. Depuis l'éclosion du virus, plusieurs pays, y compris le Canada, ont imposé des interdictions, des restrictions ou des avis concernant les voyages. Des autorités ont également recommandé certains comportements, comme de meilleures pratiques d'hygiène et des mesures de distanciation sociale, dans le but d'atténuer la propagation du virus. La situation évolue rapidement et d'autres restrictions concernant les déplacements pourraient être mises en place.

L'Office des transports du Canada (OTC), soucieux d'atténuer les graves conséquences de la pandémie de COVID-19 sur l'industrie du transport aérien, a accordé des exemptions temporaires à l'application de certaines dispositions du *Règlement sur la protection des passagers aériens* (RPPA) qui seront en vigueur **du 13 mars au 30 juin 2020**.

Le présent document explique ces changements temporaires et comment le RPPA s'applique à certaines perturbations de vol attribuables à la COVID-19.

En plus de respecter le RPPA, les compagnies aériennes doivent aussi respecter leur tarifs. À la lumière de la pandémie de la COVID-19, l'OTC a publié un message concernant les crédits.

Liens

Transporteurs aériens – exemptions relativement à la pandémie de la COVID-19
A-2020-42 | Détermination | 2020-03-13

Air Canada exerçant également son activité sous le nom d'Air Canada rouge et d'Air Canada Cargo - obtenir une exemption temporaire de l'obligation de fournir le préavis exigé à l'article 64 de la LTC
2020-A-36 | Arrêté | 2020-03-25

Prolongement de la suspension - COVID-19 - suspension immédiate et temporaire de toutes les instances de règlement des différends concernant les transporteurs aériens
2020-A-37 | Arrêté | 2020-03-25

Transporteurs aériens – exemptions prolongées relativement à la pandémie de la COVID-19
A-2020-47 | Détermination | 2020-03-25

Retards et annulations

Le RPPA définit les obligations des compagnies aériennes envers les passagers. Ces obligations varient selon que la situation **est attribuable à la compagnie aérienne, attribuable à la compagnie aérienne, mais nécessaire par souci de sécurité,** ou encore **indépendante de la volonté de la compagnie aérienne**. Ces différentes catégories sont décrites dans le Guide sur les types et catégories de perturbations de vol.

L'OTC a indiqué un certain nombre de situations liées à cette pandémie qui sont considérées comme étant indépendantes de la volonté de la compagnie aérienne, notamment :

- Perturbation de vols vers des lieux indiqués dans un avis du gouvernement interdisant les voyages ou les voyages non essentiels en raison de la COVID-19;
- Quarantaine ou isolement volontaire d'employés en raison de la COVID-19;
- Ajouts de mesures de contrôle sanitaire ou de processus de dépistage auprès de passagers en raison de la COVID-19.

Des compagnies aériennes pourraient décider d'annuler ou de retarder des vols pour d'autres raisons. Il faudrait évaluer les situations au cas par cas afin de déterminer si de telles situations sont attribuables aux compagnies aériennes ou indépendantes de leur volonté.

Obligations des compagnies aériennes

En cas de retard ou d'annulation de vol, les compagnies aériennes doivent toujours tenir les passagers informés de leurs droits et de la cause de la perturbation du vol. Elles doivent également les aider à effectuer leur itinéraire complet (en leur réservant un siège sur d'autres vols).

Si la cause de la perturbation lui est attribuable, les compagnies aériennes auront des obligations additionnelles (plus de détails ci-après).

Situations indépendantes de la volonté des compagnies aériennes (y compris les situations susmentionnées liées à la COVID-19)

Dans de telles situations, les compagnies aériennes doivent :

- Réacheminer les passagers à bord d'un prochain vol exploité par elles ou un partenaire.
    - *En ce qui concerne les perturbations de vol qui surviennent entre le 13 mars et le 30 juin 2020, les compagnies aériennes n'ont pas à suivre les obligations du RPPA qui consistent à réacheminer les passagers à bord de vols de compagnies aériennes avec lesquelles elles n'ont pas d'entente commerciale.*
    - Veuillez vous référer au message concernant les crédits.
    - Cette obligation ne requiert pas que les compagnies aériennes réacheminent les passagers qui ont déjà complété leur itinéraire (incluant d'autres moyens tels les vols rapatriement).

Situations attribuables à la compagnie aérienne

Dans ces situations, les compagnies aériennes doivent :

- **Appliquer des** normes de traitement
- Réacheminer les passagers à bord d'un prochain vol exploité par elles ou un partenaire, ou accorder un remboursement si les nouveaux arrangements ne répondent plus aux besoins du passager;
    - *En ce qui concerne les perturbations de vol qui surviennent entre le 13 mars et le 30 juin 2020, les compagnies aériennes n'ont pas à suivre les obligations du RPPA qui consistent à réacheminer les passagers à bord de vols de compagnies aériennes avec lesquelles elles n'ont pas d'entente commerciale.*
    - Veuillez vous référer au message concernant les crédits.
    - Cette obligation ne requiert pas que les compagnies aériennes réacheminent les passagers qui ont déjà complété leur itinéraire (incluant d'autres moyens tels les vols rapatriement).

  Fournir des indemnités : *En ce qui concerne les perturbations de vol qui surviennent entre le 13 mars et le 30 juin 2020, différentes obligations au titre des indemnités sont en vigueur.* Si la compagnie aérienne a avisé les passagers d'un retard ou d'une annulation moins de 72 heures d'avance, elle doit fournir des indemnités qui varieront en fonction du nombre d'heures de retard à l'arrivée du passager à destination (sauf si le passager a accepté le remboursement de son billet) :
    - *Grande compagnie aérienne :*
        - 6-9 heures : 400 $
        - 9+ heures : 700 $
    - *Petite compagnie aérienne :*
        - 6-9 heures : 125 $
        - 9+ heures : 250 $
- À compter du 25 mars 2020, le délais pour un transporteur de répondre aux demandes d'indemnisation pour un inconvénient déposé par un passager est suspendu jusqu'au 30 juin 2020 (ou toute autre période ultérieure que l'Office pourrait ordonner). Une fois la suspension terminée, les transporteurs auront 120 jours pour répondre aux demandes reçues avant ou pendant la suspension.

Situations attribuables à la compagnie aérienne, mais nécessaires par souci de sécurité

Dans ces situations, les compagnies aériennes doivent :

- **Appliquer des** normes de traitement;

- Réacheminer les passagers à bord d'un prochain vol exploité par elles ou un partenaire, ou accorder un remboursement si les nouveaux arrangements ne répondent plus aux besoins du passager.
    - *En ce qui concerne les perturbations de vol qui surviennent entre le 13 mars et le 30 juin 2020, les compagnies aériennes n'ont pas à suivre les obligations du RPPA qui consistent à réacheminer les passagers à bord de vols de compagnies aériennes avec lesquelles elles n'ont pas d'entente commerciale.*
    - Veuillez vous référer au message concernant les crédits.
    - Cette obligation ne requiert pas que les compagnies aériennes réacheminent les passagers qui ont déjà complété leur itinéraire (incluant d'autres moyens tels les vols rapatriement).

Autres exigences du RPPA

Tous les autres droits des passagers prévus dans le RPPA restent en vigueur, notamment ceux concernant les communications claires, les retards sur l'aire de trafic et l'attribution de sièges aux enfants. Pour plus d'information, consultez la page de l'OTC intitulée Connaissez vos droits.

Refus de transport

Le gouvernement du Canada a interdit aux étrangers provenant de tout pays, à l'exception des États-Unis, d'entrer au Canada (avec quelques exceptions). De plus, les compagnies aériennes ont reçu pour instruction d'interdire aux voyageurs de toute nationalité qui présentent des symptômes de la COVID-19 de monter à bord des vols internationaux à destination du Canada.

Les obligations prévues dans le RPPA visant les perturbations de vol ne s'appliqueraient pas dans ces situations.

Date de modification :
2020-03-18

This is **Exhibit "P"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on April 7, 2020

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Signature

CANADIAN TRANSPORTATION AGENCY

Home

Important Information for Travellers During COVID-19

Official Global Travel Advisory from the Government of Canada

Suspension of all air dispute resolution activities

During these difficult times, the Canadian Transportation Agency (CTA) continues to maintain its normal operations while our employees practice social distancing. Our dedicated employees are working remotely and are available through electronic means to provide service. You can continue to request CTA services, file applications, and do normal business with us through our normal channels.

Please note, however, that the CTA has temporarily paused all dispute resolution activities involving air carriers until June 30, 2020, to permit them to focus on immediate and urgent operational demands. While you can continue to file air passenger complaints with us and all complaints will be processed in due course, we may not be able to respond quickly. On or before June 30, 2020, the Agency will determine if the pause should end on that date or be extended to a later date.

Air Passenger Protection Obligations During COVID-19 Pandemic

On March 11, 2020, the World Health Organization assessed the outbreak of COVID-19 as a pandemic. Since the outbreak of the virus, a number of countries, including Canada, have imposed travel bans, restrictions, or advisories. Officials have also recommended behaviours, such as enhanced hygiene practices and social distancing, to mitigate the spread of the virus. The situation is evolving rapidly, and further restrictions relating to travel may be implemented.

The Canadian Transportation Agency (CTA) has taken steps to address the major impacts that the COVID-19 pandemic is having on the airline industry by making temporary exemptions to certain requirements of the *Air Passenger Protection Regulations* (APPR) that apply **from March 13, 2020 until June 30, 2020**.

This guide explains these temporary changes and how the APPR apply to certain flight disruptions related to COVID-19.

In addition to the APPR, carriers must also follow their tariffs. In light of the COVID-19 Pandemic, CTA has issued a Statement on Vouchers.

Related Links

Air carriers - Exemptions due to COVID-19 pandemic
A-2020-42 | Determination | 2020-03-13

Air Canada also carrying on business as Air Canada rouge and as Air Canada Cargo - temporary exemption from the advance notice requirements of section 64 of the CTA
2020-A-36 | Order | 2020-03-25

Extension of stay - COVID-19 - immediate and temporary stay of all dispute proceedings involving air carriers
2020-A-37 | Order | 2020-03-25

Air carriers - further exemptions due to COVID-19 pandemic
A-2020-47 | Determination | 2020-03-25

Delays and Cancellations

The APPR set airline obligations to passengers that vary depending on whether the situation is **within the airline's control, within the airline's control and required for safety purposes, or outside the airline's control**. Descriptions of these categories can be found in Types and Categories of Flight Disruption: A Guide.

The CTA has identified a number of situations related to the COVID-19 pandemic that are considered outside the airline's control. These include:

- flight disruptions to locations that are covered by a government advisory against travel or unnecessary travel due to COVID-19;
- employee quarantine or self-isolation due to COVID-19; and
- additional hygiene or passenger health screening processes put in place due to COVID-19.

Airlines may make decisions to cancel or delay flights for other reasons. Whether these situations are within or outside the airline's control would have to be assessed on a case-by-case basis.

Airline obligations

In the event of a flight delay or cancellation, airlines must always keep passengers informed of their rights and the cause of a flight disruption. Airlines must also always make sure the passengers reach their destinations (re-booking them on other flights).

If the cause of the disruption is within an airline's control, there are additional obligations, as outlined below.

Situations outside airline control (including COVID-19 related situations mentioned above)

In these situations, airlines must:

- Rebook passengers on the next available flight operated by them or a partner airline.
  - *For disruptions between March 13, 2020 and June 30, 2020, airlines do not have to follow APPR requirements to rebook passengers using an airline with which they have no commercial agreement.*
  - Please refer to the CTA's Statement on Vouchers.
  - This obligation does not require air carriers to rebook passengers who have already completed

their booked trip (including by other means such as a repatriation flight).

Situations within airline control

In these situations, airlines must:

- **Meet** standards of treatment
- Rebook passengers on the next available flight operated by them or a partner airline or a refund, if rebooking does not meet the passenger's needs;
    - *For disruptions between March 13, 2020 and June 30, 2020, airlines do not have to follow APPR requirements to rebook passengers using an airline with which they have no commercial agreement.*
    - Please refer to the CTA's Statement on Vouchers.
    - This obligation does not require air carriers to rebook passengers who have already completed their booked trip (including by other means such as a repatriation flight).
- **Provide compensation:** *For disruptions between March 13, 2020 and June 30, 2020, different compensation requirements are in effect*. If the airline notified the passengers of the delay or cancellation less than 72 hours in advance, they must provide compensation based on how late the passenger arrived at their destination (unless the passenger accepted a ticket refund):
    - *Large airline:*
        - 6-9 hours: $400
        - 9+ hours: $700
    - *Small airline:*
        - 6-9 hours: $125
        - 9+ hours: $250
- Effective March 25, 2020, the deadline for a carrier to respond to claims filed by passengers for payment of the compensation for inconvenience is suspended until June 30, 2020 (or any further period that the Agency may order). Once the suspension is over, carriers will have 120 days to respond to claims received before or during the suspension.

Situations within airline control, but required for safety

In these situations, the airline must:

- **Meet** standards of treatment;
- Rebook passengers on the next available flight operated by them or a partner airline or a refund, if rebooking does not meet the passenger's needs.
    - *For disruptions between March 13, 2020 and June 30, 2020, airlines do not have to follow APPR requirements to rebook passengers using an airline with which they have no commercial agreement.*
    - Please refer to the CTA's Statement on Vouchers.
    - This obligation does not require air carriers to rebook passengers who have already completed their booked trip (including by other means such as a repatriation flight).

Other APPR requirements

All other air passenger entitlements under the APPR remain in force, including clear communication, tarmac delays and seating of children. For more information visit the CTA's Know Your Rights page.

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Refusal to transport

The Government of Canada has barred foreign nationals from all countries other than the United States from entering Canada (with some exceptions). Airlines have also been instructed to prevent all travellers who present COVID-19 symptoms, regardless of their citizenship, from boarding international flights to Canada.

The APPR obligations for flight disruptions would not apply in these situations.

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Date modified:
2020-03-18

This is **Exhibit "Q"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on April 7, 2020

_____

Signature

"please refer to this link that will answer your question

Top Latest People Photos Videos

CTA.gc.ca @CTA_gc · Mar 25
Replying to @johnpeterc88 @TV_SteveWilks and @AirCanada
Good afternoon, **please refer to this link that will answer your question**: otc-cta.gc.ca/eng/statement-... Thank you. CTA social media
1

CTA.gc.ca @CTA_gc · Mar 25
Replying to @asha_jibril @TravelGoC and 2 others
Good afternoon, **please refer to this link that will answer your question**: otc-cta.gc.ca/eng/statement-... Thank you. CTA social media
2

CTA.gc.ca @CTA_gc · Mar 25
Replying to @FerrisCatWheel @libbyconser and 5 others
Good afternoon, **please refer to this link that will answer your question**: otc-cta.gc.ca/eng/statement-... Thank you. CTA social media
2

CTA.gc.ca @CTA_gc · Mar 25
Replying to @ungraceful_mi and @airtransat
Good afternoon, **please refer to this link that will answer your question**: otc-cta.gc.ca/eng/statement-... Thank you. CTA social media
1

CTA.gc.ca @CTA_gc · Mar 25
Replying to @Ian_saucy and @WestJet
Good afternoon, **please refer to this link that will answer your question**: otc-cta.gc.ca/eng/statement-... Thank you. CTA social media

101







This is **Exhibit "R"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on April 7, 2020

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Signature

From: Info <Info@otc-cta.gc.ca>
Date: March 27, 2020 at 10:25:26 AM PDT
To: Tammy 2019 <tammylyn2019@gmail.com>
Subject: RE: SWOOP AIRLINES

Hello Tammy,

Thanks for following up.

For flight disruptions that are outside an airline's control, the Canada Transportation Act and Air Passenger Protection Regulations only require that the airline ensure passengers can complete their itineraries. Some airlines' tariffs provide for refunds in certain cases, but may have clauses that may relieve the airline of such obligations in force majeure situations.

While any specific situation brought before the CTA will be examined on its merits, the CTA believes that, generally speaking, an appropriate approach in the current context could be for airlines to provide affected passengers with vouchers or credits for future travel, as long as these vouchers or credits do not expire in an unreasonably short period of time (24 months would be considered reasonable in most cases).

Best,

info@ Team
Office des transports du Canada / Gouvernement du Canada
info@otc-cta.gc.ca / Tél: 1-888-222-2592 / ATS: 1-800-669-5575
Suivez-nous : Twitter / YouTube

Canadian Transportation Agency / Government of Canada
info@otc-cta.gc.ca / Telephone 1-888-222-2592
Follow us: Twitter / YouTube

-----Original Message-----
From: Tammy 2019 <tammylyn2019@gmail.com>
Sent: Friday, March 20, 2020 11:25 AM
To: Info <Info@otc-cta.gc.ca>
Subject: Re: SWOOP AIRLINES

Hello,

Thank you for your response, but I don't understand the answer.

"However, they would have to make sure the passenger completes their itinerary." If the carrier doesn't - what form of compensation am I entitled to? A refund in the form of a future credit or a refund in the original form of payment?

I have them my money in exchange for a service they are unable to provide. This is also outside of my control and a financial burden to me. All I want is my money returned.

Any info/clarification would be appreciated.

Thank you.

Sent from my iPhone

On Mar 20, 2020, at 7:43 AM, Info <Info@otc-cta.gc.ca> wrote:

Hello Tammy,

Thanks for contacting the Canadian Transportation Agency.

Air Passenger Protection Regulations provide a list of situations considered 'outside the air carrier's control', including medical emergencies and orders or instructions from state officials. The CTA has identified a number of situations related to this pandemic that are considered 'outside of the air carrier's control'. These include flight disruptions to locations that are covered by a government advisory against travel or unnecessary travel due to COVID-19; https://rppa-appr.ca/eng/obligations-and-level-control

In these situations, air carriers would not be required to provide standards of treatment or compensation for inconvenience. However, they would have to make sure the passenger completes their itinerary.

Until April 30th, the time at which passengers will be entitled to compensation for inconvenience related to flight cancellations or delays will be adjusted, to provide air carriers with more flexibility to modify schedules and combine flights. Air carriers will be allowed to make schedule changes without owing compensation to passengers until 72 hours before a scheduled departure time (instead of 14 days), and air carriers will be obligated to compensate passengers for delays on arrival that are fully within the air carrier's control once those delays are 6 hours or more in length (instead of 3 hours).

The CTA has also exempted air carriers from offering alternative travel arrangements that include flights on other air carrier's with which they have no commercial agreement.

Best,

info@ Team

Office des transports du Canada / Gouvernement du Canada

info@otc-cta.gc.ca / Tél: 1-888-222-2592 / ATS: 1-800-669-5575

Suivez-nous : Twitter / YouTube

Canadian Transportation Agency / Government of Canada

info@otc-cta.gc.ca / Telephone 1-888-222-2592

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-----Original Message-----

From: Tammy 2019 <tammylyn2019@gmail.com>

Sent: Friday, March 20, 2020 1:08 AM

To: Info <Info@otc-cta.gc.ca>

Subject: SWOOP AIRLINES

Hello,

I booked a flight with Swoop Airlines for next month and they are cancelling the flight and only offering me a future credit. The flight is from Abbotsford, B.C. to Las Vegas, Nevada and return.

Am I not entitled to a refund back to my card?

Thank you,

Tammy Pedersen

604-308-6926

This is **Exhibit "S"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on April 7, 2020

_____

Signature

From: Info <Info@otc-cta.gc.ca>
Date: March 27, 2020 at 1:57:05 PM EDT
To: Jenn Mossey <themosseys@rogers.com>
Subject: RE: trip cancelled

Hello,

Thanks for contacting the Canadian Transportation Agency.

The CTA has taken steps to address the major impact that the COVD-19 pandemic is having on the airlines industry by making temporary exemptions to certain requirements of the Air Passenger Protection Regulations (APPR). These exemptions apply to flight disruptions that occur from March 13, 2020 until June 30, 2020.

For flight disruptions that are outside an airline's control, the Canada Transportation Act and Air Passenger Protection Regulations only require that the airline ensure passengers can complete their itineraries. Some airlines' tariffs provide for refunds in certain cases, but may have clauses that may relieve the airline of such obligations in force majeure situations.

While any specific situation brought before the CTA will be examined on its merits, the CTA believes that, generally speaking, an appropriate approach in the current context could be for airlines to provide affected passengers with *vouchers or credits for future travel, as long as these vouchers or credits do not expire in an unreasonably short period of time (24 months would be considered reasonable in most cases).*

You should first contact your airline to try and resolve the issues you have raised. Given circumstances, please be patient and provide your airline time to respond to you – a minimum of 30 days. If you do not hear back from your airline, or you are dissatisfied with the response you receive, you may file a complaint with the CTA.

If you decide to file, or have already filed, a complaint with the CTA, please note that in light of the extraordinary circumstances resulting from the COVID-19 pandemic, the CTA has decided to temporarily pause communications with airlines on complaints against them. This includes all new complaints received, as well as those currently in the facilitation process. The pause is currently set to continue until June 30, and is aimed at allowing the airlines to focus on immediate and urgent operational demands, like getting Canadians home.

Also, effective March 25, 2020, the deadline for a carrier to respond to claims filed by passengers for payment of the compensation for inconvenience is suspended until June 30, 2020 (or any further period that the Agency may order). Once the suspension is over, carriers will have 120 days to respond to claims received before or during the suspension.

Rest assured that once the pause is lifted, we will deal with every complaint. The delay will not change the outcome of our review.

Best,

info@ Team

Office des transports du Canada / Gouvernement du Canada

info@otc-cta.gc.ca / Tél: 1-888-222-2592 / ATS: 1-800-669-5575

Suivez-nous : Twitter / YouTube

Canadian Transportation Agency / Government of Canada

info@otc-cta.gc.ca / Telephone 1-888-222-2592

Follow us: Twitter / YouTube

From: Jenn Mossey <themosseys@rogers.com>
Sent: Friday, March 27, 2020 1:08 PM
To: Info <Info@otc-cta.gc.ca>
Subject: trip cancelled

Good Afternoon,

My trip was cancelled by Sunwing vacations. At which point they were offering a refund (they did this for ONE day).

I filled out the form online and got confirmation that I would be

getting a refund as did I get the same paperwork from I-travel 2000.

They are now telling me that I will not be getting a refund but a voucher.

This was BEFORE you changed the policy to (in my opinion) suit the airlines.

We need our money back since we can’t afford to have that money tied up right now because my husband may lose his job permanently after all of this, so there will be no vacations.

Once something is in writing (an email) and they post the policy and you do what you are told during the posted policy you are owed the money.

I am attaching my documentation of confirmation and the policy that was posted when I completed my refund request.

I would like your assistance during these uncertain times.

My husband and I both work in trucking and are currently still working to keep goods flowing.

Jennifer Mossey

519-471-9949

Sent from my iPhone

This is **Exhibit "T"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on April 7, 2020

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Signature

CANADIAN TRANSPORTATION AGENCY

Code of Conduct for Members of the Agency

A. CONTEXT

Mandate of the Agency

(1) The Canadian Transportation Agency (Agency) is an independent, quasi-judicial, expert tribunal and regulator which has, with respect to all matters necessary for the exercise of its jurisdiction, all the powers of a superior court.

(2) The Agency and has three core mandates:

a. Helping ensure that the national transportation system runs efficiently and smoothly in the interests of all Canadians: those who work and invest in it; the producers, shippers, travellers and businesses who rely on it; and the communities where it operates.
b. Protecting the fundamental human right of persons with disabilities to an accessible transportation network.
c. Providing consumer protection for air passengers.

Roles of the Agency's Chair, Vice-Chair, Members, and staff

(3) The Agency is comprised of up to five regular Members appointed by the Governor in Council (GIC), including the Agency's Chair and Vice-Chair, and up to three temporary Members appointed by the Minister of Transport from a roster approved by the GIC.

(4) Members make adjudicative decisions and regulatory determinations [1]. Their responsibilities in these regards cannot be delegated.

(5) The Chair, who is the also Chief Executive Officer (CEO) and a Member, is responsible for overall leadership of the Agency. He or she sets the Agency's strategic priorities, serves as its public voice, reports on its plans and results to Parliament through the Minister of Transport, and handles relations with Ministers, Parliamentarians, Deputy Ministers, and analogous bodies in other jurisdictions. He or she assigns cases to Members, supervises and directs their work, and chairs regular Members meetings. And as CEO, he or she is the most senior manager of the public servants working in the organization, serves as Deputy Head and Accounting Officer with a broad range of related responsibilities under the Financial Administration Act and other statutes, and chairs the Executive Committee.

(6) The Vice-Chair, who is also a Member, sits on the Executive Committee and assumes the responsibilities of the Chair if the Chair is absent or incapacitated.

(7) Members other than the Chair and Vice-Chair do not have any managerial functions within the Agency.

(8) All Members are supported in the discharge of their decision-making duties by the Agency's public servants, who are responsible for giving Members frank, impartial, evidence-based advice; fully implementing Members' direction; and other tasks assigned to them by the Chair, their managers, or legislation.

B. GENERAL PROVISIONS

Purpose, guiding principles, and application of the Code

(9) This Code establishes the standards for the conduct of Members and applies to all regular and temporary Members. It supplements, and should be read in conjunction with, any applicable requirements and standards set out in the Canada Transportation Act; other legislation administered by the Agency; other legislation establishing ethical and conduct obligations, such as the Conflict of Interest Act; relevant regulations, policies, and guidelines; other relevant codes; and letters of appointment.

(10) The Code reflects:

a. the Agency's commitment to independent, impartial, fair, transparent, credible, and efficient decision making; and
b. the Agency's organizational values of respect for democracy, respect for people, integrity, stewardship, and excellence.

(11) Members shall:

a. adhere to all elements of the Code and other applicable instruments;
b. uphold the highest ethical standards at all times;
c. arrange their private affairs in a manner that ensures they have no conflicts of interest;
d. conduct themselves with integrity, avoid impropriety or the appearance of impropriety, and eschew any action that could cast doubt on their ability to perform their duties with impartiality;
e. not accept gifts, hospitality, or other advantages or benefits from any party that has an interest in matters handled by the Agency;
f. recuse themselves from any proceeding where they know or reasonably should know that, in the making of the decision, they would be in a conflict of interest, or where their participation might create a reasonable apprehension of bias. In such case, they shall immediately inform the Chair and provide reason for their recusal. Members are encouraged to seek the advice of the Chair and the General Counsel when dealing with any situation where recusal is contemplated; and
g. immediately inform to the Chair if they become aware of a situation that may adversely affect the integrity or the credibility of the Agency, including possible non-compliance with the Code.

(12) The Chair is responsible for the administration of the Code, including any matters regarding its interpretation. Members are accountable to the Chair for their compliance with the Code.

Members' expertise and work arrangements

(13) Members have a responsibility to maintain the highest levels of professional competence and expertise required to fulfil their duties. Members are expected to pursue the development of knowledge and skills related to their work, including participation in training provided by the Agency.

(14) Regular, full-time Members must devote at least 37.5 hours per week to the performance of their duties during their term of appointment. If a regular Member is authorized by the Chair to continue to hear

one or more matters before them upon expiry of their term, they shall only request remuneration for actual time worked during the period of continuation.

(15) When temporary Members are appointed on a full-time basis, they must devote at least 37.5 hours per week to the performance of their duties. When temporary Members are appointed on a part-time basis, they shall only request remuneration for actual time worked.

(16) Members' designated workplace is at the Agency's head office. They shall only work from home or other off-site locations with the prior written approval of the Chair.

C. DECISION MAKING

Impartiality

(17) Members must approach each case with an open mind and must be, and be seen to be, impartial and objective at all times.

Natural justice and fairness

(18) Members must respect the rules of natural justice and procedural fairness.

(19) Members must ensure that proceedings are conducted in a manner that is transparent, fair, and seen to be fair.

(20) Members shall render each decision on the merits of the case, based on the application of the relevant legislation and jurisprudence to the evidence presented during the proceeding.

(21) Members shall not be influenced by extraneous or improper considerations in their decision making. Members shall make their decisions free from the improper influence of any other person, institution, stakeholder or interest group, or political actor.

Preparation

(22) Members shall carefully review and consider relevant material – including applications, pleadings, briefing notes, and draft decisions – before attending case-related briefing sessions, meetings, or oral hearings.

Timeliness

(23) Members shall take all reasonable steps to ensure that proceedings progress in a timely fashion, avoiding unnecessary delays but always complying with the rules of natural justice and procedural fairness. Members shall render decisions as soon as possible after pleadings have closed and ensure, to the greatest extent possible, that statutory timelines and internal service standards for the issuance of decisions are met.

Quality

(24) Members shall ensure that their decisions are written in a manner that is clear, logical, complete without being unnecessarily repetitive or lengthy, and consistent with any guidelines or standards established by the Agency regarding the quality and format of decisions.

Consistency

(25) Members shall be cognizant of the importance of consistency in Agency decisions, notwithstanding the fact that prior decisions on similar matters do not constitute binding precedents. Members should not depart from the principles established in previous decisions unless they have a reasonable basis, and provide well-articulated reasons, for doing so.

Respect for parties and participants

(26) Members shall conduct proceedings, including oral hearings, in a courteous and respectful manner, while ensuring that proceedings are orderly and efficient.

(27) Members shall conduct proceedings such that those who have cases before the Agency understand its procedures and practices and can participate meaningfully, whether or not they are represented by counsel.

(28) Members must be responsive to accessibility-related needs and implement reasonable accommodation measures to facilitate meaningful participation of parties and other participants with disabilities in Agency hearings.

(29) Members shall be responsive to diversity, gender, and other human rights considerations when conducting proceedings; for example, in the affirmation/swearing in of witnesses and the scheduling of oral hearings. Members shall avoid words, phrases, and actions that could be understood to manifest bias or prejudice based on factors such as disability, race, age, national origin, gender, religion, sexual orientation, or socio-economic status, and shall never draw inferences on a person's credibility on the basis of such factors.

Case-related communications

(30) Members shall not communicate directly or indirectly with any party, counsel, witness, or other non-Agency participants appearing before them in a proceeding with respect to that proceeding, except in the presence of all parties or their counsel.

(31) Members shall not disclose information about a case or discuss any matter that has been or is in the process of being decided by them or the Agency, except as required in the performance of, and in the circumstances appropriate to, the formal conduct of their duties. Members shall refrain from discussing any case or Agency-related matter in public places.

D. WORKING RELATIONS AND INTERACTIONS

Relations with other Members

(32) Members shall foster civil, collegial relations with other Members.

(33) Members should have frank discussions and openly debate issues, while showing respect for one another's expertise, opinions, and roles. Members shall not comment on another Member's views, decisions, or conduct, except directly and privately to that Member himself or herself, or to the Chair pursuant to subsection 11.g of this Code.

(34) Members assigned together to a Panel should strive to reach consensus decisions whenever

possible, but respectfully agree to disagree and prepare a majority opinion and a dissenting opinion where consensus cannot be achieved within a reasonable time period.

(35) Members should share their knowledge and expertise with other Members as requested and appropriate, without attempting to influence decisions in cases to which they are not assigned.

Relation with Agency staff

(36) Members shall at all times treat Agency staff with courtesy and be respectful of their views and recommendations, recognizing that staff are professional public servants who are required to offer their best advice to Members, who make the final decisions.

(37) Any concerns about staff performance should not be communicated directly to working-level employees but rather should be shared with the relevant Branch Head if the concerns are relatively minor and with the Chair if they are significant or systemic.

Interactions with non-Agency individuals and organizations

(38) Members shall not communicate with the news media. Enquiries from the media or members of the public shall be referred to the Chair's Office.

(39) Members shall not communicate with political actors or officials of other federal departments and agencies, provincial or foreign governments, or international organizations regarding a matter that is, was, or could be before the Agency.

(40) Members shall not publicly express an opinion about any past, current, or potential cases or any other issue related to the work of the Agency, and shall refrain from comments or discussions in public or otherwise that may create a reasonable apprehension of bias.

(41) Members shall not disclose or make known, either publicly or privately, any information of a confidential nature that was obtained in their capacity as a Member.

(42) Members shall not use their position or the Agency's resources (e.g., an Agency email account or letterhead) for personal gain.

(43) Members should exercise caution when using social media for personal purposes, and should not identify themselves as Members of the Agency on social media sites, except professional sites such as LinkedIn.

E. OUTSIDE ACTIVITIES

(44) Members shall not accept invitations to attend social events such as receptions or dinners with stakeholder representatives or with persons who are, or may become, a party, counsel, witness, or other non-Agency participants in an Agency proceeding, except in rare instances where there is a compelling justification and the Chair provides prior written approval.

(45) Members may take part in other outside activities that are not incompatible with their official duties and responsibilities and do not call into question their ability to perform their duties objectively, with the prior written approval of the Chair. Such activities may include participation in conferences and training seminars, speeches, teaching assignments, and volunteering.

(46) Requests for the Chair's approval of participation in social events or other outside activities must be

made in writing at least two weeks before those events or activities begin, and must fully disclose all relevant details. Members are also responsible for obtaining any other approval required by applicable legislation, guidelines, codes, or other instruments.

(47) Notwithstanding the foregoing, the Chair may, from time to time, confer with stakeholder representatives, counsel, or other parties in his role as the Agency's public voice, to discuss matters unrelated to any specific proceeding.

F. AFFIRMATION

(48) Members shall review and affirm their commitment to and compliance with the Code upon initial appointment and every year thereafter on or near the anniversary of their appointment.

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1 In this Code, "decisions" shall be understood to refer to both adjudicative decisions, which deal with disputes between parties, and regulatory determinations, which deal typically involve a single party.

- Code of Conduct for Members of the Agency last update: March 26, 2018

Date modified:
2014-01-22

This is **Exhibit "U"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on April 7, 2020

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Signature

sunwing

Travel Agent Special Update

March 27, 2020

Dear travel agents,

We would like to thank you for your continued support and patience. As you can imagine, we are moving quickly during this unprecedented time. That is why, as part of our efforts to keep our employees and customers safe, we were the first airline in Canada to suspend all southbound flights and focus solely on bringing our customers home.

Last week, we expanded our repatriation efforts to offer vacant seats free to any Canadian stranded in destination on our ongoing northbound flights. On March 23rd, we completed our repatriation efforts by bringing home more than 60,000 people including 3,300 stranded Canadians that were non-Sunwing customers.

Initially, we offered customers booked on our flights during this suspension the choice between a future travel credit valid for 12 months and a full cash refund. However, after the Government of Canada's non-essential travel advisory, we adjusted our policy to be aligned with all other Canadian airlines and tour operators. This decision is also consistent with the ruling made by the Canadian Transportation Agency on March 26, 2020. All customers booked on our flights will receive a future travel credit and, as a further gesture, we have extended the validity of this credit for two years. Your commission for bookings will be protected; however, no further commission will be paid when customers re-book using their future travel credit.

While we understand that some customers would have preferred a refund, we are confident that during the next two years they will be able to take the flights or vacations they had planned.

We want to reiterate that any customer who purchased travel insurance is still eligible for a refund in accordance with the terms of their policy. Customers that purchased the Worry Free Cancellation Waiver may be entitled to a partial refund with their future travel credit. These partial refunds will be processed as quickly as possible as we continue to work through adjusting thousands of backlogged files. We ask for your patience as we work through our backlog.

As a reminder, all our southbound flights up to and including April 30, 2020, have been cancelled. We have introduced a new flexible policy for departures between May 1 and June 30, 2020 where final payments can be provided up to 25 days before the departure date (as opposed to the standard 45 days).

Please continue to check our website for important updates.

Thank you for your continued support and stay well.

This is **Exhibit "V"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on April 7, 2020

_____

Signature

sunwing

Travel Agent Special Update
March 27, 2020

COVID-19 Frequently Asked Questions

Where can I find more information about COVID-19?

Canadians are encouraged to consult the destination page on www.travel.gc.ca for the latest advice – the Public Health Agency of Canada (PHAC) is constantly updating this page with advice for travellers based on the latest science available. Anyone travelling should also register with the Government of Canada at www.travel.gc.ca/register prior to travel.

I've tried emailing and calling, why is it taking so long for someone to get back to me?

We know that it can be frustrating waiting for a reply, and we apologize for the long delays. As you can imagine, we have been inundated with calls and emails from concerned customers. Over the past few weeks we have handled over 77,000 calls. Our focus has been ensuring the safety of all our passengers and staff during this challenging time and bringing Canadians home. All our operations were moved from our head offices in Toronto and Montreal to be home-based in order to keep our employees safe per government recommendations regarding social distancing. Now that our repatriation efforts are completed and we have ensured the safety of our employees, we're answering your calls and messages as quickly as possible. Please note that all files with departures between March 17th and April 30th are being processed by our finance team as quickly as possible and there is no need to contact us.

My clients are scheduled to travel between now and April 30, 2020 – what do I need to do?

Customers with departure dates for flights or vacation packages between March 17th and April 30th are eligible to receive a future travel credit in the value of the original amount paid. No action is needed from you or your customers to receive this. Their original booking number will be the code of their future travel credit. We will communicate formally via the email address we have on file (including group travel bookings). You and your client do not need to contact us. This credit can be redeemed against future travel for travel up to 24 months from original departure date to anywhere Sunwing Airlines operates.

Why are my clients receiving a future travel voucher instead of a full cash refund?

While we initially offered customers booked on our flights a choice between a future travel credit valid for 12 months and a full cash refund, after the announcement of the Government of Canada's non-essential travel advisory, we adjusted our policy to be aligned with all other Canadian airlines and tour operators. This decision is also consistent with the ruling made by the Canadian Transportation Agency on March 26, 2020. All customers booked on our flights will be offered a future travel credit, and as a further gesture, we have extended the validity of this credit to two years.

My clients submitted a request for a refund before the policies changed – will they still receive a refund?

All non-processed refund requests were automatically transferred over to our new policy and customers will be receiving a future travel credit. We understand that some customers would have preferred a refund, but we are confident that during the next two years they will be able to take the flights or vacations they had planned.

sunwing

COVID-19 Frequently Asked Questions

What is the future travel credit process and how does it work?

We've made the travel credit process quite simple for our customers to redeem. When your clients are ready to rebook their vacation, the previous booking number is the key to their credit. Customers will only need to answer security questions to access and apply this credit to their new booking. If they do not use the full amount, it will remain as a credit on file and can be used at a later date.

When will booking cancellations be processed?

Our finance team has been working around the clock to process thousands of files. We hope to have the majority of them complete by April 9, 2020.

My clients purchased the Worry Free Cancellation Waiver – will they receive a refund?

Sunwing's Worry Free Cancellation Waiver lets customers cancel their vacation for any reason up to three hours prior to departure. Depending on when your clients cancelled, they may be entitled to a partial refund in combination with a future travel voucher. Please see our website for full terms and conditions. These partial refunds will be processed as quickly as possible as we continue to work through adjusting thousands of backlogged files. We ask for your patience as we work through our backlog.

What are my clients' next steps if they purchased travel insurance through an insurance provider?

Once your clients' file has been processed, we will let them know via the email address on file. At that point, they can then provide this document to their insurance provider who will guide them through next steps.

My clients made a deposit on a vacation departing after May 1 – what are their options?

We have adjusted our policy to make it more flexible for customers on final payment. We have introduced a new flexible policy for departures between May 1 and June 30, 2020 where final payments can be provided up to 25 days before the departure date (as opposed to the standard 45 days). By extending our final payment window, your clients can make a more informed decision about their travel. Please note that all other terms and conditions apply and cancelling will result in the loss of your clients' deposit.

When will I receive my commission?

All commissions are paid 21 days prior to departure dates and all bookings with unpaid commissions will be looked at in the next couple of weeks. We need to finalize all booking cancellations before we can issue commissions payments and we appreciate your patience.

Is my commission protected with future travel credits?

Your commission for bookings will be protected; however, no further commission will be paid when customers rebook using their future travel credit.

Can my clients still make a future booking?

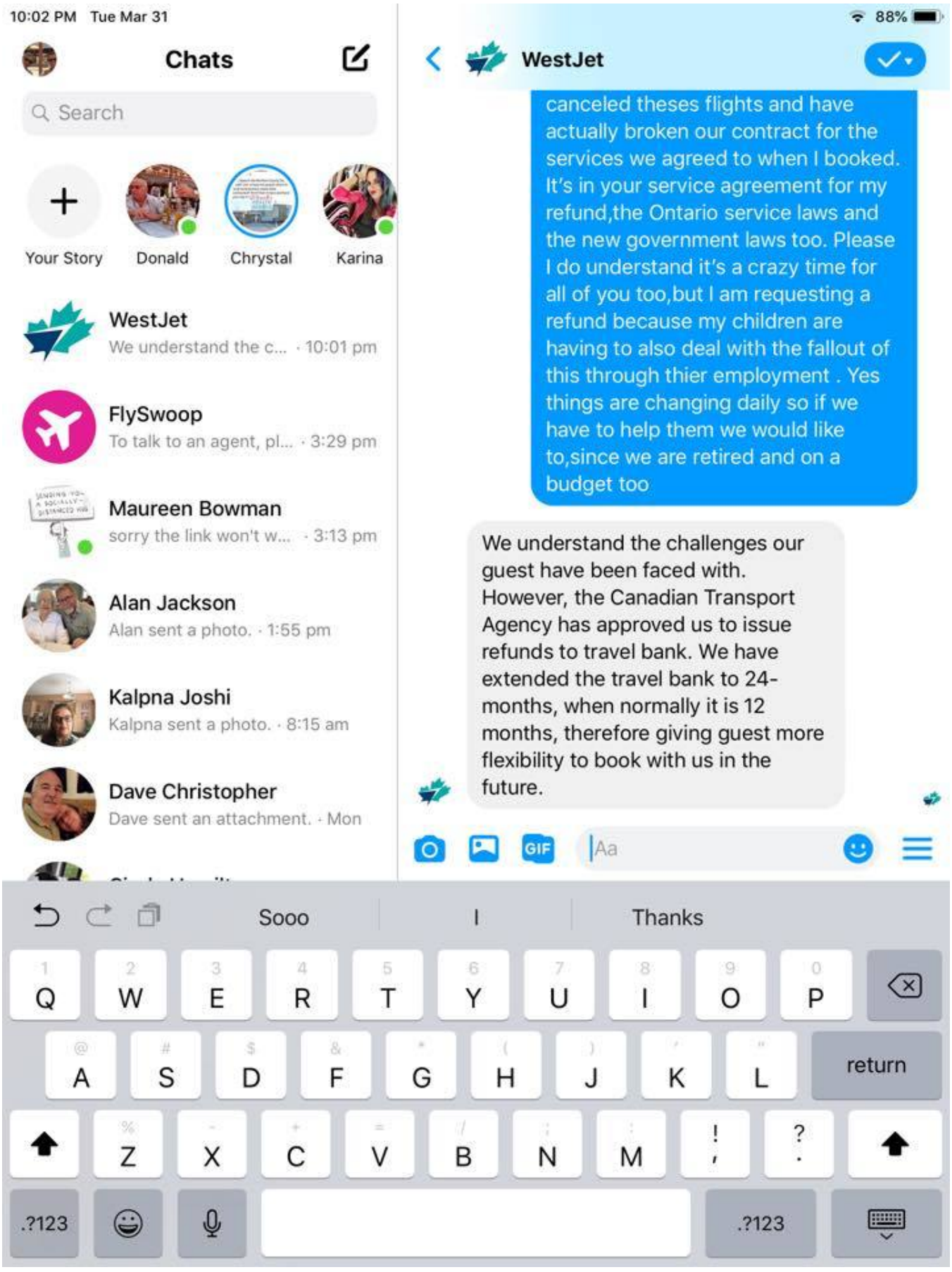
Of course! Our sales centre and website are fully operational with our schedule for the upcoming summer and winter seasons in place and up to date. Our team is also ready to assist with all you group and wedding bookings. New bookings can be made on available packages departing from May 1, 2020 onwards.

This is **Exhibit "W"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on April 7, 2020

_____

Signature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Karina
WestJet
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Maureen Bowman
sorry the link won't w... · 3:13 pm
Alan Jackson
Alan sent a photo. · 1:55 pm
Kalpna Joshi
Kalpna sent a photo. · 8:15 am
Dave Christopher
Dave sent an attachment. · Mon
WestJet
canceled theses flights and have actually broken our contract for the services we agreed to when I booked. It's in your service agreement for my refund,the Ontario service laws and the new government laws too. Please I do understand it's a crazy time for all of you too,but I am requesting a refund because my children are having to also deal with the fallout of this through thier employment . Yes things are changing daily so if we have to help them we would like to,since we are retired and on a budget too
We understand the challenges our guest have been faced with. However, the Canadian Transport Agency has approved us to issue refunds to travel bank. We have extended the travel bank to 24-months, when normally it is 12 months, therefore giving guest more flexibility to book with us in the future.
GIF
Aa
Sooo
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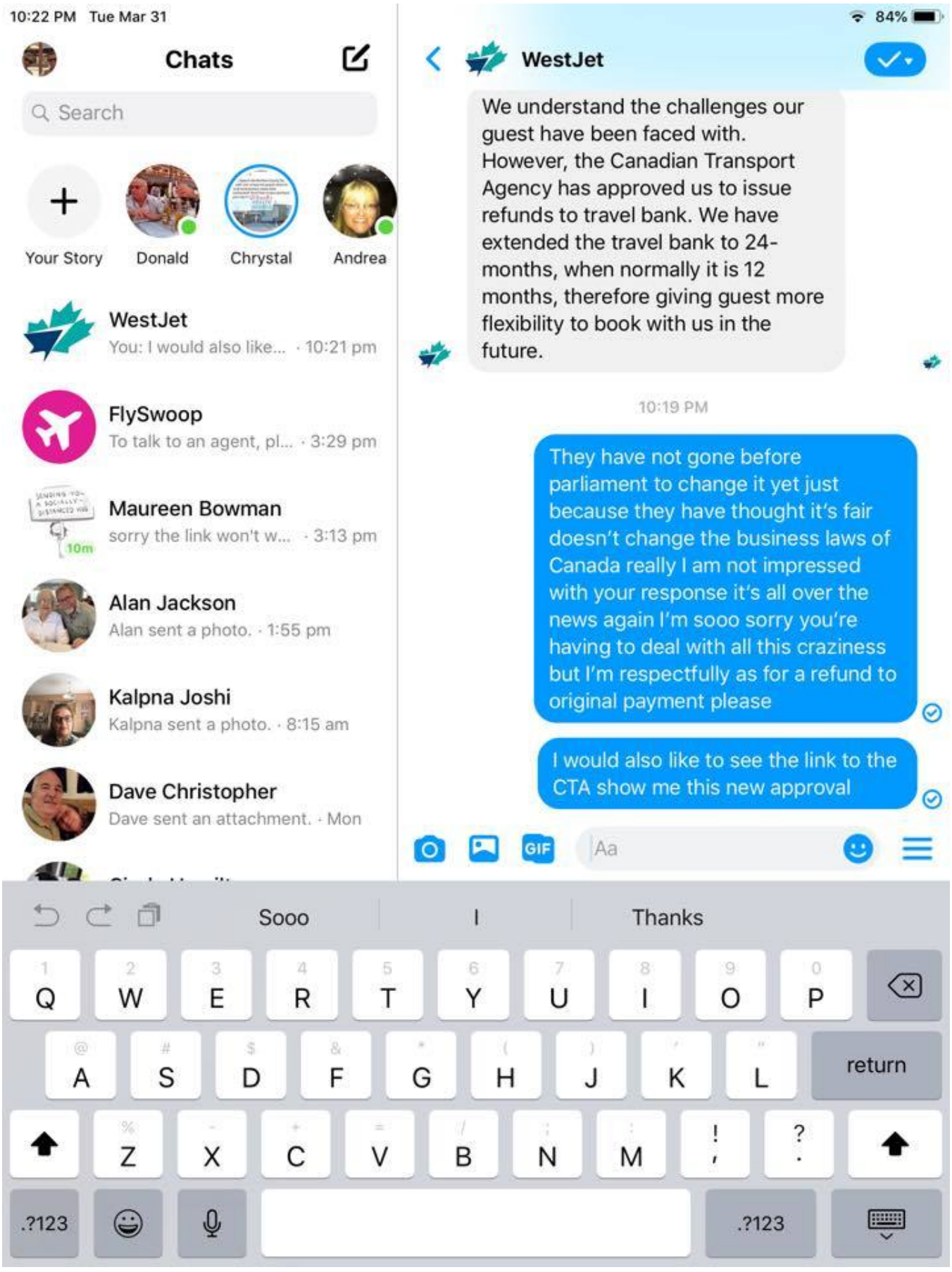
10:22 PM Tue Mar 31
84%
Chats
Search
Your Story
Donald
Chrystal
Andrea
WestJet
You: I would also like... · 10:21 pm
FlySwoop
To talk to an agent, pl... · 3:29 pm
Maureen Bowman
sorry the link won't w... · 3:13 pm
10m
Alan Jackson
Alan sent a photo. · 1:55 pm
Kalpna Joshi
Kalpna sent a photo. · 8:15 am
Dave Christopher
Dave sent an attachment. · Mon
WestJet
We understand the challenges our guest have been faced with. However, the Canadian Transport Agency has approved us to issue refunds to travel bank. We have extended the travel bank to 24-months, when normally it is 12 months, therefore giving guest more flexibility to book with us in the future.
10:19 PM
They have not gone before parliament to change it yet just because they have thought it's fair doesn't change the business laws of Canada really I am not impressed with your response it's all over the news again I'm sooo sorry you're having to deal with all this craziness but I'm respectfully as for a refund to original payment please
I would also like to see the link to the CTA show me this new approval
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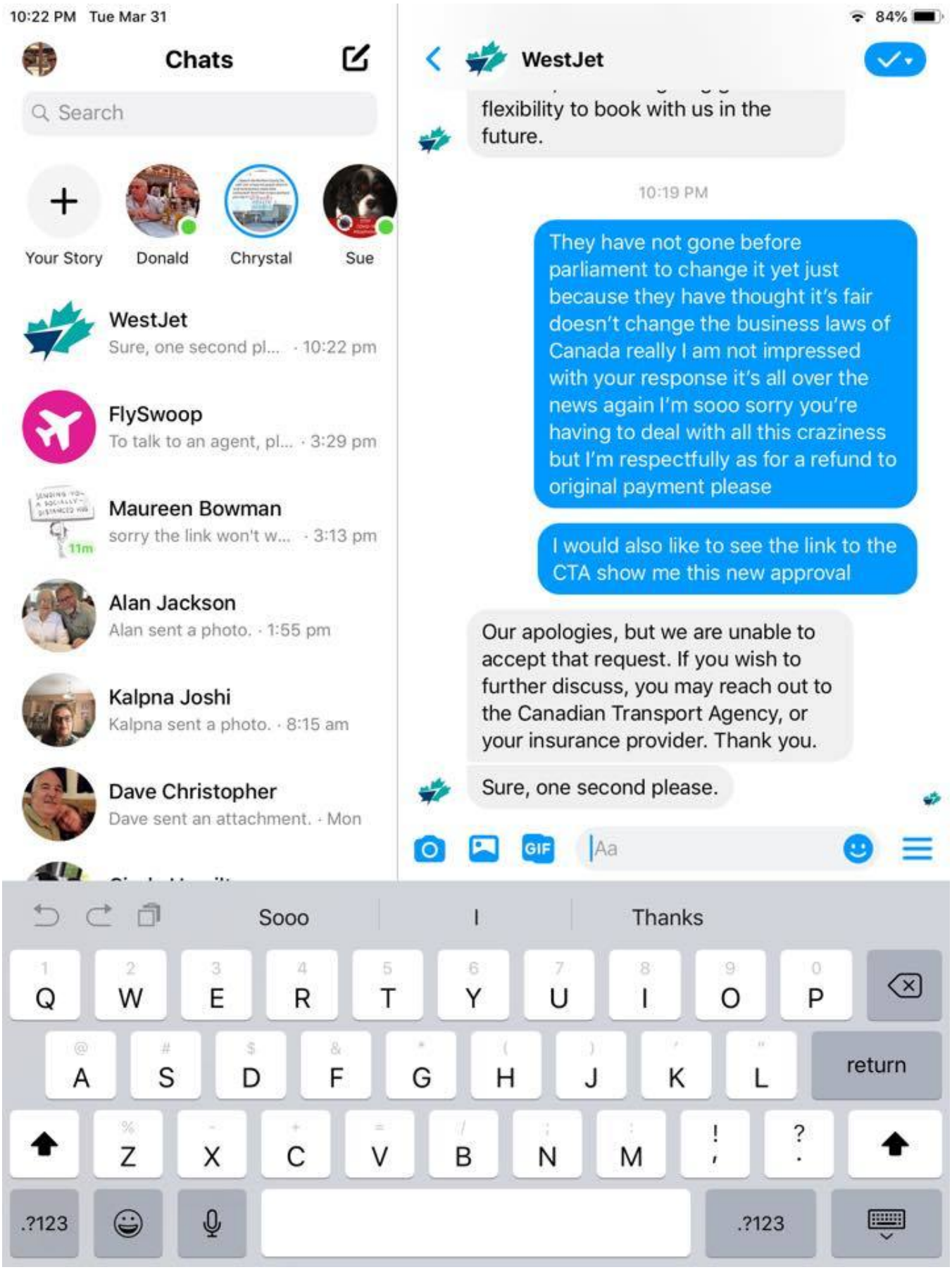
return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Sure, one second pl... · 10:22 pm
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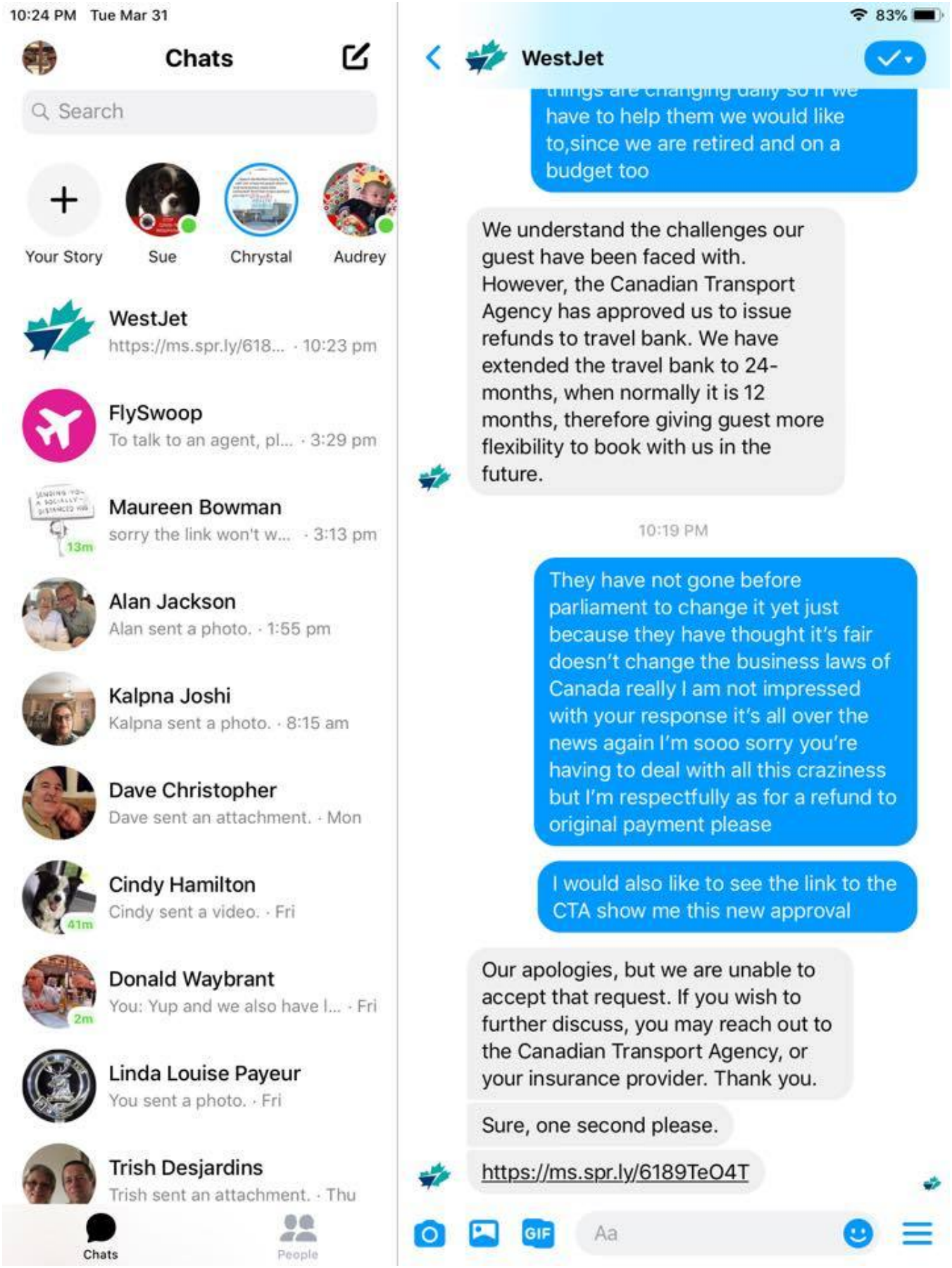
I would also like to see the link to the CTA show me this new approval
Our apologies, but we are unable to accept that request. If you wish to further discuss, you may reach out to the Canadian Transport Agency, or your insurance provider. Thank you.
Sure, one second please.
GIF
Aa
Sooo
I
Thanks
return
.?123
.?123


10:24 PM Tue Mar 31
Chats
Search
Your Story
Sue
Chrystal
Audrey
WestJet
https://ms.spr.ly/618... · 10:23 pm
FlySwoop
To talk to an agent, pl... · 3:29 pm
Maureen Bowman
sorry the link won't w... · 3:13 pm
13m
Alan Jackson
Alan sent a photo. · 1:55 pm
Kalpna Joshi
Kalpna sent a photo. · 8:15 am
Dave Christopher
Dave sent an attachment. · Mon
Cindy Hamilton
Cindy sent a video. · Fri
41m
Donald Waybrant
You: Yup and we also have l... · Fri
2m
Linda Louise Payeur
You sent a photo. · Fri
Trish Desjardins
Trish sent an attachment. · Thu
Chats
People
83%
WestJet
have to help them we would like to,since we are retired and on a budget too
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They have not gone before parliament to change it yet just because they have thought it's fair doesn't change the business laws of Canada really I am not impressed with your response it's all over the news again I'm sooo sorry you're having to deal with all this craziness but I'm respectfully as for a refund to original payment please
I would also like to see the link to the CTA show me this new approval
Our apologies, but we are unable to accept that request. If you wish to further discuss, you may reach out to the Canadian Transport Agency, or your insurance provider. Thank you.
Sure, one second please.
https://ms.spr.ly/6189TeO4T
GIF
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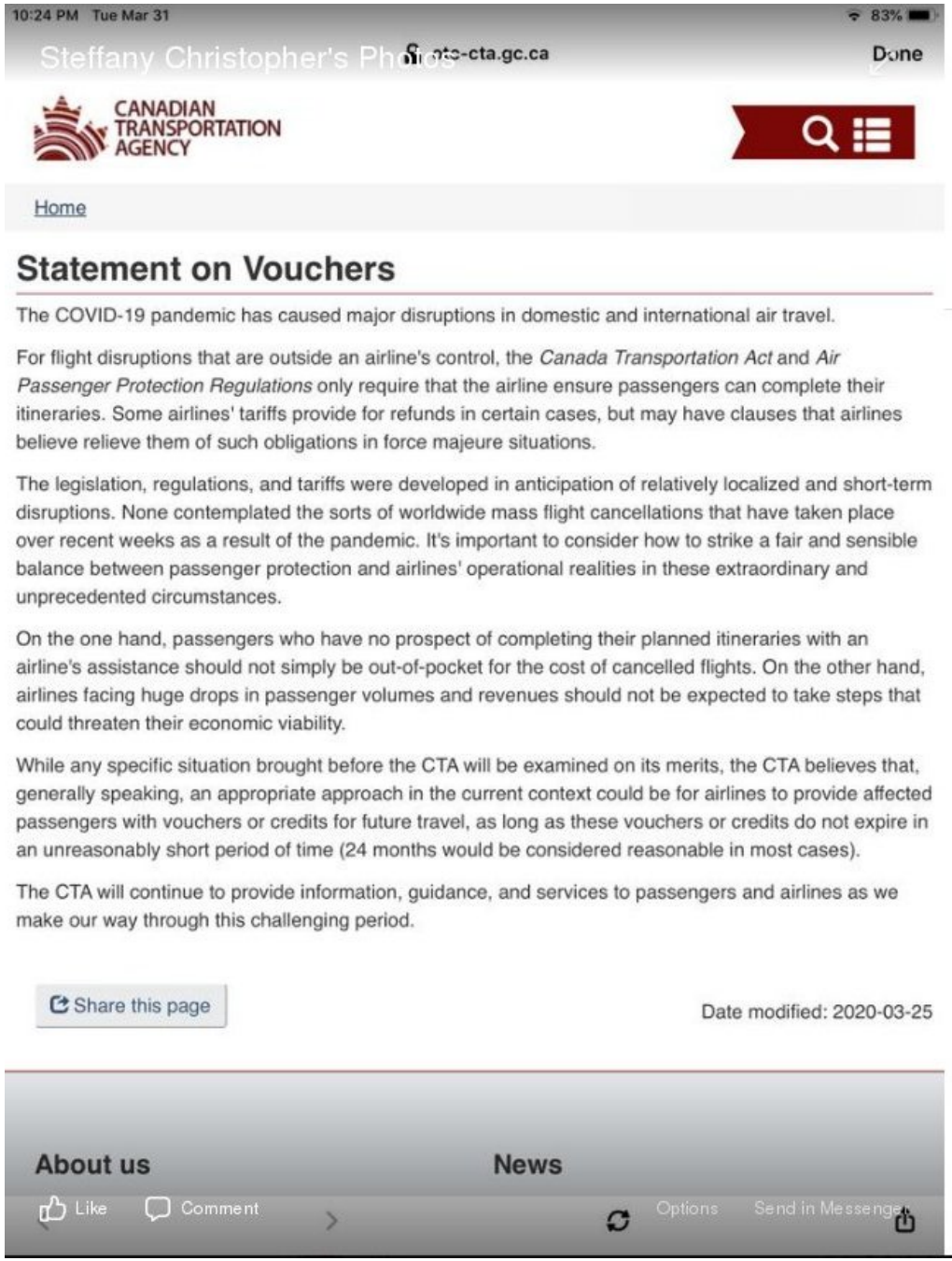

10:24 PM Tue Mar 31
83%
Steffany Christopher's Photos
cts-cta.gc.ca
Done
CANADIAN TRANSPORTATION AGENCY
Home
Statement on Vouchers
The COVID-19 pandemic has caused major disruptions in domestic and international air travel.
For flight disruptions that are outside an airline's control, the Canada Transportation Act and Air Passenger Protection Regulations only require that the airline ensure passengers can complete their itineraries. Some airlines' tariffs provide for refunds in certain cases, but may have clauses that airlines believe relieve them of such obligations in force majeure situations.
The legislation, regulations, and tariffs were developed in anticipation of relatively localized and short-term disruptions. None contemplated the sorts of worldwide mass flight cancellations that have taken place over recent weeks as a result of the pandemic. It's important to consider how to strike a fair and sensible balance between passenger protection and airlines' operational realities in these extraordinary and unprecedented circumstances.
On the one hand, passengers who have no prospect of completing their planned itineraries with an airline's assistance should not simply be out-of-pocket for the cost of cancelled flights. On the other hand, airlines facing huge drops in passenger volumes and revenues should not be expected to take steps that could threaten their economic viability.
While any specific situation brought before the CTA will be examined on its merits, the CTA believes that, generally speaking, an appropriate approach in the current context could be for airlines to provide affected passengers with vouchers or credits for future travel, as long as these vouchers or credits do not expire in an unreasonably short period of time (24 months would be considered reasonable in most cases).
The CTA will continue to provide information, guidance, and services to passengers and airlines as we make our way through this challenging period.
Share this page
Date modified: 2020-03-25
About us
News
Like
Comment
Options
Send in Messenger
Steffany Christopher
9 mins
When I opened it
1 Comment
Like

This is **Exhibit "X"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on April 7, 2020

_____

Signature

From: Air Canada Concierge <concierge@aircanada.ca>
Date: April 1, 2020 at 12:29:49 EDT
To: Michael Foulkes <Michael.foulkes@rogers.com>
Subject: Re: Booking MMHHTM

Hello / Bonjour Mr. Foulkes,

I would like to attach two links from the Canadian Transportation Agency website as they may help clarify some of your questions. The CTA has issued temporary exemptions to the Air Passenger Protection Regulations regarding refund request and extension of ticket validity.

https://www.otc-cta.gc.ca/eng/content/canadian-transportation-agency-issues-temporary-exemptions-certain-air-passenger-protection

https://otc-cta.gc.ca/eng/statement-vouchers

Kind Regards.

Yda

Air Canada
Concierge Desk / Bureau Concierge
concierge@aircanada.ca

From: Michael Foulkes <michael.foulkes@rogers.com>
Sent: Wednesday, April 1, 2020 12:24
To: Air Canada Concierge <concierge@aircanada.ca>
Subject: Re: Booking MMHHTM

Thank you for your prompt reply.

I don't believe these options are in accordance with applicable tariffs or Canadian or EU regulations. Before choosing which way to proceed I will look into this more closely, as well as consult with both the Expedia for TD and TD Visa where the booking was made.

Thank you again for your response. Best personal regards for your well-being.

Michael Foulkes

MICHAEL A FOULKES | 67 THORNCREST ROAD ETOBICOKE ONTARIO CANADA M9A 1S8 | TEL: +1-416-999-9422 | FAX: +1-416-234-9618 | MICHAEL.FOULKES@ROGERS.COM

On Apr 1, 2020, at 9:53 AM, Air Canada Concierge <concierge@aircanada.ca> wrote:

Hello / Bonjour Mr. Foulkes,

Thank you for contacting the Air Canada Concierge Desk.

I am sorry hear that your return flight was cancelled. Due to the COVID-19 crisis, our schedule change policy has been modified. Itineraries that have been affected by an schedule change (in your case cancel flight) actioned after the 19th of March are not refunded. Your flight was cancelled on the 27th of March. We can offer you two options:

- Put your reservation aside for future use. You will have no change fee for the first re-booking (which is 500cad per passenger). You have 24 months to use this credit since the day of the schedule change; in this case 27 March 2022.
- Refund your ticket with a cancellation penalty of 600cad per passenger.

Please let me know how you will like to proceed.

Kind Regards.

Yda

Air Canada

Concierge Desk / Bureau Concierge
concierge@aircanada.ca

From: Michael Foulkes <michael.foulkes@rogers.com>
Sent: Wednesday, April 1, 2020 09:32
To: Air Canada Concierge <concierge@aircanada.ca>
Subject: Booking MMHHTM

I received the attached email from Air Canada on Monday regarding a previously booked flight. I would appreciate your assistance in having this reservation refunded.

I request a full refund for this reservation as the return portion has apparently already been cancelled by Air Canada. I have not received any formal notification of the cancellation, but the May 31 return from Dublin Ireland (on the same booking reference) has disappeared from my Air Canada App itinerary and is no longer shown on your schedule. It is my understanding that under these circumstances, a cash refund is applicable and I would appreciate it you could direct this request to the appropriate area to have it processed.

If this is not possible, I would appreciate a written explanation.

Thank you.

Michael Foulkes
718-542-434

MICHAEL A FOULKES | 67 THORNCREST ROAD ETOBICOKE ONTARIO CANADA M9A 1S8 | TEL: +1-416-999-9422 | FAX: +1-416-234-9618 | MICHAEL.FOULKES@ROGERS.COM

Begin forwarded message:

From: "Air Canada" <communications@Mail.aircanada.com>
Subject: Confirm or cancel your booking / Confirmation ou annulation de votre réservation
Date: March 30, 2020 at 8:00:16 PM EDT
To: <MICHAEL.FOULKES@ROGERS.COM>
Reply-To: "Air Canada" <communications@Mail.aircanada.com>

Web version

AIR CANADA

VERSION FRANÇAISE

Confirm or cancel your booking

Booking reference: MMHHTM

As the global impact of COVID-19 continues to evolve, we would like to know whether this has impacted your travel plans.

I wish to confirm my booking
If you still plan to fly from Toronto (YYZ) to London (LHR), please review any applicable entry requirements here. If you are eligible to fly, please confirm below:

CONFIRM MY BOOKING

I wish to cancel my booking
Alternatively, we can appreciate that you may wish to alter your upcoming trip from Toronto (YYZ) to London (LHR), or are not able to travel due to new entry restrictions found here.

To give you more flexibility, we've waived change fees and are making an exception on non-refundable fares by providing the unused ticket value to be used towards a future ticket purchase. If you would like to cancel your booking but have been unable to reach your travel agency, you may be able to do so directly on our easy Air Canada self-service form.

Can I cancel my Travel Agency flight booking online with Air Canada directly?

I purchased a flight only:

• Yes, you can cancel your flight and receive **100% of the unused value of your ticket** as a future travel credit. This credit is valid for travel before March 31, 2021.

CANCEL MY BOOKING

I purchased a package (flight + hotel, car rental, etc.):

• No, unfortunately you will need to connect directly with your travel agency.

Your patience and understanding is greatly appreciated as we continue to adapt to this dynamic situation.

ENGLISH VERSION ↑

Confirmation ou annulation de votre réservation

Numéro de réservation : MMHHTM

Alors que l'impact mondial de la COVID-19 continue d'évoluer, nous souhaitons savoir si la pandémie a des conséquences sur vos plans de voyage.

Je souhaite confirmer ma réservation
Si vous prévoyez toujours de voyager au départ de Toronto (YYZ) et à destination de Londres (LHR), veuillez passer en revue ici les exigences d'entrée applicables. Si vous êtes autorisé à voyager, veuillez le confirmer ci-dessous :

CONFIRMER MA RÉSERVATION

Je souhaite annuler ma réservation
Il se peut aussi que vous souhaitiez annuler la réservation de votre voyage à venir au départ de Toronto (YYZ) et à destination de Londres (LHR), ou que vous ne puissiez voyager en raison des nouvelles restrictions d'entrée que vous trouverez ici.

Pour vous donner plus de flexibilité, nous avons annulé les frais de modification et faisons une exception pour les tarifs non remboursables : vous pouvez obtenir un crédit intégral à utiliser pour un prochain voyage. Si vous souhaitez annuler votre réservation, mais que vous n'êtes pas en mesure de communiquer avec votre agence de voyages, vous pouvez le faire directement au moyen du formulaire en libre-service d'Air Canada, facile à utiliser.

Puis-je annuler en ligne, directement auprès d'Air Canada, ma réservation faite à l'origine par une agence de voyages?

J'ai uniquement acheté un billet d'avion :

• Oui, vous pouvez annuler votre vol et recevoir **la valeur intégrale de votre billet inutilisé** sous la forme d'un crédit pour un voyage effectué d'ici le 31 mars 2021.

ANNULER MA RÉSERVATION

J'ai acheté un forfait (vol + hôtel, voiture de location, etc.) :

• Non, vous devez malheureusement communiquer directement avec votre agence de voyages.

Nous vous remercions de votre patience et de votre compréhension dans ce contexte de changements rapides.

This is **Exhibit "Y"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on April 7, 2020

_____

Signature

From: **AC Medical** <acmedical@aircanada.ca>
Date: Fri., Mar. 27, 2020, 1:30 p.m.
Subject: 21MAR BELISLE AHREN N4N4CA additional information
To: Ahren Belisle <belisle.ahren@gmail.com>

Good day Mr. Belisle,

Thank you for your email.

Please be advised that we will not be able to accommodate your request.

As mention previously the maximum we can provide is to keep your ticket as a credit for 24 months (2 years).

If I look at this link you provided this seems to be a law for resale agency we are an direct seller and provider as an airline.

The policy we follow at the moment is supported by the CTA (Canadian air transportation agency).

Please contact customer relation directly for any additional question as this is not something the medical desk can assist you with any further.

https://accc-prod.microsoftcrmportals.com/en-CA/air-canada-contact-us/

Best regards,

Nancy

AC_logo

Medical Desk/ Bureau Médical

T 1-800-667-4732 **|** 514-369-7039 **| F** 1-888-334-7717

MON-FRI: 6AM – 8PM ET **|** SAT-SUN: 6AM - 6PM ET

LUN-VEN: 0600-2000 **|** SAM-DIM: 0600-1800 heure de l'est

ACmedical@aircanada.ca

From: Ahren Belisle <belisle.ahren@gmail.com>
Sent: Thursday, March 26, 2020 3:11 PM
To: AC Medical <acmedical@aircanada.ca>
Subject: Re: Verbal disability NANCY WILL SPEAK TO GABE ON 27MAR

How do I get this cert? What tangible Code do I get?

I request a refund or a gift card with no expiry instead.

I've attached the law

Kind Regards,

Ahren Belisle

On Wed., Mar. 25, 2020, 2:11 p.m. AC Medical, <acmedical@aircanada.ca> wrote:

> Good day,
>
> The credit is valid for **24 Months (2 years).**
>
> This is the policy we have been given, if you wish to communicate with customer relations in regards to this policy you can do so by emailing then via the Air Canada website.
>
> Regards,
>
> Jesyka
>
> **From:** Ahren Belisle <belisle.ahren@gmail.com>
> **Sent:** Wednesday, March 25, 2020 11:53 AM
> **To:** AC Medical <acmedical@aircanada.ca>
> **Subject:** Re: Verbal disability
>
> I actually meant 2021 in my original email. A voucher that is only good until December 2020 is not sufficent in this crisis as I will not be traveling by then.
>
> My flights got cancelled by the airline and as per the law, I am entitled to a full refund.
>
> I will accept a gift card with no expiry date, or a refund. A voucher that must be used by December is not sufficent. Please respond.
>
> Kind Regards,
>
> Ahren Belisle
>
> On Mon., Mar. 16, 2020, 4:46 p.m. AC Medical, <acmedical@aircanada.ca> wrote:
>
> > Good day,
> >
> > Thank you for your email.

Air Canada's good will policy is applicable.

We are waiving a 1 time change fee, any fare difference is applicable.

You must begin travel by 18 December 2020.

The flights have been cancelled, and the ticket is being held as a credit.

You may refer to your booking reference N4N4C when rebooking.

Best regards,

Linda

Medical Desk/ Bureau Médical

T 1-800-667-4732 **|** 514-369-7039 **| F** 1-888-334-7717

MON-FRI: 6AM – 8PM ET **|** SAT-SUN: 6AM - 6PM ET

LUN-VEN: 0600-2000 **|** SAM-DIM: 0600-1800 heure de l'est

ACmedical.aircanada.ca

From: Ahren Belisle <belisle.ahren@gmail.com>
Sent: Monday, March 16, 2020 4:37 PM
To: AC Medical <acmedical@aircanada.ca>
Subject: Verbal disability

Hello, I have a speech disability and I would like to cancel my flight from yyz to yvr on Saturday.

Reservation code n4n4ca

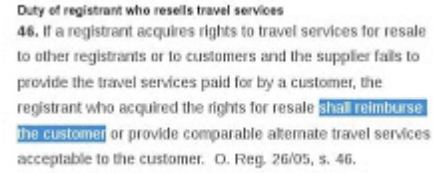
Last name Belisle.

I will accept credit for future travel in 2020. Can you help me in this medium?

cheers,

Ahren Belisle

3 attachments


Duty of registrant who resells travel services

46. If a registrant acquires rights to travel services for resale to other registrants or to customers and the supplier fails to provide the travel services paid for by a customer, the registrant who acquired the rights for resale shall reimburse the customer or provide comparable alternate travel services acceptable to the customer. O. Reg. 26/05, s. 46.

FB_IMG_1585249781078.jpg
18K

image001.jpg
4K

image001.jpg
4K

This is **Exhibit "Z"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on April 7, 2020

_____

Signature

Air Transat (@airtransat) has sent you a Direct Message on Twitter!

1 message

Air Transat (via Twitter) <notify@twitter.com> Thu, Mar 26, 2020 at 3:55 PM
To: Adam Bacour <flitox@laposte.net>

Air Transat sent you a Direct Message.

Hello, Sorry for the late reply. As you can imagine, we've been receiving high volumes of messages in the past few days, and we're working hard to respond as soon as possible. We strongly believe that the 24-month credit offered to our customers to compensate for their cancelled travel plans is a flexible proposition in these exceptional circumstances. We also continue to be flexible in our payment terms to meet the needs of our customers. In this regard, the Canadian Transportation Agency recently issued an opinion on the subject, which supports our decision and emphasizes that the solution proposed by Transat, among others,

is appropriate given the current situation. Jessica_AirTransat

Reply

This is **Exhibit "AA"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on April 7, 2020

_____

Signature

From: Swoop <support@flyswoop.freshdesk.com>
Sent: March 28, 2020 4:44 AM
To: susanannsimpson@msn.com <susanannsimpson@msn.com>
Subject: Re: REFUND ON CREDIT CARD NOT A CREDIT VOUCHER

Hi Susan,

Thank you for reaching out.
We do understand that a refund would be preferred, however we are only offering Swoop credits at this time for cancelled flights.

On March 25, the Canadian Transportation Agency clarified its position on providing credit for travel due to the uncertain times we are in. This clarification stated that airlines could offer travel credit for cancelled flights, and the credit should be valid for a reasonable amount of time, which was indicated to be 24 months. If you would like more information please visit the CTA's website here: https://otc-cta.gc.ca/eng/statement-vouchers

Kind regards,

Aris
Traveller Support
Swoop Inc. | FlySwoop.com

> On Wed, 25 Mar at 9:00 AM , Susan Simpson <susanannsimpson@msn.com> wrote:
> I have e-mailed you 8 times to privacy@flyswoop.com and as of today, Wednesday March 25th I have not heard a word from you either by e-mail or phone.
> I HAD NOT PURCHASED A TRAVEL CREDIT/VOUCHER. TRAVEL CREDIT IS IRRELEVANT TO THIS DISCUSSION. THE GOVERNMENT HAS ISSUED A WARNING TO ALL NOT TO TRAVEL ... I AM TAKING THIS SERIOUSLY ALONG WITH EVERYONE ELSE. I HAVE COPIES OF ALL MY OTHER E-MAILS THAT I HAVE SENT TO YOU AND WOULD GLADLY FORWARD THEM ON TO YOU. MY E-MAIL ADDRESS IS: susanannsimpson@msn.com
> Here is a copy of my last e-mail I sent you on March 23rd at 10:57a.m.
> Susan Simpson
> Mon 2020-03-23 10:57 AM
>
> - privacy@flyswoop.com
>
> Here I am again....still no reply from you on my other 7 e-mails.
> I called you again this morning and on hold for 31 minutes and was

then cut off.
I can't afford these calls from Cambridge, Ontario to Calgary.
I am really angry now and so frustrated with your Public Relations...
As I've said before I totally understand you are overwhelmed with all of this Covid-19.
But even an e-mail or call to say that you will at least look into my file would be common courtesy.
I will not be travelling to Tampa or anywhere that Swoop flies so therefore I would like my FULL REFUND that I am entitled to.
Under the advice from the Government we have been told NOT to travel and I am taking that seriously like many others.
As I mentioned before I accepted the Terms and Conditions when I cancelled my flight for Sunday, March 22nd (you cancelled my return on April 6) because I had no other choice. YOU CAN HAVE YOUR VOUCHER BACK ALL I WANT IS MY REFUND ON MY CREDIT CARD.
I have been given counsel and I am ENTITLED to a FULL REFUND ON MY CREDIT CARD.
The Ontario's Frustrated Contracts Act states that I should be able to get a FULL REFUND on my credit card and NOT a CREDIT VOUCER, that will be of no use to me at all.
I WOULD GREATLY APPRECIATE A REPLY FROM A SUPERVISOR!!
Thank you
Susan Simpson
1-519-623-7610
Reservation Code: X4K2RF

This is **Exhibit "AB"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on April 7, 2020

_____

Signature


TravelOnly
Gabor
Home
Find Friends
Create
TravelOnly
@travelonly
Home
Reviews
Photos
Videos
Posts
Events
About
Community
Contest
Pinterest
Welcome
Create a Page
TravelOnly
Your journey starts here
Like
Follow
Share
Get Quote
Send Message
TravelOnly
March 25 at 5:12 PM
To all of our amazing clients - thank you for putting your trust in TravelOnly and our amazing advisors. Over the course of the past two weeks, our advisors have been on hold for upwards of 12+ hours to help you get home or cancel or rebook your trips. No doubt this will continue for the foreseeable future -- we are here for you and hope that you will remember the value of using a travel advisor in the future!
Some of you have reached out to enquire how the new Air Passenger Protection Regulations would impact the requirements of airlines when flights were cancelled and/or rebooked.
The Canadian Transportation Agency has provided a statement which provides direction for you and your travel advisor regarding the issuing of future travel vouchers. In summary, the CTA believes that providing affected passengers with vouchers or credits for future travel is appropriate and reasonable. We understand that you may have questions on your voucher and how to use it for future travel and we encourage you to reach out to your TravelOnly advisor or our offices for assistance at any time. Please note that most vouchers will be issued within the next 4-6 weeks depending on the airline and travel supplier.
https://otc-cta.gc.ca/eng/statement-vouchers
OTC-CTA.GC.CA
Statement on Vouchers | Canadian Transportation Agency
The COVID-19 pandemic has caused major disruptions in domestic and international air travel. For flight disruptions that are outside an airline's...
17
23 Shares
Like
Comment
Share
Buffer
Write a comment...
Create Post
Write a post...
4.6 out of 5 · Based on the opinion of 81 people
Community
See All
Invite your friends to like this Page
7,778 people like this
7,728 people follow this
45 check-ins
About
See All
Elgin Street
Usher Street
West Street
Greenwood Cemetery
202-325A West Street
Brantford, Ontario N3R 3V6
Get Directions
Chat (20)
www.travelonly.com
Travel Service · Cruise Agency
Price Range $$
Opens Monday
Closed Now
Suggest Edits
Page Transparency
See More
Facebook is showing information to help you better understand the purpose of a Page. See actions taken by the people who manage and post content.
Page created - February 6, 2012
Pages Liked by This Page

This is **Exhibit "AC"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on April 7, 2020

_____

Signature

ONTARIO'S TRAVEL REGULATOR

(https://www.tico.ca/)

Registrar Bulletin: Vouchers or Similar Documents

TICO has been receiving questions from registrants and customers about the use of vouchers or similar documents as a form of reimbursement for travel services that have been cancelled or indefinitely delayed.

Registrants' obligations depend on the details of the travel services that were sold. These protections only apply to customers who purchased travel services through a TICO-registered travel agency or tour operator:

If you have engaged suppliers to bundle multiple travel services (e.g., airfare, accommodations, cruise and/or ground transportation), which you advertised and re-sold to either other registrants or customers for a single price:

In this scenario, if one of the suppliers fails to provide the travel service (e.g., airline, cruise line, coach operator), the registrant is required to provide one of the following to the customer:

a refund;

comparable alternate travel services acceptable to the customer; or

a voucher or similar document that is acceptable to the customer for future redemption towards travel services.

During this unprecedented global pandemic, there is a time-limited exemption under section 46, which allows registrants to elect to only provide a voucher or similar document for future redemption towards travel services where a supplier fails to provide the travel services on or after these changes came into effect and that supplier's failure to provide travel services is related to COVID-19. If the exemption is applicable, the voucher or similar document issued must meet specified requirements. This time-limited exemption is revoked on April 1, 2021.

If the voucher or similar document is issued by the registrant on or after March 30, 2020 due to the supplier failing to provide a travel service and that failure is related to COVID-19:

The voucher or similar document must be for at least equivalent value to the travel services that were not provided to the customer and must be redeemable for a minimum of one year from the date the voucher or similar document was issued. The travel can happen beyond the one year mark.

A voucher provided by the registrant or an end supplier is considered acceptable so long as the equivalent value of the travel services is provided. The registrant shall provide a voucher to the customer where a voucher, if any, from the supplier is less than the original value of the travel services.

Registrants cannot add additional fees unless disclosed at the time of booking (e.g., a fee for issuing the voucher).

Where a registrant has only sold another registrant's package, and not acquired any rights to those components for resale, the registrant that sells to the customer is not subject to this provision.

Relevant section of the Regulation: 36 (https://www.ontario.ca/laws/regulation/050026#BK39), 38 (https://www.ontario.ca/laws/regulation/050026#BK41), 46 (https://www.ontario.ca/laws/regulation/050026#BK49) (prior to March 30, 2020) 46 (https://www.ontario.ca/laws/regulation/r20101?search=101%2F20) (after March 30, 2020)

If you sold travel services that did not form part of a pre-bundled package (e.g., accommodations and/or cruise):

Customers who have travel bookings that are affected by COVID-19 are subject to the terms and conditions of the booking from the registrant and applicable suppliers (e.g., hotel or cruise line) and the policies in effect. Some suppliers may choose to issue a voucher or similar document to their customers. TICO does not have jurisdiction over end-suppliers.

In addition to the terms and conditions from suppliers, customers are also subject to the terms and conditions of either the retail travel agency and/or tour operator from whom they purchased their travel services from. These terms and conditions would need to be disclosed to the customer at the time of booking and included on the registrant's invoice to the customer.

TICO expects and requires registrants to honour all of their contractual obligations made with customers. Registrants must fully consider all of their contractual and legal obligations in determining how to address the situation. Please note: terms and conditions of travel services sold cannot override your obligations under the *Travel Industry Act, 2002* **and Ontario Regulation 26/05.**

Relevant sections of the Regulation: 36 (https://www.ontario.ca/laws/regulation/050026#BK39) and 38 (https://www.ontario.ca/laws/regulation/050026#BK41)

If you sold only air transportation on an airline regulated by the Canadian Transportation Agency (CTA):

The CTA has indicated that to sustain the economic viability of the airline industry, the airlines under their jurisdiction may issue vouchers for future travel in lieu of refunds. Please click here (https://otc-cta.gc.ca/eng/statement-vouchers) for the CTA's statement. Please note that TICO does not have jurisdiction over airlines, which are federally regulated.

Registrants issuing vouchers or similar documents for future travel should consider having a dialogue with customers to determine if a full or partial reimbursement has been processed by other means (e.g., travel insurance).

Additional information

Full text or regulatory changes on e-laws (https://www.ontario.ca/laws/regulation/r20101?search=101%2F20)

Registrar Bulletin (https://www.tico.ca/news/registrar-bulletins/398-registrar-bulletin-ontario-government-to-provide-burden-relief-to-ontario-s-registered-travel-agencies-and-tour-operators-in-response-to-the-covid-19-pandemic.html): Ontario government to provide burden relief to Ontario's registered travel agencies and tour operators in response to the COVID-19 pandemic

Additional Registrar Bulletins (https://www.tico.ca/news/registrar-bulletins.html) concerning COVID-19

Customer information (https://www.tico.ca/blog/happens-health-incident-like-coronavirus-impacts-travel-plans): FAQs that you can share with your clients

To contact TICO

TICO is operating remotely, but we are here to assist you. For more information, please click here (https://www.tico.ca/news/registrar-bulletins/393-registrar-bulletin.html).

Any questions can be directed to tico@tico.ca (mailto:tico@tico.ca) or 1-888-451-TICO (8426).

Richard Smart
Registrar, *Travel Industry Act, 2002*

This is **Exhibit "AD"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on April 7, 2020

_____

Signature

Tactful and tough, agents have effective strategies for dealing with refund demands

Friday, April 3, 2020
Posted by Kathryn Folliott

This story originally ran in the April 2, 2020 issue of Travelweek magazine. To get Travelweek delivered to your agency for free, subscribe here.

TORONTO — Financial concerns are mounting. Work and stress levels are at all-time highs. The retail travel sector is facing never-before-seen challenges amid the coronavirus pandemic. And unbelievably this has all come to a head in just a few short weeks.

Not surprising then that the last thing any travel agent wants to hear from a client right now is 'forget the voucher, I want a refund'.

Thankfully unprecedented times call for unprecedented measures and in recent days both the Canadian Transportation Agency (CTA) and the Ontario government have come out with new directives in favour of vouchers / future travel credits, aimed at mitigating the impact of the hundreds of thousands of cancellations brought on by the coronavirus pandemic.

Travel agents understand that clients want refunds. They also understand that if suppliers and retailers are on the hook for refunds amid a global health crisis, with all of the worldwide border closures and travel restrictions that have followed in its wake, then an entire industry will be on the brink of collapse.

Some say travel advisors who have been in the habit of taking the client's side in any dispute with a supplier may have to think twice before doing that this time, adding that there's a fine line to be walked, between client and supplier, if the advisor's relationship with both is to survive this pandemic.

Agents facing a financial hit with commission recalls or worse when clients pursue refunds or credit card chargebacks say they're using every skill at their disposal, from tact to tough talk, to deal with refund requests.

"SUPPLIERS HAVE BEEN VERY GENEROUS, ESPECIALLY THE CRUISE LINES"

Uniglobe Travel's Michelle Whalen knows first-hand the disappointment of missing out on a trip. Her own anniversary cruise was cancelled amid the coronavirus pandemic. "I see all these suppliers and their staff layoffs and partners I've come to have a good rapport with, they will lose their jobs. The Caribbean countries who rely on tourism dollars. My heart goes out to them. I'm not in any way going to demand a refund."

Whalen says most of her clients are willing to accept vouchers and even happier when they saw that some suppliers were extending the expiry date to up to 24

months. “Many of my clients are keen travellers and will be travelling again at some point. Suppliers have been very generous, especially the cruise lines.”

The downside of the vouchers is that the pricing, itinerary and availability “may not be as desirable” as when clients first booked. Explaining the situation to a client, Whalen says: “I gently said I know it’s disappointing you’re not getting the same trip next time at the same price but they are being flexible, they’re offering a 10% bonus.”

Whalen adds: “I explained that [suppliers] can’t possibly refund everyone’s money at once or the companies would be bankrupt making future travel even more difficult. I’ve tried to highlight to clients that it’s not about the almighty dollar – these suppliers really do care about helping people.”

More news: [Air Canada to reduce capacity and temporarily reduce workforce in Q2]

“Airline staff, tour operator staff are experiencing layoffs just like my clients’ workplaces – they have bills to pay, families to feed as well.”

“NONE CONTEMPLATED THE WORLDWIDE MASS FLIGHT CANCELLATIONS”

The small but vocal minority of travellers pursuing refunds has made its case for refunds in consumer media and Facebook groups. Earlier this week came word of a class action suit against airlines including Air Canada, WestJet, Swoop, Sunwing and Transat.

On March 25 the Canadian Transportation Agency waded into the fray, issuing a special statement saying that while specific cases may get further analysis, in general, vouchers are appropriate in these extraordinary circumstances.

The CTA added that legislation, regulations, and tariffs currently on the books “were developed in anticipation of relatively localized and short-term disruptions. None contemplated the sorts of worldwide mass flight cancellations that have taken place over recent weeks as a result of the pandemic.”

Striking a fair and sensible balance between passenger protection and airlines’ operational realities is key, said the CTA.

COMP FUND IS STILL OUT OF DATE AND INADEQUATE: ACTA

This week in Ontario the provincial government announced a number of regulatory amendments to the Travel Industry Act, 2002. In addition to measures aimed at reducing the burden on TICO registrants, the updates include a time-limited exemption that would allow registrants to choose to provide only a voucher in cases where a supplier failed to provide travel services. Also new, eligibility for Comp Fund reimbursements will be expanded to cover consumers with vouchers who do not receive their travel services, potentially due to the failure of a registrant.

ACTA applauded the moves, while cautioning that the funding model for the Comp Fund is still out of date and inadequate. “The COVID-19 pandemic has highlighted the vulnerability of the significantly inadequate Fund, and as such, ACTA will continue to lobby for recommended changes for the benefit of Ontario travel agencies, and the consumers they represent,” says ACTA President Wendy Paradis.

“IT IS NOT POSSIBLE FOR OUR SUPPLIERS TO ABSORB THESE LOSSES”

Tripcentral.ca President Richard Vanderlubbe says: “While it is understandable that customers are expecting refunds, and from a ‘moral’ point of view, they have paid for something that they have not received, this is not how the global travel industry functions.”

Vanderlubbe, who served on the TICO board for many years and who is a long-time advocate for modernizing the Comp Fund, adds: “It is not possible for our suppliers to absorb these losses, and if they were required to provide refunds, it would bankrupt most of them. Bankrupt suppliers will cause cascading losses for travel agencies due to non-payment of outstanding commissions, and damage future travel plans on the books. Further, bankruptcies will hurt us all by reducing consumer confidence.”

More news: **Holland America CEO speaks out as Zaandam, Rotterdam still stranded**

For this reason, he says, “we support suppliers policies of future travel credit, and point out that the federal government, TICO and others are supporting. The

best thing for our customers and the industry is that all of our businesses remain solvent."

"YOU HAD THE OPPORTUNITY TO PURCHASE CANCELLATION INSURANCE ... AND YOU DECLINED TO DO SO"

A letter that Vanderlubbe and his team have ready for any client making persistent refund requests or launching credit card chargebacks is strongly worded but fair, and explains the situation from the retailer's side. The letter cites the CTA statement and reads, in part: "We too are experiencing financial damage from the COVID19 pandemic, paying our staff for more than 5 weeks now with little or no revenue coming, in order to help our customers return home, process future travel credits, and we will be re-booking for months later."

The letter also notes: "The Federal Government has issued a plain language statement which you can read from the link below [https://otc-cta.gc.ca/eng/statement-vouchers] that states that, as far as the air travellers protection regime goes, it was never intended to cover acts of God, or a force majeure situation. In short, they state that a future travel credit for 2 years is sufficient compensation under this circumstance.

"Further, the Travel Industry Council of Ontario, that administers the Ontario Travel Industry Act, has issued a statement that 'under Ontario law, there is no requirement for a travel company to refund or offer alternative travel services if a government travel advisory is in effect'. In short, our suppliers are not even obligated to provide a future travel credit, but they are.

"Your chargeback through your credit card is unreasonable given that you are being offered a travel credit good for two years, and that you had the opportunity to purchase cancellation insurance at the time of booking, and you declined to do so.

"We ask that you contact your credit card company and 'reverse the chargeback request'. We need evidence of this in order to process your future travel credit."

TICO has issued a FAQ for consumers inquiring about voucher use, a FAQ that's helpful for retailer and supplier registrants as well. The FAQ can be found at

TICO's website at tico.ca.

Tags: COVID-19, TICO

Next Post >>

This is **Exhibit "AE"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on April 7, 2020

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Signature

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.

ENFORCEMENT NOTICE REGARDING REFUNDS BY CARRIERS GIVEN THE UNPRECEDENTED IMPACT OF THE COVID-19 PUBLIC HEALTH EMERGENCY ON AIR TRAVEL

The U.S. Department of Transportation's Office of Aviation Enforcement and Proceedings (Aviation Enforcement Office), a unit within the Office of the General Counsel, is issuing this notice to remind the traveling public, and U.S. and foreign carriers, operating at least one aircraft having a seating capacity of 30 or more seats, that passengers should be refunded promptly when their scheduled flights are cancelled or significantly delayed. Airlines have long provided such refunds, including during periods when air travel has been disrupted on a large scale, such as the aftermath of the September 11, 2001 attacks, Hurricane Katrina, and presidentially declared natural disasters. Although the COVID-19 public health emergency has had an unprecedented impact on air travel, the airlines' obligation to refund passengers for cancelled or significantly delayed flights remains unchanged.

The Department is receiving an increasing number of complaints and inquiries from ticketed passengers, including many with non-refundable tickets, who describe having been denied refunds for flights that were cancelled or significantly delayed. In many of these cases, the passengers stated that the carrier informed them that they would receive vouchers or credits for future travel. But many airlines are dramatically reducing their travel schedules in the wake of the COVID-19 public health emergency. As a result, passengers are left with cancelled or significantly delayed flights and vouchers and credits for future travel that are not readily usable.

Carriers have a longstanding obligation to provide a prompt refund to a ticketed passenger when the carrier cancels the passenger's flight or makes a significant change in the flight schedule and the passenger chooses not to accept the alternative offered by the carrier.[1] The longstanding obligation of carriers to provide refunds for flights that carriers cancel or significantly delay does not cease when the flight disruptions are outside of the carrier's control (e.g., a result of government restrictions).[2] The focus is not on whether the flight disruptions are within or outside the carrier's

[1] *See* Enhancing Airline Passenger Protections, 76 Fed. Reg. 23110-01, at 23129 (Apr. 25, 2011) ("We reject . . . assertions that carriers are not required to refund a passenger's fare when a flight is cancelled if the carrier can accommodate the passenger with other transportation options after the cancellation. We find it to be manifestly unfair for a carrier to fail to provide the transportation contracted for and then to refuse to provide a refund if the passenger finds the offered rerouting unacceptable (e.g., greatly delayed or otherwise inconvenient) and he or she no longer wishes to travel.")

[2] U.S. Dept. of Transportation, Aviation Consumer Protection, Refunds, https://www.transportation.gov/individuals/aviation-consumer-protection/refunds (March 4, 2020) ("Am I Entitled to a Refund? When the airline is at fault: Passengers are often entitled to a refund of the ticket price and associated fees when the airline is at fault. . . . Cancelled Flight – A passenger is entitled to a refund if the airline cancelled a flight, regardless of the reason, and the passenger chooses not to be rebooked on a new flight on that airline. . . . Schedule Change/Significant Delay – A passenger is entitled to a refund if the airline made a significant schedule change and/or significantly delays a flight and the passenger chooses not to travel.").

control, but rather on the fact that the cancellation is through no fault of the passenger. [3] Accordingly, the Department continues to view any contract of carriage provision or airline policy that purports to deny refunds to passengers when the carrier cancels a flight, makes a significant schedule change, or significantly delays a flight to be a violation of the carriers' obligation that could subject the carrier to an enforcement action.[4]

In recognition of the fact that the COVID-19 public health emergency has had major impacts on the airline industry, the Aviation Enforcement Office will exercise its prosecutorial discretion and provide carriers an opportunity to become compliant before taking further action. Specifically, the Aviation Enforcement Office will refrain from pursuing an enforcement action against a carrier that provided passengers vouchers for future travel in lieu of refunds for cancelled or significantly delayed flights during the COVID-19 public health emergency so long as: (1) the carrier contacts, in a timely manner, the passengers provided vouchers for flights that the carrier cancelled or significantly delayed to notify those passengers that they have the option of a refund; (2) the carrier updates its refund policies and contract of carriage provisions to make clear that it provides refunds to passengers if the carrier cancels a flight or makes a significant schedule change; and (3) the carrier reviews with its personnel, including reservationists, ticket counter agents, refund personnel, and other customer service professionals, the circumstances under which refunds should be made.

The Aviation Enforcement Office will monitor airline policies and practices and take enforcement action as necessary.

Questions regarding this notice may be addressed to the Office of Aviation Enforcement and Proceedings (C-70), U.S. Department of Transportation, 1200 New Jersey Avenue, S.E., Washington, D.C. 20590.

By:

Blane A. Workie
Assistant General Counsel for
Aviation Enforcement and Proceedings

Dated: April 3, 2020

An electronic version of this document is available at http://www.dot.gov/airconsumer

[3] *Id.*

[4] *See* Enhancing Airline Passenger Protections, 76 Fed. Reg. 23110-01, at 23129 (Apr. 25, 2011) (*citing* July 15, 1996 Industry Letter which advises carriers that "applying . . . nonrefundability/penalty provisions in situations in which the change of flight time or travel date has been necessitated by carrier action or 'an act of god', e.g., where the carrier cancels a flight for weather or mechanical reasons . . . is grossly unfair and it violates 49 U.S.C. 41712, as would any contract of carriage or tariff provision mandating such a result" and putting carriers on notice that the Department "will aggressively pursue any cases of this type that come to our attention").

This is **Exhibit "AF"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on April 7, 2020

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Signature

Source: *Canadian Life and Health Insurance Association*

April 01, 2020 16:34 ET

Advisory: Travel cancellation insurance and airline vouchers or credits

TORONTO, April 01, 2020 (GLOBE NEWSWIRE) -- Some travel insurance policies provide coverage that may pay for costs that consumers cannot recover when trips are cancelled. In past, travel service providers usually provided consumers with refunds where the service provider was unable to provide service. Over the past month, many service providers have changed this practice and are now offering vouchers or credits that consumers can use for future travel.

On March 25, 2020, the Canadian Transportation Agency updated its endorsement of the use of vouchers or credits as an appropriate approach for Canada's airlines as long as these vouchers or credits do not expire in an unreasonably short period of time.

Travel insurers are advising policyholders that if you have been offered this type of full credit, or voucher for future use by an airline, train or other travel provider, in many instances, under the terms of your insurance policy you will not be considered to have suffered an insurable loss.

Customers are encouraged to consider the above and review the terms of your policy prior to submitting a claim for trip cancellation coverage. You should also check your insurer's website for guidance that may be posted. Each insurer will assess the particulars of each circumstance in accordance with the terms and conditions of your policy.

Disputes over refunds and credits should be directed to your travel service provider, transportation carrier or the Canadian Transportation Agency.

You can find the contact information for your insurer in your contract or at: https://www.olhi.ca/for-insurers/member-list/

About the CLHIA

The CLHIA is a voluntary association whose member companies account for 99 per cent of Canada's life and health insurance business. The industry provides a wide range of financial security products such as life insurance, annuities (including RRSPs, RRIFs and pensions) and supplementary health insurance to almost 29 million Canadians. It

also holds over $850 billion in assets in Canada and employs more than 156,000 Canadians.

For more information:

Kevin Dorse
Assistant Vice President, Strategic Communications and Public Affairs
(613) 691-6001 / kdorse@clhia.ca

This is **Exhibit "AG"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on April 7, 2020

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Signature

Halifax, NS

lukacs@AirPassengerRights.ca

March 30, 2020

VIA EMAIL and FAX

Canadian Transportation Agency

Dear Madam or Sir:

Re: "Statement on Vouchers" – Cease and Desist

It has come to our attention that on or around March 25, 2020, the Canadian Transportation Agency [**CTA**] published a "Statement on Vouchers" on its website purporting to offer unsolicited opinions on an ongoing controversy between passengers and airlines:

https://otc-cta.gc.ca/eng/statement-vouchers

Said statement creates the false impression of a legally binding determination by the CTA, and misleads consumers about their rights. Indeed, it has been represented and/or used in such a manner by various air carriers in their dealings with passengers.

This is unacceptable.

We request that the CTA remove the aforementioned statement from its website without delay and inform the public that the statement is not a legal ruling whatsoever, by no later than **Tuesday, March 31, 2020** at noon Eastern Time.

We look forward to hearing from you.

Yours very truly,

Dr. Gábor Lukács

Enclosed: "Statement on Vouchers"

CANADIAN TRANSPORTATION AGENCY

Home

Statement on Vouchers

The COVID-19 pandemic has caused major disruptions in domestic and international air travel.

For flight disruptions that are outside an airline's control, the *Canada Transportation Act* and *Air Passenger Protection Regulations* only require that the airline ensure passengers can complete their itineraries. Some airlines' tariffs provide for refunds in certain cases, but may have clauses that airlines believe relieve them of such obligations in force majeure situations.

The legislation, regulations, and tariffs were developed in anticipation of relatively localized and short-term disruptions. None contemplated the sorts of worldwide mass flight cancellations that have taken place over recent weeks as a result of the pandemic. It's important to consider how to strike a fair and sensible balance between passenger protection and airlines' operational realities in these extraordinary and unprecedented circumstances.

On the one hand, passengers who have no prospect of completing their planned itineraries with an airline's assistance should not simply be out-of-pocket for the cost of cancelled flights. On the other hand, airlines facing huge drops in passenger volumes and revenues should not be expected to take steps that could threaten their economic viability.

While any specific situation brought before the CTA will be examined on its merits, the CTA believes that, generally speaking, an appropriate approach in the current context could be for airlines to provide affected passengers with vouchers or credits for future travel, as long as these vouchers or credits do not expire in an unreasonably short period of time (24 months would be considered reasonable in most cases).

The CTA will continue to provide information, guidance, and services to passengers and airlines as we make our way through this challenging period.

Share this page

Date modified:
2020-03-25

This is **Exhibit "AH"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on April 7, 2020

_____

Signature

RE: "Statement of Vouchers" -- Cease and Desist

secretariat <Secretariat.Secretariat@otc-cta.gc.ca> Mon, Mar 30, 2020 at 5:35 PM
To: Gabor Lukacs <lukacs@airpassengerrights.ca>
Cc: "Services Juridiques / Legal Services (OTC/CTA)" <Servicesjuridiques/LegalServicesOTC/CTA@otc-cta.gc.ca>, Scott Streiner <Scott.Streiner@otc-cta.gc.ca>

The Agency acknowledges receipt of your submission.

Your submission will be reviewed and ?you will be contacted if it is incomplete or otherwise inadequate.

Kind regards,

Secrétariat
Office des transports du Canada / Gouvernement du Canada
secretariat@otc-cta.gc.ca / Site Web www.otc-cta.gc.ca
Tél. : 819-997-7047 / Télécopieur 819-953-5253 / ATS : 1-800-669-5575

Secretariat
Canadian Transportation Agency / Government of Canada
secretariat@otc-cta.gc.ca / Web site www.otc-cta.gc.ca
Tel: 819-997-7047 / Facsimile 819-953-5253 / TTY: 1-800-669-5575

-----Original Message-----
From: Gabor Lukacs <lukacs@AirPassengerRights.ca>
Sent: Monday, March 30, 2020 3:43 PM
To: secretariat <Secretariat.Secretariat@otc-cta.gc.ca>; Services Juridiques / Legal Services (OTC/CTA) <Servicesjuridiques/LegalServicesOTC/CTA@otc-cta.gc.ca>; Scott Streiner <Scott.Streiner@otc-cta.gc.ca>
Subject: "Statement of Vouchers" -- Cease and Desist

Dear Madam or Sir,

Please refer to the attached letter.

Yours very truly,
Dr. Gabor Lukacs

--
Dr. Gabor Lukacs, Founder and Coordinator
Air Passenger Rights
Tel : (647) 724 1727
Web : http://AirPassengerRights.ca
Twitter : @AirPassRightsCA
Facebook: https://www.facebook.com/AirPassengerRights/

This is **Exhibit "AI"** to the Affidavit of Dr. Gábor Lukács

affirmed before me on April 7, 2020

_____

Signature

Court File No.:

FEDERAL COURT OF APPEAL

BETWEEN:

AIR PASSENGER RIGHTS

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 **Vancouver, British Columbia**.

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: April 6, 2020

Issued by: _____

Address of
local office: Federal Court of Appeal
90 Sparks Street, 5th floor
Ottawa, Ontario, K1A 0H9

TO: **CANADIAN TRANSPORTATION AGENCY**

APPLICATION

This is an application for judicial review pursuant to section 28 of the *Federal Courts Act* in respect of two public statements issued on or about March 25, 2020 by the Canadian Transportation Agency [**Agency**], entitled "Statement on Vouchers" [**Statement**] and the "Important Information for Travellers During COVID-19" page [**COVID-19 Agency Page**] that cites the Statement.

These public statements, individually or collectively, purport to provide an unsolicited advance ruling on how the Agency will treat and rule upon complaints of passengers about refunds from air carriers relating to the COVID-19 pandemic.

The Statement was issued without hearing the perspective of passengers whatsoever.

The Applicant makes application for:

1. a declaration that:

   (a) the Agency's Statement **is not** a decision, order, determination, or any other ruling of the Agency and has no force or effect of law;

   (b) the issuance of the Statement on or about March 25, 2020, referencing of the Statement within the COVID-19 Agency Page, and the subsequent distribution of those publications is contrary to the Agency's own *Code of Conduct* and/or gives rise to a reasonable apprehension of bias for:

      i. the Agency as a whole, or

      ii. alternatively, the appointed members of the Agency who supported the Statement;

   (c) further, the Agency, or alternatively the appointed members of the Agency who supported the Statement, exceeded and/or lost its (their) jurisdiction under the *Canada Transportation Act*, S.C. 1996, c. 10 to rule upon any complaints of passengers about refunds from carriers relating to the COVID-19 pandemic;

2. an interim order (*ex-parte*) that:

   (a) upon service of this Court's interim order, the Agency shall prominently post the interim clarification (below) at the top portion of both the French and English versions of the "Statement on Vouchers" [**Statement**] and the "Important Information for Travellers During COVID-19" page [**COVID-19 Agency Page**] (both defined in paragraphs 11-12 of the Notice of Application):

   > The Canadian Transportation Agency's "Statement on Vouchers" is not a decision, order, determination, or any legal ruling of the Canadian Transportation Agency. It does **not** have the force of law. The "Statement on Vouchers" is currently pending judicial review by the Federal Court of Appeal. This notice is posted by Order [insert URL link to PDF of order] of the Federal Court of Appeal.;

   (b) starting from the date of service of this Court's interim order, the Agency shall bring the above interim clarification to the attention of anyone that contacts the Agency with a formal complaint and/or informal inquiry regarding air carriers' refusal to refund arising from the COVID-19 pandemic;

   (c) the Agency shall not issue any decision, order, determination, or any other ruling with respect to refunds from air carriers in relation to the COVID-19 pandemic; and

   (d) this interim order is valid for fourteen days from the date of service of this Court's interim order on the Agency, and may be renewed by the Applicant under Rule 374(2);

3. an interlocutory order that:

   (a) the Agency shall forthwith completely remove the Statement from the Agency's website including any references to the Statement within the COVID-19 Agency Page and substitute it with this Court's interlocutory order, or alternatively the order renewing the interim clarification (subparagraph 2(a) above), until final disposition of the Application;

(b) the interim orders in subparagraphs 1(b)-(c) above are maintained until final disposition of the Application;

(c) the Agency shall forthwith communicate with persons that the Agency has previously communicated with regarding the Statement and bring those persons' attention to this Court's interlocutory order and the removal or clarification of the Statement; and

(d) the Agency shall forthwith communicate with air carriers under the Agency's jurisdiction, the Association of Canadian Travel Agencies, and Travel Pulse and bring those persons' attention to this Court's interlocutory order and the removal or clarification of the Statement;

4. a permanent order that:

(a) the Agency prominently post at the top portion of the COVID-19 Agency Page that the Agency's Statement has been ordered to be removed by this Court;

(b) the Agency remove the Statement, and references to the Statement within the COVID-19 Agency Page, from its website and replace the Statement with a copy of this Court's judgment;

(c) in the event the Agency receives any formal complaint or informal inquiry regarding air carriers' refusal to refund in respect of the COVID-19 pandemic, promptly and prominently inform the complainant of this Court's judgment; and

(d) the Agency, or alternatively the appointed members of the Agency who supported the Statement, be enjoined from dealing with any complaints involving air carriers' refusal to refund passengers in respect of the COVID-19 pandemic, and enjoined from issuing any decision, order, determination or any other ruling with respect to refunds from air carriers for the COVID-19 pandemic;

5. costs and/or reasonable out-of-pocket expenses of this Application; and

6. 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:

A. Overview

1. The present Application challenges the illegality of the Canadian Transportation Agency's Statement, which purports to provide an unsolicited advance ruling in favour of air carriers without having heard the perspective of passengers beforehand.

2. The Statement and the COVID-19 Agency Page preemptively suggest that the Agency is leaning heavily towards permitting the issuance of vouchers in lieu of refunds. They further suggest that the Agency will very likely dismiss passengers' complaints to the Agency for air carriers' failure to refund during the COVID-19 pandemic, irrespective of the reason for flight cancellation.

3. Despite the Agency having already determined in a number of binding legal decisions throughout the years that passengers have a fundamental right to a refund in cases where the passengers could not travel for events outside of their control, the Agency now purports to grant air carriers a blanket immunity from the law via the Statement, without even first hearing passengers' submissions or perspective as to why a refund is **mandated** by law. This is inappropriate.

4. The Agency, as a quasi-judicial tribunal, must at all times act with impartiality. That impartiality, unfortunately, has clearly been lost, as demonstrated by the Agency's issuance of the unsolicited Statement and usage thereof.

5. The fundamental precept of our justice system is that "*justice should not only be done, but should manifestly and undoubtedly be seen to be done*" (*R. v. Yumnu*, 2012 SCC 73 at para. 39). This fundamental precept leaves no room for any exception, even during difficult times like the COVID-19 pandemic.

6. Impartiality is further emphasized in the Agency's own *Code of Conduct* stipulating that the appointed members of the Agency shall not express an opinion on potential cases.

B. The COVID-19 Pandemic

7. The coronavirus [**COVID-19**] is a highly contagious virus that originated from the province of Hubei in the Peoples Republic of China, and began spreading outside of the Peoples Republic of China on or around January 2020.

8. On or about March 11, 2020, the World Health Organization declared COVID-19 a global pandemic.

9. On or about March 13, 2020, the Government of Canada issued a blanket travel advisory against non-essential travel outside of Canada until further notice and restricting entry of foreign nationals into Canada, akin to a "declaration of war" against COVID-19, and that those in Canada should remain at home unless absolutely necessary to be outside of their homes [**Declaration**].

10. COVID-19 has disrupted air travel to, from, and within Canada. The disruption was brought about by the COVID-19 pandemic and/or the Declaration, such as:

    (a) closure of borders by a number of countries, resulting in cancellation of flights by air carriers;

    (b) passengers adhering strictly to government travel advisories (such as the Declaration) and refraining from air travel (and other forms of travel) unless absolutely necessary; and

    (c) air carriers cancelling flights on their own initiative to save costs, in anticipation of a decrease in demand for air travel.

C. The Agency's Actions in Relation to COVID-19, Including the "Statement on Vouchers"

11. Since March 13, 2020 and up to the date of filing this Application, the Agency has taken a number of steps in relation to COVID-19. Those listed in the four sub-paragraphs below are **not** the subject of review in this Application.

    (a) **On March 13, 2020**, the Agency issued Determination No. A-2020-42 providing, *inter alia*, that various obligations under the *Air Passen-*

ger Protection Regulations, SOR/2019-150 [**APPR**] are suspended until April 30, 2020:

i. Compensation for Delays and Inconvenience for those that travel: compensation to passengers for inconvenience has been reduced and/or relaxed (an air carrier's obligation imposed under paragraphs 19(1)(a) and 19(1)(b) of the *APPR*);

ii. Compensation for Inconvenience to those that do not travel: the air carrier's obligation, under subsection 19(2) of the *APPR* to pay compensation for inconvenience to passengers who opted to obtain a refund instead of alternative travel arrangement, if the flight delay or the flight cancellation is communicated to passengers more than 72 hours before the departure time indicated on the passengers' original ticket; and

iii. Obligation to Rebook Passengers on Other Carriers: the air carrier's obligation, under paragraphs 17(1)(a)(ii), 17(1)(a)(iii), and 18(1)(a)(ii) of the *APPR*.

(b) **On or about March 25, 2020**, the Agency issued Determination No. A-2020-47 extending the exemptions under Decision No. A-2020-42 (above) to June 30, 2020. This Determination further exempted air carriers from responding to compensation requests within 30 days (s. 19(4) of *APPR*). Instead, air carriers would be permitted to respond to compensation requests 120 days *after* June 30, 2020 (e.g. October 28, 2020).

(c) **On or about March 18, 2020**, the Agency issued Order No. 2020-A-32, suspending **all** dispute proceedings until April 30, 2020.

(d) **On or about March 25, 2020**, the Agency issued Order No. 2020-A-37, extending the suspension (above) to June 30, 2020.

12. On or about March 25, 2020, almost concurrently with the Order and Determination on the same date (above), the Agency publicly posted the Statement on its website (**French**: https://otc-cta.gc.ca/fra/message-concernant-credits; **En-**

glish: https://otc-cta.gc.ca/eng/statement-vouchers) providing that:

> The COVID-19 pandemic has caused major disruptions in domestic and international air travel.
>
> For flight disruptions that are outside an airline's control, the Canada Transportation Act and Air Passenger Protection Regulations only require that the airline ensure passengers can complete their itineraries. Some airlines' tariffs provide for refunds in certain cases, but may have clauses that airlines believe relieve them of such obligations in force majeure situations.
>
> The legislation, regulations, and tariffs were developed in anticipation of relatively localized and short-term disruptions. None contemplated the sorts of worldwide mass flight cancellations that have taken place over recent weeks as a result of the pandemic. It's important to consider how to strike a fair and sensible balance between passenger protection and airlines' operational realities in these extraordinary and unprecedented circumstances.
>
> On the one hand, passengers who have no prospect of completing their planned itineraries with an airline's assistance should not simply be out-of-pocket for the cost of cancelled flights. On the other hand, airlines facing huge drops in passenger volumes and revenues should not be expected to take steps that could threaten their economic viability.
>
> While any specific situation brought before the CTA will be examined on its merits, the CTA believes that, generally speaking, an appropriate approach in the current context could be for airlines to provide affected passengers with vouchers or credits for future travel, as long as these vouchers or credits do not expire in an unreasonably short period of time (24 months would be considered reasonable in most cases).
>
> The CTA will continue to provide information, guidance, and services to passengers and airlines as we make our way through this challenging period.

13. On or about March 25, 2020, concurrently with the Statement, the Agency posted an amendment to the COVID-19 Agency Page on its website, adding four references to the Statement (French: **Information importante pour les voyageurs pour la periode de la COVID-19** [https://otc-cta.gc.ca/fra/information-

importante-pour-voyageurs-pour-periode-covid-19]; English: **Important Information for Travellers During COVID-19** [https://otc-cta.gc.ca/eng/important-information-travellers-during-covid-19]).

14. The COVID-19 Agency Page cites and purports to apply the Statement in the context of an air carrier's legal obligation in three circumstances: (1) situations outside airline control (including COVID-19 situations); (2) situations within airline control; and (3) situations within airline control, but required for safety.

15. In effect, the COVID-19 Agency Page purports to have relieved air carriers from providing passengers with refunds in practically **every** imaginable scenario for cancellation of flight(s), contrary to the Agency's own jurisprudence and the minimum passenger protections under the *APPR*.

D. Jurisprudence on Refunds for Passengers

16. Since 2004, in a number of decisions, the Agency confirmed passengers' fundamental right to a refund when, for whatever reason, an air carrier is unable to provide the air transportation, including those outside of the air carrier's control:

(a) *Re: Air Transat*, Decision No. 28-A-2004;
(b) *Lukács v. Porter*, Decision No. 344-C-A-2013, para. 88;
(c) *Lukács v. Sunwing*, Decision No. 313-C-A-2013, para. 15; and
(d) *Lukács v. Porter*, Decision No. 31-C-A-2014, paras. 33 and 137.

17. The Agency's jurisprudence was entirely consistent with the common law doctrine of frustration, the civil law doctrine of *force majeure*, and, most importantly, common sense.

18. The *APPR*, which has been in force since 2019, merely provides **minimum** protection to passengers. The *APPR* does not negate or overrule the passengers' fundamental right to a refund for cancellations in situations outside of a carrier's control.

19. Furthermore, the COVID-19 Agency Page also suggests that the Statement *would* apply to cancellations that are within airline control, or within airline control but required for safety purposes, squarely contradicting the provisions

of subsection 17(7) of the *APPR*. Subsection 17(7) clearly mandates that any refund be in the original form of payment, leaving no room for the novel idea of issuing a voucher or credit.

20. Finally, whether an air carrier's flight cancellation could be characterized as outside their control, or within their control, remains to be seen. For example, if a cancellation was to save costs in light of shrinking demand, it may be considered a situation within an air carrier's control. However, the Statement and the COVID-19 Agency Page presuppose that **any and all** cancellations at this time should be considered outside an air carrier's control.

21. The combined effect of the Statement and the COVID-19 Agency Page purports to ignore decade old and firmly established jurisprudence of the Agency. This all occurred without any formal hearing, adjudication, determination, or otherwise, or even a single legal submission or input from the passengers.

22. As described further below, the Agency does not even outline its legal basis or provide any support for those public statements.

23. The Agency's public statements are tantamount to endorsing air carriers in illegally withholding the passengers' monies, all without having to provide the services that were contracted for. The air carriers all seek to then issue vouchers with varying expiry dates and usage conditions to every passenger, effectively depriving all the passengers of their fundamental right to a refund, which is a right the Agency itself firmly recognized.

E. The Agency's Conduct Gives Rise to a Reasonable Apprehension of Bias

24. The Agency is a quasi-judicial tribunal that is subject to the same rules of impartiality that apply to courts and judges of the courts.

25. Tribunals, like courts, speak through their legal judgments and not media postings or "statements."

26. The Statement and/or the COVID-19 Agency Page is not a legal judgment. They give an informed member of the public the perception that it would be more

likely than not that the Agency, or the members that supported the Statement, will not be able to fairly decide the issue of refunds relating to COVID-19.

27. The Agency has already stipulated a general rule, outside the context of a legal judgment, that refunds need not be provided. No support was provided for this radical departure from the fundamental rights of passengers. The Agency merely provided a bald assertion or conclusion that passengers are not entitled to any refund.

28. The Agency's own Code of Conduct expressly prohibits members of the Agency from expressing an opinion about potential cases or any other issue related to the Agency's work, or comments that may create a reasonable apprehension of bias:

> (40) Members **shall not publicly express an opinion about any past, current, or potential cases or any other issue related to the work of the Agency**, and shall refrain from comments or discussions in public or otherwise that may create a reasonable apprehension of bias.
>
> [Emphasis added.]

29. Although neither the Statement, nor the COVID-19 Agency Page, contain the signature or names of any specific member of the Agency, given the circumstances and considering the Agency's own Code of Conduct providing that the professional civilian staff's role are to **fully** implement the appointed member(s)' directions, the Statement and the COVID-19 Agency Page ought to be attributed to the member(s) who supported the Statement either before or after its posting on the internet.

30. In these circumstances, the Court must proactively step in to protect the passengers, to ensure that "justice should not only be done, but should manifestly and undoubtedly be seen to be done," and to ensure that the administration of justice is not put to disrepute.

31. The Court ought to issue an interim, interlocutory, and/or permanent order restricting the Agency's involvement with passengers' COVID-19 related refunds against air carriers.

F. The Applicant

32. The Applicant is a non-profit corporation under the *Canada Not-for-profit Corporations Act*, SC 2009 that is an advocacy group representing the rights of air passengers.

33. Air Passenger Rights is led by a Canadian air passenger rights advocate, Dr. Gábor Lukács, whose work and public interest litigation has been recognized by this Honourable Court in a number of judgments:

(a) *International Air Transport Assn et al. v. AGC et al.* (Federal Court of Appeal File No. A-311-19, Order of Near J.A., dated March 3, 2020) that:

> [...] the Court is of the view that the case engages the public interest, that the proposed intervener [Dr. Gábor Lukács] would defend the interests of airline passengers in a way that the parties [the Agency, the Attorney General of Canada, and an airlines trade association] cannot, that the interests of justice favour allowing the proposed intervention in the appeal, and that the proposed intervention would be of assistance to the Court in deciding the appeal [...]

(b) *Lukács v. Canada (Transportation Agency)* 2016 FCA 174 at para. 6;

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

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

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

G. Statutory provisions

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

(a) *Canada Transportation Act*, S.C. 1996, c. 10 and, in particular, sections

25, 37, and 85.1;

(b) *Federal Courts Act*, R.S.C. 1985, c. F-7, and in particular, sections 18.1, 18.2, 28, and 44; and

(c) *Federal Courts Rules*, S.O.R./98-106, and in particular, Rules 300, 369, and 372-374; and

35. Such further and other grounds as counsel 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 Registry and to the Applicant:

1. Complete and unredacted copies of all correspondences, meetings, notes, and/or documents involving the appointed members of the Agency relating to the Statement and/or issuance of vouchers or credits in relation to the COVID-19 incident, including both before and after publication of the Statement;

2. The number of times the URLs for the Statements were accessed (**French**: https://otc-cta.gc.ca/fra/message-concernant-credits; **English**: https://otc-cta.gc.ca/eng/statement-vouchers) from March 24, 2020 onward;

3. Complete and unredacted copies of all correspondences, meetings, notes, and/or documents between the Canadian Transportation Agency and the travel industry (including but not limited to any travel agencies, commercial airlines, industry groups, etc.) from February 15, 2020 to the present in respect to issuing of credits, coupons, or vouchers to passengers in lieu of a refund for travel affected

by COVID-19; and

4. Complete and unredacted copies of all correspondences, e-mails, and/or complaints that the Agency received from passengers between February 15, 2020 to the present in respect to issuing of credits, coupons, or vouchers to passengers in lieu of a refund for travel affected by COVID-19.

April 6, 2020

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Counsel for the Applicant,
Air Passenger Rights

Court File No.:

FEDERAL COURT OF APPEAL

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

– and –

CANADIAN TRANSPORTATION AGENCY

Respondent

MEMORANDUM OF FACT AND LAW OF THE APPLICANT

PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. The underlying Application relates to the "Statement on Vouchers" [**Statement**] and the "Important Information for Travellers During COVID-19" page [**COVID-19 Agency Page**] the Agency published on March 25, 2020 [the **Agency Publications**].

2. The Statement endorses air carriers in withholding refunds of prepaid air fares from passengers whose travel plans are affected by COVID-19, and endorses issuing of vouchers to passengers without a legal basis. The Statement was also published contrary to the Agency's own *Code of Conduct*, raising a serious concern of a reasonable apprehension of bias and whether the Agency could be impartial when dealing with such disputes.

3. The travel industry has sought to use the Agency Publications to mislead passengers on their rights to a refund. The Statement is not a legally binding ruling or decision of the Agency, but some air carriers are passing it off as such.

4. The Agency was given notice that the Statement is misleading, but failed to take any corrective action. Absent this Court's urgent intervention and clarification of the Statement, the travel industry will continue to utilize the Agency Publications, with the Agency's silent blessing, to misinform and prejudice the passengers.

B. The Parties to this Application and Motion

i. The Respondent: Canadian Transportation Agency

5. The Canadian Transportation Agency [**Agency**] in an economic regulator of air carriers operating to, from, or within Canada. The Agency also acts as a quasi-judicial tribunal to adjudicate disputes between passengers and air carriers.

6. The Agency published a *Code of Conduct* for its appointed members that is in effect during the material times and specifically provides as follows:

> (40) Members **shall not publicly express an opinion about any past, current, or potential cases or any other issue related to the work of the Agency**, and shall refrain from comments or discussions in public or otherwise that may create a reasonable apprehension of bias.[1]

ii. The Applicant: Air Passenger Rights

7. The Applicant, Air Passenger Rights [**APR**], is a non-profit entity under the *Canada Not-for-profit Corporations Act*, SC 2009 that is an advocacy group representing and advocating for the rights of the travelling public, who travel by air.[2]

8. APR was founded in May 2019 by Dr. Gabor Lukács, who is the President of APR. APR expands upon and continues the decade long advocacy work in air passenger rights that Dr. Lukács has already commenced in his personal capacity.[3]

9. Dr. Lukács is a Canadian air passenger rights advocate, who has appeared before various quasi-judicial tribunals, including the Agency, and courts across Canada, including this Honourable Court and the Supreme Court of Canada, in respect of air passenger rights. Dr. Lukács's advocacy in the public interest and his expertise and experience in the area of passenger rights have been recognized by the transportation bar, the academic community, the judiciary, and the legislature.[4]

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1 *Code of Conduct* – Lukács Affidavit, Exhibit "T" (emphasis added) [Tab 2T, p. 110].
2 Lukács Affidavit, paras. 19-22 [Tab 2, p. 17].
3 *Ibid.*
4 Lukács Affidavit, paras. 2-18 [Tab 2, pp. 12-17].

10. This Honourable Court recently recognized Dr. Gábor Lukács, the President of APR, as representing the interest of air passengers in a way that the Agency cannot:

> [...] the Court is of the view that the case engages the public interest, that the proposed intervener [Dr. Gábor Lukács] would defend the interests of airline passengers in a way that the parties [the Agency, the Attorney General of Canada, and an airlines trade association] cannot, that the interests of justice favour allowing the proposed intervention in the appeal, and that the proposed intervention would be of assistance to the Court in deciding the appeal [...][5]

11. APR assists Canadian passengers through its Facebook Group [the **APR Facebook Group**] consisting of approximately 23,700 members currently. The APR Facebook Group serves as a platform for passengers to post and discuss their concerns about air travel and passenger rights. Volunteers of APR, in particular Dr. Gábor Lukács, also assist the passengers with the information they are seeking.[6]

C. COVID-19 Impacting Air Travel

12. The Court could take judicial notice that the coronavirus [**COVID-19**] is a highly contagious virus originating from the People's Republic of China, which began spreading to other countries on or around January 2020.

13. On March 11, 2020, the World Health Organization [**WHO**] declared COVID-19 a global pandemic.[7]

14. On March 13, 2020, the Government of Canada issued an advisory against non-essential travel abroad and restricting entry of foreign nationals, and strongly urged Canadians to stay home unless absolutely necessary [**Declaration**].[8]

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[5] *International Air Transport Association et al. v. AGC et al.*, Federal Court of Appeal File No. A-311-19, Order of Near J.A., dated March 3, 2020 – Lukács Affidavit, Exhibit "C" [Tab 2C, p. 47].
[6] Lukács Affidavit, paras. 25-27 [Tab 2, p. 18].
[7] WHO press release – Lukács Affidavit, Exhibit "E" [Tab 2E, p. 58].
[8] Government of Canada advisory – Lukács Affidavit, Exhibit "F" [Tab 2F, p. 63].

15. Air travel to, from, and within Canada became seriously disrupted after the WHO announcement and the Declaration on March 11 and 13, respectively, including:

(a) border closures or restrictions overseas, resulting in flight cancellations;

(b) passengers adhering to travel advisories or refraining from travelling; and

(c) air carriers cancelling flights in anticipation of decreasing demand.[9]

16. Around mid-March 2020, traffic in the APR Facebook Group increased substantially, despite air travel decreasing dramatically during that time period. Membership increased by 50%. The number of Facebook postings and comments increased by 189% and 195%, respectively. Most of this increased traffic related to passengers being denied full refunds for their unused air fares in light of the COVID-19 situation.[10]

17. Around that time, air carriers began to withhold refunds for unused air fares, and instead, offered to issue or purported to issue future travel vouchers to passengers. Those vouchers are subject to expiry dates and other conditions imposed by the air carriers themselves. It is likely that the traffic increase on the APR Facebook Group is directly correlated to the number of passengers being denied refunds by their air carriers for the COVID-19 situation.[11]

D. The Agency's Statement and the COVID-19 Agency Page

18. On March 25, 2020, the Agency published an anonymous and unsigned "Statement on Vouchers" [**Statement**] on its website, which reads as follows:

> The COVID-19 pandemic has caused major disruptions in domestic and international air travel.
>
> For flight disruptions that are outside an airline's control, the Canada Transportation Act and Air Passenger Protection Regulations only require that the airline ensure passengers can complete their itineraries. Some airlines' tariffs provide for refunds in certain cases, but may have clauses that airlines believe relieve them of such obligations in force majeure situations.

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[9] Lukács Affidavit, para. 36 [Tab 2, p. 20].
[10] Lukács Affidavit, paras. 32-35 [Tab 2, p. 19].
[11] Lukács Affidavit, paras. 60-66 and 71-73 [Tab 2, pp. 30-33 and 36-37].

> The legislation, regulations, and tariffs were developed in anticipation of relatively localized and short-term disruptions. None contemplated the sorts of worldwide mass flight cancellations that have taken place over recent weeks as a result of the pandemic. It's important to consider how to strike a fair and sensible balance between passenger protection and airlines' operational realities in these extraordinary and unprecedented circumstances.
>
> On the one hand, passengers who have no prospect of completing their planned itineraries with an airline's assistance should not simply be out-of-pocket for the cost of cancelled flights. On the other hand, airlines facing huge drops in passenger volumes and revenues should not be expected to take steps that could threaten their economic viability.
>
> While any specific situation brought before the CTA will be examined on its merits, the CTA believes that, generally speaking, an appropriate approach in the current context could be for airlines to provide affected passengers with vouchers or credits for future travel, as long as these vouchers or credits do not expire in an unreasonably short period of time (24 months would be considered reasonable in most cases).
>
> The CTA will continue to provide information, guidance, and services to passengers and airlines as we make our way through this challenging period.[12]

19. The Statement was published without input or submissions from the passengers. On the other hand, there is evidence that the Statement was prepared with input from air carriers as part of a "decision [...] reached in conjunction with the Canada Transportation Agency regarding the refund of itineraries immediately affected by the COVID-19 crisis period."[13]

20. At about the same time as publishing the Statement, the Agency amended the COVID-19 Agency Page on its website entitled "Information importante pour les voyageurs pour la periode de la COVID-19" (French) and "Important Information for Travellers During COVID-19" (English). The COVID-19 Agency Page states that "Airlines may make decisions to cancel or delay flights for other reasons. Whether these situations are within or outside the airline's control would have to be assessed on a

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[12] "Statement on Vouchers" – Lukács Affidavit, Exhibit "M" [Tab 2M, p. 84].
[13] Lukács Affidavit, paras. 44-45 and Exhibit "N" [Tabs 2 and 2N, pp. 23 and 86].

case-by-case basis."[14] The COVID-19 Agency Page then specifically references the Statement purporting to endorse the issuance of vouchers for **every** scenario of flight cancellations in the *Air Passenger Protection Regulations* [***APPR***], without regard to the reason for flight cancellation: (1) Situations outside airline control (s. 10 of *APPR*); (2) Situations within airline control (s. 12 of *APPR*); and (3) Situations within airline control, but required for safety (s. 11 of *APPR*).[15]

21. In stark contrast to the CTA's manner of presenting the Statement, the United States Department of Transportation, the regulator for air carriers operating to, from, or within the United States, issued a detailed enforcement notice on April 3, 2020 with proper and carefully considered legal authorities and signed by the individual issuing that notice [**USDOT Enforcement Notice**].[16]

22. Although the Agency stated that cancellations are assessed case-by-case (in the COVID-19 Agency Page above), the Agency responds to passenger inquiries on their rights to refund with boilerplate communications based largely on the Statement and/or the COVID-19 Agency Page, without even addressing the passenger's specific scenario, particularly the air carrier's reasons for cancelling a particular flight.[17]

23. Similarly, the COVID-19 Agency Page and Statement do not explain *how* the Statement's endorsement on the issuance of vouchers can be reconciled with the text of subsection 17(7) of the *APPR* mandating a refund, a minimum obligation for situations within airline control and situations within airline control, but required for safety.

Method used for refund

> **17** (7) Refunds under this section must be paid by the method used for the original payment and to the person who purchased the ticket or additional service.[18]

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[14] Lukács Affidavit, paras. 46-47 [Tab 2, pp. 24-25] and Exhibits "O" and "P" [Tabs 2O and 2P, pp. 89 and 94].
[15] *Air Passenger Protection Regulations*, ss. 10-12 [App. "A", pp. 219-221].
[16] USDOT Enforcement Notice – Lukács Affidavit, Exhibit "AE" [Tab 2AE, p. 158].
[17] Lukács Affidavit, paras. 48-58 [Tab 2, pp. 26-29] and Exhibits "Q","R", and "S" [Tabs 2Q-2S, pp. 99, 102, and 106].
[18] *Air Passenger Protection Regulations*, s. 17(7) (emphasis added) [App. "A", pp. 227].

E. The Agency's Formal Rulings on Passengers' Rights to Refund

24. The Agency's Statement and the COVID-19 Agency Page endorsing the issuance of vouchers in lieu of refunds do not explain the clear inconsistency with the Agency's own formal decisions described further below, which confirm a right to refund. The Statement also does not specify how the Statement arrived at the underlying proposition that passengers have no entitlement to a refund (i.e., "passengers who have no prospect of completing their planned itineraries with an airline's assistance should not simply be out-of-pocket for the cost of cancelled flights").

25. Since 2004, in the context of reviewing Air Transat's tariff in Decision No. 28-A-2004, the Agency opined as follows in regards to a passenger's right to a refund:

> In Decision No. LET-A-112-2003, the Agency noted that Rule 5.2 includes a provision that states that Air Transat will undertake to ensure that the passenger is routed or transported to his/her destination, as per the contract of carriage, within a reasonable period of time and at no extra cost. The Agency stated that this provision may not be just and reasonable as it does not provide the passenger with any recourse should such passenger find the anticipated time or the alternate travel arrangements provided by the carrier to reach the passenger's ticketed destination unacceptable. The Agency expressed the view that, in such circumstances, Air Transat should, at the request of the passenger, provide a refund.
>
> With respect to Rule 6.3, the Agency noted that this rule includes a provision which states that where passengers incur a schedule irregularity of not less than six hours involving a flight operated by Air Transat, and the flight is cancelled after the initial delay, Air Transat will provide a full refund. The Agency stated that this provision may not be just and reasonable in that it does not provide adequate options to passengers affected by a schedule irregularity, and does not protect passengers from events that are beyond the passengers' control. The Agency therefore advised Air Transat that it should include a provision that provides a refund, at the request of the passenger, should a flight be delayed for more than a certain period of time, e.g., 12 hours, whether or not a flight is cancelled.
>
> The Agency further noted that Air Transat has removed its liability to passengers who do not concur with the alternate travel arrangements in Rule 6.3 of the tariff. Such liability appeared in Air Transat's tariff previously on file with the Agency. The Agency stated that the current

> provision may not be just and reasonable, as it does not include a requirement that the passenger agree to the alternate travel arrangements. The Agency also advised Air Transat that it should include a provision that provides for a refund in the event a passenger finds the alternate travel arrangements unsatisfactory.[19]

26. The Agency then "read-in" or replaced a provision in Air Transat's tariff with the provision below underscoring passengers' right to a refund. The Agency mandated that in circumstances where the Carrier is unable to provide reasonable alternative transportation within a reasonable time, then the passengers must be provided a refund.

> 6.3(d) If the Carrier is unable to provide reasonable alternative transportation on its services or on the services of other carrier(s) within a reasonable period of time, then it will refund the unused ticket or portions thereof.[20]

27. In 2013, in Decision No. 313-C-A-2013 where the Agency was reviewing whether Sunwing's tariff was unreasonable, the Agency opined as follows with regards to passengers' rights to a refund, citing the 2004 decision above:

> [15] In terms of passengers' right to refunds, in Decision No. 28-A-2004, the Agency recognized the fundamental right of passengers to be refunded for the unused portions of their tickets if the carrier is unable to provide transportation on its services or on the services of other carrier(s) within a reasonable period of time.[21]

28. Also in 2013, in Decision No. 344-C-A-2013 in the context of reviewing whether Porter's tariff was unreasonable, the Agency referred to its 2004 decision (above) throughout and specifically opined that:

> [88] The Agency agrees with Mr. Lukács, and finds that it is unreasonable for Porter to refuse to refund the fare paid by a passenger because of its cancellation of a flight, even if the cause is an event beyond Porter's control.[22]

29. Then, in 2014, in Decision No. 31-C-A-201, the Agency was reviewing whether

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[19] *Re: Air Transat*, Decision No. 28-A-2004 (emphasis added) [App. "B", Tab 24, p. 521].
[20] *Ibid.* (emphasis added) [App. "B", Tab 24, p. 524].
[21] *Lukács v. Sunwing*, Decision No. 313-C-A-2013, para. 15 (emphasis added) [App. "B", Tab 19, p. 469].
[22] *Lukács v. Porter*, Decision No. 344-C-A-2013, para. 88 (emphasis added) [App. "B", Tab 17, p. 417].

Porter's international tariff was unreasonable and opined as follows with regards to passengers' right to a refund, citing the key decisions above:

> [137] As for reasonableness, Mr. Lukács correctly notes that passengers are entitled to reprotection or a refund, irrespective of the reason for their inability to travel, as long as the passengers are not responsible for it. In Decision No. 28-A-2004, the Agency recognized the right of passengers to be refunded for the unused portions of their tickets if the carrier is unable to provide transportation on its services or on the services of other carrier(s) within a reasonable period of time. [...] [23]

30. The Agency's rulings above are consistent with common sense and the right to a refund mentioned in the USDOT Enforcement Notice.

> Although the COVID-19 public health emergency has had an unprecedented impact on air travel, the airlines' obligation to refund passengers for cancelled or significantly delayed flights remains unchanged.[24]

F. Prejudice to Passengers from the Agency's Publication of the Statement

31. The Agency's publication of the Statement misinforms the public and the industry about passengers' right to refunds from air carriers. The Statement has introduced unnecessary confusion and complication into a passenger's simple refund request for a service that could not and was not even used. The Statement is being cited by the travel insurance industry as a basis for rejecting trip cancellation claims, because the Agency's Statement endorses vouchers as a near equivalent alternative to a refund.

i. The Travel Industry Denying Passengers' Their Right to a Refund

32. After the Agency's publication of the Statement, some air carriers misrepresented the Statement as if it was a conclusive and legally binding ruling, although the Statement contained no names of the decision maker, order number, or file numbers. Those air carriers used, or purported to use, the Statement as a form of legal shield to deny passengers their refunds for unused air fares.

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[23] *Lukács v. Porter*, Decision No. 31-C-A-2014, para. 137 (emphasis added) [App. "B", Tab 18, p. 449].

[24] USDOT Enforcement Notice – Lukács Affidavit, Exhibit "AE" (emphasis added) [Tab 2AE, p. 158].

(a) **Sunwing** issued a letter and an FAQ to travel agents, stating that the issuance of vouchers is the subject of a formal ruling of the Agency.

> Initially, we offered customers booked on our flights during this suspension the choice between a future travel credit valid for 12 months and a full cash refund. However, after the Government of Canada's non-essential travel advisory, we adjusted our policy to be aligned with all other Canadian airlines and tour operators. This decision is also consistent with the ruling made by the Canadian Transportation Agency on March 26, 2020.[25]

(b) **Air Canada** cited the Statement as a formal exemption granted by the Agency.

> [...] Hello / Bonjour Mr. Foulkes,
>
> I would like to attach two links from the Canadian Transportation Agency website as they may help clarify some of your questions. The CTA has issued temporary exemptions to the Air Passenger Protection Regulations regarding refund request and extension of ticket validity.
>
> https://www.otc-cta.gc.ca/eng/content/canadian-transportation-agency-issues -temporary-exemptions-certain-air-passenger-protection
>
> https://otc-cta.gc.ca/eng/statement-vouchers [...][26]

(c) **Westjet** asserted that the Statement was a decision that Westjet made "in conjunction with" the Agency and that Westjet is bound by that.

> We recognize that the cancellation of flights and the current economic uncertainty for amny of our guests has created a great deal of frustration. A viable and consistent decision was reached in conjunction with the Canada Transportation Agency regarding the refund of itineraries immediately affected by the COVID-19 crisis period.
>
> We appreciate that your view is that the Canadian Transportation Agency has issued two different initiatives however they act as the governing agency for all Canadian agencies and we operate within the policies that they set out.

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[25] Sunwing's letter and FAQ, dated March 27, 2020 – Lukács Affidavit, Exhibits "U" and "V" (emphasis added) [Tabs 2U and 2V, pp. 117 and 119].

[26] Air Canada's email to Mr. Foulkes, dated April 1, 2020 – Lukács Affidavit, Exhibit "X" (emphasis added) [Tab 2X, p. 128].

> We assure you that should future discussions result in an alternate policy adjustment that you will be contacted via email to advise you of such.[27]

33. In some instances, air carriers and the travel industry also cited the Statement suggesting the Agency supported, approved, or endorsed an air carrier's refusal to refund passengers, leaving passengers with no viable option other than to accept a voucher:

(a) **Westjet** asserted that the Agency approved Westjet issuing vouchers in place of a refund.

> We understand the challenges our guest have been faced with. However, the Canadian Transport Agency has approved us to issue refunds to the travel bank. [...][28]

(b) **Air Canada** suggested that the "maximum" the passenger could achieve is the voucher that the Agency has supported.

> As mention previously the maximum we can provide is to keep your ticket as a credit for 24 months (2 years) [...] The policy we follow at the moment is supported by the CTA (Canadian air transportation agency).[29]

(c) **Air Transat** stated that the Agency had issued an opinion that vouchers are acceptable when passengers' travel plans are cancelled.

> [...] We strongly believe that the 24-month credit offered to our customers to compensate for their cancelled travel plans is a flexible proposition in these exceptional circumstances [...] In this regard, the Canadian Transportation Agency recently issued an opinion on the subject, which supports our decision and emphasizes that the solution proposed by Transat, among others, is appropriate given the current situation.[30]

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[27] Email of WestJet to Mr. Chamberlain, dated Apirl 5, 2020 – Lukács Affidavit, Exhibit "N" (emphasis addd) [Tab 2N, p. 86].

[28] WestJet's Facebook message to Ms. Christopher, dated March 31, 2020 – Lukács Affidavit, Exhibit "N" (emphasis added) [Tab 2N, p. 86].

[29] Chain of emails between Air Canada and Mr. Belisle, dated March 20-27, 2020 – Lukács Affidavit, Exhibit "Y" (emphasis added) [Tab 2Y, p. 134].

[30] Email of Air Transat to Mr. Bacour, dated March 26, 2020 – Lukács Affidavt, Exhibit "Z" (emphasis added) [Tab 2Z, p. 139].

(d) **TravelOnly**, a travel agency, cited the Statement as a "direction" for the travel industry to issue vouchers instead of refunds.

> The Canadian Transportation Agency has provided a statement which provides direction for you and your travel advisor regarding the issuing of future travel vouchers. In summary, the CTA believes that providing affected passengers with vouchers or credits for future travel is appropriate and reasonable. We understand that you may have questions on your voucher and how to use it for future travel and we encourage you to reach out to your TravelOnly advisor or our offices for assistance at any time. Please note that most vouchers will be issued within the next 4-6 weeks depending on the airline and travel supplier.[31]

(e) **Travel Week**, a travel agents journal, encouraged travel agents to use the Statement to coerce passengers to withdraw credit card chargebacks and blame passengers for not purchasing travel insurance (see next section on how useful travel insurance could be).

> **"Tactful and tough, agents have effective strategies for dealing with refund demands"** [...]
>
> A letter that Vanderlubbe and his team have ready for any client making persistent refund requests or launching credit card chargebacks is strongly worded but fair, and explains the situation from the retailer's side. The letter cites the CTA statement and reads, in part: "We too are experiencing financial damage from the COVID19 pandemic, paying our staff for more than 5 weeks now with little or no revenue coming, in order to help our customers return home, process future travel credits, and we will be re-booking for months later."
>
> The letter also notes: "The Federal Government has issued a plain language statement which you can read from the link below [https://otc-cta.gc.ca/eng/statement-vouchers] that states that, as far as the air travellers protection regime goes, it was never intended to cover acts of God, or a force majeure situation. In short, they state that a future travel credit for 2 years is sufficient compensation under this circumstance.
>
> [...]

[31] TravelOnly Facebook post, dated March 25, 2020 – Lukács Affidavit, Exhibit "AB" (emphasis added) [Tab 2, p. 145].

> [*sic*] Your chargeback through your credit card is unreasonable given that you are being offered a travel credit good for two years, and that you had the opportunity to purchase cancellation insurance at the time of booking, and you declined to do so.
>
> [*sic*] We ask that you contact your credit card company and 'reverse the chargeback request'. We need evidence of this in order to process your future travel credit."[32]

(f) **Travel Industry Council of Ontario** issued a bulletin interpreting the Statement as the Agency allowing the issuance of vouchers in place of refunds.

> **If you sold only air transportation on an airline regulated by the Canadian Transportation Agency (CTA):**
>
> The CTA has indicated that to sustain the economic viability of the airline industry, the airlines under their jurisdiction may issue vouchers for future travel in lieu of refunds. Please click here for the CTA's statement. Please note that TICO does not have jurisdiction over airlines, which are federally regulated.[33]

34. Some air carriers and travel agencies also purported to automatically "issue" vouchers to the passengers, without reference to the passengers' right to a refund, also implying that the voucher is the best option available to the passenger.[34]

ii. The Agency repeated the Statement to brush off passengers

35. The Agency repeated the same boilerplate Statement and/or the COVID-19 Agency Page back to passenger who contacted the Agency for assistance, strongly indicating that a voucher would be the passengers' best outcome.

(a) The Agency answers passengers' Twitter inquiries by simply saying "please refer to this link that will answer your question."[35]

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[32] Travel Week article, dated April 3, 2020 – Lukács Affidavit, Exhibit "AD" (emphasis added) [Tab 2, p. 151].
[33] TICO Registrar Bulletin – Lukács Affidavit, Exhibit "AC" [Tab 2, p. 147].
[34] Lukács Affidavit, para. 18(a) [Tab 2, p. 36].
[35] Lukács Affidavit, paras. 48-49 [Tab 2, p. 26] and Exhibit "Q" [Tab 2Q, p. 99].

(b) The Agency responded to a passenger's email inquiries by copying and pasting portions of the Statement and the COVID-19 Agency Page. The Agency provides no real solution except to wait for a response from the airline by November 2020 at the earliest, and if unsuccessful, to complain to the same body that issued the endorsement of the vouchers (i.e., the Agency).[36]

iii. Passengers are likely to be denied their trip cancellation insurance claims

36. As a final resort, passengers that have purchased travel insurance would likely approach their travel insurance providers to claim their loss on the airfare that air carriers refuse to refund. However, the Statement is likely to be cited again to the passenger by the insurers to deny a travel insurance claim on the basis that the Agency endorsed the issuance of vouchers as appropriate.

> [...] On March 25, 2020, the Canadian Transportation Agency updated its endorsement of the use of vouchers or credits as an appropriate approach for Canada's airlines as long as these vouchers or credits do not expire in an unreasonably short period of time.
>
> Travel insurers are advising policyholders that if you have been offered this type of full credit, or voucher for future use by an airline, train or other travel provider, in many instances, under the terms of your insurance policy you will not be considered to have suffered an insurable loss.
>
> [...]
>
> Disputes over refunds and credits should be directed to your travel service provider, transportation carrier or the Canadian Transportation Agency. [...][37]

37. It is unclear under what circumstances trip cancellation insurance would protect a passenger when, in the COVID-19 Agency Page, the Agency endorsed the issuance of vouchers in place of refunds for flights cancelled for any reason.

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[36] Lukács Affidavit, paras. 51-58 [Tab 2, pp. 26-29] and Exhibits "R" and "S" [Tabs 2R-2S, pp. 102 and 106].

[37] Canadian Life and Health Insurance Association's press release, dated April 1, 2020 – Lukács Affidavit, Exhibit "AF" (emphasis added) [Tab 2AF, p. 161].

G. The Agency's Failure to Take Immediate Action to Rectify the Statement

38. On March 30, 2020, the Applicant Air Passenger Rights [**APR**] wrote to the Agency raising concerns regarding the Statement and requesting that it be removed by March 31, 2020. On the same day, the Agency acknowledged receipt of APR's letter. Until the filing of this Motion, the Agency has not responded to APR's letter, nor made any clarifications or changes to the Statement.[38]

PART II – STATEMENT OF THE POINTS IN ISSUE

39. Should this Court grant an interim mandatory and prohibitory injunction to protect the rights of passengers, pending the interlocutory injunction hearing?

40. Should this Court grant an interlocutory mandatory and prohibitory injunction to protect the rights of passengers, pending disposition of the Application?

41. Should this Court issue directions and/or orders to facilitate the prompt resolution of the underlying Application, including the fixing of a timetable and an order permitting electronic service of documents?

PART III – STATEMENT OF SUBMISSIONS

42. On this Motion, the Applicant is firstly seeking interim *ex parte* injunctions (both a prohibitory and mandatory injunction) to prevent further prejudice to the passengers until the interlocutory injunctions can be adjudicated. The interlocutory injunctions will be for further temporary relief, and/or continuing of the interim relief until the hearing of this judicial review application.

43. This Honourable Court has jurisdiction to grant the sought interim and interlocutory injunctions pursuant to ss. 18.2, 28(1)(k), and 44 of the *Federal Courts Act*.[39]

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[38] Lukács Affidavit, paras. 75-77 [Tab 2, p. 38] and Exhibits "AG" and "AH" [Tabs 2AG and 2AH, pp. 164 and 167].

[39] *Federal Courts Act*, ss. 18.2, 28(1)(k), and 44 [App. "A", pp. 234, 237, and 239].

A. The Legal Test for Interim or Interlocutory Injunctions

44. The Supreme Court of Canada confirmed the test for an injunction generally requires the consideration of three elements: (1) preliminary investigation of the merits; (2) irreparable harm; and (3) balance of convenience.[40] The Federal Court held that these three elements "are interrelated and that the three factors should not be assessed in total isolation from one another."[41]

i. Difference between interlocutory and interim injunctions: urgency

45. The test for the granting of an interim injunction is the same as the test for an interlocutory injunction, except that the applicant for an interim injunction must also demonstrate urgency.[42]

46. The urgency usually relates to the "irreparable harm" factor. As such, this Court should first determine if an applicant meets the three factors under the test for an injunction, and then assess the urgency of the matter.[43]

ii. The Preliminary Investigation of the Merits

47. For this first branch, the Court does not engage in an extensive review of the merits. Rather, the requirement is "a serious issue to be tried" in the sense that the underlying case is neither frivolous nor vexatious. The threshold is low. [44]

48. However, where an applicant seeks "mandatory" action from the other party, the underlying case supporting the *mandatory* injunction is tested against the standard of a

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[40] *R. v. CBC.*, 2018 SCC 5 at paras. 12-13 [App. "B", Tab 22, p. 491].

[41] *Unilin Beheer B.V. v. Triforest Inc.*, 2017 FC 76 at para. 102 [App. "B", Tab 29, p. 627].

[42] *Federal Courts Rules*, Rule 374(1) [App. "A", p. 243]; and *Laboratoires Servier v. Apotex Inc.*, 2006 FC 1443 at para. 17 [App. "B", Tab 16, p. 398].

[43] *Fournier Pharma Inc. v. Apotex Inc.*, [1999] F.C.J. No. 504 at para. 3 [App. "B", Tab 12, p. 361]; and *Canada (Public Safety and Emergency Preparedness) v. Sevic*, 2020 CanLII 20385 (FC) [App. "B", Tab 3, p. 257].

[44] *RJR – MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 [***RJR-MacDonald***] at paras. 54-55 [App. "B", Tab 25, p. 538].

strong *prima facie* case. This higher threshold does not require that the applicant show that they are sure to win, but merely a "strong likelihood on the law and the evidence presented that, at trial, the applicant will be ultimately successful."[45]

49. The essential difference between "a strong *prima facie* case" and "a serious issue to be tried" is that under the former "the court is required to undertake a closer analysis of the merits of the case before granting the interim relief," and in the latter case "the court is not required to examine the merits of the case as closely."[46]

iii. Irreparable Harm

50. The irreparable harm branch of the test is "closely tied to the remedy of damages." Irreparable refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other.[47]

51. The quality of the evidence required to establish irreparable harm is a function of the nature of the irreparable harm alleged. On the highest end of the spectrum, in cases where the alleged irreparable harm is financial in nature, clear and compelling evidence is required. The Court is also permitted to draw logical inferences of irreparable harm based on the evidence before the Court.[48]

52. Irreparable harm is "one of the factors that might be weighed when deciding whether to grant an interlocutory injunction." This element could be relaxed in cases such as: (1) when an applicant is not seeking, or may not be able to seek, damages in the

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[45] *R. v. CBC.*, 2018 SCC 5 at paras. 13 and 17 [App. "B", Tab 22, pp. 491 and 493].

[46] *Diversified Metal Engineering Ltd. v. Trivett*, 2006 PESCAD 16 at para. 25 [App. "B", Tab 10, p. 339].

[47] *Cheder Chabad v. Minister of National Revenue*, 2013 FCA 196 at para. 21 [App. "B", Tab 6, p. 303]; and *RJR-Macdonald* at para. 64 [App. "B", Tab 25, p. 541].

[48] *Administration de pilotage des Laurentides v. Corp. des pilotes du Saint-Laurent central inc.*, 2015 FCA 295 at para. 13 [App. "B", Tab 1, p. 247]; and *Newbould v. Canada (Attorney General)*, 2017 FCA 106 at paras. 28-29 [App. "B", Tab 21, p. 486].

underlying claim; or (2) the underlying dispute transcends the scope of a purely private dispute, and affects the rights of third parties, such as public interest litigation.[49]

53. Damage or inconvenience to third parties may also be considered in the determination of irreparable harm. Specifically, in the case of charitable organizations, this Court carved out an exception whereby harm to third parties may be considered when that third party depends upon the applicant that is before the Court.[50]

iv. Balance of Convenience

54. Under this third branch, the Court identifies the party which would suffer greater harm from the granting or refusal of the interlocutory injunction, pending a decision on the merits. The factors that must be considered under this branch are numerous and will vary from case to case. They could include public interest considerations, such as the concerns of society generally, and the particular interests of an identifiable group, such as air passengers in this instance, should be considered.[51]

55. Whether an applicant provides an undertaking for damages is a factor in the balance of convenience equation. The lack of an undertaking is not fatal. A respondent's absence of damages if the injunction were to issue may be an important consideration in whether an undertaking as to damages should be waived.[52]

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[49] *RJR-Macdonald* at para. 66 [App. "B", Tab 25, p. 541]; *David Hunt Farms Ltd. v. Canada (Minister of Agriculture)*, [1994] 2 F.C. 625 at para 24 [App. "B", Tab 8, p. 324]; *U.A.W. v. Pacific Western Airlines Ltd.*, 1986 ABCA 38 at para. 23 [App. "B", Tab 30, p. 649].

[50] *Edmonton Northlands v. Edmonton Oilers Hockey Club*, A.J. No. 1001, [1994] at para. 85 [App. "B", Tab 11, p. 356] (aff'd: 1994 ABCA 90); *Glooscap Heritage Society v. Canada (National Revenue)*, 2012 FCA 255 at para. 34 [App. "B", Tab 14, p. 384]; and *Holy Alpha & Omega Church of Toronto v. Canada (Attorney General)*, 2009 FCA 265 at para. 17 [App. "B", Tab 15, p. 392].

[51] *R. v. CBC.*, 2018 SCC 5 at paras. 12-13 [App. "B", Tab 22, p. 491]; and *RJR-Macdonald* at paras. 67-68 [App. "B", Tab 25, p. 541].

[52] *Federal Courts Rules*, Rule 373(2) [App. "A", p. 243]; *Soowahlie Indian Band v. Canada (Attorney General)*, 2001 FCA 387 at para. 13 [App. "B", Tab 26, p. 554]; and *Algonquin Wildlands League v. Northern Bruce Peninsula (Municipality)*, 2000 CarswellOnt 5326 at para. 4 [App. "B", Tab 2, p. 252].

56. In the context of public interest litigation, the court may waive the undertaking when there are serious public interests at stake and the balance of convenience, including the public interest, otherwise favours the applicant. Fairness concerns are also at play when an applicant is acting altruistically on behalf of and for the benefit of a group of affected persons. Courts also consider the relative economic strength of the parties, so that the financial wherewithal of an applicant would not be the sole reason to render interlocutory remedies ineffectual.[53]

B. Strong *Prima Facie* Case and a Serious Issue to be Tried in the Present Case

57. On the interim injunction, the Applicant seeks the following orders, pending hearing of the interlocutory injunction: (1) the Agency post some clarification regarding the Statement on their website; (2) the Agency bring this Court's order and the clarification to the attention of passengers inquiring about refunds from air carriers; and (3) the Agency refrain from issuing any decision, order, determination, or any other ruling with respect to refunds from air carriers for the COVID-19 pandemic.

58. On the interlocutory injunction, the Applicant seeks the following: (1) the Agency completely remove the Statement and references thereto, or alternatively continue interim injunction #1; (2) interim injunction #2 be continued; (3) interim injunction #3 be continued; (4) the Agency bring this Court's order, and the removal or clarification of the Statement, to the attention of passengers that **previously** contacted the Agency; and (5) the Agency bring this Court's order, and the removal or clarification of the Statement, to the attention of air carriers and a travel agency association.

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[53] *Taseko Mines Ltd. v. Phillips*, 2011 BCSC 1675 at paras. 68-70 [App. "B", Tab 27, p. 569]; *Friends of Stanley Park v. Vancouver (City) Board of Parks & Recreation*, 2000 BCSC 372 at paras, 44-46 [App. "B", Tab 13, pp. 377-378]; *Delta (Municipality) v. Nationwide Auctions Inc.*, [1979] 4 W.W.R. 49 at paras. 22-23 [App. "B", Tab 9, pp. 331-332]; *Comité de sauvegarde de l'École La Découverte de Saint-Sauveur c. Nouveau-Brunswick (Ministre de l'Éducation)*, [1997] N.B.J. No. 582 at paras. 13-14 [App. "B", Tab 7, pp. 316-317]; *Micaleff v. Gainers Inc.*, [1988] O.J. No. 80 at para. 41 [App. "B", Tab 20, p. 479]; and *Tracy v. Instaloans Financial Solution Centres (B.C.) Ltd.*, 2006 BCSC 1018 at para. 106 [App. "B", Tab 28, p. 604] (aff'd: 2017 BCCA 481 at para. 72).

59. Interim injunctions (1) and (2) and interlocutory injunctions (1), (2), (4), and (5) are "mandatory" in nature. Accordingly, the Applicant must demonstrate the higher threshold of a strong *prima facie* case for: (a) the Statement not being a legal ruling; or (b) the Statement and the COVID-19 Agency Page being misleading.

60. Interim injunction (3) and interlocutory injunction (3) are "prohibitory" in nature. As such, the Applicant need only meet the low threshold of "a serious issue to be tried" that the Agency's conduct gives rise to a reasonable apprehension of bias.

i. The Statement is not a legal ruling: strong *prima facie* case

61. The Agency, like other quasi-judicial tribunals and courts, speaks through its decisions, orders, determinations, and rulings.[54] This principle is reflected in section 41 of the Agency's enabling legislation, the *Canada Transportation Act* [***Act***], which provides a statutory right of appeal to this Honourable Court from decisions, orders, rules, and regulations made by the Agency.[55] Notably, the *Act* does not contemplate the Agency issuing public commentary on disputed matters, such as the Statement. On the contrary, the Agency's own *Code of Conduct* explicitly prohibits doing so.[56]

62. It is apparent on the face of the record that the Statement is not a legal ruling:

(a) Substantively, the Statement provides no legal reasoning or support for key assertions. For example, the Agency baldly asserted that in such circumstances the passengers will be out-of-pocket, with the underlying implication that passengers have *no right to a refund*. The Agency's formal decisions since 2004 specifically provide for a right to refund, which was omitted from the Statement.

(b) Procedurally, the Agency has already suspended the processing of all complaints initiated by passengers against air carriers, from March 18, 2020 to June

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[54] See, for example, Determination No. A-2020-42 – Lukács Affidavit, Exhibit "H" [Tab 2H, p. 69].
[55] *Canada Transportation Act*, s. 41(1) [App. "A", p. 230].
[56] *Code of Conduct*, para. 40 – Lukács Affidavit, Exhibit "T" [Tab 2T, p. 110].

30, 2020.[57] Consequently, the Statement could not have possibly resulted from a formal adjudication or *inter partes* proceeding.

(c) As to form, the Statement lacks the indicia of a legally binding ruling or decision from a court or tribunal, such as: (1) a file or docket number; (2) place and date the matter was heard and/or decided; (3) the parties that appeared in the matter; and (4) name of the decision maker(s).

63. The Applicant has therefore demonstrated a strong *prima facie* case that the Statement cannot be a decision, determination, order, or other legally binding ruling of the Agency. In light of clear evidence that the travel industry has passed off the Statement as if it is legally binding, or bearing some legal or government endorsement for the withholding of refunds, it is imperative that this Court direct the Agency to provide the necessary clarification(s) until the Application can be heard on its merits.

ii. That the Statement and/or the COVID-19 Agency Page are misleading: strong *prima facie* case

64. As a further or alternative basis for granting interim and interlocutory injunctions #1 and #2, there is also a strong *prima facie* case that the Statement and/or the COVID-19 Agency Page are misleading.

(a) The COVID-19 Agency Page and Statement give passengers the impression that the air carriers have a *carte blanche* to cancel flights and withhold refunds, all under the guise of COVID-19, irrespective of the actual reason for cancellation.

(b) The Statement is easily accessible from URL links in the COVID-19 Agency Page and gives lay passengers the general impression that this is an official legal ruling or endorsement.

(c) The travel industry has already misled passengers by citing the Statement as a legal ruling or decision, or passed off the Statement as a government endorsement or approval for withholding refunds from passengers.

[57] Order No. 2020-A-37 – Lukács Affidavit, Exhibit "K" [Tab 2K, p. 79].

65. On the interlocutory injunction, the Agency should be further directed to clarify any misconception for passengers who **previously** contacted the Agency regarding refunds arising from COVID-19, and key stakeholders of the travel industry.

iii. The Agency's conduct gives rise to a reasonable apprehension of bias: a serious issue to be tried

66. The fundamental precept of our justice system is that "justice should not only be done, but should manifestly and undoubtedly be seen to be done." Judicial and quasi-judicial officers speak to, and are accountable to, the public through their judgments and rulings. It is impermissible for quasi-judicial tribunals to jump into the fray extra-judicially by posting comments on the tribunal's website expressing support for the position of one side on a dispute that could come before that tribunal.[58] This is precisely the impression the Statement gives to reasonably informed members of the public.

67. The Agency's posting of the Statement in the face of the Agency's own *Code of Conduct* firmly establishes a "serious issue to be tried". The *Code of Conduct* expressly prohibits members of the Agency from expressing an opinion about potential cases or any other issue related to the Agency's work. The mere posting of the Statement runs afoul of that clear prohibition.

> (40) Members **shall not publicly express an opinion about any past, current, or potential cases or any other issue related to the work of the Agency**, and shall refrain from comments or discussions in public or otherwise that may create a reasonable apprehension of bias.[59]

68. Although the Statement does not disclose the name(s) of the appointed member(s) that supported its publication, the evidence before this Court supports the conclusion that the Statement was endorsed by the appointed members of the Agency.

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[58] *R. v. Yumnu*, 2012 SCC 73 at para. 39 [App. "B", Tab 23, p. 508]; *VIA Rail Canada Inc. v. Canadian Transportation Agency*, 2005 FCA 79 at para. 93 [App. "B", Tab 31, p. 687] (rev'd on other grounds: 2007 SCC 15); and *Wewaykum Indian Band v. Canada*, 2003 SCC 45 at paras. 57-67 [App. "B", Tab 32, pp. 710-713].

[59] *Code of Conduct* – Lukács Affidavit, Exhibit "T" (emphasis added) [Tab 2T, p. 110].

(a) The Statement clearly states that it is presenting the Agency's position. Subsection 7(2) of the *Act* states that the Agency consists of its appointed members.[60]

(b) The Agency continues to display the Statement even after APR brought to its attention the Statement's misleading nature, and requested its removal.

69. The Applicant submits that an informed, reasonable, and right-minded person, viewing the Statement and/or the COVID-19 Agency Page realistically and practically, and having thought the matter through,[61] would conclude that the Agency has not and will not act impartially because:

(a) the appointed member(s)' failure to take corrective actions gives rise to a reasonable inference that they all supported the Statement;

(b) the Statement's unexplained contradictions with the Agency's formal rulings suggest that its members are leaning towards the air carriers and seeking to protect them through extrajudicial techniques;

(c) the Agency's boilerplate repetition of the Statement and the COVID-19 Agency Page to passenger inquiries firmly supports that the Agency's predisposition is that passengers have no right to any refund, with no recourse but vouchers; and

(d) Westjet stated to a passenger that the Statement was the product of a decision reached in conjunction with the Agency.[62]

70. The Applicant therefore has established a serious issued to be tried on the issue of a reasonable apprehension of bias.

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[60] *Canada Transportation Act*, s. 7(2) [App. "A", p. 229].
[61] *Wewaykum Indian Band v. Canada*, 2003 SCC 45 at paras. 58-60 [App. "B", Tab 32, p. 711].
[62] Lukács Affidavit, paras. 44-45 and Exhibit "N" [Tabs 2 and 2N, pp. 23 and 86].

C. Irreparable Harm if an Injunction is not Granted

71. The underlying Application is a judicial review by a non-profit public interest litigant seeking to protect the rights of thousands of passengers who have been exposed to misinformation stemming from the Agency's publication of the Statement [**Affected Passengers**].[63] The Statement is an extrajudicial commentary for which the Agency cannot otherwise be held accountable.

72. The immediate harm to the Affected Passengers is two-fold.

(a) The air carriers and the travel industry are utilizing the Statement and the COVID-19 Agency Page to mislead passengers into believing that withholding full refunds is sanctioned by the law or the government, and that the Affected Passengers' only available options are accepting a voucher, paying substantial cancellations fees, or accepting a small refund.

(b) The Agency's "jump into the fray" of disputes between passengers and carriers gives Affected Passengers and the public the perception that justice will *not* be seen to be done, and thus threatens the integrity of, and public confidence in, the administration of justice.

73. The harm to the Affected Passengers is irreparable because they may have no remedy in damages against the Agency. Firstly, the Affected Passengers may not have a clear cause of action against the Agency for damages when the Statement is being passed off by a third-party, the air carriers. Secondly, with respect to the harm from the reasonable apprehension of bias, it is similarly unclear if there could even be a claim for damages against a decision maker that failed to act impartially. As the Supreme Court held in *RJR-MacDonald*:

> [...] it will in most cases be impossible for a judge on an interlocutory application to determine whether adequate compensation could ever be obtained at trial. Therefore, until the law in this area has developed further, it is appropriate to assume that the financial damage which will be suffered by an applicant following a refusal of relief, even though

[63] Lukács Affidavit, paras. 19-27 and 60-66 [Tab 2, pp. 17-18 and 30-33].

capable of quantification, constitutes irreparable harm.[64]

74. The present case is not a typical private dispute, where an applicant seeks an injunction to protect *their own* interest. APR concedes that it does not suffer direct harm in this instance; rather, the irreparable harm is suffered by the Affected Passengers. Consistent with its non-profit public interest mandate, APR brings this Motion seeking injunctive relief *for the benefit of* those passengers to preserve the *status quo*. This public interest initiative warrants special attention and consideration when the Court assesses the type of harm that the public interest litigant must demonstrate in seeking an injunction to prevent harm to persons for whom the entity speaks.[65]

75. Some of the Affected Passengers, specifically those that are members of the APR Facebook Group, rely on APR to voice their grievance over the withholding of refunds by air carriers, and to protect those passengers' interest whenever possible. It is consistent with APR's own articles of incorporation,[66] and Dr. Lukács's previous work before various courts and tribunals, to bring a public interest proceeding for the benefit of, and to protect, those vulnerable passengers.[67]

76. Affected Passengers that were subject to deception cannot be expected to bring their own motion for relief when they themselves are likely still caught in the web of deceit. The only other viable alternative is a public interest organization that may step forward to advance the Affected Passengers' interests when the Agency fails to do so.[68]

77. Absent swift intervention by this Court, the extrajudicial Statement will continue to mislead the Affected Passengers into prejudicing their rights to a refund. Moreover, the Agency's continued involvement in passengers' claims against air carriers for COVID-19 related refunds will put the administration of justice into disrepute.

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64 *RJR-Macdonald* at para. 66 (emphasis added) [App. "B", Tab 25, p. 541].
65 See para. 53, *supra*.
66 Lukács Affidavit, Exhibit "D" [Tab 2D, p. 51].
67 See para. 52, *supra*.
68 *International Air Transport Association et al. v. AGC et al.*, Federal Court of Appeal File No. A-311-19, Order of Near J.A., dated March 3, 2020 – Lukács Affidavit, Exhibit "C" [Tab 2C, p. 47].

D. The Balance of Convenience Favours Granting the Injunction

78. In this instance, there is no evidence that the Agency would suffer any monetary damages or great inconvenience if the narrowly tailored interim and interlocutory injunctions sought by the Applicant were to be granted.

(a) The Statement has no utility except to spur confusion for the passengers, and air carriers' unjustifiable reliance on it to deny rightful refunds to passengers.

(b) The Agency is not supposed to have any stake, financial or otherwise, in the disputes between passengers and air carriers. Consequently, the sought injunctions are financially neutral from the Agency's perspective.

(c) The Agency has already suspended all dispute proceedings until June 30, 2020.[69] Enjoining the Agency from addressing complaints relating to COVID-19 is simply maintaining that *status quo*, and there could be no inconvenience from that.

79. Temporarily enjoining the Agency from addressing COVID-19 refund related complaints is imperative because, absent the injunction, the Agency could, on its own motion, lift the suspension and then seek to retroactively "legitimize" their extrajudicial Statement, to the prejudice of the passengers. There is also risk for multiplicity of proceedings if the Agency were to take retroactive steps. The Agency has demonstrated that it is not shy to take steps that may have significant ramification or prejudice to the passengers, all without involvement of or notice to the passengers.

80. There is also the concern that should the Court find in the Applicant's favour on the merits that the Agency did not act impartially, the Agency would lose jurisdiction by operation of law.[70] Any COVID-19 refund complaints the Agency dealt with in the meantime could become a nullity, leading to a significant waste of resources for all.

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[69] Order No. 2020-A-37 – Lukács Affidavit, Exhibit "K" [Tab 2K, p. 79].

[70] *Canadian Cable Television Assn. - Assn canadienne de télévision par câble v. American College Sports Collective of Canada Inc.*, [1991] 3 F.C. 626 at para. 45 [App. "B", Tab 4, p. 279].

81. Compliance with the injunctions sought is not onerous for the Agency.

(a) The interim injunction merely directs the Agency, **going forward**, to bring the clarifications and this Court's order to the attention of whoever contacts them about COVID-19 refunds. This can be easily achieved with an email template.

(b) The interlocutory injunction that the Agency contact passengers who **previously** inquired with the Agency regarding COVID-19 refunds can easily be achieved with minimal time and resources. The Agency itself has records of the passengers that they corresponded with. The Agency could use a computer search using keywords such as "Statement on Vouchers" or other keywords to identify all passengers to send a template clarification email to.

(c) The interlocutory injunction that the Agency send air carriers and one travel agency association the clarifications and this Court's order is similarly not onerous. The Agency clearly has the contact information for the air carriers and it can be accomplished by sending a template email to the responsible individual for each of those air carriers.

82. Finally, the general public also has a substantial interest in ensuring that law and order are upheld and maintained, especially during a global pandemic. Members of the public will want to see that justice is seen to be done and any concerns over impartiality of a quasi-judicial tribunal be swiftly addressed without exception, with adequate protections to those who may be affected pending final determination of the issue.

Relief from undertaking for damages

83. The Applicant, as a non-profit organization engaging in public interest advocacy work, does not have the financial resources to provide an undertaking as to damages.[71]

[71] Lukács Affidavit, paras. 22-23 [Tab 2, p. 17].

84. Considering the strong merits in the Applicant's case, the serious public interest issues at stake, the balance of convenience favouring the Applicant, and the absence of any obvious monetary damages to the Agency that could arise from the injunction, this is the most appropriate case for excusing the Applicant from giving an undertaking.[72]

85. Public interest litigation and advocacy will be severely restricted if public interest litigants are required to provide an undertaking for damages.

86. Even should the Court have any residual concerns, the Court should err on the side of caution and direct the Agency to restore the *status quo* (i.e., the situation prior to the Agency's publication of the Statement on March 25, 2020).

E. Urgency in Hearing the Interim Injunction

87. As demonstrated by the evidence, misinformation relating to and/or emanating from the Statement has been disseminated and continues to be disseminated by the Agency, air carriers, travel agents, and their industry associations or publications.

(a) As recently as April 3, 2020, a publication for travel agents provided detailed instructions on how travel agents should utilize the Statement to mislead passengers and to deflect them from initiating credit card chargebacks or to coerce passengers into terminating such chargebacks.[73]

(b) The travel insurance industry is informing travel insurers how the Agency's Statement can be utilized to reject trip cancellation insurance claims.[74]

88. This conduct during a pandemic is despicable and cries out for immediate intervention by this Court to freeze any further dissemination of misinformation. The source of the misinformation is the Statement, and therefore it must be rectified promptly, without further delay, to avoid further harm to the public in general, and the Affected Passengers in particular.

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[72] See paras. 55-56, *supra*.
[73] Lukács Affidavit, Exhibit "AD" [Tab 2, p. 151].
[74] Lukács Affidavit, Exhibit "AF" (emphasis added) [Tab 2AF, p. 161].

PART IV – ORDER SOUGHT

89. The Moving Party, Air Passenger Rights, is seeking the following Orders:

(a) an interim order (*ex-parte*) that:

i. upon service of this Court's interim order, the Agency shall prominently post the interim clarification (below) at the top portion of both the French and English versions of the "Statement on Vouchers" [**Statement**] and the "Important Information for Travellers During COVID-19" page [**COVID-19 Agency Page**]:

> The Canadian Transportation Agency's "Statement on Vouchers" is not a decision, order, determination, or any legal ruling of the Canadian Transportation Agency. It **does not** have the force of law. The "Statement on Vouchers" is currently pending judicial review by the Federal Court of Appeal. This notice is posted by Order [URL link to order] of the Federal Court of Appeal.

ii. starting from the date of service of this Court's interim order, the Agency shall bring the above interim clarification to the attention of anyone that contacts the Agency with a formal complaint and/or informal inquiry regarding air carriers' refusal to refund arising from the COVID-19 pandemic;

iii. the Agency shall not issue any decision, order, determination, or any other ruling with respect to refunds from air carriers for the COVID-19 pandemic; and

iv. this interim order is valid for fourteen days from the date of service of this Court's interim order on the Agency, and may be renewed by the Applicant under Rule 374(2);

(b) an interlocutory order that:

i. the Agency shall forthwith completely remove the Statement from the Agency's website including any references to the Statement within the COVID-19 Agency Page and substitute it with this Court's interlocutory order, or alternatively the order renewing the interim clarification (subparagraph 1(a)(i) above), until final disposition of the Application;

ii. the interim order in subparagraph 89(b)(ii) above is maintained until final disposition of the Application;

iii. the interim order in subparagraph 89(b)(iii) above is maintained until final disposition of the Application;

iv. the Agency shall forthwith communicate with all persons that the Agency has communicated with regarding the Statement and bring those persons' attention to this Court's interlocutory order and the removal or clarification of the Statement; and

v. the Agency shall forthwith communicate with all air carriers under the Agency's jurisdiction, the Association of Canadian Travel Agencies, and Travel Pulse and bring those persons' attention to this Court's interlocutory order and the removal or clarification of the Statement;

(c) an order fixing an expedited timetable for the Applicant's motion for an interlocutory order (para. 89(b) above), and the hearing of the Application;

(d) an order directing that all documents in this Application shall be served electronically;

(e) costs and/or reasonable out-of-pocket expenses of this motion; and

(f) such further and other relief or directions as the counsel may request and this Honourable Court deems just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

April 7, 2020

SIMON LIN
Counsel for the Applicant,
Air Passenger Rights

PART V – LIST OF AUTHORITIES

Statutes and Regulations

Air Passenger Protection Regulatins, SOR/2019-150,
ss. 10-12 and 17

Federal Courts Act, R.S.C., 1985, c. F-7,
ss. 18.2, 28, and 44

Canada Transportation Act, S.C. 1996, c. 10,
ss. 7 and 41

Federal Courts Rules, S.O.R./98-106,
Rules 369 and 373-374

Case Law

Administration de pilotage des Laurentides v. Corp. des pilotes du Saint-Laurent central inc., 2015 FCA 295

Algonquin Wildlands League v. Northern Bruce Peninsula (Municipality), 2000 CarswellOnt 5326

Canada (Public Safety and Emergency Preparedness) v. Sevic, 2020 CanLII 20385 (FC)

Canadian Cable Television Assn. - Assn canadienne de télévision par câble v. American College Sports Collective of Canada Inc., [1991] 3 F.C. 626

Canadian Council for Refugees v. R., 2008 FCA 40

Cheder Chabad v. Minister of National Revenue, 2013 FCA 196

Comité de sauvegarde de l'École La Découverte de Saint-Sauveur c. Nouveau-Brunswick (Ministre de l'Éducation), [1997] N.B.J. No. 582

David Hunt Farms Ltd. v. Canada (Minister of Agriculture), [1994] 2 F.C. 625

Delta (Municipality) v. Nationwide Auctions Inc., [1979] 4 W.W.R. 49

Diversified Metal Engineering Ltd. v. Trivett, 2006 PESCAD 16

Edmonton Northlands v. Edmonton Oilers Hockey Club, A.J. No. 1001, [1994]

Fournier Pharma Inc. v. Apotex Inc., [1999] F.C.J. No. 504

Friends of Stanley Park v. Vancouver (City) Board of Parks & Recreation, 2000 BCSC 372

Glooscap Heritage Society v. Canada (National Revenue), 2012 FCA 255

Holy Alpha and Omega Church of Toronto v. Canada (Attorney General), 2009 FCA 265

Laboratoires Servier v. Apotex Inc., 2006 FC 1443

Lukács v. Porter, Canadian Transportation Agency, Decision No. 344-C-A-2013

Lukács v. Porter, Canadian Transportation Agency, Decision No. 31-C-A-2014

Lukács v. Sunwing, Canadian Transportation Agency, Decision No. 313-C-A-2013

Micaleff v. Gainers Inc., [1988] O.J. No. 80

Newbould v. Canada (Attorney General), 2017 FCA 106

R. v. Canadian Broadcasting Corp., 2018 SCC 5

R. v. Yumnu, 2012 SCC 73

Re: Air Transat, Canadian Transportation Agency, Decision No. 28-A-2004

RJR – MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311

Soowahlie Indian Band v. Canada (Attorney General), 2001 FCA 387

Taseko Mines Ltd. v. Phillips, 2011 BCSC 1675

Tracy v. Instaloans Financial Solution Centres (B.C.) Ltd., 2006 BCSC 1018

Unilin Beheer B.V. v. Triforest Inc., 2017 FC 76

U.A.W. v. Pacific Western Airlines Ltd., 1986 ABCA 38

VIA Rail Canada Inc. v. Canadian Transportation Agency, 2005 FCA 79

Wewaykum Indian Band v. Canada, 2003 SCC 45

Appendix A

Statutes and Regulations

CANADA

CONSOLIDATION

CODIFICATION

Air Passenger Protection Regulations

Règlement sur la protection des passagers aériens

SOR/2019-150

DORS/2019-150

Current to March 5, 2020

Last amended on December 15, 2019

À jour au 5 mars 2020

Dernière modification le 15 décembre 2019

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(a) three hours after the aircraft doors have been closed for take-off; and

(b) three hours after the flight has landed, or at any earlier time if it is feasible.

Take-off imminent

(2) However, a carrier is not required to provide an opportunity for passengers to disembark if it is likely that take-off will occur less than three hours and 45 minutes after the doors of the aircraft are closed for take-off or after the flight has landed and the carrier is able to continue to provide the standard of treatment referred to in section 8.

Priority disembarkation

(3) A carrier that allows passengers to disembark must, if it is feasible, give passengers with disabilities and their support person, service animal or emotional support animal, if any, the opportunity to disembark first.

Exceptions

(4) This section does not apply if providing an opportunity for passengers to disembark is not possible, including if it is not possible for reasons related to safety and security or to air traffic or customs control.

Obligations — situations outside carrier's control

10 (1) This section applies to a carrier when there is delay, cancellation or denial of boarding due to situations outside the carrier's control, including but not limited to the following:

(a) war or political instability;

(b) illegal acts or sabotage;

(c) meteorological conditions or natural disasters that make the safe operation of the aircraft impossible;

(d) instructions from air traffic control;

(e) a *NOTAM*, as defined in subsection 101.01(1) of the *Canadian Aviation Regulations*;

(f) a security threat;

(g) airport operation issues;

(h) a medical emergency;

(i) a collision with wildlife;

a) trois heures après la fermeture des portes en prévision du décollage;

b) trois heures après l'atterrissage ou plus tôt si cela est possible.

Décollage imminent

(2) Le transporteur n'est toutefois pas tenu de permettre aux passagers de débarquer de l'aéronef s'il est probable que le décollage aura lieu dans moins de trois heures et quarante-cinq minutes après la fermeture des portes en prévision du décollage ou après l'atterrissage et que le transporteur peut continuer à appliquer les normes de traitement prévues à l'article 8.

Priorité de débarquement

(3) Le transporteur qui permet aux passagers de débarquer de l'aéronef offre, si possible, la priorité de débarquement aux personnes handicapées et, le cas échéant, à leur personne de soutien, à leur animal d'assistance ou à leur animal de soutien émotionnel.

Exceptions

(4) Le présent article ne s'applique pas au transporteur qui n'est pas en mesure de permettre aux passagers de débarquer de l'aéronef notamment pour des raisons de sécurité, de sûreté, de contrôle de la circulation aérienne ou de contrôle douanier.

Obligations — situations indépendantes de la volonté du transporteur

10 (1) Le présent article s'applique au transporteur lorsque le retard ou l'annulation de vol ou le refus d'embarquement est attribuable à une situation indépendante de sa volonté, notamment :

a) une guerre ou une situation d'instabilité politique;

b) un acte illégal ou un acte de sabotage;

c) des conditions météorologiques ou une catastrophe naturelle qui rendent impossible l'exploitation sécuritaire de l'aéronef;

d) des instructions du contrôle de la circulation aérienne;

e) un *NOTAM* au sens du paragraphe 101.01(1) du *Règlement de l'aviation canadien*;

f) une menace à la sûreté;

g) des problèmes liés à l'exploitation de l'aéroport;

h) une urgence médicale;

(j) a labour disruption within the carrier or within an essential service provider such as an airport or an air navigation service provider;

(k) a manufacturing defect in an aircraft that reduces the safety of passengers and that was identified by the manufacturer of the aircraft concerned, or by a competent authority; and

(l) an order or instruction from an official of a state or a law enforcement agency or from a person responsible for airport security.

i) une collision avec un animal sauvage;

j) un conflit de travail chez le transporteur, un fournisseur de services essentiels comme un aéroport ou un fournisseur de services de navigation aérienne;

k) un défaut de fabrication de l'aéronef, qui réduit la sécurité des passagers, découvert par le fabricant de l'aéronef ou par une autorité compétente;

l) une instruction ou un ordre de tout représentant d'un État ou d'un organisme chargé de l'application de la loi ou d'un responsable de la sûreté d'un aéroport.

Earlier flight disruption

(2) A delay, cancellation or denial of boarding that is directly attributable to an earlier delay or cancellation that is due to situations outside the carrier's control, is considered to also be due to situations outside that carrier's control if that carrier took all reasonable measures to mitigate the impact of the earlier flight delay or cancellation.

Pertubation de vols précédents

(2) Le retard ou l'annulation de vol ou le refus d'embarquement qui est directement imputable à un retard ou à une annulation précédent attribuable à une situation indépendante de la volonté du transporteur est également considéré comme attribuable à une situation indépendante de la volonté du transporteur si ce dernier a pris toutes les mesures raisonnables pour atténuer les conséquences du retard ou de l'annulation précédent.

Obligations

(3) When there is delay, cancellation or denial of boarding due to situations outside the carrier's control, it must

(a) provide passengers with the information set out in section 13;

(b) in the case of a delay of three hours or more, provide alternate travel arrangements, in the manner set out in section 18, to a passenger who desires such arrangements; and

(c) in the case of a cancellation or a denial of boarding, provide alternate travel arrangements in the manner set out in section 18.

Obligations

(3) Lorsque le retard ou l'annulation de vol ou le refus d'embarquement est attribuable à une situation indépendante de la volonté du transporteur, ce dernier :

a) fournit aux passagers les renseignements prévus à l'article 13;

b) dans le cas d'un retard de trois heures ou plus, fournit aux passagers qui le désirent des arrangements de voyage alternatifs aux termes de l'article 18;

c) dans le cas d'une annulation ou d'un refus d'embarquement, fournit des arrangements de voyage alternatifs aux termes de l'article 18.

Obligations when required for safety purposes

11 (1) Subject to subsection 10(2), this section applies to a carrier when there is delay, cancellation or denial of boarding that is within the carrier's control but is required for safety purposes.

Obligations — nécessaires par souci de sécurité

11 (1) Sous réserve du paragraphe 10(2), cet article s'applique au transporteur dans le cas du retard ou de l'annulation de vol ou du refus d'embarquement qui lui est attribuable, mais qui est nécessaire par souci de sécurité.

Earlier flight disruption

(2) A delay, cancellation or denial of boarding that is directly attributable to an earlier delay or cancellation that is within that carrier's control but is required for safety purposes, is considered to also be within that carrier's control but required for safety purposes if that carrier took all reasonable measures to mitigate the impact of the earlier flight delay or cancellation.

Retard, annulation et refus d'embarquement subséquents

(2) Le retard ou l'annulation de vol ou le refus d'embarquement qui est directement imputable à un retard ou à une annulation précédent attribuable au transporteur, mais nécessaire par souci de sécurité, est également considéré comme attribuable au transporteur mais nécessaire par souci de sécurité si le transporteur a pris

toutes les mesures raisonnables pour atténuer les conséquences du retard ou annulation précédent.

Delay

(3) In the case of a delay, the carrier must

(a) provide passengers with the information set out in section 13;

(b) if a passenger is informed of the delay less than 12 hours before the departure time that is indicated on their original ticket, provide the standard of treatment set out in section 14; and

(c) if the delay is a delay of three hours or more, provide alternate travel arrangements or a refund, in the manner set out in section 17, to a passenger who desires such arrangements.

Retard

(3) Dans le cas du retard, le transporteur :

a) fournit aux passagers les renseignements prévus à l'article 13;

b) si le retard a été communiqué aux passagers moins de douze heures avant l'heure de départ indiquée sur leur titre de transport initial, applique les normes de traitement prévues à l'article 14;

c) s'il s'agit d'un retard de trois heures ou plus, fournit aux passagers qui le désirent des arrangements de voyage alternatifs ou un remboursement aux termes de l'article 17.

Cancellation

(4) In the case of a cancellation, the carrier must

(a) provide passengers with the information set out in section 13;

(b) if a passenger is informed of the cancellation less than 12 hours before the departure time that is indicated on their original ticket, provide the standard of treatment set out in section 14; and

(c) provide alternate travel arrangements or a refund, in the manner set out in section 17.

Annulation

(4) Dans le cas de l'annulation de vol, le transporteur :

a) fournit aux passagers les renseignements prévus à l'article 13;

b) si l'annulation a été communiquée aux passagers moins de douze heures avant l'heure de départ indiquée sur leur titre de transport initial, applique les normes de traitement prévues à l'article 14;

c) fournit aux passagers des arrangements de voyage alternatifs ou un remboursement aux termes de l'article 17.

Denial of boarding

(5) In the case of a denial of boarding, the carrier must

(a) provide passengers affected by the denial of boarding with the information set out in section 13;

(b) deny boarding in accordance with section 15 and provide the standard of treatment set out in section 16 to passengers affected by the denial of boarding; and

(c) provide alternate travel arrangements or a refund, in the manner set out in section 17.

Refus d'embarquement

(5) Dans le cas du refus d'embarquement, le transporteur :

a) fournit aux passagers concernés les renseignements prévus à l'article 13;

b) refuse l'embarquement conformément à l'article 15 et applique à l'égard des passagers concernés les normes de traitement prévues à l'article 16;

c) fournit aux passagers des arrangements de voyage alternatifs ou un remboursement aux termes de l'article 17.

Obligations when within carrier's control

12 (1) Subject to subsection 10(2), this section applies to a carrier when there is delay, cancellation or denial of boarding that is within the carrier's control but is not referred to in subsections 11(1) or (2).

Obligations — attribuable au transporteur

12 (1) Sous réserve du paragraphe 10(2), le présent article s'applique au transporteur dans le cas du retard ou de l'annulation de vol ou d'un refus d'embarquement qui lui est attribuable mais qui n'est pas visé aux paragraphes 11(1) ou (2).

Delay

(2) In the case of a delay, the carrier must

(a) provide passengers with the information set out in section 13;

(b) if a passenger is informed of the delay less than 12 hours before the departure time that is indicated on their original ticket, provide them with the standard of treatment set out in section 14;

(c) if the delay is a delay of three hours or more, provide alternate travel arrangements or a refund, in the manner set out in section 17, to a passenger who desires such arrangements; and

(d) if a passenger is informed 14 days or less before the departure time on their original ticket that the arrival of their flight at the destination that is indicated on that original ticket will be delayed, provide the minimum compensation for inconvenience in the manner set out in section 19.

Cancellation

(3) In the case of a cancellation, the carrier must

(a) provide passengers with the information set out in section 13;

(b) if a passenger is informed of the cancellation less than 12 hours before the departure time that is indicated on their original ticket, provide the standard of treatment set out in section 14;

(c) provide alternate travel arrangements or a refund, in the manner set out in section 17; and

(d) if a passenger is informed 14 days or less before the original departure time that the arrival of their flight at the destination that is indicated on their ticket will be delayed, provide the minimum compensation for inconvenience in the manner set out in section 19.

Denial of boarding

(4) In the case of a denial of boarding, the carrier must

(a) provide passengers affected by the denial of boarding with the information set out in section 13;

(b) deny boarding in accordance with section 15 and provide the standard of treatment set out in section 16 to passengers affected by the denial of boarding;

(c) provide alternate travel arrangements or a refund, in the manner set out in section 17; and

Retard

(2) Dans le cas du retard, le transporteur :

a) fournit aux passagers les renseignements prévus à l'article 13 ;

b) si le retard a été communiqué aux passagers moins de douze heures avant l'heure de départ indiquée sur leur titre de transport initial, applique les normes de traitement prévues à l'article 14;

c) s'il s'agit d'un retard de trois heures ou plus, fournit aux passagers qui le désirent des arrangements de voyage alternatifs ou un remboursement aux termes de l'article 17;

d) s'ils ont été informés quatorze jours ou moins avant l'heure de départ indiquée sur leur titre de transport initial que leur arrivée à la destination indiquée sur ce titre de transport sera retardée, verse aux passagers l'indemnité minimale prévue à l'article 19 pour les inconvénients subis.

Annulation de vol

(3) Dans le cas de l'annulation, le transporteur :

a) fournit aux passagers les renseignements prévus à l'article 13 ;

b) si l'annulation de vol a été communiquée aux passagers moins de douze heures avant l'heure de départ indiquée sur leur titre de transport initial, applique les normes de traitement prévues à l'article 14;

c) fournit des arrangements de voyage alternatifs ou un remboursement aux termes de à l'article 17;

d) s'ils ont été informés quatorze jours ou moins avant l'heure de départ indiquée sur leur titre de transport initial que leur arrivée à la destination indiquée sur ce titre de transport sera retardée, verse aux passagers l'indemnité minimale prévue à l'article 19 pour les inconvénients subis.

Refus d'embarquement

(4) Dans le cas du refus d'embarquement, le transporteur :

a) fournit aux passagers concernés les renseignements prévus à l'article 13;

b) refuse l'embarquement conformément à l'article 15 et applique à l'égard des passagers concernés les normes de traitement prévues à l'article 16;

(d) provide the minimum compensation for inconvenience for denial of boarding in the manner set out in section 20.

c) fournit aux passagers des arrangements de voyage alternatifs ou un remboursement aux termes de l'article 17.;

d) verse l'indemnité minimale prévue à l'article 20 pour les inconvénients subis.

Information — cancellation, delay, denial of boarding

13 (1) A carrier must provide the following information to the passengers who are affected by a cancellation, delay or a denial of boarding:

(a) the reason for the delay, cancellation or denial of boarding;

(b) the compensation to which the passenger may be entitled for the inconvenience;

(c) the standard of treatment for passengers, if any; and

(d) the recourse available against the carrier, including their recourse to the Agency.

Renseignements fournis à la suite d'un retard, d'une annulation ou d'un refus d'embarquement

13 (1) Le transporteur fournit aux passagers visés par le retard ou l'annulation de vol ou le refus d'embarquement les renseignements suivants :

a) la raison du retard, de l'annulation de vol ou du refus d'embarquement;

b) les indemnités qui peuvent être versées pour les inconvénients subis;

c) les normes de traitement des passagers applicables, le cas échéant;

d) les recours possibles contre lui, notamment ceux auprès de l'Office.

Communication every 30 minutes

(2) In the case of a delay, the carrier must communicate status updates to passengers every 30 minutes until a new departure time for the flight is set or alternate travel arrangements have been made for the affected passenger.

Mises à jour toutes les trente minutes

(2) Dans le cas du retard, le transporteur fournit aux passagers une mise à jour toutes les trente minutes sur la situation, et ce, jusqu'à ce qu'une nouvelle heure de départ soit fixée ou jusqu'à ce que des arrangements de voyage alternatifs aient été pris.

New information

(3) The carrier must communicate to passengers any new information as soon as feasible.

Nouveau renseignement

(3) Le transporteur fournit aux passagers tout nouveau renseignement dès que possible.

Audible and visible announcement

(4) The information referred to in subsection (1) must be provided by means of audible announcements and, upon request, by means of visible announcements.

Annonces audio et visuelle

(4) Les renseignements visés au paragraphe (1) sont fournis au moyen d'annonces faites sur support audio et, sur demande, sur support visuel.

Method of communication

(5) The information referred to in subsection (1) must also be provided to the passenger using the available communication method that they have indicated that they prefer, including a method that is compatible with adaptive technologies intended to assist persons with disabilities.

Moyen de communication

(5) Les renseignements visés au paragraphe (1) sont également fournis aux passagers à l'aide du moyen de communication disponible pour lequel ils ont indiqué une préférence, y compris un moyen qui est compatible avec les technologies d'adaptation visant à aider les personnes handicapées.

Standards of treatment

14 (1) If paragraph 11(3)(b) or (4)(b) or 12(2)(b) or (3)(b) applies to a carrier, and a passenger has waited two hours after the departure time that is indicated on

Normes de traitement

14 (1) Si les alinéas 11(3)b) ou (4)b), ou 12(2)b) ou (3)b), s'appliquent au transporteur et qu'il s'est écoulé deux heures depuis l'heure de départ indiquée sur le titre

their original ticket, the carrier must provide the passenger with the following treatment free of charge:

(a) food and drink in reasonable quantities, taking into account the length of the wait, the time of day and the location of the passenger; and

(b) access to a means of communication.

de transport initial du passager, le transporteur fournit, sans frais supplémentaires :

a) de la nourriture et des boissons en quantité raisonnable compte tenu de la durée de l'attente, du moment de la journée et du lieu où se trouve le passager;

b) l'accès à un moyen de communication.

Accommodations

(2) If paragraph 11(3)(b) or (4)(b) or 12(2)(b) or (3)(b) applies to a carrier and the carrier expects that the passenger will be required to wait overnight for their original flight or for a flight reserved as part of alternate travel arrangements, the air carrier must offer, free of charge, hotel or other comparable accommodation that is reasonable in relation to the location of the passenger, as well as transportation to the hotel or other accommodation and back to the airport.

Hébergement

(2) Si les alinéas 11(3)b) ou (4)b), ou 12(2)b) ou (3)b) s'appliquent au transporteur et que celui-ci prévoit que le passager devra attendre toute la nuit le vol retardé ou le vol faisant partie des arrangements de voyage alternatifs, le transporteur fournit au passager, sans frais supplémentaire, une chambre d'hôtel ou un lieu d'hébergement comparable qui est raisonnable compte tenu du lieu où se trouve le passager ainsi que le transport pour aller à l'hôtel ou au lieu d'hébergement et revenir à l'aéroport.

Refusing or limiting treatment

(3) The carrier may limit or refuse to provide a standard of treatment referred to in subsection (1) or (2) if providing that treatment would further delay the passenger.

Refus ou limite des normes de traitement

(3) Le transporteur peut limiter les normes de traitement prévues aux paragraphes (1) ou (2), ou refuser de les appliquer, si leur application entraînerait un retard plus important pour le passager.

Denial of boarding — request for volunteers

15 (1) If paragraph 11(5)(b) or 12(4)(b) applies to a carrier, it must not deny boarding to a passenger unless it has asked all passengers if they are willing to give up their seat.

Refus d'embarquement — demande de volontaires

15 (1) Si les alinéas 11(5)b) ou 12(4)b) s'appliquent au transporteur, celui-ci ne peut refuser l'embarquement à un passager avant d'avoir demandé aux autres passagers si l'un d'eux accepterait de laisser son siège.

Passenger on aircraft

(2) The carrier must not deny boarding to a passenger who is already on board the aircraft, unless the denial of boarding is required for reasons of safety.

Passager déjà à bord

(2) Le passager déjà à bord de l'aéronef ne peut faire l'objet d'un refus d'embarquement, sauf pour des raisons de sécurité.

Confirmation of benefit

(3) If a carrier offers a benefit in exchange for a passenger willingly giving up their seat in accordance with subsection (1) and a passenger accepts the offer, it must provide the passenger with a written confirmation of that benefit before the flight departs.

Confirmation des avantages

(3) Le transporteur qui offre un avantage aux passagers afin que l'un d'eux accepte de laisser son siège conformément au paragraphe (1), fournit aux passagers qui acceptent l'offre une confirmation écrite de l'avantage avant le départ du vol.

Priority for boarding

(4) If denial of boarding is necessary, the carrier must select the passengers who will be denied boarding, giving priority for boarding to passengers in the following order:

(a) an unaccompanied minor;

Priorité d'embarquement

(4) Lorsque le refus d'embarquement est nécessaire, le transporteur sélectionne les passagers qui se verront refuser l'embarquement en accordant la priorité d'embarquement aux passagers dans l'ordre suivant :

a) un mineur non accompagné;

(b) a person with a disability and their support person, service animal, or emotional support animal, if any;

(c) a passenger who is travelling with family members; and

(d) a passenger who was previously denied boarding on the same ticket.

b) une personne handicapée et, le cas échéant, à leur personne de soutien, à leur animal d'assistance ou à leur animal de soutien émotionnel;

c) un passager qui voyage avec des membres de sa famille;

d) un passager qui s'est déjà vu refuser l'embarquement pour le même titre de transport.

Treatment when boarding is denied

16 (1) If paragraph 11(5)(b) or 12(4)(b) applies to a carrier, it must, before a passenger boards the flight reserved as part of an alternate travel arrangement, provide them with the following treatment free of charge:

(a) food and drink in reasonable quantities, taking into account the length of the wait, the time of day and the location of the passenger; and

(b) access to a means of communication.

Normes de traitement des passagers lors du refus d'embarquement

16 (1) Si les alinéas 11(5)b) ou 12(4)b) s'appliquent au transporteur, celui-ci fournit au passager, avant son embarquement à bord d'un vol faisant partie des arrangements de voyage alternatifs, sans frais supplémentaires :

a) de la nourriture et des boissons en quantité raisonnable compte tenu de la durée de l'attente, du moment de la journée et du lieu où se trouve le passager;

b) l'accès à un moyen de communication.

Accommodations

(2) If the carrier expects that the passenger will be required to wait overnight for a flight reserved as part of alternate travel arrangements, the carrier must offer, free of charge, hotel or other comparable accommodation that is reasonable in relation to the location of the passenger, as well as transportation to the hotel or other accommodation and back to the airport.

Hébergement

(2) Si le transporteur prévoit que le passager devra attendre toute la nuit le vol faisant partie des arrangements de voyage alternatifs, il lui fournit, sans frais supplémentaires, une chambre d'hôtel ou un lieu d'hébergement comparable qui est raisonnable compte tenu du lieu où se trouve le passager, ainsi que le transport pour aller à l'hôtel ou au lieu d'hébergement et revenir à l'aéroport.

Refusing or limiting treatment

(3) The carrier may limit or refuse to provide a standard of treatment referred to in subsection (1) or (2) if providing that treatment would further delay the passenger.

Refus ou limite des normes de traitement

(3) Le transporteur peut limiter les normes de traitement prévues aux paragraphes (1) ou (2), ou refuser de les appliquer, si leur application entraînerait un retard plus important pour le passager.

Alternate arrangements — within carrier's control

17 (1) If paragraph 11(3)(c), (4)(c) or (5)(c) or 12(2)(c), (3)(c) or (4)(c) applies to a carrier, it must provide the following alternate travel arrangements free of charge to ensure that passengers complete their itinerary as soon as feasible:

(a) in the case of a large carrier,

(i) a confirmed reservation for the next available flight that is operated by the original carrier, or a carrier with which the original carrier has a commercial agreement, is travelling on any reasonable air route from the airport at which the passenger is located to the destination that is indicated on the passenger's original ticket and departs within nine

Arrangements alternatifs — situation attribuable au transporteur

17 (1) Si les alinéas 11(3)c), (4)c) ou (5)c), ou 12(2)c), (3)c) ou (4)c) s'appliquent au transporteur, celui-ci fournit aux passagers, sans frais supplémentaires, les arrangements de voyage alternatifs ci-après pour que les passagers puissent compléter leur itinéraire prévu dès que possible :

a) dans le cas d'un gros transporteur :

(i) une réservation confirmée pour le prochain vol disponible exploité par lui, ou par un transporteur avec lequel il a une entente commerciale, suivant toute route aérienne raisonnable à partir de l'aéroport où se situe le passager vers la destination indiquée sur le titre de transport initial du passager et

hours of the departure time that is indicated on that original ticket,

(ii) a confirmed reservation for a flight that is operated by any carrier and is travelling on any reasonable air route from the airport at which the passenger is located to the destination that is indicated on the passenger's original ticket and departs within 48 hours of the departure time that is indicated on that original ticket if the carrier cannot provide a confirmed reservation that complies with subparagraph (i), or

(iii) transportation to another airport that is within a reasonable distance of the airport at which the passenger is located and a confirmed reservation for a flight that is operated by any carrier and is travelling on any reasonable air route from that other airport to the destination that is indicated on the passenger's original ticket, if the carrier cannot provide a confirmed reservation that complies with subparagraphs (i) or (ii); and

(b) in the case of a small carrier, a confirmed reservation for the next available flight that is operated by the original carrier, or a carrier with which the original carrier has a commercial agreement, and is travelling on any reasonable air route from the airport at which the passenger is located to the destination that is indicated on the passenger's original ticket.

dont le départ a lieu dans les neuf heures suivant l'heure de départ indiquée sur ce titre de transport,

(ii) s'il ne peut fournir une réservation confirmée visée au sous-alinéa (i), une réservation confirmée pour un vol exploité par tout transporteur, suivant toute route aérienne raisonnable à partir de l'aéroport où se situe le passager vers la destination indiquée sur son titre de transport initial et dont le départ a lieu dans les quarante-huit heure,

(iii) s'il ne peut fournir une réservation confirmée visée aux sous-alinéas (i) ou (ii), le transport vers un aéroport se trouvant à une distance raisonnable de celui où se trouve le passager et une réservation confirmée vers la destination indiquée sur le titre de transport initial du passager suivant toute route aérienne raisonnable exploitée par tout transporteur en partance de cet aéroport;

b) dans le cas d'un petit transporteur, une réservation confirmée pour le prochain vol disponible exploité par lui, ou par un transporteur avec lequel il a une entente commerciale, suivant toute route aérienne raisonnable à partir de l'aéroport où se situe le passager, vers la destination indiquée sur le titre de transport initial du passager.

Refund

(2) If the alternate travel arrangements offered in accordance with subsection (1) do not accommodate the passenger's travel needs, the carrier must

(a) in the case where the passenger is no longer at the point of origin that is indicated on the ticket and the travel no longer serves a purpose because of the delay, cancellation or denial of boarding, refund the ticket and provide the passenger with a confirmed reservation that

(i) is for a flight to that point of origin, and

(ii) accommodates the passenger's travel needs; and

(b) in any other case, refund the unused portion of the ticket.

Remboursement

(2) Si les arrangements de voyage alternatifs fournis conformément au paragraphe (1) ne satisfont pas aux besoins de voyage du passager, le transporteur :

a) dans le cas où le passager n'est plus au point de départ indiqué sur le titre de transport et que le voyage n'a plus sa raison d'être en raison du retard, de l'annulation de vol ou du refus d'embarquement, rembourse le titre de transport et fournit au passager une réservation confirmée :

(i) pour un vol à destination de ce point de départ,

(ii) qui satisfait aux besoins de voyage du passager;

b) dans tous les autres cas, rembourse les portions inutilisées du titre de transport.

Comparable services

(3) To the extent possible, the alternate travel arrangements must provide services that are comparable to those of the original ticket.

Services comparables

(3) Dans la mesure du possible, les vols faisant partie des arrangements de voyage alternatifs offrent des services comparables à ceux prévus dans le titre de transport initial.

Refund of additional services

(4) A carrier must refund the cost of any additional services purchased by a passenger in connection with their original ticket if

(a) the passenger did not receive those services on the alternate flight; or

(b) the passenger paid for those services a second time.

Higher class of service

(5) If the alternate travel arrangements provide for a higher class of service than the original ticket, the carrier must not request supplementary payment.

Lower class of service

(6) If the alternate travel arrangements provide for a lower class of service than the original ticket, the carrier must refund the difference in the cost of the applicable portion of the ticket.

Method used for refund

(7) Refunds under this section must be paid by the method used for the original payment and to the person who purchased the ticket or additional service.

Alternate arrangements — outside carrier's control

18 (1) If paragraph 10(3)(b) or (c) applies to a carrier, it must provide the following alternate travel arrangements free of charge to ensure that passengers complete their itinerary as soon as feasible:

(a) in the case of a large carrier,

(i) a confirmed reservation for the next available flight that is operated by the original carrier, or a carrier with which the original carrier has a commercial agreement, is travelling on any reasonable air route from the airport at which the passenger is located to the destination that is indicated on the passenger's original ticket and departs within 48 hours of the end of the event that caused the delay, cancellation or denial of boarding,

(ii) if the carrier cannot provide a confirmed reservation that complies with subparagraph (i),

(A) a confirmed reservation for a flight that is operated by any carrier and is travelling on any reasonable air route from the airport at which

Remboursement d'un service additionnel

(4) Le transporteur rembourse le passager de tout service additionnel acheté en lien avec son titre de transport initial dans les cas suivants :

a) le passager n'a pas reçu ce service lors du vol alternatif;

b) le passager a payé de nouveau pour ce service.

Classe de service supérieure

(5) Si les arrangements de voyage alternatifs prévoient que le passager voyage dans une classe de service supérieure à celle prévue dans le titre de transport initial, le transporteur ne peut exiger le versement d'un supplément.

Classe de service inférieure

(6) Si les arrangements de voyage alternatifs prévoient que le passager voyage dans une classe de service inférieure à celle prévue dans le titre de transport initial, le transporteur rembourse la portion applicable du titre de transport.

Moyen utilisé pour le remboursement

(7) Les remboursements prévus au présent article sont versés, selon le mode de paiement initial à la personne qui a acheté le titre de transport ou le service additionnel.

Arrangements alternatifs — situation indépendante de la volonté du transporteur

18 (1) Si les alinéas 10(3)b) ou c) s'appliquent au transporteur, celui-ci fournit aux passagers, sans frais supplémentaires, les arrangements de voyage alternatifs ci-après pour que les passagers puissent compléter l'itinéraire prévu dès que possible :

a) dans le cas d'un gros transporteur :

(i) une réservation confirmée pour le prochain vol disponible exploité par lui, ou par un transporteur avec lequel il a une entente commerciale, suivant toute route aérienne raisonnable à partir de l'aéroport où se trouve le passager vers la destination indiquée sur le titre de transport initial du passager et dont le départ aura lieu dans les quarante-huit heures suivant la fin de l'évènement ayant causé le retard ou l'annulation de vol ou le refus d'embarquement,

(ii) s'il ne peut fournir une réservation confirmée visée au sous-alinéa (i) :

CANADA

CONSOLIDATION

CODIFICATION

Canada Transportation Act

Loi sur les transports au Canada

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L.C. 1996, ch. 10

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PART I

Administration

Canadian Transportation Agency

Continuation and Organization

Agency continued

7 (1) The agency known as the National Transportation Agency is continued as the Canadian Transportation Agency.

Composition of Agency

(2) The Agency shall consist of not more than five members appointed by the Governor in Council, and such temporary members as are appointed under subsection 9(1), each of whom must, on appointment or reappointment and while serving as a member, be a Canadian citizen or a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act*.

Chairperson and Vice-Chairperson

(3) The Governor in Council shall designate one of the members appointed under subsection (2) to be the Chairperson of the Agency and one of the other members appointed under that subsection to be the Vice-Chairperson of the Agency.

1996, c. 10, s. 7; 2001, c. 27, s. 221; 2007, c. 19, s. 3; 2015, c. 3, s. 30(E).

Term of members

8 (1) Each member appointed under subsection 7(2) shall hold office during good behaviour for a term of not more than five years and may be removed for cause by the Governor in Council.

Reappointment

(2) A member appointed under subsection 7(2) is eligible to be reappointed on the expiration of a first or subsequent term of office.

Continuation in office

(3) If a member appointed under subsection 7(2) ceases to hold office, the Chairperson may authorize the member to continue to hear any matter that was before the member on the expiry of the member's term of office and that member is deemed to be a member of the Agency, but that person's status as a member does not preclude the appointment of up to five members under subsection 7(2) or up to three temporary members under subsection 9(1).

1996, c. 10, s. 8; 2007, c. 19, s. 4; 2015, c. 3, s. 31(E).

PARTIE I

Administration

Office des transports du Canada

Maintien et composition

Maintien de l'Office

7 (1) L'Office national des transports est maintenu sous le nom d'Office des transports du Canada.

Composition

(2) L'Office est composé, d'une part, d'au plus cinq membres nommés par le gouverneur en conseil et, d'autre part, des membres temporaires nommés en vertu du paragraphe 9(1). Tout membre doit, du moment de sa nomination, être et demeurer un citoyen canadien ou un résident permanent au sens du paragraphe 2(1) de la *Loi sur l'immigration et la protection des réfugiés*.

Président et vice-président

(3) Le gouverneur en conseil choisit le président et le vice-président de l'Office parmi les membres nommés en vertu du paragraphe (2).

1996, ch. 10, art. 7; 2001, ch. 27, art. 221; 2007, ch. 19, art. 3; 2015, ch. 3, art. 30(A).

Durée du mandat

8 (1) Les membres nommés en vertu du paragraphe 7(2) le sont à titre inamovible pour un mandat d'au plus cinq ans, sous réserve de révocation motivée par le gouverneur en conseil.

Renouvellement du mandat

(2) Les mandats sont renouvelables.

Continuation de mandat

(3) Le président peut autoriser un membre nommé en vertu du paragraphe 7(2) qui cesse d'exercer ses fonctions à continuer, après la date d'expiration de son mandat, à entendre toute question dont il se trouve saisi à cette date. À cette fin, le membre est réputé être membre de l'Office mais son statut n'empêche pas la nomination de cinq membres en vertu du paragraphe 7(2) ou de trois membres temporaires en vertu du paragraphe 9(1).

1996, ch. 10, art. 8; 2007, ch. 19, art. 4; 2015, ch. 3, art. 31(A).

Parliament that is administered in whole or in part by the Agency.

Appointment of person to conduct inquiry

38 (1) The Agency may appoint a member, or an employee of the Agency, to make any inquiry that the Agency is authorized to conduct and report to the Agency.

Dealing with report

(2) On receipt of the report under subsection (1), the Agency may adopt the report as a decision or order of the Agency or otherwise deal with it as it considers advisable.

Powers on inquiry

39 A person conducting an inquiry may, for the purposes of the inquiry,

(a) enter and inspect any place, other than a dwelling-house, or any structure, work, rolling stock or ship 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.

Délégation

38 (1) L'Office peut déléguer son pouvoir d'enquête à l'un de ses membres ou fonctionnaires et charger ce dernier de lui faire rapport.

Connaissance du rapport

(2) Sur réception du rapport, l'Office peut l'entériner sous forme de décision ou d'arrêté ou statuer sur le rapport de la manière qu'il estime indiquée.

Pouvoirs de la personne chargée de l'enquête

39 Toute personne chargée de faire enquête peut, à cette fin :

a) procéder à la visite de tout lieu autre qu'une maison d'habitation — terrain, construction, ouvrage, matériel 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.

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.

Report of Agency

Agency's report

42 (1) Each year the Agency shall, before the end of July, make a report on its activities for the preceding year and submit it, through the Minister, to the Governor in Council describing briefly, in respect of that year,

(a) applications to the Agency and the findings on them; and

(b) the findings of the Agency in regard to any matter or thing respecting which the Agency has acted on the request of the Minister.

Additional content

(2) The Agency shall include in every report referred to in subsection (1)

(a) the Agency's assessment of the operation of this Act and any difficulties observed in the administration of this Act;

(b) in respect of the year to which the report relates, information about, including the number of, the following:

(i) inspections conducted under this Act for a purpose related to verifying compliance or preventing non-compliance with any provision of regulations made under subsection 170(1) or with any of sections 60 to 62 of the *Accessible Canada Act*,

(ii) orders made under section 181.2,

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.

Rapport de l'Office

Rapport de l'Office

42 (1) Chaque année, avant la fin du mois de juillet, l'Office présente au gouverneur en conseil, par l'intermédiaire du ministre, un rapport de ses activités de l'année précédente résumant :

a) les demandes qui lui ont été présentées et ses conclusions à leur égard;

b) ses conclusions concernant les questions ou les objets à l'égard desquels il a agi à la demande du ministre.

Contenu

(2) Le rapport contient notamment :

a) l'évaluation de l'Office de l'effet de la présente loi et des difficultés rencontrées dans l'application de celle-ci;

b) les renseignements, au regard de l'année en cause, concernant les éléments ci-après, y compris leur nombre :

(i) les inspections menées, au titre de la présente loi, à toute fin liée à la vérification du respect ou à la prévention du non-respect des dispositions des règlements pris en vertu du paragraphe 170(1) ou de l'un des articles 60 à 62 de la *Loi canadienne sur l'accessibilité*,

(ii) les arrêtés pris en vertu de l'article 181.2,

CANADA

CONSOLIDATION

CODIFICATION

Federal Courts Act

Loi sur les Cours fédérales

R.S.C., 1985, c. F-7

L.R.C. (1985), ch. F-7

Current to March 5, 2020

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(a) to issue an injunction, writ of *certiorari*, writ of prohibition, writ of *mandamus* or writ of *quo warranto*, or grant declaratory relief, against any federal board, commission or other tribunal; and

(b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against the Attorney General of Canada, to obtain relief against a federal board, commission or other tribunal.

a) décerner une injonction, un bref de *certiorari*, de *mandamus*, de prohibition ou de *quo warranto*, ou pour rendre un jugement déclaratoire contre tout office fédéral;

b) connaître de toute demande de réparation de la nature visée par l'alinéa a), et notamment de toute procédure engagée contre le procureur général du Canada afin d'obtenir réparation de la part d'un office fédéral.

Extraordinary remedies, members of Canadian Forces

(2) The Federal Court has exclusive original jurisdiction to hear and determine every application for a writ of *habeas corpus ad subjiciendum*, writ of *certiorari*, writ of prohibition or writ of *mandamus* in relation to any member of the Canadian Forces serving outside Canada.

Recours extraordinaires : Forces canadiennes

(2) Elle a compétence exclusive, en première instance, dans le cas des demandes suivantes visant un membre des Forces canadiennes en poste à l'étranger : bref d'*habeas corpus ad subjiciendum*, de *certiorari*, de prohibition ou de *mandamus*.

Remedies to be obtained on application

(3) The remedies provided for in subsections (1) and (2) may be obtained only on an application for judicial review made under section 18.1.

R.S., 1985, c. F-7, s. 18; 1990, c. 8, s. 4; 2002, c. 8, s. 26.

Exercice des recours

(3) Les recours prévus aux paragraphes (1) ou (2) sont exercés par présentation d'une demande de contrôle judiciaire.

L.R. (1985), ch. F-7, art. 18; 1990, ch. 8, art. 4; 2002, ch. 8, art. 26.

Application for judicial review

18.1 (1) An application for judicial review may be made by the Attorney General of Canada or by anyone directly affected by the matter in respect of which relief is sought.

Demande de contrôle judiciaire

18.1 (1) Une demande de contrôle judiciaire peut être présentée par le procureur général du Canada ou par quiconque est directement touché par l'objet de la demande.

Time limitation

(2) An application for judicial review in respect of a decision or an order of a federal board, commission or other tribunal shall be made within 30 days after the time the decision or order was first communicated by the federal board, commission or other tribunal to the office of the Deputy Attorney General of Canada or to the party directly affected by it, or within any further time that a judge of the Federal Court may fix or allow before or after the end of those 30 days.

Délai de présentation

(2) Les demandes de contrôle judiciaire sont à présenter dans les trente jours qui suivent la première communication, par l'office fédéral, de sa décision ou de son ordonnance au bureau du sous-procureur général du Canada ou à la partie concernée, ou dans le délai supplémentaire qu'un juge de la Cour fédérale peut, avant ou après l'expiration de ces trente jours, fixer ou accorder.

Powers of Federal Court

(3) On an application for judicial review, the Federal Court may

(a) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or

(b) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or

Pouvoirs de la Cour fédérale

(3) Sur présentation d'une demande de contrôle judiciaire, la Cour fédérale peut :

a) ordonner à l'office fédéral en cause d'accomplir tout acte qu'il a illégalement omis ou refusé d'accomplir ou dont il a retardé l'exécution de manière déraisonnable;

proceeding of a federal board, commission or other tribunal.

Grounds of review

(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal

(a) acted without jurisdiction, acted beyond its jurisdiction or refused to exercise its jurisdiction;

(b) failed to observe a principle of natural justice, procedural fairness or other procedure that it was required by law to observe;

(c) erred in law in making a decision or an order, whether or not the error appears on the face of the record;

(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;

(e) acted, or failed to act, by reason of fraud or perjured evidence; or

(f) acted in any other way that was contrary to law.

Defect in form or technical irregularity

(5) If the sole ground for relief established on an application for judicial review is a defect in form or a technical irregularity, the Federal Court may

(a) refuse the relief if it finds that no substantial wrong or miscarriage of justice has occurred; and

(b) in the case of a defect in form or a technical irregularity in a decision or an order, make an order validating the decision or order, to have effect from any time and on any terms that it considers appropriate.

1990, c. 8, s. 5; 2002, c. 8, s. 27.

Interim orders

18.2 On an application for judicial review, the Federal Court may make any interim orders that it considers appropriate pending the final disposition of the application.

1990, c. 8, s. 5; 2002, c. 8, s. 28.

b) déclarer nul ou illégal, ou annuler, ou infirmer et renvoyer pour jugement conformément aux instructions qu'elle estime appropriées, ou prohiber ou encore restreindre toute décision, ordonnance, procédure ou tout autre acte de l'office fédéral.

Motifs

(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas :

a) a agi sans compétence, outrepassé celle-ci ou refusé de l'exercer;

b) n'a pas observé un principe de justice naturelle ou d'équité procédurale ou toute autre procédure qu'il était légalement tenu de respecter;

c) a rendu une décision ou une ordonnance entachée d'une erreur de droit, que celle-ci soit manifeste ou non au vu du dossier;

d) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;

e) a agi ou omis d'agir en raison d'une fraude ou de faux témoignages;

f) a agi de toute autre façon contraire à la loi.

Vice de forme

(5) La Cour fédérale peut rejeter toute demande de contrôle judiciaire fondée uniquement sur un vice de forme si elle estime qu'en l'occurrence le vice n'entraîne aucun dommage important ni déni de justice et, le cas échéant, valider la décision ou l'ordonnance entachée du vice et donner effet à celle-ci selon les modalités de temps et autres qu'elle estime indiquées.

1990, ch. 8, art. 5; 2002, ch. 8, art. 27.

Mesures provisoires

18.2 La Cour fédérale peut, lorsqu'elle est saisie d'une demande de contrôle judiciaire, prendre les mesures provisoires qu'elle estime indiquées avant de rendre sa décision définitive.

1990, ch. 8, art. 5; 2002, ch. 8, art. 28.

Reference by federal tribunal

18.3 (1) A federal board, commission or other tribunal may at any stage of its proceedings refer any question or issue of law, of jurisdiction or of practice and procedure to the Federal Court for hearing and determination.

Reference by Attorney General of Canada

(2) The Attorney General of Canada may, at any stage of the proceedings of a federal board, commission or other tribunal, other than a service tribunal within the meaning of the *National Defence Act*, refer any question or issue of the constitutional validity, applicability or operability of an Act of Parliament or of regulations made under an Act of Parliament to the Federal Court for hearing and determination.

1990, c. 8, s. 5; 2002, c. 8, s. 28.

Hearings in summary way

18.4 (1) Subject to subsection (2), an application or reference to the Federal Court under any of sections 18.1 to 18.3 shall be heard and determined without delay and in a summary way.

Exception

(2) The Federal Court may, if it considers it appropriate, direct that an application for judicial review be treated and proceeded with as an action.

1990, c. 8, s. 5; 2002, c. 8, s. 28.

Exception to sections 18 and 18.1

18.5 Despite sections 18 and 18.1, if an Act of Parliament expressly provides for an appeal to the Federal Court, the Federal Court of Appeal, the Supreme Court of Canada, the Court Martial Appeal Court, the Tax Court of Canada, the Governor in Council or the Treasury Board from a decision or an order of a federal board, commission or other tribunal made by or in the course of proceedings before that board, commission or tribunal, that decision or order is not, to the extent that it may be so appealed, subject to review or to be restrained, prohibited, removed, set aside or otherwise dealt with, except in accordance with that Act.

1990, c. 8, s. 5; 2002, c. 8, s. 28.

Intergovernmental disputes

19 If the legislature of a province has passed an Act agreeing that the Federal Court, the Federal Court of Canada or the Exchequer Court of Canada has jurisdiction in cases of controversies between Canada and that province, or between that province and any other province or provinces that have passed a like Act, the Federal Court has jurisdiction to determine the controversies.

R.S., 1985, c. F-7, s. 19; 2002, c. 8, s. 28.

Renvoi d'un office fédéral

18.3 (1) Les offices fédéraux peuvent, à tout stade de leurs procédures, renvoyer devant la Cour fédérale pour audition et jugement toute question de droit, de compétence ou de pratique et procédure.

Renvoi du procureur général

(2) Le procureur général du Canada peut, à tout stade des procédures d'un office fédéral, sauf s'il s'agit d'un tribunal militaire au sens de la *Loi sur la défense nationale*, renvoyer devant la Cour fédérale pour audition et jugement toute question portant sur la validité, l'applicabilité ou l'effet, sur le plan constitutionnel, d'une loi fédérale ou de ses textes d'application.

1990, ch. 8, art. 5; 2002, ch. 8, art. 28.

Procédure sommaire d'audition

18.4 (1) Sous réserve du paragraphe (2), la Cour fédérale statue à bref délai et selon une procédure sommaire sur les demandes et les renvois qui lui sont présentés dans le cadre des articles 18.1 à 18.3.

Exception

(2) Elle peut, si elle l'estime indiqué, ordonner qu'une demande de contrôle judiciaire soit instruite comme s'il s'agissait d'une action.

1990, ch. 8, art. 5; 2002, ch. 8, art. 28.

Dérogation aux art. 18 et 18.1

18.5 Par dérogation aux articles 18 et 18.1, lorsqu'une loi fédérale prévoit expressément qu'il peut être interjeté appel, devant la Cour fédérale, la Cour d'appel fédérale, la Cour suprême du Canada, la Cour d'appel de la cour martiale, la Cour canadienne de l'impôt, le gouverneur en conseil ou le Conseil du Trésor, d'une décision ou d'une ordonnance d'un office fédéral, rendue à tout stade des procédures, cette décision ou cette ordonnance ne peut, dans la mesure où elle est susceptible d'un tel appel, faire l'objet de contrôle, de restriction, de prohibition, d'évocation, d'annulation ni d'aucune autre intervention, sauf en conformité avec cette loi.

1990, ch. 8, art. 5; 2002, ch. 8, art. 28.

Différends entre gouvernements

19 Lorsqu'une loi d'une province reconnaît sa compétence en l'espèce, — qu'elle y soit désignée sous le nom de Cour fédérale, Cour fédérale du Canada ou Cour de l'Échiquier du Canada — la Cour fédérale est compétente pour juger les cas de litige entre le Canada et cette province ou entre cette province et une ou plusieurs autres provinces ayant adopté une loi semblable.

L.R. (1985), ch. F-7, art. 19; 2002, ch. 8, art. 28.

(e) acted, or failed to act, by reason of fraud or perjured evidence; or

(f) acted in any other way that was contrary to law.

(e) elle a agi ou omis d'agir en raison d'une fraude ou de faux témoignages;

f) elle a agi de toute autre façon contraire à la loi.

Hearing in summary way

(1.4) An appeal under subsection (1.2) shall be heard and determined without delay and in a summary way.

Procédure sommaire

(1.4) L'appel interjeté en vertu du paragraphe (1.2) est entendu et tranché immédiatement et selon une procédure sommaire.

Notice of appeal

(2) An appeal under this section shall be brought by filing a notice of appeal in the Registry of the Federal Court of Appeal

(a) in the case of an interlocutory judgment, within 10 days after the pronouncement of the judgment or within any further time that a judge of the Federal Court of Appeal may fix or allow before or after the end of those 10 days; and

(b) in any other case, within 30 days, not including any days in July and August, after the pronouncement of the judgment or determination appealed from or within any further time that a judge of the Federal Court of Appeal may fix or allow before or after the end of those 30 days.

Avis d'appel

(2) L'appel interjeté dans le cadre du présent article est formé par le dépôt d'un avis au greffe de la Cour d'appel fédérale, dans le délai imparti à compter du prononcé du jugement en cause ou dans le délai supplémentaire qu'un juge de la Cour d'appel fédérale peut, soit avant soit après l'expiration de celui-ci, accorder. Le délai imparti est de :

a) dix jours, dans le cas d'un jugement interlocutoire;

b) trente jours, compte non tenu de juillet et août, dans le cas des autres jugements.

Service

(3) All parties directly affected by an appeal under this section shall be served without delay with a true copy of the notice of appeal, and evidence of the service shall be filed in the Registry of the Federal Court of Appeal.

Signification

(3) L'appel est signifié sans délai à toutes les parties directement concernées par une copie certifiée conforme de l'avis. La preuve de la signification doit être déposée au greffe de la Cour d'appel fédérale.

Final judgment

(4) For the purposes of this section, a final judgment includes a judgment that determines a substantive right except as to any question to be determined by a referee pursuant to the judgment.

R.S., 1985, c. F-7, s. 27; R.S., 1985, c. 51 (4th Supp.), s. 11; 1990, c. 8, ss. 7, 78(E); 1993, c. 27, s. 214; 2002, c. 8, s. 34.

Jugement définitif

(4) Pour l'application du présent article, est assimilé au jugement définitif le jugement qui statue au fond sur un droit, à l'exception des questions renvoyées à l'arbitrage par le jugement.

L.R. (1985), ch. F-7, art. 27; L.R. (1985), ch. 51 (4e suppl.), art. 11; 1990, ch. 8, art. 7 et 78(A); 1993, ch. 27, art. 214; 2002, ch. 8, art. 34.

Judicial review

28 (1) The Federal Court of Appeal has jurisdiction to hear and determine applications for judicial review made in respect of any of the following federal boards, commissions or other tribunals:

(a) [Repealed, 2012, c. 24, s. 86]

(b) the Review Tribunal continued by subsection 27(1) of the *Agriculture and Agri-Food Administrative Monetary Penalties Act*;

Contrôle judiciaire

28 (1) La Cour d'appel fédérale a compétence pour connaître des demandes de contrôle judiciaire visant les offices fédéraux suivants :

a) [Abrogé, 2012, ch. 24, art. 86]

b) la commission de révision prorogée par le paragraphe 27(1) de la *Loi sur les sanctions administratives pécuniaires en matière d'agriculture et d'agroalimentaire*;

(b.1) the Conflict of Interest and Ethics Commissioner appointed under section 81 of the *Parliament of Canada Act*;

(c) the Canadian Radio-television and Telecommunications Commission established by the *Canadian Radio-television and Telecommunications Commission Act*;

(d) [Repealed, 2012, c. 19, s. 272]

(e) the Canadian International Trade Tribunal established by the *Canadian International Trade Tribunal Act*;

(f) the Canadian Energy Regulator established by the *Canadian Energy Regulator Act*;

(g) the Governor in Council, when the Governor in Council makes an order under subsection 186(1) of the *Canadian Energy Regulator Act*;

(g) the Appeal Division of the Social Security Tribunal established under section 44 of the *Department of Employment and Social Development Act*, unless the decision is made under subsection 57(2) or section 58 of that Act or relates to an appeal brought under subsection 53(3) of that Act or an appeal respecting a decision relating to further time to make a request under subsection 52(2) of that Act, section 81 of the *Canada Pension Plan*, section 27.1 of the *Old Age Security Act* or section 112 of the *Employment Insurance Act*;

(h) the Canada Industrial Relations Board established by the *Canada Labour Code*;

(i) the Federal Public Sector Labour Relations and Employment Board referred to in subsection 4(1) of the *Federal Public Sector Labour Relations and Employment Board Act*;

(i.1) adjudicators as defined in subsection 2(1) of the *Federal Public Sector Labour Relations Act*;

(j) the Copyright Board established by the *Copyright Act*;

(k) the Canadian Transportation Agency established by the *Canada Transportation Act*;

(l) [Repealed, 2002, c. 8, s. 35]

(m) [Repealed, 2012, c. 19, s. 272]

(n) the Competition Tribunal established by the *Competition Tribunal Act*;

b.1) le commissaire aux conflits d'intérêts et à l'éthique nommé en vertu de l'article 81 de la *Loi sur le Parlement du Canada*;

c) le Conseil de la radiodiffusion et des télécommunications canadiennes constitué par la *Loi sur le Conseil de la radiodiffusion et des télécommunications canadiennes*;

d) [Abrogé, 2012, ch. 19, art. 272]

e) le Tribunal canadien du commerce extérieur constitué par la *Loi sur le Tribunal canadien du commerce extérieur*;

f) la Régie canadienne de l'énergie constituée par la *Loi sur la Régie canadienne de l'énergie*;

g) le gouverneur en conseil, quand il prend un décret en vertu du paragraphe 186(1) de la *Loi sur la Régie canadienne de l'énergie*;

g) la division d'appel du Tribunal de la sécurité sociale, constitué par l'article 44 de la *Loi sur le ministère de l'Emploi et du Développement social*, sauf dans le cas d'une décision qui est rendue au titre du paragraphe 57(2) ou de l'article 58 de cette loi ou qui vise soit un appel interjeté au titre du paragraphe 53(3) de cette loi, soit un appel concernant une décision relative au délai supplémentaire visée au paragraphe 52(2) de cette loi, à l'article 81 du *Régime de pensions du Canada*, à l'article 27.1 de la *Loi sur la sécurité de la vieillesse* ou à l'article 112 de la *Loi sur l'assurance-emploi*;

h) le Conseil canadien des relations industrielles au sens du *Code canadien du travail*;

i) la Commission des relations de travail et de l'emploi dans le secteur public fédéral visée par le paragraphe 4(1) de la *Loi sur la Commission des relations de travail et de l'emploi dans le secteur public fédéral*;

i.1) les arbitres de grief, au sens du paragraphe 2(1) de la *Loi sur les relations de travail dans le secteur public fédéral*;

j) la Commission du droit d'auteur constituée par la *Loi sur le droit d'auteur*;

k) l'Office des transports du Canada constitué par la *Loi sur les transports au Canada*;

l) [Abrogé, 2002, ch. 8, art. 35]

m) [Abrogé, 2012, ch. 19, art. 272]

(o) assessors appointed under the *Canada Deposit Insurance Corporation Act*;

(p) [Repealed, 2012, c. 19, s. 572]

(q) the Public Servants Disclosure Protection Tribunal established by the *Public Servants Disclosure Protection Act*; and

(r) the Specific Claims Tribunal established by the *Specific Claims Tribunal Act*.

n) le Tribunal de la concurrence constitué par la *Loi sur le Tribunal de la concurrence*;

o) les évaluateurs nommés en application de la *Loi sur la Société d'assurance-dépôts du Canada*;

p) [Abrogé, 2012, ch. 19, art. 572]

q) le Tribunal de la protection des fonctionnaires divulgateurs d'actes répréhensibles constitué par la *Loi sur la protection des fonctionnaires divulgateurs d'actes répréhensibles*;

r) le Tribunal des revendications particulières constitué par la *Loi sur le Tribunal des revendications particulières*.

Sections apply

(2) Sections 18 to 18.5, except subsection 18.4(2), apply, with any modifications that the circumstances require, in respect of any matter within the jurisdiction of the Federal Court of Appeal under subsection (1) and, when they apply, a reference to the Federal Court shall be read as a reference to the Federal Court of Appeal.

Dispositions applicables

(2) Les articles 18 à 18.5 s'appliquent, exception faite du paragraphe 18.4(2) et compte tenu des adaptations de circonstance, à la Cour d'appel fédérale comme si elle y était mentionnée lorsqu'elle est saisie en vertu du paragraphe (1) d'une demande de contrôle judiciaire.

Federal Court deprived of jurisdiction

(3) If the Federal Court of Appeal has jurisdiction to hear and determine a matter, the Federal Court has no jurisdiction to entertain any proceeding in respect of that matter.

R.S., 1985, c. F-7, s. 28; R.S., 1985, c. 30 (2nd Supp.), s. 61; 1990, c. 8, s. 8; 1992, c. 26, s. 17, c. 33, s. 69, c. 49, s. 128; 1993, c. 34, s. 70; 1996, c. 10, s. 229, c. 23, s. 187; 1998, c. 26, s. 73; 1999, c. 31, s. 92(E); 2002, c. 8, s. 35; 2003, c. 22, ss. 167(E), 262; 2005, c. 46, s. 56.1; 2006, c. 9, ss. 6, 222; 2008, c. 22, s. 46; 2012, c. 19, ss. 110, 272, 572, c. 24, s. 86; 2013, c. 40, ss. 236, 439; 2014, c. 20, s. 236; 2017, c. 9, ss. 43, 55; 2019, c. 28, s. 102.

Incompétence de la Cour fédérale

(3) La Cour fédérale ne peut être saisie des questions qui relèvent de la Cour d'appel fédérale.

L.R. (1985), ch. F-7, art. 28; L.R. (1985), ch. 30 (2e suppl.), art. 61; 1990, ch. 8, art. 8; 1992, ch. 26, art. 17, ch. 33, art. 69, ch. 49, art. 128; 1993, ch. 34, art. 70; 1996, ch. 10, art. 229, ch. 23, art. 187; 1998, ch. 26, art. 73; 1999, ch. 31, art. 92(A); 2002, ch. 8, art. 35; 2003, ch. 22, art. 167(A) et 262; 2005, ch. 46, art. 56.1; 2006, ch. 9, art. 6 et 222; 2008, ch. 22, art. 46; 2012, ch. 19, art. 110, 272 et 572, ch. 24, art. 86; 2013, ch. 40, art. 236 et 439; 2014, ch. 20, art. 236; 2017, ch. 9, art. 43 et 55; 2019, ch. 28, art. 102.

29 to 35 [Repealed, 1990, c. 8, s. 8]

29 à 35 [Abrogés, 1990, ch. 8, art. 8]

Substantive Provisions

Prejudgment interest — cause of action within province

36 (1) Except as otherwise provided in any other Act of Parliament, and subject to subsection (2), the laws relating to prejudgment interest in proceedings between subject and subject that are in force in a province apply to any proceedings in the Federal Court of Appeal or the Federal Court in respect of any cause of action arising in that province.

Prejudgment interest — cause of action outside province

(2) A person who is entitled to an order for the payment of money in respect of a cause of action arising outside a province or in respect of causes of action arising in more than one province is entitled to claim and have included

Dispositions de fond

Intérêt avant jugement — Fait survenu dans une province

36 (1) Sauf disposition contraire de toute autre loi fédérale, et sous réserve du paragraphe (2), les règles de droit en matière d'intérêt avant jugement qui, dans une province, régissent les rapports entre particuliers s'appliquent à toute instance devant la Cour d'appel fédérale ou la Cour fédérale et dont le fait générateur est survenu dans cette province.

Intérêt avant jugement — Fait non survenu dans une seule province

(2) Dans toute instance devant la Cour d'appel fédérale ou la Cour fédérale et dont le fait générateur n'est pas survenu dans une province ou dont les faits générateurs sont survenus dans plusieurs provinces, les intérêts avant

exclusivement une mission non commerciale au moment où a été formulée la demande ou intentée l'action les concernant.

Arrest

(8) The jurisdiction conferred on the Federal Court by section 22 may be exercised *in rem* against any ship that, at the time the action is brought, is owned by the beneficial owner of the ship that is the subject of the action.

Saisie de navire

(8) La compétence de la Cour fédérale peut, aux termes de l'article 22, être exercée en matière réelle à l'égard de tout navire qui, au moment où l'action est intentée, appartient au véritable propriétaire du navire en cause dans l'action.

Reciprocal security

(9) In an action for a collision in which a ship, an aircraft or other property of a defendant has been arrested, or security has been given to answer judgment against the defendant, and in which the defendant has instituted a cross-action or counter-claim in which a ship, an aircraft or other property of the plaintiff is liable to arrest but cannot be arrested, the Federal Court may stay the proceedings in the principal action until security has been given to answer judgment in the cross-action or counter-claim.

R.S., 1985, c. F-7, s. 43; 1990, c. 8, s. 12; 1996, c. 31, s. 83; 2002, c. 8, s. 40; 2009, c. 21, s. 18(E).

Garantie réciproque

(9) Dans une action pour collision où un navire, aéronef ou autre bien du défendeur est saisi, ou un cautionnement est fourni, et où le défendeur présente une demande reconventionnelle en vertu de laquelle un navire, aéronef ou autre bien du demandeur est saisissable, la Cour fédérale peut, s'il ne peut être procédé à la saisie de ces derniers biens, suspendre l'action principale jusqu'au dépôt d'un cautionnement par le demandeur.

L.R. (1985), ch. F-7, art. 43; 1990, ch. 8, art. 12; 1996, ch. 31, art. 83; 2002, ch. 8, art. 40; 2009, ch. 21, art. 18(A).

***Mandamus*, injunction, specific performance or appointment of receiver**

44 In addition to any other relief that the Federal Court of Appeal or the Federal Court may grant or award, a *mandamus*, an injunction or an order for specific performance may be granted or a receiver appointed by that court in all cases in which it appears to the court to be just or convenient to do so. The order may be made either unconditionally or on any terms and conditions that the court considers just.

R.S., 1985, c. F-7, s. 44; 2002, c. 8, s. 41.

***Mandamus*, injonction, exécution intégrale ou nomination d'un séquestre**

44 Indépendamment de toute autre forme de réparation qu'elle peut accorder, la Cour d'appel fédérale ou la Cour fédérale peut, dans tous les cas où il lui paraît juste ou opportun de le faire, décerner un *mandamus*, une injonction ou une ordonnance d'exécution intégrale, ou nommer un séquestre, soit sans condition, soit selon les modalités qu'elle juge équitables.

L.R. (1985), ch. F-7, art. 44; 2002, ch. 8, art. 41.

Procedure

Giving of judgment after judge ceases to hold office

45 (1) A judge of the Federal Court of Appeal or the Federal Court who resigns or is appointed to another court or otherwise ceases to hold office may, at the request of the Chief Justice of that court, at any time within eight weeks after that event, give judgment in any cause, action or matter previously tried by or heard before the judge as if he or she had continued in office.

Taking part in giving of judgment after judge of Federal Court of Appeal ceases to hold office

(2) If a judge of the Federal Court of Appeal who resigns or is appointed to another court or otherwise ceases to hold office has heard a cause, an action or a matter in the Federal Court of Appeal jointly with other judges of that

Procédure

Jugement rendu après cessation de fonctions

45 (1) Le juge de la Cour d'appel fédérale ou de la Cour fédérale qui a cessé d'occuper sa charge, notamment par suite de démission ou de nomination à un autre poste, peut, dans les huit semaines qui suivent et à la demande du juge en chef du tribunal concerné, rendre son jugement dans toute affaire qu'il a instruite.

Participation au jugement après cessation de fonctions

(2) À la demande du juge en chef de la Cour d'appel fédérale, le juge de celle-ci qui se trouve dans la situation visée au paragraphe (1) après y avoir instruit une affaire conjointement avec d'autres juges peut, dans le délai fixé

CANADA

CONSOLIDATION

CODIFICATION

Federal Courts Rules

Règles des Cours fédérales

SOR/98-106

DORS/98-106

Current to March 5, 2020

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(b) all affidavits and other material to be used by the respondent on the motion that is not included in the moving party's motion record;

(c) subject to rule 368, the portions of any transcripts on which the respondent intends to rely;

(d) subject to rule 366, written representations; and

(e) any other filed material not contained in the moving party's motion record that is necessary for the hearing of the motion.

SOR/2009-331, s. 6; SOR/2013-18, s. 13; SOR/2015-21, s. 28.

b) les affidavits et autres documents et éléments matériels dont l'intimé entend se servir relativement à la requête et qui ne figurent pas dans le dossier de requête;

c) sous réserve de la règle 368, les extraits de toute transcription dont l'intimé entend se servir et qui ne figurent pas dans le dossier de requête;

d) sous réserve de la règle 366, les prétentions écrites de l'intimé;

e) les autres documents et éléments matériels déposés qui sont nécessaires à l'audition de la requête et qui ne figurent pas dans le dossier de requête.

DORS/2009-331, art. 6; DORS/2013-18, art. 13; DORS/2015-21, art. 28.

Memorandum of fact and law required

366 On a motion for summary judgment or summary trial, for an interlocutory injunction, for the determination of a question of law or for the certification of a proceeding as a class proceeding, or if the Court so orders, a motion record shall contain a memorandum of fact and law instead of written representations.

SOR/2002-417, s. 22; SOR/2007-301, s. 8; SOR/2009-331, s. 7.

Mémoire requis

366 Dans le cas d'une requête en jugement sommaire ou en procès sommaire, d'une requête pour obtenir une injonction interlocutoire, d'une requête soulevant un point de droit ou d'une requête en autorisation d'une instance comme recours collectif, ou lorsque la Cour l'ordonne, le dossier de requête contient un mémoire des faits et du droit au lieu de prétentions écrites.

DORS/2002-417, art. 22; DORS/2007-301, art. 8; DORS/2009-331, art. 7.

Documents filed as part of motion record

367 A notice of motion or any affidavit required to be filed by a party to a motion may be served and filed as part of the party's motion record and need not be served and filed separately.

Dossier de requête

367 L'avis de requête ou les affidavits qu'une partie doit déposer peuvent être signifiés et déposés à titre d'éléments de son dossier de requête ou de réponse, selon le cas. Ils n'ont pas à être signifiés et déposés séparément.

Transcripts of cross-examinations

368 Transcripts of all cross-examinations on affidavits on a motion shall be filed before the hearing of the motion.

Transcriptions des contre-interrogatoires

368 Les transcriptions des contre-interrogatoires des auteurs des affidavits sont déposés avant l'audition de la requête.

Motions in writing

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

Procédure de requête écrite

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

Request for oral hearing

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

Demande d'audience

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

Reply

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

Disposition of motion

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

Abandonment of motion

370 (1) A party who brings a motion may abandon it by serving and filing a notice of abandonment in Form 370.

Deemed abandonment

(2) Where a moving party fails to appear at the hearing of a motion without serving and filing a notice of abandonment, it is deemed to have abandoned the motion.

Testimony regarding issue of fact

371 On motion, the Court may, in special circumstances, authorize a witness to testify in court in relation to an issue of fact raised on a motion.

PART 8

Preservation of Rights in Proceedings

General

Motion before proceeding commenced

372 (1) A motion under this Part may not be brought before the commencement of a proceeding except in a case of urgency.

Undertaking to commence proceeding

(2) A party bringing a motion before the commencement of a proceeding shall undertake to commence the proceeding within the time fixed by the Court.

Interim and Interlocutory Injunctions

Availability

373 (1) On motion, a judge may grant an interlocutory injunction.

Réponse du requérant

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

Décision

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

Désistement

370 (1) La partie qui a présenté une requête peut s'en désister en signifiant et en déposant un avis de désistement, établi selon la formule 370.

Désistement présumé

(2) La partie qui ne se présente pas à l'audition de la requête et qui n'a ni signifié ni déposé un avis de désistement est réputée s'être désistée de sa requête.

Témoignage sur des questions de fait

371 Dans des circonstances particulières, la Cour peut, sur requête, autoriser un témoin à témoigner à l'audience quant à une question de fait soulevée dans une requête.

PARTIE 8

Sauvegarde des droits

Dispositions générales

Requête antérieure à l'instance

372 (1) Une requête ne peut être présentée en vertu de la présente partie avant l'introduction de l'instance, sauf en cas d'urgence.

Engagement

(2) La personne qui présente une requête visée au paragraphe (1) s'engage à introduire l'instance dans le délai fixé par la Cour.

Injonctions interlocutoires et provisoires

Injonction interlocutoire

373 (1) Un juge peut accorder une injonction interlocutoire sur requête.

Undertaking to abide by order

(2) Unless a judge orders otherwise, a party bringing a motion for an interlocutory injunction shall undertake to abide by any order concerning damages caused by the granting or extension of the injunction.

Engagement

(2) Sauf ordonnance contraire du juge, la partie qui présente une requête pour l'obtention d'une injonction interlocutoire s'engage à se conformer à toute ordonnance concernant les dommages-intérêts découlant de la délivrance ou de la prolongation de l'injonction.

Expedited hearing

(3) Where it appears to a judge that the issues in a motion for an interlocutory injunction should be decided by an expedited hearing of the proceeding, the judge may make an order under rule 385.

Instruction accélérée

(3) Si le juge est d'avis que les questions en litige dans la requête devraient être tranchées par une instruction accélérée de l'instance, il peut rendre une ordonnance aux termes de la règle 385.

Evidence at hearing

(4) A judge may order that any evidence submitted at the hearing of a motion for an interlocutory injunction shall be considered as evidence submitted at the hearing of the proceeding.

Preuve à l'audition

(4) Le juge peut ordonner que la preuve présentée à l'audition de la requête soit considérée comme une preuve présentée à l'instruction de l'instance.

Interim injunction

374 (1) A judge may grant an interim injunction on an *ex parte* motion for a period of not more than 14 days where the judge is satisfied

(a) in a case of urgency, that no notice is possible; or

(b) that to give notice would defeat the purpose of the motion.

Injonction provisoire

374 (1) Une injonction provisoire d'une durée d'au plus 14 jours peut être accordée sur requête *ex parte* lorsque le juge estime :

a) soit, en cas d'urgence, qu'aucun avis n'a pu être donné;

b) soit que le fait de donner un avis porterait irrémédiablement préjudice au but poursuivi.

Extension

(2) A motion to extend an interim injunction that was granted on an *ex parte* motion may be brought only on notice to every party affected by the injunction, unless the moving party can demonstrate that a party has been evading service or that there are other sufficient reasons to extend the interim injunction without notice to the party.

Prolongation

(2) Lorsque l'injonction provisoire a été accordée sur requête *ex parte*, tout avis de requête visant à en prolonger la durée est signifié aux parties touchées par l'injonction, sauf si le requérant peut démontrer qu'une partie s'est soustraite à la signification ou qu'il existe d'autres motifs suffisants pour prolonger la durée de l'injonction sans en aviser la partie.

Limitation

(3) Where a motion to extend an interim injunction under subsection (2) is brought *ex parte*, the extension may be granted for a further period of not more than 14 days.

Période limite

(3) La prolongation visée au paragraphe (2) qui est accordée sur requête *ex parte* ne peut dépasser 14 jours.

Appointment of a Receiver

Motion to appoint receiver

375 (1) On motion, a judge may appoint a receiver in any proceeding.

Nomination d'un séquestre judiciaire

Requête pour nommer un séquestre

375 (1) Un juge peut, sur requête, nommer un séquestre judiciaire dans toute instance.

Court File No.:

FEDERAL COURT OF APPEAL

BETWEEN:

AIR PASSENGER RIGHTS

Applicant

– and –

CANADIAN TRANSPORTATION AGENCY

Respondent

MOTION RECORD OF THE MOVING PARTY, AIR PASSENGER RIGHTS

Motion for an Urgent Interim Injunction Without Notice
(Pursuant to Rules 369 and 373-374 of the *Federal Courts Rules*)

VOLUME 2 of 2

Appendix "B" – Book of Authorities

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TO: **CANADIAN TRANSPORTATION AGENCY**

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Administration de pilotage des Laurentides v.
Corp. des pilotes du Saint-Laurent central inc.

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LAURENTIAN PILOTAGE AUTHORITY (Appellant) and CORPORATION DES PILOTES DU SAINT-LAURENT CENTRAL INC. (Respondent)

Marc Noël C.J., Richard Boivin J.A., Donald J. Rennie J.A.

Heard: December 22, 2015
Judgment: December 23, 2015
Docket: A-542-15

Proceedings: Reversed, 2015 CarswellNat 10683, 2015 CarswellNat 7111, 262 A.C.W.S. (3d) 466, 2015 FC 1382, 2015 CF 1382 (F.C.)

Counsel: Patrice Gladu, for the Appellant
Jean Lortie, for the Respondent

***Marc Noël C.J.*:**

1 This is an appeal from a decision of Justice Locke of the Federal Court (the Federal Court judge), dated December 14, 2015, (2015 CF 1382) dismissing the motion for an interlocutory injunction filed by the Laurentian Pilotage Authority (the LPA). The motion was to compel the Corporation des pilotes du Saint-Laurent Central Inc. (the Corporation) to add to the Work Schedule of licensed pilots in District No 1, the required complement of pilots for the period from December 22, 2015, to January 4, 2016, according to the terms of a new service contract ratified by both parties on October 15, 2015.

2 In light of the tight timelines, the deadlines specified under the *Federal Courts Rules*, SOR/98-106, were abridged and the appeal was expeditiously heard in a one-hour hearing at Ottawa. The brief reasons that follow were issued the next day.

3 The Federal Court judge conducted his analysis on the basis of the tri-partite test established by the Supreme Court in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] S.C.R.

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311 [*RJR-MacDonald*]. He found that the LPA had succeeded in establishing the existence of a serious issue and irreparable harm, but that the balance of convenience did not favour issuing an interlocutory injunction. He therefore dismissed the LPA's motion.

4 Before us, the LPA submits that the Federal Court judge erred in law in concluding that the balance of convenience favoured the Corporation. For its part, the Corporation is asking that we uphold the Federal Court judge's decision in this regard. It adds that the Federal Court judge was wrong to conclude that the LPA had suffered irreparable harm, with the result that the injunction sought be the LPA could not have been granted in any event.

5 The decision to grant or dismiss a motion for an interlocutory injunction is a discretionary one. A review of the lawfulness of a discretionary decision ought to be conducted within the general appellate framework set out in *Housen v. Nikolaisen*, 2002 SCC 33, depending on whether it is a question of law, of fact, or a question of mixed fact and law (*Jamieson Laboratories Ltd. v. Reckitt Benckiser LLC*, 2015 FCA 104, para. 21, citing *Imperial Manufacturing Group Inc. v. Decor Grates Incorporated*, 2015 FCA 100, paras. 18 and 19).

1st branch: serious issue

6 The existence of a serious issue is not in question in this appeal. In addressing this question, the Federal Court judge explained that his decision was, for all intents and purposes, equivalent to a final decision, given the time constraints he was under. Thus, he allowed himself to make a more definitive finding than he otherwise would have, had an arbitrator been afforded enough time to properly dispose of the matter (Reasons, para. 19).

7 The Federal Court judge dismissed the Corporation's position according to which the customs and usage in the context meant that the pilot's Assignment Schedule initially established for 2015 (the 2015 Schedule) was unaffected by the signing of the new service contract during the year (Reasons, para. 22). Despite the fact that it had been entered into on October 15, 2015, the contract took effect on July 1, 2015 (Exhibit P-2 of the LPA Record).

8 As for the moment the Assignment Schedule was to be changed, the Federal Court judge pointed out that under the terms of the contract, [TRANSLATION] "[n]othing indicates that these [the new assignment] requirements will not apply immediately", namely, upon the contract's coming into force (Reasons, para. 24). He then dismissed the Corporation's contention that it was not possible to change the Assignment Schedule during the year, determining that the evidence submitted in this regard by the Corporation was insufficient (Reasons, para. 25).

9 According to the Federal Court judge, the LPA had succeeded in establishing that the Corporation had an obligation to comply with the new assignment requirements immediately upon signature of the contract (Reasons, para. 27). The issue raised by the LPA in support of the issuing

of the injunction was therefore not only a serious one but was likely to lead to a decision favourable to the LPA on the balance of the evidence presented before the judge.

2nd branch: irreparable harm

10 Under the irreparable harm branch, the Federal Court judge also dismissed the Corporation's position as follows (Reasons, para. 32):

> [TRANSLATION]
>
> [32] The Corporation maintains that the LPA's argument that there will be delays during the holiday period this year is hypothetical. I disagree. After seeing the statistics for 2008 to 2014, it seems likely that there will be delays caused by the unavailability of pilots during the holiday period this year. It is difficult to estimate the number of delays, but I expect that there will be some.

11 He further added the following (Reasons, para. 33):

> [TRANSLATION]
>
> [33] Although the problem of delays of this type is not very serious and the resulting harm is minor, I agree that harm of this type is irreparable. It is understandable that preventable delays harm the LPA's reputation, which is an irreparable outcome: *RJR-Macdonald* at p. 341. For example, the LPA's clients affected by the delays caused by the unavailability of pilots may choose other options to ship their products in the future. Even though there is no proof that an LPA client has done this in the past, I think it is likely to have happened considering the number of delays in past years.

12 The Corporation takes issue with that last passage, arguing that it contains a number of errors. Despite the fact that this aspect of the analysis is not as complete and solid as it might have been, I am unable to detect an error that would allow me to set aside the Federal Court judge's conclusion.

13 In this regard, suffice it to say that the judge's inference to the effect that the delays harm the LPA's reputation is not speculative. Rather, it is a logical inference made on the basis of the evidence. I would add that the Federal Court judge's finding that the damage to the LPA's reputation is difficult to quantify appears to be consistent with what the Supreme Court set out in the passage from *RJR-MacDonald* referred to by the Federal Court judge. Moreover, contrary to the Corporation's assertion, I am of the view that there was sufficient evidence before the Federal Court judge for him to conclude that such harm did exist.

3rd branch: balance of convenience

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14 The Federal Court judge then turned his attention to the balance of convenience branch. After having indicated that the public interest favoured compliance with the contract signed on October 15, 2015 (Reasons, para. 39), he noted that [TRANSLATION] "the pilots likely made their arrangements for the 2015-2016 holiday period...a long time ago" (*ibidem*).

15 With regard to any inconveniences experienced by the LPA, the Federal Court judge downplayed these while acknowledging their existence. Beyond the fact [TRANSLATION] "[t]hat there is a public interest in ensuring compliance with contracts" (Reasons, para. 38), the Corporation's refusal to comply with its contractual obligations would cause delays, although those delays would be fewer than anticipated (Reasons, para. 40).

16 Ultimately, it was maintaining what the Federal Court judge perceived to be the *status quo* that appears to have tipped the scale in the Corporation's favour (Reasons, para. 41):

> [TRANSLATION]
>
> [41] Each of the parties argues that the principle of maintaining the status quo goes in its favour. The Corporation maintains that the status quo means keeping the 2015 schedule, whereas the LPA contends that the status quo requires compliance with the new contract between the parties. I agree with the Corporation. The LPA asks that the Corporation be ordered to modify the 2015 schedule. The status quo requires that I not impose such an order.
>
> (Emphasis added.)

17 In reaching this conclusion, the Federal Court judge erred with regard to the applicable legal rule. In order for the 2015 Schedule to represent the *status quo*, it would have required the Federal Court judge to have reached the opposite conclusion than the one he made with regard to the existence of a serious issue. Indeed, his conclusion was that the Corporation had been aware of the new requirements since June 2015 and that it had an obligation to meet those requirements from the moment the contract was signed, despite the 2015 Schedule. Therefore, the 2015 Schedule did not represent the *status quo* as the *status quo* was based on the requirements set out in the contract signed in October 2015.

18 It follows that the only ground that favours the Corporation under the balance of convenience branch is that it would be [TRANSLATION] "inconvenient for pilots to have to change their arrangements..." for the 2015-2016 holiday period (Reasons, para. 39). This is no doubt true. However, the only reason this unfortunate situation exists, according to the Federal Court judge's finding, is that the Corporation failed to draw up a new schedule on the basis of the new requirements as it should have under the terms of the contract it had signed. In raising this frustration, the Corporation is doing nothing more than making a claim based on its own turpitude.

19 Given that this is the sole "inconvenience" selected by the Federal Court judge to tilt the balance against the LPA, it follows that the third branch also favours issuing the injunction sought.

20 I therefore find that the appeal should be allowed, the order issued by the Federal Court judge set aside, and the order that he should have issued be issued according to the terms proposed by the LPA, subject to the date marking the start of the period covered by the interlocutory injunction being extended to December 26, 2015, in order to provide the Corporation with a suitable opportunity to comply. I am awarding the LPA its costs before this Court and before the Federal Court.

***Richard Boivin J.A.*:**

I concur.

***Donald J. Rennie J.A.*:**

I concur.

2000 CarswellOnt 5326
Ontario Superior Court of Justice

Algonquin Wildlands League v. Northern Bruce Peninsula (Municipality)

2000 CarswellOnt 5326, 39 C.E.L.R. (N.S.) 53

Algonquin Wildlands League, Chippewas of Nawash First Nation, and Chippewas of Saugeen First Nation, Moving Parties and Corporation of the Municipality of Northern Bruce Peninsula, Respondent

Lamek J.

Judgment: July 27, 2000
Docket: 00-CV-194-697

Counsel: *Stewart Elgie*, *Jerry DeMarco*, for Moving Parties

***Lamek J.*:**

1 July 27, 2000: The motion material was served on the respondent earlier this week. Counsel for the respondent advised Counsel for the applicants that he would not be appearing today.

2 The legal question raised — as to the applicability of the EAA [*Environmental Assessment Act*, R.S.O. c. E. 18, as amended] to a proposed opening by a private party, of a municipally-owned road allowance is not easy and, indeed, has produced conflicting views within the Ministry of the Environment. But the applicants clearly have, at the very least, a very arguable case. Irreparable harm is easy. Absent an injunction, the clearing of the road will proceed and the trees will have gone, if not forever, at least for decades. The balance of convenience, too, favours the Applicants — as the British Columbia Court of Appeal observed in *MacMillan Bloedel Ltd. v. Mullin* [[1985] 3 W.W.R. 577 (B.C. C.A.)] (a case quite similar to the one before me) if the application for an injunction should eventually fail, the trees will still be there to be harvested.

3 In the circumstances, an injunction should go in the terms of paragraphs (a), (b), (c), and (d) in the Notice of Motion.

> [a) An order staying the effect of any by-law passed by Council of the Respondent, authorizing the clearing and improvement of the road allowance between Lots 15 and 16 in Concessions 5 and 6, W.B.R. and between Concessions 4 and 5, W.B.R. from lots 16 to 20 in the former

township of St. Edmunds (now in the Municipality of Northern Bruce Peninsula) (the "Road Allowance") pending the final disposition of the intended proceeding;

b) A mandatory order directing the Respondent to take the necessary steps to suspend the effect of any by-law passed by Council respecting the Road Allowance pending the final disposition of the intended proceeding;

c) An injunction restraining the Respondent from taking any further or other steps to permit clearing or improvement of the Road Allowance pending the final disposition of the intended proceeding;

d) An order enjoining or prohibiting the Respondent from passing any by-law to permit clearing or improvement of the Road Allowance pending the final disposition of the intended proceeding.]

4 The injunction, however, is to remain in place until October 30, 2000, on the undertaking of Counsel to proceed promptly with its main permanent injunction motion, and in the expectation that the matter can be dealt with within that time. If that cannot be done, the applicant shall be at liberty to move to extend this injunction — of course on notice to the Respondent. In these circumstances, where the applicants are seeking to advance what they believe to be the public interest and in the absence of any evidence of damages to the respondent, I do not require that the applicants give the usual — or any — undertaking in damages. The respondent, if it perceives that an undertaking should be given, is at liberty to move for an order requiring it.

5 No costs are sought or ordered.

Order

6 THIS MOTION, made by the Moving Parties for orders enjoining the Respondent from taking steps to clear or improve, or to authorize the clearing or improving of, a road allowance in the former Township of St. Edmunds and ancillary orders (as set out specifically below) was heard on July 27, 2000 at 361 University Ave., Toronto.

7 ON READING the Motion Record of the Moving Parties and on hearing the submissions of counsel for the Moving Parties, no one appearing for the Respondent or the Northern Bruce Timber Company Inc. although properly served as appears from the affidavits of service,

1. THIS COURT ORDERS that any by-law passed by Council of the Respondent, authorizing the clearing and improvement of the road allowance between Lots 15 and 16 in Concessions 5 and 6, W.B.R. and between Concessions 4 and 5, W.B.R. from lots 16 to 20 in the former township of St. Edmunds (now in the Municipality of Northern Bruce Peninsula) (the "Road Allowance") be stayed until October 30, 2000;

2. THIS COURT ORDERS the Respondent to take the necessary steps to suspend the effect of any by-law passed by Council respecting the Road Allowance until October 30, 2000;

3. THIS COURT ORDERS that the Respondent be restrained from taking any further or other steps to permit clearing or improvement of the Road Allowance until October 30, 2000;

4. THIS COURT ORDERS that the Respondent be enjoined or prohibited from passing any by-law to permit clearing or improvement of the Road Allowance until October 30, 2000;

5. THIS COURT ORDERS that an undertaking for damages by the Moving Parties be dispensed with;

6. THIS COURT ORDERS that this motion be permitted to be heard prior to the commencement of a proceeding;

7. THIS COURT ORDERS that the time for service and filing of the notice of motion and motion record be abridged to permit this motion to be heard on July 27, 2000;

8. THIS COURT ORDERS that this matter be permitted to be heard orally without service or filing of a factum;

9. THIS COURT ORDERS that this matter be heard in Toronto;

10. THIS COURT ORDERS the Respondent to serve the order of this Honourable Court made on this motion on any and all parties affected, namely the Northern Bruce Timber Company Inc. whose intended cutting of the trees on the Road Allowance will be impacted by the effect of this order.

Motion granted.

Federal Court Cour fédérale

Date: 20200226

Docket: IMM-1375-20

Toronto, Ontario, February 26, 2020

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

MARTIN SEVIC

Respondent

ORDER
(EXTENSION OF TEMPORARY STAY)

UPON THE MOTION of the Minister of Public Safety and Emergency Preparedness [Minister] for an order extending the temporary stay of release of Martin Sevic from detention for a period not exceeding 10 days to permit the parties to prepare and file documentation in respect of a motion to stay Mr. Sevic's release from detention pending determination of the Minister's application for leave and judicial review;

AND UPON reading the materials filed;

AND UPON hearing counsel for the Minister and Mr. Sevic by teleconference on February 26, 2020;

AND CONSIDERING the following:

The Minister has filed no evidence in support of this motion for an extension of the temporary stay that was issued on an *ex parte* basis this morning. The following account of the facts is derived from the written and oral submissions of counsel for the Minister in their capacities as officers of the Court.

Mr. Sevic is a citizen of Croatia. He is currently in Canada without status.

In March 2017, Mr. Sevic was charged with operating a motor vehicle while impaired, contrary to s 253(l)(a) of the *Criminal Code*, RSC, 1985, c C-46, and refusing to provide a breath sample, contrary to s 254(5) of the *Criminal Code*. He was convicted of these charges in February 2019.

Mr. Sevic is inadmissible to Canada under s 36(2)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], due to his criminal convictions. A report under s 44 of IRPA has been prepared and a deportation order was issued on May 30, 2019.

On September 22, 2019, Mr. Sevic's application for a temporary resident visa was refused. On November 26, 2019, his request for a pre-removal risk assessment was decided against him.

Mr. Sevic failed to appear for removal on February 15, 2020, and a warrant was issued for his arrest. He surrendered himself into custody on February 22, 2020.

Mr. Sevic proposed a bondsperson at his 48 hour detention review. The Minister asked to examine the bondsperson to establish that person's suitability. However, the bondsperson left the hearing without being examined.

On February 25, 2020, the Immigration Division [ID] of the Immigration and Refugee Board ordered Mr. Sevic's release. Mr. Sevic is currently scheduled to be removed from Canada on March 7, 2019.

An order staying a tribunal's decision is extraordinary equitable relief. The tripartite test in *Toth v Canada (Employment and Immigration)* (1988), 86 NR 302, 6 Imm LR (2d) 123 (FCA) [*Toth*] requires that: (i) there be a serious issue to be tried, (ii) the applicant suffer irreparable harm if the stay is not granted, and (iii) the balance of convenience favour the applicant. An applicant must satisfy each branch of the test. The applicant seeking an interim injunction must demonstrate greater urgency or risk of imminent harm than is required in an application for an ordinary interlocutory injunction if he or she proceeds without adequate notice to the respondent (*Fournier Pharma Inc v Apotex Inc* (1999), 1 CPR (4th) 344 (Fed TD)).

The test for establishing a serious issue to be tried is generally low. The issue must be neither frivolous nor vexatious. The Minister says that the ID's decision to release Mr. Sevic without giving the Minister an opportunity to examine the bondsperson amounts to a breach of procedural fairness.

Given the low threshold for establishing a serious issue to be tried, and without expressing a view on the merits of the upcoming motion for an interim stay of release or the underlying application for leave and judicial review, I am satisfied that the first branch of the *Toth* test is met.

Turning to the second branch of the *Toth* test, the party seeking a stay must adduce clear and non-speculative evidence that irreparable harm will follow if the motion is denied. The Minister says there will be irreparable harm to the orderly administration of justice if the interim stay is not granted. The underlying application for leave and judicial review will be rendered moot, and the Minister will be deprived of an adequate opportunity to prepare and present a motion for a stay pending determination of the application on its merits. In the meantime, Mr. Sevic may attempt to frustrate his removal from Canada and may present an ongoing danger to the public. He has a history of non-compliance with Canada's immigration and criminal laws, and has demonstrated through his words and actions that he may not appear for removal.

An important consideration in this case is that the temporary stay is sought for a period not exceeding 10 days. This is intended to give both parties a reasonable opportunity to prepare and file documentation to enable a full hearing of a motion for an interim stay pending determination of the underlying application for leave and judicial review. I am satisfied that denying the parties this opportunity would cause irreparable harm to the administration of justice, and potentially to the orderly enforcement of Canada's immigration and criminal laws.

For similar reasons, I conclude that the balance of convenience favours the Minister.

THIS COURT ORDERS that:

1. The Minister's motion for an order extending the temporary stay of release of Mr. Sevic from detention is granted for a period not exceeding 10 days.

2. The Minister shall file his motion record for an interim stay of release by the close of business on Monday, March 2, 2020.

3. Mr. Sevic shall file his responding motion record in accordance with the direction of the presiding judge.

4. The motion for an interim stay of release pending determination of the underlying application for leave and judicial review shall be heard as soon as possible thereafter.

"Simon Fothergill"
Judge

1991 CarswellNat 360
Federal Court of Canada — Appeal Division

Canadian Cable Television Assn. — Assn canadienne de télévision par câble v. American College Sports Collective of Canada Inc.

1991 CarswellNat 360, 1991 CarswellNat 794, [1991] 3 F.C. 626, [1991] F.C.J. No. 502, 129 N.R. 296, 27 A.C.W.S. (3d) 936, 36 C.P.R. (3d) 455, 4 Admin. L.R. (2d) 61, 4 T.C.T. 6177, 81 D.L.R. (4th) 376

CANADIAN CABLE TELEVISION ASSOCIATION — ASSOCIATION CANADIENNE DE TÉLÉVISION PAR C]BLE v. AMERICAN COLLEGE SPORTS COLLECTIVE OF CANADA, INC., BORDER BROADCASTERS' COLLECTIVE, CANADIAN BROADCASTERS RETRANSMISSION RIGHTS AGENCY INC., CANADIAN RETRANSMISSION COLLECTIVE, CANADIAN RETRANSMISSION RIGHT ASSOCIATION, COMPOSERS, AUTHORS AND PUBLISHERS ASSOCIATION OF CANADA, LIMITED, COPYRIGHT COLLECTIVE OF CANADA, FWS JOINT SPORTS CLAIMANTS, MAJOR LEAGUE BASEBALL COLLECTIVE OF CANADA, INC., and PERFORMING RIGHTS ORGANIZATION OF CANADA LIMITED

Mahoney, MacGuigan and Linden JJ.A.

Heard: May 13-17, 1991

Judgment: June 3, 1991 *

Docket: Doc. A-832-90

Counsel: *Michael K. Eisen* and *Stephen G. Rawson*, for Canadian Cable Television Association.
Gilles M. Daigle, for Border Broadcasters' Collective.
David W. Kent, for Canadian Broadcasters Retransmission Rights Agency.
Hank G. Intven, for Canadian Retransmission Collective.
Jacques R. Alleyn and *Peter E. Robinson*, for Canadian Retransmission Right Association.
Y.A. George Hynna, for Composers, Authors and Publishers Association of Canada — Performing Rights Organization of Canada.
Glenn A. Hainey and *Michael S. Koch*, for Copyright Collective of Canada.
Daniel R. Bereskin and *Grey A. Piasetski*, for FWS Joint Sports Claimants.
Richard Storrey, for Major League Baseball Collective of Canada.
J. Aidan O'Neill, for Canadian Satellite Communications Inc. — C1 Cablesystems.

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Mario Bouchard, for Copyright Board.

The judgment of the court was delivered by *MacGuigan J.A.*:

1 This s. 28 application [*Federal Court Act*, R.S.C. 1985, c. F-7] is brought by the applicant, a non-profit organization whose members include over 545 licensed operators of cable television systems across Canada, against a decision of October 2, 1990, by the Copyright Board (the "board"). The tariffs implementing the board's decision were published in the Supplement to the *Canada Gazette*, Part I, October 6, 1990, as the *Television Retransmission Tariff* and the *Radio Retransmission Tariff*.

2 The board was established pursuant to s. 66 of the *Copyright Act* (the "Act"), R.S.C. 1985, c. C-42, a section which was proclaimed in force as of February 1, 1989. By s. 66(3) the chairman of the board is required to be a judge, either sitting or retired, of a superior, county or district court. The chairman, Justice Donald Medhurst of the Alberta Court of Queen's Bench, was a member of the board panel in this case, as were Vice-Chairman Michel Hétu ("Hétu"), Dr. Judith Alexander ("Alexander"), and Michel Latraverse ("Latraverse"). Board member Latraverse was the only dissenting member of the panel.

3 Following the Canada-United States Free Trade Agreement, the Act was amended by the *Canada-United States Free Trade Agreement Implementation Act*, S.C. 1988, c. 65, s. 65 to provide for the payment of copyright royalties for the retransmission of distant radio and television broadcast signals. In June of 1989, pursuant to s. 70.61 of the Act, 11 copyright collectives, acting as collecting bodies, filed with the board statements of proposed royalties for the retransmission of such signals. The applicant was one of the three parties to file objections to those statements with the board. The board hearing, which began on November 27, 1989, occupied 57 days. In its decision of October 2, 1980, the board imposed annual royalties for the retransmission of distant television signals in Canada of approximately $51 million in each of 1990 and 1991. The "proxy" (prototype or analogue) which the board adopted as a useful starting point for its computation of royalties was the wholesale price charged by the American satellite specialty service Arts & Entertainment ("A & E"), with the proviso that the differences between A & E and distant broadcast signals had to be kept in mind (*Decision*, at pp. 25-36):

> **B. The Large Systems: 1 — The Value of Distant Signals**
>
> Four comparisons were advanced during the hearing for valuing copyright works. Three of them are based on the economic value of services similar to those provided on distant signals or of benefits which have been lost through the use of distant signals; the last establishes a direct comparison with conditions in the United States. They are listed and reviewed as follows:

(i) the value of comparable services

(ii) the value of displaced programming

(iii) the value of lost licence fees

(iv) comparison with the U.S. regime

(i) The Value of Comparable Services

The Board is charged with setting a price for distant signals; the price of a similar good in another market could provide useful information. If that analogous market were a competitive market, the price could be taken as a proxy for the value of distant signals.

CCC [Copyright Collective of Canada] claimed that the rates charged by CANCOM [Canadian Satellite Communications Inc.], the resale carrier, were a measure of the benefit of distant signals to cable systems. The price for the first distant signal delivered by CANCOM is as high as $1.70 ....

MLB [Major League Baseball Collective of Canada, Inc.] proposed the U.S. sports service, ESPN, as a proxy for the sports programming on distant signals, and specifically, for baseball programming.

. . . . .

CRC [Canadian Retransmission Collective] collected data in 1989 on the monthly wholesale rates charged to Canadian cable systems for specialty services. Prices ranged from highs of $1.05 and 88¢ for the Réseau des sports (RDS) and The Sports Network (TSN) to lows of 8¢ for MuchMusic and nothing for Vision TV. The unweighted average of these fees was 34¢. Both CCC and CRC claimed that among the services listed, YTV and Arts and Entertainment Network (A & E) are those whose content most resembles that of distant signals. It was argued that their wholesale rates of 31¢ and 25¢ respectively should be treated as a measure of the minimum value of distant signals. The rate for A & E is a market price, and that for YTV is regulated; hence, the price of A & E might be a better proxy for the value of distant signals.

A functioning market is only one requirement for a service to be a good proxy for a comparable service. A & E has a price that is determined in a functioning market, but it suffers from other deficiencies as a proxy.

. . . . .

(ii) The Value of Displaced Programming

CRC proposed the value of programming services displaced by programs on distant signals as a measure of the harm to the collecting bodies. CRC estimated that the presence of distant signals prevents the creation of at least one more national broadcast service.

. . . . .

(iii) The Value of Lost Licence Fees

CRC also suggested that the value of a program is reduced with each opportunity to watch it. As already discussed, no harm results to copyright owners where programs are simultaneously substituted, but other duplication may reduce licence fees and even prevent an additional sale. CRC used a figure of $4,000 per broadcast hour as a conservative estimate of that harm.

. . . . .

(iv) Comparison with the U.S. Regime

The projected retransmission royalties in the United States for 1990 are in the order of U.S. $200 million. CCTA [Canadian Cable Television Association, the applicant herein] proposed the 'rule of ten': given that the U.S. population is approximatelyten times that of Canada, the royalties in Canada should be ten per cent of those generated in the United States. This is about Can. $24 million.

The royalties set by the Board apply only to retransmitters in Canada, although they are paid to copyright owners in other countries. Inter-country comparisons of any kind are fraught with difficulties: industry structure, relative prices, income levels and cultures are different. At least four quantifiable differences exist between the markets in the two countries.

. . . . .

(v) The Board's Conclusions

The Board concludes that the comparable services approach is sound and that the wholesale price charged for A & E is useful starting point, so long as the differences between A & E and distant signals are recognized.

Programs on distant signals are simultaneously substituted while those on A & E are not; accordingly, the Board considers that the value of a distant signal should be discounted by 20 per cent.

The market in which a signal is distant calls for different cost recovery considerations than the subscription market of specialty services. It follows that the distant signal seller would be prepared to accept a lower price for the product in that market.

The level of penetration of distant signals is higher than that of A & E. To achieve the same level of penetration, A & E's price would have to be lower.

Distant signals are packaged in many combinations and this may have an impact on their value. Even if the price of A & E is an appropriate proxy for the price of a first distant signal, it may be too high for one of many signals in the same package.

Considering all the differences, the Board finds that an average price of 15¢ per distant signal is reasonable.

4 The statutory authority on which the board proceeded in making its decisions is contained in s. 70.63 of the Act, which reads as follows:

70.63. Certification

(1) On the conclusion of its consideration of the statements of royalties, the Board shall

(*a*) establish, having regard amongst others to the criteria established under subsection (4),

(i) a manner of determining the amount of the royalties to be paid by each class of retransmitter, and

(ii) such terms and conditions related to those royalties as the Board considers appropriate;

(*b*) determine what portion of the royalties referred to in paragraph (*a*) is to be paid to each collecting body;

(*c*) vary the statements accordingly; and

(*d*) certify the statements as the approved statements, whereupon those statements become for the purposes of this Act the approved statements.

(2) [*No discrimination*.] — For greater certainty, neither the Board, in establishing a manner of determining royalties under paragraph (1)(*a*) or in apportioning them under paragraph (1)(*b*), nor the Governor in Council, in varying any such manner under section 70.67, may discriminate between copyright owners on the ground of their nationality or residence.

(3) [*Publication*.] — The Board shall cause the approved statements to be published in the *Canada Gazette* as soon as practicable and send a copy of each approved statement, together with reasons for the Board's decision, to each collecting body and to any person who filed an objection under section 70.62.

(4) [*Criteria*.] — The Governor in Council may make regulations establishing criteria to which the Board must have regard in establishingunder paragraph (1)(*a*) a manner of determining royalties that are fair and equitable.

1

5 The applicant, which, as the board's reasons for decision indicate, had proposed the fourth comparison for valuing copyright works, viz., comparison with the U.S. regime, sought to set aside the board's decision for failure to observe principles of natural justice. In the alternative, the applicant sought an order varying the statement of royalties to be paid for the retransmission of

distant television and radio signals in Canada during 1990 and 1991 by eliminating s. 19 of the *Television Retransmission Tariff*, s. 14 of the *Radio Retransmission Tariff*, and any related liability, thereby deleting the royalties referable to interest accrued prior to publication of the tariff.

I

6 It was common ground that the board is required to act in a quasi-judicial manner and is therefore subject to the full requirements of natural justice.

7 It was also common ground that, subsequent to the close of the board hearings, board member Latraverse had attempted to obtain informationconcerning Canadian and U.S. specialty services from staff members of the Canadian Radio-Television and Telecommunications Commission ("C.R.T.C."), and had made use of some of the material so obtained. On August 15, 1990, Latraverse met, at his request, with C.R.T.C. staff members Wayne Charman ("Charman"), Janet Yale ("Yale"), and Randolph Hutson ("Hutson") to obtain information and documents about specialty services. Each of the four parties to that meeting swore an affidavit, those by the three C.R.T.C. staff members being submitted by the applicant; all of the affidavits were in agreement on all essential points. In addition, Ms. Yale was cross-examined on her affidavit.

8 At the meeting of August 15, 1990, Charman handed Latraverse a copy of the C.R.T.C. publication of November 30, 1987, *More Canadian Programming Choices* ("*Programming Choices*"). There were also three telephone conversations after the meeting between Charman and Latraverse by way of follow-up to matters raised at the meeting, and Latraverse subsequently received a chart indicating the rates paid in the United States for specialty services.

9 All of the evidence was to the effect that only three issues were canvassed in these C.R.T.C. conversations: (1) specialty services in Canada; (2) specialty services in the United States; and (3) the use of specialty services as a proxy. Latraverse advised board members Hétu and Alexander of the fact that he had obtained these documents. He did not so advise Chairman Medhurst, who might have been expected to take a dim view of this way of proceeding.

10 In addition to these conversations and documents, Latraverse also independently gathered more complete statistics on the cable industry than were available from the exhibits. He also referred in his dissenting reasons to the fact that he had "been able to determine that a very substantial percentage of [A & E's] programming is repeated several times during the same month" and that "this information was not established in evidence" (*Decision*, at p. 112). Since this is a fact obvious to any casual reader of the A & E monthly programming guide, and certainly to every subscriber to the service, I cannot attach any legal significance to Latraverse's use of it. Latraverse also stated that "[a]nother percentage of its programming, also not established in evidence, is 'blacked-out' because the Canadian broadcast rights could not be cleared by A & E" (ibid.). I also cannot attach legal significance to the fact it was not established in evidence how much of its

programming was blacked out, since the absence of evidence establishes no more one way than the other.

11 Finally, while C.C.T.A.'s panel of cable television operators was testifying, Mr. Latraverse placed a telephone call to his broker to ask the broker about certain evidence that had been given by panel members. He then used the financial information that he apparently obtained from his broker to question two of the panelists. During the questioning, Mr. Latraverse directed the following comments to Mr. Linton of Rogers Cable TV:

> a) You kept mentioning that bank loans total $37 million on the Consolidated Balance Sheet which is peanuts [for Rogers Communications].
>
> b) What I want to emphasize is: Looking at your numbers and at how sharp and remarkable an operator and how well you take care of your own affairs, it is very difficult for me to start crying for Rogers Communications because of its bank debt load.
>
> c) You just mentioned that you lost $25 million on the Home Shopping Channel. This is no big deal to [Rogers Communications].
>
> d) Maybe you [either Rogers Communications or Mr. Linton] are a super businessman, but there is something mysterious in your approach.

[Transcript, v. 45, February 22, 1990, at pp. 7815-7838.]

12 In my view, the use of privately obtained information to make such obvious comments is too trivial for serious consideration,[2] and I do not propose to deal with it further. However, the natural justice issues must be faced with respect to the other incidents.

13 The common law embraces two principles in its concept of natural justice, both usually expressed in Latin phraseology: audi alteram partem (hear the other side), which means that parties must be made aware of the case being made against them and given an opportunity to answer it; and nemo judex in sua causa debet esse (no one may be a judge in his/her own cause), a rule as to the impartiality required of deciders of issues which forbids both actual bias and a reasonable apprehension of bias. The applicant in this case invoked both principles, which I shall accordingly consider in turn.

II

14 It was alleged by the applicant that Latraverse and the board violated the principle of audi alteram partem by receiving evidence outside the hearing process, evidence of which it learned only accidentally after the board's decision through a conversation between one of its officers and Charman, and to which it had therefore no opportunity to respond. In my opinion, despite his excellent motive of attempting better to equip himself to decide the case, Latraverse's seeking

information outside the hearing process was a serious mistake of judgment which *could* certainly have had the effect of invalidating the board's decision for lack of fairness. If it did not in this instance entail that consequence, it could only be as a result of adventitious circumstances, as urged by the respondents.

15 The respondents argued: (1) that the information Latraverse obtained was either already in the record, known to the parties or in the public domain; (2) that it was in fact in the applicant's favour, not to its detriment; (3) that Latraverse's efforts did not influence and were not known to the majority; and (4) that the principle does not apply to information which affects only a dissenting member of a tribunal. The first three allegations are primarily factual, the latter a matter of law.

16 As I have indicated, the evidence from the various sources was congruent as to the matters discussed. First, with respect to specialty services in Canada, Latraverse brought with him to the meeting a copy of a chart (introduced into evidence at the board hearing by Peter Grant ("Grant"), an expert witness), as to the prices paid in Canada for specialty services. The data contained in the chart were drawn from C.R.T.C. policies and decisions, and Latraverse had questions as to the background and rationale, the carriage rules and the prices (Charman affidavit, para. 4(b), Yale affidavit, para. 6(a), Latraverse affidavit, paras. 8 and 11). Much of this information was provided by the handing-over of a copy of *Programming Choices*, a seminal C.R.T.C. policy statement available to, and universally known by, participants in the cable industry such as the 500-odd members of the applicant. Although it was not formally introduced into evidence before the board, the document was used as a basis of questioning during the hearings and was referred to directly by Grant (*Transcript*, at pp. 2626 and 2637).

17 With respect to specialty services in the United States, the evidence showed that Latraverse was especially interested in how the prices for these services were established (Charman affidavit, paras. 4(c) and 6, Hutson affidavit, paras. 2, 3(a) and 3(b), Yale affidavit, para. 6(b), Latraverse affidavit, paras. 8, 12, 17, 18 and 19). The account which was given by Latraverse in his affidavit was fully supported by the others:

> 12. During the meeting, Mr. Charman, commenting the second object of my approach, i.e. whether there were any CRTC decisions or policies relating to the price paid by Canadian cable operators for U.S. specialty signals, stated that the CRTC is not involved in the determination of those rates. He offered to verify for me whether any other available documentation existed in this regard.
>
> . . . . .
>
> 19. The last conversation took place on 21 or 22 August, 1990. Mr. Charman confirmed that he had not found any published documentation on the price paid by Canadian cable operators for U.S. specialty signals, the information being provided by cable companies on a 'lump sum' basis rather than for individual services. He also stated that such information was provided to Statistics Canada on a confidential basis. Mr. Charman offered to fax me a chart, excerpted

> from the 30 April, 1990 issue of *Cable TV Programming*, an American newsletter which is available to the public at the CRTC library. The chart indicates the rates paid in the United States for specialty services. I received this chart on the morning of 23 August, 1990; it is attached as Exhibit 'C' to this affidavit.

18 The upshot was that the only new information obtained by Latraverse on this subject was the chart referred to as Exhibit C. The chart was largely irrelevant to the issues before the board. The little that was relevant was duplicative of information already presented in the board hearings, particularly the 11-cent-a-customer-a-month basic cable network fee for 1989 for A & E in the United States, a figure which was cited by the applicant itself to the board, and was also referred to by a witness (Kain examination, March 19, 1990, at pp. 9256-9257).

19 With respect to the use of specialty services as a proxy, Charman refused to express an opinion (affidavit, para. 4(d)), whereas both Hutson (affidavit, paras. 4(c) and 4(d)) and Yale (affidavit, para. 6(c)) expressed negative opinions. Ms. Yale told him that "the prices for specialty services would not be a good proxy in that regard since they were established for a different purpose than copyright considerations." Hutson's expressed view was that making use of the prices charged for U.S. specialty services in either the United States or Canada "would be like comparing apples and oranges."

20 Latraverse possibly was influenced by these opinions, for he wrote in his dissent (*Decision*, at p. 132):

> My colleagues rely solely on the rate of an optional American service, A & E, as the unit of measure. It is a marginal service whose content is not typical; therefore it is not an appropriate benchmark for establishing the value of distant signals generally retransmitted in Canada.

Nevertheless, his rejection of the majority's approach did not lead him to the standard proposed by the applicant, but rather to an approach based on the equivalent costs of Canadian programming which caused him to propose a global annual royalty for each of 1990 and 1991 which was some $36 million higher than that adopted by the majority.

21 Latraverse also plainly acknowledged the use of the additional statistics he obtained from Statistics Canada. In his dissenting reasons for decision he stated (*Decision*, at p. 102):

> One of the collectives, PROCAN-CAPAC, provided to us during the course of the hearing CRTC documentation on the costs of programming of the private television, pay television and cable industries. [PROCAN-CAPAC-TV-8]. To obtain more complete statistics on the cable industry, I obtained from Statistics Canada the required information for the years missing from the documentation provided. It should be noted that I ignored the figures for CBC/SRC in the figures for television: otherwise, costs as a percentage of revenues would have been considerably higher but would have skewed the statistics.

22 The applicant argued that Latraverse may well have obtained more extra-hearing information than he — or the others — explicitly acknowledged,but with respect to the meeting of August 15, 1990, that not only runs counter to the tenor of all of the affidavits, but also to the direct evidence of Ms. Yale on her cross-examination (cross-examination, April 29, 1991, at pp. 7-8):

> Q. Okay. Now in addition let me ask you, having gone through the three areas that you discussed [i.e., speciality services in Canada, speciality services in U.S., the use of speciality services as proxies], you say in paragraph five that you cannot remember, there are things you can't remember regarding the details of the discussion, and what I would like to ask you is, is it possible there was anything significant, any significant or substantial topic that was discussed in addition to the three you have enumerated there?
>
> A. To the best of my knowledge those were the three identified things, were the things that we spent most of our time discussing.
>
> Q. And —
>
> A. And just to be complete, if there was anything else significant, I think I would have remembered it.

To suppose that there was more would be an entirely gratuitous assumption.

23 The applicant also attempted to establish that Latraverse (and hence his extra-hearing knowledge) influenced the deliberations of his colleagues, and in fact went so far at one point in oral argument as to argue actual bias. The first ground of this contention was his reference in para. 3 of his affidavit to participation in the decision:

> 3. J'ai participé à la décision de la Commission qui fait l'objet de la présente affaire.

The English translation provided with the affidavit reads, quite correctly, as follows:

> 3. I participated in the decision which is the object of these proceedings.

This assertion immediately follows (English translation) these first two statements:

> 1. I am a member of the Copyright Board ('the Board').
>
> 2. I have knowledge of the matters hereinafter deposed to.

In the context, therefore, I believe "participated" must be taken as meaning only an acknowledgment of having "sat on" the matter, not as having, in some unstated way, worked with the majority to produce a partially collective result. In my opinion the sense of the original French text would be to the same effect.

24 It is true, as urged by the applicant, that Latraverse indicated a small measure of agreement with his colleagues. As he put it (*Decision*, at p.98):

> **Dissent of Member Latraverse**
>
> **Preamble**
>
> I do not agree with the guiding principles adopted by my colleagues for establishing the global amount of royalties, nor do I agree with their analysis of or conclusions on the evidence, as expressed in part 3B of the majority decision, 'The Royalties to be Paid for Television Retransmission; The Large Systems I; The Value of Distant Signals'. In addition, I am of the opinion that the compilation claim should be recognized, in principle, with a nominal allocation.
>
> The tariff formula and other parts of the decision were prepared jointly by all members of the Board and I am completely satisfied with them, *except as to the amounts themselves*, and certain remarks that I make regarding compilation.

[Emphasis added.] Latraverse's agreement on the tariff formula, etc., amounted really to an agreement on the arithmetical correctness of the majority's conclusion *in the light of its hypotheses*, with which he disagreed. On my reading there is no suggestion of any combining of effort in the production of the majority decision, certainly not on the aspect which is in issue before this court. Finally, the applicant asserted (*Memorandum of Fact and Law*, para. 31):

> 31. In his affidavit, Mr. Latraverse does not deny that he was influenced by or relied on the information and documents that he obtained from the CRTC. Neither does Mr. Latraverse deny that the other members of the Copyright Board were influenced by or relied on that information and those documents.

Latraverse himself probably was influenced by and relied on the information he had received outside the hearing process, but, while it was hardly his place to give evidence as to the majority's state of mind, his failure to advert to a matter on which he was not questioned (but might have been, on his affidavit) cannot be taken as the foundation for a conclusion even as to his view of the majority's knowledge, let alone as to theirs. In my opinion there is simply no basis for speculating that the members of the board majority had any knowledge whatsoever of the content of his information (and in the case of the chairman, no knowledge that he had even made such extra-hearing inquiries). If there was anything of which they were aware, it could only have been the two documents, *Programming Choices* and the chart.

25 What we have, then, amounts to this, viz., that the dissenting member of the board received a report of which both he and the applicantmight already have been made aware in the hearings, a chart the relevant part of which was referred to in the hearings, statistical information which

appears to be of no particular significance, and two opinions which influenced him in rejecting the majority's approach and in that sense in the applicant's favour, although he, ultimately, came to an even more negative opinion from the applicant's point of view. All of the information (except for the opinions) was public information.None of it, not even the opinions, was adverse to the applicant's position.

26 The applicant did not, in fact, argue that it was adversely affected by the extra-hearing evidence, but rather that, in dealing with a complaint based on evidence received outside the hearing process, a court will not inquire into whether the evidence did work to the prejudice of one of the parties; it is sufficient if it might have done so. A court was said to be concerned, not with proof of actual prejudice, but rather with the possibility or the likelihood of prejudice in the eyes of reasonable persons.

27 The applicant further argued that it was in fact actually prejudiced in all of the circumstances, not by reason of any adverse effect, but rather by being denied the opportunity to exploit in its favour the evidence received. Thus it had no chance to rely on and further explore the opinion of two senior C.R.T.C. officials as to the inappropriateness of using the wholesale price paid for specialty services as a proxy for valuing the copyright component of distant broadcast signals.

28 These arguments necessitate a review of the case law.

29 A number of cases deal with aspects of the issue raised in the case at bar. In *R. v. Schiff*, [1970] 3 O.R. 476, *(*sub nom. *Ottawa Civic Hospital, Ex parte)* 13 D.L.R. (3d) 304 (C.A.), where a board, for purposes of an arbitration award, without notice to the parties, relied upon material researched by itself and not derived directly from the parties to the arbitration, Aylesworth J.A. said for the court at pp. 479-480 [O.R.]:

> Finally, and as an additional ground for refusal of the remedy sought, it is abundantly apparent that the material complained of and to which the board of its own motion, as it were, resorted, was material from publicly known government sources, and entirely supplemental in its nature and kind to the very material the parties themselves supplied to the board. The board complained of the fragmentary nature of the material supplied by the parties which was in the nature of statistics, collective bargaining agreements with other hospitals and the like, and it was natural that the board should look to such further material, and should be expected to look to it in view of that expressed dissatisfaction made known to the parties and in view of the board's intention expressed to them that it was going to seek further data of its own volition. Having regard to the highly informal method of procedure adopted by the parties in the hearing before the board of arbitration and, as I have said, to the nature of the material and the kind of presentation made with respect to that material as well as to the nature of the public material resorted to by the board, we fail to perceive any failure to afford natural justice to the trustees in what the board did in that respect. ...

. . . . .

> Perhaps also it is desirable, although unnecessary, to add to what has been said that, upon the peculiar facts of this case, what the board did with respect to getting the kind of material it did get after the hearing, and with respect to the use to which the board put it, really was very much akin to what frequently is resorted to in the regular Courts of law wherein those Courts take judicial notice of well-known public facts, knowledge and information. We think what has already been said illustrates that similarity and demonstrates that in fact there was no denial of natural justice.

30 It therefore appears that a board's referring to material from publicly known government sources, and entirely supplemental in its nature and kind to the very material the parties themselves applied to the board, will not of itself violate the principles of natural justice.

31 In *Canadian Pacific Ltd. v. British Columbia Forest Products Ltd.* (1980), [1981] 2 F.C. 745, 34 N.R. 209 (C.A.), where the Canadian Transport Commission had failed to give an opportunity to respond to evidence obtained by it after the close of the hearing, this court said (at p. 221 [N.R.]):

> Under subsection 23(4) of the *National Transportation Act*, it is essential that there be a hearing before the Commission may find that a 'rate' is prejudicial to the public interest. Such a hearing, in our view, would require that at least the minimum elements of natural justice in respect of the right to be heard must be observed. Because of the failure to give the appellants an opportunity to respond to the results of the Commission's post-hearing investigation into the Duncan Bay diversion, these minimum requirements were not observed. Accordingly, not only was natural justice denied, but the statutory mandate to proceed by way of a hearing was not complied with. The consequence is that the decision of the Commission is invalid.

From this last-noted material fact it would appear that a tribunal must have relied on the evidence it received subsequent to the hearing.

32 The authorities most favourable to the applicant are *Pfizer Co. v. Deputy Minister of National Revenue*, [1977] 1 S.C.R. 456, 6 N.R. 440, 24 C.P.R. (2d) 195, 68 D.L.R. (3d) 9, and *Kane v. University of British Columbia*, [1980] 1 S.C.R. 1105, 18 B.C.L.R. 124, [1980] 3 W.W.R. 125, 31 N.R. 214, 110 D.L.R. (3d) 311. In *Pfizer*, PigeonJ. said shortly for the court (at p. 463 [S.C.R.]): "It is clearly contrary to [the rules of natural justice] to rely on information obtained after the hearing was completed without disclosing it to the parties and giving them an opportunity to meet it." In *Kane*, a case involving a disciplinary suspension of a university professor, the issue was much more fully canvassed. The university president, who had initially imposed the suspension, attended the appeal hearing as a member of the board of governors, and provided additional information to the board in response to questions after the close of the hearing, although he did not participate in deliberations or vote on the decision. The board affirmed the suspension.

33 Dickson J. (as he then was), after enunciating the principle that "[a] high standard of justice is required when the right to continue in one's profession or employment is at stake" (at p. 1113 S.C.R., p. 221 N.R.), went on to state (at pp. 1113-1116 S.C.R., pp. 221-223 N.R.):

> 5. It is a cardinal principle of our law that, unless expressly or by necessary implication, empowered to act *ex parte*, an appellate authority must not hold private interviews with witnesses ... or, *a fortiori*, hear evidence in the absence of a party whose conduct is impugned and under scrutiny. Such party must, in the words of Lord Denning in *Kanda v. Government of the Federation of Malaya* [[1962] A.C. 322], at p. 337, '... know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them. ... Whoever is to adjudicate must not hear evidence or receive representations from one side behind the back of the other.' ...
>
> . . . . .
>
> 6. The Court will not inquire whether the evidence did work to the prejudice of one of the parties; it is sufficient if it might have done so. *Kanda v. Government of the Federation of Malaya, supra*, at p. 337. In the case at bar, the Court cannot conclude that there was no possibility of prejudice as we have no knowledge of what evidence was, in fact, given by President Kenny following the dinner adjournment. ... We are not here concerned with proof of actual prejudice, but rather with the possibility or the likelihood of prejudice in the eyes of reasonable persons.

34 It seems clear that the first assertion in point 6 in the above quotation cannot be given its full extension, and that the two parts of the first sentence are intended to be read together. A court will not inquire whether the evidence did work to the prejudice of one of the parties when it *might* have done so. Or, put another way, it will inquire whether the evidence *might* have worked to the prejudice of one of the parties. A showing either of actual prejudice or of the possibility of prejudice is sufficient to constitute a violation of audi alteram partem. That seems indeed to be the basis on which the court acted in *Kane*: "in the case at bar, the Court cannot conclude that there was no possibility of prejudice as we have no knowledge of what evidence was, in fact, given by President Kenny." As Ritchie J., in dissent, emphasized in analyzing the facts, the appellant considered that the facts as given in the president's statement "*could be construed adversely to him* and he had no opportunity to answer" (at p. 1121 S.C.R., p. 228 N.R. [emphasis added]).

35 The notion of adverse effect is in fact central to audi alteram partem. In the words of Gonthier J. for the majority in *Consolidated Bathurst Packaging Ltd. v. International Woodworkers of America, Local 2-69*, [1990] 1 S.C.R. 282, 42 Admin. L.R. 1, 105 N.R. 161, 88 D.L.R. (4th) 524, 90 C.L.L.C. 14,007, 38 O.A.C. 321, 73 O.R. (2d) 276 (note), [1990] O.L.R.B. Rep. 369, at p. 339 [S.C.R.]:

> Since its earliest development, the essence of the *audi alteram partem* rule has been to give the parties a 'fair opportunity of answering the case *against [them]*': Evans, *de Smith's Judicial Review of Administrative Action*, [4th ed. 1980], at p. 158. It is true that on factual matters the parties must be given a 'fair opportunity ... for correcting or contradicting *any relevant statement prejudicial to their view*': *Board of Education v. Rice*, [1911] A.C. 179, at p. 182; see also *Local Government Board v. Arlidge*, [1915] A.C. 120, at pp. 133 and 141, and *Kane v. Board of Governors of the University of British Columbia, supra*, at p. 1113.

[Emphasis added.] Certainly, this court in *Re Cardinal Insurance Co.*, [1982] I.L.R. 1-1541, 44 N.R. 428, (sub nom. *Cardinal Insurance Co. v. Minister of State (Finance)*) 138 D.L.R. (3d) 693 (Fed. C.A.) saw prejudicial effect on a party as essential. In that case the Minister had held a meeting, in the absence of an insurance company, with a reinsuring company in an effort to obtain a settlement. Immediately after quoting Dickson J.'s fifth point from *Kane*, supra, Urie J.A. wrote for the court at pp. 706-707 [D.L.R.]:

> Certainly there can be no quarrel with that proposition but, in my opinion, there was no breach thereof by the Minister in this case. No evidence was taken nor was anything done at the meeting which prejudicially affected Cardinal. As has been stated, what was done was an endeavour to persuade Union to honour its treaties or to make a settlement with Cardinal which would preclude the necessity for action by the Minister. He had already heard the evidence and representations of all concerned. What Union said at the meeting was, as far as the record shows, merely a repetition of what it had said before. I do not think that his failure to include Cardinal in the settlement discussions with Union ought, in the circumstances, to vitiate the whole proceeding.
>
> Unlike the Tariff Board in *Pfizer Co. Ltd. v. Deputy Minister of National Revenue for Customs & Excise* (1975), 68 D.L.R. (3d) 9, [1977] S.C.R. 456, 24 C.P.R. (2d) 195, where the board referred to two texts in its decision which were not put in evidence or referred to at the hearing before the board, no evidence not known to Cardinal was elicited in this case.
>
> The same comment applies in respect of *R. v. Deputy Industrial Inquiries Com'r, Ex p. Jones*, [1962] 2 Q.B. 677, and *Kanda v. Government of Federation of Malaya*, [1962] 2 A.C. 322, in both of which evidence was received by the tribunal which was prejudicial to the person concerned, without their being made aware of it and being given an opportunity to respond. If any new evidence was heard by the Minister at the February 16th meeting, and it does not appear that there was, it was not prejudicial to Cardinal. In fact the opposite is true. The efforts of the Minister and his officials were directed to attempting to negotiate a settlement. An offer of settlement was in fact obtained and was conveyed to Cardinal and rejected by it. Such efforts cannot be characterized as prejudicial.

Hence the court found no violation of audi alteram partem. A Saskatchewan court seems to have come to a similar interpretation of Kane: *C.U.P.E. (Civic Employees' Union, Local 21) v. Regina (City)* (1989), 81 Sask. R. 16 (Q.B.). In that case Armstrong J. held (at p. 21):

> In my view the improperly received evidence might well have prejudiced Murray in this case. In fact if the opinion of Dr. Abdulla means what the applicants think it means (and I do not know that it does) the Tribunal must have been influenced by the material improperly before it, to decide as it did.

That was also the line taken by this court in *Hecla Mining Co. of Canada v. Cominco Ltd.*, No. A-1137-87, decided June 16, 1989 [now reported 116 N.R. 44], where Hugessen J.A. wrote (at p. 2 [p. 45 N.R.]):

> We did require submissions from the respondents on the applicant's allegation that the Minister had failed to follow the rules of natural justice. We find that allegation to be substantiated. The record shows that, after the parties had completed their submissions, the Minister received a letter from the Mining Recorder which contained a number of assertions of fact and opinions which were incorporated by the Minister into his decision almost verbatim. That letter was never communicated to the parties prior to the decision. It was largely unfavourable to the applicant's pretentions.

In the circumstances, following *Cardinal v. Kent Institution*, [1985] 2 S.C.R. 643, 16 Admin. L.R. 233, [1986] 1 W.W.R. 577, 69 B.C.L.R. 255, 49 C.R. (3d) 35, 63 N.R. 353, 23 C.C.C. (3d) 118, 24 D.L.R. (4th) 44, the court refused to try to conclude that the ministerial decision might in any event have been to the same effect, and accordingly struck it down.

36 In my opinion, this review of the case law indicates the fallacy of the applicant's argument. Contrary to its contention that a court will not inquire into the question of prejudice, all of the authorities which focus on the matter show that the question of the possibility of prejudice is the fundamental issue: *Kane, Consolidated Bathurst, Cardinal Insurance, Civic Employees Union*, and *Hecla Mining*.

37 If the possibility of prejudice must be looked to, what, then, do the facts show in the case at bar? Much of the information Latraverse received was repetitive of, or supplementary to, the hearings, and so, as in *Schiff*, not a matter of denial of natural justice. Even the applicant alleged only the lack of a positive opportunity to exploit favourable information, not the absence of an occasion to respond to unfavourable information. The authorities, moreover, have taken "prejudicial" in the sense of "adverse effect."

38 The largest factor, however, militating against the applicant's argument is that there is not a shred of evidence that any of the information received by Latraverse had any influence whatsoever

on the board's decision, that is to say, on the decision of the board majority. Two of the board majority appear to have been aware that he had obtained some additional information, but not of its content. There is not a single reference in the board's decision, direct or indirect, to any extra-hearing evidence. Latraverse simply was off on a frolic of his own, which seems not to have impinged at all on the minds of the majority.

39 Not only is there no case law which holds that the separate activities of a dissenting board member can, without more, taint the deliberations of the majority, but I believe the *Canadian Pacific* case in this court stands for the proposition that an applicant must show that the board "placed at least some reliance on the information" in question (at p. 221 [34 N.R.]). Here there is no evidence at all of such reliance. Indeed, quite the contrary.

40 If a final word needs to be said, let it be that an inconsequential error of law, or even a number of them, which could have no effect on the outcome do not require this court to set aside a decision under para. 28(1)(*b*) of the *Federal Court Act*. In *Schaaf v. Canada (Minister of Employment & Immigration)*, [1984] 2 F.C. 334, [1984] 3 W.W.R. 1, 52 N.R. 54 (C.A.), at p. 342 [F.C.], Hugessen J.A., after setting out the text of s. 28(1), commented as follows:

> In my view, nothing in the words used makes them other than attributive of jurisdiction. They create the power in the Court to set aside decisions which offend in one of the stated ways but do not impose a duty to do so in every case.
>
> This appears also, I would suggest, from the wording of section 52, which describes the dispositions which are open to the Court on a section 28 application. The opening words are: 'The Court of Appeal may ....' They are clearly permissive and nowhere is there a suggestion that the Court must act whenever it finds an error of law.
>
> This is not to say that the Court is entitled to decline to exercise the jurisdiction which is given to it by sections 28 and 52, but simply that there is nothing in the language of the statute obliging the Court to grant the remedy sought where it is inappropriateto do so. While it can no doubt be argued that the statute creates certain rights for the litigant, it does so by granting powers to the Court and the latter must remain the master of whether or not they are to be exercised in any particular case.

41 In my view, the board made no error of law by infringing the principle of audi alteram partem in this case, but if, hypothetically, the actions of Latraverse could somehow be attached to the whole of the board, I think any error attributable to the board would be inconsequential, a mere technical breach, and should not be a basis for judicial reversal. The authorities have all required a real possibility that the result was affected.

42 As it was put by Dickson J. (as he then was) in *Martineau v. Matsqui Institution*, [1980] 1 S.C.R. 602, 13 C.R. (3d) 11, 15 C.R. (3d) 315, 50 C.C.C. (2d) 353, *(*sub nom. *Martineau v. Matsqui Institution Disciplinary Board (No. 2))* 106 D.L.R. (3d) 385, 30 N.R. 119, at p. 631 [S.C.R.]:

> 8. In the final analysis, the simple question to be answered is this: Did the tribunal on the facts of the particular case act fairly toward the person claiming to be aggrieved? It seems to me that this is the underlying question which the courts have sought to answer in all the cases dealing with natural justice and with fairness.

I have no doubt that in the case at bar the board acted fairly towards the applicant.

III

43 The applicant also alleged that the board had violated the rule of natural justice against a reasonable apprehension of bias by reason of Latraverse's receiving of extra-hearing information. The authority principally relied upon is *Spence v. Prince Albert Board of Police Commissioners* (1987), 25 Admin. L.R. 90, 53 Sask. R. 35 (C.A.) [hereinafter *Spence v. Spencer*].

44 On the facts of that case a police constable had been dismissed after having been found guilty at two separate hearings of, first, falsifying a claim for overtime and, second, various disciplinary infractions with respect to alcohol. Both meetings were chaired by the mayor. After the charges had been laid, one of the principal witnesses on the second set of charges had come to the mayor's office to talk about her motives for lodging the complaints, and had responded affirmativelyto the mayor's question as to whether the constable had done the things alleged against him. Another member of the Board of Police Commissioners had withdrawn from the second hearing because his daughter was to be a witness against the constable on the second infraction, but continued on the first hearing.

45 Vancise J.A. stated for the court (at pp. 101-105 [Admin. L.R.]):

> The law is well settled that a quasi-judicial tribunal like the Police Commissioners is subject to the rules of natural justice which are, after all, only 'fair play in action': see *Ridge v. Baldwin*, [1963] 1 Q.B. 539, [1962] 1 All E.R. 834 at 850 (C.A.) [Reversed [1964] A.C. 40, [1963] 2 All E.R. 66 (H.L.)]. The rule against bias is one of the most fundamental elements of natural justice. A person accused is entitled to have his cause determined by an impartial tribunal which is untainted with the knowledge of facts or with a predisposition to a particular point of view which might affect the result. The policy underlying this principle is that justice must not only be done but must manifestly and undoubtedly be seen to be done: see *R. v. Sussex JJ; Ex parte McCarthy*, [1924] 1 K.B. 256, [1923] All E.R. Rep. 233. A breach of the rule against bias will generally result in the statutory delegated authority losing jurisdiction and will render the administrative action void and subject to judicial review. The respondent

submits that there is no real or apprehended bias by reason that the chairman did not discuss 'specific' allegations against the appellant.

The Chambers Judge in considering this matter found that no actual bias was established and concluded that there was 'no real likelihood of bias'. In arriving at that conclusion he considered a number of factors, including the following:

> (1) Mr. Spencer was not sitting alone. He was a member of a panel;
>
> (2) He did not seek out Miss Ahenakew;
>
> (3) She did not go into all the facts;
>
> (4) The meeting with the chairman was initiated by Miss Ahenakew and was a 'chance encounter';
>
> (5) The chairman was not actually engaged in the investigation of the allegations made against the appellant;
>
> (6) There was nothing in the evidence to indicate a predisposition or partiality or prejudice.

With respect, that approach begs the question.

It is not necessary to demonstrate that the chairman was actually biased. The test is whether there was a reasonable apprehension of bias .... The test is whether a reasonable person would believe there is a real danger of bias or whether there would be a reasonable suspicion of bias even though unintended. As the Chief Justice [Laskin C.J.C. in *Committee for Justice & Liberty v. National Energy Board*, [1978] 1 S.C.R. 369, 68 D.L.R. (3d) 716, 9 N.R. 115 at p. 733 D.L.R.] stated, 'This test is grounded in a firm concern that there be no lack of public confidence in the impartiality of adjudicative agencies. ...' The public policy consideration which requires the appearance of justice focuses on perceptions. A perception of a reasonable apprehension of bias, even though there is no real likelihood of bias, is all that is required to cause the Police Commissioners to lose jurisdiction. Here, the person who provided the information to the police department which started the inquiry, the principal witness before the commission, met privately with the chairman in advance of the hearing. In that meeting she discussed the allegation contained in the charge in a general way, but what is significant is that when asked by the chairman whether the allegations were true, she answered in the affirmative. In my opinion, the facts in this case constitute in law a reasonable apprehension of bias. A reasonably well-informed person would have a reasonable apprehension of bias where the chairman has spoken privately with a principal witness in a cause. Dickson J., speaking for the authority [majority?] in *Kane v. Univ. of B.C. Bd. of Govs.* ... considered this very question. ...

> He concluded that there was a breach of the rules of natural justice and that the Court did not have to inquire into whether the evidence obtained in the private interview did work to the prejudice of one of the parties. It was sufficient if it might have worked to the prejudice of one of the parties. In the present case, we have no knowledge of what was specifically said by Miss Ahenakew to the chairman because her evidence was vague and she could not remember what she said. It is clear, however, that she did talk about the complaint and equally clear that she stated the allegations in the charge were true. In my opinion, the Chambers Judge erred in deciding that there was no reasonable apprehension of bias and no breach of the rules of natural justice.
>
> The appellant alleges that the participation by the chairman and Norman McCallum in the first hearing in view of the fact that Mr. McCallum's daughter was a witness at the second hearing and that the mayor had spoken privately to the principal witness of the second hearing, and that both decisions were rendered on the same date, raises a reasonable apprehension of bias in the first as well as the second decision.
>
> As previously noted, it is not necessary to show that participation by those two members or the participation by one or either of them affected the results. It is enough if there is an apprehensionthat the 'judge' might not act in an impartial manner. Mr. McCallum disqualified himself on the second of the hearings presumably on the ground that his daughter was to be a witness. Even though she was not to be a witness at the first hearing and the issue was different, it was still related to the professional conduct of the appellant. There is a reasonable apprehensionthat the participation by his daughter in the misconduct alleged to have been committed by the appellant could have affected his impartiality in deciding the charge. The same comments apply to the chairman. The appellant alleges that there is a reasonable apprehension the two commissioners did not judge him in a fair and impartial manner by reason of the prior knowledge. He alleges a 'probability or reasoned suspicion of bias and judgment, unintended though it be'. (Rand J. in *Szilard v. Szasz*, p. 373.) I agree. In both cases, the possibility of these members of the Police Commission obtaining information concerning the appellant prior to the hearing from these witnesses which could affect their impartial appraisal of the issues is sufficient to raise a reasonable apprehension of bias and a denial of natural justice.

Although I have no doubt that *Spence v. Spencer* was correctly decided, I find it necessary to enter two caveats. First, Dickson J. in *Kane* seems to have addressed his remarks to the audi alteram partem rule rather than to the nemo judex principle. [3] Second, as I have already established, Dickson's words must be understood to require judicial scrutiny as to the possibility of prejudice. In *Spence v. Spencer*, in the case of the mayor (which is the closer to the facts in the case at bar), the witness's affirmation that the constable had committed the act alleged was a statement highly prejudicial to him, going to the very heart of the case. In those circumstances, since the principle of reasonable apprehension of bias requires essentially a judg ment on appearances from

the viewpoint of a reasonable person, the court correctly found a reasonable apprehension of bias to exist even in the absence of any evidence as to the effect on the mayor. In my view, however, this conclusion rests on the foundation of prejudicial evidence.

46 It was common ground to the parties that bias need not be pecuniary. As was said by Hughes J. in *Bateman v. McKay*, [1976] 4 W.W.R. 129 (Sask. Q.B.), at pp. 143-144, quoting Freedman J.A. (as he then was) in *Gooliah v. R.* (1967), 59 W.W.R. 705, 63 D.L.R. (2d) 224 (Man. C.A.) at pp. 227-228 [D.L.R.]:

> Bias may be of two kinds. It may arise from an interest in the proceedings. That indeed is the kind of bias which is most frequently encountered in cases coming before the Courts. Sometimes it is a direct pecuniary or proprietary interest in the subject-matter of the proceedings. A person possessing such an interest is disqualified from sitting as a judge thereon. Sometimes the interest is not financial but arises from a connection with the case or with the parties of such a character as to indicate a real likelihood of bias. ...
>
> This brings us to the second kind of bias — namely, actual bias in fact.

A reasonable apprehension of non-pecuniary bias [4] must arise from "a connection with the case or with the parties." It has to amount to an "interest in the subject matter of the proceedings." In other words, it can come into play only when the tribunal member appears to have some stake in, or predisposition toward, a particular outcome of the adjudication. In *Bateman* the tribunal member was exonerated because "the party who did the talking with the ultimate chairman was not someone directly concerned in the matter" (at p. 142). The information there was at most enough "to allow him to form a tentative point of view as he stood on the threshold of the hearing" (at p. 145).

47 That requirement identified in *Bateman* is wholly absent from the facts in the case at bar. However unfortunate his mistake in seeking extra-hearing information, Latraverse's motivation was pure and he had no stake in the outcome beyond the best possible decision. The most that could be said for the applicant's case is that the opinions of the two C.R.T.C. staff members may have given Latraverse, not a predisposition, but what I might call a post-disposition, to reject specialty services as proxies. But this is a post-disposition favourable to the applicant's argument, and in my opinion it cannot be heard to object to it.

48 I would agree with the applicant that, if one member of a tribunal is disqualified for bias, the decision of the tribunal must be set aside even if the other members are without bias. That principle was established by *Frome United Breweries Co. v. Bath JJ.*, [1926] A.C. 586, [1926] All E.R. 576. *International Union of Mine, Mill & Smelter Workers v. U.S.W.A.* (1964), 48 W.W.R. 15, 45 D.L.R. (2d) 27 (B.C. C.A.), and *Re Canada (Anti-dumping Tribunal)*, [1972] F.C. 1078, 30 D.L.R. (3d) 678 (T.D.) are to the same effect. In the *U.S.W.A.* case the court fastened on the fact that the impugned member "retired with the other members and remained with them while they discussed and made their decision" (at p. 29 [D.L.R.]).

49 But that means nothing if no member of a tribunal is disqualifiable for bias. In *Yukon Conservation Society v. Yukon Territory Water Board* (1982), 11 C.E.L.R. 99, 45 N.R. 591 (Fed. T.D.), five members of a tribunal held private meetings with a corporation seeking a change in its licensing arrangements, thus involving themselves in the preparation of the very application they would later have to judge on its merits. Addy J. found (at p. 599 [N.R.]):

> The Five Members have become so involved in the application as to put themselves in the position of being considered gratuitous consultants of Cyprus Anvil and the application, to some limited extent at least, becomes their own. The principle *nemo judex in causa sua debet esse* might well be considered applicable.

This is one kind of case in which courts have found a reasonable apprehensionof bias to exist, viz., one where a member of a tribunal met with a party affected and discussed the matter to be determined in the hearing. The result is the same if the meeting is with a key witness, as in *Spence v. Spencer*. The other type of case is one in which a member of a tribunal has had a past relationship, or has a present one, with a party appearing before it: *Committee for Justice & Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369, 9 N.R. 115, 68 D.L.R. (3d) 716. Neither of these categories fits the case at bar, for the reasons I have given. I can therefore find no reasonable apprehension of bias on the facts of this case.

IV

50 The issue as to the award of interest on royalty payments relating to the transitional period between January 1 and August 31, 1990, is one of statutory interpretation, relating to subpara.70.63(1)(*a*)(ii), which reads as follows:

> (1) On the conclusion of its consideration of the statements of royalties, the Board shall
>
> (*a*) establish...
>
> (ii) such terms and conditions related to those royalties as the Board considers appropriate...

Acting under this power to establish such terms and conditions related to the royalties it had set, the board considered transitional provisions appropriate (*Decision*, at pp. 87-88):

> (xv) *Transitional provisions* [Television tariff, s. 19; radio tariff, s. 14]
>
> The transitional provisions are necessary because the Act provides that the tariffs will take effect on January 1, 1990 while they were, in fact, approved much later. Two main principles inform these provisions.

> First, the provisions are meant to account for the opportunity cost associated with the late payment of royalties. An interest factor has been added, starting on the date an amount would have become due had a retransmitter known the provisions of the tariffs. This interest is equal to the Bank of Canada rate; retransmitters are not responsible for the delay in certifying the tariffs. This provides collecting bodies with fair compensation and does not penalize retransmitters.
>
> Second, the Board wanted to avoid each retransmitter having to calculate the interest factors for the retroactive period. This would have imposed an unnecessary burden on the retransmitters, and would have entailed errors. For these reasons, the board has calculated in advance an interest factor by which the amount owed must be increased. This factor is suitable for most retransmitters; only those that are not small systems and did not retransmit a distant television signal for the whole period will have to calculate the interest. Even these retransmitters will find that the television tariff states the interest rates to be applied for the relevant months.
>
> The provisions containing precalculated interest ignore any fluctuations in the number of premises served by a retransmitter during the period. In the Board's opinion, the imprecision that might result from this is small.

The interest factors that the board went on to establish for both radio and television were not established separately by the tariffs as interest payments, but rather were merged into the royalties paid.

51 The applicant conceded that the board's decision that interest be paid on retransmission royalties not received by the due date may be a proper exercise of the jurisdiction under this provision, but argued that its award of interest on royalties accrued prior to publication of any tariff represents the exercise of a substantive authority beyond the board's powers.

52 This contention is based in part upon the old principle that no pecuniary burden is to be imposed upon a subject except upon clear and distinct legal authority: *Liverpool Corp. v. Arthur Maiden Ltd.*, [1938] 4 All E.R. 200. But that, I believe, is a principle of law that applies between sovereign and subject, rather than between subject and subject. It is also based in part on the fact that there is no explicit statutory provision in the Act specifically empowering the board to compel the payment of interest by retransmitters. The power would have to be implied, and, since a requirement respecting interest is a substantive right, it was said that it should be expressly provided for in the governing legislation.

53 However, the authorities do not go so far as to say that any right to interest must be provided for explicitly. *WMI Waste Management of Canada Inc. v. Metropolitan Toronto (Municipality)* (1981), 23 R.P.R. 257, 34 O.R. (2d) 708, 24 L.C.R. 204 (H.C.), which might be thought to do so,

is explained by *Kidd Creek Mines Ltd. v. Northern & Central Gas Corp.* (1988), 29 C.P.C. (2d) 257, 66 O.R. (2d) 11, 30 O.A.C. 146, 53 D.L.R. (4th) 123, as taking the position that, where a statute provides a complete code as to interest payments, then the explicit provision of interest on compensation awards, and failure to provide for interest on costs, must be taken as excluding the latter.

54 Indeed, ss. 70.62 through 70.67 are remedial legislation, the objects of which include the establishment of a regime for royalty payments for retransmissions after January 1, 1990. The transitional provisions were deemed necessary by the board only because the length of the hearings prevented it from approving the tariffs until much later, and it therefore attempted to live up to its statutory mandate by including an interest factor to make up for the late payment of royalties caused by the delays in the approval process. The *Interpretation Act*, R.S.C. 1985, c. I-21, s. 12, requires that legislation be given such a fair, large and liberal construction as best ensures the attainment of its objectives.

55 In *Bell Canada v. Canada (Canadian Radio-Television & Telecommunications Commission)*, [1989] 1 S.C.R. 1722 at p. 1756, 38 Admin. L.R. 1, 60 D.L.R. (4th) 682 at pp. 706-707, 97 N.R. 15, Gonthier J. said:

> The powers of any administrative tribunal must of course be stated in its enabling statute but they may also exist by necessary implication from the wording of the Act, its structure and its purpose. Although courts must refrain from unduly broadening the powers of such regulatory authorities through judicial law-making, they must also avoid sterilizing these powers through overly technical interpretations of enabling statutes.

Accordingly, in that case, the Supreme Court held that a power to make interim orders necessarily implied the power to revise the period during which interim rates were in force. A similarly broad interpretation was given by this court in *Performing Rights Organization of Canada Ltd. v. Canadian Broadcasting Corp.* (1986), 64 N.R. 330, 7 C.P.R. (3d) 433 (Fed. C.A.), where the majority of the court adopted the conception that whatever is reasonably necessary for the proper discharge of a duty is impliedly authorized by it. In *Banca Nazionale del Lavoro of Canada Ltd. v. Lee-Shanok* (1988), 22 C.C.E.L. 59, 88 C.L.L.C. 14,033, 87 N.R. 178, 89 C.L.L.C. 14,026 (Fed. C.A.), a power to award interest was held by this court to be impliedly authorized by a power to do anything equitable to remedy or coun teract a dismissal.

56 The board set the interest rate for the transitional period at one per cent less than the rate generally determined in the tariff for defaulting payments, to allow for the fact that retransmitters were not responsible for the delay in making the payments.

57 Parliament's intention was clearly that the royalty scheme should take effect as of January 1, 1990, regardless of how much later that scheme might actually be established. In that respect s. 149 of the *Canada-United States Free Trade Agreement Implementation Act* provides as follows:

Transitional

149. For greater certainty, the royalties in the first statements certified under paragraph 70.63(1)(*d*) of the *Copyright Act* become effective on January 1, 1990 regardless of when the statements are so certified.

Section 149 is described in the heading as the transitional provision of the Act. In the light of Parliament's manifest determination to make the royalty scheme effective on January 1, 1990, it can be supposed only that it would have wanted to make the royalty recipients whole as of that day, or at least to give the board the right to do so if it considered it appropriate, especially since subpara.70.63(1)(*a*)(ii) was also enacted by the *Canada-United States Free Trade Agreement Implementation Act*.

58 It was argued by the applicant that an interest penalty for late payment imposed by the board is unnecessary in the light of the Act's provisions that all copyright users face either liability for copyright infringement or an action to recover outstanding royalties, and indeed that it is counter-productive, by making it difficult to determine at what point a retransmitter is in breach of its obligations. If the payment of interest is not a proper part of the retransmission royalty tariff, it was contended that interest should not be construed as being within the "terms and conditions related to those royalties." However, it seems to me that any such argument is vitiated by the fact that the board was taking account of the unique situation where the retransmitters were not themselves responsible for the delay in certifying the tariffs.

59 I must therefore conclude that the applicant has failed to establish that the board committed an error of law or jurisdiction.

V

60 In the result the s. 28 application must be dismissed.

Application dismissed.

Footnotes

∗ On March 12, 1992, the court issued a corrigendum to these reasons, which has been incorporated herein.

1 No such regulations have been made by the Governor in Council.

2 It was also apparently disclosed at the hearing and no objection was taken at the time.

3 Dickson J. pointed out (at p. 1110 S.C.R., p. 218 N.R.) that at trial "[t]he main thrust of the case advanced on behalf of Dr. Kane was that no man could be a judge in his own cause ...." The Court of Appeal upheld the Chambers judge in rejecting an argument based upon that principle. Dickson J. went on to say (at pp. 1110-1111 S.C.R., p. 219 N.R.):

4 In *Energy Probe v. Atomic Energy Control Board* (1984), [1985] 1 F.C. 563 at p. 580, 11 Admin. L.R. 287, 13 C.E.L.R. 162, 56 N.R. 135, 15 D.L.R. (4th) 48 (C.A), at p. 61, Marceau J.A. (concurring) includes in non-pecuniary bias "emotional type interests ... such as kinship, friendship, partisanship, particular professional or business relationship with one of the parties, animosity towards someone interested, predetermined mind as to the issue involved, etc."

2008 CAF 40, 2008 FCA 40
Federal Court of Appeal

Canadian Council for Refugees v. R.

2008 CarswellNat 150, 2008 CarswellNat 3303, 2008 CAF 40, 2008 FCA 40, [2008] F.C.J. No. 131, 164 A.C.W.S. (3d) 564, 373 N.R. 387

Her Majesty the Queen, Appellant and Canadian Council for Refugees, Canadian Council of Churches, Amnesty International, and John Doe, Respondents

J. Richard C.J.

Heard: January 30, 2008
Judgment: January 31, 2008
Docket: A-37-08

Counsel: Mr. Greg G. George, Ms Matina Karvellas, for Appellant
Ms Barbara Jackman, Mr. Andrew Brouwer, Ms Leigh Salsberg, for Respondents, Canadian Council for Refugees, Canadian Council of Churches, John Doe

***J. Richard C.J.*:**

1 The appellant, who was the respondent in the Federal Court, seeks an Order staying the Judgment of Justice Phelan dated January 17, 2008 allowing the respondents' application for a declaration invalidating the *Agreement Between the Government of Canada and the Government of the United States of America for Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries*, also known as the *Safe Third Country Agreement* (STCA) between the Government of Canada and the Government of the United States of America (U.S.) (*Canadian Council for Refugees v. R.*, [2007] F.C.J. No. 1583, 2007 FC 1262 (F.C.)).

2 The STCA is an agreement pursuant to subsection 102(1) of the *Immigration and Refugee Protection Act*, 2001, c. 27 (*IRPA*) for the purpose of sharing responsibility with governments of foreign states for the consideration of refugee claims. The essence of the STCA is expressed at article 4(1), which states that "[t]he Party of the country of last presence shall examine, in accordance with its refugee status determination system, the refugee status claim of any person who arrives at a land border port of entry [...] and makes a refugee status claim". Similar agreements between European Union (EU) member states have existed for many years.

3 Justice Phelan held that the Governor in Council exceeded its jurisdiction when it adopted Regulations designating the U.S. a safe third country and putting into operation the STCA, as he was of the view that the U.S. did not comply with its non-refoulement obligations under article 33 of the *Convention relating to the Status of Refugee*, 189 U.N.T.S. 150 (April 22, 1954), or the *Refugee Convention* (RC), and article 3 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (June 26, 1987) or *Convention against Torture* (CAT). He further held that the return of a refugee claimant from Canada for a refugee determination by the U.S. asylum and refugee system would violate sections 7 and 15 of the *Charter of Rights and Freedoms* (*Charter*) because of the U.S.'s apparent failure to comply with its non-refoulement obligations.

4 Justice Phelan's judgment will become effective on February 1, 2008, at which point the STCA, which has been in effect since December 2004, will cease to operate in Canada.

5 The appellant seeks an Order to stay Justice Phelan's judgment until such time as this Court has had an opportunity to consider and render its decision.

6 The appellant submits that the requirements of a stay have been met as: there are serious issues to be determined, the appellant will suffer irreparable harm and the balance of convenience favours the appellant. The appellant also requests that this proceeding be expedited.

7 A brief history of the STCA between Canada and the United States and its implementation in Canada is found in the affidavit of Bruce A. Scoffield sworn September 19, 2006 which was filed in the proceedings before Justice Phelan. Mr. Scoffield is the Director for Operational Coordination in the International Region, Citizenship and Immigration Canada.

> Canada and the U.S. have a long history of cooperation relating to the movement of persons across their shared border. A formal joint commitment to bilateral responsibility sharing came in 1995 through the adoption of the "Shared Border Accord" ("SBA"). In December 1995, a preliminary draft of a responsibility sharing agreement based on the Safe Third Country concept was made public. [...] (para. 16)
>
> [...]
>
> This joint commitment was reaffirmed on December 12, 2001 when the then Minister of Foreign Affairs, the Honourable John Manley, and the Director of the U.S. Office of Homeland Security, Governor Tom Ridge, announced the "Smart Border Declaration" and associated Action Plan. The Declaration and Action Plan committed the two governments to collaborative efforts to enhance the security of our shared border while facilitating the legitimate flow of people and goods. One of the thirty-two specific commitments agreed in the Action Plan was the negotiation of a bilateral safe third country agreement. (para. 19)

[...]

Canada and the U.S. signed the Agreement on December 5, 2002. In its preamble, the two governments set out their objectives related to international cooperation, burden and responsibility sharing. The two governments recognized that the sharing of responsibility for refugee protection must include access to a full and faire refugee status determination in order to guarantee the effective implementation of the Refugee Convention and the Convention against Torture. [...] (para. 24)

The Agreement applies to situations where a refugee claim is made to one party by a refugee claimant who arrives at a land border port of entry directly from the territory of the other party. The Agreement generally assigns responsibility for adjudicating refugee claims in such cases to the "country of last presence". [...] For the moment, the Agreement is limited in application to refugee claims made at ports of entry where the movement of refugee claimants across the border can easily be observed and the country of last presence can readily be established. [...] (para. 25)

Following a final round of negotiations on the Agreement in the fall of 2002, authority was sought, further to *IRPA* s. 102(1)(a), to designate the U.S. as a country that complies with Article 33 of the Refugee Convention and Article 3 of the Convention against Torture and approval of the Agreement and authority to sign it was al so requested. *IRPA* s. 102(2) required that the Governor in Council consider four factors when considering designating a country as safe. These are: (1) whether it is a party to the Refugee Convention and the Convention against Torture; (2) its policies and practices with respect to claims under the Refugee Convention and with respect to its obligations under the Convention against Torture; (3) its human rights record; and (4) whether it is party to an agreement with the Government of Canada for the purpose of sharing responsibility with respect to claims for refugee protection. (para. 26)

[...]

Draft implementing regulations were pre-published in the *Canada Gazette Part I* on October 26, 2002. During the public comment period, the government received input from academics, members of the legal community and NGOs. The UNHCR also provided comments relating to the draft regulations. [...] In November 2002, the House of Commons Standing Committee on Citizenship and Immigration held hearings on the draft regulations, and subsequently released a report recommending a number of amendments. The government response to that report was tabled in the Hose of Commons on May 1, 2003, and noted that the Government accepted, in whole or in part, twelve out of seventeen recommendations made by the committee. [...] (para. 28)

[...]

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Final regulations were published in the *Canada Gazette Part II* on November 3, 2004. [...] (para. 31)

Two additional rounds of consultations were undertaken by the Government prior to implementation of the Agreement, focusing on the development of operational instructions and manuals. [...] (para. 32)

[...]

A monitoring plan for UNHCR staff in both Canada and the U.S. was jointly agreed upon by each government. UNHCR's mandate under this plan is to assess whether implementation of the Agreement is consistent with its terms and principles as well as with international refugee law. [...](para. 34)

[...]

The UNHCR is presently engaged with the two governments in a review of the first year of the Agreement's implementation which addresses, *inter alia*, specific observations and recommendations made by UNHCR as a result of its monitoring activities. Although the review is not yet final, UNHCR's Representative did provide an overview of UNHCR's assessment of the Agreement's first year to the Standing Committee on Citizenship and Immigration when he appeared as a witness on May 29, 2006. In his remarks, Mr. Asadi noted that overall UNHCR's findings were positive. (para. 36)

[...]

In response to a question from a member of the Committee, Mr. Asadi went on to state that "We consider the U.S. to be a safe country. Otherwise we would have not agreed to do this monitoring and we would have said so at the very beginning." [...] (para. 38)

[...]

Distinct from the monitoring and oversight of implementation of the Agreement itself is the Government's continuing review of the factors relevant to the designation of the U.S. as a safe third country. Prior to the signing of the Agreement and since its implementation, the Government has continued to monitor developments in U.S. law and policy which could have an impact on the integrity of the Agreement, as mandated by the November 2004 Order in Council on directives for ensuring a continuing review of factors set out in s. 102(3) of *IRPA* with respect to countries designated under s. 102(1)(a) of *IRPA*. The Government makes use of numerous sources of information to this end, including academic and NGO commentary, diplomatic reporting from Canadian missions in the U.S., our ongoing dialogue with the UNHCR, and regular exchanges with American officials. [...] (para. 42)

8 In summary, Canada and the United States entered into an agreement to share responsibility for the determination of refugee claims. The rationale for this agreement is to ensure that refugee claimants have access to one full and fair refugee status determination procedure and that refugee claims are handled in an orderly and efficient manner.

9 The Governor in Council (GIC) promulgated regulations under the authority of subsections 102(1) and 5(1) of the *IRPA* to implement the STCA. Subject to express exceptions, the STCA requires refugee claimants to seek protection in whichever of the two countries they first enter.

10 The respondents in this appeal, the applicants in the proceeding before Justice Phelan, three advocacy groups and one individual, challenged the validity of the GIC's designations of the U.S. as a safe third country.

11 Justice Phelan declared the regulations *ultra vires* and contrary to sections 7 and 15 of the *Charter* on the ground that the U.S. is not a safe third country that complies with the non-refoulement requirements of article 33 of the *Refugee Convention* and article 3 of the *Convention Against Torture*.

12 The result of invalidating sections 159.1-159.7 of the *Immigration Refugee Protection Regulations* is the termination of the operation of the STCA in Canada.

13 In allowing the application, Justice Phelan certified the following questions:

> 1. Are paragraphs 159.1 to 159.7 (inclusive) of the *Immigration and Refugee Protection Regulations* and the Safe Third Country Agreement between Canada and the United States of America *ultra vires* and of no legal force and effect?
>
> 2. What is the appropriate standard of review in respect of the Governor-in-Council's decision to designate the United States of America as a "safe third country" pursuant to s. 102 of the *Immigration and Refugee Protection Act*?
>
> 3. Does the designation of the United States of America as a "safe third country" alone or in combination with the ineligibility provision of clause 101(1)(*e*) of the *Immigration and Refugee Protection Act* violate sections 7 and 15 of the *Canadian Charter of Rights and Freedoms* and is such violation justified under section 1?

14 The appellant has appealed the judgment by a notice of appeal dated January 18, 2008. The appellant brings this motion under Rule 398(1)(*b*) of the *Federal Court Rules* for a stay of the Judgment pending the determination of the appeal, and seeks an Order expediting the appeal proceedings.

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15 This Court has authority to grant a stay pending an appeal before it, including the stay of an order that declares legislation to be invalid or that infringes the *Charter* pending a final determination of the issues.

16 Rule 398(1)(*b*) of the *Federal Courts Rules*, SOR/98-106, as amended, permits this Court to stay an Order of the Federal Court:

> **398.**(1) On the motion of a person against whom an order has been made,
>
> (a) where the order has not been appealed, the court that made the order may order that it be stayed; or
>
> (b) where a notice of appeal of the order has been issued, a judge of the court that is to hear the appeal may order that it be stayed.
>
> **398.**(1) Sur requête d'une personne contre laquelle une ordonnance a été rendue:
>
> a) dans le cas où l'ordonnance n'a pas été portée en appel, la cour qui a rendu l'ordonnance peut surseoir à l'ordonnance;
>
> b) dans le cas où un avis d'appel a été délivré, seul un juge de la cour saisie de l'appel peut surseoir à l'ordonnance.

17 Stays pending the disposition of an appeal are granted on the same bases as interlocutory injunctions.

18 A three-stage test is applied to applications for interlocutory injunctions and for stays in private law and *Charter* cases. At the first stage, the applicant must demonstrate a serious question to be tried. The threshold to satisfy this test is a low one. At the second stage, the applicant must establish that it will suffer irreparable harm if the relief is not granted. The third stage requires an assessment of the balance of inconvenience and it will often determine the result in applications involving *Charter* rights. The same principles apply when a government authority is the applicant. However, the issue of public interest will be considered at both the second stage as an aspect of irreparable harm to the government's interests and the third stage as part of the balance of convenience (*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.)).

Serious Issue

19 Justice Phelan certified three serious questions of general importance which I have referred above in paragraph 13.

20 In addition to the certified questions, the applicant for a stay raises other issues concerning the judge's findings of fact.

21 The respondents do not dispute that there are serious issues raised in this case based on the questions certified by Justice Phelan. However, they do not accept the further issues raised by the appellant.

22 The issues raised on appeal are not frivolous or vexatious. Therefore, the applicant has satisfied the first stage of the three-fold test for a stay.

Irreparable Harm

23 Irreparable harm refers to the nature of the harm suffered rather than its magnitude.

24 The issue of public interest, as an aspect of irreparable harm to the interest of the government, will be considered at the second stage as well as the third stage (*RJR-MacDonald*, above, at para. 81).

25 The Supreme Court of Canada has held that the public interest is to be widely construed in *Charter* cases:

> 71. In our view, the concept of inconvenience should be widely construed in Charter cases. In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.
>
> 72. A court should not, as a general rule, attempt to ascertain whether actual harm would result from the restraint sought. To do so would in effect require judicial inquiry into whether the government is governing well, since it implies the possibility that the government action does not have the effect of promoting the public interest and that the restraint of the action would therefore not harm the public interest. The Charter does not give the courts a licence to evaluate the effectiveness of government action, but only to restrain it where it encroaches upon fundamental rights (emphasis added) (*RJR-MacDonald Inc.*, para. 73).

26 As noted by the Supreme Court of Canada in *RJR-MacDonald*, above, the public interest considerations will weigh more heavily in a suspension case than in an exemption case where the public interest is more likely to be detrimentally affected. Since the operation of the STCA would be suspended by the operation of the judge's order, this is clearly a suspension case.

27 The applicant for a stay alleges that the appellant will suffer irreparable harm in other respects, which can be summarized as the likelihood of an influx of refugees into Canada from the United States and the corresponding negative impact on border services. This allegation is supported by the affidavit of George Bowles sworn on December 17, 2007.

28 The respondents claim that irreparable harm does not exist merely when there will be administrative inconvenience or expense.

29 The respondents submit that the appellant will not suffer irreparable harm if Justice Phelan's declaration is permitted to take effect. In the alternative, the respondents submit that irreparable harm will be suffered on both sides, but that the harm to the respondents outweighs any alleged harm claimed by the appellant. However, at this second stage of the test, the Court is called upon to consider the harm that the applicant will suffer if the stay is not granted.

30 I am satisfied that the applicant for a stay has satisfied the second requirement of the three-stage test.

Balance of convenience

31 Since the applicant is a government institution, the Court must consider the applicant's inconvenience as well as the respondents' convenience.

32 Once there is some indication that the impugned legislation, regulation, or activity was undertaken pursuant to the government's responsibility for promoting the public interest, a legislative scheme under attack is presumed to benefit the public interest, *RJR-MacDonald*, above, at paras. 71-80.

33 These principles were subsequently reiterated in *Harper v. Canada (Attorney General)*, [2000] 2 S.C.R. 764 (S.C.C.), at para. 9:

> It follows that in assessing the balance of convenience, the motions judge must proceed on the assumption that the law — in this case the spending limits imposed by s. 350 of the Act — is directed to the public good and serves a valid [page 771] public purpose. This applies to violations of the s. 2(b) right of freedom of expression; indeed, the violation at issue in RJR — MacDonald was of s. 2(b). **The assumption of the public interest in enforcing the law weighs heavily in the balance. Courts will not lightly order that laws that Parliament or a legislature has duly enacted for the public good are inoperable in advance of complete constitutional review, which is always a complex and difficult matter.** It follows that only in clear cases will interlocutory injunctions against the enforcement of a law on grounds of alleged unconstitutionality succeed (emphasis added).

34 I do not accept the respondents' contention that the presumption that the STCA Regulations are in the public interest has been displaced by the judgment of the Federal Court. This judgment is under appeal and the presumption of public interest remains pending complete constitutional review.

35 The public interest groups, who are the respondents in this application for a stay, will suffer no personal harm. The respondent, John Doe, has been living in the United States since 2000 and his claim for protection is still pending.

36 However, "public interest" includes both the concerns of society generally and the particular interests of identifiable groups (*RJR-MacDonald*, above, at para. 66).

37 When a private applicant alleges that the public interest is at risk, that harm must be demonstrated (*RJR-MacDonald*, above, at para. 68).

38 The respondents relied on three affidavits (the Moreno affidavit, the Giantonio affidavit and the Benatta affidavit) to demonstrate the public interest component of their position.

39 The Moreno affidavit states that she was granted refugee status in Canada but that her common-law partner was not and was returned to the U.S. and detained. He was subsequently deported to Honduras and three months later he was killed. There is no evidence that he made a refugee claim in the U.S. or of the circumstances surrounding his deportation.

40 Patrick Giantonio is the Executive Director of the Vermont Refugee Assistance. He gave three examples of individuals who sought refugee status in Canada but were found ineligible due to the STCA and were deported back to Columbia by the U.S. There is no information concerning the proceedings followed in the U.S.

41 The Benatta affidavit establishes that, on the same day Mr. Benatta's U.S. asylum claim was rejected in December 2001, he was indicted for possession of false documents. These charges were subsequently dropped by a judge who described them as "a shame". However, Mr. Benatta remained in detention until 2006 when he was allowed to return to Canada to resume his claim for refugee protection.

42 A further affidavit filed by the applicant for a stay (the Soskin affidavit) discloses that Mr. Benatta did get a hearing for his asylum application in the U.S. on two occasions. By Statement of Claim dated July 16, 2007 filed in the Ontario Superior Court of Justice, Mr. Benatta commenced an action against The Queen in Right of Canada and various government agencies claiming damages arising out of his alleged illegal transfer to authorities in the U.S. This claim has yet to be adjudicated.

43 The affidavit of David Martin, a professor of law at the University of Virginia, with over 27 years of experience in the study and practice of U.S. immigration and refugee law, sworn July 31, 2006 and filed on behalf of the applicant for a stay, states as follows:

> 229. Therefore, although there have been some unfortunate and misguided steps taken by the U.S. government or certain of its personnel in the treatment of prisoners in government custody, the U.S. legal system ultimately responded and has now set forth explicit laws and rulings both forbidding cruel, inhuman, and degrading treatment and dictating that detainees are covered, at a minimum, by common Article 3 of the Geneva Conventions.

44 The three affidavits filed by the respondents do not establish that the public interest is at risk in accordance with the standard established by the Supreme Court of Canada.

45 In his reasons for judgment, Justice Phelan identified three issues, which individually and collectively undermine the reasonableness of the GIC's conclusion of U.S. compliance: 1) the rigid application of the one-year bar to refugee claims; 2) the provisions governing security issues and terrorism based on a lower standard, resulting in a broader sweep of those caught up as alleged security threats/terrorists; and the absence of the defence of duress and coercion; 3) the vagaries of U.S. law which put women, particularly those subject to domestic violence, at real risk of return to their home country (Reasons for Judgment, para. 239).

46 The respondents argue that, for the time being at least, this decision represents the law. However, it is this very decision that is the subject of an appeal and constitutional review in this Court.

47 At the hearing, counsel for the respondents suggested as an alternative to a stay of the Order of Justice Phelan that the Court consider granting a stay exempting the groups referred to by Justice Phelan in paragraph 239 of his reasons from the application of the STCA.

48 Counsel for the applicant for a stay argued that this proposal would have the same effect as a suspension of the Regulations.

49 Counsel for the applicant for a stay noted that the STCA has been in effect now for more than three years (December 29, 2004 to January 18, 2008).

50 Applying the principles enunciated in the decisions of the Supreme Court of Canada and without pre-judging the outcome of any appeal, I am satisfied that the public interest in maintaining in place the Regulations made pursuant to legislative authority pending complete constitutional review outweighs any detriment.

51 I find that the balance of convenience favours granting the stay pending the appeal from the judgment of the Federal Court.

Disposition

52 I conclude that the issues in this appeal deserve full appellate review on their merits before ordering a suspension of the *Safe Third Country Agreement* between the Government of Canada and the Government of the United States of America (U.S.) and that the application for a stay should be granted.

53 Accordingly, the Judgment of Justice Phelan dated January 17, 2008 (Reasons for Judgment 2007 FC 1262 (F.C.), November 29, 2007) invalidating the Regulations implementing the *Safe Third Country Agreement* between the Government of Canada and the Government of the United States of America (U.S.) will be stayed until such time as this Court has heard and determined the appeal.

54 The respondents agree with the appellant that it would be in the interest of justice to expedite this appeal and the Court so orders. Accordingly, counsel for the parties to the appeal will provide the Court with a schedule for the timely completion of the steps in the appeal together with a requisition for a hearing.

Motion granted.

2013 CAF 196, 2013 FCA 196
Federal Court of Appeal

Cheder Chabad v. Minister of National Revenue

2013 CarswellNat 3084, 2013 CarswellNat 5640, 2013 CAF 196, 2013 FCA 196, [2013] 6 C.T.C. 55, 2014 D.T.C. 5048 (Eng.), 231 A.C.W.S. (3d) 1110, 456 N.R. 158

Cheder Chabad, Applicant and Minister of National Revenue, Respondent

Robert M. Mainville J.A.

Heard: August 21, 2013
Judgment: August 23, 2013
Docket: A-276-13

Counsel: Adam Aptowitzer, Alexandria Tzannidakis, for Applicant
Johanna Hill, for Respondent

***Robert M. Mainville J.A.*:**

1 The applicant is a registered charity under the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) ("Act"). The Canada Revenue Agency ("CRA") determined that the applicant failed to comply with the requirements incumbent on a registered charity, and as a result, the respondent Minister of National Revenue ("Minister"), through her delegate the Director General of the Charities Directorate, proposed on July 5, 2013, pursuant to subsection 168(1) of the Act, to revoke the registration of the applicant as a charity under the Act. The applicant now seeks an order prohibiting the Minister from giving effect to that proposal by publishing a copy of the notice in the *Canada Gazette* pursuant to subsection 168(2) of the Act.

2 On August 16, 2013, Trudel J.A. issued an interim order prohibiting the Minister from publishing the notice of revocation pending the determination of the applicant's motion. Both the applicant and the respondent Minister have now submitted their respective motion records, and I have now heard the representations from counsel by way of a telephone conference held on August 21, 2013.

Context and background

3 The applicant operates a school for boys in the Toronto area. Approximately 180 boys from different areas in Ontario, and some from Alberta, attend the school. The school teaches both

secular studies and Jewish studies of the Orthodox Chabad — Lubavitch tradition. The applicant claims to be the only school for boys in the Toronto area that provides Chabad — Lubavitch religious instruction.

4 Based on the affidavit evidence submitted by the applicant, over 80% of the students at the school receive a partial or full subsidy to cover their tuition costs, and the funds required to subsidize the tuition come from the fundraising activities of the applicant in its capacity as a charity registered under the Act.

5 The CRA audited the operations of the applicant for the period from July 2007 to June 2009. In a letter dated October 25, 2011, the CRA identified numerous specific areas of non-compliance which it says were uncovered by the audit. One notable area of alleged non-compliance is with respect to a substantial number of gifts in kind, ranging from artwork to jewellery and timeshares, which the applicant was unable to substantiate the existence, the value or the use to the satisfaction of the auditor, but for which it issued donation receipts over a number of years. The amounts at issue are substantial, since the total value of all such assets was reported to be over $10 million.

6 A series of correspondence from the applicant to the CRA ensued as a result of this audit letter, in which the applicant denied any wrongdoing. It notably attributed the discrepancies in the values indicated in the donation receipts for the gifts in kind and the actual realizable value of the assets to devaluation, physical losses resulting from flooding of its various storage facilities, and difficulties obtaining the full value of the assets through sales and silent auctions.

7 The applicant's representations did not convince the Minister. As mentioned above, on July 5, 2013 the Minister's representative, on the basis of the audit findings, issued a notice of a proposal to revoke the applicant's registration as a charity under the Act.

8 On July 31, 2013 the applicant filed an objection pursuant to subsection 168(4) of the Act. After unsuccessfully attempting to convince the Minister to delay the publication of the notice until its objection has been dealt with, on August 15, 2013 the applicant submitted to this Court (a) an application for judicial review with respect to the refusal of the Minister to postpone the publication, and (b) a notice of motion seeking the same relief.

Procedural matter

9 The applicant has proceeded by way of a judicial review application with respect to the refusal of the Minister to postpone the publication of the notice of proposal to revoke, and it has also submitted a motion for this purpose within the framework of this judicial review application.

10 The appropriate procedure is not by way of a judicial review application, but rather by way of an application under paragraph 300(*b*) of the *Federal Courts Rules*, SOR/98-106 ("Rules")

brought under paragraph 168(2)(*b*) of the Act: *International Charity Assn. Network v. Minister of National Revenue*, 2008 FCA 62, 375 N.R. 383 (F.C.A.) at para. 7.

11 Under section 57 of the Rules, an originating document is not to be set aside only on the ground that a different originating document should have been used. Moreover, under section 55 of the Rules, in special circumstances, a rule may be varied or dispensed with. In addition, the respondent Minister suffers no prejudice from the procedural irregularity. I consequently intend to deal with the motion on its merits as if it were an application under rule 300(*b*) of the Rules brought under paragraph 168(2)(*b*) of the Act.

The applicable test

12 It is well established that the applicable test, under paragraph 168(2)(*b*) of the Act, to extend the period during which the Minister is precluded from publishing a notice of revocation in the *Canada Gazette* is that set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.) ("*RJR-MacDonald*") for the granting of a stay or an injunction: *International Charity Assn. Network v. Minister of National Revenue*, 2008 FCA 114, 375 N.R. 387 (F.C.A.) at para. 5; *Millennium Charitable Foundation v. Minister of National Revenue*, 2008 FCA 414, 384 N.R. 119 (F.C.A.) at paras. 5 to 15.

13 Adapting the test set out in *RJR-MacDonald* to the circumstances of paragraph 168(2)(*b*) of the Act, I would formulate the test as follows:

> i. First, a preliminary assessment must be made of the merits of the objection made or proposed to be made under subsection 168(4) of the Act to ensure that there is a serious issue to be determined. The threshold here is a low one. It suffices that the objection is not frivolous or vexatious. A prolonged examination of the merits of the objection is neither necessary nor desirable.
>
> ii. Second, it must be determined whether the party seeking the extension will suffer irreparable harm if it were refused. The only issue to be decided at this stage is whether the refusal to grant the extension could so adversely affect the applicant's interests that the harm could not be remedied in the event that the objection or the subsequent appeal to this Court is successful. Irreparable harm refers to the nature of the harm suffered rather than its magnitude. It is harm which cannot be quantified in monetary terms or which cannot be cured, usually because the applicant cannot normally collect damages from the Minister resulting from the revocation of its registration under the Act.
>
> iii. Third, an assessment must be made as to whether the applicant would suffer greater harm from the granting or refusal of the extension than the Minister. The factors which may be considered in the assessment of this "balance of convenience" test are numerous and vary with each case. Public interest considerations may be considered within this balancing exercise.

Serious Issue

14 In this case, the respondent Minister accepts that there is a serious issue to be determined resulting from the applicant's notice of objection under paragraph 168(4) of the Act, and I am persuaded that the low threshold with respect to this element of the test has been met.

Irreparable Harm

15 The thrust of the Minister's objection to the extension is based on the second component of the test concerning irreparable harm. Since the applicant provided little financial information regarding its operations, current financial situation and future funding requirements, the Minister submits that the applicant has failed to demonstrate that the revocation of its registration will result, as it alleges, in the cancellation of the upcoming school year and to the dismissal of teachers and staff.

16 The Minister relies on *Gateway City Church v. Minister of National Revenue*, 2013 FCA 126 (F.C.A.) for the proposition that general assertions of harm are insufficient to establish irreparable harm. The Minister also relies on the 2012 Registered Charity Information Return of the applicant in which it reported over $10 million in assets, and operating expenditures of just over $1.6 million. As a result, the information the applicant has reported in its own returns suggests that it has the means to continue operating pending the outcome of its objection and its eventual appeal to this Court.

17 At the hearing, counsel for the applicant acknowledged that it reported substantial assets that, if liquidated, could cover the costs of its operations pending the outcome of its objection and of an eventual appeal to this Court. However, these assets are in kind, and the applicant would need sufficient time to liquidate them in an orderly fashion. Counsel consequently informed the Court that the applicant was no longer seeking the prohibition of publication of the notice until its rights of objection and appeal were exhausted, but was now rather seeking an extension of six months to proceed with an orderly liquidation of its assets in kind.

18 The applicant also relies heavily on the impact the revocation would have on its ability to issue donation receipts for its tuition fees. As set out in the audit letter from the CRA dated October 25, 2011, although tuition payments do not normally qualify as gifts, it has nevertheless been the CRA's position to treat as gifts the portion of tuition fees from schools that operate in the dual capacity of providing both secular and religious education, and that may be attributable to the religious education component of the curriculum. The methods for doing so are set out in CRA Circular IC75-23 *Tuition Fees and Charitable Donations Paid to Privately Supported Secular and Religious Schools*. If the applicant loses the ability to issue such receipts, the costs of tuition will necessarily be greater for the parents since they will no longer benefit from any resulting tax relief. This may impede access to the school for some students.

19 The applicant thus submits that without an orderly liquidation of its assets and the ability to collect tuition fees and to issue donation receipts for the religious instruction component of its curriculum, the school may be left without sufficient liquid funds to operate this year, resulting in its closure or in serious disruption of its activities affecting both the students and staff of the school.

20 Counsel for the respondent Minister recognizes that the after-tax costs of the tuition would be affected by the revocation. However, counsel submits that in light of the substantial assets at the disposal of the applicant, it could elect to compensate the affected parents through additional tuition subsidies.

21 As stated above, and as noted by Sopinka and Cory JJ. In *RJR-MacDonald* at p. 341, "the notion of irreparable harm is closely tied to the remedy of damages". Even if the applicant is successful in its objection under paragraph 168(4) of the Act or in an eventual subsequent appeal to our Court under subsection 172(3) of the Act, barring exceptional circumstances, it would not be entitled by law to claim damages from the Minister as a result of the prior revocation of its registration as a charity.

22 The situation here is analogous to some extent to that of stays and injunctions in cases involving the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c.11 ("*Charter*"). Again in *RJR-MacDonald* at p. 341, Sopinka and Cory JJ. noted that the assessment of irreparable harm involving *Charter* rights is a task which will often be more difficult than a comparable assessment in a private law application, since damages are not the primary remedy in *Charter* cases. This led the learned judges to conclude (at p. 342 of *RJR-MacDonald*) that in light of the relatively low threshold of the first component of the test relating to a serious issue, and the difficulties in applying the second component of the test involving irreparable harm where damages are not normally available, that many proceedings will be determined when considering the third component of the test concerning the balance of convenience.

23 Since this state of affairs is essentially the same with respect to an application under paragraph 168(2)(*b*) of the Act, it is my considered opinion that the same approach, which emphasizes the balance of convenience component of the test, should be applied to decide many such applications.

24 This approach does not negate the component of the test respecting irreparable harm. The applicant must still clearly demonstrate that it will suffer irreparable harm. However, in light of the fact that an applicant may not seek damages against the Minister, the significance of that component must be assessed accordingly. Likewise, the peculiarities of the charitable activities sector and of charitable organizations generally, which are not based on profit or gain, must also be taken into account.

25 In this regard, I note that this Court has repeatedly stated that the loss of the ability to issue tax receipts for gifts and the reduction in the ability of a charity to transfer funds to qualified donnees is not *per se* proof of irremediable harm: *Choson Kallah Fund of Toronto v. Minister of National Revenue*, 2008 FCA 311, 383 N.R. 196 (F.C.A.) at paras. 6 to 10. I agree. Charitable donations may be directed by donors to other charitable organizations, and the charitable work of an affected charitable organization may in many instances be assumed by another charity. Irreparable harm in the context of an application under paragraph 168(2)(*b*) of the Act requires more.

26 Addressing first the evidentiary issue raised by the respondent based on *Gateway City Church v. Minister of National Revenue*, above, that decision simply reiterates the well-known and long established principle that irreparable harm cannot be inferred, but must rather be established by clear and compelling evidence: *Imperial Chemical Industries plc v. Apotex Inc.* (1989), [1990] 1 F.C. 221 (Fed. C.A.) at p. 228; *A. Lassonde Inc. v. Island Oasis Canada Inc.* (2000), [2001] 2 F.C. 568 (Fed. C.A.) at paras. 2, 19-20; *Haché c. Canada (Ministre des Pêches & des Océans)*, 2006 FCA 424 (F.C.A.) at para. 11; *Choson Kallah Fund of Toronto v. Minister of National Revenue*, above at para. 5.

27 That being said, each case turns on its own facts as set out in the evidentiary record submitted to the Court. In this case, there is ample evidence in the record establishing that the operations of the applicant's school are principally funded through tuition fees from parents and funds generated from charitable gifts, including more particularly gifts in kind. This is referred to throughout the correspondence between the CRA and the applicant. Moreover, this is specifically set out in the affidavit of Rabbi Yona Shur, which confirms that over 80% of the concerned students receive a partial or full subsidy for their tuition costs through funds generated from the fundraising efforts of the applicant in its capacity as a registered charity. The respondent has not challenged this affidavit.

28 Moreover, the affidavit of Chanoch Nelekn, a parent of a student attending the school, confirms that his child's tuition is subsidized by funds raised by the school, and that if such subsidies were not provided he would not be able to afford to have his son attend the school.

29 Turning to the respondent's submissions concerning the assets, I recognize that the applicant has reported substantial assets. However, it is not challenged that these are for the most part in the form of assets in kind. Moreover, the entire record before me shows that the heart of the dispute between the CRA and the applicant revolves around the difficulties associated with the liquidation of similar assets in kind at reported market values. In these circumstances, the applicant has convinced me that it will be difficult for it, in the immediate short term, to secure the cash required to operate the school this fall from the liquidation or pledge of its assets in kind.

30 This cash-flow problem will be compounded by the fact that the parents of the students would be precluded from obtaining receipts with respect to the religious education component of the tuition fees, as allowed under the CRA Circular IC75-23 *Tuition Fees and Charitable*

Donations Paid to Privately Supported Secular and Religious Schools. Though there may be a dispute between the CRA and the applicant as to the methodology used to calculate this component, the revocation of the registration would preclude disputing the matter through notices of objection and in the Tax Court of Canada. The parents have obviously already made their choice to send their sons to this school this fall, and any change in the financial arrangements associated with the tuition fees, including the receipt related to the religious education component, would result in unexpected financial hardship for at least some parents with respect to the tuition for the fall session.

31 Taking into account the circumstances of this case and after carefully considering all the evidence submitted, the applicant has demonstrated, on a balance of probabilities, that the revocation of its registration will cause irreparable harm.

Balance of convenience

32 The concept of inconvenience should be widely construed in applications under paragraph 168(2)(*b*) of the Act. The Canadian public has a legitimate interest in the integrity of the charitable sector and in ensuring that the important advantages conferred under the Act at great expense to the taxpayers are properly managed and applied. As noted in the affidavit of Holly Brant submitted by the respondent Minister, the Department of Finance estimated the federal cost associated with the charitable sector credit and deduction was $2.9 billion for the 2011 taxation year alone.

33 It is consequently appropriate and reasonable for the CRA to closely scrutinize the activities of a registered charitable organization, and for the Minister to proceed with the revocation of the registration of such an organization where there are serious grounds to believe that the property gifted to it has been overvalued in the receipts it issues and which confer important tax benefits. In such circumstances, the balance of convenience weighs heavily in favour of the public interest which the Minister represents. As a consequence, applicants prevailing themselves of paragraph 168(2)(*b*) of the Act bear a heavy burden on the balance of convenience component of the test, since (barring evidence to the contrary) the Minister should be presumed to be acting faithfully in discharging his duty of promoting the public interest.

34 Under the circumstances of this case, and taking into account the evidence submitted, had the only harm inflicted on the applicant been that identified in the above discussion concerning the irreparable harm component of the test, I would not have found that the balance of convenience favoured the applicant.

35 However, in the analysis required under the balance of convenience component of the test, I must also include a "consideration of any harm not directly suffered by a party to the application" (*RJR-MacDonald* at p. 344). In this case there are the interests of the 180 students of the concerned school to take into account.

36 The academic year will begin in the next few days, and should the operations of the school be disrupted as a result of a shortfall of liquidities, the students and their parents will be placed in a difficult situation. I have no doubt that the parents of the students of the school would have serious difficulties finding, within the next few days, another education institution suitable to their religious convictions, since the uncontested evidence before me shows that the school is the only institution of its kind providing Chabad — Lubavitch religious instruction in the Toronto area. Moreover, with the academic year about to begin, these students would face a disruption in the education pathway that they expect to follow this fall.

37 In these circumstances, the balance of convenience requires that an orderly solution be crafted which takes into account both the interests of the students as well as the general public interest in the integrity of the charitable sector.

Conclusions

38 In light of the above I will order, pursuant to paragraph 168(2)(*b*) of the Act, that the period during which the Minister is precluded from publishing a copy of the notice proposing to revoke the registration of the applicant in the *Canada Gazette* be extended, on a one-time basis, to December 31, 2013.

39 This order will allow the applicant to pursue the operations of the school without major disruptions for the fall semester, thus hopefully allowing the students to pursue their preferred curriculum of secular and religious studies for that semester. During this period, the applicant will be expected to proceed with an orderly liquidation of a large part of its assets in kind. It will also be expected to develop, if feasible, an alternative plan to continue the operations of the school after December 31, 2013 without the status of a registered charity under the Act. The applicant will further be expected to notify forthwith the parents of the students of the fact that the Minister will, in all likelihood, proceed with the required publication so as to revoke its registration soon after December 31, 2013. This information will allow the parents sufficient time to consider and secure alternative arrangements for the education of their affected children for the winter 2014 semester, or continued enrolment with the applicant's school in a non-registered charity context if that is feasible.

40 In light of the circumstances, there shall be no order as to costs.

Application granted.

Comité de sauvegarde de l'École La Découverte de Saint-Sauveur, Comité de parents de l'École Lorette-Doiron de Saint-Simon, Comité de parents de l'École L'Escalade de Ste-Rose and Thérèse Albert, Mireille Manuel and Mireille Légère, on their behalf and on behalf of all the parents whose children are registered at La Découverte School in Saint-Sauveur, Lorette-Doiron School in Saint-Simon and l'Escalade School in Ste-Rose, (applicants) v. The Minister of Education of New Brunswick, School Districts 7 and 9, Keith Coughlan, Superintendent of School Districts 7 and 9 (respondents) and Comités de parents du Nouveau-Brunswick, Inc. (intervenor) (M/M/154/97)

Indexed As: Comité de sauvegarde de l'École La Découverte de Saint-Sauveur et autres v. Nouveau-Brunswick (Ministre de l'Éducation) et autres

New Brunswick Court of Queen's Bench
Trial Division
Judicial District of Moncton
Daigle, C.J.Q.B.
June 26, 1997.

Comité de sauvegarde le l'École La Découverte de Saint-Sauveur, Comité de parents de l'École Lorette-Doiron de Saint-Simon, Comité de parents de l'École L'Escalade de Ste-Rose et Thérèse Albert, Mireille Manuel et Mireille Légère, en leur nom et au nom de tous les parents dont les enfants sont inscrits à l'École La Découverte de Saint-Sauveur, l'École Lorette-Doiron de Saint-Simon et l'École l'Escalade de Ste-Rose (requérants) c. Le Ministre de l'Éducation du Nouveau-Brunswick, Districts scolaires nos 07 et 09, Keith Coughlan, directeur général des Districts scolaires nos 07 et 09 (intimés) et Comités de parents du Nouveau-Brunswick Inc. (intervenante) (M/M/154/97)

Répertorié: Comité de sauvegarde de l'École La Découverte de Saint-Sauveur et autres c. Nouveau-Brunswick (Ministre de l'Éducation) et autres

Cour du Banc de la Reine
du Nouveau-Brunswick
Division de première instance
Circonscription judiciaire de Moncton
Le juge en chef Daigle
Le 26 juin 1997

Counsel:

Roger Bilodeau, for the applicants;
Richard Duke and Marc Deveau, for the respondents;
Luc Desjardins, for the intervenor.

This application was heard on June 26, 1997, before Daigle, C.J.Q.B., of the New Brunswick Court of Queen's Bench, Trial Division, Judicial District of Moncton.

Daigle, C.J.Q.B., delivered the following decision orally on June 26, 1997.

Avocats:

Roger Bilodeau, pour les requérants;
Richard Duke et Marc Deveau, pour les intimés;
Luc Desjardins, pour la partie intervenante.

Cette requête fut entendue le 26 juin 1997 par le juge en chef Daigle de la Cour du Banc de la Reine du Nouveau-Brunswick, Division de première instance, circonscription judiciaire de Moncton.

Le juge en chef Daigle rendit la décision qui suit oralement le 26 juin 1997.

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[1] Daigle, C.J.Q.B. [orally] [Translation]: I am now ready to deliver judgment on the two motions heard today. I did not have the time to write my reasons for judgment, but I intend to rule forthwith on the two applications submitted to the court at the hearing of these motions: firstly, a motion for leave to intervene by the Comités de parents du Nouveau-Brunswick, and secondly, a motion brought by the applicants for an interlocutory injunction.

[2] I will deliver these decisions immediately because, in my opinion, there is an urgency regarding these matters, and also because I have had the time to peruse the abundant evidence on record submitted by way of affidavits. I have also had the opportunity of reading the numerous authorities relied upon by the two main parties in their briefs, and finally, I have had the time to reflect on the principles of law flowing from these authorities and which apply to the main issue raised in this matter. I have also had the advantage

[1] Le juge en chef Daigle [oralement]: Je suis disposé à rendre des décisions visant les deux motions qui ont été instruites aujourd'hui. Je n'ai pas eu le loisir de rédiger des motifs mais je me propose de statuer séance tenante sur les deux demandes qui ont été soumises au tribunal au cours de l'audition des présentes motions; d'abord, une motion visant une demande d'intervention de la part de Comités de parents du Nouveau-Brunswick, et deuxièmement une motion des requérants visant une demande d'injonction interlocutoire.

[2] Je rends les décisions séance tenante parce que je juge qu'il y a une certaine urgence visant ces litiges, et aussi parce que j'ai eu le temps de prendre connaissance de la preuve abondante qui avait été versée au dossier par voie d'affidavits. Également j'ai eu le loisir de lire toute la volumineuse jurisprudence que l'on a invoquée dans les mémoires des deux parties principales, et enfin j'ai eu le temps de réfléchir aux principes de droits qui sont énoncés dans cette jurisprudence et qui sont applicables à la

of the very complete and detailed pleadings of counsel. These have been of great help to me.

[3] Regarding the first motion, this was an application by the Comités de parents du Nouveau-Brunswick for leave to intervene in the proceedings. I have heard the pleadings and submissions of all counsel on this question. I have taken into consideration the criteria set out in rule 15 of the **Rules of Court** which require that the party applying for leave to intervene have an interest in the subject matter of the proceeding. Rule 15.02(2) also sets out certain factors to be considered, for instance whether or not the intervention will unduly delay or prejudice the parties as to the trial of the matter. Having considered all these factors, I find that the Comités de parents du Nouveau-Brunswick, Inc. has an interest in the subject matter of this proceeding and that its intervention would not unduly delay or prejudice the rights of the parties. I will take into account the application of the intervenor to make legal submissions only and not to adduce evidence. There was a rather long discussion today of the issues raised by the application in order to clarify them. However, I am not ready to sign the draft order submitted to the court because, in my view, it is rather vague considering the very definition of these issues, but I will order, in allowing the motion brought by the Comités de parents du Nouveau-Brunswick, Inc., that this added party may make submissions solely on the points of law raised by the applicants; in other words, I do not want to allow the intervenor to raise other points of law or broaden the scope of the issues. I believe, however, that it is proper to hear this party which wishes to make submissions on the issues raised by the applicants.

principale question soulevée en l'espèce. Enfin, j'ai eu l'avantage des plaidoiries très complètes et approfondies de la part des avocats. Elles m'ont été d'un grand secours.

[3] En ce qui concerne la première motion, il s'agissait d'une demande de la part du Comité de parents du Nouveau-Brunswick sollicitant une autorisation d'intervenir à titre de partie intervenante dans la requête. J'ai entendu les plaidoiries, les représentations de tous les avocats sur cette question. Je tiens compte des critères qui sont énoncés à la règle 15 des **Règles de procédure** et qui exigent que la partie qui demande d'être autorisée à intervenir dans la présente requête démontre un intérêt dans le litige. La règle 15.02(2) fait également état de certains facteurs qui doivent être pris en considération, à savoir que l'intervention ne causera pas de retard ni aucun préjudice aux parties quant à l'instruction de la requête. Tenant compte de tous ces facteurs, j'ai conclu que le Comité de parents du Nouveau-Brunswick Inc. a un intérêt dans ce litige et que son intervention ne causerait aucun retard ou préjudice aux parties. Je tiens compte de la demande de cette partie de ne présenter que des arguments de droit et non de la preuve. On a tenu aujourd'hui une discussion assez longue sur les questions soulevées par la requête afin de préciser celles-ci. Je ne suis pas disposé cependant à signer le projet d'ordonnance qui a été soumis au tribunal parce que je crois qu'il est un peu vague, compte tenu justement de la définition de ces questions, mais je vais ordonner en accueillant la motion du Comité des parents Inc. du Nouveau-Brunswick, que cette partie puisse faire des représentations visant uniquement les questions de droit soulevées par les requérants; autrement dit, je ne veux pas que la partie intervenante puisse soulever d'autres questions juridiques ou bien élargir le champ de discussion. Je crois cependant qu'il y a lieu d'entendre cette partie qui désire faire

des représentations visant les questions soulevées par les requérants.

[4] Therefore, I will also order that the style of the proceeding be amended to include the Comités de parents du Nouveau-Brunswick, Inc. as intervenor.

[4] Par conséquent, je vais aussi ordonner que l'intitulé de la requête soit modifié pour indiquer que le Comité de parents du Nouveau-Brunswick Inc. est une partie intervenante.

[5] With respect to the second motion, the applicants seek an interlocutory injunction prohibiting the Minister of Education of New Brunswick and the Superintendent of school districts 7 and 9 from proceeding with the closure of La Découverte School of Saint-Sauveur, Lorette-Doiron School of Saint-Simon, and l'Escalade School of Ste-Rose, and also prohibiting them from transferring the students who would normally be registered at those schools to other schools in districts 7 and 9.

[5] En ce qui concerne la seconde motion, les requérants demandent une injonction interlocutoire interdisant au ministre de l'Éducation du Nouveau-Brunswick et au directeur général des districts scolaires 7 et 9 de procéder à la fermeture de l'École La Découverte de Saint-Sauveur, de l'École Lorette-Doiron de Saint-Simon et de l'École l'Escalade de Ste-Rose et les interdisant aussi de transférer les élèves devant normalement être inscrits à ces écoles et à d'autres écoles des districts scolaires 7 et 9.

[6] Simply put, at issue here is whether it is just and equitable, in view of all the circumstances of this case, to grant an interlocutory injunction to the applicants. The tests to be considered by the court in order to determine this question have been clearly set out and defined by the courts. Two cases are particularly helpful: **Metropolitan Stores (MTS) Ltd. v. Manitoba Food and Commercial Workers, Local 832 and Labour Board (Man.)**, [1987] 1 S.C.R. 110; 73 N.R. 341; 46 Man.R.(2d) 241 and a more recent decision, **RJR-MacDonald Inc. et Imperial Tobacco Ltd. v. Canada (Procureur général)**, [1994] 1 S.C.R. 311; 164 N.R. 1; 60 Q.A.C. 241. In my opinion, these two cases clearly set out the tests and the legal principles to be applied in order to determine if it is just and equitable to grant an interlocutory injunction in this case.

[6] Énoncé simplement, la question que je dois trancher est de savoir s'il est juste et équitable, compte tenu de toutes les circonstances de l'espèce, d'accorder aux requérants une injonction interlocutoire. Les critères dont le tribunal doit tenir compte afin de trancher cette question ont été clairement énoncés et définis dans la jurisprudence. Je retiens en particulier deux arrêts: **Metropolitan Stores (MTS) Ltd. v. Manitoba Food and Commercial Workers, Local 832 and Labour Board (Man.)**, [1987] 1 R.C.S. 110; 73 N.R. 341; 46 Man.R.(2d) 241 et un arrêt encore plus récent, **RJR-MacDonald Inc. et Imperial Tobacco Ltd. v. Canada (Procureur général)**, [1994] 1 R.C.S. 311; 164 N.R. 1; 60 Q.A.C. 241. Je crois que ces deux arrêts énoncent clairement les critères, les principes de droit applicables pour décider s'il est juste et équitable d'accorder, en l'espèce, une injonction interlocutoire.

[7] There are three such tests. The first one

[7] Ces critères sont au nombre de trois. Le

may be formulated as follows: Is there a serious question to be tried? Secondly, have the applicants demonstrated that irreparable harm will result if the injunction is not granted? The third test involves an assessment of the balance of convenience, that is, a determination of which of the parties, either the applicants or the respondents, will suffer the greater harm from the granting or refusal of the injunction.

premier critère est le suivant: Est-ce qu'il existe une question sérieuse à trancher ou à juger? Deuxièmement, est-ce que les requérants ont démontré qu'ils subiront un préjudice irréparable si l'injonction interlocutoire n'est pas accordée? Et troisièmement, c'est le critère de la prépondérance des inconvénients, c'est-à-dire déterminer laquelle des deux parties, soit les requérants, soit les intimés, subira le plus grand préjudice selon que l'on accorde ou refuse l'injonction sollicitée.

[8] As far as the first test is concerned, whether there is a serious question to be tried, a rather thorough review has been made since, in fact, this is the question that will have to be decided as to the merits of the case, that is, on the hearing of the application. This question raises the issue of the constitutional validity of the decision of the Minister of Education of March 26, 1997, a decision to close a number of schools, including the three schools named in this application. We reviewed the formulation of the question, and I believe that it is a question of law, although it relates to a given situation.

[8] En ce qui concerne le premier critère, soit une question sérieuse à juger, on a fait un examen assez poussé de cette question puisqu'elle représente en fait la question qui devra être tranchée quant au fond, c'est-à-dire qui devra être tranchée au moment de l'audition de la requête. C'est une question qui soulève la validité constitutionnelle de la décision du ministre de l'Éducation prise le 26 mars 1997, une décision de fermer un certain nombre d'écoles, dont les trois écoles visées par la présente requête. On a fait l'examen de la formulation de cette question et je crois qu'il s'agit de répondre à une question de droit, même si elle se pose dans une situation donnée.

[9] This question involves an allegation that s. 23 rights have been infringed. It raises the matter of content of these rights, the definition of the rights under s. 23 of the **Charter** and, in particular, under paragraph 23(3)(b) of the **Charter**, that is the extent of management and control that could exist in this case, which is whether this management decision extended to the power to decide to close schools where Francophone minority students are educated. Mr. Duke argued, on behalf of the respondents, that since the schools involved in this case were in a homogeneous Francophone school district and that no evidence was adduced as to any threat to minority language education rights

[9] Celle-ci comporte la prétention que les droits garantis à l'art. 23 auraient été violés. Elle met en cause le contenu de ces droits, la définition des droits garantis à l'art. 23 de la **Charte**, et en particulier, l'art. 23(3)(b) de la **Charte**, à savoir, la mesure de gestion et de contrôle qui pourrait exister en l'espèce c'est-à-dire si cette mesure de gestion s'étendait au pouvoir de décision de fermer des écoles où est dispensé l'enseignement aux élèves de la minorité francophone. Me Duke, au nom des intimés, a soutenu que, comme il s'agit en l'espèce d'écoles d'un district scolaire homogène francophone et qu'aucun élément de preuve n'a été présenté indiquant l'existence d'une menace au droit à l'instruc-

in the schools where the students would be transferred, s. 23 of the **Charter** was not applicable. This, in my opinion, is a matter which can be subjected to proof in support of the decision of the Minister of Education, but that cannot be decided at the interlocutory stage. Of course, it is a matter which will only arise if there is violation of the applicants' rights. We must first dispose of this issue and then, the objection raised by Mr. Duke that it has not been proven that minority language education rights would be endangered by the closure of the schools involved will be considered at the hearing of the application on the merits. Thus, I find that the first test concerning a serious question to be tried has been satisfied.

[10] The second test is the irreparable harm test. Again here, I accept the principles set out in the two aforementioned cases, that is, that the nature of the harm rather than its magnitude should be considered. At issue of course, in this case, is the violation of constitutional rights, that is, the allegation that constitutional rights have been infringed. I believe it is proper, when speaking of irreparable harm in this context, to take into account the harm which would be suffered by the pupils. Thus, s. 23 of the **Charter** confers on the parents the right to have their children educated, but the people who are really entitled to those rights and the real recipients of the instruction services are the pupils. Therefore, at issue here is the irreparable harm which would be suffered by the pupils. I just reread some of the affidavits filed in support of this application, and reference is made to the stress suffered by the pupils and the parents; it is thus proper to take into account the transfer of the pupils to other schools and attendant adjustment. Moreover, I accept the principle set out in **RJR-MacDonald** concerning the

tion dans la langue de la minorité dans les écoles qui vont recevoir les élèves, l'art. 23 de la **Charte** ne s'applique pas. C'est là une question, à mon avis, qui peut faire l'objet d'éléments de preuve visant à établir la justification de la décision du ministre de l'Éducation mais qui ne peut pas être tranchée au stade interlocutoire. C'est, bien entendu, une question qui se posera uniquement s'il y a violation des droits des requérants. Il faut d'abord trancher cette question-là et ensuite l'objection soulevée par Me Duke selon laquelle on n'aurait pas établi que l'instruction dans la langue de la minorité serait mise en péril par la fermeture des écoles fera l'objet d'un examen lors de l'audition de la requête quant au fond. Donc, je conclus que le premier critère d'une question sérieuse à trancher a été satisfait.

[10] Le deuxième critère est celui d'un préjudice irréparable. Je retiens encore les principes énoncés dans les deux arrêts déjà invoqués, à savoir qu'il faut tenir compte de la nature du préjudice plus que de son étendue. En l'espèce, il s'agit, bien entendu, d'une violation de droits constitutionnels, c'est-à-dire la prétention voulant que droits constitutionnels auraient été enfreints. Je crois qu'il y a lieu, lorsqu'on parle de préjudice irréparable dans ce contexte, de tenir compte de préjudices qui seraient subis par les élèves. Ainsi l'art. 23 de la **Charte** confère aux parents un droit de faire instruire leurs enfants mais les vrais titulaires de ces droits et les récipiendaires de ces services de d'enseignement sont les élèves. Donc, il s'agit ici d'un préjudice irréparable qui serait subi par les élèves. J'ai relu il y a un moment certains des affidavits présentés à l'appui de la présente requête et on y mentionne le stress subi par les élèves, les parents; il y a donc lieu de tenir compte de la mutation des élèves à d'autres écoles et de l'adaptation qui sera exigée à ce moment-là. Je retiens en outre le principe énoncé dans

nature of the harm resulting from a violation of rights; the harm is often not quantifiable, although irreparable harm can be presumed. I find that the applicants have also satisfied the second test.

[11] The third test is the balance of inconvenience test. In determining whether this test has been satisfied, the public interest must be taken into account in assessing the inconvenience which it is likely to be suffered by both parties by reason of the nature of the harm alleged. This application pertains to a decision taken by the Minister of Education, thus on behalf of the government and the state, the object of which was the common good, promotion of the common good. Therefore, it is naturally in the public interest to respect the Minister of Education's decision in the sense that it represents the public interest in its attempt to achieve a sound administration of the public purse and an efficient administration of the education system.

[12] I will also take into consideration the nature of the injunction sought. The applicants have not asked that the Minister's decision be suspended, but they simply ask for an exemption, that is, that the three schools in question be exempted. However, is this really a request for an exemption or is it, for all practical purposes, a request for a suspension? Can we expect to receive many such applications because there are other schools that are subject to the same order? This is a question that must be taken into account. I have considered this, and I believe there is a way to avoid a series of claims if the interlocutory period is limited as much as possible and if the hearing on the merits is held as soon as possible. It is now the summer holiday period and schools should open in about two months, a little less than two

l'arrêt **RJR-MacDonald** visant la nature du préjudice qui découle d'une violation de droits, souvent le préjudice n'est pas quantifiable mais on peut présumer qu'il y a préjudice irréparable. Je conclus que les requérants ont satisfait également au deuxième critère.

[11] Le troisième critère est celui de la prépondérance des inconvénients. Dans l'examen de ce critère, il faut tenir compte de l'intérêt public dans l'appréciation des inconvénients susceptibles d'être subis par les deux parties en raison de la nature des préjudices invoqués. La présente requête vise une décision qui a été prise par le ministre de l'Éducation, donc au nom du gouvernement et de l'autorité publique, et dont le but était le bien commun, la promotion du bien commun. Donc, c'est naturellement dans l'intérêt public que de respecter la décision du ministre de l'Éducation en ce sens qu'elle représente l'intérêt public en visant à atteindre la saine administration des finances publiques et l'administration efficace du système éducatif.

[12] Je tiens compte aussi de la nature de l'injonction qui est sollicitée. On ne demande pas en l'espèce une suspension de la décision du ministre, mais simplement une exemption, c'est-à-dire que les trois écoles en question fassent l'objet d'une exemption. Toutefois, s'agit-il véritablement d'une exemption ou est-ce, à toutes fins pratiques, une suspension? Est-ce que l'on peut s'attendre à de nombreuses demandes parce qu'il y a d'autres écoles qui font l'objet de la même ordonnance? C'est là une question dont il faut tenir compte. J'y ai réfléchi et je crois qu'il y a moyen de contrer une série de demandes si vraiment la période interlocutoire était limitée le plus possible si l'audience sur le fond avait lieu le plus tôt possible. C'est maintenant l'époque estivale et on prévoit l'entrée des classes dans en-

months. We will therefore have to try to mitigate this inconvenience as much as possible by scheduling the hearing on the merits as soon as possible.

[13] The applicants also assert the public interest. I agree that they want to protect a public interest, that is that they want to prevent the violation of their **Charter** rights. I have also considered the issue of the status quo, to preserve the status quo as much as possible. The decision was made on March 26, 1997, and since that date the School Board has advanced in its activities, in its planning for the next school year, including transferring of personnel, organization of student transportation, etc. I admit that there is an inconvenience as far as the respondents are concerned. However, the most important element of the status quo approach which must be preserved at present is to avoid transferring students to other schools, in view of the possibility of a second transfer later on during the school year. I believe that where the students are concerned, this would be the most serious inconvenience.

[14] I will briefly rule on the application for an order under rule 40.04, that is, an exemption from an undertaking regarding damages. I believe that this is a factor which must be taken into consideration in the assessment or the analysis of the balance of inconvenience. In this regard, I bear in mind the respondents' situation, that of the students' parents, the representatives themselves representing parents. Also, this application concerns a public right, the right to an education, and the arguments include an allegation of infringement of rights guaranteed by the **Canadian Charter of Rights and Freedoms**. In my opinion, the applicants are acting on behalf of the parents and certain elements of the public. In view of these

viron deux moins, un peu mois de deux mois. Il faudra donc tenter de mitiger ou d'atténuer le plus possible cet inconvénient en fixant l'audience quant au fond dans les plus brefs délais.

[13] Les requérants invoquent aussi un intérêt public. Je suis d'avis qu'il existe, de leur part, un intérêt public, c'est-à-dire qu'ils veulent prévenir la violation des droits garantis par la **Charte**. Je me suis aussi penché sur la question du statu quo, préserver dans la mesure du possible, le statu quo. La décision a été prise le 26 mars 1997 et depuis ce temps-là, le Conseil scolaire a avancé dans sa démarche, dans sa planification pour l'année scolaire qui s'en vient, celle-ci comportant la mutation du personnel, l'organisation du transport scolaire et ainsi de suite. Je reconnais qu'il y a là un inconvénient pour les intimés. Toutefois, l'esprit du statu quo le plus important et qui doit être préservé à l'heure actuelle, c'est d'éviter le transfert des élèves à d'autres écoles, compte tenu de la possibilité d'un second transfert plus tard au cours de l'année scolaire. À mon avis, du point de vue des élèves, cela serait l'inconvénient le plus sérieux.

[14] Brièvement, je vais statuer sur la demande d'une ordonnance en vertu de la règle 40.04, c'est-à-dire une exemption ou une dispensation d'un engagement visant les dommages-intérêts. Je crois que c'est un élément dont il faut tenir compte dans l'appréciation ou l'analyse de la prépondérance des inconvénients. Je tiens compte, à cet égard, de la situation des requérants, celle de parents des élèves, les représentantes elles-même étant des représentants de parents. Également, la présente requête vise un droit public, le droit scolaire, et les prétentions comportent l'allégation de la violation des droits garantis par la **Charte canadienne des droits et libertés**. À mon avis, les requérants agissent au nom des parents et de certains

factors, I am prepared to order that the applicants be exempted from the undertaking required by rule 40.04.

[15] According to my view of the balance of inconvenience, I find that it weighs in favour of the applicants. Therefore, the applicants have established evidence which satisfies the three tests described earlier. I will allow the motion and grant an interlocutory injunction in the nature of an exemption, pertaining to the three schools in question, from the Minister of Education's decision of March 26, 1997. On the other hand, I will ask the cooperation of all parties in order to mitigate as much as possible the inconvenience of an inordinate delay before this case is decided on the merits, hoping that the issue can be disposed of before school opening. I would like a date to be set today for the hearing of this application.

[16] Hearing set for July 28, 1997, at 9:30 a.m.

Application allowed.

éléments du public. Compte tenu de ces facteurs, je suis disposé disposé à ordonner l'exemption de l'engagement requis par la règle 40.04.

[15] Selon mon appréciation de la prépondérance des inconvénients, je conclus que celle-ci penche en faveur des requérants. Les requérants ont donc établi des éléments de preuve qui satisfont aux trois critères décrits plus tôt. Je suis d'avis d'accueillir la motion et d'accorder une injonction interlocutoire qui prend la forme d'une exemption, visant les trois écoles en question, de la décision du ministre de l'Éducation prise le 26 mars 1997. Par contre, je vais demander la coopération de toutes les parties afin de mitiger le plus possible l'inconvénient d'une trop longue période d'attente avant que le présent litige ne soit tranché quant au fond, en espérant que la question puisse être tranchée avant l'ouverture des classes. J'aimerais que l'on puisse fixer aujourd'hui une date pour l'audition de la présente requête.

[16] Audience fixée au 28 juillet 1997 à 9 h 30.

Requête accordée.

1994 CarswellNat 272
Federal Court of Canada — Appeal Division

David Hunt Farms Ltd. v. Canada (Minister of Agriculture)

1994 CarswellNat 272F, 1994 CarswellNat 272, [1994] 2 F.C. 625, 112 D.L.R. (4th) 181, 167 N.R. 116, 46 A.C.W.S. (3d) 814

David Hunt Farms Ltd. (Applicant) (Appellant) v. Minister of Agriculture (Respondent) (Respondent)

Stone, Robertson and McDonald JJ.A.

Ottawa: February 4, 1994
Vancouver: February 8, 1994
Docket: A-44-94

Counsel: *Robert L. Armstrong* for applicant (appellant).
John Vaissi Nagy and *Neelam Jolly* for respondent (respondent).

The following are the reasons for judgment rendered in English by *Robertson J.A.*:

1 This is an expedited appeal from a decision of a Trial Judge rendered on January 27, 1994, dismissing the appellant's application for an interlocutory injunction. Given the urgency of the matter the initial application was heard by telephone conference. The Trial Judge did not offer written reasons and his oral reasons were not recorded. Consequently, we are obliged to assess, as a matter of first impression, whether the Trial Judge erred in law in applying the well-established tripartite test analyzed in *Turbo Resources Ltd. v. Petro Canada Inc.*, [1989] 2 F.C. 451 (C.A.) . Pending the disposition of this appeal the respondent agreed not to take the impugned action which the injunction seeks to prohibit. The essence of the dispute may be summarized as follows.

2 In 1986, a fatal neurological disorder was diagnosed and reported in adult cattle in the United Kingdom. The disease, "Bovine Spongform Encephalopathy" (BSE) is more commonly known as "Mad Cow Disease". It is contracted through contaminated feed and has two distinct attributes. First, the affected animal degenerates rapidly after the first symptoms appear, typically following a several-year incubation period. Second, its presence can only be verified by post-mortem examination of the brain tissue of the deceased animal.

3 Since BSE was first reported, it has attained epidemic proportions: over 112,000 cases have been tallied in the United Kingdom alone, where approximately one-half of all dairy herds and one-tenth of all beef herds have been affected. In response to these realities, Agriculture Canada

discontinued issuing import permits for cattle from the United Kingdom in 1990. It currently requires incidences of the disease to be reported and has instituted an "active surveillance network" to ensure that suspected cases are submitted to a laboratory for confirmation.

4 In 1988, two years prior to Agriculture Canada's ban on cattle imports, the appellant purchased and imported into Canada two Lincoln Red cattle from the United Kingdom. In November of 1993, a beef cow imported into Canada from the United Kingdom in 1987 by an Albertan farmer was slaughtered after exhibiting neurological symptoms of the kind associated with BSE. In December of 1993, laboratory testing confirmed the preliminary diagnosis of the presence of the disease. Agriculture Canada has subsequently learned that of the eleven United Kingdom herds from which cattle had been exported to Canada between 1982 and 1990, eight had reported their first case of BSE within the preceding twenty-four months.

5 In fulfilment of Canada's international obligations, Agriculture Canada notified the Office international des Épizooties, an international health agency, of the Alberta occurrence of BSE in December, 1993. That organization had established guidelines for the treatment, diagnosis, and reporting of the disease on a global basis. Agriculture Canada also alerted foreign governmental authorities of the incidence of BSE in Alberta. This information engendered an immediate and negative reaction. Several countries threatened to restrict Canada's access to the export market if it did not take appropriate measures to eliminate the risk of BSE spreading. It is maintained that the Canadian farm economy, both domestic and export, will sustain substantial damage unless all cattle imported from the United Kingdom since 1986 are promptly destroyed. Apparently a failure to take such action, compounded with a second reported incidence of BSE, will result in a revocation by Canada's key trading partners of its recognition as being free of this disease. Under these circumstances, the respondent Minister directed that all cattle imported from the United Kingdom between 1986 and 1990 be destroyed.

6 On January 10, 1994, a notice was issued under subsection 48(1) of the *Health of Animals Act* , S.C. 1990, c. 21 (the "Act"), compelling the appellant to deliver the cattle in question for destruction on January 31, 1994. The notice states that the cattle are suspected of either being contaminated by the disease or being in contact with other diseased animals. On January 26, 1994, the appellant initiated an application for judicial review and an interlocutory injunction. The appellant's attack on the validity of the notice hinges on three arguments.

7 First, the appellant maintains that there is no evidence that its cattle are diseased. It alleges that the cattle did not originate from any of the eleven infected United Kingdom herds and that the cattle's vendor has confirmed that no animal in his herd had contracted the disease or been exposed to contaminated feed. Second, the appellant argues that the belief that the disease is contagious is unsupported. Third, it alleges that the true reason underlying the Minister's decision to destroy cattle imported prior to 1990 was the threat of trade embargoes after the Albertan case was reported. The appellant maintains that if the Minister were truly concerned with the spread of disease, he

had within his possession sufficient information as of 1990 to make the decision ultimately made in 1993.

8 Against this background we now turn to the application of the tripartite test in determining whether the Trial Judge erred in refusing to exercise his discretion to grant interlocutory relief.

9 It is common ground that the first prong of the tripartite test has been satisfied. We are told by both parties that the Trial Judge agreed at the hearing below that the appellant had raised a serious question, at least in part, on the basis of an undertaking made in a similar case which will be heard on March 7, 1994, in Nova Scotia before a Trial Judge of this Court (*Macdonald v. Canada (Minister of Agriculture)* , Court File T-3017-93). In that proceeding, the respondent Minister gave an undertaking that the cattle of the applicant therein would not be destroyed until disposition of the application for judicial review. In return, a consent order expediting the judicial review application was placed before the Court and granted by a Judge of the Trial Division.

10 Apparently, the Trial Judge below found the respondent's undertaking in the Nova Scotia case persuasive evidence that the "serious issue" test had been satisfied in the case before him. The respondent takes no issue with this finding, although as discussed below he does challenge the relevance of the undertaking when weighing the balance of convenience.

11 The second prong of the tripartite test is concerned with the issue of irreparable harm. It must be remembered however, that while an applicant may be exposed to irreparable harm if injunctive relief is withheld, so too may a respondent should an injunction be granted. Obviously, the issue of irreparable harm must be addressed from the perspective of both parties. I shall deal first with irreparable harm to the appellant.

12 In the present case, Regulations adopted under the Act require the Minister to pay a maximum compensation of $2,000 per destroyed animal [(*Maximum Amounts for Destroyed Animals Regulations* , SOR/91-222, paragraph 3(*a*)) [as am. by SOR/93-491, s. 1]]. It is common ground that each of the animals in question is worth substantially more than this amount. The respondent's evidence estimates the value of each animal at $5,000. The appellant believes the value of each to be $7,500.

13 Subject to the submissions discussed below, I think it self-evident that the appellant will suffer irreparable harm if the injunction is refused. It is not the adequacy of the "damages" remedy which is in issue. Rather, it is the adequacy of the "compensation" which is available under the Regulations. Where, as in the present case, the amount of the recoverable loss is restricted by statute, and that amount is significantly less than the actual loss to be incurred if the injunction does not issue, irreparable harm is established. I take it to be accepted law that adequate compensation is to be measured in accordance with common law principles: See *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396 (H.L.) , at page 408.

14 In anticipation of this finding, the respondent sought to persuade us that in fact and law the appellant will be able to recover compensation exceeding the statutory maximum as fixed by the Regulations. He informs us by way of a press release that the Canadian Beef Breeders Council, an agency which represents the interests of beef producers, intends somehow to supplement the regulated maximum to "approach the fair market value" of the cattle. There are obvious objections to this submission. No mechanism for providing additional compensation is yet in place. Moreover, there is no legal obligation which could be owed by the foregoing agency to the appellant and by which the appellant could enforce payment of full compensation. The appellant is entitled to more than a mere possibility of recovering over and above the prescribed minimum compensation. Finally, the proposed scheme does not embrace the understanding that compensation is intended to approximate those recoverable at common law.

15 The respondent's alternate submission on this issue is to the effect that if the appellant is not satisfied with the total amount of the compensation, it is free to sue the Minister in tort. This submission invokes section 50 of the Act, which *prima facie* limits the Minister's liability. That section provides:

> *50.* Where a person must, by or under this Act or the regulations, do anything, including provide and maintain any area, office, laboratory or other facility under section 31, or permit an inspector or officer to do anything, Her Majesty is not liable
>
> (*a*) for any costs, loss or damage resulting from the compliance; or
>
> (*b*) to pay any fee, rent or other charge for what is done, provided, maintained or permitted.

16 Ironically, it is the respondent who argues that section 50 may be interpreted as limiting the liability of the Crown where the Minister acts pursuant to subsection 48(1) of the Act. While counsel's interpretation was interesting, I am not persuaded that the appellant has a practical and viable tort remedy in the event it is determined that the animals were wrongfully slaughtered. It is one matter for a party to be able to litigate the actual loss suffered and quite another to prevail in a contested argument that a statute does not immunize the other party (the Minister) from liability. In reaching this conclusion, I could not ignore the fact that the respondent was not able to concede that section 50 would not present a bar to such an action or indeed that the issue would not be raised. I am satisfied that the appellant will be exposed to irreparable harm if the injunction does not issue. This determination leaves us to consider the irreparable harm from the respondent's perspective.

17 It would be wrong in law to assume that the respondent cannot sustain irreparable harm. It is equally wrong to assume that a clear finding of irreparable harm to a defendant, such as the respondent Minister, is a condition precedent to deciding whether on a balance of convenience an injunction should issue. Both legal propositions are reflected in the jurisprudence of this Court to which I now turn.

18 The first proposition was firmly established by this Court in *Attorney General of Canada v. Fishing Vessel Owners' Association of B.C.*, [1985] 1 F.C. 791 (C.A.) . In that case, an interlocutory injunction had been granted to prevent the implementation of a government plan to extend the salmon fishing season for vessels using gill nets. Fishing vessels equipped with purse seine nets would have a shorter fishing season. The "seiners" sought an injunction arguing that the decision was discriminatory in that it was premised not on conservation objectives but rather on socioeconomic considerations which promoted the interests of "gill netters" at the expense of "seiners".

19 The Trial Judge granted the injunction [T-1356-84, Collier J., order dated 13/7/84, F.C.T.D., not reported]. On appeal, this Court held that the Trial Judge erred in his assumption that the Attorney General would not suffer irreparable harm if an injunction were issued. Writing for this Court, Pratte J.A. concluded, in part, at page 795:

> [T]he Judge assumed that the grant of the injunction would not cause any damage to the [Attorney General]. This was wrong. When a public authority is prevented from exercising its statutory powers, it can be said, in a case like the present one, that the public interest, of which that authority is the guardian, suffers irreparable harm.

20 It is apparent from the above facts that had the injunction issued, two groups would have been exposed to irreparable harm: "gill netters" who would have been deprived of the opportunity to fish during the extended season and the public interest to the extent that the government plan furthered conservation objectives could not be implemented. I should point out that when determining irreparable harm in the context of a public authority, the issue is not to be decided on the basis of pecuniary considerations alone. The inability of a public authority to carry out its legislated mandate in protecting the public interest is sufficient. The question we must address is whether the public interest will suffer irreparable harm if the appellant is granted injunctive relief. The question is a difficult one.

21 I am in agreement with Professor Sharpe when he writes that "[i]t is exceptionally difficult to define irreparable harm precisely." (R.J. Sharpe, *Injunctions and Specific Performance* (2nd ed.) (Toronto: Canada Law Book, 1993) at page 2-24, paragraph 2.440). To this observation I would add that it is not always self-evident whether the public interest will suffer irreparable harm if injunctive relief is either granted or denied. I am prepared to assume for purposes of the appeal that the public interest will be harmed if the interlocutory injunction issues. In any event, such a finding is not a condition precedent to the application of the third prong of the tripartite test.

22 The significance of the balance of convenience component of that test was clearly enunciated in *Eng Mee Yong v. Letchumanan s/o Valayutham*, [1980] A.C. 331 (P.C.) , *per* Lord Diplock, at page 337:

> The guiding principle in granting an interlocutory injunction is the balance of convenience; there is no requirement that before an interlocutory injunction is granted the plaintiff should satisfy the court that there is a "probability," a "prima facie case" or a "strong prima facie case" that if the action goes to trial he will succeed; but before any question of balance of convenience can arise the party seeking the injunction must satisfy the court that his claim is neither frivolous nor vexatious; in other words that the evidence before the court discloses that there is a serious question to be tried: *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396 .

23 In *Turbo Resources, supra* , Stone J.A. emphasized the paramountcy of the balance of convenience test while cautioning decision-makers against a purely mechanical application of legal criteria. At pages 474-475 he observed:

> I should say here that I favour the view that these factors do not constitute a series of mechanical steps that are to be followed in some sort of drilled progression. Professor Robert J. Sharpe cautions against such rigidity of approach in *Injunctions and Specific Performance* (Toronto, 1983), when he notes that each of the factors should be "seen as guides which take colour and definition in the circumstances of each case." He further observes that they are not to be seen "as separate, water-tight categories," and also that they "relate to each other, and strength on one part of the test ought to be permitted to compensate for weakness in another". In other words, considerable flexibility is called for, *bearing in mind that the balance of convenience is of paramount importance* . [Emphasis added.]

24 I do not think that it can be doubted that the questions of irreparable harm and balance of convenience are inextricably linked. But it is the balance of convenience which enables a court to take into account diverse factors which cannot be quantified in monetary terms: see *Sharpe, supra* , at page 2-30, para graph 2.530. It is the balance of convenience component of the test which ensures flexibility in the application of equitable principles in diverse factual situations. For example, the likelihood of irreparable harm is but one of the factors that might be weighed when deciding whether to grant an interlocutory injunction: see *Nintendo of America Inc. v. Canamerica Corp.* (1991), 36 C.P.R. (3d) 352 (F.C.A.) .

25 In this case, the respondent has a duty to protect the public interest of all Canadians, not simply those directly affected by notices issued under the Act. Nor can one ignore the substantial financial repercussions which could well follow a second reported case of the disease. We have been told that Canada's beef export business is valued at $1.6 billion. Given the relatively minor financial loss the appellant would suffer coupled with the Minister's efforts toward ensuring adequate compensation, it is arguable that the balance of convenience favours the respondent.

26 The appellant, however, seeks to inject into the balancing formula an additional factor, namely the Minister's undertaking in the Nova Scotia case not to destroy the cattle until the conclusion

of that judicial review hearing scheduled for March 7, 1994. It argues that it is entitled to "equal treatment", to which the respondent counters that the appellant's characterization of the two cases as "equal" is mistaken. The respondent's principal objection to this Court considering the Minister's undertaking stems from the supposedly discrete factual circumstances of each case. He argues that it is both inappropriate and wrong in law to tip the balance of convenience in favour of the appellant on the basis of an undertaking rendered within a different factual context.

27 In my opinion the argument is flawed. The action taken by the respondent in both the case before us and in Nova Scotia was predicated on the same reasoning: that the public interest was best served by destroying all cows imported from the United Kingdom between 1986 and 1990 on the suspicion that they carry BSE. The reason why the respondent seeks to have the appellant's cows destroyed is the self- same reason that it seeks to have the cattle in the Nova Scotia case destroyed.

28 The respondent argued that the appellant's cattle were more at risk than those owned by the Nova Scotia farmer because of the precise origin and breed of the respective cattle. That argument must fail for two reasons. First, the evidence does not support the assertion that cattle from one part of the United Kingdom are more at risk of disease than those from another. Second, if the Minister's undertaking in the Nova Scotia decision was based on this criterion, it conflicts with his decision not to treat the disease on a regional or individual basis in Canada because that solution "would not address the demands of our international trade markets."

29 I cannot accept the respondent's argument that the balance of convenience should be tipped in his favour. The Minister's willingness to permit another case to be decided on the merits, after a short delay, before taking the irreversible action contemplated in the case before us today is decisive of that issue. I therefore conclude that an injunction should issue on the terms appearing below.

30 During the period of the injunction, which should extend until the judicial review application is finally disposed of by the Trial Division, the appellant should not sell or otherwise dispose of either of the said cows or otherwise permit either of them to be taken or sent away from the appellant's farm property where they are presently located. The appellant should also be required to keep the said cows in strict quarantine separate or apart from the remainder of its herd. If either of the said cows should manifest any of the symptoms of BSE, the appellant should be required to notify immediately the respondent of the symptoms so observed.

31 At the hearing of this appeal counsel for the appellant stated that his client would move expeditiously to perfect the judicial review application and to bring it on for hearing in the Trial Division not later than March 7, 1994 when the Nova Scotia case is set to be heard. Accordingly, the respondent should be at liberty to apply to this Court for the dissolution of the injunction upon the ground that the appellant had failed to act *bone fide* in perfecting the judicial review application

or for failure to so act in seeking to have the application heard by the Trial Division on an urgent basis that is to say as early as possible, preferably not later than March 7, 1994.

32 For the foregoing reasons, I would allow the appeal, set aside the order of the Trial Judge dated January 27, 1994 dismissing the application for an interlocutory injunction and grant the order on the terms outlined above. The appellant is entitled to its costs both here and below.

***Stone J.A.*:**

33 I agree.

***McDonald J.A.*:**

34 I agree.

Solicitors of record:
Meighen, Demers , Toronto, for applicant (appellant).
Deputy Attorney General of Canada for respondent (respondent).

1979 CarswellBC 96
British Columbia Supreme Court

Delta (Municipality) v. Nationwide Auctions Inc.

1979 CarswellBC 96, [1979] 4 W.W.R. 49, 100
D.L.R. (3d) 272, 11 B.C.L.R. 346, 11 C.P.C. 37

DELTA v. NATIONWIDE AUCTIONS INC. and NATIONWIDE REALTY SERVICE LTD.

Locke J. [in Chambers]

Judgment: March 20, 1979
Docket: New Westminster No. C790106

Counsel: R. H. Nelson (applicant), president of defendant Nationwide Realty Service Ltd., in person.
M. H. Thomas, for respondent.

***Locke J.*:**

1 This is an application for an injunction brought by the defendants against the plaintiff municipality to restrain the municipality from repealing By-law 2876/1978 and from releasing land-use contract SA No. 3234. Apparently the repeal and release is to be brought about by means of By-law 2942/1979, which awaits third and final reading.

2 The affidavits filed and statements made at the hearing show that By-law 2876/1978 received third reading on 2nd October 1978 and was finally adopted in early January 1979. That by-law authorized the municipality to enter into a land-use contract with the defendant corporations pursuant to subdivision application 3234. This contract was registered by the defendants ("Nelson") in the land registry office but had apparently not been properly executed by the plaintiff ("Delta"). It was re-executed and subsequently re-registered on 17th January 1979.

3 On 8th January 1979 Nelson had delivered to Delta three cheques for $41,000, $5,263.34 for 1978 taxes, and $5,263.34 for estimated 1979 taxes. They were deposited after the Delta treasurer had ascertained the bank held covering funds. In fact payment was stopped by Nelson on 9th January 1979, but Delta did not receive notice of this until 17th January 1979, after the contract had been re-registered.

4 One assumes the new By-law 2942/1979 was put forward because of this and other differences with Nelson. On 12th February 1979 he brought a motion for an injunction to restrain Delta from holding the public hearing essential to its passage. The record shows only that by consent Anderson J. granted an injunction restraining Delta from proceeding further "if the following amounts of money are paid before 20th February, 1979 ..." The amounts are those set out above.

5 The money was not paid, but Nelson purported to do it in the terms of a letter of 19th February 1979 to Delta enclosing a cheque for $525.68 and offering to reconvey certain land. Delta's solicitor replied on 20th February 1979 returning the money and advising that Delta would proceed with the hearing on 20th February 1979. The by-law apparently awaited third and final reading when Nelson brought this application. It has been tabled pending these reasons.

6 Delta commenced the action on 19th January 1979, claiming specific performance of the land-use contract, alternatively damages and a lis pendens. Nelson filed a defence and counterclaim on 8th February 1979 and an amended one on 19th February 1979. It is irregular in form and not served on all the proposed defendants to the counterclaim. He claims specific performance, alternate relief and a lis pendens. Some of the allegations include allegations of malice against Delta aldermen and appear to contain other matters of doubtful relevance, nor is relief claimed on the proper grounds.

7 The material shows that Nelson has standing disagreements with Delta; another defendant by counterclaim named Sur-Del Builders Development Ltd., which holds land-use contract S.A. 3181; and others. At the hearing of this application Nelson advanced 33 points of argument, many of which were not material. He did however say he wanted to maintain the contract.

8 Counsel for Delta submitted four principal points:

9 1. The applicant had not shown a fair question to be tried;

10 2. There was no irreparable injury in the sense that damages would be an adequate remedy;

11 3. The balance of convenience was not in favour of the applicant;

12 4. A court would not be quick to enjoin the passage of a by-law which could conceivably be illegal if there was another adequate remedy available, e.g., quashing the by-law.

13 I have considered all of these arguments, but I propose to grant the injunction for the following reasons.

14 Delta is signatory to a contract and proposes to unilaterally cancel it by by-law. It is said Nelson has no fair question to be tried in the language of *Brady v. Heinekey* (1960), 24 D.L.R. (2d) 737 (B.C.C.A.). Further, it is said that Nelson is in fundamental breach of his contract as he has

failed to pay certain required money, and that this alone would disentitle him to relief. The contract by cls. 6, 7 and 9 imposes certain financial obligations on the developer; it does not specifically say that payment of these is a condition precedent to execution or delivery of the documents, and indeed it appears that whatever may have been the interpretation of Delta at the time of the consent injunction and in spite of the similar language used in cls. 6 and 9 ("agrees to pay") it did not then stipulate that the payments in cl. 9(*c*) were a prerequisite. In the absence of clear language or evidence that there is a prior collateral obligation to pay which Nelson has breached, I decline to infer it, as surely such evidence would be available to the court if it were a fact. I have no material before me nor can I speculate as to the precise reasons for the stipulations of the consent injunction or the reasoning which impelled them.

15 In opposition to the injunction it was pressed on me that the principle of *Keay v. Regina (City)* (1912), 5 Sask. L.R. 372, 2 W.W.R. 1072, 6 D.L.R. 327, was applicable, and that the by-law should be proceeded with and Nelson left to his remedy to quash for illegality. In that case Wetmore C.J. said at p. 331:

> ... I agree with what was laid down by Middleton, J., in *London v. Newmarket*, 20 O.W.R. 929, 2 D.L.R. 244, that
>
> > an injunction is an extraordinary remedy, and ought not to be resorted to when there is an appropriate remedy in a motion to quash.
>
> I may merely add that, in my opinion, when there is a procedure provided by statute which will *practically* serve the same purpose as an injunction, the injunction ought not to be granted. I am of the opinion that a proceeding under sec. 242 of the City Act [R.S.S. 1909, c. 84] would practically serve every purpose that the injunction would serve. If the city council acted wrongly or without authority, and a proceeding is properly taken, under sec. 242, the by-law would be quashed (or I must assume that it would), and any act done by the city under it would fall with it. There was no necessity for proceeding before the by-law passed that I can see.

(The italics are mine.)

16 But note that the alternate remedy must "practically serve the same purpose as an injunction". Will it in this case? I think not. If the by-law is passed, on the face of it Delta would be in breach of contract, and while a damage action would lie I do not think that in this case of a development contract in a form now abolished by statute, interrelated as it is with other contracts, damages are an adequate remedy. The contract is unique and can never be replaced and, if cancelled, it is gone forever.

17 In *Lawrason v. Dundas* (1920), 18 O.W.N. 22, the new municipal council passed a by-law annulling a previous by-law which authorized two contracts. Latchford J. said [p. 23]:

In the following year, on the 7th July, the municipal council, then differently constituted passed a by-law, No. 845, which, after reciting that the two agreements were entered into and made part of by-law 828, that nothing had been done under the agreements, that the ratepayers did not favour but opposed them, and that the council considered them detrimental to the best interests of the townspeople, purported to repeal by-law 828.

In this action the plaintiff asked that by-law 845 should be set aside and quashed, that an injunction be issued restraining the defendants from acting under it, and that by-law 828 be declared valid and binding on it.

By sec. 283 of the Municipal Act [R.S.O. 1914, c. 192], the Court, upon application of a person interested, is empowered to quash a by-law for illegality.

Reference to *Connor v. Middagh; Hill v. Middagh* (1889), 16 O.A.R. 356 at 368.

By-law 845 was not illegal, in the learned Judge's opinion: it purported merely to repeal a by-law which the plaintiff relied on as validly passed. The council has power, without acting illegally, to repeal a by-law which it has power to pass.

What was intended to be alleged by the plaintiff was, that by-law 845 was ineffective; and what he sought was in effect a declaration that in 1919 the council could not and did not derogate from the contracts made by the council, though differently constituted, in the previous year.

That a municipal council of one year is not bound by the contract of the same council in a previous year is a proposition which has no merit but that of novelty. A corporation is as fully bound by a contract which it has power to make as an individual: Halsbury's Laws of England, vol. 8, p. 379; and the corporation in 1919, though the council was differently composed, was the identical corporation which contracted with the plaintiff.

18 I agree with Murphy J. of this court in *Burnaby v. B.C. Elec. Ry.* (1913), 3 W.W.R. 628, 12 D.L.R. 320, that the principles of law applicable to this application are not those applicable to quashing by-laws but those applicable to contracts. This contract contains no express negative covenants on the part of Delta; but as it deals with real property and grants specific rights of user and is specifically enforceable, in my view a negative covenant should be implied: that Delta will not adversely alter the rights it has granted, in accordance with the principle expressed in 21 Hals. (3d) 389-91, paras. 816 to 818. Nelson has a right of property in these covenants and should have his order.

19 I would have granted the injunction without further consideration for the above reasons, but I have been obligated to reflect on two matters which have given me pause.

20 As Nelson comes to an equitable court his conduct is relevant. I have searched the material and considered statements at the hearing. If surmise were permitted, the relationship between the cheques, the credit inquiry and the re-execution of the by-law before knowledge of the stop order might raise suspicions concerning the applicant's bona fides. But Spry on Equitable Remedies at pp. 370-71 states:

> It is not uncommon to find broad statements that a plaintiff in equity will not be granted an injunction if he does not have clean hands. Properly understood, these statements are doubtless correct; but they should be applied cautiously, for it is by no means true that a plaintiff who has acted unconscionably will be refused all access to courts of equity or that he will be considered there to be caput lupi for all purposes and to be beyond protection. The court will decline to intervene only if the inequitable conduct in question is shown to have had 'an immediate and necessary relation' to the relief which is sought. The principle upon which courts of equity act is that protection will be denied the plaintiff 'where the right relied on, and which the court of equity is asked to protect or assist, is itself to some extent brought into existence or induced by some illegal or unconscionable conduct of the plaintiff, so that protection for what he claims involves protection for his own wrong. No court of equity will aid a man to derive advantage from his own wrong, and this is really the meaning of the maxim.'

21 There was no allegation that either the contract or passage of the by-law had been obtained by fraud or breach of a prior collateral contract. In the absence of substantial evidence of these matters, I will not deprive Nelson of his remedies, and so I grant the injunction asked for.

22 The second matter is that Nelson has declined to give an undertaking as to damages, and indeed stated pretty specifically that he was financially unable to do so. The practice has perhaps altered. Prior to the passage of the new rules the undertaking as to damages in an interlocutory matter was exacted as a matter of practice of the court and not enshrined in a rule. The only British Columbia case I have been able to find which deals with the history of the practice is *New Vancouver Coal Co. v. E. & N. Ry. Co.* (1898), 6 B.C.R. 222. Martin J. (later C.J.B.C.) there concluded that previous British Columbia practice had not invariably required the undertaking, but in view of the English and Ontario cases there cited to him he considered himself practically deprived of any discretion and ordered the undertaking. It was succinctly put in *Tucker v. New Brunswick Trading Co. of London* (1890), 44 Ch. D. 249 at 253 (C.A.), that "an undertaking is the price of the injunction". This uncompromising view appears to have been followed in more modern times in Ontario, and was commented on unfavourably by Miller C.J.M. in the Manitoba case of *Man. Dental Assn. v. Byman* (1962), 39 W.W.R. 608 at 611, 34 D.L.R. (2d) 602 (C.A.), though he felt compelled to require the commitment.

23 The cases uniformly express the requirement as a matter of practice of the court. The matter is discussed in Spry (op. cit.) from pp. 435-41 in detail, and the author emphasizes the nearly invariable practice; but significantly enough he says at p. 437:

> It has indeed been suggested that an undertaking as to damages 'ought to be given on every interlocutory injunction', but it is the preferable view that in exceptional cases this course may be found to be either unnecessary or else otherwise inappropriate. Thus on one occasion it was said by North J., 'If in the exercise of his discretion a judge should think fit to dispense with such an undertaking he could of course do so, and there are cases in which judges have done so; but this would only be under special circumstances.' Indeed, in the absence of a contrary intention, an order granting an interlocutory injunction is made on the implied condition that a undertaking by the plaintiff in the ordinary form will be duly given, and such an undertaking will therefore be included in the formal order of the court when it is drawn up; and similarly, where no injunction is granted, but instead an undertaking is given by the defendant not to perform the particular acts which are complained of before the matter is finally disposed of at the final hearing, it is assumed in the absence of a contrary indication that an undertaking as to damages is given by the plaintiff.

24 The authority for the statement of North J. is *A.G. v. Albany Hotel Co.*, [1896] 2 Ch. 696 at 700 (C.A.).

25 The framers of the new rules have apparently adopted this view: R. 45(6) reads:

> (6) Unless the Court otherwise orders, an order for an interlocutory or interim injunction shall contain the applicant's undertaking to abide by any order which the Court may make as to damages.

26 Acutely conscious of the fact that I can find no previous reported British Columbia decision on this point, I so "otherwise order" that an undertaking in this particular set of circumstances not be exacted. Obviously the particular facts and legal arguments of each individual case must be closely considered and the relative strengths of the parties' cases and the balance of convenience weighed. The applicant appears to me to have a strong case for breach of contract where damages will not alone be an adequate remedy. He faces a municipal body which commenced this action for specific performance of the agreement, which is the same position adopted by the applicant. Later the municipality changed its posture and is endeavouring to cancel the agreement. One wonders whether, even if Nelson is wrong, any real damage would accrue to the municipality by the granting of this interlocutory injunction. I have also considered the detailed reasoning of Lord Diplock in *Amer. Cyanamid v. Ethicon*, [1975] A.C. 396, [1975] 1 All E.R. 504 at 510-11 (H.L.), and find this at the latter page:

2006 PESCAD 16
Prince Edward Island Supreme Court (Appeal Division)

Diversified Metal Engineering Ltd. v. Trivett

2006 CarswellPEI 34, 2006 PESCAD 16, 258 Nfld.
& P.E.I.R. 13, 30 C.P.C. (6th) 299, 779 A.P.R. 13

ANDREW TRIVETT (APPELLANT) AND DIVERSIFIED METAL ENGINEERING LIMITED (RESPONDENT)

G.E. Mitchell C.J.P.E.I., J.A. McQuaid, L.K. Webber JJ.A.

Heard: June 27, 2006
Judgment: August 1, 2006 *
Docket: S1-AD-1078

Proceedings: reversing *Diversified Metal Engineering Ltd. v. Trivett* (2005), [2005] P.E.I.J. No. 49, 14 C.P.C. (6th) 258, 2005 PESCTD 38, 2005 CarswellPEI 55, 746 A.P.R. 328, 250 Nfld. & P.E.I.R. 328 (P.E.I. T.D.)

Counsel: Murray L. Murphy, Michael G. Drake for Appellant
John K. Mitchell, Q.C., Rosemary Scott, Q.C. for Respondent

***McQuaid J.A.*:**

1 The appellant, Andrew Trivett, Sc.D., P.Eng. ("Dr. Trivett") is presently an associate professor in the Department of Engineering at the University of Prince Edward Island. He also carries on an engineering consulting business. The respondent Diversified Metal Engineering Limited ("DME") is involved in the metal design and fabrication business in Prince Edward Island.

2 In 1997 and in concert with his father, Dr. Trivett began working on the development of exhaust scrubbing technology for application on the smokestacks of marine vessels. Such exhaust scrubbing technology had been used for years in removing certain gases contained in emissions from smokestacks and Dr. Trivett's father had been active in developing this technology. The technology, however, had never been adapted for use on the exhaust systems of marine vessels.

3 Time appears to be of the essence in the efforts of various companies to establish effective exhaust scrubber technology for use on marine vessels due to the fact that new pollution control regulations were scheduled to come into effect in Europe and around the world in 2006. These new regulations will require marine vessels to significantly reduce sulfur and nitrogen oxide emissions.

4 In 1997, after designing an exhaust scrubber system for marine use, Dr. Trivett began to manufacture and test it. He secured an agreement to install the system on the CCGS Louis St. Laurent, the largest icebreaker in the Canadian Coast Guard fleet and one of the largest diesel powered icebreakers in the world. He also secured the required funding from various sources and he sought proposals from three companies to manufacture the unit. He settled upon the proposal made by DME.

5 Accordingly, DME constructed the unit, identified as the i400 Exhaust Reactor. It was installed on the Louis St. Laurent for trial purposes. The operation of the unit proved to be successful.

6 In 1998, Dr. Trivett's father and some of his associates, incorporated another company known as Marine Energy Limited for the specific purpose of manufacturing and marketing the marine exhaust scrubber technology developed by Dr. Trivett. In 1999 DME and Marine Energy entered into various agreements. By these agreements DME was to acquire a minority interest in Marine Energy and DME was to be the exclusive manufacturer of the marine exhaust scrubber. The relevant agreements do not provide DME with any rights to the technology invented by Dr. Trivett and it is prohibited from disclosing any information relating to the technology to third parties. Dr. Trivett and his father applied for a patent on the technology and it was issued to them in 2001.

7 Between 1999 and 2001 and in the course of his work developing the technology, Dr. Trivett made many business contacts including one with BP Marine Ltd. ("BP") which is one of the largest suppliers of fuel for the shipping industry. He also developed a modified design of his patented technology which included the unique construction of an interior mechanism using horizontal vanes in which exhaust gases would mix with sea water. This facilitated the removal of sulphur dioxide from the gases. The relationship Dr. Trivett had with DME continued over this period by virtue of the agreements between DME and Marine Energy.

8 In April 2001 the relationship changed in that Dr. Trivett became an employee of DME and he assigned all rights to the modified design to DME. He also signed an employment contract for a term of two years.

9 It is apparent from the affidavit evidence of both Dr. Trivett and Mr. Peter Toombs, the president of DME, that the modified design was further developed by DME during the time of Dr. Trivett's employment. DME subsequently made application for a patent for marine exhaust scrubbing technology based on this modified design. It is known as the "EcoSilencer" and it is based upon different technology than that found in the patent held by Dr. Trivett and his father. Dr. Trivett was an integral part of the development of the EcoSilencer and he is listed on the patent application as the "inventor." DME also incorporated a company, Marine Exhaust Solutions Inc. to market the "EcoSilencer." There is no evidence DME has ever been granted the patent.

10 In 2003 DME entered into a contract with BP and P & O Ferries Ltd. (P & O), the leading ferry operator in the United Kingdom and a major consumer of the fuel supplied by BP. Under this contract DME would build eight EcoSilencer units and install one of them on a ship owned by P & O and known as the "The Pride of Kent." In the course of their relationship, DME provided BP as well as P & O with confidential information related to the development and operation of the EcoSilencer. To protect its rights in the technology, DME had both companies sign confidentiality agreements.

11 The evidence is divergent on the extent to which Dr. Trivett was involved in the contract DME had with BP and P & O. Mr. Toombs states in his affidavit that Dr. Trivett met with personnel from both companies. Dr. Trivett does not deny this. He admits he had contact with personnel from BP even before his contract of employment with DME, and he does state in his affidavit that while he was involved in the installation of the modified design on the "The Pride of Kent," the EcoSilencer had not been actually installed on that ship before he left DME in April 2003. Dr. Trivett also states he was involved in the installation of exhaust scrubbers on other ships, none of which were owned by BP or P & O. Most of this work, he states, was in trying to make the EcoSilencer work and it was not in research and development.

12 In 2003 or 2004 BP indicated that it was severing its relationship with DME and that it was going to pursue its own solution to reduce exhaust gas emissions from marine vessels. In 2005 DME learned that a company incorporated in the United Kingdom known as Kittiwake Developments Limited ("Kittiwake") had registered domain names using the word "EcoSilencer." DME also learned that the directors of Kittiwake had incorporated a company known as "EcoSilencers Limited" and subsequently changed its name to "Krystallon Limited." Another engineering company, WS Atkins Company Limited ("WS Atkins") was also associated. According to Mr. Toombs, these companies are all related to BP and they are working to develop the exhaust scrubber technology for BP.

13 After the business relationship between DME and BP came to an end, DME entered into a marketing contract with another company.

14 In April 2005 Dr. Trivet informed Mr. Toombs that he was doing some work for BP or related companies. At this time It was also public knowledge that BP was working on the development of its own exhaust scrubber technology. In July 2004 Dr. Trivett had become a "Reviewing Consultant" with Kittiwake. His duties involved reviewing work presented by WS Atkins, conducting literature research and analysing empirical data. Dr. Trivett's evidence is that the design being developed by WS Atkins is not similar to the EcoSilencer and that no information relating to his work with DME or the Modified Design will be used by him in the performance of his duties. At paragraph 40 of his affidavit dated May 13, 2005 Dr. Trivett states:

> 40. I refer specifically to Paragraph 1(a) of DME's Notice of Motion. I have not divulged and will not divulge any information or confidential information related to the business, products, process, know-how, trade secrets, inventions, developments, equipment used, developed or sold by DME, in particular the EcoSilencer (or Modified Design), to Krystallon, Kittiwake, BP, P & O Ferries, WS Atkins, or anyone else.

15 On April 22, 2005 DME commenced an action against Dr. Trivett seeking a permanent mandatory injunction and damages. On May 12, 2005 DME filed a notice of motion seeking an interlocutory injunction. Specifically, the notice of motion read as follows:

> 1. THE MOTION IS FOR:
>
> > (a) an interlocutory injunction prohibiting the Defendant, Andrew Trivett by himself, his agents, his servants or otherwise from divulging any information or confidential information related to the business, products, process, know-how, trade secrets, inventions, developments, equipment used, developed or sold by the Plaintiff, in particular, the EcoSilencer scrubbing technology, to any individual or company including Krystallon Limited, formerly EcoSilencer Ltd., Kittywake Developments Ltd., BP Marine Ltd., P & O Ferries Ltd., and W.S. Atkins company Ltd.

16 The basis for the relief sought was an alleged violation by Dr. Trivett of paragraphs 22 and 23 of the employment contract. They read as follows:

> 22. All inventions and improvements which the Employee may conceive of or make during the period of the Employee's employment by Employer relating to or connected with any of the matters which have been or are the subject of the Employee's investigations while the Employee is employed by Employer, shall be the sole and exclusive property of Employer, and the Employee will, whenever so requested by Employer, whether during or after the Employee's employment, execute any or all applications, assignments, and other instruments which Employer shall deem necessary in order to apply for and obtain patent rights in Canada and other countries for the inventions or improvements. The foregoing obligations shall be binding upon the Employee's heirs, executors, successors and assigns.
>
> 23. All information which the Employee obtains in the course of employment by Employer shall be held by the Employee as trustee for Employer. The Employee will keep secret all information relating to the business, products, processes, know-how, trade secrets, inventions, developments and equipment used, developed, or sold by Employer or any of its customers or any person, firm or corporation with whom Employer has business relations. Upon the termination of this Agreement, the Employee will promptly deliver to Employer any and all data, manuals, notes, records, plans or other documents held by the Employee concerning

such business, products, processes, know-how, trade secrets, inventions, developments and equipment, and the Employee will continue to keep secret all such information. The Employee shall not disclose any secret or confidential information or information which, in good faith and good conscience, ought to be treated as confidential, and of which the Employee became aware in the course of the Employee's employment by Employer relating to Employer, its affiliates, its employees or customers, and/or any person, firm or corporation with whom Employer has business relations. The foregoing obligations regarding confidentiality and trade secrets shall continue beyond the end of the Employee's employment by Employer.

17 The motion judge granted the motion. See: *Diversified Metal Engineering Ltd. v. Trivett*, 2005 PESCTD 38, [2005] P.E.I.J. No. 49 (P.E.I. T.D.). The relevant and restraining provision of the order issued by the motion judge reads as follows:

> 1. THIS COURT ORDERS that the Defendant, Andrew Trivett, by himself, his agents, his servants or otherwise is hereby restrained until final determination of the matters in dispute in this matter being Docket Number S1-GS-20926 from divulging any information or confidential information related to the business, products, process, know-how, trade secrets, inventions, developments, equipment used, developed or sold by Diversified Metal Engineering Limited. In particular, the EcoSilencer scrubbing technology, to any individual or company including Krystallon Limited, formerly EcoSilencer Ltd., Kittywake Developments Ltd., BP Marine Ltd., P & O Ferries Ltd. and W.S. Atkins Company Ltd. save as to information clearly and unequivocably in the public domain from sources other than Defendant.

18 Dr. Trivett appeals from the order on these grounds as set forth in the notice of appeal:

> (a) the Learned Trial Judge erred in law in issuing an interlocutory interim injunction;
>
> (b) the Learned Trial Judge erred in law in finding the Plaintiff established a serious issue to be tried or, alternatively, a strong *prima facie* case;
>
> (c) the Learned Trial Judge erred in law in finding the Plaintiff would suffer irreparable harm if an injunction was not issued;
>
> (d) the Learned Trial Judge erred in law in finding that the balance of convenience favoured granting an injunction;
>
> (e) the confidentiality and non-competition provisions contained in an employment contract dated 1 May 2001 between the Plaintiff and Defendant, which the Plaintiff relied on in support of its motion, are unenforceable;

(f) the Learned Trial Judge erred in law in issuing an injunction after finding, as a fact, that the Defendant is an honest and honourable person, together with the Defendant's uncontradicted evidence that he did not disclose confidential information;

(g) the Learned Trial Judge erred by failing to particularize the activities that the Defendant is, and is not, enjoined from carrying out;

(h) the Learned Trial Judge erred in law by issuing an injunction on the basis of no evidence;

(i) such further and other grounds as counsel may advise.

Issue

19 The issue in this appeal is whether the motion judge made a reviewable error in the application of the test for granting interim injunctive relief.

Disposition

20 With respect, I am of the opinion the motion judge made such an error. I would, therefore, allow the appeal and set aside the order of the motion judge.

Analysis

21 The granting of an interlocutory injunction involves the exercise of discretion by the motion judge. On appeal it is not the function of this court to interfere solely on grounds that the court would exercise the discretion differently. Only if the motion judge's exercise of discretion is based on a misunderstanding of the law or of the evidence before him, will an appellate court have the jurisdiction to interfere with the exercise of discretion. An appellate court may not merely substitute its opinion for that of the motion judge. See: *Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832*, [1987] 1 S.C.R. 110 (S.C.C.) at para. 109.

22 With respect, it is my opinion that the interlocutory injunction ordered by the motion judge is reviewable because it is clearly wrong in the sense that in exercising his discretion the motion judge erred in principle when he concluded DME adduced evidence which was capable of establishing the various tenets of the legal test for granting interim injunctive relief. This court, therefore, has the jurisdiction to intervene.

23 The test to be met by an applicant seeking an interim or interlocutory injunction is well known. It originates with the House of Lords decision in *American Cyanamid Co. v. Ethicon Ltd.*, [1975] 1 All E.R. 504 (U.K. H.L.). In two cases the Supreme Court of Canada confirmed that the characteristics of an interlocutory injunction and a stay of proceedings are sufficiently similar in character that the granting of a stay of proceedings should be governed by the same test as those

for granting an interlocutory injunction. See: *Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832 supra* and *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.). Furthermore, in *RJR-MacDonald* the court confirmed at para. 44 that the *American Cyanimid* standard is now generally accepted in Canada as the test to be met in deciding whether to grant interim injunctive relief. The test has three stages and it is as follows: (1) Does the case raise a serious issue for trial? (2) Does the balance of convenience lie in favour of granting or refusing the interlocutory in junction? (3) Will the applicant suffer irreparable harm if the interlocutory injunction is not granted?

24 As the Court also pointed out at para. 44 of *RJR-MacDonald*, prior to the decision of the House of Lords in *American Cyanimid*, the first stage of the test required an applicant to establish there was "strong prima facie case." With the decision in *American Cyanimid*, the first stage of the test was reformulated to require the applicant to establish there was a "serious issue to be tried." Lord Diplock stated at p. 510:

> Your Lordships should in my view take this opportunity of declaring that there is no such rule. The use of such expressions as 'a probability,' 'a prima facie case,' or 'a strong prima facie case' in the context of the exercise of a discretionary power to grant an interlocutory injunction leads to confusion as to the object sought to be achieved by this form of temporary relief. The court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried.
>
> It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial. One of the reasons for the introduction of the practice of requiring an undertaking as to damages on the grant of an interlocutory injunction was that 'it aided the court in doing that which was its great object, viz abstaining from expressing any opinion upon the merits of the case until the hearing' (***Wakefield v. Duke of Buccleuch***). So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.

25 In both the *RJR-MacDonald* and *Metropolitan Stores*, the Supreme Court of Canada confirmed that with only a few exceptions, the first stage of the test for granting interim injunctive relief requires an applicant to cross the threshold of establishing there is a serious issue to be tried. The exceptional cases where "the strong prima facie case" threshold may apply were discussed in *RJR- MacDonald* at paras. 51 to 56. The essential difference in the two is that with the "strong prima facie case" threshold the court is required to undertake a closer analysis of the merits of

the case before granting the interim relief. On the other hand, with the "serious issue to be tried" threshold the court is not required to examine the merits of the case as closely.

26 Counsel for both DME and Dr. Trivett presented many authorities on the application of these exceptions to the facts of this case. It is unnecessary for purposes of deciding this appeal to enter into a discussion of the exceptions and an analysis of whether they apply to the facts of this case. I am satisfied that at the first stage of the test that DME, as the applicant, was required to establish there is a "serious issue to be tried" before the court was required to move on to consider the other two stages of the test.

27 By its statement of claim DME seeks a permanent injunction restraining Dr. Trivett from disclosing confidential information to the company or companies with whom he is now associated. All are alleged to be in competition with DME for the development and manufacture of marine exhaust scrubber systems. The essential issues in the proceeding are founded on the allegations of DME that Trivett is in possession of "confidential information" belonging to DME; that he is disclosing this information to the company or companies with which he is now associated; and such disclosure, if it is proven to have occurred, violates the above provisions of the employment contract.

28 In seeking interim injunctive relief DME had to first establish the above constituted serious issues for trial. It had the onus of adducing some evidence which, on only a cursory review, would show that DME would be in a position to prove the above allegations at trial.

29 At paragraph 23 of his reasons, the motion judge identified the serious issue for trial as being "..the question of what information can and cannot be disclosed..." pursuant to the above provisions of the employment contract between the parties. This is a mis-characterization of the serious issue to be tried, and it constitutes an error in principle on the part of the motion judge.

30 This is only one issue that DME would have to prove at trial. The additional and more crucial issues are whether the information Dr. Trivett did possess, when it is defined, is information he possessed only as the result of his employment with DME and whether he is in fact disclosing this information to the companies with which he is now associated. In summary, to establish that the claim of DME for a permanent mandatory injunction based on a breach of paragraphs 22 and 23 of the employment contract raises a serious issue for trial, DME had the onus of adducing at least some evidence that even on the most cursory review would show that Dr. Trivett has violated those provisions.

31 Not only did the motion judge mis-characterize the serious issue for trial, he failed to recognize there was no evidence before him that Dr. Trivett had ever disclosed, or will ever disclose, information he obtained as the result of his employment with DME. There is no evidence that Dr. Trivett has ever, or will ever, disclose information regarding the EcoSilencer. While there was some evidence that Dr. Trivett may be in possession of information which might qualify

as confidential information (e.g. information acquired from testing the EcoSilencer), there is no evidence he is disclosing or has disclosed this information to third parties.

32 Indeed, there is evidence to the contrary from Dr. Trivett himself that he is not disclosing confidential information obtained through his employment with DME to the company or companies with which he is now associated. Furthermore, the trial judge implicitly accepted Dr. Trivett's evidence because at paragraph 27 of his reasons he found Dr. Trivett to be "... an honourable and honest man...".

33 DME argues there is a reasonable apprehension that Dr. Trivett is, or has, disclosed confidential information to BP and Kittiwake because they are now in the process of developing an exhaust scrubber which will be marketed in competition to DME's EcoSilencer. DME asserts an inference can be drawn that the information to perfect this technology could only have come from Dr. Trivett as the result of his employment with DME. This assertion does not stand up under even the most cursory scrutiny of the evidence which was before the motion judge.

34 Dr. Trivett is in possession of substantial information regarding exhaust scrubbing technology. He acquired much of this before he became employed with DME. He holds a patent for the technology and he was recognized worldwide as expert in the development of this technology before he had any association with DME. Furthermore, this assertion overlooks the fact that DME released much confidential information to BP during the course of their commercial relationship. While there is no such evidence before the court, it is possible this information is now being used or could be used by BP in violation of the confidential information agreements between it and DME.

35 Throughout much of Mr. Toombs' affidavit evidence runs the thread of a complaint against BP and/or Kittiwake for the use of DME's confidential information and breach of their confidentiality agreements. It may well be that DME has a cause of action against these companies; however, this does not constitute evidence there is a serious issue to be tried in the action DME has commenced against Dr. Trivett for damages and a permanent injunction based on an alleged breach of the terms of the employment contract.

36 There also runs through Mr. Toombs' affidavit evidence a thread of concern and dismay that Dr. Trivett is now working for one of DME's competitors in this time sensitive race to design, manufacture and market effective exhaust scrubber technology for use on marine vessels. This is a legitimate commercial concern; however, it completely overlooks the legal effect of relevant clauses in the employment contract. They are not clauses in restraint of trade or non-competition clauses. It is very important they not be given this effect.

37 Dr. Trivett was free to work for whomever he wished upon the termination of his employment contract. He was, however, restrained from disclosing to those with whom he worked confidential information he obtained during the course of his employment with DME. The contract continues to restrain him in this respect.

38 It may well be that evidence can be adduced at trial to prove there is disclosure of confidential information on the part of Dr. Trivett and that this constitutes a breach of the provisions of the employment contract. However, on the motion for interim relief, pending the outcome of the claim for permanent relief, there was no evidence which would establish that this claim raised a serious issue for trial. In the words of Lord Diplock at page 510 of the *American Cyanamid* decision "... the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at trial..." Accordingly, it will be unnecessary to consider whether DME will suffer irreparable harm from the denial of the interlocutory relief or where the balance of convenience lies between the parties.

39 In conclusion, it is unnecessary to address any of the remaining grounds of appeal. The appeal is allowed. Dr. Trivett shall have his costs throughout on a partial indemnity basis. If the parties are unable to agree on the quantum of costs within 60 days of this date, they may make written submissions to the court and costs will be assessed.

***Mitchell J.A.*:**

I agree.

***Webber J.A.*:**

I agree.

Appeal allowed.

Footnotes

∗ Correction issued by the Court on September 13, 2006 has been incorporated herein.

1993 CarswellAlta 224
Alberta Court of Queen's Bench

Edmonton Northlands v. Edmonton Oilers Hockey Corp.

1993 CarswellAlta 224, [1993] A.J. No. 1001, [1994] A.W.L.D. 143, 147
A.R. 113, 15 Alta. L.R. (3d) 179, 23 C.P.C. (3d) 49, 44 A.C.W.S. (3d) 1086

EDMONTON NORTHLANDS v. EDMONTON OILERS HOCKEY CORP.

Moore C.J.Q.B.

Judgment: December 20, 1993
Docket: Docs. Edmonton 9303-22201, 9303-23024

Counsel: *L.A. Desrochers, Q.C.*, and *F.F. Slater*, for plaintiff (defendant by counterclaim).
C.D. O'Brien, Q.C., and *E.B. Mellett*, for defendant (plaintiff by counterclaim).

***Moore C.J.Q.B.*:**

1 The parties have filed cross-applications. The Defendants (the "Oilers") apply to discharge an interim injunction Order granted ex parte to the Plaintiff ("Northlands") on November 8, 1993. The Oilers also apply to strike a second action, commenced by Northlands on identical terms on November 19, 1993.

2 Northlands, by motion, seeks an Order dismissing the application filed by the Oilers to set aside the interim injunction, and further asks that the two actions be consolidated. In the alternative, if the injunction from the first action is dissolved, Northlands asks the Court to grant an interim injunction in the second action, similar to the one previously granted in the first action.

The Facts

The Parties

3 The plaintiff, Edmonton Northlands, is the lessee, under a lease agreement with the City of Edmonton, of a recreational facility known as the Northlands Coliseum.

4 The defendant is the owner of a member franchise of the National Hockey League, known as the Edmonton Oilers. Pursuant to the bylaws of the NHL, the location at which the Oilers are scheduled to play their home hockey games and playoff games is determined by the NHL Board of Directors prior to the commencement of a particular season.

The Licence Agreement

5 On September 15, 1984, Northlands entered into an agreement (the "Licence Agreement") with the Oilers, whereby the Oilers would play home hockey games and home playoff games in the Northlands Coliseum until the end of the 1988-89 NHL hockey season. The Licence Agreement was amended by a variation agreement, in writing, as of September 26, 1986. It is common ground that, except for extending the duration of the Licence Agreement until the end of the 1998-99 NHL hockey season, the variation agreement does not impact on the instant case in any material way.

Subsequent Negotiations

6 In 1990 and 1991, the Oilers entered into negotiations with Northlands with a view to amending the Licence Agreement, on terms more favourable to the Oilers. These negotiations ceased in November 1991.

7 On April 27, 1993, the Oilers publicly announced that it had received an offer from the City of Hamilton and Copps Coliseum to move the Oilers to that centre for the 1993-94 hockey season.

8 By early May 1993, negotiations had reopened between Northlands and the Oilers. During these negotiations, Economic Development Edmonton, a company operating under the auspices of the City of Edmonton, acted as facilitator.

9 The parties disagree as to whether or not the results of these negotiations created a binding agreement between them. The position of Northlands is simply that no contract was formed. On the other hand, the Oilers assert that, on May 13, 1993, the parties orally agreed to the essential terms of a contract, which set aside and replaced the written Licence Agreement.

10 Within a few weeks, negotiations apparently came to a impasse.

11 On September 16, 1993, the Oilers commenced an action against Northlands seeking a declaration that the Licence Agreement had been terminated, specific performance of the alleged oral agreement of May 13, 1993, and consequential damages in the sum of $135,000,000.

The "Standstill Agreement" of September 24, 1993

12 On September 20, 1993, counsel for Northlands advised counsel for the Oilers that Northlands was prepared to continue negotiations to resolve the differences between the parties on the condition that the Oilers discontinue the action of September 16, 1993, and the Oilers agreed to make payments, without prejudice, for their ongoing use of the Northlands Coliseum, in an amount equal to 12% of the gate ticket receipts.

13 On September 23, 1993, a draft letter was delivered by counsel for the Oilers to counsel for Northlands, setting out the basis upon which the action of September 16, 1993 would be discontinued and payments made to Northlands. The draft letter was returned that same day with handwritten notations requested by counsel for Northlands.

14 The changes requested by Northlands' counsel were incorporated into a letter dated September 24, 1993, delivered by counsel for the Oilers to counsel for Northlands. It is common ground that the conditions as outlined by this letter were accepted by Northlands.

15 Paragraph (d) of the letter reads as follows:

> d) Edmonton Northlands will take no steps to enforce any rights they may have *while negotiations are ongoing*, i.e. until one of the parties signifies in writing to the other that negotiations are terminated. [The emphasis is mine.]

The Ex Parte Injunction

16 On or about November 3, 1993 the Oilers filed a formal application with the National Hockey League to permit the Oilers to move after the present season. On that date, Mr. Peter Pocklington publicly announced the filing, and also announced the Oilers would commence playing home games in Minneapolis in the 1994-95 season.

17 Northlands appeared before me in chambers on November 8, 1993, ex parte, seeking an interim injunction enjoining the Oilers from playing hockey games in any location other than the Northlands Coliseum, or taking any steps preparatory to doing so. A nine-page affidavit, containing thirty paragraphs and supported by nine important exhibits, was placed before the court. The deponent was Mr. Colin Forbes, the General Manager of Northlands.

18 The Court granted an interlocutory injunction allowing either party to apply to vary the Order on 48 hours notice. The Order enjoined the Oilers from playing hockey at any location other than the Northlands Coliseum, and barred the Oilers from taking any steps preparatory to playing its home hockey games other than in the Coliseum.

19 It was subsequently discovered that, prior to the commencement of this action, Northlands had not given written notice directly to the Oilers that negotiations had been terminated.

Subsequent Litigation

20 The Oilers filed a Statement of Defence and Counterclaim on November 18, 1993.

21 The Oilers further applied by Notice of Motion, on November 18, 1993, returnable on December 6, 1993, for an Order discharging the injunction, and staying the first action and all proceedings thereunder.

22 Northlands commenced a second action, on November 19, 1993, by filing a Statement of Claim identical in form and substance to that of November 8, 1993. On November 19, 1993, Northlands served the Oilers with written notice pursuant to para. (d) of the September 24, 1993 letter, and also filed a Notice of Motion, returnable December 6, 1993, seeking an Order consolidating both actions, and continuing the injunctive relief.

23 The Oilers filed a Notice of Motion, on November 26, 1993, returnable December 6, 1993, petitioning the Court for an Order to strike out or stay the second action and all proceedings thereunder.

24 In November it was agreed that all matters be scheduled for December 6, 1993, to resolve all procedural and substantive interlocutory issues at that time.

The Procedural Matters

The Second Action

25 Northlands, out of an abundance of caution, commenced a second action on November 19, 1993 by filing a Statement of Claim identical in form and substance to that filed to commence the first action.

26 The courts of Alberta generally recognize a rule against multiple prosecution. It is trite law that commencing a second action while one is currently pending is an abuse of process: *German v. Major* (1985), 62 A.R. 2, 39 Alta. L.R. (2d) 270, 20 D.L.R. (4th) 703, 34 C.C.L.T. 257 (C.A.).

27 Since the same relief can be obtained in the first action, Northlands is not entitled to bring a second action while the first is still pending: *Great Pacific Contracting Ltd. v. Harwyn Properties* (1981), 29 B.C.L.R. 145, 21 C.P.C. 280 (S.C.).

28 In my view, the second action must be set aside. I note that counsel agreed there was no legal impediment to the use of the affidavit evidence produced for the second action, to resolve the applications on the first action, as all requirements as to notice were met.

The Alleged Breach of the Standstill Agreement

29 The Oilers claim that the first action taken by Northlands was brought in direct violation of para. (d) of the Standstill Agreement, and that no written notice of the termination of negotiations was received prior to the commencement of the action.

30 As a rule, when the court hears an application to set aside an ex parte order, it should hear the motion de novo as to both the law and the facts involved: *Gulf Islands Navigation v. Seafarers' International Union of North America (Canadian District)* (1959), 28 W.W.R. 517, 18 D.L.R. (2d) 625 (B.C.C.A.); *Burns & Dutton Concrete & Construction Co. v. Dominion Insurance Corp.* (1966), 57 D.L.R. (2d) 327 [55 W.W.R. 619] (B.C.C.A.).

31 Even if the order should not have been granted ex parte, the court may refuse to set it aside if the material shows that it would have succeeded on notice: *Rempel v. Althouse*, [1984] 5 W.W.R. 246, 34 Sask. R. 281, 45 C.P.C. 131 (Q.B.), per Batten C.J.Q.B.

32 The issue that arises before me now is whether the actions of Northlands are of such gravity and effect as to displace the general discretion of the court in these matters. Counsel for the Oilers urges the Court to hold that the ex parte application was brought without proper notice to the Oilers and without disclosure of all material facts, and as a result was brought in violation of a specific agreement.

33 The Oilers rely on a line of authority to be found in *Canadian Pacific Railway v. U.T.U., Local 144* (1970), 14 D.L.R. (3d) 497 (B.C.S.C.); *Gulf Islands Navigation v. Seafarers' International Union of North America (Canadian District)* (1959), 18 D.L.R. (2d) 216, 27 W.W.R. 652 (B.C.S.C.) ; and in *Griffin Steel Foundries v. C.A.I.M.A.W.*, [1978] 1 W.W.R. 35, 5 C.P.C. 103, 80 D.L.R. (3d) 634 (Man. C.A.), which suggests that such an omission is "fatal".

34 This thinking is best summarized in the following statement of Wilson J. of the British Columbia Supreme Court in *Gulf Islands*, supra, at pp. 653-54 (W.W.R.):

> I find there is some divergence of judicial thought as to the grounds upon which an *ex parte* order ought, upon notice, to be discharged. The area of divergence does not include such generally accepted fundamental concepts as this: That the *ex parte* order is obtained *periculo petentis* so that if there has not been made to the judge a full and frank disclosure of the relevant facts, the order will be voided. Sheppard, J.A. in *Kraupner v. Ruby* (1957), 21 W.W.R. 145, at 154, cites Scrutton L.J. in *Lazard Bros. & Co. v. Banque Industrielle de Moscou*, [1932] 1 K.B. 617, 101 L.J.K.B. 65, at 75, affirmed [1933] AC 289, 102 LJKB 191:
>
> > Persons applying *ex parte* to the Court must use the utmost good faith and if they do not, they cannot keep the results of their application.
>
> To emphasize the strictness with which this Rule is applied, I cite from *Re Gedye* (1832), 15 Beav 254, 21 LJ Ch 430, 51 ER 537:
>
> > All matters must be stated. If there is suppression the court will not enquire if it would have been entitled to make the same order but only if the matters omitted required full discussion and notice should be given.

35 I cannot agree that the discretion of the court could be circumscribed to such an extent. I share the view expressed by Nicholas Browne-Wilkinson V.C., who in *Dormeuil Frères S.A. v. Nicolian International (Textiles) Ltd.*, [1988] 1 W.L.R. 1362, [1988] 3 All E.R. 197 (Ch. D.), stated, at p. 1368 (W.L.R.):

> Moreover, there is authority that, contrary to the law as it was originally laid down, there is no absolute right to have an ex parte obtained without due disclosure set aside; there is a discretion in the court whether to do so or not.

36 The judicial practice of invariably discharging ex parte injunctions, if obtained without full disclosure, cannot be allowed itself to become an instrument of injustice: *Lagenes Ltd. v. It's At (U.K.) Ltd.*, [1991] F.S.R. 492 (H.C.J.).

37 Counsel for the Oilers admitted that if the Oilers were to succeed in this action, there is nothing in law to stop Northlands from seeking another interlocutory injunction the very next day, free from any procedural impediments, to be heard only on the merits.

38 The retention and application of the court's discretion to resolve this matter here and now is entirely consistent with the *Judicature Act*, R.S.A. 1980, c. J-1:

> 8 The Court in the exercise of its jurisdiction in every proceeding pending before it has power to grant and shall grant, either absolutely or on any reasonable terms and conditions that seem just to the Court, all remedies whatsoever to which any of the parties thereto may appear to be entitled in respect of any and every legal or equitable claim properly brought forward by them in the proceeding, so that as far as possible all matters in controversy between the parties can be completely determined and all multiplicity of legal proceedings concerning those matters avoided.

39 While Northlands did not give notice pursuant to the standstill agreement, the evidence before the court clearly establishes that negotiations had broken off, making the need for such notice somewhat redundant. The Oilers had taken the overt act of applying to the NHL to move the team, and had publicized this fact in the media. If the non-disclosure was material at any point in time, it certainly became immaterial having regard to the announced action of the Oilers in filing an application to move the franchise and the public statements of the Oilers. The inadvertent breach was rectified immediately when discovered, and there is no evidence to indicate that the Oilers suffered any prejudice.

40 In my view, the non-disclosure was not material in its effect on the parties, or their relationship.

41 Even if the effect of the non-disclosure was material, that does not, under the circumstances, afford the Oilers automatic relief. While clearly there is an important duty on parties making ex parte applications and any breach of such a duty must be weighed in relation to the merits of the case. I adopt the observations of Mr. Justice Slade of the Court of Appeal, in *Brink's-MAT Ltd. v. Elcombe*, [1988] 1 W.L.R. 1350, [1988] 3 All E.R. 188, where he says, at p. 1359 (W.L.R.):

> Nevertheless, the nature of the principle, as I see it, is essentially penal and in its application the practical realities of any case before the court cannot be overlooked. By their very nature, ex parte applications usually necessitate the giving and taking of instructions and the preparation of requisite drafts in some haste. Particularly, in heavy commercial cases, the borderline between material facts and non-material facts may be a somewhat uncertain one. While in no way discounting the heavy duty of candour and care which falls on persons making ex parte applications, I do not think the application of the principle should be carried to extreme lengths. In one or two other recent cases coming before this court, I have suspected signs of a growing tendency on the part of some litigants against whom ex parte injunctions have been granted, or of their legal advisers, to rush to the *Rex v. Kensington Income Tax Commissioners*, [1917] 1 K.B. 486 as a tabula in naufragio, alleging material non-disclosure on sometimes rather slender grounds, as representing substantially the only hope of obtaining the discharge of injunctions in cases where there is little hope of doing so on the substantive merits of the case or on the balance of convenience.
>
> Though in the present case I agree that there was some material, albeit innocent, non-disclosure on the application to Roch J., I am quite satisfied that the punishment would be out of all proportion to the offence, and indeed would cause a serious potential injustice if this court were, on account of such non-disclosure, to refuse to continue the injunction granted by Roch J. on 9 December 1986.

42 Clearly an alleged non-disclosure, even if material, will not be determinative of the issue: *Canadian Caterplan Ltd. v. 488570 Alberta Ltd.* (1991), 83 Alta. L.R. (2d) 115, 1 C.P.C. (3d) 197, 123 A.R. 316 (Q.B.).

43 Nor does inadvertently breaching the standstill agreement automatically disqualify Northlands from equitable relief, as a failure under the "clean hands" doctrine: *Snell's Equity*, 29th ed. by P. Baker & P. Langan, (London: Street & Maxwell, 1990), at pp. 654-55.

44 This is not a case where Northlands has intentionally misled the Oilers or the Court. Intention is not in issue. The crucial point is not whether notice should have been given, but whether negotiations were over or not. I have already determined, on the evidence before me, that negotiations were at an end. If the breach had any consequences at all, they were not shown to prejudice the Oilers in any way.

45 Jessel M.R. states, in *Besant v. Wood* (1879), 12 Ch. 605, at pp. 627-28:

> It is not every breach of a covenant upon his part which prevents a man coming to a Court of Equity to have covenants enforced. Take a simple instance. A man is a lessee, with a proviso that he may purchase on six months' notice. He does not pay his rent punctually, but that does not prevent his coming here for a specific performance of the purchase. It must not only have some connection with the matter for which performance is sought, but it must be some material and substantial breach as will enable the Court to say his conduct has been such that it ought not to interfere in his behalf at all.

46 In contrast with the deliberate, substantial, uncorrected and prejudicial breaches noted in *Canadian Pacific* and *Griffin Steel*, such an innocent and inconsequential breach as occurred in the instant case surely cannot handcuff the court in the exercise of its discretion. Otherwise this would be an undue circumscription of the discretion of the judge, and no substitute for dealing with the merits of the case, particularly where, as here, it was agreed that all of the interlocutory matters in issue, procedural and substantive, would be settled at this hearing.

47 As stated by Sir Nicholas Browne-Wilkinson V.C., in *Dormeuil Frères*, supra, at p. 1368 (W.L.R.):

> The real question at the time of the inter parties hearing should not be what has happened in the past but what should happen in the future.

48 I must agree with this statement. What is done is done. This procedural argument, relating to the breach of the standstill agreement, is dismissed. I move now to consider the substantive merits of the case.

The Substantive Issues

The Tod Affidavit

49 Northlands has filed two affidavits, one sworn by its General Manager (Mr. Colin Forbes) and a second affidavit by its President (Mr. Gerald Yuen). Both Mr. Forbes and Mr. Yuen have an intimate knowledge of the facts, providing a basis to address the substantive issues of the case.

50 In response, the Oilers have filed an Affidivit of Mr. Brian Tod, a solicitor for the Oilers. It was revealed that Mr. Tod has only been retained by the Oilers since September 16, 1993, and thus has no personal knowledge of any events before that time. Mr. Tod, in making the deposition, relied on advice received from Mr. Werner Baum, a person he has never met, and whose qualifications where unknown to him. Mr. Tod did not have access to any financial statements, budgets, or projections.

51 I have been invited to draw a negative inference from the fact that the Oilers have not filed an affidavit sworn by someone more directly knowledgeable of the facts.

52 If the Court is to draw a negative inference, it is based on the non-production of available evidence that could have been placed before the Court by the Oilers: *Kamitomo v. Pasula* (1983), 29 Alta. L.R. (2d) 375, 25 B.L.R. 60, 50 A.R. 281 (Q.B.).

53 Mr. Baum, the Vice-President of Finance for the Oilers, would himself have been a more obvious choice to swear an affidavit. Indeed, the preferred choice would have been to have an affidavit sworn by Mr. Peter Pocklington, the owner and controlling mind of the Oilers.

54 The type of affidavit filed here by the Oilers deprives Northlands of effective cross-examination: *Kennett v. Gill* (1969), 71 W.W.R. 1, 8 D.L.R. (3d) 386 (Alta. C.A.).

55 It is worth noting *Laurentide Mortgage Corp. v. J.D. Bond Construction Group Ltd.* (1984), 32 Alta. L.R. (2d) 206, 56 A.R. 237, where Master Funduk states, at p. 229 [Alta. L.R.]:

> As indicated in *Sage Publications*, supra, it does not follow that belief in affidavits is always proper. On substantive issues, such as whether or not a mortgage or guarantee were given, such as whether or not the plaintiff did make a loan to the defendant, such as whether or not there has been default, and such as whether or not a representation was made which induced the defendant to enter into a contract, it is appropriate for the defendant himself to give such evidence. It is inappropriate in such cases for the defendant to shelter behind a front man.

56 Clearly Mr. Tod was not privy on all matters of substance and a negative inference can be drawn that his affidavit evidence is insufficient and not effective to contradict the affidavit evidence tendered by Northlands.

The Tripartite Test

57 The prerequisites for granting an interlocutory injunction are as set forth by the House of Lords in *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396, [1975] 1 All E.R. 504, [1975] 2 W.L.R. 316, and later adopted by the Alberta Court of Appeal in *Law Society (Alberta) v. Black*, [1984] 6 W.W.R. 755, 29 Alta. L.R. (2d) 326, 7 Admin. L.R. 55, 8 D.L.R. (4th) 347. In that case, Kerans J.A. states, at p. 758 (W.W.R.):

> The tri-partite sequential test of *Cyanamid* requires, for the granting of such an order, that the applicant demonstrate, firstly, that he has raised a serious issue to be tried; secondly, that he would suffer irreparable harm if no order was granted; and thirdly, that the balance of convenience considering the total situation of both parties favours the order.

Serious Issue to be Tried

58 Northlands need only show that the facts support a cause of action which is not "frivolous or vexatious". As Lord Diplock expressed in *Cyanamid*, supra, at p. 510 (All E.R.):

> It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial ... So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.

59 The claim Northlands is making is based on an anticipatory breach of the Licence Agreement by the Oilers. Specifically, Northlands claims that the Oilers have threatened to default on a clause in the Agreement requiring the team to play their home hockey games in the Northlands Coliseum.

60 Counsel for the Oilers say that the Licence Agreement was set aside by an oral agreement of May 13, 1993. They further state that if the Licence Agreement remains operative, a breach of the home games clause only gives Northlands the right to terminate the Agreement, and also that the clause is unenforceable as a restrictive covenant.

61 Counsel for both parties examined the Licence Agreement clause by clause to offer to the Court their alternative interpretations of particular sections, and the Agreement as a whole. The court was also treated to an equally thorough analysis of negotiations leading up to May 13, 1993, as to whether some accord was reached at that time to replace the Licence Agreement. On the evidence placed before me, I am satisfied that these are serious and complicated issues which must be referred to a trial judge for resolution.

62 The material before me clearly illustrates the existence of a long standing Licence Agreement, and the alleged breach of this Agreement gives rise to a real prospect of obtaining a permanent injunction at trial.

63 Suffice it to say that nothing in the material available to the court persuades me that Northlands does not have a real prospect of succeeding at trial. In light of the nature of the evidence placed before the Court, serious questions arise in my mind as to whether an oral agreement was formed on May 13, 1993. Clearly important issues have been raised, which should be addressed at trial.

64 Counsel for the Oilers state that an injunction would, in substance, compel the Oilers to carry on business, forcing specific performance of a contract (a mandatory injunction). They say such a mandatory injunction should never be granted in an interlocutory setting, where the terms of the contract cannot be fully interpreted and ruled upon.

65 Counsel for the Oilers also assert that the correct interpretation of the Licence Agreement is that the Oilers have a positive covenant to play hockey games in the Coliseum. In their view, a mandatory injunction should never be granted to compel performance of a positive covenant.

66 It is true that courts are generally loathe to grant injunctions that restrict contracting parties from exercising rights under contracts into which they have voluntarily entered. Indeed courts as a general rule should not and need not conduct ongoing supervision of the parties, and particularly where the court cannot supervise and enforce the whole of the contract, it should not specifically enforce performance of part of it: *S.B.I. Management Ltd. v. Carol Wabush Co-operative Society Ltd.* (1985), 51 Nfld. & P.E.I.R. 257, 150 A.P.R. 257 (Nfld. T.D.).

67 While courts are generally reluctant to grant injunctions restricting contracting parties from exercising their clearly stated rights, they do so notwithstanding. Injunctions are available to restrict parties from exercising rights under a contract, where there is a triable issue as to whether the contract itself is in good standing: *H & S Bookspan Investments Ltd. v. Axelrod* (1984), 47 O.R. (2d) 604, 45 C.P.C. 318 (H.C.).

68 I am of the view that the facts before me are similar to the situation faced by Mason J. in *Delta Hotels Ltd. v. Okabe Canada Investments Co.* (1990), 106 A.R. 185 (Q.B.). In that case, one party claimed a long standing contract was somehow replaced by a new and dubious collateral agreement. Mason J.'s approach is explained, at p. 192:

> Nor do I accept that by granting injunctive relief the court would be ordering specific performance of the Management Agreement or, in effect, be supporting Delta's breach of the Side Letter Agreement. Rather the court is being asked to grant a negative injunction to prevent a breach of the Management Agreement by Okabe. I am persuaded that Sachs, L.J., addressed much the same type of issue in *Evans Marshall v. Bertola*, supra, where at 1007 he stated:
>
> > It is true to say that specific performance of such an agreement will not be ordered, but it is no less plain that the court will grant negative injunctions to encourage a party in breach to keep his contract ...

69 The material before me clearly shows the existence of a long standing Licence Agreement, and the alleged breach of this agreement affords a real prospect of obtaining a permanent injunction at trial.

70 It was alternatively argued by Northlands that there is a line of authority which indicates that where there is a breach of a negative covenant in a contract, the injunction should be granted summarily without regard to irreparable harm or to the balance of convenience.

71 However, in Alberta the standard is clearly "an undisputed breach of a clear negative covenant": *Canada Safeway Ltd. v. Excelsior Life Insurance Co.* (1987), 55 Alta. L.R. (2d) 120, 82 A.R. 316 (C.A.).

72 In my view, the issues dictate the need for a trial.

Irreparable Harm

73 The principle of irreparable harm is set forth by Lord Diplock in *Cyanamid*, supra, as follows, at p. 509 (All E.R.):

> The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at trial ...

74 "Adequately compensated in damages" does not simply mean overcoming evidential difficulties to quantify a damage award. Otherwise, the test of "irreparable harm" would have no meaning. Our courts continually have to arrive at damage awards for non-pecuniary injuries with the aid of very little evidence.

75 The proper interpretation is as enumerated by Kerans J.A. of the Alberta Court of Appeal in *Lubicon Lake Indian Band v. Norcen Energy Resources Ltd.*, *(*sub nom. *Ominayak v. Norcen Energy Resources Ltd.)* [1985] 3 W.W.R. 193, [1985] 3 C.N.L.R. 111, 36 Alta. L.R. (2d) 137, 58 A.R. 161, at p. 145 (Alta. L.R.) [quoting from *High on the Law of Injunction*, 4th ed. vol. 1, p. 36]:

> By irreparable injury it is not meant that the injury is beyond the possibility of repair by money compensation *but it must be of such a nature that no fair and reasonable redress may be had in a court of law and that to refuse the injunction would be a denial of justice*.

[The emphasis is mine.]

76 Equity is what is being sought. The equitable approach is summarized by Sachs L.J. of the English Court of Appeal in *Evans Marshall & Co. v. Bertola S.A.*, [1973] 1 W.L.R. 349, [1973] 1 All E.R. 992, [1973] 1 Lloyd's Rep. 453, at p. 379 (W.L.R.):

> The standard question ... "Are damages an adequate remedy?" might perhaps, in the light of the authorities of recent years be rewritten: "Is it just, in all the circumstances, that a plaintiff should be confined to his remedy in damages?"

77 Northlands does not have to establish that damages will be inadequate, but merely that doubt exists as to whether damages will be adequate in the circumstances. This is well phrased by Hunt

J. in *Amoco Canada Petroleum Co. v. Alberta & Southern Gas Co.*, [1992] 5 W.W.R. 431, 3 Alta. L.R. (3d) 247 at 262 (Q.B.):

> That "doubt" about the adequacy of damages is the proper way to apply the second test seems to me to be logical given the very nature of an interim order. As discussed earlier in regard to the threshold test, it is not the function of a judge at this stage to decide the issues. That, indeed, would be impossible given the limited material that is available. Similarly, in considering irreparable harm, there will of necessity be many unknowns at this stage. *To expect an applicant to prove irreparable harm could detract from one of the basic purposes of an interim injunction*, namely, to preserve the status quo. As stated by Lord Diplock, the relevant question is doubt as to the adequacy of damages. [The emphasis is mine.]

78 I am mindful that doubt as to the adequacy of damages should not be mere conjecture, but must, on the evidence, be shown to have some real risk of occurring: *West Edmonton Mall Ltd. v. McDonald's Restaurants of Canada Ltd.*, unreported, June 17, 1993 (Alta. C.A.) [reported 49 C.P.R. (3d) 539].

79 The affidavit filed in support of Northlands' application does not suffer from the inadequacies of evidence noted in *McDonald's*, supra. For the most part, the depositions have some solid foundation in stated fact.

80 The speculation that was noted in *McDonald's* is not present here. In the instant case, the long standing operation of the Coliseum and the experience of the deponent provide surrounding circumstances that give colour and context to his statements of belief. They have sufficient credence to avoid being labelled as conjecture.

81 Counsel for Northlands has drawn an analogy to several cases where injunctions have been granted to restrain entertainers from appearing elsewhere than originally contracted.

82 As counsel for the Oilers pointed out, the fundamental subject matter of the contract in each case was the personal services of the entertainer. Any argument that Northlands is buying personal services here is very tenuous.

83 In my view, the heart of this issue is whether the contract has an exclusive nature or not. If the subject matter of the contract involves an interest which is somehow unique, or has some exclusive property, this can constitute irreparable harm: *Oracle Resources Ltd. v. Dome Petroleum Ltd.*, [1988] U.A.J. 831 (Q.B.).

84 No evidence has been filed in support of the contention that the subject matter of the contract is unique or exclusive, and I do not think any analogy to the "entertainer" cases is appropriate in the determination of irreparable harm.

85 Where third persons, who are not parties to the proceedings, would be caused damage or inconvenience, it is appropriate that such evidence be considered in the determination of irreparable harm: *Copithorne v. Calgary Power* (1955), 17 W.W.R. 105 (Alta. C.A.).

86 It is for this Court to determine how far this proposition extends in the present case. Northlands has identified several groups of third parties who would be affected if an interim injunction were not provided.

87 Despite representations to the contrary, I do not believe the rights of the public to watch hockey games warrant such consideration in the instant case. As Ruttan J. of the British Columbia Supreme Court said in *Nili Holdings Ltd. v. Rose* (1981), 123 D.L.R. (3d) 454, at p. 465:

> ... I am not convinced the public interest has been unduly injured. Counsel directs her attention to too narrow a field. The persons affected are a relatively small group of devoted jazz listeners. We must consider the community as a whole when we are deciding whether or not a restrictive covenant is against their interests. To deny a community the services of a doctor or a pharmacist or an artisan may create serious inconvenience for lack of necessary or even essential services. Entertainment of the type presented by the defendant does not fall into the category of such an essential service to the community at large.

88 Northlands referred to the significant impact on the company itself, on other vendors, and on employees. It is the uncontradicted evidence of Northlands that the loss of their lead tenant would naturally require the scaling back of operations, and an adjustment of staffing levels. They say an injunction is essential to protect Northlands' interests, since the loss of the Oilers is not merely the loss of a mere licensee, but the Coliseum's major tenant and customer draw.

89 Interference with a going concern constitutes irreparable harm, and the potential for loss of employment is a proper fact to consider: *Tlowitsis-Mumtagila v. MacMillan Bloedel Ltd.* (1990), 53 B.C.L.R. (2d) 69, [1991] 4 W.W.R. 83 (C.A.).

90 Counsel for Northlands also point to third party contracts that will be affected if no injunction exists. The Licence Agreement apparently worked satisfactorily for many years. There is no evidence which calls into question the continued operation of the Agreement from which the Oilers now wish to escape at any cost. It is evident that many commitments were entered into by Northlands, in reliance on the longevity of the Agreement. There will be an obvious disruption of trade, vending and other activities carried on at the Coliseum, caused by a sudden and abrupt change.

91 This is not conjecture, but a common sense assertion. If any conjecture is taking place, it relates to whether Northlands could ever recover its market position. Customers, once lost, may never come back.

92 Where a defendant's actions would impair the plaintiff's relationship with its customers, and irretrievably harm its business, no fair and reasonable redress may be available after trial: *Polesystems Inc. v. Martec Manufacturing Ltd.*, [1989] 5 W.W.R. 697, 67 Alta. L.R. (2d) 159, 96 A.R. 218, 27 C.P.R. (3d) 259 (Q.B.).

93 Counsel for the Oilers say that such contractual claims would be "special damages" which are too remote to claim against the Oilers, as they arise from contracts which post-date the Licence Agreement. That is precisely the point. These contracts, arising out of reliance on the lon gevity of the Licence Agreement, illustrate why damages will not be a fair redress.

94 The most notable of the contracts entered into over the duration of the Licence Agreement are advertising and sponsorship contracts negotiated on the basis of professional hockey being played in the Coliseum.

95 Irreparable harm can arise from injury which would lead to the "total loss of a clearly valuable marketing tool": *R.E. Newman Exploration Consultants Ltd. v. Veritas Geophysical Ltd.* (1989), 32 C.P.C. (2d) 28, 94 A.R. 188 (Q.B.); reversed in part (1989), 66 Alta. L.R. (2d) 317 (C.A.).

96 I am of the view that there is a real probability of irreparable harm to Northlands because of the difficulty and unfairness of attempting to quantify business losses arising by reason of Northlands being deprived of such a marketing tool. In this context, Northlands' interests are worthy of protection beyond mere money damages.

97 Northlands has accrued a significant amount of goodwill arising from the Licence Agreement, and would suffer harm through its breach, jeopardizing its ability to recover.

98 Damages may not be adequate where the injuries suffered would irrevocably injure the reputation, goodwill, or professional standing of a party: *Delta Hotels Ltd. v. Okabe Canada*, supra.

99 The loss of goodwill, the possible litigation arising from the contractual provisions in place, and the difficulty in determining damages over the possible term of the contract all support the position that Northlands should not be confined to a remedy in damages. Northlands' market position would be destroyed, to an extent that it might be very difficult to re-establish.

100 Counsel for Northlands state that if the interim injunction is not granted, the Oilers will move their assets to another jurisdiction, prejudicing the ability of Northlands to recover the damages that would be awarded at trial.

101 Further, one must consider the likelihood that, if damages were fully awarded, they would not or could not be paid, given the financial resources of the Oilers. This cannot be dismissed as mere conjecture, since the Oilers are presently in default on rent under a lease for office space to Northlands.

102 The risk that a damage award, when ultimately granted by the court, might not be collectible, is a valid concern to the Court in determining irreparable harm: *Cyanamid*, supra, at p. 510 (All E.R.); *Bowlen Holdings Ltd. v. R.A. Bradburn Enterprises Inc.* (1991), 2 C.P.C. (3d) 90, 126 A.R. 22 (Q.B.).

103 Weighing all the relevant factors, including the strength of the plaintiff's case, it would not be just if Northlands were confined to a remedy in damages. I very much doubt that money damages, even if they could be calculated, awarded, and collected, would be adequate to protect the reliance interests which have arisen from the expected continuation of the contract.

The Balance of Convenience

104 The Oilers say that during the course of the injunction, they will suffer operating losses, and a major depreciation in the value of the franchise.

105 As has already been alluded to, the evidence in the support of these assertions lacks credibility. More significantly, there is nothing, on the evidence before me, to suggest that any prejudice to the Oilers cannot be remedied by Northlands' undertaking for damages.

106 The "status quo" between the parties is continuing under the Licence Agreement, which has apparently served both parties well for a period extending back into the 1970's. Despite the fact that the Oilers want a better deal, there is no evidence before the court that the original Agreement is defective in any way.

107 Thus, the balance of convenience would not favour the Oilers as they are the party which acted to alter the balance of convenience of their relationship and so affected the status quo.

108 The Court is mindful of the comments of Kerans J.A., in *Ominayak v. Norcen Energy Resources*, supra, where he cautions that an interim injunction is emergent relief, with the claimant seeking a remedy without proof of his claim, before any real harm has occurred.

109 In the instant case, I believe that standard to be met. I am of the view that the need is emergent, and that the granting of the injunction was not premature.

110 The simple fact is that, on November 3, 1993, the Oilers filed a formal application with the National Hockey League to permit the team to move after the present season, and also announced publicly that the team would commence playing home games in Minneapolis in the 1994-95 season. In my view, this constitutes an overt act by the Oilers, which has seriously threatened the operations of Northlands, and prompted Northlands to seek an interim injunction.

111 The Licence Agreement outlines the lead times necessary for the scheduling of hockey games. Timetables are passing quickly and must be adhered to, or every other event the Coliseum

could possibly host will be in limbo. Employees, contractors and advertisers will be adversely affected.

112 Another relevant issue is that the emergent nature of this situation was precipitated mainly by the Oilers' unilateral acts, akin to the situation in *Delta Hotels v. Okabe*, supra. Here, as there, the legal action and the application for injunctive relief are a direct and reasonable consequence of unilateral acts carried out by one party to escape a long standing contract.

113 Finally, I am of the view that, without the injunction, the relative positions of the parties will shift so radically that a trial judge could not reverse the situation.

114 The courts have granted interlocutory injunctive relief available to enjoin actions where the transaction in dispute would otherwise succeed since it could not be undone once completed: *Carlton Realty Co. v. Maple Leaf Mills Ltd.* (1978), 22 O.R. (2d) 198, 4 B.L.R. 300, 93 D.L.R. (3d) 106 (H.C.).

115 In summary, the balance of convenience favours leaving the injunction in place until trial. Any harm that could visit the Oilers before the trial of this issue is completely covered in the undertaking for damages. No other special consideration favours the setting aside of the injunction.

116 On the whole of the evidence before me, I am satisfied that, had notice been given to the Oilers prior to the commencement of the first action on November 8, 1993, and had both parties come before me at that time, the merits of the case would have favoured Northlands, and the interlocutory injunction would have been granted. As nothing has changed, I see no convincing reason why the injunction should not be kept in place until trial.

117 In my view, these issues should be tried quickly. This Court will cooperate with the parties in ensuring an early trial date. If the parties are unable to agree on all of the issues to be put before a trial judge then they may make further representations to the Court to settle the issues to be tried.

118 Costs are a discretionary matter and in my view should be determined by the trial judge.

Applications allowed in part.

1999 CarswellNat 854
Federal Court of Canada — Trial Division

Fournier Pharma Inc. v. Apotex Inc.

1999 CarswellNat 4847, 1999 CarswellNat 854, [1999] F.C.J. No. 504, 1 C.P.R. (4th) 344

Fournier Pharma Inc. and Fournier Industrie et Santé, Plaintiffs and Apotex Inc., Defendant

Tremblay-Lamer J.

Heard: April 8, 1999
Judgment: April 12, 1999
Docket: T-601-99

Counsel: *Mr. Ronald Dimock*, for Plaintiffs.
Mr. Richard Naiberg, for Defendant.

***Tremblay-Lamer J.*:**

1 This is a motion for an interim injunction restraining the Defendant, Apotex Inc. ("Apotex"), from entering the market for micronized fenofibrate in Canada. The Plaintiff, Fournier Pharma Inc. ("Fournier"), currently markets micronized fenofibrate, a drug used to treat high cholesterol, in an orange, hard-gelatin capsule, under the name "Lipidil Micro".

2 On March 29, 1999, Apotex announced that "Apo-Feno Micro", "an alternative to Lipidil Micro", also to be marketed in an orange, hard-gelatin capsule, will be available mid-April 1999.

3 It has been said many times by this Court, that interim injunctions are a rare and exceptional remedy. [1] As stated in *The Kun Shoulder Rest*:

> The granting of interim injunctions is provided for in sub-Rule 469(2) of the Rules [now Rule 374]. It marks a clear departure from the procedural requirements which are applied to standard applications for interlocutory injunction. Both the Rules and the particular nature of an application for an interim injunction require that the applicant demonstrate an urgency of such importance that there is no alternate way to proceed in order to counter the harm that might or is actually occurring. [2]

In addition to establishing the urgency of the injunction, the applicant must also satisfy the standard three part test for an injunction. [3] As the urgency is often directly linked to the irreparable harm,

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I will determine if the plaintiffs meet the three part test, based on the evidence before me, before assessing the urgency of the matter.

4 The threshold to establish a serious issue for trial is low.[4] However, there must be *some* evidence led by the moving party to demonstrate that a serious issue exists. The Statement of Claim contains allegations that Apotex is infringing a trademark owned by the Plaintiffs, in relation to the pending release of Apo-Feno Micro. However, the evidence before me on this motion is inconclusive. I am inclined to cite from the decision of Winkler J. in *Unitel Communications Inc. v. Bell Canada*:

> The evidence before me is very thin soup, so thin in fact as to not disclose a serious issue to be tried.[5]

5 I could find no evidence that Apo-Feno Micro, in its proposed form, would be confused with Lipidil Micro. There was no evidence before me to indicate that the shape, colour and size of the Lipidil Micro capsule have acquired a reputation associated with the product, nor was there any evidence that the general public would be confused. Similarly, the Plaintiffs argued that Apotex's use of the word "micro" in its brand name was either confusing or misleading; yet there was no evidence presented to support this allegation. In my opinion, the Plaintiffs have failed to provide evidence that there is a serious issue to be tried.

6 The second part of the test for an injunction is to demonstrate that the moving party will suffer irreparable harm. I agree with my colleague Dubé J., who stated in *Merck Frosst Canada Inc. v. Canada (Minister of Health)*, that although the threshold for establishing a serious issue will be low, the threshold for showing irreparable harm will be much higher.

> At this stage of the proceedings, and more so where the applicant is merely seeking a ten day injunction, it is not for the motion judge to go very deeply into the merits of the case. Thus, the threshold of serious issue is very low: the motion judge merely has to decide whether or not there is some merit in the sense that it is not frivolous. However, the threshold of irreparable harm is very high. An injunction is an extraordinary remedy. It is discretionary. The Court ought not to grant it merely to favour one side at the expense of another in what is obviously an ongoing battle between two producers on the prescription drug market.[6]

7 In addition, I note that the Federal Court of Appeal has stated, in *Centre Ice Ltd. v. National Hockey League*, that the evidence of irreparable harm must be "clear and not speculative".[7]

8 I find that the Plaintiffs have not established that they will suffer irreparable harm, *within the next fourteen days*, if the interim injunction is not granted. As stated by Dubé J., the relevant period is only that covered by the interim injunction, which has since been extended by the new rules from ten to fourteen days.[8]

> It must be borne in mind that the interim injunction applied for is merely a ten day injunction and not an interlocutory injunction lasting up to the trial of the issue. Thus, the applicant Merck must show that it will suffer irreparable harm during a ten day period [now fourteen days]. [9]

9 The Plaintiffs claim that the entry of Apotex into the micronized fenofibrate market will result in employees of Fournier being laid off or resigning. The only evidence to this effect is that of the president, Graham Jobson, who states in his affidavit that decreased revenues will result in layoffs and that:

> the knowledge that a generic product was about to go on the market or was already on the market would certainly result in employees leaving Fournier in anticipation of layoffs. [10]

This is speculative. In fact, with respect to decreased revenues, the evidence indicates that Fournier's revenues are more likely to be reduced over a period of several months, and that no significant reduction would occur within the next fourteen days. [11] With respect to the employees, the Plaintiffs have failed to satisfy me that, with the knowledge of the pending motion for an interlocutory injunction, employees will leave if an interim injunction is not granted. As stated by Mackay J. in *Merck & Co. v. Apotex Inc.*:

> These concerns are merely speculative for another reason, in my view. At best they relate to long-term implications of Apotex's entry into the market, not to effects to be realized in the interim pending trial, if the parties are indeed determined to bring this action to trial without delay. [12]

10 The Plaintiffs have also suggested that the introduction of Apo-Feno Micro onto the market will force Fournier to market its own generic, through its licencee Pharmascience. They argue that once Pharmascience has entered the market, the withdrawal of the licence by Fournier, should the interlocutory injunction be granted subsequently, would cause considerable damage to Fournier's reputation.

11 Mr. Jobson affirms that Fournier will not licence Pharmascience unless it is forced to do so, to mitigate its losses in the event that Apotex, or some other company, enters the market with a generic version of micronized fenofibrate. [13] This statement does not satisfy me that Fournier will necessarily authorize Pharmascience to enter the market within the next fourteen days, as a direct result of Apotex's entry into the market.

12 Given that the Plaintiffs have not provided sufficient evidence to demonstrate that there are serious issues to be tried and that there is insufficient evidence to enable me to infer imminent

irreparable harm, there clearly cannot be any urgency in this case. I am of the opinion that this is not an appropriate case in which to grant an interim injunction.

13 This decision is confined to the facts and evidence before me on the motion for an interim injunction and should in no way influence the outcome of the pending motion for an interlocutory injunction.

Conclusion

14 The motion for an interim injunction is dismissed with costs.

15 I also order that the pending interlocutory motion be heard on an expedited basis, as per the following timeline, to which the parties have consented:

Apotex's evidence is to be served and filed by April 27, 1999;

Cross-examination of Fournier's affiants on April 28, 29, 30, 1999 (as needed) in Montreal (Philippe Regineault to be cross-examined by telephone conference call);

Cross-examination of Apotex's affiants on May 3, 4, 5, 1999 (as needed) in Toronto;

Factums of both Fournier and Apotex to be served and filed by May 13, 1999.

Motion dismissed.

Footnotes

1 *Searle Canada Inc. v. Novopharm Ltd.* (1994), 56 C.P.R. (3d) 213 (Fed. C.A.) at 231.

2 *Kun Shoulder Rest Inc. v. Joseph Kun Violin & Bow Maker Inc.* (June 18, 1997), Doc. T-118-97 (Fed. T.D.) at para 24.

3 *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.) at 334.

4 *Searle, supra* note 1.

5 (1994), 56 C.P.R. (3d) 232 (Ont. Gen. Div.) at 236 at 236.

6 (1997), 137 F.T.R. 243 (Fed. T.D.) at 247.

7 (1994), 53 C.P.R. (3d) 34 (Fed. C.A.) at 52.

8 *Federal Court Rules, 1998*, SOR/98-106, Rule 374.

9 *Merck Frosst* supra, note 6 at 245.

10 Affidavit of Graham Stirling Jobson (sworn 1 April 1999) at para 38.

11 Affidavit of Tom Brogan (sworn 1 April 1999) at para 39 and Exhibits "A" and "B" and "C".

12 (1993), 51 C.P.R. (3d) 170 (Fed. T.D.) at 184.

13 Affidavit of Mr. Jobson, *supra* note 10 at para 48.

2000 BCSC 372
British Columbia Supreme Court [In Chambers]

Friends of Stanley Park v. Vancouver (City) Board of Parks & Recreation

2000 CarswellBC 438, 2000 BCSC 372, [2000] B.C.W.L.D. 438,
[2000] B.C.T.C. 89, 10 M.P.L.R. (3d) 25, 96 A.C.W.S. (3d) 475

The Friends of Stanley Park and The Canadian Society Promoting Environmental Conservation, Petitioners and Vancouver Board of Parks and Recreation, Respondent

Davies J.

Judgment: February 25, 2000
Docket: Vancouver L000515

Counsel: *R. Christensen* and *K. Wristen*, for Petitioners.
G. Macintosh, Q.C. and *S. Horne*, for Respondent.

***Davies J.* (In Chambers):**

1 *THE COURT*: The petitioners seek an interim injunction prohibiting the respondent, Vancouver Board of Parks and Recreation, from taking any steps to widen the Stanley Park Causeway pending the final disposition of this proceeding.

2 Stanley Park is a 1,000-acre park, the legal title to which is held by the Government of Canada, but which was leased to the City of Vancouver in 1908 for" its use as and for a public park," for a term of 99 years, renewable in perpetuity.

3 The Stanley Park Causeway is a three-lane road, which passes through Stanley Park and connects downtown Vancouver to the Lions Gate Bridge, which then crosses Burrard Inlet to North Vancouver.

4 The Lions Gate Bridge is one of two bridges crossing Burrard Inlet. It was constructed in the mid 1930's, and it and the Stanley Park Causeway have become increasingly burdened with vehicular traffic as Greater Vancouver has grown in population density.

5 The respondent, Parks Board, has recently approved a planned comprehensive upgrading of the Stanley Park Causeway, which includes the widening of its three vehicle traffic lanes, from

2.95 metres to 3.5 metres, for safety reasons. Construction is imminent. The widening is intended to coincide with and accommodate a similar widening of the Lions Gate Bridge.

6 To accomplish the planned widening of the Causeway, the evidence establishes that it will be necessary to remove 22 trees, of a diameter in excess of 12 inches, along the Causeway's western boundary through Stanley Park. Many more smaller trees will also be lost and a total of .25 of an acre of parkland will be lost as parkland to the widening project. Most of the 22 larger trees will be removed from that same quarter acre of land.

7 The petitioners are two non-profit societies. The petitioner, Canadian Society Promoting Environmental Conservation, has been an advocate for environmentally responsible transportation for 30 years. The petitioner, Friends of Stanley Park Society, was incorporated in 1989, for the purpose of preserving, protecting and enhancing Stanley Park as a park.

8 The petitioners allege that the respondent, Parks Board, has no power to use or occupy the lands comprising Stanley Park for other than park purposes. They allege that the widening of the Stanley Park Causeway is not in furtherance of park purposes. They have alleged that it is, in fact, contrary to park purposes and thus outside the jurisdiction of the respondent, Parks Board's, powers granted to it under the *Vancouver Charter*, S.B.C. 1953, c. 55, Pt. XXIII.

9 The petitioners now seek an interim injunction to preclude the removal of the .25 acres from use as parklands and the destruction of the trees and other vegetation which will be destroyed in the widening process, pending a determination of whether the proposed widening is *ultra vires* the power of the respondent, Parks Board.

10 This application raises three issues for determination, those are:

(1) do the allegations of lack of jurisdiction raise a fair issue to be tried;

(2) does the balance of convenience favour the granting of an injunction pending the final determination of those allegations; and

(3) if an interim injunction is granted, should the petitioners be required to provide an undertaking as to the damages the respondent, Parks Board, may suffer as a consequence of the granting of such an injunction?

11 In broad terms, at issue in this proceeding *are* competing societal interests of environmental protection and the protection of public safety. In the more narrow terms to be addressed on this application, at issue is the interpretation of the 1908 lease and the statutory provisions of Part 23, of the *Vancouver Charter*, to determine whether the jurisdictional issues, advanced by the petitioners, meet the threshold test for the granting of injunctive relief. Only if that threshold test is met does consideration of competing public interests arise in the context of determining whether the balance of convenience favours the granting of the interim injunction sought.

12 In *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.), the Supreme Court of Canada determined that the threshold for determining whether there is a fair or serious issue to be tried is a low one. The judge hearing an application for interim interlocutory relief must make a preliminary assessment of the merits of the case to determine whether the application is vexatious or frivolous. If so, the application will fail. If not, the judge must then go on to consider whether the balance of convenience, including whether irreparable harm may occur if the injunctive relief is or is not granted, favours the granting of such relief.

13 The petit*i*oners argue that the Stanley Park Causeway is part of the provincial highway system by operation of an agreement between the City of Vancouver and the Provincial Ministry of Highways, entered into in 1966, for the maintenance of the Causeway. They say that the existing Causeway does not exist for park purposes, but for the purposes of general transportation needs between locations on opposite sides of Stanley Park. They argue that to widen the Causeway at the expense of existing parklands, trees and vegetation is detrimental from a park as a opposed to a transportation prospective and, as such, the widening is outside of and in contravention of the respondent, Parks Board's, powers and responsibilities to preserve, protect and enhance public parks.

14 As I understand the petitioners' argument, it is that the respondent, Parks Board, may not exercise any power to build or improve roads which are not solely for park purposes, and that the widening of the Causeway is therefore *ultra vires* the powers granted to the Parks Board under s. 489 of the *Vancouver Charter*.

15 Counsel for the petitioners suggested in argument that the power to authorize any widening of the Causeway could only be exercised by the City of Vancouver after a resolution of both its City Council and the respondent, Parks Board, approved by a two-thirds majority of each, revoking or cancelling the Parks Board's exclusive jurisdiction over that portion of Stanley Park required to widen the Causeway, so that it would no longer be designated as a permanent public park.

16 While I recognize that a prolonged examination of the merits of a dispute when a claim for interim injunctive relief is heard is generally neither necessary nor desirable, I note as well that the rationale for the preclusion of such an inquiry is that, on an interlocutory application, the evidentiary base for the claim will often be incomplete and may ultimately need to be determined by assessing conflicting evidence. Resolution of such conflicts will be better left to be determined at the final hearing of the dispute. There is, however, little evidentiary conflict in relation to the issues before me on this application.

17 Since the only question raised by the petitioners is that of jurisdiction, consideration of evidence as to the number of trees to be affected by the widening, or the possible effect of construction work on trees and habitat outside the actual construction zone, is not necessary to determine the jurisdictional issues.

18 Because the issue to be decided is one of statutory and documentary interpretation, where any conflicting evidentiary considerations are of minimal or no importance, it is, in my judgment, appropriate and necessary in this case to consider the merits of the jurisdictional arguments in some detail to assess whether the petitioners' submissions are vexatious or frivolous.

19 In doing so, I rely upon the decision of the Supreme Court of Canada, in *RJR-MacDonald v. Canada (Attorney General)*, at page 39, where the court stated:

> The second exception to the **American Cyanamid** prohibition on an extensive review of the merits arises when the question of constitutionality presents itself as a simple question of law alone.

20 The constating document granting power to the City of Vancouver to possess the federal lands comprising Stanley Park is the 1908 lease. Jurisdiction over Stanley Park as a permanent public park, granted to the respondent, Parks Board, by the *Vancouver Charter*, and a resolution of City Council in 1984, is, in my opinion, limited by the extent of the powers granted by the Federal Government to the City of Vancouver by the 1908 lease.

21 Unlike the situations concerning the use of public parks in the cases referred to me by counsel for the petitioners, the 1908 lease is not a trust document. It is a contractual agreement between two parties, whose conduct will be governed by its terms and who are free to amend those terms and whose actions, during its life, aid in the interpretation of its original and ongoing intent and purpose.

22 By its terms, the 1908 lease provides that the lands now comprising Stanley Park.

> Shall and may henceforward be used, occupied and enjoyed by the City of Vancouver for its use as and for a public park, for the term of 99 years, renewable perpetually on the same terms and conditions as herein contained, subject until their determination to any existing leases or portions of said land and to the conditions following, that is to say...

Clause 4 of those following conditions provides that:

> The existing main road around the peninsula, together with any new carriage roads that may be formed, shall be maintained and kept in order by the City of Vancouver.

Clause 9 of those provisions goes on to provide that:

> No stone shall be quarried on the said property, nor any trees be cut therefrom (except for the purpose of opening of roads thereon) without the sanction of the Minister of Militia and Defence.

23 In 1933, the City of Vancouver, with the consent of the Government of Canada, entered into an agreement with the First Narrows Bridge Company Limited to sublease the bridgehead site for the south end of the Lions Gate Bridge in Stanley Park from the City of Vancouver and to construct a new roadway through the park to connect the bridge to the City of Vancouver. That agreement was made in recognition of and notwithstanding that Stanley Park was, "Leased in perpetuity to the City, but only for public park purposes as therein set forth and provided." Clause 5 of the 1933 agreement provided that:

> The company shall have no ownership in or title to the roadway and causeway mentioned in paragraph 3 hereof, which shall be available for general park traffic purpose and shall be maintained as part of the park roadway system. But the City, with the consent, approval and concurrence of the Parks Board, hereby agrees that the said roadway and causeway shall be available at all times to and for all kinds of vehicular traffic desiring to use the said bridge, and that the said roadway and causeway shall not be disconnected or otherwise closed to such traffic without the company's written consent.

24 In 1936, the City of Vancouver, Government of Canada and the First Narrows Bridge Company Limited entered into a sublease of the bridgehead site in Stanley Park. That agreement referenced the existence of the 1908 lease and its purposes, and that the intent to build and use the Causeway through Stanley Park was intended as part of the park roadway system.

25 In 1966, the City of Vancouver and the Government of British Columbia, as the successor to the First Narrows Bridge Company Limited, entered into an agreement relating to the Causeway which, among other things, cancelled clause 5 of the 1933 tripartite agreement and substituted, therefore, the following:

> The Crown shall have no ownership in or title to the roadway and causeway mentioned in paragraph 3 hereof, and that same shall continue to be available for general park traffic purposes and shall be maintained as part of the park roadway system. But the City, with the consent, approval and concurrence of the Parks Board, hereby agrees that the said roadway and causeway shall continue to be available at all times to and for all kinds of vehicular traffic desiring to use the said bridge, and that the said roadway and causeway shall not be discontinued or otherwise closed to such traffic without the Crown's written consent.

26 I have set forth these lease and subsequent agreement provisions in some detail because, in my view, the petitioners' allegations of the respondent, Parks Board's, lack of jurisdiction to improve the Causeway cannot be considered in a historical vacuum.

27 The parties to the original 1908 lease have expressly agreed since 1933 that the Stanley Park Causeway is to:

> Continue to be available for general park traffic purposes and shall be maintained as part of the park roadway system.

28 That agreement is, in my opinion, consistent with the power granted by the Federal Crown to the City of Vancouver to "open new roads", under clause 9 of the 1908 lease, and maintain, "any new carriage roads", as provided by clause 4 of that lease. To the extent that the 1908 lease limited the use of the Stanley Park lands for park purposes, the Stanley Park Causeway has, for 65 years, been determined by the parties to that lease to be a part of that usage as part of the park roadway system.

29 In 1984, the City of Vancouver passed a resolution designating Stanley Park as a permanent park. Counsel for the petitioners argues that, by that resolution, the power of the respondent, Parks Board, is limited by Part 23 of the *Vancouver Charter*, and that while the City of Vancouver may have the power to legislate concerning the maintenance of the Causeway, the Parks Board is limited in its mandate to those powers enumerated under s. 489 of the *Vancouver Charter*. The petitioners say those powers do not include the power to build roads. I do not agree.

30 Section 488(6) of the *Vancouver Charter* provides that the respondent, Parks Board's, exclusive possession of and exclusive jurisdiction and control over permanent parks includes the authority to determine how such real property shall be used and what improvements shall be made thereon.

31 Section 489(1)(a) provides that the respondent, Parks Board, shall have the power to provide for:

> Constructing, acquiring, maintaining, equipping, operating, supervising and controlling such buildings, structures and facilities as may be required for the recreation, comfort and enjoyment of the public while within the parks.

32 The petitioners seek to interpret this power as precluding the Causeway widening because they say that such widening is not for a park purpose. In my view, that interpretation is far too narrow and ignores the facts that the parties to the original lease deemed the roadway to be part of the park road system and have treated it as such for 65 years. It also fails to recognize that, while using the Causeway, the public is within the park for the entire length of the Causeway.

33 By s. 489(1)(q), the respondent, Parks Board, is specifically given the power to:

> Do such things in furtherance of any of the above powers as shall be deemed expedient.

34 In my opinion, ss. 488 and 489(1), when read in conjunction with the historical context in which Stanley Park was created and the Stanley Park Causeway was constructed, give jurisdiction

to the respondent, Parks Board, to widen the Causeway, as now contemplated, for the comfort and enjoyment of the public while using Stanley Park.

35 In my view, there is no merit to the petitioners' lack of jurisdiction submission and the petitioners have failed to establish a fair or serious question to be tried. They have therefore failed to meet the threshold test for the granting of an interim injunction.

36 Notwithstanding that the petitioners' application must fail because of the failure to establish a serious question to be tried, I have determined to address the petitioners' balance of convenience arguments. I do so not only because they were fully argued before me, but because of the extent of the public debate on this issue and the fact that my judgment may not be the final one on the issue of whether the petitioners have met the threshold test for injunctive relief.

37 In *Canadian Broadcasting Corp. v. CKPG Television Ltd.* (1992), 64 B.C.L.R. (2d) 96 (B.C. C.A.), at page 102, Mr. Justice Lambert, speaking for the British Columbia Court of Appeal, summarized the approach to be taken in assessing the balance of convenience on an interim injunction application in this way:

> ... a judge should consider these points: the adequacy of damages as a remedy for the applicant if the injunction is not granted, and for the respondent if an injunction is granted; the likelihood that if damages are finally awarded they will be paid; the preservation of contested property; other factors affecting whether harm from the granting or refusal of the injunction would be irreparable; which of the parties has acted to alter the balance of their relationship and so affect the status quo; the strength of the applicant's case; any factors affecting the public interest; and any other factors affecting the balance of justice and convenience.

38 In *RJR-MacDonald Inc. v. Canada (Attorney General)*, to which I have earlier referred, the Supreme Court of Canada considered the public interest factor in the context of constitutional litigation, where what is at issue is not a dispute between private parties, but rather a challenge to the jurisdictional validity of a legislative action. At page 344 of that decision, the court said:

> It is, we think, appropriate that it be open to both parties in an interlocutory ***Charter*** proceeding to rely upon considerations of the public interest. Each party is entitled to make the court aware of the damage it might suffer prior to a decision on the merits. In addition, either the applicant or the respondent may tip the scales of convenience in its favour by demonstrating to the court a compelling public interest in the granting or refusal of the relief sought. "Public interest" includes both the concerns of society generally and the particular interests of identifiable groups.
>
> We would therefore reject an approach which excludes consideration of any harm not directly suffered by a party to the application.

While that statement was made in specific reference to interlocutory proceedings concerning *Charter of Rights and Freedoms* issues, I see no reason why it is not applicable to a challenge of proposed legislative action which is alleged to be *ultra vires* the authority purporting to exercise authority over the subject matter of the dispute.

39 In further considering the public interest in *RJR-MacDonald*, however, the Supreme Court of Canada also said that:

> When a private applicant alleges that the public interest is at risk that harm must be demonstrated. This is since private applicants are normally presumed to be pursuing their own interests rather than those of the public at large. In considering a balance of convenience of the public interest, it does not assist an applicant to claim that a given government authority does not represent the public interest. Rather, the applicant must convince the court of the public interest benefits which will flow from the granting of the relief sought.

The court further said, at page 346, of the decision that:

> In our view, the concept of inconvenience should be widely construed in ***Charter*** cases. In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.
>
> A court should not, as a general rule, attempt to ascertain whether actual harm would result from the restraint sought. To do so would in effect require judicial inquiry into whether the government is governing well, since it implies the possibility that the government action does not have the effect of promoting the public interest and that the restraint of the action would therefore not harm the public interest.

37 With those principles in mind, I turn to a determination of the balance of convenience in this case.

38 If an interim injunction is not granted, the scheduled widening of the Stanley Park Causeway will likely proceed with the result that 22 trees, having a diameter in excess of 12 inches, and many smaller trees and vegetation, will be lost. There is also some suggestion that harm may befall larger trees beyond the actual construction zone due to root compaction and other damage in the event

that adjacent trees are removed. I note that the opinion offered for such possible damage is, in fact, however, couched in terms of possibilities not probabilities.

39 Since the jurisdictional objection raised by the petitioners is acknowledged by them to be readily curable by the joint action of a two-thirds majority of each of City Council and the Parks Board, and since the resolutions to allow the widening of the Causeway were passed by both City Council and the Parks Board by margins in excess of 70 percent, the extent to which irreparable harm would be suffered by proceeding with widening at this time appears to me to be minimal.

40 The determination to widen the Stanley Park Causeway was approved by a substantial majority, by the respondent, Parks Board's, members, after considerable debate and with much public input. The Board has determined that public safety concerns must give way to the concerns expressed by the petitioners.

41 The petitioners have not satisfied me that any benefits which would flow from precluding the commencement of the work are sufficiently substantial for me to interfere with the Parks Board's assessments of public safety issues, especially given the weakness of the petitioners' jurisdictional arguments.

42 On the other hand, the potential for harm arising to the users of the Causeway, even in a short period of time, pending the final determination of these proceedings, is great.

43 Although the Causeway has been in use in its present condition for many years, recent studies have established a direct and significant correlation between the incidents of motor vehicle accidents and the narrow lanes of the Causeway. Delay in implementation of the widening plans may well result in injuries or even loss of life. In those circumstances, I am satisfied that the balance of convenience does not favour the granting of the injunctive relief sought.

44 Because I have determined that the petitioners' application must fail, it is not necessary for me to address the question of whether, in the circumstances of this case, I would have exercised my discretion to not require an undertaking in damages if I had granted injunctive relief. I do, however, intend to do so because the issue was argued before me and raises serious issues in public interest litigation.

45 As I said during argument, it seems to me that if an applicant who applies for injunctive relief in a matter concerning serious public interests is able to establish a serious question to be tried, and that the balance of convenience, including the public interest, favours the granting of injunctive relief, such relief should not generally, at the interlocutory stage, be rendered ineffectual by reason of the fact that the applicant may not have the financial wherewithal to provide a viable undertaking as to damages.

46 Had the applicants been successful in obtaining an interim injunction in this case, I would have exercised my discretion to allow that injunction without an undertaking as to damages.

47 In summary, therefore, the petitioners' application for an interim injunction is dismissed. The petitioners have failed to establish either a serious question to be tried, or that the balance of convenience in this matter favours the granting of the injunctive relief sought.

Application dismissed.

that adjacent trees are removed. I note that the opinion offered for such possible damage is, in fact, however, couched in terms of possibilities not probabilities.

39 Since the jurisdictional objection raised by the petitioners is acknowledged by them to be readily curable by the joint action of a two-thirds majority of each of City Council and the Parks Board, and since the resolutions to allow the widening of the Causeway were passed by both City Council and the Parks Board by margins in excess of 70 percent, the extent to which irreparable harm would be suffered by proceeding with widening at this time appears to me to be minimal.

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46 Had the applicants been successful in obtaining an interim injunction in this case, I would have exercised my discretion to allow that injunction without an undertaking as to damages.

47 In summary, therefore, the petitioners' application for an interim injunction is dismissed. The petitioners have failed to establish either a serious question to be tried, or that the balance of convenience in this matter favours the granting of the injunctive relief sought.

Application dismissed.

2012 CAF 255, 2012 FCA 255
Federal Court of Appeal

Glooscap Heritage Society v. Minister of National Revenue

2012 CarswellNat 5298, 2012 CarswellNat 5299, 2012 CAF 255, 2012 FCA 255, [2012] F.C.J. No. 1661, 2013 D.T.C. 5029 (Eng.), 224 A.C.W.S. (3d) 469, 440 N.R. 232

Glooscap Heritage Society, Applicant and The Minister of National Revenue, Respondent

David Stratas J.A.

Heard: October 5, 2012
Judgment: October 9, 2012
Docket: A-357-12

Counsel: Bruce S. Russell, Q.C., for Applicant
Rosemary Fincham, April Tate, for Respondent

***David Stratas J.A.*:**

1 The applicant, Glooscap Heritage Society, is a registered charity under the *Income Tax Act*. The Minister has notified Glooscap that he will exercise his authority under the Act and revoke Glooscap's registration as a charity. Glooscap intends to challenge the revocation.

2 Under the Act the revocation can take place before Glooscap can challenge it. This will be explained in more detail below.

3 In this application, Glooscap seeks an order delaying the revocation until this Court hears its challenge.

4 In order to delay the revocation, Glooscap must satisfy the Court that it has met the normal test for the granting of stays and injunctions: *International Charity Assn. Network v. Minister of National Revenue*, 2008 FCA 114 (F.C.A.) at paragraph 5. Glooscap must show it has an arguable case against the revocation, it will suffer irreparable harm if the revocation is allowed to happen, and the balance of convenience lies in its favour: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.).

5 For the reasons set out below, Glooscap has not satisfied this test. Therefore, I shall dismiss Glooscap's application to delay the revocation of its registration as a charity, with costs.

A. Preliminary matter

6 Initially, Her Majesty the Queen was named as the respondent to this application. The parties agree that the correct respondent is the Minister of National Revenue. I agree and will so order. The style of cause on these reasons and my order dismissing Glooscap's application shall reflect this change.

B. Facts

(1) The legislative scheme

7 When the Minister concludes that a charity's registration should be revoked, he issues a notice of intention to revoke it: *Income Tax Act*, subsection 168(1). The revocation only takes effect when notice of it is published in the *Canada Gazette*.

8 Where the charity has not requested the revocation, the publication of the notice is deferred for 30 days in order to allow the charity to challenge it: paragraph 168(2)(*b*). The challenge consists of the making of an objection and, if necessary, an appeal to this Court: Act, section 172.

9 Any time before the Court determines the appeal, the Court may extend the 30 day period for non-publication of the notice of revocation. Before the appeal is brought, the extension may be granted on the basis of an application brought under Rule 300(*b*) of the *Federal Courts Rules*. After the appeal is brought, an extension may be granted by way of notice of motion within the appeal. See *International Charity Assn. Network v. Minister of National Revenue*, 2008 FCA 62 (F.C.A.) at paragraph 7.

(2) The basic facts of this case

10 Since May 2005, Glooscap has been a registered charity under the Act.

11 At that time, broadly stated, its objects were to research, study, exhibit, and publicize artifacts and evidence relating to the history of the Mi'kmaq First Nation in central Nova Scotia. In conjunction with the Central Nova Tourist Association, Glooscap operates the Glooscap Heritage Centre and Mi'kmaw Museum. The museum is located on the Millbrook First National reserve on the outskirts of Truro, Nova Scotia.

12 Some of artifacts and exhibits in the museum come from charitable donations. But the bulk of the museum's artifacts and exhibits — some 80% — are on loan from another museum.

13 The evidence filed before the Court suggests that the relationship between the tourist association and Glooscap — an aboriginal/non-aboriginal partnership in a tourism endeavour — is special and rare, and formed only after overcoming initial resistance. Putting aside Glooscap's

involvement with the tax shelter, described below, the evidence filed before the Court demonstrates that Glooscap's activities are socially worthy and important to the community.

14 But in this application, Glooscap's involvement with the tax shelter is central.

15 The Minister alleges that from 2006 to 2011, Glooscap issued donation receipts in the following approximate totals: $166,000 (2006), $0 (2007), $11,590,000 (2008), $13,312,000 (2009), $37,131,000 (2010), $54,985,000 (2011). This shows a massive increase in donations since 2006 — ranging from 6,880% to over 33,000%.

16 The Minister says this increase was due to Glooscap's involvement, starting in 2008, with an illegitimate tax shelter known as the Global Learning Gifting Initiative.

17 In this regard, the Minister makes several allegations, largely on the basis of an audit it has conducted. On this application, it is not the role of the Court to determine whether these allegations are true. The Minister's allegations, to the extent they have a *prima facie* basis, are primarily relevant to the assessment of the public interest under the balance of convenience branch of the *RJR-Macdonald* test.

18 The Minister's alleges that the illegitimate tax shelter worked in the following way:

- Each participant made a cash payment to Glooscap.
- Each participant then applied to become a capital beneficiary of the Global Learning Trust.
- The trust provided each participant with free courseware.
- Each participant donated the courseware to a registered charity that was participating in the tax shelter. In 2009 and 2010, participants donated the courseware to Glooscap.
- Each participant received an official donation receipt for the cash payment and the donated courseware.
- Although each participant purportedly donated the courseware at fair market value, Glooscap issued receipts for the courseware that were typically at least three times the amount of the cash payment the participant had made to Glooscap.
- Under this arrangement, Glooscap kept very little of the cash payments from participants. For example, in 2009, Glooscap retained 11.6% of the payments, with the promoter of the scheme receiving 88.4% of the payments.

19 Following an audit, the Canada Revenue Agency concluded, among other things, that:

- Glooscap was not operating exclusively for charitable purposes as required under the Act, and instead was operating for the primary purpose of activities benefiting the tax shelter.

• Glooscap improperly issued receipts for cash and courseware that were not valid gifts under the Act.

20 In an administrative fairness letter, the Canada Revenue Agency notified Glooscap of its concerns and invited Glooscap to respond. In a responding letter, Glooscap defended itself, urged that its registration as a charity not be revoked, and advised that it had terminated its relationship with the tax shelter.

21 After some months, on July 17, 2012, the Canada Revenue Agency issued a Notice of Intention to revoke Glooscap's registration as a charity under the Act. Further, the Minister has told participants in the tax shelter their deductions arising from the scheme will be disallowed, and they will be reassessed for back taxes, interest and penalties.

22 In the oral hearing of this application, Glooscap advised the Court that it has just filed an objection to the Minister's Notice of Intention.

23 Assuming that the Canada Revenue Agency maintains its position, Glooscap will soon be able to challenge in this Court the Minister's planned — or, by then, actual — revocation of its registration as a charity. In the meantime, Glooscap wants this Court to stop the Minister from revoking its registration.

C. Analysis

(1) Arguable case

24 On the first branch of the threefold test for a stay, Glooscap must establish that there will be a serious question to be tried when it challenges the Minister's position in this Court. Although it has not filed its objection to the Minister's Notice of Intention, it has filed its responding letter to the Minister's administrative fairness letter.

25 The threshold for seriousness is "a low one" and "liberal": *RJR-Macdonald*, *supra* at page 337; *143471 Canada Inc. c. Québec (Procureur général)*, [1994] 2 S.C.R. 339 (S.C.C.) at page 358, *per* La Forest J. (dissenting, with apparent concurrence on this point from the majority). Glooscap need only show that the matter is not destined to fail or that it is "neither vexatious nor frivolous": *RJR-Macdonald*, *supra* at page 337.

26 Given the low threshold for "arguable case," the Minister has conceded that Glooscap has met this branch of the *RJR-Macdonald* test.

(2) Irreparable harm

27 Glooscap submits that if its registration as a charity is revoked, it will suffer irreparable harm. It points to reputational effects upon itself, the First Nation with which it is associated, the First Nation's business relationships, and business collaborations between aboriginal and non-aboriginal communities. It also says that potential donors to the museum will donate to other museums that can provide a donation receipt, and they will not lightly come back.

28 Glooscap adds that under the irreparable harm branch of the test, the Court is to look at the nature of the harm — whether it can be remedied later — and not the quantity of harm.

29 The Minister submits that the irreparable harm must be that of the moving party, here Glooscap. Harm to third parties may be considered under the balance of convenience branch of the test, but not under the irreparable harm branch of the test. The Minister also points to the general, unparticularized nature of the harm and the absence of proof of a real likelihood of harm.

30 On the law governing irreparable harm and on the record before the Court, the Minister's submissions carry some force.

31 To establish irreparable harm, there must be evidence at a convincing level of particularity that demonstrates a real probability that unavoidable irreparable harm will result unless a stay is granted. Assumptions, speculations, hypotheticals and arguable assertions, unsupported by evidence, carry no weight. See *Dywidag Systems International Canada Ltd. v. Garford Pty Ltd.*, 2010 FCA 232 (F.C.A.) at paragraph 14; *Stoney First Nation v. Shotclose*, 2011 FCA 232 (F.C.A.) at paragraph 48; *Canada (Attorney General) v. Canada (Information Commissioner)*, 2001 FCA 25, 268 N.R. 328 (Fed. C.A.) at paragraph 12; *Canada (Superintendent of Bankruptcy) v. MacLeod*, 2010 FCA 84 (F.C.A.) at paragraph 17.

32 The reason behind this was explained in *Stoney First Nation* as follows (paragraph 48):

> It is all too easy for those seeking a stay in a case like this to enumerate problems, call them serious, and then, when describing the harm that might result, to use broad, expressive terms that essentially just assert — not demonstrate to the Court's satisfaction — that the harm is irreparable.

33 Finally, only harm suffered by the moving party qualifies under this branch of the test. As was said in *Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832*, [1987] 1 S.C.R. 110 (S.C.C.) at page 128, "[t]he second test consists in deciding whether the litigant who seeks the interlocutory injunction would, unless the injunction is granted, suffer irreparable harm." It is "the applicants' own interests" that fall to be considered under this branch of the test, not that of third parties: *RJR-MacDonald*, *supra* at page 341.

34 In cases such as this, a modest modification of this principle has been made. The interests of those who are dependent on the registered charity may also be considered under this branch of the test: *Holy Alpha & Omega Church of Toronto v. Canada (Attorney General)*, 2009 FCA 265 (F.C.A.) at paragraph 17.

35 Glooscap has adduced evidence from very well-placed deponents: the executive director of the tourist association with which Glooscap is partnered, a multi-decade councillor with the Millbrook First Nation reserve, and the general manager of the museum. However, much of the evidence of harm given by these deponents consists of sweeping, unparticularized assertions and declarations that difficulties would arise that *might* result in actual harm.

36 Without a better understanding of Glooscap's overall financial situation and fundraising ability, I cannot conclude that a loss of donations would result in any irreparable harm to it or its activities.

37 Glooscap submits that revocation of its registration as a charity will cause harm to its relationships, particularly with non-aboriginal organizations, and these injuries are not capable of later remediation. However, its evidence goes no higher than to identify "jeopardy" or a risk to those relationships: see paragraphs 11 and 13 of the Mingo Affidavit.

38 The Court does accept that Glooscap will suffer some reputational harm. However, as explained below, much of the reputational harm, especially in the donor community, will be caused not by the revocation of Glooscap's registration as a charity, but rather by the reassessment of the donors to the tax shelter.

39 Ultimately fatal to Glooscap's application is the requirement that it establish irreparable harm that is *unavoidable*, *i.e.*, irreparable harm that will be caused by the failure to get a stay, not harm caused by its own conduct in running a clearly-known risk that it actually knew about, could have avoided, but deliberately chose to accept: *Dywidag Systems International*, *supra* at paragraphs 14 and 16.

40 In *Dywidag Systems International*, the irreparable harm was said to be the disclosure of confidential documents. Often the release of confidential documents causes irreparable harm. But in Dywidag, this irreparable harm was avoidable: months earlier, Dywidag was invited to agree upon a confidentiality order protecting the documents, but it did nothing.

41 In this case, Glooscap knew about the sizeable advantages of registered charitable status: exemption from income tax and the ability to issue receipts for donations received. It was warned at an early stage that it might lose its advantageous charitable status if it associated with this tax shelter. Part of that risk is the very thing that has now materialized — the revocation of its charitable status before it can challenge the revocation in this Court. Warnings about involvement with this

tax shelter came from the Canada Revenue Agency (two emails and a meeting), Glooscap's own lawyer (two letters) and its own auditor. Glooscap's auditor resigned, at least in part over the issue. There were also warnings that involvement in the tax shelter would require an amendment to Glooscap's objects and the approval of the Canada Revenue Agency. Yet, knowing of the risks, Glooscap chose to continue its association with the tax shelter, and in fact renewed its association in 2009.

42 Glooscap submits that it exercised good faith throughout. In support of that submission, among other things, Glooscap points to confirmatory testimony given on cross-examination of a representative of the Canada Revenue Agency. That may be so, but the fact remains that at an early stage Glooscap knew of the risk of the very harm that has eventuated here and it chose to run that risk.

43 If Glooscap blundered itself into involvement in this tax shelter, oblivious to any real risk, the irreparable harm might not be fairly laid at its feet. Similarly, circumstances such as mistaken advice, mistake as to the facts, trickery, duress or unauthorized conduct by someone wrongly purporting to act for Glooscap might cause a different view to be taken of the matter. But in this case none of these circumstances are present.

(3) Balance of convenience

44 Were it necessary to proceed to this branch of the test, this Court would have found that the balance of convenience lies against the granting of relief to Glooscap.

45 This Court recognizes the high significance and importance of the aboriginal/non-aboriginal partnership in this case between Glooscap and the tourist association, especially when viewed against the regrettable, often abysmal, sometimes unspeakable events surrounding Canada's history of aboriginal/non-aboriginal relations: *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Backward*, vol. 1 (Ottawa: Canada Communication Group Publishing, 1996).

46 As mentioned in paragraph 37 above, the evidence offered by Glooscap falls short of establishing a real likelihood that this partnership will fail or that the broader aboriginal/non-aboriginal relationship will suffer if Glooscap's charitable status is revoked. That being said, the evidence does describe a risk — albeit undefined, abstract and perhaps speculative — of that happening.

47 The Court also accepts that if Glooscap's registration as a charity is revoked, the reputations of it and perhaps those associated with it will suffer, with possible, undefined, perhaps speculative detrimental effects on their businesses and activities.

48 However, one would expect that the Minister's reassessment of all of Glooscap's donors who participated in the tax shelter will cause negative news to spread through all of the donor community, if not the wider community. This will happen regardless of whether the Court grants Glooscap the relief it seeks in this application.

49 Glooscap's evidence falls short of establishing that the museum will fail, or that its educational mission will be detrimentally affected. No financial information has been given that would allow such a finding to be made.

50 Putting aside the donations involving the tax shelter, Glooscap has received only $19,775 in total donations during 2007-2011, and no evidence has been provided suggesting that the loss of this level of donation will cause any significant harm.

51 On the Minister's side, is the public interest in enforcement — a matter deserving of significant weight in this case. The Minister's allegations in support of revocation of Glooscap's registration as a charity are supported, on a *prima facie* basis, by the conclusions of the audit that appears in the record before the Court. Therefore, the public interest in enforcement, as contemplated by the Act, is in play.

52 Glooscap seeks to prevent the Minister from revoking its registration, something the Act permits the Minister to do at this time, subject, of course, to later challenge. Where the moving party seeks to prevent statutory actors from carrying out their statutory duties, a "very important" public interest "weigh[s] heavily" in the balance: *143471 Canada Inc.*, *supra* at page 383, Cory J. (for the majority); *Harper v. Canada (Attorney General)*, [2000] 2 S.C.R. 764, 2000 SCC 57 (S.C.C.) at paragraph 9; *Canada (Superintendent of Bankruptcy) v. MacLeod*, 2010 FCA 84 (F.C.A.)at paragraph 12.

53 The weight to be accorded to that public interest, already significant, is driven upward by the sizeable amounts said to be in issue in this case: $116,999,482 given in receipts to participants in the tax shelter in 2008-2011, in circumstances where valid non-tax shelter donations over the same period totalled only $19,775. It is also driven up by Glooscap's decision to involve itself in the tax shelter despite the clear warnings it received.

54 In assessing and weighing the public interest considerations in this case against the considerations offered by Glooscap, I can do no better than to adopt the words of my colleague, Sharlow J.A., in *International Charity Assn. Network v. Minister of National Revenue*, *supra* at paragraph 12 (2008 FCA 62 (F.C.A.)):

> The Minister takes the position, properly in my view, that the public has a legitimate interest in the integrity of the charitable sector. It is reasonable for the Minister to attempt to safeguard that integrity by carefully scrutinizing tax shelter schemes involving charitable

> donations of property and, where there are reasonable grounds to believe that the property has been overvalued, by taking appropriate corrective action. In the circumstances of this case, the Minister's factual allegations, while untested, are sufficiently serious to outweigh any advantage [the charity] might derive from an order deferring the revocation of its registration as a charity.

D. Disposition

55 For the foregoing reasons, I shall dismiss Glooscap's application to delay the revocation of its registration as a charity. The Minister shall have his costs of the application.

Application dismissed.

2009 CAF 265, 2009 FCA 265
Federal Court of Appeal

Holy Alpha & Omega Church of Toronto v. Canada (Attorney General)

2009 CarswellNat 3131, 2009 CarswellNat 4453, 2009 CAF 265, 2009 FCA 265, [2009] F.C.J. No. 1262, [2010] 1 C.T.C. 161, 181 A.C.W.S. (3d) 350, 2009 D.T.C. 5177 (Eng.)

Holy Alpha and Omega Church of Toronto, Applicant and Attorney General of Canada, Respondent

C. Michael Ryer J.A.

Heard: September 9, 2009
Judgment: September 15, 2009
Docket: A-214-08

Counsel: Natalie Worsfold, for Applicant
Joanna Hill, for Respondent

***C. Michael Ryer J.A.*:**

Background

1 A notice (the "Notice of Intent to Revoke") dated April 10, 2008, was given by the Minister of National Revenue (the "Minister") to Holy Alpha and Omega Church of Toronto (the "Charity") pursuant to subsection 168(1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.) (the "ITA"), stating the Minister's intention to revoke the registration of the Charity as a registered charity, within the meaning of subsection 248(1) of the ITA (a "registered charity").

2 The Charity applied to this Court, pursuant to paragraph 168(2)(*b*) of the ITA, for an order extending the 30-day period referred to in that provision and therefore prohibiting the Minister from publishing the Notice of Intent to Revoke in the *Canada Gazette* until the Charity's rights of objection and appeal in respect of the proposed revocation of its status as a registered charity have been exhausted.

3 The Notice of Intent to Revoke arose out of an audit of the Charity in respect of its 2003 and 2004 taxation years that was conducted by the Canada Revenue Agency (the "CRA"). The audit was undertaken because the CRA had a concern that the Charity's donation receipts had been sold by income tax preparers to taxpayers who would then be in a position to claim income deductions or credits in respect of donations to the Charity that were never made.

4 As a result of the audit, the CRA wrote a so-called administrative fairness letter to the Charity on November 27, 2007. That letter informed the Charity of a number of concerns that the audit had revealed and invited the Charity to make representations as to why its registered charity status should not be revoked.

5 The contraventions of the charitable registration requirements under the ITA that were alleged by the CRA in the administrative fairness letter may be summarized as follows:

a) Keeping of books and records: In 2003 approximately $678,858 of $742,553, and in 2004 approximately $1,619,011 of $1,696,069, in total expenditures by the Charity had not been substantiated with supporting documentation of any kind. The lack of documentation made it impossible for the CRA to confirm the charitable nature of the Charity's expenditures. Similarly, significant portions of the revenue reported by the Charity had not been deposited into its bank account.

b) Disbursement quotas: The lack of documentation of expenditures made it impossible for the CRA to determine whether the Charity had expended its required disbursement quota in respect of its charitable activities.

c) Direction and control over resources: In 2003 and 2004, cash was transferred in a series of personal deliveries in the sums of $223,520 and $557,776 respectively. Additionally, merchandise valued at $153,296 and $324,952 was shipped in container shipments in each of the years audited. However, no agency agreements or reporting documentation were available with respect to these transfers and shipments. As such, it was impossible for the CRA to establish whether the funds and shipped goods were subject to control and direction by the Charity and whether they were used for charitable purposes.

d) Official donations receipts: The official donation receipts issued for the gifts in kind received by the applicant lacked basic information related to the gift made. Further, there were instances of missing and unaccounted official donation receipts, including a block of approximately 2,500 receipts.

e) Board of directors: Two of the four members of the Charity's board of directors did not appear to deal with each other at arm's length, which violated the requirement that more than 50% of the directors must deal at arm's length.

6 The CRA agreed to allow the Charity until mid-February of 2008 to respond to the administrative fairness letter but the Charity failed to meet that deadline, apparently because of difficulties it had in obtaining professional assistance.

7 In early March of 2008, an advisor retained by the Charity wrote to the CRA describing the progress that the Charity was making with respect to the concerns expressed by the CRA in the administrative fairness letter. However, that correspondence did not satisfy the CRA.

8 The Notice of Intent to Revoke was issued on April 10, 2008. In it, the Minister stated an intention to revoke the registration of the Charity as a registered charity for the reasons described in the administrative fairness letter.

9 The issuance of the Notice of Intent to Revoke caused the commencement of a 90 day period within which the Charity was entitled to file a notice of objection to the Notice of Intent to Revoke, in accordance with subsection 168(4) of the ITA.

10 On May 8, 2008, the Charity filed the application that is before this Court. However, the Charity missed the mid-July, 2008 deadline with respect to the filing of a notice of objection.

11 On September 22, 2008, the Charity attempted to late-file a notice of objection, requesting the consent of the Minister to do so. Initially, the Minister refused to accept the notice of objection but that is apparently no longer the case and the notice of objection is before the Appeals Branch of the Charities Directorate.

The Application

12 The parties have stipulated that this application should be considered in light to the tripartite test in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.) and, consistent with recent jurisprudence in this Court, I am prepared to proceed on that basis (see *International Charity Assn. Network v. Minister of National Revenue*, 2008 FCA 114 (F.C.A.) and *Choson Kallah Fund of Toronto v. Minister of National Revenue* (2008), 2008 FCA 311 (F.C.A.)).

13 To obtain an order under paragraph 168(2)(*b*) of the ITA on the basis of the *RJR-MacDonald* text, the Charity must establish that there is a serious issue to be tried, it will suffer irreparable harm if the order is not granted and the balance of convenience favours granting the order.

Serious Issue

14 The Crown has chosen not to contest this element of the *RJR-MacDonald* test.

Irreparable Harm

15 The establishment of the irreparable harm element of the *RJR-MacDonald* test requires evidence of harm of a type or nature that cannot be quantified in monetary terms or cannot be cured. In that case, the applicant challenged the constitutional validity of legislation that regulated

its ability to advertise its products for sale and alleged in its application that its business interests were damaged by that legislation.

16 Where the application under consideration is made pursuant to paragraph 168(2)(*b*) of the ITA, the establishment of this element of the test is complicated by the fact that as a registered charity, the applicant's essential purpose is to acquire property and then give it away. In contrast, a business organization is typically motivated by the desire to earn and, at least to some extent, accumulate profits.

17 It follows, in my view, that where the applicant is a registered charity, a somewhat broader view of the requirements of the second element of the *RJR-MacDonald* test is warranted. More particularly, it is appropriate to consider whether irreparable harm would be suffered by persons or organizations that are dependent upon the applicant and that would suffer if the applicant were to reduce its donations to them as a result of the loss of its status as a registered charity. A similar approach was adopted by Chief Justice Rip of the Tax Court of Canada in *International Charity Assn. Network v. R.*, 2008 TCC 3 (T.C.C.), a case in which the *RJR-MacDonald* test was applied in relation to an application, pursuant to subsection 188.2(4) of the ITA, for a postponement of a one-year suspension by the Minister of the authority of a registered charity to issue official tax receipts for donations.

18 In *Choson Kallah*, I held that the irreparable harm element of the test had not been established because there was no evidence of any such harm to the applicant or to any specific person or organization that was demonstrably dependent upon the applicant. More particularly, I held that the possibility that the applicant would receive fewer donations if it were unable to provide income tax receipts to the donees was not, in and of itself, sufficient to establish that the irreparable harm element of the test was met.

19 At the hearing, counsel for the Charity urged me to reconsider this latter finding on the basis that there was uncertainty as to the Charity's ability to recover damages for lost donations in the event that a revocation of its status as a registered charity should be rescinded as a consequence of a hearing of the merits of the revocation. In my view, this contention cannot be accepted.

20 Any concern about possible uncertainty with respect to the Charity's ability to recover damages for lost donations arising out of a revocation of its charitable status before there has been a determination of the merits of the revocation presupposes the Charity can establish that it has suffered harm as a result of the lost donations.

21 In my view, the receipt of a diminished amount of donations would simply mean that the Charity would have less money to give away or to meet any obligations that it may have. I fail to see how the Charity could be harmed simply because it may have less money to give away. However, harm could be demonstrated if there was evidence that specific obligations of the Charity would go unfulfilled because of a shortfall in donations. In the present circumstances, the Charity

has provided no evidence of any such obligations. Indeed, the record does not appear to contain any financial statements that would portray the financial circumstances of the Charity insofar as those circumstances may be relevant to the proposed revocation of its status as a registered charity.

22 Finally, the argument that the receipt of diminished donations necessarily establishes the irreparable harm element of the *RJR-MacDonald* test would effectively eliminate that element of the test in relation to each and every application made pursuant to paragraph 168(2)(*b*) of the ITA. In my view, that result would be unacceptable.

23 The Charity also argued that the proposed revocation would cause irreparable harm to its reputation, although counsel for the Charity conceded at the hearing that the Charity had not put forward, and the record does not contain, any evidence of any reputational harm that would result from such a revocation.

24 Counsel for the Charity argued that reputational damage might arise if the CRA were to publicly state that the Charity had been involved in sales of its official donations receipts prior to the outcome of the hearing on the merits. In response to this concern, counsel for the Crown undertook to provide and, in fact, provided an undertaking, the form of which was reviewed by the Charity, to the effect that no such public statement would be made.

25 Apart from the foregoing contentions, the Charity made no additional arguments that the Charity itself would suffer irreparable harm if the requested order is not granted. Nonetheless, the record contains evidence that Holy Alpha Academy (the "Academy") in Ghana has received significant donations from the Charity. According to the affidavit of Mr. James Wells of the CRA, cash and goods and merchandise of approximately $376,816 in 2003 and $882,728 in 2004 were delivered by the Charity to the Academy in Ghana. The record further indicates that for the 2003/2004 and 2004/2005 years of the Academy, donations from the Charity made up a large percentage of the total donations received by the Academy (see applicant's record at pages 70 and 71). This evidence points to a significant degree of dependence by the Academy on the Charity in those years. However, the record contains no evidence from the Academy or the Charity indicating the reasons for that degree of dependence in those particular years and whether that degree of dependence would likely continue in subsequent years. Accordingly, in the absence of such evidence, I am unpersuaded that the Academy, as an agency potentially dependent upon the Charity, will suffer irreparable harm if the requested order is not granted. It follows that the Charity has not established the second element of the *RJR-MacDonald* test.

Balance of Convenience

26 Because the Charity failed to establish the irreparable harm element of the *RJR-MacDonald* test, it is unnecessary for me to consider this element of the test.

Disposition

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27 For the foregoing reasons, the application will be dismissed with costs.

Application dismissed.

2006 FC 1443, 2006 CF 1443
Federal Court

Laboratoires Servier v. Apotex Inc.

2006 CarswellNat 4516, 2006 CarswellNat 5949, 2006 FC 1443, 2006 CF 1443, [2006] F.C.J. No. 1887, 154 A.C.W.S. (3d) 463, 57 C.P.R. (4th) 245

Les Laboratoires Servier, Adir, Oril Industries, Servier Canada Inc., Servier Laboratories (Australia) Pty Ltd and Servier Laboratories Limited, Plaintiffs and Apotex Inc. and Apotex Pharmachem Inc., Defendants

S. Noël J.

Heard: November 24, 2006
Judgment: November 29, 2006
Docket: T-1548-06

Counsel: Judith Robinson, Joanne Chriqui, for Plaintiffs
Andrew R. Brodkin, Nando De Luca, Ben Hackett, Lindsay P. Hill, for Defendants

***S. Noël J.*:**

1 This is a motion brought by the Plaintiffs (collectively "Servier") for an interim injunction against the Defendants (collectively "Apotex") to restrain them from using, making, selling, distributing, exporting, supplying and in any other way dealing with the compound perindopril and any pharmaceutically acceptable salts thereof, in the United Kingdom, France, Canada and Australia, on the basis that these activities allegedly infringe Canadian patent no. 1,341, 196 (the "196 Patent"). Since the filing of the motion, the scope of the interim injunction has been restricted to activities affecting the Canadian and Australian markets except for one of the two undertakings made to the Court by Apotex, which refers to the United Kingdom, France and Australia.

I. Procedural Steps

2 On August 25, 2006 the Plaintiffs instituted an action against the Defendants for infringement of the 196 Patent. The Statement of Claim plead that Apotex was making perindopril in Canada for supply to the United Kingdom, thus infringing the 196 Patent.

3 On September 12, 2006, French regulatory authorities obtained a document entitled "Perindopril Erbumine Summary of Physico-chemical Analyses", dated 2004, after conducting a

"saisie contrefaçon" (seizure for infringement). This document stated that the generic perindopril that was to enter the French market was manufactured by Apotex Pharmachem Inc. in Brantford, Ontario (Plaintiffs Motion Record, Affidavit of Yves Langourieux, Tab 8 at p.178). Given the information obtained in France, an amended Statement of Claim dated November 3, 2006 was filed adding Servier Canada, Servier Australia and Servier UK as co-Plaintiffs. The amended Statement of Claim plead new material facts, including that Apotex was infringing the 196 Patent by supplying perindopril that was made in Canada to various markets.

4 On October 26, 2006, Servier obtained a copy of the Australian Pharmaceutical Benefits Schedule ("PBC"), the Australian reimbursement formulary for medicines to take effect on December 1, 2006, which listed generic perindopril for the first time. It is to be noted that on the PBC for December 1, 2006 three generic perindopril brands were listed. All three generic brands are to sell perindopril supplied by GenRx Ltd Pty, an Australian company, who exclusively sells perindopril manufactured by Apotex (Defendants Motion Record, Affidavit of Roger Millichamp, page 9, para. 41).

5 On November 8, 2006, the Plaintiffs filed a Notice of Motion for an interlocutory injunction restraining the Defendants from using, making, selling, distributing, exporting, supplying and in any way dealing with the compound perindopril and asked that a judgment on the interlocutory injunction motion be issued before December 1, 2006. In the event that the interlocutory injunction could not be heard and a judgment issued before December 1, 2006, the Plaintiffs asked the Court for an interim injunction.

6 On November 20-21, 2006, the Court convened two conference calls with the parties to discuss all pertinent matters related to the proceedings. On November 21, 2006, an order was issued setting down a date for the Plaintiffs' interim injunction motion as well as a date for the Plaintiffs' motion for an interlocutory injunction.

7 The Plaintiffs' interim injunction motion was heard on November 24, 2006 in Ottawa. The motion for an interlocutory injunction is set down to be heard on December 6 and 7 initially in Vancouver, but will now be heard in Ottawa.

II. Background and Facts

8 The Plaintiffs are affiliated companies. ADIR is the owner of the 196 Patent. Oril Industries is the manufacturer of perindopril, an inhibitor used to treat hypertension and related cardiovascular disease, which is sold worldwide under the trademark COVERSYL. COVERSYL is Servier's most important product worldwide, it is registered in over 120 countries and has over 500 marketing authorizations.

9 The 196 Patent, entitled "Procédé de Préparation d'Imino Diacides Substitués" was granted on March 6, 2001 and will expire on March 6, 2018.

10 The Defendants are both located in Ontario and are affiliated companies and members of the Apotex Group of Companies. Apotex is manufacturing at its facilities in Ontario perindopril tablets and there is evidence that some of its production is exported.

11 In Australia, GenRx Pty Ltd, a distributor and seller of generic pharmaceutical products, has received marketing authorization from the Australian regulatory authorities to market and sell generic perindopril erbumine in 2, 4, and 8 mg tablets beginning December 1, 2006. All perindopril tablets that will be sold by GenRx are manufactured by Apotex, allegedly in breach of the Plaintiffs' Canadian 196 Patent. As it stands, GenRx has received three shipments of perindopril from Apotex and has already shipped over 1.6 million tablets of perindopril to the two other private labels listed as selling perindopril in the December 1, 2006 PBC (Defendants Motion Record, Affidavit of Roger Millichamp, page 10, para.43). Moreover, as of November 12, 2006, GenRx has informed its 'platinum customers' that it will provide a 45% turnover on all perindopril orders until December 22, 2006 and a 45% discount on all orders of perindopril after that date (Plaintiffs Motion Record, Supplemental Affidavit of Yves Langourieux, page 1403). Also according to GenRx, perindopril tablets have been distributed to over 39 warehouses across Australia and will subsequently be distributed to over 5000 pharmacies in the country (Defendants Motion Record, Affidavit of Roger Millichamp, page 10, para.44). This being said, the Court has taken note of the potential problems that might arise if the perindopril tablets already in the chain of sales are ordered not to be sold on December 1, 2006 to Australian clients and customers.

12 In Canada, Apotex is seeking regulatory approval to market and sell generic perindopril in 2, 4, and 8 mg tablets. According to the patent list submitted by Servier Canada to Health Canada pursuant to the *Patented Medications (Notice of Compliance) Regulations*, the 196 Patent is listed in respect of the 2 and 4 mg dosage form of COVERSYL but not the 8 mg dosage form (Plaintiffs Motion Record, Affidavit of Michael Sumpter, page 1218 para. 35). Thus, in what concerns the 8 mg tablets, Health Canada has apparently taken the position that the *Patented Medicines (Notice of Compliance) Regulations*, SOR/93-133, do not apply. Consequently, Apotex will sooner than later begin to market and sell perindopril tablets in Canada, at least in the 8mg dosage.

III. Apotex's Submissions

13 In responding to Servier's motion for an interim injunction, Apotex submits that Servier does not come to the Court with clean hands. Moreover, Apotex claims that Servier brought their motion after an undue delay, thereby voiding their claim that there is urgency in this matter. I feel it is appropriate to address these two issues summarily before analysing whether substantively an interim injunction is warranted in this case.

14 The clean hands argument, relates to Servier's alleged breach of a confidentiality order issued in Australia. The allegations that Servier does not come to the Court with clean hands is a very serious contention. As such, the Court could only make a finding on such an allegation after

thoroughly reviewing all relevant evidence and having profoundly investigated the issue. Such a review is not possible given the time constraints inherent to a motion for an interim injunction and the limited submissions presented by the parties at such a motion. Consequently, the Court is unable to make any conclusions on the clean hands argument at this time. However, the Court may consider and decide upon this issue in another proceeding relating to this case. This being said, it is to be noted that the Defendants did not indicate to the Court during the emergency teleconferences held November 20-21, 2006 that they had sought an order in Australia relating to the Plaintiffs' alleged breach of confidentiality. It must be remembered that a party cannot seek an equitable redress where they themselves do not act in an equitable manner (see *Pro Swing Inc. v. ELTA Golf Inc.*, 2006 SCC 52 (S.C.C.); *Hall v. Hebert*, [1993] 2 S.C.R. 159 (S.C.C.)).

15 As for the argument that Servier brought this motion to the Court after undue delay, given that Servier only received *confirmation* on October 26, 2006 that Apotex would begin to market their perindopril tablets in Australia on December 1, 2006 and that they filed a Notice of Motion on November 8, 2006, a mere 13 days later, I cannot conclude that this motion should be quashed on the basis of undue delay.

IV. Analysis

(1) Is an interim injunction against Apotex warranted given that they may imminently begin marketing and selling perindopril tablets in both the Canadian and Australian markets?

16 The Federal Court may issue interim injunctions pursuant to section 44 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 and rule 374 of the *Federal Court Rules*, SOR/98-106.

17 The test applied to determine whether an injunction should be issued has been established by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.). As per the *RJR-MacDonald* tri-partite test the Court must consider the following issues: (a) is there is a serious issue to be tried?; (b) would the moving party suffer irreparable harm if the injunction were not granted?; (c) which party is favoured on the balance of convenience?. Moreover, in what concerns interim injunctions, the jurisprudence establishes that in addition to meeting the *RJR-MacDonald* test, the moving party must also establish urgency (see *Procter & Gamble Inc. v. Colgate-Palmolive Canada Inc.* (1995), 61 C.P.R. (3d) 160 (Fed. T.D.); *Pfizer Ireland Pharmaceuticals v. Lilly Icos LLC*, 2004 FC 223 (F.C.)).

(a) Urgency

(i) Canada

18 In Canada, regulatory approval has not yet been granted for the sale or marketing of perindopril tablets in any dosage. The date on which a Notice of Compliance (NOC) will be issued to the Defendants, which would permit them to sell or market perindopril in any dosage,

is unknown. Thus, the Plaintiffs have not demonstrated urgency in what concerns the Defendants' actions in the Canadian market.

19 Furthermore, in his affidavit, Dr. Bernard Sherman, Chair of Apotex Inc., states that the Defendants are willing to provide the following undertaking: "The Defendants hereby undertake that, upon receipt of the first NOC by either or both of them for the marketing of any perindopril containing product in Canada, Apotex will provide ten (10) days' notice to the Plaintiffs' solicitors prior to selling or offering for sale any products under said NOC in Canada" (Defendants Motion Record, Affidavit of Dr. Bernard Sherman, Exhibit 5, page. 195). It is to be noted that at the hearing of this motion, the solicitors for the Defendants stated that they are willing to extend the notice period to 12 days before selling or marketing any perindopril in Canada.

20 Given that no NOC has been issued and that the Defendants undertake to give notice to the Plaintiffs before selling or marketing any perindopril products in Canada, there is no urgency justifying an interim injunction against the Defendants relating to their actions in the Canadian market.

(ii) Australia

21 Apotex's generic perindopril tablets will be available in Australia as early as December 1, 2006. On the basis of this fact alone, the Court finds that, in what concerns the Australian market, urgency is made out.

(b) Serious issue to be tried

22 The threshold for establishing a serious issue to be tried is a low one. Thus, the Defendants, for the purpose of this interim injunction motion only, with much hesitation and without prejudice to the arguments they submitted in support of their motion to strike the statement of claim or certain paragraphs thereof (Prothonotary Aronovitch is seized of this motion), acknowledge that a serious issue to be tried is established so as to simplify the submissions that the Court need deal with on this interim injunction motion.

(c) Irreparable harm

23 The threshold for establishing irreparable harm is a high one (see *Fournier Pharma Inc. v. Apotex Inc.* (1999), 1 C.P.R. (4th) 344 (Fed. T.D.) at para. 6). This being said, on a motion for an interim injunction the Court does not have the benefit of reviewing cross examinations of affidavits and must therefore evaluate the evidence presented at face value.

24 The Plaintiffs have submitted an affidavit from an expert in economics to show that Servier would suffer irreparable harm if generic perindopril were allowed to enter the Australian market.

400

This expert, Dr. Jerry A. Hausman, a professor in economics at the Massachusetts Institute of Technology (MIT), concludes that:

> ... the introduction and subsequent withdrawal of Apotex's generic perindopril would cause Servier substantial and irreparable economic harm that is impossible to estimate accurately. This harm would be caused by:
>
> • Loss of market share and sales of COVERSYL that could not be recovered upon later withdrawal of generic perindopril from the market;
>
> • Lowering of COVERSYL's price that would be irreversible;
>
> • Termination of trained sales employees; and
>
> • Severe reduction in Servier's operations in Australia
>
> (Plaintiffs Motion Record, Affidavit of Jerry A. Haussman, page 434 at para. 72)

I have carefully read the affidavit of Dr. Hausman. From my reading of this affidavit I can attest that it demonstrates Dr. Hausman's indepth knowledge of the effects on the market that release of generics have, as well as provides serious and substantial indications that monetary compensation cannot fully compensate for the harm that entry of generic perindopril will have on the Australian market and thus, that irreparable harm would occur.

25 The Defendants argue that the harm that the Plaintiffs claim the entry of generic perindopril would cause can be adequately compensated by an award of damages after a trial on the merits of the Plaintiffs' claim. Moreover, the Defendants suggest that the long-term effects on the market of the entry of the generic are merely 'speculative', and that the long-term effects alleged are irrelevant to the motion at hand as an interim injunction would only be operative for a very short period, namely for 14 days or until the release of the judgment on the interlocutory injunction, whichever period is shorter.

26 Given the emergency nature of this motion, the fact that cross-examination on the evidence has not yet taken place and that the Defendants due to extreme time constraints have not yet perfected their evidence, the Court, keeping in mind the high threshold required to demonstrate irreparable harm, can but accept the evidence presented by the Plaintiffs at face value. Consequently, the Plaintiffs have, *prima facie*, established irreparable harm were generic perindopril to enter the Australian market on December 1, 2006.

(d) Balance of convenience

27 The last part of the *RJR-MacDonald* tripartite test asks that the balance of convenience be considered. Generally, the balance of convenience will favour maintaining the status quo. In the situation at hand maintaining the status quo in some sense achieves some relief for both

parties. In what concerns the Canadian market no urgency is shown and thus the Defendants are not required to stop manufacturing perindopril. In what concerns the Defendants' perindopril entering the Australian market, the balance of convenience favours the Plaintiffs. As it stands the Defendants' perindopril product is not yet on the Australian consumer market and thus to maintain the status quo steps must be taken to ensure that the Defendants' perindopril products do not enter this market.

28 This being said, it is important to note that the Defendants in their record state that they are willing to provide the following undertaking "The Defendants hereby undertake that they will not export any quantities of perindopril to the United Kingdom, France and Australia pending the return of Plaintiffs' motion for an interlocutory injunction in this matter" (Defendants Motion Record, Affidavit of Dr. Bernard Sherman, Exhibit 5, page. 196). In addition, to this undertaking the Defendants must be prevented from selling, distributing, supplying or shipping any of the perindopril products already on Australian soil. Thus, the Defendants will be required to take all reasonable means to prevent any perindopril product they have manufactured from entering the Australian consumer market and will be required to fully document their efforts in this regard.

29 Also, it is to be noted that the Plaintiffs have stated that "Servier is prepared to undertake to compensate Apotex for its reasonable damages suffered as a result of injunctive relief if this Court so orders pursuant to a final determination at trial of non-infringement or that the '196 Patent is invalid." (Plaintiffs Motion Record, Memorandum of Fact and Law, page 1428 at para. 90). Such an undertaking will also be ordered by the Court so as to guarantee that the Defendants are fairly compensated, if need be.

V. Conclusion

30 The motion for an interim injunction against the Defendants is granted in part. The interim injunction issued prevents the exporting of perindopril products to Australia, as well as the sale, distribution, supply or shipment of any perindopril products already in Australia. The Defendants will have to take all reasonable measures to prevent any perindopril products that they have manufactured from entering the Australian consumer market and will be required to fully document their efforts to this effect. No interim injunction relating to the Defendants' actions on the Canadian market is issued, as no urgency has been demonstrated given the undertaking by the Defendants contained in paragraph 19 of this decision and which shall become part of the order.

VI. Costs

31 In the interest of justice, the costs will follow the decision on the motion for an interlocutory injunction. In the event that no decision is made on the interlocutory injunction, for whatever reason, the parties may reapply to me so that a determination as to costs can be made.

Order

402

THIS COURT ORDERS THAT:

• the Defendants undertake that upon receipt of the first NOC for the marketing of any perindopril containing product in Canada, they will provide 12 days notice to the Plaintiffs' solicitors prior to selling or offering for sale any products under the said NOC in Canada;

• the Defendants undertake that they will not export any quantities of perindopril to the United Kingdom, France and Australia pending the decision on the Plaintiffs' motion for an interlocutory injunction in this matter;

• the Defendants prevent the sale, distribution, supply or shipment of any perindopril products already in Australia, that they have manufactured. The Defendants will have to take all reasonable measures to prevent any perindopril products they have manufactured from entering the Australian consumer market, and will be required to fully document all their efforts to this effect for future purposes, if need be. This part of the order will be in effect for a period of 14 days and can be extended upon application, the whole subject to the determination to be made on the motion for an interlocutory injunction;

• the Plaintiffs undertake to compensate the Defendants for all reasonable damages they may suffer as a result of the issuance of this interim injunction, if need be;

• the costs will follow the decision on the motion for an interlocutory injunction. In the event that no decision is made on the interlocutory injunction, for whatever reason, the parties may reapply to me so that a determination as to costs can be made.

CANADIAN TRANSPORTATION AGENCY

Decision No. 344-C-A-2013

An erratum was issued on October 8, 2013

August 29, 2013

COMPLAINT by Gábor Lukács against Porter Airlines Inc.

File No.: M4120-3/13-01412

INTRODUCTION

[1] Gábor Lukács filed a complaint with the Canadian Transportation Agency (Agency) alleging that certain provisions appearing in Rule 16, *Responsibility for Schedules and Operations*, i.e., Rules 16(c), (e) and (g) (Existing Tariff Rules) of the *Tariff Containing Rules Applicable to Services for the Transport of Passengers and Baggage or Goods between Points in Canada, CTA(A) No. 1* (Tariff) applied by Porter Airlines Inc. (Porter) are unreasonable within the meaning of subsection 67.2(1) of the *Canada Transportation Act*, S.C., 1996, c. 10, as amended (CTA) for the following reasons:

i. these provisions deprive passengers of the right to be provided with notice about schedule changes;
ii. these provisions are a blanket exclusion that exonerates Porter from liability for delays (such as failure to operate on schedule or sudden changes to its flight schedule);
iii. these provisions are inconsistent with the principles of the *Convention for the Unification of Certain Rules for International Carriage by Air – Montreal Convention* (Convention).

[2] Mr. Lukács asks the Agency to disallow the Existing Tariff Rules in their entirety, or in part, and substitute them with wording that incorporates the principles of the Convention.

[3] In its answer to the complaint, Porter proposed certain tariff revisions (Proposed Tariff Rules) in an effort to respond to Mr. Lukács' challenge of the Existing Tariff Rules. In his reply, Mr. Lukács asserts that some of these Proposed Tariff Rules lack clarity, that are inconsistent with the principles of the Convention. He also asserts that they are unjust and unreasonable, and therefore, they should be disallowed.

[4] In this Decision, the Agency will address both Porter's Existing Tariff Rules and the Proposed Tariff Rules.

ISSUES

With respect to the Existing Tariff Rules:

1. Does Existing Tariff Rule 16(c), when considered together with Existing Tariff Rule 20, relieve Porter from the obligation to provide timely notice to its passengers about schedule changes? If so, is Existing Tariff Rule 16(c) unreasonable within the meaning of subsection 67.2(1) of the CTA?
2. Do Existing Tariff Rules 16(c), 16(e) and 16(g) relieve Porter from liability for damages suffered by passengers occasioned by delay and failure to operate on schedule and are they inconsistent with the principles of the Convention? If so, are these Tariff Rules unreasonable within the meaning of subsection 67.2(1) of the CTA?
3. Do the provisions of Existing Tariff Rule 16, starting on the 3rd Revised Page 31 of the Tariff, setting out a list of events for which Porter shall not be liable for failure in the performance of any of its obligations, relieve Porter from liability for delay, regardless of whether it took all reasonable steps necessary to avoid the delay? Are they inconsistent with the principles of the Convention and, if so, are these tariff provisions unreasonable within the meaning of subsection 67.2(1) of the CTA?

With respect to the Proposed Tariff Rules:

1. Is Proposed Tariff Rule 16(b) unclear with respect to Porter's obligations to inform passengers of delays and schedule changes because the phrase "without notice" in Proposed Tariff Rule 16(b) contradicts and negates the obligation to inform stated in Proposed Tariff Rule 16(c)?
2. Is Proposed Tariff Rule 16(b) unreasonable because it is inconsistent with the principles of the Convention, in that it relieves Porter from liability for failure to make connections? Does it appear to relieve Porter from liability for the consequences of providing inaccurate information to passengers, including liability for delay as a result of the misinformation?
3. Is the phrase "will make reasonable efforts" found in Proposed Tariff Rule 16(c) unreasonable in that it tends to relieve Porter from liability if it fails to notify the passenger about a schedule change resulting in the passenger's inability to travel with respect to 1) flight delays; and 2) flight advancements?
4. Is Proposed Tariff Rule 16(d) unclear in that it does not contain "terms and conditions of carriage" or other information that a tariff ought to contain pursuant to subsection 107(1) of the *Air Transportation Regulations*, SOR/88-58, as amended (ATR (Air Transportation Regulations))?
5. Is Proposed Tariff Rule 16(f) unreasonable and inconsistent with the principles of the Convention as it appears to: a) limit or exclude Porter's liability in the case of delay due to flight cancellation or schedule change and focuses on the cause rather than Porter's reaction to events; and; b) fail to provide passengers with the right to seek a full refund if Porter is unable to transport them within a reasonable amount of time and limit or exclude Porter's liability in the case of delay due to flight cancellation or schedule change?
6. Should the phrase "the Carrier proves that" be inserted into Proposed Tariff Rules 16(a)(i) and 16.2(b)(i) before "the Carrier and its employees and agents" to ensure that the burden of proof of the affirmative defense is on the carrier and to reflect the wording of Article 19 of the Convention?
7. Is the reference to "Event of Force Majeure" in Proposed Tariff Rule 16(f) unreasonable, given the proposed definition of "Event of Force Majeure" in Rule 1, because it is misleading and may prejudice passengers' ability to enforce their rights?

RELEVANT TARIFF AND STATUTORY EXTRACTS

[5] The provisions of Existing Tariff Rules, Proposed Tariff Rules and the relevant legislation are set out in the Appendix.

CLARITY AND REASONABLENESS OF TARIFF PROVISIONS

Clarity

[6] As recently stated in Decision No. 249-C-A-2012 (*Lukács v. WestJet*), a carrier meets its tariff obligation of clarity when the rights and obligations of both the carrier and the passenger are stated in such a way as to exclude any reasonable doubt, ambiguity or uncertain meaning.

Reasonableness and conformity with the principles of the Convention

[7] To assess whether a term or condition of carriage is "unreasonable," the Agency has traditionally applied a balancing test, which requires that a balance be struck between the rights of passengers to be subject to reasonable terms and conditions of carriage and the particular air carrier's statutory, commercial and operational obligations. This test was first established in Decision No. 666-C-A-2001 (*Anderson v. Air Canada*) and was recently applied in Decision No. 204-C-A-2013 (*Lukács v. Air Canada*).

[8] The terms and conditions of carriage are set out by an air carrier unilaterally without any input from passengers. The air carrier sets its terms and conditions of carriage on the basis of its own interests, which may have their basis in purely commercial requirements. There is no presumption that a tariff is reasonable.

[9] When balancing the passengers' rights against the carrier's obligations, the Agency must consider the whole of the evidence and the submissions presented by both parties and make a determination on the reasonableness or unreasonableness of the term or condition of carriage based on which party has presented the more compelling and persuasive case.

[10] Mr. Lukács, in addition to setting out concerns regarding the reasonableness and clarity of Porter's Existing Tariff Rules and Proposed Tariff Rules, also submits that the provisions do not conform with the principles of the Convention. In past Decisions, the Agency has determined that tariff provisions that are contrary to the principles of the Convention are unreasonable. The Agency will consider the submissions of the parties on the issue of conformity with the principles of the Convention.

EXISTING TARIFF RULES

Issue 1: Does Existing Tariff Rule 16(c), when considered together with Existing Tariff Rule 20, relieve Porter from the obligation to provide timely notice to its passengers about schedule changes? If so, is Existing Tariff Rule unreasonable within the meaning of subsection 67.2(1) of the CTA?

Positions of the parties

Mr. Lukács

[11] Mr. Lukács submits that, when considered together with Existing Tariff Rule 20, which provides the check-in requirements, Existing Tariff Rule 16(c) is unreasonable because it deprives passengers of their right to be notified about schedule changes affecting their travels.

[12] Mr. Lukács contends that transportation by air requires significant preparations for the passenger such as travelling to an airport that might be located some distance away from their residence, checking in, clearing security and then boarding the flight. Mr. Lukács adds that that due to natural and fully justifiable operation considerations, carriers set deadlines for completing each of these steps. Missing these deadlines may result in losing the assigned seat at the very least and possibly the cancellation of the passenger's reservation. If the departure time of a flight changes, then the respective deadlines change accordingly. In particular, if a carrier reschedules a flight an hour earlier than published, it results in passengers having to arrive at the airport an hour earlier, and having to check in an hour earlier, or else they lose their seats and reservations. Mr. Lukács points out that the Agency recognized, in Decision No. 16-C-A-2013 (*Lukács v. Porter*), the passenger's right to be informed about delays and schedule changes.

Porter

[13] Porter conceded that Existing Tariff Rule 16(c) is unreasonable and filed Proposed Tariff Rule 16(c).

Analysis and findings

[14] Existing Tariff Rule 20 provides a list of check-in requirements and states that failure to meet these requirements may result in the loss of the passenger's assigned seat or reservation.

[15] Existing Tariff Rule 16(c) is silent on the matter of the liability assumed by Porter should a flight be delayed. Given this absence of liability, passengers may not be informed of a delay or changes and therefore may fail to meet the check-in requirements set out in Existing Tariff Rule 20.

[16] In Decision No. 16-C-A-2013, the Agency addressed the same provisions as in this matter in a case that addressed Porter's international tariff. In that Decision, the Agency found that the absence of a provision to this effect relieves Porter from the obligation to provide timely notice to its passengers about delays or schedule changes. Porter has not provided any rationale that would convince the Agency that the domestic tariff should be governed by a different logic than the international tariff. As noted above, Porter conceded that Existing Rule 16(c) is unreasonable.

[17] The Agency therefore finds that Existing Tariff Rule 16(c) is unreasonable.

Issue 2: Do Existing Tariff Rules 16(c), 16(e) and 16(g) relieve Porter from liability for damages suffered by passengers occasioned by delay and failure to operate on schedule and are they inconsistent with the principles of the Convention? If so, are these Tariff Rules unreasonable within the meaning of subsection 67.2(1) of the CTA?

Positions of the parties

Mr. Lukács

[18] Mr. Lukács challenges the reasonableness of Existing Tariff Rules 16(c), 16(e) and 16(g) on the grounds that they are blanket exclusions that relieve Porter from any and every liability for delay and failure to operate on schedule, and because they are inconsistent with the principles of the Convention.

[19] Mr. Lukács submits that the Agency has consistently found blanket exclusions of liability to be unreasonable even in the context of domestic tariffs, where the Convention is not applicable. Mr. Lukács

adds that the Agency held that the principles of the Convention are a persuasive authority for determining the reasonableness of provisions, regardless of whether the Convention applies, such as in Decision No. 181-C-A-2007 (*Pinksen v. Air Canada*) and Decision No. 309-C-A-2010 (*Kipper v. WestJet*).

[20] Mr. Lukács points out that the Agency's preliminary opinion on this issue was affirmed in Decision No. 291-C-A-2011 (*Lukács v. Air Canada*) and was subsequently cited with approval by the Agency in Decision No. 16-C-A-2013, which concluded that Porter's international tariff Rule 18(e), a provision similar to its Existing Tariff Rule 16(g) of its domestic tariff, was unreasonable.

Porter

[21] Porter conceded that Existing Tariff Rules 16(c), 16(e) and 16(g) are unreasonable, and filed Proposed Tariff Rules.

Analysis and findings

[22] Existing Tariff Rules 16(c), 16(e) and 16(g) are silent on the matter of the liability assumed by Porter for failure to make connections, to operate any flight according to schedule, or for changing the schedule of any flight.

[23] With respect to applying the principles of the Convention to domestic tariff provisions, the Agency stated in Decision No. LET-C-A-129-2011 (*Lukács v. Air Canada*) that:

> [...] it is clear that the Agency is, and has been, of the view that the Convention is a useful interpretive tool to which the Agency may refer when applying its "reasonableness" test and striking the balance between passengers' rights and the statutory, commercial and operational obligations of a carrier. In doing so the Agency takes into account the principles of the Convention rather than applying the Convention itself.
>
> The Agency is of the view that passengers should expect and be entitled to consistency in treatment irrespective of whether they are on a domestic or international flight. To that end, the principles set out in the Convention provide insight into what is reasonable to apply in a domestic context.

[24] Article 19 of the Convention provides that the carrier is liable for delay, and it can exonerate itself from liability only if it demonstrates the presence of an affirmative defense, namely, that it and its servants and agents have taken all reasonable steps necessary to avoid the delay.

[25] In Decision No. 16-C-A-2013, the Agency addressed tariff provisions similar to those currently being considered. In that Decision, the Agency determined that the tariff provisions were contrary to Article 19 of the Convention and therefore unreasonable because they were silent on the liability assumed by Porter. Porter has not provided any arguments which would convince the Agency to decide differently than it did in Decision No. 16-C-A-2013. As noted above, Porter conceded that Existing Tariff Rules 16(c), 16(e) and 16(g) are unreasonable.

[26] The Agency therefore finds that Existing Tariff Rules 16(c), 16(e) and 16(g) are unreasonable and inconsistent with the principles of Article 19 of the Convention.

Issue 3: Do the provisions of Existing Tariff Rule 16, starting on the 3rd

Revised Page 31 of the Tariff, setting out a list of events for which Porter shall not be liable for failure in the performance of any of its obligations, relieve Porter from liability for delay, regardless of whether it took all reasonable steps necessary to avoid the delay? Are they inconsistent with the principles of the Convention and, if so, are these tariff provisions unreasonable within the meaning of subsection 67.2(1) of the CTA?

Positions of the parties

Mr. Lukács – Delay

[27] Mr. Lukács submits that the exclusions appearing on the list starting on 3rd Revised Page 31 of the Tariff are unreasonable as they amount to a blanket exclusion of liability. He argues that they are inconsistent with the principles of the Convention.

[28] Mr. Lukács points out that the list has a preamble that reads:

> Notwithstanding any other terms or conditions contained herein, the Carrier shall not be liable for failure in the performance of any of its obligations due to:
>
> [...]
>
> Upon the happening of any of the foregoing events, the Carrier may without notice cancel, terminate, divert, postpone or delay any flight whether before departure or enroute. If the flight, having commenced is terminated, the carrier shall refund the unused portion of the fare and shall use its best effort to provide alternate transportation to the destination for the passengers and baggage at the expense and risk of the passenger or shipper. If the flight has not commenced prior to termination, the carrier will provide a credit equal to the paid fare which will be available for use in the purchase of a new ticket on the same terms for a period of one year from the date of termination. No refund will be available.

[29] Mr. Lukács also points out that the list of events that Porter purports to exonerate itself from any liability from performance of any of its obligations includes, for example:

> v) Accidents to or failure of the aircraft or equipment used in connection therewith including, in particular, mechanical failure.
>
> vi) Non-availability of fuel at the airport of origin, destination or enroute stop.
>
> vii) Others upon whom the Carrier relies for the performance of the whole or any part of any charter contract or flight.

[30] Mr. Lukács asserts that, as the Agency explained in Decision No. 16-C-A-2013, it is not the cause of delay that determines liability but how the carrier reacts to the delay. The exclusions listed starting on 3rd Revised Page 31 of the Tariff relieve Porter from liability for delay solely based on the cause and without reference to how it reacts to the delay. Mr. Lukács argues that these exclusions are inconsistent with the principles of the Convention, and are therefore unreasonable.

Mr. Lukács – Damage or destruction of baggage or cargo

[31] Mr. Lukács points out that destruction, loss and damage to checked baggage and to cargo are governed respectively by Article 17(2) and Article 18(2) of the Convention. The exclusions listed starting on 3rd Revised Page 31 of the Tariff relieve Porter from liability for delay solely based on the cause and without reference to how Porter reacts to the delay. This is inconsistent with the principles of Articles 17(2) and 18(2) of the Convention, and therefore unreasonable.

Mr. Lukács – Relief from "performance of any of its obligations"

[32] Mr. Lukács contends that the impugned provisions purport to relieve Porter from "performance of any of its obligations" in the case of certain events, regardless of how the event affects Porter's ability to perform. Mr. Lukács thus submits that the impugned provisions are a blanket exclusion of liability, and are therefore inconsistent with the principles of the Convention.

Porter

[33] Porter conceded that the provisions starting on 3rd Revised Page 31 of the Tariff, which are in effect, a "force majeure" clause, may have the effect of excluding liability in a manner that is inconsistent with the Convention, and filed Proposed Tariff Rules.

Analysis and findings

[34] Article 19 of the Convention provides that carriers are liable for delay unless it and its servants and agents have taken all reasonable steps necessary to avoid the delay. Articles 17(2) and 18(2) of the Convention provide that carriers are liable for damage or loss of baggage and cargo even in the absence of a causal link between the damage or loss and the inherent defect, vice or quality of the baggage.

[35] The Agency agrees with Mr. Lukács that the exclusions of liability relieve Porter from liability for delay, regardless of whether it took all reasonable steps necessary to avoid the delay, and for damage or loss of baggage or cargo. Also, as noted above, Porter conceded that the provisions starting on 3rd Revised Page 31 of the Tariff, which are in effect a "force majeure" clause, may have the effect of excluding liability in a manner that is inconsistent with the Convention, and Porter filed Proposed Tariff Rules.

[36] The Agency therefore finds the exclusions listed in Existing Tariff Rule 16, starting on 3rd Revised Page 31 of the Tariff, are unreasonable within the meaning of subsection 67.2(1) of the CTA and inconsistent with the principles of the Convention.

PROPOSED TARIFF RULES

Issue 1: Is Proposed Tariff Rule 16(b) unclear with respect to Porter's obligations to inform passengers of delays and schedule given that the phrase "without notice" in Proposed Tariff Rule 16(b) contradicts and negates the obligation to inform stated in Proposed Tariff Rule 16(c)?

Positions of the parties

Mr. Lukács

[37] Mr. Lukács maintains that Proposed Tariff Rule 16(b) is unclear as part of it contradicts and negates Proposed Tariff Rule 16(c). Proposed Tariff Rule 16(b) states, in part: “Schedules are subject to change without notice.” Mr. Lukács points out that at the same time, Proposed Tariff Rule 16(c) states that: “The carrier will make reasonable efforts to inform passengers of delays and schedule changes and, to the extent possible, the reasons for them.”

[38] According to Mr. Lukács, these two provisions contradict each other because the phrase “without notice” in Proposed Tariff Rule 16(b) purports to relieve Porter of any obligation to inform passengers of delays and schedule changes, and thus negates the obligation stated in Proposed Tariff Rule 16(c).

Analysis and findings

[39] The Agency agrees with Mr. Lukács that Proposed Tariff Rule 16(b) is unclear when read in conjunction with Proposed Tariff Rule 16(c) because Proposed Tariff Rule 16(b) contradicts and seems to negate the obligation stated in Proposed Tariff Rule 16(c). In that sense, Proposed Tariff Rule 16(b) creates reasonable doubt, ambiguity or uncertain meaning.

[40] The Agency therefore finds that if filed with the Agency, Proposed Tariff Rule 16(b) would be found to be unclear.

Issue 2: Is Proposed Tariff Rule 16(b) unreasonable because it is inconsistent with the principles of the Convention, in that it relieves Porter from liability for failure to make connections? Does it appear to relieve Porter from liability for the consequences of providing inaccurate information to passengers, including liability for delay as a result of the misinformation?

Positions of the parties

Porter

[41] Porter submits that Proposed Tariff Rule 16(b) contains language taken from Rule 90(B)(2) of the Sample Tariff published by the Agency, and that the statement “schedules are subject to change without notice” was found reasonable in light of the Agency’s finding in Decision No. 16-C-A-2013. Proposed Tariff Rule 16(b) reads as follows:

> Schedules are subject to change without notice, and the carrier assumes no responsibility for the passenger making connections. The carrier will not be responsible for errors or omissions either in timetables or other representation of schedules.

[42] Porter acknowledges that when considering the same language in the context of Porter’s proposed tariff rule in that other proceeding, the Agency also held that additional language was required stating that the carrier “will make reasonable efforts to inform passengers of delays and schedule changes, and the reasons for them.” Porter advises that it has accordingly included the latter language in Proposed Tariff Rule 16 at Proposed Tariff Rule 16(c). Porter asserts that this statement serves to inform the passenger that notice from the carrier may not reach the passenger despite the carrier’s reasonable efforts, thus reducing the possibility that passengers will place undue reliance on the expectation that they will

necessarily receive prior notice in all instances.

[43] Porter contends that passengers may more frequently (but are not required to) take steps to independently ascertain their flights' status, thus reducing the likelihood that they will be unaware of schedule changes and increasing their opportunity to mitigate the impact thereof.

[44] Porter contends that the balance of Proposed Tariff Rule 16(b) reflects the Agency's repeated findings that timetables do not form part of the contract of carriage and that undue reliance by passengers on stated departure times is unreasonable. Porter argues that, to the extent that this provision is contained in the Agency's Sample Tariff, it is *prima facie* evidence of its reasonableness.

Mr. Lukács

[45] Mr. Lukács states that Proposed Tariff Rule 16(b) provides, among other things, that: "[...] the carrier assumes no responsibility for the passenger making connections."

[46] Mr. Lukács submits that in Decision No. 16-C-A-2013, the Agency considered Porter's international tariff Rule 18(c) that contained a similar disclaimer of liability with respect to making connections, and found that the absence of a provision setting out Porter's liability should a flight be delayed and Porter is unable to provide the proof required by Article 19 of the Convention to relieve itself from such liability rendered tariff Rule 18(c) inconsistent with Article 19 of the Convention, and therefore unreasonable.

[47] Mr. Lukács also states that Proposed Tariff Rule 16(b) provides that: "The carrier will not be responsible for errors or omissions [...]"

[48] Mr. Lukács asserts that this provision is unreasonable because it relieves Porter from the duty of due diligence to provide accurate information to passengers about Porter's timetables and schedules.

[49] Mr. Lukács points out that in Decision No. 16-C-A-2013, the Agency recognized that carriers should have the latitude required to amend flight schedules based on commercial and operational obligations, but also recognized the passengers' fundamental right to be informed about schedule changes that affect their itinerary and their ability to travel.

[50] Mr. Lukács submits that this portion of Proposed Tariff Rule 16(b) is therefore unreasonable because it purports to relieve Porter from liability for the consequences of providing inaccurate information to passengers, including liability for delay that follows as a result of the misinformation. Mr. Lukács adds that the impugned portion of Proposed Tariff Rule 16(b) is also unreasonable because it is inconsistent with the principles of the Convention.

Analysis and findings

[51] Porter has made statements concerning the Sample Tariff published by the Agency on its Web site. The Agency clarified its intent in the *Important Qualifiers* section of the Sample Tariff which is set out below.

> This Sample Tariff has been prepared by Agency staff and does not represent an Agency endorsement or approval of its terms. If a carrier chooses to adopt the Sample Tariff as its own, in whole or in part, it can still be subject to Agency review and complaints filed pursuant to the CTA or the ATR (Air Transportation Regulations). The Agency, upon investigating a complaint or on its own motion, could find a carrier's tariff provision to be unreasonable and require a carrier to amend its tariff accordingly even if the carrier's tariff reflects the wording of the Sample Tariff.

[52] In Decision No. 16-C-A-2013, the Agency determined that the absence of a provision that required Porter to make reasonable efforts to inform passengers of delays and schedule changes and the reasons for them rendered the Tariff Rule at issue unreasonable. Porter's Proposed Tariff Rule 16(b) does not meet that standard, nor has Porter provided any rationale that would justify a change to the Agency's determination in Decision No. 16-C-A-2013.

[53] Passengers should not be deprived of the right to be informed as described above because an error or omission has been committed by a carrier in preparing and/or publishing a timetable or schedule. The absence of a provision in Proposed Tariff Rule 16(b) compelling Porter to make a reasonable effort to advise passengers of errors or omissions in timetables and/or schedules renders that Rule unreasonable.

[54] The Agency therefore finds that if filed with the Agency, Proposed Tariff Rule 16(b) would be found to be unreasonable.

Issue 3: Is the phrase "will make reasonable efforts" found in Proposed Tariff Rule 16(c) unreasonable in that it tends to relieve Porter from liability if Porter fails to notify the passenger about a schedule change resulting in the passenger's inability to travel with respect to 1) flight delays; and 2) flight advancements?

Positions of the parties

Porter

[55] Porter advises that Proposed Tariff Rule 16(c) states: "The carrier will make reasonable efforts to inform passengers of delays and schedule changes and, to the extent possible, the reasons for them." In this regard, Porter submits that in Decision No. 16-C-A-2013, the Agency found that the same proposed change applicable to international transportation properly balances the passenger's right to information on schedule changes.

Mr. Lukács

[56] Mr. Lukács acknowledges that Proposed Tariff Rule 16(c) is an improvement compared to the current state of affairs, but submits that making "reasonable efforts" sets the bar too low for Porter in some circumstances.

[57] Mr. Lukács refers to Decision No. LET-A-112-2003 in which the Agency held, under the heading "Passenger Notification," that:

> The Agency is of the opinion that Air Transat should undertake to notify passengers of all schedule irregularities, not just flight advancements.

[58] Mr. Lukács argues that the phrase "will make reasonable efforts" ought to be replaced with the more onerous "undertakes."

[59] Mr. Lukács contends that, while in the case of flight delays, failing to notify passengers usually causes only inconvenience, in the case of advancement of flight schedules, Porter's failure to inform passengers about the schedule change will likely result in passengers not being able to travel at all, because they miss the check-in cut-off times.

[60] Mr. Lukács submits that under Proposed Tariff Rule 16 in general, and Proposed Tariff Rule 16(c) in particular, the passenger is left without any rights or remedies. However, if the word “undertakes” appeared in Proposed Tariff Rule 16(c), then the passenger would have recourse.

Analysis and findings

“Reasonable efforts” versus flight delays

[61] In Decision No. 16-C-A-2013, the Agency stated that:

> [87] [...] the Agency notes that some Canadian carriers, including Air Canada, have tariff provisions that provide that passengers have a right to information on flight times and schedule changes, and that carriers must make reasonable efforts to inform passengers of delays and schedule changes, and the reasons for them. The Agency finds that such provisions are reasonable, and that, in this regard, the rights of passengers to be subject to reasonable terms and conditions of carriage outweigh any of the carrier’s statutory, commercial or operational obligations.

[62] The Agency finds that the commitment to make “reasonable efforts” to inform passengers, insofar as such commitment pertains to flight delays and schedule changes, is consistent with the Agency’s ruling in Decision No. 16-C-A-2013, and is reasonable.

“Reasonable efforts” versus flight advancements

[63] No evidence has been put forth that flight advancements are common. They may occur in practice from time to time. When the air carrier advances the scheduled departure of a flight, the consequences may be more severe than a delay for the passenger and it follows that the duty to inform should be no less onerous.

[64] With respect to flight advancements, passengers affected by flight advancement are not afforded the same protection as passengers affected by flight delay or other schedule changes. In that sense, the Agency agrees with Mr. Lukács’ submission that in such a case, the passenger is left without any rights or remedies as the liability established by the principles of the Convention only apply to flight delays, and not to flight advancements. The absence of a tariff provision that imposes on Porter a requirement to “undertake” to inform passengers of flight advancements would severely limit the recourses available to passengers affected by those advancements, and would certainly be disadvantageous.

[65] The Agency is of the opinion that the commitment to make “reasonable efforts” to inform passengers, insofar as such commitment pertains to flight advancements, is unreasonable. The Agency therefore finds that if filed with the Agency, Proposed Tariff Rule 16(c) would be found to be unreasonable.

Issue 4: Is Proposed Tariff Rule 16(d) unclear in that it does not contain “terms and conditions of carriage” or other information that a tariff ought to contain pursuant to subsection 107(1) of the ATR (Air Transportation Regulations)?

Positions of the parties

Porter

[66] Porter submits that Proposed Tariff Rule 16(d) contains language taken from Rule 90(B)(5) of the Agency's Sample Tariff. Proposed Tariff Rule 16(d) states:

> It is always recommended that the passenger communicate with the Carrier either by telephone, electronic device or via the Carrier's Web site or refer to airport terminal displays to ascertain the flight's status and departure time.

[67] Porter asserts that to the extent that this provision does not create any obligation on the part of the passenger, nor limit the obligations or liability of the carrier, it is reasonable. According to Porter, this provision operates similarly to the warning that schedules may change without notice, insofar as it precludes undue reliance on notice from the carrier and increases the likelihood that passengers will be informed of any schedule changes and thus be better positioned to mitigate the impact.

Mr. Lukács

[68] Mr. Lukács submits that while Porter notes that this provision was taken from the Agency's Sample Tariff, Porter omits to acknowledge that the Sample Tariff is provided to carriers together with the following warning:

> This Sample Tariff has been prepared by Agency staff and does not represent an Agency endorsement or approval of its terms. If a carrier chooses to adopt the Sample Tariff as its own, in whole or in part, it can still be subject to Agency review and complaints filed pursuant to the CTA or the ATR (Air Transportation Regulations). The Agency, upon investigating a complaint or on its own motion, could find a carrier's tariff provision to be unreasonable and require a carrier to amend its tariff accordingly even if the carrier's tariff reflects the wording of the Sample Tariff.

[69] Mr. Lukács maintains that the fact that this provision was included in the Agency's Sample Tariff does not speak either to its clarity or the reasonableness of any provision, and does not convey any obligation of either the passenger or the carrier.

[70] Mr. Lukács asserts that while a carrier is entitled to display various travel tips and recommendations on its Web site, such recommendations do not and cannot form part of the contract of carriage; they are not terms and conditions of carriage, and as such, they ought not be included in the carrier's tariff.

[71] Mr. Lukács submits that Proposed Tariff Rule 16(d) fails to be clear, and ought not be included in Porter's Tariff as it contains no "terms and conditions of carriage" or any other information that a tariff is to contain pursuant to subsection 107(1) of the ATR (Air Transportation Regulations).

Analysis and findings

[72] The Agency disagrees with Mr. Lukács' contention that Proposed Tariff Rule 16(d) is unclear. The Agency finds that it is worded in such a manner that does not create reasonable doubt, ambiguity or uncertain meaning. The Agency does agree with Mr. Lukács that Proposed Tariff Rule 16(d) does not represent a term or condition of carriage. However, Proposed Tariff Rule 16(d) does not impose an obligation on either the carrier or the passenger, and is therefore unenforceable.

[73] The Agency has not been presented with evidence establishing any harm if Proposed Tariff

Rule 16(d) were to appear in the Tariff.

Issue 5: Is Proposed Tariff Rule 16(f) unreasonable and inconsistent with the principles of the Convention as it appears to: a) limit or exclude Porter's liability in the case of delay due to flight cancellation or schedule change and focuses on the cause rather than Porter's reaction to events; and b) fail to provide passengers with the right to seek a full refund if Porter is unable to transport them within a reasonable amount of time and limit or exclude Porter's liability in the case of delay due to flight cancellation or schedule change?

Positions of the parties

Porter

[74] Porter contends that the provisions following Existing Tariff Rule 16(g) have the effect of excluding liability in a manner inconsistent with the Convention, and therefore proposes to replace the impugned clause with Proposed Tariff Rule 16(f) which reads as follows:

> Except with respect to compensation available to passengers under this Rule 16, the Carrier will not guarantee and will not be held liable for cancellations or changes to scheduled flight times due to an Event of Force Majeure.

[75] Porter maintains that Proposed Tariff Rules 16.1 and 16.2 specifically incorporate the principle that passengers are entitled to compensation unless the carrier took all reasonable and possible measures to avoid the damage. Porter therefore argues that even in the case of a delay due to force majeure, passengers will have recourse to reimbursement for their resulting damages where the conditions of the Convention are satisfied.

[76] Porter advises that it is not aware of any Agency Decision in which a force majeure clause has been disallowed as unreasonable for any reason other than its failure to allow for the application of the liability regime prescribed by the Convention. Porter submits that it is reasonable, in balancing the rights of the carrier and the passenger, to exclude liability for events beyond the control of the carrier, subject always to the carrier's strict liability for damages resulting from delay, irrespective of the cause of the delay.

[77] Porter contends that Proposed Tariff Rule 16(f) corrects the defect in the Existing Tariff Rule 16 force majeure clause by specifically subjecting it to the liability regime in which Porter will be liable for delay unless it demonstrates the limited defense set forth in Article 19 of the Convention, rendering the Proposed Tariff Rule reasonable.

1. Proposed definition of "Event of Force Majeure"

[78] Porter submits that, as Proposed Tariff Rule 16(f) makes reference to the term "Force Majeure Event," Porter proposes to add a definition of this term under Rule 1 (Definitions) of its Tariff. Porter advises that the proposed definition provides that a "Force Majeure Event" represents occurrences "which are not within the reasonable control of the Carrier," and sets forth a number of examples of situations which may constitute force majeure events, subject always to the qualification that such events were beyond Porter's reasonable control.

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Mr. Lukács

[79] Mr. Lukács contends that what determines liability for delay is not the cause of the delay, but rather how the carrier reacts to events that may cause delay, even if these events may have been caused by third parties that are not directed by the carrier.

[80] Mr. Lukács submits that the Agency explains this in Decision No. 16-C-A-2013:

> [105] Accordingly, what is at issue, in terms of avoiding liability for delay, is not who caused the delay but, rather, how the carrier **reacts** to a delay. In short, did the carrier's servants and agents do everything they reasonably could in the face of air traffic control delays, security delays on releasing baggage, delays caused by late delivery of catered supplies or fuel to the aircraft and so forth, even though these may have been caused by third parties who are not directed by the carrier?

[81] Mr. Lukács maintains that as Proposed Tariff Rule 16(f) deals with flight cancellations and schedule changes, it is difficult to understand what kind of liability, other than liability for delay, this provision aims to exclude. Mr. Lukács further submits that Porter provided no explanation or examples of scenarios where it may wish to invoke Proposed Tariff Rule 16(f), but which do not already fall within the scope of delay.

[82] Mr. Lukács asserts that Porter seems to suggest that the Convention is the only reason the Agency disallowed provisions dealing with the rights of passengers in the case of flight cancellation and schedule changes, which is not the case.

[83] In this regard, Mr. Lukács points out that in Decision No. 28-A-2004 (*Air Transat*), the Agency considered in great detail the rights of passengers for protection in the case of events that are beyond the passengers' control:

> By Decision No. LET-A-166-2003 dated August 7, 2003 [...] the Agency advised Air Transat that Rule 6.3 of its tariff was not just and reasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations), in that it does not provide adequate options to passengers affected by a schedule irregularity, and does not protect passengers from events that are beyond the passengers' control, and, therefore, does not allow passengers any recourse if they are unable to connect to other air carriers or alternate modes of transportation such as cruise ships or trains.

[84] According to Mr. Lukács, that Agency Decision demonstrates that passengers have a fundamental right to a refund of their fares if the carrier is unable to transport them for any reason that is outside the passengers' control and that the carrier cannot keep the fare paid by the passengers and refuse to provide a refund on the basis that its inability to provide transportation was due to certain events.

Analysis and findings

[85] The Agency agrees with Mr. Lukács' submission that Proposed Tariff Rule 16(f) is unreasonable in that it fails to reflect the appropriate approach to the issue of liability, as set out in Decision No. 16-C-A-2013:

> [105] Accordingly, what is at issue, in terms of avoiding liability for delay, is not who caused the delay but, rather, how the carrier **reacts** to a delay. In short, did the carrier's servants and agents do everything they reasonably could in the face of air traffic control delays, security delays on releasing baggage, delays caused by late delivery of catered supplies or fuel to the aircraft and so forth, even though these may have been caused by third parties who are not directed by the carrier?

[86] The Agency also agrees with Mr. Lukács' submission that Proposed Tariff Rule 16(f) does not provide for refunds should Porter be unable to carry the passenger because of reasons beyond Porter's control. Proposed Tariff Rule 16(f) simply requires that passengers be compensated in accordance with that Rule.

[87] Existing Tariff Rule 17(b) provides that:

> **Involuntary Cancellations** – In the event a refund is required because of the carrier's failure to complete the operation of any flight after its commencement and the ticket is partially unused as a result of an enroute cancellation, termination or diversion, that part of the total fare paid for each unused segment will be refunded. If the ticket is totally or partially unused as a result of a refusal to transport, the total fare or that part of the total fare paid for each unused segment will be refunded. No refund will be available if the flight is cancelled prior to the commencement of the flight and the provisions of Rule 16 will apply.

[88] The Agency agrees with Mr. Lukács, and finds that it is unreasonable for Porter to refuse to refund the fare paid by a passenger because of its cancellation of a flight, even if the cause is an event beyond Porter's control.

[89] The Agency therefore finds that if filed with the Agency, Proposed Tariff Rule 16(f) would be found to be unreasonable.

Issue 6: Should the phrase "the Carrier proves that" be inserted into Proposed Tariff Rules 16(a)(i) and 16.2(b)(i) before "the Carrier and its employees and agents" to ensure that the burden of proof of the affirmative defense is on the carrier and to reflect the wording of Article 19 of the Convention?

Positions of the parties

Porter

[90] Porter submits that Proposed Tariff Rule 16.1 clearly sets out the circumstances in which Porter will be liable to passengers for expenses resulting from delays, in accordance with the principles of the Convention. Porter points out that the contents of its various provisions were considered and determined to be reasonable in Decision No. 16-C-A-2013.

[91] Porter maintains that Proposed Tariff Rule 16.1 is consistent with Decision No. LET-C-A-29-2011 and that Rule states plainly that Porter will be liable to reimburse passengers in the circumstances set out in that Decision; there is no suggestion that liability will only adhere in exceptional circumstances.

[92] Porter contends that Proposed Tariff Rule 16.2 addresses Porter's liability under the Tariff for delayed delivery of a passenger's baggage. Porter adds that the Proposed Tariff Rule's contents are substantially identical to those found to be reasonable in Decision No. 16-C-A-2013.

[93] According to Porter, consistent with the Convention's liability principles, Proposed Tariff Rule 16.2(b) positively states that, notwithstanding that concurrent baggage delivery is not guaranteed, Porter will be liable for delays in the carriage of baggage except in the circumstances set out therein. Porter adds that as with Proposed Tariff Rule 16.1(i)(b), Proposed Tariff Rule 16.2(b) reproduces the exception to liability contained in Article 19 of the Convention, and sets out a reasonable process by which passengers may submit claims for compensation to Porter.

[94] Porter asserts that Proposed Tariff Rule 16.2(c) provides notice to passengers of the compensation available to them from Porter, including that:

(a) Porter will reimburse passengers for the loss of her bag after 21 days, subject to limits of:

i. 1131 SDR, expressly stated to be approximately equivalent to CAD $1,800, where no excess value has been declared, and
ii. (CAD $3,000, where the passenger has declared an excess value of the lost item.

[95] Porter points out that in Decision No. 418-C-A-2011 (*Lukács v. WestJet*), the Agency has found similar provisions – including as to clarity, limits of liability and requirement of proof of value – to be reasonable.

[96] Porter also points out that as with Proposed Tariff Rule 16.1, Proposed Tariff Rule 16.2 permits Porter to deny otherwise eligible claims only where the passenger has failed to follow the reasonable process set out therein, or where the expenses claimed are not reasonable.

Mr. Lukács

[97] Mr. Lukács contends that the vast majority of the provisions under Proposed Tariff Rules 16.1 and 16.2 are reasonable but the phrase "the Carrier proves that" ought to be inserted into Proposed Tariff Rule 16.1(a)(d) [or more correctly, Proposed Tariff Rule 16.2(a)(i)] and Proposed Tariff Rule 16.2(b)(i) before "the Carrier and its employees and agents" in order to reflect the wording of Article 19 of the Convention.

[98] According to Mr. Lukács, this phrase is to ensure that the burden of proof of the affirmative defense is on the carrier, which is a central feature of the Convention that has been widely recognized by the courts in Canada.

[99] Mr. Lukács disagrees with Porter's statement that Existing Tariff Rule 16 does not affect Porter's liability with respect to baggage; not only do these provisions explicitly refer to baggage, but they also purport to relieve Porter from all of its obligations, including with respect to delivery of baggage to the passenger.

[100] Mr. Lukács points out that the provisions in Existing Tariff Rule 16 provide that:

Notwithstanding any other terms or conditions contained herein, the Carrier shall not be liable for failure in the performance ofany of its obligations due to:

> [...]
>
> Upon the happening of any of the foregoing events, the Carrier may without notice cancel, terminate, divert, postpone or delay any flight whether before departure or enroute. If the flight, having commenced is terminated, the carrier shall refund the unused portion of the fare and shall use its best effort to provide alternate transportation to the destination for the passengers and baggage at the expense and risk of the passenger or shipper. If the flight has not commenced prior to termination, the carrier will provide a credit equal to the paid fare which will be available for use in the purchase of a new ticket on the same terms for a period of one year from the date of termination. No refund will be available.

[101] Mr. Lukács submits that not only do these provisions explicitly refer to baggage, they also purport to relieve Porter from all of its obligations, including with respect to delivery of baggage to the passenger.

Analysis and findings

[102] Proposed Tariff Rules 16.1 and 16.2 are exactly the same as Rules 18.1 and 18.2 in Porter's international tariff, which were found reasonable by the Agency in Decision No. 16-C-A-2013. The only new argument raised by Mr. Lukács is the need to add the words "the Carrier proves that." The Agency disagrees with Mr. Lukács' submission that to accurately reflect the principles of the Convention, these words should be inserted in the Proposed Tariff Rules.

[103] The Agency is of the opinion that irrespective of whether the words "the Carrier proves that" appear in Proposed Tariff Rules 16.1 and 16.2, the burden of proof rests with the carrier to demonstrate that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.

[104] The Agency finds that it is not necessary that the phrase "the Carrier proves that" be inserted into Proposed Tariff Rules 16.1 and 16.2 to reflect the wording of Article 19 of the Convention.

Issue 7: Is the reference to "Event of Force Majeure" in Proposed Tariff Rule 16(f) unreasonable, given the proposed definition of "Event of Force Majeure" in Rule 1, because it is misleading and may prejudice passengers' ability to enforce their rights?

Positions of the parties

Porter

[105] Porter advises that as Proposed Tariff Rule 16(f) makes reference to an "Event of Force Majeure," Porter has filed a definition of that term which it proposes to add to Rule 1 (Definitions) of its Tariff.

[106] Porter submits that the proposed definition provides that an "Event of Force Majeure" is an occurrence that is not within the reasonable control of the Carrier and Porter sets forth a number of examples of situations which may constitute events of force majeure, subject always to the qualification that such events were beyond Porter's reasonable control.

Mr. Lukács

[107] Mr. Lukács maintains that most events of the type listed under the proposed definition are not considered to be force majeure by Canadian courts or international authorities. Mr. Lukács contends that Porter's proposed definition of "Event of Force Majeure" is misleading and may prejudice passengers' ability to enforce their rights. According to Mr. Lukács, the definition is cause-and-event based and unnecessarily complicates the simple and straightforward liability regime of Article 19 of the Convention.

Analysis and findings

[108] The Agency is of the opinion that, in and of itself, the proposed definition of "Event of Force Majeure" provided under Proposed Tariff Rule 1 is unreasonable as it includes incidents that have not been determined to be of a nature to constitute "force majeure." In addition, the event causing a flight delay or cancellation is not the determining factor in establishing whether a carrier is liable under the principles of the Convention. The Agency has determined in Decision No. 16-C-A-2013, for example, that what is vital is the manner in which the carrier reacts to those events.

[109] The Agency finds that the reference to "Event of Force Majeure" in Proposed Tariff Rule 16(f) would be found to be unreasonable if filed with the Agency, given the proposed definition of "Event of Force Majeure" in Rule 1.

SUMMARY OF CONCLUSIONS

With respect to Porter's Existing Tariff Rules

Issue 1

[110] The Agency has determined that Existing Tariff Rule 16(c), when considered together with Existing Tariff Rule 20 of the Tariff, is unreasonable.

Issue 2

[111] The Agency has determined that Existing Tariff Rules 16(c), 16(e) and 16(g) are unreasonable.

Issue 3

[112] The Agency has determined that the exclusions listed in Existing Tariff Rule 16, starting on the 3rd Revised Page 31 of the Tariff, are unreasonable.

With respect to Porter's Proposed Tariff Rules

Issue 1

[113] The Agency has determined that the wording in Proposed Tariff Rule 16(b) would be found to be unclear if filed with the Agency.

Issue 2

[114] The Agency has determined that the wording in Proposed Tariff Rule 16(b) would be found to be unreasonable if filed with the Agency.

Issue 3

[115] The Agency has determined that the wording in Proposed Tariff Rule 16(c) would be found to be unreasonable if filed with the Agency.

Issue 4

[116] The Agency has determined that the wording in Proposed Tariff Rule 16(d) would be found to be clear if filed with the Agency.

Issue 5

[117] The Agency has determined that Proposed Tariff Rule 16(f) would be found to be unreasonable if filed with the Agency.

Issue 6

[118] The Agency has determined that it is not necessary to insert the phrase “the Carrier proves that” in Proposed Tariff Rules 16.1 and 16.2.

Issue 7

[119] The Agency has determined that the reference to “Event of Force Majeure” in Proposed Tariff Rule 16(f) would be found to be unreasonable if filed with the Agency, given the proposed definition of “Event of Force Majeure” in Rule 1.

ORDER

[120] The Agency, pursuant to section 113 of the ATR (Air Transportation Regulations), disallows the following provisions of Porter’s Tariff:

- Rule 16(c);
- Rule 16(e);
- Rule 16(g); and,
- The exclusions listed in Existing Tariff Rule 16, starting on 3rd Revised Page 31.

[121] The Agency orders Porter, by September 30, 2013, to amend its Tariff to conform to this Order and the Agency’s findings set out in this Decision.

[122] Pursuant to paragraph 28(1)(*b*) of the CTA, the disallowance of Existing Tariff Rules 16(c), 16(e) and 16(g), and the exclusions listed in Existing Tariff Rule 16 starting on 3rd Revised Page 31, shall come into force when Porter complies with the above or on September 30, 2013, whichever is sooner.

Appendix

RELEVANT TARIFF EXTRACTS

Existing Tariff Rules

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RULE 16 – RESPONSIBILITY FOR SCHEDULES AND OPERATIONS

a. The Carrier will endeavour to transport the passenger and baggage with reasonably dispatch, but times shown in timetables or elsewhere are not guaranteed and form no part of this contract.
b. The agreed stopping places are those places shown in the carrier's timetable as scheduled stopping places on the route. The carrier may, without notice, substitute alternative carriers or aircraft and, if necessary, may alter or omit stopping places shown in the timetables.
c. Schedules are subject to change without notice. The carrier is not responsible or liable for failure to make connections or for failure to operate any flight according to schedule, or for a change to the schedule of any flight.
d. Without limiting the generality of the foregoing, the carrier cannot guarantee that the passenger's baggage will be carried on the flight if sufficient space is not available as determined by the carrier.
e. The Carrier is not responsible or liable for failure to make connections, or for failure to operate any flight according to schedule, or for a change to the schedule of any flight.
f. Without limiting the generality of the foregoing, the Carrier cannot guarantee that a passenger's baggage will be carried on the flight if sufficient space is not available as determined by the Carrier.
g. The Carrier will not provide or reimburse passengers for expenses incurred due to delays or cancellations of flights or be responsible for any special, incidental, direct or indirect, or consequential damages arising out of such delays or cancellations of flights whether or not the carrier had knowledge that such damages might be occurred.

Notwithstanding any other terms or conditions contained herein, the Carrier shall not be liable for failure in the performance of any of its obligations due to:

i. Act of God.
ii. War, revolution, insurrection, riot, blockade or any other unlawful act against public order or authority including an act of terrorism involving the use or release or threat thereof, of any nuclear weapon or device or chemical or biological agent.
iii. Strike, lock-out, labour dispute, or other industrial disturbance whether involving the Carrier's employees or others upon whom the Carrier relies.
iv. Fire, flood, explosion, storm, lightning or adverse weather conditions generally.
v. Accidents to or failure of the aircraft or equipment used in connection therewith including, in particular, mechanical failure.
vi. Non-availability of fuel at the airport of origin, destination or enroute stop.
vii. Others upon whom the Carrier relies for the performance of the whole or any part of any charter contract or flight.
viii. Government order, regulation, action or inaction.
ix. Unless caused by its negligence, any difference in weight or quantity of cargo from shrinkage, leakage or evaporation.
x. The nature of the cargo or any defect in the cargo or any characteristic or inherent vice therein.
xi. Violation by a consignee or any other party claiming an interest in the cargo of any of the terms and conditions contained in this tariff or in any other applicable tariff including, but without being limited to, failure to observe any of the terms and conditions relating to cargo not acceptable for transportation or cargo acceptable only under certain conditions.
xii. Improper or insufficient packing, securing, marking or addressing.
xiii. Acts or omissions of warehousemen, customs or quarantine officials or other persons other than the Carrier or its agents, in gaining lawful possession of the cargo.

[...]

RELEVANT STATUTORY EXTRACTS

Air Transportation Regulations, SOR/88-58, as amended

Subsection 107(1)

Every tariff shall contain:

[...]

(*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;

[...]

(*n)* 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,
>
> (iv) passenger re-routing,
>
> (v) failure to operate the service or failure to operate on schedule,
>
> (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,
>
> [...]

Subsection 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.

Section 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*).

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Canada Transportation Act, S.C., 1996, c. 10, as amended

Subsection 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.

PROPOSED AMENDED RULE 16 TO PORTER'S TARIFF

Rule 16 – Responsibility for Schedules and Operations

a. The carrier will endeavor to transport the passenger and baggage with reasonable dispatch, but times shown in timetables or elsewhere are not guaranteed and form no part of this contract.
b. Schedules are subject to change without notice, and the carrier assumes no responsibility for the passenger making connections. The carrier will not be responsible for errors or omissions either in timetables or other representation of schedules.
c. The Carrier will make reasonable efforts to inform passengers of delays and schedule changes and, to the extent possible, the reasons for them.
d. It is always recommended that the passenger communicate with the Carrier either by telephone, electronic device or via the Carrier's Web site or refer to airport terminal displays to ascertain the flight's status and departure time.
e. The agreed stopping places are those places shown in the carrier's timetable as scheduled stopping places on the route. The carrier may, without notice, substitute alternative carriers or aircraft and, if necessary, may alter or omit stopping places shown in the timetable.
f. Except with respect to compensation available to passengers under this Rule 16, the Carrier will not guarantee and will not be held liable for cancellations or changes to scheduled flight times due to an Event of Force Majeure.

Rule 16.1 – Passenger Expenses Resulting from Delays

(a) Passengers will be entitled to reimbursement from the Carrier for reasonable expenses incurred as a result of a delay,subject to the following conditions:

i. The Carrier shall not be liable for any damages, costs, losses or expenses occasioned by delays if it, and its employees and agents, took all measures that could reasonably be required to avoid the damage or if it was impossible for the Carrier and its employees or agents to take such measures;
ii. Any passenger seeking reimbursement for expenses resulting from delays must provide the Carrier with (a) written notice of his or her claim, (b) particulars of the expenses for which reimbursement is sought and (c) receipts or other documents establishing to the reasonable satisfaction of the Carrier that the expenses were incurred.

(b) The Carrier may refuse or decline any claim, in whole or in part, if:

i. the passenger has failed or declined to provide proof or particulars establishing, to the reasonable satisfaction of the Carrier, that the expenses claimed were incurred by the passenger and resulted

from a delay for which compensation is available under this Rule 16; or

ii. the expenses for which reimbursement is claimed, or any portion thereof, are not reasonable or did not result from the delay, as determined by the Carrier, acting reasonably.

In any case, the Carrier may, in its sole discretion, issue meal, hotel and/or ground transportation vouchers to passengers affected by a delay.

Rule 16.2 – Baggage Delays

(a) The carrier cannot guarantee that the passenger's baggage will be carried on the flight if sufficient space is not available as determined by the Carrier.

(b) Notwithstanding the foregoing, passengers whose baggage does not arrive on the same flight as the passenger will be entitled to reimbursement from the Carrier for reasonable expenses incurred as a result of the baggage delay, subject to the following conditions:

i. The Carrier shall not be liable for any damages, costs, losses or expenses occasioned by delays in the delivery of baggage if the Carrier, and its employees and agents, took all measures that could reasonably be required to avoid the damage or if it was impossible for the Carrier and its employees or agents to take such measures;
ii. The passenger must have complied with the check-in requirements set out in Rule 20 of this tariff;
iii. In order to assist the Carrier in commencing the tracing of the baggage in question, the passenger is encouraged to report the delayed baggage to the Carrier as soon as reasonably practicable following the completion of the flight;
iv. The passenger must provide the Carrier with (a) written notice of any claim for reimbursement within 21 days of the date on which the baggage was placed at the passenger's disposal, or in the case of loss within 21 days of the date on which the baggage should have been placed at the passenger's disposal; (b) particulars of the expenses for which reimbursement is sought; and (c) receipts or other documents establishing to the reasonable satisfaction of the Carrier that the expenses were incurred;
v. The liability of the Carrier in the case of lost or delayed baggage shall not exceed CAD$1,800 for each passenger, unless the passenger has declared a higher value and paid the supplementary sum in accordance with Rule 9(a) of this tariff, in which case the Carrier's liability will be limited to the lesser of the value of the delayed baggage or the declared value, up to a maximum of CAD$3,000.

(c) After a 21 day delay, the Carrier will provide a settlement in accordance with the following rules:

i. if no value is declared per Rule 9(a), the settlement will be for the value of the delayed baggage or CAD$1 ,800, whichever is the lesser, and
ii. if value is declared per Rule 9(a), the settlement will be for the value of the delayed baggage or the declared sum (per Rule 9(a)) up to a maximum of $3,000, whichever is the lesser.
iii. in connection with any settlement under this subsection (c), the passenger shall be required to furnish proof of the value of the delayed baggage which establishes such value to the satisfaction of the Carrier, acting reasonably.

(d) The Carrier may refuse or decline any claim relating to delayed baggage, in whole or in part, if:

i. the conditions set out in subsection 16.2(b) above have not been met;
ii. the passenger has failed or declined to provide proof or particulars establishing, to the reasonable

satisfaction of the Carrier, that the expenses claimed were incurred by the passenger and resulted from a delay for which compensation is available under this Rule 16; or

iii. the expenses for which reimbursement is claimed, or any portion thereof, are not reasonable or did not result from the delay, as determined by the Carrier, acting reasonably.

Proposed Addition to Rule 1 (Definition)

Event of Force Majeure means an event, the cause or causes of which are not within the reasonable control of the Carrier, which may include, but are not limited to (i) earthquake, flood, hurricane, explosion, fire, storm, epidemic, other acts of God or public enemies, war, national emergency, invasion, insurrection, riots, strikes, picketing, boycott, lockouts or other civil disturbances, (ii) interruption of flying facilities, navigational aids or other services, (iii) any laws, rules, proclamations, regulations, orders, declarations, interruptions or requirements of or interference by any government or governmental agency or official thereof, (iv) inability to procure materials, accessories, equipment or parts from suppliers, mechanical failure to the aircraft or any part thereof, damage, destruction or loss of use of an aircraft, confiscation, nationalization, seizure, detention, theft or hijacking of an aircraft, or (v) any other cause or circumstances whether similar or dissimilar, seen or unforeseen, which the Carrier is unable to overcome by the exercise of reasonable diligence and at reasonable cost.

Member(s)

Raymon J. Kaduck
Sam Barone

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Date modified:
2013-08-29

CANADIAN TRANSPORTATION AGENCY

Decision No. 31-C-A-2014

January 31, 2014

COMPLAINT by Gábor Lukács against Porter Airlines Inc.

File No.: M4120-3/13-05680

INTRODUCTION

[1] Gábor Lukács filed a complaint with the Canadian Transportation Agency (Agency) alleging that certain provisions in Rules 1, 3.4, 15, 18 and 20 (Existing Tariff Rules) of the Tariff Containing Rules Applicable to Scheduled Services for the Transportation of Passengers and Baggage or Goods Between Points in Canada on the One Hand and Points Outside Canada on the Other Hand (Tariff) applied by Porter Airlines Inc. (Porter) are inconsistent with the Convention for the Unification of Certain Rules for International Carriage by Air – Montreal Convention (Montreal Convention), and are unclear and/or unreasonable. The Rules at issue set out Porter's responsibilities relating to flight cancellation, schedule change, flight advancement and denied boarding. Mr. Lukács also alleges that Porter's Tariff fails to incorporate certain elements of the *Code of Conduct of Canada's Airlines* (Code of Conduct).

[2] Porter filed proposed revisions to its Existing Tariff Rules (Proposed Tariff Rules) with its answer.

ISSUES

With respect to the Existing Tariff Rules

1. Does the failure to incorporate certain elements of the Code of Conduct into Porter's Tariff render it unreasonable?
2. Is the definition of "Event of Force Majeure" in Existing Tariff Rule 1.1 unreasonable within the meaning of subsection 111(1) of the *Air Transportation Regulations*, SOR/88-58, as amended (ATR (Air Transportation Regulations))?
3. Are Existing Tariff Rules 3.4 and 15 unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations) and/or unclear, contrary to section 122 of the ATR (Air Transportation Regulations)?
4. Is Existing Tariff Rule 18(c) unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations)?
5. Is Existing Tariff Rule 20 unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations) and/or unclear, contrary to section 122 of the ATR (Air Transportation Regulations)?

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With respect to the Proposed Tariff Rules

1. Is the definition of “Credit Shell” in Proposed Tariff Rule 1.1 unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations)?
2. Is Proposed Tariff Rule 15(a)(iii)(b) unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations)?
3. Is Proposed Tariff Rule 15(a)(iv) unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations)?
4. Is Proposed Tariff Rule 15(a) unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations) and/or unclear, contrary to section 122 of the ATR (Air Transportation Regulations)?
5. Is Proposed Tariff Rule 15(c) unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations) and/or unclear, contrary to section 122 of the ATR (Air Transportation Regulations)?
6. Is Proposed Tariff Rule 18(c) unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations)?
7. Is Proposed Tariff Rule 20 unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations) and/or unclear, contrary to section 122 of the ATR (Air Transportation Regulations)?

RELEVANT STATUTORY AND TARIFF EXTRACTS

[3] The Existing Tariff Rules and Proposed Tariff Rules as well as the statutory extracts relevant to this Decision are set out in the Appendix.

CLARITY AND REASONABLENESS OF TARIFF PROVISIONS

Clarity

[4] In Decision No. 2-C-A-2001 (*Mr. H v. Air Canada*) the Agency formulated the test respecting the carrier’s obligation of tariff clarity as follows:

> [...] the Agency is of the opinion that an air carrier’s tariff meets its obligations of clarity when, in the opinion of a reasonable person, 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.

[5] This test was recently applied in Decision No. 442-C-A-2013 (*Azar v. Air Canada*).

Unreasonableness

[6] To assess whether a term or condition of carriage is “unreasonable”, the Agency has traditionally applied a balancing test, which requires that a balance be struck between the rights of passengers to be subject to reasonable terms and conditions of carriage and the particular air carrier’s statutory, commercial and operational obligations.

[7] When balancing the passengers’ rights against the carrier’s obligations, the Agency must consider the whole of the evidence and the submissions presented by both parties, and make a determination on the reasonableness or unreasonableness of the term or condition of carriage based on which party has presented the more compelling and persuasive case. This test was first established in Decision No. 666-

C-A-2001 (*Anderson v. Air Canada*) and was recently applied in Decision No. 442-C-A-2013.

EXISTING TARIFF RULES

Issue 1: Does the failure to incorporate certain elements of the Code of Conduct into Porter's Tariff render it unreasonable?

Positions of the parties

Mr. Lukács

[8] Mr. Lukács submits that in 2008, the Government of Canada and the three major Canadian air carriers (Air Canada, Air Transat A.T. Inc. carrying on business as Air Transat (Air Transat) and WestJet) voluntarily agreed to the Code of Conduct.

[9] Mr. Lukács asserts that the key points of the Code of Conduct are:

- Passengers have a right to information on flight times and schedule changes. Airlines must make reasonable efforts to inform passengers of delays and schedule changes and to the extent possible, the reason for the delay or change.
- Passengers have a right to punctuality.
    a. If a flight is delayed and the delay between the scheduled departure of the flight and the actual departure of the flight exceeds 4 hours, the airline will provide the passenger with a meal voucher.
    b. If a flight is delayed by more than 8 hours and the delay involves an overnight stay, the airline will pay for overnight hotel stay and airport transfers for passengers who did not start their travel at that airport.
    c. If the passenger is already on the aircraft when a delay occurs, the airline will offer drinks and snacks if it is safe, practical and timely to do so. If the delay exceeds 90 minutes and circumstances permit, the airline will offer passengers the option of disembarking from the aircraft until it is time to depart.
- Passengers have a right to take the flight they paid for. If the flight is overbooked or cancelled, the airline must offer passengers a choice between transportation to their destination or a refund of the unused portion.

[10] Mr. Lukács argues that Existing Tariff Rules 3.4 and 15 are inconsistent with the Code of Conduct. He contends that the Rules fail to incorporate the "right for care" provisions (meal voucher, overnight hotel, and drinks and snacks) that the three major Canadian air carriers have long ago adopted, and which Sunwing Airlines Inc. (Sunwing) recently incorporated into its tariff.

Porter

[11] Porter submits that inclusion in tariffs of the provisions set out in the Code of Conduct is not required by the ATR (Air Transportation Regulations), and that its Proposed Tariff Rules contain reasonable provisions, to the full extent required, concerning remedies available to passengers for delay. In addition, Porter argues that any failure to prescribe a right to vouchers in no way limits the rights of passengers in a manner inconsistent with the Montreal Convention.

Mr. Lukács

[12] Mr. Lukács states that while Porter incorporated (c) of the Code of Conduct as Proposed Tariff Rule 18(d), Porter refuses to incorporate (a) and (b) of the Code of Conduct into its Tariff, and vehemently argues against them.

[13] Mr. Lukács maintains that subsection 86(1) of the *Canada Transportation Act*, S.C., 1996, c. 10, as amended (CTA), and subsection 111(1) and section 113 of the ATR (Air Transportation Regulations) confer upon the Agency jurisdiction to examine whether the absence of tariff provisions requiring Porter to distribute meal, accommodation and transportation vouchers in the case of flight delay renders Porter's Tariff unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations).

[14] Mr. Lukács asserts that subparagraph 122(*c*)(v) of the ATR (Air Transportation Regulations) requires Porter to state its policy with respect to flight delay in its Tariff. He therefore maintains that even if the Agency's jurisdiction were confined to matters listed under section 122 of the ATR (Air Transportation Regulations), the issue of distributing meal, accommodation and transportation vouchers to delayed passengers would still be within the Agency's jurisdiction.

[15] Mr. Lukács argues that while passengers have a legitimate interest in being issued meal, accommodation and transportation vouchers in the case of longer delays (as set out in the Code of Conduct), doing so would not affect Porter's ability to meet its statutory, commercial and operational obligations. Mr. Lukács contends that the incorporation of the Code of Conduct has become an industry standard for Canadian air carriers, and Porter's competitors have implemented that Code in their respective tariffs.

[16] Mr. Lukács therefore concludes that the absence of the Code of Conduct from Porter's Tariff, including the requirement to distribute meal, accommodation and transportation vouchers to delayed passengers, renders the Tariff unreasonable.

Analysis and findings

[17] The Agency notes, as does Mr. Lukács, that the Code of Conduct is voluntary, and was agreed upon by Air Canada, Air Transat and WestJet. The word "voluntary", in and of itself, is clearly indicative of a free and unrestrained will. In that sense, the Agency cannot force a carrier, through an Agency decision, to abide by that Code. In any case, the Agency agrees with Porter that its Proposed Tariff Rules provide, to the extent required, reasonable remedies for passengers who have been affected by flight delays. The Agency therefore finds that the absence from Porter's Tariff of all of the elements of the Code of Conduct does not render the Tariff unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations).

Issue 2: Is the definition of "Event of Force Majeure" in Existing Tariff Rule 1.1 unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations)?

Positions of the parties

Mr. Lukács

[18] Mr. Lukács points out that in Decision No. 344-C-A-2013 (*Lukács v. Porter*), a virtually identical tariff provision that Porter had proposed to include in its domestic tariff was considered, and the Agency held that:

> [108] The Agency is of the opinion that, in and of itself, the proposed definition of "Event of Force Majeure" provided under Proposed Tariff Rule 1 is unreasonable as it includes incidents that have not been determined to be of a nature to constitute "force majeure." In addition, the event causing a flight delay or cancellation is not the determining factor in establishing whether a carrier is liable under the principles of the Convention. The Agency has determined in Decision No. 16-C-A-2013, for example, that what is vital is the manner in which the carrier reacts to those events.

[19] Mr. Lukács maintains that the same conclusion is applicable to the definition of "Event of Force Majeure" in Existing Tariff Rule 1.1, and that the definition ought to be disallowed.

Porter

[20] Porter acknowledged that this Existing Tariff Rule as well as the Existing Tariff Rules set out in Issues 3 to 6 require revisions. In this regard, Porter filed Proposed Tariff Rules.

Analysis and findings

[21] The Agency finds that because the definition of "Event of Force Majeure" includes incidents that have not been determined to be of a nature to constitute "force majeure", the same conclusion is applicable in this matter as that reached in Decision No. 344-C-A-2013. The Agency finds, therefore, that the definition of "Event of Force Majeure" in Existing Tariff Rule 1.1 fails to strike a balance between the rights of passengers to be subject to reasonable terms and conditions of carriage and Porter's statutory, commercial and operational obligations. As such, the definition is unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations).

Issue 3: Are Existing Tariff Rules 3.4 and 15 unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations) and/or unclear, contrary to section 122 of the ATR (Air Transportation Regulations)?

Position of Mr. Lukács – Reasonableness of Existing Tariff Rules 3.4 and 15: Limitation of liability

[22] Mr. Lukács submits that the Agency explained in Decision No. 16-C-A-2013 (*Lukács v. Porter*) that what determines liability for delay is not the cause of the delay, but rather how the air carrier reacts to the delay.

[23] Mr. Lukács maintains that the effect of Existing Tariff Rules 3.4 and 15 is to relieve Porter from virtually every liability in the case of delay and/or failure to operate on schedule, regardless of whether Porter and its servants and agents have taken all reasonable measures necessary to avoid the delay. He contends that the impugned provisions effectively limit Porter's liability in the case of delay to providing passengers, at Porter's sole discretion, a credit that is valid for one year or otherwise a refund of the fare paid by the passengers.

[24] Mr. Lukács argues that Existing Tariff Rules 3.4 and 15 are provisions tending to relieve Porter from the liability set out in Article 19 of the Montreal Convention and/or to fix a lower limit of liability than what is set out in that Convention. He submits that Existing Tariff Rules 3.4 and 15 are null and void, under Article 26 of the Montreal Convention, and are therefore unreasonable and ought to be disallowed.

Analysis and findings

[25] The Agency finds that Existing Tariff Rules 3.4 and 15 relieve Porter from virtually all liability in the

case of delay and/or failure to operate on schedule, regardless of whether Porter and its servants and agents have taken all reasonable measures necessary to avoid the delay. The Agency indicated in Decision No. 16-C-A-2013 that it is how the air carrier reacts to the delay that will determine the liability, and not who caused the delay. As such, the Agency finds that these Rules are inconsistent with Article 19 of the Montreal Convention, are null and void pursuant to Article 26 of that Convention, and are therefore unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations).

Position of Mr. Lukács – Concomitant obligation of air carriers to reprotect passengers

[26] Mr. Lukács points out that in Decision No. 250-C-A-2012 (*Lukács v. Air Canada*), the Agency held that:

[25] It is clear that Article 19 of the Convention imposes on a carrier liability for damage occasioned by delay in the carriage of, amongst other matters, passengers, but a carrier will not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or it was impossible for them to take such measures. As the Agency stated in the Show Cause Decision, with a presumption of liability for delay against a carrier, there is a concomitant obligation for a carrier to mitigate such liability and address the damage which has or may be suffered by a passenger as a result of delay. [...]

[27] Mr. Lukács cites certain court cases to support his position.

[28] Mr. Lukács argues that a carrier cannot avoid liability under Article 19 of the Montreal Convention by merely stating that its flights were fully booked. He maintains that, instead, the carrier must take steps to mitigate the damage suffered by passengers as a result of the delay, and must attempt to secure seats on other carriers.

Analysis and findings

[29] The Agency finds that when a flight delay occurs, Article 19 of the Montreal Convention imposes an obligation on the carrier to take the necessary steps to mitigate the damage suffered by passengers because of the delay, including the arranging of alternative air transportation. As such, the Agency finds that the absence of this obligation in Existing Tariff Rules 3.4 and 15 renders them inconsistent with Article 19 of the Montreal Convention, null and void pursuant to Article 26 of the Montreal Convention, and therefore unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations).

Position of Mr. Lukács – Passengers are entitled to a refund if the carrier is unable to transport them within a reasonable period of time

[30] Mr. Lukács points out that in Decision No. 28-A-2004, the Agency recognized the fundamental right of passengers to be refunded for the unused portions of their tickets if the carrier is unable to provide transportation on its services or on the services of other carrier(s) within a reasonable period of time. He also points out that in that Decision, the Agency substituted Air Transat's International Tariff Rule 6.3(d) with the following provision:

> 6.3(d) If the Carrier is unable to provide reasonable alternative transportation on its services or on the services of other carrier(s) within a reasonable period of time, then it will refund the unused ticket or portions thereof.

[31] Mr. Lukács submits that passengers have a fundamental right to a refund of their fares if the carrier is

unable to transport them for any reason that is outside the passengers' control. Mr. Lukács adds that, in particular, the carrier cannot keep the fare paid by passengers and refuse to provide a refund on the basis that its inability to provide transportation was due to certain events.

[32] Mr. Lukács points out that in Decision No. 344-C-A-2013 (*Lukács v. Porter*), the Agency considered Porter's proposed Domestic Tariff Rule 16(f), and reached the same conclusion as in Decision No. 28-A-2004. He asserts that the same conclusion is applicable to Existing Tariff Rules 3.4 and 15, namely, that they are unreasonable, because they purport to allow Porter to refuse to refund fares paid for flights that were cancelled.

Analysis and findings

[33] The Agency finds that as they allow Porter to refuse the tendering of refunds when a flight is cancelled for reasons outside the passenger's control, Existing Tariff Rules 3.4 and 15 are unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations). The Agency finds that the Rules fail to strike a balance between the passengers' rights to be subject to reasonable terms and conditions of carriage and Porter's statutory, commercial and operational obligations.

Position of Mr. Lukács – The choice with respect to refund lies with the passenger

[34] Mr. Lukács refers to Decision No. LET-C-A-80-2011 (*Lukács v. Air Canada*), where the Agency expressed the preliminary opinion that it is unreasonable for a carrier to retain the choice between reprotecting passengers and providing a refund, and that the choice ought to lie with the passengers. He points out that in Decision No. 250-C-A-2012, the Agency affirmed this finding, and stated that:

> [123] [...] the Agency finds that Tariff Rule 91(B)(3), as currently drafted, is unreasonable for failing to give the passenger sole discretion to choose to obtain a refund.
>
> [124] The Agency also determines that Air Canada's proposal to leave the choice of option with the passenger is reasonable.

[35] Mr. Lukács argues that the choice of whether to obtain a refund or be reprotected ought to lie solely with the passenger, and any provision purporting to allow the carrier to retain that choice is unreasonable. He therefore concludes that Existing Tariff Rules 3.4 and 15 are unreasonable as they fail to give the passenger sole discretion to choose to obtain a refund.

Analysis and findings

[36] The Agency finds that the absence of a provision in Existing Tariff Rules 3.4 and 15 providing the passenger with the sole discretion to determine whether a refund will be tendered or reprotection occurs, renders those Rules unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations). The Agency therefore finds that these Rules fail to strike a balance between the passengers' rights to be subject to reasonable terms and conditions of carriage and Porter's statutory, commercial and operational obligations.

Position of Mr. Lukács – In certain circumstances, passengers are entitled to transportation to their point of origin without a charge in addition to a full refund

[37] Mr. Lukács refers to Decision No. LET-C-A-80-2011, where the Agency held that:

> [104] [...] As Mr. Lukács submits, payment of a partial refund may force a passenger to absorb some of the costs directly associated with their delayed travel. The Agency accepts Mr. Lukács' submission

> that the actual costs, or damages, incurred by a passenger may exceed the mere refund of the unused ticket.
>
> [105] Accordingly, the Agency is of the preliminary opinion that the part of Tariff Rule 91(B) that allows for a refund of the unused portion of the ticket only is unreasonable. Air Canada has not demonstrated why, given its commercial and operational obligations, it cannot refund the entire ticket cost. Furthermore, Air Canada has not addressed the question of returning a passenger to their point of origin, within a reasonable time and at no extra cost, in cases where delay or cancellation occurs at a connecting point during travel, with the result that a passenger's travel no longer serves the passenger's purpose. As Mr. Lukács argues, many situations can be envisioned in which a passenger could be forced to absorb the cost of a flight that does not meet their needs, nor fulfill their purpose of travel, and does not coincide with the transportation for which the passenger contracted.

[38] Mr. Lukács maintains that in Decision No. 250-C-A-2012, the Agency affirmed these preliminary findings. He also notes that Air Canada, Air Transat, Sunwing and WestJet have all incorporated provisions in their tariffs that give effect to these findings. He submits that Porter will suffer no competitive disadvantage by doing the same.

[39] Mr. Lukács asserts that Existing Tariff Rules 3.4 and 15 are unreasonable in that they fail to address the question of returning a passenger to their point of origin, within a reasonable time and at no cost, in cases where delay or cancellation occurs at a connecting point during travel, with the result that a passenger's travel no longer serves the passenger's purpose. He also asserts that these Rules fail to provide for a refund of the full fare in such situations.

Analysis and findings

[40] The Agency finds that Existing Tariff Rules 3.4 and 15 are unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations) because they do not provide for the return of a passenger to their point of origin, within a reasonable time and at no cost, when a delay or cancellation occurs at a connecting point during travel, with the result that a passenger's travel no longer serves the passenger's purpose. The Agency finds that the absence of such a provision in Existing Tariff Rules 3.4 and 15 fails to strike a balance between the passengers' rights to be subject to reasonable terms and conditions of carriage and Porter's statutory, commercial and operational obligations.

Position of Mr. Lukács – Existing Tariff Rule 3.4: "without notice to any passengers affected thereby"

[41] Mr.Lukácspoints out that Existing Tariff Rule 3.4, which he also submits is unreasonable because it purports to deprive passengers of the right to notice of schedule changes affecting their travel, states that:

> The Carrier reserves the right to cancel or change the planned departure, schedule, route, aircraft or stopping places of any flight for which fares in respect of a International Service have been paid, at any time and from time to time, for any reason, **without notice to any passengers affected thereby** and, in connection therewith, the Carrier shall not be liable to any passenger in respect of such cancellation or change, whether or not resulting from an Event of Force Majeure [...] [Emphasis added by Mr. Lukács]

[42] Mr. Lukács points out that in Decision No. LET-A-112-2003, the Agency held, in relation to Air Transat's tariff, that:

> The Agency notes that Rule 5.2(b) of the tariff is devoid of any provision relating to the notification of

> passengers in the event of a flight delay. As such, the Agency is of the view that this provision may not be just and reasonable. The Agency is of the opinion that **Air Transat should undertake to notify passengers of all schedule irregularities, not just flight advancements**. [Emphasis added by Mr. Lukács]

[43] Mr. Lukács submits that the right of passengers to be informed about delays and schedule changes was more recently recognized by the Agency in Decision No. 16-C-A-2013, in the context of Porter's International Tariff.

[44] Mr. Lukács maintains that in the absence of notice about schedule changes, passengers are at risk of losing the entire benefit of the itinerary for which they have paid. He asserts that it is unreasonable to deprive passengers of notice about schedule changes, and that any provision exempting Porter from the obligation to notify passengers ought to be disallowed as unreasonable.

Analysis and findings

[45] The Agency finds that the absence of a provision in Existing Tariff Rule 3.4 requiring Porter to provide notice to passengers regarding schedule changes renders that Rule unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations). The Agency therefore finds that Existing Tariff Rule 3.4 fails to strike a balance between the passengers' rights to be subject to reasonable terms and conditions of carriage and Porter's statutory, commercial and operational obligations.

Position of Mr. Lukács – Lack of clarity of Existing Tariff Rules 3.4 and 15

[46] Mr. Lukács contends that Existing Tariff Rule 18, which was established in its existing form following Decision No. 16-C-A-2013, imposes liability upon Porter for damage occasioned by delay that reflects Porter's obligations under Article 19 of the Montreal Convention. He adds that, at the same time, Existing Tariff Rules 3.4 and 15 purport to relieve Porter from virtually every liability in the case of delay and/or failure to operate on schedule, regardless of whether Porter demonstrated the facts necessary to invoke the defense set out in Existing Tariff Rule 18.1(i) (which reflects Article 19 of the Montreal Convention). Mr. Lukács concludes that Existing Tariff Rules 3.4 and 15 contradict Existing Tariff Rule 18 and, as such, they render Porter's Tariff unclear, contrary to section 122 of the ATR (Air Transportation Regulations).

Analysis and findings

[47] The Agency finds that Existing Tariff Rules 3.4 and 15 are unclear, contrary to section 122 of the ATR (Air Transportation Regulations) given the contradiction between those Rules and Existing Tariff Rule 18(c). Given that contradiction, the Agency finds that Existing Tariff Rules 3.4 and 15 are stated in such a way as to create reasonable doubt, ambiguity or uncertain meaning as to the Rules' application.

Issue 4: Is Existing Tariff Rule 18(c) unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations)?

Position of Mr. Lukács

[48] Mr. Lukács contends that while in the case of flight delays failing to notify passengers usually causes only inconvenience, in the case of advancement of flight schedules, the failure of Porter to inform passengers about the schedule change will likely result in passengers not being able to travel at all, because they miss the check-in cut-off times. He argues that making "reasonable efforts" sets the bar too low for Porter in the case of flight advancements, and points out that in Decision No. LET-A-112-2003, the

Agency stated, under the heading “Passenger Notification”, that:

> The Agency is of the opinion that Air Transat should undertake to notify passengers of all schedule irregularities, not just flight advancements.

[49] Mr. Lukács points out that, subsequently, in Decision No. 344-C-A-2013, the Agency held that:

> [64] [...] The absence of a tariff provision that imposes on Porter a requirement to “undertake” to inform passengers of flight advancements would severely limit the recourses available to passengers affected by those advancements, and would certainly be disadvantageous.
>
> [65] The Agency is of the opinion that the commitment to make “reasonable efforts” to inform passengers, insofar as such commitment pertains to flight advancements, is unreasonable. [...]

[50] Mr. Lukács concludes that Existing Tariff Rule 18(c) ought to be substituted with wording that imposes on Porter the requirement to “undertake” to inform passengers of flight advancements.

Analysis and findings

[51] The Agency agrees with Mr. Lukács’ submission. As the Agency indicated in Decision No. 344-C-A-2013, the absence of a provision in Existing Tariff Rule 18(c) requiring Porter to undertake to advise passengers of a flight advancement renders that Rule unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations). The Agency finds that Existing Tariff Rule 18(c) fails to strike a balance between the passengers’ rights to be subject to reasonable terms and conditions of carriage and Porter’s statutory, commercial and operational obligations.

Issue 5: Is Existing Tariff Rule 20 unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations) and/or unclear, contrary to section 122 of the ATR (Air Transportation Regulations)?

[52] Mr. Lukács challenges the reasonableness and clarity of Existing Tariff Rule 20, as a whole, because it is, according to him, inconsistent with the legal principles set out by the Agency in Decision No. 666-C-A-2001, Decision No. 204-C-A-2013 (*Lukács v. Air Canada*) and Decision No. 227-C-A-2013 (*Lukács v. WestJet*).

Reasonableness

Position of Mr. Lukács – “reasonable efforts” and “same comparable, or lower booking code”

[53] Mr. Lukács asserts that it is a common practice of air carriers to reprotect passengers who are denied boarding on booking codes higher than their original codes, if doing so results in mitigation of the passengers’ delay. He also asserts that reprotecting passengers, on a higher booking class if necessary, is the normal and ordinary consequence of overselling a flight, and is consistent with the carrier’s concomitant obligation under Article 19 of the Montreal Convention to mitigate the delay of passengers.

Analysis and findings

[54] The Agency finds that the phrase “same comparable, or lower booking code” is unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations) because such phrase is inconsistent with the obligation under Article 19 of the Montreal Convention to mitigate the delay of

passengers, including reprotecting those passengers on booking codes higher than their original reservations.

Position of Mr. Lukács – No refund or alternate transportation for flights originating in the United States

[55] Mr. Lukács notes that Existing Tariff Rule 20 provides, in part, that:

> If a passenger has been denied a reserved seat in case of an oversold flight on Porter Airlines:
>
> [...]
>
> (b) where the flight originates in the United States, the Carrier will provide denied boarding compensation as set forth in this Rule 20 below.

[56] Mr. Lukács submits that a literal reading of this provision suggests that with respect to flights originating in the United States, Porter provides only monetary compensation, but has no obligation to provide a refund or to arrange for alternate transportation.

[57] Mr. Lukács contends that while this is likely not the intended meaning of Existing Tariff Rule 20, it is obvious that the Rule is either unclear or unreasonable with respect to the rights of passengers departing from the United States.

Analysis and findings

[58] The Agency finds that the absence of a provision from Existing Tariff Rule 20 requiring Porter to also provide a refund or arrange for alternate transportation for flights originating in the United States renders that Rule unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations). In this regard, the Agency finds that Existing Tariff Rule 20 fails to strike a balance between the passengers' rights to be subject to reasonable terms and conditions of carriage and Porter's statutory, commercial and operational obligations.

Position of Mr. Lukács – No denied boarding compensation for passengers departing from Canada

[59] Mr. Lukács submits that Existing Tariff Rule 20 contains no provisions requiring Porter to pay compensation to passengers departing from Canada who are denied boarding, and that, instead, the Rule is confined to the reprotection of these passengers. He argues that reprotection of passengers is not a form of compensation, but rather the belated fulfillment of the contract of carriage.

[60] Mr. Lukács refers to Decision No. 666-C-A-2001, where the Agency considered the principles governing the amount of denied boarding compensation payable to passengers, and held, in part, that:

> [...] any passenger who is denied boarding is entitled to compensation; evidence of specific damages suffered need not be provided.

[61] Mr. Lukács contends that compensation of victims of denied boarding has two components:

1. reimbursement for out-of-pocket expenses, including refunds; and,
2. denied boarding compensation (lump sum, no evidence of specific damage is required).

[62] Mr. Lukács maintains that this principle has been recognized, for example, in Decision No. 268-C-A-2007 (*Kirkham v. Air Canada*), where the Agency ordered Air Canada to both reimburse the passenger for his out-of-pocket expenses and pay the passenger denied boarding compensation.

[63] Mr. Lukács points out that in Decision No. 227-C-A-2013, the Agency considered the lack of tariff provisions requiring the payment of denied boarding compensation in WestJet's International Tariff, and stated that:

> [21] [...] any passenger who is denied boarding is entitled to compensation. [...] The Agency finds, therefore, that Existing Tariff Rule 110(E) is unreasonable.
>
> [...]
>
> [39] [...] 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.

[64] Mr. Lukács maintains that Existing Tariff Rule 20 is unreasonable because it fails to impose any obligation of paying denied boarding compensation to passengers, contrary to the Agency's findings in Decision No. 666-C-A-2001. Mr. Lukács asserts that the Rule ought to be substituted with a provision that implements the denied boarding compensation amounts of the United States regime, so that the same amounts will apply to all international flights of Porter, regardless of the point of origin.

Analysis and findings

[65] The Agency finds that Existing Tariff Rule 20 is unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations) because the Rule does not require Porter to tender denied boarding compensation to passengers departing from Canada, contrary to the Agency's findings in Decision No. 666-C-A-2001. The Agency therefore finds that Existing Tariff Rule 20 fails to strike a balance between the passengers' rights to be subject to reasonable terms and conditions of carriage and Porter's statutory, commercial and operational obligations.

Position of Mr. Lukács – Substitution of aircraft with one of a smaller capacity

[66] According to Mr. Lukács, Existing Tariff Rule 20 relieves Porter from the obligation to pay denied boarding compensation to passengers who are denied boarding because "a smaller capacity aircraft was substituted for safety or operational reasons." He notes that a virtually identical provision was recently considered in Decision No. 204-C-A-2013.

[67] Mr. Lukács points out that in Decision No. 204-C-A-2013, the Agency concluded that, in the absence of specific language that established context or qualified Air Canada's exemption from paying denied boarding compensation, the applicable rule was unreasonable.

[68] Mr. Lukács submits that this conclusion is equally applicable to Existing Tariff Rule 20, and therefore the impugned provision is unreasonable.

Analysis and findings

[69] The Agency finds that the finding in Decision No. 204-C-A-2013 relating to the payment of denied boarding compensation when substitution to a smaller aircraft occurs is equally applicable to this matter. The absence of specific language that establishes context or qualifies Porter's exemption from paying denied boarding compensation renders Existing Tariff Rule 20 unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations) as it fails to strike a balance between the passengers' rights to be subject to reasonable terms and conditions of carriage and Porter's statutory, commercial and operational obligations.

Position of Mr. Lukács – Cash v. voucher

[70] Mr. Lukács points out that Existing Tariff Rule 20 provides, under the heading “Method of Payment”, that:

> Except as provided below, the Carrier must give each passenger who qualifies for denied boarding compensation a payment by cheque or draft for the amount specified above, on the day and place the involuntary denied boarding occurs. However, if the Carrier arranges alternate transportation for the passenger’s convenience that departs before the payment can be made, the payment will be sent to the passenger within 24 hours. Carrier may offer free or discounted transportation vouchers in place of cash or cheque payment. The passenger may, however, insist on the cash/cheque payment or refuse all compensation and bring private legal action.

[71] Mr. Lukács submits that in Decision No. LET-C-A-83-2011 (*Lukács v. WestJet*), the Agency stated that any compensation paid in accordance with the tariff is to be paid in the form of cash, cheque, credit to a passenger’s credit card, or any other form acceptable to the passenger. He adds that this finding was reiterated by the Agency in Decision No. 227-C-A-2013 in the specific context of denied boarding compensation.

[72] Mr. Lukács argues that the acceptance of other forms of denied boarding compensation must be an informed decision, based on the passenger being fully informed of the restrictions that accepting an alternative form of compensation may entail. Mr. Lukács states that this principle is common to both the American and the European denied boarding compensation regimes.

[73] Mr. Lukács contends that although, in theory, receiving a travel voucher for an amount equal to double or triple the cash denied boarding compensation may mutually benefit Porter and its passengers, in practice, the vouchers tend to be nearly worthless due to the many restrictions imposed on their use, and benefit only Porter. He states that one of these restrictions is that vouchers seem to be valid only for Porter’s flights, and that is a significant restriction given that Porter does not have an extensive network.

[74] Mr. Lukács asserts that the vast majority of passengers are not aware of the many restrictions associated with vouchers, and that it is very difficult to verify whether passengers have been adequately informed about their rights by the carrier. He maintains that even if passengers are made aware of all the restrictions and limitations of Porter’s travel vouchers, they cannot make an informed decision at the airport, in a matter of minutes, as to whether to seek cash compensation or accept a travel voucher instead.

[75] Mr. Lukács points out that in Decision No. 252-C-A-2012 (*Lukács v. WestJet*), the Agency recognized the importance of passengers having a reasonable opportunity to fully assess their options.

[76] Mr. Lukács submits that in this case, acceptance of compensation by way of travel vouchers may have very significant disadvantages for passengers, and there is a very serious concern about passengers being deprived of the ability to make an informed decision, based on the consideration of all the pros and cons, about the form of compensation that they wish to receive.

[77] Mr. Lukács maintains that even if the Agency were to find that paying compensation by way of travel vouchers, with the written consent of the passenger, is a reasonable alternative to cash compensation, passengers ought to be able to change their minds within a reasonable amount of time, and exchange their travel vouchers with cash compensation.

[78] Mr. Lukács refers to Decision No. 342-C-A-2013 (*Lukács v. Air Canada*), where the Agency considered the issue of appropriate method of payment of denied boarding compensation. He states that

in that Decision, the Agency imposed the following restrictions on Air Canada offering denied boarding compensation by way of travel vouchers:

- (R1) carrier must inform passengers of the amount of cash compensation that would be due, and that the passenger may decline travel vouchers, and receive cash or equivalent;
- (R2) carrier must fully disclose all material restrictions before the passenger decides to give up the cash or equivalent payment in exchange for a travel voucher;
- (R3) carrier must obtain the signed agreement of the passenger, confirming that the passenger was provided with the aforementioned information, prior to providing travel vouchers in lieu of compensation;
- (R4) the amount of the travel voucher must be not less than 300% of the amount of cash compensation that would be due;
- (R5) passengers are entitled to exchange the travel vouchers to cash at the rate of $1 in cash being equivalent to $3 in travel vouchers within one (1) month.

[79] Mr. Lukács submits that these restrictions are reasonable, and strike a balance between the rights of passengers to be subject to reasonable terms and conditions of carriage and the carrier's statutory, commercial and operational obligations. He also submits that if Porter chooses to offer denied boarding compensation by way of travel vouchers at all, then Porter ought also be subject to the aforementioned restrictions.

Analysis and findings

[80] The Agency finds that Existing Tariff Rule 20 is unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations) because of the absence of provisions that provide for the following:

- denied boarding compensation must be tendered in the form of cash, cheque, credit to a passenger's credit card, or any other form acceptable to the passenger;
- the passenger must be fully informed of the restrictions that may apply to alternative forms of compensation;
- in the event that a passenger opts for travel vouchers as compensation, the passenger must be able to change their mind within a reasonable amount of time, and exchange their vouchers for cash;
- if the carrier offers travel vouchers, the restrictions set out in Decision No. 342-C-A-2013 must apply.

[81] The Agency finds that, in the absence of the above provisions, Existing Tariff Rule 20 fails to strike a balance between the passengers' rights to be subject to reasonable terms and conditions of carriage and Porter's statutory, commercial and operational obligations.

Lack of clarity

Position of Mr. Lukács – Where does the choice lie?

[82] Mr. Lukács points out that in Decision No. LET-A-82-2009, the Agency considered a similar provision in Air Canada's tariff and raised serious concerns about its clarity. He also points out that Air Canada subsequently amended its tariffs to clarify that it retained the choice between a refund and alternate transportation. Mr. Lukács maintains that in Decision No. 479-A-2009, the Agency accepted this amendment for the limited purpose of the Agency's concerns about clarity; however, subsequently, in Decision No. LET-C-A-80-2011, the Agency stated that:

> [108] [...] By retaining some discretion over the selection of the choice of options from its Tariff provision, Air Canada may be limiting or avoiding the actual damage incurred by a passenger as a result of delay. The Agency also notes that with respect to this Issue, Air Canada has not demonstrated to the satisfaction of the Agency why, from an operational and commercial perspective, the choice of option could not lie exclusively with the passenger.

[83] Mr. Lukács states that following this finding, Air Canada amended its tariffs to ensure that the choice lies exclusively with the passenger.

[84] Mr. Lukács asserts that Existing Tariff Rule 20 is unclear in its current form because it fails to specify with whom the choice lies between a refund and alternate transportation. He maintains that the choice between a refund and alternate transportation ought to lie exclusively with the passenger.

Analysis and findings

[85] The Agency finds that Existing Tariff Rule 20 is unclear because it fails to specify with whom the choice lies between a refund and alternate transportation. The Agency finds that the choice between a refund and alternate transportation ought to lie exclusively with the passenger. The Agency therefore finds that Existing Tariff Rule 20 is contrary to section 122 of the ATR (Air Transportation Regulations) because the Rule is stated in such a way as to create reasonable doubt, ambiguity and uncertain meaning as to the Rule's application.

Position of Mr. Lukács – "reasonable efforts" and "same comparable, or lower booking code"

[86] Mr. Lukács argues that the phrase "will make reasonable efforts" renders Existing Tariff Rule 20 unclear in that it does not impose a clear obligation upon Porter, and that "will make reasonable efforts" ought to be replaced simply with "shall". He also argues that Existing Tariff Rule 20 purports to limit Porter's obligation to secure alternate transportation on flights "in the same comparable, or lower booking code". Mr. Lukács submits that this phrase is unclear because Porter's booking codes may not be comparable to the booking codes of other air carriers, and that, more importantly, this restriction is unreasonable.

Analysis and findings

[87] The Agency finds that the phrase "will make reasonable efforts" in Existing Tariff Rule 20 is unclear in that the provision, as worded, does not impose a clear obligation on Porter. The Agency agrees with Mr. Lukács' submission that the phrase "same comparable, or lower booking code" is unclear because other carriers may not have booking codes comparable to those of Porter. The Agency finds that, given those phrases, Existing Tariff Rule 20 is contrary to section 122 of the ATR (Air Transportation Regulations) because it is stated in such a way as to create reasonable doubt, ambiguity and uncertain meaning as to the Rule's application.

Reasonableness and lack of clarity

Position of Mr. Lukács – Passenger's option

[88] Mr. Lukács notes that Existing Tariff Rule 20 provides, under the heading "Passenger's Option", that:

> Acceptance of the compensation relieves the Carrier from any further liability to the passenger

> caused by the failure to honour the confirmed reservation. However, the passenger may decline the payment and seek to recover damages in a court of law or in some other manner.

[89] Mr. Lukács contends that this provision is virtually identical to WestJet's Tariff Rule 110(G) in effect at that time that was considered in Decision No. 227-C-A-2013, where the Agency held, in part, that:

> [28] [...] the Agency is of the opinion that even if a payment is accepted by a passenger, that passenger can still seek to recover damages in a court of law or in some other manner [...]

[90] Mr. Lukács argues that the same conclusion is applicable to the "Passenger's Option" section of Existing Tariff Rule 20, and thus the provisions under this heading are both unclear and unreasonable.

Analysis and findings

[91] With respect to the issue of clarity, the Agency finds that the findings in Decision No. 227-C-A-2013 also apply to this matter, and that the provision at issue is unclear, contrary to section 122 of the ATR (Air Transportation Regulations), because it leaves the impression that the passenger cannot seek to recover damages in a court of law or in some other manner even if a payment is accepted by the passenger. The Agency finds that the provision at issue in Existing Tariff Rule 20 is stated in such a way as to create reasonable doubt, ambiguity and uncertain meaning as to the Rule's application.

[92] With respect to the reasonableness of the provision at issue, the Agency agrees with Mr. Lukács' submission. The Agency finds that the findings in Decision No. 227-C-A-2013 also apply to this matter, and that the provision at issue is unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations) because even if a passenger has accepted a payment, that passenger can still seek to recover damages in a court of law or in some other manner. The Agency therefore finds that the provision fails to strike a balance between the passengers' rights to be subject to reasonable terms and conditions of carriage and Porter's statutory, commercial and operational obligations.

Position of Mr. Lukács – Last sentence of "Method of Payment"

[93] Mr. Lukács notes that Existing Tariff Rule 20 provides, under the heading "Method of Payment", that:

> [...] The passenger may, however, insist on the cash/cheque payment or refuse all compensation and bring private legal action.

[94] Mr. Lukács maintains that this provision is virtually identical to WestJet's Proposed Tariff Rule 110(G) that was considered in Decision No. 227-C-A-2013, where the Agency held that:

> [44] As to the reasonableness of Proposed Tariff Rule 110(G), the Agency concurs with Mr. Lukács' submission that the Rule seems to indicate that for a person to retain a right to legal redress, that person must first reject any payment offered by WestJet, and that a similar provision was deemed to be unreasonable in Decision No. 249-C-A-2012. The Agency finds that if Proposed Tariff Rule 110(G) were to be filed with the Agency, it would also be determined to be unreasonable.

[95] Mr. Lukács submits that the same conclusion is applicable to the last sentence of the "Method of Payment" section of Existing Tariff Rule 20, and thus the impugned sentence is both unclear and unreasonable.

Analysis and findings

[96] With respect to clarity, the Agency finds that the findings in Decision No. 227-C-A-2013 also apply to this matter, and that the provision at issue is unclear, contrary to section 122 of the ATR (Air

Transportation Regulations), because it leaves the impression that the availability of the option of seeking payment in a court of law is predicated on the passenger first declining payment offered by Porter. The Agency therefore finds that the provision at issue in Existing Tariff Rule 20 is stated in such a way as to create reasonable doubt, ambiguity and uncertain meaning as to the Rule's application.

[97] With respect to reasonableness, the Agency finds that the findings in Decision No. 227-C-A-2013 also apply to this matter, and that the provision at issue is unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations). The Agency therefore finds that the provision fails to strike a balance between the passengers' rights to be subject to reasonable terms and conditions of carriage and Porter's statutory, commercial and operational obligations.

PROPOSED TARIFF RULES

Issue 1: Is the definition of "Credit Shell" in Proposed Tariff Rule 1.1 unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations)?

Position of Mr. Lukács

[98] Mr. Lukács notes that stipulation (a) of the proposed definition of "Credit Shell" is that a "Credit Shell" is valid only for one year, and stipulation (c) of that definition states that a "Credit Shell" can be used only once, and the remainder of the balance is forfeited. He submits that the "Credit Shell" refers to payments made by passengers, and that, therefore, it appears that a "Credit Shell" is not a form of goodwill credit by Porter to passengers, but rather a credit for consideration received by Porter.

[99] Mr. Lukács argues that stipulations (a) and (c) purport to permit Porter to keep some or all of the consideration offered by passengers without providing any services in exchange, and that the absence of services (consideration) provided to passengers in return would result in the unjust enrichment of Porter. He maintains that the unjust enrichment of Porter provided by the "Credit Shell" fails to strike a balance between the rights of passengers and the ability of Porter to meet its statutory, commercial and operational obligations, and hence stipulations (a) and (c) of the "Credit Shell" proposed definition are unreasonable.

Analysis and findings

[100] A "Credit Shell" represents one of the alternatives available to a passenger under Proposed Tariff Rule 15 when the passenger's carriage is affected by flight overbooking, cancellation or advancement. As correctly noted by Mr. Lukács, the "Credit Shell" constitutes a remedy, and not a goodwill gesture. The Agency finds that the restrictions associated with the "Credit Shell", as set out in (a) and (c) of the definition in Proposed Tariff Rule 1.1 fail to strike a balance between the passengers' rights to be subject to reasonable terms and conditions of carriage and Porter's statutory, commercial and operational obligations. Therefore, the definition of "Credit Shell" in Proposed Tariff Rule 1.1 would be found unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations) if filed with the Agency.

Issue 2: Is Proposed Tariff Rule 15(a)(iii)(b) unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations)?

Position of Mr. Lukács

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[101] Mr. Lukács asserts that Proposed Tariff Rule 15(a)(iii)(b) is overly restrictive with respect to the rights of passengers, and imposes an unreasonable and impossible burden of proof on passengers, who do not always have evidence about the cause of a schedule irregularity. He argues that the burden of proof ought to rest with the carrier, rather than the passengers, and the test ought to incorporate the principle of “all reasonable measures”.

[102] Mr. Lukács refers to Decision No. 204-C-A-2013, where the Agency considered the question of what conditions a carrier must satisfy to relieve itself from the obligation to pay denied boarding compensation in the case of aircraft substitution with one of a smaller capacity. He states that the Agency made the following key findings:

> In order to relieve itself from the obligation to pay denied boarding compensation, the carrier must demonstrate that:
>
> 1. substitution occurred for operational and safety reasons beyond its control; and,
> 2. it took all reasonable measures to avoid the substitution or that it was impossible for the carrier to take such measures.
>
> If the carrier fails to demonstrate both of these, then compensation should be due to the affected passengers.

[103] Mr. Lukács contends that in that Decision, the Agency concluded that, in the absence of specific language that establishes context or qualifies Air Canada’s exemption from paying denied boarding compensation, the Air Canada tariff provision at issue was unreasonable. He argues that the same principles are applicable to the obligation to refund passengers for the fare and charges paid for segments already travelled that no longer serve the purpose for which the passenger undertook the travel. Mr. Lukács maintains that Porter ought to be able to relieve itself from this obligation only if it demonstrates that:

- (C1) the Schedule Irregularity occurred for reasons beyond its control, and
- (C2) it took all reasonable measures to avoid the Schedule Irregularity or that it was impossible for the carrier to take such measures.

[104] Mr. Lukács concludes that based on the Agency’s findings in Decision No. 204-C-A-2013, Proposed Tariff Rule 15(a)(iii)(b) is unreasonable without imposing on Porter the requirement to demonstrate (C1) and (C2).

Analysis and findings

[105] The Agency agrees with Mr. Lukács’ submission respecting this matter. Particularly, the Agency agrees that the principles set out in Decision No. 204-C-A-2013 (respecting the matter of the conditions that a carrier must satisfy to relieve itself from the obligation of tendering denied boarding compensation in the event of substitution of aircraft) also apply to refunding passengers for the fare and charges paid for segments already travelled that no longer serve a purpose.

[106] The Agency finds that Proposed Tariff Rule 15(a)(iii)(b) fails to strike a balance between the passengers’ rights to be subject to reasonable terms and conditions of carriage and Porter’s statutory, commercial and operational obligations. Therefore, the Agency finds that Proposed Tariff Rule 15(a)(iii)(b) would be found unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations) if filed with the Agency.

Issue 3: Is Proposed Tariff Rule 15(a)(iv) unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations)?

Position of Mr. Lukács

[107] Mr. Lukács points out that in Decision No. LET-C-A-83-2011, the Agency stated that any compensation paid in accordance with the tariff is to be paid in the form of cash, cheque, credit to a passenger's credit card, or any other form acceptable to the passenger. He adds that this finding was reiterated by the Agency in Decision No. 227-C-A-2013 in the specific context of denied boarding. Mr. Lukács maintains that the same conclusion is applicable with respect to the refund of fares and charges in the case of flight cancellation or advancement: passengers who paid cash or equivalent are entitled to be refunded in the same manner.

[108] Mr. Lukács contends that the "Credit Shell" is a highly restricted instrument: it is valid only for one year from the original ticket's issuance date and it can be used only once; any balance remaining after its use is forfeited by the passenger. He asserts that these restrictions have a high potential of unjust enrichment for Porter, without providing any benefit to passengers, and that allowing Porter to offer passengers a "Credit Shell" instead of a refund carries the same risks and disadvantages for passengers as offering travel vouchers in lieu of denied boarding compensation.

[109] Mr. Lukács submits that a future credit is not a proper form of refunding passengers money paid for services that were not provided, and that Proposed Tariff Rule 15(a)(iv) is unreasonable. He argues that the Agency should impose the same restrictions on Porter providing a "Credit Shell" in lieu of a refund as the Agency did with respect to travel vouchers in lieu of denied boarding compensation in Decision No. 342-C-A-2013. Mr. Lukács proposes the following restrictions:

- (R1) carrier must inform passengers of the amount of cash refund that would be due, and the passenger may decline travel vouchers, and receive cash or equivalent;
- (R2) carrier must fully disclose all material restrictions before the passenger decides to give up the cash or equivalent payment in exchange for a travel voucher;
- (R3) carrier must obtain the signed agreement of the passenger, confirming that the passenger was provided with the aforementioned information, prior to providing travel vouchers in lieu of cash refund;
- (R4) the amount of the travel voucher must be not less than 300% of the amount of cash refund that would be due;
- (R5) passengers are entitled to exchange the travel vouchers to cash at the rate of $1 in cash being equivalent to $3 in travel vouchers within one (1) month.

Analysis and findings

[110] The Agency finds that in the absence of the safeguards set out in Decision No. 342-C-A-2013 associated with the tendering of travel vouchers when denied boarding occurs, Proposed Tariff Rule 15(a)(iv) fails to strike a balance between the passengers' rights to be subject to reasonable terms and conditions of carriage and Porter's statutory, commercial and operational obligations. Therefore, the Agency finds that Proposed Tariff Rule 15(a)(iv) would be found unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations) if filed with the Agency.

Issue 4: Is Proposed Tariff Rule 15(a) unreasonable within the meaning

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of subsection 111(1) of the ATR (Air Transportation Regulations) and/or unclear, contrary to section 122 of the ATR (Air Transportation Regulations)?

Positions of the parties

Porter

[111] Porter contends that Proposed Tariff Rule 15 resolves the inconsistency found between Existing Tariff Rules 3.4 and 15 and Existing Tariff Rule 18, by removing the exclusionary language in Existing Tariff Rule 15, and with the revision in Proposed Tariff Rule 15(a), which expressly indicates that passengers affected by schedule irregularities may be entitled to reimbursement for damages resulting from delays under Tariff Rule 18. Porter notes that in Decision No. 248-C-A-2012 (*Lukács v. Air Transat*), Decision No. 249-C-A-2012 (*Lukács v. WestJet*) and Decision No. 250-C-A-2012 (*Lukács v. Air Canada*), the Agency determined that situations of overbooking and cancellation that are within the carrier's control constitute delays entitling passengers to relief, and such relief may, in certain circumstances, also apply where overbooking and cancellation are not within the carrier's control. Porter submits that by expressly indicating that relief under Proposed Tariff Rule 18 may be available to passengers affected by schedule irregularities, Proposed Tariff Rule 15 harmonizes the two Rules.

[112] Porter submits that, similarly, Proposed Tariff Rule 15 omits the language in Existing Tariff Rule 3.4 indicating that Porter is not required to give notice of schedule irregularities to passengers, consistent with the requirement in Tariff Rule 18 that Porter make efforts to notify passengers in advance of any schedule changes.

[113] Porter maintains that consistent with the circumstance-focussed approach endorsed by the Agency in Decision No. 248-C-A-2012, Decision No. 249-C-A-2012 and Decision No. 250-C-A-2012, Proposed Tariff Rule 15 sets out those remedies which are potentially available in cases of schedule irregularities – including alternative transport within a reasonable time and at no additional cost, refund, credit and remedies under the principles of Article 19 of the Montreal Convention.

[114] Porter contends that Proposed Tariff Rule 15 clearly states that Porter (a) "will consider, to the extent they are known to the Carrier, the transportation needs of the passenger and/or other relevant circumstances of the passenger affected by the Schedule Irregularity", (b) will not limit its consideration of alternative transportation to its own services, and (c) will "make a good faith effort to fairly recognize, and appropriately mitigate, the impact of the Schedule Irregularity upon the passenger".

[115] Porter argues that Proposed Tariff Rule 15 clearly sets forth the range of potential remedies arising from scheduling irregularities, and indicates that Porter will, acting in good faith and in light of all relevant circumstances, offer a remedy or remedies designed to "appropriately mitigate the impact of the Schedule Irregularity", including remedies available under Proposed Tariff Rule 18.

[116] Porter submits that Proposed Tariff Rule 18 clearly indicates that it is the passenger who bears "the choice" among the remedies offered, including as between a refund (Proposed Tariff Rule 15(a)(iii)) and a credit (Proposed Tariff Rule 15(a)(iv)).

[117] Porter also submits that its Proposed Tariff Rule 15(a) is similar to that of Air Transat in all material respects, and thus similarly meets the requirement of clarity.

Mr. Lukács

[118] Mr. Lukács points out that Proposed Tariff Rule 15(a) requires Porter to offer passengers the choice between one or more of five remedial options, including:

> v. a monetary payment to the passenger for any amounts to which the passenger may be entitled pursuant to Rule 18 of this Tariff.

[119] Mr. Lukács contends that this suggests that Porter views the monetary payment pursuant to Proposed Tariff Rule 18 as an alternative to reprotecting passengers, instead of viewing the two as working together, in tandem.

[120] Mr. Lukács submits that it is not clear whether Proposed Tariff Rule 15(a) is simply unclear, or if Porter intended it to be read as monetary compensation under Proposed Tariff Rule 15(a)(v) being an alternative to reprotection. He suggests that the latter interpretation is reinforced by Porter's submission, which refers to three options, at the passenger's choice:

> i. alternative transportation to their destination within a reasonable time at no additional charge; or
> ii. where the flight is interrupted at a connection point, return to the point of origin and a refund or credit for unused segments or the full ticket in the indicated circumstances; and
> iii. compensation for resulting damages under Rule 18, which incorporates the principles of Article 19 of the Montreal Convention per Decision No. 16-C-A-2013.

[121] Mr. Lukács argues that the presence of (v) renders Proposed Tariff Rule 15(a) at the very least unclear, but possibly also unreasonable, depending on its intended meaning.

[122] Mr. Lukács asserts that Proposed Tariff Rule 15 ought to clearly state that passengers are entitled to monetary payment pursuant to Proposed Tariff Rule 18 regardless of how they choose to be reprotected (transportation to destination, transportation to point of origin, or refund).

Analysis and findings

[123] As noted by Mr. Lukács, the monetary payment available to passengers under Proposed Tariff Rule 15(a) represents one of several options made available by Porter to passengers affected by flight overbooking, delay or cancellation. Given the wording of that Rule, i.e., "the Carrier will offer the passenger the choice of accepting one or more of the following remedial choices", it is not entirely clear whether a monetary payment constitutes a sole remedy. The Agency finds that Proposed Tariff Rule 15(a) is stated in such a way as to create reasonable doubt, ambiguity or uncertain meaning as to the Rule's application and, as such, the application of that Rule is unclear.

[124] With respect to the reasonableness of Proposed Tariff Rule 15(a), the Agency finds that the Rule should clearly state that passengers are entitled to monetary payment, under Tariff Rule 18, irrespective of how the passengers choose to be reprotected. Given that Proposed Tariff Rule 15(a) does not do so, the Agency finds that it fails to strike a balance between the passengers' rights to be subject to reasonable terms and conditions of carriage and Porter's statutory, commercial and operational obligations.

[125] Therefore, the Agency finds that Proposed Tariff Rule 15(a) would be found unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations) and unclear, contrary to section 122 of the ATR (Air Transportation Regulations), if filed with the Agency.

Issue 5: Is Proposed Tariff Rule 15(c) unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations) and/or

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unclear, contrary to section 122 of the ATR (Air Transportation Regulations)?

Positions of the parties

Porter

[126] Porter argues that Proposed Tariff Rule 15(c) is consistent with the rule filed by WestJet as a result of Decision No. 249-C-A-2012.

[127] Porter maintains that Proposed Tariff Rule 15(c) does not purport to exclude any liability on Porter's part, but rather confirms that the intention of that Rule is not to create an absolute liability regime; that is, there may be instances where schedule irregularities resulting from matters beyond the carrier's control do not necessarily result in the carrier's liability under the principles of Article 19 of the Montreal Convention. Porter notes that in Decision No. 249-C-A-2012, the Agency stated that:

> [93] Whether a carrier will be held liable under Article 19 of the Convention will depend on whether it or its servants and agents took all measures that could reasonably be required to avoid damage occasioned by delay, or that it was impossible for them to take such measures. Rather than setting out broad exclusions from liability such as acts of nature or of third parties, a case by case approach is warranted which looks, for example, at the predictability of an event in determining whether the carrier is exonerated under Article 19 of the Convention.

[128] Porter points out that the Agency ultimately accepted a tariff filing by WestJet upon its clarification that it was not intended that WestJet be liable for acts of nature or third parties "in all cases", which clarification is reflected in Proposed Tariff Rule 15(c).

Mr. Lukács

[129] Mr. Lukács submits that Proposed Tariff Rule 15(c) creates the impression that Porter does not have to reprotect or refund passengers for the unused portions of their tickets if Porter can demonstrate the "all reasonable measures" defense. He states that if this was not Porter's intent, then Proposed Tariff Rule 15(c) is simply unclear, and that if it was Porter's intent, then Proposed Tariff Rule 15(c) is unreasonable, and inconsistent with the Agency's findings in Decision No. 344-C-A-2013.

[130] Mr. Lukács also submits that Proposed Tariff Rule 15(c) confuses two different rights of passengers who are affected by a flight cancellation, denied boarding or flight advancement:

1. the right for damages occasioned by the cancellation, denied boarding, or flight advancement (Proposed Tariff Rule 18); and,
2. the right for reprotection or refund of unused portion (Proposed Tariff Rules 15(a)(i) to (iii)).

[131] Mr. Lukács argues that the difference between the nature of these two obligations is very substantial. He maintains that a carrier can relieve itself from the obligation under right 1 above by demonstrating that it and its agents and employees have taken all reasonable steps necessary to avoid the damage or that no such measures were available, but a carrier cannot relieve itself from the obligation under right 2 above.

[132] Mr. Lukács contends that passengers are entitled to reprotection or a refund regardless of the reason for their inability to travel, as long as the passengers are not culpable for it. He notes that in Decision No. 28-A-2004, the Agency recognized the fundamental right of passengers to be refunded for the unused portions of their tickets if the carrier is unable to provide transportation on its services or on

the services of other carrier(s) within a reasonable period of time.

[133] Mr. Lukács submits that Proposed Tariff Rule 15(c) is either unclear or unreasonable in that it purports to relieve Porter from the obligation to refund the unused portions of tickets to passengers, contrary to the Agency's findings in Decision No. 344-C-A-2013.

[134] Mr. Lukács asserts that the first half of Proposed Tariff Rule 15(c) incorrectly focuses on the cause of the so-called "Schedule Irregularity" rather than on how Porter reacts to it, and thus misstates the test under Article 19 of the Montreal Convention. He notes that in Decision No. 16-C-A-2013, the Agency explained that what determines liability for delay is not the cause of the delay, but rather how the carrier reacts to the delay. Mr. Lukács argues that Proposed Tariff Rule 15(c) is inconsistent with the findings of the Agency in that Decision, and thus it ought to be disallowed as being either unclear or unreasonable.

[135] Mr. Lukács maintains that the "all reasonable measures" test set out in Proposed Tariff Rule 15(c) does not relieve Porter from the obligation to refund or reprotect passengers, regardless of the cause of the "Schedule Irregularity", and that the test is relevant only to the obligation to refund the fares and charges for segments travelled that no longer serve any purpose for the passenger's travel. He submits, therefore, that the scope of Proposed Tariff Rule 15(c) ought to be confined to the second portion of Proposed Tariff Rule 15(a)(iii).

Analysis and findings

[136] The Agency finds that Proposed Tariff Rule 15(c) creates the impression that Porter does not have to reprotect or refund passengers for the unused portions of their tickets if Porter can demonstrate the "all reasonable measures" defense. As such, the Agency finds that Proposed Tariff Rule 15(c) is contrary to section 122 of the ATR (Air Transportation Regulations) because the Rule is stated in such a way as to create reasonable doubt, ambiguity or uncertain meaning as to the Rule's application.

[137] As for reasonableness, Mr. Lukács correctly notes that passengers are entitled to reprotection or a refund, irrespective of the reason for their inability to travel, as long as the passengers are not responsible for it. In Decision No. 28-A-2004, the Agency recognized the right of passengers to be refunded for the unused portions of their tickets if the carrier is unable to provide transportation on its services or on the services of other carrier(s) within a reasonable period of time. Taking "all reasonable measures" does not relieve Porter from its obligation to refund passengers for the unused portions of their tickets or reprotect passengers affected by flight cancellation, denied boarding or flight advancement. If it was Porter's intent under Proposed Tariff Rule 15(c) not to reprotect or refund for unused portions of tickets, employing the "all reasonable measures" defense, Proposed Tariff Rule 15(c) fails to strike a balance between the passengers' rights to be subject to reasonable terms and conditions of carriage and Porter's statutory, commercial and operational obligations.

[138] Therefore, the Agency finds that Proposed Tariff Rule 15(c) would be found unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations) and unclear, contrary to section 122 of the ATR (Air Transportation Regulations), if filed with the Agency.

Issue 6: Is Proposed Tariff Rule 18(c) unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations)?

Positions of the parties

Porter

[139] Porter submits that Proposed Tariff Rule 18 reflects an approach similar to those adopted by Air Transat and WestJet in their tariff rules concerning remedies for schedule irregularities, filed in response to Decision No. 248-C-A-2012 and Decision No. 249-C-A-2012.

[140] Porter advises that its Existing Tariff Rule 18 was filed in response to Decision No. 16-C-A-2013, and following issues raised in this complaint, Porter has made further revisions, reflected in Proposed Tariff Rule 18, which:

a. Extend the rights set forth therein, including concerning advance notice, to passengers affected by flight advancements (Proposed Tariff Rules 18(c) and 18.1); and,
b. Confirm Porter's practices concerning on-board flight delays, consistent with the voluntary Code of Conduct.

[141] Porter argues that Proposed Tariff Rule 18.1 entitles passengers affected by flight advancements to resulting damages to the same extent as such are available to passengers affected by flight delays pursuant to Article 19 of the Montreal Convention. Porter submits that taken together with the remedies available to such passengers under Proposed Tariff Rule 15, the Tariff would provide clear and reasonable recourse for such passengers which accord with the Agency requirements.

[142] Porter states that it has proposed in Proposed Tariff Rule 18(c) to make "best efforts" to inform passengers of flight advancements. Porter argues that it is not in a position to guarantee that notice will reach the passenger despite any efforts Porter may make. Porter submits that it would be required to take the same steps on a "best efforts" basis as pursuant to an "undertaking"; the distinction being, however, one of result: As Porter cannot guarantee that the passenger will receive the message, it cannot "undertake" to ensure that the passenger is informed.

[143] Porter maintains that the explicit extension of the remedies under Proposed Tariff Rule 18, together with the availability of the remedies under Proposed Tariff Rule 15, satisfy the Agency's prescribed requirements as to relief that must be made available in the case of flight advancements.

Mr. Lukács

[144] Mr. Lukács argues that "best efforts" to advise of flight advancements are not sufficient, and that Porter must "undertake" to inform passengers affected by such an event. He notes that in Decision No. LET-A-112-2003, the Agency held, under the heading "Passenger Notification", that:

> The Agency is of the opinion that Air Transat should undertake to notify passengers of all schedule irregularities, not just flight advancements.

[145] Mr. Lukács also points out that in Decision No. 344-C-A-2013, the Agency held that:

> [63] [...] When the air carrier advances the scheduled departure of a flight, the consequences may be more severe than a delay for the passenger and it follows that the duty to inform should be no less onerous.
>
> [64] [...] The absence of a tariff provision that imposes on Porter a requirement to "undertake" to inform passengers of flight advancements would severely limit the recourses available to passengers affected by those advancements, and would certainly be disadvantageous.
>
> [65] The Agency is of the opinion that the commitment to make "reasonable efforts" to inform passengers, insofar as such commitment pertains to flight advancements, is unreasonable [...]

[146] Mr. Lukács submits that in response to Decision No. 344-C-A-2013, Porter amended its Domestic

Tariff Rule 16(c) to read as follows:

> Schedules are subject to change. Passengers have a right to information on flight times and schedule changes, and the Carrier will make reasonable efforts to inform passengers of flight delays, and schedule changes and, to the extent possible, the reasons for them. Carrier will also undertake to inform passengers of any advancement of departure times.

[147] Mr. Lukács contends that Porter does not have any difficulty to "undertake" to inform passengers on domestic itineraries about advancement of departure times. He adds that the purpose of the requirement to "undertake" to inform passengers of flight advancements is precisely to provide an adequate recourse for passengers affected by these advancements. He submits that the consequence of a passenger not being notified about a flight advancement is not merely a delay of a few hours, but rather the passenger missing the flight, and possibly forfeiting the ability to travel.

[148] Mr. Lukács concludes that in respect of flight advancements, Porter ought to bear all the risks and consequences associated with passengers missing their flights because they did not know about the flight advancement. He argues that Porter making merely a "best effort" to inform such passengers ought not to relieve Porter from these risks, consequences and liabilities, because it is inconsistent with the passengers' fundamental rights to travel on the itinerary they paid for.

Analysis and findings

[149] The Agency finds that "best efforts" to advise passengers of flight advancements is unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations) for the reasons set out by Mr. Lukács, that carriers must undertake to inform passengers of those advancements, and that the Agency has already ruled on this matter in other decisions. Therefore, the Agency finds that Proposed Tariff Rule 18(c) fails to strike a balance between the passengers' rights to be subject to reasonable terms and conditions of carriage and Porter's statutory, commercial and operational obligations. The Agency therefore finds that Proposed Tariff Rule 18(c) would be found unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations) if filed with the Agency.

Issue 7: Is Proposed Tariff Rule 20 unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations) and/or unclear, contrary to section 122 of the ATR (Air Transportation Regulations)?

Position of Porter

Form of compensation

[150] Porter argues that Proposed Tariff Rule 20 is already clear that the choice between cash or voucher lies solely with the passenger, and this discretion on the passenger's part is maintained with the broadening of the denied boarding compensation regime to Canadian-originating flights. Porter states that, consistent with the Agency's ruling in Decision No. 342-C-A-2013, Porter may only tender vouchers in lieu of cash as follows:

a. at a value ratio of 3:1; i.e., vouchers offered must be redeemable at three times the value of cash compensation the passenger would otherwise be entitled to;
b. upon disclosing to the passenger all material restrictions applicable to the vouchers;
c. if the passenger agrees in writing to accept the vouchers in lieu of cash.

[151] Porter submits that in recognition that passengers accepting vouchers will be making decisions affecting their legal rights in a relatively short time frame, Porter will permit passengers to reverse their decisions and exchange their vouchers for cash within 30 days of the denied boarding incident, in accordance with the Agency's finding in Decision No. 342-C-A-2013.

Reprotection of passengers who are involuntarily denied boarding

[152] Porter points out that passengers affected by overbooking are now expressly entitled to certain remedies under Proposed Tariff Rule 15, including the choice between reprotection and a refund, and Porter is not limited to offering alternative service on its own flights or the "same or lower booking code" on another carrier's flights.

Denied boarding compensation is available on all flights

[153] Porter contends that while Existing Tariff Rule 20 provides distinct remedies depending on whether a flight departs from the United States or Canada (the only two countries served by Porter), Proposed Tariff Rule 20 removes this distinction, applying the same rules on all flights under the Tariff.

Amount of denied boarding compensation

[154] Porter proposes to implement the same "grid" of compensation amounts, depending on length of the delay in the passenger's arrival at their destination, as currently applies to its United States-originating flights.

[155] Porter points out that in Decision No. 204-C-A-2013, the Agency found that the United States' compensation regime and an alternative regime proposed by Mr. Lukács were both reasonable options. Porter indicates that it has elected to implement the United States regime for all of Porter's international flights, including those originating in Canada. Porter believes that the adoption of a single compensation regime will be less confusing to passengers, and that the implementation of a single, uniform regime across all of its stations will ensure consistency and facility of implementation for its own personnel.

[156] Porter points out that it has modified the United States regime slightly to provide for compensation of "at least" the amount prescribed under that regime, up to the stipulated maximums. Porter advises that while this will not prejudice passengers, it will allow Porter some flexibility during the rollout of its broader denied boarding compensation program as overbooking is tested on more routes, whereby it may simply offer the maximum amount to passengers during initial rollout until it can confidently implement a compensation regime based on actual fares paid by each individual passenger. Porter submits that it will not pay any passenger less than the minimum amounts indicated in Proposed Tariff Rule 20, which amounts the Agency has found to be reasonable.

Position of Mr. Lukács

Form of compensation

[157] Mr. Lukács points out that in Decision No. 342-C-A-2013, the Agency imposed the following conditions on the offering of travel vouchers in lieu of denied boarding compensation:

- (R1) carrier must inform passengers of the amount of cash compensation that would be due, and the passenger may decline travel vouchers, and receive cash or equivalent;
- (R2) carrier must fully disclose all material restrictions before the passenger decides to give up the cash or equivalent payment in exchange for a travel voucher;
- (R3) carrier must obtain the signed agreement of the passenger, confirming that the passenger was

provided with the aforementioned information, prior to providing travel vouchers in lieu of compensation;
- (R4) the amount of the travel voucher must be not less than 300% of the amount of cash compensation that would be due;
- (R5) passengers are entitled to exchange the travel vouchers to cash at the rate of $1 in cash being equivalent to $3 in travel vouchers within one (1) month.

[158] Mr. Lukács argues that while Proposed Tariff Rule 20 incorporates (R2), (R4), and (R5), it fails to incorporate (R1) and to fully incorporate (R3).

[159] Mr. Lukács notes that Proposed Tariff Rule 20 only requires Porter to obtain a written agreement from passengers to accept vouchers in lieu of cash or cheque payment, but omits the requirement to obtain written confirmation that the passengers were provided with the information required under (R1) and (R2). He asserts that the absence of (R1) and the full incorporation of (R3) renders Proposed Tariff Rule 20 unreasonable, and Porter ought to be ordered to fully incorporate (R1) and (R3) into the Rule.

[160] Mr. Lukács submits that it is common knowledge that cash or equivalent, which constitutes legal tender, is more valuable than any kind of coupons or vouchers, which can be used only for payment at a specific business or from a service provider. He notes that vouchers, as acknowledged by Porter, are subject to restrictions imposed by Porter (including an expiry date), while legal tender is not subject to these restrictions.

[161] Mr. Lukács maintains that the conditions on the offering of travel vouchers in lieu of denied boarding compensation set out in Decision No. 342-C-A-2013 mitigate these disadvantages, and it is important to bear in mind that the restrictions were imposed by the Agency precisely for the purpose of mitigating the disadvantage to passengers.

The reference to “reconfirmation requirements” in Proposed Tariff Rule 20

[162] Mr. Lukács argues that the reference to “reconfirmation requirements” renders Proposed Tariff Rule 20 unclear and/or unreasonable for the following reasons:

1. Porter’s general conditions of carriage state that: “3. Reconfirmation of flights is not required [...]”. Thus, Proposed Tariff Rule 20 appears to be incorporating a non-existent requirement, which creates substantial confusion and lack of clarity, at the very least;
2. The word/term “reconfirmation” is nowhere defined in Porter’s Tariff;
3. Reconfirmation of reservations is an outdated requirement that has been abandoned by the industry, given that the standard practice is to issue confirmed reservations; and,
4. It is virtually impossible for a passenger to prove that they reconfirm their reservation.

[163] Mr. Lukács maintains, therefore, that conditioning the payment of denied boarding compensation on some sort of reconfirmation would effectively deprive passengers of their right to be paid denied boarding compensation.

Analysis and findings

[164] The Agency finds that paragraphs (a) to (d) under “Method of Payment” in Proposed Tariff Rule 20 do not fully incorporate the restrictions imposed by Decision No. 342-C-A-2013 (R1 to R5). Specifically, R3 is not fully incorporated into paragraph (c) because it only requires Porter to obtain a written agreement from the passenger to accept vouchers in lieu of cash or cheque payment, but omits the requirement to obtain written confirmation that the passengers were provided with the information

required under (R1) and (R2). Also, R1 is not reflected in Proposed Tariff Rule 20. The Agency finds that the failure to fully reflect the conditions associated with the issuance of travel vouchers, set out in Decision No. 342-C-A-2013, fails to strike a balance between the passengers' rights to be subject to reasonable terms and conditions of carriage and Porter's statutory, commercial and operational obligations.

[165] The Agency also finds that the reference to "reconfirmation requirements" makes Proposed Tariff Rule 20 unclear for the reasons set out by Mr. Lukács. The Agency therefore finds that the Rule is stated in such a way as to create reasonable doubt, ambiguity and uncertain meaning as to the Rule's application.

[166] Furthermore, the Agency agrees with Mr. Lukács' submission that requiring reconfirmation fails to strike a balance between the passengers' rights to be subject to reasonable terms and conditions of carriage and Porter's statutory, commercial and operational obligations.

[167] Therefore, the Agency finds that Proposed Tariff Rule 20 would be found unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations) and unclear, contrary to section 122 of the ATR (Air Transportation Regulations), if filed with the Agency.

SUMMARY OF CONCLUSIONS

With respect to Porter's Existing Tariff Rules

Issue 1

[168] The Agency has determined that the absence from Porter's Tariff of all of the elements of the Code of Conduct does not render the Tariff unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations).

Issue 2

[169] The Agency has determined that the definition of "Event of Force Majeure" in Existing Tariff Rule 1.1 is unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations).

Issue 3

[170] The Agency has determined that Existing Tariff Rules 3.4 and 15 are unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations) and are unclear, contrary to section 122 of the ATR (Air Transportation Regulations).

Issue 4

[171] The Agency has determined that Existing Tariff Rule 18(c) is unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations).

Issue 5

[172] The Agency has determined that Existing Tariff Rule 20 is unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations) and is unclear, contrary to section 122 of the ATR (Air Transportation Regulations).

With respect to Porter's Proposed Tariff Rules

Issue 1

[173] The Agency has determined that the definition of "Credit Shell" in Proposed Tariff Rule 1.1 would be found unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations) if filed with the Agency.

Issue 2

[174] The Agency has determined that Proposed Tariff Rule 15(a)(iii)(b) would be found unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations) if filed with the Agency.

Issue 3

[175] The Agency has determined that Proposed Tariff Rule 15(a)(iv) would be found unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations) if filed with the Agency.

Issue 4

[176] The Agency has determined that Proposed Tariff Rule 15(a) would be found unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations) and unclear, contrary to section 122 of the ATR (Air Transportation Regulations), if filed with the Agency.

Issue 5

[177] The Agency has determined that Proposed Tariff Rule 15(c) would be found unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations) and unclear, contrary to section 122 of the ATR (Air Transportation Regulations), if filed with the Agency.

Issue 6

[178] The Agency has determined that Proposed Tariff Rule 18(c) would be found unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations) if filed with the Agency.

Issue 7

[179] The Agency has determined that Proposed Tariff Rule 20 would be found unreasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations) and unclear, contrary to section 122 of the ATR (Air Transportation Regulations), if filed with the Agency.

ORDER

[180] The Agency, pursuant to section 113 of the ATR (Air Transportation Regulations), disallows the following provisions of Porter's Tariff:

- the definition of "Event of Force Majeure" in Existing Tariff Rule 1.1;
- Existing Tariff Rules 3.4 and 15;
- Existing Tariff Rule 18(c); and,
- Existing Tariff Rule 20.

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[181] The Agency orders Porter, by February 28, 2014, to amend its Tariff to conform to this Order and the Agency's findings set out in this Decision in the following manner:

Adopt Proposed Tariff Rules 1.1, 15, 18 and 20 with the following amendments:

1. Delete (a) and (c) from the definition of "Credit Shell" in Proposed Tariff Rule 1.1.

2. Amend Proposed Tariff Rule 15(a)(iii) to read: a refund of the fare paid by the passenger for each unused segment, and, subject to Rule 15(c), for segments already flown if they no longer serve the purpose for which the passenger undertook the travel.

3. Delete Proposed Tariff Rule 15(a)(v), and delete Proposed Tariff Rule 15(a)(iv) should Porter choose not to include the additional provisions under Proposed Tariff Rule 20 set out below in (6).

4. Amend Proposed Tariff Rule 15(c) to read:

If the Carrier demonstrates that

1. the Schedule Irregularity occurred for reasons beyond its control, and
2. it took all reasonable measures to avoid the Schedule Irregularity or that it was impossible for the Carrier to take such measures,

then the Carrier shall not be required to refund passengers for segments already travelled, regardless of whether they serve the purpose for which the passenger undertook such travel.

5. Amend Proposed Tariff Rule 18(c) by replacing "best efforts" with "undertake".

6. Amend the provision in Proposed Tariff Rule 20 appearing as the first bullet under the heading "Compensation for Involuntary Denied Boarding" by deleting the word "reconfirmation"; and should Porter choose to retain a "Credit Shell" as a form of compensation, add the following conditions under the heading "Method of Payment":

- Carrier must inform passengers of the amount of cash compensation that would be due and the passenger may decline travel vouchers, and receive cash or equivalent.
- Carrier must obtain the signed agreement of the passenger, confirming that the passenger was provided with the aforementioned information, prior to providing travel vouchers in lieu of compensation.

[182] Pursuant to paragraph 28(1)(*b*) of the CTA, the disallowance of Existing Tariff Rules 1.1, 3.4, 15, 18(c) and 20 shall come into force when Porter complies with the above or on February 28, 2014, whichever is sooner.

APPENDIX

EXISTING TARIFF RULES

RULE 1. DEFINITIONS AND INTERPRETATION

1.1 Definitions

Event of Force Majeure means an event, the cause or causes of which are not attributable to the willful misconduct or gross negligence of the Carrier, including, but not limited to (i) earthquake, flood, hurricane, explosion, fire, storm, epidemic, other acts of God or public enemies, war, national emergency, invasion, insurrection, riots, strikes, picketing, boycott, lockouts or other civil disturbances, (ii) interruption of flying facilities, navigational aids or other services, (iii) any laws, rules, proclamations, regulations, orders, declarations, interruptions or requirements of or interference by any government or governmental agency or official thereof, (iv) inability to procure materials, accessories, equipment or parts from suppliers, mechanical failure to the aircraft or any part thereof, damage, destruction or loss of use of an aircraft, confiscation, nationalization, seizure, detention, theft or hijacking of an aircraft, or (v) any other cause or circumstances whether similar or dissimilar, seen or unforeseen, which the Carrier is unable to overcome by the exercise of reasonable diligence and at a reasonable cost.

RULE 3. RATES AND CHARGES – INTERNATIONAL SERVICE

3.4 Carrier Cancellation, Change, and Refund Terms

The Carrier reserves the right to cancel or change the planned departure, schedule, route, aircraft or stopping places of any flight for which fares in respect of a International Service have been paid, at any time and from time to time, for any reason, without notice to any passengers affected thereby and, in connection therewith, the Carrier shall not be liable to any passenger in respect of such cancellation or change, whether or not resulting from an Event of Force Majeure; provided that, the Carrier may and reserves the right, at its sole discretion, to provide any passengers affected by such cancellation or change with:

a. a credit, valid for one year from the original ticket issuance date, towards the provision of a fare relating to a future flight, which credit shall be equal to the original fare (s) which was/were cancelled. When redeeming the credit toward a future booking, passenger may apply the credit toward the base fare, airlines surcharges, change fees, and government taxes and fees. Credit can be used one time only. If the total cost of the transaction to which the credit is applied is less than the value of the credit, the residual value left from its use is forfeited. Bookings using credit must be in the name of the owner of the credit. Credit may be transferred to another traveler one time only, and the credit's original expiration date shall continue to apply after any such transfer; or
b. to otherwise refund to such passenger, an amount which shall not be greater than the fare paid by that passenger in respect of that flight or flights if booked as a round trip and the originating sector is cancelled.

RULE 15. CARRIER CANCELLATION, CHANGE, AND REFUND TERMS

The Carrier reserves the right to cancel or change the planned departure, schedule, route, aircraft or stopping places of any flight for which fares have been paid, at any time and from time to time, for any reason, in connection therewith, the Carrier shall not be liable to any passenger in respect of such cancellation or change, whether or not resulting from an Event of Force Majeure; provided that, the Carrier may and reserves the right, at its sole discretion, to provide any passengers affected by such cancellation or change with:

a. a credit, valid for one year from the original ticket issuance date, towards the provision of a fare relating to a future flight, which credit shall be equal to the original fare which was cancelled. When redeeming the credit toward a future booking, passenger may apply the credit toward the base fare, airlines surcharges, change fees, and government taxes and fees. Credit can be used one time

only. If the total cost of the transaction to which the credit is applied is less than the value of the credit, the residual value left from its use is forfeited. Bookings using credit must be in the name of the owner of the credit. Credit may be transferred to another traveler one time only, and the credit's original expiration date shall continue to apply after any such transfer; or

b. to otherwise refund to such passenger, an amount which shall not be greater than the fare paid by that passenger in respect of that flight.

RULE 18. RESPONSIBILITY FOR SCHEDULES AND OPERATIONS

[...]

(c) Passengers have a right to information on flight times and schedule changes. In the event of a delay or schedule change, the carrier will make reasonable efforts to inform the passengers of delays and schedule changes, and, to the extent possible, the reasons for them.

RULE 20. DENIED BOARDING COMPENSATION

General

For the purposes of this Rule 20, "alternate transportation" means air transportation with a confirmed reservation at no additional charge (by a scheduled airline licensed by Canada or another appropriate country), or other transportation accepted and used by the passenger in the case of denied boarding.

If a passenger has been denied a reserved seat in case of an oversold flight on Porter Airlines:

a. where the flight originates in Canada, the Carrier will:
   i. refund the total fare paid for each unused segment; or
   ii. arrange reasonable alternate transportation on its own services; or
   iii. if reasonable alternate transportation on its own services is not available, the Carrier will make reasonable efforts to arrange transportation on the services of another carrier or combination of carriers on a confirmed basis in the same comparable, or lower booking code; and

d. where the flight originates in the United States, the Carrier will provide denied boarding compensation as set forth in this Rule 20 below.

Volunteers and Boarding Priorities

If a flight is oversold (more passengers hold confirmed reservations than there are seats available), no one may be denied boarding against his/her will until the Carrier's personnel first ask for volunteers who will give up their reservations willingly, in exchange for such compensation as the Carrier may choose to offer. If there are not enough volunteers, other passengers may be denied boarding involuntarily, in accordance with the Carrier's boarding priority.

In determining boarding priority, the Carrier will consider the following factors:

- whether a passenger is traveling due to death or illness of a member of the passenger's family, or,
- age of a passenger, or
- whether a passenger is an unaccompanied minor, or
- whether a passenger is a person with a disability, or
- the fare class purchased and/or fare paid by a passenger

Compensation for Involuntary Denied Boarding (Applicable only on flights originating in the United States)

If you are denied boarding involuntarily on a flight originating in the United States, you are entitled to a payment of “denied boarding compensation” from Carrier unless:

- you have not fully complied with the Carrier’s ticketing, check-in and reconfirmation requirements, or you are not acceptable for transportation under the Carrier’s usual rules and practices; or
- you are denied boarding because the flight is cancelled; or
- you are denied boarding because a smaller capacity aircraft was substituted for safety or operational reasons; or
- you are offered accommodations in a section of the aircraft other than specified in your ticket, at no extra charge, (a passenger seated in a section for which a lower fare is charged must be given an appropriate refund); or
- Carrier is able to place you on another flight or flights that are planned to reach your final destination within one hour of the scheduled arrival of your original flight.

Amount of Denied Boarding Compensation

Passengers traveling from the United States to Canada with a reserved seat on Porter Airlines who are denied boarding involuntarily from an oversold flight originating at a U.S. airport are entitled to:

a. No compensation if the Carrier offers alternate transportation that is planned to arrive at the passenger’s destination or first stopover not later than one hour after the planned arrival time of the passenger’s original flight;
b. 200% of the fare to the passenger’s destination or first stopover, with a maximum of $650 USD, if the Carrier offers alternate transportation that is planned to arrive at the passenger’s destination or first stopover more than one hour but less than four hours after the planned arrival time of the passenger’s original flight; and
c. 400% of the fare to the passenger’s destination or first stopover, with a maximum of $1,300 USD, if the Carrier does not offer alternate transportation that is planned to arrive at the airport of the passenger’s destination or first stopover less than four hours after the planned arrival time of the passenger’s original flight.

0 to 1 hour arrival delay – No compensation.

1 to 4 hour arrival delay – 200% of one-way fare (but no more than $650 USD).

Over 4 hours arrival delay – 400% of one-way fare (but no more than $1,300 USD).

For the purpose of calculating compensation under this Rule 20, the “fare” is the one-way fare for the flight including any surcharge and air transportation tax, minus any applicable discounts. All flights, including connecting flights, to the passenger’s destination or first 4-hour stopover are used to compute the compensation.

Method of Payment

Except as provided below, the Carrier must give each passenger who qualifies for denied boarding compensation a payment by cheque or draft for the amount specified above, on the day and place the involuntary denied boarding occurs. However, if the Carrier arranges alternate transportation for the passenger’s convenience that departs before the payment can be made, the payment will be sent to the passenger within 24 hours. Carrier may offer free or discounted transportation vouchers in place of cash or cheque payment. The passenger may, however, insist on the cash/cheque payment or refuse all compensation and bring private legal action.

Passenger's Option

Acceptance of the compensation relieves the Carrier from any further liability to the passenger caused by the failure to honour the confirmed reservation. However, the passenger may decline the payment and seek to recover damages in a court of law or in some other manner.

PROPOSED TARIFF RULES

RULE 1. DEFINITIONS AND INTERPRETATION

1.1 Definitions

Credit Shell means a record with a payment but no flight used to hold a credit or credits for future flights, which (a) shall be valid for one year from the original ticket issuance date, towards the provision of a fare relating to a future flight, (b) may be applied toward the base fare, airlines surcharges, change fees, and government taxes and fees, (c) can be used one time only, whereby if the total cost of the transaction to which the Credit Shell is applied is less than the value of the Credit Shell, the residual value left from its use is forfeited, (d) may be used exclusively toward bookings in the name of the owner of the Credit Shell, provided however that a Credit Shell may be transferred to another traveler one time only, and the Credit Shell's original expiration date shall continue to apply after any such transfer;

Event of Force Majeure: Deleted

RULE 3. RATES AND CHARGES – INTERNATIONAL SERVICE

3.4 Carrier Cancellation, Change and Refund Terms

Refer to **Rule 15. Carrier Cancellation, Change and Refund Terms** for applicable terms and conditions.

RULE 15. CARRIER CANCELLATION, CHANGE, AND REFUND TERMS

a. If the passenger's journey is interrupted due to overbooking, a flight cancellation or an advancement of a flight's scheduled departure by more than the minimum period for the passenger to check in pursuant to Rule 21 of this Tariff (each a "Schedule Irregularity"), the Carrier will offer the passenger the choice of accepting one or more of the following remedial choices:
    i. alternative transportation, within a reasonable time and without additional charge, to the passenger's intended destination;
    ii. return transportation to the passenger's point of origin within a reasonable time and without additional charge;
    iii. a refund of the fare and charges paid by the passenger for each unused segment, and for the segments already flown if (a) they no longer serve the purpose for which the passenger undertook such travel, and (b) the Schedule Irregularity was within the control of the Carrier;
    iv. a Credit Shell in the amount described in sub-section (iii) above; and
    v. a monetary payment to the passenger for any amounts to which the passenger may be entitled pursuant to Rule 18 of this Tariff.

f. In defining the remedy or remedies appropriate in each case arising under Rule 15(b) above, the Carrier:
    i. will consider, to the extent they are known to the Carrier, the transportation needs of the passenger and/or other relevant circumstances of the passenger affected by the Schedule

Irregularity;

ii. will not limit itself to considering its own services or the services of carriers with which it has interline or code-sharing agreements; and

iii. will make a good faith effort to fairly recognize, and appropriately mitigate, the impact of the Schedule Irregularity upon the passenger.

d. The provisions of this Rule are not intended to make the Carrier responsible in all cases for acts of nature or for the acts of third parties that are not deemed servants and/or agents of the Carrier under applicable law or international conventions, and all the rights set forth herein are subject to the following exception, namely, that the Carrier shall not be liable for damage occasioned by a Schedule Irregularity if the Carrier, and its employees and agents, took all reasonable steps that could reasonably be required to avoid the damage or if it was impossible to take such measures.

e. The rights of a passenger against the Carrier in the event of overbooking and cancellation is, in most cases of international carriage, governed by the Montreal Convention. Article 19 of that Convention provides that an air carrier is liable for damage caused by delay in the carriage of passengers and goods unless it proves that it took all reasonable measures to avoid the damage or that it was impossible for it to take such measures. There are some exceptional cases of international carriage in which the rights of passengers are not governed by an international convention. In such cases, only a court of competent jurisdiction can determine which system of laws must be consulted to determine what those rights are.

RULE 18. RESPONSIBILITY FOR SCHEDULES AND OPERATIONS

a. The Carrier will endeavor to transport the passenger and baggage with reasonable dispatch, but times shown in timetables or elsewhere are not guaranteed.

b. The agreed stopping places are those places shown in the carrier's timetable as scheduled stopping places on the route. The Carrier may, without notice, substitute alternative carriers or aircraft and, if necessary, may alter or omit stopping places shown in the timetable.

c. Passengers have a right to information on flight times and schedule changes. In the event of a delay or schedule change, the carrier will make reasonable efforts to inform the passengers of delays and schedule changes, and, to the extent possible, the reasons for them, including that the Carrier will make best efforts to inform passengers of advancements of scheduled flight departures.

d. If a delay occurs after passengers have boarded the aircraft, the Carrier will offer drinks and snacks if it is safe, practical and timely to do so. If the delay exceeds 90 minutes and circumstances permit, the Carrier will offer passengers the option of disembarking from the aircraft until it is time to depart.

18.1 Passenger Expenses Resulting from Delays and Flight Advancements

For the purposes of this Sub-Rule 18.1, "Flight Advancement" shall mean an advancement of the scheduled flight departure by more than the minimum period for the passenger to check in pursuant to Rule 21 of this Tariff.

Passengers will be entitled to reimbursement from the Carrier for reasonable expenses incurred as a result of a delay or a Flight Advancement, subject to the following conditions:

i. The Carrier shall not be liable for any damages, costs, losses or expenses occasioned by delays or a Flight Advancements if it, and its employees and agents, took all measures that could reasonably be required to avoid the damage or if it was impossible for the Carrier and its employees or agents to take such measures;

ii. Any passenger seeking reimbursement for expenses resulting from delays or a Flight

Advancements must provide the Carrier with (a) written notice of his or her claim, (b) particulars of the expenses for which reimbursement is sought and (c) receipts or other documents establishing to the reasonable satisfaction of the Carrier that the expenses were incurred; and

iii. The Carrier may refuse or decline any claim, in whole or in part, if:

A. the passenger has failed or declined to provide proof or particulars establishing, to the reasonable satisfaction of the Carrier, that the expenses claimed were incurred by the passenger and resulted from a delay or Flight Advancement for which compensation is available under this Rule 18; or

B. the expenses for which reimbursement is claimed, or any portion thereof, are not reasonable or did not result from the delay or Flight Advancement, as determined by the Carrier, acting reasonably.

In any case, the Carrier may, in its sole discretion, issue meal, hotel and/or ground transportation vouchers to passengers affected by a delay or a Flight Advancement.

RULE 20. DENIED BOARDING COMPENSATION

General

If a passenger has been involuntarily denied a reserved seat in case of an oversold flight on Porter Airlines, the Carrier will provide the passenger with:

a. a remedy or remedies in accordance with Rule 15 above; and
b. denied boarding compensation as set forth in this Rule 20 below.

Volunteers and Boarding Priorities

If a flight is oversold (more passengers hold confirmed reservations than there are seats available), no one may be denied boarding against his/her will until the Carrier's personnel first ask for volunteers who will give up their reservations willingly, in exchange for such compensation as the Carrier may choose to offer. If there are not enough volunteers, other passengers may be denied boarding involuntarily, in accordance with the Carrier's boarding priority.

In determining boarding priority, the Carrier will consider the following factors:

- whether a passenger is traveling due to death or illness of a member of the passenger's family, or,
- age of a passenger, or
- whether a passenger is an unaccompanied minor, or
- whether a passenger is a person with a disability, or
- the fare class purchased and/or fare paid by a passenger

Compensation for Involuntary Denied Boarding

If you are denied boarding involuntarily on a flight, you are entitled to a payment of "denied boarding compensation" from Carrier unless:

- you have not fully complied with the Carrier's ticketing, check-in and reconfirmation requirements, or you are not acceptable for transportation under the Carrier's usual rules and practices; or
- you are denied boarding because the flight is cancelled; or
- you are denied boarding because a smaller capacity aircraft was substituted for safety or operational reasons, and the events prompting such substitution were beyond the Carrier's control

and the Carrier took all reasonable measures to avoid the substitution or it was impossible for the Carrier to take such measures; or

- you are offered accommodations in a section of the aircraft other than specified in your ticket, at no extra charge, (a passenger seated in a section for which a lower fare is charged must be given an appropriate refund); or
- Carrier is able to place you on another flight or flights that are planned to reach your final destination within one hour of the scheduled arrival of your original flight.

Amount of Denied Boarding Compensation

Passengers with a reserved seat on Porter Airlines who are denied boarding involuntarily from an oversold flight are entitled to:

a. No compensation if the Carrier offers alternate transportation that is planned to arrive at the passenger's destination or first stopover not later than one hour after the planned arrival time of the passenger's original flight;
b. No less than 200% of the fare to the passenger's destination or first stopover, with a maximum of $650 USD, if the Carrier offers alternate transportation that is planned to arrive at the passenger's destination or first stopover more than one hour but less than four hours after the planned arrival time of the passenger's original flight; and
c. No less than 400% of the fare to the passenger's destination or first stopover, with a maximum of $1,300 USD, if the Carrier does not offer alternate transportation that is planned to arrive at the airport of the passenger's destination or first stopover less than four hours after the planned arrival time of the passenger's original flight.

0 to 1 hour arrival delay – No compensation

1 to 4 hour arrival delay – At least 200% of one-way fare (but no more than $650 USD)

Over 4 hours arrival delay – At least 400% of one-way fare (but no more than $1,300 USD)

For the purpose of calculating compensation under this Rule 20, the "fare" is the one-way fare for the flight including any surcharge and air transportation tax, minus any applicable discounts. All flights, including connecting flights, to the passenger's destination or first 4-hour stopover are used to compute the compensation.

Method of Payment

Except as provided below, the Carrier must give each passenger who qualifies for denied boarding compensation a payment by cheque or draft for the amount specified above, on the day and place the involuntary denied boarding occurs. However, if the Carrier arranges alternate transportation for the passenger's convenience that departs before the payment can be made, the payment will be sent to the passenger within 24 hours. The Carrier may offer free or discounted transportation vouchers in place of cash or cheque payment, provided:

a. the value of such voucher(s) is no less than 300% of the value of the cash compensation to which the passenger would otherwise have been entitled;
b. the Carrier has disclosed to the passenger all material restrictions applicable to the use of such vouchers;
c. the passenger agrees in writing to accept vouchers in lieu of cash or cheque payment; and
d. The passenger may in any event refuse to accept such vouchers and insist on the cash/cheque

payment, including that any passenger who accepts vouchers in lieu of cash or cheque payment at the time of involuntary denied boarding may, within 30 days, elect to exchange such vouchers for the cash or cheque payment she would have been entitled to receive had the passenger not accepted vouchers, provided that the vouchers have not been redeemed by the passenger in whole or in part.

Air Transportation Regulations, SOR/88-58, as amended

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.

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,

[...]

Convention for the Unification of Certain Rules for International Carriage by Air – Montreal Convention

Article 19 – Delay

The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.

Article 26 – Invalidity of contractual provisions

Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this Convention shall be null and void, but the nullity of any such provision does not involve the nullity of the whole contract, which shall remain subject to the provisions of this Convention.

Member(s)

Sam Barone
Geoffrey C. Hare

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CANADIAN TRANSPORTATION AGENCY

Decision No. 313-C-A-2013

August 15, 2013

COMPLAINT by Gábor Lukács against Sunwing Airlines Inc.

File No.: M4120-3/13-02395

INTRODUCTION

[1] On April 22, 2013, Gábor Lukács filed a complaint with the Canadian Transportation Agency (Agency) alleging that Rules 3.4, 15, 18(c), 18(e), and 18(f) of Sunwing Airlines Inc.'s (Sunwing) International Tariff (Tariff) are unclear, contrary to paragraph 122(*c*) and unreasonable within the meaning of subsection 111(1) of the *Air Transportation Regulations*, SOR/88-58, as amended (ATR (Air Transportation Regulations)). Those Rules concerns Sunwing's liability for schedule changes such as flight delay, advancement and cancellation.

[2] In its answer, as amended on June 3, 2013, Sunwing states that it proposes to delete Tariff Rule 3.4 and certain provisions of Tariff Rule 18 as they were repetitive with Tariff Rule 15. Sunwing advised that it would be replacing its Tariff Rule 15 with Proposed Tariff Rules 15 and 15A, which are, in its opinion, compliant with the *Convention for the Unification of Certain Rules for International Carriage by Air – Montreal Convention* (Convention), the Code of Conduct of Canada's Airlines and Transport Canada's Flight Rights provisions, and reflect the Agency's jurisprudence.

[3] In his reply, also dated June 3, 2013, Mr. Lukács states that the parties agree, among other things, that Sunwing's Proposed Tariff Rules 15 and 15A fully address the issues raised in his complaint.

[4] Sunwing subsequently filed, in its Tariff with the Agency, Proposed Tariff Rules 15 and 15A for an effective date of June 14, 2013. In this case, only Proposed Tariff Rule 15 is relevant to the matter before the Agency. Given that the Previous Tariff Rules to which Mr. Lukács objected in his complaint are no longer in effect, it is not necessary for the Agency to address the clarity and reasonableness of those Rules.

[5] The Agency therefore will only consider the clarity and reasonableness of Existing Tariff Rules 15(1)(b), 15(1)(e), 15(1)(f), 15(1)(h) and 15(3).

ISSUES

1. Is Existing Tariff Rule 15(1)(h) clear within the meaning of paragraph 122(*c*) of the ATR (Air Transportation Regulations)?
2. Are ExistingTariff Rules 15(1)(b), 15(1)(e), 15(1)(f), 15(1)(h) and 15(3) reasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations)?

RELEVANT STATUES AND TARIFF EXTRACTS

[6] The relevant Tariff provisions and the statutory extracts relevant to this Decision are set out in the Appendix.

CLARITY AND REASONABLENESS OF THE PROPOSED TARIFF RULES

Test for clarity

[7] In Decision No. 2-C-A-2001, the Agency formulated the test respecting the carrier's obligation of tariff clarity as follows:

> [...] the Agency is of the opinion that an air carrier's tariff meets its obligations of clarity when, in the opinion of a reasonable person, 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.

Test for reasonableness

[8] To assess whether a term or condition of carriage is "unreasonable", the Agency has traditionally applied a balancing test, which requires that a balance be struck between the rights of passengers to be subject to reasonable terms and conditions of carriage and the particular air carrier's statutory, commercial and operational obligations. This test was first established in Decision No. 666-C-A-2001 (*Anderson v. Air Canada*), and was recently applied in Decision No. 227-C-A-2013 (*Lukács v. WestJet*).

ISSUE 1: IS EXISTING TARIFF RULE 15(1)(h) CLEAR WITHIN THE MEANING OF PARAGRAPH 122(c) OF THE ATR (Air Transportation Regulations)?

Analysis and findings

[9] The Agency notes that Existing Tariff Rule 15(1)(h) states that the rights of a passenger vis-à-vis Sunwing are, in most cases of international carriage, governed by the Montreal Convention. The same Rule also provides that a carrier is liable for damage caused by delay in the carriage of the passenger and goods unless the carrier proves that it did everything that could reasonably be expected to avoid the damage.

[10] As stated in the test for clarity set out earlier in this Decision, an air carrier meets its tariff obligation of clarity when the rights and obligations of both the carrier and the passenger are stated in such a way as to exclude any reasonable doubt, ambiguity or uncertain meaning.

[11] The Agency finds that Existing Tariff Rule 15(1)(h) clearly establishes that a carrier does have liability for loss, damage or delay of baggage and only in exceptional circumstances is a carrier able to raise a defence to a claim for liability or invoke damage limitations.

[12] The Agency therefore finds that Existing Tariff Rule 15(1)(h) is clear within the meaning of paragraph 122(*c*) of the ATR (Air Transportation Regulations).

ISSUE 2: ARE EXISTING TARIFF RULES 15(1)(b), 15(1)(e), 15(1)(f), 15(1)(h) AND 15(3) REASONABLE WITHIN THE MEANING OF SUBSECTION 111(1) OF THE ATR (Air Transportation Regulations)?

Analysis and findings

- Existing Tariff Rule 15(1)(e) states, in part, that a passenger has a right to information on flight times and schedule changes;
- Existing Tariff Rule 15(1)(f)(i) states, in part, that a passenger whose journey has been interrupted by an advance flight departure, a flight cancellation or overbooking, will be provided with remedial choices of whether they wish to continue to travel or receive a refund;
- Existing Tariff Rule 15(1)(b) establishes that Sunwing shall not be liable for damage occasioned by overbooking or cancellation if it proves that it and its employees and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for the carrier and its employees or agents to take such measures;
- Existing Tariff Rule 15(1)(f) states that a passenger whose journey is interrupted by an advance flight departure, a flight cancellation or overbooking will be provided with the option of accepting one or more of the following: reimbursement of the total price of the ticket for the parts of the journey not made, and/or transportation to the passenger's intended destination at the earliest opportunity at no additional cost.

[13] With respect to a passengers' right to notice about schedule changes, the Agency noted in Decision No. 16-C-A-2013 that some Canadian carriers have tariff provisions stating that that passengers have a right to information on flight times and schedule changes and found such a tariff provision to be reasonable.

[14] Concerning a carrier's liability for damage, the Agency stated in Decision No. LET-C-A-80-2011 (*Lukács v. Air Canada*) that Article 19 of the Convention imposes certain obligations upon the carrier, beyond those of payment of compensation:

> A carrier, pursuant to Article 19 of the Convention, is liable for damage occasioned by delay in the carriage of, amongst other matters, passengers, but will not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or it was impossible for them to take such measures.

[15] In terms of passengers' right to refunds, in Decision No. 28-A-2004, the Agency recognized the fundamental right of passengers to be refunded for the unused portions of their tickets if the carrier is unable to provide transportation on its services or on the services of other carrier(s) within a reasonable period of time.

[16] The Agency is of the opinion that all of the Agency's findings stated above are applicable to this complaint.

[17] The Agency finds that Existing Tariff Rules 15(1)(b), 15(1)(e), 15(1)(f), 15(1)(h) and 15(3) are reasonable in that they strike a balance between the right of passengers to be subject to reasonable terms and conditions of carriage and Sunwing's statutory, commercial and operational obligations. Furthermore, these provisions are consistent with previous Agency decisions.

CONCLUSION

Issue 1

[18] The Agency has determined that Existing Tariff Rule 15(1)(h) is clear within the meaning of paragraph 122(*c*) of the ATR (Air Transportation Regulations).

Issue 2

[19] The Agency has determined that Existing Tariff Rules 15(1)(b), 15(1)(e), 15(1)(f), 15(1)(h) and 15(3) are reasonable in that they strike a balance between the right of passengers to be subject to reasonable terms and conditions of carriage and Sunwing's statutory, commercial and operational obligations. Furthermore, these provisions are consistent with previous Agency decisions.

APPENDIX

EXISTING TARIFF RULES

RULE 15 – RESPONSIBILITY FOR SCHEDULES AND OPERATIONS

[...]

General

[...]

(b) The provisions of this Rule are not intended to make Carrier responsible for the acts of third parties that are not deemed employees and/or agents of the Carrier under applicable law or international conventions and all the rights herein described are subject to the following exception, namely, that Carrier shall not be liable for damage occasioned by overbooking or cancellation if the Carrier proves that it, and its employees and agents, took all measures that could reasonably be required to avoid the damage or if it was impossible for the Carrier, and its employees or agents to take such measures.

(e) Passengers have a right to information on flight times and schedule changes. In the event of a delay, an advanced flight departure or schedule change the carrier will make reasonable efforts to inform the passengers of delays, proposed advanced flight departures and schedule changes, and, to the extent possible, the reasons for them.

(f) (i) If the passenger's journey is interrupted by an Advance Flight Departure, a flight cancellation or overbooking, the Carrier will take into account all the circumstances of the case as known to it and will provide the passenger with the option of accepting one or more of the following remedial choices:

> reimbursement of the total price of the ticket at the price at which it was bought, for the part or parts of the journey not made, and for the part or parts already made if they no longer serve any purpose in relation to the passengers original travel plan, together with, when relevant, transportation to the passenger's point of origin, at the earliest opportunity, at no additional cost;
>
> transportation to the passenger's intended destination at the earliest opportunity, at no additional cost;

[...]

(ii) When determining the transportation service to be offered, the Carrier will consider:

available transportation services, including services offered by interline, code sharing and other affiliated partners and, if necessary, other non-affiliated carriers;

the circumstances of the passenger, as known to it, including any factors which impact upon the importance timely arrival at the destination,

(iii) having taken all known circumstances into consideration, the Carrier will take all measures that can reasonably be required to avoid or mitigate the damages caused by the Advance Flight Departure, overbooking and cancellation. Where a passenger nevertheless incurs expense as a result of the overbooking or cancellation, the Carrier will in addition offer a cash payment or travel credit, the choice of which will be at the passenger's discretion.

(iv) When determining the amount of the offered cash payment or travel credit, the Carrier will consider all circumstances of the case, including any expenses which the passenger, acting reasonably, may have incurred as a result of the Advance Flight Departure, overbooking or cancellation, for example, costs incurred for accommodation, meals or additional transportation. The Carrier will set the amount of compensation offered with a view to reimbursing the passenger for all such reasonable expenses.

[...]

(h) The rights of a passenger against the Carrier are, in most cases of international carriage, governed by an international convention known as the Montreal Convention, 1999. Article 19 of that Convention provides that an air carrier is liable for damage caused by delay in the carriage of passengers and goods unless it proves that it did everything it could reasonably be expected to do to avoid the damage. There are some exceptional cases of international carriage in which the rights of the passengers are not governed by an international convention. In such cases only, a court of competent jurisdiction can determine which system of laws must be consulted to determine what those rights are.

[...]

(3) Passenger Expenses Resulting from Flight Delays or Advance Flight Departures

Passengers will be entitled to reimbursement from the Carrier for reasonable expenses incurred as a result of a flight delay or an Advance Flight Departure, subject to the following conditions:

(a) The Carrier shall not be liable for any damages, costs, losses or expenses occasioned by delays or advance flight departures if the Carrier proves it, and its employees and agents, took all measures that could reasonably be required to avoid the damage or if it was impossible for the Carrier and its employees or agents to take such measures;

(b) Any passenger seeking reimbursement for expenses resulting from delays or advance flight departures must provide the carrier with (a) written notice of his or her claim, (b) particulars of the expenses for which reimbursement is sought and (c) receipts or other documents establishing to the reasonable satisfaction of the Carrier that the expenses were incurred; and

(c) The Carrier may refuse or decline any claim, in whole or part, if:

the passenger has failed or declined to provide proof or particulars establishing, to the reasonable satisfaction of the Carrier, that the expenses claimed were incurred by the passenger and resulted from a

delay or advanced flight departure for which compensation is available under this Rule 15; or

(ii) the expenses for which reimbursement is claimed, or any portion thereof, are not reasonable or did not result from the delay or advanced flight departure as determined by the Carrier, acting reasonably.

Without affecting any obligation to reimburse a passenger as provided for in this tariff, the Carrier may, in its sole discretion, issue meal, hotel and/or ground transportation vouchers to passengers affected by a delay or advanced flight departure.

Air Transportation Regulations, SOR/88-58, as amended

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.

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,

[...]

iv. passenger re-routing,

v. failure to operate the service or failure to operate on schedule,

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,

[...]

x. limits of liability respecting passengers and goods,

xi. exclusions from liability respecting passengers and goods

[...]

Montreal Convention

Article 19 – Delay

The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.

Member(s)

J. Mark MacKeigan
Sam Barone

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Date modified:
2013-08-15

1988 CarswellOnt 347
Ontario Supreme Court, High Court of Justice

Micaleff v. Gainers Inc.

1988 CarswellOnt 347, [1988] O.J. No. 80, 25 C.P.C. (2d) 248, 63 O.R. (2d) 687

MICALLEF et al. v. GAINERS INC. et al.; GAINERS INC. et al. v. MICALLEF et al.

MacFarland J.

Judgment: January 29, 1988
Docket: No. 16833/87

Counsel: *Raymond Koskie*, Q.C. and *Mark Zigler*, for plaintiffs.
Donald J.M. Brown, Q.C. for defendants Gainers Inc. and Daniel Harrington.
T.P.D. Bates, for defendant William M. Mercer Limited.

***MacFarland J.*:**

1 The plaintiffs were prior to July 5, 1983 employees of Gainers Inc. in Eastern Canada. They were either salaried or hourly rated employees who were for pension purposes covered under the Gainers Salaried Plan or the Gainers Hourly Plan as they then existed.

2 By agreement made July 5, 1983 Gainers Inc. sold the business in which the plaintiffs worked to 123599 Canada Limited which subsequently became Maybank Foods Inc. ("Maybank").

3 Gainers Inc. continued to carry on business in other locations mainly in Western Canada, although the evidence before me revealed that Gainers Inc. does today maintain a business in Ontario which, according to Gainers Inc., has a net worth of between 2.5 and 5 million dollars.

4 In any event, the plaintiffs after July 5, 1983 became employees of Maybank.

5 There is little dispute that at the time of the sale there were sufficient assets in the two Gainers Plans to cover all outstanding pension liabilities attributable to the Maybank employees which at that time were $10,362,700.

6 Clause 14.01 of the Agreement of Sale between Gainers Inc. and Maybank sets out the formula by which funds were transferred from the Gainers Plans to the Maybank Plan. The transferred amount was $6,802,024.34 which was $3,560,675.66 less than the liabilities attributable to the Maybank employees at the time of the sale.

7 Maybank made an assignment in bankruptcy as of February 4, 1986 and it is stated there are insufficient assets in the Maybank Plan to cover all outstanding pension liabilities on termination of the Plan. Such liability is estimated as at December 31, 1987 to be $2,864,480.

8 Following the sale Gainers Inc. transferred the registration of their plans from Ontario to Alberta. The trust funds, however, comprising the Gainers Plans remain in Ontario with Montreal Trust Company of Canada.

9 The plaintiffs claim entitlement to these trust funds from the defendants Gainers Inc. and Harrington in respect of the shortfall in the Maybank plan by virtue of s. 29(2) of the *Pension Benefits Act*, R.S.O. 1980, c. 373.

10 The plaintiffs notified the defendants Gainers Inc. and Harrington of their claims by letter dated September 29, 1986 and commenced this action in January, 1987. The defendants deny the plaintiffs' claims.

11 Gainers Inc. has since the summer of 1986 been involved in lengthy negotiations with the union representing its employees in Western Canada. As the result of those negotiations Gainers Inc. now seeks to wind up its Hourly Plan and to transfer the funds now held by Montreal Trust to the Trustees of the Canadian Commercial Workers' Industry Pension Plan ("CCWIP"), pursuant to the terms of the collective agreement negotiated with that union.

12 When this litigation was commenced the defendant, Montreal Trust, indicated to the plaintiffs that the assets of the Gainers Plans would remain in Ontario for the time being and the plaintiffs would be notified of any action to move such assets out of Ontario.

13 Similarly the Alberta Superintendent of Pensions agreed to notify the plaintiffs of any proposal to wind up the Gainers Plans in Alberta.

14 By letter dated November 3, 1987 the Alberta Superintendent of Pensions notified the plaintiffs that the Gainers Hourly Plan was to be terminated as of December 31, 1986 and that this was expected to be accomplished by January 31, 1988. This of necessity would involve the transfer of certain assets out of the fund presently held by Montreal Trust.

15 On January 21, 1988, Montreal Trust notified the plaintiffs that a request had been made of it to dispose of the assets of the Gainers Hourly Plan and transfer that trust fund out of the custody of Montreal Trust.

16 The transfer is to take place January 29, 1988 and this application for a form of injunctive relief was brought before me on January 28, 1988.

17 It is important to note that on January 22, 1988 the Ontario Superintendent of Pensions issued a notice pursuant to s. 88 of the *Pension Benefits Act*, S.O. 1987, c. 35 indicating his proposal to make an order preserving $3,000,000 in assets of the Gainers Hourly Plan in Ontario. Under the provisions of that Act, however, the defendants have up to 30 days to request a hearing in respect of the said notice before the Pension Commission of Ontario. To put it simply, however, there is no order now and there is nothing to prevent the transfer of the assets proposed by the defendants Gainers Inc. and Harrington without the intervention of this Court by order.

18 The final terms of the collective agreement negotiated by Gainers Inc. were only finalized in December 1987 according to Mr. Solursh's affidavit. This was long after that defendant had notice of the plaintiffs' claims in respect of the assets of that fund.

19 The plaintiffs' entitlement to the trust funds held presently by Montreal Trust is disputed by the defendants as is the quantum of the amount to which the plaintiffs claim to be entitled. These are very complex issues which can only be dealt with at trial. Much of the evidence before me is conflicting.

20 There is no dispute that the plaintiffs have raised a substantial issue to be tried. Counsel for Gainers Inc. and Harrington concedes that to be the case.

21 The relief sought by plaintiffs is set out at length in the notice of motion filed.

22 The plaintiffs claim they are *not* seeking a "Mareva" injunction. They seek not to restrain the defendants from disposing generally of assets but rather only to restrain the defendants from disposing of specific assets held in a very specific trust fund by Montreal Trust — namely $3,000,000 of the Gainers Hourly Plan.

23 I should say here that the plaintiffs also claim similar injunctive relief of a more general nature in respect of the Gainers Salaried Plan. There is, however, no evidence before me of any intention on the part of any of the defendants to deal with that plan at this time and accordingly I will not make any order in respect of that plan at this time.

24 As was noted by Estey J. in *Aetna Financial Services Ltd. v. Feigelman*, [1985] 1 S.C.R. 2, 29 B.L.R. 5, [1985] 2 W.W.R. 97, 55 C.B.R. (N.S.) 1, 56 N.R. 241, 15 D.L.R. (4th) 161 at 167 (S.C.C.), the traditional abhorrence which the common law has felt toward allowing execution before judgment has always been subject to certain obvious exceptions. First and foremost among those exceptions is for the preservation of assets which are the very subject matter of the dispute. That is the case here, the plaintiffs' claim entitlement to the assets of the two Gainers Plans now held by Montreal Trust. It should not make a difference if those assets are cash as opposed to some other form of property.

25 That it is this specific fund against which the plaintiffs claim is apparent from the joinder of Montreal Trust as a party defendant to the action.

26 The defendants Gainers Inc. and Harrington are about to dispose of a significant part of the assets of the Gainers Hourly Plan such that it will reduce the fund to an amount less than the amount to which the plaintiffs claim entitlement.

27 These plaintiffs are not members of the union to which union's Plan Gainers proposes to transfer the funds presently held by Montreal Trust.

28 It must always be borne in mind that the fund is not the property of Gainers Inc. The assets held in the Gainers Hourly Plan are the property of the members of that Plan.

29 Gainers Inc. negotiated an agreement relating to pension moneys with the Union representing its employees which is not uncommon today. It is pursuant to the terms of that agreement, that Gainers Inc. now wish the funds held by Montreal Trust in the Gainers Hourly Plan to be transferred to the union Plan.

30 Not only the present employees of Gainers Inc., represented by the union with whom Gainers Inc. negotiated the agreement, however, are persons having an interest in the Gainers Hourly Plan.

31 For Gainers Inc. to have gone ahead and negotiated these terms, when it was well aware of the claims of these plaintiffs, it did so at is own peril.

32 The assets of the Gainers Hourly Plan are not the assets of Gainers Inc. They are the assets of the beneficiaries of the Plan. Those beneficiaries *may* include the plaintiffs before this Court by virtue of s. 29(2) of the *Pension Benefits Act*, [1980], which was in force at the time of the sale from Gainers Inc. to Maybank.

33 The plaintiffs do not seek to restrain the defendants from dealing with the entire fund which according to the affidavit of Jean-Marc Pagé had a market value as at December 31, 1987 of $12,042,678.17 but only $3,000,000 of that fund.

34 I am satisfied on the material that there is a specific fund here as is contemplated by the provisions of r. 45.02 which provides:

> Where the right of a party to a specific fund is in question, the court may order the fund to be paid into court or otherwise secured on such terms as are just.

35 The shortfall in the Maybank Plan according to the plaintiffs' actuaries is $2,864,480. This amount together with interest on that amount would be the maximum amount to which the plaintiffs would be entitled out of the fund if it were successful on this aspect of its claim.

36 I am satisfied in all the circumstances that the balance of convenience here favours the plaintiffs.

37 On the one hand the defendants, Gainers Inc., argues it has substantial assets in other parts of Canada to satisfy any judgment the plaintiffs may be awarded. On the other hand they say if an order is made restraining them from using the moneys in the Gainers Hourly Plan to meet their contractual obligations to the union, this will result in further labour unrest and irreparable harm. I am not satisfied any harm will result to the defendants if an order such as the plaintiffs seek is made.

38 The plaintiffs can give no undertaking as to damages which is usual in applications of this nature.

39 Counsel for the Superintendent of Pensions for Ontario was in Court on the return of this motion and I heard her over the objection of counsel for Gainers Inc. The Superintendent is concerned that if plaintiffs in the position of these plaintiffs are required to give an undertaking in respect of damages, that s. 112 of *Pension Benefits Act* (1987) will be rendered "nugatory", as she phrased it.

40 Mr. Koskie says his clients are ordinary people who cannot afford to give an undertaking and an exception should be made to their situation as was done in *Allen v. Jambo Holdings Limited*, [1980] 2 All E.R. 502 (C.A.).

41 The plaintiffs here bring action in their capacity as trustees and not in their personal capacity. They have no funds or assets in the capacity in which they sue which could be used to fund such an undertaking in respect of damages. They would be required to resort to their personal assets — their homes and furnishings and the like. The action is representative in nature and brought for the benefit of all members of a group. In my view it would be unfair to require the trustees to risk their personal assets in an action of this nature.

42 In my view the combined provisions of *The Pension Benefits Act* (1987) and r. 45.02 indicate that no undertaking in respect of damages should be required in this type of situation. The plaintiffs seek recovery of, or entitlement to, a fund of which they allege they are the beneficiaries. They are in effect seeking return of what they say is rightfully theirs.

43 They are not, in this aspect of their action, seeking property which is otherwise the defendants' property. It is not. The assets of the Gainers Hourly Plan are the property of the beneficiaries of the Plan.

44 In my view no undertaking to damages is required in these circumstances.

45 An order will go, therefore, pursuant to r. 45.02 requiring the Montreal Trust Company of Canada to pay forthwith to the Accountant of the Supreme Court of Ontario the sum of $3,000,000

from the assets currently held by it in trust for the Gainers Hourly Plan. These moneys are to remain on deposit with the Accountant of the Supreme Court of Ontario until the final disposition of the issues between the parties or until further order of this Court.

46 Costs of this application are to the plaintiffs in the cause.

Order accordingly.

2017 CAF 106, 2017 FCA 106
Federal Court of Appeal

Newbould v. Canada (Attorney General)

2017 CarswellNat 2258, 2017 CarswellNat 8732, 2017 CAF 106, 2017 FCA 106, 23 Admin. L.R. (6th) 233, 279 A.C.W.S. (3d) 3

THE HONOURABLE FRANCIS J.C. NEWBOULD (Applicant/Appellant) and ATTORNEY GENERAL OF CANADA (Respondent/Respondent)

J.D. Denis Pelletier, Johanne Trudel, Donald J. Rennie JJ.A.

Heard: May 16, 2017
Judgment: May 19, 2017
Docket: A-118-17

Proceedings: affirming *Newbould v. Canada (Attorney General)* (2017), 2017 FC 326, 2017 CarswellNat 3199 (F.C.)

Counsel: Andrea Gonsalves, Pam Hrick, for Applicant, Honourable Francis J.C. Newbould
Falguni Debnath, Andrea Bourke, for Respondent, Attorney General of Canada

***J.D. Denis Pelletier J.A.*:**

I. INTRODUCTION

1 This is an appeal by the Honourable Mr. Justice Francis Newbould (the appellant) from the dismissal of his motion for a stay of a decision of the Judicial Conduct Review Panel (the Review Panel) dated February 10, 2017 constituting an Inquiry Committee to inquire into his conduct. In effect, the appellant seeks to prevent the continuation of the Canadian Judicial Council (CJC) proceedings investigating his conduct until such time as his application for judicial review of the Review Panel's decision is decided. In reasons reported as 2017 FC 326, the Federal Court dismissed the motion on the grounds that it was premature and, in the alternative, that he had not satisfied the irreparable harm portion of the tripartite test set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.) at 334, (1994), 111 D.L.R. (4th) 385 (S.C.C.) [*RJR — MacDonald*].

2 For the reasons set out below, I would dismiss the appeal.

II. FACTS

3 In late 2014, the CJC received a number of complaints about the appellant's involvement in a public controversy regarding an aboriginal land claim in the vicinity of a cottage property owned by his family. The Chairperson of the CJC's Judicial Conduct Committee, Chief Justice MacDonald, after reviewing these complaints and the submissions of the appellant, closed the files while communicating to the appellant his concerns about the latter's conduct. This outcome is contemplated by section 5.1 of the CJC's *Procedures for the Review of Complaints or Allegations about Federally Appointed Judges* (the *2014 Review Procedures*).

4 Six months later, one of the complainants, the Indigenous Bar Association, requested reconsideration of the decision to take no further action with respect to its complaint. Chief Justice MacDonald deferred the reconsideration request to the next most senior judge on the Judicial Conduct Committee, Senior Associate Chief Justice Pidgeon. In a decision dated May 5, 2016, Pidgeon S.A.C.J. decided to forward the matter to a Review Panel to determine whether an Inquiry Committee should be constituted.

5 In response to an invitation to make submissions to the Review Panel, the appellant provided submissions as did his chief justice, Chief Justice Smith of the Ontario Superior Court of Justice. In her letter Chief Justice Smith raised the question as to whether the *2014 Review Procedures* in force at the time the original complaints were received or the subsequent revision of those procedures (the *2015 Review Procedures*) provided for reconsideration at all, or by someone other than the original decision maker.

6 Before the Review Panel advised him of its decision, the appellant wrote to the Minister of Justice resigning from his office as judge effective June 1, 2017.

7 In a decision dated February 10, 2017, the Review Panel concluded that the CJC had jurisdiction to reopen the Indigenous Bar Association's complaint. It went on to constitute an Inquiry Committee as provided in section 63(3) of the *Judges Act*, R.S.C 1985 c. J-1 (the Act) and subsection 2(4) of the *Canadian Judicial Council Inquiries and Investigations By-laws*, *2015*, SOR/2015-203.

8 The appellant applied for judicial review of that decision, seeking a declaration that the CJC had no jurisdiction to reconsider Chief Justice MacDonald's decision and an order prohibiting the CJC from taking any further steps concerning the complaints disposed of by Chief Justice MacDonald. In his notice of application he alleges that Pidgeon S.A.C.J. had no jurisdiction to reconsider the decision of Chief Justice MacDonald in relation to the same subject matter and therefore, Pidgeon S.A.C.J. had no jurisdiction to refer the matter to a review panel. As a result, the Review Panel was itself without jurisdiction to constitute an Inquiry Committee.

9 In the interim, the appellant moved for an order staying the decision of the Review Panel pending the outcome of his application for judicial review. That motion was heard by Mr. Justice Boswell of the Federal Court.

III. THE DECISION UNDER REVIEW

10 After setting out the facts and the parties' submissions, the Federal Court set out the issues which it was called upon to decide:

> 1. Was the application for judicial review of the Review Panel's decision premature?
>
> 2. Should the Review Panel's decision constituting an Inquiry Committee be stayed pending the outcome of the judicial review?

11 The Federal Court began its analysis of the prematurity issue by referring to a decision I wrote as a single judge of this Court sitting on motions, *Groupe Archambault Inc. c. CMRRA/ SODRAC Inc.*, 2005 FCA 330, 357 N.R. 131 (F.C.A.) [*Groupe Archambault*] in which I stated at paragraph 7: "Before addressing the conditions for issuing an interlocutory stay of proceedings, the Court must be satisfied that its intervention is warranted under the circumstances." Following my review of the circumstances, I dismissed the motion for a stay before considering the *RJR — McDonald* test for an injunction or a stay of proceedings.

12 In light of this authority, the Federal Court reviewed the law as to prematurity and adequate alternate remedies, quoting at length from this Court's decision in *C.B. Powell Ltd. c. Canada (Agence des services frontaliers)*, 2010 FCA 61, [2011] 2 F.C.R. 332 (F.C.A.). The Federal Court was of the view that there were no extraordinary circumstances that would justify interfering with the ongoing administrative proceedings until they were completed or until all effective available remedies were exhausted.

13 The Federal Court referred to the case of *Girouard c. Canada (Procureur général)*, 2014 FC 1175, [2014] F.C.J. No. 1360 (F.C.) (QL) [*Girouard*]. In that case, the Federal Court struck a notice of application brought by a federally appointed judge seeking judicial review of a Review Panel decision to constitute an Inquiry Committee. The Federal Court did so on the basis that the application for judicial review was premature: see *Girouard* at para. 17. In the course of discussing *Girouard*, the Federal Court commented that the Attorney General had not brought a motion to strike out the underlying application for judicial review. In the result, the Federal Court dismissed the application for a stay on the basis that it was premature. Given that there was no motion before it seeking the striking out of the application for judicial review, it did not do so.

14 In the event that this Court did not agree with its view as to prematurity, the Federal Court addressed the merits of the motion for a stay. As is well known, the elements of the tri-partite test in *RJR-MacDonald* are:

1. A serious question to be tried; (serious issue)

2. Irreparable harm if the relief is not granted; and (irreparable harm)

3. The balance of convenience.

RJR — MacDonald at 343

15 In this case, the Federal Court found that the application for judicial review raised a serious issue and that it was neither frivolous nor vexatious.

16 On the issue of irreparable harm, the Federal Court found that any harm to the appellant's reputation had conceivably already occurred as a result of media coverage of his participation in the public controversy in relation to the aboriginal land claim. The Federal Court found that irreparable reputational harm could not be proven by unsubstantiated allegations; in the Court's view, irreparable harm could only be established by clear and compelling evidence. The Federal Court found that there was no evidence that any harm suffered by the appellant would be irreparable.

17 Given that the tri-partite test is conjunctive, the Federal Court did not go on to consider the balance of convenience since the appellant's motion for a stay failed on the issue of irreparable harm.

IV. STATEMENT OF ISSUES

18 The issues considered by the Federal Court are the issues in this appeal. The question as to whether prematurity is a preliminary issue which must be decided prior to consideration of the tri-partite test is challenged by the appellant as is the Federal Court's conclusion that no reputational damage amounting to irreparable harm has been shown here.

V. STANDARD OF REVIEW

19 This is an appeal of a discretionary decision of a judge of the Federal Court. As a five-member panel of this Court found in *Hospira Healthcare Corp. v. Kennedy Institute of Rheumatology*, 2016 FCA 215 (F.C.A.) at paragraph 79, (2016), 402 D.L.R. (4th) 497 (F.C.A.), the standard of review in such a case is the appellate standard identified in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.): correctness for questions of law and palpable and overriding error for questions of fact and questions of mixed fact and law, save where an extricable question of law can be identified.

VI. PREMATURITY

20 In *RJR-MacDonald* at pages 337-38, the Supreme Court discussed the characteristics of "a serious question to be tried." It noted that there were no specific requirements to be met in order to satisfy the test; the threshold is a low one. The judge hearing the motion for the injunction (or stay) is required to make a preliminary assessment of the merits of the case. If the judge concludes that the issues raised are not frivolous or vexatious, the test is satisfied even if the judge's own view is that the applicant is unlikely to succeed when the case is heard on the merits. The Supreme Court brought this portion of its analysis to a close by remarking that "[a] prolonged examination of the merits is generally neither necessary nor desirable": *RJR-MacDonald* at 338.

21 This is to be contrasted with *Groupe Archambault*, where the following comment appears at paragraph 7: "Before addressing the conditions for issuing an interlocutory stay of proceedings, the Court must be satisfied that its intervention is warranted under the circumstances." This led the motions judge in that case to dismiss the motion for a stay before even addressing the *RJR — MacDonald* factors. While the result in *Groupe Archambault* can perhaps be justified on its facts — the underlying judicial review, a challenge to a decision as to the disclosure of documents in the course of a discovery process, was doomed to fail — its reasoning cannot be reconciled with *RJR-MacDonald*.

22 The insertion of a decision on the merits of the underlying application before consideration of the tri-partite test for granting a stay or an injunction pre-empts the question of whether there is a serious issue, as the Supreme Court has conceived it. It forces applicants who need only meet a low threshold under the serious issue branch of the tri-partite test to satisfy the more demanding test of showing extraordinary circumstances as a condition of being heard on their application for a stay. Prematurity/extraordinary circumstances is a feature of the law of judicial review, and not of the law of injunction. The creation of a requirement that prematurity be negatived before the tri-partite test can be considered is a conflation of the law governing two distinct remedies, for which no justification has been offered other than a repetition of the rationale underlying the doctrine of prematurity.

23 I can only conclude that *Groupe Archambault* was wrongly decided and ought not to be followed. As it was a decision of a single judge of this Court, *Groupe Archambault* is not binding on a panel of the Court so there is no need to engage in the analysis set out in *Miller v. Canada (Attorney General)*, 2002 FCA 370 (Fed. C.A.) at paragraphs 8-10, (2002), 220 D.L.R. (4th) 149 (Fed. C.A.).

24 To summarize, prematurity and extraordinary circumstances (two aspects of the same policy of judicial restraint) are not free-standing preliminary questions which must be addressed before considering the tri-partite test. These issues should be considered under the heading of serious issue where, consistently with *RJR-MacDonald*, the question is whether their weight is such that

the underlying application can be considered frivolous or vexatious. If not, the Court proceeds to the next step of the analysis.

25 In this case, the Federal Court's determination that it could dismiss the appellant's motion for a stay on the basis of prematurity was based on an error of law, though the responsibility for the error lies elsewhere. This error would justify our intervention but for the fact that consideration of the tri-partite test persuades me that the appeal must be dismissed.

VII. THE TRI-PARTITE TEST

26 The Federal Court found that there was a serious question as to the jurisdiction of the CJC to reconsider complaints which it had previously dismissed. The Federal Court's conclusion on this point was not challenged in the argument before us. As a result, I will proceed on the basis that this portion of the tri-partite test has been satisfied.

27 Two issues have been raised in relation to irreparable harm, (i) whether the Federal Court chose the right evidentiary standard and (ii) whether the Federal Court made a palpable and overriding error in concluding that the appellant would not suffer irreparable damage if the stay was not granted.

28 As regards the first issue, the Federal Court applied the clear and compelling evidence standard set out in cases such as *Choson Kallah Fund of Toronto v. Minister of National Revenue*, 2008 FCA 311 (F.C.A.) at paragraphs 5-11, (2008), 383 N.R. 196 (F.C.A.) and *Gateway City Church v. Minister of National Revenue*, 2013 FCA 126 (F.C.A.) at paragraph 14, (2013), 445 N.R. 360 (F.C.A.) [*Gateway City Church*] and the cases cited therein. The appellant argues that in cases involving reputational damage or damage to other social attributes such as credibility, the occurrence of irreparable harm can be inferred, relying on cases such as *Adriaanse v. Malmo-Levine* (1998), 161 F.T.R. 25 (Fed. T.D.) at paragraphs 20-22, 1998 CanLII 8809 [*Malmo-Levine*], *Douglas v. Canada (Attorney General)*, 2014 FC 1115 (F.C.) at paragraph 43, (2014), 94 Admin. L.R. (5th) 229 (F.C.) [*Douglas*], and *Bennett v. British Columbia (Superintendent of Brokers)* (1993), 77 B.C.L.R. (2d) 145 (B.C. C.A. [In Chambers]), 1993 CanLII 2057 at paragraphs 17-18 [*Bennett*].

29 In my view, the presence of two lines of cases such as these shows that the quality of the evidence — "clear and compelling" or something less — is a function of the nature of the irreparable harm being alleged. Where the harm apprehended is financial, clear and compelling evidence is required because the nature of the harm allows it to be proven by concrete evidence such as that set out at paragraph 17 of *Gateway City Church*. In the case of harm to social interests such as reputation or dignity, as in *Douglas*, the occurrence of irreparable harm can be satisfied by inference from the whole of the surrounding circumstances.

2018 SCC 5, 2018 CSC 5
Supreme Court of Canada

R. v. Canadian Broadcasting Corp.

2018 CarswellAlta 206, 2018 CarswellAlta 207, 2018 SCC 5, 2018 CSC 5, [2018] 1 S.C.R. 196, [2018] 2 W.W.R. 431, [2018] A.W.L.D. 832, [2018] A.W.L.D. 861, 11 C.P.C. (8th) 221, 144 W.C.B. (2d) 163, 287 A.C.W.S. (3d) 745, 358 C.C.C. (3d) 143, 417 D.L.R. (4th) 587, 44 C.R. (7th) 1, 63 Alta. L.R. (6th) 1

Canadian Broadcasting Corporation (Appellant) and Her Majesty The Queen (Respondent) and CTV, a Division of Bell Media Inc., Global News, a division of Corus Television Limited Partnership, The Globe and Mail Inc., Postmedia Network Inc., Vice Studio Canada Inc., Aboriginal Peoples Television Network and AD IDEM/ Canadian Media Lawyers Association (Interveners)

McLachlin C.J.C., Abella, Moldaver, Karakatsanis,
Wagner, Gascon, Côté, Brown, Rowe JJ.

Heard: November 1, 2017
Judgment: February 9, 2018
Docket: 37360

Proceedings: reversing *R. v. Canadian Broadcasting Corp.* (2016), [2017] 3 W.W.R. 413, 2016 ABCA 326, 2016 CarswellAlta 2034, 43 Alta. L.R. (6th) 213, 404 D.L.R. (4th) 318, 93 C.P.C. (7th) 269, [2016] A.J. No. 1085, Frans Slatter J.A., J.D. Bruce McDonald J.A., Sheila Greckol J.A. (Alta. C.A.); reversing *R. v. Canadian Broadcasting Corp.* (2016), [2016] A.J. No. 336, 2016 ABQB 204, 2016 CarswellAlta 620, 37 Alta. L.R. (6th) 299, [2016] 9 W.W.R. 613, 86 C.P.C. (7th) 373, Peter Michalyshyn J. (Alta. Q.B.)

Counsel: Frederick S. Kozak, Q.C., Sean Ward, Tess Layton, Sean Moreman, for Appellant
Iwona Kuklicz, Julie Snowdon, for Respondent
Iain A.C. MacKinnon, for Interveners

Brown J. **(McLachlin C.J.C. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté and Rowe JJ. concurring):**

I. Introduction

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1 The background leading to this appeal was summarized in the reasons of the chambers judge: [1]

> On March 5, 2016 [the accused], was charged with the first degree murder of D.H., a person under the age of 18 ("the victim"). On March 15, 2016 the Crown requested and a judge ordered a mandatory ban under s. 486.4(2.2) of the *Criminal Code*, R.S.C., 1985, c. C-46. The order prohibits the publication, broadcast or transmission in any way of information that could identify the victim.
>
> As of March 16, 2016, two articles which pre-existed the publication ban, and which identified the victim by name and photograph ("the articles"), continued to exist on the CBC Edmonton website.
>
> In response to a March 16, 2016 Edmonton Police Service inquiry, a senior digital producer with CBC Edmonton advised that no future stories would contain the victim's identifying information.
>
> On March 18, 2016, however, the pre-publication ban articles remained on the website, unaltered.
>
> One of the articles contains some evidence that the victim's identity appears already in wide circulation, by way of social media, but also by reason of the fact the victim attended school and lived in a smaller Alberta community where the murder is alleged to have occurred.

2 Because CBC would not remove from its website the victim's identifying information published prior to the order granting a publication ban, the Crown filed an Originating Notice seeking an order citing CBC in criminal contempt of the publication ban, and an interlocutory injunction [2] directing removal of that information from CBC's website. As the terms of that Originating Notice are important to my proposed disposition of this appeal, I reproduce them here, in relevant part [3]:

> TAKE NOTICE that an Application will be made by the Attorney General of Alberta on behalf of her Majesty the Queen before the presiding Justice of the Court of Queen's Bench, ... for an Order citing [CBC] in criminal contempt of court.
>
> AND FURTHER TAKE NOTICE that an application will be made for an interim injunction, directing that [CBC] remove any information from their website that could identify the complainant in the [subject] case.
>
> RELIEF SOUGHT:
>
> 1. That [CBC] be cited in criminal contempt of court.

2. That [CBC] be directed to remove any information from their website that could identify the complainant in the [subject] case.

3. That an appropriate sentence be imposed against [CBC].

4. Any such further order that this Honourable Court deems appropriate.

3 The chambers judge concluded that the Crown had not established the requirements for a mandatory interlocutory injunction, and dismissed its application. On appeal, the Court of Appeal divided on whether the Crown was entitled to a mandatory interlocutory injunction. While the majority allowed the appeal and granted the injunction, Greckol J.A., in dissent, would have dismissed the appeal, finding that the majority applied incorrect legal principles to the Crown's application. [4]

4 For the reasons that follow, I would allow the appeal. In my respectful view, the chambers judge applied the correct legal test in deciding the Crown's application, and his decision that the Crown's case failed to satisfy that test did not, in these circumstances, warrant appellate intervention.

II. Legislative Provisions

5 Sections 486.4(2.1) and 486.4(2.2) of the *Criminal Code*, [5] taken together, provide that a presiding judge or justice shall make an order, upon application by the victim or the prosecutor, for a publication ban in cases involving offences against victims under the age of 18 years. Specifically, the Crown or the victim is entitled to an order "directing that any information that could identify the victim *shall not be published* in any document or broadcast *or transmitted* in any way".

III. Judicial History

A. The Chambers Judge's Reasons

6 Acceding to the parties' submissions, the chambers judge applied a modified version of the tripartite test for an interlocutory injunction stated in *RJR-MacDonald Inc. v. Canada (Attorney General)*. [6] This required the Crown to prove (1) a strong *prima facie* case for finding CBC in criminal contempt; (2) that the Crown would suffer irreparable harm were the injunction refused; and (3) that the balance of convenience favoured granting the injunction.

7 As to the requirement of a strong *prima facie* case, the Crown had argued for a "broad interpretation" of s. 486.4(2.1)'s terms "publish[ed]" and "transmit[ted]", such that it would catch web-based articles posted *prior* to the publication ban. [7] The chambers judge, however, concluded that the case authorities did not support such an interpretation. In these circumstances, and applying the test for criminal contempt stated in *U.N.A. v. Alberta (Attorney General)*, [8] he found that the

Crown could not "likely succeed" in proving beyond a reasonable doubt that CBC, by leaving the victim's identifying information on its website after the publication ban had been issued, was in "open and public defiance" of that order. [9]

8 Regarding the requirement of irreparable harm, the Crown had argued such harm would be suffered by the administration of justice, since the ongoing display of the victim's identifying information on CBC's website would deter others from seeking assistance or remedies. The chambers judge declined to so find, however, noting that the underlying policy objective of protecting a victim's anonymity loses significance where the victim is deceased. And, in assessing balance of convenience, the chambers judge determined that the compromising of CBC's freedom of expression, and of the public's interest in that expression, outweighed any harm to the administration of justice that would result from leaving the two impugned articles on CBC's website.

B. The Court of Appeal

9 At the Court of Appeal, the majority (Slatter and McDonald JJ.A.) reversed the chambers judge and granted the mandatory interlocutory injunction sought by the Crown. The chambers judge, it held, had erred by characterizing this matter as requiring the Crown to demonstrate a strong *prima facie* case of criminal contempt. Rather, the Originating Notice, "[w]hile essentially civil in nature, ... has a 'hybrid' aspect to it" [10] , in that it seeks both a citation for criminal contempt *and* the removal of the victim's identifying information from CBC's website. The request for the interlocutory injunction, the majority explained, is "tied back" to the latter request for an order removing the identifying information, and not to the request for a criminal contempt citation. [11] The issue, therefore, was "whether the Crown has demonstrated a strong *prima facie* case entitling it to a mandatory order directing removal of the identifying material from the website". [12]

10 As to whether or not s. 486.4(2.1)'s reference to identifying information that is "published" is (as the Crown contends) met by the ongoing appearance of such information on a website after it is first posted, the majority conceded that "either position is arguable". [13] That said, the majority viewed the Crown as having a strong *prima facie* case for a mandatory interlocutory injunction, since, if "published" is construed as a continuous activity, CBC is arguably wilfully disobeying the publication ban. Further, such disobedience is harmful to the integrity of the administration of justice, and contrary to Parliament's direction that such orders are to be mandatory. [14] Finally, the balance of convenience did not favour CBC, since the publication ban must be presumed to be constitutional at this stage of the proceedings, and freedom of expression would not, in any case, be a defence against the contempt charge.

11 Justice Greckol would have dismissed the appeal. In her view, the majority's characterization of the relief sought in the Originating Notice as "hybrid" was misplaced, since the Crown's

application for an interlocutory injunction was brought in respect of the sought-after citation for criminal contempt. The chambers judge asked the right question (being, whether the Crown could show a strong *prima facie* case of criminal contempt), and his exercise of discretion to refuse an injunction was entitled to deference. And here, where the proscriptions against "publish[ing]" and "transmitt[ing]" may reasonably bear two meanings, one capturing the impugned articles and one not, no strong *prima facie* case of criminal contempt could be shown. Further, and even allowing that open defiance of a facially valid court order may amount to irreparable harm to the administration of justice, the ambit of s. 486.4's proscriptions is an unsettled question. And, as the victim in this case is deceased, the privacy of the victim is not vulnerable to harm. Finally, and even if the pertinent provisions of the *Criminal Code* are presumed constitutional, the chambers judge was entitled to consider freedom of expression in assessing the balance of convenience.

IV. Analysis

A. What Is the Applicable Framework for Granting a Mandatory Interlocutory Injunction?

12 In *Metropolitan Stores (MTS) Ltd. v. Manitoba Food & Commercial Workers, Local 832*.[15] and then again in *RJR — MacDonald*, this Court has said that applications for an interlocutory injunction must satisfy each of the three elements of a test which finds its origins in the judgment of the House of Lords in *American Cyanamid Co. v. Ethicon Ltd.*.[16] At the first stage, the application judge is to undertake a preliminary investigation of the merits to decide whether the applicant demonstrates a "serious question to be tried", in the sense that the application is neither frivolous nor vexatious.[17] The applicant must then, at the second stage, convince the court that it will suffer irreparable harm if an injunction is refused.[18] Finally, the third stage of the test requires an assessment of the balance of convenience, in order to identify the party which would suffer greater harm from the granting or refusal of the interlocutory injunction, pending a decision on the merits.[19]

13 This general framework is, however, just that — general. (Indeed, in *RJR — MacDonald* the Court identified two exceptions which may call for "an extensive review of the merits" at the first stage of the analysis.[20]) In this case, the parties have at every level of court agreed that, where a *mandatory* interlocutory injunction is sought, the appropriate inquiry at the first stage of the *RJR — MacDonald* test is into whether the applicants have shown a strong *prima facie* case. I note that this heightened threshold was not applied by this Court in upholding such an injunction in*Google Inc. v. Equustek Solutions Inc.*[21] In *Google*, however, the appellant did not argue that the first stage of the *RJR — MacDonald* test should be modified. Rather, the appellant agreed that only a "serious issue to be tried" needed to be shown and therefore the Court was not asked to consider whether a heightened threshold should apply.[22] By contrast, in this case, the application by the courts below

of a heightened threshold raises for the first time the question of just what threshold ought to be applied at the first stage where the applicant seeks a mandatory interlocutory injunction.

14 Canadian courts have, since *RJR — MacDonald*, been divided on this question. In Alberta, Nova Scotia and Ontario, for example, the applicant must establish a strong *prima facie* case. [23] Conversely, other courts have applied the less searching "serious issue to be tried" threshold. [24]

15 In my view, on an application for a mandatory interlocutory injunction, the appropriate criterion for assessing the strength of the applicant's case at the first stage of the *RJR — MacDonald* test is *not* whether there is a serious issue to be tried, but rather whether the applicant has shown a strong *prima facie* case. A mandatory injunction directs the defendant to undertake a positive course of action, such as taking steps to restore the *status quo*, or to otherwise "put the situation back to what it should be", which is often costly or burdensome for the defendant and which equity has long been reluctant to compel. [25] Such an order is also (generally speaking) difficult to justify at the interlocutory stage, since restorative relief can usually be obtained at trial. Or, as Justice Sharpe (writing extrajudicially) puts it, "the risk of harm to the defendant will [rarely] be less significant than the risk to the plaintiff resulting from the court staying its hand until trial". [26] The potentially severe consequences for a defendant which can result from a mandatory interlocutory injunction, including the effective final determination of the action in favour of the plaintiff, further demand what the Court described in *RJR — Macdonald* as "extensive review of the merits" at the interlocutory stage. [27]

16 A final consideration that may arise in some cases is that, because mandatory interlocutory injunctions require a defendant to take positive action, they can be more burdensome or costly for the defendant. It must, however, be borne in mind that complying with prohibitive injunctions can also entail costs that are just as burdensome as mandatory injunctions. [28] While holding that applications for mandatory interlocutory injunctions are to be subjected to a modified *RJR — MacDonald* test, I acknowledge that distinguishing between mandatory and prohibitive injunctions can be difficult, since an interlocutory injunction which is framed in prohibitive language may "have the effect of forcing the enjoined party to take ... positive actions". [29] For example, in this case, ceasing to transmit the victim's identifying information would require an employee of CBC to take the necessary action to remove that information from its website. Ultimately, the application judge, in characterizing the interlocutory injunction as mandatory or prohibitive, will have to look past the form and the language in which the order sought is framed, in order to identify the substance of what is being sought and, in light of the particular circumstances of the matter, "what the practical consequences of the ... injunction are likely to be". [30] In short, the application judge should examine whether, in substance, the overall effect of the injunction would be to require the defendant to *do* something, or to *refrain from doing* something.

17 This brings me to just what is entailed by showing a "strong *prima facie* case". Courts have employed various formulations, requiring the applicant to establish a "strong and clear chance of success";[31] a "strong and clear" or "unusually strong and clear" case;[32] that he or she is "clearly right" or "clearly in the right";[33] that he or she enjoys a "high probability" or "great likelihood of success";[34] a "high degree of assurance" of success;[35] a "significant prospect" of success;[36] or "almost certain" success.[37] Common to all these formulations is a burden on the applicant to show a case of such merit that it is very likely to succeed at trial. Meaning, that upon a preliminary review of the case, the application judge must be satisfied that there is a *strong likelihood* on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice.

18 In sum, to obtain a mandatory interlocutory injunction, an applicant must meet a modified *RJR — MacDonald* test, which proceeds as follows:

> (1) The applicant must demonstrate a strong *prima facie* case that it will succeed at trial. This entails showing a *strong likelihood* on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice;
>
> (2) The applicant must demonstrate that irreparable harm will result if the relief is not granted; and
>
> (3) The applicant must show that the balance of convenience favours granting the injunction.

B. Does the Liberty Net "Rarest and Clearest of Cases" Test Apply in These Circumstances?

19 CBC argues that, on an application for an interlocutory injunction where a media organization's right to free expression is at stake, the application judge should apply the test stated in *Canada (Human Rights Commission) v. Canadian Liberty Net*.[38] This would entail the applicant showing "the rarest and clearest of cases"[39], such that the conduct complained of would be impossible to defend.

20 In *Liberty Net*, the Court explained that the *RJR — MacDonald* tripartite test is not appropriately applied to cases of "pure" speech, comprising the expression of "the non-commercial speaker where there is no tangible, immediate utility arising from the expression other than the freedom of expression itself".[40] This appeal does not present such a case. The reason the Court gave in *Liberty Net* for not applying the *RJR — Macdonald* test to "pure" speech was that the defendant in such cases "has no tangible or measurable interest" [also described as a "tangible, immediate utility"] *other than the expression itself*".[41] Where discriminatory hate speech or other potentially low-value speech is at issue (as was the case in *Liberty Net*), the *RJR — MacDonald*

test would "stac[k] the cards" against the defendant at the second and third stages.[42] In this appeal, however, the chambers judge correctly identified a "tangible, immediate utility" to CBC's posting of the identifying information, being the "public's interest" in CBC's right to express that information, and in freedom of the press.[43] Because CBC does not therefore face the same disadvantage as defendants face at the second and third stages of the *RJR — MacDonald* test in cases of low- to no-value speech, it is unnecessary to apply the "clearest of cases" threshold, and I would not do so.

C. What Strong Prima Facie Case Must the Crown Show?

21 As I have already canvassed, in this case the majority at the Court of Appeal, in reversing the chambers judge, reasoned that he had mischaracterized the basis for which the Crown had sought the injunction. Specifically, the majority said that the Originating Notice, properly read, was "hybrid"[44] , such that the application for the injunction did not "relate directly"[45] to the criminal contempt citation, but to the direction sought that CBC remove the victim's identifying information from its website. The identical wording shared by part of the Originating Notice's preamble ("AND FURTHER TAKE NOTICE that an application will be made for an interim injunction, directing that [CBC] remove any information from their website that could identify the complainant in the [subject] case") and the part of the Originating Notice which sought an injunction ("That [CBC] be directed to remove any information from their website that could identify the complainant in the [subject] case") was said to demonstrate "that the request for an interim injunction is tied back ... to ... the removal of the objectionable postings".[46] The "strong *prima facie* case" which the Crown was bound to show, then, was *not* one of criminal contempt, but rather of an "entitl[ement] ... to a mandatory order directing removal of the identifying material from the website".[47]

22 In dissent, Greckol J.A. saw the matter differently. "A literal reading of the Originating Notice", she said, "shows that the Crown brought an application for criminal contempt and sought an interim injunction *in that proceeding*".[48] This was in her view confirmed by the record which reveals that the Crown had proceeded on the basis that its application for an interlocutory injunction was sought in respect of the citation for criminal contempt.

23 For two reasons, I agree with Greckol J.A. First, the Originating Notice itself, and the sequencing therein of the relief sought, belies its putatively hybrid character. It begins by giving notice ("TAKE NOTICE") of an "an [a]pplication ... for an Order citing [CBC] in criminal contempt of court". That notice is immediately followed by a *further* notice ("AND FURTHER TAKE NOTICE") of an "application ... for an interim injunction, directing that [CBC] remove any information from [its] website that could identify the complainant in the [subject] case".[49] The text "AND FURTHER TAKE NOTICE" makes plain that the two applications are linked, such that the latter is tied *not* to the mere placement by CBC of the victim's identifying information on

its website, but to the sought-after criminal contempt citation. In other words, each prayer for relief does not launch an independent proceeding; rather, both relate to the alleged criminal contempt.

24 The second reason goes to the fundamental nature of an injunction and its relation to a cause of action. Rule 3.8(1) of the *Alberta Rules of Court* [50] requires that an originating application state *both* "the claim and the basis for it", *and* "the remedy sought". In other words, an applicant must record both "a basis" *and* "[a] remedy". An injunction is generally "*a remedy ancillary to a cause of action*". [51] And here, the Crown's Originating Notice discloses only a single basis for seeking that remedy: CBC's alleged criminal contempt of court. As I have already noted, this is consistent with how the Crown framed its case at the courts below.

25 The majority's conclusion at the Court of Appeal that the basis for the injunction is an "entitl[ement] ... to a mandatory order directing removal of the identifying material from the website" [52] , therefore, simply begs the question: what, precisely, is the source in law of that entitlement? An injunction is not a cause of action, in the sense of containing its own authorizing force. It is, I repeat, a remedy. This is undoubtedly why, before both the chambers judge and the Court of Appeal, the Crown framed the matter as an application for an interlocutory injunction in the proceedings for a criminal contempt citation. [53] And, on that point, I respectfully endorse Greckol J.A.'s conclusion that it was not for the Court of Appeal to re-cast the Crown's case as a civil application for an interlocutory injunction pending a permanent injunction. The Crown was bound to show a strong *prima facie* case of criminal contempt of court.

26 I add this. It is implicit in the foregoing analysis that, in some circumstances, an interlocutory injunction may be sought and issued to enjoin allegedly criminal conduct. The delineation of those circumstances, however, I would not decide here. To be clear, the disposition of this appeal should not be taken as standing for the proposition that injunctive relief is ordinarily or readily available in criminal matters, or that — even had the Crown been able to show in this case a strong *prima facie* case of criminal contempt — an injunction would have been available.

D. Is the Crown Entitled to a Mandatory Interlocutory Injunction?

27 The decision to grant or refuse an interlocutory injunction is a discretionary exercise, with which an appellate court must not interfere solely because it would have exercised the discretion differently. In *Metropolitan Stores*, [54] the Court endorsed this statement of Lord Diplock in *Hadmor Productions Ltd. v. Hamilton* [55] about the circumstances in which that exercise of discretion may be set aside. Appellate intervention is justified only where the chambers judge proceeded "on a misunderstanding of the law or of the evidence before him", where an inference "can be demonstrated to be wrong by further evidence that has [since] become available", where there has been a change of circumstances, or where the "decision to grant or refuse the injunction

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is so aberrant that it must be set aside on the ground that no reasonable judge ... could have reached it". [56] This principle was recently affirmed in *Google*. [57]

28 In this case, and as I have explained, the first stage of the modified *RJR — MacDonald* test required the Crown to satisfy the chambers judge that there was a strong likelihood on the law and the evidence presented that it would be successful in proving CBC's guilt of criminal contempt of court. This is not an easy burden to discharge and, as I shall explain, the Crown has failed to do so here.

29 In *United Nurses of Alberta*, McLachlin J. (as she then was) described the elements of criminal contempt of court in these terms:

> To establish criminal contempt the Crown must prove that the accused defied or disobeyed a court order in a public way (the *actus reus*), with intent, knowledge or recklessness as to the fact that the public disobedience will tend to depreciate the authority of the court (the *mens rea*). The Crown must prove these elements beyond a reasonable doubt. [58]

30 As to the *actus reus* — that is, as to whether the Crown could demonstrate a strong *prima facie* case that CBC "defied or disobeyed [the publication ban] in a public way" [59] by leaving the victim's identifying information on its website — the chambers judge rejected the Crown's submission that s. 486.4(2.1)'s terms "publish[ed]" and "transmit[ted]" should be "broad[ly]" interpreted. [60] In his view, the meaning of that text was not so obvious that the Crown could "likely succeed at trial" in showing that s. 486.4(2.1) would capture the impugned articles on CBC's website, since they had been posted *prior* to the issuance of a publication ban. In other words, and as CBC argued before the chambers judge, the statutory text might also be reasonably taken as prohibiting only publication which occurred for the first time *after* a publication ban.

31 Significantly, the majority at the Court of Appeal conceded that "either position is arguable". [61] In my respectful view, that was, in substance, an acknowledgment that the Crown had not shown a strong *prima facie* case of criminal contempt. Before us, the Crown urged this Court to infer that the majority nevertheless "leaned" towards the Crown's preferred interpretation of "publish[ed] when it stated that to see the matter otherwise would "significantly limit the scope of many legal rights and obligations that depend on making information available to third parties [and] [i]f publishing is a continuous activity, then it is also arguable that [CBC] is wilfully disobeying the court order". [62] But, even allowing that this may be so, the Crown's burden was not to show a case for criminal contempt that "leans" one way or another, but rather a case, based on the law and evidence presented, that has a *strong likelihood* of success at trial. And, again with respect, I see nothing in the chambers judge's reasons or, for that matter, in the majority reasons which persuades me that the chambers judge, in refusing the interlocutory injunction sought here, committed any of the errors described in *Hadmor* as justifying appellate intervention.

32 My finding on this point is determinative, and obviates the need to consider *mens rea*, or the other two stages of the *RJR — MacDonald* test.

V. Conclusion

33 I would allow this appeal.

Appeal allowed.

Pourvoi accueilli.

Footnotes

1 2016 ABQB 204, [2016] 9 W.W.R. 613 (Alta. Q.B.), at paras. 2-6 (emphasis added).

2 The Crown's Originating Notice uses the term "interim injunction". In substance, however, the Crown's application was for an interlocutory injunction. (See R.J. Sharpe, *Injunctions and Specific Performance* (4th ed. 2012), at paras. 2.15 and 2.55.)

3 A.R., at pp. 39-40.

4 2016 ABCA 326, 404 D.L.R. (4th) 318 (Alta. C.A.).

5 R.S.C. 1985, c. C-46.

6 [1994] 1 S.C.R. 311 (S.C.C.).

7 Chambers judge's reasons, at para. 26.

8 [1992] 1 S.C.R. 901 (S.C.C.), at p. 933.

9 Chambers judge's reasons, at para. 34.

10 para. 5.

11 para. 6.

12 para. 7.

13 para. 10.

14 para. 11.

15 [1987] 1 S.C.R. 110 (S.C.C.).

16 [1975] A.C. 396 (U.K. H.L.).

17 *RJR — MacDonald*, at pp. 334-35.

18 *RJR — MacDonald*, at pp. 334 and 348.

19 *RJR — MacDonald*, at p. 334.

20 pp. 338-39.

21 2017 SCC 34 (S.C.C.), [2017] 1 S.C.R. 824.

22 *Google*, at paras. 25-27.

23 *Medical Laboratory Consultants Inc. v. Calgary Health Region*, 2005 ABCA 97, 19 C.C.L.I. (4th) 161 (Alta. C.A.), at para. 4; *Modry v. Alberta Health Services*, 2015 ABCA 265, 388 D.L.R. (4th) 352 (Alta. C.A.), at para. 40; *Conway v. Zinkhofer*, 2006 ABCA 74 (Alta. C.A.), at paras. 28-29; *D.E. & Son Fisheries Ltd. v. Goreham*, 2004 NSCA 53, 223 N.S.R. (2d) 1 (N.S. C.A.), at para. 10; *Amec E & C Services Ltd. v. Whitman Benn & Associates Ltd.*, 2003 NSSC 112, 214 N.S.R. (2d) 369 (N.S. S.C.), at para. 20, aff'd 2003 NSCA 126, 219 N.S.R. (2d) 126 (N.S. C.A.); and *Cytrynbaum v. Look Communications Inc.*, 2013 ONCA 455, 307 O.A.C. 152 (Ont. C.A.), at para. 54.

24 *Sawridge Band v. R.*, 2004 FCA 16, [2004] 3 F.C.R. 274 (F.C.A.), at para. 45; *Jamieson Laboratories Ltd. v. Reckitt Benckiser LLC*, 2015 FCA 104, 130 C.P.R. (4th) 414 (F.C.A.), at paras. 1 and 22-25; *Potash Corp. of Saskatchewan Inc. v. Mosaic Potash Esterhazy Ltd. Partnership*, 2011 SKCA 120, 341 D.L.R. (4th) 407 (Sask. C.A.), at para. 42; *La Plante v. Saskatchewan Society for the Prevention of Cruelty to Animals*, 2011 SKCA 43, [2012] 3 W.W.R. 293 (Sask. C.A.), at paras. 16-17; *Summerside Seafood Supreme Inc. v. Prince Edward Island (Minister of Fisheries, Aquaculture & Environment)*, 2006 PESCAD 11, 256 Nfld. & P.E.I.R. 277 (P.E.I. C.A.), at para. 65.

25 *Injunctions and Specific Performance*, at paras. 1.510, 1.530 and 2.640.

26 *Injunctions and Specific Performance*, at para. 2.640.

27 *RJR — MacDonald*, at pp. 338-39.

28 *Injunctions and Specific Performance*, at paras. 1.530 and 1.540. See also *Potash*, at paras. 43-44.

29 *Potash*, at para. 44; see also *Injunctions and Specific Performance*, at para. 1.540.

30 *National Commercial Bank Jamaica Ltd. v. Olint Corp. Ltd.*, [2009] UKPC 16, [2009] 1 W.L.R. 1405 (Jamaica P.C.), at para. 20.

31 *H&R Block Canada Inc. v. Inisoft Corp. (Ontario)* [2009 CarswellOnt 4261 (Ont. S.C.J. [Commercial List])], 2009 CanLII 37911, at para. 24.

32 *Fradenburgh v. Ontario Lottery & Gaming Corp.*, 2010 ONSC 5387 (Ont. S.C.J.), at para. 14; *Boehringer Ingelheim (Canada) Inc. v. Bristol-Myers Squibb Canada Inc.* (1998), 83 C.P.R. (3d) 51 (Ont. Gen. Div.), at paras. 49 and 52 (citing *Shepherd Homes Ltd. v. Sandham*, [1970] 3 All E.R. 402 (Eng. Ch. Div.), at p. 409).

33 *Barton-Reid Canada Ltd. v. Alfresh Beverages Canada Corp.* [2002 CarswellOnt 3653 (Ont. S.C.J.)], 2002 CanLII 34862, at para. 9; *Bark & Fitz Inc. v. 2139138 Ontario Inc.*, 2010 ONSC 1793 (Ont. S.C.J.), at para. 12.

34 *Quality Pallets & Recycling Inc. v. Canadian Pacific Railway* [2007 CarswellOnt 2477 (Ont. S.C.J.)], 2007 CanLII 13712, at para. 16.

35 *West Nipissing Economic Development Corp. v. Weyerhaeuser Co.* [2002 CarswellOnt 4165 (Ont. S.C.J.)], 2002 CanLII 26148, at para. 16.

36 *Parker v. Canadian Tire Corp.*, [1998] O.J. No. 1720 (Ont. Gen. Div.), at para. 11.

37 *Barton-Reid*, at paras. 9, 12 and 17. (See, generally, M. A. Vermette, "A Strong Prima Facie Case for Rationalizing the Test Applicable to Interlocutory Mandatory Injunctions" in T. L. Archibald and R. S. Echlin eds., *Annual Review of Civil Litigation, 2011* (2011) 367, at pp. 378-79.)

38 [1998] 1 S.C.R. 626 (S.C.C.).

39 *Liberty Net*, at para. 49.

40 paras. 47 and 49.

41 para. 47 (emphasis in original).

42 para. 47.

43 Chambers judge's reasons, at para. 59.

44 para. 5.

45 para. 6.

46 C.A. reasons, at para. 6.

47 C.A. reasons, at para. 7.

48 C.A. reasons, at para. 23 (emphasis added).

49 A.R., at p. 39.

50 Alta. Reg. 124/2010.

51 *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897 (S.C.C.), at p. 930 (emphasis added).

52 C.A. reasons, at para. 7.

53 C.A. reasons, at paras. 25-26; chambers judge's reasons, at para. 7.

54 pp. 154-55.

55 [1982] 1 All E.R. 1042 (U.K. H.L.), at p. 1046.

56 See also *British Columbia (Attorney General) v. Wale* (1986), [1987] 2 W.W.R. 331 (B.C. C.A.), aff'd [1991] 1 S.C.R. 62 (S.C.C.); *White Room Ltd. v. Calgary (City)*, 1998 ABCA 120, 62 Alta. L.R. (3d) 177 (Alta. C.A.); *Musqueam Indian Band v. Canada*, 2008 FCA 214, 378 N.R. 335 (F.C.A.), at para. 37, leave to appeal refused, [2008] 3 S.C.R. viii (note) (S.C.C.).

57 para. 22.

58 p. 933 (emphasis added).

59 Chambers judge's reasons, at para. 12.

60 para. 33.

61 C.A. reasons, at para. 10.

62 C.A. reasons, at para. 10; Transcript, at pp. 65 and 70-71.

2012 SCC 73
Supreme Court of Canada

R. v. Yumnu

2012 CarswellOnt 15801, 2012 CarswellOnt 15802, 2012 SCC 73, [2012] 3 S.C.R. 777, [2012] S.C.J. No. 73, 104 W.C.B. (2d) 753, 290 C.C.C. (3d) 323, 297 O.A.C. 257, 356 D.L.R. (4th) 381, 437 N.R. 289, 98 C.R. (6th) 44, J.E. 2013-27

Ibrahim Yumnu, Appellant and Her Majesty the Queen, Respondent and Canadian Civil Liberties Association, British Columbia Civil Liberties Association, Ontario Crown Attorneys' Association, Information and Privacy Commissioner of Ontario, David Asper Centre for Constitutional Rights and Criminal Lawyers' Association, Interveners

Vinicio Cardoso, Appellant and Her Majesty the Queen, Respondent and Canadian Civil Liberties Association, British Columbia Civil Liberties Asssociation, Ontario Crown Attorneys' Association, Information and Privacy Commissioner of Ontario, David Asper Centre for Constitutional Rights and Criminal Lawyers' Association, Interveners

Tung Chi Duong, Appellant and Her Majesty the Queen, Respondent and Canadian Civil Liberties Association, British Columbia Civil Liberties Association, Ontario Crown Attorneys' Association, Information and Privacy Commissioner of Ontario, David Asper Centre for Constitutional Rights, Criminal Lawyers' Association and Attorney General of Alberta, Interveners

McLachlin C.J.C., LeBel, Deschamps, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis JJ.

Heard: March 14-15, 2012
Judgment: December 21, 2012
Docket: 34090, 34091, 34340

Proceedings: affirming *R. v. Yumnu* (2010), 269 O.A.C. 48, 2010 CarswellOnt 7383, 2010 ONCA 637, [2010] O.J. No. 4163, 260 C.C.C. (3d) 421 (Ont. C.A.)

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***Moldaver J.*:**

I. Introduction

1 These appeals require the Court to decide whether it is permissible for the Crown, in conjunction with the police, to conduct background checks on prospective jurors through the use of police databases — and if so, to what extent and for what purposes.

2 On December 22, 2005, following a nine-month trial before Stong J. of the Ontario Superior Court of Justice and a jury, each of the appellants — Ibrahim Yumnu, Vinicio Cardoso, and Tung Chi Duong — was convicted of two counts of first degree murder and two counts of conspiracy to commit murder.

3 All three appellants appealed from their convictions to the Ontario Court of Appeal. Their appeals were heard together on April 6 and 7, 2009 and on February 1, 2010. At the proceedings in April 2009, the appellants raised grounds of appeal relating to the adequacy of the trial judge's charge to the jury. At the end of the hearing on April 7, the court reserved its judgment.

4 Several months later, while the appeals remained under reserve, the appellants became aware of a "jury vetting" practice that the Crown Attorney's office in Barrie, Ontario (the locale of the appellants' trial) and police forces throughout the Judicial District of Simcoe County (the geographic area from which the jurors were selected) had apparently been following for some years. The vetting consisted of inquiries conducted by the police, at the behest of the Crown Attorney's office, as to whether potential jurors had a criminal record or whether they were otherwise "disreputable persons" who would be undesirable jurors.

5 Once the widespread nature of this practice became known, inquiries were made and the appellants ordered transcripts of the jury selection process. The parties then produced a record, including affidavits upon which cross-examinations were conducted, and the appeals were reopened.

6 On February 1, 2010, the Court of Appeal heard arguments concerning the propriety of the vetting practice, including: its impact on the jury selection process and the composition of the jury; its impact on trial fairness; and, more broadly, its impact on the integrity of the criminal justice system and the administration of justice as a whole.

7 On October 5, 2010, the Court of Appeal (Weiler, Gillese and Watt JJ.A.) released comprehensive reasons for judgment dismissing all three appeals (2010 ONCA 637, 269 O.A.C. 48 (Ont. C.A.)). Writing for the court, Watt J.A. concluded that certain features of the jury vetting process were inappropriate and should not be repeated. Other aspects were acceptable, subject to the Crown complying with its disclosure obligations.

8 In accordance with a concession from the Crown on appeal, Watt J.A. found that the Crown at trial had failed to disclose information obtained from the jury vetting process that might have assisted the appellants in the exercise of their peremptory challenges. In the end, however, he was not satisfied that the appellants suffered any prejudice from the Crown's failure to meet its disclosure obligations. In his view, there was no reasonable possibility that the jury would have been differently constituted had disclosure been made; nor was there a basis for concluding that the Crown's failure to disclose caused actual unfairness in the peremptory challenge process. Finally, it could not be said that the jury vetting practice created an appearance of unfairness that cast a pall over the entire proceeding. Accordingly, Watt J.A. rejected this ground of appeal. He also rejected the grounds relating to the alleged errors in the trial judge's final instructions to the jury.

9 Before this Court, the appellants no longer challenge the adequacy of the trial judge's instructions to the jury. Rather, the appeals centre on the jury vetting issue and the Court of Appeal's treatment of it.

10 In a nutshell, the appellants complain that the jury vetting undertaken by the police, at the behest of the Crown, was highly improper. It compromised the integrity of the jury selection process and resulted in a jury that, if not favourably disposed to the Crown, might well have been differently composed had the appellants received the disclosure to which they were entitled.

11 On a more fundamental level, the appellants contend that the jury vetting conducted by the police, in conjunction with the Crown, strikes at the very heart of our criminal justice system and impinges on the sanctity of trial by jury that forms such a vital part of it. They say it raises the spectre of jury tampering and as such, it deserves this Court's unqualified condemnation.

12 One of the appellants equates what occurred here to the situation in *R. v. Latimer*, [1997] 1 S.C.R. 217 (S.C.C.), where the police, with the approval of the Crown, approached prospective jurors and asked them to complete a questionnaire setting out their views on a number of issues pertinent to the case. In *Latimer*, this Court found that the conduct of the Crown constituted a flagrant abuse of process and an interference with the administration of justice. This gave rise to

an appearance of unfairness and necessitated a new trial. According to the appellants, the conduct of the police and the Crown in the present case led to an appearance of unfairness and resulted in a miscarriage of justice. Hence, they request a new trial.

13 For the reasons that follow, I am unable to accede to the appellants' arguments.

14 On the issue of trial fairness, I see no basis for interfering with the findings of the Court of Appeal on the impact — or more accurately, the lack of impact — that the jury vetting practice had on the jury selection process. The appellants received a fair trial by an impartial jury.

15 As for the appearance of unfairness and the suggestion that the verdicts are the product of a miscarriage of justice, I readily acknowledge that aspects of the Crown's conduct were improper and should not be repeated. Nonetheless, I am not persuaded that what occurred here constituted a serious interference with the administration of justice, nor was it so offensive to the community's sense of fair play and decency that the proceedings should be set aside as a miscarriage of justice.

16 It follows, in my view, that there is no basis for ordering a new trial. I would accordingly dismiss the appeals.

II. Background

17 The situation here is somewhat unique in that the Court of Appeal acted as a court of first instance in respect of the jury vetting issue. By that, I mean that the evidence pertinent to that issue was assembled by the parties and the court made its findings of fact and carried out its legal analysis on the basis of that record. In these circumstances, the findings of the Court of Appeal, like those of a trial court, are entitled to deference.

18 The decision of the Court of Appeal is replete with detail and I see no need to replicate the court's thorough review of the background facts, nor its comprehensive review of the jury selection process as a whole.

19 The jury vetting practice at issue occurred in the context of the appellants' joint trial on two counts of first degree murder and two counts of conspiracy to commit murder. The trial was conducted in Barrie, Ontario. It commenced in January 2005 and lasted nine months.

20 On December 13, 2004, prior to the commencement of the jury selection process, someone from the Court Services Branch of the Ministry of the Attorney General for Ontario provided a copy of the jury panel lists to the Crown Attorney's office in Barrie. The person responsible for providing the lists failed to comply with s. 20 of the *Juries Act*, R.S.O. 1990, c. J.3, which forbids disclosure of jury panel lists "until ten days before the sittings of the court for which the panel has been drafted". The return date of the first panel in this case was set for January 24, 2005.

21 Upon receiving the lists, an administrative assistant in the Crown Attorney's office sent a copy of them to every police force with jurisdiction in the Judicial District of Simcoe County. Accompanying the lists was a standard-form memorandum which read as follows:

> Please check the attached jury panel list, for the persons listed in your locality, and advise if any of them have criminal records. We are not able to provide birth dates.
>
> It would also be helpful if comments could be made concerning any disreputable persons we would not want as a juror. All we can ask is that you do your best considering the lack of information available to us.
>
> Please relay the information by telephone to [the Crown Attorney's telephone number] on or before Wednesday, January 12, 2005.

22 Information obtained in response to the memorandum was recorded on a copy of the jury panel lists kept at the Crown Attorney's office.

23 I pause here to note that as of December 14, 2004, when the standard-form memorandum was sent to the various police forces in the Judicial District of Simcoe County, the Criminal Law Division of the Ontario Ministry of the Attorney General had not yet issued a Practice Memorandum on the subject of juror background checks. It was not until April 26, 2005, some four months into the trial, that the *draft* of the Practice Memorandum, referred to as PM [2005] No. 17, was circulated by email to Crown Attorneys throughout the province of Ontario. PM [2005] No. 17 came into effect on March 31, 2006, long after the trial in this matter had been completed, and was circulated to Crown Attorneys, as well as other organizations such as the Criminal Lawyers' Association of Ontario and the Law Society of Upper Canada. The salient features of the Practice Memorandum are reproduced below:

> In choosing a jury, both Crown counsel and defence should have access to the same background information material. To that end, results of criminal record checks of potential jurors, if obtained by Crown counsel, should be disclosed to defence counsel. Crown counsel should not request police to undertake any further or other investigation into the list of jurors. Crown counsel should not request police to conduct out-of-court investigations into private aspects of potential jurors' lives.
>
> Any concrete information provided by police to Crown counsel suggesting that a prospective juror may not be impartial should be disclosed to the defence. If background information relating to a prospective juror raises the issue of whether he/she is able to judge the case without bias, prejudice or partiality, Crown counsel should utilize the challenge for cause process to address these concerns.
>
> [Emphasis added.]

24 The vetting practice undertaken in this case was not new. It had been in place since the late 1990s when it was discovered, in the context of an ongoing jury trial in Barrie, that a person who had been selected as a juror was in the process of serving an intermittent sentence for a hybrid offence (see *R. v. E.A.* (Ont. Ct. (Gen. Div.)), transcript of discussion on January 6, 1998 about jurors serving an intermittent sentence (Respondent's authorities, vol. II, Tab 43, at pp. 34-38)). It is unclear whether the Crown in that case had proceeded by way of indictment so as to render the juror ineligible for jury duty under s. 4(b) of the *Juries Act* as it then read. Be that as it may, he had slipped through the cracks and the situation would have proved awkward, to say the least, if his sentencing obligations had prevented him from performing his jury duties.

25 In the present case, vetting of the jury lists by the police in response to the Crown's memorandum netted information about a number of prospective jurors. For the most part, the information indicated that the person in question had no criminal record. In some instances, the prospective juror was referred to as a "victim/complainant". Other notations identified persons who "possibl[y]" had a criminal record or who may have been involved in a motor vehicle infract ion.

26 None of the information the Crown received about the prospective jurors was shared with the defence — at least not at the selection stage of the process. The record indicates that after the trial judge had excused a host of prospective jurors for reasons of personal hardship, and a challenge for cause on the basis of race had run its course, of the prospective jurors who remained in the pool at the peremptory stage of the proceedings, the Crown had information about ten of them that it should have disclosed to the defence, but did not. Hence, the appellants entered the peremptory challenge phase of the process missing information that might have been useful in exercising their peremptory challenges.

27 With respect to the ten people in question, on my review of the record, of the three appellants before us, the appellant Yumnu is the only one who may have used a peremptory challenge that he might otherwise have saved had he received the disclosure to which he was entitled. That said, each of the appellants, including Mr. Yumnu, had one or more peremptory challenges remaining to him at the end of the selection process.

III. Findings of the Court of Appeal

28 As mentioned, the parties assembled a record for the Court of Appeal on the jury selection issue. On the basis of that record, the Court of Appeal made a number of findings that had a direct bearing on the outcome of the appeal. Those findings retain their importance at this stage and they are summarized below.

A. Issue 1: The Effect of Non-Disclosure on Trial Fairness

29 First, the court reviewed the peremptory challenge phase of the process and determined that there was "no reasonable possibility that the jury would have been constituted differently had disclosure [of the pertinent information obtained from the vetting process] been made" (para. 122).

30 Second, the court found that even though the Crown had not complied with its disclosure obligations, the defence knew or should have known about the jury vetting practice no later than six weeks into the trial when the investigating officer's notebook was turned over to defence counsel. The production of the officer's notebook was not an attempt on the Crown's part to belatedly comply with its disclosure obligations. Nonetheless, the notes contained a complete inventory of the checks undertaken by the investigating officer, including the names of prospective jurors and the information he had obtained about them. The notes also revealed that several police databases had been accessed and that information had been obtained about some of the prospective jurors that went beyond the question of whether they had a criminal record.

31 Against that backdrop, in assessing the impact of the Crown's failure to comply with its disclosure obligations on the overall fairness of the trial process, the court considered it significant that five experienced defence counsel did not raise the issue of non-disclosure with the trial judge, either when they received the officer's notebook or during the seven and a half months of trial that followed. Nor did counsel raise the issue at the outset of the appeal. Moreover, throughout the course of the appeal, trial counsel provided no information about what they knew (or did not know) about the record checks, nor did they offer an explanation for their failure to raise the disclosure issue in a timely fashion. I note parenthetically that the answers to those questions remain unsatisfactory to this day.

32 In the end, the court refused to give effect to the appellants' submission that their right to a fair trial had been impaired by the failure of the Crown to meet its disclosure obligations. Watt J.A. put the matter succinctly as follows: "In this case, [the appellants] have failed to demonstrate a reasonable possibility that the nondisclosure affected either the outcome of the trial or the overall fairness of the trial process" (para. 107).

B. Issue 2: Appearance of Unfairness

33 Apart from defence counsel's failure to raise the jury issue with the trial judge, the Court of Appeal made two critical findings concerning the conduct of the Crown and the police.

34 First, the court found that despite the scope of the Crown's request in the December 14, 2004 memorandum, "the purpose of the police inquiries was to determine whether a prospective juror had a criminal record" (para. 94). Second, the court found that in the circumstances, the conduct of the Crown and the police did not "reveal [a] colourable use of legitimate criminal record checks of prospective jurors to obtain a favourable jury" (para. 95).

35 In the circumstances, the Court of Appeal declined to order a new trial on the basis of alleged improprieties surrounding the jury selection process. The Crown's conduct, though improper in certain respects, was far less egregious than the conduct engaged in by the Crown and police in *Latimer* — and, in the court's opinion, the jury vetting practice did not create an appearance of unfairness that necessitated a new trial.

IV. Analysis: The Acceptable Bounds of Jury Vetting

36 Jury vetting by the Crown and police is a risky business. It gives rise to a number of concerns — some more troublesome than others — but all worthy of consideration.

37 Foremost among the concerns is the prospect of the Crown and police joining forces to obtain a jury favourable to their cause. Nothing could do more harm to the criminal justice system; nothing could more readily bring the administration of justice into disrepute.

38 The mere thought of the Crown and the police "checking out" potential jurors carries with it the spectre of jury tampering and the evils associated with it. Care must be taken to guard against this. The integrity of our criminal justice system hangs in the balance.

39 Closely aligned with the first concern is the fundamental precept of our justice system that "justice should not only be done, but should manifestly and undoubtedly be seen to be done" (*per* Lord Hewart C.J. in *R. v. Justices of Sussex*, *Ex parte McCarthy* (1923), [1924] 1 K.B. 256 (Eng. K.B.), at p. 259).

40 Appearances count. And regardless of the Crown's good intentions, aligning itself with the police and using their vast resources to investigate potential jurors could be seen by some as incompatible with the Crown's responsibility, as an officer of the court, to ensure that every accused receives a fair trial. Randomness and representativeness are two of the qualities we look for in juries. Widespread checking could give rise to a suggestion of stereotyping and arbitrariness in the selection process, particularly if it could be shown that peremptory challenges were being used to remove certain types or classes of people who would otherwise be eligible to serve as jurors.

41 Another concern is juror privacy. Jurors give up much to perform their civic duty. In some instances, serving on a jury can be a difficult and draining experience. Long trials in particular can take a toll on an individual's personal and professional life.

42 Jury duty is precisely that — a duty. People are not asked to volunteer; they are selected at random and required to serve unless they are otherwise exempted or excused. Once selected, jurors become judges of the facts. Their personal lives at that point are no more relevant than that of the presiding judge.

43 Jurors deserve to be treated with respect. Subject to a few narrow exceptions, they are entitled to know that their privacy interests will be preserved and protected. I note that the subject of prospective jurors' privacy was addressed in a recent report of Ontario's Information and Privacy Commissioner, Ann Cavoukian: see *Excessive Background Checks Conducted on Prospective Jurors*: *A Special Investigation Report* (2009) ("IPC Report").

44 The concerns that I have identified are very real and they are to be taken seriously. There are, however, countervailing interests at play that warrant some limited checking and some minimal intrusion into the private lives of potential jurors.

45 Manifestly, only those persons eligible to serve as jurors should be permitted to participate in the process. Impartiality is equally essential. Those who serve as jurors must be capable of putting aside their biases, prejudices, and any tentative opinions they might hold about the case. In short, they must be able to render a true verdict according to the evidence.

46 Section 626(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, provides that "[a] person who is qualified as a juror according to ... the laws of a province is qualified to serve as a juror in criminal proceedings in that province." Each province and territory in Canada has its own eligibility criteria for jurors. In Ontario, the province from which the present appeals originate, s. 4(b) of the *Juries Act* currently states that anyone who "has been convicted of an offence that may be prosecuted by indictment" and who has not been granted a pardon for that conviction, is ineligible to serve as a juror. I note that until 2010, s. 4(b) of the *Juries Act* provided that a person was ineligible to serve as a juror in Ontario if he or she "ha[d] been convicted of an indictable offence" and had not been granted a pardon. In the case of a hybrid offence, this was interpreted to mean a conviction where the prosecutor chose to proceed by indictment (see IPC Report, at pp. 33-34). In 2010, the *Juries Act* was amended to broaden the scope of juror ineligibility (S.O. 2009, c. 33, Sch. 2, s. 38(1)). This amendment addressed the problem that criminal record databases do not record whether, in respect of hybrid offences, the Crown proceeded by way of summary conviction or by indictment. Other provinces have different eligibility requirements, including some that preclude persons "charged" with a criminal offence from serving on a jury. For instance, individuals are ineligible to serve as jurors: in Alberta, if "charged with a criminal offence" (*Jury Act*, R.S.A. 2000, c. J-3, s. 4(h)(ii)); in British Columbia, if "currently charged with an offence under the *Criminal Code*" (*Jury Act*, R.S.B.C. 1996, c. 242, s. 3(q)); in Newfoundland and Labrador, if charged with an indictable offence (*Jury Act, 1991*, S.N.L. 1991, c. 16, s. 5(m)); and in Quebec, if charged or convicted of a "criminal act" (an indictable offence) (*Jurors Act*, R.S.Q., c. J-2, s. 4(j)) (for the relevant legislation in the other provinces and territories, see: *The Jury Act, 1998*, S.S. 1998, c. J-4.2, s. 6(h); *The Jury Act*, C.C.S.M., c. J30, s. 3(p) and (r); *Jury Act*, S.N.B. 1980, c. J-3.1, s. 3(r); *Juries Act*, S.N.S. 1998, c. 16, s. 4(e); *Jury Act*, R.S.P.E.I. 1988, c. J-5.1, s. 5(i); *Jury Act*, R.S.Y. 2002, c. 129, s. 5(a) and (b); *Jury Act*, R.S.N.W.T. 1988, c. J-2, s. 5(a); and *Jury Act*, R.S.N.W.T. (Nu.) 1988, c. J-2, s. 5(a)).

47 Under s. 638(1)(*c*) of the *Code*, either the prosecutor or the accused may challenge a potential juror for cause on the basis that "[the] juror has been convicted of an offence for which he was sentenced to death or to a term of imprisonment exceeding twelve months".

48 As is apparent, under provincial statutes and the *Criminal Code*, a potential juror's criminal antecedents — and in some instances, his or her pending charges — may render that person ineligible for jury duty or result in his or her removal from the jury pool following a successful challenge for cause. Self-reporting is one way of screening potential jurors who, by virtue of their involvement with the criminal law, are ineligible under provincial law from serving as jurors. In Ontario, at the time of the appellants' trial, a self-reporting questionnaire was sent to potential jurors asking:

> 7. HAVE YOU BEEN CONVICTED OF AN INDICTABLE OFFENCE FOR WHICH YOU HAVE NOT BEEN GRANTED A PARDON?
>
> An indictable offence is a serious offence and does not include violations of provincial statutes such as traffic and liquor laws. Nor are some Criminal Code offences indictable; for example, causing a disturbance, taking a motor vehicle without the owner's consent and vagrancy are not indictable offences. A person who has been convicted of an indictable offence is ineligible to serve as a juror, unless he or she has subsequently been granted a pardon.
>
> (IPC Report, Appendix 8)

49 While useful, self-reporting has proved to be less than satisfactory. Under the regime that existed when the trial in this case was conducted, potential jurors may not have known whether the offence for which they had been convicted was an indictable offence (which would have included a hybrid offence only if the Crown had proceeded by way of indictment). Following the IPC Report in 2009 in Ontario, along with the amendment of the *Juries Act*, the self-reporting questionnaire has been improved and provides a more comprehensive explanation of what constitutes an indictable offence (see Form 1, *Juries Act*, Reg. 680, "Questionnaire about Qualifications for Jury Service"). Even with that, there is no certainty that prospective jurors will read the explanatory notes; nor is it clear that those who do will fully understand them. Well-intentioned individuals may still provide inaccurate information. Moreover, the explanatory notes leave out broad categories of offences that could give rise to indictable convictions, such as income tax evasion. And finally, as reporting procedures are not uniform throughout the country, some are likely to produce more accurate responses than others. In short, self-reporting can result in relevant criminal background information slipping through the cracks. It is not a substitute for criminal record checks.

50 It follows, in my view, that absent legislation to the contrary, the authorities should be permitted to do criminal record checks on potential jurors to determine whether they are eligible to serve as jurors under provincial law and/or whether they may be subject to a challenge for cause

under s. 638(1)(*c*) of the *Code*. In those provinces where the eligibility criteria cover persons who have been charged with a criminal offence, this too is something the authorities may properly check for.

51 In that narrow sense, I consider it permissible for the Crown, with the assistance of the police, to do limited background checks using police databases to identify potential jurors who, by virtue of their criminal conduct, are not eligible for jury duty under provincial law or who are subject to being challenged for cause under s. 638(1)(*c*) of the *Code*. I recognize that the defence bar does not have the same prerogative. It cannot avail itself of the information stored in police databases. But any resulting imbalance is, in my view, overcome by the disclosure obligations placed on the Crown. Information received by the Crown that is relevant to the jury selection process must be turned over to the defence, thereby restoring the balance.

52 I also recognize that the Crown and the police are separate entities and that the police ought not to be seen as Crown agents tasked with the responsibility of investigating potential jurors for partiality, much less obtaining a jury favourable to the Crown's cause. But any perception of impropriety must be assessed in context, which in this case means taking into account the circumscribed nature of the police mandate and the important objective it serves. Viewed that way, I do not believe that a reasonable member of society would find it offensive for the Crown and the police to engage in the limited form of checking I consider permissible.

53 In the course of performing valid criminal background checks through the use of police databases, the authorities may inadvertently come across information that falls outside the scope of the provincial eligibility criteria or the criteria specified in s. 638(1)(*c*) of the *Code*. For example, in Ontario, the authorities may learn that a prospective juror does not have a criminal record but that he or she is presently charged with a criminal offence, or perhaps even a provincial offence, that may render the prospective juror unsuitable or raise concerns about his or her ability to remain impartial. Equally, a database scan may reveal a potential juror's prior conviction for a pure summary offence (not captured by s. 4(b) of Ontario's *Juries Act* or s. 638(1)(*c*) of the *Code*) for which the person is currently serving an intermittent sentence, thereby calling into question his or her suitability for jury duty. Alternatively, the authorities may discover that a potential juror has been a complainant on a prior occasion and may, for that reason, find it difficult to remain impartial, either generally or in the particular circumstances of the case at hand.

54 The authorities cannot set out to find this type of information — but if it comes to their attention in the course of performing valid criminal background checks, they need not turn a blind eye to it. It could form the basis for any of the following procedures in the courtroom:

> (1) a request to the trial judge to excuse the juror under s. 632(*a*) to (*c*) of the *Code* on grounds of obvious partiality, personal hardship, or other reasonable cause;

(2) a request to the trial judge to stand the juror aside under s. 633 of the *Code* for reasons of personal hardship or any other reasonable cause, including potential partiality;

(3) a request to challenge a juror for cause for any of the reasons set out in s. 638(1)(*a*) to (*f*) of the *Code*; and

(4) a reason to exercise or refrain from exercising a peremptory challenge under ss. 634 and 635 of the *Code*.

55 Of course, it goes without saying that any information the authorities obtain that is relevant to the jury selection process must be disclosed to the defence. This would include information relevant to eligibility, s. 638(1)(*c*) and any of the other matters I have identified.

56 Checking for a prospective juror's criminal record is not as easy as one might think. As Watt J.A. observed, at para. 92, jury panel lists lack crucial information the authorities need to ensure that the results of inquiries made through the various databases available to them are accurate. The more information the authorities have about the prospective juror — and by that I am referring to details such as full name, date of birth, fingerprint search number, and so on — the less intrusive the search need be. Access to one database, most likely the Canadian Police Information Centre ("CPIC"), will usually be all that is required.

57 Contrast this with the situation where the authorities have virtually no information about the prospective juror other than his or her name and occupation. To be sure, this is problematic, especially when the individual has a common name. Cross-referencing and cross-checking through the use of multiple databases may be the only means the authorities have to ensure that the right person is being checked. And even then, there can be no guarantees.

58 Of course, the more databases accessed, the more likely it is that the authorities will come upon information that goes beyond a particular province's eligibility criteria as it relates to prior or ongoing criminal activity, or the criteria needed to bring a challenge for cause under s. 638(1)(*c*) of the *Code*. In other words, the broader the search, the greater the intrusion into the prospective juror's privacy interests.

59 In an ideal world, it would be preferable if the persons doing the checking had available to them the information needed to do pinpoint searches through a single database. That would be one way of better protecting the privacy interests of prospective jurors.

60 Ontario has taken some steps in this regard following the release of the IPC Report. Without going into detail, under s. 18.2 of the *Juries Act* (enacted in 2010, see S.O. 2009, c. 33, Sch. 2, s. 38(2)), the sheriff may request that a criminal record check be conducted using the CPIC database, on any person selected for inclusion on a jury panel. A questionnaire completed by the prospective

juror and sent to the Provincial Jury Centre contains personal information that enables the Centre to engage in pinpoint searches.

61 According to the Crown, such searches are conducted on a random basis and only cover about 10 percent of the names on panel lists (R.F., at para. 85, fn. 37). As such, they do not provide certainty that persons who are ineligible under s. 4(b) of the *Juries Act* or subject to being challenged under s. 638(1)(*c*) of the *Code* will be detected. Moreover, there is no legislative equivalent to s. 18.2 of the Ontario *Juries Act* in the territories and most of the other provinces.

62 I propose to say no more about s. 18.2 of the *Juries Act*. Its impact, if any, on the Crown's right to have limited background checks conducted on potential jurors through the use of police databases is not before us. Nor is it our mandate to consider solutions that might better preserve and protect the privacy interests of prospective jurors, including the personnel who should be doing the checking and the means by which they may gain access to the pertinent information. Our task is to determine whether it was permissible for the authorities to perform the checks they did in the instant case and, if so, to what extent and for what purposes.

63 The case before us deals with background prospective juror checks conducted through the use of police databases. For reasons already discussed, absent legislation to the contrary, I am satisfied that the authorities can use such databases to discover whether prospective jurors have engaged in criminal conduct that would render them ineligible to serve as a juror under provincial law, or subject them to a challenge for cause under s. 638(1)(*c*) of the *Code*. As well, absent legislation to the contrary, I am of the view that the authorities are entitled to access multiple databases, where necessary, to uncover the requisite information. As indicated, where this leads to the inadvertent discovery of other information that may be relevant to the jury selection process, the authorities need not turn a blind eye to it. It should be conveyed to the Crown and disclosed to the defence. That will go some way towards achieving the level playing field that should exist between the Crown and the defence during the jury selection process.

64 To be clear, when I speak of information that is relevant to the jury selection process, I am *not* talking about matters of public knowledge, such as a prospective juror's general reputation in the community, nor am I referring to such things as feelings, hunches, suspicions, innuendo, or other such amorphous information. I am speaking rather about information that rises above the general and is both reasonably accurate and reliably based. At para. 76 of his reasons for the Court of Appeal, Watt J.A. made the following observation about the disclosure obligations of the Crown, with which I agree:

> The disclosure obligations of the prosecutor are well defined. Circumscribed, not infinite. Those obligations are not co-extensive with the entire storehouse of information, knowledge and experience, in brief the stock-in-trade a prosecutor may acquire by exposure to daily appearances in the courts and interactions with the police, witnesses, victims and the

> communities at large in their jurisdiction. Equality of knowledge and community intelligence, like equivalence in skill and experience as between opposing counsel in a criminal trial, is not a constitutional requirement or a principle of fundamental justice.

65 The question of there being a reciprocal obligation on the part of the defence to disclose information in its possession that could impact on the jury selection process was raised only tangentially on this appeal. It was not fully argued. Accordingly, I propose to limit my remarks to two situations where it is self-evident that defence counsel, as officers of the court, must make disclosure to both the court and Crown counsel to preserve the integrity of the process.

66 First, where defence counsel know or have good reason to believe that a potential juror has engaged in criminal conduct that renders him or her ineligible for jury duty under provincial law or subject to being challenged for cause under s. 638(1)(*c*) of the *Code*, this should be disclosed.

67 Second, where defence counsel know or have good reason to believe that a potential juror cannot serve on a particular case due to matters of obvious partiality, this too should be disclosed.

68 The second situation comports with Rule 4.05 of the *Rules of Professional Conduct* of the Law Society of Upper Canada (online) and Rule 21 of the *Code of Professional Conduct* of the Canadian Bar Association (online). Under those rules, lawyers are permitted to investigate prospective jurors to ascertain any basis for a challenge, but in doing so, they must not directly or indirectly communicate with the juror or a member of his or her family. The rules further provide that when acting as an advocate, a lawyer must disclose to the judge and opposing counsel any information of which the lawyer is aware that a juror or prospective juror

> (a) has or may have an interest, direct or indirect, in the outcome of the case,
>
> (b) is acquainted with or connected in any manner with the presiding judge, any counsel or any [party], or
>
> (c) is acquainted with or connected in any manner with any person who has appeared or who is expected to appear as a witness, ...

69 As for the first situation, I consider it axiomatic that as officers of the court, defence counsel who know or have good reason to believe that a prospective juror, by reason of his or her criminal conduct, is ineligible to serve as a juror under provincial law or is subject to being challenged for cause under s. 638(1)(*c*) of the *Code*, cannot remain mute. Disclosure must be made in such circumstances to protect the integrity of the process and the administration of justice at large.

70 I conclude this aspect of my reasons with two trite but important observations.

71 First, jury selection is not a game and it should not be approached as though it were. Winning and losing are concepts that ought not to be associated with it. The process is not governed by

the strictures of the adversarial model, nor should it be, in my view. The idea at the end of the day is not to obtain a jury that is partial to one side or the other. We are looking for jurors who are eligible, impartial, representative and competent. The jury does not belong to the parties; it belongs to the people.

72 Second, while there are various rules and regulations that govern the selection of juries, much of what occurs is rooted in custom. The process must take into account the needs of the people and the special problems that may exist in the locale or region in which the trial is being held. Flexibility is essential, as is common sense, good judgment and good faith on the part of those who play a central role in the process, including judges, Crown and defence counsel, the police, and court administration personnel. In the end, it is essential to keep in mind that from start to finish, the jury selection process is designed to make good on the constitutional promise, enshrined in s. 11(*d*) of the *Canadian Charter of Rights and Freedoms*, that everyone charged with an offence has the right to be tried by an independent and impartial tribunal. Attempts by one side or the other to obtain a favourable jury are inimical to that ideal and the parties should be guided by this and conduct themselves accordingly.

V. Application to this Appeal

A. Issue 1: The Effect of Non-Disclosure on Trial Fairness

73 Before considering the effect of non-disclosure on trial fairness as it relates to the instant case, I propose to set out the principles that apply when it is discovered, at the appeal stage, that information about prospective jurors which should have been disclosed at trial was not disclosed.

74 In *R. v. McQuaid*, [1998] 1 S.C.R. 244 (S.C.C.), and *R. c. Taillefer*, 2003 SCC 70, [2003] 3 S.C.R. 307 (S.C.C.), this Court set out the principles that apply when information that should have been disclosed at trial is discovered for the first time at the appeal stage. Persons who seek a new trial on the basis that such non-disclosure deprived them of their right to a fair trial under s. 7 of the *Charter* must show that: (1) the Crown failed to comply with its disclosure obligations, and (2) there is a reasonable possibility that the failure to disclose affected the outcome of the trial or the overall fairness of the trial process (*Taillefer*, at para. 71).

75 Adapting those principles to the issue at hand, I am of the view that persons who seek a new trial on the basis that non-disclosure of information about potential jurors deprived them of their s. 7 *Charter* right to a fair trial must, at a minimum, establish that: (1) the Crown failed to disclose information relevant to the selection process that it was obliged to disclose; and (2) had the requisite disclosure been made, there is a reasonable possibility that the jury would have been differently constituted.

76 In addition to these two steps, as my colleague Karakatsanis J. points out at para. 55 of *R. v. Davey*, 2012 SCC 75 (S.C.C.), in the event that the jury would have been differently constituted,

it may be that the Crown should then have the opportunity to show, on balance, that the jury was nonetheless impartial. Since the present appeals can be resolved without addressing that issue, I propose to leave it for another day.

77 For present purposes, I am prepared to accept that the Crown failed in its disclosure obligations. It is on step 2 that the appellants' case founders. As discussed earlier, the Court of Appeal found that there was no reasonable possibility that the jury would have been differently constituted had the pertinent information obtained from the vetting process been disclosed. Of the prospective jurors considered at the peremptory challenge stage of the proceedings, the Crown had information about ten of them that it should have disclosed. With respect to those ten people, Mr. Yumnu is the only appellant who used a peremptory challenge that he might otherwise have saved had he received the disclosure to which he was entitled. That said, each of the appellants, including Mr. Yumnu, had one or more peremptory challenges remaining at the end of the selection process. On the record before it, the Court of Appeal was entitled to come to the conclusion that the jury would not have been composed differently had disclosure been made. I see no basis for interfering with that conclusion. It follows that the appellants have not met the test, and their argument that the trial was unfair must fail.

B. Issue 2: Appearance of Unfairness

78 That leaves one issue for discussion — did the Court of Appeal err in concluding that the conduct of the police and the Crown did not result in a miscarriage of justice?

79 To be clear, when I speak of a miscarriage of justice in this context, I am referring to conduct on the part of the Crown and the police, within and surrounding the jury selection process, that would constitute a serious interference with the administration of justice and offend the community's sense of fair play and decency. When conduct of that nature is found to exist, it matters not that the accused may otherwise have had a fair trial; nor is it necessary to find that the accused may have been wrongfully convicted. It is the conduct itself that gives rise to a miscarriage of justice and demands that a new trial be ordered.

80 With those principles in mind, I turn to the conduct of the Crown and the police in this case to determine whether it crossed the line and resulted in a miscarriage of justice. In concluding that it did not, I begin by reiterating two critical findings made by the Court of Appeal concerning the conduct of the Crown and the police.

81 First, the court found that despite the scope of the Crown's request in the December 14, 2004 memorandum, the purpose of the police inquiries was to determine whether a prospective juror had a criminal record. Second, the court found that in the circumstances, the impugned conduct did not reveal a colourable use of legitimate criminal record checks to obtain a favourable jury.

82 Those findings, which were open to the Court of Appeal to make, satisfy me that the record checks were carried out in good faith. There was no attempt on the part of the police or the Crown to uncover information about prospective jurors in an effort to obtain a favourable jury. In its December 14, 2004 memorandum to various police forces, the Crown should not have asked the police to go beyond criminal record checks and use their databases to provide "comments ... concerning any disreputable persons we would not want as a juror" — although this may not have been clearly understood at the time, given that PM [2005] No. 17, the Practice Memorandum on juror background checks, had not been formalized and did not come into effect until March 31, 2006. Moreover, under the *Rules of Professional Conduct* of the Law Society of Upper Canada and the *Code of Professional Conduct* of the Canadian Bar Association, inquiries made by the parties for the purpose of exercising a challenge for cause were not prohibited. Be that as it may, certainly there was no attempt by the investigating officer to hide the information he obtained from the record checks, be it criminal record information or information that went beyond that. The additional information was recorded in his notebook and was there for anyone to see, including the five defence counsel who received a copy of his notes six weeks into the trial.

83 The fact that the Crown and the police were acting in good faith is important — although not determinative — in assessing whether the conduct in question crossed the forbidden line.

84 That brings me to the nature of the impugned information and the manner in which it was obtained.

85 I have explained that it was permissible for the police to conduct criminal record checks to determine if a prospective juror was eligible to serve as a juror under provincial law and/or was subject to being challenged for cause under s. 638(1)(*c*) of the *Code*. I have also pointed out that it can be very difficult to discover whether or not a particular person has a criminal record. The use of multiple police databases may be required to make the inquiry meaningful and, even then, certainty will not always be achieved.

86 In carrying out legitimate criminal record checks, the police are liable to happen upon information that could be relevant to the selection process. As discussed, where that occurs, the police need not turn a blind eye to it. Rather, they should bring it to the Crown's attention and the Crown should disclose it to the defence.

87 In this case, the investigating officer came upon information of that kind while conducting individual prospective juror record checks. He made it available to the Crown, as he should have. The Crown went wrong in failing to disclose it to the defence prior to the commencement of the selection process.

88 While the failure to disclose was serious, it was not done for improper reasons. And in the end, according to the findings of the Court of Appeal, it had no impact on the composition of the jury, nor did it affect the outcome of the trial or the overall fairness of the trial process.

89 In these circumstances, while the Crown should not have asked the police to use police databases to detect "disreputable persons", and while it should have disclosed to the defence information it received that may have been relevant to the selection process, I am not persuaded that what occurred here constituted a serious interference with the administration of justice, nor was it so offensive to the community's sense of fair play and decency that the proceedings should be set aside as a miscarriage of justice.

VI. Conclusion

90 The appellants had a fair trial and I am not persuaded that the proceedings constituted a miscarriage of justice. Accordingly, I would dismiss the appeals from conviction.

Appeals dismissed.

Pourvois rejetés.

Decision No. 28-A-2004

January 16, 2004

January 16, 2004

APPLICATION by Air Transat A.T. Inc. carrying on business as Air Transat for an exemption from subsection 115(1) of the *Air Transportation Regulations*, SOR/88-58, as amended, to file with the Canadian Transportation Agency a new international scheduled services tariff on less than statutory notice; and IN THE MATTER OF a new international scheduled services tariff applicable to Air Transat A.T. Inc. carrying on business as Air Transat.
File No. M4110/A328-1

APPLICATION

On January 15, 2002, Air Transat A.T. Inc. carrying on business as Air Transat (hereinafter Air Transat) applied to the Canadian Transportation Agency (hereinafter the Agency) for an exemption from subsection 115(1) of the *Air Transportation Regulations* (hereinafter the ATR (Air Transportation Regulations)) to file a new international scheduled services tariff on less than statutory notice.

Pursuant to subsection 29(1) of the *Canada Transportation Act*, S.C., 1996, c. 10 (hereinafter the CTA), the Agency is required to make its decision no later than 120 days after the application is received unless the parties agree to an extension. In this case, Air Transat has agreed to an indefinite extension of the deadline.

BACKGROUND

After numerous exchanges of correspondence between staff of the Agency and Air Transat concerning certain issues arising from the proposed international scheduled services tariff, the Agency, by Decision No. LET-A-359-2002 dated December 10, 2002, advised Air Transat that the Agency was satisfied with Air Transat's proposed international scheduled services tariff, in general, but that certain amendments should be made to make the tariff fully acceptable to the Agency. These amendments concerned the following provisions, respectively: refusal to transport, fare guarantee, schedule irregularity, refunds in cases of schedule irregularity, advancement of flight times, and the introduction of more restrictive conditions/increases in charges.

On February 25, 2003, Air Transat, in response to Decision No. LET-A-359-2002, filed on statutory notice a new international scheduled services tariff, designated CTA(A) No. 4, for effect April 24, 2003. Air Transat advised the Agency that it had considered the amendments proposed by the Agency, and had attempted to address these concerns through a multitude of changes to tariff provisions. Air Transat also advised the Agency that it was unable to accept the Agency's proposal that a full refund be provided should a passenger wish to cancel a reservation for a flight that has been delayed for more than six hours

due to a schedule irregularity. In Air Transat's view, such a provision would have a major and perhaps crippling financial impact, given that Air Transat is a non-network, non-connecting and non-interlining carrier that carries primarily origin/destination traffic.

Following additional exchanges of correspondence between Agency staff and Air Transat respecting certain matters not addressed by the carrier in relation to Decision No. LET-A-359-2002, Air Transat filed amendments to its tariff on April 22, 2003 for effect April 24, 2003.

AGENCY ANALYSIS AND FINDINGS

The Agency's jurisdiction in matters respecting international tariffs is set out, in part, in section 26 of the CTA, and sections 111 and 113 of the ATR (Air Transportation Regulations).

Pursuant to section 26 of the CTA, the Agency may require a person to do or refrain from doing any thing that the person is or may be required to do or is prohibited from doing under any Act of Parliament that is administered in whole or in part by the Agency.

Subsection 111(1) of the ATR (Air Transportation Regulations) provides that:

> 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.

Further, section 113 of the ATR (Air Transportation Regulations) provides that 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*).

By Decision No. LET-A-112-2003 dated May 12, 2003, the Agency advised Air Transat that in order to make the tariff provisions filed by the carrier fully acceptable, further amendments would be required to Rule 5.2 (Responsibility for schedules and operations) and Rule 6.3 (Liability for refusal to transport and for failure to operate on schedule). These tariff provisions provide that:

> 5.2 Responsibility for schedules and operations:(a) The Carrier will endeavor to transport passengers and baggage with reasonable dispatch. Times shown in schedules, scheduled contracts, tickets, air waybills or elsewhere are not guaranteed. Flight times are subject to change without notice. The Carrier assumes no responsibility for making connections.(b) Schedules are subject to change without notice. The Carrier is not responsible or liable for failure to make connections, or for failure to operate any flight according to schedule, or for a change to the schedule of any flight. Under no circumstances shall the Carrier be liable for any special, incidental or consequential damages arising directly or indirectly from the foregoing (including the carriage of baggage) whether or not the Carrier had knowledge that such damages might be incurred. Notwithstanding, the Carrier will undertake to notify passengers reasonably in advance through means it deems appropriate of any schedule changes resulting in the advancement of flight departure times.(c) Without limiting the generality of the foregoing, the Carrier cannot guarantee that a passenger's baggage will be carried on the flight if sufficient space is not available as determined by the Carrier.(d) Subject to the Convention, the Carrier will not provide or reimburse passengers for expenses incurred due to delays or cancellations of flights.(e) In the event of an involuntary re-routing of a flight, the Carrier will undertake to ensure that the passenger is routed or transported to his/her ultimate destination, as per the contract of carriage, within a reasonable period of time and at no extra cost.6.3 Liability for refusal to transport and for failure to operate on scheduleThe Carrier is not liable for its refusal to transport any passenger in accordance with Rule 6. Subject to Rule 5.3.1, where a passenger incurs a schedule irregularity of not less than six (6) hours involving a flight operated by the Carrier:(a) The Carrier will transport the passenger without stopover on its next flight on which space is available and in the same class of service as his original flight.(b) If the Carrier is unable to provide reasonable alternative transportation on its services, the Carrier will arrange transportation on the services of other carriers or combination of carriers with whom the Carrier has interline traffic agreements for such transportation. In such cases, the passenger will be transported without stopover and at no additional costs to himself, in the same class of service as applied to his original outbound flight on the Carrier.(c) In the event that space on the Carrier is only available and used in a lower class of service than applied to the passenger's original flight(s), the difference in fares will be refunded.(d) Where the flight is cancelled after the initial delay, the Carrier will provide a full refund of the fare paid.

In Decision No. LET-A-112-2003, the Agency noted that Rule 5.2 includes a provision that states that Air Transat will undertake to ensure that the passenger is routed or transported to his/her destination, as per the contract of carriage, within a reasonable period of time and at no extra cost. The Agency stated that this provision may not be just and reasonable as it does not provide the passenger with any recourse should such passenger find the anticipated time or the alternate travel arrangements provided by the carrier to reach the passenger's ticketed destination unacceptable. The Agency expressed the view that, in such circumstances, Air Transat should, at the request of the passenger, provide a refund.

The Agency also noted that Rule 5.2(b) is devoid of any provision relating to the notification of passengers in the event of a flight delay. As such, the Agency stated that this provision may not be just and reasonable. The Agency advised Air Transat that it should undertake to notify passengers of all schedule irregularities, not just flight advancements.

With respect to Rule 6.3, the Agency noted that this rule includes a provision which states that where passengers incur a schedule irregularity of not less than six hours involving a flight operated by Air Transat, and the flight is cancelled after the initial delay, Air Transat will provide a full refund. The Agency

stated that this provision may not be just and reasonable in that it does not provide adequate options to passengers affected by a schedule irregularity, and does not protect passengers from events that are beyond the passengers' control. The Agency therefore advised Air Transat that it should include a provision that provides a refund, at the request of the passenger, should a flight be delayed for more than a certain period of time, e.g., 12 hours, whether or not a flight is cancelled.

The Agency further noted that Air Transat has removed its liability to passengers who do not concur with the alternate travel arrangements in Rule 6.3 of the tariff. Such liability appeared in Air Transat's tariff previously on file with the Agency. The Agency stated that the current provision may not be just and reasonable, as it does not include a requirement that the passenger agree to the alternate travel arrangements. The Agency also advised Air Transat that it should include a provision that provides for a refund in the event a passenger finds the alternate travel arrangements unsatisfactory.

With respect to flight advancement, the Agency stated that the six hour criterion to qualify as a schedule irregularity, set out in Rule 6.3, may not be just and reasonable. The Agency expressed the opinion that, in the event of a flight advancement, the consumer should be offered alternate travel options immediately. In addition, the Agency stated that it would be beneficial if Air Transat included a provision that provides for a refund, at the request of the passenger, if such passenger should wish to cancel a reservation for a flight that has been advanced.

The Agency therefore provided Air Transat with the opportunity to show cause why the Agency should not (i) pursuant to paragraph 113(*a*) of the ATR (Air Transportation Regulations), disallow the aforementioned tariff provisions as being unjust and unreasonable, thereby contravening subsection 111(1) of the ATR (Air Transportation Regulations), and (ii) pursuant to paragraph 113(*b*) of the ATR (Air Transportation Regulations), substitute another tariff or portion thereof to make the tariff acceptable to the Agency.

On May 20, 2003, Air Transat requested an extension until June 19, 2003 to respond to the Agency's letter. By Decision No. LET-A-122-2003 dated May 26, 2003, the Agency granted this extension. On May 29, 2003, Air Transat filed its response, in which it advised that the Agency's proposal respecting refund provisions in cases of flight delays of more than a certain period of time, or if the passenger finds alternative travel arrangements to be unsatisfactory, may constitute an undue financial burden. Air Transat asked the Agency to reconsider its proposal for amendments to the aforementioned tariff provisions.

Concerning the Agency's proposal that the consumer be offered alternative travel options and refunds in the event of any scheduled flight time advancement, Air Transat advised that this is unreasonable, as the advancement may be the result of circumstances beyond the carrier's control, such as the airport authority altering pre-authorized slot times as a result of congestion. Air Transat also advised that by eliminating any minimum threshold for a flight time advancement, it would have to offer alternative travel arrangements or refunds for a 15 minute change. The carrier further stated that by undertaking to notify all passengers in the event of a flight advancement of six hours or less and generally treating all other such schedule changes as irregularities, Air Transat has struck a reasonable and fair balance.

With respect to a provision allowing for refunds where an involuntary routing is invoked and the anticipated time or the alternate travel arrangements are deemed unacceptable to the passenger, Air Transat stated that this is unfair and imbalanced, given that a rerouting can often be caused by reasons beyond Air Transat's control.

Concerning passenger notification for all schedule irregularities, the carrier suggested that airport notification is sufficient, except where a delay of at least three hours becomes known a minimum of six hours in advance of the scheduled departure time, in which case Air Transat would undertake to advise

affected passengers, normally by telephone.

By Decision No. LET-A-166-2003 dated August 7, 2003, the Agency advised Air Transat that it was not satisfied that Air Transat had shown cause as to why the Agency should not, pursuant to paragraph 113(*b*) of the ATR (Air Transportation Regulations), substitute another tariff or portion thereof to make the tariff acceptable to the Agency. The Agency advised Air Transat that Rule 6.3 of Air Transat's tariff was not just and reasonable within the meaning of subsection 111(1) of the ATR (Air Transportation Regulations), in that it does not provide adequate options to passengers affected by a schedule irregularity, and does not protect passengers from events that are beyond the passengers' control, and, therefore, does not allow passengers any recourse if they are unable to connect to other air carriers or alternate modes of transportation such as cruise ships or trains. The Agency also advised Air Transat that the Agency found that the six hour criterion to qualify as a schedule irregularity set out in the rule was not reasonable in the event of a flight advancement. The Agency further advised Air Transat that the passengers should have some recourse if a flight is advanced beyond the check-in requirement.

With respect to involuntary rerouting and passenger notification, the Agency advised Air Transat that the Agency found paragraphs (b) and (e) of Rule 5.2 to be not just and reasonable, as they do not provide the passenger with any recourse if the carrier can not arrange any reasonable transportation in the event of an involuntary rerouting. The Agency also noted that Rule 5.2(b) was devoid of any provision relating to the notification of passengers if a flight is delayed or cancelled.

In view of the foregoing, the Agency provided Air Transat with the opportunity to show cause as to why the Agency should not:

1. pursuant to paragraph 113(*a*) of the ATR (Air Transportation Regulations), disallow Rule 6.3 (Liability for refusal to transport and for failure to operate on schedule), appearing on First Revised Page 16; Rule 1 (Definitions) as it pertains to the definition of "Schedule Irregularity", appearing on First Revised Page 7; and paragraphs (b) and (e) of Rule 5.2 (Responsibility for schedules and operations), appearing on First Revised Page 10 of Air Transat's International Scheduled Services Tariff, CTA(A) No. 4, for being unjust and unreasonable, thereby contravening subsection 111(1) of the ATR (Air Transportation Regulations), and
2. pursuant to paragraph 113(*b*) of the ATR (Air Transportation Regulations), substitute the wording of these provisions with certain prescribed wording.

Regarding passenger notification in the event of a flight delay, the Agency advised Air Transat that the carrier's position, as described in its May 29, 2003 letter, was acceptable, and requested Air Transat to provide the Agency with proposed wording, for consideration.

On September 3, 2003, Air Transat filed its response, indicating that it was prepared to accept the Agency's proposed changes to Rule 5.2(b) and to the definition of "Schedule Irregularity" contained in Rule 1. With respect to Rule 6.3, Air Transat advised the Agency that it was not prepared to accept the proposed amendment to paragraph (d) because, as previously stated, the carrier believes that this could have a major financial impact on its operation.

On September 30, 2003, Air Transat further advised the Agency that it was prepared to accept the principle of refunding the unused portion of a ticket in the event of a delay exceeding a certain amount of time, i.e., 36 hours.

The Agency has carefully considered the submissions filed by Air Transat with respect to this matter, and is satisfied, in general, with the tariff provisions filed by Air Transat. However, the Agency is of the opinion that Air Transat has not proven to the Agency's satisfaction, that it is reasonable to have a time limit in the

event of a delay of 36 hours or more, after which Air Transat would refund the unused ticket or portion thereof.

CONCLUSION

Based on the above findings, the Agency has determined that the terms and conditions relating to liability for refusal to transport and failure to operate on schedule, as set out in Rule 6.3(d) of Air Transat's International Scheduled Services Tariff, CTA (A) No. 4, are not just and reasonable, and are therefore contrary to subsection 111(1) of the ATR (Air Transportation Regulations).

Accordingly, the Agency, pursuant to paragraph 113(*a*) of the ATR (Air Transportation Regulations), hereby disallows Rule 6.3(d) of Air Transat's International Scheduled Services Tariff, CTA (A) No. 4, and, pursuant to paragraph 113(*b)* of the ATR (Air Transportation Regulations), hereby substitutes the following provision:

> 6.3(d) If the Carrier is unable to provide reasonable alternative transportation on its services or on the services of other carrier(s) within a reasonable period of time, then it will refund the unused ticket or portions thereof.

Pursuant to section 28 of the CTA, this disallowance and substitution are effective 10 (ten) days from the date of this Decision.

Back to rulings

Date modified:
2004-01-16

1994 CarswellQue 120
Supreme Court of Canada

RJR — MacDonald Inc. v. Canada (Attorney General)

1994 CarswellQue 120F, 1994 CarswellQue 120, [1994] 1 S.C.R. 311, [1994] A.C.S. No. 17, [1994] S.C.J. No. 17, 111 D.L.R. (4th) 385, 164 N.R. 1, 46 A.C.W.S. (3d) 40, 54 C.P.R. (3d) 114, 5 W.D.C.P. (2d) 136, 60 Q.A.C. 241, J.E. 94-423, EYB 1994-28671

RJR — MacDonald Inc., Applicant v. The Attorney General of Canada, Respondent and The Attorney General of Quebec, Mis-en-cause and The Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada, Interveners on the application for interlocutory relief

Imperial Tobacco Ltd., Applicant v. The Attorney General of Canada, Respondent and The Attorney General of Quebec, Mis-en-cause and The Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada, Interveners on the application for interlocutory relief

Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

Judgment: October 4, 1993
Judgment: March 3, 1994
Docket: 23460, 23490

Proceedings: Applications for Interlocutory Relief

Counsel: *Colin K. Irving* , for the applicant RJR — MacDonald Inc.
Simon V. Potter , for the applicant Imperial Tobacco Inc.
Claude Joyal and *Yves Leboeuf* , for the respondent.
W. Ian C. Binnie, Q.C. , and *Colin Baxter* , for the Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada.

The judgment of the Court on the applications for interlocutory relief was delivered by *Sopinka and Cory JJ.*:

I. Factual Background

1 These applications for relief from compliance with certain *Tobacco Products Control Regulations, amendment* , SOR/93-389 as interlocutory relief are ancillary to a larger challenge to regulatory legislation which will soon be heard by this Court.

2 The *Tobacco Products Control Act* , R.S.C., 1985, c. 14 (4th Supp.), S.C. 1988, c. 20, came into force on January 1, 1989. The purpose of the Act is to regulate the advertisement of tobacco products and the health warnings which must be placed upon tobacco products.

3 The first part of the *Tobacco Products Control Act* , particularly ss. 4 to 8, prohibits the advertisement of tobacco products and any other form of activity designed to encourage their sale. Section 9 regulates the labelling of tobacco products, and provides that health messages must be carried on all tobacco packages in accordance with the regulations passed pursuant to the Act.

4 Sections 11 to 16 of the Act deal with enforcement and provide for the designation of tobacco product inspectors who are granted search and seizure powers. Section 17 authorizes the Governor in Council to make regulations under the Act. Section 17(*f*) authorizes the Governor in Council to adopt regulations prescribing "the content, position, configuration, size and prominence" of the mandatory health messages. Section 18(1)(*b*) of the Act indicates that infringements may be prosecuted by indictment, and upon conviction provides for a penalty by way of a fine not to exceed $100,000, imprisonment for up to one year, or both.

5 Each of the applicants challenged the constitutional validity of the *Tobacco Products Control Act* on the grounds that it is *ultra vires* the Parliament of Canada and invalid as it violates s. 2(*b*) of the *Canadian Charter of Rights and Freedoms* . The two cases were heard together and decided on common evidence.

6 On July 26, 1991, Chabot J. of the Quebec Superior Court granted the applicants' motions, [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449 , finding that the Act was *ultra vires* the Parliament of Canada and that it contravened the *Charter* . The respondent appealed to the Quebec Court of Appeal. Before the Court of Appeal rendered judgment, the applicants applied to this court for interlocutory relief in the form of an order that they would not have to comply with certain provisions of the Act for a period of 60 days following judgment in the Court of Appeal.

7 Up to that point, the applicants had complied with all provisions in the *Tobacco Products Control Act* . However, under the Act, the complete prohibition on all point of sale advertising was not due to come into force until December 31, 1992. The applicants estimated that it would take them approximately 60 days to dismantle all of their advertising displays in stores. They argued that, with the benefit of a Superior Court judgment declaring the Act unconstitutional, they should not be required to take any steps to dismantle their displays until such time as the Court

of Appeal might eventually hold the legislation to be valid. On the motion the Court of Appeal held that the penalties for non-compliance with the ban on point of sale advertising could not be enforced against the applicants until such time as the Court of Appeal had released its decision on the merits. The court refused, however, to stay the enforcement of the provisions for a period of 60 days following a judgment validating the Act.

8 On January 15, 1993, the Court of Appeal for Quebec, [1993] R.J.Q. 375, 102 D.L.R. (4th) 289 , allowed the respondent's appeal, Brossard J.A. dissenting in part. The Court unanimously held that the Act was not *ultra vires* the government of Canada. The Court of Appeal accepted that the Act infringed s. 2(*b*) of the *Charter* but found, Brossard J.A. dissenting on this aspect, that it was justified under s. 1 of the *Charter* . Brossard J.A. agreed with the majority with respect to the requirement of unattributed package warnings (that is to say the warning was not to be attributed to the Federal Government) but found that the ban on advertising was not justified under s. 1 of the *Charter* . The applicants filed an application for leave to appeal the judgment of the Quebec Court of Appeal to this Court.

9 On August 11, 1993, the Governor in Council published amendments to the regulations dated July 21, 1993, under the Act: *Tobacco Products Control Regulations, amendment* , SOR/93-389. The amendments stipulate that larger, more prominent health warnings must be placed on all tobacco products packets, and that these warnings can no longer be attributed to Health and Welfare Canada. The packaging changes must be in effect within one year.

10 According to affidavits filed in support of the applicant's motion, compliance with the new regulations would require the tobacco industry to redesign all of its packaging and to purchase thousands of rotograve cylinders and embossing dies. These changes would take close to a year to effect, at a cost to the industry of about $30,000,000.

11 Before a decision on their leave applications in the main actions had been made, the applicants brought these motions for a stay pursuant to s. 65.1 of the *Supreme Court Act* , R.S.C., 1985, c. S-26 (ad. by S.C. 1990, c. 8, s. 40) or, in the event that leave was granted, pursuant to r. 27 of the *Rules of the Supreme Court of Canada* , SOR/83-74. The applicants seek to stay "the judgment of the Quebec Court of Appeal delivered on January 15, 1993", but "only insofar as that judgment validates sections 3, 4, 5, 6, 7 and 10 of [the new regulations]". In effect, the applicants ask to be released from any obligation to comply with the new packaging requirements until the disposition of the main actions. The applicants further request that the stays be granted for a period of 12 months from the dismissal of the leave applications or from a decision of this Court confirming the validity of *Tobacco Products Control Act* .

12 The applicants contend that the stays requested are necessary to prevent their being required to incur considerable irrecoverable expenses as a result of the new regulations even though this Court may eventually find the enabling legislation to be constitutionally invalid.

13 The applicants' motions were heard by this Court on October 4. Leave to appeal the main actions was granted on October 14.

II. Relevant Statutory Provisions

Tobacco Products Control Act, R.S.C., 1985, c. 14 (4th Supp.), S.C. 1988, c. 20, s. 3:

14

> *3.* The purpose of this Act is to provide a legislative response to a national public health problem of substantial and pressing concern and, in particular,
>
> (*a*) to protect the health of Canadians in the light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases;
>
> (*b*) to protect young persons and others, to the extent that is reasonable in a free and democratic society, from inducements to use tobacco products and consequent dependence on them; and
>
> (*c*) to enhance public awareness of the hazards of tobacco use by ensuring the effective communication of pertinent information to consumers of tobacco products.

Supreme Court Act, R.S.C., 1985, c. S-26, s. 65.1 (ad. S.C. 1990, c. 8, s. 40):

15

> *65.1* The Court or a judge may, on the request of a party who has filed a notice of application for leave to appeal, order that proceedings be stayed with respect to the judgment from which leave to appeal is being sought, on such terms as to the Court or the judge seem just.

Rules of the Supreme Court of Canada, SOR/83-74, s. 27:

16

> 27. Any party against whom judgment has been given, or an order made, by the Court or any other court, may apply to the Court for a stay of execution or other relief against such a judgment or order, and the Court may give such relief upon such terms as may be just.

III. Courts Below

17 In order to place the applications for the stay in context it is necessary to review briefly the decisions of the courts below.

Superior Court, [1991] R.J.Q. 2260, 82 D.L.R. (4th) 449

18 Chabot J. concluded that the dominant characteristic of the *Tobacco Products Control Act* was the control of tobacco advertising and that the protection of public health was only an incidental objective of the Act. Chabot J. characterized the *Tobacco Products Control Act* as a law regulating advertising of a particular product, a matter within provincial legislative competence.

19 Chabot J. found that, with respect to s. 2(*b*) of the *Charter* , the activity prohibited by the Act was a protected activity, and that the notices required by the Regulations violated that *Charter* guarantee. He further held that the evidence demonstrated that the objective of reducing the level of consumption of tobacco products was of sufficient importance to warrant legislation restricting freedom of expression, and that the legislative objectives identified by Parliament to reduce tobacco use were a pressing and substantial concern in a free and democratic society.

20 However, in his view, the Act did not minimally impair freedom of expression, as it did not restrict itself to protecting young people from inducements to smoke, or limit itself to lifestyle advertising. Chabot J. found that the evidence submitted by the respondent in support of its contention that adver tising bans decrease consumption was unreliable and without probative value because it failed to demonstrate that any ban of tobacco advertising would be likely to bring about a reduction of tobacco consumption. Therefore, the respondent had not demonstrated that an advertising ban restricted freedom of expression as little as possible. Chabot J. further concluded that the evidence of a rational connection between the ban of Canadian advertising and the objective of reducing overall consumption of tobacco was deficient, if not non-existent. He held that the Act was a form of censorship and social engineering which was incompatible with a free and democratic society and could not be justified.

Court of Appeal (on the application for a stay)

21 In deciding whether or not to exercise its broad power under art. 523 of the *Code of Civil Procedure of Québec* to "make any order necessary to safeguard the rights of the parties", the Court of Appeal made the following observation on the nature of the relief requested:

> But what is at issue here (if the Act is found to be constitutionally valid) is the suspension of the legal effect of part of the Act and the legal duty to comply with it for 60 days, and the suspension, as well, of the power of the appropriate public authorities to enforce the Act. To suspend or delay the effect or the enforcement of a *valid* act of the legislature, particularly one purporting to relate to the protection of public health or safety is a serious matter. The courts should not lightly limit or delay the implementation or enforcement of *valid* legislation where the legislature has brought that legislation into effect. To do so would be to intrude into the legislative and the executive spheres. [Emphasis in original.]

The Court made a partial grant of the relief sought as follows:

> Since the letters of the Department of Health and Welfare and appellants' contestation both suggest the possibility that the applicants may be prosecuted under *Sec. 5* after December 31, 1992 whether or not judgment has been rendered on these appeals by that date, it seems reasonable to order the suspension of enforcement under *Sec. 5* of the Act until judgment has been rendered by this Court on the present appeals. There is, after all, a serious issue as to the validity of the Act, and it would be unfairly onerous to require the applicants to incur substantial expense in dismantling these point of sale displays until we have resolved that issue.
>
> We see no basis, however, for ordering a stay of the coming into effect of the Act for 60 days following our judgment on the appeals.
>
> . . . . .
>
> Indeed, given the public interest aspect of the Act, which purports to be concerned with the protection of public health, if the Act were found to be valid, there is excellent reason why its effect and enforcement should not be suspended (*A.G. of Manitoba v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110 , 127, 135). [Emphasis in original.]

Court of Appeal (on the validity of the legislation), [1993] R.J.Q. 375, 102 D.L.R. (4th) 289

1. LeBel J.A. (for the majority)

22 LeBel J.A. characterized the *Tobacco Products Control Act* as legislation relating to public health. He also found that it was valid as legislation enacted for the peace, order and good government of Canada.

23 LeBel J.A. applied the criteria set out in *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401 , and concluded that the Act satisfied the "national concern" test and could properly rest on a purely theoretical, unproven link between tobacco advertising and the overall consumption of tobacco.

24 LeBel J.A. agreed with Brossard J.A. that the Act infringed freedom of expression pursuant to s. 2(*b*) of the *Charter* but found that it was justified under s. 1 of the *Charter* . LeBel J.A. concluded that Chabot J. erred in his findings of fact in failing to recognize that the rational connection and minimal impairment branches of the *Oakes* test have been attenuated by later decisions of the Supreme Court of Canada. He found that the s. 1 test was satisfied since there was a possibility that prohibiting tobacco advertising might lead to a reduction in tobacco consumption, based on the mere existence of a [Translation] "body of opinion" favourable to the adoption of a ban. Further he found that the Act appeared to be consistent with minimal impairment as it did not prohibit consumption, did not prohibit foreign advertising and did not preclude the possibility of obtaining information about tobacco products.

2. Brossard J.A. (dissenting in part)

25 Brossard J.A. agreed with LeBel J.A. that the *Tobacco Products Control Act* should be characterized as public health legislation and that the Act satisfied the "national concern" branch of the peace, order and good government power.

26 However, he did not think that the violation of s. 2(*b*) of the *Charter* could be justified. He reviewed the evidence and found that it did not demonstrate the existence of a connection or even the possibility of a connection between an advertising ban and the use of tobacco. It was his opinion that it must be shown on a balance of probabilities that it was at least possible that the goals sought would be achieved. He also disagreed that the Act met the minimal impairment requirement since in his view the Act's objectives could be met by restricting advertising without the need for a total prohibition.

IV. Jurisdiction

27 A preliminary question was raised as to this Court's jurisdiction to grant the relief requested by the applicants. Both the Attorney General of Canada and the interveners on the stay (several health organizations, i.e., the Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada) argued that this Court lacks jurisdiction to order a stay of execution or of the proceedings which would relieve the applicants of the obligation of complying with the new regulations. Several arguments were advanced in support of this position.

28 First, the Attorney General argued that neither the old nor the new regulations dealing with the health messages were in issue before the lower courts and, as such, the applicants' requests for a stay truly cloaks requests to have this Court exercise an original jurisdiction over the matter. Second, he contended that the judgment of the Quebec Court of Appeal is not subject to execution given that it only declared that the Act was *intra vires* s. 91 of the *Constitution Act, 1867* and justified under s. 1 of the *Charter* . Because the lower court decision amounts to a declaration, there is, therefore, no "proceeding" that can be stayed. Finally, the Attorney General characterized the applicants' requests as being requests for a suspension by anticipation of the 12-month delay in which the new regulations will become effective so that the applicants can continue to sell tobacco products for an extended period in packages containing the health warnings required by the present regulations. He claimed that this Court has no jurisdiction to suspend the operation of the new regulations.

29 The interveners supported and elaborated on these submissions. They also submitted that r. 27 could not apply because leave to appeal had not been granted. In any event, they argued that the words "or other relief" are not broad enough to permit this Court to defer enforcement of regulations that were not even in existence at the time the appeal judgment was rendered.

30 The powers of the Supreme Court of Canada to grant relief in this kind of proceeding are contained in s. 65.1 of the *Supreme Court Act* and r. 27 of the *Rules of the Supreme Court of Canada* .

Supreme Court Act

31

> *65.1* The Court or a judge may, on the request of a party who has filed a notice of application for leave to appeal, order that proceedings be stayed with respect to the judgment from which leave to appeal is being sought, on such terms as to the Court or the judge seem just.

Rules of the Supreme Court of Canada

32

> 27. Any party against whom judgment has been given, or an order made, by the Court or any other court, may apply to the Court for a stay of execution or other relief against such a judgment or order, and the Court may give such relief upon such terms as may be just.

33 Rule 27 and its predecessor have existed in substantially the same form since at least 1888 (see *Rules of the Supreme Court of Canada* , 1888, General Order No. 85(17)). Its broad language reflects the language of s. 97 of the Act whence the Court derives its rule-making power. Subsection (1)(*a*) of that section provides that the rules may be enacted:

> *97. ...*
>
> > (*a*) for regulating the procedure of and in the Court and the bringing of cases before it from courts appealed from or otherwise, and for the effectual execution and working of this Act and the attainment of the intention and objects thereof;

Although the point is now academic, leave to appeal having been granted, we would not read into the rule the limitations suggested by the interveners. Neither the words of the rule nor s. 97 contain such limitations. In our opinion, in interpreting the language of the rule, regard should be had to its purpose, which is best expressed in the terms of the empowering section: to facilitate the "bringing of cases" before the Court "for the effectual execution and working of this Act". To achieve its purpose the rule can neither be limited to cases in which leave to appeal has already been granted nor be interpreted narrowly to apply only to an order stopping or arresting execution of the Court's process by a third party or freezing the judicial proceeding which is the subject matter of the judgment in appeal. Examples of the former, traditionally described as stays of execution, are contained in the subsections of s. 65 of the Act which have been held to be limited to preventing the intervention of a third party such as a sheriff but not the enforcement of an order directed to

a party. See *Keable v. Attorney General (Can.)*, [1978] 2 S.C.R. 135 . The stopping or freezing of all proceedings is traditionally referred to as a stay of proceedings. See *Battle Creek Toasted Corn Flake Co. v. Kellogg Toasted Corn Flake Co.* (1924), 55 O.L.R. 127 (C.A.) . Such relief can be granted pursuant to this Court's powers in r. 27 or s. 65.1 of the Act.

34 Moreover, we cannot agree that the adoption of s. 65.1 in 1992 (S.C. 1990, c. 8, s. 40) was intended to limit the Court's powers under r. 27. The purpose of that amendment was to enable a single judge to exercise the jurisdiction to grant stays in circumstances in which, before the amendment, a stay could be granted by the Court. Section 65.1 should, therefore, be interpreted to confer the same broad powers that are included in r. 27.

35 In light of the foregoing and bearing in mind in particular the language of s. 97 of the Act we cannot agree with the first two points raised by the Attorney General that this Court is unable to grant a stay as requested by the applicants. We are of the view that the Court is empowered, pursuant to both s. 65.1 and r. 27, not only to grant a stay of execution and of proceedings in the traditional sense, but also to make any order that preserves matters between the parties in a state that will prevent prejudice as far as possible pending resolution by the Court of the controversy, so as to enable the Court to render a meaningful and effective judgment. The Court must be able to intervene not only against the direct dictates of the judgment but also against its effects. This means that the Court must have jurisdiction to enjoin conduct on the part of a party in reliance on the judgment which, if carried out, would tend to negate or diminish the effect of the judgment of this Court. In this case, the new regulations constitute conduct under a law that has been declared constitutional by the lower courts.

36 This, in our opinion, is the view taken by this Court in *Labatt Breweries of Canada Ltd. v. Attorney General of Canada*, [1980] 1 S.C.R. 594 . The appellant Labatt, in circumstances similar to those in this case, sought to suspend enforcement of regulations which were attacked by it in an action for a declaration that the regulations were inapplicable to Labatt's product. The Federal Court of Appeal reversed a lower court finding in favour of Labatt. Labatt applied for a stay pending an appeal to this Court. Although the parties had apparently agreed to the terms of an order suspending further proceedings, Laskin C.J. dealt with the issue of jurisdiction, an issue that apparently was contested notwithstanding the agreement. The Chief Justice, speaking for the Court, determined that the Court was empowered to make an order suspending the enforcement of the impugned regulation by the Department of Consumer and Corporate Affairs. At page 600, Laskin C.J. responded as follows to arguments advanced on the traditional approach to the power to grant a stay:

> It was contended that the Rule relates to judgments or orders of this Court and not to judgments or orders of the Court appealed from. Its formulation appears to me to be inconsistent with such a limitation. Nor do I think that the position of the respondent that there is no judgment against the appellant to be stayed is a tenable one. Even if it be so, there

> is certainly an order against the appellant. *Moreover, I do not think that the words of Rule 126, authorizing this Court to grant relief against an adverse order, should be read so narrowly as to invite only intervention directly against the order and not against its effect while an appeal against it is pending in this Court.* I am of the opinion, therefore, that the appellant is entitled to apply for interlocutory relief against the operation of the order dismissing its declaratory action, and that this Court may grant relief on such terms as may be just. [Emphasis added.]

37 While the above passage appears to answer the submission of the respondents on this motion that *Labatt* was distinguishable because the Court acted on a consent order, the matter was put beyond doubt by the following additional statement of Laskin C.J. at p. 601:

> Although I am of the opinion that Rule 126 applies to support the making of an order of the kind here agreed to by counsel for the parties, I would not wish it to be taken that this Court is otherwise without power to prevent proceedings pending before it from being aborted by unilateral action by one of the parties pending final determination of an appeal.

Indeed, an examination of the factums filed by the parties to the motion in *Labatt* reveals that while it was agreed that the dispute would be resolved by an application for a declaration, it was not agreed that pending resolution of the dispute the enforcement of the regulations would be stayed.

38 In our view, this Court has jurisdiction to grant the relief requested by the applicants. This is the case even if the applicants' requests for relief are for "suspension" of the regulation rather than "exemption" from it. To hold otherwise would be inconsistent with this Court's finding in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110 . In that case, the distinction between "suspension" and "exemption" cases is made only after jurisdiction has been otherwise established and the public interest is being weighed against the interests of the applicant seeking the stay of proceedings. While "suspension" is a power that, as is stressed below, must be exercised sparingly, this is achieved by applying the criteria in *Metropolitan Stores* strictly and not by a restrictive interpretation of this Court's jurisdiction. Therefore, the final argument of the Attorney General on the issue of jurisdiction also fails.

39 Finally, if jurisdiction under s. 65.1 of the Act and r. 27 were wanting, we would be prepared to find jurisdiction in s. 24(1) of the *Charter* . A *Charter* remedy should not be defeated due to a deficiency in the ancillary procedural powers of the Court to preserve the rights of the parties pending a final resolution of constitutional rights.

V. Grounds for Stay of Proceedings

40 The applicants rely upon the following grounds:

> 1. The challenged *Tobacco Products Control Regulations, amendment* were promulgated pursuant to ss. 9 and 17 of the *Tobacco Products Control Act* , S.C. 1988, c. 20.

2. The applicants have applied to this Court for leave to appeal a judgment of the Quebec Court of Appeal dated January 15, 1993. The Court of Appeal overturned a decision of the Quebec Superior Court declaring certain sections of the Act to be beyond the powers of the Parliament of Canada and an unjustifiable violation of the *Canadian Charter of Rights and Freedoms* .

3. The effect of the new regulations is such that the applicants will be obliged to incur substantial unrecoverable expenses in carrying out a complete redesign of all its packaging before this Court will have ruled on the constitutional validity of the enabling legislation and, if this Court restores the judgment of the Superior Court, will incur the same expenses a second time should they wish to restore their packages to the present design.

4. The tests for granting of a stay are met in this case:

(i) There is a serious constitutional issue to be determined.

(ii) Compliance with the new regulations will cause irreparable harm.

(iii) The balance of convenience, taking into account the public interest, favours retaining the status quo until this court has disposed of the legal issues.

VI. Analysis

41 The primary issue to be decided on these motions is whether the applicants should be granted the interlocutory relief they seek. The applicants are only entitled to this relief if they can satisfy the test laid down in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd., supra* . If not, the applicants will have to comply with the new regulations, at least until such time as a decision is rendered in the main actions.

A. Interlocutory Injunctions, Stays of Proceedings and the Charter

42 The applicants ask this Court to delay the legal effect of regulations which have already been enacted and to prevent public authorities from enforcing them. They further seek to be protected from enforcement of the regulations for a 12-month period even if the enabling legislation is eventually found to be constitutionally valid. The relief sought is significant and its effects far reaching. A careful balancing process must be undertaken.

43 On one hand, courts must be sensitive to and cautious of making rulings which deprive legislation enacted by elected officials of its effect.

44 On the other hand, the *Charter* charges the courts with the responsibility of safeguarding fundamental rights. For the courts to insist rigidly that all legislation be enforced to the letter until the moment that it is struck down as unconstitutional might in some instances be to condone the

most blatant violation of *Charter* rights. Such a practice would undermine the spirit and purpose of the *Charter* and might encourage a government to prolong unduly final resolution of the dispute.

45 Are there, then, special considerations or tests which must be applied by the courts when *Charter* violations are alleged and the interim relief which is sought involves the execution and enforceability of legislation?

46 Generally, the same principles should be applied by a court whether the remedy sought is an injunction or a stay. In *Metropolitan Stores* , at p. 127, Beetz J. expressed the position in these words:

> A stay of proceedings and an interlocutory injunction are remedies of the same nature. In the absence of a different test prescribed by statute, they have sufficient characteristics in common to be governed by the same rules and the courts have rightly tended to apply to the granting of interlocutory stay the principles which they follow with respect to interlocutory injunctions.

47 We would add only that here the applicants are requesting both interlocutory (pending disposition of the appeal) and interim (for a period of one year following such disposition) relief. We will use the broader term "interlocutory relief" to describe the hybrid nature of the relief sought. The same principles apply to both forms of relief.

48 *Metropolitan Stores* adopted a three-stage test for courts to apply when considering an application for either a stay or an interlocutory injunction. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits. It may be helpful to consider each aspect of the test and then apply it to the facts presented in these cases.

B. The Strength of the Plaintiff's Case

49 Prior to the decision of the House of Lords in *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396 , an applicant for interlocutory relief was required to demonstrate a "strong *prima facie* case" on the merits in order to satisfy the first test. In *American Cyanamid* , however, Lord Diplock stated that an applicant need no longer demonstrate a strong *prima facie* case. Rather it would suffice if he or she could satisfy the court that "the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried". The *American Cyanamid* standard is now generally accepted by the Canadian courts, subject to the occasional reversion to a stricter standard: see Robert J. Sharpe, *Injunctions and Specific Performance* (2nd ed. 1992), at pp. 2-13 to 2-20.

50 In *Metropolitan Stores* , Beetz J. advanced several reasons why the *American Cyanamid* test rather than any more stringent review of the merits is appropriate in *Charter* cases. These included the difficulties involved in deciding complex factual and legal issues based upon the limited evidence available in an interlocutory proceeding, the impracticality of undertaking a s. 1 analysis at that stage, and the risk that a tentative determination on the merits would be made in the absence of complete pleadings or prior to the notification of any Attorneys General.

51 The respondent here raised the possibility that the current status of the main action required the applicants to demonstrate something more than "a serious question to be tried." The respondent relied upon the following *dicta* of this Court in *Laboratoire Pentagone Ltée v. Parke, Davis & Co.*, [1968] S.C.R. 269 , at p. 272:

> The burden upon the appellant is much greater than it would be if the injunction were interlocutory. In such a case the Court must consider the balance of convenience as between the parties, because the matter has not yet come to trial. In the present case we are being asked to suspend the operation of a judgment of the Court of Appeal, delivered after full consideration of the merits. It is not sufficient to justify such an order being made to urge that the impact of the injunction upon the appellant would be greater than the impact of its suspension upon the respondent.

To the same effect were the comments of Kelly J.A. in *Adrian Messenger Services v. The Jockey Club Ltd. (No. 2)* (1972), 2 O.R. 619 (C.A.) , at p. 620:

> Unlike the situation prevailing before trial, where the competing allegations of the parties are unresolved, on an application for an interim injunction pending an appeal from the dismissal of the action the defendant has a judgment of the Court in its favour. Even conceding the ever-present possibility of the reversal of that judgment on appeal, it will in my view be in a comparatively rare case that the Court will interfere to confer upon a plaintiff, even on an interim basis, the very right to which the trial Court has held he is not entitled.

And, most recently, of Philp J. in *Bear Island Foundation v. Ontario* (1989), 70 O.R. (2d) 574 (H.C.) , at p. 576:

> While I accept that the issue of title to these lands is a serious issue, it has been resolved by trial and by appeal. The reason for the Supreme Court of Canada granting leave is unknown and will not be known until they hear the appeal and render judgment. There is not before me at this time, therefore, a serious or substantial issue to be tried. It has already been tried and appealed. No attempt to stop harvesting was made by the present plaintiffs before trial, nor before the appeal before the Court of Appeal of Ontario. The issue is no longer an issue at trial.

52 According to the respondent, such statements suggest that once a decision has been rendered on the merits at trial, either the burden upon an applicant for interlocutory relief increases, or the applicant can no longer obtain such relief. While it might be possible to distinguish the above authorities on the basis that in the present case the trial judge agreed with the applicant's position, it is not necessary to do so. Whether or not these statements reflect the state of the law in private applications for interlocutory relief, which may well be open to question, they have no application in *Charter* cases.

53 The *Charter* protects fundamental rights and freedoms. The importance of the interests which, the applicants allege, have been adversely affected require every court faced with an alleged *Charter* violation to review the matter carefully. This is so even when other courts have concluded that no *Charter* breach has occurred. Furthermore, the complex nature of most constitutional rights means that a motions court will rarely have the time to engage in the requisite extensive analysis of the merits of the applicant's claim. This is true of any application for interlocutory relief whether or not a trial has been conducted. It follows that we are in complete agreement with the conclusion of Beetz J. in *Metropolitan Stores* , at p. 128, that "the *American Cyanamid* 'serious question' formulation is sufficient in a constitutional case where, as indicated below in these reasons, the public interest is taken into consideration in the balance of convenience."

54 What then are the indicators of "a serious question to be tried"? There are no specific requirements which must be met in order to satisfy this test. The threshold is a low one. The judge on the application must make a preliminary assessment of the merits of the case. The decision of a lower court judge on the merits of the *Charter* claim is a relevant but not necessarily conclusive indication that the issues raised in an appeal are serious: see *Metropolitan Stores, supra* , at p. 150. Similarly, a decision by an appellate court to grant leave on the merits indicates that serious questions are raised, but a refusal of leave in a case which raises the same issues cannot automatically be taken as an indication of the lack of strength of the merits.

55 Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.

56 Two exceptions apply to the general rule that a judge should not engage in an extensive review of the merits. The first arises when the result of the interlocutory motion will in effect amount to a final determination of the action. This will be the case either when the right which the applicant seeks to protect can only be exercised immediately or not at all, or when the result of the application will impose such hardship on one party as to remove any potential benefit from proceeding to trial. Indeed Lord Diplock modified the *American Cyanamid* principle in such a situation in *N.W.L. Ltd. v. Woods*, [1979] 1 W.L.R. 1294 , at p. 1307:

> Where, however, the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action because the harm that will have been already caused to the losing party by its grant or its refusal is complete and of a kind for which money cannot constitute any worthwhile recompense, the degree of likelihood that the plaintiff would have succeeded in establishing his right to an injunction if the action had gone to trial is a factor to be brought into the balance by the judge in weighing the risks that injustice may result from his deciding the application one way rather than the other.

Cases in which the applicant seeks to restrain picketing may well fall within the scope of this exception. Several cases indicate that this exception is already applied to some extent in Canada.

57 In *Trieger v. Canadian Broadcasting Corp.* (1988), 54 D.L.R. (4th) 143 (Ont. H.C.) , the leader of the Green Party applied for an interlocutory mandatory injunction allowing him to participate in a party leaders' debate to be televised within a few days of the hearing. The applicant's only real interest was in being permitted to participate in the debate, not in any subsequent declaration of his rights. Campbell J. refused the application, stating at p. 152:

> This is not the sort of relief that should be granted on an interlocutory application of this kind. The legal issues involved are complex and I am not satisfied that the applicant has demonstrated there is a serious issue to be tried *in the sense of a case with enough legal merit* to justify the extraordinary intervention of this court in making the order sought without any trial at all. [Emphasis added.]

58 In *Tremblay v. Daigle*, [1989] 2 S.C.R. 530 , the appellant Daigle was appealing an interlocutory injunction granted by the Quebec Superior Court enjoining her from having an abortion. In view of the advanced state of the appellant's pregnancy, this Court went beyond the issue of whether or not the interlocutory injunction should be discharged and immediately rendered a decision on the merits of the case.

59 The circumstances in which this exception will apply are rare. When it does, a more extensive review of the merits of the case must be undertaken. Then when the second and third stages of the test are considered and applied the anticipated result on the merits should be borne in mind.

60 The second exception to the *American Cyanamid* prohibition on an extensive review of the merits arises when the question of constitutionality presents itself as a simple question of law alone. This was recognized by Beetz J. in *Metropolitan Stores* , at p. 133:

> There may be rare cases where the question of constitutionality will present itself as a simple question of law alone which can be finally settled by a motion judge. A theoretical example which comes to mind is one where Parliament or a legislature would purport to pass a law imposing the beliefs of a state religion. Such a law would violate s. 2(*a*) of the *Canadian*

> *Charter of Rights and Freedoms* , could not possibly be saved under s. 1 of the *Charter* and might perhaps be struck down right away; see *Attorney General of Quebec v. Quebec Association of Protestant School Boards*, [1984] 2 S.C.R. 66 , at p. 88. It is trite to say that these cases are exceptional.

A judge faced with an application which falls within the extremely narrow confines of this second exception need not consider the second or third tests since the existence of irreparable harm or the location of the balance of convenience are irrelevant inasmuch as the constitutional issue is finally determined and a stay is unnecessary.

61 The suggestion has been made in the private law context that a third exception to the *American Cyanamid* "serious question to be tried" standard should be recognized in cases where the factual record is largely settled prior to the application being made. Thus in *Dialadex Communications Inc. v. Crammond* (1987), 34 D.L.R. (4th) 392 (Ont. H.C.) , at p. 396, it was held that:

> Where the facts are not substantially in dispute, the plaintiffs must be able to establish a strong *prima facie* case and must show that they will suffer irreparable harm if the injunction is not granted. If there are facts in dispute, a lesser standard must be met. In that case, the plaintiffs must show that their case is not a frivolous one and there is a substantial question to be tried, and that, on the balance of convenience, an injunction should be granted.

To the extent that this exception exists at all, it should not be applied in *Charter* cases. Even if the facts upon which the *Charter* breach is alleged are not in dispute, all of the evidence upon which the s. 1 issue must be decided may not be before the motions court. Furthermore, at this stage an appellate court will not normally have the time to consider even a complete factual record properly. It follows that a motions court should not attempt to undertake the careful analysis required for a consideration of s. 1 in an interlocutory proceeding.

C. Irreparable Harm

62 Beetz J. determined in *Metropolitan Stores* , at p. 128, that "[t]he second test consists in deciding whether the litigant who seeks the interlocutory injunction would, unless the injunction is granted, suffer irreparable harm". The harm which might be suffered by the respondent, should the relief sought be granted, has been considered by some courts at this stage. We are of the opinion that this is more appropriately dealt with in the third part of the analysis. Any alleged harm to the public interest should also be considered at that stage.

63 At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.

64 "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision (*R.L. Crain Inc. v. Hendry* (1988), 48 D.L.R. (4th) 228 (Sask. Q.B.)); where one party will suffer permanent market loss or irrevocable damage to its business reputation (*American Cyanamid, supra*); or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined (*MacMillan Bloedel Ltd. v. Mullin*, [1985] 3 W.W.R. 577 (B.C.C.A.)). The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration (*Hubbard v. Pitt*, [1976] Q.B. 142 (C.A.)).

65 The assessment of irreparable harm in interlocutory applications involving *Charter* rights is a task which will often be more difficult than a comparable assessment in a private law application. One reason for this is that the notion of irreparable harm is closely tied to the remedy of damages, but damages are not the primary remedy in *Charter* cases.

66 This Court has on several occasions accepted the principle that damages may be awarded for a breach of *Charter* rights: (see, for example, *Mills v. The Queen*, [1986] 1 S.C.R. 863 , at pp. 883, 886, 943 and 971; *Nelles v. Ontario*, [1989] 2 S.C.R. 170 , at p. 196). However, no body of jurisprudence has yet developed in respect of the principles which might govern the award of damages under s. 24(1) of the *Charter* . In light of the uncertain state of the law regarding the award of damages for a *Charter* breach, it will in most cases be impossible for a judge on an interlocutory application to determine whether adequate compensation could ever be obtained at trial. Therefore, until the law in this area has developed further, it is appropriate to assume that the financial damage which will be suffered by an applicant following a refusal of relief, even though capable of quantification, constitutes irreparable harm.

D. The Balance of Inconvenience and Public Interest Considerations

67 The third test to be applied in an application for interlocutory relief was described by Beetz J. in *Metropolitan Stores* at p. 129 as: "a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits". In light of the relatively low threshold of the first test and the difficulties in applying the test of irreparable harm in *Charter* cases, many interlocutory proceedings will be determined at this stage.

68 The factors which must be considered in assessing the "balance of inconvenience" are numerous and will vary in each individual case. In *American Cyanamid* , Lord Diplock cautioned, at p. 408, that:

> [i]t would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.

He added, at p. 409, that "there may be many other special factors to be taken into consideration in the particular circumstances of individual cases."

69 The decision in *Metropolitan Stores* , at p. 149, made clear that in all constitutional cases the public interest is a 'special factor' which must be considered in assessing where the balance of convenience lies and which must be "given the weight it should carry." This was the approach properly followed by Blair J. of the General Division of the Ontario Court in *Ainsley Financial Corp. v. Ontario Securities Commission* (1993), 14 O.R. (3d) 280 , at pp. 303-4:

> Interlocutory injunctions involving a challenge to the constitutional validity of legislation or to the authority of a law enforcement agency stand on a different footing than ordinary cases involving claims for such relief as between private litigants. The interests of the public, which the agency is created to protect, must be taken into account and weighed in the balance, along with the interests of the private litigants.

1. The Public Interest

70 Some general guidelines as to the methods to be used in assessing the balance of inconvenience were elaborated by Beetz J. in *Metropolitan Stores* . A few additional points may be made. It is the "polycentric" nature of the *Charter* which requires a consideration of the public interest in determining the balance of convenience: see Jamie Cassels, "An Inconvenient Balance: The Injunction as a Charter Remedy", in J. Berryman, ed., *Remedies: Issues and Perspectives* , 1991, 271, at pp. 301-5. However, the government does not have a monopoly on the public interest. As Cassels points out at p. 303:

> While it is of utmost importance to consider the public interest in the balance of convenience, the public interest in *Charter* litigation is not unequivocal or asymmetrical in the way suggested in *Metropolitan Stores* . The Attorney General is not the exclusive representative of a monolithic "public" in *Charter* disputes, nor does the applicant always represent only an individualized claim. Most often, the applicant can also claim to represent one vision of the "public interest". Similarly, the public interest may not always gravitate in favour of enforcement of existing legislation.

71 It is, we think, appropriate that it be open to both parties in an interlocutory *Charter* proceeding to rely upon considerations of the public interest. Each party is entitled to make the court aware of the damage it might suffer prior to a decision on the merits. In addition, either the applicant or the respondent may tip the scales of convenience in its favour by demonstrating to the

court a compelling public interest in the granting or refusal of the relief sought. "Public interest" includes both the concerns of society generally and the particular interests of identifiable groups.

72 We would therefore reject an approach which excludes consideration of any harm not directly suffered by a party to the application. Such was the position taken by the trial judge in *Morgentaler v. Ackroyd* (1983), 150 D.L.R. (3d) 59 (Ont. H.C.) , per Linden J., at p. 66.

> The applicants rested their argument mainly on the irreparable loss to their potential women patients, who would be unable to secure abortions if the clinic is not allowed to perform them. Even if it were established that *these women* would suffer irreparable harm, such evidence would not indicate any irreparable harm to *these applicants* , which would warrant this court issuing an injunction at their behest. [Emphasis in original.]

73 When a private applicant alleges that the public interest is at risk that harm must be demonstrated. This is since private applicants are normally presumed to be pursuing their own interests rather than those of the public at large. In considering the balance of convenience and the public interest, it does not assist an applicant to claim that a given government authority does not represent the public interest. Rather, the applicant must convince the court of the public interest benefits which will flow from the granting of the relief sought.

74 Courts have addressed the issue of the harm to the public interest which can be relied upon by a public authority in different ways. On the one hand is the view expressed by the Federal Court of Appeal in *Attorney General of Canada v. Fishing Vessel Owners' Association of B.C.*, [1985] 1 F.C. 791 , which overturned the trial judge's issuance of an injunction restraining Fisheries Officers from implementing a fishing plan adopted under the *Fisheries Act* , R.S.C. 1970, c. F-14, for several reasons, including, at p. 795:

> (b) the Judge assumed that the grant of the injunction would not cause any damage to the appellants. This was wrong. When a public authority is prevented from exercising its statutory powers, it can be said, in a case like the present one, that the public interest, of which that authority is the guardian, suffers irreparable harm.

This dictum received the guarded approval of Beetz J. in *Metropolitan Stores* at p. 139. It was applied by the Trial Division of the Federal Court in *Esquimalt Anglers' Association v. Canada (Minister of Fisheries and Oceans)* (1988), 21 F.T.R. 304 .

75 A contrary view was expressed by McQuaid J.A. of the P.E.I. Court of Appeal in *Island Telephone Co., Re* (1987), 67 Nfld. & P.E.I.R. 158 , who, in granting a stay of an order of the Public Utilities Commission pending appeal, stated at p. 164:

> I can see no circumstances whatsoever under which the Commission itself could be inconvenienced by a stay pending appeal. As a regulatory body, it has no vested interest, as

> such, in the outcome of the appeal. In fact, it is not inconceivable that it should welcome any appeal which goes especially to its jurisdiction, for thereby it is provided with clear guidelines for the future, in situations where doubt may have therefore existed. The pub lic interest is equally well served, in the same sense, by any appeal....

76 In our view, the concept of inconvenience should be widely construed in *Charter* cases. In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to that responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action.

77 A court should not, as a general rule, attempt to ascertain whether actual harm would result from the restraint sought. To do so would in effect require judicial inquiry into whether the government is governing well, since it implies the possibility that the government action does not have the effect of promoting the public interest and that the restraint of the action would therefore not harm the public interest. The *Charter* does not give the courts a licence to evaluate the effectiveness of government action, but only to restrain it where it encroaches upon fundamental rights.

78 Consideration of the public interest may also be influenced by other factors. In *Metropolitan Stores* , it was observed that public interest considerations will weigh more heavily in a "suspension" case than in an "exemption" case. The reason for this is that the public interest is much less likely to be detrimentally affected when a discrete and limited number of applicants are exempted from the application of certain provisions of a law than when the application of certain provisions of a law is suspended entirely. See *Black v. Law Society of Alberta* (1983), 144 D.L.R. (3d) 439 ; *Vancouver General Hospital v. Stoffman* (1985), 23 D.L.R. (4th) 146 ; *Rio Hotel Ltd. v. Commission des licences et permis d'alcool*, [1986] 2 S.C.R. ix .

79 Similarly, even in suspension cases, a court may be able to provide some relief if it can sufficiently limit the scope of the applicant's request for relief so that the general public interest in the continued application of the law is not affected. Thus in *Ontario Jockey Club v. Smith* (1922), 22 O.W.N. 373 (H.C.) , the court restrained the enforcement of an impugned taxation statute against the applicant but ordered him to pay an amount equivalent to the tax into court pending the disposition of the main action.

2. The Status Quo

80 In the course of discussing the balance of convenience in *American Cyanamid* , Lord Diplock stated at p. 408 that when everything else is equal, "it is a counsel of prudence to ... preserve the status quo." This approach would seem to be of limited value in private law cases, and, although there may be exceptions, as a general rule it has no merit as such in the face of the alleged violation of fundamental rights. One of the functions of the *Charter* is to provide individuals with a tool to challenge the existing order of things or status quo. The issues have to be balanced in the manner described in these reasons.

E. Summary

81 It may be helpful at this stage to review the factors to be considered on an application for interlocutory relief in a *Charter* case.

82 As indicated in *Metropolitan Stores* , the three-part *American Cyanamid* test should be applied to applications for interlocutory injunctions and as well for stays in both private law and *Charter* cases.

83 At the first stage, an applicant for interlocutory relief in a *Charter* case must demonstrate a serious question to be tried. Whether the test has been satisfied should be determined by a motions judge on the basis of common sense and an extremely limited review of the case on the merits. The fact that an appellate court has granted leave in the main action is, of course, a relevant and weighty consideration, as is any judgment on the merits which has been rendered, although neither is necessarily conclusive of the matter. A motions court should only go beyond a preliminary investigation of the merits when the result of the interlocutory motion will in effect amount to a final determination of the action, or when the constitutionality of a challenged statute can be determined as a pure question of law. Instances of this sort will be exceedingly rare. Unless the case on the merits is frivolous or vexatious, or the constitutionality of the statute is a pure question of law, a judge on a motion for relief must, as a general rule, consider the second and third stages of the *Metropolitan Stores* test.

84 At the second stage the applicant must convince the court that it will suffer irreparable harm if the relief is not granted. 'Irreparable' refers to the nature of the harm rather than its magnitude. In *Charter* cases, even quantifiable financial loss relied upon by an applicant may be considered irreparable harm so long as it is unclear that such loss could be recovered at the time of a decision on the merits.

85 The third branch of the test, requiring an assessment of the balance of inconvenience, will often determine the result in applications involving *Charter* rights. In addition to the damage each party alleges it will suffer, the interest of the public must be taken into account. The effect a decision on the application will have upon the public interest may be relied upon by either party. These public interest considerations will carry less weight in exemption cases than in suspension

cases. When the nature and declared purpose of legislation is to promote the public interest, a motions court should not be concerned whether the legislation actually has such an effect. It must be assumed to do so. In order to overcome the assumed benefit to the public interest arising from the continued application of the legislation, the applicant who relies on the public interest must demonstrate that the suspension of the legislation would itself provide a public benefit.

86 We would add to this brief summary that, as a general rule, the same principles would apply when a government authority is the applicant in a motion for interlocutory relief. However, the issue of public interest, as an aspect of irreparable harm to the interests of the government, will be considered in the second stage. It will again be considered in the third stage when harm to the applicant is balanced with harm to the respondent including any harm to the public interest established by the latter.

VII. Application of the Principles to these Cases

A. A Serious Question to be Tried

87 The applicants contend that these cases raise several serious issues to be tried. Among these is the question of the application of the rational connection and the minimal impairment tests in order to justify the infringement upon freedom of expression occasioned by a blanket ban on tobacco advertising. On this issue, Chabot J. of the Quebec Superior Court and Brossard J.A. in dissent in the Court of Appeal held that the government had not satisfied these tests and that the ban could not be justified under s. 1 of the *Charter* . The majority of the Court of Appeal held that the ban was justified. The conflict in the reasons arises from different interpretations of the extent to which recent jurisprudence has relaxed the onus fixed upon the state in *R. v. Oakes*, [1986] 1 S.C.R. 103 , to justify its action in public welfare initiatives. This Court has granted leave to hear the appeals on the merits. When faced with separate motions for interlocutory relief pertaining to these cases, the Quebec Court of Appeal stated that "[w]hatever the outcome of these appeals, they clearly raise serious constitutional issues." This observation of the Quebec Court of Appeal and the decision to grant leaves to appeal clearly indicate that these cases raise serious questions of law.

B. Irreparable Harm

88 The applicants allege that if they are not granted interlocutory relief they will be forced to spend very large sums of money immediately in order to comply with the regulations. In the event that their appeals are allowed by this Court, the applicants contend that they will not be able either to recover their costs from the government or to revert to their current packaging practices without again incurring the same expense.

89 Monetary loss of this nature will not usually amount to irreparable harm in private law cases. Where the government is the unsuccessful party in a constitutional claim, however, a plaintiff will face a much more difficult task in establishing constitutional liability and obtaining monetary

redress. The expenditures which the new regulations require will therefore impose irreparable harm on the applicants if these motions are denied but the main actions are successful on appeal.

C. Balance of Inconvenience

90 Among the factors which must be considered in order to determine whether the granting or withholding of interlocutory relief would occasion greater inconvenience are the nature of the relief sought and of the harm which the parties contend they will suffer, the nature of the legislation which is under attack, and where the public interest lies.

91 The losses which the applicants would suffer should relief be denied are strictly financial in nature. The required expenditure is significant and would undoubtedly impose considerable economic hardship on the two companies. Nonetheless, as pointed out by the respondent, the applicants are large and very successful corporations, each with annual earnings well in excess of $50,000,000. They have a greater capacity to absorb any loss than would many smaller enterprises. Secondarily, assuming that the demand for cigarettes is not solely a function of price, the companies may also be able to pass on some of their losses to their customers in the form of price increases. Therefore, although the harm suffered may be irreparable, it will not affect the long-term viability of the applicants.

92 Second, the applicants are two companies who seek to be exempted from compliance with the latest regulations published under the *Tobacco Products Control Act* . On the face of the matter, this case appears to be an "exemption case" as that phrase was used by Beetz J. in *Metropolitan Stores* . However, since there are only three tobacco producing companies operating in Canada, the application really is in the nature of a "suspension case". The applicants admitted in argument that they were in effect seeking to suspend the application of the new regulations to all tobacco producing companies in Canada for a period of one year following the judgment of this Court on the merits. The result of these motions will therefore affect the whole of the Canadian tobacco producing industry. Further, the impugned provisions are broad in nature. Thus it is appropriate to classify these applications as suspension cases and therefore ones in which "the public interest normally carries greater weight in favour of compliance with existing legislation" (p. 147).

93 The weight accorded to public interest concerns is partly a function of the nature of legislation generally, and partly a function of the purposes of the specific piece of legislation under attack. As Beetz J. explained, at p. 135, in *Metropolitan Stores* :

> Whether or not they are ultimately held to be constitutional, the laws which litigants seek to suspend or from which they seek to be exempted by way of interlocutory injunctive relief have been enacted by demo cratically-elected legislatures and are generally passed for the common good, for instance: ... *the protection of public health* .... It seems axiomatic that the granting of interlocutory injunctive relief in most suspension cases and, up to a point, as will

be seen later, in quite a few exemption cases, is susceptible temporarily to frustrate the pursuit of the common good. [Emphasis added.]

94 The regulations under attack were adopted pursuant to s. 3 of the *Tobacco Products Control Act* which states:

> *3.* The purpose of this Act is to provide a legislative response to a national public health problem of substantial and pressing concern and, in particular,
>
> (*a*) to protect the health of Canadians in the light of conclusive evidence implicating tobacco use in the incidence of numerous debilitating and fatal diseases;
>
> (*b*) to protect young persons and others, to the extent that is reasonable in a free and democratic society, from inducements to use tobacco products and consequent dependence on them; and
>
> (*c*) to enhance public awareness of the hazards of tobacco use by ensuring the effective communication of pertinent information to consumers of tobacco products.

95 The Regulatory Impact Analysis Statement, in the *Canada Gazette* , Part II, Vol. 127, No. 16, p. 3284, at p. 3285, which accompanied the regulations stated:

> The increased number and revised format of the health messages reflect the strong consensus of the public health community that the serious health hazards of using these products be more fully and effectively communicated to consumers. Support for these changes has been manifested by hundreds of letters and a number of submissions by public health groups highly critical of the initial regulatory requirements under this legislation as well as a number of Departmental studies indicating their need.

96 These are clear indications that the government passed the regulations with the intention of protecting public health and thereby furthering the public good. Further, both parties agree that past studies have shown that health warnings on tobacco product packages do have some effects in terms of increasing public awareness of the dangers of smoking and in reducing the overall incidence of smoking in our society. The applicants, however, argued strenuously that the government has not shown and cannot show that the specific requirements imposed by the impugned regulations have any positive public benefits. We do not think that such an argument assists the applicants at this interlocutory stage.

97 When the government declares that it is passing legislation in order to protect and promote public health and it is shown that the restraints which it seeks to place upon an industry are of the same nature as those which in the past have had positive public benefits, it is not for a court on an interlocutory motion to assess the actual benefits which will result from the specific terms of the legislation. That is particularly so in this case, where this very matter is one of the main

issues to be resolved in the appeal. Rather, it is for the applicants to offset these public interest considerations by demonstrating a more compelling public interest in suspending the application of the legislation.

98 The applicants in these cases made no attempt to argue any public interest in the continued application of current packaging requirements rather than the new requirements. The only possible public interest is that of smokers' not having the price of a package of cigarettes increase. Such an increase is not likely to be excessive and is purely economic in nature. Therefore, any public interest in maintaining the current price of tobacco products cannot carry much weight. This is particularly so when it is balanced against the undeniable importance of the public interest in health and in the pre vention of the widespread and serious medical problems directly attributable to smoking.

99 The balance of inconvenience weighs strongly in favour of the respondent and is not offset by the irreparable harm that the applicants may suffer if relief is denied. The public interest in health is of such compelling importance that the applications for a stay must be dismissed with costs to the successful party on the appeal.

Applications dismissed.

Solicitors of record:
Solicitors for the applicant RJR — MacDonald Inc.: *Mackenzie, Gervais* , Montreal.
Solicitors for the applicant Imperial Tobacco Inc.: *Ogilvy, Renault* , Montreal.
Solicitors for the respondent: *Côté & Ouellet* , Montreal.
Solicitors for the interveners on the application for interlocutory relief the Heart and Stroke Foundation of Canada, the Canadian Cancer Society, the Canadian Council on Smoking and Health, and Physicians for a Smoke-Free Canada: *McCarthy, Tétrault* , Toronto.

2001 CAF 387, 2001 FCA 387
Federal Court of Canada — Appeal Division

Soowahlie Indian Band v. Canada (Attorney General)

2001 CarswellNat 2964, 2001 CarswellNat 5095, 2001 CAF 387,
2001 FCA 387, 110 A.C.W.S. (3d) 1123, 209 D.L.R. (4th) 677

Chief Larry Commodore, Chief of the Soowahlie Indian Band, on behalf of himself and all other members of the Soowahlie Indian Band, and on behalf of himself and all other members of the Sto:lo Aboriginal Nation; Chief David Sepass, Chief of the Skowkale Indian Band, on behalf of himself and all other members of the Skowkale Indian Band, and on behalf of himself and all other members of the Sto:lo Aboriginal Nation; Chief Joe Hall, Chief of the Tzeachten Indian Band, on behalf of himself and all other members of the Tzeachten Indian Band, and on behalf of himself and all other members of the Sto:lo Aboriginal Nation; Chief Frank Malloway, Chief of the Yakweakwioose Indian Band, and Chief Dalton Silver, Acting Chief of the Yakweakwioose Indian Band, and on behalf of themselves and all other members of the Sto:lo Aboriginal Nation (Appellants) and Attorney General of Canada (Respondent) and City of Chilliwack (Intervener)

Rothstein J.A., Noël J.A. and Malone J.A.

Heard: December 10, 2001
Judgment: December 11, 2001
Oral reasons: December 11, 2001
Docket: A-656-01

Proceedings: affirmed *Soowahlie Indian Band v. Canada (Attorney General)* ((2001)), 2001 CarswellNat 2721, 2001 CarswellNat 3267, 2001 FCT 1334, 2001 CFPI 1334 (Federal Court of Canada — Appeal Division)

Counsel: *Louise Mandell*, *Clarine Ostrove*, for Appellant
John Hunter, *Michael Stephens*, for Respondent
Jennifer Chow, *Malcolm Palmer*, for Respondent
Reece Harding, *Sukhbir Manhas*, for Intervener

552

***Rothstein J.A.*:**

ROTHSTEIN J.A.

1 This is an appeal from a decision of Nadon J. dismissing the appellants' motion for, what is, in substance, an interlocutory injunction enjoining the Government of Canada from transferring a 62 hectare portion of the former Canadian Forces base at Chilliwack to the Canada Lands Company. The Canada Lands Company is a non-agent Crown corporation devoted to developing federal lands and disposing of them. The transfer is to take place on December 14, 2001 and this appeal has therefore been brought and heard on an expedited basis.

2 The underlying proceeding, as originally framed, was a judicial review brought by the appellants on July 14, 2000 asking the Trial Division of this Court to declare invalid or unlawful, a June 16, 2000 Order in Council authorizing the transfer of the subject lands to the Canada Lands Company. On application of the respondent, the judicial review was converted to an action pursuant to section 18.4 of the *Federal Court Act* by Rouleau J. on January 29, 2001. The appellants are appealing that decision and the appeal is to be heard in Vancouver on January 28, 2002. No further steps have been taken in the Trial Division.

3 The basis for Nadon J.'s dismissal of the interlocutory injunction application was that the appellants did not establish that they would suffer irreparable harm from the transfer of the subject lands. We have concluded that there is no basis for this Court to interfere with Nadon J.'s discretionary decision and indeed, based on the arguments made before this Court, we agree with his reasons for dismissing the motion.

4 The appellants allege that the land is reserve land or is subject to aboriginal title. The respondent accepts that the appellants have raised a serious issue in respect of aboriginal title. The arguments therefore centre on irreparable harm and balance of convenience.

5 The substance of the appellants' irreparable harm argument can be briefly stated. They say they were the historical owners of the land, that in the past the land was a place for meeting and for travel routes, that hunting and gathering took place on the land and that fishing took place nearby. Accordingly, they have an historical connection to the land and if it is disposed of, that connection will be lost. Although the land was occupied by the Canadian Forces, they say they have always claimed their right to the land.

6 Under section 35 of the *Indian Act*, the Crown is empowered to expropriate Indian reserve land. The fact that land is reserve land, even taken together with the historical significance of the land to an Indian band, is not sufficient to preclude an expropriation. The issue is only one of proper compensation. Even when the Crown wrongly disposes of reserve land, the claim is for breach of fiduciary duty and the remedy is damages. In this case, the government will dispose of

land that it owns and in respect of which there is only a claim to reserve status or aboriginal title. As in the case of expropriation or wrongful disposition of reserve land, the remedy here, if the appellants are successful, would be damages.

7 The appellants have demonstrated no special circumstances relating to the land. They say they require the land to sustain themselves. The historical connection which the appellants claim is unrelated to their anticipated use of the land and there is no evidence as to why this particular land is required having regard to their anticipated use. The appellants have not established a case of irreparable harm. It is sufficient to conclude that if, as the appellants allege, the disposition of the land constitutes a breach of a fiduciary duty by the respondent, the Court will be in a position to order damages or to fashion such other remedy as may be suitable based on the evidence before it.

8 Nadon J. raised, but did not find it necessary to deal with, the balance of convenience in his reasons. We are satisfied on the evidence that the balance of convenience favours the respondent. The appellants made a number of arguments. One is that the appellants and the residents of Chilliwack are neighbours and permitting the disposition to proceed will upset that relationship. However this argument cuts both ways. The City of Chilliwack, on behalf of its citizens, intervened to oppose the interlocutory injunction application.

9 A second argument is that the respondent was proceeding with the disposition notwithstanding that this case is still pending in the Court. A disposition in these circumstances would, they say, undermine the integrity of the judicial review application as it would render a decision moot. However, it appears that the appellants have taken no steps to expedite proceedings or, indeed, to move the matter along at all. They are not in a strong position to make this argument.

10 Third, the appellants say the disposition should await judgment by the Supreme Court of Canada in an unrelated case which they say could shed light on the parties' rights in this case. However, there are many uncertainties both as to when the Supreme Court might render its decision, but more importantly, whether it would resolve the present matter. This is not a compelling argument for granting an injunction.

11 A further argument pertains to land claims negotiations. However, the process and outcome and their bearing on the present litigation is unclear. Little weight can be accorded to this consideration.

12 The respondent and the City of Chilliwack say there are important public uses for the land in question. One important use is the provision of a school which is needed because of current overcrowding in the area. Doubt as to the future status of the land has inhibited investment to upgrade a recreational centre and building to be used for a library that are located on the land. The City also says there will be residential construction, an increase to the City's tax base from development of the land, payment to the City of $7.5 million by Canada Lands Company for development of off site services and, from a planning perspective, integration of the land into

the community. These are all balance of convenience considerations that weigh in favour of the respondent.

13 It is also relevant that the appellants have not provided an undertaking as to damages, which is normal in interlocutory injunction proceedings. The failure to provide an undertaking is not always fatal to an applicant. Counsel pointed out that the appellants are financially unable to provide such an undertaking. While that may be understandable, this still is a factor that favours a respondent in a balance of convenience assessment. See *Lavoie v. Canada (Minister of the Environment)*, [1998] F.C.J. No. 1213 (Fed. T.D.)at paragraph 14 per Hugessen J.

14 We have no hesitation concluding the balance of convenience favours the respondent.

15 The appeal will be dismissed with costs to the respondent and intervener.

Appeal dismissed.

2011 BCSC 1675
British Columbia Supreme Court

Taseko Mines Ltd. v. Phillips

2011 CarswellBC 3478, 2011 BCSC 1675, [2011] B.C.J. No. 2350, [2012] 3 C.N.L.R. 298, [2012] B.C.W.L.D. 1018, [2012] B.C.W.L.D. 1026, [2012] B.C.W.L.D. 1129, [2012] B.C.W.L.D. 1155, [2012] B.C.W.L.D. 1156, [2012] B.C.W.L.D. 1157, [2012] B.C.W.L.D. 1158, 212 A.C.W.S. (3d) 1025, 64 C.E.L.R. (3d) 84

Taseko Mines Limited (Plaintiff) and Emery Phillips, Marie Williams aka Marie William, Marilyn Baptiste, John Doe #1, John Doe #2 and John Doe #3 (Defendants)

Marilyn Baptiste, on her own behalf and on behalf of all other members of the Xeni Gwet'in First Nation Government and the Tsilhqot'in Nation (Petitioner) and Her Majesty the Queen in Right of the Province of British Columbia, the Chief Inspector of Mines, the District Manager Resource Operations, Cariboo-Chilcotin, and Taseko Mines Limited (Respondents)

Grauer J.

Heard: November 28, 2011 - December 1, 2011
Judgment: December 2, 2011
Docket: Vancouver S117685, 114556

Counsel: Joan Young, Melanie Harmer for Taseko Mines Limited
Jay Nelson, Dominique Nouvet, M. Boulton (A/S) for Emery Phillips, Marie Williams aka Marie William, Marilyn Baptiste on her own behalf and on behalf of all other members of the Xeni Gwet'in First Nation Government and the Tsilhqot'in Nation
Erin Christie for Her Majesty the Queen in Right of the Province of British Columbia, Chief Inspector of Mines and the District Manager Resource Operations, Cariboo-Chilcotin

Grauer J. **(orally):**

Introduction

1 Taseko Mines Limited, the plaintiff in Vancouver Action No. S117685, and Marilyn Baptiste, a defendant in that action and petitioner in Victoria Action No. 114556, apply for competing interim injunctions, each restraining the other in relation to a program of exploration work in an area of the traditional territory of the Tsilhqot'in Nation.

2 For a period approaching 20 years, Taseko has pursued the development of a major open pit gold and copper mine in the Cariboo-Chilcotin area of British Columbia, known as the Prosperity Project. The resource is said to be one of Canada's largest known undeveloped gold and copper deposits. To this end, Taseko has acquired various mineral claims and a mining lease, all lawfully granted under the *Mineral Tenure Act*, R.S.B.C., 1996, c. 292.

3 The proposed Prosperity mine is potentially a billion-dollar project. Should it proceed, its impact on both the economy and the environment will be unquestionably substantial.

4 This proceeding is not about whether the project should or will proceed.

5 The location of the proposed mine is in an area over which the Tsilhqot'in Nation assert aboriginal title, and within which they claim aboriginal rights. In *Xeni Gwet'in First Nations v. British Columbia*, 2007 BCSC 1700 (B.C. S.C.), the appeal from which has been heard but not decided, the area is described as the "Eastern Trapline Territory". Mr. Justice Vickers concluded that the Tsilhqot'in had failed to prove aboriginal title to the Eastern Trapline Territory, but had established aboriginal rights throughout the area. Among that territory's distinguishing features are Fish Lake (Teztan Biny), Little Fish Lake (Y'anah Biny), and their surrounding area, the Nabas.

6 In its initial iteration, the Prosperity Project failed to satisfy a Review Panel established by the Federal Minister of the Environment. Among its perceived flaws were the required sacrifice of Fish Lake, Little Fish Lake and the Nabas.

7 The review process included public hearings in the Cariboo-Chilcotin area in the spring of 2010, in which the Tsilhqot'in Nation participated. The Panel's Report, described by some as "scathing", was issued on July 2, 2010. The Federal Government's response came on November 2, 2010:

> Taking into consideration the Report of the Panel and the implementation of any mitigation measures that the RAs consider appropriate, and in weighing the socio-economic benefits and potential significant adverse environmental effects, the Government of Canada has determined that the significant adverse environmental effects cannot be justified in the circumstances.
>
> The Government of Canada wishes to see resource projects developed, however, it must balance the economic benefits of projects with responsible resource development. The Government is not opposed to the mining of the Prosperity ore body, however, it cannot justify providing the authorizations that would enable the Project to be carried out as proposed. The Government notes that this decision does not preclude the proponent from submitting a project proposal that includes addressing the factors considered by the panel.

8 Taseko Mines did just that. The rise in the prices for gold and copper, and the economic outlook, allowed Taseko to develop a viable proposal that eliminated the most significant adverse environmental effects of the original project; in particular, the destruction of Fish Lake. This redesigned proposal, named the "New Prosperity Project", would add $300 million to the projected development cost, but this was justified by the increase in commodity prices. Accordingly, in August of 2011, Taseko submitted a revised comprehensive project description for the New Prosperity Project to the Canadian Environmental Assessment Agency.

9 Since then, Taseko has obtained two provincial permits that allow it to carry out a program of exploration designed principally to obtain geological information of relevance to the engineering of the new project. Taseko expects that this information will assist in the environmental assessment of the New Prosperity Project, particularly in relation to the environmental impact of the changes that were made to preserve Fish Lake. These two permits were a Notice of Work (NOW) approved by the Senior Inspector of Mines, and an Occupant Licence to Cut and Remove Timber (OLC) approved by the District Manager Resource Operations, Cariboo-Chilcotin.

10 Taseko's attempts to embark on the program covered by these permits were stymied by the refusal of Marilyn Baptiste to recognize their authority to proceed into what she described as Tsilhqot'in territory. In a blockade that appeared to me to be more moral than physical, but was nonetheless effective, she declined to let Taseko's convoy of trucks and equipment pass. To its credit, Taseko turned its convoy around and left, avoiding any action that might escalate the confrontation.

11 Marilyn Baptiste is the elected Chief of the Xeni Gwet'in, one of the six bands that constitute the Tsilhqot'in Nation. Within the Tsilhqot'in Nation, the Xeni Gwet'in have a particular responsibility for the stewardship of that portion of Tsilhqot'in traditional territory that includes Fish Lake, Little Fish Lake and the Nabas.

12 In the circumstances, Taseko applies for an injunction preventing Chief Baptiste and any others with notice of the order from obstructing, impeding or restricting its access to the area where its program of exploration is to be carried out.

13 The Xeni Gwet'in and the Tsilhqot'in, meanwhile, through Chief Baptiste, had filed a petition seeking judicial review of the decisions to issue the permits required by Taseko to carry out this program. I will refer to them collectively as the petitioners. They seek an injunction preventing Taseko from proceeding with its exploration program until they have had an opportunity to have their application for judicial review heard and determined.

14 When the Taseko injunction application came before me on November 18, 2011, I adjourned it to this week, and ordered that it be heard together with the petitioners' injunction application. That has now taken place.

15 For the reasons that follow, I have decided that the petitioners are entitled to the interim injunction they seek, subject to terms to be discussed. In these circumstances, I can find no basis to support the granting of the injunctive relief sought by Taseko Mines.

Background

16 The bands of the Tsilhqot'in Nation vigorously opposed the original Prosperity Project, and put a great deal of blood, sweat and tears into educating the Federal Review Panel about their concerns, and how the project would impact them. This was an exhausting exercise, and they were dismayed by the project's resurrection as the New Prosperity mine. From their perspective, the revised project did not adequately address the factors considered by the Federal Review Panel, but continued to represent significant adverse environmental effects that remained unjustifiable.

17 In the circumstances, the Tsilhqot'in National Government, through Chief Baptiste and others, entered into a process of consultation with the Federal Government in the hope of persuading it to reject the New Prosperity Project without the need for holding another environmental assessment with all the expense and effort that that would entail. It was their position that the revised proposal was based on an alternate mine plan that the previous Federal Review Panel had already considered and rejected.

18 On August 30, 2011, the Canadian Environmental Assessment Agency wrote to the Tsilhqot'in National Government to advise that it had accepted the Project Description for the New Prosperity Gold-Copper Mine Project Proposal. The agency indicated that it had 90 days from August 9, when the proposal was received, within which to determine whether to commence a comprehensive study of the proposed project. That determination was to be made by November 7, 2011. The Agency then discussed meeting with the Tsilhqot'in National Government for information gathering and further discussion of their views.

19 The parties appear to have had a materially different appreciation of the significance of this process. Taseko, it seems, assumed that all that remained to be determined was by which route the Agency's environmental assessment would proceed. The Tsilhqot'in National Government, on the other hand, understood that the agency would be determining whether to proceed with an environmental assessment at all, and if so, by what route. In short, unlike Taseko, the Tsilhqot'in understood that the possibility remained that the project would be rejected at that point, without further assessment.

20 I accept the parties' assertions as to their respective states of mind. The affidavit evidence before me supports the conclusion that the understanding of the Tsilhqot'in was likely the correct one.

21 In anticipation of this process, Taseko wrote to the BC Ministry of Energy and Mines on May 11, 2011, stating as follows:

> Please find enclosed a Notice of Work (NOW) application for Taseko's proposed 2011 exploration drilling and test pitting for the Prosperity Gold-Copper Project.
>
> In 2011, we intend to conduct exploration activities to provide information supporting the detailed engineering of the project. The program includes:
>
> • Approximately 59 test pits to inform detailed engineering of new tailings storage facility (TSF) and ore stockpile foundations;
>
> • 10 geophysical lines along the proposed main, west and south embankments of the TSF;
>
> • Approximately 8 geotechnical drill holes of approximately 50 to 75 m in depth to inform detailed engineering of the new TSF embankments;
>
> • Approximately 10 diamond drill holes of up to roughly 250 m in depth within the pit area to collect samples for confirmatory metallurgical work to be performed this winter; and,
>
> • Approximately 23.5 km of exploration trail required to access exploration sites.

22 The letter went on to indicate that the total disturbance of the 2011 program was expected to be 13.1 ha, including 12 ha due to clearing timber and brush for exploration trails and geophysical lines. The timber volume was estimated at 1,048 m^3, most of which was attributed to trail clearing. Reclamation of the trails would be accomplished by pulling wood waste back over them to discourage recreational and ATV use, and breaks in the debris would be provided to allow for cattle and horse travel. It was expected that the work would begin August 1, 2011 and would require three months to complete.

23 On June 23, 2011, Ms. Bev Wassenaar, Land and Resource Specialist, Resource Authorizations, First Nation Consultation Coordination, Ministry of Forests, Lands and Natural Resource Operations, wrote to Chief Baptiste to advise of the notice of work application, attaching a copy. Ms. Wassenaar acknowledged that the proposed work was within an area of proven aboriginal rights, and advised that she would be the consultation contact for the NOW application, and the related occupant licence to cut. She went on to say:

> To support the consultation process for this distinct and separate exploration phase of the overall revised Project proposal, the province has begun to conduct an initial analysis of the potential impacts of this exploration on known Aboriginal rights and Aboriginal Interests of the Tsilhqot'in Nation in the area of the proposed work. In doing that the province has

> also proposed some preliminary mitigations in relation to the identified potential impacts from exploration.... The attached initial assessment of potential impacts to known Aboriginal Rights and Interests relates only to the specific activities presented in the NOW application and its related Occupant License to Cut and outlines draft mitigation options and proposed permit conditions for you to consider. Your contribution to the development and refinement of this draft table is being requested.

24 Ms. Wassenaar went on to request comments in the next 30 days, and indicated a desire to set up a meeting with appropriate representatives from the province, Xeni Gwet'in and Taseko.

25 A response to this letter came from counsel representing the petitioners addressed to the Minister of Forests, Lands and Natural Resource Operations and copied to Ms. Wassenaar. This letter outlined their opposition to the project as a whole, to the notice of work, and to any other steps being taken to further the development of the mine in an area of "profound cultural importance for the Tsilhqot'in people".

26 The letter also raised particular objections to proceeding with the consideration of the notice of work at that time. This was said to be premature given that the Federal Government had yet to decide whether to proceed further in the regulatory process. Consequently, it was suggested,

> • the NOW's extensive drilling and roadwork with its impact upon Tsilhqot'in established rights, culture and traditional use, should be avoided pending that decision;
>
> • the Tsilhqot'in ought not to be put to the further effort and expense of dealing with the application until it was decided that the project would proceed to further stages of review; and
>
> • the Tsilhqot'in were already involved in a federal consultation process, and had neither the manpower nor the economic resources to deal with a provincial consultation process that may prove to be unnecessary.

27 In this letter, and the exchanges of correspondence that succeeded it, three significant areas of disagreement emerged. The first was the issue of prematurity as just discussed. Ms. Wassenaar's response was that the relevant decision-makers were by statute required to consider applications such as this and to make decisions.

28 The second was the assessment of both the required degree of consultation and the potential impact of the proposed NOW activities on proven aboriginal rights. Ms. Wassenaar assessed the former at the middle range, and the latter as low. The Tsilhqot'in position was that they were entitled to a deep level of consultation in the circumstances, and that the impact upon their aboriginal rights was high.

29 This dispute arose in part from the third area: Ms. Wassenaar limited her assessment to the specific activities presented in the NOW and the OLC, contrary to the Tsilhqot'in position that the

assessment should take into account the cumulative effect of this exploration program on top of previous programs, together with the potential impact of the full mining operation towards which this program was a step. Both positions find some support in the case law.

30 On September 22, 2011, Ms. Wassenaar wrote to the Tsilhqot'in National Government:

> As stated, Statutory Decision-Makers are required to consider all relevant information provided to them including points you made requesting deferral of the NOW decision until after the CEAA (Canadian Environmental Assessment Agency) decision. In addition to the timing of the CEAA decision, the decision-maker will also need to balance factors such as the restrictive timing window Taseko Mines Limited (TML) will have with regard to their ability to be able to conduct exploration activity in the fall of 2011. As I indicated previously, my summary and recommendations on this will be provided to the decision makers September 29, 2011. A decision by each of the Statutory Decision-Makers will follow. The decision-makers can choose to approve or refuse to issue the authorizations based in part on the information included in my report. If the Decision-Maker concludes that further consultation or information is needed prior to making a decision, then these further steps would occur.

31 Ms. Wassenaar went on to reiterate an offer to meet, and advised that any additional comments received prior to September 29, 2011, would be reflected in her recommendations to the decision-makers.

32 At 5:43 PM on September 29, 2011, Mr. J. P. Laplante, Mining, Oil and Gas Manager for the Tsilhqot'in National Government, sent an e-mail in response to Ms. Wassenaar's letter and a subsequent voicemail requesting a meeting. The e-mail reiterated its opposition to "the continued fragmentation and impacts to this sensitive area from the proposed exploration program", and confirmed the Tsilhqot'in's interest in meeting with the statutory decision-makers prior to any permits being issued. The position was restated that no permits should be issued until meaningful consultation and accommodation occurs, including a meeting with the Minister, and responses to various requests that were previously made.

33 On September 29, 2011, the Inspector of Mines issued a *Mines Act*, R.S.B.C. 1996, c. 293, permit authorizing the activities detailed in the notice of work. The Tsilhqot'in were advised of this on October 4, 2011.

34 On October 7, 2011, Chief Baptiste and other representatives of the Tsilhqot'in National Government and its bands met with Mike Pedersen, the Ministry of Forests decision-maker with respect to the Occupant Licence to Cut Timber. Mr. Pedersen had not yet rendered his decision. Mr. Pedersen had not reviewed the relevant documentation, in order to keep an open mind. As a result, he was unable to answer questions concerning what support there was for the need to do some or all of the work at that time. He noted that his responsibility was limited to the cutting permit; the justification for the trails would be dealt with through the Ministry of Mines.

35 The Occupant Licence to Cut Timber was approved and issued on October 12, 2011.

36 On October 13, 2011, the Tsilhqot'in National Government wrote to Taseko concerning the proposed 2011 exploration program and the approval of the NOW application, stating:

> TNG has still not received any rationale for the decision. At this stage, TNG considers the authorization to be in breach of the Crown's duties of consultation, and an unjustified infringement of its aboriginal rights, and accordingly unconstitutional and unlawful. We advise you not commence any activities on the basis of such an authorization. We further advise that any reliance placed by [Taseko] on such an authorization is at the company's risk, as TNG is presently reviewing its options for response, including legal challenge.

37 On November 7, 2011, the Canadian Environmental Assessment Agency issued its decision that the New Prosperity Project would be referred to a Review Panel for assessment. The project accordingly remained alive.

38 The Ministry of Energy, Mines and Petroleum Resources' reasons for its September 29 decision approving the exploration program (the rationale referred to in the Tsilhqot'in letter of October 13) were set out in a letter dated October 10, 2011. On the evidence, however, that letter was signed on November 4, mailed on November 7, and reviewed at the Tsilhqot'in office following the long weekend on November 14, 2011, after the events on the ground that led to Taseko's application had begun to unfold.

39 In the meantime, the petition for judicial review had been filed on November 10, 2011, and the petitioners' application for an interim injunction was filed on November 14, the same date as the filing of Taseko's Notice of Civil Claim.

Discussion

1. The Petitioners' Application

40 I propose to assess the petitioners' application for an injunction first. This is because if they are entitled to the relief they seek, being an order restraining Taseko from proceeding with the program covered by the permits at issue in the application for judicial review, then the basis for Taseko's application arguably disappears. Conversely, if they are not entitled to injunctive relief, then Taseko's application could be considered in a more discrete context.

a. The Test

41 In British Columbia, the test for interlocutory injunctions is the two-part test established in *British Columbia (Attorney General) v. Wale* (1986), 9 B.C.L.R. (2d) 333 (B.C. C.A.), at 345, aff'd

[1991] 1 S.C.R. 62 (S.C.C.), and described in *Canadian Broadcasting Corp. v. CKPG Television Ltd.* (1992), 64 B.C.L.R. (2d) 96 (B.C. C.A.), at 101:

> The two-pronged test is this: "first, the applicant must satisfy the court that there is a fair question to be tried as to the existence of the right which he alleges and a breach thereof, actual or reasonably apprehended. Second, he must establish that the balance of convenience favours the granting of an injunction."

See also *Expert Travel Financial Security (E.T.F.S.) Inc. v. BMS Harris & Dixon Insurance Brokers Ltd.*, 2005 BCCA 5 (B.C. C.A.) and *Canadian Forest Products Ltd. v. Sam*, 2011 BCSC 676 (B.C. S.C.).

42 The threshold for the first part, whether there is a fair question to be tried, is relatively low and does not require the applicant to prove a strong *prima facie* case: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.) at para. 49.

43 Weighing the balance of convenience as required by the second part will, of course, include a consideration of irreparable harm, and the question of who will suffer the greater harm from the granting or refusal of the interlocutory injunction pending a determination on the merits: *RJR-MacDonald Inc.* at para. 62.

b. Is there a fair question to be tried?

44 The question to be tried is whether, in its conduct of the process that led to granting the NOW and OLC approvals, the Crown breached its duties of consultation owed to the Xeni Gwet'in and Tsilhqot'in Nation.

45 That such duties were owed is beyond doubt. That the Crown in fact engaged in a process of consultation and accommodation is also beyond doubt. The question is whether it did so sufficiently in the circumstances.

46 The petitioners point out that this is a case in which both the entitlement to aboriginal rights and the importance of the lands in question to the Xeni Gwet'in and Tsilhqot'in Nation have been established and recognized, through both the *Tsilhqot'in Nation* decision and the previous environmental assessment process. They argue that, in all of the circumstances, the scope of the duty required here was deep consultation, as discussed in *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 (S.C.C.). They assert further that the Crown fell short of its consultation obligations in a number of ways including: rushing to approval without any need to do so and imposing arbitrary deadlines; limiting its consideration of potential impacts to the 2011 program in isolation from the cumulative impact of years of exploration work, and the future impact of a full mining operation; failing to consider cultural impacts including impact on the exercise of aboriginal rights, as opposed to the environment alone; carrying out its perceived

duties of consultation on the basis of an erroneous assessment of the scope of those duties; failure to provide necessary information; and failure to provide timely notice of its reasons.

47 The Crown and Taseko submit that even though the threshold for this test is low, the petitioners fail to cross it. They argue that the Crown was correct to focus on the effect of the work to be performed in this particular program, relying on *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2010 SCC 43, [2010] 2 S.C.R. 650 (S.C.C.). They contend that given the limited nature of this work, the required scope of consultation fell at the lower end of the *Haida* spectrum. They assert that the permits, having validly issued, must be assumed lawful until proven otherwise, relying on *Moulton Contracting Ltd. v. British Columbia*, 2011 BCCA 311, 20 B.C.L.R. (5th) 35 (B.C. C.A.). They maintain that the petitioners could have started their challenge much sooner, and, most importantly, failed in their own obligation to participate in the consultation process in a meaningful way. Instead, they held fast to their opposition to anything that might advance the mine, and waited until Taseko had vested rights before raising their challenge.

48 I am satisfied that the petitioners have established that there is a fair question to be tried. I am unable to conclude on the evidence before me (which was not the entire consultation record) that the Xeni Gwet'in and Tsilhqot'in Nation failed in their own consultation obligations, particularly given their limited resources and all with which they were having to contend. Moreover, this is not the place to determine whether the Crown's focus on the work to be performed was appropriate, as suggested in *Rio Tinto*, or whether the circumstances are such that *Rio Tinto* should be distinguished, as our Court of Appeal concluded was the case in *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247 (B.C. C.A.). Questions such as the appropriate focus, and the scope of consultation required, must be determined at the hearing of the petition for judicial review. For my part, I have no difficulty in concluding that the petitioners have established a serious case to be tried. The first part of the test, then, has been met.

c. Does the balance of convenience favour an injunction?

49 Taseko and the Crown argue that the balance of convenience strongly favours the denial of the petitioners' application for injunctive relief, and, it follows, the granting of an injunction to Taseko.

50 They point to a number of factors. These include the following submissions:

a) the status quo favours Taseko: it is the holder of permits which must be presumed valid until proven otherwise, and therefore is entitled to go about its lawful business;

b) preventing Taseko from going about its lawful business of itself constitutes irreparable harm;

c) delaying the process of gathering information for the environmental assessment constitutes irreparable harm to Taseko; time is an asset, and the redesign of the project, which would involve an additional expenditure of $300 million, is based on time-sensitive conditions;

d) even if the petitioners can successfully establish that the Crown had breached its duties of consultation, it does not follow that the permits would be quashed.

e) Taseko continues to incur ongoing expense as a result of the delay, and has lost the availability of expertise it had lined up but has been obliged to let go because of this proceeding;

f) there is no prospect of recovering any losses from the Xeni Gwet'in and Tsilhqot'in Nation, thereby once again giving rise to irreparable harm;

g) the petitioners have given no undertaking in damages, disentitling them to an injunction in the circumstances, or at least constituting a significant factor in weighing the balance of convenience;

h) the potential loss of the procedural right of consultation at the appropriate level that might flow from the failure to grant an injunction to the Xeni Gwet'in and Tsilhqot'in Nation does not in law constitute irreparable harm. That harm must arise in relation to their substantive rights;

i) the Xeni Gwet'in and Tsilhqot'in Nation have been unable to demonstrate satisfactorily any harm to their substantive rights (that is, their aboriginal rights) from this particular scope of work, and the ultimate development of the mine itself remains far too speculative to be taken into account;

j) the actual harm flowing from the permitted program is minimal, consisting of small drill holes and shallow test pits that will be refilled and recovered, the cutting of timber that is largely pine beetle kill, and the clearing of trails that will be subject to reclamation, all in an area that is no longer pristine, having been subjected to various mining related activities in the past;

k) it is in the public interest that Taseko have available to it all of the best information to submit to the environmental assessment process; and

l) having illegally prevented Taseko from exercising its lawful rights, the petitioners do not come to court with the clean hands required of a party seeking the equitable remedy of injunctive relief, and this should at least be taken into account in assessing the balance of convenience.

51 I do not propose to deal with each of these points individually. Rather, I will endeavour to explain as best I can why, in my view, the balance of convenience favours the petitioners. I turn first to the question of delay.

52 I think it clear on the evidence that Taseko indeed pursued its permits with dispatch. It began the application process before it even submitted the New Prosperity Project to the Canadian Environmental Assessment Agency, initially proposing to carry out the work between the beginning of August and the end of October, 2011.

53 That target could not be achieved. The "timing window" referred to by Ms. Wassenaar in her letter of September 22, 2011, evaporated for reasons that had little to do with the petitioners, who remained mystified as to why there could not be a further delay at least to determine from the environmental assessment agency's pending decision whether there was any point to the exercise. Taseko never took the position that it wanted to proceed with the program regardless of whether the project would be accepted for environmental assessment. Yet no reason was ever given by either Taseko or the Crown for proceeding with the timetable the Crown imposed, other than the fact of Taseko's application

54 Taseko originally took the position that the Federal Government established a 12-month window for the environmental assessment process so that any delay irreparably harmed its ability to fulfill its obligations within that mandated time. On the evidence, however, this position proved to be incorrect; the 12-month period does not include the time it would take Taseko to respond to information requests, or the time that it would take Taseko to prepare and submit its environmental impact studies.

55 Taseko then took the position that time is still an asset, and as it is in the business of developing mines, delay in this process constitutes irreparable harm. Yet Taseko has pointed to its efforts over 20 years to bring the Prosperity Project to fruition. One wonders how irreparable a few more months would be? Its new project is based upon long-term forecasts, not short-term market fluctuations. That does not mean that delay is not harmful, and I accept that delay is contrary to Taseko's interests. What does follow is that the delay weighs less heavily in the balance.

56 I next turn to the question of what harm alleged by the petitioners is relevant. Taseko and the Crown rely on *Sunshine Logging (2004) Ltd. v. Prior*, 2011 BCSC 1044 (B.C. S.C.), for the proposition that "the loss of the constitutional right ... to be consulted does not itself amount to irreparable harm" (para.30). Mr. Justice Willcock went on, however, to reflect at paragraph 34 that "it ought not to be said that irreparable harm arises in every case where there is a failure to consult". What he makes clear in paragraph 32 is that while a failure to consult need not without more signify irreparable harm, it nevertheless remains to be weighed in determining the balance of convenience.

57 In my view, it follows from that case and many others that in weighing the balance of convenience, it is proper to take into account the fact that if the injunction does not issue, the petitioners will have lost their asserted right to be consulted at a deep level in relation to the exploration program, and their petition will become moot. Granting the injunction, on the

other hand, will not deprive Taseko of the opportunity to obtain the geological and engineering information it requires, except to the extent that their proposed program is properly curtailed by the process of appropriate consultation. If the petitioners are ultimately unsuccessful, and the permits upheld, then Taseko will be behind by a few months, but in the overall scheme of its billion-dollar project, I consider that to be a real but relatively minor inconvenience.

58 Like Dillon J. in the *Canada Forest Products* case at para. 75, I consider the words of MacPherson J.A. in *Frontenac Ventures Corp. v. Ardoch Algonquin First Nation*, 2008 ONCA 534 (Ont. C.A.), to be apropos the issue we are considering here:

> [46] Having regard to the clear line of Supreme Court jurisprudence, from *Sparrow* to *Mikisew*, where constitutionally protected aboriginal rights are asserted, injunctions sought by private parties to protect their interests should only be granted where every effort has been made by the court to encourage consultation, negotiation, accommodation and reconciliation among the competing rights and interests. Such is the case even if the affected aboriginal communities choose not to fully participate in the injunction proceedings.
>
> . . .
>
> [48] Where a requested injunction is intended to create "a protest-free zone" for contentious private activity that affects asserted aboriginal or treaty rights, the court must be very careful to ensure that, in the context of the dispute before it, the Crown has fully and faithfully discharged its duty to consult with the affected First Nations: see Julia E. Lawn, "The John Doe Injunction in Mass Protest Cases" (1998) 56 U.T. Fac. L. Rev. 101.

59 This leads me to the public interest aspect of the balance of convenience. I fully accept Taseko's submission that it is in the public interest for Taseko to obtain the best available information for the purpose of informing the environmental assessment process. I do not, however, see that interest as being significantly at risk should the petitioners obtain their injunction, for the reasons just discussed.

60 On the other hand, it is also very much in the public interest to ensure that, in circumstances such as these, reconciliation of the competing interests is achieved through the only process available, being appropriate consultation and accommodation. Those duties, of course, attach to the Crown. Nevertheless, from the perspective of Taseko, that process is a cost and condition of doing business mandated by the historical and constitutional imperatives that are at once the glory and the burden of our nation. Only by upholding the process can reconciliation be promoted; without reconciliation, nothing is accomplished. This interest, in my view, is at risk should the injunction be denied, and weighs heavily in the balance of convenience.

61 I observe that the importance of that interest in this case is magnified by the reality that the petitioners and Taseko will be involved for the foreseeable future in an ongoing relationship with

the Crown in the middle. In these circumstances, it seems to me that the public interest in ensuring that the process of consultation and accommodation is set on a proper footing is particularly high.

62 I turn next to the question of actual damage. Beside the fact of delay, Taseko points to the expense to which it has been put in marshalling its contractors and equipment only to have to release them all, without any assurance of ongoing availability, when its access to the work area was denied. We are speaking of thousands, and perhaps tens of thousands of dollars, and I accept that there is little chance of recovering such losses from the petitioners should the petition for judicial review ultimately fail. I further accept that this constitutes irreparable harm. At the same time, it must be viewed in the context of the hundreds of millions of dollars that Taseko is prepared to spend on this project, and by my comments above as to the cost of doing business. Moreover, there is no evidence here of widespread unemployment or damage to the community that would result from the injunction as there was in cases such as *Lax Kw'Alaams Indian Band v. British Columbia (Minister of Forests)*, 2004 BCCA 392 (B.C. C.A.).

63 Turning to the potential effect of the program on the aboriginal rights of the petitioners, I bear in mind that the result of a successful challenge by the petitioners is on balance unlikely to eliminate the work altogether, though it may reduce it or effect an improved program of mitigation, or both.

64 Taseko submits that much of the harm asserted by the petitioners overstates the actual impact the work will have:

> [61] ...The area in which the work under the Approvals will be conducted is not the pristine environment contemplated in some cases in which interlocutory injunctions have been granted. The work is in an area which is already had various mining related activities take place, and some of the current work is in the same location as previous works.

65 It seems to me, with respect, that this highlights one of the significant problems raised by the petitioners. Each new incursion serves only to narrow further the habitat left to them in which to exercise their traditional rights. Consequently, each new incursion becomes more significant than the last. Each newly cleared trail remains a scar, for although reclamation is required, restoration is impossible. The damage is irreparable. It follows that if only a portion of the proposed new clearings and trails prove to be unnecessary, the preservation of that portion is vital.

66 The geology will always be there. The ore bed is not going anywhere. The same cannot be said of the habitat that is presently left to the petitioners. Once disturbed, it is lost. Once lost, the exercise of aboriginal rights is further diminished. This is supported by the evidence of Chief Baptiste, Alice William and Sonny Lulua.

67 In my view, this not only establishes significant irreparable harm to the petitioners' substantive rights, but also emphasizes again the importance of the process discussed above. It also speaks to the *status quo*.

68 Next, I consider the point that the petitioners are unable to offer any undertaking as to damages. They request relief from the requirement of Rule 10-4(5) of the *Supreme Court Civil Rules*, which provides:

> (5) Unless the court otherwise orders, an order for a pre-trial or interim injunction must contain the applicant's undertaking to abide by any order that the court may make as to damages.

69 That relief is to be provided only under special circumstances, which circumstances include the strength of the respective cases and the balance of convenience: *Delta (Municipality) v. Nationwide Auctions Inc.* (1979), 100 D.L.R. (3d) 272, [1979] 4 W.W.R. 49 (B.C. S.C.). There is no general exemption to the obligation for aboriginal litigants asserting aboriginal rights and title: *Siska Indian Band v. British Columbia (Minister of Forests)* (1998), 62 B.C.L.R. (3d) 133 (B.C. S.C.); *Hupacasath First Nation v. British Columbia (Minister of Forests)*, 2005 BCSC 345 (B.C. S.C.).

70 I conclude that the circumstances of this case justify an order relieving the petitioners of the obligation to give an undertaking as to damages. Those circumstances are: my assessment of the balance of convenience as outlined above; the importance of ensuring that matters proceed on an appropriate basis between these parties for the foreseeable future; and the relative economic strength of the parties and the relative harm each is likely to suffer. I also take into account the petitioners' letter to Taseko of October 13, 2011, in which they notified Taseko of their position, and advised Taseko not commence any activities under the permits while the Tsilhqot'in National Government considered its options for response.

71 Finally, I turn to the question of whether the conduct of Chief Baptiste and others in effectively blocking Taseko from exercising its rights under the permits in question should disentitle the petitioners from injunctive relief, or otherwise weigh into the balance of convenience.

72 The conduct in question is not irrelevant, but on the state of the evidence, I question whether it is appropriate to conclude that the Xeni Gwet'in and the Tsilhqot'in Nation have come to court with unclean hands because of the unlawful action of Chief Baptiste and those who assisted her. In my view, this conduct is more properly to be taken into account in considering Taseko's application, which I do below.

73 Taking all these matters into consideration, I conclude that petitioners will suffer greater harm from the refusal of the injunction then will Taseko from the granting of it. Accordingly, the balance of convenience weighs in favour of granting the injunction requested by the petitioners.

d. Conclusion

74 The petitioners have satisfied the test for an interim injunction, and the order will go subject to terms that I will discuss with counsel. The costs of the petitioners' application for an interim injunction will be at the discretion of the judge who hears the judicial review application.

2. Taseko's Application

75 Given that Taseko is to be enjoined, for the time being, from proceeding with the exploration program that is covered by the two permits that are at issue, I am unable to see any need for injunctive relief for Taseko.

76 Taseko submitted that it has other reasons for going into the area in question in the ordinary course of its business, and therefore should be protected from any further interference. Taseko has been exercising its rights under its permits, claims and lease over many years. Never before has it encountered difficulty of the sort it encountered here. The evidence does not establish any risk that Taseko will again be impeded in the circumstances that now exist. I therefore see no basis to support the granting of injunctive relief to Taseko at this time. Taseko will of course have leave to renew its application should events justify it doing so.

77 I am also mindful of the fact that Taseko has acted lawfully throughout and ought not to have been put in a position where it had to seek the injunctive relief set out in its application. In the circumstances, because of the unlawful conduct of Chief Baptiste and the other defendants to Taseko's action, I exercise my discretion in relation to costs to award Taseko the costs of its application payable forthwith in any event of the cause of either proceeding. The hearing of these applications took 3 $^{1}/_{2}$ days. I would attribute 1 $^{1}/_{2}$ days to Taseko's application, and the other 2 days to the petitioners' application.

3. Terms

78 I will now hear from counsel as to appropriate terms for the interim injunction awarded to the petitioners.

[DISCUSSION WITH COUNSEL]

79 The terms the order in Victoria Action No. 114556 will be these:

• Taseko Mines Limited and its agents, employees and contractors, are hereby enjoined from undertaking any of the activities authorized by the permit granted by the Inspector of Mines on September 29, 2011, pursuant to Taseko's Notice of Work application, and/or the Occupant Licence to Cut permit granted on October 12, 2011;

• This order will remain in effect for 90 days from the date hereof unless extended upon application by the petitioners upon notice to the respondents, and in any event for no longer than is required for the petitioners' application for judicial review to be heard and determined;

• Upon any application to extend the term of this order beyond 90 days, the petitioners will be required to establish that they are proceeding with the petition in a timely manner and in good faith, but will not otherwise have to re-establish their entitlement to an injunction as outlined in these reasons;

• The Victoria Registry of this Court is directed to schedule the hearing of this petition to take place within 90 days or as soon thereafter as is practicable.

80 Finally, as discussed, the parties are encouraged to re-engage in consultation immediately with a view to resolving the differences and competing interests that have been so capably articulated over the last week.

Order accordingly.

2006 BCSC 1018
British Columbia Supreme Court

Tracy v. Instaloans Financial Solution Centres (B.C.) Ltd.

2006 CarswellBC 1791, 2006 BCSC 1018, [2006] B.C.J. No. 1639, [2007] B.C.W.L.D. 1000, [2007] B.C.W.L.D. 1001, [2007] B.C.W.L.D. 1002, [2007] B.C.W.L.D. 1003, [2007] B.C.W.L.D. 866, [2007] B.C.W.L.D. 888, [2007] B.C.W.L.D. 889, [2007] B.C.W.L.D. 890, [2007] B.C.W.L.D. 891, [2007] B.C.W.L.D. 892, [2007] B.C.W.L.D. 894, [2007] B.C.W.L.D. 895, [2007] B.C.W.L.D. 896, 151 A.C.W.S. (3d) 365

Gracia Tracy (Plaintiff) and Instaloans Financial Solution Centres (B.C.) Ltd., Instaloans Financial Solution Centres (Kelowna) Ltd., Instaloans Financial Solution Centres (Mgmt) Ltd., Instaloans Financial Solution Centres (Vernon) Ltd., Tim Latimer and Marc Arcand (Defendants)

Gracia Tracy (Plaintiff) and Instaloans Financial Solution Centres (B.C.) Ltd., Instaloans Financial Solution Centres (Vernon) Ltd., 903759 Alberta Ltd., 856402 Alberta Ltd., 864556 Alberta Ltd., Tim Latimer and Marc Arcand (Defendants)

Brown J.

Heard: March 8-17, 2006
Judgment: June 30, 2006
Docket: Vancouver L051076, L051975

Proceedings: allowed leave to appeal *Tracy v. Instaloans Financial Solution Centres (B.C.) Ltd.* (2006), 2006 CarswellBC 2023, 2006 BCCA 373 (B.C. C.A. [In Chambers])

Counsel: P.R. Bennett, M.W. Mounteer for Plaintiff
G. McLennan, S. Chambers for Defendants

***Brown J.*:**

1 The plaintiff applies to certify these proceedings as class proceedings pursuant to s. 4 of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 and to be appointed as representative plaintiff in each of the class proceedings. These applications were argued together and raised many common issues and, as such, I will deal with them together in this judgment. In the first action, L051076, which I will refer to as the "Payday Loan Action", the proposed class is all residents of British Columbia who have borrowed money as a "Payday Loan" from an Instaloans location and:

(a) have repaid the loan and the standard "finance charge" to Instaloans on the due date of the loan;

(b) have repaid those amounts within 173 days of the loan advance or the last extension ("rollover") of the loan; or

(c) have rolled over the loan at least 5 times.

(Collectively the "Class Loans"), as of the date notice is given of this class proceeding.

2 In the second action, L051975, which I will refer to as the "Title Loan Action", the proposed class is all residents of British Columbia who have borrowed money as a "Title Loan" from an Instaloans location and:

(a) have repaid the loan and the standard "fee" to the Instaloans defendants on the due date of the loan;

(b) have repaid those amounts within 173 days of the loan advance or the last extension ("rollover") of the loan;

(c) have rolled over the loan at least 5 times; or

(d) had the vehicle pledged to obtain the loan seized by the Instaloans defendants.

(Collectively the "Class Loans"), as of the date notice is given of this class proceeding.

3 The plaintiff alleges that the fees charged to her and to other members of the proposed classes contravene s. 347 of the *Criminal Code*, R.S.C. 1985, c. C-46. That section makes it illegal to agree to receive or to receive a rate of interest, which exceeds 60% per annum.

4 The plaintiff seeks the following relief in the Payday Loan Action:

(a) a declaration that the Finance Charges charged by the Instaloans Defendants in relation to the Class Loans are interest within the meaning and for the purpose of s. 347 of the *Criminal Code*;

(b) a declaration that the standard form loan agreements used by the Instaloans Defendants to advance the Class Loans to the Class members are unlawful;

(c) a declaration that all Unlawful Finance Charges received by the Defendants in relation to the Class Loans are held in constructive trust for the benefit of the Plaintiff and Class members;

(d) an accounting and restitution to the Plaintiff and Class members of all Unlawful Finance Charges received by the Defendants in relation to the Class Loans;

(e) damages for unconscionable trade acts and practices pursuant to s. 22(1) of the *Trade Practices Act*, R.S.B.C. 1996, c. 457 (the "*Trade Practice Act*") and ss. 105 and 171 of the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 (the "*BPCPA*");

(f) damages for conspiracy;

(g) punitive damages; and

(h) interest.

5 In the Title Loan Action, the plaintiff seeks similar relief:

(a) a declaration that the Fees charged by the Instaloans defendants in relation to the Class Loans are interest within the meaning of and for the purpose of s. 347 of the *Criminal Code*;

(b) a declaration that the standard form loan agreements used by the Instaloans Defendants to advance the Class Loans are unlawful as contrary to s. 347(1) of the *Criminal Code*;

(c) a declaration that all unlawful Fees received by the Defendants in relation to the Class Loans are held in constructive trust for the benefit of the plaintiff and Class members;

(d) a declaration that the Surpluses retained by the Instaloans Defendants from the plaintiff and Seized Vehicle Subclass members are held in a constructive trust for the benefit of the plaintiff and Seized Vehicle Subclass members;

(e) an accounting and restitution to the plaintiff and Class members of all Unlawful Fees received by the Defendants in relation to the Class Loans;

(f) an accounting and restitution to the plaintiff and Seized Vehicle Subclass members of the Surplus unlawfully retained by the Instaloans defendants;

(g) damages for unconscionable trade acts and practices pursuant to s. 22(1) of the *Trade Practice Act* and ss. 105 and 171 of the *BPCPA*;

(h) damages for conspiracy;

(i) punitive damages; and

(j) interest.

I note at the outset that I granted a very similar application for certification in *Bodnar v. Cash Store Inc.*, 2005 BCSC 1228 (B.C. S.C.) aff'd 2006 BCCA 260 (B.C. C.A.) . In that action, plaintiffs who had borrowed payday and title loans from Cash Store locations alleged that the broker fees and

interest charged exceeded the criminal rate of interest and contravened trade practices legislation. Many of the issues addressed in that application arose in this proceeding, and as such, the reasons of this Court and the Court of Appeal on that application inform much of these Reasons.

Background

6 These actions focus on Payday Loans and Title Loans provided through Instaloans outlets. The plaintiff asserts that the fees charged for these loans constitute interest within s. 347(2) of the *Criminal Code*, exceed the criminal rate of interest, and breach the *Trade Practice Act* and *BPCPA*. The plaintiff seeks recovery of these fees, as well as damages.

Instaloans' Payday Loans

7 From December 1998 to April 21, 2005 Instaloans provided short-term Payday Loans at Instaloans' locations throughout British Columbia. The loans were for amounts of up to $500, and for terms of up to 30 days. The term of the Payday Loan was based on a borrower's next scheduled pay from an employer, pension, unemployment insurance or disability benefit. Instaloans' standard form loan agreements required the borrower to pay charges calculated at 25% of the principal amount of the Payday Loan (the "Finance Charge"). As security, the borrower was required to provide Instaloans with a signed cheque for the amount of the Payday Loan and Finance Charge. Instaloans held that cheque and would use the cheque to obtain repayment of the loan, provided the borrower neither attended to repay the loan and Finance Charge by other means, nor opted to roll over the Payday Loan by paying the Finance Charge then due and executing a new standard loan agreement, thereby extending repayment of the principal (and a second Finance Charge) to a future date.

8 From time to time Instaloans advanced Payday Loans on a "$50 for $50" program. Under this promotion, the borrower could avoid paying the Finance Charge if the Payday Loan was repaid on the due date in cash rather than by the cheque provided at the time the loan was obtained.

Title Loans

9 From July 14, 2000 to April 21, 2005 Instaloans provided a second type of short-term loan, known as a "Title Loan", which was secured by an automobile or other motor vehicle. These arrangements were not structured as a typical loan. Rather, the borrower was required to complete a buying form and lease agreement (by which Instaloans leased the motor vehicle back to the borrower with an option to purchase) and provide a promissory note. Instaloans would register a security interest in the motor vehicle at the Personal Property Registry. The amount of the loan was a fraction of the value of the borrower's vehicle to a maximum of $10,000. Its term was for up to 30 days.

10 Under the Title Loan standard form agreement, the borrower was required to repay the principal amount of the Title Loan plus an amount equal to 25% of the principal advanced (the "Fee") on or before the loan's due date. By paying the principal and Fee, the borrower "repurchased" his or her vehicle. As with the Payday Loan, the borrower could extend the loan for an additional period of up to 30 days by paying the Fee on the original due date, and rolling over the principal. Where this occurred, the borrower "repurchased" the vehicle at the extended due date upon paying the principal and second Fee. In some circumstances, the borrower was charged an amount equal to only 10% of the Title Loan plus Fee outstanding to extend the loan. Although the defendants do not state the circumstances in which this reduced fee was charged, it appears, based on the evidence of past loan agreements, that it was charged where the loan exceeded $1,000.

11 If the borrower failed to repay the Title Loan in full on or before the due date, Instaloans obtained repayment of the Title Loan and Fee by taking possession of the vehicle. The plaintiff alleges that Instaloans did not account to the borrower for the value in excess of the amount owed that was received from the sale, retention, or transfer of ownership of the vehicle.

The Plaintiff's Evidence

12 The plaintiff has provided evidence of her dealings with Instaloans, with respect to both a Payday Loan and Title Loan. In particular, the plaintiff provided evidence that on April 15, 2003 she borrowed $50 from Instaloans for a term expiring April 28, 2003. She provided a post-dated cheque to April 28, 2003 for $62.50, which was accepted by Instaloans as repayment on that date. The plaintiff also provided evidence of Payday Loans obtained by David Wournell. Starting in approximately 2003, he obtained more than 30 Payday Loans from Instaloans for an average amount of $200. On many occasions, he paid a Finance Charge equal to 25% of the principal amount he borrowed or rolled over.

13 With respect to her Title Loan, the plaintiff provided evidence that on May 21, 2003 she provided Instaloans with title to her 1994 Chrysler Le Baron. Instaloans determined that the wholesale value of her vehicle was $2,300 and the retail value, $5,855. It advanced her $1,000, to be repaid with a $250 Fee on June 21, 2003. The loan contract provided for the extension of the Title Loan for a period of up to 30 days upon payment of an additional $250 Fee. The plaintiff made three payments to Instaloans of $500, $250 and $500 on August 29, 2003, October 31, 2003 and December 19, 2003 respectively. Her vehicle was seized on approximately April 19, 2004.

14 The plaintiff has also provided actuarial opinion evidence from Mr. Ian Karp, F.S.A., F.C.I.A. That evidence addresses the effective annual rate of interest charged under the Class Loans. Mr. Karp shows that if $100 is advanced and $125 is repaid 14 days later, the effective annual interest rate is 33,519%. He also calculates that where a Finance Charge is 25% of the principal advanced, the effective annual rate of interest will exceed 60% of the principal amount of the loan when it is repaid (with Finance Charge) within 173 days of the loan advance. He also opines that if a 25%

fee is charged and the loan is rolled over five times or more at intervals of 30 days or less, the effective annual interest rate will exceed 60% per annum.

15 Instaloans has provided Payday Loans to more than 32,000 different borrowers who would qualify as members of the Payday Loan class. Instaloans has provided Title Loans to approximately 589 different borrowers, 90% of whom repaid their Title Loans without default and would qualify as Title Loan class members. Of the remaining 10%, approximately 60 borrowers may be class members if they repaid a Title Loan within 173 days of the loan advance, rolled their Title Loan over 5 or more times, or had the vehicle they pledged to obtain the Title Loan seized by Instaloans.

The Requirements for Certification

16 Section 4(1) of the *Class Proceedings Act* provides that the court must certify a proceeding as a class proceeding if the following requirements are met:

> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of 2 or more persons;
>
> (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
>
> (e) there is a representative plaintiff who
>
> > (i) would fairly and adequately represent the interests of the class,
> >
> > (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
> >
> > (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

17 I will review these requirements in turn.

Do the Pleadings Disclose a Cause of Action?

18 It is well established that in determining if the pleadings disclose a cause of action, the threshold the plaintiff must meet is a low one. As stated in *Brogaard v. Canada (Attorney General)* (2002), 7 B.C.L.R. (4th) 358, 2002 BCSC 1149 (B.C. S.C. [In Chambers]) at ¶ 30:

> It is beyond dispute that the Court will refuse to certify an action on the basis that the pleadings do not disclose a cause of action only if it is plain and obvious that the plaintiffs cannot succeed. The test is similar to the onus on a defendant to strike out a statement of claim for failing to disclose a cause of action on an application pursuant to Rule 19(24) of the Rules of Court. However, on a certification application, the burden is on the plaintiffs to demonstrate affirmatively that a cause of action is properly pled. The threshold is a very low one.

19 The plaintiff submits that this threshold is met. She says that, with the exception of the liability of the directors, the claims made in this action are identical to those recognized in *Bodnar*. With respect to the claims against directors, she notes that a similar claim was found to disclose a cause of action in *Tschritter v. Rent Cash Inc.* (2004), 2 B.L.R. (4th) 309, 2004 ABQB 590 (Alta. Q.B.).

20 The defendants argue that the threshold is not met. First, they submit that the pleadings in the Payday Loan Action do not disclose a cause of action against the defendant, Instaloans Financial Solution Centres (Management) Ltd., as it at no time issued or offered Payday Loans (or for that matter Title Loans) to any customers in British Columbia. Likewise, they say, the pleadings do not disclose a cause of action against the defendants 856402 Alberta Ltd. and 864556 Alberta Ltd. in the Title Loan Action because neither company made Title Loans in this province. Second, the defendants argue, many members of the proposed class will not have a cause of action against the defendants because their claims are statute barred, their claims have been compromised or settled with Instaloans, they failed to repay some or all of the principal or fees owing to Instaloans, or they are subject to a mandatory arbitration clause.

21 As *Brogaard* indicates, it must be plain and obvious that the plaintiff cannot succeed for the court to refuse to certify a class action under s. 4(1)(a) of the *Class Proceedings Act*. In making this determination, the court is not to assess the evidence. In my opinion, the issues raised by the defendants go to the sufficiency of the evidence underlying these claims and to defences that may be available against subsets of the proposed classes. These arguments do not make it plain and obvious that the plaintiff cannot succeed.

22 I am satisfied that the pleadings do disclose a cause of action.

Is there an Identifiable Class of Two or more Persons?

23 The plaintiff proposes the following classes, which she notes are identical in material respects to the class definition approved in *Bodnar* :

> **Payday Loan Action**
>
> All residents of British Columbia who have borrowed money as a "Payday Loan" from an Instaloans location and:

(a) have repaid the loan and the standard "Finance Charge" to Instaloans on the due date of the loan;

(b) have repaid those amounts within 173 days of the loan advance or the last extension ("roll over") of the loan; or

(c) have rolled over the loan at least five times.

Title Loan Action

All residents of British Columbia who have borrowed money as a "Title Loan" from an Instaloans location and:

(a) have repaid the loan and the standard "Fee" to the Instaloans defendants on the due date of the loan;

(b) have repaid those amounts within 173 days of the loan advance or the last extension ("roll over") of the loan;

(c) have rolled over the loan at least five times; or

(d) had the vehicle pledged to obtain the loan seized by the Instaloans defendants.

24 The defendants submit that these definitions are overly broad and unworkable because they do not account for the number of defences that may apply to a class member's claim. They also submit that under each definition it is possible that an individual who borrowed and repaid monies once but subsequently took out a loan which was not repaid will come within the class definition when he or she has no cause of action.

25 The purpose of a class definition is threefold: (1) to identify those people who have a potential claim for relief against the defendant(s); (2) to define the parameters of the lawsuit so as to identify those persons who are bound by its result; and (3) to describe those who are entitled to notice: *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172 at 175 (Ont. Ct. Gen. Div.); see also *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534, 2001 SCC 46 (S.C.C.) at ¶ 38. The proposed class is adequately defined to meet these objectives. It is sufficient to objectively identify those people who have a *potential* claim against the defendants. It defines the parameters of the lawsuit so as to identify those who will be bound by its result and describes those who are entitled to notice. In making this finding, I note that in *Bruley v. Instaloans et al* (Ont. Action No. 05-CV-294691 CP) — the national counterpart to this action which has been certified by consent for settlement - the Court certified an almost identical class:

All persons in Canada save and except those residents of British Columbia, other than the defendants, who borrowed money from one of the corporate defendants as a "Payday Loan" ... between January 1 st 1998 and April 21, 2005 ... and who:

(a) repaid the loan and the standard finance charge to one or more of the corporate defendants on the due date of the loan;

(b) repaid those amounts within 173 days of the loan advance or the last extension (rollover) of the loan or

(c) rolled over the loan at least five times.

26 That the defendants may have a defence, counter-claim or set-off against an individual who falls within the class definition does not mean that the class is overly broad. These defences may be treated as a common issue, or dealt with at the individual issues stage. A set-off can be dealt with when determining entitlement.

Do the Claims raise Common Issues?

27 Under s. 4(1)(c) of the *Class Proceedings Act* the court must determine if the claims of the class members raise common issues. The common issues which the plaintiff proposes for the Payday Loan Action are:

(a) Do the Finance Charges charged by the Instaloans defendants constitute interest as defined by and for the purpose of s. 347 of the *Criminal Code*, either in whole or in part?

(b) If the answer to (a) is yes, then do the standard form agreements pursuant to which those Finance Charges have been collected from Class members constitute agreements or arrangements to receive interest at a criminal rate, contrary to s. 347(1)(a) of the *Criminal Code*?

(c) If the answer to (a) is yes, then has the collection by the Instaloans Defendants of those Finance Charges in accordance with the terms of the standard form agreement on which the Payday Loans have been advanced by Instaloans to Class members, together with any charge expressly stated by those agreements to be interest, resulted in the payment by Class members to and the receipt by the Instaloans defendants of interest at a criminal rate, contrary to s. 347(1)(b) of the ***Criminal Code?***

(d) If the answer to (c) is yes, have the Instaloans defendants been unjustly enriched by the collection of those Finance Charges from the Class Members?

(e) If the Instaloans defendants have received a payment of interest at a criminal rate from Class Members in respect of the Class Loans, then:

(i) were the Class Loans advanced by the Instaloans defendants to the Class Members at the direction and for the benefit of Arcand and Latimer?

(ii) were the Finance Charges received by the Instaloans defendants paid in whole or in part to Arcand and Latimer? And

(iii) did Arcand and Latimer direct the transfer, use, or otherwise have the benefit of the Finance Charges collected by the Instaloans defendants from the Class Members?

(f) If the answer to any one of (e)(i) to (iii) is yes, then have Arcand and Latimer been unjustly enriched by the payment by Class Members of interest at a criminal rate in respect of their Class Loans?

(g) If the answer to (d) or (f) is yes:

(i) Do those defendants hold the benefit they have received as a result of this unjust enrichment in trust for those Class members who provided that benefit those defendants? and

(ii) Are those defendants liable to account to those Class members for the benefit received from them and all profits earned therefrom?

(h) If the answer to (b) or (c) is yes, does the provision by the Instaloans defendants of the Class Loans to Class members on terms that offend s. 347(1) of the ***Criminal Code***, or and the receipt by the Instaloans Defendants of interest at a criminal rate in respect of those Class Loans, constitute an unconscionable act or practice within the meaning of s. 4 of the ***Trade Practice Act*** and s. 8 of the ***Business Practices and Consumer Protection Act***, irrespective of whether the factors set out in ss. (3)(a) through (d) of those sections are present in any individual case?

(i) If the answer to any one of (e)(i) to (iii) is yes, then does such conduct of Arcand and Latimer constitute unconscionable acts or practices within the meaning of s. 4 of the ***Trade Practice Act*** and s. 8 of the ***Business Practices and Consumer Protection Act***, irrespective of whether the factors set out in ss. (3)(a) through (d) of those sections are present in any individual case?

(j) If the answer to (h) or (i) is yes, are those defendants liable for damages to those Class members who have suffered any loss or damage because of the unconscionable act or practice, pursuant to the ***Trade Practice Act*** s. 22(1) and the ***Business Practices and Consumer Protection Act*** ss. 105 and 171?

(k) If the answer to (b) or (c) is yes then did the Instaloans defendants, Arcand, and Latimer (or any combination thereof) conspire to implement a scheme to provide those

Loans to the Class Members in order to earn profits on the Class Loans at an unlawful rate of interest?

(l) If any or all of the Defendants conspired to provide the Class Loans to the Class Members at an unlawful rate of interest, then are those defendants jointly and severally liable for damages to those Class Members who have suffered loss or damage as a result of that illegal conspiracy?

(m) If the answer to (b) or (c) is yes, then are Latimer and Arcand jointly and severally liable for the acts of the Instaloans Defendants, or any of them, in advancing Class Loans on terms that offend s. 347(1)(a) of the ***Criminal Code*** or receiving interest in respect of the Class Loans at the criminal rate, contrary to s. 347(1)(b) of the ***Criminal Code.***

(n) If the answer to (b) or (c) is yes, and if Arcand or Latimer has participated in and been unjustly enriched by or conspired with the Instaloans Defendants in respect of the Class Loans, then does the conduct of the defendants justify an award of punitive or exemplary damages?

(o) If the answer to (n) is yes, what is the amount of punitive or exemplary damages to be awarded?

28 The common issues for the Title Loan Action are essentially the same:

(a) Do the Fees charged by the Instaloans defendants constitute interest as defined by and for the purpose of s. 347 of the ***Criminal Code***, either in whole or in part?

(b) If the answer to (a) is yes, then do the standard form agreements pursuant to which those Fees have been collected from Class members constitute agreements or arrangements to receive interest at a criminal rate, contrary to s. 347(1)(a) of the ***Criminal Code***?

(c) If the answer to (a) is yes, then has the collection by the Instaloans Defendants of those Fees in accordance with the terms of the standard form agreement on which the Title Loans have been advanced by Instaloans to Class members, together with any charge expressly stated by those agreements to be interest, resulted in the payment by Class members to and the receipt by the Instaloans defendants of interest at a criminal rate, contrary to s. 347(1)(b) of the ***Criminal Code***?

(d) If the answer to (c) is yes, have the Instaloans defendants been unjustly enriched by the collection of those Fees from the Class Members?

(e) If the Instaloans Defendants have received a payment of interest at a criminal rate from Class Members in respect of the Class Loans, then:

(i) were the Class Loans advanced by the Instaloans Defendants to the Class Members at the direction and for the benefit of Arcand and Latimer?

(ii) were the Fees received by the Instaloans defendants paid in whole or in part to Arcand and Latimer? And

(iii) did Arcand and Latimer direct the transfer, use, or otherwise have the benefit of the Fees, collected by the Instaloans defendants from the Class Members?

(f) If the answer to any one of (e)(i) to (iii) is yes, then have Arcand and Latimer been unjustly enriched by the payment by Class Members of interest at a criminal rate in respect of their Class Loans?

(g) If the answer to (d) or (f) is yes:

(i) Do those defendants hold the benefit they have received as a result of this unjust enrichment in trust for those Class members who provided that benefit those defendants? and

(ii) Are those defendants liable to account to those Class members for the benefit received from them and all profits earned therefrom?

(h) Have the defendants or any of them been unjustly enriched by the value received from the sale, retention, or transfer of ownership of the vehicles of the Class members who have lost possession of their vehicle to the Instaloans defendants (the "Seized Vehicle Subclass") in excess of any amounts lawfully owed (the "Surplus")?

(i) If the answer to (h) is yes:

(i) Do those defendants hold the benefit they have received as a result of this unjust enrichment in trust for those Seized Vehicle Subclass members who provided that benefit to those defendants? and

(ii) Are those defendants liable to account to those Seized Vehicle Subclass members for the benefit received from them and all profits earned therefrom?

(j) If the answer to (b) or (c) is yes, does the provision by the Instaloans defendants of the Class Loans to Class members on terms that offend s. 347(1) of the ***Criminal Code***, or and the receipt by the Instaloans defendants of interest at a criminal rate in respect of those Class Loans, constitute an unconscionable act or practice within the meaning of s. 4 of the ***Trade Practice Act*** and s. 8 of the ***Business Practices and Consumer Protection Act***, irrespective of whether the factors set out in ss. (3)(a) through (d) of those sections are present in any individual case?

(k) If the answer to any one of (e)(i) to (iii) is yes, then does such conduct of Arcand and Latimer constitute unconscionable acts or practices within the meaning of s. 4 of the ***Trade Practice Act*** and s. 8 of the ***Business Practices and Consumer Protection Act***, irrespective of whether the factors set out in ss. (3)(a) through (d) of those sections are present in any individual case?

(l) If the answer to (j) or (k) is yes, are those defendants liable for damages to those Class members who have suffered any loss or damage because of the unconscionable act or practice, pursuant to the ***Trade Practice Act*** s. 22(1) and the ***Business Practices and Consumer Protection Act*** ss. 105 and 171?

(m) If the answer to (b) or (c) is yes, then did the Instaloans defendants, Arcand, and Latimer (or any combination thereof) conspire to implement a scheme to provide those Loans to the Class Members in order to earn profits on the Class Loans at an unlawful rate of interest?

(n) If any or all of the defendants conspired to provide the Class Loans to the Class Members at an unlawful rate of interest, then are those defendants jointly and severally liable for damages to those Class Members who have suffered loss or damage as a result of that illegal conspiracy?

(o) If the answer to (b) or (c) is yes, then are Latimer and Arcand jointly and severally liable for the acts of the Instaloans defendants, or any of them, in advancing Class Loans on terms that offend s. 347(1)(a) of the ***Criminal Code*** or receiving interest in respect of the Class Loans at a criminal rate, contrary to s. 347(1)(b) of the ***Criminal Code***.

(p) If the answer to (b) or (c) is yes, and if Arcand or Latimer has participated in and been unjustly enriched by or conspired with the Instaloans defendants in respect of the Class Loans, then does the conduct of the defendants justify an award of punitive or exemplary damages?

(q) If the answer to (p) is yes, what is the amount of punitive or exemplary damages to be awarded?

29 The defendants submit that the plaintiff's claim does not raise common issues. They argue that the first three of the plaintiff's proposed common questions in both the PayDay Loan Action and Title Loan Action cannot be answered globally, as there is insufficient commonality in the way that Instaloans contracted with its customers. They further submit that proposed common issues (h) and (i) of the Title Loan Action are not, in fact, "common" because they relate to only a small portion of the proposed class: the approximately 24 individuals who actually had their vehicle seized. The defendants also argue, with respect to the majority of the above issues, that these

questions cannot be answered without considering the individual circumstances of each plaintiff. I address these arguments in turn.

(1) No Commonality

30 The defendants say that the terms of Instaloans' PayDay Loans varied so widely over the class period as to make it impossible for the questions proposed by the plaintiff to be answered for all class members. They say the loan agreements evolved over the proposed class period and were commonly varied or amended orally.

31 The plaintiff says, in reply, that there has been no material change to Instaloans standard form of contract during the class period. She points to the defendants' concession that the form of contract used for Payday Loans was essentially the same from December 7, 1998 to February 14, 2003. Thereafter, she notes, Instaloans:

> (a) changed the name of the document from "Terms, Conditions, and Client Rights Contract" to "Statement of Disclosure";
>
> (b) clarified that the $25 in finance charges per $100 borrowed included a $13 documentation fee, an $11.50 administration fee and $.50 in interest;
>
> (c) removed a 5% per month penalty charged on overdue accounts;
>
> (d) included a clause enabling the customer to enrol in a loan balance insurance program; and
>
> (e) included a mandatory arbitration clause.

32 The plaintiff says these changes are merely cosmetic and that in material respects, the PayDay Loan contract remained the same. She notes that the 5% penalty on overdue accounts and the insurance program clause are not in issue in this litigation, and that the arbitration clause is only relevant to the question of whether a class proceeding is a preferable procedure.

33 To be considered common, issues need not be dispositive of the litigation. As noted in *McDougall v. Collinson*, 2000 BCSC 398 (B.C. S.C.) at ¶ 86:

> A resolution of the common issues does not have to be determinative of liability or supportive of the relief sought. It need not produce the same result for all members of the class. It must, however, advance the litigation forward. If it does not, then certification is inappropriate

Will the resolution of the common issues proposed by the plaintiff advance the litigation forward?

34 I agree with the plaintiff that the changes to the standard loan agreement are of limited significance. At issue in this action is whether Instaloans' various charges constitute interest within the meaning of s. 347 of the *Criminal Code*. That the earlier form, "Terms,

Conditions and Rights Contract", describes all charges as "finance charges", while the later form, "Statement of Disclosure" describes those charges as "total finance charges" comprising of $13 for "documentation", $11.50 for "administration" and $5.00 for "interest" does not prevent that issue from being addressed. The broad scope of the definition of "interest" in s. 347(2) makes it clear that the nomenclature given to charges is of limited significance in determining if s. 347(1) has been contravened.

35 Nor, in my opinion, does Instaloans' practice of varying the standard form contract orally prevent these issues from being answered globally. The defendants identify only one such variation at the date of contract: the $50 for $50 promotion. The other variations identified are concessions made after default. The plaintiff correctly argues that subsequent variations are not relevant in determining if an agreement for credit violates s. 347(1)(a). Section 347 considers credit charges as determined at the time the transaction is entered into: *Garland v. Consumers' Gas Co.*, [1998] 3 S.C.R. 112 (S.C.C.), 165 D.L.R. (4th) 385 ["*Garland #1*"]; *Degelder Construction Co. v. Dancorp Developments Ltd.*, [1998] 3 S.C.R. 90, 165 D.L.R. (4th) 417 (S.C.C.).

36 The variation made at the time of contract, the $50 for $50 loan, was a promotional offer made by Instaloans under which a borrower could borrow $50 and repay the loan without fees or interest, provided the borrower repaid the loan in cash on his or her next pay day. When making the loan, Instaloans required a cheque from the borrower for $62.50, which it would deposit if the borrower did not attend to repay with cash.

37 That some Payday Loans were made on these terms does not detract from the commonality of the proposed issues. It is clear on reviewing the plaintiff's proposed class definition that individuals who borrowed on these terms and repaid in cash will not fall within the proposed class definition because they will not have paid the "standard 'finance charge'". Where individuals have paid the Finance Charge, the proposed issues remain relevant. It may be that individuals who paid fees in these circumstances may be found to have done so voluntarily, such that Instaloans can raise a voluntariness defence. However, that defence does not detract from the common issues; indeed, it may itself be a common issue. As I noted in *Bodnar* :

> Whether choosing to pay broker's fees, or choosing to receive funds by cash card, or choosing to repeatedly use a cash card, thereby incurring fees, constitutes a voluntary payment at law is an issue which can be considered on a class-wide basis. In the event that the court determines that the voluntariness issue cannot be decided for the entire class, it would constitute a defence to an individual's claim, but would not detract from the commonality of the criminal interest rate issues: whether the fees are illegal interest and related questions could be determined, would move the litigation forward, with voluntariness to be considered at the individual issues stage. (¶ 36)

38 Similarly, here, whether failing to return to pay in cash makes payment voluntary can be considered on a class-wide basis. If it cannot, then the defendants may raise it as a defence to be considered at the individual issues stage.

39 With respect to the proposed Title Loan issues, the defendants argue that the proposed common issues are not shared by all class members, as only some of the class members have had their vehicles seized. They say that an issue that applies to such a minute proportion of the class can hardly be said to be a "common issue".

40 Section 7(e) of the *Class Proceedings Act*, however, contemplates that an issue can be shared by a subset of the proposed class. That section provides:

> **7. Certain matters not bar to certification**
>
> The court must not refuse to certify a proceeding as a class proceeding merely because of one or more of the following:
>
> . . . . .
>
> (e) the class includes a subclass whose members have claims that raise common issues not shared by all class members.

41 Thus a common issue does not need to be shared by every member of the proposed class. Whether the defendants have been unjustly enriched by seizing motor vehicles is a question that advances this litigation forward, and therefore meets the test in *McDougall.*

42 The defendants also submit that the common issues respecting Title Loans cannot be answered because these loans varied, depending on the value of a borrower's vehicle. This, however, does not mean that the loans were provided on materially different terms, it simply shows that the amount of the loan varied between customers.

(2) Individual Inquiries

43 The defendants also allege that any attempt to answer these questions on a class wide basis will ultimately fail because the court will be required to consider the individual circumstances of each claimant.

44 First, the defendants argue that the court will be required to determine in each case whether the principal was repaid and the length of time over which it was repaid to determine if the total interest paid exceeds 60%. Such an inquiry, however, will not be required. The plaintiff's class definition is limited so that, if the plaintiff's theory is correct, interest will necessarily exceed 60%.

45 Second, the defendants submit that the court will be required to consider individual circumstances to determine whether or not a claim falls outside of the applicable six year limitation

period. The plaintiff, in reply, submits that this argument overlooks s. 38.1 of the *Class Proceedings Act*, which suspends the limitation period applicable to a cause of action from the time a proceeding starts to the time an application for certification is denied and either the time for appealing that denial expires or an appeal of the denial is disposed of. They say that because a previous action against Instaloans (*MacKinnon v. National Money Mart Co.*, 2005 BCSC 271 (B.C. S.C.) was commenced in January 2003 and not abandoned until after this action commenced, the applicable limitation period was suspended. Moreover they submit, the existence of a limitation defence in these circumstances is an issue of law that can be determined as part of the common issues trial.

46 I am not satisfied that the applicable limitation period is necessarily six years. In any event, I agree with the plaintiff, particularly in light of the potential applicability of s. 38.1 of the *Class Proceedings Act*, that the existence of a limitation defence is an issue that goes to the merits of the action, to be considered at trial.

47 Third, the defendants claim that individual circumstances will have to be assessed to determine if a claimant is subject to a mandatory arbitration clause. The existence of a mandatory arbitration clause is of no effect in this action because, for reasons that follow, I find these clauses to be inoperative.

48 Fourth, the defendants argue that because the plaintiff seeks equitable relief, the court will be required to consider the specific circumstances surrounding each plaintiff's dealings with Instaloans, such as whether an individual knew that the interest rate exceeded 60%; whether an individual comes to court with "clean hands"; and what expectations an individual held. With respect to the constructive trust sought by the plaintiff, the defendants argue that the court will be required to determine if the factors set out in *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, 9 R.P.R. (3d) 1 (S.C.C.), have been met. Those factors are (1) was the defendant under an equitable obligation? (2) Have the assets resulted from deemed agency activities? (3) Does the plaintiff have a legitimate reason for seeking a proprietary remedy? (4) Are there factors which would render the imposition of a constructive trust unjust in all of the circumstances?

49 On these issues, the plaintiff relies on *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629, 2004 SCC 25 (S.C.C.), ["*Garland #2*"]. In that case, the Court held that "[w]here the defendant has obtained the enrichment through some wrongdoing of his own, he cannot then assert it would be unjust to return the enrichment to the Plaintiff" (¶ 65). The plaintiff says, in light of the foregoing, that as a question of law one who receives payment of interest at a criminal rate has necessarily been unjustly enriched, and cannot argue that relief be denied based on the conduct of the plaintiff. She also relies on *Kiriri Cotton Co. v. Dewani* (1959), [1960] A.C. 192 (East Africa P.C.) for the proposition that knowledge on the part of the plaintiff that the loan breaches s. 347, as a matter of law, is not relevant in this enquiry. If it is, she says, that can be determined at the common issues trial.

50 As in *Bodnar* , I accept the plaintiff's arguments on the restitution issues. A similar issue was before the Court of Appeal in *Elms v. Laurentian Bank of Canada* (2001), 90 B.C.L.R. (3d) 195, 2001 BCCA 429 (B.C. C.A.). In that case, the plaintiff investors sought to certify a class action against a number of defendants involved in a mortgage scheme. The defendants argued that issues characterized as common by the Chambers judge, including whether a fiduciary duty existed, could only be answered through an individualized analysis. The Court said at ¶ 44:

> The investors' characterization of their claim suggests that the issues of whether there is a duty of care, the scope of that duty, and whether there is a fiduciary duty are issues that are capable of extrapolation to each member of the class or subclass. The investors' argument is that Oliver had a duty, in the absence of reliance, based on the relationship Oliver had with all investors. Because the investors claim that any individual differences do not affect the nature of Oliver's duty to each of them, the resolution of this issue would be applicable to all members of the class. Similarly, the investors argued that the Bank had the same duty to each of them regardless of a particular investor's individual circumstances. They note that the documents by which each of them opened the R.R.S.P.'s with the Bank were identical. The resolution of the question of whether the Bank breached a duty of care or a fiduciary duty in these circumstances would be capable of extrapolation to each member of the class and would clearly move the litigation along significantly.

51 In *Bodnar* , I found that situation to be analogous to the one before me. On the plaintiff's theory no individual inquiry is required: under *Garland #2* and *Kiriri Cotton Co.* the conduct of the plaintiff is immaterial and any potential knowledge irrelevant, in determining if Instaloans can deny recovery. In response to a very similar argument in *Bodnar* I said "[t]he plaintiffs may fail on this issue, but I am not satisfied at this point that the issue necessarily cannot be decided without an individual inquiry" (¶ 40). That comment is apposite here.

52 Fifth, the defendants say that individual circumstances will have to be considered to determine if Instaloans has a set-off or counter-claim against a plaintiff. In my opinion, that the defendants may have a set-off or counterclaim does not detract from the commonality of the issues. As noted above, this can be addressed at the individual issues stage.

53 Sixth, the defendants argue that the court will not be able to determine if s. 4 of the *Trade Practices Act* and s. 8 of the *BPCPA* apply, given that each section requires the court to consider individual circumstances in determining if unconscionable acts or practices have taken place. A similar argument was made in *Bodnar* . I held at ¶ 43-45:

> The plaintiffs do not propose to prove breach of the trade practices legislation and unconscionability by reference to individual circumstances. The plaintiffs have been careful to limit these issues, so that they are determined without reference to subsections (3) (a) to (d), which require individual considerations. In other words, the plaintiffs' theory is

that, regardless of individual circumstances, charging/receiving fees in breach of s. 347 is necessarily unconscionable.

In ***Knight v. Imperial Tobacco Company Ltd.***, [2005] B.C.J. No. 216 (S.C.) (QL), 2005 BCSC 172, this court certified a claim against the defendant, where the plaintiff alleged that the marketing of light and mild cigarettes constituted a deceptive trade practice. The plaintiff asserted that it could satisfy the required element of reliance without reference to individual circumstances. The court said at ¶ 36:

> I am not at all convinced that this theory of causation of damages which has had some measure of success in American jurisdictions would succeed in a British Columbia action under the ***TPA***, but I am not prepared at the certification stage to pronounce it plain and obvious that it will fail. The cause of action under s. 22(1)(a) and s. 171(1) should be allowed to proceed to trial as framed, and for the purposes of certification I will assume that the plaintiff will not be proving reliance on the alleged deceptive acts and practices of the defendant by individual members of the proposed class.

Here, too, the plaintiffs will not rely on individual circumstances to establish an unconscionable practice. They may not succeed in this approach, but I am not satisfied that the issues should not be certified.

54 The approach taken by counsel for the plaintiff is the same in this case, and therefore, these comments apply.

55 Finally, the defendants argue that individual circumstances will have to be considered to determine whether punitive damages or exemplary damages are appropriate. They say that the court will be required to determine in each case whether a borrower knew the interest rate exceeded 60%, whether he or she defaulted, and whether the defendants' conduct towards each borrower can be said to be uniform. In reply, the plaintiff relies on *Reid v. Ford Motor Co.*, 2003 BCSC 1632 (B.C. S.C.) and *Fakhri v. Alfalfa's Canada Inc.* (2004), 34 B.C.L.R. (4th) 201, 2004 BCCA 549 (B.C. C.A.), where the applicability of punitive damages was found to be a common issue.

56 I find that the question of whether punitive or exemplary damages apply in the present action is, on the plaintiff's theory, at least partly a common issue. As noted in *Fakhri* there are two stages in deciding a punitive damage claim: first, the defendant's behaviour is assessed to determine if it is deserving of a punitive response (the common issue), and second, the effect of that behaviour on individual class members is examined (¶ 23). Here, it is clear that the plaintiff's theory for damages hinges largely on the conduct of the defendants. Whether punitive damages should be awarded can therefore be determined on a class-wide basis. Other damage questions can be determined at a later stage. Such a flexible approach is, as noted by the Court of Appeal in *Fakhri* at ¶ 26, contemplated by the *Class Proceedings Act*. In this regard, the plaintiff's approach to damages is similar to her approach to the restitution and breach of trade issues previously discussed.

592

57 As the defendants acknowledge that the conspiracy and director liability issues are common issues, I need not address them.

Is a Class Proceeding the Preferable Procedure?

58 The next step is to determine whether a class proceeding is, in the words of the section, the preferable procedure for the fair and efficient resolution of the common issues. Here, the court must consider the factors listed in s. 4(2) of the *Class Proceedings Act*:

> (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
>
> (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
>
> (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
>
> (d) whether other means of resolving the claims are less practical or less efficient;
>
> (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

59 I consider these questions in turn.

(1) Do the common issues predominate?

60 The plaintiff submits that if the common issues are resolved in favour of the plaintiff, it will be determinative of Instaloans' liability to class members. They say that the remaining individual issues are simple mathematical assessments required to determine entitlement, which are both contemplated by the *Class Proceedings Act* in s. 7(a) and a common part of the bifurcated nature of class action proceedings. The defendants argue that if a class action were to proceed, the determination of eligibility would be a complex function, requiring an assessment of, among other things, whether the loan has been repaid or can be set-off; whether the terms of the loan have been amended, varied or compromised; and whether the relief sought is foreclosed based on the plaintiff's conduct.

61 I am not convinced that the concerns raised by the defendants should be considered at the certification stage. As I note above, these questions either do not arise on the plaintiff's class definition, or amount to defences which can be treated as common issues or addressed at a later stage of the action. Once again, *Bodnar v. Cash Store Inc.* is instructive. In that case, I held at ¶ 58 - 59:

> Determination of the common issues will significantly advance the litigation. As the plaintiffs argue, the claims of the class members do raise issues which are common to the class as a whole and which do not engage an assessment of evidence that is individual to each class member. In addition, it may be that some of the defences raised can be determined on a class-wide basis, for example, whether electing to obtain the loan funds by use of the cash card is a voluntary payment for the purposes of s. 347(1) of the ***Criminal Code***.
>
> Counterclaims may be advanced, but this does not preclude certification. As the court noted in ***Metera v. Financial Planning Group***, [2003] A.J. No. 468, 2003 ABQB 326 at para. 69:
>
> > It should be noted that it would be extremely rare for a class proceeding to contain only common issues, with no individual issues to be determined. Class proceedings are usually bifurcated. First there is a hearing or trial to determine the common issues, and then a procedure must be devised to resolve the individual issues. This is the normal situation, and the presence of individual issues should not be overemphasized, the question always being whether a class proceeding is the preferable way to resolve what common issues there are. ...

62 In my opinion, to accede to the defendants argument would be to overemphasize the presence of individual issues, which as *Metera* instructs, is to be avoided.

(2) Do a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions?

63 There is no evidence that there are class members who have an interest in pursuing individual actions.

(3) Are the claims subject of other proceedings?

64 There are no other proceedings in British Columbia against Instaloans. A national class action against Instaloans relating to Payday Loans was settled on a national basis in the *Bruley* action, however that settlement excluded B.C.

(4) Are other means of resolving the class members' claims less practical or less efficient? Would the administration of the class proceeding create greater difficulties than those likely to be experience if relief were sought by other means?

65 I have collapsed the last two factors into one, as in the context of this case and the submissions of the parties, they address the same consideration.

66 On this point, the plaintiff says that the small amount of an individual's claim, compared to the high cost of pursuing litigation individually, makes it unlikely that plaintiffs will pursue

their own claims. As a result, they say, a class proceeding is practical and efficient and will not create difficulties. The defendants submit that Instaloans' willingness to pay arbitrations costs and reasonable legal expenses, combined with the fact that anticipated individual damage claims will be small, makes arbitration preferable.

67 In *MacKinnon v. National Money Mart Co.* (2004), 41 B.L.R. (3d) 198, 2004 BCSC 136 (B.C. S.C.), rev'd (2004), 203 B.C.A.C. 103, 2004 BCCA 473 (B.C. C.A.), where similar claims were pursued and the defendants argued that an arbitration procedure was preferable, I said at ¶ 22-25:

> The claims advanced in this case are exactly those contemplated by the ***Class Proceedings Act***. Individually, they are very small, and could not be litigated economically. Even if there were no legal fees involved, an expert's report would be required to establish a criminal rate of interest. This alone would make the litigation uneconomical. Given the potential recovery, it is unlikely that any individual claimant would litigate.
>
> Similarly, it is highly unlikely that any claimant would arbitrate. Arbitration would be as uneconomical as litigation. Even if a claimant were to represent him or herself, the cost of an expert's report would likely exceed any potential recovery. I am not satisfied that any offer by the defendants to pay the arbitration fees would increase the ability of claimants to arbitrate.
>
> A stay in these circumstances does not serve the policy objectives of the ***Commercial Arbitration Act*** or the ***Class Proceedings Act.*** It does not expedite resolution of the dispute or save costs that would be incurred in a court action. Rather, it effectively bars resolution of the dispute by placing an insuperable hurdle before the claimants.
>
> I concur with Cumming J. in ***Huras*** at paras. 43-46:
>
> > Two of the normative purposes of an arbitration provision are to expedite the resolution of a dispute and to save costs that would be seen in a court action. The arbitration provision in the case at hand is to the opposite effect. As I have said, someone in the plaintiff's position is not as a practical reality going to seek arbitration. At the same time, if the arbitration provision is binding, there is not recourse to a court, including Small Claims Court. Thus, the provision inhibits and effectively frustrates aggrieved individuals from being able to obtain any resolution of disputes through a neutral, independent adjudicator. Primerica submits that the arbitration clause is enforceable even if utilization of the clause might prove inconvenient or more costly to the plaintiff and similarly-situated persons.
> >
> > I disagree. The existence of the arbitration clause in Primerica's contractual documents gives a superficial appearance of fairness to the unsophisticated. In reality, the arbitration clause serves to prevent, any resolution of a dispute other than upon the terms dictated by Primerica...

> The arbitration clause in the case at hand, if enforceable, would defeat the public policy inherent in the ***CPA***.

This, to my mind, is an absurd result: a case otherwise suited to class proceedings will be stayed; the stay will not fulfill the policy objectives of either act; the claimants will be denied access to effective justice.

68 The Court of Appeal held:

> I take no issue with the case management judge's analysis of the competing policy objectives of both statutes in the circumstances of this case. She had before her the evidence of Mr. MacKinnon and other individuals who have obtained payday loans from some of the defendants that they would not be able to pursue their claims if they had to proceed with individual actions. She considered the cost-saving objectives of both arbitration and class proceedings, and concluded that individual actions or arbitrations would likely create an economic bar to the resolution of the individual claims, while a class proceeding would allow the claimants economic access to justice. This is a proper approach to a preliminary or *prima facie* analysis of whether a class proceeding is the preferable procedure. (¶ 47)

69 In my view, in the context of this action, arbitration is also not a preferable procedure. Ms. Tracy and Mr. Wournell depose that they could not afford to hire a lawyer to pursue their claims against Instaloans. It is likely that other members of the class would be in the same position. Their claims are for very small amounts and could not be litigated or arbitrated in a cost effective way. Each of them is legally complex. Each will require expert evidence. The results of arbitration would not be binding on the class.

70 Even though Instaloans is prepared to pay the fees of the arbitrator and the facility; group claims together; agree not to be represented at the arbitration; and waive costs of the arbitration if successful, arbitration is not an effective way to pursue the class claims. Presenting legally complex claims is expensive and difficult. This hurdle may well be insurmountable, given the amount in issue in each individual claim. If individuals were to pursue individual actions or arbitrations, there would be an unnecessary proliferation of proceedings, fact finding and legal analysis.

71 In support of their argument that a class proceeding is not preferable, the defendants also submit that certifying this action will inevitably lead to the destruction of the payday loan industry. They say this is not a desirable outcome to the many borrowers who use the services of short-term loan providers. This argument, however, is a policy argument, which must be left to the legislature and parliament. Section 347 has not been amended to except the payday loans industry. The court cannot selectively apply the *Criminal Code* or trade practice legislation.

Is the Plaintiff a Suitable Representative?

72 Section 4(1)(e) requires that the court determine that there is a representative plaintiff who:

> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

73 The defendants argue that the plaintiff is not a proper representative. They say that in the Payday Loan Action, the plaintiff cannot adequately represent the class because, in obtaining her Payday Loan on the $50 for $50 promotion, there may be a voluntariness issue regarding her payment of Finance Charges. The defendants also point to the plaintiff's past borrowing habits. They say that because she often paid her $50-$50 loans back in cash, her total interest charge on loans totaling $450 equals only $12.50. They make a similar argument in respect of Mr. Wournell's suitability. With respect to her Title Loan, the defendants say that Ms. Tracy is not a suitable representative plaintiff because she defaulted on her loan and because any payments received by Instaloans in excess of the principal owed do not constitute interest charges, but rather, the payment of storage costs.

74 The plaintiffs, in reply, argue that the fact that Ms Tracy may have a specific defence does not mean her interests conflict with other class members; that other loans she obtained are irrelevant to establishing if Instaloans charged interest in excess of the criminal rate; and, with respect to the Title Loan, that whether the fee she paid constitutes a storage cost is an issue that goes to the merits of the plaintiff's claim and not her suitability to act as a representative plaintiff.

75 I am satisfied that Ms. Tracy is a suitable representative plaintiff. That she obtained many loans without paying interest is immaterial. The loan at issue, and for which the plaintiff brings this action, is the loan under which she paid interest in excess of 60%.

76 As I note at ¶ 37 above, the potential availability of a voluntariness defense does not undercut the plaintiff's proposed common issues. This observation applies equally in assessing Ms. Tracy's suitability as plaintiff. As noted by this Court in *Fakhri v. Alfalfa's Canada Inc.* (2003), 26 B.C.L.R. (4th) 152, 2003 BCSC 1717 (B.C. S.C.) at ¶ 75:

> The inquiry about whether the representative plaintiff adequately and appropriately represents class members and potential conflicts of interest is focused on the proposed common issues. If differences between the representative plaintiff and the proposed class do not impact on the common issues then they do not affect the representative plaintiff's ability to adequately and

fairly represent the class, nor do they create a conflict of interest. *Hoy v. Medtronic*, ¶ 83-85; *Endean v. Canadian Red Cross Society* (1997), 36 B.C.L.R. (3d) 350 (B.C. S.C.) at ¶ 66.

77 Many members of the class may have obtained their loans in similar circumstances. Therefore, whether payment was voluntary may be a common issue. If it is not, then it may apply at the individual issues stage. Regardless, it does not appear to me that the issue will impact on the common issues. I therefore do not see how Ms. Tracy's interests conflict with other members of the class. Ms. Tracy has sworn that she will represent the interests of the class and see the matter through to conclusion. I find that she is a suitable representative plaintiff.

78 With respect to s. 4(1)(e)(ii), the defendants submit that the plaintiff's plan neither complies with the *Class Proceedings Act* nor addresses the complexities of this case.

79 The plan here is identical in material respects to the plan proposed in *Bodnar* . As in that case, I am satisfied that the plan sets out a workable method.

Evidentiary basis

80 Although cast as an issue under s. 4(1)(a) by the defendants, the sufficiency of the plaintiff's evidentiary basis is relevant in determining if all the requirements for certification have been met. As noted in *Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158, 2001 SCC 68 (S.C.C.) at ¶ 25:

> ... the representative of the asserted class must show some basis in fact to support the certification order .... In my view, the class representative must show some basis in fact for each of the certification requirements set out in s. 5 of the Act, other than the requirement that the pleadings disclose a cause of action. That latter requirement is of course governed by the rule that a pleading should not be struck for failure to disclose a cause of action unless it is "plain and obvious" that no claim exists: see Branch, *supra*, at para. 4.60.

81 In determining if the plaintiff has met this requirement, however, the court must not assess the evidence. As noted in *Hollick* at ¶ 15-16:

> ... In my view, it is essential therefore that courts not take an overly restrictive approach to the legislation, but rather interpret the Act in a way that gives full effect to the benefits foreseen by the drafters.
>
> It is particularly important to keep this principal in mind at the certification stage. In its 1982 report, the Ontario Law Reform Commission proposed that new class action legislation include a "preliminary merits test" as part of the certification requirements. The proposed test would have required the putative class representative to show that "there is a reasonable possibility that material questions of fact and law common to the class will be resolved at trial in favour of the class": *Report on Class Actions*, *supra*, vol. III, at p. 862. Notwithstanding

> the recommendation of the Ontario Law Reform Commission, Ontario decided not to adopt a preliminary merits test. Instead it adopted a test that merely requires that the statement of claim "disclos[e] a cause of action": see *Class Proceedings Act, 1992*, s. 5(1)(a). Thus the certification stage is decidedly not meant to be a test of the merits of the action: see *Class Proceedings Act, 1992*, s. 5(5) ("An order certifying a class proceeding is not a determination of the merits of the proceeding"); see also *Caputo v. Imperial Tobacco Ltd.* (1997), 34 O.R. (3d) 314 (Gen. Div.), at p. 320 ("any inquiry into the merits of the action will not be relevant on a motion for certification"). Rather the certification stage focuses on the form of the action. The question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action: see generally *Report of the Attorney General's Advisory Committee on Class Action Reform*, at pp. 30-33.

82 The defendants argue that there is no evidentiary basis for the claim against Instaloans Financial Solution Centres (Mgmt) Ltd., 856402 Alberta Ltd. and 864556 Alberta Ltd. In support of this, they rely on Mr. Latimer's deposition that none of these companies "engage[d] in the business of offering payday loans, or title transactions ... to any customers in the Province of British Columbia". The plaintiff says this is of no significance because the pleadings allege that the defendants functioned as an integrated business.

83 I am satisfied that the plaintiff has established an evidentiary basis for each of the certification requirements. At this stage, the plaintiff is not required to provide evidence to prove all the allegations in the statement of claim. Certification is not a determination of the merits of the action. Further, the evidence the defendants rely on in claiming that the corporate defendants did not carry on business in this province is very circumscribed. Mr. Latimer does not, for example, address the allegation that these defendants received payment or partial payment of interest at a criminal rate contrary to s. 347(1)(b), or the allegation of conspiracy against these defendants.

Conclusion

84 I conclude that the plaintiff's action should be certified as a class action.

The Defendants' Application for a Stay

85 The defendants ask to have this action stayed for all members of the class whose claims are subject to arbitration. In support of a stay, the defendants rely on s. 15 of the *Commercial Arbitration Act*, R.S.B.C. 1996, c. 55.

86 The effect of mandatory arbitration clauses in class proceedings has been considered by our Court of Appeal in *MacKinnon* . There the Court said at ¶ 3-4, 52:

> The appellants claim that the arbitration clauses in their contracts take precedence over Mr. MacKinnon's intended class proceedings. Counsel for Mr. MacKinnon argues in response that the public policy dimension of class proceedings justify Brown J.'s refusal to stay the action.
>
> While I am in general agreement with Brown J.'s reasoning, it is my opinion that the order refusing to stay the action was premature. If a proceeding is certified as a class proceeding, it logically and legally follows that an arbitration agreement is "inoperative". That decision cannot be made, however, before the court determines whether the proceeding will be certified.
>
> . . . . .
>
> It is only when the court has completed its analysis of the certification application and determines that it must certify the proceeding as a class proceeding that it can legally conclude that the arbitration agreement is "inoperative". It is inoperative because the court, following the direction of the Legislature, has determined that the class proceeding is the "preferable procedure" and the other requirements for certification have been met.

87 As I am satisfied that the PayDay Loan Action should be certified, the arbitration clauses included in the PayDay Loan agreements are rendered inoperative. The defendants' application for a stay must therefore be refused.

The Plaintiff's Application

88 The plaintiff brings parallel motions in both the PayDay Loan Action and the Title Loan Action, seeking among other things, a Mareva injunction restraining the defendants from dissipating or disposing of their assets (except as is required in the ordinary course and to comply with obligations under the settlement reached in *Bruley*); an order requiring that outstanding funds being held for the defendants be deposited in trust with the defendants' solicitors; and an affidavit listing the location and value of the defendants' assets.

89 The plaintiff says that she has established a good arguable case that the fees charged by the defendants are contrary to s. 347 of the *Criminal Code* and that class members are entitled to restitution of unlawful fees paid. She says that the defendants have sold the Instaloans business and have engaged in "asset protection" strategies to protect the proceeds of sale from execution and, therefore, that the balance of justice and convenience favours an injunction to prevent further dissipation of assets. She says that because she is a representative plaintiff, she should not be required to provide an undertaking as to damages.

90 In opposing these motions, the defendants say that there is no evidence that the defendants have taken steps to dispose of their assets since this action was started; that the court does not have jurisdiction to order an injunction where the defendants are not resident, nor have

assets in the province; that the plaintiff delayed in bringing these motions; that granting these motions may cause prejudice to third parties; that the assets the plaintiff seeks to have secured are disproportionate to the percentage of the business and net revenues generated by the defendants in the British Columbia; and that to order the defendants to disclose the location and value of their assets is to permit pre-judgment execution. They further submit that as the plaintiff's motion had not been certified at the time I heard argument, the only claim for which security can be sought is the plaintiff's individual claim, which they say amounts to less than $300.

91 In *Mooney v. Orr* (1994), 100 B.C.L.R. (2d) 335, [1995] 3 W.W.R. 116 (B.C. S.C.), Huddart J. (as she then was) set out the two-step approach to Mareva injunctions:

> The comparable approach to a Mareva injunction would be to require a strong prima facie (which seems to have been favoured in *Aetna*, supra) or a good arguable case (as expounded in *Ninemia*, supra) to cross the threshold, and then to balance the interests of the two parties, having regard to all the relevant factors in each case, to reach a just and convenient result. Included in such factors will be evidence that establishes the existence of assets within British Columbia (for a domestic injunction) or outside (for a national or international injunction) and a real risk of their disposal or dissipation so as to render nugatory any judgment. (¶ 51)

92 This approach was followed in *Silver Standard Resources Inc. v. Joint Stock Co. Geolog* (1998), 168 D.L.R. (4th) 309, 59 B.C.L.R. (3d) 196 (B.C. C.A.). In that case, Newbury J.A. said that "[t]he overarching consideration in each case is the balance of justice and convenience between the parties" (¶ 20). She went on to state at ¶ 21:

> ... it is clear that in most cases, it will not be just or convenient to tie up a defendant's assets or funds simply to give the plaintiff security for a judgment he may never obtain. Courts will be reluctant to interfere with the parties' normal business arrangements, and affect the rights of other creditors, merely on the speculation that the plaintiff will ultimately succeed in its claim and have difficulty collecting on its judgment if the injunction is not granted.

93 This concern was cast in *Aetna Financial Services Ltd. v. Feigelman*, [1985] 1 S.C.R. 2, [1985] 2 W.W.R. 97 (S.C.C.), as requiring that the plaintiff establish that there is a genuine risk of disappearance of assets.

94 I accept that the plaintiff has made out the first condition: that her claim advances a good arguable case. The thrust of the defendants' argument on this point concerned the individual defendants, namely that the plaintiff's claim against the individual defendants was weak because it hinged on affixing personal liability to their conduct as directors. The plaintiff refers me to *642947 Ontario Ltd. v. Fleischer* (2001), 56 O.R. (3d) 417, 209 D.L.R. (4th) 182 (Ont. C.A.) at ¶ 68:

> Typically, the corporate veil is pierced when the company is incorporated for an illegal, fraudulent or improper purpose. But it can also be pierced if when incorporated "those in

> control expressly direct a wrongful thing to be done". *Clarkson v. Zhelka* at 578. Sharpe J. set out a useful statement of the guiding principle in *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1986), 28 O.R. (3d) 423 (Gen. Div.) at 433-34, affirmed [1997] O.J. No. 3754 (C.A.) [summarized 74 S.C.W.S. (3d) 207]: "the courts will disregard the separate legal personality of a corporate entity where it is completely dominated and controlled and being used as a shield for fraudulent or improper conduct".

95 The plaintiff has a good arguable case that the fees charged constitute interest in excess of the criminal rate; that the individual defendants as the directors and officers of the corporate defendants directed that wrongful thing to be done; and in light of the foregoing, that the court will pierce the corporate veil to affix liability to those individuals.

96 The plaintiff submits that the balance of convenience also favours an injunction. She says there is a risk that the defendants are dissipating assets and engaging in asset protection strategies. The defendants submit that the plaintiff's claims regarding asset protection are unfounded and any restructuring of assets on their part is not improper. They say the balance of convenience weighs against granting the injunction for the following reasons: (1) the motion, as amended, serves no useful purpose because all exigible funds held by the defendants will likely go to obligations under the settlement in *Bruley*; (2) a freezing order will compromise the interests of national class members who have settled; and (3) the motion, coupled with the plaintiff's motion to be relieved of her undertaking as to damages, prejudices the defendants.

97 The Instaloans assets were sold in April 2005 for $39.5 million. In December of that year, a settlement was reached in *Bruley*, the national class action against the defendants and others. The plaintiff relies on research into the financial state of the defendants that was conducted for the *Bruley* settlement. There, class counsel filed an affidavit saying:

> Apart from the vagaries of litigation, it appeared to us that Instaloans had no substantial assets but was simply a group of shell companies operating out of retail locations and employing low paid staff. Thus, in the event that we were able to obtain a judgment against Instaloans, we would likely have been left with uncertain rights of recovery against the individual directors and officers, who might not have personal assets to meet a claim, and who had likely received sophisticated advice on asset protection.

98 The defendants were careful not to disclose background information in that action. Instead, they provided class counsel with an opinion from independent counsel, the terms of which were as follows:

> We have been asked to provide an independent commentary on the sale of the business assets of Instaloans to Rent-Cash Inc. and a subsidiary thereof, effective April 21, 2005, the dispensation of the proceeds derived therefrom and the various debtor protection strategies historically implemented by Tim Latimer and Marc Arcand (the "Individuals") and Instaloans.

> We have had no previous solicitor/client relationship with either Instaloans or the Individuals prior to this retainer.
>
> It is agreed between our firm, McLennan Ross LLP ("MR") and McNally Cuming Raymaker that the information that we have reviewed will remain privileged and will not be disclosed to [class counsel] any time in the future, under any circumstances. In addition, the provision of this letter to [class counsel] does not constitute a waiver of the solicitor/client privilege between our firm and Instaloans and the Individuals.

99 The defendants did not did not provide any access to underlying financial information. The independent opinion provided in lieu of access concluded:

> Subject to the assumptions and understandings conveyed to MR and set out in this letter and subject to the qualifications and restrictions set out in this letter, we are satisfied that a judgment rendered against Instaloans and the Individuals in due course in the class action proceedings will go unsatisfied except to the extent of the attachment of the assets referenced in the Watson Aberant Opinion.

100 The plaintiff says that the defendants ceased operating the Instaloans business and shielded the sales proceeds to ensure that few or no assets would be available to the claimants in this action and in the national action. She also submits that the small settlement in the national action was driven by the absence of readily exigible assets.

101 In *Mooney v. Orr* (1994), 98 B.C.L.R. (2d) 318 (B.C. S.C. [In Chambers]) at ¶ 7, (1994), 33 C.P.C. (3d) 13 (B.C. S.C. [In Chambers]), Newbury J. (as she then was) reviewed the authorities respecting pre-judgment Mareva injunctions:

> In *Derby & Co. v. Weldon (No. 2)*, [1989] 1 All E.R. 1002 (C.A.), the Court .... affirmed its general jurisdiction to make a worldwide order pre-judgment, emphasizing the need for courts to adapt to the changing conditions in which sophisticated parties can dissipate or conceal assets. Lord Donaldson of Lymington, M.R. said this ...:
>
> > The fundamental principle underlying this jurisdiction is that, within the limits of its powers, no court should permit a defendant to take action designed to ensure that subsequent orders of the court are rendered less effective than would otherwise be the case. On the other hand, it is not its purpose to prevent a defendant carrying on business in the ordinary way or, if an individual, living his life normally pending the determination of the dispute, nor to impede him in any way in defending himself against the claim. Nor is its purpose to place the plaintiff in the position of a secured creditor. In a word, whilst one of the hazards facing a plaintiff in litigation is that, come the day of judgment it may not be possible for him to obtain satisfaction of that judgment fully or at all, *the*

> *court should not permit the defendant artificially to create such a situation*. [emphasis in original]

102 She noted at ¶ 11:

> In my view, this reasoning is compelling both as a matter of logic and as a matter of commercial reality in this jurisdiction as well. The reasons for extending Mareva injunctions to apply to foreign assets are valid in British Columbia no less than in England and Australia the notion that a court should not permit a defendant to take action designed to frustrate existing or subsequent orders of the court, and the practical consideration that in this day of instant communication and paperless cross-border transfers, the courts must, in order to preserve the effectiveness of their judgments, adapt to new circumstances. Such adaptability has always been, and continues to be, the genius of the common law.

103 At ¶ 14 she went on to note that the plaintiff must demonstrate a real risk of removal or dissipation of assets to avoid judgment before a Mareva injunction will issue:

> Underlying all these elements in each case is the realization that a Mareva injunction can result in substantial harm and inconvenience to a defendant, which harm and inconvenience are obviated only in part by the undertaking as to damages normally required to be given by the applicant. The courts are understandably unwilling to allow Mareva injunctions, much less those with extra-territorial effect, to become the norm, especially before a judgment has been given against the defendant. This is why the "risk" must be a "real" and substantiated one, not simply an apprehension arising out of the suspicion that normally exists between litigants, or a stratagem to obtain security for costs not otherwise available under the Rules. As noted by Nicholls, L.J. in *Derby & Co. v. Weldon (No. 1)* ...:
>
> > An order restraining a defendant from dealing with any of his assets overseas, and requiring him to disclose details of all his assets wherever located, is a draconian order. The risk of prejudice to which, in the absence of such an order, the plaintiff will be subject is that of the dissipation or secretion of assets *abroad*. This risk must, on the facts, be appropriately grave before it will be just and convenient for such a draconian order to be made. It goes without saying that before such an order is made the court will scrutinize the facts with particular care.... I do not think that it is correct, that if an order is made in the present case regarding overseas assets, such an order will become, or should become, the norm in cases where a restraint order is made regarding assets within the jurisdiction.

104 I am satisfied that the plaintiff has established a real risk of dissipation of assets, or, as some of the cases have put it, the "defendant taking action, the purpose of which is to render nugatory or less effective any judgment or order which the plaintiff may thereafter obtain": *Polly Peck International plc v. Nadir (No. 2)*, [1992] 4 All E.R. 769 (Eng. C.A.). The sale of the business

assets for $39.5 million, combined with the evidence before the Court on the national class action settlement is sufficient to establish a real risk.

105 Where does the balance of convenience lie? The plaintiff has been careful to limit the terms of the injunction; the injunction will not interfere in the ordinary day-today business of the defendants or prevent payment of the *Bruley* settlement. The inconvenience to the defendants and third parties has been circumscribed. The balance of convenience favours granting the injunction sought by the plaintiff.

106 The plaintiff asks to be relieved of the obligation to provide an undertaking for damages, as this is a representative action. I am satisfied that it is appropriate in this case not to require an undertaking: these proceedings are brought by the plaintiff, whose wherewithal is limited, on her own behalf and on behalf of others in similar circumstances. To require an undertaking would defeat the plaintiff's ability to obtain an injunction for the class. Given the circumscribed injunction in this case, damages, if any, have been minimized.

107 I am not convinced, as the defendants argue, that this Court does not have jurisdiction to grant the injunction because the defendants do not reside and may not have assets in British Columbia. As the English Court of Appeal noted in *Derby & Co. v. Weldon (No. 6)*, [1990] 3 All E.R. 263 (Eng. C.A.), at 272-73 , the granting of a Mareva injunction is not a matter of territorial jurisdiction, but a matter of *in personam* jurisdiction. The defendants have attorned to the jurisdiction of this Court. The Court has *in personam* jurisdiction to grant the injunction.

108 The plaintiff also seeks to amend the style of cause to add 864556 Alberta Ltd. as a defendant. The Style of Proceeding and Statement of Claim will be amended accordingly.

109 In the result, I grant the orders sought in the plaintiff's Amended Notices of Motion.

Plaintiff's applications granted; defendants' application dismissed.

Unilin Beheer B.V. v. Triforest Inc., [2017] F.C.J. No. 1330

Federal Court Judgments

Federal Court

Ottawa, Ontario

D. Gascon J.

Heard: January 4, 2017.

Judgment: January 20, 2017.

Docket: T-2105-16

[2017] F.C.J. No. 1330 | *[2017] A.C.F. no 1330* | *2017 FC 76*

Between Unilin Beheer B.V. and Flooring Industries Limited, Sarl, Plaintiffs, and Triforest Inc., Junwu Zhang, Zairong Feng, Congyu Zhang, and Molson International Trading Inc., Defendants

(175 paras.)

Counsel

François Guay, Guillaume Lavoie-Ste-Marie, Renaud Garon-Gendron, for the Plaintiffs.

Gervas Wall, Junyi Chen, for the Defendants Triforest Inc., Junwu Zhang, Zairon Feng, Conyu Zhang.

Christopher Tan, for the Defendant Molson International Trading Inc.

PUBLIC ORDER AND REASONS

D. GASCON J.

I. Overview

1 By an amended notice of motion dated December 28, 2016, the Plaintiffs Unilin Beheer B.V. [Unilin] and Flooring Industries Limited, Sarl [FIL] request three remedies from this Court. First, they apply for a review of the execution of the *ex parte* Mareva

injunction order [the Mareva Injunction Order] issued by Mr. Justice LeBlanc on December 19, 2016 against the Defendants Triforest Inc. [Triforest], Mr. Junwu Zhang, Ms. Zairong Feng and Ms. Congyu Zhang [collectively, the Triforest Defendants], and a declaration that this Mareva Injunction Order was lawfully executed. Second, they seek to convert this Mareva Injunction Order into an interlocutory Mareva injunction pursuant to Rule 373 of the *Federal Courts Rules*, *SOR/98-106*. Third, they want to obtain an interlocutory injunction order against the Triforest Defendants as well as the Defendant Molson International Trading Inc. [Molson] pursuant to Rule 373 or, in the alternative and as the Defendants may elect, an order to deposit into Court. The three aspects of the Plaintiffs' motion are collectively referred to as the Review Motion in this judgment.

2 The Plaintiffs claim that the Defendants are infringing certain patents they hold with respect to laminate flooring products. Laminate flooring is a multi-layer wood-based flooring product and generally consists of multiple panels that are coupled together to cover a floor surface.

3 The Plaintiffs contend that an interlocutory Mareva injunction order should be issued by this Court against the Triforest Defendants as there is genuine risk that the Triforest Defendants would remove their liquid assets from Canada or dissipate them to render ineffective any judgment of this Court. The Plaintiffs further submit that the Court should also issue an interlocutory injunction order against all Defendants to prevent them from continuing to manufacture, use, sell or import into Canada their laminate flooring products until the questions of patent infringement and validity are finally determined by this Court on the main action.

4 The Defendants respond that the Court should dismiss the Plaintiffs' request on the execution of the Mareva Injunction Order as the Order was improperly obtained and is impossible to properly enforce. The Defendants further submit that the Plaintiffs have failed to establish the existence of a real risk that the Triforest Defendants have or will expatriate or dissipate financial resources, let alone outside the normal course of business and for the purpose of avoiding the possibility of a judgment. Finally, the Defendants argue that the Court should not issue an interlocutory injunction to restrain them from manufacturing, using, selling or importing into Canada laminate flooring products that purportedly infringe the Plaintiffs' patents as the Plaintiffs have failed to establish irreparable harm that cannot be compensated financially.

5 There are three issues to be decided on this Review Motion:

A. Was the Mareva Injunction Order lawfully executed?

B. Should the Mareva Injunction Order be converted into an interlocutory Mareva injunction order?

C. Should the interlocutory injunction order sought by the Plaintiffs be granted?

6 For the reasons that follow, the Plaintiffs' Review Motion is granted in part. I conclude

that the Mareva Injunction Order was lawfully executed in accordance with its terms and followed the applicable procedural rules. However, I am not persuaded that the elements required to issue an interlocutory Mareva injunction order are satisfied. This is because the evidence obtained and provided by the Plaintiffs is not sufficient to demonstrate, on a balance of probabilities, that there is a real risk of removal or dissipation of assets in order to frustrate judgment. I am also not satisfied that the tripartite test set forth in *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 [*RJR-MacDonald*] for the issuance of interlocutory injunctions is met, as the Plaintiffs have notably failed to provide the required clear and non-speculative evidence to demonstrate, on a balance of probabilities, that they will suffer irreparable harm if the injunction is not granted.

II. Background

A. *The parties*

7 The Plaintiffs Unilin and FIL are sister companies that are part of the Unilin Group. Unilin is a Netherlands-based company and FIL is a Luxembourg company. The Unilin Group regroups companies that are leading manufacturers of a variety of products in the building materials industry, including laminate flooring products.

8 Traditionally, laminate flooring was installed by coupling panels with each other using a simple tongue and groove joint secured by an adhesive such as glue. The Unilin Group then developed a revolutionary technology for joining panels of laminate floor products without the use of an adhesive [the Glueless Locking Technology], and launched it in the market in 1997. The Glueless Locking Technology involves shaping the profiles of the tongue and groove of the flooring panels such that they are "locked" when coupled together. The tongue and groove of the flooring panels can be coupled together by rotation or lateral displacement. The Glueless Locking Technology is protected throughout the world by a vast portfolio of patents held by the Unilin Group.

9 Unilin owns the patent rights relating to the Glueless Locking Technology and FIL is responsible for the licensing and enforcement of the Unilin Group's patent rights. The Plaintiffs do not manufacture or sell directly laminate flooring products in Canada but they are present in the Canadian market through importers of their licensed products.

10 The Defendant Triforest is a Canadian importer, distributor and retailer of laminate flooring products. Triforest operates three stores in Canada, one in Markham, Ontario and two in the Vancouver area in British Columbia. It has a total of 20 employees. Triforest sells its laminate flooring products to retailers in association with at least the trademarks TOUCAN and TOUCAN FOREST PRODUCTS, and the retailers in turn resell them to Canadian customers. The laminate flooring products currently sold by Triforest are not licensed by the Plaintiffs [the Unlicensed Products].

11 The three individual Defendants are all directors of Triforest. They are members of

the same family, Mr. Zhang and Ms. Feng being husband and wife and Ms. Zhang being their daughter.

12 The Unlicensed Products imported by Triforest are manufactured by at least two companies located in China, namely Chuzhou Runlin Wood Industry Co Ltd [Runlin] and Shenglang Wood Co, Ltd [Shenglang]. Triforest, Runlin, Shenglang and the three individual Defendants are also associated with a third Chinese company, Chuzhou Jiude Wood Co, Ltd [Jiude]. Shenglang was a licensee of the Unilin Group from January 2014 until March 2016, when its license was terminated due to Shenglang's inaccurate reporting of products manufactured and sold under license, and thus of the royalties due to Unilin. Runlin and Jiude are not and have never been licensees of Unilin. Mr. Zhang, Ms. Feng and Ms. Zhang, are also the shareholders and legal representatives of the three Chinese manufacturers Runlin, Shenglang and Jiude.

13 In other words, the three individual Defendants are involved in both Triforest's business activities in Canada and in the Chinese companies that manufacture and export the Unlicensed Products imported and distributed in Canada by Triforest.

14 The Defendant Molson sells laminate flooring products imported into Canada by Triforest from two retail locations located in Markham, Ontario and Mississauga, Ontario. According to the Plaintiffs' investigation of publicly available information data, Molson is estimated to be the largest Canadian importer of unlicensed laminate flooring products manufactured by Runlin, after Triforest.

B. *The Plaintiffs' patents*

15 Unilin owns a vast portfolio of patents and patent applications around the world pertaining to the Glueless Locking Technology, including Canadian Patent Nos. 2,475,076 [the 076 Patent] and 2,522,321 [the 321 Patent], directed at certain aspects of the Glueless Locking Technology [collectively, the Canadian Patents]. FIL is a licensee of the Canadian Patents, and has the right to grant sublicenses.

16 Over the years, the Unilin Group has developed an extensive licensing program for the Glueless Locking Technology, whereby Unilin grants licenses to manufacturers around the world to manufacture and sell flooring products incorporating this technology. At present, the Unilin Group has approximately 150 active licensees for the Glueless Locking Technology and, on the basis of data available to the Plaintiffs, some 49 Canadian importers of laminate flooring products have exclusively imported Unilin's licensed products in 2016.

17 In 2012, the Plaintiffs developed a program pursuant to which licensed manufacturers in certain countries (including China) must affix a holographic authentication label [the L2C Label] to each box of flooring products they manufacture under license from the Plaintiffs [the L2C Program]. The purpose of the L2C Program was to more easily identify Unilin's licensed products in the marketplace and more

accurately trace the complete volume of products incorporating the Glueless Locking Technology manufactured by its licensees.

18 The Unilin Group has distributed over 143 million L2C Labels to its licensees since the start of the L2C Program in April 2012. Since that time, these licensees have reported the manufacture and sale of approximately 280 million square meters of laminate flooring products. In addition, the Plaintiffs have spent time and resources enforcing their patents related to the Glueless Locking Technology throughout the world, including in Canada.

C. *History of the proceedings*

19 Around August 2014, the Plaintiffs became aware of Triforest's alleged infringing activities. An investigation by the Plaintiffs uncovered that Triforest imported, distributed and sold in Canada laminate flooring products manufactured by Runlin that were not licensed by the Plaintiffs, that allegedly infringe several claims of the Canadian Patents and that did not bear the L2C Label.

20 Between September 2014 and September 2015, the Plaintiffs and their counsel wrote several letters to Triforest requesting that it cease importing and selling unlicensed laminate flooring. In October 2015, representatives of Triforest (including Ms. Feng) met with counsel for the Plaintiffs. The evidence submitted by the Plaintiffs shows that, during that meeting, it was confirmed that Triforest imported Unlicensed Products manufactured by Runlin. Ms. Feng also represented that Triforest would not be in a position to compensate the Plaintiffs for the unpaid royalties associated with the past importation and sale of the Unlicensed Products and that if Triforest were forced to do so, it would go bankrupt. Triforest also confirmed at the meeting that it would cease selling unlicensed laminate flooring products in Canada.

21 In early 2016, the Plaintiffs learned that, despite the October 2015 meeting, Triforest had continued to import into Canada significant amounts of unlicensed laminate flooring products from Runlin. According to the Plaintiffs' investigation, as of August 2016, Triforest had imported close to one million square meters of unlicensed laminate flooring products from Runlin to Canada.

22 Between October 2013 and April 2015, the Plaintiffs also sent letters to Molson. At first, it was to inform Molson about the L2C Program, the L2C Label and the patents held by the Unilin Group on laminate flooring products incorporating the Glueless Locking Technology. When they learned that Molson was selling laminate flooring products manufactured by Runlin and supplied by Triforest, the Plaintiffs requested that Molson cease its importation and sale of unlicensed laminate flooring products.

23 In May and June 2016, investigators were retained by the Plaintiffs to purchase sample flooring products sold by Triforest and Molson in Toronto and Vancouver. The vast majority of the boxes of Unlicensed Products obtained by the investigators did not

bear L2C Labels. In June and July 2016, the Plaintiffs' technical expert, Dr. Joseph Loferski, proceeded to test and analyse some of the sample flooring products purchased by the investigators, in order to assess whether they infringe any of certain specific claims of the Canadian Patents. Dr. Loferski issued his opinion in October 2016 and concluded that each and every element of claims 13 to 17, 19, 20 and 21 of the 076 Patent and of claims 10, 11 and 12 of the 321 Patent were found in each of the samples of the products he had analysed.

24 In October 2016, Mr. Olivier Soucisse, an analyst investigator, was engaged by the Plaintiffs to investigate the financial situation of the Triforest Defendants. Mr. Soucisse conducted background checks, ascertained ownership of real estate and other assets, and gathered wealth and financial information on these Defendants. Mr. Soucisse issued his report in November 2016, indicating that the Canadian assets of the Triforest Defendants included heavily leveraged real estate, as well as bank accounts for which the details and contents were unknown.

25 On December 6, 2016, the Plaintiffs commenced an action for infringement against the Defendants and brought an *ex parte* motion for a Mareva injunction against the Triforest Defendants. On the basis of the evidence then provided by the Plaintiffs, including affidavits from the investigators, from Dr. Loferski, from Mr. Soucisse and from a representative of FIL, Ms. Christine Walmsley-Scott, the *ex parte* motion was heard and granted by this Court on December 19, 2016. The Mareva Injunction Order was directed at Triforest, at the three individual Defendants and at various banks and financial institutions.

D. *Settlement privilege issue*

26 The Triforest Defendants claim that the Plaintiffs improperly rely on certain documents which are the subject of settlement privilege. These documents relate to the October 2015 meeting between representatives of Triforest and counsel for the Plaintiffs, where the importation of Unlicensed Products and the alleged infringement of the Plaintiffs' Canadian Patents were discussed.

27 I do not agree with the Triforest Defendants. It is well established that the settlement privilege requires the presence of three conditions: a litigious dispute in existence or within contemplation; a communication made with the express or implied intention that it would not be disclosed to the court in the event negotiations failed; and a communication made with the purpose to attempt to effect a settlement (*Kirkbi AG v Ritvik Holdings Inc*, *[2002] F.C.J. No. 793* at para 175). However, there is an exception to the rule of settlement privilege where the communication subject to privilege is not used as evidence of liability for the conduct which is the subject of negotiations or of weak cause of action, but is used for other purposes. In those circumstances, the privilege does not bar production in Court (Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 4th ed, Markham: LexisNexis Canada Inc, at para 14.343; *Sabre Inc v International Air Transport Assn*, *[2009] OJ No 903* at paras 20-21).

28 This is the case here, as the Plaintiffs do not rely on the impugned documents to establish the liability of the Triforest Defendants for the alleged infringement of its Canadian Patents, but instead as evidence that Triforest were aware of the Plaintiffs' licenses and that its representatives had then indicated that they would not have the financial resources to pay the license fees on all the Unlicensed Products if they had to.

29 These documents and the arguments relying on their content can therefore be properly considered by this Court in the context of the Plaintiffs' Review Motion.

III. Analysis

A. *Execution of the Mareva Injunction Order*

30 The first question to be determined is whether the Mareva Injunction Order issued on December 19, 2016 was lawfully executed.

31 The issue on this first portion of the motion brought by the Plaintiffs is to review the execution of the Mareva Injunction Order to determine if the execution was lawful and proper. This is not an appeal on the merits of the Mareva Injunction Order granted or a motion for a stay of the Order. Nor is it a motion to vary or set aside the Mareva Injunction Order pursuant to Rule 399.

32 On the record before me, I am satisfied that, in the circumstances of this case, the Mareva Injunction Order was lawfully executed by the Plaintiffs.

(1) Mareva injunctions

33 A Mareva injunction is a type of interlocutory injunction whereby the assets of a party are frozen so that they cannot be removed from the jurisdiction or dissipated in order to frustrate judgment. This is an exceptional form of injunction, granted on the basis that there is a genuine risk that the defendants will dissipate their assets or remove them outside of the jurisdiction prior to judgment, which would render judgment against that party useless, as there would be nothing against which to enforce it.

34 A Mareva injunction is a most extraordinary remedy. The general rule established in *Lister & Co v Stubbs*, [1886-90] All ER 797 (CA) is that execution cannot be obtained prior to judgment and judgment cannot be obtained prior to trial (*Aetna Financial Services v Feigelman*, *[1985] 1 SCR 2* [Aetna] at 10; Eli Lilly Canada Inc v Novopharm Limited, *2010 FC 241* [*Eli Lilly*] at para 15). The fundamental principle is that a litigant is not entitled to a remedy or execution against a defendant's assets before having established liability on the part of that defendant. Moreover, the Mareva injunction is typically an *ex parte* order, which puts an even higher threshold on the moving party. The granting of a Mareva injunction is therefore only available where the strict conditions for its issuance are met, and the courts should be prudent and cautious before issuing one.

35 The test for the granting of a Mareva injunction is well-established and was first developed by Lord Denning in *Third Chandris Shipping Corporation v Unimarine SA*, [1979] 1 QB 645 (CA) [*Third Chandris*]. The requirements outlined by Lord Denning in *Third Chandris* have been cited with approval in Canada, and the Canadian courts have developed and re-articulated them in various cases (*Chitel et al v Rothbart et al* *(1982), 141 DLR (3d) 268* (Ont CA) [*Chitel*] at paras 43-57; *Aetna* at 19-21; *Marine Atlantic Inc v Blyth et al* *(1993), 113 DLR (4th) 501* (FCA) [*Marine Atlantic*] at paras 5-10; *Eli Lilly* at paras 17-20; *Cho v Twin Cities Power-Canada*, *2012 ABCA 47* at para 5).

36 Further to those precedents, the moving party must therefore satisfy the following test to obtain a Mareva injunction:

A. establish a *strong prima* facie case;

B. meet the five following guidelines developed in *Third Chandris* as modified and rephrased in *Chitel*:

i. make full and frank disclosure of all matters in its knowledge which are material for the judge to know;

ii. give particulars of its claim against the defendant, stating the ground of its claim and the amount thereof, and fairly stating the points made against it by the defendant;

iii. give some grounds for believing that the defendant has assets in the jurisdiction;

iv. give some grounds for believing that there is a risk of the assets being removed from jurisdiction or dissipated in order to frustrate judgment; and

v. give an undertaking in damages in case it fails in its claim or the injunction turns out to be unjustified; and

C. satisfy the regular tripartite test for an interlocutory injunction described in *RJR-MacDonald*, namely the presence of a serious issue to be tried, irreparable harm if the injunction is not granted and the balance of convenience favouring the moving party.

37 If the moving party fails on any of these conditions, the courts should refuse the Mareva injunction.

(2) Execution of the Mareva Injunction Order

38 The terms regarding the execution of the Mareva Injunction Order were set out in the Order.

39 The Mareva Injunction Order required that the Plaintiffs deposit with the Court the

amount of $50,000 as security for damages prior to service upon the Defendants, banks or financial institutions. The Plaintiffs did file the $50,000 deposit with the Court on December 20, 2016.

40 The Mareva Injunction Order was then sent by facsimile and formally served on December 21 and 22, 2016 on eight banks and financial institutions (namely Bank of Montreal, CIBC, HSBC, Royal Bank of Canada, Scotiabank, TD Canada Trust [TD], Bank of China and Industrial and Commercial Bank of China [ICBC]). The Mareva Injunction Order was accompanied by a letter from counsel for the Plaintiffs, indicating what the Mareva Injunction Order required these banks and financial institutions to accomplish. The letter notably mentioned to the banks and financial institutions that the Order was to prevent the Triforest Defendants from transferring assets (including by the payment of monies) outside of Canada.

41 The Mareva Injunction Order was then properly served upon Triforest, Ms. Feng and Ms. Zhang on December 21, 2016, and the following day upon Mr. Zhang and Molson. The affidavits filed by the Plaintiffs in support of the Review Motion attest to that.

42 As required, the Plaintiffs brought their motion to review the execution of the Mareva Injunction Order before the Court within 14 days of service upon all Defendants, namely on January 4, 2016, one day before the scheduled expiry of the Order. Plaintiffs' counsel also filed with the Court the written reports received from the banks and financial institutions further to the execution of the Order. There is no indication that the Plaintiffs did not compensate the banks and financial institutions for reasonable expenses they incurred in carrying the searches and freezing of assets ordered.

43 Based on my review of the evidence, I find that the procedure followed was in accordance with the terms of the Mareva Injunction Order, that no improper execution of the Order arose and that the behaviour of the Plaintiffs and their counsel involved with the execution of the Order was irreproachable. I also do not find that the Order was obtained for an improper purpose and I observe that, at the time the Order was issued, the conditions for the issuance of the *ex parte* Mareva injunction were met to the satisfaction of the presiding judge.

44 The Triforest Defendants claim that the Mareva Injunction Order cannot be considered as having been lawfully executed on two grounds: they contend that the Plaintiffs have failed to make a full and frank disclosure, and they complain about the fact that the banks and the financial institutions ended up freezing all banking accounts of the Triforest Defendants, thereby widely exceeding the scope of the Order.

45 I am not convinced that these arguments raised by the Triforest Defendants reflect an unlawful execution of the Mareva Injunction Order.

46 I agree that a party seeking an *ex parte* Mareva injunction is required to make full and frank disclosure of all material facts as the Court is asked to grant such order solely

on the basis of the evidence presented by the moving party. It is indeed a well-established principle of our law that a party seeking the extraordinary relief of an *ex parte* injunction must provide a balanced and complete presentation of the facts. A fact may be material even if it is not determinative. However, I do not find that there was a lack of full and frank disclosure in the Plaintiffs' application for the Mareva Injunction Order or that they omitted or misrepresented material facts. On the contrary, I conclude that the Plaintiffs lived up to their obligations and duties imposed by the law.

47 The Triforest Defendants essentially take exception with the Plaintiffs' reliance on the fact that they had been recently unable to pursue a similar claim for infringement against a third party, MGA Commodities Inc. [MGA], who became insolvent before the Plaintiffs could execute a judgment against it. In their submissions, the Plaintiffs expressed strong concerns that the Triforest Defendants would imitate MGA and seek bankruptcy protection to avoid paying any amount for which they would be liable to the Plaintiffs for patent infringement. The Triforest Defendants claim that the Plaintiffs failed to disclose to the Court that there was no relationship between MGA and Triforest; that by November 2016, the financial investigations into the Triforest Defendants showed significant assets in Canada and no risk of insolvency; and that the MGA case dealt with counterfeiting of the Plaintiffs' laminate flooring products as well as allegations of copyright and trademark infringement, unlike the present proceeding limited to an alleged patent infringement.

48 I am satisfied that the Plaintiffs made a full and frank disclosure of the MGA situation in their attempt to draw a parallel between that case and the current case. At no point did the Plaintiffs claim or suggest that there was a relationship between MGA and the Triforest Defendants. In addition, the results of the Plaintiffs' financial investigations, the existence of the real estate assets owned by the three individual Defendants and the financial situation of all Triforest Defendants were fully disclosed through the affidavit of Mr. Soucisse. Finally, the failure to specifically mention the counterfeiting aspect of the MGA case was not, in my opinion, a material element. In fact, Ms. Walmsley-Scott testified that, in her view, infringement and counterfeiting were serious problems of a similar nature for the Unilin Group. Moreover, the parallel drawn with the MGA situation was made with respect to the inability to collect payment following an infringer's insolvency rather than in relation to the features and extent of the infringement by MGA.

49 The Triforest Defendants also complain about the fact that the Plaintiffs have been unable to properly enforce the Mareva Injunction Order, which only permitted the prohibition of money transfers by the Triforest Defendants to recipients outside of Canada. Instead, the banks and financial institutions have completely frozen the bank accounts and credit cards of the Triforest Defendants, preventing them from depositing or withdrawing any funds in the normal course of their livelihoods or business.

50 The Plaintiffs acknowledge that the financial assets of the Triforest Defendants have been completely frozen, that this was not the remedy contemplated by the Mareva Injunction Order, and that this went beyond the scope of the terms of the Mareva Injunction Order. The banks and financial institutions that were served with the Mareva

Injunction Order indicated to Plaintiffs' counsel that it was not possible for them to limit their application of the Mareva Injunction Order to its scope as issued. The evidence before me and the representations made by counsel at the hearing, however, indicate that, as soon as this became known to the Plaintiffs, their counsel had discussions with the banks and the financial institutions to find a solution, which proved difficult to do during the Christmas holiday period.

51 While this might have raised an issue with respect to the enforceability of the Mareva Injunction Order and might have provided grounds to the Triforest Defendants to vary the Order or to set it aside, I am not ready to find that this constitutes an unlawful or improper execution of the Order by the Plaintiffs or its representatives. I note that, in the interim order issued with the consent of the Triforest Defendants on January 5, 2017, to remain valid until the issuance of this judgment, the terms that the banks and financial institutions had found impossible to implement have been modified and that the banking accounts of the Triforest Defendants are no longer frozen.

(3) Conclusion on the review of the Order

52 For the above reasons, I am thus of the view that the execution of the Mareva Injunction Order was carried out lawfully by the Plaintiffs. The Plaintiffs are therefore authorized to withdraw the deposit of $50,000 they had filed with the Court on December 20, 2016.

B. *Interlocutory Mareva injunction*

53 The second issue to be determined is whether the Mareva Injunction Order should be converted into an interlocutory Mareva injunction order. To succeed, the Plaintiffs have to demonstrate that all the components of the test for the issuance of Mareva injunctions remain satisfied further to the evidence obtained from the execution of the Mareva Injunction Order and the receipt of the response materials filed by the Triforest Defendants.

54 I have reviewed the voluminous evidence obtained by the Plaintiffs from the four banks and financial institutions that provided banking accounts information on the Triforest Defendants, as well as the evidence tendered by the Triforest Defendants through the affidavits of Mr. Steve Wang, accountant for Triforest, and Ms. Zhang. The Plaintiffs' evidence is contained in the various affidavits of Ms. Julie Morin and of Ms. Van Khai Luong containing the letters and reports from the banks and financial institutions, and in the extracts of the Triforest Defendants' bank statements and passports prepared by Plaintiffs' counsel for the hearing before this Court. On the evidentiary record before me, I am not satisfied that there is clear and convincing evidence allowing me to conclude that a remedy as exceptional and extraordinary as an interlocutory Mareva injunction should be issued in this case. More specifically, I do not find that there is evidence supporting, on a balance of probabilities, a real risk that the Triforest Defendants would remove their assets from Canada or dissipate them outside

of normal and lawful course of business, for the purpose of avoiding or rendering ineffective a judgment that the Plaintiffs may obtain on their claim of infringement. The evidence uncovered through the execution of the Mareva Injunction Order simply does not confirm the risk anticipated and feared by the Plaintiffs when the *ex parte* Order was issued.

55 This "genuine risk" factor contained in the five *Third Chandris / Chitel* guidelines is the "overriding consideration" for the issuance of a Mareva injunction (*Aetna* at 24), and I conclude that the Plaintiffs do not satisfy it. As this is sufficient to refuse the interlocutory Mareva injunction, there is no need to consider the other factors and conditions prescribed by the jurisprudence on Mareva injunctions.

(1) Strong *prima facie* case

56 That said, since the parties and their respective counsel spent a fair portion of their written and oral submissions on the issue of the "strong *prima facie* case" of infringement, and in anticipation of the discussion below on the *RJR-MacDonald* test, I will make the following remarks on this point.

57 The Triforest Defendants dispute the assertion that the Plaintiffs have a strong *prima facie* case against them. They raise four arguments in support of their position. The Triforest Defendants first assert that the infringement analysis of Dr. Loferski is flawed because he did not measure the density of the core in the Unlicensed Products, whereas claims in each of the 076 Patent and the 321 Patent require that the product be made with HDF or MDF. The Triforest Defendants also contend that claim 10 of the 321 Patent requires "elastic deformation of the groove" and that Dr. Loferski admitted that the lower lip of the Triforest products deformed, not the groove. They further submit that the 076 Patent and the 321 Patent are invalid on the basis of various grounds including overbreadth, claim ambiguity, indefiniteness, anticipation by other patents and lack of utility. Finally, the Triforest Defendants have provided decisions issued in other countries where Unilin Group's patents apparently corresponding to the Canadian Patents have been found invalid, and where the corresponding European patents had their claims narrowed.

58 For the following reasons, I am not satisfied that the Triforest Defendants have provided clear and convincing evidence disputing the validity of the 076 Patent and the 321 Patent, to the point where the statutory presumption of validity has been displaced and where the Plaintiffs' case no longer falls within the range of a strong *prima facie* case of infringement. The Triforest Defendants may have laid the ground for some arguable points on the merits of the Plaintiffs' case of patent infringement, a matter to be decided at trial. However, at this stage, I find that the evidence adduced by the Plaintiffs provides answers to the various arguments raised by the Triforest Defendants against the validity of the Canadian Patents, sufficient to satisfy me that the Plaintiffs have demonstrated a strong *prima facie* case.

59 I pause to note that counsel for the Triforest Defendants opposes the production of the second supplemental affidavit of Ms. Luong filed on behalf of the Plaintiffs, which contains responding evidence on the issue of prior art documents submitted to the Canadian Patent Office in 2006, during the prosecution of the Canadian Patents. I do not agree. I am instead satisfied that this affidavit can be admitted as it is relevant and is assisting the Court on an issue raised by the Triforest Defendants in their response and discussed at length in the cross-examination of Ms. Walmsley-Scott. I am also of the view that it causes no undue prejudice to the Triforest Defendants and that it serves the interests of justice to have it on the record (*Atlantic Engraving Ltd v Lapointe Rosenstein (2002), 23 CPR (4th) 5* (FCA) at paras 8-9).

60 Turning to the Triforest Defendants' arguments, I am not persuaded that the cross-examination of Dr. Loferski allows to conclude that, since the density of the core in Triforest's Unlicensed Products was not measured, it was not possible for Dr. Loferski to conclude that these products infringed the identified claims of the Canadian Patents. Dr. Loferski stated in his evidence that he was able to confirm that the Triforest Unlicensed Products were made of HDF and MDF, and there is evidence showing that Triforest explicitly advertises that its products are made of HDF. Similarly, on the elastic deformation of the groove, I agree with the Plaintiffs that there is evidence showing that Dr. Loferski equates the groove with the lower lip.

61 As to the decisions arising from the other jurisdictions, I am not persuaded that they erode the strong *prima facie* case of the Plaintiffs. Despite certain challenges in Europe, the Plaintiffs' patents have remained valid and have been slightly modified further to those decisions, prior to the Canadian Patents being issued. These decisions, in my view, are not sufficient to question the validity of the Canadian Patents. Patent law varies between jurisdictions and the scope of the claims and of the monopolies granted to the Plaintiffs' various patents related to the Glueless Locking Technology will therefore differ from one country to the other. Absent any expert evidence challenging the validity of the Canadian Patents, I do not find that the decisions issued in the UK, France and the Netherlands pertaining to patents owned by the Unilin Group in these jurisdictions, as well as the two pieces of prior art cited by the Triforest Defendants, are sufficient to dispute, cast doubt or challenge the deemed validity of the Plaintiffs' Canadian Patents.

62 More specifically, the evidence shows that the relevant UK patent was declared valid following an amendment, and a corresponding European patent was also found valid following opposition proceedings. Similarly, in France, there was consent to the reversal of the French decision invalidating certain claims of a European patent, following a parallel opposition to the same patent decided in the Plaintiffs' favour after the issuance of the French decision. As to the decision in the Netherlands, I agree with the Plaintiffs that it is of no relevance, as it pertains to a patent directed at an invention different from the inventions covered by the Canadian Patents. Finally, the Plaintiffs point out that the pieces of prior art raised by the Triforest Defendants were submitted and considered by the Canadian patent authorities prior to the issuance of the Canadian Patents.

63 I am therefore of the view that the Plaintiffs have demonstrated a strong *prima facie* case of infringement against the Triforest Defendants. A strong *prima facie* case requires more than an arguable case; it implies that the moving party has a high chance of success on the merits. In this case, the Plaintiffs own the rights in the 076 and 321 Patents, including the exclusive right, privilege and liberty of making, constructing, using and selling to others to be used, the inventions as claimed therein. This was confirmed in the affidavits of Ms. Walmsley-Scott and Dr. Loferski. There is an initial presumption of validity. The Canadian Patents are in force since 1997, and their validity has never been challenged in Canada. Furthermore, the expert evidence of Dr. Loferski demonstrates that the Unlicensed Products imported and sold by the Triforest Defendants incorporate all of the elements of many claims of the 076 Patent and 321 Patent and infringe upon the Plaintiffs' exclusive patent rights. The evidentiary record also satisfies me that the Triforest Defendants sell and distribute Unlicensed Products that may infringe upon the 076 and 321 Patents and do not bear any L2C Label. The Plaintiffs' investigations further show that the Defendants hold a significant inventory of Unlicensed Products. All of this evidence points to a high chance of success for the Plaintiffs in their action for infringement.

64 The Triforest Defendants claim that statutory presumption alone is not sufficient to establish a *prima facie* case required to support an interlocutory injunction when affidavit evidence is offered disputing the validity of the patent, relying on *Teledyne Industries Inc et al v Lido Industrial Products Ltd* (1977), 33 CPR (2d) 270 at 276 [*Teledyne*]. However, *Teledyne* was a case where expert affidavit evidence from a patent agent had been offered to dispute the validity and infringement of the patent. In addition, this was a case where the patent was of recent origin and its validity had never been established. This is not the situation here. On the contrary, the Triforest Defendants did not submit any expert affidavit evidence challenging the validity of the Plaintiffs' Canadian Patents.

65 Accordingly, I am satisfied that the Plaintiffs have made out a strong *prima facie* case of patent infringement against all Defendants.

(2) Real risks of removal or dissipation of assets

66 The problem with the Plaintiffs' motion for an interlocutory Mareva injunction is the requirement of a real risk of removal or dissipation of assets by the Triforest Defendants.

67 The Plaintiffs claim that the banking information received further to the execution of the Mareva Injunction Order confirms that the Triforest Defendants have liquid assets in Canada, and that they frequently and easily transfer large sums of money in and out of their Canadian bank accounts, to and from unknown destinations. On the basis of these banking patterns and of the Triforest Defendants' commercial activities in China, the Plaintiffs submit that there is no question that the conversion of the Mareva Injunction Order into an interlocutory Mareva injunction order is necessary to ensure that any final judgment of this Court will be effective and enforceable.

68 I disagree. Despite the able representations made by counsel for the Plaintiffs, I am not persuaded that, with the evidence uncovered by the Plaintiffs and the evidence filed by the Triforest Defendants on this Review Motion, the demanding test for the issuance of an interlocutory Mareva injunction is now met.

(a) *The Chitel test*

69 True, the real risk of assets being removed from the jurisdiction or dissipated by the defendant to avoid the possibility of judgment is only one of the five *Third Chandris / Chitel* factors and it may be that the Plaintiffs satisfy many of the other conditions. However, this "genuine risk" factor is the overriding consideration for granting a Mareva injunction (*Aetna* at 24). Evidence of a threat to arrange assets to as to defeat judgment and "for the purpose of avoiding judgment" is key (*Marine Atlantic* at para 9).

70 On this point, it is worth citing the exact test I must apply, as set out in *Chitel* at para 57. It reads as follows:

> The applicant must persuade the Court by his material that the defendant is removing or there is a real risk that he is about to remove his assets from the jurisdiction to avoid the possibility of a judgment, or that the defendant is otherwise dissipating or disposing of his assets, in a manner clearly distinct from his usual or ordinary course of business or living, so as to render the possibility of future tracing of assets remote, if not impossible in fact or in law.

71 The Plaintiffs therefore had to provide clear and convincing evidence that, on a balance of probabilities, 1) the Triforest Defendants are removing or there is a real risk that they are about to remove their assets from Canada or are otherwise dissipating or disposing of their assets, 2) they do this in a manner clearly distinct from their usual or ordinary course of business or living, 3) so as to render the possibility of future tracing of the assets remote, if not impossible, or for the purpose of avoiding the possibility of judgment.

72 The burden is on the moving party to prove each of those three elements. Only where all those criteria are met can a Mareva injunction prevent the impugned behaviour. It would therefore not be enough to provide evidence that the defendant is having financial difficulties or that the defendant will probably remove its assets from the jurisdiction, if there is no evidence to suggest that the defendant also has a purpose to defeat or frustrate a potential judgment. If the assets are not dissipated for the purpose to avoid judgment, or if transfers are carried out in the normal course of a defendant's affairs, then the moving party, like all others with claims against the defendant, must run the risk that the defendant may dissipate its assets or consume them in discharging other liabilities and so leave nothing with which to satisfy a judgment.

73 I pause to underline that, as the Supreme Court stated in *FH v McDougall*, *2008 SCC*

53 [*McDougall*], there is only one standard of proof in civil cases in Canada, and that is proof on a balance of probabilities (*McDougall* at para 46). In that decision, Mr. Justice Rothstein, for a unanimous court, said that "it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending upon the seriousness of the case" and that the only legal rule in all cases is that "evidence must be scrutinized with care by the trial judge" to determine whether it is more likely than not that an alleged event occurred or is likely to occur (*McDougall* at para 45). Evidence "must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test" (*McDougall* at para 46). This, evidently, applies to the type of evidence needed for a Mareva injunction.

74 I agree with the Plaintiffs that, in determining whether there is a genuine risk that a defendant removes its assets from Canada or dissipates them, the courts must consider all of the relevant circumstances, including the nature of the conduct alleged and the type of assets involved (*Caisse populaire Laurier d'Ottawa Ltee v Guertin*, [1983] OJ No 2221 (Ont HC) [*Laurier*] at para 17; *Insurance Corp. of British Columbia v Patko*, 2008 BCCA 65 at para 29). But in the end, what needs to be assessed is "whether in all of those circumstances the assets will be dealt with in a manner that will serve to hamper or defeat the plaintiff's attempts to realize on any judgment they might obtain" (*Laurier* at para 17).

75 A motion like this one ultimately turns on its facts. And, when all of the circumstances are considered, the evidence adduced in this case fails to convince me that, on a balance of probabilities, the three components of the test set out in *Chitel* are met. What the Plaintiffs more specifically overlooked here are two fundamental elements of the test: acting out of the ordinary course of business, and a purpose or intent to evade legitimate execution and enforcement of a potential adverse decision.

(b) *The evidence*

76 I find that the evidence on the record before me shows that:

A. Neither Triforest nor the three individual Defendants are currently insolvent or face financial difficulties;

B. The Triforest Defendants own [REDACTED] real estate assets in Canada, [REDACTED];

C. Before the expiration of the Mareva Injunction Order on January 5, 2016, four financial institutions confirmed that they did not locate any account in the name of the Triforest Defendants. Counsel for the Plaintiffs however received information and transaction history pertaining to certain banking accounts that the Triforest Defendants hold [REDACTED];

D. The deposit and withdrawal patterns in the various banking accounts of the Triforest Defendants date back to 2013 and 2104 (and sometimes to 2011 and 2012) for the majority of their banking accounts;

E. The majority of the evidence singled out by the Plaintiffs in their extracts provided to the Court relate to 2012, 2013, 2014 and 2015. More limited evidence has been provided for 2016;

F. The travel evidence regarding the three individual Defendants, adduced to reflect the correlation between banking withdrawals and travel abroad to China, essentially date back to 2012 and 2014, with only one single instance in 2016;

G. The banking accounts of the Triforest Defendants generally contain vague and general entries [REDACTED], not allowing to know the source or the destination of the money transfers;

H. The [REDACTED] banking accounts report regular transfers to [REDACTED] institutions offering various cross-border financial services including global payments solutions, foreign exchange and international transfers;

I. The evidence does not allow to confirm or corroborate whether the transfers of money [REDACTED], are transfers out of the jurisdiction;

J. The payments made to the supplier Runlin were well identified in one [REDACTED] banking account, but these explicit entries were only for one supplier and were limited to a few payments made in the first quarter of 2016;

K. Several banking accounts of Triforest and of the three individual Defendants [REDACTED] showed substantial balances in December 2016, at the time the accounts were frozen further to the Mareva Injunction Order. [REDACTED];

L. Ms. Feng has a banking account [REDACTED] showing no movement since January 2015;

M. The various [REDACTED] banking accounts of Triforest show lots of deposits and withdrawal activities, with significant balances regularly remaining in the accounts throughout the period for which the accounts have been provided.

77 As was the case in *Eli Lilly*, I am of the view that, when considered in its totality, this evidence does not establish, on a balance of probabilities, that the Triforest Defendants are about to remove assets from Canada or that in making their various money transfers, they are acting in anything other than the ordinary and usual course of their business and livelihood. Further, there is insufficient evidence on the record to prove, on a balance of probabilities, that the Triforest Defendants are transferring these amounts for the purpose of avoiding judgment or that they would wind up their Canadian operations

rather than pay a judgment awarded to the Plaintiffs.

(c) *No expatriation or dissipation of assets*

78 On the removal of assets out of the jurisdiction or the dissipation of assets, I find no clear and convincing evidence able to support the affirmations made by the Plaintiffs. At best, the evidence is inconclusive and speculative. To use the words of Ms. Walmsley-Scott in her cross-examination, there is a belief "that because of the defendants' close ties to China that there's a significant risk that they could transfer all their assets out of Canada" (my emphasis). This is too speculative and insufficient to constitute evidence of expatriation of assets on which to base the grant of a Mareva injunction, as the removal of assets must be more than a mere possibility.

79 I am also not persuaded, based on the record before me, that I can reasonably infer from the evidence on the transfers [REDACTED], that this is to be read as necessarily meaning transfers outside of Canada, in the absence of other corroborating evidence. I am also not ready to infer that regular [REDACTED] from a banking account, without any more detail and without any other evidence, is sufficient to demonstrate, on a balance of probabilities, the existence of a transfer outside the jurisdiction or a dissipation of assets. Stated otherwise, I cannot conclude that it is more likely than not that the required expatriation or dissipation of assets occurred or is likely to occur.

80 True, the transaction history of the Triforest Defendants' [REDACTED] banking accounts shows that the accounts are sometimes kept at a relatively low ongoing balance, that the Triforest Defendants frequently deposit large sums of money in their accounts, and subsequently transfer equally large sums of money out of the accounts a few days or weeks after the deposits, normally by way of withdrawal or Internet transfer. But the evidence also shows that substantial balances regularly remain in the Triforest accounts. Further, as acknowledged by the Plaintiffs in two paragraphs in their written submissions, the large deposits, withdrawals and transfers are more often than not "to and from unknown destinations".

81 I accept that the evidence on the banking accounts of the Triforest Defendants reflects the transfer of significant withdrawals and deposits representing a large amount of money in the past few years. I understand that this may be a source of concern for the Plaintiffs. However, I do not agree that this amounts to evidence of a genuine risk of removal of assets out of Canada or of dissipation of assets.

(d) *Transfers in the usual course of business or living*

82 Turning to the second element of the *Chitel* test, which is the disposition of assets in a manner clearly distinct from the defendant's usual or ordinary course of business or living, the reports of the Triforest Defendants' banking accounts provided [REDACTED] show large deposits, withdrawals and transfers that have been going on for years, that clearly started prior to the events leading to the Plaintiffs' motion, and that do not exhibit

a change in behavior as a result of the Plaintiffs' correspondences, meeting with the Plaintiffs' counsel in October 2015, or the commencement of their action for infringement. The [REDACTED] bank records, in particular, show a pattern of large transfers in and out of the Triforest Defendants' banking accounts that pre-date the events in question. This evidence does not support a conclusion that these are or were transfers occurring outside of the normal course of the livelihoods and business of the Triforest Defendants, and actually supports the opposite conclusion. There is also no evidence suggesting that this course of action is fraudulent or illegal.

83 Of course, given the vertical integration of the Triforest Defendants' operations, it is reasonable to infer that some of those transfers and withdrawals made in the normal course of business must have included money transfers to China, to the related manufacturers and suppliers of laminate flooring products, or to the three individual Defendants. Since only a few transactions with suppliers were clearly identified as such in the [REDACTED] account, it is also reasonable to infer that [REDACTED] included payments to suppliers. However, there is no evidence allowing me to conclude that these money transfers are clearly distinct from the normal course of business or living of the Triforest Defendants.

84 The banking accounts evidence obtained by the Plaintiffs is voluminous. The problem for the Plaintiffs is that this evidence goes back to 2012, 2013 and 2014 (and sometimes to 2011), and shows a recurring pattern of deposits, withdrawals and transfers that have been occurring for years in the banking accounts of the Triforest Defendants. There is no evidence reflecting a change in the circumstances of the Triforest Defendants' livelihood, business or operations, or any risk of the Triforest Defendants removing assets out of the usual or ordinary course of their livelihood or business in order to defeat or frustrate an eventual judgment.

85 In her affidavit, Ms. Zhang also indicated that, for the three individual Defendants, the source of the large deposits were from accounts in China, line of credit accounts with the [REDACTED], Internet transfers from other banks accounts held by them, or loan repayments by Triforest. She stated that the large withdrawals were used for the purchase of real estate, home renovations and transfers to other bank accounts held by the individual Defendants, loans to Triforest, mortgage payments, tuition and living expenses. Turning to Mr. Wang, he has affirmed in his affidavit that Triforest regularly transfers funds from its [REDACTED] banking accounts to entities or persons located in or outside of Canada for the purpose of fulfilling its payment obligations for the normal operation of the business, including several reoccurring monthly expenses such as payroll, payments to suppliers, rental expenses and GST remittances. He testified that transfers made by Triforest from its [REDACTED] banking accounts to entities or persons located in China have been only for business-related purposes. This evidence of Ms. Zhang and of Mr. Wang was not challenged nor contradicted.

86 On the evidentiary record before me, I therefore find that the Triforest Defendants have not changed, and do not intend to change, their usual methods of transferring their

monetary assets and of running their business. I note that their laminate flooring business is active and continuing, both as manufacturers in China and importers in Canada, and that Triforest has become one of the five largest importers of laminate flooring products in Canada.

(e) *No purpose of avoiding judgment*

87 Finally, turning to the third and last part of the *Chitel* test, I can only consider granting a Mareva injunction if I can conclude that the purpose and intention of the Triforest Defendants is to defeat any judgment that the Plaintiffs may obtain against them. Again, there is no clear and convincing evidence demonstrating, on a balance of probabilities, that the purpose of the Triforest Defendants withdrawing the funds from their accounts is not a legitimate one. The fact that these transfers might affect the Plaintiffs' ability to recover on any judgment it may obtain does not, in and of itself, justify the granting of a Mareva injunction.

88 As was the case in *Aetna*, there is no evidence allowing me to find an improper motive behind the transfers of money by the Triforest Defendants. The evidence instead shows that the transfers reflect the history of conduct of the business and personal affairs carried out by the Triforest Defendants, and there is no sufficient basis to find a purpose on the part of the Triforest Defendants to default on their obligations, either generally or to the Plaintiffs, if such an obligation is found to exist on the merits (Aetna at 36).

89 In light of the evidence before me, I do not find that, on a balance of probabilities, there is an improper purpose on the part of the Triforest Defendants in the various transfers of funds observed in their banking accounts. Nor am I persuaded that, on a balance of probabilities, the evidence unearthed with the benefit of the Mareva Injunction Order support a conclusion that there is a real risk that the Triforest Defendants will deal with their banking accounts in a manner that will interfere with or defeat the Plaintiffs' attempt to realize on any judgment they might obtain on the merits. I further observe that the Plaintiffs' investigation into the current status of the Triforest Defendants' finances showed no evidence of an intention by the Triforest Defendants to defeat or frustrate an eventual judgment. It instead showed that the bank accounts, loans, mortgages, credit cards and leases of the Triforest Defendants were in good standing, and there was no evidence of dissipation of assets, bankruptcy, collections or judgment against them. Their respective financial situation is sound.

90 In any event, I note that evidence that a defendant is insolvent or having financial difficulties, or the possibility that potential judgment debtors may be declared bankrupt, is not sufficient to justify a Mareva injunction (*Marine Atlantic* at para 9). There must be evidence that the disposal of assets is "for the purpose of avoiding judgment": "[t]he removal of assets from the jurisdiction by a resident defendant in the normal course of its business, without there being any suggestion of an intent to defeat or frustrate any

eventual judgment recovery by the plaintiff, is not enough to support a Mareva injunction" (*Marine Atlantic* at para 9).

91 I accept that representatives of Triforest have at least been evasive if not untruthful with Plaintiffs' counsel in October 2015, that they have tried to hide the fact that they knew the source of Triforest's Unlicensed Products, and that they then indicated they would go bankrupt if they had to pay royalties to the Plaintiffs for all their past importations of Unlicensed Products. For the Plaintiffs, the October 2015 report from their counsel on the meeting with Triforest is a key document. I acknowledge that, on the basis of this document, there may have been some dishonesty on the part of the Triforest Defendants at the time. However, considering all the circumstances and all the evidence before me, I do not find that this October 2015 statement is enough to tip the balance in favour of the Plaintiffs on the interlocutory Mareva injunction, and to conclude that the transfers of money the Triforest Defendants have been doing for years are for the purpose of avoiding judgment.

92 Looking at the matter with the added benefit of the results from the execution of the Mareva Injunction Order, it is my view that the significance of the October 2015 statement has atrophied with the passage of time and with the dissonance observed between its contents and the more recent evidence on the sound financial situation of the Triforest Defendants.

93 One other point is worth mentioning. The evidence shows that the Triforest Defendants have ties to Canada. The three individual Defendants became permanent Canadian residents in March 2012, have lived in Canada since then, and own real estate assets in the country, [REDACTED]. Triforest operates three stores in Canada with 20 employees. Triforest has an on-going business as one the five largest imports of laminate flooring products in Canada, perhaps, I acknowledge, due to the benefit of Unlicensed Products that could be infringing on the Canadian Patents of the Plaintiffs. This is not reflective of a situation where defendants are about to flee the jurisdiction or dissipate assets in order to avoid a judgment against them.

94 In other words, when all the evidence on the record is considered, I am not persuaded that it is now sufficient to meet the third dimension of the *Chitel* test and to support the issuance of the interlocutory Mareva injunction now sought by the Plaintiffs. The evidence uncovered through the execution of the Mareva Injunction Order does not confirm the significance of the risk identified to obtain the initial Order.

(3) Conclusion on the interlocutory Mareva injunction

95 For the above reasons, I am unable to conclude, based on all the circumstances of this case and on a balance of probabilities, that there is real risk of removal of assets from the jurisdiction before a judgment could be obtained by the Plaintiffs, or that assets would be dissipated by the Triforest Defendants so as to frustrate a judgment, outside of their normal course of business and operations. The evidence does not show that, and it

does not allow me to draw such inference. Evidence that the Triforest Defendants regularly transfer large sums of money in and out of their Canadian bank accounts, to and from unknown destinations, is not enough to satisfy the stringent test established for Mareva injunctions, and to convince me that the conversion of the Mareva Injunction Order into an interlocutory Mareva injunction order is necessary to ensure that any final judgment of this Court will be effective and enforceable.

96 I observe that, in its submissions to the Court, Triforest is prepared to undertake to produce to the Plaintiffs an accounting of past sales of its laminate flooring products in Canada for the period starting on June 1, 2014, ending on the day before the date of signing such undertaking, and to keep an accounting of current and future sales of its laminate flooring products in Canada until the disposition of this matter or until the term of the Canadian Patents, whichever comes first. I am of the view that it would be in the interests of justice to keep that undertaking in place and that an order to that effect seems just and appropriate in the circumstances.

C. *Interlocutory injunction*

97 The third issue to be determined on this Review Motion is whether an interlocutory injunction order should be issued against all Defendants to prevent them from continuing to manufacture, use, sell or import into Canada their unlicensed laminate flooring products until the matters raised by the action for patent infringement are finally determined by the Court. To succeed, the Plaintiffs have to demonstrate that each element of the *RJR-MacDonald* test for the issuance of interlocutory injunctions is met.

98 For the reasons that follow, I am not persuaded that, on the record before me, the Plaintiffs have provided the required clear and non-speculative evidence to demonstrate, on a balance of probabilities, that they will suffer irreparable harm if the interlocutory injunction sought is not granted.

(1) The *RJR-MacDonald* test

99 It is trite law that for an interlocutory injunction to be granted, the moving party must satisfy the three conditions set out in *RJR-MacDonald*. In that decision, the Supreme Court held that, to issue an order for injunctive relief, a court must first be satisfied that there is a serious issue to be tried. Second, it must determine that the applicant would suffer irreparable harm if the injunction were refused. Third, it must find that the "balance of convenience", which contemplates an assessment of which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits, favours the moving party (*RJR-MacDonald* at 334). The tripartite test is conjunctive, so all three elements have to be met in order for an injunction to be granted.

100 In recent decisions issued in the context of stays, as opposed to interlocutory injunctions, the Federal Court of Appeal has indeed frequently reminded that all three elements of the tripartite test have to be satisfied. Finding the existence of a serious

issue does not automatically bring with it that the other two prongs of the tripartite test are satisfied. As the Federal Court of Appeal stated in *Janssen Inc v Abbvie Corporation*, 2014 FCA 112 [*Janssen*], each branch of the test adds something important and "none of the branches can be seen as an optional extra" (*Janssen* at para 19).

101 I add that the Federal Court of Appeal has repeatedly considered that the applicable test for interlocutory injunctions is the same as the test governing the granting of stays of proceedings or of appeals (*Toronto Real Estate Board v Commissioner of Competition*, 2016 FCA 204 at para 11; *Janssen* at paras 12-17; *Glooscap Heritage Society v Canada (National Revenue)*, 2012 FCA 255 [*Glooscap*] at para 4; *International Charity Association Network v Canada (National Revenue)*, 2008 FCA 114 at para 5). As the Federal Court of Appeal makes no distinction between the principles developed for interlocutory stays or for interlocutory injunctions, its observations on the cumulative requirement of the three elements of the *RJR-MacDonald* test are equally applicable in the context of injunctions, even though these were made in the context of stays.

102 That said, I agree that three prongs of the interlocutory injunction test are interrelated and that the three factors should not be assessed in total isolation from one another (*University of California v I-Med Pharma Inc*, 2016 FC 350 [*I-Med Pharma I*] at para 31; University of California v I-Med Pharma Inc, 2016 FC 606 [I-Med Pharma II] at para 27, aff'd 2017 FCA 8; *Geophysical Service Incorporated v Canada-Nova-Scotia Offshore Petroleum Board*, 2014 FC 450 [*Geophysical Service*] at para 35; *Merck & Co Inc v Nu-Pharm Inc*, (2000) 4 CPR (4th) 464 [*Nu-Pharm*] at para 13).

103 In their written and oral submissions, the Plaintiffs relied on case law developing the "blatant infringement" approach to suggest that this may result in a lower irreparable harm threshold or even in an exemption from the requirement to establish irreparable harm, depending on the facts at stake. They argue that, in the circumstances of this case, the behaviour of the Triforest Defendants amounts to a blatant patent infringement, and they invite the Court to consider a more lenient approach on the issue of irreparable harm.

104 This line of jurisprudence on "blatant infringement" must, however, be put in its proper context.

105 First, I note that the "blatant infringement" argument has arisen in copyright cases, as opposed to patent cases. While it is well accepted that copyright infringement does not take place inadvertently, this is not necessarily the case for patent infringement given the highly technical nature of most patent claims. In fact, in one of the early cases where the notion of "blatant infringement" was introduced, Madam Justice Reed made an explicit distinction with patent cases before accepting that there was a lesser need to prove irreparable harm in "blatant" cases of copyright infringement (*International Business Corporation v Ordinateurs Spirales Inc/Spirales Computers Inc* (1984), 80 CPR (2d) 187 (FCTD) [*Spirales Computers*] at 201). She explicitly indicated that for patent cases, the threshold must be higher, and would require the usual proof of irreparable

harm for interlocutory injunctions:

> In any event, I am not convinced that the degree of harm required to be proved in a case such as this, where there had been blatant copying, is as high as that required in other cases of interlocutory injunction. Counsel for the plaintiff argued that the irreparable harm test was appropriate to patents because it was easy to inadvertently infringe a patent right. Thus, the courts are slow to grant interlocutory injunctions in patent cases. He argued, however, that copying could not take place inadvertently and therefore the courts were more willing to grant interlocutory injunctions in copyright infringement actions when the copying was very clear, without requiring irreparable harm or a finding that damages would not be adequate. I accept this reasoning. It accords with my interpretation of the jurisprudence.

106 I am not aware of cases, and counsel for the Plaintiffs did not cite any, where this notion of "blatant infringement" was used in the context of an injunctive relief sought for patent infringement. It is a concept which remains foreign to patent cases.

107 Second, the "blatant infringement" cases can be traced back to the reasoning of Mr. Justice Nadon in *Diamant Toys Ltd v Jouets Bo-Jeux Toys Inc*, *2002 FCT 384* [*Diamant Toys*], where he adopted the Court's view in *Spirales Computers* and found that when copyright infringement is blatant, there must be a less stringent test of damages (*Diamant Toys* at para 56). However, as recently stated by Madam Justice Tremblay-Lamer in *Bell Canada v 1326030 Ontario Inc (iTVBox.net)*, *2016 FC 612* [*Bell Canada*], Mr. Justice Nadon's reasoning has subsequently been read by this Court as being restricted to those situations where there is a finding of blatant copyright infringement (*Bell Canada* at para 29; *Geophysical Service* at para 36; *Western Steel and Tube Ltd v Erickson Manufacturing Ltd*, *2009 FC 791* [*Western Steel*] at paras 11-12).

108 Third, these "blatant infringement" cases did not go as far as suggesting or implying that no proof of irreparable harm is required in order to obtain an interlocutory injunction when there is evidence of blatant copyright infringement. In my view, they rather only hold for the proposition that a strong finding on the first prong of the tripartite injunction test in copyright cases may lower the threshold on the other two prongs, and that it may then be appropriate to consider a less severe test of potential damage than would otherwise be the case (*Western Steel* at para 12). I am not aware of injunction cases where an applicant's case was sufficiently strong, even in the copyright context, that the threshold for meeting the other two factors was set so low that no proof of irreparable harm was required. A robust case on the serious issue dimension of the *RJR-MacDonald* test does not relieve the moving party from the burden of establishing that it would suffer some irreparable harm that could not be compensated with damages (*Bell Canada* at para 29). In short, "there is no automatic conclusion that irreparable harm exists merely because the foundation of an action is an infringement of copyright or trademark or the alleged tort of passing off" (*Western Steel* at para 11).

109 I further observe that, in cases where this issue of blatant copyright infringement was raised, the Court was nonetheless persuaded that there was some form of irreparable harm (*Bell Canada* at para 31). I mention one last point: the early cases such as *Diamant Toys* where the "blatant infringement" approach emerged were not interlocutory injunction cases but rather cases involving preservation orders, where the legal requirements are different (*Western Steel* at paras 11-12).

110 For all those reasons, I am not convinced that the "blatant infringement" case law should guide my approach to the assessment of irreparable harm in this patent case, or that I should depart from the well-accepted principles governing the evidentiary requirements for this second element of the *RJR-MacDonald* test.

111 In any event, even if I were to assume that there is precedent to support the proposition that irreparable harm can be satisfied by a demonstration that a defendant's allegedly infringing patented product is substantially the same as that of the plaintiff, and that the "blatant infringement" approach developed in the copyright space could be imported into the patent space, I consider that the evidence before me is inadequate and insufficient to make a determination that there is a "blatant" patent infringement in this case. A strong *prima facie* case of patent infringement does not necessarily equate to a blatant infringement. To be qualified as blatant, the infringement needs to be undeniable and unmistakable. I accept that such obviousness can arise in copyright and trademark cases, but it is much more difficult to establish in patent cases. Especially in a situation where, as is the case here, the Triforest Defendants have raised some arguments questioning the validity of the Plaintiffs' Canadian Patents, where the patents cover dozens of pages and each identify numerous claims, and where there is no explicit admission of infringement. The issue will be debated in detail at trial. While I agree that the Plaintiffs have a strong *prima facie* case of patent infringement, I am not persuaded that the evidence before me suffices, at this early stage, to qualify this case as one of "blatant infringement" by the Triforest Defendants.

(2) Serious issue

112 The first part of the tripartite test is whether the evidence before the Court is sufficient to satisfy it that there is a serious issue to be tried. The threshold is a low one. While a preliminary assessment of the merits of the case is required, "a prolonged examination of the merits is generally neither necessary nor desirable" (*RJR-MacDonald* at 337-338). As a general rule, the question of whether a serious issue exists should be answered on the basis of no more than an "extremely limited review of the case" (*RJR-MacDonald* at 348). Once the Court determines that the underlying proceeding is "neither vexatious nor frivolous", it should proceed to the second part of the test (*RJR-MacDonald* at 337). In an interlocutory injunction, "the underlying dispute remains to be decided, and judges sitting on such matters should generally avoid wading any further into that underlying dispute than is strictly necessary to deal with the matter before them" (*Jamieson Laboratories Ltd v Reckitt Benckiser LLC*, *2015 FCA 104* at para 25).

113 In light of my earlier finding that the Plaintiffs have demonstrated a strong *prima facie* case of patent infringement on the motion for an interlocutory Mareva injunction, I am satisfied that there is a serious issue to be tried. There is an initial presumption that the Canadian Patents of the Plaintiffs are valid and based on the facts before me, there is definitely at least an arguable case and a serious issue that the Defendants' Unlicensed Products would fall within the scope of one or more claims of the Canadian Patents. The fact that the Defendants may have an arguable case of their own to question the validity of the Canadian Patents does not mean that there is no serious issue to be tried.

114 The first element of the *RJR-MacDonald* test is accordingly met.

(3) Irreparable harm

115 I now turn to the second part of the tripartite test, irreparable harm.

(a) *Legal requirements*

116 "Irreparable" refers to the nature of the harm suffered rather than its magnitude; it is harm which "either cannot be quantified in monetary terms or which cannot be cured" (*RJR-MacDonald* at 341). The threshold for establishing irreparable harm is very high. Harm does not become irreparable solely because precisely calculating damages would be difficult, as is regularly the case in patent cases (*I-Med Pharma II* at para 32; *Merck Frosst Canada Inc v Canada (Minister of Health)* (1997), 74 CPR (3d) 460 (FCTD) [*Merck Frosst Canada*] at 464; *Merck & Co v Apotex Inc*, [1993] F.C.J. No. 1095 at para 42). Difficulty in precisely calculating damages does not constitute irreparable harm, provided there is some reasonably accurate way of quantifying and measuring those damages (*Nu-Pharm* at para 32).

117 It is also well established that irreparable harm in the context of injunctive relief must flow from clear and non-speculative evidence which demonstrates how such harm will occur if the relief is not granted (*AstraZeneca Canada Inc v Apotex Inc*, 2011 FC 505 at para 56, aff'd 2011 FCA 211; *Aventis Pharma SA v Novopharm Ltd*, 2005 FC 815 [*Aventis Pharma*] at paras 59-61, aff'd 2005 FCA 390; *Syntex Inc v Novopharm Ltd* (1991), 36 CPR (3d) 129 (FCA) at 135). Simply finding that irreparable harm is likely is not enough; there must be evidence that the moving party will or would suffer irreparable harm if the injunction if not granted (*Centre Ice Ltd v National Hockey League at al* (1994), 53 CPR (3d) 34 (FCA) [*Centre Ice*] at 52).

118 In *Janssen*, the Federal Court of Appeal stated that a party seeking a suspension relief must demonstrate in a detailed and concrete way that it will suffer "real, definite, unavoidable harm -- not hypothetical and speculative harm -- that cannot be repaired later" (*Janssen* at para 24). In that decision, Mr. Justice Stratas added that "it would be strange if vague assumptions and bald assertions, rather than detailed and specific

evidence, could support the granting of such serious relief" (*Janssen* at para 24). The Federal Court of Appeal has indeed frequently insisted on the quality of evidence needed to establish irreparable harm. General assertions cannot establish irreparable harm as "[t]hey essentially prove nothing" (*Gateway City Church v Canada (National Revenue)*, *2013 FCA 126* [*Gateway Church*] at para 15). Similarly, "[a]ssumptions, speculations, hypotheticals and arguable assertions, unsupported by evidence, carry no weight" (*Glooscap* at para 31).

119 I cannot do better than repeat the often-cited passage from Mr. Justice Stratas in *Stoney First Nation v Shotclose*, *2011 FCA 232* [*Stoney First Nation*] at para 48:

> It is all too easy for those seeking a stay in a case like this to enumerate problems, call them serious, and then, when describing the harm that might result, to use broad, expressive terms that essentially just assert -- not demonstrate to the Court's satisfaction -- that the harm is irreparable.

120 In injunctive matters, the burden is on the moving party to satisfy the court that there is "evidence at a convincing level of particularity that demonstrates a real probability that unavoidable irreparable harm will result" unless the injunction is granted (*Gateway Church* at para 16; *Glooscap*, at para 31; *Stoney First Nation* at para 48). Again, the requirement of having evidence "sufficiently clear, convincing and cogent to satisfy the balance of probabilities test", set out in *McDougall*, of course also applies to the clear and non-speculative evidence needed for irreparable harm.

(b) *Plaintiffs' claims of irreparable harm*

121 The Plaintiffs argue that, if an interlocutory injunctive relief preventing the Defendants from continuing to import and sell the Unlicensed Products is not granted, they will suffer serious and irreparable harm under a number of headings. These allegations of harm are premised on the fact that Triforest is now amongst the top five importers of laminate flooring products in Canada and that, to the Plaintiffs' knowledge, it is the largest importer of infringing laminate flooring products.

122 The Plaintiffs' claims of irreparable harm are all contained in the affidavit of Ms. Walmsley-Scott. No other evidence has been provided by the Plaintiffs. In essence, Ms. Walmsley-Scott states that the Plaintiffs will suffer harm through 1) the loss of goodwill and reputation; 2) the loss of market share and of existing and potential customers; 3) the risk of the Defendants "springboarding" into the post-patent market; and 4) the financial inability of the Defendants to pay an eventual judgment against them.

123 I observe that Ms. Walmsley-Scott does not cite nor provide a single document in support of her allegations of harm.

124 Having reviewed the totality of the evidence provided by the Plaintiffs, I am not satisfied that, on a balance of probabilities, there is the required clear and non-

speculative evidence to support any of the allegations of irreparable harm. In fact, even if I were to assume that the current case could amount to a "blatant infringement" and that the lower threshold approach discussed above could be imported in the patent space, I do not find that the Plaintiffs' assertions of irreparable harm would meet these more flexible requirements.

125 First, the various allegations of harm are not supported by detailed and specific evidence, and they thus remain in the universe of speculations. Second, the harm alleged by the Plaintiffs is all quantifiable, and no expert evidence has been provided to demonstrate that such harm is not measurable in monetary terms or that no methodology is available to calculate the Plaintiffs' alleged damages.

(c) *Speculative nature of irreparable harm*

126 The alleged harm singled out in the affidavit of Ms. Walmsley-Scott can be regrouped under four different headings.

(i) Loss of goodwill and reputation

127 The Plaintiffs first claim that if the infringement of their intellectual property rights is allowed to continue, their goodwill and reputation will be hurt. This will result from the impossibility of monitoring the Defendants' infringement, the destruction of the goodwill built between the Unilin Group and its licensees and importers of licensed products, and the incitement of other importers to trade in unlicensed products.

128 The Plaintiffs contend that the Unilin Group will be perceived in the flooring industry as being unwilling and unable to enforce its Canadian intellectual property rights and the L2C Program, despite the significant time and resources it has spent on developing its program. Ms. Walmsley-Scott says it will become impossible to monitor and prevent the infringing activities if Triforest is not prevented from selling the Unlicensed Products, and that it is already impossible for Unilin to properly monitor the situation. The Plaintiffs also submit that the failure by the Triforest Defendants to pay royalties has impaired the ability of other licensees to fairly compete in the Canadian marketplace, thus undermining Unilin's licensing program. The Plaintiffs further allege that, if not restrained by this Court, the Defendants' ongoing infringement will incite other importers of laminate flooring products to purchase their products from unlicensed manufacturers, and new manufacturers not to seek a license from Unilin, the whole in order to avoid paying the royalties owed to Unilin for the licensing of the products incorporating the Glueless Locking Technology.

129 Ms. Walmsley-Scott affirms that this harm cannot be measured in monetary terms.

130 The problem is that, apart from Ms. Walmsley-Scott own self-serving assertions, there is no evidence on the various components of this chain of events. The risk of such harm is entirely speculative as these assertions are unsupported by any evidence and

any degree of particularity. The record indicates that Triforest and Molson have been present in the Canadian market for over two years and that Triforest has managed to become one of the five leading importers of laminate flooring products in Canada. Yet, no particular evidence has been provided by Ms. Walmsley-Scott or the Plaintiffs with respect to the impact of the Defendants' presence on the business of their licensees in Canada, or of the Canadian importers of their licensed products.

131 There is no evidence on the potential negative perceptions or impossibility of monitoring. Also, no evidence from importers or from licensees has been adduced to the effect that they might have a negative view on the Plaintiffs' monitoring and enforcement of its Canadian Patents. There is no evidence of licensees having discontinued or threatening to discontinue paying royalties to Unilin if the Triforest Defendants continue to operate their business without having to pay theirs. There is also no evidence of potential or prospective licensees refraining from doing business with Unilin while awaiting the outcome of the Plaintiffs' recourses against the Triforest Defendants.

132 This situation is quite different from the cases cited by the Plaintiffs, such as *Universal City Studios Inc v Zellers Inc* (1983), 73 CPR (2d) 1 (FCTD) at 11 or *Anne of Green Gables Licensing Authority Inc v Avonlea Traditions Inc* (2000), 6 CPR (4th) 57 (Ont CA) at para 16, where some supporting evidence from license users had been provided on the issue of loss of goodwill and reputation.

133 Similarly, there is no evidence to substantiate the so-called floodgates argument advanced by the Plaintiffs, as no particulars or examples (expect for the statements made by Ms. Walmsley-Scott) have been provided showing that other manufacturers or importers have been or could be encouraged to engage in the infringing activities, resulting in a "death by 1000 cuts" to the Unlin Group's licensing and L2C Program (*Spirales Computers* at 199-200).

134 The Plaintiffs bear the onus of providing the clear and convincing evidence of irreparable harm to their goodwill and reputation, but their evidence on this issue boils down to hypotheticals and speculations. No witness and no document lend any support for the assertions made on this claim of reputational damage. I must therefore conclude that the Plaintiffs have not established a basis for this heading of irreparable harm.

135 In addition, I am also not persuaded that the evidence supports the allegation that it has been or will become impossible for the Plaintiffs to monitor and prevent infringing activities if the injunction is not granted. I instead note that the Plaintiffs' own evidence shows that they have been somewhat actively protecting and enforcing their patents relating to the Glueless Locking Technology, including the Canadian Patents. The Plaintiffs have sent over 200 letters to potential importers operating in Canada to notify them regarding the LC2 Program and to flag the issue of potential infringement of their intellectual property rights on laminate flooring products. The evidence also indicates that the Plaintiffs keep track of sales of unlicensed products in Canada. Finally, they have taken action and initiated a few lawsuits against various alleged infringers, including

recently against MGA. This behaviour is not reflective of a patent owner unable to monitor and enforce its intellectual property rights, or shackled in its efforts to do so.

(ii) Loss of market share and of existing and potential customers

136 The Plaintiffs also claim that the infringing activities of the Defendants will allow them to gain market share at the expense of Unilin's licensees, because unlicensed flooring products are sold by manufacturers at lower prices than licensed products since no royalties are paid. This will also result in manufacturers and importers being encouraged to sell unlicensed products at a lower cost, and in a loss of actual or potential customers for the Plaintiffs. The Plaintiffs further contend that, if the Defendants are permitted to maintain their infringing activities, they will be able to continue to unfairly compete with competitors selling licensed laminate flooring products in Canada, including Unilin and customers of Unilin's licensees, by either charging lower prices for their products and/or using the larger profits to invest in other activities to increase sales.

137 This, repeats Ms. Walmsley-Scott, cannot be estimated or measured in monetary terms either.

138 Again, the evidence provided only shows general and speculative assertions about loss of market share, without any particularity. This, as the Federal Court of Appeal frequently reminded, is insufficient to meet the high threshold of irreparable harm.

139 There is no evidence of new manufacturers refraining from seeking a license from Unilin in order to avoid paying royalties, or threatening to do so. Let alone evidence of such behaviour being triggered by the infringing activities of the Defendants. There is no evidence of Unilin licensees having terminated or threatening to terminate their licensing arrangements, of licensees or importers having lowered or threatening to lower prices for their licensed products. There is no evidence of lost sales or threat by importers to purchase cheaper, unlicensed imported products. There is no evidence of other manufacturers being tempted or encouraged to sell unlicensed products at a lower cost, or of Unilin's licensees losing actual or potential customers to unlicensed manufacturers. There is not even evidence of Triforest' Unlicensed Products being sold at prices lower or with larger profits than the Unilin licensed products because of the alleged monetary benefit gained from the failure to pay royalties. Not a single sales report, example of lost business, testimony of licensee or of importer has been offered to support the allegations made by Ms. Walmsley-Scott.

140 In that context, to suggest that there could be irreparable harm in the form of lost sales or lost customers in the period leading to the hearing on the merits is entirely speculative. The unsubstantiated affirmations of Ms. Walmsley-Scott cannot base a finding of irreparable harm. In fact, at one point, Ms. Walmsley-Scott even says that, since it is difficult to get back a customer's business once it is lost, this <u>may</u> result in some of Unilin's licensees going out of business due to an inability to compete. This falls short of the requirements established by the case law on irreparable harm.

141 Again, despite the fact that the Plaintiffs have known about the allegedly infringing activities of the Defendants since at least August 2014 and monitored Triforest's importation activity using publicly accessible data from Datamyne, they offer no concrete evidence to support any loss of business during this period, or that other importers of laminate flooring products have purchased their products from unlicensed manufacturers.

142 This is a case where the party seeking to enforce its patents was in the market at the same time as the alleged infringer and, as the Federal Court of Appeal reminded in *Centre Ice*, a notable absence of supporting evidence of lost business in those circumstances is fatal to a claim of irreparable harm (*Centre Ice* at 54). I would add that this Court has frequently held that this type of harm alleged to be suffered by the Plaintiffs in terms of lost market share, lost opportunities to expand and price reductions is typically not irreparable in patent cases (*I-Med Pharma II* at paras 43-46; *Aventis Pharma* at paras 33-45; *Merck Frosst Canada* at 462).

143 In any event, if that was to translate into an ability for the Defendants to obtain a greater market share than they would otherwise have been able to have, to the detriment of competitors who respect intellectual property rights and acquire products from licensed manufacturers, this damage would be quantifiable as it would take the form of increased sales of unlicensed products for which royalties need to be paid to Unilin.

(iii) Springboarding

144 The Plaintiffs further raise the prospect of irreparable harm resulting from "springboarding". The "springboard" argument refers to situations where the alleged infringer has not yet entered the market but plans to do so near the end of the patent life, or where the alleged infringer actually enters the market, in order to gain an early start or position to better compete in the after-patent market. The party holding the patent thus loses a part of the market share due to a breach of its patent in anticipation of the patent's expiry (*China Ceramic Proppant Ltd v Carbo Ceramics Inc*, *2004 FCA 283* at paras 3 and 10). Springboarding thus typically refers to losses intervening after the expiry of the patent, caused by a behaviour that, however, occurred prior to the expiry (*Bayer Healthcare AG v Sandoz Canada Incorporated*, *2007 FC 352* [*Bayer*] at para 52).

145 Given that the 076 Patent and the 321 Patent will expire in June 2017, the Plaintiffs claim that the Defendants' ongoing infringement of Unilin's patent rights until their term will provide them with the ability to obtain a greater market share than they would otherwise have been able to secure through selling licensed products, and provide the Defendants with a "springboard" into the post-patent market (*Baker Hughes Inc v Galvanic Analytical Systems Ltd* *(1991), 37 CPR (3d) 512* (FCTD) at 515; *Spirales Computers* at 199-200). That is, the advantage gained by the Triforest Defendants as a result of their premature entry into the market will continue to result in losses for Unilin in

the months immediately following the expiry of the Canadian Patents, which damages, the Plaintiffs say, are not recoverable.

146 I do not find that, in light of the evidence before me, this "springboarding" amounts to demonstrated irreparable harm to the Plaintiffs. First, it is true that Unilin's Canadian Patents are approaching the end of their term of protection but, since the Defendants are already on the market and are not new players planning a "springboard" entry, I am not convinced that there is clear and non-speculative evidence of harm in that respect in the existing market context. As indicated above, the Plaintiffs have failed to provide the required convincing and non-speculative evidence of loss of market share despite the Plaintiffs' awareness of the Triforest Defendants' activities since more than two years.

147 Second, since the Plaintiffs are not directly present in the Canadian market except through the sales of their licensed products made by importers and the receipt of royalties, how can there be harm to the Plaintiffs in terms of lost market opportunities following the expiry of the Canadian Patents? That would be harm to the business of Unilin's licensed manufacturers or of importers of its licensed products, which would allegedly lose ground to the Triforest Defendants in the after-patent market. Only harm suffered by the moving party qualifies under this branch of the *RJR-MacDonald* test, not that of third parties (*Glooscap* at para 33). The Plaintiffs thus cannot claim these potential losses of their importers or licensees in the post-patent market as irreparable harm of their own. In addition, this claim of potential loss remains hypothetical and suffers from the same shortcomings identified above on the lack of particularity.

148 Third, I am also not persuaded that this type of harm cannot be measured in monetary terms for the Plaintiffs, as it will essentially translate into loss of royalty revenues until the expiry of the patent protection (*Aventis Pharma* at para 61; *Bristol Myers Squibb Co v Apotex Inc*, *2001 FCT 1086* at paras 20-21). Damages in patent cases are intended to put a successful plaintiff in the position that it would have been in, but for the infringement. It is entirely speculative to say that a party will not be able to recover damages for any losses that it may suffer in the post-patent period, as such damages can indeed be recoverable and calculable (*Bayer* at paras 56-57).

(iv)Inability to pay

149 The Plaintiffs finally claim that, based on Unilin's prior experience in being denied proper compensation by MGA following MGA's infringement of its patent rights in Canada, there is a genuine risk that Unilin would not be able to recover the complete damages owed by the Defendants as a result of their similar infringing activities. Ms. Walmsley-Scott states that she believes "that Triforest will attempt to thwart any order of this Court through a similar scheme" (as MGA). In relation to that concern over the Defendants' inability to pay, the Plaintiffs also rely on the October 2015 events detailed above. They argue that the Triforest Defendants have explicitly stated and shown that they had no intention to pay Unilin the royalties owed for the unlicensed laminate flooring products they had imported at the time and continue to import, and that, if Triforest were

to be forced to do so, their only option would be to go bankrupt. In light of the fact that Triforest explicitly stated that it would be financially unable to pay the license fees for the unlicensed products they have imported, the Plaintiffs submit that it is absolutely reasonable to conclude that Triforest will not pay the damages they would be ordered to pay by the Court.

150 I do not agree that this amounts to clear and non-speculative evidence of irreparable harm in the circumstances of this case.

151 I first note that this inability to pay has not been recognized as irreparable harm in *Eli Lilly*, since a failure to be able to collect a judgment is speculative. It is speculative with respect to the monetary amount at stake as the moving party does not know what will not be available from the defendant in the event it is successful in its action for infringement. This is precisely the case here. The Plaintiffs have only established that they are concerned to be unable to collect on a future judgment against the Triforest Defendants. This does not satisfy the irreparable harm requirements (*Eli Lilly* at para 32). The Plaintiffs must establish the harm with clear and convincing evidence and demonstrate on a balance of probabilities that the alleged harm is likely to occur. The Plaintiffs' potential failure to be able to collect a judgment meets none of these requirements as the Plaintiffs can only speculate as to the amount of damages they say that they may fail to recover (*Eli Lilly* at para 32; *RBC Dexia Investor Services Trust v Goran Capital Inc*, *2016 ONSC 1138* at para 11).

152 That said, I acknowledge that some cases suggest that a real, non-speculative risk of a defendant's financial inability to satisfy a judgment or an award could, in certain circumstances, be a relevant consideration in the assessment of the question of irreparable harm (*RJR-MacDonald* at 341; *Turbo-Resources Ltd v Petro-Canada Inc (1989), 24 CPR (3d) 1* (FCA) at 18-19). Even if I was to follow this line of cases, for a defendant's inability to pay to constitute irreparable harm, there would still need to be, as always, clear and non-speculative evidence demonstrating such inability on a balance of probabilities. I am not persuaded that the evidentiary record before me supports such a conclusion in this case.

153 The Plaintiffs have the evidentiary burden of establishing that the Defendants' current financial situation is such that the Plaintiffs would not be able to collect on damages which may be awarded to them if successful. I can appreciate that Ms. Walmsley-Scott and the Plaintiffs feel some frustration following the recent experience they went through in the aborted enforcement of their rights against another infringer, MGA, due to MGA's filing for bankruptcy. However, to draw from this separate and unrelated event a claim of irreparable harm based on a suspected parallel behaviour by the Defendants is entirely speculative.

154 I further note that the statement attributed to Triforest to the effect that they would be financially unable to pay the Unilin license fees was made in October 2015, and that the information available on the financial situation of the Triforest Defendants since then

does not reflect that they are in financial difficulty. On the contrary, there is no evidence of dissipation of assets, bankruptcy, collections or judgment against the Defendants in the results of the financial investigations conducted by the Plaintiffs and filed in support of their Review Motion. As previously discussed, the Plaintiffs' investigation shows that the bank accounts, loans, mortgages, credit cards and leases of the Triforest Defendants are in good standing, and that the three individual Defendants recently acquired Canadian real estate assets. Furthermore, the banking accounts evidence obtained further to the execution of the Mareva Injunction Order shows that the Triforest Defendants hold many banking accounts containing substantial balances in December 2016.

155 I therefore do not find, after weighing the various elements of the evidentiary record before me and on a balance of probabilities, that the Plaintiffs' sour collection experience with MGA or the October 2015 statement of Triforest's representatives suffice to conclude that there is clear and non-speculative evidence of an inability to pay on the part of the Defendants, cogent enough to qualify as irreparable harm. The suggestion that the Defendants would not be in a financial position to pay whatever amount of damages might be awarded to the Plaintiffs at trial does not find support in the evidence in the circumstances. In other words, doubts or concerns that a plaintiff may have about a defendant's eventual incapacity to pay are not enough to grant an interlocutory injunction pending trial.

156 To demonstrate that harm will actually be suffered and that it will not be able to be repaired later, the moving party must provide evidence concrete and particular enough to allow the Court to be persuaded on the matter (*Stoney First Nation* at para 49). Injunctive relief is not granted on the basis of assertions, it is granted on the basis of evidence. And this is what is lacking here.

(v) Conclusion on speculative nature of harm

157 In light of the foregoing, I am not convinced that the Plaintiffs have adduced the required real, clear and non-speculative evidence showing that they will suffer irreparable harm. There is no persuasive, detailed and concrete evidence demonstrating the existence of the various headings of potential harm asserted by Ms. Walmsley-Scott. I thus find that the various allegations cannot support a finding of irreparable harm meeting the requirements established by *RJR-MacDonald* and its progeny. As was the case in *Janssen*, the harm that the Plaintiffs say they might potentially suffer is too speculative and hypothetical to form a basis for a finding of irreparable harm.

158 It is entirely understandable that, given the context of this dispute, the Plaintiffs are concerned and fear that, absent an injunctive restraint on the Defendants, they will continue to suffer lost revenues from unpaid royalties by the Defendants, what they feel is a loss of goodwill and other adverse impacts. However, these fears need an objective basis in order to qualify as irreparable harm and to open the door to an exceptional interlocutory injunctive relief. The central problem with the Plaintiffs' claims of irreparable

harm is that they are unsupported by evidence beyond the assertions of Unilin's main corporate witness. "Irreparable harm must be demonstrated, not just asserted. Demonstration is achieved by supplying particular information that empowers the Court to find the existence of harm that cannot be repaired later" (*Gateway Church* at para 18). On the record before me, there is only assertion, not demonstration.

(d) *Quantifiable nature of harm*

159 There is also a second major problem with the Plaintiffs' allegations of irreparable harm, and it is the fact that the evidence on the record does not allow to conclude that the alleged harm is not quantifiable, and thus irreparable.

160 Ms. Walmsley-Scott states on a few occasions that the damages apprehended by the Plaintiffs cannot be measured in monetary terms. These bald statements fall short of the exigencies of irreparable harm in two main respects. First, no credible and convincing evidence has been provided to support the assertions that the Plaintiffs' harm would be impossible to quantify in monetary terms. Second, there is every indication on the record that damages in respect of any royalty revenues lost or likely to be lost by Unilin are indeed capable of calculation.

161 As rightly pointed out by counsel for Molson at the hearing, an affirmation from Ms. Walmsley-Scott to the effect that the Plaintiffs' alleged harm is not quantifiable in monetary terms is not good enough. Ms. Walmsley-Scott is a corporate witness who does not have the experience nor the expertise to render an "opinion on what is quantifiable in damages and what is not" (*I-Med Pharma I* at para 39). Furthermore, Ms. Walmsley-Scott offers no factual basis for her assertions on the incapacity to measure the alleged damages. I agree with the Defendants that such evidence is not sufficient and falls well short of having the attributes able to convince me that, on a balance of probabilities, the claimed harm is not quantifiable in monetary terms (*I-Med Pharma I* at paras 36-44).

162 No proper expert evidence on the record speaks to quantification issues, neither on why the alleged damages of the Plaintiffs cannot be quantified and measured in monetary terms, nor on why no methodology exists to calculate them. This is quite different from the situation in *Reckitt Benckiser LLC v Jamieson Laboratories Ltd*, *2015 FC 215* [*Jamieson*] at paras 53-54, aff'd *2015 FCA 104* at para 31, where losses were considered irreparable because there was extensive expert evidence demonstrating that no possibility of quantifying the losses and of calculating the damages existed.

163 Contrary to the situation in *Jamieson*, no attempt was even made by the Plaintiffs to try to quantify the alleged harm. And no expert evidence was provided to support the assertion that the Plaintiffs' damages are not capable of quantification or to demonstrate that no methodology for quantifying the losses exists. I just cannot infer that damages cannot be quantified in monetary terms from the unsupported allegations of a corporate witness who is not in a position to address the quantification issue.

164 I add that damages are not unquantifiable simply because there could be some difficulty in calculating them (*Nu-Pharm* at para 32). "Patent rights are economic in nature and there is usually no reason why damages ensuing from infringement are unable to be measured or calculated in a reasonably accurate way" (*I-Med Pharma II* at para 79; *Pfizer Ireland Pharmaceuticals v Lilly Icos LLC*, *2003 FC 1278* at para 27 citing *Cutter Ltd v Baxter Travenol Laboratories of Canada Ltd (1980), 47 CPR (2d) 53* (FCA) at 55-56). It is the burden of the moving party to demonstrate that damages cannot be quantified when it alleges that this is the case. The Plaintiffs have failed to do so here.

165 Superimposed on this is the fact that there is every indication that the damages claimed by the Plaintiffs to be irreparable are in fact quantifiable. The harm to be suffered by the Plaintiffs further to the alleged patent infringement by the Defendants results from lost licensing revenues and lost royalties. The Plaintiffs do not themselves sell the laminate flooring products at issue in the Canadian market; only importers selling Unilin's licensed products do. The Plaintiffs rather collect royalties under non-exclusive licensing agreements with approximately 49 importers operating in the Canadian market. The Plaintiffs' royalties and license fees are based on a simple formula using the volume of laminated flooring products sold.

166 Based on the evidence, this looks to be easily capable of quantification. Indeed, the Plaintiffs have been able to estimate lost licensing revenues in their written submissions. For example, using publicly accessible data of Triforest's import activity, the Plaintiffs have quantified a reasonable royalty of $228,000 on inventory currently in Triforest's possession, using the square meterage (m^2) of these products multiplied by the royalty rate of $US 0.92 per m^2 adjusted by the exchange rate of $1.33/$US. For past sales, a reasonable royalty can thus easily be calculated. Using the same simple arithmetic, the Plaintiffs were also able to quickly make a damage assessment and to estimate the lost royalties for past importation by the Defendants in the conclusions contained in the revised proposed order they submitted to the Court at the hearing of their Review Motion. Again, this figure was computed based on square meterage of sales multiplied by the royalty rate.

167 I should mention that there is nothing extraordinary about the type of harm alleged -- loss of goodwill, loss of market share, incitement of others to infringe -- that would differentiate this case from most patent infringement proceedings. The loss of licensing fees which may be owed are quantifiable damages which can reasonably be determined after a decision on the merits of the case.

168 For all those reasons, I am therefore not satisfied that the Plaintiffs have offered sufficient evidence demonstrating, on a balance of probabilities, that they would suffer harm that is irreparable, if the interlocutory injunction is not granted. The allegations and evidence before me do not amount to clear and non-speculative evidence establishing harm and allowing the Court to make inferences that the claimed harm is not quantifiable and thus irreparable. The second element of the *RJR-MacDonald* test is accordingly not

met.

(4) Balance of convenience

169 I now turn to the last part of the *RJR-MacDonald* test, the balance of convenience (or inconvenience, as some prefer to state it). Under this third part of the test, the Court must determine which of the parties will suffer the greater harm from the granting or refusal of the interlocutory injunction, pending a decision on the merits (*RJR-MacDonald* at 342). Given that the Plaintiffs have not led the evidence needed to allow me to make a finding of irreparable harm and having concluded that they have failed to satisfy that branch of the *RJR-MacDonald* test, it is not necessary for me to consider where the balance of convenience lies. The Plaintiffs' motion succeeds only if all three requirements are proved, and one of the elements has clearly not been established.

170 Since the three components of the test are interrelated, I would however add that, in my view, the balance of convenience favours the Defendants as refusing the issuance of an interlocutory injunction implies that the *status quo* will be maintained until a decision on the merits of the Plaintiffs' action for patent infringement, and that the Defendants will continue to carry on their business in the interim period. Moreover, if an interlocutory injunction is refused, the Plaintiffs have not established that they will suffer irreparable harm, and damages will remain a remedy available and adequate for the unpaid royalties that could be owed by the Defendants.

(5) Conclusion on the interlocutory injunction

171 The Plaintiffs have the obligation to satisfy me that they meet all elements of the tripartite conjunctive test set forth in *RJR-MacDonald* in order to be successful on their motion for interlocutory injunction. On the basis of the evidence before me, I find that they have not provided clear and non-speculative evidence of irreparable harm, and that the balance of convenience does not favour them. I must therefore deny their motion.

D. *Other remedies*

172 Both the Plaintiffs and the Defendants seek a confidentiality order with respect to certain affidavits containing banking information and financial information on the Triforest Defendants. The evidence uncovered through the execution of the Mareva Injunction Order and filed with the Court as exhibits to the affidavits of Ms. Morin and Ms. Luong, as well as the affidavits of Ms. Zhang and Mr. Wang, contain financial information pertaining to the Triforest Defendants, including account numbers, transaction history and current balances.

173 In the circumstances, I am satisfied that this evidence should be filed under seal and be subject to a confidentiality order in accordance with Rule 151. I consider this to be appropriate on the basis of the principles in *Sierra Club of Canada v Canada (Minister of Finance)*, *2002 SCC 41* at paras 53-55 and the submissions of the parties.

IV. Conclusion

174 For the reasons detailed above, I conclude that the Mareva Injunction Order was lawfully executed in accordance with its terms and followed the applicable procedural rules. However, I am not persuaded that the grounds required for the issuance of an interlocutory Mareva injunction order are met, as the evidence obtained and provided by the Plaintiffs is not sufficient to demonstrate, on a balance of probabilities, that there is a real risk of removal or dissipation of assets by the Triforest Defendants in order to frustrate judgment, outside the normal scope of their business. I am also not satisfied that the tripartite test set forth in *RJR-MacDonald* for the issuance of interlocutory injunctions is met, as the Plaintiffs have failed to provide the required clear and non-speculative evidence to demonstrate, on a balance of probabilities, that they will suffer irreparable harm if the injunction is not granted.

175 Costs are awarded to the Plaintiffs on their motion for the *ex parte* Mareva Injunction Order and on the first dimension of their Review Motion dealing with the review of the execution of the Order. Costs are awarded to the Defendants on the two other aspects of the Plaintiffs' Review Motion, namely the motion for an interlocutory Mareva injunction and the motion for an interlocutory injunction.

ORDER

THIS COURT'S ORDERS that:

1. The execution of the Mareva Injunction Order issued on December 19, 2016 was lawfully conducted;
2. The Plaintiffs are authorized to withdraw from the Court the deposit they have filed on December 20, 2016, as security for damages in connection with the execution of the Mareva Injunction Order, and the Administrator is ordered to pay out the said deposit together with all interest accrued thereon, by cheque payable to Smart & Biggar In Trust;
3. The motion to convert the Mareva Injunction Order into an interlocutory Mareva injunction order is dismissed;
4. The motion for the issuance of an interlocutory injunction order is dismissed;
5. The affidavits of Julie Morin dated December 28 and 30, 2016 and the second supplementary affidavit of Van Khai Luong dated January 3, 2017 filed by the Plaintiffs and the affidavits of Steve Wang dated December 28, 2016 and Congyu Zhang dated December 30, 2016 filed by the Defendants shall be treated as confidential;
6. The Defendant Triforest shall maintain its undertaking dated January 3, 2017 with respect to its accounting of sales;

7. Costs are awarded to the Plaintiffs on their *ex parte* motion for a Mareva injunction and on their review motion dealing with the review of the execution of the Order. Costs are awarded to the Defendants on the Plaintiffs' review motion relating to the motion for an interlocutory Mareva injunction and the motion for an interlocutory injunction. If the parties are unable to agree on costs, they should file written submissions within 14 days of this Order, not to exceed five pages in length.

D. GASCON J.

1986 ABCA 38
Alberta Court of Appeal

U.A.W. v. Pacific Western Airlines Ltd.

1986 CarswellAlta 35, 1986 ABCA 38, [1986] 3 W.W.R. 531, [1986] A.W.L.D. 454, [1986] A.J. No. 119, 36 A.C.W.S. (2d) 16, 43 Alta. L.R. (2d) 289, 70 A.R. 67, 86 C.L.L.C. 14,041

INTERNATIONAL UNION, UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA et al. v. PACIFIC WESTERN AIRLINES LTD.

Laycraft C.J.A., McDermid and Harradence JJ.A.

Judgment: February 13, 1986
Docket: Calgary Appeal No. 18017

Counsel: *M. McGown*, for appellants.
J. Martland, Q.C., and *J. D'Andrea*, for respondent.

The judgment of the court was delivered by *Laycraft C.J.A.*:

1 The unions appeal from the order of Dixon J. in Queen's Bench chambers in which he granted an interim injunction restraining them from various picketing activities and limiting the number of pickets permitted at one time at various locations. I would dismiss the appeal.

2 The unions are engaged in a lawful strike against Pacific Western which commenced on 20th November 1985. The strike is governed by the Canada Labour Code, R.S.C. 1970, c. L-1, which contains no provisions relating to picketing.

3 The company has maintained operations despite the strike, using management personnel and subcontractors to fill the positions of employees on strike. When the strike commenced, the unions immediately established picket lines around Pacific Western premises throughout the country. At airport terminals the picket lines are both outside the terminal buildings and inside in the public areas adjacent to Pacific Western ticket counters. This appeal concerns only the picketing of premises in Calgary or at the Calgary International Airport.

4 On 20th December 1985 Pacific Western commenced action in Court of Queen's Bench alleging various improper actions arising during the course of picketing "by the Defendant Unions or their members or persons authorized by the Defendant Unions or their members" at the Calgary

locations. It claimed an interim injunction restraining these activities and damages of $10,000,000 "for loss of business and loss of reputation".

5 The application for an interim injunction was heard in Queen's Bench chambers on 23rd December 1985. It was supported by a number of affidavits. The person swearing the principal affidavit, Jack Lawless, who is an official of Pacific Western, was made available for cross-examination on the affidavit at the hearing. The affidavits alleged a number of picket line incidents summarized as follows:

6 1. A mechanic employed by a subcontractor engaged by Pacific Western alleged that on 19th December 1985 approximately 18 picketers "armed with 2' x 2' clubs" used them to smash the windshield and dent the bodywork on his car as he entered a hangar.

7 2. The airport manager for Pacific Western at Calgary International Airport alleged that on 6th December and 15th December approximately 90 picketers on one occasion and 125 picketers on another occasion paraded for some two hours through the terminal and outside it in front of Pacific Western premises, causing "severe congestion and disruption and making it extremely difficult to carry on business." He says that police were ineffective in ensuring the lawful entry and exit of Pacific Western customers. The picketers sang and the volume of singing "rendered all phone and radio communications non-existent" and made verbal communication with customers difficult. It also "rendered the public address system useless and information relating to airline operations, safety announcements and police security bulletins could not be heard".

8 Photographs of these two incidents put in evidence show that on these occasions the strikers substantially filled the Pacific Western section of the terminal. A member of the public intending to proceed from the entrance of the terminal to the Pacific Western ticket counter would have been forced to shoulder his way through 4 to 6 moving lines of picketers.

9 3. Incidents were alleged in which persons crossing picket lines to do work normally done by strikers were then threatened with violence by remarks such as "We've got your address now. You won't be safe at home. We know where you live now."

10 4. A picketer approached two employees who were working and said to one of them "You need a body guard now eh" and followed the remark by a blow and a kick.

11 5. Nails and spikes have been found in front of hangars and the air cargo terminal. Pacific Western alleges these were designed to damage company vehicles and the implication is they were placed by striking workers.

12 6. On one occasion a person intending to do business with another airline not involved in the dispute parked his car in front of the Pacific Western portion of the terminal at the Calgary

International Airport. A picketer passing near by, apparently under the impression he intended to deal with Pacific Western, struck his car, doing some damage to it.

13 The unions filed several affidavits of officers stating that a limited number of pickets had been used and that "the purpose of any picketing was to advise the public of the strike and promote the interest of the three Unions, members of which were on strike".

14 During his cross-examination Mr. Lawless adopted a statement read to him which he had made earlier during a television interview:

> We are doing about the same as last year which indicates to us that, uh, the travelling public, uh, has not been intimidated; however with the economy on an upturn and certainly comments by the retail trade that this has been a good season so far, the potential is that we could have done a lot better.

15 After reserving his decision overnight, Dixon J. gave oral reasons for judgment stating that, despite the stated purpose of the picketing, improper and unlawful activities had occurred during the course of it. He said:

> I am persuaded on the evidence before me that the interest of the travelling public and the business interest of the applicant have been compromised by the picketing activities of the respondents and that such activities have exceeded the bounds of that which is proper and lawful, such that limited picketing only is to be permitted.

16 The operative portion of the order restrains the union, its members, and associated persons for a period of 60 days from:

> A. Unlawfully interfering or threatening to interfere with the Plaintiff's operations;
>
> B. Intimidating, threatening, persistently following, harassing, obstructing the Plaintiff's employees or any other person or persons having dealings with the Plaintiff;
>
> C. Hindering, interfering or obstructing ingress to and egress from, and causing a nuisance at or near the premises or places of business of the Plaintiff within Calgary, Alberta, as more particularly identified hereinafter;
>
> D. Picketing, parading or congregating at, near or in the various business premises of the Plaintiff, except for picketing in the following numbers and locations;
>
> > (i) The Calgary International Airport Terminal, Arrivals level, not more than 3 persons inside the Terminal and not more than 6 persons outside the Terminal. At the Calgary International Airport Terminal, Departures level, not more than 9 persons inside the Terminal and not more than 12 persons outside the Terminal.

IT IS HEREBY FURTHER ORDERED AND DIRECTED that all picketers at the Calgary International Airport Terminal keep moving and keep the doorways clear and airport counters, desks and luggage carousels free from blockage;

(ii) At the Executive Offices of the Plaintiff, in the Scotia Centre, 700 - 2nd Street S.W. Calgary, Alberta, no more than 4 persons at the Second Street S.W. entrance, no more than 2 persons at the Mall entrance and no more than 2 persons at the Seventh Avenue S.W. entrance;

(iii) At the Air Cargo premises, #402, 2100 - 78 Avenue N.E. Calgary, Alberta, no more than 4 persons;

(iv) At the Corporate Administration Office, #614 - 18th Street, N.E., Calgary, Alberta, no more than 4 persons;

(v) At the District Sales Office, 1121 Centre Street, North, Calgary, Alberta, no more than 4 persons;

(vi) At the Pacific Western Airlines Ltd., Hangar, 8050 - 22nd Street N.E. Calgary, Alberta, no more than 6 persons.

17 The continuance of the acts of violence and the threats has never been at issue in these proceedings. Before Dixon J. and before this court, counsel for the unions very properly invited the court to issue an injunction against that sort of activity. It is not, he said, union policy, and is not condoned by the unions but represents the exuberance of individual picketers. What is at issue is the limit to the numbers of picketers imposed by the learned Queen's Bench judge. Counsel was frank to state that the numbers specified at each location are completely adequate to enable the union to carry on its legitimate activity of communicating information. Indeed, he says, there would rarely if ever be as many pickets at any location as the number limited. But, he says, any limit is wrong in principle even if it has no effect on union activities.

18 The error alleged to have been made by the learned chambers judge is that he "applied the wrong test". It is urged that irreparable damage is not proven on the evidence; in the absence of irreparable damage an interim injunction should not be issued: *Amer. Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396, [1975] 2 W.L.R. 316, [1975] 1 All E.R. 504 (H.L.); *Stevens v. Home Oil Co.* (1980), 123 D.L.R. (3d) 297, 28 A.R. 331 (Q.B.); and *Ominayak v. Norcen Energy Resources Ltd.*, 36 Alta. L.R. (2d) 137, [1985] 3 W.W.R. 193, [1985] 3 C.N.L.R. 111, 58 A.R. 161 (C.A.)

19 A strike is a blunt instrument in labour relations. By the very nature of the process, the purpose of each side is to subject the other to such economic harm and hardship that it will be forced to submit. To inflict this economic damage, employees are entitled to picket in order to induce other persons not to work for or do business with the employer so long as they use no

unlawful means. Coercion or intimidation is tortious and wrongful; persuasion even in dramatic terms is not. It is often a difficult problem where a few unlawful incidents have occurred during the course of picketing, which is otherwise peaceful, to determine what portion of the economic harm has been done by the lawful picketing and which portion may be attributed to the unlawful acts.

20 Counsel for the unions posed for the court a "dilemma" which, he said, exists in labour cases when unlawful acts have been part of the picketing process in a lawful strike, but the employer does not prove irreparable damage arising out of them. In my view the courts have never had difficulty in resolving that "dilemma". A great mass of precedent establishes that unlawful acts by picketers will be enjoined whether or not irreparable harm is established. Moreover, where it is shown that certain activities have led to the commission of the unlawful acts, those activities will be so controlled as to prevent further similar problems, while leaving each side in the dispute free to pursue legitimate goals by legitimate means. It is hardly necessary to cite the many cases in which this control has been exercised without reference to the existence of irreparable harm. A few of them are *A.G.B.C. v. Ellsay* (1959), 59 C.L.L.C. 1076, 19 D.L.R. (2d) 453 (B.C.S.C.); *North Can. Air Ltd. v. Wicker* (1980), 8 Sask. R. 158 (Q.B.); and *Bulk-Lift Systems Ltd. v. Warehousemen etc. Union, Loc. 419* (1975), 10 O.R. (2d) 612, 75 C.L.L.C. 14,306, 64 D.L.R. (3d) 208 (H.C.).

21 In this court in *Dewar Insulation Inc. v. Sheetmetal Wkrs. Union, Loc. 8* (1976), 57 D.L.R. (3d) 609, the majority of the court declined to decide whether activities should be enjoined since, with the end of the strike, the issue had become academic. McGillivray C.J.A. expressed his opinion, however, at p. 611 in these terms:

> In the result, we have a dispute which the agreement says will be determined by arbitration. The union, in the face of a provision not to do so, strikes. The strike is illegal. Surely on these facts alone the circumstances call for an injunction ...

22 While that statement was made in the context of an illegal strike, the same considerations apply, in my opinion, to unlawful acts in a legal strike.

23 The considerations affecting an application for an interim injunction to restrain picketing incidents are not the same as those in cases such as *Stevens v. Home Oil Co.* or *Ominayak v. Norcen Energy Resources Ltd.*, both supra. The court must be aware that in virtually all cases the injunction issued in respect of picketing is effectively a final injunction. Rarely do the issues on such "interim" applications ever come before the court again since they do not survive the settlement of the labour dispute. Moreover, picket line incidents do not affect merely the parties to the strike; they involve the public right to pass or re-pass freely on a street or highway or the right of every citizen to be free from violent or intimidating acts. In this particular case they affect the right of citizens to enter or pass peacefully through a public airport. It is not a mere private dispute in the law of contract or tort. In my view, the test of irreparable damage required to be met to obtain interim relief in a private dispute is not applicable where the rights of third parties are affected. Where unlawful acts

have occurred, the court in its discretion may enjoin a recurrence: *A.G. Alta. v. Plantation Indoor Plants Ltd.*, 17 Alta. L.R. (2d) 289, [1982] 2 W.W.R. 167, 65 C.C.C. (2d) 544, 133 D.L.R. (3d) 741, 34 A.R. 348 (C.A.).

24 Two other courts have considered applications to restrain or limit picketing in the course of this strike. On 30th December 1985 in Court of Queen's Bench at Saskatoon, Pacific Western alleged that picketing had gone beyond the mere dissemination of information and had interfered with and obstructed employees of Pacific Western and members of the public. Estey J. held that irreparable damage had been established because the unlawful acts had interfered with Pacific Western's right to carry on its business [not yet reported]. He held that large numbers of pickets in a confined space was wrongful. He restrained acts of intimidation and interference with employees and limited the numbers of pickets at various locations.

25 In Vancouver, Pacific Western sought before McEachern C.J.S.C. to limit picketing [31st December 1985, not yet reported]. The unions contended that some actions of Pacific Western, the use of replacement services to operate during the strike without its unionized employees, the use of security agents, video tapes and recording devices and delay in negotiations, was such inequitable conduct as to disentitle Pacific Western to relief. The Chief Justice observed that "one can hardly imagine less enlightened labour relations", but said:

> I do not think the unfortunate but lawful use of raw economic power amounts to conduct that can be called inequitable in legal sense or to give rise to the clean hands principle. *My function in this matter is really to keep the peace against unlawful conduct* ... [The italics are mine.]

26 He enjoined the unions from assigning to active picket duty certain named pickets who had been identified as having committed violent acts but refused to limit the number of pickets. He said:

> ... I would not limit the lawful right of the members of the defendant union lawfully to communicate their grievance by peaceful gathering at their work place for this purpose. I rely on the good sense of the defendants and their members not to overstate their case *either by congregating in excessive numbers* or by slipping into unlawful nuisance, violence or intimidation. The union has issued instructions to its members regarding their conduct on the picket line and I commend these guidelines to the defendants and their members and urge them strictly to follow the good advice that they have been given. *Otherwise a further order may be necessary*. [The italics are mine.]

27 I make no comment on his observations as to the "use of raw economic power" other than to observe that that is, unfortunately, the nature of the strike weapon. Each side is entitled to employ the "use of raw economic power". The employer does so by operating if he can, replacing striking workers if he is able and so inflicting hardship on them and their families. The employees do so by bringing the employer's business to a halt and so inflicting financial harm on him if they can do so. I respectfully agree with McEachern C.J.S.C., however, that the function of the courts in these

unfortunate contests is to keep the peace against unlawful conduct on either side. While he did not enjoin the union from using an excessive number of pickets, he recognized that there could be an excessive number, and he relied on the good sense of the union officers to prevent it.

28 The case law dealing with picketing in a labour dispute tends to establish what is wrongful conduct rather than what is permissible conduct. In *A.G.B.C. v. Ellsay*, supra, Ruttan J. quoted from "Picket Instructions" issued by the union in that case [at p. 459 D.L.R.]:

> A picket has several purposes, the principal ones being:
>
> 1. To discourage non-members and fellow employees from reporting for work.
>
> 2. To identify 'struck' premises so that fellow unionists will not cross our picket lines.
>
> 3. To inform the public that a strike is on; to draw attention to the issues at stake and to arouse public interest and support.

29 I accept that statement as accurate in setting forth the principal purposes of picketing. It is not the legitimate or lawful purpose of picketing to threaten or intimidate others or physically to prevent or hinder ingress to or egress from the employer's premises. Lawful picketing is informational or persuasive in character; it is not coercive or intimidating.

30 Counsel for the unions urges that, without some other factor, sheer numbers cannot constitute unlawful picketing. In support of this contention he cites *Vancouver Museum & Planetarium Assn. v. Vancouver Mun. & Regional Employees' Union* (1981), 27 B.C.L.R. 73, 81 C.L.L.C. 14,111, a decision of the British Columbia Court of Appeal. In that case, on some occasions as many as 30 to 50 pickets were present at the entrances to the museum and its parking lot. The picketing was peaceful but the picketers took photographs of visitors and of parked cars. Affidavits of museum officials alleged that visitors to the museum on those days reported that they felt intimidated by the picket lines. As noted by Craig J.A., who gave the judgment of the court, none of the informants quoted was in fact deterred since each had made his way into the museum to make his report. At p. 76 (B.C.L.R.) Craig J.A. said:

> If the pickets are acting lawfully, the fact that there are relative large numbers of pickets does not make the assembly unlawful. I think too that there was nothing wrongful in taking photographs or in taking licence numbers.
>
> Although the mere number of picketers is not a basis upon which to grant an injunction in this case, I think that we must consider whether the material justifies any restraining order and, if so, the form of the order. As I have indicated, counsel emphasizes that generally the conduct of the picketers has been uneventful and lawful, and that furthermore no one apparently has been coerced or intimidated from entering the museum by the conduct of the picketers. While proof of coercion or intimidation is a prerequisite to recovery of damages and may be a significant

> factor in the question of whether an interlocutory injunction should be granted, I think that the absence of proof that any one in fact has been coerced is not necessarily determinative on an interlocutory application for an injunction. Although the facts are in dispute, there is evidence which tends to support the allegation that some of the picketers were using illegal means, namely, obstructing access to the premises and causing a disturbance, either actually or potentially, by shouting or using insulting and obscene language.

31 In the result, the court refused to limit the number of pickets but did restrain the pickets from obstructing access to the premises or from causing a disturbance by shouting or using insulting or obscene language. Craig J.A. added [at pp. 76-77]:

> I would not limit the number of pickets who may be at or near the access road, parking lot or entrance to the museum — although such an order may become necessary if the union is unable or unwilling to control its members and there is obstruction of access.

32 Although the difference between us may be merely one of semantics, I respectfully disagree with the proposition that sheer numbers of picketers can never be unlawful. I disagree, too, with the proposition that the arrival of a person inside strike-bound premises of itself proves that he was not subjected to unlawful activity of pickets as he made his way. The hardy person may choose to run a gauntlet, to shove aside obstruction and proceed. His ultimate success in completing the trip does not make lawful that which occurred on the way.

33 In my view the numbers of pickets on 6th December and 15th December did amount to unlawful picketing. Sheer numbers can of itself obstruct access or even deny it. Sheer numbers of picketers, far beyond that which is necessary to disseminate information, can intimidate by their exuberance and their numbers. In this case the numbers were such as to give rise to the inference that members of the public were obstructed from entering or leaving the terminal. This inference may be drawn on the whole of the evidence despite the statement of Mr. Lawless that the travelling public was not intimidated. In the context in which it was made, that statement meant no more than that members of the public in numbers equal to last year's traffic had not been deterred from entering. Whether some members of the public chose not to travel on Pacific Western aircraft and their reason for doing so is not established. But that statement does not establish that pickets did not obstruct ingress and egress. Moreover, their exuberance, on the evidence here, denied the use of the public address system for operational and safety announcements.

34 In my opinion the learned chambers judge was entitled to restrain a repetition of the two incidents of mass picketing. It was in his discretion whether he issued a restraining order or, as did McEachern C.J.S.C. and Craig J.A. in the cases discussed above, "rely on the good sense" of the union officers to prevent a repetition of the incidents with the threat of an order if the reliance was misplaced. The order made did not restrain the legitimate purposes of picketing. Counsel

agreed that the number of pickets allowed was adequate for all legitimate purposes and that, indeed, seldom was that number employed.

35 I would dismiss the appeal.

Appeal dismissed.

2005 CAF 79, 2005 FCA 79
Federal Court of Appeal

VIA Rail Canada Inc. v. Canadian Transportation Agency

2005 CarswellNat 2643, 2005 CarswellNat 567, 2005 CAF 79, 2005 FCA 79, [2005] 4 F.C.R. 473, [2005] F.C.J. No. 376, 137 A.C.W.S. (3d) 1046, 251 D.L.R. (4th) 418, 330 N.R. 337

VIA Rail Canada Inc., Appellant and Canadian Transportation Agency and Council of Canadians With Disabilities, Respondents

Décary J.A., Evans J.A., Sexton J.A.

Heard: November 22-23, 2004
Judgment: March 2, 2005
Docket: A-238-04

Counsel: John A. Campion, Annie M.K. Finn, Nicole D. Samson, for Appellant
Inge Green, Elizabeth Barker, for Respondent, Canadian Transportation Agency
David Baker, Sarah Godwin, for Respondent, Council of Canadians with Disabilities

***Sexton J.A.*:**

1 This is an appeal from two decisions of the Canadian Transportation Agency (the "Agency"), wherein it was determined that concerns raised by the Council for Canadians with Disabilities (the "CCD") in regard to VIA Rail Canada Inc.'s ("VIA") newly-purchased passenger rail cars (the "Renaissance cars") constituted undue obstacles to the mobility of persons with disabilities (specifically persons in wheelchairs) and the consequent order for VIA to take corrective measures to eliminate those obstacles.

Facts

2 On December 1, 2000, VIA purchased 139 Renaissance cars for $139 million, which increased the size of its fleet by approximately one third. These cars had been developed in Europe in 1990 and had been designed for fast overnight service between Europe and the northern regions of the United Kingdom through the Channel Tunnel. However, the original contract was halted in 1998 and the trains were offered for sale at what VIA considered to be a bargain price. VIA purchased the Renaissance cars and at the time of purchase, the cars were fully designed and partially assembled such that they would be ready for use after final assembly.

3 Upon learning of VIA's plans, on December 4, 2000, the CCD applied to the Agency for interim relief pursuant to sections 27 and 28 of the *Canada Transportation Act* S.C. 1996, c. 10 [the "*CTA*"] and for a final order pursuant to subsection 172(1). Specifically, the CCD, believing that the sale had not yet been completed and without having personally inspected the Renaissance cars, asked the Agency to delay or stop VIA from purchasing them because they were not accessible for persons in wheelchairs. The CCD asked the Agency to examine the Renaissance cars to determine whether they contained "undue obstacles" to the mobility of such persons.

4 Since VIA had already purchased the Renaissance cars, the Agency did not attempt to stop the purchase. It instead proceeded to consider whether the Renaissance cars constituted undue obstacles to persons in wheelchairs by undertaking an examination of the Renaissance cars. Except for a one-day oral hearing on April 8, 2002, the proceeding consisted entirely of letter submissions and responses by the parties and the Agency. Similarly, the Agency rendered most of its decisions on various issues by letter.

5 This has been a lengthy and involved proceeding. It commenced on December 4, 2000 and the Agency rendered its final decision more than 2 years and 9 months later, on October 29, 2003. In the record, there were approximately 47 letters from the CCD, 57 letters from VIA, 10 from the Agency and 71 letter decisions and orders issued by the Agency. The matters adjudicated by letter largely dealt with production of documents, timeliness of responses, inspection of the Renaissance cars and Agency jurisdiction.

6 The proceeding culminated with two decisions, both of which are the subject of this appeal.

Preliminary Decision

7 On March 27, 2003, the Agency issued Decision No. 175-AT-R-2003 (the "Preliminary decision"), being a decision of the majority of a 3-member panel. At issue were 46 concerns raised by the CCD regarding the accessibility of the Renaissance cars. The Agency inspected the Renaissance cars and issued this decision containing its preliminary findings. Of the 46 items raised by the CCD, the Agency found 14 of them to be "undue obstacles". The Preliminary decision is lengthy and detailed and took over two years to be released. After the Agency had made the preliminary findings regarding certain features of the Renaissance cars, it directed VIA to specifically address the findings in its Direction to Show Cause (the "Show Cause Order"), wherein VIA was directed to file answers to 9 complex questions within 60 days from the date of the decision. VIA subsequently filed a response to the Show Cause Order and the Agency, finding the response to be inadequate, gave VIA an additional 60 days to provide further response.

8 The third and dissenting member, Richard Cashin, did not find any of the obstacles to be "undue". However, Mr. Cashin retired before the Agency rendered its final findings but

the Agency's decision-making process was unaffected, since two members constitute a quorum pursuant to subsection 16(1) of the *CTA*.

Final Decision

9 Decision No. 162-AT-R-2003 (the "Final decision") was issued on October 29, 2003. Here, the Agency made final determinations on its preliminary findings of undue obstacles. As one of the preliminary issues in this decision, the Agency found that VIA's response to the Show Cause Order had been inadequate.

10 After addressing the specific undue obstacles, the Agency directed VIA to take corrective measures by re-designing and re-constructing certain aspects of the Renaissance cars that were placed in service. The Agency required that VIA, within 60 days of the date of the Final decision, submit its plan for the timing of the implementation of the modifications as required in the Final decision.

11 After the Final decision was released, VIA brought a motion to stay both the Preliminary and Final decisions pending this Court's decision on the motion for leave to appeal. The stay was granted by Order dated December 19, 2003 and renewed on June 10, 2003.

12 Leave to appeal to the Federal Court of Appeal was granted by Order dated March 10, 2004 on the following grounds:

> (a) The Agency committed errors of law and jurisdiction by undertaking an examination of an alleged design problem in the train set or consist comprising Renaissance cars, rather than examining an alleged *physical problem* encountered by an actual passenger with disabilities. The Agency, therefore, erred in law and exceeded its jurisdiction in adjudicating a complaint under section 172 of the *Canadian Transportation Act* on hypothetical facts upon which there could be no finding of any "obstacle".
>
> (b) Even if the Agency could have found, in the circumstances of this case, that one or more features of the Renaissance cars constituted an obstacle to the mobility of persons with disabilities, it erred in law in finding such obstacles to be "undue". The Agency failed to apply the correct legal test in its determination of "undueness".
>
> (c) The Agency's order is patently unreasonable because it is not rationally connected to any finding of undue obstacle open on the facts of this case.
>
> (d) The Agency erred in law and exceeded its jurisdiction by failing to afford VIA Rail its rights of natural justice and procedural fairness.

VIA's Arguments

13 VIA's submissions consisted of four arguments. First, it argued that the Agency's jurisdiction pursuant to section 172 to consider the existence of obstacles is derived from actual incidents involving disabled passengers. If no such incident or complaint has occurred, VIA maintains that the Agency's only recourse is to pass regulations under section 170. These regulations must be approved by the Governor in Council. Here, there was no complaint nor incident and the Agency did not pass regulations. Therefore, VIA maintains that the Agency was without jurisdiction to make such an order.

14 Second, VIA submits that the Agency failed in its determination of whether an undue obstacle exists in the network as a whole. Such an analysis requires a balancing exercise, to be done while taking into account the criteria from section 5 of the *CTA*, which VIA maintains the Agency failed to undertake.

15 VIA says that a wrong result by the Agency, that the Renaissance cars had undue obstacles, was unavoidable, due to the Agency having asked itself the wrong question. The correct conclusion would have addressed whether there are undue obstacles in the network as a whole.

16 Third, VIA argued that the remedy ordered by the Agency was not rationally connected to the undue obstacles found. Rather, VIA found the Agency's order to be disproportionate and excessive since it bore no relationship to the minor impediments to the mobility of persons in wheelchairs. The Agency ordered corrective measures, regardless of the cost, disregarding the need for a network that is economical, efficient, adequate, viable and available to serve the needs of all travellers.

17 Fourth, VIA submits that its procedural fairness rights were denied when the Agency refused to grant an oral hearing. Accordingly, VIA argued that the Agency's order should be quashed and the matter remitted back to it.

Legislation

18 There are several provisions of the *CTA* that must be set out:

> 5. It is hereby declared that a safe, economic, efficient and adequate network of viable and effective transportation services accessible to persons with disabilities and that makes the best use of all available modes of transportation at the lowest total cost is essential to serve the transportation needs of shippers and travellers, including persons with disabilities, and to maintain the economic well-being and growth of Canada and its regions and that those objectives are most likely to be achieved when all carriers are able to compete, both within and among the various modes of transportation, under conditions ensuring that, having due regard to national policy, to the advantages of harmonized federal and provincial regulatory approaches and to legal and constitutional requirements,

(a) the national transportation system meets the highest practicable safety standards,

(b) competition and market forces are, whenever possible, the prime agents in providing viable and effective transportation services,

(c) economic regulation of carriers and modes of transportation occurs only in respect of those services and regions where regulation is necessary to serve the transportation needs of shippers and travellers and that such regulation will not unfairly limit the ability of any carrier or mode of transportation to compete freely with any other carrier or mode of transportation,

(d) transportation is recognized as a key to regional economic development and that commercial viability of transportation links is balanced with regional economic development objectives so that the potential economic strengths of each region may be realized,

(e) each carrier or mode of transportation, as far as is practicable, bears a fair proportion of the real costs of the resources, facilities and services provided to that carrier or mode of transportation at public expense,

(f) each carrier or mode of transportation, as far as is practicable, receives fair and reasonable compensation for the resources, facilities and services that it is required to provide as an imposed public duty,

(g) each carrier or mode of transportation, as far as is practicable, carries traffic to or from any point in Canada under fares, rates and conditions that do not constitute

(i) an unfair disadvantage in respect of any such traffic beyond the disadvantage inherent in the location or volume of the traffic, the scale of operation connected with the traffic or the type of traffic or service involved,

(ii) an undue obstacle to the mobility of persons, including persons with disabilities,

(iii) an undue obstacle to the interchange of commodities between points in Canada, or

(iv) an unreasonable discouragement to the development of primary or secondary industries, to export trade in or from any region of Canada or to the movement of commodities through Canadian ports, and

(h) each mode of transportation is economically viable,

and this Act is enacted in accordance with and for the attainment of those objectives to the extent that they fall within the purview of subject-matters under the legislative authority of Parliament relating to transportation.

. . .

28. (1) The Agency may in any order direct that the order or a portion or provision of it shall come into force

(a) at a future time,

(b) on the happening of any contingency, event or condition specified in the order, or

(c) on the performance, to the satisfaction of the Agency or a person named by it, of any terms that the Agency may impose on an interested party,

and the Agency may direct that the whole or any portion of the order shall have force for a limited time or until the happening of a specified event.

(2) The Agency may, instead of making an order final in the first instance, make an interim order and reserve further directions either for an adjourned hearing of the matter or for further application.

29. (1) The Agency shall make its decision in any proceedings before it as expeditiously as possible, but no later than one hundred and twenty days after the originating documents are received, unless the parties agree to an extension or this Act or a regulation made under subsection (2) provides otherwise.

(2) The Governor in Council may, by regulation, prescribe periods of less than one hundred and twenty days within which the Agency shall make its decision in respect of such classes of proceedings as are specified in the regulation.

. . .

31. The finding or determination of the Agency on a question of fact within its jurisdiction is binding and conclusive.

. . .

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.

. . .

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.

(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.

(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.

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

. . .

170. (1) The Agency may make regulations for the purpose of eliminating undue obstacles in the transportation network under the legislative authority of Parliament to the mobility of persons with disabilities, including regulations respecting

(a) the design, construction or modification of, and the posting of signs on, in or around, means of transportation and related facilities and premises, including equipment used in them;

(b) the training of personnel employed at or in those facilities or premises or by carriers;

(c) tariffs, rates, fares, charges and terms and conditions of carriage applicable in respect of the transportation of persons with disabilities or incidental services; and

(d) the communication of information to persons with disabilities.

(2) Regulations made under subsection (1) incorporating standards or enactments by reference may incorporate them as amended from time to time.

(3) The Agency may, with the approval of the Governor in Council, make orders exempting specified persons, means of transportation, services or related facilities and premises from the application of regulations made under subsection (1).

. . .

172. (1) The Agency may, on application, inquire into a matter in relation to which a regulation could be made under subsection 170(1), regardless of whether such a

regulation has been made, in order to determine whether there is an undue obstacle to the mobility of persons with disabilities.

(2) Where the Agency is satisfied that regulations made under subsection 170(1) that are applicable in relation to a matter have been complied with or have not been contravened, the Agency shall determine that there is no undue obstacle to the mobility of persons with disabilities.

(3) On determining that there is an undue obstacle to the mobility of persons with disabilities, the Agency may require the taking of appropriate corrective measures or direct that compensation be paid for any expense incurred by a person with a disability arising out of the undue obstacle, or both.

5. Il est déclaré que, d'une part, la mise en place d'un réseau sûr, rentable et bien adapté de services de transport viables et efficaces, accessibles aux personnes ayant une déficience, utilisant au mieux et aux moindres frais globaux tous les modes de transport existants, est essentielle à la satisfaction des besoins des expéditeurs et des voyageurs — y compris des personnes ayant une déficience — en matière de transports comme à la prospérité et à la croissance économique du Canada et de ses régions, et, d'autre part, que ces objectifs sont plus susceptibles de se réaliser en situation de concurrence de tous les transporteurs, à l'intérieur des divers modes de transport ou entre eux, à condition que, compte dûment tenu de la politique nationale, des avantages liés à l'harmonisation de la réglementation fédérale et provinciale et du contexte juridique et constitutionnel:

a) le réseau national des transports soit conforme aux normes de sécurité les plus élevées possible dans la pratique;

b) la concurrence et les forces du marché soient, chaque fois que la chose est possible, les principaux facteurs en jeu dans la prestation de services de transport viables et efficaces;

c) la réglementation économique des transporteurs et des modes de transport se limite aux services et aux régions à propos desquels elle s'impose dans l'intérêt des expéditeurs et des voyageurs, sans pour autant restreindre abusivement la libre concurrence entre transporteurs et entre modes de transport;

d) les transports soient reconnus comme un facteur primordial du développement économique régional et que soit maintenu un équilibre entre les objectifs de rentabilité des liaisons de transport et ceux de développement économique régional en vue de la réalisation du potentiel économique de chaque région;

e) chaque transporteur ou mode de transport supporte, dans la mesure du possible, une juste part du coût réel des ressources, installations et services mis à sa disposition sur les fonds publics;

f) chaque transporteur ou mode de transport soit, dans la mesure du possible, indemnisé, de façon juste et raisonnable, du coût des ressources, installations et services qu'il est tenu de mettre à la disposition du public;

g) les liaisons assurées en provenance ou à destination d'un point du Canada par chaque transporteur ou mode de transport s'effectuent, dans la mesure du possible, à des prix et selon des modalités qui ne constituent pas:

(i) un désavantage injuste pour les autres liaisons de ce genre, mis à part le désavantage inhérent aux lieux desservis, à l'importance du trafic, à l'ampleur des activités connexes ou à la nature du trafic ou du service en cause,

(ii) un obstacle abusif à la circulation des personnes, y compris les personnes ayant une déficience,

(iii) un obstacle abusif à l'échange des marchandises à l'intérieur du Canada,

(iv) un empêchement excessif au développement des secteurs primaire ou secondaire, aux exportations du Canada ou de ses régions, ou au mouvement des marchandises par les ports canadiens;

h) les modes de transport demeurent rentables.

Il est en outre déclaré que la présente loi vise la réalisation de ceux de ces objectifs qui portent sur les questions relevant de la compétence législative du Parlement en matière de transports.

. . .

28. (1) L'Office peut, dans ses arrêtés, prévoir une date déterminée pour leur entrée en vigueur totale ou partielle ou subordonner celle-ci à la survenance d'un événement, à la réalisation d'une condition ou à la bonne exécution, appréciée par lui-même ou son délégué, d'obligations qu'il aura imposées à l'intéressé; il peut en outre y prévoir une date déterminée pour leur cessation d'effet totale ou partielle ou subordonner celle-ci à la survenance d'un événement.

(2) L'Office peut prendre un arrêté provisoire et se réserver le droit de compléter sa décision lors d'une audience ultérieure ou d'une nouvelle demande.

29. (1) Sauf indication contraire de la présente loi ou d'un règlement pris en vertu du paragraphe (2) ou accord entre les parties sur une prolongation du délai, l'Office rend sa décision sur toute affaire dont il est saisi avec toute la diligence possible dans les cent vingt jours suivant la réception de l'acte introductif d'instance.

(2) Le gouverneur en conseil peut, par règlement, imposer à l'Office un délai inférieur à cent vingt jours pour rendre une décision à l'égard des catégories d'affaires qu'il indique.

. . .

. . .

31. La décision de l'Office sur une question de fait relevant de sa compétence est définitive.

. . .

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.

. . .

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.

(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.

(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.

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

. . .

170. (1) L'Office peut prendre des règlements afin d'éliminer tous obstacles abusifs, dans le réseau de transport assujetti à la compétence législative du Parlement, aux possibilités de déplacement des personnes ayant une déficience et peut notamment, à cette occasion, régir:

a) la conception et la construction des moyens de transport ainsi que des installations et locaux connexes — y compris les commodités et l'équipement qui s'y trouvent — , leur modification ou la signalisation dans ceux-ci ou leurs environs;

b) la formation du personnel des transporteurs ou de celui employé dans ces installations et locaux;

c) toute mesure concernant les tarifs, taux, prix, frais et autres conditions de transport applicables au transport et aux services connexes offerts aux personnes ayant une déficience;

d) la communication d'information à ces personnes.

(2) Il peut être précisé, dans le règlement qui incorpore par renvoi des normes ou des dispositions, qu'elles sont incorporées avec leurs modifications successives.

(3) L'Office peut, par arrêté pris avec l'agrément du gouverneur en conseil, soustraire à l'application de certaines dispositions des règlements les personnes, les moyens de transport, les installations ou locaux connexes ou les services qui y sont désignés.

. . .

172. (1) Même en l'absence de disposition réglementaire applicable, l'Office peut, sur demande, enquêter sur toute question relative à l'un des domaines visés au paragraphe 170 (1) pour déterminer s'il existe un obstacle abusif aux possibilités de déplacement des personnes ayant une déficience.

(2) L'Office rend une décision négative à l'issue de son enquête s'il est convaincu de la conformité du service du transporteur aux dispositions réglementaires applicables en l'occurrence.

(3) En cas de décision positive, l'Office peut exiger la prise de mesures correctives indiquées ou le versement d'une indemnité destinée à couvrir les frais supportés par une personne ayant une déficience en raison de l'obstacle en cause, ou les deux.

Analysis

Jurisdiction

19 VIA argued that the Agency lacked jurisdiction to inquire under section 172 of the *CTA* unless an actual incident occurred wherein a disabled individual encountered an undue obstacle to his or her mobility. Accordingly, if no incident has occurred, VIA maintains that the Agency had no jurisdiction to look into a matter.

20 Rather, VIA argued that the Agency's only jurisdiction to act in this matter was to determine *potential* undue obstacles pursuant to section 170, which permits the Agency to make regulations to eliminate undue obstacles in the network.

21 The parties agreed that there had been no previous case in which the Agency had purported to act under section 172 where no incident had occurred.

Jurisdictional Question: Standard of Review

22 When the court is reviewing decisions of administrative tribunals, the pragmatic and functional approach must be applied. (See *Q. v. College of Physicians & Surgeons (British Columbia)*, [2003] 1 S.C.R. 226 (S.C.C.) at paragraph 25). The factors to be considered in this approach are the (1) presence or absence of a privative clause or statutory right of appeal; (2) expertise of the tribunal; (3) purpose of the legislation and the provision; and (4) nature of the question.

23 First, section 41 of the *CTA* contains a statutory right of appeal with leave from a decision of the Agency, which suggests a less deferential standard of review. In fact, this Court, in commenting on the statutory right of appeal in the *CTA* on questions of law or jurisdiction, has decided that once leave is granted, the Agency should be allocated a lower level of deference (*Canadian Pacific Railway v. Canada (Transportation Agency)*, [2003] 4 F.C. 558 (Fed. C.A.) at para. 17 [*Canadian Pacific Railway*]).

24 The second factor, relative expertise, is a comparison of the court's expertise to that of the administrative tribunal's and calls for greater deference when the tribunal has more expertise in the particular subject matter than the court (*Dr. Q*, *supra*, at paragraph 28). Here, the Agency had to determine its jurisdiction to deal with this problem through the interpretation of sections 170 and 172 of the *CTA*. As this Court determined in *Canadian Pacific Railway* , *supra*, questions of statutory interpretation are within the expertise of the courts, so this also calls for a less deferential standard of review (*Canadian Pacific Railway* , *supra*, paragraph 18).

25 The third factor is the purpose of the legislation and the provision at issue. The Agency implements the regulatory provisions of the *CTA*, which provide for more deference to the Agency. However, the provisions at issue are contained in Part V of the *CTA* and have a human rights aspect to them (Agency's Preliminary decision at page 15). Therefore, a lower level of deference is required (*Canadian Pacific Railway* , *supra*, paragraph 19.)

26 Finally, the nature of the question must be determined. Questions of statutory interpretation are legal and therefore militate in favour of less deference (*Dr. Q*, *supra*, at paragraph 34).

27 Taken together, the factors point to a correctness standard on the jurisdictional question.

Interpretation of CTA

28 In my view, section 172 of the *CTA* should not be interpreted as suggested by VIA.

29 Subsection 172(1) gives the Agency the ability to inquire, upon application, into a matter in relation to which a regulation could be made pursuant to subsection 170(1). Subsection 170(1) allows the Agency to make regulations in order to eliminate undue obstacles from the transportation network, including regulations respecting the design, construction or modification of the means of transportation.

30 Thus, the Agency, pursuant to subsection 172(1), can inquire into matters relating to design, construction or modification of the means of transportation, which is exactly what the Agency undertook to do in the present case. Therefore, I believe the Agency did not exceed its jurisdiction in undertaking the inquiry.

31 VIA further argued that allowing the Agency to act pursuant to section 172, where no incident had occurred, permitted it to interfere with the planning and operation of the railway. VIA submitted that its board of directors must be free to act without consulting the Agency in matters relating to the purchase and design of rail equipment. To allow this, VIA argued, would be to allow the Agency to "intrude into the boardroom of the company".

32 While I do not believe that the Agency exceeded its jurisdiction in this case for the reasons given, I do note, with concern, the danger suggested by counsel for VIA. The fact that the CCD, upon learning that VIA was considering the purchase of the Renaissance cars, and prior to even having had the opportunity to inspect the cars themselves, sought an order directing VIA not to enter into any agreement or to take any steps to purchase the Renaissance cars, does suggest an interference with VIA's decision-making. While I am unable to find that the Agency lacked the jurisdiction to consider the CCD's application here, it does seem to me that the nature of the CCD's application resulted in the Agency focussing virtually exclusively on the potential obstacles to the mobility in the cars the CCD believed still had to be purchased. This in turn resulted in the Agency failing to focus on the obstacles in the VIA network as a whole, as will be seen later. This has been indeed unfortunate because it led to the Agency's failure to focus on ways in which the Renaissance cars could be incorporated into VIA's network so the undueness of the obstacles could be avoided.

33 It may well be that the Agency should have declined to commence an investigation based on the information which it had received from the CCD - that is - that VIA had not actually purchased the cars. Arguably the commencement of the investigation was premature. If the cars had not yet been purchased then they could not create an obstacle. Section 170(1) provides that the Agency may start an inquiry in order to determine whether "there is an undue obstacle to the mobility of persons with disabilities". There could hardly be said to be an obstacle if the cars had not yet been purchased. However, the fact was that VIA had already purchased the cars so the objection to prematurity would have been academic.

34 It is also worth noting that section 29 of the *CTA* envisions expeditious hearings with decisions being delivered within 120 days after commencement of the proceedings. The present hearing

commenced with the CCD's application which was filed on December 4, 2000. The Preliminary decision was rendered on March 27, 2003, more than two years and 80 interim decisions and rulings later. This perhaps illustrates that the legislature did not intend that issues of the present magnitude be pursued under section 172. Nevertheless the statute must be interpreted according to its current provisions. Accordingly, the Agency's determination of its jurisdiction was correct.

35 As an additional jurisdictional argument, VIA maintained that in its identification of potential obstacles, the Agency treated the Rail Code (February, 1998 Code of Practice of Passenger Rail Accessibility and Terms and Conditions of Carriage by Rail of Persons with Disabilities), which provides voluntary goals and objectives of the industry, as mandatory, and enforced it against VIA. This was said to be beyond the Agency's jurisdiction. I do not accept that argument since in my view, the Rail Code was not treated as mandatory by the Agency. The Agency indicates at various places that the Rail Code is "voluntary and not legally binding" (Agency's Preliminary decision at page 20) and therefore does not rely exclusively on it when making its undue obstacle findings (Agency's Preliminary decision at page 22). The Agency does, however, find that the standards in the Rail Code serve as a "useful reference point" (Agency's Preliminary decision at page 22).

The undueness analysis:

36 It was incumbent on the Agency to balance the various interests referred to in section 5 when undertaking its undueness analysis, before requiring expenditure of money to reconstruct or reconfigure the Renaissance cars. The issue of "undueness" was discussed in *VIA Rail Canada Inc. v. Canada (National Transportation Agency)* (2000), [2001] 2 F.C. 25 (Fed. C.A.) ["*Lemonde*"]. In *Lemonde*, the Court said

> In determining whether the obstacle was undue, the Agency should have first considered the aim of the *National Transportation Act*, 1987. This is found in Section 3(1) (now Section 5), which provides that the nations transportation network should be, *inter alia*, economic, efficient, viable and effective.

Thus the undueness analysis can only be conducted by an examination of the transportation network as a whole.

37 Keeping this in mind, the Court in *Lemonde* set out the following principles to be considered in conducting the undueness analysis.

- undueness is a relative concept;
- the approach to defining undueness is a contextual one; it must be defined in light of the aim of the relevant legislation;
- an assessment of the consequences if the undue thing is allowed to remain in place can be useful;

• there is a requirement to balance the interests of the various parties, who, in proceedings of this nature, are usually persons with disabilities, VIA and the Canadian public;

• the transportation network must serve the needs of all travellers, including those with disabilities; and

• the needs of non-disabled passengers and those of disabled passengers may be inconsistent, which leads to the Agency having to undertake a balancing of interests such that the satisfaction of one interest does not create disproportionate hardship affecting the other interest.

38 A proper balancing of these factors when considering the entire transportation network will, of course, involve the issue of the costs of the changes to the Renaissance cars and the issue of the impact on other travellers. I will consider each of these issues separately.

Standard of Review

39 The standard of review analysis requires more deference here. The Agency's expertise is rooted in regulatory matters. Also, section 5 of the *CTA* is polycentric, meaning that it requires the Agency to balance competing principles. The finding of undue obstacles and the costs of remedying such obstacles are factual findings and the *CTA* contains a strong privative clause at section 31, calling for deference to the Agency when it comes to findings of fact (*CTA*, *supra*, at section 31). Also, the application of section 5 to the issues raised in this case involve questions of mixed fact and law. All these factors, in my opinion, suggest a high level of deference, bringing the standard of review on the question of undueness and the balancing of interests to be one of patent unreasonableness.

Undue Obstacles and Network Analysis

40 Section 5 of the *CTA* dictates that the Agency, when faced with a complaint by disabled persons in connection with the facilities offered by a transportation service provider, must go through the following analysis. First, it must determine if there is an obstacle to the mobility of disabled persons. Second, it must examine the whole network of the transportation service provider with a view to determining whether the network itself provides relief such that the obstacle cannot be said to be undue. Where the network does not provide such relief, the Agency must then consider the possible improvements to the network (including possible alternative transportation) which can eliminate or alleviate the undue obstacle. In considering the improvements to be ordered, the Agency must undertake a balancing exercise that takes into account the interests of disabled persons, non-disabled persons, the transportation service provider, as well as the economic well-being and growth of Canada.

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41 Obviously the cost of any improvement ordered is crucial. Similarly, the transportation service provider may be totally unable to fund the improvements. If the costs are excessive, the fares may have to be increased to a point where the average person cannot afford to travel.

42 In the present case, VIA is subsidized by the federal government, which may be unwilling or unable to fund VIA to the extent of all the improvements ordered. The interests of all disabled persons must also be considered. There are many other disabilities such as blindness, deafness, cardiac conditions, asthmatic conditions, etc. All of these require different facilities. One must not be favoured to the detriment of another. Thus, such consideration cannot be limited to those in wheelchairs. It is also clear that not every railway car and not even every train can be fully equipped to cope with all forms of disability. The cost of so doing would be so great that the transportation service would be unlikely to survive. At the very least, its viability would be severely jeopardized.

43 In my view, the Agency in the present case made the following errors:

> I. In attempting to resolve the undue obstacles which it found for travel by persons in wheelchairs, it confined itself to considering only alterations to the Renaissance cars rather than considering whether VIA's network could be flexible enough to accommodate these disabilities;
>
> II. It failed to conduct the necessary balancing exercise in that it:
>
> > a) failed to consider the interests of non-disabled persons;
> >
> > b) failed to balance the costs of the improvements ordered against the interests of VIA. Here it failed because it did not wait to receive the cost estimates which it had ordered VIA to prepare;
> >
> > c) failed to balance the interests of persons with disabilities other than wheelchair users without taking into account the total amount of money which could realistically be available.

44 As previously mentioned, the CCD's December 4 application to the Agency only focussed on the Renaissance cars. VIA responded to the Agency that it was the adequacy of the network that was in issue and that the network as a whole posed no undue obstacles to the mobility of persons with disabilities.

45 However, the CCD continued to focus its undue obstacle analysis on the Renaissance cars as opposed to the network as a whole. There are several examples of this. In his December 14, 2000 response to VIA's December 12, 2000 letter that was sent to the Agency, David Baker, counsel for the CCD, replied,

> Transport Canada officials and CTA officials who viewed the rolling stock [referring to the Renaissance cars], have not provided their opinion as to whether it meets even the voluntary Rail Code, let alone the "undue obstacle" standard in the Canada Transportation Act.

46 Unfortunately, the Agency responded by also focussing on the Renaissance cars instead of the network. In a letter dated December 18, 2000 from the Agency to VIA, the Agency stated,

> VIA Rail is required to submit to the Agency and provide a copy to CCD by January 3, 2001 its existing plan to make this rolling stock accessible for persons with disabilities.

47 Similarly, in the Agency's January 24, 2001 letter to the CCD, the focus was again on the problems in the Renaissance cars as opposed to the whole network, since the Agency had only sought to determine the existence of undue obstacles in the Renaissance cars. Further in that letter, the Agency even considered issuing an interim order preventing VIA from entering into a contract to retrofit the cars, without any consideration of VIA's network. VIA responded that it was the network that should be considered.

48 Therefore, it seems that from the beginning, the primary focus of the proceeding was on the Renaissance cars and not the transportation network. This mind set was carried out through both the Preliminary and Final decisions, both of which I will now analyse.

Preliminary decision of the Agency - did the Agency look at the network?

49 In looking at the Preliminary decision, it seems that the Agency knew that the network had to be considered, as is evidenced by the fact that it set out the appropriate undue obstacle analysis prior to looking at the facts. Nonetheless, the Agency's primary focus was on the design and features of the Renaissance cars as they apply to the mobility of persons who use wheelchairs.

50 At the commencement of the analysis on page 31, the Agency states,

> When making a determination pursuant to section 172 of the CTA, the Agency must first determine whether there is an obstacle and, if there is an obstacle, whether that obstacle is undue. The following summarizes what the Agency may consider when determining whether the design of the Renaissance Cars and its features constitute obstacles to the mobility of persons with disabilities (emphasis added) and whether any of the obstacles are undue.
>
> . . .
>
> The Agency typically makes an obstacle determination in the context of whether or not a situation constituted an obstacle to the mobility of a person with a disability in a particular case. However, as previously discussed, given that CCD's application alleges obstacles to the mobility of persons with disabilities in the context of the design of the Renaissance Cars, the

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> Agency's analysis of the alleged obstacles is based on the design and features of these rail cars. Specifically, the Agency's analysis focusses primarily on the design and features of the Renaissance Cars as they apply to the mobility of persons who use wheelchairs, given that the primary focus of CCD's application is whether the cars are accessible to persons who use wheelchairs
>
> (emphasis added).

51 While later, the Agency referred to VIA's network, it did not conduct anything approaching a thorough analysis. A cursory analysis of one aspect of the network is engaged by the Agency at one point but seems to be confined to an examination of sleeper facilities for persons in wheelchairs on VIA's system. The Agency should have always, upon coming to a determination that the Renaissance cars lacked certain features, turned to the network to see if persons in wheelchairs could nonetheless have been accomodated.

52 Throughout the Preliminary decision, we see evidence of VIA's repeated expressions that the Agency needed to consider the network, rather than just the Renaissance cars. At page 32 of the Preliminary decision, VIA's argument about the consideration of section 5 of the *CTA* is noted,

> The Agency must also consider and balance the interests of all passengers, the efficiency of rail transportation generally, the costs of operating VIA's passenger rail network and the economic viability of the railway company.
>
> And again at pages 36-37, it is noted that VIA drew attention to its entire network. At page 37 of the Preliminary decision, VIA is said to have submitted, specifically,
>
> VIA asserts that the Renaissance trains are only a part of "the fleet of the future" as they will be operating together with its existing fleet and will continue to operate together with new trains that will be built "hopefully as the moneys become available as we meet our needs to all Canadians".

53 Even when VIA submitted to the Agency that the Agency did not have enough evidence before it to look at the entire Canadian rail system (Agency's Preliminary decision at page 27.), and that persons in wheelchairs have a greater number of options in their travel planning, which the Agency would have to consider if undertaking a network analysis, the agency's response was,

> As the Agency has repeatedly stated throughout these proceedings, it is considering whether certain features of the Renaissance Cars constitute undue obstacles arising out of the design of the Renaissance Cars (Agency's Preliminary decision at page 28).

54 Before the Agency, the CCD took the position that having to take a different train at a different time from that chosen by the wheelchair person constitutes an undue obstacle. The CCD argued that if such persons' needs could not be accommodated on a Renaissance train of their

choice, then their freedom to travel was restricted, which amounted to discrimination (Agency's Preliminary decision at page 37).

55 In making this argument, the CCD overlooked the fact that in attempting to balance every interest, the system cannot afford to have every rail car equipped with every type of mechanism to be able to address every type of disability. Although this would be ideal, the funds required to design, implement and maintain such a system are clearly not available.

Show Cause Order

56 After the Agency made its preliminary findings regarding features in the Renaissance cars that constitute undue obstacles, it issued the Show Cause Order. This Order further shows that the Agency only looked at the Renaissance cars in order to determine the existence of undue obstacles. There, the Agency stated,

> The Agency has made preliminary findings that the following features in the Renaissance Cars constitute undue obstacles to the mobility of persons with disabilities, including, and in particular, persons who use wheelchairs (Agency's Preliminary decision at page 143).

And again,

> In recognition of both the fact that this application is unique in nature in that it involves the consideration of the design of rail cars and the volume of submissions filed relating to the forty-six concerns raised by CCD, the Agency is providing VIA with the opportunity, by way of a direction to show cause, to specifically address the preliminary undue obstacles that have been determined by the Agency to exist in the Renaissance Cars (Agency's Preliminary decision at page 144).

57 Further, the Show Cause Order directed VIA to answer 9 questions, none of which addressed VIA's network. Instead, each question was directed at the issues taken with the Renaissance cars. The questions were as follows:

> (a) VIA is required to identify the various methods of remedying each of the above listed obstacles in the Renaissance Cars. If VIA is of the opinion that it is not possible, because of structural reasons, to remedy an obstacle, VIA is required to clearly explain the reasons why it is of such an opinion and to provide supporting evidence from a Professional Engineer who has expertise in the design and manufacture of rail cars.
>
> (b) Where CCD has specifically identified a method(s) of remedying an obstacle, such as is the case for the wheelchair tie-down, VIA is required to give consideration to such method(s) and to indicate, in its response, whether it is of the opinion that such method(s) is structurally possible. If VIA is of the opinion that, because of structural reasons, such method(s) of remedying an obstacle is not possible, VIA is required to clearly explain the reasons why it

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is of such an opinion and to provide supporting evidence from a Professional Engineer who has expertise in the design and manufacture of rail cars.

(c) VIA is further required to describe, in detail, in respect of each of the methods of remedying an obstacle that it identifies as being structurally possible (including those suggested by CCD), the various structural modifications that would be required, according to the stage of completion of the Renaissance Cars (i.e., shells, partially completed cars, and completed cars). VIA is required to provide a level of detail commensurate with what would be required in order to enable a Professional Engineer with expertise in the design and manufacture of rail cars to fully understand the various structural modifications and any other structural implications entailed in respect of the particular method of remedying the obstacle.

(d) VIA is required to obtain from a third party an estimate of the cost of the various structural modifications that would be required in respect of each of the methods of remedying an obstacle identified by VIA as being possible, on a per car basis. The cost estimate must give consideration to the cost in respect of the cars that are completed, partially completed and uncompleted and must provide a level of detail sufficient to permit a full understanding of the cost estimate.

(e) In the event that any of the methods of remedying an obstacle, which VIA has identified as being possible, would have structural implications for other areas in the Renaissance Cars, VIA is required to specify what these are in a level of detail commensurate with what would be required in order to enable a Professional Engineer with expertise in the design and manufacture of rail cars to fully understand the associated structural implications resulting from the method of remedying the obstacle.

(f) In the event that any of the methods of remedying an obstacle, which VIA has identified as being possible, would have operational implications, VIA is required to specify in detail what these are so as to permit a full understanding of the operational implications resulting from the method of remedying the obstacle.

(g) VIA is required, in respect of items (iv) and (vi) above, to clearly identify and quantify any one-time costs and ongoing operating expenses that VIA would incur as a result of making the modifications to remedy an obstacle.

(h) If VIA is of the opinion that it cannot, from a financial perspective, afford the costs associated with remedying an obstacle, VIA is required to provide verifiable evidence to support its views. In this context, the Agency considers verifiable evidence to include financial information that is supported by VIA's financial records. The Agency is of the opinion that, of particular relevance are VIA's current audited and interim financial statements, its current cash flow projections and the underlying assumptions, and VIA's detailed business plan.

(i) VIA is required, as part of its response to the Agency's direction to show cause, to submit a plan for the Agency's consideration that sets out how VIA can address the obstacles that exist in the Renaissance Cars over a reasonable period of time. While the Agency recognizes that there may be significant operational and economic implications resulting from the requirement for VIA to undertake modifications to the Renaissance Cars in order to remedy the obstacles, the Agency is of the opinion that such implications may be mitigated by planning the modifications to occur over time so as to minimize the impact on the operation of VIA's passenger rail network. For example, VIA could start addressing the obstacles by focussing on those Renaissance Cars which are shells and those which are partially completed. In this way, existing Renaissance Cars which contain the obstacles can be taken out of service over time and be replaced with new cars as they are fitted up or modified to address the obstacles.

VIA has sixty (60) days from the date of this Decision to file its answer to these questions, along with a copy to CCD, who will have thirty (30) days to file its reply, with a copy of VIA. Should VIA wish to respond at that point, it will have then fifteen (15) days to do so. In the absence of any or all of the above required information, the Agency will finalize its findings and determination based on the evidence on file.

58 The Agency chose its own procedure. Its choice was to issue a Preliminary decision and a final decision. In the Preliminary decision it imposed detailed and onerous obligations upon VIA for the purpose of remedying the obstacles which the Agency perceived for the people in wheelchairs who made use of Renaissance cars. Indeed, it is obvious from the Show Cause Order that the sole remedy considered by the Agency was to have VIA structurally modify the Renaissance cars. This was a serious error. The Agency should rather, having identified the obstacles, have allowed VIA to remedy the obstacles by means of its network. One remedy might be to modify the Renaissance cars but VIA should not have been confined to this remedy. If the Agency was going to adopt a procedure of compelling VIA to suggest remedies for the obstacles it should have directed VIA to respond with suggestions as to how its network could respond to the obstacles. Although the Agency also invited VIA to file any further information which it considered relevant, this hardly represented an invitation to address VIA's whole network. Indeed given the tremendous emphasis which the Agency had placed on modification of the Renaissance cars, VIA might reasonably have thought it was not being invited to submit further information about available network solutions.

59 Also in the Preliminary decision, the Agency opined about the probability of the Renaissance cars replacing the existing fleet in the future as the existing fleet retired from service, even though VIA argued to the contrary. If this was a concern, the Agency should have so expressed in the Show Cause Order and directed VIA to address it. In the absence of this being addressed in the Show Cause Order, it was dangerous for the Agency to speculate about the abilities of VIA's future trains to meet the needs of disabled persons.

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Subsequent to Preliminary decision but before Final decision

60 VIA submitted a letter with its internal cost estimates approximately 60 days after the Agency issued its Preliminary decision. The Agency found VIA's response inadequate and gave VIA an additional 60 days to provide further response. In VIA's further response, it provided documents to substantiate the internal cost estimates it had submitted earlier and it objected to the process, indicating that the time allotted was insufficient in which to render a response. In VIA's response to the Agency, it stated as follows:

> VIA Rail takes the position with the greatest of respect to the Agency that the following factors limit the ability of VIA Rail to answer the questions in the way in which they are put by the Agency.
>
> . . .
>
> The reason for VIA Rail's objection to the present process, although it continues to attempt to fulfil the Agency's directions, is that it cannot be accomplished in the way the Agency has directed. For example, to make even the most minor change in railway rolling stock and provide costs requires structural, electrical and mechanical engineers. It also requires costing experts. In a simple process of redesign, the following engineering steps must be taken:
>
> (a) a detailed analysis of drawings;
>
> (b) stripping of various areas in the cars to validate actual design and identify space available and hidden components;
>
> (c) identify major risk items;
>
> (d) elaborate first potential solutions;
>
> (e) contact suppliers/vendors on long lead items and explore potential solutions with them;
>
> (f) define concept layouts;
>
> (g) review concepts with VIA Rail;
>
> (h) write technical description for heavily modified and new systems;
>
> (i) support negotiation phases with vendors;
>
> (i) [sic] do soft mock-up on problematic areas;
>
> (j) contract award to vendors;
>
> (k) reiteration of concepts and review with VIA Rail;

(l) produce detail drawings for components;

(m) issue requests to purchase raw materials and standard components;

(n) design review with vendors;

(o) build a mock-up to validate final design;

(p) support First Article Inspection of systems;

(q) do final detail drawings for manufacturing and installation; and

(r) issue nomenclature.

These steps will take much longer than the 60 day period allotted by the Agency to complete one design change. Multiple changes and alternatives as requested by the Agency make the task unmanageable and beyond the human resources of VIA Rail to complete in the time allotted.

. . .

In any event, none of the various design alternatives sought by the Agency can be completed until one final solution has been decided upon and the lengthy process described above is completed.

. . .

(h) finally, VIA Rail requests an oral hearing to explain these positions so that the Agency can be fully satisfied that it has all of the information presently available to VIA Rail.

61 The Agency did not grant an oral hearing and proceeded to give its Final decision on October 29, 2003, in which, for the first time, it specified the actual changes to be made to the Renaissance cars.

Final decision

62 In the Final decision, although the Agency used the correct language at the commencement of its analysis by stating that a balance had to be struck between the rights of persons with disabilities and the transportation service provider in accordance with section 5 of the *CTA* (Agency's Final decision at page 19), it failed to conduct such an analysis. While the Agency did, in a cursory manner, examine VIA's financial status, this does not amount to a balancing of interests within the meaning of section 5 of the *CTA*.

Both decisions

63 In my view, the Agency, having been asked by the CCD at the beginning of this proceeding, to halt the purchase of the Renaissance cars, failed to then look beyond the Renaissance cars to properly consider the whole network. The Agency's conclusion in the Preliminary decision and its Show Cause Order demonstrate that its primary focus was confined to the Renaissance cars and not on the network as a whole, which resulted in a failure to consider alternative actions that VIA could take to avoid or ameliorate the problem, such as providing alternative transportation or providing different trains at different times. The Agency's failure to properly consider VIA's network as a whole was patently unreasonable.

64 Instead of focussing on the Renaissance cars, there were certain points the Agency should have addressed in the Show Cause Order, which would have provided VIA with an opportunity to suggest other means of accommodating the problems. For example, the Agency should have requested more information as to the features in the Renaissance cars that were advantageous to persons with disabilities. If the Agency had asked, undoubtedly they would have been told that the Renaissance cars provided:

a. the availability of a wheelchair tie-down;

b. the use of a bedroom for a non-sighted passenger accompanied by a guide dog;

c. the use of a VIA-supplied purpose-built wheelchair, to allow wheelchair passengers to move throughout the train;

d. automatic doors between cars to assist in movement by persons with disabilities;

e. brail marking for sight impaired;

f. visual train information;

g. emergency warnings for hearing impaired; and

h. moveable arm rests for mobility impaired. (See affidavit of John Marginson, sworn December 5, 2003. While the Marginson affidavit was not before the Agency during the proceedings, by Order of Malone J.A. dated July 13, 2004, VIA was allowed to adduce fresh evidence before this Court. This Order was never appealed).

65 While the Agency focussed its analysis on obstacles in the Renaissance cars rather than the entire network, the dissenting member of the panel correctly focussed on whether VIA's network was able to cope with any undue obstacles found in the Renaissance cars. I believe he took the proper approach. At pages 148-9 of the Preliminary decision, Mr. Cashin stated,

> Upon making a finding that there are obstacles, it is then necessary again, pursuant to subsection 172(1) of the CTA, to consider whether those obstacles are undue. This analysis

involves a balancing of the undueness factors set out by the parties. As set out by the Federal Court of Appeal in the Lemonde Decision, the Agency must take into account the context in which an allegation that an obstacle is undue is made. In this regard, I agree with VIA's argument that its network is the proper context for the Agency's undueness analysis. My assessment of the evidence and argument presented by the parties leads me to the preliminary conclusion that the obstacles found in respect of the Renaissance cars do not constitute undue obstacles to the mobility of persons with disabilities.

. . .

After reviewing VIA's submissions regarding its network, I can only conclude that there is no evidence that VIA's existing network, with the addition of the Renaissance cars, will not continue to provide appropriate services to persons with disabilities. In fact, VIA submitted that its current policies and practices that assist persons with disabilities will continue to apply, with the introduction of the new cars.

. . .

VIA advised that the Renaissance trains are a "special one-time purchase" and are not the trains of the future. VIA acknowledges that the Renaissance cars will not "meet all of the needs of those with disabilities" and that any obstacles alleged by CCD concerning the Renaissance trains are overcome by the "adequate provision of other transportation services provided on VIA Rail's network". In my view, this implies that VIA will address any obstacles related to the Renaissance cars by taking the appropriate measures to ensure that VIA's network continues to address the needs of persons with disabilities.

. . .

Although I recognize CCD's arguments concerning the impact of the obstacles identified by the Agency on persons with disabilities, I am of the view that there is no evidence that these obstacles will not be accommodated by VIA's network. The rights of persons with disabilities to have equivalent access to the federal transportation network does not mean identical access or the provision of the identical services that are available to other passengers but rather it implies the notion of accommodation and VIA, in my view, has demonstrated that even with the addition of the Renaissance cars, the interests of persons with disabilities will continue to be accommodated by VIA's network.

66 The dissenting member retired before the Final decision was rendered and did not participate in it.

Balancing of Interests

Cost of remedying the obstacles

67 In the Show Cause Order, the Agency made preliminary findings as to the obstacles in the Renaissance cars it considered to be undue. At page 143 of the Preliminary decision, the Agency made the following findings:

> The Agency has made preliminary findings that the following features in the Renaissance Cars constitute undue obstacles to the mobility of persons with disabilities, including, and in particular, persons who use wheelchairs:
>
> 1. Coach car
>
> (a) the lack of movable aisle armrests on the double seat side of the coach cars
>
> 2. Economy coach car
>
> (a) the width of the aisle between the two washrooms
>
> (b) the inadequate clear floor space of the wheelchair tie-down to accommodate a Personal Wheelchair and a service animal
>
> (c) the amount of manoeuvring space, including the lack of a 150 cm (59.06") turning diameter in the wheelchair tie-down area
>
> (d) the width of the bulkhead door
>
> (e) the lack of seating either beside or facing the wheelchair tie-down for an attendant
>
> (f) the insufficient space that will accommodate persons travelling with service animals
>
> 3. Consists
>
> (a) the Montréal-Toronto overnight train consist and the fact that there is no accessible washroom for persons using the wheelchair tie-down in the economy coach cars
>
> 4. Stairs
>
> (a) the riser heights and stair depths
>
> (b) the lack of closed stair risers
>
> 5. "Accessible suite"
>
> (a) the width of the doors in the "accessible suite"

(b) the fact that a person with a disability will not be able to retain a Personal Wheelchair in the "accessible suite"

(c) the insufficient space beside the toilet in the "accessible suite" to allow a person using a Personal Wheelchair to effect a side transfer to the toilet

(d) the lack of a 150 cm (59.06") turning diameter in the "accessible suite"

68 As noted above, VIA was unable to provide cost estimates prepared by a third party within the time allotted by the Agency, including the 60 day extension. As a result of this, the Agency rendered its Final decision without such cost estimates. What the Agency did have and did consider was a cost estimate by a company called Pro-Sphere, which, according to the Agency, had been in the files of VIA, and were produced by VIA along with its letter indicating that it needed more time to comply with the Agency's order for production of more information. The problem with the Pro-Sphere report is that it provided estimates only on toilet configuration, which was only one of the fourteen features found by the Agency to constitute undue obstacles. It is also not clear as to what expertise Pro-Sphere possessed or for what purpose the estimates were prepared. Therefore, the Agency, in ordering its final corrective measures in the Final decision, did not have comprehensive third-party estimates as to the total cost of the changes as it requested from VIA in the Show Cause Order.

69 Subsequent to the issuance of the Final decision, VIA obtained much more detailed information about the costs from a train expert at Bombardier, Peter Schrum. He filed a 10 page affidavit attaching his 33 page report (Affidavit of Peter Schrum, sworn December 5, 2003 at paragraph 3. This affidavit was also newly adduced into evidence before this Court by Order of Malone J.A., *supra*.) The Schrum affidavit analyses the steps required to complete the work. It describes the steps of the production process and the major areas of change directed by the Agency. It contains diagrams, hours estimated, plans, timing and risks. The report addressed each of the ten corrective measures ordered by the Agency in its Final decision and is the only objective third party report which comprehensively estimates the costs of all the changes ordered by the Agency.

70 In his affidavit, Mr. Schrum said,

The re-construction of the cars, as directed by the Agency, make no engineering or production sense. Some of the directions of the Agency are laden with a number of complex and unknown structural, engineering, production and timing risks. I have done my best to complete the analysis needed for the engineering feasibility study and the preparation of the work up to the issuance of tenders and the completion of the work itself. My conclusions are qualified by a series of identified risks and a concern that there are unknown risks which will appear as the actual construction is carried out. Finally, there are a number of functions or costs which are

not included in the calculations. To the extent possible I have applied an appropriate order of magnitude in order to estimate those costs.

71 He then estimated the total costs of changes ordered by the Agency to be in the order of $48 million. However, he then said,

> The $48 million figure does not take into account structural changes which are unknown and a highly complex risk factor. In this regard, the service cars may be feasible from an engineering and production perspective. It may be possible to complete all of the work with minor structural changes. For the coach cars, they will need major structural changes for much of the work. These major structural changes are so complex that they cannot be fully mapped out until work begins.
>
> For example, moving the seat to the floor level requires a new seat, a new attachment, re-engineering of the floor, a new mounting attachment and load-path changes in the floor itself. The new washroom in the coach car requires structural changes in the coach car itself, both the floor, the flooring structure and other possible parts. It is also necessary to re-route or re-work the plumbing, the holding tanks, the electrical system, the air conditioning system, the battery underneath the train and other major structural changes. None of these changes are included in the $48 million cost and may not be possible from an engineering perspective. The costs could go as high as $92 million if structural problems arise.
>
> In addition, the total cost excludes all detailed engineering of components.

72 It should be pointed out that the CCD, upon receiving the Schrum report, filed a report of their own by a Mr. Ron Woollam, which, while critical of the Schrum report, does not in itself make clear estimates of the total costs involved in making the changes ordered by the Agency.

73 The Agency, in the Preliminary decision, before undertaking any such balancing, concluded that VIA had failed to provide "compelling evidence of economic impediments to addressing any undue obstacles found to exist in the Renaissance Cars" (Agency's Preliminary decision at page 46). The Agency came to this conclusion before it had even defined the changes to be made to the Renaissance cars. At this point, it would not have been possible for anyone to know the costs involved.

74 Similarly, the Agency found that there was no evidence of economic impediments preventing VIA from addressing the obstacles in the Renaissance cars (Agency's Preliminary decision at page 46) at the beginning of the analysis in the Preliminary decision, before it required VIA to obtain the estimated cost for the various structural modifications in the Show Cause Order. Having reached the conclusion that there was no compelling evidence of economic impediments in funding the changes *before* asking VIA to obtain estimates of these costs is patently unreasonable. One cannot conclude that VIA can afford to pay for the changes without knowing the cost of these changes.

75 The Agency therefore determined that there were no economic impediments before it addressed the changes to be made to the Renaissance cars and before it asked for cost estimates.

76 In my view, it is of utmost importance not just to persons in wheelchairs, but to all other disabled persons, VIA, the Government of Canada and the Canadian public, that before costs of the magnitude envisioned by the Schrum report are incurred, that the Agency reconsider its decision, taking into account the total costs of the changes ordered as well as the other factors to be balanced, as set out in the *Lemonde* decision.

77 As it has been said, it is absolutely necessary to balance the various interests under section 5 of the *CTA*. This can only be done once the true cost of the changes is known. VIA had indicated to the Agency that it could not respond to the Show Cause Order adequately in the time allotted. It is clear to me that VIA had a valid point. The amount of detail required by the Agency in its Show Cause Order was very great and more time should have been provided for VIA to respond. The Agency's failure to provide such opportunity to VIA, in my view, constitutes a denial of procedural fairness justifying that its decision be set aside with a direction to reconsider the matter.

Impact on other travellers

78 In an undueness analysis, the interests of the various parties must be balanced. However, at page 40 of the Preliminary decision, the Agency said,

> With respect to VIA's opinion that the Agency must consider its network against the actual number of passengers with disabilities who travel on it, the Agency is of the opinion that such a factor is not determinative. As discussed, the Agency is of the opinion that Part V of the CTA is, by its nature, human rights legislation, which is specifically aimed at protecting the rights of a minority group; namely, persons with disabilities.

79 In the above quotation, it is unclear as to whether the Agency dismissed as a consideration the fact that, of the passengers travelling by rail, only 0.5% of them were disabled in 1995 according to the Agency (Agency's Preliminary decision at page 40) and 0.0611% in 2003, according to VIA. In either event, the figure representing disabled passengers travelling by rail is small. While I am in agreement that the fact that passengers with disabilities constitute a small percentage of all passengers cannot be taken to justify totally inadequate facilities for disabled people, the numbers must nonetheless be taken into consideration.

80 It must be noted that although the carrier is obliged to take into account the needs of disabled persons, the needs of non-disabled persons must also be taken into account because the system must function and be available for all users. Part of the balancing analysis requires a consideration of the monies necessary to keep the system running. If expenses are so high that VIA has to increase

its fares and average citizens cannot afford to travel, then the objectives in section 5 of the *CTA* cannot be met.

81 In my view, without having the necessary information as to costs before it while rendering its Final decision and by failing to consider the cost and the impact on other travellers, the Agency's decision is patently unreasonable.

Agency expertise

82 In the Preliminary decision, the Agency concluded that there was no evidence to support VIA's opinion that its network could address obstacles that were found to exist in the Renaissance cars. Specifically, at page 38 of the Preliminary decision, the Agency found,

> Furthermore, the Agency finds that there is no evidence on the record that supports VIA's opinion that its existing fleet or its network, generally, will address obstacles that may be found to exist in the Renaissance Cars.

83 However, there was some evidence in relation to VIA's belief that it could accommodate persons in wheelchairs. For example, there was evidence before the Agency as to VIA's network features. VIA's network has various policies in place specifically designed for the accommodation and comfort of persons with disabilities, including policies regarding wheelchair handling, where VIA service agents are trained in providing assistance and equipment for persons with disabilities.

84 The Agency also said that VIA had not submitted any evidence about its alternative transportation policy. This fails to note that the Agency is a tribunal with expertise in areas of railway transportation policy. This expertise is the reason deference is shown to the Agency by the Courts. In Decision No. 479-AT-R-2002, dated more than one year prior to the Final decision, the Agency reviewed VIA's transportation network when it was considering a complaint about an undue obstacle and noted the following about its own mandate:

> It is worth noting that the tribunal's consideration of the matter of accessible transportation predates the 1988 amendments in that the first accessible transportation matter was considered in 1980 when the RTC entertained the application filed by Clariss Kelly, a person with a disability who uses a wheelchair, against VIA under section 281 of the then Railway Act which required railway tariff provisions to not be prejudicial to the public interest.

85 The Agency noted the same fact at page 28 of the Preliminary decision:

> Concerning expertise, the Agency has the necessary expertise to deal with this complaint. The first accessible transportation matter was considered in 1980, prior to the enactment of specific accessible transportation provisions in the legislation...

> Specifically, the Agency has addressed complaints where, among others, issues pertaining to aisle widths and accessible washrooms have been examined. **In terms of the balancing process, the Agency has examined economic considerations, carrier policies and transportation alternatives offered by the transportation provider**
>
> (emphasis added).

86 While my views on this point are not necessary for my decision, I would say, by way of *obiter dicta*, that given the Agency's mandate, its expertise and the fact that VIA has come before it on numerous occasions, the Agency should have made use of its expertise relating to rail transportation matters when considering VIA's network. Accordingly, while there may not have been extensive evidence submitted by VIA (because the Agency's focus was on the Renaissance cars), the Agency is required to draw on its expertise for its decisions. That is the purpose of having an expert tribunal and of the Courts giving deference to its decisions.

VIA's right to an oral hearing

87 As previously mentioned, subsequent to receiving the Show Cause Order in the Preliminary decision, VIA requested an oral hearing to explain *inter alia* the difficulties in responding to the Show Cause Order. This oral hearing was denied.

88 VIA's position was that the Agency's decisions would have a significant impact upon VIA and therefore, VIA should have been afforded full procedural rights. Full procedural rights, in many instances, require an oral hearing, especially where the issues cannot be resolved on the basis of the documentary evidence alone. Here, VIA requested an oral hearing in order to fully present its arguments on the Show Cause Order and has now stated that the failure by the Agency to grant the oral hearing deprived the Agency of evidence that was necessary for the proper rendering of its Final decision. Therefore, VIA submits that when procedural rights have been denied, the proper remedy is for the court to quash the decision and remit the matter back to the administrative decision-maker.

89 In noting that the content of the duty of fairness is flexible and depends on the context of the statute at issue (*Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.) at paragraph 22 [*Baker*]), it is my view that the Agency had the right to exercise its discretion in deciding whether to grant an oral hearing. It has discretion in the conduct of its own affairs (*Baker* , *supra* at paragraph 27) and neither the *CTA* nor the Agency's General Rules (*National Transportation Agency General Rules*, SOR/88-23, Rule 38) require it to hold an oral hearing. Specifically, General Rules 38 and 40 state,

> **38.** The Agency may make any order, decision, ruling or direction or give any leave, sanction or approval otherwise than by holding an oral hearing.

> **40.** Procedural decisions shall be made on the basis of material filed with the Agency and without an oral hearing unless a party demonstrates that the interests of justice require the holding of an oral hearing.

90 Therefore, the Agency's decision regarding the refusal to grant an oral hearing is one which it has the discretion to make. It cannot be said that this decision was patently unreasonable.

91 I do not wish, however, in saying this, to be taken as saying that VIA did not need further opportunity and more leeway to present the information and estimates to the Agency pursuant to its direction in the Show Cause Order. While it was within the discretion of the Agency to require that this be done by letter, it was incumbent on the Agency to allow sufficient time to permit this to be done.

Standing of the Agency before this Court

92 The Agency filed a factum in this appeal and appeared to make oral argument. In its factum, the Agency addressed not only the questions of its jurisdiction and standard of review, which it was entitled to do, but also other issues relating to the facts and merits of VIA's position. I quote some excerpts from the Agency's factum as examples:

> It is respectfully submitted that, as evidenced by the March and October Decisions, the Agency conducted a careful balancing of the undueness factors, as raised by the parties... It is respectfully submitted that, based on the evidence that was provided by the parties, the Agency's analyses were appropriate and reasonable in the circumstances.
>
> . . .
>
> A. Paragraph 70(a): The Agency respectfully submits that it finds it surprising that VIA was unable to obtain expert evidence on the projected costs of conducting redesign and reconstruction work until after the Agency rendered its final decision when the Agency had clearly set out in the March Decision the preliminary undue obstacle findings that it had made.
>
> E. Paragraph 70(e):... Many of the corrective measures that VIA has been directed to undertake will, in addition to benefiting passengers with disabilities who use wheelchairs, also benefit other passengers with and without disabilities. For example, an accessible washroom will benefit many passengers as will moveable aisle armrests and thus the number of passengers benefiting from the Agency's Decision is greater than the 0.061% that VIA sets out in this paragraph.
>
> . . .

> In conclusion, the Agency respectfully submits that it recognizes the requirements of natural justice and fairness in its decision-making process and that VIA was not denied the opportunity to properly present its case before the Agency.

93 From these excerpts, it appears that the Agency has entered into the fray and become an adversary in this matter. This is to be regretted. The statements of Estey J. in *Northwestern Utilities Ltd. v. Edmonton (City)* (1978), [1979] 1 S.C.R. 684 (S.C.C.), at 708 to 710 are apposite.

> This appeal involves an adjudication of the Board's decision on two grounds both of which involve the legality of administrative action. One of the two appellants is the Board itself, which through counsel presented detailed and elaborate arguments in support of its decision in favour of the Company. Such active and even aggressive participation can have no other effect than to discredit the impartiality of an administrative tribunal either in the case where the matter is referred back to it, or in future proceedings involving similar interests and issues or the same parties. The Board is given a clear opportunity to make its point in its reasons for its decision, and it abuses one's notion of propriety to countenance its participation as a full-fledged litigant in this Court, in complete adversarial confrontation with one of the principals in the contest before the Board itself in the first instance.
>
> It has been the policy in this Court to limit the role of an administrative tribunal whose decision is at issue before the Court, even where the right to appear is given by statute, to an explanatory role with reference to the record before the Board and to the making of representations relating to jurisdiction....
>
> In the sense the term has been employed by me here, "jurisdiction" does not include the transgression of the authority of a tribunal by its failure to adhere to the rules of natural justice. In such an issue, when it is joined by a party to proceedings before that tribunal in a review process, it is the tribunal which finds itself under examination. To allow an administrative board the opportunity to justify its action and indeed to vindicate itself would produce a spectacle not ordinarily contemplated in our judicial traditions.

94 The Agency cannot be an adversary in a matter on appeal wherein the decisions being appealed were rendered by the Agency itself. The Agency should take note of this for future proceedings.

Conclusions

95 For the reasons given, the appeal will be allowed with costs against the respondents, and this matter will be referred back to the Agency for reconsideration in accordance with these reasons.

***Décary J.A.*:**

688

I agree

Evans J.A. **(concurring reasons):**

A. Introduction

96 I have had the great benefit of reading the careful reasons of my colleague Sexton J.A. and agree that neither the preliminary order nor the final order of the Agency can stand. However, I would dispose of the appeal on somewhat different bases.

97 In my respectful view, the only error by the Agency warranting the intervention of this Court is its failure to afford a reasonable opportunity to VIA to address issues crucial to the ultimate determination of the CCD's application. First, the Agency's preliminary order should have specifically invited VIA to submit evidence that would enable the Agency to determine if the obstacles to mobility presented by the Renaissance cars were undue when considered in the context of VIA's network. Second, when it issued its "final" order specifying the modifications to the Renaissance cars that it required, the Agency should have invited VIA to submit a third party estimate of the costs of the modifications and an assessment of their feasibility from an engineering perspective.

98 I am not persuaded, however, that, having considered VIA's submissions regarding its network, the Agency committed reversible error when it concluded in the preliminary decision that the obstacles to the mobility of persons in wheelchairs presented by the Renaissance cars were "undue". Nonetheless, a consideration of the network is so fundamental to any determination of whether an obstacle is undue, and the evidence on the issue before the Agency was so limited, and lacking in specificity, that the Agency ought to have invited VIA to demonstrate how it proposed to mitigate the obstacles in the Renaissance cars, thereby obviating the need to make the prescribed modifications to them.

99 In its preliminary decision, the Agency found that the design of the Renaissance cars constitutes an obstacle to the mobility of many persons whose disability requires them to use a personal wheelchair. I do not understand Sexton J.A. to require the Agency to revisit this issue. The evidence before the Agency was that these cars do not to meet mandatory accessibility standards in other countries, such as the United States and the United Kingdom. This may explain why VIA was able to purchase them at what it regarded as a bargain price.

100 The undueness of the obstacles is the issue in dispute. As I have already indicated, I am not persuaded that the Agency's conclusion that the obstacles were undue was patently unreasonable, in view of the Agency's analysis of the issue, and of the general and limited information that VIA submitted to the Agency concerning the capacity of the network to mitigate the effect of the obstacles to travel presented by the Renaissance cars to passengers using personal wheelchairs.

I am also doubtful whether VIA has established that the Agency's balancing of the factors listed in section 5 was patently unreasonable on the basis of the evidence before it on the cost of the modifications that it ordered.

101 The following three preliminary observations inform these conclusions. First, review for patent unreasonableness does not authorize the Court to intervene on the ground that it would have weighed the relevant factors and the evidence differently from the Agency. In its preliminary, or show cause, decision, the Agency clearly did consider the undueness of the obstacles in the context of the network as a whole. That the Agency's reasons sometimes make no reference to the network in the context of undueness is explicable, in part at least, by the fact that the Agency was not satisfied, on the basis of the evidence submitted by VIA, that the network prevented the obstacles inherent in the design of the Renaissance cars from being undue. Not every shortcoming in the Agency's analysis will constitute patent unreasonableness.

102 Second, I agree with my colleague's observation that, while it is not legally necessary for the Agency to wait until it has a specific complaint from a passenger who is unable to use the service ordinarily provided by a carrier between two points, the kind of generic complaint made in this case may prove difficult for the Agency to investigate, especially, as this case illustrates, when it comes to considering the undueness of obstacles in the context of the network and the potential cost of modifications. The critical issues will often only come into focus towards the end of a lengthy administrative process.

103 Third, in my view, the Agency's problems were compounded by an apparent lack of cooperation during the administrative process on the part of VIA. Any corporation in a regulated industry, including VIA Rail, is entitled to defend vigorously the interests of its shareholders and customers, as well as the public purse, from the imposition of regulatory burdens. Nonetheless, in viewing the limited material before the Agency on the network issue and the question of cost, I find it hard to avoid the conclusion that, if the Agency's analysis was based on incomplete information, VIA was, in part at least, the author of its own misfortune.

B. Issues and Analysis

(i) standard of review

104 Sexton J.A. rightly points out that this Court may reverse the decisions on the basis of the Agency's determination of "undueness" only if they are patently unreasonable, unless the Agency has erred in the interpretation of the statutory provisions relevant to the disposition of the CCD's complaint, or breached the duty of procedural fairness.

105 The selection of the most deferential standard to review findings of undueness is appropriate because of the multiplicity of factors and interests to be weighed, and the technical aspects of some

of the issues. Decisions on these matters involve the exercise of discretion, based on the evidence and the statutory criteria, and are within the specialized mandate of the Agency.

(ii) the network issue

a) duty of fairness

106 As Sexton J.A. rightly emphasises, it is settled law in this Court that whether an obstacle to the mobility of passengers with a disability is undue must be assessed in the context of the carrier's network. In other words, the Agency must inquire to what extent the carrier can accommodate passengers wishing to travel between two points on the network who are unable to access the mode of transport offered to passengers at large: *VIA Rail Canada Inc. v. Canada (National Transportation Agency)* (2000), [2001] 2 F.C. 25 (Fed. C.A.).

107 In view of the fundamental importance of considering the undueness of the obstacles in the cars in the context of possible network solutions, the unsatisfactory nature of the evidence submitted by VIA, and the generic nature of the inquiry, the Agency was not entitled to regard the network issue as concluded when it issued its preliminary order.

108 Accordingly, as a matter of fairness, and sound public administration, VIA was entitled to an opportunity to show whether, or how, it could address through its network the specific issues that had emerged during the process culminating in the preliminary decision. A brief invitation to VIA to submit any other information it thought relevant was included at the end of the Agency's preliminary order, which dealt in detail with problems in the structure and design of the cars, and VIA's obligations with respect thereto. This was insufficient to make it clear to VIA that it could make further submissions to the Agency on the network issue.

109 The Agency should have ensured that VIA had an opportunity to provide information on

> two network issues: first, the network solutions that VIA proposed for passengers in personal wheelchairs who wished to travel on routes where VIA operated consists of Renaissance cars;
>
> second, as more Renaissance cars were brought into service, the likely effects on existing travel options of the redeployment and retirement of the older, more accessible cars.

110 For example, VIA might have responded by advising the Agency whether it would (or could) ensure that, say, once or twice a week, it would put a consist of older cars on routes on which it normally ran Renaissance cars. Alternatively, in view of VIA's estimate of the small number of passengers unable to access the Renaissance cars, it might have proposed paying the cost, over and above the price of a rail ticket, of another mode of transportation.

b) the Agency's network analysis

111 The CCD's principal concern on the network issues identified in paragraph 109 was that, given their projected life span of 25-30 years, the 139 Renaissance cars purchased by VIA were likely, over time, to replace older, but more wheelchair-accessible cars on routes in the corridor between Quebec and Windsor. VIA had announced that, in 2003, it would replace its existing cars on the routes between Montreal and Halifax, and between Montreal and Gaspé, and use Renaissance cars to provide a day and overnight service. In addition, Renaissance cars are currently being used on the Toronto-Ottawa overnight service, as well as on the Montreal-Ottawa and Montreal-Quebec routes.

112 VIA had provided no information explaining how it would deal with these issues. Since the evidence before the Agency was that Renaissance cars could not be combined with other cars in the same consist, the obstacles presented by the Renaissance cars could not be mitigated by including in a consist one of the older, more accessible cars.

113 Instead, the information provided to the Agency by VIA simply listed the range of options that it made generally available to accommodate passengers with disabilities. Thus, in its final written submission, dated February 18, 2002, VIA stated (Appeal Book, vol. 6, p. 2193):

> The network design includes the reservation systems, the alternative transportation policy, ground services, special handling services, train accommodation, employee training and special service requests. The train accommodation includes all of VIA Rail's rolling stock. ... The evidence in this regard indicates that VIA meets its obligations to passengers with in Canada, even without the Renaissance cars. With these cars there are more options for passengers with disabilities.
>
> [emphasis added]

It said also that Renaissance cars would form only a part of the "fleet of the future" and would operate with existing cars and with cars to be built in the future.

114 The Agency's analysis of the network issue occupies four pages (Appeal Book, vol. 1, pp. 53-57), or less than three per cent, of the reasons given for the preliminary decision. However, whether the reasons on the issue are sufficient to pass judicial scrutiny cannot be determined merely by their length, without also considering the nature and quantity of the information provided to the Agency.

115 In its analysis, the Agency set out the information contained in the sentence underlined in the above quote from VIA's written submissions, and noted VIA's assurance that all these arrangements would remain in place after the introduction of the Renaissance cars. The Agency also referred to the existence of VIA's communication system that enabled passengers to call in

advance to discover their travel options, and to its contention that passengers with disabilities may not be able to travel on every train.

116 The Agency concluded that the evidence did not establish to its satisfaction that the existing fleet or the network would address the obstacles that it had found to exist in the Renaissance cars. First, it was of the view that, over time, cars in the existing fleet would be deployed from the Quebec-Windsor corridor to routes in western Canada, or retired. This would reduce the options available for those unable to use the Renaissance cars. Moreover, the Agency also found (Appeal Book, vol. 1, p. 56) that, in view of the number purchased, and their life expectancy,

> Renaissance cars will be the only cars in operation on some of VIA's routes in the near future and they will be a significant part of VIA's network for a considerable period of time.
>
> In so finding, the Agency did not accept VIA's assertion that the introduction of the Renaissance cars would have no effect on existing travel options because they were intended to augment the size of the fleet.

117 Second, the Agency noted that neither the cars in the existing fleet, nor the Renaissance cars, have sleeper units accessible to personal wheelchair users, despite a previous commitment by VIA to improve the accessibility of its sleeping cars in order to comply with Rail Code standards.

118 Third, as for the number of passengers with disabilities for whom some kind of accommodation is needed, the Agency concluded that VIA's figure was an underestimate. This was because VIA had not taken account of either the numbers unable to travel as a result of the inaccessible features of its cars, or the fact that the demand for accessible travel is likely to increase as the population ages and travel becomes more accessible.

119 Patent unreasonableness is a standard of review that does not permit the Court to re-evaluate the material before the Agency, or even to subject the Agency's reasons to the somewhat probing examination that must be undertaken when reasonableness *simpliciter* is the applicable standard.

120 In view of the evidence before it, and the quality of the analysis, the Agency's decision was not patently unreasonable. In my respectful opinion, it was rationally open to the Agency to conclude that, in the absence of more precise information from VIA as to how it would accommodate passengers through its existing fleet or its network on the routes where Renaissance cars would by deployed, the obstacles were undue.

121 Further, it was not patently unreasonable for the Agency to reject VIA's assertion that present network options would continue to be available, despite the redeployment of cars to the west, and the retirement of aging cars, as Renaissance cars were brought into service. In view of counsel's submissions on the state of VIA's finances, the claim that VIA would be purchasing

additional cars at some unspecified date in the future is too speculative a basis on which to reverse the Agency's finding regarding the continuation of existing options.

c) a duty to take official notice?

122 VIA argues that the Agency should have supplemented the evidence on the record in this matter by resorting to its institutional knowledge of the range of options available through VIA's network. The argument is that, as an expert administrative tribunal, the Agency is required to take official notice of information that it had acquired about VIA's network in the course of conducting other proceedings. Presumably, this duty is subject, as a matter of procedural fairness, to the Agency's disclosing to the parties the information of which it has taken notice, and giving them an opportunity to comment on it.

123 I cannot accept this argument for two reasons. First, it could be very onerous to impose a general obligation on specialist administrative agencies to resort to their institutional expertise or knowledge in order to remedy deficiencies in the information which, in a particular proceeding, a party provided about its business. It is one thing for the law to permit an agency, subject to considerations of procedural fairness, to supplement an administrative record from its specialist knowledge. It is quite another to oblige it to search its institutional memory for information that a party could have provided readily. In the absence of legal authority on the point, I would not impose such a potentially far-reaching duty on the Agency, which should normally be able to decide a matter on the basis of the material put before it by the parties in the very proceeding that is the subject of judicial review.

124 Second, the information previously provided to the Agency about the policies and practices that VIA had developed to accommodate passengers with disabilities who require the use of a wheelchair does not seem to me to be materially different from that submitted to the Agency by VIA in this case. It is general in nature and does not address the specific accessibility issues raised for users of personal wheelchairs by the introduction of the Renaissance cars on routes in the corridor between Quebec and Windsor, and by the redeployment or phasing out of the more accessible cars in the existing fleet.

(iii) cost

125 In my opinion, the Agency acted in breach of the duty of procedural fairness when it failed to afford VIA an opportunity to respond to its "final" order specifying the modifications that it required VIA to make to the Renaissance cars. The opportunity given to VIA to respond to the preliminary decision was not adequate in view of VIA's submission that the information required from it would be too costly and time-consuming to produce: see, for example, the report to VIA from Bombardier (Appeal Book, vol. 3, p. 1192).

126 The onerous nature of the order in the Agency's preliminary decision is evident from paragraphs (a) through (i) of its order (Appeal Book, vol. 1, p. 145) which, among other things, require VIA to list and to cost the ways of removing the identified obstacles in the design and structure of the Renaissance cars. The Agency required VIA to retain an independent professional engineer with relevant expertise and to prepare a report on these matters. In addition, if it was not possible, in the view of the engineer, to make any of the prescribed modifications to the cars, the report to the Agency should explain the reasons why.

127 There was no evidence before the Agency contradicting VIA's submission that compliance with the Agency's preliminary decision would be unduly onerous. The CCD's observation that VIA did not request another extension of time to enable it to submit the information required by the Agency does not respond to VIA's complaint that compliance would be too expensive.

128 In other words, the Agency's invitation to the parties to respond to the preliminary decision did not provide VIA with a reasonable opportunity to make submissions on costs and feasibility. In these circumstances, the Agency ought to have permitted VIA to submit a report on costs and feasibility after the Agency had identified the modifications to the Renaissance cars that it required in order to remove the obstacles that they had been found to contain.

C. Conclusions

129 For these reasons, I would allow the appeal, set aside the preliminary and final orders of the Agency, and remit the matter to the Agency. I would direct the Agency to invite submissions from the parties on whether the obstacles that have been found to exist in the Renaissance cars are undue, having regard to: (i) the alternatives available through VIA's network for travellers unable to access Renaissance cars; (ii) the likely costs, and technical feasibility, of the corrective actions that it ordered VIA to take; and (iii) the other factors that section 5 requires the Agency to balance in making its determination of undueness.

Appeal allowed.

2003 SCC 45
Supreme Court of Canada

Roberts v. R.

2003 CarswellNat 2822, 2003 CarswellNat 2823, 2003 SCC 45, [2003] 2 S.C.R. 259, [2003] S.C.J. No. 50, [2004] 1 C.N.L.R. 342, [2004] 2 W.W.R. 1, 19 B.C.L.R. (4th) 195, 231 D.L.R. (4th) 1, 309 N.R. 201, 40 C.P.C. (5th) 1, 7 Admin. L.R. (4th) 1, J.E. 2003-1819, REJB 2003-47809

Roy Anthony Roberts, C. Aubrey Roberts and John Henderson, suing on their own behalf and on behalf of all other members of the Wewaykum Indian Band (also known as the Campbell River Indian Band), Appellants v. Her Majesty The Queen, Respondent and Ralph Dick, Daniel Billy, Elmer Dick, Stephen Assu and James D. Wilson, suing on their own behalf and on behalf of all other members of the Wewaikai Indian Band (also known as the Cape Mudge Indian Band), Respondents/Appellants

Ralph Dick, Daniel Billy, Elmer Dick, Stephen Assu, Godfrey Price, Allen Chickite and Lloyd Chickite, suing on their own behalf and on behalf of all other members of the Wewaikai Indian Band (also known as the Cape Mudge Indian Band), Appellants v. Her Majesty The Queen, Respondent and Attorney General of Ontario, Attorney General of British Columbia, Gitanmaax Indian Band, Kispiox Indian Band and Glen Vowell Indian Band, Interveners

McLachlin C.J.C., Gonthier, Iacobucci, Major, Bastarache, Arbour, LeBel, Deschamps JJ.

Heard: June 23, 2003
Judgment: September 26, 2003
Docket: 27641

Counsel: Michael P. Carroll, Q.C., and Malcolm Maclean for appellants Roy Anthony Roberts et al.
John D. McAlpine, Q.C., and Allan Donovan for respondents/appellants Ralph Dick et al.
J. Vincent O'Donnell, Q.C., and Jean Bélanger for respondent Her Majesty the Queen
Patrick G. Foy, Q.C., and Angus M. Gunn, Jr. (written submissions only), for intervener Attorney General of British Columbia
Peter Grant and David Schulze (written submissions only) for interveners Gitanmaax Indian Band, the Kispiox Indian Band and the Glen Vowell Indian Band

***Per curiam*:**

I. Introduction

1 The Wewaykum or Campbell River Indian Band ("Campbell River") and the Wewaikai or Cape Mudge Indian Band ("Cape Mudge") allege that the unanimous judgment of this Court in *Roberts v. R.*, [2002] 4 S.C.R. 245, 2002 SCC 79 (S.C.C.), with reasons written by Justice Binnie, is tainted by a reasonable apprehension of bias and should be set aside. The alleged reasonable apprehension of bias is said to arise from Binnie J.'s involvement in this matter in his capacity as federal Associate Deputy Minister of Justice over 15 years prior to the hearing of the bands' appeals by this Court.

2 An allegation that a judgment may be tainted by bias or by a reasonable apprehension of bias is most serious. That allegation calls into question the impartiality of the Court and its members and raises doubt on the public's perception of the Court's ability to render justice according to law. Consequently, the submissions in support of the applicant bands and the other parties have been examined in detail as reflected in the following reasons.

3 After an analysis of the allegations and the record upon which they are based, all of which is attached as Appendix A to these reasons, we have concluded that no reasonable apprehension of bias is established and hence that Binnie J. was not disqualified. The involvement of Binnie J. in this dispute was confined to a limited supervisory and administrative role, over 15 years prior to the hearing of the appeals. In his written statement filed as part of the record, Binnie J. has stated that he has no recollection of any involvement in this litigation, and no party disputes that fact. In light of this and for the reasons which follow, we are of the view that a reasonable person could not conclude that Binnie J. was suffering from a conscious or unconscious bias when he heard these appeals, and that, in any event, the unanimous judgment of this Court should not be disturbed. Accordingly, the motions to set aside this Court's judgment of December 6, 2002, are dismissed.

II. Factual Background

4 The bands have each presented motions to set aside the unanimous judgment of this Court, dated December 6, 2002, with reasons written by Binnie J. The judgment dismissed their appeals from an order of the Federal Court of Appeal. The motions to set aside allege that Binnie J.'s involvement as federal Associate Deputy Minister of Justice in the early stages of Campbell River's claim in 1985 and 1986 gives rise to a reasonable apprehension of bias by properly informed and right-thinking members of the public. These motions were brought following an application by the Crown in right of Canada for directions and were heard on June 23, 2003. Binnie J. had recused himself from any participation in this process after filing a statement as part of this record

indicating that he had no recollection of participating in the litigation process involving these claims while serving in the Department of Justice.

5 Prior to his appointment to the Supreme Court of Canada in 1998, Binnie J. had a long and varied career as a practising lawyer. Called to the Ontario Bar in 1967, Binnie J. practised litigation with Wright & McTaggart and successor firms until 1982. Between 1982 and 1986, and of most relevance to these motions, Binnie J. served as Associate Deputy Minister of Justice for Canada, having joined the federal civil service on a secondment. As Associate Deputy Minister of Justice, Binnie J. was responsible for all litigation involving the government of Canada, except cases originating from the province of Quebec and tax litigation. He also had special responsibilities for aboriginal matters. Upon leaving the Department of Justice on July 31, 1986, Binnie J. joined the firm of McCarthy Tétrault, where he remained until his appointment to this Court. Understandably, when Binnie J. left the Department of Justice, the files he worked on, in accordance with usual practice, remained with the Department of Justice. As a result, in the absence of recollection, judges who leave their firms or institutions do not have the ability to examine their previous files in order to verify whether there has been any prior involvement in a matter coming before them.

6 To distinguish between his role as judge and as Associate Deputy Minister, Justice Binnie is referred to in these reasons as Binnie J. and Binnie respectively.

A. The Original Appeals

7 To understand the allegations of reasonable apprehension of bias, it is necessary to examine the factual and procedural background of this case. Campbell River and Cape Mudge are sister bands of the Laich-kwil-tach First Nation. Since the end of the 19th century, members of each band have inhabited two reserves located a few miles from each other on the east coast of Vancouver Island. In particular, members of Campbell River inhabit Reserve No. 11 (Campbell River) and members of Cape Mudge inhabit Reserve No. 12 (Quinsam). In 1985 and 1989 respectively, Campbell River and Cape Mudge instituted legal proceedings against each other and the Crown. In these proceedings, each band claimed exclusive entitlement to both Reserves Nos. 11 and 12.

8 The bands' claims rely on a historical review of the process that led to the creation of the two reserves. In 1888, Mr. Ashdown Green, a federal government surveyor, recommended the creation of these reserves. In his report, however, he did not allocate the reserves to a particular band but rather to the Laich-kwil-tach Indians. The first Schedule of Indian Reserves, published in 1892 by the Department of Indian Affairs, listed Reserves Nos. 11 and 12 as belonging to Laich-kwil-tach Indians without any indication of how the reserves were to be distributed between the bands of the Laich-kwil-tach Indians. By 1902, the Schedule indicated that both reserves were allocated to the "Wewayakay" (Cape Mudge) Band. The Schedule allocated Reserves Nos. 7 through 12 to Cape Mudge. The name of the Cape Mudge Band ("Wewayakay") was written in the entry

corresponding to Reserve No. 7. Ditto marks were used to reproduce the same reference for entries corresponding to Reserves Nos. 8 through 12.

9 The allocation of Reserve No. 11 to Cape Mudge created difficulties. Cape Mudge was not and had never been in possession of Reserve No. 11. Members of Campbell River had occupied the reserve for several years to the exclusion of Cape Mudge. In 1905, a disagreement between the two bands over fishing rights in the Campbell River led to a dispute over possession of Reserve No. 11. In 1907, this dispute was settled by a resolution in which Cape Mudge ceded to Campbell River any claim to Reserve No. 11, subject to retaining fishing rights in the area. This resulted in the Department of Indian Affairs modifying the 1902 Schedule of Indian Reserves by marking "We-way-akum band" (Campbell River) in the entry corresponding to Reserve No. 11. By inadvertence, the "ditto marks" in the subsequent entry corresponding to Reserve No. 12 were not altered creating the erroneous appearance that Reserve No. 12 was also allocated to Campbell River. However, the alteration of the Schedule was intended to refer only to Reserve No. 11 and there was no intention to make any change to Reserve No. 12.

10 In 1912, the McKenna McBride Commission was established to address continuing disagreements between the federal and provincial governments about the size and number of reserves in British Columbia. The Commission acknowledged that Reserve No. 11 was properly allocated to Campbell River but noted the irregularity that was the source of the confusion with respect to Reserve No. 12. Nevertheless, the Commission made no alteration to the Schedule so that matters remained with Cape Mudge occupying Reserve No. 12 and Campbell River occupying Reserve No. 11 subject to the fishing rights in the waters of the Campbell River given to Cape Mudge.

11 The McKenna McBride Report did not receive approval by the province. Both the provincial and federal governments then established the Ditchburn Clark Commission to resolve the outstanding federal-provincial disagreements. In its 1923 report, the Ditchburn Clark Commission restated the position proposed in the McKenna McBride Report concerning Reserves Nos. 11 and 12. In 1924, both levels of government adopted the McKenna McBride recommendations as modified by the Ditchburn Clark Commission. In 1938, a provincial Order-in-Council was issued, transferring administration and control of the reserve lands to the federal Crown.

12 In the 1970s, a dispute between the bands resurfaced. Eventually, in December 1985, Campbell River started an action against the Crown and Cape Mudge in the Federal Court. It claimed that the Crown had acted in breach of its fiduciary duty, had acted negligently, had committed fraud, equitable fraud and deceit, and had breached and continued to breach statutory duties owed to Campbell River. Campbell River further claimed that Cape Mudge had trespassed and continued to trespass on Reserve No. 12. In 1989, Cape Mudge counterclaimed against Campbell River and brought its own claim against the Crown. Cape Mudge claimed that the Crown had breached its fiduciary duty, duty of trust and statutory duties under the *Indian Act*, R.S.C. 1985,

c. I-5. Each band thus claimed both reserves for itself, but sought compensation from the Crown as relief rather than dispossession of either band from their respective Reserves Nos. 11 and 12.

13 The two joined actions were heard together in the Federal Court - Trial Division by Teitelbaum J. The trial lasted 80 days and the actions were dismissed on September 19, 1995 (99 F.T.R. 1 (Fed. T.D.)). The bands appealed to the Federal Court of Appeal. By unanimous judgment the appeals were dismissed on October 12, 1999 (247 N.R. 350 (Fed. C.A.)).

14 The bands applied for and were granted leave to appeal on October 12, 2000, [2000] 2 S.C.R. xii (S.C.C.). The appeals were heard by the full Court on December 6, 2001. On December 6, 2002, in reasons written by Binnie J. and concurred in unanimously, the appeals were dismissed. The Court held that the Crown had not breached its fiduciary duty to either band. In any event, it found that the equitable defences of laches and acquiescence were available to the Crown. As well, the Court concluded that the bands' claims were statute-barred under the applicable statutes of limitations.

B. The Access to Information Request

15 In February 2003, a request under the *Access to Information Act*, R.S.C. 1985, c. A-1, made by Campbell River was received by the Department of Justice. The request sought:

> . . . copies of all records, including letters, correspondence and internal memoranda to, from or which make reference to Mr. William Binnie (Ian Binnie) [now Justice Binnie] in the matter of the claim against Canada by the Wewaykum (or Campbell River) Indian Band and the Wewaikai (or Cape Mudge) Indian Band for Quinsam IR 12 and Campbell River IR 11 between the years 1982 and 1986.

16 During the hearing of these motions, counsel for Campbell River explained the origin of the access to information request. Subsequent to the release of the Court's reasons, the band's solicitor, Mr. Robert T. Banno, reviewed the reasons with the band and, as stated by its counsel, the band was upset both by the tone and the result of the appeal. Counsel for Campbell River stated that:

> They were upset, quite frankly, with the tenor of the reasons in the sense that the claim had been dismissed; some of the words used were "a paper claim". And in effect they thought, as parties sometimes feel when they lose cases, that their arguments had not been properly addressed.

17 Counsel for Campbell River offered the following explanation as to why an unsuccessful litigant would be unusually inclined to present an access to information request about one of the authors of the reasons of the Court:

> Now, one could look at the FOI [freedom of information] request and could sort of infer something from it other than perhaps a proper - well, something improper about doing it. In my submission, what happens if a client is upset, an FOI request may be the very thing to satisfy that client or that litigant that everything is fine. I mean that may be the type of situation that comes back - the FOI request comes back with nothing and the client is satisfied. Well, the chips fall where they fall . . . .
>
> . . . in something like this, in sitting down with a client and - a litigant and explaining what has happened, this is the kind of thing that helps explain what has happened. You say, look, there is nothing untoward here, everything is above board.
>
> . . . in my submission, there should be no improper motive at all attributed to the filing of that information. That sometimes helps lawyers explain to litigants, helps quell those kinds of concerns.

18 Counsel for Campbell River offered this explanation as a rejection of any suggestion that Binnie J.'s involvement in the band's claim as Associate Deputy Minister in the Department of Justice many years previous was suspected prior to or during the hearing before this Court but only investigated subsequently when a negative decision was rendered.

C. Results of the Access to Information Request

19 Pursuant to the access to information request, the Department of Justice found a number of internal memoranda to, from or making reference to Binnie and related to Campbell River's claim. These memoranda show that in late 1985 and early 1986. Binnie, in his capacity at that time as Associate Deputy Minister of Justice, received some information and attended a meeting in the early stages of Campbell River's claim. On May 23, 2003, the Assistant Deputy Attorney General, James D. Bissell, Q.C., wrote the Registrar of the Supreme Court of Canada to inform her that, as a result of the preparation of the Department's response to the access to information request, it appeared "that Mr. W.I.C. Binnie in 1985 and early 1986, in the course of his duties as Associate Deputy Minister of Justice, participated in discussions with Department of Justice counsel in the *Wewaykum* [Campbell River] *Indian Band* case."

20 Accompanying Assistant Deputy Attorney General Bissell's letter to the Registrar were several documents, dated between 1985 and 1988, referring to Mr. Binnie and the Campbell River claim against Canada in regard to Reserves Nos. 11 and 12. Assistant Deputy Attorney General Bissell advised the Registrar that, in view of its duty as an officer of the Court, the Department was waiving solicitor-client privilege to these documents and that they would be provided to the requester under the *Access to Information Act*. He also advised that the Department intended to file a motion for directions, pursuant to R. 3 of the *Rules of the Supreme Court*, as to what steps,

if any, should be taken by reason of the information found in his letter. Attached to the letter was a Statement setting forth the following factual information that is part of the motion record:

> 1. The case of *Roberts v. R.*, [2002] SCC 79, file no. 27641 was heard in the Supreme Court of Canada in December 6, 2001 and judgment was rendered December 6, 2002.
>
> 2. The original claim in the case was filed in December 1985 and the original Defense on behalf of the Crown was filed on February 28, 1986.
>
> 3. The trial judgment was released by the Federal Court Trial Division on September 19, 1995 and the appeal judgment was released on October 12, 1999 by the Federal Court of Appeal.
>
> 4. Mr. W.I.C. Binnie was Associate Deputy Minister of Justice from September 2nd, 1982 until July 31st, 1986; at that time he left the Department of Justice and entered private practice.
>
> 5. As Associate Deputy Minister, Mr. Binnie's duties included responsibility for all litigation, civil as well as criminal matters, involving the Government of Canada as a party, arising in the common law provinces and territories of Canada; in that context he would have had under his general supervisory authority thousands of cases. In addition to his responsibilities for litigation, Mr. Binnie was also responsible for Native Law in the Department.
>
> 6. In the course of the preparation of a response to a request for information under the *Access to Information Act* received in February 2003, it has come to light that Mr. Binnie had occasion to discuss the case with Department counsel, in late 1985 and early 1986.
>
> 7. In the course of preparing for the hearing of the case before the Supreme Court of Canada, Department of Justice counsel noted the fact of Mr. Binnie's position as Associate Deputy Minister in 1985 and 1986, and asked themselves whether Mr. Binnie had had any specific involvement in the case.
>
> 8. Counsel did not conduct a thorough examination of the files. Consequently, Mr. Binnie's involvement was not discovered by counsel at that time.

21 Copies of Assistant Deputy Attorney General Bissell's letter, the Statement and the documents were provided to counsel for the other parties and the interveners.

D. The Motion for Directions

22 The Crown served and filed a motion for directions on May 26, 2003, on the following grounds:

> 1. Judgment in this appeal was handed down on December 6, 2002. The appeal from the Federal Court of Appeal was unanimously dismissed (9:0). The Honourable Mr. Justice Binnie wrote the decision;
>
> 2. It has recently come to the attention of counsel for the Respondent, Her Majesty the Queen, that in 1985 and 1986, when Mr. Justice Binnie was Associate Deputy Minister of Justice (Litigation), he had been involved in some of the early discussions within the Department of Justice regarding the proceeding that eventually came before the Court as this appeal;
>
> 3. The Respondent therefore brings this motion in order to formally place this fact before the Court, and to ask this Court for directions as to any steps to be taken.

23 Produced with the motion for directions were the documents referring to Mr. Binnie while in the employ of the Department of Justice and Campbell River's claim in relation to Reserves Nos. 11 and 12. Upon receipt of the motion by the Court, Binnie J. recused himself from any further proceedings on this matter and, on May 27, 2003, filed the following statement with the Registrar of the Supreme Court:

> With respect to the Motion for Directions filed yesterday by the Crown, would you please place this note on the Court file and communicate its contents to counsel for the parties.
>
> It is a matter of public record that between September 1982 and July 1986 I was Associate Deputy Minister of Justice responsible for all litigation for and against the federal Crown except tax matters and cases in Quebec. This included Indian claims. At any given time, the responsibility covered several thousand cases.
>
> When this appeal was pending before the Court in 2002, I had no recollection of personal involvement 17 years earlier at the commencement of this particular file, which was handled by departmental counsel in the Vancouver Regional Office.
>
> I do not recall anything about any involvement in this case to add to what is set out in the departmental file.
>
> I recuse myself from consideration of the pending motion.

24 The Court invited further submissions by the parties with respect to the Crown's motion for directions. The Crown filed a memorandum in which it submitted that there was no reasonable apprehension of bias affecting the Court's judgment as a result of Binnie J.'s employment in the Department of Justice and involvement in this matter some 17 years earlier and for which he had no recollection. In response, Cape Mudge sought an order setting aside the Court's judgment of December 6, 2002, and requesting that the Court recommend that the parties enter into a negotiation and reconciliation process. In the alternative, Cape Mudge sought an order suspending

the operation of the judgment for a period of four months to permit negotiation and reconciliation between the parties with further submissions to the Court, if required.

25 Campbell River, for its part, sought an order vacating the Court's judgment of December 6, 2002, and the reasons for judgment, as well as an order permitting a further application for relief in the event the Supreme Court's decision was vacated. The Crown opposed both motions. It also opposed Cape Mudge's submission that further negotiation would be an appropriate remedy in this matter.

26 The Attorney General of British Columbia, an intervener, submitted that there was no reasonable apprehension of bias and that the motions to vacate should be dismissed.

27 Several other interveners, being the Gitanmaax Band, the Kispiox Band and the Glen Vowell Band, submitted that the Court's judgment should be vacated.

E. Details of Binnie J.'s Involvement in the Appellants' Litigation 1985-86

28 We turn now to the documents produced by the Crown in order to determine the nature and extent of Binnie's involvement in the Campbell River claim in 1985-1986. Seventeen documents were produced by the Crown. As noted previously, the documents are reproduced in their entirety in the *Appendix*. All documents were shown to or seen by Binnie in his official capacity as Associate Deputy Minister of Justice. Where relevant, the documents relate to the Campbell River claim. Cape Mudge's claim was commenced in 1989, several years after Binnie left the Department of Justice. As can be seen, the 17 documents include one letter and 16 internal memoranda. The letter, dated May 23, 1985, is from Binnie to Chief Sol Sanderson of the Federation of Saskatchewan Indian Nations and is obviously not relevant to these motions. Of the remaining 16 documents, two were produced twice; they are the memorandum dated December 13, 1985, and the memorandum dated February 25, 1986, from Ms Mary Temple to Binnie. Consequently, 14 documents require examination, which will be done in chronological order.

29 Memorandum No. 1, dated June 19, 1985, is a memo to file written by Ms Temple, Acting Senior Counsel, Office of Native Claims. The memorandum refers to Binnie by reason of the fact that it includes a reference to his letter of May 23, 1985, to Chief Sanderson. The memorandum does not detail any involvement of Binnie in the Campbell River claim and is of no relevance to these motions.

30 Memorandum No. 2, dated August 9, 1985, is from Ms Temple to Binnie. The memo predates Campbell River's statement of claim. It indicates that an issue raised by the Campbell River claim and another matter known as the Port Simpson claim were referred to Mr. Tom Marsh of the Vancouver Office for his opinion. The memo further states that Mr. Marsh's opinion would not be ready before the middle of September. It concludes with a request to be informed of any further communications with respect to the Port Simpson opinion from Band representatives.

31 Memorandum No. 3 also predates Campbell River's statement of claim. It is from Mr. R. Green, General Counsel in the Department of Indian Affairs and Northern Development, to Binnie and is dated October 11, 1985. This memo, which relates to the Campbell River and Port Simpson claims, was prepared for a meeting between Binnie and Mr. Green to discuss a legal issue "which potentially touches on all claims from B.C. bands, or at least all involving a determination of rights and liabilities arising out of the pre-McKenna/McBride period." The memo addresses the gazetting of notices and reserve creation in British Columbia. In his memo, Mr. Green refers to the work of Mr. Marsh and sets out three likely interpretations of the B.C. legislation:

> 1. no reserve is legally established until the notice is Gazetted;
>
> 2. the Gazetting provision is for the purpose of land banking;
>
> 3. the Gazetting process is a condition precedent to transferring administration and control of reserves to the federal government but not to the creation of the Indian interest.

32 A handwritten note on the margin, presumably from Mr. Green to Binnie, reads: "On the surface argument 3 seems to be the least damaging way to go."

33 Memorandum No. 4, dated December 12, 1985, is from Mr. Duff Friesen, General Counsel, Civil Litigation Section, to Binnie. In it, Mr. Friesen proposes that Campbell River's statement of claim, filed on December 2, 1985, be referred to the Vancouver Regional Office of the Department of Justice. In a handwritten note on the memo, Binnie wrote "I agree."

34 Memorandum No. 5, dated December 13, 1985, is from Ms Temple to Mr. G. Donegan, General Counsel - Vancouver Regional Office, and copied to Binnie. The memo indicates that Campbell River had filed a statement of claim and intended to proceed by way of litigation rather than negotiation under the Department of Indian Affairs policy. The memo also indicates that certain aspects of the claim were the subject of correspondence with Mr. Marsh of the Vancouver Regional Office and were also discussed with Binnie in Ottawa. With respect to these discussions, Ms Temple wrote that:

> In particular, Ian Binnie formed the opinion that the McKenna McBride report, to the extent that it specified that Quinsam Reserve No. 12 was the Campbell River Band's Reserve, should be taken at its face value notwithstanding the apparent fact that the designation of the Reserve for this band stemmed from an administrative error in the list of reserves on which the Commission relied as its primary source of information.

35 Memorandum No. 6, dated January 14, 1986, is from Binnie to Ms Temple. It acknowledges receipt of Memorandum No. 5 and sets out the above-quoted passage from that memorandum. Binnie then wrote:

> I recall some discussion about this, but not in the raw terms you have stated it. Could you let me have a note setting out the factual circumstances of the case and the legal points addressed in our discussion and any other relevant legal points you think should be considered?

36 Memorandum No. 7, dated January 15, 1986, is from Binnie to Mr. Harry Wruck of the Vancouver Regional Office. In it Binnie wrote that he is delighted with the assignment of this matter to Mr. Bill Scarth (now Scarth J.). He further asks to be informed of anything that the Minister should be made aware of.

37 Memorandum No. 8, dated January 20, 1986, is from Ms Temple to Binnie in response to Memorandum No. 6. In this memo, Ms Temple describes the factual background of Campbell River's claim. She concludes the memo with the following description of their discussions in relation to the claim:

> In our discussion of this claim in October 1985, we spent most of the time on another legal issue. However, when we turned to the issue of the effect of the McKenna McBride Commission report vis a vis Reserves No.'s 11 and 12, you indicated that such a qualification of the apparent terms of the McKenna McBride Report, as suggested by me, should not be supported and that a report should be accepted on its face so as to result in the legal vesting of an interest for the Campbell River Band only in these two reserves. My understanding of your reasons for such a position was that if we started to qualify the face of the record in any way, we would call into question other aspects of the McKenna McBride exercise.
>
> The other issue on which we spent most of our time during the October discussion was in relation to the question of the effect of the B.C. Land Act Legislation on the establishment of Reserves during the time of the nineteen [*sic*] century reserve commissions. In particular, one interpretation of this legislation would have confirmed the necessity of publishing in the B.C. Gazette the decision of the B.C. Government or officials authorized by it to establish reserves for bands before a band could be considered to have a vested interest in such a reserve. We concluded that notwithstanding the basis for such an interpretation, we should maintain the position that at least with respect to the Campbell River and Quinsam Reserves there was no requirement to gazette notices of those reserves before they could be considered to have been established. The legislation in question was somewhat ambiguous and our decision reflected an attempt to support an interpretation which was, of course, reasonably arguable but which also was reflective of the treatment of these reserves during the period preceeding [*sic*] the McKenna McBride report implementation.

As indicated in the above-quoted passage, the discussions referred to by Ms Temple occurred in October 1985, before Campbell River filed its statement of claim and while the parties were still in the negotiation process.

38 Memorandum No. 9 is dated February 25, 1986, and is also from Ms Temple to Binnie. The memo transmits to Binnie a copy of Campbell River's statement of claim. The memo clarifies that when Binnie participated in discussions in this case "it was still in the ONC [Office of Native Claims] claims process and before the Campbell River Band decided to proceed with litigation." The memo further advises that Mr. Scarth, who had earlier been retained and had carriage of the action, had been instructed to file a full defence. Ms Temple also indicates in her memo that:

> I would just like to note for your information that a full defense of the action by the Crown might involve the Crown in arguing some qualification or interpretation of the implementation of the McKenna McBride Report which was a position which in our discussions respecting negotiation of the claim you advised against. It seemed to Bob Green and I [*sic*] and to the Departmental officials that such a defense in the context of this court action was, nevertheless, justified.

39 Memorandum No. 10 is also dated February 25, 1986, and is from Ms Temple to Mr. Scarth. The memo conveys instructions to file a full statement of defence. The following passage from this memo relates to Binnie's involvement in discussions relating to the claim:

> Since such a defense might result in legal arguments which involve "going behind" the face of the McKenna McBride decisions as implemented by the legislation and Orders in Council, these instructions are being communicated to Ian Binnie because when the Government position respecting the claim was initially discussed with him, he advised that, at least, in the claims process we should not challenge the McKenna McBride report itself.

40 Memos 8, 9 and 10 establish that any advice given by Binnie in relation to the preferred treatment of the McKenna McBride Report was offered in the context of the negotiation process not litigation. Indeed, Binnie's advice, in the context of the negotiation towards a settlement of Campbell River's claim, is what led to acceptance of the claim as valid for the purposes of negotiation. In Memorandum No. 9, Ms Temple wrote:

> When we discussed the position the Crown should take for the purpose of negotiating a settlement under the claims process, we decided to recommend acceptance of the Campbell River Band's claim for negotiation since to do otherwise would suggest that the implementation of the McKenna McBride Report was ineffective to vest Reserve No. 12 in the Campbell River Indian Band. At the time, this position was understood to be justified since although both on legal issues and factual issues the claim was debatable, there seem to be sufficiently reasonable arguments to support it so as to justify settlement, at least on a pro-rated basis, especially since it would presumably have involved a surrender by the Campbell River Band and therefore a clarification of the interest of the Cape Mudge Band in the Reserve.

41 Memorandum No. 11, dated February 27, 1986, is from Ms Temple to Ms Carol Pepper, Legal Counsel - Specific Claims Branch Vancouver. The memo transmits to Ms Pepper a number of opinions culled from the Campbell River claim file. In this memo, Ms Temple writes that her opinions eventually reflected Ian Binnie's preferred position "to not 'go behind' the McKenna McBride Report."

42 Memorandum No. 12, dated March 3, 1986, is from Mr. Scarth to Binnie. The memo transmits to Binnie a copy of the statement of defence presumably prepared by Mr. Scarth and filed on behalf of the Crown on February 28, 1986. In this memo, Mr. Scarth indicates that he believes that the defence reflects the positions of both Justice and Indian Affairs. He further indicates that he has attempted not to repudiate the McKenna McBride Commission Report.

43 Memorandum No. 13, dated March 5, 1986, is from Binnie to Ms Temple and is in response to Memorandum No. 9. In this memo, Binnie wrote:

> With respect to the treatment of the McKenna McBride Report, I suggest that we all await the advice of Bill Scarth as to how this aspect of our possible defence should be dealt with. So far as I am concerned Bill Scarth is in charge of the file. I am sure he will take note of the view expressed by you and Bob Green and "departmental officials" that it would be appropriate in the Crown's defence to argue some qualification or interpretation of the implementation of the McKenna McBride Report.
>
> I look forward to hearing Bill Scarth's views on this aspect of the matter in due course. We will then decide what to do.

44 Memorandum No. 13 is the last document evidencing Binnie's involvement in this matter. As conceded by the parties, the Court's determination of the extent of Binnie's involvement in the Campbell River claim is limited by the documentary record produced by the Crown. The record does not disclose any further involvement on Binnie's part and, in particular, no involvement in this matter between March 5, 1986, and his departure from the Department of Justice on July 31, 1986.

45 Finally, Memorandum No. 14 is dated February 3, 1988, after Binnie left the Department of Justice, and is from Mr. Scarth to Mr. E.A. Bowie, Q.C., Assistant Deputy Attorney General (now Bowie J.). In this memo, Mr. Scarth provides a summary of the Campbell River case to Mr. Bowie. In the body of his memo, Mr. Scarth writes:

> I point out, parenthetically, that Ian Binnie, during his time as Associate Deputy Minister, suggested, because of its wider impact, that we not challenge the validity of what was done by the Royal Commission. With respect, I continue to concur with that advice, and suggest it is a question of defining more narrowly what the Commission did, at least insofar as the Reserves in question are concerned.

III. The Parties' Arguments

A. Cape Mudge, Campbell River and the Interveners the Gitanmaax Band, the Kispiox Band and the Glen Vowell Band

46 Campbell River and Cape Mudge both agree that actual bias is not at issue. Neither band makes any submission that actual bias affected Binnie J., the reasons for judgment or the judgment of the Court. Both bands unreservedly accept Binnie J.'s statement that he had no recollection of personal involvement in the case. The bands submit, however, that the material disclosed by the Crown gives rise to a reasonable apprehension of bias.

47 Cape Mudge submitted that Binnie J.'s involvement in Campbell River's claim was so significant that he effectively acted as a senior counsel for the Crown and that he was disqualified on account of the principle that no judge should sit in a case in which he or she acted as counsel at any stage of the proceeding. According to Cape Mudge, the disclosed documents reveal that Binnie J. was actively involved in risk analysis and the development of litigation strategy on behalf of the defendant Crown. Cape Mudge submitted that Binnie J.'s involvement in the litigation while he was Associate Deputy Minister of Justice raises legitimate questions as to whether the positions he formulated and recommended and the various memoranda and documents he read would have had an influence on his approach to the same case as a judge. In Cape Mudge's submission, such influence could well be unconscious and Binnie J.'s lack of recollection does not change the fact that he was involved in a significant and material way. According to Cape Mudge, the fact that Binnie J. was involved as a lawyer for the defendant Crown, combined with the fact that some 15 years later he wrote a judgment in the same litigation that freed the Crown of potential liability, gives rise to a reasonable apprehension of bias. Cape Mudge submitted that had the documents disclosed by the Crown come to light prior to the hearing before the Court, Binnie J. would have recused himself from the hearing of the appeals.

48 Campbell River submitted that the test for reasonable apprehension of bias is met where a judge sits in a case in which he or she has had any prior involvement. In Campbell River's view, the documents disclosed by the Crown indicate that Binnie J.'s prior involvement in the band's claim was substantial. Like Cape Mudge, Campbell River submitted that had Binnie J.'s earlier involvement in these matters come to light prior to the hearing he would have had no choice but to recuse himself absent the consent of all the parties. According to Campbell River, subjective evidence of a judge's state of mind, and thus Binnie J.'s absence of recollection, is legally irrelevant to a determination of whether there is a reasonable apprehension of bias. Moreover, Campbell River submitted that, owing to Binnie J.'s special interest in aboriginal matters, the unique "ditto mark error" at issue in this case and his involvement as counsel in *Guerin v. R.*, [1984] 2 S.C.R. 335 (S.C.C.), common sense would indicate that some contaminating knowledge would have survived the passage of time, albeit unconsciously.

49 With respect to remedy, both bands submitted that a judgment affected by a reasonable apprehension of bias is void and must be set aside. According to Campbell River, the concurrence of the eight other judges of this Court does not remove the taint of bias. Campbell River submitted that in law a reasonable apprehension of bias taints the entire proceeding and is presumed to be transmitted among decision-makers.

50 As indicated previously, Cape Mudge submitted that this Court should also recommend that the parties enter into a negotiation and reconciliation process or, in the alternative, suspend operation of the judgment for four months so that discussions between the parties could take place. For its part, Campbell River requested an order permitting it to bring an application for further relief following a decision to set aside the judgment. During oral argument, counsel for both bands indicated that a rehearing of the appeals may ultimately become necessary should the decision be set aside and agreement between the parties prove impossible.

51 The interveners the Gitanmaax Band, the Kispiox Band and the Glen Vowell Band presented written arguments in support of the motions to vacate the Court's judgment. In their submission, the facts of this case give rise to a reasonable apprehension of bias and a legal finding of bias must result. Binnie J.'s lack of actual recollection is, in their view, irrelevant. The interveners go further suggesting that actual bias may have existed on Binnie J.'s part even if he neither intended it nor recalled his involvement in the case. Like Campbell River and Cape Mudge, the interveners submitted that Binnie J. would have recused himself had he recalled his participation in this case before the hearing.

B. The Crown and the Intervener the Attorney General of British Columbia

52 The Crown submitted that the Court's judgment should not be set aside and that no other remedy was required. In the Crown's view, the rule that a judge is disqualified if he or she previously acted as counsel in the case is subject to the general principle that disqualification results only where there is a reasonable apprehension of bias. Accordingly, the Crown submitted that the general test set out by de Grandpré J. in dissent in *Committee for Justice & Liberty v. Canada (National Energy Board)* (1976), [1978] 1 S.C.R. 369 (S.C.C.), and approved in *R. v. Valente (No. 2)*, [1985] 2 S.C.R. 673 (S.C.C.), should be applied to the particular circumstances of this case.

53 The Crown submitted that since Binnie J. had no recollection, he brought no knowledge of his prior participation by way of discussions about Campbell River's claim. As a result, there was neither actual bias nor any reasonable apprehension of bias on his part. Relying on the English Court of Appeal's decision in *Locabail (U.K.) v. Bayfield Properties Ltd.*, [2000] Q.B. 451 (Eng. C.A.), the Crown submitted that Binnie J.'s lack of recollection dispels any appearance of possible bias. According to the Crown, the fact that Binnie J.'s prior involvement occurred 17 years earlier reinforces the conclusion that there can be no reasonable apprehension of bias. On this point, the bands concede that the passage of time is a relevant factor. Finally, the Crown submitted that since

the judgment of the Court was unanimous in dismissing the appeals, and since Binnie J. had no recollection of his earlier involvement, no reasonable person could conclude that he somehow influenced the minds of the other eight judges who heard the case.

54 The Attorney General of British Columbia also submitted that the Court's judgment should not be disturbed. He submitted that the information disclosed by the Crown would not have necessitated Binnie J.'s recusal had an application been made before the hearing. *A fortiori*, the disclosed information does not establish a reasonable apprehension of bias nor require that the judgment be set aside. The Attorney General of British Columbia further submitted that, although evidence of a judge's subjective state of mind is not determinative as to the issue of whether a reasonable apprehension of bias arises, it remains relevant and of assistance to the reasonable and right-minded observer.

55 The Attorney General of British Columbia submitted that Binnie J. did not act as counsel for the Crown in this case. His involvement was in a general administrative and supervisory capacity, which does not give rise to a reasonable apprehension of bias. It was submitted that a reasonable person would not consider that the tentative views on a general issue expressed by Binnie J. 15 years earlier, in his capacity as Associate Deputy Minister, would prevent him from deciding the case impartially.

56 The Attorney General of British Columbia further submitted that since the decision-maker was the Court as a whole, a reasonable apprehension of bias in respect of Binnie J. is not legally significant unless it also establishes a reasonable apprehension of bias in respect of the judgment of the Court as a whole. In this case, the judgment of the Court as a whole is not tainted by any apprehension of bias. Moreover, the presumption of impartiality has a practical force in respect of appellate tribunals. The fact that appellate courts normally evaluate a written record and the collegial nature of an appellate bench reduces the leeway within which the personal attributes, traits and dispositions of each judge can operate. Finally, the Attorney General submitted that if there was a disqualifying bias in respect of the Court as a whole, the remedy would be to vacate the judgment and for the Court to reconsider the appeals in the absence of Binnie J. under the doctrine of necessity.

IV. Analysis

A. The Importance of the Principle of Impartiality

57 The motions brought by the parties require that we examine the circumstances of this case in light of the well-settled, foundational principle of impartiality of courts of justice. There is no need to reaffirm here the importance of this principle, which has been a matter of renewed attention across the common law world over the past decade. Simply put, public confidence in our legal system is rooted in the fundamental belief that those who adjudicate in law must always do so without bias or prejudice and must be perceived to do so.

58 The essence of impartiality lies in the requirement of the judge to approach the case to be adjudicated with an open mind. Conversely, bias or prejudice has been defined as

> . . . a leaning, inclination, bent or predisposition towards one side or another or a particular result. In its application to legal proceedings, it represents a predisposition to decide an issue or cause in a certain way which does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind which sways judgment and renders a judicial officer unable to exercise his or her functions impartially in a particular case.

(*R. v. Bertram*, [1989] O.J. No. 2123 (Ont. H.C.), quoted by Cory J. in *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 (S.C.C.), at para. 106)

59 Viewed in this light, "[i]mpartiality is the fundamental qualification of a judge and the core attribute of the judiciary" (Canadian Judicial Council, *Ethical Principles for Judges* (Ottawa: The Council, 1998), at p. 30). It is the key to our judicial process and must be presumed. As was noted by L'Heureux-Dubé J. and McLachlin J. (as she then was) in *S. (R.D.)*, *supra*, at para. 32, the presumption of impartiality carries considerable weight, and the law should not carelessly evoke the possibility of bias in a judge, whose authority depends upon that presumption. Thus, while the requirement of judicial impartiality is a stringent one, the burden is on the party arguing for disqualification to establish that the circumstances justify a finding that the judge must be disqualified.

60 In Canadian law, one standard has now emerged as the criterion for disqualification. The criterion, as expressed by de Grandpré J. in *Committee for Justice & Liberty v. Canada (National Energy Board)*, *supra*, at p. 394, is the reasonable apprehension of bias:

> . . . the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.

61 We will return shortly to this standard, as it applies to the circumstances outlined in the factual background. Before doing that, it is necessary to clarify the relationship of this objective standard to two other factors: the subjective consideration of actual bias; and the notion of automatic disqualification re-emerging in recent English decisions.

B. Reasonable Apprehension of Bias and Actual Bias

62 Determining whether the judge brought or would bring prejudice into consideration as a matter of fact is rarely an issue. Of course, where this can be established, it will inevitably lead to the disqualification of the judge. But this said, most arguments for disqualification typically begin with an acknowledgment by all parties that there was no actual bias and move on to a consideration of the reasonable apprehension of bias. Here, as in many cases, it is conceded by the parties that there was no actual bias on Binnie J.'s part, and his statement that he had no recollection of involvement is similarly accepted by all concerned. As submitted by the parties, his personal integrity is not in doubt, either in these appeals or in any appeal in which he has sat as a member of this Court. Nevertheless, it is said, the circumstances of the present case are such as to create a reasonable apprehension of bias on his part. Since the two propositions go hand in hand, to understand what is meant by reasonable apprehension of bias, it is helpful to consider what it means to say that disqualification is not argued on the basis of actual bias.

63 Saying that there was "no actual bias" can mean one of three things: that actual bias need not be established because reasonable apprehension of bias can be viewed as a surrogate for it, that unconscious bias can exist, even where the judge is in good faith, or that the presence or absence of actual bias is not the relevant inquiry. We take each in turn.

64 First, when parties say that there was no actual bias on the part of the judge, they may mean that the current standard for disqualification does not require that they prove it. In that sense, the "reasonable apprehension of bias" can be seen as a surrogate for actual bias on the assumption that it may be unwise or unrealistic to require that kind of evidence. It is obviously impossible to determine the precise state of mind of an adjudicator (Cory J. in *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623 (S.C.C.), at p. 636). As stated by the English Court of Appeal in *Locabail (U.K.)*, *supra*, at p. 472:

> The proof of actual bias is very difficult, because the law does not countenance the questioning of a judge about extraneous influences affecting his mind; and the policy of the common law is to protect litigants who can discharge the lesser burden of showing a real danger of bias without requiring them to show that such bias actually exists.

Again, in the present instance, no one suggests that Binnie J. was consciously allowing extraneous influences to affect his mind. Consequently, it would appear that reasonable apprehension of bias is not invoked here as a surrogate for actual bias.

65 Second, when parties say that there was no actual bias on the part of the judge, they may be conceding that the judge was acting in good faith and was not consciously relying on inappropriate preconceptions, but was nevertheless unconsciously biased. In *R. v. Gough*, [1993] A.C. 646 (Eng. C.A.), at p. 665, quoting Devlin L.J. in *R. v. Justices of Barnsley*, [1960] 2 Q.B. 167 (Eng. C.A.), Lord Goff reminded us that:

> Bias is or may be an unconscious thing and a man may honestly say that he was not actually biased and did not allow his interest to affect his mind, although, nevertheless, he may have allowed it unconsciously to do so. The matter must be determined upon the probabilities to be inferred from the circumstances in which the justices sit.

As framed, some of the arguments presented by the parties suggest that they are preoccupied that Binnie J. may have been unconsciously biased despite his good faith.

66 Finally, when parties concede that there was no actual bias, they may be suggesting that looking for real bias is simply not the relevant inquiry. In the present case, as is most common, parties have relied on Lord Hewart C.J.'s aphorism that "it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done" (*R. v. Justices of Sussex* (1923), [1924] 1 K.B. 256 (Eng. K.B.), at p. 259). To put it differently, in cases where disqualification is argued, the relevant inquiry is not whether there was *in fact* either conscious or unconscious bias on the part of the judge, but whether a reasonable person properly informed would apprehend that there was. In that sense, the reasonable apprehension of bias is not just a surrogate for unavailable evidence, or an evidentiary device to establish the likelihood of unconscious bias, but the manifestation of a broader preoccupation about the image of justice. As was said by Lord Goff in *Gough*, *supra*, at p. 659, "there is an overriding public interest that there should be confidence in the integrity of the administration of justice."

67 Of the three justifications for the objective standard of reasonable apprehension of bias, the last is the most demanding for the judicial system, because it countenances the possibility that justice might not be seen to be done, even where it is undoubtedly done - that is, it envisions the possibility that a decision-maker may be totally impartial in circumstances which nevertheless create a reasonable apprehension of bias, requiring his or her disqualification. But, even where the principle is understood in these terms, the criterion of disqualification still goes to the judge's state of mind, albeit viewed from the objective perspective of the reasonable person. The reasonable person is asked to imagine the decision-maker's state of mind, under the circumstances. In that sense, the oft-stated idea that "justice must be seen to be done," which was invoked by counsel for the bands, cannot be severed from the standard of reasonable apprehension of bias.

68 We emphasize this aspect of the criterion of disqualification in Canadian law because another strand of this area of the law in the Commonwealth suggests that some circumstances of conflict of interest may be enough to justify disqualification, whether or not, from the perspective of the reasonable person, they could have any impact on the judge's mind. As we conclude in the next section, this line of argument is not helpful to counsel for the bands in the present case.

C. Reasonable Apprehension of Bias and Automatic Disqualification

69 At the opposite end from claims of actual bias, it has been suggested that it is wrong to be a judge in one's own cause, whether or not one knows this to be the case. The idea has been linked to the early decision of *Dimes v. Grand Junction Canal Co.* (1852), 3 H.L.C. 759, 10 E.R. 301 (U.K. H.L.). More recently, in *Gough*, *supra*, at p. 661, Lord Goff stated that

> . . . there are certain cases in which it has been considered that the circumstances are such that they must inevitably shake public confidence in the integrity of the administration of justice if the decision is to be allowed to stand . . . . These cases arise where a person sitting in a judicial capacity has a pecuniary interest in the outcome of the proceedings . . . . In such a case, . . . not only is it irrelevant that there was in fact no bias on the part of the tribunal, but there is no question of investigating, from an objective point of view, whether there was any real likelihood of bias, or any reasonable suspicion of bias, on the facts of the particular case. The nature of the interest is such that public confidence in the administration of justice requires that the decision should not stand.

70 This has been described as "automatic disqualification" and was recently revisited by the House of Lords in *R. v. Bow Street Metropolitan Stipendiary Magistrate*, [1999] 2 W.L.R. 272 (U.K. H.L.). There, the House of Lords dealt with a situation in which Lord Hoffman had participated in a decision in which Amnesty International was an intervener, while sitting as a director and chairperson of a charity closely allied with Amnesty International and sharing its objects. In that context, it was found that the rule of "automatic disqualification" extended to a limited class of non-financial interests, where the judge has such a relevant interest in the subject matter of the case that he or she is effectively in the position of a party to the cause. As a result, Lord Hoffman was disqualified, and the decision of the House of Lords was set aside, in a judgment that drew much attention around the world.

71 A more recent decision of the English Court of Appeal suggests that this extension of the rule of automatic disqualification, beyond cases of financial interests, is likely to remain exceptional (*Locabail (U.K.)*, *supra*). Even so extended, the rule of automatic disqualification does not apply to the situation in which the decision-maker was somehow involved in the litigation or linked to counsel at an earlier stage, as is argued here.

72 Whatever the case in Britain, the idea of a rule of automatic disqualification takes a different shade in Canada, in light of our insistence that disqualification rest either on actual bias or on the reasonable apprehension of bias, both of which, as we have said, require a consideration of the judge's state of mind, either as a matter of fact or as imagined by the reasonable person. In any event, even on the assumption that the line of reasoning developed in *Bow Street*, *supra*, is authoritative in Canada, it is of no relevance in the present case. On the facts before us, there is no suggestion that Binnie J. had any financial interest in the appeals, or had such an interest in the subject matter of the case that he was effectively in the position of a party to the cause.

73 To sum up, if disqualification is to be argued here, it can only be argued on the basis of a reasonable apprehension of bias. It can only succeed if it is established that reasonable, right-minded and properly informed persons would think that Binnie J. was consciously or unconsciously influenced in an inappropriate manner by his participation in this case over 15 years before he heard it here in the Supreme Court of Canada. We now move to this aspect of the matter.

D. Reasonable Apprehension of Bias and Its Application in this Case

74 The question, once more, is as follows: What would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude? Would this person think that it is more likely than not that Binnie J., whether consciously or unconsciously, did not decide fairly?

75 Three preliminary remarks are in order.

76 First, it is worth repeating that the standard refers to an apprehension of bias that rests on serious grounds, in light of the strong presumption of judicial impartiality. In this respect, de Grandpré J. added these words to the now classical expression of the reasonable apprehension standard:

> The grounds for this apprehension must, however, be substantial, and I . . . refus[e] to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience".

(*Committee for Justice & Liberty v. Canada (National Energy Board)*, *supra*, at p. 395)

77 Second, this is an inquiry that remains highly fact-specific. In *Man O'War Station Ltd v. Auckland City Council*, [2002] 3 N.Z.L.R. 577 (New Zealand P.C.), at para. 11, Lord Steyn stated that "This is a corner of the law in which the context, and the particular circumstances, are of supreme importance." As a result, it cannot be addressed through peremptory rules, and contrary to what was submitted during oral argument, there are no "textbook" instances. Whether the facts, as established, point to financial or personal interest of the decision-maker; present or past link with a party, counsel or judge; earlier participation or knowledge of the litigation; or expression of views and activities, they must be addressed carefully in light of the entire context. There are no shortcuts.

78 Third, in circumstances such as the present one, where the issue of disqualification arises after judgment has been rendered, rather than at an earlier time in the proceedings, it is neither helpful nor necessary to determine whether the judge would have recused himself or herself if the matter had come to light earlier. There is no doubt that the standard remains the same, whenever the issue of disqualification is raised. But hypotheses about how judges react where the issue of recusal is raised early cannot be severed from the abundance of caution that guides many, if not

most, judges at this early stage. This caution yields results that may or may not be dictated by the detached application of the standard of reasonable apprehension of bias. In this respect, it may well be that judges have recused themselves in cases where it was, strictly speaking, not legally necessary to do so. Put another way, the fact that a judge would have recused himself or herself *ex ante* cannot be taken to be determinative of a reasonable apprehension of bias *ex post*.

79 As the parties acknowledged, Binnie J.'s past status as Associate Deputy Minister is, by itself, insufficient to justify his disqualification. The same can be said of his long-standing interest in matters involving First Nations. The source of concern, for the bands in these motions to vacate the judgment, is Binnie J.'s involvement in this case, as opposed to his general duties as head of litigation for the Department of Justice in the mid-1980s.

80 In this respect, the bands relied, among other arguments, on the following statement of Laskin C.J., in *Committee for Justice & Liberty v. Canada (National Energy Board)*, *supra*, at p. 388:

> Lawyers who have been appointed to the Bench have been known to refrain from sitting on cases involving former clients, even where they have not had any part in the case, until a reasonable period of time has passed. *A fortiori*, they would not sit in any case in which they played any part at any stage of the case. This would apply, for example, even if they had drawn up or had a hand in the statement of claim or statement of defence and nothing else.

81 This dictum must be understood in the context of the principle of which it is but an illustration. It does not suggest that any degree of earlier participation in a case is cause for automatic disqualification. This statement provides sensible guidance for individuals to consider *ex ante*. It suggests that a reasonable and right-minded person would likely view unfavourably the fact that the judge acted as counsel in a case over which he or she is presiding and could take this fact as the foundation of a reasonable apprehension of bias.

82 However, contrary to what has been argued, it cannot realistically be held that Binnie J. acted as counsel in the present case, and the limited extent of his participation does not support a reasonable apprehension of bias. To repeat, what is germane is the nature and extent of Binnie J.'s role. The details of Binnie J.'s involvement in this case, as outlined in the earlier part of these reasons and which should be viewed in the context of his broad duties in the Department of Justice, would convince a reasonable person that his role was of a limited supervisory and administrative nature.

83 Admittedly, Binnie J.'s link to this litigation exceeded *pro forma* management of the files. On the other hand, it should be noted that he was never counsel of record and played no active role in the dispute after the claim was filed. Memorandum No. 4, dated December 12, 1985, shows that the case was referred to the Vancouver Regional Office within a few days after filing of the Campbell River Claim. Although subsequent memoranda indicate that Binnie was kept informed of some developments in relation to this claim, carriage of the action was in the hands of Mr.

Bill Scarth in Vancouver. The facts do not support the proposition that Binnie planned litigation strategy for this case, as is suggested by the bands. For example, in their submissions, the Cape Mudge Band seemed to imply that the handwritten note in the margin of Memorandum No. 3 was written by Binnie in that "[he] was part of the Crown's early tactical considerations in this case; considering which approach would create the lowest risk for the Crown; which approach would constitute the 'least damaging way to go' " (see Cape Mudge's factum, at para. 12). However, upon examination of this note it would appear that it is addressed to "Ian [Binnie]" and signed "Bob" [Green]. Furthermore, and as indicated above, Memos 8, 9 and 10, in particular, establish that any views attributed to Binnie earlier on were offered in the context of wider implications of the negotiation process, and not in the context of litigation.

84 Furthermore, in assessing the potential for bias arising from a judge's earlier activities as counsel, the reasonable person would have to take into account the characteristics of legal practice within the Department of Justice, as compared to private practice in a law firm. See the Canadian Judicial Council's *Ethical Principles for Judges*, *supra*, at p. 47. In this respect, it bears repeating that all parties accepted that a reasonable apprehension of bias could not rest simply on Binnie J.'s years of service in the Department of Justice. In his capacity as Associate Deputy Minister, Binnie had responsibility for thousands of files at the relevant time. While his views were sought in the negotiations stage of the present dispute, it is relevant that he was consulted on strategic orientations in dozens of cases or classes of cases. In this regard, the matter on which he was involved in this file, principally the effect of the McKenna McBride Report, was not an issue unique to this case, but was an issue of general application to existing reserves in British Columbia. This was presumably the reason why he was approached in the first place.

85 To us, one significant factor stands out and must inform the perspective of the reasonable person assessing the impact of this involvement on Binnie J.'s impartiality in the appeals. That factor is the passage of time. Most arguments for disqualification rest on circumstances that are either contemporaneous to the decision-making, or that occurred within a short time prior to the decision-making.

86 In *Locabail (U.K.)*, *supra*, at p. 480, the English Court of Appeal stated:

> . . . every application must be decided on the facts and circumstances of the individual case. The greater the passage of time between the event relied on as showing a danger of bias and the case in which the objection is raised, the weaker (other things being equal) the objection will be.

87 Similarly, in *Panton v. Minister of Finance*, [2001] 5 L.R.C. 132, [2001] UKPC 33 (England P.C.), at para. 16, the Privy Council said:

> Another consideration which weighs against any idea of apparent or potential bias in the present case is the length of time which intervened between Rattray P.'s conduct in connection

> with the Act or indeed his holding of the office of Attorney General and the time when he sat as President in the Court of Appeal to hear the present case . . . . It appears that Rattray P. retired as Attorney General in 1993. The hearing of the appeal was in 1998. While that interval of time is not so great as to make the former connection with the Act one of remote history, it is nevertheless of some significance in diminishing to some degree the strength of any objection which could be made to his qualification to hear the case.

88 In the present instance, Binnie J.'s limited supervisory role in relation to this case dates back over 15 years. This lengthy period is obviously significant in relation to Binnie J.'s statement that when the appeals were heard and decided, he had no recollection of his involvement in this file from the 1980s. The lack of knowledge or recollection of the relevant facts was addressed by the English Court of Appeal in *Locabail (U.K.)*, *supra*. There, at p. 487, the Court of Appeal asked

> How can there be any real danger of bias, or any real apprehension or likelihood of bias, if the judge does not know of the facts that, in argument, are relied on as giving rise to the conflict of interest?

89 The parties have not challenged Binnie J.'s statement, and we are of the view that they are not required to do so. The question is whether the reasonable person's assessment is affected by his statement, in light of the context - that is, in light of the amount of time that has passed, coupled with the limited administrative and supervisory role Binnie played in this file. In our view, it is a factor that the reasonable person would properly consider, and it makes bias or its apprehension improbable in the circumstances.

90 Binnie J.'s lack of recollection is thus relevant. Yet it is not decisive of the issue. This is not a case in which the judge never knew about the relevant conflict of interest, which would be much easier, but a case in which the judge no longer recalls it. Without questioning his recollection, the argument can be made that his earlier involvement in the file affected his perspective unconsciously. Nevertheless, we are convinced that the reasonable person, viewing the matter realistically, would not come to the conclusion that the limited administrative and supervisory role played by Binnie J. in this file, over 15 years ago, affected his ability, even unconsciously, to remain impartial in these appeals. This is true, quite apart from the multitude of events and experiences that have shaped him as a lawyer and judge in the interim and the significant transformations of the law as it relates to aboriginal issues, that we have all witnessed since 1985.

91 We thus conclude that no reasonable apprehension of bias is established and that Binnie J. was not disqualified in these appeals. The judgment of the Court and the reasons delivered by Binnie J. on December 6, 2002, must stand. It is unnecessary to examine the question whether, in the event that the Court had found that Binnie J. was disqualified, the judgment of the Court in these appeals would have been undermined. Nevertheless, because of the importance of the issue, we offer a few comments in this respect.

92 The decision-making process within the Supreme Court of Canada, while not widely known, is a matter of public record. Many Justices of the Court have spoken publicly on this matter, and a rather complete description of it can be found in an essay published in 1986 by Justice Bertha Wilson ("Decision-making in the Supreme Court" (1986), 36 *U.T.L.J.* 227). For present purposes, it is enough to say the following. Each member of the Supreme Court prepares independently for the hearing of appeals. All judges are fully prepared, and no member of the Court is assigned the task to go through the case so as to "brief" the rest of the coram before the hearing. After the case is heard, each judge on the coram expresses his or her opinion independently. Discussions take place on who will prepare draft reasons and whether for the majority or the minority. Draft reasons are then prepared and circulated by one or more judges. These reasons are the fruit of a truly collegial process of revision of successive drafts. In that sense, it can be said that reasons express the individual views of each and every judge who signs them, and the collective effort and opinion of them all.

93 Here, the nine judges who sat on these appeals shared the same view as to the disposition of the appeals and the reasons for judgment. Cases where the tainted judge casts the deciding vote in a split decision are inapposite in this respect. In the circumstances of the present case, even if it were found that the involvement of a single judge gave rise to a reasonable apprehension of bias, no reasonable person informed of the decision-making process of the Court, and viewing it realistically, could conclude that it was likely that the eight other judges were biased, or somehow tainted, by the apprehended bias affecting the ninth judge.

V. Conclusion

94 We conclude that no reasonable apprehension of bias is established. Binnie J. was not disqualified to hear these appeals and to participate in the judgment. As a result, the motions to vacate the judgment rendered by this Court on December 6, 2002, are dismissed. The Crown's motion for directions is also dismissed. Although the bands requested costs, the Crown did not. Under the circumstances, each party will bear its own costs.

Motion dismissed.

APPENDIX